

AUTISM AND THE LAW

Part 1: How 'Endrew' Can Improve Future Educational Prospects

By Lawrence R. Jones

This article is the first of a four-part special series on autism, in honor and recognition of National Autism Awareness Month.

In March, 2017, the U.S. Supreme Court issued its opinion in *Endrew F. v. Douglas County School District*, 580 U.S. ___, 137 S.Ct 988, 197 L. Ed. 2d 335 (2017). In *Endrew*, the court overturned a 10th Circuit Court of Appeals decision holding that a child with autism in a non-mainstreamed, special education program, under an Individualized Education Plan (IEP) was entitled only to an educational program that was calculated by the child's school district to provide "merely more than a de minimus" benefit. In a unanimous opinion authored by Chief Justice Roberts, the Supreme Court held that to meet its legal obligation under the Individuals with Disabilities Education Act

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(IDEA), "a school district must offer the special needs student an Individualized Education Plan (IEP) that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 14-15, 16.

The court emphasized that, in dealing with a special-needs child who is not mainstreamed, "the goals may differ" from those for a child in a regular education curriculum. *Id.* at 14. Nonetheless, "every child should have a chance to meet challenging objectives." *Id.* Moreover, the court held that while a primary standard for a fully included student may involve the child "progressing

smoothly through the regular curriculum," a different circumstance exists when a child is not fully included. *Id.* In such instance, school officials must look to the disabled child's unique needs to develop an IEP that is "pursuing academic and functional advancement." *Id.* at 11. Further, in a statement of interpretation dated Dec. 7, 2017, the U.S. Department of Education announced that, "The *Endrew F.* decision is important because it informs our efforts to improve academic outcomes for children with disabilities." Accordingly, *Endrew* essentially raises the legal bar for school districts in meeting their responsibilities

for overseeing the preparation of IEP plans for students with Autism Spectrum Disorder.

Under the spirit of *Endrew*, IEP plans must logically be approached and prepared with a constructive, creative and reasonably expansive mindset in order to meet a student's needs, with more than "de minimus" progress in mind. In this respect, a post-*Endrew* IEP plan for a special-needs student will reasonably involve: (a) developing meaningful objectives which (b) are challenging to an individual student, in terms of (c) addressing both academic and *functional* needs of the student as underscored by the court itself.

For certain, functional advancement means something beyond mere academic advancement. Otherwise, there would have been no need for the court to include the qualifying words "and functional" after the word "academic." These terms are expansive enough to include countless different potential components of meaningful IEP plans, which are designed to educationally and functionally assist a special-needs child on the path to adulthood.

Because of the inherently broad scope of the term "functional," as set forth in the context of a remedial Supreme Court decision, parents, school personnel, lawyers and judges may be analyzing and debating the meaning of this term under *Endrew* for years or decades to come. As *Endrew* is a relatively new case, there has been little opportunity for the development of a body of subsequent case law interpreting the scope of its language. Applying logic and

common sense, however, a reasonable person may reasonably conclude that, as a matter of law and social policy, *Endrew* expands the lens of focus in a pro-child manner upon not only the child's academic progress, but also the child's non-academic, functional progress and the need, when applicable, to improve a child's social skills to help meet a long-term "challenging objective" of achieving future independence and employability following graduation.

Since an IEP is an individualized education plan, each plan must be uniquely designed and tailored to appropriately fit each child's needs. While sometimes overlooked in the IEP process, it is clear that an underlying goal and purpose of any IEP, when possible, is "to prepare students for further education, employment and independent living." 300 C.F.R. 300.1. Hence, in preparing a child with special needs for the possibility of future employment and independent living, the focus must often logically be as much on a child's social deficits and challenges as on purely academic ones.

