

# Autism Litigation Under the IDEA: A New Meaning of “Disproportionality”?

Perry A. Zirkel, Ph.D., J.D., L.L.M.  
Lehigh University, Bethlehem, PA

- **Children with autism accounted for almost one third of a comprehensive sample of published court decisions concerning the core concepts of free appropriate public education (FAPE) and least restrictive environment (LRE) under the Individuals With Disabilities Education Act.**
- **The other major, and more significant, finding was that when comparing this litigation percentage with the autism percentage in the special education population for the period 1993 to 2006, the ratio was approximately 10 : 1.**
- **The reasons for this disproportionality, or overrepresentation of children with autism in FAPE/LRE litigation, are complex.**
- **Special education leaders need to pay particular attention to establishing effective communications and trust building with parents of students with autism and to optimize the use of various approaches of alternative dispute resolution.**

Autism is on the rise at what seems to be epidemic proportions. For example, from 1980 to 2000, the rate of autism in the United States rose from 2 to 5 cases per 10000 people to 20 cases per 10000 people (Goldstein, 2002). According to the Centers for Disease Control and Prevention (CDC), it is uncertain whether such figures accurately measure the extent of the increase or, instead, are attributable to other reasons, such as “changes in diagnosis” (CDC, n.d., p. 1). The specific explanation remains unclear (Feinberg & Vacca, 2000). For example, a study limited to California found that neither increased awareness nor population increase accounted for the notable rise in the incidence of childhood autism in that state (Goldstein, 2002).

In light of this purported epidemic and its disputed etiology, the recognition of autism is, at least as a matter of public policy, relatively recent (Steuernagel, 2005). For example, the Individuals With Disabilities Education Act (IDEA) only included autism as one of its classifications for eligibility in the 1990 amendments; previously, a child with autism would only qualify for special education services under one of the other, traditional classifications, such as mental retardation.

As a result of this relatively recent recognition in, and dramatic growth under, the IDEA, autism has become a major issue in the education context. The Government Accounting Office (GAO, 2005) reported that the number of children with autism served under IDEA increased from approximately 20000 in 1992–1993 to 120000 in 2001–2002. The possible reasons the GAO identified were (a) the advent of better diagnoses; (b) a wider range of conditions being categorized as autism spectrum disorder (ASD); and (c) a higher incidence of autism in the general population. More recent enrollment data are now available that reinforce the concern within and beyond the schools.

.....  
The Government Accounting Office (GAO, 2005) reported that the number of children with autism served under IDEA increased from approximately 20000 in 1992–1993 to 120000 in 2001–2002.

The increased concern is attributable not only to frequency but also severity. Due to the pervasiveness

of this condition, children with autism typically require a wide array of educational and health services. Similarly, their families incur significantly greater annual costs for health care services than the families of other children (Liptak, Stuart, & Auinger, 2006). Yet, parents of children with autism are less likely to be satisfied with these educational services (e.g., Spann, Kohler, & Soenksen, 2003) and health services (Liptak, Orlando, et al., 2006).

Given these concerns, states have established autism-specific initiatives under the IDEA. More specifically, these initiatives focus on professional development and technical assistance under both Part C, which covers ages 0–3, and Part B, which covers ages 3–21 (Henderson, 2009). Yet, reflecting various factors, including parental dissatisfaction, litigation has also notably increased.

### Previous Autism Case Law Research

Systematic studies of education litigation for students with autism have been largely limited to hearing/review officer cases concerning methodology (e.g., Etscheidt, 2003; Yell & Drasgow, 2000) or court decisions concerning this same subject (e.g., Choutka, Doloughy, & Zirkel, 2004; Nelson & Huefner, 2003; Seligmann, 2005; Womack, 2002). Incidental to their focus on distilling guidelines for legally appropriate programs for students with autism, Yell, Katsiyannis, Drasgow, and Herbst (2003) included a broader tabulation of autism-related hearing/review officer and judicial decisions in the *Individuals With Disabilities Education Law Report (IDELR)* for the period 1990–2002 that seemed to suggest increasing litigation for the first 9 years but a decline during the final 3 years. However, likely because the frequency table was only the backdrop for its free appropriate public education (FAPE)–violation focus, the accompanying text referred only to “administrative hearings and litigation in [autism spectrum disorders]” (Yell et al., p. 182) without specifying the selection criteria. For example, it was not clear whether the tabulation included *IDELR*-published decisions where the issue was adjudicative, such as statute of limitations, stay-put, or additional evidence, or where the basis was other than the IDEA, such as Section 504 or the Americans With Disabilities Act. Similarly, it was unclear whether the tabulation tracked hearing officer or court cases that were subject to more than one published decision, particularly those superseded on appeal.

Another cluster of studies provided such selection information but were limited to the relative frequency of the particular issues of autism litigation. Overall, eligibility has been an infrequent subject of study, likely attributable to the relatively negligible number of court decisions specific to this issue (Fogt, Miller, & Zirkel, 2003). In contrast, a comprehensive analysis of the autism-related litigation in *IDELR* revealed that the most frequent issue by far was FAPE, accounting for two thirds of the issue rulings when combined with LRE (Zirkel, 2001). As summarized in a follow-up article (Zirkel, 2002), the frequency of the autism court decisions, including the central FAPE/LRE segment, increased steadily in 5-year increments from 1981–2000, with the most notable increase from 1996–2000.

### A Different “Disproportionality” Analysis

However, none of the previous studies has examined the frequency of autism litigation in relation to the enrollments of students with autism. Regular reviewing of special education litigation under the IDEA provides an incidental impression that children with autism account for a relatively high number of the cases. Does systematic analysis confirm this impression? If so, is the number in line with the proportion of special education enrollments in this classification? The literature has not included this type of comparative analysis for any IDEA classification. Thus, the concept lacks a name. On a tentative basis, this analysis borrows, by way of approximate analogy, a term that the IDEA applies to a different situation.

