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The Analysis and Synthesis of Litigating a Free Appropriate Public Education (FAPE) as It Relates to Students Who Are Classified as Autistic: an Investigation of New Jersey Administrative Law Decisions

David M. Miceli
Seton Hall University

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**THE ANALYSIS AND SYNTHESIS OF LITIGATING A FREE APPROPRIATE
PUBLIC EDUCATION (FAPE) AS IT RELATES TO STUDENTS WHO ARE
CLASSIFIED AS AUTISTIC: AN INVESTIGATION OF NEW JERSEY
ADMINISTRATIVE LAW DECISIONS**

BY

DAVID M. MICELI

Dissertation Committee

Anthony Colella, Ph.D., Mentor

Elaine Walker, Ph.D.

James McLaughlin, Ed.D.

Jennifer Manger, Ph.D.

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requirements of the Degree of Doctor of Education
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I would like to thank all of the members of my dissertation committee for their time, patience, and encouragement throughout the entire process. I would also like to thank my family, especially my wife Cindy for her never-ending support and encouragement not only during my dissertation, but also throughout my entire graduate school education.

ABSTRACT

THE ANALYSIS AND SYNTHESIS OF LITIGATING A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) AS IT RELATES TO STUDENTS WHO ARE CLASSIFIED AS AUTISTIC: AN INVESTIGATION OF NEW JERSEY ADMINISTRATIVE LAW DECISIONS.

The purpose of this study was to analyze and evaluate existing autism case law data on a state level in order to extrapolate and synthesize information. These extracted findings could then be utilized to make meaningful recommendations, so that school districts can effectively address student needs, while decreasing litigation, when dealing with a special education population who are classified as Autistic. A sample of New Jersey Administrative Law Judge (ALJ) decisions were reviewed and evaluated, as per the study's rubric, in order to propose specific advice to local school districts regarding compliance, assessment, program recommendations, methodology, and implementation of services. The study's rubric was developed based on the Individuals with Disabilities Education Act (IDEA) mandates, and it evaluated district violations both procedurally and substantively. The rubric includes five areas of procedural violations and two areas of substantive violations. The research responded to the impetus of the following question: How can school districts meet the new standards set forth by today's case law, well-informed clients, researchers, and advocacy groups regarding students with autism? Local school district's Special Services departments struggle with litigating issues related to this population regularly. It is apparent that litigation and Autism have too often become synonymous, especially in districts that have a growing Autistic population. Precedent, case law, and challenging, well-informed parents continue to augment the *in the box model* that school districts have previously relied on heavily. The

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CHAPTER I

Introduction

With the turn of the new millennium, public education's challenges continue to mount. Public educators are no longer the predominate voice in the decision-making process of educating children. Charter schools, vouchers, home schooling, and educating disabled children are venues in public education which are being influenced by parent supervisory and advocacy-group contribution.

The past decade in the United States was a period of financial prosperity unlike any other in its history. With an extraordinary surplus available, areas such as special education were on the threshold of increased funding. Congress originally intended to fund 40% of states' costs in providing special education services through the Individuals with Disabilities Education Act (IDEA). The actual levels of funding to states, however, have usually amounted to approximately 8% to 10% of states' total expenditures on special education. Lobbyists have been stirring in this direction for a number of years, and finally with the additional funds available, congress could dispense these funds accordingly. This financial support would come at an opportune time with the cost of educating disabled students skyrocketing. As federal and state mandates become less ambiguous, and interpretations expanded upon, the expectations, standards, and costs for school districts have increased remarkably.

Shortly after the turn of the millennium, the United States began to shift into an economic recession. Then September 11th 2001 occurred! The United States came under the attack of unprecedented terrorism. With the impact of these attacks, and the beginning of an economic recession, the sought after surplus quickly diminished, with strong implications for little or no change in the current funding for special education. Bruce Hunter, Associate Executive Director for Public Policy at the American Association of School Administrators stated, "The problem all along in special education is that there is a chronic shortage of money that is exacerbated by downturns in the economy, which is when it really gets bad" (Tarkan, 2002).

One of the reasons for the increased cost to public schools for special education is the increasing rate of autism diagnoses. Autism is now second only to Down syndrome in disorders in childhood (Feinberg & Vacca, 2000). Autism shows a steep curve, with the number of students with a diagnosis of autism showing a dramatic growth, from approximately 5,500 in 1991-1992 to 55,000 in 1998-1999 (Communique, 2002). Hence, with the extreme increase in this population coupled with the higher standards set forth in the IDEA, educating disabled students, especially students with autism, has become a financial impasse. This predicament has created an unfortunate tension between school districts and parents whose outcome leads to litigating a Free Appropriate Public Education (FAPE).

Recently, in a number of due process hearings and cases, parents of children with autism have challenged school districts' educational programs for their children. These hearings and cases represent the fastest growing area of litigation in special education (Baird, 1999). A factor that has made autism a particularly vexing topic is the fact that

the obligation of school districts to provide particular methodologies has become the focus of considerable due process hearings and court cases (Simpson, 1999). The nature of the legalities changes the previous dynamic of educational program development. Yell and Drasgow (1999) frame this process well when they state that critical decisions are too often being made by hearing officers and judges rather than by families and clinicians. What must school districts do to alleviate this complicated quandary in education?

Purpose of Study

The purpose of this study was to analyze and evaluate existing autism case law on a state level in order to extrapolate and synthesize information. This could then be utilized to make meaningful recommendations, so that school districts can effectively address student needs, while decreasing litigation, when dealing with a special education population who are classified as Autistic. A sample of New Jersey Administrative Law Judge (ALJ) decisions will be reviewed and evaluated, as per the study's rubric, in order to propose specific advice to local school districts regarding compliance, assessment, program recommendations, methodology, and implementation of services. The study's rubric was developed based on the mandates of IDEA and will evaluate district violations both procedurally and substantively. The rubric includes five areas of procedural violations and two areas of substantive violations.

Statement of the Problem

Despite a school district's good faith effort to provide appropriate programs and related services for the autistic population, litigation continues to increase, impacting

upon an expanding interpretation of a FAPE. The resulting court-based higher standard is creating financial hardship for public school districts. This higher standard dictates increased personnel training, programs, staff, and overall enhanced services leading to individual meaningful educational benefit for all disabled students.

Research Questions

Why do school districts appear negligent when engaging in the inquiry of FAPE? What are some of the new expectations for notice, assessment, methodology, and program development? Can parents demand that school districts adopt particular methodologies? Can cost be a consideration in designing programs? What are some of the obstacles in including students with autism in the regular education classroom? Do districts have a responsibility to reimburse parents for in-home programs? What are the key elements of petitioner arguments? How can school districts meet the new standards set forth by today's case law, well-informed clients, researchers, and advocacy groups? Are there other alternatives to the current approach to this dilemma? Do parents who enter into litigation without an attorney and/or without expert witnesses have a successful chance? Are there teacher certifications or endorsements specific to autism?

Significance of the Study

Local school district's Special Services departments struggle with litigating issues related to the autistic population regularly. It appears that litigation and autism have too often become synonymous, especially in districts that have a growing autistic population. Precedent, case law, and challenging, well-informed parents continue to augment the "in

the box model” that school districts have previously relied on heavily. This study will contribute to the public school district’s knowledge, policy, and practice by analyzing current data and extrapolating useful information so that it may be synthesized into practical recommendations. Not only will proactive school districts reorganize and benefit from this information, but all compliant driven districts will need to make the necessary changes outlined while moving forward in order to stay buoyant when dealing with the autistic population.

Delimitations of the Study

First, law is contextual and can be dissimilar in other states, but mandates within special education are initially developed by the federal government and then filtered down to the state level. With that said, interpretation of the law can vary from state to state. New Jersey tends to be one of the more regulated states when it comes to education, so there can be some discrepancies when comparing issues state to state. However, generally speaking, these mandates will hold judicial muster throughout many areas of the country. Despite this, the level of potential discrepancy regarding mandates and regulations could have limiting effects on the study. Other limiting factors include the following: Only ALJ cases from New Jersey will be evaluated as per the study’s rubric. National cases will be discussed in the literature review.

Currently, there are only district and appellate level national cases to evaluate. There are no current Supreme Court decisions available regarding students with autism, and New Jersey does not have any current district or appellate proceedings. Another limitation is that published case law decisions are only a sample of the population of all

court decisions. There is only limited research suggesting that reported education law cases are representative of unreported cases (Imber & Gayler, 1988). Although this is indicated, recent case law regarding autism has established precedent within the field and seems to impact district decision-making regarding pursuit of mediation or due process. In addition, published case law decisions might not accurately reflect all of the intricacies of each case. The language used within the publication lends itself to the interpretation of the Administrative Law Judge. The Judge's interpretation and consequential language could skew actual details, hence, impacting upon the researcher's analysis of the data via the rubric.

Finally, the rubric established for the analysis of ALJ cases could have some bias based on the researcher's previous experience in the field, and its development by one individual as opposed to a collaborative group of researchers from multiple disciplines.

Definition of Terms

Autism: Federal guidelines (IDEA, 1997), which dictate the eligibility criteria for special education and related services, state that autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotypical movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

Free Appropriate Public Education (FAPE): IDEA defines FAPE as special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet standards of the state educational agency; (c) include appropriate preschool, elementary, or secondary school education in the state involved; and (d) are provided in conformity with the Individual Education Program (IDEA, 20 U.S.C. section 1401 (8)).

Individualized Education Plan (IEP): The Individualized Education Plan (IEP) is the process and document that defines a FAPE for a student. It is a collaborative process in which school personnel and student's parents design the student's appropriate educational program. The special education and related services a student in special education receives are delineated in, and provided in conformity with the IEP. The IEP document describes the educational needs of a student, the goals and objectives that direct his or her program, the educational programming and placement, and the evaluation and measurement criteria that were developed during the IEP creation process. The IEP will be carefully scrutinized in litigation involving the determination of a FAPE.

Individuals with Disabilities Education Act (IDEA): In 1975, the federal government passed and signed into law the Education of All Handicapped Children Act (EAHCA). The EAHCA was reauthorized in 1990 and renamed the Individuals with Disabilities Education Act (IDEA). IDEA was amended and reauthorized again in 1997 (IDEA '97). Since the passage of the original law almost 25 years ago, educators have been charged with the responsibility for developing and delivering a free appropriate public education (FAPE) to students with disabilities. A FAPE is a publicly funded and individually

designed educational program developed to meet the unique needs of eligible students with disabilities.

Least Restrictive Environment (LRE): To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services and modifications cannot be achieved satisfactorily (IDEA, 20 U.S.C. Sec. 1412).

Inclusion/ Mainstreaming: The philosophical position of inclusion is based primarily on two arguments:

1. Segregating children in special classes or programs denies these children access to normal classes or denies these children access to normal experiences, and
2. Segregated services have not resulted in adequate education for handicapped students. While the arguments for inclusion sound similar to another movement, mainstreaming, there are important differences. Mainstreaming handicapped children typically involved integrating children when the child was able to demonstrate that he or she could successfully participate in the regular planned activities within the regular education class. Inclusion advocates typically argue that mainstreaming efforts have forced the handicapped children to "earn" time in the integrated settings. Inclusion advocates typically support the notion that each child has the right to be included, and the necessary support services and accommodations to the child's handicap must be made within the regular education classroom (TEACCH, 2001).

Organization of Study

After review of the current literature related to children with autism and litigation, an analysis of the most current decisions from the Office of Administrative Law (OAL) in New Jersey took place. The cases were selected and reviewed online from the Rutgers School of Law website, which has links to OAL decisions. A rubric was then applied to these cases. After implementation of the rubric, information was extrapolated regarding the district's inability to adhere to procedural and substantive safeguards impacting the litigious process. Upon completion of this extraction, recommendations were made to assist school districts in becoming proactive, and more capable when addressing students with autism.

CHAPTER II

Review of the Literature

Why are services to children diagnosed with autism now a major issue? Autism is now second only to Down syndrome in disorders in childhood (Feinberg & Vacca, 2000). Until recently, incidence/prevalence figures indicated that 1 in 5,000 children could be diagnosed with autism. Now, Power (1999) has asserted that the incidence of children with autism could be 1 in 500 or more, depending on how broadly we define the autistic spectrum. At present, there are four areas of causation that are receiving attention from the scientific community. These include genetic predisposition, neurochemical explanation, vaccine explanation, environmental toxin, and nutritional theories. This description of autism comes from the Autism society website publication. " Autism is a complex developmental disability that typically appears during the first three years of life. Autism is the result of a neurological disorder that effects the functioning of the brain, and its associated behaviors have been estimated to occur in as many as 1 in 500 hundred individuals. Autism is four times more prevalent in boys than in girls and knows no racial, ethnic, or social boundaries. Family income, lifestyle, and educational levels do not affect the chance of autism's occurrence. Autism impacts the normal development of the brain in the areas of social interaction and communications skills. Children and adults with autism typically have difficulty in verbal and non-verbal communication, social interactions, and leisure or play activities. The disorder makes it hard for them to communicate with others and relate to the outside world. In some cases, aggressive

and/or self-injurious behavior may be present. Persons with autism may exhibit repeated body movements (hand flapping, rocking), unusual responses to people or attachments to objects and resistance to changes in routines. Individuals may also experience sensitivities in the five senses of sight, hearing, touch, smell, and taste. Over a half million people in the U.S. today have autism or some form of pervasive developmental disorder. Its prevalence rate makes autism one of the most common developmental disabilities. Yet most of the public, including many professionals in the medical, educational, and vocational fields are still unaware of how autism affects people and how they can effectively work with individuals with autism”.

Autism is a spectrum disorder. In other words, the symptoms and characteristics of autism can present themselves in a wide variety of combinations; from mild to severe. Although autism is defined by a certain set of behaviors, children can exhibit any combination of the behaviors in any degree of severity. Two children, both with the same diagnosis, can present very differently from one another and have varying skills. Therefore, there is no standard *type* or *typical* person with autism. Parents may hear different terms used to describe children with this spectrum, such as autistic like, autistic tendencies, autism spectrum, high functioning or low-functioning autism, and more-abled or less-abled. More important to understand is, whatever the diagnosis, children can learn and function productively and show gains from appropriate education and treatment. Autism is actually one of five disorders that share varying degrees of impairment across three different domains: social functioning, communication, and behavioral variability. The other disorders are Retts Disorder; Childhood Disintegrative

Disorder, Asperger's Disorder, and Pervasive Developmental Disorder Not Otherwise Specified.

There are no medical tests for diagnosing autism. An accurate diagnosis must be based on observation of the individual's communication, behavior, and developmental levels. However, because many of the behaviors associated with autism are shared by other disorders, various medical tests may be ordered to rule out or identify other possible causes of the symptoms exhibited (Autism Society, 2001). Since the characteristics of the disorder vary so much, ideally a child should be evaluated by a multidisciplinary team which may include a neurologist, psychologist, developmental pediatrician, speech/language therapist, learning consultant, or another professional knowledgeable about autism. It is important to distinguish autism from other conditions, since an accurate diagnosis and early identification can provide the basis for building an appropriate and effective educational and treatment program. Core domains to be assessed include social competence, communication, behavioral variability, environmental influence, physical functioning/ motor skills, play/ leisure skills, academic skills, self-help/ independent living skills, general/vocational behavior, and cognitive functioning (Shriver, Allen, & Matthews, 1999).

According to federal guidelines (IDEA, 1997), which dictates the eligibility criteria for special education and related services, autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in

repetitive activities and stereotypical movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

Public Education

Public education is viewed as a birthright in our country that leads to an educated electorate without which there would be no viable democracy (Levine & Wexler, 1981). A common misconception regarding public education is that it is guaranteed by the Federal Constitution. In fact, education is the business of the states. The tenth Amendment to the U.S. Constitution implies that education is the responsibility of the state government. That education is a state, not a federal matter, was seen as essential by the founders of this country. This was because state governments were seen as being closer and more connected to the needs of the people. Rhode Island was the first state to pass a compulsory education law in 1840. By 1918 compulsory education laws were in place by all states. Despite the enactment of compulsory education laws, however, children with disabilities were often excluded from public schools. In 1934, the Cuyahoga County Court of appeals in Ohio ruled that the state statute mandating compulsory attendance for children ages 6 through 18 years gave the State Department of Education the authority to exclude certain students (Winzer, 1993). This type of ruling indicates the internal contradiction frequently presented in legal rulings on students with disabilities of the time. The court stated that students have a right to attend, noting the importance of education as evidenced by the compulsory education statute. It acknowledged the conflict between compulsory education and the exclusionary provisions, but did not rule to resolve this conflict (Yell, & Rogers, 1998). States

continued to enact statutes that specifically authorized school officials to exclude students with disabilities. As recently as 1969, the courts upheld legislation that excluded students whom school officials judged would not benefit from public education or who might be disruptive to other students.

Special Education Law History

Prior to 1975, students with educational disabilities access to educational opportunities was limited in two major ways. First, many students were completely excluded from public schools. In fact, congressional findings in 1974 indicated that more than 1.75 million students with disabilities did not receive educational services. Second, more than three million students with disabilities who were admitted to school did not receive an education that was appropriate to their needs. Moreover, because of the limited opportunities offered by the public schools, families were often forced to secure education and related services elsewhere, often at great distance from their homes and at their own expense. The education of students with disabilities was seen as a privilege, rather than a right (Huefner, 2000). In the early 1970s, U.S. schools educated only 20% of children with disabilities. Many of these students received an education that was not appropriate to their needs, and some states had laws that actually excluded certain categories of students with disabilities from schools (Office of Special Education Programs (OSEP), 2000).