As expressly noted by the Supreme Court in *Endrew*, autism is a neurodevelopmental disorder generally marked by various behavioral components, including *impaired social and communicative skills*. *Id.* at 6. Further, under the DSM-5 for neurodevelopmental disorders, autism spectrum disorder includes deficits in *social* communication and interaction, and restrictive repetitive behaviors, interests and activities. Social communication deficits are particularly prevalent with

children who have Asperger Syndrome or "Asperger's"—which is often referred to as a high functioning form of ASD. Some students with Asperger's may perform exceptionally well in mainstream scholastic settings and even achieve test scores and grades which far exceed their non-disabled peers. Notwithstanding such academic success, the social deficits that often accompany Asperger's can, in certain instances, seriously obstruct a child's ability to successfully obtain or maintain a job later in life.

While academics are certainly important in the realm of special education, social skills are often at least as important—if not even more important—for long-term goals such as the child's future employability and independence. If a student has academic challenges but strong social skills, he or she may actually have a greater chance of obtaining and maintaining long-term meaningful employment than a student with strong academic skills but very poor social skills. Yet, time and time again, child study teams and other applicable school personnel often move a child with Asperger Syndrome and severe social challenges through the scholastic system without adequate supports to meet his or her needs, simply because the student has achieved good grades and performed well on standardized tests designed to measure progress. In essence, the child may fly under the radar for years, while receiving little or none of the educational help that could be most relevant and

beneficial to helping meet his or her special needs on the road to potential independence.

While an advancement from grade to grade may be appropriately ambitious for “most” children in a regular classroom setting, the *Endrew* court explicitly cautioned that this concept “should not be interpreted as an inflexible rule.” *Id.* at 14, note 2. Rather, the court expressly declined to hold that every special-needs child who is advancing from grade to grade is automatically receiving a free and appropriate education. As *Endrew* noted, an IEP is not a form document, but is “constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Id.* at 12. Such consideration should then be utilized to create an educational program that is “appropriately ambitious” in light of the circumstances, and which allows the special-needs student to strive for challenging objectives and goals. *Id.* at 14. The adequacy of an IEP turns on the unique circumstances of the child for whom it was created. *Id.* at 16.

Accordingly, while *Endrew* factually focused upon an autistic student who was placed outside of a mainstreamed, regular education setting, the ambitious spirit of the opinion arguably and logically applies, on an educational basis, to addressing the challenging social needs of students with high-functioning autism and/or Asperger Syndrome who may have in fact been placed

in mainstreamed classrooms, but who nonetheless still critically suffer from major social deficits and challenges which need to be appropriately addressed as part of a functional IEP plan. The overlooking or glossing over of such components of the disorders in educational planning may severely undermine the express purpose of the IDEA in helping further prepare such students for future education, employment and independent living.

Programs with an intense focus on the enhancement of social skills may be highly appropriate under *Endrew* as part of the “challenging objectives” for legal consideration by parents and school districts in the formulation of appropriate IEP plans. In the context of developing post-*Endrew* IEP plans for children with autism, Asperger’s and other ASD-related disabilities, there is often a very legitimate need to place social skills on as important a level as academic skills. Historically, there has been an overwhelming focus in the plan on academics, but comparatively little focus on specific plans, exercises and goals relating to the child’s need for developing and/or improving social skills. Further, some IEPs address the issue of social skills in an overgeneralized manner, without any specific, detailed plan, such as how such improvement is designed to take place, or how success will be incrementally measured over time, or who will be doing the measuring and analysis of progress, or the

need for periodic adjustments of an ongoing program in order to reach certain milestones and goals.

Some academic traditionalists or purists take the position that education in school is supposed to be primarily about academics, and that ancillary concerns such as “socialization” are of secondary importance. Given the purpose of our special education laws and policies, however, such a viewpoint is arguably out of step with the expansive spirit of *Endrew* itself. In fact, there is an often overlooked, or unknown, federal regulation found at 34 C.F.R. 300.320(a)(4), which states that, when possible, an IEP is to be designed with a goal to enable the child to not only advance appropriately toward attaining annual goals, and to be involved in and make progress in the general education curriculum, but also to participate in extracurricular and other nonacademic activities, and participate with other children with disabilities and non-disabled children. Accordingly, in creating an appropriate IEP plan, the federal regulations to IDEA require consideration and focus not only on the student’s academic needs, but on non-academic needs as well.