In the context of special education under the IDEA, the prevailing meaning of *disproportionality* is significant over- or underidentification or placement in relation to race or ethnicity in terms of not only disability overall but also disability classifications (IDEA, §§ 1412(a)(24) and 1418(d); Gamm, 2010). Instead, the use of this term here is to investigate possible significant over- or underrepresentation in relation to special education litigation. More specifically, the purpose of this investigation is to explore whether the litigation concerning students with autism is disproportional to their enrollment in special education programs under the IDEA. The litigation variable here refers to the percentage of published court decisions concerning the core IDEA entitlement of FAPE and the overlapping mandate for LRE where the court opinion identified the child’s

IDEA classification as autism. The corresponding variable is the percentage of annual special education enrollments attributable to children with the autism classification.

## Method

For the aforementioned litigation variable, the database consisted of the successive compilations of court decisions under the IDEA that have appeared in *West's Education Law Reporter* (Zirkel, 1993, 1995, 1997, 1999, 2002, 2004; Zirkel & Rose, 2007, 2009). These comprehensive compilations are annotated case citations, by category (e.g., eligibility, FAPE, LRE, discipline, and remedies), for the officially published court decisions under the IDEA for each time period, without any gaps, from 1992 through 2008. This exploratory analysis was limited to the overlapping FAPE and LRE categories because previous studies showed them to be the major segment of IDEA litigation and—aside from the negligible number of eligibility cases—the most related to autism. The FAPE category consisted of decisions where the parent challenged the appropriateness of the child's individual program or placement based on the two-pronged test first established in *Board of Education v. Rowley* (1982). This category included cases where the court decided the appropriateness of the proposed placement as the first step in the tuition reimbursement analysis that originated in *Burlington School Committee v. Massachusetts Department of Education* (1985). The other overlapping category consisted of cases where the parents and district sought different placements, and the court used the test, or set of criteria, applicable in its federal appellate jurisdiction for determining the LRE.

For each court decision in the FAPE and the LRE categories, the tabulation consisted of (a) the classification of the child as identified in the court opinion, (b) the year of the court decision, and (c) the year in which the dispute arose, here approximated by determining from the court opinion the year of the disputed IEP. For the third tabulated item, *disputed IEP* refers to the one the parent challenged at the due process hearing that preceded the ultimate court decision. For the second item, to avoid double-counting of the relatively infrequent decisions that, due to appeal, appeared in more than one of the successive compilations, the tabulation only recorded the date of the most recent decision. Using the

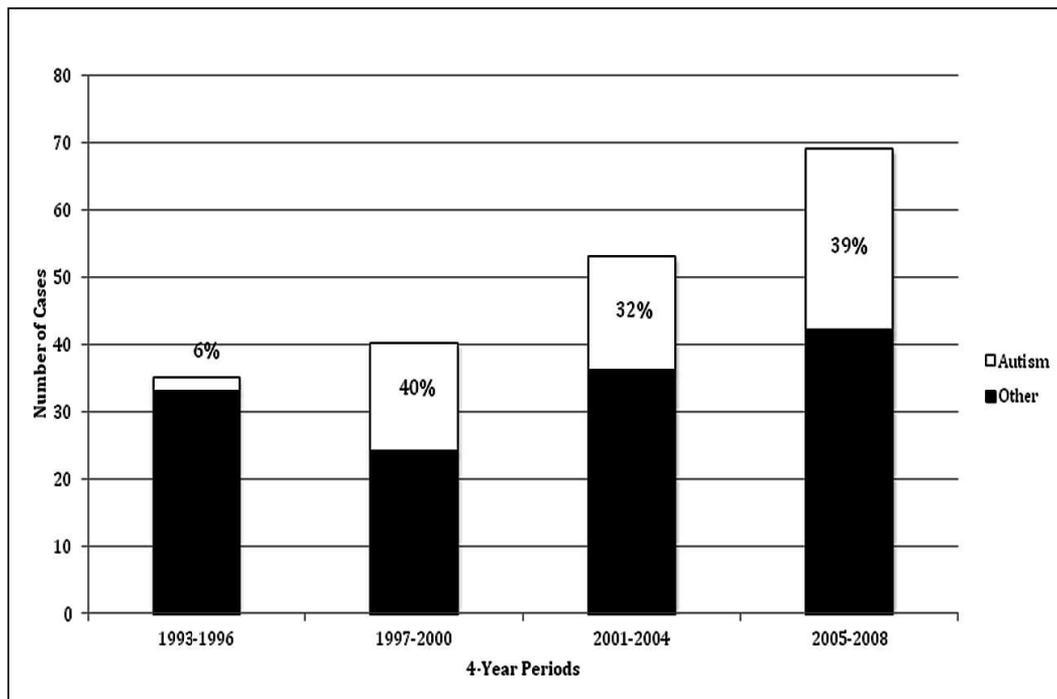
Westlaw case "history" feature enabled examination of all the available court opinions in each case not only to determine the most recent one specific to FAPE/LRE, but also to find the classification of the child and the year that the dispute arose. For the first item, the relatively few court decisions that did not report the child's classification were excluded from the analysis.

For the autism enrollments variable, the data were from the U.S. Department of Education's (1995, 2004, 2005, 2006, 2007, 2008, 2009) official reports for the United States and—tallied in the total but accounting for negligible numbers—its outlying areas. Based on the availability in these reports of the enrollment data by disability classification, including autism, the starting date for the analyses was 1993, although the figures for this initial year may be not quite as complete as those for the subsequent years (C. Bruce, personal communication, July 22, 2010). The enrollment data are based on ages 6–21 rather than 3–21 because the official enrollment data for children with autism ages 3–5 were not available for the first half of the overall period for the analysis. Dividing the autism enrollment by the total special education enrollment yielded a proportion, reported as a percentage, for each year.

For the corresponding percentage of autism cases in the overall FAPE/LRE litigation, the basis was the year of the ultimate decision, because this is the prevailing procedure for empirical analysis of case law (e.g., Chouhoud & Zirkel, 2008; D'Angelo & Zirkel, 2008; Gavin & Zirkel, 2008). However, for the proportionality comparison, the enrollment years corresponded to the time that the dispute arose (i.e., the year of the IEP that the parent challenged in the due process hearing) rather than to the year of the ultimate court decision. The reason was the substantial time lag—an average of 2.8 years for all the cases in our sample—between the parents' filing for the hearing and the court's ultimate decision in the case. As a result, the analysis ended in 2006: Although official enrollment data were available for 2007 and 2008, the litigation numbers for those years represent unreliable undercounts; some of the cases arising during those years would not have final court decisions, including any appeals, until 2009 or thereafter.

