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# Autism Spectrum Disorder and New Jersey Administrative Law Decisions: An Analysis of Case Law Involving Public School Students

Michael J. Barcadepone  
*Seton Hall University*

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AUTISM SPECTRUM DISORDER AND  
NEW JERSEY ADMINISTRATIVE LAW DECISIONS:  
AN ANALYSIS OF CASE LAW INVOLVING PUBLIC SCHOOL STUDENTS

By

MICHAEL J. BARCADEPONE

Dissertation Committee

Anthony J. Colella, Ph.D., Mentor  
Barbara V. Strobert, Ed.D., Committee Member  
Monica M. Browne, Ed.D., Committee Member  
Harry A. Groveman, Ed.D., Committee Member

Submitted in Partial Fulfillment  
of the Requirements for the Degree of  
Doctor of Education  
Seton Hall University

2012

**SETON HALL UNIVERSITY**  
**COLLEGE OF EDUCATION AND HUMAN SERVICES**  
**OFFICE OF GRADUATE STUDIES**

**APPROVAL FOR SUCCESSFUL DEFENSE**

Doctoral Candidate, **Michael J. Barcadepone**, has successfully defended and made the required modifications to the text of the doctoral dissertation for the Ed.D. during this **Fall Semester 2012.**

**DISSERTATION COMMITTEE**

(please sign and date beside your name)

Mentor:

Dr. Anthony Colella

*Anthony Colella Ph.D. 12/6/12*

Committee Member:

Dr. Barbara Strobert

*Barbara Strobert Ed.D. 12/6/12*

Committee Member:

Dr. Monica M. Browne

*Monica M. Browne 12/6/12*

Committee Member:

Dr. Harry A. Groveman

*Harry A. Groveman 12/6/12*

The mentor and any other committee members who wish to review revisions will sign and date this document only when revisions have been completed. Please return this form to the Office of Graduate Studies, where it will be placed in the candidate's file and submit a copy with your final dissertation to be bound as page number two.

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I would like to thank all of my committee members for their time, patience, and guidance throughout this entire process, especially my mentor Dr. Anthony Colella. I would also like to acknowledge and recognize my family for their continued support throughout my entire educational career. To my mother and father who have always encouraged me and offered their unconditional love and support, I thank you. To my wife, without your never-ending support, understanding, and encouragement, this would not have been possible. To my children, I apologize for the late nights that I missed your bedtime. However, I hope one day when you understand, my motivation and dedication will serve as a model for all that you will accomplish. Last, but definitely not least, I dedicate this dissertation and my doctorate to my grandmother and grandfather.

## ABSTRACT

### AUTISM SPECTRUM DISORDER AND NEW JERSEY ADMINISTRATIVE LAW DECISIONS: AN ANALYSIS OF CASE LAW INVOLVING PUBLIC SCHOOL STUDENTS

The purpose of this case study was to investigate existing New Jersey case law for the special education population classified as Autism Spectrum Disorder (ASD) and analyze New Jersey Administrative Law Judge (ALJ) decisions to identify why districts win or lose cases, adding to the limited body of research in New Jersey. In addition, the purpose of this study concurrently sought to determine if there was a correlation between litigation outcomes and the scientifically-based methods identified in the National Standards Project as acceptable treatments for students with ASD.

By analyzing these cases, the study sought to determine a higher level of knowledge and understanding regarding the continuously increasing trend in ASD litigation and provide educationally sound suggestions to reduce litigation. Hence, reduced litigation would save school districts money, while also allowing them to service their students more effectively.

The following guiding questions were implemented in this research: (a) What are the similar underlying arguments for each case that petitioners have filed?; (b) What have the court rulings said when parents made unilateral placements?; (c) What types of programs, placements, or methods of instruction do parents demand most frequently?; (d) What role does documentation have in the process and how important was it?; (e) What factors weighed the most when ALJ's made their decisions and rulings?; (f) Where did school districts fail and succeed most often and was there a pattern?; (g) What types of scientifically-based treatments were utilized if any and did they impact on the district's

success?; (h) What is the influence of expert medical professionals and/or witnesses testimony on a petitioner's behalf?

The methodology utilized in this research was an explanatory case study model. This study produced fifteen recommendations for policy and practice that school districts could adopt and/or implement to reduce litigation. Many of these recommendations are rather simple, with results that could minimize litigation. More importantly, with tight budget constraints, many recommendations could be implemented immediately with zero to minimal financial resources required.



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## Chapter I

### INTRODUCTION

The prevalence of Autism Spectrum Disorder (ASD) has grown in recent decades (Hall, 2009). In the mid-1990s, the Center for Disease Control (n.d.) estimated the number of children living in the United States diagnosed with ASD at 1 in 5,000. By 1999, the estimate grew to 1 in 500 and in 2004, 1 in 150. Currently, projections by the CDC for children diagnosed with ASD are between 1 in 80 and 1 in 240 children, with an average of 1 in 110 (CDC, 2010). However, a study conducted by the CDC in 2008, found New Jersey's ASD population to be 1 in 94, the highest in the nation. ASD has become the second fastest growing special education classification in New Jersey (NJDOE, n.d.).

New Jersey's Office of Special Education Programs (NJDOE, n.d.) reported on December 1, 2002 that 4624 students with ASD were enrolled in New Jersey public schools. The most recent statistic available from the OSEP was from December 1, 2007, when 9750 students with ASD were enrolled, more than double in only 5 years.

In a 2007 report, *Financing Special Education in New Jersey*, by the New Jersey School Boards Association, it was noted that local districts supported 57% of the cost of special education, the state funded 34%, and federal aid accounted for 9%. One of the largest drivers of special education costs are programs for students with ASD and their related services. Furthermore, with out of district placement costs increasing by 8-12 % a

year and a cap on local district budgets, school budgeting has become an uphill battle. To compound the problem, school districts are increasingly concerned about meeting the expectations of the No Child Left Behind Act (NCLB), especially in special education. As a result, school districts are consistently examining curricula, looking for research based methods to improve achievement, and incorporating highly structured programs such as applied behavior analysis to teach an ever growing population of ASD students.

With this increase in prevalence, coupled with new research and change in federal laws impacting students with disabilities, school districts have found themselves litigating a student's right to a Free and Appropriate Public Education (FAPE) in an increased capacity. Although school districts are in the business of education; litigation and special education has become synonymous. As a result, educational planning has led to a disconnect between many parents and their local school districts. Considering the possibility of litigation and the complexity of educating students with ASD in a rising population, New Jersey school districts are faced with a daunting challenge.

Zirkel and Gilschlar (2008) empirically stated that New York and New Jersey accounted for 56% of the total adjudicated special education court hearings in the United States from 1991-2005. New Jersey averaged 220 cases per 10,000 students; almost double the next closest state, Pennsylvania, and approximately 1000% more than the last place, Utah. Gilschlar and Zirkel (2008) suggested that the New York-New Jersey metropolitan area is generally regarded as heavily litigious and has a strong concentration of attorneys. Interestingly, states such as California, Texas, Michigan, Florida, and Ohio experienced a decrease in special education litigation during the same time period. Nebraska, South Dakota, Alaska, Idaho, Montana, Wyoming, North Dakota, and Utah

combined, amounted to less than 1% of all adjudicated hearings in the United States from 1991- 2005. Clearly, the research indicates that New Jersey schools are often in litigation. Lanigan (as cited in Gischlar & Zirkel, 2008) stated that a high level of due process hearings amounts to a considerable cost for school districts, but more importantly, important educational collaboration between school personnel and parents is lost. Yell and Drasgow (1999) stated that critical decisions are being made by hearing officers and judges rather than by families and professionals when educating students with ASD.

A study by Miceli (2003) in the State of New Jersey analyzed and evaluated existing case law data on the state level in order to extrapolate and synthesize information for the special education population who were classified as autistic. The researcher found that school districts in New Jersey between 1997 and 2002 did not provide FAPE 38% of the time. His results indicated that school districts lost every time if the district did not meet the expectations outlined in NJ Administrative Code 6A:14. He further observed that if students did not make progress, districts were required to make rapid changes to a students' program (Miceli, 2003). Miceli's final recommendations included a suggestion to obtain access to a further sample of litigious cases and their outcomes and begin to quantify the results and to consider other methods of review of the legal autistic cases in terms of a rubric or additional format. This research, then, aims to follow these recommendations by replicating Miceli's study with a larger sample size and increase the format of the rubric. It is particularly important to assess if there has been any change in New Jersey litigation since the rewrite of IDEA 2004 and to determine if there is a correlation between litigation outcomes and the scientifically-based methods the National

Standards Project (National Autism Center, 2009). This information was not available when Miceli's research was conducted.

This study seeks to determine a higher level of knowledge and understanding regarding the increasing trend in ASD litigation to provide educationally sound suggestions to reduce litigation. Hence, reduced litigation will save school districts money, while also allowing them to service their students more effectively.

### **Statement of the Problem**

In recent years, across the country, the population of special education students classified with ASD has grown substantially. The National Center for Education Statistics (2009) found that students diagnosed with ASD had risen from 42,000 between 1997-1998 to 296,000 between 2007-2008: an increase of over 700% in a decade. Furthermore, students with ASD grew faster than any other disability recognized by IDEA. With this increase, school districts have also seen an increase in litigation as school personnel and parents have failed to come to an agreement as to what constitutes a students' rights to a free and appropriate public education. Parents are increasingly challenging school decisions; utilizing advocates, lawyers, and expert witnesses specializing in ASD (Yell, Katsiyannis, Drasgow, & Herbst, 2003).

During the 2009-2010 school year the average cost per pupil in the state of New Jersey was \$13,835 (NJDOE, n.d.). During that same time period, the average cost per pupil for a student diagnosed with ASD was \$57,430, with some costs as low as \$15,000 and other costs more than \$100,000 (NJDOE, n.d.). As special education costs across the state continue to escalate dramatically, coupled with reduction or elimination in state aid

to support costs, strains on school district budgets and taxpayers have become a reality. Inherently, litigation only compounds this dilemma.

Currently, there is little empirical literature that has studied the outcome of litigation and its impact on school districts in the state of New Jersey. Furthermore, even though the IDEA mandates the use of scientifically-based treatments, there is no empirical literature that has specifically studied the correlation between the National Autism Center's National Standards Project (2009) and Administrative Law Judges' (OAL) decisions.

### **Purpose of Study**

The purpose of this case study is to investigate existing New Jersey case law for the special education population classified as ASD and analyze New Jersey Administrative Law Judges (ALJ) decisions to identify why districts win or lose cases, adding to the limited body of research in this area. Research has examined ASD litigation at a national level and one qualitative study (Miceli, 2003) investigated New Jersey case law prior to the revision of IDEA 2004. This study will move the research forward with an investigation of New Jersey litigation since IDEA 2004.

In addition, the National Autism Center's National Standards Project (2009) finally produced a study that definitively determined what ASD methodology is acceptable as scientifically proven and acceptable treatment for individuals with ASD. Consequently, the purpose of this study concurrently seeks to determine if there is a correlation between litigation outcomes and the scientifically-based methods identified in the National Standards Project.



It seeks to determine a higher level of knowledge and understanding regarding the increasing trend in ASD litigation and provide educationally sound suggestions to reduce litigation. Hence, reduced litigation will save school districts money, while also allowing them to service their students more effectively.

### **Research Questions**

(a) What are the similar underlying arguments for each case that petitioners have filed?; (b) What have the court rulings said when parents made unilateral placements?; (c) What types of programs, placements, or methods of instruction do parents demand most frequently?; (d) What role does documentation have in the process and how important was it?; (e) What factors weighed the most when ALJ's made their decisions and rulings?; (f) Where did school districts fail and succeed most often and was there a pattern?; (g) What types of scientifically-based treatments were utilized if any and did they impact on the district's success?; (h) What is the influence of expert medical professionals and/or witnesses testimony on a petitioner's behalf?

### **Study Design and Methodology**

This study was a qualitative research design that examined the outcomes of 38 New Jersey Administrative Law Judges (ALJ) decisions through an explanatory case study. This study involved all 38 cases published in which a complete judicial decision regarding a student with ASD was rendered. Furthermore, every case since the reauthorization of IDEA in 2004 through 2010 was included in my sample, eliminating all biases. Each case was carefully examined utilizing the same rubric and questions to ensure validity and continuity among all cases.

I used the same rubric Miceli (2003) implemented to analyze NJ ALJ decisions. In addition, I added one more criteria to the rubric that identified scientifically-based interventions recognized through the National Autism Center's (2009) National Standards Project that were utilized to treat and/or educate each student with ASD in the case. This research was unavailable in 2003 but was incorporated in this research because of the IDEA (2004) requirement that scientifically-based research must be incorporated when educating a student with ASD.

The purpose of this case study was to investigate existing New Jersey case law for the special education population classified as ASD and describe New Jersey Administrative Law Judges (ALJ) decisions so as to identify the reason districts win or lose cases. As a result, this study will contribute to the literature by providing research with an analysis of New Jersey litigation since IDEA 2004.

Therefore, this study will provide school districts, professionals, educators, and attorneys with a better understanding of the current state of research and an ability to make informed decisions about the education of students with ASD. In addition, it is hoped that this research serves as a resource to prevent litigation and, at the same time, to provide meaningful recommendations for successful litigation if it must occur.

### **Significance of the Study**

The cost of litigation impacts school districts and families alike. For school districts, every dollar spent in litigation is one less dollar spent in the classrooms. In our current economy, every dollar is significant when providing a thorough and efficient education. This study will identify trends in ASD litigation, preventative measures that can be implemented to reduce litigation and effectively meet the students' needs, while

concurrently satisfying the students', parents', and school districts' needs. School districts that are proactive will benefit from this information, while school districts that are reactive, may integrate this data to prevent further failure.

In addition, identifying whether there is any relation between case outcomes and scientifically-based research on ASD will provide insight on the impact of IDEA on ALJ's decisions.

### **Limitations of the Study**

First, this study does not report on qualitative or quantitative analysis that includes but is not limited to: attitudes or perceptions of parents, professionals, or school districts. This study only analyzes the final decision rendered by the ALJ who heard the case. Furthermore, all case decisions are based on an ALJ's interpretation of the law. Hence, each judge may have a slightly skewed opinion of the law, impacting on my rubric.

This is not an exhaustive study or an analysis on a national level. This study will only analyze litigation in the state of New Jersey. Although IDEA is a federal mandate, New Jersey is recognized as a highly litigious state, especially in the area of ASD. In addition, New Jersey tends to be more regulated than other states when it comes to education. Therefore, comparing this data to national cases may be difficult.

Once a disagreement begins between a school district and parents, there are various ways the situation can be rectified. Parents and school districts can have meetings, attend mediation, or hold administrative hearings. However, none of these outcomes is public knowledge. Therefore, this study only evaluated cases that were

settled through due process hearings because these cases became the case law that sets precedent for future decisions.

Lastly, the implementation of a rubric reduced researcher bias. However, this rubric was not created by a collaborative group of researchers; it was created by a researcher in a previous study conducted in New Jersey (Miceli, 2003) with modification by me. Therefore, the rubric could possess some bias based upon my experience in the field.

### **Definition of Terms**

The following terms are being defined per the definition of the second edition of *Special Education Law* (Wright & Wright, 2007).

*Accommodations.* Changes in how a test is administered that do not substantially alter what the test measures; includes changes in presentation format, response format, test settings or test timing.

*Appeal.* Procedure in which a party seeks to reverse or modify a judgment or final order of a lower court or administrative agency, usually on grounds that lower court misinterpreted or misapplied the law, rather than on the grounds that it made an incorrect finding of fact.

*Assessment.* Systematic method of obtaining information from tests or other sources; procedures used to determine child's eligibility, identify the child's strengths and needs, and services child needs to meet these needs.

*Child find.* Requirement that states first, ensure that all children with disabilities are identified, located, and evaluated, and second, determine which children are receiving special education and related services.

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*Consent.* Requirement that the parent be fully informed of all information that relates to any action that school wants to take about the child, that parent understands that consent is voluntary and may be revoked at any time.

*Disability.* In Section 504 and ADA, defined as impairment that substantially affects one or more major life activities; an individual who has a record of having such impairment, or is regarded as such impairment.

*Due process complaint notice.* Notice filed to request a due process hearing; must include specific information, including the child's name and address, name of the school the child attends, a description of the nature of the problem, and a proposed resolution of the problem.

*Due process hearing.* Procedure to resolve disputes between parents and schools; administrative hearing before an impartial hearing officer or administrative law judge.

*Evaluation:* Procedures used to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.

*Free Appropriate Public Education (FAPE).* Special education and related services provided in conformity with an IEP; these services are provided without charge, and meet standards of the State Department of Education.

*IDEA.* The Individuals with Disabilities Education Act of 2004.

*IEP.* Individualized Educational Plan

*Inclusion.* An effort to make sure students with disabilities go to school with their friends, neighbors, and siblings, while also receiving the specially designed instruction and support they need to achieve high standards and succeed as learners.

*Least Restrictive Environment (LRE).* Legal requirement to educate children with disabilities in general education classrooms with children who are not disabled to the maximum extent possible.

*Mediation.* Procedural safeguards to resolve disputes between parents and schools; must be voluntary, and cannot be used to deny or delay right to a due process hearing; must be conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

*Modifications.* Substantial changes in what the student is expected to demonstrate; includes changes in instructional level, content, and performance criteria, may include changes in test form or format; includes alternate assessments.

*OSEP.* Office of Special Education Programs

*Parent.* Parent, guardian, or surrogate parent; may include grandparent or stepparent with whom a child lives, and foster parent.

*Procedural safeguards notice.* Requirement that schools provide full easily understood explanation of procedural safeguards that describe a parent's right to an independent educational evaluation, to examine records, to request mediation and due process.

*Public Law (P.L.) 94-142.* The Education for All Handicapped Children Act that was enacted in 1975.

*Scientifically Based Research.* Research that applies rigorous, systematic, and objective procedures to obtain reliable, valid knowledge about education activities and programs includes research that employs systematic, empirical methods that draw on observation or experiment, involves rigorous data analyses to test hypotheses and justify

conclusions, relies on methods that provide reliable and valid data across evaluators and observers, and studies that are accepted by a peer-reviewed journal or approved by a panel of independent experts through rigorous, objective, and scientific review.

*Section 504.* Section 504 of the Rehabilitation Act protects individuals with disabilities from discrimination due to disability by recipients of federal financial assistance.

*Special Education.* Specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability

*U.S.C.* United States Code

### **Organization of the Study**

A complete review of the current literature related to ASD, scientifically-based treatments, and litigation was conducted. At the conclusion of this review, all decisions from the New Jersey Office of Administrative Law (OAL) between 2005 and 2010 were reviewed and analyzed. A rubric was then applied to each case. After a careful analysis with the rubric, data regarding procedural violations, substantive violations, and scientifically-based treatments implemented was gathered. With this information, recommendations were implemented for school districts moving forward when educating students diagnosed with ASD.



## **Chapter II**

### **A REVIEW OF THE LITERATURE**

#### **Introduction**

In this review, the complex educational and litigious environments in which educating students with disabilities are educated is evaluated, specifically students diagnosed with Autism Spectrum Disorder (ASD), using data from empirical studies, federal legislation, and case law decisions. Relevant research literature will be reviewed and critiqued in order to make sound legal and educational recommendations to reduce litigation. This review will focus on what is known in the literature about scientifically-based treatments and methodologies for students with ASD, federal legislation impacting students with disabilities, landmark court decisions, and an analysis on case law studies.

The purpose of this study is to review and synthesize the research literature focused on the fields of special education law and Autism Spectrum Disorder (ASD). It seeks to determine a higher level of knowledge and understanding regarding the increasing trend in ASD litigation and provide educationally sound suggestions to reduce said litigation.

This review of the related research is divided into five sections and includes: (a) a review of special education law, history, and framework and current federal legislation, as it relates to the Individuals with Disabilities Education Act (IDEA), Individual Education Plans (IEP), Free and Appropriate Public Education (FAPE), least restrictive environment (LRE), appropriate evaluation parent participation, No Child Left Behind Act (NCLB), Section 504 , and United States Supreme Court landmark decisions; (b) a background of Autism Spectrum Disorder (ASD), identification, and scientifically-based

communication, social skills, and behavior treatments; (c) ASD methodology and litigation; (d) Teacher training; and (e) New Jersey ASD.

