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## **Ninth Circuit Upholds the Appropriateness of an Eclectic Autism Program and Holds that Student is Entitled to Stay-Put Throughout the Appeals Process**

In Joshua A. v. Rocklin Unified Sch. Dist. (9th Cir., Mar. 19, 2009, No. 08-15845) \_\_\_ F.3d \_\_\_ [2009 WL 705405].), the Ninth Circuit Court of Appeals issued a memorandum in which it upheld the appropriateness of a school district’s “eclectic” program for students with autism. It also issued a separate opinion finding that the student was entitled to remain in his “stay-put” placement throughout the appeals process.

Initially, the school district filed for a due process hearing with the Office of Administrative Hearings (“OAH”) to prove that its offer to place the student in its kindergarten autism program constituted a free appropriate public education (“FAPE”). The program incorporated elements of various methodologies, including the Treatment and Education of Autistic and related Communication-handicapped Children (“TEACCH”), Social Stories, relationship development intervention (“RDI”), pivotal response training (“PRT”), and discrete trial training (“DTT”). At hearing, the student alleged that the program did not constitute a FAPE because it was not a “pure” applied behavior analysis (“ABA”) program. Specifically, the student alleged that the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”) requires school districts to use peer-reviewed methodologies and that a pure ABA program was the only methodology supported by peer-reviewed research.

OAH found in the school district’s favor, stating that the IDEA “does not mandate that a district use a particular methodology, especially for autistic students. Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students.” The student appealed the decision to a federal district court and, ultimately, the Ninth Circuit. The Ninth Circuit affirmed the district court’s decision and held that the “eclectic approach, while not itself peer-reviewed, was based on ‘peer-reviewed research to the extent practicable.’”

The Ninth Circuit’s memorandum is unpublished. Therefore, it provides no precedential value; courts cannot rely on it in formulating opinions on similar issues. However, the unpublished disposition provides insight into how the Ninth Circuit views eclectic programs and the extent to which school districts must use methodologies based on peer-reviewed research.

In the separate opinion related to stay-put, the Ninth Circuit found that stay-put is applicable “during the pendency of *any* . . . judicial proceeding,” including an appeal to the Ninth Circuit. Therefore, it held that the student was entitled to remain in his last agreed upon and implemented placement not only during the due process hearing, but also during the subsequent appeals to the district court and to the Ninth Circuit.

Because appeals can be lengthy, sometimes lasting over a year, school districts should analyze the cost of maintaining a student's placement in determining whether to proceed to hearing or attempt to settle.

If you have any questions regarding these new cases, please contact one of our four offices.

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**This F3 NewsFlash is a summary only and not legal advice. We recommend that you consult with legal counsel to determine how this matter may apply to your specific facts and circumstances.**

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