

No. 20-619

IN THE  
SUPREME COURT OF THE UNITED  
STATES

◆  
A.S. a 9-year old child with Autism Spectrum  
Disorder (ASD) entitled to Special Education and  
Related services per IDEA represented by his  
parents R.S. *Pro se* and E.S. *Pro se*

*Plaintiffs-Petitioners*

-v.-

Board of Education Shenendehowa Central  
School District,  
Interim Commissioner Betty Rosa, of The  
University of the State of New York

*Defendants-Respondents*

FILED  
OCT 05 2020  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

◆  
On Writ of Certiorari  
To the U.S. Court of Appeals for the 2<sup>nd</sup>  
Circuit

◆  
**PETITION FOR A WRIT OF CERTIORARI**

Appeal from the Decision, Order and Judgment of  
The United States Court of Appeals of the Second  
Circuit by Judges Pierre N. Leval, Raymond J.  
Lohier, Jr. and Michael H. Park to dismiss for lack  
of jurisdiction the Appeal from the Memorandum-  
Decision and Order and Judgment of The United

States District Court for the Northern District of New York by Judge Lawrence E. Khan entered February 20, 2019 and Motion to Reopen Granted on March 16, 2020 and postmarked on March 16, 2020 where FRAP suggests 14-day timeline begins on March 19, 2020 in Action No. 20-1153.

### **QUESTIONS PRESENTED**

1. Whether an appellate court may *sue sponte* dismiss an appeal which has been filed within the time limitations stated in the Federal Rules of Appellate Procedure FRAP Rule 26(c) that adds 3 days for service by mail to file an appeal for which the motion has been granted to reopen the time to file an appeal under rule 4(a)(6) of FRAP?
2. Whether non-attorney *pro se* parents can reasonably have been expected to know of unwritten rules that lawyers take for granted that FRAP Rule 26(c) does not apply to mailed motions that are granted to reopen the time to file an appeal under rule 4(a)(6) of FRAP when that is impossible to determine when reading the Federal Rules of Appellate Procedure?
3. Whether the interpretation of FRAP is intended to be based on the stand-alone document and whether supplementary rules are required for its interpretation where such supplementary rules are referenced within FRAP to the particular application of FRAP rule 26(c) on FRAP rule 4(a)(6)?

4. Is Intensive Behavioral Intervention or its equivalent intensive Applied Behavior Analysis (ABA) required for a specific period of time for a child with autism in order for the IEP to be “reasonably calculated” for the child to make progress in light of their circumstance?
5. In light of question 4, is there any other way to raise measures by “technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.” (20 U.S.C. § 1414 (b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) such as IQ and Vineland Adaptive Behavior Scales (VABS) such that “further education, employment and independent living” 20 U.S.C. § 1400(d)(1)(A) is a reasonable expectation for at least half of all school aged children with autism?
6. Can a court defer to the opinion of a lower judicial body when there is an alleged bias of that lower judicial body?
7. Are the rules, regulations and laws of 8 N.Y.C.R.R. §200 et seq. and also The IDEA 20 U.S.C. §§ 1400-1482 especially as it relates to persons with autism written so that they are unconstitutionally vague and such that they cause confusion and variation in opinion in the courts, absent expensive expert testimony, and

unlawfully empower school personnel, schools, school districts other Local Education Agencies (LEAs) to broadly interpret the education law themselves especially on such pertinent matters of Least Restrictive Environment (LRE) determinations and the appropriateness of a particular educational approach such that it permits the curtailing of the rights of students receiving special education and their parents and consistently results in a denial of a FAPE, a denial of access to the students LRE to the maximum extent appropriate and also results in confusion amongst the appellate courts on how to interpret the education law and render a judgment?

8. Given the nature of the common developmental delays found in nearly all autism spectrum disorder (ASD) diagnoses, if a student with a an ASD entitled to an Individualized Education Plan (IEP) and special education and related services should the three measures of 1) expressive language, 2) conversational ability (measured in the number of peer aged exchanges that a student can consistently demonstrate) with typically developing peers if in their LRE and 3) a reduction in prompt dependence be guaranteed goals on the student's IEP since these measures are necessary to the purpose of The Individuals with Disabilities Education Act (The IDEA) (20 U.S.C. §§ 1400-1482) which is "to ensure that students with disabilities have available to them a FAPE in the LRE to the maximum

extent appropriate that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living" (20 U.S.C. §§ 1400(d)(1)(A))?

9. If Question 7 is not answered in the affirmative does 20 U.S.C. §§ 1400(d)(1)(A)) have any meaning for a child with autism?

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### **OPINIONS BELOW**

The *sue sponte* dismissal of the United States Court of Appeals for the 2<sup>nd</sup> Circuit is unpublished at 20-1153 (Pet. App. 196). The opinion of the United States District Court for the Northern District of New York 1:17-CV-0501 (LEK/CFH) (Pet. App. 168). is available at 2019 WL 719833. The opinion of the New York Office of State Review is published NYSRO Decision No. 17-008 (Pet. App. 51). The Decision of the Impartial Hearing Officer is unpublished (Pet. App. 304).

### **JURISDICTIONAL STATEMENT**

The panel decision of the United States Court of Appeals for the Second Circuit by *sue sponte* dismissal was entered on May 8, 2020. Petition for a Writ of Certiorari along with the application to increase the word limit was mailed in accordance with 28 U.S.C. § 1254 on October 5, 2020. The application to increase word limit was denied and pursuant to Rule 14.5 the corrected Petition due by December 14, 2020.

### **STATUATORY BACKGROUND AND STATEMENT OF THE CASE**

The purpose of The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400 *et seq.*), is

“to ensure that students with disabilities have available to them a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE) to the maximum extent appropriate that emphasizes special education and related services designed to

meet their unique needs and prepare them for further education, employment, and independent living”

(20 U.S.C. §1400(d)(1)(A). Parents have independent and enforceable rights under the IDEA. “our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” Justice Anthony M. Kennedy, U.S. Supreme Court (2007) Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2003 (2007) (quoting 20 U.S.C. § 1400(c)(1) (2000 & Supp. IV 2004)). When Congress drafted the IDEA with its primary purpose of “further education, employment and independent living” they had two important ideas in mind first that when a child is denied a FAPE in their LRE they are effectively denied certain constitutional rights<sup>1</sup> of “Liberty” and in turn “property” as it is defined in the 14<sup>th</sup> Amendment. Additionally, denying a child access to a FAPE in the LRE reduces the likelihood of “further education, employment and independent living” and thus places an enormous economic strain on this country that would have been substantially avoided had a FAPE been provided in the LRE of the student across all students in the country.