By intensifying focus upon not only a child’s academic needs but social needs in creating a functional IEP, educators and parents can jointly improve the quality of services provided to many children with autism in a more expansive manner, consistent with the ambitious spirit of *Endrew* itself. ■

AUTISM AND THE LAW

Part 2: Discrimination Against Persons with Autism

By Lawrence R. Jones

This article is the second installment of a four-part special series in honor and recognition of National Autism Awareness Month.

New Jersey's Law against Discrimination (LAD) protects against discrimination based upon age, race, gender, marital status, disability and other categories as well. See N.J.S.A 10:5-5, 10:5-12. Accordingly, as a matter of public policy, our case law is evolving so as to help eradicate the cancer of discrimination. See *L.W. v. Toms River Regional Schools Board of Education*, 189 N.J. 381, 399 (2007). Freedom from this cancer is in fact one of the fundamental principles of our society. *Lehmann v. Toys R Us*, 132 N.J. 587, 600 (1993).

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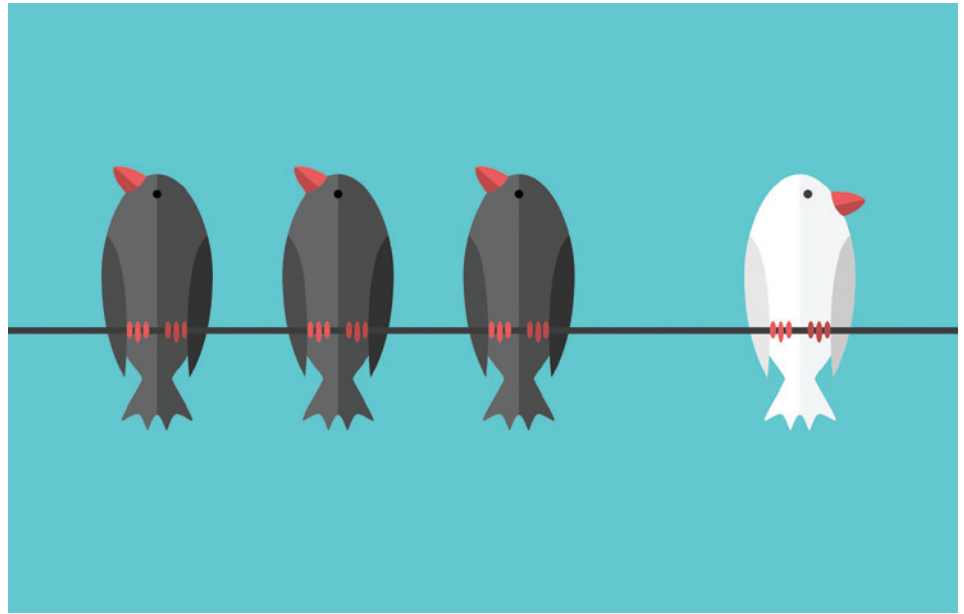


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The recent case of 'Oasis Therapeutic Life Centers v. Wade' serves as a significant breakthrough in this underdeveloped area of the law.

While there is a growing body of precedential case law that focuses on issues of discrimination based upon race, religion, gender, age, familial status, and various physical disabilities, there has been comparatively little focus of the law of discrimination relating to persons with developmental disabilities such as Autism Spectrum Disorder. The recent case of *Oasis Therapeutic Life Centers v. Wade*, ___ N.J. Super. ___ (App. Div. 2018), however, serves as a significant

breakthrough in this underdeveloped area of the law. *Oasis* is relevant in not only in addressing discrimination against people with autism, but in serving as a decision which has been approved for publication by the Committee on Judicial Opinions, thereby giving the ruling a significant degree of precedential value.

In *Oasis*, plaintiff alleged that defendants interfered with efforts to purchase property for use as a group home for persons with

autism, in violation of the New Jersey Law Against Discrimination. The trial court dismissed plaintiff's action. On appeal, however, the appellate court reversed and remanded the matter for further trial-level proceedings, concluding that plaintiffs set forth a case that defendants "targeted and tormented Oasis because Oasis was providing a residence for autistic individuals." The court concluded that plaintiffs established a potential cause of action because: (a) it is unlawful to discriminate against a buyer of real estate because of the disabilities of the persons with autism intending to live on the premises, N.J.S.A. 10:5-4.1; and (b) it is improper, with discriminatory intent, to interfere with another's transaction under N.J.S.A. 10:5-12, by attempting to obstruct plaintiff's attempt to secure a monetary grant from a nonprofit foundation to assist with the proposed purchase of the subject estate to establish the group home.

