

ADA REQUIRES DAYCARE PROGRAM TO ACCOMMODATE AUTISTIC CHILD

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As illustrated by the case of *Burriola v. Greater Toledo YMCA*, 133 F. Supp. 2d 1034 (N. Dist. Ohio 2001), the Americans with Disabilities Act (ADA) requires entities offering services or facilities to the public to reasonably accommodate disabled individuals. In this particular case, the mother of 8-year-old child with autism alleged a violation of Americans with Disabilities Act (ADA) after her son was terminated from a YMCA daycare program.

Jordan Burriola attended a charter school to serve the needs of autistic children, the M.O.D.E.L. Community School (MODEL School). After school, Jordan attended a licensed group daycare facility at the Calvary United Methodist Church ("Calvary"). This facility was operated by West Family YMCA, an affiliate of the YMCA of Greater Toledo ("YMCA"). The license for this daycare facility required a minimum ratio of one counselor to every 18 children.

The symptoms of Jordan's autism manifested itself at Calvary in the form of included repetitive activities, movements such as flapping his hands, pounding his chest, pounding his head, and running into walls. Moreover, when noises or other stimuli created sensory overload, Jordan would cry, run in circles, or run to hide from the noise.

On several occasions, Jordan exhibited violent and destructive behavior when he became extremely frustrated. Such behavior included hitting himself or other children, hitting a counselor, biting other children, cursing, throwing objects, chasing children, and urinating on the floor. During the twenty months Jordan participated in the YMCA daycare program, Jordan's mother, Melissa Burriola, was made aware of several "incidents" involving these inappropriate behaviors.

Ms. Burriola spoke with defendant Kathy Miley, the director of Family Services for the West Family YMCA, regarding Jordan's autism. Burriola told Miley that Jordan required some attention such as providing written activity schedules, offering explanations when Jordan was to transition from one activity to another, and providing him with a quiet place to "recoup" when he became frustrated. Moreover, Burriola told Miley that professionals from the MODEL School were available to help the YMCA daycare staff if the need arose.

In response to a request from Burriola, Joan McCarthy, a representative from the MODEL School, came to observe Jordan at Calvary and assisted the staff in working with Jordan. After observing Jordan at Calvary, McCarthy made several recommendations to the Calvary staff that she believed would help make Jordan's experience at Calvary successful. McCarthy also made free training available to all the YMCA employees who worked with Jordan. The training was not made mandatory for

the employees, and only two Calvary counselors attended the training.

The training focused on autism generally and on Jordan specifically, and taught techniques for working with autistic children. The two counselors who attended the training learned some simple techniques, such as using visual re-direction signs, for working successfully with Jordan. McCarthy and the counselors discussed modifications, or "supports," that would work well for Jordan at Calvary, and could easily be implemented. These supports were never implemented for Jordan at Calvary. In fact, one of the counselors who attended the training said Miley instructed the staff not to implement any of the supports.

The counselors who attended the training left Calvary shortly after the training occurred, and before any other supports were implemented. Thus, by late August, 2000, there were no counselors at Calvary who were trained in working with autistic children generally or Jordan specifically, and no counselors attempted to implement the suggested supports. Shortly thereafter, Jordan's inappropriate behavior, and apparently the staff's inability to help Jordan avoid such behavior, increased.

Upon learning that the two trained counselors were leaving Calvary, McCarthy sent a letter to Miley outlined a written schedule, supports, activities and other information available in Jordan's school file folder. McCarthy indicated that Jordan's teacher would share these activities with Calvary. Moreover, McCarthy offered another training session, free of cost, to YMCA employees who would be working with Jordan. The training would take a minimum of two and one-half hours, but McCarthy stated she would be willing to spend more time with any employees who were interested or willing. Miley never responded to the letter. None of the suggested supports were implemented, and no additional counselors were trained.

Two weeks after the trained counselors left Calvary, Burriola received a letter from Miley informing her that Jordan was to be terminated from the daycare program. The letter was dated September 6, 2000; Jordan's termination was effective two days later.

REASONABLE ACCOMMODATIONS?

