

A LEGAL REVIEW OF AUTISM, A SYNDROME RAPIDLY
GAINING WIDE ATTENTION WITHIN OUR SOCIETY

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I. INTRODUCTION

The word autism is derived from the Greek word “autos” which means “self” and describes conditions in which a person is removed from social interaction, that is, an isolated self.¹ Unlike many other brain disorders, Autism Spectrum Disorder (“ASD”) “does not appear to be a clear unifying mechanism at either the molecular, cellular or systems level.”² “Because autism is characterized by groups of symptoms and signs even in its narrowest conception, it is a highly variable neurodevelopmental syndrome and not a unitary condition.”³ Thus, the saying goes that if you have met one person

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¹ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 121 (4th ed. 2000).

² *Autism*, HUM. MEMORY, http://www.human-memory.net/disorders_autism.html (last visited Mar. 21, 2014).

³ Daniel H. Geschwind, *Autism: Many Genes, Common Pathways?*, 135 CELL 391, 391

with an ASD, you have only met one person with an ASD.

In this article we shall discuss ASD diagnosis and treatment, developments in State autism insurance programs, and a variety of litigation issues arising from the education of ASD students including the provision of a free and appropriate education, unlawful transfer policies, denial of tuition reimbursements, limitations of Applied Behavioral Analysis (“ABA”) therapy, confinement in the “Autism Intervention Room,” and bullies in the classroom.⁴ In addition, we will examine tort litigation involving vaccine design defects, premature deliveries and low birth weight as a possible cause of autism, and failing to warn of the violent behavior of ASD students.⁵ We shall also discuss guardianship and the least restrictive means doctrine, maintaining control and the need for periodic review.⁶ We shall also discuss family law issues including the relocation of the parent with sole custody and what is in the best interests of the ASD child including the availability of services and extended placement.⁷ We shall also discuss criminal law issues involving the perceived anti-social behavior of persons with ASD and how to establish intent and guilt.⁸ Finally, we shall discuss violence in the home directed towards ASD children.⁹

Public Awareness

In 2007, the United Nations General Assembly passed a resolution declaring April 2 “World Autism Awareness Day.”¹⁰ In 2011, President Obama followed suit, declaring that each April 2 would be World Autism Awareness day in the United States and stressing that “autism is an urgent public health issue with a profound impact on millions of Americans.”¹¹ Thereafter, numerous state governors and local officials proclaimed April as Autism Awareness Month, publicly recognizing the individual and unique

(2008).

⁴ See *infra* Parts II–IV.

⁵ See *infra* Part V.

⁶ See *infra* Part VI.

⁷ See *infra* Part VII.

⁸ See *infra* Part VIII.

⁹ See *infra* Part VIII.

¹⁰ G.A. Res. 62/139, ¶ 1, U.N. Doc. A/RES/62/139 (Dec. 18, 2007).

¹¹ Proclamation 8647—World Autism Awareness Day, 2011, 2011 DAILY COMP. PRES. DOC. 220 (Apr. 1, 2011).

needs of those with developmental disabilities.¹² In 2013, President Obama commemorated World Autism Awareness Day by announcing the launch of a \$100 million Brain Research through Advancing Innovative Neurotechnologies (“BRAIN”) Initiative “designed to revolutionize our understanding of the human brain” and “to help researchers find new ways to treat, cure, and [potentially] prevent brain disorders, such as[, inter alia, autism].”¹³

Societal Costs

ASDs impose enormous financial and personal burdens not only on the families of an ASD individual, but also on society as a whole.¹⁴ The financial costs to families and service agencies for providing the appropriate multi-faceted treatments, interventions, and services are significant, and because of the pervasive nature of the disorder, these costs are often required in some form during the ASD individual’s lifetime.¹⁵ Yet, the costs to society for not providing treatment are even greater. An ASD is a lifelong condition: “Assuming prevalence stays flat in the future, the population of adults with autism is expected to rise 625 percent by the year 2030 (compared to 2010).”¹⁶ According to the United States Department of Labor, the labor force participation rate for individuals with disabilities is only 20.5 percent.¹⁷

The impact of ASD will be increasingly realized by society as ASD

¹² See, e.g., *Cuomo Signs Proclamation Declaring April ‘Autism Awareness Month’*, AUTISM SPEAKS (Apr. 14, 2012), <http://www.autismspeaks.org/advocacy/advocacy-news/cuomo-signs-proclamation-declaring-april-autism-awareness-month>; Press Release, State of New Jersey Governor Chris Christie, Governor Christie Designates April as Autism Awareness Month (Apr. 1, 2013), <http://www.nj.gov/governor/news/news/552013/approved/20130401b.html>; *Mayor Jennings Declares April ‘Autism Awareness Month’*, AUTISM SOC’Y CAP. REGION (Apr. 2, 2013), http://www.albanyautism.org/News/13-04-02/Mayor_Jennings_declares_April_Autism_Awareness_Month.aspx.

¹³ Press Release, The White House Office of the Press Secretary, Fact Sheet: BRAIN Initiative (Apr. 2, 2013), <http://www.whitehouse.gov/the-press-office/2013/04/02/fact-sheet-brain-initiative>.

¹⁴ See, e.g., Michael L. Ganz, *The Lifetime Distribution of the Incremental Societal Costs of Autism*, 161 ARCHIVES PEDIATRIC & ADOLESCENT MED. 343, 348 (2007) (finding that the total lifetime societal costs of all persons diagnosed with autism in the United States “could range from \$13 billion to \$76 billion” depending on the assumptions of the statistical model employed).

¹⁵ See *id.*

¹⁶ *National Autism Awareness Month: Fact of the Day #24*, AUTISM SOC’Y (Apr. 25, 2013), <http://www.autism-society.org/news/national-autism-awareness-15.html>.

¹⁷ See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY SEX, AGE, AND DISABILITY STATUS, NOT SEASONALLY ADJUSTED tbl.A-6, <http://www.bls.gov/news.release/empsit.t06.htm> (last modified Sept. 6, 2013).

individuals mature out of infancy, as “[t]he substantial costs resulting from adult care and lost productivity of both individuals with autism and their parents have important implications for those aging members of the baby boom generation approaching retirement.”¹⁸

II. DIAGNOSIS AND TREATMENT

ASD is a range of complex neurodevelopment disorders, characterized by social impairments, communication difficulties, and restricted, repetitive, and stereotyped patterns of behavior.¹⁹ Autistic disorder, sometimes called autism, is on the most severe end of the “spectrum.”²⁰ In these severe cases, the individual may not interact with others, lack the ability to speak, or treat people as objects.²¹ Milder conditions along the spectrum include Asperger’s Syndrome, childhood disintegrative disorder, and pervasive developmental disorder not otherwise specified (usually referred to as “PDD-NOS”).²² These cases may involve some difficulty understanding and relating to others, and trouble understanding other people’s perspectives and emotions.²³

While some individuals with diagnoses within the autism spectrum have excelled in visual skills, sciences, mathematics, and the arts,²⁴ others, and perhaps the same individuals, have been

¹⁸ Ganz, *supra* note 14, at 343.

¹⁹ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 299.00 (5th ed. 2013) [hereinafter DSM-5].

²⁰ Melinda Smith et al., *Autism Spectrum Disorders: A Parent’s Guide to Symptoms and Diagnosis on the Autism Spectrum*, HELPGUIDE.ORG, http://www.helpguide.org/mental/autism_spectrum.htm (last updated Aug. 2013).

²¹ *Autism and Asperger’s Syndrome*, BEHAV. NEUROTHERAPY CLINIC, http://www.adhd.com.au/Autism.htm#1_Characteristic_behaviours_in_Autism_Spectrum_Disorder (last visited Mar. 21, 2014).

²² See generally AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 299.10, 299.80 (4th ed. 1994) [hereinafter DSM-IV] (discussing the diagnostic features of Asperger’s Syndrome, child disintegrative disorder, and pervasive developmental disorder not otherwise specified).

²³ See DSM-5, *supra* note 19, § 299.00.

²⁴ While speculation runs rampant that famous individuals such as Albert Einstein, Isaac Newton, Mozart, Beethoven, and Andy Warhol all experienced the autism spectrum, others such as Temple Grandin, Daryl Hannah, 2002 Nobel Prize Winner Vernon Smith, jazz prodigy Matt Savage, Pulitzer Prize winner Tim Page, actor Dan Aykroyd, and musician Peter Dinklage have been confirmed to be individuals on the spectrum. See, e.g., Michelle Fattig, *Famous People with Aspergers Syndrome*, DISABLED WORLD (Dec. 28, 2007), http://www.disabled-world.com/artman/publish/article_2086.shtml; Susie McGee, *Famous Autistic People*, LOVETOKNOW AUTISM, http://autism.lovetoknow.com/Famous_Autistic_People (last visited Mar. 21, 2014).

associated with, inter alia, cognitive disabilities, difficulties in fine motor skills, attention deficit disorders, may suffer from mental health problems such as anxiety and depression, as well as physical health issues such as insomnia and gastrointestinal and digestive problems.²⁵

ASDs vary significantly in character and severity, occur in all ethnic and socioeconomic groups, and affect every age group.²⁶ In 2006 the Centers for Disease Control and Prevention (“CDC”) released data indicating that approximately one in 110 children in the United States had an ASD.²⁷ Just two years later, the CDC updated its estimates finding that one in 88 children in the United States had an ASD (one in 54 boys and one in 252 girls).²⁸ This rapid increase in prevalence rates has intensified the need for a unified societal approach to this disorder. According to the CDC, “[t]he reasons for the increase in the identified prevalence of ASDs are not understood completely[, while] [s]ome of the increase is due to the way children are identified, diagnosed, and served in their local communities . . . reported increases are explained partly by greater awareness by doctors, teachers, and parents.”²⁹

There is not yet a biological test that provides for a precise diagnosis of an ASD.³⁰ Rather, a formal diagnosis is currently based on descriptions and observations of behavior by a specialist, such as an experienced psychiatrist, psychologist, neurologist, or developmental pediatrician, or a team of specialists.³¹ Accordingly,

²⁵ DSM-5, *supra* note 19, § 299.00.

