

Education as Healthcare: Doctors, Teachers, and Lawyers Unite to Ensure Students with ASD Get the Related Services They Deserve Under the IDEA

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Introduction

In 2018, the Center for Disease Control and Prevention estimated that 1 in 59 children have an Autism Spectrum Disorder (hereinafter “ASD” or “Autism”).¹ This statistic has risen rapidly in the last few decades due to the changing definition of Autism and the inclusion of different conditions within the ASD label.² However, major issues have arisen in trying to educate all students with an ASD while keeping in mind the straining budgets of the public school system in the United States.³ Congress passed the

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¹ *Data & Statistics on Autism Spectrum Disorder*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/autism/data.html> (last visited Nov. 24, 2019). The Center for Disease Control’s website displays estimates of the proportion of children with ASD as far back as the year 2000. *Id.* The proportion of people with an ASD has gone up significantly in recent years. *Id.* In the year 2012, 1 in 69 children were thought to have an ASD. *Id.* In 2008, 1 in 88 children were estimated to have an ASD. *Id.* In 2004, 1 in 125 children were estimated to have an ASD, while in 2000, 1 in 150 children were estimated to have an ASD. *Id.* See generally CDC increases estimate of autism’s prevalence by 15 percent, to 1 in 59 children, AUTISM SPEAKS, <https://www.autismspeaks.org/science-news/cdc-increases-estimate-autism-prevalence-15-percent-1-59-children> (last visited Nov. 24, 2019).

² See *Are Rates of Autism Spectrum Disorders Increasing?*, HARVARD HEALTH PUBL’G, HARVARD MED. SCH. (Jan. 2010), https://www.health.harvard.edu/newsletter_article/are-rates-of-autism-spectrum-disorders-increasing (last visited Nov. 24, 2019). They indicate that expanded diagnostic criteria and greater public awareness are the reasons why ASDs are much more prevalent today than in previous years. *Id.*

³ See Deanna L. Sharpe & Dana L. Baker, *The Financial Side of Autism: Private and Public Costs*, A COMPREHENSIVE BOOK ON AUTISM SPECTRUM DISORDERS, (Sept. 2011), http://cdn.intechopen.com/pdfs/20045/InTech-The_financial_side_of_autism_private_and_public_costs.pdf. “Autism can be an expensive disorder. Diagnosis and therapeutic intervention can be a lengthy and labor-intensive process. Families can spend more than \$50,000 per year on autism-related therapies such as applied behavior analysis (ABA) (National Conference of State Legislatures [NCSL], 2010).” *Id.* at 276. “As a practical matter, however, in times of cutbacks in education funding, school districts cannot afford the high cost of ABA therapy for each child with an autism diagnosis. Even if they could, they could not hire necessary personnel.” *Id.* at 285. “Public schools are short more than 12,000 special education teachers, and the shortage is expected to rise as teachers retire or leave teaching.” *Id.* See also Jeffrey A. Cohen et. al., *A Legal Review of Autism, a Syndrome Rapidly Gaining Wide Attention Within Our Society*, 77 ALB. L. REV. 389 (2013/2014). “...the average per pupil expenditure for educating a child with autism was estimated by the Special Education

Individuals with Disabilities Education Act (IDEA) in an effort to educate all students, including students who were previously marginalized from the public school system because of their disability.⁴ The IDEA ensures that all students with disabilities get a free and appropriate education which includes related services.⁵ Autism was added to the list of recognized disabilities that the IDEA covers in 1991.⁶ In guaranteeing students with

Expenditure Project to be over \$18,000 in the 1999-2000 school year. This estimate was nearly three times the expenditure for a typical regular education student who did not receive special education services.” *Id.* at 400. “In conjunction with the new public school system reality, where our economy is forcing larger class sizes, layoffs and other changes that may compromise our schools’ ability to serve students, it is foreseeable that school districts will be increasingly challenged to accommodate students with ASDs.” *Id.*

⁴ See INDIVIDUALS WITH DISABILITIES EDUC. ACT, 20 U.S.C. § 1400 *et seq.*; see also Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 603 (1995). “One study found that as late as 1969, only seven states were educating more than fifty-one percent of their disabled children. Until recently, exclusion of children with disabilities from public schools enjoyed the imprimatur of state courts and legislatures.” *Id.* “In 1893, the highest court of Massachusetts upheld the expulsion from the public schools of a child who was ‘weak in mind.’” *Id.* “In 1919, the Wisconsin Supreme Court approved the exclusion of a child who was capable of benefiting from a public school education, but had a speech impediment and displayed facial contortions and uncontrollable drooling.” *Id.* “[In] 1958, the Illinois Supreme Court held that the state compulsory education statute did not require the state to provide a free public education to children with mental impairments...” *Id.* at 604. “...in 1965, a North Carolina statute made it a crime for parents to ‘persist in forcing...the attendance’ of a child with disabilities who school authorities had determined could not ‘profit from instruction.’” *Id.* (internal parentheses omitted) See *About IDEA*, IDEA INDIVIDUALS WITH DISABILITIES EDUC. ACT, <https://sites.ed.gov/idea/about-idea/> (last visited Nov. 24, 2019). “IDEA governs how states and public agencies provide early intervention, special education and related services to more than 6.5 million eligible infants, toddlers, children and youth with disabilities.” *Id.*

⁵ See also Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restricting Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 DAYTON L. REV. 243, 254 (1994). “In drafting EHA, Congress explicitly adopted the holding in *Mills v. Board of Education* that equal protection requires a publicly funded education for all children with disabilities. IDEA mandated that states provide children with ‘special education and related services . . . at public expense, under public supervision and direction, and without charge.’” *Id.* To note, Congress enacted the EHA (Education for All Handicapped Children Act of 1975) prior to renaming it to IDEA in 1990. *Id.* at 243. “In the years before and after the enactment of IDEA, state government has been the primary funding source for special education. Today, states continue to bear the ultimate responsibility for ensuring the provision of a free education to all handicapped individuals.” *Id.* at 254. “An ‘appropriate education’ could mean an ‘adequate’ education, that is, an education substantial enough to facilitate a child’s progress from one grade to another and to enable him or her to earn a high school diploma.” *Id.* at 256. “An ‘appropriate education’ could also mean one which enable the handicapped child to achieve his or her full potential.” *Id.* See *About IDEA*, *supra* note 4. “The stated purpose of the IDEA is: to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living [...]” *Id.*

⁶ See generally Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity under the IDEA*, 58 HASTINGS L.J. 1147, 1156 (2007).

The Education of the Handicapped Act Amendments of 1990 went still further in expanding eligibility under the statute. The nomenclature of the protected

ASD a free and appropriate education, the act includes guarantees of related services.⁷ These related services can include expensive services like Applied Behavior Analysis (ABA), Occupational Therapy (OT), Physical Therapy (PT) and Speech Therapy (Speech).⁸ Due to straining budgets, many school districts try to draw a distinction

class was changed from ‘handicapped children’ to ‘children with disabilities,’ and the statute was renamed the Individuals with Disabilities Education Act in recognition of the changing dynamic of special education and the emergence of ‘people-first’ terminology. Congress expanded the categorical disabilities identified in the act by adding autism and traumatic brain injury to the list and changed the language of the statute to mandate that those seeking eligibility show they ‘need’ special education and related services rather than that they ‘require’ the same.

Id.

⁷ See INDIVIDUALS WITH DISABILITIES EDUCATION ACT, PUB. L. 101-476, 104 STAT. 1142. The IDEA guarantees due process rights to students and parents of students with Autism. *Id.* It gives all students with disabilities the right to a free and appropriate public education with related services in the least restrictive environment. *Id.* This is the primary mechanism for ensuring students with autism get the appropriate education they deserve. See also *Individuals with Disabilities Education Act (IDEA)*, AM. PSYCHOL. ASS’N, <https://www.apa.org/advocacy/education/idea/index.aspx> (last visited Nov. 24, 2019). The IDEA is divided into Part A, Part B, Part C, and Part D. *Id.* Part A is the blueprint for the rest of the IDEA including definitions. *Id.* Part B is the section that determines the guidelines for students with disabilities in schools ages three through twenty-one. *Id.* Part C is about the recognition and intervention of young children with disabilities. *Id.* Part D is about national activities to improve the education for children with disabilities. *Id.* See also About IDEA, *supra* note 4. “The Individuals with Disabilities Education Act is a law that makes available a free appropriate public education to eligible children with disabilities throughout the nation and ensures special education and related services to those children.” *Id.* “Congress reauthorized the IDEA in 2004 and most recently amended the IDEA through Public Law 114-95, the Every Student Succeeds Act in December 2015.” *Id.*

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

Id.

⁸ See *Treatment for Autism Spectrum Disorder*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/autism/treatment.html> (last visited Nov. 24, 2019). “ABA has become widely accepted among health care professionals and used in many schools and treatment clinics. ABA encourages positive behaviors and discourages negative behaviors in order to improve a variety of skills. The child’s progress is tracked and measured.” *Id.* The CDC recognizes five different types of ABA: Discrete Trial Training (DTT), Early Intensive Behavioral Intervention (EIBI), Early Start Denver model (ESDM), Pivotal Response Training (PRT), and Verbal Behavior Intervention (VBI). *Id.* “DTT is a style of teaching that uses a series of trials to teach each step of a desired behavior or response. Lessons are broken down into their simplest parts and positive reinforcement is used to reward correct answers and behaviors. Incorrect answers are ignored.” *Id.* EIBI “...is a type of ABA for very young children with an ASD, usually younger than five, and often younger than three.” *Id.* “[ESDM] is a type of ABA

between educational and medical services in an effort to cut costs from the expensive education and services that students with special needs require.⁹

This note presents the argument that a student who is denied related services – of both an *educational* and medical nature – in the individualized education plan process is denied a free and appropriate education under the IDEA. This note first looks to Autism generally, how it is diagnosed by doctors, and how doctors recommend services that early intervention starts to address before a child reaches the age of three. This note will then discuss the shifting of these services to the public school system when a child ages out of early intervention services, and how teachers and professionals in schools are carrying out physician recommended services, along with the implementation process regarding these services through Individualized Education Plans (IEPs) for each student. This note then turns to a lawyer’s involvement in the IEP process and the need for parents to get courts involved when they feel their children are not getting the services necessary for their education.

History

ASD is a developmental disability that causes behavioral, communication and social challenges.¹⁰ Signs and symptoms of ASD in young children can include behaviors

for children with ASD between the ages of 12-48 months. Through ESDM, parents and therapists use play and joint activities to help children advance their social, language, and cognitive skills.” *Id.* “PRT aims to increase a child’s motivation to learn, monitor his own behavior, and initiate communication with others. Positive changes in these behaviors should have widespread effects on other behaviors.” *Id.* VBI is a type of ABA that focuses on teaching verbal skills. *Id.* “Occupational therapy teaches skills that help the person live as independently as possible. Skills might include dressing, eating, bathing, and relating to people.” *Id.* “Speech therapy helps to improve the person’s communication skills. Some people are able to learn verbal communication skills. For others, using gestures or picture boards is more realistic.” *Id.* *See also Physical Therapy for Autism*, NAT’L INST. OF HEALTH, <https://www.nichd.nih.gov/health/topics/autism/conditioninfo/treatments/physical-therapy> (last visited Nov. 24, 2019). Physical therapy can include exercises that build motor skills and improve strength, posture, and balance. *Id.* “Problems with movement are common in autism spectrum disorder (ASD), and many children with autism receive physical therapy. However, there is not yet solid evidence that particular therapies can improve movement skills in those with autism.” *Id.*

⁹ *See Sharpe & Baker, supra* note 3. *See also* Yaakov Pollak, Comment, *Is Applied Behavioral Analysis Education, Medicine, or Both?: A Study of the Funding Challenges That Accompany an Autism Diagnosis*, 47 SETON HALL L. REV. 267 (2016). Insurance companies often deny ABA coverage reasoning that it is not medical but educational. *Id.*

When there is ambiguity in the very nature of the treatment, neither sector can be held to account. Any sense of moral obligation or sympathy an entity would feel is blunted by the presence of another player. If an insurance company – or a school board for that matter – can lay the responsibility at somebody else’s doorstep, they are going to jump at the opportunity.

Id.

¹⁰ *See Data & Statistics on Autism Spectrum Disorder*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/autism/data.html> (last visited Nov. 24, 2019).

such as not pointing at objects to show interest, avoiding eye contact, having trouble expressing needs using typical words or motions, and having trouble adapting when a routine changes.¹¹ Two scientists have been credited with first recognizing what we now deem ASDs: Leo Kanner and Hans Asperger.¹² The more famous of the two, Asperger,

“Autism spectrum disorder (ASD) is a developmental disability that can cause significant social communication and behavioral challenges.” *Id.* “...people with ASD may communicate, interact, behave and learn in ways that are different than most other people. The learning, thinking, and problem-solving abilities of people with ASD can range from gifted to severely challenged.” *Id.* See also *Autism Spectrum Disorder Fact Sheet*, NAT’L INST. OF NEUROLOGICAL DISORDERS AND STROKE, <https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Autism-Spectrum-Disorder-Fact-Sheet> (last visited Nov. 24, 2019). The NIH states that, “Many people with ASD find social interactions difficult. The mutual give-and-take nature of typical communication and interaction is often particularly challenging. Children with ASD may fail to respond to their names, avoid eye contact with other people, and only interact with others to achieve specific goals.” *Id.* The NIH also identifies repetitive and characteristic behaviors, for example, children flapping their arms or twirling. *Id.* “Children may also become obsessively interested in a particular topic such as airplanes or memorizing train schedules.” *Id.*

¹¹ See *Signs and Symptoms of Autism Spectrum Disorder*, CTNS. FOR DISEASE CONTROL AND PREVENTION (Aug. 27, 2019), <https://www.cdc.gov/ncbddd/autism/signs.html>. The symptoms for ASD can additionally include: repetitive actions, not playing pretend games, being very interested in people but not knowing how to converse with them, preferring not to be touched, repeating words in place of normal conversation and not looking at an object when another person points to it. *Id.* “People with ASD might have unusual responses to touch, smell, sounds, sights, and taste, and feel.” *Id.*

People with ASD often thrive on routine. A change in the normal pattern of the day – like a stop on the way home from school – can be very upsetting to people with ASD. They might ‘lose control’ and have a ‘meltdown’ or tantrum, especially if in a strange place.

Id. “People with ASD might have a hard time using and understanding gestures, body language, or tone of voice.” *Id.*

¹² See *Child Psychiatry Began at Hopkins*, PSYCHIATRY AND BEHAVIORAL SCI.: CHILD AND ADOLESCENT PSYCHIATRY, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/psychiatry/specialty_areas/child_adolescent/about_us/kanner_history.html (last visited Nov. 24, 2019). “Dr. Kanner was the first physician in the United States to be identified as a child psychiatrist. His textbook, *Child Psychiatry* (1935) was the first English language textbook to focus on the psychiatric problems of children.” *Id.* “His first use of the term ‘child psychiatry’ in the title so aptly captured the scope of the field that child psychiatry became the formal title of this medical discipline.” *Id.* “In 1943, Dr. Kanner first described the syndrome of infantile autism. His concise and cogent clinical descriptions of children with autism continues to inform, and is the standard against which current diagnostic criteria are measured.” *Id.* See also, John Donvan & Caren Zucker, *The Early History of Autism in America*, SMITHSONIAN MAGAZINE (Jan. 2016), <https://www.smithsonianmag.com/science-nature/early-history-autism-america-180957684/> (identifying Leo Kanner as “the man usually credited with first recognizing autism”).

His contribution, he said, was not in spotting the disparate behavioral traits that constitute autism – strange use of language, a disconnectedness from human interaction and a rigid affinity for sameness, among others – but in seeing that the conventional diagnoses used to explain those behaviors (insanity,

focused his research on what would today be just one subset of people who have an ASD.¹³ Kanner observed in his 1943 paper, *Autistic Disturbances of Affective Contact*, that strange use of language, social isolation, and strict routines were at that time mistakenly labeled as insanity, feeble-mindedness and even deafness, as these diagnoses overlooked a very distinct pattern of people having these same traits.¹⁴ Kanner even proclaimed later in his career that he did not, in fact, discover Autism because it had always been there.¹⁵

Clinicians often diagnose Autism based on symptoms, signs, and testing that are laid out in the Diagnostic and Statistical Manual of Mental Disorders-V (DSM-5).¹⁶ Under

feeble-mindedness, even deafness) were often mistaken, and in recognizing that the traits formed a distinctive pattern of their own.

