

All Things ABA: Obligations for FAPE & ADA Access

ConnCASE Legal Issues Conference
March 2025

Presented by: Deanna Arivett, Esq.



ARIVETT
LAW PLLC



Agenda

- ◆ Need for ABA Services in the School Setting?
- ◆ Obligations for FAPE
 - ◆ Excusing ABA related Absences
 - ◆ Allowing Private ABA Providers in School
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 - ◆ Providing ABA services through an IEP
- ◆ Developing Legally Defensible IEPs for Students w/ Autism

Disclaimer: The information in this handout and presentation is for the purpose of providing general information and is not intended to provide legal advice or substitute for the legal advice of counsel.

Need for ABA Services in the School Setting?



What is ABA?

- ◆ Applied Behavior Analysis (ABA) is an applied science based on the principals of behavior.
- ◆ ABA focuses on learning and promoting socially significant behaviors.
- ◆ Behavior is defined in a way that is specific, objective, and measurable.
- ◆ Uses data collection and analysis to measure behavior to determine the effectiveness of recommended interventions.

[See BCBA's in Schools: Guidelines and Professional Standards for Connecticut.](#)

What is ABA?

- ◆ There are various methodologies used in ABA.
 - ◆ Discrete trial teaching
 - ◆ Natural environment/Incidental teaching
 - ◆ Verbal behavior
 - ◆ Pivotal response training
 - ◆ Social skills training

What does ABA look like?

- ◆ Teaching Style—Typically a mix of direct teaching and play-based activities, depending on the child's age.
- ◆ 1:1 v. Group—Typically 1:1, but may include group instruction for social skills and generalization.
- ◆ Skills Taught—Child specific based on assessments and programming.

Determination of ABA Services

- ◆ Provider/Parent:
 - ◆ Goals and programming are typically based on provider's choice of assessment(s) and the goals of the parent.
- ◆ Insurance:
 - ◆ Progress reports/goals may also be driven by insurance obligations.
- ◆ IEP team:
 - ◆ In the school setting, ABA services should be determined based on the student's individual needs to received FAPE.

ABA Services

- ◆ Most are 1:1 services under tiered level system
 - ◆ BCBA- Board Certified Behavior Analyst
 - ◆ Requires at least a master's degree
 - ◆ BCaBA- Board Certified Assistant Behavior Analyst
 - ◆ Requires Bachelor's level degree
 - ◆ Supervised by BCBA
 - ◆ RBT- Registered Behavior Technician
 - ◆ Requires High school diploma
 - ◆ Supervised by BCBA or BCaBA

* All of these certifications are provided through the Behavioral Analyst Certification Board (BACB).

Licensed Behavior Analyst

- ◆ In Connecticut, behavior analysts must be licensed through the Connecticut Dept. of Health to practice in addition to having their BCBA certification.
- ◆ Therefore, both BCBA-D (doctoral level) and BCBA (master's level) behavior analysts must be a licensed behavior analyst (LBA) in Connecticut.
- ◆ BCaBA & RBT level providers do not have state licensure, but must practice under the supervision of a BCBA (or in the case of the RBT, they could practice under a BCaBA).

Private ABA Services

- ◆ Medical Model
 - ◆ Almost all states have passed some law mandating insurance coverage for ABA.
 - ◆ Must meet requirements for medical necessity if billing insurance insurance.
 - ◆ Medical necessity has been defined by Medicare as accepted health care services and supplies provided by health care entities appropriate to the evaluation and treatment of a disease, condition, illness, or injury and consistent with the applicable standard of care.
 - ◆ May require goals to specifically focus on improvement of symptoms of autism
 - ◆ The specific coverage is dictated by state law and individual insurance carriers.

