

Autism Spectrum Disorders

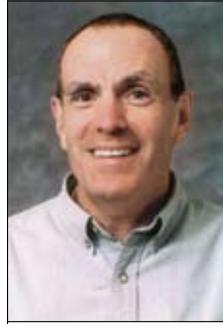
Autism spectrum disorders are on the rise, as are their associated education and legal issues. Individual variability within the spectrum and the educational methodologies for addressing it contribute to a high and unsettled level of controversy. The following case and the subsequent question-and-answer discussion provide a sampling of the eligibility, methodology, and related legal issues under federal law.



The Case

L.I. was an elementary school student in Cornish, Maine. Although she excelled academically, she began to experience problems with peer relationships and personal anxieties in the fourth grade. Troubled by L.I.'s increased social isolation and her drop in grades from "high honors" to "honors" during the fifth grade, L.I.'s parents arranged for psychological counseling and anti-depressant medication. As a result, L.I. became more successful in interacting with peers and participating in class.

During the summer preceding sixth grade, however, L.I. asked her mother to allow her to be home-schooled or to



attend a private school in New Hampshire, approximately 30 miles from her home. Her mother refused both requests, believing that her daughter would benefit from her assigned and well-regarded sixth-grade teacher.

Unfortunately, sixth grade did not go well for L.I. By mid-September, the teacher met with her mother, reporting that L.I. had exhibited a passive resis-

tance to her assigned academic work and a "serious lack of awareness," bordering on hostility, to her peers. She also suggested that cuts or scratches on L.I.'s arms might have been self-inflicted during "lengthy bathroom breaks" from class. Yet, the teacher reported, L.I. was "a very bright young girl with strong language and math skills ... capable of powerful insights in her reading and writing."

The teacher and parent developed a "contract" for L.I. that would have entitled her to study more advanced topics in her areas of interest in November if she satisfactorily completed her assignments for October. L.I. refused to sign the contract and stayed home from school on Sept. 30 and Oct. 1. On the second of these days, in the wake of an argument with her mother about one of her assignments, L.I. took excessive quantities of prescription and over-the-counter medications in a suicide attempt.

After being discharged from the hospital, L.I. met with a new therapist, who referred her to a neuropsychologist for diagnosis. After extensive testing, the diagnosis was Asperger Syndrome and depression-related adjustment disorder. A later private speech-language evaluation recommended social skills instruction.

In the meantime, the district initiated an evaluation to determine L.I.'s eligibility under the Individuals with Disabilities Education Act (IDEA) and promised to provide her with home tutoring in the interim. Frustrated with the district's failure to deliver the promised tutoring, and their difficulties in trying to meet L.I.'s educational needs at home, her parents unilaterally placed her in the New Hampshire private school after notifying the district of their intent to seek tuition reimbursement.

The district evaluation team accepted L.I.'s diagnosis as valid and—although divided as to whether her condition constituted "autism," "emotional disturbance" (ED), or "other health impairment" (OHI)—the members concluded that it did not have a significant adverse affect on her educational performance, thus not necessitating special education. Instead, the district offered L.I. a Section 504 plan, which included "social pragmatics." Her parents rejected the proposal and filed for a due process hearing. L.I. remained at the private school, where she had been thriving academically and gradually developing some positive peer relationships, even though the school did not provide recommended services of social skills instruction and behavior therapy.

The hearing officer upheld the district's decision that L.I.

was not eligible under IDEA, due to the requisite lack of adverse effect on her educational performance. The hearing officer concluded that IDEA does not require services “to address social and emotional needs when there are *no* academic needs,” finding that L.I. had been successful in terms of her classroom behavior, assigned work, and test performance. L.I.’s parents appealed to a federal court.

Questions and Answers

What do you think was the court’s ultimate decision in regard to L.I.’s IDEA eligibility?