Following the United States Supreme Court's mandate to racially desegregate schools in *Brown v. Board of Education* (1954), advocates for individuals with disabilities championed desegregated education for children with disabilities. In legal

theories rooted in *Brown, supra*, many cases have been filed nationwide alleging that children with disabilities were being excluded from public schools and denied equal protection and due process rights. This early legislation did not provide for mainstreaming or FAPE, but it established the groundwork for future legislation concerning these issues. Basing their arguments on this decision, advocates for students with disabilities argued that if segregation by race was a denial of equal educational opportunity, then the exclusion of students with disabilities from schools was also a denial of equal educational opportunity (Huefner, 2000). In 1972, two landmark court cases, *Pennsylvania Association for Retarded Citizens (PARC) v. Commonwealth of Pennsylvania* and *Mills v. Board of Education*, began the nationwide establishment of the right of students with disabilities to receive a public education (Katsiyannis, Yell and Bradley, 2001). Both cases resulted in schools being required to provide educational services to students with disabilities. In 1973, Congress passed Section 504 of the Rehabilitation Act, prohibiting discrimination against handicapped persons in programs receiving federal funds. In 1975, Congress passed Public Law 94-142, the Education for All Handicapped Children Act (EAHCA), providing significant new substantive legal rights and procedural protections for handicapped children.

Congressional hearings on the EAHCA in 1975 revealed that although some states had laws to mandate educational services for students with disabilities, many did not. Thus, in many states, students with disabilities were excluded from school entirely. Many other students were either offered an education that was not appropriate to their needs or “left to fend for themselves in classrooms designed for education of their non-handicapped peers” (Board of Education of the Hendrick Hudson Central School District

v. Rowley, 1982, p. 191). Congress passed the EAHCA to correct this situation. This law offered federal financial assistance to states to assist them in the development and improvement of educational programs for students who were eligible for special education (Yell & Drasgow, 2000). Eligible students have a disability covered under the law and need special education and related services. To qualify for assistance, states were required to submit plans to the federal government that assured that all eligible students with disabilities would receive FAPE. The EAHCA required that students with disabilities received education and related services that are provided at public expense; meet the standards of the state education agency, included appropriate preschool, elementary, and secondary education in the state involved; and are provided in conformity with an Individualized Education Program that is designed for each student.

This act was renamed the Individuals with Disabilities Education Act in 1990. The most recent legislation established in 1997 is the reauthorization of the Individuals with Disabilities Education Act (IDEA). According to IDEA, the right to FAPE includes special education and related services that are free and without cost to the parents or students, and provided through an appropriate educational program that is under public supervision and direction, and in conformity with the child's IEP.

The IDEA is a comprehensive law that not only provides supportive funding to the states but also governs how students with disabilities will be educated. According to the law, eligible students with disabilities must be provided with a FAPE, which consists of special education and related services. A student is eligible for services under the IDEA if he or she has a disability covered under the law and, because of the disability, needs special education services. The IDEA is divided into four parts, Parts A, B, C, and

D. Part A is the section of the law in which Congress justifies IDEA. It contains findings of fact regarding the education of students with disabilities that existed when IDEA was passed. Part A also contains definitions and terms that are used throughout the IDEA. Part B is the section with which special education teachers and administrators are most familiar. It sets forth funding mechanisms by which states obtain federal money, principles under which students with disabilities must be educated, and procedural safeguards to ensure that parents have an opportunity to be meaningfully involved in their children's educational programming. Part B benefits student who are ages three through 21. Part C covers infants and toddlers from birth through age 2. Part D creates a variety of national activities to improve the education of children with disabilities through investment areas including research, training, and technical assistance. Part D contains provisions that are vitally important to the development of special education in the United States.

Landmark Cases

There is, perhaps, no area of educational law that has been more highly litigated than the education of students with disabilities (Katsiyannis, Yell, & Bradley, 2001). The following are seven of the most important special education cases heard in the past 25 years:

Timothy W. v. Rochester (NH) School District, 875 F.2d 954 (1st Cir. 1989):

The IDEA mandates that all eligible children with disabilities, regardless of the severity of disability, are entitled to an education.

Board of Education v. Rowley, 419 U.S. 565 (1975):

The IDEA requires that states provide students with instruction and sufficient support services to permit a child to receive meaningful educational benefit (maximization of potential is not required). In FAPE cases, a court must ask: (a) Did the state comply with the procedural requirements of the law and (b) was the IEP reasonably calculated to enable the child to receive meaningful educational benefit

Irving Independent School District v. Tatro, 478 U.S. 675 (1984):

To receive related services, (a) the student must be eligible for services under IDEA, (b) the related services must be necessary to assist the student to benefit from special education, and (c) the service must be performed by a non-physician.

Burlington School Committee v. Massachusetts Department of Education, 471 U.S. 359 (1985): Parents who unilaterally place their child with disabilities in a private school are entitled to reimbursement for tuition and living expenses if the court finds that the school had proposed an inappropriate IEP.

Honing v. Doe, 484 U.S. 305 (1988):

Schools cannot unilaterally exclude students with disabilities from school. During the pendency of due process proceedings, a student must remain in the then-current placement unless school officials and parents agree otherwise.

Daniel R.R. v. El Paso, 874 F.2d 1036 (5th Cir. 1989):

In determining if a school has followed the IDEA's LRE provisions, courts must ask: (a) if education in the general education classroom with aids and services can be achieved satisfactorily, and (b) if a student is placed in a more restrictive setting, if he/she is integrated to the maximum extent appropriate.

Cedar Rapids Community School District v. Garret F., 119 S. Ct. 992 (1999):

School districts must provide any and all necessary health services to qualified students with disabilities regardless of the intensity of complexity of the services, as long as they do not need to be provided by a physician.

Currently in New Jersey, litigious cases regarding autism have only been mediated at the Office of Administrative Law level. New Jersey has no history of District, or Appellate case decisions regarding students with autism. In addition, the Supreme Court has not yet heard a student with autism case, and recently turned away two opportunities. Based on the current controversy and escalation of this type of case in the public schools, it seems that it will only be a matter of time before societal pressure will force a hearing into the Supreme Court. The outcome of that future decision will have strong implications for the New Jersey Public Schools.

FAPE

In *Brown v. Board of Education of Topeka* (1954), precedent was established in not excluding students with disabilities from an educational program. In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the concept and specificity of FAPE was challenged. The Supreme Court held that the language of PL 94-142 contains no requirement like the one imposed by the district court. They claimed that the potential of disabled children be maximized, commensurate with the opportunity provided to other children. Thus, the District Court and Court of Appeals erred when they held that PL 94-142 requires New York to maximize the potential of each handicapped student. A FAPE provides personalized

instruction with sufficient support services to permit the child to benefit educationally from that instruction.

A more recent case of a student with disabilities applies the standard of FAPE to a higher level. In *Ridgewood Board of Education v. M.E., as Guardian Ad Litem for M.E., an infant; Mary E., Individually and as Guardian Ad Litem for M.E., an infant N.J.* (1999), the issue on appeal is whether Ridgewood Board of Education provided its student M.E. with a FAPE, as required by the Individuals with Disabilities Education Act. The District Court found the Board of Education satisfied IDEA because it provided M.E. with more than a trivial educational benefit. The Court of Appeals held that IDEA imposes a higher standard and reversed the District Court's decision awarding M.E. Although this case was not specific to a student with autism, this can be applied to cases of students with autism, in that, a higher standard will be reviewed when determining whether a program established for a disabled student is truly appropriate. This case clearly establishes that an inquiry must be made into the student's potential and educational need before you can establish FAPE. The law now clearly conveys the requirement that if a student fails to make progress toward his or her annual goals, the IEP must be revised (Clark, 1999).

School officials, parents of students with disabilities, and legal and educational scholars began to debate what constituted a FAPE almost immediately after the passage of the EAHCA (Osborne, 1992). Soon, due process officers and courts were called on to interpret the meaning of FAPE (Huefner, 1991). Recently there have been a number of due process hearings and cases in which parents of children with autism have challenged school districts' educational programs for their children. These hearings and cases

represent the fastest growing area of litigation in special education (Baird, 1999), with most litigation involving requests that school districts provide, fund, or reimburse parents for a program of treatment for young children with autism developed by O. Ivar Lovaas (Lovaas, 1993).

Congress has never provided a substantive definition of FAPE in any federal legislation, nor has it ever specifically indicated what components must be included in a student's program (Yell & Drasgow, 2000). Congress did this intentionally because they believe that a FAPE would vary from student to student on account of the individual needs of each student. However, current law mandates very specific procedures that educators must follow to develop special education programs for students with disabilities. The purpose of the procedures is to safeguard a student's right to a FAPE by ensuring that parents are meaningfully involved in the development of their child's educational program. The lack of a substantive definition of FAPE, however, has led to frequent disagreements between parents and schools regarding what constitutes an appropriate education for a particular student.

In the case of the Board of Education of the Hendrick Hudson Central School District v. Rowley (1982), it was reported that FAPE was more than just access to public school programs. It consisted of educational instruction designed to meet the unique needs of a student with disabilities, supported by services to permit the student to benefit from instruction. The Supreme Court also ruled that students with disabilities do not have an enforceable right to the best possible education or an education that allows them to achieve their maximum potential. Rather they are entitled to an education that is reasonably calculated to confer educational benefit. Osborne (1992) summarized the

trend of recent court decisions to interpret the FAPE mandate in a light more favorable to students with disabilities. That is, when a school district was challenged, it had to show that a student's FAPE was individually designed to provide educational advancement that was consistent with a student's overall ability, and that there was measurable gain in a student's progress.

Questions of educational methodology are closely related to the concept of FAPE. There have been a number of cases in which parents have gone to due process hearings or to court in an attempt to compel school districts to teach their child using the specific methodology of their choice. The courts, however, have routinely placed decisions regarding the choice of educational methodologies in the hands of educators (Gorn, 1996). That is, parents of students with disabilities do not have a legal right to compel a school district to use a specific methodology or provide a specific program in educating children, as long as districts offer a FAPE. A concise statement of the case law regarding educational methodology was provided by the U.S. Court of Appeals for the Fourth Circuit in *Barnett v. Fairfax County School Board* (1991), which stated that "while a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system".

Autism Law

Yell and Drasgow (2000) found the following procedural and substantive violation areas as important in determining why school districts lose in court when dealing with students with autism. The first category of procedural violations occurred when parents were not able to participate in the IEP process. This includes schools

failing to provide adequate notice so that parents may attend meetings, not informing parents of their procedural rights, or holding meetings without inviting parents. The second category of procedural errors involved evaluations. Two of the most serious evaluation errors are failing to evaluate all areas of need, and having evaluations conducted by individuals with no knowledge of autism or appropriate evaluation procedures to assess students with autism. If the district's staff lacked the qualifications to assess a student's needs and then made recommendations for the student's IEP based on the inadequate assessment, the student will clearly be denied FAPE. Some areas that have not been addressed in assessments are the child's need for communication, behavior, socialization, or extended school year services.

The third category of procedural errors involved the development of inadequate IEP's. The most common problem was that school districts wrote IEP's that lacked meaningful goals and objectives. That is, goals were vague, general, and had no criteria for mastery. Using anecdotal data and other subjective procedures are not appropriate for monitoring progress and should never be the basis of a data collection system. The most appropriate data collection systems are those from applied behavioral analysis (Alberto & Troutman, 1999), in which target behaviors can be measured, graphed, and visually inspected to evaluate progress toward goals and objectives. The fourth category of procedural violations involved placement decisions. The most common placement error was to determine where the child would be educated prior to developing the educational program. The fifth category of procedural violations involved the lack of qualified school personnel to work with students with autism. A district violates IDEA '97 when it fails to use knowledgeable faculty to work with students with disabilities, obtain the

necessary expertise its staff lacks, or secure and consider the recommendations of experts.

To assess the substance of a special education program, the court will ask whether a student's IEP was *reasonably calculated* to provide educational benefit. There are two major areas of substantive violations. The first is when school districts fail to provide needed services to the student. That is, many of the losing school district fail to provide extended school-year services, speech/language services, or programs to address problem behaviors. Some districts provide needed services, but the intensity of the service was not sufficient to address the student's need. The second area of substantive violation occurred when a student did not make progress in the school district's program. School districts need to collect meaningful data to show progress, and to implement empirically supported educational practices that are effective for educating children with autism.

Yell and Drasgow (2000) found that school districts will tend to prevail if they made no significant procedural errors in developing a student's IEP, hired qualified staff or provided expert assistance to staff for evaluating and teaching students with autism, used research-supported practices of proven effectiveness in their educational programming, and collected meaningful data to monitor student progress and document program effectiveness. It is also beneficial for school districts to use experts to conduct student evaluations, to consult with school personnel in developing educational programs, and to serve as expert witnesses to support the programming in due process hearings. These changes emphasize accountability in special education and thus hold schools to a higher level of responsibility for developing and implementing valid and beneficial IEP's than in the past (Drasgow, Yell and Robertson 2001). The underlying theme of IDEA

was to improve the effectiveness of special education by requiring demonstrable improvements in the educational achievement of students with disabilities. IDEA requires that schools further the educational achievement of students with disabilities by developing an IEP that provides a special education program that confers measurable and meaningful educational progress.

The topic of lawsuits has increasingly focused on parental requests for intensive behavioral services for children with autism. Unfortunately, for some families and systems, the win-lose mentality of litigation has replaced the complexity of cogent discussions. Families, through an ever growing number of internet on-line chat rooms, have learned that even the most minor procedural violations by school teams can lead to an invalidation of an IEP by the courts. They have learned that procedural errors can yield substantive victory. School district personnel, also learning from court cases, have been encouraged to replace informal discussions with formal meetings, in an effort to ensure that they have litigation-proof documentation that can withstand the rigors of contentious due process hearings. Feinberg and Vacca (2000) found that the result is that families and clinicians are often mutually suspicious, communication breakdowns occur with regrettable frequency, and critical decisions are too often being made by hearing officers and judges rather than by families and clinicians.

Mediation

Mediation is a tool used to aid disputing parties (i.e., complainant, respondent) in reaching an agreement. A third party listens to both arguments and assists the disputants in reaching a consensus. When disputing parties must continue to work together and they

find themselves in conflict, mediation is of particular use. People in this situation are the most open to coming to a settlement, because their working relationship is at stake (Chandler, 1985). The process is especially productive in resolving special educational disputes, in that the conflicting parties work together to develop a reasonable and equitable resolution (Morgan & Whorton, 1995). Typically, the process of mediation may occur through each or any of three procedures:

1. open session (individual uninterrupted sharing)
2. general discussion of the issues
3. caucus (each party meets with the mediator to clarify issues or to share concerns)

Through the judicious use of these processes, the mediator guides the disputants to a mutually developed agreement. If a resolution is developed, a written agreement is composed by the participants. The document is then signed by the participants.

Negotiation involves the settling of an educational dispute by employing a third party to hear both sides in the dispute and recommend a solution.

The use of informal procedures to resolve special education disputes, such as negotiation and mediation, are not required but encouraged by federal legislation.

Negotiation is a procedure which is ongoing in many schools. It involves a face-to-face meeting with the disputing parties and usually entails a third party who recommends a resolution to the conflict. If such a procedure fails, mediation may be utilized to resolve the continuing dispute. However, such processes of negotiation and mediation cannot preclude the due process rights or the time table of said process for either party. In addition, either party may opt out of either procedure at any time. Both processes offer a

means of resolving special education disputes while avoiding the adversarial approaches of due process and litigation. In addition, both negotiation and mediation may result in discovery of mutual interests, joint problem solving, win/win solutions, orientation to the future, multiple options, creative, flexible solutions, respect for and sharing of differing expertise by parents and professionals, control of the outcome in the hands of the parties, and control of the process by a neutral mediator (Morgan & Whorton, 1995).

Individualized Education Plan

The IEP is the cornerstone of special education (Drasgow, Yell, & Robinson, 2001). It directs and monitors all aspects of a student's special education program. The IEP document describes the educational needs of a student, the goals and objectives that direct his or her program, the educational programming and placement, and the evaluation and measurement criteria that were developed during the IEP creation process. Indeed, the IEP is the document and process that formalizes a FAPE for students with disabilities (Yell, 1998). Since their inception in 1975, however, IEP's have been fraught with problems (Huefner, 2000). For example, Smith (1999) identified a number of problems with IEP development, including a lack of adequate teacher training in developing IEP's, poorly developed team processes, mechanistic compliance with the burdensome paperwork requirements, and excessive demands on teacher time. Additional problems with the IEP requirements are minimal coordination with general education, the failure to link assessment data to instructional goals, and the failure to develop measurable goals and objectives to evaluate student achievement. Furthermore, the IEP process has been replete with such legal errors as failure to report current levels

of educational performance; lack of appropriate goals, objectives, and evaluation procedures; absence of key personnel at the IEP meeting; and placement decisions that are not based on the IEP. Yell and Drasgow (2000) further highlighted problems that schools and professionals confront with IEP procedures and requirements. They analyzed 45 published due process hearings and court cases in which parents of children with autism challenged school district's educational programs for their children. These hearings and cases involved parental requests for school districts to provide, fund, or reimburse them for the Lovaas Autism Treatment Program. Yell and Drasgow found that school district lost 34 of the 45 (76%) hearings and court cases. Most of the schools' losses were due to either procedural or substantive errors or both.

Schools should follow both procedural and substantive requirements when developing and implementing IEPs. The procedural requirements ensure that parents are involved in developing their child's special education program. The substantive requirements of the IEP ensure that a student receives meaningful educational benefit. Finally, IEPs should be based on research-supported educational programs of proven effectiveness in educating students with disabilities. Hearing officers or courts usually examine five areas of the IEP process to determine whether a student has made meaningful educational progress: the evaluation, the present levels of educational performance, the measurable annual goals, benchmarks and objectives, the special education and related services, and the annual review.

The following is an outline of the procedural and substantive requirements as outlined by IDEA 1997 and demonstrated in an article entitled, *Developing Legally Correct and Educationally Appropriate IEPs* by Drasgow, Yell, and Rowand (2001):

Parental Participation

1. The parents were notified of the IEP meeting early enough to ensure that they had an opportunity to attend.
2. The IEP meeting was held at a time and place that was mutually agreed upon.
3. The parents were informed of their procedural rights under IDEA.
4. The team has documentation regarding unsuccessful attempts to involve the parents in the meeting when the parents did not attend the IEP meeting.
5. The parents were equal partners in the IEP process from evaluation to placement. Any parental concerns or requests were considered and discussed at the IEP meeting.