School Specific Laws

- ◆ Schools have legal limitations under federal law that are not imposed upon private BCBAs.
 - ◆ IDEA
 - ◆ Restricts the use of placement options (LRE) for the provision of behavioral supports
 - ◆ Restricts the use of disciplinary removals
 - ◆ FAPE requirement limits a school's ability to address behavior before addressing academics
 - ◆ Requirement to address state standards
 - ◆ Requirement to make progress towards IEP goals
 - ◆ Obligates districts to serve children with disabilities within its jurisdiction

School Specific Laws

- ◆ Schools have additional legal limitations under state law that are not imposed upon private BCBAs.
 - ◆ Restraint and Seclusion State Laws
 - ◆ May restrict the use of restraints and isolation on students with disabilities in the school setting
 - ◆ School Safety Laws
 - ◆ May impose statutory obligations on schools to take reasonable measures to keep students safe and report certain criminal behavior
 - ◆ Building & Fire Codes
 - ◆ May prohibit the use of certain spaces & the locking of some doors

Obligations for FAPE



Excusing ABA Related Absences



Excusing Absences for Private Therapy

- ◆ Remember that the district is legally responsible for the child's provision of FAPE
 - ◆ If the child is not at school, we have less time to provide IEP services.
 - ◆ Students with autism typically require high levels of IEP services to be able to make progress.
 - ◆ Children do not age out of private ABA services- If excessive absences are excused this year, how do we deny them next year?

Excusing Absences for Private Therapy

- ◆ Compulsory School Age
 - ◆ If the child is compulsory school age, the district has state reporting requirements.
 - ◆ Provide parent with options (nonpublic school or homeschool) if they want their child to attend ABA in lieu of school.
 - ◆ Potential Issues- Consistency across schools
 - ◆ Principals are given the latitude to excuse absences.
 - ◆ Attendance:
 - ◆ Know your Board policy regarding excused/unexcused absences
 - ◆ IEP Team Decision:
 - ◆ Determine whether the child is unable to attend school due to his disability or requires a blanket excusal letter (or other services) because the child is unable to attend school repeatedly because of the child's disability.

Allowing Private ABA Providers in School



Demand for Private ABA Services in School

- ◆ Receiving private ABA services does not automatically qualify a student for ABA services in the schools.
 - ◆ Students may receive private ABA services due because they are “medically necessary” as determined by a student’s physician and insurance provider, but not necessary for FAPE.
- ◆ The “school district is responsible for determining who may or may not enter the school building.”
- ◆ Connecticut law requires that a contract, with certain provisions, be in place between the school district and outside providers for any service deemed necessary for FAPE and requires the district to pay for such services (House Bill #5447).

[See BCBAs in Schools: Guidelines and Professional Standards for Connecticut.](#)

Demand for Private ABA at School

- ◆ Smith v. Orcutt Union Sch. Dist., 81 IDELR 153 (9th Cir. Aug. 10, 2022).
 - ◆ Smith is the mother of O.A., a 10-year-old boy with autism.
 - ◆ O.A. struggled with significant behavioral issues that at times has required him to be accompanied throughout the school day by one-to-one aides who would monitor his safety.
 - ◆ He received ABA therapy as part of the treatment for his autism.
 - ◆ O.A.'s mother requested that his school allow outside ABA therapists to accompany him during the school day, but the district denied the request.
 - ◆ O.A.'s mother, subsequently filed suit, alleging that the district violated his rights under Title II of the ADA and Section 504 by failing to accommodate his outside ABA therapists and therefore denying him access to an education.

Demand for Private ABA at School

- ◆ Smith v. Orcutt Union Sch. Dist., 81 IDELR 153 (9th Cir. Aug. 10, 2022).
 - ◆ The Circuit Court ruled in favor of the district because the parent failed to show how O.A.'s significant behavior issues kept him from accessing education or how ABA therapy would help.
 - ◆ There was no evidence of the extent to which O.A.'s behavioral issues affected his ability to remain in the classroom and participate in instruction, how often he would elope, soil himself, or be removed because of other behavioral problems, or how much class time he missed during each incident.
 - ◆ The Court noted that expert testimony didn't mention the child's specific needs and didn't opine that ABA therapy was universally necessary for children with autism to meaningful access instruction or that the child required it.
 - ◆ The Court explained that “despite that ABA therapy is medically necessary for the child, it was not enough to establish that it was necessary for him to access his education.”

