

## ATTORNEY'S CORNER

**By Jack Feldman**

**MONTH IN REVIEW: January 2016**

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

In this installment of the Attorney's Corner, we review a series of decisions dealing with bullying from the Second Circuit Court of Appeals to a federal district court in New York to a New York State court, to the SRO. In addition, we discuss a decision of the federal district court addressing how graduation with a Regents diploma ends a student's entitlement to IDEA services, and a decision by the SRO exploring a district's responsibilities when a parent refuses to provide consent to send out application packets or make the student available for screening.

In August of 2014, we reported on a decision from the Eastern District of New York which held that the anti-bullying measures must be included in a student's IEP when that student had suffered an adverse educational impact in school as a result of bullying. That case was appealed to the Second Circuit which just affirmed the lower court's decision.

### **Bullying Decisions of Interest**

#### ***Second Circuit Court of Appeals***

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#### **I. Districts Must Address Parental Concerns of Bullying and its Potential Educational Impact at a CSE Meeting.**

***T.K. v. New York City Dept. of Educ., -- F.3d --, 2016 WL 229842 (2d Cir 2016)***

### **SALIENT FACTS:**

A third grader with autism, classified with a learning disability, was placed in a collaborative team teaching class (“CTT”). In second grade, the child was physically injured by another student in her class. The students were placed together in the same class in third grade, because they both required a CTT class, and the school building only had one CTT class per grade. The child was again physically injured by the same student in November of third grade and continued to complain to her Parents of being bullied daily. The Parents alleged that the child was “emotionally unavailable to learn, gained weight, needed to bring her dolls to school [for comfort], and accumulated 24 latenesses.” The Parents had a private psychological evaluation conducted that indicated that the child needed a more supportive academic environment. After the Parents learned that their child would be in the same fourth grade class as the child who had bullied her in the past, they unilaterally enrolled the child in Summit, a private SED-approved special education school. The Parents filed for due process alleging that the District denied FAPE because it was aware of the bullying and failed to address it in a meaningful way. The Parents sought tuition reimbursement.

The IHO determined that the child was bullied by other students, that the District had reason to know about the extent of the bullying, and that the District failed to take adequate steps to address the bullying. However, the IHO found that the child’s educational opportunities were not negatively affected by the bullying because the child made academic progress and achieved her IEP goals. As such, the District did not deny the child FAPE; tuition reimbursement was denied. On appeal, the SRO determined that the District was not deliberately indifferent, as it took steps to address the bullying. The SRO also affirmed that the bullying did not affect the child’s learning, as she made academic and social-emotional progress. The SRO held that the child was not denied FAPE, the Parents did not demonstrate that the unilateral private school placement was appropriate, and the equities were not in the Parents’ favor.

### **EASTERN DISTRICT COURT’S DECISION:**

The Eastern District stated that FAPE is denied “when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts a child with learning disabilities in her educational opportunities.” Bullying occurs when student behavior is “sufficiently severe, persistent, or pervasive that it creates a hostile environment” for the victim. Districts must take appropriate measures to address bullying, including having a system in place to investigate any allegations of bullying and implementing programs to prevent bullying from occurring in the future. The Court examined three factors to determine whether the CSE adequately addressed bullying:

1. The CSE must consider evidence of bullying when developing the IEP. Failure to do so indicates that Parents were not able to meaningfully participate in the IEP’s development.

2. Anti-bullying measures must be included on the IEP “where there is a substantial probability that bullying will severely restrict a disabled student’s educational opportunities.”
3. Any language on the IEP pertaining to anti-bullying must specify steps to be taken and must be written in language understood by a layperson. Failing to do so prevents the Parents from meaningfully participating in the IEP development process.

The Court determined that the CSE did not take the child’s bullying into account when creating her IEP. Further, the IEP did not include an anti-bullying plan, goals or recommendations to address bullying and the IEP did not include language that would have led a parent to believe that the District was addressing the bullying issue. Although the IEP provided some goals to address the child’s reaction to bullying, the failure to mention bullying, its impact, and how it would be addressed in the IEP denied the Parent’s the opportunity to participate in the development of their daughter’s IEP. As such, the Court found that the District denied FAPE because of its failure to consider the child’s bullying issues and failure to specifically address this issue in the child’s IEP. Further, the Court determined that the private school was appropriate for the child and the equities favored the Parents. The Court awarded tuition reimbursement, and the District appealed.

