

THE EFFECTS OF THE IDEA REAUTHORIZATION OF 2004
AND THE NO CHILD LEFT BEHIND ACT ON FAMILIES WITH
AUTISTIC CHILDREN: ALLOCATION OF BURDEN OF
PROOF, RECOVERY OF WITNESS FEES, AND ATTAINMENT
OF PROVEN EDUCATIONAL METHODS FOR AUTISM

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I. INTRODUCTION

Autism presents an emerging health and educational crisis for American children, families, schools, and courts. In the United States, diagnoses of autism in children ages three to twenty-two increased 805% between 1992 and 2003.² Diagnoses of autism spectrum disorders are now more prevalent in America than diagnoses of juvenile diabetes and leukemia combined.³ A 2007 Centers for Disease Control study estimates as many as one in 150 American children have an autism spectrum disorder.⁴ Although researchers remain uncertain of the cause of autism spectrum disorders, the number of children seeking services is well-documented.

“Autism” is an umbrella term encompassing five disorders for which there is no cure. The disorders fall on a continuum, together comprising what are termed “autism spectrum disorders,” or ASDs. The autism spectrum disorders include autistic disorder (also known as Kanner’s autism), pervasive developmental disorder-not otherwise specified (PPD-NOS), Asperger’s syndrome, Rett’s syndrome, and childhood disintegrative disorder.⁵ The three

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2. D. F. HOLLENBECK, FIGHTING AUTISM, PUBLIC SCHOOLS AUTISM PREVALENCE REPORT SERIES, 1992–2003, at 1 (2004), *available at* <http://www.fightingautism.org/idea/reports/US-Autism-Statistics-Prevalence-Incidence-Rates.pdf>.

3. AUTISM & DEVELOPMENTAL DISABILITIES MONITORING NETWORK, CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE OF THE AUTISM SPECTRUM DISORDERS (ASDs) IN MULTIPLE AREAS OF THE UNITED STATES, 2000 AND 2002 1, 32 (2006) [hereinafter CDC Study], *available at* <http://www.cdc.gov/ncbddd/autism/documents/AutismCommunityReport.pdf>.

4. *Id.* at 31.

5. AutismToday.com, What is Autism?, http://www.autismtoday.com/whatis_aspergers.htm (last visited Sept. 23, 2008).

most common ASDs are autistic disorder, PDD-NOS, and Asperger's.⁶ All five of the disorders share diagnostic criteria of global developmental delays in social communication and understanding, with the prognosis differing depending upon where on the spectrum the child falls, on what interventions he or she receives, how early he or she receives interventions, and whether the interventions are appropriate, among other factors.⁷ Typically, children with diagnoses of Asperger's syndrome have the best prognoses, while children with Kanner's autism and childhood disintegrative disorder have the most guarded prognoses.⁸

A barrage of interventions is available, including speech therapy, occupational therapy, and intensive, research-based educational approaches. Research consistently shows that the most appropriate and effective educational approaches for children with autism include utilization of either applied behavioral analysis or LOVAAS methods of intervention.⁹ The cost of educating students with autism is extremely high. The societal costs per capita for treating autism are up to \$50,000 per year per child, while costs for adults can run even higher.¹⁰ Although the Individuals with Disabilities in Education Act ("IDEA") guarantees all students a "free and appropriate public education," ("FAPE") there has been a backlash against the provision of needed services to students with autism and other disabilities in the schools.¹¹

In 1990, autism spectrum disorders were added to the list of disabilities authorized to receive funding under the IDEA.¹² The IDEA, originally enacted in 1975, guarantees disabled children a FAPE in the least restrictive environment ("LRE").¹³ The Act accomplishes this through the creation and implementation of an Individualized Education Plan ("IEP").¹⁴ In 2004, Congress reauthorized the IDEA as the Individuals with Disabilities Education Improvement Act, or IDEIA, to realign the original act with the No Child Left Behind Act ("NCLB") signed into law by President George W. Bush in 2001.¹⁵ The 2004 reauthorization significantly changed provisions in the areas of burden shifting, recovery of expert witness and attorneys' fees, and private

6. See NAT'L INST. FOR MENTAL HEALTH, AUTISM SPECTRUM DISORDERS: PERVASIVE DEVELOPMENTAL DISORDERS 1, 2 (2007) [hereinafter NIMH], available at <http://www.nimh.nih.gov/health/publications/autism/nimhautismspectrum.pdf>.

7. *Id.* at 4.

8. *Id.*

9. *Id.* at 18.

10. John W. Jacobson et al., *Cost-Benefit Estimates for Early Intensive Behavioral Intervention for Young Children with Autism — General Model and Single State Case*, 13 BEHAV. INTERVENTIONS 201, 213 (1998).

11. Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1150-51 (2007).

12. *Id.* at 1156.

13. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(5) (Supp. 2005).

14. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended in scattered sections of 20 U.S.C.) [hereinafter IDEIA].

15. *Id.*

tuition reimbursement.¹⁶ As reauthorized, it restricts reimbursement of tuition, attorneys' fees, and expert witness fees, while simultaneously placing the burden of persuasion on families who initiate a complaint with their child's school district for not providing appropriate educational accommodations to their child.¹⁷ At the same time, anti-disability sentiment has increased, partly due to scarce educational funding.¹⁸ The No Child Left Behind Act ties student improvements on national assessment tests to school funding. But the Act has never been fully funded, leaving schools scrambling to meet its demands.¹⁹

Courts have responded to the IDEA as reauthorized by reading its provisions narrowly, placing further limitations on parents and students. The Supreme Court has found that parents are not entitled to recovery of expert witness fees in IDEA litigation while simultaneously allocating the entire burden of proof to the parents and treating the school systems' experts with deference.²⁰ The Supreme Court and lower courts have also interpreted the attorney fees provisions narrowly, holding that families' attorneys cannot recover fees if the case settles, even though less than 50% of cases make it past the administrative processes of mandated arbitration and settlement.²¹ For example, in one post-reauthorization case, the First Circuit, in applying *Buckhannon*, found parents who settled with the school district before completing an administrative hearing did not qualify as a prevailing party under the IDEA, and thus were not entitled to reimbursement of their attorney fees.²² Similarly, the Eighth Circuit has applied *Buckhannon* to the fee-shifting provisions of the IDEA, finding that a party only prevails upon receiving a favorable judgment on the merits, not by settlement.²³ While the costs of providing a free and appropriate education to students with autism are admittedly high, the cost of not providing that education will cost society more in the long run as the children become adults.²⁴ With educational intervention, many people with Autism can lead relatively independent lives as adults but are unable to do so if they do not receive intensive interventions beginning at a

16. GEORGE MILLER, COMM. ON EDUC. & LABOR, U.S. HOUSE OF REPRESENTATIVES, KEY CHANGES IN THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) 2004 AMENDMENTS 3, 5 (2007), available at <http://edlabor.house.gov/publications/IDEA2004keychanges.pdf>.

