

REDUCING ABA LITIGATION THROUGH
AUTISM-CENTRIC CHARTER SCHOOLS: LEGALLY VIABLE OR VULNERABLE?

Janet R. Decker

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Doctoral Committee

Suzanne E. Eckes, J.D., Ph.D.

Martha M. McCarthy, Ph.D.

Amy G. Applegate, J.D.

Samantha M. Paredes Scribner, Ph.D.

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A recent study discovered that charter schools designed for children with autism or “autism-centric charter schools” comprise half of the total number of charter schools designed for children with disabilities. However, these unique charter schools may be vulnerable to legal challenges because they may be violating the Individuals with Disabilities Education Act’s Least Restrictive Environment and Individual Education Program team decision-making requirements, as well as equal protection constitutional principles. At the same time, autism-centric charter schools may be one solution to reduce Applied Behavior Analysis (ABA) litigation which is an increasing and divisive subset of autism-related lawsuits. Thus, this study examines whether federal and state law may need to evolve in order to meet the current policy needs of the increasing number of students with autism while also decreasing expensive litigation.

First, the researcher provides an overview of the current literature examining the law and litigation relevant to autism-centric charter schools. Next, the study provides a summary of the findings gleaned from a uniquely comprehensive mixed-methods review of all the published, substantive ABA judicial decisions in order to analyze whether autism-centric charter schools are a legally viable way to reduce ABA lawsuits. The researcher offers a thorough analysis of the litigation trends and concludes that autism-centric charter schools – despite their legal vulnerabilities – may be a legally feasible solution to decrease ABA litigation. The study also provides recommendations about how to amend policy and practice to so that the educational needs of students with autism are better addressed.

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CHAPTER ONE: RESEARCH OVERVIEW

1.1 Introduction

The homepage of the New York Center for Autism Charter School Website states that it is “dedicated *exclusively* to educating students with Autism Spectrum Disorders” (emphasis added).¹ Similarly, the Website for the Autism Academy of Learning in Ohio describes its charter school as “a year-round, public school with programming designed around the needs of students with Autism Spectrum Disorders.”² Under the eligibility requirements of another charter school, The Princeton House, the Website instructs that by age six “all students *must* be diagnosed as autistic” (emphasis added).³ Interestingly, these charter schools designed specifically for students with autism or “autism-centric charter schools” comprise half of the total number of charter schools designed for children with disabilities.⁴ Yet, the emergence of this special type of charter school also creates a number of important legal and policy tensions. Thus, federal and state law may need to evolve in order to meet the current policy needs of students with autism.

To explore these issues, this study begins by presenting an overview of the current research, which examines the law and litigation relevant to autism-centric charter schools. In addition to the research literature, background information about the three controversial topics that intersect in this study - autism, charter schools, and special education law - is provided. Yet, the focus of this research is to analyze whether autism-centric charter schools are a legally viable

¹ New York Center for Autism Charter School, http://www.newyorkcenterforautism.com/index_flash.htm (last visited July 22, 2010).

² Autism Academy of Learning, <http://www.theautismacademy.org/about-the-aal/philosophy> (last visited July 22, 2010).

³ The Princeton House, <http://www.princeton-house.org/EligibilityRequirements.htm> (last visited July 22, 2010).

⁴ JULIE F. MEAD, CHARTER SCHOOLS DESIGNED FOR CHILDREN WITH DISABILITIES: AN INITIAL EXAMINATION OF ISSUES AND QUESTIONS RAISED (2008), *available at* http://www.uscharterschools.org/cs/spedp/print/uscs_docs/spedp/reports.htm.

way to reduce Applied Behavior Analysis (ABA) litigation which is an increasing and divisive subset of autism-related lawsuits. The researcher employed a uniquely comprehensive mixed-methods review of all the published, substantive ABA judicial decisions since 1975, and identified themes in the existing case law. After a summary of the findings, the researcher provides a thorough analysis of the litigation trends. A conclusion is drawn that autism-centric charter schools – despite their legal vulnerabilities – may be a legally viable way to reduce ABA litigation. Recommendations are also provided on how to amend policy and practice to better address the legal and practical tensions that arise when educating students with autism.

1.2 Statement of the Issues

As mentioned, this study examines the specific legal tensions of charter schools designed for students with autism. In general terms, autism-centric charter schools may be violating 1) LRE requirements under the Individuals with Disabilities Education Act (IDEA); 2) IEP team decision-making requirements under IDEA; and 3) the principle of equal protection pursuant to the Fourteenth Amendment of the U.S. Constitution. The occurrence of these legal tensions despite the potential that autism-centric charter schools could reduce ABA litigation indicates policy changes may be needed.

LRE Violations

Because autism-centric charter schools appear to be segregating children with autism from their typically developing peers, they could be found to be in violation of federal law. Specifically, IDEA stipulates that states must provide children with disabilities such as autism with a Free Appropriate Public Education (FAPE) that is delivered in the Least Restrictive

Environment (LRE).⁵ In other words, students with autism must be educated with children “who are not disabled” “to the maximum extent appropriate,” and

children with disabilities, including children in public or private institutions or other care facilities, are [to be] educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁶

Most educators and parents refer to the LRE mandates under IDEA as “inclusion” or “mainstreaming.” However, a range of placement options are possible including a placement where a student spends a portion of the day in the general education classroom with non-disabled peers and a portion of the day in another setting such as a resource room that provides a smaller teacher-to-student ratio and more individualized instruction.⁷

Autism-centric charter schools may be seen as violating inclusion requirements because their students are only, or primarily educated with other students diagnosed with autism and not with typically developing peers “to the maximum extent appropriate.” Nevertheless, autism-centric charter schools seem to be emerging, which could mean that those developing these charter schools and the parents who enroll their children at autism-centric charter schools believe that the legal requirement of inclusion is not good policy for *all* children with autism.

The emergence of these schools could also suggest that parents are interested in more specialized intervention for children with autism than what the traditional schools are providing. Supporters of this theory may explain that the charter school movement has provided a vehicle to answer this unmet need. Proponents may claim that autism-centric charter schools offer parents

⁵ 20 U.S.C. § 1412 (a)(5) (2004).

⁶ 20 U.S.C. § 1412 (a)(5)(A) (2004).

⁷ Mitchell L. Yell & Antonis Katsiyannis, *Placing Students with Disabilities in Inclusive Settings: Legal Guidelines and Preferred Practices*, PREVENTING SCHOOL FAILURE, Fall 2004, at 28.

a long-awaited choice to obtain certain methodologies that traditional schools are reluctant to offer. In particular, many of the autism-centric charter schools appear to be providing ABA intervention, which is further explained in Chapter Two and is a scientifically-based intervention shown to be an effective treatment for individuals with autism.⁸ ABA is also expensive to implement, which could help explain why a substantial body of ABA litigation exists. In these disputes, parents and school districts disagree about whether providing ABA to students with autism is required as part of IDEA's FAPE entitlement.⁹ Parents may be gravitating to some autism-centric charter schools because expensive ABA treatment is being provided at public expense without the parents having to struggle or litigate to receive it for their children.

Team Decision-making Violations

Nevertheless, if parents are unilaterally deciding to enroll their children in autism-centric charter schools, then another legal problem arises. IDEA mandates that a specific group of educators, administrators, and the parents comprise a special education student's Individualized Education Program (IEP) team.¹⁰ At a minimum, the local education agency (LEA) representative and a parent must be in attendance at IEP meetings.¹¹ The IEP team must agree if the student's placement changes. Many lawsuits, including the recent U.S. Supreme Court case *Forest Grove School District v. T.A.* (2009), have occurred after parents unilaterally decided to place their children in private schools because they believed a FAPE could not be provided by their public school and later sought reimbursement from the district for the private school tuition. If the parents unilaterally decide to place their child in a private school and seek reimbursement,

⁸ See *infra* Section 2.1.

⁹ Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 UC DAVIS J. JUV. L. & POL'Y 217, 285-87 (2005).

¹⁰ 20 U.S.C. § 1412(d)(1)(B) (2004).

¹¹ 20 U.S.C. 1414(d)(1)(C) (2004).

the parents must prove 1) the public school did not provide their child with a FAPE and 2) the private school's program is appropriate.¹²

However, the law is not clear about whether parents are permitted to unilaterally transfer their children from a traditional public school to a charter school without the approval of the IEP team. Unilateral transfer into a charter school may be seen as especially problematic if the charter school provides a more restrictive environment than the traditional school. Similarly, school districts may be concerned about losing the funding that may follow students with disabilities and therefore, they may challenge parents' decisions to place children with autism in a charter schools without first convening the IEP team to reach agreement on the new placement option.

Equal Protection and Anti-discrimination Violations

First, creating publicly-funded schools that segregate students based on a certain characteristic, such as disability, runs counter to long-standing principles of equity in education. Although the Equal Protection Clause of the Fourteenth Amendment states that the government cannot deny its citizens "equal protection of the laws," disagreement exists about how this applies to students. *Brown v. Board of Education* (1954) provided some clarity when the U.S. Supreme Court held that it was unconstitutional to segregate students based on race. Since *Brown*, a proliferation of cases has further clarified the legality of separating students based on traits including ability, language, gender, and religion.¹³ Important to this study, the Court has not held that students with disabilities have the same equal protection rights as students of color. Put simply, it is easier for schools to segregate based on certain student classifications than

¹² *Burlington v. Mass. Dept. of Educ.* 471 U.S. 359 (1985).

¹³STEPHEN B. THOMAS, NELDA H. CAMBRON-MCCABE, & MARTHA M. MCCARTHY, PUBLIC SCHOOL LAW TEACHERS' AND STUDENTS' RIGHTS 187 (2009).

others. To treat students differently based on race, a school must have an *extremely* good reason defined as a “compelling governmental interest.” However, to treat students differently based on ability, a school only needs a good reason that is “rationally related” to a “legitimate” government interest.¹⁴

Therefore, it is clearly unconstitutional for public schools to segregate students based on classifications such as race; however, it is unclear whether courts would find it permissible for charter schools to segregate students based on ability level.¹⁵ Furthermore, intentional racial segregation or “*de jure* segregation” has been found to be legally impermissible in public schools; whereas, racial segregation that occurs based on individual choices or “*de facto* segregation” has withstood judicial scrutiny. Nevertheless, when faced with a real-world example, courts may have difficulties differentiating whether *de jure* or *de facto* segregation is occurring. Currently, autism-centric charter schools appear to be recruiting only students with autism, but no lawsuits challenging this issue have occurred.

It is unclear whether courts would decide that this practice is constitutional. If courts apply the *de facto/de jure* segregation principle, then they may hold that targeting students with autism is a permissible recruitment strategy. However, if an autism-charter school is found to be discriminatory in its admissions, a court may be more likely to hold that the charter school has violated the constitutional principle of equal protection. For example, parents of a child with a disability other than autism may argue that their child is entitled to a specialized education similar to what is being provided by the autism-centric charter schools. Those parents could claim that their child is being discriminated against because s/he could not be appropriately

¹⁴ *Id.*

¹⁵ See Janet Decker, Suzanne Eckes, & Jonathan Plucker, Charter schools designed for gifted and talented students: Legal and policy issues and considerations. EDUC. L. REP. (in press).

educated at the autism-centric charter school. The admission procedures for students with disabilities have been under the microscope since charter schools originated. If autism-centric charter schools are suspected of discriminatory admission practices, then equal protection protections pursuant to the Fourteenth Amendment and Section 504 of the Rehabilitation Act of 1973 could be claimed.¹⁶

The principle of equal protection is also evident in state charter school statutes. Namely, state charter statutes require charter schools to have an open-enrollment admissions policy and many have clauses that explicitly make it illegal to discriminate based on disability.¹⁷ If the schools receive Charter School Program (CSP) funding, they must employ a lottery or similar procedure to admit students when there are more applicants than seats. Yet, autism-centric charter schools appear to be enrolling *only* students diagnosed with autism. Even if these schools explain that they would admit children without a diagnosis of autism, these schools may not be conducive to teaching other students. For instance, they may only have curriculum individualized for students with autism. Courts could determine that this practice is discriminatory to students with other disabilities or to non-disabled students, and therefore, in violation of state charter school statutes in addition to federal law.¹⁸

1.3 Purpose of the Study

The overarching goal of this study is to research and analyze the legal and policy implications of autism-centric charter schools in order to shape policy decisions. This study evaluates how vulnerable autism-centric schools are to legal challenges. If litigation is probable, then the study aims to identify preventative measures that can be taken to avoid lawsuits. In

¹⁶ Julie F. Mead, *Determining Charter Schools' Responsibilities for Children with Disabilities: A Guide through the Legal Labyrinth*, 11 B.U. PUB. INT. L. J. 167 (2002) [hereinafter *Determining Charter Schools' Responsibilities*].

¹⁷ MEAD, *supra* note 4, at 13-14.

¹⁸ *Id.*

addition to preventing future lawsuits filed against autism-centric charter schools, the researcher seeks to identify whether the existence of autism-centric charter schools may be one solution to decrease the expensive and prolific ABA litigation. If autism-centric charter schools are able to withstand legal challenges, or alternatively, if policy is changed to allow for autism-centric charter schools, then these schools may provide a choice for parents such that parents are not motivated to challenge the education the traditional schools are providing their children with autism.

Thus, these schools may have emerged because there is an unmet need for students with autism in the traditional public school setting that is being met at the autism-centric charter schools. Mead began to explore this general question of why charter schools designed for students with disabilities have emerged. Some were established by teachers seeking a “particular methodology.”¹⁹ This study seeks to add to Mead’s findings about autism-centric charter schools.

Specifically, since some of these schools appear to be offering ABA intervention,²⁰ the current study analyzes ABA litigation. Past research indicates ABA lawsuits arise when parents

¹⁹ *Id.*

²⁰ *E.g.*, New York Center for Autism Charter School, http://www.newyorkcenterforautism.com/index_flash.htm (last visited July 22, 2010); Palm Beach School for Autism, <http://www.pbsfa.org/AboutUs.html> (last visited July 22, 2010); Renaissance Learning Center, <http://www.rlc2000.com/aboutus.html> (last visited July 22, 2010); Renaissance Learning Academy Charter High School, <http://www.rlacademy.com/> (last visited July 22, 2010); South Central Charter Schools, Inc., <http://www.sfacs.org/> (last visited July 22, 2010); St. Coletta Special Education Public Charter School, <http://www.stcoletta.org/index.php?page=school-program> (last visited July 22, 2010); Florida Autism Charter School of Excellence, <http://www.faceprogram.org/program-services.php> (last visited July 22, 2010); Hope Center for Autism, <http://www.hopecenterforautism.org/> (last visited July 22, 2010); Princeton House Charter School, <http://www.princeton-house.org/WhoWeAre.htm> (last visited July 22, 2010). Additionally, some of the websites of schools providing ABA services state that they are approved by the state education department and accept referrals from local school districts (e.g., The Vista School, <http://www.thevistaschool.org/enrollment.htm>, (last visited July 22, 2010)). Thus, additional non-profit private schools are receiving funding from public districts; *See* ABA Schools and Intervention, <http://rsaffran.tripod.com/schools.html> (last visited July 22, 2010); e.g., The James C. Hormel School, <http://www.viaschool.org/SchoolFAQ.aspx> (last visited July 22, 2010). In Florida, the McKay *Scholarships for Students with Disabilities Program* allows parents to enroll students at private and public schools and some of the

of children with autism challenge traditional public schools that refuse to provide ABA intervention.²¹ In sum, this study hopes to build upon the past ABA litigation research by providing a uniquely comprehensive mixed-method analysis to uncover litigation trends and determine whether autism-centric charter schools could be a solution to reduce litigation.

1.4 Research Questions

In order to analyze the legal and policy tensions surrounding autism-centric charter schools, the current study answers the following two research questions.

1. Since the enactment of IDEA, what trends have emerged in the ABA litigation involving students with autism?
2. In light of these litigation trends, are autism-centric charter schools a legally viable solution to decrease autism-related ABA litigation?

1.5 Significance of Study

The topic of autism-centric charter schools is not only timely, but also fills a gap in the research literature. Mead began the discussion about the relevant legal issues surrounding charter schools designed for students with disabilities,²² but no peer-reviewed research exists that investigates these schools. This study adds to charter school research and the legal discourse about segregating students based on ability and about special education in charter schools. Although it focuses on students with autism, connections can be drawn to other charter schools serving special student populations. Specifically, this study offers insights for policy makers,

schools approved for this scholarship include ABA private schools (e.g., Interventions Unlimited, <http://www.interventionsunlimited.com/FQA.html> (last visited July 22, 2010)).

²¹ Claire Maher Choutka, Patricia Doloughty, & Perry Zirkel, *The 'Discrete Trials' of Applied Behavior Analysis for Children with Autism: Outcome-Related Factors in the Case Law*, 38 J. SPECIAL EDUC. 95 (2004); Susan Etscheidt, *An Analysis of Legal Hearings and Cases Related to Individualized Education Programs for Children with Autism*, 28 RES. & PRACTICE FOR PERSONS WITH SEVERE DISABILITIES 51(2003); Mitchell L. Yell & Erik Drasgow, *Litigating a Free Appropriate Public Education: The Lovaas Hearings and Cases*, 33 J. SPECIAL EDUC. 205 (2000).

²² MEAD, *supra* note 4.

scholars, and practitioners interested in charter schools that serve students of color, gifted and talented students, low-income students, and students with disabilities other than autism.

Further, there is a current demand for autism-focused research. Autism is treatable and effective; scientifically-based interventions such as ABA are available. Without effective intervention, individuals with autism may never learn to communicate or become contributing members of society. In the past, ABA was only available at private settings and parents faced “an uphill battle”²³ that often involved expensive and emotionally draining lawsuits in attempts to obtain ABA intervention for their children. Since charter schools for students with autism are providing examples of how this treatment can be delivered within the public school system, it is vital to study this model and to determine whether it is legally viable.

Additionally, the prevalence of autism is on the rise²⁴ and educating and caring for individuals with autism is expensive.²⁵ As a result, many schools’ special education budgets have increased.²⁶ Yet, the increase in special education expenditures and the passage of special education laws have not alleviated concerns about limited resources. The federal government is often blamed for enacting IDEA which requires schools to provide numerous services and follow complicated procedures, but Congress has been criticized for not providing adequate funding to assist schools to be able to properly follow IDEA’s mandates.²⁷ As a result, there has been a

²³ Rachel Ratcliff Womack, *Autism and the Individuals with Disabilities Education Act: Are Autistic Children Receiving Appropriate Treatment in our Schools?*, 34 TEX. L. REV. 189, 229 (2002).

²⁴ CATHERINE RICE, PREVALENCE OF AUTISM SPECTRUM DISORDERS --- AUTISM AND DEVELOPMENTAL DISABILITIES MONITORING NETWORK, SIX SITES, UNITED STATES 2000 (2007), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5601a1.htm>

²⁵ Michael Ganz, *The Costs of Autism*, in UNDERSTANDING AUTISM: FROM BASIC NEUROSCIENCE TO TREATMENT (Steven O. Moldin & John L. R. Rubenstein eds., 2006).

²⁶ Rachel Ratcliff Womack, *Autism and the Individuals with Disabilities Education Act: Are Autistic Children Receiving Appropriate Treatment in our Schools?*, 34 TEX. L. REV. 189 (2002).

²⁷ See L. Darnell Weeden, *An Essay: Unfunded Federal Mandates: The No Child Left Behind Act and the Individuals with Disabilities Education Act*, 31 T. MARSHALL L. REV. 239 (2006).

substantial amount of special education litigation and the largest number of these lawsuits involves students with autism.²⁸

While it is true that autism-centric charter schools have not been legally challenged, it is likely that they will be in the near future. These schools exist in a context that is fraught with controversy making them ideal targets for litigation. To begin, because no cure exists for autism and there is a palpable fear that more and more children are being diagnosed with this disability, there is intense emotion and pressure surrounding intervention for these students. As a result, people tend to have strong opinions about autism. To illustrate, Paul Offit, a doctor specializing in vaccines, has spoken publically that he believes vaccines do not cause autism. In response, he has received death threats and been physically assaulted.²⁹

Similarly, intense debate surrounds the charter school movement putting these schools under a microscope of public scrutiny. Advocates who dislike charter schools may be motivated to create test cases to highlight and challenge the reality that only students with autism seem to be attending these specialized and segregated schools. The missions of these schools may be obstructed if they are legally required to admit non-disabled students or students with disabilities other than autism.

Further, policy makers, researchers, educators, and parents should be interested in learning more about autism-centric charter schools because they could potentially reduce the rising rates of ABA litigation. If ABA intervention is provided at autism-centric charter schools, then parents may be more satisfied and less litigious in response to the education their child is receiving. Thus, this study seeks to inform the discussion about potential legal and policy issues

²⁸ Perry A. Zirkel, *The Autism Case Law: Administrative and Judicial Rulings*, 17 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 84 (2002).

²⁹ PAUL A. OFFIT, *AUTISM'S FALSE PROFITS: BAD SCIENCE, RISKY MEDICINE, AND THE SEARCH FOR A CURE*. (2008).

at these schools while also answering whether autism-centric charter schools may help reduce the rates of ABA litigation.

1.6 Limitations of the Study

The data set is comprised of a comprehensive set of ABA judicial decisions; yet, much could be learned from supplementing this information with data collected from surveys, interviews, and/or observation. While the mixed-method design that focuses on a legal analysis can provide insights that a purely qualitative analysis is unable to provide, this study does not uncover the underlying reasons why autism-centric charter schools may be emerging at increasing rates.³⁰ In order to reveal motivation, policy makers, educators, and especially parents would need to be contacted. Yet, the current research does not seek their input.

Additionally, almost all of these schools are located in Florida and Ohio, thus suggesting something unique is occurring in these two particular states. While the study provides research that these states' unusual charter school statutes are part of the explanation,³¹ a complete explanation is unknown. It could be that cultural variables exist in these two locations that do not exist elsewhere. Although the data set is representative of 21 states located in 11 of the 12 U.S. Circuit Court jurisdictions, not every state is represented and administrative decisions are not included. Therefore, certain findings from this study may not be applicable to the entire country.

Finally, this study rests on the assumption that the current charter schools designed for students with autism will continue to exist and others will emerge. Yet, it is unknown whether autism-centric charter schools are part of a trend that will emerge across the nation. Charter schools risk closure if achievement levels are not met. These schools are extremely new, as are

³⁰ Additional methodological limitations such as a lack of inter-rater reliability are discussed in Chapter 3.

³¹ See *MEAD*, *supra* note 4,

the statutes in Ohio and Florida that appear to foster the majority of the schools' existence.

Thus, it is always possible that these special schools and charter schools generally are part of an educational reform that is merely temporary.

CHAPTER TWO: LITERATURE REVIEW

As mentioned in Chapter One, this study seeks to answer two main research questions. First, what trends have emerged in the Applied Behavior Analysis (ABA) litigation involving students with autism? Second, in light of these litigation trends, are autism-centric charter schools a legally viable solution to decrease autism-related ABA litigation? Prior to analyzing these questions, it is important to review the existing research relevant to special education, charter schools, and autism-related litigation.

Therefore, this chapter provides an overview of the literature relevant to this study. It not only provides a background to the present study, but also identifies gaps in the existing literature which the current study addresses. Section 2.1 provides background information about the three overarching topics of this study: 1) autism; 2) charter schools; and 3) special education law. Next, Section 2.2 summarizes the research pertaining to special education and charter schools. The discussion explains not only why charter schools face challenges when serving students with disabilities, but also what specific problems exist when charter schools serve special education students. Next, segregation at charter schools is examined in Section 2.3. The biggest body of research on this topic pertains to racial segregation; however, in addition to discussing racial segregation, this section discusses student segregation based on ability level as it is more relevant to the research questions of the present study. Section 2.4 of this chapter summarizes the legal issues affecting students with autism. In particular, the research about ABA litigation is highlighted.³²

³² Throughout this chapter, a few significant cases are summarized; however, this literature review primarily discusses articles and books. Relevant cases are included in Chapter 4.

2.1 Background Information about Autism, Charter Schools, and Special Education Law

Autism

Definition. To begin, professionals may use one type of definition to diagnose children with autism; however, it is also imperative to be aware of a more personal account of autism that can only be told by those who know children with this disorder. This section attempts to present both vantage points.

Psychology and medical professionals define autism as one of five related disorders that are classified as Pervasive Developmental Disorders (“PDD”).³³ These disorders are “characterized by severe and pervasive impairment in several areas of development: reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests, and activities.”³⁴ The five disorders classified under this umbrella include: Autistic Disorder, Retts Disorder, Childhood Disintegrative Disorder, Aspergers Disorder, and Pervasive Developmental Disorder - Not Otherwise Specified (“PDD-NOS”).³⁵ The terms “Autism Spectrum Disorder” (ASD) or “on the Spectrum” are often used to describe this group of autism-related disabilities and are commonly used interchangeably with the term “autism.”³⁶ Other professionals such as school personnel, attorneys, and judges may look to a legal definition because they are typically interested in identifying the type of services a child with autism is entitled to receive. The federal regulations providing guidance for the Individuals with Disabilities Education Act (IDEA) define autism as:

³³ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION (DSM-IV-TR) 299.00 Autistic Disorder, (2000). Oftentimes, Pervasive Developmental Disorders are also referred to as “Autistic Spectrum Disorders” or “ASD.”

³⁴ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION (DSM-IV-TR) 299.00 Autistic Disorder, (2000).

³⁵ *Id.*

³⁶ In this study, the term autism will be used to describe autism and autism spectrum disorders.

a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, which 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.³⁷

Yet, these medical and legal definitions do not present the whole picture. In order to truly understand the severity of autism, it is important to examine a broader definition offered by people who are directly affected by autism. The Autism Society, which is one of the most influential advocacy groups for individuals with autism, defines autism as a *complex* developmental disability.³⁸ The development of social interaction and communication is affected causing individuals with autism to have difficulties with verbal and non-verbal communication, social interactions, and leisure or play activities.³⁹ It is hard for children and adults with autism to communicate and relate to others and the world around them.

Parents and people who care for individuals with autism are likely to define the disorder by a variety of behaviors.⁴⁰ For instance, because a child with autism has difficulty communicating, caregivers may report that the child cries, tantrums, or exhibits aggressive behavior more often or extreme than typical children. In order to illustrate a child's social skill deficits, a parent may explain that their child avoids eye contact and being touched by others, is disinterested in people, is unaware of social cues, and does not seek the attention from others. Because children with autism have both verbal and non-verbal language deficits, they may not engage in conversation, ask questions, or even speak. Children with autism may show

³⁷ 34 C.F.R. § 300.7 (c)(1)(i) (2004).

³⁸ Autism Society of America, http://www.autism-society.org/site/PageServer?pagename=about_home (last visited July 22, 2010).

³⁹ Autism Society of America, What are Autism Spectrum Disorders, http://www.autism-society.org/site/PageServer?pagename=about_what (last visited July 22, 2010).

⁴⁰ See KAREN SIFF EXKORN, THE AUTISM SOURCEBOOK (2005); CATHERINE MAURICE, LET ME HEAR YOUR VOICE (1993).

difficulties related to play activities such as not imitating peers or playing with toys inappropriately (e.g., repetitively taking a Big Bird toy and touching walls with it instead of engaging in imaginative play).⁴¹ Caregivers also describe that children with autism insist on sameness and avoid changes in routine.⁴² For instance, a child with autism may become agitated if there is a change in routine such as driving a different route to school or having to switch from winter shoes to summer sandals. They may also refuse to eat anything other than a small repertoire of foods with certain textures. Some parents describe a general regression.⁴³ One parent explained that her child “began to slip quietly away from us.”⁴⁴

Additionally, children with autism are likely to engage in unusual behaviors such as self-stimulatory behaviors such as spinning or hand-flapping, self-injurious behaviors such as head banging or eye poking, and obsessive behaviors such as excessively carrying around certain objects or perseverating on a specific topic of conversation. Additionally, children with autism often are unaware of dangerous situations. For instance, they may walk off of the top of playground equipment or run into a busy street. Some parents define “autism” as the end to any semblance of normalcy that they once knew. During the early stages after her daughter was diagnosed with autism, one mother wrote, “...we are catapulted into a future that has suddenly become menacing, terrifying.”⁴⁵

Causes. Although Dr. Leo Kanner first described autism over sixty-five years ago,⁴⁶ researchers do not know what causes it and there is no known cure. However, research has documented that brain scans of children with autism differ in shape and structure when compared

⁴¹ See EXKORN, *supra* note 40; MAURICE, *supra* note 40, at 17, 31, 33, 35.

⁴² See EXKORN, *supra* note 40; MAURICE, *supra* note 40, at 18.

⁴³ See EXKORN, *supra* note 40.

⁴⁴ See MAURICE, *supra* note 40, at 4.

⁴⁵ See *id.* at 26-27.

⁴⁶ Leo Kanner, *Autistic Disturbance of Affective Contact*, 2 NERVOUS CHILD 217 (1943).

to typically-developing children. Further, theories about a genetic link exist. To support this notion, researchers point to many families in which more than one child has autism or an autism-related disability.⁴⁷

In recent years, the public concern surrounding autism has heightened primarily due to increased media attention that the prevalence of this disability is on the rise. In 2007, the Centers for Disease Control and Prevention (CDC) published a report indicating that “ASDs are more common than was believed previously.”⁴⁸ In a 2009 report, the CDC estimated that 1 out of every 110 children were diagnosed with autism in the United States.⁴⁹ A total of 1.5 million Americans are estimated to have autism and the international figures are relatively unknown, but aggressive efforts are being made to better identify this information.⁵⁰ Some postulate that autism rates have increased because of greater public awareness and media attention devoted to autism.

Others explain that changes in diagnostic criteria that have expanded the number of children listed as having the disorder, especially, considering the figures now include ASD. Finally, although these causes are controversial and may be vehemently disputed, some contend that environmental toxins, food additives/preservatives, vaccines, and other environmental factors are to blame.⁵¹

⁴⁷ Autism Society of America, What Causes Autism, http://www.autism-society.org/site/PageServer?pagename=about_whatcauses (last visited July 22, 2010).

⁴⁸ RICE, *supra* note 24.

⁴⁹ *Id.*

⁵⁰ Autism Speaks & Centers for Disease Control and Prevention, International Autism Epidemiology Network http://www.worldautismawarenessday.org/atf/cf/%7B2DB64348-B833-4322-837C-8DD9E6DF15EE%7D/IAEN_EpiFAQ_2009.pdf (last visited July 22, 2010).

⁵¹ OFFIT, *supra* note 29.

Treatment. Importantly, autism experts believe autism is treatable.⁵² Although there are many known treatments, this study will focus primarily on a treatment commonly referred to as Applied Behavior Analysis (“ABA”). Albeit controversial, many argue that ABA is the leading methodology with substantial empirical research documenting its effectiveness when used to teach individuals with autism.⁵³ Further, whether public schools should provide ABA intervention is a focal issue of much of the recent and growing autism litigation.⁵⁴ Specifically, numerous parents, teachers, therapists, researchers, and doctors assert that children with autism, who receive this type of intensive behavioral intervention, make significant learning gains, increase their IQ, and rarely, even become indistinguishable from their peers.⁵⁵ Yet, many others refute these claims and the scientific validity of the empirical studies evaluating ABA.⁵⁶

⁵² See CATHERINE MAURICE, GINA GREEN & STEPHEN C. LUCE (eds.), *BEHAVIORAL INTERVENTION FOR YOUNG CHILDREN WITH AUTISM* (1996); L. Juane Heflin & Richard Simpson, *Interventions for Children and Youth with Autism: Prudent Choices in a World of Exaggerated Claims and Empty Promises. Part I: Intervention and Treatment Option Review*, 13 *FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES* 194 (1998); Johnny L. Matson, Debra A Benavidez, Lesley Stabinsky Compton, Theodoia Paclawskyj, & Chris Baglio, *Behavioral Treatment of Autistic Persons: A Review of the Research from 1980 to the Present*, 17 *RESEARCH IN DEVELOPMENTAL DISABILITIES* 433 (1996); Autism Society of America, Treatment Options, http://www.autism-society.org/site/PageServer?pagename=life_treat (last visited July 22, 2010); Centers for Disease Control and Prevention, Treatment <http://www.cdc.gov/ncbddd/autism/treatment.html> (last visited July 22, 2010).

⁵³O. Ivar Lovaas, *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*, 55 *J. CONSULTING & CLINICAL PSYCHOLOGY* 3 (1987); Greg MacDuff, Patricia Krantz, & Lynn McClannahan, *Treating Children with Autism to Use Pictographic Activity Schedules: Maintenance and Generalization of Complex Response Chains*, 26 *J. APPLIED BEHAV. ANALYSIS* 89 (1993).

⁵⁴ *E.g.*, *Deal v. Hamilton County Dept. of Educ.*, 258 Fed. App’x 863 (6th Cir. 2008); *J.A. v. E. Ramapo Cent. Sch. Dist.*, 603 F. Supp. 2d 684, (S.D.N.Y. 2009); *O’Dell v. Special Sch. Dist. of St. Louis County*, 503 F.Supp.2d 1206, (E.D. Mo. 2007).

⁵⁵ See MAURICE, *supra* note 40, at 26-27; U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL* at ch. 3 (1999), available at <http://www.surgeongeneral.gov/library/mentalhealth/chapter3/sec6.html#autism>; Edward C. Fenske, Stanley Zalenki, Patricia J. Krantz, & Lynn E. McClannahan, *Age at Intervention and Treatment Outcome for Autistic Children in a Comprehensive Intervention Program*, 5 *ANALYSIS & INTERVENTION IN DEVELOPMENTAL DISABILITIES* 49 (1985); John W. Jacobson, James A. Mulick, & Gina Green, *Cost-benefit Estimates for Early Intensive Behavioral Intervention for Young Children with Autism: General Modes and Single State Case*, 13 *BEHAVIORAL INTERVENTIONS* 201(1998); Lovaas, *supra* note 53; David Satcher, *Report of the Surgeon General* (2005).

⁵⁶ See Heflin & Simpson, *supra* note 52; Michael McMahon, *School Districts Feel Pressure from Requests for Lovaas*, 11 *SPECIAL EDUCATOR* (1995); Barry M. Prizant & Emily Rubin, *Contemporary Issues in Interventions for Autism Spectrum Disorders: A Commentary*, 24 *J. OF THE ASSOC. FOR PERSONS WITH SEVERE HANDICAPS* 199 (1999).

Despite the controversy, ABA is a popular treatment option. Generally speaking, professionals utilize ABA methodology to teach children with autism how to learn, play, and interact with the world around them by “teaching small, measurable units of behavior systematically;” and initially, teaching often occurs in a one-to-one setting.⁵⁷ The theory behind ABA intervention is based on B.F. Skinner’s Theories of Classical and Operant Conditioning which are often referred to as Behaviorism or Learning Theory.⁵⁸ Typical ABA strategies include reinforcement, functional behavioral assessment, shaping, discrete-trial teaching, prompting, generalization, incidental teaching, task analysis, and maintenance plans.⁵⁹ ABA targets behaviors such as “aberrant behaviors, social skills, language, daily living skills, and academic skills.”⁶⁰

In 1987, Dr. Ivar Lovaas at the University of California Los Angeles published a landmark study which is cited as the first empirical evidence of ABA’s effectiveness in teaching students with autism.⁶¹ Because of Lovaas’ research and contributions, ABA is also sometimes referred to as “Lovaas therapy.” Lovaas studied three groups of children under the age of four who had autism. The experimental group received approximately 40 hours of ABA intervention per week for an average of two and a half years. The first control group received 10 hours of ABA and the second control group received non-behavioral intervention. The results showed that 47% of the children receiving intensive ABA intervention were considered indistinguishable from their peers after mainstreaming into general education classrooms. These children also

⁵⁷ B.D. v. DeBuono, 130 F. Supp. 2d 409 (S.D.N.Y. 2000).

⁵⁸ Johnny L. Matson, Debra A Benavidez, Lesley Stabinsky Compton, Theodoia Paclawskyj, & Chris Baglio, *Behavioral Treatment of Autistic Persons: A Review of the Research from 1980 to the Present*, 17 RES. IN DEVELOPMENTAL DISABILITIES 433, (1996).

⁵⁹ RONALD LEAF, MITCHELL TAUBMAN, & JOHN MCEACHIN, *IT’S TIME FOR SCHOOL!* (2008); Heflin & Simpson, *supra* note 52, at 194; Matson et al., *supra* note 58.

⁶⁰ Matson et al., *supra* note 58, at 457.

⁶¹ Lovaas, *supra* note 53.

gained an average of 37 IQ points. On the other hand, the children in the control groups made few significant improvements and almost none were able to participate in regular schooling. Many subsequent studies have also documented the effectiveness of ABA. Jacobson et. al found that “[r]esearch indicates that with early, intensive intervention based on the principles of [ABA], substantial numbers of children with autism...can attain intellectual, academic, communication, social, and daily living skills within the normal range.”⁶²

Charter Schools

Background. The first charter school was authorized by Minnesota in 1991.⁶³ In 2010, more than 5,000 charter schools enroll over 1.5 million students in 39 states and the District of Columbia.⁶⁴ The development of charter schools was one of many school reforms that were introduced as a response to criticisms of the influential report *A Nation at Risk: The Imperative for Educational Reform*.⁶⁵ In 1988, Ray Budde introduced the idea of charter schools⁶⁶ and others have developed his concept into a national movement intended to offer additional and alternative options within the public school system.⁶⁷ Charter schools have grown in popularity since their early beginnings. In 2009, the Obama administration announced the \$4.3 billion Race to the Top Fund offering competitive grants “to support education reform and innovation in

⁶² Jacobson, Mulick, & Green, *supra* note 55. *But see* Heflin & Simpson, *supra* note 52; Michael McMahon, *School Districts Feel Pressure from Requests for Lovaas*, 11 SPECIAL EDUCATOR (1995); Barry M. Prizant & Emily Rubin, *Contemporary Issues in Interventions for Autism Spectrum Disorders: A Commentary*, 24 J. OF THE ASSOC. FOR PERSONS WITH SEVERE HANDICAPS 199 (1999).

⁶³ PRESTON C. GREEN & JULIE MEAD, CHARTER SCHOOLS AND THE LAW: ESTABLISHING NEW LEGAL RELATIONSHIPS (2004).

⁶⁴ Center for Education Reform, *Just the FAQs* http://www.edreform.com/Fast_Facts/Ed_Reform_FAQs/?Just_the_FAQs_Charter_Schools (last visited July 22, 2010).

⁶⁵ GREEN & MEAD, *supra* note 63, at 1.

⁶⁶ *Id.*

⁶⁷ RPP INTERNATIONAL, U.S. DEP’T OF EDUC., THE STATE OF CHARTER SCHOOLS, FOURTH YEAR REPORT: NATIONAL STUDY OF CHARTER SCHOOLS (2000).

classrooms.”⁶⁸ On June 8, 2009, U.S. Secretary of Education Arne Duncan stated, “States that do not have public charter laws or put artificial caps on the growth of charter schools will jeopardize their applications under the Race to the Top Fund.”⁶⁹ The U.S. Department of Education’s Office of Innovation and Improvement also administers the Charter School Program which “provides financial assistance for the planning, program design, and initial implementation of charter schools, and the dissemination of information on charter schools.”⁷⁰

Two key aspects of charter schools are innovation and choice. Unlike traditional public schools, charter schools are given greater autonomy, but also are also held to higher standards of accountability.⁷¹ The level of autonomy and accountability vary from state to state because charter schools are governed by state law. Typically, however, charter school administrators, referred to as operators, are free to create unique public schools that do not always have to follow the same bureaucratic rules of the area school district.⁷² A unique feature of some charter schools may be a non-traditional calendar or daily schedule. They may have longer or shorter school days or follow inventive designs such as being a virtual or cyber charter school. Also, charter school curriculum may differ by adhering to a particular philosophy of teaching such as Montessori or project-based learning. The curriculum may emphasize a specific content such as college-preparatory, core knowledge, vocational or arts-based. Further, the charter school may

⁶⁸ U.S. Dept. of Educ., Press Release: U.S. Secretary of Education Duncan Announce National Competition to Advance School (July 24, 2009), *available at* <http://www2.ed.gov/news/pressreleases/2009/07/07242009.html>.

⁶⁹ U.S. Dept. at Educ., Press Release: States Open to Charters Start Fast in 'Race to Top' (June 8, 2009), *available at* <http://www2.ed.gov/news/pressreleases/2009/06/06082009a.html> .

⁷⁰U.S. Dept. of Educ., Charter Schools Program, <http://www.ed.gov/programs/charter/index.html> (last visited Aug. 2, 2010).

⁷¹ Suzanne Eckes & Janet Rumble, *Charter Schools, Accountability and Achievement*, 74 SCH. BUS. AFFAIRS, 8-10 (2008).

⁷² Lauren M. Rhim, Eileen M. Ahearn, & Cheryl M. Lange, *Charter School Statutes and Special Education: Policy Answers or Policy Ambiguity?*, 41 J. SPECIAL EDUC. 50 (2007) [hereinafter *Charter School Statutes*].

be designed to address the needs of a particular population such as students of color, low-income students,⁷³ students with disabilities,⁷⁴ or gifted and talented students.⁷⁵

Despite the increased independence granted to charter schools, they are still funded by tax payers, part of the public school system, and thus, not free from regulation.⁷⁶ In fact, they are held more accountable for their levels of student achievement than traditional schools.⁷⁷ To start a charter school, a contract outlining the schools' goals for student achievement must be developed. This contract, called a charter, also defines the length of time that the school will be in operation; usually the charters are granted for three to five years.⁷⁸ The charter is then approved by an authorizer or sponsor. Currently, authorizers are defined by state statute and include a variety of entities such as local school districts, state charter boards, state departments of education, mayor's offices, city councils, universities, and non-profit organizations.⁷⁹ Sponsors are responsible to hold charter schools accountable for the goals articulated in their charter.⁸⁰ If schools fail to demonstrate progress toward their goals, their charters can be revoked or not renewed.⁸¹ Thus, even in light of the No Child Left Behind Act's heightened accountability standards for all public schools, it is much easier to close a charter school than a traditional school.

⁷³ Erin Macey, Janet Decker, & Suzanne Eckes, *The Knowledge is Power Program (KIPP): An Analysis of One Model's Efforts to Promote Achievement in Underserved Communities*, 3 J. SCH. CHOICE 212 (2009).

⁷⁴ GREEN & MEAD, *supra* note 63, at 158.

⁷⁵ Suzanne E. Eckes & Jonathan A. Plucker, *Charter Schools and Gifted Education: Legal Obligations*, 34 J.L. & EDUC. 421 (2005).

⁷⁶ Eckes & Rumpel, *supra* note 71.

⁷⁷ *Id.*

⁷⁸ Suzanne E. Eckes, Jonathan A. Plucker, & Sarah A. Benton, *Charter School Accountability: Legal Considerations Concerning Non-renewal and Revocation Procedures*, 2 EDUC. & L.J. 551(2006).

⁷⁹ GREEN & MEAD, *supra* note 63, at 3.

⁸⁰ Lauren M. Rhim & Margaret McLaughlin, *Students with Disabilities in Charter Schools: What We Now Know*, 39 FOCUS ON EXCEPTIONAL CHILD. 1, 2 (2007) [hereinafter *What We Now Know*].

⁸¹ *Id.*

Current Issues. Charter schools are sometimes described as a controversial school reform movement but receive bipartisan support. Proponents claim that charter schools allow parents and students a diverse set of schooling options. Some argue that because of the heightened level of accountability, charter schools must achieve results or risk closure.⁸² Supporters also believe that an expansion of educational choice will foster competition among schools. Thus, market forces will encourage traditional schools to improve in order to retain students and funding.⁸³ Finally, charter school advocates explain that charter schools provide an avenue for educational experimentation that is likely to lead to positive improvements in areas such as school design, leadership, and curriculum. Although it was initially feared that charter schools may provide a parallel school system for a disproportionate number of wealthy, white students, recent studies show that the opposite may be true. Charter schools appear to have a higher proportion of low-income students of color than traditional schools.⁸⁴ Thus, another benefit cited by advocates is that these schools provide increased educational opportunities to disadvantaged and minority students and therefore, improve educational equity.⁸⁵

On the other hand, critics argue that charter schools could negatively impact the traditional school system by driving students, and therefore funding, away.⁸⁶ They complain that charter schools are not being effectively monitored and are not being held accountable.⁸⁷ Moreover, some highlight that charter schools segregate students based on racial and economic lines and may be failing to adequately address the needs of special education and English

⁸² GREEN & MEAD, *supra* note 63, at 2.

⁸³ *Id.*

⁸⁴ Suzanne Eckes & Anne Trotter, *Are Charter Schools Using Recruitment Strategies to Increase Student Body Diversity?*, 40 EDUC. & URB. SOC'Y 62 (2007).

⁸⁵ See SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS (Janelle T. Scott ed., 2005).

⁸⁶ Suzanne E. Eckes & Kelly E. Rapp, *Charter schools: Trends and Implications*, in READINGS ON EDUCATION 1-26 (E. St. John ed., 2006).

⁸⁷ Center for Education Reform, *Charter School Myths and Realities Answering the Critics* (Sept. 30, 1997), http://www.edreform.com/Archive/?Charter_School_Myths_and_Realities_Answering_the_Critics.

Language Learner students.⁸⁸ Buchanan and Fox among many others, caution that charter schools may be “restratifying, resegregating and further balkanizing an already ethnically and socioeconomically divided population.”⁸⁹

Because they are relatively new, many questions about charter schools remain unanswered. A hotly debated issue is whether charter schools increase levels of student achievement.⁹⁰ Further, many disagree whether it is appropriate to apply business principles to education.⁹¹ Others argued that charter schools are in fact quite similar to traditional public schools and that the debate about whether charter or traditional schools are “better” is a misguided and unproductive argument to be having.⁹²

Special Education Law

As mentioned, charter schools are given greater independence than their traditional school counterparts in exchange for increased accountability.⁹³ However, charter school operators still must follow federal and state special education law because they are considered public schools. In particular, public schools that serve students with disabilities must adhere to some of the most complicated and controversial education laws. Special education “results from a complex and oft times confusing combination of federal law and regulation, individual state constitutions, state law and regulation, and policy traditions.”⁹⁴ Understanding and abiding by

⁸⁸ Erica Frankenberg & Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, 11 EDUC. POL’Y ANALYSIS ARCHIVES 1 (2003), available at <http://epaa.asu.edu/epaa/v11n32/>.

⁸⁹ Nina K. Buchanan & Robert A. Fox, *Back to the Future: Ethnocentric Charter Schools in Hawaii*, in THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS 77 (Eric E. Rofes & Lisa M. Stulberg eds., 2004).

⁹⁰ MARTIN CARNOY, REBECCA JACOBSEN, LAWRENCE MISHEL, & RICHARD ROTHSTEIN, THE CHARTER SCHOOL DUST UP: EXAMINING THE EVIDENCE OF ENROLLMENT AND ACHIEVEMENT (2005).

⁹¹ Anne E. Trotter, Suzanne E. Eckes, & Jonathan A. Plucker, *Education Management Organizations and Charter Schools: Serving All Students*, 213 EDUC. L. REP. 935 (2006).

⁹² JEFFREY R. HENIG, SPIN CYCLE: HOW RESEARCH IS USED IN POLICY DEBATES (2008).

⁹³ *Charter School Statutes*, supra note 72.

⁹⁴ *Id.* at 50.

special education policy and procedures may seem counterintuitive to charter school leaders who strive to reduce bureaucracy.⁹⁵

Operators are also likely to be frustrated that the law requires them to follow a “narrow and rigid approach to providing special education.”⁹⁶ The inherent difficulties surrounding special education in charter schools has resulted in a growing number of lawsuits.⁹⁷ Yet, there is little motivation to expand special education charter school policy because charter school proponents generally want less, not more, regulations.⁹⁸

For the purposes of this study, it is important to provide a background of the three main areas of federal special education law that charter schools are required to follow. These three categories include: 1) disability education law; 2) disability discrimination law; and 3) non-disability law relevant to special education.

Disability education law. In 1975, Congress passed the Individuals with Disabilities Education Act (IDEA)⁹⁹ and has reauthorized and amended this important special education law as recently as 2004. IDEA is a federal funding law enacted to ensure all students with disabilities receive a free and appropriate education.¹⁰⁰ Yet, as the U.S. Supreme Court noted in *Honig v. Doe*,

Congress did not content itself with passage of a simple funding statute. Rather the [IDEA] confers upon disabled students an enforceable substantive right to public

⁹⁵ *Charter School Statutes*, *supra* note 72.

⁹⁶ *What We Now Know*, *supra* note 80, at 4.

⁹⁷ *M.N. v. N.Y.C. Dept. of Educ.*, 2010 WL 1244555 (S.D.N.Y. 2010); *District of Columbia v. Brant-James*, 675 F. Supp. 2d 115 (D.D.C. 2009); *Sch. for the Art in Learning (SAIL) Public Charter Sch. v. Johnson*, No. 02-1722(RMC), 2006 WL 1000337 (D.D.C. Apr. 13, 2006); *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 669 F. Supp. 2d 80 (D.D.C., 2009); *Waslow v. Penn. Dept. of Educ.*, 984 A.2d 575 (Pa. Commw. Ct. 2009); *Charter School Statutes*, *supra* note 72, at 50; *What We Now Know*, *What We Now Know*, *supra* note 80, at 4.

⁹⁸ *Charter School Statutes*, *supra* note 72, at 50.

⁹⁹ First enacted in 1975 as the Education of All Handicapped Children Act.

¹⁰⁰ 20 U.S.C. § 1400(d) (2009).

education...and conditions federal financial assistance upon states' compliance with substantive and procedural goals of the Act.¹⁰¹

In order for states to obtain IDEA funds, they must ensure that students with disabilities receive a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE).¹⁰² In practical terms, in order to provide FAPE, a school must provide students with disabilities with an Individualized Education Program (IEP). This document outlines measurable goals for a student with disabilities and describes the individualized programming and related services that are needed for the student to meet these goals. It is created by a team of professionals and parents, who are referred to as the "IEP team" and it is reviewed on an annual basis.¹⁰³ To be in accordance with IDEA's LRE requirement, schools must ensure students with disabilities are placed in settings that are as close to the general education classrooms as possible, while still providing an appropriate education. In addition to substantive requirements, IDEA requires that public schools follow a number of procedures when educating students with disabilities.¹⁰⁴ For instance, parents must be invited to be members of the IEP team.¹⁰⁵ Additionally, if the school and parents disagree about special education services, there are a variety of due process procedural protections including proper notice and opportunity for a hearing that must occur.

Disability discrimination law. Whereas IDEA ensures students with disabilities are afforded an appropriate education, Section 504 of the Rehabilitation Act of 1973 (Section 504)

¹⁰¹ Honig v. Doe, 484 U.S. 305, 310 (1998).

¹⁰² 20 U.S.C. § 1400 (26)(A) (2004).

¹⁰³ 20 U.S.C. § 1414(d) (2004).

¹⁰⁴ *Charter School Statutes*, *supra* note 72, at 55; *see, e.g.*, 20 U.S.C. § 1412(a)(10) (procedures for parents who enroll their children with disabilities in private schools); 20 U.S.C. § 1414(a) (parental consent for evaluations); 20 U.S.C. § 1415(b)(3) (notice provisions in identification, evaluation, placement, or free appropriate public education), 20 U.S.C. § 1415(d) (notice of procedural safeguards), 20 U.S.C. § 1415(e) (mediation procedures), 20 U.S.C. § 1415(f) (due process hearing).

¹⁰⁵ 20 U.S.C. § 1414(d) (2004).

and the Americans with Disabilities Act of 1990 (ADA) are civil rights statutes that prohibit disability discrimination. These federal laws also require public facilities to be accessible for individuals with disabilities.¹⁰⁶ Some students may not fit under IDEA’s definition of disability, but are entitled to special services because they fit within Section 504 and ADA’s definition of disability. These federal laws define disability in much broader terms. Namely, a person with a disability is defined as “any individual with a physical or mental impairment that substantially limits one or more major life activities, or who has a record of such an impairment, or who is regarded as having such an impairment.”¹⁰⁷

For example, chronically ill children who suffer from diabetes or those who are physically impaired may be entitled to accommodations under Section 504 and ADA, but not IDEA. Neither Section 504 nor ADA provides funding to states; however, these laws mandate that all schools must provide “reasonable accommodations” to teachers and students who are disabled.¹⁰⁸ Section 504 also requires schools to provide “educational and related aids and services that are designed to meet the individual educational needs of the child.”¹⁰⁹

Non-disability law relevant to special education. Two additional federal statutes affecting special education are the Family Educational Rights and Privacy Act (FERPA) and No Child Left Behind Act (NCLB).¹¹⁰ Unlike IDEA, these laws do not create a private cause of action. In contrast to IDEA, Section 504, and ADA, these laws are not specifically intended to

¹⁰⁶ 29 U.S.C. § 794 (1973); 42 U.S.C. §§ 12101 *et seq.* (1990).

¹⁰⁷ *Id.*

¹⁰⁸ *Charter School Statutes*, *supra* note 72, at 57.

¹⁰⁹ Special Education Technical Assistance for Charter Schools Project (SPEDTACS), *Primer Background Section Special Education Requirements and Including Student with Disabilities in Charter Schools*, (2008) available at http://www.uscharterschools.org/specialedprimers/download/background_primer.pdf [hereinafter *Primer Background Section*].

¹¹⁰ 20 U.S.C. § 1232g (1974); Pub.L. 107-110 (2002). The Elementary and Secondary Education Act (ESEA) was renamed NCLB in 2001.

protect individuals with disabilities. However, similar to the aforementioned statutes, all schools serving students with disabilities should be familiar with and must follow FERPA and NCLB.

In 1974, Congress passed FERPA in order to protect the privacy of students' educational records. Basically, this law prohibits public schools from releasing student records to third parties, but permits parents to view their children's educational records. FERPA pertains to special education because schools and parents commonly disagree about the identification and evaluation of students in need of special education. Parents may seek to review and refute the diagnosis information and/or evaluation of their children that is contained within the school's confidential educational records. Thus, FERPA's legal requirements about the handling of these student records are important for school administrators to understand.

NCLB is more commonly cited than FERPA. Under NCLB, schools that repeatedly fail to make Adequate Yearly Progress (AYP) can be converted to charter schools. Therefore, some contend that due to NCLB, the proportion of charter schools will continue to increase.¹¹¹ The most relevant aspect of NCLB pertaining to special education is its accountability requirements. Students with disabilities must be included in the state and district testing, but must be provided with alternative assessments if they fit certain criteria. Their IEPs should detail how they will be tested.¹¹² Some have argued that there is a conflict between IDEA's individualized approach and NCLB's grade-level approach to testing and accountability.¹¹³

¹¹¹ *Charter School Statutes*, *supra* note 72, at 50.

¹¹² *Primer Background Section*, *supra* note 109.

¹¹³ Suzanne Eckes & Julie Swando, *Adequate yearly progress and NCLB: How are students with disabilities faring in the era of accountability and how have the courts reacted?*, paper presented at the annual meeting of the Education Law Association, Nassau, Bahamas (2006); Christina A. Samuels, *Suit Says NCLB's Demands Conflict with those of IDEA*, 24 EDUC. WEEK 23 (2005); Rebekah Gleason Hope, *IDEA and NCLB; Is There a Fix to Make Them Compatible?* (unpublished paper 2009), http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=rebekah_hope.

2.2. Special Education at Charter Schools

Now that the overall context of autism, charter schools, and special education law has been explained, a review of the specific context of special education at charter schools is presented to help analyze whether autism-centric charter schools are a legally viable option. Although additional literature has discussed this topic as part of a larger discussion about charter schools,¹¹⁴ special education and charter schools is the main topic in the four law review articles and four studies that are summarized in this section. Although a brief overview of the eight main research articles appears below, more detailed findings are included in subsequent sections.

Law Review Articles. Primarily, four law review articles written by legal scholars exist that focus on special education at charter schools.¹¹⁵ In 1997, Heubert was one of the first researchers to discuss charter schools and special education. He wrote a law review article which explored the extent to which charter schools must follow federal disability law.¹¹⁶ Four years later in 2001, there was no question that charter schools must follow disability law. Therefore, Mead's law review article offered guidance about how charter schools can meet their obligations in light of Section 504, ADA, and IDEA.¹¹⁷ More recently in 2007, Gleason's law journal article outlined the issues and highlighted concerns and suggestions based on the charter schools in the District of Columbia.¹¹⁸ In 2008, Casanova wrote a law review article that

¹¹⁴ E.g., CARNOY ET. AL., *supra* note 90; GREEN & MEAD, *supra* note 63; RPP INTERNATIONAL, *supra* note 67; Eckes & Rumble, *supra* note 71.

¹¹⁵ See GARY MIRON & CHRISTOPHER NELSON, WHAT'S PUBLIC ABOUT CHARTER SCHOOLS? (2002); Trotter, Eckes, & Plucker, *supra* note 91, at 935.

¹¹⁶ Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301 (1997).

¹¹⁷ *Determining Charter Schools' Responsibilities*, *supra* note 16.

¹¹⁸ Rebekah Gleason, *Looking Back and Moving Forward: New Approaches to Legal Advocacy in the 21st Century: Charter Schools and Special Education: Part of the Solution or Part of the Problem?*, 9 UDC L. REV. 145 (2007).

discussed the issues with special education and charter schools and recommended that charter schools become better versed in the law.¹¹⁹

Studies. In addition to studies and articles that appear in education journals, there are a number of non-peer reviewed publications about special education and charter schools.¹²⁰ Many of them are part of the *Primers on Special Education in Charter Schools* series that was developed under the Special Education Technical Assistance for Charter Schools Project (SPEDTACS) that was funded by the U.S. Department of Education and conducted at the National Association of State Directors of Special Education (NASDSE).¹²¹ Three members of the SPEDTACS team, Ahearn, Lange, and Rhim, have also been involved in three of the following publications that provide a background to the current study. It appears that an impetus to their research was an evaluation conducted in 2000 by Fiore, Harwell, Blackorby, and Finnigan for the U.S. Department of Education's Office of Educational Research and Improvement.¹²²

The purpose of the national study conducted by Fiore et al. was to examine how charter schools were serving students with disabilities. From 1998 to 1999, the researchers conducted site visits to 32 charter schools in 15 states. They interviewed 151 parents, 196 teachers, 164 students with disabilities, and at least one administrator per school. The researchers were particularly interested in determining why parents had enrolled their children at a charter school;

¹¹⁹ Clarisse C. Casanova, *Charter Schools: A Step in the Right Direction or a Fourth Left Turn for Public Education?* 7 WHITTIER J. CHILD & FAM. ADVOC. 231 (2008).

¹²⁰ E.g., EILEEN M AHEARN, CHERYL M. LANGE, LAUREN MORANDO RHIM, & MARGARET J. MCLAUGHLIN, PROJECT SEARCH: SPECIAL EDUCATION AS REQUIREMENT IN CHARTER SCHOOLS. FINAL REPORT OF A RESEARCH STUDY: CROSS-STATE ANALYSIS OF FINDINGS AND SUMMARIES OF STATE CASE STUDIES (2001), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/03/e6.pdf

¹²¹ About the SPEDTACS Primers, http://www.uscharterschools.org/cs/spedp/print/uscs_docs/spedp/about.htm (last visited Aug. 3, 2010).

¹²² THOMAS FIORE, LESSLEY HARWELL, JOSE BLACKORBY & KARA FINNIGAN, U.S. DEP'T OF EDUC., CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES: A NATIONAL STUDY (2000).

how the charter schools were serving the students; what student outcomes had been set; how those outcomes were being assessed; and how successful the schools were in meeting the outcome goals. Some of their findings are described in more detail in subsequent sections; however, parents explained that they enrolled their children with disabilities at charter schools because of positive aspects the schools offered and because of dissatisfaction with their child's former traditional schools. Although operators were knowledgeable of special education law, many staff counseled parents against enrolling their children at the charter school.¹²³ Yet, some charter schools targeted special education students and other at-risk learners. In general, administrators and teachers thought they were successful in assisting students with disabilities to achieve the goals that had been set.

In 2001, Ahearn, Lange, Rhim, and McLaughlin presented their comprehensive findings from a three-year study called Project Special Education as Requirements in Charter Schools (Project SEARCH).¹²⁴ The researchers conducted a study that was sponsored by the U.S. Department of Education's Office of Special Education Programs to determine how charter schools interpret laws and regulations governing students with disabilities. The researchers first completed a policy analysis of 15 states. Second, they collected qualitative data from seven states and D.C. Although specific findings are discussed in subsequent sections, the researchers identified recurring themes, two primary policy tensions, and ten recommendations for authorizers and operators.

Two of the authors of the Project SEARCH study, Rhim and McLaughlin, wrote a 2007 article synthesizing the results from the studies that had been conducted during the previous ten years by the University of Maryland in collaboration with the National Association of State

¹²³ *Id.* at 40.

¹²⁴ More information about Project SEARCH can be found at www.nasdse.org/project_search.htm

Directors of Special Education (NASDSE).¹²⁵ Rhim and McLaughlin were interested in presenting an overview about how charter schools have served special education students and what policy issues have arisen. They analyzed the data collected from the following previous research studies: 1) the 1998 Center for Disability Policy Research study examining special education issues in Colorado; 2) the 2001 Project SEARCH study described in the previous paragraph; and 3) the 2005-2006 Project Intersect study that sought to quantify the status of special education at charter schools.¹²⁶ Then, Rhim and McLaughlin grouped their findings into three areas: “1) central policy tensions, 2) practical challenges, and 3) student outcomes.”¹²⁷ They concluded that although in theory, the individualized goals of charter schools align with the goals of special education. However, from the limited existing research, Rhim and McLaughlin stated that charter schools are struggling to serve students with disabilities.

Also in 2007, Rhim, Ahearn, and Lange offered their analysis of 41 charter school statutes in order to document how states are addressing special education in their charter school laws.¹²⁸ Specifically, they examined whether the statutes addressed antidiscrimination language, Section 504, provision of special education services, school mission, legal status for purposes of special education, special education finance, and accountability.¹²⁹ In addition to the findings that are discussed in the following sections, the researchers concluded the state laws varied and were not specific in the structure governing special education delivery at charter schools. Rhim, Ahearn, and Lange stated that it may not be prudent to assign the responsibility of interpreting special education law to charter school authorizers and operators. Policymakers were

¹²⁵ *What We Now Know*, *supra* note 80.

¹²⁶ *Id.* at 4.

¹²⁷ *Id.*

¹²⁸ *Charter School Statutes*, *supra* note 72.

¹²⁹ *Id.* at 54.

encouraged to identify and attempt to remedy the tensions and the authors stated that more research was needed so that students with disabilities could “access and succeed in charter schools.”¹³⁰

Overall, the four existing law reviews and four studies highlight the many difficulties charter schools have when faced in educating students with disabilities. On one hand, it is important to review the research that highlights the problems with providing appropriate special education for students at charter schools in order to evaluate whether autism-centric charter schools are a feasible type of charter school. On the other hand, the existing research fails to explain how the charter school reform movement could potentially benefit students with disabilities. The current study seeks to shift the conversation. Instead of only focusing on the problems existing in charter schools for students with disabilities, this study asks whether charter schools could benefit students with disabilities by providing a more individualized education and by potentially reducing litigation filed by parents who are dissatisfied with the special education provided by traditional schools.

Yet, first, it is necessary to delve in why charter schools are having difficulties serving students with disabilities. The following section reviews the reasons why educating special education students have been challenging for charter schools. Then, the next section summarizes the specific problems that have ensued because charter schools are finding it difficult to educate special education students. Both sections primarily draw information from the eight articles described above.

¹³⁰ *Id.* at 57.

Reasons Why Special Education is Problematic at Charter Schools

The existing literature about special education and charter schools discuss a number of reasons why problems have arisen at charter schools. In order to present the authors' findings in an organized framework, the problems have been grouped into the following five categories: 1) misconception, 2) philosophical conflict, 3) structural issues, 4) inadequate funding, and 5) failure to prioritize.