#### **COURT OF APPEALS DECISION:**

The Second Circuit found that the CSE’s refusal to discuss the student’s bullying, despite the parents’ repeated requests to do so, was in and of itself a denial of the parents’ right to participate in the formation of their child’s IEP and a denial of FAPE. The Court rejected the District’s arguments that other avenues were available to address the effects of bullying outside of the CSE process, or that the student’s goals already addressed any adverse impact. Instead, the fact that the CSE refused to discuss bullying significantly impeded the parents’ ability to participate, and prevented the parents from properly assessing the offered IEP in line with the Court’s reasoning in R.E. v. NYC Department of Education. There, the Court held that a school district defending its CSE’s IEP must do so with evidence available to the parents at the time of the IEP’s creation. In so finding, the Court upheld the lower court’s award of tuition reimbursement.

#### **WHY YOU SHOULD CARE:**

Bullying continues to be an IEP issue for students with disabilities. The social-emotional and management sections of an IEP are areas in which to describe a child’s social-emotional well-being, needs and steps to be taken to address bullying. When bullying is a concern for a particular child, the Committee should gather additional information from the child’s teachers, service providers, and parents. Once a CSE has determined that a child with a disability is being bullied, it must consider whether the child’s “educational opportunities are substantially restricted” or whether the student is suffering “adverse educational

impact.” The CSE should look beyond typical academic impact (e.g., grades, achievement scores, progress on academic IEP goals) in determining whether bullying affects a child’s educational opportunities. Other factors to consider include the child’s social-emotional well-being, peer relationships, and physical manifestations of harassment. When there is evidence of negative educational impact due to bullying, the District should systematically address this by providing supports, accommodations, and implementing comprehensive bullying prevention strategies. Further, the CSE must include methods of addressing the bullying in the victim’s IEP. This should include an anti-bullying program and goals designed to address the child’s social-emotional needs. Failure to address bullying in this systematic manner and failure to alleviate the harassment will likely result in a finding of a denial of FAPE for a child with a disability. Moreover, a CSE should consider and respond to parental concerns of bullying, and they should be clearly documented in the student’s IEP.

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### **Federal District Courts**

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#### **I. Parents must exhaust administrative remedies when IDEA is the underlying predicate to a 1983 discrimination claim.**

***Tyron and Tyron o/b/o A.T. v. East Islip U.F.S.D., 2015 WL 7312910 (SDNY 2015)***

#### **SALIENT FACTS:**

A student diagnosed with severe depression, anxiety, and a mood disorder not otherwise specified, alleged she was routinely subjected to bullying, threats and harassment by a number of students throughout both middle school and high school over a period of at least two school years. The student’s parents repeatedly complained to school administrators. The student continued to be bullied. From March 2014 to the end of the school year, the student began receiving home instruction. In May 2014, the parents asked the district to specify what actions it would take to stop the bullying. The district responded that it would ensure that the student would not only be placed in classes separate from the two bullying students, but that the student would be “completely separated” from those two students, during the rest of the school day, as well. Nevertheless, the district placed the student in five classes with one of the bullying students and both of these students’ lockers were in close proximity. The parents filed a complaint in federal court, alleging violations of, *inter alia*, Section 504 of the Rehabilitation Act, the ADA, and DASA.

### **COURT'S DECISION:**

The district court dismissed the parents' action. Because the parents did not file a due process complaint, the court held that the parents had failed to exhaust their administrative remedies under IDEA. The court noted that, where a claim is related to "grievances related to the education of disabled children," a parent must follow the procedures under IDEA. The fact that the parents sought relief pursuant to statutes other than the IDEA and requested money damages did not change the analysis. The parents' claim was barred by their failure to follow the procedures of IDEA (i.e., due process complaint and impartial hearing) before bringing a claim in federal court.

### **WHY YOU SHOULD CARE:**

When a student is being bullied and negative effects are manifested – such as school avoidance or other emotional difficulties, school staff should begin considering whether the student should be referred to the CSE. In this instance, parents' counsel tried to leap frog over the administrative hearing process, and for that reason, the Court never addressed the substance of the parents' claims.

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### ***New York State Courts***

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#### **I. Bullying, in and of itself and without educational impact, does not rise to the level of a classifiable condition.**

***Paul T. v. South Huntington U.F.S.D., 49 Misc. 231, 320 Ed. Law Rep. 373 (2015).***

### **SALIENT FACTS:**

A fifth-grade student was brought up on student disciplinary charges for drawings in the student's notebook depicting acts of violence. In lieu of a hearing, the District and the parents agreed that the student would not return to school until such time as a "psychiatric clearance had been granted by a District-provided evaluator." Over the summer, the parents referred their child to the CSE for evaluation, alleging in part the child was being bullied. The CSE met and eventually determined that the student did not meet the criteria of a student with a disability. The parents appealed the classification decision.

