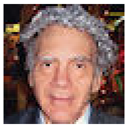
New Jerseyans with Disabilities: Still Struggling for Access to Employment, Health Care, Housing, Community Acquiescence, and Human Rights



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Access to Human Rights

The struggle for basic human rights among people with disabilities is an issue that transcends geographic, social, and economic boundaries. Only within recent years have the legal issues associated with people with disabilities finally begun to be monitored and discussed among public and private organizations.

The American Bar Association formed the Commission on Mental and Physical Disability Law (CMPDL) to establish rules for addressing the civil rights issues that confront people with disabilities. In 1973, the ABA created the Commission on the Mentally Disabled. The 1990 passage of the Americans with Disabilities Act prompted the ABA to address the impact of all disabilities, forming the Commission on Mental and Physical Disability Law. The CMPDL addresses disability policy, including the needs of lawyers with disabilities. According to the American Bar Association, the Commission is charged with the responsibility to:

> *“promote the ABA's commitment to justice and the rule of law for persons with mental, physical, and sensory disabilities and to promote their full and equal participation in the legal profession.”*

New Jersey has unique issues that pertain to the plight of people with disabilities. Some of the issues emanate from the Demographics of the State that impact on social interaction, environmental concerns, employment, transportation, health care, and community acquiescence.

The State of New Jersey has the greatest population density among all States in the Union. Furthermore, one section of the State and one County (Hudson), along with portions of four other counties (Bergen, Essex, Passaic, and Union) have the greatest population density within the State. Five municipalities (Guttenberg, Union City, West New York, Hoboken, and Jersey City) are the most densely populated in the nation. This high population density has both advantages and disadvantages for people with disabilities. Generally, high population density areas provide greater access to mass transit. However, relatively few mass transit entities have appropriate accommodations for people with disabling conditions. Hence, those with disabilities are far less likely to travel to a work site, doctor’s office, supermarket, or community activity.

In addition, New Jersey has barren, rural areas where no mass transit exists (portions of Sussex County, for example). It is possible to live in such a rural area and have much limited access to employment, health care, shopping, or community activities.

Furthermore, the problems of identifying people with disabilities for evacuation planning during an environmental crisis or a terrorist attack have been studied with mixed results. Although attempts have been made to create a data base in order to identify people with disabilities (and design a method to contact them during a crisis), the development of such a data base depends on the active cooperation of people with special needs, many of whom have limited expressive skills and are less likely to respond to questionnaires and telephone queries in order to be placed on a list.

In recent years, the issues of the design, preparedness, and implementation of emergency services in New Jersey have been discussed and debated with a mixed degree of consensus. Since September 11, 2001, the issue has increased in importance for some, and placed in the "back burner" by others. The inordinate amount of time that is taken in the planning of such services requires that the organization of agencies and communication systems begin as early as possible.

The evacuation of the populace during a catastrophic event remains a primary concern. Over the last few years, whether the evacuation of people with special needs during an environmental or man-made emergency can be feasibly undertaken has been discussed by FEMA and other agencies. In fact, FEMA held a conference in New York City in August 2008 that included county, state and federal agencies in order to seek an effective method of coordination and communication in order to secure the evacuation of people with disabling conditions during such a crisis. Unfortunately, the opinion of many in attendance was that there was no effective method for doing so.

New Jersey has the greatest population density in the nation. An evacuation from northern New Jersey would have to be westward and away from the coastal areas. Who would lead the evacuation? What form of transportation would be used?

During the Katrina crisis in 2005, the populace of New Orleans was ordered to evacuate.. It was known for many years that the levee system may not hold during a hurricane at a stage three level or greater. In addition, evacuation orders took for granted that the population would independently leave the area. No provision was made for those who did not own automobiles or those whose special needs made an independent evacuation impossible. City buses that could have been used for a mass evacuation remained idle. Appropriate food and water supplies for those left behind were inadequate or non-existent. Critical medical professionals left the area ahead of those needing their services.

Many people with disabilities were unaccounted for and simply left behind and perished. Later investigations indicated that these people did not respond to the news media announcements or telephone inquiries. Furthermore, there were inadequate provisions for accessible transportation on buses or trains or in automobiles, due to the overt nature of their disabilities.

The New Jersey Law Against Discrimination

According to the State of New Jersey:

> *"The New Jersey Law Against Discrimination (LAD) makes it unlawful to subject people to differential treatment based on race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital status, domestic partnership or civil union status, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for military service, and mental or physical disability, perceived disability, and AIDS and HIV status. The LAD prohibits unlawful discrimination in employment, housing, places of public accommodation, credit and AIDS and HIV status. The LAD prohibits unlawful discrimination in employment, housing, places of public accommodation, credit and business contracts. Not all of the foregoing prohibited bases for discrimination are protected in all of these areas of activity. For example, familial status is only protected with respect to housing. The Division has promulgated regulations that explain that a place of public accommodation must make reasonable modifications to its policies, practices or procedures to ensure that people with disabilities have access to*

> *public places. The regulations also explain that under the LAD, these reasonable accommodations may include actions such as providing auxiliary aides and making physical changes to ensure paths of travel.”*

In New Jersey, Disability Rights- NJ (formerly New Jersey Protection and Advocacy) was formed in 1994 to address the civil rights and due process issues that confront people with special needs. The mission of Disability Rights –NJ is to:

> *“protect, advocate for and advance the rights of persons with disabilities in pursuit of a society in which persons with disabilities exercise self-determination and choice, and are treated with dignity. DRNJ's activities are grounded in its belief in the inherent value and worth of all individuals and their right to equality of opportunity and full participation in their communities."*

Disability Rights – NJ has filed litigation on several issues that impact on the civil rights of people with disabilities and/or special needs.