From a legal standpoint, the alleged facts of *Oasis* are particularly noteworthy. Apparently, there were some homeowners and residents who opposed the creation of a group home for persons with autism in the neighborhood where they resided, based upon unfounded, purported "fears" that people with autism were somehow dangerous to the community and/or created a risk to public

safety. Certain neighbors began a door-to-door campaign, compiling signatures on a petition objecting to the proposed group home, and taking steps to derail or otherwise interfere with the property owner's plan to sell his land to the organization intending to establish the group home on the property.

When such efforts failed, and the land sale was proceeding, the defendant-neighbors attempted to interfere with the group home's access to a shared driveway (erecting a fence across the easement), and further defaced and vandalized the area around the property with "enormous, garish and frightening graffiti" that included depictions of snakes and fire covering approximately 600-700 square feet on and around the property driveway. Thereafter, defendants participated in having animals trespass onto the Oasis property, including an aggressive goat and a horse that grazed and left piles of manure on the land.

For the autism community, the legal and social relevance of *Oasis* potentially extends far beyond the specific facts of the case. In a larger sense, *Oasis* shines a light upon the reality that as members of the autistic community become further integrated into the mainstream of society, there may potentially be additional cases and circumstances where the cancer of discrimination rears its head in the form of unfounded stereotypes and

misinformation, resulting in additional social hardships to persons with autism. For this reason, it is critical that members of the autistic community, as well as family members and professional service providers, become as educated as possible not only on the nature of ASD itself, but on the legal rights designed to protect persons against prejudice and discrimination as well.

What is particularly interesting about the *Oasis* opinion is that while the content focuses upon the New Jersey Law against Discrimination and its liberal construction and application under N.J.S. 10:5-1, the decision makes no specific reference to a 2009 statutory amendment to N.J.S.A. 10:5-12(q) which provides that the anti-discrimination statute applies to persons with a disability "which shall include, but not be limited to ... any ... developmental disability, *including autism spectrum disorders*" While the Legislature amended the law nearly a decade ago in order to better protect members of the autistic community from discrimination in housing, employment and other important aspects of daily living, many people are simply unaware that this statutory provision exists. Yet, it does exist and will likely be relevant on an ongoing basis to the autistic community and the public as a whole.

As a participant to the drafting and enactment of this statutory

amendment, the author can detail the history of this legislative development. In 2007, the New Jersey Legislature enacted legislation enabling the governor to (a) create an “Adults with Autism Task Force” and (b) appoint its members. The main function of the Task Force was to study the needs of adults in the autistic community, and to write a report of concise recommendations for consideration of implementation by the governor and legislature. In 2009, following over a year of intensive study and debate, the Task Force rendered a report of 44 specific recommendations to the governor on ways to assist adults with autism, including, but not limited to, issues relating to the development of day programs, life skills, health care, employment, housing, and private sector engagement.

This author chaired the Legal Issues Subcommittee of the Governor’s Task Force. A copy of the 2009 report is available here: <http://state.nj.us/humanservices/ddd/boards/AATFrpt.pdf>

As part of this report to the governor, the Task Force recommended an amendment of N.J.S.A.

10:5-1(q), to expressly reflect an intent of the governor and legislature to prohibit discrimination against persons with autism and other developmental disabilities. This clarification was of specific importance to the Committee on various issues including but not limited to housing, so as to cover the exact type of circumstances that ultimately arose in the *Oasis* case. In the end, the legislature voted overwhelmingly to approve the proposed amendment accordingly.