To establish a claim under the ADA, Jordan had to demonstrate that he could succeed at Calvary with reasonable modifications, and the YMCA failed to make such modifications. In light of Jordan's past experience at Calvary, the federal district court judge found a "substantial likelihood" that Jordan could succeed at Calvary with reasonable modifications.

For nearly twenty months, Jordan was enrolled at Calvary with no mention of termination. During this time period there was at least one counselor who made sincere efforts to work with Jordan and to accommodate his needs. This counselor never had the chance to implement the simple supports that were suggested for Jordan, yet, with the efforts he did make, Jordan was able to participate in the program. After this counselor left, no

other counselors attempted to accommodate Jordan, and it was at this time that Jordan's inappropriate behavior caused defendants to want to terminate him.

Moreover, the judge found that “the counselors, and specifically Miley, were unwilling to try to accommodate Jordan.” Had they tried, the judge believed that Jordan would not have been terminated from the program.

FUNDAMENTAL ALTERATION?

The YMCA contended that they did not unlawfully discriminate against Jordan in refusing to implement the proposed modifications because the modifications would fundamentally alter their program. Specifically, the YMCA asserted that Jordan required one-on-one supervision to succeed at Calvary, and to provide such supervision would fundamentally alter the nature of defendants' group care facility.

In response, the district court judge noted that Burriola did not ask that Jordan be provided with a one-on-one assistant. Moreover, even if one-on-one care was requested, the judge found such one-on-one attention to Jordan would not effect a fundamental alteration of the services provided by the daycare facility.

In any group child care setting, a group counselor may be required, at times, to provide one-on-one care to an individual child. Counselors must give individual attention to children who become upset or injured; they may be called upon by any child to answer a question or help with a task.

It is noted here that a one-on-one assistant was hired for an extremely brief period to work with Jordan and other special needs children. This person was paid for by outside funding, and thus worked no hardship to defendants. Also, there is another autistic child at Calvary who has a one-on-one assistant. Thus, the mere presence of a one-on-one assistant cannot fundamentally alter the nature of defendants program.

Moreover, the judge found that the requested accommodation of preparing a daily schedule for Jordan was a reasonable modification and would not effect a fundamental alteration of the daycare program.

As Melissa Burriola testified, these schedules can be made up in a few minutes. Additionally, there is nothing to suggest that the same schedule could not be used on multiple days. The effort of preparing a schedule for Jordan may vary from the norm of what counselors do, but it cannot be said to fundamentally alter the program.

Additionally, plaintiffs assert that with the schedule, Jordan can work independently and occupy himself with tasks for longer periods of time.

Thus, the schedule may actually reduce the amount of time counselors have to spend giving one-on-one attention to Jordan.

DIRECT THREAT?

The YMCA also argued that their refusal to implement the proposed modifications was justified under the ADA because Jordan would pose a direct threat to the health and safety of others if he remained in the daycare program. In so doing, the YMCA pointed to the fact that Jordan had demonstrated physically aggressive behavior in the past which creates a danger of harm to other children in the program. In response, Jordan's mother asserted that none of the requested supports were in place when Jordan acted aggressively. The YMCA, however, maintained that no one could ensure that Jordan would not act aggressively in the future, no matter what modifications were made at Calvary.

Burriola countered that no parent could guarantee the behavior of any child at Calvary. Moreover, she noted that Calvary staff had testified that there were several children at Calvary who frequently hit other children and none of these children had been terminated from the daycare program.

In the opinion of the federal district court judge, it was significant that Jordan had never had the benefit of any of the proposed modifications at Calvary. Moreover, the judge noted that the professionals who worked with Jordan at school felt the requested modifications would significantly reduce the chances that Jordan would become frustrated at Calvary and thus lose self control and act aggressively. Accordingly, the federal district court judge concluded that the requested modifications would mitigate the risk that Jordan would pose a direct threat to others.

Having found that Jordan could succeed with reasonable modifications, the federal district court judge found that the YMCA had unlawfully discriminated against Jordan in violation of the ADA in refusing to make any of the requested modifications.

The federal district court judge, therefore, ordered the YMCA to reinstate Jordan in the Calvary daycare program. Further, the judge ordered all Calvary counselors and staff working with Jordan to undergo the free training offered by the MODEL School.