

MEDICALIZATION OF EDUCATION: APPLIED BEHAVIORAL ANALYSIS IN COLORADO SCHOOLS

Zachary Quaratella*

Since the passage of the Individuals with Disabilities Education Act (IDEA), parents, schools, districts, states, and courts have carved complex adjudicatory systems which lay out the responsibilities of the various stakeholders in a disabled student's education. These systems often result in students receiving an education at odds with the family's, especially in situations where the student has a disability that is hard to manage in a typical school environment. One of the most difficult disabilities to treat in schools is autism spectrum disorder (ASD) because it has vague diagnostic criteria and a wide variety of treatment plans. Applied behavioral analysis (ABA), a popular type of treatment for ASD, uses rudimentary reward and punishment systems to help people with ASD learn verbal and social communication skills. For some students, ABA is highly effective. For others, it is unethical and dehumanizing. Many school districts around the country choose to implement ABA with varying levels of fidelity, while others utilize other educational methods. In those situations where school districts will not provide ABA, some parents have pursued legal action. However, courts interpreting the IDEA have found that parents cannot select the exact way their child is educated and must defer to the expertise of district decisionmakers. In Colorado, the General Assembly recently enacted a statute compelling Colorado districts to allow ABA providers access to schools, whether these providers are providing IDEA services, are funded by parents, or are funded by Colorado's

*Zack Quaratella is a J.D. Candidate at the University of Colorado Law School, Class of 2025. He received his B.A. from the College of William and Mary with high honors for his thesis titled *The Ornament of Human Society*. After earning his M.Ed from William and Mary, he taught social studies for seven years. The author would like to thank Kathleen Murray, Esq. for her notes on this Article, the editors of the *Colorado Law Review* for their efforts to improve the quality of this Article, and Chloe Quaratella for her support during the writing process.

Medicaid program. Schools responded with policies limiting ABA providers' actual access. Therefore, many students in the state cannot benefit from needed ABA services. This Note aims to untangle this web of stakeholders so that students who need ABA can get access and schools can still comply with the IDEA.

INTRODUCTION	332
I. AUTISM SPECTRUM DISORDER DIAGNOSIS AND TREATMENT	335
II. FEDERAL EDUCATION DISABILITY STATUTES	340
III. CLARIFYING FAPE BEFORE AND SINCE <i>ENDREW F.</i>	345
IV. FAPE IN THE CONTEXT OF APPLIED BEHAVIORAL ANALYSIS ACCESS.....	349
V. COLORADO GENERAL ASSEMBLY GIVES ABA PROVIDERS ACCESS TO SCHOOLS	354
VI. COLORADO SCHOOL DISTRICTS' HB 22-1260 POLICIES ..	357
VII. A PROPOSED SOLUTION TO THE ABA PROBLEM	359
A. Amended HB 22-1260 Language.....	360
B. Clarifying the Endrew F. Standard	361
C. Amending the IDEA and Promulgating New Regulations.....	363
D. Reimburse ABA Providers Fairly Under Medicaid	365
CONCLUSION	366

INTRODUCTION

The United States has long grappled with the difficulty of diagnosing, treating, protecting, and educating children with autism spectrum disorder (ASD).¹ Like many mental disorders, medicine's understanding of ASD has shifted dramatically over the last fifty years, leaving policymakers and courts scrambling to keep up with medical and societal advances.² One such recent change has been the popularization and professionalization of Applied Behavioral Analysis (ABA) to treat ASD.³ Though seen

1. See *infra* Part I.

2. See *infra* Part II.

3. *BACB Certificant Data*, BEHAV. ANALYST CERTIFICATION BD., (Jul. 1, 2024) <https://www.bacb.com/bacb-certificant-data> [<https://perma.cc/A4UY-GWTH>].

by some as stripping people with ASD of their neurodivergence,⁴ ABA has quickly drawn the attention of parents, courts, and policymakers as a method for allowing students with ASD to better access public education.

In November 2022, the Colorado General Assembly voted to allow Applied Behavioral Analysis providers and other outside healthcare providers to physically access schools in the state for the purposes of providing necessary medical treatment to students.⁵ Though written broadly, this legislation aimed to ensure that ABA providers would have access to students with ASD while at school.⁶ Prior to this legislation, Colorado school districts enforced an incomplete patchwork of policies and practices which generally made it difficult for ABA providers to provide therapy in school buildings.⁷ School districts had argued that allowing outside providers, like ABA providers, would inhibit the school district's ability to deliver a free and appropriate education to those students with disabilities.⁸ If ABA providers give instruction and direction to students during the school day, school districts argue they might not be able to comply with the student's Individualized Education Program (IEP).⁹ Schools are concerned about allowing adults whom they do not employ into the school building to directly interact with students, as these adults may pose a risk to students or staff.¹⁰ By contrast, recent research resulted in the classification of ABA as a medical treatment. This classification launched ABA into a space of uncertainty—educators, parents, doctors, and courts have come to different conclusions of whether this treatment is

4. Elizabeth Davita-Raeburn, *The Controversy Around Autism's Most Common Therapy*, SPECTRUM NEWS (Aug. 10, 2016), <https://www.spectrumnews.org/features/deep-dive/controversy-autisms-common-therapy> [<https://perma.cc/TXA8-KFSQ>].

5. COLO. REV. STAT. § 20-20-121 (2022).

6. *Id.*

7. *Access to Medically Necessary Serv for Students: Hearing on H.B. 22-1260 Before the H. Comm. on Education*, 73rd Gen. Assemb., 2d Reg. Sess. (Colo. 2022) (statements of several parents who attested to lack of access for outside providers in the state).

8. *Id.* (statements of several parents who attested to difficulty of receiving ABA).

9. *Id.* (statements of several special education directors from various counties in Colorado opposing passage of HB 22-1260).

10. NAT'L LAW ENF'T AND CORR. TECH. CTR., SCHOOL SAFETY ASSESSMENT, 10-12 (checklist promoting use of stringent visitor access control to ensure school is aware of all persons in the building).

part of the pedagogical mission of a school or of students' healthcare.¹¹ Simultaneously, various courts around the country have grappled with the question of whether to compel schools to allow ABA providers into their buildings, resulting in an inconsistent application of the law for students.¹²

Despite the legal, pedagogical, and medical debate across the country, the Colorado General Assembly mandated that by July 1, 2023, schools must have developed and disseminated a policy surrounding the access of outside medical providers into their schools.¹³ The policy must ultimately allow ABA providers into schools, despite their controversial methodologies.¹⁴ The Centers for Disease Control and Prevention estimates that one in thirty-six children have been identified with ASD, which means that Colorado schools may soon face a deluge of outside providers in their buildings.¹⁵

This Note will assess how legislators, courts, policymakers, and schools should approach this new challenge. Part I provides a brief description of ASD treatment and diagnosis to establish the methodologies preferred by professionals who treat ASD. Part II traces how federal disability and education statutes protect students with ASD and other disabilities. Parts III, IV, and V outline the current case law which controls the ways in which schools nationally approach these statutory and regulatory schemes. Part VI introduces Colorado's response to these interpretations: The legislature determined that ABA is a medical treatment that schools must allow students to access. Finally, Part VII proposes solutions to the issue of whether students should be able to access their ABA provider while at school.

11. ABA CODING COAL., MODEL COVERAGE POLICY FOR ADAPTIVE BEHAV. SCIENCES 6 (2nd ed. 2022) (showing that insurers are covering ABA as a medical treatment).

12. *See generally* Z. W. v. Horry Cty. Sch. Dist., 68 F.4th 915 (4th Cir. 2023) (discussing whether ABA is a medical treatment or a pedagogy).

13. C.R.S. § 20-20-121.

14. *Id.*

15. *Data and Statistics on Autism Spectrum Disorder*, U.S. CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/autism/data-research/?CDC_AAref_Val=https://www.cdc.gov/ncbddd/autism/data.html [https://perma.cc/2RTN-9HJG].

I. AUTISM SPECTRUM DISORDER DIAGNOSIS AND TREATMENT

The first description of Autism Spectrum Disorder (ASD) came in 1943. A special publication of *The Nervous Child* described a disorder that affects one's ability to make social contact.¹⁶ Doctors characterized ASD as a form of childhood schizophrenia for decades until the *Diagnostic and Statistical Manual of Mental Disorders (DSM) III* classified it as a "pervasive developmental disorder."¹⁷ Later versions of the DSM broadened the criteria for diagnosing ASD and attempted to add subtypes like Asperger's Syndrome and Rett's syndrome.¹⁸ These additions reflected doctors' developing understanding of the diverse symptomatology expressed by ASD patients.¹⁹ The current version, the DSM-V, recognizes ASD as a spectrum of behavior and symptoms which can merge "at the lower end of the scale of ability, with profound mental retardation. At the upper end of this scale, they merge into mildly eccentric variations of typical development."²⁰

As ASD is a spectrum, the DSM-V offers clinicians the flexibility to code ASD with a specifier, such as "with or without accompanying language impairment" or "with catatonia," which allows a broader population of individuals to receive an ASD diagnosis.²¹ The DSM-V also encourages practitioners to consider the severity with which an individual suffers from ASD.²² However, clinicians are warned that "descriptive severity categories should not be used to determine eligibility for and provision of services; these can only be developed at an individual level and through discussion of personal priorities and targets."²³ This warning reflects the notion that ASD patients and their caregivers have diverse views on how to treat

16. James C. Harris, *The Origin and Natural History of Autism Spectrum Disorders*, 19 NATURE NEUROSCIENCE 1390–91 (2016), <https://doi.org/10.1038/nn.4427> [<https://perma.cc/9N4Z-7RHG>].

17. *Id.*

18. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 66 (4th ed. 1994).

19. Lorna Wing, *Reflections on Opening Pandora's Box*, 35 JOURNAL OF AUTISM AND DEVELOPMENT DISORDERS 197 (2005), <https://link.springer.com/article/10.1007/s10803-004-1998-2> [<https://perma.cc/GE4U-ZUAG>].