Developmental Disabilities

With the law firm of Lowenstein Sandler PC, Disability Rights – NJ has sued the State and the Department of Human Services (and the Division of Developmental Disabilities) over the egregious waiting list that New Jereyans must confront when seeking housing. Often, a person with a Disability has a residential housing application filed when that their parents pass on or are too old and frail to care for them Unfortunately, the waiting list requires the subject to wait eight years or longer for housing, at which point the client may be without shelter or health care during that period.

The State of New Jersey responded by informing the federal court that it cannot afford the financial burden that is required in order to provide these individuals with housing. However, the federal court rejected the argument. DR-NJ issued the following press release:

“DRNJ Sues State Over Division of Developmental Disabilities Residential **Waiting List**

> *“DRNJ and Lowenstien Sandler, a prominent NJ law firm, filed a complaint in the U.S. District Court against the Department of Human Services, saying 8,000 people with developmental disabilities have had their rights violated because they have been waiting too long to move into Division-sponsored community housing”.*

> *The lawsuit alleges the state is failing to meet its legal responsibility to provide housing for people who want or need to live outside of their family homes. The Department has established a waiting list, but few ever leave it unless a parent or other caretaker becomes ill or dies, the lawsuit said.*
>
> *On June 29, 2009 the U.S. Department of Justice ("DOJ") filed a brief in DRNJ's waiting list case against the State of NJ. The DOJ's brief rebutted the State's claim that the Americans with Disabilities Act and the Rehab Act were not constitutionally valid, and that DRNJ was attempting to apply the rights established under Olmstead in an impermissible manner."*
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> On July 20, 2009, the Court denied the State's motion to dismiss.

Disability Rights – NJ also addressed the State's "dragging its feet" in deinstitutionalizing developmentally disabled patients in residential centers and patients in psychiatric hospitals and placing them in the community. According to a United States Supreme Court decision, patients and residents in State facilities who have been deemed by physicians and other personnel to be ready for community living should be released from the institutions and placed in appropriate independent and semi-independent settings. The United States Department of Justice agreed with DRNJ's position. According to DRNJ's press release:

"The U.S. Department of Justice (DOJ) has filed a brief in support of DRNJ's Olmstead litigation against the Division of Developmental Disabilities.

> *"In their lawsuit, DRNJ charges that the State not only ignores the mandates of Olmstead and the ADA, but also violates other state and federal laws that protect the rights of individuals with mental disabilities, including Section 504 of the Rehabilitation Act, the New Jersey Patients' Bill of Rights, and fundamental state and federal constitutional laws.*
>
> *DRNJ seeks a court order requiring the State to provide individuals on CEPP status with services in the most integrated settings appropriate to their needs, to limit CEPP status to 60 days, and to provide monthly reports to DRNJ detailing the progress of individuals on CEPP status towards return to the community.*
>
> *Subsequent to filing the lawsuit the Judge David L. Bazelon Center for Mental Health Law based in Washington. D.C., and Pepper Hamilton, LLP, a private law firm based in Philadelphia with offices in Princeton, NJ joined DRNJ as co-counsel.*

> *The response from the State of New Jersey to the law suit was to file a Motion to Dismiss claiming that DRNJ was not a proper party to bring the law suit. DRNJ and co-counsel filed an Objection. The court ruled in favor of DRNJ finding that DRNJ was a proper plaintiff. The State of New Jersey then attempted to prevent attorneys from the Bazelon Center from assisting DRNJ in the case. DRNJ and Pepper Hamilton responded to the State's objection. Once again the court ruled in favor of DRNJ finding that there was no basis to exclude the attorneys from assisting DRNJ in the case. The State has answered the complaint denying most of the allegations and raising some defenses."*

Actually, the Olmstead decision, as ruled by the United States Supreme Court, does not mandate the automatic deinstitutionalization of patients with developmental disabilities. The decision of the United States Supreme Court in Olmstead v. L.C., 527 U.S. 581 (1999) was that individuals with developmental and other disabilities had a right to treatment in community, rather than residential settings and had a right to live in the community, as well. The conditions set by the Supreme Court, as part of an interpretation of the Americans with Disabilities Act, was that an evaluation by the medical and other professionals providing the treatment deemed the individuals capable of living in the community. In addition, the Court decreed that individuals must be willing to live in the community and receive community-based treatment without diminishing the way in which such services were provided in the residential setting.