Id. See also Steven Shapin, *Seeing the Spectrum*, THE NEW YORKER (Jan. 17, 2016), <https://www.newyorker.com/magazine/2016/01/25/seeing-the-spectrum>. “Autism was discovered, and given its identity as a discrete pathological condition, by two physicians working independently of each other during the Second World War.” *Id.* “One was Leo Kanner, an Austrian émigré at John Hopkins; the other was Hans Asperger, who was working in Nazi-occupied Vienna and whose findings were little known in the Anglophone world until the early nineteen-eighties.” *Id.*

¹³ See Shapin, *supra* note 12; see also Kara Rogers, *Asperger syndrome*, BRITANNICA, <https://www.britannica.com/science/Asperger-syndrome#ref1104499> (last visited Nov. 24, 2019). “Asperger syndrome, a neurobiological disorder characterized by autism-like abnormalities in social interactions but with normal intelligence and language acquisition. The disorder is named for Austrian physician Hans Asperger, who first described the symptoms in 1944 as belonging to a condition he called autistic psychopathy.” *Id.* Asperger syndrome is now considered an ASD. *Id.*

¹⁴ See Leo Kanner, *Autistic Disturbances of Affective Contact*, PATHOLOGY, http://mail.neurodiversity.com/library_kanner_1943.pdf (last visited Nov. 24, 2019); see also, Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J. L. AND MED. 483, 489 (2010). “An article written by Dr. Leo Kanner of the Johns Hopkins Hospital in 1943 marks the birth of autism in the world of psychiatry.” *Id.* “Kanner used the label ‘infantile autism’ to describe an unusual psychiatric syndrome, characterized by an inability to relate to people, a failure to develop speech or an abnormal use of language, deviant responses to environmental objects and events, excellent rote memory, and an obsession with repetition and sameness.” *Id.*

¹⁵ See Donovan, *supra* note 12. “‘I never discovered autism,’ Kanner insisted late in his career. ‘It was there before.’” *Id.*

¹⁶ See *Autism Spectrum Disorder Fact Sheet*, NAT’L INST. OF NEUROLOGICAL DISORDERS AND STROKE, <https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Autism-Spectrum-Disorder-Fact-Sheet> (last visited Nov. 24, 2019). “Autism spectrum disorder is diagnosed by clinicians based on symptoms, signs, and testing according to the Diagnostic and Statistical Manual of Mental Disorders-V, a guide created by the American Psychiatric Association used to diagnose mental disorders.” *Id.* “If screening instruments indicate the possibility of ASD, a more comprehensive evaluation is usually indicated. A comprehensive evaluation requires a multidisciplinary team, including a psychologist, neurologist, psychiatrist, speech therapist, and other professionals who diagnose and treat children with ASD.” *Id.* “The team members will conduct a thorough neurological assessment and in depth cognitive and language testing. Because hearing problems can cause behaviors that could be mistaken for ASD, children with delayed speech development should also have their hearing tested.” See also *Autism Spectrum Disorder*, NAT’L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml> (last visited Nov. 24, 2019). Doctors can typically diagnose ASD by age 2 by looking at how a person

the new DSM-5 criteria, individuals with an ASD must show symptoms from early childhood, even if those symptoms are not recognized as signs or symptoms of an ASD until later on in the person's life.¹⁷ In 2018, the National Institute of Mental Health recommends that children be screened for Autism as young as nine months old.¹⁸ A number of indicators are looked to for children of this age, including not babbling, pointing or talking, not responding to their name, making poor eye contact and not smiling or lacking social responsiveness.¹⁹ Indicators for children later in life are: an impaired ability to make friends or sustain conversation, absence of social play with peers, abnormally intense interest and inflexible adherence to specific routines or rituals.²⁰ The

behaves and develops. *Id.* Diagnoses in young children usually begins with screening at their pediatrician checkups at nine, eighteen, and twenty-four or thirty month visits. *Id.* If a pediatrician recognizes some signs of ASD the child will be sent for additional evaluation by a team that may include a developmental pediatrician, a child psychologist, a neuropsychologist or a speech-language pathologist. *Id.* These evaluators may look at cognitive level or thinking skills, language abilities, and age appropriate skills to complete regular activities like eating or dressing. *Id.* If a child is older when concerns are raised the child will usually be assessed by their school's special education team who then recommend additional testing. *Id.* Diagnosing an adult with ASD is often more difficult because many of the recognizable signs and symptoms overlap with symptoms of other mental health disorders like anxiety or attention-deficit/hyperactivity disorder. *Id.* Adults will be referred to a neuropsychologist, psychologist or psychiatrist with experience diagnosing an ASD. *Id.* They will be asked questions about social interactions, sensory issues, repetitive behaviors, and restricted interests. *Id.*

¹⁷ See *DSM-5 Autism Spectrum Disorder*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets> (last visited Nov. 24, 2019). "...Individuals with ASD must show symptoms from early childhood, even if those symptoms are not recognized until later. This change in criteria encourages earlier diagnosis of ASD but also allows people whose symptoms may not be fully recognized until social demands exceed their capacity to receive the diagnosis." *Id.*

¹⁸ See *Autism Spectrum Disorder*, *supra* note 16.

¹⁹ See *Autism Spectrum Disorder Fact Sheet*, *supra* note 16. Common signs of an ASD can be categorized into social impairment and communication difficulties, repetitive and characteristic behaviors. *Id.* "Children with ASD may fail to respond to their names, avoid eye contact with other people, and only interact with others to achieve specific goals. Often children with ASD do not understand how to play or engage with other children and may prefer to be alone." *Id.* Repetitive behaviors a child with an ASD might engage in are flapping their arms, rocking from side to side, twirling, preoccupation with certain parts of an object, obsession with a particular topic and strict adherence to daily routines. See also *Autism Spectrum Disorder (ASD)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/autism/facts.html> (last visited Nov. 24, 2019). Signs or symptoms can include: not pointing at objects to show interest, not looking at objects when another person points at them, having trouble relating to others or not have an interest in other people at all, prefer not to be held, appear to be unaware when people talk to them, repeat or echo phrases said to them, not play pretend games, and have unusual reactions to the way things smell, taste, look, feel or sound. *Id.* See generally *Autism Spectrum Disorder*, *supra* note 16. "Signs and Symptoms of ASD may include: making little or inconsistent eye contact, tending not to look at or listen to people, rarely sharing enjoyment of objects or activities by pointing or showing things to others, failing to, or being slow to, respond to someone calling their name or to other verbal attempts to gain attention, having difficulties with the back and forth conversations..." *Id.*

²⁰ See *Autism Spectrum Disorder Fact Sheet*, *supra* note 16. "Children should be screened for developmental delays during periodic checkups and specifically for autism at 18- and 24-month well-child visits." *Id.* See also *Autism Spectrum Disorder (ASD) – Screening and Diagnosis*, CTFS FOR

American Academy of Pediatrics prescribes to the view that all children should now be screened for developmental delays at their regular 9, 18 and 24 or 30 month visits.²¹ Pediatricians use several different screening tools in trying to determine if a child has ASD, including: Ages and Stages Questionnaires, Communication and Symbolic Behavior Scales, a Modified Checklist for Autism in Toddlers, and a Screening Tool for Autism in Toddlers and Young Children.²²

If a doctor identifies a child under the age of three as having a developmental delay or an ASD through screening tools, the doctor will usually recommend early intervention services.²³ Early intervention services are typically centered around four main principles: family, natural settings, child direction, and systematic and functional

DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/autism/screening.html> (last visited Nov. 24, 2019). “Developmental screening is a short test to tell if children are learning basic skills when they should, or if they might have delays. During developmental screening the doctor might ask the parent some questions or talk and play with the child during an exam to see how she learns, speaks behaves, and moves. A delay in any on these areas could be a sign of a problem.” *Id.* “All children should be screened for developmental delays and disabilities during regular well-child doctor visits at: nine months, eighteen months, twenty four or thirty months, additional screening might be needed if a child is at high risk for developmental problems due to preterm birth, low birth weight or other reasons.” *Id.* “In addition, all children should be screened specifically for ASD during regular well-child doctor visits at: 18 months, 24 months, additional screening might be needed if a child is at high risk for ASD (e.g., having a sister, brother, or other family member with an ASD) or if behaviors sometimes associated with ASD are present.” *Id.*

²¹ See *Autism Spectrum Disorder (ASD) – Screening and Diagnosis*, *supra* note 20. Doctors should screen children developmental delays 9, 18, 24 or 30 month doctor’s visits. *Id.*

²² See *id.* The CDC identifies the Ages and Stages Questionnaires (ASQ), Communication and Symbolic Behavior Scales (CSBS), Parents’ Evaluation of Developmental Status (PEDS), Modified Checklist for Autism in Toddlers (MCHAT) and Screening Tool for Autism in Toddlers and Young Children (STAT) as examples of diagnostic screening tools a health care provider may use when diagnosing a person with ASD. *Id.* The ASQ is a general screening questionnaire that a parent completes concerning their child’s communication, gross motor, fine motor, problem-solving, and personal adaptive skills. *Id.* The CSBS is a one-page parent completed checklist that screens children up to 24 months for their communication and symbolic abilities. *Id.* PEDS is a parent interview form that screens for developmental and behavior problems that may be used for all ages. *Autism Spectrum Disorder (ASD) – Screening and Diagnosis*, *supra* note 20. MCHAT is a questionnaire that a parent completes to assess the risk their child has ASD. *Id.* STAT is an interactive tool of 12 activities that are designed to assess play, communication, and imitation skills. See also, Laura C. Hoffman, *Health Care for the Autistic Child in the U.S.: The Case for Federal Legislative Reform for ABA Therapy*, 46 J. MARSHALL L. REV. 169, 187 (2012). “There are a number of tools that may be used for developmental screening. Different developmental screening tools identified by the CDC include Ages and Stages Questionnaires (ASQ), Communication and Symbolic Behavior Scales (CSBC), Modified Checklist for Autism in Toddlers (M-CHAT), Screening Tool for Autism in Toddlers and Young Children (STAT).” *Id.* at 188.

²³ See *Learn the Signs Act Early*, CTRS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/actearly/parents/states.html> (last visited Nov. 24, 2019). “Early Intervention is the term used to describe the services and supports that are available to babies and young children with developmental delays and disabilities and their families.” *Id.* “Early intervention may include speech therapy, physical therapy, and other types of services based on the needs of the child and family.” *Id.*

services.²⁴ Early intervention services typically consider the family culture and needs so they can better assist the child in addressing issues in their everyday life.²⁵ Many early intervention services are administered in the child's home or community to capitalize on the child's everyday settings.²⁶ The services are often designed to follow the child's lead and his or her intrinsic motivation.²⁷ They also tend to follow a developmental or behavior trajectory using an incremental approach.²⁸

Early intervention has proven to have some very promising results.²⁹ Early intervention services often include or are paired with ABA, occupational therapy, physical

²⁴ See Rachel Hopf, *Critical Components of Early Intervention for Children with ASD*, IND. RESOURCE CTR. FOR AUTISM, <https://www.iidc.indiana.edu/pages/critical-components-of-early-intervention-for-children-with-asd> (last visited Nov. 24, 2019), quoting H.H. Schertz, et al., *Principles of Early Intervention Reflected in Toddler Research in Autism Spectrum Disorders*, 33 TOPICS IN EARLY CHILDHOOD SPECIAL EDUC. 4, 5 (2011). Family centered typically means that the services, “[c]onsider family culture and needs throughout the intervention process and includes parents as part of the intervention process.” *Id.* Naturalistic meaning that it “occurs in natural, everyday settings.” *Id.* Child directed meaning that it “[f]ollows the child's lead and his/her intrinsic motivation...” *Id.* Systematic and functional meaning that it “[f]ollows a developmental or behavioral trajectory...” *Id.*

²⁵ See *id.* (identifying the meaning of family centered).

²⁶ See *id.* (identifying the meaning of naturalistic).

²⁷ See *id.* (identifying the meaning of child directed); see also Martha P. Carlton & Adam Winsler, *Fostering Intrinsic Motivation in Early Childhood Classrooms*, 25 EARLY CHILDHOOD EDUC. J. no. 3 159, 159 (1998), <http://winslerlab.gmu.edu/pubs/CarltonWinsler98.pdf> (last visited Nov. 18, 2019). “Goal-directed behavior may be intrinsically motivated, extrinsically motivated, or motivated by a combination of the two. Intrinsic motivation refers to the desire to participate in an activity merely for the pleasure derived from that activity (Pintrich & Schunk, 1996).” *Id.*

²⁸ See Hopf, *supra* note 24 (stating early intervention follows a developmental or behavioral trajectory).

²⁹ See Geraldine Dawson et. al., *Randomized, Controlled Trial of an Intervention for Toddlers with Autism: The Early Start Denver Model*, AM. ACAD. OF PEDIATRICS (2010),

<https://pediatrics.aappublications.org/content/125/1/e17>. “This is the first randomized, controlled trial to demonstrate the efficacy of a comprehensive developmental behavioral intervention for toddlers with ASD for improving cognitive and adaptive behavior and reducing severity of ASD diagnosis. Results of this study underscore the importance of early detection of and intervention in autism.” *Id.* See also Lonnie Zwaigenbaum et. al., *Early Intervention for Children with Autism Spectrum Disorder Under 3 Years of Age: Recommendations for Practice and Research*, AM. ACAD. OF PEDIATRICS, (2015)

http://pediatrics.aappublications.org/content/136/Supplement_1/S60 (last visited Nov. 18, 2019). Summary statements from this study include “[c]urrent best practices for interventions for children aged < 3 years with suspected or confirmed ASD should include a combination of developmental and behavioral approaches and begin as early as possible.” *Id.* “Current best practices for children aged < 3 years with suspected or confirmed ASD should have active involvement of families and/or caregivers as part of the intervention.” *Id.* “Interventions should enhance developmental progress and improve functioning related to both the core and associated features of ASD, including social communication, emotional/behavioral regulation, and adaptive behaviors.” *Id.* Intervention services should consider the sociocultural beliefs of the family and family dynamics and supports, as well as economic capability, in terms of both the delivery and assessment of factors that moderate outcomes.” *Id.* See generally, Jen Christensen, *Could early intervention erase signs of autism?*, CNN, <https://www.cnn.com/2014/09/10/health/autism-early-intervention/index.html> (last visited Nov. 18, 2019). The article discusses a mother and son's

therapy and speech therapy.³⁰ Children often show great strides in these areas until they enter the public school system at age three, and distribution of services shifts from the Department of Health and Human Services to the Department of Education.³¹

For most students with ASDs, much of what many would consider healthcare is distributed at schools.³² ASD is a medical diagnosis that is often treated in our school systems by doctors identifying a child with an ASD and recommending services and teachers, occupational therapists, speech pathologists, physical therapists, behavior technicians and Board Certified Behavior Analysts carrying out the recommended

participation in a 12-week clinic where researchers taught the parents behavioral modification techniques to use with their children that were aimed at things that could be easily woven into their daily life, like playing a game with the son while touching his feet, as many kids with ASD do not like to be touched. *Id.* See also Hopf, *supra* note 24. “These findings suggest that (a) parents should be involved in intervention, (b) intervention should occur in the child’s natural environments when possible such as the home or community settings, (c) intervention should have an incremental approach by targeting objectives immediately beyond the child’s current abilities.” See also *Early Intervention For Toddlers With Autism Highly Effective, Study Finds*, AUTISM SPEAKS (Nov. 29, 2009) <https://www.autismspeaks.org/science-news/early-intervention-toddlers-autism-highly-effective-study-finds> (discussing Dawson study).

³⁰ See *Autism Spectrum Disorder (ASD) – Treatment*, CTRS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/autism/treatment.html> (last visited Nov. 18, 2019). According to the Centers for Disease Control (“CDC”), common services available through early intervention services include Applied Behavior Analysis, Occupational applied behavior analysis, occupational therapy, and speech therapy. See generally *Overview of Early Intervention*, CTR. FOR PARENT INFO. & RESS., <https://www.parentcenterhub.org/ei-overview/> (last updated Sept. 1, 2017). Parent Center Hub identifies examples of early intervention services to include: assistive technology, audiology or hearing services, speech and language services, counseling and training for a family, medical services, nursing services, nutrition services, occupational therapy, physical therapy and psychological services. *Id.*

³¹ See Annabel Marsh et. al, *Transition to School for Children with Autism Spectrum Disorder: A Systematic Review*, WORLD J. PSYCHIATRY, 2017 Sep 22; 7(3): 184-196. “Children with ASD face more challenges transitioning to school, particularly with social interaction. Further development and implementation of specific school-based interventions is needed in order to assist children with autism to maximize their success in starting school.” *Id.*

However, survey studies that have examined opinions of parents and teachers on best practices for school transition identified a number of key areas: (1) Transition team established; (2) parent involvement in planning; (3) child and parent visit to school; (4) visit support; (5) placement identification; (6) parent communication and information; (7) teacher sharing between preschool and kindergarten teacher; (8) child preparation (e.g., social stories); (9) decision support; (10) support identification; (11) transition administrator to supervise and evaluate the transition; and (12) peer, classroom and school preparation.

Id.

³² See Tahra Johnson, *Improving Systems of Care for Children with Special Needs*, NAT’L CONF. OF STATE LEGIS., <http://www.ncsl.org/documents/health/ChildrenSpecialNeeds17.pdf> (last visited Nov. 18, 2019). “Working with Title V agencies, faith-based organizations and other community-based organizations can help mitigate barriers to access by increasing convenience to care. This might include offering care in more accessible locations, such as communities or schools, and improving well-care visit rates with evening and weekend appointments.” *Id.*

services.³³ However, a doctor's recommendation is just one piece of the puzzle in getting students with ASD the services to which they are entitled.³⁴ When transitioning a child from early intervention services to the public school system, typically the team of people that have been working with the child are involved in the recommendations for the IEP process.³⁵

The IDEA is the cornerstone for protecting any student with a disability in early intervention and schools.³⁶ According to the act, students with disabilities are entitled to

³³ See Individuals with Disabilities Educ. Act, 34 C.F.R. § 300.34 (2019).

[R]elated services means transportation and such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

Id. "Physical therapy, occupational therapy, speech therapy and applied behavior analysis fall into this category of related services that are often distributed at schools." *Id.*

³⁴ See Amanda Morin, *Private Evaluations: What You Need to Know*, UNDERSTOOD <https://www.understood.org/en/school-learning/evaluations/evaluation-basics/outside-evaluations-the-difference-between-private-and-independent> (last visited Nov. 13, 2019). Key takeaways include: "[y]ou can choose a private evaluator who specializes in your child's needs;" "[y]ou don't have to share the results of a private evaluation with the school;" and "[y]ou can use the evaluator's recommendations to help find ways to support your child's learning." *Id.*

³⁵ See *Early Childhood Special Educ., Frequently Asked Questions: Transition from Early Intervention to Special Educ.*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., <http://www.doe.mass.edu/sped/ecse/TransitionFAQ.html> (last visited Nov. 18, 2019).

