



Legally Defensible Programming for Students With Autism

Charles L. Weatherly, The Weatherly Law Firm, LLP
Monica J. Conrad, Church, Church, Hittle & Antrim

Presented at the 2016 School Law Seminar, April 7-9, Boston, Massachusetts

The NSBA Council of School Attorneys is grateful for the written contributions of its members. Because Seminar papers are published without substantive review, they are not official statements of NSBA/COSA, and NSBA/COSA is not responsible for their accuracy. Opinions or positions expressed in Seminar papers are those of the author and should not be considered legal advice.

© 2016 National School Boards Association. All rights reserved.

LEGALLY DEFENSIBLE PROGRAMMING FOR STUDENTS WITH AUTISM

Charles L. Weatherly
The Weatherly Law Firm, LLP
3399 Peachtree Rd, NE
Suite 1550
Atlanta, Georgia 30326
(404) 262-9500
[**CLWesq@aol.com**](mailto:CLWesq@aol.com)

Monica J. Conrad
Church, Church, Hittle & Antrim
8585 Broadway Suite 860
Merrillville, IN 46410
(219) 525-4465
[**MConrad@cchalaw.com**](mailto:MConrad@cchalaw.com)

I. INTRODUCTION

In our experience, one of the most commonly litigated areas under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, 34 C.F.R. Part 300, is the provision of educational services to students with Autism Spectrum Disorders (“ASD”). This session will highlight principles established by pertinent judicial and/or agency decisions in the area of educating students with autism, examining what went right and what went wrong, both procedurally and substantively.

The prevalence of diagnosis of ASD is 1 in 68 births. CDC, *Autism and Developmental Disabilities Monitoring Network*, SURVEILLANCE SUMMARIES, 28, 2014/63 (SS02); (March 18, 2014). Over the past fifteen years, the prevalence has increased by nearly 120%. *Id.* With the increase in prevalence of diagnosis, school attorneys have noted a concomitant increase in prevalence of special education litigation between parents and schools. This increase may be due to a number of factors.

First, each diagnosis of ASD is unique and complex, which means the IEP process is unique and complex for each student. The disability affects social skills, communication skills, and behavior functioning. *See infra* Diagnostic Statistical Manual of Mental Disorders, Fifth Edition (“DSM-V”). Often one of the greatest challenges to educating students with ASD is that these students can respond unpredictably to new settings or have sensory challenges resulting in aggressive behaviors.

Second, the average cost of educating a child with ASD is an extra \$8,600 per child, a number that reflects ASD-related therapists and services that must be coordinated with school, home and multiple providers. T. Lavell et al., *Economic Burden of Childhood Autism Spectrum Disorder*, PEDIATRICS, 133, 3 (March 2014).

A third reason ASD-based litigation may be so prevalent is the well-developed parent support network which historically has touted the benefits of methods like Lovaas or Early Start, see Autism Speaks, <https://www.autismspeaks.org/what-autism/treatment>, which require large amounts of staff time in one-on-one work with the student.

Although the research may show that certain methods may have positive results for some children with ASD, the applicable legal standard remains whether an Local Educational Agency (LEA) is providing a “free appropriate public education” (FAPE) to a student with a disability.

II. FAPE FOR STUDENTS WITH ASD

A. The Rowley Standard in ASD Cases

In the seminal case of *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court first defined the level of education schools must provide under the IDEA by handing down a definition of free appropriate public education (FAPE). The *Rowley* Court enunciated the following twofold inquiry for courts reviewing such cases: (1) First, has the school complied with the procedures set forth in the Act? (2) Second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Since *Rowley*, courts applying its framework issue findings on both prongs -- process/procedure and content/substance. In other words, the determination as to whether FAPE has been made available by a school district requires the school district to defend, first, against any allegations that it did not comply with the procedures of the IDEA in the development and implementation of the student's IEP or program. The school district then must defend against any allegations that the program is substantively inappropriate for the student.

B. Methodological Deference in ASD Cases

It is longstanding legal precedent that parents of students with disabilities, including students with ASD, cannot dictate the instructional methodology that is used by a school district to implement an appropriate IEP. See, e.g., *Lachman, et al. v. Illinois St. Bd. of Educ.*, 441 IDELR 456, 853 F.2d 290 (7th Cir. 1988) (*Rowley* leaves no doubt that parents, no matter how well-motivated, do not have a right under the Act to compel a school district to provide a specific program or employ a specific methodology in providing for the education of a disabled child.). While courts are required to give deference to a school district's chosen methodology for programming, school districts must be prepared to earn that deference and to show that the methodology it uses (or proposes to use) to implement the IEP is reasonably calculated to provide “educational benefit” to the student under the *Rowley* standard.

Courts have heard ASD cases raising numerous methodologies, and some established principles of law have emerged. There is a wide variety of programs and methodologies for providing educational services to these students, such as—but certainly not limited to—Lovaas, TEACCH, Discrete Trial Training (DTT), Applied Behavior Analysis (ABA), Picture Exchange Communication System (PECS), Pivotal Response Training, Social Stories, Floor time, etc. (not to mention the “eclectic” model). These substantive methodology issues generally arise in part 2 of the *Rowley* framework - whether the School's IEP is reasonably calculated to enable the child

to receive educational benefits. We'll take a close look at the relevant cases and the principles they establish in Section IV below.

III. ROWLEY'S FIRST PRONG: DEVELOPING IEP/PROGRAM FOR THE STUDENT WITH AUTISM THAT ADHERE TO PROCEDURAL REQUIREMENTS

One extremely important legal principle established by cases involving students with ASD is that a violation of a procedural requirement in the development of a student's program—in and of itself—can lead to a finding that the school district has denied FAPE. While the 2004 IDEA Amendments diminishes the legal significance of procedural violations by saying that a decision made by a hearing officer “shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education,” this provision has not yielded the safe harbor we expected when it was passed. Nonetheless, the IDEA clearly provides that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: 1) impeded the child's right to a FAPE; 2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or 3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(i) and (ii).

Since the passage of the 2004 IDEA Amendments, courts continue to issue decisions that find some procedural violations to be harmful on their face and, therefore, a denial of FAPE to a student with ASD. In cases involving the education of students with autism, it is most frequently argued that the alleged procedural violation committed by the school district was harmful and somehow “significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child.” 34 C.F.R. § 300.513(a)(2)(ii).

Other alleged procedural violations may be considered to be mere “technical deviations” and of no consequence to the issue of FAPE. Whether process violations are harmful or not, however, they can take over an entire case and cost thousands of dollars to defend against. Thus, the overall lesson learned is to avoid all procedural violations to the extent possible. Below we address several common procedural errors and how courts have ruled with respect to them. The principals gleaned from each case can help guide the drafting of a defensible IEP.

A. The Failure to Take Action in a Timely Manner

Particularly in cases involving students with ASD, the failure to take action in a timely manner can be a fatal procedural violation. This is so because of the field's distinct focus upon the importance of early—and timely—referral, evaluation and identification of autism. Also fatal can be the failure to timely develop and offer an IEP, especially if it is not in place by the beginning of the school year. For example, a district was ordered to reimburse parents for the cost of private school placement of one autistic student because when the parent notified the school of residency, the school did not proceed immediately with an evaluation, nor did it provide the parent with notice of the procedural safeguards. *Robertson County Sch. Sys. v. King*, 24 IDELR 1036, 99 F.3d 1139 (6th Cir. 1996).

B. Failure to Promptly Refer, Evaluate and Identify

When an IEP thoroughly details the present levels of performance, the needs, and the goals with sufficient clarity to ensure that specific needs are addressed, in many cases the particular disability affixed to a child's IEP will be substantively immaterial because the IEP will be tailored to the child's specific needs. *K.S. v. Fremont Unified Sch. Dist.*, 56 IDELR 190 (9th Cir. 2011) (unpublished). This is a key consideration because the diagnosis of students with autism often is more descriptive of a variety of needs. When the IEP team prepares a program for an ASD student, therefore, it is critical to address specific needs and to determine a student's potential for anticipated progress.

The DSM-V provides the following as the diagnostic criteria for autism:

- A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history:
 - 1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
 - 2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
 - 3. Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

- B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):
 - 1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
 - 2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns or verbal nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interest).
 4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).
- C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).
 - D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.
 - E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

The DSM-V further explains that the severity of the diagnosis is “based on social communication impairments and restricted repetitive patterns of behavior.” American Psychiatric Association, C DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 50-51 (2013). A diagnosis needs to specify whether there is also an intellectual impairment and/or language impairment. *Id.*

Commonly, a diagnosis will be associated with descriptors such as “mild,” “moderate,” or “severe.” The above diagnostic criteria are key to defending a school’s adherence to IDEA’s procedural requirement that the school evaluate the child in all areas of suspected need. 34 C.F.R. 300.304(c)(4). In *N.B. v. Hellgate Elementary Sch. Dist.*, 50 IDELR 241, 541 F.3d 1202 (9th Cir. 2008), the parents disclosed that the student had been diagnosed with autism by a private provider but the school district suggested that the parents arrange for an evaluation. The school district was found to have failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis. This regulatory provision (300.304(c)(4)) can trigger duties to assess behavior, speech, assistive technology, cognition and physical functioning. As the DSM-IV criteria suggests, accompanying intellectual disabilities can coexist. When communication skills and behavior are impacted, standardized testing measurement may be less informative than the functional assessment. This can be particularly true with assessing clear intellectual abilities. In *K.S. v. Fremont Unified Sch. Dist.*, 56 IDELR 190, (9th Cir. 2011), the school did not use specific IQ measurements, but instead relied upon functional assessment procedures to determine that an impairment was present. The Court upheld the school’s use of various informal reports to demonstrate that the child’s slow progress was a function of the student’s autism and cognitive impairment. *Id.*