“The long-range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain

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<sup>1</sup> That are effectively the right and the enablers to pursue a quality of life.

such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society."

S. Rep. No. 94-168, at 9 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (quoted in Bd. Of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). "Providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." Rowley, 458 U.S. at 201 n. 23, 102 S.Ct. 3034 (quoting 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams)). (see Pet. App. 1), The Individuals with Disability Education Act: Congressional Intent, The Library of Congress May, 1995. In a country that spends atleast \$250 - \$300 Billion<sup>2</sup> annually autism related services across individuals of all ages the opportunities for savings if evidence-based autism methodology is provided in schools are atleast \$100 Billion per year. Thus, there is a mutual benefit to country and person in providing a FAPE in the LRE that leads to "further education, employment and independent living" where the only way to do that is to provide an education that increases measures by "technically sound instruments that may assess the

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<sup>2</sup> See <http://www.autism-society.org/what-is/facts-and-statistics/> (last updated 8/26/2015) citing (Buescher et al., 2014)

relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414 (b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) where the measures that are the most relevant and reliable predictors to obtaining such an independent lifestyle are the measures of IQ and a comprehensive measure of adaptive behavior such as the gold standard Vineland Adaptive Behavior Scales (VABS).

#### **RELEVANT STATUATORY PROVISIONS**

The Individuals with Disabilities Education Act (The IDEA) Purpose 20 U.S.C. §1400(d)(1)(A):

"to ensure that students with disabilities have available to them a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE) to the maximum extent appropriate that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"

Content of the IEP 20 U.S.C. § 1414(d)(1)(A)(i)(IV) and 8 N.Y.C.R.R. § 200.4(d)(2)(v)(b)

"a statement of the special education and related services 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, and a statement of the program modifications or supports for school personnel that will be provided for the child"

Federal Rules of Appellate Procedure Rules (FRAP)  
Rule 4(a)(6) and 26(c) (See App 321)

**LEGAL BACKGROUND**

In 1972 aware that children with disabilities were not given adequate access to an education and social environment in public schools Congress conducted an investigation and found that there were unacceptable educational standards for children with disabilities. Thus, Congress enacted the Individuals with Disabilities with Education Act (IDEA) 20 U.S.C. §§ 1400-1482 *et seq.*, Pub. L. No. 101-476, 104 Stat. 1103 (1990). Since then, Congress has amended and reauthorized the IDEA twice in 1997 and in 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

Under the IDEA children with disabilities are entitled to a Free Appropriate Public Education (FAPE) that entitles them to an “Individualized Education Plan” (IEP) 20 U.S.C. § 1414(d) and placement in the least restrictive environment (LRE) to the “maximum extent appropriate” (20 U.S.C. § 1412(a)(5)(A)). The IDEA also entitles students to methodology “to the extent practicable, be based on peer-reviewed research” (20 U.S.C. § 1414(d)(1)(A)(i)(IV) and 8 N.Y.C.R.R. §200 *et seq.*<sup>3</sup>, § 200.4(d)(2)(v)(b)). The IEP lays out the students LRE placement, their level and types of services, their progress in the prior year and their goals in the upcoming year, the IEP even lays out how the services

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<sup>3</sup> <http://www.p12.nysed.gov/specialed/lawsregs/documents/regulations-part-200-201-oct-2016.pdf>

are delivered or specifies the methodology, if there is any used. Because schools use “technically sound instruments” (20 U.S.C. § 1414 (b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) measuring IQ and VABS to make major decisions about the educational placement and planning of a student it only logically follows if and only if the peer-reviewed research that the student's methodology is based on is proven to be highly effective in raising these two measures if such a methodology is available. It turns out there is such a methodology that can substantially raise the IQ and VABS of students with autism known as intensive Applied Behavior Analysis (ABA) that may be referred to as Intensive Behavioral Intervention (IBI) and it is the only single educational methodology for persons with autism that can meet the rigorous requirements of the Daubert Standard<sup>4</sup> which is defined as follows:

“Standard used by a trial judge to make a preliminary assessment of whether an expert's scientific testimony is based on reasoning or methodology that is scientifically valid and can properly be applied to the facts at issue. Under this standard, the factors that may be considered in determining whether the methodology is valid are: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the

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<sup>4</sup> [https://www.law.cornell.edu/wex/daubert\\_standard](https://www.law.cornell.edu/wex/daubert_standard)

existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community."

Further in the long-term intensive ABA will result in a net savings for school districts and for this nation because a far greater number of individuals with autism will achieve independence during elementary thereby eliminating costs associated with providing extensive services for some of elementary school, most of middle high school and during the rest of the lifetime of the individual. Any other methodology while having potentially lower costs in the first 3 years of preschool and elementary education will result in a 2-fold increase in costs for the remainder of that persons school-aged period and a substantial increase in costs for the remainder of the individuals life in comparison to intensive ABA which would have higher costs during the first 3 years and such costs would precipitously drop in subsequent 2-3 years followed by complete elimination of services for 45% of children with autism when the entire spectrum is considered (see e.g. Lovaas, O. I., 1987, *Journal of Consulting and Clinical Psychology*, 55:3-9; McEachin, J.J., Smith, T., Lovaas, O.I., 1993, *AJMR*, 97:359-372.). Of the remaining 55% about 10 - 15% will have been deemed to not benefit from ABA and about 40% will be deemed to substantially benefit but need ongoing special education support. Overall with intensive ABA 50+% of persons with autism across the spectrum can achieve all three of "further education, employment and independent living" 20 U.S.C. § 1400(d)(1)(A)). However, without intensive

ABA that percentage will fall within 10-25% depending on the collective effectiveness of the teachers in the school district. There is an army of specialists that are capable of implementing intensive ABA programs and training staff that implement such programs while overseeing the day to day progress of such programs and they are known as Board Certified Behavior Analysts (BCBAs).