²⁶ *Facts About ASDs*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/autism/facts.html> (last updated Mar. 29, 2012).

²⁷ CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE OF AUTISM SPECTRUM DISORDERS—AUTISM AND DEVELOPMENTAL DISABILITIES MONITORING NETWORK, UNITED STATES, 2006, at 1 (Dec. 18, 2009), <http://www.cdc.gov/mmwr/pdf/ss/ss5810.pdf>.

²⁸ CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE OF AUTISM SPECTRUM DISORDERS—AUTISM AND DEVELOPMENTAL DISABILITIES MONITORING NETWORK, 14 SITES, UNITED STATES, 2008, at 1 (Mar. 30, 2012), <http://www.cdc.gov/mmwr/pdf/ss/ss6103.pdf>. Still, a mere two years later, the CDC noted a 30% increase and now estimate that one in 68 children has an autism spectrum disorder (one in 42 boys and one in 189 girls). Press Release, Ctrs. for Disease Control & Prevention, CDC Estimates 1 in 68 Children has been Identified with Autism Spectrum Disorder (Mar. 27, 2014), *available at* <http://www.cdc.gov/media/releases/2014/p0327-autism-spectrum-disorder.html>.

²⁹ *Why Are Autism Spectrum Disorders Increasing?*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/features/autismprevalence/> (last updated Apr. 16, 2012).

³⁰ *See Screening and Diagnosis*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/autism/screening.html> (last updated May 13, 2010).

³¹ *See id.*; *Developmental Screening Guideline for Children*, FDA (Jan. 2004), <http://www.fda.gov/ohrms/dockets/dockets/04p0349/04p-0349-ref0001-50-Tab-46-Autism-Alarm-vol7.pdf>.

diagnostic assessment is both complex and expensive.³² In addition, even those who can afford the overwhelming cost of formal diagnosis face obstacles in detecting ASDs early enough to provide effective intervention.³³ Because the hallmarks of ASDs include social impairments, communication difficulties, and restricted, repetitive, and stereotyped patterns of behavior, the most obvious signs and symptoms of an ASD only start to become apparent between two and three years of age.³⁴

The core symptoms of an ASD can be treated, and the ASD individual can benefit from therapies such as sensory integrations, speech therapy, occupational therapy, physical therapy, and auditory interventions.³⁵ One key behavior therapy, recognized as beneficial for individuals with ASDs, is Applied Behavior Analysis (“ABA”).³⁶ In ABA, certain techniques and principles are used to bring positive changes in behavior in children with Autism and other related developmental disorders.³⁷

Although outcomes are variable and specific behavioral characteristics change over time, most children with ASDs remain within the spectrum as adults and, regardless of their intellectual functioning, continue to experience problems with independent living, employment, social relationships, and mental health. The primary goals of treatment are to minimize the core features and associated deficits, maximize functional independence and quality of life, and alleviate family distress. Facilitating development and learning, promoting socialization, reducing maladaptive behaviors, and educating and supporting families can help accomplish these goals. Ideally, interventions should help mitigate the core features of ASDs, which include impairment in social reciprocity, deficits in communication,

³² Paul T. Shattuck & Scott D. Grosse, *Issues Related to the Diagnosis and Treatment of Autism Spectrum Disorders*, 13 MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES RES. REV. 129, 131 (2007).

³³ See American Acad. of Pediatrics, *Autism Spectrum Disorders*, HEALTHYCHILDREN.ORG, <http://www.healthychildren.org/English/health-issues/conditions/developmental-disabilities/Pages/Autism-Spectrum-Disorders.aspx> (last updated Aug. 7, 2013).

³⁴ *Signs and Symptoms*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/autism/signs.html> (last updated May 13, 2010).

³⁵ *Treatment*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/autism/treatment.html> (last updated June 27, 2013).

³⁶ *Id.*

³⁷ Scott M. Myers & Chris Plauché Johnson, *Management of Children with Autism Spectrum Disorders*, 120 PEDIATRICS 1162, 1164 (2007).

and restricted, repetitive behavioral repertoire.³⁸

III. INSURANCE DEVELOPMENTS

Enacted by Congress in March 2010, the Patient Protection and Affordable Care Act³⁹ (“ACA”) was intended to “increase the number of Americans covered by health insurance and decrease the cost of health care.”⁴⁰ A key provision of the ACA is the mandate that requires most Americans to maintain “minimum essential” health insurance coverage.⁴¹

Health Care Exchanges

ACA aimed to increase access to health insurance through an expansion of Medicaid and private insurance, and in order to facilitate the selection of health insurance plans, ACA created “Health Benefit Exchanges.”⁴² Each exchange, initially scheduled for implementation on January 1, 2014—now postponed to January 1, 2015⁴³—provides a marketplace for “qualified health plans” offering an “essential health benefits” (“EHB”) package in the individual and small business insurance market.⁴⁴ Included among the ten general categories of EHB was “[m]ental health and substance use disorder services, including behavioral health treatment.”⁴⁵ In December 2011, the United States Department of Health and Human Services (“HHS”) issued guidance on ACA, stating that each state could determine which “essential health benefits” must be provided in policies sold through the state’s exchange, giving each state the discretion to select a benchmark plan based on options currently offered in the state, which all insurers would then be required to match.⁴⁶

³⁸ *Id.* at 1162–63 (footnote omitted).

³⁹ Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).

⁴⁰ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

⁴¹ 26 U.S.C. § 5000A(a) (2012).

⁴² 42 U.S.C. § 18031(a) (2012).

⁴³ See Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP’T TREASURY BLOG (July 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx>.

⁴⁴ 42 U.S.C. § 18031(b), (d).

⁴⁵ *Id.* § 18022(b)(1)(E).

⁴⁶ See Press Release, U.S. Dep’t of Health & Human Servs., HHS to Give States More Flexibility to Implement Health Reform (Dec. 16, 2011), <http://www.hhs.gov/news/press/2011pres/12/20111216c.html>.

New York's Health Care Exchange

On April 12, 2012, the State of New York established its exchange “within the Department of Health” via New York Executive Order 42 [the “Exchange”]. The [E]xecutive [O]rder gave the [E]xchange authority to work in conjunction with the New York State Department of Financial Services and other agencies to carry out the requirements of ACA. On Oct[ober] 26, 2012, New York submitted its blueprint application for its state-based [E]xchange to HHS for approval. On Dec[ember] 14, 2012, New York received conditional approval from HHS to operate its state-based [E]xchange.⁴⁷

However, it is still unclear which behavioral treatments are covered.⁴⁸

New York's Autism Insurance Program

On Nov[ember] 1, 2011, New York became the 29th state to adopt autism insurance [coverage]. Under New York's autism insurance reform law, state-regulated insurance plans that were to be issued, renewed or modified [on or after] Nov[ember] 1, 2012 . . . were required to cover the screening, diagnosis and treatment of ASDs. When th[is] law was enacted it required that regulations be promulgated regarding those who provide behavioral health treatment, including . . . [ABA]. [However, o]n the eve of New York's autism insurance reform law's effective date, the New York Department of Financial Services issued emergency regulations that required service providers to be New York [S]tate-licensed psychologists, psychiatrists, or social workers as well as board certified behavior analysts. . . . [W]hile national certification currently exists for behavior analysts that provide ABA, state licensure does not currently exist in the State of New York.⁴⁹

⁴⁷ Thomas A. Dickerson & Jeffrey A. Cohen, *With Rise of Autism, Courts Face Challenging Legal Issues*, N.Y.L.J., May 24, 2013, at 4, col. 1 (footnote omitted).

⁴⁸ *Id.*

⁴⁹ *Id.* (footnotes omitted); *see also* N.Y. INS. LAW § 3216(i)(25)(B) (McKinney 2013) (enacting insurance coverage “for the screening, diagnosis and treatment of autism spectrum disorder” in New York).

New York Licensure Needed

Thus, autism advocates have taken the position that the promulgated regulations drastically reduce coverage of ABA, as no behavior analyst can satisfy the licensure mandates. Accordingly, while state law requires [that] all insurance policies issued in New York . . . cover ABA, the accessibility to ABA therapy covered by insurance seems, at this time, to be unsatisfactory to those seeking same.⁵⁰

In response to the absence of a licensing procedure for board certified ABA therapists in New York, an organization known as Autism Speaks teamed up with New York State Assemblyman Joseph Morelle and New York State Senator Chuck Fuschillo to work on passing two bills creating a state licensing process.⁵¹

Licensure in Other States

Similar licensing legislation has already been passed in other states.⁵² Ohio passed a law similar to the New York law requiring ABA behavior analysts to be licensed, but failed to have a licensing procedure in place at the time the bill passed.⁵³ In response to the problem of families under the state-regulated health care plans being unable to access ABA treatment, Ohio's governor included an amendment to the state budget bill establishing a state certification process for ABA providers.⁵⁴ Pursuant to "the amendment, the Ohio Board of Psychology . . . [is] responsible for certifying Board Certified Behavior Analysts (BCBAs) as 'certified Ohio behavior analysts.'"⁵⁵ Ohio's licensing process and the reimbursement for ABA treatment will take effect in 2014.⁵⁶

To avoid requiring a separate licensing amendment, an Oregon bill for autism insurance coverage that includes a licensing mechanism, was recently signed into law, after having been passed

⁵⁰ Dickerson & Cohen, *supra* note 47.

