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*By Jack Feldman*

## MONTHS IN REVIEW: February-March 2018

## Read All About It!

### *A Monthly Synopsis of Salient Cases in Special Education*

In this installment of the Attorney's Corner, we review two federal decision, an appellate decision by the Eighth Circuit Court of Appeals, a decision by NYSED's Office of State Review, and an opinion letter by the DOE's Office of Educational Management.

We start with a pair of decisions, each examining under what circumstances a school district may be held liable when a student commits suicide, allegedly due to peer bullying. The first is a decision from the U.S. District Court, Western District of New York, which found that a school had not reasonably responded to the parents' repeated calls for help to address their child's bullying. This is contrasted with a decision from the Eighth Circuit Court of Appeals which, while considering the same standard, found that any knowledge the school had of a child's experience of being bullied was gained only after the child had taken his own life. We also review a decision from the U.S. District Court in Colorado, on remand, where the family in the *Endrew F.* case successfully convinced the court that their child's IEP from the 2010-11 school year was inappropriate. This is potentially the final case in a long saga which resulted in a decision by the U.S. Supreme Court. In a decision by the Office of State Review ("SRO"), we explore whether a child — now considered an adult — may file his or her own due process demand. We conclude with an advisory opinion by the U.S. Department of Education's Director of Student Privacy directing that school security camera footage likely is an educational record. As such, the local school district must redact or obscure other children's images if a parent requests an opportunity to

  

review the tape and, should the district be unable to obscure other students' identities or segregate their involvement, the record must be shared.

## *Federal District Courts-Bullying Decisions*

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## I. Parents' Case Allowed to Go Forward Whether to Find School District Liable for Child's Suicide

*Spring, et al. v. Allegany-Limestone C.S.D., et al.*, 71 IDELR 82, 14-cv-4763 (WDNY 2018)

### SALIENT FACTS AND HISTORY:

Gregory Spring was a student with multiple disabilities, including diagnoses of Tourette's Syndrome, ADHD, and Callosum Dysgenesis, a disorder manifesting itself in challenges interpreting social cues. Near the end of his senior year, Gregory took his own life. His parents, both individually and as the administrators of his estate, sued the school district, including board members and an assistant principal in their individual capacities. The suit argued that school staff and administration were aware that Gregory had been bullied due to his disability for many years, both during middle and high school, and that the district failed to take any steps to address the bullying. The parents also filed suit against a number of Gregory's classmates alleged to have been his aggressors.

### FEDERAL COURT PROCEEDINGS AND APPEALS:

The parents filed their federal lawsuit exactly one year after Gregory's death under the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, New York Civil Rights Law, and a number of state tort claims. The District Court initially dismissed the parents' complaint before trial, finding that the family had not pled facts showing Gregory had been denied an opportunity to benefit from, or participate in, the District's program. The parents filed a motion seeking to amend their complaint, which was denied by the District Court. The parents appealed to the Second Circuit Court of Appeals.

The Second Circuit held that the District Court abused its discretion in denying the parents an opportunity to fix any of the errors in their complaint, and gave the family the opportunity to do so.

On remand to the District Court, the parents filed a new complaint in an effort to address the prior deficiencies. The District moved yet again to dismiss the parents' claim, arguing that the family still had not alleged any facts which would show, even if all were true, that the District was at fault.

  

## DISTRICT COURT'S DECISION:

In a lengthy decision discussing the parents' allegations, the District Court found that the parents' lawsuit against the school district and the assistant principal could proceed. The District Court found that the parents had raised sufficient allegations to support their claims, including a detailed history of years' worth of altercations between Gregory and two fellow students while in school, that the fellow students were the aggressors in these altercations, and that the aggressors specifically targeted Gregory's disability during these occasions. The underlying bullying was alleged to consist of incidences of name calling, offensive touching and hitting, mimicking and mocking Gregory's ticks in class and in the schools, and taunting, all through middle and high school on an almost daily basis. The District Court also examined allegations that Gregory was suspended from school as a result of a number of these altercations, but that the District never conducted a manifestation determination to consider whether there was a direct and substantial connection between Gregory's conduct and his disability.

