Appendix C: The Rating Scale: A Key to Estimate Degree of Motor Skill (adapted from Gutteridge, 1939)

Skillful execution with variations in use
1. Uses skill in larger projects such as dramatic play.
2. Speeds, races, or competes with self or others.
3. Combines activity with other skill or skills.
4. Tests skill by adding difficulties or taking chances.

Basic movements achieved
5. Evidence of accuracy, poise and grace.
7. Movements coordinated.

Habit in process of formation
8. In process of refining movements.
9. Is practicing basic movements.
10. Is progressing but is still using unnecessary movements.
11. Tries even when not helped or supported but is inadpet.
12. Attempts activity but seeks help or support.

No attempt made
13. Makes no approach or attempt but does not withdraw.
14. Withdraws or retreats when opportunity is given.

Key used in rating the following activities:

<table>
<thead>
<tr>
<th>Activity</th>
<th>Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Climbing</td>
<td>Hopping</td>
</tr>
<tr>
<td>Jumping</td>
<td>Galloping</td>
</tr>
<tr>
<td>Sliding</td>
<td>Throwing balls</td>
</tr>
<tr>
<td>Skipping</td>
<td>Bouncing balls</td>
</tr>
<tr>
<td>Tricycling</td>
<td>Catching balls</td>
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Implications of U.S. Federal Law and Court Cases for Physical Education Placement of Students With Disabilities

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University of Virginia

Inclusion, the philosophy of placing all children with disabilities in regular education settings, is easily the most discussed and controversial education reform issue since the 1975 passage of PL 94-142, Education of Handicapped Children Act (EHA). However, inclusion is never mentioned in the original EHA or the updated PL 101-476, Individuals with Disabilities Education Act (IDEA) (e.g., Sherrill, 1994; Stein, 1994). What is discussed in IDEA as well as Section 504 of the Rehabilitation Act of 1973 is the “continuum of least restrictive environments” (LRE). The purpose of this paper is to (a) review United States federal laws regarding inclusion and LRE, most notably IDEA and Section 504 of the Rehabilitation Act of 1973; (b) review recent U.S. court cases regarding inclusion and LRE including three landmark cases: Roecker v. Walter (Ohio) (1983), Daniel R.K. v. State Board of Education (Texas) (1989), and Sacramento Unified School District, Board of Education v. Rachel H. (California) (1994); and (c) apply these federal laws and court decisions to physical education placement.

Since the passage in 1975 of PL 94-142, the Education for All Handicapped Children Act (EHA), confusion, misinterpretation, and misapplication have existed regarding the concept of least restrictive environment (LRE). The confusion has been heightened over the years by the use of such terms as mainstreaming, integration, regular education initiative, and inclusion (see Block & Krebs, 1992, for a review of these terms as well as Sherrill, 1994, for a definition of LRE). Unfortunately, the original text regarding LRE (which has yet to be altered in any reauthorizations of the Act including the most recent reauthorization, PL 101-476, Individuals with Disabilities Education Act [IDEA]) was written rather ambiguously. While lawmakers who wrote the LRE doctrine may have had a clear intent in mind, the passage itself is open to many interpretations (Bateman & Chard, 1995; Huefner, 1994; Turnbull, 1990). As Turnbull (1990) noted, “Given

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the inaccurate code name 'mainstreaming,' this [the LRE] requirement had the potential for encountering the same level of opposition, misunderstanding, and ill will as the earlier constitutional and legislative-judicial requirements for racial desegregation of the public school” (p. 145).

To further complicate the issue, the Act focused attention on two arguably independent mandates: LRE and appropriate education. As noted by the 5th Circuit Court of Appeals in Daniel R.R. v. State Board of Education (1989), "By creating a statutory preference for mainstreaming (i.e., placing students with disabilities in some type of regular education setting with support based on assessment and IEP [Individualized Education Plan],) Congress also created tension between two provisions of the Act. School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs” (p. 1044).

This controversy about appropriateness within LRE has been the center of debate. The term “appropriate education” was clarified by the U.S. Supreme Court in Board of Education of Hendrick Hudson Central School District v. Rowley (1982) when the court maintained that appropriate education was “providing personalized instruction with sufficient services to permit the child to benefit educationally from that instruction.” Known as the "Rowley standard," the ruling suggested that "to benefit educationally" requires schools to provide meaningful benefit (observable and measurable educational progress; Sherrill, 1994) but not maximize a student's potential for learning (O'Hara, 1985; Osborne, 1992, 1996; Sherrill, 1994). The definition of "meaningful benefit" depends on standards set by the state agency (Osborne, 1996; Sherrill, 1994). Additionally, the court noted that for an IEP to be appropriate, the special education program must be provided in the least restrictive environment and that the school must provide related or supportive services which may be necessary for the child to benefit from that instruction (Osborne, 1992, 1996).

Yet, those in favor of inclusion argue that the only way to provide a truly appropriate program for students with disabilities is to place these students in regular education environments with individually prescribed supports (e.g., Block, 1994; Lipsky & Gartner, 1989; Snell, 1991; Snell & Drake, 1994; Stainback & Stainback, 1990; Villa, Thousand, Stainback, & Stainback, 1992). Others argue that appropriateness requires a continuum of least restrictive environments with full inclusion on one end of the spectrum and placement in separate, specialized settings at the other end. Placement within this spectrum is then linked to an IEP and is based on assessment and decision making by experts (e.g., Bateman & Chard, 1995; DuBow, 1989; Fuchs & Fuchs, 1994; Grosse, 1991; Hallahan, Keller, McKinnon, Lloyd, & Bryan, 1988; Kauffman, 1993; Kubicek, 1994; Sherrill, 1994; Stein, 1994).

As is the case with most U.S. federal legislation, the Act and more specifically the LRE passage provided a framework for policy and decision making (see Appendix A for an explanation of how U.S. federal and state regulations are created). While specific rules and regulations were written for parts of the

1To make matters even more confusing, state standards for what is “appropriate” can be higher (but not lower) than federal standards, and several states have enacted higher standards (e.g., Michigan, Massachusetts, and New Jersey) (Sherrill, 1994).

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Act including LRE, many implementation details would be formulated from court cases in which two parties disputed the meaning of various passages of the Act. These court decisions ultimately determined whether a school district was in compliance with the Act (see Appendix B for an explanation of the U.S. judicial system). Not surprisingly, there is a long history of such court cases involving appropriateness versus LRE.

Early court decisions clearly argued that an appropriate level of education outweighed Congress's strong preference for placement within regular education (Lipton, 1994; Osborne, 1992, 1996; Osborne & Dimattia, 1994). Some decisions even held that the LRE requirement could not be used to prevent placement in a separate setting if that setting was required for appropriate education (e.g., Board of Education of East Windsor [New Jersey] v. Diamond, 1986; DeVries v. Fairfax County [Virginia] School Board, 1989; Matthews v. Campbell, 1979 [Virginia]; St. Louis Developmental Disabilities Center v. Mallory, 1984). For example, in St. Louis Developmental Disabilities Center v. Mallory (1984), the courts ordered a school district to place students in segregated private day schools and residential schools when circumstances warranted. Similarly, in DeVries v. Fairfax County School Board (1989), the court upheld the school board's decision to place a child with autism in a county vocational center versus the public high school that his mother wanted. The court concluded that the child could not be satisfactorily educated within the regular setting, even with supplementary aids and services (Huefner, 1994; Osborne, 1990).

