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With Rise of Autism, Courts Face Challenging Legal Issues

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On April 14, 2012, Governor Andrew Cuomo signed a proclamation declaring the month of April as Autism Awareness Month. In this regard we will examine the federal Patient Protection and Affordable Care Act (ACA) and its creation of "Health Care Exchanges" providing "mental health and substance use disorder services, *including behavioral health treatment*."¹ While the ACA is a great step forward it leaves it to each state to determine whether autism is included within the definition of "behavioral health treatment." Further, New York's recently enacted "autism insurance" reform law has raised questions about its accessibility to autistic individuals. In addition, there is a developing body of law involving issues and services affecting autistic individuals including the side effects of childhood vaccines, violations of the Individuals with Disabilities Education Act, personal injury lawsuits, guardianships, civil commitment and criminal abuse. Lastly, we shall discuss a new diagnostic publication that has raised concern in the autism community.

Autism Awareness

Clearly, the public's awareness of autism² has increased exponentially in the last few years, and with good reason. In 2010, the Centers for Disease Control (CDC) released data indicating that approximately one in 110 children in the United States had an autism spectrum disorder (ASD). Just two years later the CDC updated its estimates finding that autism rates affected one in 88 American children (one in 54 boys and one in 252 girls). "Although autism is often thought of as a disorder of childhood, its impact can be felt well into adulthood. The substantial costs resulting from adult care and lost productivity of both individuals with autism and their parents have important implications for those aging members of the baby boom generation approaching retirement."³

Affordable Care Act

Enacted by Congress in March 2010, the Patient Protection and Affordable Care Act⁴ (ACA) was intended to "increase the number of Americans covered by health insurance and decrease the cost of health care."⁵ While comprehensive in approach this well meaning legislation fails to specify what behavioral disorders are actually covered.

Health Care Exchanges. A key provision of the ACA is the mandate that requires most Americans to maintain "minimum essential" health insurance coverage.⁶ ACA aimed to increase access to health insurance through an expansion of Medicaid and private insurance, and in order to facilitate the selection of health insurance plans, ACA created "health care exchanges."

The exchanges, effective Jan. 1, 2014,⁷ are a new mechanism for individuals and small businesses to purchase health insurance, in which only "qualified health plans" offering an "essential health benefits" (EHB) package would be made available.

Behavioral Health Treatment. Included among the 10 general categories of EHB was "mental health and substance use disorder services, including behavioral health treatment."⁸ In December 2011, the U.S. Department of Health and Human Services (HHS) issued guidance on ACA, stating that each state could determine which "essential health benefits" must be provided in policies sold through the state's exchange, giving each state the discretion to select a benchmark plan based on options currently offered in the state, which all insurers must then match.

New York's Exchange. On April 12, 2012, the State of New York established its exchange "within the Department of Health" via New York Executive Order 42. The executive order gave the exchange authority to work in conjunction with the New York State Department of Financial Services and other agencies to carry out requirements of ACA. On Oct. 26, 2012, New York submitted its blueprint application for its state-based exchange to HHS for approval.⁹ On Dec. 14, 2012, New York received conditional approval from HHS to operate its state-based exchange.

Autism Insurance

On Nov. 1, 2011, New York became the 29th state to adopt autism insurance.¹⁰ Under New York's autism insurance reform law, state-regulated insurance plans that were to be issued, renewed or modified from Nov. 1, 2012, forward were required to cover the screening, diagnosis and treatment of ASDs. When the law was enacted it required that regulations be promulgated regarding those who provide behavioral health treatment, including Applied Behavior Analysis (ABA). On the eve of New York's autism insurance reform law's effective date, the New York Department of Financial Services issued emergency regulations¹¹ that required service providers to be New York state-licensed psychologists, psychiatrists, or social workers as well as board certified behavior analysts.