Demand for Private ABA at School

- 💧 Johnson v. Tomball Indep. Sch. Dist., 81 IDELR 78 (S.D.Tex. Mar. 31, 2022).
 - 💧 Parent requested that O.J.'s private ABA providers be allowed to attend kindergarten with him, but district denied request.
 - 💧 District proposed IEP with supports/accommodations but continued to refuse private providers access to school.
 - 💧 Parent withdrew request for IEP but requested Section 504 plan. District proposed Section 504 plan which allowed private ABA providers to attend school with student during a transition period (until Sept. 10) when the district's BCBA and paraprofessional (who would be RBT) would provide in-class services.
 - 💧 Parent claimed district acted with deliberate indifference to O.J.'s disability by denying his private ABA therapy providers access to the school.
 - 💧 Bypassed due process hearing, filed discrimination claim in federal court. District filed a motion to dismiss due to failure to exhaust administrative remedies.

Demand for Private ABA at School

- 💧 Johnson v. Tomball Indep. Sch. Dist., 81 IDELR 78 (S.D.Tex. Mar. 31, 2022).
 - 💧 Case hinged on whether the claims seek relief for a denial of FAPE
 - 💧 Court held that exhaustion was NOT required! The Court's rationale was as follows:
 - 💧 O.J. could have brought the same claims against a public facility (such as a library or public theater).
 - 💧 Similar to case where a museum violating the ADA by requiring a disabled person to pay admission of his employed personal care assistant.
 - 💧 Like O.J., the personal care assistant was "medically necessary."
 - 💧 An adult could have brought the same claim
 - 💧 For example, an adult could allege that they could not access a PTA meeting on school grounds if they could not bring their ADA provider.

Demand for Private ABA at School

- 💧 Hawaii Disability Rights Center v. Kishimoto and Bhanot, 124 LRP 40099 (9th Cir. Nov. 26, 2024).
- 💧 Hawaii's Disability Rights Center (HDRC) challenged Hawaii's Dept. of Education's (DOE) policy that limits the provision of in-school therapeutic services for students to only those services deemed educationally relevant by the DOE claiming that it violates the ADA, Section 504, the Medicaid Act, and the IDEA.
 - 💧 So, unless the DOE determines that a student requires ABA for educational purposes and provides DOE-approved personnel for that purpose, a student with autism who has been medically prescribed ABA services will not receive those during the school day.
- 💧 The lower court dismissed the case for failure to exhaust administrative remedies, and the HDRC appealed the decision to the 9th Circuit.

Demand for Private ABA at School

- 💧 Hawaii Disability Rights Center v. Kishimoto and Bhanot, 124 LRP 40099 (9th Cir. Nov. 26, 2024).
 - 💧 While the Court held that HDRC had to exhaust its IDEA claims, it did not have to exhaust the ADA, Section 504, and Medicaid claims so it reversed the lower court's grant of summary judgment on the non-IDEA claims.
 - 💧 Under *Fry*, the ADA and Section 504 claims were not premised on a denial of FAPE, so they did not have to be exhausted.
 - 💧 The 4th Circuit explained in a similar ADA access case that the plaintiff did not have to exhaust a claim that the school system violated the ADA by refusing to permit an ABA therapist to accompany the visitor. *Z.W. v. Horry Cnty Sch. Dist.*, 68 F.4th 915 (4th Cir. 2023).
 - 💧 Similarly, the Medicaid Act Claims were not based on a denial of FAPE, but instead on the State of Hawaii's statutory requirement under the Medicaid Act "to provide early and periodic screening, diagnostic, and treatment services that have been found to be medically necessary, regardless of their educational relevance."

Demand for Private ABA Services in School

- ◆ Considerations for Allowing Private Providers in Schools:
 - ◆ Know your Board policy.
 - ◆ Be consistent with the policy across schools to avoid claims of discrimination.
 - ◆ Do you allow other private providers to provide services during the school day? If so, what are those parameters?
 - ◆ If the BCBA is not working on the IEP goals, they are just taking time away from the school's provision of FAPE.
 - ◆ In addition to your FERPA restrictions, most BCBA's have HIPPA restrictions on what they can share with the district without parental consent.

