

Autism, the IDEA and Recent Developments in Virginia*

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Recent stories on the evening news and in national news magazines have drawn increased public attention to autism, a disability with an increasing rate of prevalence among children in the United States. It is a disability that provides an occasion for substantial controversy between parents and school systems, as they square off to define their rights and responsibilities under special education law. This article will review some of the major legal issues that parents and school systems are likely to encounter in these controversies under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. 1400 *et seq.*

Nature of Autism

Many Americans were first introduced to autism years ago in the movie "Rainman," where an institutionalized Dustin Hoffman displayed uncanny mental abilities alongside a host of deficits. For most children with autism, the picture is different. Uncanny abilities are not so prevalent and, while institutionalization may be the fate of some, a better understanding of treatment programs should enable most children to live in their communities, with many achieving independence.

For purposes of the IDEA, "autism" is defined as:

a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

34 C.F.R. 300.8(c)(1)(i).

As at least one court has recognized, "[t]he main characteristics that differentiate autism from other developmental disorders include 'behavioral deficits in eye contact, orienting to one's name, joint attention behaviors (*e.g.*, pointing, showing), pretend play, imitation, nonverbal communication, and language development.'" *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001) (quoting National Research Council, *Educating Children With Autism* 20, Catherine Lord & James P. McGee, eds., National Academy Press 2001).

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Early Intervention and the Window of Opportunity

For reasons that are not understood, autism appears to be a condition of increasing prevalence.¹ While there is no cure, as such, it is clear that “*intensive early intervention* can make a critical difference to children with autistic disorders.” *Amanda J.*, 267 F.3d at 883 (citing National Research Council at 132) (emphasis added). Indeed, “[e]arly diagnosis is crucial because *education* (of children as well as of parents and teachers) is *the primary form of treatment*, and the earlier it starts, the better.” *Id.* (citing National Research Council at 9) (emphasis added).

As another circuit court has recognized, “[a child with autism] has a *window of opportunity* for when he can most effectively learn to overcome his deficits due to autism, which window will close at age eight or nine.... [A]fter age eight or nine, [the child] will have a far more difficult time learning the skills that he needs to function in life.” *JH v. Henrico County Sch. Bd.*, 326 F.3d 560, 564-65 (4th Cir. 2003) (emphasis added) (citing testimony of Ronald M. David, M.D., associate clinical professor at Medical College of Virginia and an expert in pediatric neurology and autism). Or, to put it more emphatically:

“[I]mmediately, immediately do something fast, now, right now! Let’s get him in speech! Let’s get him in OT! Let’s get him with a psychologist! Let’s go!”

L. Matthew Frank, M.D., pediatric neurologist (explaining window of opportunity to parents of child with autism) (quoted in *Jaynes v. Newport News Sch. Bd.*, 2000 U.S. Dist. LEXIS 21684, *1-2 (E.D. Va. 2000), *aff’d Jaynes v. Newport News Sch. Bd.*, 13 Fed. Appx. 166).

Eligibility Issues: Diagnosis and Denial

The diagnosis of autism is not an easy one for parents to hear. Recounting her own experience, one mother has explained it this way:

There you are, happy in your life, one or two little ones at your feet. Life is complete and good.... One day someone comes up from behind you and throws a black bag over your head. People start kicking you in the stomach and trying to tear your heart out.... This is the day you get the diagnosis: “YOUR CHILD HAS AUTISM.”

Welcome to Beirut, The Sun, Autism Society of Delaware, May/June 2001, p. 4.

Under IDEA regulations, a child who manifests the characteristics of autism may be identified as having this disability “after age three,” 34 C.F.R. 300.8(c)(1)(iii). However, “[a]ccording to the National Academy of Sciences, ‘with adequate time and training, the

¹ For example, researchers at the University of California found that the number of autism cases was up 273% from 1987 to 1998. See Report to the Legislature of the Principal Findings from the Epidemiology of Autism in California (available at http://www.ucdmc.ucdavis.edu/mindinstitute/newsroom/study_final.pdf).

diagnosis of autism can be made reliably in *two-year-olds* by professionals experienced in the diagnostic assessment of young children' with autistic disorders." *Amanda J.*, 267 F.3d at 883 (quoting National Research Council at 3) (emphasis added). This discrepancy between medical science and regulatory requirements may stand as an obstacle to early diagnosis and intervention; however, it is not the only obstacle. Parents as well as school systems may be prone to denial.

As another mother explained, "I was in denial. I did not want to admit that my child had autism. I did not want the stigma of that label on my child." For school systems, the denial is driven not by stigma, but by costs. Identifying a child as autistic can be a major step toward controversy with parents, spawning disagreement over what is needed to provide an appropriate education and triggering a legal fight for the funds needed to pay for effective programs. Accordingly, one medical professional has noted that families in one major Virginia locality are reporting refusals by the school system to classify children as autistic despite unassailable medical diagnoses.

Educational Benefit: Optimal, Trivial or What?