Misconception. In 1997, Heubert was one of the first researchers to identify that there was a public misconception that charter schools did not have to follow special education law. Heubert highlighted that even President Clinton had erroneously referred to charter schools as “schools without rules” in the 1996 Presidential Debate.¹³¹ Heubert emphasized that charter schools must follow federal disability laws and regulations.

These laws are detailed and complicated and can create unique challenges for charter schools. For example, the “zero reject” principle under IDEA requires public schools to teach *all* special education students, no matter how severe their disability may be. Miron and Nelson explained that this federal mandate becomes problematic because charter schools typically do not have the equivalent structures, resources, or support that traditional schools have. For example, being obligated to accept - and therefore provide funding for - a special education student who requires constant nurse service could essentially bankrupt a charter school.¹³²

Nevertheless, recent regulations have removed any ambiguity that all charter schools must follow special education laws. IDEA's most recent regulations emphasize that charter schools are not exempt. Specifically, the regulations state, “[c]hildren with disabilities who

¹³¹ President William Clinton, The White House: Hartford Debate between President Clinton and Senator Dole (Oct. 8, 1996) *available at* <http://www.nytimes.com/1996/10/07/us/a-transcript-of-the-first-televized-debate-between-clinton-and-dole.html?pagewanted=1>), *cited in* Heubert, *supra* note 116, at 301.

¹³² MIRON & NELSON, *supra* note 115, at 85.

attend public charter schools and their parents retain all rights under this part.”¹³³ Despite being explicitly instructed that they must follow IDEA’s requirements, charter schools face many challenges living up to what is legally required of them. As a result, some argue these schools may be failing to properly educate special education students.¹³⁴

Rhim and McLaughlin noted that the charter school movement does promise increased flexibility; however, charter schools are public schools and thus, they must follow federal and state law.¹³⁵ Therefore, despite the misconception that charter schools are immune to governmental regulations, researchers have been quick to point out that charter schools receive public funding and therefore, must follow the same legal requirements that all public schools must follow.¹³⁶

Philosophical conflict. Most of the existing literature on charter schools and special education explain that problems arise due to the inherent conflict between the charter school goals of autonomy and the special education realities of regulation.¹³⁷ For instance, Rhim, Ahearn and Lange explained that charter school proponents advocate that by decreasing district oversight and increasing accountability, charter schools are able to teach students more effectively than traditional public schools.¹³⁸ Ahearn et al. clarified that a philosophical conflict arises, however, when these goals of autonomy are hindered by the reality of special education law.¹³⁹ As explained by Rhim, Ahearn, and Lange, “Federal, state, and local special education rules and regulations are generally perceived to be somewhat counterintuitive in charter schools

¹³³ 34 C.F.R § 300.209 (2008). As mentioned in Chapter One, Section 504 and ADA must be adhered to by charter schools. However, this dissertation will focus on charter schools’ obligations under IDEA.

¹³⁴ *What We Now Know*, *supra* note 80, at 11.

¹³⁵ *What We Now Know*, *supra* note 80.

¹³⁶ Heubert, *supra* note 116, at 302; *What We Now Know*, *supra* note 80, at 1.

¹³⁷ *Charter School Statutes*, *supra* note 72.

¹³⁸ *Id.*

¹³⁹ AHEARN ET AL., *supra* note 120.

striving to reduce bureaucracy.”¹⁴⁰ Thus, when charter schools must attend to the complicated intricacies of law, it runs counter to their anti-bureaucracy philosophy. Rhim and McLaughlin cited this as one of three key policy tensions that they referred to as “compliance versus autonomy.”¹⁴¹ To elaborate, leaders and teachers who are attracted to charter schools are often seeking the freedom to be innovative.¹⁴² However, special education law mandates that school personnel adhere to a very rigid structure that rarely allows for deviation. Often the procedural rules are as important as the substantive rules in special education law.¹⁴³ For instance, IDEA requires a variety of notices to be provided to parents within certain timeframes and if those procedural rules are not followed, a court could rule that a school has failed to provide FAPE. It may come as a surprise to some charter school educators that failing to follow procedural steps could amount to failing to provide an appropriate education. In sum, serving special education students in charter schools may cause a philosophical conflict for those who are intentionally avoiding bureaucracy by working at charter schools when they are forced to comply with one of the most bureaucratic aspects of public education.¹⁴⁴

Structural issues. In their study of 41 charter school statutes, Rhim, Ahearn and Lange identified that one of the reasons charter schools are facing difficulties serving special education students is due to structural issues.¹⁴⁵ The inconsistency of charter schools’ local education agency (LEA) status is at the root of the structural problems affecting special education.

¹⁴⁰ *Charter School Statutes*, *supra* note 72, at 52.

¹⁴¹ *What We Now Know*, *supra* note 80, at 5.

¹⁴² *What We Now Know*, *supra* note 80.

¹⁴³ Mitchell L. Yell, Antonis Katsiyannis, Erik Drasgow, & Maria Herbst, *Developing Legally Correct and Educationally Appropriate Programs for Students with Autism Spectrum Disorders*, 18 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 182, 186-87 (2003) [hereinafter *Developing Legally Correct*].

¹⁴⁴ *What We Now Know*, *supra* note 80, at 4.

¹⁴⁵ *Charter School Statutes*, *supra* note 72.

Currently, the structure of the charter schools is defined by the charter school statute of the state where it is located. Worded differently, each state defines the parameters governing the charter schools in their states.¹⁴⁶ Currently, every state charter statute grants authority to certain bodies to approve applications to establish charter schools.¹⁴⁷ These bodies are called authorizers or sponsors and are most commonly LEAs,¹⁴⁸ but they can also be state education agencies (SEAs), universities, charter boards, and nonprofit organizations.¹⁴⁹ The authorizers are responsible for holding the charter schools accountable for the goals and objectives of their charter which includes revoking or not renewing the charter if a school fails to demonstrate progress toward their goals.¹⁵⁰ In addition to holding the schools accountable, the LEA status is important because it determines the school's level of programmatic and financial responsibility.

Charter schools can either be their own LEA or part of another LEA.¹⁵¹ Complicating this issue is the fact that there is great variability in the state charter statutes. Some states require charter schools to only be part of another LEA, other states allow charter schools to be their own LEA, and a few states allow the charter school to choose whether it is a LEA or part of another LEA.¹⁵²

Rhim, Ahearn, and Lange found that 12 states identify charter schools as LEAs; therefore, the responsibility for ensuring IDEA compliance is entirely on the district, which can be daunting.¹⁵³ Another 18 states assign charter schools as part of the existing LEA and thus, the IDEA compliance monitoring is shared between the charter school and the district. The other 11

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *What We Now Know, supra* note 80.

¹⁴⁹ *Charter School Statutes, supra* note 72.

¹⁵⁰ *What We Now Know, supra* note 80.

¹⁵¹ *Primer Background Section, supra* note 109.

¹⁵² *Charter School Statutes, supra* note 72.

¹⁵³ *Id.* at 56.

states allow the charter schools to choose whether they will be a free standing LEA or part of the existing LEA.

In addition to summarizing the LEA status of charter schools across the U.S., the researchers determined that every statute has specific language prohibiting charter schools from discriminating against students based on disability, and 12 of the statutes require that a charter school's application must explain how it plans to provide special education services.¹⁵⁴ A total of 14 charter school laws mention how special education services will be provided. Twenty-nine of the statutes, however, do not explicitly require charter schools to have a special education plan. Fourteen states stipulate that "charter schools should prioritize educating 'at-risk,' 'high-risk,' or 'academically low-achieving' students" and four of these laws define "at-risk students" to include students with disabilities.¹⁵⁵

In response to their analysis of the charter school statutes, Rhim, Ahearn, and Lange determined that the underlying structures determining how special education services are delivered in charter schools are inconsistent. This inconsistency leads to problems. For example, the charter schools that are freestanding LEAs must develop their special education policies and procedures from square one; whereas charter schools that are part of a LEA and can look to the LEA for support and guidance in handling special education matters.¹⁵⁶

In addition to the LEA structural inconsistency, Rhim, Ahearn, and Lange concluded that state charter school laws are ambiguous about the charter school operators' roles and responsibilities in providing special education. Operators are likely to have practical questions concerning the transportation for and testing of students with disabilities, but they do not find

¹⁵⁴*Id.* at 55.

¹⁵⁵ *Id.* at 55-56.

¹⁵⁶ *Id.* at 43.

any guidance in the state charter school laws.¹⁵⁷ These ambiguities could cause difficulties between the charter school operators and authorizers as they try to determine their joint responsibilities in serving students with disabilities.¹⁵⁸ The researchers warned, “it is questionable whether it is prudent for state policy leaders to bestow responsibility for interpreting the laws to charter authorizers and charter operators.”¹⁵⁹

In 2004, Wilson found public schools have more than 60 sources of laws and regulations they must follow;¹⁶⁰ thus, understanding special education law is only part of the puzzle bestowed upon charter school leaders. The operators’ relative inexperience, lack of established policies, and smaller staff and student populations may exacerbate their problems.¹⁶¹ Moreover, some charter schools are structured around a special mission with a specified curriculum which is not amenable to serving special education students.¹⁶² For instance, in 2004, approximately 3% of all charter schools were cyber or virtual charter schools.¹⁶³ Although these schools may be making efforts to serve students with disabilities such as holding IEP meetings through videoconferencing, some doubt whether virtual schools can properly meet the needs of special education students.¹⁶⁴ Therefore, the charter schools’ unique and inconsistent structures are one explanation why charter schools are having difficulties serving students with disabilities.

Inadequate funding. Rhim and McLaughlin cited inadequate funding as a practical challenge and a reason why charter schools are facing difficulties serving students with

¹⁵⁷ *Id.* at 52.

¹⁵⁸ *Id.* at 53.

¹⁵⁹ *Id.* at 57.

¹⁶⁰ STEVEN F. WILSON, *LEARNING ON THE JOB: WHEN BUSINESS TAKES ON PUBLIC SCHOOLS* 88 (2006).

¹⁶¹ MIRON & NELSON, *supra* note 115.

¹⁶² *What We Now Know*, *supra* note 80.

¹⁶³ Kelly E. Rapp, Suzanne E. Eckes, & Jonathan A. Plucker, Center for Evaluation & Policy, *Cyber Charter Schools in Indiana: Policy Implications of the Current Statutory Language*, 4 EDUC. POL’Y BRIEF 1 (2006), available at http://ceep.indiana.edu/projects/PDF/PB_V4N3_Winter_2006_CyberCharter.pdf

¹⁶⁴ *Id.* at 2.

disabilities.¹⁶⁵ They stated that the “most common complaint of charter operators is that they do not receive adequate funds to provide special education services.”¹⁶⁶ According to the Center for Education Reform, charter schools are funded at 61% of what traditional schools receive.¹⁶⁷ Specifically, charter schools receive an average of \$6,585 per student compared to \$10,771 per student at their traditional school counterparts.¹⁶⁸ Charter schools are funded based on student enrollment like traditional schools; yet, charter schools face more dire financial demands because they often create their programs from scratch and do not have the luxury of experienced staff and established systems.¹⁶⁹ Moreover, their funding is less than what traditional schools receive; specifically, charter schools have been said to have “limited funding.”¹⁷⁰ Charter schools also may lack options for serving students with disabilities in a cost-effective manner. They lack economies of scale. To illustrate, three special needs students may still require a special education director, a psychologist, a physical therapist, a speech therapist, and an occupational therapist, in addition to a special education teacher. Further, educating students with disabilities is an expensive endeavor; a small charter school could experience economic hardship even when only a few students require a full-time aide.¹⁷¹ According to Miron and Nelson, it could even be possible for one student with a severe disability to “bankrupt a small charter school.”¹⁷²

The issue of inadequate funding is closely tied to the structural issues discussed in the previous section. For traditional schools, special education funding is routed from the federal

¹⁶⁵ *What We Now Know*, *supra* note 80, at 7; *see also* FIORE ET AL., *supra* note 122.

¹⁶⁶ *What We Now Know*, *supra* note 80, at 7.

¹⁶⁷ Center for Education Reform, All About Charter Schools http://www.edreform.com/Issues/Charter_Connection/?All_About_Charter_Schools (last visited July 22, 2010).

¹⁶⁸ *Id.*

¹⁶⁹ *What We Now Know*, *supra* note 80, at 7.

¹⁷⁰ Mary B. Estes, *Choice for All? Charter Schools and Students with Special Needs*, 37 J. SPECIAL EDUC. 257 (2004).

¹⁷¹ WILSON, *supra* note 160, at 207.

¹⁷² MIRON & NELSON, *supra* note 115, at 85.

government to the state education agency (SEA) to the local education agency (LEA).

Therefore, the LEA status of charter schools is once again an important variable. LEAs are responsible for paying the cost of special education by using federal, state, and local funds; however, how these funds actually flow to the charter school students varies from state to state.¹⁷³

In their analysis of 41 charter school statutes, Rhim, Ahearn, and Lange discovered that 10 laws failed to even mention funding related to charter schools.¹⁷⁴ Further, according to their findings, “some state funding systems provide incentives to both overidentify and underidentify students with disabilities.”¹⁷⁵ IDEA mandates that charter schools receive a “proportionate” amount of special education funds, but it does not specify a formula to determine what would be proportionate.¹⁷⁶ Clearly, the research indicates that the problems associated with special education in charter schools can be partially attributed to the inadequate funding of charter schools and the lack of guidance about how much federal funding they receive.

Failure to Prioritize. In her 2008 law review article, Casanova argued that charter schools were not prioritizing the needs of special education students. She stated that students with disabilities “are arguably the ones who could benefit from unique programs and innovative practices the most.”¹⁷⁷ Yet, she highlighted that in 2004, only 7-10% of charter school students are students with disabilities.¹⁷⁸ This percentage is slightly less than the percentage that Rhim and McLaughlin cite. They stated that in their survey of authorizers, they tallied 0-100% of the

¹⁷³ *Charter School Statutes*, *supra* note 72, at 51-52.

¹⁷⁴ *Id.* at 57.

¹⁷⁵ *Id.* at 53.

¹⁷⁶ *Id.* at 60.

¹⁷⁷ Casanova, *supra* note 119, at 232.

¹⁷⁸ *Id.*, cited in Lisa Snell, Special Education Accountability: Structural Reform to Help Charter Schools Mark the Grade 2 (2004), <http://reason.org/news/show/special-education-accountability>.

students having disabilities with a weighted average of 13%.¹⁷⁹ Because students with disabilities comprise such a small minority, some argue that they may be either overlooked or thought of as a population that does not require much attention. Commonly, other student populations such as students of color and low-income students are the populations who are at the heart of the charter school movement. In fact, many charter schools are established to educate these other students.¹⁸⁰

Ahearn et al. cited that many, including parents, have criticized charter schools for not living up to the promises of providing a superior education for their children with disabilities.¹⁸¹ Critics contend that charter schools have the incentive to be unconcerned about students with disabilities.¹⁸² First, charter schools lack incentive to enroll special education students who may lower their test scores, drain their budgets, and require bureaucratic policies to be put into place. One of the cornerstones of the charter school movement is that these schools must be held accountable. If they do not live up to the promises outlined in their charter, their charter risks being revoked or not renewed. Primarily, the promises made relate to student achievement. Thus, the charter school accountability system works against special education students because as a group, special education students have lower test scores than their peers. It is logical that operators would seek students who are more likely to contribute to increasing their achievement scores.

Another key principle of charter schools is competition. Thus, even for schools that are unconcerned about having their charter revoked or not renewed, the school is likely to be

¹⁷⁹ *What We Now Know*, *supra* note 80, at 6-7.

¹⁸⁰ See SCHOOL CHOICE AND DIVERSITY, *supra* note 84; e.g., JAY MATHEWS, WORK HARD. BE NICE (2009) (discussing how Knowledge Is Power Program (KIPP) is known to recruit racial minority students from low-income neighborhoods).

¹⁸¹ AHEARN ET AL., *supra* note 120.

¹⁸² MIRON & NELSON, *supra* note 115.

concerned about competing with area schools in order to maintain its enrollment and funding. Because consumers of public education commonly use test scores as a measure of school quality, once again charter schools may be motivated to avoid admitting special education students. Students with disabilities may also be considered undesirable when expense is taken into consideration. As mentioned in the previous section, one special education student could “bankrupt a small charter school.”¹⁸³ Finally, charter school staff may consider students with disabilities as harder to educate and may stereotype them as requiring special treatment and irritating bureaucratic policies to be followed.

Rhim, Ahearn, and Lange surmised that “special education is frequently an afterthought in the development of charter schools....” and some operators ignore their responsibility to hire special education teachers who possess the “highly qualified” credential.”¹⁸⁴ In fact, “special education teachers in charters schools may not have to meet the certification requirements under IDEA”¹⁸⁵ because many states’ charter school laws do not specify that charter school teachers need to be certified.¹⁸⁶ Furthermore, charter schools may have difficulties providing the related services necessary to fulfill an “appropriate” education under IDEA.¹⁸⁷ For instance, some charter schools have reduced the speech and occupational therapy they provide to students with disabilities because they lacked therapists.¹⁸⁸ In some schools, the population of students with disabilities may be so small that it does not seem economical to hire additional staff or offer specialized programming.¹⁸⁹

¹⁸³ *Id.* at 85.

¹⁸⁴ *Charter School Statutes*, *supra* note 72, at 53.

¹⁸⁵ USCharterSchools.org, Checklist of Special Education Considerations for Charter School Operators, www.uscharterschools.org/cs/spedp/print/uscs_rs/1870 (last visited April 25, 2010).

¹⁸⁶ *What We Now Know*, *supra* note 80, at 3.

¹⁸⁷ *Id.* at 8.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

Some charter school proponents believe charter schools should welcome students with disabilities; however, some of these advocates suggest special education students should be sent to special charter schools designed for students with disabilities.¹⁹⁰ In sum, the assumption that charter schools should not have to ‘deal’ with special education attributes to the special education problems that pervade. Ahearn et al. identified that some charter school leaders are simply unaware of their legal obligations.¹⁹¹ Unlike the federal law surrounding Title I, state and local leaders have limited experience interpreting how IDEA relates to charter schools.¹⁹²

In sum, the research names many reasons why problems in special education exist at charter school. These reasons can be classified into five groups including misconception, philosophical conflict, structural issues, inadequate funding, and failure to prioritize. When analyzing whether charter schools designed specifically for students with autism is a viable option, it is important to review what the existing research identifies as reasons the problems and the reasons why the problems have arisen.

The Specific Special Education Problems that have Emerged within Charter Schools

This section summarizes the existing research findings about the special education problems at charter schools. The issues have been grouped into two types of problems. First, problems that affect students, such as questionable admissions policies, are addressed. Second, a summary of the problems that affect leaders, such as failure to follow the law, are discussed.

Student problems. The most common student effect discussed in the literature is that charter schools have disproportionately fewer special education students in comparison to

¹⁹⁰ Leonard Goldberg, *Lift the Charter School Cap, Create more Special Education Charters*, N.Y. DAILY NEWS, Oct. 13, 2009, available at http://www.nydailynews.com/opinions/2009/10/13/2009-10-13_lift_the_charter_school_cap_create_more_special_ed_charters.html.

¹⁹¹ AHEARN ET AL., *supra* note 120.

¹⁹² *Charter School Statutes*, *supra* note 72, at 51.

traditional schools.¹⁹³ In 2000, Horn and Miron conducted an evaluation of Michigan's charter schools. They found that charter schools were enrolling fewer children with disabilities than traditional public schools and the special education students that they were enrolling tended to have more mild disabilities.¹⁹⁴ Miron and Nelson warned that the actual percentages of special education students at charter schools may not be accurate because some parents are choosing to place their children at charter schools in attempts to hide their child's disability.¹⁹⁵ Rhim and McLaughlin also noted that their research found the same phenomenon occurring.¹⁹⁶ However, these researchers found that once the outliers were removed, the mean percentage of special education students was 11% in comparison with the U.S. Department of Education's 2003 data of 12% of public school students are students with disabilities.¹⁹⁷

One potential explanation why fewer students with disabilities attend charter schools may be because the schools are only accepting and/or attracting nondisabled students. Researchers have categorized this phenomenon into a variety of charter school enrollment practices including creaming, cherry-picking, cropping, and counseling out.

The first enrollment practice is most commonly referred to as creaming, but is also known as cream skimming, or selective admissions.¹⁹⁸ Rhim and McLaughlin explained that charter school critics' originally complained that charter schools would cream the best students away from traditional public schools.¹⁹⁹ One particular criticism was that the charter school

¹⁹³ MIRON & NELSON, *supra* note 115, at 87; Gleason, *supra* note 118; *Charter School Statutes*, *supra* note 72, at 53.

¹⁹⁴ JERRY HORN & GARY MIRON, SECOND EVALUATION OF MICHIGAN CHARTER SCHOOLS: FINAL REPORT (2000).

¹⁹⁵ MIRON & NELSON, *supra* note 115.

¹⁹⁶ *What We Now Know*, *supra* note 80, at 5.

¹⁹⁷ *Id.* at 7.

¹⁹⁸ David R. Garcia, *Academic and Racial Segregation in Charter Schools*, 40 EDUC. & URB. SOC'Y, 590, 591 (2008). "Cream skimming" is a term used by Garcia to refer to a phenomenon where high achieving students move to charter schools and leave a disproportionate number of low-achieving students in traditional schools.

¹⁹⁹ *What We Now Know*, *supra* note 80, at 6.

system would become an elitist system enrolling mostly white, high achieving students.²⁰⁰ Thus, the term “creaming” is applied to other student populations in addition to special education students. This literature review does not extend to the controversial research about whether charter school students are achieving at higher rates than students at traditional schools; however, it is important to note that achievement matters to charter school operators. Oftentimes, students with disabilities, especially students with mental disabilities, are assumed to not be high achieving students. For example, Frankenberg and Lee explained that students who score lower on standardized tests, such as students with disabilities, are not enrolled at charter schools, then the charter schools’ test scores get falsely inflated.²⁰¹

The research is limited about whether creaming exists and no studied could be found about creaming as it relates to students with disabilities; yet, there are two studies that conclude it is not occurring. First, Garcia concluded creaming did not exist in Arizona. After studying Arizona’s charter school students, he surmised that the academic standing of the charter school where the students were attending was at least as good as the traditional schools that the students had left.²⁰² Garcia also noted that there were not a disproportionate number of gifted students enrolled in Arizona’s charter schools.²⁰³ Additionally, Mickelson et al. found that “Except for the 30% of charter schools that have gifted and talented themes, there is little evidence that charter schools general cream high-achieving students away from the host district’s public schools.”²⁰⁴

²⁰⁰ Eckes & Trotter, *supra* note 84.

²⁰¹ Frankenberg & Lee, *supra* note 88.

²⁰² Garcia, *supra* note 198.

²⁰³ *Id.*

²⁰⁴ ROSLYN MICKELSON, MARTHA BOTTIA & STEPHANIE SOUTHWORTH, SCHOOL CHOICE AND SEGREGATION BY RACE, CLASS, AND ACHIEVEMENT 17 (2008), <http://epsl.asu.edu/epru/documents/EPSSL-0803-260-EPRU.pdf>.

Unlike creaming, the existing research connects the practice of cherry-picking to special education students. Cherry-picking is an admissions practice where only the students diagnosed with low-to-moderate disabilities are enrolled. For instance, Miron and Nelson discuss a Michigan study where no charter school had admitted a student with autism and instead, many of them had enrolled students with learning disabilities.²⁰⁵ Further, Fiore et al. found the enrollment of students with more serious disabilities in charter schools was unusual, except in charter schools that are designed to serve students with disabilities.²⁰⁶ Researchers have postulated that the reason charter schools are selective is because students with milder disabilities are typically less expensive and easier to educate.²⁰⁷

Cropping is similar to the practice of creaming the best students off the top; however, cropping refers to slicing the less desirable students off the bottom.²⁰⁸ Specifically, cropping is permitted through the open-enrollment admissions practice of some charter schools. Some schools are allowed to admit based on a ‘first come, first served,’ rolling admissions policy, and therefore, the charter schools may strategically recruit the more desirable students first so that targeted students groups apply early and there are no longer spaces available for the less desirable students.²⁰⁹

In 2007, Rhim, Ahearn, and Lange revealed that some operators report they “regularly counseled students with disabilities away from their schools primarily due to fears about the costs of educating students with disabilities.”²¹⁰ Fiore et al. reported that many of the

²⁰⁵ MIRON & NELSON, *supra* note 115.

²⁰⁶ FIORE ET AL., *supra* note 122.

²⁰⁷ *Charter School Statutes*, *supra* note 72, at 53.

²⁰⁸ Natalie Lacireno-Paquet, Thomas T. Holyoke, Michele Moser, & Jeffrey R. Henig, *Creaming Versus Cropping: Charter School Enrollment Practices in Response to Market Incentives*, 24 EDUC. EVAL. & POL’Y ANALYSIS 145 (2002).

²⁰⁹ Eckes & Trotter, *supra* note 84.

²¹⁰ *Charter School Statutes*, *supra* note 72, at 53.

administrators who they interviewed were “counseling out” students with disabilities by explaining to parents that the students’ needs would be better served at other schools.²¹¹ In contrast, Rhim and McLaughlin summarized that “multiple research studies have documented that charter schools are enrolling students with disabilities and, in some cases, attracting more students with disabilities than traditional public schools.”²¹² Therefore, these researchers conclude that more research is needed regarding enrollment trends.

Unlike creaming, cropping, cherry-picking and counseling out, the final problem relating to students is not related to the lower proportion of special education students. Instead, it relates to what may be happening to special education students once they are enrolled in charter schools. Namely, Gleason found that some charter schools are violating IDEA by not individualizing special education students’ placements.²¹³ She cited to the national study conducted by Fiore et al. when describing the problem.²¹⁴ Gleason explained that the charter schools were not using a “true inclusion model”²¹⁵ because the general and special educators were not co-teaching the class. Instead, as Fiore et al. found, students were being pulled from general education classes when they needed extra assistance.

Yell and Katsiyannis wrote extensively about inclusion and the applicable legal guidelines. They explained that under IDEA, the IEP team must determine a placement for students with disabilities based on their individual needs.²¹⁶ One of the most controversial and frequently litigated placement issues²¹⁷ is the requirement under IDEA to place students with

²¹¹ MIRON & NELSON, *supra* note 115.

²¹² *What We Now Know*, *supra* note 80, at 7.

²¹³ Gleason, *supra* note 118.

²¹⁴ FIORE ET AL., *supra* note 122.

²¹⁵ Gleason, *supra* note 118, at 163.

²¹⁶ 20 U.S.C. § 1400 (26)(A) (2004); Yell & Katsiyannis, *supra* note 7.

²¹⁷ Yell & Katsiyannis, *supra* note 7, at 29.

disabilities in the least restrictive environment (LRE).²¹⁸ Although this mandate is discussed in great detail below in Section 2.2, it is important to emphasize here that the LRE requirement can be divided into two parts. First, special education students must be educated with their nondisabled peers “to the maximum extent appropriate.”²¹⁹ Second, students with disabilities cannot be removed from the general education setting unless education outside of the general education setting can fulfill the student’s free appropriate public education (FAPE) as outlined in his/her individualized education program (IEP).²²⁰ IDEA regulations have provided schools with guidance of what the “continuum of alternative placements” may entail.²²¹ Specifically, the continuum is comprised of: general education classroom²²² → special classes within the school²²² → special schools → homebound instruction and → hospital/residential instruction.²²³

Thus, the LRE mandate does not allow schools to follow a one-size-fits-all placement policy where all students with disabilities are placed in general education classrooms.²²⁴ Yell and Katsiyannis refer to this as a full inclusion policy and explain that it is impermissible because the school is not accounting for special education students’ individual needs.²²⁵ Rhim and McLaughlin also identify that it is unclear how charter schools are defining “inclusive” and whether the level of inclusion is proper for the individual students.²²⁶ Thus, the finding of the Fiore et al. study and discussed by Gleason that some charter schools are following a full inclusion policy is an illegal practice.

²¹⁸ 20 U.S.C. § 1400 (26)(A) (2004).

²¹⁹ 20 U.S.C. § 1400 (26)(A) (2004); Yell & Katsiyannis, *supra* note 7, at 30.

²²⁰ Yell & Katsiyannis, *supra* note 7, at 30.

²²¹ C.F.R. § 300.17.

²²² These may be “resource rooms” where students go to receive special help at scheduled times or “self-contained classrooms” where students remain with other students with disabilities for the entire day.

²²³ C.F.R. § 300.17; Yell & Katsiyannis, *supra* note 7, at 30.

²²⁴ Yell & Katsiyannis, *supra* note 7, at 32.

²²⁵ *Id.*

²²⁶ *What We Now Know*, *supra* note 80, at 9.

Leader problems. The literature identified three main problems that charter school leaders are experiencing as a result of special education are: 1) the inability to find qualified special education staff, 2) a failure to adhere to the legal requirements of special education law, and 3) a lack of accountability. First, there is a shortage of special education staff in traditional schools already, which makes it especially difficult to hire special education staff for the numerous, new, and smaller charter schools.²²⁷ Because charter schools are often smaller schools with fewer staff, it may mean that the special education personnel are less skilled and experienced.²²⁸

Another important issue addressed in all four law review articles on the subject²²⁹ includes the claim that charter school leaders are not adhering to the legal requirements. Charter school operators who serve students with disabilities must adhere to some of the most complicated and controversial laws. Rhim, Ahearn, and Lange explained that special education “results from a complex and oft times confusing combination of federal law and regulation, individual state constitutions, state law and regulation, and policy traditions.”²³⁰ Therefore, it is not surprising that leaders may be unintentionally failing to adhere to special education law simply because they are ignorant about the law’s requirements. Nevertheless, *ignorantia juris non excusat* or said differently, ignorance of the law is no excuse. A universal premise found in the U.S. legal system is that no person escapes liability of violating the law simply because s/he is unaware of it.²³¹

²²⁷ Antonis Katsiyannis, Dalun Zhang, & Maureen A. Conroy, *Availability of Special Education Teachers*, 24 REMEDIAL & SPECIAL EDUC. 246 (2003).

²²⁸ Estes, *supra* note 160.

²²⁹ Casanova, *supra* note 119; Gleason, *supra* note 118; Heubert, *supra* note 116; *Determining Charter Schools’ Responsibilities*, *supra* note 16.

²³⁰ *Charter School Statutes*, *supra* note 72, at 54.

²³¹ STEVEN M. BARKAN, ROY M. MERSKY, & DONALD J. DUNN., FUNDAMENTALS OF LEGAL RESEARCH (2009).

Despite the claims and likelihood that charter school leaders are likely to be violating special education law, in 2001, Broy reported that relatively few charter school cases exist.²³² Similarly in 2004, Martin explained that the cases about discrimination in charter schools are mainly about discrimination based on race, ethnicity, or socioeconomic status (SES) and not disability.²³³ However, Martin found that there are many letters of complaint written to the Office for Civil Rights (OCR) regarding charter schools that failed to provide appropriate services for special education students.²³⁴

Critics contend that charter school leaders are not only failing to follow special education law; but also, they are not being held accountable for this disregard of the law.²³⁵ NCLB's charter school requirements and state charter school statutes may be partially to blame for this accountability failure. NCLB identifies students with disabilities as a subgroup that must be monitored, but according to Rhim, Ahearn, and Lange, only five state charter school statutes provide language about accountability for special education.²³⁶ Because there is a lack of guidance explaining how leaders will be held accountability for special education, the charter school and the LEA are left to determine accountability.²³⁷

Another accountability issue is that the special education students in charter schools comprise such a small subgroup that they may not be reported due to state confidentiality rules. Further, if the subgroup of students with disabilities is small enough, a charter school does not have to include them in their test data. Thus, some students with disabilities are not being

²³² Andrew Broy, *Charter Schools and Education Reform: How State Constitutional Challengers Will Alter Charter School Legislation*, 79 N.C.L. REV. 493, 514 (2001).

²³³ Robert J. Martin, *Charter School Accessibility for Historically Disadvantaged Students: The Experience in New Jersey*, 78 ST. JOHN'S L. REV. 327, 365 (2004).

²³⁴ *Id.* at 665-66.

²³⁵ *What We Now Know*, *supra* note 80, at 11.

²³⁶ *Charter School Statutes*, *supra* note 72, at 57.

²³⁷ *Primer Background Section*, *supra* note 109.

tracked.²³⁸ Essentially, there are no mandated checks in place that ensure students with disabilities are: 1) accessing charter schools, 2) receiving free appropriate public education in the least restrictive environment, or 3) experiencing academic success in charter schools.²³⁹ If the special education students are not being tracked in charter schools, then it is extremely difficult to monitor how well the charter school leaders are serving the students and adhering to the relevant legal requirements.

In 2006, Rhim, Faulkner, and McLaughlin studied the academic success of special education students in charter schools in California. After reviewing the educational outcomes of students with disabilities at 270 charter schools,²⁴⁰ they found that the charter schools' special education students had higher levels of proficiency than students with disabilities at comparable traditional schools. The researchers warned of the study's limitations and the need for further research. In another article, two of the authors of this original study (i.e., Rhim and McLaughlin) concluded that the academic data on how well students with disabilities are performing in charter schools is seriously limited and they recommended that it be further examined.²⁴¹

Rhim and McLaughlin found that the LEA status of a charter school is another "critical factor" that influences its accountability.²⁴² Ultimately, it is the federal Office of Special Education Programs (OSEP) that oversees IDEA compliance,²⁴³ however, governance is also a state and local function. In their review of 41 charter school laws, Rhim, Ahearn and Lange concluded that states hold onto "oversight and monitoring responsibilities," but delegate the

²³⁸ *Charter School Statutes*, *supra* note 72, at 60.

²³⁹ *Id.*

²⁴⁰ *What We Now Know*, *supra* note 80, at 10.

²⁴¹ *Id.*

²⁴² *What We Now Know*, *supra* note 80, at 6.

²⁴³ *Primer Background Section*, *supra* note 109.

responsibility of implementing IDEA to local districts.²⁴⁴ In practical terms, if a charter school is part of a LEA, its students with disabilities must be served in the same manner that the LEA serves non-charter school students with disabilities. If the charter school is its own LEA, then it is responsible for monitoring IDEA compliance unless the state law has assigned this duty to another group.²⁴⁵ Yet, state laws do not always clearly identify the legal status of charter schools. In fact, sometimes a charter school's legal status for special education is different from its status for other issues.²⁴⁶

In response to these issues, measures have been taken to improve the special education accountability for charter school. For example, IDEA mandates state special education advisory panels to include a charter school representative.²⁴⁷ Further, some argue that this failure to adhere to special education has put some charter schools under immense scrutiny which will eventually translate into better special education in charter schools. On a positive note, Estes found that as the charter school movement has grown, charter school leaders have become more cognizant of the special education requirements.²⁴⁸

Yet, Martin warned that the threat of impending lawsuits remains.²⁴⁹ He stated that charter schools located in districts with a high proportion of "historically disadvantaged students," such as students with disabilities may be especially vulnerable to legal attacks citing violation of federal law.²⁵⁰ Martin predicted that as the number of charter schools increase, so

²⁴⁴ *Charter School Statutes*, *supra* note 72, at 51.

²⁴⁵ *Primer Background Section*, *supra* note 109.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Mary B. Estes, *Charter Schools and Students with Disabilities: How Far have We Come?*, 30 REMEDIAL & SPECIAL EDUC. 1 (2009).

²⁴⁹ Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN. ST. L. REV. 43 (2004).

²⁵⁰ *Id.* at 102-03.

will the charter school litigation.²⁵¹ As traditional schools become more concerned about the fiscal impact charter schools are having on them, charter school opponents may strategize how to hinder charter school expansion by filing a barrage of lawsuits.²⁵² Thus, Martin calculated that both charter school proponents and opponents could benefit by becoming more cognizant of legal issues that are not currently before the judiciary, but may be in the near future.²⁵³

2.3 Segregation and Charter Schools

A related but different rising concern discussed in the literature is the reality of charter schools segregating students based on characteristics such as religion, race, socio-economic status, and ability level.²⁵⁴ According to Frankenberg and Lee, some researchers believe charter schools “can compromise the public good by educating students in isolation from others for their private good, often further stratifying students.”²⁵⁵ The research about segregation of student in charter schools is necessary to inform the study as it is questioning whether autism-centric charter schools can legally segregate students with autism.

As mentioned in Chapter One, the legal framework pertaining to the issue of segregation is rooted in the Fourteenth Amendment of the U.S. Constitution. Essentially, this amendment requires similarly situated people to be treated similarly.²⁵⁶ Overall, the government and hence, schools, have different standards to follow when they treat students differently. Teaching certain student populations such as students of color or special education students in isolated locations would be considered treating those students differently. To treat students differently based on race, the current legal standard is that a school must have an *extremely* good reason defined as a

²⁵¹ *Id.*

²⁵² *Id.* at 102.

²⁵³ *Id.* at 46.

²⁵⁴ Buchanan & Fox, *supra* note 89.

²⁵⁵ Frankenberg & Lee, *supra* note 88.

²⁵⁶ THOMAS ET AL., *supra* note 13, at 11.

“compelling governmental interest.”²⁵⁷ However, to treat students differently based on ability, a school only needs a good reason that is “reasonably related” to a “legitimate” government interest.

These constitutional principles apply to charter schools because research shows that some charter schools are serving targeted student populations.²⁵⁸ Scholars have questioned whether these segregated schools violate the Constitution. Schools that segregate students based on race are more likely to violate constitutional principles than those segregating students based on ability. However, as this section will explain, the Constitution is merely one legal authority affecting charter school segregation. Federal and state laws, as well as case law and regulations, also come into play. Thus, federal disability law may more greatly limit a charter school’s ability to segregate special education students than to segregate based on race. Further, the issue whether the segregation is *de jure* versus *de facto* also proves to be an important differentiation.

Because autism-centric charter schools are isolating students based on disability, a review of the literature pertaining to segregation at charter schools is needed. This section begins by examining those studies that identify reasons why charter schools may be isolating certain types of students. Next, charter school practices that are closely tied to segregation are discussed. Specifically, the research about charter school lotteries, admissions practices, and recruitment strategies is presented. The third sub-section summarizes the research about racial segregation in charter schools. It is the most commonly cited type of segregation in charter school research and informs the discussion found in the last sub-section, which is ability-level segregation at charter

²⁵⁷ *Id.* at 143-45.

²⁵⁸ RPP INTERNATIONAL, *supra* note 67; Buchanan & Fox, *supra* note 89; Joe Schneider, *Five Prevailing Charter Types*, 56 SCH. ADMIN. 29 (1999).

schools. This type of segregation is extremely important to review as it is the primary focus of this study.

Reasons for Charter School Segregation

Unconcerned about isolating students as long as positive results are achieved.

Frankenberg and Lee have identified that some believe it is appropriate to segregate charter school student populations if the end justifies the means.²⁵⁹ In other words, charter school proponents may not be prioritizing segregation as a core issue because it is overshadowed by the end goal of increased student achievement. In particular, charter schools have been lauded as a way to provide educational opportunities to disadvantaged students. Some believe that achievement gap can be reduced through this reform effort.²⁶⁰ Frankenberg and Lee rebuff this “‘separate, but equal’ justification” stating that there is “no systematic research or data that show that charter schools perform better than [traditional] public schools.”²⁶¹

Nonetheless, as noted by Eckes and Trotter, some charter school leaders may dismiss the segregation controversy because they personally believe they are making a difference for disadvantaged students. They may believe that isolating students on racial or other grounds is justifiable if it results in positive outcomes. To that end, charter school leaders may be unconcerned about ensuring that their study body is diverse. Eckes and Trotter investigated the recruitment and admissions practices at eight charter schools. The charter schools had high levels of academic achievement and were located in racially diverse locations.²⁶² The researchers hypothesized that the charter school leaders would take advantage of their ability to enroll students from across district lines in order to achieve greater racial diversity at their

²⁵⁹ Frankenberg & Lee, *supra* note 88.

²⁶⁰ Macey et al., *supra* note 73.

²⁶¹ Frankenberg & Lee, *supra* note 88.

²⁶² Eckes & Trotter, *supra* note 84.

schools.²⁶³ A review of the relevant state charter school statutes revealed that every state had anti-discrimination language in its law. However, Eckes and Trotter found that the charter schools' leaders were not necessarily concerned about racial integration and were more interested in ensuring their schools served students from disadvantaged backgrounds.²⁶⁴

Structure fosters segregation. At least five studies have identified that some charter schools are geared to serve a homogeneous population. RPP International found that 25% of charter schools are serving targeted populations such as fine arts students, African American students, and ELL students.²⁶⁵ Eckes found that some charter schools are based on cultural backgrounds such as Native American, Native Hawaiian, Muslim, and Jewish charter schools.²⁶⁶ Mickelson et al. also noted charter schools designed to serve students such as special education students, adjudicated youth, teen parents, and gifted and talented students.²⁶⁷ Schneider categorized five types of charter schools including one he termed "ethnic."²⁶⁸ He described these charter schools as serving predominantly African American or Latino students. Yancey noted that some states have charter schools where the enrollment is "85-100% Black" and have an "Afrocentric philosophy and curriculum."²⁶⁹ These ethnic charter schools may exist because the design of the schools, the relevant state statutes, or the school board policies may permit segregation.²⁷⁰ This structural segregation may occur unintentionally. For example, if charter schools are restricted to enroll students in their district and the district is racially homogeneous,

²⁶³ *Id.* at 67.

²⁶⁴ *Id.* at 82.

²⁶⁵ RPP INTERNATIONAL, *supra* note 67.

²⁶⁶ Suzanne Eckes, Robert Fox, & Nina Buchanan, Legal issues and niche charter schools. Paper presented at the annual meeting of the International Conference on Education, Honolulu, HI. (2010, January).

²⁶⁷ MICKELSON ET AL., *supra* note 204.

²⁶⁸ Schneider, *supra* note 258.

²⁶⁹ Patty Yancey, *Independent Black Schools and the Charter Movement*, in THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS, *supra* note 89, at 126 .

²⁷⁰ MICKELSON ET AL., *supra* note 204, at 20.

then it follows that the charter schools would not be racially diverse.²⁷¹ However, structuring a charter school to serve a targeted population is often an intentional design. By advertising for whom the school is designed, the school may discourage parents of ELL students, low performing students, students with disciplinary issues, and special education students from even applying.²⁷² Further, Frankenberg and Lee noted that charter schools are allowed to selectively recruit certain students.²⁷³

The policies outlining the structure of the school may also permit segregation. When compared to magnet schools, Frankenberg and Lee stated that charter schools are more likely to racially segregate than magnet schools. The purpose behind magnet schools was to racially integrate public education. They were established to attract white students to attend schools that were predominantly comprised of students of color.²⁷⁴ Yet, unlike magnet schools, racial integration is not one of the popular motivations of the charter school movement.

Furthermore, magnet schools are required to follow specific desegregation policies, but similar desegregation policies are not found in the federal charter law.²⁷⁵ According to Orfield, “The charter school law was a movement backward to the unregulated choice policies common 40 years ago across the South and in many big cities. Those did not work to produce integration and charter school policies do not either.”²⁷⁶ Interestingly, magnet schools are typically bound by certain geographic boundaries and many charter schools are not.²⁷⁷ This freedom to enroll diverse populations could allow charter school leaders to recruit diverse student populations;²⁷⁸

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ Frankenberg & Lee, *supra* note 88; *see also infra* Lotteries, admission policies, and recruitment section.

²⁷⁴ Frankenberg & Lee, *supra* note 88.

²⁷⁵ *Id.*

²⁷⁶ Frankenberg & Lee, *supra* note 88, at Foreword.

²⁷⁷ Frankenberg & Lee, *supra* note 88.

²⁷⁸ *Id.*

however, as Eckes and Trotter discovered, the leaders do not appear concerned about diverse student populations. Additionally, Frankenberg and Lee hypothesized that some charter schools are segregated because there are no accountability measures to ensure they have diverse student populations.²⁷⁹

Parental Choice. Mickelson et al. and Yancey found that segregation in charter schools may also be occurring because parents are unconcerned about school integration. According to Mickelson et al.,

Some Native American, black, Latino, white parents, and parents of special-needs children choose schools segregated by race or ability. Parents frequently say they choose better quality schools for their children, but the evidence reviewed in this chapter indicates that they are often guided less by a school's academic reputation and more by its demographic profile. Parents appear to select a choice school with a student body similar to their own race, even if the choice school has lower test scores than their current school.²⁸⁰

As will be discussed in the racial segregation section, Yancey found that African American parents of children at charter schools were not concerned about their child's school being racially segregated.²⁸¹

Procedures Related to Charter School Segregation: Lotteries, Admissions Policies, and Recruitment Strategies

In addition to research about why charter schools are segregated, there are articles describing the procedures in place that relate to intentional segregation. Namely, the research describes lotteries, admissions policies, and recruitment strategies.

Beginning with lotteries, Eckes and Trotter explained that on average, charter schools are smaller than traditional schools and typically have fewer seats available.²⁸² Thus, many charter

²⁷⁹ *Id.*

²⁸⁰ MICKELSON ET AL., *supra* note 204, at 20.

²⁸¹ Yancey, *supra* note 269, at 154.

²⁸² Eckes & Trotter, *supra* note 84.

schools conduct lotteries for the available seats.²⁸³ If charter schools receive Charter School Program (CSP) or Title I funding from the federal government and they have limited openings available at their school, then random selection procedures are not optional.²⁸⁴ Therefore, lotteries or a similar random procedure must occur in the approximate 61% of charter schools receiving CSP funding.²⁸⁵

Some have praised the lottery system for allowing equal access to all families.²⁸⁶ However, others are not entirely confident that the lottery requirement prevents illegal selection from occurring. After interviewing charter school leaders from eight charter schools, Eckes and Trotter stated that one charter school leader “inferred that the state does not know what occurs with the lottery ‘behind closed doors.’”²⁸⁷ Others have also noted a lack of monitoring of lottery procedures.²⁸⁸

Moreover, the U.S. Department of Education (U.S. DOE) published guidance for charter schools and clarified that charter schools that receive CSP funds are legally permitted to favor some students over others. A weighted lottery is allowed if it is needed to comply with Section 504, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Equal Protection Clause, or state law.²⁸⁹ Schools in their last year of CSP funds can legally select students for the next school year without using a lottery.²⁹⁰ Further, a weighted lottery can

²⁸³ *Id.*

²⁸⁴ U.S. DEP’T OF EDUC., TITLE V, PART B: NON-REGULATORY GUIDANCE (2004), *available at* <http://www.ed.gov/policy/elsec/guid/cspguidance03.doc>.

²⁸⁵ OFFICE OF MGMT. AND BUDGET, EXPECT MORE: DETAILED INFORMATION ON THE CHARTER SCHOOLS GRANT ASSESSMENT (2005), <http://www.whitehouse.gov/OMB/expectmore/detail/10003302.2005>.

²⁸⁶ Eckes & Trotter, *supra* note 84.

²⁸⁷ *Id.* at 82.

²⁸⁸ *Id.* at 64-67.

²⁸⁹ U.S. DEP’T OF EDUC., *supra* note 284.

²⁹⁰ *Id.* at 5.

be used to give preference to students seeking to transfer schools according to the Elementary and Secondary Education Act Title I.²⁹¹

The U.S. DOE informed charter schools that the following types of students can be exempted from the lotteries of CSP funded charter schools:

- (a) students who are enrolled in a public school at the time it is converted into a public charter school;
- (b) siblings of students already admitted to or attending the same charter school;
- (c) children of a charter school's founders (so long as the total number of students allowed under this exemption constitutes only a small percentage of the school's total enrollment); and
- (d) children of employees in a work-site charter school (so long as the total number of students allowed under this exemption constitutes only a small percentage of the school's total enrollment).²⁹²

Therefore, research identifies that there are students who can be selectively admitted without having to enter the lottery pool. However, the charter schools not funded by CSP or Title I and are exempt from these lottery guidelines and may have more leeway in enrollment procedures if their state charter school statute does not require lotteries.

When it comes to admissions policies, the U.S. DOE instructs charter schools that they must provide students in the community an “equal opportunity to attend the charter school;” however, it also clarifies that CSP charter schools do not have to admit every student.²⁹³ In fact, CSP charter schools may set minimum admissions qualifications if they are:

- (a) consistent with the statutory purposes of the CSP;
- (b) reasonably necessary to achieve the educational mission of the charter school; and
- (c) consistent with civil rights laws and Part B of the Individuals with Disabilities Education Act.²⁹⁴

²⁹¹ *Id.* at 12.

²⁹² *Id.* at 12-13.

²⁹³ *Id.* at 15.

²⁹⁴ *Id.*

As will be discussed in the disability segregation section, charter schools designed for gifted and talented students as well as other types of niche charter schools exist and scholars have questioned the legal vulnerability of their admissions policies.²⁹⁵

In addition, in Eckes and Trotter's study of eight charter schools, they found that the charter school leaders employed particular recruitment strategies.²⁹⁶ Most of the leaders chose particular neighborhoods or regions as recruiting grounds where the leaders "felt were being underserved by the public education system."²⁹⁷ To illustrate, the leaders appeared to have specific types of students that they sought to recruit. One leader stated he was targeting poor, Latino students.²⁹⁸

The researchers concluded that charter schools may avoid recruiting certain students such as students with disabilities and may target others such as gifted and talented students or students of a certain ethnicity.²⁹⁹ In sum, charter schools are allowed to advertise in strategic ways that limit the scope of students who apply to their schools.³⁰⁰

In addition to recruiting, in an attempt to create a student population of a certain socio-economic status or race, charter schools may be interested in recruiting to comprise a gender balanced student population. The U.S. DOE instructed CSP charter schools "seeking to achieve greater gender balance should do so by targeting additional recruitment efforts toward male or female students."³⁰¹ Yet, in the same publication, the U.S. DOE warned,

When recruiting students, charter schools should target all segments of the parent community. The charter school must recruit in a manner that does not discriminate

²⁹⁵ Decker et al., *supra* note 15.

²⁹⁶ Eckes & Trotter, *supra* note 84, at 73.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Eckes & Trotter, *supra* note 84.

³⁰⁰ *Id.* at 65.

³⁰¹ U.S. Dept. of Educ., Charter Schools Program, <http://www.ed.gov/programs/charter/index.html> (last visited Aug. 2, 2010).

against students of a particular race, color, national origin, religion, or sex, or against students with disabilities; but the charter school may target additional recruitment efforts toward groups that might otherwise have limited opportunities to participate in the charter school's programs.³⁰²

Thus, under the Elementary and Secondary Education Act (ESEA), charter schools receiving CSP funding are instructed to inform students in the community about the school and give every student “an equal opportunity to attend the charter school,”³⁰³ but they also are permitted to exempt students from lotteries, hold weighted lotteries, set minimum admissions qualifications, and recruit targeted student populations.

Racial Segregation

While it is true that research related to segregation of students based on ability level at charter schools is more closely related to the research questions of the current study, limited research exists about this topic. Therefore, since segregation based on race is a related topic, it is summarized in this section. The current study plans to add to the existing research about segregation based on ability level so that there is comparable research available in comparison to the literature about racial segregation at charter schools.

Historical connection between racial segregation and the charter school movement. Stulberg’s research analyzes how history has influenced racial segregation at charter schools. Racial segregation has been at the forefront of educational reform since *Brown v. Board of Education*. As articulated by Stulberg, it is rare to discuss school reform without discussing the racial inequalities in schools.³⁰⁴ Additionally, the issue of racial segregation in public schools

³⁰² *Id.* at 12-13.

³⁰³ 20 U.S.C. 7221b(b)(3)(I)

³⁰⁴ Lisa M. Stulberg, *What History Offers Progressive Choice Scholarship*, in THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS, *supra* note 89, at 9.

bleeds into other areas of social reform. Stulberg explains that after *Brown*, schools were assigned a “broad responsibility for mitigating American racial inequity.”³⁰⁵

The first time the principle of choice was tied to fostering integration was in the late 1960s and early 1970s. In “freedom of choice” plans, students were permitted to choose where to attend schools. Consequently, African American students chose the African American schools and the White students chose the White schools. The U.S. Supreme Court held the school board’s use of these plans was unconstitutional in *Green v. County School Board of New Kent County*.³⁰⁶ In the early 1970s, magnet schools emerged. School reformers hoped that by offering specialized programming at schools with high percentage of racial minority students such as magnet science programs, White students would be attracted to the schools and voluntarily would choose to leave their home schools to enroll in the magnet programs. The courts upheld this program of choice.³⁰⁷

At the same time alternative education had emerged in the 1960s and 1970s. Independent alternative schools were also known as free or community schools and were “generally created by small groups of parent or community activists who wanted the freedom to implement their own philosophies and pedagogical perspectives on childhood and school.”³⁰⁸ Surprisingly, these schools increased from 464 in 1973 to approximately 5000 in 1975.³⁰⁹ The concept of educational vouchers was also introduced to the school reform movement around this time. Milton Friedman hypothesized that by introducing market principle of competition and choice,

³⁰⁵ *Id.*

³⁰⁶ 391 U.S. 430 (1968).

³⁰⁷ Stulberg, *supra* note 304, at 13.

³⁰⁸ *Id.* at 14.

³⁰⁹ *Id.*

the public school system would improve.³¹⁰ These same market principles have been applied to the modern charter school movement.

Yet, unlike the school reform goals behind the magnet school reform, some researchers believe that because there are market principles attached to the charter school movement, racial segregation may be perpetuated.³¹¹ Mickelson et al. critiqued,

Market principles are not egalitarian; they are blind to race and SES. As such, market mechanisms are more likely to perpetuate racial and SES stratification in educational opportunities than generate greater equality in them. Contrary to the assertions of advocates who argue that choice will promote diversity and enhance learning, the empirical evidence... suggests that, overall, choice options have neither fostered greater equity in educational outcomes nor stimulated improvement in non-choice schools.³¹²

Orfield has also noted his concern about charter schools' potential for further segregating U.S. schools. Orfield noted that "black and Latino students are more isolated than they have been for three decades."³¹³ He stated, "Racial segregation in charter schools needs to be considered as both a critical problem and a lost opportunity....too many [charter schools] are separate and unequal."³¹⁴

Likelihood that charter schools are racially segregated. Research about racial segregation in charter schools is mixed.³¹⁵ Some researchers postulate that the national and state charter school studies "mask ethnic stratification" by reporting data in the aggregate.³¹⁶ Yancey identified that when the national aggregate data is presented, charter schools appear to serve a population that is "demographically similar" to traditional schools.³¹⁷ Yet, she stated that when individual charter schools are examined more closely on a state-by-state basis, "the picture

³¹⁰ *Id.* at 14-15.

³¹¹ Frankenberg & Lee, *supra* note 88.

³¹² MICKELSON ET AL., *supra* note 204, at 19.

³¹³ Frankenberg & Lee, *supra* note 88.

³¹⁴ *Id.*

³¹⁵ Eckes & Trotter, *supra* note 84, at 64.

³¹⁶ Buchanan & Fox, *supra* note 89, at 81.

³¹⁷ Yancey, *supra* note 269.

blurs.³¹⁸ For instance, Arizona appears to have a higher percentage of White students at charter schools than traditional schools and racial minorities are underrepresented at California's charter schools.³¹⁹ Garcia studied the attendance patterns of students in Arizona which is a state having one of the highest numbers of charter school students.³²⁰ He concluded that charter school students were leaving more racially integrated traditional school to attend more segregated charter schools.³²¹ Frankenberg and Lee identified that segregation of White students in charter schools is as high as segregation of African American charter school students in some states.³²² Whereas, other research indicated that some charter schools are more integrated than their traditional school counterparts.³²³

Overall, however, Rapp and Eckes concluded that charter schools are slightly more racially segregated than traditional schools because a disproportionately high number of minority students are enrolled at charter schools.³²⁴ Green also found disproportionately high percentages of racial minorities at many charter schools.³²⁵ In 2007, the Center for Education Reform released aggregate data of all U.S. charter schools that indicated racial minority students comprise 53% of the total charter school student population.³²⁶ Mickelson et al. found that schools of choice are as racially segregated, and in some instances, more segregated than their

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ Garcia, *supra* note 198.

³²¹ *Id.*

³²² Frankenberg & Lee, *supra* note 88.

³²³ Frankenberg & Lee, *supra* note 88; Kelly E. Rapp & Suzanne E. Eckes, *Dispelling the myth of "White flight." An examination of Minority Enrollment in Charter Schools*, 21 EDUC. POL'Y 615 (2007).

³²⁴ Rapp & Eckes, *supra* note 323.

³²⁵ Preston Green, *Racial Balancing Provisions and Charter Schools: Are Charter Schools Out on a Constitutional Limb?*, 1 BYU EDUC. & L. J. (2001).

³²⁶ Center for Education Reform, Number of Charter Schools up 11 Percent Nationwide, May 10, 2007, http://www.edreform.com/Archive/?Number_of_Charter_Schools_Up_11_Percent_NationwideMore_than_Half_of_Charter_Students_Are_LowIncome_or_Minority

neighboring schools.³²⁷ Frankenberg and Lee went even further and concluded that in general, charter schools are more segregated than traditional schools.³²⁸ They identified African American charter school students are more segregated than Latino students. According to Buchanan and Fox, “What is clear is that the emergence of charter school movement has provided a vehicle whereby groups who wish to provide an ethnically separated educational experience can obtain public funds in order to do so.”³²⁹

Few of the researchers who have identified racial segregation at charter schools have also provided recommendations about how to remedy this issue. Mickelson et al. suggested policymakers should “restructure existing choice plans,” “sanction designs that segregate,” “reward those that generate diversity,” provide transportation, “redesign public/private sector relationships,” and increase accountability.³³⁰

Positives of racially segregated charter schools. To the contrary, some researchers have offered the benefits of separating students based on race or ethnicity as opposed to highlighting how to avoid racial segregation. Rofes and Stulberg noted in the foreword to their edited book entitled *The Emancipatory Promise of Charter Schools* that charter schools “are playing a powerful role in reviving democratic participation in public education, expanding opportunities for progressive methods in public school classrooms, and providing new energy to community-based, community-controlled school initiative for communities of color.”³³¹ Stulberg insinuated

³²⁷ MICKELSON ET AL., *supra* note 204, at 19-20.

³²⁸ Frankenberg & Lee, *supra* note 88.

³²⁹ Buchanan & Fox, *supra* note 89, at 82.

³³⁰ MICKELSON ET AL., *supra* note 204, at 21.

³³¹ THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS, *supra* note 89, at 4.

that charter schools may provide a way to combat racial inequities in a time when there is a “national assault on affirmative action and retreat from school desegregation.”³³²

Buchanan and Fox described three ethnocentric Native Hawaiian charter schools and the positive results they have discovered in student achievement and satisfaction.³³³ In particular, these ethnocentric charters are focused on preserving the native language and culture. The researchers discussed that a pervasive part of the schools’ pedagogy was the respect for Hawaiian values. According to the researchers, “What had begun as an unquestioned assumption by communities of color that ‘separate is unequal’ may have evolved into the belief that only through schools that emphasize difference can true equity emerge.”³³⁴ They explained that some believe “this return to educational separatism...is a case of ‘separate but better,’ rather than the discredited ‘separate but equal.’”³³⁵

Yancey also reported that racially segregating students for educational purposes is not always viewed in a negative light. She noted that independent Black institutions (IBIs) have been in existence as far back as 1798, and although they have traditionally been established as private schools, now some are able to convert to charter schools.³³⁶ In a case study of three IBI charter schools, Yancey quoted a politician in support of IBIs stressed, “There are more important things than integration.”³³⁷ The researcher commented,

Statements like these shock and disturb progressive educators and charter opponents. They continue to sound warning bells about the charter movement fostering a return to a segregated public education system, but Black charter parents appear not to buy into one-race charter schools as a negative thing.³³⁸

³³² Stulberg, *supra* note 304, at 29.

³³³ Buchanan & Fox, *supra* note 89, at 81.

³³⁴ *Id.* at 82.

³³⁵ *Id.* at 100.

³³⁶ Yancey, *supra* note 269, at 128-30.

³³⁷ *Id.* at 153.

³³⁸ *Id.* at 153-54.

A recurring theme across Yancey's interviews with African American parents was that they had "lost faith" in our current public education system and were not concerned about charter schools being racially segregated.³³⁹ One mother she interviewed said, "No one seemed to care about that until the charter school came along."³⁴⁰ Yancey also explained that when African American parents see their children achieving, they may not care whether the school is integrated.

Segregation based on ability

As mentioned, limited research has critiqued charter schools that segregate based on ability level.³⁴¹ A few researchers have written explicitly on the subject and a few others³⁴² have briefly discussed the topic in connection with segregation based on race or segregation based on gifted ability levels. Mickelson et al. noted that when charter schools are designed for certain populations such as special education or gifted students, they will promote segregation by achievement or ability level.³⁴³ Unlike the legal and policy issues arising in charter schools that are racially segregated, if schools discriminate based on ability level, then they also face complications related to federal disability law. The legal framework of ability-based segregation is complicated because in addition to case law, there are many applicable federal statutes.

What is common in the existing literature is the notion that when schools segregate based on ability, three main legal tensions arise. The literature findings have been grouped into these three categories including 1) discriminatory admissions, 2) illegal placement, and 3) LRE violations.

³³⁹ *Id.* at 154.

³⁴⁰ *Id.*

³⁴¹ MEAD, *supra* note 4; Decker et al., *supra* note 15.

³⁴² MICKELSON ET AL., *supra* note 204; Eckes and Plucker, *supra* note 75.

³⁴³ MICKELSON ET AL., *supra* note 204, at 16.

Discriminatory admissions. In addition to the Equal Protection Clause of the 14th Amendment, Section 504 is the main source of law that relate to discriminatory admissions in charter schools based on ability level. IDEA's zero reject principle in which public schools are not permitted to deny admission to any student no matter how severe his/her disability also applies. Because the constitutional equal protection principles were already discussed and IDEA is not primarily a civil rights statute, this section will only focus on Section 504.

As described at the beginning of this chapter, Section 504 is a civil rights statute that prohibits disability discrimination. Thus, if charter schools were suspected of discriminatory admission practices, Section 504 violations could be claimed.³⁴⁴ Because research has found a disproportionately lower number of students with disabilities at charter schools,³⁴⁵ it is possible that special education students are being improperly denied admission into charter schools. Additionally, there are charter schools that are designed to only serve students with disabilities.

According to Mikelson et al., the choice movement has a history of segregating based on ability levels.³⁴⁶ College preparatory magnet schools have enrolled students based on entrance exams scores and have had a tradition of segregating gifted students based on ability level.³⁴⁷ However, state charter statutes explicitly make it illegal to discriminate based on disability and charter schools receiving CSP funding follow certain admissions procedures such as open-enrollment and lotteries. Courts could determine that this practice of specialized schools for students with certain disabilities (e.g., autism-centric charter schools) is discriminatory to

³⁴⁴ *Determining Charter Schools' Responsibilities*, *supra* note 16.

³⁴⁵ Casanova, *supra* note 119.

³⁴⁶ MICKELSON ET AL., *supra* note 204.

³⁴⁷ *Id.*

students with other disabilities or to non-disabled students, and therefore, in violation of state charter school statutes and Section 504.³⁴⁸

In 2007, Rhim, Ahearn, and Lange reviewed all 41 of the existing charter school statutes and found that only two mentioned Section 504.³⁴⁹ Yet, in 2002, the U.S. Office for Civil Rights (OCR), which is the office responsible for monitoring Section 504 and ADA, received 35 complaints about Section 504 violations in charter schools.³⁵⁰

Placement violations. Unlike discriminatory admissions, IDEA comes into play when analyzing whether parents placing their children with disabilities into charter schools is illegal. A key aspect of IDEA is protecting the parents' right to participate in educational decisions about their children. Similarly, a parent's ability to make educational decisions is respected in the charter school movement. Namely, parents are not told where their children must go to school, but are instead allowed to choose their child's school. Despite these similarities, Rhim, Ahearn, and Lange warned that "the divergent manner in which the two programs manifest in practice can set up barriers to a harmonious merger."³⁵¹ In particular, when parents of students with disabilities choose what school their child will attend without involving the student's entire IEP team, a problem emerges.

