# SPECIAL EDUCATION LEGAL ALERT

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As a service to CASE members, this periodic legal alert provides, as a two-column table, highlights (on the left) and practical implications (on the right) of major new legal developments. The monthly update for this issue of the CASE newsletter identifies the effects of previous recent legal developments specific to bullying and methodology under the IDEA.

| **1. A recent federal court decision specific to the effect of bullying on the district's FAPE obligation illustrates the limits of both the U.S. Department of Education Dear Colleague Letter and the Second Circuit *T.K.* decision that partially relied on it.** | |
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| In an official published decision in *J.M. v. Department of Education* (2016), the federal district court in Hawaii ruled that the IEP team's minimal discussion of the previous "horrifying" bullying of a child with autism was not a denial of FAPE under the IDEA where the IEP, including its crisis plan, was reasonably calculated to confer the requisite educational benefit. Thus, the court reached a different outcome from the Second Circuit's decision in *T.K. v. New York City Department of Education* (2016). | The Second Circuit in *T.K.* had ruled that the failure to discuss severe bullying amounted to a denial of FAPE in terms of parental participation, thus affirming the lower court's decision against the district; however, the appellate court did not adopt the lower court's specific requirements that included, in certain circumstances, an individually anti-bullying plan in the IEP. The Hawaii decision illustrates the limited precedential effect of the Second Circuit's ruling and, all the more, that of the lower court's even more extensive anti-bullying rulings in *T.K.* |
| At least as important, the federal district court in *J.M.* did not accord significant weight to the OCR Dear Colleague Letter (2014) on bullying, concluding that it was "merely aspirational." More specifically, this court reasoned that in the absence of precedent otherwise, such agency policy statements merely provide guidance to schools, not binding or even persuasive effect on courts. In the past, courts have often found such federal agency interpretations to be persuasive, but the proverbial pendulum may be shifting. | Both the lower court's and the Second Circuit's bullying-related ruling relied in part of this Dear Colleague Letter. More generally, the Supreme Court's recent remand of the transgender student case in response to the U.S. Department of Education's reversal of its policy position on this issue not only illustrates the potential transience of these agency positions, especially under the current Administration, but also represents the loss of potential precedent from the Supreme Court on their legal weight. |

| **2. As described in the February 2017 Monthly Alert, the Second Circuit in *A.M. v. New York City Department of Education* (2017) ruled that the child was entitled to a particular methodology where the "a clear consensus" of the evaluative info at the IEP meeting supported it. This decision was a potential sea change in terms of the traditional tide for methodology cases. Other recent decisions before and after *A.M.* illustrate is special status but unclear reach thus far.** | |
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| Here is a sample of recent methodology cases <u>prior to *A.M.*</u>:<br><br>- In *Forest Grove v. Student* (2016), the Ninth Circuit Court of Appeals ruled that the IEP's failure to incorporate parent's preferred methodology, which was based on English teacher's instructional approach, did not amount to denial of FAPE.<br>- In *Genn v. New Haven Board of Education* (2016), the federal district court in Connecticut decided that the IEP was substantively appropriate, including the disputed reading methodology for a student with multiple diagnoses, including dyslexia.<br>- In *M.T. v. New York City Department of Education* (2016), a federal district court in New York ruled that the lack of ABA methodology was not a denial of FAPE because the IEP only mentioned it as one of previous successful methods for the student. | These decisions continued the long line of cases in which the courts deferred to the school districts' choice of methodology in applying the relatively relaxed substantive standard for FAPE under the IDEA. Most of these cases have been specific to students with autism or SLD, as canvassed in these two articles:<br><br>• Zirkel, P. A. (2015). An update of legal issues related to students with autism: Eligibility and methodology. *West's Education Law Reporter, 322*(1), 10–44<br>• Rose, T., & Zirkel, P. A. (2007). Orton-Gillingham methodology for students with reading disabilities. *Journal of Special Education*, *41*, 171–185. |
| Here is the more limited number of methodology decisions issued in the two months <u>since *A.M.*</u>:<br><br>- In *Ms. M. v. Falmouth School District* (2017), the First Circuit rejected the parent's contention that the prior written notice, which proposed use of a particular multisensory reading program, was part of the IEP, while noting that the absence of ambiguity in the IEP rendered *A.M.* "irrelevant" to the analysis.<br>- In *P.C. v. Rye City School District* (2017), a federal district court in New York upheld the substantive appropriateness of an IEP, finding that—unlike *A.M.*—the evaluative materials did not identify any services so necessary that their omission was a denial of FAPE. | As expected, *A.M.* has set a methodology standard that will broadly apply within the three states of the Second Circuit—Connecticut, New York, and Vermont. Yet, the *P.C.* case illustrates that this standard, although a change from the previous trend, is not a particularly low hurdle for parents. However, as the *Falmouth* ruling shows, the impact of this standard in other circuits remains an open question at this point, without automatic adoption or rejection. |