court cited *McAlindin*, wherein the plaintiff, who had panic attacks and anxiety, had "communicative paralysis" and was "barely functional." In *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005), the plaintiff avoided crowds, stores, and even doctors' appointments, and was "house bound" for weeks, even after losing the job. Both precedents were pre-ADAAA. The *Weaving* court agreed that interaction with others is a major life activity, but Mr. Weaving was not considered disabled under the ADA because he had difficulty getting along with subordinates and peers only, distinguishing him from the claimants in *McAlindin* and *Head*. Thus, the city's actions did not violate federal law.

Dissent

Judge Consuelo M. Callahan dissented, opining that Mr. Weaving had satisfied the *McAlindin* standard, and, in reversing the circuit court's verdict, the appellate court usurped the jury's role and failed to follow the controlling circuit's precedent. She noted that the majority in *Weaving* did not follow *McAlindin*, which had been disparaged in another circuit's decision, *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2nd Cir. 2004).

Judge Callahan remarked that the court did not give weight to the medical and psychological evidence or to the testimony of Mr. Weaving's superiors. His Lieutenant's investigation provided the basis for Mr. Weaving's termination when he concluded that Mr. Weaving was a "bully" and refused to accept responsibility for his behavior. The Lieutenant admitted that he was biased against Mr. Weaving and that his report contained some inaccuracies. At the trial, Deputy Chief Skinner testified that the city's decision to terminate Weaving was influenced by Lieutenant Goodling's report. He also reported that Mr. Weaving's lack of emotional intelligence was the basis of the city's decision. Judge Callahan referred to the testimony of Mr. Weaving's psychologist, Dr. Monkarsh, who described him as "one of the clearest examples of adult ADHD" and opined that his difficulties in interpersonal interactions were the result of weak emotional intelligence, a common symptom of ADHD. Nevertheless, he could still be an "excellent police officer." Another psychologist attributed Mr. Weaving's interpersonal difficulties to ADHD, explaining that he was unable to read other people's facial expressions and respond appropriately because of slow visual processing speed.

Discussion

The *Weaving* case addresses the significance of social impairments in applying for mental disability under the ADA. The Ninth Circuit Court of Appeals ruled that a person who is able to communicate, but whose communications are offensive or "inappropriate, ineffective, or unsuccessful," does not have substantial limitations on his ability to interact with others within the meaning of the ADA, and to interpret it otherwise would entice frivolous lawsuits against employers by "ill-tempered employees." Accusing the majority of gutting their own precedent, Judge Callahan dissented on the basis that conduct arising from a disability is part of the disability, and the ADA protects people with mental or physical disability equally. She also opined that the appellate judges had "brush[ed] away" the medical evidence and jury findings in their decision and that the outcome of disability cases should be independent of a litigant's likeability.

Although we understand that the Ninth Circuit's controlling standards in *McAlindin* serve a gatekeeping function, it concerns us that the majority in *Weaving* did not fully appreciate the seriousness of the functional impairments in some ADHD cases. Given the ambiguity raised in this case and the crossfire among federal courts, we eagerly await further developments.

Disclosures of financial or other potential conflicts of interest: None.

Parental Involvement in the Special Education Evaluation Process

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Violation of the Individuals With Disabilities Education Act by Not Providing Parents With Educational Data

In *M.M. v. Lafayette School District*, 767 F.3d 842 (9th Cir. 2014), the Ninth Circuit U.S. Court of Appeals held that the school district's failure to

provide a child's parents with data from the child's participation in a preliminary general-education intervention program procedurally violated the Individuals with Disabilities Education Act (IDEA) and denied the child a free appropriate public education (FAPE).

Facts of the Case

C.M. attended kindergarten in the 2005–2006 school year, the same year the Lafayette School District (the District) implemented a response-to-intervention (RTI) approach to assist struggling general-education students before referral for special education. In kindergarten, C.M. was identified as needing reading intervention and began to receive additional instruction. That year, he scored at benchmark in one aspect of a literacy test (The Dynamic Indicators of Basic Early Literacy Skills; DIBELS) and below benchmark in others.

In October of C.M.'s first-grade year, his parents requested that the District evaluate him for learning disabilities. The District held two Student Study Team meetings with the parents. The graphs of C.M.'s RTI data were not reviewed during these meetings. In April, his individualized education program (IEP) team (which included the parents) met and determined that he was eligible for special education due to a phonological processing disorder. He began participating in the school's instructional support program.