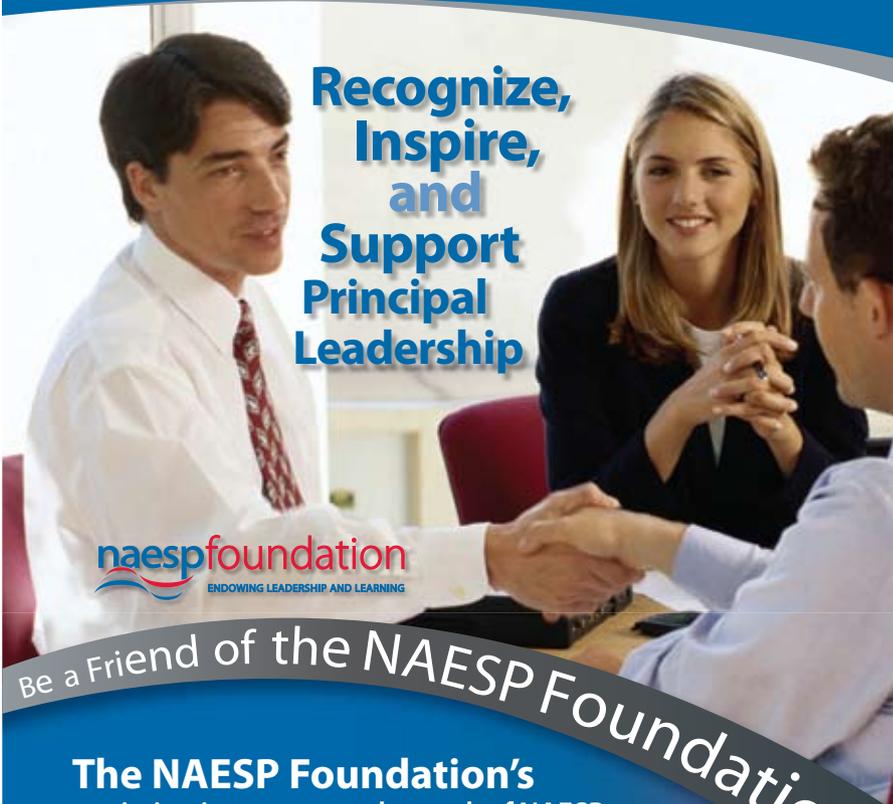
In *Mr. I. v Maine School Administrative District No. 55* (2007), the 1st Circuit Court of Appeals specifically ruled in L.I.’s favor, in effect more generally responding to the question of whether a child with Asperger Syndrome is eligible under IDEA with an “it depends” answer. The key in L.I.’s case was that Maine’s state law defined “educational performance” broadly, without any specific narrowing standard for adverse effect—in contrast to the 2nd Circuit’s earlier decision in a case from Vermont, which defines educational performance as “basic skills” and adverse effect as “significantly below expected or age grade norms” (*J.D. v. Pawlet School District*, 2000). Thus, the appellate court seemed to conclude that eligibility, in terms of this second of the two essential elements under IDEA, depends on state law definitions of adverse effect on educational performance.

Did L.I.’s condition qualify for IDEA under the first essential element of eligibility, which is a recognized classification? More generally, does Asperger Syndrome qualify under IDEA’s definition of autism?

As the district’s multidisciplinary team initially reasoned and the appellate court ultimately observed, there was no dispute that L.I.’s diagnosis fit under ED or OHI, if not autism. The answer to the second part of the question again is “it depends,” based on the individual characteristics of the child’s disorder.

“Individual variability within the spectrum and the educational methodologies for addressing it contribute to a high and unsettled level of controversy.”

In contrast to the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*, which psychiatrists and some psychologists use, the legally determinative criteria are in IDEA (Fogt, Miller, & Zirkel, 2003). The IDEA definition of autism includes a significant effect on 1) verbal communication, 2) nonverbal communication, and 3) social interaction. Asperger Syndrome typically qualifies in terms of No. 3, but qualification for the other two criteria depends on



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the individual child. Nevertheless, other recognized classifications in IDEA, especially OHI, are likely to fulfill the first criterion, shifting the focus to the second in order to determine whether the child needs special education.