The District Court further examined allegations that the parents raised Gregory's experience of being bullied at Committee on Special Education ("CSE") meetings, documentation of meetings between the parents and the assistant principal on the same topic, and email and letter records appearing to demonstrate that the parents had brought the issue to the attention of various board members prior to Gregory's suicide. The District Court found sufficient allegations that the assistant principal had repeatedly declined to investigate any of the parents' claims that Gregory had been bullied, and that the assistant principal had astonishingly assisted the aggressor classmates and their respective families in filing a civil lawsuit against Gregory, apparently for the purpose of harassing him. Based on the above, the parents' federal disability related discrimination claims were permitted to proceed against both the school district as an entity and the assistant principal individually.

## WHY YOU SHOULD CARE:

Gregory's case is ongoing. There has yet to be a trial to determine what actually occurred. The District Court based its decision purely on the facts alleged by Gregory's parents and that those facts, if true, were sufficient to support their legal theory. The upshot of the District Court's decision is that the parents now have an opportunity to prove their allegations at trial.

It is important to note that the student here took his own life almost one year after Dignity for All Students Act ("DASA") was enacted in New York. DASA requires school districts adopt a number of anti-bullying policies. Chief among these as relevant to this case are policies which describe the identification of DASA coordinators to accept complaints of bullying, and procedures to investigate these claims. Had these procedures been followed, the assistant principal would have been the subject of the bullying claim, rather than being charged with responsibility to investigate the claims.

When a bullying complaint is received, whether among students or perpetrated by district staff, the school district should begin a formal investigation of the complaint without delay. This includes interviewing the alleged victim, the accused, potential witnesses, and any staff who may be familiar with the particulars. Once completed and, if found to be credible, the school district should identify ways, including student disciplinary proceedings, to address the underlying problem.

When a student with a disability is involved, whether as the victim or aggressor, the CSE should be convened to review the student's individualized education program ("IEP") to determine whether the bullying is impacting the student's ability to receive a free appropriate public education ("FAPE") and, if so, what changes to program or accommodations can be recommended to alleviate the problem. This can include drafting new goals; adding changes to the student's schedule, such as leaving class early, to minimize contact between the aggressor and victim; social skills counseling; the provision of a safe harbor; or the addition of staff and/or student training to address bullying. Creativity is the watchword in this process.

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## II. A Parent's General Concerns of Bullying Does Not Put School District On Notice of Student's Peer Harassment

*Estate of Barnwell v. Watson, et al.*, No. 16-3067, 118 LRP 3470 (8th Cir 2018).

### SALIENT FACTS AND HISTORY:

Another tragic story, Chandler Barnwell ("Chandler") was 16 years old at the time of his death. He had been previously diagnosed at different times with ADHD, depression, anxiety disorder, oppositional-defiant disorder, as well as being on the autism spectrum (previously Asperger's Syndrome). He moved from school to school starting in 6th grade; from the public setting to private school, to being homeschooled and back again. In each setting, he exhibited maladaptive behaviors, in one instance being expelled from a parochial school in 7th grade for setting fire in a trash can while smoking in the bathroom. Throughout his educational career, Chandler had been hospitalized numerous times for various reasons, including reports of hearing voices and suicidal ideation and attempts.

For the 2009-10 school year, Chandler was re-enrolled in the District as an 8th grader. The parents and the District both reported he performed well academically in a regular education classroom, and there were no reports of bullying occurring in school. However, the parents described ongoing conflicts between Chandler and other children in the neighborhood.

Chandler entered the District's Arts-Science Magnet School in 9th grade.

  

His IEP recommended counseling, a social skills "pragmatics" group, and program modifications to address getting to class on time. After the start of the school year, his "educational management team" (similar to a child study team in New York), modified his schedule to permit Chandler to leave class five minutes early in response to a complaint that other students were impeding Chandler in the hall. In October, Chandler was suspended for one day after striking another student. Chandler claimed that the other student called him a name attacking his sexuality. During this time, Chandler stopped riding the bus, purportedly due to ongoing strife with peers in his neighborhood.