“The IDEA does not confer a legal right to proper disability classification, [but] legal ramifications do arise from a student’s disability classification.” *Weissburg v. Lancaster Sch. Dist.*, 591 F.3d 1255, 1259 (9th Cir. 2010).¹ In *Weissburg*, the Court held that a change in the eligibility classification altered the legal relationship between the parties, because it entitled the student to placement in a classroom with a teacher qualified to teach students with mental retardation and autism. *Id.* at 1260. The parent’s assessment of the student revealed a diagnosis of autism; whereas the school’s assessment of the student revealed mental retardation. *Id.* at 1257. Because the student’s teacher was qualified to teach students having both mental retardation and autism, the court held that student was appropriately placed in that classroom. *Id.* at 1260. Nonetheless, the parent was entitled to reimbursement of attorney’s fees due to the change in eligibility area. *Id.*

C. Failure to Have Appropriate and Qualified Personnel Conduct Evaluations

The focus of evaluations truly is the identification of needs – not eligibility. However, in an IDEA-based dispute, even if all other issues are resolved in favor of the LEA, resulting in no changes to the IEP except eligibility, the eligibility determination can be deemed a procedural error.

Evaluations conducted by the school district, which form the basis of all IEP recommendations, are almost always the center of attention in cases involving educational programming for students with ASD. School districts need to ensure that personnel conducting evaluations are trained and qualified to assess students with ASD. In addition, a school district should conduct its own “independent” evaluation, by experts of its choosing, to ensure it has adequate evaluative information. Numerous courts have confirmed a school district’s right to conduct evaluations by professionals of its choosing, even when it had already conducted previous assessments. “If a student’s parents want [their child] to receive special education under IDEA, then they are obligated to permit necessary evaluations.” *Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 559 (7th Cir. 1996) *citing to Andress v. Cleveland Independent Sch. Dist.*, 64 F.3d 176, 178 (5th Cir. 1995). (This also extends to use of school personnel over private providers for therapy services, particularly where this is no evidence that the school’s provider was not qualified. *See Zasslow v. Menlo Park City Sch. Dist.*, 2001 U.S. Dist. LEXIS 19177 (N.D. Cal. 2001), *aff’d*, 60 Fed.Appx.27 (9th Cir. 2003)). In addition, it is often necessary that a highly experienced expert utilize parts of different tests to form a conclusion. Though a composite score may not be conclusive about a particular deficit, the school districts gains valuable information about a child’s skill in different areas if the expert(s) obtain data from a number of sources.

¹ A similar conclusion was reached in *Pohorecki v. Anthony Wayne Local Sch. Dist.*, 109 LRP 46145 (N.D. Ohio 2009). The court held that the IDEA does not require that children be classified by their disability. *Id.* at *8. Rather, it requires that a child who needs special education and related services be regarded as a child with a disability and receive an appropriate education. *Id.* The label assigned merely assists in developing the appropriate education program. *Id.* Additionally, there was ample evidence that the student met the IDEA’s definition of Emotional Disorder and that classification was a reasonable one. *Id.*; *see also*, *B.F. v. Fulton County Sch. Dist.*, 51 IDELR 76, *24 (N.D. Ga. 2008) (An IEP is to be based on the skills, needs, and functioning of the student, regardless of a specific diagnosis.).

D. Failure to Consider the Recommendations of Private Evaluators

The regulations require that school staff consider the results of independent educational evaluations obtained by parents. 34 C.F.R. § 300.502(c)(1). If the parents bring an outside evaluation to the meeting, appropriate "consideration" must be given to it. "Consideration" does not require a school to incorporate recommendations of a private evaluator. See *Watson v. Kingston City Sch. Dist.*, 43 IDELR 244, *2 (2d Cir. 2005) (parent's claim that an IEP was inappropriate because it failed to implement the two private education experts' recommendations lacked merit). The regulations require that the LEA provide written notice to explain reasons for rejecting proposals. 34 C.F.R. § 300.503(b)(2). We suggest, therefore, that an LEA provide some reasonable rationale as to why it is rejecting the parents' expert's recommendations. See, e.g. *Tarlowe v. New York City Bd. of Educ.*, 50 IDELR 186, *6-7 (S.D. N.Y. 2008) (school district properly considered results of private evaluation, and determined it was "incomplete and inadequate" because it used only a small number of subtests and improperly focused on the child's potential, rather than his current level of functioning).

E. Failure to Promptly Develop/Propose and/or Implement IEPs

The LEA's "childfind" obligation requires it to evaluate and propose an IEP to all students within its boundaries. 34 C.F.R. § 300.111(a). Parents of students with ASD may have considerable anxiety about what a school may propose, as it may conflict with the parents' preferences, causing avoidance or refusal to participate in the IEP process. It is critical that schools make every effort to comply with the IDEA childfind requirements. When they do, courts often find in their favor. For example, in *Systema v. Academy Sch. Dist. No. 20*, 50 IDELR 213, 538 F.3d 1306 (10th Cir. 2008), the court held that the parents' refusal to participate in the IEP process effectively excused any procedural defects in the IEP's development, including the failure to have a final IEP in place by the beginning of the school year. *Id.* at *6. Similarly, in *Michael J. v. Derry Township Sch. Dist.*, 45 IDELR 36, *24 (M.D. Pa. 2006), the court held that a school's failure to offer an IEP for a school year is not a violation of the IDEA where the parents had advised the district on multiple occasions that they did not want special education services from the district that year. Reimbursement for private tuition was not warranted, as there is no entitlement to reimbursement for children whose parents have unilaterally placed them in private school after a school's offer of FAPE. *Id.* at *25. Even with this helpful case law, however, we suggest that an LEA somehow formalize an offer to meet to develop the IEP in the face of refusal by parents. Alternatively, the LEA can insist on holding the meeting if the parent will not commit in writing that they are refusing to attend.

F. Failure to have Proper Representatives Present at IEP Meetings

Under the IDEA, the public agency must ensure that the IEP team for each child with a disability includes (1) the parents of the child; (2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher of the child, or if appropriate, at least one special education provider of the child; (4) a representative of the public agency who (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general curriculum; and (iii) is knowledgeable about the availability of resources of the public agency; (5) an individual who can interpret the instructional

implications of evaluation results, who may be a member of the team already described; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) if appropriate, the child. 34 C.F.R. § 300.321(a).

It is particularly important in cases involving students with ASD that all required school personnel participate in the IEP meeting. Schools have failed to ensure that the appropriate "LEA representative" attends the IEP meeting. This person is likely to be someone *in addition to* the child's teachers. However, the federal regulations indicate that the LEA representative can be one of the other LEA team members listed, as long as that person also meets the qualifications of an LEA representative. 34 C.F.R. § 300.321(d).

In cases involving students with ASD, the presence of a regular education teacher can be extremely important. A regular education teacher of the child must participate in IEP development and review/revision when the student is or may be participating in the regular education environment. The IDEA provides that a member of the IEP team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the LEA **agree** that the attendance of such member is not necessary "because the member's area of the curriculum or related services is not being modified or discussed in the meeting." 34 C.F.R. § 300.321(e). When the meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member may be excused if the parent and LEA **consent** to the excusal and the member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting. *Id.* Parental consent to any excusal must be in writing. *Id.* For example, in *Vestavia Hills City Bd. of Educ.*, 51 IDELR 59, *25-27 (SEA Ala. 2008), even though the student did not appear to meet the state's criteria for autism, the school was ordered to hold a second eligibility meeting because IEP team members were excused without the parents' consent, causing the parent to be deprived of critical information about her son's performance.

The Ninth Circuit has held that the failure of the school district to have a regular education teacher at the IEP meeting for an autistic and intellectually impaired student was a denial of FAPE. *M.L. v. Federal Way Sch. Dist.*, 42 IDELR 57, *12-13, 387 F.3d 1101 (9th Cir. 2004). When the general education teacher was unable to attend, the court held, the school district should have cancelled the meeting and not proceeded without the benefit of input from the general education teacher regarding the regular curriculum and environment. *Id.* at *13; *see also Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109, 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 126 S. Ct. 422 (2005) (failure to have regular education teachers present at several IEP meetings was, in and of itself, a denial of FAPE).

Particular attention should be paid to the regular education teacher requirement when the student is a preschooler. For example, in *S.B. v. Pomona Unified Sch. Dist.*, 50 IDELR 72 (C.D. Cal. 2008), the court deemed district's failure to include the student's preschool teacher as a substantive procedural violation that resulted in a loss of educational opportunity for the student because the teacher could have shared her observations of the student's abilities and special needs. "At the very least, she could have elaborated on what she had told the transdisciplinary assessment team" and "would have assisted the IEP team in devising a program that was better tailored to Student's abilities and special needs." *Id.* at *11-12.

It is not unusual for challenges to be made that the IEP team did not include team members that had sufficient expertise in the area of autism. In upholding the school’s “eclectic” program using multiple instructional and behavioral methods, one court held that IDEA does not require that an “autism expert” be included on a child’s IEP team so long as all mandatory members to the IEP meeting are present. *Parenteau v. Prescott Unif. Sch. Dist.*, 51 IDELR 213 (D. Ariz. 2008); *see also, Dong v. Board of Educ. of Rochester Community Schs.*, 31 IDELR 157, 197 F.3d 793 (6th Cir. 1999) (school district not required to have present an expert in the parent's chosen methodology particularly if there is the presence of persons who were generally familiar with the various methodologies employed with children with autism and had direct experience working with children with autism); *Burilovich v. Board of Educ.*, 32 IDELR 85, 208 F.3d 560 (6th Cir. 2000).

