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Autism Spectrum Disorder: A Legal Update

Autism spectrum disorder (ASD) continues to be an active area of K-12 student litigation. In a recent study of court decisions concerning free appropriate public education (FAPE), which is the most litigated issue under the Individuals with Disabilities Education Act (IDEA), I found that the percentage of cases attributable to students with ASD was almost 10 times higher than their percentage in the special education population, with both proportions rising dramatically since the early 1990s. This parental propensity for litigation is driven by the relatively recent acute national awareness of this disability category, the high costs but unsettled methods for educational interventions, and the organized, impassioned efforts for this relatively broad spectrum of individuals.

In the November/December 2008 issue of *Principal*, this column focused on *Mr. I v. Maine School Administrative Unit No. 55* (2007), in which the First Circuit Court of Appeals decided that a particular high functioning elementary school child with ASD was eligible under the IDEA in light of the rather broad definition of "educational performance" in Maine law. This update examines a more recent eligibility decision from another jurisdiction, with the accompanying questions and answers extending to other recent legal developments concerning FAPE under the IDEA.

The Case

In 2004-2005, A.J. received special education services arranged by his school district in an integrated private preschool program. In May 2005, the individualized education program

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

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

What do you think was the court's decision in this case?

Acknowledging the issue of interpreting "educational performance" in the absence of a definition in the IDEA and New York law as a difficult one, the federal district court in *A.J. v. Board of Education* (2010) decided in favor of the defendant district. The parents relied in part on the Second Circuit's aforementioned decision in *Mr. I*, but the court distinguished it as being from another jurisdiction. The court similarly gave short shrift to the parents' citation to various IDEA regulations that required assessing and addressing functional performance, not just academic achievement. Instead, the court emphasized two recent, unpublished Second Circuit

decisions that interpreted "educational performance" in terms of "academic performance … [as] the principal, if not only, guiding factor." Further citing the Supreme Court's FAPE decision in *Board of Education v. Rowley* (1982) as an analogy, the court concluded that the parents' argument boiled down to A.J.'s inability to reach his full potential due to Asperger's, which is not the applicable standard.

Is this decision representative of the Second Circuit view?

Yes, unless state law specifies otherwise. The two Second Circuit decisions on which the federal district court relied were based on other classifications but addressed the same definitional element—educational performance in light of the absence of a definition in New York law. A previous Second Circuit decision, *J.D. v. Pawlet School District* (2000) reached the same conclusion for the specific learning disability classification but based on a definition in the applicable state law—in this case, Vermont. The law defined educational performance in terms of basic skills, such as reading comprehension or math calculation, significantly below expected age or grade norms. Moreover, another federal district court in New York reached the same interpretation in *Maus v. Wappingers Central School District* (2010) for an academically high performing child with multiple diagnoses, including but far from limited to Asperger's syndrome. The classifications at issue in this case were other health impairments and emotional disturbance, and the child's high performance was with a 504 plan.

For IDEA eligibility of children with ASD who perform well academically, has the case law changed since the First Circuit's *Mr. I* decision in 2007?

The ultimate answer remains "It depends." In Mr. I., it hinged largely on state law. These newer cases have added that where state law does not provide definitional guidance on the scope of educational performance, the Second Circuit view is that academic achievement is the primary, although not necessarily exclusive, factor. In the many federal circuits that have not addressed this issue, it is important to first determine whether there is any applicable state law and any lower court decisions, but in most jurisdictions it will depend on other factors, such as (a) the philosophy and policy of the school district, (b) the litigation propensity and efficacy of the parties, and (c) the particular diagnoses and individual nuances of the child. Eligibility also depends on whether the child meets the criteria for one or more IDEA classifications and, if so, whether the child needs special education.

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If a child with ASD is eligible under the IDEA, regardless of the classification, what are the predominant issues in the burgeoning litigation?

The primary issues that are particular to children with autism are in the frequent FAPE decision, most often relating to methodology, parental participation, and tuition reimbursement. The court tends to defer to districts in pure methodology cases, which for student with autism, often concern some form of applied behavioral analysis (ABA), such as Lovaas or newer models. However, attorneys representing parents are learning to not put all of the eggs in that basket, with special emphasis on the strong IDEA obligation for districts to provide parents with a meaningful opportunity for participation in the educational decision-making process.

Due to the specialized and intensive nature of the interventions, including 1:1 ABA services in the home, unilateral placements with the requested relief being reimbursement for tuition and/or related services are the predominant posture for these cases. Nevertheless, compensatory education services is fast becoming an additionally or alternatively requested remedy, and other issues, such as least restrictive environment, discipline, and attorneys' fees are similarly on the rise for children with ASD. Thus, exploration of alternative avenues of dispute resolution, such as facilitated IEPs, mediation, and special education or, depending on the state, autism-specific vouchers, is also escalating. Finally, a recent study of the use of restraints, which is an increasing subject of state laws and possible federal legislation, revealed that the plaintiff was more often a parent of a child with autism than any other IDEA classification and that their legal theories were multiple, extending well beyond the IDEA to various federal and state bases.

Conclusion

ASD is another legally "hot" topic for elementary principals for several reasons:

1. As our main case illustrates, if the student is not eligible for special education, the legal responsibility is solely that of general education.
2. Even if the student is eligible under the IDEA, the increasing level and costs of litigation—including multi-session due process hearings—are bound to affect the principal in terms of staff witnesses, parental adversariness, methodological issues, placement disputes, and budgetary resources.
3. The least restrictive environment mandate often causes the district to advocate for the child's placement in the principal's domain. P

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