Identifying a child as autistic is only the start of the struggle for parents. All parents want the best for their children, and especially when their children are afflicted with disabilities as serious as autism. "The IDEA does *not, however, require* a school district to provide a disabled child with the *best possible* education." *MM v. Sch. Dist.*, 303 F.3d 523, 526 (4th Cir. 2002) (emphasis added). "[W]hile a state must provide specialized instruction and related services sufficient to confer *some educational benefit* upon the handicapped child, ... the Act does *not require* the furnishing of every special service necessary to *maximize* each handicapped child's potential." *Id.* at 527 (citations and internal quote marks omitted) (emphasis added).

School systems seeking to minimize their obligations—and expenses—routinely quote this reference to "some educational benefit" in their arguments to hearing officers and courts. The law is not, however, so unfavorable to parents as this one statement might make it seem. There is more: "Although the IDEA does not require that a state provide the best education possible, 'Congress did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some *minimal* academic advancement. *no matter how trivial.*'" *County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 300 (4th Cir. 2005) (emphasis added) (quoting *Hall v. Vance County Bd. of Education*, 774 F.2d 629, 636 (4th Cir. 1985)).

The educational benefit to be provided a child must be "meaningful" and it "must be assessed based on the educational capacity of each individual student." *J.P. v. County Sch. Bd. of Hanover County*, 447 F. Supp. 2d 553, 584 (E.D. Va. 2006). As the Supreme Court explained, "[i]t is clear that the benefits obtainable by children at one end of the [disability] spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 202 (1982). Even under the best of circumstances, parents and school systems are likely to disagree on the educational capacity of the child, with parents naturally being more hopeful for their child than

school systems charged with their education. The tendency toward disagreement is exacerbated by the fact that different programs have different costs, with school systems being less willing than parents to risk additional dollars where positive outcomes are uncertain.

The Methodology Debate: TEACCH v. ABA

While there are multiple ways of seeking to educate a child with autism, “the two most contested instructional approaches are TEACCH and ABA.” Claire Maher Chouta, *et al.*, *The “discrete trials” of applied behavior analysis for children with autism: outcome-related factors in the case law*, *Journal of Special Education* (June 22, 2004). Known by its acronym, TEACCH refers to an approach developed in the 1970’s at the University of North Carolina: Treatment and Education of Autistic and Related Communication-Handicapped Children. ABA refers to Appplied Behavioral Analysis and a subset of that methodology known as “discrete trial training” and its modification, “Lovaas therapy.”² While each methodology has its advocates and critics, the major similarities and differences may be summarized by the following chart:

	TEACCH	ABA
Similarities	Predictable routines Supportive teaching arrangements Planned transitions Family involvement	
Differences	Extensive group instruction Independent work time Structured teaching Heavy reliance on state certified teachers No research-based recovery rates Cheaper	Extensive one-on-one instruction Discrete trial training Collecting and graphing data; adjusting program Heavy reliance on other instructors Research-based recovery rates More expensive

² As explained by Chouta in the *Journal of Special Education*, *supra*:

ABA is the study of behavior and the manipulation of contingencies and setting events to increase or decrease specific behaviors. Behavior analysts use objective measures of the desired behaviors and monitor the results of instruction to ensure skill acquisition. One small subset of this methodology is discrete trial therapy (DTT). A further modification of DTT is Lovaas therapy, after its namesake, Professor O. Ivar Lovaas, of the University of California at Los Angeles (UCLA). The “discrete trial” in DTT refers to the basic teaching unit delivered in one-to-one instruction. Although DTT and ABA are synonymous for most parents and school officials, discrete trial is but one aspect of ABA.

Whose Call Is It, Anyway?

A frequent point of disagreement between parents and school systems is whether the choice of methodology—TEACCH or ABA or something else—is to be made by the IEP team or by the school system after the IEP is developed.

Under the IDEA, a child's IEP must include "a statement of the special education and related services ... to be provided to the child ... and a statement of the program modifications or supports for school personnel that will be provided for the child." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). However, school systems sometimes argue that it is better for the child if the IEP does not specify a methodology, thereby leaving the teacher free to exercise her professional judgment and vary her approach based on the child's need. On the other hand, parent advocates say that failing to specify a methodology allows the school system to engage in precisely the sort of unilateral decision-making that the IDEA was designed to prevent. They also say there is no guarantee that the teacher will base her approach on the needs of the individual child because she will be limited by the need to serve other children in the classroom and by shortages of resources.

In a passage often quoted by school systems as support for their position, the Fourth Circuit has explained that hearing officers and courts cannot simply insist on their own views about what methodology should be followed:

Neither a state administrative hearing officer nor a reviewing court may reject an *otherwise appropriate* IEP because of dissatisfaction with the educational methodology proposed in the IEP. If an IEP is "reasonably calculated to enable the child to receive educational benefits," the hearing officer cannot reject it because the officer believes that a different methodology would be better for the child.