### **IHO's DECISION:**

The IHO dismissed the parents' claim, finding that, while the student had in fact suffered harassment and bullying while in school, no adverse educational impact had been demonstrated. The IHO relied on the District's evaluations as well as the parents' private evaluations. The parents appealed to the SRO, arguing

that the IHO erred by not finding their child exhibited a “generally pervasive mood of unhappiness or depression,” therefore meeting the requirement of an emotional disturbance classification.

### **SRO’S DECISION:**

The SRO found the record was barren of any diagnosis or report, other than those of the parent, which supported the suggestion that the student exhibited characteristics requiring classification, whether other health impaired, emotional disturbance, or otherwise. The SRO held that, even assuming that the student met the requirements for classification, absent from the record was any support for the allegation the student suffered adverse educational impact. Therefore the SRO dismissed the appeal, and the parents appealed to the New York Supreme Court.

### **NY SUPREME COURT’S DECISION:**

Reviewing the record *de novo*, the Court found that the SRO’s decision was well reasoned, and that the student did not present with any adverse educational impact as a result of the bullying. The Court ruled that the District appropriately met its child find mandate by having sufficient procedures and provisions in place to identify students suspected as having a disability.

### **WHY YOU SHOULD CARE:**

Here, the District responded properly to a parental IDEA referral, resolving the correct question, i.e. whether a bullied student has suffered an adverse educational impact in school due to the harassment, similar to the overarching question of initial classification. This question can only be resolved by the CSE. The District’s response was consistent with the Second Circuit’s strong direction to ensure parents’ concerns are addressed by the CSE when making educational determinations. Districts are also reminded to discuss any issue raised before the committee to ensure parents participate in the educational decision process.

The takeaway is that not all victims of bullying in the school environment may be classifiable. In such cases the District need not classify the student, but must take all steps necessary to address the bullying.

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### ***Office of State Review***

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## **I. District’s Failure to Address Effect of Bullying on a Student’s Education Experience Continues to Give Rise to a Failure to Offer FAPE.**

**Application of a Student with a Disability, Appeal No. 15-057 (9/25/15)**

### **SALIENT FACTS:**

Midway through the 2012-23 school year, the parents of a classified student in New York City – then receiving instruction in an integrated co-taught setting – requested homebound instruction because of severe anxiety. The school granted the request. The parents reapplied for the homebound instruction in September 2013, but the district denied the request. The parents then filed a due process complaint alleging, among other issues, the District’s failure to address bullying, and that such bullying denied the student meaningful benefit. The parents sought an independent educational evaluation (“IEE”), 1:1 home-based instruction, occupational therapy, and tutoring, along with compensatory education for violations stemming from the 2012-13, 2013-14 school years, as well as other violations alleged to have occurred during the 2010-11 and 2011-12 school years.

The IHO found that a FAPE, under both the IDEA and Section 504 of the Rehabilitation Act, was not provided in 2012-13 because the school failed to address either the bullying of the student or the student’s social emotional needs, or convene an annual review of the IEP. The IHO dismissed the remainder of the claims, and directed the District to provide the student with compensatory education to address its failures. The IHO declined to find that the bullying constituted a gross violation and declined to order compensatory education for the remainder of the 2013-14 school year, holding that events post-dating the filing of the parents’ request were outside the scope of the hearing. In addition, the IHO denied the request for an IEE at public expense.

### **SRO’S DECISION:**

The SRO found that the bullying resulted in a denial of FAPE in 2012-13, noting the student’s high absence rates, suffering grades, and the CSE’s failure to consider modifying the student’s IEP to address the effects of bullying on the student’s education. The SRO found that the District was on notice following repeated complaints of bullying concerning three separate incidents, and the school-lead mediation session between the student and the bully. The SRO ordered 100 hours of compensatory tutoring (thereby increasing the award over that ordered by the IHO), 10 hours of occupational therapy, and 18 hours of 1:1 counseling to make up for the district’s failure to offer specially designed instruction during the period of homebound instruction. The SRO refused to award an IEE at public expense because the parents never identified a specific evaluation with which they disagreed.

### **WHY YOU SHOULD CARE:**

District’s need to take allegations of bullying very seriously and, when the victim is a classified student, the CSE should convene to consider what, if any, educational impact such bullying has on the student’s educational program.