In an interesting turn of events, recent court cases have begun to emphasize the LRE mandate, giving preference to placement in regular settings when it can be demonstrated that such placements provide educational benefits (Arnold & Dodge, 1994; Lipton, 1994; Maloney, 1994; Osborne & Dimattia, 1994). The reason for this seemingly sudden shift in favor of placing children with disabilities in regular programs is due in part to the way the courts have perceived and defined key terminology contained in the Act. For example, recent court cases have broadened the definition of “benefit” (e.g., the 3rd Circuit in Oberoi v. Board of Education of the Borough of Clementon [New Jersey] School District, 1993), emphasized the use of supplementary services and aids (e.g., the 11th Circuit in Greer v. Rome [Georgia] City School District, 1992), and given greater weight to the inherent benefits of inclusive settings even when a special setting may provide a somewhat more appropriate education (e.g., the 11th Circuit in Greer v. Rome City School District, 1992, and the Idaho Supreme Court in Thornrock v. Boise Independent School District, 1988). These cases have in some respects redefined the LRE requirement of regular education placement whenever possible, even to the point of elevating it above the appropriateness requirement (Lipton, 1994; Maloney, 1994; Osborne & Dimattia, 1994).

The question still remains as to when it is appropriate to remove a child from regular education. Given the recent push for and debate over inclusion, the question becomes even more significant. Professionals in adapted physical education must understand legislative mandates for LRE as well as recent court cases that appear to be reshaping these mandates if we are going to advocate for appropriate physical education services for children with disabilities. The purpose of this paper is twofold. First, the legislative basis of LRE will be examined, specifically the "educational setting" statement in Section 504 of the Rehabilitation Act of 1973 and the LRE statement and the related "continuum of place-
ments” statement in PL 101-476, IDEA. Second, recent United States Federal Circuit Court cases related to LRE will be examined, with an emphasis on carefully reviewing the court cases and then applying these findings to placement decisions in physical education.

U.S. Federal Legislation, Inclusion, and Least Restrictive Environment

Least Restrictive Environment

Nowhere is the term inclusion or even mainstreaming mentioned in any federal laws, including the two laws that have the most direct impact on education: PL 101-476, Individuals with Disabilities Education Act (IDEA), and PL 93-112, Section 504 of the Rehabilitation Act of 1973 (Bateman & Chard, 1995; Hollis & Gallegos, 1993; Stein, 1994; Sherrill, 1994). In fact, Part B of IDEA requires placement decisions to be made on an individual, case-by-case basis. The law does require students with disabilities to be educated alongside students without disabilities to the maximum extent appropriate. Termed “educational setting” in Section 504 of the Rehabilitation Act, Section 104.34 of the law prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting. Among the factors to be considered in placing a child is the need to place the child as close to home as possible. (Federal Register, May 9, 1980, p. 30952)

Using the term least restrictive environment (LRE), IDEA provides the following directions for public agencies:

(1) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled; and (2) That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Federal Register, September 29, 1992, p. 44823)

In both statements, the “burden of proof” when a child with a disability is removed from regular education is now being interpreted by the courts as a school district’s responsibility. School districts must clearly demonstrate that each child with a disability who is placed in a separate setting cannot be satisfactorily educated in the regular setting with supplementary aids and services (Arnold & Dodge, 1994; Hollis & Gallegos, 1993; Lipton, 1994; Maloney, 1994; Osborne, 1990). Lawmakers wanted to prevent the unnecessary placement of children with disabilities in separate programs while at the same time ensuring that students with and without disabilities are educated together whenever possible. Given this notion of burden of proof, the typical practice of placing students in separate programs based on a label or preplacement evaluation is a violation of the intent of the act (Bateman & Chard, 1995; Lipton, 1994; Maloney, 1994; Osborne, 1996). In the vast majority of cases, students with disabilities first should be placed within the regular setting with individually prescribed support services. Only when it has been determined that regular class placement with support services is not appropriate, then a child with a disability can be placed in a separate setting (Arnold & Dodge, 1994; Lipton, 1994). Such an interpretation of LRE is evident in the Daniel, Greer, Oberti, and Holland cases, which will be discussed later in this paper.

Turnbull (1990) and Bateman and Chard (1995) did note that there is no “fail-through” requirement that would require all children with disabilities to be placed first in a regular classroom and then fail in that setting before being placed in an alternative setting. In rare cases it may be permissible to use a priori professional judgment to place a child directly into a separate setting. However, this “prediction of failure” in an integrated setting must be based on clear, indisputable, objective-based data. In at least one case (Christopher M. v. Corpus Christi ISD, 1992), a hearing officer in fact excused a district’s failure to attempt full or partial integration of a child with orthopedic impairments, multiple disabilities, health impairment including obstructive airway disease, and profound mental retardation before placing that child in a self-contained setting (Hollis & Gallegos, 1993). The hearing officer noted that the child’s unique health condition, which required constant monitoring by a trained nurse without which his life would be endangered, was a critical factor in the decision (a doctor even testified that integrating this child with others might endanger his health since the child’s unique medical conditions precluded him from receiving any vaccinations for childhood diseases) (Hollis & Gallegos, 1993). In addition, the hearing officer noted that appropriate educational strategies including the presentation of various noises and visual displays would be disruptive to other students in academic programs and would harm their education. Finally, the hearing officer noted that this child would receive no benefit from exposure to nondisabled peer models, and the lack of such exposure would not detract from this child’s IEP objectives (Hollis & Gallegos, 1993).

Why such a strong emphasis on LRE? Turnbull (1990) outlined several factors that were presented to Congress at the time the Act was being debated. First, LRE was a reaction to the traditionally accepted practice at the time of viewing students with disabilities as different, and different meant excluding them from education alongside children without disabilities (DuBow, 1988; Stainback, Stainback, & Bunch, 1989). Research at the time showed that separating children with disabilities from their peers without disabilities led to stigma, ridicule, and poor self-image. Thus, LRE was written in an effort to protect children with disabilities from the stereotype that they are so different that they need to be educated in separate settings (Lipton, 1994).

Second, LRE addressed another popular practice at the time, that is, placing a child in special programs without first determining if the student could benefit from regular education placement (this practice continues today despite the LRE mandate) (Brown, 1994; Stainback et al. 1989). In preventing the wholesale
placement of students with disabilities in separate programs, LRE focused attention on the concept that individually prescribed curricular and instructional adaptations could occur within the regular setting (Block, 1994; Snell & Drake, 1994; Snell & Eichner, 1989).