### **Literature Search Methodology**

A broad literature search was conducted to identify all research and studies that met the criteria for inclusion. Electronic searches were made of the following data bases: (a) EBSCO, (b) Academic Search Premier, (c) Proquest Multiple Databases, (d) LexisNexis Academic, (e) Rutgers Camden on-line law library, and (f) web based search engine Google Scholar. In addition, the Seton Hall Library and Amazon.com were utilized to borrow and purchase books related to the field.

### **Criteria for Inclusion and Exclusion**

Criteria for inclusion in this review were as follows: (a) quasi-experimental research on scientifically based treatments and methodologies that impact students with ASD, (b) studies of treatments and methodologies that could be implemented by a school system, (c) grade level of students studied varied from pre-K through grade 12 (ages 3-21), (d) studies that identified and analyzed litigation outcome, (e) research that analyzed federal legislation and landmark decisions impacting the education of students with ASD, and (f) articles that were included if published in peer reviewed journals or published court cases.

Criteria for exclusion in this review were as follows: (a) studies in which educators or professionals were the sole subject of the treatment or methodology; (b) studies that examined biological, genetic, or medical treatments; (c) studies that did not include empirical data; (d) articles or studies that were not published in English; (e)

studies that included ASD individuals with comorbidity; and (f) studies that analyzed opinion, attitude, or perception of parents or professionals.

### **Special Education Law History and Framework**

Prior to 1975, students with disabilities were afforded limited opportunities to attend public schools. In 1975, less than half of all children with disabilities received an appropriate education. Over one million special needs children were completely excluded from school (IDEA, 20 U.S.C. Sec. 1400). Furthermore, many states had statutory regulations that enabled them to specifically exclude students with disabilities. Frustrated families, seeking the best for their children, often sought an appropriate education and related services elsewhere. Hence, education for students with disabilities was seen as a privilege, rather than a right (Huefner, 2000).

During the civil rights movement of the 1950s and 1960s, parents and advocacy groups began to utilize courts to seek services that would meet their children's needs. In *Brown v. Board of Education* (1954), the United States Supreme Court ruled that segregation denied educational opportunity. Parents of students with disabilities, advocates, and attorneys, armed with this decision, fought for an equal opportunity to a public education; if segregation by race was a violation of the 14th amendment to the U.S. Constitution, so was the exclusion of students with disabilities (Yell, 1998).

By the early 1970s, lawsuits against individual states became prevalent as more and more parents advocated for their children. In 1972, two landmark court cases, *Pennsylvania Association for Retarded Citizens (PARC) v. Commonwealth of Pennsylvania* and *Mills v. Board of Education*, began a nationwide establishment for the rights of students with disabilities to receive a public education (Yell, Bradley, &

Katsiyannis, 2001). These two cases developed clear expectations; students with disabilities must be provided educational services. Almost immediately, comparable lawsuits were filed across the nation which developed new laws and judicial case decisions. However, in many cases, the denial of an appropriate education for students with disabilities remained (Yell, 1998).

Recognizing the need for more substantial reform, President Ford signed into law the Education for All Handicapped Children Act (EAHCA). The EAHCA was an amendment to the Education of the Handicapped Act of 1970 (EHA). EHA was the first law that specifically recognized students with disabilities; it provided federal funds to colleges and universities that created programs to train teachers of students with disabilities. EAHCA, also known as P.L. 94-142, was created by Congress to ensure students with disabilities, as well as their parents, had rights. With this law, federal financial assistance was available to states that passed laws aligned with EAHCA and demonstrated a free and appropriate public education (FAPE) was provided to students with disabilities. P.L. 94-142 required special education and related services that: (a) were provided at the public expense; (b) met the standards of the state education agency; (c) included an appropriate preschool, elementary, and secondary school education in the state involved; and (d) were provided in conformity with an Individualized Education Program (IEP) that was designed for each student (Katsiyannis et al., 2001).

### **Individuals with Disabilities Education Act (IDEA)**

Since 1975, the EAHCA has been amended a number of times. The original law passed in 1975 placed a strong emphasis on access to educational programs. In 1990, the EAHCA was renamed The Individuals with Disabilities Education Act of 1990 (IDEA)

and added the category ASD. In 1997, IDEA shifted its focus beyond access to educational programs. The new concern became the level of educational opportunity (Yell, 2006; Yell & Drasgow, 2000). Yell (2006) suggested that these amendments significantly increased ASD litigation: (a) strengthened role of parents, (b) emphasized student progress toward meaningful educational goals, (c) encouraged resolution of differences by using mediation, (d) made changes to the IEP team and document, and (e) added disciplinary provisions in favor of parents and students.

The latest revision of IDEA occurred in 2004. With this reauthorization, Congress focused on accountability; improved outcomes, such as peer reviewed research based instruction; and required special education teachers to be highly qualified (Yell, 2006). The purpose of IDEA 2004 was to (a) ensure 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; and (b) to ensure that the rights of children with disabilities and parents of such children are protected (IDEA, 20 U.S.C. Sec. 1400).

The IDEA is divided into five parts, Parts A, B, C, D, and E. Part A is the general provisions (Sections 1400-1409). In this section, Congress justified the law and provided purpose. In addition, definitions found throughout the law and presented. Part B is the Assistance for Education of All Children with Disabilities (Sections 1411 -1419). Part B governs special education for children with disabilities between the ages of 3 and 21. It addresses child find, unilateral placements, reimbursement, assessments, least restrictive environment, evaluations, parental consent, eligibility, IEPs, placement, and procedural

safeguards designed to protect the rights of children and their parents. Part C is Infants and Toddlers with Disabilities (Sections 1431 – 1444). Part C governs early intervention services for children under the age of 3. Part D is the Activities to Improve Education of Children with Disabilities. Part D governs state personnel developmental grants, personnel preparation to improve outcomes, parent training and information centers, and general provisions. Part E is the national Center for Special Education Research (Section 9567). Part E developed a special education research center to improve services, identify scientifically-based educational practices, and identify scientifically-based related services and interventions. All parts are interrelated and function as one.

Murdick, Garten, and Crabtree (2007) identified six principles of IDEA: (a) individualized education program (IEP), (b) the guarantee of a free appropriate public education (FAPE), (c) education in the least restrictive environment (LRE), (d) appropriate evaluation, (e) parent and student active participation in the child's education, and (f) procedural safeguards for all participants. The most common litigious issue with IDEA involved placement decisions and educational methodologies and treatments (Yell, 2006). Hearing officers and courts have repeatedly respected a school district's right to choose an instructional approach; focusing their attention on whether an IEP was correctly developed rather than on instructional methodology. Itkonen (2007) found that when districts violated procedural safeguards and failed to meet IDEA mandates, courts awarded reimbursement for therapies, treatments, and methodologies requested by parents.

In reviewing the literature, IDEA cases that involved placement often focused on the LRE provision. All students with disabilities are entitled to be educated with non-

disabled peers. However, this right has been challenged when the setting is deemed inappropriate. In such cases, courts determined if the benefits of the more restrictive setting outweighed the inclusive classroom (Zirkel, 2002).

Yell, Katsiyannis, Ryan, McDuffie, and Mattocks (2008) suggested ways school districts could comply with IDEA: (a) meet the procedural requirements of IDEA, (b) convene legally correct IEP meetings, (c) develop educationally meaningful IEP's, (d) conduct relevant assessments, (e) link assessment results to goals and services, (f) develop measurable annual goals, (g) determine how to measure progress, (h) consistently reports to parents, (i) utilize peer-reviewed research, (j) modify programs for general education, (k) provide related services, (l) address special factors in IEP, (m) placement is developed after program, (n) always taught in LRE, (o) continuously monitor progress, (p) discipline students in accordance with IDEA, (q) provide educational services to suspended or expelled students, (r) provide comparable services to transfer students, and (s) services should not be contingent on medication.

Huelett (2009) agreed with Murdick et al. (2007) and identified six pillars of IDEA that led to litigation disputes. These pillars included: (a) individual education plan, (b) free and appropriate public education, (c) least restrictive environment, (d) appropriate evaluation, (e) parent participation, and (f) procedural safeguards.

### **Individual Education Plan (IEP)**

"The cornerstone of the Individuals with Disabilities Education Act of 2004 is the Individualized Education Program document, known as the IEP" (Gartin & Murdick, 2005, p.327). Gartin and Murdick (2005) indicated courts expect an IEP to include: (a) the child's present level of academic performance, (b) measurable annual goals, (c)

special education and related services provided, (d) an explanation for nonparticipation in regular education classes, (e) accommodations implemented on district and statewide assessments, (f) date and duration of services provided, (g) measurable post-secondary goals and transition services, (h) a statement of how goals will be measured, and (i) a vision for ensuring parental participation (Etscheidt, 2005). If a school district failed to comply, document, or demonstrate progress in any one or more area the courts rendered a judgment in favor of the parents.

Research has shown an IEP developed with full collaborative effort among parents, school personnel, and other service providers to be the most effective. In addition, when parents are active participants, courts recognized the school districts strong desire for an educational partnership (Murdick et al., 2007). At minimum, the IEP team must include the child's parents, a regular education teacher, a special education teacher, a representative of the school who is able to supervise special education, an individual who can interpret evaluative results and any others at the discretion of the school or parents (Wright & Wright, 2009).

However, IEPs have been filled with problems, including a lack of teacher preparation to meet legal requirements (Huefner, 2000). The importance of the IEP is so critical that failure to develop or implement it appropriately could deem the special education student's entire program invalid by the court (Yell & Drasgrow, 2000). In order to confirm an appropriate education, schools must ensure both the procedural and substantive requirements of the IEP. Procedural requirements mandate that parents are active participants in developing their child's IEP. Substantive requirements require that schools provide a meaningful educational benefit to students. Bateman and Linden



(as cited in Yell, 2006) stated that a well-designed IEP can reduce failure, promote self-esteem, and develop a productive student.

Lake (2002) identified the 10 most common IEP mistakes. They were: (a) team membership was incorrect or incomplete; (b) IEP lacked adequate parental input or consent; (c) key components were missing; (d) goals were incomplete, inadequate, or not measurable; (e) transition component was lacking or deficient; (f) failed to adequately address the student's least restrictive environment; (g) placement offer and services were inadequate; (h) school district failed to provide and fully implement the services under an existing IEP; (i) not developed or revised in a timely manner; and (j) failed to include positive behavioral interventions.

Etscheidt (2003) reviewed the outcomes of 68 judicial decisions related to appropriate programs for children with ASD. He identified three factors that supported if an IEP had been reasonably calculated to provide educational benefit. They were: (a) IEP goals must be matched to evaluation data, (b) IEP team members must be qualified to develop programs, and (c) the methodology selected must assist the student in achieving IEP goals.

Yell and Drasgow (2000) conducted an analysis of the cases on 45 published due process hearings and court cases between 1993 and 1998 in which parents of children with ASD challenged the educational program developed by school district personnel. All cases involved parental requests to provide, fund, or reimburse them for the Lovaas program. Astoundingly, school districts lost 34 of the 45 (76%) cases due to procedural errors, substantive errors, or both. Furthermore, in 29 of the 45 (64%) cases, school districts lost litigation because of deficiencies in the IEP. Parents filed for due process

seeking a specific program but only won because of incorrect procedures in one or more areas of the IEP.

Yell (2006) suggested that school districts could have reduced litigation if: (a) the IEP process followed the procedural and substantive requirements of IDEA, (b) had professionals with expertise in the area of autism conduct evaluations when planning the IEP, (c) developed IEP's that addressed all areas of need identified through evaluation, (d) implemented scientifically based instructional strategies and programs when addressing the IEP, and (e) IEP team collected meaningful data to document student progress and program efficacy. Simply stated, it is easier and cheaper to do the right thing, then go to court and obtain the same results.

### **Free and Appropriate Public Education (FAPE)**

In *Brown v. Board of Education of Topeka* (1954), the Supreme Court ruled the segregation of minorities from school based upon race was unconstitutional. This ruling established the guidelines and framework to include individuals with disabilities. The first FAPE case heard by the United States Supreme Court was the *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). "The High Court noted that the IDEA mandates that school districts provide not the "optimal level of services," but rather a 'basic floor of opportunity' and 'some educational benefit'" (Hulett, 2009, p.95). Inherently, the high court overruled the lower court and set the standard for some educational benefit rather than a student's maximum potential (Yell, 2006). "One of the best known decisions used an automobile analogy and concluded that students required a serviceable Chevrolet, not a Cadillac" (Huefner, 2008, p.368).

Congress understood it would be very difficult to define FAPE. Therefore, FAPE is defined, primarily, as specific procedures necessary when developing a special education program that meets the unique needs of the individual student (Yell, 2006). However, the vague definition has resulted in costly conflicts and litigation for school districts and parents (Crocket & Yell, 2008).

In an analysis of the literature that was published between 1982 and 2008, when referencing FAPE the Rowley decision was cited 1095 times in federal and state court decisions. Hulett (2009) stated that the Rowley decision had dominated court decisions over the past 28 years; despite the fact Congress changed the law IDEA (1997, 2004). The goal for IDEA (2004) was full integration with the core mission of No Child Left Behind (NCLB). Congress emphasized academic proficiency with a strengthened focus on progress toward IEP goals. All students, regardless of disability, should reach academic achievement goals based upon their present levels of academic achievement set in their IEP (Daniel, 2008). However, the lower courts have dealt varying opinions since the adoption of IDEA 2004.

Currently, there are two cases under appeal in the U.S. Court of Appeals in the 9th and 10th Circuit, courts, explaining whether the achievement of self-sufficiency is a requirement of FAPE. In *J.L. and M.L. v. Mercer Independent School District* (2006), the district court implied a standard of “meaningful educational benefit toward self-sufficiency” based upon statute in IDEA (2004). In the decision, the district court ordered the administrative law judge to apply the independent living and economic self-sufficiency standard of IDEA (2004). This ruling extends beyond a basic floor of opportunity. In *Deal v. Hamilton County Board of Education* (2004), the Sixth Circuit

Court ruled that “meaningful benefit” and not “self-sufficiency” remained the FAPE standard and cited *Rowley* as the standard. However, the refusal of the school district to provide applied behavior analysis treatment constituted a procedural violation. In *K.C. v. Fulton County School District* (2006), the district court ruled in favor of the school district because proficiency was achieved on the standardized test used in that state. These cases reflect differences of opinion as to how a FAPE should be measured and against what standards - complicating matters further for school districts even with the best intentions.

In relation to ASD, questions of appropriate educational methodology are closely related to the concept of FAPE (Yell & Drasgow, 2000). Recently, the courts have become increasingly involved in methodological and treatment cases (Hulett, 2009). Two decades ago, decisions regarding the choice of educational methodologies with individual students were primarily in the hands of educators. “Now, after 30 years of experience with IDEA, and considering the 1997 and 2004 amendments, it's time for an authoritative, persuasive judicial decision clearly enunciating the updated expectations of FAPE” (Huefner, 2008, p.371). The U.S. Court of Appeals for the Fourth Circuit in *Barnett v. Fairfax County School Board* (1991) provided a brief statement regarding educational methodology, “While the school system must offer a program which provides educational benefits, the choice of particular educational methodology employed is left to the school system” (p.371)

Inevitably the Supreme Court will hear an ASD case regarding FAPE to update the 1982 *Rowley* decision. Until then, parents do not have the legal right to demand specific methodology or programming when educating students with ASD. However,

until the Rowley decision is updated, parents and school districts will continue to disagree and litigation will persist. Yell (2006) found school districts were most successful with FAPE cases when: (a) documented student progress was available, (b) expert witness testimony concurred progress, (c) goals and objectives were measurable, (d) measurable data informed decisions, and (e) scientifically-based research strategies were implemented.

### **Least Restrictive Environment (LRE)**

The purpose of LRE was to eliminate the practice of educating students with disabilities separate from students without disabilities. The focus of the provision was to educate students with disabilities with students who are not disabled, in regular education classes, to the maximum extent appropriate. LRE is the educational setting closest to the regular classroom in which a special education student is taught.

Over the past 30 years, research has shown that four court cases were crucial to the implementation of LRE when educating students with disabilities (Yell & Katsiyannis, 2004). A synthesis and analysis of these four cases provides a framework of the legal proceedings when parents file for due process, claiming that their child with ASD has been placed incorrectly.

In *Roncker v. Walter* (1983), the Sixth Circuit Court overruled the district court in support of the Cincinnati School District. The ruling developed the *Roncker portability test*. The two part test evaluated: (a) can services provided in a separate placement be reasonably provided in an integrated place; (b) if the answer is no, then the more restrictive setting is appropriate. If the answer is yes, the separate placement is incorrect and does not meet the LRE standard.

In *Daniel R.R. v. State Board of Education* (1989), the Fifth Circuit Court ruled in favor of the school district. The ruling developed a two part test to determine if a school met the LRE provision: (a) Can a satisfactory education be provided in a regular education class with supplemental aides and services, and (b) Has there been an attempt to educate the child in the regular education setting to the maximum extent appropriate?

In *Sacramento Union County School District v. Rachael H.* (1994), the Ninth Circuit ruled in favor of the parents and developed a four part test known as the *Rachael H. four factor test*. The four parts to be evaluated are: (a) whether the restrictive setting is more beneficial than the general, (b) the social and nonacademic needs, (c) the effect of the student with disabilities on the regular education students, and (d) the cost of placement in general education.

In *Hartmann v. Loudoun County Board of Education* (1998), the Fourth Circuit Court overruled the decision of the district court to side with the parents. The ruling utilized the following criteria to check if a regular education placement was not appropriate: (a) regular education classes did not provide benefit, (b) the more restrictive setting outweighed the less restrictive setting, and (c) the child's behavior was detrimental to fellow classmates.

The only LRE case heard by the Supreme Court was *Honig v. Doe* (1988). In this case, two students with emotional disabilities were expelled from school and unilaterally excluded from receiving a FAPE. The Supreme Court ruled school districts do not have the authority to make unilateral placements and cannot expel a student for longer than 10 days (Yell, 2006). Students have the right to “stay put” pending due process proceedings, unless parents and the school district are in agreement to change placement.

Consequently, in IDEA 2004, the “stay put” placement was replaced by an Interim Alternative Educational Setting (IAES) to reduce litigation and provide schools the ability to protect other students from those that are behaviorally challenged (Hulett, 2009).

In review of the research, there is a substantial amount of controversy and litigation regarding ASD students and their LRE educational placements. Parents and school districts consistently disagree whether in-district or out-of-district placements are appropriate for the child (Yell, 2006). Even when students are educated in-district, debate remains. Consequently, school districts must be aware of and comprehensively understand all four cases and decisions. A well informed IEP team should understand the child's unique and individual needs and provide a FAPE in the LRE. Katsiyannis and Herbst (2004) stated court decisions are very clear when making a LRE decision. Conducting careful evaluations of the child and an analysis of their needs is paramount. Moreover, before a change in placement occurs: (a) an IEP team should always reconvene, (b) all four court developed LRE tests should be applied, (c) the outcome of each test should be determined, (d) an informed decision should be developed, (e) the process should be documented, (f) data and evaluations that support decisions should be maintained, and (g) parents should participate through the entire process.

### **Appropriate Evaluation**

The evaluation process determines whether a child is or is not eligible for special education services. IDEA mandated that a variety of assessments and tools must be implemented. Properly conducted evaluations are important to identify areas of weakness and strength. Types of assessments that may be included are but are not

limited to: informal, formative, summative, cognitive, and alternative. Hulett (2009) recognized that norm-referenced, standardized achievement and high-stakes testing may be incorporated as well. However, the literature has indicated that courts have weighed heavily on school district assessments and professional cognitive tests. In a majority of cases, courts have been less inclined to use data from high-stakes testing.

Historically, parents have contested evaluations for students with disabilities. Yell and Katsiyannis (2004) found school districts that conducted evaluations by individuals with no knowledge of ASD or failed to evaluate all areas of need lost in litigation. Yell's (2004) review of the literature showed parents and school districts agreed upon evaluative diagnosis but disagreed upon meaningful student progress. Hence, no litigation was found, nor were empirical studies conducted on diagnosis; rather the literature indicated ASD litigation focused on evaluations that demonstrated progress or lack thereof.

### **Parent Participation**

IDEA strongly encourages parents to be active participants in their child's education. Parental involvement in children's learning is positively related to achievement (Yell & Katiyannis, 2004). Yell & Katiyannis (2004) found that schools that involved and informed parents through every step of the special education process had less litigation. Yell (2006) recommended that: (a) parents be active participants in their child's IEP team, (b) parents receive a copy and clear explanation of their rights and procedural safeguards, and (c) that parents be notified of any changes, updates, or meetings that affect their child.