17. *Id.*

18. Hensel, *supra* note 11, at 1186.

19. National Education Association, *Funding Gap: No Child Left Behind - Funding Promised in the Law Vs. Funding Actually Received FY 2002-2009* (2008), available at <http://www.nea.org/lac/funding/images/fundinggap.pdf>.

20. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006) (barring the recovery of expert witness fees by parents as costs under the IDEA's fee-shifting provision); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 55 (2005) (holding that the party seeking relief has the burden of proof in due process hearings).

21. *Buckhannon Bd. & Care Home v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598 (2001).

22. *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 27 (1st Cir. 2005); see also *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 29-30 (1st Cir. 2004).

23. *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003).

24. *Jacobson et al.*, *supra* note 10, at 208-10.

young age.²⁵

Part II and III of this paper will detail the various autism spectrum disorders, their diagnostic criteria, prognoses, and the effects of appropriate, research-based educational interventions. The public and judicial backlash against funding these educational interventions will also be discussed. In Part IV of this paper, the impact of No Child Left Behind on schools and education will be analyzed. Part V will address the IDEA — beginning with its history, the recognition of autism as a covered disability, and the changes in the IDEA throughout the 1990s up through the No Child Left Behind Act. The reauthorized IDEIA will also be analyzed, and the impact of the changes will be discussed. Finally, in Part VI and VII, judicial interpretations and applications of the IDEIA will be discussed, and the public policy implications will be explored.

II. AUTISM: A LIFE-LONG PERVASIVE DEVELOPMENTAL DISORDER.

The term “autism” encompasses a spectrum of disorders ranging along a continuum of severity level. The most severe forms include autistic disorder, Rett’s syndrome, and childhood disintegrative disorder, while less severe forms can include PDD-NOS and Asperger’s syndrome.²⁶ Children with more severe forms of autism often also have mental retardation and may be nonverbal, while children with less severe forms may have relatively good verbal skills but have marked delays in social interaction.²⁷ Although not all researchers agree, one common way by which children’s diagnoses are classified along the continuum is by their scores on IQ tests, which are commonly administered as a part of the diagnostic evaluation process.²⁸ Children with autism spectrum disorders whose IQs fall below seventy are diagnosed with more severe forms, while children whose IQs are in the normal range are diagnosed with Asperger’s syndrome or PDD-NOS.²⁹

Diagnoses require a long observation and evaluation process during which a battery of psychological tests are administered and the children’s behaviors are observed.³⁰ As more knowledge has been gained about ASDs, more children are being diagnosed at increasingly younger ages, which can provide an excellent opportunity to provide needed behavioral, educational, and therapeutic interventions from early on, allowing children with ASDs better prognoses than similar children in the past.³¹ Although society now has a

25. *Id.* at 204.

26. NIMH, *supra* note 6, at 2.

27. National Institute of Mental Health, *Autism Spectrum Disorders: Pervasive Developmental Disorders*, 2007, available at <http://www.nimh.nih.gov/health/publications/autism/nimhautismspectrum.pdf>.

28. Don J. Siegel et al, *Wechsler IQ Profiles in Diagnosis of High-Functioning Autism*, 26 J. OF AUTISM & DEVELOPMENTAL DISORDERS 389 (1996).

29. NIMH, *supra* note 6, at 2.

30. *Id.* at 13-15.

31. American Academy of Neurology, *Practice Parameter: Screening and Diagnosis of Autism*, 55 NEUROLOGY 468, 469 (2000), available at

better idea about how to help these children, many parents who have children with ASDs report feeling despair and hopelessness upon learning their children have autism.³² Unfortunately, the research-based, intensive early interventions can be extremely expensive and are not available in every community. Even when parents are able to afford the expensive therapies, the level of advocacy required by the parents of children with autism can be exhausting and overwhelming.

Although the behaviors of children with ASDs differ in severity, all children with ASDs share global delays in the ability to understand social interaction and to engage in back-and-forth communication (expressive and receptive language).³³ Children with ASDs may also have global delays in occupational-motor skills and cognitive skills. Similarly, children with ASDs often have comorbid diagnoses that can include seizure disorder, fragile X syndrome, mental retardation, anxiety, and depression.³⁴

A. Asperger's Syndrome

Children with Asperger's syndrome ("AS") differ from children with other autism spectrum disorders in the severity of the symptoms and the lack of significant language delays.³⁵ While they may seem socially aloof, these children desire social interaction with others.³⁶ However, they lack the ability to understand how to interact appropriately.³⁷ According to the National Institute of Health:

Asperger syndrome (AS) is a developmental disorder that is characterized by: 1) limited interests or an unusual preoccupation with a particular subject to the exclusion of other activities; 2) repetitive routines or rituals; 3) peculiarities in speech and language, such as speaking in an overly formal manner or in a monotone, or taking figures of speech literally; 4) socially and emotionally inappropriate behavior and the inability to interact successfully with peers; 5) problems with non-verbal communication, including the restricted use of gestures, limited or inappropriate facial expressions, or a peculiar, stiff gaze; and 6) clumsy and uncoordinated motor movements.³⁸

<http://www.aan.com/professionals/practice/pdfs/g10063.pdf>.

32. Autism Speaks *How to Cope: Coping Strategies*,

<http://www.autismspeaks.org/howtcope/strategies.php> (last visited Nov. 15., 2008).

33. NIMH, *supra* note 6, at 1.

34. *Id.* at 9-11.

