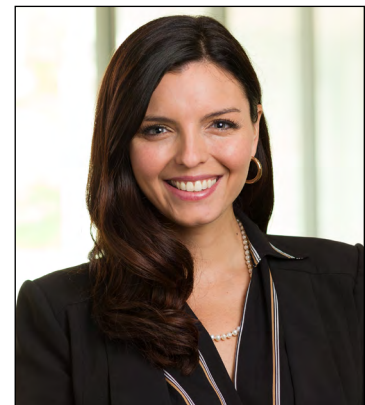

Addressing Developmental Delays in Children of Divorce Despite Judicial Backlog

by Erika R. Piccirillo, Esq. of Cohn Lifland Pearlman Herrmann & Knopf LLP

As a mother of a neurodiverse child, I know well the obstacles and delays that parents may face in seeking diagnoses and treatments for their children. The backlog in receiving a diagnosis and services for a child with developmental delays has always been problematic. Typically, children wait six to 18 months for an appointment with a Developmental Pediatrician, who evaluates children with a wide range of conditions, including developmental and learning disorders. Unfortunately, the backlog worsened during the COVID-19 pandemic and virtual learning environments with some waitlists ballooning to two years..



Erika R. Piccirillo, Esq.

For children of divorce with developmental delays who may require intervention, co-parents' inability to agree on whether intervention is necessary exacerbates the delay in treatment as they find themselves at a standstill in a Court system plagued by judicial vacancies.

According to the Centers for Disease Control and Prevention (the "CDC"), one in 36 children have been identified with Autism Spectrum Disorder ("ASD"). Many of those with an ASD diagnosis also have another intellectual disability. The CDC acknowledges disruptions in timely evaluation of children and delays with connecting those children to services and support they need. Undisputedly, it is vital for children with developmental delays to be engaged in early intervention therapies as soon as possible. Consequently, the CDC urges parents to, "Learn the Signs. Act Early."

Family law practitioners use the resources available to us to guide our clients through the judicial crisis while also protecting the best interests of their children, including those with special needs.

What should you do when you have a concerned client with a child who is showing signs of developmental delays that require a comprehensive developmental evaluation and early intervention, but their co-parent disagrees? More importantly, how do you advise this client in a county where the judicial backlog continues to be substantial, and family-related trials have been paused or significantly delayed?

Co-Parenting Therapy: It is not unusual for divorcing spouses to struggle with communication. After all, their inability to effectively communicate may have been a large factor in the demise of the relationship. Coupled with the anxieties and pressures of parenting a child with special needs, the inability to effectively communicate can cause one co-parent to harbor feelings of ill-will towards the other and to reject all proposals by their co-parent without appropriate consideration.

When speaking with a client, if a family law practitioner feels that one of the major breakdowns in the parties' co-parenting relationship is the result of poor communication skills or harboring resentment, it might be appropriate to suggest co-parenting therapy during the divorce. While a co-parenting therapist cannot make decisions related to the best interests of the child, they may be able to alleviate the communication barrier, which may be the biggest stumbling block in the parties' ability to agree upon therapies, medications, Individual Educational Plans (IEPs), and other resources for their child.

Consult with a Special Education Attorney and/or Advocate: There may be times where it is wise to consult with a Special Education Attorney or an Education Advocate. Maybe the parties are struggling to agree upon evaluations through the school district. An attorney who practices in Special Education can provide insight as to what specialized or limited evaluations may be available and appropriate for the child. A Special Education Attorney can also assist a family law practitioner in drafting language to protect the child's best interests, including language regarding parental designations and educational decisions.

If the parties cannot agree upon the best school district for their child or are unsure if their child is getting the services to which they are entitled, an Education Advocate can review a child's Individual Education Plan (IEP) to provide recommendations and suitability for other programs.

Mediation: Mediation is perhaps the most popular of all Alternative Dispute Resolution options because it is a non-binding process in which a neutral third party – typically an experienced attorney or retired judge – assists in facilitating communication between the parties in the hopes of bringing them to a mutually agreeable resolution of the issues surrounding their child.

If you feel like the disputes about what therapies, treatments, and accommodations may be best for their child may not be as large as the parties perceive them to be, mediation may be the right option. Mediation gives the parties the opportunity to be candid about their positions in an informal setting, where the discussions remain confidential.

