

SUMMARY OF ABA SCHOOL CASES

This is a non-comprehensive sampling list of school cases in which a parent sought ABA services from a school district. For convenience, the cases are organized by the circuit in which the school district is located, but cases are included from circuit court, district court and hearing officer levels.

Latest Federal Guidance: Dear Colleague Letter, 66 IDELR 21 (OSEP, 2015)

Ruling: OSEP stated in a *Dear Colleague* letter that it has received reports that districts may be leaving speech-language pathologists out of the loop when determining eligibility and services for students with autism, and that some districts may be leaning entirely on ABA therapists for input and services. Citing concerns "in the field," OSEP reminded educational agencies that ABA therapy "is just one methodology" that may be appropriate for a child on the autism spectrum, and that Part C and Part B of the IDEA require IEP teams to determine a child's services based on the child's unique needs.

1st Circuit

Natick Pub. Schs, 63 IDELR 236 (SEA MA 2014): A Massachusetts hearing officer found that there was a significant gap between what a 7 year old with autism needed to obtain educational benefit and what the district offered and concluded the child did not receive a FAPE. The parents requested a preschool program with ABA and an individual aide with sign language skills. No one from the district evaluated whether the proposed program was a signing environment or whether classroom structure, organization, and instruction were based on ABA principles, the IHO concluded that the IEP team "offered what was available rather than thoughtfully considering and planning for [the student's] individual learning needs." The HO ordered private placement. She concluded that: "The preponderance of the credible evidence in this record supports the conclusion that Jolene requires full time, full year, placement in a signing environment which uses the principles of ABA in its structure, organization and instruction, offers intensive 1:1 discrete trials, coordination with home based service providers and opportunities for inclusion with developmentally appropriate peers."

2nd Circuit

Malkentzos ex rel. MM v. DeBuono, 102 F.3d 50 (2nd Cir. 1996): District court awarded parents retrospective reimbursement for private ABA services for 3 year old child; case was deemed moot because child had aged out of program by time of appeal.

Still v. DeBuono, 101 F. 3d 888 (2nd Cir. 1996): District ordered to provide parents reimbursement for privately obtained ABA services for three year old child, even though providers did not meet state qualification standards.

D.F. and D.F. ex rel N.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595 (2nd Cir. 2005). Case remanded for additional evidence about whether IEP for four years old is effective despite lack of home-based ABA services.

T.P. and S.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247 (2nd Cir. 2009). District was not required to provide reimbursement for in-home ABA services for a kindergartener where it offered some 10 hours per week of school based ABA services.

M.H. v. New York City Dept. of Ed., 712 F. Supp. 2d 125 (S.D.N.Y. 2010): Parents decision to unilaterally place 5 year old child in 1:1 ABA program is not unnecessarily restrictive and District must reimburse tuition.

A.S. ex rel S. v. New York City Dep't. of Educ., 573 Fed. App'x. 63 (2nd Cir. 2014): A New York district was found in compliance with the IDEA when it placed a child in an autism program that introduced the TEACCH program instead of the parent's preferred ABA program.

C.F. by R.F. and G.F. v. New York City Dep't. of Educ., (2nd Cir. 2014): A school district denied a 6 year old, who previously had been provided a 1:1 ABA program, a FAPE when it failed to develop an appropriate behavioral intervention plan or a 1:1 program.

New York City, 47 IDELR 5, (State Hearing Officer New York, 2006): An SRO concluded that a New York district's failure to offer the child ABA services, coupled with the child's need for services and the scarcity of providers, justified the parents' decision to pay the provider \$55 an hour instead of \$25/hour.

3rd Circuit:

Bucks County Dep't of Mental Health/Mental Retardation v. Commonwealth of Pennsylvania, Dep't of Pub. Welfare, 379 F.3d 61 (3d Cir. 2004). District was ordered to pay for her time to provide early intervention ABA services to her 2 year old daughter because she stepped into the shoes of a therapist.

M.A. v. Jersey City Bd. of Ed., 592 Fed. App'x 24 (3rd Cir. 2014) (Grade school child was in private school with ABA services and district sought to move to public school. District prevailed).

Fisher ex rel. T.C. v. Stafford Twp. Bd. of Educ., 289 Fed. App'x. 520 (3d Cir. 2008) IEP provided for in school aide and 10 hours of at home assistance per week and aides to be Lovaas Trained. Student was not provided services for all of the period of time when aide could not be

found. Parent hired school aides (unknown to district) and sought reimbursement which was denied.

G.K. ex rel C.B. v. Montgomery Cnty, Intermediate Unit, 2015 WL 4395153 (E.D. Pa):

Where school made efforts to provide ABA services for a student but the service was stopped due to parental interference, only required to provide parents for services occurring when school did not have therapist.

L.J. by V.J. and Z.J. v. Audobon, 49 IDELR 484 (N.D.N.J. 2008): A New Jersey district violated a court order reported at 49 IDELR 6, when it failed to provide 270 hours of compensatory ABA services to a child with autism. Finding the district to be in contempt, the U.S. District Court, District of New Jersey ordered the district to pay \$250 for each subsequent day of noncompliance.

