

TRACING THE PATH TO INCLUSIVE EDUCATION

A journey through our recent past with applications to the present and future!

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Introduction

The purpose of this article is an attempt to follow the complex evolution of inclusion law leading us to “the state of inclusion” where we find ourselves today. The judiciary has played a major role in shaping the course of inclusion law (Sharp & Pitasky, 2002). In some cases reversing previous decisions creating serious questions as to what direction will be taken in the future.

It may be important to first discuss the history of The Education for Handicapped Law Report, (EHLR). The EHLR was first published in 1979. Twelve years later, LRP Publications, changed the name of this biweekly report to reflect the growing sensitivity within the special education community toward the use of person-first language. Consequently, with the first issue of Volume 18 in October 1991, the EHLR officially became the Individuals with Disabilities Education Law Report, (IDELR). IDELR is an up to date, loose-leaf reporting service designed to meet the needs of the special education community, including attorneys, advocates, administrators, teachers and service providers, By compiling and up dating relevant federal statutes and regulations, and combining these with cases, rulings and interpretations. IDELR includes complete text of Individuals with Disability Education Act (IDEA), IDEA section 504 implementing regulations, Americans with Disability Act, (ADA), Family Education Rights and Privacy Act (FERPA), U.S. Education Department General Administrative Regulations (EDGAR), U.S. Department of Education, office for Civil Rights (OCR) with regular up dates to these statues and regulations (LPR Publications, 2001).

Perhaps more importantly IDELR provides complete text, with concise summaries of rulings and memoranda from Federal and State courts, U.S. Department of Education, Level I and Level II due process hearings, tables of cases referenced by name, issuing authority, case number, date and citation. Other text include Special Reports issued periodically, providing analysis of current legal topics within the special education community. Last but certainly not least is The Year in Review providing a selection of important judicial decisions rendered during the preceding calendar year including summaries of each case and analysis of the most important cases (LPR Publications, 2001).

Education of the Handicapped Act

The United States Congress in 1970 initiated the Education of the Handicapped Act, P.L. 91-230 in an effort to address concerns for the disabled sector of the population in the United States. Since then this important Public Law has been reauthorized a number of different times in an effort to provide necessary changes that need to be made. In 1975 came an important reauthorization in the form of P.L. 94-142, (reclassified as Sec. 1400 in 1981). In 1981 Congress made General Provision Statements and Declarations (P.L. 91-230, amended by P.L.94-142) concerning findings about disabled populations in the United State. These declarations, provisions and findings have had far reaching implications for the state of disability legislation (ADA, IDEA, P.L. 94-142) and services that exist today.

Congress found in 1981 that there were over eight million disabled children in the United States and the special education needs of these children were not being met. More than half of these disabled children do not receive appropriate educational services, which would enable them to have *full equality of opportunity*; and over one million were excluded entirely from the public schools. Many disabled children participating in regular school programs were prevented from a successful experience because their disabilities were undetected; because of the lack of services within the public schools many had to find services outside of the school system, at great distances from their homes and at their own expense (Education of the Handicapped Act, 20 U.S.C., Sec. 1400).

Congress decided that developmental training of teachers, diagnostic methods and procedures had advanced to the degree, given the appropriate funding, state and local educational agencies can and will provide special education and related services to meet the needs of disabled children. State and local education systems have the responsibility to provide education for all disabled children, but the financial resources are inadequate to meet the need of disabled children in special education. Congress states, “that it is in the National interest that the Federal government assists state and local efforts to provide programs to meet the needs of Handicapped Children in order to assure protection of the law” (Education of the Handicapped Act, 20 U.S.C., Sec. 1400).

The purpose of this chapter is to assure that all handicapped children have available to them, a free and appropriate public education with emphasis on special education and related services designed to meet their unique needs, that assure the rights of handicapped children and their parents or guardians are protected and provide an education for all handicapped children, and to assess and assure the effectiveness of efforts to educate the handicapped (P.L. 91-230, Title IV, Sec. 601, reclassified as section 1400 in 1981, Education of the Handicapped Act, 20 U.S.C. Sec. 1400.)

