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Second Circuit Holds District Denied FAPE by Refusing to Discuss Bullying at IEP Meeting

On January 20, 2016, the Court of Appeals for the Second Circuit issued its decision in *T.K. v. New York City Dep't of Educ.*, --- F.3d ---, 2016 WL 229842 (2d Cir. Jan. 20, 2016), an important decision regarding the role of a planning and placement team (PPT) in addressing issues of bullying. Specifically, the court held that a PPT's refusal to address bullying concerns through the PPT process was a procedural violation of the Individuals with Disabilities Education Act (IDEA) because it denied parents their right to meaningfully participate in the PPT process and the development of the student's individualized education program (IEP). As the procedural violation impacted the parents' right to participate, the court further held that the violation amounted to a denial of the student's right to a free appropriate public education (FAPE).

In *T.K.*, an elementary student had been subject to bullying behavior by other students, including other students pinching her; stomping on her toes; tripping her; laughing at her; calling her "ugly," "stupid" and "fat;" refusing to touch a pencil she had touched, and otherwise ostracizing the student victim. According to the court, the teachers did little to address the bullying behavior, and instead labeled the pencil with her name and "berated" the student for "making a scene" when she was tripped. The parents attempted to raise these issues at IEP meetings, but the team told the parents it was an inappropriate topic for the team to consider in developing the IEP and, therefore, refused to discuss the bullying issues at IEP meetings. Subsequently, the parents unilaterally placed the student in a private school and filed for due process to seek tuition reimbursement from the school district.

Although the school district prevailed at the administrative levels, the parents appealed to federal district court and that court ruled in favor of the parents. The district court ultimately held that bullying behavior against a special education student that is not remedied could result in a denial of FAPE. In reaching its decision, the district court developed a novel, four-part test to determine whether bullying constitutes a denial of FAPE:

- (1) was the student a victim of bullying;
- (2) did the school have notice of substantial bullying of the student;

- (3) was the school “deliberately indifferent” to the bullying, or did it fail to take reasonable steps to prevent the bullying; and
- (4) did the bullying “substantially restrict” the student’s “educational opportunities?”

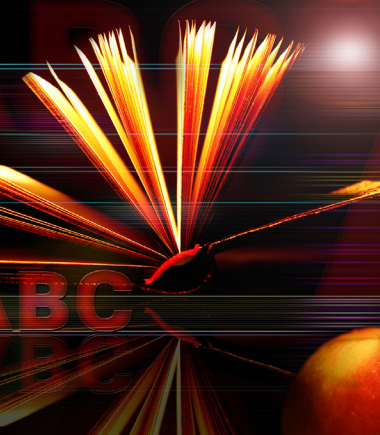
T.K., 2016 WL 229842, at *2 (citing the district court decision, *T.K. v. New York City Dep’t of Educ.*, 779 F. Supp. 2d 289, 316, 318 (E.D.N.Y. 2011)). The school district ultimately appealed to the Second Circuit from further administrative and district court proceedings.

On appeal, the school district conceded that bullying behavior that “reaches a level where a student is substantially restricted in learning opportunities,” could impact a student’s FAPE and was an appropriate consideration in the development of an IEP. *Id.* at *4. Because of that concession, the Second Circuit assumed without deciding that such bullying behavior was a proper topic for discussion at the IEP meetings. The court noted, however, that the school district’s concession “recognizes that a child with a disability who is severely bullied by her peers may not be able to pay attention to her academic tasks or develop the social and behavioral skills that are an essential part of any education.” *Id.* The court further observed that this concept is supported by the U.S. Department of Education’s position that bullying can impact a student’s receipt of FAPE as set forth in the Office of Special Education and Rehabilitative Services’ (OSERS) August 20, 2013 *Dear Colleague* letter regarding bullying and FAPE issues. (That *Dear Colleague* letter is available at www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf).

In addition, by concluding that the school district violated FAPE obligations on procedural grounds because the school district did not allow discussion of bullying at the IEP meetings, the Second Circuit did not address whether the bullying behavior in this case would have constituted a substantive violation of FAPE. Importantly, as a result, the court also noted that it expressed no opinion on the four-part bullying-FAPE test developed by the district court.

While there are still many important outstanding questions about the interplay between bullying and FAPE, several points can be taken away from the Second Circuit’s recent *T.K.* case:

- It is clear that bullying may be an appropriate topic to discuss at a PPT meeting and to consider when developing an IEP. Schools may not refuse to discuss bullying at PPT meetings even though there are separate bullying reporting and investigation processes under the safe school climate plan.
- As a result, administrators must be cognizant of the PPT’s responsibility to consider bullying issues in addition to their overlapping responsibilities to address such issues under the bullying/safe school climate plans and civil rights laws/harassment policies.



- Although not squarely decided by the Second Circuit in this case, the court strongly signaled that bullying behavior could rise to the level of a substantive violation of FAPE. As a result, PPTs should make appropriate programming decisions to address such issues for the student victim regardless of whatever administrative or disciplinary action the school may take against the bullying perpetrators.
- Because the Second Circuit neither endorsed nor rejected the four-part bullying-FAPE test from the lower court, there is still no authoritative legal test to determine when bullying behavior may constitute a substantive denial of FAPE.
- While OSERS' *Dear Colleague* letter on bullying and FAPE is not binding legal authority and was cited by the court only as an example of the U.S. Department of Education's position on the matter, school districts should be familiar with the Department's guidance in that letter. In addition to being the official position of the U.S. Department of Education, which is responsible for administering IDEA, the fact that the court cited the letter when it was not a crucial element in the resolution of the case suggests that the court may have found some merit to the guidance.

Questions or Assistance:

If you have any questions about the recent ruling or its possible implications, please contact Peter J. Maher at pmaher@goodwin.com or 860-251-5507.

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