Finally, the analysis for the proportionality comparison was limited to visual examination of a graphical presentation of the data for several reasons.

Figure 1. Longitudinal frequency of free appropriate public education/least restrictive environment, including autism, cases.



First, the data violate the independence assumption fundamental to both parametric and nonparametric methods, thus triggering an alternative akin to the methods that Tukey (1977) developed in place of formal hypothesis testing. Second, the enrollment data clearly—and the case-law data arguably—constituted the respective populations for each variable, thus making a statistical test for generalizability superfluous. Finally, the disproportionality issue is ultimately a matter of practical rather than statistical significance.

## Results

After eliminating those FAPE/LRE cases in the successive compilations that had a subsequent decision within the period on appeal, the total was 206 decisions, but in five cases the disability classification was not specified. Thus, the total usable sample was 201 FAPE/LRE decisions between 1993 and 2008. The child's classification was identified as autism in 64 (32%) of these 201 decisions.

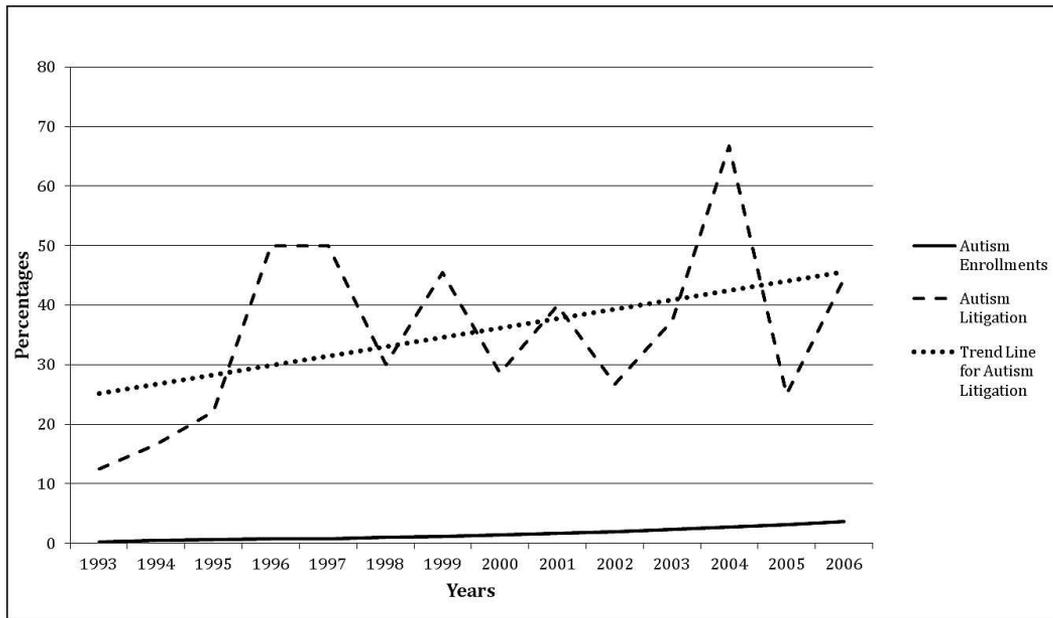
As a backdrop for the proportionality results, *Figure 1* presents the longitudinal frequency of FAPE/LRE cases overall and the segment of this litigation attributable to students with autism for the period 1993–2008. As explained in the Method

section, the tabulation for these 4-year periods is based on the year of the ultimate decision in each case.

This bar graph shows that the overall frequency of litigation for the successive 4-year segments rose steadily during this 16-year period. At the same time, the percentage of autism cases, which is represented by the white segment of each successive bar in the graph, has stabilized within a range of approximately 32–40% after an initial 6% rate in the period closest to the 1990 addition of autism to the list of disability classifications in the IDEA.

Directly addressing the proportionality purpose of this analysis, *Figure 2* provides the percentage of autism enrollments (in relation to the total special education enrollments) and the proportion of autism litigation (in relation to the total number of FAPE/LRE court decisions) according to the year that the dispute arose. *Figure 2* is different from *Figure 1* in two respects: (a) This analysis includes the corresponding enrollment data, and (b) the ending year is 2006 rather than 2008. As explained in the Method section, *Figure 2* does not extend to the last 2 years of available enrollment data because the number of cases would be undercounts due to the substantial time lag in reaching an ultimate court decision. The change in the length of the period and

Figure 2. Comparative proportion of autism enrollments and litigation.



to the year of the dispute, rather than decision, resulted in 177 useable cases for this figure.

The solid, lower line shows not only the rather consistent upward trajectory of autism enrollments but also the relatively low percentage of this disability classification even at its highest, most recent point. For example, in 2006, the percentage of total special education enrollments for autism was lower than that for five other IDEA classifications, starting with specific learning disability (44.6%). The much more fluctuating broken, upper line has, as its dotted trend approximation shows, an even more pronounced upward trend. More significant for the purpose of this investigation, this litigation line, even with its fluctuations, has consistently and markedly been at a disproportionately higher level than the line for autism enrollments. More specifically, the autism litigation trended up from approximately 12–45% (or on a trend line basis, 25–45%), whereas the autism enrollments increased steadily within the 0–5% range (specifically, from 0.3% in 1993 to 3.7% in 2006). Thus, overall the proportionality ratio of autism litigation to autism enrollments was more than 10 : 1.

## Discussion

The overall rise of FAPE/LRE litigation is in accordance with the upward trajectory of both autism litigation (e.g., Zirkel, 2002) and special education litigation (e.g., Zirkel & D’Angelo, 2002) more

generally. However, the major findings are that (a) students with autism account for approximately a third of this central stream of court decisions after the transitional period in the wake of the 1990 IDEA amendments, and (b) the proportion of autism cases has been consistently and markedly higher than the proportion of autism enrollments for the period from 1993 to 2006. Although the analysis was limited to FAPE/LRE cases, this combined category—which includes tuition reimbursement cases limited to the first, FAPE step of the applicable analysis—consistently accounts for the not only the central but the predominant segment of special education litigation (Zirkel, 1993, 1995, 1997, 1999, 2002, 2004; Zirkel & Rose, 2007, 2009). In addition, the disproportionately high prevalence in FAPE/LRE cases reverberates in derivative issues, such as the frequent adjudicative issues of attorneys’ fees (e.g., *M.S. v. New York City Dept. of Educ.*, 2010) and stay-put (e.g., *Joshua A. v. Rocklin Unified Sch. Dist.*, 2009).