20. *Id.* at 198.

21. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 51 (5th ed. 2013).

22. *Id.* at 52.

23. *Id.*

their symptoms.²⁴ The Code of Federal Regulations, for its part, defines “autism” as “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. . . . Other [common] characteristics . . . are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.”²⁵

The current diagnostic criteria for ASD reflect an understanding that the disorder presents across a patient’s life in a variety of contexts and in differing severities. In the DSM-V, the American Psychiatric Association eliminated specifiers of autism such as Asperger’s Syndrome, preferring to formulate ASD into a broader disorder which is essentially characterized by “persistent impairment in reciprocal social communication and social interaction.”²⁶ These symptoms must be present in early development, but diagnosis often arises when children move into more complex social environments like daycare and school.²⁷ The DSM-V also notes that ASD can be comorbid with other developmental disorders such as intellectual disabilities. Therefore, doctors will need to assess whether social impairment is not merely a function of the child’s developmental ability, as other developmental disorders may impact social skills.²⁸

24. *Id.* at 51; see e.g., Shannon Des Roches Rosa, *Ten Ways to Honor Autistic People Via Autism Acceptance*, THINKING PERSON’S GUIDE TO AUTISM (Oct. 11, 2023), <https://thinkingautismguide.com/2023/10/ten-ways-to-honor-autistic-people-via-autism-acceptance.html> [<https://perma.cc/UAD2-NYAQ>] (writing that many people with autism simply want acceptance, not to be experimented upon using ABA techniques).

25. 34 C.F.R. § 300.8(c)(1)(i).

26. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 53 (5th ed. 2013).

27. Elpis Papaefstathiou & Christine Syriopoulou-Delli, *A Thorough Presentation of Autism Diagnostic Observation Schedule (ADOS-2)*, in INTERVENTIONS FOR IMPROVING ADAPTIVE BEHAVIORS IN CHILDREN WITH AUTISM SPECTRUM DISORDERS 21 (Christine Syriopoulou-Delli, ed., 2021); DISORDERS 21 (Christine Syriopoulou-Delli, ed., 2021), https://www.researchgate.net/publication/354007156_A_Thorough_Presentation_of_Autism_Diagnostic_Observation_Schedule_ADOS-2 [<https://perma.cc/8YDU-RXQV>] (showing that ADOS-2, the most common diagnostic test for ASD, relies heavily on complex social interaction and language development, which presents commonly for neurotypical children around the age of two.).

28. AM. PSYCHIATRIC ASS’N, *supra* note 21.

Treatment of ASD must weigh the disorder's severity and the goals of the patient and caregivers.²⁹ Like many mental health disorders, ASD causes dysregulation in a broad range of behavioral, emotional, and social contexts. Therefore, in some cases, medications to treat anxiety, depression, hyperactivity, self-injurious behavior, and mood instability can be effective for children with ASD.³⁰ However, because medication often fails to ameliorate core social-emotional concerns for children with ASD, psychiatrists recommend combining medication with therapy.³¹ Among the therapy options commonly studied and found to be effective for children with ASD are ABA,³² cognitive behavioral therapy (CBT),³³ the Picture Exchange Communication System,³⁴ and occupational therapy.³⁵

For individuals with severe forms of ASD, ABA can be an effective treatment program. Depending on the willingness of parents or guardians, the recommendations of healthcare providers, and coverage by medical insurance, ABA could be employed to treat students with ASD for up to forty hours per

29. *Parent's Guide to Applied Behav. Analysis for Autism*, AUTISM SPEAKS (2012), <http://www.nimh.nih.gov/health/publications/a-parents-guide-to-autism-spectrum-disorder/index.shtml> [<https://perma.cc/EB22-4CTX>].

30. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, *AUTISM SPECTRUM DISORDER: PARENTS' MEDICATION GUIDE 4* (2016) https://www.aacap.org/App_Themes/AACAP/Docs/resource_centers/autism/Autism_Spectrum_Disorder_Parents_Medication_Guide.pdf [<https://perma.cc/788U-JNGS>].

31. *Id.* at 6.

32. Qian Yu et al., *Efficacy of Interventions Based on Applied Behavior Analysis for Autism Spectrum Disorder: A Meta-Analysis*, 17 *PSYCHIATRY INVESTIGATION* 432 (2020). This meta-analysis of ABA RCTs suggests that "socialization, communication and expressive language" improved with ABA compared to non-intervention, but it did not find significant improvement in other symptoms associated with ASD. *Id.*

33. F. J. A. van Steensel & S. M. Bögels, *CBT for Anxiety Disorders in Children With and Without Autism Spectrum Disorders*, 83 *J. OF CONSULTING AND CLINICAL PSYCH.* 512, 517 (2015) (showing that CBT significantly improved subjective reporting of anxiety among children with ASD).

34. Anna Lerna et al., *Social-Communicative Effects of the Picture Exchange Communication System (PECS) in Autism Spectrum Disorders*, 47 *INT'L J. OF LANGUAGE AND COMMUN DISORDERS* 609, 615 (2012) (showing a significant improvement in cooperative play after use of PECS therapy).

35. Jane Case-Smith & Marian Arbesman, *Evidence-Based Review of Interventions for Autism Used in or of Relevance to Occupational Therapy*, 62 *AM. J. OF OCCUPATIONAL THERAPY* 416, 420 (2008) ("By establishing social rules, encouraging interaction and sharing, and facilitating problem solving, children made gains in social interaction and social competence.").

week.³⁶ Therapy with ABA is based on a theory of behavioralism which holds that human behavior is largely shaped by responses to stimuli in the environment.³⁷ Therapists conduct “discrete trial learning,” which asks the student to complete a given task repetitively and distributes rewards when the student successfully completes a task.³⁸ Depending on the ability of the student, a task might be as simple as asking the student, “can you please look at me?” and rewarding the student if they do so.³⁹ Discrete trial learning may be modified to include verbal behavior training, which helps students make connections between words and their meanings by reinforcing the connection between words and objects.⁴⁰ Therapists will systematically repeat the name of objects and then teach students how to use the name functionally.⁴¹

To build on discrete trial learning, therapists also practice “natural environment training.”⁴² This therapy places students in everyday environments and “utilizes naturally occurring opportunities in order to help the child learn” to generalize skills developed in discrete trial learning.⁴³ For example, a student may want to exit a room with a closed door. The therapist will not open the door until the student asks, and each time the student faces another door, the therapist will wait for the student to ask before opening the door.

36. Henry S. Roane et al., *Applied Behavior Analysis as Treatment for Autism Spectrum Disorder*, 175 J. PEDIATRICS 27, 28 (2016).

37. Henry L. Roediger, *What Happened to Behavioralism*, ASSOC. FOR PSYCHOLOGICAL SCIENCE (March 1, 2004), <https://www.psychologicalscience.org/observer/what-happened-to-behaviorism/comment-page-1> [https://perma.cc/2WZW-HMNT]. As behavioralism as a school of psychology has fallen out of favor due to lack of empirical evidence that it can be truly applied to humans, modern providers do not typically ascribe to radical behavioralism, but ABA techniques are objectively behaviorist in nature. See generally Susan Schneider & Edward Morris, *A History of the Term Radical Behavioralism: From Watson to Skinner*, 10 BEHAVIOR ANALYST 27 (1987).

38. *Parent's Guide to Applied Behav. Analysis for Autism*, supra note 29.

39. J. BOGIN ET AL., NAT'L PROFESSIONAL DEVELOPMENT CENTER ON AUTISM SPECTRUM DISORDERS, STEPS FOR IMPLEMENTATION: DISCRETE TRIAL TRAINING 2 (2010).

40. *Id.*

41. *Id.*

42. Jolin Jackson & Miguel Ampuero, PaTTAN Autism Initiative ABA Supports Consultants, Teaching for Generalization in the Natural Environment at the National Autism Conference (Aug. 2, 2016) https://storage.outreach.psu.edu/autism/31-Presentation_0.pdf [https://perma.cc/5TX9-6D2H].

43. *Parent's Guide to Applied Behav. Analysis for Autism*, supra note 29.

Another facet of ABA is pivotal response training, which focuses on “pivotal areas”: (1) motivation, (2) self-initiations, (3) self-functioning, and (4) responding to cues.⁴⁴ A randomized controlled trial performed by psychiatrists at Stanford University suggests that these pivotal areas lead to some generalized gains in frequency of utterances among students.⁴⁵ Key areas of difficulty for students with ASD are cognition and language development.⁴⁶ Pivotal response training is designed to build pivotal areas, which hopefully allows children with ASD to develop competence in other areas of their lives.⁴⁷

Finally, ABA usually involves the “natural language paradigm,” which teaches children with ASD to use language in the most appropriate environment rather than relying entirely on discrete trial learning.⁴⁸ While much of ABA can be rote and insulated from real-world settings, this part of ABA therapy challenges students to use language in typical settings, such as asking another student for a toy or ordering a meal at a restaurant.⁴⁹

Based on these principles, ABA can be effective to help students with ASD in school settings to access school. Some schools allow ABA therapists to safely place students with ASD in secluded areas for discrete trials. Then, when the student is ready, ABA therapists can expose them to natural environments which generate generalizable experiences.⁵⁰ In school, a student with ASD may spend months practicing in discrete trials how to ask another student for a toy and then transition to practicing that skill on the playground with other students.

44. U.S. DEPT OF EDUC., INST. OF EDUC. SCIS., WWC INTERVENTION REPORT: PIVOTAL RESPONSE TRAINING (2016), <https://files.eric.ed.gov/fulltext/ed572041.pdf> [<https://perma.cc/Y8DS-YNSD>].

45. Antonio Hardan, *A Randomized Controlled Trial of Pivotal Response Treatment Group for Parents of Children with Autism*, 56 J. OF CHILD PSYCH. AND PSYCHIATRY 884 (2014) (finding that PRT group therapy led to improvement in adaptive communication skills and increases in mean utterance lengths).