Third, LRE was preferred because of the notion that separate but equal self-contained classrooms tended to be unequal (Stainback et al., 1989; Taylor, 1988). Testimony to Congress at the time suggested that special class placement often meant having the “worst” teacher, the most inferior facilities, and limited educational materials. Stories about students with disabilities being placed in a small room in the basement of the school next to the boiler and having untrained teachers were rampant at the time the law was being discussed. Thus, LRE was established to prevent inappropriate education.

Fourth, LRE was written as a reaction to the “terminal aspects of special education” (Turnbull, 1990, p. 150). At the time (and still evident today), children with disabilities were placed in separate special education programs, and many children would spend the rest of their education in these separate programs with little chance of moving out to regular settings (Taylor, 1988). Lawmakers hoped that LRE, and in particular the statement regarding annual review of placement and procedural due process, would prevent students from being stuck in a “special education track.”

**Continuum of Placements**

To further clarify the LRE doctrine, lawmakers added a statement regarding a continuum of alternative placements:

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum. . . must (1) Include the alternative placements listed in the definition of special education (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provisions for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. (*Federal Register*, September 29, 1992, p. 44823)

The “continuum of placements” statement has been used as a rationale for placing students with disabilities in separate settings (Fuchs & Fuchs, 1994; Stein, 1994; Taylor, 1988). However, the continuum of placements statement must be read within the context in which it was written. Data presented to Congress at the time EHA was being debated showed that more than half of the students with disabilities in the United States were in educational programs that were deemed inappropriate for their needs, and an estimated 1 million children with disabilities were excluded entirely from the public school system. Prior to 1975, many children with disabilities still resided at home, in residential facilities, or in hospitals. The few day programs that were available for students with disabilities usually were separate from public school buildings (e.g., placed in churches or rented office spaces). In most cases these residential facilities, hospitals, and day programs did not provide any systematic educational programs

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(Brown, 1994; Stainback et al., 1989). Rather, these children were more or less "warehoused" such that their basic needs were taken care of but not their educational and social needs. As noted by Turnbull (1990), the dual system of education prior to EHA had a variety of effects, one of which was denial of educational opportunities for children with disabilities.

In light of the exclusion of educational opportunities, lawmakers made a clear statement that, regardless of a child’s severity of disability and regardless of where the child resides, he or she must receive education commensurate with individual abilities and needs. Thus, children who were not in traditional school programs but rather were at home, in residential facilities, in hospitals, or in day programs were guaranteed free, appropriate education under the law (Turnbull, 1990). It was never the intent of lawmakers for these separate placements to become an option for placing students with disabilities unless "the IEP of a child with a disability requires some other arrangement" (*Federal Register*, September 29, 1992, p. 44823). Lawmakers appeared to favor having students with disabilities educated alongside peers without disabilities whenever appropriate. It seems unlikely that they meant for the continuum statement to serve as a justification for placement in these separate settings (Taylor, 1988; Turnbull, 1990).

In summary, the educational setting and LRE statements in the federal laws were created by Congress as a reaction to inappropriate special education practices at the time. These statements articulated Congress’s strong preference that children with and without disabilities should be educated together to the maximum extent possible. In addition, LRE brought attention to the notion that most children with disabilities could receive an appropriate education within the regular setting if given supplementary services and aids. While a continuum was presented, it was meant to ensure that students already placed in these more restrictive environments would receive appropriate educational programs. Finally, the law clearly noted that all placement decisions needed to be made on an individual basis.

**Selected Litigation Related to LRE and Inclusion**

While early court cases may have favored appropriate education over placement in regular education, in the past 5 years there have been dramatic shifts in the courts’ interpretation of the LRE doctrine. This has been no more evident than in court cases in which parents of children with disabilities have argued for and won the right to have their children placed in regular education classes. The courts apparently have focused on two critical aspects of the LRE mandate. First, has the school district tried to educate students with disabilities in regular education settings, or have school officials quickly dismissed such placement, favoring instead special class placement based solely on disability label? Second, has the school system attempted to use supplementary aids and services when placing the child in regular settings? If a school system cannot satisfactorily answer either of these questions, then the courts have ruled in favor of the parents, demanding that the student with disabilities be placed regular education. The following section reviews several of the more
significant court cases related to inclusion and their potential impact on placement in physical education.


Case Law

Ohio is one of the few states in the United States that has a dual system of education. One segment of the public school system provides services to students without disabilities as well as students with mild disabilities. The other segment of the system provides services to students with more severe disabilities; these services are provided in separate settings (usually referred to as "MR/DD County Program Schools"). The issue in this case was where a student with moderate mental retardation should receive free, appropriate public education (FAPE) as guaranteed in IDEA (at that time EHA); in the typical school system or in the special school system. The Sixth Circuit Court of Appeals in Ohio overruled the decision of a lower court to place the student in question in the separate system and ordered the lower court to make a new decision regarding the student's placement (Huefner, 1994; Lipton, 1994; Osborne, 1996).

In reaching this decision, the court of appeals noted the strong congressional preference for educating students with disabilities alongside their peers without disabilities to the maximum extent appropriate. The court questioned whether services provided in a segregated facility could be provided in the nonsegregated setting:

The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate.... In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. (Roncker v. Walter, 1983)

This Roncker standard, or the "portability test," suggested that "the maximum extent appropriate" depends on the ability of the school system to provide, in a nonsegregated setting, the services that make a segregated facility superior.

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If it is feasible to transport special services to nonsegregated settings, then placement in segregated settings is inappropriate (Block, 1994; Huefner, 1994; Lipton, 1994). This ruling forced school systems under the jurisdiction of the 6th Circuit Court to actually demonstrate why a nonsegregated setting cannot be modified to accommodate the unique needs of students with disabilities. School systems thus bear the responsibility of proving that an integrated setting cannot satisfy the "educational benefit" requirement in the Act.

A somewhat gray area in the Roncker case was the determination of feasibility (Turnbull, 1990). How could a school system or court determine if in fact it was feasible to provide special services in a nonsegregated setting? Feasibility was defined in Roncker in terms of three exceptions to the appropriateness/integration requirement:

1. No benefit to the child.
2. Greater benefits in segregated settings even after the feasibility standard is applied (i.e., after the courts determine what segregated-setting services can be created in nonsegregated settings).
3. Disruption in a nonsegregated setting.

Thus, school systems must demonstrate the existence of one or more of these exceptions before they can appropriately place a child with disabilities in a separate setting (Osborne, 1990; Turnbull, 1990).

Implications for Physical Education

One of the more salient arguments for placing children with disabilities in separate physical education programs is the notion that these separate programs offer something that is not available in general physical education. This may be a trained adapted physical educator, specialized equipment such as beep balls and ramps, specialized instruction such as physical assistance or task analysis, greater attention to IEP objectives that may not match the general physical education curriculum, smaller pupil-teacher ratio, and generally more intensive provision of services. The notion that these specialized services can be provided only in a separate setting has led many to view adapted physical education (APE) as a placement rather than a service (note that most experts in APE repeatedly emphasize that APE is a service, not a placement).

