New Jersey’s Move Toward Inclusion

by Jessica P. Limbacher and James J. La Rocca

The concept of inclusion in special education law generally refers to the placement of a student with a disability in a general education classroom alongside peers who do not have disabilities. The notion that children with disabilities should be included in the general education classroom setting began gaining steam following the U.S. Supreme Court’s 1954 ruling in Brown v. Bd of Educ. The Brown decision, while specifically related to race, focused attention on segregated schooling in general, at a time when most special education students were segregated from their non-disabled peers in school. But it was not until 1975 that a federal law, the Individuals with Disabilities Education Act (IDEA), set forth the rights of students with disabilities.

For the past 40 years, states across the country have made concerted efforts toward ensuring that students with disabilities would be included in their general education classrooms. Last year, following lengthy litigation in Disability Rights N.J. v. N.J. Dept of Educ., brought by disability advocates who alleged that the New Jersey Department of Education excluded children with disabilities throughout the state
from general education settings, New Jersey entered into a comprehensive settlement agreement focused on inclusion.

**Least-Restrictive Environment Standards and New Jersey’s History of Restriction**

While inclusion is not explicitly referenced in the IDEA, students with disabilities are required to be educated in the “least-restrictive environment” (LRE), and the general education classroom is the first placement option to be considered.

Under the New Jersey Administrative Code, and in language that mirrors the IDEA, each school district is required to ensure that a student with a disability is educated with children without disabilities, to the maximum extent appropriate. The separate schooling, special classes, or any other form of removal of a student with a disability from the general education class can only occur when education could not be achieved satisfactorily in general education classrooms with the use of supplementary supports and services. In addition, alternative placements must be available to meet the special education and related services needs of the student. These placements, as well as any activities necessary to transition a student to a less restrictive placement, are required to be determined at least annually.

A student’s placement must be based on his or her individualized education program (IEP), and the appropriate educational settings must be as close to the student’s home as possible. If the IEP does not provide any specific restrictions, the student is educated in the same school he or she would be educated in if he or she did not have a disability.

Several cases in the 1980s and 1990s set the standard for LRE determinations in New Jersey. In Kruelle v. New Castle County School District, the behavior of a 13-year-old student who had severe cognitive and physical impairments began to deteriorate in his public school classroom, and the parents sought a residential program for him. The hearing officer and state review officer both determined the IEP proposed by the district was appropriate and the residential placement was too restrictive. However, the Third Circuit held the student’s social, emotional, medical, and educational problems were so intertwined it was not possible to separate them, and that residential placement was, therefore, necessary. The school district was thus held responsible for the cost of the residential placement.

In a subsequent case in New Jersey, Bd. of Educ. v. Diamond, a school district appealed from a final judgment requiring the district to pay for a child’s private educational expenses in a residential placement on a full calendar basis. The court, in determining that residential placement was appropriate for the student, defined the LRE standard as “the least restrictive environment in which educational progress rather than educational regression can take place.”

In Oberti v. Bd. of Educ., the Third Circuit identified three factors to consider when determining whether a child’s placement is in the LRE: 1) whether the school district has made reasonable efforts to accommodate the student in a general education classroom with supplementary aids and services; 2) a comparison of the benefits of a general versus special education classroom; and 3) the potential negative effects a placement may have on other students in the classroom.

Two years later, in D.B. v. Ocean Twp. Bd. of Educ., the court identified six additional factors to determine whether a residential placement would be appropriate: 4) whether any emotional conditions fundamentally interfered with the student’s ability to learn in a local placement; 5) whether the student’s behavior was so inadequate, or regressing to such a degree, as to fundamentally interfere with the student’s ability to learn in a local placement; 6) whether any health or educational professionals had previously determined that a residential placement was appropriate; 7) whether the student had significant unrealized potential that could only be developed in a residential placement; 8) whether past experience indicated a need for a residential placement; and 9) whether the demand for residential placement was primarily to address the student’s educational needs.

Despite the standards set forth by federal and state laws, and although more recent court decisions in New Jersey supported inclusive settings, New Jersey continued to favor separate placements for students with disabilities. This is due, in part, to New Jersey’s state laws prior to the IDEA, beginning as early as 1911, which promoted what was believed at that time to be most effective: educating students with disabilities in separate settings. After the IDEA mandated that children with disabilities should be educated alongside children without disabilities whenever possible, New Jersey struggled to shift toward inclusion.