46. See *Data and Statistics on Autism Spectrum Disorder*, *supra* note 15.

47. Elizabeth Fuller et al., *The Effects of the Early Start Denver Model for Children with Autism Spectrum Disorder: A Meta-Analysis*, 10 BRAIN SCI. 368 (2020). The Early Start Denver Model relies heavily on PRT.

48. *Id.*

49. Karen Laski et al., *Training Parents to Use the Natural Language Paradigm to Increase their Autistic Children's Speech*, 21 J. OF APPLIED BEHAV. ANALYSIS 391, 396 (1988).

50. See Olive Healy et al., *Three Years of Intensive Applied Behavioral Analysis: A Case Study*, 5 J. OF EARLY & INTENSIVE BEHAV. INTERVENTION 4, 5 (2008).

However, compared to other well-recognized support services provided by schools (speech pathology, occupational therapy, etc.), ABA is not implemented faithfully by schools.⁵¹ Educators are generally not well-trained in ABA therapy,⁵² lack support from administrators,⁵³ or are uncomfortable with the behaviorist approach of the practice.⁵⁴ Therefore, many parents have fought to either (1) have ABA therapy specifically written into their student's Individualized Education Program (IEP) to ensure proper clinical training and support, or (2) try to bring a private ABA-certified provider into the school building.⁵⁵ Despite the proof that ABA therapy is an effective treatment for children with ASD, both paths have faced pushback from schools, as the following Sections will discuss. But first, it is important to understand the rights students with disabilities have in a school environment.

II. FEDERAL EDUCATION DISABILITY STATUTES

Two key federal statutes govern obligations of schools to students with disabilities: The Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973. These statutes work in tandem to ensure (1) physical access to school and (2) a free and appropriate education once students are at school.

Section 504 of the Rehabilitation Act of 1973 mandates, in relevant part, that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁵⁶

51. Chana Max & Nicole Lambright, *Board Certified Behavioral Analysts and Sch. Fidelity of Applied Behav. Analysis Services: Qualitative Findings*, 68 INT. J. OF DEVELOPMENTAL DISABILITIES 913 (2022).

52. *Id.* at 919 (principal interviewed noted that most educators did not think ABA could be done in a school environment).

53. Lisa Hagermoser Sanetti et al., *Increasing In-Service Teacher Implementation of Classroom Mgmt. Practices Through Consultation, Implementation Planning, and Participant Modeling*, 20 J. OF POSITIVE BEHAV. INTERVENTIONS (2017), <https://doi.org/10.1177/1098300717722357> [<https://perma.cc/47AW-4PG4>] (discussing general CMP training importance).

54. Max & Lambright, *supra* note 51, at 922 (finding that many teachers reported their belief that ABA is just bribing students with candy).

55. *Parent's Guide to Applied Behav. Analysis for Autism*, *supra* note 29.

56. 29 U.S.C. § 794.

Though no specific agency was required to write regulations which give effect for Section 504, the Department of Education's Office of Civil Rights (OCR) has done so, promulgating that "any public elementary or secondary education program or activity shall provide a free appropriate public education (FAPE) to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."⁵⁷ As discussed *infra*, OCR's language mimics, but does not mirror, that required by the IDEA, but FAPE requirements in the IDEA and Section 504 are "overlapping but different."⁵⁸ For Section 504, FAPE requires that the school simply place the disabled student in a similar position to nonhandicapped students, which may not require any special education.⁵⁹

Schools are obligated to evaluate disabled students and then to create a "504 Plan," which details the accommodation that the school will make and how it places the disabled student in a similar position to nondisabled students.⁶⁰ Students with 504 Plans may not need additional educational services to receive FAPE, but if they do, these students fall within the purview of the IDEA.⁶¹ For instance, a 504 Plan may be as simple as providing a student with a severe allergy access to an EpiPen, a student with enuresis access to a bathroom and a change of clothing, or providing a student with asthma inhalant therapy.⁶² They may also address more complex situations, like providing a student with cerebral palsy a classroom that is wheelchair accessible. A student with ASD might have a 504 Plan which provides visual aids, a behavior management plan, or a picture exchange communication system.⁶³

The IDEA, for its part, intends to ensure that all students with disabilities, like ASD, receive a free appropriate public

57. 34 C.F.R. § 104.33(a).

58. Mark H. v. Lemahieu, 513 F.3d 922, 925 (9th Cir. 2008).

59. 34 C.F.R. § 104.33(b)(1).

60. Durbrow v. Cobb Cty. Sch. Dist., 887 F.3d 1182, 1186 (11th Cir. 2018).

61. 34 C.F.R. § 104.33(a). Students may have both IEPs and 504 Plans, but if FAPE is in question, the IDEA controls.

62. *Id.* None of these accommodations implicate FAPE, and therefore Section 504 controls.

63. Jennifer Hanson, *504 Plan for Autism*, SPECIAL EDUC. JOURNEY (2023) <https://special-education-journey.com/504-plan-for-autism> [<https://perma.cc/9DS9-922Q>].

education by providing them special education.⁶⁴ In exchange for federal funding, states must adhere to certain requirements which aim to expand the scope of education to students with disabilities.⁶⁵ In the years since its last major amendment in 2004, the IDEA has ensured that over 50 percent of students with disabilities are being educated in their least restrictive environment, increased graduation rates of students with disabilities, and shepherded more students with disabilities to post-secondary educational opportunities.⁶⁶ Prior to the implementation of federal protections for students with disabilities, schools discouraged disabled students from attending schools. Some states explicitly banned students with certain types of disabilities from public schools.⁶⁷ Guided by landmark civil rights cases from the early 1970s, the drafters of the IDEA aimed to ensure that all students have a fundamental right to access education.⁶⁸

One of the provisions which furthers the IDEA's objective is the creation of IEPs for students with disabilities. As the core means by which schools fulfill their IDEA obligations, IEPs are created by a team of stakeholders, including the student, parent(s) or guardian(s), teachers, school administrators, and school psychologists.⁶⁹ The "IEP team" generates an IEP which details,

- (1) the student's current academic and functional performance,
- (2) a statement of goals for the academic year,

64. 20 U.S.C. § 1400(d)(1)(A).

65. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 388 (2017).

66. OFF. OF SPECIAL EDUC. & REHAB. SERVS., HISTORY: TWENTY FIVE YEARS OF PROGRESS EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA (2007), <https://sites.ed.gov/idea/files/idea-history.pdf> [<https://perma.cc/AL2G-ADUG>].

67. *Id.* See also *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) (explaining that a substantive standard marking progress for students with disabilities is implied from the legislative history of the IDEA).

68. See generally *Schaffer v. Weast*, 546 U.S. 49 (2005); *Mills v. Bd. of Educ.*, 348 F.Supp 866 (D.C. 1972); *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp 1257 (E.D. Pa. 1971).

69. 34 C.F.R. § 300.321 (2007). In *Endrew F.*, the Court explains that IEPs are the result of "collaboration among parents and educators and require careful consideration of the child's individual circumstances." 580 U.S. at 388.

- (3) a description of how the student's progress will be measured and reported to parents,
- (4) a description of the special education, services, aids, and modifications of the curriculum that will be provided by the school,
- (5) an explanation of the extent to which the student will not participate in regular class, and
- (6) a list of accommodations necessary for the student to appropriately measure their performance on standardized tests.⁷⁰

IEPs must be updated annually, and they must provide students with a transition plan when they approach the end of their public education.⁷¹ Students must exhaust administrative remedies provided by the IDEA to state a claim in federal court when alleging failure by schools to provide FAPE.⁷²

Another key provision of the IDEA is its least restrictive environment requirement (LRE). Worried that schools were entirely excluding students with disabilities, Congress imposed the requirement that students with disabilities not be hidden away, segregated, or otherwise shipped out of regular education classrooms.⁷³ Section 1412(a)(5)(A) of the IDEA requires:

To the maximum extent appropriate children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in

70. 34 C.F.R. § 300.320.

71. *Id.*

72. *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298 (9th Cir. 1992). Administrative remedies available to students under the IDEA include mediation, a due process hearing with local and state administrators, and an appeal to the state's education agency. *See Perez v. Sturgis Pub. Sch.*, 598 U.S. 142 (2023) (explaining remedies in the syllabus).

73. *See* Donald Stone, *The Least Restrictive Environment for Providing Education, Treatment, and Community Services for Persons with Disabilities: Rethinking the Concept*, 35 *TOURO L. REV.* 523 (2019).

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁷⁴

Parents may challenge districts on this provision in two ways: (1) they may look for an LRE for their student other than what the district is providing, or (2) they may argue that the district was incapable of providing an appropriately restrictive environment and they were forced to enroll their student in private school.⁷⁵

To approach LRE questions, courts will employ the balancing test that the Third Circuit announced in *Oberti v. Board of Education*. In *Oberti*, a student with down syndrome presented with significant behavioral issues “including repeated toileting accidents, temper tantrums, crawling and hiding under furniture, and touching, hitting and spitting on other children.”⁷⁶ There, the court found that districts should first “look to the steps that the school has taken to try to include the child in a regular classroom.”⁷⁷ Second, the district should compare the educational benefits of a regular classroom with the benefits of a segregated special education classroom.⁷⁸ Many students will thrive in the presence of other students in the LRE, while some students with disabilities may find a regular education classroom distracting, distressing, or disturbing.⁷⁹ Finally, courts must consider whether the student’s inclusion in the LRE will negatively impact other students’ ability to learn in that environment.⁸⁰

The Department of Education promulgated regulations offering schools similar guidance. A child with a disability should only be educated outside of the “regular educational environment” if the “nature or severity of the disability is such

74. 20 U.S.C. § 1412(a)(5)(A).

75. *Blount Cty. Bd. of Educ. v. Bowers*, 762 F.3d 1242 (11th Cir. 2014) (holding private tuition appropriate when school failed to provide LRE as mother was not estopped from pursuing rights); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989) (parents attempting to “mainstream” student by claiming environment too restrictive).

76. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993).

77. *Id.*

78. *Id.* See also *Daniel R.R.*, 874 F.2d 1036.

79. See *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991) (role modeling and language development associated with inclusion in LRE are benefits of mainstreaming).

80. *Daniel R.R.*, 874 F.2d at 1047.

that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁸¹ Where a school determines these factors show a student cannot be placed in a regular education environment, the district must offer a continuum of alternative placements including special classes, special schools, home instruction, instruction in hospitals and institutions, and a suite of supplementary services like resource rooms, provided “in conjunction with regular class placements.”⁸² These determinations must be reviewed at least annually,⁸³ and must be reasonably calculated to provide a FAPE, as discussed in the next Part.

III. CLARIFYING FAPE BEFORE AND SINCE *ENDREW F.*

Hoping to clarify the requirements of a FAPE program, the Supreme Court has concluded schools must create a measurement of the progress the school anticipates a student will make over the course of a school year.⁸⁴ For some students, it may be very difficult to measure progress—severely disabled individuals may not be able to communicate with teachers. However, for most students, progress is easily measured through performance assessments.⁸⁵ Schools must balance the cost of providing services to disabled students against the IDEA’s legal standard. Courts afford schools significant deference in how the schools balance their costs and legal obligations.⁸⁶ Therefore, when parents allege that an IEP has not been fulfilled, they face procedural and substantive barriers to any remedy.

In a recent Supreme Court decision, *Endrew F.*, the Court attempted to clarify the legal obligation of “appropriate” progress that schools owe to students when providing FAPE under the IDEA.⁸⁷ *Endrew F.*, the student in question, was diagnosed with ASD and exhibited severe behavioral problems

81. 34 C.F.R. § 300.114.114 (2006).

82. 34 C.F.R. § 300.115.115 (2017).

83. 34 C.F.R. § 300.116 (2006).

84. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 397 (2017).

85. *Id.*

86. *Id.*

87. *Id.* at 999; see also Alyssa Iuliano, *Endrew F. v. Douglas County School District: The Supreme Court’s Elusive Attempt to Close the Gap Between Some Educational Benefit and Meaningful Educational Benefit*, 35 *TOURO L. REV.* 261 (2019).

which, unmitigated by the school, resulted in his stalled academic and functional progress by fourth grade.⁸⁸ Though there are “infinite variations” of progress for students with disabilities, students should be enrolled in regular classes as much as possible, because those courses are able to measure students’ progress.⁸⁹ Generally, passing from “grade to grade” constitutes appropriate progress. However, the Court noted that some students cannot perform such an achievement.⁹⁰ While the Tenth Circuit found that in cases of severe disability like *Andrew F.*’s the IEP need only facilitate more than *de minimis* progress, the Supreme Court disagreed, determining that an IEP “must aim to enable the child to make progress.”⁹¹ Where this is not possible, the student’s “educational program must be appropriately ambitious in light of his circumstances.”⁹² With this holding, the Court added an important caveat: the “IDEA cannot and does not promise any particular [educational] outcome.”⁹³ Thus, *Andrew F.* leaves IDEA FAPE jurisprudence in a somewhat murky place: It calls for “appropriately ambitious” progress but also reminds judges not to substitute their judgment (or hindsight) for the expert educators who craft IEPs.⁹⁴

Lower courts have consistently found that while the Supreme Court in *Andrew F.* declined to use the term “meaningful” to describe the progress afforded by the IDEA to disabled students, the statute still requires “significant

88. *Andrew F.*, 580 U.S. at 397.

89. *Id.* at 400.

90. *Id.* at 401.

91. *Id.* at 399. The Tenth Circuit based its decision on *Rowley*, which found that even though a deaf student could not understand much of what was being said in her class, her grades were good enough that she was “advancing easily from grade to grade,” so she was being provided a substantively adequate program of education. *Id.* at 392 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 185–86 (1982)). The court there found that the IEP must simply furnish “some educational benefit” to the student. *Rowley*, 458 U.S. at 200. The Circuit was misguided in relying on *Rowley*, as that case was cabined to students who were capable of making progress from grade to grade.

92. *Andrew F.*, 580 U.S. at 402.

93. *Id.* at 398; see also *J.B. v. District of Columbia*, 325 F. Supp.3d 1, 15 (D.C. 2018) (holding that *Andrew F.* “did not hold that any time a child makes limited, or even zero, progress, that a school system necessarily failed to provide FAPE and violated the IDEA”).

94. *Andrew F.*, 580 U.S. at 402.

learning” and “meaningful benefit” to these students.⁹⁵ Courts, in light of *Andrew F.*’s opaque standard, have grappled with how to measure “progress” for students who are not able to pass from grade to grade.⁹⁶ As a result, deference to IEP goals has become the norm. For example, the Ninth Circuit held that “the appropriate benchmark for measuring the academic benefits they receive is [the student’s] progress toward meeting the academic goals established in the[ir] IEP.”⁹⁷ IEPs contain a wide range of academic goals depending on the needs of the student and the willingness of the IEP team to establish ambitious expectations for the student, so courts will generally defer to the IEP’s goals and measurement tools. For example, in *G. D. v. Swamscott Public Schools*, the First Circuit accepted purported “slow gains” towards IEP goals and rejected outside standardized evaluations which suggested the student’s progress had stalled.⁹⁸ Further, in cases where even “slow gains” are not realized, courts have given deference to schools that make even “incremental changes” to IEPs. This trend indicates deference towards IEP teams and the statutory preference to keep students in regular education environments.⁹⁹ Indeed, as IEPs are forward looking, courts do not require that districts accurately determine a student’s actual potential, as that would

95. See *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 798 F.3d 1329 (10th Cir. 2015), *vacated and remanded*.

96. 4 EDUCATION LAW § 10C.06 (2023). While *Rowley* solved the “easy” grade-to-grade question, *Andrew F.* is looking more specifically at students who are not necessarily able to pass from grade to grade.

97. *D. R. ex rel R. R. v. Redondo Beach Unified Sch. Dist.*, 56 F.4th 636, 644–45 (9th Cir. 2022).

98. *G. D. v. Swamscott Pub. Sch.*, 27 F.4th 1, 11–12 (1st Cir. 2022) (parents presented standardized testing evidence that their daughter had made little progress in reading, the court instead favored informal evidence of “slow gains” presented by district. The court noted that standardized tests are improper for measuring FAPE because *Andrew F.* requires that progress be measured in light of students’ individual circumstances, which standardized tests by definition do not do).

99. *H. W. v. Comal Indep. Sch. Dist.*, 32 F.4th 454, 460 (5th Cir. 2022). As most appellate-level suits regarding FAPE are brought by parents who wish for the district to pay for their student’s placement in expensive private schools, courts cite the IDEA’s preference for “mainstreaming” as a statutory disinclination toward private school placement. *Id.* This preference is “only overcome ‘when education in a regular classroom cannot meet the handicapped child’s unique needs.’” *Id.* at 461 (quoting *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989)).

push districts beyond *Endrew F.*'s "reasonably calculated" standard.¹⁰⁰

Claimants seeking remedies under the IDEA which allege a failure to implement an IEP must show the school "failed to implement substantial or significant provisions of the IEP," which creates a significant barrier for claimants.¹⁰¹ While IEPs outline the district's responsibility to students, courts will not award relief if claimants can only prove the IEP was not followed to the letter. To determine whether a "significant" provision has not been implemented, courts will ask whether, even without the unimplemented portion of the IEP, the student "nevertheless received educational benefit."¹⁰² In one such analysis, a Maryland district court analyzed an IEP for a student with balance issues.¹⁰³ The IEP required an aide follow the student full time, but the aide was frequently absent, and the student once fell at school and suffered an injury which required surgery.¹⁰⁴ The court found that the aide was "a substantial and material provision in the IEP" because the aide made it possible "for [the student] to be maintained in the general educational setting."¹⁰⁵

There are significant procedural and substantive hurdles placed in the way of claimants seeking remedy under the IDEA. Claimants who are challenging an IEP must: (1) demand revision of the IEP by the IEP team, (2) meet to mediate with the IEP team, (3) await final adjudication by the IEP Coordinator as to what will be in their student's IEP, (4) appeal that decision to the Impartial Hearing Officer (IHO), and (5) appeal the IHO's decision to the State Resource Officer.¹⁰⁶ Only

100. 4 EDUCATION LAW § 10C.06 (2023); *Endrew F.* 580 U.S. at 399 (emphasis added) ("To meet its substantive obligation under the IDEA, a school must offer an IEP *reasonably calculated* to enable a child to make progress appropriate in light of the child's circumstances.").

101. *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). The "*Bobby R. Standard*" has been adopted in a number of circuits. *See, e.g.*, *Melissa S. v. Sch. Dist.*, 183 F. App'x 184 (3d Cir. 2006); *Neosho R V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003); *Schoenbach v. District of Columbia*, 309 F. Supp.2d 71 (D.D.C. 2004).

102. *Bobby R.*, 200 F.3d at 349.

103. *Manalansan v. Bd. of Educ.*, Civil No. AMD 01-312, 2001 U.S. Dist. LEXIS 12608 (D. Md. Aug. 14, 2001).

104. *Id.* at *7-10.

105. *Id.* at *34.

106. *Due Process Complaints F.A.Q.*, COLO. DEPT OF EDUC. (Mar. 21, 2024), <https://www.cde.state.co.us/spedlaw/dueprocess> [<https://perma.cc/67JQ-AQ3R>].

after that protracted process can a claimant stagger into federal court, often a year after the initial IEP was disputed.¹⁰⁷ Even then, it is rare for district courts to overturn the judgment of the IEP team, the state IHO, or (where applicable) the State Review Officer.¹⁰⁸ The *Rowley* Court found that reviewing courts should afford state administrative procedures “due weight,” which “requires a more critical appraisal of the agency determination than clear-error review entails but which, nevertheless, falls well short of complete de novo review.”¹⁰⁹ Because the IDEA intends to provide states with resources so they can administer special education programs, courts have found that “the substantive adequacy of an IEP should be afforded more weight than determinations concerning whether the IEP was developed according to proper procedures.”¹¹⁰ In light of these constraints, parents have difficulty successfully navigating the IDEA’s structure, as will be discussed in the next Part.

