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LEGAL UPDATE

January 23, 2009

To: Superintendents/Presidents, Member Community College Districts

From: Frank Zotter Jr., Sr. Associate General Counsel *FZ*

Subject: Maintenance Of A "Hiding Place" Where Special Needs Child Can Be Victimized Makes It Easier To Show Liability If An Assault Occurs
Memo No. 03 -2009(CC)

On December 8, 2008, the California Court of Appeal, Second District, published its decision in *Jennifer C. v. Los Angeles Unified School District* (2008) 168 Cal.App.4th 1320 holding that maintenance of a "hiding place" where a special needs child could be victimized made the foreseeability of an assault easier to prove. The court reversed a decision by the superior court to dismiss the case against the district resulting from such an assault, and sent it back for the case to proceed to trial.

The court said that it published the decision because, while the law relating to school authorities' duty of supervision to students in general is "well settled," the law with respect to a "special needs" child "is still emerging." The court asked rhetorically, "The general rules . . . surely apply but, are there special rules for the 'special needs' child?" The court answered its question by stating that schools "may need an incentive to drive compliance with the duty to provide adequate supervision. Our ruling today provides that incentive."

In *Jennifer C.*, the incident that led to the case took place on April 11, 2005. Jennifer C. was a 14-year-old student at Virgil Middle School in Los Angeles. She suffered from a mental disability, hearing disability, aphasia, behavior problems, emotional difficulties and cognitive impairments. She could, however, function at public school on a "borderline" basis, and was not entitled to one-on-one supervision. During the lunch break, which lasted 30 minutes, she was allowed to interact with the general student body.

After her lunch, Jennifer was approached by Tony J., another "special needs" student who said that he wanted to talk to her. She did not know Tony J. and had never seen him before, and did not appreciate the danger of his request to follow him to a secluded area. Tony J. led Jennifer to a concrete stairway on the school's border. They walked down the stairway and into

an alcove under the stairway. A chain-link fence separated the alcove from an adjoining public sidewalk. While the alcove was not visible from the campus, anyone walking along the adjoining public sidewalk would have had an unobstructed view of the alcove. Inside the alcove, Tony J. sexually assaulted Jennifer.

The school had assigned nineteen employees and volunteer parents to provide supervision during the lunch break. Four adults had been assigned to supervise the particular area where the alcove was located. (In fact, the assault was eventually interrupted when a parent walking by on the sidewalk saw what was taking place and alerted the school's officials.) The area around the alcove was marked by a bright yellow chain to indicate that students were not allowed there. The student body had been informed that this area was off limits during lunch break.

The school's assistant principal was aware that students could attempt to evade school supervision by hiding in the alcove. Because this was a "problem area," the assistant principal asked a campus aide to check the alcove regularly during the lunch break. Although the area of the alcove was used by students to avoid supervision, prior to the incident on April 11, neither the Virgil administration, nor its staff charged with supervising the area, was aware of any sexual assaults or other illicit activity occurring during school hours around or under the stairs in question.

On April 11, the aide assigned by the assistant principal checked the alcove five times, but found no one there. Her final check occurred approximately three minutes before the bell rang to mark the end of lunch break. The school also did a "tardy sweep" after the bell to ensure that all students were in class. Nevertheless, Jennifer and Tony J. were not spotted inside the alcove until about 11 minutes after the final bell rang.

Jennifer sued the District under theories of negligent supervision and maintenance of a dangerous condition. The trial court concluded that the school's actions were sufficient to discharge its general duty to supervise its students. One factor upon which the trial court relied was the absence of prior similar incidents; although that does not determine the outcome one way or the other, as the court of appeal noted, "Generally speaking, the absence of prior similar [incidents] is one factor pointing to the absence of negligent supervision."

Quoting from another case, the court of appeal also observed that the occurrence of an incident also does not mean that the defendants were negligent, because, "When an injury occurs despite a defendant's efforts to provide security or supervision, it is relatively easy to claim that, ipso facto, the security or supervision provided was ineffective. Without more, such claims fail."¹ But then the *Jennifer C.* court continued:

Here, there is "more." Given the unique vulnerability of "special needs" students, it is foreseeable that they may be victimized by other students. Where school officials allow a hidden area to be maintained on campus, it is foreseeable that other students may use the hiding place to take advantage of a "special needs" student. School officials were on constructive notice that this hidden alcove was a potential place for victimization, i.e. a "problem area."²

¹ Citing *Thompson v. Sacramento Unified School Dist.* (2003) 107 Cal.App.4th 1332, 1370.

² *Jennifer C. v. L.A. Unified School District*, Slip Opinion at 6.

The court did go out of its way to emphasize that it was not creating a new rule regarding school officials' general duty to prevent harm or to provide supervision:

We do not hold, indicate, or suggest that school officials (1) are the insurers of a “special needs” child’s safety, or (2) are strictly liable for injuries suffered by such a student, or (3) owe a higher duty of care with respect to such a child. A “special needs” child at public schools needs help and protection. We believe school officials, in theory, would agree with this unremarkable statement. But, in our view, they may need an incentive to drive compliance with the duty to provide adequate supervision. Our ruling today provides that incentive. We hold that 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.³

Despite the court’s emphasis that it was not creating a new standard, it did focus throughout the opinion on the peculiar vulnerability of special needs students, and of course mentioned that school officials may “need an incentive” to provide adequate supervision. At a minimum, this suggests that, on campuses with special needs students who are mainstreamed in situations similar to that at the Virgil Middle School, schools may need to provide a different level of supervision or monitoring of those students, even though, like Jennifer C. herself, they may not be entitled to one-to-one oversight. The court’s emphasis on the architectural condition that aided in the assault—the “hiding place” of which Virgil’s staff readily acknowledged it was aware—may also require a review of such areas on each campus to provide better security or more effective barriers to prevent student access.

The decision can be cited in other pending court cases now, but on January 20, Los Angeles Unified filed a petition asking the California Supreme Court to hear the case. Other interested parties can also ask that the Supreme Court review the case—or, in the alternative, that it “depublish” the case so that, while the result would be the same for Los Angeles Unified, it would no longer be binding legal precedent.

We will notify you of the subsequent developments in the case. In the meantime if you have any questions, please contact one of the attorneys in our offices.

³ *Id.*, Slip Opinion at 7.