

**SPECIAL  
POINTS OF  
INTEREST:**

- Find out how a California Court ruled on a child's right to bring a service animal to school
- Train staff to take confidentiality of student records seriously to avoid personal liability.
- Academic achievement alone is not the sole test to determine eligibility
- Tips to address bullying complaints for special education students.

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## California Case Gives Guidance on Services Animals in School

A recent California case provided some guidance on how the revised ADA regulations regarding service animals may affect schools. In C.C. v. Cypress School District, a judge granted parents' request for a preliminary injunction and ordered a school district to permit a 6 year old child with autism to bring his service dog to school, at least until the parents' ultimate issue of discrimination was decided.

CC is a 6 year old student with severe autism: he is nonverbal, has low cognitive level and great difficulty in-

teracting with others. He frequently becomes anxious and will shriek, pace, plug his ears, laugh inappropriately and flap his arms. He recently began pinching and wetting himself at school.

CC was in an autistic support class with 10 students and 5 adults: his teacher and 4 ABA trained aides.

Parents obtained a dog, Eddy, from the Autism Service Dogs of America (ASDA) that had specifically been trained for two years for CC. He was trained to prevent or interrupt CC's impul-

sive or destructive behaviors. His training included work in a classroom around other autistic children.

Parents requested that CC be allowed to bring Eddy to school, but the School District refused. Parents filed suit alleging violations of the ADA, violations of Section 504 and violations of California state law. Parents also sought a Preliminary Injunction to permit CC to immediately begin bringing his service dog to school. This article will analyze the Court's decision and rationale.

**Turn to page 4 to read the Court's analysis in one of the first service animal cases under the new ADA regulations**

## Train Staff on the Importance of Confidentiality to Avoid Liability

A recent New Jersey case highlights the importance of maintaining student confidentiality in special education cases. A teacher's and social worker's unbelievable lack of judgment in releasing information about a special education student resulted in a School District, Superintendent, Board, principal, and these two individuals being sued. Although the claims against the School District were dismissed, the individual claims against the teacher and social worker were not and will likely lead to monetary liability. Read this article to find out how your school can avoid liability for the mistakes made by your teachers.

**Turn to page 6 to read how the school district avoided liability in this case.**

## CASE LAW UPDATE

### **GD v. Wissahickon School District ED PA**

**HOLDING:** An evaluation of a kindergarten student that focused only on academic progress and ignored escalating behavior that impeded the child’s learning was not appropriate under the IDEA.

**FACTS:** Jack is a 7 year old child who enrolled in kindergarten for the 2008-2009 school year. He was previously diagnosed with a Sensory/Processing Disorder and ADHD and had a history of aggressive behavior. Prior to beginning school, the parents gave the District a Pre-Admission Screening Report indentifying Jack’s verbal IQ at 143 and performance IQ at 103.

The District immediately issued a PTE and completed an ER identifying Jack eligible for a Section 504 Service Agreement that included OT, alternative seating, and a plan to inform Jack of programs and behavioral expectations. Jack made good academic progress, but his behavior was increasing and interfering with his learning, he was easily distracted and had trouble with organization.

The District issued a second PTE and the parents obtained an IEE. On April 3, 2009 the District issued a second RR. Jack’s cognitive skills were assessed between high average and superior (no score is given) achievement test scores were at or above age and grade equivalency and his academic skills fell within or above age and grade level in all areas. Despite reports from the teacher that Jack’s behavior was escalating and interfering with his learning, the psychologist characterized his behavior as “isolated incidents.” Jack was found not eligible for special education.

Jack’s behaviors continued to escalate through the end of school including aggression toward other stu-

dents, a lack of remorse and episodes of wailing and screaming. On June 19, a 3rd RR was issued finding that the behaviors were significant and interfering with Jack’s learning and that of his classmates. He was identified as OHI and an IEP was developed. Parents filed for due process alleging child find issues.

**DECISION:** A District Federal Court upheld a Hearing Officer’s decision that the District denied Jack FAPE from April 3, 2009 through the end of the school year. The Hearing Officer ordered 2 hours per day of compensatory education.