IV. FAPE IN THE CONTEXT OF APPLIED BEHAVIORAL ANALYSIS ACCESS

Parents of students with ASD who want their child to receive ABA therapy in the school setting face a number of administrative, legal, and monetary hurdles.¹¹¹ First, courts will generally align with school districts’ decisions on whether to provide a student access to ABA when applying the IDEA’s FAPE lens.¹¹² Second, when parents have challenged districts’ decisions to deny ABA through students’ IEPs in schools, courts have inconsistently ruled on ABA access: Some courts have viewed ABA in the IDEA FAPE context while others have placed it in the ADA medical care (Section 504) context.¹¹³ Finally,

107. *Id.*

108. See generally Perry A. Zirkel, *The Legal Boundaries for Impartiality of IDEA Hearing Officers: An Update*, 21 PEPP. DISP. RESOL. L.J. 257 (2021) (discussing the deferential weight the IDEA provides IHOs whose impartiality are generally upheld by federal court decisions).

109. *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993).

110. *M. H. v. N.Y.C. Dep’t of Educ.*, 685 F.3d 217, 244 (2d Cir. 2012).

111. *Access to Medically Necessary Serv for Students*, *supra* note 7 (statements of several parents who attested to difficulty of receiving ABA).

112. See *supra* notes 103–105.

113. See *Z. W. v. Horry Cty. Sch. Dist.*, 68 F.4th 915, 918 (4th Cir. 2023).

while Medicaid and some medical insurers will provide coverage for ABA, this is not consistent across various states.¹¹⁴

In *M. H. v. N.Y.C. Department of Education*, the Second Circuit considered the efficacy of ABA as compared to “various teaching methods” offered by a school district.¹¹⁵ There, the court heard two separate appeals in tandem. In the first of the two appeals, the parents (M. H.) of a student with ASD (P. H.), when confronted with an improperly-crafted IEP that proposed to move their nonverbal son from a 1:1 ABA program to a 6:1:1 special education program, opted to enroll their son in a private school which offered 1:1 ABA.¹¹⁶ The Second Circuit agreed that evidence provided by the parents “tended to show that P. H. required a methodology employing a 1:1 student-teacher ratio.”¹¹⁷ The New York Department of Education, in its defense of the IEP, argued that the district court should not have disturbed its decision on the methodology of special education because “decisions regarding the best methodology to utilize in teaching special education students . . . should be made by teachers, not by the courts.”¹¹⁸

While the court generally agreed with the department’s call for deference, it noted that it would not defer to judgments which were based on a lack of evidence.¹¹⁹ The Second Circuit then evaluated the record and found that (1) the state failed procedurally to consider all relevant evidence in its determination that a FAPE was not denied to P. H.,¹²⁰ and (2) ABA in a private school was, in fact, the better educational program for students like P. H. Thus, P. H. was denied a FAPE. The second part of this decision was necessitated by the fact that the school district told P. H.’s parents that it could not provide ABA at P. H.’s school.¹²¹

Turning to the second appeal in *M. H.*, the Second Circuit rejected the student’s ABA claim and deferred to the Impartial

114. See e.g., H.B. 22-1260(1)(e).

115. *M. H. v. N.Y.C. Dep’t of Educ.*, 685 F.3d 217, 250 (2d Cir. 2012).

116. *Id.* at 228.

117. *Id.* at 251.

118. *Id.*

119. *Id.* at 252. The Second Circuit’s concern here lay in the fact that the State Review Officer (SRO) excluded the parents’ evidence about the efficacy of ABA because they had not raised the issue in their initial appeal of the IEP Team’s decision to place P. H. in a 6:1:1 classroom rather than a 1:1 ABA environment. *Id.*

120. See *id.* at 250.

121. *Id.* at 242 (2d Cir. 2012).

Hearing Officer's (IHO's) decision.¹²² There, the school district's expert noted the child's deficiencies and "chose the 6:1:1 classroom program with these deficiencies in mind."¹²³ The court found the IHO's decision was entitled to deference because the IHO was weighing the credibility of various education experts.¹²⁴ The difference between the two parallel appeals in *M. H.* lies not in the disability suffered by the student—the two students' educational records were similar. Nor does the difference lie in the requested remedy—both students sought tuition for a private ABA school. Instead, it lies in the procedural error committed by the state adjudicator in *P. H.*'s case, and the lack of procedural error in the latter case. Therefore, for claimants seeking ABA treatment in school against the (procedurally sound) finding of their school districts, the Second Circuit's conclusions offer little hope of remedy.

Finding the road blocked by procedural and substantive hurdles, parents have begun to press ABA therapy claims away from the IDEA and towards the Americans with Disabilities Act (ADA).¹²⁵ While the IDEA specifies that claimants may not circumvent exhausting state administrative remedies by filing a claim under a different federal statute if that claim may be properly filed under the IDEA,¹²⁶ some courts suggest that ABA therapy may fall outside the grasp of the IDEA in some circuit courts.¹²⁷ This route poses an attractive path for parents looking to get ABA for their students, as will be discussed in more detail below.

The Supreme Court in *Fry v. Napoleon Community Schools* laid the blueprint for parents seeking to avoid exhausting administrative remedies as required by the IDEA.¹²⁸ There, the Court heard the case of a student, *E. F.*, with cerebral palsy.¹²⁹ In order to attend school, the student requested she be able to bring her service dog, *Wonder*. The school district denied this request, arguing that it would rather provide *E. F.* with a human

122. *See Id.* at 255–258.

123. *Id.* at 257.

124. *Id.* IHOs are entitled deference when weighing credibility, similar to other factfinding bodies.

125. *See, e.g., Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154 (2017); *Z. W. v. Horry Cty. Sch. Dist.*, 68 F.4th 915 (4th Cir. 2023).

126. *Fry*, 580 U.S. at 161.

127. *Z. W.*, 68 F.4th at 918.

128. *Fry*, 580 U.S. at 157.

129. *Id.* at 161.

aide instead of Wonder.¹³⁰ After a protracted back-and-forth, the Frys removed their child from the school district and filed a Section 504 complaint with the Department of Education's Office of Civil Rights (OCR). OCR found for the Frys, noting that denying E. F.'s service animal was akin to carrying a person with a wheelchair.¹³¹ The district then allowed E. F. and Wonder back into the school building, but shortly after decided that the dog could not continue joining E. F. at school.¹³² The Frys then filed suit in federal court, alleging a Section 504 violation, but the court dismissed their case, citing the fact that the Frys had not exhausted all administrative remedies offered under the IDEA.¹³³ However, on appeal, the Supreme Court found that the Frys' suit did not allege or seek to remedy a denial of a FAPE, the only relief available under the IDEA.¹³⁴ Therefore, the Frys were free to file their claim in federal court without first exhausting the IDEA's administrative remedies. When applied in the ABA context, circuit courts have struggled with determining whether ABA providers fit the *Fry* exception to administrative exhaustion due to the uncertainty regarding whether ABA providers are more like wheelchairs or educational programs.

In *Z. W. v. Horry County School District*, for example, the Fourth Circuit considered whether a student with ASD (Z. W.) could bring an ABA provider funded by his private insurance into the school building.¹³⁵ Despite posing no cost to the district, the school rejected Z. W.'s request to bring his ABA provider to school on four separate occasions, leading Z. W. to file suit in federal court.¹³⁶ In its analysis, the Fourth Circuit repeated the standard set out in *Fry* to determine whether FAPE exhaustion applies to an education-related claim: Courts must "look to the substance, or gravamen, of the plaintiff's complaint" to determine whether it "concerns the denial of a FAPE, or instead addresses disability-based discrimination."¹³⁷ Whereas the

130. *Id.* at 162.

131. *Id.* at 163.

132. *Id.*

133. *Id.* at 164.

134. *Id.*

135. *Z. W. v. Horry Cty. Sch. Dist.*, 68 F.4th 915, 918 (4th Cir. 2023).

136. *Id.* Z. W. filed his complaint directly in federal court, alleging violations of the ADA and the Rehabilitation Act when the school failed to accommodate Z. W.'s ABA provider. The complaint made no mention of FAPE.

137. *Id.* at 920 (*quoting* *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 171 (2017)).

Second Circuit in *M. H.* saw the denial of a FAPE as the “gravamen” of the complaints it considered, the Fourth Circuit in *Z. W.* found that the district’s denial of access to an ABA therapist is discrimination against a student with a disability.¹³⁸ Applying *Fry*’s guiding hypothetical, the Fourth Circuit found that a “non-student visitor . . . could make a largely identical claim against the school district if it refused to permit an ABA therapist to accompany the visitor to Z. W.’s school.”¹³⁹ Therefore, the Fourth Circuit viewed ABA therapy not as an educational tool, but as an access tool for students with ASD.¹⁴⁰

Therefore, for parents of students with ASD, there are a variety of challenges to getting ABA therapy at school. Schools may reject ABA therapy as a tool for FAPE, and they get wide deference from courts. Other circuits have not viewed ABA therapy as a medical service, and in those areas, parents must travel the fraught administrative path toward getting ABA as part of FAPE. The following Part will discuss the current state of case law in Colorado as well as legislative efforts to provide ABA in schools.