In a private evaluation in November of C.M.'s second-grade year, a doctor of audiology, Dimitra Loomos, determined that C.M. had a central auditory processing disorder (CAPD). C.M. "showed 'a deficit for integrating auditory information within the central auditory nervous system . . . [and] in the ability to perform binaural separation of auditory signals.'" (*M.M.*, p. 849). Dr. Loomos recommended environmental modifications, direct interventions, and compensatory strategies. C.M.'s parents provided copies of this evaluation to school personnel.

The IEP resulting from C.M.'s first annual IEP review meeting was identical to the previous IEP and did not reference his CAPD. His parents obtained another private evaluation from a speech and language pathologist, who found that he "'experiences a range from average ability to significant difficulty with specific skills of auditory-based language processing'" (*M.M.*, p. 849). His parents paid for him to attend sound-based therapy, but by the end of that year, he scored below benchmark in Oral Reading Fluency on the DIBELS and below basic level in language arts on a state test.

In C.M.'s third-grade year, at an interim IEP team meeting held at their request, his parents expressed disagreement with the 2007 assessment results and requested an independent educational evaluation (IEE) at the District's expense. They also obtained a private evaluation by a licensed psychologist, Tina Guterman, who found that C.M. had weaknesses in auditory processing and severe dyslexia. Dr. Guterman opined that C.M.'s IEP services were insufficient to meet his needs, and his parents withdrew him from the District's instructional support program and enrolled him in a private program.

Ultimately, the parents filed a complaint with the California Department of Education, stating that the District failed to comply with IDEA procedures in response to their request for an IEE; two due process complaints against the District with the Office of Administrative Hearings; and three lawsuits in federal district court. In February 2012, the district court found in favor of the District on all but one claim. The parents appealed.

Ruling and Reasoning

The Ninth Circuit concluded that the District, by failing to provide the parents with the RTI data, violated the IDEA's procedural requirements and denied C.M. a FAPE. These procedural requirements included providing the entire IEP team with the RTI data. Thus, although the District had properly used the RTI data and other factors in assessing C.M.'s educational disability and needs, its failure to provide his parents with the RTI data on which that determination was made denied them a genuine opportunity to give informed consent as required by the federal statute.

The District argued that the IDEA requires only a statement, not documentation; that the requirement was applicable only if the RTI was used to determine C.M.'s eligibility for special education services; and that neither of his formal evaluations relied on RTI data. The Ninth Circuit ruled, however, that the statement given did not include the required information and that the District failed to cite any authority for the inapplicability of the provision. A procedurally valid eligibility determination could be made only after receipt by the entire IEP team of all rele-

vant information, including the RTI data, not merely the report's conclusions.

The Ninth Circuit observed that the federal statute assumes the parents are in the best position to know their child's needs. The IDEA, as described in 20 U.S.C. § 1400 et seq. (2004), requires informed parental consent before conducting an initial evaluation and before providing special education services. In addition, the District must establish procedural safeguards that provide an opportunity for the parents of a student with a disability to examine all records relating to the child. The court cited other cases in which it held that examination of such records by parents is critical to the development of an IEP.

Without C.M.'s complete RTI data, his parents were unable to give informed consent for the initial evaluation and the special education services he received. It was immaterial that his parents did not request the RTI data until the middle of his third-grade year, because the District had a procedural duty to provide the IEP team with the RTI data when making the eligibility determination. The District therefore violated the procedural safeguards of the IDEA by not providing the parents with an opportunity to examine all records relating to C.M.

The Ninth Circuit noted that not all procedural violations of the IDEA deny a child a FAPE, but held that the District's violation denied C.M. a FAPE by preventing the parents from meaningfully participating in the IEP formulation process. Without the RTI data, the parents lacked access to information about his lack of educational progress and discrepancies between his diagnosed processing disorder and his performance on relevant measures. His parents were thus deprived of the opportunity to advocate properly for changes to his IEP.

The dissenting opinion notes that the RTI assessments were given to all students and not used to identify or assess for eligibility for special education, and thus it was not mandatory that the data be provided to the parents.

Discussion

The Ninth Circuit's opinion in *M.M.* focuses on the procedural requirements of the IDEA and underscores the importance of providing the parents of a child with disabilities with data regarding assessments of the child's academic performance. The Ninth Circuit held that without the complete data, the parents could not provide informed consent for the evaluation of their child or for the provision of special education services. Furthermore, the parents could not advocate for changes to their child's special education program that could clarify his specific deficits and address his lack of academic progress without being permitted to review the data that illustrated these problems. The IDEA emphasizes the integral role of the parents in the planning and implementation of special education services and presumes that the parents are in the best position to know the child's needs.

