Inclusion for the Developmentally Disabled Child

by Michael I. Inzelbuch

Inclusion, the right of a classified child to receive a meaningful and individualized education in a regular classroom with appropriate supports, modifications and strategies, is an issue that is often the subject of heated debate between parents of special needs children and school districts. Consequently, is it often the subject of fierce legal battles.

The philosophy of inclusion is at times touted by the school districts as a basis for denying parental requests to have their child educated at the school district's expense in a smaller more restrictive setting other than at the local public school. Moreover, on a simultaneous basis many districts are seemingly ignoring the mandate of inclusion, and resultantly are locking out children from the opportunity to interact with their typically developing peers in a regular mainstream classroom.

This article will examine the history of inclusion and the necessary tools to make it work in the actual classroom.

The History of Inclusion

The famous case of *Brown v. Bd. of Ed.*[1] was one of the first reported decisions to recognize that "a sense of inferiority affects the motivation of a child to learn,"[2] albeit primarily concerning itself with the great racial divide in the public school system. Building upon the concept that segregation with the sanction of law was detrimental to the educational and mental development of children, two decisions, *Penn. Ass. for Retarded Citizens v. Commonwealth of Penn*[3] and *Mills v. Bd. of Ed. of D.C.*,[4] took exception to the often systematic exclusion of children with disabilities from a regular education setting, and established guiding principles for inclusion, often referred to as the least restrictive environment mandate of the Individuals with Disabilities Education Act (IDEA).[5]

In 1975, the principle that "[P]lacement in a regular public school class with the appropriate ancillary services is preferable to placement in a special school class"[6] was the basis for the Education for All Handicapped Children Act,[7] landmark federal legislation that spurred a national movement to educate special needs children with typically developing children. Then-Senator Arthur Randolph, chair of the congressional Sub-Committee on the Handicapped, declared that handicapped children had the right to gain access to all of the educational and social benefits of the mainstream classroom, and that in-service training of general and special education personnel was required, a logical, but as of then, not codified requirement. Specifically, the *Congressional Record* indicates, in part, that all "... teachers must receive training that not only provides technical assistance necessary to teach handicapped children but also deals with the potential problem of attitudinal barriers."[8]

In a concerted effort to integrate children with disabilities, various federal mandates have since been established, including, but not limited to, the need to modify the regular education curriculum;[9] the provision of technical assistance and training to teachers and administrators to successfully include disabled children;[10] the adaptation and dissertation of promising inclusion and special education practices to district staff;[11] statements in the child's individualized educational plan (IEP) of the iron-clad program supports for school personnel that would facilitate a child's meaningful involvement

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in the general education curriculum;[12] and ongoing consultation and collaboration between special education providers, such as a child's treating speech therapists and resource room teachers, with the mainstream general education teacher.[13]

Despite the above, New Jersey remains one of the most consistent *offenders*, if you will, of the federal government's mandated directive for including students with disabilities in a meaningful fashion in the regular education setting. In 1998, the U.S. Department of Education's Office of Special Education and Rehabilitation Services forwarded to then-Education Secretary Leo Klagholz an extensive articulation of the actions the state, through its local districts, would have to effectuate in the sphere of inclusion in order to remain eligible for federal funding. Specifically, the federal government found that the New Jersey Department of Education, through its local school districts

> ... did not meet its responsibility under §300.550(b).[14] In many cases children with disabilities were removed from the regular education environment for reasons other than the child's needs. The reasons included large class sizes in the regular classroom, the classification disability of the child, the inability of the district to make modifications or provide supplementary aids and services in the regular classroom and/or lack of availability of sufficient therapeutic or related services within regular school district to meet the child's needs."

In 1990, Congress reaffirmed its commitment to inclusion, while recognizing that people with disabilities "are still subjected to widespread discrimination and segregation in all significant areas of their lives," by passing the Americans with Disabilities Education Act.[15]

The *Oberti* Standard

In *Oberti v. Bd. of Ed.*,[16] the Third Circuit considered what standard should be utilized in determining whether a New Jersey school district complied with the federal mandate to meaningfully include children with disabilities in the regular classroom. In this seminal case, Raphael Oberti's disabling condition was Down syndrome, "a genetic defect that severally impairs intellectual functioning and ability to communicate."[17] The district offered Raphael a program where all academics were to be learned in a segregated setting, to wit, a self-contained classroom with only disabled children.

The district's rationale for placement in a self-contained classroom was based on the fact that Raphael,

while making some progress in an inclusive mainstream kindergarten class, experienced a number of "serious" behavioral issues in the setting, including repeated toileting accidents, temper tantrums, offensive touching, hitting, spitting at other children, and on several occasions striking and hitting his teacher and aide.[18] Moreover, the district concluded that since it had facilitated consultation between the regular education teacher and the school psychologist to discuss possible approaches to manage Raphael's behavior (albeit, *no* formal plan having been developed) and the regular education teacher attempted to modify Raphael's curriculum, (but *without* a systematic approach being utilized and without consultation between the special education teacher and the regular education teacher) it was required to do no more.