⁵¹ *NY ABA Licensure Bills Win Autism Speaks' Support*, AUTISM SPEAKS (May 29, 2013), <http://www.autismspeaks.org/advocacy/advocacy-news/ny-aba-licensure-bills-win-autism-speaks-support>.

⁵² *See, e.g., Ohio ABA Provider Issue Resolved*, AUTISM SPEAKS (July 1, 2013), <http://www.autismspeaks.org/advocacy/advocacy-news/ohio-aba-provider-issue-resolved>.

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

by Oregon's House of Representatives 56–0.⁵⁷ Under the legislation, Oregon will require state-regulated health plans to cover a maximum of twenty-five hours per week of ABA treatment.⁵⁸ The bill also includes a provision to create “[a] seven-member Behavior Analysis Regulatory Board . . . within the Oregon Health Licensing Agency [in order] to license providers.”⁵⁹ The bill will go into effect for public employees in 2015 and for state-regulated health plans in 2016.⁶⁰

Variation in Autism Insurance Coverage

Currently, thirty-four states have some form of autism insurance coverage;⁶¹ however, coverage varies widely from state to state. For example, Texas, the third state to pass a bill providing autism insurance coverage, recently passed a bill expanding autism insurance benefits by eliminating the age cap for state-regulated health plans.⁶² In exchange for the elimination of the age cap, ABA benefits for children aged ten and older are limited to \$36,000 per year,⁶³ a generous limit in comparison to other state plans. Texas is one of several states to pass expansions to autism insurance coverage: New Mexico recently expanded coverage to public employees and Kansas made such coverage permanent for state employees;⁶⁴ Massachusetts is going one step further by attempting to expand autism insurance benefits through the state's Medicaid program.⁶⁵

Conversely, Utah only offers Medicaid-funded ABA treatment implemented through a lottery system, despite having the highest per capita autism rate in the nation: over 18,000 children are

⁵⁷ See *Oregon Governor Gets Autism Insurance Reform Bill*, AUTISM SPEAKS (July 1, 2013), <http://www.autismspeaks.org/advocacy/advocacy-news/oregon-governor-gets-autism-insurance-reform-bill>; *Welcome #34! Oregon Enacts Autism Insurance Reform*, AUTISM SPEAKS (Aug. 14, 2013), <http://www.autismspeaks.org/advocacy/advocacy-news/welcome-34-oregon-enacts-autism-insurance-reform>.

⁵⁸ *Welcome #34! Oregon Enacts Autism Insurance Reform*, *supra* note 57.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Oregon was the thirty-fourth state to enact autism insurance reform. See *id.*

⁶² *Perry Expands Autism Insurance Benefits in Texas*, AUTISM SPEAKS (June 15, 2013), <http://www.autismspeaks.org/advocacy/advocacy-news/perry-expands-autism-insurance-benefits-texas>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Mass. Moves on Autism Benefits for Medicaid*, AUTISM SPEAKS (June 24, 2013), <http://www.autismspeaks.org/advocacy/advocacy-news/mass-moves-autism-benefits-medicaid>.

diagnosed with some form of ASD in that state.⁶⁶ Utah enacted the program in 2012 after abandoning a bill before the legislature seeking autism insurance coverage under state-health plans.⁶⁷ Although an income test is not required as with traditional Medicaid coverage, a child must not have more than \$2,000 in assets in his or her name in order to qualify.⁶⁸ Additionally, coverage is very limited with only thirty-five available slots in the lottery and an age cap of six years old.⁶⁹

In California, ABA therapy may have been

a casualty of the state's effort to phase out its Healthy Families insurance program and shift the nearly 900,000 children it covered into Medi-Cal, the broader healthcare program for the poor. Despite . . . assurances that the transition would not jeopardize services, activists say hundreds of children are losing coverage for [ABA].⁷⁰

Notably, despite being a part of the federal government and thus a prime candidate for insurance under the ACA, TRICARE, the Department of Defense's health benefits program, recently placed new restrictions and imposed cutbacks on benefits received by military families with autistic children.⁷¹ The ECHO ("Extended Care Health Option") program, currently in place, only provides ABA and other ASD treatment to the families of active military personnel.⁷² Additionally, a new pilot program that provides ABA coverage to children diagnosed with ASD requires state-licensed providers and only reimburses the minimal coverage despite the child's particular ASD diagnosis.⁷³

⁶⁶ *Utah Adds Another 35 Slots in ABA Lottery Program*, AUTISM SPEAKS (June 18, 2013), <http://www.autismspeaks.org/advocacy/advocacy-news/utah-adds-another-35-slots-aba-lottery-program>.

⁶⁷ *Id.*

⁶⁸ Kirsten Stewart, *Utah Kids Get a Second Chance at Free Autism Therapy*, SALT LAKE TRIB., June 17, 2013, <http://www.sltrib.com/sltrib/news/56471324-78/therapy-health-utah-autism.html.csp>.

⁶⁹ *Id.*; *Utah Adds Another 35 Slots in ABA Lottery Program*, *supra* note 66.

⁷⁰ Chris Megerian, *Slipping Through the Cracks*, L.A. TIMES, July 8, 2013, at AA1.

⁷¹ *TRICARE 'Turns Back the Clock' on Military Families*, AUTISM SPEAKS (June 27, 2013), <http://www.autismspeaks.org/advocacy/advocacy-news/tricare-turns-back-clock-military-families>.

⁷² *Senate Armed Services Grills DoD on TRICARE Autism Coverage*, AUTISM SPEAKS (June 21, 2012), <http://www.autismspeaks.org/advocacy/advocacy-news/senate-armed-services-grills-dod-tricare-autism-coverage-1>.

⁷³ See *TRICARE Operations Manual 6010.56-M*, AUTISM SPEAKS, 1, 4, 5, 9 (June 25, 2013), http://www.autismspeaks.org/sites/default/files/docs/gr/tricare_pilot_ch18sec17_june252013.pdf.

IV. EDUCATION

“[T]he average per pupil expenditure for educating a child with autism [was estimated by the Special Education Expenditure Project to be over] \$18,000 in the 1999–2000 school year.”⁷⁴ This estimate was nearly three times the expenditure for a typical regular education student who did not receive special education services.⁷⁵ If “prevalence [rates] stay[] flat in the future, the number of school-age students [diagnosed with an ASD] is projected to rise by 44 percent by the year 2030.”⁷⁶ In conjunction with the new public school system reality, where our economy is forcing larger class sizes, layoffs and other changes that may compromise our schools’ ability to serve students, it is foreseeable that school districts will be increasingly challenged to accommodate students with ASDs.

Individuals With Disabilities Education Act

Federal Court cases brought on behalf of students with ASDs are based on challenges under the Individuals with Disabilities Education Act (“IDEA”).⁷⁷ Pursuant to the regulations accompanying the IDEA:

the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with [federal regulations] . . . , and that must include[: inter alia] . . . [a] statement of the child’s present levels of academic achievement and functional performance[:] . . . [a] statement of [the child’s] measurable [academic and functional] annual goals[:] . . . [a plan to] [m]eet the child’s needs[:] . . . [a] description of . . . [h]ow the child’s progress toward meeting the annual goals . . . will be measured; . . . [a] statement of the special education and related services

⁷⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-220, SPECIAL EDUCATION: CHILDREN WITH AUTISM 10 (2005).

⁷⁵ *Id.*

⁷⁶ *National Autism Awareness Month: Fact of the Day #18*, AUTISM SOC’Y (Apr. 19, 2013), <http://www.autism-society.org/news/national-autism-awareness-11.html>.

⁷⁷ See 20 U.S.C. §§ 1400–1444 (2012). Under the IDEA, the term “child with a disability” means a child with one or more of a variety of impairments, including autism, who, by reason of such impairment, needs special education and related services. See *id.* § 1401(3); see also 34 C.F.R. § 300.8(a)(1) (2013) (same).

and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child[;] . . . [a]n explanation of the extent . . . to which the child will not participate with nondisabled children in the regular class . . . activities . . . [and a] statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on [various State and local level assessments].⁷⁸

A Free And Appropriate Education

Beginning, at the latest, when the student reaches 16 years of age “the IEP must include . . . [a]ppropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and . . . the transition services (including courses of study) needed to assist the child in reaching those goals.”⁷⁹

The IDEA also requires that the IEP allow the student to receive an education in the “[l]east restrictive environment.”⁸⁰

The IDEA provides that all students are entitled to a free and appropriate education (“FAPE”).⁸¹ “If a state fails in its obligation to provide a [FAPE] to a handicapped child, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the state.”⁸² These tuition reimbursement cases are also brought under the IDEA.⁸³ To determine whether reimbursement is warranted, the United States Supreme Court has established the three-pronged “Burlington/Carter test,” which asks (1) whether the IEP proposed

⁷⁸ 34 C.F.R. § 300.320(a)(1)–(a)(6)(i) (2013).

⁷⁹ 34 C.F.R. § 300.320(b)(1)–(2). The language in the regulation tracks that of the statute. See 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)–(bb) (2012).

⁸⁰ 20 U.S.C. § 1412(a)(5) (2012). On April 2, 2014, the United States Court of Appeals for the Second Circuit ruled that the IDEA's least restrictive means requirement applies in the same way to an extended school year placement as to a regular school year placement. *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, Nos. 12-4301 & 12-4484, 2014 U.S. App. LEXIS 6129 (2d Cir. Apr. 2, 2014).

⁸¹ *Id.* § 1412(a)(1).