4th Circuit:

Sumter County Sch. Dist. 17 v. Heffernan ex rel. T.H., 642 F.3d 478 (4th Cir. 2011) (Middle schooler was to receive 14 hours a week of ABA therapy and the next year 27.5 hours a week. District failed to implement. Parents removed from school and hired ABA therapist for 30 hours a week after new assessment showed regression. Court upheld home placement.

J.D. by Davis v. Kanawha County Bd. of Educ., 357 F. App'x 515 (4th Cir. 2009). At age 7, parents were seeking ABA (child had about 6 hours per week at the time) and District refused; District prevailed as child was progressing without ABA.

Bd. of Educ. of the County of Boone, W. Va. vs. K.M., 65 IDELR 138 (S.D. W.Va. 2015): A West Virginia district could not persuade a federal District Court to stay an administrative order requiring it to arrange certain third-party services for a student with a disability. Holding that the request violated the IDEA's stay-put provision, the court denied the district's motion.

Prince George's School District, 115 LRP 23708 (State Educational Agency Maryland 2015),: A district violated the IDEA when it delayed considering a parent's request for ABA therapy for a student with autism for nearly a full year, the Maryland ED concluded.

J.P. v. County Sch. Bd. of Hanover County, Va., 46 IDELR 133 (E.D. Va. 2006).

Because a 12-year-old student with autism significantly regressed in his speech and language skills while attending a public school, - in part because of lack of Certified Behavior Analyst, a Virginia district will have to pay for his tuition and related accommodations at a private school for students with autism.

5th Circuit:

Texas.

Killeen School District, 115 LRP 49467 (Texas Hearing Officer 2015): Holding that District violated FAPE by not providing child with behavioral programming and reimbursing for ABA services. District was ordered to provide or contract with a specialist trained in ABA to ensure assessment and develop a comprehensive Behavior Intervention Plan for the student with an ABA program.

Numerous Texas hearing officers have ordered ABA therapy and day placements over the years because of school districts who failed to supply it to students who needed it. (Examples include Student v. Tyler ISD, TEA Docket # 347-SE-0812; Student v. Silsbee ISD, TEA Docket # 268-SE-0709; Student v. Beaumont ISD, TEA Docket # 296-SE-0710; Student v. Beaumont ISD, TEA Docket # 205-SE-0413; Student v. Beaumont ISD, TEA Docket # 162-E-0214, copy of this one was already supplied at hearing). Further, Texas Administrative Code recognizes and defines Applied Behavior Analysis at Title 28, part 1, RULE §21.4402: (1) Applied behavior analysis-- The design, implementation, and evaluation of systematic environmental changes to produce socially significant change in human behavior through skill acquisition and the reduction of problematic behavior. Applied behavior analysis includes direct observation and measurement of behavior and the identification of functional relations between behavior and the environment. Contextual factors, establishing operations, antecedent stimuli, positive reinforcers, and other consequences are used to produce the desired behavior change. It refers in section 4 to the “Generally recognized services:” (A) evaluation and assessment services; (B) applied behavior analysis; (C) behavior training and behavior management.

6th Circuit:

Deal ex rel. Deal v. Hamilton County Dep’t. of Educ., 392 F. 3d 840 (6th Cir. 2004): Parents requested 43 hours per week of 1:1 Lovaas style ABA therapy. When school district predetermined not to offer intensive ABA services to 3 year old child, this deprived parent of participation in process and FAPE was denied. Parents were entitled to reimbursement for up to 30 hours a week of home based ABA, until proper IEP developed, but later district’s eclectic program was deemed appropriate.

Young v. Ohio, 60 IDELR 134 (January 2013): Because the parents of a 2-year-old boy with autism showed that they were likely to succeed on their IDEA Part C claims, the child could receive ABA services while his parents' due process complaint was pending. The U.S. District Court, Southern District of Ohio ordered the state to either provide the services directly or reimburse the parents for private ABA services. Representatives of educational agencies must be mindful of what they say at IEP and IFSP meetings. If a representative tells the parent that the agency does not offer a particular service, a court or hearing officer may conclude that the agency predetermined the child's program. In this case, representatives allegedly told the parents that the state's early intervention provider did not offer ABA therapy. That statement, coupled with the provider's testimony at the hearing that it did not have any approved ABA providers in the county, demonstrated that the parents were likely to prevail on their predetermination claim.

Dong ex rel Dong v. Board of Educ. of the Rochester Cmty. Schs., 197 F. 3d 793 (6th Cir. 1999): School provided child with 27.5 hours per week of TEACCH based services at school; parents felt this was insufficient and withdrew child in favor of 40 hours per week DTT services at home. Court held for District as TEACCH was appropriate and provided in the LRE and allowed child to meet her maximum potential.