Parents must provide legal consent for evaluation of their child, as well as for special education and related services. An IEP should not be completed prior to parent participation, and all members of the IEP team must be present, unless the parents provided prior written consent, giving excusal. Courts consistently ruled that prior completion constitute a clear lack of parental participation (Huefner, 2006). In addition, a school district is legally responsible for providing an interpreter for parents who speak another language. If any rights are denied, parents possess the right to initiate due process. Furthermore, school districts that failed to demonstrate meaningful parental participation in all decisions had the IEP invalidated by the courts (Murdick et al., 2007).

Few litigation cases have involved parental attendance; rather, meaningful participation in a student's IEP was an issue. The few cases found had other issues at the heart of the matter such as FAPE, LRE, or placement complaints (Murdick et al., 2007). School districts that viewed parent participation simply as a signature on an evaluation, attendance at a meeting, or as informational only, did not constitute meaningful participation under IDEA (Yell et al., 2003). Hence, litigation was inevitable for these districts.

The National Center for Autism (2009) recommends the following for family involvement: (a) invite parents to serve as classroom volunteers, (b) maintain frequent communication, (c) develop school sponsored family events, (d) incorporate home school learning activities, and (e) invite student input.

### **Procedural Safeguards**

Zirkel (2009) found that procedural violations were the most common errors that led to school district losses with ASD litigation. Inherently, school districts failed to get

parents meaningfully involved in their child's special education program. IDEA guarantees the following procedural rights to parents: (a) right to review all educational records, (b) to be an equal partner with the district on the IEP team, (c) to participate in all aspects of planning their child's IEP, (d) to file complaints with the state education agency (SEA), (e) to request mediation or due process hearing, (f) to present an alternative IEP along with witnesses to support their case, and (g) to request hearings or Alternative Dispute Resolutions (Wright & Wright, 2009).

Yell and Drasgow (2000) identified seven commonly violated procedural safeguards: (a) parents were unable to participate in the IEP process because they were not provided adequate notice, (b) parents were not informed of their rights, (c) district held meetings without inviting parents, (d) evaluations were conducted by individuals with no knowledge of ASD or who failed to evaluate all areas of need, (e) an inadequate IEP was developed because the IEP lacked meaningful goals and objectives, (f) placement decisions were made prior to the development of an educational program, and (g) school districts lacked qualified personnel to work with students with ASD.

Research has shown that families, through an ever growing online presence, have learned that procedural violations can lead to a win in court. Armed with this information, families seek even minor infractions to invalidate an IEP. Aware of this knowledge, school districts hesitate to hold informal meetings without formal documentation admissible in a due process hearing. Unfortunately, lack of trust deteriorates communication between home and school (Wright & Wright, 2009). Consequently, hearing officers and judges rather than families and educators are making educational decisions for students with autism (Yell & Drasgow, 1999).

### **No Child Left Behind Act (NCLB)**

In 2001, Congress passed the No Child Left Behind Act as the reauthorization of the Elementary and Secondary Act of 1965 “to ensure that all children have a fair, equal, and significant opportunity to obtain a high quality education and reach, at minimum, proficiency on challenging State academic achievement standards and State academic assessments” (IDEA, 2 U.S.C. Sec. 6301). According to Yell, Drasgow, and Lowrey (2005), this act created an urgency to align the IDEA and NCLB’s core mission and goals when providing students a FAPE occurred. The two laws compelled schools to require and deliver high expectations for all children, access to general education curriculum, and to meet developmental goals.

NCLB changed the role of the federal government in America's public educational system. “In fact, NCLB represented the most significant expansion of the federal government into education in US history” (Yell et al., 2005). The primary goals for NCLB are: (a) all students will achieve high academic standards by attaining proficiency or better in reading and mathematics by the 2013 - 2014 school year; (b) highly qualified teachers will teach all students by the 2005 - 2006 school year; (c) all students will be educated in schools and classrooms that are safe, drug-free, and conducive to learning; (d) all limited English proficient students will become proficient in English; and (e) all students will graduate from high school (Yell et al., 2005, 131).

Yell, Drasgow, and Lowrey (2005) identified the following litigation implications of NCLB for administrators, special education teachers, and professionals: (a) know the law, (b) assess students for instruction, (c) use instructional procedures grounded in scientifically-based research, and (d) collect meaningful data. If a school district does this

and does it well, litigation for students with ASD is minimized and if litigation occurs, outcomes are more positive for school districts.

The law emphasized scientifically-based research because it is not subject to fads and fashions and makes teaching more effective, productive, and efficient. The National Research Council (2001) issued a report that stated education will only see progress if classrooms reflect the research. The Coalition for Evidences-Based Practice (2002) stated that educational practices for students with ASD that have been proven effective by rigorous research improved student outcome. By including students with disabilities in the NCLB assessment system, students with ASD were held to the same standards.

Educators must understand and apply the requirements of NCLB and IDEA to succeed in litigation. "There is a huge gap between what we know works from scientifically based research and what is actually taught in many teacher preparation programs and then applied in ASD classrooms" (Yell et al., 2005, p.137). Therefore, the strategies, interventions, programs, and methodologies analyzed in this literature review, place a strong emphasis on scientifically-based peer reviewed research.

There are five integral components to educating students with disabilities, especially those with ASD. Tincani (2007) stated an integration and overlap of legislative reforms (e.g., NCLB), legal mandates (e.g., IDEA 2004, LRE), philosophies and values (e.g., professionals and parents), staff training (e.g., teachers and parents), and resources available (e.g., staffing ratios, consultations) overlap. The least amount of ASD litigation occurs when all areas overlap, intermittently.

## Section 504

Section 504 of the Rehabilitation Act of 1973 mandated that all students with disabilities are to be protected from discrimination and receive free and appropriate accommodations. In order to receive accommodations, a student with a disability is defined as a person who, "has a physical or mental impairment; or has a record of such impairment; or is regarded as having such an impairment" (29 U.S.C. §§ 705 (20) which substantially limits one or more major life activities. Major life activities include caring for one's self, walking, seeing, hearing, speaking, breathing, working, performing manual tasks, and learning.

"Under Section 504, no child with a disability may be excluded from, denied the benefits of, or subjected to discrimination under any program funded by the federal government" (29 U.S.C. §794). Since all public schools in New Jersey receive federal funds, there are no exceptions.

All students classified as having a disability under IDEA are eligible under section 504 due to the physical or mental impairment that impedes the child's ability to learn. However, not all students eligible under section 504 meet the requirements for IDEA. IDEA specifically addresses 13 disability categories, including autism, whereas Section 504 has a much broader definition, which created eligibility for a larger population.

As with IDEA, any student found eligible for a 504, must be provided a FAPE in the LRE. Parents and students are afforded procedural safeguards and protections under the law. Parents must be provided written notice pertaining to identification, evaluation,

or placement of their child. In addition, a reevaluation must occur whenever there is a significant change in the student's 504.

School districts are responsible for the identification, evaluation, and determination of a student suspected or thought to have a disability under Section 504. Most often, students with disabilities that warrant educational services are classified under IDEA (Zirkel, 2009). Students with disabilities classified under Section 504, usually do not receive educational services. They do tend to get modified services.

On January 1, 2009, amendments to the Americans with Disabilities Act (ADA) went into effect and the school nurse's role became integral to a significant number of students under Section 504. The amendments added to the health related functions identified within major life activities (Zirkel, 2009). This new amendment, coupled with increasing numbers of children diagnosed with ASD has expanded the role of the school nurse within the decision-making process and the IEP and 504 plans. Furthermore, it created an ever expanding role for schools when providing a FAPE in the LRE to students with ASD.

To date, no empirical studies have been conducted with students diagnosed with ASD possessing a 504. In a review of the research, only two litigation cases appeared. However, both cases rendered decisions with implications for the students' IEPs, rather than their 504 plans. Zirkel (2009) suggested that this may be an area of contention for the future. However, the amendment is premature as is the effect on ASD litigation.

### **United States Supreme Court Landmark Decisions**

IDEA has generated much litigation since its original passage in 1975. Most litigation has occurred at the federal level and has originated from disagreements between parents and their child's school district over content or placement (Yell, 2006). In a review of the literature from 1975 to 2004 it was found that the Supreme Court heard six cases related to students with disabilities, whereas, from 2005 to 2009 the Supreme Court heard five cases. This represents a significant increase in recent years. Supreme Court decisions dictate how law is interpreted nationally, thus the importance of reviewing cases pertinent to ASD. Based on increased litigation, it is only a matter of time before an ASD case reaches the United States Supreme Court (Yell, 2006). When it does, its decision will impact educational and legal decisions in New Jersey public schools.

Yell, Hazelkorn, and Katsiyannis, (2007) suggested that school districts and educators develop a better understanding of the law, especially Supreme Court decisions that are case law in all 50 states. Parents no longer attend IEP meetings ignorant, unaware, or lacking legal advice. The following is an analysis and synthesis of 10 of the 11 special education cases heard in the past 35 years. One case was excluded because it lacked implication on litigation for students with ASD.

**Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley 458 U.S. 176 (1982)**

#### **Case Topic - Free and Appropriate Education (FAPE)**

Questions asked of the court were as follows: (a) What is meant by a FAPE? (b) What is the role of state and federal courts when reviewing IDEA, Part B Section 1415?

The Supreme Court elucidated that students with disabilities had the right to access an education that provided educational benefit. However, they were not entitled to the best education or an education that would maximize their potential. Inherently, for school districts to provide a FAPE, it was mandatory to implement all procedural requirements and provide reasonable educational benefits.

**Irving School District v. Tatro 468 U.S. 176 (1982)**

**Case Topic – Health Services for FAPE**

Questions asked of the court were as follows: (a) Is medical treatment a related service under IDEA? (b) Is a public school required to perform medical treatments? The Supreme Court elucidated that schools are required to assist students with disabilities to benefit from special education. Congress's goal was to make public education available to all students. Hence, a service that allowed a child to remain in school and provided meaningful access to public education was necessary.

**Burlington School Committee v. Massachusetts Board of Ed. 468 U.S. 883 (1984)**

**Case Topic – Tuition Reimbursement**

Questions asked of the court were as follows: (a) Does relief in IDEA Sec. 1415 include reimbursement for private school tuition and related services? (b) Is reimbursement still available to parents that reject an IEP and make a unilateral placement? The Supreme Court elucidated that when the school district provided a FAPE, there was no legal responsibility. However, if a FAPE was not provided, the school district was responsible. Consequently, a new IEP placing the child in a private school at the expense of the public would be mandated.



**Honig v. Doe 484 U.S. 305 (1988)****Case Topic – Suspension and Long-Term Expulsion**

Questions asked of the court were as follows: (a) Do suspensions and expulsions manifested from the child's disability deprive a child of a FAPE? (b) Are there any exceptions to the stay-put regulation in IDEA Section 1415? The Supreme Court elucidated that school districts do not have the authority to make a unilateral placement that excludes students from school. Students have the right to stay put pending due process proceedings, unless parents and the school district are in agreement to change placement.

**Florence County School District Four v. Shannon Carter 510 U.S. 7 (1993)****Case Topic – Parental Choice and Educational Benefit**

The question asked of the court was as follows: Does relief in IDEA Sec. 1415 include reimbursement for private school tuition and related services when the private school is not in compliance with IDEA? The Supreme Court elucidated that parents are entitled to monetary relief if the courts find that the parent's private placement was proper and the IEP developed by the school district was inappropriate. In addition, the Court determined that the standards of the law only apply to school districts and not to parents' private placements.

**Cedar Rapids v. Garret F. 526 U.S. 66 (1999)****Case Topic – Nursing Services for FAPE**

The question asked of the court was as follows: Do schools have to provide one-on-one nursing assistance under IDEA? The Supreme Court elucidated that the goal of

Congress was to educate students with disabilities with students without disabilities.

Therefore, if the service is necessary to maintain the child's placement, the school district is mandated to provide the service.

**Schaffer v. Weast 546 U.S. (2005)**

**Case Topic – Burden of Proof in Due Process**

The question asked of the court was as follows: Which party bears the burden of persuasion, the school district or the parents? The Supreme Court elucidated that the party seeking relief is responsible to bear the burden of proof. However, the Supreme Court was clear that in states where the burden of proof is already placed on one party or the other, there is no change.

**Arlington Central School Dist. v. Pearl and Theodore Murphy 548 U.S. (2006)**

**Case Topic – Expert Witness Fee Reimbursement**

The question asked of the court was as follows: Do parents have the right to reimbursement for expert witness fees other than their attorney? The Supreme Court elucidated that parents are not entitled to expert witnesses fees. In addition, the parent's attorney cannot include or shift expert fees as part of their legal charges.

**Board of Education of City of New York v. Tom F. 552 U.S. (2007)**

**Case Topic – Tuition Reimbursement for Unilateral Placement**

The question asked of the court was as follows: Can parents of a child that never received special education and related services from a public school make a unilateral placement to a private school and receive reimbursement? The Supreme Court delivered a 4-4 split decision, with one justice recusing. Hence, families that live in the Second

Circuit (Connecticut, New York, and Vermont) may receive reimbursement as previously decided.

**Forest Grove School District v. T.A. 557 U.S. (2009)**

**Case Topic – Tuition Reimbursement**

The question asked of the court was as follows: Can parents of a child that never received special education and related services from a public school receive reimbursement? The Supreme Court elucidated that parents may receive reimbursement if their child was not provided a FAPE. Although a child may not have received special education services from a public school, it does not mean he or she was not eligible. If a child was found eligible through litigation, the court ruled that the child was denied a FAPE and therefore eligible for reimbursement.

**Autism Spectrum Disorder (ASD)**

Autism is a complex developmental disability that typically appears during the first 3 years of life (Feinburg & Vacca, 2000). Currently there is no cure for ASD. The presence of symptoms and impairments varies greatly from individual to individual. The Diagnostic and Statistical Manual of Mental Disorders IV (DSM IV) (APA, 2000) separates ASD into five diagnoses: (a) Autistic Disorder, (b) Asperger's Disorder, (c) Rett's Disorder, (d) Childhood Disintegrative Disorder (CDD), and (e) Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS). Currently, researchers and clinicians prefer the term autistic spectrum disorder. Classified as a spectrum disorder, researchers and clinicians have recognized significant social deficits, consistent repetitive behaviors, and narrowed interests in these individuals. Eigisti, Bennetto, and Dadlani (2007) that found 25% to 50% of individuals diagnosed with ASD possessed

pragmatic language skills. Furthermore, the remaining 50% to 75% failed to develop language at any level.

Autistic Disorder is a pervasive developmental disorder characterized by impaired social interaction, specific language abnormalities, behavioral stereotypes, and a range of cognitive deficits. A strong diagnostic feature of autism is a lack of spoken language or significant delay in the development of communication. Often, difficulties with social interaction and understanding are the basis for communication barriers faced by individuals with autism. Even individuals with autism, who possess the highest skills, experience difficulty and challenge in social situations (Hall, 2009). Autism is four times more prevalent in boys than girls and demonstrates no racial, ethnic, or social boundary. The onset of social impairments most often occur before 36 months of age and is characterized by poor eye contact, a failure to use gestures for communication, an inability to develop friendships, and a lack of empathy awareness toward others. Communication impairments include but are not limited to: (a) lack of speech, (b) oddities of speech (e.g., pronoun reversal), (c) and a lack of pretend play.

In 1944 Hans Asperger described social deficits observed in a group of young boys. Asperger's Disorder is characterized by abnormalities in social interaction and communication that impede an individual's functioning. Individuals with Asperger's often have repetitive interests and behaviors, fail to understand social cues, and possess an intense preoccupation with narrowed subjects (APA, 2000). Individuals with Asperger's are not typically withdrawn from others or afraid to speak. Rather, social awkwardness with a failure to react appropriately to others' feelings is common. Individuals maintain inflexible routines, are intensely focused, and extremely rigid.

Rules and procedures are followed: An individual with Asperger's does not deviate from rules and procedures and often reports on those who do not comply.

Individuals diagnosed with Asperger's have no significant delays in cognitive development or language development. Clinicians have observed communication pattern, marked by poor prosody, tangential and circumstantial speech, and marked verbosity. Young children with Asperger's often possess a sophisticated vocabulary but have difficulty comprehending figurative language. Loud voice and the ability to speak about a topic unrelated to a listener's interests is a trademark. Strong science and math capabilities, with an astute mind for miniscule detail and memory, allow them to grasp large bodies of knowledge but with little ability to apply it to the outside world (Hall, 2009).

First described by Dr. Andreas Rett, Rett's Disorder is characterized by normal development between 6 and 18 months of age, followed by deceleration in head growth, purposeful hand movement, and a regression in language and social skills. Rett's Disorder has only been observed in females and is described in three stages. Stage 1 (between 6 and 18 months) is characterized by developmental stagnation, stage 2 (between 12 and 36 months) is marked by regression, and stage 3 (between 2 and 10 years) is characterized by dementia and difficulty with motor skills. Misdiagnosed as autistic disorder, individuals with Rett's Disorder mirror individuals with autistic disorder during stage 2. Severe mental retardation and major communication deficits are associated with Rett's Disorder (APA, 2000).

Childhood Disintegrative Disorder (CDD) was first described by Theodore Heller. CDD is known as Heller's syndrome, a rare condition with a core deficit in

communication. CDD is distinguished from autistic disorder by a regression in function, after 2 years of normal development but before age 10. According to the DSM-IV, children demonstrate a loss of skills in at least two major domains, including language, social skills, bowel or bladder control, play, or motor skills. In addition, there must be at least two categories diagnostic of autism: lack of social skills, communication deficits, or repetitive behaviors (APA, 2000). Other than the diagnoses in the DSM-IV, literature is scarce. Very few studies have been conducted on CDD due to the lack of subjects.

PDD-NOS, otherwise known as atypical autism, is detailed in the DSM-IV as diagnosed when there is marked impairment in social interaction, communication, and stereotyped behavior patterns or interest, but full features for autism or PDD are not met. Fombone and Meilleur (2009) conducted a study of 135 patients, 80 of whom were diagnosed with autistic disorder, 44 with PDD-NOS, and 11 with Asperger's disorder. The researchers found that parents noticed developmental abnormalities at a younger age for children with autism than children with PDD-NOS (19.9 vs. 25.1 months;  $P = 0.028$ ). In addition, individuals with autism had higher incidence of regression in social skills, repetitive behaviors, and communication skills, but not language compared to PDD-NOS subjects. The diagnosis of PDD-NOS has increased the umbrella of ASD. With increased number of children diagnosed within the umbrella of ASD, litigation has increased as well (Yell, 2006).

### **Identification and Treatment**

The identification of ASD has increased during recent decades (Heflin & Alaimo, 2007). Consequently, ASD litigation has significantly increased as well. Identifying individuals with ASD as young as possible is crucial to the early intervention that

provides access to scientifically-based interventions that may change lifelong outcomes. Dickerson, Calhoun, Murray, Morrow, Yurich, Mahr and Purichia (2009) studied the validity of three ASD instruments: the Checklist for Autism Spectrum Disorder, the Childhood Autism Rating Scale (CARS), and Gilliam Asperger's Disorder Scale (GADS) designed to help parents and clinicians identify ASD. Results found an overall accuracy among clinicians (Checklist-100%, CARS-99%, GADS-93%) and for parents (Checklist-91%, CARS-93%, GADS-78%). Data for the checklist and CARS showed relatively high in agreement between clinician and parent scores. Research found both instruments to be useful as parent screening measures that identified the need for early intervention. These two tools are commonly provided to parents and are utilized by doctors, early intervention specialists, and child study teams seeking further data.

Fombonne (2005) conducted research that analyzed 43 surveys, 37 of which provided data on rates of autistic disorder. The number of subjects ranged from 6 to 5038 per study (median 48; mean 209). Intellectual functioning data was collected in 21 studies. Results indicated that 29.6% (range 0-60%) of subjects had no intellectual impairment, 29.3% (range 6.6-100%) of subjects had mild to moderate intellectual impairment, and 38.5% (range 0-81.3%) had severe to profound intellectual impairments. Individuals with no intellectual impairment, known as high functioning autism (HFA), commonly display communication deficits with normal intelligence. Yell (2006) stated that professionals must understand the current functioning level of an ASD student to properly provide scientifically-based instruction and to maintain compliance with NCLB. An inability to properly identify ASD could delay early intervention practices.