... overall the proportionality ratio of autism litigation to autism enrollments was more than 10 : 1.

The *Figure 1* results serve as a backdrop for and transition to the proportionality analysis. The approximately parallel rise in the size of the autism segment of the FAPE/LRE case law fits the pattern

found in other studies (e.g., Zirkel, 2002). Although meriting caution in light of the limited number of cases, especially in the autism segment of the bar, for each 4-year period, the relatively large proportion attributable to this “low incidence” disability (GAO, 2005, p. 16) set the stage for the *Figure 2* analysis.

The second finding that *Figure 2* shows is the focal point of this exploratory investigation. During the period 1993–2006, although both variables—the proportion of published court decisions concerning FAPE and/or LRE under the IDEA attributable to the autism classification and the proportion of the overall special education population specifically in the autism classification—rose rapidly, the litigation percentage continued to be far higher than the enrollment percentage. Overall, the FAPE/LRE court cases are over 10 times more likely to concern a child with autism than the proportion of these children in the special education population. The ratio may even be higher due to possible undercounting in the autism enrollment figures for the beginning and end of this period. For the first year of this period, as part of the transition in the wake of the 1990 IDEA Amendments, a few states did not report autism enrollment data. For the most recent years, the autism enrollment data may be undercounts due to the optional but increasing use of the “developmental delay” classification under the IDEA, which accounted for 0% of overall special education enrollments in 1993 and 1.4% in 2006. In any event, the key question is what is the explanation for this significant disproportionality—that is, why do children with autism account for such a disproportionately high rate of FAPE/LRE court decisions? The answer to this complex question is—like the analysis—only exploratory and tentative.

### Initial Contributing Factor

The initial explanations concern the severity of the disability and its resulting high emotional toll. For example, citing the Autism Speaks Web site, one lawyer-parent reported: “many parents who have children with [autism spectrum disorders] report feeling despair and hopelessness upon learning their children have autism” (Marlett, 2008, p. 57). Similarly, in one of the FAPE-autism cases in this tabulation, the Tenth Circuit Court of Appeals recognized in its concluding comment “the enormous burdens [the child’s parents] face” (*Thompson R2-J Sch. Dist. v. Luke P.*, 2008, p. 1155).

“Whereas many still think of autistic individuals as resembling stereotypical characters seen in films such as *Rainman*, the degree of impairment varies widely” (Jennings, 2005 p. 583).

However, this undeniable and significant factor does not alone serve as a sufficient explanation for two reasons. First, autism is generally understood to constitute a spectrum, with varying severity, rather than a relatively homogeneous disability classification. As Jennings (2005) observed: “Whereas many still think of autistic individuals as resembling stereotypical characters seen in films such as *Rainman*, the degree of impairment varies widely” (Jennings, 2005 p. 583). Second, other disability classifications, such as mental retardation, emotional disturbance, and visual or hearing impairment, at least approach comparability to autism in terms of severity and its family effects.

### Significant Other Factors

Instead, two overlapping explanations seem to be more potent contributing factors due to their differentiation for this particular disability classification. The first is cost (Mandlawitz, 2002). For example, in a national study limited to children with disabilities aged 3–5, Bitterman et al. (2008) found that children with ASD received a significantly higher number of different special education and related services and total hours of service than did their peers with other disabilities, even upon controlling for severity of disability. Even more directly on point, during the most recent year for such data, which was 1999–2000, the average per-pupil expenditure for special education services for school-age children with autism was more than that for any other IDEA disability classification (Chambers, Shkolnik, & Perez, 2003). Characterizing cost in the special education context as “the elephant in the room,” Seligmann (2005, p. 285) cited the example of a court case where the district’s preschool budget was in the range of \$360,000 to \$400,000 and the estimated cost of the program for the plaintiff preschool child with autism was estimated as being between \$50,000 and \$63,500. These high stakes for both parents and districts fuel litigation, as evidenced by the notable number of tuition reimbursement cases in the FAPE/LRE cases generally and, even to a greater extent, the autism

segment more specifically. Because the primary question in tuition reimbursement analysis is whether the district's proposed placement provides FAPE, the case category for our sample includes a substantial segment of this otherwise separate category of tuition reimbursement.

The disproportionate growth of autism litigation is likely due in part to school systems' limited success in effectively addressing this complex disability.

The second potent, differential contributing factor is the relative recency in the recognition of and, thus, educational attention to autism in comparison with the other IDEA disability classifications. Paralleling the poignant emotional roller coaster that parents of children with autism have well documented (e.g., Siff Exkorn, 2005), this recency has fueled litigation in at least two interrelated ways. One is the state of the art/science of treatment in general and special education in particular with regard to autism. For example, as a federal appeals court observed: "Autism is very difficult for parents, as well as teachers, to handle, and there are divergent theories as to the best treatment" (*T.B. v. Warwick Sch. Comm.*, 2004, p. 830). Scholars concur. As Feinberg and Vacca (2000) aptly stated: "The state of the art is at once elusive and inconclusive" (p. 130). A more recent methodological review in the school context concluded: "Although there is a growing body of quality research available on effective interventions for children with ASD, it is still fairly limited" (Ryan, Hughes, Katsiyannis, McDaniel, & Sprinkle, 2011, p. 63). Similarly, another recent literature review, which was limited to children up to age 12, concluded: "There is not yet adequate evidence to pinpoint specific behavioral intervention approaches that are the most effective for individual children with ASDs" (Warren, McPheeters, Sathe, Foss-Feig, Glasser, & Veenstra-VanderWeele, 2011). Additionally, Caruso pointed out that *Rowley's* substantive standard for FAPE invites autism litigation due to the uncertainty of the science and the diversity of the disorder, which "call[s] for different styles and modes of intervention" (p. 518). Thus, the disproportionate growth of autism litigation is likely due in part to school systems' limited success in effectively addressing this complex disability.