However, while national certification currently exists for behavior analysts that provide ABA, state licensure does not currently exist in the State of New York. Thus, autism advocates have taken the position that the promulgated regulations drastically reduce coverage of ABA, as no behavior analyst can satisfy the licensure mandates.¹² Accordingly, while state law requires all insurance policies issued in New York to cover ABA, the accessibility to ABA therapy covered by insurance seems, at this time, to be unsatisfactory to those seeking same.

Childhood Vaccines

To those who are of the belief that autism was a side effect of childhood vaccines, the U.S. Supreme Court's 2011 ruling in *Bruesewitz v. Wyeth*¹³ foreclosed litigation against vaccine manufacturers. Those possibly affected must now rely solely on a compensation system created under the National Childhood Vaccine Injury Act.¹⁴ The U.S. Supreme Court found that this compensation system, created in 1986, preempted all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects.

IDEA Lawsuits

Federal court cases based on challenges brought on behalf of individuals with ASDs, particularly children, under the Individuals with Disabilities Education Act (IDEA)¹⁵ are not uncommon. Recently an action was brought by parents of autistic students against the New York City Education Department under the IDEA alleging that the city improperly denied their claims for private-school-tuition reimbursement based on testimony about services students "would have" received under their proposed individual education programs (IEPs).¹⁶

The U.S. Court of Appeals for the Second Circuit ruled this past fall, in a matter of first impression, that the adequacy of a student's IEP and the ability to provide students with free appropriate public education was to be evaluated prospectively as of the time the IEP was created. In adopting this "snapshot" rule, the court, in *R.E. v. New York City Dept. of Education*, stated that consideration of "retrospective testimony," i.e., testimony about additional services that "would have been provided," but did not officially appear within the confines of the IEP, was precluded.

Personal Injury Lawsuits

Recently, in *Melnick v. Consolidated Edison*, an action to recover damages for personal injuries allegedly suffered by a pedestrian, who was pregnant at the time of her slip and fall on a utility company's manhole cover, and her later born infant daughter, the New York State Supreme Court sitting in Richmond County was asked to preclude the plaintiff's proposed expert testimony.¹⁷ The plaintiff, who alleged that she prematurely gave birth to her child as a result of her accident, proposed expert testimony by a neurologist to support her theory that the infant plaintiff's autism spectrum disorder and pervasive developmental delay was proximately caused by her premature birth and low birth weight.

Low Birth Weight and Autism. The utility company moved for a *Frye* hearing on whether the plaintiff could present expert testimony supporting her theory of causation.¹⁸ The Supreme Court ruled that although two studies had suggested a possible association between low birth weight and autism, there was no generally accepted causal link. Citing the Appellate Division, Second Department, in an action where the plaintiff sought to establish a causal connection between her therapeutic use of acetaminophen and her subsequent development of cirrhosis of the liver,¹⁹ the Supreme Court noted that an "association in medicine or science is different from causation."

A Quantum Leap of Causation. The Supreme Court found the plaintiff's attempt to equate "general developmental delays of a slightly premature birth to a diagnosis of Autism Spectrum Disorder with Pervasive Developmental Delay" (PDD) to be a "quantum leap of causation" since, *inter alia*, "[g]eneral causation must first be established by medical researchers and scientists who have considered prematurity and low birth weight as a generally acceptable cause of autism/PDD," but thus far, "medical researchers have only shown a statistical association and have cautioned about establishing it as a cause of autism/PDD."

Guardianships

Article 81 of the New York Mental Hygiene Law, which contains due process protections, can be used to appoint a guardian for any person who is found in need of a guardian, including those with autism. Article 17-A of the New York's Surrogate's Court Procedure Act is an alternative guardianship statute which is limited to people with developmental disabilities, autism, traumatic brain injuries, and other enumerated conditions.²⁰ Initially enacted in 1968, primarily for the benefit of parents of children with developmental disabilities who were reaching the age of majority, Article 17-A has not been amended in any significant way and lacks most, if not all, of the due process protections of Article 81.