It is key to ensure the presence of persons knowledgeable about the student, as well. In *Melodee H. v. Department of Educ.*, 374 F. Supp. 2d 886 (D. Haw. 2008), the court found that the school district had no one at the pivotal IEP meeting who knew the child, except for the parents; there was no discussion of where the student was going to school; and the parents were not given any information about the proposed elementary school. These procedural violations were coupled with the insufficient consideration about the harmful effect on the child if placed at the elementary school. Together, these inadequacies gave rise to the procedural error – failure to invite the parents’ expert to the IEP meeting. *See also*, 34 C.F.R. § 300.116(d) (procedural requirement to consider the harmful effects of placement in the LRE).

G. **Failure to Adequately Involve the Parents in the Educational Decision-making Process**

Parental participation in the development of an IEP is one of the cornerstones of the IDEA, and is particularly crucial in ASD cases, where each diagnosis and set of needs is unique. Indeed, parents frequently raise this issue.

The mere existence of a difference in opinion between a parent and the rest of the IEP team is not sufficient to show that the parent was denied full participation in the process, nor that the school determined that the student should return to a public school placement. *Laddie C. v. Dept. of Educ.*, 52 IDELR 102, *4 (Haw. 2009). On remand, the court instructed the lower court to determine at which meeting the placement decision was actually made, who was involved in that decision, and whether those persons were sufficiently knowledgeable of the student’s needs to make the decision, in order to assess whether a violation occurred. *Id.*

1. “Predetermination”

It is important that the IEP team make every attempt to get parent input before making a placement decision. Perhaps the most commonly alleged procedural violation in cases involving the education of students with ASD is that a “predetermination of placement” was made prior to the IEP meeting involving the parent. If a parent can show that they were denied meaningful participation in the development of an IEP, and that a predetermination of placement occurred, it will very likely lead to a finding of a denial of FAPE. For example, a single-minded focus on a particular placement on the LRE continuum, along with the refusal meaningfully to discuss the parents’ proposal, violates the IDEA. *Modesto City Schs.*, 6 ECLPR 40 (SEA Cal. 2008). In

Modesto, the school refused meaningfully to discuss the need for one-to-one ABA services because such services were not what the school believed to be the student's LRE. *Id.* at *6. Further, because the district insisted on placing the child in a special day class for autistic students in lieu of "allow[ing the parents] to present their proposed placement to the IEP team, and...fairly consider that proposal as an option for [the child]," the district was ordered to provide compensatory services and 30 hours of weekly private ABA services for nearly a year. *Id.* at *6 and 16.

To establish predetermination, the parents need to show that the district was unwilling to consider other placements. In a case where the parents had failed to suggest any alternative placement at their son's IEP meeting in the face of the school's desire for a public school placement, the Ninth Circuit found no predetermination. *H.B. v. Las Virgenes Unif. Sch. Dist.*, 48 IDELR 31 (9th Cir. 2007, *unpublished*) (remanded for evidentiary hearing to determine if school would have been willing to consider other options).

Another component of "predetermination of placement" is whether the school personnel fail to have open minds about the IEP development. Typically, the focal point of a predetermination finding is the existence of a pre-meeting. For example, in a case where there was no evidence of a pre-meeting agreement to adopt particular recommendations (i.e. the school's consultant's recommendations) and there was evidence that the parents participated in the IEP meeting that led to the IEP team adopting some of the parents' recommendations, such participation can be found to be meaningful. *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 253 (2nd Cir. 2009). Similarly, school personnel's research of placement options, including one newly developed for students with Asperger Syndrome and located in the public high school, prior to an IEP meeting did not amount to predetermination, held one court. *Schoenbach v. Dist. of Columbia*, 46 IDELR 67, *5-6 (D. D.C. 2006). In *Schoenbach*, the court further explained that the district was required to determine if there was an appropriate public school placement before agreeing to private placement. *Id.* at *5.

This concept of exploring options prior to decision-making also applies to parents and their experts. A school's suggestion of reviewing a public school placement for a student before testing was all finalized is not an error; rather, it would have been wrong to refuse to indicate to the parents where it appeared the data was leading. *W.S. v. Rye City Sch. Dist.*, 454 F.Supp.2d 134, 148 (S.D. N.Y. 2006). In this case, the re-emergence of stereotypical behaviors observed by the child's classroom teacher causing her to re-evaluate the committee's earlier conclusion was proper. *Id.*

Next, issues arise when school personnel do have a pre-meeting. When school staff meet prior to the IEP meeting and without the parents, the focus of the meeting needs to be for preparation of draft goals and objectives, inform opinions, and compile reports prior to IEP meetings, and yet ensure that the IEP meeting subsequently conducted has meaningful discussions and considerations of various options. *E.W. v. Rocklin Unified Sch. Dist.*, 46 IDELR 192, *6-7 (E. D. Cal. 2006). In *E.W.*, factors that supported there was no predetermination included an IEP summary that reflected discussion of five different placement options including the provision of in-home services, the ultimate program recommendation, input of an in-home provider, and a summary of the discussion replete with references to input provided by the student's parents. *Id.* at *7. The right of parental participation is *not* violated where teachers or staff merely discuss a child or the IEP outside of an IEP meeting, where such discussions are in preparation for IEP

meetings and no final placement determinations are made. *N.L. v. Knox County Schools*, 38 IDELR 62, 315 F.3d 688 (6th Cir. 2003). See also, *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003); *Burilovich v. Board of Educ.*, 208 F.3d 560 (6th Cir. 2000); and *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 19 IDELR 259 (E.D. Va. 1992) (school officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind).

The IDEA does not explicitly vest within parents a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement. *L.M. v. Hawaii Dept. of Educ.*, 46 IDELR 100, *5 (D. Haw. 2006). When a parent's suggestions are not accepted nor incorporated into the IEP, it does not necessarily constitute a procedural violation. *Id.*

2. Clear and Final Offers/Prior Written Notice

An LEA must make an offer to provide special education and related services with sufficient clarity and finality to provide parents sufficient opportunity for meaningful input into the decision-making. For example, where the written language of an autistic student's IEP noted that the school district considered the mother's plans for the summer and offered special education services instead, this constituted valid written notice of the district's refusal to place the student at a private summer camp. *A.B. v. San Francisco Unif. Sch. Dist.*, 51 IDELR 158 (N.D. Cal. 2008). This notice sufficed as clear prior written notice to deny extended school year (ESY) services. *Id.*

H. Failure to Make Placement Recommendations Based On the Student's Individual Needs

There may be nothing worse than evidence that the school district's recommendations for services are based on something other than the individual needs of the child. Where it appears that a recommendation for services was based upon someone's schedule, policy or custom or even cost, that can be a procedural violation sufficient to constitute a denial of FAPE.

An LEA's failure to consider the student's needs when it recommends a program for the student is a denial of FAPE. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2004), *cert. denied*, 126 S. Ct. 422 (2005). Similarly, an LEA's unofficial policy of refusing to provide one-to-one ABA programs because it had previously invested in another educational methodology has been found to constitute a denial of FAPE, as "school system personnel thus did not have open minds and were not willing to consider the provision of such a program." *Id. at 858*. One school's proposal to enroll a student in a new program was not shown to be based on evaluative information or individualized consideration of the student's needs, but rather was based on administrative convenience and staffing difficulties involving the retaining of aides to deliver DTT. *Sanford Sch. Comm. v. Mr. and Mrs. L.*, 34 IDELR 262 (D. Me. 2001). The important lesson here is that recommending placement based on availability of services, not the child's needs, can result in a procedural violation that creates a financial obligation for the school. See *T.H. v. Board of Educ. of Palantine Community Consolidated Sch. Dist.*, 30 IDELR 764 (N.D. Ill. 1999).

I. Failure To Provide Sufficient Written Notice

1. Offer of FAPE

As part of an LEA's efforts to ensure adequate parental participation in decision making, it must provide "prior written notice" with respect to a proposal or refusal to initiate or change the student's identification, evaluation, placement or services.

An LEA's prior written notice of proposed services and placement to parents must be consistent with the discussions of the IEP meeting and detailed enough for the parent to be fully informed about the placement. The written notice can be found insufficient when it differs from the IEP meeting discussion. For example, a written notice proposing 20 hours of special education services, not all of which were to be provided by special educators but by the regular education teacher, provided after, and inconsistent with, the IEP meeting discussion, was found to be an improper change of placement without sufficient written notice. *Anchorage Sch. Dist. v. M.P.*, 45 IDELR 253 (Alaska Sup. Ct. 2006).

In one case, despite its eventual offer of an appropriate program, the school district was found to have denied FAPE because it failed to have a formal written offer of placement that provided the family enough information to determine whether the offered placement would meet the child's needs. *Glendale Unified Sch. Dist. v. Almasi*, 33 IDELR 221, 122 F.Supp.2d 1093 (C.D. Cal. 2000). This resulted in an award of reimbursement, but only partial reimbursement because of the family's withholding of information from the school district.