Mental Illness

DRNJ also felt compelled tp file litigation specifically addressing the rights of patients in the psychiatric institutions. According to the press release:

> *"Lawsuit Charges State with Illegal and Unnecessary Segregation of Residents in Psychiatric Institutions*
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> *On April 5, 2005, Disability Rights New Jersey filed a lawsuit in federal district court against James Davy, Commissioner of the Department of Human Services for the State of New Jersey. The lawsuit seeks the release of hundreds of New Jersey residents from unnecessary confinement in state psychiatric institutions.*
>
> *Nearly half of all individuals in state psychiatric hospitals remain confined needlessly because the State of New Jersey has failed to develop suitable community residences and programs to support their return to the community. The Conditional Extension Pending Placement (CEPP) status was created by the State Supreme Court in the 1983 S.L. case [In re S.L., 94 N.J. 128 (1983)] to give the State time to develop community placements*

> *before discharging individuals. Now, however, CEPP status is used by the State to retain those individuals long past their need for hospitalization.*
>
> *According to Emmett Dwyer, Director of Litigation for DRNJ, "The State has for far too long failed to live up to its obligations under the Americans with Disabilities Act (ADA) as interpreted by the United States Supreme Court. The State continues to retain large numbers of individuals in locked and dangerous facilities while simultaneously failing to plan for their discharge and transfer into the community with appropriate supports. The time these individuals have lost and continue to lose in institutions can never be regained. Their continued confinement long after a court has determined that they are no longer a danger to themselves or others constitutes an egregious violation of their rights."*

Disability Rights – NJ specifically addressed the failure of the State to be in compliance with federal mandates. According to DRNJ:

> *"Sarah Mitchell, DRNJ's Former Executive Director/President, states that, "We applaud Acting Governor Codey for his long time commitment to addressing the needs and concerns of people with mental illness. The work of the Mental Health Task Force is certainly further evidence of this. But we read nothing in the Task Force's recently released report to suggest that the rights and needs of the individuals we represent in this lawsuit will be addressed anytime soon. New Jersey has long been on notice about its unnecessary confinement of large numbers of individuals on CEPP status, without developing the placements and supports necessary for their transfer to less restrictive community placements. The State is in violation of both the letter and the spirit of the law we know as the Americans with Disabilities Act. The U.S. Supreme Court in the Olmstead v. L.C. case, 527 U.S. 581 (1999), discusses such unnecessary segregation as illegal discrimination based on disability. The individuals on CEPP status that the State has kept waiting in institutions long past their need for such restrictive settings deserve more than recognition that the CEPP situation is a problem. They deserve an immediate plan that details, within a reasonable time frame, when they can expect to return to the community."*

DRNJ's Olmstead Case Against the State of New Jersey

Disability Rights – NJ continued in its quest for deinstitutionalization:

"On May 24, 2010 the Department of Justice filed a Motion to Intervene in DRNJ's Olmstead case against the State for its failure to move people into the community.

In filing its brief in support of DRNJ the Dept. of Justice wrote the following "[The] undisputed facts ... reveal that the State provides services to far too many individuals with disabilities in the most segregated setting imaginable – its large, congregate institutions. Indeed, there are admittedly hundreds of institutionalized residents (at least 2,303 as of May 2007) who meet ADA and Olmstead criteria for community integration. Yet, these qualified and unopposed residents remain inappropriately segregated in the State's institutional facilities...."

Case Developments...

An important hearing occurred in federal court on Wednesday, September 22, 2010 at the U.S. Courthouse in Trenton, NJ. At that hearing the law firm of Pepper Hamilton appearing on behalf of DRNJ was joined by the Principal Deputy Assistant Attorney General of the Civil Rights Division of the U.S. Department of Justice in arguing for summary judgment in an Olmstead case filed by DRNJ.

Summary Judgment is granted to a party if the facts are not in dispute and if the facts therefore dictate that one side or the other should prevail in the case. DRNJ filed a Motion for Summary Judgment because the Division was not disputing the fact that there are hundreds of people confined to its seven developmental centers who do not belong there and are not likely to be discharged anytime soon, nor is the Division disputing the fact that it is still actively admitting people to its developmental centers because it has nowhere else to place people, including people who have chosen to receive services in the community. The Division's defense is that it has no money to develop community placements.

Notwithstanding the Division's claim of a lack of money, DRNJ claims, and the Division does not dispute, that it costs over twice as much money to place an individual in a developmental center instead of caring for them in the community. Furthermore, DRNJ claims that it is a violation of the ADA to keep people in segregated institutions, and that the ADA does not make an exception for a state that claims a lack of funds; in short, civil liberties are not dependent on whether or not a state is running a deficit."

When Richard Codey became Governor in January 2005, he was determined to improve programs for New Jerseyans with Mental Illness. Three years earlier, when he served as the Acting Governor for three and one-half days during the brief period between Donald Defranseco's brief term as Governor (as the State Senate President, he became the Governor when Christine Todd Whitman resigned to be become the head of the federal Environmental Protection Agency) and the swearing of James McGreevy, he announced that he had found appalling conditions at the State's psychiatric institutions, including physical abuse. Now, as McGreevy resigned following the Golan Cipel scandal, Codey became the Governor (not Acting Governor. Now, he felt, he was in a position to improve the lives of patients with mental illness. As Codey pointed out in his book, "Me Governor?", new policy was needed. According to Codey:

> *"My priorities were clear: overhaul the mental health system... From home, I went to Greystone (Psychiatric Center --- underscoring immediately that mental health was an urgent priority ---- and joined about fifty patients for small talk and French toast – my second of the day. My son Kevin came along because I wanted him to understand how vulnerable the mentally ill are and why I was so determined to be their Governor."*

Codey created a State Mental Health Task Force and established a goal to educate the public about the problems of mental illness and the needs of patients.