⁸² *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 363 (2d Cir. 2006) (citing *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370 (1985); *M.S. v. Bd. of Educ. of Yonkers*, 231 F.3d 96, 102 (2d Cir. 2000)).

⁸³ See, e.g., *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 12 (1993); *Sch. Comm. of Burlington*, 471 U.S. at 368–69.

by the school district was appropriate to the child's needs and (2) whether the private placement was appropriate to the child's needs, and then looks to (3) the equitable considerations relating to the reasonableness of the action taken by the child's parents.⁸⁴

Although the IDEA outlines both procedural and substantive requirements for IEPs,⁸⁵ it "does not itself articulate any specific level of educational benefits that must be provided through an IEP."⁸⁶ If a parent or guardian believes that his or her child's IEP is not compliant with the IDEA, the parent or guardian may file a "due process complaint"⁸⁷ to challenge the adequacy of the student's IEP.⁸⁸

Unlawful Transfer Policies

Several cases illustrate the diversity of litigation involving ASDs within the confines of education law.

In 2013, a lawsuit was commenced against the Philadelphia school district concerning its "treatment of, and policies governing, school children with autism."⁸⁹ The case stated:

[p]laintiffs contend that the School District transfers students with autism automatically from one school to another, simply because they complete a certain grade, more frequently than the School District transfers non-disabled students who therefore, unlike autistic children, enjoy continued, uninterrupted attendance in K-5 schools or K-8 schools. . . . Plaintiffs further allege that the decision-making process leading up to the transfer of an autistic student is conducted with little to no parental notice or involvement,

⁸⁴ See *Florence Cnty. Sch. Dist. Four*, 510 U.S. at 15–16; see also *Sch. Comm. of Burlington*, 471 U.S. at 370 (explaining the first factor).

⁸⁵ See 20 U.S.C. § 1414 (2006).

⁸⁶ *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998).

⁸⁷ *R.E. ex rel. J.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 175 (2d Cir. 2012) (internal quotation marks omitted) (citing 20 U.S.C. § 1415(b)(6) (2006)), *cert. denied*, 133 S. Ct. 2802 (2013).

⁸⁸ See, e.g., *P.K. ex rel. S.K. v. N.Y.C. Dep't of Educ.*, Nos. 11-3525(L), 11-3633(XAP), 2013 U.S. App. LEXIS 10477, at *4 (2d Cir. May 21, 2013); *M.W. ex rel. A.W. v. Bd. of Educ. of Enlarged City Sch. Dist. of Middletown*, No. 12 Civ. 1476 (ER), 2013 U.S. Dist. LEXIS 82808, at *5 (S.D.N.Y. June 12, 2013); *B.M. ex rel. E.M. v. N.Y.C. Dep't of Educ.*, 12 Civ. 3247 (JMF), 2013 U.S. Dist. LEXIS 68526, at *3 (S.D.N.Y. May 14, 2013); *T.L. v. N.Y.C. Dep't of Educ.*, No. 12-CV-4483, 2013 U.S. Dist. LEXIS 53090, at *24–25 (E.D.N.Y. Apr. 12, 2013); *D.C. ex rel. E.B. v. N.Y.C. Dep't of Educ.*, No. 12 Civ. 1394 (JGK), 2013 U.S. Dist. LEXIS 42764, at *4 (S.D.N.Y. Mar. 26, 2013).

⁸⁹ See *P.V. ex rel. Valentin v. Sch. Dist. of Phila.*, 289 F.R.D. 227, 228 (E.D. Pa. 2013).

and without the required consideration of the children's individualized circumstances.⁹⁰

The plaintiffs argued "that this is particularly problematic because children with autism have difficulty transitioning from one environment to another. Claiming that the School District's policy of transferring autistic students violates several statutes, the . . . plaintiffs [sought] . . . systemic relief from the allegedly unlawful transfer policy, [and] [p]laintiffs filed a motion for class certification . . ." ⁹¹ The federal district court granted the application for class certification.⁹² The outcome of this litigation will of course be of interest.

Denial Of Tuition Reimbursement

In 2012, an action was brought by parents of autistic students against the New York City Education Department under the IDEA, alleging that the city improperly denied their claims for private-school-tuition reimbursement based on testimony about services students "would have" received under their IEP.⁹³ The Second Circuit Court of Appeals ruled, in what it found to be a matter of first impression, that the adequacy of a student's IEP and the ability to provide students with free appropriate public education was to be evaluated prospectively as of the time IEP was created.⁹⁴ In adopting this "snap-shot" rule, the court stated that consideration of "retrospective testimony," that is, testimony about additional services that "would have been provided," but, did not officially appear within the confines of the IEP, was precluded.⁹⁵

Limiting Applied Behavioral Analysis Therapy

In 2000, parents of children with an ASD in a New York public school brought suit against the county in which they resided, the county's Department of Health ("DOH"), and certain DOH officials under 42 U.S.C. § 1983 for violations of IDEA, the Rehabilitation Act of 1973, and the New York Public Health Law, as well as the Fifth and Fourteenth Amendments of the United States

⁹⁰ *Id.* at 228.

⁹¹ *Id.* at 228–29.

⁹² *Id.* at 236.

⁹³ *See R.E. ex rel. J.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 174 (2d Cir. 2012).

⁹⁴ *Id.* at 185–86.

⁹⁵ *Id.* at 186.

Constitution.⁹⁶ The plaintiffs alleged that the defendants “unlawfully implemented policies to prevent, discourage and limit the use of 1:1 Applied Behavior Analysis Therapy . . . in the treatment of autistic/PDD children, [and as a result of those policies, plaintiffs’ children] . . . were deprived of appropriate ABA therapy and suffered injury as a result.”⁹⁷ The District Court found, *inter alia*, that the defendants had denied due process protections to several of the plaintiffs’ through the existence of a “secret” policy, which, among other things, limited ABA therapy to ten hours a week despite IEP plans, without informing the parents or holding post-deprivation hearings under IDEA.⁹⁸

The “Autism Intervention Room”

Physical restraints and seclusion of students with an ASD have also been a source of litigation and legislation.⁹⁹

In 2006, plaintiffs brought suit on behalf of ASD students seeking declaratory and injunctive relief under section 1983, section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act against members of Parchment High School located in Parchment, Michigan.¹⁰⁰ The plaintiffs argued that the officials violated the due process clause of the United States Constitution by depriving students of their liberty interests by placing personal restraints on them, both in the past and in the future.¹⁰¹ The case arose out of the use of an “autism intervention room” used in Parchment High School.¹⁰² A teenage student with ASD exhibited seizure-like symptoms and was brought to the room where he was physically restrained until his guardian came to pick him up.¹⁰³ During the forty-five minute period before the guardian arrived, several officials physically restrained the student until he was no

⁹⁶ *BD v. DeBuono*, 130 F. Supp. 2d 401, 407 (S.D.N.Y. 2001).

⁹⁷ *Id.*

⁹⁸ *Id.* at 431, 435.

⁹⁹ See generally Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323, 337–45 (2011) (discussing the results of a sixty-one case study concerning parental challenges to restraints used by pre-K-to-twelve educational institutions against students and finding that autism, alone or in combination with other disability classifications, was the underlying disability classification in fifty-five percent of the cases).

¹⁰⁰ *Autism Soc’y v. Fuller*, No. 5:05-CV-73, 2006 U.S. Dist. LEXIS 33979, at *2 (W.D. Mich. May 26, 2006).

¹⁰¹ *Id.* at *2–3.

¹⁰² *Id.* at *4.

¹⁰³ *Id.* at *4–5.

longer moving.¹⁰⁴ He was taken to the hospital thereafter and pronounced dead.¹⁰⁵ His death resulted from the restraint.¹⁰⁶ Several other parents in the district became concerned about their ASD children attending Parchment High School because of the use of the “autism intervention room”; the plaintiffs brought suit on behalf of these parents and children.¹⁰⁷ The District Court, however, found that the plaintiffs lacked standing to bring suit in place of the ASD children and their parents.¹⁰⁸

Legislative Response

In 2009, a Government Accountability Office (“GAO”) study identified several hundred cases of alleged abuse and deaths of school children related to the use of restraint and seclusion.¹⁰⁹ In 2012, the Civil Rights Data Collection showed that nearly 40,000 students in the United States were physically restrained during the 2009–10 school year.¹¹⁰ The data also showed that restraint and seclusion were used disproportionately, among others, upon students with disabilities.¹¹¹ Recently, the Keeping All Students Safe Act (“KSSA”), was re-introduced by United States Representative George Miller (D-CA).¹¹² Its purpose is to safeguard children from unsafe and unnecessary restraint and seclusion in schools or in a school setting.¹¹³

Bullies In The Classroom

Other educational needs of ASD students also need to be addressed, including safety in the actual classroom. A recent study found that children with ASDs are bullied nearly five times as often as their peers, with approximately 46 percent of ASD children in

¹⁰⁴ *Id.* at *5.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at *5–6.

¹⁰⁷ *See id.* at *7–9.

¹⁰⁸ *See id.* at *14–29, *51.

¹⁰⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 5 (2009) [hereinafter SECLUSIONS AND RESTRAINTS].

¹¹⁰ U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION 5 (2012), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf>.

¹¹¹ *See id.*

¹¹² *See* H.R. 1893, 113th Cong. (2013).