In 1994, the New Jersey Developmental Disabilities Council compiled information about students educated in segregated settings. The result, a report titled Separate and Unequal, highlighted a pattern of segregation of students with disabilities in New Jersey compared with students nationwide. Even 10 years later, in 2004, 8.8 percent of New Jersey’s students classified as eligible for special education were segregated in separate facilities, as compared with the national average of 2.9 percent. In particular, minority students were classified and placed in segregated settings at significantly higher rates than their white peers. Students with behavioral challenges were also disproportionately placed in restrictive classrooms—during the 2002-03 school year, nearly one
third of New Jersey students classified as having emotional disturbance were placed in separate public and private facilities as compared to a national average of 12 percent.24 While New Jersey accounts for less than three percent of the U.S. population, over 11 percent of segregated placements nationwide are New Jersey students.25

Significantly, research over the past several years emphasizes the benefits of inclusive placements when it comes to students with disabilities. Students with disabilities who are educated in general education classrooms are provided with higher academic standards and opportunities for modeling social skills.26 In a review of several studies published by the Journal of Special Education, the authors concluded that students with severe disabilities could successfully achieve positive academic outcomes and realize acceptance and friendship in inclusive settings.27 Students without disabilities also benefit from interactions with special education peers in inclusive classrooms by developing greater self-esteem, patience, and empathy.28 Additionally, students without disabilities demonstrate consistent academic gains when educated alongside students with disabilities, and there is no evidence of any negative impacts from inclusion.29

New Jersey’s history of restriction set the stage for the lawsuit in Disability Rights N.J. v. N.J. Dept of Educ.

**New Jersey’s Move Toward Inclusion: Disability Rights N.J. v. N.J. Dept of Educ.**

Almost a decade ago, disability rights advocates filed a federal lawsuit against the New Jersey Department of Education, New Jersey Board of Education, and individuals employed by these agencies, alleging the defendants violated the rights of children with disabilities to a “free appropriate public education” in the “least restrictive environment” under the IDEA, Section 504 of the Rehabilitation Act of 1973, and New Jersey’s non-discrimination law.30 The plaintiffs sought to compel the defendants to include children with disabilities in general education classrooms with appropriate accommodations, aids, and services, to the maximum extent appropriate.

The plaintiffs specifically alleged that the defendants “unnecessarily segregated” children with disabilities, “denied their right to be educated with children who do not have disabilities, to the maximum extent appropriate,” and denied accommodations, aids, and services needed to receive an appropriate education, even when placed in general education classrooms. Additionally, they alleged the defendants failed to have a system in place to ensure their personnel and school districts were appropriately and effectively trained and monitored in providing children with disabilities inclusive education and appropriate accommodations, aids, and services. To make their case, the plaintiffs focused on the difficulties six children with disabilities faced, statistics indicating that New Jersey was behind the national curve when it came to inclusion, and citations by the United States Department of Education and Office of Special Education against the state.31

After six-and-a-half years of litigation,32 the parties entered into a comprehensive settlement agreement33 geared toward including children with disabilities in general education settings throughout the state. Most significantly, the settlement agreement establishes a statewide system for the New Jersey Department of Education (NJDOE) to: 1) assess challenges facing specific school districts in their efforts to provide students with disabilities a free appropriate public education in the least-restrictive environment, 2) offer the school districts technical assistance and training to help them overcome these challenges, and 3) monitor the school districts’ progress. A critical component in ensuring the system’s success is the creation of a seven-member stakeholder committee comprised of disability rights advocates, which acts as a check on the NJDOE as it implements the terms of the settlement agreement.

**Assessing Challenges/Needs**

Consistent with New Jersey’s history of restriction, the settlement agreement outlines a broad array of challenges facing the districts, including: adapting curriculum, instruction and materials for students with disabilities; analyzing placement data to ensure a student’s placement in the least-restrictive environment; designing and implementing policies and programs for students with disabilities; having long-range facilities planning related to educating students with disabilities; having strategies to address disproportionate placement of minority children with disabilities in more segregated areas; reviewing individual IEPs and other student records; identifying needs in targeted districts; and supporting diverse students with disabilities in typical childhood settings with peers who are not disabled.

In the state’s effort to turn the tide toward inclusion, the NJDOE already has completed its first step in implementing the settlement agreement by mandating performance of least-restrictive needs assessments for designated school districts. Earlier this year, the stakeholder committee provided the NJDOE with its recommendations regarding each district’s needs, based upon the assessments.