In November 2010, the IEP team met to review Chandler's needs. Chandler's mother stated that, while she was pleased with his academic success, she was concerned that Chandler was being bullied. The team discussed, in general terms, how children with autism had a higher likelihood than other children of being bullied due in part to difficulties interpreting social cues. The team agreed to focus on this need during Chandler's pragmatics group.

Following the IEP team meeting, Chandler met with his guidance counselor, requesting information to aid in early graduation. Chandler reported that he had no friends at school, and that he could not handle being an "outcast" any longer. Thereafter, the educational management team discussed moving Chandler to a higher functioning social skills group. In December, following a verbal altercation with a classmate, Chandler took his life upon returning to his home.

The parents filed a complaint with the Office of Civil Rights ("OCR"), alleging that Chandler was a victim of peer-based harassment due, in part, to his disability. Thereafter, they filed suit in federal court, naming school district employees in their individual capacity as defendants, including the Superintendent of Schools, seeking monetary damages for violations of Chandler's rights to be free of disability-based discrimination. The Superintendent moved to dismiss for failure to state a claim.

## DISTRICT COURT'S DECISION:

The District Court granted the Superintendent's motion, finding that both the District defendants and the parents agreed that the school had no reasonable notice of specific instances of bullying or peer-harassment prior to Chandler taking his life. The Court declined to consider the parents' argument that the school should have been more proactive in inquiring about Chandler's needs. The Court rejected this argument, finding that since the family knew of specific facts, they had a duty to share that information with the school. As such, the parents were unable to meet 504's standard of bad faith or gross indifference.

## CIRCUIT COURT'S DECISION:

The U.S. Court of Appeals of the Eighth Circuit affirmed the District Court's decision, holding that a school district cannot be held liable under Section 504 of

  

the Rehabilitation Act or ADA for disability-based harassment if the school was not aware of the bullying. Specifically, the Court found that the parent had merely raised general concerns that Chandler was being bullied, without sharing or describing incidents of harassments or the identities of the alleged aggressors. The Court found that sharing unspecified concerns at the student's IEP meeting was insufficient to put the district on notice. The Court pointed out that there were many instances in the record reflecting the parents' withholding or failing to share information with the school district, including; times and reasons Chandler had been hospitalized throughout his educational career, the reasons why Chandler ceased riding the bus to school in 9th grade, and withholding private school records following Chandler's various expulsions. In reviewing the school's responses to the issues actually raised by the parents at Chandler's IEP meetings, the Court found that the District addressed all of the parents' concerns actually raised at the time of the meetings. In conclusion, the Court found no evidence that the District knew, or should have known, that Chandler was being harassed at school.

## WHY YOU SHOULD CARE:

Comparing this case to *Spring*, discussed above, it highlights the importance of responding to parents' concerns of bullying. In *Spring*, the district appears to have had specific knowledge of the student being the victim of bullying. Here, the family withheld that same information. This case, in dicta, identifies an unfortunate truth when educating children: schools are "unlike the adult workplace and that children may regularly interact in a manner that would [be] unacceptable among adults." The takeaway is that a district must investigate reports of bullying when receiving a specific complaint of such harassment. When generic claims of bullying are raised, districts should make all reasonable efforts to obtain specific details.

The reality is that most reports received by school staff don't come packaged in an ideal form. When receiving such a report, best practice is to elicit as much detail from the reporter — be it a student, staff member, or parent — including the identities of the victim and aggressor(s), the dates and locations of the incident(s), and any background on the actors. Once the background is collected, the district should investigate the claim, and document the results in a report. If the allegation accuses a staff member as the aggressor or as being otherwise involved, that staff member should **not** conduct the investigation.