Evaluation

1. The IEP team considered evaluation data provided by the parents.
2. The evaluation met the federal and state requirements.
3. The evaluation and reevaluation were conducted in a timely manner.
4. Parents were given an explanation of their right to seek an independent educational evaluation if they disagreed with the school district's evaluation.
5. A reevaluation was conducted when conditions warranted it or the parents or teacher requested a reevaluation.
6. A reevaluation was conducted every three years while the student was in special education. The IEP team determined what assessments would be administered during the reevaluation, unless the student's parents requested a complete evaluation.

7. A reevaluation was conducted before a significant change in placement. This is a requirement of section 504.
8. A reevaluation was conducted before revising the IEP.
9. School district evaluators were qualified to conduct evaluations.

IEP Meeting and Document

1. The IEP meeting, at a minimum, included the student's parents or guardians, a representative of the local educational agency, the student's special education and general education teachers, and a person who could interpret the instructional implications of the evaluation results.
2. The IEP included all of the required components
3. The IEP addressed all the needs identified during the evaluation.
4. The IEP included a schedule of regular progress reports to the parents.
5. The IEP was developed before the placement was determined.
6. The IEP was conducted in a timely manner.
7. The IEP was rewritten when an evaluation indicated that it needed to be revised.
8. The student received all services and modifications listed in the IEP.
9. An annual review of the IEP was conducted.

Placement

1. The student was placed after the IEP was written.

2. The student was placed in an appropriate setting, even if the school district did not have the appropriate placement. For example, a school district may contract for placement with another school district or a private agency.

IEP

1. The school district provided services as indicated in the IEP.
2. There was a direct relationship between the present levels of educational performance, the annual goals, benchmarks, and short term objectives, and special education services and program modifications.
3. Annual goals, benchmarks, and short term objectives were measurable.
4. Modifications to the general education program were included in the IEP if needed.
5. The IEP was implemented as written.
6. The school district administered certain disciplinary procedures through the IEP team.
7. The IEP was written to confer meaningful educational benefit.

Special Education Services

1. The student was placed after the IEP was written.
2. The student was educated with non-disabled students when appropriate.
3. The school district provided sufficient intensity of services.
4. The IEP included positive behavioral interventions, strategies, and supports to address any behavior that impedes the student's learning or the learning of others.

5. The IEP was disseminated to appropriate staff members, and they implemented it as written.
6. The IEP team collected meaningful data to document the student's progress.
7. The IEP was revised if the data indicated a need to do so.
8. The school district used empirically validated instructional procedures.

Qualifications of Personnel

1. Teachers and service providers were qualified to teach or work with students with specific disabilities.

IEP Components

1. Statements detailing a student's present levels of educational performance, including how the disability influences progress in the general education curriculum.
2. Measurable annual goals, including benchmarks and short term objectives, that detail strategies to address needs that emanate from a disability, thus enabling participation and progress in the general education curriculum.
3. Statements that detail the special education and related services, supplementary aids, and program modifications or supports to be provided.
4. An explanation that specifies the extent to which a student will not participate with non-disabled peers in the general education environment.
5. Statements that detail individual modifications to statewide or district wide assessments to allow for student participation.

6. The projected date to implement the services and modifications, as well as their anticipated frequency, location, and duration.
7. Statements specifying measurement of the annual goals and strategies for informing parents about their child's progress on a regular basis.
8. Statements detailing the transition service needs of a student, if appropriate, that focus on the student's courses of study at age 14 and interagency responsibilities at age 16.

One way to correct the problems inherent in viewing the IEP as primarily a document is to see it as an ongoing, developmental process. That is, to recognize that the IEP is a fluid, creative, flexible, and useful procedure from which a framework emerges to guide an ongoing educational program (Smith & Slattery, 1993). The goal of this approach is to deliver a comprehensive, free, and appropriate education with the involvement of many participants. The following are benefits of conceptualizing the IEP as a process:

1. Viewing the IEP as a process focuses on the varied roles of participants who are needed for an accurate and relevant description of the child's strengths and weaknesses in many different settings, including the current educational setting.
2. Longitudinal planning that is community referenced and broad in perspective for children and youth with autism, as well as placement decisions, can be the results of the IEP process.
3. Viewing the IEP as a process rather than a product allows for ethical compliance and discussion of the intent of the law, rather than with the letter of the law.
4. Conceptualizing the IEP as a process allows for the shared responsibility for educating children with autism among all individuals in the school, home, and

community. The IEP participants can become owners of a process that fosters increased participation in a decision-making team and provides essential ecological information.

5. The likelihood of appropriate mainstreaming in the school and community increases when participants see the IEP as an ongoing, developmental process that enhances appropriate educational programming.

IDEA Cases

The most common litigious issues involve placement decisions and educational methodologies (Katsiyannis & Reid, 1999). Regarding the use of specific methodology, hearing officers have focused on whether the district's IEP is appropriate. Hearing officers generally respect the school district's right to choose an instructional approach. For example, although the IEP of a student with autism was found to be invalid, the district was allowed to choose the instructional methodology (Board of Education of the North Rose-Wolcott Central School District, 1997). In contrast, violation of procedural safeguards, refusal to implement terms of an IEP, and failure to meet obligations under IDEA have resulted in reimbursement of privately obtained ABA therapy and required districts to follow the methodology requested by parents.

Placement has also been a contentious area, especially the issue of when a general education classroom placement constitutes the least restrictive environment for a student with disabilities. IDEA's LRE provision has established the presumptive right for all students with disabilities to be educated with same-aged peers. Such right, however, may be challenged if integration is deemed inappropriate for the student. Factors considered

in such cases often include the educational benefit received by the student in the general education classroom as compared with the benefits of a more restrictive placement, nonacademic benefits, the effect of the student's behavior on peers, and teacher as well as the costs (Yell, 1998).

Section 504

Section 504 requires that public schools provide free and appropriate educational accommodations to all qualified children with disabilities. Unlike IDEA, in which 13 disability categories are specifically delineated, Section 504 presents a much broader and more loosely defined definition of disability. Thus, Section 504 provides rights and protections for school-age children with disabilities beyond the groups identified under IDEA. However the two are not mutually exclusive. Children who are served under IDEA are also eligible and covered under section 504. Eligibility requirements for section 504 are as follows: a person who has a physical or mental impairment that substantially limits one or more major life activities qualifies as having a disability. Major life activities qualifying an individual for services under Section 504 include self-care, performing manual tasks, walking, seeing, hearing, breathing, learning, and working.

There are a limited number of Office of Civil Rights (OCR) rulings regarding children with autism. Generally issues have involved assessment, placement, and the provision of a FAPE. Placement guidelines under Section 504 closely parallel those of the least restrictive environment under IDEA. That is, students should be placed in an environment with people without disabilities to the maximum extent appropriate to meet individual educational needs. However, this does not mean that Section 504 requires all

students with autism to be placed in the general education classroom. Another issue related to placement pertains to the qualifications of teachers. Specifically, whether teachers who work with children with autism have specific training or coursework in autism. The OCR ruled that there was no statutory requirement under Section 504 that would compel states to require that special education teachers receive specific training in autism. Students with autism may be suspended pending a change in placement if their behavior constitutes a danger to themselves or others. However, in the interim period between suspension and initiation of the new placement, a district must provide services in the home at the district expense. What may be the biggest problem is the fact that the requirements of Section 504 must be addressed by general educators, who may be unaccustomed to working with students with special needs. Thus, special educators and other specialists should take care to consult and collaborate with general educators to ensure that legal responsibilities are met and that children are provided with all necessary supports and services (Katsiyannis & Reid, 1999).

Inclusion and the Courts

The Least Restrictive Environment requirement of IDEA states the following: to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily. In *Hartmann v. ...*

Loudon County Board of Education (1997) the court used the following criteria to determine if mainstreaming is required:

1. Mainstreaming is not required if a student with disabilities will not receive any educational benefit from mainstreaming into a regular classroom;
2. Mainstreaming is not required where any marginal benefit that the student might receive would be significantly outweighed by benefits that could feasibly be obtained only in a separate instructional setting; or
3. Mainstreaming is not required if the child is a disruptive force in the general education classroom.

The Hartmann decision is law in the Fourth Circuit, which comprises Maryland, North Carolina, South Carolina, Virginia, and West Virginia. The U.S. Court of Appeals for the Third, Fifth, Ninth and Eleventh Circuits have adopted similar standards for judicial review of LRE cases based on statutory language. New Jersey is in the third circuit.

In an article by the Consortium on Inclusive Schooling Practices Issue Brief from December of 1997 entitled *Providing Accurate Placement Data on Students with Disabilities in General Education Settings* the following was reported: States are at very different places in their efforts to accurately report student data for national statistics. Several states have shown dramatic improvements, while many others have not. Scarce public resources, coupled with the complexity of issues surrounding inclusive schooling practices, demand that state and federal projects involved in inclusive education look carefully at the extent to which the placement of included students is being accurately reported. They go on to report that the U.S. Department of Education, like its

counterparts in state education departments and local school districts, has come under intense public scrutiny to justify public expenditures for educational programs.

Ultimately, inclusion initiatives appear to be evaluated by the number of students who move from a segregated special education program into a program that is offered in an inclusive environment. Therefore, it is important to disseminate accurate data with respect to student placements and programs as well as to cultivate an understanding of why the data reported to Congress are inaccurate. Such actions not only justify the use of federal dollars in support of inclusion, but also promote continued advocacy of these efforts (Consortium, 1997).

In an article by the Consortium on Inclusive Schooling Practices Issue Brief from April of 1998 entitled *Including Students with Disabilities in Accountability Systems*, the following was reported: Students with disabilities are under-represented in nearly all state assessment systems. There are few if any incentives for increasing inclusion of students with disabilities in assessments. This practice may lead to sorting students and ranking some students as more valuable than others. As states move to implement new ways of making accountability decisions, students with disabilities present a significant obstacle. It is tough to implement new forms of accountability practice. It is much tougher when all students must be included. The concept of inclusive schooling, after all, means that all students attend their home school along with their age and grade peers. To the maximum extent possible, all students, including those with disabilities, receive their in-school educational services in general education classrooms with appropriate in-class supports. Inclusive practices therefore imply more than just being in a classroom or a single

instructional method. Inclusive practices provide a means of supporting children and youth in their learning in ways that affect the entire educational system.

In a publication by the New Jersey Department of Education, Office of Special Education Programs in collaboration with Statewide Parent Advocacy Network entitled *Inclusion Insights from the Spring of 2000*, it revealed the following information: Providing systematic transition planning has been an important element in including students with a variety of special needs. Planning ahead is a key element to success. Several components have been identified as critical in the planning process: staffing, training, scheduling, equipment/materials, accessibility, child involvement, and parent involvement.

Special Education Tuition Reimbursement Claims

The ability of parents of children with disabilities to seek reimbursement for private school tuition is one of the most controversial aspects in special education law (Mayes & Zirkel, 2001). When the parents of a special education child are dissatisfied with the programming offered by the school district, they may enroll their child in a private placement and seek reimbursement from the public school district. Whether the parents are successful depends largely on the application of the standards set forth by the Supreme Court in *Burlington School Committee v. Department of Education* (1985) and *Florence County School District Four v. Carter* (1993). In addition, the IDEA amendments of 1997, as well as the U.S. Department of Education's (1999) implementing regulations may change the legal landscape for parents seeking tuition reimbursement. Mayes and Zirkel reported the following results in their 2001 study of tuition reimbursement claims: First, the volume, at least in terms of the number per year,

of published administrative and judicial tuition reimbursement decisions has increased relatively steadily and steeply across four time periods spanning 1978 to 2000. This continuing increase is similar to but more accelerated than the overall pattern in the volume of published special education decisions generally. Given the high stakes nature of these cases and the conservative nature of these estimates, this increasing volume merits the attention of both policymakers and practitioners. Second, although they prevailed in more tuition reimbursement disputes than parents, schools did not prevail at an overwhelming rate. When partial conclusive outcomes and inconclusive decisions are considered, parents prevailed almost as often as school districts. Although schools may be increasingly financially strained by tuition reimbursement awards, it is the increased frequency of tuition reimbursement claims, rather than any change in outcomes, that appears to be causing those strains.

Criteria for Empirically Supported Treatment

The Clinical Child and Pediatric Psychology sections of Division 12 of the American Psychological Association formed a task force to identify criteria that should be used in determining the efficacy of various psychosocial treatments for childhood disorders. The task force formulated guidelines for evaluating efficacy research on five childhood disorders: depression, anxiety disorders, attention deficit hyperactivity disorder, conduct disorder, and autism.

Division 12's Task Force Criteria for Well-Established Psychosocial Treatments for Childhood Disorders are as follows (Longjan, Elber, & Johnson, 1998):

1. Random assignment of children to treatment groups

2. At least two well-conducted group design studies, conducted by different research teams, showing the treatment to be either:
 - a. superior to pill placebo or alternate treatment, or
 - b. equivalent to an already established treatment in studies with adequate statistical power.
3. A large series of single-case design studies (i.e., $n > 9$) that both
 - a. use good experimental design and
 - b. compare the intervention to another treatment
4. Treatment manuals used for the intervention preferred.
5. Sample characteristics must be clearly specified.

Division 12's Task Force Criteria for Probably Efficacious Psychosocial Interventions for Childhood Disorders are as follows (Lonigan, Elber, & Johnson, 1998):

1. Two studies showing the intervention more effective than a no-treatment control group or
2. Two groups-design studies meeting criteria for well-established treatments but conducted by the same research team or
3. A small series of single case design experiments (i.e., $n > 3$) that otherwise meet Criterion 3 for well-established treatments and
4. Treatment manuals used for intervention preferred and
5. Sample characteristics must be clearly specified.

Interventions and Treatment

School systems are experiencing a dramatic increase in the number of contested IEP's for students who meet the eligibility requirements for autism. Due to antagonistic attitudes and significant differences of opinion (Autism Treatment Options, Inc., 1996), along with the controversy surrounding the efficacy and preferences for certain options (Simpson, 1995), IEP meetings are routinely consuming multiple days. In a small but significant number of cases, IEP participants are unable to reach agreement and due process is invoked. Specific to students with autism, due process proceedings have challenged (a) methodology used, (b) adequacy of support services, (c) placement decisions, and (d) length of services (Heflin & Simpson, 1998). According to federal law, the choice of methodologies used to support progress toward IEP goals and objectives is to be left to the discretion of the schools. However, due process decisions reflect that if schools use certain methodologies there is an enhanced likelihood of settlement in favor of their programs (Independent School District No. 318, 1996). Several key factors appear to determine which decision will be reached. These factors include the availability of a developed program, the provision of appropriate intensity, an emphasis on meaningful outcomes, and the creation of an individually tailored program.

In regard to the availability of a developed program, if a school district indicates that it is struggling to put together an appropriate program for students with autism and even refers to the program as new or a pilot, then programs with documented benefits will be deemed more effective in providing educational benefits (High Bridge Board of Education, 1995). The programs available through the schools must be able to document student progress toward IEP goals and objectives relative to the instruction and support

being provided. School districts are also in a position to better defend itself if an expert witness is available to support the programming. Unfortunately district personnel are routinely discredited as expert witnesses (Board of Education of the Ann Arbor Public Schools, 1996). It is important for the district to have outside evaluators who not only have expertise in autism, but also have knowledge of the children involved to assess the programming offered.

An analysis by Rogers (1996) of six studies involving interventions for children with autism concluded that benefit is enhanced when interventions include 15 or more hours per week of intensive effort. To produce meaningful outcomes, schools must create programs that are individually tailored to meet each child's needs. Districts that create an *autistic program* are opening themselves up to allegations of taking a *cookie cutter approach* of trying to design a single program to meet the needs of a very heterogeneous group of students (Board of Education of the Ann Arbor Public Schools, 1996). Schools must be able to articulate a variety of programming options from which they will tailor a specific program for each student with autism.

A commonly provided support service is the provision of additional personnel. Districts are providing assistants, including one-on-one aides, to enable students to make progress toward IEP goals and objectives. Although one-on-one assistance can increase the ability of the student with autism to be engaged in the programming, students can become dependent on this assistance, which may actually interfere with their ability to be accepted by others in the school environment (Giangreco, Edelman, Lusicelli, & MacFarland, 1997). When providing one-on-one aides, districts need to plan the systematic fading of such intensive, and often intrusive, support. Cooperative teaching

and the assignment of additional assistants to a classroom are two strategies that can provide necessary support while minimizing the potential negative effects related to assigning a one-on-one aide.

Research discoveries refining the understanding of the genetic and biological basis of autism, along with the veritable explosion of treatment options available for individuals with autism, have resulted in conflicting views of education and treatment (Heflin & Simpson, 1998). Clashes between persons who are cautiously optimistic and those who are quick to believe exaggerated claims have led to the assumption of adversarial positions, often before the individuals involved in advocating for a child with autism have even met to discuss the child's needs and possible educational programming. Proponents of certain treatments actually promote initiating discussions with aggressive, confrontational attitudes (Autism Treatment Options, Inc., 1996). Rather than expecting opposition, a more reasonable approach would be for a group of advocates to establish guidelines to facilitate the decision making process (Heflin & Simpson, 1998). Heflin & Simpson (1998) also stated: The purpose of agreeing on guidelines is to encourage the consideration of innovative approaches while also setting the parameters for reasonable and informed decision making. The use of the guidelines will require the collection of relevant information regarding the student characteristics, family goals, and intervention facts. Systematically, each option can be considered in relation to student characteristics and goals, and an appropriate program will be tailored specifically for the individual student. No option is accepted or discarded until it has been examined from every angle.