Forced Drugging

The administration of unwarranted and dangerous medication to children and adults with disabilities has become endemic in New Jersey.

This writer petitioned New Jersey's Office of Administrative Law to end the illegal "forced drugging" of children with special needs who receive services in the State's schools. It has been apparent that school personnel throughout the state are requiring parents to have their children medicated with psychotropic and other medications as a condition for receiving special education and related services. This practice is specifically prohibited by federal law.

Along with other Disability Law experts, including Jim Gottstein, a Harvard trained lawyer who is the head of PsychRights, a national advocacy group, this writer is considering a civil action in order to end the illegal practice and subsequent civil rights violations. A letter to Judge Laura Sanders, Acting Director of the State's Office of Administrative Law, indicates that "the Individual Disabilities Education Act Amendments of 2004 (Public Law 108-446) and our New Jersey Administrative Code for Special Education (N.J.A.C. 6A:14) are being violated without oversight".

Gottstein has stated that the vast majority of professionals may not be aware of the dangers that these medications may pose for children. So, Gottstein suggests, *"we need lawyers to explain to them what their prescriptions are doing to their patients. Drugging children the way they are doing is unacceptable and a crime. So we need jurisprudence to deal with it".*

The letter to Sanders also indicates that federal law "specifically prohibits school districts from requiring parents to place their children on psychotropic or other medication as a condition for receiving special education or related services. Furthermore, school personnel, who are not medical professionals, are prohibited from discussing medication with parents". Conferences between parents and school personnel, Pizzuro points out, should be limited to a child's academic and behavioral needs. Pizzuro also suggests that "Any discussion regarding medicating a child should be between the physician and parent and nobody else".

Federal law requires the State to create standards and practices that will prevent school districts from coercing a parent to medicate a child. Nevertheless, the language in New Jersey's Administrative Code for Special Education is ambiguous and confusing. As a result, this writer has asked the Office of Administrative Law and the State Legislature to revise the language of the Code to conform to federal law. It is hereby suggested that psychotropic medications are recommended by school officials in order to control behaviour, rather than cure a disorder.

This issue impacts on the lives of adults with disabilities, as well. DRNJ issued the following press release regarding their complaint:

"DRNJ Files Complaint Regarding Involuntary Administration of Medication

> *DRNJ, in collaboration with Kirland & Ellis, has filed a complaint in U.S. District Court in New Jersey against the Departments of Human Services and Health and Senior Services regarding the involuntary administration of medication to psychiatric patients in New Jersey's public and private hospitals. The lawsuit challenges the current implementation of procedures put in place in the state-operated psychiatric hospitals in response to the litigation in Rennie v Klein (1978-1983) and the lack of any formal procedures or oversight in the other hospitals. The lawsuit alleges that the current procedures, which do not provide for an independent review in the event of a challenge to the need for involuntary medication no longer conforms to today's understanding of patient rights and good clinical practice."*

Special Education Funding

Special Education programs in New Jersey are becoming more expensive each year, and are underfunded. Currently, the Governor and the State Department of Education are faced with the dilemma of finding additional dollars for programs for children with disabilities who have specific needs for related services that are provided in addition to the educational program. Yet, it is the right of every student with a disability to receive a free and appropriate education (FAPE). The history of how FAPE became a guaranteed civil right is circuitous, yet specific.

Although the Individuals with Disabilities Education Act, which guarantees a free and appropriate education, was not passed until 1975, the groundwork actually began with three United State Supreme Court cases, the first of which dated back to 1896. Plessy v. Ferguson (1896) was a landmark United States Supreme Court decision that was used to support the "separate but equal" doctrine in the schools, even though the initial case dealt with railroads. Homer Plessy, who was one-eighth black, boarded a train and sat in a "whites only" car on June 7, 1892. Plessy was arrested when he refused to leave, and filed a lawsuit in State court, asserting that his thirteenth and fourteenth amendment rights were violated. Not successful at the State level, the case eventually made it way to the United States Supreme Court, where a decision was made in 1896. The 7–1 decision authored by Justice Henry Billings Brown upheld Louisiana’s right to segregate its trains.

According to Justice Brown:

> *“We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”*

Interestingly, Melville Fuller served as the Chief Justice during Plessy. The Fuller Court developed the fourteenth Amendment Equal Protection Clause "as a safeguard of property rights" (Schwartz, (1993). Unfortunately, Homer Plessy was not a beneficiary of the Clause. Associate Justice John Marshall wrote a scathing dissent:

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Cumming v. Richmond County Board of Education (1899) was a class action suit filed by three individuals in Georgia who were persons of color. Their goal was to end school segregation by claiming that a tax, paid by their county to the State, was used to support a school district they served only white children.