In 2010, a proceeding in *In re Mark C.H.* was commenced seeking the appointment of a guardian for a disabled and autistic male, who, after his mother died, was institutionalized.²¹ The Surrogate's Court, New York County, after discussing the history of Article 17-A within a constitutional and international human rights framework, held that due process required that the guardianship appointment be subject to a requirement of periodic reporting and review to assure that the person's needs were being met by the guardian with the benefit of a substantial trust established by the deceased mother.²²

Civil Commitment

In 2011, the Appellate Division, Third Department, was asked to determine whether a civil commitment trial against a developmentally disabled respondent violates due process.²³ The respondent in *State v. Daniel OO* had been permanently admitted to the autism unit at a facility operated by the Office for People with Developmental Disabilities where he remained until his violent aggression necessitated a transfer to a semi-secure unit.

After respondent allegedly sexually assaulted a female speech therapist in 2004, resulting in her long-term hospitalization, he was charged in an indictment with two counts of sexual abuse in the first degree. The respondent, who had been diagnosed with numerous psychiatric conditions, including autism, and who had an IQ of 46, had been found to be mentally incapacitated to stand trial and committed to a secure unit pursuant to CPL 730.50(1).

After reaching the maximum period of commitment permitted under CPL article 730, the state filed a sex offender civil management petition pursuant to Mental Hygiene Law article 10. The court held that given the state's "strong interest in providing treatment to sex offenders with mental abnormalities and protecting the public from their recidivistic conduct," Mental Hygiene Law §10.07(d) did not deprive an incompetent respondent of his or her right to due process.

Victims of Abuse

However, individuals with ASDs and those with other disabilities are more likely to be victims of crimes than the perpetrators.²⁴ *People v. Clark*, a 2008 Appellate Term decision, held, as a matter of first impression, that an autistic child's mother lawfully consented to the recording of a defendant's conversation on behalf of her 8-year-old child, who was in fact present at the time of the conversation.²⁵ The child's mother had surreptitiously placed an audio recording device in her child's backpack after noticing that he was coming home from school with bruises and abnormal redness on his body.

As another basis for its holding, the court, noting that autism is defined under the Mental Hygiene Law as a developmental disability,²⁶ and in turn a mental disability,²⁷ found that there must be "a balance between important competing public policy considerations of protecting those with disabilities from abuse and protecting citizens against eavesdropping."

Diagnostic Publications

The publication of the fifth edition of Diagnostic and Statistical Manual of Mental Disorders (DSM-5) in May 2013 has proven to be a source of debate in the ASD community in that there is concern that it will have an impact on how ASDs

are classified. In the DSM-5, Asperger syndrome and "Pervasive Developmental Disorder—Not Otherwise Specified" or "PDD-NOS", will disappear merging these "high-functioning" ASDs into the streamlined New Autism Spectrum Disorder.

The DSM-4 has been noted in decisions by New York courts as recently as Feb. 12, 2013.²⁸ It remains to be seen what impact, if any, the new classification will have on how these individuals with high-functioning ASDs receive services, insurance coverage, and are perceived within the courtroom.

Conclusion

As we learn more about ASDs, interesting questions are sure to arise within the courtroom. Individuals with ASDs are bound to find themselves as litigants, and on either side of the aisle in criminal proceedings.

Thomas A. Dickerson and **Jeffrey A. Cohen** are associate justices of the Appellate Division, Second Department. **Joanne Mathews Forbes**, Principal Law Clerk to Cohen, assisted in the preparation of this article.

Endnotes:

1. 42 U.S.C. §18022(b)(1)(E) [emphasis added].
2. Autism spectrum disorder (ASD) is a range of complex neurodevelopment disorders, characterized by social impairments, communication difficulties, and restricted, repetitive, and stereotyped patterns of behavior. Autistic disorder, sometimes called autism, is on the most severe end of the "spectrum," while other conditions along the spectrum include a milder form known as Asperger syndrome, and childhood disintegrative disorder and pervasive developmental disorder not otherwise specified (usually referred to as PDD-NOS). ASDs vary significantly in character and severity, occur in all ethnic and socioeconomic groups, and affect every age group. Males are four times more likely to have an ASD than females.
3. Michael L. Ganz, "The Lifetime Distribution of the Incremental Societal Costs of Autism," 161 Archives Pediatrics & Adolescent Med. 343(2007), <http://archpedi.ama-assn.org/cgi/reprint/161/4/343.pdf>.
4. The Patient Protection and Affordable Care Act (ACA), 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act (HCERA), Pub. L.No. 111-152, 124 Stat. 1029 (2010)[codified in various sections of 42 U.S.C.] is commonly referred to as the "Affordable Care Act."
5. *National Federation of Independent Business v. Sebelius*, ___ U.S. ___, 132 S.Ct. 2566, 2571 (2012).
6. 26 U.S.C. §5000A.
7. Patient Protection and Affordable Care Act: Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers, 77 Fed. Reg. 18,310 (March 27, 2012).
8. 42 U.S.C. §18022(b)(1)(E) [emphasis added].
9. The New York Health Benefit Exchange Blueprint can be found at www.healthbenefitexchange.ny.gov.
10. <http://www.autismspeaks.org/advocacy/advocacy-news/autism-speaks-hails-new-york-governor-andrew-cuomo-signing-one-nation%C2%92s-stron>; see Insurance Law §3216(i)(25)(B).
11. Insurance Regulation 200, 11 NYCRR 226.
12. See, for example, www.autismspeaks.org.
13. ___ U.S. ___, 131 S.Ct. 1068, 179 L.Ed.2d 1.
14. 42 U.S.C.A. §300aa-1 et seq.
15. 20 U.S.C. §1400 et seq. Under the Individuals with Disabilities Education Act, the term "child with a disability" means a child with a variety of impairments, including autism, who, by reason of such impairment, needs special education and related services (see 20 USCA §1401; 34 CFR 300.8 [a][1]) usually effected pursuant to an individual education program.
16. *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167 (2d Cir. 2012).
17. *Melnick v. Consolidated Edison*, ___ N.Y.S.2d ___, 2013 WL 657883 (Sup. Ct., Richmond Cty. 2013).
18. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

19. *Ratner v. McNeil-PPC*, 91 AD3d 63, 933 N.Y.S.2d 323 (2d Dept. 2011) is an opinion written by our colleague Justice John M. Leventhal.

20. SCPA 1750-a.

21. *In re Mark C.H.*, 28 Misc.3d 765 (Sur. Ct., N.Y. Co., 2010).

22. *In re Mark C.H.*, 28 Misc.3d 765 (Sur. Ct., N.Y. Co., 2010).

23. *State v. Daniel OO.*, 88 A.D.3d 212, 928 N.Y.S.2d 787 (3d Dept. 2011).

24. Hughes, K., Bellis, M. A., Jones, L., Wood, S., Bates, G., Eckley, L., and Officer, A. (2012). "Prevalence and risk of violence against adults with disabilities: a systematic review and meta-analysis of observational studies." *The Lancet*. 379, 1621-1629.

25. *People v. Clark*, 19 Misc.3d 6, 855 N.Y.S.2d 809 (N.Y. Sup. App. Term, 2008), lv. to app. denied, 10 NY3d 861, 860 N.Y.S.2d 487 (2008).

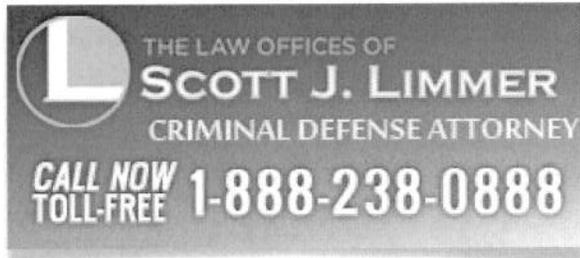
26. Mental Hygiene Law §1.03(22)(a)(1).

27. Mental Hygiene Law §1.03(3).

28. *People v. Palmer*, --- N.E.2d ---, 2013 WL 499482 (2013).

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