



July 13, 2016

### *ADDRESSING BULLYING IN IEPs*

Recent case law, *T.K. and S.K. ex rel. L.K. v. New York City Dep't of Educ.*,<sup>1</sup> advises that districts must address bullying of special education students in IEPs.

Bullying is a term that is often heard in school settings. Studies indicate that students with disabilities are disproportionately affected by bullying<sup>2</sup> and they are more likely to be bullied than their peers.<sup>3</sup>

The purpose of the Individuals with Disabilities Education Act (IDEA) is “to ensure that all children with disabilities have available to them a free appropriate public education (FAPE).”<sup>4</sup> The “centerpiece” of the IDEA and its principal mechanism for achieving its goal is the individualized education program (IEP).<sup>5</sup> While not all acts of bullying can lead to a denial of a FAPE, bullying of a student with a disability that results in the student not receiving meaningful educational benefits constitutes a denial of FAPE under the IDEA and the Office of Civil Rights has indicated that bullying must be remedied.<sup>6</sup>

Ignoring the issue of bullying when the parents bring it up at IEPs is a denial of FAPE because the IDEA requires districts to provide parents with the “opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child.”<sup>7</sup> Courts have held that by not allowing the parents to be heard and address the issue of bullying in IEPs, a District denies the parents the safeguards afforded to them under the IDEA.

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<sup>1</sup> 67 IDELR 1 (2<sup>nd</sup> Cir. 2016).

<sup>2</sup> Dear Colleague letter, Aug. 20, 2013, 67 IDELR 1. Available at: (<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf>), citing Swearer, S.M., Wang, C., Maag, J.M., Siebecker, A.B., & Frerichs, L.J. (2012). Understanding the bullying dynamic among students in special and general education. *Journal of School Psychology*, 50, 503-520.

<sup>3</sup> *Id.* citing Twyman, K.A., Saylor, C.F., Saia, D., Macias, M.M., Taylor, L.A., & Spratt, E. (2010). Bullying and ostracism experiences in children with special health care needs. *Journal of Developmental Behavioral Pediatrics*, 31, 1-8.

<sup>4</sup> 20 U.S.C. § 1400(d)(1)(A).

<sup>5</sup> *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197 (2<sup>nd</sup> Cir. 2002).

<sup>6</sup> Dear Colleague letter, Aug. 20, 2013, 67 IDELR 1. Available at: (<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf>).

<sup>7</sup> 20 U.S.C. § 1415(f)(3)(E)(ii).

In *T.K. and S.K. ex rel. L.K. v. New York City Dep't of Educ.*, the student had a disability and was in both special and general education. Although she was making academic progress, at some point in the school year, the student started frequently going home crying and she reported to her parents that she was being bullied at school on nearly a daily basis. The bullying was so severe that it affected her academic and non-academic development. School staff knew about the bullying and did nothing. Her parents tried to address the issue of bullying during two IEP meetings. At the first meeting, the principal flatly refused to discuss the issue with them and during the second meeting, school officials refused to discuss the issue saying it was an inappropriate topic to develop the IEP. While the district won at the due process hearing, the U.S. Court of Appeals held that “The Department’s persistent refusal to discuss L.K.’s bullying at important junctures in the development of the IEP ‘significantly impede[d]’ the parent’s “right to participate in the development of L.K.’s IEP.” The Court further held that “denying L.K.’s parents the opportunity to discuss bullying during the creating of L.K.’s IEP not only potentially impaired the substance of the IEP but also prevented them from assessing the adequacy of their child’s IEP.”

While the above holding may be considered by California courts,<sup>8</sup> the Ninth Circuit currently holds that if a teacher is deliberately indifferent to the teasing of a child with a disability and the abuse is so severe that the child can derive no benefit from the services that he/she is offered by the school district, the child has been denied FAPE.<sup>9</sup> Therefore, it is very likely that the holding in *T.K.* will eventually be incorporated into any reexamination of this issue by the Ninth Circuit.

Given the current state of the law, Schools Legal Service is advising that all issues of bullying, whether brought up by the parents or known by the school staff, be discussed during an IEP. If a parent requests the issue of bullying be addressed, or if the school staff is aware that a student with an IEP is being bullied, the IEP team should convene to determine whether, as a result of the effects of bullying, the student’s needs have changed such that the IEP is no longer designed to provide meaningful educational benefits. IEP teams should exercise caution when considering a change in the placement or the location of services provided to a student with a disability that was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current placement.<sup>10</sup>

Although the problem of bullying, both “generic” bullying and discriminatory bullying (based on disability, race, gender and so on) may be addressed by parents and teachers through the IEP process, doing so is not a substitute for additional investigation and/or corrective action as may be required. If the problem is, subsequently or simultaneously, brought to the district compliance officer in the form of a complaint, then the Uniform Complaint Process (UCP) must also be initiated.<sup>11</sup> The two processes should be complimentary, with the UCP process resulting in a broader investigation, additional analysis and the possibility of corrective action that is different or more comprehensive.

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<sup>8</sup> The *T.K.* decision arises from the 2<sup>nd</sup> Circuit Court of Appeals which is not binding in California as we are under the jurisdiction of the 9<sup>th</sup> Circuit Court of Appeals.

<sup>9</sup> *M.L. v. Federal Way School District*, 394 F.3d 634 (9<sup>th</sup> Cir. 2005).

<sup>10</sup> Dear Colleague Letter, Aug. 20, 2013, 67 IDELR 1. Available at: (<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf>).

<sup>11</sup> See, BP/AR 1312.3 and Title 5 C.C.R. §§ 4600-4687.

Through the IEP process, the targeted student's IEP team may, of course, recommend and implement new accommodations and services. Such accommodations and services would be designed to interdict harassing behavior and mitigate its effect on the target. Examples of such corrective action may include early release from class or from school at the end of the day; or escort; preferred seating in class and on the school bus; preferred locker assignment; use of a staff bathroom; additional academic support; psychological counseling; development and implementation of a communication plan; and in extreme cases even the assignment of a "shadow aide," alternative transportation altogether, and if necessary, even placement at another site if preferred and requested by the targeted student.<sup>12</sup>

If you need any further assistance or advice, please feel free to contact our office.

– *ELIZABET RODRIGUEZ*

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<sup>12</sup> As with the IEP process, the UCP process can also result in corrective action that is focused on the targeted student. Such corrective action could be similar to that which may be taken by the targeted student's IEP team. In addition, however, through the UCP process, the corrective action recommended and taken may also focus on the school environment as a whole and on individual perpetrators, as may be warranted.

Examples of corrective action under the UCP process that is systemic in nature includes: (i) school climate surveys; (ii) additional training for faculty, staff and the student body designed to reinforce district policies; (iii) school-wide anti-bullying program purchased from and presented by outside source; and (iv) monitoring of the complaints plus a review to correct any inadequate responses.

Also, through the UCP process, the perpetrator him/herself can be required to participate in conflict mediation; comply with "no-contact" directives; be referred to a student study/success team; engage parent involvement; participate in pro-social behavior instruction; receive a behavior support plan; participate in restorative justice strategies; participate in anger management instruction; and be subjected to progressive student discipline leading to suspension from school and an expulsion recommendation.