In 1997 Congress passed amendments to IDEA, mandating for the first time that states provide data on race and ethnicity of special needs students. The data revealed a disproportionate representation of minorities among students with disabilities. Approximately half of all disabled students in 2003-2004 spent 80 percent or more of their day in regular classrooms. Black students with disabilities spend less time in a regular classroom than non-black students. Additionally changes have occurred between 1994-1995 and 2003-2004 in the percentages of time disabled students ages 6-21 spent in regular classroom versus other settings. Between 1994 and 2004, the percentage of disabled students spending 80 percent or more time in the regular classroom increased from 45 to 50 percent (U.S. Department of Education, 2005).

In *Tracing the Evolution of Inclusion Law*, Sharp and Pitasky, (2002), identify the 1980's as the birth of inclusion. They express how the judiciary has played a major role in shaping the course of inclusion law. Cases from the 1980's indicate that the early inclusion decisions placed great emphasis on individual needs and frequently concluded that they were not

compatible with the regular education environment. Below review several cases that support this, however some of these decision were over turned at a later time

In the case of a child with mental retardation and citing a lack of significant progress over an 18 month period. *Roncker v. Walter*, (1981), the school district proposed to move a child who was trainable mentally retarded from a separate class for disabled students operated in a public school to a class for disabled students operated by the county board of mental retardation. The student would receive no contact with non-disabled children. The district court refused to intervene. On appeal, the 6th circuit court ruled that in deciding whether placement in a segregated institution met the mainstreaming requirement of the IDEA, the district court should first determine whether services which made that placement superior could be feasibly provided in a non-segregated setting. The district court's judgment was vacated and remanded for further proceedings. The *Ronker v. Walter*, case is significant as it introduced the "feasibility" test concerning how services may best be provided.

W. by NX v. Northwest R-1 Sch. Dist., (1987), the district's proposal to place a child with Down syndrome, severe mental retardation and minimal self care abilities, at a state school attended only by students with disabilities. The court ruled that the LRE did not require the student to be educated in a local school district where the district would have to employ a certified teacher of severely retarded students to provide FAPE and the student would receive minimal benefit from a local school placement.

In another case of a young child with Down syndrome *Daniel R.R. v. El Paso Independent Sch. Dist.*, (1989), the court upheld the school district's proposal to remove the child from a pre-kindergarten class and place him in a special education class. While in a regular classroom the teacher had to spend an inordinate amount of time focusing on the student to the detriment of the other students.

It was decided that schools must accommodate disabled students in the regular classroom that amount to more than "Token Gestures" it is not required to modify its curriculum to the degree that the student is excused from learning the skills taught in the regular classroom.

Although *Daniel R.R.v. El Paso*, struck down the regular classroom as the LRE, it later served as one of the chief decisions that laid down the framework for a number of pro-inclusion cases that followed in the 1990's. In a number of later court decisions a two part test was applied for determining the appropriateness of placement in the LRE. At a later time, in *Daniel R.R. v. El Paso*, the Fifth Circuit Court derived from the language and applied this two part test. First the court must determine "whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily". Second, if the court finds that placement outside of a regular classroom is necessary for the child to benefit educationally, then it must be decided "whether the school has mainstreamed to the child to the maximum extent appropriate". For example, has the school made efforts to include the child in school programs with non-disabled children whenever possible. The two part test seems to be faithful to IDEA'S directive that children with disabilities are

educated with non-disabled children “to the maximum extent appropriate”. In addition to IDEA’S requirement that schools provide individualized programs to account for each child’s specific needs *Liscio v. Woodland Hills Dist.*, (1989).

The early 1990’s with society’s growing political consciousness of the rights of disabled, inclusion took center stage in Washington (Sharp & Pitasky, 2002) with the media close at hand. The disparity of issues in cases reported in 1991 suggests that Education of the Handicapped Act, (P. L. 94-142) had succeeded in altering our society’s approach to educating children with special needs (McKee & barber, 1991). The premise that children with disabilities require individualized programs based on their needs, seems to be accepted, and the most recent court cases tend to focus on the means to achieve this goal (McKee & Barber, 1991). A renewed interest in educational reform has resulted in a call for parental choice in education placement and sparked new debate over public funding of parochial schools. We have also had an increase in the challenges made under alternative legal theories by integrating special education law with constitutional law, civil rights litigation and the common law of negligence.

In *Greer v. Rome City Sch. Dist.*, (1992), the district proposed placement of a child with Down syndrome in a self contained classroom other than her neighborhood school with mainstreaming for physical education, lunch, and music. It was determined that the district failed to adequately consider if the student could be educated with supplementary aids and services, or consider an alternative LRE, violated the IDEA. The district was ordered to reconsider its placement decision.