35. AM. PSYCHOLOGICAL ASSOC., DIAGNOSTIC STATISTICAL MANUAL OF MENTAL DISORDERS IV 299.80 (1994) [hereinafter DSM-IV].

36. Ami Klin & Fred R. Volkmar, *Asperger's Syndrome: Guidelines for Assessment and Diagnosis*, 1995, available at

<http://www.med.yale.edu/chldstudy/autism/resources/docs/asdiagnosis.pdf>.

37. AutismToday.com, *supra* note 5.

38. National Institute of Neurological Disorders & Stroke, *Asperger Syndrome Fact Sheet*, 2005, http://www.ninds.nih.gov/disorders/asperger/detail_asperger.htm (last visited Sept. 27,

Children with AS typically have at least one highly restricted special interest, about which they garner a great amount of knowledge.³⁹ These children, while trying to interact with peers, may speak incessantly about their special interests to the exclusion of other topics and may have difficulty understanding why others do not share the same interest level.⁴⁰ They may receive good grades but have difficulty learning adequate social skills, an important component of the education provided by schools.⁴¹

Asperger's syndrome was originally identified by Hans Asperger in the 1940s, who observed young boys with marked social impairments, rigidity in routine, highly specialized interests, and normal intelligence.⁴² The diagnosis, while widely recognized in Europe, was not added to the Diagnostic and Statistical Manual of recognized psychiatric disorders in the United States until 1994.⁴³ AS affects boys with much greater frequency than girls.⁴⁴ For every one girl diagnosed with AS, four boys are also diagnosed.⁴⁵ Children with Asperger's syndrome have the best prognoses of all of the ASDs, and with early and appropriate intervention, many can lead normal lives.

B. Pervasive Developmental Disorder - Not Otherwise Specified

Children who receive a diagnosis of pervasive developmental disorder-not otherwise specified ("PDD-NOS") share some diagnostic characteristics with children diagnosed with autistic disorder but are not diagnosed with AD because of the presence of "late age onset, atypical and/or sub threshold symptomology."⁴⁶ Children diagnosed with PDD-NOS have some diagnostic criteria for an ASD but do not have all of the characteristics needed to diagnose a specific disorder. Children are diagnosed with PDD-NOS when they have "a severe and pervasive impairment in the development of reciprocal social interaction or verbal and nonverbal communication skills, or when stereotyped behavior, interests, and activities are present."⁴⁷ Generally, PDD-NOS is thought to fall at the milder end of the autism continuum, with prognoses not quite as good as those for Asperger's syndrome but better than those for the other ASDs.⁴⁸ Interventions used for children with PDD-NOS

2008) [hereinafter *Asperger Syndrome Fact Sheet*].

39. Klin & Volkmar, *supra* note 36.

40. *Asperger Syndrome Fact Sheet*, *supra* note 38..

41. BRENDA SMITH MYLES ET AL., LIFE JOURNEY THROUGH AUTISM: AN EDUCATOR'S GUIDE TO ASPERGER SYNDROME 2 (2005), available at http://www.researchautism.org/resources/OAR_Guide_Aasperger.pdf.

42. *Id.* at 1.

43. *Id.*

44. *Asperger Syndrome Fact Sheet*, *supra* note 38.

45. *Id.*

46. Autism Society of America, *Pervasive Development Disorders (PDD)*, Jan. 30, 2008, http://www.autism-society.org/site/PageServer?pagename=about_what_is_PDD#PDDNOS (last visited Aug. 28, 2008).

47. *Id.*

48. Mai Anh K. Nguyen, *Autism and Language Disorders*, in CASE BASED PEDIATRICS FOR MEDICAL STUDENTS AND RESIDENTS, 40, 41 (Loren G. Yamamoto et al., eds., 2004),

should be very structured, as should those implemented for children with other ASD diagnoses.⁴⁹

C. *Autistic Disorder or Kanner's Autism*

Autistic disorder, or Kanner's autism, is what most people generally think of when they hear the word "autism." Children with Kanner's autism fall on the more severe end of the spectrum. These children show marked impairments in social interaction and communication, combined with repetitive behaviors (i.e., spinning, twirling, hand-flapping, or other stereotyped behavior) and significant delays in the ability to play imaginatively.⁵⁰ Many children with Kanner's autism are nonverbal and appear disinterested in other people.⁵¹ The age of onset for a diagnosis of Kanner's autism is prior to age 3.⁵²

D. *The Rare ASDs: Rett's Syndrome and Childhood Disintegrative Disorder*

Rett's syndrome and childhood disintegrative disorder round out the five disorders comprising the autism spectrum disorders. These disorders are very rare and are marked by the loss of previously gained skills.⁵³ Both Rett's and Childhood Disintegrative Disorder fall on the severe end of the ASD continuum.⁵⁴

Children with Rett's syndrome develop normally following birth and then begin to lose previously acquired psychomotor skills, especially skills involving the hands.⁵⁵ Following this loss, children with Rett's begin to engage in stereotyped hand movements, including hand-wringing.⁵⁶ Beginning at age five months, the rate of growth in head circumference slows markedly, and these children lose the ability to engage socially and have severe delays in language.⁵⁷ Most children diagnosed with Rett's syndrome are girls.⁵⁸ Rett's syndrome is very rare, appearing in only one out of 10,000 births.⁵⁹

Children with Childhood Disintegrative Disorder develop normally for the first two years of life.⁶⁰ Beginning at age two, the children regress in at least two developmental areas, including losing language skills, social skills,

available at <ftp://ftp.hawaii.edu/outgoing2/loreny/pedtext5.pdf>.

49. NIMH, *supra* note 6 at 18.

50. DSM-IV, *supra* note 35, at 299.00.

51. *Id.*

52. NIMH, *supra* note 6, at 2.

53. *Id.*

54. *Id.*

55. *Id.* at 4.

56. *Id.*

57. *Id.* at 2.

58. *Id.* at 4.

59. *Id.* at 3.

60. *Id.*

potty-training, play, or motor skills.⁶¹ Mostly affecting males, Childhood Disintegrative Disorder is exceedingly rare; only two out of 100,000 children with autism spectrum disorders have a specific diagnosis of Childhood Disintegrative Disorder.⁶²

Like the three more common ASDs, interventions used with children who are diagnosed with Rett's syndrome or childhood disintegrative disorder focus on the individual child's developmental needs. The goal of therapeutic interventions is to increase the child's functional level while minimizing delays.⁶³ Like all autism spectrum disorders, there is no cure for Rett's or Childhood Disintegrative Disorder. However, the appropriate use of research-based therapeutic interventions can help all children with ASDs function more normally.