County Sch. Bd. of Henrico County v. Z.P., 399 F.3d 298, 308 (4th Cir. 2005) (quoting *Rowley*, 458 U.S. at 207) (emphasis added). Focusing on the language highlighted here, parents respond by noting that the school system is only entitled to select a methodology if that methodology is "otherwise appropriate," thus leaving parents free to argue that a proposed methodology should be rejected. The distinction was highlighted by the Fourth Circuit in the *Z.P.* case:

If the School Board's IEP were appropriate, then it would have been impermissible for the hearing officer to reject it simply because he thought the Faison program would be better for Z.P. But that is not what the hearing officer did. The hearing officer concluded, as a factual matter, that the School Board's IEP was not appropriate for Z.P., but that the Faison program was appropriate. Thus, the hearing officer did not impermissibly impose on the School Board what he believed was a better method for teaching Z.P.

Id. at 309.

In short, in any dispute with a school system, parents should be able to object to the school system's refusal to name a methodology on the grounds that the choice of methodology is part of the "services" that the IEP must specify. And, where the school system has named a methodology, they may object to that methodology on the grounds that it is not appropriate (though not on the grounds that it is not the best).

Judging Whether FAPE Has Been Provided

Under the IDEA, children with disabilities are entitled to a "free, appropriate public education" or "FAPE." 20 U.S.C. § 1400(d). When parents and school systems disagree over whether a child has been provided FAPE, they generally focus on one of two major issues—program selection and program implementation.³ Does the IEP proposed by the school system designate a program—*e.g.*, a methodology—that is appropriate? And, if the IEP has designated an appropriate program, has the school system implemented that program appropriately?

Two recent cases in the U.S. District Court for the Eastern District of Virginia illustrate these two different types of issues. A major program-selection decision was rendered by the Court in the case of *County Sch. Bd. of Henrico County v. R.T.*, 433 F. Supp. 2d 657 (E.D. Va. 2006). While stopping short of criticizing TEACCH in general, the Court did not hesitate to find that it was inappropriate for the autistic child before it.

[T]he TEACCH method was not appropriate for instructing RT, considering the level of RT's basic learning skills (imitation and joint attention skills), and his degree of stimming [self-stimulating behavior]. Likewise, the record makes a convincing case that the methodology was not appropriate to teach RT the more complex language, pre-writing, and academic skills needed to transition towards education in the natural environment.

Id. at 668. On this basis, the Court upheld the parents' right to reimbursement for placing the child at the Faison School for Autism, a school where R.T. made significant progress through ABA therapy.

In *J.P. v. County Sch. Bd. of Hanover County*, 447 F. Supp. 2d 553 (E.D. Va. 2006),⁴ the parents alleged that the school system promised but failed to implement properly the use of the discrete trial method, as part of the ABA instructional method. As the Court noted, "[t]he accommodations section of JP's IEP includes 'direct one-on-one instruction to include opportunities for the discrete trials where appropriate.' It goes on to state that JP will have a '[t]rained instructional assistant to support J[P]'s programs.'" *Id.* at 570. In its defense, the school system claimed that the IEP was worded so as to give it *discretion* when and where to implement the discrete trial technique. *Id.* at 591.

³ See generally, Chouta, *supra*.

⁴ The *J.P.* case is now pending on appeal before the U.S. Court of Appeals for the Fourth Circuit, No. 06-2068.

While recognizing that the IEP gave the school system some leeway, the Court found “that leeway does not afford [the school system] the discretion not to employ the discrete trial method at all, or to do so ineffectively when it was employed.” *Id.* at 571. The Court then found that the attempt by the school system to implement the agreed approach was “woefully inadequate,” *id.*, and that its data collection efforts (an essential element of the method) were “useless in assessing JP’s progress.” *Id.* at 571.⁵ Thus, the Court ruled that the school system “did not satisfy its obligation under the IEP’s discrete trial method provision,” *id.* at 572, and it required the school system to reimburse the parents for the expenses they incurred in placing J.P. at the Dominion School, a private school for children with autism.

Conclusion

These two recent decisions—*R.T.* and *J.P.*—place significant limits on the ability of school systems to act unilaterally in matters of program selection and program implementation for children with autism. The cases are major victories for parents of children with disabilities—and especially for parents of children with autism—and they will help redeem for those children the right to a free, appropriate public education promised by Congress when it enacted the IDEA.

⁵ Discrete trial training was explained in some detail by the Court:

[The] discrete trial method is central to the ABA instructional method and tracks a child’s progress by recording data that chronicles a student’s performance on each discrete component of the task. One discrete trial consists of posing the task to the child, providing prompting and fading if needed, and reinforcing the child if the child succeeds. The nature of the child’s response—correct, incorrect, prompted—is recorded on data sheets, which are kept routinely and in standardized form.... After a certain time period, the instructor graphs the data to assess the child’s progress towards a particular goal.

J.P., 447 F. Supp. 2d at 570.