While nearly 10 years have passed since enactment of this statutory amendment, the issue of discrimination against persons with autism has rarely presented itself in such a publicly magnified manner as in *Oasis*. The concept of neighbors acting out in such a socially inappropriate manner against developmentally disabled members of our society reflects not only a genuine present risk of discrimination, but also exemplifies why there is a need for (1) heightened social education on autism in general, and (2) greater social tolerance, acceptance and inclusion of persons with autism and other developmental disabilities.

For these reasons, and consistent with the spirit of April as National Autism Awareness month, it is urged that our public officials and the legal community spend a reasonable allotment of time and energies in educating the public in a constructive manner on Autism Spectrum Disorder. Arguably, the more educated the general population becomes about autism, the less common will be occurrences of discrimination based upon ignorance, and fear-induced prejudices which have no legitimate place in our society.

Moreover, as nearly 10 years have passed since the issuance of the 2009 Report to the Governor, the time is arguably ripe for the present New Jersey Legislature and governor to convene a new task force to review the status and progress made in assisting the autistic community over the past decade, and to thereafter update, develop and frame fresh new strategies to meet specific, still-outstanding goals and objectives. Such new strategies would logically include but not be limited to the goal of effectively countering and eradicating the cancer of discrimination against persons with Autism Spectrum Disorder. ■

AUTISM AND THE LAW SERIES

Part 3: Why NJ Must Increase Social Awareness of the Need for Early Diagnosis

By Lawrence R. Jones

This article is the third installment of a four-part special series in honor and recognition of National Autism Awareness Month.

On April 26, 2018, the United States Center for Disease Control (CDC) issued a periodic report of updated findings by the Autism and Developmental Disabilities Monitoring (ADDM) Network. The results were noteworthy and must be viewed as relevant by lawmakers throughout the state and nation.

The data contained in the report reflected that the estimated percentage of children identified with Autism Spectrum Disorder (ASD) was higher than in previous reports. Approximately one in 59 children were identified with ASD, based on tracking within 11 communities in the United States. (2018 Report, page 2.) Moreover, the percentage of children identified with ASD was significantly higher in areas of New Jersey than in other specified parts of the country. In New Jersey, the incidence was one in every 34 children—the highest rate of any state included in the study.

The reasons for regional differences in statistics are unknown, and may have been partly attributable to the diagnosis

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The study reflects that most children (85%) identified with ASD actually had concerns about their development noted in their records by three years of age.

process. Both on a state and national level, however, it is clear that the rate of autism is prevalent and recurring enough to warrant increasing public concern and focus. For this reason, the ADDM report itself expressly urges policymakers and community leaders to use the information in its report of findings to: (a) promote social awareness of autism spectrum disorder and bring the community together to address the growing needs of families living with ASD; (b) develop policies and promote early identification and equity in access to services and supports so that all children get the help they need; and (c) serve as the basis for the creation of a task force or commission, focused on

the coordination of ASD activities in local communities.

The ADDM report further notes that service providers, such as healthcare organizations and school systems, can use the findings in the report to: (a) promote early identification efforts in order to lower the age when children are first evaluated for developmental concerns, diagnosed with ASD, and enrolled in community based support systems; (b) plan for resource and service needs; and (c) target outreach to under-identified groups of children.

Moreover, the study reflects that most children (85%) identified with ASD actually had concerns about their development noted in their records by three

years of age. Specifically, parents or caregivers may have noticed concerns through ongoing tracking of a child's development (developmental monitoring) and/or developmental screening. Parental concern regarding development is a reason to have a comprehensive developmental evaluation. In turn, such evaluation is often a key step in getting access to services, including through an applicable school system. Yet, while the majority of children with ASD had concerns about their development documented in their records by three years of age, there was frequently a lag between first concern and first developmental evaluation. Accordingly, despite the fact that developmental concerns were noted in many of children's records by three years of age, fewer than half of children with ASD received a comprehensive developmental evaluation by this same age. Further, while ASD can be diagnosed as early as two years of age, about half of children were not diagnosed with ASD by a community provider until after four years of age. Such a lag can negatively impact when children with autism may begin to actually obtain the services they need. It is well-established that obtaining services as early as possible can make a very positive and meaningful difference in the development of a child with autism. Unfortunately, however, the CDC study found that fewer than half (42%) of children with ASD received a developmental evaluation by three years of age. Yet, the percentage of children with ASD increased in New Jersey, from about 2.5% in 2012 to about 3%, in 2014.