If mediation seems like a reasonable option, it is important to pick the right mediator for the case. Research family law mediators who have experience handling disputes for children with developmental disabilities and other conditions that may be at issue. While every case is different, the parties will be more likely to trust a mediator's recommendations if that mediator is knowledgeable on neurodiversity. A concerned parent does not want to feel that they are having to educate the mediator along the way.

Arbitration: In New Jersey, but not in all other states, parents have the right to use arbitration to resolve custody issues. If the parties' disputes regarding a child's special needs run deeper, it may be necessary to have a neutral third party make a binding decision on the disputed issues and the best interests of the child. In addition, for some parents, they may feel more confident that their rights are being protected in a formal process in which an arbitrator hears testimony and considers expert reports. As with a mediator, an arbitrator can be an experienced attorney or retired Judge who has experience in handling disputes involving neurodiverse children.

For some parents, an hourly cost associated with arbitration may be off-putting. After all, why would they want to pay for something they consider tantamount to a trial when they can get that service for "free" with a judge sitting

at the courthouse? However, if the child's developmental needs must be addressed right away, arbitration will assuredly be a much quicker process and may be less expensive. Not only may the parties avoid costs associated with posturing through counsel regarding continued disputes while they wait years for a trial, but arbitration can also be more easily scheduled for continuous days, which means less in trial preparation costs.

For parents of children with special needs, having a trial that may take place in two- to three-hour chunks over several months, requiring additional cooperation in preparing for various trial days, can cause additional anxieties in trying to find appropriate childcare arrangements for the child during these various sessions. Then, waiting for a judge to issue a ruling may further delay finalization of the plans for that child.

Parent Coordinator: Parent Coordinators are independently retained advisors who liaise between parents to facilitate communication, resolve disputes by consensus or, if necessary, make decisions that parents are unable or willing to make between themselves. Parent Coordinators are typically retained when post-judgment disputes arise. Often, parties want to rely upon a Parent Coordinator for simpler disputes like a switch of parenting time for a special event. However, in the right case, it could be meaningful to engage a Parent Coordinator for a specific scope, like assisting the parties in resolving disputes related to a child's treatment plan.

For example, do the parties agree, in theory, that a certain type of therapy could be helpful, but can't agree upon who should provide the services? A Parent Coordinator may be able to assist in helping research, interview, and ask the right questions of a therapist to be able to give a recommendation and set the parties on the right path forward.

Guardian Ad Litem: It may be appropriate to have a *Guardian Ad Litem* ("GAL") appointed by the Court to protect the best interests of a child with special needs. Unlike an attorney representing the position of a parent, a GAL works in a much more objective manner. A GAL has the authority to investigate and evaluate the current circumstances. They can have discussions with the child (if the child is verbal), interview other individuals like the child's teachers, counselors, pediatricians, and review relevant documentation.

While the Court may not have the ability to schedule a trial with dueling custody experts to rule on the best interests of the child anytime soon, if a GAL has been appointed to the case, the Court may be inclined to order the parties to abide by the GAL's recommendations pending final resolution of the matter. Of course, it is important to be aware of the risk that the GAL may not agree with your client's position about what is best for the child and may be a proponent of an alternative resolution that neither party proposed.

A Bifurcated Trial: Sometimes it just isn't possible to avoid a trial. The parties are entrenched in their positions, perhaps to the great detriment of a neurodiverse child who could significantly benefit from a custody ruling so they have more stability in their routine and a set treatment plan.

New Jersey Rule 5:7-8 provides that "Bifurcation of trial of the divorce, dissolution of civil union, termination of domestic partnership or custody dispute from trial of disputes over support and equitable distribution shall be permitted only with the approval of the Family Presiding Judge, which approval shall be granted only in extraordinary circumstances and for good cause shown."

Though certainly not an insubstantial burden to meet and rarely requested, in "extraordinary" circumstances it may be appropriate to request a bifurcated trial on the issue of the best interests of the child, which may include the testimony of dueling custody experts as related to the child's significant health and educational needs. The financial issues – buyout of the house, division of retirement funds, alimony – can wait, but sometimes a child with

significant special needs cannot. As attorneys, we need to be prepared to look beyond an Order to Show Cause if the best option is to reach a final resolution of the custody issues by way of bifurcated trial.

As family law practitioners, we are bound to be confronted with difficult situations involving children with developmental delays and other special needs. We must be prepared to advise our clients who are facing life-changing decisions regarding their options in managing custody disputes and divorce in a time of judicial delays.