2. Procedural Safeguards

LEAs must provide parents with copies of the IDEA procedural safeguards; and it is a good idea to document that the notice of parent rights has been provided. Where the failure to comply with IDEA's notice requirements leads to a finding of denial of FAPE, a court may award reimbursement for substantial educational expenses incurred by parents because they were not notified of their right to challenge the appropriateness of the district's program. The Fourth Circuit determined in *Jaynes v. Newport News*, 35 IDELR 1, 13 Fed. Appx. 166 (4th Cir. 2001) that a school district's failure to notify the parents of their right to a due process hearing was a procedural violation that constituted a violation of FAPE. It upheld the decision of the district court to award reimbursement for the parents' Lovaas program.

IV. ROWLEY'S SECOND PRONG: THE CONTENT/QUALITY OF THE IEP

Once an LEA has cleared the procedural hurdles in its preparation of preparing the IEP, it should keep in mind the *Rowley* Court's second prong for determining FAPE: —whether the IEP is reasonably calculated to enable the student to receive educational benefit. Courts addressing this prong have established legal principles that reveal a number of elements that should be included in a defensible IEP for a student with ASD.

It is challenging, at times, for staff working with students with ASD to align goals to the regular curriculum and to measure progress gaining skills in the school environment. Yet we must be able to demonstrate academic and behavior progress to successfully defend costly and often high-stakes compensatory education claims involving students with ASD. There are a number of complicating factors in these cases, especially when associated behavior issues have complicated the decision about placement within the least restrictive environment ("LRE").

A. **Ascertaining the Student’s Potential to Determine “Educational Benefit”**

Crucial to the defense of a school district’s IEP/program is consideration of the relevant jurisdiction’s definition or standard for “educational benefit.” While all of the courts have accepted that IDEA does not require services that will “maximize the potential” of a student with a disability, the slight majority of circuit courts of appeal have interpreted *Rowley* to require “some” (not *de minimis*) educational benefit² while the minority of them have interpreted the *Rowley* decision to require “meaningful benefit”³ that is relative to or gauged based upon the student’s potential. Understanding the standard is particularly important in the defense of cases involving students with ASD. As described above, clear evaluation or functioning information is needed to define potential. Potential is complicated analysis of rate of progress, intellectual abilities, and contributions of impairments of communication and/or behavior. Thus, it is critical to determine what can be reasonably anticipated for progress on goals and objectives to measure educational benefit, and analyze the student’s success according to the appropriate standard in that Circuit.

Some have argued that over the course of IDEA’s amendments, the *Rowley* standard has been eviscerated; however, courts have consistently held that Congress has expressed no clear intent to change it. See *J.L. v. Mercer Island Sch. Dist.*, 52 IDELR 241 (9th Cir. 2009); *Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist.*, 49 IDELR 180, 518 F.3d 18 (1st Cir. 2008); and *K.C. v. Mansfield Indep. Sch. Dist.*, 52 IDELR 103, 618 F. Supp.2d 568 (N.D. Tex. 2009) (each addressing the 1997 Amendments); *Mr. and Mrs. C. v. Maine Sch. Admin. Dist. No. 6*, 49 IDELR 281, 538 F.Supp.2d 298 (D. Me. 2008) (addressing the 2004 Amendments); *Leighty v. Laurel Sch. Dist.*, 46 IDELR 214 (W.D. Pa. 2006) (addressing No Child Left Behind Act.) It is too early to determine whether similar argument will be made with the new Every Student Succeeds Act.

B. **IDEA’s “Peer-Reviewed Research” and “Evidence-Based” Requirements**

The 2004 IDEA Amendments changed the requirements related to the IEP’s statement of special education and related services/supplementary aids and services by requiring this statement to be “based on peer-reviewed research to the extent practicable....” 20 U.S.C. § 1414(d)(1)(A)(i)(IV). In addition, the IDEA and the regulations now use the terms “scientifically research based” when referring to interventions and services provided. This language has led advocates to argue that all

² Jurisdictions following the “some educational benefit” standard: *Reid v. District of Columbia*, 43 IDELR 3, 401 F.3d 516 (D.C. Cir. 2005); *Missouri Dept. of Elementary & Secondary Educ. v. Springfield R-12 Sch. Dist.*, 40 IDELR 204, 358 F.3d 992 (8th Cir. 2004); *A.B. v. Lawson*, 40 IDELR 121, 354 F.3d 315 (4th Cir. 2004); *Maine Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R.*, 38 IDELR 131, 321 F.3d 9 (1st Cir. 2003); *Todd v. Duneland Sch. Corp.*, 37 IDELR 151, 299 F.3d 899 (7th Cir. 2002); *O’Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 28 IDELR 177, 144 F.3d 692 (10th Cir. 1998); *JSK v. Hendry County Sch. Bd.*, 18 IDELR 143, 941 F.2d 1563 (11th Cir. 1991).

³ Jurisdictions following the “meaningful educational benefit” standard: *Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109, 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 126 S. Ct. 422 (2005); *Shore Reg’l High Sch. Bd. of Educ. v. P.S.*, 41 IDELR 234, 381 F.3d 194 (3^d Cir. 2004); *Adam J. v. Keller Indep. Sch. Dist.*, 39 IDELR 1, 328 F.3d 804 (5th Cir. 2003); *Adams v. Oregon*, 31 IDELR 130, 195 F.3d 1141 (9th Cir. 1999); *Mrs. B. v. Milford Bd. of Educ.*, 25 IDELR 217, 103 F.3d 1114 (2^d Cir. 1997).

instructional methodologies must be “scientifically research based” or based upon “peer-reviewed research.”⁴ “There are many interventions for ASD; yet scientific research has found only some of these interventions to be effective.” <http://autismpdc.tpg.unc.edu>. The National Professional Development Center on ASD has found 27 practices through scientific research to be effective when implemented correctly with students with ASD. *Id.*

To balance this challenging argument, we may find some assistance in the commentary issued by the U.S. Department of Education (DOE) as part of the finalization of the 2006 IDEA regulations. Among other things, DOE declined “to require all IEP Team meetings to include a focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refuses to provide documentation of research-based methods, as we believe such requirements are unnecessary and would be overly burdensome.” 71 Fed. Reg. 46665. In conjunction with this, however, DOE noted that states, school districts, and school personnel must select and use methods that research has shown to be effective, “to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE.” 71 Fed. Reg. 46665.

A few regulatory commenters requested that the final regulations require special education programs to be research-based with demonstrated effectiveness in addressing the particular needs of a child. DOE responded that “[w]hile the Act clearly places an emphasis on practices that are based on scientific research, there is nothing in the Act that requires all programs provided to children with disabilities to be research-based with demonstrated effectiveness in addressing the particular needs of a child where not practicable. We do not believe the recommended change should be made because, ultimately, it is the child’s IEP Team that determines the special education and related services that are needed by the child in order for the child to receive FAPE.” 71 Fed. Reg. 46665.

A school is not required to adopt the parents’ preferred program when there was no evidence that the methodology was the only one that would provide a student with an educational benefit. *Brown v. Bartholomew Consolidated Sch. Corp.*, 43 IDELR 60, 2005 WL 552194 (D. Ind. 2005), *vacated*, 45 IDELR 147 (7th Cir. 2006) (IEP dispute later deemed moot when a child moved to a different school district). In *Brown*, the school district’s IEP was appropriate for a kindergarten-age student with autism, even though it did not provide him with his parents’ preferred methodology—at-home

⁴ Currently, the most-often referenced publications regarding the research conducted and results thereof relative to educational programs for students with Autism are “Educating Children with Autism,” National Research Council/National Academy Press (2001) and “Autism Spectrum Disorders: Interventions and Treatments for Children and Youth,” Richard L. Simpson (2005), available at <http://www.nationalautismcenter.org/national-standards-project/phase-2>.

Also, the National Professional Development Center on Autism Spectrum Disorder released National Standards Project, Phase 2, on April 2, 2015, which summarizes empirical intervention literature on interventions for ASD researched between 2007 to 2012. <http://autismpdc.tpg.unc.edu>.

one-to-one ABA instruction by trained ABA instructors. While evidence demonstrated that the student progressed through his at-home ABA instruction, that alone does not establish that ABA was the only way for him to be educated; nor did it establish that it was unreasonable at the time District created his IEP "to suppose that [he] could receive meaningful educational benefits from a program that did not include ABA." *Id. at *10*. Finally, a comparison of the two programs was irrelevant "except to the extent it sheds light on the adequacy or inadequacy of the school district's program." *Id.* The proper inquiry is whether the District's program complied with the IDEA.

Most conflicts between schools and parents arise from parents seeking a single methodology or the provision of services by a private provider. Most typically, schools will use eclectic methodologies in programming for ASD; schools tend to focus on approaches that yield skill mastery that can be generalized from setting to setting and within a series of tasks. Other approaches, most notably, ABA, operate within a structured format for task instruction, are susceptible to criticisms that it does not focus on outcomes for generalization of skills. Also, arguments emerge about how much time must be devoted to particular methodologies.

The school district is not required to develop an ABA-based program for an autistic child to comply with the 2004 IDEA's "peer-reviewed research" provision; rather, a school only needs to show that a proposed IEP based on eclectic methodology would provide educational benefit to the student. *Joshua A. v. Rocklin Unif. Sch. Dist.*, 49 IDELR 249, 2008 WL 906243 (E.D. Cal. 2008), *aff'd*, 52 IDELR 64 (9th Cir. 2009). "It does not appear that Congress intended that the service with the greatest body of research be used in order to provide FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE." *Id. at 3*.

