

Improved communication between stakeholders and use of more collaborative education planning approaches throughout this process could have circumvented some of the ensuing conflict regarding the most appropriate placement for A.N.H. Such practices may have included enhanced IEP facilitation, external mediation, or both, designed to fuel quicker resolutions amenable to all involved parties.

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## Prisoners' Rights to Safety and Officials' Requirements to Follow Mandatory Regulations

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### Discretionary-function Exception Does Not Universally Shield the Government From Liability Claims Resulting From Inmate Violence

In *Keller v. United States*, 771 F.3d 1021 (7th Cir. 2014), Charles D. Keller was attacked by a fellow inmate in the United States Penitentiary in Terre Haute, Indiana. After the assault, Mr. Keller sued the federal government for damages under the Federal Tort Claims Act (FTCA), claiming negligence on the part of federal prison employees who failed to protect him. The United States District Court for the Southern District of Indiana granted motion for summary judgment brought by the government, which was subsequently appealed by Mr. Keller to the Seventh Circuit Court of Appeals.

#### Facts of the Case

Charles Keller was confined to the United States Penitentiary in Terre Haute, Indiana, in 2007. On admission, Dr. Joseph Bleier, an intake psychologist, assessed Mr. Keller, who informed Dr. Bleier that he believed he had a mental illness that affected his ability to function in general population and that he feared attack by other inmates if placed in general population because of his functional difficulty. Dr.

Bleier placed Mr. Keller in general population despite Mr. Keller's concerns. On October 25, 2007, a fellow inmate attacked Mr. Keller. The attack was unprovoked, unwitnessed, and occurred at the base of a prison watchtower at the boundary of two units of the prison yard. After being found lying unconscious and face down, Mr. Keller was eventually taken to a nearby emergency room. Examinations revealed extensive injuries to his face and head.

Mr. Keller then brought suit against the United States under the FTCA, arguing that prison employees' neglect of mandatory institutional regulations and duties had resulted in the attack. Mr. Keller claimed that prison guards assigned to the watchtower under which the attack had transpired and the guards on the units bordering the location of the attack failed to monitor their posts adequately, allowing the beating to occur. He also contended that Dr. Bleier failed to conform his actions to institutional regulations that require the intake psychologist to read the entirety of an inmate's available medical records before placing the inmate in general population. The government moved for a summary judgment, which the court granted under the discretionary-function exception to liability under the FTCA (described in Discussion). Mr. Keller appealed.

#### Ruling and Reasoning

The Seventh Circuit Court of Appeals reversed the lower court's grant of a summary judgment and remanded the case for further proceedings consistent with its opinion. Although the government argued in its summary judgment briefs that the discretionary-function exception always shielded the government from liability for inmate violence based on *Calderon v. United States*, 123 F.3d 947 (7th Cir. 1997), the court rejected this argument. The court concluded that the government failed to sustain its burden to prove that the discretionary-function exception shielded it from liability for the attack on Mr. Keller. The court opined that the district court incorrectly placed the burden of proof on Mr. Keller, when the burden should lie on the government to present evidence that shows "beyond reasonable dispute" that the government's "conduct was shielded" by the discretionary-function exception. The court held that this legal error was not harmless.

In addition, the court held that the guards' actions and Dr. Bleier's actions were not covered under the discretionary-function exception, because the gov-

ernment failed to produce evidence that their actions were based on institutional regulations and that prison personnel were not violating mandatory regulations with their behavior. Because of this lack of evidence, the court could not, by default, assume that prison personnel were acting under institutional policies at the time of the attack, thus making the discretionary-function exception inapplicable.

The court contrasted this decision with the previous decision in *Calderon v. United States*, where prison officials took note of threats against an inmate and proceeded within institutional policy on how to respond to those threats. In that case, the discretionary exception function did apply, as the federal employees were acting under institutional policy. Finally, the court held that heavy redactions contained in the records provided to both the district court and the Seventh Circuit Court made the determination of which regulations applied to the prison personnel difficult. Those records that were available showed that both Dr. Bleier and the guards were subject to rules and regulations, but which rules and regulations remained unknown. The available records did indicate that psychology services were required to develop procedures to clear inmates who had a PSY ALERT designation, which indicated that the facility had procedures that Dr. Bleier needed to follow to clear Mr. Keller, who had a PSY ALERT, before placing him into general population. However, since those actual procedures were not contained in the record, the court could not assume that the regulations did not “constrain Dr. Bleier’s discretion” for placing Mr. Keller in general population.

*Discussion*

The FTCA allows for claims against an employee of the government acting within their scope of office for loss of property, personal injury or death if caused by negligence or wrongful act of omission, under circumstances that a private citizen could also be held liable (28 U.S.C. § 1346(b)(1) (2009)). Numerous case law decisions have upheld federal prisoners’ rights to sue under the FTCA for injuries suffered from negligence of government employees. The discretionary-function exemption shields the government employee from liability, if

... any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or

an employee of the Government, whether or not the discretion involved be abused [28 U.S.C. § 2680(a) (2006)].

The court in *Keller v. United States* rejected that the discretionary-function exception always shields the government from claims resulting from inmate violence and found that the government must show beyond “reasonable dispute” that the exception is applicable. The implications for psychiatrists and psychologists working in correctional settings are clear. In the case of inmate violence, failure to follow mandated statutes, regulations, or policies, nullifies a discretionary-function exception defense. While working with a legal defense team, providing evidence of clinically appropriate adherence to procedures and policies is an effective means of using the exception rule, and not doing so may make a clinician more vulnerable to tort actions. As in this case, the court remanded in part to determine the nature of the procedures governing mental health intake screening and to determine whether Dr. Bleier had complied with those regulations or violated them, which would determine if his action to release Mr. Keller into general population was shielded by the discretionary-function exception or not.

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## Ineffective Counsel Resulting From Failure to Explore History of Brain Injury in a Capital Case

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### Failure to Fully Investigate and Present Potentially Mitigating Evidence During the Sentencing Phase Violates a Defendant’s Sixth Amendment Right to Effective Counsel

In *Mann v. Ryan*, No. 09-9901 (9th Cir. 2014), the Ninth Circuit Court of Appeals reviewed the *habeas corpus* petition of a man with a state conviction and death sentence for two first-degree murders. The Ninth Circuit affirmed in part and reversed in part the Arizona district court ruling, which had de-