The other interrelated recency factor is the advent of the Internet, which facilitates advocacy and support groups. For example, the National Research Council's Committee on Educational Interventions for Children With Autism observed: "In the last ten years, the widespread availability of the Internet and media attention to autism have increased parents' knowledge but often conveyed perspectives that were not balanced nor well-supported scientifically" (2001, p. 215). Adding another relatively recent source beyond the media to the support and advocacy groups, Heflin and Simpson (1998) identified special commercial interests: "Business-minded promoters may make exaggerated claims and empty promises" (p. 219). Moreover, it is not unusual to find articles in law reviews (e.g., Marlett, 2008; Womack, 2002) that have advocated for the Lovaas and applied behavior analysis (ABA) methods as having unquestionable research-based support. Such special interests and touted methods, according to behavior intervention advocates Mulick and Butter (2002), have fostered emotional expectations that have motivated parents of children with autism with "the strength and perseverance to expend the effort and endure the terrible cost of pursuing [legal proceedings]" (pp. 59–60).

### Interactive Effects

At times, the emotion-enhancing effects of these various sources may go over the edge in terms of litigation. For example, in *Parenteau v. Prescott Unified Sch. Dist.* (2009), the court ruled that the parents of a child with autism and their attorney were jointly liable for \$141,211 for the defendant district's attorneys' fees and court costs due to their litigation being without legal or factual foundation and for an improper purpose; because the district had not only complied with the IDEA's requirement but also provided the extra personnel and ABA methodology that the parents had sought, the court inferred that their sole purpose was anger, and "anger alone is not a proper purpose for pursuing litigation" (p. 96).

Yet, though it is not unusual to find the various special interests touting a particular panacea for children with autism with emotional effect, the much more objective assessment of the scientific community is sobering. For example, the same National Research Council (2001) report concluded: "There is no outcome study published in a peer-reviewed journal that supports comparative statements of the superiority of one model or approach over another" (p. 166).

As a result of the disparity between the interest groups' prescriptions and school districts' prevailing practices, with the underlying mutual motives of high costs and methodological controversy, it is not surprising that the parents of children with autism would be more prone to litigation than the parents of children with other disabilities. For example, an article from *The New York Times* reported: "As parents become more educated and advocacy groups more vocal about autism, more services are often demanded" (Nussbaum, 2004, p. NJ-6). Consequently, in their aforementioned study, Bitterman et al. (2008) found the parents of the children with ASD, though generally satisfied with the quality of the relatively extensive range of services, were significantly more likely—controlling for severity of disability, total hours of service, and numbers of services—to be dissatisfied with the quantity of these services than the parents of children with other disabilities.

.....  
 ... with the underlying mutual motives of high costs and methodological controversy, it is not surprising that the parents of children with autism would be more prone to litigation than the parents of children with other disabilities.

Yet some of the media reporting, even from respected newspapers, may be skewed toward selectively sensationalizing the situation. For example, pointing to the gap between rising enrollments and local district programs specific to autism, another article from *The New York Times* reported that "the mismatch between needs and services is widening" (Gross, 2004, p. A1). The reported result is a "frenzied race" on the parents' part that includes moving their residences to districts with the reputation for specialized programs and hiring special education attorneys to fight for private school services at public expense. According to the article, the prevailing parental perspective is "I can't fix [my child], so my only peace of mind is to get him the best services I can" (Gross, p. A1).

### Additional Limited Factors

Other explanations add what are more likely to be limited contributions. For example, the paradigm

shift between Part C (ages 0–3) of the IDEA, for which the family is the focus and the home is the LRE, and Part B (ages 3–21) of the IDEA, for which the student is the focus and the school is the LRE, can lead to frustrated expectations and resulting litigation at least during the earlier years of public school education. This factor is differentially significant for children with autism due to the early onset of this disability and its characteristic symptom of difficulty with transitions. Similarly, in their "drama and trauma" analysis, Feinberg and Vacca (2000) also pointed out that litigation among families with autism may foster further litigation, because the win-lose mentality of this adversarial mechanism fuels rather than resolves conflict. More specific to the autism classification than this litigation-leading-to-more-litigation factor are two additional features: (a) the availability of impassioned, specialized attorneys, such as Gary Mayerson, who has represented children with autism in major cases in various parts of the country (e.g., *Deal v. Hamilton County Dept. of Educ.*, 2004; *L.B. v. Nebo Sch. Dist.*, 2004) and who interlocks with advocacy groups (e.g., *Autism Speaks*, n.d.); and, conversely, (b) passionate nonattorney advocates, such as the parents who succeeded in convincing the Supreme Court that parents have the right to proceed in court without an attorney under the IDEA, based on the rationale that they have enforceable rights under this Act independent to those of their children (*Winkelman v. Parma City Sch. Dist.*, 2007).

On the other hand, much less likely is the additional or alternative hypothesis that the enrollment-rate jurisdictions within the wide variability among states for IDEA autism identification and services (e.g., CDC, 2006) may be those with correspondingly high litigation rates under the IDEA. The problems with this purported explanation include that (a) neither the states with the higher and lower levels (CDC, 2006, table 3) are in the top litigation jurisdictions (e.g., Zirkel & D'Angelo, 2002; Zirkel & Gischlar, 2008); (b) the IDEA enrollment rates for students with disabilities, which served as the denominator for the percentages reported in this investigation, also vary widely from state to state; and (c) even if there were a close correlation jurisdictionally (i.e., states with higher identification rates having higher litigation rates), it would not remove the notable

disparity in percentages (i.e., parallel difference between rates).

## Design Factors

Finally, the methodological features of limiting the litigation to FAPE/LRE cases and published court decisions may be intervening factors. The first factor likely is not significant in terms of generalizability, because FAPE and LRE account for such a high proportion of IDEA litigation, and various other issue categories, such as remedies and attorneys' fees are derivatives of these same central sources of parent-district disputes. The second factor is much more problematic, because it would require systematically examining first the classification-proportionality issue for IDEA hearing/review officer decisions and next the issue of proportionality—at a threshold level in terms of comparing parents with districts and then, within parents, comparing disability classifications—for appeals to the court level. The complications of conducting such research include the difficulty of obtaining a representative national sample of hearing/review officer decisions (D'Angelo, Lutz, & Zirkel, 2004); the threshold need to address the judicial appeal issue in terms of the parties (i.e., districts compared with parents, controlling for the win-loss ratio at the hearing/review officer level); and the even more limited availability of complete records of unpublished judicial cases, including settlements.