Certainly, in general, parents support the best interests of their children. However, whether parents are in the best position to know the specific educational interventions that will best serve the child's needs or whether parents should hold the primary responsibility for advocating for specific educational services that meet these needs are questions the Ninth Circuit does not address. If, as the Ninth Circuit noted, reviewing the RTI data would have demonstrated to the parents C.M.'s insufficient academic progress and the discrepancy between C.M.'s diagnosed disability and the deficits shown on assessments, the question remains why the school personnel on the IEP team, who did review these data, did not appear to be alarmed by the same problems. The education professionals on the team would likely have been in a better position than the parents to propose specific reassessment procedures to clarify the diagnosis or programmatic changes to better promote academic gains. Although the IDEA's emphasis on parental involvement necessitates parents' having the opportunity to advocate for changes to the services that their children receive, relying substantially on parental advocacy to ensure that the educational needs of children with disabilities are met is inconsistent with the IDEA's "great emphasis on procedural safeguards to 'ensure that the rights of children with disabilities and parents of such children are protected'" (*M.M.*, p. 851, quoting 20 U.S.C. § 1400(d)(1)(B) (2004)).

When called on to perform evaluations of students who may be eligible for special education services, forensic psychiatrists can play an important role in balancing the sometimes competing interests of, and alleviating the tension between, parents and educators on the IEP team. Providing clear, specific diagnostic impressions and recommendations presented in a manner accessible to team members with various educational and professional backgrounds can

facilitate understanding of and communication about the student's needs and guide the formulation of appropriate interventions. Psychiatrists can also help schools interpret assessment data and evaluate the student's response (or lack thereof) to special education services. In addition, psychiatrists can contribute a strong voice in advocating for the needs of their patients to be addressed by appropriate interventions.

Disclosures of financial or other potential conflicts of interest: None.

Trial Strategy and the Presentation of Mental Health, Sexual Abuse, and Intoxication Evidence in a Death Penalty Case

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Counsel's Decision Not to Present Intoxication and Mental Health Defenses Was Reasonable Trial Strategy, but Failure to Present Evidence of Sexual Abuse Prejudiced the Defendant

George Herbert Wharton, who had been sentenced to death for first-degree murder in California, appealed the federal district court's denial of *habeas* relief to the United States Court of Appeals for the Ninth Circuit. In *Wharton v. Chappell*, 765 F.3d 953 (9th Cir. 2014), several questions were before the court. Among these were whether defense counsel's decision not to present intoxication and mental-health defenses during the guilty phase was a reasonable trial strategy; whether counsel was ineffective in failing to investigate and present mental health evidence as part of the mitigation case at the penalty phase; and whether counsel's deficiency in failing to present evidence of previous sexual abuse had prejudiced Mr. Wharton.

Facts of the Case

On February 27, 1986, police discovered the body of Linda Smith stuffed inside a barrel located in the kitchen of her home. An autopsy revealed that she had been struck on the head with a blunt instrument, probably a hammer. Her live-in boyfriend, George Herbert Wharton, was arrested shortly after the discovery of the body and charged with her murder. Mr. Wharton admitted to killing Ms. Smith after they had been drinking heavily and had argued. Because of the overwhelming evidence of guilt, acquittal on all charges was considered unlikely. Instead, Mr. Wharton's defense counsel sought to convince the jury that Mr. Wharton was guilty of only second-degree murder or manslaughter as a result of provocation. The jury was unconvinced and convicted him of first-degree murder during the guilt phase of the trial. The same jury returned a verdict of death during the death penalty phase on the third day of deliberations, which the trial judge imposed.

The jury was unaware of Mr. Wharton's earlier convictions of second-degree murder and rape (both of which had occurred in 1975) during the guilt phase. The prosecution introduced this evidence during the penalty phase, when the defense presented mitigating evidence concerning Mr. Wharton's appalling childhood upbringing, which included physical abuse by his step-grandfather. Mr. Wharton's psychotherapist, Dr. Judith Hamilton testified that her diagnosis of Mr. Wharton was atypical impulse control disorder and multiple forms of substance abuse. Dr. Donald Patterson, a psychiatrist retained by the defense, testified that Mr. Wharton had a personality disorder, a substance abuse disorder, and possibly paranoid schizophrenia. Dr. Patterson testified that Mr. Wharton acted under extreme mental or emotional disturbance at the time of the offense. Mitigating evidence of extensive childhood sexual abuse (which was later revealed by Mr. Wharton's half-brother) was not presented during the penalty phase.

The conviction and sentence were affirmed by the California Supreme Court in *People v. Wharton*, 809 P.2d 290 (Cal. 1991). His application to the United States Supreme Court for a writ of *certiorari* was denied in *Wharton v. California*, 502 U.S. 1038 (1992). Following this, Mr. Wharton applied for federal *habeas* relief. The United States District Court for the Central District of California denied his petition.