

Special Education Fact Sheet # 3

THE RIGHT OF CHILDREN WITH AUTISM AND PERVASIVE DEVELOPMENTAL DISORDER (PDD) TO APPLIED BEHAVIORAL ANALYSIS (ABA) THROUGH SPECIAL EDUCATION AND EARLY INTERVENTION

This fact sheet explains the rights of children with autism and pervasive developmental disorder (PDD) to Applied Behavioral Analysis (ABA) through the Special Education and Early Intervention Programs, and the steps parents need to take to increase their chance of obtaining these services.

Q: Is my child entitled to Applied Behavioral Analysis (ABA) through the Special Education and Early Intervention Programs?

A: Under special education law, children with disabilities are entitled to a free and appropriate education and related services. This does not mean that children have the right to the best programs or to services that will maximize their functioning or development. The word “appropriate” has been defined in court decisions to mean: reasonably calculated to enable a child to learn. If the program and services that are being proposed or provided by the Committee on Special Education (CSE), Committee on PreSchool Education (CPSE), or school-based IEP team do not meet your child’s educational needs, and you can show that ABA is needed to enable your child to learn, the Department of Education must provide ABA for your child, in a setting and in a sufficient number of hours that will meet your child’s educational needs. If the CSE or CPSE does not agree to do this on its own, you may have to go to a special education hearing to get a hearing officer to order that ABA be provided for your child.

Under the Early Intervention Program, infants and toddlers with developmental disabilities are entitled to programs and services that are designed to meet their needs and to enhance development and minimize developmental delay. As with special education, if your child’s Individualized Family Service Plan (IFSP) does not meet your child’s developmental needs and does not minimize developmental delay and you can show that ABA is needed to meet your child’s developmental needs and minimize developmental delay, your child will be entitled to ABA in the setting and number of hours that is necessary to meet your child’s needs.

Q: How can the Department of Education or Early Intervention Program provide ABA to my child, or how can a hearing officer order that ABA be provided, if not enough ABA programs exist?

A: By law, the Department of Education and Early Intervention Program must provide necessary programs and services to your child, even if they must create new schools and programs, hire additional staff, train existing staff, or provide services in your home to do so. Once you demonstrate that your child is entitled to a program or service under the law, it is the Department's or Early Intervention Program's responsibility to figure out a way to provide the program or service.

Q: What types of programs and services might my child be entitled to under the Special Education and Early Intervention Programs?

A: A partial list of what your child may be entitled to through the Special Education and Early Intervention Programs is as follows:

1. Placement in a public or private school or program that provides ABA;
2. Provision of ABA services in home or payment by the Department of Education or Early Intervention Program for privately-arranged in-home services;
3. Provision of additional hours of ABA instruction if your child is receiving an insufficient number of hours;
4. Reimbursement for previous payments for ABA home or private school program;
5. Transitional services to help children with autism and PDD to transfer to more mainstream programs and schools; and
6. ABA in kindergarten and grade school for children who are too old for private preschools providing ABA.

Q: What should I do to obtain ABA through the Special Education or the Early Intervention Program?

A: To obtain ABA in the Special Education or Early Intervention Program, you need a professional evaluation stating that your child needs the particular program or service. Unless the evaluations conducted or arranged by the Department of Education or Early Intervention Program recommend ABA for your child, you will need to obtain an independent evaluation of your child by a professional. If you do not know where to find an independent evaluator, the local Protection and Advocacy offices funded under the Developmental Disabilities Act, or one of the parents' groups in the State, may be able to give you the names of evaluators who can provide such evaluations. Parents' groups can also provide you with other information about autism and ABA.