Schools are not required to provide a prescriptive 40 hours per week of ABA services. *A.G. v. Frieden*, 52 IDELR 65 (S.D. N.Y. 2009). In *A.G.*, the court determined that an Individualized Family Service Plan is adequate in the context of IDEA if it is reasonably calculated to provide some non-trivial educational benefit. *Id. at 5-6*. It need not maximize the student's potential, nor need it be the best program possible. *Id.* Similarly, "[a]lthough the parents' witnesses all believed that 20 hours of ABA therapy per week would neither be the optimal treatment level for N.G. nor maximize his development and that more hours were desirable, none testified that 20 hours of ABA therapy per week [offered by the school] would provide no or only trivial benefit." *Id. at 11*. See also, *Encinitas Union Sch. Dist.*, 5 ECLPR 117 (SEA Cal. 2008) wherein the court rejected the parents' argument for a 40 hours per week of home-based ABA services in favor of the school's proposed IEP, with eclectic programming, which offered 39 hours of services in a preschool special day class through a Head Start program.

One of the keys is to ensure that goals and objectives are aligned to assessment data and ensure meaningful benefit. But keep in mind there may be conflict over which methodologies can ensure such benefit. When the goals and objectives of the IEP are appropriately designed to provide a student with a meaningful educational benefit and the goals and objectives are developed based on evaluations, assessments, parental input, and observations of the student, such evidence may defeat a challenge in which the parents asked for an intensive home ABA program. *Michael J. v. Derry Township Sch. Dist.*, 45 IDELR 36 (M.D. Pa. 2006). In *Michael J.*, the school included the techniques (including some ABA) used to implement the IEP and supported placement in the least restrictive environment because of the opportunity to interact with non-disabled peers, whereas the

home-based program did not. Similarly, in upholding a District program described as “eclectic,” a court was not convinced that the ABA/discrete trial training approach was the only appropriate methodology for teaching the student. *J.P. v. West Clarke Community Sch.*, 38 IDELR 5, *20, 230 F.Supp.2d 910 (S.D. Ind. 2002). Further, the District demonstrated a willingness to incorporate ABA/DTT methods into its teaching plans and demonstrated flexibility by adding more hours and communication goals to the child's program. *Id.* In a similar analysis, appropriately incorporated DTT instruction into a comprehensive curriculum can overcome prescribed desired methodology, particularly when parents’ expert subscribed to only one methodology. *Renner v. Board of Educ. of the Pub. Schs. of Ann Arbor*, 30 IDELR 885,* 8-9, 185 F.3d 635 (6th Cir. 1999).

C. **Generalization of Skills**

In defending cases involving students with ASD, you should consider how the IEP addresses social skills, communication skills, and behavior function across settings. A defensible IEP usually addresses generalizing learned knowledge along with the variance of intellectual and behavioral functioning, and ideally takes into account the variance or consistency between home and school. As a general rule, generalization of skills across settings is not necessary to establish educational benefit under the IDEA. *Thompson R2-J Sch. Dist. v. Luke P.*, 50 IDELR 212, 540 F.3d 1143 (10th Cir. 2008). As long as the student is making some progress in the classroom, the school district does not need to ensure that the student with ASD can generalize functional behavior to his home or other environments. *Id.* at *6.

One court upheld a proposed public school placement where, despite conflicting testimony, there was sufficient support for the determination that the student did not require a residential setting to receive FAPE. *Gonzalez v. Puerto Rico Dept. of Educ.*, 34 IDELR 291, 254 F.3d 350 (1st Cir. 2001). There was adequate evidence that the student's behavior problems could be managed effectively through further services and training in the home; therefore, the District Court's determination that the student's IEP should be expanded to provide the parents with training designed to help them address and control the student's behavior at home was upheld. *Id.* at *3. The court also pointed out that the IDEA “does not require... a residential program simply to remedy a poor home setting....” *Id.* at *2. Other circuits have also made similar conclusions. For example, in *Devine v. Indian River County Sch. Bd.*, 34 IDELR 203, 249 F.3d 1289 (11th Cir. 2001), the court held that a proposed IEP for student with autism was appropriate where the student received at least some educational benefit from the district's program. Accordingly, parents' demand for a private residential placement and reimbursement was rejected based, in part, on testimony that the student acquired skills, “which he could display across settings.” *Id.* at *3. The court also rejected the parents’ claim that the IEP was inadequate because it did not provide for individuals other than family members to care for the student while at home. *Id.*

D. **Including an Appropriate Determination of Least Restrictive Environment (LRE)**

For students with ASD, the issue of providing special education services in the LRE can be particularly challenging. Specifically, the IDEA provides that each State must establish procedures to assure that, “to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when

the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5).

The IDEA regulations require that each public agency ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. This continuum must include the alternative placements listed in the definition of special education under 34 C.F.R. § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) and supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. 34 C.F.R. § 300.115. In determining the educational placement of a child with a disability, each public agency An LEA must ensure that the placement decision for a child with a disability is made by a group of persons, including the parents, and other persons knowledgeable about the child, which considers the meaning of the evaluation data, and the placement options, and that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. In addition, unless the IEP of a child with a disability requires some other arrangement, the child is to be educated in the school that he or she would attend if nondisabled. In selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. Importantly, the placement team must also ensure that a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R. § 300.116.

Established case law for several Circuit Courts of Appeal have formed the standards and/or factors that IEP Teams are to follow in making LRE decisions. Obviously, you must determine the relevant standard in your jurisdiction and follow it when determining what the LRE is for a student with ASD. *See, e.g., P. v. Newington Bd. of Educ.*, 51 IDELR 2, 546 F.3d 111 (2d Cir. 2008); *L.B. v. Nebo Sch. Dist.*, 41 IDELR 206, 379 F.3d 966 (9th Cir. 2004); *Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Holland*, 20 IDELR 812, 14 F.3d 1398 (9th Cir. 1994); *Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist.*, 19 IDELR 908, 995 F.2d 1204 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 18 IDELR 412, 950 F.2d 688 (11th Cir. 1991), *withdrawn*, 956 F.2d 1025 (11th Cir. 1992), *reinstated*, 967 F.2d 470 (11th Cir. 1992); *Daniel R.R. v. State Bd. Educ.*, 411 IDELR 433, 874 F.2d 1036 (5th Cir. 1989); *Roncker v. Walter*, 554 IDELR 381, 700 F.2d 1058 (6th Cir.), *cert. denied*, *Cincinnati City Sch. Dist. v. Roncker*, 464 U.S. 864 (1983).

1. Balancing the LRE Requirement for a Student with ASD with Instruction Utilizing ASD Methodologies.

One of the touch stones for analyzing whether a particular placement for a student with ASD meets LRE legal standards concerns consideration to the underlying methodologies. While the IEP itself may not specify the methodology, in developing the IEP an LEA should ensure that personnel knowledgeable about ASD methodologies and knowledgeable about the student participate in the IEP process, including the placement decision. The LEA must also ensure that data supports the rate of learning in the settings being contemplated. *See Burilovich v. Board. of Educ. of the Lincoln Consolidated Schs.*, 32 IDELR 85, 208 F.3d 560 (6th Cir. 2000)(where school ensured IEP meetings properly involved knowledgeable personnel, placement in LRE had been offered; parents' program of in-home DTT was overly restrictive and amounted to a methodological choice.)

LRE for preschool students has its own set of considerations. The Comments to 300.552 clarify that districts that do not operate programs for nondisabled preschool children are not required to initiate those programs solely to satisfy LRE requirements. For those school districts, alternative methods for meeting the requirements include: a) providing opportunities for participation of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start); b) placing children with disabilities in private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities with nondisabled children; and c) locating classes for preschool children with disabilities in regular elementary schools. Comment to 34 C.F.R. § 300.552. A California district was found to have failed to provide FAPE to an autistic preschool student with a language disorder where the child's non-inclusive placement was not designed to meet her unique needs in the area of pragmatics and social skills. *Katherine G. v. Kentfield Sch. Dist.*, 42 IDELR 29 (9th Cir. 2004). Similarly, an LEA that had placed a student with ASD in its preschool program populated primarily with students with disabilities needed also to ensure opportunities for more appropriate role models better suited to meet her behavioral and social needs. *L.B. v. Nebo Sch. Dist.*, 41 IDELR 206, 379 F.3d 966 (10th Cir. 2004).

Another factor that often arises is the use of one-to-one aides as a supplementary service to support a less restrictive environment. A district court's decision that school district's program was inappropriate because the provision of a one-to-one aide promoted "learned helplessness" was overturned because the school district had outlined fading of the aide to foster the student's independence by decreasing the level of prompting where it was no longer needed and had focused on independence in following daily routines. *A.C. v. Board of Educ. of the Chappaqua Cent. Sch. Dist.*, 51 IDELR 147, 553 F.3d 165 (2d Cir. 2009). The issue of providing the one-to-one aide needs to be examined in light of the severity of the students' needs. In contrast, a school's proposal to address multiply-disabled high school student's increasing academic difficulties by revising his IEP to provide for a more restrictive class setting, a one-to-one aide and counseling was found to be the appropriate LRE over a residential placement. *Corpus Christi Indep. Sch. Dist. v. Christopher N.*, 45 IDELR 221, *5-6, (S.D. Tx. 2006).