Research has found that delayed early intervention or no intervention at all increases ASD deficits. In fact, a small percentage of students “fall off” the spectrum following intensive intervention (USA Today, May 8, 2009). Furthermore, the failure of a school district to provide early intervention has resulted in costly litigation.

Gresham, Beebe-Frankenberger, and MacMillan (1999) stated that there are six common elements to a comprehensive treatment program in their article, “A Selective Review of Treatments for Children with Autism.” The elements are: (a) five skill domains (attend to stimuli, ability to imitate, receptive and expressive language, appropriate toy play, and social interaction skills; (b) a highly supportive and instructive teaching environment; (c) an environment characterized by predictability and routine; (d) functional approach to problem behaviors; (e) a transition between preschool to kindergarten and first grade; and (f) family involvement.

As studies progressed, a body of research has emerged and a number of promising evidence-based strategies have been developed (Simpson, 2005). The most exhaustive ASD study ever conducted was completed by The National Autism Center which published the National Standards Project (2009). The project analyzed over 500 quantitative methodology and treatment studies successful for students with ASD. The following interventions were recognized as established treatments: (a) antecedent package, (b) behavioral package, (c) comprehensive behavioral treatment for young children, (d) joint attention intervention, (e) modeling, (f) naturalistic teaching strategies, (g) peer training package, (h) pivotal response treatment, (i) schedules, (j) self-management, and (k) story based intervention package. Although other treatments were investigated, only these 11, were recognized as established and empirically proven.



Within each intervention are a myriad of strategies. For example, the antecedent package, categorized in the field of applied behavior analysis (ABA) lists 25 interventions. Regardless of treatment, all focus on improving communication, social, and behavior skills through therapies delivered by trained professionals.

### **Scientifically Based Communication Treatments**

Researchers and practitioners have attempted to analyze, understand, and document communication deficits in children with autism. Typically, language is acquired over the first few years of life. Infants coo, cry, giggle, and make facial expressions. Between 2 and 3 months of age, children continue to coo, begin to babble, and attempt playful yelling. In addition, typically developing children start eye-gazing at people and objects. Around 6 or 7 months of age, consonants and syllables begin to be muttered. By 36 months of age, children develop an ability to articulate 90% of words (Heflin & Alaimo, 2007).

According to the DSM-IV, delayed language development or no language development at all is a consistent indicator of ASD (APA, 2000). The communicative abilities of children with ASD vary. Children with ASD may have difficulty with use of pronouns. Prosody, pitch, or volume may be unusual, and intonation has been described as mechanical. Furthermore, individuals with autism may struggle to answer questions involving who, what, or why? Repetitive patterns of vocalization can be self-stimulatory rather than communicative (Hall, 2009).

Koegel, Koegel, Green-Hopkins, and Barnes (2010) conducted a study of three preschool children with autism and tested if intrinsic motivation taught children to ask the question *where*. Prior to intervention, all students could say over 50 words, had language

delay, and none could answer a *where* question. After 8 weeks of verbal prompt and reward intervention, children asked “where” an average of 28 times per session: Child 1 (range 18-49), Child 2 (range 25-50), and Child 3 (range 23-49). A limitation of the study was the limited number of participants, however, intrinsic motivational procedures proved helpful when teaching students with ASD. Research has shown that proper motivation and instructional interventions can improve task analysis for students with ASD. Therefore, educators and professionals must recognize the research and apply this body of knowledge when creating educational opportunities for students.

Koegel et al. (2010) suggested that children with autism rarely utilize communication for information seeking purposes, rather they use it for simple requests and protests. Murdock and Thurm (as cited in Koegel et al., 2010) found that children with ASD asked few, if any questions at all, about anything but their immediate wants or needs. Siller and Sigmund (2002) emphasized the importance of questions for information seeking and communication as a component for learning language and developing social interactions; two skills lacking in students with ASD.

Pivotal Response Treatment (PRT) seeks to teach ASD students to respond to stimuli in their environment without verbal prompting. PRT studies have demonstrated an increase in spontaneous communication (Gillett & LeBlanc, 2007). Harper, Frea, and Symon (2008) conducted a study of two fully integrated third grade students with ASD. PRT treatment was found to increase the important social skills that allowed these students to interact appropriately at recess with nondisabled peers. Specifically, their ability to interact and take turns increased.

Pelphrey, Sasson, Reznick, Paul, Goldman, and Piven (2002) analyzed five autistic males and five typical males. Using an ISCAN series RK-464 remote, participants' eye movement was monitored and recorded. The ISCAN measured the amount of time and location of eye gaze. Participants were shown faces on a screen and asked to identify emotion. Results demonstrated that males without ASD generalized the entire face ( $M=91.28\%$ ,  $SD=6.66\%$ ), however males with ASD focused on specific facial features (e.g., identifying emotion). Riby and Hancock (2009) found similar results and concluded that teachers must implement strategies and interventions that focus students with ASD on a person's face when communicating.

Research based strategies are expected with NCLB and Section E of the IDEA. Teaching and delivering instruction as usual, without clear scientifically-based research, is against the law. Schools that are unaware of these methods or that claim ignorance are vulnerable to costly litigation battles (Itkonen, 2007). Thus, early intervention for communication training is a clear expectation for children with ASD. However, with a triage of strategies, schools, speech therapists, and private practitioners are challenged. Furthermore, difficulty increases with the broad spectrum of language and communication abilities demonstrated by students with ASD (Flippin, Reszka, & Watson, 2010). With different responses to intervention, each child must receive differentiated strategies. Right or wrong, choice of methodology often leads to litigation (Yell, 2006). Although, replication of effective studies that validate the use of these procedures are invaluable with litigation.

### Scientifically Based Social Skills Treatments

Qualitative impairments in social interaction are one of the defining characteristics in the DSM IV (APA, 2000) for a diagnosis of ASD. For individuals with autism, difficulties with social interaction and understanding continue through life. An inability to recognize facial expressions, body posture, or gestures that regulate social interactions are common. These difficulties are reflected when individuals with autism attempt to understand other's perspectives or engage in reciprocal conversation. Hence, developing friendships at the appropriate developmental level is a challenge. Furthermore, a complete lack of sharing with others, lack of interest in group participation, lack of expression of pleasure, or the absence of imaginative play is common (APA, 2000).

Hall (2009) found children with ASD do not imitate people because of an inability to identify with others. Some children with ASD possess good social skills and may even speak with adults but rarely interact with peers. Research shows that lack of peer interaction creates less learning opportunities from peer to peer relationships. This deficiency impedes social skills, social referencing, and social interactions which are all embedded through sustained play (Hall, 2009).

In a review of the research, many studies have analyzed social skill development for individuals with autism. Gray (2004a) and Ozdemir (2008) conducted research with positive results that social stories increased social interactions for students with ASD. Consistent cues, reinforcement, and appropriate responses were important factors in both studies. Peer Training Packages (PTP) are ever increasing, scientifically-based strategies that increase communication skills for students with ASD. Theimann and Goldstein (2004) and Lee, Odom, and Loftin (2007) conducted empirical research that found that

PRP: (a) reduced self-stimulatory behavior, (b) increased play skills, (c) developed better social interactions, and (d) improved acceptance. However, all students in the studies still demonstrated deficits.

Social stories are a common approach utilized to decrease problem behaviors in social situations. Social stories can be written by anyone who works with an individual with ASD. The story is always written from the perspective of the individual with ASD. The focus is to improve understanding and responses in social situations designed to decrease fear, aggression, and obsessions (Gray, 2000). Kuoch and Mirenda (2003) conducted research that implemented social story interventions with positive outcomes. Ozdemir (2008) conducted a study that analyzed the effectiveness of social stories. Three participants with ASD, (ages 7, 9, 9), possessed various behavioral challenges (e.g., chair tipping, cutting lunch lines, loud outbursts). Each student had social stories specifically developed for their disruptive behavior, analyzed with an initial baseline. Results included: Participant 1 initial baseline (range 42.5 to 85%) post intervention (range 23.75 to 31.25%); Participant 2 initial baseline (range 45 to 57.5%) post intervention (range 10 to 23.75%); Participant 3 initial baseline (range 50 to 66.25%) post intervention (range 0 to 11.25%). Thus, indicating a successful reduction of undesired behaviors. Agosta, Gretz, Mastropieri, and Scruggs (2004) found students yelled less and sat appropriately with the use of social stories. As with all ASD interventions, social stories are recommended as part of a treatment package (Gray, 2004b). Furthermore, Simpson (2005) found social stories as a promising practice with educational impact for students with ASD. These intervention strategies should be included in classroom instruction for highly qualified teachers as specified in NCLB and IDEA (Yell, 2006).

### **Scientifically Based Behavior Treatments**

Behavior can vary dramatically for students diagnosed with ASD. Aggression, stereotypy, and self-injurious behavior (SIB) are the most commonly reported behavioral difficulties (Hall, 2009). A common observation is the apparent need for rituals and events. In addition, rituals usually coincide with a repetitive obsession for a specific object, followed by a brief period of motor activity (e.g. hand flapping, rocking, head banging). When rituals are unable to occur or an object is removed from the individual's environment, tantrums may occur.

SIB is very dangerous for individuals with autism. SIB can indicate frustration with communication, may be the result of internal hypersensitivity to pain, or even function as a form of attention seeking behavior dependent upon antecedent and consequence. Baghdadli, Pascal, Grisi, and Aussiloux (2003) found that SIB can be reduced when: (a) structured environments are created, (b) functional behavioral assessments (FBA) and intervention plans are developed, and (c) scientific based research intervention strategies and methodologies are utilized. Yell (2006) stated that when empirically based teaching strategies are implemented by highly qualified teachers, compliance with NCLB is met. Furthermore, students with autism have more educational opportunities afforded to them when the behaviors that impede his or her ability to participate with peers are reduced.

Rocha, Schreibman, and Stahmer (2007) recognized that very few professionals would disagree that behavioral interventions are not the treatment of choice for individuals with ASD. Methods for treating challenging behaviors include but are not limited to: social stories, joint attention intervention, self-management, visual strategies,

modeling, and schedules. Joint attention is the behavior of two individuals focused on the same object, game, object, or activity. Martins and Harris (2006) found that ASD students learned to respond when adults got their attention and then looked at an object of interest. No prompting, gestures, or comments were required for successful attention.

Students with ASD respond well to predictability and schedules. Byran and Gast (2000) completed an empirical analysis utilizing visual schedules for students with ASD. Students were provided pictures in a photo album that demonstrated transition from one learning center to another. Students successfully transitioned from center to center, completed four activities, and provided attention to the teacher when completed.

Self-management interventions have been utilized to build awareness of an individual's behavior, provide immediate feedback, and decrease future occurrences. Todd and Reid (2006) found students with ASD successfully monitored their own actions and behaviors through a self-monitoring board, verbal queuing, and edible reinforcement. At the conclusion of a 6 month treatment program, all students exhibited positive results.

### **Methodology and Litigation**

Many ASD due process proceedings have challenged methodology. Even though the courts have ruled methodology is a school decision; several factors appear to determine which decision will be reached. These factors are: (a) the availability of the developed program, (b) provision of appropriate intensity, (c) emphasis on meaningful outcomes, and (d) implementation of an individual program (Simpson, 2005). Schools must choose among various treatments and methodologies and incorporate data to discriminate based upon student need. Regardless of program methodology, schools

must document student progress toward IEP goals and objectives and are more successful when witness testimony is available to validate the data.

Tincani (2007) recommended five steps to guide the process of selecting methodology: (a) establish an evidence base for potential interventions, (b) solicit input and evaluate the compatibility of interventions with team members' values, (c) assess the capacity of team members to support the intervention, (d) assess the compatibility of the intervention with school wide programs and administrative supports, and (e) implement and evaluate the intervention.

Although it is difficult for professionals to come to an agreement on the best methodologies to use with children with ASD, most agree that children with ASD respond best to highly structured programs. Until recently, no empirical research has evaluated broad ASD studies to the extent that the National Autism Center has with their National Standards Project (2009). Significant controversy about which approach was effective, how data was gathered, and whether change in condition occurred was common. Although, many studies had empirical validity: (a) social stories (Gray, 2004b), (b) visual schedules (Bryan & Gast, 2000), and (c) the arrangement of furniture and stimuli (Leach & Duffy, 2009); all studies lacked a cohesive bond. The National Research Project is the first study of its kind in the field of ASD. The research provides a solid framework for the future of ASD education.

Simpson (2005) suggested that legislative and legal rulings have benefited students with ASD. In reality, many programs, treatments, and interventions are currently available because of legal rulings and legislative mandates. Simpson described characteristics of effective and scientifically valid interventions for students with ASD



and presented three basic questions for parents and professionals to ask related to efficacy of outcomes, potential risks, and evaluation of a particular approach. The expectation for professionals and parents is to adopt effective strategies based on expert recommendations and analysis of the research. The three questions are: (a) What are the efficacy and anticipated outcomes that align with a particular practice and are the anticipated outcomes in harmony with the needs of the student, (b) What are the potential risks associated with the practice, and (c) How will a method for strategy be an evaluated?

Simpson (2005) empirically researched 33 interventions and treatments and described them as fitting into one of four categories: (a) Scientifically Based Strategies – significant and convincing empirical efficacy and support; (b) Promising Practice – efficacy and utility with individuals with ASD; (c) Practice Having Limited Supporting Information – lacked objective and convincing supporting evidence, but had undecided, possible, or potential utility; and (d) Not Recommended – lacked efficacy and might have the potential to be harmful. Simpson (2005) identified five programs that met criteria as a scientifically-based practice: (a) Applied Behavior Analysis (ABA), (b) Discrete Trial Teaching (DTT), (c) Treatment and Education of Autistic and Related Communication-Handicapped Children (TEACCH), (d) Pivotal Response Training (PRT), and (e) Learning Experiences: An Alternative Program (LEAP).

Simpson found that the most common methodologies used to educate students with ASD are Applied Behavior Analysis (ABA), TEACCH, and LEAP. Interestingly, the most controversial and litigated area of ASD has focused on instructional methodology, especially, ABA and TEACCH (Yell, Drasgow, & Lowrey, 2005). Yell

and Drasgow (2000) and Choutka, Doloughty, and Zirkel (2004) conducted research that found more than half of all ASD litigation revolves around instructional approaches. As a result, educators must possess a solid understanding of the various programs, their components, and their efficacy when parents request them. If not, when parents challenge school districts, armed with information from the Internet, advocates, and attorneys; school districts are at a substantial disadvantage.

Applied Behavior Analysis (ABA) is the study of behavior, the manipulation of contingencies, and the setting of events to increase or decrease specific behaviors (Hall, 2009). Professionals utilize objective measures of desired behaviors and monitor the results of instruction to ensure skill acquisition. The subsequent instruction is individualized to strengthen the probability of future behavior. A component of this methodology is discrete trial therapy (DTT). DTT refers to the basic teaching strategy delivered through one-on-one instruction. DTT is implemented in three parts: (a) the behavioral sequence consists of the adult giving instruction, (b) the child's response to the instruction, (c) and the consequence following the response reinforcing the stimulus.

ABA and DTT are tantamount for most parents and educators; however DTT is only one component of ABA (Choutka et al., 2004). The Lovaas approach, named after Oliver Lovaas of the University of California at Los Angeles (UCLA), began in the 1960s. Based in early intervention, the program starts with children under 2 years old, when possible. A child undergoes between 30 and 40 hours a week of treatment from a team of therapists, family members, and helpers. The aim is to provide optimal treatment and education for most of the child's waking hours. The training program can be quite expensive, ranging from \$18,000 - \$90,000 per year. Lovaas's original research studied

19 children with autism that received 40 hours a week of DTT over a 2-year period.

Lovaas found a 47% recovery rate of normal educational functioning and students were able to attend a public school for first grade (Lovaas, 1987).

ABA has become synonymous with behavioral treatment. In addition, its popularity has increasingly involved requests that school districts provide or reimburse parents for a program characterized by ABA (Yell et al., 2005). In a review of the research, school districts unable to provide ABA or demonstrate progress have consistently lost in litigation. Therefore, districts must employ professionals knowledgeable of ABA or provide an alternative to avoid litigation.

Since 1987, parents of children with ASD entered due process seeking reimbursement and the continuation of in-home Lovaas programming. Since courts have ruled parents cannot demand educational methodology, parents and their attorneys have not requested the Lovaas programming as methodology. Rather, parents have argued that school district programs have not conferred meaningful benefit, whereas Lovaas programming did. Following this strategy, cases brought by parents focused on the failure of a school district to meet the Rowley test (Yell & Drasgow, 2000).

Much research has been conducted since Lovaas's original study. Boyd and Corley (2001) and Eikeseth, Smith, Jahr, and Eldevik (2002) conducted research with utilizing the Lovaas method with positive results. Although, studies have consistently fallen short of the 47% success rate that Lovaas obtained. "It is understandable that parents and professionals have hoped for children to be recovered and normal functioning. However, it is time for the professional community to acknowledge to families that although the Lovaas method may be beneficial there is no evidence that

results in 'recovery' or 'normal functioning' in 47% of its recipients" (Shea, 2005, p. 109).

Moreover, parents continue to champion for their children, actively seeking the Lovaas method. Ultimately, legal decisions rendered have revolved around the denial of FAPE, rather than the Lovaas method. In cases where school districts were able to demonstrate meaningful educational progress, the outcome was positive. Contrary, cases where the district could not demonstrate meaningful progress, school districts were liable for denial of FAPE (Yell et. al, 2003).

Yell et al. (2003) analyzed 52 due process case hearings brought against school districts between 1993 and 2002 where parents challenged the appropriateness of a school district's educational program for their child with ASD. Results indicated parents prevailed 34 times (65%) and were required to reimburse parents for in-home Lovaas treatment, continued treatment, or both.

The Treatment and Education of Autistic and Related Communication-Handicapped Children (TEACCH) was developed at the University of North Carolina in 1972. It was a university project started by Dr. Eric Schopler and now includes nine regional centers in North Carolina that support people with ASD of all ages. TEACCH is a behavioral approach that allows for incidental learning, as well as structured teaching, with a focus on developing appropriate communication skills and personal autonomy, rather than reducing problem behaviors (Tutt, Powell, & Thorton, 2006). TEACCH implements an environment that is organized with clear, concrete, and visual information. It aims to improve social interaction and communication through specifically adapted approaches. The child's program is developed through individual assessments where

material and activities scheduled meet the needs of the child and family (National Research Council, 2001). Classrooms are so structured that students sometimes have difficulty with transitions or change in other settings. The literature states this approach works best with low functioning autistic students (Tutt et al., 2006).

Choutka et al. (2004) conducted an analysis of 68 court hearings concerning ABA and TEACCH. All decisions were published in the Education for Handicapped Law Report (EHLR) and the Individuals with Disabilities Education Law Report (IDELR). The research examined program selection (e.g., instructional approach) and program implementation (e.g., location, duration, or frequency) in relation to prevailing party (parent or district) and related outcomes. The authors utilized a scale previously used by Zirkel (2002) to code descriptions. The results were split regarding program implementation and selection (ABA and TEACCH) for the winning party. However, the research indicated three predominant factors with positive outcomes (regardless of party); testimony of witnesses, documentation of progress, and IEP elements.

Zirkel (2002) conducted a study that analyzed 290 cases involving students with PDD. The study represented a comprehensive but careful sampling; the empirical analysis was only based on decisions of the highest courts. A similarity between Choutka et al. (2004) and Zirkel (2002) was an analysis of methodology. However, Zirkel (2002) furthered the research by analyzing attorney fees, discipline, extended school year, and related services. Results were determined using a seven-point scale. Results of the study were as follows: (a) completely for the district ( $n=123$ , 41.4%), (b) largely for the district ( $n=19$ , 6.5%), (c) inconclusively for the district ( $n=5$ , 1.7%), (d) evenly split ( $n=11$ , 3.7%), (e) inconclusively for the parents ( $n=9$ , 3.0%), (f) largely for the parents ( $n=20$ ,

6.7%), and (g) completely for the parents ( $n=110$ , 37.0%). Overall, neither party was more or less successful, rather, outcomes were neutral. However, in New Jersey's Third Circuit Court, parents were successful in two out of every three cases. New Jersey's Third Circuit Court had the highest rate of district losses which creates a further question regarding the outcome of ASD litigation in the State of New Jersey.