III. RESEARCH-BASED INTERVENTIONS

Research has proven applied behavioral analysis and LOVAAS education interventions to be effective interventions for children with ASDs.⁶⁴ A third method, TEACCH, is an instructional method focused solely on routines, schedules, and structuring and, as such, is not an actual therapy but rather a tool that teachers can use in planning.⁶⁵ This article focuses on the ABA and LOVAAS methods, as research consistently has demonstrated their efficacy in the treatment of children with autism spectrum disorders.

A. *Applied Behavioral Analysis*

The applied behavioral analysis ("ABA") intervention is an approach based on principles of learning theory in which children with ASDs are taught to increase desirable social behaviors while simultaneously documenting that the use of the intervention resulted in the increase.⁶⁶ Children with autism are provided support with ABA in order to increase desirable behaviors, to learn and maintain new skills, to teach children how to apply newly learned skills in a multitude of settings, and to reduce problematic behaviors through the implementation of environmental modifications.⁶⁷

61. *Id.*

62. *Id.*

63. Scott M. Myers et al., *Management of Children with Autism Spectrum Disorders*, 120 *Pediatrics* 1162, 1163 (2007), available at <http://pediatrics.aappublications.org/cgi/reprint/120/5/1162?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&fulltext=myers&searchid=1&FIRSTINDEX=0&volume=120&issue=5&resourcetype=HWCIT>.

64. John. J. McEachin et al., *Long-Term Outcome for Children with Autism Who Received Early Intensive Behavioral Treatment*, 4 *AM. J. ON MENTAL RETARDATION* 359, 359 (1993), available at <http://ctfeat.org/articles/lovaas93.htm>.

65. Stephen Edelson, *Structured Teaching—The TEACCH Method* (2007), <http://www.autism.com/families/therapy/teacch.htm> (last visited Aug. 27, 2008).

66. Myers et al., *supra* note 63, at 1164.

67. See generally Svein Eikeseth et al., *Outcome for Children with Autism Who Began Intensive Behavioral Treatment Between Ages 4 and 7: A Comparison Controlled Study*, 31

Children with ASDs have much greater difficulty interpreting social cues than do normally developing children.⁶⁸ ABA focuses on modifying and structuring the learning environment to minimize distractions and intensify learning opportunities.⁶⁹ Applied behavioral analysis is widely accepted by researchers as the best intervention method for children with autism spectrum disorders.⁷⁰ The method focuses on objectively observing behaviors, applying behavioral interventions, and documenting the changes in frequency of those behaviors.⁷¹ Research supporting the validity and use of ABA dates back to the 1960s and has been replicated in hundreds of subsequent studies.⁷² According to the 1999 Surgeon General's Report on Mental Health, "thirty years of research demonstrated the efficacy of applied behavioral methods in reducing inappropriate behavior and in increasing communication, learning, and appropriate social behavior."⁷³

B. LOVAAS

The LOVAAS method is best characterized as an intensive subset of applied behavioral analysis. This method arose from the research of Ole Lovaas, who used intensive ABA techniques with autistic children for forty hours per week in both home and school settings.⁷⁴ Children in the treatment group — as opposed to children in the control group (those not receiving the intensive intervention) — showed significant improvements over the six years of treatment. Forty-seven percent of children in the treatment group received passing grades in a regular first-grade setting and scored in the average IQ range, while only one child in the control group was able to do both.⁷⁵ Only two children in the treatment group required placement in a profoundly mentally retarded classroom, where students had IQs in the 40s.⁷⁶ Twenty-one children in the control group required placement in such a classroom.⁷⁷ Children in the treatment group showed improvements in IQ, with a mean score of 83.3; however, children in the control group had no improvements in

BEHAV. MODIFICATION 264 (2007) (stating that treatment based on applied behavioral analysis may facilitate clinically significant gains in intellectual, social, emotional, and adaptive functioning).

68. MYLES ET AL, *supra* note 39, at 13; NIMH, *supra* note 6, at 6.

69. Myers et al., *supra* note 61, at 1163-64.

70. See Jacobson et al., *supra* note 10, at 204.

71. Myers et al., *supra* note 61, at 1163.

72. Jacobson et al., *supra* note 10, at 204.

73. DEP'T OF HEALTH & HUM. SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL, OTHER MENTAL DISORDERS IN CHILDREN & ADOLESCENTS (1999), available at <http://www.surgeongeneral.gov/library/mentalhealth/chapter3/sec6/html#autism>.

74. O. Ivar. Lovaas, *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*, 55 J. CONSULTING & CLINICAL PSYCHOL. 3, 3 (1987) [hereinafter *Behavioral Treatment*].

75. *Id.*

76. *Id.*

77. *Id.*

IQ, with a mean score of 53.3.⁷⁸

A 1993 follow-up study revisited the nine children who made the greatest improvement in Lovaas' original 1987 study.⁷⁹ Trained psychologists were not told the children had diagnoses of ASDs. When not presented with this information, the psychologists were unable to differentiate these nine children from normally developing children, clearly evidencing the benefits of the six years of intensive intervention from the 1980s.⁸⁰

C. Public and Judicial Backlash Against Utilization of the Proven Methods

There has been both a public and a judicial backlash against providing expensive educational methods to teach children with autism, especially in consideration of educational funding shortages. The publication of Lovaas' research combined with increasing diagnoses of autism brought an increased demand for ABA and LOVAAS therapeutic interventions.⁸¹ Public reaction has been negative, with pundits arguing that paying for expensive therapies for disabled children comes at the expense of those in general education.⁸²

Rising incidences of autism have caused the number of children receiving educational services under the IDEA to increase astronomically, leading to calls for restrictions on eligibility.⁸³ During the ten-year period from 1993 to 2002, the number of autistic children between the ages of six to twenty-one receiving services under the IDEA increased from under 20,000 in 1992 to over 163,000 in 2003, an increase of 805%.⁸⁴ Costs for educating children with autism under the IDEA are approximately three times as much as the cost for educating children without disabilities. During the 1999 to 2000 school year, the cost of educating a child with autism was \$18,790, while the cost of educating a child without a disability was \$6,556.⁸⁵

Courts are responding to the public's demands by placing increased burdens of proof on parents seeking needed services for their disabled children, including waiting until the child demonstrates serious academic failure before allowing intervention under the IDEA.⁸⁶ This is unfortunate because research has shown that, the earlier interventions begin for children with autism, the greater chance they have to succeed. Most autism researchers assert that interventions should begin in the toddler or preschool years to minimize academic and social failures.⁸⁷ Since the 2001 passage of the No Child Left

78. *Behavioral Treatment*, *supra* note 74, at 3.