Placement on the continuum from partial day to full day placement in special education programming can be a function of the age of the student, the student's cognitive functioning level, and his/her ability to regulate behavior. One district proposed placement of an elementary student in general education classes part of the day was found to meet LRE requirements over a full time general education placement, *Laura P. v Haverford Sch. Dist.*, 51 IDELR 183 (E.D. Pa. 2008), where there was evidence that the student tested at the beginning kindergarten level in math and reading, and required intensive instruction in subjects that could not be provided in the general education classroom, even with the use of supplemental aids and services. *Id.* at *13. "[This student] has significant language, attention and sensory needs, requiring intensive, systematic and direct instruction with multiple opportunities for guided practice and repetition in a [small], structured learning environment." *Id.*

Evidence of unsuccessful use of numerous supports and accommodations in the general education classroom, including a one-to-one aide, to enable learning in basic skills in math, language and reading comprehension has supported a placement decision for a self-contained class with the ABA-based intensive instruction for students with autism. *S.K. v. Parsippany-Troy Hills Bd. of Educ.*, 51 IDELR 106, *9 (D. N.J. 2008). There, the evidence also showed that the student would

continue to have mainstreaming opportunities and lacked progress in developing skills over the years. *Id.* at *9-10.

In cases where parents have challenged changes of placement from inclusive to more restrictive settings, courts often employ a multi-factored analysis of harmful effects and supporting evidence to demonstrate meaningful benefit. In one case, a self-contained program that offered a low student-to-teacher ratio, was staffed by personnel certified in ABA methodology, and allowed the child to have regular opportunities to interact with typically developing peer was found to support the finding that it is the child's LRE over a general education preschool program. *M.W. v. Clarke County Sch. Dist.*, 51 IDELR 63 (M.D. Ga. 2008). In *M.W.*, the school was able to show that ABA training "would be almost impossible in a regular setting and that [the child] would require 'a truckload of pull-out' from a regular education classroom to obtain all of the services he needed...." *Id.* at 10. Similarly, a proposal for a high schooler with autism to receive math instruction in a resource room, rather than a general education classroom, was found to be appropriate when there was evidence of the need for direct verbal instruction from an adult. *Yates v. Washoe County Sch. Dist.*, 51 IDELR 7 *5 (D. Nev. 2008).

As the age of the student with ASD increases, so do curricular demands. These curricular demands can be a focal point of the evidence. For example, a change in placement of a 12-year-old student with ASD and multiple disabilities from a full inclusion program to a segregated program did not violate IDEA when the student's instruction was substantially an individualized curriculum and the "student's academic progress was virtually nonexistent and her developmental process was limited." *Pachl v. Seagren*, 43 IDELR 136, *7, 373 F.Supp.2d 969 (D. Minn. 2005), *aff'd*, 453 F.3d 1064 (8th Cir. 2006); 46 IDELR 1 (8th Cir. 2006). Even though a student with ASD and multiple other disabilities was fully included into regular education courses during elementary years, when the student entered sixth grade, the school recommended a part-time placement in special education classes. *Id.* The court heavily factored the marginal benefits to the student along with the disruptive force to the non-segregated setting. *See also, Metropolitan Govt. of Nashville Davidson Co. v. Guest*, 31 IDELR 75, 193 F.3d 457 (6th Cir. 1999). Most notably, in the foregoing cases, the students were no longer in elementary grades.

Often the question of methodology is tied to the issue of LRE. For example, when there is evidence that student's needs are such that he cannot be educated in a group setting, reimbursement to parents for private schooling utilizing one-to-one ABA therapy versus the school district's TEACCH program provided in a group setting can be warranted. *County Sch. Bd. of Henrico County v. R.T.*, 45 IDELR 274 (E. D. Va. 2006). (This case is also noteworthy because it provides a detailed description of the TEACCH and ABA methodologies as well as the attendant challenges, as described by testifying experts, of addressing behavior issues with students with cognitive deficits through research-based programs.)

As discussed above, students with ASD commonly display social skills and/or behavior regulation challenges. Behavior can be further complicated with communication and/or intellectual delays. The interplay between these challenges often generates discussion regarding private and/or residential placements. Residential placement was found to be inappropriate for an autistic child in one case because experts had testified that the child could make educational progress in a day program, and the remaining concerns were primarily with the child's behavior at home and after school. *Schreiber v. Ridgewood Bd. of Educ.*, 25 IDELR 421, 952 F. Supp. 205 (D. N.J. 1997).

The court's decision affirmed the practical proposition that "neither the Court nor the school district can be charged with caring for a disabled child at all times." (*See also* discussion above about generalization of skills.)

2. Unilateral Placements

It is common for parents to have placed a student in a private setting unilaterally before an IEP is implemented. Thus, the school's procedural duty to timely evaluate and offer a FAPE can be linked to unilateral placement decisions. For example, in *T.F. v. Special Sch. Dist. of St. Louis County*, 449 F.3d 816 (8th Cir. 2006), the school's proffered public program was upheld over parents' request for full-time residential placement. The student, who had multiple disabilities including "educational autism," attended public school through fourth grade, participating in mainstream classrooms with several hours of special education services per week. The student exhibited behavior problems, and the parents enrolled him in private placements through seventh grade. In seventh grade, despite good academic performance, the student's behavior problems led to his expulsion from private school and the parents' request for residential placement. The school district's offer of unique services, which were focused on his needs, that the student had not previously experienced, was found to have provided an appropriate education. Similarly result was found in *M.E. v. Board of Educ. for Buncombe County*, 36 IDELR 97, 186 F.Supp.2d 630 (W.D. N.C. 2002). When evidence shows that the parents would not have accepted the district's IEP without the methodology of their choice and that the parents sought an unilateral placement without giving the school district an opportunity to develop and implement an appropriate program, a court may determine that any procedural violations cannot form the basis of an award for reimbursement in the absence of repeated violations or loss of educational opportunity for the student. *Id.* at *8.

It is also critical to note the impact of the *Forest Grove Sch. Dist. v. T.A.*, 129 U.S. 230 (2009) on the unilateral placement analysis. While *Forest Grove* was not a case involving a student with ASD, the Court held that the IDEA does not bar parents from removing a student from a public school setting prior to requesting an IEP. *Id.* This further punctuates the importance of ensuring a timely offer of FAPE. In a dispute decided after *Forest Grove* concerning the unilateral placement of a student into an ABA program, the Second Circuit held that the claim of reimbursement would also require an analysis of "equitable considerations relating to the reasonableness of the action taken by the parents," which took into account attempts the parent made to determine if a placement within the school was available, and that he did not make plans for the unilateral placement until after the IEP meeting which resulted in an inappropriate IEP. *C.F. v. New York City Dept. of Educ.*, 62 IDELR 281, *10 (2nd Cir. 2014).

As noted by *M.N., v. State of Hawaii, Dept. of Educ.*, 58 IDELR 6 (D.C. Hi 2011), *aff'd* 60 IDELR 181 (9th Cir. 2013), parents unilaterally remove their children "at their own financial risk," *citing to Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. at 359, 373 (1985). In *M.N.*, the administrative law judge found that the school's IEP was inappropriate because it lacked a transition plan. The court, however, found that the IHO could not impose a legal requirement that the IDEA itself does not require. *Id.* * 5. Further, the court determined that under the private ABA program the parents chose, the student had not made progress in too many areas, and the program did not meet the student's needs for "academics, group instruction, socialization, generalization and OT" over the 1½ years period. Reimbursement was denied. *Id.*

Finally, in a recent case, an Indiana court held that for an award of compensatory education in a private school setting, there must be a determination that the school violated the IDEA in the development of an IEP by not offering FAPE and that the private school was proper under the Act utilizing the same legal analysis as is applied to unilateral placements. *J.H. v. Lake Central Sch. Corp.*, * 6 (N.D. Ind. 2014). In *J.H.*, the IHO awarded compensatory education “without finding even one fact that supports the conclusion that placement at any therapeutic day school the parents might choose would satisfy the IDEA’s guarantee to [the student].” *Id.*

E. **Consultation with and Use of Experts/Expert Witnesses in Developing Programs for Students with ASD**

Particularly in cases involving the education of students with ASD, use and reliance upon experts in the field of autism are vital to successful defense of programming. More often than not, the court decisions boil down to a “battle of the experts” and an assessment of the quality of the expert witness testimony. In preparing for IEP meeting or disputes, both parties commonly engage experts. To be helpful to either party an expert should have some familiarity with the student. IDEA does not provide a general entitlement to parents or their professional representatives to observe their child in a classroom or in a proposed educational placement. *Letter to Mamas*, 42 IDELR 10 (OSEP 2004). However, school district personnel and parents are encouraged to work together in ways that meet the needs of the parents and the school, including providing opportunities for parents to observe their children’s classrooms and proposed placement options. *Id.* It should be noted as generally explained above, permitting access to observe the student can be linked to the parents’ right to meaningful participation.

For example, the school’s recommendation for ESY needs was upheld because the school demonstrated it had assessed the child’s needs particularly when presented with contrary evidence from experts who were not familiar with the student. *Faulders v. Henrico County Sch. Bd.*, 36 IDELR 183, 190 F.Supp.2d 849 (E.D. Va. 2002). (In *Faulders*, the school successfully focused evidence on the child’s difficulties generalizing social language skills and needs for improving peer communication rather than on one-to-one services.) Similarly, where schools consulted with experts and research to design an appropriate program, instead of opting for a program based on one methodology, it is proper for the fact finder to rely upon the judgment of the experts who crafted the student’s IEP. *Gill v. Columbia 93 Sch. Dist.*, 32 IDELR 254, 217 F.3d 1027 (8th Cir. 2000). To overcome criticisms that an expert lacks knowledge about a student, observations - if not also evaluations - are critical to assess the student’s needs and determine services options.

