EXTENDED SCHOOL YEAR AND ITS INTERSECTION WITH THE LEAST RESTRICTIVE ENVIRONMENT MANDATE

It's Extended School Year (ESY) season, and as with many issues our clients regularly face, the legal standards that apply to the provision of ESY services are less than clear. A glaring example of this consistent lack of consistency is the question of whether the IDEA's Least Restrictive Environment (LRE) mandate applies to ESY programming just as it does to programming provided during the regular school term.

At first blush, the answer should be obvious: how could public school districts possibly offer varying levels of inclusion with nondisabled peers if those very nondisabled peers are not required to attend school during the summer? And if public school districts are required to account for LRE considerations during ESY, does that mean that they must now create compulsory, year-round schooling for all of their pupils?

Although not binding upon our clients, the United States Court of Appeals for the Second Circuit (Connecticut, New York, and Vermont) has recently weighed in on this issue, determining that the IDEA's LRE requirement does indeed apply the same way to ESY placements as it does to placements operative during the regular school term.

In *T.M. v. Cornwall Central School District*, 752 F.3d 145 (2nd Cir. 2014), the Second Circuit opined that public school districts must "consider an appropriate continuum of alternative placements" for ESY-eligible students, and that "a school district...cannot avoid the LRE requirement just by deciding not to operate certain types of educational environments..."... In so doing, the Second Circuit has essentially indicated that, when it comes to ESY services, it is of no consequence that the vast majority of public school districts do not operate regular education summer programs.

While declining to order that public school districts must create new regular education summer programs, the court suggests that ESY-eligible receive placements in "private mainstream" summer programs or "mainstream summer program[s] operated by another public entity."

Aside from the fact that very few, if any, public school districts operate such programs (not to mention the discretion such entities would maintain in deciding whether to even admit nonresident tuition students for the summer), using such placements would essentially require school districts to cede the provision of special education services to third parties over which they exercise no direct control. In the litigation-driven IDEA landscape, it assuredly would not be long before public school districts were faced with claims that children were denied appropriate ESY services that were provided by third parties.

For now, the T.M. case serves only as a reminder of what might become a larger trend, as decisions from other circuits are not binding upon our Pennsylvania clients. We note that in *Travis G. v. New Hope-Solebury School District*, 544 F. Supp. 2d 435 (E.D. Pa. 2008), the United States District Court for the Eastern District of Pennsylvania refused to overturn a Pennsylvania Hearing Officer's decision (subsequently affirmed by the now-defunct appeals panel) that determined that the IDEA's LRE mandate does not apply to ESY services. We believe that our clients can, for now, safely

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rely on this case to take the position that ESY services are not tethered to the LRE requirement.

Given the Second Circuit's decision and increasing overall scrutiny of ESY serviced, however, taking such a position is not without peril. As always, reasonable compromise of ESY disputes should be considered when appropriate in order to avoid costly and time-consuming litigation over a relatively narrow issue.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.

1. Although this article refers only to school entities, the law applies to all agencies, programs, troops, clubs or other organizations in which children under the age of 18 participate.