Raphael's parents argued successfully that under the IDEA and the New Jersey Administrative Code their child was entitled to be educated in a regular classroom with his typically developing peers. While the administrative law judge[19] denied the entitlement, the United States District Court, with the affirmance of the United States Court of Appeals, overturned the administrative decision and ruled that Raphael's entitlement to a free and appropriate education in the mainstream classroom had been denied.

In reaching this decision, the *Oberti* court evaluated whether the individual child, Raphael, could be educated satisfactorily in a regular classroom, utilizing a three-part analysis. The first level of inquiry was whether the *whole range* of supplementary aids and services were considered, including, but not limited to, resource room, itinerant instruction, speech and language therapy, special education training for the regular education teacher, behavior modification programs, and any other available aids

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or services appropriate to the child's particular disabilities and individual needs.[20] In considering Raphael's case, the court concluded perfunctory and feigned "gestures" to accommodate Raphael were not sufficient. The court stated in general terms:

> If the school has given no serious consideration to include the child in a regular class with such supplementary aids and services and to modify the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive.[21]

The court went on to inquire, and compared the educational benefits Raphael would receive in the regular classroom with all the aforementioned accommodations and services against the benefits he was receiving in a more restrictive setting. In analyzing the aforementioned second factor, the court provided specific guidelines. Specifically, the court concluded that the importance of inclusion was so great that even a finding that a child with disabilities would make greater academic progress in a segregated class like a resource room or self-contained class would not warrant exclusion from the mainstream.[22] In addition, the court acknowledged that the mere fact that "... a child with disabilities will learn differently ... within a regular classroom does *not* justify exclusion."[23]

Moreover, the court noted,

> in reviewing the benefit of placing handicapped children with typically developing peers," the fact finder must pay special attention to those unique benefits the child *may* obtain from integration in a regular classroom that cannot be achieved in a segregated environment, *i.e.*, the development of social and communication skills from interaction with non-disabled peers ...[24]

The third factor considered was the negative effect the child's inclusion might have on the education of other children in the mainstream classroom. In considering this factor, the court placed great emphasis on the fact that "an adequate individualized program with ... aids and services may prevent disruption that would otherwise occur."[25] The court went on to state "however ... in considering the possible negative effects of the child's presence on the other students, the court must keep in mind the school's obligation under the Act to provide supplementary aids and services to accommodate the child's disabilities."[26]

In weighing the above three factors, the court concluded that Raphael should have been provided an opportunity to be included with his typically developing peers. Specifically, the court concluded that the district's efforts were "negligible," as there did not exist a curriculum plan and there were not "adequate" special education supports provided to the teacher.[27] Moreover, the court concluded Raphael was denied a

regular education experience based on behavioral problems he had experienced primarily a year earlier in kindergarten, that had not been attended to by the district.[28] Lastly, the court took strong exception to the district, and stated, "the record reflects that the school district had access to the information and expertise about specific methods to enable children with disabilities like Raphael to be included in the regular classroom but the school district did not (do so)."[29]

The Case of E.M.

In the year 2000, the author represented a seven-year-old autistic child, Eli, who resides in Manalapan. Prior to the author's engagement, Eli's parents had consistently requested that he be placed in a regular first grade classroom with appropriate supports and modifications, as opposed to the district's proffered placement in a self-contained classroom. After many long meetings and heated discussions between district personnel and Eli's parents, the district agreed to place Eli in a regular first grade classroom with the crucial *caveat* that he would be removed to a resource room for reading, language arts, and math, as well as related therapies such as speech. Moreover, during his time in the regular education classroom the district would afford Eli an aide. This approach was not satisfactory to Eli's parents, who insisted upon Eli's entitlement to receive *all* of his educational programming and services in the regular first grade classroom with the appropriate supports and modifications, including teachers and aides who were adequately trained in dealing with autistic children and a program composed in an individualized education plan that was sufficiently specific and provided the necessary supports, strategies and modifications.[30]

The district maintained during the hearing, which lasted eight days, that Eli should not be fully mainstreamed in the regular first grade due to his distractibility, impulsivity, and pereservative behaviors the district said would negatively impact the 21 other children in the classroom. Moreover, the district stated that Eli would have minimal educational benefit from instruction in mathematics and language arts in the first grade classroom, as his functioning levels were below that of his peers.[31] In the post-hearing brief, the district maintained that they had included Eli to the maximum extent appropriate, that even with supplementary aids and services his education would not be satisfactorily achieved, that his peers were being negatively affected by him, that the level of training of the regular education teacher and aide assigned to Eli was sufficient, and that the IEP was specific and appropriate.