Prior to becoming an issue in the charter school movement, this issue arose in educating visually impaired children at state schools. In 1991, an Indiana law was passed that permitted parents to enroll their children in any public school. The superintendent from the Indiana School for the Blind wrote a letter, which is referred to as the "Letter to Bina," requesting clarification

³⁴⁸ MEAD, *supra* note 4.

³⁴⁹ *Charter School Statutes*, *supra* note 72, at 55.

³⁵⁰ Rapp et al., *supra* note 163, at 2.

³⁵¹ *Charter School Statutes*, *supra* note 72, at 51.

from the Office of Special Education Programs (OSEP) to determine when parents were allowed to unilaterally choose to place children in a state school. OSEP responded,

[I]f a program ‘specifically provides that parent preference is the sole criterion for placement of children,’ it would be inconsistent with the legal requirement that placements be determined by IEP teams in conformity with the law. Therefore, the letter concluded ‘parent preference cannot override the decision of the child’s [IEP] team.’³⁵²

In comparing OSEP’s response to the current practice of parents unilaterally deciding to enroll their special education students in charter schools, Mead maintains, “[t]his long-held position of OSEP reiterates the fact that the FAPE is the child’s entitlement and parents may not waive their child’s rights, even in the name of parental choice”³⁵³ The Office for Civil Rights (OCR) further clarified the issue by stating, “choice programs must ensure that children with disabilities are not subjected to discrimination by being excluded from choice programs or being required to waive services or rights in order to participate in them.”³⁵⁴ Mead concluded, the consistent message from the U.S. Department of Education has been that those parental choices that are consistent with federal disability law can and should be honored and that conversely, a parental choice may not be implemented if it does not meet those requirements.³⁵⁵ Similarly, guidance letters written by the Office of Special Education Programs (OSEP) suggest that IDEA mandates that a child’s IEP team must determine that the student requires a special placement before parents unilaterally place their child at a state school for the hearing or visually impaired.³⁵⁶

Rhim and McLaughlin also highlighted the problem of unilateral placement decisions.³⁵⁷

However, these scholars were concerned that by allowing parents to enroll children in any

³⁵² MEAD, *supra* note 4, at 4.

³⁵³ *Determining Charter Schools’ Responsibilities*, *supra* note 16, at 185.

³⁵⁴ MEAD, *supra* note 4, at 4.

³⁵⁵ *Id.* at 5.

³⁵⁶ *Id.* at 4, Mead was discussing *Letter to Bina*, 1991; *Letter to Lunar*, 1991; *Letter to Evans*, 1991.

³⁵⁷ *What We Now Know*, *supra* note 80, at 4-5.

charter school, it assumes parents will act according to what is appropriate for their children which may not be accurate.³⁵⁸

Rhim, Ahearn, and Lange cautioned that problems can arise when parents enroll children in charter schools without consulting existing members of the student's IEP team.³⁵⁹ The IEP team includes not only the parents, but also educational professionals who are supposed to consult with one another to determine an "appropriate" education program. When parents make unilateral decisions to enroll students with disabilities in charter schools, it may be in violation of the IDEA's requirement for team decision-making.

Additionally, some question parental motivations when putting students with disabilities in charter schools. For instance, Rhim and McLaughlin documented that some parents enroll their children in charter schools to avoid the traditional schools from identifying their child as disabled.³⁶⁰

One aspect that is unclear is whether the team-decision requirement is met when a newly-convened IEP team at a charter school agrees with parents' unilateral transfer of the child to the charter school. According to a federal regulation clarifying transfers of students with disabilities, if the student transfers to a "new public agency" in the same state and enrolls at the new school within the same school year, then the "new public agency" is responsible to provide services comparable to the services in the child's existing IEP from the old school.³⁶¹ The "new public agency" can either adopt the student's existing IEP or can create a new IEP with a new IEP

³⁵⁸ *Id.*

³⁵⁹ *Charter School Statutes, supra* note 72, at 52.

³⁶⁰ *What We Now Know, supra* note 80, at 5.

³⁶¹ 34 C.F.R. § 300.323(e) (2009).

team.³⁶² A “public agency” could be a LEA or depending on the state law, could be the charter school.³⁶³

LRE violations. The literature about illegal placement of students with disabilities ties into the research conducted by Yell and Katsiyannis³⁶⁴ and Yell, Katsiyannis, Drasgow, and Herbst,³⁶⁵ which evaluates whether schools designed for children with disabilities meet the Least Restrictive Environment (LRE) requirements under IDEA. These researchers explained that according to the federal regulations, the LEA must have a “‘continuum’ of placement alternatives.”³⁶⁶ Although IDEA does not mandate that special education students must be placed in inclusive environments,³⁶⁷ there is a preference that students with disabilities will be placed in the general education environment as much as is appropriate based on their individual needs.³⁶⁸ In other words, the LRE mandate has been interpreted to require that students with and without disabilities are to be educated together as much as possible.³⁶⁹ Or as stated by Yell and Katsiyannis, “All students with disabilities have a presumptive right to be educated in integrated settings.”³⁷⁰ As summarized by Yell et al.,

It is only when an appropriate education cannot be provided, even with the use of supplementary aids and service, that students with disabilities may be placed in more restrictive settings. Thus, IDEA favors integration but recognizes for some students, more restrictive or segregated settings may be appropriate if they are necessary to provide a student with a FAPE.³⁷¹

³⁶² 34 C.F.R. § 300.33 (2009).

³⁶³ 20 U.S.C.A. § 1413(a)(1).

³⁶⁴ Yell & Katsiyannis, *supra* note 7.

³⁶⁵ *Id.*

³⁶⁶ 34 C.F. R. §300.115.

³⁶⁷ Yell & Katsiyannis, *supra* note 7, at 32.

³⁶⁸ *Id.* at 32.

³⁶⁹ Mitchell L. Yell & Erik Drasgow, *A Legal Analysis of Inclusion*, 43 PREVENTING SCH. FAILURE 118(1999).

³⁷⁰ Yell & Katsiyannis, *supra* note 7, at 34.

³⁷¹ Yell et al., *supra* note 143, at 185.

Thus, charter schools that automatically educate special education students away from their typically developing peers without attending to the student's individual needs may be in violation of the LRE mandate.³⁷² Much of the descriptions about the LRE mandate in the research did not term this as “segregation;” however, Yell et al. stated, “when the general education setting is not appropriate, [then the child should be placed in] a setting with the least amount of *segregation* [emphasis added] from a student's nondisabled peers.”³⁷³

At the same time, in the seminal IDEA case *Hendrick Hudson Central School District v. Rowley*, the U.S. Supreme Court held,

Despite this preference for “mainstreaming” handicapped children – educating them with non-handicapped children – Congress recognized that regular education simply would not be a suitable setting for the education of many handicapped children...[IDEA] thus provides for the education of some handicapped children in separate classes or institutional settings.³⁷⁴

It is up to the multidisciplinary IEP team to develop the IEP and as a result, to determine what constitutes as the LRE for each individual student.³⁷⁵ Thus, placement decisions are based on the IEP and can only be made after the IEP has been developed and must be reviewed and updated at least annually.³⁷⁶ IDEA mandates that parents are “members of any group that makes decision on educational placement of their child.”³⁷⁷ According to Yell and Katsiyannis, IEP teams are to use information from a variety of sources when determining a student's placement.³⁷⁸ For instance, they may look to test scores, teacher recommendations, or adaptive behavior and all factors are to be considered.³⁷⁹ Yell and Katsiyannis recommended that all evaluation materials

³⁷² MEAD, *supra* note 4.

³⁷³ *Developing Legally Correct*, *supra* note 143, at 184-85.

³⁷⁴ 458 U.S. 176, 192 (1982).

³⁷⁵ 20 U.S.C. 1414(d)(1)(A)(i) (2004).

³⁷⁶ 300.552(b)(2); Appendix A to 34 C.F.R. Part 200, Question 14.

³⁷⁷ 20 U.S.C. § 1414(f) (2004).

³⁷⁸ Yell & Katsiyannis, *supra* note 7, at 29.

³⁷⁹ *Id.*, citing to *Letter to Anonymous*, 30 IDELR 707 (OSEP 1998).

are to be thoughtfully considered and the educational needs of the individual student should be at the center of the decision-making process.³⁸⁰ As was discussed previously, IEP teams must consider a continuum of placement options when making placement decisions.³⁸¹

At the same time, IEP teams are permitted to consider the potential negative effects that a student's placement could have on his/her fellow students. Therefore, if a student is likely to disrupt the classroom or need constant supervision by the classroom teacher, the IEP team can take that into consideration. However, the IEP team must also consider the use of supplemental aids and services that could allow the student to be included without disruption.³⁸² In *Oberti v. Board of Education of the Borough of Clementon School District*, the Third Circuit Court of Appeals held that in order for schools to meet the LRE mandate, it was vital that they properly use supplementary aids and services.³⁸³ These aids and services include supports such as behavior intervention plans (BIPs), paraprofessionals, resource rooms, staff professional development, and assistive technology.³⁸⁴

Further, IDEA requires students to be placed in their neighborhood school when possible and if not, in a school as close as possible to their home.³⁸⁵ Specifically, the IDEA regulations state, "unless the IEP of a student with a disability requires some other arrangement, the student should be educated in the school he or she would attend if he or she were not disabled."³⁸⁶

³⁸⁰ Yell & Katsiyannis, *supra* note 7, at 29.

³⁸¹ 34 C.F.R. § 300.17

³⁸² Yell & Katsiyannis, *supra* note 7, at 29.

³⁸³ 995 F. 2d 1204 (3d Cir. 1993).

³⁸⁴ Yell & Katsiyannis, *supra* note 7, at 31.

³⁸⁵ 34 C.F.R. § 300.552(c); Yell & Katsiyannis, *supra* note 7, at 32.

³⁸⁶ 34 C.F.R. § 300.552(c)

The U.S. Department of Education has provided additional guidance via policy letters about what criteria should *not* be used when making placement decisions.³⁸⁷ In particular, schools cannot determine placement based on the

- (a) category of disability,
- (b) severity of disability,
- (c) availability of educational or related service,
- (d) availability of space, or
- (e) administrative convenience.³⁸⁸

As Yell and Katsiyannis explained, it would be illegal if a school determined that a student diagnosed with emotional and behavioral disorders (EBD) should be placed in a self-contained classroom for students with EBD without first analyzing his/her individual needs.³⁸⁹ Even with this limited guidance about what factors should and should not be a part of placement decisions, schools and parents find it difficult to determine what placement constitutes the LRE for students with disabilities. As a result, it is common for disagreements and litigation to arise about placements.³⁹⁰ For example, it is difficult to ascertain at what level the problem behavior of a special education student will interfere with other students' learning.³⁹¹ In fact, Yell and Drasgow explained, "the principle of LRE and the tension between LRE and FAPE have provoked more confusion and controversy than any other issue in special education."³⁹²

The mainstreaming debate. In addition to understanding the legal ramifications of LRE violations, it is important to discuss the philosophical debate about whether mainstreaming is positive or negative. While the term "inclusion" is often used to connote educating each child to

³⁸⁷ Yell & Katsiyannis, *supra* note 7, at 31.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 32.

³⁹⁰ Yell & Drasgow, *supra* note 369; Yell & Katsiyannis, *supra* note 7.

³⁹¹ Yell & Katsiyannis, *supra* note 7, at 29.

³⁹² Yell & Drasgow, *supra* note 369, at 118.

the maximum extent appropriate, the term “mainstreaming” usually refers to placing students with disabilities in regular classrooms.³⁹³

Yell and Drasgow identified that the debate may be caused in part because two of IDEA’s major provisions appear to conflict.³⁹⁴ Specifically, there is a tension between FAPE and LRE. The requirement to provide “an appropriate education may not always be available in a regular education setting, and the regular education setting may not always provide the most appropriate education.”³⁹⁵ As a result, research often discusses mainstreaming, placement, least restrictive environment, and inclusion as the most confusing and controversial areas of special education.³⁹⁶ Mead explained “what began as a preference for placement of children with disabilities in regular class settings (*Board of Education v. Rowley*, 1982) has evolved into a legal statutory presumption that children with disabilities will be educated in regular classrooms unless evidence exists to support a child-centered rationale for doing otherwise.”³⁹⁷

Regardless of the inherent tension in, and evolution of the law, the research documents that mainstreaming students with disabilities into regular classrooms is prevalent in traditional schools. Mead identified that in 2006, the *Twenty-Sixth Annual Report to Congress on the Implementation of IDEA* states “[a]lmost half of all student with disabilities (48.2 %) [are] educated for most of their school day in the regular classroom....” and only four percent are educated in a completely separate facility from their non-disabled peers.³⁹⁸

³⁹³ LARRY D. BARTLETT, SUSAN ETSCHIEDT, & GREG R. WEISENSTEIN, SPECIAL EDUCATION LAW AND PRACTICE IN PUBLIC SCHOOLS 97 (2007).

³⁹⁴ Yell & Drasgow, *supra* note 369, at 118-24.

³⁹⁵ Larry D. Bartlett, *Mainstreaming: On the road to clarification*, 1 EDUC. L. Q. 465 (1993), *cited in* Yell & Drasgow, *supra* note 369.

³⁹⁶ Yell & Katsiyannis, *supra* note 7, at 28; Yell & Drasgow, *supra* note 369, at 119.

³⁹⁷ Senate Committee Report on P.L. 105-17 (1997), *cited in* MEAD, *supra* note 4, at 3.

³⁹⁸ U.S. DEPARTMENT OF EDUCATION, TWENTY-SIXTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF IDEA (2006), *available at* <http://www2.ed.gov/about/reports/annual/osep/2004/index.html>, *cited in* MEAD, *supra* note 4, at 6.

It is likely that mainstreaming is so prevalent because it appears to be the preferential choice of how students with disabilities should be educated. In Melvin's law review article about the desegregation of children with disabilities, he concluded that the preferred view of Congress is to place students with disabilities in the regular classroom.³⁹⁹ He explained that the legislative history of IDEA substantiates that Congress was concerned about the "threat to individual mislabeling, placement in needlessly restrictive environments, and the attendant stigma that would attach."⁴⁰⁰ The drafters of IDEA also noted that mainstreaming children with disabilities would have a positive effect on non-disabled children as well. For example, students with disabilities would no longer be "kept out of sight" or "threatening."⁴⁰¹ Further, Congress thought inclusion of students with disabilities would remedy economic concerns because guaranteeing an education for these students would lead to more productive and less dependent members of society.⁴⁰² Melvin stated that "Congress viewed the categorical segregation of children with disabilities as a matter of constitutional dimension....segregating students on the basis of a disability involves labeling children, a practice which itself poses a threat to individual liberty."⁴⁰³

In comparison, Bartlett, Etscheidt, and Weisenstein explained that there is a preference for mainstreaming in public schools; however, the researchers stressed that not all students should be mainstreamed into regular classrooms. On one hand, Bartlett et al. quoted a segment of the book, *Creating an Inclusive School* that described inclusion as "an attitude – a value or

³⁹⁹ Daniel H. Melvin II, *The Desegregation of Children with Disabilities*, 44 DEPAUL L.R. 599, 649 (1995).

⁴⁰⁰ *Id.* at 616.

⁴⁰¹ *Id.* at 617.

⁴⁰² *Id.* at 618.

⁴⁰³ *Id.* at 648.

believe system – not an action or set of actions”⁴⁰⁴ and warned that “[s]egregated specialized education creates a permanent underclass of students.”⁴⁰⁵

On the other hand, Bartlett et al. found that many teachers and parents may try to provide “full inclusion” for special education students; however, some students “would not benefit..., their needs would overtax the school’s resources, or the situation would cause significant disruption to the learning of other students.”⁴⁰⁶ These special education researchers concluded “the law clearly does not require full inclusion efforts..., and is not likely to do so in the immediate future.”⁴⁰⁷

They also explained that some administrators “use inclusion as a budget-stretching device, often to the detriment of the students...and to the staff.”⁴⁰⁸ Therefore, the researchers did not offer a blanket conclusion that all mainstreaming is positive. In contrast, they identified examples when full inclusion should not occur and explained that sometimes inclusion is not “done correctly.”⁴⁰⁹ Nevertheless, the popular sentiment in public schools appears to be that students with disabilities should be mainstreamed as much as possible.

Students who are not mainstreamed. If the majority of students with disabilities are being mainstreamed and the preferential treatment is to mainstream, then why are some students learning in segregated learning environments? This overarching question directly relates to the current study’s evaluation of whether autism-centric charter schools are a viable option. Since charter schools exist in which students with autism are taught in separate schools, then it follows that some believe that this segregated environment is necessary to properly educate these

⁴⁰⁴ BARTLETT ET AL., *supra* note 393, at 98.

⁴⁰⁵ *Id.* at 99.

⁴⁰⁶ *Id.* at 97-98.

⁴⁰⁷ *Id.* at 98.

⁴⁰⁸ *Id.* at 102.

⁴⁰⁹ *Id.*

particular students – in other words, a segregated placement is the LRE. Alternatively, some may believe it is not required, but instead preferable to educate these particular students in a segregated environment. A review of the existing literature is necessary to better understand this unique situation of public school students who are not mainstreamed. This section summarizes one article about charter schools designed for students with disabilities and then the research pertaining to charter schools targeting gifted and talented students.

Charter schools designed for students with disabilities. Unfortunately, only one article exists about charter schools designed specifically for students with disabilities. In this article, Mead noted that she researched charter schools designed for students with disabilities because other research only identified that these type of schools were in existence. Mead sought to “fill that void” in the research by “address[ing] both why and how charter schools designed for students with disabilities operate their programs.”⁴¹⁰ First, she described the legal and policy context related to this type of charter school.⁴¹¹ Mead noted that these segregated schools have emerged in an environment that presumes mainstreaming.⁴¹² Later, she provided a list of questions and answers about these schools in hopes of providing technical assistance. Mead’s final section outlined practical implications and further questions.

Information from multiple sources was obtained. First, Mead gathered data from websites to identify charter schools designed to serve students with disabilities. Second, she surveyed the 41 state education agency (SEA) officials where charter schools were permitted and

⁴¹⁰ MEAD, *supra* note 4, at 2.

⁴¹¹ *Id.*

⁴¹² *Id.* at 6.

received 25 responses. In addition, Mead conducted phone interviews of a diverse sample of the operators.⁴¹³

Mead located 71 schools especially designed for children with disabilities. Thirty-four were in Florida, sixteen were in Ohio, but no other state had more than three. They were found across 13 states and the District of Columbia. The schools were classified into three categories: 1) those designed specifically for a certain disability (e.g., autism); 2) those designed for children with disabilities; and 3) those designed to cater to students with disabilities (i.e., “model inclusion schools”).⁴¹⁴ The majority of the schools (40) were designed to serve a particular disability. Of those schools, half of them (20) were designed for students with autism. Surprisingly, of those 20 schools, 13 were located in Ohio.⁴¹⁵

Charter schools designed specifically for other disabilities included those created for students with learning disabilities/ADD/ADHD; emotional/behavioral disabilities; deaf and hearing impaired; and severe cognitive/physical disabilities.⁴¹⁶ Twenty-five schools were designed for children of any disability and six were considered “model inclusion schools.”⁴¹⁷ In an article written six years prior to this study, Mead highlighted that charter schools serving “children at risk” also may have a disproportionately high number of children with disabilities.⁴¹⁸

In her 2008 study, Mead did not mention conducting a statutory analysis in her methodology; however, her findings analyzed state charter school law as it relates to schools designed for children with disabilities.⁴¹⁹ Some states’ charter statutes appear to prohibit charter schools designed for children with disabilities; however, there is “little explicit statutory

⁴¹³ *Id.* at 8.

⁴¹⁴ *Id.* at 10.

⁴¹⁵ *Id.* at 12.

⁴¹⁶ *Id.* at 10.

⁴¹⁷ *Id.*

⁴¹⁸ *Determining Charter Schools’ Responsibilities*, *supra* note 16.

⁴¹⁹ MEAD, *supra* note 4.

language.”⁴²⁰ Oklahoma’s law appears to prohibit some specially designed charter schools if they are designed for hearing and/or visually impaired students and if the curriculum is replicated by an already formed state school.⁴²¹ Sixteen charter school statutes include language that limits selective admission on criteria such as “race, ethnicity, national origin, disability, gender, income level, proficiency in the English language or athletic ability”⁴²² and other states had statutory language expressing that all interested students should be permitted to enroll.⁴²³

On the other hand, some states appeared to foster the creation of charter schools designed for students with disabilities. New Hampshire appeared to allow specially designed charter schools, but none were in existence.⁴²⁴ Further, something unique was occurring in Florida and Ohio that warranted further investigation. Interestingly, the state law in these two states appeared to encourage the development of charter schools for students with autism.

Mead surmised that Florida seemed to be moving toward also creating special regulations geared toward creating schools only for children with autism.⁴²⁵ In 2006, the Florida legislature granted a state entity named the Florida Schools of Excellence Commission (FSE) with the authority to collaborate with other organizations “to determine the feasibility of opening charter schools for students with disabilities, including, but not limited to, charter schools for children with autism.”⁴²⁶

In Ohio, §3314.061 of the Revised Code explicitly authorizes charter schools designed for students with autism by stating that a school could be created

⁴²⁰ *Id.* at 11.

⁴²¹ MEAD, *supra* note 4, at 11; *see* 70 Okla. Stat. Ann §3-136(A)(3).

⁴²² MEAD, *supra* note 4, at 11; *see* Mo. Rev. Stat. 160.410(3).

⁴²³ MEAD, *supra* note 4, at 11.

⁴²⁴ *Id.* at 12.

⁴²⁵ MEAD, *supra* note 4, at 12; *see* Fla. Stat. §1002.335(4)(b)(13).

⁴²⁶ Fla. Stat. §1002.335(4)(b)(13)(b).

that is limited to providing simultaneously special education and related services to a specified number of students identified as autistic and regular educational programs to a specified number of students who are not disabled....However, unless the total capacity established for the school has been filled, no student with any disability shall be denied admission on the basis of that disability.

Mead postulated that this statute was created to clarify Ohio's law since a number of autism-centric charter schools were already in existence.⁴²⁷ She noted that it was unclear whether charter schools created under this statute would be obligated to enroll students with disabilities other than autism, but it was clear that the statute only applied to schools serving children with autism.

Usually, school districts were the authorizers for charter schools designed to serve students with disabilities; only 13 were chartered by other designated authorizers such as SEA or universities.⁴²⁸ The local school districts also served as the LEA for all but 28 of the identified schools. Mead questioned how these schools fit into the district's placement choices because all of the schools in the study were initiated by a person or group and not initiated by the district.⁴²⁹

Mead also explored why these special charter schools exist. Some were established by teachers seeking a "particular methodology."⁴³⁰ Others began because parents wanted more program options.⁴³¹ A number of them grew out of organizations such as non-profits serving people with disabilities. Some school officials explained that their charter schools were a

direct response to what they perceived to be an over-emphasis on inclusion. Officials detailed what they believed to be the negative consequences of serving children in traditional classes, including insufficiently trained teachers, inadequate attention to learning needs, lack of adequate structure for learning, subjecting children to teasing, and lowered self esteem. [One school]...specifically sought to concentrate these learners in an environment away from non-disabled learners on the theory that students would then be

⁴²⁷ MEAD, *supra* note 4, at 12.

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 13.

⁴³⁰ *Id.* at 12.

⁴³¹ *Id.* at 12-13.

free to focus on their learning without worrying that disclosing difficulties would expose them to possible ridicule from either students or teachers.⁴³²

In addition to identifying the motivations behind creating these charter schools, Mead recognized three areas where these schools were legally vulnerable. Specifically, she categorized these into: 1) discriminatory admissions practices; 2) the parental choice predicament; and 3) LRE violations.

In regards to discriminatory admissions practices, Mead stressed these special charter schools still must admit all interested students in order to comply with the law.⁴³³ The researcher analyzed whether an argument could be made that the specialized charter school could justify admitting only students with disabilities by stating that its reason for doing so “is substantially related to the important interest of exploring innovative ways to teach children with learning challenges.” Yet Mead argues this “may be difficult given the current policy context that relies on research suggesting inclusionary practices yield good results for children.”⁴³⁴ Nevertheless, some of the current charter school leaders do not seem to be concerned about their legal vulnerability because their schools’ websites are “expressly nam[ing] disability status as an eligibility requirement” for admission.⁴³⁵ Plus, even if they advertised admitting all students, if only students with disabilities were present, they would be vulnerable because their students would not be interacting with non-disabled peers as required by IDEA’s LRE mandate.⁴³⁶

However, other charter school leaders may be attending to their legal obligations. Mead identified that some special charter schools have created unique ways to foster interactions

⁴³² *Id.* at 13.

⁴³³ *Id.*

⁴³⁴ *Id.* at 14.

⁴³⁵ *Id.* at 15.

⁴³⁶ *Id.*

between their students and non-disabled children such as sharing playground or lunch areas, extra-curricular clubs, and sports with other schools.⁴³⁷

Mead concluded by offering additional areas worthy of further inquiry. First, she suggested researchers should examine why states are not requiring special charter contracts or giving additional guidance to these schools designed for children with disabilities. Next, she highlighted that the research should document what motivates parents to seek these unique placements. Mead explained that although she did not interview parents, officials said parents are attracted to these schools because of the “supportive culture,” “small teacher-student ratio,” “peers who could relate to their learning struggles and provide support,” and impressive state test results of current students.⁴³⁸ Interestingly, some parents were attracted to the exclusionary nature of schools, while other parents did not enroll their children at the schools for the same reason. Another area to research includes an examination of the financial implications. For instance, a state official complained that these special schools could “tax limited state resources” because additional staff would need to be hired to monitor IDEA compliance.⁴³⁹ Mead also suggested researchers should investigate how IEP teams are placing students at these schools. Finally, she recommended that more empirical research be conducted on the “model inclusion schools” to determine whether less children were becoming identified as disabled.⁴⁴⁰

Gifted charter schools. Another type of charter school that may be segregating based on ability level are charter schools that are designed to educate gifted and talented students (gifted charter schools). There is not much guidance explaining whether gifted charter schools illegally

⁴³⁷ *Id.* at 16. All of Mead’s findings were not summarized due to irrelevance. For example, Mead provided further findings that described the schools’ operations.

⁴³⁸ *Id.* at 19.

⁴³⁹ *Id.* at 21.

⁴⁴⁰ *Id.* at 22.

discriminate against non-gifted students, particularly students with disabilities. Zirkel provided an overview of the potential legal issues when schools educate students who are both gifted and have a disability.⁴⁴¹ He also stated that litigation related to gifted education is imminent and compared it to what has occurred with special education litigation.⁴⁴² Eckes and Plucker reviewed the legal obligations that charter schools have in general toward gifted students.⁴⁴³ Eckes and Plucker determined that charter schools may be overlooking the needs of gifted students in light of their financial constraints and small school size; yet, the researchers stressed the importance of charter school leaders to attend to the needs of this special student population. Mead questioned the legality of charter schools that are designed especially for gifted students. She reasoned that the procedure by which gifted charter schools select students is of critical importance.⁴⁴⁴ If a gifted charter school requires a minimum IQ score in order to be admitted, then the school is likely to be vulnerable to a legal challenge.⁴⁴⁵

Similar to the issue of charter schools for students with disabilities, state statutes prove to be influential in determining gifted charter schools' legality. Many states have charter school laws that expressly prohibit discrimination based on disability. For instance, the charter school law for Louisiana explicitly states that charter schools are not permitted to use IQ scores for admissions.⁴⁴⁶ Similarly, New Jersey and Oklahoma have statutory language that prohibits charter schools from discriminating on "basis of intellectual...ability"⁴⁴⁷ or "limit[ing] admission

⁴⁴¹ PERRY A. ZIRKEL, THE NATIONAL RESEARCH CENTER ON GIFTED AND TALENTED, THE LAW ON GIFTED EDUCATION 14 (rev. ed. 2005), *available at* <http://www.gifted.uconn.edu/NRCGT/reports/rm05178R/rm05178R.pdf>. Zirkel referred to these students as "gifted-plus" (e.g., a student who has Asperger Syndrome and a genius-level IQ).

⁴⁴² *Id.*

⁴⁴³ Eckes & Plucker, *supra* note 75.

⁴⁴⁴ *Determining Charter Schools' Responsibilities*, *supra* note 16, at 170.

⁴⁴⁵ *Id.*

⁴⁴⁶ LA. REV. STAT. ANN. § 3991(B)(3) (2009).

⁴⁴⁷ N.J. STAT. ANN. § 18A:36A-7 (1996).

based on...measures of achievement [or] aptitude.”⁴⁴⁸ Most charter school statutes mirror federal anti-discrimination laws and prohibit charter schools from excluding students with disabilities. To illustrate, North Carolina’s law provides, “Except as otherwise provided by law or the mission of the school as set out in the charter, the school shall not limit admission to students on the basis of intellectual ability, measures of achievement or aptitude, athletic ability, disability, race, creed, gender, national origin, religion, or ancestry.”⁴⁴⁹

Mead concluded that simply recruiting gifted students to enroll in gifted charter may not be a prima facie violation of state and federal law. Gifted and talented programs that teach students in isolation⁴⁵⁰ and grouping students based on ability level are permitted at traditional schools. Therefore, Mead argued that if students are admitted into gifted charter schools because of their past achievement and recommendations, then the admissions policy may not necessarily be unlawful.⁴⁵¹

On the other hand, setting a minimum IQ score for admissions would likely violate Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA). Under these federal laws, charter schools cannot bar access to individuals with disabilities and establishing a minimal IQ score would create a discriminatory admissions policy for some students with mental disabilities.⁴⁵²

Regardless of the legal vulnerability of charter schools designed for special populations, it does not appear that there has been much relevant litigation. However, legal scholars have

⁴⁴⁸ OKLA. STAT. § 70-3-140(D) (2000).

⁴⁴⁹ N.C. GEN. STAT. § 115C-238.29F(g)(5) (2007).

⁴⁵⁰ *Determining Charter Schools’ Responsibilities*, *supra* note 16, at 170.

⁴⁵¹ *Id.*

⁴⁵² *Id.*

predicted that litigation involving segregation in charter schools may be ripe to occur.⁴⁵³ For example, Decker, Eckes, and Plucker identified and analyzed at least one case that has questioned the legality of a Pennsylvania charter school serving gifted students.⁴⁵⁴ Martin predicted that as the number of charter schools increase, they will face more discrimination challenges.⁴⁵⁵ A lack of litigation could be because charter schools are relatively new.⁴⁵⁶

2.4 Legal Issues Affecting Students with Autism

The previous sections have covered the existing literature about charter schools and special education. This information is important when answering the current study's second research question that asks whether autism-centric charter schools are a legally viable option. However, the study's first research question has not yet been addressed. It asks, "what trends have emerged in the ABA litigation involving students with autism?" Hence, the remaining sections of Chapter Two summarize the existing research that is relevant to this question. Namely, the legal issues affecting students with autism are addressed. The most detailed topic is the research conducted about ABA litigation which is covered at the end of the chapter. However, to provide the context of the ABA litigation research, it is important to first provide an overview of the research related to special education litigation, the increase in autism, autism-related litigation, litigation and FAPE, placement litigation, and methodology litigation.

The Context for ABA Litigation Research

Special education litigation. The increase in autism litigation is directly tied to the overall increase in special education disputes. Katsiyannis and Herbst explained that special

⁴⁵³ See Martin, *supra* note 233; R.C. Miller, *Validity, Construction, and Application of Statute or Regulation Governing Charter Schools*, 78 A.L.R. 533 (2008).

⁴⁵⁴ Cent. Dauphin School Dist. v. Founding Coal. of the Infinity Charter Sch., 847 A.2d 195 (Penn. Commw Ct. 2004); Decker et al., *supra* note 15.

⁴⁵⁵ Martin, *supra* note 233.

⁴⁵⁶ Casanova, *supra* note 119, at 246.

education has “consistently been the most litigated area in education.”⁴⁵⁷ They hypothesized that the litigation may be the result of inadequate knowledge about IDEA. Katsiyannis and Herbst explained that the “lack of understanding results in adversarial relationships between school personnel and parents of students with disabilities.”⁴⁵⁸

When parents and school districts disagree about what type of education is appropriate for a child with a disability, they are required to resolve their dispute through the administrative procedure commonly referred to as “due process.” It is only after they have exhausted the requirements of due process that they can then file their dispute in federal or state court.

In addition to the increase in special education disputes, dissatisfaction with due process hearings also exists. D’Alo and Mueller noted that parents, attorneys, teachers, administrators, and legislators all had complaints about due process hearings.⁴⁵⁹ These hearings are similar to court hearings in that parents and the school district bring a matter of dispute before a hearing officer.⁴⁶⁰ After both sides complete discovery, present their evidence, and complete cross-examination, the hearing officer makes a decision in accordance with the applicable law.⁴⁶¹

Mueller noted that critics have voiced concern about the growing number of due process hearings⁴⁶² and have accused the due process system as being inefficient, expensive, ineffective, inconsistent,⁴⁶³ and “corrosive” to the relationship between parents and schools.⁴⁶⁴ In 2008, the

⁴⁵⁷ Antonis Katsiyannis & Maria Herbst, *20 Ways to Minimize Litigation in Special Education*, 40 INTERVENTION IN SCH. & CLINIC 106 (2004).

⁴⁵⁸ *Id.*

⁴⁵⁹ Grace E. D’Alo, *Accountability in Special Education Mediation: Many a Slip ‘Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV., 201 (2003); Tracy G. Mueller, *IEP Facilitation: A Promising Approach to Resolving Conflicts between Families and Schools*, 41 EXCEPTIONAL CHILDREN, 60 (2009).

⁴⁶⁰ Mueller, *supra* note 459.

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ D’Alo, *supra* note 459; D. Edwards, *New Amendments to Resolving Special Education Disputes: Any Good IDEAs?*, 5 PEPP. DISPUTE RESOLUTION L. J. 137 (2005).

⁴⁶⁴ Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities under the IDEA*, 53 RUTGERS L. REV. 333, 344. (2001).

Consortium for Appropriate Dispute Resolution in Special Education (CADRE) reported that during 2005-2006, approximately 19,000 due process hearings were requested and about 5,300 of them resulted in a fully adjudicated hearing.⁴⁶⁵ Each hearing can cost as much as \$50,000 to \$100,000.⁴⁶⁶ CADRE (2008) reported that U.S. school districts are spending more than \$90 million per year to resolve conflicts.⁴⁶⁷

There are many reasons parents and schools would enter into due process including disagreement about a student's IEP, related services, and disciplinary procedures. However, this study will only review the literature related to disagreements about FAPE, placements, and methodology of students with autism.

Increase in autism. The research reports that the incidence of autism has “skyrocketed”⁴⁶⁸ or “grown exponentially.”⁴⁶⁹ Some believe the increased autism awareness is due to heightened media attention and parent advocacy.⁴⁷⁰ It has been over two decades since Congress added autism as a disability in the list of disabilities under IDEA. During 1991-1992, the year after autism was added as one of the disabilities covered by IDEA, the U.S. Department of Education listed 5,415 students with autism as being educated in U.S. public schools.⁴⁷¹ Shockingly, the number of students listed in the ASD category has since drastically increased.

⁴⁶⁵ Consortium for Appropriate Dispute Resolution in Special Education (CADRE), *Part B – Three Year Annual Report Summaries for Written Complaints, Mediations and Due Process* (2008) <http://www.directionservice.org/cadre/statecomrpts.cfm>.

⁴⁶⁶ Mueller, *supra* note 460.

⁴⁶⁷ Consortium for Appropriate Dispute Resolution in Special Education (CADRE), *supra* note 465.

⁴⁶⁸ Heflin & Simpson, *supra* note 52; *Developing Legally Correct*, *supra* note 143; Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 8 FLA L. REV. 7, 46 (2006); Mitchell L. Yell & Erik Drasgow, *Litigating a Free Appropriate Public Education: The Lovaas Hearings and Cases*, 33 J. SPECIAL EDUC. 205 (2000) [hereinafter *Litigating a Free*]; Zirkel, *supra* note 28.

⁴⁶⁹ Eve Muller, *State Approaches to Serving Students with Autism Spectrum Disorders*, (2006) available at <http://www.projectforum.org/docs/StateApproachestoServingStudentswithAutismSpectrumDisorders.pdf>.

⁴⁷⁰ Julie B. Fogt, David N. Miller, & Perry A. Zirkel, *Defining Autism: Professional Best Practices and Published Case Law*, 41 J. SCH. PSYCHOL. 201 (2003).

⁴⁷¹ U.S. DEPT. OF EDUC., ELEVENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (1992).

Specifically, during the 1999-2000 school year, 65,424 students with autism received special education services.⁴⁷² Yell et al. calculated this as a 1,108% increase; whereas, during this same timeframe, students classified under *all* of IDEA's other disability categories only increased by 26%.⁴⁷³ Muller explained that some of the growth can be attributed to the time that it takes for state data systems to adapt; yet, she admitted this does not explain autism's immense growth.⁴⁷⁴ Yell and Katsiyannis identified that there has been a "concomitant increase in policy and practices issues and controversies regarding the education of students with autism" during this same time period.⁴⁷⁵

Autism-related litigation. During the past decade, there has also been a dramatic increase in the litigation regarding the education of students with autism.⁴⁷⁶ The litigation has covered a variety of issues including methodology,⁴⁷⁷ extended school year services, evaluation, and placement.⁴⁷⁸ Despite the increase in the litigation, researchers have commented that there is a dearth in the research examining the litigation.⁴⁷⁹ In Zirkel's discussion of his study, he welcomed additional case analysis in regards to autism litigation and he described it as "necessary in this increasingly fertile field, particularly in light of the high-stakes nature of autism litigation...."⁴⁸⁰ Yell et al. categorized the existing literature about autism-related educational litigation into the following two categories: 1) research summarizing the litigation in

⁴⁷² *Id.*

⁴⁷³ *Developing Legally Correct*, *supra* note 143.

⁴⁷⁴ Muller, *supra* note 469.

⁴⁷⁵ Mitchell L. Yell & Antonis Katsiyannis, *Critical Issues and Trends in the Education of Students with Autism Spectrum Disorders: Introduction to the Special Issue*, 18 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 138 (2003) [hereinafter *Critical Issues and Trends*].

⁴⁷⁶ Choutka et al., *supra* note 21; *Developing Legally Correct*, *supra* note 143; Etscheidt, *supra* note 21; Fogt et al., *supra* note 470; Heflin & Simpson, *supra* note 52; *Litigating a Free*, *supra* note 468, at 205; Zirkel, *supra* note 28.

⁴⁷⁷ Choutka et al., *supra* note 21.

⁴⁷⁸ MITCHELL L. YELL, *THE LAW AND SPECIAL EDUCATION* (1998); Fogt et al., *supra* note 470; Heflin & Simpson, *supra* note 52.

⁴⁷⁹ Fogt et al., *supra* note 470.

⁴⁸⁰ Zirkel, *supra* note 28, at 92.

a particular area (e.g., ABA methodology cases), or 2) research analyzing a group of autism cases in order to draw legal trends.⁴⁸¹

The research classified in the first category (i.e., FAPE, placement and methodology litigation) is discussed in the below sections; however, the research that noted legal trends in the autism litigation is covered in this section. First, Zirkel reviewed 290 administrative, state, and federal published opinions related to educating students with autism from 1978-2000.⁴⁸² The cases dealt with a large variety of issues including eligibility, methodology, attorney's fees, discipline, extended school year, and related services. He separated the cases based on whether they dealt with "issues" such as eligibility or "relief" such as tuition reimbursement.⁴⁸³ Thus, out of the 290 cases, Zirkel categorized a total of 450 issue rulings and 383 relief rulings.⁴⁸⁴ The rulings were separated in the geographic regions of the U.S. federal circuit courts.⁴⁸⁵ The case outcome for each relief or issue ruling was also given a 1-7 point rating.⁴⁸⁶ The Likert-scale used was adapted from Lupini and Zirkel⁴⁸⁷ in which 1 signified "complete win for the parents" and 7 signified "complete win for the school authorities."

In comparing the administrative law hearings to the court cases, he noted both forums had seen growth in this type of litigation. However, Zirkel found statistically significant differences in the outcomes of the hearings versus the cases. Specifically, the issue rulings were

⁴⁸¹ *Developing Legally Correct*, *supra* note 143, at 182.

⁴⁸² Zirkel, *supra* note 28. Zirkel collected published opinions from the *Individuals with Disabilities Education Law Report* (IDELR) and its earlier versions, the *Education for Handicapped Law Report* (EHLR). Cases decided in the latter half of 2000 were not included.

⁴⁸³ Zirkel, *supra* note 28, at 85.

⁴⁸⁴ *Id.* at 86.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at 85.

⁴⁸⁷ William H. Lupini & Perry A. Zirkel, *An Outcomes Analysis of Education Litigation*, 17 *EDUC. POL'Y* 257, 257-79 (2003).

“modestly more favorable to districts” in both the SEA hearings and courts.⁴⁸⁸ The relief rulings were nearly equal at the SEA level, but were more district friendly at the court level.⁴⁸⁹

Zirkel concluded that frequency of the cases increased sharply from the early 1980s to the late 1990s.⁴⁹⁰ He discussed that overall the outcomes slightly favored school districts. He concluded that the only region that appeared to favor the districts in the administrative and court forum was the Second Circuit; whereas, the Third Circuit appeared most favorable to parents.⁴⁹¹ At the same time, he cautioned that the heterogeneous nature of the cases and the omission of unpublished decisions also meant that the Circuit Court findings “are suspect.”⁴⁹²

Additionally, Zirkel opined that parents of students with autism are likely to exercise their rights under IDEA. He warned, “The costs of these cases are high not only in terms of the fees of expert witnesses, stenographers, hearing/review officers, and attorneys but also in terms of the time required, emotions evoked, and relationships affected for parents and educators.”⁴⁹³ Finally, Zirkel recommended parties should resolve the dispute early instead of devoting limited resources to litigation.⁴⁹⁴

Yell et al. followed Zirkel’s lead and analyzed 10 OCR letters, 5 OSEP letters, 254 administrative hearings and 110 court cases regarding autism from 1990-2002.⁴⁹⁵ Unlike Zirkel, they were not counting the number of decisions where schools versus parents prevailed. Instead, they were seeking to extrapolate principles from the hearings in order to provide guidelines about how IEP teams should develop appropriate programming for students with autism. In particular,

⁴⁸⁸ Zirkel, *supra* note 28, at 90.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* at 85.

⁴⁹¹ *Id.* at 91.

⁴⁹² *Id.*

⁴⁹³ *Id.* at 93.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Developing Legally Correct*, *supra* note 143, at 183; *see* Table 1; OCR = Office of Civil Rights; OSEP = Office of Special Education Programs.

Yell et al. wrote, "...we have attempted to extend the literature on ASD litigation by focusing on the factors that hearing officers and judges have relied on to determine whether a school district has developed an appropriate education program."⁴⁹⁶

Unlike Zirkel and the other researchers reviewed in this study, Yell et al. offered "a few important caveats to keep in mind when interpreting litigation."⁴⁹⁷ Specifically, the researchers emphasized that litigation is fact specific. Every case has a different set of facts and the judge or hearing officer interprets how the law relates to these facts. Thus, Yell et al. warned the reader to be cautious when generalizing the autism litigation.

Another caveat explained by Yell et al. was the concept of precedent. The researchers explained that some court decisions create precedent that lower courts must follow (*i.e.*, controlling authority); whereas, other decisions may not have to be followed by all courts (*i.e.*, persuasive authority). Yell et al. highlighted that many of the ASD litigation consist of administrative hearings at the local or state level and are not controlling precedent.⁴⁹⁸ They noted these administrative decisions are rarely persuasive precedent either; yet, they provide guidelines how the law could be applied to a certain set of facts.⁴⁹⁹

A third caveat stressed by the researchers was the fact that "counting the numbers of cases and particular trend in decisions is not particular useful for informing" school employees about their practices. In other words, simply counting case outcomes fails to uncover the important factual analysis completed by the courts. According to Yell et al., "it is important to

⁴⁹⁶ *Developing Legally Correct*, *supra* note 143, at 183.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.* at 190. The researchers clarified that autism-related litigation usually begins with due process hearing at the LEA level and can proceed to administrative hearings at the SEA level. It is only at that stage that administrative decisions can be appealed to the federal or state court systems.

⁴⁹⁹ *Id.* at 183.

understand what the law says, what school districts have done incorrectly, and how to adjust educational practices to adhere to the law.”⁵⁰⁰

The fourth caveat identified by the researchers was that students with autism do not necessarily present a “unique set of legal challenges” for schools. Schools lose autism litigation for the same reasons they lose other IDEA cases. Namely, schools are unsuccessful when they do not follow IDEA’s requirements.

In terms of ABA litigation, Yell et al. concluded, “The crucial determinant is whether the school district’s educational program is appropriate.”⁵⁰¹ The researchers explained that if the court identified the disputes as one about a “preference of educational methodology,” then the school district was likely to prevail. However, if the parents framed the issue as one where the school was denying the child of a FAPE and the parents showed their methodology has resulted in an appropriate education, then the parents are likely to prevail.⁵⁰²

Based on their analysis of the autism cases, Yell et al. recommend that schools must: 1) understand and follow IDEA’s procedural requirements; 2) “develop educational programs based on empirically proven practices;” and 3) collect data in order to monitor students’ progress.⁵⁰³

Litigation and FAPE. IDEA and case law provide definitions of what a FAPE entails; however, the question of whether a student’s education is “appropriate” is a common issue in autism litigation. A vague, but commonly used definition of an appropriate education is one that provides more than access to education, but provides less than the *best* education.⁵⁰⁴ IDEA defines FAPE as special education and related services that are: 1) provided at public expense,

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* at 186.

⁵⁰² *Id.*

⁵⁰³ *Id.* at 187

⁵⁰⁴ *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

under public supervision, 2) meet the standards outlined by the SEA, 3) include PK-12 education as outlined by the state, and 4) conform with the student's IEP.⁵⁰⁵ Congress purposely has not provided more clarity in defining FAPE because what is considered "appropriate" varies from student-to-student.⁵⁰⁶ This lack of guidance, however, has led to frequent disagreement about whether a FAPE has been met for individual students. The disagreement has resulted in litigation and while the numerous court decisions do provide additional guidance, the only case law that must be followed by every state is the U.S. Supreme Court precedent.

In 1982, the high court provided guidance about how FAPE should be defined in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁵⁰⁷ The Court held that in order to provide FAPE, a school must provide instruction that was designed to meet the unique needs of the student.⁵⁰⁸ The instruction must be supported with services that allow the student to benefit from the instruction. The Court clarified that students with disabilities do not have a right to the best possible education or an education that allows them to achieve their maximum potential.⁵⁰⁹ Instead, students are entitled to an education that is "reasonably calculated" to "confer some educational benefit."⁵¹⁰ The Court created a two-part test to determine whether schools have met their FAPE obligations. The first part asks whether the school has followed IDEA's procedures.⁵¹¹ The second part questions whether the IEP was developed through IDEA's "procedures reasonably calculated to enable the child to receive educational benefits."⁵¹²

⁵⁰⁵ 20 U.S.C. § 1401(8)

⁵⁰⁶ *Litigating a Free*, *supra* note 468, at 206.

⁵⁰⁷ 458 U.S. 176 (1982).

⁵⁰⁸ *Id.* at 181.

⁵⁰⁹ *Id.* at 198.

⁵¹⁰ *Id.* at 200.

⁵¹¹ *Id.* at 206.

⁵¹² *Id.* at 207.

Yell and Drasgow described lower court cases that followed *Rowley*.⁵¹³ These scholars stated that courts have begun to interpret the FAPE requirement as requiring more than an education that “confers minimal benefit.”⁵¹⁴ They cite two cases from the Third Circuit Court of Appeals in which the court held that a FAPE must “confer *meaningful* educational benefit...and an education that conferred minimal or trivial progress was insufficient.”⁵¹⁵ Yell and Drasgow summarize that a legally compliant FAPE must “provide the student with an educational program that will result in meaningful and measurable advancement toward goals and objectives that are appropriate for the student given his or her ability.”⁵¹⁶

Seligmann analyzed the principle of giving deference to the local school district’s decisions that was articulated by the *Rowley* Court.⁵¹⁷ She stated the principle of deference is in tension with FAPE because IDEA makes parents partners in developing what is an appropriate education for their child.⁵¹⁸ Further, *Rowley* instructed courts to give “due weight” to the state administrative decisions.⁵¹⁹ Seligmann emphasized that the courts have struggled to determine “when a dispute over a child’s educational plan is one over choice of ‘methodology,’ which, under *Rowley*, lies within the discretion of the school district, versus one whose resolution implicates the child’s rights to appropriate educational services.”⁵²⁰

In the cases relating to placement and methodology that are discussed below, the overarching question is whether the school has provided a FAPE. However, the placement and methodology cases delve even deeper and ask whether FAPE has been achieved in light of the

⁵¹³ *Litigating a Free*, *supra* note 468, at 207.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ Seligmann, *supra* note 9.

⁵¹⁸ *Id.*

⁵¹⁹ 458 U.S. 176, 205-08 (1982).

⁵²⁰ Seligmann, *supra* note 9, at 219.

student's placement or mode of instruction. Thus, when parents file lawsuits challenging placement or methodology, they are essentially alleging that a FAPE has not been provided by the school.

Placement Litigation

The research regarding placement litigation provides analysis of the judicial trends. Namely, Yell and Drasgow⁵²¹ and Bon⁵²² highlighted the confusion and inconsistency in how placement cases are analyzed by the courts. Primarily, the two articles described the three judicial tests used by the federal circuit courts to analyze placement litigation. The purpose of the research is to provide guidance. Yell and Drasgow sought to aid educators and administrators; whereas Bon offered a potential policy solution.

In her law review article, Bon identified that IDEA failed to provide schools with clear guidance about how to analyze LRE and make educational placement decisions.⁵²³ She noted since there is a void in the U.S. Supreme Court precedent and because LRE and FAPE appear to contradict, it is unclear to analyze “when and if it is appropriate to place a child with a disability in a segregated environment.”⁵²⁴ To guide the analysis, the federal circuit courts have developed three tests.

First, Bon explained that LRE differs from inclusion for the purposes of making placement decisions. Under IDEA, LRE is the guiding principle for making placement decisions and there are a “continuum of alternative placements.”⁵²⁵ As part of the placement is the provision of supplementary services such as time spent in a resource room. Bon highlighted that

⁵²¹ Yell & Drasgow, *supra* note 369.

⁵²² Susan C. Bon, *Confronting the Special Education Inclusion Debate: A Proposal to Adopt New State-wide LRE Guidelines*, 249 EDUC. L. REP. 1 (2009).

⁵²³ *Id.*

⁵²⁴ *Id.* at 2.

⁵²⁵ *Id.* at 5.

scholars and courts often incorrectly use the terms inclusion and mainstreaming as interchangeable terms with LRE. She stated that “inclusion” is often a term to express the commitment of including students with disabilities into the general education classroom; whereas, “mainstreaming” is the practice of doing so.⁵²⁶ Bon explained that the confusion in the terminology leads to judicial misinterpretation. Courts may fail to recognize the continuum of placements which appeared to be what had occurred in a few cases she cited. “In other words, the general education classroom is not presumed to be an appropriate placement, but instead it is mandated given the philosophical interpretation of inclusion.”⁵²⁷

Bon explained that this terminology confusion affects the education community as well. She stated that there is a debate between educators who believe in full inclusion versus those who prescribe to the LRE principle. Because of this philosophical debate and the confusion in the courts, parents may assume that the law requires inclusion in the general education classroom and educators may erroneously place students with disabilities in regular classrooms out of fear of litigation.⁵²⁸

Next, Bon described the three-way split among the circuit courts as to how they are interpreting the LRE requirement. The Sixth, Fifth, and Ninth Circuits each have developed a unique test.

The Sixth Circuit’s test arose out of *Roncker v. Walter* which involved parents who challenged the placement of their son with mental retardation and seizures in a setting where he would have no contact with non-disabled peers.⁵²⁹ The test that emerged from this case is

⁵²⁶ *Id.* 5.

⁵²⁷ *Id.* at 5-6.

⁵²⁸ *Id.* at 6.

⁵²⁹ *Id.*

sometimes referred to as the Three Factor Feasibility Test⁵³⁰ or Roncker Portability Test.⁵³¹

Based on the court's interpretation that Congress preferred mainstreaming, "the court held that in order to justify placement in a segregated facility, a school district must 'determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.'"⁵³² After this initial determination, the school must consider:

- 1) comparison of the benefits received by a child with a disability in the segregated special education environment to the benefits received in the non-segregated setting;
- 2) consideration of whether the child will be a disruptive force in the non-segregated setting; and
- 3) consideration of the cost of mainstreaming⁵³³

In *Roncker*, the Sixth Circuit determined that the boy must be placed in a non-segregated environment. The Eighth and Fourth Circuits have adopted the Roncker Test.

The Fifth Circuit's Two-Prong Test resulted from *Daniel R.R. v. State Board of Education* and is sometimes called the Daniel R.R. Two-Pronged Test.⁵³⁴ It also reflects a preference for mainstreaming and specifies:

- 1) whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily, and
- 2) whether the school has mainstreamed the child to the maximum extent appropriate.⁵³⁵

In applying the first prong, the court stated that the services and accommodations are not minimal or "limitless." Also, the "nature and severity" of the student's disability should be examined to determine whether the student will "receive educational benefit and developmental lessons in the regular classroom."⁵³⁶ Schools should evaluate the benefits of regular and special education and should consider whether the student will negatively affect the other students'

⁵³⁰ *Id.* at 7.

⁵³¹ Yell & Drasgow, *supra* note 369, at 118.

⁵³² Bon, *supra* note 522, at 7.

⁵³³ *Id.*

⁵³⁴ Yell & Drasgow, *supra* note 369, at 118-19.

⁵³⁵ Bon, *supra* note 522, at 8.

⁵³⁶ *Id.*

education. If the student is disruptive or needs “significant attention,” then the regular classroom may not be appropriate.⁵³⁷

Because the student with Down Syndrome was disruptive and not progressing academically, the Fifth Circuit Court stated the first prong was satisfied. Next, because the child had opportunities to be with nondisabled children at lunch and recess, the Court held the second prong was satisfied and thus, the child was to remain in a segregated environment. The Eleventh, Third, and Tenth Circuit have adopted the Fifth Circuit’s Two-Prong Test although they’ve altered the factors under the first prong.⁵³⁸

A Four Factor Test was adopted by the Ninth Circuit in *Sacramento City Unified School District v. Rachel H.*⁵³⁹ Parents challenged the placement of their daughter who was mildly retarded and had been placed in the general education classroom for non-academic subjects like art and in special education for academic subjects. The Court analyzed the facts by using the district court’s four factor balancing test:

- 1) the educational benefits of placement full-time in a regular class;
- 2) the non-academic benefits of such placement;
- 3) the effect [the student] had on the teacher and children in the regular class; and
- 4) the cost of mainstreaming [the student].⁵⁴⁰

Essentially, the Ninth Circuit’s test combines aspects of the other two tests, but not the issue of supplemental aids and services. In applying the factors to the student, the Court determined that the student had not been educated with non-disabled peers to the maximum extent appropriate.⁵⁴¹

⁵³⁷ *Id.*

⁵³⁸ *Id.* L.B. *ex rel.* K.B. v. Nebo Sch. Dist., 379 F.3d 966 (10th Cir. 2004) was the Tenth Circuit case where the two-prong test was accepted.

⁵³⁹ Bon, *supra* note 522, at 9.

⁵⁴⁰ *Id.* at 10.

⁵⁴¹ Yell & Drasgow, *supra* note 369, at 123. Bon and Yell & Drasgow disagree that the Fourth Circuit test is a separate test.

No other circuits have adopted this test; however, Bon recommended that this Four Factor Test is adopted through state-wide guidelines.⁵⁴²

Yell and Drasgow describe the three tests similarly to Bon; however, they did not list that the Fourth Circuit has adopted the Roncker test. Instead, Yell and Drasgow listed a separate test entitled the Hartmann Three-Part Test that originated out of the Fourth Circuit.⁵⁴³ The reason for the discrepancy in the research may be because Yell and Drasgow's article was written in 1999; whereas, Bon's article was published a decade later. However, Bon noted that the Fourth Circuit adopted the Roncker test in 1989, which is prior to Yell and Drasgow's article. Therefore, it is unclear whether Yell and Drasgow's fourth test may be referenced in the modern courts.

Yell and Drasgow's fourth test originated from *Hartman v. Loudoun County Board of Education*. Hartman was a boy with autism who "had an extremely short attention span, engaged in self-stimulatory behaviors, and could be very aggressive, sometimes pinching, biting, and hitting his teacher and classmates."⁵⁴⁴ The student had been in a general education classroom with an aide; however, the school proposed he be placed in a nearby school that had a special education class for students with autism. He was also to be in the regular classroom for four hours each day. The hearing officer and state review board held for the school; however, the district court held in favor of the parents. The Fourth Circuit Court of Appeals stated that inclusion was preferred but not required for all students. It then analyzed the facts by applying the following test when concluding that mainstreaming is not required when:

- 1) the disabled child would not receive educational benefit from mainstreaming into the regular class;
- 2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or

⁵⁴² Bon, *supra* note 522, at 15-16.

⁵⁴³ Yell & Drasgow, *supra* note 369, at 124.

⁵⁴⁴ *Id.*

3) the disabled child is a disruptive force in the regular classroom setting.⁵⁴⁵

The Fourth Circuit Court held that the school's proposed segregated placement was appropriate.

It reasoned that the student had not made academic progress and needed individualized instruction. Plus, he was disruptive to the other students.⁵⁴⁶

Yell and Drasgow predict that due to the similarity amongst the tests that the U.S. Supreme Court is unlikely to review a LRE case. The researchers offered a number of recommendations to educators and administrators. For instance, they stated that

the LRE mandate in the IDEA sets forth a clear preference for [integrated] settings, and the courts have repeatedly indicated the importance of this preference....Before...a student should be educated in a more restrictive setting, [schools] must consider whether supplementary aids and services would permit an appropriate education in the general education setting....Finally, the school must provide as many integrated experiences for the child as possible (e.g., recess...) when the student is educated in more restrictive settings.⁵⁴⁷

Methodology Litigation

Before turning to the research analyzing the litigation about methodology, it is important to review the legal background about educational methodology. In terms of the legal parameters of educating nondisabled students, it has long been established that schools have the authority to make decisions about curriculum and instruction,⁵⁴⁸ or stated differently, about methodology. Teachers are not allowed sole discretion and in general, parents cannot dictate what the public schools teach their children.⁵⁴⁹

It becomes more complicated when special education students and parents are involved. Namely, IDEA grants parents authority to participate in the educational decisions for their

⁵⁴⁵ Cox v. Guilford County Bd. of Educ., 118 F.3d. 996 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998).

⁵⁴⁶ Yell & Drasgow, *supra* note 369, at 124.

⁵⁴⁷ *Id.* at 125.

⁵⁴⁸ THOMAS ET AL., *supra* note 13, at 80.

⁵⁴⁹ *Id.* at 81-82.

children.⁵⁵⁰ Thus, when it comes to litigation involving situations where the parents favor one type of methodology and the schools favor another, schools typically have the authority to make methodology decisions;⁵⁵¹ yet, they do not have unlimited authority.

The issue of *how much* authority schools have is at the center of autism methodology litigation. According to Etscheidt, “As a substantive legal issue, the selection of methodology is at the heart of the controversy concerning appropriate programs for students with autism.”⁵⁵² Additionally, Choutka et al. stated, “Although the courts hesitate to dictate methodology, when a hearing officer or court determines that FAPE is denied, the court will impose a program.”⁵⁵³ It is also important to note that disabilities other than autism are also plagued with this debate about methodology. For instance, in cases involving students with learning disabilities or hearing and visual impairments, defining whether the education provided by the school is appropriate also bleeds into the issue of whether the schools have sole authority in determining what methodology is used.⁵⁵⁴

ABA Litigation

For the purposes of this study, only the research regarding ABA methodology is examined. However, ABA is only one of the two “most contested instructional approaches for children with autism.”⁵⁵⁵ The other program that is often found in the autism-related litigation is TEACCH.⁵⁵⁶ Although researchers and practitioners have examined the similarities and

⁵⁵⁰ 20 U.S.C. 1414(1)(B).

⁵⁵¹ Yell & Drasgow, *supra* note 369, at 207.

⁵⁵² Etscheidt, *supra* note 21, at 53.

⁵⁵³ Choutka et al., *supra* note 21, at 101.

⁵⁵⁴ Yell et al., *supra* note 143, at 186.

⁵⁵⁵ Choutka et al., *supra* note 21, at 95.

⁵⁵⁶ *Id.* According to the University of North Carolina School of Medicine, Treatment and Education of Autistic and Communication related handicapped Children (TEACCH) “is an evidence-based service, training, and research program for individuals of all ages and skill levels with autism spectrum disorders.” It was “established in the early

differences between the TEACCH and ABA methodologies,⁵⁵⁷ only ABA was included in this study because it appears to be the preferred methodology used at some of the emerging autism-centric charter schools.⁵⁵⁸ Additionally, ABA is typically the type of methodology that is requested in the autism methodology litigation. Etscheidt stated that ABA litigation is the “fastest growing” and “most expensive area” of special education litigation.⁵⁵⁹ Choutka et al. categorized ABA litigation as the “most controversial” type of autism related litigation.⁵⁶⁰

The research defines the ABA methodology in a variety of ways. Yell and Drasgow referred to it as the “Lovaas method.”⁵⁶¹ They explain that it was named after O. Ivar Lovaas, a researcher at the University of California at Los Angeles. Yell and Drasgow explained that Lovaas “therapy” is “based on the principles of operant conditioning (e.g., reinforcement, punishment).”⁵⁶² Seligmann explained that ABA techniques are usually taught “one-on-one,” “are costly,” “require trained personnel,” and typically “begin in the preschool years.”⁵⁶³ She stated that although schools have developed programs and expertise in autism that their programming is typically school-based and not as intensive. She warned, “Because the stakes are high financially and for the future progress of the child, more [ABA lawsuits] have made

1970s by Eric Schopler and colleagues.” Introduction to TEACCH, <http://www.teacch.com/> (last visited Aug. 4, 2010).

⁵⁵⁷ E.g., The Autism Society of North Carolina, Considerations in the Structured Teaching and Discrete Trial Training Approaches, http://www.autismsociety-nc.org/DIFFERENCES_IN_THE_STRUCTURED_TEACHING_APPROACH_AND_DISCRETE_TRIAL_TRAINING.pdf (last visited Aug. 4, 2010); Teacher Focus Post “ABA vs. TEACCH,” <http://www.teacherfocus.com/forum/viewtopic.php?f=45&t=5017> (last visited Aug. 4, 2010).

⁵⁵⁸ A few examples of ABA autism-centric charter schools include: New York Center for Autism Charter School http://www.newyorkcenterforautism.com/index_flash.htm (last visited Aug. 4, 2010), Florida Autism Center of Excellence (FACE), <http://www.faceprogram.org/> (last visited Aug. 4, 2010), and Summit Academy Ohio <http://www.summitacademies.com/OurSchools/OurMission/tabid/134/Default.aspx> (last visited Aug. 4, 2010).

⁵⁵⁹ Etscheidt, *supra* note 21; *see also Litigating a Free*, *supra* note 468, at 205.

⁵⁶⁰ Choutka et al., *supra* note 21, at 95.

⁵⁶¹ *Litigating a Free*, *supra* note 468, at 208.

⁵⁶² *Id.* They also explained “that the program involves 2 to 3 years of one-to-one training with the child,” “is conducted 2 to 40 hours a week,” “is usually provided in the child’s home by members of a training team,” and “can be quite expensive.”