Additionally, the confusion of interpreting the terms “reasonably calculated” Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982) LRE “to the maximum extent appropriate” 20 U.S.C. §§ 1400(d)(1)(A) and “to the extent practicable be based on peer reviewed research” (20 U.S.C. § 1414(d)(1)(A)(i)(IV)) has led courts to interpret the cases of students with autism that have similar ages and practically identical identifiable characteristics as a result of their autism to have widely differing judgements and opinions at the U.S. Court of Appeals and District Court levels. What is necessary is a unified interpretation of the IDEA as it relates to persons with autism. In other words, a student with autism should have a right to an intensive ABA methodology for up to three years followed by a transitional ABA program (e.g. for 2 hours a day) for up to 2 years, as a matter of law and right because intensive ABA methodology is the only such methodology that is proven to raise IQ and VABS to levels that can carry out the primary purpose of the IDEA 20 U.S.C. § 1400(d)(1)(A) by increasing those measures that parallel one’s ability to achieve “*further education, employment, and independent living*” 20 U.S.C. § 1400(d)(1)(A). Those measures

are only IQ and VABS. In other words, district and appellate courts misinterpreting these fundamental elements of the special education law is a clear sign that the law is effectively “void for vagueness” when applied to students with autism.

### **FACTUAL BACKGROUND**

A.S. was diagnosed with autism at 3½ years old. Exposure to other children with autism or other children with similar disorders causes A.S. to have a more noticeable impairment. (see L.B. and J.B. on behalf of K.B. v. Nebo Sch. Dist., 379 F.3d 966 (10th Cir. 2004)). A.S. has responded very well to ABA when applied comprehensively and intensively. ABA has helped A.S. improve academics, social skills, language and increases A.S. participation in virtually all settings of society.

### **Attendance at the ABA Preschool**

At the age 3 years and 10 months A.S. was enrolled in an ABA preschool in a highly restrictive LRE without first having a trial period in the LRE that was less restrictive. A.S. previously was enrolled in a full-time daycare for typically developing children prior to the move to the ABA preschool. 5.5 months later A.S. was moved fulltime to an integrated placement where he saw a large improvement in his language, disposition and was overall much happier and more participative. These behaviors were key ingredients for learning, communication and participation in society.

### **The Kindergarten Placement in Eclectic Special Education**

The next fall A.S. was placed in a Kindergarten Program that was based on a methodology known as eclectic intervention or a collection of practices and methodologies that may be taken from a variety of different sources because the permissively vague language of the IDEA permitted it as the guidance was limited to “to the extent practicable be based on peer reviewed research” <sup>6</sup> 20 U.S.C. § 141(d)(1)(A)(i)(IV). Essentially, the fall 2015 Kindergarten Program was an eclectic special education program that had no evidence to be effective for student with autism and was more restrictive than the LRE of A.S. most prior preschool placement. They caused A.S. to have a significant regression and a due process complaint resulted in a settlement with A.S. placement back at the ABA preschool by that December.

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<sup>6</sup> Researchers can publish “peer reviewed” interventions that are not evidence-based that may appear to be effective where upon close inspection such interventions actually do not build independence and make the intervention recipient with autism highly dependent on cues and prompts from the staff providing the intervention where no data on independence is provided or independence data demonstrated. These programs are often easy to implement and selected by special education programs and are of little to no value to the student with autism. Evidence-based research on the other hand requires that the more significant measures of efficacy are used to demonstrate a significant outcome on a universal measure where in autism research for primary programs those measure are related to IQ and VABS and the intervention recipient’s specific ability to independently demonstrate the skill of interest without a nearby adult assisting.

**Return to the ABA Preschool**

A.S. parents received formal ABA training for 8 sessions over 8 weeks from the preschool. For the following school year The Shenendehowa Central School District (Shen) wanted to place A.S. back in the same program that caused him to substantially regress and thus a second due process complaint was filed by parents disputing the placement for the following school year. This due process disputed the LRE, goals and the eclectic programming arguing that A.S. required intensive ABA in his LRE. The disputed goals were at A.S.'s present levels which parents viewed as a way for Shen to guarantee the achievement of goals on the IEP to prove the efficacy of their restrictive program while shunning program evaluation based on "technically sound instruments" (20 U.S.C. § 1414(b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) measuring IQ and VABS. Thus, the permissively language of IDEA has enabled schools to provide special education programming that does not have to demonstrate that it is helping students with autism achieve "further education, employment and independent living" 20 U.S.C. § 1400(d)(1)(A) since the very "technically sound instruments" measuring IQ and VABS triennially are not part of the program evaluation. With no clear guidance from the IHO on pendency A.S. parents provided A.S. a fulltime home-based intensive ABA program supplemented with 2-3 days a week in an afterschool program for 2-3 hours each day at a daycare for typically developing peers to provide social and language generalization opportunities for A.S. A.S. made significant gains and in 5 months by January A.S. had achieved all the goals parents requested on

the IEP that was part of the due process complaint. By late February A.S. was enrolled in kindergarten at a private school for typically developing children. A.S. made very good progress at the private school where an evaluation by a Shen psychologist 4 months later resulted in a placement in a co-taught<sup>7</sup> 1<sup>st</sup> grade classroom at his current elementary school where he made good progress and kept up with the curriculum. By second grade in the co-taught placement A.S. made progress but one or both of the teachers relied on excessive prompting that caused A.S. to become prompt dependent. Several notes were sent home that A.S. was prompted over and over again for some assignments. During this 2<sup>nd</sup> grade placement the newly appointed Committee for Elementary Special Education (CSE) Chairperson had begun pushing for a placement in a more restrictive placement that resulted in a due process complaint that was subsequently settled. A.S. continued with his co-taught placement for the third grade and presently in the fourth grade.

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<sup>7</sup> A co-taught classroom is co-taught by a general education teacher, a special education teacher will support two separate co-taught classrooms at 50% effort per class and an aide will support two separate co-taught classrooms at 50% effort per class. Thus, a co-taught class at any given time will have the general education teacher and generally either a special education or aide to provide additional support. A co-taught class has a typical make-up of about 5 students that qualify for special education programming and about 15 – 18 students with no special education needs. The 5 students that qualify for special education programming will typically include no more than one student with autism.

**Summer Programming 2018, 2019 and 2020**

A.S. has attended full time camp for typically developing students for the past three summers attending for 8 weeks averaging 4.5 days a week for 5.5 hours a day for the last two years.

**PROCEEDINGS BELOW****Due Process Complaint**

A.S. parents filed a due process complaint in August 5, 2016 seeking intensive ABA methodology in A.S. correct LRE disputing substandard goals, an inappropriate LRE and eclectic special education programming. Following 5 days of hearings the decision by the IHO George Khandhalikis that December was in total support of the district dismissing the parent's position in its entirety. Additionally, none of the exhibits relating to intensive ABA methodology were admitted into evidence. Parents felt the IHO was unfairly biased.

