PULLMAN &COMLEY

Summertime Blues: T.M. v. Cornwall and The Mainstreaming of Extended-School-Year Programs

Education Law Notes

07.29.2014

In a decision that will likely result in both practical challenges and financial burdens for public school districts, the United States Court of Appeals for the Second Circuit held in *T.M. v. Cornwall Central School District* that the legal obligation to educate special education students in the least restrictive environment, or "LRE," is not limited to the regular school year. To the contrary, the court held that the Individuals with Disabilities Education Improvement Act of 2004, or "IDEA," mandates that students also be mainstreamed to the maximum extent possible in extended-school-year, or "ESY," programs.

The IDEA requires public school districts to provide special education and related services to eligible students in the form of an Individualized Education Program, or "IEP." Although IEPs typically address educational needs only during the regular school year, some disabled students who, like T.M., would otherwise experience substantial educational regression, are also entitled to ESY services. In Cornwall, T.M.'s parents rejected the district's summer ESY programs as they did not include non-disabled students and instead unilaterally placed him in a private, less-restrictive program. Noting that T.M.'s IEPs during the regular school years were designed for implementation in mainstream classrooms, and that he had previously progressed in a private, mainstream summer program, the Second Circuit held that the district was obligated to offer T.M. an ESY placement in a mainstream classroom.

In so holding, the court flatly rejected the school district's contention that the LRE requirement should apply differently to ESY programs, writing instead that as with school-year placements, "a school district first must consider an appropriate continuum of alternative [ESY] placements; it then must offer the disabled student the least restrictive placement from that continuum that is appropriate for his or her needs." The court also dismissed Cornwall's argument that a student's LRE must be considered solely within the context of the district's preexisting ESY programs, tartly observing that a student's LRE "refers to the least restrictive setting consistent with the student's needs, not the least restrictive setting that the school district chooses to make available."

The court sought to reassure districts that the IDEA does not require them to create new, mainstream ESY programs in order to serve the needs of one, or even more, disabled children, writing that districts can instead contract with other public or private entities to provide a less-restrictive ESY placement. The court added that school districts may also avoid the obligation to reimburse parents for the cost of unilateral placements if the parents' placement is inappropriate, or if it is "objectively impossible or impracticable" for the district to

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provide a student with an ESY program in his or her LRE. Thus, the court did "not believe that school districts will face any substantial burden from reimbursement claims for ESY programs – at least, no burden that Congress did not foresee and intend when framing the IDEA."

What is the effect of the t.m. decision?

The appeals court's unwillingness to recognize the different purposes served by a regular school year IEP and by an ESY program creates a significant dilemma for school districts. Whereas the school-year IEP is designed to ensure that disabled students – like their non-disabled peers -- *progress* academically, ESY services are provided so that certain disabled students will not *regress*. In other words, the school year IEP contemplates a forward educational trajectory, whereas ESY aspires only to educational stasis. By its very nature, then, ESY is an intervention that is limited to the most impaired special education students, and it is neither necessary nor appropriate for regular education children. Consequently, and unlike a district's regular school year programming, ESY programs typically have no non-disabled students with whom a district can mainstream disabled students.

The decision, then, leaves school districts with a limited number of responses. They could implement a form of the reverse mainstreaming that is common in district preschool programs, thereby offering summer programming to non-disabled students for the sole purpose of creating a mainstream ESY environment for special education students. Given the divergent academic needs of the special and the regular education students, however, this could prove to be a tricky pedagogical mix, particularly in the higher grades. This same challenge would confront cooperative programs established among contiguous districts – or, in a state like Connecticut, by a Regional Educational Service Center – in which the cost of staff would be allocated among the districts based upon the number of their respective students.

A far less palatable, but perhaps almost inevitable, approach would be for districts to contract with private, mainstream programs, leaving districts to struggle with the costly proposition of providing these students with the requisite special education and related service staff.

Regardless of what option a district adopts, and contrary to the Second Circuit's conclusion, the T.M. decision may constitute a new and potentially costly obligation for school districts.

Tags: Individualized Education Program (IEP), Individuals with Disabilities Education Improvement Act (IDEA)