According to Roncker, the twofold question that must be asked is, (a) What makes separate physical education so special? and (b) Can that "specialness" be transported into the general physical education setting? Block (1994) argued that virtually everything that happens in a separate physical education program can be implemented at least as well in a general physical education setting. As noted by Snell and Eichner (1989), "There is no program component or educational strategy that is provided in a segregated setting that cannot be implemented at least as effectively within local public schools" (pp. 109-110).

For example, let us consider the personnel, instructional, and curricular adaptations that often make separate adapted physical education seemingly more appropriate than general physical education. Can these adaptations be provided within general physical education? Can the trained adapted physical educator provide his or her expertise within general physical education as a consultant,
monitor, supervisor, or direct service provider? Can specialized equipment such as
beep balls and ramps be brought into general physical education? Can specialized
instruction such as physical assistance or task analysis be implemented in general
physical education? Can general physical educators be trained to focus more
attention on a student’s IEP objectives even if these objectives do not match the
general physical education curriculum? (And will the general physical educators
follow through with this focus?) If the answer to the above queries is yes, then
according to *Roncker* these services must be provided within general physical
education. If the answer is no, then it may be appropriate to place the student
in a separate program (Bateman & Chard, 1995; Osborne, 1996). However, the
*Roncker* standard suggests that adapted physical educators need to carefully
examine the services they provide in separate settings and determine objectively
whether these services can be provided within general physical education. If they
can, general physical education is the preferred place for the service.

The courts did note that under certain circumstances it may be appropriate
to place a child with disabilities in a separate educational setting. According to
*Roncker*, these circumstances must include one of the following situations (as
applied to physical education): (a) The child is not benefiting from regular
physical education even with support (e.g., the child cries throughout the entire
regular physical education session, even with support), (b) the child receives
significantly greater benefits in a segregated physical education setting (e.g.,
training in a community-based recreation site that promotes development of
lifelong leisure goals), or (c) the child significantly disrupts the regular physical
education program (e.g., the child is extremely physically and verbally abusive
to peers, which affects their ability to concentrate and learn motor skills). How-
ever, before removing the child from regular physical education, the school
system must clearly demonstrate that at least one of these circumstances exists
and cannot be remedied with supplementary services and aids.

**Daniel R.R. v. (Texas) State Board of Education (1989):**

**Daniel R.R. Test**

Case Law

Daniel R.R. was a preschooler with Down syndrome. His parents wanted Daniel
enrolled in a regular half-day prekindergarten program. The school system agreed,
and Daniel was placed in the half-day program for several months. Not long
after his placement in regular prekindergarten, the teacher began having problems
with Daniel. Specifically, she noted that Daniel was not very attentive, was well
below the ability and social levels of his peers, and generally was unable to
participate in class activities. The teacher noted that she spent most of her time
with Daniel and that modifying the curriculum to meet his needs would require
its complete overhaul. The school system recommended that Daniel attend only
special education classes and that he have lunch with the regular education class
when his mother was available to supervise. The parents appealed, but a hearing
officer upheld the district on the grounds that Daniel was receiving little educa-
tional benefit from the prekindergarten program and that the instructor’s time
was spent almost exclusively with Daniel at the detriment of other students. On

appeal, the circuit court upheld the hearing officer’s decision (Huefner, 1994;
Lipton, 1994; Maloney, 1994). The circuit court based the decision on the follow-
ing three factors:

First, did the school system take genuine steps to modify the prekindergarten
program and to provide supplementary aids and services for Daniel? The court
found that in fact the school system did attempt to modify the program for Daniel,
and the prekindergarten teacher made creative efforts to reach Daniel. In addition,
she spent a disproportionate amount of time with Daniel, but to no avail.

Second, did Daniel receive any educational benefit from prekindergarten? The
court found that Daniel was not receiving any educational benefit. Daniel’s regular
and special education teachers noted that Daniel was so delayed that he was unable
to benefit from activities in prekindergarten even when they were modified in an
attempt to meet his unique needs. They noted that Daniel did not participate in class
activities even with assistance, and he could not master even the simplest classroom
activities. The court found that prekindergarten was nothing more than an opportunity
for Daniel to associate with children without disabilities.

Third, did Daniel receive any overall benefit from prekindergarten? Since
he could not grasp the majority of the prekindergarten curriculum, the only
benefit to placement in such a class was the opportunity for interaction with
peers without disabilities. Such opportunities alone could be considered sufficient
evidence for placement in regular settings. However, the court found that Daniel
was not receiving these other benefits from the placement. Teachers noted that
Daniel did not interact with his peers. More importantly, they noted that Daniel’s
placement in prekindergarten might in fact be harmful. Daniel attended a special
preschool program in the morning and prekindergarten in the afternoon. He
usually was so tired by the afternoon that he often slept during many class
activities. The teachers also noted that Daniel was beginning to stutter due to
the stress of regular placement. On the other hand, Daniel was making progress
in the special preschool program. The courts, balancing the benefits of the special
program against the marginally beneficial and possibly harmful aspects of the
regular program, found that the benefits of the separate program far outweighed
the preference for placement in a regular setting with support (Lipton, 1994;
Maloney, 1994).

The systematic way in which the 5th Circuit Court of Appeals interpreted
the LRE doctrine in this case became a standard for other state and circuit courts
of appeals known as the “Daniel R.R. test” (Lipton, 1994; Maloney, 1994).
This test is designed to answer two questions: (a) Can education in the regular
classroom, with supplementary aids and services, be achieved satisfactorily for
a given child? and (b) If education cannot be achieved satisfactorily in the regular
classroom and the school intends to provide special education or remove the
child from regular education, has the school mainstreamed the child to the
maximum extent appropriate? The court then developed the following set of
standards to determine if either condition was met:

1. Did the school system take steps (not merely token gestures) to include
the student with disabilities in regular education with supplementary aids and
supports? As noted by the 5th Circuit Court,

If the state has made no effort to take such accommodating steps, our
inquiry ends, for the state is in violation of the Act’s express mandate to
supplement and modify regular education. If the state is providing supplementary aids and services and is modifying its regular education program, we must examine whether its efforts are sufficient. (Daniel, 824 F.2d at 1048, 1989)

As noted earlier, the burden of proof when a child with a disability is removed from regular education lies with the school district. School districts must clearly demonstrate that a particular child with a disability who is placed in a separate setting cannot be educated satisfactorily within the regular setting with supplementary aids and services. This is critical in terms of how placement decisions should be made. As noted earlier, placement decisions often are made in one of two ways. In some school systems, a child with a disability is placed based on a label. For example, a child with mental retardation is automatically placed in a class for children with mental retardation, and a child with a specific learning disability is automatically placed in a class for children with learning disabilities. Such a decision model would be a clear violation of the LRE doctrine as interpreted by Daniel, since the school system would have made no effort to accommodate these students within the regular setting (Bateman & Chard, 1995; Lipton, 1994; Maloney, 1994; Osborne, 1996).