Did the 1st Circuit Court grant tuition reimbursement to the parents? How about their second requested remedy—compensatory education?

In this particular case, L.I.'s parents did not succeed with regard to tuition reimbursement. The 1st Circuit Court's denial was based on its conclusion that the private school was not an appropriate setting due to its failure to provide "anything approaching the direct teaching of social skills" that she needed.

As for the second requested remedy, the parents did not dispute the lower court's delegation of compensatory education to an individualized education program team, but sought specifics as to the type, form, intensity,

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and duration of the program. The 1st Circuit Court declined, pointing to the complete absence of "evidence as to the effect of the district's failure to offer IDEA services to L.I. over the past two years."

In general, the courts use a multistep framework for tuition reimbursement and are still in the process of finalizing the standards for compensatory education (e.g., Zirkel, 2006), thus warranting an "it depends" answer for cases other than L.I.'s.

If, instead, the district had agreed with the parents that L.I. was eligible under IDEA but proposed an individualized education program that did not provide the methodology the parents insisted on, which party would likely prevail in litigation?

For methodology, the odds would generally but not absolutely favor the district. Moreover, if the case also presented procedural issues, the outcome would also depend on the court's or a hearing officer's determination as to whether the district violated IDEA's procedural requirements to the extent of denying the child an appropriate education.

For example, in the 6th Circuit's most recent decision concerning a child with autism, the appellate court decided the procedural issue in favor of the parents, concluding that the repeated absence

of the regular education teacher at the individualized education program meetings and the district's predetermination for its proposed methodology was prejudicial. The court remanded the decision on the appropriateness of the disputed methodology to the trial court, observing that there were limits to the deference accorded to local districts in such matters (*Deal v. Hamilton County Department of Education*, 2004). Nevertheless, the trial court subsequently determined, and the 6th Circuit affirmed, that the district's proposed methodology met the substantive standard for appropriateness (*Deal v. Hamilton County Department of Education*, 2006, 2008).

These autism cases are frequent (e.g., Choutka, Doloughy, & Zirkel, 2004), and they continue to vary in their facts and outcomes (e.g., *Clear Creek Independent School District v. J.K.*, 2005; *County School Board v. R.T.*, 2006; *J.P. v. County School Board*, 2008; *O'Dell v. Special School District*, 2007).

Finally, did the district's determination that L.I. was eligible under Section 504 "square" with current judicial interpretations of that statute's definition of disability?

No. In recent years, the courts have been increasingly restrictive in their interpretation of the Section 504 definition of disability, particularly with regard to whether the diagnosed impairment "substantially" limits a major life activity (Zirkel, 2003). Certainly, L.I. would not qualify in this regard because her social issues would be subordinated within the broad scope of learning, for which her central performance was not substantially below that of the average sixth grader. Even for the minority of courts that regard interacting with others as a major life activity (e.g., *Jacques v. DiMarzio, Inc.*, 2004), L.I. would not qualify for the requisite substantial limitation; "[t]he standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful."



More importantly, if a particular child with Asperger Syndrome did qualify under these stringent standards for Section 504, it is probably likely that he or she would qualify as meeting the criteria of one of the three IDEA classifications that applied to L.I. Thus, using Section 504 as a consolation prize in such a situation would likely represent an indefensible “child find” case under the IDEA.

Conclusion

The identification and education of children with autism spectrum disorders pose significant legal issues for public schools, especially under IDEA. The answers to these legal issues, like the educational question of which methodology is appropriate, are often “it depends,” requiring an individualized determination and careful legal application. Much of the extensive litigation concerning children with autism spectrum disorders (e.g., Zirkel, 2002)

are not specific to autism, representing instead legal issues applicable to special education generally. But, as L.I.’s case and the accompanying Q-and-A discussion reveal, eligibility and methodology defy easy, all-purpose answers. The key is for general and special education personnel to work collaboratively and creatively, in partnership with parents, for effective use of resources, with reasonable expectations that carefully balance legal requirements with best practice. 

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WORD SEARCH

Solution to page 49

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