## Disproportionality Revisited

Although the concept of disproportionality is mathematically defensible and practically enlightening, its prevailing meaning, which concerns race/ethnicity or disability more generally, carries a connotation that may not be fitting in this context. Specifically, the prevailing use in the IDEA, borrowed in turn from the wider social justice discourse, includes the understanding that the mathematical disparity is due to invidious discrimination. Here, to the extent that the explanation for the disproportional litigation is due to rational explanations, such as the unusual challenges that school districts face in providing effective programs for individual children with autism, the usual connotation does not apply. Although further research is needed to determine the extent and nature of this disproportionality, it would appear to have practical significance even if its explanation is totally rational.

## Recommendations for Further Research

This analysis was only an initial exploration of disability disproportionality in special education litigation. First, although FAPE is consistently the most frequent category of cases, especially when—as here—it broadly includes rulings concerning LRE and also the many tuition reimbursement rulings based on appropriateness of the district's proposed program, this analysis did not extend to all of the categories of litigation under the IDEA. Second, its scope was limited to students in the 6–21 age range, whereas Part C (ages 0–3) and preschool (ages 3–5) are significant stages for identification and education of children with autism. Litigation is relatively infrequent for children ages 0–3, partly due to the absence of attorneys' fees for prevailing parents under Part C (*Bucks County Dept. of MH/MR v. De Mora*, 2002). For children at the preschool level, litigation is not as infrequent, but many of these decisions are at the hearing/review officer level (e.g., Mandlawitz, 2002). Thus, the analysis was limited to published court decisions. Litigation under the IDEA starts with hearing/review officer decisions and extends to court decisions available in wider databases, such as Westlaw and IDELR. Although studies of such broader samples of litigation specific to students with autism (e.g., Zirkel, 2002) and students with disabilities more generally (e.g., Zirkel & D'Angelo, 2002) show trends generally similar to those for published court decision, they have not specifically addressed this disproportionality issue.

Thus, extending the analysis to the full scope of litigation under the IDEA in terms of both issue categories and adjudicatory levels and to the full 3–21 age range, especially in future years when more complete longitudinal data become available, would be worthwhile. Such follow-up research would also allow analysis of the data to determine whether the extent of disproportionality differs according to the issue category and the adjudicatory level. Finally, corresponding research would appear to be warranted to examine the comparative litigation and enrollment proportions among the other IDEA disability classifications, with the focus on determining which are the classifications that, in terms of disproportionality, amount to the counterbalancing opposites of autism. Evidence of the underidentification of autism in the school population (e.g., Wilkinson, 2010) would only appear to be relevant to these initial findings if other

classifications of these children, primarily mental retardation, reflected disproportionality in terms of litigation. Finally, this research approach should be extended not only to more recent years, as the enrollment data becomes available, but also to more precise indicators of “litigation” because under the IDEA, the successive levels start with a due process hearing and continue with the choice for judicial review and further appeals, which may be at the parent’s and/or the district’s initiation.

## Practical Significance

In any event, the practical significance of this investigation concerns the litigation propensity of parents of children with autism. Given the obvious costs in terms of time, money, emotions, and adversariness of what the Supreme Court recognized as the “ponderous” process of litigation under the IDEA (*Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 1985, p. 370), the relatively obvious implication is that school district officials need to pay particular attention to providing effective research-based programs for children with autism and to establishing effective communications and trust building with their parents.

However, the particular approaches are left to other authors, who have the relevant specialized expertise. For example, special education practitioners should examine the utility of prescriptions for parent-professional partnering (e.g., Brookman-Fraee, 2004; Harte, 2009). Similarly, given the complexity of the contributing factors, including the limited knowledge of effective educational interventions, school officials must also be ready to address inevitable complaints from parents of children with autism. At this stage, special education leaders should explore and evaluate the use of the increasing array of alternate dispute resolution mechanisms, such as mediation, IEP facilitation, or the more recent innovations of advisory opinions (Connecticut Agencies Regs., 2009; Massachusetts Department of Elementary and Secondary Education, n.d.a), a special education ombudsman (Virginia Department of Education, n.d.), and SpedEx (Massachusetts Department of Elementary and Secondary Education, n.d.b), to minimize FAPE/LRE litigation. Although such steps are appropriate with all parents, especially with those of children with disabilities, these results suggest that, without such

priority extra efforts, the likelihood of the parents of students with autism filing for an impartial hearing to challenge the IEP and persisting through this costly and cumbersome adversarial process to a court decision will remain disproportionately high.

## References

- Autism Speaks (n.d.). Developing a great IEP, with Gary Mayerson. Retrieved August 26, 2010 from [http://www.autismspeaks.org/howtoCOPE/iep\\_mayerson.php](http://www.autismspeaks.org/howtoCOPE/iep_mayerson.php).
- Bitterman, A., Daley, T.C., Misra, S., Carlson, E., & Markowitz, J. (2008). A national sample of preschoolers with autism spectrum disorders: Special education services and parent satisfaction. *Journal of Autism and Developmental Disorders*, 38, 1509–1517.
- Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).
- Brookman-Fraee, L. (2004). Using parent/clinician partnerships in parent education for children with autism. *Journal of Positive Behavioral Interventions*, 6, 195–213.
- Bucks County Dept. of MH/MR v. De Mora, 38 IDELR 2 (E.D. Pa. 2002).
- Burlington Sch. Comm. v. Massachusetts Dep’t. of Educ., 471 U.S. 359 (1985).
- Caruso, D. (2010). Autism in the U.S.: Social movement and legal change. *American Journal of Law and Medicine*, 36, 483–539.
- Centers for Disease Control and Prevention (CDC). (n.d.). *Prevalence of the autism spectrum disorders (ASDs) in multiple areas of the United States, 2000 and 2002*. Retrieved August 26, 2010 from <http://www.cdc.gov/autism>.
- Centers for Disease Control and Prevention (CDC). (2006). *Prevalence of autism spectrum disorders: Autism and Developmental Disabilities Monitoring Network, United States*. Retrieved August 26, 2010 from <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5810a1.htm>.
- Chambers, J.G., Shkolnik, J., & Perez, M. (2003). *Total expenditures for students with disabilities, 1999–2000: Spending variation by disability*. Palo Alto, CA: American Institutes for Research. Retrieved August 26, 2010 from <http://www.csef.air.org>.
- Chouhoud, Y., & Zirkel, P. (2008). The Goss progeny: An empirical analysis. *San Diego Law Review*, 45, 353–382.
- Choutka, C., Doloughty, P., & Zirkel, P.A. (2004). The “discrete trials” of applied behavior analysis for children with autism. *Journal of Special Education*, 38, 95–103.
- Conn. Agencies Regs. § 10-76h-6 (2009).
- D’Angelo, A., Lutz, J.G., & Zirkel, P.A. (2004). Are published IDEA hearing officer decisions