Oberti v. Board of Education of Borough of Clementon Sch. Dist., (1992) ranks near the top concerning inclusion pitfalls. The district failed to make a sufficient effort at a regular education placement. Noted was the districts shortcoming to offer any supplementary aids and services, in particular a program of behavior management. *The Oberti v. Board of Education* case was significant as a warning to school districts across the nation. The IDEA imposes affirmative obligation on school districts to consider placing students with disabilities in regular classroom settings, with the use of supplemental aides and services, before exploring other alternatives. In addition the court recognized that special placement could not be justified simply because a child might make improved academic progress away from the regular educational environment.

Statum V. Birmingham Pub. Sch. Board of Education., (1993) was the first decision credited as the first full inclusion decision to consider the appropriateness of a regular classroom placement of a child with severe and profound disabilities. Even though the board made significant accommodations, including the provision of equipment, a paraprofessional and training to the teacher and aide, the efforts were not considered extensive enough by the court.

By the mid 1990’s the courts had sufficient opportunity to evaluate the LRE standard, understanding that the LRE does not apply to a regular education in each and every instance.

A number of cases from this time have ruled in favor of placements other than regular education as satisfying the LRE mandate, unique needs are the dominate theme. The LRE requirement was part of the original law passed by congress. It was not until the 80's that the debate came to the forefront when special education community began to seriously review what the requirement really meant. The LRE may be considered a "late Bloomer" (Pitasky, 1996) because it took a considerable amount of time for the first inclusion lawsuits to make their way into the courts and the judiciary to contribute its interpretation. The growing fervor over inclusion spurred several national organizations to act, including The National Association of School Board of Education, Learning Disabilities Association of America and The American Federation of Teachers. When combined the movement was monumental and would change the face of LRE permanently (Pitasky, 1996, Sharp & Pitasky, 2002).

Cases dealing with mental retardation all up held a placement other than regular education as LRE. This seems to be at odds with the pre-existing inclusion cases from the 1990's. Several theories exist, but many experts believe that regular education may not be appropriate for students with more severe or profound disabilities. In addition they contend that as student's age, academic concerns take precedence over social benefits.

In the late 1990's and 2000's cases have become fact sensitive. Programming and placement are very individualized. Decisions regarding placement and what is the LRE for a student are now based on their own facts.

Deptford Township Sch. Dist. V. H. B. by E. B. and P. B., (2002) is an example of the districts proposed IEP that did not provide a student with Autism, the placement in the LRE. The district offered a half day pre school program for disabled students, and a half day program in a regular education setting. The court decided that the district made little attempt to accommodate the student in a regular classroom before offering a segregated program. The court found that the district's proposed placement was too restrictive, as the student needed to learn skills from peers in the regular classroom setting. The student could have been educated in a regular classroom with appropriate supplemental aids and services.

The opposite was found in *Gill v. Columbia.*, (2002). The parents sought a private based one-on-one instructor for a student with Autism. The parents failed to prove that the district's program did not provide FAPE. The student made slow progress in the district program that provided for placement in several different instructional environments to meet the student's needs. An Autism expert was used by the district as a consultant.

This resulted in the student receiving more one-on-one training in the districts program. The IEP provided for at least 16 hours of discrete training weekly. The district also adjusted the student's communication goal to reflect those Identified by the parents. It was found that the district program offered a FAPE in the LRE.

A 17 year old student with Autism, *Jefferson Parish Sch. Bd. V. Picard.*, (1998) placed in a self contained classroom separate from his high school that was close by. The school

provided opportunity for mainstreaming. The classroom contained a kitchen, bathroom, and other rooms, they were used as part of the life skills curriculum. Given the student's needs and the fact that opportunity for inclusion with non-disabled peers were provided, placement in this self contained classroom was found to be the LRE for this student.

SOME INTERESTING LEGAL OUTCOMES

Failure to provide a jailed student with services means 22 year old gets compensatory education *Hester V. District of Columbia*, (2006). A Federal District court determined a student that had been incarcerated at the age of 16 and who had entered into an agreement with his district that was adopted by an Impartial Hearing Officer (IHO) as a consent order did not receive services required by his IEP. The court found during a subsequent due process hearing, the IHO decided incorrectly that the student was not entitled to services because he had become a resident of another state in which he was jailed. The court awarded the student five years of compensatory education services. This means that a person's residency does not change by the virtue of being incarcerated in another state. The student's presence in Maryland was involuntary and the district did not dispute that he intended to return to the District of Columbia upon his release. The court found that he resided in the District of Columbia the entire time that he was incarcerated.

