

***T.K. and S.K. v. New York City Dept. of
Educ., 56 IDELR 228 (E.D.N.Y. 2011).***

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Background Facts

“L.K. is a 12-year-old girl who was originally diagnosed as autistic, but has since been reclassified as learning disabled. []. During the 2007-2008 school year, the DOE placed her in a ‘Collaborative Team Teaching’ (‘CTT’) classroom, which involved teaching students who are learning disabled alongside those who are not...”

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According to L.K.'s Parents...

“During the 2007-2008 school year, L.K. complained to her parents almost daily about being bullied at school.”

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According to L.K.'s One-on-One Aides...

“Both report that L.K. was ostracized in the classroom and the subject of ridicule from other students.”

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According to the Tues./Thurs. Aide

“When she arrived at the school, she described it as a ‘hostile environment’ in which she was simply ‘just trying to get ... [L.K.] by each day.’ []. Maloney reported that there was a great deal of teasing of L.K., with other children physically backing away to avoid her.”

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According to the M/W/F Aide

“She testified that there was ‘constant negative interaction’ between L.K. and other students on a daily basis. []. Other children would intentionally stay away from L.K. and at times physically push her away for fun. []. ‘She would be tripped, where she was walking by and they would stick out their feet just to see what would happen. And then if she fell, well, then the teachers would get upset with her for making a scene.’”

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According to the Substitute Aide

“Her reaction was that ‘[L.K.] was isolated by girls and boys in her classroom. There was an incident in the classroom when there was a group of students at one table that [L.K.] was sitting at, where they had to write an assignment, and there was a pencil that [L.K.] touched. And for some reason, she put it down and no one wanted to touch the pencil.’ []. This behavior continued when L.K. tried to participate in class. ‘And a question was asked of the class ... to give an opinion about a situation. And [L.K.] raised her hand and kind of people laughed at her.’”

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Specific Incidents of Bullying

- A drawing in the record made by a student in L.K.'s class depicting L.K. in a disparaging light;
- A student chasing L.K. with what he claimed was blood but was in fact ketchup;
- Other students refusing to touch things once L.K had; and
- A prank phone call made to L.K.'s home, which the school was informed about.

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The School's Knowledge

“No incident reports were generated by the school relating to these occurrences. This lack of records is significant because it raises questions about whether the school was actually on notice, or if it was, whether it was deliberately indifferent.”

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The School's Knowledge

“L.K.'s parents sent several letters to her school about her being bullied, which the school principal says she responded to via telephone call. []. The principal recalls receiving letters from L.K.'s parents specifically reporting two acts of bullying.”

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The School's Knowledge

“During the 2007-2008 school year, L.K.'s parents brought her to the school principal's office to discuss bullying in the school. []. After showing them into her office, the principal asked L.K.'s parents to have the conversation outside of L.K.'s presence. []. When L.K.'s parents continued to try to discuss the matter, the principal asked them to leave. As the parent's continued to try to discuss their daughter's problem the principal opened the door to her office and said she would call security if they did not leave.”

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The School's Knowledge

“No subsequent meeting about bullying with school personnel took place. The principal does not recall what she did to investigate any claims of bullying. []. (‘Question: What, if anything, did you do to investigate [claims of bullying] internally? Answer: I can't recall.’)”

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The IEP Team

“During [the IEP] meeting, L.K.'s parents sought to discuss bullying of their daughter, but were rebuffed by the school's principal. []. The principal stated that it was not the appropriate time to discuss bullying, but the matter could be discussed later. []. No future meeting was scheduled or took place.”

“The school principal did not permit this discussion because she said she thought it was not appropriate for [an IEP] meeting.”

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FAPE Claim

“L.K.'s parents maintain that bullying caused their daughter to resist attending school, hurt her academic performance, and damaged her emotional well-being.”

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Proceedings Below

- Independent Hearing Officer and State Review Officer both found that L.K. was not denied a FAPE.
- “The hearing officer passingly referred to the issue of bullying in his decision. []. When bullying was discussed the focus was on how the student had been progressing academically despite these claims of bullying. []. Ultimately, the SRO determined that bullying did not deprive L.K. of a FAPE, though no specific test appears to have been used in arriving at this conclusion.”

