NEWS RELEASES

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Husch Blackwell Authors Amicus Brief in Ninth Circuit Supporting ABA Treatment for Autism

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Husch Blackwell prepared and filed an amicus curiae brief on behalf of three autism-advocacy organizations urging the U.S. Court of Appeals for the Ninth Circuit to reverse the District Court of Hawai'i's decision dismissing an action challenging the state's practice of refusing to allow applied behavior analysis (ABA) therapists to accompany students to school. The ABA treatment involved is medically necessary and prescribed for certain Hawai'i students diagnosed with autism.

The amici—National Autism Law Center, Autism Legal Resource Center, LLC, and the Council of Autism Service Providers—support the position of the Hawai'i Disability Rights Center (HDRC), which filed suit against the Superintendent of the State of Hawai'i Department of Education (DOE) and the Director of the State Department of Human Services asserting various claims, including failing to accommodate and discriminating against persons under 22 who have been diagnosed with autism and are recommended some level of ABA services to ameliorate their condition.

Among its claims, HDRC alleged denial of accommodation and access under the Americans with Disabilities Act (ADA) and Rehabilitation Act § 504 and discrimination based upon disability and DOE's blanket policy of refusing to allow any reasonable modifications or accommodations to allow children access to their prescribed medically necessary ABA treatment. In dismissing the action, the District Court ruled that the claims were for the denial of a free and public education under the Individuals with Disabilities Education Act (IDEA) and plaintiff HDRC must exhaust its administrative remedies under IDEA before filing suit.

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The brief, written by Husch Blackwell attorneys Lisa Lawless and Kirsten Atanasoff, with attorney Dan Unumb of the Autism Legal Resource Center, argues that IDEA exhaustion requirements do not apply, relying on the U.S. Supreme Court's decision in *Fry v. Napoleon Community Schools*. In *Fry*, the Court ruled that exhaustion of IDEA administrative procedures is not required when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a "free appropriate public education" (FAPE). *Fry* established a test for determining whether an action's ADA and § 504 claims really assert denial of a FAPE.

"Here, as in *Fry*, HDRC's ADA claims do not seek to compel the school to provide services, but rather to make reasonable modifications and accommodations to allow children access to their own supports used across settings to mitigate and ameliorate the effects of their disability in their daily lives," the Husch Blackwell brief says. Applying the *Fry* factors, the action is not for denial of FAPE because the same claims could be brought "for the same conduct occurring in other public settings and by adults or visitors of the school."

"With the benefit of the expertise and experience of our clients, the amicus brief will assist the Ninth Circuit in understanding the context for these claims, including the features of autism spectrum disorder and its effects upon a child's functioning and health," said Lawless, the lead Husch Blackwell attorney. "In addition to providing insight into the compelling needs and challenges of students diagnosed with autism, the brief also provides background on the nature and characteristics of applied behavior analysis, which is a medically prescribed behavioral health treatment that is nationally acknowledged by experts as 'the standard of care' for the treatment of ASD."

"The immediate question before the Court is a procedural one: whether these are educational claims that trigger IDEA exhaustion," Atanasoff said. "But a lot underlies that issue. ABA therapy does not simply address some educational deficit and these students' need for ABA therapy is not that they are unintelligent or academically disinclined. ABA therapy is a medically prescribed treatment for these students' medically diagnosed condition. The effectiveness of ABA therapy in improving the health, well-being, and future of children with autism is supported by mounds of evidence. Conversely, however, denial of ABA therapy during this critical development window can be equally devastating. This is a matter of allowing children with autism an accommodation that they require and would have access to in any other public setting—school should not be an exception. Our amicus brief sought to illuminate that for the Court."

"I believe the amicus brief will make an invaluable contribution to the Court's understanding of the stakes in this case, the plight of children with autism in the public schools, and the vindication of their rights," said Dan Unumb, President of the Autism Legal Resource Center. "As a father of a child with autism and advocate, I am thankful for Husch Blackwell's work and willingness to use its attorneys' legal talents to give voice to those who too often are not heard."

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In addition to Lawless and Atanasoff, the Husch Blackwell team included Audrey Allen and Eleanor Kittilstad.

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