The Learning Experiences Alternative Program (LEAP) program is a federally funded model demonstration program that consists of four main components: (a) integrated preschool classrooms (each consisting of 10 typical children and 3 with autism), (b) a parent behavioral skills training program, (c) national outreach training activities that involve training in IEP's, behavior management, social skills training,

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**APPROVAL FOR SUCCESSFUL DEFENSE**

Doctoral Candidate, **Michael J. Barcadepone**, has successfully defended and made the required modifications to the text of the doctoral dissertation for the **Ed.D.** during this **Fall Semester 2012**.

**DISSERTATION COMMITTEE**  
(please sign and date beside your name)

Mentor:

Dr. Anthony Colella

*Anthony Colella Ph.D. 12/6/12*

Committee Member:

Dr. Barbara Strobert

*Barbara Strobert Ed.D. 12/6/12*

Committee Member:

*12/1/12*

with ASD (Hall, 2009). The most significant challenge facing individuals with ASD is the preparation of qualified educators (Simpson, 2005). Teaching individuals with ASD requires specialized skills, specific classroom structure and management, evidence-based research and practice, and an ability to collect meaningful data to develop classroom decisions and intervention strategies. The literature has shown years of experience, education, specialty training, and data collection methods are often challenged by the parents' attorney (Wright & Wright, 2009).

The National Research Council (2001) recognized that teachers cannot obtain the level of training and skills necessary to ensure high levels of student engagement simply through workshops and presentations alone. Selecting scientifically based methods, designing appropriate curriculum, and individualizing instruction require specialized intensive programs. Fixsen (as cited in Hall, 2009) recognized five crucial components for a successful ASD program: (a) coaching on-site, (b) performance evaluation, (c) program evaluation, (d) facilitative administrative practices, and (e) methods for systems interventions. Understanding the core components of interventions and methodologies (e.g., ABA, TEACCH) is important. However, on-the-job coaching by an expert in the field significantly increases the rate of success.

Teacher training and staff instruction should include Behavior Skills Training (BST): (a) instruction, (b) modeling, (c) role playing, (d) corrective feedback, and (e) skill assessments to modify or adapt the quality of instruction and treatment (Weiss, 2005). Two well recognized ASD programs, both in New Jersey, are the Douglas Developmental Center at Rutgers University and the Princeton Child Development Institute at Princeton University. Both programs focus on intensive training in the area of

ABA. The Princeton Child Development Institute utilizes a two-part approach: (a) an individualized prescription of ABA intervention strategies and programs; (b) a trained programmer visits the house twice a month to assist parents with a behavioral intervention component.

The Douglas program utilizes three different classes: prep class, small group class, and an integrated class. The prep class centers on intensive Lovaas's DTT treatment and includes in-home treatment. The small group class focuses on skills that would enable a student to function in integrated class. Lastly, the integrated class teaches skills necessary to function in a regular classroom and is developed around the LEAP model.

As mandated in NCLB, all instruction should be grounded in scientifically-based research, thereby avoiding unnecessary litigation. Unless more training programs develop across the nation as comprehensive as these two, a lack of qualified educators may continue to persist (Hall, 2009). Furthermore, it is imperative for schools and professionals to understand the research. Parents can easily find one study that may or may not be scientifically-based and cite it when developing their child's IEP. If school districts and professionals are unaware of current research, executing appropriate decisions for an IEP and providing students with a FAPE become a challenge.

The National Autism Center's National Standards Project (2009) recognized the importance of teacher training for data collection. Excellent data has proved invaluable in litigation. The NAC recommends: (a) using efficient data collection techniques, (b) selecting procedures that can be utilized while performing other tasks, and (c) having more than one professional collect data (team). In addition, the NAC suggests four types



of ASD data collection: (a) frequency (number of times within a period), (b) time sampling (specific time interval), (c) duration (length of time), and (d) latency (time between instruction and behavior). ASD litigation begins with data and ends with data. Furthermore, Davis-McFarland (as cited in National Standards Project, 2009) found family participation in data collection can break down the home-school barrier and reduce litigation.

### **New Jersey Autism**

In a front-page, Star-Ledger article “N.J. shows high rate of autism study,” (2007, p. A1), Walter Zahorodny, who headed the New Jersey Autism Study, commented that New Jersey has an excellent rate of early intervention and services available to students with ASD. He stated that children under 3 years of age are evaluated by the Health and Senior Services Department and those over 3 years of age, by the school district’s child study team. In the same article, New Jersey State Health Commissioner, Fred M. Jacobs, stated that New Jersey children have more health and educational records than other states which may contribute to better diagnoses. Furthermore, New Jersey officials suggested that New Jersey’s higher rates of ASD may correlate to an aggressive system of treatment interventions and of pediatric specialists than other areas of the country.

The CDC (2007) released a report about the high rate of ASD in New Jersey. In that report, Dr. Zahorodny, a doctor at the University of Medicine and Dentistry of New Jersey, suggested that awareness of ASD in New Jersey is high and this helps to identify children at younger ages. In an area where there is a high concern and a lot of

professionals working in collaboration with parents children will get help sooner than in other places.

In addition, New Jersey is home to three internationally known private schools for ASD: (a) the Douglas Developmental Disabilities Center (Rutgers University, New Brunswick), (b) the Princeton Child Development Institute (PCDI); and (c) the Eden Institute in Princeton. These three schools teach students with ASD, train teachers, and have visitors from around the country; all seeking the vast knowledge available at these institutions. On July 31, 2009, US Newswire announced that Caldwell College will offer a Ph.D. program in ABA for fall 2009.

Furthermore, New Jersey has a large network of family and parent resources. These resources educate, advocate, and support families as they learn to live and grow with an ASD family member. A few New Jersey resources are but are not limited to: Autism Family Services of New Jersey, the New Jersey Coalition for Inclusion, Autism Speaks, Cure Autism Now, New Jersey Center for Outreach and Services to the Autism Community, and the Daniel Jordan Fiddle Foundation.

ASD advocates found support in the legislature and governor's office. On August 13, 2009, former Governor John Corzine signed state law that mandated New Jersey insurance companies to cover treatments for children with ASD. Current New Jersey Governor, Chris Christie, vowed on April 10, 2010 to increase funding and keep New Jersey on the forefront of ASD education. As of June 25, 2010, New Jersey is under extreme financial pressure and strain. However, current lawmakers still want ASD to be a state priority.

Hence, there is no lack of support available in New Jersey. However, with the highest rate of ASD in the country (1 in 94), support from the government, a plethora of resources, and the most well-known programs in the country, litigation persists.

### Summary

The prevalence of children diagnosed with ASD has increased with each passing decade (Center for Disease Control, n.d.). Although early intervention has demonstrated success, the fact that ASD is a spectrum disorder, creates a complex educational environment with an array of student needs. Coupled with this increase is an ever growing group of concerned parents' advocating methodologies, treatments, and research in the hope that the quality of life for their child may improve. Parents seeking the best for their child have challenged school districts. Unfortunately, escalating disagreements between school districts and parents have led to an increase in litigation related to interpreting how students with ASD should be educated.

Simpson (2005) suggested that no other specific disability area has presented such difficulty to determining effective and scientifically-based practices for treatment and intervention as ASD. Treatments and interventions have varied greatly over the years, with varied opinions and success stories. Although many studies were conducted, no treatment or intervention has been hailed as a cure. Within the last decade, certain methodologies (ABA, DTT) have become more acceptable and mainstream than others.

It is not uncommon or unrealistic to expect health professionals to recommend medications, treatments, medical interventions, or surgeries that meet a high standard of evidence based research. Why then, the disagreement and controversy in the area of ASD? It is impossible for any professional, medical practitioner, educator, or parent to

be an expert in all ASD treatments. However, in light of recent research, professionals can hone in on treatments scientifically researched and proven to be successful. The National Autism Center conducted the most exhaustive study ever completed on ASD treatments, the National Standards Project (2009). In a systematic review of the treatment literature, 11 treatments were identified as established and, having sufficient evidence, were identified as effective. However, it is recognized that some of the results of these studies were limited because of their small sample size.

School districts are required to provide a FAPE in the LRE for all students with disabilities, ASD students are no exception. Crockett and Yell (2008) reported that there has been a significant amount of litigation surrounding students with ASD. The Centers for Disease Control and Prevention (CDC, n.d.) reported that 1 in 94 residents in New Jersey have ASD. Gischlar and Zirkel (2008) identified New Jersey as the second highest special education litigious state in the nation, second to New York. Considering the increase in ASD diagnoses and the heavily litigious special education environment in New Jersey, it is important for school districts to know what issues are being adjudicated, who is prevailing, and why. If New Jersey school districts are aware of these issues, they may be better prepared to provide an appropriate education to students with as ASD.

In addition, being well informed with scientifically-based research, appropriate data, an understanding of the law, and prior judicial case decisions, will not only be beneficial to the student, but also has the potential to impact whether the school district prevails if the district ends up in litigation. Furthermore, NCLB and IDEA mandated the

use of scientifically-based instruction but prior to the definitive answers provided in the National Standards Project, confusion even among professionals existed.

In light of the current fiscal climate, now more than ever, every dollar counts when providing a public education. Not only is litigation costly, it reduces the amount of instructional time professionals spend in class. Knowing the law, investigating judicial decisions, and understanding the research is a step in the right direction for school districts when educating students diagnosed with ASD. In addition, knowing what research based strategies and data hold up in court is valuable now and in the future. Inherently, if a school district must go to court, they should be prepared to win. Therefore, it is of the utmost importance to know what issues exist and which party, if anyone, the courts favor.

### **Chapter III**

## **METHODOLOGY**

This chapter presents the design of the study, methodology, and the procedures used, including a description of the sample, instrument, data collection, and analysis.

Educating students with ASD can vary greatly from student to student and may impact all avenues of their life, especially their education. Since federal legislation recognized ASD, litigation has consistently been on the rise. As educating students with ASD becomes more complex, parents are requesting programming and placement on a more frequent basis. This has created challenges for school districts and increase in disagreements between parents and schools. When disagreements escalate, providing a student with a FAPE has become an increasing litigious battle for stakeholders, especially in New Jersey.

The purpose of this case study is to analyze existing New Jersey case law for the special education population classified as ASD and describe New Jersey Administrative Law Judges (ALJ) decisions to identify why districts win or lose cases. Research has examined ASD litigation at a national level and one qualitative study (Miceli, 2003) analyzed New Jersey prior to the revision of IDEA 2004. This study will move the research forward with an analysis of New Jersey litigation since IDEA 2004.

In addition, the National Autism Center's National Standards Project (2009) finally produced a study that definitively identified ASD methodologies that are scientifically proven and acceptable for treating individuals with ASD. Consequently, the purpose of this study also seeks to determine if there is a correlation between

litigation outcomes and the scientifically-based methods the National Standards Project identified.

This study seeks to determine higher level of knowledge and understanding regarding the increasing trend in ASD litigation and provides educationally sound suggestions to reduce litigation. Hence, reduced litigation will save school districts money, as well as service its students more effectively.

### **Description of Sample**

The cases chosen for this study were from the New Jersey Office of Administrative Law. These cases are public documents available through the New Jersey Department of Education or the Rutgers University School of Law. In order to protect the rights of juveniles in these cases, all decisions use initials when referring to the child or the child's parents.

In 2004, IDEA was reauthorized which initiated new law, hence all cases from 2005-2010, a period of 6 years, were analyzed. Analyzing all published cases over the past 6 years provided an unbiased sample to study. In addition, by analyzing all cases the chance of researcher bias will be reduced.

The research sample contains districts from different demographics and various levels of socioeconomic status. The following list includes all 38 cases and the date the case was decided:

- |   |      |
|---|------|
| 1. Springfield Township Board of Education    | 2005 |
| 2. Stafford Township Board of Education       | 2005 |
| 3. West Orange Board of Education             | 2005 |
| 4. Voorhees Township Board of Education       | 2005 |
| 5. West Windsor-Plainsboro Board of Education | 2006 |
| 6. Mountain Lakes Board of Education          | 2006 |
| 7. Caldwell-West Caldwell Board of Education  | 2006 |
| 8. Magnolia Board of Education                | 2006 |

9. Bloomsbury Board of Education	2006
10. Ramsey Board of Education	2006
11. Audubon Board of Education	2006
12. Brick Township Board of Education	2006
13. Summit Board of Education	2006
14. Franklin Township Board of Education	2006
15. Great Meadows Regional Board of Education	2006
16. Secaucus Board of Education	2007
17. Springfield Township Board of Education	2007
18. Monroe Township Board of Education	2007
19. Parsippany Troy Hills Township Board of Education	2007
20. West Paterson Board of Education	2007
21. Freehold Regional High School Board of Education	2007
22. Metuchen Board of Education	2007
23. Wyckoff Board of Education	2007
24. West New York Board of Education	2008
25. Gloucester Township Board of Education	2008
26. East Brunswick Township Board of Education	2008
27. Passaic City Board of Education	2008
28. Tinton Falls Board of Education	2008
29. West Windsor-Plainsboro Board of Education	2009
30. Franklin Township Board of Education	2009
31. Cherry Hill Township Board of Education	2009
32. Fair Lawn Board of Education	2009
33. Dumont Board of Education	2009
34. Palmyra Board of Education	2009
35. West Windsor-Plainsboro Regional Board of Education	2009
36. Wayne Township Board Of Education	2010
37. Tinton Falls Board of Education	2010
38. Passaic City Board of Education	2010

### **Instrument**

I implemented a rubric to ensure the validity and outcome among all cases.

Without a rubric, it would be very difficult to analyze the differences and similarities between the outcomes of each case without researcher bias. The rubric developed utilized New Jersey Administrative Code 6A:14. This section describes all laws implemented in New Jersey for students with disabilities.

The rubric assessed procedural violations and substantive violations that occurred with each case. These are the exact violations an administrative law judge would



examine to render a decision. In addition, it also analyzed which scientifically-based method was utilized, if any.

The procedural violations analyzed five areas: (a) parents were unable to participate in all aspects of planning their child's IEP, (b) inappropriate evaluations, (c) development of inadequate IEP's, (d) placement decisions, (e) lack of qualified school personnel to work students with autism.

The substantive violations analyzed two areas: the school district failed to provide needed services and the student did not make progress in the school district program.

The scientifically-based treatment utilized if any was: (a) antecedent package, (b) behavioral package, (c) comprehensive behavioral treatment for young children, (d) joint attention intervention, (e) modeling, (f) naturalistic teaching strategies, (g) peer training package, (h) pivotal response treatment, (i) schedules, (j) self-management, (k) story based intervention package.

### **Design of Research**

The design for this study was an explanatory case study. Explanatory case study research is utilized to describe, explain, or evaluate when topics are broadly defined, and rely on multiple sources of data. Case studies are utilized when a researcher is attempting to determine why or how a situation has occurred (Gall, Gall, & Borg, 2005).

Case studies provide a systematic approach to collecting data, analyzing information, and reporting results. An explanatory case study presents data based on cause and effect relationships, detailing which cause produced what effect (Gall, Gall, & Borg, 2005). Inherently, an explanatory case study allowed me to gather data that would provide meaningful recommendations to school administrators and districts. This study

attempted to answer why school districts were or were not successful in litigation for students classified as ASD. It also attempted to discover what scientifically-based treatments, if any, were utilized and their impact on litigation outcomes.

### **Data Collection**

Each case was assessed using a previously developed field-based rubric (Miceli, 2003). The rubric identified eight areas for every due process case decision: (a) name of school district, (b) court/judge's name, (c) petitioners argument/reason, (d) procedural violations, (e) substantive violations, (f) district strength, (g) scientifically-based instruction implemented if any, and (h) case outcome. I added one more category, scientifically-based instruction. This was added to gather data regarding the impact of scientifically-based instruction on a judge's decision in light of the National Autism Center's National Standards Project (2009).

Through this rubric, procedural and substantive violations were collected. School districts that did not have any violations were successful in litigation. Therefore, data that described how the district met the procedural and substantive criteria under IDEA and FAPE were collected. School districts that failed to meet one or more criteria may or may not have lost litigation. Therefore, the outcomes, as well as the areas of delinquency were collected. In addition, this study collected data about which scientifically-based treatment, if any were utilized and their impact on litigation outcomes. Although, IDEA mandates scientifically-based treatments, it does not identify which are acceptable.

### **Data Analysis**

The data provided by the rubric will provide answers to the following research questions.

- (1) What are the similar underlying arguments for each case petitioners have filed?
- (2) What have the court rulings said when parents made unilateral placements?
- (3) What types of programs, placements, or methods of instruction do parents demand most frequently?
- (4) What role does documentation have in the process and how important was it?
- (5) What factors weigh the most when ALJ's made their decisions and rulings?
- (6) Where did school districts fail and succeed most often and was there a pattern?
- (7) What types of scientifically-based treatments were utilized if any and were there an impact on the district's success?
- (8) What is the influence of expert medical professionals and/or witnesses testimony on a petitioner's behalf?

Using the rubric, I will analyze, synthesize, and evaluate data from these court cases. From these case decisions, strategies will be provided for school administrators and districts. This data, at the very least, will provide insight to what has and has not been successful with ASD litigation. Therefore, data gathered can be used by districts to develop informed decisions regarding an ASD student's placement and program.

## Chapter IV

### ANALYSIS OF DATA

The purpose of this case study was to investigate existing New Jersey case law for the special education population classified as ASD and describe New Jersey administrative law judges (ALJ) decisions to identify why districts win or lose cases, adding to the limited body of research in New Jersey. In addition, the purpose of this study concurrently sought to determine if there was a correlation between litigation outcomes and the scientifically-based methods identified in the National Standards Project.

The purpose of this chapter was to summarize each due process hearing that was heard, decided, and written by the ALJ presiding over the case. Each brief varied in length from several to more than hundred pages. However, the format was consistent among all cases.

Each case listed the petitioner and respondent, attorneys if any, the administrative law judge, and the dates of proceedings. Next, a case history was presented, undisputed facts, brief witness backgrounds, and then the testimony of witnesses. After hearing from all attorneys and witnesses, the ALJ referenced laws, previous court cases, and legal decisions that set the framework for their decision-making process. Next, the ALJ would state significant points, connect key findings, sometimes provide a brief summary, and render a decision with a final order. Specifically, these findings and final decisions helped answer the research questions proposed in Chapter I. By developing a higher level of knowledge and understanding regarding the increasing trend in ASD litigation, educationally sound suggestions can be proposed in Chapter V to reduce litigation.

Hence, reduced litigation will save school districts money, while also allowing them to service their students more effectively.

The cases chosen for this study were from the New Jersey Office of Administrative Law. These cases are public documents available through the New Jersey Department of Education or the Rutgers University School of Law.

### Case Analysis

*Table 1*

*Springfield Township Board of Education v. D.L. and K.L.*, EDS 05979-2005N (2005)

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

B. Petitioners Argument/Reason: Petitioners rejected the proposed IEP and made a unilateral placement seeking reimbursement for the expenses incurred for the engagement of ABA personnel during the 2004-2005 school year and the summer of 2005.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: None

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: It was determined that J.L. had not previously received special education and related services from a public agency, Therefore, there was no legal requirement to reimburse the tuition expenses arising from the parents' unilateral placement at a private school.

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*Table 2**Stafford Township Board of Education v. N.F.*, EDS 928-04 (2005)

- A. Court/Judge: Office of Administrative Law/Israel D. Dubin, ALJ
  - B. Petitioners Argument/Reason: Petition for providing FAPE.
  - C. Procedural Violations: None
  - D. Substantive Violations: None
  - E. District Strength: Everything was documented extremely well.
  - F. Scientifically-Based Instruction Implemented: None
  - G. Case Outcome: Petitioner was supplementing district employees' pay without the knowledge of the district. Hence, the district was in compliance with all aspects of the IEP and could not be responsible for items petitioner did not make available.
- 

*Table 3**West Orange Board of Education v. J.F.*, EDS 9099-04 (2005)

- A. Court/Judge: Office of Administrative Law/Maria La Fiandra, ALJ
- B. Petitioners Argument/Reason: Petitioners argue IEP did not confer a meaningful educational benefit and sought reimbursement for costs incurred when providing certain educational services for their child, specifically all Lovass educational costs, a one-on-one aide, consultation fees, and home-based ABA services.
- C. Procedural Violations: Lack of parent participation and an inappropriately developed IEP. The IEP contained ambiguities and incorrect dates. The effective date for the IEP was from 9/8/04 to 6/22/04, an impossible timeframe.
- D. Substantive Violations: None.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: Reimbursement was granted for the 2003 ESY, 2003-2004 school year, and ABA hours for the summer of 2004. However, reimbursement for the 2002-2003 school year and unilateral placement over the summer was dismissed due to statutory time limits. Petitioner should have filed for due process earlier and would have been entitled to reimbursement. Since the ALJ could not allocate the proportion of benefit derived from each of the programs, the home-based ABA program was found to be an integral part of the child's education and the parents were entitled to reimbursement.