⁵⁶³ Seligmann, *supra* note 9, at 218.

their way through the state administrative process and into the federal courts.”⁵⁶⁴ Weber stated that ABA therapies “may not be as effective as their proponents believe they are, but they are backed by solid evidence of enabling children to make substantial developmental progress.”⁵⁶⁵

Similarly, Seligmann noted that the National Research Council (NRC) has reported that effective educational programs for autism provide: “early intervention; intensive, full-time, programming of a minimum of 25 hours per week, year round, that actively engages the child; planned teaching...; enough one-on-one or small group instruction to meet the child’s individualized goals.” The NRC also recommended that the setting should allow for “regular interaction with typically developing children...”⁵⁶⁶

Some schools are skeptical about ABA and “these therapies are quite expensive and require great departure from the way schools ordinarily do things.”⁵⁶⁷ For instance, they may recommend 40 hours per week, they do not conform to schools’ methods, and are often requested to be done in a home environment with a one-on-one ratio.⁵⁶⁸ Weber concluded it is not surprising that school districts are resisting parents’ requests for ABA.⁵⁶⁹

Despite the increasing presence of ABA litigation, it has rarely been studied. According to Choutka et al., it is an area “has been subjected to insufficient systematic study.”⁵⁷⁰ In Zirkel’s study about autism litigation in general, he urged researchers to study specific issues such as methodology in order to reveal whether the general trends he found apply to “more

⁵⁶⁴ *Id.* at 219.

⁵⁶⁵ Weber, *supra* note 468.

⁵⁶⁶ NATIONAL RESEARCH COUNCIL, EDUCATING CHILDREN WITH AUTISM (2001), *cited in* Seligmann, *supra* note 9, at 249.

⁵⁶⁷ Weber, *supra* note 468, at 46.

⁵⁶⁸ *Id.* at 46-47.

⁵⁶⁹ *Id.* at 47.

⁵⁷⁰ *Id.*

homogeneous samples of autism litigation.”⁵⁷¹ The remainder of this section summarizes the six prevailing ABA litigation studies which are presented in chronological order starting in 2000 and concluding in 2006 (See Appendix A. for a comparison of the two autism litigation studies and six ABA litigation studies in relation to the current study).

In 2000, Yell and Drasgow suggested that on the surface ABA cases “should not be a legal problem” because the courts have held that decisions about educational methodology are left to the school system.⁵⁷² However, they noted that parents have been successful in “winning in the vast majority” of ABA cases.⁵⁷³ The researchers explained the disconnect by stating, “These cases clearly involve much more than questions of educational methodology. In fact, they involve determining the essence of a FAPE because they directly address the meaning of ‘educational benefit.’”⁵⁷⁴

According to Yell and Drasgow, parents started filing ABA due process hearing requests and lawsuits in the early 1990s. The parents did not frame the issue as one of educational methodology, but instead, they used the “strategy” of arguing that the school’s program did not confer “meaningful benefit,” whereas the ABA programming did.⁵⁷⁵

Yell and Drasgow examined 45 administrative and court decisions relating only to ABA methodology.⁵⁷⁶ The hearings and cases involved situations where parents requested that the schools provide, fund, or reimburse the parents for ABA intervention. Specifically, the researchers reviewed cases published in the *Individuals with Disabilities Education Law Report (IDELR)* between 1993-1998. The authors did not specify how many of these cases were

⁵⁷¹ Zirkel, *supra* note 28, at 92.

⁵⁷² *Litigating a Free*, *supra* note 468, at 207.

⁵⁷³ *Id.*

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.* at 208.

⁵⁷⁶ However, in their article, they used the term “Lovaas” cases. See Chapter Two for a clarification why these terms are similar and being used interchangeably in this study.

administrative due process hearings versus state or federal court cases.⁵⁷⁷ They concluded that the aggregate of the decisions favored the parents in 76% (34) of the 45 decisions that they reviewed.

Yell and Drasgow questioned how these decisions affected the definition of what was considered “appropriate” in educating students with autism under the *Rowley* standard. The researchers stated that the parents usually prevailed due to procedural errors related to *Rowley*’s first prong or substantive errors related to the second prong.⁵⁷⁸

Yell and Drasgow categorized the ABA case procedural violations into five groups: 1) parental participation, 2) evaluation, 3) IEPs, 4) placement, and 5) personnel qualifications.⁵⁷⁹ In terms of parental participation errors, the districts failed to involve “parents as equal partners.”⁵⁸⁰ The evaluation errors involved schools either failing to evaluate all aspects of need or failing to have the evaluation done by someone knowledgeable about autism.⁵⁸¹ Interestingly, one evaluator stated he “didn’t believe in this behavioral stuff” which was rebuked by a hearing officer by citing research that documented the effectiveness of ABA.⁵⁸² The third group involved inadequate IEPs which often lacked meaningful goals and objectives.⁵⁸³ The placement violations typically involved situations where placement was determined prior to IEP development which was found to be in violation of IDEA.⁵⁸⁴ The final procedural category involved school personnel that were not qualified to work with students with autism.⁵⁸⁵

⁵⁷⁷ The authors did not define ‘prevailing’ and it is unclear exactly which cases were included in data set.

⁵⁷⁸ *Litigating a Free*, *supra* note 468, at 208.

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.* at 209.

⁵⁸² Board of Education of the Ann Arbor Public Schools, 24 IDELR 621, 621 (SEA MI, 1996), *cited in Litigating a Free*, *supra* note 468, at 210.

⁵⁸³ *Litigating a Free*, *supra* note 468, at 210-11.

⁵⁸⁴ *Id.* at 211.

⁵⁸⁵ *Id.*

In their analysis of the substantive violations made by districts, Yell and Drasgow concluded that the ABA cases could be categorized into two groups: 1) failure to provide needed services and 2) progress of student in ABA program but not the school's program. The authors opined that in cases where the schools lost due to the students' progress made in the ABA programs that the schools' programs may have yielded progress, but it was not documented.⁵⁸⁶

Yell and Drasgow also discussed the factors why schools won 24% of the cases they reviewed. The four primary reasons included that the school: 1) made no procedural errors, 2) hired qualified staff or expert assistance to staff, 3) implemented programming that was documented as being effective, and 4) collected documentation that proved teaching effectiveness.⁵⁸⁷ Further, when the school hired expert witnesses to support their position, they were more likely to prevail.

In sum, Yell and Drasgow stated that judges and hearing officers are holding school districts to a higher standard in providing FAPE to students with autism.⁵⁸⁸ Essentially, the judicial officers are stressing "meaningful" educational benefits.⁵⁸⁹ The emphasis has gone from "access" to "quality."⁵⁹⁰ The researchers recommended that school districts:

1. Do not delay in meeting the procedural requirements of IDEA (e.g., evaluating the student and implementing the IEP).
2. Hire professionals who have expertise in autism.
3. Ensure IEP is developed correctly and "reasonably calculated to provide meaningful educational benefit."⁵⁹¹
4. Integrate students with autism to the maximum extent appropriate.
5. Adopt strategies and programs that are validated by the research.
6. Collect data and document student progress in connection with his/her IEP.⁵⁹²

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.* at 213.

⁵⁹¹ *Id.*

⁵⁹² *Id.*

In conclusion, Yell and Drasgow warned, “schools are now going to be held to a higher standard in providing a FAPE and they must be prepared to meet this challenge.”⁵⁹³

In 2003, Nelson and Huefner conducted a study similar to Yell and Drasgow’s study, but unlike Yell and Drasgow, Nelson and Huefner did not include administrative decisions in their data set because federal court cases “have more precedential value than administrative hearings and indicate what standards are actually being employed in federal court.”⁵⁹⁴ The researchers employed the Lexis-Nexis legal database to locate 19 cases decided between 1997-2002 using the search terms “autism or autistic and Lovaas.”⁵⁹⁵ Four U.S. Courts of Appeals and eight district courts located within other circuits were represented in their data set.

Nelson and Huefner noted that unlike the administrative decisions, the federal court litigation identified fewer procedural errors. Contrary to Yell and Drasgow’s finding that 76% of the ABA decisions favored the parents, Nelson and Huefner concluded that parents only prevailed in 21% (4) of the 19 cases. The researchers disaggregated the cases into two groups: 1) cases involving children from birth to three-years-old who were covered by Part C of IDEA and 2) cases involving children from three to twenty-two-years-old who were covered by Part B of IDEA.⁵⁹⁶ Three of the cases were classified as Part C cases and the school district prevailed in all of these cases. An additional 16 cases were considered Part B cases.

⁵⁹³ *Id.* at 214.

⁵⁹⁴ C. Nelson & D. S. Huefner, *Young Children with Autism: Judicial Response to the Lovaas and Discrete Trial Training Debates*, 26 J. EARLY INTERVENTION 1, 6 (2003).

⁵⁹⁵ *Id.* They also located three of these cases with different search terms because they mentioned the courts used Discrete Trial Training (DTT) or Applied Behavior Analysis terminology as opposed to calling the intervention “Lovaas.”

⁵⁹⁶ Part C covers children from birth to two-years-old and Part B covers children from three to twenty-one-years-old. It is unclear whether Nelson & Huefner were including cases where the child had not yet turned three in their Part C data set. It is also unclear when the researchers determined the child’s age (e.g., the date the administrative hearing was filed, the date the case reviewed was decided).

Of the Part B cases, Nelson and Huefner found that four were TEACCH cases in which the school district prevailed. They concluded that the courts “declined to decide whether Lovaas or TEACCH-like methods would be more effective for the student involved.”⁵⁹⁷ If the courts held that the school’s IEP provided a FAPE, then the courts refrained from interfering with the school district’s choice of methodology. The authors also gave brief summaries of the other six Part B cases in which the school district prevailed.

Nelson and Huefner discovered that the parents prevailed in four Part B cases. They determined that two cases were substantive and reasoned that the courts favored the parents because the schools could not explain why they had chosen their methodology. Additionally, the districts could not demonstrate how their program was “tailored to meet the student’s unique needs.”⁵⁹⁸ The other two cases in which the parents prevailed involved serious procedural errors which resulted in the schools not prevailing.

In addition to summarizing the cases included in their data set, Nelson and Huefner provided a description of IDEA, autism, and the Lovaas method. Specifically, they summarized the key Lovaas methodology research and provided the corresponding critique of the research.

The researchers also discussed a few public policy issues. For example, they stressed the importance for schools to “provide and interpret fully all assessment and evaluation data” to parents.⁵⁹⁹ They noted that there were not any federal court cases examining whether parents of Part C children may have more legal input about methodology than parents of Part B children. When it comes to the methodological debate, Nelson and Huefner generalized that courts are allowing educators to dictate methodology as long as their programs meet *Rowley’s*

⁵⁹⁷ Nelson & Huefner, *supra* note 594, at 10.

⁵⁹⁸ *Id.* at 13.

⁵⁹⁹ *Id.* at 15.

requirements. The authors voiced some concern that IDEA's 1997 amendments and its corresponding regulations may shift the focus more toward methodology when considering whether a child's education is appropriate. They concluded that courts are increasingly requiring school districts to provide justification for their teaching methods.

As far as recommendations, Nelson and Huefner articulated that

- (a) Practitioners should base service determinations on the needs of individual children, rather than the needs of agencies or on the blanket adoption of a given program;
- (b) Agencies must have available individuals qualified to assess children suspected of having autism;
- (c) Programs for children with autism should reflect current, empirically validated research;
- (d) Agencies should have individuals available who are knowledgeable about and skilled in delivering the various programs and educational techniques appropriate for individuals with autism;
- (e) Progress toward goals must be measured;
- (f) The need for extended school year services for Part B children must be carefully considered; and
- (g) Practitioners must develop individualized programs that address all areas of need, regardless of whether they are commonly associated with the child's identified disability.⁶⁰⁰

The researchers also stressed the importance of including parents as "participating partners"⁶⁰¹ and ensuring that the parents are trained on their responsibilities. They recommended "improved preservice and inservice training" for educators.⁶⁰²

Nelson and Huefner concluded, "The dilemmas presented by the cases reviewed in this paper defy simply answers. It is critical that the issues not be seen as a win-lose dichotomy. Solutions do not lie in teaching agencies how to develop 'bullet proof' programs or teaching parents how to sue school districts successfully."⁶⁰³

⁶⁰⁰ *Id.* at 16.

⁶⁰¹ *Id.*

⁶⁰² *Id.* at 17.

⁶⁰³ *Id.*

The researchers also seemed to warn schools that they should not define “educational benefit” as the barest minimum; whereas, parents should not mistake “‘cookie-cutter’ programs, however intensive or expensive,”⁶⁰⁴ as the only solution for the complexity of autism. Finally, they emphasized the necessity for autism programs to be “research-based” and “adhere to the spirit of IDEA [such that they] are built in partnership with families....”⁶⁰⁵

Also in 2003, Etscheidt conducted a study similar to Nelson and Huefner’s study, but she was interested in autism methodology cases in general, not just ABA cases. Specifically, Etscheidt sought to identify the “specific factors influencing administrative and judicial decisions regarding the adequacy of IEPs for students with autism.”⁶⁰⁶ Like previous researchers, she reviewed administrative due process hearings as well as state and federal court decisions that were published in IDELR. Etscheidt used an online database, the LRP Education Research Library. Instead of the 1993-1998 timeframe, she reviewed cases from 1997-2002. To locate the cases, she used the general search parameter of “autism,” and the topical search parameters of “educational methodologies,” “identification,” and “placement” to locate cases involving “instructional methodology disputes.”⁶⁰⁷

Her data set included 68 cases addressing “IEPs for students with autism.”⁶⁰⁸ She did not include autism cases that were not about “methodology” such as “attorney fees, statute of limitations, stay put, jurisdiction, mediation agreements, residential placements (with no

⁶⁰⁴ *Id.*

⁶⁰⁵ *Id.*

⁶⁰⁶ Etscheidt, *supra* note 21, at 53.

⁶⁰⁷ *Id.*

⁶⁰⁸ *Id.*

discussion of methodology), interim alternative education settings, damages, and injunctions.”⁶⁰⁹ She organized the decisions by court level and chronology in table format.

Of the 68 cases, 11 (16%) were federal circuit court of appeals cases, 16 (24%) were federal district court cases, and 41 (60%) were administrative law hearings.⁶¹⁰ The district court and administrative decisions occurred in 28 states and the circuit court of appeals cases occurred in five circuits.⁶¹¹ Thirty-eight of the students involved in the cases were of preschool age, 22 of elementary school age, 2 of middle school age, and one of high school age.⁶¹² Etscheidt concluded that in her data set, the school district prevailed in 57% of the cases (39) and parents prevailed in 43% (29).⁶¹³ The cases reviewed by Etscheidt involved students with autism and methodology; but, they were not limited to ABA methodology and also involved methodologies such as TEACCH.

Etscheidt theorized that the factors influencing the court decisions about the adequacy of the IEPs included: 1) “whether the proposed IEP program goals were consistent with evaluation data,” 2) “whether the IEP members were qualified to determine appropriate programs for students with autism,” and 3) “whether the methodology of the IEP was reasonably tailored to accomplish the goals of the IEP.”⁶¹⁴ In regards to the third factor, Etscheidt commented that the parent-preferred program will only be examined if the school’s program is deemed inappropriate.⁶¹⁵

Etscheidt warned that the generalization of her findings is limited due to its small and limited sample of cases reviewed. In particular only 28 states were represented. Interestingly,

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.*

⁶¹¹ *Id.*

⁶¹² *Id.*

⁶¹³ *Id.*

⁶¹⁴ *Id.*

⁶¹⁵ Etscheidt, *supra* note 21, at 66.

some of Etscheidt's conclusions mirrored the conclusions of the previous ABA litigation researchers. Specifically, she recommended that schools follow IDEA's requirements when evaluating students with autism and applying the evaluation to the IEP development.⁶¹⁶

Etscheidt stated that school personnel must be qualified to work with students with autism. Additionally, she stressed the need for schools to adopt empirically validated programming.⁶¹⁷ Her final comment was that she hoped her review would assist in the development of "appropriate programs for students with autism and reduce the need for expensive, time-consuming litigation."⁶¹⁸

In 2004, Choutka, et al. conducted a study that they claimed was unlike previous studies because it was "an empirical analysis of a comprehensive sample of pertinent hearing/review officer and court decisions."⁶¹⁹ They only reviewed certain ABA cases and administrative decisions. The two areas they investigated were what they thought were the "two central issues of contention between parents and school districts."⁶²⁰ Specifically, Choutka et al. were interested in the outcome-related factors in ABA cases involving program selection and program implementation.⁶²¹

In their review of the literature, Choutka et al. critiqued three previous related studies.⁶²² Primarily, the researchers criticized that the former studies did not review a comprehensive collection of cases and did not "provid[e] a systematic or complete analysis" of the decisions.⁶²³ Although Choutka et al. stated that Yell and Drasgow's study was the "closest to an empirical

⁶¹⁶ *Id.* at 67.

⁶¹⁷ *Id.*

⁶¹⁸ *Id.*

⁶¹⁹ Choutka et al., *supra* note 21, at 96.

⁶²⁰ *Id.* at 95.

⁶²¹ *Id.*

⁶²² PATRICIA GRZYWACZ & LISA LOMBARDO, *SERVING STUDENTS WITH AUTISM: THE DEBATE OVER EFFECTIVE THERAPIES* (1999); Choutka et al., *supra* note 21, at 96; Heflin & Simpson, *supra* note 52, at 212-20.

⁶²³ Choutka et al., *supra* note 21, at 96.

analysis of the pertinent case law,” they critiqued the former study for using a “simplistic, dichotomous categorization of outcomes without defining the meaning of the terms *won* and *lost*.”⁶²⁴ Choutka et al. questioned how Yell and Drasgow categorized cases that were “inconclusive, such as when a court denied the motion for dismissal and thus preserved the matter for trial, or mixed, such as when the hearing officer or judge decided one issue in the parents’ favor and another in the favor of the district.”⁶²⁵

Thus, Choutka et al. were proposing to remedy the design errors of the previous studies.⁶²⁶ They examined “all” of the “ABA/DTT/Lovaas cases” published in the *Education for Handicapped Law Report (EHLR)* and *IDELR* through Volume 34 (i.e., published between 1978-2001).⁶²⁷ Twenty-three of the 68 cases (34%) were federal court cases and 45 (66%) were administrative due process decisions.⁶²⁸

Next, the researchers divided the 66 administrative and court decisions into two groups: program selection and program implementation.⁶²⁹ They explained that the cases categorized in program selection included ones in which the parents sought an instructional program (e.g., ABA) that differed from what the district had provided (e.g., TEACCH). The program implementation cases were ones in which ABA was the agreed upon program for the child; however, the location, duration, or provider was in dispute.⁶³⁰

In order to determine the overall outcome, Choutka et al. used a Likert-scale adapted from Lupini and Zirkel⁶³¹ in which 1 signified “complete win for the parents” and 7 signified

⁶²⁴ *Id.*

⁶²⁵ *Id.*

⁶²⁶ *Id.*

⁶²⁷ *Id.* at 96-97.

⁶²⁸ *Id.* at 97.

⁶²⁹ *Id.*

⁶³⁰ *Id.*

⁶³¹ Lupini & Zirkel, *supra* note 487.

“complete win for the school authorities.”⁶³² Parents prevailed if the outcome code was 1-2, schools prevailed if the outcome code was 6-7, and the researchers determined the case was “inconclusive,” they did not report the case in the results.⁶³³ By rating the level of outcome, the researchers stated it improved the “validity” of research such as Yell and Drasgow’s study.⁶³⁴

The final step employed by Choutka et al. was to divide the two categories even further into two subcategories that corresponded with the *Rowley* standard. In other words, whether the court/hearing officer’s decision was focused on: 1) whether the IEP was developed in accordance with IDEA’s procedural requirements or 2) whether the IEP was calculated to yield educational benefit.⁶³⁵ The authors labeled these two subcategories as “compliance with IDEA requirements” and “evidence of educational benefit.”⁶³⁶ “Compliance with IDEA requirements” category was further divided into the following sub-categories: a) “IEP elements” and b) “other procedural requirements.”⁶³⁷ “Educational benefit” was divided into: a) “documentation of educational progress,” and b) “effectiveness of witnesses.”⁶³⁸ Some of the cases were slotted into more than one category/subcategory. The reviewers had 94-97% interrater reliability across two of the authors.⁶³⁹

Chouta et al. discovered that 63% (43) of the 68 cases focused on program selection and 37% (25) were implementation cases. Parents prevailed in 20 cases, schools prevailed in 18

⁶³² Choutka et al., *supra* note 21, at 97.

⁶³³ *Id.* at 97-98.

⁶³⁴ *Id.* at 97.

⁶³⁵ *Id.* at 97.

⁶³⁶ *Id.*

⁶³⁷ *Id.*

⁶³⁸ *Id.* The researchers noted that an outcome related factor had to appear in at least 14 of the 68 case to be included as a factor. Two other factors that did not meet this minimum frequency criterion were “the expertise of program implementers” and “deference.”

⁶³⁹ *Id.*

cases, and 5 cases were “inconclusive” and were not included in the results.⁶⁴⁰ Of the remaining 25 (37%) cases involving program implementation, parents prevailed in 13 cases and schools prevailed in 12 cases.⁶⁴¹ Thus, when all cases were combined parents prevailed in 52% (33) of the cases, schools prevailed in 44% (30) of the cases, and 6% (5) of the cases were deemed to yield inconclusive results.⁶⁴² Choutka et al. assigned an outcome code of 3.9 for the program selection cases and 4.0 for the implementation cases. Thus, the overall outcome code averaged to be 3.95.⁶⁴³

In contrast to the previous researchers, Chouta et al. concluded that the decisions were evenly split such that the schools and parents were ‘winning’ approximately the same number of cases. The researchers attributed the “50-50” odds to the “individualized, ‘it depends’ nature of IDEA.”⁶⁴⁴

The researchers stated the difference in the outcomes was a result of four factors: 1) witness testimony; 2) elements of the IEP; 3) other procedural requirements; and 4) data illustrating progress.⁶⁴⁵ They stated that the “most frequently occurring outcome-related factor, testimony of witnesses, had not been empirically identified in the previous pertinent literature.”⁶⁴⁶ According to Choutka et al., if parents want to prevail, they need to “establish an appropriate program and validate it with empirical evidence and effective experts.”⁶⁴⁷ It is also helpful if they show the district committed procedural errors or failed to document the school’s

⁶⁴⁰ *Id.* A case was deemed “inconclusive” if it had an outcome code of 3, 4, or 5.

⁶⁴¹ *Id.* at 98-99.

⁶⁴² The current researcher calculated these percentages in order to compare them with the current study’s results.

⁶⁴³ The current researcher calculated this average in order to compare it with the current study’s results.

⁶⁴⁴ *Id.* at 100.

⁶⁴⁵ *Id.*

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.*

program efficacy.⁶⁴⁸ Yet, the authors offered the caveat that “each case stands on its own merits.”⁶⁴⁹ In order for districts to prevail, they too need to show program effectiveness through competent witnesses.⁶⁵⁰

Choutka et al. admit that their findings lack replication and the sample does not include the “larger but generally unavailable” sample of “settled and unreported decisions.”⁶⁵¹ Further, they allude that other outcome-related factors may be important, but are not evident in the written decisions.⁶⁵² The authors suggest that future studies investigate “deference” that the appellate courts give to the lower court decisions.⁶⁵³ Thus, they conclude, “this analysis constitutes a significant start rather than a conclusive end for autism methodology litigation” research.⁶⁵⁴

Although Seligmann and Weber authored two distinct law review articles, they are discussed together because Weber was providing commentary based on Seligmann’s article.⁶⁵⁵ One clear difference between the two articles is that Seligmann concluded that parents generally lose ABA cases due to the courts’ deference to school districts’ choice of methodology. However, Weber mentioned that the trend that districts are prevailing may have shifted because courts may be diminishing the relevance of *Rowley*.

In her 2005 article, Seligmann provides a legal analysis of the ABA case law.⁶⁵⁶ In particular, she questioned whether courts are giving too much deference to school districts. Seligmann explained that the courts usually analyze ABA cases under the *Rowley* standard

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.*

⁶⁵⁰ *Id.* at 101.

⁶⁵¹ *Id.* at 101.

⁶⁵² *Id.* (e.g., “undisclosed side comments”).

⁶⁵³ *Id.*

⁶⁵⁴ *Id.*

⁶⁵⁵ Seligmann, *supra* note 9, at 217; Weber, *supra* note 468.

⁶⁵⁶ Seligmann, *supra* note 9, at 218.

because they view them as methodology cases. By doing so, courts may be offering too much deference to school district's discretion.

Seligmann noted that “the courts are far less comfortable weighing in on competing educational perspectives than they are reviewing the procedural compliance....”⁶⁵⁷ According to Seligmann because of the increase in autism methodology litigation, courts “have had to sort out legal questions from educational debates, and distinguish when a dispute invokes educational appropriateness (which is their role to review) as opposed to a choice among differing educational approaches (which is not).”⁶⁵⁸ She urged that due to the uncharted territory of these cases that “better standards than those gleaned from *Rowley* may be needed.”⁶⁵⁹

Because it is a model case illustrating how courts are handling ABA methodology litigation, Seligmann analyzed the 2004 First Circuit decision in *Lt. T.B. v. Warwick School Committee*.⁶⁶⁰ T.B.'s parents were seeking an ABA program for their son with autism and challenged the school district's IEP even though the district provided a TEACCH program and significant one-on-one behavioral instruction. Seligmann stated that the courts' reviewed the case in a typical manner because they first analyzed the “legal and procedural issues” prior to examining the issues of “content and adequacy of the IEP.”⁶⁶¹ She cited a similar ABA versus TEACCH case where the appellate court stopped after finding a procedural error instead of being forced to rule whether “ABA was appropriate and TEACCH was not.”⁶⁶² Seligmann concluded that many times these cases are resolved on procedural grounds or finding that the IEP was

⁶⁵⁷ *Id.* at 220.

⁶⁵⁸ *Id.* at 253.

⁶⁵⁹ *Id.* at 254.

⁶⁶⁰ 361 F.3d 80 (1st Cir. 2004).

⁶⁶¹ Seligmann, *supra* note 9, at 267.

⁶⁶² *Id.* at 268.

inappropriate; however, when courts do evaluate the program offered by the school, they invoke the *Rowley* standard. Thus, the courts often defer to the school district.⁶⁶³

If it is a question of an ABA program and another approach, Seligmann determined that school districts typically prevail. She criticized that IDEA, *Rowley*, nor any Circuit court “has offered a rubric for a court to assess the soundness of an approach.”⁶⁶⁴

Based on her analysis of the case law, Seligmann offered several lessons for schools and parents when developing IEPs for students with autism. First, it was important to have “credible expertise, documented by experience and training.”⁶⁶⁵ Decisions must be made on the child’s individual needs “rather than using a cookie-cutter approach to programs or services.”⁶⁶⁶ She stated, “. . . a school district or parent who treats the other as an enemy to be avoided rather than a participant in a process” is problematic.⁶⁶⁷ Additionally, the more a school incorporates recommendations from experts and parents, the more likely a court would favor the school’s judgment.⁶⁶⁸ Finally, Seligmann identified that the level of how much progress the student has made is also a significant factor involved in these cases. Seligmann warned that the appellate courts should not offer too much deference to the administrative hearing officers. She stated, “Hazards lie in allowing deference to turn to blind acceptance.”⁶⁶⁹

In 2006, Weber discussed Seligmann’s article, but first he discussed the general legal trends in ABA litigation. He explained that in the beginning of ABA litigation, courts favored the school districts.⁶⁷⁰ Even if the courts found the ABA program was superior to what the

⁶⁶³ *Id.* at 280.

⁶⁶⁴ *Id.* at 283.

⁶⁶⁵ *Id.* at 220.

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.*

⁶⁶⁸ *Id.*

⁶⁶⁹ *Id.*

⁶⁷⁰ Weber, *supra* note 468, at 47.

school was offering, the courts determined that educational methodology decisions were left to the schools to make. Further, courts would stress that schools merely needed to provide an adequate education. Weber noted that more recently there has been a judicial trend favoring parents. Specifically, he stated, “Remarkably, over the last two years, five federal circuit courts of appeal decisions have either directly or indirectly supported parents’ demands for applied behavior analysis-style programs.”⁶⁷¹

Weber agreed with Seligmann’s analysis that because of *T.B. v. Warwick School Committee*, it is possible that *Rowley*’s standard has shifted.⁶⁷² Seligmann determined that courts that apply the *Rowley* some-educational-benefit standard and defer to school districts to make decisions are less likely to uphold parents’ requests.⁶⁷³ Yet, if courts decide for the parents, they try to diminish *Rowley*’s relevance.⁶⁷⁴ These courts may reason that the school’s educational program does not confer adequate educational benefit or even more likely, the courts rely on procedural problems that are blamed on the school. For example, the school may have had an informal policy that it never approved ABA programs regardless of the student’s needs which would be in violation of IDEA.⁶⁷⁵ Parents can also succeed by showing problems with the least restrictive environment. In *L.B. v. Nebo School District*, the court held for the parents reasoning that the home-based ABA programming would allow the student to succeed in the mainstreamed preschool.⁶⁷⁶ The test applied by the court was not about educational progress, but instead whether the ABA would allow the child to have success in a mainstreamed educational setting. The court analyzed the 35-40 hours of ABA as a supplemental service needed to support the

⁶⁷¹ *Id.*

⁶⁷² *Id.*

⁶⁷³ Seligmann, *supra* note 9; Weber, *supra* note 468, at 47.

⁶⁷⁴ Weber, *supra* note 468, at 48.

⁶⁷⁵ *Id.*

⁶⁷⁶ *Id.* at 49.

child's mainstreamed placement.⁶⁷⁷ Although Weber noted he was unsure how typical a case like *Nebo* is, it was a new direction in how ABA cases are analyzed. Instead of the focus being on the program producing some educational benefit, the focus may shift toward the LRE mandate.

Seligmann and Weber both discussed that the “elephant in the room”⁶⁷⁸ is how expensive this type of autism intervention is.⁶⁷⁹ Because of this cost issue, Weber recommended that Congress should create a funding stream for intensive services for autism. He argued when school districts determine that ABA is appropriate, “cost should be taken off the table.”⁶⁸⁰

2.5 Analysis of Existing Literature

Chapter Two's summary of the literature has provided a background and context for the analysis of the current study's data. After reviewing the current research about special education and charter schools, the research emphasizes the legal tensions and practical problems that exist. To the contrary, the current study analyzes whether the charter school movement could have a positive effect on providing special education for students with autism and reducing the growing, expensive, and controversial ABA litigation.

At the same time, autism-centric charter schools appear to be segregating students based on ability-level. Therefore, the literature about racial and ability level segregation provided a context for the current study's data analysis. In other words, the state charter school legislation may allow for or even promote autism-centric charter schools; however, this study analyzes whether the statutory language could be seen as in violation of federal law because it may be encouraging schools to segregated based on ability level.

⁶⁷⁷ Weber, *supra* note 468, at 49.

⁶⁷⁸ Seligmann, *supra* note 9.

⁶⁷⁹ Weber, *supra* note 468, at 50.

⁶⁸⁰ *Id.* at 51.

The research about legal issues affecting students with autism informs the current study's first research question about the trends in the ABA litigation. The current study builds upon the existing studies by providing an update and more comprehensive coverage of the ABA litigation. The six existing ABA litigation studies do not yield conclusive results. Thus, much can be learned about the ABA case law. Importantly, the current research also seeks to attend to previous methodological flaws which are discussed further in Chapter Three.

CHAPTER THREE: METHODOLOGY

3.1 Introduction and Research Questions

This study aims to analyze litigation trends related to students with autism. Specifically, it answers the following two research questions:

1. Since the enactment of IDEA, what trends have emerged in the ABA litigation involving students with autism?
2. In light of these litigation trends, are autism-centric charter schools a legally viable solution to decrease autism-related ABA litigation?

These questions require an analysis of judicial trends as well as a legal analysis. Judicial trends can be examined through quantitative and qualitative methods; whereas, a legal analysis necessitates legal research methodology. Therefore, the research design of this study embodies all of these methods. As illustrated by the literature review in Chapter Two, previous research examining autism-related litigation employed *either* quantitative and/or qualitative analysis geared toward an education audience *or* a legal analysis written for a legal audience; however, this study seeks to improve upon the existing research by employing *all* methods and writing for *both* audiences.

This chapter provides an explanation about why this mixed-methods research design was chosen. Section 3.2 describes the methodological flaws that exist in the current research. Next, Section 3.3 provides an explanation of what a legal analysis, quantitative inquiry, and qualitative inquiry entail. Section 3.4 describes the data collection and analysis used in the current study. The chapter concludes by listing the limitations in the methodology employed in Section 3.5.

3.2 Methodological Flaws in Existing Literature

As mentioned, the research designs of the autism-litigation studies can be improved upon. On one hand, the previous research provides a number of valuable findings and

recommendations and the existing studies offer some information that this study cannot.

Nevertheless, the former studies failed to address the complexities of the case law and presented an incomplete analysis of the issues. Two overarching limitations of the past research designs include 1) data collection methods and analyses were *either* quantitative/qualitative⁶⁸¹ *or* legal⁶⁸² and 2) the researchers failed to disaggregate the data based upon important variables such as jurisdiction. Related, but more specific problems inherent in the past research designs are described below (see Appendix A. for a comparison of the past autism-litigation studies with the current study).

Only counting prevailing parties is impractical and limited.

To begin, most of the past researchers of autism litigation were writing for an education audience and identified merely whether school districts or parents were the prevailing party. However, according to Yell et al., attempting to count number of cases won or lost is impractical for practitioners.⁶⁸³ School personnel may find it more meaningful to be given guidance about how to prevent litigation and not simply seeking a summary of which party is prevailing most often. Because of their motivation to provide more applicable findings for practitioners, Yell et al. distinguished their research from Zirkel's 2002 study by explaining that they were not interested in counting the prevailing parties, but were seeking to extrapolate principles from the hearings in order to provide guidelines about how IEP teams should develop appropriate programming for students with autism. Essentially, Yell et al. identified the limitations of simply identifying how many cases were won or lost by parties without investigating the factors that influenced the judges' or hearing officers' decisions.

⁶⁸¹ Choutka et al., *supra* note 21; Etscheidt, *supra* note 21; Yell & Drasgow, *supra* note 21.

⁶⁸² Seligmann, *supra* note 9; Weber, *supra* note 468.

⁶⁸³ *Developing Legally Correct*, *supra* note 143, at 183.

Unlike most of the existing researchers, Yell et al. was concerned with how their research could be utilized by practitioners. The other autism-related litigation studies failed to provide much analysis about why the litigation had occurred or what could be done to prevent litigation from arising.⁶⁸⁴ Thus, the majority of the education researchers overlooked providing an in-depth analysis that would aid practitioners and policy-makers. Instead, they provided a summary of what had occurred in the ABA litigation as far as whether parents/children or school districts had prevailed most often.

Only providing a legal analysis is impractical and limited.

In contrast to the most of the research written for an education audience, the law review articles written by Seligmann and Weber that were summarized in Chapter Two focused on the underlying factors of why ABA cases were won or lost. They also examined the case law through a legal lens and attended to past precedent and other important legal principles. However, similar to the education research, the legal analyses provide an incomplete picture. Seligmann primarily analyzed *Lt. T.B. v. Warwick School District* as an exemplar case and then predicted how this decision may influence future decisions.⁶⁸⁵ While it is interesting and beneficial to examine one case in isolation, it does not offer a comprehensive summary of judicial trends. Discussing one case in depth may be more beneficial for those in the same jurisdiction of the case, but this type of analysis does not offer much practical guidance for those outside the jurisdiction.

Weber too highlighted one case, *L.B. v. Nebo School District*, but he also generalized that “a strong trend has recently emerged for courts to rule in favor of parents.”⁶⁸⁶ Unfortunately, he

⁶⁸⁴ E.g., Nelson & Heufner, *supra* note 594; Zirkel, *supra* note 28.

⁶⁸⁵ Seligmann, *supra* note 9.

⁶⁸⁶ Weber, *supra* note 468, at 47.

failed to provide much evidence for this conclusion.⁶⁸⁷ Additionally, of the only five cases he cited, one has been overruled. By focusing on five cases in which parents prevailed, Weber failed to take into consideration the possibility that that school districts may have prevailed in twenty other recent cases. Thus, the legal scholars attempted to describe the judicial trends like the education researchers did, but their findings were flawed because they did not systematically collect and analyze data to support their claims. Alternatively, they failed to adequately explain their methodology and its limitations.

Moreover, the legal researchers appeared to be writing more as solely a theoretical endeavor. Weber mentioned that *L.B.* may not be a typical case, but it provided an interesting argument in favor of ABA intervention. Thus, his analysis of this case may not have much influence on future litigation. On one hand, the findings and recommendations provided by the legal scholars could be utilized by attorneys to bolster their arguments and by policy makers to analyze how this issue is being handled by the judiciary. On the other hand, overly theoretical legal research may not provide many practical solutions about how ABA litigation may be reduced or what educators and parents could do to alleviate the causes behind the litigation.

Education researchers usually did not attend to precedential and jurisdictional constraints.

Another flaw in most of the education literature is that it failed to address precedent and jurisdiction. The only education researchers who addressed the important issue of precedent were Yell et al. and Nelson and Huefner.⁶⁸⁸ Yell et al. explained that some court decisions create precedent that lower courts must follow (*i.e.*, controlling authority); whereas, other decisions may not have to be followed by all courts (*i.e.*, persuasive authority). Yell et al. highlighted that most of the autism-related litigation occurs at the local or state level and the decisions made at

⁶⁸⁷ Weber, *supra* note 468.

⁶⁸⁸ *Developing Legally Correct*, *supra* note 143; Nelson & Heufner, *supra* note 594.

this level are not controlling precedent.⁶⁸⁹ They noted these administrative decisions are rarely persuasive precedent either; yet, they provide guidelines how the law could be applied to a certain set of facts.⁶⁹⁰ Thus, when designing a study and then analyzing the data, it is crucial to understand that decisions have limited precedential authority. That is, unless a case is a U.S. Supreme Court decision, it can only be applied to cases within the same jurisdiction.⁶⁹¹ It is vital that ABA litigation researchers attend to jurisdictional and precedential constraints to fully understand the case law and its implications.

Researchers usually did not disaggregate based on geographic location.

The context of where a case occurs is likely to make a difference. For instance, a geographic area like New Jersey where private schools for students with autism are prevalent and it has been said to have the highest autism rate in the country may have a different culture surrounding services for students with autism.⁶⁹² Thus, a New Jersey court may be more accepting of parents seeking ABA programs for their children because of the potential widespread recognition of ABA intervention in New Jersey. Whereas, for cases that arise in other states where ABA is not as widespread, the courts may look upon this treatment less favorably. In other words, cultural influences are likely to impact court decisions. However, nearly all of the autism litigation research summarized in Chapter Two failed to take these variables into consideration.

⁶⁸⁹ *Id.* at 190.

⁶⁹⁰ *Id.* at 183.

⁶⁹¹ THOMAS ET AL., *supra* note 13, at 21-23.

⁶⁹² John Mooney, Legislators Consider Cap Exemption for Special Ed Costs, N.J. SPOTLIGHT, July 9, 2010, <http://www.njspotlight.com/stories/10/0708/2118/>.

Education researchers usually did not disaggregate administrative decisions from court decisions.

Yell et al. also noted that autism-related litigation usually begins with a due process hearing at the LEA level and after the conclusion of that proceeding, the litigation may proceed to administrative hearings at the SEA level.⁶⁹³ It is only after administrative remedies have been sought that ABA cases can be appealed to the federal or state court systems. Yet, most of the autism-related litigation researchers writing for an education audience grouped the administrative hearings with the court cases.⁶⁹⁴ Because of the judicial hierarchy in which courts exist at a higher level than administrative forums, the court decisions carry more clout than administrative decisions. Stated differently, administrative law decisions do not have controlling authority in federal and state courts.

Another limitation of reviewing only administrative decisions is that the hearing officers and state review officers have a different standard of review than the federal district and circuit court judges. As will be discussed more in Chapters Four, Five, and Six, the deference that that federal judges must give to the administrative decision-makers is influential in the ABA litigation. The higher courts must review the administrative record and often do not accept additional testimony.

Additionally, when a research design includes administrative hearings, the research is selecting an incomplete sample because administrative hearing decisions are not published in the official reports or always available for public review.⁶⁹⁵ Thus, the collection of administrative rulings from an entire state may be missing from the data set and could greatly skew the results.

⁶⁹³ *Developing Legally Correct*, *supra* note 143, at 190.

⁶⁹⁴ *E.g., Litigating a Free*, *supra* note 468. In contrast, Zirkel did disaggregate these two judicial forums. Zirkel, *supra* note 477.

⁶⁹⁵ ROMANTZ & VINSON, *LEGAL ANALYSIS THE FUNDAMENTAL SKILL* (1998).

Many of the education researchers who examined autism-related litigation obtained administrative rulings from the Individuals with Disabilities Education Law Report (IDELR) which is a publication that includes special education cases and administrative rulings.⁶⁹⁶ It is problematic, however, that a subscription to the IDELR for one year costs \$1349⁶⁹⁷ and this publication is not readily available at libraries. Therefore, the administrative law data that was being analyzed by research summarized in Chapter Two is not easily accessible due to its expense, should be disaggregated from court decisions, does not have controlling authority, and is an incomplete sample.

Researchers usually did not disaggregate based on level of judicial review.

In addition to failing to distinguish administrative rulings from court cases, the autism-litigation researchers sometimes failed to separate cases based on their level of judicial review. For instance, Choutka, et al. grouped U.S. District Court cases with U.S. Circuit Court of Appeals cases.⁶⁹⁸ Yet, like the difference between court cases and administrative law rulings, the U.S. Circuit Court of Appeals case decisions are more significant than the District Court cases because they are the prevailing authority for all of the lower federal courts in their jurisdictions.

Education researchers usually did not disaggregate procedural versus substantive issues.

It is also problematic that cases dealing with substantive legal issues such as whether the student was receiving a FAPE were grouped together with cases involving procedural issues such as whether the parents had received proper notice. Seligmann identified, “The courts are far less comfortable weighing in on competing educational perspectives than they are reviewing

⁶⁹⁶ E.g., Etscheidt, *supra* note 21; Zirkel, *supra* note 28.

⁶⁹⁷ LRP Publications, <http://www.shoplrp.com/product/p-300001.html> (last visited Aug. 4, 2010).

⁶⁹⁸ Choutka et al., *supra* note 21.

the procedural compliance of parties with IDEA's requirements."⁶⁹⁹ Because the education research often grouped these types of cases together, the researchers commonly recommended that schools should ensure IDEA's procedural requirements are followed.⁷⁰⁰ However, this conclusion seems rather commonsensical and does not get to the more difficult issue of how to define an appropriate education. A deeper analysis may be reached if the cases dealing with substantive issues are reviewed in isolation.

Researchers did not always emphasize the significance of the facts involved.

Of all the autism-related litigation research summarized in Chapter Two, only three studies⁷⁰¹ discussed the importance of the individual fact patterns of the cases and three studies⁷⁰² described some of the facts involved in the cases. Yell et al. emphasized that litigation is fact specific.⁷⁰³ Every case has a different set of facts and the judge or hearing officer interprets how the law relates to these facts. Thus, Yell et al. warned the reader to be cautious when generalizing the autism litigation. It is unlikely that the decision of one case would apply to all other cases because each case has its own set of facts.

To illustrate, Zirkel examined 290 autism cases without concern for what individual fact patterns were at issue.⁷⁰⁴ He separated them based on whether they dealt with "issues" such as eligibility or "relief" such as reimbursement of services. However, the specific facts are crucial. For instance, a case involving a family seeking tuition reimbursement for a \$55,000 per year ABA private school would greatly differ from a case about a family seeking reimbursement for speech therapy that costs \$1000 per year. Other facts that would likely influence a court's

⁶⁹⁹ Seligmann, *supra* note 9, at 219.

⁷⁰⁰ *E.g.*, Choutka et al., *supra* note 21.

⁷⁰¹ Seligmann, *supra* note 9; Weber, *supra* note 468; Yell et al., *supra* note 143.

⁷⁰² Nelson & Huefner, *supra* note 594; Seligmann, *supra* note 9; Weber, *supra* note 468.

⁷⁰³ *Developing Legally Correct*, *supra* note 143, at 183.

⁷⁰⁴ Zirkel, *supra* note 28.

decision in autism-related litigation include: quality of the school's existing educational program, quality of the parent's proposed educational program, expert witness credentials and testimony, age of child, and the credentials and past behavior of the school's personnel. In sum, the individual facts of a case matter and a research design should address these facts.

Education research was overly broad and legal research was too specific.

Overall, the education research about autism litigation addressed the issues too generally; whereas, the legal analyses examined the issues too specifically. One clue that the education research may be too broad is that it attempted to make generalizations about which party prevailed most often in autism litigation.⁷⁰⁵ However, across the six education autism-litigation studies, no consistent generalizations were made. For example, in contrast to Yell and Drasgow, Choutka et al. concluded that the ABA litigation decisions were evenly split such that the schools and parents were 'winning' approximately the same number of cases.⁷⁰⁶

On the other hand, the two legal analyses summarized in Chapter Two of this study covered specific cases. The legal researchers made statements such as "how typical a case [like this case] is remains uncertain."⁷⁰⁷ Therefore, the legal researchers were aware that their analyses were specific to the cases that they were directly reviewing. The legal researchers offered their reasoned analysis based on the specific cases they reviewed, but were cautious to make generalizations. Thus, both the educational and legal analyses employed research designs that failed to provide clear generalizations in the ABA litigation.

⁷⁰⁵ *Litigating a Free*, *supra* note 468, at 207.

⁷⁰⁶ Choutka et al., *supra* note 21, at 100.

⁷⁰⁷ Weber, *supra* note 468, at 50.

3.3 Mixed Methods Design of this Study

In order to address the existing flaws of the past autism-litigation research, this study employs a mixed methods design that includes a legal analysis which incorporates both quantitative and qualitative methodologies while attending to important legal constraints. The value of using multiple methods in educational law research is to obtain a clearer focus and more solutions.⁷⁰⁸ By using multiple methodologies, the findings should be more descriptive and informed. For example, past researchers such as Fogt et al. recommended that future autism-litigation researchers complete a case analysis.⁷⁰⁹ Specifically, they suggested to examine court cases focusing on methodology and specified that since ABA intervention is considered “the most effective treatment for children with autism” that the research should review court decisions that have analyzed this type of treatment in particular.⁷¹⁰ The current study adheres to Fogt et al.’s recommendation by studying ABA case law.

With richer findings gleaned from a more meaningful method of data collection, the analysis and recommendations should be more comprehensive and practical. Baldwin and Ferron agree that a mixed methods design is advantageous. They clarify: “No one method alone can provide the information needed for decision making. Several methods combined, however, can produce a stronger decision and course of action.”⁷¹¹ Kromrey, Onwuegbuzie, and Hogarty agree in the benefits of mixed methodology. They state that it “has yet to permeate the field of

⁷⁰⁸ Charles Russo, *School Law and Research in the 21st Century*, in RESEARCH METHODS FOR STUDYING LEGAL ISSUES IN EDUCATION 5 (2006). This book is an update and expansion of David Schimmel’s 1996 Monograph: *Research that Makes a Difference: Complementary Methods for Examining Legal Issues in Education*.

⁷⁰⁹ Fogt et al., *supra* note 470

⁷¹⁰ *Id.*

⁷¹¹ Grover Baldwin & John Ferron, *Quantitative Research Strategies*, in RESEARCH METHODS FOR STUDYING LEGAL ISSUES IN EDUCATION, *supra* note 708, at 57, 87.

legal research,” but can “improve the quality of legal research.”⁷¹² This following section provides a detailed description about what makes a legal analysis unique because it is the primary methodology employed in this study. It is followed by a description of quantitative and qualitative methods which were also used by the researcher.

However, these three methodologies should not necessarily be considered divergent from one another. In fact, a legal analysis utilizes both quantitative and qualitative techniques. According to McCarthy, legal research shares some similarities with other types of research because “often a hypothesis is chosen and evidence is gathered to prove or disprove the hypothesis.”⁷¹³ To illustrate, when legal scholars wish to identify litigation trends, they may code and count a certain type of case. Coding is typically thought to be a qualitative method and measuring such as counting is typically considered a quantitative method.

According to Hollander, legal research entails “doctrinal legal scholarship” that can be compared to historical research.⁷¹⁴ The comparison is drawn because like historical research, legal analysis often calls on a researcher to synthesize trends in the law. Both legal and historical scholars often develop arguments based upon these trends. Historical research like legal research employs quantitative and qualitative techniques in gathering and analyzing data. Many legal scholars resist classifying legal analysis as neither quantitative nor qualitative, but instead they may describe it as a form of “historical-legal research.”⁷¹⁵ As stated by Kromrey et al., it is more productive to think of research

⁷¹² Kromrey, Onwuegbuzie, & Hogarty, *The Continua of Disciplined Inquiry in RESEARCH METHODS FOR STUDYING LEGAL ISSUES IN EDUCATION*, *supra* note 708, at 91, 99.

⁷¹³ Martha McCarthy, *Legal Research: Tensions involving Student Expression Rights*, in *ANALYZING SCHOOL CONTEXTS* 229-253 (2010).

⁷¹⁴ D.A. Hollander, *Interdisciplinary Legal Scholarship: What Can We Learn from Princeton's Long-standing Tradition?*, 99 *L. LIBR. J.* 771 (2007).

⁷¹⁵ Charles Russo, *supra* note 708, at 6.

as continua rather than dualisms. The realization that individual studies may incorporate aspects of both qualitative and quantitative methods gives rise to mixed methods of inquiry and coherent approaches that combine desirable aspects of multiple approaches to empirical study. Such blended methods build on the strengths of the individual components, creating a composite that yields more information and higher-quality information than would be obtained through inquiry rooted in a single approach.⁷¹⁶

Thus, although this section discusses legal analysis separately from quantitative and qualitative methodologies, the three methods are not necessarily distinct from one another.⁷¹⁷

Legal Analysis

The purpose of conducting a legal analysis is to conduct a systemic inquiry in the law.⁷¹⁸ According to Russo, education law researchers conduct legal analysis hoping “to inform policymakers and practitioners” and “raise questions for future research.”⁷¹⁹ Because the legal field has its own special language and rules, researchers who study legal issues will be most effective if they understand the law. Russo asserts that “a knowledge gap exists between those who work with the law on a regular basis and those who don’t”⁷²⁰ and thus, it is crucial that legal researchers have the requisite legal knowledge before conducting legal analysis.

Although the “body of jurisprudence”⁷²¹ is too vast to memorize and is always changing, the basic principles of legal analysis are consistent. By understanding these ‘rules of law,’ a researcher can better understand legal issues and can predict legal results.⁷²² For instance, by comprehending jurisdiction and precedent, a researcher can better identify whether court decisions should be applied to the issue that they are studying. To conduct legal research, a

⁷¹⁶ Kromrey et al., *supra* note 712, at 91-92.

⁷¹⁷ *But see* Russo, *supra* note 708, at 6 (describing legal research as “neither qualitative nor quantitative”).

⁷¹⁸ RESEARCH METHODS FOR STUDYING LEGAL ISSUES IN EDUCATION (NO. 72 IN THE MONOGRAPH SERIES) (Steve Permut & Ralph D. Mawdsley eds., 2006).

⁷¹⁹ *Id.* at 6-7.

⁷²⁰ *Id.*

⁷²¹ ROMANTZ & VINSON, *supra* note 695, at 4.

⁷²² ROMANTZ & VINSON, *supra* note 695.

researcher must be familiar with 1) the seminal principles of legal analysis; 2) the primary and secondary sources of law; 3) the legal research tools; and 4) the limitations of legal analysis.

Seminal Principles of Legal Analysis

Common Law, Precedent, and Stare Decisis. An important aspect of legal research is the analysis of court cases. However, as noted by Romantz and Vinson, “courts do not render decisions in a vacuum.”⁷²³ Instead, courts must abide by certain doctrine such as common law, precedent, and *stare decisis*. Common law is also referred to as “case law” and is defined as the comprehensive body of law that is derived from court decisions.⁷²⁴ Stated differently, it is the “law of reported judicial opinions as distinguished from statutes or administrative law.”⁷²⁵ Some have made the distinction that common law is law that judges make; whereas, statutes are the law enacted by legislatures.⁷²⁶ In the historical sense, common law is the “basis of the Anglo-American legal systems” which originated from England where customary law was typically “unwritten, until discovered, applied and reported by the courts of law.”⁷²⁷

In making decisions, judges must rely on precedent. A precedent is a past court decision or opinion that provides future courts an example of how similar law could be applied to similar fact patterns. In other words, courts research precedent for guidance when making decisions. The legal principle requiring courts to use precedent when deciding similar cases is known as *stare decisis*. In Latin “*stare decisis et quieta non movere*” translates as “those things which have been so often adjudged ought to rest in peace.”⁷²⁸ The purpose for this legal principle is to

⁷²³ *Id.*

⁷²⁴ *Id.*

⁷²⁵ BARKEN ET AL., *supra* note 231, at xxiii.

⁷²⁶ ROMANTZ & VINSON, *supra* note 695.

⁷²⁷ BARKEN, ET AL., *supra* note 231, at xxv.

⁷²⁸ ROMANTZ & VINSON, *supra* note 695, at 8.

ensure fairness so that similar cases are decided similarly.⁷²⁹ It also promotes stability and a “predictable body of law.”⁷³⁰ The only time courts may decide not to follow *stare decisis* is when “absolutely necessary, to avoid an injustice or to reflect current policy concerns.”⁷³¹ For example, prior to *Board of Education v. Brown*, courts followed the precedent which allowed for government-sponsored racial segregation to exist. However, the U.S. Supreme Court in *Brown* overturned the past precedent because it held that racial segregation was unjust and in violation of the Fourteenth Amendment.⁷³² At the same time, most legal theorists now acknowledge that judges often create new law when applying precedent to current issues.⁷³³ This differs from the traditional “doctrine of precedent” in which “judges merely declared what had always been the law when they decided a case.”⁷³⁴

Nevertheless, *stare decisis* is important for legal researchers because it provides a continuity in court decisions such that researchers can predict how future courts may decide. Barkan et al. states that “precedent remains the foundation upon which our models of legal research are constructed.”⁷³⁵ When researchers consider emerging questions, they must analyze past decisions that have analyzed the same issue.⁷³⁶ If there are past cases that support their position, then the researcher can state it should be followed. However, if the precedent runs counter to the researcher’s position, then the researcher could offer how the current situation

⁷²⁹ ROMANTZ & VINSON, *supra* note 695.

⁷³⁰ *Id.* at 9.

⁷³¹ *Id.* at 8.

⁷³² 347 U.S. 483 (1954).

⁷³³ BARKEN, ET AL., *supra* note 231, at 4-5.

⁷³⁴ BARKEN, ET AL., *supra* note 231, at 4.

⁷³⁵ *Id.* at 7.

⁷³⁶ Russo, *supra* note 708, at 7.

differs from the past cases. For instance, the researcher may highlight the differences in the facts at hand.⁷³⁷

Hierarchy of the Court Structure. The level of the court that decides a case determines the value or the authoritative weight that the precedent has. The judiciary is primarily organized in a federal and a state hierarchical system.⁷³⁸ Federal courts decide cases involving federal questions or constitutional issues; whereas, the state courts handle cases involving issues involving state law. Therefore, the court structure consists of federal and state courts. However, administrative agencies, such as state departments of education are given decision-making authority too. When administrative agencies are the decision-making body, their decisions are referred to as regulations and collectively as administrative law. Administrative agencies are created by the legislature and exist within the executive branch of government.⁷³⁹

The federal court system and most state court systems are comprised of three tiers. The lowest level of both federal and state courts is the trial court. The next tier is the intermediate appellate court. The third tier is the highest appellate court.⁷⁴⁰ Thus, in the federal court system, the highest court is the U.S. Supreme Court, followed by the U.S. Circuit Courts of Appeal and then the U.S. District Courts. The highest level of the state court system is typically the state Supreme Court;⁷⁴¹ followed by the state Court of Appeals and then the trial courts which are often referred to as district, superior, or circuit courts.

⁷³⁷ *Id.*

⁷³⁸ ROMANTZ & VINSON, *supra* note 695.

⁷³⁹ BARKEN ET AL., *supra* note 231, at 9.

⁷⁴⁰ ROMANTZ & VINSON, *supra* note 695.

⁷⁴¹ New York and Massachusetts are the only exception to this rule. BARKEN ET AL., *supra* note 231, at xlv.

The trial courts are the “courts of original jurisdiction that make determinations of law and fact, with juries often making the determinations of fact.”⁷⁴² Appellate courts review lower court decisions and actions after an appeal has been filed.⁷⁴³ Typically, appellate courts do not review the factual determinations of the lower courts and instead review alleged errors of law that appear in the lower court’s record.⁷⁴⁴ In both the federal and state court systems, the decision of the highest appellate court, which is also termed the “court of last resort”⁷⁴⁵ are binding on all the other courts within the same jurisdiction.⁷⁴⁶ The intermediate appellate courts’ decisions are binding if the highest court is silent on the issue.⁷⁴⁷

State and federal systems are independent with the exception of the U.S. Supreme Court. Since the U.S. Supreme Court is the highest court for the entire country and thus, its jurisdiction encompasses the entire United States. Therefore, U.S. Supreme Court opinions are binding for all other U.S. courts regardless of whether they are part of the federal or state system. The federal appellate courts are divided into thirteen circuits. Every state and U.S. territory has at least one federal district court.⁷⁴⁸

Jurisdiction. According to Barkan, Mersky, and Dunn, jurisdiction is “the power given to a court by a constitution or legislative body to make legally binding decisions....”⁷⁴⁹ In other words, courts or legislative bodies to have authority over the lower courts or legislative bodies within their jurisdiction.⁷⁵⁰ To illustrate, a state legislature may enact a law that local legislative

⁷⁴² *Id.* at 3.

⁷⁴³ *Id.* at xxi.

⁷⁴⁴ *Id.* at 4.

⁷⁴⁵ *Id.*

⁷⁴⁶ ROMANTZ & VINSON, *supra* note 695.

⁷⁴⁷ *Id.*

⁷⁴⁸ BARKEN ET AL., *supra* note 231, at 55.

⁷⁴⁹ *Id.* at. xxxii.

⁷⁵⁰ *Id.* at 3.

bodies such as the city and county councils must follow if, as in most states, these local legislative bodies are within the jurisdiction of the state.

There are two main types of jurisdiction: subject matter and geographic jurisdiction. Although courts have to follow precedent, they do not have to follow *all* precedent. Instead, they only must follow the precedent within their jurisdiction.⁷⁵¹ Therefore, subject matter jurisdiction limits the type of cases that a court can consider. For instance, a federal court is prohibited from deciding cases about state law if there are no additional federal questions involved in the case.⁷⁵² Similarly, a federal bankruptcy court could not hear a criminal case. Geographic jurisdiction restricts a court from deciding cases outside of the physical boundaries assigned to that court. Moreover, a court's decisions or laws made legislatures are only binding within their assigned geographical area.⁷⁵³ An example of a geographic boundary is that the U.S. Seventh Circuit Court of Appeals has geographic jurisdiction over the federal courts in Indiana, Illinois, and Wisconsin and thus, a court in California would not be bound to a Seventh Circuit Court ruling.

Types of Authority. Jurisdiction relates to types of authority because how much authority a case has often depends on the jurisdiction of the deciding court. According to Romantz and Vinson, “the type of authority determines whether a source must be followed, or whether it merely serves to guide the court.”⁷⁵⁴ If a source of law is said to have binding authority, then the court must follow it. If the source of law is from within the same jurisdiction, it is binding. In contrast, persuasive authority originates from outside the court's jurisdiction and can be used in attempts to persuade the court based on the reasoning of another court.⁷⁵⁵ Thus, a “court may,

⁷⁵¹ ROMANTZ & VINSON, *supra* note 695.

⁷⁵² *Id.*

⁷⁵³ BARKEN ET AL., *supra* note 231, xxxii.

⁷⁵⁴ ROMANTZ & VINSON, *supra* note 695, at 14.

⁷⁵⁵ Russo, *supra* note 708, at 10.

but is not bound to, follow” persuasive authority.⁷⁵⁶ For instance, if an Indiana court is reviewing a novel issue, or a case of first impression, it may review what the Ohio courts have decided about the issue.⁷⁵⁷ The precedent from Ohio would not be binding on the case before the Indiana court; yet, the court may review the Ohio precedent as persuasive authority in hopes that it may provide guidance.

Barkan et al. discussed the variability of influence that a source is likely to have on a court. They explained, “Variations in the facts of individual cases enable judges, influenced by their own philosophies and perspectives, to exercise wide discretion in interpreting and applying legal authority.”⁷⁵⁸ Similarly, some persuasive authority may be more compelling to a court than other persuasive authority.⁷⁵⁹ As stated by Romantz and Vinson, “the more legally authoritative the source, the more persuasive the authority.”⁷⁶⁰ For instance, it may depend on who the author or publisher is. Some secondary sources like journal articles, restatements, and treatises are likely to be more persuasive than legal encyclopedias to a court.⁷⁶¹

A researcher should also be aware of *dictum* which is the language in a court opinion that is “not necessary to the decision.”⁷⁶² *Dictum* is not binding on future courts, but it can be used as a persuasive authority. According to Barkam et al., “yesterday’s *dictum* may develop into today’s doctrine.”⁷⁶³

Substantive versus Procedural Law. Law may be divided into two main types: substantive and procedural law. Substantive law establishes rights and obligations; whereas,

⁷⁵⁶ BARKEN ET AL., *supra* note 231, at xxxvii.

⁷⁵⁷ Russo, *supra* note 708, at 10.

⁷⁵⁸ BARKEN ET AL., *supra* note 231, at 2.

⁷⁵⁹ ROMANTZ & VINSON, *supra* note 695.

⁷⁶⁰ *Id.* at 14.

⁷⁶¹ BARKEN ET AL., *supra* note 231, at 10.

⁷⁶² *Id.* at 5.

⁷⁶³ *Id.* at 6.

procedural law includes the rules that ensure substantive law is followed.⁷⁶⁴ Turnbull, Stowe, and Huerta describe substantive and procedural law as it relates to due process.⁷⁶⁵ Namely, procedural due process requires the government to provide citizens access to procedures so that they can challenge a state action. This access must occur before the government can infringe upon individual rights. As applied to IDEA, parents are provided with a variety of procedural protections. For example, the government is required to provide parents with a hearing where parents could challenge their child's special education placement or services.⁷⁶⁶

In comparison, substantive due process limits what a government can do. According to Turnbull et al., "It protects certain individual rights from government intrusion."⁷⁶⁷ Thus, a substantive aspect of IDEA is that students with disabilities are to be educated with non-disabled peers to the maximum extent appropriate.

Published versus Unpublished Opinions. A controversial and evolving legal issue involves the use of unpublished cases. Many legal professionals and scholars are concerned that too many opinions that do not merit being published are being published and reported.⁷⁶⁸ They argue that many of the published cases do not advance or clarify legal doctrine.⁷⁶⁹ Some legislatures and courts have tried to limit published cases by putting specific requirements on which cases can be published.⁷⁷⁰ Weisgerber defines unpublished opinions as "opinions that a court has designated as having non-binding precedential effect."⁷⁷¹ She states that the opinions

⁷⁶⁴ ROMANTZ & VINSON, *supra* note 699, at xlii.

⁷⁶⁵ H. RUTHERFORD TURNBULL III, MATTHEW J. STOWE, & NANCY E. HUERA, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES 211 (2007).

⁷⁶⁶ *Id.* at 211

⁷⁶⁷ *Id.*

⁷⁶⁸ BARKEN ET AL., *supra* note 231, at 35.

⁷⁶⁹ *Id.*

⁷⁷⁰ *Id.*

⁷⁷¹ Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L. J. 621, 623 (2009).

often only have a short description of the facts and law and that they are “unpolished and less carefully crafted than published opinions.”⁷⁷² Yet, she recognizes that the term “unpublished opinions” is a misnomer because they are not published in the official report, but they are still published on court websites, the Federal Appendix, and legal databases.⁷⁷³

Because numerous commercial publishers publish cases, it is important to recognize that if a publication is sanctioned by the legislature or judiciary, then those court reports are termed “official reports.”⁷⁷⁴ The official reporter may be a commercial publisher if it has been designated as such.⁷⁷⁵ However, reports that are published without a statute or court rule authorizing their publication are referred to as “unofficial reports.”⁷⁷⁶ Unofficial reports may have the identical text of the official report, but it may be more useful to access for research because they often have “editorial enhancements” such as case summaries and they are published more quickly than official reports.⁷⁷⁷ Thus, unpublished opinions may be readily available for researchers. Yet, Barkan et al. advises to consult the “appellate court rules and local court rules before relying on unpublished or unreported cases as authority.”⁷⁷⁸

Court opinions are officially published in reporters. All U.S. Supreme Court written opinions are published in the *United States Reports*. The *Federal Reporter* publishes U.S. Circuit courts of appeal opinions and the *Federal Supplement* publishes federal district court opinions.⁷⁷⁹ The *Federal Appendix* contains the so-called unpublished federal appellate court

⁷⁷² *Id.* at 623.