79. McEachin et al., *supra* note 64, at 359.

80. *Id.*

81. See Jacobson et al., *supra* note 10, at 202.

82. Hensel, *supra* note 11, at 1148-49.

83. Hensel, *supra* note 11, at 1149.

84. HOLLENBECK, *supra* note 2, at 1.

85. U.S. GOV'T ACCOUNTABILITY OFFICE, No. GAO-05-220, SPECIAL EDUCATION: CHILDREN WITH AUTISM 24 (2005), available at <http://www.gao.gov/new.items/d05220.pdf>.

86. Hensel, *supra* note 11, at 1149, 1151.

87. Michael D. Powers, *What Is Autism?*, in CHILDREN WITH AUTISM: A PARENT'S GUIDE 28 (Michael D. Powers ed., 2000).

Behind Act, school funding problems have increased significantly, further complicating the picture.⁸⁸

IV. THE NO CHILD LEFT BEHIND ACT OF 2001

A. Overview

In 2001, the United States Congress passed President Bush's pet education initiative, the No Child Left Behind Act ("NCLB").⁸⁹ President Bush subsequently signed the Act into law and it became effective in fiscal year 2002.⁹⁰ NCLB relies on results from assessment tests to measure student improvement and achievement. In order to accomplish this goal, NCLB requires states to set educational goals for their students according to assessment results.⁹¹ Students must make annual improvements on the assessments or states lose federal educational funding.⁹² Finally, all students are required to show these achievement improvements by 2014.⁹³

One of the stated goals of NCLB is to "determin[e] which educational programs and practices have been proven effective through rigorous scientific research" and then to fund these programs with federal dollars.⁹⁴ NCLB, however, allows the states to set student performance goals and devise their own NCLB-required assessments.⁹⁵ Many states, fearing the loss of federal funds, reacted by "dumbing down" their educational performance goals for students in order to demonstrate "progress."⁹⁶ This, in effect, rewards states for setting low standards.⁹⁷

States rely on improvements on annual assessments to determine whether the schools have demonstrated adequate yearly progress ("AYP").⁹⁸ Improvements are measured according to preset levels.⁹⁹ The AYP goals include all students, even those students with disabilities. While students with disabilities may be able to take alternative assessments in order to count

88. National Education Association, *supra* note 19.

89. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

90. *Id.*

91. *Id.*

92. Michael Metz-Topodas, Comment, *Testing – The Tension Between the No Child Left Behind Act and the Individuals with Disabilities Education Act*, 79 TEMP. L. REV. 1387, 1389 (2006).

93. *Id.*

94. U.S. Department of Education, Four Pillars of NCLB, 2004, <http://www.ed.gov/nclb/overview/intro/4pillars.html> (last visited September 30, 2008).

95. Metz-Topodas, *supra* note 93, at 1390-91.

96. George Allen, *Stop Dumbing Down America - Reform the No Child Left Behind Act*, WASH. TIMES, Jul. 29, 2008, at A25; Michael Winerip, *Standardized Tests Face a Crisis Over Standards*, N.Y. TIMES, Mar. 22, 2006, at B7.

97. William Duncombe et al, *The No Child Left Behind Act: Have Federal Funds Been Left Behind?*, 36 PUB. FIN. REV. 381 (2008).

98. Metz-Topodas, *supra* note 93, at 1390-91.

99. *Id.* at 1391.

toward a school's AYP, the total number of students in a district who are administered such alternative assessments cannot exceed one percent.¹⁰⁰

In addition to states lowering performance standards in order to meet AYP and protect federal funding, school districts have responded by teaching children test-taking skills in order to show artificial improvements and, therefore, maintain educational funding.¹⁰¹ This can be especially problematic when taking into consideration the IDEA's mandate that children with disabilities receive a free and appropriate education. Teaching disabled children how to take a test is not the most appropriate educational approach for many disabled children, including children with autism spectrum disorders.

B. NCLB Has Never Been Fully Funded

Since it became law, NCLB has never been fully funded. For example, the federal government earmarks additional funds for schools that are located in high-poverty and high needs areas or are failing to meet AYP. These schools are designated as "Title I" schools, and the additional services they are supposed to provide to improve are called "Title I services." Congressional authorization for Title I services under NCLB for 2006 was 22.75 billion dollars, but only 12.7 billion dollars was actually appropriated.¹⁰² The ten billion dollar shortfall was passed on to states and local school districts,¹⁰³ resulting in fewer teachers and, ultimately, larger classroom sizes.

C. NCLB and the IDEA prior to 2004

At times, the mandates of NCLB countered the guarantees and mandates of the IDEA prior to the 2004 reauthorization. The IDEA's goal of providing a free and appropriate education to all students abutted NCLB's goal of assessment-based instruction to show performance-related achievement. Teaching a disabled child to take a test or focusing on an assessment could run counter to the child's most appropriate educational approach and could even be detrimental to the child.

According to the IDEA, parents have the right to participate fully in the development of their child's Individualized Education Plan ("IEP").¹⁰⁴ Parents have the right to disagree with and refuse to sign the developed IEP.¹⁰⁵ Accordingly, the emphasis is on "individualized" education — an education plan designed for the individual child's unique educational needs. However, NCLB's stated goal of improving standardized achievement of all students

100. *Id.* at 1394.

101. Winerip, *supra* note 97.

102. Michael A. Resnick, National School Boards Association, *Congress Turns its Back on Education*, FED. ACTION ALERT, Jun. 2006, at 1, available at <http://www.nsba.org/MainMenu/Advocacy/Archives/FederalActionAlertsArchive/ActionAlertCongressTurnsItsBackonEducation.aspx>.