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#### *Table 4*

*Voorhees Township Board of Education v. M.B.*, EDS 6270-04 (2005)

A. Court/Judge: Office of Administrative Law/Joseph F. Martone, ALJ

B. Petitioners Argument/Reason: Petitioners challenged the IEP and program that the school district proposed for J.B. The relief requested by the petitioners was the continuation of JB's current IEP and placement based upon recognition of the true nature of J.B.'s disability.

C. Procedural Violations: The child study team developed an inadequate IEP and recommended placement decisions that would not provide a meaningful educational benefit.

D. Substantive Violations: Not all of the necessary training or assistance was provided to those educating J.B. Regression of academics, social, and emotional skills occurred and J.B. did not make progress in the district's program.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: Petitioners program and placement was granted. Respondent school district was required to provide: ABA; therapists and aides who were properly trained in ABA; an intense one-on-one relationship with constant prompting, taught in a controlled environment with no distractions; a home program that had to address functional life skills; and the placement in the present home-based ABA program must be continued at the expense of the district.

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*Table 5*

*West Windsor-Plainsboro Board of Education V. G.C. and R.C., EDS 8731-04(2005)*

A. Court/Judge: Office of Administrative Law/Anthony T. Bruno, ALJ

Petitioners Argument/Reason: Petitioners sought placement in a highly specialized program designed to meet the needs of students with autism, such as Princeton Child Development Institute, and compensatory education.

C. Procedural Violations: The school district developed an inadequate IEP that did not meet all of N.C.'s needs. Furthermore, the school district lacked qualified school personnel to implement the principles of ABA or a certified behaviorist to create a behavior management plan. In addition, the school district did not listen to the petitioners' experts' recommendations.

D. Substantive Violations: The school district failed to provide the needed services to address N.C.'s tangential language, self-talk, lack of social reciprocity, and hygiene. Therefore, FAPE was not provided. In addition, the student did not make



progress in any of these areas that should have been addressed through social skills, a behavior plan, and home programming. Furthermore, a previous court ordered settlement ordered the school district to create a more specific behavior management plan, conduct the neurological exam, and sought input from the behavior consultant which was not completed.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Lack of Applied Behavior Analysis

G. Case Outcome: The respondents were ordered to comply with the previous court order and to develop a more specific behavior management plan, conduct a neurological exam, seek input from the behavior consultant, and provide a FAPE. In addition, N.C. was entitled to related services for an additional 2 years as compensatory education.

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#### *Table 6*

*Mountain Lakes Board of Education v. J.M. and S. M.*, EDS 7173-06 (2006)

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

B. Petitioners Argument/Reason: Petitioner sought reimbursement for the ESY program R.M. attended at a private placement.

C. Procedural Violations: None.

D. Substantive Violations: The district failed to provide needed services to R.M.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: Petitioner was reimbursed the full amount of the ESY program. This case was very unique because the student moved to the district in early July without an enforceable IEP. However, two meetings were held with the Director of Special Services advising the respondent that the child was autistic. Respondent allowed three siblings to register prior to actual residence, but refused to address the IEP of the sibling until residence was completed. Hence, because the respondent was put on notice and agreed autistic children usually need ESY, the respondent should have discussed services or payment for FAPE.

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*Table 7*

*Caldwell-West Caldwell Board of Education v. S.A. and D.A., EDS 07645-06 (2006)*

A. Court/Judge: Office of Administrative Law/Leslie X. Celentano, ALJ

B. Petitioners Argument/Reason: Petitioner sought enforcement of the stay put provision under IDEA and placement at a private camp for an ESY program.

C. Procedural Violations: Respondent had staff members who never worked with T.A. attend a meeting 10 days prior to beginning summer camp to change the placement decision for the ESY school year.

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

E. District Strength: None

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: The district claimed a student could not attend Harbor Haven Day Camp because of the Naples Act. The Naples Act (approved institution by NJDOE

and fingerprinted employees) does not apply to Harbor Haven because it is not a school. Furthermore, the respondent provided no proof to demonstrate that an alternative program similar to Harbor Haven was proposed. Therefore, the stay put provision of IDEA and reimbursement was granted.

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*Table 8*

*Magnolia Board of Education v. A.S., EDS 6517-05 (2006)*

A. Court/Judge: Office of Administrative Law/Israel D. Dubin, ALJ

B. Petitioners Argument/Reason: Petitioner sought a full day program and related services for C. C., primarily in a private Pre-K. Petitioner argued that the respondent's placement would be too restrictive of an environment.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: Respondent met with the petitioner and provided three different options of programming and placement. In addition, a continuum of least restrictive environment placements were offered and more importantly documented.

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: ALJ issued one final order, providing programming and placement that the petitioner and respondent were in agreement with. C. C. will attend an in-district open preschool program with a full-time one-to-one aide and related services. However, the entitlement to compensatory education was severed from this due process case, and considered as a case of its own to move forward at a later date.

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*Table 9**Bloomsbury Board of Education v. W.H. and E.H.*, EDS 8666-05 (2006)

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

B. Petitioners Argument/Reason: Petitioner sought reimbursement for the 2005-2006 school year, as well as compensatory education for speech services not provided during the 2004-2005 school year.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: District filed a due process cross petition for further evaluations. A. H. made progress in the district's programs which was well documented.

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: Petitioner's application for reimbursement and for compensatory education was denied.

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*Table 10**Ramsey Board of Education v. R.P. and V.P.*, EDS 11682-04 (2006)

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

B. Petitioners Argument/Reason: Petitioners requested reimbursement for tuition, transportation, and associated out-of-pocket expenses related to their unilateral placement at an out of district high school. In addition, petitioners sought a compensatory education for 3 years that they contend E.P. did not receive a FAPE.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: The district was well-prepared and documented everything regarding the student's placement and progress. They demonstrated that the goals and objectives of the IEP were obtained, that there was progress from year to year, and that evaluations and assessments were conducted regularly. The psychologist for the district was open to and accepted outside evaluations from the Boston Children's Hospital which validated the school district's assertion that progress was made with E.P.'s goals and objectives.

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: Petitioners request for reimbursement for tuition, transportation, and out-of-pocket expenses for a unilateral placement were denied. Furthermore, it was found, the petitioners acted in bad faith, did not inform the district of the out of district placement, and waited a period of almost three years to file for due process.

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### *Table 11*

*Audubon Board of Education v. V.J.*, EDS 6203-06 (2006)

A. Court/Judge: Office of Administrative Law/Joseph F. Martone

B. Petitioners Argument/Reason: Petitioners sought: a behavior plan from a certified behaviorist to address interfering behaviors, an increase in ABA related services, replacement sessions for lost behavior programming, IEP goals that provided clear benchmarks, specific interventions designed to improve communication, a comprehensive communication plan developed by a communication specialist, and ongoing parental training that generalized interventions and programs in the IEP.

C. Procedural Violations: Failure to develop an appropriate IEP, lack of qualified school personnel to implement ABA, IEP lacked clear and measurable academic and functional goals, and a lack of parent participation with developing the IEP.

D. Substantive Violations: The school district failed to provide needed services and the student did not make progress in any area which constitutes a denial of FAPE.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: Petitioners request for a positive behavior plan created by a qualified behavior specialist, compensatory education for behavior programming lost during the 2005-2006 school year to be conducted by qualified personnel, and 15 hours of ABA related services to comply with the 2005-2006 IEP was granted. In addition, the IEP must be revised to set forth goals, providing clear benchmarks with related services and methodologies, and ongoing parental training to generalize these programs and interventions. Lastly, a communication specialist to create a communication plan was not granted due to lack of expert witness testimony for the petitioner. In summary, the ALJ ruled the IEP was completely and unequivocally out of compliance with the requirements of IDEA and NJ code.

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### *Table 12*

*Brick Township Board of Education v. W.G. and B. G.*, EDS 4374-03 (2006)

A. Court/Judge: Office of Administrative Law/Ana C. Viscomi, ALJ

B. Petitioners Argument/Reason: Respondent sought enforcement of a disputed IEP developed on June 23, 2003, which required a residential placement. Petitioner sought compensatory education and transition to an in-district program.

C. Procedural Violations: School district lacked transitional plans and appropriate placement.

D. Substantive Violations: School district failed to provide the needed services for the ESY and there was significant regression during transitional periods between residential placement, in-district placement, and home instruction.

E. District Strength: The school district developed an outstanding pilot program for A.G. at the Children's Center. However, the program no longer addressed A.G.'s needs appropriately, as testified by both petitioners and respondent's experts.

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: The district acted inappropriately by not implementing the original IEP fully. Respondent school district was ordered to retain the services of two behavioral specialists to transition A.G. to an in-district program with the least amount of regression. In addition, the district must implement the recommendations of two expert witnesses for A.G.'s gradual transition and integration. Furthermore, the IEP in its entirety was enforceable and the request for compensatory education was granted.

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### *Table 13*

*Summit Board of Education v. W.C. and S. C.*, EDS 1547-05 (2006)

A. Court/Judge: Office of Administrative Law/Richard McGill

B. Petitioners Argument/Reason: Petitioners filed for due process for a failure to provide FAPE. Specifically, they sought a revision of the proposed IEP, placement of R.C. at a private learning institute, and reimbursement for the unilateral placement at this institute.

C. Procedural Violations: Respondent developed an inadequate IEP and did not allow for full participation in all aspects of planning their child's IEP.

D. Substantive Violations: None.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: Both parties were assigned equal responsibility for the failure of the IEP and an appropriate program and placement. Respondent was ordered to develop an IEP that would provide R.C. with a FAPE and to reimburse the petitioners for half of the costs of tuition and transportation to Somerset Hills. In addition, it was determined that reimbursement shall terminate if R.C. became ineligible to receive special education and related services.

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#### *Table 14*

*Franklin Township Board of Education v. C.F.*, EDS 4411-06 (2006)

A. Court/Judge: Office of Administrative Law/Joseph F. Fidler, ALJ

B. Petitioners Argument/Reason: On the motion of emergent relief, the petitioner sought an extended school year service, consisting of 4 to 6 weeks of a full day program focusing on behavior management, social skills training, and speech/language. In



addition, a due process petition was filed seeking an appropriate IEP for the 2006-2007 school year.

C. Procedural Violations: Respondent ignored the ESY element of the IEP.

D. Substantive Violations: None

E. District Strength: None

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: Petitioners request for ESY service for behavior management and social skills training was denied. However, as per the IEP the ESY program for speech/ language was granted.

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*Table 15*

*Great Meadows Regional Board of Education v. R. B. and C. B.*, EDS 10163-06

A. Court/Judge: Office of Administrative Law/Ken R. Springer, ALJ

B. Petitioners Argument/Reason: On the motion of emergent relief, the petitioner sought a stay put provision for A.B. to remain in his out of district placement for the ESY program. The respondent school district received notice from the receiving school district on July 19, 2006 that it could not provide promised services due to increased enrollment.

C. Procedural Violations: Respondent did not convene an appropriate IEP meeting to discuss placement decisions within the appropriate timeline of a proposed change.

D. Substantive Violations: None

E. District Strength: None

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: The petitioner's motion for emergent relief was granted.

Although the receiving district did everything correctly, the respondent school district did not. Even though the petitioners failed to act within 15 days of receiving notice of the change and placement, it was mute because the respondent school district never proposed a change of placement in writing. The respondent school district did not follow the appropriate timeline and only informed the petitioner orally.

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*Table 16*

*Secaucus Board of Education v. M.F and L.F.*, EDS 10762-06 (2007)

A. Court/Judge: Office of Administrative Law/Barry N. Frank, ALJ

B. Petitioners Argument/Reason: Petitioners argued that the proposed IEP conferred no educational benefit and that the appropriate placement for N. F. was a unilateral placement outside of the school district. The petitioners sought reimbursement for all related expenses.

C. Procedural Violations: The respondent school district failed to develop an IEP that stated the frequency and duration of services, failed to offer an appropriate placement, and did not include specific dates for the beginning or end of services. Furthermore, the Supervisor of Special Services made most of the relevant determinations prior to the IEP meeting with very little input from other evaluators or parents who attended IEP meeting.

D. Substantive Violations: None

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: The petitioners request was granted in its entirety. N.F. was appropriately placed at EPIC as a full-time student, the placement was within LRE, the district proposed programs and placements were inappropriate, and the IEP was imprecise and too restrictive. The respondent was ordered to reimburse petitioners for all charges.

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*Table 17*

*Springfield Township Board of Education v. L.Z. and S.Z., EDS 09419-06 (2007)*

A. Court/Judge: Office of Administrative Law/Jesse H. Strauss

B. Petitioners Argument/Reason: The petitioners sought a one-to-one aide trained in ABA for K.Z.'s kindergarten class, 10 hours per week of home-based ABA, 4 hours per week in ABA consultation services, a transition plan for kindergarten, and reimbursement for the full cost of the unilateral placement. In addition, emergency relief was requested.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: The district was able to clearly demonstrate measurable progress for K.Z.'s IEP occurred.

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: The petitioners were denied all requests except that the respondent must reimburse petitioners or pay ABA consultants their contractual rate paid for district services during the 30 day emergency relief order.

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*Table 18**Monroe Township Board of Education v. A.P and M.P.*, EDS 6976-07 (2007)

A. Court/Judge: Office of Administrative Law/Joseph F. Fidler

B. Petitioners Argument/Reason: The petitioners sought tuition reimbursement for a unilateral placement in an ESY program at Harbor Haven Camp. They felt A.P. would severely regress unless his extended school year program had more hours and weeks.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: The school district was in compliance with all laws and time frames. Furthermore, the school district had the parents sign that they received a copy of the "Parental Rights in Special Education" booklet.

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: Since the parents did not follow the appropriate timelines and procedures to seek reimbursement for a unilateral placement, their due process petition was dismissed.

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*Table 19**Parsippany Troy Hills Township Board of Education v. S.K.*, EDS 09651-06 (2007)

A. Court/Judge: Office of Administrative Law/Leslie Z. Celentano, ALJ

B. Petitioners Argument/Reason: The petitioner sought a mainstream, third-grade classroom placement with a one-on-one aide, support of a board certified behavior analyst, home programming, and reimbursement and compensatory services to provide a FAPE. Specifically, 10 hours of programming in addition to his current IEP.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: The proposed IEP satisfied all least restrictive environment requirements of IDEA. The school district was more than willing to have open dialogues with the petitioner, implemented suggestions from an independent evaluator, and integrated 3 years of placement and programming the petitioner sought. In addition, the school district had documentation of the lack of progress, even with an instructional aide over the 2 previous academic years.

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: Petitioner failed to demonstrate that the proposed IEP failed to provide an appropriate, least restrictive placement for N. K. Therefore, the due process case was dismissed and it was ordered that N.K. be placed in a self-contained class with mainstreaming as provided in the respondent's original proposed IEP.

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#### *Table 20*

*West Paterson Board of Education v. T. M.*, EDS 11022-06 (2007)

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

B. Petitioners Argument/Reason: The petitioner disagreed with the board's proposed autistic program. The petitioner sought an out of district placement at either of two public schools or three private schools.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: The petitioner's case was dismissed. However, this due process case was not simple. Unfortunately, the petitioner sought relief based upon her opinions of what was best for her child. The respondent did provide expert witnesses. However, their testimony was not very strong. Based upon testimony alone, the outcome may have been very different if the petitioner brought expert witnesses with better documentation.

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*Table 21*

*Freehold Regional High School Board of Education v. W.O. and D.O.*, EDS 4652-07  
(2007)

A. Court/Judge: Office of Administrative Law/Israel D. Dubin, ALJ

B. Petitioners Argument/Reason: On the motion of emergent relief, the petitioner sought a stay put order to continue T.O.'s current placement in an after school program at New Horizons in Autism and to maintain his current level of speech and occupational therapy sessions.

C. Procedural Violations: The respondent school district did not follow the appropriate notification timelines for parent involvement, thus the petitioners did not have a 15 day period to respond to the proposed IEP.

D. Substantive Violations: None

E. District Strength: None

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: The petitioners request for a stay put placement seeking due process was granted. Timelines must be followed with accurate documentation.

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*Table 22*

*Metuchen Board of Education v. Wm.S. and M.M., EDS 8820-07*

A. Court/Judge: Office of Administrative Law/John R. Tassini

B. Petitioners Argument/Reason: On the motion of emergent relief, the petitioner's sought an amendment to the current IEP for services from a behaviorist. Petitioners alleged W. S. had regressed educationally due to his problematic behaviors that interfered with his learning.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: The district had a well-documented case, plenty of expert witnesses, and most importantly demonstrated that a good-faith attempt was made to involve the petitioners and collaborate with them for a mutual agreement. Even when the petitioners failed to participate, the respondent school district continued to make attempts for communication and joint decision-making.

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis, Social Stories

G. Case Outcome: The petitioners' motion for emergency relief was denied. Furthermore, the ALJ specifically acknowledged that the petitioners made a good-faith and practical effort to resolve their differences during their resolution session.

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*Table 23**Wyckoff Board of Education v. G.V. and L.V.*

A. Court/Judge: Office of Administrative Law/Jesse H. Strauss, ALJ

B. Petitioners Argument/Reason: The petitioners argued that the respondent's in-district program was not based on the principles and science of ABA and could not afford J.V. with the opportunity to make meaningful educational progress. The parents unilaterally placed J.V. in a home-based ABA program and a neurotypical private preschool and sought reimbursement of tuition, an appropriate placement, and 20 hours of home-based ABA supplemental services.

C. Procedural Violations: The respondent did not allow the parents to participate in all aspects of the planning of their child's IEP, specifically, the behavior intervention plan.

D. Substantive Violations: The respondent did not provide a FAPE in the least restrictive environment. J.V. did not make progress in the school district program and did in the out of district placement.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: The petitioners were granted full reimbursement for the unilateral placement and for the home-based ABA programs, shadows, and related services. Specifically, the petitioners' witnesses were very helpful in determining student progress in the out of district placement with the use of ABA. Although the respondent stated ABA was infused, there was no data or individual instruction during observations to validate the claim. In addition, the district's behaviorist did not testify, leaving most



classroom testimony to the classroom teacher. The ALJ determined that the district did not offer or provide an education designed to provide J.V. with meaningful education. Not having any data or written ABA programs substantially hurt the district.

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*Table 24*

*West New York Board of Education v. J.G.*, EDS 3385-08 (2008)

A. Court/Judge: Office of Administrative Law/Richard McGill, ALJ

B. Petitioners Argument/Reason: The petitioner opposed the respondent's proposal to return J.G. to an in-district program and sought to continue J.G.'s current out-of-district placement.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: The respondent offered a program that was in the least restrictive environment. In addition, the respondent provided a transition plan that would gradually reduce the current placement and increase time at the new placement until the full transition was complete.

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: The petitioner's request was denied and placement in the respondent's in district program was identified as providing a FAPE in the least restrictive environment.

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*Table 25**Gloucester Township Board of Education v. D.B. and L.B.*, EDS 10522-07 (2008)

A. Court/Judge: Office of Administrative Law/Donald J. Stein, ALJ

B. Petitioners Argument/Reason: The petitioners alleged procedural and substantive defects under the Individuals with Disabilities Education Act and challenged the appropriateness of the program and placement proposed by the respondent school district. The petitioners argued the district had not provided an education in the least restrictive environment; the nature of the disability allowed for a regular class with the use of supplementary aids and services, not a self-contained autistic class.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: The district had a well-documented case and plenty of expert witnesses (both in district employees and out of district consultants). The expert witnesses for the respondent had a high level of experience, education, and expertise that the ALJ found much more compelling than the respondent's witnesses. The outside experts weighed heavily on this case and its outcome. The district placed the child in the least restrictive environment that would allow for a meaningful educational benefit. In addition, the district was able to respond through testimony and documentation, providing conclusive answers to each and every argument the respondent raised.

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: The petitioners motion was dismissed. The petitioners were commended for doing what they thought was in the best interest of their child. However, the respondent followed all applicable laws, documented everything, and maintained

informative communication with the petitioners at all times. Furthermore, the respondent was able to document how they consistently transitioned the child into a more restrictive environment based upon assessments, observations, and demonstrated the more restrictive environment was more educationally appropriate.