F. **Employment and Training of Teachers/Service Providers in an Array of Instructional Strategies Appropriate for Students with ASD**

Although the training and qualifications of the school personnel delivering services to students with disabilities is nearly always an issue in IDEA cases, it seems to be more frequently one in cases involving students with ASD. Having trained and qualified staff available to provide FAPE to these students is vital to the successful defense of a school district’s program.

Where a parent is requesting a particular methodology, the school need not compare the qualifications of its staff with that of the parents’ chosen private providers; rather, the school must show that its staff is trained and qualified to implement the child’s educational program. *G. v.*

Fort Bragg Dep. Schs., 40 IDELR 4, 343 F.3d 295 (4th Cir. 2003). See also, *Bradley v. Arkansas Dept. of Educ.*, 45 IDELR 149, 443 F.3d 365 (8th Cir. 2006) wherein the court upheld the school's offer of FAPE to a student with Asperger Syndrome where the record reflected considerable training of teachers, aides, and even fellow students. Training also can impact on the issue of LRE. For example, a school's proposal to move an autistic student to a special education classroom outside the district was rejected where staff at neighborhood school only needed in-service training on autism. *North Scott Community Sch. Dist.*, 21 IDELR 226 (SEA Iowa. 1994), *aff'd*, 26 IDELR 1095 (S.D. Iowa 1995).

One of the most overlooked area for training is with ancillary non-certified staff. As an example, a jury awarded damages of \$400,000 against a school when the student's right to personal safety and security was compromised. The 7-year-old student with Asperger Syndrome had been transported on a bus with lax discipline and sexually explicit conversations. *Enright v. Springfield Sch. Dist.*, 49 IDELR 100 (E.D. Pa. 2007). In *Enright*, evidence showed that the district failed to properly train and supervise its bus drivers and failed to instruct them as at the special needs of students with disabilities. Instead, it told drivers to use their "best judgment" in deciding whether to report unruly behavior.

G. The Inclusion of Appropriate Behavior Intervention Plans/Services

While the IDEA does not specifically require a behavior intervention plan to be part of a student's IEP, it is generally believed that an IEP or a program for a student with ASD should, at the very least, incorporate appropriate behavior strategies and interventions. In addition, the performance of a functional behavioral assessment may be necessary, even if behavioral strategies are effective. Functional behavioral assessments are one of the 27 evidence-based practices identified by the National Professional Development Center on ASD.

1. FBAs/BIPs

Even when a student with ASD and inattentive behavior can be successfully redirected, the school continues to have a duty to conduct an FBA when the student's hyperactivity and self-stimulatory behaviors impede her learning. *Danielle G. v. New York City Dept. of Educ.*, 50 IDELR 247 (E.D. N.Y. 2008). The student also exhibited screaming behaviors, self-stimulatory behaviors and finger play to the point where she was bleeding. Although the teacher was able to manage the student's behavior and to help her to refocus, the student still had difficulty completing assignments and organizing her books. The student's problematic behaviors triggered the district's duty to conduct an FBA.

Often other components within the IEP support and address behavior. The mere absence of a BIP is not evidence that the district did not "consider" strategies to address student's behaviors. *J.K. v. Metropolitan Sch. Dist.*, 43 IDELR 193 (N.D. Ill. 2005). In *J.K.*, behavioral goals were incorporated into the IEP and also listed ABLLS objectives along with "additional behavioral objectives" as two of five goal categories outside the classroom is required to show educational benefit. Similarly, "failure to conduct a [functional behavior assessment], there, does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior." *C.F. v. N.Y.C. Dept. of Educ.*, 62 IDELR 281,*8 (2d Cir. 2014) *citing M.W. ex rel. S.W. v. N.Y.C. Dept. of Educ.*, 725

F.3d 131, 140 (2d Cir. 2013). In *C.F.*, the court also found that the school's own witness admitting that the BIP was vague along with the BIP's failure "to match strategies with specific behaviors, instead simply listing behaviors and strategies" led to a finding of denial of FAPE. *Id.*

One of the common issues that arise in ASD cases is demonstrating timely and on-going assessment of student behavior. Evidence of academic benefits can be discounted when evidence shows that behavior problems "went unchecked and interfered with [a student's] ability to obtain a benefit from his education." *Neosho R-V Sch. Dist. v. Clark*, 38 IDELR 61 (8th Cir. 2003). The court cited the lower court's conclusion that the need for a proper BIP existed long before the school district made an effort to establish one. As an example of the need to timely develop an effective BIP, compensatory education was awarded for a first-grade student with Asperger Syndrome because the student's behaviors ultimately prevented him from attending school, as they became increasingly aggressive, leading to placement in a home-hospital. *Redlands Unif. Sch. Dist.*, 49 IDELR 294 (SEA Cal. 2008).

A common component of behavior programming is the use of sensory diets along with BIPs. In *Lathrop R-II Sch. Dist. v. Gray*, 54 IDELR 276, *5 (8th Cir. 2010), the court rejected the parents' arguments that the BIP lacked baseline data because school was able to show several components that supported its BIP. These included: staff trained in autism, the amount of OT therapy and speech therapy, use of an one-to-one aide, a variety of tailored BIPs using a sensory diet, and involvement of an autism specialist.

2. Social Skills Training

In many cases, the provision of related services to students with ASD is an important issue, particularly those services that address social deficits. As OSEP has opined, appropriate related services for a student with ASD could include social skills training, even though these services are not specifically listed in the definition of "related services" under the IDEA or its regulations. *Letter to Williams*, 33 IDELR 249 (OSEP 2000).

One SEA decided that a school district's social skills program ("Positive Action") was a proven research-based program appropriate for the student and provided him with invaluable practice in social skills interaction with his peers. *Karnes City Indep. Sch. Dist.*, 108 LRP 67639 (SEA Tx. 2008). In addition, the evidence overwhelmingly established repeated attempts by the district to offer parent training to the student's parents in the form of going to an out-of-town Autism conference, parenting classes, and in-home training.

Another SEA found a district's proposed program inadequate, however. There, the SEA decided that a transfer student with Asperger Syndrome required explicit, structured development of his abilities to understand and function in normal social situations. The district's decision to replace the student's social skills training with a study skills class was inappropriate, the SEA found, and entitled the parents to recover the cost of student's private schooling. *Acalanes Union High Sch. Dist.*, 108 LRP 55665 (SEA Cal. 2008). According to a social skills teacher, an independent evaluator, and two school psychologists, the student required numerous opportunities to practice social skills in order to apply them in other settings. There was no evidence that the study skills class included any planned or structured interaction between students or that any organized social skills training occurred. Instead, the study skills class only addressed social skills reactively and

when the teacher became aware of an incident that suggested a need for intervention. The study skills class was not a valid substitute for social skills training.

H. Adequate Transition Services

The issue of transition of students with disabilities, particularly those with ASD, is an important and challenging one. Generally, the IEP team must address and include transition services (generally no later than the IEP that is in place when the student turns 16) that will assist the student in the successful transition to his or her post-secondary world—whether it be a post-secondary school, a job, etc.

For students with ASD, the IEP team may also need to address transition services for a student who has difficulties transitioning *within the school* environment, either from class-to-class or school-to-school. This type of transition service has been the basis for legal challenges. For example, one school’s program was rejected in favor of a private placement when it was found inappropriate for the autistic student due to six deficiencies in the proposed IEP, one of which was the failure to plan adequately for the student’s transition back to public school. *Regional Sch. Dist. No. 9 v. Mr. and Mrs. P.*, 109 LRP 2103 (D. Conn. 2009).

Other decisions have noted that while neither the IDEA nor state special education regulations require districts to offer transition services related to movement from one class to another, the law does require that an IEP meet a child’s unique needs and offer a meaningful educational benefit. *Maine Sch. Admin. Dist. #61*, 49 IDELR 264 (SEA Me. 2008). This can be particularly true when a student consistently experiences significant difficulties with even minor changes in his routine, such as changing from one room to another in a familiar building. *Id. See also M.N., v. State of Hawaii, Dept. of Educ.*, 58 IDELR 6 (D.C. Haw. 2011), *aff’d* 60 IDELR 181 (9th Cir. 2013) (IHO could not impose legal requirement for transition planning that the IDEA itself does not require). Where a school wanted to move a teenager with autism from one private school to another, as part of his transition back to the public high school, the IEP was found to lack a transition plan addressing potential regression of the change in placement, as “anxiety issues and educational needs would present severe problems in transitioning the student from [the current private placement] to another private approved facility, and then ultimately to the [school district’s] high school.” *Wallingford Bd. of Educ.*, 51 IDELR 173 (SEA Conn. 2008).

One school district’s decision to change its recommended placement of ninth-grader with Asperger Syndrome from a small highly structured special day school to a large co-teaching support program was found to have denied the student FAPE because there was no evidence that the student’s previous difficulties coping with a large classroom setting had been resolved; nor could the district justify its “abrupt” decision to change the placement it had recommended for the student for the previous four years. *Cabouli v. Chappaqua Cent. Sch. Dist.*, 44 IDELR 252 (S.D. N.Y. 2005). *See also, T. H. v. Bd. of Educ. of Palatine Comm. Consolidated Sch. Dist.*, 30 IDELR 764 (N.D. Ill. 1999) wherein the school’s program provided no transition from ABA/DTT program to the district’s program.