Heflin and Simpson (1998) stated that legislative and legal rulings have benefited individuals with disabilities including children and youth with autism. Indeed, much of

the credit for initiation and current availability of programs for these students is directly attributable to legal rulings and legislative mandates. Yet, they believe that with regard to the debate over choice of intervention and treatment options, supports beyond legislation and court rulings are needed, and in fact bode well for professionals, parents, advocates, and other interested parties reaching mutually acceptable resolution to the present conflict. In pursuit of this outcome, Heflin and Simpson have established a set of guidelines for making treatment and intervention decisions. They indicated that five key questions should be asked when discussing the elements of programming for individuals with autism. They are:

1. What are the anticipated outcomes of the programming option?
2. What are the potential risks?
3. How will the option be evaluated?
4. What proof is available that the option is effective?
5. What other options would be excluded if this option is chosen?

Within these questions lie other questions that should be addressed by IEP teams. In discussing anticipated outcomes of the option in question one, the IEP team should ask: (a) Have meaningful outcomes been identified for the student? (b) Are the outcomes developmentally significant or developmentally trivial? (c) Are the outcomes developmentally appropriate for the child? (d) Do the outcomes promoted by this option match the identified outcomes? (e) Does the option promote educational gain or merely address symptoms of the disorder? (f) How similar is the student to other students who have benefited from the approach?

In question 2, potential risks are identified. The following questions can guide that discussion: (a) Is there any immediate or eventual health or behavioral risk for the student with autism? (b) Is there any risk involved for parents and/ or school personnel? (c) What impact will treatment have on the quality of life for the student, his or her family, and the school personnel involved in treatment? (d) If the treatment fails, what are the implications for the child and his or her family?

Answering the following questions can help the team to objectively evaluate the option: (a) How will progress be demonstrated? (b) How often will the effectiveness of the intervention be evaluated? (c) Who will conduct the evaluations? (d) What criteria will be used to determine if a treatment should be continued or abandoned?

In considering the available evidence, a team of advocates can consider the following questions: (a) Is the treatment published in peer-reviewed journals? (b) Does the information regarding effectiveness come from a variety of sources? (c) Are the studies validating effectiveness of high quality? (d) Is empirical validation available, or does the majority of the support come from personal testimonials? (e) Do proponents claim that the option will help almost everyone with autism?

To prioritize treatment and intervention options, a team can discuss the following questions: (a) How does this treatment rate in terms of restrictiveness and intensity? (b) Are there other options that are better researched than this one? (c) Are there less

restrictive/ intensive alternatives that may be just as effective? (d) Does the treatment ignore the functional communication and socialization needs of the child?

Evidence shows that early intervention results in dramatically positive outcomes for young children with autism. While various pre-school models emphasize different program components, all share and emphasize early, appropriate, and intensive educational interventions for young children. Other common factors may be: some degree of inclusion, mostly behaviorally based interventions, programs which build on the interests of the child, extensive use of visuals to accompany instruction, highly structured schedule of activities, parent and staff training, transition planning, and follow-up. Because of the spectrum nature of autism and the many behavior combinations which can occur, no one approach is effective in alleviating symptoms of autism in all cases. Various types of therapies are available; including (but not limited to) applied behavioral analysis, auditory integration training, dietary interventions, medications, music therapy, occupational therapy, PECS, physical therapy, sensory integration, speech/ language therapy, and vision therapy.

The autism society (Spring 2001) also reported studies where individuals with autism responded well to a highly structured, specialized educational program, tailored to their individual needs. A well designed intervention approach may include some elements of communication therapy, social skills development, sensory integration therapy, and applied behavioral analysis, delivered by trained professionals in a consistent, comprehensive, and coordinated manner. The more severe challenges of some children with autism may be best addressed by a structured education and behavior program, which contains a one-to-one teacher to student ratio or small group environment.

However, many other children with autism may be successful in a fully inclusive general education environment with appropriate supports. In addition to appropriate educational supports in the area of academics, students with autism should have training in functional living skills at the earliest possible age (Gresham, Beebe-Frankenberger, & MacMillan 1999). Learning to cross a street safely, to make a simple purchase or to ask for assistance when needed are critical skills, and may be difficult, even for those with average intelligence levels. Tasks that enhance the person's independence and give more opportunity for personal choice and freedom in the community are important.

Gresham et al. (1999) empirically state common elements of comprehensive treatment programs prior to the transition into kindergarten or first grade in their article, *A Selective Review of Treatments for Children with Autism*. They report the following: One element that is common across programs is curriculum content that emphasizes five basic skill domains: ability to selectively attend to stimuli in the environment, imitative ability including both verbal and motor imitation, receptive and expressive language ability, appropriate toy play, and social interaction skills. A second element identified across programs is a highly supportive and structured teaching environment. A third common element of these programs is that they can be characterized by predictability and routine. A fourth element in these treatment programs is that they are based on a functional approach to problem behaviors. A fifth common element in these programs is the focus upon transition between preschool to kindergarten and first grade. A final common element in most of these treatment programs is family involvement in the treatment.

A key element in the inclusion of autistic students into regular education settings is developing communicative competence in school settings (Koegel, Koegel, & Carter 1999). They reported that most children with autism have social communicative goals in their IEP's but that there typically have been few instances throughout the day during which implementation of such interventions occur. Recently they have found that special education and regular education teachers can quickly and easily learn to carryover effective phonology and language intervention procedures on a continuing basis throughout the school day. This has been accomplished by having the teacher create opportunities for language use by environmental manipulations that provide the child with opportunities to gain access to highly desired items through communicative means. Another example of appropriate inclusion of a student with autism is through improving social play during recess and lunch. Recent literature has defined a number of procedures designed to improve social play and interactions among children with autism and their non-disabled peers in school settings. A recent study (Baker, Koegel, & Koegel, 1998) designed a social skills development program that capitalized on strengths shown by children with autism so that the children with autism were viewed as a valued member of the peer group. Koegel and colleagues (1999), conclude that accumulating research has identified a variety of specific procedures that, when implemented in the school setting, can greatly improve academic and social performance of children with autism. They report that by improving teaching interactions so that they directly address important pivotal behaviors, including motivation to respond to difficult social and academic tasks, self-management, responding to multiple cues, and child-initiations, there may be an

increased likelihood of improvement in the overall symptomatology of autism with improved prognosis and long-term positive gains.

Another important aspect when associating autism and inclusion is the development of appropriate curriculum for students with autism. Although curriculum has attracted much less attention in the research literature and the popular press than has other aspects of autism treatment, a useful body of knowledge is available. No single curriculum has been shown to be universally effective, but the range of available information provides rich resources from which educators can design individualized curriculum (Olley, 1999).

One of the primary determinants of successful intervention programs for children with autism is the degree to which the programs are implemented with precision and consistency, that is fidelity (Detrich, 1999). Detrich further indicated that one strategy for increasing the fidelity of program implementation is to match the intervention procedures to contextual variables in the classroom. One of the critical contextual variables in the classroom is the teaching staff. By considering how the staff currently interacts with students and provides instruction, it is possible to design services that closely match current practices in the classroom and, consequently, increase the probability that the intervention plan will be implemented with fidelity.

Controversial Practices

McWilliam (1999) proposed five criteria for what constitutes a controversy: claims that the practice produces a cure, requirement of practitioner specialization, questionable research, high intensity requirement, and legal action. He reported the following about these five criteria: If a practice is claimed to cure a disability that

theoretically cannot be cured, it is controversial. If a practice requires people who are already specialists to undergo even more specialized training, it is probably controversial. When there are no published true experimental studies demonstrating the effectiveness of one treatment over other treatments, nothing adequately separates the treatment in question from a placebo. Any therapeutic practice can become controversial when it is described as needing to occur for a certain amount of time per week. Almost by definition, as soon as the merits of a practice are debated in court, it is controversial. Controversial treatments in early intervention can be grouped into the following three broad categories: medical, educational, and therapeutic. A number of controversial treatments have been touted as effective intervention strategies for children with autism. The three most common are facilitated communication, auditory integration training, and sensory integration therapy. Facilitated communication refers to a method of providing the physical support to a person who is disabled to enable the person to communicate by forming words with letters or pictures (Biklen & Cardinal, 1997). Auditory Integration Training is a method by Berard (1993) designed to soften spoken sound frequencies due to a hypo or hypersensitivity for specific sound frequencies found in a subset of persons with autism. Sensory Integration Therapy is a method designed to stimulate the skin and vestibular system of individuals to elevate hypothesized sub-optimal arousal levels (Biklen & Cardinal, 1997).

McWilliam, (1999) also reports reasons for adopting non-empirically based practices:

1. Proven practices are not necessarily the easiest to implement.
2. Some unproven practices reinforce the specialization of the professional.

3. Professionals do not read the literature.
4. People only believe the literature that supports their values.
5. Professionals believe what other professionals tell them.
6. A parent's job is to have hope, and these practices offer hope.

Methodology

The present focus of most intervention includes applied behavioral analytic techniques, particularly the approaches of Ivaar Lovaas, the TEACCH curriculum, sensory integration, and the floor time approach of Stanley Greenspan. There is significant controversy about which approach has data to support its effectiveness, how those data are derived, and whether changes in development persist over time (Feinberg & Bayer, 1998; Jordan & Jones, 1999). The central concern is that each school of thought proudly produces tantalizing case studies that attempt to make it clear that their way is the most effective. The problem is that there are tremendous differences in approach. Some approaches work for some children. But it is not generally known why some work for some children, why others don't, and how to make reasonable predictions about their efficacy for specific individuals (Robbins, Giordans, Rhoads, & Feldman, 1996). Variables across theories have been noted as consistency in approach, behavioral measurement of outcomes, and a predictable daily regimen.

The Lovaas method is named after O. Ivar Lovaas of the University of California at Los Angeles (UCLA). Lovaas first began developing his method for treating young children with autism more than 30 years ago. His treatment is based on the principles of operant conditioning (e.g., reinforcement, punishment). The program involves 2 to 3 years of one-to-one training with a child. The training is typically conducted from 2 to

40 hours per week. The program is usually provided in the child's home by members of the training team (Lovaas, 1996). The team typically consists of persons who are trained as therapists in the Lovaas method. Training for the team and the child's parents is often provided by an experienced therapist from the Lovaas clinic at UCLA. The training program can be quite expensive, with estimates varying from \$12,000 to \$70,000 per year.

Yell and Dragow (2000) found that in the 1990's, parents of children with autism began to go to due process hearings or courts in an attempt to compel school districts to educate their children using the Lovaas procedures. The majority of these cases involved parental requests that school districts fund continuation of, or the reimbursement for, in-home Lovaas programming. These parents did not maintain that the Lovaas program was a more effective method for educating their children than the method used by the school district, even though they clearly believed it was. To do so would have been fruitless, because of the courts' clear holdings on educational methodology. Rather, the parents sought to convince hearing officers and the courts that the school district's program was inappropriate for their child because it did not confer *meaningful benefit*, whereas the Lovaas programming did. Following this strategy, the cases brought by parents focused on the school district's failure to meet the standards of the Rowley Test, instead of advocating for a particular educational methodology.

Dragow & Yell (2001) state that in the Lovaas hearings and other special education cases that have involved the FAPE issue, schools generally have argued that the student has made progress. The student's parents have usually countered that their child has made insufficient progress or no progress. In cases in which parents prevailed,

the hearing officer or judge held that a student's insufficient progress constituted the denial of FAPE. Similarly, in cases in which school districts prevailed, school personnel were able to produce evidence that the student had made meaningful educational progress. Thus, the crucial determinant in hearings or cases involving the substantive standard of the IDEA is whether the student is making progress.

The Department of Psychiatry and the Office of Continuing Medical Education in the School of Medicine, at the University of North Carolina, developed the TEACCH program. It is a university-based project providing comprehensive services, research and multidisciplinary training for autism and other pervasive development disorders. The program was founded in 1971.

A popular method of training for students within restrictive settings and inclusive settings is TEACCH (Treatment and Education of Autistic and related Communication Handicapped Children) (Spring 2001). The following insights to this approach come from the autism-PDD website. TEACCH is not a teaching or learning system, but a behavioral management system which, when properly implemented, delivers more predictable behavior and greater cooperation from the TEACCH subject. TEACCH uses structure and modified environments to teach skills, using children's affinity for routines and rituals to teach and reinforce. The classrooms are so structured and routinized that children are happy, but cannot truly learn to adapt to transitions and changes. This behavioral approach appears, from the literature, to work with low functioning autistic students. This approach has been implemented within regular education settings with minimal success as students have had difficulty transitioning and making changes. TEACCH's position on inclusion of children with autism can be reported as follows:

1. The TEACCH program recognizes the important value of preparing all persons with autism for successful functioning in society.
2. Decisions about including children with autism into fully integrated settings must be made consistent with the principal of the *least restrictive environment* as a guiding principal.
3. Activities which are inclusive for children with autism should be offered based on an individual assessment of the child's skills and abilities to function and participate in the setting.
4. Inclusion should never replace a full continuum of service delivery, with different students with autism falling across the spectrum. Full inclusion should be offered to all persons with autism who are capable of success in fully integrated settings. Partial inclusion is expected to be appropriate for other clients of autism.

The Learning Experiences an Alternative Program (LEAP) for preschoolers and parents began in 1982 as a federally funded model demonstration program serving young children with autism as well as typical children between and including the ages of 3 to 5 years. At the time of its inception, the LEAP program was one of only a few early childhood programs that were committed to the inclusive practices for young children with autism and their families (Kohler, Strain, & Shearer, 1996). Kohler, Strain and Shearer reported five principles that have shaped program development. They are:

1. All children can benefit from integrated early childhood environments;
2. Benefits of interventions are maximized when conducted across home, school, and community settings;

3. Interventions are more effective when parents and professionals work together as partners;
4. Young children with autism can learn many important skills from typical same-aged peers; and
5. Children with and without disabilities benefit from curricular activities that reflect developmentally appropriate practices.

The LEAP program consists of four main components: an integrated preschool consisting of three classrooms each serving 13 children (10 typical preschool aged children and three with autism), a parent behavioral skills training program that teaches basic behavior management principals and effective strategies for teaching young children, national outreach training activities that involve training in key areas, and ongoing research on instructional practices.

Two well recognized Applied Behavioral Analysis Programs are the Douglas Developmental Center at Rutgers University and the Princeton Child Development Institute at Princeton University. The Douglas program consists of three different classroom arrangements. The *prep* class is based upon Lovaas's discrete trial training approach and includes in-class and in-home treatment. The small group classroom has a children-to-teacher ratio of 2:1 and focuses upon skills that would facilitate functioning in an integrated classroom. Finally, the integrated class concentrates on skills needed to function in an integrated classroom and is based largely upon the LEAP model.

The Princeton Child Development Institute treatment program for children with autism uses applied behavior analytic principles to prescribe an intervention program for each child enrolled in the program. The program also uses home visits from a home

programmer twice per month to assist parents in implementing the home based behavioral intervention component.

The Denver Health Sciences Center Program was initiated in 1981 at the University of Colorado by Rogers and his colleagues (Rogers, 1998). This treatment program focuses on the use of play, interpersonal relationships, pragmatic language development procedures, techniques to facilitate symbolic thought, and structures and routine in the classroom.

Autism Mecca

New Jersey's superior schools for the autistic have prompted a migration of families seeking a brighter future for their kids (Levin, 2002). Within the autism community is the belief that where one lives matters; that some school districts are better than others, that some states are better than others. Levin indicates that New Jersey is considered one of the best. This reputation is rooted in three internationally known private schools for the autistic: the Princeton Child Development Institute (PCDI), the Eden Institute in Princeton, and the Douglas Developmental Disabilities Center on Rutgers University's New Brunswick campus. All were founded in the 1970s, an era when autism still was poorly understood, and institutionalization was common. Educators from PCDI, Eden and Douglas have had a hand in developing other autism programs, private and public, in the state. New Jersey has more than 100 autism programs, a relatively huge concentration. Columbus psychologist Mulick, a professor of pediatrics at Ohio State University, says "It's inside knowledge that New Jersey's autism schools and the behavioral scientists who've established them are among the finest in the

world" (Levin, 2002). Yet it's a measure of the schools' reputations, and of the rising incidence of autism, that the most sought after private programs are practically impossible to get into.

New Jersey also has one of the nation's oldest and largest statewide autism advocacy and resource organizations, the New Jersey Center for Outreach and Services to the Autism Community (COSAC), which was started in the 1960s. The National Alliance of Autism Research, founded by the parents of a PDCI student in 1994, is in Princeton, and Upper Saddle River is home to a chapter of another national research and advocacy group, Cure Autism Now, founded in 1995. A national program called First Signs, which educates parents and physicians about the early warning signs of autism, was launched in New Jersey last year. And the Garden State's universities and medical schools are hubs of autism research.

During the 1997-1998 school year 37% of autistic children in New Jersey attended private schools; this past school year that figure fell to 30%, according to the New Jersey Department of Education. "What the numbers show is that the expertise is being developed at the local-district level," says Barbara Gantwerk, Director of the Department's Office of Special Education Programs.

National Cases

In tying this information together and applying it to cases regarding students with autism, applicable cases on a national level will be reviewed. In the United States Court of Appeals for the Ninth Circuit, *Amanda J., A Minor, By and Through Her Guardian Ad Litem, Annette J., Plaintiff-Appellant, v. Clark County School District, and Nevada State*

Department of Education, Defendants-Appellees, 99-17157 (2001), Amanda J. appeals from the district court's decision to affirm the State Review Officer's conclusion that she received a FAPE under the IDEA. Related information to this case is as follows:

1. Assessment information revealed the possibility of a diagnosis of autism.
2. Amanda's parents were not given access to the written reports.
3. An educational program was developed without the participation of Amanda's parents.
4. Additional recommendations from the district assessments were not followed up.
5. An appropriate educational program to meet Amanda's individual needs was not developed.

The court held that, by failing to disclose Amanda's full records to her parents once they were requested, the district denied Amanda FAPE. These procedural violations, which prevented Amanda's parents from learning critical medical information about their child, rendered the accomplishment of the IDEA's goals and the achievement of FAPE impossible.