**Appeal to the State Review Officer (SRO)**

In an appeal to the SRO Justyne Bates parents experienced a similar bias in the SRO decision on April 3, 2017. The SRO not only inappropriately found the goals set at the conclusion of the 2016-2017 school year—that A.S. had already achieved by the conclusion of the 2015-2016 school year as appropriate—but also found the goals appropriate based on present levels. Additionally, the SRO found that according to legal precedent A.S. was not entitled to methodology (See NYSED SRO Decision 17-008 pp. 36) excepting when it was shown that absent evidence to the contrary a program that does not recommend

the use of that methodology will not be reasonably calculated to enable the student to receive educational benefits. A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541-45 (2d Cir. 2017). The SRO ignored parent testimony the accepted teacher testimony. Further, the SRO further biased this case by siding with the IHO to block the use of exhibits related to IBI and ABA methodology so that it would be more difficult to demonstrate the benefit of such a methodology. There is universal data that shows unambiguously that a program that does not recommend the use of IBI or intensive ABA to a student with autism cannot be reasonably calculated to enable the student to receive educational benefits and thus would be unlikely to result in "further education, employment or independent living". Interestingly while the SRO finds that the school district did not offer A.S. a FAPE in the LRE for the 2016-2017 both on procedural and substantive levels but does not issue any order to correct these inadequacies making these findings the equivalence of a dismissal of the case.

#### **Appeal to the U.S. District Court N.D.N.Y.**

The appeal to the District Court was filed on May 9, 2017. The District Court's decision was reached with unwarranted deference to the SRO and IHO and effectively using SRO reasoning to render a decision on February 20, 2019. (Case 1:17-CV-501 LEK/CFH Dkt. No. 95 Appendix at 168). The District Court effectively restated the SRO decision and used the SRO opinion and citing the transcript only where the SRO did to find further legal precedent to support the SRO biased decision. This deference to the SRO may

have impacted the impartiality of new issues raised in this case because deference to the SRO gave the appearance to the Judge that the special education law was sufficiently sound to ensure justice in the due process of the law for persons with autism.

**Reopening the Time to File and Appeal under  
FRAP Rule 4(a)(6) and Adding 3 days for  
service by mail FRAP Rule 26(c)**

Because E.S. *pro se* was not properly notified of the court's dismissal of the case the U.S. District Court re-opened the time to file an appeal. The decision was postmarked on 3/16/2020 and mailed to E.S. *pro se* (See Appendix at 12). FRAP rule 26(c) that adds 3 days for service by mail to file an appeal for which the motion has been granted to reopen the time to file an appeal under rule 4(a)(6) of FRAP allows 14 days from the date of the decision. It was construed by petitioners that the due date for the appeal was due 14 days after 3/19/2020 or 4/2/2020

**Sue Sponte Dismissal by the U.S. Court of  
Appeals for the 2<sup>nd</sup> Circuit**

Petitioners filed the appeal online and mailed the appeal with payment to the U.S. District Court on 4/2/20 as parents drove there at about 3:00pm on 4/2/20 learning for the first time that the court closed early at 2:00pm daily due to the COVID-19 pandemic. On May 8, 2020 the U.S. Court of Appeals for the 2<sup>nd</sup> Circuit *sue sponte* dismissed the case.

**REASONS TO GRANT CERTIORARI  
THE COURTS SPAN A BROAD SPECTRUM ON**

**WHETHER AND THE DEGREE TO WHICH  
APPLIED BEHAVIOR ANALYSIS  
CONSTITUES THE ONLY EDUCATIONAL  
PROGRAM THAT IS REASONABLY  
CALCULATED TO CONFER EDUCATIONAL  
BENEFIT FOR PERSONS WITH AUTISM.**

Intensive behavioral intervention (IBI) or intensive ABA is the only methodology "reasonably calculated" to increase "technically sound" (20 U.S.C. § 1414 (b)(2)(c); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) measures of IQ and also adaptive behavior so that "further education, employment and independent living" is a reasonably calculated outcome for atleast 50% of persons with autism. Students with autism should have a right to intensive ABA or IBI methodology for 3 years and up to 2 - 3 additional years of part time ABA based support in the student's LRE.

"After a very intensive behavioral intervention, an experimental group of 19 preschool-age children with autism achieved less restrictive school placements and Higher IQs than did a control group of 19 similar children by age 7 (Lovaas, 1987). The present study followed-up this finding by assessing subjects at a mean age of 11.5 years. Results showed that the experimental group preserved its gains over the control group. The 9 experimental subjects who had achieved the best outcomes at age 7 received particularly extensive evaluation indicating that 8 of them were indistinguishable from average children on tests of intelligence and adaptive behavior. Thus, behavioral

treatment may produce long-lasting and significant gains for many young children with autism.”

((see App. at 322) quoting McEachin, J.J., Smith, T., Lovaas, O.I., 1993, *AJMR*. 97:359-372; for the extensive evaluation mentioned in this report see App. at 329.

**Where there is Consensus on an Educational Methodology Among the Courts for school aged persons with autism that Consensus only relates to intensive ABA as the Only Proven Methodology.**

There is a near unanimous consensus among the courts that intensive ABA is the only proven methodology to be “reasonably calculated” to confer educational benefits for students that have autism. Although, courts continue to allow educators to use flexible methodologies that are not proven to result in improvements based on “technically sound instruments” (20 U.S.C. § 1414 (b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) measuring of IQ and VABS that can result in “further education, employment and independent living” 20 U.S.C. § 1400(d)(1)(A)

Intensive ABA or IBI was developed originally by Professor Ivar Lovaas who in his seminal publication stated the following challenge regarding persons with autism “One may assume that normal children learn from their everyday environment Autistic children, conversely, do not learn from similar environments” (Lovaas, O. I., 1987, *Journal of Consulting and Clinical Psychology*, 55:3-9) The need for an intensive