Young v. Ohio, 60 IDELR 134 (January 2013): Because the parents of a 2-year-old boy with autism showed that they were likely to succeed on their IDEA Part C claims, the child could receive ABA services while his parents' due process complaint was pending. The U.S. District Court, Southern District of Ohio ordered the state to either provide the services directly or reimburse the parents for private ABA services. Representatives of educational agencies must be mindful of what they say at IEP and IFSP meetings. If a representative tells the parent that the agency does not offer a particular service, a court or hearing officer may conclude that the agency predetermined the child's program. In this case, representatives allegedly told the parents that the state's early intervention provider did not offer ABA therapy. That statement, coupled with the provider's testimony at the hearing that it did not have any approved ABA providers in the county, demonstrated that the parents were likely to prevail on their predetermination claim.

7th Circuit:

Brown v. Bartholomew Consol. Sch. Corp., 442 F. 3d 588 (7th Cir. 2006): District's refusal to provide 1:1 ABA instruction at home versus increased 1:1 assistance and full time aide at school with similar methodology did not deny child a FAPE.

8th Circuit:

Independent School District of Grand Rapids, Minnesota, 24 IDELR 1096 (Minnesota State Hearing Officer, 1996): Finding district denied a FAPE to 5 year old with autism and ordering ABA services and reimbursement for parentally provided ABA.

9th Circuit:

Mark H. v. Lemahieu, 49 IDELR 91 (9th Cir. 2008), State Department of Education had to defend a suit for money damages based on its alleged failure to provide appropriate special education services to sisters with autism. Because monetary damages aren't available under the IDEA, the court concluded that the parents could pursue their claim under Section 504. It explained, "While the IDEA focuses on the provision of appropriate public education to disabled children, the Rehabilitation Act of 1973 more broadly addresses the provision of state services to disabled individuals. ... The remedies available under IDEA are limited and do not include compensatory damages. ... The remedies available under Rehabilitation Act 504 are broader and include compensatory damages." Then in 2010, in **Mark H. v. Hamamoto**, 55 IDELR 31, (9th Cir. 2010), the 9th Circuit held that the Hawaii Education Department's alleged failure to provide reasonable accommodations, coupled with evidence of its deliberate indifference, could support an award of damages under Section 504. It explained that a public entity can be liable for damages under Section 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to people with disabilities.

Anchorage v. D.S., 688 F. Supp. 2d 883 (D. Ct. Alaska, July 24, 2009), Hearing Officer Opinion at 51 IDELR 230,: Court affirmed hearing officer ruling ordering District to reimburse parents for ABA program for 10 year old student with autism and cerebral palsy and to provide same for student in the future.

K.S. v. Fremont Unified School District, 426 Fed. App'x. 536 (9th Cir. 2011): Court held that an IEP does not violate the IDEA just because it does not use ABA as an eclectic approach that meets the substantive standards of the IDEA is sufficient.

Joshua A. by Jorge A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036 (9th Cir. 2009): District's eclectic program appropriate despite not being peer-reviewed and parent's request for ABA based program denied.

Clark County Sch. Dist., 113 LRP 11163 (State Educational Agency Nevada 12/17/12): The State of Nevada department of education found that the Clark County School District violated the IDEA by defining FAPE to exclude in-home ABA services and requiring parents to arrange and pay for any in-home ABA therapy identified as supplemental services in their children's IEPs.

Anaheim School District, 6 ECLPR 3 (California Hearing Officer 2008): The parent of a 6-year-old girl with autism failed to show that her daughter required ABA services to receive a meaningful educational benefit. The District established it offered TEACCH, PECS and other "ABA-like" programs.

10th Circuit:

L.B. and J.B. ex rel. K.B. v. Nebo Sch. Dist., 379 F.3d 966 (10th Cir. 2004) Preschool child not offered preschool in the LRE; parents entitled to reimbursement for reasonable costs of ABA services and supplementary aide provided in mainstream preschool.

11th Circuit:

R.L. and S.L. ex rel O.L. v. Miami-Dade County Sch. Bd., 757 F.3d 1173 (11th Cir. 2014)

Where district quickly dismissed ABA as an option for a 14 year old boy, this constitutes predetermination and Court ordered reimbursement for 1:1 instructional services outside of the school setting.

C.C. ex rel. A.C. v. Sch. Bd. of Broward Cnty, Fla., 2014 WL 4771751 (S.D. Fla.): Where preschool child brought class action against District that allegedly denied all requests for ABA therapy as a matter of policy, must narrow proposed class to students with autism who need ABA.

L.M.P. v. School District of Broward County, Fla., 49 IDELR 14 (S.D. Fla. 2007): A Florida district could not avoid allegations that it discriminated against children with autism by

systematically denying requests for individualized ABA services. Not only did the parents of 3-year-old triplets sufficiently allege a Section 504 violation on behalf of their own children, the District Court concluded, but they could pursue a class action on behalf of all preschoolers who were denied one-to-one ABA therapy.

L.M.P. v. School District of Broward County, Fla., 345 F. Spp'x. 428 (11th Circuit 2009):
Disagreeing with Pardini decision of Third Circuit holding that school district is not required to continue IFSPS (with ABA) while parents dispute programming offered to three triplets entering school.