Future efforts may therefore need to emphasize the importance of screening young children with standard tools and connecting families to needed services before three years of age. The importance of early diagnosis and intervention cannot be overstated. As noted in the undersigned's judicial opinion in unreported New Jersey case of *Rooney v. Wall* (2015):

There is no known "cure" for autism. It is well-documented

and critical to note, however, that young children who receive an early diagnosis, followed by intense behavioral intervention often make very significant improvement to the point that they can effectively mainstream with non-autistic children, both in school and otherwise. In the realm of intervention and behavioral therapy for autistic children, perhaps the most recognized form of behavioral intervention is known as Applied Behavioral Analysis (ABA), with a sub-category known as discrete trial techniques (DTT). This type of therapy is based on a 1987 study conducted at UCLA known as the "Lovaas" study, which supports intense behavioral interventions of 25-40 hours a week or more.

Generally, the earlier the diagnosis and start of intense therapeutic intervention, the greater the chance for possible success in improving the autistic child's functional abilities. Some professionals refer to the age bracket of two-to-five as the greatest "window of opportunity to improve an autistic child's functionality, since the brain is still forming (i.e., the age of "plasticity of the brain") Thus, failure to provide a young autistic child with intense behavioral intervention during his or her early years of life may have significant negative consequences on the child's progress and future (*Citing Dr. Sandra Harris in "Right from the Start: Behavioral Intervention for Young Children with Autism 2d edition (2007).*).

This benefit of early diagnosis and intense early intervention, was documented in a 1987 study by Dr. Ivar Lovaas of UCLA, who was considered one of the major pioneers is the treatment and education of children with autism.

According to the CDC, there are possible "red flags" that a child might

possibly have autism. For example, a child with ASD might:

- Not respond to their name by 12 months of age
- Not point at objects to show interest (point at an airplane flying over) by 14 months
- Not play "pretend" games (pretend to "feed" a doll) by 18 months
- Avoid eye contact and want to be alone
- Have trouble understanding other people's feelings or talking about their own feelings
- Have delayed speech and language skills
- Repeat words or phrases over and over (echolalia)
- Give unrelated answers to questions
- Get upset by minor changes
- Have obsessive interests
- Flap hands, rock his/her body, or spin in circles
- Have unusual reactions to the way things sound, smell, taste, look, or feel

A child may possibly have autism even without demonstrating any or all of these traits. If a parent or guardian believes that his or her child might possibly have autism, it is logical for such parent or guardian to schedule an appointment with the child's physician as soon as possible. If the child does in fact have autism, an early diagnosis and the start of intense early intervention may potentially make a world of difference in the child's future progress.

Based upon the findings of the report from the ADDM and CDC, there is arguably a clear and compelling social need to focus upon increasing public education and awareness of the need for early diagnosis of childhood autism. Accordingly, in view of these statistics, the New Jersey governor and legislature may consider reviewing the status of the state's prior public awareness efforts and strategies, and thereafter launching an increased public awareness campaign through the Department of Health and/or Human Services of the critical importance of early diagnosis and intervention of children with autism. ■

AUTISM AND THE LAW SERIES

Part 4: Separation, Divorce and a Child With Autism

By Lawrence R. Jones

This article is the fourth and final installment of a special series in honor and recognition of National Autism Awareness Month.

The United States Center for Disease Control (CDC) has recently reported that one in 59 children have Autism Spectrum Disorder (ASD). Given the nearly 50% divorce rate in the United States, it is mathematically likely that a reasonably active matrimonial attorney will, over the course of a career, professionally participate in one or more cases involving parents of a child with autism.

Unfortunately, when one mixes a contentious divorce with the unique challenges and responsibilities of raising a child with autism, a complex dynamic often emerges. Specifically, two participants ending an unsuccessful marriage with “irreconcilable differences” must nonetheless attempt to work functionally together as joint parents in accepting, understanding and

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meeting their child’s special and intricate needs. Inherent in this joint obligation is the further need of each parent to fully and fundamentally appreciate how a failure of mutual cooperation can potentially threaten the child’s progress and ability to fully reach his or her potential regarding behavioral improvement, mainstreaming and independent functioning.