**Technical Assistance and Training**

The technical assistance and training component of the settlement agreement involves an annual technical assistance and training plan, a minimum of four technical assistance and/or training sessions each year, and an interactive web-based training—
geared to helping school districts educate students with disabilities in the least-restrictive environment.

The NJDOE agreed to develop an annual plan identifying areas where each designated district requires (or, at least, is likely to benefit from) least-restrictive environment technical assistance and training, for three consecutive years, and to discuss each year’s plan with the stakeholder committee. Here too, the NJDOE already has made progress, having drafted the first-year plans based, in part, upon each designated district’s needs assessment, as well as data from federal and state monitoring reports and the results of NJDOE complaint investigations, and received stakeholder committee comments regarding the first-year plans. The monitoring provisions of the settlement agreement (discussed below) will play a role in the NJDOE’s drafting of the second- and third-year plans, as will other data, such as federal monitoring reports.

The NJDOE is to provide designated districts a minimum of four least-restrictive environment technical assistance and/or training sessions covering one or more areas of need, starting July 2015. Additionally, the NJDOE is expected to direct each designated district that has been deemed non-compliant with least-restrictive environment requirements as a result of the needs assessment (or an NJDOE complaint investigation during the prior academic year) to designate a district least-restrictive environment facilitator. The facilitator is to be a resource person for, and provide technical assistance to, other district staff members regarding least-restrictive environments.

As far as designated districts that have not been deemed non-compliant, the NJDOE is to make one or more state inclusion facilitators available to each of them, and, has, in fact, already done so. The state inclusion facilitators are to contact the designated districts monthly to offer assistance regarding any least-restrictive environment issues facing the districts. A district may receive on-site assistance from state inclusion facilitators equal to up to five times the number of compliant districts in the given year.

The NJDOE also agreed to create at least one interactive web-based training session based upon its formal and informal monitoring for the 2015-16, 2016-17, and 2017-18 school years. The stakeholder committee will have an opportunity to weigh-in on the content and topics covered by the web-based training.

**Monitoring Progress**

During the 2015-16 and 2016-17 school years, the settlement agreement requires the NJDOE to monitor the designated districts. As part of this monitoring, the NJDOE is to contact each district’s special education advisory group and offer to speak with a random sample of 20 parents of students who represent a variety of disabilities, ethnicities, grade levels, placements, and races. The NJDOE is to provide the stakeholder committee a copy of the completed monitoring reports and discuss areas to address in the second- and third-year technical assistance and training plans with the stakeholder committee, based upon the monitoring reports.

At the conclusion of each year’s technical assistance and training plan, the NJDOE is to monitor each designated district for compliance with the least-restrictive environment requirements and provide the stakeholder committee with a monitoring report. The settlement agreement expires when the stakeholder committee receives a copy of the report.

**Conclusion**

After a well-documented history of exclusion and restrictions, New Jersey is on its way toward providing children with disabilities with an education in as inclusive an environment as it can following the settlement in *Disability Rights New Jersey*. Although the true impact of the settlement is not yet known, it is at the very least a move toward improving the educational opportunities for students who receive special education services.

Jessica Limbacher is a staff attorney at Volunteer Lawyers for Justice (VLJ); she manages the Children’s Representation Project, which provides pro bono representation for students in special education, discipline, and bullying matters. James La Rocca is an associate at Gibbons P.C., who represents businesses in employment and labor law matters, and recently represented a student in a special education matter on a pro bono basis through the VLJ program.

ENDNOTES

2. 20 U.S.C. §§ 1400 et seq.
5. Id. at (a)(2).
6. Id. at (a)(3).
7. Id. at (a)(4).
8. Id. at (a)(5), (6).
9. Id. at a(7).
11. Id. at 690.
13. Id. at 992.
15. Id. at 1215-17.
17. Id. at 492-93.

21. Id. at 11.

22. Id.

23. New Jersey Department of Education, Office of Special Education Services, Number of Public and Nonpublic students ages 6-21 with Disabilities by Racial-Ethnic-Gender Group and Placement for State Agencies.


25. Id.

26. Id. at 8.


31. Id.

32. After the lawsuit was filed in 2007, the state moved to dismiss for failure to exhaust administrative remedies and lack of standing. The motions were denied. The state’s appeal was subsequently denied by the United States Court of Appeals for the Third Circuit. The plaintiffs then began discovery efforts, which involved conducting depositions, consulting with experts, and reviewing student records. Settlement discussions began in 2012, and the agreement was signed in Feb. 2014.