In the United States District Court for the Northern District of Illinois, Beth B. and Susan and Tom B., individually and as next friends of Beth B., Plaintiffs, v. Mark Van Clay, individually and in his official capacity as superintendent, and Lake Bluff School District No. 65, 14094 (2001), the Plaintiffs alleged that the defendants failed to provide Beth B. a FAPE under the IDEA and requesting that the court review an administrative decision upholding the district's decision to place her in a special education program. The complaint also included counts seeking reimbursement for the

costs of Beth's private therapy and alleged discrimination under the American with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. Factual information related to this case is as follows:

1. Beth is a thirteen year old girl with Rett's Syndrome, which is a form of Autism, resulting in severe to profound disabilities in motor functioning, communication, and cognition.
2. Beth began receiving specialized services at age two and was diagnosed with Rett's disorder one year later.
3. Beth's program included a one-to-one aid, adaptive physical education, speech and language therapy, occupational therapy, and physical therapy.
4. At the beginning of the 1994-95 school-year, Beth was placed in a regular education kindergarten class, at the request of her parents, with the supportive services mentioned above.
5. At the end of Beth's second grade year, the district recommended that Beth be placed in a self-contained life skills program for the majority of her school day.
6. Beth's parents rejected this placement, demanded a due process review and invoked the IDEA's *stay put* provision. The stay put provision simply means that a student will remain in their current program until a decision has been made through litigation.

The major issue related to this case is the LRE requirement and how it interacts with the district's obligation to provide FAPE. The court's judgment granted in favor of the

defendants on all accounts. The district court held that the district was recommending FAPE, and that Beth was not being discriminated against on account of her disability.

In *Pitchford (MP) v. Salem-Keizer School District*, United States District Court for the District of Oregon 629-JO (2001), the court found that the district provided M.P. with a FAPE and that the two parties should convene immediate mediation hearings to reach an agreement so that further litigation would not be necessary. Again this case describes how the school district developed appropriate programs each year for this student, but the parent continued to request additional services in order to improve M.P.'s programming. The district denied these requests claiming that M.P. was making progress within the setting and with the services provided.

In reviewing *Amanda J.*, *supra*, and *Beth B.*, *supra*, and *Pitchford*, *supra*, we can see how two very different issues can be applied to FAPE. In *Amanda J.*, the school district was absolutely negligent. They clearly were undermining the parents, even if they had good intentions. In this case, the court easily applied FAPE. Although it may appear that the district was implementing a FAPE, the district's negligence made *Amanda's* education inappropriate, hence, denying her a FAPE. In *Beth B.*, we see how the court ruled in favor of the district because they were providing appropriate services, notification, and collaboration. The district even provided a program that was specific to the parent's request. But once the district assessed that the program was no longer appropriate for *Beth*, they sought to establish one that would meet her needs. The district personnel's opinion and efforts held in court, even with the parent's rejection of the program, because they were providing FAPE. The court will not dispute the educator's assessment as long as they are providing FAPE. In *Pitchford*, the courts ruled in favor of

the student when they were not proactive in providing FAPE. Once they collected their data and offered FAPE, they were no longer out of compliance and not responsible for the additional expenses.

In *Stefan Jaynes v. Newport News School Board*, United States Court of Appeals for the Fourth Circuit, 15580 (2001), the court addressed whether a reimbursement award for educational expenses was proper under the IDEA. Stefan's pediatric neurologist recommended a program specifically designed for children with autism called Paces. At a later date the district held a meeting, which deemed Stefan eligible for special education and related services and developed an IEP. The parents received notice of the meeting, but did not attend. District personnel were aware of Stefan's neurologist's recommendations, but developed a plan, which placed Stefan in their own program for educating exceptional preschoolers. The district neither inquired as to the parent's absence nor briefed them on the meeting. Although the parents signed the IEP document, they both contend that they were never informed of their rights or of their right to a due process hearing. Even with this agreed upon document, the district did not begin the services until four months later. During that period, the parents repeatedly contacted the district and requested that the services begin. The district ignored or denied parental requests. At a second IEP meeting a few months later, which Mrs. Jaynes attended, the district made changes to Stefan's IEP, reducing services without any rationale. Again, Mrs. Jaynes consented to this plan, but the district later altered it again without her knowledge. One year after beginning this process with the district and recognizing that Stefan was not making progress, the parents unilaterally removed Stefan from the public school program and placed him in a private Lovaas Applied Behavioral Analysis

program. Two years later, the parents learned that they had the right to contest the IEP in a due process hearing. They requested such a hearing, alleging that Newport committed procedural and substantive violations of IDEA. The court of appeals agreed with the district court's findings that the district repeatedly failed to notify the parents of their right to a due process hearing, and held that these procedural violations constituted failure of the district to provide Stefan with a free appropriate public education. Hence, the parents were awarded tuition reimbursement for the unilateral placement.

In *Justin G v. Board of Education of Montgomery County and Jerry D. Weast*, United States District Court for the District of Maryland, 2019 (2001), the court ruled in favor of the plaintiff for a unilateral placement during the 1998-1999 school year, but denied the request for tuition reimbursement for the 1999-2000 school year. In *Justin G*, the court cited *Rowley*, *supra*, in that the district is not obligated to provide the best program for a child with disabilities, but an appropriate one. The court reviewed two particular school years for this child in which the parents rejected recommendations by the school district and sought reimbursement for a program of their choice. The court would only reimburse for two previous years of programming. They incorporated, full histories into their decision-making, but reimbursement was limited to two years. The court held that the district made FAPE available to the plaintiff during the 1999-2000 school year, but did not for the 1998-1999 school year because they were late in developing the IEP. As a result, the district was obligated to reimburse the parents for tuition payments for the one school year.

Summary

Feinberg and Vacca (2000) reported that there is considerable controversy regarding the provision of appropriate services for young children with autism and their families. They go on to mention that there are a plethora of therapies available, most of which have uncertain efficacy. There is a debate regarding which public agencies and private third-party payers have the responsibility for the financing of services. There is particular controversy as to whether these therapies should be considered part of the scope of the entitlement under the IDEA. With that said, what are the factors that make autism a controversial public policy issue? Feinberg and Vacca included the following factors: an increase in the incidence of children with autism, a lack of consensus on the etiology of the disorder, a lack of consensus on the most successful methodology for clinical intervention, coincidence of the age of diagnosis with the upper age limit of part C of IDEA, a shift to a family-centered decision-making paradigm, and an increase in due process hearings and litigation. Feinberg and Vacca identify concerns regarding the gradual shift to an expectation that early intervention and special education systems should include a full array of services for this population. They argue that the service delivery system should include a range of public and private agencies with a shared obligation for services to children with autism. They also propose the creation of a community-based mechanism for pooled funding of high cost services.

On a practical level, there is uncertainty about the scope of our legal and even moral obligations to children with autism (Boiomer, 1995). Yet, lawmakers and stakeholders feel or are compelled to come up with some kind of public policy that is fair, reflective of the ever evolving state of research, consistent with the various laws that

govern service delivery, informative to the many parents who are determined to provide the best possible environment for their child, and applicable to the procedural practices within the special education system (Robbins, et al., 1996). State and local school districts, advocacy organizations, and family associations are contending with the need to define direction, determine how resources are to be used, define training needs, and ensure implementation of appropriate services.

CHAPTER III

Methodology

There is perhaps no area of educational law that has been more highly litigated than the education of students with disabilities (Yell & Katsiyannis, 2001). The IDEA mandates that all eligible children with disabilities, regardless of the severity of disability, are entitled to an education. Currently in New Jersey, litigious cases regarding autism have only been mediated at the Office of Administrative Law level. New Jersey has no history of District or Appellate case decisions regarding students with autism. Recently, the Supreme Court turned away two opportunities to try a case related to students with autism. Based on the current controversy and escalation of this type of case in public schools, it seems that it will only be a matter of time before societal pressure will force a hearing into the Supreme Court. The outcome of that future decision will have strong implications for New Jersey Public Schools.

Recently, in a number of due process hearings, parents of children with autism have challenged school districts' educational programs for their children. These hearings and cases represent the fastest growing area of litigation in special education (Baird, 1999). A factor that has made autism a particularly vexing topic is the fact that the obligation of school districts to provide particular methodologies has become the focus of considerable due process hearings and court cases (Simpson, 1999). The nature of the legalities changes the previous dynamic of educational program development. Yell and Dragow (2001) frame this process well when they state that critical decisions are too

often being made by hearing officers and judges rather than by families and clinicians. What must school districts do to alleviate this complicated quandary in education?

Description of Sample

In determining the selection of the sample, different populations were considered when developing the database of litigious autistic cases. Consideration was given to evaluating as many recent legal cases as possible on both a local and national level. A National vs. New Jersey comparison model was also considered as a possibility so as to gain a greater understanding of how this problem is impacting both New Jersey as well as the nation as a whole. When reviewing preliminary cases, generally speaking, it became apparent that current National cases were more simplistic in nature as compared to the complexity that New Jersey school districts were facing related to students with autism. Therefore, it was more relevant and purposeful for this research to address the status of New Jersey based cases so that specific recommendations could be made for local school districts.

The cases that were chosen for this study were derived from the Rutgers University School of Law. The Rutgers School of Law website posts Office of Administrative Law Judge decisions for New Jersey hearings. The researcher utilized this site to obtain current case decisions regarding students with autism. All 29 cases currently posted regarding students with autism were utilized in this study. These cases were initiated and decided over the past five years. Researcher bias was less significant by employing this website and choosing all available cases.

The sample of legal cases, stem from school districts throughout the state of New Jersey from 1997-2002. It was quite evident that the Rutgers School of Law selected a random set of cases to be posted on the website. It included variety of school districts throughout the state, with varying demographic and economic status. It should be noted that both the East Brunswick School District and West Windsor-Plainsboro Regional School District each had two cases within the sample. The following list includes all 29 sample case school districts, and the date the case was decided:

1. Willingboro Board of Education 1997
2. East Brunswick Board of Education 1997
3. Washington Township Board of Education 1998
4. Mantua Board of Education 1998
5. East Brunswick Board of Education 1998
6. Carlstadt Board of Education 1998
7. South Brunswick Board of Education 1998
8. West Orange Board of Education 1998
9. West Windsor-Plainsboro Regional Board of Education 1999
10. Mt. Laurel Board of Education 1999
11. Washington Township Board of Education 1999
12. Tinton Falls Board of Education 1999
13. Hasbrouck Heights Board of Education 1999
14. Hamilton Board of Education 2000
15. Westfield Board of Education 2000
16. Toms River Board of Education 2000

17. Pequannock Township Board of Education	2000
18. Bayonne Board of Education	2000
19. Union Township Board of Education	2000
20. Maywood Board of Education	2000
21. Jersey City State Operated School District	2000
22. Woodbury Board of Education	2000
23. West Windsor-Plainsboro Board of Education	2000
24. Manalapan-Englishtown Regional Board of Education	2001
25. Newark Board of Education	2001
26. Shamong Board of Education	2001
27. Jefferson Township Board of Education	2002
28. Clinton Township Board of Education	2002
29. South Orangeand Maplewood Board of Education	2002

Instrument

The study employed a Field-Based Analysis Rubric that incorporated criteria from the New Jersey Administrative Code 6A:14, which governs special education. It was of a functional nature to utilize criteria, which is specific to the language established in the New Jersey Administrative Code. Without it, validity could not be established between the legal outcome of each case, and the data needed to be evaluated through the study's rubric. This validity would provide consistent information and procedure to help New Jersey school districts become legally sound when engaging in this process with students of autism. The rubric is also a reliable measure because, regardless of user, the same outcome should result when applying this rubric to the cases utilized in the study.

Field-Based Analysis Rubric:

Procedural Violations: The first category of procedural violations occur when parents are not able to participate in the IEP process. The second category of procedural errors involve evaluations. The third category of procedural errors involve the development of inadequate IEP's. The fourth category of procedural violations involve placement decisions. The fifth category of procedural violations involves the lack of qualified school personnel to work with students with autism.

Substantive Violations: The first is when school districts fail to provide needed services to the student. The second area of substantive violation occurs when a student does not make progress in the school district's program.

Design of Research

Case study research continues to be an essential form of social science inquiry (Yin, 1993). Robert Yin, 1993 reported the following: Case Study Research is appropriate when investigators desire to (a) define topics broadly and not narrowly, (b) cover contextual conditions and not just phenomenon of study, and (c) rely on multiple and not singular sources of evidence. An explanatory case study presents data bearing on cause-effect relationships, explaining which causes produced which effects. Explanatory theories are more suitable for designing and doing causal case studies. In fact the more complex and multivariate the explanatory theory, the better this model will work. The case study analysis can then take advantage of pattern-matching techniques.

The methodology adopted for this research utilized the explanatory case study model. Its theoretical approach was appropriate to obtain the necessary data to make appropriate recommendations for local schools districts.

Data Collection

Each case was reviewed and evaluated through utilization of the rubric. Data was collected by establishing procedural and/or substantive violations made by each district. When a district was compliant in terms of the procedural and substantive criteria, specific data was collected to highlight how the district accomplished meeting the procedural safeguards established in IDEA and FAPE. Districts that did not have any procedural or substantive violations throughout their process would fair to have positive outcomes in their hearings.

Data Analysis

The data provided by the rubric and through its analysis will answer the following questions initially outlined by the researcher: Why do school districts appear negligent when engaging in the inquiry of FAPE? What are some of the new expectations for notice, assessment, methodology, and program development? Can parents demand that school districts adopt particular methodologies? Can cost be a consideration in designing programs? Do districts have a responsibility to reimburse parents for in-home programs? What are the key elements of petitioner arguments? How can school districts meet the new standards set by today's case law, well-informed clients, researchers and advocacy groups? Are there other alternatives to the current approach to this dilemma? Do parents

who enter into litigation without an attorney and/or without expert witnesses have a successful chance? Are there teacher certifications or endorsements specific to autism?

The rubric, itself, will extrapolate and provide rich and detailed information to be analyzed, and ultimately depict a sound approach for school districts to entertain when they encounter circumstances of a similar nature. The outcome of these cases, and the steps taken by school districts prior, will, at a very minimum, establish an informal blueprint. This can then be scrutinized by local school districts while they embark on identifying, evaluating, and developing programs for students with autism.

CHAPTER IV

Analysis of Data

The purpose of this study was to analyze and evaluate existing case law data on a state level in order to extrapolate and synthesize information. That could then be utilized to make meaningful recommendations, so that school districts can effectively address student needs while decreasing litigation when dealing with a special education population who are classified as autistic. A sample of New Jersey Administrative Law Judge (ALJ) decisions were reviewed and evaluated as per the study's rubric in order to propose specific advice to local school districts regarding compliance, assessment, program recommendations, methodology, and implementation of services.

As a matter of protocol and framework, the presentation of the cases in their written format, first, established the petitioner and respondent, attorneys if any, the Administrative Law Judge, and then dates of the proceedings. The format then continued with case history, facts, and testimony of the witnesses. Once this information was presented, the Administrative Law Judge established a body of language which created a legal basis for their decision making. After developing a legal premise, the Administrative Law Judge then reiterated significant points through a discussion format, concluding with a final decision rendering an order.

The legal basis discussed in many of the cases reviewed frequently spoke to the issues of FAPE and LRE. Following is a common body of legal language utilized to establish decision making premises.

In a due process hearing in which the question at hand is whether the Board has fulfilled its statutory responsibility to provide FAPE, the Board bears the burden of proving that it has met its legal obligation. In fulfilling its FAPE obligation, the Board must develop an IEP for the student, and the IEP must be reasonably calculated to confer some educational benefit; *Board of Education of the Ramapo Indian Hills Regional School District v. Lascari*, (1989). The Third Circuit Court of Appeals has clarified the meaning of educational benefit. It must be more than trivial, and must be significant and meaningful; *Ridgewood Board of Education v. M.E.* (1999). The IEP must be tailored to the unique needs of the student, considering his or her potential, and must be reviewed and revised at least annually. In providing a student with a FAPE, a school district must provide such related services and supports as are necessary to enable the disabled student to benefit from the education; *Board of Education v. Rowley*, (1982). The IDEA requires both that handicapped children be educated in the LRE suitable to their unique needs and that, to the greatest extent possible, they be mainstreamed in the regular education process, that is, educated along with non-handicapped students, *Oberti v. Board of Education of Collingswood* (1993).

The cases that were chosen for this study were derived from the Rutgers University School of Law. The Rutgers School of Law website posts Office of Administrative Law Judge decisions for New Jersey hearings. The researcher utilized this site to obtain current case decisions regarding students with autism. All 29 cases currently posted regarding students with autism were utilized in this study. From those cases the following data was presented.

Individual Case Analysis

Table 1

Willingboro Board of Education v. T.P., 98-9040E (1997)

A. Court/ Judge: Office of Administrative Law/ Kathryn A. Clark ALJ

B. Reason: Petition for a particular out of district placement.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: It was not shown that the services offered by Willingboro would not be beneficial for the child, much less that such services, if accepted, would create irreparable harm. It may ultimately be shown that the services offered by Bancroft or another school would be better for T.P., but the standard upon which the decision on emergent relief is to be based is *irreparable harm*. No one has shown that the services offered by Willingboro would be irreparably harmful to the child. T.P.'s appeal was denied, and the matter was returned to the Department of Education for a pre-hearing conference.

F. District Accolade: The district had prepared themselves with four other placement options, in terms of private schools, if placement in the home district was unavailable. These four other options were presented to the parent with an explanation of how and why the district would utilize their services.