103. *Id.*

104. 20 U.S.C. § 1414(d)(1)(B)(i) (Supp. 2005).

105. 20 U.S.C. §§ 1414(a)(1)(D)(ii), (d)(1)(C)(iii) (Supp. 2005).

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seemingly forces the inclusion of this mandate within an IEP without parental consent or approval.

The 2004 reauthorization of the IDEA realigned the IDEA with NCLB.¹⁰⁶ The changes circumscribed parents' due process rights, altered eligibility criteria for learning disabled students, and made discipline for disabled students harsher.¹⁰⁷

V. THE INDIVIDUALS WITH DISABILITIES IN EDUCATION ACT

A. IDEA History

The IDEA was originally known as the Education for All Handicapped Children Act of 1975 ("EAHCA").¹⁰⁸ The passage of the EAHCA grew out of the disability rights movement of the early 1970s.¹⁰⁹ Prior to its passage, many children with disabilities had limited access to public education; a great number of children were kept out of public schools by school officials and laws.¹¹⁰ In the early 1970s, disability advocates sought integration of disabled children into schools and gained momentum through early court victories.¹¹¹ The EAHCA guaranteed children with disabilities access to public schools with support as needed.¹¹² A 1986 amendment to the EAHCA lowered the age of eligibility for special services to three-years-old, in recognition of the importance of early intervention.¹¹³ The 1986 amendment also established Part H, which provided assistance to children who needed it from birth to age three.¹¹⁴ Prior to 1990, the IDEA did not cover autism. A 1990 amendment added autism as a covered disability.¹¹⁵ The 1990 and 1991 amendments also changed the name of the Act to the IDEA.¹¹⁶

After these important amendments, autism rates increased more than 200% through the 1990s. In 1990, the incidence of autism was around three in 10,000 children.¹¹⁷ The most recent comprehensive study found the incidence of autism spectrum disorders to be seven in 1000 children, or one in 150.¹¹⁸

106. Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 8 (2006).

107. See generally MILLER, *supra* note 16.

108. Hensel, *supra* note 11, at 1148.

109. *Id.*

110. *Id.*

111. *Id.* at 1147-48.

112. *Id.*

113. Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145 (codified as amended in scattered sections of 20 U.S.C.).

114. *Id.*

115. Lisa J. Rudy, *Is Autism on the Rise?* (2006); available at <http://autism.about.com/od/causesofautism/p/ontherise.htm> (last visited October 18, 2008).

116. Hensel, *supra* note 11, at 1147-48.

117. Salynn Boyles, *Centers for Disease Control: Autism Rates are Higher Than Thought*, WebMD Health News (2002); available at <http://www.webmd.com/mental-health/news/20021231/cdc-autism-rates-higher-than-thought> (last visited October 19, 2008).

118. AUTISM & DEVELOPMENTAL DISABILITIES MONITORING NETWORK, *supra* note 3, at

Researchers are unclear why the rates are increasing so rapidly. The increase in diagnoses may be partly attributable to an improved understanding of autism by practitioners and, therefore, improved diagnoses, as well as the recognition of Asperger's syndrome as an ASD in the United States as of 1994.¹¹⁹

B. IDEA Reauthorization of 2004 and Restriction of Rights

In 2004, the IDEA was reauthorized as the Individuals with Disabilities in Education Improvement Act ("IDEIA").¹²⁰ The reauthorization brought multiple changes. One of the goals of the reauthorization was to realign the IDEA with the goals of NCLB.¹²¹ The reauthorization resulted in some significant changes, including changes in the allocation of burden of proof, recovery of expert witness fees, and recovery of attorneys' fees.¹²² Most of these changes limit families' rights to recourse under the IDEA.

In order to bring the IDEA into alignment with NCLB, Congress altered performance goals of students with disabilities and required inclusion of disabled children in statewide NCLB assessments. Performance goals under the IDEA are now defined the same for all students, regardless of disability status.¹²³ Children with disabilities are now required to be included in the statewide NCLB assessments and as such, are included in the annual improvement standards which are tied to school funding.¹²⁴

The reauthorization of the IDEA further complicated the steps parents must complete before seeking redress from the court system to resolve a dispute over their child's IEP. Parents must participate in mandatory arbitration with the school district before exercising their due process rights.¹²⁵ Additionally, parents must bring an action within two-years of the violation of the IDEIA.¹²⁶ The clock begins ticking from the time the parents "knew or should have known that a violation occurred."¹²⁷ If the parents' claim is found to be unreasonable or without foundation, the family's attorney can be ordered to pay the school district's attorney fees.¹²⁸

1. Attorney Fee Recovery

The IDEIA altered the procedure parents must satisfy before exercising their due process rights to seek redress when they disagreed with their child's IEP. Under the IDEIA, school districts may recovery attorney fees from

31.

119. *Id.* at 5.

120. IDEIA, *supra* note 14, at 1.

121. MILLER, *supra* note 16, at 1.

122. *Id.* at 5.

123. *Id.* at 2.

124. *Id.*

125. *Id.* at 3.

126. *Id.*

127. *Id.*

128. *Id.*

parents if the complaint is “frivolous, unreasonable, or without foundation.”¹²⁹ This change allows the same potential liability in due process hearings that was previously only available when actions were filed in court and could potentially have a chilling effect, leaving parents and their attorneys less willing to seek due process in order to change a child’s IEP.¹³⁰

2. Encouraging Settlement

The reauthorization of the IDEA strongly promotes settlement by mandating the availability of mediation at all times — even prior to or independent of a parent filing a complaint.¹³¹ If parents are afraid of being potentially liable for attorney fees for filing a due process complaint, mediation may very likely replace due process hearings.¹³²

3. Mandatory Resolution

If parents file a due process complaint, the IDEIA requires parents to attend a mandatory resolution session during which the parties discuss the basis of the complaint.¹³³ If the parents do not bring an attorney, the school district cannot bring an attorney either. However, school districts have much more experience than typical parents in navigating due process complaints under the IDEIA. So even if neither party brings an attorney, parents would still be in an unequal bargaining position.¹³⁴ If an agreement is reached, the parties sign a legally binding document at the resolution session.