The school district cannot refuse a referral of a child made by an EI provider. EI providers are responsible for determining if a child is potentially eligible for Part B services. The school district must act on the referral and conduct an evaluation (including all areas of suspected disability) of the child in order to determine if the child is eligible for special education services.

Id. "Evaluations must be comprehensive and complete in all areas of suspected disability. The school district is encouraged to consider any and all evaluation information that is already available, and conduct additional assessments that are needed, as appropriate for the child under consideration." *Id.*

³⁶ See Paul H. Lipkin & Jeffrey Okamoto, *The Individuals With Disabilities Educ. Act (IDEA) for Children with Special Educational Needs*, AM. ACAD. OF PEDIATRICS VOL. 136 NO. 6 (Dec. 1, 2015). "The Individuals with Disabilities Education Act entitles every affected child in the United States from infancy to young adulthood to a free appropriate public education through EI and special education services." *Id.* The article identifies one of the several key requirements in the IDEA as, "Free appropriate public education: States and local school districts must offer FAPE to all children with disabilities between the ages of 3 and 21 years, inclusive. *Id.* The article also identifies and another key requirement as, "Least Restrictive environment: Children with

free and appropriate public education in the least restrictive environment.³⁷ A free and appropriate education under the IDEA includes what is deemed “related services.”³⁸ These related services are derived from the Individualized Education Plan (IEP) process.³⁹

An IEP is “a plan or program developed to ensure that a child who has a disability identified under the law and is attending an elementary or secondary educational institution receives specialized instruction and related services.”⁴⁰ This comes from the understanding that each child with a disability is different and therefore learns differently; what is an appropriate education for one student may not be an appropriate education for

disabilities must be educated with children without disabilities ‘to the maximum extent possible’ in the least restrictive environment (LRE).” *Id.*

³⁷ See 20 U.S.C. § 1412(a)(1)(A) (2019). “A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.” *Id.* See also 20 U.S.C. § 1412(a)(5)(A) (2019).

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and 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.

Id. See also Megan McGovern, Note, *Least Restrictive Environment: Fulfilling the Promises of IDEA*, 21 WIDENER L. REV. 117, 117 (2015). “IDEA guarantees students with disabilities access to ‘free, appropriate public education’ (FAPE) in the ‘least restrictive environment’ (LRE) with accommodating supports and services.” *Id.*

³⁸ See *Free Appropriate Public Education (FAPE)*, U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/dis-issue03.html> (last visited Nov. 14, 2019). “Students with disabilities have the same right to K-12 public education that students without disabilities have. In order to receive and benefit from that education, students with disabilities may need special education and/or related aids and services.” *Id.* “OCR works to ensure that public elementary and secondary schools, including charter schools, provide a free appropriate public education (“FAPE”) to all qualified students with disabilities (generally, students with disabilities who are of school age), regardless of the nature or severity of their disabilities.” *Id.*

³⁹ See Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL’Y 217 (2005). “Those provisions require participating states to identify school-aged children who may have a disability, evaluate them and provide each public school child with a disability a free and appropriate public education (the FAPE).” *Id.* at 222. “The free appropriate public education required by IDEA must offer a child with a disability special education and related services at public expense, through the implementation of a program derived out of the IEP process.” *Id.*

⁴⁰ See *What is the Difference between an IEP and a 504 Plan?*, DISABILITIES, OPPORTUNITIES, INTERNETWORKING, AND, TECH., <https://www.washington.edu/doit/what-difference-between-iep-and-504-plan> (last visited Nov. 14, 2019). The Understood Team, *Understanding IEPs*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/ieps/understanding-individualized-education-programs> (last visited Nov. 14, 2019). Key takeaways from this site include: “Your child needs an IEP to get special education services at school[.]” “You play a key role throughout the IEP process[.]” and “It’s important to stay on top of your child’s IEP and make sure your child is making progress.” *Id.*

another.⁴¹ Drafting an IEP takes an entire team of people that will or have worked with the student.⁴² Often times meetings about a child's IEP are called "team meetings."⁴³ The team is composed of the parent(s) or guardian(s) of the child with a disability, the student with a disability if appropriate, at least one general education teacher if the child is or may be engaging in the regular education environment, at least one special education teacher, a representative of the local education agency who has the authority to commit resources, an individual who can interpret evaluation results and other individuals who have knowledge of the student at the parent's discretion.⁴⁴ Within a parent's discretion, some individuals can be excused from the IEP meeting if need be.⁴⁵

An IEP is composed of different sections.⁴⁶ The first section identifies a child's present level of educational performance.⁴⁷ The second section identifies annual goals for the student's education.⁴⁸ The third section identifies how a parent will be notified of a child's progress toward their educational goals, sometimes identified as "Progress Reporting."⁴⁹ The fourth section identifies what services a child will be receiving to further their educational goals.⁵⁰ The fifth section identifies supplementary aids and

⁴¹ See *About IDEA*, IDEA INDIVIDUALS WITH DISABILITIES EDUC. ACT, <https://sites.ed.gov/idea/about-idea/#IDEA-Purpose> (last visited Nov. 18, 2019). "The stated purpose of the IDEA is: to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]" *Id.*

⁴² See *Sec. 300.321 IEP Team*, IDEA INDIVIDUALS WITH DISABILITIES EDUC. ACT, <https://sites.ed.gov/idea/regs/b/d/300.321> (last visited Nov. 18, 2019). The regulations indicate that the IEP team should include, the parents of the child, a regular education teacher of the child, special education teacher, a representative of the public agency who is qualified to provide or supervise the instruction to meet the needs of a child with disabilities, someone who can interpret the instructional implications of differing evaluations, other individuals who know the child at the parent's discretion, and the child with a disability if appropriate. *Id.*

⁴³ *Id.*

⁴⁴ See *id.* (listing the requirements for an IEP team).

⁴⁵ See Letter from Ruth E. Ryder, Acting Director, Off. of Special Educ. Programs, to David Andel, Ill. State Board (Feb. 17, 2016) (on file with the Dep't of Educ.) (indicating that a parent may bring an attorney to an IEP meeting without prior notice).

⁴⁶ See *At a Glance: Anatomy of an IEP*, UNDERSTOOD, <https://www.understood.org/en/image-viewer?image=%2F%7e%2Fmedia%2F%2Fc10cd023d53b4125b25ea25864800d95.png> (last visited Nov. 19, 2019). An IEP is made up of a student's information, their present level of educational performance, annual goals, progress reporting, services, supplementary aids and services, participation and parent consent. *Id.*

⁴⁷ See *id.* (describing section to include child's current abilities, skills, weaknesses, strengths, social skills and behavior).

⁴⁸ See *id.* "These should consist of academic and functional skills that your child can reasonably accomplish during the school year. Each is broken down into shorter-term objectives".

⁴⁹ See *id.* (stating an IEP plan shows how you'll be informed about progress toward yearly goals); see also *supra* text accompanying note 46.

⁵⁰ See *At a Glance*, *supra* note 46. "Here, the IEP plan details: 1. What special education services your child will get and for how long; 2. Any services outside the school year (like summer services she qualifies for); 3. Any 'transition planning' to get your child ready for life after high school." *Id.*

services to accommodate a student.⁵¹ The sixth section is the participation section, which identifies to what extent a student will be included in general education and activities.⁵² The final section is the parental consent section, where a parent must sign to officially agree with the plan for the child's education.⁵³

The "related services" language of the IDEA is incorporated into the fourth section of the IEP.⁵⁴ Related services can include: applied behavior analysis (ABA), speech language and audiology services, interpreting services, psychological services, occupational and physical therapy, recreation, including therapeutic recreation, early identification and evaluation of disabilities in children, counseling services including rehabilitation counseling, orientation and mobility, medical services, school health and school nurse services, social work services, and parent counseling and training.⁵⁵

ABA is used to encourage positive behavior while discouraging negative behaviors.⁵⁶ Autism Speaks identifies ABA as a therapy that "applies our understanding of how behavior works to real situations." The goal is to increase behaviors that are helpful and decrease behaviors that are harmful or affect learning. ABA therapy programs

⁵¹ *Id.* The IEP plan specifies what accommodations your child will get in the learning environment – like a seat at the front of the class. It also details any modifications your child may have. These are changes to what's expected of her – like less homework. This section will also include information about any assistive technology your child needs.

⁵² *Id.* "This section explains how and to what extent your child will be included in general education classes and other activities, including assessment sites." *Id.*

⁵³ *See* At a Glance, *supra* note 46. "Many IEP plans have a signature line where you would officially agree to the plan. Keep in mind that you don't have to give consent to the entire plan. You can use an addendum to give consent only to specific parts of the IEP plan." *Id.*

⁵⁴ *See* 20 U.S.C. § 1412(a)(5)(A) (2005).

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and 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.

Id. *See also* At a Glance: Anatomy of an IEP, UNDERSTOOD, <https://www.understood.org/en/image-viewer?image=%2F%7e%2Fmedia%2F%2Fc10cd023d53b4125b25ea25864800d95.png> (last visited Jan. 29, 2019) (pointing to the section that determines what special education services a child will receive).

⁵⁵ *See* Amanda Morin, *Related Services for Kids With Learning and Attention Issues: What You Need to Know*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/special-education-basics/related-services-for-kids-with-learning-and-attention-issues-what-you-need-to-know> (last visited Jan. 29, 2019). "Speech-language, occupational and physical therapy are all examples of related services." *Id.* "IDEA names many types of related services, but a child's team decides which services are necessary." *Id.* "In some cases, related services are the only special education services a child might need." *Id.*

⁵⁶ *Treatment for Autism Spectrum Disorder (ASD)*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/autism/treatment.html> (last visited Jan. 29, 2019). "ABA encourages positive behaviors and discourages negative behaviors in order to improve a variety of skills. The child's progress is tracked and measured." *Id.*

can help increase language and communication skills, improve attention, focus, social skills, memory and academics, and decrease problem behaviors.”⁵⁷

Occupational therapy helps people “to do things that they want and need to do through the therapeutic use of daily activities.” Practitioners enable people of all ages to live life to its fullest by helping them promote health and prevent – or live better with – injury, illness, or disability.”⁵⁸ Occupational therapy can include things like brushing teeth, writing on a classroom whiteboard, copying in a notebook what a teacher writes on the board, using scissors, using a pencil, doing jumping jacks, and helping students to respond to their sensory processing issues.⁵⁹

According to the Eunice Kennedy Shriver National Institute of Child Health and Human Development, physical therapy includes activities and exercises that build motor skills and improve strength, posture, and balance.⁶⁰ This is especially important for

⁵⁷ *Applied Behavior Analysis (ABA)*, AUTISM SPEAKS, <https://www.autismspeaks.org/applied-behavior-analysis-aba-0> (last visited Jan. 29, 2019).

Positive reinforcement is one of the main strategies used in ABA. When a behavior is followed by something that is valued (a reward), a person is more likely to repeat that behavior. Over time, this encourages positive behavior change. First, the therapist identifies a goal behavior. Each time the person uses the behavior or skill successfully, they get a reward. The reward is meaningful to the individual – examples include praise, a toy or book, watching a video, access to playground or other location, and more. Positive rewards encourage the person to continue using the skill. Over time this leads to meaningful behavior change.

Id.

⁵⁸ *What is Occupational Therapy?*, AM. OCCUPATIONAL THERAPY ASS’N, INC., <https://www.aota.org/Conference-Events/OTMonth/what-is-OT.aspx> (last visited Jan. 29, 2019).

Common occupational therapy interventions include helping children with disabilities to participate fully in school and social situations, helping people recovering from injury to regain skills, and providing supports for older adults experiencing physical and cognitive changes. Occupational therapy services typically include: an individualized evaluation, during which the client/family and occupational therapist determine the person’s goals[;] customized intervention to improve the person’s ability to perform daily activities and reach the goals[;] and an outcomes evaluation to ensure that the goals are being met and/or make changes to the intervention plan.

Id.

⁵⁹ *See Occupational Therapy: What You Need to Know*, UNDERSTOOD <https://www.understood.org/en/learning-attention-issues/treatments-approaches/therapies/occupational-therapy-what-you-need-to-know> (last visited Nov. 14, 2019). “Before it begins, an occupational therapist (an OT) looks at a child’s strengths and challenges, and the tasks that child has trouble with. The OT will then create a program of activities for the child to work on.” *Id.*

⁶⁰ *See Physical Therapy for Autism*, U.S. DEPT. OF HEALTH AND HUMAN SERV., <https://www.nichd.nih.gov/health/topics/autism/conditioninfo/treatments/physical-therapy>

children with an ASD because problems with movement are common among this population.⁶¹

Speech language therapy is a common service for children with ASD.⁶² According to the National Institute on Deafness and Other Communication Disorders, “Children with ASD may have difficulty developing language skills and understanding what others say to them. They also often have difficulty communicating nonverbally, such as through hand gestures, eye contact and facial expressions.”⁶³ Many children with ASD

(last visited Feb. 12, 2019). “For example, this type of therapy aims to help a child build muscle control and strength so that he or she can play more easily with other children. Problems with movement are common in autism spectrum disorder (ASD), and many children with autism receive physical therapy.” *Id.* See also *Fact Sheet: Practice Recommendations for the School Based Physical Therapy Evaluation of Children with Autism Spectrum Disorder*, ACAD. OF PEDIATRIC PHYSICAL THERAPY, <https://pediatricapta.org/includes/factsheets/pdfs/14%20Prac%20Rec%20for%20Schools%20or%20Eval%20of%20Autism.pdf> (last visited Jan. 29, 2019).

Although deficits in communication and social skills are considered to be defining characteristics of this disorder, current literature suggests impairments in motor development and motor control systems as core characteristics of children with ASD. Physical therapists (PTs) are increasingly involved in working with children with ASD and, like other professionals, they encounter the need for autism-specific assessment and intervention strategies.

Id. at 1.

Physical therapists should advocate for education programming that addresses the needs of children with ASD. As active members of interdisciplinary teams assessing children and developing their individualized education programs (IEPs) or supporting program/curriculum development, physical therapists can facilitate access to age-appropriate physical activity, leisure and fitness activities to promote optimal physical development for children with ASD.

Id. at 2. “The first step in a school-based evaluation is for the team to identify the functional limitations and participation restrictions affecting the student. This information will guide the physical therapist in the choice of examination, observation, and assessment tools.” *Id.*

⁶¹ See *id.*

⁶² See *Autism Spectrum Disorder: Communication Problems in Children*, NAT’L INST. ON DEAFNESS AND OTHER COMM. DISORDERS (NIDCD), <https://www.nidcd.nih.gov/health/autism-spectrum-disorder-communication-problems-children> (last visited Jan. 29, 2019). “Children with ASD may have difficulty developing language skills and understanding what others say to them. They also often have difficulty communicating nonverbally, such as through hand gestures, eye contact, and facial expressions.” *Id.*

⁶³ *Id.* “Often children with ASD who can speak will say things that have no meaning or that do not relate to the conversation they are having with others. For example, a child may count from one to five repeatedly amid a conversation that is not related to numbers.” *Id.* “Some children may be able to deliver an in-depth monologue about a topic that holds their interest, even though they may not be able to carry on a two-way conversation about the same topic.” *Id.* “Many children with ASD develop some speech and language skills, but not to a normal level of ability, and their progress is usually uneven.” *Id.* “Children with ASD are often unable to use gestures – such as pointing to an object – to give meaning to their speech”.

may have repetitive or rigid language, narrow interests and exceptional abilities, uneven language development and poor nonverbal conversation skills.⁶⁴

Facts

Pre-Individuals with Disabilities Education Act

Pennsylvania Association for Retarded Citizens (PARC) v. Pennsylvania was brought in 1971.⁶⁵ The Pennsylvania Association for Retarded Children (PARC) organization worked to advance the general interests of Pennsylvania citizens with cognitive disabilities throughout the Commonwealth of Pennsylvania.⁶⁶ This was the first lawsuit to overturn a state law that denied services to disabled children on the basis that they were “uneducable and untrainable.”⁶⁷ More specifically, the issue in *PARC* was that the school would not accept students who had not “attained a mental age of five years” by the start of the first grade.⁶⁸ Parents were not given any due process hearings nor any procedure

⁶⁴ *Id.*

⁶⁵ See *Pennsylvania Ass’n for Retarded Citizens v. Pennsylvania*, 343 F. Supp. 270 (E.D. Pa. 1972). This was the first case to attack a state statute that allowed for the exclusion of people with disabilities from public school systems. *Id.* The Plaintiffs in the case argued that a Pennsylvania statute that allowed for the exclusion of people with disabilities who had not reached the mental age of five years old by the first grade from public schools was unconstitutional because of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. *Id.* The attorney for the Plaintiff’s, Thomas K. Gilhool, relied on the seminal case of *Brown v. Board of Education*, in his argument for equal access to schools for people with disabilities. *Id.* See also U.S. CONST. amend. XIV, § 1. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added) *Id.* See generally *The Right to Education*, DISABILITYJUSTICE, <https://disabilityjustice.org/right-to-education/> (last visited Nov. 25, 2018) (explaining importance of *PARC v. Pennsylvania*).