Table 2

East Brunswick Board of Education v. C.P., 98-9003 (1997)

A. Judge/ Court: Office of Administrative Law/Bruce R. Campbell, ALJ

B. Reason: Petition for a shorter transportation duration.

C. Procedural Violations: None

D. Substantive Violations: District failed to provide needed services to the student

E. Outcome: The parties seemed to agree that consistency and follow-through was the key to C.P.'s progress. These two elements cannot be maintained if both parties do not make reasonable steps to assure their maintenance as much as possible. Despite the absence of a *bright line test* for school bus transportation duration, the Judge believes in common experience and common sense instructing that a forty-five to sixty minute bus ride is ill preparation for a four-year old attending a preschool handicapped class for children with pervasive developmental disorders. This may have been recognized tacitly when the Board attempted to realign routes and went so far as to advertise for a new route that would accommodate C.P. The Judge concluded that the district will provide a bus ride lasting thirty minutes or less. The petitioner has also suggested that, because transportation is a related service, the duration of transportation should be specified in the IEP. The Judge ruled that in addition to there being no express authority for this, the uncertain nature of transportation and the many variables such as traffic, bad weather, and pupils who reach the bus late, dictates that such a requirement would be a useless exercise.

F. District Accolade: The district had advertised to establish a new route but was unsuccessful. Although this was a good faith attempt by the district it came back to hurt their case. If they thought well enough to seek a new route, they should have not made a case that the student did not require a route with lesser time.

Table 3

Washington Township Board of Education v. D.P., 98-9712 (1998)

A. Court/Judge: Office of Administrative Law/ Bruce R. Campbell, ALJ

B. Reason: Petition by LEA for immediate transition back to a public school setting.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: Judge Campbell found that the district did not make any procedural or substantive violations. The CST did nothing arbitrary, capricious, or unreasonable under the circumstances. They devoted considerable care, thought, and resources to D.P. and his IEP. Therefore the IEP dated September 3, 1998 is an appropriate IEP and should be implemented immediately.

F. District Accolade: The district planned a transition for D.P. from the out-of-district school to his home school. The district planned for similar staff to work with D.P. The district spent many hours planning for D.P.'s return including staff training and curriculum coordination with the regular eighth grade program.

Table 4

Mantua Board of Education v. L. B., 99-9814 (1998)

A. Court/Judge: Office of Administrative Law/Kathryn A. Clark, ALJ

B. Reason: Petition for related service amount, quality and intensity.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: The question becomes one of whether the petitioners can demand a teacher of a particular experience level, or record of past successful performance. This is not the case. The Judge reported that she was unable to find any statute, regulation, or precedent which would authorize petitioners to require that the person who teaches their son possess, beyond the required certification and endorsement, a certain level of expertise or a certain number of years experience, or in particular, years of *successful* experience. The judge also was unable to find precedent supporting the contention that the child should be assigned to another teacher if the present teacher has not established a rapport with the student sufficient to satisfy the student or the student's parents. And surely there can be no basis for the reassignment if the student is making demonstrable progress, as all parties admit in this case. L.B. is clearly making progress under his current educational program, and he is being provided with the services necessary to permit him to benefit from the instruction. Petitioners may not demand a teacher of particular experience level or level of successful past performance.

F. District Accolade: District was able to establish the progress that the student was making with the program they had in place, that they had certified professionals delivering the service, and that they were open to other options if progress was not noted.

Table 5

East Brunswick Board of Education v. M.P., EDS6670-98 (1998)

A. Court/ Judge: Office of Administrative Law/ Bernard Goldberg, ALJ

B. Reason: Petition for the district preschool handicapped class and denial of FAPE by refusing to develop an IEP.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: Judge Goldberg concluded that the terms of the consent agreement between petitioner and the district are binding upon the parties. It was further concluded that the issue with respect to placement was considered in the consent agreement and pursuant to *res adjudicate* it may not be relitigated. It was also concluded that the district has completed an IEP with parental participation and it will be implemented during the first week of school. Therefore, the district's motion to dismiss the petition was granted.

F. District Accolade: The district had met the procedural expectations outlined with appropriate documentation of such actions.

Table 6

Carlstadt Board of Education v. D.D., EDS 7288-98 (1998)

A. Court/Judge: Office of Administrative Law/ Thomas A. Clancy, ALJ

B. Reason: Petition to change student's program from one out of district program to another.

C. Procedural Violations: None

D. Substantive Violations: The district was not providing needed related services according to expert witnesses.

E. Outcome: Judge Clancy ordered that the request for the new out of district placement and attorney fees be denied. Although, the district did not make any procedural violations, and the student was making progress, Judge Clancy recognized expert witness commentary regarding other enhancements that could be made to D.D.'s IEP to help generalize and improve skills. Judge Clancy ordered that the district implement these recommendations within the current setting proposed by the district.

F. District Accolade: The district considered the parents request, and visited the proposed school finding the speech therapist and occupational therapist were not properly certified. The district had good documentation of the student's progress in the areas designated in the IEP, and was able to establish FAPE in the LRE.

Table 7

South Brunswick Board of Education v. M.P., EDS 8650-97 (1998)

A. Court/Judge: Office of Administrative Law/ Solomon A. Metzger, ALJ

B. Reason: Petition for change in placement from district program to an out of district placement.

C. Procedural Violations: Development of an inadequate IEP, the lack of qualified school personnel to work with students of autism.

D. Substantive Violations: District failed to provide needed services to the student.

E. Outcome: Student making progress within school setting, but regression is noted in the home setting. Petition to change current placement denied, but additional

home services provided by Douglas Developmental Disabilities Center ordered to address the inadequacy of the current services as well as being provided by qualified staff. Douglas will be responsible to design, implement, and modify as necessary the home program. This should be geared to stabilizing the present out of control behaviors, compensating to the extent possible for lost time, and establishing necessary protocols to foster generalization at home and in the community. This is to be accomplished in consultation with the family, the CST and the teacher, but the DDDC shall have the decision-making authority over all aspects of the program. To promote coordination, the DDDC, the teacher, a CST member, and the parent shall meet monthly and confer weekly by phone. The home program is to be placed no later than 45 days from the date of this decision.

F. District Accolade: The district established M.P.'s progress in the existing school program.

Table 8

West Orange Board of Education v. C. L., EDS 3102-98 (1998)

A. Court/Judge: Office of Administrative Law/ Thomas E. Clancy, ALJ

B. Reason: Petition for removal from an out of district program to an individualized home program with as much mainstreaming as possible.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: Based on the information presented, C.L. was the recipient of a meaningful education from the Allegro School during the 1997-1998 school-year that such education was not *de minimis* in nature and that C.L.'s placement at that school was indeed appropriate. The West Orange Board of Education satisfied its educational responsibilities to C. L. for the 1997-1998 school year. Furthermore, since the 1998-1999 school year IEP is crafted in such a way as to continue that education at a location which has proven to be conducive to learning and educational progress, it is concluded that no justification exists for changing C.L.'s placement to individual academic instruction at home. This case is not about catering to parental wants, rather it is about fulfilling C.L.'s educational needs in the context of what the applicable law requires and allows. Individual preferences, no matter how well intentioned, are not allowed to prevail per se. Thus maximizing a child's potential in a setting which might be more educationally preferable is not the established standard. On the contrary, it is whether the respondent is supplying an environment from which educational benefit is being derived by C.L. Therefore, petitioner's request for more mainstreaming and for a placement change was denied.

F. District Accolade: The district provided appropriate educational services in the least restrictive environment. The district tried to provide C. L. with as much exposure to the mainstream as possible when considering programming.

Table 9

West Windsor-Plainsboro Regional Board of Education v. L.M., EDS 621-99 (1999)

A. Court/Judge: Office of Administrative Law/ M. Kathleen Duncan, ALJ

B. Reason: Petition for continued placement in a residential/ educational setting.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: Petitioner seeking residential placement for L.M. based on her behavioral problems within the home setting. Student is making progress within school setting and after-school program. Student hospitalized for evaluation and treatment program recommendations. Upon completion of hospital stay, petitioner files for stay-put act until an appropriate educational program has been determined. Judge determines that the stay-put clause does not reflect the program at the hospital setting, but does reflect the student's last educational placement. The hospital stay was for evaluation and not the primary educational program. Therefore, L.M. will continue with the previous placement until both parties can agree on a new placement or until a determination after a hearing on the merits.

F. District Accolade: The district considered the potential harmful effects of lowered self-esteem, on-going frustration, and significant gaps in her skills when determining L.M.'s program.

Table 10

Mt. Laurel Board of Education v. K.M., EDS 10015-99 (1999)

A. Court/Judge: Office of Administrative Law/ Steve C. Reback, ALJ

B. Reason: Petition for placement in an out of district preschool

C. Procedural Violations: District developed an inadequate IEP, made poor placement decisions, made recommendations for programming outside of a formal IEP meeting without parent input, and did not consider recommendations from outside professionals.

D. Substantive Violations: District failed to provide needed services.

E. Outcome: In this matter K.M.'s parents are thoroughly familiar with the alternatives of placement, and are unequivocally committed to placing K.M. at the Bancroft School. In addition, the respondent has not come forward with legitimate evidence to demonstrate that in its IEP it has provided K.M. with a placement consistent with the IDEA's goals and objectives. K.M.'s program should have begun months ago and it has not. Since this is the case, Mt. Laurel cannot assert as its defense to an emergent relief action as it has failed to comply with the legal requirements for early childhood special services. The district has not come forward with a more appropriate placement as part of the IEP which would justify rescinding what was otherwise a tacit approval of the placement to Bancroft. Therefore, emergent relief in the form of the placement to the Bancroft School with all related services was granted.

F. District Accolade: None

Table 11

Washington Township Board of Education v. L.D., EDS 6681-99 (1999)

A. Court/Judge Office of Administrative Law/ Bruce R. Campbell, ALJ

B. Reason: On the motion of emergent relief, petitioner seeks (a) invocation of the stay put provision; (b) emergent relief in the form of an order to the Washington Township Board of Education to continue L.D.'s education program pending outcome of this case, and (c) permanent relief in the form of an order directing the Board to provide compensatory education to L.D. and to develop a transition plan for L.D.

C. Procedural Violations: Lack of appropriate transition plans, evaluations, and related services.

D. Substantive Violations: Failure to provide a means for L.D. to make educational progress because there was no appropriate Present Levels of Educational Performance section nor are the goals and objectives specific or measurable. The goals have not changed from year to year. None of the necessary training or assistance has been provided. Other representatives available to help with or implement the transition plan were not contacted or invited to the IEP meeting.

E. Outcome: Emergent relief in this case was denied because the petitioner had already turned 21 prior to the emergent relief being filed. IDEA's provision of stay put lends itself to students up to age 21. Since this student had already turned 21 prior to the suit, the safeguards provided by IDEA no longer apply to this student. Therefore, the motion for emergent relief was denied. The district was clearly not providing FAPE to this child, and prevailed due to legalities. Petitioner should have filed for due process earlier.

F. District Accolade: None

Table 12

Tinton Falls Board of Education v. N.E., EDS 2130-99 (1999)

A. Court/Judge: Office of Administrative Law/ Robert S. Miller, ALJ

B. Reason: Petition for providing FAPE

C. Procedural Violations: Procedural errors in evaluations, development of an inadequate IEP, and placement decisions.

D. Substantive Violations: Substantive errors in providing needed services, and making progress in district program.

E. Outcome: Judge Miller was compelled to conclude that the respondent has not been able to carry its burden of proving that it has offered a FAPE. Under these circumstances a family seeking reimbursement for a private school need only show that the placement unilaterally chosen is appropriate. The placement in the district's preschool handicapped class is not the least restrictive environment in which he would be able to receive a meaningful educational benefit. N.E. was also making good educational progress at the Martin Luther Memorial preschool. Thus, the respondent will reimburse N.E. for tuition at the Martin Luther Memorial Preschool, as well as costs for transportation retroactive to February 28, 1999.

F. District accolade: None

Table 13

Hasbrouck Heights Board of Education v. D.J., EDS 5783-99 (1999)

A. Court/Judge: Office of Administrative Law/ Maria Mancini La Fiandra, ALJ

B. Reason: Petitioner asserts that the preschool placement offered by the respondent school district and incorporated into the 1989-1999 IEP is not appropriate. They are seeking reimbursement for the costs of the unilateral placement they chose in March of 1999, as well as an order compelling the district to develop an IEP consonant with continued placement, at the expense of the district, in the school chosen by the parents during the 1999-2000 school year.

C. Procedural Violations: Predetermined decisions were made prior to parental input, all preschool students attend the SBJ program, and parental concerns were not addressed regarding placement.

D. Substantive Violations: None

E. Outcome: It was determined that the unilateral placement at EPIC was appropriate. It was further concluded that the placement should continue for the 1999-2000 school year. The district should reimburse the parents for the cost of placement dating from March 16, 1999 to the end of the 1999-2000 school year.

F. District Accolade: None

Table 14

Hamilton Board of Education v. K.C., EDS 906-00 (2000)

A. Court/Judge: Office of Administrative Law/ Solomon A. Metzger, ALJ

B. Reason: Petition to receive transportation to and from a before and aftercare program outside the normal jurisdiction established by the transportation company and school district.

C. Procedural Violations: None

D. Substantive Violations: School district failed to provide needed service to the student.

E. Outcome: The issue is not straight forward and the parties have presented a sparse record. The IDEA assures children with disabilities that they will receive a FAPE and related services necessary to benefit from that education. Transportation under IDEA is not limited by the geographic boundaries of the school district. Accordingly, the district's representation that it is inconvenient to travel out of the county is unavailing, particularly because the detour is slight. The personal needs of parents ought not generally to drive the related service requirement, as this can open a school to extra cost not strictly geared to the provision of education. While no district or MCSSD bus routes currently service Bordentown, some adjustment in routes or other means of transportation are required. The matter might be otherwise if the Over the Rainbow preschool were located at some great distance from Mercer County, or if it were anything but the only preschool available to K.C. in the general area. Based on this, it is ordered that the school district provide transportation services for K.C. to and from the Over the Rainbow preschool as soon as practical, but no later than twenty days from the date of the order.

F. District accolade: None

Table 15

Westfield Board of Education v. S.W., EDS 3049-01 (2000)

A. Court/Judge: Office of Administrative Law/ Daniel B. McKeown, ALJ

B. Reason: Westfield Board of Education seeks an order to implement an IEP which would place a student in an out-of-district placement.

C. Procedural Violation: None

D. Substantive Violation: None

E. Outcome: The board was authorized to place S.W. at the Regional Day School in Jersey City, or other suitable placement if vacancies are found, so that the student's needs may be addressed.

F. District Accolade: The district provided sound educational evidence which justified their placement decision. The district showed their effort to try to provide a program in the least restrictive environment and as close to home as possible. Parental input was also considered.

Table 16

Toms River Board of Education v. A.J., EDS 2700-00 (2000)

A. Court/Judge: Office of Administrative Law/ Robert W. Scott, ALJ

B. Reason: The petitioners sought an order finding the respondent had failed to offer the petitioner, A.J. an appropriate education, that the petitioner, A.J. was entitled to an educational program comparable to that being currently provided by his parents, that the petitioner was entitled to ESY and that the respondent was to reimburse the petitioners for expenditures they had incurred in educating A.J. from December 1999, that the respondent develop an Individual Education Program that provided A.J. with an

appropriate education which would provide educational benefit, and that the respondent reimburse petitioners for attorneys fees and other costs.

C. Procedural Violation: The evidence does not show that the respondent's CST really considered the opinions of those therapists and others who have been working with A.J. for the past year. The IEPs do not set forth a transition program for A.J. from his current program to the one proposed by the respondent. Contrary to the testimony of the respondent's witnesses, there is no evidence that that transition could reasonably have taken place within a matter of weeks. Further, the IEPs do not provide realistic goals for A.J. They do not guarantee advancement or that he would not be prepared to go into regular indergarten when he is age five, but in that they, being accomplished, might fail to show that he may have regressed rather than advance from his current levels of achievements. In other words, A.J.'s accomplishment of the proposed IEP's goals and objectives would fail to show any real educational advancement.

D. Substantive Violation: None

E. Outcome: Petitioner awarded an appropriate placement including home therapy, ESY, reimbursement for the costs the parents incurred while providing the program for A.J., cost for expert witnesses, but no attorney fees.

F. District Accolade: None

Table 17

Pequannock Township Board of Education v. A.V., EDS 7754-00 (2000)

A. Court/Judge: Office of Administrative Law/ Irene Jones, ALJ

B. Reason: Petitioner filed a due process petition contesting the respondent's decision to place her daughter in a self-contained program within district, and was also requesting an independent evaluation.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: Petitioner's request for continued placement of A. V. and independent evaluation denied. Respondent's placement of A. V. in the self-contained program was ordered.

F. District Accolade: The district was well-prepared in their decisions regarding the student's transition. They had considered all of the student's needs and were prepared to provide them within the student's home school as opposed to another school district or private school. Further, the district conducted evaluations at the request of the parent, which also substantiated the child's placement.

Table 18

Bayonne Board of Education v. A.S., EDS 3537-00 (2000)

A. Court/Judge: Office of Administrative Law/ Thomas R. Vena, ALJ

B. Reason: Petitioner seeks an order directing the placement of A.S. in a specialized out-of-district placement.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: Judge Vena determined that the respondent has offered A.S. a FAPE in the LRE. It was ordered that the implementation of the 1999-2000 IEP providing placement in the district autistic program commence.

F. District Accolade: The district addressed the student's educational needs within the LRE.

Table 19

Union Township Board of Education v. G. L., EDS 7056-00 (2000)

A. Court/Judge: Office of Administrative Law/ Thomas R. Vena, ALJ

B. Reason: Petitioner seeks an order directing the placement of G.L., an eleven year-old child classified as eligible for special education and objects to the proposed placement in an out-of-district placement. Respondent seeks an order directing placement of the child in the proposed out-of-district setting.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: Judge Vena has determined that the respondent has offered G.L. a FAPE in the LRE, and has ordered the implementation of the 2000-2001 IEP providing for placement in Millburn Regional Day School.

F. District Accolade: The district met its burden of showing that the program offered provides significant learning and confers meaningful educational benefit. The district tried prior to provide a program for the student in district with many supports, but the student was not making progress within this setting.