In other school systems, a child with a disability is placed based on a preplacement evaluation. For example, a child is given a battery of tests that measure academic readiness, adaptive behavior, and language development. If results indicate that the child has a significant delay, as defined by the school system, the IEP team may place the child in a separate special education program. Again, such a decision model is in violation of the LRE doctrine as interpreted by the Daniel R.R. test, since the IEP team did not (a) present clear, undisputable evidence that the child could not receive an appropriate education within the regular setting or (b) attempt to place the student within a regular classroom with individually prescribed supports to determine success (Arnold & Dodge, 1994; Bateman & Chard, 1995; Lipton, 1994; Maloney, 1994).

The court did set two limits under this part of the test: (a) The regular education teacher is not required to devote all or most of her time to the child with a disability, and (b) the regular education program does not need to be modified beyond recognition. However, both of the exemptions must be examined in light of supplementary services and aids.

2. Will the student gain any educational benefit from regular education? Under EHA, benefit is defined more broadly than just academic achievement. In determining extent of mainstreaming, appropriate inquiry also must include overall educational experience of the child: “Academic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a non-handicapped environment may be beneficial in and of itself” (Daniel, 1989, 824 F.2d at 1049). In addition, the 5th Circuit Court noted that the law does not require a child to be performing at grade level in order to participate in regular classes or even benefit the same way as his or her peers.

We recognize that some handicapped children may not be able to master as much of the regular education curriculum as their non-handicapped classmates. This does not mean, however, that those handicapped children are not receiving any benefit from regular education. Nor does it mean that they are not receiving all of the benefit that their handicapping condition will permit. If the child’s individual needs make mainstreaming appropriate, we cannot deny the child’s access to regular education simply because his education achievement lags behind that of his classmates. (Daniel, 1989, 824 F.2d at 1049)

If the child is benefiting (defined as making reasonable progress toward his or her IEP objectives), then the placement is appropriate.

3. Effect on the regular classroom environment and education of children without disabilities. This standard is referenced to two specific circumstances. First, is the child so disruptive that the education of students without disabilities is compromised? For example, on the surface it might seem appropriate to separate a child who is so aggressive that his classmates are constantly watching out for this student and fearing for their safety. Obviously, this student is extremely disruptive to the class. However, the student might be removed intermittently from the class during extreme bouts of aggressive behavior as opposed to being separated for the day. Second, is the child’s IEP so different from a typical student’s program that he or she commands a disproportionate amount of the teacher’s time? For example, a child with severe cerebral palsy who needs special positioning, personal hygiene, and feeding may take virtually all of a regular educator’s time. However, teacher aids and even peers can provide the assistance this student needs so that the teacher can attend to the other students. Effects on the regular classroom environment must be examined in light of supplementary services and aids.

Implications for Physical Education

Placement of students with disabilities in physical education has traditionally followed three scenarios. Unfortunately, none of these scenarios would pass the Daniel R.R. test. In Scenario 1, children with specific labels are placed in self-contained, adapted physical education classes based on a label (e.g., adapted physical education for children with mental retardation or adapted physical education for students who use wheelchairs). The two assumptions in this model are that (a) all children with similar labels (e.g., mental retardation, use wheelchairs, blind) have the same motor development, physical fitness, and lifetime leisure skill needs, and (b) children with these labels will not benefit from regular physical education even with supplementary aids and services. While many children with similar disabilities share common needs, this does not mean that they all have the same needs or interests in physical education or that they will benefit from such placement. Placing a child in a separate physical education program based on a label clearly violates the LRE mandate as interpreted by Daniel. When placement is made based on a label, the physical education program has failed to (a) take steps to include the student with disabilities in regular physical education with supplementary aids and services and (b) determine if the student might receive educational benefit from regular physical education.

In Scenario 2, all children with disabilities are placed in regular physical education without determining their unique support needs. Tantamount to “dumping” these children in a setting in which they will fail, this too is a clear violation of the LRE mandate as interpreted by Daniel. In such cases the physical education
program has failed to take steps—*and not just token gestures*—to include students with disabilities in regular physical education with supplementary aids and services. In addition, in such scenarios there are rarely any mechanisms to determine if the student is receiving any educational benefit, nor are there means to determine the effects of such placement on the regular physical education environment (including effects on children without disabilities).

In Scenario 3, a child with a disability is evaluated to determine his or her educational needs. Based on present level of performance, an IEP is generated by the IEP team, and the team determines which placement would best facilitate the child’s acquisition of IEP objectives. Some children are placed in regular physical education with varying amounts of support, while others are placed in separate physical education settings with varying amounts of support. However, all placement decisions are determined through “clinical judgment.” For example, a certain child is given a battery of motor tests including the Test of Gross Motor Development (Ulrich, 1985) and the Bruininks–Oseretsky Test of Motor Proficiency (Bruininks, 1978). Results indicate that this child is 2–3 years delayed compared to his or her peers. An IEP is written based on present level of performance, and the team decides that this child would have the greatest opportunity to master targeted IEP objectives in a separate adapted physical education program. This decision model violates the LRE mandate as interpreted by *Daniel*, because the team has not taken steps to include the child with disabilities in regular physical education with supplementary aids and services. For the vast majority of children with disabilities, there is no way to clearly and objectively determine if a child might benefit from regular physical education. Placing a child in a separate setting without first trying a regular physical education setting with support violates *Daniel*.

If these three scenarios do not meet the LRE requirement as interpreted by *Daniel*, how then should physical education placement be decided? First, the child’s IEP for physical education (IEP–PE) should be developed based on such information as present level of performance, how long it takes the student to learn particular skills, parent and student interests, and availability of recreation opportunities in the community. Once the IEP–PE has been developed, the team determines how much and what type of supplementary aids and services are needed for the child to receive appropriate physical education within the regular setting. As noted in *Daniel*, these supplementary aids and services must be more than mere token efforts. For example, simply providing a beep ball for a child who is blind may not ensure this child’s safety and success in regular physical education. The regular physical education teacher may need to consult with an adapted physical education specialist, a vision teacher, or an orientation/mobility specialist to learn how to modify instructional cues and curricular content. Additionally, this child may need a peer or even teacher assistant to guide him or her through the environment, extra (and even different) instructional cues compared to peers, a greater number of practice opportunities compared to peers, and possibly a smaller class environment. The courts in *Daniel*, as well as in later cases (particularly *Oberoi*), did not approve of school districts that did not take seriously the responsibility of providing supplementary aids and services. While this “fail-through” approach (Bateman & Chard, 1995) is not required by law and can be circumvented in rare cases, it is extremely difficult to determine if a child will or will not be successful in regular education without first trying that placement with supports.

**Recent Court Decisions and Their Impact on Physical Education**

Several decisions since *Daniel* have used the Daniel R.R. test regarding placement within regular education. The following briefly describes three of these cases. Significant points that were brought up during the hearings and their implications for physical education will be highlighted.

**Greer v. Rome (Georgia) City School District (1991)**

The 11th Circuit Court used the Daniel R.R. test when determining if Christy Greer, a child with Down syndrome who “functioned like a moderately mentally
handicapped child with significant deficits in language and articulation," should be placed in a regular versus a self-contained special class (Arnold & Dodge, 1994; Lipton, 1994). The courts found that the school district violated the integration requirements in Section 1412 (5)(B), finding in favor of the Greers' request for placement with support in regular education. The court made three critical points when handing down the decision. First, one of the special education administrators stated that Christy's cognitive functioning level was a severe impairment that justified placement in a separate class. The court noted that such a statement reflected a bias and a predetermination on the part of the school system that children with severe impairments cannot be appropriately served in regular classrooms with support. Such predetermination was a clear violation of the LRE doctrine and did not follow the proper IEP process (Lipton, 1994; Yell, 1995).