¹¹³ *Id.* § 3.

middle and high school reporting to their parents that they had been victimized at school within the past year.¹¹⁴ The study found that the highest functioning ASD children were at the greatest risk, being three times more likely to be bullied than those ASD children whose verbal abilities were limited.¹¹⁵ The highest functioning ASD students are often mainstreamed and while interacting in mainstream classrooms social awkwardness becomes more visible to children without ASDs—while the disability less so—perhaps making it more difficult for student peers to understand the ASD child’s condition compassionately.¹¹⁶ As the study’s authors conclude: “Inclusive classrooms need to increase the social integration of adolescents with an ASD into protective peer groups while also enhancing the empathy and social skills of typically developing students towards their peers with an ASD and other developmental disabilities.”¹¹⁷

V. TORT LAW

Vaccine Design Defects

To those who are of the belief that autism is a side effect of childhood vaccines, the United States Supreme Court’s 2011 ruling in *Bruesewitz v. Wyeth LLC*¹¹⁸ foreclosed litigation against vaccine manufacturers.¹¹⁹ Instead, those possibly affected by vaccines must now rely solely on a compensation system created under the National Childhood Vaccine Injury Act.¹²⁰ The Act establishes a strict three-year statute of limitation from the time a vaccine-induced injury occurs to file a claim.¹²¹ The Supreme Court found that this compensation system, created in 1986, “preempt[ed] all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects.”¹²²

¹¹⁴ Paul R. Sterzing et al., *Bullying Involvement and Autism Spectrum Disorders: Prevalence and Correlates of Bullying Involvement Among Adolescents with Autism Spectrum Disorder*, 166 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 1058, 1060 (2012).

¹¹⁵ See *id.* at 1061 tbl.1, 1063.

¹¹⁶ See *id.* at 1063.

¹¹⁷ *Id.*

¹¹⁸ *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011).

¹¹⁹ *Id.* at 1082.

¹²⁰ 42 U.S.C. § 300aa–15 (2012).

¹²¹ *Id.* § 300aa–16(a)(2).

¹²² *Bruesewitz*, 131 S. Ct. at 1082.

Low Birth Weight and Autism

In a recent action in New York, a plaintiff sought to recover damages for personal injuries she allegedly suffered as a pedestrian while she was pregnant, when she slipped and fell on a utility company's manhole cover.¹²³ The plaintiff also sought damages on behalf of her later born infant daughter.¹²⁴ The utility company asked the New York State Supreme Court to preclude the plaintiff's proposed expert testimony, and moved for a *Frye* hearing on whether the plaintiff could present expert testimony supporting her theory of causation.¹²⁵ The plaintiff, who alleged that she prematurely gave birth to her child as a result of her accident, proposed expert testimony by a neurologist to support her theory that the infant plaintiff's autism spectrum disorder and pervasive developmental delay was proximately caused by her premature birth and low birth weight.¹²⁶

A Quantum Leap of Causation

The New York State Supreme Court ruled that although two studies had suggested a possible association between low birth weights and autism, there was no generally accepted causal link.¹²⁷ Citing the Appellate Division, Second Department, in an action where the plaintiff sought to establish a causal connection between her therapeutic use of acetaminophen and her subsequent development of cirrhosis of the liver,¹²⁸ the supreme court noted that “[a]n association in medicine or science is different from causation.”¹²⁹ Accordingly, the supreme court found the plaintiff's attempt to equate “general developmental delays of a slightly premature birth to a diagnosis of Autism Spectrum Disorder with Pervasive Developmental Delay . . . [to be a] quantum leap of causation” since medical researchers and scientists must first establish general causation between prematurity/low birth weight

¹²³ Melnick v. Consol. Edison, Inc., 959 N.Y.S.2d 609, 610 (Sup. Ct. Richmond County 2013).

¹²⁴ *Id.* at 609.

¹²⁵ *Id.* at 611.

¹²⁶ *Id.* at 613–14.

¹²⁷ *Id.* at 621–22.

¹²⁸ *Id.* at 613 (citing Ratner v. McNeil-PPC, Inc., 933 N.Y.S.2d 323, 325 (App. Div. 2d Dep't 2011)).

¹²⁹ *Id.* at 618.

and autism/PDD; however, medical research has only shown a statistical association and has cautioned against establishing prematurity/low birth weight as a cause of ASD/PDD.¹³⁰

Failure To Warn Of Violent Behavior

In a 2010 case from New York Appellate Division, Fourth Department, a licensed occupational therapist at an elementary school who was assigned to render services to a severely autistic child, sought damages for her personal injuries against the school district and student's parents after she alleged the student injured her in a classroom.¹³¹ The plaintiff alleged that the parents and the school district were negligent in failing to warn the plaintiff of the violent behavior of the student, and that the parents "were also negligent in failing to supervise their daughter in an adequate manner."¹³² The appellate division affirmed the trial court's grant of summary judgment to the defendants, holding that the parents did not have opportunity or ability to control their daughter's behavior in the classroom, and a warning was not required where the therapist knew of the student's behavior.¹³³

VI. GUARDIANSHIP—THE LEAST RESTRICTIVE MEANS DOCTRINE

The "least restrictive means" is an increasingly common approach to dealing with a guardianship proceeding involving an ASD party.¹³⁴ However, prior to reform that began in the late twentieth century, mentally incapacitated individuals, regardless of their cognitive abilities, were deemed wholly incapable of retaining any legal rights or autonomy.¹³⁵ These individuals were frequently institutionalized and divested of their individual rights.¹³⁶ However, the availability of more comprehensive medical studies

¹³⁰ See *id.* at 622.

¹³¹ *Johnson v. Cantie*, 905 N.Y.S.2d 384, 385 (App. Div. 4th Dep't 2010).

¹³² *Id.*

¹³³ *Id.* at 385–86.

¹³⁴ See Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 98 (2012) ("Th[e] current paradigm leads to 'tailored' or limited guardianships, which represent the least restrictive means of protection, the promotion of greater autonomy for the incapacitated person, and robust procedural protections in the determination of incapacity and appointment of a guardian.").

¹³⁵ See *id.* at 94.

¹³⁶ *Id.* at 104–05.

and the persistent demands of civil rights proponents have resulted in a significant remodeling of the method by which guardians are appointed¹³⁷—namely, the least restrictive means doctrine. For example, in New York State, mentally incapacitated individuals are deemed capable of retaining all of their legal rights until it is proven by clear and convincing evidence that they are incapable of retaining complete autonomy.¹³⁸

New York's Surrogate's Court Procedure Act

The original New York statute controlling guardianship appointment, Surrogate's Court Procedure Act Article 17-A, was enacted in 1969 as a legal means for parents with a mentally incapacitated child, that is, a child with developmental disabilities, autism, traumatic brain injuries, and other enumerated conditions, to maintain control over their child's decision-making after the child has reached majority.¹³⁹ Although a seemingly progressive statute, Article 17-A does not require periodic review, often considered a necessary safeguard to ensure that incapacitated individuals receive due process and are not erroneously deprived of their liberty.¹⁴⁰ Periodic review ensures that the evolving needs of the individual continue to be met over time, particularly where comprehensive medical information continues to yield a greater understanding of mentally incapacitated individuals.¹⁴¹ Courts will typically allow modification of guardianship if an evaluation presents evidence that the individual has made significant progress, thereby relieving the guardian of some or all duties.¹⁴² Thus, Article 17-A, prior to judicial interpretation, lacked most, if not all, of the due process protections of Article 81 of the New York Mental Hygiene Law.

¹³⁷ See *id.* at 98.

¹³⁸ *Id.* at 113 & n.87 (citing N.Y. MENTAL HYG. LAW § 81.12(a) (Mckinney 2013)).

¹³⁹ 1969 N.Y. Laws 3046; Rose Mary Bailly & Charis B. Nick-Torok, *Should We Be Talking?—Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 ALB. L. REV. 807, 818 & n.73 (2012) (“The new statute was envisioned as an opportunity for parents to continue as the legal caregivers of their mentally retarded child once the child reached the age of majority . . .”).

¹⁴⁰ *In re Mark C.H.*, 906 N.Y.S.2d 419, 423, 428–29 (Sur. Ct. N.Y. County 2010).

¹⁴¹ See *id.* at 424–25 (citations omitted).

¹⁴² See *id.* at 428.

Maintaining Control And Periodic Review

In 2010, a proceeding was commenced seeking the appointment of a guardian for a disabled and autistic male who was institutionalized after his mother died.¹⁴³ The court sought to determine whether the child's needs were being met by the guardian, with the benefit of a substantial trust established by the child's deceased mother.¹⁴⁴ The surrogate's court, after discussing the history of Article 17-A within a constitutional and international human rights framework, held that due process required that the guardianship appointment be subject to a periodic reporting and review requirement.¹⁴⁵ The court concluded that,

[a]s a matter of fundamental due process, the State may not impose the "extensive loss of personal liberty [inherent] in the guardianship process" without some guarantee that the [guardian] . . . continues to act in her ward's best interests, and that the ward is . . . no worse off than before the guardianship was awarded.¹⁴⁶

The Mathews Test

An additional safeguard to the liberty of incapacitated individuals is a three-part test, commonly known as the Mathews test, which was established under New York's Mental Hygiene Law Article 81.¹⁴⁷ This test requires that, for an individual to be divested of their legal rights, it must be proven that the person is likely to suffer harm, that "the person is unable to provide for personal needs and/or property management; and . . . [that] the person cannot adequately understand and appreciate the nature and consequence of such inability."¹⁴⁸ If the court finds that the individual is lacking certain capacities, it is only for those specified incapacities that a guardian may be appointed.¹⁴⁹ This nuanced method has been nominally termed "tailored" or "limited" guardianship.¹⁵⁰ Tailored

¹⁴³ *Id.* 419–20.

¹⁴⁴ *See id.* at 420.

¹⁴⁵ *Id.* at 435.

¹⁴⁶ *Id.* at 434 (second alteration in original) (quoting Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. TOL. L. REV. 189, 190 (1994)).