Demand for Private ABA Services in School

- ◆ How to legally defend the district's decision following a demand for a private ABA services in the school setting:
 - ◆ If the district policy prevents private providers from serving students during school hours, the IEP team (or Section 504 team) should determine the following.
 - ◆ Does the child require private ABA services to “access” the school and/or obtain the benefits of an education?
 - ◆ If the child cannot access the school and/or obtain the benefits of education without modification of district policy, the district must consider such modification of policy pursuant to the ABA.
 - ◆ Note: The Connecticut State Dept of Ed's guidance does not address how to analyze a request to modify policy to prevent discrimination under ADA.
 - ◆ Are ABA services required for FAPE?
 - ◆ The district must provide them through the IEP.
 - ◆ Provide a PWN to the parent outlining the reason for any refusal.

Demand for Private ABA Services in School

- ◆ With with your Board attorney to address potential issues through contracts/agreements with private providers:
 - ◆ Potential issues with complying with administrator directives.
 - ◆ Issues with using restraint or isolation techniques without training and without knowledge of legal requirements.
 - ◆ Potential issue with ABA provider informing their supervisor and the parent of concerns (such as suspected abuse) instead of the administrator in the school.
 - ◆ Potential issues with release of confidential information regarding other students.
 - ◆ Potential issues with taking pictures or recording in the school setting.

Collaborating with Private BCBA's



Collaborating with Private BCBA's

- ◆ IF you can get a working relationship with a private BCBA, collaboration can be GREAT for the child!
- ◆ Release of information to collaborate with BCBA
 - ◆ Pick a person who knows the BCBA language
- ◆ Requesting an observation of the student working with the private BCBA
- ◆ Remember the CHILD!
 - ◆ You may come from different perspectives, but try to work collaboratively in the best interest of the child.

Demand for Private BCBA to Observe Student in School

- ◆ How to legally defend the district's decision following a demand for a private BCBA to observe the student in school:
 - ◆ Know your Board policy regarding classroom observations.
 - ◆ Does it limit the number per year?
 - ◆ Does it require the observer to sign a confidentiality statement?
 - ◆ Have a staff member observe with the private BCBA (if possible, your BCBA/behavior analyst).
 - ◆ This is likely a district decision, not an IEP team decision.

Providing ABA services through an IEP



Demand for ABA

- ◆ The CSDE recommends consideration of direct and indirect ABA interventions that may be provided by a BCBA or others supervised/supported by the BCBA *IF* the IEP team determines that such services are required for FAPE.
 - ◆ Indirect Services- FBAs or other relevant assessments, analyzing data collected by the student's team, developing a BIP and instructional programming, providing training to staff and family on the programming, and monitoring the implementation and effectiveness of the plan.
 - ◆ Direct Services- Where a BCBA (or BCaBA or RBT with supervision) works directly with a student to provide intense instructional ABA approaches or to implement a BIP.
- ◆ The amount of ABA/BCBA services should be listed in the student's IEP.

Demand for ABA

- ◆ Courts and Administrative Judges have considered the following in determining the appropriateness of ABA services:
 - ◆ Whether the child had shown progress with a certain number of ABA services in the past
 - ◆ Recommendations from the National Research Council
 - ◆ Efforts by the school district to provide services to the student
 - ◆ Testimony of parents' experts
 - ◆ Failure to provide services due to staffing and timing issues on the part of the district
 - ◆ Functioning level of the student
 - ◆ School district's success with other students in its proposed program
 - ◆ Child's specific needs (as opposed to general recommendations for students with autism)

ALJ considers Student's Progress for Number of ABA Hours

- ◆ Long Beach Unified Sch. Dist., 49 IDELR 210 (Cal. Ed. Agency Feb. 5, (2008).
 - ◆ ALJ held Intensity of ABA Services were Appropriate.
 - ◆ District offered 34 hours per week of eclectic 1:1 intense behavior intervention.
 - ◆ Child's ABA service provider recommended 35-40 hours.
 - ◆ ALJ held in favor of the District because child had shown progress with 34 hours, and 34 hours was consistent with the National Research Council.