When applied to physical education, the Greer decision suggests that it would be a violation for a school system to predetermine that children with severe disabilities could not be appropriately served in regular physical education with support. A school system must demonstrate that alternative physical education placements are warranted, and the only way to make such a determination is through objective, individualized assessment including observation of the child in regular physical education with support. Making predetermined placement decisions in physical education based solely on a label clearly would be a violation according to Greer (Baieman & Chard, 1995; Osborne, 1996).

Second, the court questioned whether Christy received any educational benefit from regular class placement. The school district argued that Christy made more progress in the self-contained class. In finding for the Greers, the court put a unique spin on the concept of "educational benefit." The court noted that a determination by the school district that a handicapped child will make academic progress more quickly in a self-contained special education environment may not justify educating the child in that environment if the child would receive considerable nonacademic benefit, such as language and role modeling, from association with his or her non-handicapped peers (Lipton, 1994). Greer showed a preference for placement and a broadening of the term "educational benefit" over "appropriate education." The court favored regular class placement even when it could be demonstrated that a self-contained class may be more educationally beneficial (Lipton, 1994).

Making progress more quickly in a self-contained physical education program may not justify placing the student in that special environment if the child would receive "considerable nonacademic benefit" such as language and role models and interactions with peers without disabilities in the regular physical education setting. For example, a child with autism might acquire throwing skills more quickly in a one-on-one situation in a quiet, controlled environment compared to regular physical education. However, in a regular physical education setting the student learns how to interact appropriately with peers, how to wait his turn, how to ask for help, how to control his impulsivity in a noisy, sometimes chaotic environment, and how to apply his throwing skills to a game of "clean out your backyard." The overall benefits this child receives in regular physical education may outweigh the specific motor development benefits he might gain in a one-on-one setting. The bottom line is that, if the child is making adequate progress toward his or her individually prescribed physical education goals and objectives while in the regular setting, then the additional benefits of regular physical education outweigh the advantages of alternative physical education placements (see the Holland discussion later in this paper concerning what constitutes adequate progress toward IEP objectives).

Third, Greer addressed the notion of financial burden in determining if Christy could be placed in a regular classroom with support (Arnold & Dodge, 1994; Hollis & Gallegos, 1993). The court noted that even if the school district more to educate Christy in the regular classroom, the district still may be required to place Christy in the regular classroom with support. The court suggested that cost should only be considered when it "is so great that it would significantly impact upon the education of other children in the district." (950 F.2d 697, 1991). For example, sending a child to a private residential facility at the cost of $100,000 per year is significant for a small school district with an annual special education budget of $1 million. Programs for other children would have to be cut, which would negatively affect services for other students in the district. However, hiring a teacher assistant to serve two or three students in an elementary school including regular physical education at a cost of $15,000, or providing several in-service courses on physical education programming for children with disabilities to regular physical education staff at a cost of $2,000, most likely would not be considered unduly burdensome. In fact, such accommodations, particularly staff training for regular physical education teachers, would benefit more than just the targeted students in the school district.


The 3rd Circuit Court affirmed a lower court decision that Rafael Oberti, an 8-year-old child with Down syndrome, was inappropriately removed from a regular education classroom and placed in a segregated special education classroom. The court found that the school district, which maintained that Rafael was not benefiting from regular education and was disruptive to other students, did not properly consider several factors when removing Rafael. Again, the courts relied on the Daniel R.R. test when determining Rafael's placement. As with Greer, the court in Oberti made several critical points.

First, Oberti reaffirmed the notion that the burden of proving compliance with the LRE requirement was with the school district, not with the parents:

The Act's strong preference in favor of mainstreaming, 20 U.S.C. 1412 (5)(B) would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom. (Oberti, 995 F.2d 1219, 1993)

Oberti clearly gives parents a tremendous amount of power, particularly in making initial placement decisions. School districts have to prove that regular class

To the extent that courts have taken costs into consideration, they have done so only when choosing among several options, all of which offer an "appropriate" education (Lipton, 1994).
placement, including regular physical education, cannot be achieved satisfactorily with supplementary services and aids. The Oberti decision suggests that the only way to prove that regular class placement is inappropriate is to first place the student in the regular setting with support services and clearly document problems related to (a) lack of educational benefit and (b) negative effect on classmates (Arnold & Dodge, 1994; Lipton, 1994; Maloney, 1994).

Second, Oberti highlighted the importance of supplementary services and aids. Rafael was placed in a regular classroom for part of his education before the school system decided to change his placement to a segregated classroom. However, the court found that the school district did not provide Rafael with proper supports to ensure his success in the regular class. They noted that the school district placed Rafael “without a curriculum plan, without a behavior management plan, and without providing adequate special education support to the teacher” (995 F.2d 1397, 1993). Placing Rafael in the regular setting without support was nothing more than a token gesture. The court further explained that “use of these services in the regular classrooms is the key to resolving any tension between IDEA’s presumption in favor of regular placement and providing an individualized program tailored to the specific needs of each disabled child” (995 F.2d 1214, 1993).

The Oberti decision means that simply placing a child with a disability in regular physical education does not go far enough to meet the requirements of the law. An array of supports need to be provided to the regular physical educator (e.g., curriculum development and modification skills, assessment techniques, behavior management strategies, individualized instructional techniques) and to the student (e.g., individual physical education program, modified instructional techniques, adapted equipment, support personnel). Regular physical educators should be prepared to ask and even fight for these supports if they are expected to provide appropriate physical education to students with disabilities.

Third, the court discussed the notion of educational benefit as it related to the teacher’s ability to modify the regular curriculum to meet Rafael’s unique needs. Using the notion of portability (see Roncker, 1983), the court argued that many of the techniques used in the separate classroom could be imported to the regular classroom. Furthermore, the court suggested that these techniques could be implemented by the regular classroom teacher once given proper training. Given that special techniques can be successfully implemented within the regular setting, the court argued in favor of regular class placement based on the “unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers . . . [and] the reciprocal benefits of inclusion to the nondisabled students in the classroom” (995 F.2d 1216-1217, 1993). When applied to physical education, this decision would likely mean that regular physical education teachers can be trained to provide individualized physical education programs to students with disabilities. In addition, the court probably would favor implementing these individualized programs within regular physical education so that the child can receive the benefits that are only available from interactions with children without disabilities.

Fourth, the court addressed the extent to which the curriculum would have to be modified to accommodate Rafael’s unique learning needs. The court argued that modification to the curriculum is significant only with respect to the effect such modification has on other students. The court noted that curriculum and instructional modifications needed for a particular child should not be used to determine the appropriateness of a placement in and of itself.