- representative? *Journal of Disability Policy Studies*, 14, 241–252.
- D'Angelo, A., & Zirkel, P. (2008). An outcomes analysis of student-initiated litigation. *West's Education Law Reporter*, 226, 539–555.
- Deal v. Hamilton County Dept. of Educ., 392 F.3d 840 (6th Cir. 2004).
- Etscheidt, S. (2003). An analysis of legal hearings and cases related to individualized education programs for children with autism. *Research & Practice for Persons With Severe Disabilities*, 28, 51–69.
- Feinberg, E., & Vacca, J. (2000). The drama and trauma of creating policies on autism: Critical issues to consider for the new millennium. *Focus on Autism and Other Developmental Disabilities*, 15, 130–137.
- Fogt, J., Miller, D., & Zirkel, P.A. (2003). Defining autism: Professional best practices and published case law. *Journal of School Psychology*, 41, 201–216.
- Gamm, S. (2010). *Disproportionality in special education*. Horsham, PA: LRP Publications.
- Gavin, I., & Zirkel, P. (2008). An outcome analysis of school employee-initiated litigation: A comparison of 1977–81 and 1997–2001 decisions. *West's Education Law Reporter*, 232, 19–36.
- Goldstein, L.F. (2002, October 30). Autism study rebuts various explanations of increase in cases. *Education Week*, 10.
- Government Accounting Office (GAO). (2005, January). *Special education: Children with autism* (Report No. GA-05-2200). Retrieved August 26, 2010 from <http://www.gao.gov/new.items/d05220.pdf>.
- Gross, J. (2004, January 30). As autism cases rise, parents run frenzied race to get help. *The New York Times*, pp. A1, B7.
- Harte, H.A. (2009). What teachers can learn from mothers of children with autism. *Teaching Exceptional Children*, 42(1), 24–30.
- Heflin, L.J., & Simpson, R. (1998). Interventions for children and youth with autism: Prudent choices in a world of exaggerated claims and empty promises. *Focus on Autism and Other Developmental Disabilities*, 13, 212–220.
- Henderson, K. (2009, April). Autism spectrum disorders: State Part C and Part B initiative to serve a growing population. *InForum*. Retrieved August 26, 2010 from <http://nasdse.org>.
- Individuals With Disabilities Education Act (IDEA). 20 U.S.C. §§ 1401 *et seq.* (2009).
- Jennings, S. (2005). Autism in children and parents: Unique considerations for family court professionals. *Family Court Review*, 43, 582–596.
- Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036 (9th Cir. 2009).
- L.B. v. Nebo Sch. Dist., 379 F.3d 966 (10th Cir. 2004).
- Liptak, G.S., Orlando, M., Yingling, J.T., Theurer-Kaufman, K.L., Malay, D.P., Tompkins, L.A., & Flynn, J.R. (2006). Satisfaction with primary health care received by families of children with developmental disabilities. *Journal of Pediatric Health*, 20, 245–252.
- Liptak, G.S., Stuart, T., & Auinger, P. (2006). Health care utilization and expenditures for children with autism: Data from U.S. national samples. *Journal of Autism and Developmental Disorders*, 36, 871–879.
- M.S. v. New York City Dep't. of Educ., 734 F. Supp. 2d 271 (E.D.N.Y. 2010).
- Mandlawitz, M. (2002). The impact of the legal system on educational programming for young children with autism spectrum disorder. *Journal of Autism and Developmental Disorders*, 32, 495–508.
- Marlett, C. (2008). The effects of the IDEA reauthorization of 2004 and the No Child Left Behind Act on the families of autistic children. *Kansas Journal of Law and Public Policy*, 18, 53–72.
- Massachusetts Department of Elementary and Secondary Education. (n.d.a). Advisory opinion process. Retrieved August 26, 2010 from <http://www.doe.mass.edu/bsea/opinions.html>.
- Massachusetts Department of Elementary and Secondary Education. (n.d.b). SpedEx. Retrieved August 26, 2010 from <http://www.doe.mass.edu/sped/spedx/>.
- Mulick, J.A., & Butter, E.M. (2002). Educational advocacy for children with autism. *Behavioral Interventions*, 17, 57–74.
- National Research Council. (2001). *Educating children with autism*. Washington, DC: National Academy Press.
- Nelson, C., & Huefner, D.S. (2003). Young children with autism: Judicial responses to the Lovaas and discrete trial training debates. *Journal of Early Intervention*, 26, 1–19.
- Nussbaum, D. (2004, February 8). A surge in autism, but why? *The New York Times*, p. NJ-6.
- Parenteau v. Prescott Unified Sch. Dist., 53 IDELR ¶ 23 (D. Ariz. 2009).
- Ryan, J.B., Hughes, E.M., Katsiyannis, A., McDaniel, M., & Sprinkle, C. (2011). Research-based educational practices for students with autism spectrum disorders. *Teaching Exceptional Children*, 43(3), 56–64.
- Seligmann, T.J. (2005). Rowley comes home to roost: Judicial review of autism special education disputes. *UC Davis Journal of Juvenile Law and Policy*, 9, 217–288.
- Siff Exkorn, K. (2005). *The autism sourcebook*. New York: HarperCollins.
- Spann, S.J., Kohler, F.W., & Soenksen, D. (2003). Examining parents' involvement in and perceptions of special education services: An interview with families in a parent support group. *Focus on Autism and Other Developmental Disabilities*, 18(4), 228–237.