AFFIRMED by the U.S. District Court, Central District of California (No. 08-CV-02213-GAF).

Intensity Appropriate where Student Made Progress

- ◆ In re: Student with a Disability, 115 LRP 51042 (N.Y. Ed. Agency Sept. 21, 2015).
 - ◆ Reviewing ALJ held Intensity of ABA Services were appropriate.
 - ◆ Reviewing ALJ declined parent's request for additional services because:
 - ◆ School previously "agreed to provide 20 hours of ABA service per week;"
 - ◆ Student was receiving 27 hours per week in current services; and
 - ◆ Parents previously testified that student made progress with 20 hours of ABA service.

Predetermination of ABA Services

- ◆ Deal ex rel. Deal v. Hamilton County Dep't of Ed., 49 IDELR 123 (6th Cir. 2008).
 - ◆ The Sixth Circuit Court “ruled that the district and parents should split cost of the child’s home-based ABA services.”
 - ◆ The Sixth Circuit Court agreed with the District court, concluding that refusing to consider 1:1 is “a predetermination of the child’s services.”
 - ◆ The Sixth Circuit Court further agreed with the District court and declined parent’s request for additional services because FAPE was provided with a full-day eclectic program based on the students needs and did not require the school district to provide 30 hours of ABA.

District offers FAPE

- ◆ B.M. v. Encinitas Union Dist., 60 IDELR 188 (S.D. Cal. 2013).
- ◆ The IEP proposed 8 hours of school-based ABA and 6 hours of in-home ABA services per week.
- ◆ The district continued to provide 20 hours of in-home ABA services after parent rejected IEP and sought out private services.
- ◆ ALJ affirmed a hearing officer's decision that FAPE was offered to the student but awarded parent attorneys fees and costs because the School filed an IDEA counterclaim.

The District Court Affirmed in (61 IDELR 189 S.D. Cal. 2013).

Extent to which Behavioral Services Needed given Deference

- ◆ J.A. and E.A. ex rel. M.A. v. East Ramapo Cent. Sch. Dist., 52 IDELR 196 (S.D.N.Y. 2009).
 - ◆ The Court held that 1 hours of 1:1 behavioral therapy at school plus in-class behavioral therapy provided the student with FAPE.
 - ◆ The Court denied Parents' request for 10 additional hours of 1:1 in-home therapy.
 - ◆ The Court held that the extent to which behavior therapy is provided was the type of educational judgement that the court should provide deference.

Judge considers School's Effort to Provide Services

- ◆ Seladoki v. Bellaire Local Sch. Dist. Bd. Of Educ., 53 IDELR 153 (S.D. Ohio 2009).
 - ◆ Parents argued “that districts are required to provide children with autism between 30-40 hours of ABA services each week.”
 - ◆ The Court rejected parents’ argument stating that “neither the IDEA nor judicial decisions require a set amount of ABA.”
 - ◆ The district attempted to discuss and offer a 30-hour “option with parents but district needed additional information” regarding the amount of activities the student would attend before it could specify amount and location of 1:1.
 - ◆ Increase in activity hours would require a decreased amount of ABA due to amount of time in typical school day.
 - ◆ Court held “parents did not participate in the IEP process in good faith” and IEP was appropriate, denying parents’ request for relief.

ALJ considers School's Success with Other Students

- ◆ San Juan Unified Sch. Dist., 48 IDELR 201 (Cal. Ed. Agency June 18, 2007).
 - ◆ ALJ held the district provided FAPE based on its “eclectic” program for children with autism 4 hours per day, 5 days per week.
 - ◆ ALJ held the district was not required to reimburse parents for 40 hours of in-home 1:1 ABA.
 - ◆ ALJ reasoned that program met child’s needs and the “school was successful in educating and mainstreaming other students.”