One of the problems in the instant case is that the parents withheld information of Chandler's experience in the private school setting. Districts should implement a practice of expressly requesting consent to receive records from the student's previous setting when enrolling, or re-enrolling, a student into their buildings. However, an exception to the Family Education Rights in Education Act ("FERPA") is the sharing of records between school districts when a new student comes to the district. Should the parents withhold consent, records should be sought directly from the prior school. For students with disabilities coming with an

  

IEP from another school district, new evaluations should be conducted if the special education file has not been shared to ensure the student will be placed in an appropriate setting, but also to catch any problems not disclosed by the family.

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## *Federal District Court*

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## III. The Last Chapter in *Endrew F.* (Possibly)

*Endrew F. v. Douglas Cty. Sch. Dist.* RE 1, No. 12-CV-2620-LTB, 118 LRP 5674 (D. Colo. Feb. 12, 2018)

### SALIENT FACTS AND HISTORY:

As we first reported last Spring, the national standard for FAPE was changed. The Supreme Court reversed a 10th Circuit Court of Appeals case, redefining the FAPE standard for the entire country. As part of the decision, the case was sent back to the lower courts.

By way of background, the parents of a fourth-grade autistic youngster unilaterally withdrew their child from public school after his IEP proposed a program for fifth grade that closely resembled prior years' IEPs, including the same goals year after year. The child had been educated in the public school district since pre-school, and by fourth grade, the parents believed that his progress had stalled. According to the hearing record, the child exhibited multiple behaviors in the classroom that inhibited his ability to learn. The parents sought tuition reimbursement for their unilateral private school placement, where the child made "significant progress" during fifth grade.

The impartial hearing officer and two federal courts found that the public school's program provided the child with some educational benefit, and therefore, denied the parents' request for tuition reimbursement. The Tenth Circuit interpreted Rowley to indicate that Endrew's IEP was adequate, as it was calculated to confer an educational benefit that is merely more than *de minimis*.

The U.S. Supreme Court overruled the 10th Circuit Court of Appeals, describing two distinct standards – one for children in the regular education environment and another for those in more restrictive settings. For a child being fully integrated in the regular education environment, the Court reiterated what it stated in Rowley, that educational progress means passing marks and advancement from grade to grade. The Court did note that the converse is not always the case, that not every disabled child advancing from grade to grade is automatically receiving FAPE.

  

For a child who is not educated in the regular education environment, and who is not functioning on grade level, a standard of "barely more than *de minimis* progress" is no longer considered appropriate. Rather, although grade level advancement may not be the standard to view progress, it should be "markedly more demanding" than "merely more than *de minimis*."

The Supreme Court remanded the matter to the 10th Circuit, who immediately remanded Endrew's case to the District Court.

## COURT'S DECISION:

On remand, the U.S. District Court applied the Supreme Court's standard, i.e., whether the proposed IEP was reasonably calculated to enable the student to make progress that was appropriate in light of his unique circumstances, and found that the student's IEP did not satisfy the 'new' FAPE standard. The Court found that the student's fifth-grade IEP had the same annual goals as IEPs from the prior three school years, absent minor changes to the underlying short-term objectives. The Court rejected the district's argument that the student's increasingly severe behavioral problems prevented him from making greater progress, instead finding that the District's failure to conduct an FBA or develop a BIP for the student suggested that the IEP in question was inappropriate. The Court found that the failure to address interfering behaviors "negatively impacted [the student's] ability to make progress on his educational and functional goals[.]"

The Court similarly discussed the District's argument that compliance with the procedural requirements of IDEA should confer a certain level of deference to the determinations of the IEP Team.1 Rejecting this argument, the Court held that any deference would be based upon expertise and educational judgment which leads to a substantively appropriate IEP. Therefore, the Court did not consider, nor made any findings, as to the school district's claims of "expertise" or "reasonable judgment." The court held the parents were entitled to recover their reasonable private school and transportation costs.