- Steuernagel, T. (2005). Increases in identified cases of autism spectrum disorders. *Journal of Disability Policy Studies, 16*, 138–146.
- T.B. v. Warwick Sch. Comm., 361 F.3d 80 (1st Cir. 2004).
- Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143 (10th Cir. 2008), cert. denied, 129 S. Ct. 1356 (2009).
- Tukey, J.W. (1977). *Exploratory data analysis*. Reading, MA: Addison-Wesley.
- U.S. Department of Education. (1995). *Seventeenth annual report to Congress on the implementation of the Individuals With Disabilities Education Act*, number and change in number of children age 6–21 served under IDEA, part B [table AA11]. Retrieved August 26, 2010 from <http://www2.ed.gov/pubs/OSEP95AnlRpt/pdf/aa11.pdf>.
- U.S. Department of Education, Office of Special Education Programs, Data Accountability Center. (2004, July 31). Number of children served under IDEA by disability and age group 1994 through 2003 age group 6–21 [table AA9]. Retrieved August 26, 2010 from [http://www.ideadata.org/tables27th\ar\\_aa9.htm](http://www.ideadata.org/tables27th\ar_aa9.htm).
- U.S. Department of Education, Office of Special Education Programs, Data Accountability Center. (2005, July 30). Students ages 6 through 21 served under IDEA, part B, by disability category and state: 2004 [table 1–3]. Retrieved August 26, 2010 from [https://www.ideadata.org/arc\\_toc6.asp#partbCC](https://www.ideadata.org/arc_toc6.asp#partbCC).
- U.S. Department of Education, Office of Special Education Programs, Data Accountability Center. (2006, July 17). Students ages 6 through 21 served under IDEA, part B, by disability category and state: Fall 2005. Retrieved August 26, 2010 from [https://www.ideadata.org/tables29th\ar\\_1-3.htm](https://www.ideadata.org/tables29th\ar_1-3.htm).
- U.S. Department of Education, Office of Special Education Programs, Data Accountability Center. (2007, July 15). Students ages 6 through 21 served under IDEA, part B, by disability category and state: Fall 2006. Retrieved August 26, 2010 from [https://www.ideadata.org/tables30th\ar\\_1-3.htm](https://www.ideadata.org/tables30th\ar_1-3.htm).
- U.S. Department of Education, Office of Special Education Programs, Data Accountability Center. (2008, July 15). Students ages 6 through 21 served under IDEA, part B, by disability category and state: Fall 2007. Retrieved August 26, 2010 from [https://www.ideadata.org/tables30th\ar\\_1-3.htm](https://www.ideadata.org/tables30th\ar_1-3.htm).
- U.S. Department of Education, Office of Special Education Programs, Data Accountability Center. (2009, August 3). Students ages 6 through 21 served under IDEA, part B, by disability category and state: Fall 2008. Retrieved August 26, 2010 from [https://www.ideadata.org/tables30th\ar\\_1-3.htm](https://www.ideadata.org/tables30th\ar_1-3.htm).
- Virginia Department of Education. (2010). Special education: Resolving disputes—ombudsman for special education. Retrieved August 26, 2010 from [http://www.doe.virginia.gov/special\\_ed/resolving\\_disputes/index.shtml](http://www.doe.virginia.gov/special_ed/resolving_disputes/index.shtml).
- Warren, Z., McPheeters, M.L., Sathe, N., Foss-Feig, J.H., Glasser, A., & Veenstra-VanderWeele, J. (2011). A systematic review of early intensive interventions for children with autism spectrum disorders. *Pediatrics, 127*, 1303–1311.
- Wilkinson, L.A. (2010). Facilitating the identification of autism spectrum disorders in school-age children. *Remedial and Special Education, 31*(5), 350–357.
- Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007).
- Womack, R.R. (2002). Autism and the Individuals With Disabilities Education Act. *Texas Tech Law Review, 34*, 189–234.
- Yell, M.L., & Drasgow, E. (2000). Litigating a free appropriate public education: The Lovass hearings and cases. *Journal of Special Education, 30*, 205–214.
- Yell, M.L., Katsiyannis, A., Drasgow, E., & Herbst, M. (2003). Developing legally correct and educationally appropriate programs for students with autism spectrum disorders. *Focus on Autism and Other Developmental Disabilities, 19*, 182–191.
- Zirkel, P.A. (1993). Special education law update III. *West's Education Law Reporter, 83*, 543–551.
- Zirkel, P.A. (1995). Special education law update IV. *West's Education Law Reporter, 98*, 1–9.
- Zirkel, P.A. (1997). Special education law update V. *West's Education Law Reporter, 116*, 1–8.
- Zirkel, P.A. (1999). Special education law update VI. *West's Education Law Reporter, 133*, 323–334.
- Zirkel, P.A. (2001). *Autism and the law: Rulings and expert analysis*. Horsham, PA: LRP Publications.
- Zirkel, P.A. (2002). The autism case law: Administrative and judicial rulings. *Focus on Autism, 17*, 84–93.
- Zirkel, P.A. (2002). Special education law update VII. *West's Education Law Reporter, 160*, 1–16.
- Zirkel, P.A. (2004). Special education law update VIII. *West's Education Law Reporter, 183*, 35–47.
- Zirkel, P.A., & D'Angelo, A. (2002). Special education case law: An empirical trends analysis. *West's Education Law Reporter, 161*, 731–753.
- Zirkel, P.A., & Gischlar, K. (2008). Due process hearings under the IDEA: A longitudinal frequency analysis. *Journal of Special Education Leadership, 21*, 22–31.
- Zirkel, P.A., & Rose, T. (2006). Special education law update IX. *West's Education Law Reporter, 206*, 501–515.
- Zirkel, P.A., & Rose, R. (2009). Special education law update X. *West's Education Law Reporter, 240*, 503–523.

## About the Author

Perry A. Zirkel, Ph.D., J.D., L.L.M., is university professor of education and law at Lehigh University in Bethlehem, PA.