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Applicable IDEA Bullying Test as Articulated by the District Court

The court relied on guidance from the U.S. Department of Education, and applied the following test:

- 1) Plaintiff is an individual with a disability who was harassed because of the disability;
- 2) Defendant knew about the harassment;
- 3) Defendant failed to take reasonable steps to address the harassment; and
- 4) The student was denied educational benefit.

See OCR *Dear Colleague Letter* (October 26, 2010).

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1) Was Plaintiff an individual with a disability who was harassed because of her disability?

“First, [L.K.’s] parents have produced witnesses who have testified that L.K., a disabled student, was isolated and the victim of harassment from her peers.”

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2) Did the Defendant know about the harassment?

“Second, the parents allege that they sent letters and tried to speak to the principal about the issue. There is evidence on both sides. The principal acknowledged knowing about an incident of bullying but cannot recall what she did to investigate it. She admits receiving letters that reveal incidents of bullying. She acknowledges asking L.K.’s parents to leave a meeting designed to discuss concerns about bullying. This meeting was never rescheduled. Aides who helped L.K. state that they tried to bring the bullying to the attention of their superiors but were ignored. No determination was made by the IHO about whether school personnel had notice of substantial bullying.”

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3) Did the Defendant fail to take reasonable steps to address the harassment?

“Third, L.K. presents evidence that could reasonably be construed as proving the school's failing to take reasonable steps to address the harassment. The school has not provided documentation that it either investigated claims of bullying or took steps to remedy the conduct. This evidence was not touched upon by the fact finder.”

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4) Was the student denied educational benefit?

“Fourth, L.K.'s parents state that she withdrew emotionally, did not want to go to school, and suffered social scars as a result of the bullying. The school district refutes this by pointing to academic progress for L.K. Whether the harassment rose to a level that deprived L.K. of an educational benefit was not decided in the administrative hearings. A student is not required to prove that she was denied all educational benefit. She may not be deprived of her entire educational benefit, but still may suffer adverse educational effects as a result of bullying. ... To be denied educational benefit a student need not regress, but need only have her educational benefit adversely affected.”²⁰

What happened to *Rowley*?

FAPE Standard as articulated by the Supreme Court:

- First, has the school district complied with the procedures set forth in the IDEA?
- Second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

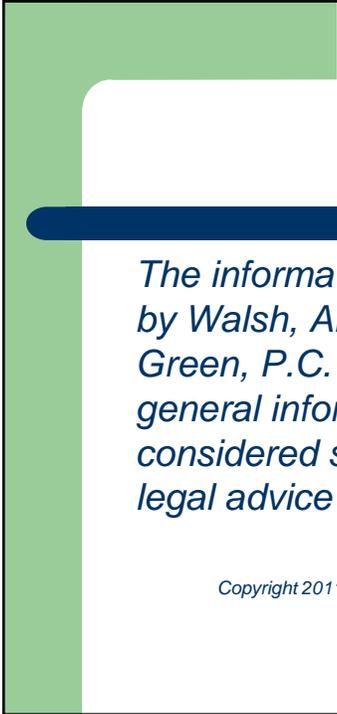
Board of Educ. v. Rowley, 102 S.Ct. 3034 (1982).

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Has anyone seen *Rowley*?

“Academic growth is not an all-or-nothing proposition. There are levels of progress. A child may achieve substantial educational gains despite harassment, and yet she still may have been seriously hindered. Growth may be stunted providing an education below the level contemplated by IDEA. In New York, IEP's are required to give children more than an opportunity for just ‘trivial advancement.’ []. The law recognizes that a student can grow academically, but still be denied the educational benefit that is guaranteed by IDEA. Where bullying reaches a level where a student is substantially restricted in learning opportunities she has been deprived a FAPE. Whether bullying rose to this level is a question for the fact finder.”

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