



Do Schools Owe a Special Duty of Care to “Special-Needs” Students?

By Richard Fossey, J.D., Ed.D., and Charles J. Russo, J.D., Ed.D.

The court highlighted the need of school officials to take the vulnerability of plaintiffs such as Jennifer into account when evaluating whether they have provided adequate supervision.

Schools officials owe a duty of care to all the students in their custody. An emerging, but not unanimous, judicial consensus seems to agree that school board officials have a greater legal duty when supervising students with disabilities.

A case on this important issue arose in *Jennifer C. v. Los Angeles Unified School District* (2008), wherein an appellate court in California ruled that school board officials had the duty to protect a middle school student with “special needs” from an assault that occurred in an out-of-the-way alcove under a stairway at her school. The court rejected the board’s argument that this tragic event was unforeseeable because such an assault had never before happened on the school’s grounds.

Jennifer C. highlights significant safety and liability issues for school business officials, other education leaders, and their school boards.

Facts of the Case

The facts in *Jennifer C.* (2008) are simple. Jennifer, a “special-needs” student at a middle school in Los Angeles, experienced “hearing disability, aphasia, behavior problems, emotional difficulties, and cognitive difficulties” and could only function at school on a “borderline” basis (p. 278). However, Jennifer was allowed to mingle with her peers during the school’s daily lunch break, which allowed her to interact freely with the general student body.

One day during lunch, another special-needs student lured Jennifer into an alcove under a secluded outdoor stairway on the school campus and allegedly assaulted her sexually. A parent passing by on the sidewalk saw what was happening and notified school officials. When a campus aide

arrived at the scene, she discovered Jennifer seated on the ground with her skirt above her waist. The boy’s pants were unzipped. Jennifer reported that the boy had sexually assaulted her.

Acting through her guardians, Jennifer sued the school board and various officials for negligent supervision and for maintaining a dangerous condition on public property.

Judicial History

The school board’s trial attorney attempted to establish that the campus grounds were adequately supervised. Here, the board relied on evidence in the record indicating that 19 school employees and a variety of volunteer parents were assigned to supervise the campus during lunch. Further, four adults were assigned to supervise the alcove area and three administrators walked around the campus during lunch.

The assistant principal was aware that the alcove was a problem area where students could evade supervision. As such, he asked the campus aide (the same one who ultimately came to the scene of Jennifer’s assault) to check the alcove regularly. On the day of the assault, the aide reported that she checked the alcove five times during the 30-minute lunch break, approximately every 6 minutes. The aide made her final check about 3 minutes before the lunch break ended and no one was in the alcove. When the aide returned to the area 14 minutes later, she discovered Jennifer C. and the male student under the stairway.

The board contended that it should not have been liable because the assault was unforeseeable. In buttressing its case, the board pointed out that no one on the school staff was aware of any sexual assaults or other illicit activities around the stairway or

in the alcove before the assault on Jennifer.

After a trial court granted the school board's motion for summary judgment on the grounds that education personnel had not breached their duty of care to Jennifer as a matter of law, she appealed. On further review, a three-judge appellate panel reversed in favor of Jennifer.

The court conceded that the law with respect to special-needs children was still emerging, but that in California, there are special rules for students with disabilities. According to the court, the assault on Jennifer was foreseeable because she was particularly vulnerable, and education officials should have foreseen that she might be assaulted in an isolated spot on the school campus.

From the court's perspective, it did not create a higher duty of care for students with special needs than for other children, since it emphasized that schools are not the insur-

ers of the safety of special-needs children. The court also rejected the notion that school boards are strictly liable for injuries to special-needs children whether or not school officials have been negligent.

Nevertheless, the court essentially created a higher standard of care in finding that special-needs children need help and protection while at school. The court ruled that the "maintenance of a hiding place where a 'special needs' child can be victimized satisfies the foreseeability factor of the duty analysis even in the absence of prior similar occurrences" (p. 282).

At the same time, the court rejected the notion that everything is foreseeable in hindsight. Here, the court highlighted the need of school officials to take the vulnerability of plaintiffs such as Jennifer into account when evaluating whether they have provided adequate supervision. In sum, the court was not

convinced that educators had exercised the appropriate standard of care during the time that Jennifer was assaulted.

The panel next reviewed the record of the trial court with regard to the fact that Jennifer's expert witness testified that lunchtime supervision at the school was inadequate. The trial court had rejected the expert's testimony on the grounds that the witness was not qualified to testify as an expert. Reversing in favor of Jennifer, the panel asserted that the trial court abused its discretion in disqualifying the expert. In fact, the appellate court made clear that it was satisfied that the expert witness raised triable issues of fact about the adequacy of lunchtime supervision at the school, a question that a jury was entitled to consider.

Turning to the claim that school officials had maintained public property in a dangerous condition, the court observed that this, too,

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was a question of fact for a jury to decide. Although school officials had marked the stairway area with bright yellow chains indicating that it was off limits to students, thus warning students to stay out of that area, those precautions may have been insufficient to protect a student with special needs.