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## OTHER DECISIONS OF INTEREST

### *Federal District Courts*

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#### I. Claims for Relief must be pleaded in the Due Process Demand at all Stages of Litigation.

*J.M. v. Kingston City Sch. Dist.*, 2015 WL 7432374 (N.D.N.Y. Nov. 23, 2015)

#### SALIENT FACTS:

In the 2012-2013 school year, the student, classified as autistic, attended Chapel Haven, a residential life skills program and unilateral placement. Chapel Haven did not offer academic credit and was not approved by the state. The CSE met in June 2013 and, after reviewing numerous evaluations and reports, recommended an 8:1+1 placement in a BOCES Autism Spectrum Program for Independent Education (“ASPIE”), plus counseling, speech-language therapy, parent counseling and training, and transition support services. The CSE also recommended assistive technology and testing accommodations. The parent rejected the CSE’s recommendations and filed a due process complaint, alleging that the district’s recommendations were inappropriate and did not adequately address the student’s needs, seeking prospective tuition reimbursement at Chapel Haven for relief.

#### IHO’S DECISION:

The IHO held that the district had not offered a FAPE, specifically finding that a) the CSE failed to discuss whether the student continued to require a residential setting, b) the CSE failed to discuss the student’s goals, c) the District failed to present evidence at the hearing regarding the appropriateness of the “ASPIE” program and whether students with similar needs would be in attendance, d) no evidence was offered that the CSE’s recommendation for the student to take community college courses could be accommodated by the “ASPIE” program, and e) the record was barren regarding the CSE’s efforts to offer appropriate transition support. Critically, the District itself conceded back in 2011 that the “ASPIE” program was inappropriate for the student. The IHO held that Chapel Haven was an appropriate placement, and ordered the district to reimburse the parent for her tuition costs.

#### SRO’S DECISION:

The district appealed to the SRO who reversed the IHO’s findings, holding that the district did provide FAPE to the student. The SRO found that the CSE discussed the continuum of services, the recommended program, and the student’s goals. The SRO noted that the parents had opportunity to question representatives

from the “ASPIE” program at the CSE; however, they declined to do so. Furthermore, the SRO found there was sufficient evidence in the record that the recommended program would meet the student’s education and transition needs as well as provide an appropriate peer group. The parent appealed to federal court.

### **COURT’S DECISION:**

The district court dismissed the parent’s claim on the grounds that during the time of appeal over the 2013-14 school year, the student had earned a Regents diploma rendering the parents’ claim moot. As the parent did not enroll the student at Chapel Haven during the 2013-14 school year, tuition reimbursement in any form was not available as relief. The Court rejected the parents’ argument that compensatory education could be awarded in the alternative by the Court due to the length of litigation and the change in circumstances, specifically the fact that the student aged out during the litigation period. Rather, the Court concluded that the parent could not raise a claim for compensatory education since she had not sought such relief at either the impartial hearing or the SRO appeal. Accordingly, the court dismissed the parent’s claim in its entirety.

### **WHY YOU SHOULD CARE:**

A parent’s due process complaint must be closely scrutinized and, should an impartial hearing officer or parent seek to expand the issues or relief sought at the hearing, districts must carefully consider whether to agree to any such expansion. Such scrutiny is necessary during all stages of litigation.

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## ***Office of State Review***

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### **I. Parents’ Efforts to Frustrate the CSE Process Defeat Claim for Tuition Reimbursement.**

**Application of a Student with a Disability, Appeal No. 15-047 (6/29/15)**

### **SALIENT FACTS:**

The student was born in another country and attended several other districts before being placed in the custody of the Office of Children and Family Services. The student was then registered in the current District. After a series of disciplinary infractions, the child was suspended and returned to a private school by the family court. While the parent referred the student to the CSE, the referral was later withdrawn and the parent requested Section 504 accommodations on the basis of ADHD and ODD diagnoses. Accommodations were recommended in the form of program modifications. In January 2014, after another disciplinary

incident, the parent again referred the student to the CSE. In March 2014, the CSE convened and considered psychiatric reports, neuropsychological and educational evaluations, as well as disciplinary reports and the student's then current 504 accommodation plan. The CSE classified the student and recommended that they explore a residential program. The parent refused to sign consent to release student records for the purpose of securing a placement. Notwithstanding, the District sent applications to in-state residential programs, eventually expanding their search to out-of-state placements.