ABA methodology stems from the fact that learning is occurring for typically developing children during all waking hours in all that they do and that learning is necessary for proper development. Such learning fails to occur for many persons with autism at a young age before a specific set of age-level skills and abilities are learned. It has been observed that if learning is not occurring during all waking hours the opportunity to regress is present and that regression during non-intervention hours can contribute to substantial diminishment of gains made during intervention in a low intensity ABA program of 15 - 20 hours per week. In other words low intensity ABA programs cannot be "reasonably calculated" to confer educational benefit in part because as intervention intensity reduces the time for regression increases. This is an empirical scientific fact: (Experimental Group: Average IQ Gain: 30, 19 participants; Control group with 10 hours of weekly ABA intervention IQ gain: 6, 19 participants. (Lovaas, O. I., 1987, *Journal of Consulting and Clinical Psychology*, 55:3-9; McEachin, J.J., Smith, T., Lovaas, O.I., 1993, *AJMR*, 97:359-372) LOVAAS PROGRAM REPLICATION: Average Intensive ABA IQ Gain: 25, VABS Gain: 11, 21 participants; Average control group based on local school special education program IQ gain: 13, VABS Gain: -3, 19 participants; 3-year study (Cohen, H., Amerine-Dickens, M., & Smith, T., 2006, *Developmental and Behavioral Pediatrics*, 27:S145-S155.) LOVAAS PROGRAM REPLICATION: Average Experimental Group IQ gain: 29, VABS Gain: 4, 21 participants; Average Intensive Eclectic Intervention Group IQ Gain: 10, VABS Gain: -12, 14 participants; Average Generic Special Education

Programming IQ Gain: 11, VABS Gain: -4 , 13 participants; 3-year study. (Howard, J. S., Stanislaw, et al., 2014, *Research in Developmental Disabilities*. 35:3326-3344). LOVAAS PROGRAM REPLICATION: Average Experimental Group Parent Managed IQ gain: 28, VABS Gain: 6, 10 participants; Average Experimental Group Instructor Managed IQ gain: 22, VABS Gain: 9.5, 13 participants; 4-year study. (Sallows, G. O., & Graupner, T. D., 2005, *AJMR*, 110:417-438).

**But Courts Grapple with the Degree that Educators Should be Able to Incorporate their own Notions of Pedagogical Effective Methodology. And the Circuits are Scattered on their support for a child's right to ABA Methodology when they have Autism with Confusion Amongst Some Circuits on How ABA is Made to Confer Educational Benefit.**

The U.S. Court of Appeals operates on a broad spectrum regarding whether an IEP lacking in ABA methodology—and the degree to which it may be lacking—can be reasonably calculated to confer benefit to a student with autism. This broad spectrum also speaks to the vagueness of the education law and the appellate courts ability to interpret it. Further, the courts are completely scattered with regards to what constitutes an ABA methodology that meets the substantive requirement in light of the child's circumstance and how it provides guidance for what the substantive requirement should be. Although, the circumstance of the child is irrelevant in 88% of the cases of autism. 88% of persons with autism will see major gains in IQ (if they

are not at typical levels) and adaptive behavior in two to three years of intensive ABA, where 45% will reach the levels of their typically developing peers in that time.

**THE 2<sup>ND</sup> CIRCUIT STANDS ALONE AT THE  
MOST SEVERE END OF THE SPECTRUM IN  
ITS TREATMENT OF APPLIED BEHAVIOR  
ANALYSIS METHODOLOGY.**

The 2<sup>nd</sup> circuit heavily favors—absent any substantive justification—methodological flexibility for educating persons with autism (See NYSED SRO Decision 17-008 at 36) and places a unwieldly burden of proof to demonstrate that intensive ABA is the only means to provide reasonably calculated educational benefits to students with autism. “all reports that addressed student's needs as they related to teaching methodology and classroom size specifically recommended the continued need for ABA therapy and 1:1 support in order for student to progress” A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541-45 [2d Cir. 2017].

**THE 5<sup>TH</sup>, 9<sup>TH</sup> AND 11<sup>TH</sup> CIRCUITS**

Courts are often misguided by the administrative bodies and school districts on how ABA confers educational benefit and what the effects of a washed down version of ABA as measured by “technically sound instruments” (20 U.S.C. § 1414 (b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) that measure of IQ and VABS. The 5<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> circuits often favor ABA to be incorporated into the IEP but not in the form where it is proven to confer educational benefit.

"But here, the IEP team discussed ABA at length and recognized that it was integral to J.B.'s education. And ABA is widely recognized as a superior method for teaching children with autism" ... "When a particular methodology plays a critical role in the student's educational plan, it must be specified in the IEP rather than left up to individual teachers' discretion."

R.E.B. v. State of Hawaii Department of Education 870 F.3d 1025 [9d Cir. 2017]. But some judges hold that educators should have the methodological flexibility without out even citing specific proof on how such a methodology can be effective. Rather those Judges resort to laws and legal opinions that do not give any deference to the substantial aspect of the education:

"DOE was not required to specify ABA methodology in J.B.'s IEP. While we recognized in J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 952 (9th Cir. 2010), that "school districts should specify a teaching methodology for some students" in their IEPs, we did not provide much guidance beyond stating that doing so is necessary for some students. The facts of J.L., however, suggest that DOE was not required to specify ABA methodology in J.B.'s IEP. In J.L., "[t]he District ... declined to name a particular teaching methodology to be utilized by all teachers because its experts recommended

several effective programs, not just a single 'right' choice." Id. at 945. After the district court held that the school district committed a procedural violation of the IDEA in so doing, we reversed. Id. at 952, 954."

"We accord deference to the District's determination and the ALJ's finding that [the student's] teachers needed flexibility in teaching methodologies because there was not a single methodology that would always be effective. We hold that the District did not commit a procedural violation of the Individuals with Disabilities Education Act by not specifying teaching methodologies in [the student's] individualized educational programs[.]"

R.E.B. v. State of Hawaii Department of Education  
55770 Fed. Appx. 796 [9d Cir. 2019] **Yet the court provides no evidence that such flexibility can confer educational benefit.** This is the repeated theme time and time again that courts cite the need for educators to have methodological flexibility but do not provide support for this contention that it can result in reasonably calculated educational benefit.

The state of Texas provides further guidance for the education of persons with autism with a document known as the autism supplement:

"The Texas Autism Supplement lists 11 strategies that "must be considered" and,

“when needed, addressed in the [Individualized Education Plan].” 19 Tex. Admin. Code §89.1055(e). The Autism Supplement includes a requirement that an ARD Committee consider “teaching strategies based on peer reviewed, research-based practices for students with[autism spectrum disorder] (for example: those associated with discrete-trial training, visual supports, applied behavior analysis, structured learning, augmentative communication, or social skills training).” 19 Tex. Admin. Code § 89.1055(e)(11).The Supplement supports the District’s position that Applied Behavioral Analysis is one example of peer-reviewed practices, rebut not the only option.”

Renee J. v. Houston Independent School District 333 F.Supp.3d 674 (S.D.TX.)