⁷⁷³ *Id.* at 624.

⁷⁷⁴ BARKEN ET AL., *supra* note 231, at 34.

⁷⁷⁵ *Id.*

⁷⁷⁶ *Id.*

⁷⁷⁷ *Id.*

⁷⁷⁸ *Id.* at 48.

⁷⁷⁹ *Id.* at 56-57.

opinions which do not have binding authority.⁷⁸⁰ The state court opinions are published in seven reporters including: *Atlantic Reporter*, *North Eastern Reporter*, *South Eastern Reporter*, *Southern Reporter*, *South Western Reporter*, *North Western Reporter*, and *Pacific Reporter*.⁷⁸¹

Primary and Secondary Sources of Law. A variety of sources of law can be used to support or oppose a legal argument.⁷⁸² Primary sources of law are synonymous with “primary authority” which has been defined as “the law itself.”⁷⁸³ Primary sources include a variety of types of federal and state law such as “constitutions, statutes (and their legislative histories), regulations (along with administrative decisions and rulings that interpret them), and case law.”⁷⁸⁴ Primary sources of law are created by all three branches of the U.S. government including the executive, legislative, and judicial branches. They can be either binding or persuasive authority depending on the source and content of the authority.⁷⁸⁵

On the other hand, secondary sources provide commentary about the law and include legal encyclopedias, law review and other scholarly journal articles, legal treatises, restatements of the law, and loose-leaf services.⁷⁸⁶ Secondary sources are only used as persuasive authority⁷⁸⁷ and “are never binding on courts.”⁷⁸⁸

Cases. The first primary source of law is case law which is created by the judicial branch or court system. Case law is the term used to describe the collective body of law that is derived from the court opinions.⁷⁸⁹ Although the traditional role of the judiciary is to interpret the

⁷⁸⁰ *Id.* at 57.

⁷⁸¹ *Id.* at 74.

⁷⁸² ROMANTZ & VINSON, *supra* note 695.

⁷⁸³ BARKEN ET AL., *supra* note 231, at xxxix.

⁷⁸⁴ Russo, *supra* note 708, at 8.

⁷⁸⁵ ROMANTZ & VINSON, *supra* note 695, at 2.

⁷⁸⁶ *Id.*

⁷⁸⁷ *Id.*

⁷⁸⁸ BARKEN ET AL., *supra* note 231, at xxxix.

⁷⁸⁹ ROMANTZ & VINSON, *supra* note 695.

application of the law by making decisions when parties disagree about how the law should be interpreted, courts actually create binding law as a result of their decisions. For example, courts make law by deciding cases that involve interpreting legal principles.⁷⁹⁰ Because each case has a unique set of facts, new binding precedent is created every time a case is decided. The judiciary also makes law by interpreting the existing law such as constitutions, statutes, and regulations.⁷⁹¹ According to Russo, a logical place to start legal analysis is by reviewing the case law. By doing so, a legal researcher is not ignoring the other primary sources of constitutions, statutes, and regulations. To the contrary, case law is often necessary to obtain the important information about how the judiciary has interpreted the constitutions, statutes, and regulations will apply to real-life examples.⁷⁹²

Statutes. A statute is an enacted law which “prescribes and governs conduct.”⁷⁹³ It is passed by a legislative body such as a state legislature or Congress.⁷⁹⁴ Most legislatures are bicameral and are made up of a Senate and a House of Representatives or Assembly.⁷⁹⁵ Statutes are also referred to as laws or legislation.⁷⁹⁶ Statutes that are grouped together by subject matter are called codes.⁷⁹⁷ After statutes have been enacted, they have authority until they have been amended or abolished by the legislature or deemed unconstitutional by a relevant court.⁷⁹⁸ Courts “interpret the meaning and application” of statutes, but they cannot change the language of laws.⁷⁹⁹ Court do, however, extend “the law to subjects not expressly covered by statutes.”⁸⁰⁰

⁷⁹⁰ *Id.*

⁷⁹¹ *Id.*

⁷⁹² Russo, *supra* note 695, at 14.

⁷⁹³ ROMANTZ & VINSON, *supra* note 695, at 4.

⁷⁹⁴ ROMANTZ & VINSON, *supra* note 695.

⁷⁹⁵ *Id.*

⁷⁹⁶ BARKEN ET AL., *supra* note 231, at 7.

⁷⁹⁷ *Id.*

⁷⁹⁸ ROMANTZ & VINSON, *supra* note 695.

⁷⁹⁹ *Id.* at 5.

Although the legislature may enact a general legal rule, it is often then interpreted and applied to specific cases by the judiciary.

Researchers must not only be able to locate statutes and read the “plain meaning” of the law, but also must understand how to conduct statutory interpretation.⁸⁰¹ Stated differently, a legal researcher needs to understand what the language of the statute means and how it should be applied. To do this, researchers should look to court cases about the specific statute.⁸⁰² The applicability of a given opinion is based on how similar its facts are to the controversy the researcher is examining and on the authority of the deciding court.⁸⁰³ Sometimes, statutes codify past court decisions and thus, the applicable court opinion is especially important to review.

Researchers may also be interested in uncovering why the legislature passed a particular statute. To reveal the purpose of the legislature, a researcher would locate the legislative history of the statute.⁸⁰⁴ The legislative history includes documents such as “the original bill...revised versions of bills and legislative debates, hearings, reports, and other materials, created by the legislature while the statute was under consideration.”⁸⁰⁵ Some question the appropriate weight that should be assigned to legislative histories; however, judges and lawyers often cite it when creating a legal argument.⁸⁰⁶

Constitutions. Barkan et al. defines a constitution as “the system of fundamental principles by which a political body or organization governs itself.”⁸⁰⁷ As the primary law of the United States, the U.S. Constitution provides the framework for the American legal system.

⁸⁰⁰ BARKEN ET AL., *supra* note 231, at 8.

⁸⁰¹ *Id.*

⁸⁰² *Id.*

⁸⁰³ *Id.*

⁸⁰⁴ *Id.*

⁸⁰⁵ *Id.*

⁸⁰⁶ *Id.*

⁸⁰⁷ *Id.* at xxvi.

State and federal governments must follow the U.S. Constitution, but state constitutions and statutes are supreme in their state jurisdictions as long as they “do not contradict or limit rights protected under their federal counterpart.”⁸⁰⁸ Thus, the judiciary often reviews statutes, regulations, state constitutions, and the case law to determine whether it aligns with the U.S. Constitution because the U.S. Constitution is the supreme law of the land.

Regulations. Regulations are “rules or orders issued by various governmental departments to carry out the intent of the law . . . Regulations are not the work of the legislature and do not have the effect of law in theory. In practice, however, because of the intricacies of judicial review of administrative action, regulations can have an important effect in determining the outcome of cases involving regulatory activity.”⁸⁰⁹ Federal regulations are first published in the *Federal Register* and then are organized by subject area in the *Code of Federal Regulations*.⁸¹⁰ Administrative agencies are granted power through “legislative enactments and are subject to judicial review.”⁸¹¹

Secondary Sources. Secondary sources which are also known as secondary authorities include legal materials that are “used to explain, interpret, develop, locate, or update primary authorities.”⁸¹² The secondary sources of education law are oftentimes law review articles. Law reviews or law journals are legal periodicals which contain scholarly articles edited by law students.⁸¹³ Primary sources of the law often appear in the footnotes. Therefore, review of these

⁸⁰⁸ Russo, *supra* note 708, at 8.

⁸⁰⁹ BARKEN ET AL., *supra* note 231, at xl.

⁸¹⁰ *Id.*

⁸¹¹ *Id.* at xix.

⁸¹² *Id.* at 2.

⁸¹³ *Id.* at xxxii.

articles is similar to the triangulation of data used by qualitative researchers because a researcher often is led to other research through cross-referencing.⁸¹⁴

Research tools and process

Tools. Legal information can be accessed through books or microform,⁸¹⁵ but most likely the information is found nowadays through subscriptions to electronic databases such as Westlaw, LexisNexis, and Loislaw, or on free online databases found on the internet such as FindLaw.com.⁸¹⁶ The legal databases consist of approximately three million cases and add another 50,000 decisions each year.⁸¹⁷ Therefore, accessing cases is much more efficient when done electronically. Westlaw, LexisNexis, and Loislaw are Computer-Assisted Legal Research (CALR)⁸¹⁸ services found on the internet.⁸¹⁹ By accessing CALRs, a legal researcher can find the full text of court decisions, statutes, administrative regulations, *ALR*⁸²⁰ annotations, law review articles, Supreme Court briefs, and many additional legal materials. Legal databases allow researchers to search by entering key-words, Boolean, natural language, field, and citations. Westlaw and LexisNexis provide the full text of published federal and state opinions and are more extensive than the other available CALRs.⁸²¹ According to Barkan et al., “Materials provided by Westlaw and LexisNexis are constantly undergoing expansion and

⁸¹⁴ Russo, *supra* note 708, at 8; BARKEN ET AL., *supra* note 231, at 10.

⁸¹⁵ BARKEN ET AL., *supra* note 231, at 518.

⁸¹⁶ Russo, *supra* note 708, at 8. Barkan and others do not recommend citing to free internet sources. BARKEN ET AL., *supra* note 231, at 37.

⁸¹⁷ Russo, *supra* note 708, at 19.

⁸¹⁸ BARKEN ET AL., *supra* note 231, at xxii.

⁸¹⁹ Westlaw is produced by Thomson Reuters; LexisNexis is produced by Reed Elsevier Inc.; and Loislaw is a subsidiary of Wolters Kluwer Law & Business. BARKEN ET AL., *supra* note 231, at xxxiii, xxxiii, xlvi, 518.

⁸²⁰ ALR is the abbreviation for American Law Reports which are “articles, called annotations [that] provide background, analysis, and citations to relevant cases, statutes, law review articles, and other annotations.” American Law Reports, <http://law.harvard.libguides.com/content.php?pid=103327&sid=1030211> (last visited Aug. 4, 2010); *see also* BARKEN ET AL., *supra* note 231, at 327.

⁸²¹ BARKEN ET AL., *supra* note 231, at 59-60.

refinement.”⁸²² It is also important to note that researchers at law schools and universities often have unlimited access to these services through “educational” subscriptions; however, commercial accounts are often based on the amount of time spent online⁸²³ and are extremely expensive.

Process. To identify whether a case has been overturned, reaffirmed, questioned, or cited by subsequent courts, legal researchers “shepardize” or “keycite.” These terms are trademarks of the companies who created the systems. Essentially, shephardizing describes using Shepard’s publications and citatory services which traditionally appeared in book form, but are now online through LexisNexis,⁸²⁴ whereas, key citing refers to the system that Westlaw employs.⁸²⁵ A citator can be a book or online service that links the researcher to the previous and subsequent judicial history. It also indicates whether the case or statute has been cited by another source and lists those citing sources.⁸²⁶ The two main functions of citation services are to allow researchers to determine the validity and strength of the authority and to expand upon their legal research.⁸²⁷ Oftentimes, legal researchers informally use the term “shepardizing” to define the action of using citators in general no matter which online citation service they are using.

It is imperative for legal researchers to shepardize because the legal system is bound by following precedent. It would be seriously problematic for a researcher to erroneously rely on an overturned court opinion. Consequently, legal analysis requires researchers to ensure that the authorities they are relying on are still “good” law.⁸²⁸

⁸²² *Id.* at 519.

⁸²³ *Id.* at 526.

⁸²⁴ *Id.* at xli.

⁸²⁵ *Id.* at 275.

⁸²⁶ Thus, *Shepard’s* is LexisNexis’ citator and *KeyCite* is Westlaw’s citator.

⁸²⁷ BARKEN ET AL., *supra* note 231, at 275.

⁸²⁸ *Id.* at 274.

Barkan et al. also suggest that legal researchers create case analysis charts.⁸²⁹ These charts allow the researcher to compare cases across meaningful categories⁸³⁰ including facts, issue, decision, rationale, and dissenting or concurring opinion(s). This organizational tool aids the researcher such that s/he can identify similarities and differences in fact patterns that meet or fail to meet a legal rule.⁸³¹

Multiple suggestions exist for how legal research can be conducted.⁸³² However, the current study employed a modification of the strategy suggested by Kunz et al.⁸³³ These authors suggest the following four-step process: 1) consider whether legal authorities and sources are available; 2) analyze the legal question in order to generate search terms; 3) locate secondary sources to research the relevant legal issues and search terms; and 4) review primary sources to determine what the law itself says.⁸³⁴ The data collection and analysis for this study built upon these four steps and is described in detail in Section 3.4.

Limitations of Legal Analysis. Yet, the limitation of conducting legal research is that it does not “go beyond the law to consider the attitudes, values, and beliefs of those affected by legal decisions.”⁸³⁵ According to Adler and Lee, traditional legal research answers “what is the law?”⁸³⁶ Yet, they noted that the law is “a social construction and is suited to exploring the questions of *why* and *how* society, through courts and legislative bodies, has created specific laws.”⁸³⁷ Adler and Lee highlight that it is also helpful to understand the intended and

⁸²⁹ *Id.* at 29.

⁸³⁰ *Id.*

⁸³¹ *Id.*

⁸³² *E.g.*, BARKEN ET AL., *supra* note 231, at 15; ROMANTZ & VINSON, *supra* note 695, at 33-70.

⁸³³ C.L. KUNZ, D.A. SCHMEDEMANN, M.P. DOWNS, & A.L. BATESON, *THE PROCESS OF LEGAL RESEARCH* (2004).

⁸³⁴ *Id.*

⁸³⁵ Russo, *supra* note 708, at 10.

⁸³⁶ Lee & Adler, *School Law and Research in the 21st Century*, in *RESEARCH METHODS FOR STUDYING LEGAL ISSUES IN EDUCATION*, 31 (2006).

⁸³⁷ *Id.*

unintended consequences of the law which can be done by employing additional qualitative methods.⁸³⁸ Similarly, Russo suggests legal researchers look into other inquiry methods as well.

Quantitative and Qualitative Inquiry

To respond to this need to go beyond legal research, this study includes quantitative and qualitative methods. Baldwin and Ferron recommend employing quantitative methods in order to build upon other methods.⁸³⁹ They explain that quantitative inquiry can be used to “substantiate” the findings of another research methodology.⁸⁴⁰

The purpose of using quantitative methods is to create a database to make “rational decisions.”⁸⁴¹ Additionally, quantitative methods allow a researcher to examine the parts of the whole⁸⁴² -- or put differently, they allow a researcher to disaggregate the data to examine the nuances that may be occurring.

Baldwin and Ferron state that the key elements of quantitative research studies are: 1) identification of the problem; 2) study design; 3) examination of internal and external validity; and 4) review the “appropriateness of statistical analyses.”⁸⁴³ To examine a study’s internal validity, a researcher determines whether the study can be reproduced with similar results.⁸⁴⁴ On the other hand, a study is said to have external validity if its results can be generalized.⁸⁴⁵ Baldwin and Ferron describe a variety of research strategies including the “studies of the past” which involves counting the prevailing/losing parties in court decisions. It is also referred to as

⁸³⁸ *Id.*

⁸³⁹ Baldwin & Ferron, *supra* note 711, at 57.

⁸⁴⁰ *Id.*

⁸⁴¹ *Id.* at 59.

⁸⁴² *Id.*

⁸⁴³ *Id.*

⁸⁴⁴ *Id.* at 60.

⁸⁴⁵ *Id.* at 61.

“simple box scoring.”⁸⁴⁶ At the same time, as discussed previously, the researchers warn that applying quantitative methodology to education law research “should not be limited to merely counting cases. [Quantitative inquiry can] also deal with the attitudes, opinions, and effects of specific and multiple court decisions on issues facing school personnel.”⁸⁴⁷

Baldwin and Ferron believe that

The key element is that in quantitative methodology, the user of the information has sound data on which to base a decision because of the use of control and the effort to eliminate bias and confounding variables.....Quantitative research methodology tries to assure that the data are accurate and reproducible, thus allowing for consistency that aids the decision-making process.⁸⁴⁸

The current study utilizes quantitative methodology in attempts to “eliminate bias and confounding variables” as discussed by Baldwin and Ferron. Further, it analyzes whether past research data are “accurate and reproducible” by replicating the Likert-scale coding system used in a study by Choutka et al.⁸⁴⁹ Although the quantitative methods employed in the current study are rudimentary, the resulting data analysis is not “limited to merely counting cases.” Instead, it identifies legal trends across the case law.

In addition to its use of quantitative methods, the current study employed qualitative methods. According to Lee and Adler, qualitative methods provide “interpretive insight into legal issues”⁸⁵⁰ and “qualitative research has the potential to enlighten, supplement, reinterpret, and validate our perspectives about legal issues....”⁸⁵¹ Qualitative inquiry is a diverse approach to research that includes a wide number of methods including ethnography, case study, action

⁸⁴⁶ *Id.* at 87.

⁸⁴⁷ *Id.* at 86.

⁸⁴⁸ *Id.* at 87.

⁸⁴⁹ Choutka et al., *supra* note 21.

⁸⁵⁰ *Id.*

⁸⁵¹ *Id.* at 26.

research, phenomenology, and discourse analysis. It also is associated with a wide variety of techniques including interviews, participant observations, and document reviews.⁸⁵²

Denzin and Lincoln described qualitative research as being “a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that make the world visible.”⁸⁵³ Thus, qualitative researchers are hesitant to make universal generalization or claim statistical validity.⁸⁵⁴ Qualitative methods do not seek to quantify information, but rather a qualitative approach aims to gather and group or stated differently, collect and code, data so that the researcher can interpret it and find meaning through data analysis. In the current study, characteristics of the case law are not merely quantified, but they are also coded, aggregated, and disaggregated so that litigation trends may be identified.

Limitations of Quantitative and Qualitative Inquiry. A limitation of using quantitative methods in legal research is that the access to data is limited.⁸⁵⁵ Oftentimes, cases are settled outside of court. Also, variables that affect the courts’ decisions are not recorded.⁸⁵⁶ Thus, a researcher does not have access to a complete data set. Nevertheless, a researcher can provide a starting point that can be further examined.⁸⁵⁷

Another limitation of quantitative inquiry is that it only examines factors that can be measured. According to Adler and Lee, quantitative research seeks to answer the relevant legal questions about “*who, where, how many, how much* and what is the relationship between specific variables.”⁸⁵⁸ They noted that oftentimes legal quantitative research does what was done in this

⁸⁵² Lee & Adler, *supra* note 836, at 43-44.

⁸⁵³ NORMAN K. DENZIN & YVONNE S. LINCOLN, COLLECTING AND INTERPRETING QUALITATIVE MATERIALS (2003).

⁸⁵⁴ Lee & Adler, *supra* note 836, at 33.

⁸⁵⁵ Baldwin & Ferron, *supra* note 711, at 62.

⁸⁵⁶ *Id.*

⁸⁵⁷ *Id.*

⁸⁵⁸ L. Adler, *Qualitative Research of Legal Issues*, in RESEARCH THAT MAKES A DIFFERENCE: COMPLEMENTARY METHODS FOR EXAMINING LEGAL ISSUES IN EDUCATION 3 (1996).

study, *i.e.*, count cases and their outcomes and compare relationships among variables. Yet, Adler and Lee criticize that this level of inquiry fails to examine how people interpret the world and “assign meaning to their experiences and actions.”⁸⁵⁹

On the other hand, qualitative research not only investigates *whether* a category of cases are increasing, but also examines *why* the litigation in this area is increasing.⁸⁶⁰ The current study does attempt to answer some questions as to why autism-centric charter schools may be emerging. It hypothesizes that these schools may be able to reduce ABA litigation. However, it comes from only the researcher’s vantage point. If the study interviewed administrators, educators, parents, and policy makers, then it would be able to offer a richer explanation. Thus, although the current study employs qualitative and quantitative techniques, it could be improved by expanding the techniques used.

3.4 The Current Study’s Data Collection and Analysis

The current study’s data collection and analysis were designed to alleviate some of the methodological flaws of past ABA litigation research that were described in Section 3.2. For example, most of the past literature does not take into account the important factual differences between the cases. Overall, the existing literature has taken only a surface-level approach; whereas, the current study goes into more depth with a more sophisticated legal analysis that employs both quantitative and qualitative methods.

In order to attend to the important details, this study only addresses a very narrow population of cases. Specifically, only ABA autism cases that involve substantive issues are analyzed. Further, only published opinions are included in the data set and thus, no

⁸⁵⁹ *Id.*

⁸⁶⁰ *Id.* at 32-33.

administrative law hearings are reviewed.⁸⁶¹ Finally, multiple variables were coded for and then the data was disaggregated based on these variables in order to better explain the legal trends and implications.

As mentioned in Section 3.3., the data collection and analysis for this study modified Kunz et al.'s four-step process. An important alteration of the process is that it is supplemented with quantitative and qualitative methods. For instance, the outcome coding Likert-scale which was used in Choutka et al.'s study of ABA litigation and adapted from Lupini and Zirkel's study⁸⁶² is replicated in this study.⁸⁶³ See Appendix C. for a description of the Likert-scale outcome codes. Additionally, some of the quantitative methods employed mirror legal research tools. Specifically, the quantitative method of "simple box scoring"⁸⁶⁴ is similar to the legal research tool of case law analysis charts.⁸⁶⁵ A combination of both methods is being used in the Case Law Spreadsheet under Step Three below. Step Five is a novel step added to Kunz et al.'s process to test the validity and reliability of the study.

Step One:⁸⁶⁶ First, the researcher identified the legal issues, described the significance of the problem, and developed two primary research questions.⁸⁶⁷ These research questions generated the search terms or broad topic areas that were researched in Step Two.

Step Two:⁸⁶⁸ Next, the researcher determined that legal authorities and sources were available to respond to the research questions. The researcher located, read, and summarized the

⁸⁶¹ The researcher's definition of "published" includes cases that are *only* found in the official Reporters and *not* simply published on court websites, the Federal Appendix, and legal databases.

⁸⁶² Lupini & Zirkel, *supra* note 487. See Appendix C., for description of the Likert-scale.

⁸⁶³ Choutka et al., *supra* note 21. See Table X, for Outcome Code Descriptions.

⁸⁶⁴ Baldwin & Ferron, *supra* note 711, at 87.

⁸⁶⁵ BARKEN ET AL., *supra* note 231, at 29.

⁸⁶⁶ This step corresponds with Kunz et al.'s second step and Baldwin & Ferron's quantitative element one. See Section 3.1, for list of three research questions.

⁸⁶⁷ See *supra* Chapter One.

relevant secondary sources.⁸⁶⁹ In addition to educating the researcher about the literature that existed on the topic, this step also allowed the researcher to identify the gaps in the existing literature. Thus, she was able to create a research design and develop search terms that remedied some of the methodological flaws in the existing research. Specifically, the research design includes a legal and quantitative trend analysis in order to expand upon and deepen the level of data collection and analysis.

Step Three:⁸⁷⁰ The researcher collected and organized the relevant primary sources of law. The data set included:

- all state and federal court cases published⁸⁷¹ from 1975-2009⁸⁷² involving
 - pK-12 students with autism and⁸⁷³
 - substantive issues⁸⁷⁴ about
 - Free Appropriate Public Education (FAPE); and
 - Applied Behavior Analysis (ABA); discrete trial teaching (DTT); or Lovaas therapy/treatment/intervention.

To collate the relevant case law, the researcher used the electronic databases of Westlaw and LexisNexis. She conducted a key-word search of all “state and federal cases” restricting the dates to 1975-2009.⁸⁷⁵ A total of 153 cases were collected from Westlaw and 137 cases from

⁸⁶⁸ This step corresponds with a combination of Kunz et al.’s steps one and three and Baldwin and Ferron’s quantitative element two.

⁸⁶⁹ See *supra* Chapter Two.

⁸⁷⁰ This step was added to Kunz et al.’s four-steps.

⁸⁷¹ See definition of “published“ *supra* note 860.

⁸⁷² This timeframe covers the enactment of IDEA until the last calendar year.

⁸⁷³ Including students classified as included within the Autism Spectrum Disorder (ASD) classification

⁸⁷⁴ See *supra* Section 3.3, for a distinction between substantive versus procedural law.

⁸⁷⁵ The exact Westlaw search term entered was: (AUTISM AUTISTIC PDD-NOS ASPERGER “PERSISTENT DEVELOPMENTAL”) & (“INDIVIDUALS WITH DISABILITIES EDUCATION ACT” “EDUCATION OF THE HANDICAPPED ACT” I.D.E.A. “EDUCATION FOR ALL HANDICAPPED CHILDREN ACT” E.A.H.C.A.) & (“APPLIED BEHAVIOR ANALYSIS” “ABA” “DISCRETE TRIAL TEACHING” “DTT” “LOVAAS”) & da(aft 12/31/1974 & bef 12/31/2009). The exact LexisNexis search term entered: (AUTISM or AUTISTIC or “PDD-NOS” or ASPERGER or “pervasive developmental”) and (“INDIVIDUALS WITH DISABILITIES EDUCATION ACT” or “EDUCATION OF THE HANDICAPPED ACT” or “I.D.E.A.” or “EDUCATION FOR ALL HANDICAPPED CHILDREN ACT” or “E.A.H.C.A.”) and (“APPLIED BEHAVIOR ANALYSIS” or “ABA” or “DISCRETE TRIAL TEACHING” or “DTT” or “LOVAAS”) from 1/1/1975 to 12/31/2009.

LexisNexis.⁸⁷⁶ After accounting for duplicate and novel cases found on both databases, a total of 160 cases remained.⁸⁷⁷

Next, the complete list of 160 cases was entered into table in a Word Document titled “Complete List of Cases.” The researcher then reviewed all 160 cases. If the case was not a published opinion and thus did not have precedential value, then “excluded: unpublished” was entered into the table within the Complete List of Cases Word Document.⁸⁷⁸ Each case was shepardized using Lexis-Nexis and key cited using Westlaw. If the case was no longer “good law” because it had been overruled, then “excluded: not good law” was entered into the table.⁸⁷⁹ If the case did not reference IDEA, then “excluded: irrelevant” was entered into the table. If the case did not include substantive issues, then “excluded only procedural issues” was entered into the table. If the case did not include substantive issues related to FAPE, then “excluded: no FAPE” was entered into the table. If the case was a lower court decision and its appellate counterpart was in the data set, then “excluded: appealed” was entered into the table. All the excluded cases were highlighted red and all the non-excluded cases were highlighted green. Once 121 cases were excluded from the data set for these reasons, the total number of cases in the sample equaled 39.

These 39 cases were then entered into an excel spreadsheet titled “Final Case Data Set” that served as a case analysis chart.⁸⁸⁰ A complete list of cases used in this study can be found in Appendix B. The column headings of the chart/spreadsheet included: case name, citation, court,

⁸⁷⁶ The data collection occurred on May 12, 2010.

⁸⁷⁷ Of the 160 cases, 130 were found on both Westlaw and LexisNexis. Seven were unique to LexisNexis and 23 were unique to Westlaw.

⁸⁷⁸ However, if the opinion was a slip opinion, it was not included in the data set *unless* it was the result from an appeal from a published lower court case.

⁸⁷⁹ This determination was done by shepardizing the cases. The legal databases automatically identify whether the case is no longer “good law.” If one database classified the case as bad law and the other did not (e.g., Westlaw considered the case bad law and Lexis did not), then the case was excluded.

⁸⁸⁰ See *supra* Section 3.3 “research tools and process.”

year decided, notes, census region, U.S. Court of Appeal Circuit Court jurisdiction, state of origin, procedural history, reversal v. non-reversal, facts, ABA provided then removed/reduced, self-contained classroom, diagnosis, age of student when due process was filed, relief sought, program v. implementation,⁸⁸¹ issue question, holding, remedy awarded, rationale, dissenting opinion(s), concurring opinion(s), outcome code, and lessons learned.

Step Four:⁸⁸² After the data was collected and organized, the researcher conducted a legal analysis of the case law to determine what the primary source itself said. To begin, each cell of the Final Case Data Set Spreadsheet was filled with the relevant information for each column (e.g., facts, rationale). To complete the outcome code column found in the Case Law Spreadsheet, the Likert-scale of 1 to 7 was used from Choutka et al.'s ABA litigation research.⁸⁸³ Next, the coded case law data was grouped together based on similarity in the following variables: court, year decided, notes, census region, U.S. Court of Appeal Circuit Court jurisdiction, state of origin, procedural history, reversal versus non-reversal, facts, ABA provided then removed/reduced, self-contained classroom, diagnosis, age of student when due process was filed, relief sought, program versus implementation, remedy awarded, rationale, dissenting opinion(s), concurring opinion(s), and outcome code. Additionally, the cases were color-coded. If the parents/child(ren) were the prevailing party, then the case was highlighted green. If the school district was the prevailing party, then the case was highlighted red. If the prevailing party was inconclusive for reasons such as the published case was remanded and the remanded case was unavailable for review, then the case was highlighted blue.

⁸⁸¹ Program v. implementation was included based on Choutka and others' study, *supra* note 21, in which the researchers categorized whether the relief being sought was programmatic (e.g., parents requested a instructional approach that differed from what was proposed by the school) or the implementation of the program (e.g., all parties agreed upon ABA but parents contested location, duration, or provider).

⁸⁸² This step corresponds with Kunz and others' fourth step.

⁸⁸³ Choutka et al., *supra* note 21; *see* Appendix C, for Outcome Code Descriptions.

Step Five: Finally, the researcher examined the internal and external validity as suggested by Baldwin and Ferron.⁸⁸⁴ If a study is valid, then the research measures what it claims to be measuring. Thus, a study with good internal validity should be “reproducible” and yield similar results.⁸⁸⁵ Baldwin and Ferron explain that “External validity addresses questions as to the value of the findings to larger or different groups.”⁸⁸⁶ In other words, if a study has good external validity, then its results are likely to be able to be generalized. Specifically, the researcher cross-referenced or triangulated the 39 cases against those listed in past research about ABA litigation⁸⁸⁷ and two books that discussed ABA case law.⁸⁸⁸ The purpose was to double-check two aspects of the study. First, the researcher was interested in determining whether other researchers included the same cases in their data sets. Second, the researcher sought to identify whether the previous researchers’ interpretation of who prevailed in the cases was the same.

3.5 Limitations and Strengths in the Current Study’s Methodology

After completing Step Five, there were a number of limitations and strengths identified in the current study’s methodology.

Internal Validity

First, it is difficult to ascertain the internal validity because the cases identified in this study were not exactly the same cases identified in the other research. Further, unlike some of the previous studies, there was only one researcher and thus, there was no opportunity to measure internal validity through interrater reliability.

⁸⁸⁴ Baldwin & Ferron, *supra* note 711, at 59.

⁸⁸⁵ *Id.* at 60.

⁸⁸⁶ *Id.* at 61.

⁸⁸⁷ Choutka et al., *supra* note 21; Zirkel, *supra* note 28.

⁸⁸⁸ ELENA M. GALLEGOS, & JILL M. SHALLENBERGER, *AUTISM METHODOLOGY CASES TO LIVE BY: LEGAL GUIDANCE FOR PRACTICAL PROGRAM STRATEGIES* (2008); A. E. SLATER & J. W. NORLIN, *AUTISM CASE LAW: A DESKTOP REFERENCE TO KEY DECISIONS* (2009).

Instead, to check internal validity the researcher compared 1) her data set and 2) her findings regarding prevailing party with past research. The researcher was only able to conduct this cross-referencing with three studies and two books about ABA/autism litigation. The remaining ABA/autism litigation research failed to provide information about the data set (e.g., case names, prevailing party).

Choutka et al.⁸⁸⁹ only listed the names of the cases in which they determined were inconclusive as to the prevailing party and thus, the current researcher's attempt to cross reference cases was extremely limited. The current study had three cases in common with those listed as inconclusive by Choutka et al.; however, the current researcher disagreed by finding that the school prevailed in two of the three cases that Choutka et al. listed as inconclusive.⁸⁹⁰ The current researcher was in agreement with Choutka et al. that the third case was inconclusive.⁸⁹¹ The current research shared 13 cases in common with Nelson and Huefner's study.⁸⁹² Furthermore, the two studies were in unanimous the agreement about who prevailed in 100% (13) of the cases.

The last study that the researcher was able to cross-reference because it provided some information about its data set was Zirkel's 2008 study. Although Zirkel's study published in 2002 did not list its data set and findings on prevailing party, the researcher was able to locate an unpublished update of this prior study written in 2008 that included this information.⁸⁹³ The

⁸⁸⁹ Choutka et al., *supra* note 21.

⁸⁹⁰ *Adams v. State*, 195 F.3d 1141 (9th Cir. 1999); *C.M. ex rel. J.M. v. Bd. of Public Educ. of Henderson County*, 184 F. Supp. 2d 466 (D.N.C. 2002).

⁸⁹¹ *Malkentzos v. DeBuono*, 102 F.3d 50 (2d Cir. 1996).

⁸⁹² Nelson & Huefner, *supra* note 594.

⁸⁹³ PERRY A. ZIRKEL, LEGAL ISSUES RELATED TO AUTISM: ELIGIBILITY AND METHODOLOGY (2008), <http://www.ksde.org/LinkClick.aspx?fileticket=yJphCJvaVKY%3D&tabid=3339&mid=7404>.

current study had 28 cases in common with Zirkel's 2008 article. Of those 28 cases, the researcher agreed with 89% (25) of Zirkel's findings about prevailing party.⁸⁹⁴

In addition to the past research, the researcher reviewed two books on the subject.⁸⁹⁵ The first book only shared one case in common with this study's final data set because of the book's 17 cases about methodology, 13 were cases from administrative courts, 2 were unpublished, and 1 was bad law.⁸⁹⁶ The second book had a total of 11 methodology cases listed.⁸⁹⁷ Of those, 64% (7) were in this study's final data set, 3 were unpublished, and 1 was irrelevant because it was procedural. Neither book made determinations as to prevailing party.

In sum, disagreement existed between which cases were included in the data set and even in how to interpret prevailing party. While explanations exist why this disagreement exists such as the disparity in the years of the studies, it still is a limitation that the design, results, and conclusions of the current study have not been replicated. On a positive note, this study does provide ample detail about its methodology in hopes that another may attempt to replicate its findings and so internal validity can be better ascertained.

External Validity

Although the cases included in the current data set include cases from almost half of the states (21), they are not necessarily representative of the ABA litigation. Primarily, they are a select subset of the litigation that includes only published, judicial decisions focused on substantive issues. While it is beneficial to disaggregate this subset from the larger sample, there

⁸⁹⁴ The three cases where the researcher disagreed include *Deal v. Hamilton County Dept. of Educ.*, 258 Fed. App'x 863 (6th Cir. 2008); *Malkentzos v. DeBuono*, 102 F.3d 50 (2d Cir. 1996); and *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward County*, No. 05-60845-CIV-MARRA/JOHNSON, 2009 U.S. Dist. LEXIS 74288 (S.D. Fla. Aug. 18, 2009).

⁸⁹⁵ GALLEGOS & SHALLENBERGER, *supra* note 888; SLATER & NORLIN, *supra* note 888.

⁸⁹⁶ SLATER & NORLIN, *supra* note 888.

⁸⁹⁷ GALLEGOS & SHALLENBERGER, *supra* note 888.

is much more ABA litigation occurring at the administrative level. Additionally, many cases are unpublished and other cases settle.

Another problem with the external validity of the current study is that the researcher was limited in her interpretation because she only had what was written in the courts' opinions to review. It is likely that many additional variables could influence the courts' decisions.⁸⁹⁸ For instance, the competence of legal representation or witnesses could carry great weight inside a courtroom, but such variable were seldom discussed in the judicial opinions.

At the same time, the current researcher put forth great effort to gather a comprehensive body of information about the cases. When the current study is compared with the past literature, it appears that the current study is the most complete study completed thus far.⁸⁹⁹ Further, efforts were made to replicate aspects of the methodology of previous studies. For instance, Zirkel and Choutka et al.'s Likert-scale outcome codes were used in the current study. Although the current study did not use the exact same data set as previous studies and its results are not exactly the same as previous studies, it does further the main conclusion from previous studies that school districts have prevailed in the majority of ABA cases. Other findings are also similar which suggests that the study is somewhat able to be generalized.

Methods Employed

On one hand, an obvious design limitation is that the study failed to employ some of the techniques employed by both quantitative and qualitative researchers.⁹⁰⁰ For instance, no actual people with knowledge on the subject were interviewed or surveyed. Similarly, the current study did not provide any statistical analyses. On the other hand, the study is the first ABA litigation

⁸⁹⁸ See Choutka et al., *supra* note 21.

⁸⁹⁹ See Appendix A. (comparing the current study with past research).

⁹⁰⁰ Lee & Adler, *supra* note 836, at 25.

study to employ a mixed method design that was written for both an education and legal audience. Although the sample size is smaller than many of the former studies, the depth of the findings and analysis is more meaningful and comprehensive.

CHAPTER FOUR: SUMMARY OF DATA

4.1 Introduction to the Data

Because this study analyzes the litigation trends related specifically to the ABA case law involving students with autism and how the emergence of autism-centric charter schools may relate to these trends, the data set was comprised of published cases in which the following six criteria were met. First, the cases occurred between 1975 and 2009. Second, the cases were published.⁹⁰¹ Third, the cases were considered ‘good law’ meaning that they had precedential value.⁹⁰² Fourth, the cases involved Pk-12 students diagnosed with an ASD.⁹⁰³ Fifth, the cases’ all addressed a substantive issue involving FAPE and ABA methodology.⁹⁰⁴ Sixth, the courts analyzed IDEA as a source of law in the cases.

This chapter presents findings gleaned from the data set through the following subcategories: 1) number and frequency of cases; 2) prevailing party; 3) geographic distribution; 4) jurisdictional distribution; 5) geographical and jurisdictional distribution in relation to prevailing party; 6) procedural history in relation to prevailing party; 7) relief sought; 8) patterns in rationales; 9) fact patterns; and 10) general findings. These findings are applied to the study’s two research questions in Chapter Five.

⁹⁰¹ Three cases in the data set were not published. Two of those cases *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward County*, No. 05-60845-CIV-MARRA/JOHNSON, 2009 U.S. Dist. LEXIS 74288 (S.D. Fla. Aug. 18, 2009) and *Deal v. Hamilton County Dept. of Educ.*, 258 Fed. App’x 863 (6th Cir. 2008), were included in the data set because their procedural history included cases that were published. The third case, *Brown v. Bartholomew Consol. Sch. Corp.*, No. 1:03-cv-0939-DFH-VSS, 2005 U.S. Dist. LEXIS 3690 (S.D. Ind. Feb. 4, 2005), *vacated and remanded by* 442 F.3d 588 (7th 2006), was included in the data set because although a subsequent case was published, the issue of FAPE was decided at the district court level.

⁹⁰² One case, *Brown v. Bartholomew Consol. Sch. Corp.*, No. 1:03-cv-0939-DFH-VSS, 2005 U.S. Dist. LEXIS 3690 (S.D. Ind. Feb. 4, 2005), *vacated and remanded by* 442 F.3d 588 (7th 2006), had been overruled by the circuit court; however, its district court opinion was included in the data set because the issue that was overruled was procedural and the FAPE issue was decided on the district court level.

⁹⁰³ Although the term autism is used to describe autism and autism spectrum disorders (ASD) in this study, the cases included children diagnosed with any ASD.

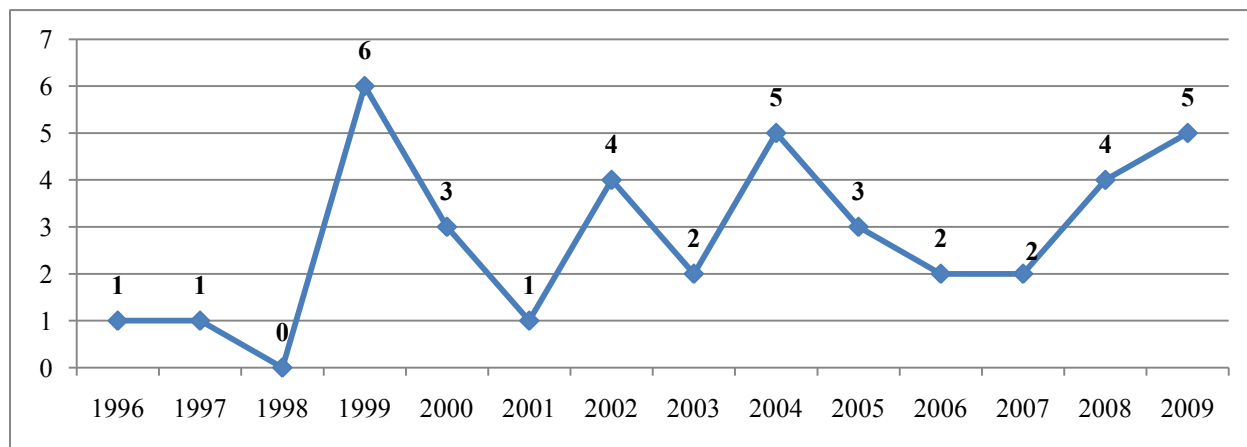
⁹⁰⁴ The cases also involved types/strategies of ABA methodology including discrete trial teaching (DTT); and Lovaas therapy/treatment/intervention; however, for brevity’s sake the term “ABA” will be used. See *supra* Chapter Two, for a discussion about ABA, DTT, and Lovaas intervention.

4.2 Number and Frequency of Cases

Thirty-nine Cases Occurred between 1996-2009

To begin, the data set was comprised of 39 cases that were decided from 1996-2009 (see Chart 1.). The highest number of cases (6) was decided in 1999, followed by five cases decided in 2009 and five cases from 2004. Although IDEA was enacted in 1975, no cases meeting the requirements of the data set occurred before 1996. The only year in which no cases were decided from 1996-2009 was 1998. Finally, cases decided in 2010 were not included in the data set because the year is not yet complete; however, it is important to note that a Lexis search conducted on July 12, 2010 using the same search terms as the current study excluding cases that specified they were not for publication⁹⁰⁵ yielded 10 additional cases.⁹⁰⁶

Chart 1. Number of Cases per Year 1996-2009 (N=39)



⁹⁰⁵ Twelve cases were gathered; however, two of the cases specified “not for publication.” All cases were relevant and good law; however, most of them still had LEXIS citations due to their newness.

⁹⁰⁶ M. v. Bd. of Educ., No. 10 C 2110, 2010 U.S. Dist. LEXIS 67531 (N.D. Ill. July 7, 2010); Andrew M. v. New York State Dep't of Educ. (Kalliope R.), No 09-CV-1718 (JFB) (WDW), 2010 U.S. Dist. LEXIS 53426 (E.D.N.Y. June 1, 2010); Doe v. Hampden-Wilbraham Reg'l Sch. Dist., No. 08cv12094-NG, 2010 U.S. Dist. LEXIS 51383 (D. Mass. May 25, 2010); C.P. v. Dept' of Educ., CV. NO. 09-00393 DAE-BMK, 2010 U.S. Dist. LEXIS 48501 (D. Haw. May 17, 2010); M.H. v. New York City Dep't of Educ., No. 09 Civ. 3657 (LAP), 2010 U.S. Dist. LEXIS 45400 (S.D.N.Y. May 10, 2010); Dumont Bd. of Educ. v. J.T., No. 09-5048 (JLL), 2010 U.S. Dist. LEXIS 45413 (D.N.J. May 10, 2010); D.B. v. Bedford County Sch. Bd., No. 6:09-cv-00013, 2010 U.S. Dist. LEXIS 40311 (W.D. Va. Apr. 23, 2010); S.H. v. Plano Indep. Sch. Dist., No. 4:08-CV-96, 2010 U.S. Dist. LEXIS 31399 (E.D. Tex. Mar. 31, 2010); M.N. v. New York City Dep't of Educ., No. 09 Civ. 20 (RJS), 2010 U.S. Dist. LEXIS 33239 (S.D.N.Y. Mar. 25, 2010); M.L. v. Bourbonnais Sch. Dist., No. 08-CV-2203, 2010 U.S. Dist. LEXIS 23744 (C.D. Ill. Mar. 15, 2010); A.D. & M.D. v. Bd. of Educ. of the City Sch. Dist., 690 F. Supp. 2d 193 (S.D.N.Y. 2010).

More Cases Decided from 2003-2009, but No Sharp Increase in ABA Case Law

Because the data set spanned a range of 14 years, the data set was split in half. The last seven years were labeled “recent cases;” whereas, the first seven years were labeled “older cases.” As shown in Chart 2., 18% (7) more cases were decided from 2003-2009 than from 1996-2002.

However, if the cases are not split in half but instead are disaggregated into four-year cycles (1994-1997; 1998-2001; 2002-2005; 2006-2009), the number of cases per four-year cycles was fairly constant except for the first four years (1994-1997) (see Chart 3.). As illustrated by Chart 3., between 10 and 14 cases were decided in each of the last three, four-year cycles. Thus, although more cases have been decided recently (*i.e.*, in the last seven years), there does not appear to be a sharp incline in the ABA case law. Worded differently, the rate of published ABA litigation pertaining to substantive issues has remained fairly constant over the past decade.

Chart 2. Distribution of Recent and Older Cases (N=39)

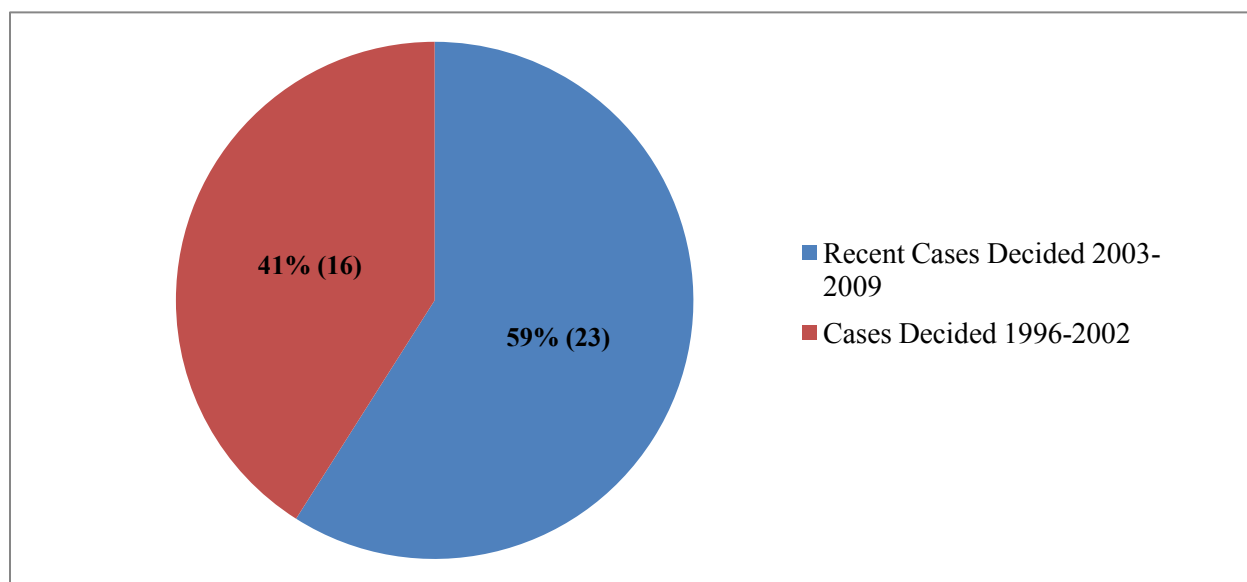
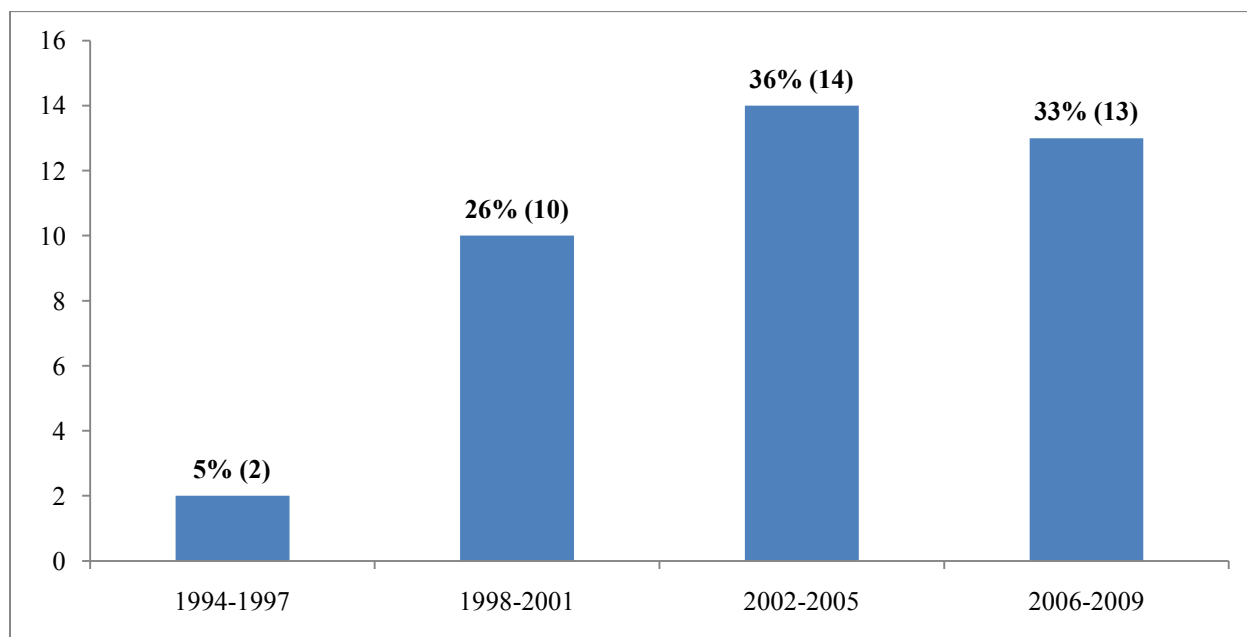
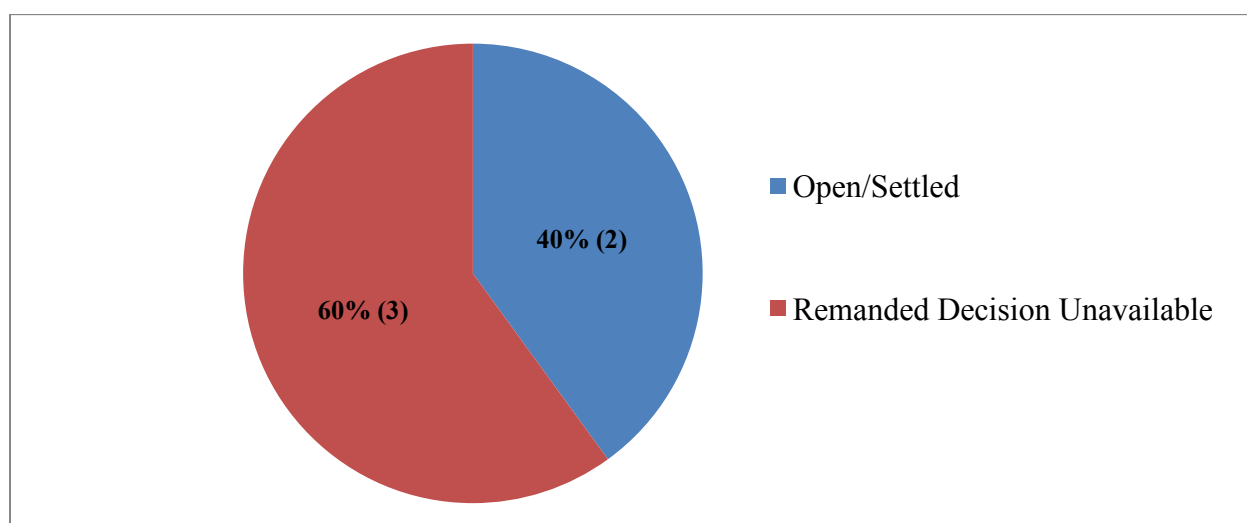


Chart 3. Distribution of Cases by Four Year Cycles (N=39)

4.3 Prevailing Party

Inconclusive Results in Five Cases

As summarized in Chart 4., 13% (5) of the 39 cases were deemed inconclusive because they were either open/settled (40%, 2) or remanded to the lower court and the final decision was unavailable (60%, 3).

Chart 4. Reasons Why Prevailing Party was Inconclusive (n=5)

*Malkentzos v. DeBuono*⁹⁰⁷ was the first of the two cases that were inconclusive because the court in the most recent published decision ordered that the case be remanded and the decisions on remand were unavailable for review. In *Malkentzos*, the Second Circuit Court of Appeals vacated the district court's order that granted a father's request for a preliminary injunction which ordered state agencies to reimburse him for prospective expenses he incurred for ABA intervention because the agencies did not have ample qualified ABA providers available. The Second Circuit reasoned that injunctive relief could not be granted for claims alleging only monetary damages. Yet, the injunction only pertained to the issue of prospective expenses and the court remanded the case back to the district court to determine whether the parent would prevail on his claim for retrospective expenses. The remanded decision is not found on Westlaw or Lexis-Nexis so it is inconclusive whether the parent prevailed at that stage.

Similarly in another Second Circuit case, *D.F. ex rel. N.F. v. Ramapo Central School District*,⁹⁰⁸ the court remanded the case to the district court to determine whether it failed to give proper deference to the administrative decision and to decide whether retrospective evidence should have been considered. Again, the decision on remand was unavailable for review.

The final three of the five cases (60%) were classified as inconclusive because no decision was reached and no subsequent history was found on Westlaw or Lexis-Nexis. Thus, these cases were classified as either "open" or "settled" because it appears that the litigation is pending or was potentially settled out of court. Two of the cases in this category are class action lawsuits, which make them uniquely situated within the data set. The first class action, *S.W. by J.W. v. Warren*,⁹⁰⁹ involved six children whose parents brought the suit on behalf of their

⁹⁰⁷ 102 F.3d 50 (2d Cir. 1996).

⁹⁰⁸ 430 F.3d 595 (2d Cir. 2005).

⁹⁰⁹ 528 F. Supp. 2d 282 (S.D.N.Y. 2007).

children individually and on behalf of all others similarly situated. The parents alleged that the director of early intervention services for a county, the county department of health, and the county implemented policies that caused a shortage of service providers, including ABA providers, limited the hours of ABA and ESY, improperly billed their private insurance, failed to evaluate the children properly, and failed to develop appropriate early intervention programs for children with autism. Although the defendants motioned to dismiss the litigation for a variety of reasons including that the parents failed to exhaust their administrative remedies, the District Court for the Southern District of New York denied the motion for five of the six children. Nevertheless, subsequent decisions were unavailable.

The second class action, *L.M.P. v. School Board*,⁹¹⁰ involved a set of triplets diagnosed with ASD and similarly situated children. The plaintiffs alleged that the district systematically denied the children with autism FAPes under IDEA and violated Section 504 because of the district policy to deny ABA services. Further, the plaintiffs claimed that the district was in violation of LRE because it placed children with autism in segregated private schools. In the most recent decision available, the District Court for the Southern District of Florida denied the district's motion to dismiss for failure to state a claim. Yet, no other information about this litigation is available.

The last inconclusive case, *A.Y. v. Cumberland Valley School District*,⁹¹¹ involved parents who requested reimbursement for their unilateral placement of the child in an ABA-based private school. They claimed that the district failed to provide a FAPE. In denying both parties' motions for summary judgment or judgment on the administrative record, the District

⁹¹⁰ No. 05-60845-CIV-MARRA/JOHNSON, 2009 U.S. Dist. LEXIS 74288 (S.D. Fla. Aug. 18, 2009); *see also* 516 F. Supp. 2d 1294 (S.D. Fla. 2007).

⁹¹¹ 569 F. Supp. 2d 496 (M.D. Pa. 2008).

Court for the Middle District of Pennsylvania held that the school district had not provided a FAPE; however, there were still issues of fact concerning whether the ABA-based private school was appropriate. Therefore, the case was to proceed to trial. Again, no subsequent information was available.

School Districts Prevailed Most Often

Overall, half (61%, 24) of the 39 courts held for the school district; approximately one quarter (26%, 10) of the courts held for the parents/child(ren); and the remaining 13% (5) of the courts reached inconclusive results (see Chart 5).⁹¹² When the inconclusive cases were excluded in Chart 4., 71% (24) of the 34 courts held in favor of school districts' and 29% (10) of the courts decided in favor of parents/child(ren) (see Chart 6.).

Chart 5. Distribution of Prevailing Parties, Inconclusive Cases Included (N=39)

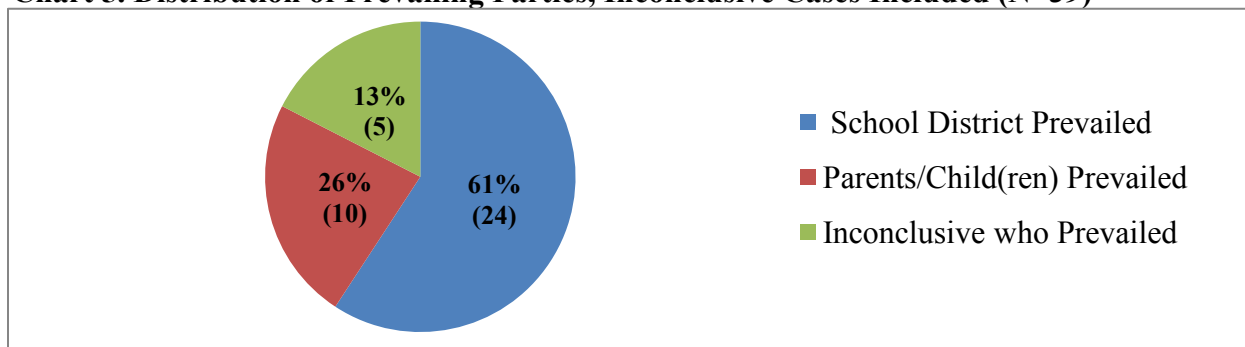
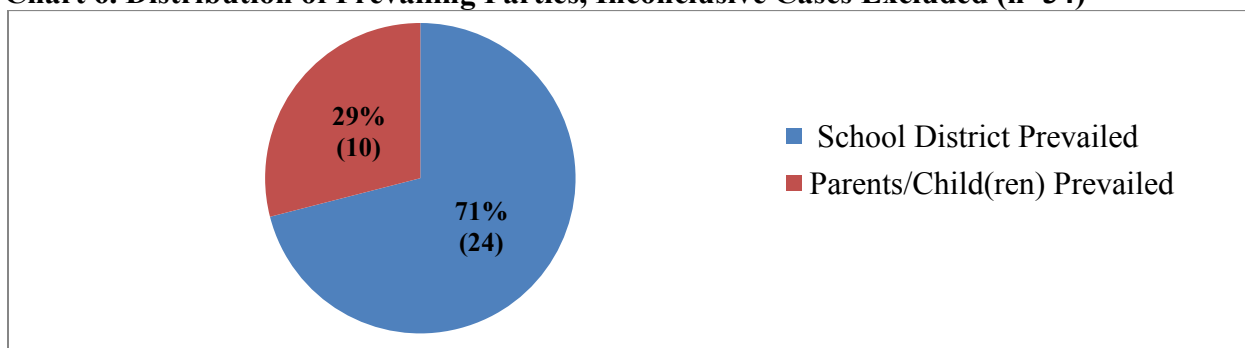


Chart 6. Distribution of Prevailing Parties, Inconclusive Cases Excluded (n=34)

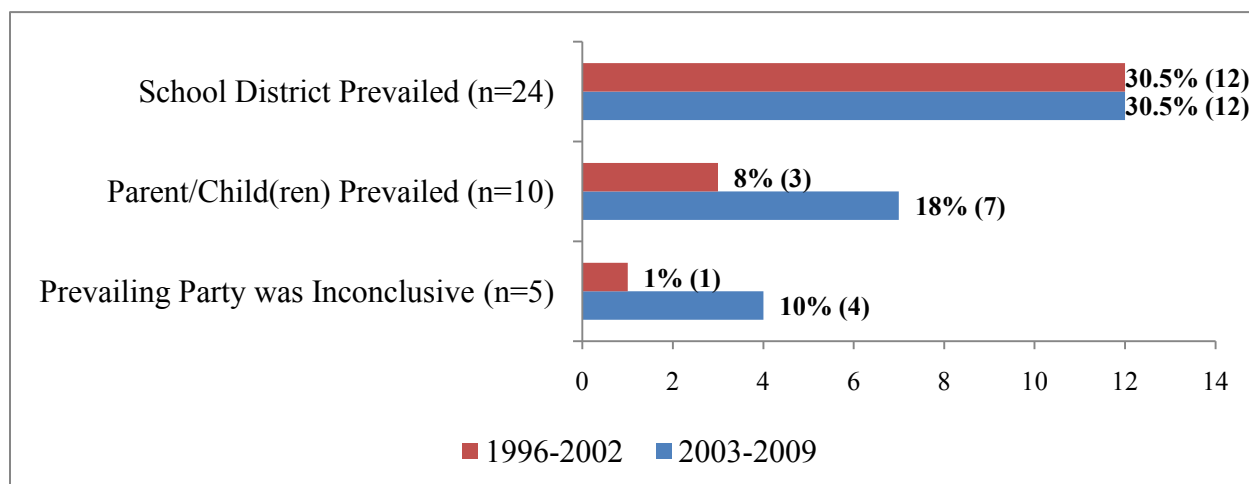


⁹¹² See *infra* Table A., for listing of cases where school district and parents/chil(ren) prevailed, as well as cases that were deemed inconclusive. A seven point Likert-scale was used to determine whether a party prevailed. It is discussed in detail in the subsequent section about outcome codes.

More Parents/Child(ren) Prevailed Recently, but Prevailed Less than School Districts Overall

Chart 7. illustrates that when the prevailing parties are disaggregated into recent and older cases, the parents/child(ren) prevailed more often in 2003-2009 (seven cases) than they did in 1996-2002 (3 cases). Nevertheless, school districts still prevailed more often than parents/child(ren) during 2003-2009 (24 cases).

Chart 7. Distribution of Prevailing Parties by Year (N=39)



Outcome Coding Indicated Schools Prevailed, but not Conclusively

As mentioned in Chapter Three, past researchers have opined that classifying prevailing party by only assigning a dichotomous prevailing party versus non-prevailing party is problematic because courts' decisions are often more complicated in awarding relief. In other words, a party may prevail but only be awarded half of the relief it sought. Or a party may prevail on two issues, but the other party may prevail on one issue. Choutka et al. explained that using a Likert-scale to determine prevailing party "reflects multiple issues and varying dispositions."⁹¹³ Thus, they utilized outcome codes based on a seven-point Likert-scale to assign a more accurate label to describe to what extent a party prevailed (See Appendix C. for

⁹¹³ Choutka et al., *supra* note 21, at 97.

description of the Likert-scale Outcome Codes). As seen in Table A., this study assigned Choutka et al.'s Likert-scale outcome codes to the 39 cases in the data set. Overall, the outcome codes ranged from “1: Parents/child(ren) complete win” to “7: complete win for school authorities.”