The court declared that “by definition, such a child may not be capable of appreciating this admonition. This is tantamount to screaming at a person who has a total hearing disability” (p. 287). Accordingly, the court suggested that the board’s duty of care might have included fencing in the alcove area to make it completely inaccessible to students.

In rendering its judgment, the court was not plowing new legal ground in California. Five years earlier, in *M. W. v. Panama Buena Vista Union School District* (2003), another appellate court in California

affirmed a judgment against a board for negligent supervision after a special-education student was sodomized in a school bathroom before the beginning of the school day.

In *M. W.*, the court held that when school officials take on the duty of educating children in special-education settings, they accept the unique responsibilities associated with meeting those students’ special needs. In *M. W.*, then, the court determined that school officials should have foreseen that an unsupervised special-education student who was on the campus during the early morning hours was at risk for sexual assault.

The *Jennifer C.* court went on to conclude that since there were triable issues of fact as to whether officials could have acted in such a way as to prevent this incident, the case had to be returned to a trial court for future consideration.

Reflections

Jennifer C. raises three key points for educators. First, in light of the court’s rationale, simple warnings to all students to stay out of dangerous areas are likely to be deemed inadequate, especially with regard to students with cognitive disabilities.

Second, *Jennifer C.* is a reminder that since secluded locations on school grounds are the most likely places for sexual assaults to occur, officials must do more to safeguard all students, including children with special needs. For example, in *McLeod v. Grant County School District* (1953), a 12-year-old child in Washington State sued the school board, charging that she had been dragged into a dark room under the grandstand of a gymnasium and raped by two older boys when no adult supervisor was nearby.

In reinstating the student’s claim, the Washington Supreme Court ruled that it was for a jury to evaluate

New Jersey ASBO Recognizes School Business Administrator of the Year

The New Jersey Association of School Business Officials (NJASBO) recently named Lacey Township School District Business Administrator James G. Savage, Jr., 2008/2009 School Business Administrator of the Year, in addition to awarding him with a Distinguished Service Award.

As SBA of the Year, Savage will have the honor of presenting a graduating high school senior at the school of his choice with a \$1,500 NJASBO scholarship.

With more than 27 years of experience in the school business profession, Savage has served as business administrator and board secretary for the Lacey Township Board of Education for 21 years. During his tenure with the district, Savage has overseen nine successful referenda for additions/renovations or construction of 16 facilities, most recently an \$18 million referendum that includes environmentally sound and energy saving projects such as solar energy generation, HVAC upgrades, and window and roof insulation replacement.

NJASBO also honored two other Distinguished Service Award winners and three Meritorious Service Award winners at its annual conference in May. All will have the opportunity to provide a graduating high school senior at the school of his choice with a \$1,000 NJASBO scholarship.

The other 2008/2009 NJASBO award winners are:

Distinguished Service

Steven Cea, West Milford Public School District

Barbara Harris, Springfield Township School District

Meritorious Service

Debe Besold, Bedminster Township School District

Bernardo Giuliana, East Brunswick Public School District

Rebecca Joyce, Alloway Township School District

Congratulations to New Jersey’s top school business officials.



James G. Savage, Jr., (center) accepts congratulations for being named NJASBO School Business Administrator of the Year. Pictured with Savage, from left, are: Debra Naley-Minenna, Butler Public Schools Business Administrator and NJASBO president; John Donahue, NJASBO CEO; James Edwards, Brick Township Public Schools Business Administrator and NJASBO president-elect.

whether the negligence of educators was the proximate, or legal, cause of the sexual assault. The court explained that since the darkened room under the bleachers was a dangerous place, school officials might have foreseen an incident such as the one that took place.

Third, moving to apply the first two points, four additional considerations come to mind:

- In conjunction with their attorneys, school boards should develop and implement up-to-date policies designed to highlight the need for employees and volunteers to provide adequate supervision for all children in their care while offering a heightened level of care for students with disabilities.
- Boards should provide professional development activities for employees and volunteers to help ensure that they are well aware of the need to carry out board policies when supervising students.

- Educators should include specific statements in the individualized education programs of students with disabilities so parents are aware of the additional precautions that educators are taking to safeguard their children.
- Boards should review and update their policies annually to address any legal developments that may have taken place during the previous year.

Conclusion

Education leaders must ensure that isolated areas on school campuses are closely monitored or firmly secured. The fact that schools may not have histories of assaults in specific locations does not mean that educators have no duty to take reasonable precautions to prevent isolated spots on school grounds from becoming the scene of a crime. School business officials and other education officials must be ever

mindful of the need to ensure the safety of all children, paying particular attention to the special needs of students with disabilities.

References

Jennifer C. v. Los Angeles Unified School District, 86 Cal.Rptr.3d 274 (Cal. Ct. App. 2008), review denied, 2009.

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