The Supreme Court denied that it had any jurisdiction to interfere in the affairs of Georgia. Thus, the Cummings case became a de facto decision in support of school segregation.

The Supreme Court said, in part:

> *"Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the state to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States, ... the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."*

Brown v. Board of Education (1954) set the groundwork for future legislation that provided civil rights protections for persons with disabilities. The Individuals with Disabilities Education Act and the Americans with Disabilities Act would not have been possible without the Brown decision.

This case began as a class action suit in 1951 as a class action suit was filed against the Board of Education of the City of Topeka, Kansas in the U.S. District Court for the District of Kansas. The plaintiffs were thirteen Topeka parents on behalf of their twenty children. Oliver L. Brown, who eventually became a minister, allowed the suit to be filed in his name, because his daughter, Linda, was forced to travel to a school on the other side of town to a school for black children, when a school, for whites only, was but a few blocks away. The case of Brown v. Board of Education as heard before the Supreme Court combined five cases: Brown itself, Briggs v. Elliott (filed in South Carolina), Davis v. County School Board of Prince Edward County (filed in Virginia), Gebhart v. Belton (filed in Delaware), and Bolling v. Sharp (filed in Washington D.C.).

On May 17, 1954 the Warren Court handed down a 9-0 decision which stated, in no uncertain terms, that "separate educational facilities are inherently unequal", which reversed the precedent set by the Court's previous decision in Cumming v. Richmond County Board of Education.

The Individuals with Disabilities Education Act (IDEA) guarantees FAPE, designed in the Individualized Education Program (IEP). The plan should meet the unique needs and degree of disability of the child. Parents have a right to due process and a meeting before a neutral hearing officer if they disagree with the IEP.

The Education of All Handicapped Children Act (renamed the IDEA in 1990) was passed in 1975. The primary sponsors were Harrison Williams of New Jersey in the Senate and John Brademus of Indiana in the House of Representatives. The states were required to provide a free and appropriate education (FAPE) to all children with disabilities between the ages of 5 and 21 (in 1986, Senator Lowell Weicker of Connecticut extended preschool services to children between the ages of 3 and 5, and early intervention services to children from birth to 36 months). Immediately, the Law was considered by many to be an unfunded mandate. Although the Congress mandated that the federal contribution be no more than 40% of the average per pupil expenditure (APPE), federal dollars, at the time it was no more than 12%. The inevitable legal challenges were unsuccessful; the Court correctly interpreted the Law to be civil rights legislation. The right to FAPE would not be tampered with.

The famous Rowley case (Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley, 1982) prompted the Supreme Court to define FAPE, on behalf of Amy Riley, a deaf student. The Arlington case (Arlington Board if Education v. Pearl Murphy and Theodore Murphy, 2006) re-designed, and in some ways rewrote, the Individuals with Disabilities Education Act. Justice Alito, writing for the majority, held that parents of special education students who, upon successfully challenging the IEP of the child, are not entitled to reimbursement of attorneys fees. During the more the 30 previous years in which the IDEA was in operation, attorneys' fees were automatically returned to parents who were successful litigants. In addition, previous Supreme Court interpretations of the Law supported reimbursement. However, the appointment of Alito to the Court, replacing the moderate O'Connor, has automatically changed the direction of the federal law that guarantees that children with disabilities will be formally educated.

Children with disabilities are also protected under Section 504 of the Rehabilitation Act. In 1973, the Congress passed Public Law 93-112, the Rehabilitation Act Amendments, which included the following language:

> *"No otherwise qualified individual with a disability in the United States, as defined in Section 705(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."*

Section 504 was considered so offensive by President Nixon that he vetoed it twice (the second time as a pocket veto). Nixon clearly believed that 504 was a violation of "States Rights" and vowed to see its repeal. Similarly, President Gerald Ford refused to sign the Education of all Handicapped Children Act when it was passed in 1975. Like Nixon, Ford believed that it took power away from the states. Ultimately, political pressure forced Ford to sign the EHA.

However, he made a statement at the signing, vowing, like Nixon, to see it repealed.

The rights and protections of people with disabilities have changed over the years. In addition, laws have been passed on the state and federal level; yet, litigation continues. The passage of the IDEA has not lessened litigation over the education of children with disabilities. Similarly, the inclusion of Section 504 in the Rehabilitation Act has not lessened the litigation over the exclusion of people with disabilities in educational and other public settings. Furthermore, the passage of the ADA has not lessened litigation over the quality of life and services for people with disabilities in the schools, employment settings, hospitals, and prisons. One might argue that the continued litigation is an extension of the IDEA, Section 504, and the ADA.

The State of New Jersey is committed by law to provide funding for student whose costs are more than $40,000 per school year. In addition, Governor Christie has proposed that the State provide an additional seven percent of funding. Currently, the State has a formula in which New Jersey would pay between 75 and 90 percent of additional costs above the $40,000 threshold. Unfortunately, the average costs have been much higher. Some have estimated that the average per pupil cost is currently closer to $55,000 per year.