Table 20

Maywood Board of Education v. D.L., EDS 12096-99 (2000)

A. Court/Judge: Office of Administrative Law/ Margaret M. Hayden, ALJ

B. Reason: Petitioner filed a request for a hearing to challenge the program and placement of the child in a full day autistic program as proposed by respondent. The petitioner requested that his son be educated completely at home and that the father be paid to be the full-time teacher of his son.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: It was ordered that the proposed IEP and placement for the 1999-2000 school year for D.L. provided a FAPE in the LRE and should be implemented immediately. The IEP must include a home to school program, which the district has been offering for a number of years. The request for the father to be D.L.'s teacher was denied.

F. District Accolade: The district considered other alternatives although the parents did not agree, they tried to incorporate home to school activities and training to improve D.L.'s performance. Respondent witnesses were knowledgeable of the circumstances and were able to articulate progress with the established program.

Table 21

Jersey City State Operated School District v. F.H., EDS 9131-00 (2000)

A. Court/Judge: Office of Administrative Law/ Daniel B. McKeown, ALJ

B. Reason: The district is seeking an order to evaluate F.H.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: The Jersey City State Operated School District shall be authorized to immediately cause its child study team to conduct an evaluation of F.H. to determine whether she is eligible for special education.

F. District Accolade: The district pursued litigation in order to provide S.H. appropriate services despite the parent's objection to the evaluations and services.

Table 22

Woodbury Board of Education v. D.D., EDS 06042-00S (2000)

A. Court/Judge: Office of Administrative Law/ Jeff S. Masin, ALJ

B. Reason: Petitioner requested a due process hearing to challenge the proposal of the Board of Education to place him in the 8th grade at Woodbury Junior High School for the 2000-2001 school year. Petitioner objects to the Board's proposed placement and argues that he should be placed at the Hill Top School in Rosemount, Pennsylvania, a school that specializes in the education of students with learning disabilities. The CST believes that the appropriate LRE for D.D. is in the mainstream classes at the local junior high with some modifications to accommodate and address his learning disabilities.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: It was determined that Woodbury had met its burden to establish that its proposed placement of D.D. in the Woodbury Middle School mainstream program with an aide serving as a classroom aide is an appropriate placement under the IDEA.

F. District Accolade: The district provided appropriate supplementary aides and services in order to program for the student in the LRE.

Table 23

West Windsor-Plainsboro Board of Education v. M.G., EDS 4215-99 (2000)

A. Court/Judge: Office of Administrative Law/ Solomon Metzger, ALJ

B. Reason: Petitioner rejects placement in a multiply disabled self-contained class within district claiming that this placement is a more restrictive setting than his current program.

C. Procedural Violations: Development of inadequate IEP, and placement decision not within the LRE

D. Substantive Violations: None

E. Outcome: It was determined that M. G. should continue in the seventh-grade mainstream/PI program that is ongoing, with substitution of art and computers for science and social studies.

F. District Accolade: None

Table 24

Manalapan-Englishtown Regional Board of Education v. E.M., EDS 4235-01 (2001)

A. Court/Judge: Office of Administrative Law/ Robert W. Scott, ALJ

B. Reason: Ongoing placement concerns have occurred with this student, but the present petition is related to an ESY program for the summer of 2001. Petitioners seek order of the student to be placed at the Atlantic Club and Camp Learning Center. The respondent seeks to have the student placed in a self-contained class in the district for approximately three weeks, two and half hours a day and in a community based program for the remainder of the day for the first three weeks, and then for three additional weeks for a full-day at the community based program.

C. Procedural Violations: Development of inadequate IEPs, and placement decisions

D. Substantive Violations: The district failed to provide needed services to the student.

E. Outcome: It was determined that the district's ESY program was not an appropriate placement for the student because it would place the student in a self-contained class after he had been included in regular classes with pull-out instruction for academics, and therapies during the last regular school year. Further, the length of the ESY program was not appropriate for the student. Therefore, it was found that the Atlantic program was appropriate and the district would be responsible for reimbursing the parents the tuition. The respondent shall also provide an aide as it was willing to do so in their program and the respondent will continue speech therapy three times per week

and occupational therapy once per week. The respondent shall also reimburse the parent for transportation at the rate of .31 cents per mile.

F. District accolade: None

Table 25

Newark Board of Education v. A.R., EDS 1533-01 (2001)

A. Court/Judge: Office of Administrative Law/ Daniel B. McKeown, ALJ

B. Reason: Petitioner complains in her letter requesting emergent relief that her son was terminated from his educational program for behavioral problems on or about November 17, 2000. As of December 15, 2000 A.R. receives 10 hours per week of home instruction but no related services of speech therapy and occupational therapy, which are specified in his IEP. The home instructors who are assigned to A.R. have no experience with autistic children and as a result of this the goals set in his IEP are not being achieved via home instruction. Since home instruction was initiated, at times, A.R. has been without a tutor, when the tutor refuses to work with him because they cannot meet his educational and behavioral needs. When this occurs his education is interrupted as he waits for a new tutor to be assigned.

C. Procedural Violations: None

D. Substantive Violations: The school district failed to provide needed services to the student, and the student is not making progress in the district's program.

E. Outcome: Despite the overwhelming evidence that the district was not providing an appropriate program for A.R., the petitioner did not have any alternatives to

the present situation, therefore the motion was denied for emergent relief. The petitioner did mention residential placement as an option, but did not have the specifics outlined or prepared for the hearing. The Judge then made the recommendation that the matter be resolved in a mediation hearing.

F. District Accolade: None

Table 26

Shamong Township Board of Education v. J.W., EDS 6124-01 (2001)

A. Court/Judge: Office of Administrative Law/ Bruce R. Campbell, ALJ

B. Reason: The Shamong Township Board of Education seeks an order upholding D.W. classification, individualized education program and placement.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: It was concluded that the Shamong Township Board of Education has not selected inappropriate service providers to carry out J.W.'s IEP and it was further concluded that the present IEP is appropriate for J.W. The main issue appears to be when to shift emphasis from one approach to another approach. It was the Board's burden to show that it was providing a free appropriate public education to J.W. in the least restrictive environment. They have done so. Nothing J.W. has introduced is sufficient to change that determination. They have shown that other approaches are possible, but they have not shown that the Board's approach is wrong. The judge was satisfied that the IEP proposed for J.W. will confer educational benefit.

F. District Accolade: The district has accommodated certain parent requests. The parents had submitted a book of articles and suggestions to the CST. All members reviewed the documents and considered incorporating these ideas into the student's program.

Table 27

Jefferson Township Board of Education v. E.S., EDS 9287-01 (2002)

A. Court/Judge: Office of Administrative Law/ Stephen G. Weiss, ALJ

B. Reason: Petitioner requests to shorten his son's transportation time to and from his home in Jefferson to a school in another district. The petitioner maintains that the length of time his son spends in transport on a van is longer than it needs to be, particularly in light of what he contends is an IEP requirement, that is, if reasonably possible E.S. would be the last student on and first off the van.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: It was determined that the transportation arrangements provided by the Board of Education for E.S. to go to and from his home in Jefferson to school in Wantage meets all of the requirements of state and federal law. To implement the change requested by the parents with regard to shortening their son's travel time would impose a longer travel time on another special education child half their son's age. Not only is that not required, it would disserve the needs of another child who is entitled to equal consideration at least. Personal needs do not supersede the discretionary authority of the

Board reasonably to take such action as it deems appropriate. As the Board points out in its post-hearing submission, parents are not entitled to fashion transportation arrangements to meet their own views of what is best for their child, provided that a FAPE has been made available, including the provision of related services. The question is not whether another route would be more reasonable. Rather, it is whether the route which is now provided is a reasonable one.

F. District Accolade: The district made many efforts to resolve the transportation issues at hand, and developed a plan that was reasonable for all parties involved.

Table 28

Clinton Township Board of Education v. D.D., EDS 4990-01 (2002)

A. Court/Judge: Office of Administrative Law/ Bernard Goldberg, ALJ

B. Reason: Petitioners identified the issues precipitating their appeal as:

Respondent's failure to meaningfully include D.D. in regular classes, respondent's decision reducing D.D.'s occupational therapy from two sessions weekly to one session weekly, plus one consult per month, respondent's failure to establish goals and objectives on his pre-vocational program, respondent's refusal to conduct a curriculum review, and respondent's refusal to update D.D.'s behavior plan.

C. Procedural Violations: None

D. Substantive Violations: None

E. Outcome: It was concluded that D.D. is receiving a FAPE in the LRE. D.D. is being educated with non-handicapped children to the maximum extent possible. The CST

decision to provide one weekly OT session and one monthly consult is appropriate.

D.D.'s curriculum, as contained in the IEP, does not require review and the Behavioral Plan, as is presently written and implemented is appropriate.

F. District Accolade: The district met its burden in justifying their position in the decision making process of developing an appropriate educational program.

Table 29

South Orange and Maplewood Board of Education v. B.H., EDS 1256-02 (2002)

A. Court/Judge: Office of Administrative Law/ Jeffrey A Gerson, ALJ

B. Reason: Petitioners contend that the program offered by the Board at Developmental Learning Center was not appropriate. They favored a home program which had been initiated several months prior to B.H.'s third birthday on November 29, 2001.

C. Procedural Violations: Placement decisions

D. Substantive Violations: None

E. Outcome: The judge determined that the Board's objective was to place B.H. in an out of district school that was state approved. It was not B.H.'s individual education needs that were paramount, but rather his diagnosis that governed his placement. B.H. was tested and evaluated by the child study team but the tenor of the testimony was felt to conclude that the testing and evaluations were merely done in conformance with legal requirements knowing that ultimately the recommendation would be for out of district placement in any state approved school with little or no attention paid to the desires of the

parents or the specific needs of the child. Not disputed by the respondent in this matter are two extremely important contentions. The first is that a CST member had contended that a blanket rule existed that home programs were not funded and secondly, that the child study team refused to even consider a home program offered by the parents. The school board offered a program for an autistic child, but not a program individualized to his needs. The home program is so individualized. It was ordered that the costs of the petitioner's home program from the time of the student's third birthday be reimbursed.

F. District Accolade: None

Table 30

Summary Chart of the 29 Cases Evaluated

<u>Case</u>	<u>Procedural Violation</u>	<u>Substantive Violation</u>	<u>District Outcome</u>
Willingboro Board of Education v. T.P.	N	N	W
East Brunswick Board of Education v. C.P.	N	Y	L
Washington Township Board of Education v. D.P.	N	N	W
Mantua Board of Education v. L.B.	N	N	W
East Brunswick Board of Education v. M.P.	N	N	W
Carlstadt Board of Education v. D.D.	N	Y	L
South Brunswick Board of Education v. M.P.	Y	Y	L
West Orange Board of Education v. C.L.	N	N	W
West Windsor-Plainsboro Regional Board of Education v. L.M.	N	N	W
Mt. Laurel Board of Education v. K.M.	Y	Y	L
Washington Township Board of Education v. L.D.	Y	Y	W
Tinton Falls Board of Education v. N.E.	Y	Y	L
Hasbrouck Heights Board of Education v. D.J.	Y	N	L
Hamilton Board of Education v. K.C.	N	Y	L
Westfield Board of Education v. S.W.	N	N	W
Toms River Board of Education v. A.J.	Y	N	L
Pequannock Township Board of Education v. A.V.	N	N	W
Bayonne Board of Education v. A.S.	N	N	W
Union Township Board of Education v. G.L.	N	N	W
Maywood Board of Education v. D.L.	N	N	W
Jersey City State Operated School District v. F.H.	N	N	W
Woodbury Board of Education v. D.D.	N	N	W
West Windsor-Plainsboro Board of Education v. M.G.	Y	N	L
Manalapan-Englishtown Regional Board of Education v. E.M.	Y	Y	L
Newark Board of Education v. A.R.	N	Y	W
Shamong Board of Education v. J.W.	N	N	W
Jefferson Township Board of Education v. E.S.	N	N	W
Clinton Township Board of Education v. D.D.	N	N	W
South Orange/Maplewood Board of Education v. B.H.	Y	N	L

Note. N: No, Y: Yes, W: Win, L: Loss. School districts were found to be providing FAPE in 18 of the 29 cases (62%).

CHAPTER V

Conclusions and Recommendations

New Jersey's superior schools for the autistic have prompted a migration of families seeking a brighter future for their kids (Levin, 2002). Within the autism community is the belief that where one lives matters; that some school districts are better than others, that some states are better than others. New Jersey is considered one of the best.

With the migration of autistic children into the state, the rising level of diagnoses of resident children, and the mecca of expertise and research being conducted locally, it is quite apparent that the level of involvement and complexity for local school districts regarding autistic cases in New Jersey goes beyond what the national level is currently addressing. Issues within FAPE such as compliance, LRE, related services, home programming, and unilateral placements are ongoing dilemmas within New Jersey.

New Jersey's complications and residual implications seem to be on a higher level. In addition, enter the Ridgewood case, which clearly sets a much higher standard within the third circuit when developing IEP's. It is no longer just about providing a meaningful program for students with disabilities, its about providing one in which you will shoot for maximum developmental gains or close to it. With that comes specificity in your assessment of a student with autism and your understanding of the methodologies available to intervene. For example, when we speak to the LRE with autistic students,

potential and methodology become crucial factors in determining FAPE. Child study team members need to become more than familiar with assessing students with autism, and then be able to speak to a methodology that can intervene or meet that student's needs. Once these factors are determined, the how and where the district will provide and implement these services is the next hurdle.

As parents are becoming more familiar with their rights, understanding of autism, methodology, and programming, school districts are struggling with agreement of the "appropriateness" of a program. With the Internet revolution among us, parents within special education have gained greater confidence in their requests because of their access to information from reliable public and private resources, other parents, and the many organizations developing state and nationwide. This implies that school district's special services departments need to become more sophisticated when they are dealing with disabled students especially students with autism.

In terms of compliance, it's a *dead issue*, and one not worth mentioning for more than this sentence. If a district did not meet the expectations outlined in 6A:14, despite their best intentions its over! So, we shall move onto unilateral placements, which were also addressed within the context of cases. Unilateral placements are increasing with frequency, and are beginning to get more attention on a local and national level. If one were to speculate as to the increase in frequency regarding unilateral placements, one might say that there is a mounting lack of trust between parents and schools. Another factor that can play heavily into this issue is the *grass is always greener* attribute, or indeed an alternate placement might be appropriately deemed. By nature, this direction is

costly to school districts and will typically be avoided until all other resources have been exhausted.

Although educators have student's best interests in mind, the rising costs of special education have district personnel scrambling to accommodate students within the letter of the law. In a recent article in the New York Times, Laurie Tarkan quotes David Egnor, Policy Director at the Council for Exceptional Children, "The biggest obstacle is budgetary. When your looking at limited resources in a school district, sometimes available resources drive what services schools will propose to offer. It's simply pragmatic".

There are more services and opportunities available to students with disabilities now than in the past. A large percentage of these services are instrumental in aiding students with autism. As parents advocate for their children to have the best, district leaders battle as to what is appropriate for a student's educational needs and not what is preeminent. District leaders must balance their global needs as well as individual needs, but the state and federal governments continue to focus more on the individual than the larger group.

The third circuit has not established any type of precedent when we speak to children with autism. At this time, districts and parents are mediating issues at the Office of Administrative Law level, in which an administrative law judge makes decisions based on the information presented to them on a case-by-case basis without any district, appellate or Supreme Court review. This continues to lend itself to favor parents, but if districts have been compliant and proactive in demonstrating how they have provided FAPE they have a better chance.

Purpose of Study

The purpose of this study was to analyze and evaluate existing case law data on a state level in order to extrapolate and synthesize information, which could be utilized to make meaningful recommendations, so that school districts can effectively address student needs while decreasing litigation when dealing with a special education population who are classified as autistic.

Statement of the Problem

Despite a school district's good faith effort to provide appropriate programs and related services for the autistic population, litigation continues to increase, impacting upon an expanding interpretation of a FAPE. The resulting court-based higher standard is creating financial hardship for public school districts. This higher standard dictates increased personnel training, programs, staff, and overall enhanced services leading to individual meaningful educational benefit for all disabled students.

Description of Sample

The cases that were chosen for this study were derived from the Rutgers University School of Law. The Rutgers School of Law website posts Office of Administrative Law Judge decisions for New Jersey hearings. The researcher utilized this site to obtain current case decisions regarding students with autism. All 29 cases posted regarding students with autism were utilized in this study. These cases were initiated and decided over the past five years. Researcher bias was less significant by employing this website and choosing all available cases.

The sample of legal cases, stem from school districts throughout the state of New Jersey from 1997-2002. It was quite evident that the Rutgers School of Law selected a random set of cases to be posted on the website. It included a variety of school districts throughout the state, with varying demographic and economic status.

Methods of Research

The study employed a Field-Based Analysis Rubric that incorporated criteria from the New Jersey Administrative Code 6A:14, which governs Special Education. It was of a functional nature to utilize criteria, which is specific to the language established in the New Jersey Administrative Code. Without it, validity could not be established between the legal outcome of each case, and the data needed to be evaluated through the study's rubric. The methodology adopted for this research utilized the explanatory case study model. Its theoretical approach was appropriate to obtain the necessary data to make appropriate recommendations for local schools districts.

Research Questions and Findings

Why do school districts appear negligent when engaging in the inquiry of FAPE?:
After reviewing data, the majority of the cases were being litigated around placement. Placement and its related program seem to create the majority of dilemmas that both districts and parents face. It seems clear that when districts engage in evaluating a student with autism, the most crucial aspect is that the evaluators are knowledgeable about autism, and that they use appropriate assessment tools to obtain specific information related to the deficits of a student with autism. If a district begins to engage

in the evaluations without this level of understanding and inquiry, they are only headed down a path that will likely end up in some type of dispute. It is clear from both New Jersey and national data that evaluators who have limited or no experience with autism are less credible witnesses in a court of law. If they cannot conduct an appropriate evaluation, then they cannot make meaningful recommendations. Therefore, program recommendations have less merit and are merely open to parent criticism.