Next, the cases were disaggregated by prevailing party such that for any case with an outcome code of 6 or 7, the researcher determined that the school district prevailed as had been done by Choutka et al. (see Table A.). For any cases with an outcome code of 1 or 2, it was considered that the parents/child(ren) prevailed. The remaining cases with an outcome code of 3, 4, or 5 were deemed “inconclusive,” which also aligned with the method employed by Choutka et al.⁹¹⁴

Table A. Outcome Codes (“O.C.”) with Averages Disaggregated by Year and Prevailing Party (N=39)

1996-2002 Cases, District Prevailed (n=12)	O.C.
J.P. <i>ex rel.</i> Popson v. West Clark Community Schools	7
MM <i>ex rel.</i> DM v. School Dist. of Greenville Co.	7
Tyler W. <i>ex rel.</i> Harvey W. v. Northwest Independent School Dist.	7
CM <i>ex rel.</i> JM v. Board of Public Educ. of Henderson Co.	7
Gill v. Columbia 93 School Dist.	7
Burilovich v. Board of Educ. of Lincoln Consol. Schools	7
Dong v. Board of Educ. of Rochester Community Schools	7
Renner v. Board of Educ. of Public Schools of City of Ann Arbor	7
School Bd. of Martin County v. A.S.	7
Wagner v. Short	7
Pitchford <i>ex rel.</i> M. v. Salem-Keizer School Dist.	6
Adams v. State of Oregon	6
1996-2002 Cases, Parents/Child(ren) Prevailed (n=3)	O.C.
Board of Educ. of County of Kanawha v. Michael M.	1
T.H. v. Board of Educ. of Palatine Community Consol. School Dist. 15	1
Mr. X v. New York State Educ. Dept.	1
1996-2002 Cases, Inconclusive (n=1)	
Malkentzos v. DeBuono	5
Average 1996-2002 Outcome Code=5.63	

⁹¹⁴ However, Choutka and others assigned a 3, 4, or 5 to Adams v. State, 195 F.3d 1141 (9th Cir. 1999) and C.M. *ex rel.* J.M. v. Bd. of Public Educ. of Henderson County, 184 F. Supp. 2d 466 (D.N.C. 2002). Whereas, the current researcher did not. Choutka and others and the current researcher agreed that Malkentzos v. DeBuono, 102 F.3d 50 (2d Cir. 1996) was an inconclusive case.

2003-2009 Cases, District Prevailed (n=12)	O.C.
E.G. v. City School Dist. of New Rochelle	7
T.P. <i>ex rel.</i> S.P. v. Mamaroneck Union Free School Dist.	7
K.S. <i>ex rel.</i> P.S. v. Fremont Unified School Dist.	7
Brown v. Bartholomew Consol. School Corp.	7
J.A. v. East Ramapo Cent. School Dist.	7
M.M. <i>ex rel.</i> A.M. v. New York City Dept. of Educ. Region 9	7
Wagner v. Board of Educ. of Montgomery Co.	7
Travis G. v. New Hope-Solebury School Dist.	7
Deal v. Hamilton County Dept. of Educ.	7
W.S. <i>ex rel.</i> C.S. v. Rye City School Dist.	7
Lt. T.B. <i>ex rel.</i> N.B. v. Warwick School Committee	7
Johnson <i>ex rel.</i> Johnson v. Olathe Dist. Schools Unified School Dist.	7
2003-2009 Cases, Parents/Children Prevailed (n=7)	O.C.
County School Bd. of Henrico Co. v. R.T.	2
County School Bd. of Henrico Co. v. Z.P. <i>ex rel.</i> R.P.	2
G <i>ex rel.</i> RG v. Fort Bragg Dependent Schools	2
Bucks County v. Pennsylvania	1
L.B. <i>ex rel.</i> K.B. v. Nebo School Dist.	1
Diatta v. District of Columbia	1
J.P. <i>ex rel.</i> Peterson v. County School Bd. of Hanover Co.	1
2003-2009 Cases, Inconclusive (n=4)	O.C.
A.Y. v. Cumberland Valley Sch. Dist.	4
D.F. <i>ex rel.</i> N.F. v. Ramapo Cent. School Dist.,	4
L.M.P. <i>ex rel.</i> E.P. v. School Bd. of Broward County, Fla.	3
S.W. by J.W. v. Warren	3
Average 2003-2009 Outcome Code=4.70	
Overall 1996-2009 Average Outcome Code=5.08	

As depicted in Table A., the average outcome code for the 39 cases was 5.08 which slightly favors the school districts overall. When the cases were disaggregated by older cases (1996-2002) and recent cases (2003-2009), the average outcome codes were 5.63 and 4.7 respectively. Again based on the outcome code data, it appears that parents/child(ren) prevailed in the ABA published litigation with greater intensity recently in 2003-2009 than they did in 1996-2002. Nevertheless, school districts still prevailed in more total cases in recent years.

What the outcome coding helps discern, however, is that with an average outcome code of 5.08 as opposed to an average of 6 or higher, the extent that the school districts are prevailing in the published ABA litigation overall is not conclusive. In fact, according to Choutka et al. an

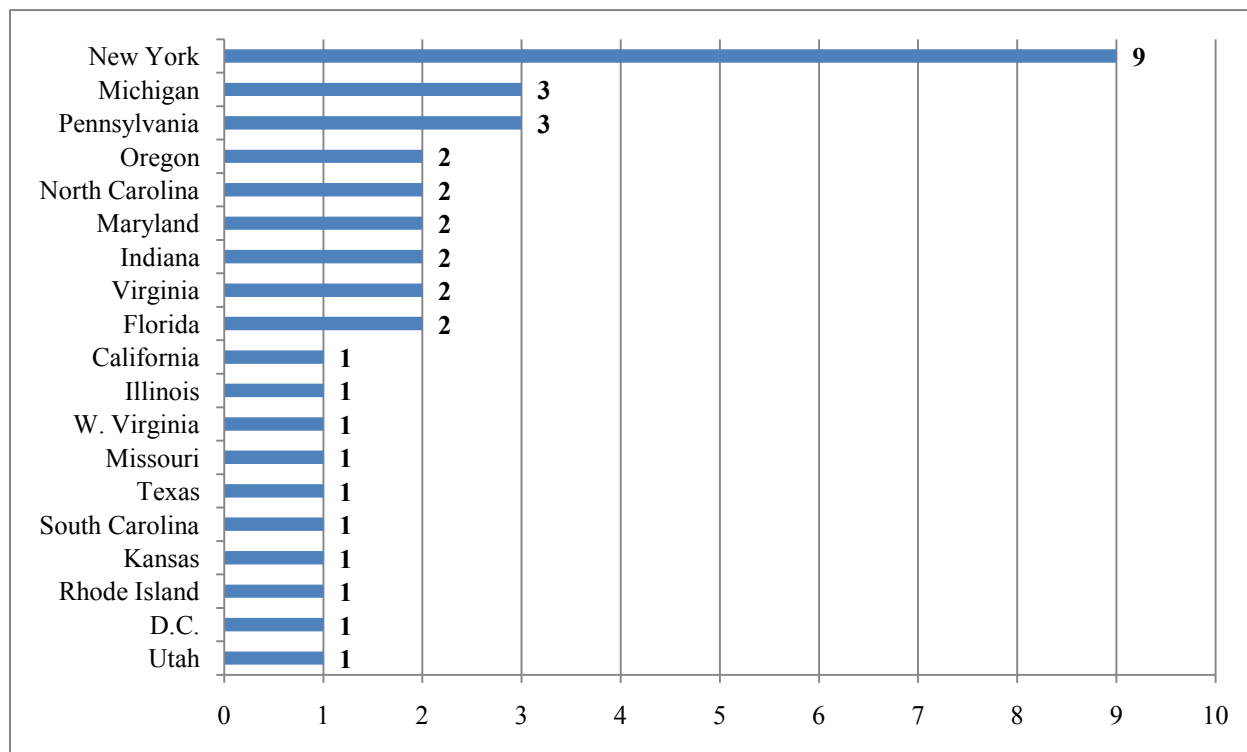
outcome code of a 5 results in an “inconclusive win for the school authorities.”⁹¹⁵ However, Choutka et al., also stated that the outcomes could be considered slightly skewed as a result of the decisions that are at the polar positions of being predominantly in favor of the parents or districts (i.e., outcome codes of 1 or 7).⁹¹⁶ The current data set includes 74% (29) of the 39 cases with outcome codes at the polar ends.

4.4 Geographic Distribution

Cases Originated from Twenty-one States/Federal Districts

As depicted by Chart 8., the 39 cases originated in twenty-one different states/federal districts. New York and Michigan were the states with the highest number of cases (9) and Pennsylvania had the second highest number of cases (3).

Chart 8. Number of Cases Per State/Federal Districts (N=39)



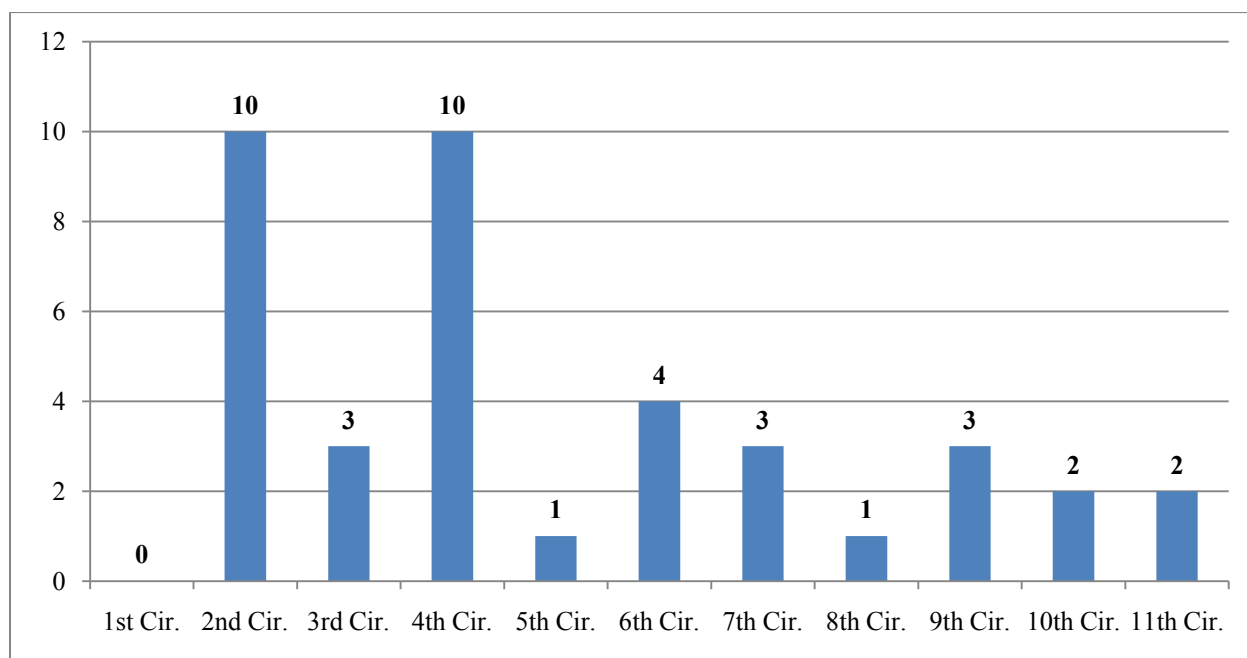
⁹¹⁵ Choutka et al., *supra* note 21, at 97.

⁹¹⁶ *Id.* Choutka and others also defined outcome codes of 2 and 6 as “polar”; however, the current researcher does not consider those to be at the “polar” ends.

Most Cases Originated from the 2nd or 4th U.S. Circuit Court of Appeals Jurisdictions

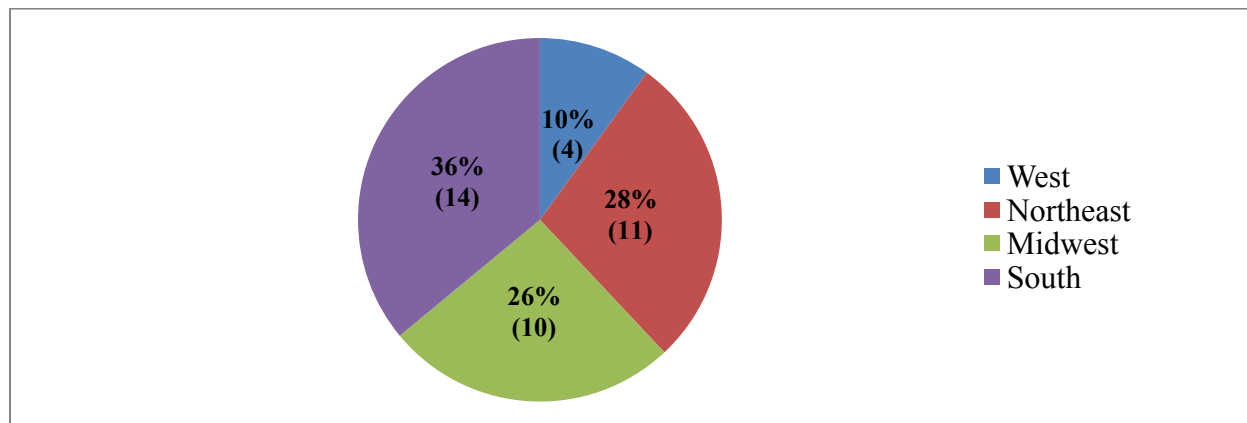
The cases were also coded based on which U.S. Circuit Court of Appeals' jurisdiction that they were located. Therefore, even district court cases were coded based on this geographic criterion. The 39 cases originated in 91% (11) of the 12 Circuit Court jurisdictions. As seen in Chart 9., the highest number of cases (10) originated out of the 2nd (Connecticut, New York, and Vermont) or the 4th (Maryland, Virginia, West Virginia, North Carolina, and South Carolina) Circuits.

Chart 9. Number of Total Cases Per Geographic Circuit Court of Appeals' Jurisdiction (N=39)



Most Cases Originated from the South

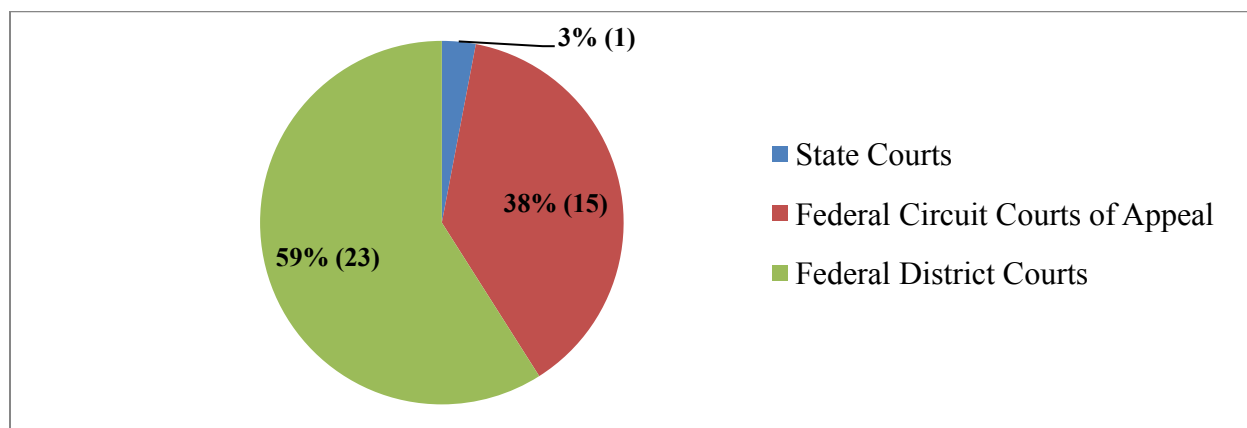
The cases were also coded based on the U.S. Census regions including Northeast, Midwest, South, and West. As illustrated by Chart 10., 36% (14) of the 39 cases originated from states considered to be in the South; 28% (11) were from states in the Northeast; 26% (10) were from states in the Midwest; and 10% (4) were from states in the West.

Chart 10. Distribution of Cases by Census Regions (N=39)

4.5 Jurisdictional Distribution

Most Cases were Decided in U.S. District Courts

In addition to geographic location, the 39 cases were coded based on jurisdictional location. Chart 11. identifies that the majority of the cases (59%, 23) were decided in U.S. District Courts; whereas, 38% (15) were decided in U.S. Circuit Courts of Appeals and 3% (1) were decided in state courts.⁹¹⁷

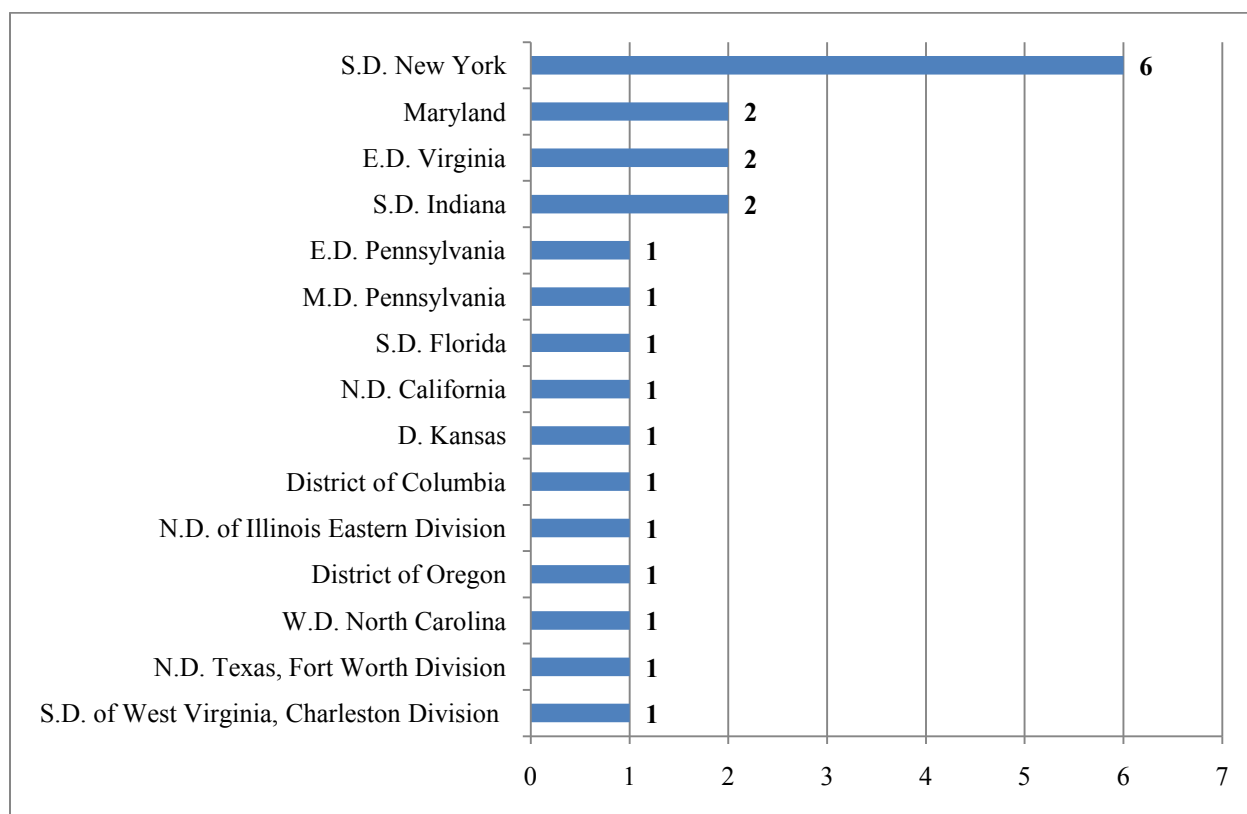
Chart 11. Distribution of Courts Represented (N=39)

⁹¹⁷ *Brown v. Bartholomew Consol. Sch. Corp.*, 2005 U.S. Dist. LEXIS 3690 (S.D. Ind. Feb. 4, 2005), *vacated and remanded* by 442 F.3d 588 (7th 2006) and *J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County*, 641 F. Supp. 2d 499 (E.D. Va. 2009) were decided by the 7th and 4th Circuit Courts respectively. However, the district court cases were included in the data set because in *Brown*, the 7th Circuit did not determine the substantive FAPE issue and in *J.P.*, the case had been remanded back to the district court to determine the substantive FAPE issue.

Most Common District Court was the Southern District of New York

Of the 23 cases culminating at the district court level, the most (6) came from the Southern District of New York and a total of 15 distinct district courts were represented in the data set (see Chart 12.). Because there are a total of 89 district courts in the U.S., the 23 cases account for approximately one-fourth (26%) of the total number of district courts.

Chart 12. Number of Cases Represented Per District Court (n=23)

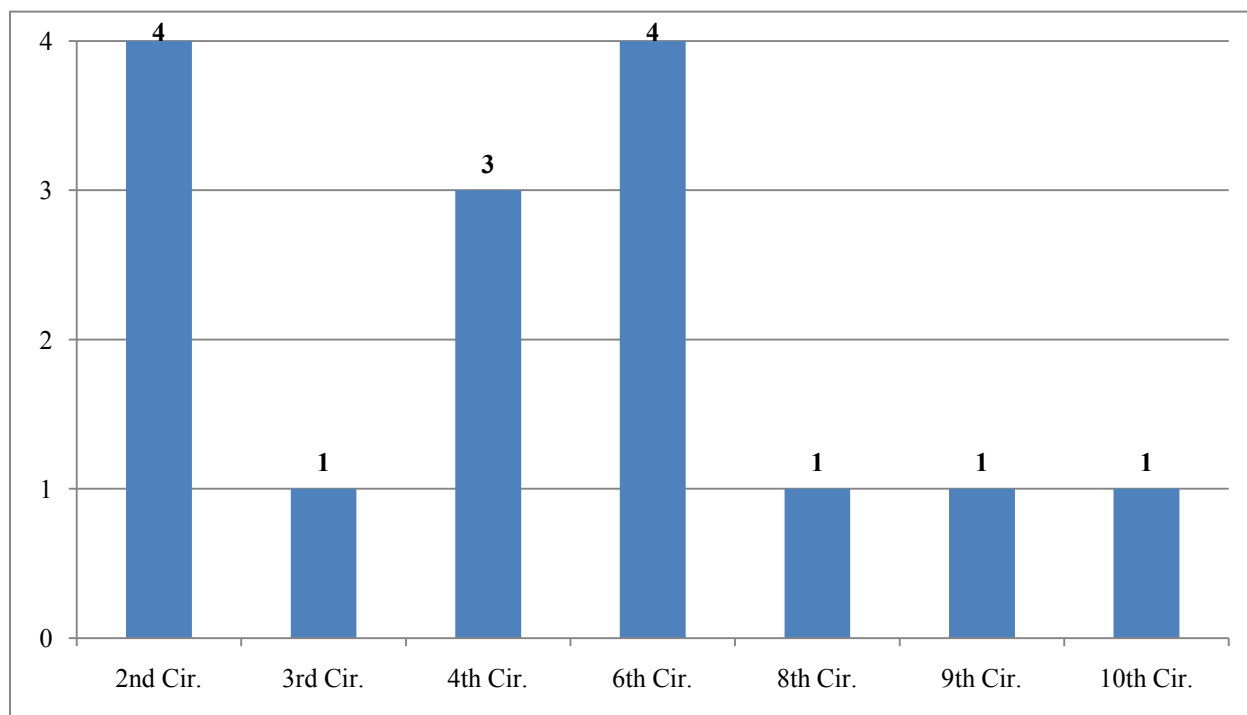


Most Common U.S. Circuit Courts of Appeals were the 2nd and 6th Circuits

As illustrated by Chart 13., of the 15 U.S. Circuit Court of Appeals cases, four were decided in the Second Circuit and another four were decided in the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee). Therefore, 53% (8) of the circuit court cases were ultimately

decided by these two circuits.⁹¹⁸ Notably, 20% (3) of the cases were decided by the Fourth Circuit Court of Appeals. The First, Fifth, Seventh, and Eleventh Circuit Courts of Appeals did not decide any of the cases in the data set.⁹¹⁹

Chart 13. Number of Cases Represented Per Circuit Courts of Appeals (n=15)



4.6 Geographical and Jurisdictional Distribution in relation to Prevailing Party

Courts in the 4th Circuit Decided Most Favorably for Parents/Child(ren)

As illustrated in Table B., of the 10 cases in which the parents/child(ren) were the prevailing party, 60% (6) of them occurred in the Fourth Circuit Court of Appeals' jurisdiction.

The other circuit court jurisdictions where parents were able to prevail included the Second,

⁹¹⁸ The 4th and 7th Circuits did each review a case in which the district court decision was included in the data set (i.e., *Brown v. Bartholomew Consol. Sch. Corp.*, 2005 U.S. Dist. LEXIS 3690 (S.D. Ind. Feb. 4, 2005), *vacated and remanded* by 442 F.3d 588 (7th 2006) and *J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County*, 641 F. Supp. 2d 499 (E.D. Va. 2009)). The ultimate substantive issue about FAPE was included in the data set was the district court case, however.

⁹¹⁹ See *supra* note 920, explaining that the 7th Circuit did review *Brown v. Bartholomew*, but because it did not touch the FAPE issue, the district court case was chosen to be included in the data set.

Third, Seventh, and Tenth Circuit Courts of Appeals. Additionally, parents/child(ren) prevailed most often (3 cases) in cases originated from Virginia.

Table B. Location of Court when Parents/Child(ren) were Prevailing Party (n=10)

Court where Case was Decided	Circuit where Case was Decided	State where Case originated	Total Number per Court	Total Number per Circuit
4 th Circuit	4 th Circuit	Virginia and N. Carolina	2	6
United States District Court, District of Columbia	4 th Circuit	District of Columbia	1	
United States District Court, S.D. of West Virginia, Charleston Division	4 th Circuit	W. Virginia	1	
United States District Court, E.D. Virginia	4 th Circuit	Virginia	2	
United States District Court, S.D. New York	2 nd Circuit	New York	1	1
3 rd Circuit	3 rd Circuit	Pennsylvania	1	1
United States District Court, N.D. of Illinois Eastern Division	7 th Circuit	Illinois	1	1
10 th Circuit	10 th Circuit	Utah	1	1

Courts in the 2nd Circuit Decided Most Favorably for School Districts

Similarly, of the 24 cases in which the school districts were the prevailing party, 25% (6) of the cases were decided in the Second Circuit Court of Appeals' jurisdiction; 17% (4) of the cases were decided in the Sixth Circuit's jurisdiction; another 17% (4) of them were decided in the Fourth Circuit's jurisdiction; and 13% (3) were decided in the Ninth Circuit's jurisdiction (see Table C.). School districts were also the prevailing party in the Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuit Court of Appeals' jurisdictions. Thus, despite the fact that parents/child(ren) prevailed most often in the Fourth Circuit's jurisdiction, school districts also prevailed in this jurisdiction. The only jurisdictions where parents/child(ren) have not prevailed and school districts have prevailed include the Fifth, Eighth, Ninth, and Eleventh Circuit Courts

of Appeals. School districts prevailed most often in cases originated from New York (5 cases) and Michigan (3 cases).

Table C. Location of Court when School Districts were Prevailing Party (n=24)

Court where Case was Decided	Circuit where Case was Decided	State where Case originated	Total Number	Total Number per Circuit
United States District Court, S.D. New York	2 nd	New York	4	6
2 nd	2 nd	New York & Rhode Island	2	
6 th	6 th	Tennessee, Michigan (3)	4	4
United States District Court, D. Maryland	4 th	Maryland	2	4
4 th	4 th	S. Carolina	1	
United States District Court, W.D. North Carolina	4 th	N. Carolina	1	
9 th	9 th	Oregon	2	3
United States District Court, N.D. California	9 th	California	1	
United States District Court, S.D. Indiana	7 th	Indiana	2	2
United States District Court, E.D. Pennsylvania	3 rd	Pennsylvania	1	1
United States District Court, N.D. Texas, Fort Worth Division	5 th	Texas	1	1
8 th	8 th	Missouri	1	1
United States District Court, D. Kansas	10 th	Kansas	1	1
State Court of Appeals of Florida, Fourth District	11 th	Florida	1	1

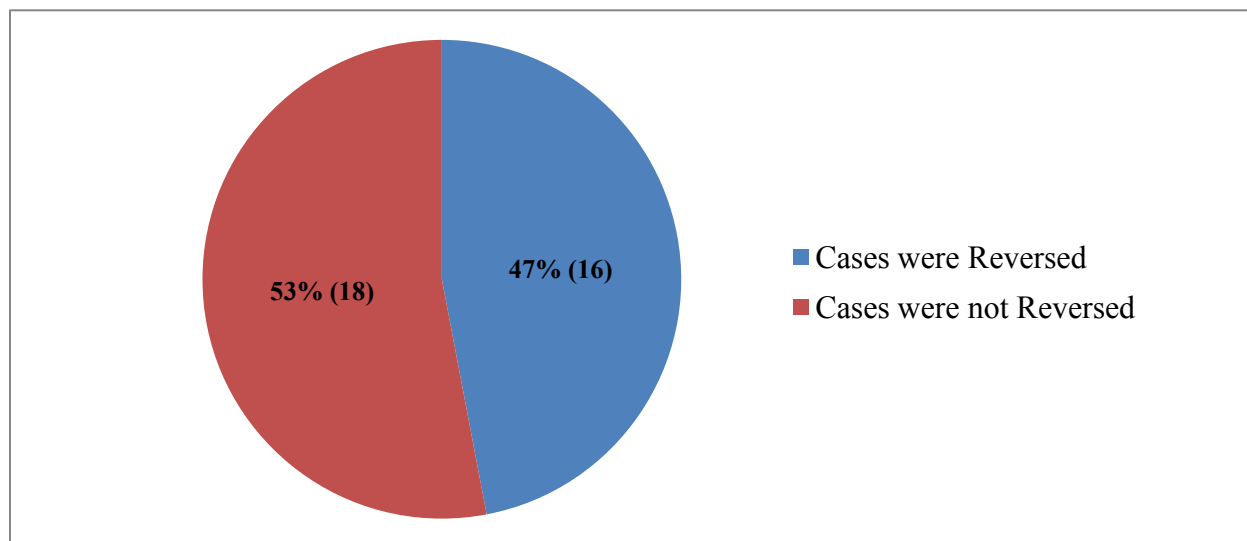
4.7 Procedural History in relation to Prevailing Party

A Slight Majority of Cases were not Reversed

As illustrated in Chart 14., of the 34 cases where the prevailing party was not classified as inconclusive, 47% (16) were considered “reversals” in which there was some disagreement

amongst the courts as the litigants proceeded with their appeals.⁹²⁰ Thus, a slight majority of the 34 cases (53%, 18) were appealed without any reversal.⁹²¹

Chart 14. The Procedural History of the Prevailing Party Cases (n=34)



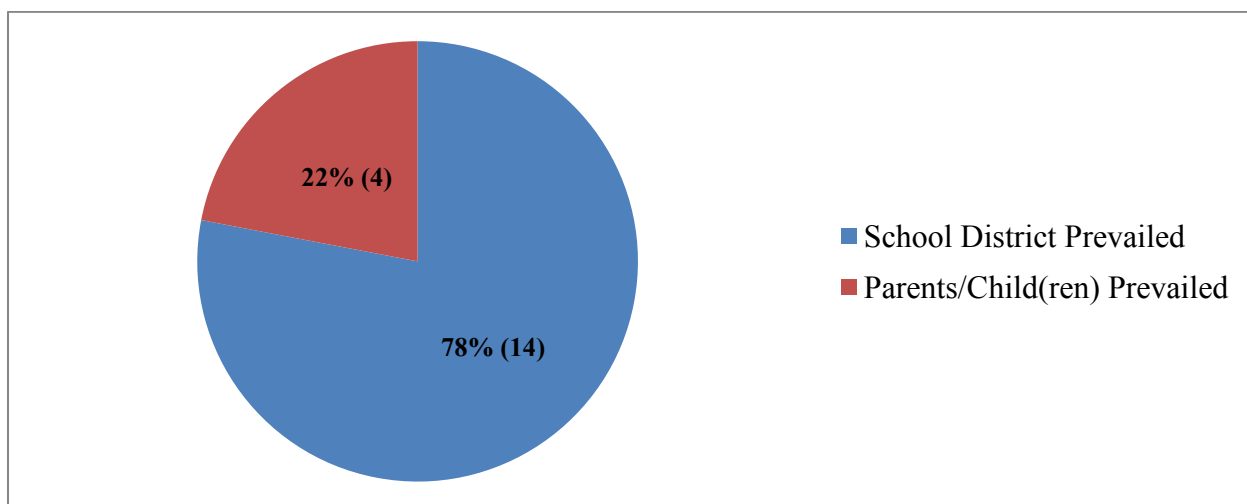
⁹²⁰ T.P. *ex rel.* S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247 (2d Cir. 2009); Deal v. Hamilton County Dept. of Educ., 258 Fed. App'x 863 (6th Cir. 2008); County Sch. Bd. of Henrico Co. v. Z.P. *ex rel.* R.P., 399 F.3d 298 (4th Cir. 2005); Bucks County v. Pennsylvania, 379 F.3d 61 (3d Cir. 2004); Wagner v. Bd. of Educ. of Montgomery County, 340 F. Supp. 2d 603 (D. Md. 2004); L.B. *ex rel.* K.B. v. Nebo Sch. Dist., 379 F.3d 966 (10th Cir. 2004); Lt. T.B. *ex rel.* N.B. v. Warwick Sch. Comm., 361 F.3d 80 (2d Cir. 2004); G. *ex rel.* R.G. v. Fort Bragg Dependent Schools, 343 F.3d 295 (4th Cir. 2003); M.M. *ex rel.* D.M. v. Sch. Dist. of Greenville County, 303 F.3d 523 (4th Cir. 2002); Pitchford *ex rel.* M. v. Salem-Keizer Sch. Dist., 155 F. Supp. 2d 1213 (9th Cir. 2001); Burirovich v. Bd. of Educ. of Lincoln Consol. Schs., 208 F.3d 560 (6th Cir. 2000); Adams v. State, 195 F.3d 1141 (9th Cir. 1999); Renner v. Bd. of Educ. of Pub. Schs. of City of Ann Arbor, 185 F.3d 635 (6th Cir. 1999); J.P. *ex rel.* Peterson v. County Sch. Bd. of Hanover County, 641 F. Supp. 2d 499 (E.D. Va. 2009); Mr. X v. New York State Educ. Dept., 975 F. Supp. 546 (S.D.N.Y. 1997); Sch. Bd. of Martin County v. A.S., 727 So.2d 1071 (Fla. Dist. Ct. App. 1999). Adams and Pitchford were considered reversals because the courts reversed at least one issue, but not every issue.

⁹²¹ Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027 (8th Cir. 2000); Dong v. Bd. of Educ. of Rochester Community Schools, 197 F.3d 793 (6th Cir. 1999); E.G. v. City Sch. Dist. of New Rochelle, 606 F.Supp.2d 384 (S.D.N.Y. 2009); K.S. *ex rel.* P.S. v. Fremont Unified Sch. Dist., 679 F. Supp. 2d 1046 (N.D. Cal. 2009); J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684 (S.D.N.Y. 2009); M.M. *ex rel.* A.M. v. N.Y.C. Dept. of Educ. Region 9, 583 F. Supp. 2d 498 (S.D.N.Y. 2008); Travis G. v. New Hope-Solebury Sch. Dist., 544 F. Supp. 2d 435 (E.D. Penn. 2008); W.S. *ex rel.* C.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134 (S.D.N.Y. 2006); County Sch. Bd. of Henrico Co. v. R.T., 433 F. Supp. 2d 657 (E.D. Va. 2006); Brown v. Bartholomew Consol. Sch. Corp., No. 1:03-cv-0939-DFH-VSS, 2005 U.S. Dist. LEXIS 3690 (S.D. Ind. Feb. 4, 2005), *vacated and remanded by* 442 F.3d 588 (7th Cir. 2006); Diatta v. District of Columbia, 319 F.Supp.2d 57 (D.D.C. 2004); Johnson *ex rel.* Johnson v. Olathe Dist. Schs. Unified Sch. Dist., 316 F. Supp. 2d 960 (D. Kan. 2003); J.P. *ex rel.* Popson v. West Clark Cmty. Schs., 230 F. Supp. 2d 910 (S.D. Ind. 2002); Tyler W. v. Nw. Indep. Sch. Dist., 202 F. Supp. 2d 557 (N.D. Tex. 2002); C.M. *ex rel.* J.M. v. Bd. of Public Educ. of Henderson County, 184 F. Supp. 2d 466 (D.N.C. 2002); Bd. of Educ. of County of Kanawha v. Michael M., 95 F. Supp. 2d 600 (S.D. W. Va. 2000); T.H. v. Bd. of Educ. of Palatine Cmty. Consol. Sch. Dist. 15, 55 F. Supp. 2d 830 (N.D. Ill. 1999); Wagner v. Short, 63 F. Supp. 2d 672 (D. Md. 1999).

When Cases were not Reversed, the School District was Predominantly the Prevailing Party

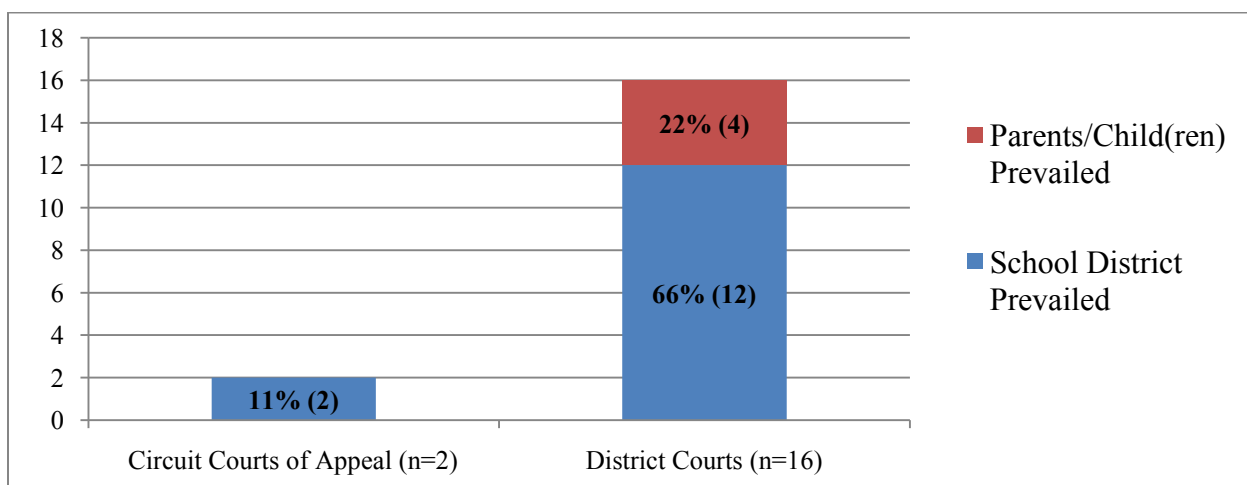
The prevailing party was continuously the school district in 78% (14) of the 18 cases that were not reversed during their appeal (see Chart 15.). The prevailing party was continuously the parents/child(ren) in 22% (4) of the 18 non-reversal cases.

Chart 15. Prevailing Parties in Cases that were not Reversed (n=18)



As illustrated by Chart 16., all but two (89%, 16) of these non-reversal cases were district court cases.

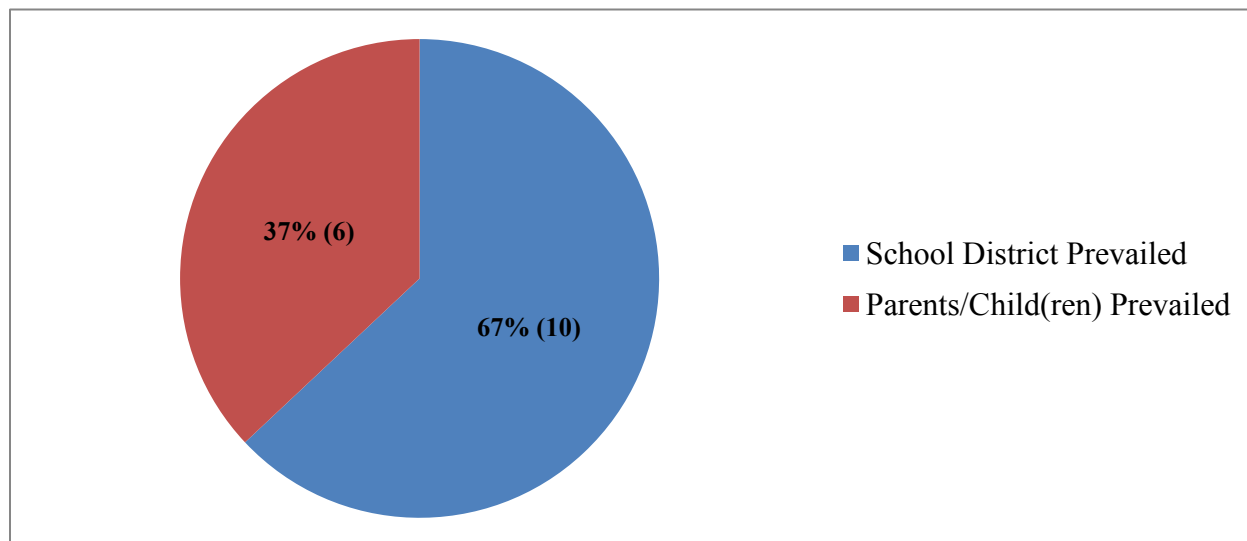
Chart 16. Courts in Non-Reversal Cases (n=18)



When Cases were Reversed, the School District was Predominantly the Prevailing Party

The prevailing party was the school district in 63% (10) of the 16 cases that were reversed during their appeal and the parents/child(ren) prevailed in 37% (6) of the reversals (see Chart 17.).

Chart 17. Prevailing Parties in Cases that were Reversed (n=15)



As seen in Chart 18., of the 16 cases that were considered reversals, the U.S. circuit courts of appeal were the courts that determined the ultimate prevailing party⁹²² in 38% (6) of the cases. Of these 6 cases, the circuit courts held that the school district was the prevailing party in 50% (3) of the cases and held that the parents/child(ren) were the prevailing party in 50% (3) of the cases.

Additionally, of the 16 cases that were considered reversals, the U.S. district courts were the courts that determined the ultimate prevailing party in 38% (6) of the cases. Of these four cases, the district courts held that the school district was the prevailing party in two-thirds (67%,

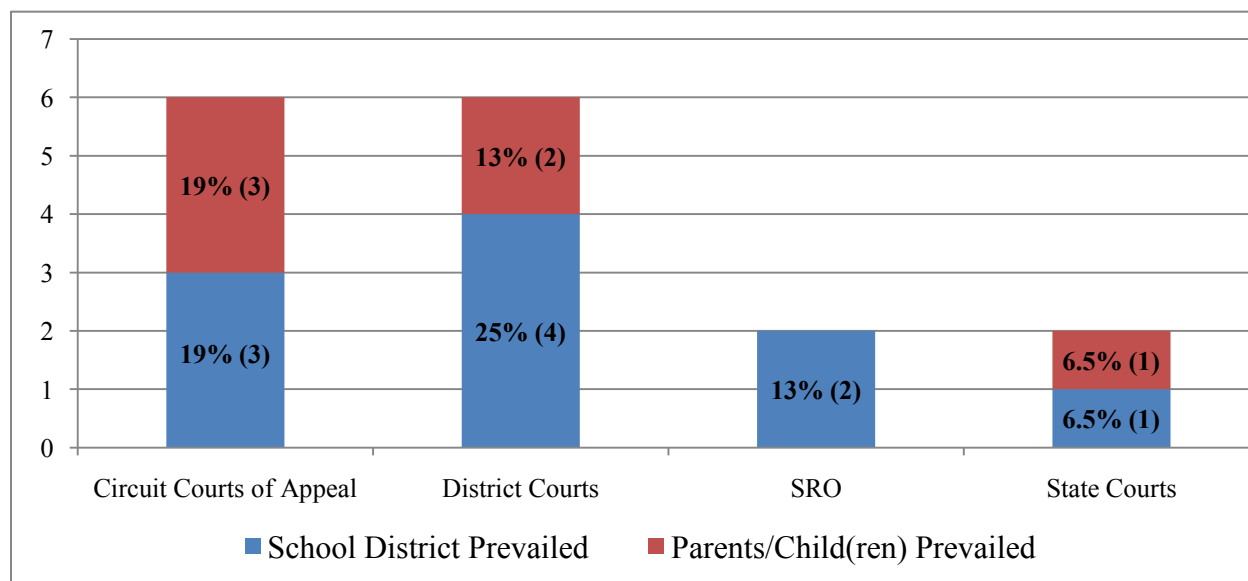
⁹²² This is the court which was the reversing agent and ultimately decided the party that prevailed. In other words, a district court could be considered the court that determined the ultimate prevailing party if it reversed the administrative court's decision and even if the district court was appealed to the circuit court and the circuit court affirmed the district court's decision.

4) of the cases and held that the parents/child(ren) were the prevailing party in one-third (33%, 2) of the cases.⁹²³

Two (13%) of the 16 cases that were classified as reversals involved the 2nd administrative tier or the State Review Officer (“SRO”) determining the ultimate prevailing party. Of these 2 cases, the SRO held that the school district was the prevailing party in both (100%) cases.

A state court was also the ultimate decision-maker of the prevailing party in two (13%) of the 16 reversal cases.⁹²⁴ The state court determined that the school district was the prevailing party in one case and this decision was not appealed. In the other case, the state court determined the parent was the prevailing party and the district court and circuit court affirmed the state court decision.

Chart 18. Courts that Ultimately Determined Prevailing Party in Reversal Cases (n=16)



⁹²³ These cases were *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80 (2d Cir. 2004); *Bucks County v. Pennsylvania*, 379 F.3d 61 (3d Cir. 2004); and *J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County*, 641 F. Supp. 2d 499 (E.D. Va. 2009). The other case, *Mr. X v. New York State Educ. Dept.*, 975 F. Supp. 546 (S.D.N.Y. 1997), culminated at the district court level.

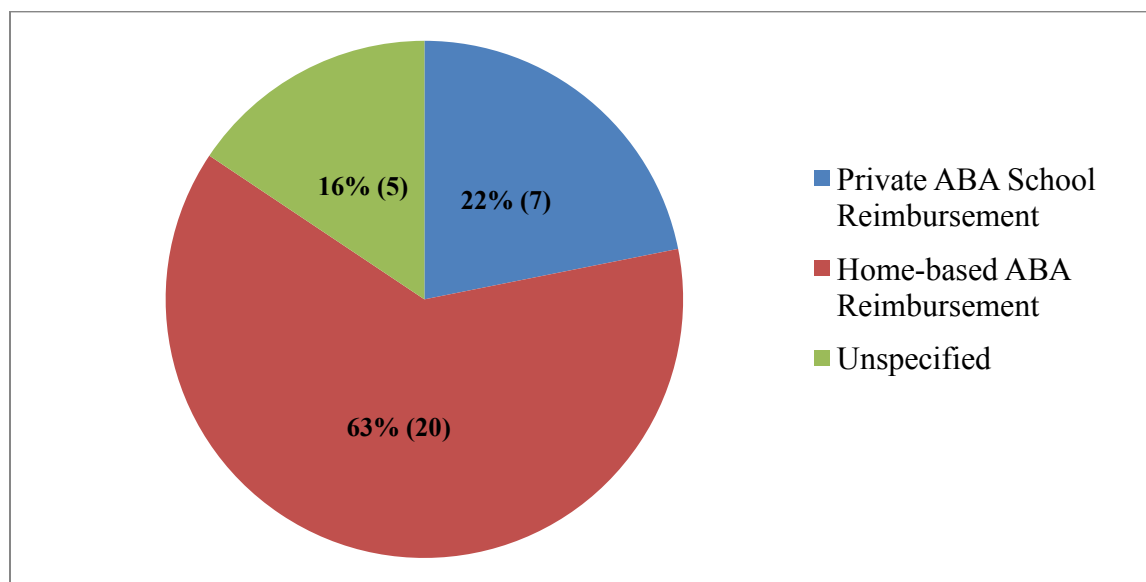
⁹²⁴ *Sch. Bd. of Martin County v. A.S.*, 727 So.2d 1071 (Fla. Dist. Ct. App. 1999).

4.8 Relief⁹²⁵

Reimbursement for ABA Intervention sought in 85% of the Cases

The parents/child(ren) sought reimbursement for ABA intervention in 82% (32) of the 39 cases. As seen in Chart 19., reimbursement for private schools that provided ABA methodology was requested in 22% (7) of the 32 reimbursement request cases.⁹²⁶ All requests for private ABA school tuition occurred from 2004-2009. Reimbursement for home-based ABA therapy was requested in 63% (20) of the 32 cases and 16% (5) of the cases did not specify the location of the ABA intervention.⁹²⁷

Chart 19. Reimbursement for ABA Intervention (n=32)



Parents/child(ren) prevailed on 28% (9) of the 32 reimbursement requests. The plaintiffs in *J.P. ex rel. Peterson v. County*⁹²⁸ were awarded \$33,188 for private ABA school tuition. The

⁹²⁵ Determinations about relief sought and awarded were gleaned from the language of the cases; however, additional relief could have been sought and/or awarded. Most cases were not explicit about exact relief.

⁹²⁶ The private schools included McCarton, Janus, Dominion, Devereux Millwood Learning Center, Faison, and Pathways Strategic Learning Center.

⁹²⁷ Some of the plaintiffs in these cases also requested school-based ABA intervention.

⁹²⁸ 641 F. Supp. 2d 499 (E.D. Va. 2009).

plaintiffs in *County School Board. of Henrico County. v. R.T.*⁹²⁹ were also awarded private ABA school tuition of an unspecified amount and potentially prospective relief. In *County School Bd. of Henrico County v. Z.P. ex rel. R.P.*,⁹³⁰ the parents requested private school tuition and the Fourth Circuit Court of Appeals remanded the case to the district court with instructions to give proper deference to the Independent Hearing Officer who awarded the parents private school tuition costs.

The plaintiffs in *L.B. ex rel. K.B. v. Nebo School District*⁹³¹ were awarded their request of

- (1) 40 hours per week of ABA services;
- (2) seven and one-half hours per week of preparation time for ABA therapists to plan for individual sessions;
- (3) two and one-half hours per week for a team meeting with [the child's] five ABA therapists;
- (4) one day per month for an ABA consultant to train the five therapists; [and]
- (5) materials for ABA program....⁹³²

The District Court for the Northern District of Illinois, Eastern Division also did not specify a dollar amount in *T.H. v. Board of Education of Palatine Community Consolidated School District*,⁹³³ but it held that the parents were entitled to two year's worth of ABA intervention amounting to 38 hours per week, a training workshop, and program materials.

In addition, \$11,117 was awarded to the plaintiffs in *G ex rel. RG v. Fort Bragg Dependent Schools*⁹³⁴ for the expenses they incurred implementing an ABA home-based program. Similarly, \$24,000 was awarded for home-based ABA intervention in *Board of Educ. of County of Kanawha v. Michael M.*⁹³⁵ The largest dollar amount request for ABA home-based therapy was for \$88,000 in *Mr. X v. New York State Education Department*,⁹³⁶ however, the

⁹²⁹ 433 F. Supp. 2d 657 (E.D. Va. 2006).

⁹³⁰ 399 F.3d 298 (4th Cir. 2005).

⁹³¹ 379 F.3d 966 (10th Cir. 2004).

⁹³² *Id.* n.2. The exact dollar amount was unspecified.

⁹³³ 55 F. Supp. 2d 830 (N.D. Ill. 1999).

⁹³⁴ 343 F.3d 295 (4th Cir. 2003).

⁹³⁵ 95 F. Supp. 2d 600 (S.D. W. Va. 2000).

⁹³⁶ 975 F. Supp. 546 (S.D.N.Y. 1997).

District Court for the Southern District of New York did not specify the exact amount awarded in its decision.

In the unusual case of *Bucks County v. Pennsylvania*,⁹³⁷ the mother was not only awarded \$3,520 for expenses incurred in hiring a private ABA service provider, but also \$6,842 for the time she personally spent providing ABA intervention to her daughter when the private provider was no longer available.⁹³⁸

Finally, *Deal v. Hamilton County Department of Education*⁹³⁹ was not included in these cases where parents/child(ren) prevailed on requests for reimbursement because the parents requested full reimbursement of \$50,410 and were only awarded half of that request (\$25,205). On one hand, researchers may classify this case as a partial award for the parents;⁹⁴⁰ however, since the Sixth Circuit Court of Appeals affirmed the district court's finding that the school provided a FAPE, *Deal* was classified as a case in which the school district prevailed for the purposes of this study. Specifically, this study examines only substantive and not the procedural issues related to the reimbursement award in *Deal*.⁹⁴¹

Compensatory Education sought in 49% of the Cases

Compensatory education due to the school district's failure to provide a FAPE was requested in 49% (19) of the cases. It appears that parents/child(ren) were successful in 21% (4) of these claims. For instance, in *Diatta v. District of Columbia*⁹⁴² the District Court for the District of Columbia ordered the school district to provide compensatory education from May 20, 2000 to June 1, 2004 that included a 40 hour per week ABA program including training,

⁹³⁷ 379 F.3d 61 (3d Cir. 2004).

⁹³⁸ The service provider was compensated approximately \$44 per hour and the mother was compensated \$22 per hour.

⁹³⁹ 258 Fed. App'x 863 (6th Cir. 2008).

⁹⁴⁰ See Zirkel, *supra* note 28.

⁹⁴¹ It is likely that the court awarded reimbursement because of the procedural violations.

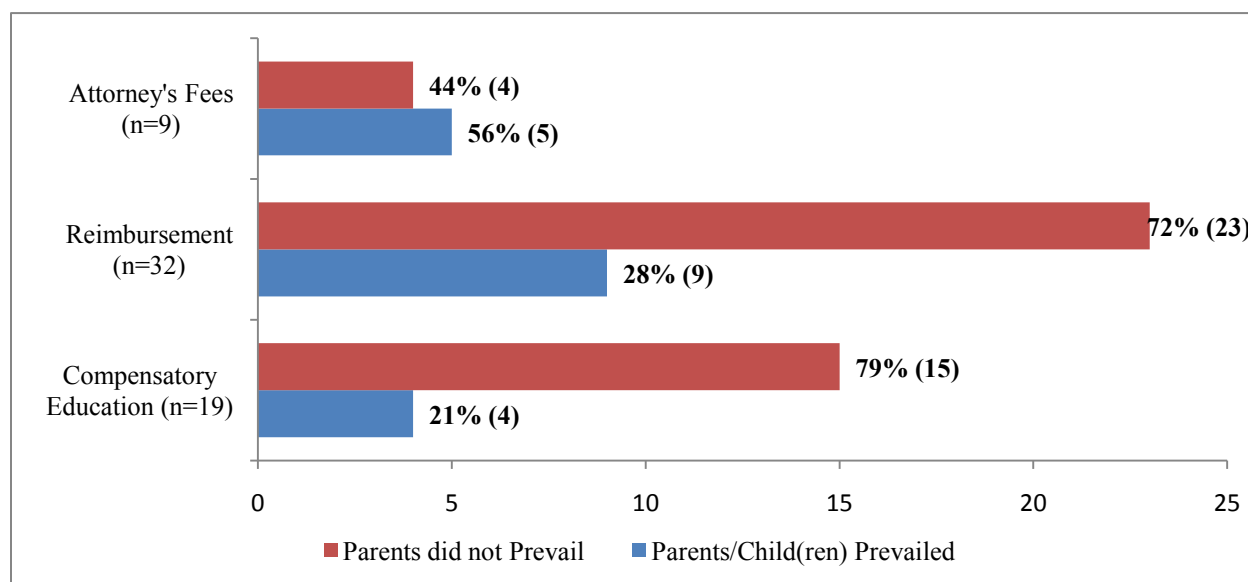
⁹⁴² 319 F. Supp. 2d 57 (D.D.C. 2004).

consultation, and monitoring for activities such as seminars to train the therapists and the mother and for the therapists' salaries.⁹⁴³

Attorney's Fees sought in 23% of the Cases

It is likely that attorney's fees were requested by and awarded to the parents in more cases because to be awarded attorney's fees, the party must be considered the prevailing party and parents prevailed in 10 of the cases. However, the court opinions in 23% (9) of the 39 cases explicitly mentioned attorney's fees. Parents/child(ren) prevailed on 56% (5) of these requests. For example in *J.P. ex rel. Peterson v. County*⁹⁴⁴ the plaintiffs were awarded \$307,150 in attorney's fees. Thus, according to Chart 20., parents/child(ren) were most successful in their requests for attorney's fees and less successful in their requests for compensatory education.

Chart 20. Parent/Child(ren's) Success on Relief Sought



⁹⁴³ *Id.* at 68.

⁹⁴⁴ 641 F. Supp. 2d 499 (E.D. Va. 2009).

Punitive Damages sought in Two Cases

Punitive damages in the amount of \$250,000 were requested in *Mr. X v. New York State Education Department*⁹⁴⁵ and an unspecified amount of damages were requested in *M.M. ex rel. DM v. School Dist. of Greenville County*.⁹⁴⁶ In the first case, it is unknown how the court ultimately handled this request. In the second case, the parents/child(ren) did not prevail.

Other Relief sought in 41% of the Cases

Other types of relief were requested in 41% (16) of the cases. In some cases, this relief was for additional types of therapy such as speech or occupational therapy.⁹⁴⁷ In other cases, it was for litigation expenses,⁹⁴⁸ prejudgment interest,⁹⁴⁹ evaluation expenses,⁹⁵⁰ and conferences.⁹⁵¹ In *S.W. by J.W. v. Warren*,⁹⁵² the other type of relief sought included the parents/child(ren)'s request that the policies which limited available ABA services providers and hours be rescinded.

4.9 Patterns in Rationale

In regards to the courts' rationales pertaining to the substantive issue of whether schools provided FAPEs, most opinions discussed six main legal principles. First, the courts often explained that IDEA required schools to provide students with disabilities with a FAPE "that emphasizes special education and related services designed to meet their unique needs."⁹⁵³ To

⁹⁴⁵ 975 F. Supp. 546 (S.D.N.Y. 1997).

⁹⁴⁶ 303 F.3d 523 (4th Cir. 2002).

⁹⁴⁷ *E.g.*, T.P. *ex rel.* S.P. v. Mamaroneck Union Free School Dist., 554 F.3d 247 (2d Cir. 2009).

⁹⁴⁸ *E.g.*, J.P. *ex rel.* Peterson v. County Sch. Bd. of Hanover County, 641 F. Supp. 2d 499 (E.D. Va. 2009).

⁹⁴⁹ *E.g.*, G. *ex rel.* R.G. v. Fort Bragg Dependent Schs., 343 F.3d 295 (4th Cir. 2003).

⁹⁵⁰ *E.g.*, Renner v. Bd. of Educ. of Pub. Schs. of City of Ann Arbor, 185 F.3d 635 (6th Cir. 1999).

⁹⁵¹ T.H. v. Bd. of Educ. of Palatine Cmty. Consol. Sch. Dist. 15, 55 F. Supp. 2d 830 (N.D. Ill. 1999).

⁹⁵² S.W. *ex rel.* J.W. v. Warren, 528 F. Supp. 2d 282 (S.D.N.Y. 2007).

⁹⁵³ 20 U.S.C. § 1400(d)(1)(A).

ascertain a child’s unique abilities, “progress must be gauged against reasonably accurate evaluations of a child’s potential.”⁹⁵⁴

Second, to determine whether a child is receiving a FAPE, the courts usually apply the standard from *Board of Education of Hendrick Hudson Central School District v. Rowley* that the IEP must be “reasonably calculated to enable the child to receive educational benefits.”⁹⁵⁵ If a court finds for the school district, it may emphasize that schools are only responsible to provide a “basic floor of opportunity” not the best education possible.⁹⁵⁶ On the other hand, if a court holds for the parents/child(ren), it is likely to emphasize that “an IEP must offer more than a trivial or de minimis educational benefit.”⁹⁵⁷ In order for an IEP to be satisfactory, it must provide “significant learning” and confer “meaningful benefits.”⁹⁵⁸ However, the standard defined by the *Rowley* Court was simply that the IEP had to “confer *some* educational benefit.”⁹⁵⁹ The Court stated that the IEP was sufficient if it is “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁹⁶⁰

Third, the courts typically express that they were bound to apply the *de novo* standard of review and must accord “due weight” to the administrative hearing officer’s findings.⁹⁶¹ “Due weight” is determined on a case-by-case basis and the district court is granted the authority to

⁹⁵⁴ *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 202 (1982), *cited in* *County Sch. Bd. of Henrico Co. v. R.T.*, 433 F. Supp. 2d 657 (E.D. Va. 2006).

⁹⁵⁵ *Rowley*, 458 U.S. 176.

⁹⁵⁶ *Id.* at 197, n.21.

⁹⁵⁷ *Kingwood Twp. Bd. Of Educ.* 205 F.3d 572, 577 (3d Cir. 2000), *cited in* *A.Y. v. Cumberland Valley Sch. Dist.*, 569 F. Supp. 2d 496 (M.D. Pa. 2008); *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 160 (4th Cir. 1991), *cited in* *Bd. of Educ. of County of Kanawha v. Michael M.*, 95 F. Supp. 2d 600 (S.D. W. Va. 2000).

⁹⁵⁸ *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988), *cited in* *A.Y. v. Cumberland Valley Sch. Dist.*, 569 F. Supp. 2d 496 (M.D. Pa. 2008).

⁹⁵⁹ 458 U.S. 176 (emphasis added).

⁹⁶⁰ *Id.* at 188.

⁹⁶¹ Some states require only the one level of administrative review and some states require two levels of administrative review. The *de novo* standard of review and the determination of affording “due weight” originate in *Id.* at 207.

determine the degree of deference that it will accord to the hearing officer's findings.⁹⁶² In cases in which the courts wish to reverse the administrative court's decision, the courts may emphasize the precedent that federal courts are not to "simply rubber stamp administrative decisions."⁹⁶³ The courts may also clarify that if the administrative findings are not "regularly made," then they are not entitled to deference.⁹⁶⁴ Further, a few courts have held that "to give deference only to the decision of the School Board would render meaningless the entire process of administrative review."⁹⁶⁵ In cases where courts wish to affirm the administrative court's decision, the courts may emphasize the precedent that deference to the administrative courts is especially important when the "hearing officer's review has been thorough and careful."⁹⁶⁶ The appellate courts apply a "clearly erroneous standard" to questions of law and fact which includes the appropriateness of an IEP. They uphold the lower court's decision unless it was "clearly erroneous on the record as a whole."⁹⁶⁷

Fourth, the district court can supplement the administrative record by admitting supplemental evidence,⁹⁶⁸ but it must make an "independent ruling based on the preponderance of the evidence."⁹⁶⁹ However, the U.S. Supreme Court held that IDEA does not allow "courts to substitute their own notions of sound educational policy for those of the school authorities which

⁹⁶² *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995).

⁹⁶³ *Walczak v. Fla. Union Free Sch. Dist* 142 F.3d 119, 129 (2d Cir. 1998), *cited in* *M.M. ex rel. A.M. v. New York City Dept. of Educ. Region 9*, 583 F. Supp. 2d 498 (S.D.N.Y. 2008).

⁹⁶⁴ *Doyle v. Arlington County Sch. Bd.* 953 F.2d 100, 105 (4th Cir. 1991), *cited in* *J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County*, 641 F. Supp. 2d 499 (E.D. Va. 2009).

⁹⁶⁵ *Sch. Bd. v. Malone* 762 F.2d 1210, 1217 (4th Cir. 1985), *cited in* *County Sch. Bd. of Henrico Co. v. R.T.*, 433 F. Supp. 2d 657 (E.D. Va. 2006).

⁹⁶⁶ *Walczak v. Fla. Union Free Sch. Dist* 142 F.3d 119, 129 (2d Cir. 1998), *cited in* *M.M. ex rel. A.M. v. N.Y.C. Dept. of Educ. Region 9*, 583 F. Supp. 2d 498 (S.D.N.Y. 2008).

⁹⁶⁷ *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 84 (2d Cir. 2004).

⁹⁶⁸ 20 U.S.C. § 1415(i)(2)(C).