ALJ considers Student's Substantial Progress

- ◆ Oxnard Union High Sch. Dist., 119 LRP 45937 (Cal. Ed. Agency Nov. 4, 2019).
 - ◆ Parent insisted child needed 1:1 ABA therapy to receive FAPE, but the Court could not “deny the substantial progress the teen had made at the large public high school.”
 - ◆ ALJ held that “an appropriate program does not mean the absolute best or potential maximizing plan.”
 - ◆ Explaining that the “IEP only need to be reasonably calculated to enable a student to make progress appropriate in light of circumstances.”
 - ◆ Thus, where a district can provide evidence to show significant progress, it will likely overcome a parent’s allegations.

Reduction of ABA Services

- ◆ New York City Dept. of Edu., 46 IDELR 209 (N.Y. Ed. Agency Sept. 20, 2006)(affirmed by A.D. and H.D. ex rel. J.D. v. New York Dep't of Educ., 51 IDELR 134 (S.D.N.Y. 2008).
- ◆ The ALJ and District Court Judge upheld a reduction in a student's ABA services from 25 hours per week to 10 hours per week.
- ◆ Student was in a gifted and talented program, performed in the middle range of his class, and demonstrated typical behavior for his age range.
- ◆ Thus, the student did not need the amount of services requested by Parent.

Home-based ABA not LRE

- ◆ Board of Educ. of the Greenwood Lake Union Free Sch. Dist., 23 IDELR 1032 (N.Y. Ed. Agency Mar. 11, 1996).
 - ◆ The board recommended TEACCH placement for child with pervasive developmental disorder and cerebral palsy.
 - ◆ Parent contested the program, requesting that the Lovaas home-based program from the previous year be continued.
 - ◆ The Court “rejected the parent's argument” holding that the Board “complied with least restrictive placement requirement due to allowing opportunities to interact with peers and develop socially,” while still offering necessary small group settings.

ABA Methodology in Past did not preclude TEACCH Classroom

- ◆ P.S. v. New York City Dep't of Educ., 114 LRP 32792, (S.D.N.Y. 2014).
 - ◆ The Court held that when “a student has benefited from a particular methodology in the past,” it doesn't require the district to “continue using that method.”
 - ◆ The Court noted that while ABA is the superior methodology, the district had no obligation to maximize the student's educational benefit.
 - ◆ Thus, concluding that a student can “receive FAPE in the TEACCH classroom despites parents' preference for an ABA-based program.”

No Requirement to Specify Number of ABA/DTT Hours when Incorporated

- ◆ Cobb County Sch. Dist., 53 IDELR 308, (Ga. Ed. Agency Nov. 2, 2009).
 - ◆ The Court held that when a District offers a 6-hour daily preschool program that incorporates 1:1 ABA/DTT and NET based on individual needs it is not required to specify the number of ABA/DTT hours provided to student.
 - ◆ The Court reasoned that the amount of ABA needed before a child progressed to NET may vary from day to day and child to child.
 - ◆ However, parents may review progress notes/logs used to determine the amount of time needed and child's progress with the services.

Incorporated Program at School Appropriate

- ◆ Wilson County Bd. of Educ., 110 LRP 33095 (Tenn. Ed. Agency Mar. 15, 2010).
 - ◆ Parent argued that only full-time at-home ABA therapy could help her daughter, rather than those ABA methodologies incorporated at the school.
 - ◆ The ALJ noted that parents “cannot dictate the instructional methodology that is used by a district.”
 - ◆ The ALJ found that the district’s incorporated program adequately addressed the child’s unique needs and offered FAPE.

School's Eclectic Program Appropriate

- ◆ Hacienda La Puente Unified Sch. Dist., 48 IDELR 237 (Cal. Ed. Agency July 23, 2007).
- ◆ The district offered placement in “inclusion Headstart program with 3.5 hours of GE, 1 hour of Special Ed daily, and additional 5 hours DTT/modified ABA per week.”
- ◆ Despite evidence of progress with 30 hours ABA, ALJ held that it does not prove the child would not benefit educationally from the program offered by the school.