Much like the case law in other circuits and the Supreme Court, the Tenth Circuit has shown reticence to mandate ABA, or any other specific educational tool, in an IEP for students with ASD. In *Elizabeth B. v. El Paso County School District 11*, the Tenth Circuit considered an IDEA FAPE case in which a school district offered to provide a student with ASD services that approximated ABA but were not in fact provided by a licensed ABA therapist.¹⁴¹ The student’s parents argued that “the School District’s ABA strategies would be ineffective because the School district is applying a ‘simple strategy . . .’ rather than ‘specialized training and continuous implementation with

138. *Id.*

139. *Id.*

140. It should be noted that medical services are not covered under the IDEA, which provides “such medical services [that are] for diagnostic and evaluation purposes only.” 20 U.S.C. § 1401(26)(A). In general practice, this amounts to staffing a school nurse, who can provide students with basic medical services. In *Cedar Rapids Community School District v. Garret F. by Charlene F.*, the Court held that “a rule that limits the medical services exemption to physician services is unquestionably a reasonable and generally workable interpretation of the statute.” 526 U.S. 66 (1999).

141. *Elizabeth B. v. El Paso Cty. Sch. Dist. 11*, 841 F. App’x 40 (10th Cir. 2020).

fidelity.”¹⁴² The Tenth Circuit agreed with the school district, who argued, under *Andrew F.*, it need not provide “perfect” adherence to a “particular methodology” and the IEP, despite providing an uncertified version of ABA, did not violate the IDEA.¹⁴³ Lower courts within the Tenth Circuit in the years since *Andrew F.* have similarly approached claimants’ requests for ABA to provide their student a FAPE.¹⁴⁴ These decisions have severely curtailed students’ likelihood of forcing ABA therapy under a FAPE theory in school unless the district decides to provide it.

V. COLORADO GENERAL ASSEMBLY GIVES ABA PROVIDERS ACCESS TO SCHOOLS

Given the lack of access to ABA therapy in schools nationwide, and in Colorado specifically,¹⁴⁵ in 2022 the Colorado General Assembly looked to ensure that students with ASD would be provided their medically necessary services. Perhaps building off the interpretation of some courts finding ABA a medical service, rather than an educational service, the Colorado General Assembly moved to compel districts to allow private ABA providers in their schools.¹⁴⁶ While ABA case law has mostly viewed the service in light of the IDEA’s FAPE requirements, increased regulation of ABA therapists

142. *Id.* at 44.

143. *Id.*

144. *See* *Renee v. Unm*, No. 20-cv-01006-MIS-JHR, 2023 U.S. Dist. LEXIS 43350 (D.N.M. Mar. 15, 2023) (finding ABA not necessary to provide a FAPE to student with ASD); *Alex W. v. Poudre Sch. Dist. R-1*, Civil Action No. 19-cv-01270-CMA-SKC, 2022 U.S. Dist. LEXIS 126041 (D. Colo. July 15, 2022) (finding a program “similar” to ABA was enough to constitute a FAPE); *William B. v. Horizon Blue Cross Blue Shield N.J.*, No. 2:17-cv-01331-EJF, 2020 U.S. Dist. LEXIS 69660 (D. Utah Apr. 20, 2020) (finding that outpatient ABA was sufficient to show school did not have to pay for inpatient education); *Smith v. Cheyenne Mt. Sch. Dist. 12*, 2017 U.S. Dist. LEXIS 100475 (D. Colo. May 11, 2017) (denying special education eligibility and ABA therapy because student with ASD was doing well in class).

145. Erica Meltzer, *Parents of Students with Autism Want Behav. Therapists Allowed in Colorado Classrooms*, CHALKBEAT COLO. (March 1, 2020), <https://www.chalkbeat.org/colorado/2020/3/1/21178691/parents-of-students-with-autism-want-behavior-therapists-allowed-in-colorado-classrooms> [https://perma.cc/4R4Q-W5R2].

146. *Id.* Early forms of H.B. 22-1260 had more compulsory language than what survived to law.

nationwide shows that state legislatures are beginning to favor ABA as medical service.¹⁴⁷

Originally sponsored by Representative Meg Froelich and Senator Jeff Bridges during the 2020 Regular Session, HB 20-1058 required “an administrative unit to allow a behavior analyst to provide medical necessary services to a student during school hours if the student’s parent or legal guardian requests such services.”¹⁴⁸ While this language did not pass the Colorado House of Representatives, an amended version of HB 20-1058 which required each “administrative unit to adopt a policy” that would determine when it would allow “behavior analysts” into their school buildings did pass the House but died in committee in the Senate.¹⁴⁹ Several major education interest groups opposed the language in HB 20-1058 that would have required schools to provide access to ABA therapists on the basis that it would strip counties of their local control of their education systems.¹⁵⁰

Two years later, Representative Froelich joined with Senators Cleave Simpson and Rhonda Fields to sponsor HB 22-1260, titled “Access To Medically Necessary Services For Students,” which Governor Jared Polis signed into law in June 2022.¹⁵¹ This revised version of HB 20-1058 faced virtually no opposition in either house of the state legislature, though its initially-introduced form was pared down before being passed.¹⁵² HB 22-1260 (codified at C.R.S. § 22-20-121) begins

147. See *Licensure and Other Regulation of ABA Practitioners*, ASS’N OF APPLIED PROFESSIONAL BEHAV. ANALYSTS, <https://www.bacb.com/u-s-licensure-of-behavior-analysts> [<https://perma.cc/E2FE-FJUM>].

148. Behavior Analysts in Public Schools, H.B. 20-1058, 70th Gen. Assemb., Reg. Sess. (Colo. 2020).

149. *Id.*

150. Meltzer, *supra* note 145; see generally *Denver Bd. of Educ. v. Booth*, 984 P.2d 639, 648 (Colo. 1999) (discussing school districts’ autonomy under the Colorado State Constitution).

151. Access to Medically Necessary Services for Students, H.B. 22-1260, 72nd Gen. Assemb., Reg. Sess. (Colo. 2022).

152. *Id.* The original bill would have created “collaborative care teams” to implement the medically necessary treatment, which some Colorado groups viewed as duplicative of an IEP Team. *Id.* Froelich describes the amended bill as reducing the obligations of administrative units while still allowing parents to get ABA providers in schools. “*Access to Medically Necessary Serv for Students: Hearing on H.B. 22-1260 Before the H. Comm. on Education*, 73rd Gen. Assemb., 2d Reg. Sess. (Colo. 2022) at 5:29:15 PM, https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20220421/-1/13324#agenda_ [<https://perma.cc>

with a legislative declaration that “access to medically necessary services in the school setting has lagged” behind treatment options outside of school.¹⁵³ Then, the statute specifically declared that “generally accepted standards of care [for students with ASD] require that ABA therapy is provided across settings, including schools, in accordance with a child’s clinical needs.”¹⁵⁴ No other “medically necessary services” are mentioned in the statute, which leads to an inference that this law was passed to mainly address ABA access in schools.¹⁵⁵ HB 22-1260 indicates that Colorado health insurance is required to “cover all specified medically necessary treatment for ASD, including treatment in school settings.”¹⁵⁶ With an eye towards school funding, HB 22-1260 declares that ABA therapy is paid for by private insurance or Medicaid, so counties will bear no cost to allow ABA providers into their schools.¹⁵⁷ This provision also appears calculated to reassure districts that HB 22-1260 does not interfere with IDEA determinations.

In substance, HB 22-1260 requires administrative units to “adopt a policy that addresses how a student who has a prescription from a qualified health-care provider for medically necessary treatment receives such treatment in the school setting. . . .”¹⁵⁸ As physicians may prescribe ABA, the statute requires that schools permit ABA providers in schools as long as they follow the school’s policy.¹⁵⁹ The statute references Section 504, discussed *supra*, and Title II of the ADA (“Title II”) which together provide students the right to medically necessary treatment in school. The policies required by HB 22-1260 must include a notice to parents whose children qualify for

/5N2R-CWYA] (statement of Rep. Meg Froelich). (“Your district is going to work out what works best for your community.”). The final bill passed unanimously in the senate and had only three dissenters in the house.

153. H.B. 22-1260(1)(a).

154. *Id.*

155. C.R.S. § 22-20-121; Meltzer, *supra* note 145 (Bill Sponsor Meg Froelich speaks extensively in this article about her desire to allow ABA providers into schools).

156. H.B. 22-1260(1)(c).

157. H.B. 22-1260(1)(f). This, of course, is complicated by the fact that Medicaid reimbursement in Colorado is so low that it has put many ABA providers out of business in the state. J. Tomash, *The Silent Crisis of Autism Services in Colorado*, BEHAVIORSPAN (Jun. 30, 2023), <https://www.behaviorspan.com/post/the-silent-crisis-of-autism-services-in-colorado> [https://perma.cc/SXV3-92HK].

158. C.R.S. § 22-20-121(2)(a).

159. *Id.* § 22-20-121.

Section 504 and/or Title II that they may receive medically necessary treatment while at school.¹⁶⁰ Importantly, the policies must “address the process” that would allow an outside provider to “observe” a student while at school, “collaborate” with “instructional personnel,” and also provide the medically necessary treatment which is at the heart of the statute’s purpose.¹⁶¹ The policy must be publicly available online, and administrative units must report the number of individuals who made requests under the policy to the Colorado Department of Education.¹⁶² At no point does HB 22-1260 discuss how these policies would relate to schools’ obligations under the IDEA, which led many Colorado school districts to write policies which aim to limit ABA providers’ access to school buildings.

VI. COLORADO SCHOOL DISTRICTS’ HB 22-1260 POLICIES

School districts in Colorado were generally opposed HB 22-1260. Concerned about the potential for violating the IDEA, school districts worried that the original version of HB 22-1260, which called for the creation of collaborative care teams, would co-opt the IEP process and open them to IDEA liability.¹⁶³ Indeed, because Colorado requires schools find students with disabilities and move them into an IEP process governed by the IDEA, these collaborative care teams would have potentially violated the IDEA.¹⁶⁴ Even as amended, school districts worry they will not have the time to provide a FAPE to students who are working with an ABA provider.¹⁶⁵ If, for example, an ABA provider works with a student for several hours per day while in school, the school district has little control over what sort of education is actually being provided to that

160. *Id.* § 22-20-121(2)(b)(I).