Some forms of severe mental retardations may present some unique circumstances concerning proper educational placement. CRI DU CHAT SYNDROME ("cry of the cat" in French) for example is a genetic disorder caused by the loss or misplacement of genetic material from the fifth chromosome. *Kari H v. Franklin Special Sch. Dist.*, (1997) is an instance of a child with severe mental retardation characterized by persistent cat-like meowing. The district's placement in a comprehensive development special education classroom with some mainstreaming complied with the LRE. Considering any gains the student might experience in a fully inclusive regular classroom would be marginal she would have a better chance in a setting where the students could communicate with the teacher in sign language. The student's behavior was deemed disruptive to the regular classroom necessitating her removal.

In another case involving Cri Du Chat Syndrome the plaintiff alleges the defendants have failed to comply with procedural and substantive requirements of the Individuals with Disability Education Act (IDEA), *Park V. Anaheim Union High School District and the Greater Anaheim Special Education Local Plan Area.*, (2005). In this case the Parks expressly challenged the compensatory award and the denial of attorney's fees. As demonstrated in *Park v. Anaheim* litigation has become more contentious and complex as regulations and other factors have been explored.

Other instances of students with mental retardation *Hudson v. Bloomfield Hills Pub. Sch.*, (1997) had similar outcomes. The LRE was found to be at the district's only middle school with programs for this student, as opposed to a regular placement in her neighborhood middle school. It was determined that no amount of special services and aids would meet the

needs of the student in a regular education setting. The student's performance at the regular school was done in isolation completely reliant on her personal aid who supplied with her own curriculum at the first and second grade level. The student's educational objectives included independent living skills, and social skills that could not be accomplished in a regular setting.

A number of court decisions suggest the importance of attempting a regular education placement before rejecting it in favor of a more restrictive placement. The more diligent a district's efforts at inclusion, the easier it is to defend it's self in the eyes of the law. Attempting to include a student in the LRE is simply not enough. The district must offer a good faith effort while providing sufficient supplementary aids and services.

Conversely some courts have indicated that a district is not required to attempt a regular education before restrictive placement, relying upon a student's proven track record of failure over a several year period. The district may rely on the facts offering compelling evidence that inclusion would be unsuccessful based on some past experience in an inclusion setting.

Academic, non-academic/socialization considerations are all important when deciding the LRE for a student with disabilities. No magic formula exists in striking a balance between the two. A warning may be raised if a student is not receiving any academic benefit from an inclusive placement and only a social benefit. In addition if a student's personal program of instruction leaves the student in isolation, the social benefits would be questionable.

Authors (Pitasky, 1996; Sharp & Pitasky, 2002) contend that the evolution of inclusion may be best described as a period of strong pro-inclusion in the early 1990's, placed in between equally weighty authority opposing regular education, followed by cases decided in the new millennium in which placement decisions are highly dependant on the individual facts of the case. These factors have contributed to the fluctuation in decisions in conjunction with one another.

Norlin (2003), reports that Federal Circuit Courts are still frequently called upon to rule on IEP disputes, addressing issues concerning IEP meetings and behavioral management techniques. Attorney's fees and reimbursement questions remain in the legal limelight. FAPE claims including questions over methodology, location of services, LRE, stay put and extended school year programs continue to be litigated.

Congress reauthorized IDEA in 1975 and it is still considered a young law. The process of interpreting IDEA has been a slow and deliberate one. The intent of congress is to enable disabled individuals to have *full equality of opportunity*. Each inclusion case has its own unique aspects. Individual needs must be considered when dealing with the issues of FAPE and LRE. A direct correlation exists between the facts of the case and its ultimate outcome. The LRE law can have slippery concepts. Districts must select their strategies wisely as the appropriateness of inclusion depends on the details involved. A number of issues have

influenced the current state of inclusion. Perhaps the most accurate description of the state of inclusion may be one of a “mixed bag” with support for and against regular education placement. The inclusion dilemma is not one of a black and white resolution. Districts must base their decisions with a flexible approach weighing all of the relevant factors in dealing with disabled populations.

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