The Hearing Officer found that the District’s initial decision to provide a Chapter 15 Service Agreement was sound, but Jack’s behavior worsened and the April 13, 2009 RR contained “significant flaws that resulted in an inappropriate evaluation.” The HO found that the psychologist overemphasized Jack’s “superior cognitive ability” and ignored his deteriorating behavior.

The decision quotes the psychologist as making such statements as “Jack is not eligible based on his academic skill” and that she didn’t “do IEPs for students who have good skills to have better skills.” She also asked the parents—what category do you think he is eligible under, “its not like he’s blind.”

**WHAT DOES THIS MEAN:** Academic progress is not the sole indicator for eligibility, especially in a case like this where the child has a high IQ. You likely will see that the child is making academic progress. But a school still has the obligation to address attention issues and behaviors that are impeding the child’s progress. Further, this case highlights that while it may be sufficient to START with a 504 Plan for behaviors and ADHD, the effectiveness of the plan must be continuously monitored. If the accommodations are not working, the Team and/or evaluator should be considering whether additional services in the form of an IEP are necessary.



# BULLYING

Children with disabilities may find themselves to be the target for teasing or bullying. This can lead to the child taking dramatic action like refusing to come to school and has therefore, led parents to request changes of placement to keep their children safe. Schools have been sued for disability discrimination for failure to take prompt and appropriate action.

Consider these steps if you are faced with a report from a parent, child or teacher that a student is being harassed or bullied:

- 1. Take All Complaints Seriously:** Never simply dismiss a parent's concern. Parents who feel their complaints are being ignored are more likely to become frustrated and file Complaints and lawsuits than those who know the District is addressing their concerns.
- 2. Follow Your Policy:** Your school should have a Harassment Policy that outlines how parents can make a formal complaint and the procedures you will use to investigate such complaints. **DOCUMENT!**
- 3. Document Your Investigation:** Determine whether the Complaint is founded or unfounded. If you find that the bullying exists, document when and how often it is occurring, who is bullying the child, and what are the circumstances surrounding the bullying so it can be appropriately addressed. If you do not observe any bullying, document the child's positive interactions with others. Consider observing the child in a variety of settings and at different times of day.
- 4. Talk To The Student:** The child may be able to give you more details of the events or they might have a different perspective than the parents.
- 5. Support, But Don't Blame the Victim:** While parents may want you to change their child's placement and discipline the bully, consider addressing the child's needs for social skills through the IEP. That may include pragmatic language instruction through the speech therapist, participation in a social skills group or "lunch bunch" or counseling with the school counselor or psychologist. You may want to look at revising the child's behavior plan if s/he is engaging in behavior that is leading other children to tease.
- 6. Support The Entire Class:** Consider teaching a bullying prevention curriculum to the class if the teasing/bullying is pervasive. This is more effective in the elementary grades, but kids should be taught about other children's differences. Obviously, no personal information should be shared about any child without a parent's written consent.
- 7. Bring the Right People To The IEP Team Meeting:** School Counselors, Social workers and psychologists can provide invaluable information on bullying prevention.
- 8. Develop Safety Plans To Keep Children Apart:** If you need to separate the victim and the bully, be sure to develop a realistic plan that can be implemented. Discuss contingencies and what the team will do if the children come into contact with one another. Also, ensure that the victim is not isolated from interactions with peers.

# Service Animals

*(continued from p. 1)*

A preliminary injunction is a provisional remedy to prevent the loss of rights while waiting for a judgment. A Plaintiff seeking a preliminary injunction must provide a likelihood of success on the merits, a likelihood of suffering irreparable harm in the absence of preliminary relief, that the balance of the equities is in your favor and that the injunction is in the public interest. The Court found Plaintiff met this standard.

## Likelihood of Success on the Merits

The Court focused on parents' claim under the ADA. It analyzed whether the School District failed to make reasonable accommodations for CC that would not fundamentally alter the nature of the District's educational program. There were 2 major points of contention: (1) was Eddy a "service dog" under the ADA and (2) whether the district's educational program would be fundamentally altered if Eddy accompanied CC to school.

## Whether Eddy is a Service Dog

The School District argued that Eddy was not a services dog under the ADA and therefore, they were not required to permit Eddy into the school. Under the ADA, a service dog is any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability. "Work" includes helping persons with psychiatric and neurological disability by preventing or interrupting impulsive or destructive behaviors, but does not include the provision of "emotional support, well-being, comfort or companionship" The School argued that Eddy was primarily present to comfort CC when he was anxious or nervous and therefore, was not doing "work" under the ADA.