The author argued that the district, pursuant to *Oberti* and its progeny, was obliged to provide a fully inclusive program in the regular first grade classroom, that the teacher and aide who received some training (at the parents' insistence) and were well-meaning (with the aide being the parent of a special needs child herself) were not sufficiently trained for Eli, and that the IEP and program were not sufficiently individualized or modified to take into account Eli's unique learning style due to his disabilities.

After a lengthy and costly trial that cost the district in excess of $300,000, the administrative law judge concluded that, in fact, Eli's teachers and aide were not sufficiently trained, and ordered the district to retain a consultant knowledgeable in autism to train and work with the district staff and parents in creating "a realistic behavioral plan relevant to E.M.'s disability." The court went on to state that without this, Eli's "potential to achieve some educational benefit in a mainstream setting would be stifled."[31] Moreover, it was concluded that the IEP "unaided will not serve" Eli's right to be entirely educated in the first grade classroom. However, despite the above, the administrative law judge concluded that for the time being the amount of time Eli should spend in the regular education first grade classroom should remain unchanged.[33]

The TIP Program

Recently, the author was retained by the Lakewood Board of Education to serve as its board attorney, special education attorney, and special education consultant.[34] In an effort to guide the district to comply with the federal and state mandate of inclusion, the first step was to examine the state of special education affairs within the district, including the technical intervention program (TIP), a high school program for classified children operated for several years by a state-approved commission. This alternative program operated on the premise that special needs children assigned to the TIP could not receive a free and appropriate education at Lakewood High School due to behavioral, academic, and attendance issues and, thus, should receive an education separate and apart from their typically developing peers.

After examining documentation including the classified student's IEPs and numerous files describing the program, speaking with a host of individuals who were in some manner familiar with the program, and consulting with independent educational experts, it was concluded that the program was not only violative of the inclusion mandate, but in large part failed to deliver a free and appropriate education to the enrolled students. To that end, an administrative decision was made to allow for most of the students to re-enter Lakewood High School with the attendant supports,

modifications, and strategies being provided.

While the program is still in its infancy, due to the best efforts of many district personnel, the Lakewood Board of Education can now lay claim to the fact that the educational right of special needs children to be educated with their peers to the extent possible as established in *Oberti* and its progeny is being facilitated. Granted, there are many hurdles yet to overcome, such as public outcry from some parents of regular education students who do not want special education students in the mainstream high school and some staff members who do not fully appreciate the *Oberti* mandate, but today these students are receiving the benefit of a more inclusive education in a less restrictive environment in order to prepare them to function in the real world.

Conclusion

In conclusion, while the federal and state requirements to educate special needs children with their peers may seem evasive, and can be considered yet another directive from Washington, D.C., and Trenton that cannot be easily accomplished at the schoolhouse, the benefits to children are too important to ignore, and with a concentrated true effort can be accomplished.