During this period, the Family Court vacated its custody of the student and permitted the parent to unilaterally place the student at CALO, a private residential facility in Missouri. The student began attending CALO in March 2014, and the CSE reconvened in April 2014 to discuss his progress at the unilateral placement. At that time, the CSE continued to send out application packets. In June 2014, the CSE reconvened, yet again, to discuss residential placements, noting that every placement applied to, save one, had rejected the student. The remaining placement had advised the CSE it could not determine whether the student would be an appropriate fit, without conducting a screening interview, for which the parent did not make the student available. Consequently, the CSE made no placement recommendation.

The parent filed for due process seeking tuition reimbursement, alleging the CSE failed to recommend an appropriate placement or finalize the IEP. The IHO found that the March IEP – had it been finalized and a placement recommendation been made – would have offered the student FAPE. Finally, while the IHO found CALO was an appropriate placement, the equitable factors did not support the parent because of the parent's failure to provide consent for the evaluations, to make the student available for screenings, or to provide the District notice of the parent's intention to unilaterally place her child. Accordingly, the IHO denied reimbursement.

### **SRO'S DECISION:**

The SRO concluded that the district had met its child find obligation, because the parent refused to provide consent for the evaluation and withdrew her request for the evaluation. However, the SRO found that the District had not provided a FAPE since it had never finalized the student's IEP. The SRO upheld the IHO's finding that CALO was appropriate because it addressed the student's specific emotional and behavioral issues, along with a sufficient academic component. The SRO denied reimbursement because the equitable considerations did not weigh in the parent's favor. She had refused to cooperate in the CSE process and interfered with the District's attempt to offer a FAPE. Further, the SRO affirmed the IHO's finding that the parent never clearly informed the District or CSE of her intent to enroll the student in CALO, either orally or with a 10-day letter seeking reimbursement.

### **WHY YOU SHOULD CARE:**

A District should be mindful that regardless of whether parents provide consent<sup>1</sup> for evaluations or the sharing of educational records, efforts are still to be made to assess the student and locate an appropriate educational setting. Documenting the district's efforts as well as the parents' lack of cooperation is critical to showing a finder of fact, the manner in which a parent may frustrate the CSE process. In this instance, those parental efforts defeated a claim for tuition reimbursement even when the District was unable to locate a placement for the student.

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## **II. Compensatory Education must be Tailored to the Student's FAPE Denial.**

### **Application of a Student with a Disability, Appeal No. 15-061 (7/27/15)**

#### **SALIENT FACTS:**

The student received home instruction during the 2013-14 and 2014-15 school years because the district was unable to locate an appropriate placement in a state-approved public or non-public school setting to address learning deficits and significant interfering behaviors. The parent filed a due process complaint and sought reimbursement and prospective funding for the student to attend Fusion Academy ("Fusion"), essentially a 1:1 tutoring program that is not SED approved. The IHO found that the district did not offer the student FAPE for the 2013-14 and 2014-15 school years, but concluded that compensatory academic education services at Fusion were not appropriate. The IHO found that a) there was little to no difference between Fusion and home instruction when comparing the type of instruction, and b) Fusion offered nothing to address the student's interfering behaviors. Instead, the IHO awarded a variety of equitable relief, including compensatory speech, OT, and PT services. The parents appealed the IHO's determination concerning Fusion tuition.

#### **SRO'S DECISION:**

The SRO upheld the IHO's decision denying compensatory academic education services at Fusion Academy. The SRO noted that the student passed credit bearing courses and Regents' Exams in the home instruction environment, while the student did not receive instruction in any Regents level courses while at Fusion. The SRO upheld the IHO's findings that the student used Fusion to take preferred courses, and that such courses were the type that did not trigger the student's interfering behaviors. The SRO found that the parent presented no

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<sup>1</sup> With exception, of course – a district's responsibilities under the IDEA cease should a parent refuse to accept the initial provision of services or revoke consent overall to their child's receipt of special education services.

evidence to suggest that Fusion would be able to address the student's interfering behaviors. Because the student exhibited a pervasive and complex history of behaviors that impeded his learning, the SRO ordered the district to conduct an FBA and develop a BIP and reminded the district to identify with specificity the student's transportation accommodations.

**WHY YOU SHOULD CARE:**

Compensatory education is a tricky equitable remedy, taking into account the FAPE violation, the extent of the loss of opportunity, the individual needs of the child, and the proposed relief. The SRO was not impressed with the fact that the student did not exhibit behaviors at Fusion, because he only took courses he liked and he was not faced with any of the behavioral triggers he faced in public school.

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