⁶⁶ See *Pennsylvania Ass’n for Retarded Citizens*, 343 F. Supp. at n. 1. PARC was a state-wide organization in Pennsylvania that advocated for the rights and general interests of people with cognitive disabilities. *Id.* PARC did this by participating in the education of people with disabilities. *Id.* At the time of the federal district court’s decision the association had been around for about 20 years and had 53 member chapters throughout the state of Pennsylvania. *Id.*

⁶⁷ See *Pennsylvania Association for Retarded Citizens (PARC) v. Commonwealth of Pennsylvania*, THE PUB. INTEREST L. CTR., <https://www.pubintl.org/cases-and-projects/pennsylvania-association-for-retarded-citizens-parc-v-commonwealth-of-pennsylvania/> (last visited Nov. 25, 2018) (depicting progress of case and result of consent decree). See also *PARC*, 343 F. Supp. at n. 3. This provides the text for one of the Pennsylvania statutes in question: 24 Purd. State. Sec. 13-137. *Id.* This statute provided that students deemed uneducable or untrainable in the public schools, the public schools would be relieved of their obligation of providing education and training to the child. *Id.* The child would then receive care, training and supervision from the Department of Public Welfare instead. *Id.* at n. 4. This provides the now repealed statute of 25 Purd. Stat. Sec. 13-304 stating that the board of school directors could refuse to accept or retain beginners who have not attained a mental age of five years. *Id.*

⁶⁸ See *Pennsylvania Ass’n for Retarded Citizens*, 343 F. Supp. at n. 4. This provides the now repealed statute of 25 Purd. Stat. Sec. 13-304 stating that the board of school directors could refuse to accept or retain beginners who have not attained a mental age of five years. *Id.* 1949 Act 14 PA. CONS. STAT. § 1304 (b) states:

to help their children get an education; they were just denied on the basis that the school believed that the child was incapable of learning like their neurotypical peers.⁶⁹ *PARC* also helped establish a parent's right to contest a school's placement decision of their child, a subject which remains the source of much litigation in special education law today.⁷⁰ However, Pennsylvania was not the only state to have a law like this on their books that made disability discrimination legal.⁷¹ Numerous other states had statutes such as this and many advocacy groups took charge in trying to get them repealed.⁷²

Admission shall be limited to beginners who have attained the age of five years and seven months before the first day of September if they are to be admitted in the fall, and to those who have attained the age of five years and seven months before the first day of February if they are to be admitted at the beginning of the second semester. The board of school directors of any school district may admit beginners who are less than five years and seven months of age, in accordance with standards prescribed by the State Board of Education. ***The board of school directors may refuse to accept or retain beginners who have not attained a mental age of five years, as determined by the supervisor of special education or a properly certificated public school psychologist in accordance with standards prescribed by the State Board of Education.*** (emphasis added).

Id.

⁶⁹ *Id.* at 283. Stating that Section 1375 and 1304 offend due process because they lack any provision for notice and a hearing before a person with cognitive disabilities is marginalized from the public school system. *Id.* The Plaintiff argues that the two sections are unconstitutional because they arbitrarily and capriciously deny a right given to all other students solely on the basis of disability. *Id.* The statute itself lays out the procedure of how a school psychologist makes the recommendation to the Board of School Directors but there is no hearing. *PARC*, 343 F. Supp. at 283. There is no parental notice. *Id.* There is no adversarial proceeding for a parent to contest their children's denial with the school. *Id.*

⁷⁰ *Id.* at n. 4 (stating that a child could not be placed in a school without parental involvement). See Philip T. K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J. L. EDUC. 1, 6 (2000). Noting that *PARC* recognized that the parents of children with disabilities had the rights to contest a school's placement decision for their child. *Id.*

⁷¹ *Id.* (highlighting the many state statutes allowing discrimination of students with disabilities from participating in schools): see, e.g., OHIO REV. CODE ANN. § 3321.05 (West 1971); MASS. GEN. LAWS ANN. ch. 71, § 46A (West 1969); OR. REV. STAT. § 111.2803 (West 1969); D.C. CODE ANN. § 31-2-3 (West 1967); S.D. CODIFIED LAWS § 13-27-4 (1967), *repealed* by SL 1979, ch. 118, §§ 1, 2; ME. REV. STAT. ANN. tit. 403, § 20-3117 (1964); COLO. REV. STAT. ANN. § 123-20-7 (West 1963); LA. STAT. ANN. § 8:1951 (1963); ALASKA STAT. ANN. § 14.30.010 (West 1962); N.D. CENT. CODE ANN. § 1959-04 (West 1960). These statutes eliminated disabled children from state compulsory attendance laws, permitted school officials to use their discretion in determining whether a student with special needs could benefit from instruction, created programs only when a need was established, or authorized the creation of special education programs only on the basis of the availability of sufficient funds. *Id.*

⁷² See Perri Meldon, *Disability History: The Disability Rights Movement*, NAT'L PARK SERV., https://www.nps.gov/articles/disabilityhistoryrights_movement.htm (last visited Jan. 25, 2019). "In 1950, several local groups came together and formed the National Association for Retarded Children (NARC). By 1960, NARC had tens of thousands of members, most of whom were parents. They were dedicated to finding alternative forms of care and education for their children." *Id.*

Mills v. Board of Education further expanded on the ideas laid out in *PARC v. Pennsylvania*.⁷³ *Mills* was brought on behalf of seven children ranging in age from eight to sixteen years old with many different types of mental and behavioral disabilities.⁷⁴ The families of these children brought suit on the basis that the District of Columbia's public school system had either refused to enroll some of their children or expelled them because of their disabilities.⁷⁵ This was supposedly due to budget constraints that the District of Columbia was experiencing at this point in time, combined with the expensive costs of educating people with disabilities.⁷⁶ The court in *Mills* ruled that children with disabilities

⁷³ See *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972); see also *PARC*, 343 F. Supp. at 279. *Mills* was one of the seminal cases that helped to establish a disabled child's right to an education. See generally Edwin W. Martin et al., *The Legislative and Litigation History of Special Education*, 6 FUTURE CHILD. 1 (1996). <https://pdfs.semanticscholar.org/16b1/c6fda4e8be11fa56b0bc77f70553ee2572bf.pdf> (last visited Nov. 25, 2018). The families of seven children brought suit against the District of Columbia after the District refused to enroll students on the basis of their disabilities. *Id.* The children that brought suit were just seven out of 12,340 children with disabilities within the District of Columbia that were denied schooling due to budget constraints. *Id.* The district court ruled that the District was constitutionally prohibited from denying students with disabilities an education due to insufficient funding. *Id.* See also Philip T. K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J. L. & EDUC. 1, 6 n. 27 (2000). Stating that *Mills* extended the right to contest a school's placement decision on the basis of a child's disability to students who were identified as emotionally disturbed, physically disabled and behavioral problems. *Id.*

⁷⁴ See *Mills*, 348 F. Supp. at 869 (identifying the plaintiffs in the case). Peter Mills was a twelve-year-old living in D.C. who was excluded from the Brent Elementary School as a fourth grader with behavioral problems. *Id.* Duane Blacksheare was a thirteen-year-old child who was a resident of St. Elizabeth's Hospital in D.C. who was excluded from the third grade at Giddings Elementary School in October of 1967. *Id.* George Lidell Jr. was an eight-year-old at the time of the court case and never attended public school in the district on the basis that he had an MR diagnosis and required a special class. *Id.* Steven Gaston was an eight-year-old resident of D.C. who was excluded from first grade at Taylor Elementary School in September of 1969. See *Mills*, 348 F. Supp. at 870. Michael Williams was a sixteen-year-old resident of St. Elizabeth's Hospital in D.C. when he was excluded from the Sharpe Health School in October of 1969 due to an MR diagnosis and epilepsy. *Id.* Janice King was a thirteen-year-old resident of D.C. when she was rejected from public schools due to brain damage from a childhood illness. *Id.* Jerome James was a twelve-year-old D.C. resident who was excluded from public school due to an MR diagnosis. *Id.*

⁷⁵ See *Mills*, 348 F. Supp. at 868. Stating that:

The genesis of this case is found (1) in the failure of the District of Columbia to provide publicly supported education and training to plaintiffs and other "exceptional" children, members of their class, and (2) the excluding, suspending, expelling, reassigning and transferring of "exceptional" children from regular public school classes without affording them due process of law.

Id.

⁷⁶ See *Mills*, 348 F. Supp. at 875 (articulating the District's defense). The District of Columbia argued essentially that there were only two ways to give the Plaintiffs the relief they requested. *Id.* The District's first option required requesting that Congress allocate millions of dollars to improve the District's special education services. *Id.* The District's second option to improve special education services consisted of diverting millions of dollars of its already sparse

had an equal right to both public education that was meaningful to them and procedural protections.⁷⁷ This case established that all students are entitled to a free and appropriate education specific to the students' learning abilities.⁷⁸

IDEA with Amendments

The IDEA was the legislative response to the cornerstone cases of *Mills* and *PARC*.⁷⁹ In 1975, the United States Congress passed the Education for Handicapped Children Act (EHCA)—now renamed the IDEA—to combat the fact that many students with disabilities were being turned away from public schools.⁸⁰ The EHCA was proposed and enacted in a time when only 1 in 5 children with disabilities were being educated in

educational funds. *Id.* The District alleged the second option would be unlawful and inequitable to students outside this class of Plaintiffs. *Id.*

⁷⁷ See *Mills*, 348 F. Supp. at 876 (ruling insufficient educational funds not adequate basis for denying an education to students with disabilities). The court states that the United States Constitution, the District of Columbia Code, and the Board of Education's own regulations required the District to provide publicly-supported services for these students with disabilities. *Id.* "Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds." *Id.*

⁷⁸ See *Mills*, 348 F. Supp. at 878. Holding that,

...no child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a Rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative.

Id.

⁷⁹ See Individuals with Disabilities Education Act, Pub. L. 101-476, 104 Stat. 1142. See also Philip T. K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J. L. EDUC. 1, 6 (2000). Stating that the *PARC* and *Mills* decisions led the United States Congress to pass the Education for All Handicapped Children's Act, which was later renamed to the Individuals with Disabilities Education Act. *Id.* See also Edwin W. Martin et. al., *The Legislative and Litigation History of Special Education*, THE FUTURE OF CHILDREN, 29-30 (2009) <https://pdfs.semanticscholar.org/16b1/c6fda4e8be11fa56b0bc77f70553ee2572bf.pdf> (last visited Nov. 16, 2019). Explaining that Congress utilized an educational grant program through the Education for All Handicapped Children Act. *Id.* The Act required that all students with disabilities receive a free appropriate public education and provided the grant program to help with the excessive costs of educating children with special needs. *Id.*

⁸⁰ See generally *History, Twenty-Five Years of Progress In Educating Children with Disabilities Through IDEA*, U.S. DEP'T OF EDUC. OFF. OF SPECIAL EDUC. PROGRAMS, <https://www2.ed.gov/policy/spced/leg/idea/history.pdf> (last visited Nov. 16, 2019). See also Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J. L. AND MED. 483, 516 (2010) (stating that throughout the 1960s very few schools would accept children with Autism). The Education for Handicapped Children Act of 1975 did not do much to support children with Autism but it did create due process rights in schools. *Id.*

the public school system, if at all.⁸¹ Children who were excluded were those who were deemed by the school system to fall into any of the following categories: deaf, blind, emotionally disturbed or mentally retarded (MR).⁸² Proponents of the IDEA purposely used language similar to the Civil Rights Act in an effort to ensure that students with disabilities would be given equal access to a free and appropriate education that their neurotypical peers received following *Mills* and *PARC*.⁸³

The four main purposes of the IDEA were: “to assure that all children with disabilities have available to them...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs[;]” “to assure that the rights of children with disabilities and their parents...are protected[;]” “to assist States and localities to provide for the education of all children with disabilities[;]” and “to assess and assure the effectiveness of efforts to educate all children with disabilities[.]”⁸⁴ All of these goals were not so easily attained after the IDEA was passed

⁸¹ See generally *History, Twenty-Five Years of Progress*, *supra* note 80. In 1970, only 1 in 5 children with disabilities were being educated in the public school system, if at all. *Id.*

⁸² See generally *id.* “Early legislation in many states permitted the exclusion of any child whenever school administrators decided that the child would not benefit from public education or that a child’s presence would be disruptive to others.” *Id.* See Letter from Ruth E. Ryder, *supra* note 45, at 1-2 (displaying discriminatory education statutes against students with disabilities).

⁸³ See Melvin, *supra* note 44, at 615-18.

Constitutional theories of equal opportunity for children with disabilities are rooted in the United States Supreme Court’s decision in *Brown v. Board of Education*. The Court’s decision in *Brown* rested on several findings. First, the Court noted the importance of education to a democratic society and to a child’s ability to succeed in life. Consequently, the Court held that an educational opportunity is so important that ‘where the state has undertaken to provide it, it is a right which must be made available to all on equal terms.’ Secondly, the Court found that segregating school children on the basis of race engendered feelings of inferiority and that such de jure segregation had a ‘tendency to retard the educational and mental development of negro children.’ Thus, the Court ruled that ‘separate but equal’ education facilities for black students was inherently unequal, depriving black children of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Id. at 606. See generally *Brown v. Bd. of Educ. of Topeka et. al.*, 347 U.S. 483, 495 (1954) (deciding that ‘separate but equal’ doctrine has no place in public education). See The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241. See IDEA Individuals With Disabilities Education Act, *supra* note 4 (discussing the IDEA).

⁸⁴ *History, Twenty-Five Years of Progress*, *supra* note 80, at 4.

Changes implicit in the law included efforts to improve how children with disabilities were identified and educated, to evaluate the success of these efforts, and to provide due process protections for children and families. In addition, the law authorized financial incentives to enable states and localities to comply with Public Law 94-142.

Id.

in 1975.⁸⁵ One of the biggest issues at this time was that there were still many disabilities that were not included in the original IDEA.

As discussed previously, ASD was first recognized in the 1940s by Leo Kanner, but it was not added to the IDEA until an amendment in 1990.⁸⁶ The same amendment that added Autism to the list of recognized disabilities under the IDEA also changed the name of the act from the Education for Handicapped Children Act to the Individuals with Disabilities Education Act.⁸⁷ Until this time, many students with an ASD were systematically ignored and left out of the public school system.⁸⁸

Despite the fact that by 1990 Autism was dramatically growing in prevalence, no federal regulations were set forth to better equip educators for dealing with the changing populations of their students until fourteen years later, with the IDEA Improvement Act of 2004.⁸⁹ This amendment called for the development of training programs to better prepare special education professionals for the particularities of educating students with

⁸⁵ See Melvin, Comment, *supra* note 44, at 601, 643, 649.

Notwithstanding this expression of Congressional preference for educating children with disabilities with non-disabled children, only about one-third of the approximately five million disabled children receiving a special education in the 1990-91 school year were educated entirely in the regular education classroom. Few children with severe intellectual disabilities are educated in the regular classroom.

Id.

⁸⁶ See *supra* notes 12-15 and accompanying text (discussing Leo Kanner's involvement in the recognition of ASD).

⁸⁷ See Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J. L. AND MED. 483, 516 (2010). "Throughout the 1960s, very few school programs would accept children with autism. Since their condition was neither a physical disability nor, in many cases, mental retardation, they 'slipped through the educational loophole.'" *Id.* "When the Education for Handicapped Children Act of 1975 (later renamed IDEA) came into force, the educational know-how in matters of autism was still virtually null." *Id.*

⁸⁸ See Melvin II, *supra* note 4, at 603 (describing the systematic exclusion of children with disabilities prior to the IDEA).

⁸⁹ See CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 1 (describing the proportional increase in the amount of children with ASD); see also Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004). The IDEA Improvement Act of 2004 reauthorized the IDEA with certain changes. *Id.* Section (d)(3) of the Act describes that the one of the purposes for this amendment is "to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services;..." *Id.* See also Sheryl Dicker & Emily Bennett, *Engulfed by the Spectrum: The Impact of Autism Spectrum Disorders on Law and Policy*, 45 VAL. U. L. REV. 415, 418 (2011). "The IDEA was amended most recently by the Individuals with Disabilities Education Improvement Act of 2004. This amendment specifically called for developing and improving programs to train special education teachers on the needs of children with ASDs." *Id.*

ASDs.⁹⁰ This task was then delegated to the Department of Education.⁹¹ The Department of Education set forth regulations in 2006 to better clarify the 2004 amendment.⁹² These regulations defined Autism and made clear that Autism is quite different from an emotional disturbance.⁹³

Since the IDEA was enacted, a number of important cases have interpreted the IDEA.⁹⁴ One of particularly grave importance is *Board of Education v. Rowley*.⁹⁵ In *Rowley*, a student with “minimal residual hearing” who was an “excellent lip reader” began attending kindergarten.⁹⁶ The student’s parents agreed to place her in a regular kindergarten classroom for an experimental period of two weeks with a sign language

⁹⁰ See Dicker & Bennett, *supra* note 89, at 418 (noting the call of action created by the amendment to develop training tools).

⁹¹ See *id.* “This amendment specifically called for developing and improving programs to train special education teachers on the needs of children with ASDs. In 2006, the Department of Education augmented prior regulations to assist in implementing the IDEA.” *Id.* See generally Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300 (2006).

⁹² See Dicker & Bennett, *supra* note 89, at 418. As of 2006, the regulations are:

- (i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.
- (ii) Autism does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.

Id. 34 C.F.R. § 300.8 (c)(1). *Id.*

⁹³ See Dicker & Bennett, *supra* note 89, at 418 (clearly identifying ASD as a developmental disability). The Combating Autism Act of 2006 was enacted to fund a lot of the provisions of the IDEA and combat ASD through functions like research, screening, intervention, and education. Combating Autism Act of 2006, Pub. L. No. 109-416, 120 Stat. 2821 (2006) (codified at 42 U.S.C. §§280i-280i-4, 283j) (2006)).