Parents conceded that was one of Eddy's functions and the Court acknowledged that this function alone may not qualify Eddy as a service dog. However, the Court held that parents proved that Eddy performed other duties like preventing CC from eloping, shriek-

ing and throwing tantrums which does qualify as "work" under the ADA.

The Court also found that Parents provided detailed evidence that Eddy was specifically trained for two years for CC and his specific needs. Therefore, the Court held that Eddy is a "service dog" under the ADA.

## Whether the District's Program Would Be Fundamentally Altered

Next the Court looked at whether allowing CC to bring Eddy to school would fundamentally alter the District's educational program. The Court held that the School District had the burden of showing that "making the modifications would fundamentally alter the nature of the service, program or activity."

The District argued that the teachers would have to learn the 5-10 commands that Eddy is trained to obey and that an aide would need to hold the dog's leash when navigating campus, provide the dog with water and tether and untether Eddy to CC occasionally throughout the day. They also argued that they may be forced to hire additional staff to command the dog in the classroom.

The parents on the other hand provided evidence that Eddy does not need water during the school day and has been trained not to go to the bathroom during school. Also, Eddy's leash only needs held when CC travels from one part of school to the other and the staff will only need to learn two commands "Down stay" and "Eddy OK." Additionally, parents provided evidence that no school in which an ASDA dog has been placed has ever had to hire additional staff.

The Court held that while the District certainly may have to make a few changes to its program and may incur additional expenses, they did not show that any changes were drastic or unreasonable. Nor did they show that they would be responsible for the care or supervision of Eddy.

# Service Animals

## Impact on Other Children

The Court did hint that a school's strongest argument for prohibiting a service dog may not concern the impact of the dog on the student, but the impact it will have on the other children who are part of the District's program. However, the Court pointed out that the School District only briefly addressed this point; raising only that they would have to teach the other children to ignore the dog and "unsupported concerns" about canine aggression.

Based on this language, schools may be able to argue that a dog would significantly impact other students. However, to do so, schools should have documented evidence of issues like allergies. For example, a school with one autistic support class may be able to argue that one child in that class could not bring a service animal to school if another child is allergic and the District has no other options for placement for either child.

Further, a school may be able to argue that a dog is aggressive or difficult to control, but to do so, the District is likely going to have to let the dog in first and then argue that it had to fundamentally change its program to deal with the dog.

## FAPE Analysis

The School District's argument that CC's IEP Team determined that CC did not need Eddy to receive FAPE was rejected by the Court. The Court held that whether Eddy is needed to help CC reach his educational goals is a different issue from whether the District discriminated against CC by not providing the accommodation of allowing him to bring Eddy to school. The issue of whether the service dog is required for FAPE is "completely irrelevant under Section 504."

The Department of Justice filed a Statement of Interest in the case arguing that the right to bring a

service animal to school is a civil right. They point out that the obligation to provide CC with FAPE is not the school district's only duty. Schools also have an obligation to provide accommodations so a child can have equal access to the school under Section 504 and the ADA.

They also point out that it is the parent's decision, not the school district's decision as to what type of accommodation the child uses to access the school. For example, a school would not have the right to require a child to use crutches instead of a wheelchair during school. Nor can a school district tell a parent that they have to choose some other form of accommodation if they want their child to have a service animal.

## Irreparable Harm

In the case of a civil rights violation, the Court presumes irreparable harm. Additionally, in this case, the parents provided evidence that preventing Eddy from coming to school with CC damages the bond between the two, thereby reducing the efficacy of the service dog in CC's daily life. By keeping Eddy and CC apart for 6.5 hours every school day, the bond is deteriorating and Eddy becomes confused about his role as a service dog, which can be irreversible.

If you have had a request for a service dog in school, these are likely issues that you have faced and arguments that you have heard from the parents. This case shows that schools must give careful consideration to students' rights to access the school.

What is clear at least from this one case is that the use of a service animal in school is a civil right, it is not a question of FAPE. To prevent a service animal in school, Districts will have to prove that the presence of the animal will result in a fundamental change in the District's program. That proof must be substantiated and not simply unsupported assumptions or concerns. At least based on this one case—this will be a heavy burden for schools to meet.