¹⁴⁷ *See* N.Y. MENTAL HYG. LAW § 81.02(b) (McKinney 2013); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁴⁸ N.Y. MENTAL HYG. LAW § 81.02(b)(1)–(2).

¹⁴⁹ *See* Glen, *supra* note 134, at 114.

¹⁵⁰ *Id.*

guardianship ensures that mentally incapacitated individuals are retaining the utmost autonomy while also receiving the care and guidance that they require but are unable to self-administer.¹⁵¹ Mental Hygiene Law Article 81 affords additional due process safeguards as well, including notice, hearing, right to counsel, proof by clear and convincing evidence that a guardian is necessary, tailored guardianship, and periodic reporting.¹⁵²

The evolution of guardianship from unlimited to restricted control over incapacitated individuals represents a shift in our society's understanding and subsequent treatment of those individuals.

VII. FAMILY LAW

Parents may disagree in addressing the issue of what is in their child's best interest. When custody litigation ensues, that question becomes even more complicated when considering the special needs of an ASD child. The growing population of families affected by ASD requires attorneys and courts to grapple with the issues that arise in determining what constitutes appropriate care and decision-making for a child who has an ASD. Attorneys for these children are also required to become familiar with, *inter alia*, safety issues, therapies, medical terminology, educational issues, and IEPs. These issues concern not only the child with an ASD, who in certain cases may not be able to communicate, but also the siblings of children with an ASD, many of whom are also impacted by these questions.

Relocation and the Best Caregiver

In one case, a mother sought to move to North Carolina with her ASD child from New York.¹⁵³ The court noted that the move could prove potentially damaging to the child as the child was prone to outbursts associated with his ASD, and it was the father, who would remain in New York, who was found to be best able to soothe

¹⁵¹ See N.Y. MENTAL HYG. LAW § 81.20(a)(7) (McKinney 2013) (“[A] guardian who is given authority relating to the personal needs of the incapacitated person shall afford the incapacitated person the greatest amount of independence and self-determination with respect to personal needs in light of that person's functional level, understanding and appreciation of that person's functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living.”).

¹⁵² See *In re* Chaim A.K., 885 N.Y.S.2d 582, 587–89 (Sur. Ct. N.Y. County 2009).

¹⁵³ *Kellie A.H. v. Peter A.H.*, No. V-21577-04/06B/C, 2006 N.Y. Misc. LEXIS 3261, at *1 (Fam. Ct. Suffolk County 2006).

the child during these outbursts.¹⁵⁴ However, the court, in assessing the best interests of the child, permitted the move, finding the mother to be the primary psychological caregiver.¹⁵⁵ The court found that the move would allow for better living conditions for the child, whereas “[a] reversion of custody to the father would be emotionally devastating” for the child.¹⁵⁶ The court also noted that the mother had already found various services within North Carolina to benefit her ASD child.¹⁵⁷

Available Services

Other courts have placed a prime importance on services available to the ASD child when determining custody. In one such case, the court found that steps taken by one parent to improve the quality of his son’s life as an individual with Asperger’s Syndrome was the most important issue with respect to the child’s best interest.¹⁵⁸ This included providing for all the medical attention needed for the child, helping him “fit in” with his peers, and helping the child overcome any difficulties he faced in performing tasks due to his conditions.¹⁵⁹

Extended Placement

However, where the parents have been unable to recognize, cope with, or adequately address the special needs of an ASD child, extended placement of the ASD child is not uncommon. In one case, extended placement of an ASD child with the Department of Social Services for twelve months was made because the father was unwilling or unable to recognize the child’s autism.¹⁶⁰ The father refused to provide the necessary care and services required for the well-being of a child with heightened needs.¹⁶¹

Indeed, in certain instances, courts have found that placement in foster homes is necessary in order to meet the heightened needs of the child.¹⁶² One court opined that autism amplifies the need for

¹⁵⁴ *Id.* at *5–6.

¹⁵⁵ *See id.* at *4, *11–16.

¹⁵⁶ *Id.* at *15.

¹⁵⁷ *Id.* at *9, *14.

¹⁵⁸ *See Harris v. Grice*, 244 S.W.3d 9, 13 (Ark. Ct. App. 2006).

¹⁵⁹ *Id.* at 12–13.

¹⁶⁰ *See In re Austin A.*, 641 N.Y.S.2d 752, 753 (App. Div. 3d Dep’t 1996).

¹⁶¹ *Id.*

¹⁶² *See, e.g., State Div. of Youth & Family Servs. v. G.S.*, No. A-5960-09T3, A-5982-09T3,

stability, even if such stability requires placement with foster parents who are better able to meet the child's heightened developmental needs for permanency, consistency, nurturance, and guidance.¹⁶³

VIII. CRIMINAL LAW

The issue of ASDs in our criminal courts is likely to grow in significance as the large population of children on the spectrum grows into adulthood. We expect that these cases will prove quite challenging, as an ASD individual's motivation and intent may be difficult to comprehend. Interesting questions arise regarding mental capacity and an ASD individual's perception.

Perceived Antisocial Behavior

We have a general understanding today that even individuals with high-functioning ASDs can have issues with sensory overload, semantics, sarcasm, have difficulty when dealing with changes in routine or structure, generally have poor social awareness, and inadequate understanding of nonverbal communications such as body language and facial expressions, both on the giving and receiving end.¹⁶⁴ Accordingly, their responses within society can be very difficult and they can often be viewed as exhibiting antisocial behavior.¹⁶⁵ While there is no evidence to suggest that individuals with ASDs will commit crimes at a higher rate than the general population, it stands to reason that offenses may be committed by individuals with ASD. However, as with any offense, intent must be considered, and when considering an individual with an ASD, such intent may have to be evaluated differently.

Vulnerable to a Range of Crimes

Individuals with ASDs have also, of course, found themselves the victims of improper behavior often rising to the level of criminal

2011 N.J. Super. Unpub. LEXIS 1710, at *43–44 (N.J. Super. Ct. App. Div. June 30, 2011); Idaho Dep't of Health & Welfare v. Doe, 256 P.3d 764, 767 (Idaho 2011).

¹⁶³ See generally *State Div. of Youth & Family Servs.*, 2011 N.J. Super. Unpub. LEXIS 1710, at *25, *36 (noting that the trial judge, in making her decision, considered the opinion of the child's doctor that the child's autism increased the child's need for stability).

¹⁶⁴ See *Symptoms: What Are the Symptoms of Autism?*, AUTISM SPEAKS, <http://www.autismspeaks.org/what-autism/symptoms> (last visited Mar. 21, 2014).

¹⁶⁵ See *id.*

conduct.¹⁶⁶ According to the Autism Society of America, because individuals with ASDs have difficulty picking up social cues and understanding other individual's thoughts and intentions, they are "vulnerable to a range of crimes from fraud and theft to more violent crimes. Individuals with ASD are also generally taught compliance from a very young age, making them easy targets for abuse and victimization."¹⁶⁷

Evidence of Guilt

One autism advocate opined that "[a] diagnosis of an autism spectrum disorder is as relevant to police and legal proceedings as a diagnosis of mental retardation or mental illness would be, no matter how bright, high functioning, and/or verbal the individual may be" since individuals with ASDs "have significant problems in both verbal and non-verbal communication and in both sending and understanding messages, [t]his results in behavior that needs to be explained and understood" since they "respond and perform neurologically *inconsistently* depending on emotional state, familiarity with the people and situation and various sensory experiences."¹⁶⁸ It is without question that criminal justice professionals may struggle to differentiate those behaviors typical of

¹⁶⁶ See CAROLYN GAMMICCHIA & CATRIONA JOHNSON, AUTISM SOC'Y OF AM., LIVING WITH AUTISM: AUTISM INFORMATION FOR FOR LAW ENFORCEMENT AND OTHER FIRST RESPONDERS, http://www.autismspeaks.org/docs/family_services_docs/LawEnforcement.pdf (last visited Mar. 21, 2014).

¹⁶⁷ *Id.*

¹⁶⁸ BARBARA T. DOYLE, AND JUSTICE FOR ALL: UNLESS YOU HAVE AUTISM: WHAT THE LEGAL SYSTEM NEEDS TO KNOW ABOUT PEOPLE WITH AUTISM SPECTRUM DISORDERS 1-2, http://www.autismspeaks.org/docs/family_services_docs/LegalSystem.pdf (last visited Mar. 21, 2014). One recent example of how an autism spectrum disorder is as relevant to legal proceedings as a diagnosis of mental retardation or mental illness is the case of David Allen Raley, who was sentenced to death in 1988 for capital murder. Howard Mintz, *California Death Penalty and Autism: Killer David Allen Raley Seeks Reprieve*, SAN JOSE MERCURY NEWS (Sept. 8, 2013), http://www.mercurynews.com/ci_24045718/california-death-penalty-and-mental-retardation-condemned-killer. Over Raley's objection, his attorneys recently raised, as part of an *Atkins* Eighth Amendment claim, that he is autistic and therefore falls under the legal protections against executing the mentally retarded. Howard Mintz, *Santa Clara County Killer Raley Tries to Fire Lawyers for Arguing He is Mentally Retarded*, SAN JOSE MERCURY NEWS (Sept. 9, 2013), http://www.mercurynews.com/ci_24053303/condemned-santa-clara-county-killer-tries-fire-lawyers; *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that execution of a mentally retarded offender violates the Eighth Amendment prohibition against cruel and unusual punishment). The California Supreme Court ordered a Superior Court Judge to hold hearings and make recommendations. Howard Mintz, *Santa Clara County Killer Raley Tries to Fire Lawyers for Arguing He is Mentally Retarded*, SAN JOSE MERCURY NEWS (Sept. 9, 2013), http://www.mercurynews.com/ci_24053303/condemned-santa-clara-county-killer-tries-fire-lawyers. The case is still pending.