During this time of fiscal restraint and an economy that may not recover for years, New Jersey is faced with the problem of meeting the legally mandated needs of children with disabilities. We are then left with the question of what is an appropriate education? The soaring costs include related services, such as speech/language services, occupational and physical therapy, and counselling. Of course, included in the costs are the ever increasing costs of health insurance and pension payments for staffers.

Once again, Disability Rights – NJ rose to the occasion on this issue. DRNJ's press release stated the following:

"***DRNJ Joins Amicus Brief in Litigation Disputing Funding for Special Education***

> *DRNJ, represented by White and Case, filed an amicus curiae (friend of the court) brief with the New Jersey Supreme Court on behalf of itself and seven other organizations in support of litigation against the State of New Jersey contesting the amount of funding in the new FY 2011 state budget for special education. The original litigation, begun in 1981 and now known as Abbott v. Burke, established a right under New Jersey's constitution to a "thorough and efficient" education. Over the last three decades there have been numerous legal contests and court decisions involving the funding of educational programs, primarily in the*

> *state's poorest districts, known as Abbot districts. In 2008, Governor Corzine proposed a revised school funding formula that also changed the funding of special education in each of the local districts. Instead of allocating special education funding based on the actual number of students in need of special education services in each district, the new funding formula assumed that every district had the same percentage of students (about 14.6%) using special education services. In a decision in 2009, the NJ Supreme Court held that the new funding formula, including the special education provisions, did not violate New Jersey's constitution as long as that formula was funded at the proposed level.*
>
> *Governor Christie's proposed FY 2011 budget, while still applying Governor Corzine's funding formula, significantly reduced the level of funding for schools, including a reduction of some $300 million for special education programs. The Education Law Center is asking the NJ Supreme Court to declare that the funding reductions violate the NJ constitution's "thorough and efficient" requirement. The amicus brief argues that the funding reduction for special education violates the Court's 2009 decision that expected the 2008 funding formula to be fully funded. The brief also argues that the funding reduction violates the federal Individuals with Disabilities Education Act (IDEA) by jeopardizing the statutory right of students with disabilities to a free and appropriate public education. IDEA conditions the receipt of federal funds for special education on the state's maintaining a level of state funding for special education programs.*
>
> *Joining DRNJ on the amicus brief are the Alliance for the Betterment of Citizens with Disabilities, the Cherry Hill Special Education Parent Teacher Association, the New Jersey Down Syndrome Government Affairs Committee, the New Jersey Speech-Language-Hearing Association, the Special Education Clinic at Rutgers University School of Law-Newark, the Special Education Leadership Council of New Jersey, and the State-wide Parent Advocacy Network."*

John Mooney stated on March 19, 2011 in the publication Education:

"State Aid for Special Education: The Underfunding Continues

> *"According to latest guidelines, districts will only recoup 84 percent of what's due them for Special Education.*

The law came out of New Jersey's previous school-funding formula in the 1990's, a way for the state to provide local districts with help for some of their steepest bills: so-called

These are the bills for students with significant special needs, often requiring expensive staffing and other services. The law at the time set the threshold at $40,000, offering up the state's help to bear some of the costs above that amount.

More than a decade later, Gov. Chris Christie has proposed raising the extraordinary aid fund to $162.7 million next year, up about 7 percent. But while welcomed by districts, it's also not quite what it seems.

> *The education department this week put out the guidelines that the state used to determine the aid amounts for next year. For special-needs students in-district who cost over $40,000, the state would pay from 75 percent to 90 percent of the additional cost, depending on services. In out-of-district schools, the threshold is $55,000, after which the state would pay 75 percent, the guidelines said."*

A Continuing Problem

But the fine print is critical. This program, once widely praised by districts, has been long underfunded, and that continues. The guidelines say that after the computation, districts will still only receive 84 percent of the full eligible amount, a caveat explained later by the department as being due to the state's 'limited funds.'

And what is not said is that $40,000 isn't that high anymore in the world of special education, even for students served inside their home districts. In fact, the threshold of $55,000 for students in out-of-district schools is becoming closer to the norm than the exception, say some officials and others.

'The $40,000 is almost outdated. I'm not sure that it is so extraordinary any more,' said Brenda Considine, a longtime special education advocate and coordinator for the New Jersey Coalition for Special Education Funding Reform, a group of organizations serving children with disabilities.

Even the $55,000 threshold is, 'only a little above the average,' Considine said.

> *According to the most recent state data, the average per-pupil cost for special-services districts run by the counties was $52,000, and that doesn’t include state-paid pensions and other costs.*
>
> *Private schools for disabled kids can range widely, typically close to $50,000 per student but starting as low as $32,000 and going as high as $89,000 for a West Orange school for children with autism.*
>
> *Still, Considine was among those who welcomed any additional relief from the state, pointing out that previous administrations have short-changed the fund by paying well less than 84 percent of eligible costs in the past.*
>
> *Distribution of state aid remains a point of contention in general, with the state Supreme Court currently weighing the latest challenge to how state aid was cut last year.*
>
> *But some advocates have long said putting more money into the extraordinary aid fund would be a good, short-term way to help even out the aid across districts, as virtually every district deals with these costs at one time or another.*
>
> *'We’re obviously waiting for the Supreme Court decision, but if the state is looking for ways to spread the money around, this is a natural place to go that is indiscriminate and treats everyone fairly,' said Lynne Strickland, executive director of the Garden State Coalition of Schools, representing mostly suburban districts.”*