An inspection of these programs reveal that they are effectively eclectic ineffective interventions because they do not require ABA nor do they specify how much ABA will be used. There is no evidence in the literature that such programs can increase “technically sound” (20 U.S.C. § 1414 (b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) measures of IQ and adaptive behavior. Although, Texas does recognize the importance of ABA but has unfortunately miscalculated what is required in order for ABA to be effective. As intensive ABA is not prescribed as a right to some students and the Autism Supplement is effectively “void for vagueness” as teachers decide to what intensity ABA will be used as well and to what degree other methodologies will be used. Further,

there is no element that has to do with fidelity of the intervention or the requirement that professionals trained in ABA be hired to help measure and ensure fidelity is sufficiently high. One can thus conclude it ultimately is based on the discretion of the teacher rather than modeling a specific proven program. Unfortunately, the 5<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> circuits do not provide evidence that they favor programs based on intensive ABA that can confer reasonably calculated educational benefit. This petition established heretofore that these programs do not result in even *de minimus* gains for the participants.

**THE 3<sup>RD</sup>, 4<sup>TH</sup>, 6<sup>TH</sup> AND 7<sup>TH</sup> CIRCUITS ARE THE MOST EMBRACING OF THE INTENSIVE ABA METHODOLOGY.**

Generally, the 3<sup>rd</sup> circuit does not see many cases because there appears to be a reasonable level of cooperation between school districts and parents to provide intensive ABA services. This is clearly evident in some of the District Court cases e.g. see Madison Board of Education v. S. V. 2020 WL 5055149 (U.S. NJ 2020). The 3<sup>rd</sup> Circuit while favoring the use of ABA however, failed to favor a child having an ABA placement that includes both a heavy dose of discrete trial training and access to the child's LRE: A general education environment with typically developing peers that would have afforded the child ample opportunity to generalize skills. L.G. ex rel. E.G. v. Fair Lawn Bd. of Educ. 486 Fed. Appx. 967 (3<sup>rd</sup> Cir. 2012).

District Courts in the 7<sup>th</sup> Circuit also favor intensive ABA and the 7<sup>th</sup> Circuit has not really seen any cases

appropriate to present. For many of the cases that reach the District Court level schools often offer provide intensive ABA home-based services to the student which is highly appropriate. Some of the challenges have to do with transitions, when the school wants the student to move over to a school-based program that may have elements of ABA but is more similar to special education as usual. There is both the question of whether the transition is too significant of a change or if the transition is too early by a year or more. Z.F. v. South Harrison Community School Corp. 2005 WL 2373729 (S.D. IA. 2005) Also see, T.H. v. Board of Educ. of Palatine Community Consol. School Dist. 55 F.Supp.2d 830 (N.D. IL 1999)

“The 38-hour ABA/DTT program was reasonably calculated to enable T. to receive educational benefits. We find the district's arguments as to the “non-variability” and lack of “individualization” of the parents' program to be preposterous in light of the evidence.”

It is important to also highlight that there is a broad range of circumstances and degree of debilitation of persons with autism at the start of the ABA therapy. However, research has shown that the starting point is not a clear indicator of how receptive a child will be to the ABA intervention. The 4<sup>th</sup> circuit often embraces intensive ABA methodology. For example, in Sumter County School Dist. 17 v. Heffernan ex rel. TH 642 F.3d 478 (4<sup>th</sup> Cir. 2011) the 4<sup>th</sup> Circuit Court sided with the SRO that the home-based program was reasonably calculated to confer the student educational benefit.

“The SRO concluded that the home placement was appropriate, given that it provided proper ABA therapy to T.H.; that T.H. had made educational progress in the home placement; and that the parents and the therapist made sure T.H. had regular opportunities to interact with other children.”

Sumter 642 F.3d 478 (4<sup>th</sup> Cir. 2011); also, see Wittenberg v. Winston-Salem/Forsyth County Board of Education, 2008 WL 11189389 (M.D.N.C. 2008) Although sometimes a program that attempts to appear similar to ABA is approved by district courts over a formalized ABA program. see A.H. v. Smith, 367 F.Supp.3d 387 (S.D. MD. 2019).

The 6<sup>th</sup> Circuit while in the 1990s not favoring ABA in 2004 made a major change in position with regard to ABA in Deal v. Hamilton County Board of Educ., 392 F.3d 840 (6th Cir. 2004) where the Court Stated the following regarding the use of intensive ABA methodology over a more eclectic or special education as usual approach “Indeed, \*862 there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to denial of a FAPE.” The differences is outcome when comparing an intensive ABA methodology to a program that merely offers some ABA can be an average of 30 IQ points as an average across all students in the autism intervention program which highlights the significant potential across most children with autism. “Further, that benefit “must be gauged in relation to a child's

potential.” Kingwood, 205 F.3d at 578 (quoting Ridgewood, 172 F.3d at 247).” Deal 392 F.3d 840 (6th Cir. 2004). The child’s potential in the case of autism is high when given access to the correct methodology at the correct intensity. Further, the overall costs of programs over the school aged period is far less where ABA will help 45% of students have a substantial reduction in service/intervention/counseling need after 2 – 3 years and be free of services within 5 years. Thus, schools have effectively taken programs that could cost the school for 18 years to a program that while greater per year for the first 3 years is less overall and substantially reduced in the 4<sup>th</sup> and 5<sup>th</sup> year. Thus, the denial in FAPE is also an unnecessary and avoidable over expenditure of school funds when considering the costs for the entire public education period.

#### **THE 1<sup>ST</sup>, 8<sup>TH</sup> AND 10<sup>TH</sup> CIRCUITS AS WELL AS THE D.C. CIRCUIT.**

The remaining circuits the 1<sup>st</sup>, 8<sup>th</sup> and 10<sup>th</sup> Circuits as well as the DC Circuit generally do not have a clear direction of support of lack of it for intensive ABA programs. But generally when considering the appeals circuit and District Courts they generally do not support them to any appreciable extent where there are some exceptions. The circumstance of the student may influence the specifics of the ABA methodology including time spent with one-on-one discrete trials vs. time spent socializing and time spent learning a variety of behaviors related to both academic, language and socializing and time spent in the general education setting. Any true intensive ABA program almost exclusively focuses on providing

one-on-one ABA intervention, facilitated social and conversational skills play dates combined with a placement in a general education classroom where there is a graduated increase in the time spent in the general education classroom and no time spent in a setting with other disabled peers. Typically, 45% of participants will be able to have a substantial reduction in services by the end of the 2<sup>nd</sup> or 3<sup>rd</sup> year of genuinely intensive ABA. Where the student will be able to communicate with same aged peers at some level, be able to work and play cooperatively with peers and have some age level or close to age level academic abilities. Although, in order to truly overcome the language hurdle a student almost always requires structured one-on-one play dates with typically developing peers.