Another area where districts can appear negligent is related to procedural safeguards. Both the federal and state governments have made overwhelmingly strong and persuasive arguments that the procedural safeguards are to be followed, and if districts are remiss, then a FAPE cannot be established. Districts still make procedural mistakes impacting the outcome of cases in which they are involved. Today, parents of students with disabilities have become more aware of their rights and the procedural safeguards established. They are pushing the envelope within this capacity, looking for even more than they are already entitled. If districts cannot meet the basic requirements, they will undoubtedly lose their cause.

Finally, districts appear negligent when they make substantive violations. It is no longer acceptable for a student to be within a program and not derive meaningful educational benefit. Provision of a program and placement in and of itself will no longer meet the established higher standard. The program must be thoroughly appropriate and developed in such a way that the student will make meaningful educational progress. In order for districts to produce these results, they must have personnel working with students who are knowledgeable of autism so that they can intervene with the assessed deficits. Deficits must be defined and then translated into appropriate goals and

objectives which are specific and measurable. Personnel should be armed with scientifically based research methodologies to increase the likelihood for academic success. Multiple methodologies should be utilized so that programs can be tweaked if necessary, and so that students can acquire the skills outlined in the goals and objectives. These goals and objectives must have specific requirements in terms of mastery, and then followed accordingly. Ongoing data collection must convene so that true measured progress can be assessed. If a student is not making the expected progress based on the IEP, either the expectations must change or the level or type of instruction may need to be looked at further. Either way, the district is obligated to have a strong handle on these expectations and be able to present the necessary data and verbiage when called upon in due process.

In addition, if a student is not making progress, districts are required to have the additional resources available to make the necessary changes to the students program or seek other outside available consultants and programs. Districts must have the flexibility to do this on a regular basis without delay. They cannot be ill-prepared nor have an inefficient mechanism to deliver the necessary services for disabled students. When districts linger or balk at these issues, their repercussions are more frequently ending in litigation. Parents have become more demanding and less tolerant of school and budget related issues impacting their children's programs. Similar intolerance is noted by Administrative Law Judge decisions.

What are some of the new expectations for notice, assessment, methodology, and program development?: The cases reviewed had limited broadmindedness for notice and assessment violations. It was apparent that these procedural safeguards are valued

entitlements and need to be followed with precise specification. A district has limited discretion when it comes to notice and assessment. IDEA spells them both out very specifically, and if they are not in compliance, the district will typically be penalized for its shortcomings. IDEA illustrates that a FAPE cannot be established without these expectations being satisfied.

IDEA and its interpretation allow for more district discretion when it comes to methodology. Parents cannot preclude a district from implementing a particular methodology within their programs. Administrative Law Judges consistently report that this is an area upon which they will not render decisions and that they will *leave education up to the educators*. The caveat is the loop-hole that good attorneys have established when it comes to methodology. If the student is not making progress with the particular methodology being implemented within a program, and the petitioner can establish this, then Administrative Law Judges appear more open to ruling on particular methodology based on the program's inability to confer meaningful educational progress. With that said, districts need to adopt sound educationally research methodologies so that they have an arsenal to draw from when students are not making progress. Districts should also be familiar with other available methodology so that they can articulate their strengths, weaknesses, similarities, and differences. Districts will appear negligent and open to criticism when they do not have district personnel well-versed in the available methodologies. District should also be clear as to why they are using a particular methodology for each individual student. Generalities are not favorable to individual situations when it comes to students with disabilities. Therefore, districts can no longer believe that they are in the position to be the sole experts on education. Both the federal

Can parents demand that school districts adopt particular methodologies?: As previously mentioned, it is clear that parents cannot outright demand a particular methodology for their child's program. Districts have the right to address student deficits based on the philosophy and methodologies the district has adopted, and its personnel have been trained to implement. It would be foolish for districts to begin implementing something that their personnel have not been trained in. This would lead to further negligence. If districts do not establish progress with their recommended methodology, parents have more say in the matter than previously noted. Although parents may ultimately have their child's program implemented with the methodology of choice, time should be considered to allow for the district to train their staff appropriately before implementation of the methodology.

Again, it is also beneficial for district personnel to become knowledgeable of the available methodologies so that they may speak to the specific similarities and differences that exist between the current methodology and the one being proposed. It is recognized that, at times, parents request services because they are the *buzz services* of the day. Sometimes, parents themselves are not sure of the particular implications of implementing such a methodology or what it even proposes to address. These questions should be explored further when gathering with parents during formal meetings.

Can cost be a consideration in designing programs? : Cost can not be a consideration when designing a program. Districts must develop a program for students that will confer meaningful educational benefit in the least restrictive environment. They are not obligated to provide the very elite of services for a student, but the program established must prove to address all areas outlined in the IEP. If progress is not

established then program recommendations could become more costly to districts, but program cost itself should not be a factor in the decision making process.

The research did give examples of when districts can consider cost, such as transportation. Parents would obviously like to have the child's transportation, if needed, to be as short as possible in duration. At times, some students may be on a route which is upwards of one hour. Parents who have contested these issues are only granted with a change if they can demonstrate that it is impacting the educational performance of that child, or that the duration of transportation is unreasonable considering all of the factors related to the student. Otherwise, districts can use cost as a mitigating factor when they are requested to establish separate routes for individual children.

What are some of the obstacles in including students with autism in the regular education classroom? : It is quite clear that there is a wealth of knowledge available to accurately assess and evaluate a student with autism, and then properly place that student into an appropriate program. It is also evident by recent law and its interpretation, that a student with autism has the right to an inclusive setting if deemed appropriate. One thing that is obvious is the difficulty that boards of education and professionals in special education within the public schools continue to face. This is the continual growth of expenditures for special education. School systems establish a budget and then work from it religiously. There tends to be little flexibility when it comes to additional money for a particular school year. Even with supplemental funding from the state and federal government, the lack of money still remains a substantial issue in special education.

It is particularly frustrating when districts are not suppose to consider money when developing a child's program, but at the same time realize that options they might

consider are not feasible. People might argue that it will be expensive to educate autistic students whether in an inclusive setting or in a more restrictive setting. It is clear that most professionals are in favor of including students with autism into a regular education setting when appropriate.

Although educators are in a transitional period and are becoming more accepting of the concept of inclusion, all are not comfortable with its implications. These issues continue to be the obstacles in making decisions regarding placement of students with autism, or any other more complex disability requiring substantial planning and resources. This issue is related to the bigger picture, which emphasizes how our educational system, although becoming more complex and diversified, continues to follow a *within the box* model. People in education still hold on tight to the traditional classroom, curriculum, assessments, and scheduling, which clashes with the concept of inclusion of disabled students. This dichotomy will continue until educators embrace all students with special needs and are willing to become more flexible with our educational system. Politically, what has been established sounds wonderful and better yet in proper application provides wonderful results, but even with all of these ideological and ambitious thoughts there seems to be a gap between ideology and the realization of its impact and cost.

Do districts have a responsibility to reimburse parents for in-home programs?:
Districts have a responsibility to reimburse parents for in-home programs if it is outlined in the student's IEP and they have not been providing it, or if this service is an appropriate program in order for the student to make meaningful educational progress. If a child has a program in which the student is making gains with the goals and objectives

outlined in the IEP and the parent initiates an in-home program unilaterally, the district might not have to reimburse the parents as long as they can establish progress in the recommended program. The research did show that, although some districts were providing an appropriate program, they still were required to enhance the child's program by adding in-home services coordinated by private facilities. Administrative Law Judges made these decisions based on expert witness testimony used by parents to establish credibility for the program.

It is also important that districts consider recommendations made by the parent. If the district was negligent in that they did not even respond to the parent concerns or suggestions, there is greater likelihood that the parents could be reimbursed. Again, this is not about parent autonomy, but if a need is appropriately identified, and it is not being addressed by the district, there is greater likelihood that the parent will gain some level of reimbursement.

What are the key elements of petitioner arguments? : If we are considering the petitioner as the parent, and in most cases reviewed that was the circumstance, then the key elements to a petitioner's arguments is that their child is not receiving an appropriate program in the least restrictive environment. Both FAPE and LRE are the key impetus to initiating litigation. This is not to say that other scenarios are not available, but most attorneys will frame whatever the cause for concern under these mandates. These mandates hold muster when it comes to legal obligations and expectations that each public school district must provide and honor. If a petitioner can establish that the district is not providing these mandates, and the district cannot meet its burden, then it opens the door to higher parental expectations.

How can school districts meet the new standards set by today's case law, well-informed clients, researchers and advocacy groups?: School districts must establish budgets which will allow for increased staffing and programs within district, the continuum of alternative placements, ongoing training and professional development, the use of technology to expedite paperwork, and a reserve of funds to utilize for unexpected programs or services that develop over the course of the school year.

Are there other alternatives to the current approach to this dilemma?: The cases reviewed in this study did not provide any specifics that would address this issue! The literature did suggest the following: The development of an organization within the district which includes parents, staff, administrators, and board members to discuss these issues more openly and in a general format so that all parties have a better understanding of where each stands in the process. It will also allow for more and ongoing communication amongst all parties which might alleviate some of tensions that are quickly established with a lack of communication and or misinterpretations of what is available.

Do parents who enter into litigation without an attorney and/ or without expert witnesses have a successful chance?: Based on the data reviewed, there is a much greater chance of success in litigation for parents if they have an attorney. Clearly the advice of an attorney, specifically ones who specialize in this area are of tremendous resource to parents. They are knowledgeable of producing the evidence likely to gain them a clearer path to their goals. They will hire expert witnesses for opinions to support their rationale. Their expertise in terms of questioning district personnel also positions the parent's case in a framework, that they would be unable to produce independent of an attorney. The

mere presence of having an attorney makes things more challenging for a district. Settlements have become more likely based on the numerous petitions the Office of Administrative law has received. With an attorney, there is greater likelihood that a portion of the request will be granted. This is not to say that parents are infallible with an attorney or that a parent would not be successful without an attorney, it is only a mere observation of the cases reviewed that parents tend to be more successful with the presence of an attorney. This observation leads to further speculation regarding the process that has been established and the professionals who engage in that process.

Are there teacher certifications or endorsements specific to autism?: An issue that was presented in a number of cases in this research was of certification and experience. Parents in their participation of the development of an IEP have requested that their child be serviced by a professional who has a level of experience with autism. Ideally speaking this would obviously be optimum. Unfortunately, not all districts have professional staff that has the level of expertise requested by parents of students with autism. Parents criticize districts and make it one of contention by stating that therefore their child is not receiving an appropriate program, or how can their child make progress if the staff does not have expertise in this area. Accordingly, there is no endorsement or certification that the State of New Jersey offers specific to autism. Teachers must be certified as a teacher of the handicapped to work specifically with students with disabilities. This also applies to CST and related service providers. There is no specific certification for autism. Autism has become an area of specialty. One of which people have become more familiar in general, but do not have the same level of expertise as those working with these students on a daily basis.

The problem for school districts is that there are people in private facilities who have this level of expertise and once parents are exposed to these professionals they are requesting their services from local school districts. This quandary that has been created continues to make assessment, program development, and delivery difficult for districts that do not have the resources to provide additional training or bring in consultants to deliver additional services. This issue connects on many levels in that, if the district does not have people knowledgeable of autism delivering the services, the likelihood is that they are not providing an appropriate program, therefore they will ultimately be responsible for additional cost to provide one. It seems unfair to districts that there is *silent rule* related to this issue. The state clearly indicates that the only certification required to work with these student is the teacher of handicapped certification. Yet, if they are certified but not experienced with this population, the district can be scrutinized and held accountable for its program. It seems that if districts are going to be held to that standard that an alternative certification be developed specifically related to autism. This would alleviate the current dilemma that districts face.

The researcher speculates that this has not already occurred because of its implications related to other disabled student who do not have autism. Then, parents of students with other disabilities would be lobbying for a certification for their child's particular disability. This is understandable, but does not resolve the issue at hand. It seems that autism has created a platform of its own, even if the deficits related are common to other disabilities. This platform has created a higher standard and expectations beyond what education has been presented with before.

Conclusions and Recommendations for School Districts Regarding Students with Autism

The following conclusions and recommendations can be drawn from this research.

1. School districts must ensure that there are no delays in responding to parental requests to evaluate their child, conducting the evaluation, developing and proposing an IEP, and implementing the IEP. Furthermore, parents must be notified of their due process rights under the IDEA. The procedural requirements of the IDEA are clearly specified, and a hearing officer or court will not accept excuses when these requirements are not followed.

2. School districts must have professionals with expertise in the area of autism conduct comprehensive and individual evaluations. Two frequent reasons for school district losses are that a person without knowledge of autism conducted the evaluation and the evaluation did not address all areas of the student's needs. If a school district's personnel do not have the necessary knowledge, experience, and expertise to evaluate students with autism, then the school district must have their personnel trained or hire outside consultants to conduct the evaluations. Furthermore, the evaluation must address all areas of need of the student with autism, including language, communication, behavior, adaptive skills, and transition needs. If an evaluation is incomplete, the IEP will be inadequate.

3. School districts must develop IEP's that address all the areas of need that are identified in the evaluation, and then the IEP must be reasonably calculated to provide meaningful educational benefit. It is important that school districts develop both procedurally and substantively correct IEP's. For example, conducting an IEP meeting

without required participants (e.g., parents) has resulted in rulings against school districts. It is especially important that someone knowledgeable about autism be included on the team. The IEP also must provide sufficient intensity of instruction and related services to students, which may include extended school year services. The IEP must also contain all the necessary components as detailed in the IDEA (e.g., present levels of performance; measurable annual goals; length frequency and duration of services; statement of special education and related services; and transition services if appropriate). Moreover, an IEP must address both the academic and non-academic needs (e.g., social development, communication) of a student. Finally, the assessment and instructional strategies must be linked in the IEP. Every area of identified need must have a corresponding measurable annual goal.

4. Students should be placed in integrated settings to the maximum extent appropriate because the least restrictive environment principle of the IDEA requires it. Additionally, children with disabilities can be removed from general classes only when the nature and severity of their disability is such that education in general classes cannot be achieved satisfactorily even with the use of supplementary aids and services. That is, school districts should assume that students with and without disabilities should be educated together to greatest extent possible. When such an education is not appropriate, either for the student with disabilities or for his or her non-disabled peers, the school district may move the student to a more restrictive setting that is appropriate. Student placement decisions must be made by a knowledgeable group of people, usually the IEP team; in accordance with the individual needs of each student; and after the determination

is made of a student's educational needs. That is, decisions regarding the content of a student's FAPE must be made before the determination of a student's placement.

5. School districts must adopt empirically validated methodologies and instructional strategies and programs. Unfortunately, teachers frequently do not apply research findings in classroom practice. This tendency puts school districts and teachers in a very weak position to defend their programs successfully in a hearing or court. Previous cases reveal that the FAPE standard has evolved toward requiring school districts to adopt procedures and practices that are based on research findings. A school district is on legally strong ground when it designs and implements programs derived from empirical research.

6. School districts must continuously collect meaningful data to document student progress toward IEP goals and, thus, to document the program's efficacy. That is, data must be collected over the course of instruction so that student progress is continually monitored. The purpose of data collection is to provide objective evidence on student performance that can be used to guide instructional decisions. School districts can meet the FAPE standards demanded by current case law by collecting meaningful data and by demonstrating that data were used to guide sound instructional decisions

7. Directors of Special Services must advocate locally to the district Superintendent, and more importantly to the Board of Education, that additional resources need to be allotted so that a "free balance" is available when Directors of Special Services need to access funds that might not have been appropriated or projected. It is virtually impossible at this point for Directors to project concise budgets for the upcoming school year with the current status in special education. Obviously, having

unlimited resources for Special Education is not something that can easily be persuaded or realistically be funded. Keeping the Board of Education well-informed of the current status of the department will help in developing a rapport, which can then be utilized when additional resources need to be appropriated for special education programs. Individual circumstances should be clearly addressed so that cost-effective interventions can be justified by the Board of Education.

8. Staffing needs to be closely monitored so that heavy caseloads or large classrooms do not become the norm. Once case managers or teachers become flooded in paperwork, less attention will be paid to their existing students leaving room for error. It is imperative that manageable caseloads and classroom sizes are established, so that case managers and teachers are able to be proactive with children instead of being reactive, which tend to be the norm in many school districts.

Recommendations for Future Research

1. Investigate how stakeholders plan policies and programs for a childhood disorder in which there may be a variety of etiologies, and in which there may be a variety of potentially promising interventions strategies, at a time when we do not yet know which strategies are most effective.

2. Obtain access to a larger sample of litigious cases and their outcomes and begin to quantify the results.

3. Consider other methods of review of the legal autistic cases in terms of a rubric or additional formats.

4. Survey all districts in New Jersey related to the issues described in this research. Develop questions specific to their existing and previous litigious experiences with students with disabilities and more specifically students with autism.

5. Develop separate Focus Groups with the following: parents, administrative law judges, child study teams, directors of special services, superintendents, attorneys, expert witnesses, and legislators. Develop a collaborative Focus group utilizing these parties in an all-inclusive group setting.

6. Explore interpretations and opinions of the previously mentioned parties further through individual interviews.

7. Investigate the challenge of how districts will not only be providing access to students with autism, but excellence to students with autism. How will districts continue to raise the bar on the higher standards established in the courtroom?

8. Investigate how we can establish a unified system of services that features the needs of children as the focus of a multi-agency deliberation, rather than a system of services in which each agency tries to define why it is not the agency responsible for the provision of services to a particular child.

9. Investigate the impact of obtaining council; its implication for districts, parents, and the length of time for settlement of these litigious cases.

10. Consider the implications of having expert witness involvement in litigious cases regarding students with autism. Do cases become reduced to battles between experts and/ or who is more persuasive in courtroom settings?

11. Investigate the equity issue and its implications related to the upfront costs for parents initiating due process with appropriate council and expert witnesses.

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