If the evaluation you obtain on your own concludes that ABA is necessary for your child, you need to show it to the Committee on Special Education, Committee on PreSchool Education, other school-based IEP team, or Early Intervention Multidisciplinary Team and ask for ABA for your child. You should show these independent evaluations to these committees or teams and ask for ABA even if the members have said that ABA is not available or will not be provided to your child. By law, these teams and committees only have to provide services that they know or have reason to know are necessary and appropriate. If the Department's or Early Intervention Program's own evaluations do not conclude that ABA is needed, and independent evaluations recommending ABA have not been given to these committees and

teams, the CSE, CPSE, or Early Intervention Program can take the position that they had no reason to know the service was needed and therefore have no obligation to provide it. Your own statements to these teams or committees that you believe it is needed may not be enough to trigger their obligation, so you must show your independent evaluations to them as well.

If you show the independent evaluations concluding that ABA is necessary for your child to the Committee on Special Education, Committee on Preschool Education, or Early Intervention Team, and they deny your request for ABA or agree to provide fewer hours of ABA than the evaluation recommends, then you should contact New York Lawyers for the Public Interest (NYLPI) or another attorney about possible legal representation at an impartial hearing.

If your child is aging out of a preschool ABA program and you are concerned that your child will not get ABA next year, you must take the same steps. Show the evaluations and proof that your child has benefited from ABA to the CSE or school-based IEP team, ask for what you want, and contact NYLPI or another attorney if your request has been denied.

Q: What documents will a lawyer or advocate need to see to evaluate my case?

A: To give you advice, evaluate your case, or represent you at a hearing, a lawyer will usually need to see the following:

1. The most recent evaluations conducted by or for the Department of Education or Early Intervention Program;
2. Independent evaluations recommending ABA;
3. IEP's or IFSP's, both final and proposed, over the last year;
4. Any progress reports from your child's school and current ABA provider, if applicable, written within the last year;
5. A description from you, either written or verbal, of what happened at your CSE, CPSE, school-based IEP team, or Early Intervention team meeting when you requested ABA, including the decision and the reasons given for the decision; and
6. A description of any in-home or other ABA services your child is receiving now.

Q: How can I get an independent evaluation that will be of greatest help in my child's case?

A: The success of a Special Education or Early Intervention meeting or hearing depends on how up-to-date and detailed your child's independent evaluations are. You can help your child's case by making sure the evaluator discusses each of the issues listed below in the written evaluation:

1. A description of the specific amount (in hours and days per week) of ABA services that your child needs and whether the ABA must be provided one-on-one or in a group setting.
2. A description of what services, other than speech and language, should be provided through ABA.

3. An explanation of why ABA, in the manner and number of hours requested, is necessary for your child in particular.
4. A discussion of any other methods of instruction and programs your child has received, and effectiveness or lack of effectiveness of these programs for your child.
5. The number of hours and duration of any home or private ABA programs provided to your child.
6. Any progress or observed changes in your child since your child has begun to receive ABA.
7. Any conclusions about the factors responsible for your child's progress.
8. A description of any observations that the evaluator has made of your child at school or in a home ABA program.
9. If the evaluator believes that ABA must be provided either in a center-based or home setting, an explanation of why.

You may want to show this list to the evaluator before the evaluation begins, to ensure that the evaluator knows that you want these issues to be addressed.

It is important to understand that an evaluation generally stating that a full-time ABA program is recommended for your child without any explanation of the basis for this conclusion may not be enough, and follow-up evaluations or written reports that discuss these issues may be needed. It is preferable, but not absolutely necessary, to get the evaluator to address these issues before you contact a law office.

It is also important to remember that you do not have to demonstrate that ABA is the only, or the most effective, method of instruction for all children with autism. You only have to show that ABA is necessary for your child. In fact, arguing that your child is entitled to ABA because every child with autism needs ABA may even hurt your position. The special education and early intervention laws are based on the principle that each child is entitled to the services necessary for him/her. Therefore, the question of what other children need is irrelevant. Further, there are some families with children with autism who are satisfied with the services that the special education and Early Intervention programs provide, and CSE's CPSE's, and Early Intervention Teams are aware of this fact, as are hearing officers. It will not improve your case to argue otherwise.

***DUE TO THE GENERAL NATURE OF THE INFORMATION PRESENTED, THIS FACT SHEET SHOULD NOT BE REGARDED AS LEGAL ADVICE. ***

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