# CONFIDENTIALITY

(Continued from page 1)

## FACTS

Mr. Bosch, a special education teacher was helping to teach the novel The Catcher in the Rye to an 11th grade special education English class. The students were to write a psychological profile of the protagonist, Holden Caulfield. The students asked the teacher for an example of a psychological profile. Bosch went to Mr. Johnson, a school social worker and asked for a sample. As the Court said “shockingly,” Johnson gave Bosch a copy of a student’s psychiatric evaluation and instructed him to redact information that would enable others to identify the student.

Bosch redacted the report and distributed it to the class. However, significant information about the student remained such as background and medical conditions, information about the student’s homeschooling, his age, religion, grade, family members, physical condition, past medical and psychiatric history, examinations and diagnoses. Another student in the class recognized immediately who the report pertained to. That student told the parents of the child in the report.

The parents claimed that their child was shocked and embarrassed and became too scared to attend school at all. In addition, they argued that he became generally reclusive, withdrawn and asocial. In contrast, the School maintained that the student was largely unaffected because he thought most of his friends didn’t read it or realize it was his.

Needless to say, the parents filed a federal lawsuit against Bosch and Johnson but also named the Special Education Director, the regular education English teacher, High School Principal, District Superintendent and the Board. The parents alleged breach of privacy under the IDEA, FERPA, HIPAA and the US and state Constitution and negligence.

## SCHOOL DISTRICT LIABILITY

Luckily for the school district and the majority of its employees, the claims against them were dismissed. The Court found that there was no evidence that either the Board or Administrators knew that Bosch and Johnson shared this information, that there was no policy or practice of sharing confidential student information, that the District did not fail to train its staff and the District was not deliberately indifferent to Bosch and Johnson’s actions. There was no evidence that any of the individuals (other than Bosch and Johnson) played any part whatsoever in releasing the student’s psychiatric evaluation. Further there is no right to monetary damages under the IDEA and there is no private cause of action under FERPA or HIPAA.

**CONFIDENTIAL**

## BOSCH AND JOHNSON LIABILITY

Understandably, Bosch and Johnson were not so lucky. The Court ruled for the parents, finding that Bosch and Johnson were negligent in their actions and violated the student’s constitutional right to privacy. In fact, the Court found their actions rose above negligence and held that the two individuals intentionally violated the student’s rights. The court observed that Johnson provided the evaluation “knowing full well what was in it.” And “in a feeble attempt to conceal the student’s identity, Bosch knowingly disclosed substantial portions of the student’s medical information to other students in the class.

The decision that Bosch’s and Johnson’s conduct rose to the level of intentional misconduct places both individuals in a situation where they will likely pay monetary damages out of their own pockets to the family. An insurance policy is not likely to cover any “intentional” acts of an employee.

# CONFIDENTIALITY

## WHAT STEPS CAN YOU TAKE TO AVOID LIABILITY

- Make sure your District has a Policy regarding confidentiality of documents
- Review the Policy to ensure that it specifically includes/addressed special education records
- Train all staff on confidentiality—including FERPA and IDEA requirements
- Distribute the policy to staff at the in service.
- Refer to colorful cases like this—let them know this is real and could happen to them!
- Highlight the possibility of individual damages for intentional actions
- Monitor whether the training has been effective
- If complaints continue or errors are found, consider additional training
- Review student record files to ensure staff is following proper procedure of signing files when they are reviewed
- If a breach in confidentiality occurs, address it quickly and thoroughly
- Investigate—find out who was involved and to whom the confidential records were distributed
- Collect and destroy any confidential records that were incorrectly distributed
- Discipline employees if warranted
- Notify parents



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If you have a special education issue you would like to see addressed in subsequent issues of this newsletter, please write to or e-mail Trish Andrews at the above address.

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## *Consult Your Solicitor!*

*The legal issues discussed herein are for the purpose of providing general knowledge and guidance in the area of special education. This newsletter should not be construed as legal advice and does not replace the need for legal counsel with respect to particular problems which arise in each district. As each child is unique, each legal problem is unique. Accordingly, when districts are faced with a particular legal problem, they should consult their solicitor or with special education counsel to work through the issues on a case by case basis.*