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*Table 26*

*East Brunswick Township Board of Education v. S.P.*, EDS 4718-08 (2008)

A. Court/Judge: Office of Administrative Law/Douglas H. Hurd

B. Petitioners Argument/Reason: On the motion of emergent relief, the petitioner sought an ESY program that offered sufficient social skills training. Petitioner contended there is a deficiency in social skills training addressed in the proposed IEP.

C. Procedural Violations: None

D. Substantive Violations: M.P. did not make meaningful progress and regressed the past two summers.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: The petitioner's request for emergent relief was granted. The petitioner sought a full day out of district ESY program at Camp Shiver. However, the ALJ granted a half day program at Camp Shiver and a half day program in the respondent's ESY program. The petitioner demonstrated that M.P. regressed over the past two summers at the respondent's ESY program and the respondent agreed that M.P. would benefit at Camp Shiver. Therefore, a blend of the two programs was determined to be the most appropriate.

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Table 27

*Passaic City Board of Education v. S.M.*, EDS 9950-08 (2008)

A. Court/Judge: Office of Administrative Law/Ken R. Springer, ALJ

B. Petitioners Argument/Reason: On the motion of emergent relief, the petitioner sought an amendment to B.M.'s IEP to incorporate a behavior intervention plan developed by the Kennedy Krieger Institute. The petitioner contended that the respondent school district's IEP lacked a behavior intervention plan for B.M.'s safety to himself and others.

C. Procedural Violations: The respondent failed to develop an appropriate IEP, did not address the child's functional performance or academic achievement, and lacked qualified personnel to work with students with autism.

D. Substantive Violations: None

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: The petitioner's request for emergent relief was granted.

Overall, the respondent was willing to work with the petitioner and truly was concerned about the student's progress. However, the district expressed reluctance to expose itself to liability in the event B.M. was harmed implementing the Kennedy Krieger Institute's recommendations, specifically, two controversial aspects of the recommended program: the use of a harness and face screening. The harness did not allow the child to run away and the face screening trained an adult to cover the child's eyes as a form of sensory

deprivation to calm the child. To this end, the court's decision to grant emergent relief alleviated the respondent's exposure to tort liability.

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*Table 28*

*Tinton Falls Board of Education v. J.W. and E.W.*, EDS 2200-08

A. Court/Judge: Office of Administrative Law/John R. Tassini

B. Petitioners Argument/Reason: On the motion of emergent relief, the petitioner disagreed as to what therapy should be provided. The petitioners argued that the respondent eliminated the subject's speech therapy unilaterally, without appropriate evaluations and had not provided occupational therapy.

C. Procedural Violations: None

D. Substantive Violations: The respondent failed to provide occupational therapy services as required by the IEP.

E. District Strength: The respondent was forthright and honest about not providing occupational therapy, despite good-faith efforts to secure a provider.

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: The respondent school district was ordered to provide occupational therapy and compensatory hours for time missed. The respondent provided documentation and proof of failed efforts and offered compensatory hours and occupational therapy prior to the administrative law judge's decision.

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*Table 29*

*West Windsor-Plainsboro Board of Education v. M.F. and M.F.*, EDS 8905-08 (2008)

A. Court/Judge: Office of Administrative Law/Patricia M. Kerins, ALJ

B. Petitioners Argument/Reason: The petitioners sought reimbursement for costs and expenses of an ABA program for the 2007-2008 and 2008-2009 school years, and continuation of the home-based program the 2009-2010 school year. The petitioners also contested the placement of A.F. in an in-district program.

C. Procedural Violations: None

D. Substantive Violations: The school district failed to provide needed services and appropriate placement. The student did make meaningful progress in the ABA home program provided by parents and did not make progress in the school district's program which constituted a denial of FAPE.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: Midway through the case, the respondent withdrew the in-district program as the placement for A.F. Expert witnesses for both the petitioners and respondent concurred that the in-district program was not the appropriate placement and did not provide a meaningful education. Furthermore, the home ABA program, had accomplishments with the child that the in-district program did not even recognize. In addition, it was determined that the in-district program was not significantly challenging and was too simplistic. The petitioners' request for reimbursement for home programming for the school years 2007-2008 and 2008-2009, including the ESY for both years, was

granted. Lastly, the petitioners were to be reimbursed the home program's cost for the 2009-2010 school year if A.F. remained in the current placement.

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*Table 30*

*Franklin Township Board of Education v. C.F. and T. F.*, EDS 10256-08 (2009)

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

B. Petitioners Argument/Reason: The petitioners argued that a reduction in services from the prior year was unwarranted. They contended that in order for J.F. to receive a FAPE, all services must be reinstated to the prior year's IEP.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: The school district was able to demonstrate proficiency in language arts and advanced proficiency in math on state standardized assessments. In addition, the respondent district submitted laudatory letters on behalf of J.F.'s teacher, written by the petitioners. Furthermore, the respondent documented excellent report card grades, better performance than regular education peers, and J.F.'s ability to help non-disable peers struggling.

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: Clearly, J.F. was making significant progress in school and the respondent's ability to document this success was evident. Therefore, this due process case was dismissed.

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*Table 31*

*Cherry Hill Township Board of Education v. K.B. and R.B.*, EDS8663-08 (2009)

A. Court/Judge: Office of Administrative Law/John Schuster III, ALJ

B. Petitioners Argument/Reason: The petitioners sought home programming services utilizing the Developmental, Individual Difference, Relationship (DIR) Education modality during the current school year and during the 2009 ESY.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Floor Time, Applied Behavior Analysis

G. Case Outcome: J.B. was making progress academically, socially, and behaviorally in his current program and placement. The flexible instruction provided the appropriate motivation necessary for J. B. to perform. Originally, the school district utilized DIR for all special education students but decided to alter its delivery of instruction. With this change, J.B. was still successful. Therefore, the petitioner's case was dismissed.

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*Table 32*

*Fair Lawn Board of Education v. L.G. and E.G.*, EDS 5077-08 (2009)

A. Court/Judge: Office of Administrative Law/Joseph A. Paone, ALJ

B. Petitioners Argument/Reason: The petitioners asserted that the respondent failed to provide E.G. with a FAPE in the LRE. The petitioners unilaterally placed E.G. at



the Children's Center at Montclair State University, which they contended provided a FAPE. They sought reimbursement for all services, tuition, transportation, and an at home service program. In addition, they sought the continuation of all home programming and placement at the Children's Center on a 12 month, full day contingency.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: The respondent was extremely well organized, had all documentation necessary, and was able to demonstrate progress and lack of progress in various goals and objectives. Furthermore, school district employees had excellent backgrounds in the field of autism and were highly regarded as experts within their field. Their testimony was extremely important and weighed upon heavily by the ALJ. Not only could they speak in depth about the child, they were well-versed in their fields and able to respond to the petitioner's accusations and claims. Furthermore, the respondent's employees were very convincing that their concerns were in the best interest of the child, and nothing more.

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis, Floor-Time

G. Case Outcome: Too many of the petitioners' concerns, questions, and problems were based upon her own opinion and judgment as a parent. Having no expertise in the area of autism or education, the ALJ did not place a tremendous amount of weight on their testimony. Furthermore, the petitioners' expert witnesses clearly stated the same recommendations as the petitioners' needs and wants. However, when

questioned on cross examination, the petitioners' witnesses' observations and evaluations did not substantiate their recommendations. Therefore, the petitioners' case was completely denied and dismissed.

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*Table 33*

*Dumont Board of Education v. I.T.*, EDS 05553-08 (2009)

A. Court/Judge: Office of Administrative Law/Sandra Ann Robinson, ALJ

B. Petitioners Argument/Reason: The petitioners argued for a unilateral placement and tuition reimbursement at The Children's Center at Montclair State University because of its combination of ABA, Floortime, Developmental Individual Relationship Intervention in a (DIR), and the integration of typical preschool children with added support and services.

C. Procedural Violations: The district did not allow one of I.T.'s early intervention teachers to participate in the IEP although this was requested by the parents. A general education teacher attended the meeting for the first 3 minutes, signed the attendance sheet, and left. The parents did not consent orally or in writing to the general education teacher leaving the IEP meeting. In addition, an inadequate IEP was developed because it did not fully address a sensory diet.

D. Substantive Violations: The school district failed to provide needed services in the IEP.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis,  
Floor -Time

G. Case Outcome: The district contended that this case was about methodology. The district stated when I.T. masters behavioral control; she would be transferred to a more integrated environment. The current placement recommended by the district was Tri-Valley Academy, a school for students with ASD servicing the districts of Bergenfield, New Milford, and Dumont. Prior to this request, the parents requested home programming and a placement at Celebrate the Children, which were both denied by the district. The district argued that it had the right to select and implement methodology and determine its success before the methodology was rejected by the parents. The district argued that the parents never allowed I.T. to be placed in a public school setting and that I.T. was offered FAPE. Interestingly, I.T.'s parents had knowledge about Tri-Valley Academy because their two 5 year-old ASD twin sons attended the school.

The petitioners' request for a unilateral placement and tuition reimbursement was granted. The ALJ determined that based upon testimony from the petitioners' and respondent's witnesses, I.T. made meaningful educational progress and benefited from her placement. The respondent did not establish an in district program and placement that provided a modified education program to address I.T.'s needs. They prepared an IEP that did not include the modifications recommended, discussed, and promised for I.T., including DIR/Floortime, a sensory diet, and behavior plan recommended by the district. The district did not provide I.T. a FAPE in the least restrictive environment.

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*Table 34*

*Palmyra Board of Education v. B.C.*, EDS 8025-09 (2009)

A. Court/Judge: Office of Administrative Law/John Schuster III, ALJ

B. Petitioners Argument/Reason: On the motion of emergent relief, the petitioner sought and ESY program for B.W., as she felt he would suffer significant regression if the program was not offered.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: None

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: The petitioner was not able to demonstrate irreparable nor was able to demonstrate that regression in academic or social development would occur. Therefore, the petitioners request for emergent relief was denied.

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### *Table 35*

*West Windsor-Plainsboro Regional Board of Education v. M.F. and M.F.*, EDS 8905-08 (2009)

A. Court/Judge: Office of Administrative Law/Patricia M. Kerins

B. Petitioners Argument/Reason: The petitioners' argued that the respondent's proposed IEP would not provide a FAPE and A.F. would regress even further. The petitioners sought placement in a full-time ABA program that would provide 35 to 40 hours a week of instruction, along with home services.

C. Procedural Violations: None

D. Substantive Violations: The respondent failed to provide A.F. with a FAPE. The respondent's own witnesses testified that for the school years 2007-2008 and 2008-

2009 when A.F. was placed at CCMC, the education was deficient in several crucial aspects.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: The respondents were ordered to reimburse all costs related to A.F.'s home program for the school years 2007-2008 and 2008-2009, including ESY for both years. Petitioners shall be reimbursed for the cost of the home program for the school year 2009-2010 if A. F. remains in his CCMC placement.

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*Table 36*

*Wayne Township Board of Education v. J.M. and D.M.*, EDS 123465-08 (2010)

A. Court/Judge: Office of Administrative Law/Barry E. Moscovitz, ALJ

B. Petitioners Argument/Reason: The petitioners sought 40 hours of special education and related services in a program run by Nexus, transportation to and from Nexus, and reimbursement for their unilateral placement. The petitioners argue that L.M. failed to make meaningful progress within the respondent's program and felt that there was significant regression since L.M. left early intervention.

C. Procedural Violations: None

D. Substantive Violations: None

E. District Strength: The respondent invited the petitioners to discuss IEP options many times. In addition, they maintained excellent documentation that clearly demonstrated that L.M. made progress toward the goals and objectives in the IEP. The

district's expert witness was able to defend, answer, and identify significant weaknesses in the petitioners' expert witness.

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis and Social Stories

G. Case Outcome: Although L.M. only achieved partial proficiency and did not master all objectives within his IEP, this occurred in both schools. The petitioners never informed the respondent school district about problematic behaviors at home and in the community. The respondent did not witness the same behaviors at school interfering with his learning. Therefore, the IEP was deemed to be reasonably calculated for L.M. to receive educational benefits. Furthermore, even though L. M. learned quicker at Nexus it is not a legal basis for determining FAPE. The law imposes a meaningful benefit, not maximum. Hence, the petitioners' relief for due process was denied.

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*Table 37*

*J.W. and E.W. v. Tinton Falls Board of Education*, EDS 8125-09 (2010)

A. Court/Judge: Office of Administrative Law/Joseph F. Martone, ALJ

B. Petitioners Argument/Reason: The petitioners argued the respondent school district's choice to reduce speech and occupational services and to end parent training was unfounded. Petitioners' concurrently sought compensatory services for speech, occupational therapy, and parent training during the stay put period.

C. Procedural Violations: The respondent proposed reducing services in the IEP without conducting any current comprehensive or independent evaluations. In addition, the IEP was inadequate because it failed to address the child's functional performance or

academic needs. Furthermore, the parents were provided an incomplete IEP without all goals and objectives and the respondent terminated parent training without their input. Clearly, parents were not able to participate in all aspects of planning their child's IEP.

D. Substantive Violations: The respondent failed to provide occupational therapy, speech therapy services at home and in school, and at-home parent trainings as required by the IEP under stay put. In addition, B.W. did not make progress in the school district's program.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: None

G. Case Outcome: The respondent school district was ordered to provide compensatory makeup sessions of at-home speech therapy and at-home parent training. Sessions had to contain a detailed statement of annual goals, with short-term and long-term objectives. In addition, the respondent school district was ordered to provide speech language therapy five times per week, individual speech therapy at home 2 hours per week, occupational therapy in the classroom twice a week, and 2 hours of parent training per month.

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### *Table 38*

*Passaic City Board of Education v. J.S. and B.S.*, EDS 7551-09 (2010)

A. Court/Judge: Office of Administrative Law/Joel M. Miklacki, ALJ

B. Petitioners Argument/Reason: The petitioners argued that a 2007 ALJ's order for a private placement at the Garden Academy had not been followed even though a placement had become available and the respondent school district did not allow for

active parent participation when developing the IEP. Petitioners sought reimbursement for a unilateral placement at the Garden Academy.

C. Procedural Violations: The parents clearly did not have an opportunity to participate in the decision-making process. The IEP that was developed had no input from anyone other than the case manager who even testified that members of the IEP team were not consulted. Inappropriate timelines were followed and the respondent never formally proposed a program because it did not hold an IEP meeting with qualified school personnel to work with students with autism. Furthermore, the respondent predetermined J.S.'s placement without input based upon inappropriate evaluations.

D. Substantive Violations: Respondent did not provide a FAPE.

E. District Strength: None

F. Scientifically-Based Instruction Implemented: Applied Behavior Analysis

G. Case Outcome: The petitioners prevailed and the respondent school district was required to fully reimburse the petitioners for a unilateral placement at the Garden Academy. Not only did the respondent not include the parents in the initial or follow-up IEP, but they failed to even honor a 2007 court order.

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In order to summarize each case in an easy to understand format, a table was developed. This table lists each district by name and year of final decision, whether or not the district made a procedural or substantive violation, if a scientifically-based research method was implemented, and whether the ALJ's final decision was in favor of the district or not (see Appendix A)



### Summary

Thirty eight cases were analyzed utilizing a field-based rubric. Although each case was filed by petitioners in different districts from various areas of the state, and came from all socioeconomic backgrounds, there were similarities among these cases. The petitioners' arguments often focused on the denial of FAPE. Furthermore, petitioners frequently sought unilateral placements, reimbursement, and compensatory damages as a remedy. In addition, most districts that lost the case made procedural violations. Although there is much research on the various forms of scientifically-based research methods, ABA was the only research-based method found to be similar among cases.

In Chapter V, I will analyze, synthesize, and evaluate the data from Chapter IV to answer the research questions and propose recommendations for policy and practice.

## CHAPTER V

### Conclusions and Recommendations

Students diagnosed with ASD continue to rise at an ever increasing rate. The Government Accounting Office (GAO, 2005) identified the possible reasons as a) better diagnoses; (b) a wider range of conditions being categorized as ASD; and (c) the higher incidence of ASD in the general population.

New Jersey has been recognized by experts, professionals, and parents alike for exceptional schools, medical facilities, and parent support groups and networks in the area of ASD. Social networking sites, blogs, and parent support groups state that New Jersey is an excellent place to live and raise a child diagnosed with ASD. Although there is no conclusive answer, New Jersey does have the highest rate of children with ASD in the United States. As the rate and population of students diagnosed with ASD in New Jersey increased, litigation has risen as well.

In many instances, litigation has centered on the issue of FAPE. However, unilateral placements in New Jersey have become frequent, as parents seek a better education for their child. These placements can range from two to fifteen times the cost of educating a pupil in district. These high-stakes, for both parents and districts, contribute to the litigation as reflected in the number of tuition reimbursement cases found in this research.

Parents have become educated, more willing to retain the services of advocates and attorneys, and better able to question program, methodology, and frequency of services. With the Internet at everyone's finger tips and social media providing immediate interactive access to millions of opinions, school districts are questioned on

almost every aspect of the child's education; from occupational and physical therapy to behavior modification plans and ABA tracking and hours.

School districts must have child study teams that are well-versed in diagnosis, treatment, and methodology for students with ASD. Child study teams that create IEPs that are a one-size fits all approach or more commonly developed for other learning disabilities will incur more dissatisfied parents and increased litigation. More importantly, the child study team may not be addressing the child's needs appropriately. Experts that understand ASD or at the very least have received professional development and training in the area of ASD are critical to a school district's child study team.

Now, more than ever, there is a growing body of quality research available on effective interventions for children with ASD. These services are available to students in public and private schools. Many public schools have developed programs specifically tailored to meet the needs of students with ASD, in the hopes that educating these children in the LRE will be a substantial cost savings to the district. However, even with a district's best intentions, the rising cost of educating children with ASD has become a major dilemma for districts with limited financial resources. School Superintendents must remain in close communication with their Director of Special Services in their districts as they create programs to meet the individual needs of students while concurrently being fiscally responsible to the tax payers.

The Third Circuit, of which New Jersey is a member, has not created any special case law or precedent. Districts and parents are still mediating issues at the Office of Administrative Law, where administrative law judges are making decisions on a case-by-case basis without input from the higher courts. This has not changed since Miceli (2002)

conducted his research on ASD litigation in New Jersey. One topic has remained consistent, if a district is not compliant and does not meet the standards outlined in 6A:14, the case is over before it even begins. Consequently, districts must be compliant with the law and possess documentation that demonstrates progress or changes in program when progress is absent.

### **Purpose of the Study**

The purpose of this case study was to investigate existing New Jersey case law for the special education population classified as ASD and to analyze New Jersey Administrative Law Judge (ALJ) decisions to identify the reasons that districts win or lose cases, adding to the limited body of research regarding cases in New Jersey. In addition, the purpose of this study was to determine if there was a correlation between litigation outcomes and the scientifically-based methods identified in the National Standards Project.

### **Statement of Problem**

The National Center for Education Statistics (2009) found that the number of students diagnosed with ASD had risen from 42,000 in 1997-1998 to 296,000 in 2007-2008, an increase of over 700% in a decade. Furthermore, the number of students with ASD grew faster than any other disability recognized by IDEA. With this increase, school districts have also seen an increase in litigation as school personnel and parents have failed to come to an agreement as to what constitutes a student's right to a Free and Appropriate Public Education. Parents are increasingly challenging school decisions; utilizing advocates, lawyers, and expert witnesses specializing in ASD.

### **Description of Sample**

The cases chosen for this study were from the New Jersey Office of Administrative Law. These cases are public documents available through the New Jersey Department of Education or the Rutgers University School of Law. In order to protect the rights of juveniles in these cases, all decisions utilized initials when referring to the child or the child's parents.

In 2004, IDEA was reauthorized which initiated new law, hence all cases from 2005-2010, a period of 6 years, were analyzed. Analyzing all published cases over the past 6 years provided an unbiased sample to study. In addition, by analyzing all cases the chance of researcher bias was reduced. The research sample contained 38 districts from different demographics and various levels of socioeconomic status.

### **Research Questions and Findings**

In Chapter I, eight research questions were presented for the purpose of this study. After applying a rubric to each of the 38 due process hearings, the information was analyzed, synthesized, and evaluated to answer the proposed research questions. The research questions are presented in a question and answer format in no particular order of importance.