This decision, applied to physical education, means that a student with a disability could work on skills or receive instruction differently than his or her classmates. As long as modifications to the curriculum and instruction do not affect students without disabilities, then modifications are reasonable. For example, it would be reasonable for a regular physical educator to provide physical assistance to a student who is blind and has mental retardation if this student does not understand verbal directions and demonstrations provided to classmates. Such instructional modifications allow the student to receive instruction commensurate with his or her abilities without affecting other students in the class.


The 9th Circuit Court of Appeals affirmed a district court's ruling that Rachel, a 6-year-old (at the time of the original dispute) girl with “moderate mental retardation” could be educated satisfactorily full time in a regular class with supplementary services and aids. As with Greer and Oberti, the court used the Daniel R.R. test to determine if Rachel could be satisfactorily educated in regular education with proper supports (Arnold & Dodge, 1994; Lipton, 1994). In particular the court examined the following:

1. Whether the educational benefits for Rachel in regular education were comparable to the benefits of a special education classroom.
2. The nonacademic benefits of placement with children without disabilities.
3. Effects of Rachel’s presence on the teacher and other children in the regular setting.
4. The cost of supplementary aids and services.

As with Greer and Oberti, the court in Holland made several critical points. First, in analyzing the comparative benefits of regular versus separate environments, the court examined whether Rachel’s IEP goals and objectives could be met satisfactorily in a regular class with curriculum modifications and supplementary services and aids. After hearing testimony from the staff of a private school in which Rachel was enrolled full time in regular education during the time of the trial, the court decided that Rachel’s unique educational needs could be met in a regular classroom. The most compelling testimony came from Rachel’s second grade teacher in this private school, who reported that Rachel made significant progress toward her objectives while in regular second grade. In addition, this teacher noted the many nonacademic benefits Rachel received while in regular education, such as normal behavioral and language role models (Lipton, 1994).

This decision, applied to physical education, means that the school system must weigh the comparative benefits of regular versus separate physical education before removing a child from regular physical education. The school system must examine whether the child is making satisfactory progress toward his or
her IEP–PE goals and objectives as well as nonacademic benefits such as learning how to interact appropriately with peers, following rules of games, and learning how to move in a noisy, cluttered environment (more typical of real-life recreation settings). If the student is making satisfactory progress toward his or her IEP–PE goals and objectives while in regular physical education, then regular physical education with its many “nonacademic benefits” is the placement of choice. This even can be true if a separate physical education setting would accelerate progress toward IEP–PE goals and objectives.

Another critical point brought out in Holland was that Rachel did not disrupt class or distract other students, nor did she take a disproportionate amount of the teacher’s time (Lipton, 1994). However, if Rachel did demonstrate severe, disruptive behaviors, then it might have been appropriate to remove her from regular education. Such decisions were made in Klington v. Corpus Christi ISD (1993) and John J. v. Texas City (1991). In both cases children with behavior problems, one with Tourette’s syndrome who made inappropriate noises and was extremely hyperactive and one who had severe tantrums and was verbally and physically abusive to peers and staff, were removed from regular education and placed in self-contained programs (Holllis & Gallegos, 1993). It is important to note that in both cases, the school districts originally placed these children in regular education settings with supports. The children were eventually moved to self-contained programs after it could be demonstrated that regular education was ineffective for these students (Holllis & Gallegos, 1993).

In terms of physical education, the team must determine if the child’s behaviors and/or skill limitations are so severe that, even with supplementary aids and services, he or she significantly disrupts the regular physical education program. The burden of proof that a child is significantly disruptive must come from the regular physical education teacher. The regular physical education teacher has to clearly document that having a particular student with disabilities in regular physical education significantly affects the abilities of students without disabilities to learn critical psychomotor, affective, and/or cognitive skills. In fact, it may be appropriate to remove an extremely disruptive child from regular education, but it would be difficult to make such a decision without first placing the child in regular physical education with proper support.

Finally, Holland addressed the issue of Rachel’s academic deficits compared to her classmates. The point became an issue when a first-grade teacher in the Sacramento school system (who, incidently, never had Rachel in her class) testified that one of her requirements was that all of her first graders pass a reading test, something that Rachel could not do. The court, citing Daniel and Greer, noted that the law does not require children with disabilities to perform at or near grade level to participate in regular education. They only need to benefit (i.e., make reasonable progress toward their individually determined goals and objectives) from that setting (Lipton, 1994). A child who is not performing at age level in gross motor development still may benefit from regular physical education. There is no requirement that a child with a disability pass the same gross motor, fitness, and/or cognitive tests required of children without disabilities. Rather, the measure of success for a child with a disability is satisfactory progress toward individually prescribed physical education goals and objectives. These goals and objectives do not necessarily have to match those of the regular physical education class.

Summary

When creating the LRE mandate in IDEA and Section 504 of the Rehabilitation Act, lawmakers directed school systems to educate children with disabilities alongside children who are not disabled to the maximum extent appropriate. Lawmakers noted, to ensure appropriate placement of students with disabilities within the regular setting (including regular physical education), it may be necessary to provide a variety of support services. However, lawmakers anticipated that such supports would make it possible for the vast majority of children with disabilities to be educated in regular education settings (including regular physical education). While clearly favoring placement within regular education, lawmakers noted that LRE might require alternative placements for some children if “education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily” (Federal Register, September 29, 1992, p. 44823). It is this latter statement that has led to so much confusion regarding placement decisions. How does one determine if education in regular classes (including regular physical education) cannot be achieved satisfactorily?

It was left to the courts to help school districts understand and operationalize this notion of satisfactory achievement of education in regular classes. Ronaner responded by asking school districts to examine what makes an alternative placement special and determine if it would be feasible to transport this “specialness” to the regular setting. Daniel provided the criteria that were to be used to determine if a school district met its responsibility under LRE. While Daniel noted that it still would be possible to place a child with disabilities away from regular education in order to provide appropriate education, a school district would have to first answer three critical questions (known as the Daniel R.R. test). It became clear to the courts after Daniel (e.g., Greer, Oberli, and Holland) that a school district could not satisfactorily answer any of these questions (and in turn place a child away from regular education) without first placing the child within regular education with support services. In addition, the courts forced school districts to carefully examine and document educational benefits a child might receive while in regular education (including nonacademic benefits) as well as the effects a child with disabilities has on children without disabilities. Simply stating that a child with disabilities was not on age level with his or her peers or saying that it would cost more to educate a child with disabilities in regular education would no longer justify removal from regular education (including regular physical education).

How do these recent court decisions impact the placement of children with disabilities in regular physical education? Based on the Ronaner “principle of portability,” one question that should be asked is, What makes a proposed alternative physical education setting more appropriate for a child with a disability? If the circumstances that make an alternative setting more appropriate can be brought into regular physical education, then regular physical education is the placement of choice. Of greater importance is the Daniel ruling and how it changed the way placement decisions should be made. Rather than initially asking where a child with a disability should be placed for physical education, educators should ask how much support a child needs to receive appropriate physical education within the regular setting (Block & Krebs, 1992). Once support is provided and the child has been in regular physical education for a reasonable
period of time, then educators can evaluate the benefits the child is receiving from regular physical education and the impact this child is having on children without disabilities. If it can be objectively determined that the child is not benefiting in regular physical education or is having a significant negative effect on the physical education program for children without disabilities, then the child can be removed from regular physical education and placed in an alternative physical education setting.