VI. JUDICIAL INTERPRETATIONS OF THE IDEA INCREASINGLY

RESTRICTIVE ON PARENTS’ RIGHTS

A. Defining FAPE: The Rowley Decision

Although the IDEA/EAHCA of 1975 guaranteed all children a “free and appropriate education,” the Act did not define what constituted such an education. The Supreme Court enunciated the original standard for determining what constitutes an appropriate education in *Board of Education v. Rowley* in 1982.¹³⁵ The case arose when Amy Rowley, a deaf girl, began attending public school. The school sent her teachers to a sign language class, and Amy’s IEP stated she would be educated in a regular classroom using a special hearing aid. But her IEP did not provide for a sign language interpreter in the classroom, even though Amy and her parents — who were also deaf — exclusively used sign language at home.¹³⁶ Rowley’s parents sued, arguing the school failed to provide their daughter with a free and appropriate education as

129. Weber, *supra* note 107, at 27-28; 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III) (Supp. 2005).

130. Weber, *supra* note 107, at 30.

131. § 1415(e)(1).

132. Weber, *supra* note 107, at 30.

133. MILLER, *supra* note 16, at 3.

134. Weber, *supra* note 107, at 31.

135. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

136. *Id.* at 184.

required by the IDEA/EAHCA.¹³⁷

The Supreme Court held that the IEP does not have to provide the most beneficial education for the student's disability but, rather, that the IEP has the potential to give some benefit in order to provide a free and appropriate public education.¹³⁸ According to the Court, the *Rowley* test is two-fold: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"¹³⁹ Accordingly, the Court established a principle of deference to the school systems as well as to their choices in teaching methodologies.

B. Judicial decisions Post Reauthorization and Further Restriction of Rights

1. Expert Witness Fees

In *Arlington Central School District v. Murphy*, the Supreme Court held that expert witness fees are not recoverable by parents under the IDEA's fee-shifting provisions, even if the parents prevail.¹⁴⁰ The Murphy family had earlier filed suit against the school district under the IDEA seeking private school tuition reimbursement, because the public school was unable to provide a free and appropriate public education for their child.¹⁴¹ After winning the lawsuit, the family sought reimbursement from the school district for expert witness fees they had incurred through employing an educational consultant.¹⁴²

The IDEA contains a fee-shifting provision that allows prevailing parents to be awarded "reasonable attorneys' fees as part of the costs."¹⁴³ The Murphy's relied on this provision, arguing the expert witness fees paid to the educational consultant during their IDEA hearing process were "part of the costs," and, as such, were recoverable under the provision.¹⁴⁴ The Court disagreed, stating that expert witness fees were not recoverable under the IDEA provision.¹⁴⁵ Although they might be fees incurred through the litigation process, the Court stated they were not attorney fees and so were not recoverable.¹⁴⁶

2. Allocation of the Burden of Proof

Congress did not indicate which party bears the burden of proof when it reauthorized the IDEA in 2004. Courts and hearing officers were much

137. *Id.* at 179.

138. *See id.* at 203.

139. *Id.* at 206-07.

140. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 303 (2006).

141. *Id.* at 294.

142. *Id.*

143. 20 U.S.C. § 1415(i)(3)(B) (Supp. 2005).

144. *Arlington*, 548 U.S. at 296.

145. *Id.* at 303.

146. *Id.* at 297-98.

divided on who bore the burden of proof concerning the validity and appropriateness of an IEP.¹⁴⁷ In 2005, the Supreme Court decided *Schaffer ex rel Schaffer v. Weast*, in which they allocated the burden of proof to the party seeking relief.¹⁴⁸ In due process settings, the party seeking relief for an ill-conceived IEP is generally the parents or guardians of the disabled child, and the parents or guardians are at a distinct disadvantage, since schools are much more privy to the information and the process.

3. Recovery of Attorney Fees

Although the IDEIA contains a fee-shifting provision allowing recovery of attorney fees by the prevailing party,¹⁴⁹ courts have prevented parents from seeking reimbursement of attorney fees upon settlement, even when they prevail, through the application of *Buckhannon Board & Care Home v West Virginia Department of Health & Human Resources* to IDEIA cases.¹⁵⁰ In applying *Buckhannon*, courts have said there must be a judicial order awarding parents' relief for the parents to qualify as a prevailing party.¹⁵¹ Therefore, if the school district settles with parents prior to the complaint reaching court, then parents cannot recover attorney fees.

VII. PUBLIC POLICY CONSIDERATIONS

A. Cost Benefit Analysis of Intensive Early Intervention

The cost of educating a child with an ASD is at least three times as expensive as educating a non-disabled child.¹⁵² This figure does not even take into account the use of intensive early behavioral intervention methods, such as applied behavioral analysis and LOVAAS, which have been proven through years of research to be the most effective interventions available for the treatment of children with autism spectrum disorders. Research has shown that children who receive ABA methods beginning when they are very young and at intense levels can achieve normal or near-normal functioning.¹⁵³ In 1996, the annual cost of providing early intensive intervention using a LOVAAS approach in Pennsylvania was approximately \$33,000.¹⁵⁴ The researchers used the cost of three years of intensive ABA for an average per pupil cost of \$100,000, which is the average length of time needed for the intensive

147. Thomas A. Mayes et al., *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27, 31 (2005).

148. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

149. 20 U.S.C. § 1415(i)(3)(B) (2005).

150. See, e.g., *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16 (1st Cir. 2005); *Doe v. Boston Pub. Sch.*, 358 F.3d 20 (1st Cir. 2004); *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003).

151. MILLER, *supra* note 16, at 5.

152. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 85, at 10.

153. *Behavioral Treatment*, *supra* note 78, at 3.