1. What are the similar underlying arguments for each case that petitioners have filed? Every case was diverse and therefore the circumstances for each student, set of parents, and school district were different. However, in most cases, the petitioners' arguments focused on FAPE and LRE. Since the courts have ruled that school districts have the right to choose instructional methodology, attorneys consistently chose to argue cases on the premise that the choice of instructional methodology did not provide or

would not provide the student a FAPE. Hence, FAPE was overwhelmingly the primary argument when petitioners filed for due process. In regards to LRE, parents often sought placements in a more restrictive environment that provided intensive therapies and low student to teacher ratios. Frequently, districts countered with the argument that a FAPE in the LRE could be implemented in an in-district program or at an appropriate public school placement rather than the private placement sought. Ironically, even though New Jersey law mandates that a public school district must first seek a public school placement if the student's district cannot offer a suitable program in-district, parents seldom wanted to hear these options. Rather parents and their attorneys made the argument for expensive private placements and sought tuition reimbursement and compensatory damages when a unilateral placement was made.

2. What have the court rulings said when parents made unilateral placements?

The courts have been very clear, parents do not have the right to make a unilateral placement without notifying the district first and following the appropriate timeline. If parents made a unilateral placement, parents bore the burden of proof that the school district did not provide a FAPE. If a school district demonstrated FAPE, parents were not entitled to reimbursement, compensatory damages, or placement at a private school. On the contrary, when school districts did not provide a FAPE or could not document how a FAPE would have been provided, the district lost. The school district was responsible for reimbursement, future placement, and in many cases, compensatory damages.

3. What types of programs, placements, or methods of instruction do parents demand most frequently? Unilateral placements, ESY, ABA methodology, home programming, increased hours for various services (i.e. ABA, OT, PT, Speech, etc.), and

the integration of a behaviorist (BCBA) were sought most often. Commonly, the case was argued under the denial of FAPE, but these services and compensatory hours were sought as remedy.

In most cases, unilateral placements were made when the school district and parents could not come to an agreement over placement. However, in a few cases, parents made the placement before the district even had a chance to evaluate or develop a program recommendation. Inherently, these disagreements led to parents making unilateral placements; seeking a permanent placement and tuition reimbursement for their child's placement. ESY was litigated as a unilateral placement after the fact and in preparation of a potential summer placement. However, ESY was more commonly litigated as a unilateral placement. In some cases, parents enacted a stay put under the previous terms and agreement of the IEP, armed with the knowledge that the child would most likely start the summer program before an ALJ would even hear the case.

ABA was the only scientifically-based research method that was similar among cases. For the most part, litigation persisted over who was trained and responsible for implementation, the amount and frequency of hours, tracking of data, and home programming. Although not as frequent, sometimes ABA litigation stemmed from the refusal of a district to utilize or implement the methodology at all. Lastly, districts that did incorporate ABA into the child's IEP, but lacked qualified staff to implement the methodology appropriately, lost every time.

Often, parents requested increased hours of specific instruction for all three educational settings; in school, private school, and at home. Factors argued were cost, place of implementation, and frequency. Cost could not be a consideration for school

districts and if it was, the district lost. The only rare exception occurred over transportation. Therefore, the place of program implementation and frequency of instruction were the real questions. For most, implementation occurred at the school or private facility. However, if the need for transition between home and school was necessary, school districts were responsible for home programming, which was developed through the student's IEP. Frequency was more difficult to determine. Many parents and private consultants have argued more is always best. However, some school districts refused to increase hours for specific therapies. Consequently, parents made unilateral placements. In cases where parents were able to demonstrate that the child had experienced increased success and was provided a more meaningful educational benefit, school districts had an uphill battle presenting and winning their argument for not increasing hours.

Although not as common, utilizing a behaviorist (BCBA) has become more prevalent. The integration of a behaviorist when developing goals and objectives for social skills in the student's IEP was requested by parents. Consequently, a certified BCBA was frequently requested when developing behavior modification plans. More often than not, a disagreement occurred when district employees that were not certified BCBAs created the social skills goals and objectives for the student's IEP. Ironically, a BCBA is not even a recognized certification by the New Jersey Department of Education. Regularly, BCBAs are employed by a school district as a certified school psychologist, social worker, or as a district consultant.

#### 4. What role does documentation have in the process and how important was it?

Documentation was critical to the success of litigation. By the time a school district



reaches a hearing, both parties are actively trying to portray themselves as the one who was willing to cooperate, when the other side was not. Rather than asking an ALJ to side with the district over the parents, correspondence provided powerful evidence of who was willing to do, consider, or accommodate at the time it was happening.

An IEP begins with documentation and ends with documentation. Specifically, from the first correspondence between the parents and school district to the day an ALJ issues a final order, everything must be documented. Documentation can include but is not limited to: IEP, e-mails, letters to and from parents, cards, thank you notes, student work, data sheets, behavior modification plans, discrete trials, CST evaluations, outside evaluations, and consultant consultations. As trivial as it may sound, nothing was too small to document or write as an anecdotal note in records. In addition, all documentation should be in chronological order and dated appropriately.

After conducting this investigation, it was determined that much of a school district's success or failure aligned with the factors that weighed most when an ALJ ruled. Therefore, two research questions were combined for the purpose of an answer: What factors weighed the most when ALJ's made their decisions and rulings? (Question 5) and Where did school districts fail and succeed most often and was there a pattern? (Question 6) Simply stated, ALJs are legal practitioners, not educational practitioners. Hence, the first thing they sought to establish was whether procedural or substantive violations occurred. Regardless of their opinion, if it was determined that the respondent did not meet the legal requirements, the decision was rather simple.

IDEA legislation and federal and state governments have been very clear that procedural requirements must be followed and met to establish FAPE. The procedural

requirements are clear; parents must have the ability to participate in all aspects of planning their child's IEP, appropriate evaluations must be conducted, and an IEP must be developed to provide a meaningful educational benefit, appropriate placement decisions must be made, and school districts must employ or consult with qualified personnel with expertise in ASD. Interestingly enough, school districts failed to meet the procedural requirements of the law in 16 of the 38 (42%) cases. Attorneys and petitioners know this could entitle them to other requests. Consequently, it is a staggering that almost half of these cases may have been lost before they began. It stands to reason, that district personnel, administration, and their attorney's advice must be questioned.

Substantive violations occurred for various reasons. However, the key to remember is meaningful progress. A district must demonstrate that the student was progressing in their proposed program and when progress was not demonstrated a change in programming must have occurred. Districts no longer are afforded the benefit of just proposing a program; they must provide a program that helps the student progress. Goals and objectives must be created and revised dependent upon the student's successes and failures as measured by objective measures. School districts were also viewed more favorably if they proposed new programs rather than sitting idle until parents complained.

Documentation is required at every level of a student's educational program. Districts that were able to demonstrate and document every step of the educational decision-making process were better prepared for litigation than those that had limited documentation. Documentation can range from something as complex and legal as the actual IEP, to as simple as a handwritten note from a teacher to a parent. In conjunction with this documentation, the data must demonstrate progress or lack thereof. All of this

documentation and data is critical when the district must re-create the case and walk an ALJ through the process from start to finish.

Although good faith may not be considered law, school districts that were able to demonstrate their many attempts to include the parents in the IEP process were viewed more favorably by the ALJ. Furthermore, ALJs even recognized school districts that went above and beyond the procedural requirements for parents participation. Clearly, this immediately placed the district in a positive light when petitioners attempted to paint a picture of an uncooperative district. However, the reverse was true as well. School districts that were uncooperative and/or unwilling to work and collaborate with parents were viewed unfavorably by administrative law judges.

Throughout each case, districts had to validate that certified staff were employed, trained, and well-versed in educating students with ASD. Although there is no certification specifically for ASD, Miceli (2002) confirmed that school districts were held to an unwritten rule that expertise matters. School districts that did not employ staff members with specialized training, professional development, and coursework in educating students with ASD were not successful in litigation. More importantly, those conducting the evaluations and assessments must be well versed when developing program recommendations based upon their assessments. Districts unable to change a student's program immediately when progress was not demonstrated were destined for failure. Furthermore, when a district could not establish progress was made with their program recommendations, parents immediately were given greater consideration with their requests for methodology. This led to a greater cost for training, services, and the potential for out-of-district placements.

7. What types of scientifically-based treatments were utilized if any and did they impact on the district's success? Although various methods of scientifically-based treatments have been recognized, there was limited use or mention of these techniques within the litigation analyzed for this research. For the 38 cases evaluated, ABA was the only scientifically-based research method that was prevalent in its use and championed by parents. Many of the websites and parent advocacy groups speak about ABA in detail, unlike some of the other methodology. Therefore, one may assume that this may be the reason for the increased litigation revolving around ABA methodology. Others, including educators and medical professionals specializing in ASD, believe that ABA should be the preferred method of instruction for students with ASD due to documented success. Lastly, ABA documentation is intensive. Therefore, demonstrating meaningful progress, or lack thereof may be simpler to prove.

8. What is the influence of expert medical professionals and/or witnesses testimony on a petitioner's behalf? Expert medical professionals and witnesses were critical in determining the success or failures of a case. If an ALJ determined a witness or medical professional to be credible; the evidence played a role in the decision-making process. If the witness or medical professional was determined to be an expert with long-standing documented evidence, the ALJ increasingly incorporated their testimony in the decision-making process. However, smart attorneys played a pivotal role when these professionals' opinions were introduced to provide testimony. In some cases, an expert's testimony was detrimental because the opposing attorney demonstrated that the expert's opinion was completely contradictory of their past record.

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### **Recommendations for Practice and Policy**

1. The facts are paramount in every case. Documentation is a critical component in any legal matter and court proceeding. All staff responsible for educating a child with ASD must understand how vital documentation becomes when defending a school district's decision for educational placement, methodology, or instruction. This cannot be stressed enough; everything should be kept, filed, and documented. An IEP is a legal contract between two parties and must be implemented exactly as written, unless both parties agree to an amendment. Districts that prevailed in court, documented every step of the educational decision-making process. Furthermore, districts that provided e-mail communications from teachers to the parents, thank you letters from parents, and items that may seem incidental on a daily basis were just as crucial as the educational data. Clearly, if a district documented everything well; it aided the ALJ's decision. More importantly, when parents claimed a lack of involvement; these items were extremely helpful. Bottom line, document and keep everything.

2. Document the results of collaborative efforts with parents. A district should not let correspondence be their only form of protection when demonstrating their willingness to take parental concerns seriously. An IEP is an important document that carries legal significance. Districts should follow through and ensure that the parents' concerns or input make their way into the IEP, even if the IEP team disagreed and the concerns are not part of the program recommendation. A district should always respond to parent concerns in a timely fashion and allow for their input at all times. Parents are entitled to a meaningful opportunity to participate in the development of the IEP.

3. Provide parents WITH a choice when possible. Any time that a district demonstrated that parents were provided a choice of options that are educationally appropriate, the courts viewed it as highly engaging and in the spirit of cooperation and participation. Although this is not possible at all times, it is optimal when available. Again, document these options and collaborative decisions.

4. Consistency between words and actions are important in the eyes of a third-party, specifically an ALJ. When a party says one thing and does another, an ALJ will recognize this and it damages the party's credibility. Simply stated, if the district states a form of instruction, methodology, or time interval will occur; it should occur. If it did not, the specific reason should be communicated to the parents and memorialized in writing.

5. District staff should be professional at all times and protect their credibility. Although this may seem obvious, regardless of how a parent speaks or acts, be professional. Listen to the parent, state the reasons for your decisions clearly, and follow the meeting with a letter or email to memorialize the conversation. Parents may make comments to others; staff must maintain confidentiality and professionalism.

6. School districts must follow all procedural standards set forth in 6A:14 or there is no chance the district will win in litigation. School districts must consider an evaluation, conduct the appropriate evaluations as necessary, and develop, propose, and implement an IEP when found eligible; all within the appropriate time frame and with no excuses or exceptions. School districts must allow parents to participate in all aspects of planning their child's IEP. In addition, parents must be notified of their due process rights under IDEA.

7. School districts that do not employ professionals with expertise conducting evaluations for students with ASD must hire outside professionals to conduct these assessments. Whether the evaluation is conducted by an in-district employee or a consultant, it is critical that the evaluation addresses all potential areas of need, including but not limited to: occupational therapy, physical therapy, speech pathology, behavior, adaptive skills, transitioning, and educational needs. These evaluations are imperative to create an appropriate IEP.

8. The IEP developed must provide meaningful educational benefit. Therefore, the IEP must address issues such as ESY to reduce the chance of regression, related services beyond educational needs, and identify all of the mandates found in IDEA. An IEP must identify the student's present levels of performance, create measurable goals, possess a statement of special education and related services, length and frequency of service, and allow for transition services if appropriate. Through this research, social skills and behavior were identified to be as important, if not more important than the educational goals for parents. Parents felt social and behavioral goals were often overlooked. The district must document that progress occurred in both academic and nonacademic areas. If the child study team and parents determine an area of need, a goal and objective must be created.

9. All students should be educated in the least restrictive environment to the maximum extent appropriate. Students with disabilities can be removed from general education classes when the nature and severity of the disability is such that education in general classes cannot be achieved with the use of supplementary aids and services. This is a contentious area because there are very different philosophical approaches among



parents. Some prefer all inclusion, regardless of the extent of their child's disability and others advocate for private placements with very low student to teacher ratios. LRE created much litigation, especially when parents made unilateral placements. For school districts, the law is the law. Districts should educate students to the maximum extent appropriate with their peers. If this is determined to be unsuccessful, the next step would place the child in a more restrictive environment. However, it is important to note, an out-of-district placement is always the last resort. It is critical to document success or lack thereof when recommending changes or the continuation of a program or placement.

10. Although IDEA mandates that scientifically-based research must be implemented when educating a student with ASD, it stops short of stating what methodology is and is not acceptable. Therefore, the courts have consistently ruled that school districts have the right to choose the instructional methodology. However, when teachers do not implement any practices based upon scientifically-based research, the courts have ruled in favor of the parents. It becomes difficult for a school district to defend its decisions if the program implemented was not derived from scientifically-based research. Although there is much research on various methodologies, ABA tends to be the most widely accepted methodology and the most prevalent in litigation. Hence, employing staff or consultants trained in ABA methodologies is advantageous for a district.

11. School districts must collect data to document a student's progress toward IEP goals. This data is critical when making placement decisions, determining changes in program, or demonstrating progress or lack thereof. Districts lacking data to guide instructional decisions place themselves at a substantial disadvantage during litigation.

The purpose of data is to provide objective measurements for the decision-making process. Staff must avoid adjectives such as well, good, nice, better, etc. without better descriptors of what each adjective truly means and the data to substantiate it. If there is no data or very little; it will be difficult for an ALJ to determine how the district made its decisions.

12. All staff, including building principals, should undergo professional development and training in the area of special education law. The school district's attorney and Director of Special Services should not act as the legal gatekeeper. If the district went through the litigation process, win or lose, make it an educational opportunity. Since staff will have active knowledge of the case, invite your attorney to present the case to staff and allow for questions. Rather than dwelling on the past, use this case as an educational opportunity for the future.

13. School districts should take advantage of the expertise found in the County Educational Service Commissions or Jointures. Since many focus on students with educational disabilities, staff and administrators have increased exposure and knowledge of disabilities and instructional methodologies. It would be prudent for Superintendents and staff to develop close relationships with their colleagues.

14. The Department of Education should make available a database of legal decisions concerning special education legal outcomes. This would allow school districts, parents, and others interested to obtain simple access to legal decisions. Currently, you must know where to search, which keywords to utilize when searching, and the information is not readily available. This database would be easy for the layperson, someone lacking the experience of a lawyer or trained researcher.

15. Legislators should explore the opportunity of increased funding, specifically for ABA instruction. Since ABA instruction is so intensive and laborious, students and districts could benefit from more direct funding. If cost was removed from the equation, parents and districts may disagree less on the amount of hours, decreasing litigation on ABA and home programming.

### **Recommendations for Future Research**

1. School districts vary in size from relatively small to extremely large. Research could be conducted to determine if larger districts are more successful than smaller districts due to a larger pool of options, resources, and staff.

2. In the state of New Jersey, all special education teachers must hold the same certification. There is not a special certification for ASD. However, class work, training, and professional development contribute to a teacher's knowledge. A study that assesses the type and level of training received for staff involved in district litigation and its outcome should be conducted.

3. Expert witnesses were found to be helpful in litigation. A closer analysis of whether in-district employees or out-of-district consultants creates a difference is suggested.

4. As New Jersey litigation continues to rise, the rate in other states such as Texas and California have decreased. A study that compares state by state similarities and differences in litigation.

5. This study included all students between the ages 3-21. A study that determines if litigation is more prevalent at certain ages and if school districts are more or less successful at various grade levels is recommended.

6. School districts provide different parent trainings, some more detailed and frequent than others. Exploring if school districts that provide more detailed and frequent trainings are more or less prone to litigation would be beneficial. In addition, if litigation is less, determine what type of parent trainings reduced litigation.

7. A follow-up study that explores attitudes and opinions of parents, Administrative Law Judges, child study team members, Directors of Special Services, Superintendents, attorneys, and witnesses is recommended. In addition, determining where each felt their successes and failures occurred and what they would do differently if they had the ability to do so again is recommended.

8. A replication of this current study will be beneficial in the future if changes in IDEA occur that may impact ASD litigation.

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## Appendix

*Summary Chart of the 38 Cases Evaluated*

<u>Case</u>	<u>Procedural Violation</u>	<u>Substantive Violation</u>	<u>Scientifically- Based Instruction Implemented</u>	<u>Case Outcome</u>
Springfield Township Board of Education (2005)	N	N	N	W
Stafford Township Board of Education (2005)	N	N	N	W
West Orange Board of Education (2005)	Y	N	Y	L
Voorhees Township Board of Education (2005)	Y	Y	Y	L
West Windsor-Plainsboro Board of Education (2006)	Y	Y	Y	L
Mountain Lakes Board of Education (2006)	N	Y	N	L
Caldwell-West Caldwell Board of Education (2006)	Y	Y	N	L
Magnolia Board of Education (2006)	N	N	N	W/L
Bloomsbury Board of Education (2006)	N	N	N	W
Ramsey Board of Education (2006)	N	N	N	W
Audubon Board of Education (2006)	Y	Y	Y	L
Brick Township Board of Education (2006)	Y	Y	Y	L
Summit Board of Education (2006)	Y	N	Y	W/L
Franklin Township Board of Education (2006)	Y	N	N	W/L
Great Meadows Regional Board of Education (2006)	Y	N	N	L
Secaucus Board of Education (2007)	Y	N	Y	L
Springfield Township Board of Education (2007)	N	N	Y	W
Monroe Township Board of Education (2007)	N	N	Y	W
Parsippany Troy Hills Township Board of Education (2007)	N	N	Y	W
West Paterson Board of Education (2007)	N	N	Y	W
Freehold Regional High School Board of Education (2007)	Y	N	N	L
Metuchen Board of Education (2007)	N	N	Y	W
Wyckoff Board of Education (2007)	Y	Y	Y	L
West New York Board of Education (2008)	N	N	N	W
Gloucester Township Board of Education (2008)	N	N	Y	W
East Brunswick Township Board of Education (2008)	N	Y	N	L
Passaic City Board of Education (2008)	Y	N	Y	L
Tinton Falls Board of Education (2008)	N	Y	N	L
West Windsor-Plainsboro Board of Education (2009)	N	Y	Y	L

Note: N:No, Y:Yes, W:Win, L:Loss, W/L: Win/Loss. School districts provided FAPE in the LRE in 16 of the 38 cases (42%)

*Summary Chart of the 38 Cases Evaluated*

<u>Case</u>	<u>Procedural Violation</u>	<u>Substantive Violation</u>	<u>Scientifically- Based Instruction Implemented</u>	<u>Case Outcome</u>
Franklin Township Board of Education (2009)	N	N	N	W
Cherry Hill Township Board of Education (2009)	N	N	Y	W
Fair Lawn Board of Education (2009)	N	N	Y	W
Dumont Board of Education (2009)	Y	Y	Y	L
Palmyra Board of Education (2009)	N	N	N	W
West Windsor-Plainsboro Regional Board of Education (2009)	N	Y	Y	L
Wayne Township Board Of Education (2010)	N	N	Y	W
Tinton Falls Board of Education (2010)	Y	Y	N	L
Passaic City Board of Education (2010)	Y	Y	N	L

Note: N:No, Y:Yes, W:Win, L:Loss, W/L: Win/Loss. School districts provided FAPE in the LRE in 16 of the 38 cases (42%)