Disability Rights –NJ, as always, answered the bell on this issue:

“DRNJ Sues New Jersey Department of Education on Behalf of Children with Disabilities

> *“DRNJ, along with Lowenstein Sandler PC, the Education Law Center, and the Hackensack law firm Loughlin & Latimer filed a lawsuit on June 27, 2007, in the United States District Court for the District of New Jersey against the New Jersey Department of Education to enforce laws governing the education of children with disabilities. Plaintiffs in the case are DRNJ, the Education Law Center, the Statewide Parent Advocacy Network of New Jersey and The Arc of New Jersey on behalf of children with disabilities across the state.*

> *"Countless children with disabilities in New Jersey have been unnecessarily segregated and denied their right to an inclusive education, to the maximum extent appropriate, with children who do not have disabilities," said lead attorney David L. Harris, who chairs Lowenstein Sandler’s Litigation Department. "The State’s Performance Plan holds little promise for redressing this situation within the educational lifetime of today’s students."*
>
> *“Sarah W. Mitchell, Former Executive Director of DRNJ added that New Jersey has been cited repeatedly by the U.S. Department of Education for its failure to implement the Individuals with Disabilities Education Act. "This litigation is prompted by the State's failure to step up to the plate and take this issue on with the resolve and attention that it deserves," she said. "With few exceptions these deficiencies are the norm throughout New Jersey's 640 plus school districts due to lack of enforcement of the special education mandate to provide students with disabilities a 'free and appropriate public education' in the 'least restrictive environment' ," said special education attorney Michaelene Loughlin of the law firm of Loughlin & Latimer.*
>
> *In November, plaintiffs filed a brief in opposition to the defendant’s motion to dismiss.*
>
> *DRNJ continues to litigate the case of Disability Rights New Jersey v. New Jersey Department of Education which seeks to ensure that students with disabilities in New Jersey are educated in the "least restrictive environment." Pursuant to a Court Order in the case, DRNJ is posting a "Notice of Disclosure of Student Records" in English and Spanish to allow DRNJ and its co-plaintiffs -- Education Law Center, The ARC of New Jersey and the Statewide Parent Advocacy Network -- to obtain relevant documents.”*

Parent Groups

New Jersey’s Parents of Blind Children, an advocacy group, is committed to providing the development opportunities that will allow children with blindness and visual impairments to grow up to be productive adults. The Blind Children's Resource Center provides advocacy and training with the goal that such children will be high functioning, independent contributors to society. The Parent advocacy group stresses that we should have normal and reasonable expectations for their development. In addition, it is important for non-disabled citizens to have a positive attitude toward people with blindness.

According to **New Jersey’s Parents of Bind Children**:

> *“The Blind Children's Resource Center wants parents and teachers to learn how blind/VI people accomplish tasks without or with limited eyesight; how blind/VI children can use simple adaptations to become full participants at home, at school, and in the community; and how we can create stimulating environments that encourage children with additional disabilities to be active participants in the world.*
>
> *What does it actually mean to be blind? Does it mean a person can't see or can't see well? Does it mean limitations—a person can't do this or can't do that? We'd like to propose a skills definition of blindness: blindness means using alternative skills, methods, and tools to get the job done. We believe the key is skills. With the alternative skills of blindness, a child will be able to accomplish tasks without frustration and with success.*
>
> *It is up to the adults in the blind child's life to provide the expectation for success and the training and opportunity to practice the skills. Before you know it, the child will have high expectations for him/herself and, when faced with a new or challenging situation, will know to ask, what skills do I need to learn in order to accomplish this task?"*
>
> *“We hope that at the Blind Children's Resource Center site you'll find the information you need to get you and your child off to a good start. And remember, don't think limits—think possibilities!”*

Parents of Autism have also been strong advocates for their children. **Putting the Pieces Together**, a New Jersey group of parents of children with Autism, have become active in their children’s lives. They proudly share their goals with the public at large:

> **“Putting The Pieces Together** *is a support group that meets on Thursday evenings. We provide support and education to families by hosting speaker meetings and workshops because education is our best weapon against autism and other different needs. We are affecting children from every county in NNJ and no child is turned away. Our children range between the ages of 18 months to adult. We are not affiliated with a town or school so we rely strictly on donations and fundraisers. We are a non for profit organization with the sole purpose of serving families of children with autism and other different needs in every way we can. We are over 200 families strong.*
>
> *The special needs community is growing. 1 in 95 children in NNJ are affected with autism. Our group also has children with*

> *Fragile X, Down Syndrome, Cerebral Palsy, ADD, ADHD and other different needs. We make sure that ALL children have the choices they deserve.*
>
> *We are recommended by The Institute for Child Development at Hackensack Hospital, Arc of Bergen and Passaic County, many special education schools and facilities that play a part in the life of a child with different needs. We are grateful for the referrals and want to continue to offer quality programs that have a proven success rate. You have nothing to loose and everything to gain by coming to meet us. Being a parent of a special needs child is not the end of the world, it's just the beginning of a new journey. Let's take that journey together and support each other each step of the way.*"

Conclusion

New Jersey has a mixed history regarding its commitment to meeting the needs pf people with disabilities. Our State led the nation in its commitment to Special Education. In fact, the federal law, the Individuals with Disabilities Education, when passed in 1975, was based on our Beatleston Legislation in New Jersey and was introduced by New Jersey Senator Harrison Williams. Yet, our commitment to adults with disabilities is wanting. As Governor, Richard Codey discovered appalling conditions at our State residential psychiatric centers, including unsanitary conditions and patient abuse. Among the abuse were acts of violence and rape.