⁹⁶⁹ *Town of Burlington v. Dep't of Educ.* 736 F.2d 773, 790 (1st Cir 1984).

they review.”⁹⁷⁰ Specifically, the *Rowley* Court stated that the judiciary generally “lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.”⁹⁷¹

Fifth, IDEA grants courts the authority to “grant such relief as the court determines is appropriate.”⁹⁷² If the parents are seeking retroactive reimbursement after unilaterally placing their child in a private school or providing services such as ABA intervention that is not provided by the child’s IEP, then the courts must determine that 1) the district’s IEP was inadequate to provide a FAPE and 2) the parents’ private school or services were appropriate for the child’s needs.⁹⁷³ Both requirements must be met for the parents to be granted reimbursement, but if the first criterion is not met, then courts do not need to analyze the second criterion. Further, the Third Circuit Court of Appeals has held that “an appropriate private placement is not disqualified because it is a more restrictive environment than that of the public placement.”⁹⁷⁴

Sixth, the burden of proof is on the party claiming that the independent hearing officer’s decision was contrary to a preponderance of the evidence.⁹⁷⁵ After presenting these six legal principles, the courts applied the facts to the law. Many of the courts analyzed additional legal standards if necessitated by the facts.

⁹⁷⁰ *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206 (1982), *cited in* *M.M. ex rel. A.M. v. N.Y.C. Dept. of Educ. Region 9*, 583 F. Supp. 2d 498 (S.D.N.Y. 2008).

⁹⁷¹ *Id.*

⁹⁷² 20 U.S.C. § 1415(i)(2)(C)

⁹⁷³ *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359 (1985), *cited in* *W.S. ex rel. C.S. v. Rye City Sch. Dist.*, 454 F. Supp. 2d 134 (S.D.N.Y. 2006).

⁹⁷⁴ *Ridgewood Bd. Of Educ. v. N.E.*, 172 F.3d 238, 249 (3d Cir. 1999), *cited in* *A.Y. v. Cumberland Valley Sch. Dist.*, 569 F. Supp. 2d 496 (M.D. 2008).

⁹⁷⁵ *Schaffer v. Weast* 546 U.S. 49, 57-58 (2005), *cited in* *M.M. ex rel. A.M. v. N.Y.C. Dept. of Educ. Region 9*, 583 F. Supp. 2d 498 (S.D.N.Y. 2008).

4.10 Fact Patterns

No ABA Litigation Involved Charter Schools

As mentioned previously, charter schools have been in existence since 1991. In 2009, the Center for Education Reform reported that over 5000 charter schools exist nationwide.⁹⁷⁶ Further, Chapter Two presented research that explained 1) autism-centric charter schools comprise half of the total charter schools designed for children with disabilities; 2) many of these autism-centric charter schools appear to implement ABA methodology; and 3) autism-centric charter schools face legal vulnerabilities due to potential issues with LRE, IEP team-decision-making, and discrimination violations. However, none of the cases in this study's data set involved charter schools. Thus, despite the potential legal vulnerabilities of autism-centric charter schools using ABA methodology, these schools did not appear in the relevant, published case law as of 2009.

It should be noted, however, that one case involving an autism-centric ABA charter school was discovered, but it was decided in 2010 and therefore outside the scope of this data set.⁹⁷⁷ In the 2010 case, the Southern District of New York Court held that the child was not denied a FAPE after he transferred to an autism-centric ABA charter school and the district refused to pay for speech, physical, and occupational therapy. The court reasoned that the charter school provided these services embedded into their program and therefore, did not need to provide supplemental services.

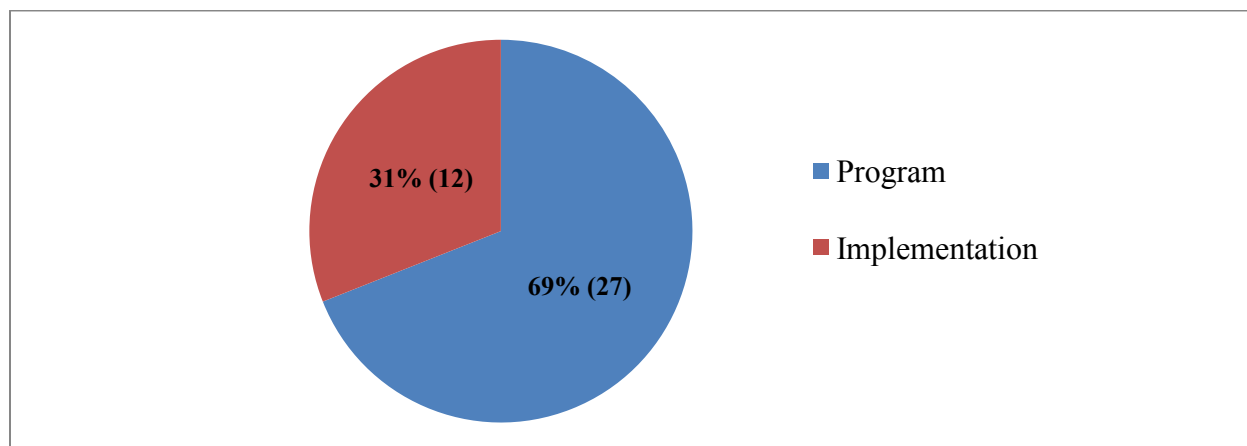
⁹⁷⁶Center for Education Reform, National Charter School and Enrollment Statistics 2009, http://www.edreform.com/_upload/CER_charter_numbers.pdf (last visited July 12, 2010).

⁹⁷⁷M.N. v. New York City Dep't of Educ., NO. 09 Civ. 20 (RJS), 2010 U.S. Dist. LEXIS 33239 (S.D.N.Y. Mar. 25, 2010).

The Dispute in the Majority of the Cases was about Program and not Implementation of Program

In their 2004 study, Choutka, Doloughty, and Zirkel⁹⁷⁸ disaggregated the cases they analyzed based on whether the parties were in disagreement about the type of program (*i.e.*, parents sought an instructional program such as ABA that differed from what the district had provided such as TEACCH) versus the implementation of the program (*i.e.*, ABA was the agreed upon program for the child; however, the location, duration, or provider was in dispute). This study's 39 cases were also disaggregated along these variables. The strong majority of cases (69%, 27) were about program; whereas, 31% (12) of the cases dealt with implementation (see Chart 21.).

Chart 21. Distribution of Program and Implementation Cases (N=39)



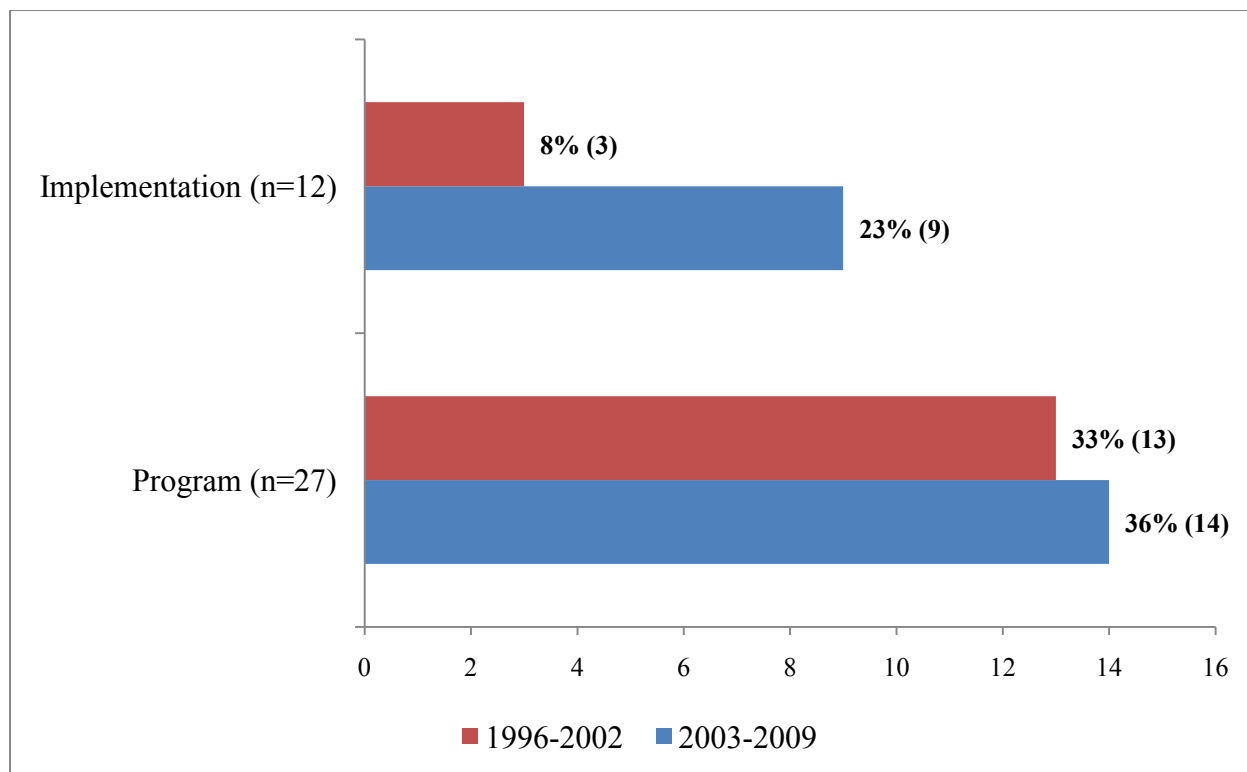
Most of the Implementation Cases were Recent Cases

When the program and implementation cases are further disaggregated based on when they were decided, it appears that most (75%, 9) of the 12 implementation cases were decided between 2003-2009 (see Chart 22.). However, the 27 program cases were decided on a

⁹⁷⁸ Choutka et al., *supra* note 21.

consistent basis from 1996-2009. In other words, about half (48%, 13) of the program cases were older cases and about half (52%, 14) of them were recent cases.

Chart 22. Distribution of Program and Implementation Cases by Year (N=39)



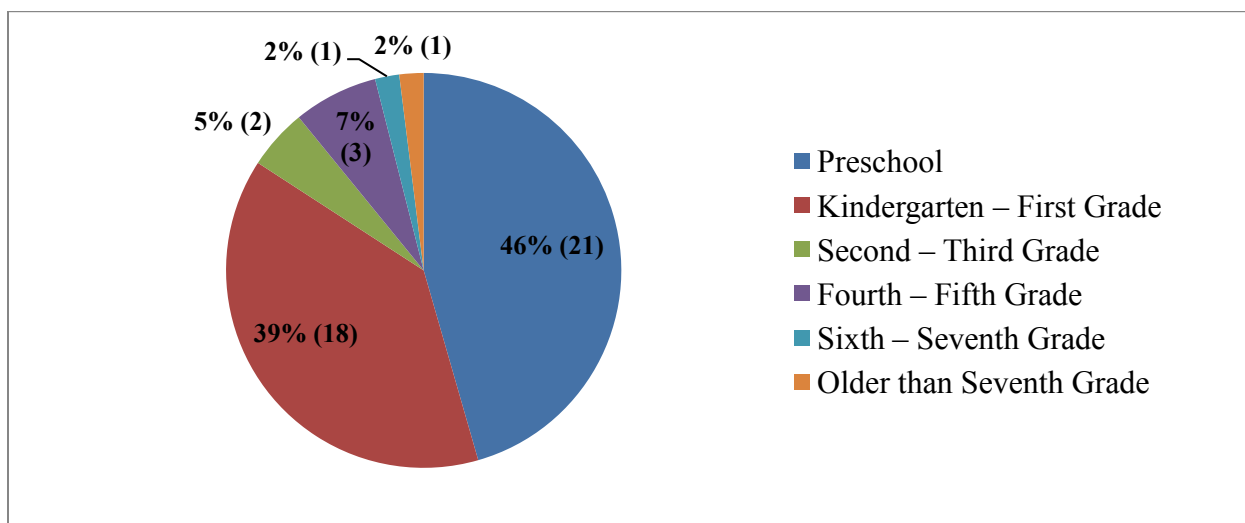
Eighty-five Percent of the Children were Preschoolers, Kindergarteners, or First-graders

As shown in Chart 23., the cases were coded based on whether the child or children in the case was/were in preschool (4 years old or younger); kindergarten – first grade (5-6 years old); second – third grade (7-8 years old); fourth – fifth grade (9-10 years old); sixth – seventh grade (11-12 years old); or older than seventh grade (13+ years old). The age of the child was determined at the time a request for a due process hearing was requested.

Chart 23. reveals that 85% (39) of the 46 children⁹⁷⁹ were either in preschool, kindergarten, or first grade. Nearly half (46%, 21) of the children were of preschool age.

⁹⁷⁹ The number of children exceeded the number of cases because two cases had more than one child at issue.

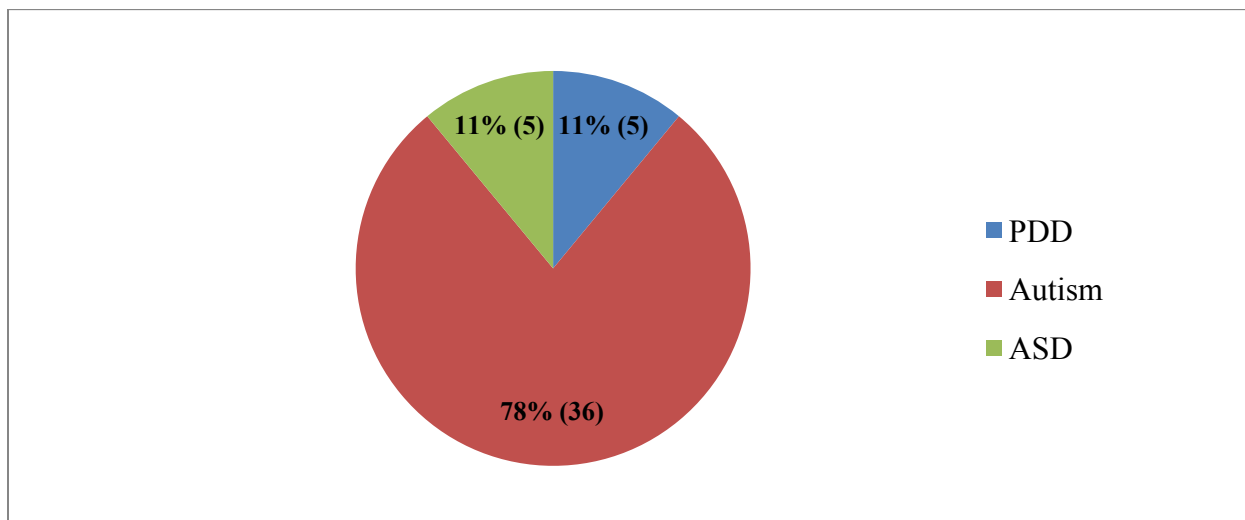
Chart 23. Age of Child(ren) at Time Due Process was Requested (n=46)



Seventy-eight Percent had a Diagnosis of Autism

Of the 46 children, approximately 80% (36) of them had a diagnosis of autism; whereas 11% (5) were diagnosed with Pervasive Developmental Disorder (PDD) and 11% (5) of the children were simply classified as having an Autism Spectrum Disorder (ASD) (see Chart 24.). None of the cases discussed a child diagnosed with Asperger’s Syndrome.

Chart 24. Distribution of Diagnoses (n=46)



Fifteen Percent of the Cases mentioned TEACCH as a Competing Methodology

TEACCH was mentioned as a competing methodology in 15% (6) of the 39 cases.⁹⁸⁰ It is likely that many additional cases that described the school's program as a self-contained classroom for children with autism were also TEACCH cases, but the court opinion failed to detail this fact. The last time TEACCH was mentioned in the ABA litigation was in 2006.

In half (50%, 3) of the TEACCH cases, the school district prevailed; in one-third (33%, 2) of these cases, the parents/child(ren) prevailed; and in the remaining case, it was inconclusive who was the prevailing party⁹⁸¹ because three of the school's four IEPs were determined to provide a FAPE by the court.

In the three of the four cases where the parents/child(ren) did not prevail,⁹⁸² the courts declined to address the merits of whether the TEACCH or ABA methodology was the better approach for teaching children with autism. Instead, they focused on the requirement under *Rowley* requiring the IEP to be "reasonably calculated to enable the child to receive meaningful benefit."⁹⁸³ As long as the school's TEACCH program met this standard,⁹⁸⁴ then the courts deferred to the school district's choice in methodology.

⁹⁸⁰ These cases included *County Sch. Bd. of Henrico Co. v. Z.P. ex rel. R.P.*, 399 F.3d 298 (4th Cir. 2005); *Pitchford ex rel. M. v. Salem-Keizer Sch. Dist.*, 155 F. Supp. 2d 1213 (9th Cir. 2001); *Dong v. Bd. of Educ. of Rochester Community Schools*, 197 F.3d 793 (6th Cir. 1999); *J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County*, 641 F. Supp. 2d 499 (E.D. Va. 2009); *County Sch. Bd. of Henrico Co. v. R.T.*, 433 F. Supp. 2d 657 (E.D. Va. 2006); *C.M. ex rel. J.M. v. Bd. of Public Educ. of Henderson County*, 184 F. Supp. 2d 466 (D.N.C. 2002). In *J.P. ex rel. Popson*, the school's program was primarily referred to as an eclectic approach, yet the Court mentioned that it utilized TEACCH methodology. *Nelson & Huefner*, *supra* note 594, state that an additional two cases, *Burilovich v. Bd. of Educ. of Lincoln Consol. Schs.*, 208 F.3d 560 (6th Cir. 2000) and *Renner v. Bd. of Educ. of Pub. Schs. of City of Ann Arbor*, 185 F.3d 635 (6th Cir. 1999) are TEACCH cases, but the current researcher did not find TEACCH mentioned in them.

⁹⁸¹ *Pitchford ex rel. M. v. Salem-Keizer Sch. Dist.*, 155 F. Supp. 2d 1213 (9th Cir. 2001).

⁹⁸² *Pitchford ex rel. M. v. Salem-Keizer Sch. Dist.*, 155 F. Supp. 2d 1213 (9th Cir. 2001); *C.M. ex rel. J.M. v. Bd. of Public Educ. of Henderson County*, 184 F. Supp. 2d 466 (D.N.C. 2002); *J.P. ex rel. Popson v. West Clark Cmty. Schs.*, 230 F. Supp. 2d 910 (S.D. Ind. 2002).

⁹⁸³ *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206 (1982).

⁹⁸⁴ Some courts also analyzed whether the IEP met a higher standard as required by state law (e.g., Michigan and North Carolina's maximum potential standard).

For example, in *J.P. ex rel. Popson v. West Clark Community Schools*, the Southern District Court of Indiana explained,

It is the [parents'] right and duty to attempt to push and cajole [the district] into providing the best possible education for [the child]. To that end, the [parents] have argued strongly that [the child] began progressing much more rapidly once he started his [ABA program]. But, while such an argument is highly relevant at a case conference meeting, it does not carry much weight in this legal action. The law does not require [the school] to provide [the child] with the better or best possible education.⁹⁸⁵

The court clarified that it does not fault the parents for seeking the best program but explained that the law allows schools to only provide an appropriate program.

In *Pitchford ex rel. M. v. Salem-Keizer School District*, the U.S. District Court of Oregon explained that the plaintiffs

have a fundamentally mistaken view of the role of the district. It is not the role of a school or the district to maximize the child's potential; such a goal is unreasonable and likely unattainable, in light of the broad services schools are obligated to provide. The schools are necessarily institutions that must cater to the needs of an extraordinary number of children, and the corresponding diversity of needs, abilities, personalities and backgrounds of those children.⁹⁸⁶

Interestingly, the court gave this reasoning why schools are only required to provide an appropriate education, but the court also stated, “While the court may agree that [an ABA]-based program would have been more beneficial for [this child], it is not the court’s role to make such a determination.”⁹⁸⁷

The Western District Court of North Carolina also resisted making a determination about which methodology was more effective for the child in *CM ex rel. JM v. Board of Public Education of Henderson County*. However, the court concluded the opinion by stating, “Indeed, it may well be that the TEACCH program would have provided a superior model for [the child’s]

⁹⁸⁵ *J.P. ex rel. Popson v. West Clark Cmty. Schs.*, 230 F. Supp. 2d 910, 934 (S.D. Ind. 2002).

⁹⁸⁶ *Pitchford ex rel. M. v. Salem-Keizer Sch. Dist.*, 155 F. Supp. 2d 1213, 1238 (9th Cir. 2001).

⁹⁸⁷ *Id.* at 1232.

emotional and social development.”⁹⁸⁸ Thus, the courts in these three cases took a hands-off approach reasoning that it was off-limits for courts to determine which methodology was appropriate for the children. At the same time, they appeared to do this somewhat reluctantly.

In the *Dong v. Board of Education of Rochester Community Schools*, the Sixth Circuit Court of Appeals did address whether the TEACCH versus the ABA methodology would be more effective to address the child’s need. The court stated that while the IHO held that either the ABA or the TEACCH program provided the child with a FAPE, the district court contented that the TEACCH program “was better designed to develop [the child’s] potential than the more restrictive [ABA] program.”⁹⁸⁹ The court also emphasized that even if the ABA program were the *best* program, it would not follow that the school’s TEACCH program was not *appropriate*. At the administrative level of review for all four of these TEACCH cases where the districts prevailed, the independent hearing officer (IHO) determined the school’s program had afforded the children a FAPE.

The two Fourth Circuit Court of Appeals cases where the parents/child(ren) prevailed involved the same school district and parents’ request for the same ABA-based private school (Faison).⁹⁹⁰ Further, the IHO in both cases held that the school’s program had not provided the children a FAPE. In *County School Bd. of Henrico County v. Z.P. ex rel. R.P.*, the district court held for the school district reasoning that the IHO’s findings were not regularly made. But the Fourth Circuit Court of Appeals rebutted this determination and stated that the IHO gave “careful consideration to the opinions of the School Board’s witnesses.”⁹⁹¹ The court stated that “the

⁹⁸⁸ C.M. *ex rel.* J.M. v. Bd. of Public Educ. of Henderson County, 184 F. Supp. 2d 466, 489 (D.N.C. 2002).

⁹⁸⁹ *Dong v. Bd. of Educ. of Rochester Cmty. Schs.*, 197 F.3d 793, 803 (6th Cir. 1999).

⁹⁹⁰ *County Sch. Bd. of Henrico Co. v. Z.P. ex rel. R.P.*, 399 F.3d 298 (4th Cir. 2005); *County Sch. Bd. of Henrico Co. v. R.T.*, 433 F. Supp. 2d 657 (E.D. Va. 2006).

⁹⁹¹ *County Sch. Bd. of Henrico Co.*, 399 F.3d at 305.

respect and deference that must be accorded to those professional opinions, however, does not give a district court license to ignore the requirement of *Rowley* and *Doyle* that the findings of the administrative proceeding must be given due weight."⁹⁹² "To give deference only to the decision of the School Board would render meaningless the entire process of administrative review."⁹⁹³ The court also stated,

The fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate.... To conclude that the hearing officer erred simply because he did not accept the testimony of the School Board's witnesses, an argument that the School Board comes very close to making, would render meaningless the due process rights guaranteed to parents by the IDEA.... The hearing officer did not conclude that the [district's program] was inappropriate for all autistic students.⁹⁹⁴

Thus, a key difference in whether the school's TEACCH program was determined to be appropriate was based on the validity of the school's witnesses.

Thirty-eight Percent of the Cases had School Programs associated with ABA Intervention

Approximately 40% (38%, 15) of the 39 cases discussed a school program that had some ABA element to it.⁹⁹⁵ On one end of the continuum was *Wagner v. Short*⁹⁹⁶ in which the school did not promise any ABA services, but stated they would consider them in the draft IEP. Similarly, in *J.A. v. East Ramapo Cent. School District*⁹⁹⁷ the school program provided one hour of ABA intervention per week. Further, in some cases it appeared doubtful that true ABA methodology was being conducted by skilled staff.⁹⁹⁸ On the other end of the continuum was

⁹⁹² *Id.* at 307.

⁹⁹³ *Id.*, citing *School Bd. v. Malone*, 762 F.2d 1210, 1217 (4th Cir. 1985).

⁹⁹⁴ *County Sch. Bd. of Henrico Co.*, 399 F.3d at 307-08.

⁹⁹⁵ See *supra* Chapter Two for a discussion of why TEACCH-only cases were not included in data set.

⁹⁹⁶ 63 F. Supp. 2d 672 (D. Md. 1999).

⁹⁹⁷ 603 F. Supp. 2d 684 (S.D.N.Y. 2009).

⁹⁹⁸ E.g., In *Renner v. Bd. of Educ. of Pub. Schs. of City of Ann Arbor*, 185 F.3d 635 (6th Cir. 1999), the school district claimed that they were providing some ABA methodology (i.e., discrete trial training); however, the parents were unconvinced.

*L.B. ex rel. K.B. v. Nebo School District*⁹⁹⁹ in which the school was already providing 15 hours of ABA intervention per week. Similarly, in *E.G. v. City Sch. Dist. of New Rochelle*¹⁰⁰⁰ and *T.P. ex rel S.P. v. Mamaroneck Union Free Sch. Dist.*¹⁰⁰¹ the school was already providing 10 hours of ABA intervention per week.

Thirty-one Percent of the Cases Involved School District who Removed/Reduced the ABA Program Previously Provided

Interestingly, 31% (12) of the 39 cases involved situations in which the school district had previously provided some form of ABA and then removed or reduced the number of hours. It was this removal/reduction that instigated the parents' request for a due process hearing. For example, the school district in *Brown v. Bartholomew*¹⁰⁰² had provided an extensive 40 hour per week home and school-based ABA program in which consultation services and materials were provided. Then, the district determined ABA was no longer appropriate.

Most of School District Placements were in Self-contained Classrooms

Of the 39 cases, 62% (24) of the suggested or current placements of the school district included self-contained classrooms. Of the remaining 15 cases, the placements were either in a regular classroom (often with a 1:1 aide), in a combination of a regular and self-contained classroom, an unspecified classroom type because the child was not in a school setting yet, or the opinion did not mention the type of placement.

Agreement within Courts

The case law did show, however, that once an ABA case is decided by a court where multiple judges are responsible for making the decision that the judges often unanimously agree.

⁹⁹⁹ *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004).

¹⁰⁰⁰ *E.G. v. City Sch. Dist. of New Rochelle*, 606 F. Supp. 2d 384 (S.D.N.Y. 2009).

¹⁰⁰¹ *T.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247 (2d Cir. 2009).

¹⁰⁰² *Brown v. Bartholomew Consol. Sch. Corp.*, 2005 U.S. Dist. LEXIS 3690 (S.D. Ind. 2005), *vacated and remanded by* 442 F.3d 588 (7th Cir. 2006).

Only 13% (2) of the 15 U.S. Circuit Courts of Appeal cases had a dissenting¹⁰⁰³ or a concurring¹⁰⁰⁴ opinion.

Cases had Similarities in Attorneys, Experts, and Services Providers

Many of the cases shared common attorneys, witnesses, and service providers. Specifically, Gary Mayerson was the attorney representing the parents/child(ren) in 31% (12) of the 39 cases.¹⁰⁰⁵ Likewise, the University of Richmond's School of Law's Disability Law Clinic represented the parents/child(ren) in two cases and wrote an amici brief supporting the parents/child(ren) in a third case.

The McCarton Center is the ABA provider in four of the cases and Dr. Patricia Meinhold is the ABA provider in three of the cases. Dr. John Umbreit is cited as a witness in three cases; two times supporting the school district's argument and one time supporting the parents' position.

4.11 Summary of the Data

This chapter summarized data gleaned from 39 ABA litigation cases. The data were presented in ten subcategories including: 1) number and frequency of cases; 2) prevailing party; 3) geographic distribution; 4) jurisdictional distribution; 5) geographical and jurisdictional distribution in relation to prevailing party; 6) procedural history in relation to prevailing party; 7) relief sought; 8) patterns in rationales; 9) fact patterns; and 10) general findings. This data is analyzed in Chapter Five in order to answer the two main research questions of this study.

¹⁰⁰³ County Sch. Bd. of Henrico Co. v. Z.P. *ex rel.* R.P., 399 F.3d 298 (4th Cir. 2005).

¹⁰⁰⁴ Bucks County v. Pennsylvania, 379 F.3d 61 (3d Cir. 2004).

¹⁰⁰⁵ In Tyler W. v. Nw. Indep. Sch. Dist., 202 F. Supp. 2d 557 (N.D. Tex. 2002). Mayerson was admonished by the court.

CHAPTER FIVE: DATA ANALYSIS

5.1 Introduction

Now that the research findings have been summarized, this chapter analyzes those findings. In Section 5.2, the researcher analyzes how the research findings answer the original two research questions. She first highlights the main ABA litigation trends and then concludes that autism-centric charter schools are likely to reduce the ABA litigation. The researcher also provides statutory, constitutional, and case law arguments to explain why autism-centric charter schools are a legally viable option despite their potential legal vulnerabilities.

In Section 5.3, the researcher compares and contrasts the current study's findings with the results from the previous ABA and autism litigation research. The chapter concludes with a explanation about how this study contributes to the existing literature on ABA and autism litigation, as well as the research about special education at charter schools.

5.2 Answering Research Questions

Since the Enactment of IDEA, what Trends have Emerged in the ABA Litigation?

The findings summarized in Chapter Four may be characterized as the trends that have emerged in the ABA litigation since IDEA was enacted. However, in isolation those findings fail to provide a generalized analysis of what *key* ABA litigation trends have occurred in the past 34 years (from 1975 to 2009). Thus, in this section the researcher extracted themes from the findings in light of the literature that was reviewed in Chapter Two. These overall litigation trends are likely to provide legal and education practitioners and researchers, as well as policy makers, with a bigger picture of what has occurred in the courts with ABA litigation.

Deference was a key determinant in cases. Seligmann explained that the concept of deference is rooted in *Rowley*. First, the U.S. Supreme Court held that courts must defer to

school districts' expertise when analyzing methodology.¹⁰⁰⁶ Second, courts must give “due weight” to the administrative decisions.¹⁰⁰⁷ Seligmann identified that with autism cases in particular, courts are required to “sort out legal questions from educational debates, and distinguish when a dispute invokes educational appropriateness (which is their role to review) as opposed to a choice among differing educational approaches (which is not).”¹⁰⁰⁸

Choutka et al. recommended that further research be conducted with a homogeneous sample of judicial cases to investigate the relationship of deference to the outcomes.¹⁰⁰⁹ The current study examined the issue of deference in its homogeneous sample of published, substantive ABA cases and found that *Rowley*'s insistence on deferring to school personnel and administrative decisions has remained a key theme in the courts' rationales.

Seligmann critiqued that courts may be placing too much deference on the decisions made by school personnel and the administrative hearing and/or review officers.¹⁰¹⁰ She reviewed 31 district and circuit court ABA procedural and substantive cases and found that 55% (17) of them involved courts upholding the decision of the administrative court(s).¹⁰¹¹ Similarly, the current study found that a slight majority (53%, 18) of the 34 cases were non-reversals, which translates that the district and/or circuit courts deferred to the administrative decision and did not overrule it.

Thus, the current researcher shares Seligmann's conclusion that deference given to lower courts and to the school authorities was clearly an influential determinant in how courts decided

¹⁰⁰⁶ Seligmann *supra* note 9, at 217.

¹⁰⁰⁷ Seligmann *supra* note 9.

¹⁰⁰⁸ *Id.* at 253.

¹⁰⁰⁹ Choutka et al., *supra* note 21, at 102.

¹⁰¹⁰ Seligmann *supra* note 9.

¹⁰¹¹ *Id.* at n.229.

these cases.¹⁰¹² In the current data set, it was rare that a court deciding an ABA case failed to mention deference in its opinion. For example, the court in *J.A. v. East Ramapo Central School District* explained, “The precise allocation of behavior therapy hours between 1:1 and group and between home and school is the type of educational judgment that is entitled to deference....[This Court] must not engage in Monday-morning quarterbacking....”¹⁰¹³

Another court explained,

The problem with plaintiffs' argument is that this sort of weighing of conflicting evidence is exactly the sort of area in which I am required to defer to the [State Review Officer] - the education professional - rather than pretend to transform myself into some sort of educational specialist.¹⁰¹⁴

This and similar language that was found in a majority of the courts' rationales caused the researcher to include deference as the third legal principle that was repeatedly emphasized in the rationales reviewed for this study.¹⁰¹⁵ Overall, this study found that school districts prevailed in a majority (61%, 24) of the cases¹⁰¹⁶ and in the cases in which school districts were victorious, the courts typically cited deference as a key determinant.

At the same time, if a school district did not support ABA intervention or if a hearing or review officer decided in favor of the district, then it did not mean that it is impossible for parents to prevail. In fact, this study found that parents prevailed in 26% (10) of the cases despite the deference given to the schools and administrative decisions.¹⁰¹⁷ Furthermore, as mentioned previously, this study found that *only* a slight majority of the cases (53%) were never reversed.¹⁰¹⁸ Thus, deference to the administrative decision was not absolute because there were

¹⁰¹² See *supra* Section 4.9 for discussion of patterns in rationale for more information about deference.

¹⁰¹³ 603 F. Supp. 2d 684, 689 (S.D.N.Y. 2009).

¹⁰¹⁴ *W.S. ex rel. C.S. v. Rye City Sch. Dist.*, 454 F. Supp. 2d 134, 145 (S.D.N.Y. 2006).

¹⁰¹⁵ See *supra* Section 4.9.

¹⁰¹⁶ See *supra* Section 4.3.

¹⁰¹⁷ See *supra* Section 4.3.

¹⁰¹⁸ See *supra* Section 4.7.

still a considerable number (47%) of cases that were reversed by a higher court. In other words, it does not appear that the district and circuit courts are simply rubber-stamping the decisions of *all* of the administrative decision-makers.

In sum, deference was a mainstay in the courts' rationales; yet, citing deference alone did not indicate that the courts would *always* adhere to the decisions of either the school personnel or the administrative hearing and/or review officers.

The ABA litigation has not conclusively advanced FAPE to a higher level. Yell and Drasgow claimed that the ABA case law “had advanced FAPE to a higher level by stressing ‘meaningful’ educational benefits.”¹⁰¹⁹ The researchers contended that the “definition of FAPE has shifted from an emphasis on access to an emphasis on quality.”¹⁰²⁰ They warned school districts would be held to a higher standard because the “FAPE standard has evolved.”¹⁰²¹ To the contrary, in light of all of the cases reviewed in the current study, the researcher did not share in Yell and Drasgow’s conclusion.

On one hand, it is true that a few cases did seem to focus on *how much* benefit the school district’s program was providing to student. To illustrate, in a case in which the parents/child prevailed, *G. ex rel. R.G. v. Fort Bragg Dependent Schools*, the Fourth Circuit Court of Appeals appeared concerned with the quality of the education that the student was receiving. The court quoted the IHO’s decision which stated, ABA “is not simply a methodology that any educator may employ with success, but rather, the experience, insight, and adaptability that the consultant brings ‘to the chair’ are what is essential.”¹⁰²²

¹⁰¹⁹ Yell & Drasgow, *supra* note 21, at 211.

¹⁰²⁰ *Id.* at 213.

¹⁰²¹ *Id.*

¹⁰²² 343 F.3d 295, 307 (4th Cir. 2003).

Further, in *T.H. v. Board of Education of Palatine Community Consolidated School District*, the Northern District Court of Illinois was concerned not simply with access, but also with quality of education. It explained that it was not impressed with the district's "vague, generalized, non-specific, eclectic, child-led approach to educating autistic children."¹⁰²³ The court clarified that by finding for the parents/child, it was

not ordering the School District to groom [the child] to become an Olympic swimming champion. The goal is not to have [the child] sitting on the 'steps' of the pool. Nor is it to have [the child] drown in the deep end because he was thrown into that environment before he was ready to do so. [The decision for the parents/child was] 'reasonably calculated' to provide [the child] with a meaningful opportunity to achieve some measure of success 'swimming' with typically developed children.¹⁰²⁴

Another case in which the court did not focus on the "basic floor of opportunity" standard from *Rowley* was a case that Weber identified in his law review article.¹⁰²⁵ In *L.B. ex rel. K.B. v. Nebo School District*, the Tenth Circuit Court of Appeals focused not necessarily on a heightened FAPE standard, but instead took a different approach.¹⁰²⁶ The court held that the parents were entitled to 35-40 hours of ABA intervention per week at home so that she could be successfully mainstreamed in the future. Thus, the focus was not on the standard of educational benefit, but instead on the ability to achieve a placement that was less restrictive. Weber questioned whether future courts would analyze the appropriateness of a child's education in future ABA litigation by applying LRE instead of purely looking to *Rowley's* some-educational-benefit standard.

The current study did not find any cases other than *Nebo School District* that defined FAPE based on whether the program would allow the child to eventually progress into a less restrictive environment. In fact, the majority of the court opinions reviewed in this study

¹⁰²³ 55 F. Supp. 2d 830, 836 (N.D. Ill. 1999).

¹⁰²⁴ *Id.* at 842.

¹⁰²⁵ Weber, *supra* note 468.

¹⁰²⁶ 379 F.3d 966 (10th Cir. 2004).

involved courts emphasizing that the school's program only needed to provide some educational benefit. Thus, they primarily applied *Rowley's* original FAPE standard and *not* a heightened standard focused on the quality of the education.

For example, some courts stressed that providing a FAPE was simply about allowing access. In *W.S. ex rel. C.S. v. Rye City School District*, the Southern District Court of New York reviewed the precedent holding that IDEA only requires schools "to open the door of public education to handicapped children on appropriate terms," not "to guarantee any particular level of education once inside."¹⁰²⁷ The court eventually held for the school district stating that "only if the parents prove that the IEP confers no educational benefit will a court go on to consider the other *Burlington* factors."¹⁰²⁸ This court did not stress *meaningful benefit* as the standard, but rather mentioned *no* benefit.

In another case where the district prevailed, *K.S. ex rel. P.S. v. Fremont Unified School District*, the court appeared to lack high expectations for the amount of progress the child could make. The court opined, "slow progress, however, is not necessarily indicative that plaintiff did not receive a FAPE, especially in light of the substantial evidence in the record concerning plaintiff's autism and cognitive impairments."¹⁰²⁹

Thus, unlike the conclusion of *Yell* and *Drasgow*, the current data set did not conclusively demonstrate that the FAPE standard has been heightened as a result of the recent ABA litigation. While it is true that there are a few cases in which the courts elucidate an appropriateness standard that appears to focus on quality as opposed to mere access, these cases are not necessarily only from recent years. Further, if the FAPE standard had been conclusively

¹⁰²⁷ 454 F. Supp. 2d 134, 139 (S.D.N.Y. 2006).

¹⁰²⁸ *Id.*

¹⁰²⁹ *K.S. ex rel. P.S. v. Fremont Unified Sch. Dist.*, 679 F. Supp. 2d 1046, 1057 (N.D. Cal. 2009).

heightened by the ABA litigation, one would assume that more parents/child(ren) would be prevailing. While a heightened FAPE standard could help to explain Weber's conclusion that a "strong trend" had emerged recently that favors parents,¹⁰³⁰ the current study did not find a "strong trend" favoring parents. Instead, the current research concludes that school districts prevailed more than parents in recent years and the majority of the courts have *not* applied a heightened FAPE standard with only one court altering its analysis to include an LRE analysis to determine whether the school's program provided a FAPE.

Despite the pro-school district findings, the pendulum may be shifting toward requests for ABA from parents/child(ren). Although it was just stressed that the current study did not find that parents/child(ren) prevailed in a total of more cases than school districts in recent years (*i.e.*, 2003-2009), the findings do indicate that parents/child(ren) have prevailed more often recently than previously (*i.e.*, 1996-2002).¹⁰³¹ Further, because the average outcome code was 5.08 on a 7 point scale in which 1 indicated a complete win for the parents/child(ren) and 7 indicated a complete win for the school district, it cannot be concluded that school districts are *conclusively* prevailing.¹⁰³² To support the proposition that school districts are not decisively prevailing, many of the past researchers found that school districts prevailed even less often than the current study. For example, the two studies in which the same Likert-scale outcome codes were employed found that the average outcome code was 4.81¹⁰³³ and 3.98¹⁰³⁴ which are averages that favor the parents/child(ren) even more than the current study's average of 5.08. Additionally, whereas the current study found that school districts prevailed in 61% of the

¹⁰³⁰ Weber, *supra* note 468, at 47.

¹⁰³¹ See *supra* Section 4.3.

¹⁰³² If the average outcome code was a 6 or a 7, then this conclusion would be more likely.

¹⁰³³ Zirkel, *supra* note 28.

¹⁰³⁴ Choutka et al., *supra* note 21.

cases,¹⁰³⁵ Choutka et al. found that school districts prevailed in 44% of the cases and Yell and Drasgow found that school districts prevailed in only 24% of the litigation. As mentioned, Weber believed there was a “strong trend” emerging recently where parents were prevailing.¹⁰³⁶ Although the samples are different among these studies and the current research, it is meaningful that these previous researchers found school districts prevailing less often than the current researcher. Therefore, if the unpublished and administrative decisions are added to the sample, it is probable that parents would have prevailed more often than the current study reported.

In support of the notion that parents/child(ren) may be gaining momentum, the current research also identified that schools are providing ABA intervention more often in recent years. In fact, 15% more of the recent cases as compared to the older cases involved situations where the school was already offering ABA intervention, but the parent was requesting more hours of ABA intervention.¹⁰³⁷ Therefore, in recent years, it was more common to see ABA litigation where the parents were seeking more hours of ABA intervention than what the school had offered; whereas, in the older litigation, parents were requesting *any* amount of ABA intervention and the school districts were refusing.

Similarly, approximately 40% of the current study’s cases discussed a school program that had some ABA element to it.¹⁰³⁸ For example, in two 2009 cases, the school district was already providing 10 hours per week of ABA.¹⁰³⁹ Additionally, 31% of the current cases

¹⁰³⁵ See *supra* Section 4.3.

¹⁰³⁶ Weber, *supra* note 468, at 47.

¹⁰³⁷ See *supra* Section 4.10.

¹⁰³⁸ *Id.*

¹⁰³⁹ T.P. *ex rel.* S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247 (2d Cir. 2009); E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384 (S.D.N.Y. 2009).

involved situations where the school district had previously provided some form of ABA and then removed or reduced the number of hours.¹⁰⁴⁰

When all of these findings about the ABA programming that has been offered or provided by schools in recent years are taken into consideration, a conclusion can be made that despite the fact that parents/child(ren) prevailed less often than school districts, parents/child(ren) appear to be garnishing more support in recent years. Stated differently, the past ABA litigation may have increased the school districts' willingness to offer more ABA. Perhaps school districts are trying to avoid litigation as was mentioned in two 2009 cases,¹⁰⁴¹ or perhaps school districts have identified the merits of this type of intervention as was also discussed in a few cases reviewed.

Parents are likely to continue to file ABA litigation which has the potential to be tremendously expensive to school districts. Primarily, this conclusion is drawn because the current study identified that ABA litigation has been pervasive and constant for over a decade.

To begin, ABA litigation has been pervasive since 1996. It has occurred in almost half of the states, nearly all of the federal circuits, approximately one-fourth of the federal district courts, and in every U.S. Census regions. ABA litigation has occurred more often in some areas including New York, the Southern District Court of New York, the Second Circuit, the Sixth Circuit, and the South.¹⁰⁴² At the same time, it is not restricted to these areas. Instead school districts in every region of the country appear to be vulnerable to facing ABA lawsuits.

¹⁰⁴⁰ See *supra* Section 4.10.

¹⁰⁴¹ *T.P. ex rel. S.P.*, 554 F.3d 247; *E.G.*, 606 F. Supp. 2d 384.

¹⁰⁴² See *supra* Section 4.4-4.5.

Second, the published ABA litigation at the federal and state court levels has remained fairly constant since 1998.¹⁰⁴³ Despite the past research claiming that ABA litigation is the “fastest growing” special education litigation,¹⁰⁴⁴ the current researcher determined that the subset of ABA litigation that she studied has actually remained fairly constant for the past decade. There has been more ABA litigation in recent years, but not a tremendous amount more and when the rates were measured across time, they remained quite stable.¹⁰⁴⁵ That being said, this study only evaluated a smaller subset of cases; therefore, it is possible that when unpublished and administrative decisions are added to the sample, a conclusion could be made that ABA litigation is on the rise.

Nevertheless, school professionals should not be overly confident that because school districts have prevailed in more cases than parents/child(ren) that they are immune from legal challenges. The data from this study illustrated that parents do not appear to be retreating in their attempts to have ABA intervention funded by public schools. Schools should be concerned about this litigation trend because ABA litigation has resulted in very expensive relief for parents.¹⁰⁴⁶ As seen in the findings of the current study, when parents/child(ren) prevail, the relief could be incredibly high. For example, some parents/child(ren) were awarded private school tuition or 40 hours per week of ABA intervention. The highest dollar figure request was for \$88,000; however, it is unknown whether the parent was awarded that amount. Additionally, when parents/child(ren) were the prevailing party, there were often attorney’s fees awarded, one of which equaled \$307,150.

¹⁰⁴³ See *supra* Section 4.2.

¹⁰⁴⁴ Etscheidt, *supra* note 21; see also *Litigating a Free*, *supra* note 468, at 205.

¹⁰⁴⁵ It is quite possible, however, that if this study included administrative, procedural, and unpublished decisions the researcher would have concluded that ABA litigation had increased.

¹⁰⁴⁶ See *supra* Section 4.8.

Furthermore, schools and parents alike should not assume they will fare better based on the jurisdiction in which they are located. The current study found that no jurisdiction truly held in favor of one party more than the other.¹⁰⁴⁷ While it is true that school districts prevailed more in the Second Circuit and parents/child(ren) prevailed more in the Fourth Circuit, parents also prevailed in the Second Circuit and districts also prevailed in the Fourth Circuit. Moreover, the number of cases in each circuit was inconsistent. Thus, no conclusive decisions about a jurisdiction being more favorable to one party over the other could be made.

Parents appear to be filing ABA lawsuits on behalf of very young children whom schools are placing in self-contained classrooms. The researcher found that 85% (39) of the 46 children involved in these cases were preschoolers, kindergarteners, or first graders. Thus, it follows that the parents who are primarily unsatisfied with the education provided by the public schools are parents of very young children.¹⁰⁴⁸ In fact, only one student was older than seventh grade when the parents requested a due process hearing. This study did not uncover why these parents are more discontent than parents of older children; however, based on the literature reviewed about the empirical studies that document the importance of early intervention for children with autism, it would make sense that these parents are most desperate for intensive and effective treatment for their child. Further, because some children have been known to lose their diagnosis of autism after receiving intensive ABA intervention as very young children, it follows that parents of very young children would be those who are most motivated to file litigation to attempt to receive these services for their children. Parents of older children may not share the level of hope that their child could be as dramatically affected by ABA intervention as compared to parents of younger children.

¹⁰⁴⁷ See *supra* Section 4.6.

¹⁰⁴⁸ See *supra* Section 4.10.

In the majority of this study's cases, the school district chosen placement for students with autism was in self-contained classrooms.¹⁰⁴⁹ In fact, of the cases where the type of placement was known, 62% (24) of the 39 school districts were offering a self-contained classroom for the child with autism as opposed to the parents' request for ABA intervention. Thus, in the majority of these cases, the IEP teams had determined that the students' LRE was a segregated environment.

A common perception of the past research was that many of these cases involved a battle between a TEACCH program offered by the school versus an ABA program requested by the parents. Yet, the current research discovered that TEACCH was the competing methodology in only a minority of the cases.¹⁰⁵⁰ Although TEACCH has been discussed as the competing methodology with ABA intervention in some of the past literature,¹⁰⁵¹ it was only discussed in 15% (6) of the 39 cases. Therefore, although these cases have been touted as pure methodology cases, it does not appear that preference about methodology is the foremost issue. Instead, the arguments hinged on whether the child was provided a FAPE by the school district and if not, whether the parents' request for ABA intervention would provide a FAPE. The parents' claims are not simply about requesting that their children be provided with a specific type of teaching; they are requesting that their children receive an individualized education which incorporates methods that have empirical support that shows their effectiveness in teaching young children with autism.

A future trend in ABA litigation may be for parents to file class action claims. Only two of the cases were class action lawsuits, but both were permitted by the courts and both

¹⁰⁴⁹ *Id.*

¹⁰⁵⁰ *Id.*

¹⁰⁵¹ Etscheidt, *supra* note 21; Nelson & Huefner, *supra* note 594.

occurred in 2007.¹⁰⁵² In a third case, the court denied the parents' motion for leave to amend to file a class action complaint.¹⁰⁵³ In *L.M.P.*, the Southern District Court of Florida denied the school district's motion to dismiss the class action and stated, "There is little dispute that claims of generalized violations of the IDEA lend themselves well to class action treatment."¹⁰⁵⁴ The Southern District Court of New York also agreed that the plaintiffs in *S.W. by J.W. v. Warren*, were permitted to bring a class action based on their complaints. The court reasoned, "individual remedies would be insufficient to address the defendants' failure to provide the service required by the IDEA...."¹⁰⁵⁵ The school district had motioned to dismiss based on their claim that the plaintiffs had failed to exhaust their administrative remedies. However, the court rebutted that the issue was about a systemic policy and held that "a hearing officer could not offer a remedy, and therefore it would be futile for them to exhaust their administrative remedies."¹⁰⁵⁶ The court also explained that "the number of claims might not be handled expeditiously and effectively."¹⁰⁵⁷

Since many of the parents filing ABA litigation have attorneys, witnesses, and service providers in common and would therefore have some potential encouragement to pursue class action lawsuits, it may be likely that an increasing number of class action ABA lawsuits are filed. Further, since the prevalence of autism is increasing, parents may identify that they have more power in numbers. Many of the cases reviewed for this study involved cases where systemic problems were alleged to exist. For instance, some parents complained of a lack of ABA service providers available in the district. Other parents argued that the school districts had a blanket

¹⁰⁵² See *supra* Section 4.3.

¹⁰⁵³ *Dong v. Bd. of Educ. of Rochester Cmty. Schs.*, 197 F.3d 793 (6th Cir. 1999).

¹⁰⁵⁴ *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward County*, No. 05-60845-CIV-MARRA/JOHNSON, 2009 U.S. Dist. LEXIS 74288 (S.D. Fla. Aug. 18, 2009).

¹⁰⁵⁵ *S.W. ex rel. J.W. v. Warren*, 528 F. Supp. 2d 282, 294 (S.D.N.Y. 2007).

¹⁰⁵⁶ *Id.* at 295.

¹⁰⁵⁷ *Id.*

policy to not fund ABA based on its expense without taking the individual children's needs into consideration. There were also situations where students were allegedly placed in autism classrooms or private schools by the district without making an individualized determination of LRE. Thus, some of the parents' previous claims may be appropriate for class action treatment and parent advocates may encourage this course of action.

The above key litigation trends are important for legal and educational professionals, researchers, parents, and policy makers to heed. They provide generalizations based on all the published ABA court cases concerning the substantive issue of FAPE. It could be argued that these 39 cases are the most significant cases to concentrate on because they are the most up-to-date cases with precedential value. Further, the data set did not include procedural claims because those are often straight-forward; whereas, substantive claims force courts to apply *Rowley's* vague definition of FAPE to the new genre of ABA cases. Even though *Rowley* was decided approximately thirty years ago, courts continue to struggle with applying *Rowley* to the ever-evolving fact patterns found in special education litigation. Notably, the current researcher forecasts how ABA litigation will advance based on how it has evolved over the past 34 years. These predictions directly inform the second research question of whether autism-centric charter schools provide a feasible solution in decreasing ABA litigation.

In light of these litigation trends, are autism-centric charter schools a legally viable solution to decrease autism-related ABA litigation?

To answer the second research question adequately, the researcher must really answer two inherent questions. First, whether autism-centric charter schools are likely to decrease ABA litigation. Second, whether autism-centric charter schools are a legally viable option. The answer to both of these sub-questions is yes. The analysis for these two conclusions appears below and has been separated by statutory, constitutional, case law, good-for-society, and

rebuttal of counter arguments.¹⁰⁵⁸ The reasoning that explains why ABA litigation is likely to decrease is primarily covered in the good-for-society arguments section while the reasoning why autism-centric charter schools are legally viable is the main focus of the other sections. After all, autism-centric charter schools cannot or should not exist if they are in violation of the law. And if this is the case, it would rendered the possibility of decreasing ABA litigation moot.

Therefore, it is critical to first provide a persuasive argument why autism-centric charter schools are a legally viable option.

Statutory Arguments. Chapters One and Two presented statutory concerns that autism-centric charter schools may be found to be in violation of IDEA's LRE and IEP decision-making requirements. However, after 18 years of the existence of charter schools, no one has filed any published litigation claiming autism-centric charter schools are in violation of any laws. One explanation for the lack of litigation could be related to the fact that autism-centric charter schools have only been in existence in recent years. Thus, it is possible that LRE and IEP decision-making challenges may be ripe to occur in the future, especially considering that a minimum of twenty of these schools existed in 2008.¹⁰⁵⁹

In light of probable lawsuits claiming autism-centric charter schools are in violation of IDEA, two solutions to the challenges exist. First, persuasive arguments can be made to counter LRE and IEP decision-making challenges. The challenge that autism-centric charter schools would not place students in their least restrictive environment can be countered in two ways. First, a general statement such as this cannot be made for *all* children with autism. The case law reviewed for this study stressed the issue of evaluating programming, including placement in

¹⁰⁵⁸ This section incorporates an organizational format to present legal arguments that was designed by Suzanne Eckes and is taught to her students in the classes she teaches at Indiana University (*i.e.*, Statutory, Constitutional, Caselaw, Good-for-society (a.k.a. Policy), and Counter Arguments).

¹⁰⁵⁹ Mead, *supra* note 4.

respect to the individual child. If school districts appeared to be offering a cookie-cutter program or recycling IEP goals used for other students with autism, the courts took serious issue. In particular, while some children with autism who have adequate communication, social, imitation, and attention skills and who are not behaviorally disruptive may be better served in a mainstream regular education class, it is in error to believe that *all* children with autism should be placed in inclusion settings.

Moreover, the current research documented that 62% (24) of the 39 cases included school district proposed placements in self-contained classrooms.¹⁰⁶⁰ Thus, the majority of the children were in restrictive, segregated placements already. Simply because an environment is segregated does not mean it is an ineffective environment for students to learn. Gifted and talented classes are segregated and schools overwhelming track students based on ability level. Traditional and charter schools alike have discovered the benefits of segregating students based on special characteristics.¹⁰⁶¹ Although researchers have identified concerns with charter schools that segregate based on race and ability,¹⁰⁶² courts have not conclusively held that these settings are illegal. If an autism-centric charter school was challenged on the issue of its segregated learning environment, then the claim would be further undermined if the traditional public school placement is also a segregated self-contained classroom.

The second way to refute an LRE challenge made to an autism-centric charter school is by proactively incorporating programs in the schools so that the students with autism are not isolated from typically developing peers. Some autism-centric charter schools already appear to

¹⁰⁶⁰ See *supra* note 4.10.

¹⁰⁶¹ See *supra* Chapter Two.

¹⁰⁶² E.g., Eckes & Trotter, *supra* note 84; Decker et al., *supra* note 15.

be providing their students with interactions with typical peers.¹⁰⁶³ Not only is this strategy an advisable way to avoid legal challenges, but also it is beneficial for all of the students involved. The proponents of inclusion urge that students with disabilities need to interact with typical children so that the typical children are aware and do not fear children with disabilities.

Additionally, proponents explain that children with disabilities need to learn how to socialize and typical peers provide necessary models. The witnesses in many of the current study's cases recommended that students with autism were mainstreamed because they needed to learn how to generalize their skills in typical environments and they needed to improve their social skills. Therefore, there are multiple reasons why it is important to ensure students at autism-centric charter schools have many opportunities to interact with typical peers. Importantly, at autism-centric ABA charter schools where the teacher-to-student ratio is likely to be 1:1, these interactions should be teachable moments and not simply co-existence on a playground where the child with autism may not even attend to the typical peer.

In regards to the statutory challenge that autism-centric charter schools are in violation of IDEA's IEP team-decision-making requirement, autism-centric charter schools in open-enrollment jurisdictions should have no problem refuting this claim. Based on a review of the literature, if the school is located in an open-enrollment jurisdiction for charter schools, then the parents are free to choose any school – traditional or charter – within that jurisdiction. On the other hand, it is possible even in open-enrollment jurisdictions that traditional schools could become interested in keeping their students with disabilities because they want the funding that may attach to the student. However, this has not occurred yet and appears unlikely to occur in the near future.

¹⁰⁶³ E.g., the Ohio Charter School statute requires that autism-centric charter schools also have non-disabled students enrolled at the school.

On the other hand, if the autism-centric charter school is not located in an open-enrollment jurisdiction *and* the state is organized such that the charter school is its own LEA,¹⁰⁶⁴ then the issue of an IEP team-decision-making violation may be more difficult to refute. One potential argument that could be made, however, is the same argument that parents used in the ABA litigation case law in which they unilaterally decide to enroll their children in private schools and then seek reimbursement. Under *Burlington*,¹⁰⁶⁵ a parent simply must show that the traditional school's IEP was not appropriate and that the new placement in the autism-centric charter school is appropriate. In the case law reviewed for this study in which parents prevailed, parents were able to prove this when their child was placed at an ABA private school.

Therefore, depending on the programs at the traditional and charter schools in question, the parents may or may not be able to prove the inadequacy of the traditional school placement and the adequacy of the charter school placement. Importantly, since parents transferring their children to a charter school would not be seeking the expensive private school tuition that the parents in the past litigation were seeking, it is likely that the parents would not have to file these lawsuits because the traditional schools would be content with the student transferring. After all, many of the parents in the cases¹⁰⁶⁶ and ABA litigation researchers¹⁰⁶⁷ criticized that school districts were basing their refusal of ABA based on financial constraints and not because they were truly adverse to this type of intervention.

To bolster these arguments that LRE and IEP challenges are unlikely to occur, students with autism have been classified as difficult and expensive to teach. An unfortunate consequence of this classification is that traditional schools may eagerly support the transfer of

¹⁰⁶⁴ See *supra* Chapter Two for more explanation about LEA assignment.

¹⁰⁶⁵ *Burlington v. Mass. Dept. of Educ.*, 471 U.S. 359 (1985).

¹⁰⁶⁶ *E.g.*, *J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County*, 641 F. Supp. 2d 499 (E.D. Va. 2009).

¹⁰⁶⁷ *E.g.*, Seligmann, *supra* note 9; Weber, *supra* note 468.

students with autism to autism-centric charter schools. Additionally, policy is constantly evolving based on societal change. If society determines that autism-centric charter schools are the appropriate placement for some children with autism, then it is possible that IDEA could be amended to ensure these types of schools are not vulnerable to legal challenges. Similarly, state law could be enacted to allow or even encourage autism-centric schools to exist. Despite the movement toward the federalization of educational policy,¹⁰⁶⁸ states are still considered to hold the primary authority in determining policy for schools.¹⁰⁶⁹ As Mead discovered, two states, Florida and Ohio, have already codified their state law to reflect their approval of autism-centric charter schools.¹⁰⁷⁰ It is possible that additional states will do the same. Thus, autism-centric charter schools are unlikely to lose if faced with federal or state statutory challenges.

Constitutional Arguments. The main constitutional claim against autism-centric charter schools is that they are segregating students and thus not adhering to the Fourteenth Amendment's guarantee for equal protection.¹⁰⁷¹ Yet, as explained in the previous section, autism-centric charter schools could implement practices so that the schools are integrated with typical peers. Also, unlike racial segregation, to treat students differently based on ability, a school only needs a good reason that is "rationally related" to a "legitimate" government interest. Persuasive arguments could be made to support that providing an individualized education for a student with autism that is in a specialized school is rationally related to the legitimate government interest of ensuring individuals with autism are taught and able to learn effectively. The case law indicated that school districts are placing students with autism at private schools

¹⁰⁶⁸ SANDRA J. STEIN, *THE CULTURE OF EDUCATION POLICY* (2004).

¹⁰⁶⁹ THOMAS ET AL., *supra* note 13.

¹⁰⁷⁰ Mead, *supra* note 4.

¹⁰⁷¹ Claims could also arise based on Section 504 violations or violations in light of a state's anti-discrimination admissions requirement in its charter school law.

with segregated environments,¹⁰⁷² as well as being placed primarily in self-contained classrooms.¹⁰⁷³ If this practice has been tolerated and not seen to be discriminatory, then it is doubtful that a court would find an autism-centric charter school's segregated environment problematic due to the legitimate interest in providing an effective education.

Furthermore, only intentional racial segregation or "de jure segregation" has been found to be legally impermissible in public schools; whereas, racial segregation that occurs based on individual choices or "de facto segregation" has withheld judicial scrutiny. Currently, autism-centric charter schools appear to be recruiting only students with autism, but no lawsuits challenging this issue have occurred. If they schools have no policy or practice that forbids students who are not diagnosed with autism to enroll at their schools, then these segregated learning environments could be classified as permissible de facto segregation. However, in light of this, autism-centric charter schools should not advertise that children *must* have a diagnosis of autism as does the website of the autism-centric charter school, the Princeton House.¹⁰⁷⁴ Additionally, challenges could be brought against state laws that allow or foster charter schools that *only* admit students with autism. Since many states have charter school laws that forbid discrimination based on ability level, a law that allows or encourages schools with restrictive admissions policies could be seen as in direct violation of the anti-discrimination provisions.

Also, autism-centric charter schools could be legally required to hold a lottery and it is not implausible that parents of a child with another disability may want the same individualized intervention and enroll their child at these schools. Therefore, it is advisable for autism-centric

¹⁰⁷² County Sch. Bd. of Henrico Co. v. Z.P. *ex rel.* R.P., 399 F.3d 298 (4th Cir. 2005); County Sch. Bd. of Henrico Co. v. R.T., 433 F. Supp. 2d 657 (E.D. Va. 2006).

¹⁰⁷³ See *supra* Section 4.10.

¹⁰⁷⁴ The Princeton House. <http://www.princetonhouse.org/EligibilityRequirements.htm> (last visited September 13, 2009).

charter schools to have curriculum that is not *only* individualized for students with autism, but would be applicable to other students as well.

Case Law Arguments. The issue of whether an autism-centric charter school is legally viable is one of first impression and thus, there are no cases directly on point. Nevertheless, if the issue was pressed, the plaintiffs could use the same case law arguments that were used in the ABA litigation in which the parents/child(ren) prevailed.

Many of the ABA litigation researchers have clarified that if the issue is framed such that it appears to be one of methodological preference, the school district is likely to prevail. Therefore, case law should be applied to frame the issue as one of FAPE. This study did not find that the FAPE standard has been conclusively heightened to a higher level; yet, a plaintiff could argue that it has been or should be. Yell and Drasgow claimed that courts have begun to interpret the FAPE requirement as requiring more than an education that “confers minimal benefit.”¹⁰⁷⁵ They cite two cases from the Third Circuit Court of Appeals in which the court held that a FAPE must “confer *meaningful* educational benefit...and an education that conferred minimal or trivial progress was insufficient.”¹⁰⁷⁶ Yell and Drasgow summarize that a legally compliant FAPE must “provide the student with an educational program that will result in meaningful and measurable advancement toward goals and objectives that are appropriate for the student given his or her ability.”¹⁰⁷⁷ Further, the researchers warn educators that they should track student progress to be able to provide evidence of the required meaningful benefit.

As Weber discovered, there has been one case in which the parents successfully argued that without ABA intervention their child would be denied a LRE because he would not have the

¹⁰⁷⁵ Yell & Drasgow, *supra* note 21.

¹⁰⁷⁶ *Id.*

¹⁰⁷⁷ *Id.*

prerequisite skills to be mainstreamed.¹⁰⁷⁸ Thus, plaintiffs could attempt a similar argument and explain that the goal is to ultimately mainstream the child into a non-autism-centric charter school. Yet, by approving placement at the specialized school, the student will receive the needed services so that s/he can ultimately be placed in an inclusive environment. Bon and Yell and Drasgow illustrated in their articles that a circuit split exists over which test should be applied to determine LRE. Yell and Drasgow stated that the U.S. Supreme Court is unlikely to review a LRE case. Thus, without more guidance about LRE from the Supreme Court, plaintiffs may have more success using an LRE-based argument than a FAPE argument because the FAPE argument did not result in favorable results for the majority of the parents/child(ren) in the cases reviewed for this study. Additionally, only one case in the data set attempted to use an LRE argument and the parents/child of that case prevailed.