⁹⁴ See generally *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Fry v. Napoleon Cnty. Sch.*, 137 S. Ct. 743 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); *Cedar Rapids Cnty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66 (1999); *Bd. of Educ. v. Russman*, 521 U.S. 1114 (1997); *Agostini v. Felton*, 521 U.S. 203 (1997); *Florence Cnty. Sch. Dist. Four v. Carter by & through Carter*, 510 U.S. 7 (1993); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Honig v. Doe*, 484 U.S. 305 (1988); *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359 (1985); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

⁹⁵ See *Rowley*, 458 U.S. at 209-10 (declaring that a FAPE is not the best available education).

⁹⁶ See *Rowley*, 458 U.S. at 184. “This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, N.Y. Amy has minimal residual hearing and is an excellent lipreader.” *Id.* See generally David Ferster, “Broken Promises: When Does a School’s Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education,” 28 BUFF. PUB. INTEREST L.J. 71 (2009-10).

interpreter.⁹⁷ The interpreter reported at the conclusion of the two weeks that he felt that the student did not necessarily need his services.⁹⁸ Instead she was given a hearing aid to amplify spoken words so that she was better able to hear her peers and instructor.⁹⁹ The Rowleys' argued that denying their daughter a sign language interpreter in the classroom was denying her a free and appropriate public education that was guaranteed to her under the IDEA.¹⁰⁰ The Supreme Court agreed with the school district in stating that the purpose of the free and appropriate education requirement was to provide some sort of educational benefit to the child, not what was necessarily best for the child.¹⁰¹

⁹⁷ See *Rowley*, 458 U.S. at 184. "The Rowleys agreed with parts of the IEO but insisted that Amy also be provided a qualified sign-language interpreter in all her academic classes in lieu of the assistance proposed in other parts of the IEP." *Id.* "Such an interpreter had been placed in Amy's kindergarten class for a 2-week experimental period, but the interpreter had reported that Amy did not need his services at that time." *Id.*

⁹⁸ See *Rowley*, 458 U.S. at 184. "[B]ut the interpreter had reported that Amy did not need his services at that time." *Id.*

⁹⁹ See *supra* notes 98-99 and accompanying text.

¹⁰⁰ *Rowley*, 458 U.S. at 209-10 (1982).

On the contrary, the District Court found that the "evidence firmly establishes that Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." 483 F.Supp., at 534. In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign language interpreter.

Id.

¹⁰¹ See *Rowley*, 458 U.S. at 203-04. "Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* "Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP." *Id.* "In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* See also Seligmann, *supra* note 39 at 226-27 (2005). "While IDEA stresses the individually crafted nature of each child's IEP, it gives less guidance on how to determine whether an IEP is adequate to provide the FAPE the law mandates for the child with a disability." *Id.* "In *Rowley*, the Supreme Court provided the standard that today governs the inquiry, ruling that the state is required to provide 'personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Id.* "The Court specifically rejected the lower court's standard that the state must provide services allowing the child to maximize his potential 'commensurate with the opportunity provided to other children.'" *Id.* See generally Amy J. Goetz et. al, *The Devolution of the Rowley Standard in the Eighth Circuit: Protecting the Right to a Free and Appropriate Public Education by Advocating for Standards-Based IEPs*, 34 HAMLIN L. REV. 503 (2011); Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for "Free Appropriate Public Education?"*, 28 J. NAT'L ASS'N L. JUD. 397 (2008); Michele L. Beatty, Note, *Not a Bad Idea: The Increasing Need to Clarify Free Appropriate Public Education Provisions Under the Individuals with Disabilities Education Act*, 46 SUFFOLK U. L. REV. 529 (2013).

In *Endrew F.* the Supreme Court attempted to clarify the meaning of a free and appropriate public education under *Rowley*.¹⁰² The case involved a boy with ASD whose IEP goals every year were effectively copy and pasted onto the IEP for the following school year.¹⁰³ His behaviors were changing and nothing was being done or adjusted in terms of his IEP.¹⁰⁴ The parents brought the claim challenging that their son was being

¹⁰² See *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988, 994 (2017). The Court recognized that a FAPE was first determined in *Rowley*. *Id.*

In this Court, the parties advanced starkly different understandings of the FAPE requirement. Amy's parents defended the approach of the lower courts, arguing that the school district was required to provide instruction and services that would provide Amy 'an equal educational opportunity' relative to children without disabilities. The school district, for its part contended that the IDEA 'did not create substantive individual rights'; the FAPE provision was instead merely aspirational.

Id.

Neither position carried the day. On the one hand, this Court rejected the view that the IDEA gives "courts carte blanche to impose upon the States whatever burden their various judgments indicate should be imposed." After all, the statutory phrase, "free appropriate public education" was expressly defined in the Act, even if the definition "tended toward the cryptic rather than comprehensive..." This Court went on to reject the "equal opportunity" standard adopted by the lower courts, concluding that "free appropriate public education" was a phrase "too complex to be captured by the word 'equal' whether one is speaking of opportunities or services." The Court also viewed the standard as "entirely workable," apt to require "impossible measurements and comparisons" that courts were ill suited to make.

Id. "We explained that this requirement is satisfied, and a child has received a FAPE, if the child's IEP sets out an educational program that is 'reasonably calculated to enable the child to receive educational benefits.'" *Id.* at 995-96. "For children receiving instruction in the regular classroom, this would generally require an IEP 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" *Id.* at 996. "It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot." *Endrew F.*, 137 S. Ct. at 1000-01.

¹⁰³ See *id.* at 996. The petitioner in this case is a child who was diagnosed with ASD at the age of two. *Id.* "As Endrew's parents saw it, his academic and functional progress had essentially stalled: Endrew's IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aim." *Id.* See also Laura McKenna, *Is the Bar Too Low for Special Education?*, THE ATLANTIC (Jan. 24, 2017), <https://www.theatlantic.com/education/archive/2017/01/is-the-bar-too-low-for-special-education/514241/>. See also Laura McKenna, *How a New Supreme Court Ruling Could Affect Special Education*, THE ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/>.

¹⁰⁴ See *Endrew F.*, 137 S. Ct. at 996 (stating Endrew's IEPs were largely carried over from one year to the next).

denied a free and appropriate public education under the IDEA.¹⁰⁵ The parents argued that “the final IEP proposed by the school district was not ‘reasonably calculated to enable [Andrew] to receive educational benefits’ and that Andrew had therefore been denied a FAPE.”¹⁰⁶ The administrative law judge disagreed with Andrew’s parents, so Andrew’s parents appealed to the federal district court.¹⁰⁷

The federal district court concluded that “...annual modifications to Andrew’s IEP objectives were ‘sufficient to show a pattern of, at the least, minimal progress.’ Ibid. Because Andrew’s previous IEPs had enabled him to make this sort of progress, the court reasoned, his latest, similar IEP was reasonably calculated to do the same thing. In the court’s view, that was all *Rowley* demanded.”¹⁰⁸ The Tenth Circuit agreed as they believed the standard under *Rowley* to be “some educational benefit.”¹⁰⁹ Andrew’s parents then argued that a FAPE is “an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without

Each year, his IEP Team drafted an IEP addressed to his educational and functional needs. By Andrew’s fourth grade year, however, his parents had become dissatisfied with his progress. Although Andrew displayed a number of strengths . . . he still “exhibited multiple behaviors that inhibited his ability to access learning in the classroom.

Id.

¹⁰⁵ *See id.* at 997.

In February 2012, Andrew’s parents filed a complaint with the Colorado Department of Education seeking reimbursement for Andrew’s tuition at Firefly. To qualify for such relief, they were required to show that the school district had not provided Andrew a FAPE in a timely manner prior to his enrollment at the private school. (citation omitted).

Id. “Andrew’s parents contended that the final IEP proposed by the school district was not ‘reasonably calculated to enable [Andrew] to receive educational benefits’ and that Andrew had been denied a FAPE.” *Id.* *See generally* Holly T. Howell, Comment, *Andrew F. v. Douglas County School District: How Much Benefit Is Enough When Evaluating the Educational Needs of Disabled Students in Federally-Funded Public Schools?*, 40 AM. J. TRIAL ADVOC. 347 (2016).

¹⁰⁶ *Andrew F.*, 137 S. Ct. at 997. *See generally* Allison Zimmer, Note, *Solving the IDEA Puzzle: Building a Better Special Education Development Process Through Andrew F.*, 93 N.Y.U.L. REV. 1015 (2018).

¹⁰⁷ *See Andrew F.*, 137 S. Ct. at 997. “An Administrative Law Judge (ALJ) disagreed and denied relief.” *Id.*

¹⁰⁸ *Id.* “Andrew’s parents sought review in Federal District Court. Giving ‘due weight’ to the decision of the ALJ, the District Court affirmed.” *Id.* “The Tenth Circuit affirmed. The Court of Appeals recited language from *Rowley* stating that the instruction and services furnished to children with disabilities must be calculated to confer ‘some educational benefit.’” *Id.*

¹⁰⁹ *See supra* note 108 (discussing the reasoning). *See generally* Zirkel, *supra* note 101.

disabilities.”¹¹⁰ The court disagreed and declined to make a bright line rule to better guide special education matters in this country.¹¹¹

As indicated above in case law, a lawyer’s involvement in a student with an ASD’s education often begins during IEP team meetings.¹¹² Parents have the ability to amend IEPs, and refuse to sign them.¹¹³ Until both a parent and the rest of the IEP team can agree on an IEP, a child’s “stay put” rights come in to ensure the child is still getting an adequate education.¹¹⁴

¹¹⁰ See *Andrew F.*, 137 S. Ct. at 1001 (citing Andrew’s parents argument from Petitioner’s brief).

¹¹¹ See *id.* “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Id.* See generally Julie Waterstone, *Andrew F.: Symbolism v. Reality*, 46 J. L. & EDUC. 527 (2017); Miriam Kurtzig Freedman, *Waterstone’s Andrew F.: Symbolism and Reality from the School’s Perspective*, 47 J. L. & EDUC. 517 (2018).

¹¹² See Erin Phillips, Note, *When Parents Aren’t Enough: External Advocacy in Special Education*, 117 YALE L. J. 1802, 1830 (2008). “Given that disability is a widely varying condition which each individual experiences uniquely, it is quite probable that a parent may not be the most appropriate advocate.” *Id.* “Since the passage of the IDEA, multiple scholars have argued that parents are often not fully aware of education options available for their children and therefore have a difficult time forming accurate expectations of schools and teachers.” *Id.* “Compounding this gap in knowledge of education options is the fact that the special education regime involves not only the text of the IDEA, but also federal regulations, state statutes and regulations, and judicial decisions.” *Id.* at 1831. “Moreover, the notice provided to parents does not clearly illuminate the various substantive requirements for schools and the reasoning behind those policies.” *Id.* “Thus, the procedural safeguard allowing parents to participate in IEP team meetings and challenge IEP decisions is not very effective if parents are unaware of alternative options for educational programming.” *Id.* at 1832.

¹¹³ See 20 U.S.C.S. § 1414 (2012). “Consent for services. An agency that is responsible for making a free appropriate public education available to a child with a disability under this part shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.” *Id.* See also Individual Education Programs for Children with Disabilities, 4 Educ. L. § 10C.06.

Parents are not responsible for the development of the IEP. Of course, they are entitled to and should be fully involved in the process. There might be instances when school officials rely too extensively on parents in developing a child’s IEP. ‘Line drawing is often difficult, and in the IEP context it is impossible to draw a precise line separating healthy requests for parental input from impermissible demands that parents do the school system’s work.’ Quite clearly, though, school officials are entitled to expect parents to cooperate in the process and be specific in pointing out deficiencies in a proposed or existing IEP.

Id.

¹¹⁴ See MASS. SCH. L. SOURCEBOOK & CITATOR § 2-603-28.07 § 1(b) Parental Involvement. If after the initial evaluation and placement of a child a school district cannot get parental consent as to a reevaluation or a placement, the school district can then consider with the parent if the child is being denied a FAPE. *Id.* See generally Andrew M.I. Lee, J.D., “Stay Put” Rights: *What They Are and How They Work*, UNDERSTOOD, <https://www.understood.org/en/school-learning/your->

Stay put rights are when the parents and the school district cannot agree on an IEP for the upcoming year so the previous IEP stays in place until a new IEP can be agreed upon.¹¹⁵ This disagreement could be regarding a child's placement at the school, a denial of services or even not getting enough of a certain service that the parent feels the child needs, among other things.¹¹⁶ At this point, a parent may elect to bring a lawyer with them to a team meeting to help negotiate an IEP.¹¹⁷ Often, if the school district has advance notice that a parent will be bringing a lawyer to a team meeting, the school district will be represented as well.¹¹⁸

If the school district and the parent cannot agree, the parent has the option to file a request for a due process hearing with an administrative law body of that particular state's Department of Education.¹¹⁹ In Massachusetts, for instance, this body is named

childs-rights/basics-about-childs-rights/stay-put-rights-what-they-are-and-how-they-work (last visited Nov. 21, 2019). A child's stay put rights allow a child to stay in the previous agreed upon placement from the previous IEP while the dispute resolution process proceeds. *Id.*

¹¹⁵ *See id.*

¹¹⁶ 20 U.S.C.S. § 1415 (j) Maintenance of current educational placement. (2004).

...during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed...

Id.

¹¹⁷ *See supra* note 42 and accompanying text (indicating that a parent can bring whomever they wish to an IEP Team meeting).

¹¹⁸ *See* Letter from Ruth E. Ryder, *supra* note 45. A letter from the Acting Director of the Office of Special Education Programs to an Illinois State Board of Education official indicates, "[i]n accordance with 34 CFR 300.321(a)(6), at the discretion of the parent or public agency, other individuals who have knowledge or special expertise regarding the child may attend the IEP meeting." *Id.* "The determination of the knowledge or special expertise of these individuals must be made by the party (parent or public agency) who invited the individual to be a member of the IEP Team." *Id.* "Under 34 CFR 300.322(b), the public agency must inform parents in advance of the IEO meeting, including the purpose, time, and location of the meeting and who will be in attendance." *Id.* "There is no similar requirement in the IDEA for the parent to inform the public agency, in advance, if he or she intends to be accompanied by an individual with knowledge or special expertise regarding the child, including an attorney." *Id.* The letter also cautions the use of bringing attorneys to IEP meetings as they may create an adversarial atmosphere. *Id.*

¹¹⁹ *See Request a BSEA Hearing*, MASS. BUREAU OF SPECIAL EDUC. APP., <https://www.mass.gov/how-to/request-a-bsea-hearing> (last visited Nov. 21, 2019). A student who is 18 or over, parents, guardians, individuals with court appointed education decision making authority, a surrogate parent, special education director, an attorney or advocate can request a due process hearing on behalf of a student. *Id.* A hearing request has to provide the name and address of the student, name of the school the student attends, name and contact information for the parents or legal guardian, name of the responsible school district or state agency, the name, address, phone number, statement of the issues to be resolved at the due process hearing, and statement explaining the resolution sought through the process. *Id.*

the Bureau of Special Education Appeals.¹²⁰ The Bureau of Special Education Appeals (BSEA) is the administrative law body that handles mediations and due process hearings.¹²¹ In fiscal year 2018, the Bureau of Special Education Appeals in Massachusetts received approximately 11,900 rejected IEPs, facilitated 142 IEP team meetings, conducted 699 mediations and received 481 hearing requests.¹²² At hearings such as this, parents can either be represented by counsel, an advocate, or represent themselves pro se.¹²³ If a parent or school district does not approve of the outcome from a BSEA hearing, they have the option of appealing to superior court for a review of the administrative record.¹²⁴

¹²⁰ See *Bureau of Special Education Appeals*, MASS. BUREAU OF SPECIAL EDUC. APP., <https://www.mass.gov/orgs/bureau-of-special-education-appeals> (last visited Nov. 21, 2019). The BSEA derives authority from both federal and Massachusetts statutes. *Id.* “[The BSEA] conducts due process hearings and renders Rulings and Decisions concerning eligibility, evaluation, placement, individualized education programs (IEP), provision of special education and procedural protections for students with disabilities.” *Id.*

¹²¹ See *id.* (indicating what BSEA does relating to education of children with disabilities).