161. *Id.* § 22-20-121(2)(b)(II).

162. *Id.* § 22-20-121(3).

163. *Access to Medically Necessary Serv for Students*, *supra* note 7 (statements of several special education directors from various counties in Colorado opposing passage of H.B. 22-1260).

164. *Id.* (concern from administrative units that they would be forced to violate federal law by using collaborative care teams rather than IEP teams).

165. *See e.g., Medically Necessary Treatment in School Setting (JLCDC)*, DENVER PUB. SCH’S. ADMIN. POL’YS. (Aug. 21, 2023), <https://go.boarddocs.com/co/dpsk12/Board.nsf/goto?open&id=CUXMVP5CF071> [<https://perma.cc/8V3C-4ZYL>]. Concern can be inferred from language of several administrative units’ policies created in response to H.B. 22-1260.

student and may face liability from parents dissatisfied with their student's progress.

Reflecting that opposition, school districts that have fulfilled their legal obligation to generate policies have created policies which are restrictive of ABA provider access. Ultimately, it is clear from the policies, as written, that schools will not readily allow ABA providers into their buildings.¹⁶⁶

Boulder Valley School District's policy, for example, clarifies that "nothing in this policy will be construed to require the school district to permit a third party to determine or provide special education in the school setting in a way that interferes with the school districts' obligations and/or authority under state or federal law."¹⁶⁷ Boulder's policy further disclaims "[i]f the . . . school district believe[s] that the services could or should be provided by the school district through an IEP or Section 504 [P]lan [*sic*], then the school district will convene the appropriate team to consider the request."¹⁶⁸

One of the strongest instances rejecting the legislative intent of HB 22-1260 is St. Vrain Valley Schools's policy.¹⁶⁹ This policy states "[i]t will be the responsibility of a student's IEP team or 504 team to determine whether any medically necessary treatment must be provided to the student within the school setting in order for the student to access their education."¹⁷⁰ Unlike Boulder and Denver, St. Vrain clearly stated that it will not allow medically necessary treatment in school without the consent of an IEP or 504 team.¹⁷¹ All of these disclaimers, with varying levels of forcefulness, place the issue squarely back in the realm of a FAPE question; if the school district feels that an ABA provider is necessary to provide a FAPE, then it can prevent an outside provider from entering the building until an

166. See C.R.S. § 22-20-121; H.B. 22-1260(1)(c), (e); Meltzer, *supra* note 145; Tomash, *supra* note 157.

167. *Access to Medically Necessary Treatment at School (JLCM)*, BOULDER VALLEY SCH. DIST. BD. OF EDUC. POLY'S. (June 13, 2023) <https://www.bvsvd.org/about/board-of-education/policies/policy/~board/j-policies/post/jlc-1686784723801> [<https://perma.cc/TQ9K-NG4N>].

168. *Id.*

169. *Medically Necessary Treatment in School Setting (JLCDC*)*, ST. VRAIN VALLEY SCH. DIST. BD. OF EDUC. POLY'S. (May 10, 2023), <https://www.svsvd.org/wp-content/uploads/2023/05/JLCDC.pdf> [<https://perma.cc/GDC3-DLXR>].

170. *Id.*

171. *Id.* These teams are generally made up of school personnel and the student's parent(s).

IEP team is convened. At that point, the school district can argue, as countless have in the case law cited above,¹⁷² that (1) ABA is not medically necessary (in this particular situation), (2) they can provide a FAPE using other methods (which courts have allowed in the past), and (3) the student can get ABA treatment outside of school.¹⁷³ It is possible that, in light of these policies, students in various districts in Colorado are exactly where they were prior to HB 22-1260's passage: fighting with districts to get them to include ABA as part of a FAPE.

VII. A PROPOSED SOLUTION TO THE ABA PROBLEM

As currently diagnosed, ASD is a complex spectrum of disorders which do not easily align to any one treatment plan. Therefore, any proposed solution must recognize the autonomy of students and parents. Some students with ASD will benefit from mainstream educational opportunities with few accommodations or modifications to the educational curriculum. For those students, ABA is not a necessary intervention, so any solution to this issue will need to have ample room for medical practitioners, parents, and special educators to work together to find the correct treatment plan. Further, any solution will need to account for new research into the appropriate interventions for students with ASD. It is possible that a treatment like ABA will be superseded by other methods, or that it will evolve into something that is no longer appropriate for most school environments. As it stands, ABA is already difficult to incorporate into many schools: it requires one-on-one ratios of student to provider, quiet spaces, and near total control of the environment in which it is practiced.¹⁷⁴ If research proves that it needs even greater restrictions, schools must have flexibility to reject it as a treatment plan for schools. That said, ABA is the current standard in treatment for complex ASD symptomologies, so this Note assumes that it would be best practice for ABA providers to get access to school buildings, regardless of issues of cost or school autonomy.

172. See *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 162 (2017).

173. MELISSA BARBER, OVERVIEW OF H.B. 22-1260: ACCESS TO MEDICALLY NECESSARY SERVICES (2022), <https://www.cde.state.co.us/cdesped/essu-fall-meeting-22-handout-hb22-1260> [<https://perma.cc/DC7N-8SGX>].

174. See Henry S. Roane et al., *Applied Behavior Analysis as Treatment for Autism Spectrum Disorder*, 175 J. PEDIATRICS 27, 28 (2016).

To untangle this complicated web of laws, case law, and stakeholders is a challenge for parents, students, and providers. Ultimately, a solution must take into account that (1) ASD is a broad spectrum, (2) the IDEA only requires FAPE under the *Endrew F.* standard, (3) courts have been hesitant to apply Section 504 in the context of ABA, and (4) if students use a private ABA, schools will not pay for it as they would under IDEA. To solve this issue, (1) the Colorado legislature must redraft the language in HB 22-1260; (2) courts must clarify the *Endrew F.* standard; (3) Congress must amend the IDEA or the Department of Education must promulgate new rules commanding schools to provide ABA therapy; and, (4) until the first three items of this list are accomplished, states like Colorado must reimburse ABA fairly under Medicaid. Therefore, this Note's solution is multipart; each part is described in turn below.

A. Amended HB 22-1260 Language

In light of the policies promulgated by districts like Boulder, Denver, and St. Vrain, the Colorado General Assembly's language in HB 22-1260 did not effectuate its legislative intent.¹⁷⁵ The legislature, in HB 22-1260's legislative declaration, highlighted that "access to medically necessary services in the school setting is too often restricted, causing damage to Colorado children and the state, which bears the cost when medically necessary services are not provided."¹⁷⁶ However, in the bill, the legislature merely required that schools adopt a policy that addresses "how" a student will get medically necessary services in school.¹⁷⁷ The drafters further made references to Section 504 in HB 22-1260, which implies that the law is simply a restatement of the requirements in that federal statute.¹⁷⁸ Because of this language, schools have decided their policies need only restate their legal obligations under Section 504, which do not fully address the Colorado General Assembly's legislative intent.¹⁷⁹ A simple solution to this issue is for the

175. See C.R.S. § 22-20-121.

176. H.B. 22-1260(1)(g).

177. H.B. 22-1260(2)(a).

178. *Id.*

179. See, e.g., ST. VRAIN VALLEY SCHOOL DISTRICT BOARD OF EDUCATION POLICIES, *supra* note 169.

General Assembly to amend HB 22-1260. Sample language may look as follows:

(2)(a) No later than July 31, 2025, each administrative unit shall adopt a policy ~~that addresses how~~ WHICH MANDATES THAT a student who has a prescription from a qualified health-care provider for medically necessary treatment receives such treatment in the school setting as required by applicable federal and state laws, including section 504 of the federal “Rehabilitation Act of 1973,” 29 U.S.C. Sec. 794, as amended, and Title II of the federal “Americans with Disabilities Act of 1990.” BECAUSE THIS POLICY ADDRESSES MEDICALLY NECESSARY TREATMENT AND NOT EDUCATIONAL PROGRAMMING, SUCH POLICY SHALL NOT INVOLVE A FAPE DETERMINATION OR MAKE REFERENCE TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

If the Colorado General Assembly had clarified HB 22-1260 to more effectively enact its legislative intent, it is likely that schools would not have been able to write such restrictive policies. This solution is the simplest and most effective of those proposed in this Note.

B. Clarifying the Endrew F. Standard

Federal laws that govern students’ disabilities in schools provide schools ample authority to determine the method and sufficiency of education provided to disabled students. As outlined in *Endrew F.*, the Supreme Court has held that schools only need to ensure that students make some measurable progress in their least restrictive environment to fulfill the requirements of the IDEA.¹⁸⁰ The least restrictive environment (LRE) requirement poses a problem for parents: It gives schools the ability to reject more expensive (and possibly more effective) placements for students with ASD under the guise that school districts want students in their LRE.¹⁸¹ Likewise, the *Endrew F.* FAPE interpretation means that students who are not receiving “perfect” ABA therapy at school might be getting a “good enough” approach that will compromise their ability to

180. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

181. *See Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993).

ever learn. Courts have consistently held that *Andrew F.* gives parents neither the right to choose the method of education nor the place.¹⁸² Still, parents should continue fighting through the administrative process under the IDEA, as doing so will force courts to clarify the murky standard created by *Andrew F.* Many organizations exist to help parents push for more effective special education programs, including the Council for Exceptional Children, the Colorado Cross-Disability Coalition, Disability Law Colorado, and Parents Encouraging Parents. When faced with IEP team determinations they disagree with, parents should turn to these organizations for support; doing so will continue to push courts toward a more objective FAPE standard.