Education of persons with autism suffers from a tradition of vagueness in the educational law. This vagueness while well called for due to a lack of a well-established methodology in the 1980s is simply no longer the case today. What is perhaps most concerning is that educators in general are generally not trained in college in a methodology that is proven to raise “technically sound” 20 (U.S.C. § 1414 (b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) measures of IQ and VABS. Educators are undeniably competent in their art but were afraid that all too often that art does not encompass the skills specific to autism. Autism have been unnecessarily suffering for decades due to unproved educational methods because they courts have held that substandard results are acceptable and that schools may create their own methodologies. Teachers have been accorded the

right to subject students with autism to one experimental approach after the next using whatever mixed method approach they wish. Even with greatest of intentions were afraid this is not enough to justify that a person with autism is provided with an unproven experimental program.

No educator is being measured based on the results of the special education students by "technically sound instruments" (20 U.S.C. § 1414 (b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) measuring of IQ and VABS. Rather measurement is more often based on predetermined goals that equate to present levels of performance in the prior school year. Quite often student goals for a subsequent year are not based on present levels but are the present levels of the prior year thus they are all but guaranteed to be achieved. Any methodology other than IBI or intensive ABA will not yield results that allow for proven universal increases in "technically sound" (20 U.S.C. § 1414 (b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) measures of IQ and VABS whose increases serve the purpose of IDEA for "further education, employment and independent living" and will continue to cripple this country financially since the majority of the costs for autism occur in adulthood. Three-year assessments make it more difficult to identify program deficiencies. Annual assessments will give a much better sense on program quality. Even if intensive ABA is required by law the substantive quality of the ABA will vary from program to program.

**THERE ARE ESSENTIAL ELEMENTS TO AN INTENSIVE ABA PROGRAM THAT MUST BE**

**INCLUDED AT A MINIMUM FREQUENCY TO  
ENSURE “FURTHER EDUCATION,  
EMPLOYMENT AND INDEPENDENT LIVING”.**

To ensure independence almost universally children with autism require a reduction in prompt dependence and social skills to be an integral part of the IEP where facilitated play dates occur multiple times each week. The defining feature of autism are related to impairments in social and communications skills including social reciprocity and communication skills, especially back and forth conversational skills and maintaining friendships.

(<https://www.autismspeaks.org/autism-diagnosis-criteria-dsm-5> ; Also see Lee, P. F., Thomas, R. E., et al., 2015, *Canadian Family Physician*, 61:421-424)

As without all of these deficits one does not have autism. “Autism is a developmental disorder; those affected by autism exhibit significant deficiencies in communication skills, social interaction, and motor control.” Amanda J. ex rel. Annette J. v. Clark County School Dist. 267 F.3d 877 (9<sup>th</sup> Cir. 2001). If specifications of an intensive ABA program are not sufficiently clear there is a certain likelihood that LEAs will continue to negotiate on elements of an intensive ABA intervention that are so critical that without them meeting an intensity threshold an intensive ABA program will no longer be “reasonably calculated” to confer educational benefit. Two critical elements of an intensive ABA program that are essential relate to reducing prompt dependence and improving conversational skills.

Independent participation with typically developing peers in the classroom and society universally

requires that the student be able to carry on a conversation with peers and that the participant is able to engage in various day to day activities without support, especially without prompting. When an individual is prompt dependent they may not engage in activities and assignments that fall within their abilities because they require external adult reminders to engage in them. That is the stimuli that typically developing peers rely on to take action are not always stimuli that are normally recognized by a child with autism. Intervention providers that are not properly trained in using prompts and fading those prompts away have a tendency to overly prompt the individual and heavily rely on verbal prompts, as this is a natural human tendency that tends to work with typical persons and persons with some non-autism related disabilities but works against the progress of a person with autism because they almost universally have a tendency to become dependent on verbal prompts rather quickly and even other prompts. The student with autism thus may require an adult to remind them to complete the assignment and also may require the adult to remind them to read the question for some specific problems. A.S. like other persons with autism can become dependent on the adult verbal reminder to complete assignments that fall within his capacity to complete. Additionally, the improvement in conversational ability not only makes persons with autism including A.S. more attuned to the environment but becomes a source of motivation to complete assignments independently. Thus, conversational skills effectively reduce some level of prompt dependence and also

increase independence because they allow the individual to be more attuned to the environment.

Intensive ABA or IBI programs that are proven to raise “technically sound” 20 (U.S.C. § 1414 (b)(2)(C); 8 N.Y.C.R.R. § 200.6(6)(ii)(x)) measures of IQ and VABS have a common element of facilitated one-on-one play dates with similar aged typically developing peers that occurs at a frequency of 3 – 5 times per week across three or more peers at an average duration of about 35 minutes, where duration is dependent on how productive the activity is during that particular session.

“As part of the generalization of skills and behaviors to the natural environment, the peer play component is initiated 3 to 5 sessions per week with a typically developing peer for 15 to 60 minutes per session”...” When the child is 90% accurate initiating with peers across 3 or more peers for 18 to 24 months, additional children are presented at one time to form a group play setting.”

(Cohen, H., Amerine-Dickens, M., & Smith, T<sup>17</sup>., 2006, Developmental and Behavioral Pediatrics, 27:S145–S155); Also see, the approach taken in the seminal report “The second year of treatment emphasized teaching expressive and early abstract language and interactive play with peers.” (Lovaas, O. I., 1987,

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<sup>17</sup> Tristram Smith completed his PhD under Ivar Lovass. The 3 – 5 play dates per week discussed in this report is a direct replication of the Semial Lovaas UCLA program.

Journal of Consulting and Clinical Psychology, 55:3–9). Regularly scheduled play dates is used in every ABA program proven to increase “technically sound” measures of IQ and VABS “Instruction occurred during formal, structured sessions as well as less structured situations, such as supervised play dates with typically developing peers.” (Howard, J. S., Sparkman, C. R, et al., 2005, Research in Developmental Disabilities, 26:359–383.; Also, see the multiyear outcome: Howard, J. S., Stanislaw, et al. (2014), Research in Developmental Disabilities. 35:3326-3344.) There is a correlation between the amount of supervised play dates and the acquisition of social skills “acquisition of social skills was positively related to amount and duration of supervised peer play” (Sallows, G. O., & Graupner, T. D., 2005, *AJMR*, 110:417–438).