¹²² See *Report: Fiscal Year 2018 BSEA Statistics*, MASS.GOV, <https://www.mass.gov/report/fiscal-year-2018-bsea-statistics> (last visited Jan. 30, 2019). “There were approximately 11,900 rejected IEPs received by the BSEA during FY 2018 (representing an increase from the 11,400 received in the prior year).” *Id.* “This year’s the BSEA facilitated 142 IEP Team meetings, an increase from the 118 conducted during the previous year.” *Id.* “There were 699 mediations conducted in FY 2018 with an agreement rate of 85%.” *Id.* “The BSEA received approximately 481 hearing requests during FY 2018. BSEA hearing officers conducted full hearings resulting in the issuance of 13 decisions. In addition, 35 substantive written rulings were issued.” *Id.* “As of the date of this report, settlement conferences were held in 78 of the cases that were filed for hearing in FY 2018, of which 72 were settled.” *Id.*

¹²³ See *Report: Fiscal Year 2018 BSEA Statistics*, MASS.GOV, <https://www.mass.gov/report/fiscal-year-2018-bsea-statistics> (last visited Jan. 30, 2019). BSEA hearing officers conducted full hearings which resulted in 13 decisions. *Id.* “Of the 13 decisions noted above, parents fully prevailed in 1, school districts fully prevailed in 11, and 1 decision involved a finding against a private school.” *Id.* In the one case where the parents fully prevailed the parents and the school district were both represented by counsel. *Id.* There were 11 cases in which school districts fully prevailed; parents were represented by counsel in 2 matters, an advocate in 1 matter and appeared pro se in 7 cases whereas the school district in each of these cases were all represented by counsel. *Id.* See also Andrew M.I. Lee, J.D., *The Difference Between Special Education Advocates and Attorneys*, UNDERSTOOD <https://www.understood.org/en/school-learning/your-childs-rights/dispute-resolution/the-difference-between-special-education-advocates-and-attorneys> (last visited Jan. 30, 2019). A Special Education Advocate is “A person who guides you through the special education process. An advocate may have legal training but is not required to.” *Id.* A Special Education Attorney is “A professional with a law degree who represents you when you’re considering dispute resolution or legal action against a school.” *Id.* An advocate is unable to give a parent legal advice about their child’s rights, prepare legal complaints and papers or, represent you as legal counsel in a lawsuit in state or federal court. *Id.*

¹²⁴ See *Bureau of Special Education Appeals Reference Manual*, MASS. ADMIN. OF SPECIAL EDUC., <http://www.asepage.org/BSEA.pdf> (last visited Jan. 30, 2019). “Once a Hearing Officer has issued a decision on the merits of the dispute, it is a final agency decision that cannot be reconsidered by the BSEA.” *Id.* “A party may appeal the decision by filing a complaint in a Massachusetts Superior Court or a federal District Court within 90 calendar days of the date of the Hearing Officer’s decision.” *Id.*

Often times, school districts will try to get out of paying for a service like ABA as it is extremely expensive.¹²⁵ Many school districts will not provide in-home ABA therapy because of the sheer expense of the services.¹²⁶ Parents exposure to ABA therapy often begins when their child is engaged in early intervention.¹²⁷ Parents often see impressive progress with ABA providers throughout their child's time in early intervention.¹²⁸

Parents that see progress with ABA may want this behavior therapy incorporated into their child's education when the child enters the public school system.¹²⁹ Many special education teachers subscribe to the teachings of ABA.¹³⁰ Parents will often try pushing for more in home ABA services to see the same progress for their child that they did in early intervention, but they may not be successful depending on their school system.¹³¹

¹²⁵ See generally *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217 (2nd Cir. 2012); *D.B. v. Ocean Twp. Bd. of Educ.*, 985 F. Supp. 457 (D.N.J. 1997); *Deal v. Hamilton County Dep't of Educ.*, 2006 U.S. Dist. LEXIS 27570 (U.S.D.C. E. Tenn. 2006); *McKay v. Sch. Bd. of Avoyelles Parish*, 2015 U.S. Dist. LEXIS 168886 (U.S.D.C. West. LA 2015); *Toth v. N.Y.C. Dep't of Educ.* (U.S.D.C. E. N.Y. 2017); *R.K. v. N.Y.C. Dep't of Educ.*, 2011 U.S. Dist. LEXIS 32248 (U.S.D.C. E. N.Y. 2011); *D.D. v. DeBuono*, 130 F. Supp. 2d 401 (U.S.D.C. S. N.Y. 2001); *K.M. v. Tehachapi Unified Sch. Dist.* 2017 U.S. Dist. LEXIS 52179 (U.S.D.C.E.Ca. 2017).

¹²⁶ See *supra* note 125 and accompanying text (displaying cases where ABA services were disputed).

¹²⁷ See *supra* notes 30-35 and accompanying text (discussing ABA in a child's early intervention).

¹²⁸ See ABA, *supra* note 57 (discussing ABA's effectiveness). See generally Meghan Kehoe, "The Effectiveness of Applied Behavior Analysis", FISHER DIGITAL PUBL'N. https://fisherpub.sjfc.edu/cgi/viewcontent.cgi?article=1308&context=education_ETD_masters (last visited Mar. 11, 2019).

¹²⁹ See *M.H.*, 685 F.3d at 227.

¹³⁰ See generally *Student X v. N.Y.C Dep't of Educ.*, 2008 U.S. Dist. LEXIS 88163 (E.D.N.Y. 2008); *Cty. Sch. Bd. v. R.T.*, 433 F. Supp. 2d 657 (E. Va. 2006); *P.K. v. N.Y.C Dep't of Educ.*, 819 F. Supp. 2d 90 (E.D.N.Y. 2008); *K.M. v. Tehachapi Unified Sch. Dist.*, 2018 U.S. Dist. LEXIS 76958 (E. Ca. 2018); *L.M.P. v. Sch. Bd.*, 2014 U.S. Dist. Lexis 134514 (S.D. Fla Fl. 2014); *J.K. v. Metro. Sch. Dist. Southwest Allen Cty.*, 2005 U.S. Dist. LEXIS 42439 (N.D. Ind. 2005).

¹³¹ See Cathina T. Ngugen et. al., *Sociodemographic Disparities in Intervention Service Utilization in Families of Children with Autism Spectrum Disorder*, 46 J. AUTISM DEV. DISORDER 3729, 3729-38. (2016).

Among families of children receiving classroom-based programs and/or individual services, 59% of mothers were non-Hispanic White, 92% were primarily English speaking, 44% had Bachelor degrees, and 83% were privately insured at the time the child was born. (Table 1). Sociodemographic characteristics were very similar for those receiving classroom-based services, those not receiving classroom-based services, and those receiving individual based services; those not receiving individual services were less likely to have graduate education and more likely to have vocational training or college without a bachelor's degree.

Id. at 3731-32. See also John McLaughlin, *Why Model Autism Programs are Rare in Public Schools*, SPECTRUM NEWS (July 11, 2017), <https://www.spectrumnews.org/opinion/viewpoint/model-autism-programs-rare-public-schools/>. "I learned that a number of public school districts – especially those in Massachusetts, Utah, New Jersey and California – have developed stellar programs for children with autism. But these model programs make up a tiny minority of special education programs and do not seem to be sparking imitators." *Id.*

This was the case in *M.H. v. New York City Department of Education*.¹³² This case was consolidated in the appeals court from two other cases with similar issues.¹³³ P.H. was a child with ASD who was attending a mainstream preschool and was receiving one to one in home services.¹³⁴ The teachers P.H. had were trained in ABA and provided ABA services to him for approximately 35 hours a week.¹³⁵ Additionally, P.H. received five one-hour sessions of speech therapy, three one-hour occupational therapy and two one-hour physical therapy sessions.¹³⁶ When P.H. and his family were beginning the transition process from early intervention to public school, they sent in multiple documents to help draft the IEP, including recommendations from P.H.'s current learning environment.¹³⁷ The IEP states P.H. would be placed in a special education school, in a special education class, with a student, teacher, paraprofessional ratio of 6:1:1.¹³⁸ It further provided for two thirty-minute sessions of physical therapy, three thirty-minute sessions of occupational therapy and three thirty-minute sessions of speech, which would be significantly less than what P.H. was receiving prior to this IEP.¹³⁹ The parents examined multiple placements recommended by the IEP team, finding none of them adequate for their son.¹⁴⁰ The parents' main complaint was they "...thought that P.H. would not benefit from the instruction offered in the classes, both because the school offered only minimal ABA 1:1 therapy and because, M.H. thought, the methodologies the school did use would not work for P.H."¹⁴¹ With this in mind, P.H.'s parents placed him at the Brooklyn Autism Center because of the one to one ABA therapy they provided

¹³² See 685 F.3d at 217.

¹³³ See *id.* at 226. These were separate proceedings that have been consolidated as there was similar facts. *Id.* Both Plaintiffs asserted that the school district denied their child a FAPE so the school must reimburse the parents for the outplacement of their children to private school. *Id.*

¹³⁴ See *M.H.*, 685 F.3d at 226. "P.H., the son of M.H. and E.K., was born on October 11, 2001. He is autistic. During the 2006-07 school year, when P.H. was of pre-school age, he attended a mainstream preschool." *Id.* "In addition, P.H. received several related services weekly, including five 60-minute speech therapy sessions; three 60-minute occupational therapy sessions; and two 60-minute physical therapy sessions." *Id.*

¹³⁵ *Id.* "Pursuant to the CPSE mandate, P.H.'s SEITs were trained in Applied Behavior Analysis ("ABA") and provided at least 35 hours weekly of services using that approach." *Id.*

¹³⁶ See *M.H.*, 685 F.3d at 226. Indicating Plaintiff received five one hour sessions of speech therapy, three one hour sessions of occupational therapy and two one hour physical therapy sessions. *Id.*

¹³⁷ See *id.* at 227. The Plaintiff parents provided the IEP team with a psycho educational evaluation; speech, occupational, and physical therapy progress reports; educational progress report; social history from a social worker; and a report by the Plaintiff child's preschool teacher. *Id.* See generally Stephanie M. Poucher, Comment, *The Road to Prison is Paved with Bad Evaluations: The Case for Functional Behavioral Assessments and Behavior Intervention Plans*, 65 AM. U. L. REV. 471 (2015).

¹³⁸ See *M.H.*, 685 F.3d at 227. "Under the IEP, P.H. would be placed in a special school in a special education class with a 6:1:1 student-teacher-paraprofessional ration." *Id.*

¹³⁹ *Id.* "The IEP also provided for (1) twice weekly 30-minute physical therapy sessions; (2) thrice weekly 30-minute occupational therapy sessions; and (3) thrice weekly 30-minute speech and language therapy sessions. Under this IEP, P.H. would thus receive fewer hours of these related services than he had been receiving under the prior year's plan." *Id.*

¹⁴⁰ *Id.* at 228. The parents examined a similar classroom at the school, which the incoming principal was currently working at with similar conditions to the one he would be overseeing at the recommended placement and a private school named the Brooklyn Autism Center. *Id.*

¹⁴¹ See *M.H.*, 685 F.3d at 229.

throughout the day and sought reimbursement through a due process hearing on the grounds that P.H. had been denied a free and appropriate public education.¹⁴²

The child that is the focus of the second case consolidated with *M.H. v. New York City Department of Education* is referred to as D.S.¹⁴³ D.S. was diagnosed with Pervasive Developmental Disorder, which is on the ASD spectrum, and was engaged in services through New York State Early Intervention program.¹⁴⁴ By the time D.S. began transitioning to the public school system, he was receiving 40 hours of ABA services a week along with five hours a week of speech, five hours a week of OT and two hours a week of PT.¹⁴⁵ The different specialists that had been working with the student sent in evaluations that the IEP team did not acknowledge.¹⁴⁶ The IEP team recommended in the IEP that the student attend a 6:1:1 program in a district school similar to B.H.¹⁴⁷ The plan also reduced services to “thirty minutes each of occupational, physical, and speech therapy, five times per week, and thirty minutes of counseling three times weekly.”¹⁴⁸ The

¹⁴² *Id.* at 228.

“M.H. testified that with the start of the school year fast approaching, his intention was ‘to place [P.H.] temporarily if they’ll accept him into BAC in that program,’ while M.H. continued to seek information regarding the IEP’s public school placement. P.H. was accepted into BAC, and the plaintiffs signed the contract with the school and paid the deposit.”

Id.

¹⁴³ *Id.* at 232. Plaintiff M.S. and L.S.’s son was diagnosed with Pervasive Developmental Disorder at 17 months old. *Id.*

¹⁴⁴ *Id.* “Immediately thereafter, D.S. began to receive services from the New York State Early Intervention program (‘E.I.’)...” *See M.H.*, 685 F.3d at 232.

¹⁴⁵ *Id.* “...[I]ncluding 20 hours per week of special education involving a combination of ABA and other therapy techniques. He also received occupational and physical therapy.” *Id.*

¹⁴⁶ *See id.* at 233. The IEP team received several written reports. *Id.* “D.S.’s occupational therapist reported that D.S.’s progress had been ‘extremely slow,’ and that ‘[i]t is essential that [D.S. receive] [occupational therapy] 5 times a week for at least 60 minutes in order to make adequate progress.” *Id.* “D.S.’s speech therapist wrote that as of that time, D.S. had ‘never spoken’ and could ‘not effectively communicate pain or discomfort... [or] basic wants or needs.” *M.H.*, 685 F.3d at 233. “She thought it to be ‘imperative that [D.S. continue[s] to receive speech and language therapy for no [fewer] than [5] times weekly for [60] minute session to maintain and carryover learned skills thus far, and to help him to communicate spontaneously.” *Id.* “D.S.’s physical therapist ‘recommended that [D.S.] continue to receive physical therapy services as per mandate’ to continue his improvement. The CSE group also received a report from DOE evaluator Pearl, who, according to L.S., recommended that D.S. be placed in an ABA program.” *Id.* “Jill Weynert, D.S.’s preschool program coordinator and a certified behavior analyst, expressed the view at the IHO hearing that D.S. ‘absolutely needed a one to one – he needed an ABA program.” *Id.* “Weynert explained that D.S. ‘had a hard enough time learning with one to one,’ and that he ‘wouldn’t be able to learn’ in a group setting. She also stated that unlike most children, D.S. would not benefit from being exposed to peers in a classroom environment because he could not ‘attend to other kids.’ *Id.* at 233-34. “According to Weynert, there was no discussion at the CSE meeting of D.S.’s progress over the previous year, or whether he had achieved any of the annual or short-term goals that the CPSE had theretofore set out for him.” *M.H.*, 685 F.3d at 234.

¹⁴⁷ *Id.* No discussion was had at the IEP meeting about the progress of the child or if he had met his IEP goals. *Id.* “...Bowser indicated that D.S. would be placed in a 6:1:1 program despite ‘expressed...concerns’ about such a placement.” *Id.*

¹⁴⁸ *Id.*

parents visited the school and decided it was not an adequate setting for their child and unilaterally placed him at the Brooklyn Autism Center for \$80,000.00 a year in tuition.¹⁴⁹ They sought reimbursement from the school district based on their belief that their child had been denied a free appropriate education similar to P.H.¹⁵⁰ Both families were ultimately denied reimbursement for the tuition at the private school, as the circuit court felt they were not denied a free and appropriate education as interpreted by the Supreme Court in *Rowley*.¹⁵¹

Additionally, parents may also get into disputes with school districts due to the denial of occupational therapy services for their children with ASD.¹⁵² This is often a doctor prescribed service for helping children with things like better hand eye coordination and caring for themselves.¹⁵³ *B.H. v. W. Clermont Board of Education* involved a student with diagnoses including, "...mental retardation, poorly controlled epilepsy, asthma, selective mutism, ADHD, explosive behavior disorder, Cushings Disease, pervasive developmental disorder (a form of autism), and post traumatic stress disorder."¹⁵⁴ B.H. was evaluated for occupational therapy issues in 2006-2007.¹⁵⁵ "The occupational therapy evaluation identified B as having significant deficits in the areas of hygiene, toileting, self-care, reciprocal communication and attention to task, among other

¹⁴⁹ See *M.H.*, 685 F.3d at 235. "They signed a contract with BAC pledging to pay the \$80,000 tuition for the 2007-08 school year." *Id.*

¹⁵⁰ *Id.* "In light of their discomfort, D.S.'s parents explored private school options for D.S., including the BAC." *Id.* "D.S. was accepted to BAC and another specialized school. His parents chose to enroll him at BAC, which offers only ABA 1:1 teaching." *Id.* "They signed a contract with BAC pledging to pay the \$80,000 tuition for the 2007-08 school year." *Id.*

¹⁵¹ See *M.H.*, 685 F.3d at 235. "...it has not been established by a preponderance of the evidence that the IEP offered to D.S. by the State was inappropriate – that is, that D.S. was denied a FAPE." *Id.* "By contrast, although P.H. participated in a special education-only class at BAC, the facility is also located within a mainstream school, and P.H. participated in two non-academic classes with mainstream children." *Id.* "Unlike the situation at P.S. 94, the BAC students also share a school entrance, hallways, and playtime with non-disabled peers. In light of this un rebutted evidence, the district court properly agreed with the IHO's conclusion that BAC was an appropriate unilateral placement." *Id.* at 254; see also *Bd. of Educ.*, 458 U.S. 176, 176 (1982). See generally Yaakov Pollak, *supra* note 9.

¹⁵² See *M.S. v. Mullica Twp Bd. of Educ.*, 485 F. Supp. 2d 555 (D. N. J. 2007); *C.R. v. N.Y.C. Dep't of Educ.*, 211 F. Supp. 3d 583 (S. N. Y. 2016); *J.C. v. N.Y.C. Dep't of Educ.*, 2015 U.S. Dist. LEXIS 42937 (S. N. Y. 2015); *T.B. v. San Diego Unified Sch. Dist.*, 806 F.3d 451, (9th Cir. 2015).

¹⁵³ See *M.H.*, 685 F.3d at 232 (indicating that OT is used to help people with ASD learn basic everyday tasks).