an individual with an ASD and the prototypical conduct of an offender, and measures will need to be taken to avoid misinterpreting behaviors and characteristics typical of those with autism as evidence of guilt, indifference, or lack of remorse. Indeed, the willingness of an ASD individual to “cooperate” can lead to allegations of entrapment.¹⁶⁹

The Misunderstood Witness

It will also be a significant task for attorneys to present courtroom witnesses with ASDs in a manner that jurors lacking exposure to individuals with ASDs can understand, without judgment as to unusual responses or mannerisms, and with understanding as to an ASD individual’s “normal.” Left unexplained, such witness’s loud vocal tone, aloof body language, flat facial expressions, difficulty in making eye contact, repetitive behavior, and tactless statements, could adversely affect the ultimate goal of meting out justice.¹⁷⁰

Excluding Expert Testimony

In a recent criminal court case arising in New Jersey, a defendant was charged in a two-count indictment with second-degree aggravated assault and second-degree endangering the welfare of a child.¹⁷¹ “Following [this] defendant’s first trial in 2004, he was convicted of second-degree aggravated assault and the lesser-included offense of third-degree endangering the welfare of a minor.”¹⁷² However, on appeal, the Superior Court of New Jersey “reversed and remanded because the trial court erred ‘in excluding expert testimony regarding defendant’s diagnosis of Asperger’s Disorder.’”¹⁷³ “The [New Jersey] Supreme Court granted the State’s petition for certification, and the Court agreed that defendant was

¹⁶⁹ See Sabrina Rubin Erdely, *The Entrapment of Jesse Snodgrass*, ROLLING STONE (Feb. 26, 2014, 10:00 AM), <http://www.rollingstone.com/culture/news/the-entrapment-of-jesse-snodgrass-20140226> (describing how an autistic high school student who had no access to drugs, anxious to interact with his peers, was duped by an in-school drug sting).

¹⁷⁰ See *id.* at 2–4.

¹⁷¹ *State v. Burr*, No. A-2671-10T3, 2013 N.J. Super. Unpub. LEXIS 1130, at *1 (N.J. Super. Ct. App. Div. May 13, 2013); *State v. Burr*, 921 A.2d 1135, 1137 (N.J. Super. Ct. App. Div. 2007), *aff’d*, 948 A.2d 627 (N.J. 2008).

¹⁷² *Burr*, 2013 N.J. Super. Unpub. LEXIS 1130, at *1.

¹⁷³ *Id.* (quoting *Burr*, 921 A.2d at 1146).

entitled to a new trial.”¹⁷⁴

Placement In Foster Care Program

In a criminal proceeding arising in the State of Iowa, a juvenile entered an *Alford* plea to allegations of sexual abuse and incest and thereafter requested an entry of consent decree in lieu of a delinquency adjudication as means to receiving a detention more conducive to treating his diagnosed cognitive impairment.¹⁷⁵ The issue the Iowa Supreme Court was asked to consider was “the juvenile court’s authority in a delinquency proceeding to enter a consent decree, over the State’s objection.”¹⁷⁶ The juvenile court officer had recommended that the juvenile “be adjudicated a delinquent and placed in a residential treatment facility for sex offenders.”¹⁷⁷ The recommendation was based partly on an evaluation of the juvenile by a psychologist who diagnosed him with Asperger’s Syndrome and found that he “was not safe out in the community given his level of accepted responsibility, impulsivity and his general denial.”¹⁷⁸ At the dispositional hearing, following his *Alford* plea, the juvenile offered the testimony of a child psychiatrist, who opined that the juvenile’s diagnosis was more properly PDD–NOS, and who strongly recommended against placing him in a sex offender treatment facility.¹⁷⁹ The expert concluded that because of the juvenile’s “developmental disorder and his lack of history of other inappropriate sexual behavior, he

¹⁷⁴ *Burr*, 2013 N.J. Super. Unpub. LEXIS 1130, at *2 (citation omitted). In May 2013, on appeal following the new trial, the Superior Court of New Jersey, Appellate Division, was asked to determine whether “[t]he jury charge as to the defendant’s expert witness [was] defective” *Id.* (second alteration in original). It was asserted that the charge failed to guide the jury how it was to consider the expert’s testimony regarding the defendant’s Asperger’s Syndrome. *Id.* More specifically, the defendant argued that the trial court erred by failing to explain to the jury that his expert’s testimony was offered to show that defendant’s “ability to make certain social judgments [was] impaired.” *Id.* at *14 (alteration in original) (internal quotation marks omitted). The New Jersey Appellate Court rejected this contention, holding that the trial court’s instruction substantially mirrored the Model Jury Charge for expert witnesses and thus was acceptable. *Id.*

¹⁷⁵ *State v. Iowa Dist. Court for Warren Cnty.*, 828 N.W.2d 607, 609–10 (Iowa 2013); see generally *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (“An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”).

¹⁷⁶ *Iowa Dist. Court for Warren Cnty.*, 828 N.W.2d at 609.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (internal quotation marks omitted).

¹⁷⁹ *Id.*

would likely be victimized himself or learn more inappropriate sexual behavior if placed in such a facility.”¹⁸⁰ Instead the expert “opined that a community-based program focusing on improving all of [the juvenile’s] social skills would be the most effective and appropriate under the circumstances.”¹⁸¹ Accordingly, the expert “recommended either a family placement or, if no family placement was available, foster care.”¹⁸²

The Iowa Supreme Court held, with one justice dissenting, that the juvenile court lacked authority under Iowa law to place the juvenile in state-funded group foster care program as a term and condition of a consent decree and remanded the case.¹⁸³ However, the court noted in its conclusion that it did not “have any *substantive* disagreement with [the juvenile’s] placement,” clarifying that the issue before it was “not whether [the juvenile] should be placed in group foster care where he can receive appropriate treatment,” but “whether a juvenile court can bring about that result by ordering a transfer of custody, payment by the State, and a residential placement [under] . . . the consent decree provision of the juvenile justice chapter,” in that the court was obligated to follow the framework established by the Iowa legislature.¹⁸⁴

Determining Credibility Of ASD Witness

However, individuals with ASDs and those with other disabilities are more likely to be victims of crimes than perpetrators.¹⁸⁵ In 2013, the Wisconsin Court of Appeals was asked to review a judgment against a defendant convicted of three counts of first-degree sexual assault of an autistic child.¹⁸⁶ One of the issues in contention was whether the child’s autism somehow reduced her credibility as an expert at trial had discussed suggestibility in autistic children.¹⁸⁷ The court rejected the contention that the

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 609–10.

¹⁸² *Id.* at 610.

¹⁸³ *Id.* at 616–17.

¹⁸⁴ *Id.* at 617; *see* IOWA CODE § 232.46 (2013).

¹⁸⁵ Karen Hughes et al., *Prevalence and Risk of Violence Against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies*, 379 LANCET 1621, 1626, 1627 (2012).

¹⁸⁶ *State v. Otero*, No. 2010AP1622-CR, 2013 Wisc. App. LEXIS 541, at *1 (Wis. Ct. App. June 26, 2013).

¹⁸⁷ *Id.* at *12 n.4.

defendant “could have offered an expert at trial who would have opined that the child’s autism somehow reduced her credibility.”¹⁸⁸

Bruising and Eavesdropping

A 2008 New York Appellate Term decision held, in a matter of first impression, that an autistic child’s mother lawfully consented to the recording of a defendant’s conversation on behalf of her eight year old child, who was in fact present at the time of the conversation.¹⁸⁹ The child’s mother had surreptitiously placed an audio recording device in her child’s backpack after noticing that he was coming home from school with bruises and abnormal redness on his body.¹⁹⁰ As another basis for its holding, the court, noting that autism is defined under the Mental Hygiene Law as a developmental disability, and in turn a mental disability, found that “[t]here must be a balance between important competing public policy considerations of protecting those with disabilities from abuse and protecting citizens against eavesdropping.”¹⁹¹

Violence in the Home

Unfortunately, individuals living with an ASD are not immune to violence within their own home. Very recently, an autistic teenager was killed, allegedly by his mother and his caregiver.¹⁹² The victim, Alex Spourdalakis, was found dead in his bed inside a second-floor apartment which he shared with his mother.¹⁹³ It is alleged that the two women had grown frustrated with the teen, who required around-the-clock care, and had originally plotted to kill him using sleeping pills.¹⁹⁴ Failing to kill the teen with the pills, the victim’s mother allegedly stabbed him four times in the chest before slitting his wrists, while the caregiver, who was also the victim’s godmother, allegedly killed the family cat.¹⁹⁵ The two women were

¹⁸⁸ *Id.* at *12.

¹⁸⁹ See *People v. Clark*, 855 N.Y.S.2d 809, 813 (App. Term 2d Dep’t 2008) (mem.); see also *id.* at 814 (Patterson, J., dissenting) (“[T]he issue of whether a parent can consent to such recording on behalf of a child is one of first impression . . .”).

¹⁹⁰ *Id.* at 811 (majority opinion).

¹⁹¹ *Id.* at 813; N.Y. MENTAL HYG. LAW §1.03(3), (22)(a)(1) (McKinney 2013).