154. Jacobson et al., *supra* note 10, at 207.

services.¹⁵⁵ With inflation, the annual costs are even higher. However, the cost-benefit analysis of providing intensive, early, appropriate intervention methods like ABA or LOVAAS to autistic children demonstrates that while it is expensive to do in schools, the overall societal cost of not providing the services will be much higher as the children become adults.¹⁵⁶

Studies have shown that ABA and LOVAAS methods, when provided consistently from a young age, can help children with autism learn to function either normally or near-normally.¹⁵⁷ In other studies, autistic children who received early intensive behavioral intervention demonstrated significant gains in IQ and development and that the changes can be lasting.¹⁵⁸

Children who do not receive adequate help grow to be adults who have a great likelihood of burdening the social welfare system. Since the Jacobson study, the number of people who have autism in the United States has exploded. One in 150 Americans now have autism. Using a United States population figure of 301 million,¹⁵⁹ this means roughly two million people in the United States now have an autism spectrum disorder. Autism is increasing at a rate of approximately 20% per year, and annual costs of treating autism cost the United States at least \$35 billion annually, with 90% of the cost attributable to adult services.¹⁶⁰ Within the next ten years, researchers project annual costs could increase to 200 to 400 billion dollars.¹⁶¹ The annual costs can be slashed by two-thirds through the use of intensive early behavioral intervention with children identified with ASDs.¹⁶²

B. Public Policy Analysis

The burden of proof and inability to recover expert witness fees may prevent parents from seeking redress for poorly developed individualized education plans. Schools have experts at their disposal, while parents likely do not have the expertise to adequately prove whether or not a disputed IEP is indeed appropriate or inappropriate for their child. Expert witnesses are expensive, and many parents may simply be unable to afford to hire them. Without an expert witness, however, it would be difficult for parents to meet their burden of proof.

155. *Id.* at 208.

156. *Id.* at 213, 217.

157. *Behavioral Treatment*, *supra* note 78 at 3; John. J. McEachin et al., *supra* note 64, at 359-72.

158. Jay S. Birnbrauer & David. J. Leach, *The Murdoch Early Intervention Program After 2 Years*, 10 BEHAV. CHANGE 63, 69 (1992).

159. Central Intelligence Agency, *The World Factbook - United States* (2008), <https://www.cia.gov/library/publications/the-world-factbook/print/us.html>.

160. HOLLENBECK, *supra* note 2; Medical News Today, *Autism Has High Costs to U.S. Society*, Apr. 27, 2006, <http://www.medicalnewstoday.com/articles/42260.php> (last visited Oct. 19, 2008).

161. Autism Society of Boulder County, *About Autism: Prevalence*, 2007, <http://autismboulder.org/prevalence.html> (last visited Oct. 1, 2008).

162. *Id.*

In a recent decision, the Supreme Court held that parents can represent their own children *pro se* in the federal court system in suits seeking changes to an IEP under the IDEA.¹⁶³ The decision ostensibly appears to grant parents more rights, but when taken into context with the burden of proof allocation and the non-reimbursement of expert witness fees, this decision does not appear to help parents. The complexities of the administrative process and the heavy allocation of the burden of proof make it unlikely parents will be successful, and if the Court determines their suit was frivolous, they could also be forced to pay the school district's attorney fees. Individual parents, however, may not have the knowledge necessary to determine whether or not their IDEA cause of action is with merit.

With the application of the *Buckhammon* decision to IDEA cases, attorneys are less likely to take cases knowing that they will be unable to recover fees if the case settles. The IDEA, as revised, specifically encourages settlement through its mandate for availability of mediation at all stages, even prior to when a parent may find it necessary to file a complaint.

With the emphasis ABA and LOVAAS techniques place on individualized, one-on-one intensive instruction, the mandates of NCLB for assessment-based student performance and achievement, and its inclusion of children with disabilities in the required performance goals, make the implementation of the ABA/LOVAAS methods not only costly but difficult. Neither NCLB nor the IDEA have ever been fully funded.¹⁶⁴ Funding shortages for Title I services make it difficult for schools to include such expensive methods as a part of a child's IEP. Similarly, some courts have found that an appropriate education does not have to maximize a student's potential; it just has to reasonably provide potential benefit.¹⁶⁵ So although the ABA/LOVAAS methods have been shown through research to maximize the potential of autistic children, schools do not have to provide them. Instead, they can utilize other, less successful approaches.

While restrictions on parents' rights and the use of other instructional methods will save schools money, the actual costs to society of not providing ABA and/or LOVAAS methods to children with autism through IEPs will be much higher over their lifetimes. This will effectively shift the higher cost onto the public as the children become adults who rely on the social services net to the projected tune of 200 to 400 billion dollars per year within ten years. With the implementation of intensive early intervention methods, the cost can be reduced by 66% — or a savings of 132 billion to 264 billion dollars

163. Winkleman *ex rel.* Winkleman v. Parma City Sch. Dist., 550 U.S. 516, 127 S. Ct. 1994, 2006 (2007).

164. Resnick, *supra* note 103.

165. See *e.g.*, Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982); Lt. T.B. *ex rel.* N.B. v. Warwick Sch. Comm., 361 F.3d 80 (1st Cir. 2004); O'Toole *ex rel.* O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692 (10th Cir. 1998); Devine v. Indian River County Sch. Bd., 249 F.3d 1289 (11th Cir. 2001)

annually.¹⁶⁶

VIII. CONCLUSION

Although there is a public backlash against providing expensive treatments to children with autism through public schools, the expense of the intervention pales in comparison to the societal costs of providing lifetime care to adults with ASDs who do not receive these interventions as children. Several steps should be taken, both by Congress and the court system:

Congress should fully fund the IDEIA, providing the needed special education dollars. Congress should either not reauthorize NCLB or they should at the least remove children with disabilities from the assessment formula so IEPs can be designed that adequately address each child's individual educational needs. Courts should recognize the importance of including social learning for children with autism as a component of the least restrictive environment requirement of the IDEIA.

Similarly, courts should interpret the IDEIA provisions more broadly to allow parents to qualify as a prevailing party when cases settle in their child's favor without a judicial order. This would allow parents to recover expert witness fees when they prevail in a settlement agreement or a court proceeding.

The increasing prevalence of autism and the lack of a cure compel society to employ the best interventions and approaches available. Autism is not only devastating to parents, children, and families, it is fast becoming a national health crisis with an annual growth rate of approximately twenty percent.¹⁶⁷ Accordingly, the courts and Congress must seek to help as many children as possible maximize their potential through the use of proven early intervention strategies, no matter the present cost. The economic and social repercussions of failing to do so are potentially disastrous.

166. Jacobson et. al., *supra* note 10, at 207-10.

167. HOLLENBECK, *supra* note 2