¹⁵⁴ *B.H. v. W. Clermont Bd. of Educ.*, 788 F. Supp. 2d 682, 686 (S. Ohio 2011). "At the time of the hearing in this matter, B was a 10 year old child residing in the West Clermont Local School District. When B was four months old, Plaintiff B.H. ('Mrs. H'), took her in and subsequently became her legal guardian." *Id.* "B has a variety of diagnoses including mental retardation, poorly controlled epilepsy, asthma, selective mutism, ADHD, explosive behavior disorder, Cushing's Disease, Pervasive developmental disorder (a form of autism), and post traumatic stress disorder." *Id.*

¹⁵⁵ See *id.* at 687. "Plaintiff had B evaluated at Cincinnati Children's Hospital for both speech and occupational therapy issues in 2006-2007, and those evaluations were provided to West Clermont, including Nancy Parks, the principal of Holly Hill Elementary, where B was a student." *Id.* "The speech evaluation recommended that B receive direct speech therapy and the occupational therapy evaluation recommended that she receive direct occupational therapy." *Id.*

things.”¹⁵⁶ She did not receive the level of occupational therapy her guardian thought was necessary, and after raising this issue multiple times with the school district, the guardian filed a due process request after placing B.H. in a private school.¹⁵⁷ B.H. prevailed in the case and the school district was ordered to pay for both her placement at the private school as well as her direct occupational therapy for two years as a remedy.¹⁵⁸

Another service that students with ASD often receive through their school system is physical therapy.¹⁵⁹ Physical therapy is often prescribed by the child’s pediatrician, as many children with ASD struggle with physical activities and are often mistaken as simply being clumsy, when in reality it is a common symptom of ASD.¹⁶⁰ As physical therapy constitutes a related service under the IDEA, it is often the subject of litigation as displayed in *Paris School District v. A.H.*¹⁶¹

A.H. was a fourth grade student with ASD who had recently relocated to the Paris School District.¹⁶² A.H. underwent a number of evaluations prior to moving to the Paris School District, one of which was for physical therapy.¹⁶³ In drafting her IEP at the Paris School District, A.H.’s mother provided the IEP team with a number of evaluations,

¹⁵⁶ See *B.H.*, 788 F. Supp. 2d at 687.

¹⁵⁷ *Id.* at 690-91. “The due process request was filed by Plaintiff in May 2009. Among other things, the request sought behavior, speech, and occupational therapy evaluations by individuals trained in behavior management techniques.” *Id.*

¹⁵⁸ *Id.* at 701-02. “Based on the evidence of record, the Court finds that Plaintiff proved her case by the preponderance of the evidence, and has established that B was denied a FAPE.” *Id.*

- (1)The West Clermont Local School District shall pay for the placement of B for the 2009-2010 and the 2010-2011 school years at Applied Behavioral Services (‘ABS’);
- (2)The District shall pay for direct speech therapy and direct occupational therapy in the ABS program for two years 1-2 times per week as determined by B’s IEP team, which will include Mrs. H, the occupational therapist, and the speech therapist.
- (3)Plaintiff is the prevailing party and is therefore entitled to an award of her attorney fees and costs. Within 21 days of entry of this Order, Plaintiff shall evidence by affidavit and exhibit her fees and costs incurred in pursuing this matter.

Id.

¹⁵⁹ See *Physical Therapy for Autism*, *supra* note 8 (indicating physical therapy is a common treatment for students with ASD at schools).

¹⁶⁰ *Id.*

¹⁶¹ See *Paris Sch. Dist. v. A.H.*, No. 2:15-CV-02197, 2017 U.S. Dist. LEXIS 50042 (W. Ark. 2017).

¹⁶² See *A.H.*, 2017 U.S. Dist. LEXIS 50042 at *2. “On November 13, 2013, A.H. first enrolled in the PSD as a fourth grader. While enrolled at PSD, A.H. received special education services for her diagnosis of autism.” *Id.* “A.H. previously attended school in Memphis, Tennessee. Upon moving into the area covered by the PSD A.H. was enrolled at the ‘virtual academy’ of the Memphis school, and then a private school within the PSD.” *Id.*

¹⁶³ *Id.* at *2-3. “Upon enrolling A.H. at PSD, Ms. Harter provided the following to PSD: a September 19, 2013 physical therapy evaluation conducted by Pediatrics Plus that concluded that A.H. qualified for physical therapy to improve her participation in activities at home, in the community, and at school...” *Id.*

including a physical therapy evaluation by Pediatrics Plus indicating that A.H. required physical therapy to improve her participation in activities in her home, community and school.¹⁶⁴ She had received thirteen physical therapy sessions in Paris School District when her physical therapist received an email from the special education coordinator at the school indicating that A.H.'s physical therapy services would be discontinued.¹⁶⁵ There were contradicting reasons for this, but it was concluded that the IEP team discontinued physical therapy for A.H. without an appropriate evaluation.¹⁶⁶

A.H.'s mother brought an administrative complaint for breach of due process, alleging, *inter alia*, the improper discontinuance of physical therapy services for her daughter.¹⁶⁷ At trial and on appeal, the Paris School District had no evidence to offer for the discontinuance of this service.¹⁶⁸ The district court accordingly agreed with the hearing officer that "A.H.'s physical therapy needs . . . were not adequately provided and the discontinuance of such was without evaluative justification."¹⁶⁹

¹⁶⁴ *A.H.*, 2017 U.S. Dist. LEXIS 50042, at *2-3. When Ms. H enrolled A.H. at the school she provided the school with a neuropsychological evaluation, a speech language evaluation, an occupational therapy evaluation, a physical therapy evaluation, a letter from A.H.'s treating neurologist recommending that A.H. receive in home services, and an assessment and behavior support plan. *Id.*

¹⁶⁵ *Id.* at *5. "A.H. received physical therapy in thirteen sessions from November 26, 2013 to March 17, 2014, although the therapists' notes do not reflect any progress toward the goals." *Id.* "On March 20, 2014, the physical therapist indicated that she received an email from PSD's special education coordinator, indicating that the IEP team had met and made the decision that physical therapy would be discontinued." *Id.*

¹⁶⁶ *See A.H.*, 2017 U.S. Dist. LEXIS 50042, at *5-6 (summarizing records of A.H.'s therapy and IEP team's actions). "There was no evaluation done prior to discontinuing these services, and there was not a physical therapist present at the meeting where the decision was made to discontinue physical therapy." *Id.* "The special education coordinator testified that the reason for this decision was that A.H. fought the physical therapist on 'many occasions' and that 'the physical therapist pretty much decided to end services because there was no progress.'" *Id.* "However, the notes from the physical therapist recording summaries of the sessions held do not reflect this problem." *Id.*

¹⁶⁷ *See A.H.*, 2017 U.S. Dist. LEXIS 50042, at *9. "Ms. Harter's relationship with PSD deteriorated, and she initiated a separate due process hearing to take up the issue of A.H.'s placement in ALE." *Id.* "The Hearing Officer concluded that 'at this point it would have been [PSD's] responsibility of the ADE's regulations to ask for a due process hearing to resolve the issue of whether or not [A.H.] needed special education services.'" *Id.* at *10.

¹⁶⁸ *See Paris Sch. Dist. v. A.H.*, 2017 U.S. Dist. LEXIS 50042, at *31. (affirming administrative hearing officer's findings of fact and law). "In essence, PSD does not argue that it did not provide physical therapy in accordance with A.H.'s IEP, but rather argues that its noncompliance is excusable." *Id.* "If PSD were to succeed on this point the Court must make a factual determination of whether the physical therapy services were a trigger for A.H. since this might provide justification for PSD's actions." *Id.* "The notes of the physical therapist from the therapy session on March 17, 2014 indicate compliance and progress." *Id.* "PSD's argument to the contrary is supported only with a citation to the notes from the meeting held on March 19, 2014, that state that the services will be discontinued."

Id. "Those notes do not state a reason for that decision, and do not indicate any factual support for PSD's argument, any discussion of the issue, or any consent by Ms. Harter." *Id.*

¹⁶⁹ *See A.H.*, 2017 U.S. Dist. LEXIS 50042, at *32. (quoting administrative order).

As ASD is often communication-based, most pediatricians will opt for their patients with ASD to be in some sort of speech therapy.¹⁷⁰ This is often done through the public school system.¹⁷¹ A speech pathologist that works for the school or contracts with the school for services will come into the child's school and either pull one child, or a small group of students, with ASD and similar speech issues out to work on their speech in a separate room from their peers.¹⁷² Occasionally, as is the case with many early intervention services, school-aged children will also receive speech therapy in their homes with a specialist.¹⁷³

The same case that dealt with issues of occupational therapy, *B.H. v. W. Clermont Bd. of Educ.*, also involves the denial of speech therapy services.¹⁷⁴ As previously discussed, B.H. has a variety of medical diagnoses, one of which is an ASD.¹⁷⁵ In 2006, an Evaluation Team Report identified B.H. as having "...significant adaptive behavior deficits and a language disorder which qualified her for speech therapy."¹⁷⁶ Mrs. H had B.H. evaluated for speech issues and provided the school with a speech evaluation indicating that B.H.

¹⁷⁰ See Autism Spectrum Disorder Fact Sheet, *supra* note 16 (stating many children diagnosed with ASD get referred to speech pathologist because ASD often communication-based).

¹⁷¹ See Beverly Vicker, *The Role of the School Speech Language Pathologist and the Student with Autism*, IND. RESOURCE CTR. FOR AUTISM, <https://www.iidc.indiana.edu/pages/The-Role-of-the-School-Speech-Language-Pathologist-and-the-Student-with-Autism> (last visited Nov. 21, 2019) (discussing the frequent use of school speech language pathologists by students with ASD). See also *supra* note 33 and accompanying text (identifying that speech therapy is a related service that is distributed at schools).

¹⁷² See Kate Kelly, *Speech-Language Pathologists: What You Need to Know*, UNDERSTOOD, <https://www.understood.org/en/learning-attention-issues/treatments-approaches/working-with-clinicians/speech-language-pathologists-what-you-need-to-know> (last visited Nov. 21, 2019). "SLPs work with kids both one-on-one and in small groups. They may coordinate with a special education teacher to support an individual child. They may also come into the classroom to work with kids in a reading or language center or to co-teach a lesson with the classroom teacher." *Id.* See also *The Role Of The SLP In Schools: A Presentation for Teachers, Administrators, Parents, and the Community*, AM. SPEECH-LANGUAGE HEARING ASS'N, 17-19, <https://www.asha.org/uploadedfiles/slp/schools/prof-consult/slprole.pdf>. (last visited Nov. 21, 2019). Speech language pathologists have many roles in schools including: prevention of communication disorders, identification of students at risk for later problems, assessment of students' communication skills, evaluation of the results of comprehensive assessments, development and implantation of IEOs, documentation of outcomes, collaborations with teachers and other professionals, advocacy for teaching practices, supervision of assistants, supervision of graduate students and clinical fellows, and participation in school-wide curriculum, and literacy teams. *Id.* at 20-21.

¹⁷³ See *Speech Therapy*, AUTISM SPEAKS, <https://www.autismspeaks.org/speech-therapy> (last visited Nov. 21, 2019) (articulating where speech therapy services are provided). See also Autism Spectrum Disorder (ASD) – Treatment, *supra* note 30 (identifying speech as a common therapy in Early Intervention).

¹⁷⁴ See *B.H.*, 788 F. Supp. 2d at 693 (articulating the issues that the Court addressed).

¹⁷⁵ See *id.* at 686. "B has a variety of diagnoses including: mental retardation, poorly controlled epilepsy, asthma, selective mutism, ADHD, explosive behavior disorder, Cushing's Disease, pervasive developmental disorder (a form of autism), and post-traumatic stress disorder." *Id.*

¹⁷⁶ See *id.* "B was qualified by West Clermont as a student with multiple disabilities in a 2006 Evaluation Team Report ('ETR')... Among other things, the 2006 ETR identified B as having significant adaptive behavior deficits and a language disorder which qualified her for speech therapy." *Id.*

needed direct speech therapy.¹⁷⁷ Mrs. H. sent letters to officials at B.H.'s school identifying concerns with B.H.'s education and her need for direct speech therapy.¹⁷⁸ Following these letters, no changes were made to B.H.'s IEP.¹⁷⁹ The district never explained their refusal to provide direct speech therapy to B.H.¹⁸⁰ By the 2007-2008 school year, the IEP provided for 30 minutes per quarter of speech.¹⁸¹ This was reduced again in the following school year to 15 minutes of speech per quarter.¹⁸² The speech therapist had never worked with B.H. and was not even aware that she had a cognitive deficit or speech and language issues.¹⁸³ The court concluded that the evidence in this case supported a finding that the district predetermined that B.H. did not need services in violation of 34 C.F.R. § 300.320(a)(4).¹⁸⁴

Analysis

“When all is said and done, a student offered an education program providing ‘merely more than de minimis’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly . . . awaiting the time when they were

¹⁷⁷ See *id.* at 694. “In 2007 and 2008, Mrs. H provided Nancy Parks with the speech neuropsychological, and OT evaluations from Cincinnati Children’s Hospital... These evaluations established that B needed direct speech-language services and occupational therapy to work on adaptive behavior and self-care skills in her educational program, or she would regress... Additionally, Dr. McClure, of Children’s Hospital, also sent a letter to Mrs. Parks requesting speech and behavior services for B.” See *B.H.*, 788 F. Supp. 2d at 694.

¹⁷⁸ See *id.* at 688. “In the fall of 2007, Plaintiff sent letters to both Mrs. Parks, the principal of Holly Hill, and Mr. Nacke, B’s special education teacher, detailing concerns she had about B’s behavior, adaptive behavior deficits, and need for direct speech and occupational therapy.” *Id.* “While both Parks and Nacke acknowledged receiving these documents, no changes to B’s IEP were made at that or any other time.” *Id.* “At no time did anyone in the District send a prior written notice to Plaintiff explaining the District’s refusal to provide speech or occupational therapy, or its refusal to address B’s functional needs in her IEP, or advising her of her rights.” *Id.*

¹⁷⁹ See *B.H.*, 788 F. Supp. 2d at 688. “At no time did anyone in the District send a prior written notice to Plaintiff explaining the District’s refusal to provide speech or occupational therapy, or its refusal to address B’s functional needs in her IEP, or advising her of her rights.” *Id.*

¹⁸⁰ See *id.*

¹⁸¹ See *B.H.*, 788 F. Supp. 2d at 688. “B’s IEP for the 2007-08 school year provided her with 30 minutes of speech consult per quarter, which was reduced in the 2008-09 school year to 15 minutes of speech consult per quarter, for a total of 45 minutes per year.” *Id.*

¹⁸² See *id.* “B’s IEP for the 2007-08 school year provided her with 30 minutes of speech consult per quarter, which was reduced in the 2008-09 school year to 15 minutes of speech consult per quarter, for a total of 45 minutes per year.” *Id.*

¹⁸³ See *B.H.*, 788 F. Supp. 2d at 694. “Ms. Standbury testified that she had never been sent the neuropsychological evaluations done on B in both 2005 and 2008, which recommended that B receive speech therapy. The IHO determined that since Ms. Standbury did not know anything about B, and was not provided with the evaluations, she could not have contributed to the discussion even if she had been present at the meeting.” *Id.*

¹⁸⁴ See *id.* at 695. “Therefore, the evidence supports a finding that the District ignored the documentation of B’s need for speech services which supports the IHO’s conclusion that the District predetermined that B did not need speech services in violation of 34 C.F.R. § 300.320(a)(4). The Court declines to give deference to the SLRO’s finding, where it is clear that such a finding was not based on the record evidence.” *Id.*

old enough to 'drop out.' (internal citation omitted). *The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.*"¹⁸⁵

Despite this quote's appearance as a rallying cry for students with disabilities, it is an excerpt of the opinion written by Chief Justice Roberts and the majority on the Court in *Endrew* finally asserting that the bare minimum is not enough when it comes to providing a free and appropriate education to children with ASD.¹⁸⁶ *Endrew's* parents wanted what was best for their child, like all parents should.¹⁸⁷ They argued that a free and appropriate education is "...an education that aims to provide a child with opportunities to achieve academic success, attain self-sufficiency and contribute to society that are substantially equal to the opportunities afforded without disabilities."¹⁸⁸

The dissent in *Rowley*, written by Justice White and joined by Justice Brennan and Justice Marshall, points out that the meaning of an "appropriate" education is clearly displayed throughout the legislative history of the IDEA.¹⁸⁹ "Indeed, at times the purpose

¹⁸⁵ See *Endrew F.*, 137 S. Ct. at 1001 (2017). *Endrew F.* is a case that essentially reexamined the meaning of a free and appropriate education as it was defined in *Rowley* in 1983. *Id.* This was essentially the Court's second chance to do right by students with disabilities and instead they decided that in educating a student with a disability, school districts doing more than just bare minimum is not enough. *Id.* They declined to create a bright line rule indicating when a child with disabilities is receiving a free and appropriate education and when they are being deprived of the free and appropriate education they should be receiving under the IDEA. *Id.*

¹⁸⁶ See *id.*

We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is the nature of the Act and the standard we adopt to resist such an effort. The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U.S., at 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690.

At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue.

Id.

¹⁸⁷ See *Endrew F.*, 137 S. Ct. at 1001. "Endrew's parents argue that the Act goes even further in their view, a FAPE is 'an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.'" *Id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *Rowley*, 458 U.S. at 213 (1982).

of the Act was described as tailoring each handicapped child's educational plan to enable the child 'to achieve his or her maximum potential.'¹⁹⁰ The dissenters elaborate by then stating, "Senator Stafford, one of the sponsors of the Act, declared: 'We can all agree that education [given a handicapped child] should be equivalent, at least, to the one those children who are not handicapped receive.'¹⁹¹

What are we educating students for if not to attain self-sufficiency and contribute to society? Why take on the enormous task of educating every young person in the United States – disability or not? If we as a society are going to provide education to benefit neurotypical students why would we not provide an education to benefit students with disabilities?

The dissenters in *Rowley* pointed out that the IDEA defines special education as "specifically designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child..."¹⁹² That is not free. That is not "specifically designated instruction at no cost to parents." However, in 2019, the best option for families trying to secure a free and appropriate education for their disabled child is usually to pull their child from the public school system and to place their child in a private school. Parents then hope and pray to receive reimbursement from the government for the tuition of that school, which can be tens of thousands of dollars a year.¹⁹³ The IDEA promises students

However, if there are limits not evident from the face on the statute on what may be considered an 'appropriate education,' they must be found in the purpose of the statute or its legislative history. The Act itself announces it will provide a 'full educational opportunity to all handicapped children.' 20 U.S.C. 1412(2)(A). This goal is repeated throughout the legislative history, in statements too frequent to be 'passing references and isolated phrases.' Ante, at 204, n. 26 quoting *Department of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982). These statements elucidate the meaning of 'appropriate.' According to the Senate Report, for example, the Act does guarantee that handicapped children are provided equal education opportunity.' S. Rep. No. 94-168, p. 9 (1975). This promise appears throughout the legislative history.