Good-for-society Arguments. The current study found that parents have prevailed in only 26% of the ABA cases filed since IDEA was enacted. Nevertheless, they have continuously filed lawsuits and have done so across the nation. Even though it is evident that public schools have altered their practice and are providing more ABA intervention, parents remain unsatisfied and are bringing an increasing number of cases in which they are discontent with the level or intensity of the ABA. Based on these findings, it does not appear that parents are going to cease or diminish their attempts to require public schools to fund ABA intervention. Additionally, despite the fact that school districts have prevailed more than parents, they have not conclusively prevailed and parents have begun to prevail in more cases recently. Thus, ABA litigation is likely to remain to be a controversial, expensive, and potentially an area of special education litigation that is increasing in prevalence. This study has demonstrated that school districts

¹⁰⁷⁸ Weber, *supra* note 468.

should not be confident that they will prevail if a parent files a due process hearing seeking ABA intervention. Regardless of who prevails, school districts and parents should be prepared to endure years of expensive, emotionally-draining litigation that is likely to leave the two parties as bitter adversaries. The lawsuit is also likely to shift the focus away from the child's educational needs and onto the all-consuming litigation.

In light of the likelihood that ABA litigation will continue and considering its many negative side effects, it seems prudent to seek a way to reduce this litigation from ensuing. One option that is likely to successfully reduce ABA litigation is the creation of autism-centric charter schools that provide ABA intervention. Specifically, since the majority of the ABA lawsuits were brought on behalf of young children, if autism-centric charter schools are created especially for preschoolers through first-graders, then these parents may be more satisfied and less likely to file claims against school districts. Further, this study identified that courts have been receptive to class action lawsuits brought by parents. Autism-centric charter schools could use this strand of case law to identify the parental support for ABA programming and the risk of not providing it. School districts would want to avoid class action lawsuits whenever possible.

Therefore, by providing parents with an option where ABA is offered at public expense, they are likely to reduce the amount of litigation parents file. Without autism-centric charter schools, some parents are likely to feel powerless in truly ensuring their child receives an education that teaches him/her to communicate and eventually live more independently.

Numerous ABA private schools exist for children with autism, as do expensive home programs. Parents who are aware of these options but cannot afford them, may feel a heightened level of injustice which could serve as the motivation to file suit. Yet, by providing parents with more choices, they are likely to feel empowered and not fear what their child's future will entail.

ABA litigation may be fueled by fear, anxiety, and anger. By increasing parents' confidence that their children will be educated at a level that they desire, parents are less likely to have any reason to be involved in litigation.

The time is ripe for public education to provide this type of intervention at no cost. The cases reviewed illustrated that many school districts and courts do not dispute that ABA methodology is an appropriate methodology for some children with autism. School districts were already providing some form of ABA in approximately one-third of the cases, and a different third of the school districts had funded ABA in the past but had recently reduced or removed the funding for it. Apart from the case law, there has been an increase in the advocacy that ABA can be provided effectively in the public school environment. Leaf authored a book providing guidance how schools can effectively implement this type of treatment within the public school setting.¹⁰⁷⁹ The misconception that ABA intervention is simply a home-based, strict, and rigid methodology that fails to generalize students' skills and causes students to be prompt-dependent appears to be diminishing. Instead, public school educators have begun to embrace this type of intervention and some have incorporated it in their classrooms.

In addition, the case law revealed that educators and judges were swayed, and at times, clearly impressed with the progress the children had made as a result of ABA intervention as well as respectful of the empirical research and expert witness support for ABA. The primary reason schools and courts did not approve ABA intervention being provided to the child was simply because under the law -- in particular, under *Rowley's* standard that children are not entitled to the *best* education -- schools do not have to. Yet, if the legal standard is removed from the equation and school personnel and courts who are likely compassionate people wanting

¹⁰⁷⁹ LEAF ET AL., *supra* note 59.

what is best for children, are asked *should* ABA intervention be provided to some children with autism, then the probable response is that yes, educators and judges would agree that ABA *should* be provided for some children with autism.

Essentially, the notion that public educators should not strive for the best education simply because they are not legally required is unjust and unwise. Further, it works against economical interests. As research documents that lifelong care for individuals with autism can cost society up to 3.2 million dollars,¹⁰⁸⁰ it is imperative for educators to prioritize the education of the ever-growing population of children with autism so that they may develop the skills required to participate in rather than depend on society once they become adults. When empirically-validated intervention documents effective treatment for students with autism, public education must provide this type of intervention to appropriately fulfill its responsibilities to both the individual and to society. The cases reviewed for this study often discussed that ABA was a scientifically-supported and effective treatment option for students with autism; however, sometimes the schools were unable to provide empirical support for their program. Thus, autism-centric charter schools are not only a legally viable, but also a socially responsible solution to reduce ABA litigation.

Rebutting Counter-arguments. Those who are skeptical that autism-centric charter schools can reduce ABA litigation may point to the past litigation in which schools had provided some level of ABA, yet parents requested more. The skeptics may contend that parents will continue to make demands through litigation even if autism-centric charter schools provide ABA intervention. While it is possible that some level of ABA litigation may ensue, it is extremely unlikely that the majority of parents will be unsatisfied with a full-time school placement that is

¹⁰⁸⁰ Ganz, *supra* note 25.

providing ABA. First, the parents have *chosen* to enroll their child at this setting. Second, unlike the implementation ABA litigation, the autism-centric ABA charter schools do not provide a mere 10 hours of ABA intervention; rather, the children would be receiving ABA intervention the entire time they are at school.

Other critics of autism-centric charter schools may concede that they sound ideal, but are too expensive to be a practical solution in reducing ABA litigation, especially considering the limited budgets in public schools today. This argument is quite persuasive; ABA intervention is expensive. At the same time, other types of specialized charter schools are also likely to require increased funding to support their missions. For instance, some charter schools provide longer hours and Saturday school¹⁰⁸¹ and other charter schools provide mental health treatment for adolescents addicted to drugs and alcohol.¹⁰⁸² Therefore, finding supplemental funding for the expenses needed is not impossible. Further, at least 20 autism-centric charter schools are already in existence.¹⁰⁸³ Unlike traditional public schools, charter schools are often successful at garnishing private donations and working with the private sector. With the amount of increased media attention and advocacy in support of autism, it is plausible that autism-centric charter schools could prosper despite their expense. It is also appealing that they could reduce costs from the financially under-resourced traditional public schools by educating some of the more expensive students. There could be financial incentives that may make it more efficient to educate students with autism under one roof too, such having resources in one location instead of spread across a district of school buildings.

¹⁰⁸¹ *E.g.*, Knowledge is Power Program charter schools, <http://www.kipp.org/> (last visited Aug. 5, 2010).

¹⁰⁸² *E.g.*, The Hope Academy, <http://www.fairbanksd.org/highschool.htm> (last visited July 24, 2010).

¹⁰⁸³ Mead, *supra* note 4.

A final counter-argument that can be refuted is that there is no evidence that autism-centric charter schools have actually decreased ABA litigation. It is true that no studies have measured whether school districts located in areas where autism-centric charter schools are prevalent have noticed a decrease in ABA litigation. Yet, one documented fact from the current study is that no cases in the data set originated from Ohio and only two originated from Florida. These are the two states that Mead identified as having the highest number of autism-centric charter schools.¹⁰⁸⁴ Therefore, based on this limited information, it appears that decreased ABA litigation is occurring in states that have autism-centric charter schools.

In response to the second research question, statutory, constitutional, case law, and good-for-society arguments were made based on the findings from the current study. It was determined that not only are autism-centric charter schools likely to decrease ABA litigation; but also, they are a legally viable option.

5.3 Comparing Current Findings to Past Research

This chapter concludes with a comparison of the methodologies and findings of the current study with the past research.¹⁰⁸⁵ The researcher also explains why the current study contributes to the current body of research about ABA litigation and special education at charter schools.

Main methodological differences

To begin, a stark methodological difference was that the current study did not combine the administrative decisions with the judicial cases as conducted by Zirkel,¹⁰⁸⁶ Yell,¹⁰⁸⁷ Yell and

¹⁰⁸⁴ *Id.*

¹⁰⁸⁵ See Appendix A., for a table comparing all the research.

¹⁰⁸⁶ Zirkel, *supra* note 28.

¹⁰⁸⁷ *Developing Legally Correct Developing Legally Correct*, *supra* note 143.

Drasgow,¹⁰⁸⁸ Etscheidt,¹⁰⁸⁹ and Choutka et al.¹⁰⁹⁰ Additionally, Zirkel based his findings on rulings rather than cases. Thus, he analyzed 450 issue rulings and 383 relief rulings which came from 290 cases. Yell et al. included OCR and OSEP letters, but neither the current study nor any of the previous studies examined these.

The sample size of the current study was dissimilar and less specific than that of Zirkel, Yell et al., Yell and Drasgow, Nelson and Huefner,¹⁰⁹¹ Etscheidt, and Choutka et al. Specifically, the current study based its results on a much smaller sample size that included only a small portion of the targeted cases that were included in most of the previous studies.¹⁰⁹² However, Nelson and Huefner, Seligmann, and Weber had smaller sample sizes than the current study. The reasons for the differences in sample sizes was because this study had a much more specific requirement for the cases that were included in its data set (*i.e.*, published ABA autism litigation focused on substantive issues).

None of the ABA/autism litigation studies have reviewed the same chronological sample. Because the studies occurred at different times, some of the cases were likely overruled and thus, the findings changed. Additionally, IDEA and its regulations were amended over the years, which would also affect how the case law was decided by the courts.

The primary audience for the studies conducted by Zirkel, Yell et al., Yell and Drasgow, Nelson and Huefner, Etscheidt, and Choutka et al. was educational and the primary audience for Seligmann and Weber's research was legal; whereas, the current study is geared to both an educational *and* legal audience.

¹⁰⁸⁸ *Litigating a Free*, *supra* note 468.

¹⁰⁸⁹ Etscheidt, *supra* note 21.

¹⁰⁹⁰ Choutka et al., *supra* note 21.

¹⁰⁹¹ Nelson & Huefner, *supra* note 594.

¹⁰⁹² E.g., Etscheidt, *supra* note 21; Yell et al., *supra* note 143; Zirkel, *supra* note 28.

Due to these methodological differences, the findings cannot be compared against one another. Such a comparison would be analogous to comparing apples to oranges.

Main methodological similarities

Turning to the methodological similarities, this study replicated the same Likert-scale outcome codes used in two previous studies conducted by Zirkel and Choutka et al. Similar to Nelson and Huefner, Seligmann, and Weber, the current study examined judicial and not administrative opinions. This study replicated Choutka et al.'s disaggregation of program versus implementation.

Main differences in findings

As for the differences in the findings amongst the studies, Zirkel discussed that overall the outcomes “slightly favored school districts” when he reviewed 209 autism cases and administrative decisions; Yell and Drasgow determined parents prevailed in 76% (34) of the 45 cases and administrative decisions they reviewed; Nelson and Huefner found school districts prevailed in 79% (15) of the cases they reviewed; Etscheidt found school districts prevailed in 57% (39) of the cases and administrative decisions she reviewed; Choutka et al. determined that school districts prevailed in 44% (30), parents/child(ren) prevailed in 49% (33) of the cases, and 7% (5) cases were inconclusive; Seligmann concluded the school districts are primarily prevailing when the issue is framed as one of methodology; Weber identified that a strong trend has emerged where parents are prevailing recently; and the current study found the school districts prevailed in 61% (24) of the cases, the parents/child(ren) prevailed in 26% (10) of the cases, and 13% (5) of the cases were inconclusive.

Chouta et al. discovered that 63% (43) of the cases focused on program selection; whereas the current study found 31% (12) were program cases.

Some of the previous studies¹⁰⁹³ concluded that frequency of autism cases had increased sharply in recent years; yet, the current study found that when disaggregating the cases based on four year cycles, the amount of litigation has remained fairly constant from 1998-2009.

Zirkel concluded that the only region that appeared to favor the districts in the administrative and court forum was the Second Circuit region; whereas, the Third Circuit region appeared most favorable to parents. Although, the current study also found that the Second Circuit appeared to be most favorable to the districts, it found that the Fourth Circuit appeared to be most favorable to the parents/child(ren). Yet, the current study resisted making any conclusions on this data because the number of cases originating from each circuit jurisdiction varied.

Yell et al. claims “there is nothing unusual or special about the ASD litigation. It is like all IDEA-related litigation – school districts lose when they fail to follow the fundamental requirements of IDEA.”¹⁰⁹⁴ Yet, the current study classifies the ASD litigation involving ABA to be unique. It is more than simply adhering to IDEA requirements; courts appeared to struggle with how to determine whether a school had provided a FAPE.

Nelson and Huefner were concerned that IDEA’s 1997 amendments and its corresponding regulations may shift the focus more toward methodology when considering whether a child’s education is appropriate. They concluded that courts are increasingly requiring school districts to provide justification for their teaching methods. However, the current study did not determine that the 1997 amendments caused more importance to be placed on methodology and did not find the amendments or their regulations to have appeared in any of the case law. Additionally, the current researcher did not conclude that districts must provide

¹⁰⁹³ E.g., Yell et al., *supra* note 143; Zirkel, *supra* note 28.

¹⁰⁹⁴ Yell et al., *supra* note 143, at 187.

justifications for their methods. Instead, the courts appeared more focused on the language of the IEP and the credibility of the witnesses.

Etscheidt identified the district court and administrative decisions occurred in 28 states and the circuit court of appeals cases occurred in five circuits.¹⁰⁹⁵ Whereas, the current study identified the district court and court of appeals cases originated in 21 states and the court of appeals cases occurred in seven circuits.

Etscheidt determined that 60% (38) of the 63 students involved in the cases were of preschool age, 35% (22) of elementary school age, 3% (2) of middle school age, and one (2%) of high school age;¹⁰⁹⁶ whereas, the current researcher determined that 46% (21) of the students involved in the cases were of preschool age, 51% (21) of them were elementary school age, 4% (2) of middle school age, and none of the students were high school age.¹⁰⁹⁷

Main similarities in findings

Turning to the similarities amongst the findings, Choutka et al. and the current study determined some of the cases were inconclusive. The current study echoes Yell and Drasgow's conclusion that ABA methodology cases, "clearly involve much more than questions of educational methodology. In fact, they involve determining the essence of a FAPE because they directly address the meaning of 'educational benefit.'"¹⁰⁹⁸

5.4 The Current Study's Contribution to the Literature

Educators, parents, attorneys, judges, researchers, and policy makers are likely to notice the value of the current study's analysis in light of the past research findings. They will notice

¹⁰⁹⁵ Etscheidt, *supra* note 21, at 53.

¹⁰⁹⁶ *Id.*

¹⁰⁹⁷ The results from Chapter 4 were recalculated to mirror the categories Etscheidt employed. Sixth and seventh graders were considered to be in middle school.

¹⁰⁹⁸ *Litigating a Free*, *supra* note 468, at 207.

that some of the current findings contradict past findings; whereas, other findings from this study confirm generalizations made by other researchers. The current study offers a fresh perspective and provides novel findings while also helping to decipher any universal conclusions that can be made about ABA litigation. The researcher carefully chose a research design that takes important legal constraints such as precedent and jurisdiction into consideration. Further, the researcher collected an in-depth detail about the cases that was aggregated and disaggregated on many dimensions. Overall, the study is the most comprehensive ABA litigation research in existence.

In addition, the analysis of the research was not merely one-dimensional as past research had been. It did not simply examine which party prevailed in the cases, nor did it provide only a narrow analysis about ABA litigation. Instead, the researcher went one step beyond what other researchers have done and applied the data to the current educational reform movement of charter schools.

In the end, the researcher was able to make a positive finding about special education and charter schools. As mentioned in Chapter Two, the research on this subject thus far has emphasized the many problems that charter schools face when attempting to serve students with disabilities. The overarching theme in the past special education literature about charter schools is that they are failing to follow the law and properly educate special education students. But, the current study takes a completely different approach. It identified that charter schools may actually positively affect the education of students with disabilities. In particular, the creation of autism-centric charter schools may decrease ABA litigation while potentially providing a superior education for students than they may have received in the traditional public schools.

Undoubtedly, the current study contributes to the current body of research about ABA litigation and special education at charter schools.

CHAPTER SIX: AVENUES FOR FUTURE RESEARCH AND RECOMMENDATIONS FOR PRACTICE AND POLICY

While this study provides insights about the trends in ABA litigation and whether autism-centric charter schools may be one solution to reduce ABA litigation, it still leaves many questions unanswered. This section provides an overview of potential avenues for future research. After that discussion, the researcher provides practical and policy recommendations based on the findings of this study.

6.1 Avenues for Future Research

Studies about autism-centric charter schools with more of a qualitative focus

First, as mentioned previously, this study did not uncover why autism-centric charter schools have emerged or whether they have actually reduced ABA litigation in the surrounding areas. The current study was limited because it did not include accounts from individuals like policy makers, parents, administrators, and educators who may have insights about autism-centric charter schools. Future researchers may wish focus more on qualitative techniques and ask questions such as:

- Why do parents enroll their children at these schools?
- From what type of education (e.g., private, public, or home-based) do students at autism-centric charter schools come?
- How many exist currently?
- Where are they located?
- Who created them?
- How many autism-centric charter schools are providing ABA intervention?
- Are autism-centric charter school operators aware of potential legal vulnerabilities and if so, what are they doing to reduce their liability?
- How do the school leaders and teachers from traditional schools feel about students who transfer to autism-centric charter schools?
- Is there less ABA litigation in areas where autism-centric ABA charter schools exist?
- How do parents feel about the education that their children are receiving at autism-centric charter schools in comparison to the education received at their children's previous schools?

Studies examining the enactment of and consequences of the Florida and Ohio statutes relating to autism-centric charter schools

Second, this study identified that there appears to be something unique occurring in Florida and Ohio because they have state laws that foster the creation of autism-centric charter schools. These states' policies warrant more investigation. Future researchers may wish to ask:

- Why were these laws enacted and by whom?
- What was the legal and cultural context and to what extent did it influence the development of these statutes?
- What effect have these laws had on educating students with autism in these states?

Research investigating ABA intervention provided by traditional schools

An unforeseen consequence of studying the trends in ABA litigation was to discover that many of the schools were already providing some sort of ABA intervention. Thus, although parents have not prevailed more often than school districts, parents and others may have influenced a significant change in the practice of special education in which ABA is being implemented in public school environments. Future study of this topic may wish to ask:

- Has there been an increase of ABA intervention provided by traditional schools?
- Why have traditional public schools begun to provide ABA intervention?
- Who is providing ABA at traditional schools and what are their backgrounds?
- How has providing ABA at traditional schools affected the academic achievement of students with autism?
- Are parents, teachers, and school leaders satisfied with the ABA intervention at traditional schools?
- To what extent has the provision of ABA through traditional public schools affected ABA litigation?

Use of empirical data to determine the effectiveness of autism-centric charter schools

In recent years, a focus in educational policy has been on accountability of student achievement. Therefore, it follows that student achievement data should be reviewed in order to determine whether fostering autism-centric charter schools is a positive policy goal. Researchers may want to study a sample of students with autism who first attend a traditional school setting

and then attend an autism-centric charter school to measure if there is a change in their progress at the charter school. Qualitative studies could also compare and contrast the type of education received at the two settings.

Replication of the current study with a few alterations

Finally, one difficulty in comparing all the past studies to one another and to the current research is that even though many of them focus on ABA litigation, they all have different sub-foci. This research should be replicated to measure its validity. Moreover, future ABA litigation research should try to mirror past research to some extent so that the findings are comparable to other research. Future researchers may consider conducting a similar study, but may wish to expand the data set by including non-published court cases and possibly administrative hearings that focus on substantive issues and ABA litigation. Additionally, a future researcher may wish to hone in on the various ways that the courts defined a FAPE. After targeting this issue, the researcher could then recommend a legal test that is more descriptive and perhaps better suited for ABA litigation than the *Rowley* standard.

6.2 Recommendations for Practice

Because this study was written with both an education and legal audience in mind, the following recommendations for practice are presented in two sections. The first section provides recommendations for legal practitioners such as attorneys and judges. The second section offers guidance for individuals responsible for educating children including school administrators, teachers, paraprofessionals, consultants, service providers, and parents.

Legal Practitioners

Focus on implementation of the IEP. To prevail in ABA methodology cases, it may be beneficial for the school district attorneys to not only demonstrate that the IEP as written on

paper was appropriate, but also, that the school's methods and instructors were effective such that the child would reasonably reach the IEP goals. On the other hand, attorneys representing the parents/child(ren) may want to emphasize that although the IEP on paper appears to be appropriate, the school's methods and instructors are unlikely to allow the child to reach the goals in the IEP. In sum, both attorneys should consider not only the IEP, but the *implementation* of the IEP.

Frame the issue wisely. To prevail in ABA methodology cases, the school district's attorney may attempt to frame the issue as one of preference in methodology. It has long been established that schools have the authority to make decisions about curriculum and instruction,¹⁰⁹⁹ or stated differently, about methodology. Conversely, parents/children's attorneys should shy away from a dispute in methodology. Parents cannot dictate what the public schools teach their children;¹¹⁰⁰ however, parents of children with disabilities are provided more of a voice because of IDEA's parental participation requirements. How much voice parents have remains to be decided on a case-by-case basis. Therefore, attorneys representing parents/child(ren) may attempt to frame the issue as 1) whether the child was provided a FAPE or 2) whether providing ABA is required so that the child can be educated in the least restrictive environment.¹¹⁰¹

Be cautious when citing empirical research that supports your client's position. Nelson and Huefner recommended that "programs for children with autism should reflect current, empirically validated research" and the current researcher agrees.¹¹⁰² However, courts were inconsistent in the extent to which they valued empirical findings. Some courts were swayed by empirical research that supported a school district's use of TEACCH; yet, other courts

¹⁰⁹⁹ THOMAS ET AL., *supra* note 13, at 80.

¹¹⁰⁰ *Id.* at 81-82.

¹¹⁰¹ See Weber, *supra* note 468.

¹¹⁰² Nelson & Huefner, *supra* note 594, at 16. Etscheidt also provided a similar recommendation.

discounted ABA empirical research provided by parents/child(ren). For example in one case,¹¹⁰³ the district court reasoned that because the child's home ABA program was not identical to the experimental design in the Lovaas research, that the research was not influential as to whether the child would progress. Overall, the judiciary seems to avoid evaluating empirical studies and appears more comfortable judging the competence of witnesses.

Take advantage of alternative dispute resolution. It was evident in a couple of the cases reviewed for this study that the parents and school authorities had a relationship that was damaged beyond repair. For example, one court criticized the damaged relationship for interfering with the child's opportunity to learn. The court stated that the "perceived lack of candor, miscommunication, and mistrust exacerbated a disabled child's already difficult struggle to learn. Resolutions of the motions before the court today will not change that reality."¹¹⁰⁴ Seligmann also identified that school districts and parents should not treat each other "as an enemy."¹¹⁰⁵ In *Tyler v. Northwest Independent School District*, it appeared that the attorney's clients could have been better served through an alternative dispute resolution proceeding because the court was clearly unimpressed with the attorney. The court stated, "[the] hearing officer bent over backwards to accommodate plaintiff's lead counsel....because of [the attorney's] conduct, the proceedings took twice as long as they should have....Plaintiff's lead counsel was obstreperous, argumentative, and frequently mischaracterized testimony."¹¹⁰⁶ Another court ordered the parties to mediation.¹¹⁰⁷

¹¹⁰³ Deal v. Hamilton County Dept. of Educ., 258 Fed. App'x 863 (6th Cir. 2008).

¹¹⁰⁴ Wagner v. Bd. of Educ. of Montgomery County, 340 F. Supp. 2d 603, 610 (D. Md. 2004).

¹¹⁰⁵ *Id.*

¹¹⁰⁶ Tyler W. v. Nw. Indep. Sch. Dist., 202 F. Supp. 2d 557, 562 (N.D. Tex. 2002).

¹¹⁰⁷ Pitchford *ex rel.* M. v. Salem-Keizer Sch. Dist., 155 F. Supp. 2d 1213 (9th Cir. 2001).

Thus, one way to prevent damaging parent-school relationships further is by advising your clients to take advantage of alternative dispute resolution options such as facilitation, resolution sessions, arbitration, and mediation. These alternatives should be entered into with an open-mind and willingness to compromise. The current researcher wholeheartedly agrees with Zirkel that parties should attempt to resolve the dispute early instead of devoting limited resources to litigation.¹¹⁰⁸ Although the relief awarded was often described in the cases, the potential damage to the relationships between the schools and parents and the potential damage to the child's education while the lawsuit ensued was not detailed and is hard to quantify. However, these costs are endured by all the parties involved, including the student. Advocates for both sides should consider the merit of settling cases when something as precious as a child's education is at stake. Time spent on litigation is time usually spent focused away from the child's needs.

Gather data and prepare witnesses. The current researcher agrees with Choutka et al. that to prevail, attorneys for parents/children and school districts should provide convincing evidence that their programs are effective and ensure their experts are competent. Sometimes the courts were unable to distinguish whether the school or parents' programs were responsible for the student's progress because both programs were occurring simultaneously. Therefore, when attempting to demonstrate progress or lack thereof, it may be prudent to ensure only one intervention is occurring. Many of the cases were brought by parents as soon as they refused to sign the school district's proposed IEP. However, it may be of some value for the parents/child(ren)'s attorney to advise his/her client to move forward with the school district's program and cease ABA intervention in order to document that the child either regressed or

¹¹⁰⁸ Zirkel, *supra* note 28.

failed to make adequate progress. Similarly, attorneys for school districts should advise their clients to collect data at the same vigor that ABA practitioners collect. Videotaped evidence is likely to gather important details that written data may not provide. Further, advocates for both parties should spend time preparing their witnesses and ensure their witnesses know the child. Some courts diminished the value of witnesses who had not spent ample time with the child or were unable to answer questions about their program in a knowledgeable manner.

Judges can also influence ABA litigation. Courts have been universally applying *Rowley* to ABA cases; however, as recommended by Seligmann, “better standards than those gleaned from *Rowley* may be needed.”¹¹⁰⁹ She criticized that neither the *Rowley* Court nor any subsequent court “has offered a rubric for a court to assess the soundness of an approach.”¹¹¹⁰ The current researcher identified that one court attempted to create such a rubric. It suggested a way to determine educational soundness of an approach would be to analyze whether

- a) the school district can articulate its rationale or explain the specific benefits of using that approach in light of the particular disabilities of the child;
- b) the teachers and special educators involved in implementing that approach have the necessary experience and expertise to do so successfully; and
- c) there are qualified experts in the educational community who consider the school district's approach to be at least adequate under the circumstances.¹¹¹¹

There was no evidence in the subsequent court decisions that this rubric had been applied; however, it is a start. Seligmann also warned that appellate courts should not offer too much deference to the school authorities or administrative decisions. She stated,

Hazards lie in allowing deference to turn to blind acceptance. Too much deference an insufficient scrutiny of the soundness of a school's proposal...can encourage school district decisions based more on considerations of money and expedience than on appropriateness to the individual child's needs.¹¹¹²

¹¹⁰⁹ *Id.* at 254.

¹¹¹⁰ *Id.* at 283.

¹¹¹¹ J.P. *ex rel.* Popson v. W. Clark Cmty. Schs., 230 F. Supp. 2d 910, 936 (S.D. Ind. 2002).

¹¹¹² *Id.* at 220-21.

After reviewing the cases in the current study, Seligmann's recommendations about what judges can do to influence ABA litigation appear to be sensible. Courts should work toward developing a legal test to apply to the ABA litigation fact patterns that determines whether the school's program is likely to confer educational benefit in light of the parents' request for ABA intervention and courts should be cautious about the amount of deference they offer to school and administrative court decisions.

Individuals Responsible for Educating Children

Avoid being too rigid and uncooperative. Instead of getting stuck on differences in methodologies based on assumptions of what the methodology entails and how much it may cost, individuals responsible for educating children should be open-minded. Ultimately, they should be concerned about how to develop an effective intervention for each individual child with autism based on that individual child's needs. Parents and educators should strive to not become polarized in their positions for what they think is best, but instead, should be willing to incorporate others' recommendations at least temporarily to document whether it was effective in teaching the child. By remaining open-minded and willing to compromise, they may discover that they learn from one another and the child's education will benefit from the multiple perspectives.

Yet, if the school personnel choose to provide an 'eclectic approach' after the parents have documented that the child learns more efficiently through an ABA approach, it does not necessarily follow that the IEP team should adhere to the eclectic approach. What the IEP team should strive to do is find what type of intervention or interventions are most effective in teaching the individual child. Instead of relying on anecdotal recommendations, those teaching the child should take ample and systematic data to measure the child's acquisition.

Educators and parents alike may be reluctant to incorporate a type of intervention because it is new, requires them to change their practice, or not their idea. However, none of these reasons are child-focused. Understandably, well-intentioned parents and educators may have strong differences in opinion. As Nelson and Huefner stated, “The dilemmas presented by the [ABA litigation] defy simple answers. It is critical that the issues not be seen as a win-lose dichotomy. Solutions do not lie in teaching agencies how to develop ‘bullet proof’ programs or teaching parents how to sue school districts successfully.”¹¹¹³ Nelson and Huefner were astute to advise schools to not define “educational benefit” as the barest minimum; whereas, parents should not mistake “‘cookie cutter’ programs, however intensive or expensive,”¹¹¹⁴ as the only solution for the complexity of autism.

Seek the advice of experts and ensure competent practitioners are teaching children with autism. Individuals who educate children with autism should not wait until litigation is inevitable to seek the advice of experts. Schools should employ educators who are truly experts in autism and who are willing to adopt intervention strategies that have been validated by research as opposed to implementing programs simply because a program is what they know. What remains tricky to assess, however, is whether educators are truly knowledgeable and skilled. For instance, it seems problematic that school personnel could attend a one-day conference about ABA intervention and then claim that they are competent at providing ABA intervention. Similarly, parents may claim that TEACCH is absolutely inappropriate for their child without truly understanding or observing this type of program. Thus, certain criteria should be promulgated that educators teaching students with autism should embody. Parents should

¹¹¹³ Nelson & Huefner, *supra* note 594, at 17.

¹¹¹⁴ *Id.*

also have information about a variety of effective interventions made available to them so that they can become a knowledgeable IEP team member too.

6.3 Recommendations for Policy

The existence of ABA litigation may be a symptom that policy needs to be amended. Past researchers have advised parents and school districts how to win;¹¹¹⁵ yet, the focus should not necessarily be about prevailing in litigation. An alternative approach is to consider how policy can be changed so that the reasons parents file lawsuits are nullified.

Ways to Reduce ABA Litigation

ABA litigation may be reduced if parents are provided with more educational choice.

Lawsuits were filed by parents because they were discontent with the school's proposal for educating their child. However, it is likely that if parents are provided with more than one option for their children and thus have more freedom to choose, then they will be less likely to file lawsuits against schools. Wealthy parents have had this option to enroll their children in a wide variety of private schools for years. This study did not identify any parents of children with autism enrolled at private schools who were unhappy. Yet, it is injudicious for educational policy to only offer choice to wealthy parents. Choice in a variety of educational opportunities should be available to all children no matter the socio-economic-status of their parents. By increasing parental choice and thus providing more educational opportunities for children, it is likely that litigation involving public schools will decrease.

ABA litigation may be reduced if efforts are increased to reduce the polarization and lack of cooperation between schools and parents of children with autism. As was explained in the previous section, the child is often the injured party when parents and schools become

¹¹¹⁵ E.g., Choutka et al., *supra* note 21.

adversarial parties. Policy should prioritize preventing damaged relationships between parents of special education students and schools. Fostering positive communication and cooperation is one way to attempt to decrease ABA litigation from ensuing.

Ways to Amend IDEA

The following are recommendations about how IDEA could be amended so that ABA litigation may be reduced.

Protect autism-centric charter schools from LRE and IEP team-decision-making legal challenges. If charter schools are a reform movement to allow certain states to create and evaluate innovative solutions to education issues in public schools, then it follows that autism-centric charter schools should be allowed to exist without fearing they are in violation of IDEA. While IDEA's LRE and IEP team-decision-making requirements have valid purposes, it may be beneficial to insert language in IDEA that explains that it is a rebuttable assumption that if parents choose to exercise their right to transfer their child to a charter school, it is not a violation of LRE or IEP team-decision-making requirements under IDEA.

Recognize not only the needs of students with different disabilities, but also the needs of different students who have the same disability. In other words, the educational needs of all students with disabilities are not alike. A student with a physical disability or Down's Syndrome may drastically benefit from an inclusive educational setting. Yet, a student with autism may not have the communication and social skills to benefit from an inclusive setting in the same way. Moreover, the regular educators may lack the specialized teaching skills necessary to appropriately teach students of all disabilities. Thus, there should be exceptions written into IDEA so that all students with disabilities are not grouped together. Alternatively, IDEA could

have subsections that address the individual needs of individual disability groupings while also allowing for individualized treatment for particular children.

Include ABA as a recognized related service. Speech, physical, and occupational therapy are identified as related services. IDEA has recently included language about Functional Behavioral Assessments (FBAs) and Behavioral Intervention Plans (BIPs).¹¹¹⁶ It is time that this federal legislation recognizes the prevalence and legitimacy of ABA which provides the theory behind FBAs and BIPs.

Increase funding for intensive early intervention for autism. Seligmann and Weber both discussed that the “elephant in the room”¹¹¹⁷ is how expensive ABA intervention is.¹¹¹⁸ Because of this cost issue, Weber recommended that Congress should create a funding stream for intensive services for autism. He argued when school districts determine whether ABA is appropriate, “cost should be taken off the table.”¹¹¹⁹ With the lack of funding provided to school districts to provide special education, it is no wonder that schools resist funding ABA programs. Funding one child’s program could essentially bankrupt their annual budget. Nevertheless, the more years a child has where s/he cannot communicate or learn effectively, the more difficult that child will become to teach. If left without an effective education, that child will become an adult who may be aggressive because s/he cannot communicate and may require constant care. Thus, resources should be prioritized to ensure these children are effectively educated as preschoolers. After all it was the parents of preschoolers, kindergarteners, and first graders who were filing the most ABA litigation. To reduce their discontent with the services provided, more funding needs to be streamlined to early intervention services for children with autism.

¹¹¹⁶ 20 U.S.C. § 1415(k)(1)(F) (2004).

¹¹¹⁷ Seligmann, *supra* note 9.

¹¹¹⁸ Weber, *supra* note 468, at 50.

¹¹¹⁹ *Id.* at 51

6.4 Conclusion

Hopefully, this study's findings, analysis and recommendations will fill in some gaps that exist in the literature about ABA litigation and autism-centric charter schools. The researcher began the study doubtful that autism-centric charter schools were a legally viable option. She also assumed that ABA litigation had skyrocketed. Although a thorough inquiry into the relevant literature and 39 published ABA cases taught her that her initial inclinations were incorrect, the researcher is optimistic that autism-centric charter schools may in fact be a legally viable solution to decrease ABA litigation.

APPENDIX A: COMPARISON OF PAST ABA LITIGATION RESEARCH TO CURRENT STUDY

Study →	Zirkel (2002)	Yell et al. (2003)	Yell & Drasgow (2000)	Nelson & Huefner (2003)	Etscheidt (2003)	Choutka, Doloughty, & Zirkel (2004)	Seligmann (2005)	Weber (2006)	CURRENT STUDY: Decker (2010)
Total cases reviewed	290 ⁱ	254	45	19	68	68	31 ⁱⁱ	14 ⁱⁱⁱ	39
Total OCR letters reviewed	0	10 OCR letters, 5 OSEP letters	0	0	0	0	0	0	0
Topic of data set	autism cases	autism cases	ABA cases	ABA cases	Autism methodology cases	ABA cases	ABA cases	ABA cases	Substantive ABA cases
Source of data set	IDELR & EHLR	IDELR	<i>IDELR</i>	Lexis-Nexis	LRP Education Research Library	<i>IDELR</i>	Not specified	Not specified	Westlaw & Lexis-Nexis
Years	1978-2000	1990-2002	1993-1998	1997-2002	1997-2002	1978-2001	Not specified, but before 2005	Not specified, but before 2006	1975-2009
Federal cases (#)	Yes	Yes	Yes	Yes	Yes (27) ^{iv}	Yes (22)	Yes (31)	Yes (14)	Yes (38)^v
State cases (#)	Not specified	Not specified	Not specified	No	No	Yes (1)	No	No	Yes
Administrative decisions (#)	Yes	Yes	Yes	No	Yes (41)	Yes (45)	No	No	No
Conducted Legal Analysis^{vi}	No ^{vii}	No ^{viii}	No ^{ix}	No ^x	No ^{xi}	No ^{xii}	Yes	Yes	Yes
Conducted Trend Analysis^{xiii}	Yes	No	Yes	No	Yes	Yes	No	No	Yes

Study →	Zirkel (2002)	Yell et al. (2003)	Yell & Drasgow (2000)	Nelson & Huefner (2003)	Etscheidt (2003)	Choutka, Doloughty, & Zirkel (2004)	Seligmann (2005)	Weber (2006)	CURRENT STUDY: Decker (2010)
Coded by prevailing party	Yes	No	Yes	Yes	Yes	Yes	No	No	Yes
Prevailing party findings	“modest edge in favor of school districts ” but not “the polar perceptions that either parents or districts are generally winning.”	If seen “as primarily differences in preference of educational methodology, school districts typically prevail. When the dispute is presented as a denial of FAPE by the school district and parents can show that their methodology has resulted in an appropriate education, the parent is likely to prevail”	School Districts = 24% (11) Parents/child(ren)= 76% (34)	School Districts = 79% (15) Parents/child(ren)= 21% (4)	School Districts = 57% (39) Parents/child(ren)= 43% (29)	School Districts = 44% (30) Parents/child(ren)= 49% (33) Inconclusive =7% (5) Yet, researchers concluded cases were evenly split <i>When inconclusive cases removed,</i> School Districts = 48% (30) Parents/child(ren)= 52% (33)	Parents generally lose due to courts’ deference given to District’s choice in methodology. If it is a question of an ABA program and another approach, School Districts typically prevail.	“A strong trend has recently emerged” where Parents/child(ren) are prevailing. Courts may be diminishing the relevance of <i>Rowley</i> .	School Districts = 61% (24) Parents/child(ren)= 26% (10) Inconclusive= 13% (5) <i>When inconclusive cases removed,</i> School Districts = 71% (24) Parents/child(ren)=29% (10)

Study →	Zirkel (2002)	Yell et al. (2003)	Yell & Drasgow (2000)	Nelson & Huefner (2003)	Etscheidt (2003)	Choutka, Doloughty, & Zirkel (2004)	Seligmann (2005)	Weber (2006)	CURRENT STUDY: Decker (2010)
Identified significance of facts	No	Yes	No	No	No	No	Yes	Yes	Yes
Identified fact patterns	No	No	No	Yes	No	No	Yes	Yes	Yes
Disaggregated program versus implementation cases	No	No	No	No	No	Yes	No	No	Yes
Additional factors that were identified	Zirkel refers readers to his book on the subject “for a more comprehensive treatment of variables other than forum”	Provided guidelines about how IEP teams should develop appropriate programming for students with autism	Substantive violations occurred when districts failed to provide services & student did not progress in school program but did in ABA program	Disaggregated based on Part B & Part C cases; discussed TEACCH cases	Age of student	Compliance with IDEA requirements & evidence of educational benefit; Subcategories: IEP elements, other procedural requirement, documentation of educational progress, & effectiveness of witnesses	Whether courts may be giving too much deference to school districts & administrative decisions	Whether courts may analyze cases differently by focusing on LRE instead of Rowley’s educational benefit standard	Age of student; diagnosis; attorneys; ABA service providers; witnesses; TEACCH cases; charter schools; deference, self-contained classrooms; ABA reduced/removed; some form of ABA in school’s program

- i. Yet, Zirkel's results are based on 450 issue rulings and 383 relief rulings, not the 290 cases.
- ii. Although Seligmann states she reviewed 31 cases in footnote 229, she primarily analyzed *Lt. T.B. ex rel. N.B. v. Warwick School Committee*, 361 F.3d 80 (2d Cir. 2004).
- iii. These cases were listed in Weber's footnotes. Weber discussed *L.B. v. Nebo School District*, 379 F.3d 966 (10th Cir. 2004) in more detail than the other cases.
- iv. Eleven (16%) of the federal cases were circuit court of appeals cases and 16 (24%) were federal district court cases.
- v. 38% (15) of the federal cases were circuit court of appeals cases and 59 (23%) were federal district court cases.
- vi. For the purposes of this study, a Legal Analysis is defined as one in which litigation trends are identified after taking into consideration precedential, jurisdictional, and factual constraints. Legal analyses are written for a legal audience and typically are found in law review journals.
- vii. Zirkel disaggregated administrative and court decisions and concluded that this litigation is increasing, but he did not discuss legal caveats such as precedential and jurisdictional constraints
- viii. Yell et al. noted legal caveats of generalizing findings and summarized a few cases, but they did not discuss litigation trends.
- ix. Yell & Drasgow provide some generalizations from the caselaw, but did not identify precedential, jurisdictional, factual constraints, or litigation trends.
- x. Nelson & Huefner summarized cases in detail and discussed precedent, but they didn't identify litigation trends.
- xi. Etscheidt did, however, disaggregate the cases by court level.
- xii. Choutka et al. identified that they were providing an empirical analysis.
- xiii. For the purposes of this study, a trend analysis occurs when the researcher(s) analyzes the increases/decreases in prevailing parties in a systematic way where methods are described. Trend analyses are written for an audience of education researchers, practitioners, and policymakers and typically are found in education journals.
- xiv. Zirkel did not provide this average in his article. He stated that overall outcomes slightly favored school districts which this average reflects. The author of the current study calculated this number by finding the average of the averages listed in Figure 3. which lists the average outcomes for issues rulings by region for courts and not administrative decisions. Then, calculating the average of the averages listed in Figure 5. which lists the average outcomes for relief rulings by region for courts and not administrative decisions. Finally, the two averages were averaged to determine the 4.81 outcome code. This number *only* accounts for the overall outcomes in the court cases and not the administrative decisions. Further, Zirkel coded 290 cases but within those cases he coded categorized a total of 450 issue rulings and 383 relief rulings; thus the outcome code average reflects the rulings and *not* the cases.
- xv. Nelson & Huefner identified the precedential value of federal case law, but did not identify jurisdictional constraints within caselaw which would influence where the decisions had precedential value.
- xvi. Choutka et al. did discuss the need to examine how deference in judicial opinions influences case outcomes.
- xvii. Choutka et al. did discuss the need to examine how deference in judicial opinions influences case outcomes.
- xviii. Zirkel divided based on "issues" or "relief."
- xix. Yell et al. did not specify how the decisions were disaggregated based on procedural versus substantive violations and they did not exclude procedural cases from their data set as the current study does, but they reported procedural and substantive violations separately.
- xx. Yell & Drasgow did not specify how the decisions were disaggregated based on procedural versus substantive violations and they did not exclude procedural cases from their data set as the current study does, but they reported procedural and substantive violations separately.
- xxi. Nelson & Huefner did not specify how the decisions were disaggregated based on procedural versus substantive violations and they did not exclude procedural cases from their data set as the current study does, but they reported procedural and substantive violations separately.
- xxii. Although Choutka et al. did not refer to it as substantive; they disaggregated based on *Rowley's* second prong which essentially is substantive in nature.

APPENDIX B: CASES IN DATA SET

- Adams v. State, 195 F.3d 1141 (9th Cir. 1999)
- A.Y. v. Cumberland Valley Sch. Dist., 569 F. Supp.2d 496 (M.D. 2008).
- Bd. of Educ. of County of Kanawha v. Michael M., 95 F. Supp. 2d 600 (S.D. W. Va. 2000).
- Brown v. Bartholomew Consol. Sch. Corp., 2005 U.S. Dist. LEXIS 3690 (S.D. Ind. 2005),
vacated and remanded by 442 F.3d 588 (7th 2006)
- Bucks County v. Pennsylvania, 379 F.3d 61 (3d Cir. 2004).
- Burilovich v. Bd. of Educ. of Lincoln Consol. Schs., 208 F.3d 560 (6th 2000).
- County Sch. Bd. of Henrico Co. v. Z.P. *ex rel.* R.P., 399 F.3d 298 (4th Cir. 2005).
- County Sch. Bd. of Henrico Co. v. R.T., 433 F. Supp. 2d 657 (E.D. Va. 2006).
- C.M. *ex rel.* J.M. v. Bd. of Public Educ. of Henderson County, 184 F. Supp. 2d 466 (D.N.C. 2002).
- Deal v. Hamilton County Dept. of Educ., 258 Fed. App'x 863 (6th Cir. 2008).
- D.F. *ex rel.* N.F. v. Ramapo Cent. School Dist., 430 F.3d 595 (2d Cir. 2005).
- Diatta v. District of Columbia, 319 F.Supp.2d 57 (D.D.C. 2004).
- Dong v. Bd. of Educ. of Rochester Community Schools, 197 F.3d 793 (6th Cir. 1999).
- E.G. v. City Sch. Dist. of New Rochelle, 606 F.Supp.2d 384 (S.D.N.Y. 2009).
- G. *ex rel.* R.G. v. Fort Bragg Dependent Schools, 343 F.3d 295 (4th Cir. 2003).
- Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027 (8th Cir. 2000).
- J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684 (S.D.N.Y. 2009).
- Johnson *ex rel.* Johnson v. Olathe Dist. Schools Unified School Dist., 316 F. Supp. 2d 960 (D. Kan. 2003).
- J.P. *ex rel.* Peterson v. County Sch. Bd. of Hanover County, 641 F. Supp. 2d 499 (E.D. Va. 2009).
- J.P. *ex rel.* Popson v. West Clark Cmty. Schs., 230 F. Supp. 2d 910 (S.D. Ind. 2002).

K.S. *ex rel.* P.S. v. Fremont Unified Sch. Dist., 679 F. Supp. 2d 1046 (N.D. Cal. 2009).

L.B. *ex rel.* K.B. v. Nebo Sch. Dist., 379 F.3d 966 (10th Cir. 2004).

L.M.P. *ex rel.* E.P. v. Sch. Bd. of Broward County, No. 05-60845-CIV-MARRA/JOHNSON, 2009 U.S. Dist. LEXIS 74288 (S.D. Fla. Aug. 18, 2009).

Lt. T.B. *ex rel.* N.B. v. Warwick Sch. Comm., 361 F.3d 80 (2d Cir. 2004).

Malkentzos v. DeBuono, 102 F.3d 50 (2d Cir. 1996).

M.M. *ex rel.* D.M. v. Sch. Dist. of Greenville County, 303 F.3d 523 (4th Cir. 2002).

M.M. *ex rel.* A.M. v. New York City Dept. of Educ. Region 9, 583 F. Supp. 2d 498 (S.D.N.Y. 2008).

Mr. X v. New York State Educ. Dept., 975 F. Supp. 546 (S.D.N.Y. 1997).

Pitchford *ex rel.* M. v. Salem-Keizer Sch. Dist., 155 F. Supp. 2d 1213 (9th Cir. 2001).

Renner v. Bd. of Educ. of Pub. Schs. of City of Ann Arbor, 185 F.3d 635 (6th Cir. 1999).

Sch. Bd. of Martin County v. A.S., 727 So.2d 1071 (Fla. Dist. Ct. App. 1999).

S.W. *ex rel.* J.W. v. Warren, 528 F. Supp. 2d 282 (S.D.N.Y. 2007).

T.H. v. Bd. of Educ. of Palatine Cmty. Consol. Sch. Dist. 15, 55 F. Supp. 2d 830 (N.D. Ill. 1999).

T.P. *ex rel.* S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247 (2d Cir. 2009).

Travis G. v. New Hope-Solebury Sch. Dist., 544 F. Supp. 2d 435 (E.D. Penn. 2008).

Tyler W. v. Nw. Indep. Sch. Dist., 202 F. Supp. 2d 557 (N.D. Tex. 2002).

Wagner v. Bd. of Educ. of Montgomery County, 340 F. Supp. 2d 603 (D. Md. 2004).

Wagner v. Short, 63 F. Supp. 2d 672 (D. Md. 1999).

W.S. *ex rel.* C.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134 (S.D.N.Y. 2006).

APPENDIX C: LIKERT-SCALE OUTCOME CODES

This table is replicated from Choutka et al.'s study, *The "Discrete Trials" of Applied Behavior Analysis for Children with Autism: Outcome-Related Factors in the Case Law* (see Table 1). All changes made by the current researcher appear in black, bold-faced font. For the current study, the outcomes were solely based on the substantive issues the court was addressing.

Outcome Code	Description
1 – Parents/child(ren) Complete Win	This category consists of summary judgments in favor of the parents/ child(ren) (<i>i.e.</i> , decisions without a trial), as well as other conclusive wins on all major issues of the case in favor of the parents , including summary judgments.
2 – Decision largely, but not completely, for the parents/child(ren)	This category represents conclusive decisions in the parents/ child(ren) 's favor for the majority of the issues or the awarding of relief (e.g., compensatory education, tuition reimbursement) of more than 50% and less than 100% of what the parents/ child(ren) originally sought. In the rare instance when these two criteria are conflicted, relief criteria are the controlling factor. Further, in review officer and court decisions where the published opinion does not specify the amount of relief sought by the parents/ child(ren) , the frame of reference was the amount of relief awarded by the preceding level.
3 – Inconclusive decision favoring the parents/child(ren)	This category includes the granting of a preliminary injunction (an interim decision after a short proceeding) as well as the reversal of a dismissal of a case by a lower court), which means that the case was "remanded" and will return to the lower court for a trial. Additionally, this category includes the denial of a summary judgment motion sought by school authorities (because this preliminary ruling will result in a trial to determine the ultimate, conclusive winner). It also includes cases in which the court denied the school authorities' motion to dismiss and the case remains open (or could have been potentially settled outside of court).
4 – Split decision	This category includes the awarding of relief (e.g., compensatory education, tuition reimbursement) of approximately 50% of that originally sought by the parents/ child(ren) . Further, in situations where the original amount of relief sought is unknown, this category includes the awarding of relief approximating 50% of that originally awarded by a lower court to the parents/ child(ren) . In addition, this category includes cases 1) in which petitions by both parties for rehearing are denied, 2) as well as the denial of cross motions for summary judgment (because the effect in such situations does not favor either party)-, and 3) where the court remands the case to a lower court and the final decision is unknown.
5 – Inconclusive win for the school authorities	This category includes the denial of a preliminary injunction or summary judgment sought by the parents/ child(ren) (in that the parent still has the opportunity for a trial). In addition, it includes cases dismissed for failure to exhaust administrative remedies (<i>i.e.</i> , cases where the parents/ child(ren) did not resort first to a due process hearing) and cases dismissed without prejudice (because, after correcting the specified technical defects, the parents/ child(ren) may still have their day in court).
6 – Decision largely, but not completely, for school authorities	This category includes the awarding of relief (e.g., compensatory education, tuition reimbursement) of clearly less than 50% of that originally sought by the parents/ child(ren) . Further, in situations where the original relief sought is not known, this category includes the awarding of relief approximating 50% of that originally awarded by a lower court to the parents/ child(ren) .
7 – Complete win for school authorities	This category includes granting of summary judgment in favor of school authorities (because in both cases , the school authorities have won decisively at this preliminary step, ending the proceedings against them).

JANET R. DECKER, J.D., Ph.D.
(812) 219-6264 • deckerjt@ucmail.uc.edu

EDUCATION

INDIANA UNIVERSITY SCHOOL OF EDUCATION - Bloomington, IN
Ph.D., Educational Leadership and Policy Studies

Dissertation Title: Reducing ABA Litigation through Autism-centric Charter Schools: Legally Viable or Vulnerable?

INDIANA UNIVERSITY SCHOOL OF LAW - Bloomington, IN
J.D.; May 2004; Admitted to the Indiana Bar and Domestic Relations Mediator

LONDON LAW CONSORTIUM - London, England
Studied abroad at law consortium of six U.S. law schools; 2004

COLLEGE OF CHARLESTON - Charleston, SC
B.S. in Psychology; Minor: Political Science; May 1997

UNIVERSITY OF SOUTHERN QUEENSLAND - Toowoomba, Australia
Studied abroad at Australian University; 1997

PROFESSIONAL EXPERIENCE

UNIVERSITY OF CINCINNATI - Cincinnati, OH
Assistant Professor, September 2010- present

Teach educational law courses in the Educational Leadership Program to graduate students.
Research special education law topics with a focus on policy related to students with autism.

INDIANA UNIVERSITY, CENTER FOR EVALUATION & EDUCATION POLICY -
Bloomington, IN

Research Associate, July 2009-July 2010

Designed, executed, and managed evaluation and research projects relating to higher and K-12 education. Developed evaluation tools, collected and analyzed data, prepared reports, and created evaluation plans for grant proposals. Coordinated evaluation of Title VI National Resource Centers at Harvard and Indiana Universities. Conducted site visits for the Indianapolis Mayor's Office Charter School Evaluation Project, including special education file audits. Researched legal issues related to special education and charter schools. Participated in the School Choice and Options Team.

OWEN COUNTY CIRCUIT COURT - Spencer, IN
Family Court Administrator, October 2005-August 2010

Oversaw the operations of the Mediation Project which provided mediations to low-income families in divorce, paternity, and CHINS cases. Coordinated with the judge to develop policy and procedures. Wrote grant applications, managed the budget, and secured funding. Conducted mediations and intake interviews, assessed co-payments, researched case histories, and

supervised mediators. Maintained statistics and wrote evaluation reports for the Indiana Supreme Court.

INDIANA UNIVERSITY SCHOOL OF EDUCATION - Bloomington, IN

Adjunct Professor, January 2010-May 2010

Associate Instructor, August 2005-May 2009

Research Assistant, August 2007-June 2009

Taught A608 Legal Perspectives on Education (a graduate course) and taught multiple sections of E310/A308/A508: Legal and Ethical Issues in Education (a graduate and undergraduate course). Assisted in teaching and grading of A624: the Principalship K-12 (a graduate course). Researched and edited a variety of journal articles, book chapters, and textbooks by Drs. Martha McCarthy and Suzanne Eckes.

INDIANA UNIVERSITY PURDUE UNIVERSITY INDIANAPOLIS - Indianapolis, IN

Lecturer, July 2008 and July 2009

Developed and taught a three-week intensive graduate course, A608 Legal Perspectives in Education, to students accepted to the Urban Principal Program.

INDIANA UNIVERSITY SCHOOL OF LAW - Bloomington, IN

Family and Children Mediation Clinic and Child Advocacy Clinic Fellow, June 2004-June 2006

Taught and supervised law students to become Domestic Relations Mediators and *Guardians ad Litem*. Drafted legal documents and edited students' legal writing. Assisted in administrative and curricular responsibilities; writing of appellate briefs; development and presentation of Continuing Legal Education trainings; and transition of the Child Advocacy Clinic into the Family and Children Mediation Clinic. Served as *Pro Bono* Project Coordinator for the IU School of Law.

J.R. CONSULTING - Bloomington, IN, and Princeton, NJ, August 2000-December 2003

BARTHOLOMEW CONSOLIDATED SCHOOL CORP. - Columbus, IN, 2000-2003

Behavioral Consultant, 2000-2003

Designed and supervised Applied Behavior Analysis programs for children with autism. Trained and evaluated school personnel and parents. Created skill acquisition, behavior reduction, and Individualized Education Programs. Led workshops. Advocated for children at IEP meetings, due process hearings, and before the Indiana Legislature.

PRINCETON CHILD DEVELOPMENT INSTITUTE - Princeton, NJ, January 1998-August 2000

FUTURES IN MIND - Toowoomba, Australia, January-October 1997

JENNIFER AND KEN BOGGS - Charleston, SC, May 1996-January 1997

Teacher, 1996-2000

Taught children with autism ages two through thirteen years old using an Applied Behavior Analysis methodology. Collected and analyzed data. Created curriculum. Implemented skill acquisition and behavior reduction in school, home, and community settings. Wrote progress reports. Trained parents and new teachers. Conducted and presented research.

COURSES TAUGHT

Legal Perspectives on Education (graduate course taught online)
Legal and Ethical Issues in Education for Elementary Majors (undergraduate)
Legal Issues for Secondary Teachers (undergraduate)
School Law and the Teacher (graduate)
Legal Perspectives on Education (graduate)
Family and Children Mediation Clinic (graduate)
Child Advocacy Clinic (graduate)

PUBLICATIONS

Decker, J., Eckes, S. & Plucker, J. (in press). Charter schools designed for gifted and talented students: Legal and policy issues and considerations. *Education Law Reporter*.

Eckes, S. & Decker, J. (in press). Tort law and public schools. In C. Russo (Ed.), *The yearbook of education law*. Dayton, OH: Education Law Association.

Decker, J. (2010). *University of Pennsylvania v. EEOC*. In C. Russo (Ed.), *Encyclopedia of law and higher education*. Thousand Oaks, CA: Sage Publications, Inc.

Decker, J. (2010). *Berea College v. Kentucky*. In C. Russo (Ed.), *Encyclopedia of law and higher education*. Thousand Oaks, CA: Sage Publications, Inc.

Macey, E., Decker, J., & Eckes, S. (2009). The Knowledge is Power Program (KIPP): An analysis of one model's efforts to promote achievement in underserved communities. *Journal of School Choice*, 3(3), 212-241.

Eckes, S. & Decker, J. (2009). Tort law and public schools. In C. Russo (Ed.), *The yearbook of education law*. Dayton, OH: Education Law Association.

Eckes, S. & Rumble, J. (2008) Charter schools, accountability and achievement. *School Business Affairs*, 74(9), 8-10.

Rumble, J. (2008). *Bethel School District v. Fraser*. In C. Russo (Ed.), *Encyclopedia of education law*. Thousand Oaks, CA: Sage Publications, Inc.

Rumble, J. (2008). *Hazelwood School District v. United States*. In C. Russo (Ed.), *Encyclopedia of education law*. Thousand Oaks, CA: Sage Publications, Inc.

Rumble, J. (2008). *Owasso v. Falvo*. In C. Russo (Ed.), *Encyclopedia of education law*. Thousand Oaks, CA: Sage Publications, Inc.

REFEREED PRESENTATIONS AT ACADEMIC CONFERENCES

Eckes, S., Plucker, J., Macey, E., & Rumble, J. (2008, March). *Closing the achievement gap for minority students and the KIPP charter school movement*. Roundtable presentation at annual meeting of the American Education Research Association, New York City, New York.

Gibbs, J., Rumple, J., & Steketee, A. (2006, October). *Schools in a Rapidly Advancing Technological Age: Is the Law Keeping Pace?* Paper presented at the annual meeting of the Education Law Association, Nassau, Bahamas.

SELECTED INVITED TALKS, PRESENTATIONS, AND TRAININGS

Decker, J. (2010, May). Facebook, Email, & Blogging: Employee Internet Policies for Your School. Progressive Business Audio Conferences, National Webinar.

Rumple, J. (2008, June). Role Play Coach and Trainer for the Domestic Relations Mediation Training with a Focus on Low-Income and Unrepresented Mediation Parties. Indianapolis, IN.

Rumple, J. (2008, March). *How to decrease expenditures while better educating Indiana's growing number of students with disabilities.* Indiana Legislature Graduate Education Day, Indianapolis, IN.

McCarthy, M., Eckes, E., Rumple, J. & Bathon, J. (2007, October). *Current issues in school law.* Indiana Network of Women Administrators. Educational Leadership Conference, Bloomington, IN.

Rumple, J. & Bathon, J. (2007, April). *The changing legal landscape in reaction to changes in technology.* Education and Social Issues Seminar. Indiana University. Bloomington, IN.

Rumple, J. (2006, October). *Public interest law.* Legal Professions Course. Indiana University School of Law, Bloomington, IN.

Eckes, S., & Rumple, J. (2006, August). *Legal issues in special education.* Special Education Licensure Group. Indiana University School of Education. Bloomington, IN.

Applegate, A., & Rumple, J. (2006, July). *Overview of Guardian ad Litem role.* Continuing Legal Education: Representing the Child's Best Interest – GAL Training for Attorneys. Lake County Superior Court, Gary, IN.

Applegate, A., & Rumple, J. (2006, July). *Best interest and the role of the Guardian ad Litem.* Continuing Legal Education: Representing the Child's Best Interest – GAL Training for Attorneys. Lake County Superior Court, Gary, IN.

Rumple, J. (2006, July). *Indiana Parenting Time Guidelines and Child Support Guidelines.* Continuing Legal Education: Representing the Child's Best Interest – GAL Training for Attorneys. Lake County Superior Court, Gary, IN.

Rumple, J. (2006, July). *Education and settlement issues.* Continuing Legal Education: Representing the Child's Best Interest – GAL Training for Attorneys. Lake County Superior Court, Gary, IN.

Rumple, J. & Applegate, A. (2006, July). *How to conduct the Guardian ad Litem investigation.* Continuing Legal Education: Representing the Child's Best Interest – GAL Training for Attorneys. Lake County Superior Court, Gary, IN.

Rumple, J. (2005, June). *Educational issues for Guardians ad Litem*. Continuing Legal Education Conference for *Guardians ad Litem*. Indiana University School of Law, Bloomington, IN, June, 2005.

Rumple, J. & Applegate, A. (2005, June). *Parenting time issues*. Continuing Legal Education Conference for *Guardians ad Litem*. Indiana University School of Law, Bloomington, IN.

Rumple, J. (2004, November). *The value of special education mediation*. Indiana Autism Coalition: Experts in Our Backyard Conference, Indianapolis, IN.

Rumple, J. (2004, November). *Applied Behavior Analysis methodologies and myths*. Indiana Autism Coalition: Experts in Our Backyard Conference, Indianapolis, IN.

Rumple, J. (2001, June). *An introduction to Applied Behavior Analysis and autism*. Continuing Renewal Unit Program. Bartholomew Consolidated School Corporation, Columbus, IN.

Krantz, P. J., McClannahan, L. E., Rumple, J., MacDuff, M. A., McLaughlin-Cheng, E., & Myles, S. (1999, April). *Peer tutoring: skill acquisition by tutors and tutees with autism*. Center for Outreach and Services for the Autism Community (COSAC) Conference, Atlantic City, NJ.

Rumple, J. (1997, March). *Introduction to Applied Behavior Analysis for children diagnosed with autism*. ABA Training Conference, Toowoomba, Australia.

Rumple, J. & Portwood, S. (1996, November). *Deception in young children: Implications for legal contexts*. Ecological Community Psychology Conference, Charleston, SC.

SERVICE

- Secretary/Treasurer, American Education Research Association Law & Education SIG, 2010-present
- Judge *Pro Tem*, Owen County Circuit Court, 2007
- Law and Disorder Journal, Reviewer, 2007
- *Guardian ad Litem*, Owen County Circuit Court, 2006
- National Advisory Board Member, Special Education Advocates Training (SEAT), 2005-2006
- *Pro Bono* Project Coordinator for the IU School of Law, 2004-2006
- President, Public Interest Law Foundation, IU School of Law, 2002-2003
- Chairperson, Loan Repayment Assistance Program Committee, IU School of Law, 2002-2003
- Executive Board, American Constitution Society, IU School of Law, 2002-2003
- Executive Board, Disability and the Law Society, IU School of Law, 2003

MEMBERSHIPS

- Indiana Bar
- Education Law Association
- University Council for Educational Administration

- American Education Research Association
- Law and Education Special Interest Group

AWARDS

- Beechler Pre-Proposal Dissertation Award, 2009
- David L. Clark National Graduate Student Research Seminar in Educational Administration and Policy, Indiana University Nominee, 2008
- Nancy Louis Kaye Memorial Fellowship, Indiana University Department of Educational Leadership and Policy Studies, 2008
- Outstanding Associate Instructor Award, Indiana University School of Education, 2007
- Clinical Legal Education Association's Outstanding Clinical Student Award, Indiana University School of Law, 2004
- Public Interest Law Foundation Award, Indiana University School of Law, 2004