¹⁹² Joseph Ruzich, *Officials: Autistic Boy’s Slaying Chronicled*, CHI. TRIB., June 13, 2013, at 10.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

also found in the apartment and were reportedly lying in a semiconscious state after taking sleeping pills in an attempt to take their own lives.¹⁹⁶ Both have been charged with first-degree murder in the stabbing death.¹⁹⁷

IX. OTHER MATTERS OF NOTE

In light of the scientific progress and increased social understanding of ASD, courts and autism awareness societies have come to recognize how legal matters affect those individuals living with ASD.¹⁹⁸ Notably, there has been a progressive shift in the legal system towards understanding the nature and complexity of ASD.¹⁹⁹

Uncaring Trustees

A New York surrogate's court recently heard a case involving a severely disabled, vulnerable ASD teenager named Mark, who was the beneficiary of a multimillion dollar trust.²⁰⁰ Mark suffered from autistic disorder and required constant supervision.²⁰¹ Mark was nonverbal and engaged in numerous repetitive behaviors, "including spitting, throwing objects and hitting his head."²⁰² Due to the severity of Mark's ASD, his mother, Marie, after being informed she had terminal cancer, placed Mark in an institution and set up a trust in his name so that he would always be taken care of.²⁰³ After Marie's death, H.J.P. (Marie's attorney) and J.P. Morgan Chase Bank were designated co-trustees of Mark's trust.²⁰⁴ H.J.P. knew Marie and Mark well, and was aware of Mark's serious condition.²⁰⁵ Yet, H.J.P. failed to visit Mark, inquire about his needs, or apply any of the trust income towards improving his condition.²⁰⁶

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J.L. & MED. 483, 512–13, 520, 521–23 (2010) (describing cases in which courts have recognized or expanded on the rights of persons living with ASDs).

¹⁹⁹ See *id.* at 512–14, 520, 521–23.

²⁰⁰ *In re JP Morgan Chase Bank N.A.*, 956 N.Y.S.2d 856, 857–58 (Sur. Ct. N.Y. County 2012).

²⁰¹ See *id.* at 860.

²⁰² *Id.* (internal quotation marks omitted).

²⁰³ *Id.* at 857–58.

²⁰⁴ *Id.* at 858.

²⁰⁵ See *id.* at 861.

²⁰⁶ *Id.*

Nevertheless, both trustees took commissions from the trust.²⁰⁷

After H.J.P. further attempted to be appointed as Mark's guardian, Mental Health Services brought an action, on behalf of Mark, against the co-trustees for breach of fiduciary duty.²⁰⁸ The court found that because the co-trustees were aware of the beneficiary's incapacity and allowed him to languish for years, despite his abundant assets, the co-trustees had breached their fiduciary duty to Mark.²⁰⁹ The co-trustees were subjected to a denial or reduction in commissions, among other remedies available for such a breach, pending the completion of an accounting.²¹⁰

Discharging Student Loans

In 2012, a Maryland Bankruptcy Court dismissed a sixty-three-year-old woman's \$320,000 plus school debt, after hearing testimony of her life as an adult woman living alone with Asperger's Syndrome.²¹¹ The Chapter 7 debtor, Ms. Todd, commenced an adversary proceeding seeking a determination that she was entitled to an "undue hardship" discharge of her student loan debt.²¹² The court determined that Ms. Todd had satisfied the *Brunner* test, establishing "undue hardship" by a showing that her (1) "minimal standard of living" was not enough to pay back her debt, and (2) that her hardship, due to her Asperger's Syndrome, was sufficient to establish "additional circumstances."²¹³ The court noted that even though Ms. Todd had never attempted to make any payments on the loan, she was not prevented from (3) satisfying the "good faith" requirement or obtaining an "undue hardship" discharge of any of the loans.²¹⁴ Ms. Todd had testified that, in spite of her condition, she would spend her days researching and calling local charities and churches for work so that she could maintain her minimal standard of living.²¹⁵ Her monthly expenses totaled just under \$2,000, with her rent constituting half of the total.²¹⁶ The

²⁰⁷ *Id.* at 860.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 866, 868.

²¹⁰ *Id.* at 868.

²¹¹ *Todd v. Access Grp., Inc. (In re Todd)*, 473 B.R. 676, 679–80 (Bankr. D. Md. 2012).

²¹² *Id.* at 679, 687.

²¹³ *Id.* at 686–87, 688, 692 (quoting *Brunner v. N.Y. State Higher Educ. Servs. Corp.* 831 F.2d 395, 396 (2d Cir. 1987)).

²¹⁴ *In re Todd*, 473 B.R. at 694–95.

²¹⁵ *Id.* at 681.

²¹⁶ *See id.* at 683.

court found that it was possible that Ms. Todd was a fully functional and bright student, but could not maintain employment because of her Asperger's Syndrome; the court called this dichotomy "the mystery that is Autism."²¹⁷

ASD Under the New Diagnostic Criteria (DSM 5)

The publication of the fifth edition of Diagnostic and Statistical Manual of Mental Disorders (DSM-5) in May 2013 has proven to be a source of debate in the ASD community in that there is concern that it will have an impact on how ASDs are classified. In the DSM-5, Asperger syndrome and "Pervasive Developmental Disorder—Not Otherwise Specified" or "PDD-NOS", will disappear merging these "high functioning" ASDs into the streamlined New Autism Spectrum Disorder.²¹⁸

The new Autism Spectrum Disorder includes three "functional levels," which are defined under the new criteria based on "need for support."²¹⁹ The DSM-5 applies to those who are being newly diagnosed or reevaluated.²²⁰ Those with a preexisting autism spectrum diagnosis, including a diagnosis of Asperger's syndrome or PDD-NOS, need not be re-evaluated as their existing diagnoses should simply be re-coded under the new Autism Spectrum.²²¹ Unlike the DSM-IV, which provided multiple medical codes, the new Autism Spectrum Disorder carries a single medical code.²²²

While the DSM is not a legal authority, it is a widely regarded guide and has been noted, in its fourth version, in decisions relating to ASDs across the nation.²²³ It remains to be seen what impact, if

²¹⁷ *Id.* at 690.

²¹⁸ Dickerson & Cohen, *supra* note 47.

²¹⁹ See DSM-5, *supra* note 19, § 299.0 tbl.2 (explaining the spectrum levels based on social communication and restricted or repetitive behaviors).

²²⁰ *Id.* § 299.0.

²²¹ *Id.*

²²² Compare *id.* at 50–51 (giving one code for autistic disorder, Asperger's disorder, and pervasive developmental disorder), with DSM-IV, *supra* note 22, §§ 299.0, 299.8 (having separate codes for autistic disorder, Asperger's disorder, and pervasive developmental disorder). Medical codes are used, inter alia, to group and identify diseases, disorders, and symptoms, describe diagnoses and treatments, determine costs and reimbursements, and relate one disease or drug to another and are developed by the American Medical Association. See DSM-5, *supra* note 19, at 23. In practice, medical coding is primarily used to file healthcare claims with third party insurers. See *id.*

²²³ See, e.g., *Mayberry ex rel. M.I.J. v. Comm'r of Soc. Sec.*, No. 12-11256, 2013 U.S. Dist. LEXIS 86891, *7 n.1 (E.D. Mich. May 16, 2013); *T.L. v. N.Y.C. Dep't of Educ.*, No. 12-CV-

any, the new classification will have on how these individuals with high-functioning ASDs receive services, insurance coverage, and are perceived within the courtroom.

X. NEW RESOURCES

New resources for those affected by ASDs, as well as legal professionals, arise frequently.²²⁴ On June 4, 2013, Autism Speaks, an autism advocacy and science organization, announced that it formed the Autism Speaks Legal Resource Center (ASLRC) to help develop and protect the legal rights of people with autism.²²⁵ The ASLRC “may provide logistic support, coordination, legal advice and analysis, training and policy analysis, co-counseling in strategic cases and amicus (friend of the court) briefing.”²²⁶ The Elizabeth Birt Center for Autism Law and Advocacy states that its purpose “is to educate lawyers, advocates and parents about the legal challenges of autism” and “provides training, resources and a forum within which to advance legal and advocacy strategies to improve the lives of those with autism.”²²⁷ Wrightslaw is noted by many as an invaluable resource of special education law information.²²⁸

XI. CONCLUSION

Due to the exponential increase in ASD diagnoses, it is without question that we can expect to see a rise in ASD related controversies within, and which directly affect, our legal system. Our society, and in particular our laws, seems willing to accommodate this growing population of affected individuals. Our review is by no means complete as new findings, studies, cases, and legislation touching on these issues now arise frequently. The ever-changing landscape of ASDs and the law requires a dedicated

4483, 2013 U.S. Dist. LEXIS 53090, at *35 (E.D.N.Y. Apr. 12, 2013); *Melnick v. Consol. Edison, Inc.*, 959 N.Y.S.2d 609, 615–16 (Sup. Ct. Richmond County 2013).

²²⁴ See, e.g., *About: Our Mission*, ELIZABETH BIRT CENTER FOR AUTISM LAW & ADVOCACY, <http://www.ebcala.org/about> (last visited Mar. 21, 2014); *Autism Speaks Announces Launch of Legal Resource Center*, AUTISM SPEAKS (June 4, 2013), <http://www.autismspeaks.org/news/news-item/autism-speaks-announces-launch-legal-resource-center>; *Wrightslaw Special Education Law and Advocacy*, WRIGHTSLAW, <http://www.wrightslaw.com> (last visited Mar. 21, 2014).

²²⁵ *Autism Speaks Announces Launch of Legal Resource Center*, *supra* note 224.

²²⁶ *Id.*

²²⁷ See *About: Our Mission*, *supra* note 224.

²²⁸ See *Wrightslaw Awards*, WRIGHTSLAW, <http://www.wrightslaw.com/awards.htm> (last updated Oct. 1, 2008).

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periodic analysis and review to keep abreast of the issues that affect the ASD individual, their families, and our society as a whole.