Postscript

A hearing officer recently ruled that the Loudon County (Virginia) School System could remove a child with autism from his home school, where he was placed in a regular second-grade classroom, and place him in a special program for children with autism in a different county school. The hearing officer noted that Loudon County had made a substantial effort to help this student succeed in regular education, including reducing the class size and providing the student with a one-on-one assistant. Still, school officials noted that the student continued to have numerous tantrums in class, which disrupted his peers, and that he did not seem to benefit from being with classmates without disabilities. Interestingly, Loudon County school officials noted that the student would continue to attend art, music, and physical education classes alongside his peers without disabilities at his new school (Pae, 1994). One wonders whether any effort was made to determine if regular physical education placement was appropriate for this student, whether he was receiving any benefit from such placement, or what impact such placement was having on his classmates’ physical education program.

References


Brown, L. (1994, December). Including students with significant intellectual disabilities in regular education. Presentation at the Annual Conference of The Association for Persons with Severe Handicaps, Atlanta, GA.


Individuals with Disabilities Education Act (IDEA), U.S.C. Title 20, §§ 1400 et seq. Formerly titled the Education for All Handicapped Children Act, originally enacted as PL 94-142 (1975).


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**Appendix A: Regulation of U.S. Laws Governing Education of Children With Disabilities**

**Federal**

**Federal Constitution:** The Constitution, especially the 5th and 14th amendments, grants that an individual shall not be deprived of life, liberty, or property without due process of law. Classifying children as disabled when they are not or misclassifying children can result in the denial of educational opportunities and due process. The 14th amendment also requires that states treat citizens equally.

**Laws Enacted by Congress:** E.g., Individuals with Disabilities Education Act; Section 504 of Rehabilitation Act.

**Regulations (Federal Agencies):** Special education programs within Office of Special Education and Rehabilitative Services.

**State**

**State Constitution:** Especially provisions about education.

**State Statutes:** E.g., equal educational opportunities legislation.

**State Regulations:** E.g., State Office of Education or Department of Public Instruction, Division for Children with Disabilities.

**Local**

**Local Charter:** Especially provisions creating schools and school boards.

**Local Ordinances:** E.g., school board policies establishing programs for children with disabilities.

**Local Regulations:** Director of Special Education.

**Note:** Federal laws supersede conflicting state statutes, and state statutes supersede conflicting local ordinances. In essence, federal laws and related regulations are minimal standards that must be followed by states, and state statutes are minimal standards that must be followed by local agencies. However, states can enact statutes that are higher than federal law, and localities can enact ordinances that are more stringent than state statutes. For example, while the Supreme Court of the United States has defined "appropriate education" as a situation in which the student receives some benefit, some states (e.g., Michigan and New Jersey) have defined appropriate education as a situation in which the student attains maximal benefit.


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**Appendix B: United States Judicial System**

**Federal System**

Hears cases involving questions about federal or constitutional rights.

**U.S. District Courts:** Each state has at least one federal court, and in some larger states they are divided into several districts. For example, the *Holland* case was tried in the U.S. District Court for the Eastern District of California. Decisions are binding within that district but are only persuasive, not binding, in other districts. Appeals of decisions handed down from U.S. District Courts go to the U.S. Circuit Court of Appeals.
U.S. Circuit Courts of Appeals: The 50 United States and the U.S. Territories are divided into 11 numbered regions called circuits. Each circuit has a U.S. Court of Appeals for that circuit. For example, Holland eventually moved to the 9th Circuit, which has jurisdiction over appeals from California, Arizona, Nevada, Oregon, Washington, Idaho, Montana, Alaska, and Hawaii. Decisions are binding for states within that circuit but are only persuasive in other circuits.

State System

Hears cases involving questions about state law or state or federal constitutional rights.

State Trial Court System: Usually each state has a trial court for each county. Decisions are binding in the state but are only persuasive in other states or circuits. Appeals of decisions handed down in state trial courts can be appealed to state appellate courts. For example, Thorncock v. Boise Independent School District (1988) was tried in an Idaho State Trial Court. Appeals on decisions handed down from state trial courts go to state appellate courts.

State Appellate Court: State trial cases can be appealed to the State Supreme Appellate Court (known as the State Supreme Court in some states). Some states also have intermediate courts of appeal. State appellate courts are "courts of last resort" for states, and decisions are binding in that state. For example, Thorncock eventually moved to the Idaho Supreme Court.

U.S. Supreme Court

This represents the "court of last resort." Cases can be appealed to the U.S. Supreme Court from the U.S. Circuit Court of Appeals or State Supreme Courts. Decisions made by the U.S. Supreme Court are binding in all federal and state courts. For example, Rowley was a U.S. Supreme Court decision that defined "appropriate education" as presented in Part B of the Individuals with Disabilities Education Act.

Note: Federal and state court systems are parallel, and the way cases fall into either the federal or state system is an extremely complicated matter. In general, cases between citizens of different states or cases pertaining to federal statutes or the federal Constitution go through the federal courts, while cases pertaining to state statutes go through the state courts. Also, decisions may be appealed to the U.S. Supreme Court from either the U.S. or state courts. It is an extremely complicated process as to when a case can be taken to the U.S. Supreme Court. The U.S. Supreme Court will only hear cases from state courts that deal with federal law or constitutional issues.


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A Critical Examination of Selected Hand-Held Dynamometers to Assess Isometric Muscle Strength

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This paper provides a critical review of objective hand-held dynamometers (HHDs) in assessing muscle strength in children and individuals with disabilities. In the past few years, numerous studies have examined the reliability and validity of HHDs as an objective method of measuring muscle strength. However, the standardization of testing protocols, which is paramount for the effective use of HHDs in clinical and educational settings, is lacking. This paper compares two commonly used HHDs, the Nicholas Manual Muscle Tester and Microfet, to provide the practitioner with the most current information.

Manual muscle testing has been used in clinical and rehabilitation settings since the 1900s (see Table 1) to assess isometric strength and to determine the functional capacity of muscles. (For a more complete history of manual muscle testing, see Daniels, Williams, & Worthingham, 1956, pp. 1-4.) Original efforts, by Dr. Robert Lovett at Harvard Medical School, involved assessing functional strength in partially paralyzed muscles. Lovett developed the gravity test and subsequently added more dimensions to manual muscle testing. For example, various types of grading and subjective point rating scales (0-5 points) were developed to estimate a range from no strength to normal functioning in a muscle. In conjunction with colleagues, Dr. Lovett and Dr. E.G. Martin developed the spring balance test (Lovett, 1917; Lovett & Martin, 1916; Martin & Lovett, 1915). Many of these early efforts resulted in publications. The textbook The Treatment of Infantile Paralysis (Lovett, 1917) included a section on gravity and