Studies repeatedly show that children with autism have an increased chance of improvement when they receive: (a) an early diagnosis and (b) intense early invention via behavioral therapy and other related therapies. What most, if not all, therapies appear to have in common

is the requirement of application of intensity and consistency in reinforcement on a regular (daily) basis. Additionally, studies show that the earlier the child is diagnosed and professional intervention begins, the greater chance there may be of success. This concept is based upon the idea of *plasticity* of the brain, meaning that the brain is more flexible and susceptible to changing its thinking patterns when a child is very young. Conversely, the older a child grows with little or no behavioral intervention, the smaller the window of opportunity may shrink for the child to ultimately achieve results in accordance with his or her inherent potential.

For this reason, it is beneficial for both parents to be fully on the same page in supporting sustained consistency of the therapeutic approach, delivery and reinforcement in the generalized settings of the child's everyday life. In the case of a contentious separation or divorce, however, former partners often have "irreconcilable differences" over absolutely everything, and either cannot or *will not* attempt to respectfully and effectively communicate or cooperate with each other on anything at all. Instead, power struggles often supersede logic and reason, leading otherwise reasonable and responsible parents to spend exorbitant time, money and negative energies on contentious litigation, while emotionally destabilizing their own child in the process.

In the case of a child with autism, parents who engage in a never-ending war with each other may not only stress their child, but can impair the intensity and consistency of the child's ongoing therapeutic program. While some divorced parents of a child with autism are in fact able to put their past marital issues aside and work together to maintain a consistent approach between two homes during each party's respective parenting time, other ex-couples are not so successful. Instead of peacefully, flexibly and constructively synchronizing their efforts for their child's sake, they perpetually fight and create their own impediment to a consistent approach and therapy schedule. This unfortunate circumstance sometimes leads to stagnation or even regression in the child's improvement, which may have long-term consequences on the child's road to mainstreaming, functioning, and his or her possible

chance of achieving independence as an adult.

So long as there is no restraining order prohibiting contact between the parties, separated or divorced parents of an autistic child generally have a clear ongoing obligation to attempt to cooperate and consistently address the needs of the child, rather than dooming the child's chances for improvement as the result of ongoing parental hostility and dysfunction. Often, following educational mediation sessions, counseling sessions or settlement conferences, the parties agree to forge a working relationship as divorced co-parents for the child's sake. When parties are unable or unwilling to do so, however, custody litigation often arises.

In custody litigation, a court's function is to protect the child's best interests. *Hoefers v. Jones*, 288 N.J. Super. 590, 608 (Ch. Div. 1994). The controlling consideration is the child's welfare. *See Sobel v. Sobel*, 46 N.J. Super. 284, 286 (Ch. Div. 1957). For certain, a court in any case must consider the statutory factors in the New Jersey custody statute, N.J.S.A. 9:2-4. Among the relevant statutory factors for consideration are: the needs of the child, the safety of the child, the quality and continuity of the child's education, and the fitness of the parents. Notably, however, the statutory factors for custody under N.J.S.A. 9:2-4 are not exclusive or exhaustive. To the contrary, the statute expressly states that in making an award of custody, "the court shall consider but not be limited to the (statutory) factors."

Accordingly, several years ago, the author of this article joined with noted autism expert Dr. David

Holmes (formerly of Princeton University) to develop proposed additional criteria for family courts to consider when adjudicating custody litigation concerning a child with autism. Labeled as the "Jones-Holmes criteria," these considerations were published in a 2009 article in *New Jersey Lawyer* magazine entitled: "Autism and Divorce: Guidelines for Family Court Practice," and were further presented at the Autism Society of America's annual convention in Pittsburgh in 2013, and the American College of Forensic Psychology symposium in San Francisco in 2008. The author included the criteria in the unreported opinion of *Rooney v. Wall* (Ocean County, 2015), which involved custody of a child with autism.