## WHY YOU SHOULD CARE:

The likely, albeit cynical, interpretation is that the District Court revised its prior decision because the Supreme Court overruled it, notwithstanding a finding that the school district provided a higher level of educational benefit than the old 10th Circuit standard required.2 Furthermore, the District Court focused a portion of its decision on the level of behavioral supports the CSE offered to Endrew F., a factor not previously addressed in the earlier decisions.

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1Colorado's version of the CSE.

2Previously, courts in the 10th Circuit looked to determine "whether the IEP was calculated to confer an educational benefit that is merely more than de minimis." Thompson R2-J Sch. Dist. Luke P., 540 F.3d 1143, 1150 (10th Cir. 2008).

We previously wrote that the US Supreme Court's decision in *Endrew F. v. Douglas County School District RE-1* brought greater scrutiny in assessing the substantive appropriateness of students' IEPs. Here, the District Court's focus on the student's behavior may be a signal that CSEs should closely consider identifying and alleviating any impediments to the student's ability to benefit from the IEP. Consider that the Second Circuit has already identified bullying as a potential impediment to the access of FAPE. What other factors may be considered an impediment? Poverty? Drug Abuse? A Broken Home? The point is not so much hyperbolically alarmist, rather that CSEs must identify whether there are any factors which may impede a student's ability to benefit from the IEP. And once identified, the CSE must make recommendations to address those factors. While the CSE may not be expected to eliminate bullying, it is required to discuss and consider the impact when making its recommendations.3 As of the writing of this article, the school district has yet to file an appeal of the federal district court's decision. A final determination will likely be made once the family's attorneys file their report on damages sought, and fee reimbursement. We will continue to monitor the developments in this ordeal to its conclusion.

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## *Office of State Review*

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## I. Confusion Continues as to Whether a Student May File His or Her Own Due Process Complaint

*Application of a Student with a Disability,* Appeal No.'s 17-077 (November 15, 2017)

**SALENT FACTS AND HISTORY:**

The student who was in the final year of his eligibility had retained an attorney on his own initiative and sought a re-evaluation from the school district while attending a 12:1+1 special class program in a state-approved nonpublic school. The CSE arranged for a psychoeducational evaluation to be conducted, which was reviewed by the committee in June of 2014. No changes were made to the student's IEP as a result of the new information. At the end of the month, the student graduated from his program and was issued a diploma which ended the student's eligibility for IDEA services.

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3The district in T.K. was ultimately found to have failed to offer FAPE due to its refusal to discuss the student's bullying with the parents at the CSE meeting. See T.K. v. NYC Dept. of Educ., 810 F.3d 869 (2d Cir. 2016).

  

Approximately one year later (May 2015), the student filed an impartial hearing request, arguing he was denied FAPE due to the district's failure to appropriately prepare him for "requisite skills to transition into a post-secondary school setting." The student sought compensatory education for failure to provide FAPE during the 2012-13 and 2013-14 school years, a full re-evaluation at district expense, and other relief.

## IHO'S DECISION:

After accepting appointment, the IHO became concerned that no parent was involved in the litigation. The IHO requested the parties to brief whether a student could pursue his own claims in an impartial hearing. After considering the parties' papers, the IHO dismissed the complaint, finding that a student may not file a hearing request on his or her own behalf, in that New York has no statute or regulation which transfers decision-making authority to children for the purpose of special education. In the IHO's August 2017 decision, the IHO held he lacked jurisdiction to determine whether the student himself had this authority. The student appealed to the SRO, requesting that the matter be remanded to the IHO for a decision on the merits.

## SRO'S DECISION:

The SRO remanded the case back to the IHO, not to decide the case on the merits, but to develop a record as to whether any other person could be considered the student's parent for the purpose of the hearing. In reviewing the record, the SRO noted that the student's mother had previously been involved in the student's education in prior years, but over time that role had been assumed by the student's brother and brother's partner. The SRO directed the IHO to determine whether, under NY Educ. Law 3212, any other adult had been appointed a "custodian" or "guardian" of the student. If not, the IHO was to develop a record exploring whether the school district should have appointed a surrogate parent for the student, purely for the purpose of resolving the question of standing.