Programs for children with disabilities are currently being cut. Overall Special Education funding is being cut in public schools. The New Jersey Commission for the Blind has cut services for adults and now proposes eliminating many teachers of blind children. Developmental Centers are being closed and residents, such as those with Autism, face being transferred to community settings without guaranteed supports. Parent and advocacy groups continue to strive to support New Jerseyans with disabilities, but resources are becoming scarce. During this time of fiscal restraint, vulnerable citizens who cannot fend for themselves may become the first casualties of a disinterested society.

The rights and opportunities that have been mandated by federal law over the past fifty years do not translate into real opportunities for people with disabilities in educational settings or the workplace. Those with disabling conditions remain well below the status of the non-disabled population in virtually every area of life. This phenomenon continues in New Jersey and across the nation.

According to the Americans with Disabilities Act:

> *“No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity, or be subjected to discrimination by any such entity.”*

Brown v. Board of Education (1954) set the groundwork for future legislation that provided civil rights protections for persons with disabilities. The Individuals with Disabilities Education Act and the Americans with Disabilities Act would not have been possible without the Brown decision.”\

This case began as a class action suit in 1951 against the Board of Education of the City of Topeka, Kansas in the U.S. District Court for the District of Kansas. The plaintiffs were thirteen Topeka parents on behalf of their twenty children. Oliver L. Brown, who eventually became a minister, allowed the suit to be filed in his name, because his daughter, Linda, was forced to travel to the other side of town to a school for black children, when a school, for “whites only”, was but a few blocks away. The case of Brown v. Board of Education as heard before the Supreme Court combined five cases: Brown itself, Briggs v. Elliott (filed in South Carolina), Davis v. County School Board of Prince Edward County (filed in Virginia), Gebhart v. Belton (filed in Delaware), and Bolling v. Sharp (filed in Washington D.C.).

On May 17, 1954 the Warren Court handed down a 9-0 decision which stated, in no uncertain terms, that "separate educational facilities are inherently unequal", which reversed the precedent set by the Court's previous decision in Cumming v. Richmond County Board of Education.

Special Education has perhaps become the most litigious of all education services. During Sandra Day O’Connor’s last months on the Court, the issue of "burden of proof" was heard. A group of parents wanted the burden of proof, in cases in which they challenged the educational programs of their children with disabilities, to be placed on the shoulders of school districts. The Supreme Court, however, upheld the tradition that the burden of proof rests with the plaintiff.

The Education of All Handicapped Children Act (renamed the IDEA in 1990) was passed in 1975. The primary sponsors were Harrison Williams of New Jersey in the Senate and John Brademus of Indiana in the House of Representatives. The states were required to provide a free and appropriate education (FAPE) to all children with disabilities between the ages of 5 and 21 (in 1986, Senator Lowell Weicker of Connecticut extended preschool services to children between the ages of 3 and 5, and early intervention services to children from birth to 36 months). Immediately, the Law was considered by many to be an unfunded mandate. Although the Congress mandated that the federal contribution be no more than 40% of the average per pupil expenditure (APPE), federal dollars, at the time were no more than 12%. The inevitable legal challenges were unsuccessful; the Court correctly interpreted the Law to be civil rights legislation. The right to FAPE would not be tampered with.

Children with disabilities are also protected under Section 504 of the Rehabilitation Act. In 1973, the Congress passed Public Law 93-112, the Rehabilitation Act Amendments, which included the following language:

> *"No otherwise qualified individual with a disability in the United States, as defined in Section 705(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."*

Section 504 was considered so offensive by President Nixon that he vetoed it twice (the second time as a pocket veto). Nixon clearly believed that 504 was a violation of "States Rights" and vowed to see its repeal. Similarly, President Gerald Ford refused to sign the Education of Al; Handicapped Children Act when it was passed in 1975. Like Nixon, Ford believed that it took power away from the states. Ultimately, political pressure forced Ford to sign the EHA. However, he made a statement at the signing, vowing, like Nixon, to see it repealed.

Interestingly, Section 504 regulations clearly describe reasonable accommodations, including the alteration or design of work facilities and the modification of work schedules. Section 504 also mandates that:

> *"[n]o qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity..."*
>
> The above paragraph is the "program access" requirement of Section 504."

Nearly sixty years after Brown v. the Board of Education, nearly forty years after the passage of section 504, more than thirty-five years after the passage of the Education of All Handicapped Children Act (now the Individuals with Disabilities Education Act), and more than twenty years after the passage of the Americans with Disabilities Act, we continue to fight for the same rights that were mandated by those laws.