No Requirement to Reimburse Parents for Home ABA

- ◆ Fremont Unified Sch. Dist., 49 IDELR 114 (Cal. Ed. Agency Nov. 9, 2007).
 - ◆ The Court found the district's eclectic program offered FAPE to a preschooler with autism.
 - ◆ The program incorporated ABA principles into 5 hours per day, 5 days per week, and 5 hours per week of 1:1 ABA/DDT services.
 - ◆ The district was not required to reimburse the parents for 30 hours per week of home ABA services.

Appropriate Placement

- ◆ Worcester Pub. Schs., 109 LRP 50939 (Mass. Ed. Agency Aug. 7, 2009).
 - ◆ The district offered the child 10 hours of ABA services per week in home and in school, and placement in a class for autistic children.
 - ◆ The child's communication and behavior steadily improved.
 - ◆ ALJ held that the parent failed to prove the services were not appropriate or that the student required 1:1 program.

District's Placement Appropriate

- ◆ L.G. and E.G. ex rel. E.G. v. Fair Lawn Bd. of Educ., 59 IDELR 65 (3rd Cir. 2012).
 - ◆ The Circuit Court affirmed that parents were not entitled to reimbursement.
 - ◆ Parents claimed child's placement in an autism program was overly restrictive.
 - ◆ A video provided by the parents showed child had problems "following directions, engaged in self stimulatory behaviors, and failed to notice other children in an inclusion program"
 - ◆ Thus, Court found that child "did not have the needed skills to benefit from an inclusion placement," and the district "offered intensive 1:1 ABA services and opportunities to interact with peers and skills progressed."

Proposed IEP did not include any ABA Services

- ◆ In re: Student with a Disability, 115 LRP 20173 (N.Y. Ed. Agency Mar. 24, 2019).
 - ◆ Administrative Judge reimbursed intensity of ABA services requested.
 - ◆ The ALJ held that the district failed to provide FAPE and reimbursed parents of a preschooler with autism for 34 hours per week of 1:1 ABA services.
 - ◆ In the underlying case, the hearing officer did not reimburse the parents for additional ABA therapy hours provided after school.

District Failed to Address Student's Significant Behavioral Needs

- ◆ Enterprise City Bd. of Educ. v. S.S. and J.S. ex rel. S.S., 76 IDELR 295 (M.D. Ala. June 12, 2020).
 - ◆ In this case the student “frequently presented dangerous behaviors -- including hitting, biting, pulling hair, pica, eloping, and self-harming behaviors -- that prevented his receipt of services.
 - ◆ Parents requested that a BCBA develop and implement a BIP.
 - ◆ The Court noted that “the student's behaviors escalated so much that his one-to-one aide requested assistance and subsequently resigned;” yet, the district still failed to incorporate any positive interventions in the IEP or develop a BIP.
 - ◆ The District Court held that the IEP failed to appropriately address the student’s severe behaviors, which resulted in the student’s regression in academic skills and behaviors over the course of two school years.

IEP must Appropriately Address Severe Behaviors

- ◆ Enterprise City Bd. of Educ. v. S.S. and J.S. ex rel. S.S., 76 IDELR 295 (M.D. Ala. June 12, 2020), (Cont.).
 - ◆ The district argued that “the IDEA only requires the development of a BIP when the district seeks to discipline the student.”
 - ◆ The court noted that the district had disciplined the student by suspending him from the school bus due to his behaviors. The Court explained, “the IDEA requires the IEP team to consider behavioral interventions and strategies where the student's behaviors interfere with his learning or that of others.”
 - ◆ To remedy this FAPE violation, the district was ordered to conduct an FBA, develop a BIP, assign a BCBA, and provide the student with counseling.