Id.

¹⁹⁰ See *id.* at 214. See also H.R. REP. NO. 94-332, at 13, 19 (1975); 121 CONG. REC. 23709 (1975).

¹⁹¹ See *Rowley*, 458 U.S. at 214.

¹⁹² See *Rowley*, 458 U.S. at 215 (White, J., dissenting) (quoting 20 U.S.C.S. § 1401(16) (1975). The current regulations pertaining to the IDEA expand on this definition:

General. (1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including – (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) Instruction in physical education. (2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section – (i) Speech-language pathology services, or any other related services, if the service is considered special education rather than a related service under State standards; (ii) Travel training; and (iii) Vocational education.

Id. 34 C.F.R. § 300.39(a) (2019). *Id.*

¹⁹³ See generally *B.H.*, 788 F.2d at 682; *A.H.*, 2017 U.S. Dist. LEXIS 50042; *M.H.*, 685 F.3d at 217.

with disabilities a free and appropriate education in the least restrictive environment.¹⁹⁴ A student should not be denied services because their family does not have the money to send them to a private school.¹⁹⁵ Students with ASD should receive related services at public schools, funded by the state.¹⁹⁶ Having a child with a disability is expensive.¹⁹⁷ Children with disabilities – and children with ASD – are much more expensive to educate than a neurotypical child.¹⁹⁸ Families should not have to bear the burden of services that a child should already have access to through the public-school system, as guaranteed by federal law.¹⁹⁹

The related services included in a free and appropriate education are too often denied to students with ASD and become the subject of litigation.²⁰⁰ Teaching a student to be a self-sufficient, productive member of society is the purpose of most schools.²⁰¹

¹⁹⁴ See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004). The IDEA guarantees a free and appropriate public education. *Id.*

¹⁹⁵ See U.S. CONST. amend. XIV, § 1. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*” *Id.* (emphasis added).

¹⁹⁶ See *supra* note 7 and accompanying text (stating that the IDEA gave students with ASD the right to a free appropriate public education).

¹⁹⁷ See *supra* note 3 and accompanying text.

¹⁹⁸ See CTR. FOR SPECIAL EDUC. FIN., SPECIAL EDUC. EXPENDITURE PROJECT, REPORT NO. 5, TOTAL EXPENDITURES FOR STUDENTS WITH DISABILITIES, 1999-2000 (2003), <https://www.air.org/sites/default/files/SEEP5-Total-Expenditures.pdf> (discussing spending variation by student disability). *Id.* During the 1999-2000 school year, the government spent an average \$6,556 per non-disabled student services. *Id.* at 5. A disabled student cost \$12,525 on average to educate that year. *Id.* The cost to educate an ASD student that year amounted to nearly three times the amount of the non-disabled student, averaging out to \$18,790. *Id.* Even more shocking, educating a child at a non-public school during that year cost \$25,580. *Id.* See also Cohen, *supra* note 3.

¹⁹⁹ See Sharpe & Baker, *supra* note 3 at 284-86. Stating:

As a practical matter, however, in times of cutbacks in education funding, school districts cannot afford the high cost of ABA therapy for each child with an autism diagnosis. Even if they could, they could not hire necessary personnel. Public schools are short more than 12,000 special education teachers, and the shortage is expected to rise as teachers retire or leave teaching.

Id. at 285.

²⁰⁰ See *Rowley*, 458 U.S. at 208-10 (indicating cases where the Supreme Court has examined the IDEA and Education for Handicap Children’s Act).

²⁰¹ See William M. Sloan, *What is the Purpose of Education?*, ASCD EDUC. UPDATE (ASCD, ALEXANDRIA, VA.) Vol. 54, No. 7, (July 2012), available at <http://www.ascd.org/publications/newsletters/education-update/jul12/vol54/num07/What-Is-the-Purpose-of-Education.aspx>.

In the United States, historically, the purpose of education has evolved according to the needs of society. Education’s primary purpose has ranged from instructing youth in religious doctrine, to preparing them to live in a democracy, to assimilating immigrants into mainstream society, to preparing workers for the industrialized 20th century workplace...

The primary goals of education are to make people as self-sufficient as they can be while being productive members of society.²⁰²

ABA helps students with ASDs to flourish by encouraging positive behaviors.²⁰³ Capitalizing on children's intrinsic motivation to help them learn.²⁰⁴ The core principles of ABA are to help students and families adapt to help children with an ASD learn positive behaviors in their natural environment, like school and home.²⁰⁵ Study after study and doctor after doctor have agreed that ABA is a phenomenal resource for many students with ASD, yet it is often denied to families through the IEP process.²⁰⁶

M.H. v. New York City Department of Education consolidated two cases that were substantially similar.²⁰⁷ It was displayed through numerous evaluations and testimony of different providers that the best way the children in *M.H.* learned was through a one to one ABA program.²⁰⁸ The best the school district could do was place the children in a classroom with five other children, a teacher and a paraprofessional.²⁰⁹ Both families subsequently removed their children to the Brooklyn Autism Center so their children could receive one to one ABA throughout the day, then sought reimbursement from the

“There are many different points of view on this topic, says Jonathan Cohen, co-founder and president of the National School Climate Center. ‘I think that my view, and most people’s view, is that the purpose of education is to support children in developing the skills, the knowledge, and the dispositions that will allow them to be responsible, contributing members of their democratically-informed community. Meaning to be a good friend, to be a good mate, to be able to work, and to contribute to the well-being of the community.’

Not only should children learn civic knowledge-how the electoral college works, the history of political parties, and so on – but they also need to master civic skills, which include respecting others, working collaboratively, acting in a way that is fair and just, and being an active participant in the life of the community, Cohen says.

Id.

²⁰² See *id.*; see generally Stephanie Rivera, *What is the Purpose of School?*, NAT’L EDUC. POL’Y CTR. (Feb. 28, 2013), <https://nepc.colorado.edu/blog/what-purpose-school>.

²⁰³ See *supra* note 8 and accompanying text (discussing prevalence of ABA among health care professionals, schools and treatment clinics).

²⁰⁴ See *supra* note 8 and accompanying text (discussing how ABA focuses on following a child’s intrinsic motivation).

²⁰⁵ See *supra* note 8 and accompanying text (explaining how ABA encourages positive behaviors and discourages negative behaviors in order to improve skills).

²⁰⁶ See Sharpe & Baker, *supra* note 3; Treatment for Autism Spectrum Disorder, *supra* note 8; Hoffman, *supra* note 22, at 204-07; Autism Speaks, *supra* note 57 (identifying ABA as a phenomenal resource for children with ASD).

²⁰⁷ See *supra* notes 128, 132-133 and accompanying text (identifying that this is a consolidated case with similar facts).

²⁰⁸ See *supra* notes 130, 146 and accompanying text (explaining that all of the child’s previous providers were trained in ABA).

²⁰⁹ See *supra* note 133, 138 and accompanying text (articulating the school district’s best offer was a classroom ratio of 6:1:1).

New York City Department of Education as the families felt their children were denied a free and appropriate education through the public school.²¹⁰

Occupational therapy is essential for students with ASD to live productive and self-sufficient lives.²¹¹ Occupational therapy includes a wide array of uses including helping people with ASD to brush their teeth, practice handwriting, use scissors, using a pencil, exercise, and help students with ASD who have sensory processing issues.²¹² As previously discussed, the parent in *B.H. v. West Clermont Board of Education*, filed a due process complaint due to the effective denial of related services to her daughter.²¹³ The court particularly discusses the school district's errors in regards to occupational therapy and speech therapy.²¹⁴ The parent in this case had a variety of private evaluations done on her child including OT and neuropsychological evaluations done at Cincinnati Children's Hospital.²¹⁵ This evaluation identified that the student needed to improve in the areas of hygiene, toileting, self, care, attention to task and several other areas.²¹⁶ As the student did not receive the proper amount of occupational therapy for her deficits, the court ruled in her favor and forced the school district to pay for her outside placement and occupational therapy services for two years.²¹⁷

A lack of occupational therapy was and is detrimental to so many students with an ASD, as displayed in *B.H. v. West Clermont School District*.²¹⁸ Occupational therapy is designed to help students with ASD bathe themselves, toilet themselves, or even something like write a check themselves.²¹⁹ What are we doing to educate students in this country who are in need of learning fundamental life skills such as this one? If we are content with letting schools shirk the responsibilities of helping these children to live as self-sufficiently as possible we have done a serious injustice.

Children with ASD often partake in physical therapy due to problems associated with movement.²²⁰ Physical therapy in schools for children with ASD can include exercises that work on things like strength or balance.²²¹ In *Paris School District v. A.H.*,

²¹⁰ See *supra* notes 135, 142, 149-150 and accompanying text (displaying both children were placed at the Brooklyn Autism Center).

²¹¹ See 'Treatment for Autism Spectrum Disorder, *supra* note 8 (stating that OT teaches skills like dressing, eating, bathing).

²¹² *Id.*

²¹³ See *B.H.*, 788 F. Supp. 2d at 690-91 (identifying the parent brought a due process complaint for denial of related services).

²¹⁴ See *id.* at 688 (explaining nothing happened with the private evaluations and no changes were made to her IEP).

²¹⁵ See *M.H.*, 685 F.3d at 235 (articulating that the parent had private OT and neuropsychological evaluations done).

²¹⁶ See *id.* (identifying that OT evaluation recommended student for direct OT).

²¹⁷ See *supra* note 152 and accompanying text (ruling in favor of the parent and student).

²¹⁸ See *supra* note 8 and accompanying text (identifying OT as a detrimental resource for students with ASD; see also *B.H.* 788 F.2d at 682).

²¹⁹ See *supra* note 8 and accompanying text (explaining that OT helps people to do basic tasks like bathe and toilet themselves).

²²⁰ See Physical Therapy for Autism, *supra* note 8. "Problems with movement are common in autism spectrum disorder (ASD), and many children with autism receive physical therapy." *Id.*

²²¹ See Physical Therapy for Autism, *supra* note 8. "Physical therapy can include exercises that build motor skills and improve strength, posture, and balance." *Id.*

the student in question moved to the Paris School District after receiving many services in her previous learning environment.²²² The student's mother presented the IEP team with a private physical therapy evaluation indicating that the student required the service to be able to better participate in activities in her school, at her home, and in her community.²²³ The Paris School District provided thirteen physical therapy sessions.²²⁴ Abruptly, the special education coordinator for the district emailed the physical therapist indicating that physical therapy for this service was going to be discontinued and no evaluation was done.²²⁵

The court in *Paris School District* reasoned that there was no evidential support for the school district's claim that the student had fought with the physical therapist.²²⁶ "In essence, PSD does not argue that it did provide physical therapy in accordance with A.H.'s IEO, but rather argues that its noncompliance is excusable."²²⁷ The Hearing Officer and the court by extension found that the student's "physical therapy needs were ... not adequately provided and the discontinuance of such was without evaluative justification."²²⁸

Physical therapy is an essential service for students with an ASD that struggle with different types of movement.²²⁹ To cancel a child's physical therapy services with no evaluation and no documentation of any behavior incidents is incomprehensible.²³⁰ This is such an important service for children with an ASD who need it.²³¹ It enables them to comfortably live in their surroundings, to walk and run around, and to thrive.²³² To deny a child a service such as this when it is clearly demonstrated that they need it is denying

²²² See *B.H.*, 788 F. Supp. 2d at 687 (identifying A.H. moved to the school district as a fourth grader and was previously enrolled in numerous services).

²²³ See *id.* at 701-02 (articulating that student's mother presented IEP team with numerous private evaluations).

²²⁴ See *A.H.*, 2017 U.S. Dist. LEXIS 50042 at *5 (displaying that student received thirteen sessions of PT).

²²⁵ See *id.* (explaining the physical therapist received an email stating the IEP team will halt PT sessions).

²²⁶ See *id.* at *2. "PSD's argument to the contrary is supported only with a citation to the notes from the meeting held on March 19, 2014, that state that the services will be discontinued." *Id.* "Those notes do not state a reason for that decision, and do not indicate any factual support for PSD's argument, any discussion of the issue, or any consent by Ms. Harter." *Id.*

²²⁷ See *id.* at *31.

²²⁸ See *id.*

²²⁹ See Physical Therapy for Autism, *supra* note 8 (discussing many children with ASD partake in PT). "Problems with movement are common in autism spectrum disorder (ASD), and many children with autism receive physical therapy." *Id.*

²³⁰ See What is Occupational Therapy?, *supra* note 58. "For example, this type of therapy aims to help a child build muscle control and strength so that he or she can play more easily with other children. Problems with movement are common in autism spectrum disorder (ASD), and many children with autism receive physical therapy." *Id.* See also *A.H.*, 2017 U.S. Dist. LEXIS 50042.

²³¹ See What is Occupational Therapy?, *supra* note 58 (discussing physical therapy as service for children with ASD).

²³² *Id.* (noting practitioners' holistic perspective that focuses on adapting environment and/or task to fit the person).

them a quality of life devoid with relying on people for everything.²³³ Denying a child a service like this kisses self-sufficiency goodbye.

Speech language therapy is a related service most schools utilize to better accommodate students with ASD, as it is common for people with ASD to struggle with communicating with others.²³⁴ The parent in *B.H. v. West Clermont Board of Education*, filed a due process request in May 2009 seeking speech therapy services for their child who had a number of diagnoses, one in particular being an ASD.²³⁵ The evaluations the parent produced revealed that the student required direct speech therapy services to address her significant deficit in communication.²³⁶ The parent claimed that the school district was in violation of the IDEA as it did not give any consideration to the outside speech evaluations the student had undergone.²³⁷ The parent claimed that the ignoring of the speech evaluation was a procedural violation that amounted to the district predetermining related services for two different school years.²³⁸ Additionally, in *B.H.*, the speech pathologist had never received the neuropsychological evaluations.²³⁹ She did not know that the parent had requested direct speech therapy.²⁴⁰ The IHO found that the speech pathologist did not know anything about the student in question.²⁴¹

The court's opinion in *B.H.* points out that, "While districts and parents can agree to excuse team members from attendance where services remain unchanged (34 C.F.R. § 300.321(e)(2)), the agreement in this instance was made without the information that would have informed Ms. Standbury of the new evaluations."²⁴² They go on to rule that, "Therefore, the evidence supports a finding that the District ignored the documentation of B's need for speech services which supports the IHO's conclusion that the District predetermined that B did not need speech services in violation of 34 C.F.R. § 300.320(a)(4). The Court declines to give deference to the SLRO's finding, where it is clear that such a finding was not based on the record evidence."²⁴³

²³³ See Treatment for Autism Spectrum Disorder, *supra* note 8 (displaying list of reasons PT helps students with ASD).

²³⁴ See Treatment for Autism Spectrum Disorder, *supra* note 8 (discussing how speech therapy helps improve communication in many ways).

²³⁵ See *A.H.*, 2017 U.S. Dist. LEXIS at *2. (discussing variety of diagnoses student had). *Id.* at 9 (articulating when and why the parent filed a due process hearing request).

²³⁶ See Individuals with Disabilities Educ. Act, *supra* note 33 (describing private speech evaluation parent had done and how IEP team ignored it).

²³⁷ See Individuals with Disabilities Educ. Act, *supra* note 33 (articulating that student had significant deficit in speech and needed direct therapy).

²³⁸ See *B.H.*, 788 F.2d at 693. (discussing court's decision).

²³⁹ See *id.* at 694 (noting since pathologist did not know student, she could not contribute to team meeting).

²⁴⁰ See *id.* (stating that the speech pathologist had never received the neuropsychological evaluation).

²⁴¹ See *id.* (concluding the IHO decided that the speech pathologist did not know anything about this student).

²⁴² See *id.* at 695.

²⁴³ See *id.* at 688.

Speech therapy is a primary method of teaching students with ASD to properly communicate.²⁴⁴ One of the tell-tale signs of an ASD is an inability to communicate or a communication delay.²⁴⁵ Speech therapy helps students through things like sign language, nonverbal cues, and talking.²⁴⁶ These are essential skills for everyone. Denying students related services with an ASD who have a demonstrated need for speech services is essentially denying them the tools they need to communicate.

Conclusion

Denying students with ASDs services for which they have demonstrated needs is completely depriving them of a worthwhile education. The education received by student's with ASD will not always be equal to that of a neurotypical child, as every child with an ASD has different needs. This is why the IDEA provides for IEPs. A free and appropriate public education under the IDEA includes related services. When students have a demonstrated need that doctors and specialists have notarized and school districts willingly ignore or set aside, they are denying students a necessary facet of their education, and by extension their health care. Most importantly, they are denying students with ASDs the necessary tools to live a meaningful life.

²⁴⁴ See Treatment for Autism Spectrum Disorder, *supra* note 8. "Speech therapy helps to improve the person's communication skills. Some people are able to learn verbal communication skills. For others, using gestures or picture boards is more realistic." *Id.*

²⁴⁵ See Autism Spectrum Disorder: Communication Problems in Children, *supra* note 62. "Children with ASD may have difficulty developing language skills and understanding what others say to them. They also often have difficulty communicating nonverbally, such as through hand gestures, eye contact, and facial expressions." *Id.*

²⁴⁶ *Id.*