Those parents that have tried to circumvent *Andrew F.* using Section 504 run into *Fry*. Though *Fry* allowed parents suing over a service dog to evade IDEA exhaustion, lower courts have subsequently found that ABA providers are not analogous to service dogs.¹⁸³ Further, even where courts let parents access this remedy, parents must use their own private insurance or Medicaid to pay for the provider. Therefore, those parents trying to get ABA providers into school under Section 504 must hope their insurer covers such therapy (or that the state Medicaid program does so). Parents should still continue to push federal courts to characterize ABA as a Section 504 service, as it would pressure schools to accept ABA providers in school buildings. This may be what the Colorado General Assembly was attempting to do with its most recent legislative effort, but schools have found ways to restrict ABA access by shifting these requests toward IEP teams. If parents can get courts to recognize ABA as akin to service dogs, then more private providers will have unfettered access to school buildings.¹⁸⁴

182. See, e.g., *M. H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217 (2d Cir. 2012).

183. *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 161 (2017); *Z. W. v. Horry Cty. Sch. Dist.*, 68 F.4th 915, 920 (4th Cir. 2023). While *Z. W.* does make this analogy, it is an outlier.

184. See *Z. W.*, 68 F.4th at 918 (successful circumvention of the IDEA meant ABA could access school to provide § 504 services).

C. Amending the IDEA and Promulgating New Regulations

The current legal and regulatory system gives schools too much authority to determine whether ABA providers are allowed into their school system. Truly individualized services for the growing population of students who qualify for IEPs are extremely expensive, and schools have little legal incentive to provide them.¹⁸⁵ The IDEA provides federal funding, but it is distributed on a per-pupil basis. This means if services (such as a full time ABA provider) cost more than the per-pupil formula allows, other students will receive cheaper services or the school district will have to make up the financial difference through other means.¹⁸⁶ As such, in school districts where ABA providers have not been traditionally employed or contracted by schools, IEPs will likely not include those services. The IDEA, under *Endrew F.*, offers broad substantive deference to schools and complicated procedural burdens for students to overcome to challenge a school's decision to deny ABA.¹⁸⁷ In those areas where courts have characterized ABA providers as falling under *Fry*, schools still have the authority to determine when and how ABA is used within their building, as they can convene an IEP team and use that to block the ABA provider.¹⁸⁸ And in Colorado, where ABA is characterized as a "medically necessary service," schools have already begun to promulgate policies which severely curtail parents' ability to dictate when their student receives such treatment.¹⁸⁹

ASD is a spectrum, so a one size fits all legislative solution is very difficult to achieve. If, for example, Congress were to mandate schools use ABA to treat students with ASD, they would be capturing a significant cross section of students who do not need the service to function in a school setting. Indeed, doing

185. Eesha Pendharkar, *The Number of Students in Special Education Has Doubled in the Past 45 Years*, EDUCATION WEEK, (July 31, 2023), <https://www.edweek.org/teaching-learning/the-number-of-students-in-special-education-has-doubled-in-the-past-45-years/2023/07> [https://perma.cc/F68U-BZNU].

186. Most states, Colorado included, provide state level boosters to special education funding for districts out of the state treasury. *See, e.g.*, S.B. 22-127, 73rd Gen. Assemb., 2d Reg. Sess. (Colo. 2022).

187. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386 (2017).

188. *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 161 (2017).

189. *See, e.g.*, ST. VRAIN VALLEY SCHOOL DISTRICT BOARD OF EDUCATION POLICIES, *supra* note 169.

so could be harmful for some students, and many people with ASD find ABA to be discriminatory against neurodiverse individuals.¹⁹⁰ However, a simple solution to this quagmire is for Congress to pass an amendment to the IDEA which lists ABA as a “related service” that must be provided to students with disabilities if the IEP team determines it necessary. Doing so would not mandate the use of ABA, but would place it alongside widely recognized services like audiology, speech pathology, and occupational therapy.

Short of federal legislation, the Department of Education should promulgate new rules which dictate to schools that they must provide ABA to students.¹⁹¹ For example, the IEP team is asked to consider “special factors,” like whether the student may need Braille or an assisted hearing device. To encourage IEP teams to consider ABA as an access-option for students with ASD, the Code of Federal Regulations (C.F.R.) should be amended to add it as a service. Adding this to the C.F.R. would also lend support to parents who wish to have ABA provided in the school building. This route would lead to more standardized use of ABA across the country. It would also mean that the funding for ABA would be easily accounted: It would come from school coffers, collected from the local communities in which students live. All students should have equal access to, and success within, education. An amendment to the C.F.R. would be a positive step toward that end.

On the other hand, allowing parents to force schools to provide their student with ABA therapy would completely destabilize the system that the IDEA created, which values the expertise of local educators. Over the course of decades, a delicate balance between parents, teachers, and school districts has formed to provide students with access to FAPE. Schools are often incapable of surviving significant financial changes, and ABA is an expensive therapy option. In school districts where several students need an ABA provider, the taxpayers may face significant increases that are not politically tenable. Ultimately,

190. Catherine Lord, *The Controversy Around ABA*, THE CHILD MIND INST. (Nov. 6, 2023), <https://childmind.org/article/controversy-around-applied-behavior-analysis> [<https://perma.cc/3M8Z-3TUP>]; *ABA Risks*, INSTEAD OF ABA, <https://www.insteadofaba.org> [<https://perma.cc/6NYW-RRG9>] (advocacy group which argues ABA leads to greater incidence of PTSD, is ineffective, and strips people with ASD of their agency).

191. 34 C.F.R. § 300.324 (2017).

school districts answer to their local population, and voters often do not accept tax increases for services like special education.¹⁹² Therefore, in order to provide ABA to students in the school setting under an IDEA scheme, schools would be forced to cut funding from other programs, potentially harming the educational outcomes for other students.¹⁹³ It is this bind that school districts are desperate to avoid; it is difficult to sell voters on special education, as opposed to new programs catering to all students. Therefore, when the Colorado General Assembly wrote HB 22-1260, attempting to compel schools to allow ABA providers into schools, the legislature was forced to remove any provision that schools believed would compel them to provide ABA under the IDEA funding streams. However, cost should not be an excuse: The Colorado legislature should step up its support for local school districts' special education programming and provide funding for ABA providers where required by the IDEA.

D. Reimburse ABA Providers Fairly Under Medicaid

Colorado stands as one of the most progressive states for ABA reimbursement but it must do more to reimburse ABA providers for their medical treatment under Medicaid.¹⁹⁴ Parents using private insurance still report struggles with expensive copayment obligations.¹⁹⁵ Further, while Medicaid covers ABA therapy in Colorado with no copayments, parents report difficulties finding ABA providers because the reimbursement rate to such providers is too low.¹⁹⁶ In January 2024, the Senate Budget Committee voted to increase reimbursement for ABA providers in response to an exodus of

192. Jenny Van Dyne, *Four Colorado Springs-Area School Districts Denied Tax Increases*, THE GAZETTE, (Nov. 7, 2023), https://gazette.com/election-coverage/four-colorado-springs-area-school-districts-denied-tax-increases/article_d72f514e-7dd2-11ee-94f1-a79432ea4e4a.html [https://perma.cc/F9PM-F5GA].

193. Jenny Brundin, *For Years, The State Hasn't Paid Its Share of What It Costs to Educate Students With Disabilities. Now, More Money Is Coming, But Is It Enough?*, CPR NEWS (Apr. 8, 2022), <https://www.cpr.org/2022/04/08/colorado-special-education-funding> [https://perma.cc/677K-TCKQ].

194. See S.B. 15-015, 67th Gen. Assemb., Reg. Sess. (Colo. 2015) (provides high reimbursement rates for ABA providers).

195. Although insurers are required to cover ABA, typical copayments of thirty dollars per day adds up to hundreds of dollars per month for fulltime ABA services.

196. *Access to Medically Necessary Serv For Students*, *supra* note 7 (statements of several parents who attested to difficulty of receiving ABA).

ABA companies out of the state.¹⁹⁷ However, as of the writing of this Note, the Colorado Department of Health Care Policy and Financing continues to reimburse ABA providers at a rate lower than surrounding states like New Mexico, where the cost of living is lower.¹⁹⁸ Making sure that ABA providers are reimbursed properly represents another way to ensure all children who need ABA can access it.

CONCLUSION

For some students, autism spectrum disorder (ASD) is a devastating disability which limits communication, development, and their ability to effectively participate in school. Over the past fifty years, researchers have found that applied behavior analysis (ABA) greatly benefits some students who have the most severe forms of ASD. These benefits are both medical and educational in nature. They can help prevent people with ASD from self-harming, learn to communicate verbally for the first time, and advocate for their wants and needs. Though Congress did not write the Individuals with Disabilities Education Act (IDEA) at a time when researchers had proven ABA effective, the law aimed to ensure all students have the right to access free and appropriate education (FAPE). Without ABA, many students do not get that chance. Parents must continue to litigate through the complex IDEA adjudicatory framework to push on *Andrew F.* The Department of Education should promulgate new rules which compel IEP teams to consider ABA as a tool to help students. Finally, if the Colorado legislature wants students to have access to ABA in schools, it

197. Karen Morfitt, *State budget committee approves Medicaid reimbursement increase for autism care providers in Colorado*, CBS NEWS (Jan. 26, 2024), <https://www.cbsnews.com/colorado/news/state-budget-committee-approves-medicaid-reimbursement-increase-autism-care-providers-colorado> [https://perma.cc/BUH7-HC8F].

198. Nick Coltrain, *“They don’t have a voice”—Fiscal struggles shutter dozens of autism clinics—Families worry state funding will dry up and patient progress will come to a stop*, DENVER POST (Apr. 14, 2024), <https://infoweb-newsbank-com.colorado.idm.oclc.org/apps/news/openurl?> [https://perma.cc/VV39-PUN6] (“Rebecca Urbano Powell, executive director of Seven Dimensions Behavioral Health, said she watched her wait list balloon from two months to six months as the industry contracted in recent years. And with low reimbursement rates, she has lost entry-level workers to Starbucks and Walmart, she said, effectively cutting off entry into the behavioral health workforce before workers can get their feet under them.”).

should step up and provide the funding to achieve that end, either through Medicaid or through the IDEA.