The Jones-Holmes criteria include the following additional factors, which a court may appropriately wish to consider on issues concerning custody and the child's best interests:

1. Each parent's role in obtaining the initial diagnosis of autism, and any delay caused by a parent in obtaining the diagnosis;
2. Each parent's acknowledgment and acceptance of the child's autistic disorder, as opposed to a denial of the condition;
3. Each parent's role in obtaining early intervention and therapy for the child, and the reasons for any delay in attempting to obtain services for the child;
4. Each parent's ability to reinforce and follow through on daily recommended behavioral interventions for the autistic child, and the level of participation the parent has in working with the autistic child;

5. Each parent's history of increasing his or her education on the needs of an autistic child, by attending seminars, joining autism support groups, seeking private professional assistance and engaging in other reasonable self-education techniques;
6. Each parent's history of willingness to be a tireless and effective advocate for the autistic child, and ability to do so;
7. Each parent's ability to handle the emotional and psychological stress which may be involved with raising a particular child;
8. Each parent's understanding and appreciation of the importance of early intense and consistent intervention, and potential consequences to the child and family if intervention does not take place;
9. The quality of the special education (either in public school or private school) the child will receive while in the parent's care.

Pursuant to N.J.S.A. 9:2-4(a) a court has discretion to establish different types of custody, including joint or sole residential or legal custody. Public policy generally favors joint legal custody. *Beck v. Beck*, 86 N.J. 480 (1981). However, joint legal custody requires an ability of parties to agree, communicate and cooperate in matters involving the health, safety and welfare of the child. If there is no ability to cooperate, then sole custody may be appropriate in some circumstances. See *Nufrio v. Nufrio*, 341 N.J. Super. 548, 552 (App. Div., 2001).

Before granting sole custody to one parent, however, a court has discretion to provide an opportunity for a previously non-cooperative parent of an autistic child to demonstrate the ability to act in a manner consistent with the child's special needs. With regard to parenting time with an autistic child following separation or divorce, it is generally recognized that absent compelling circumstances, each party will be entitled to reasonable parenting time in his/her home. Indeed, public policy favors the right of the parents and child to have parenting time. See *Wilke v. Culp*, 196 N.J. Super. 487, 496 (App. Div., 1984). Yet, in determining the parenting specifics of a custodial arrangement, a primary and controlling consideration is the welfare of the child. See *Fiore v. Fiore*, 49 N.J. Super. 219, 225 (App. Div. 1958). When weighed, balanced against the constitutional principles, *parens patriae* jurisdiction must be of paramount importance. See *Hoefers v. Jones*, 288 N.J. Super. 590, 608 (Ch. Div. 1994).

Accordingly, while it is understood that the accommodation of a reasonable parenting schedule between homes may logically require consideration of some reasonable flexibility or adjustment to a therapeutic schedule that has been in place for the child, a parenting schedule should not unduly or unreasonably interfere with the general ability of the child to attend a regular schedule of behavioral therapy with intensity and consistency. Further, when possible, the parents should attempt to implement similar approaches to

therapy and reinforcement in their homes, so as not to go against the child's need for consistency by presenting inconsistent or conflicting expectations. Additionally, when possible, both parents should be simultaneously receiving the same information, advice, input and feedback from any of the child's treating professionals (therapists, teachers, etc.), so that the parents are on the same page in providing a consistent program to enhance the child's potential progress.

It is advisable for both parents to engage in consistent and ongoing parental training on autism. Additionally, when permissible and not prohibited by a restraining order, parents should strive to engage in positive, constructive, coordinated communication with each other on the child's progress. There should be no parental arguments in the child's presence which may cause the child unnecessary stress.

If the evidence reflects that a parent is acting in a manner which unreasonably interferes with or undermines the autistic child's therapeutic and educational program, or need for parental cooperation and support of a consistent program, a court may take any and all action to protect the child's interests, including short or long term modifications of custody and parenting time schedules, and/or a requirement of further mandatory education for the interfering parent on the nature and intricacies of autism. Hopefully, with responsible and cooperative conduct by both sides, such steps will rarely be necessary to protect a child's best interests. ■