If intensive ABA is prescribed by The Supreme Court of the United States for persons with autism there exists a reasonable likelihood that it can be construed to not be required to include one-on-one play dates with typically developing peers at a duration and frequency reasonably calculated to increase “technically sound” measures of IQ and VABS. There is also a reasonably likelihood that once a participant transitions more heavily into the general education class and is participating in the less intensive portion of their ABA program intervention providers could overly subject the student to prompts due to a lack of training. Communicative Deficits and Prompt Dependence are Defining features of autism and progress towards improving them should be measured by “technically sound” instruments based

on VABS or similar. These are essential skills necessary for "further education, employment and independent living."

The appropriately described evidence-based method to promote conversational skills between students with autism and their typically developing peers took place as part of a play date intervention known as contextually supported play date interactions by Koegel and Coworkers, (2005). In this play date arrangement a facilitator provides contextual support to increase the socialization of students with autism and their typically developing peers across several peers. The contextual support enabled the child with autism to engage in unprompted synchronous reciprocal social interactions that "was defined as both children engaging in social communicative behaviors related to the other child's current interest. These social and communicative behaviors consisted of the children showing verbal initiations, verbal responses, nonverbal eye contact, facial expressions, and/or gestures in relation to their engagement in a joint activity." (Koegel, R. L., Werner, et al., 2005, *Research and Practice for Persons with Severe Disabilities*, 30:93-102.) In this report for persons with autism there was an increase in the rate of spontaneous interactions between the two participants (one with autism and the other without) and an increase in the quality of those interactions.

The appropriate duration, intensity and time window for such a program to be "reasonably calculated" to be effective is a total of 4 play dates per week, across 3 or more typically developing peers for about 35 minutes per play date for 2 school years where in the

last half of the second school year there would ideally be an increasing number of peers participating in a play dates as appropriate for the student with autism. 2 and ½ hours per week of properly facilitated play dates for 2 consecutive years—at the earliest age<sup>19</sup>—to make a lifetime of difference. In 40-week school year that is 200 hours total over 2 school years that will translate into a lifetime of employment and over \$2 million in savings in government programs for 50% of participants. That is being the other requirements of the ABA program are met.

**THERE IS AN ARMY OF PROFESSIONALS  
THAT ARE SPECIFICALLY TRAINED TO  
PROVIDE ABA INTERVENTION AND THEIR  
NUMBERS ARE SUFFICIENTLY LARGE SUCH  
THAT VIRTUALLY NO PERSON WITH  
AUTISM WOULD BE LEFT BEHIND IN  
PUBLIC SHCOOLS.**

With each passing decade IBI or intensive ABA has laid a greater foundation both in its literature precedent and the number of BCBA professionals practicing ABA such that a single methodology could apply broadly with sufficient manpower to adequately serve early every child with autism and give them a far better shot at “further education, employment and independent living.”

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<sup>19</sup> “when the child has mastered prerequisite skills: verbal response to questions, on topic statements, simple play skills, and turn taking” (Cohen, H., Amerine-Dickens, M., & Smith, T., 2006, *Developmental and Behavioral Pediatrics*, 27:S145-S155)

There are more than 30,000 BCBA's in this country. Thus, there is an infrastructure of human experts to implement and provide support for ABA methodological programs. One BCBA can oversee the implementation of intervention of 6 – 10 full time therapists covering the intervention for 6 - 30 persons with autism, depending on need, and at an incidence of autism at 1 in 54<sup>20</sup> births based on 2020 CDC data <https://www.cdc.gov/ncbddd/autism/data.html> suggesting that there are about 700,000 children with autism in the United States between the ages of 3 and 12. This group thus requires about 25,000 – 35,000 BCBA's based on the assumption that 45% of them will only require 3 - 4 years of ABA and 12% will be deemed to not benefit after 2 years. While these ratios may appear unequitable on the surface they will result in a net savings for school districts over the entire public education period for students with autism. Further, the nation spends \$250 - \$300 Billion a year on autism services with the bulk of that amount spent in adulthood. Early intervention is the key to recovering individuals and eliminating the bulk of autism related costs for the remaining 70 – 80 years of the individual's lifetime. Effective special education laws that make ABA a matter of right for persons with autism will save schools substantial

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<sup>20</sup> <https://www.autism-society.org/releases/cdc-releases-new-prevalence-rates-of-people-with-autism-spectrum-disorder/>

While the CDC data shows the prevalence of autism increasing with each surveillance year this is due to a combination of improved diagnostics, better recognition and a change in the method to identify persons with autism all of which results in an increased rate of identification. Additionally, there may be a real increase in prevalence.

funds and save this nation \$100 Billion annually in the long term.

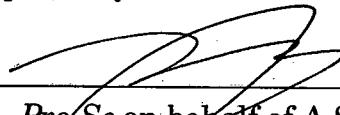
**THE FEDERAL RULES OF APPELLATE  
PROCEDURE (FRAP) LEAD *PRO SE*  
PARENTS OF A.S. OR OTHER *PRO SE*  
REPRESENTATIVE TO BELIEVE THAT  
REOPENING THE TIME TO FILE AN APPEAL  
FRAP RULE 4(a)(6) IS EXTENDED BY THREE  
DAYS PER FRAP RULE 26(c) IF THAT  
ORDERED GRANTING THE MOTION IS SENT  
VIA USPS MAIL**

Taken together FRAP Rule 26(c) and Rule 4(a)(6) (Appendix at 321) lead a pro se representative to believe that reopening the time to file an appeal is extended by 3 days when the order granting reopening the time to file an appeal is sent via USPS mail which it was to E.S. It may be conceivable that an attorney learns in law school that FRAP Rule 26(c) cannot be applied to FRAP Rule 4(a)(6). However, it was impossible for non-attorney pro se parents E.S. and R.S. to know this. Further, there is nothing in FRAP that supports that reopening the time to file an appeal is not extended by 3 days when that order granting the motion is sent via USPS mail. There are no supplementary rules referenced in FRAP that would lead *pro se* parents to believe that FRAP Rule 26(c) does not apply to FRAP Rule 4(a)(6). Petitioners mailed the appeal to the U.S. District Court on 4/2/20 with the enclosed payment as parents drove there at about 3:00pm on 4/2/20 learning for the first time that the court closed early at 2:00pm daily due to the COVID-19 pandemic.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted on November 2, 2020

 11/2/20  
R.S. Pro Se on behalf of A.S.

 11/2/20  
E.S. Pro Se on behalf of A.S.