I. Extended School Year Services

Many experts in the field of educating students with ASD believe that for an educational program to be appropriate, there is preference for ESY services (or year-round services), particularly for those with more involved forms of ASD. While legal precedent does not necessarily support this notion, and it is clear that the ESY consideration must be individualized for all students, including those with ASD, it is an important consideration and is a common basis for a challenge to the content of a school's proposed IEP.

In 1999, the IDEA regulations codified the court-created requirement that IEP teams consider for all students, at least annually, eligibility for ESY services. *See* 34 C.F.R. § 300.106(a)(2). The mere failure to consider ESY services properly, in itself, could lead to a finding of a denial of FAPE, particularly in cases involving students with ASD. *See, e.g., Bend Lapine Sch. Dist. v. K.H.*, 43 IDELR 191 (D. Ore. 2005).

A proper ESY analysis generally requires consideration as to whether: (1) a child suffers an inordinate or disproportionate degree of regression during that portion of the year in which the customary 180-day school year is not in session; and (2) it takes an inordinate or unacceptable length of time for the child to recoup those lost skills (academic, emotional or behavioral) upon returning to school. *See, Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986).

The multi-factored approach suggests that the IEP team consider a number of factors, of which regression-recoupment is only one:

- a. Degree of regression suffered in the past
- b. Exact time of the regression
- c. Ability of the parents to provide educational structure at home
- d. Student's rate of progress
- e. Student's behavioral and physical problems
- f. Availability of alternative resources
- g. Ability of the student to interact with nondisabled children
- h. Areas of the student's curriculum that need continuous attention
- i. Student's vocational needs
- j. Whether the requested services are extraordinary for the student's disabling condition, as opposed to an integral part of a program for populations of students with the same disabilities

Johnson v. Indep. Sch. Dist. No. 4, 921 F.2d 1022 (10th Cir. 1990) (per curiam).

Under the IDEA, ESY services are only necessary when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. *J.H. v. Henrico County Sch. Bd.*, 326 F.3d 560, 38 IDELR 261 (4th Cir. 2003). In *J.H.*, the court decided that the hearing officer used the wrong standard in finding that ESY services were necessary in order for the autistic student to continue to progress on the IEP goals.

J. Related Services

Therapies such as occupational, physical and speech/language as well as assistive technology services are often requested for students with autism. (There are other therapies that may be requested, including Sensory Integration, Auditory Integration (Music), and Vision Therapy.) Whatever the therapy sought, courts will analyze whether it is a necessary related service for the student to benefit from special education services.

Courts have address various related services. One district's delay in developing OT goals was found to be reasonable in light of the child's need to adjust to a new environment. *Winkelman v. Parma City Sch. Dist.*, 51 IDELR 92 (6th Cir. 2008). Another district's proposal to reduce speech therapy services from 90 minutes per week to 60 was determined appropriate, particularly in light of the fact that language services would be incorporated throughout the student's instruction. *See Winkelman v. Parma City Sch. Dist.*, 43 IDELR 162 (N.D. Ohio 2007). Finally, music therapy was not necessary for the student to receive FAPE. *Id.*

The amount of speech services for a student with ASD can be an area of dispute. For example, in an SEA decision, three individualized speech-language therapy sessions and one group session each week for student with autism, who had significant delays in receptive, expressive and pragmatic language were ordered to offset a school's offer of two weekly 30-minute group sessions of speech-language therapy. *Garvey Sch. Dist.*, 51 IDELR 88 (SEA Cal. 2008).

In *North Hills Sch. Dist. v. M.B.*, 65 IDELR 150, (C.D. Pa. 2014) the court details the difficulties associated with programming for a nonverbal student with ASD. The student used moaning and crying to make needs known through a multi-modal communication systems that included PECS, signs, and iPod use. Often the student's attempts to communicate would cause frustration, leading the behavior issues that would be addressed through use of iPod or other means. Because the school had not developed a BIP nor offered an assistive technology evaluation and progress in communication had been limited, compensatory education was awarded to the parents. *Id.* at *10. This case well exemplifies the interplay between behavior and related services needs, including of communication and assistive technology, that often exists in ASD situations.

Disputes over hours of programming have involved parental requests for a certain number of ABA hours per week in the home (e.g., 40 hours per week) and/or after school services to assist the parents in the home. "Parent counseling and training" was specifically added to the list of related services in the 1999 IDEA regulations:

- a. assisting parents in understanding the special needs of their child;
- b. providing parents with information about child development; and
- c. helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

34 C.F.R. § 300.34(c)(8). Although these services are important to include in the IEPs for many students with ASD, as examined above, case law to date does not support the proposition that generalization of skills outside of the school day and into the home is the obligation of the school to ensure FAPE.

V. CONCLUSION AND CHECK LIST

The legal principles established by predominant federal circuit courts and other applicable decisions support the following practical tips to defending case involving students with ASD.

A. **Be proactive.**

As discussed above, programming for students with ASD often requires consultation with experts. If the parents seek to have a methodology-oriented dispute, school personnel should become familiar with the experts associated with that private facility and the programs it offers. If the child is already participating in the private placement, the LEA should obtain as much information about the private school as possible prior to the dispute erupting. School personnel should obtain all records and talk to the private providers. The IEP team should utilize recognized persons in the ASD field to assist in developing the student's program. Any expert consulted by the school should have some experience working with student as well as the family.

B. **Adopt a recognized ASD program.**

All staff working with a student with ASD should be familiar with the theoretical construct of the program adopted. If the school has an eclectic program, then school personnel need be able to explain what components are used and to what extent, how they are used, and why the program was constructed as it was. They also should be able to explain how components operate together. This is particularly true concerning the knowledge base of the certified staff persons developing and/or implementing the IEP.

C. **Train. Train. Train.**

IEP implementation for students with ASD can involve methodologies or techniques that require staff training. It is essential that consideration be given to training at all points of contact for the school across that student's school day. For example, if the student has a specific communication system, consideration needs to be given to transportation personnel and lunch attendants, particularly if that student is expected to navigate those settings with staff support. Similarly, training need will need to be reviewed whenever staff change or when the student changes settings or schools.

D. **Review district/school policies and procedures and all of the student's records.**

Ensure district/school procedures comply with procedural requirements. Many of the common procedural errors are outlined above. This may involve interview staff to ensure their understanding of compliance requirements to tailored placement decisions on an individual basis, particularly with students with ASD. Key areas to investigate are use and implementation of ASD methodologies and how such aid to provide meaningful educational benefit; whether the ASD methodologies are implemented with fidelity, whether timely FBAs/BIPs were developed, and data showing progress.

E. **Ensure IEP team members are “knowledgeable.”**

Where resources permit, it is best that a school staff person (or more than one if it is a large district) who is knowledgeable about various approaches and methodologies for students with ASD be involved with developing IEPs. At an IEP meeting, that person can aid in explaining the district’s continuum of services. More importantly, as issues develop with implementing an IEP, that key staff person can be brought in to assist and/or train.

F. **Focus on adequate transition plans.**

One of the common issues with programming for students with ASD is that changes to a school day or school setting can invite a change in the student’s functioning. It is critical to plan ahead and to ensure that the IEP team addresses any transition issues that may arise over the course of implementing an IEP. This would include all pertinent times in the school day, changes from school to school, changes from a class to class, changes from end of school year to ESY services, changes from a private program to a public school setting, and changes from a public program to a private program funded by the district.

G. **Ensure Parental Participation.**

Throughout the IEP process, from evaluation to development of the IEP, determine the parents’ concerns. Address concerns with data and, to the extent possible, information about research showing the effectiveness of programming selected by the school. Avoid disputes drawn out by staff opinions that are not supported by well documented data. IDEA requires the school to provide a description of what the parent was seeking that the LEA refused, along with a description of data used as the basis for refusing. *See* 34 C.F.R. § 503(a)(2). Ensure that the proposed placement is fully reviewed with the parent at the IEP team meeting along with the data that supports the recommendation. Make sure to provide a clear description of the setting in which services will be provided, by whom, and in what amount.

H. **Address Extended School Year.**

In an overwhelming majority of cases involving students with ASD that are favorable to schools, some amount of ESY services were provided. While the provision of ESY will be a function of the student’s needs, most often, students with moderate to severe forms of ASD receive some amount of ESY. Experts tend to be equipped with research supporting extended school year programs due to problems often encountered by children with autism when they experience changes in their environment. It is also helpful to bear in mind that ESY services can be focused on more severely affected areas, where data demonstrates concerns exist.

I. **Generalize Skills Learned Across Settings at School.**

Make certain that the IEP has as one focus the ability of the child to generalize skills learned under the IEP across settings at school. While some ASD methodologies do not measure skills in multiple settings to assess generalization, it is helpful that schools do have such focus. It is not uncommon for disputes to arise because a student with ASD displays a level of functioning at school different from that displayed at home. It is helpful if the student is making educational gains in the school setting generalized to the home, though this evidence has not been typically

required. It can be beneficial for schools to offer parent assistance or training on techniques shown to work in the school setting so that may also be implemented at home.

J. **Implement the IEP with Fidelity.**

Once the IEP is developed, determine as soon as possible what training, equipment or other new staffing will be needed. Attention needs to be given to concerns such as ensuring qualified staffing patterns for staff absences. Ensure mechanisms are in place to inform whether the student is making progress. If a BIP is a component of the IEP, then ensure data is collect that improvement can be demonstrated. Most importantly, if data suggest progress is not occurring, it is critical that the school reconvene the IEP team to address issues and make adjustments. Failing to make adjustment in the face of data suggesting that a student is not making progress can undermine the defense of the school offer of FAPE.