The SRO rejected the student's argument that a "guardian as litem" should have been appointed by the IHO, noting that this only occurs when the interests of the parent and student are in opposition. Because there was no parent identified, no opposition could be found to exist.

## WHY YOU SHOULD CARE:

This is a strange decision. Standing is the principle that a litigant has the right to bring a case. One imagines that turning 18 years-old confers upon a student the ability to pursue an action in his or her own interests. Certainly, there is a two-year statute of limitations in all IDEA cases, which seems to suggest a student – even after graduation – could go back and request compensatory education, for example, from his or her former school district. According to the SRO, this does not appear to be the case.

The more important question this decision intimates is who is making educational decisions for the student prior to his graduation, and whether that person had the authority to do so. To whom were prior written notices or copies of the IEP sent and who was invited to his CSE meetings? Districts should be careful to ensure they are actually interacting with a student's parent. In the event of a split family, in the instance of divorce or separation, districts should secure the operative custody order, especially the sections detailing who has educational decision-making authority. Where no agreement exists, parents should be consulted to determine their continued involvement in their children's education.

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## *Office of Special Education Programs*

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### I. Video Containing the Images of Multiple Students May be Released Under FERPA

*Letter to Wachter, 117* LRP 41923 (OEM Dec. 7, 2017)

**SALIENT FACTS AND HISTORY:**

A law firm wrote to the Department of Education's Office of Educational Management ("OEM") inquiring whether a Pennsylvania school district was required to allow a parent of a student involved in a purported hazing incident to view surveillance video and student witness statements under FERPA. The facts as relayed by the law firm suggest that the incident involved multiple members of the football team engaged in unspecified hazing of 10—12 other students. A number of innocent bystanders witnessed the event and reduced their observations to writing.

Copies of student witness statements and the surveillance video were requested from the district under FERPA. The district declined, citing other students' privacy regarding the disclosure of personally identifiable information. The surveillance video and student witness statements were sought in order to challenge the subject student's disciplinary penalty.

**ADVISORY OPINION:**

The OEM first identified the video and statements as student records covered by FERPA. However, such records, which contain information on more than one student can only be inspected if the parents of the other students have consented in writing. If no consent has been provided, then the parents of the subject student may only have access to portions of the record which relate to him or her. Access in this instance refers to receiving a copy of the record, inspecting

  

the record, or being "informed of" the contents of the record. See 34 CFR § 99.12(a). Regarding witness statements, personally identifiable information of other students should be redacted, unless doing so would destroy its meaning. 73 Fed. Reg. 74806, 74832 (Dec. 9, 2008).

In the specific instance, the question was raised whether any portion of the video or statements could be viewed without disclosing FERPA-protected information about the other students. OEM advised that the district should review both the video and the statements to determine whether the subject student's involvement can be segregated from the other students, or whether the other students' personally identifiable information can be redacted without destroying the meaning of the items in question. If segregation or redaction would change the meaning of the items, the subject student's parents would be entitled to review (by copy, inspection or being informed of the content) the unedited records. OEM advised that the school district is in the best position to make this determination.

## WHY YOU SHOULD CARE:

Security within the school building is becoming an ever-increasing concern to families and staff alike. As such, administration will be called upon to produce copies of surveillance video recordings, such as during student disciplinary hearings, as was the case in the opinion letter discussed. Districts should review their policies and practices to determine how long such video recordings are maintained. If such recordings are maintained for any significant length of time, storage and retrieval protocols should be reviewed to ensure staff may locate a particular record upon request.

Additionally, districts may wish to develop and implement regulations to their FERPA policies to direct administration how to determine whether other students' personally identifiable information can be redacted or otherwise obscured. There was discussion in the OEM opinion letter about whether there were technological solutions to video redaction, such as the pixilation of other students' faces. There is significant cost to this technology; it is unlikely that such technology is available. However, as technology costs decrease over time, this may be the type of investment school districts may wish to make. If this approach is taken, districts should scrupulously ensure that the original recording is maintained in its original form.

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