Developing Legally Defensible IEPs for Students w/Autism



Demand for ABA

- ◆ How to legally defend the IEP's team's decision following a demand for ABA services:
 - ◆ Make a determination based on the student's individual needs.
 - ◆ Consider the parent's input and outside evaluations.
 - ◆ Consider multiple sources of data.
 - ◆ Consider the age of the student.
 - ◆ Be creative...many programs upheld by courts are eclectic programs (i.e., include both ABA and other methodologies).
 - ◆ Clearly document the reasoning for the team's determination in a prior written notice.

ABA Services & FAPE

- ◆ Are ABA supports needed for the student to receive FAPE under *Endrew F.*?
 - ◆ What does your data collection show? Does it need to be more formal/systematic/frequently collected?
 - ◆ What data collection is needed to document goal progress?
 - ◆ Is the student making progress towards academic goals with current programming strategies?
 - ◆ Did you indicate that the student's behavior/social-emotional/pre-vocational skills were exceptional for your present levels?
 - ◆ Did the team indicate that the student's behavior impedes his/her learning or the learning of others?

ABA Services & FAPE

- ◆ Do you need to increase the level of academic or behavioral services for the student to receive FAPE?
 - ◆ Behavioral/ABA strategies- ex. reinforcement, token board, skill training
 - ◆ Staff training
 - ◆ FBA/BIPs
 - ◆ ABA strategies for academics- ex. discrete trial training

Demand for Specific Methodologies

- ◆ The IDEA does not require a district to include the methodology used in the IEP.
- ◆ A district is not required to use the “specific ABA language” in the IEP unless the IEP team determines that specific methodology is necessary for the child to receive FAPE.
- ◆ Additionally, a district does not have to include the specific type of ABA methodology (e.g., discrete trial, verbal behavior, specific program names).

Tips for the IEP Meeting

- ◆ Lead the meeting
 - ◆ Don't allow the private BCBA to control the meeting.
 - ◆ The district is responsible for providing FAPE.
- ◆ Have team members present who can speak BCBA language and explain how many ABA principles can be implemented in a school setting
- ◆ Have data available for review
- ◆ Ask questions about the BCBA services and collaboratively discuss how some of those techniques could be implemented in the school environment

Tips for the IEP Meeting

- ◆ Listen to the concerns of the parent/private BCBA
- ◆ Self-analyze—Do you have a solid, legally defensible data to show progress towards IEP goals?
- ◆ Document the team's agreement or refusal to provide ABA services through the IEP.
 - ◆ Use data to support your decision of why ABA is needed or not needed for the child to receive FAPE.

Personnel & Training

- ◆ Carefully consider who will be conducting FBAs in your district and providing any ABA services.
 - ◆ BCBA's are not required.
 - ◆ However, if you have the resources to either have a BCBA on staff or consult, they can provide valuable support to your staff, particularly on difficult cases.
 - ◆ Due to their credentials alone, their opinion may be more highly valued.
 - ◆ If you use anyone other than BCBA's, training in behavior analysis is needed.
 - ◆ RBT's are not required. However, if you have a BCBA on staff who can supervise the RBT, you can use an RBT to assist the special education teacher in providing ABA services.

Staff Training

- ◆ Special education teachers and other staff working with the student will need training on the ABA strategies required.
 - ◆ RBT online training modules.
 - ◆ Curricular program trainings (Ex. TEACCH)
 - ◆ Consultation and modeling by BCBA
- ◆ Training needs to occur regarding the specific behavioral strategies set forth in the BIP.
 - ◆ Typically provided by BCBA/behavior specialist
- ◆ Documentation needs to be completed after training

Implementation & Fidelity Checks

- ◆ Implementation/Fidelity Checks of BIP (including appropriate use of ABA strategies)
- ◆ A data collection for skills taught with ABA services.
- ◆ If fidelity is low, then the IEP team might want to consider
 - ◆ More training for the staff members (document training)
 - ◆ Modification of the BIP

Questions?



Thank You!

Deanna Arivett, Esq.
Arivett Law, PLLC
567 Cason Lane, Suite A
Murfreesboro, TN 37128
615-987-6006
deanna@arivettlaw.com



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LAW PLLC