Endnotes

1. 347 U.S. 438 (1954).
2. *Id.* at 493.
3. 334 F. Supp. 1257, 1260 (Pa. 1971).
4. 248 F. Supp. 866, 873-4 (D.D.C. 1972).
5. The least restrictive environment standard is not set forth in 20 U.S.C. 1412(5)(B) and N.J.A.C. 6A:14-4.2. *See also,* 34 C.F.R. §300.550(b). Specifically, removal of handicapped children from the regular educational environment should only occur when the nature or severity of the handicap is such that education in regular classes with the use of supports, medications and services cannot be of assistance. It must be noted from the outset that this requirement does not mean that parents of children with disabilities must entrust them to *alleged* and/or *feigned* district inclusion programs that are anything but thought out and resemble more of a hodge-podge of services to be delivered by staff that are often not trained and that are often motivated by money. *See, Egg Harbor Twp. Bd. of Ed.,* 19 IDELR (D. NJ 1992) where Judge Reginald Gerry concluded that the parents of a special needs child were correct in enrolling their child in a residential private school for the handicapped hundreds of miles away and at great expense, as "the least restrictive environment ... cannot be approved to cure an otherwise inappropriate placement." *See also, Burlington School Com. v. Dept. of Ed.,* 105 S. Ct. 1996 (1985) where the court held that when possible, education should be provided in the local public school with the child participating as much as possible in the same activities as non-handicapped children, but also provides for placement in private schools at public expense where this is not possible due to either the severity of the disability or the inability of the school district to provide a truly individualized, well thought out program with appropriately trained staff to deliver same to the child in question.
6. *Mills, supra* at 876.
7. U.S. Public Law 94-142 (1975))
8. 121 Congressional Record § 10960.
9. 34 C.F.R. §300.522.
10. 34 C.F.R. §300.555.
11. 20 U.S.C. §1453(c)(3)(d)iii.
12. 20 U.S.C. §1414(d)(1)(A)(iii)(II), 34 C.F.R. §300.47(a)(3)(ii), N.J.A.C. 6A:14-3.7(d)3. An IEP is a written codification by the district and its personnel that is to clearly delineate the student's needs and educational program and services. (*See,* N.J.A.C. 6A:14-3.7).
13. 34 C.F.R. §300.24(14)(u).
14. 34 C.F.R. §300.550(b).
15. 42 U.S.C. 1201, *et seq.*
16. 995 F.2d 1204 (3rd Cir. 1993).
17. *Oberti,* at 1217.
18. *Id.* at 1208.
19. The judge at the administrative level was Joseph Lavery, who presided over the case the undersigned litigated, to be discussed below.
20. *Id.* at 1216.
21. *Id.* The *Oberti* court sanctioned the approach adopted in *Greer v. Rome City Sch. Dist.,* 950 F.2d 688 (11th Cir. 1999), that an examination of the steps taken to accommodate the child in the regular education class must be evaluated from the vantage point of what was accomplished both prior to and during the development of the IEP. *Id.* at 696.
22. *Id.* at 1217. (emphasis added).
23. *Id.* at 1216.
24. *Id.* Please note that the analysis is on what benefits the child *may* receive, not what he or she in fact *will* receive.
25. *Id.* at 1217.
26. *Id. See also, Millersburg Area Sch. Dist.,* 27 IDELR 555, where it was concluded that the negative effect of a child's behavior could not be considered in determining whether a mainstream setting was appropriate, as appropriate and individualized supports and services were not provided.
27. *Id.* at 1220-21. *See also,* N.J.A.C. 6A:14-12 and N.J.A.C. 6A:14-3.7(1).

28. *Id.* at 1221.
29. *Id.*
30. An IEP must contain, in part, relevant data with regard to the child (N.J.A.C. 6A:14-3.7(c)2), the strengths of the child (N.J.A.C. 6A:14-3.7(c)1), behavioral interventions if a student's behavior impedes the student's learning or the learning of others (N.J.A.C. 6A:14-3.7(c)3), and measurable goals and objectives that can be monitored to track a student's progress. (N.J.A.C. 6A:143.7(d)2).
31. The parents of Eli contended that the formalized testing of his functioning levels in math and language arts were skewed to his detriment as they were administered without any defense to his disability. For example, testing Eli verbally when he suffered from a speech deficit was potentially unfair. Nevertheless, despite this it was proven that Eli was not the lowest functioning in math or language arts bases on the district's very own reported statistics of the children in the classroom, albeit, not readily shared with the parents.
32. The administrative law judge ordered additional training despite the fact that the district had engaged an expert on several occasions from a recognized autism center *prior* to the hearing at the parent's request, and despite the fact that the district staff had attended several days of training at another noted center for autism.
33. The administrative law judge who previously adjudicated the fate of Ralphael Oberti again, in the author's opinion, incorrectly applied the dictates of the *Oberti* decision. Specifically, in accordance with the first level of inquiry in *Oberti*, the analysis was to consider if the appropriate supports and modifications such as training and a well-developed IEP were in existence, and *only if same existed* could exclusion of a child from a mainstream classroom be maintained. On appeal, the district agreed to fully mainstream Eli, a decision that proved correct as Eli's success in a mainstream setting for the entire day is well known throughout the Manalapan school district. Much credit goes to the district's new special education director who had the vision to prevent any further injustice to Eli. Unfortunately, after the decision of the administrative law judge was entered the district still attempted to place Eli in a self-contained program for the following summer. However, after the author filed two additional emergent relief applications two additional administrative law judges, Robert S. Scott and Robert S. Miller, held that the district's self-contained placement was too restrictive and that the parents unilateral placement at the Atlantic Club and Learning Center, Manasquan, where Eli could develop with typically developing peers, was to be paid for by the district. *See, F.M. & W.M. o/b/o E.M. v. Manalapan-Englishtown Bd. of Ed.,* EDS-4085-01 (July 5, 2001) and *F.M. & W.M. o/b/o E.M. v. Manalapan-Englishtown Bd. of Ed.,* EDS-4235-01 (July 3, 2001).
34. The board, most notably Board Member Harvey Kranz, and Lakewood Superintendent Dr. Ernest Cannava, after facing five years of litigation filed on behalf of classified children, extended an offer to correct the special education system within the district. The offer was accepted with the understanding that special education children's needs would be paramount, not monetary considerations, and based on the ability to be of assistance to hundreds of special needs students as opposed to the approximate 30 the author represented on a yearly basis in an adversarial position.

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