Education and the Law
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Riding a Wave and Paving a Path –

Sacramento City Unified School District, Board of Education v. Rachel Holland

Kim and Robert Holland had one simple request for the administrators of the Crocker Riverside Elementary School. They wanted their daughter, Rachel Holland, a four year-old with mental retardation,[1] to receive one hour of integrated class time each day in the Sacramento City Unified School District elementary school. Having just enrolled Rachel in Crocker Riverside the previous year in 1987, the Hollands were concerned that their daughter was spending her entire school day in a segregated special education classroom, completely isolated from her non-disabled peers. Rachel's parents were by no means advocating for a full-time general education placement. Instead, they simply wanted their daughter to at least have the opportunity to socialize and learn from her non-disabled peers at some point during the school day.

Special education matters, however, were relatively foreign to the Hollands. Kim and Robert were unaware of many of the resources and services that Rachel was entitled to and they did not know how to effectively advocate for services they were aware of. Instead, the Hollands had embraced a "go with the flow"[2] attitude regarding Rachel's education. For a year, the Hollands had overlooked the fact that Rachel's school day consisted of hours basking in pacifying glow of the classroom's small black and white television. Kim and Robert ignored the

[1] The American Association on Mental Retardation defines mental retardation as a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.
[2] Telephone Interview with Kim Holland (Mar. 3, 2011).

fact that half of Rachel's classroom served as the school's make-shift storage closet, a room so cluttered that one could argue that the school's storage closet was in fact serving as a make-shift special education classroom. In fact, for almost two years, the Hollands somehow accepted that the menacing time-out box in the corner of the classroom, a three-walled cube roughly the size of a confessional booth that Rachel's teacher used to discipline special education students, was an appropriate component of a special education classroom.

The Hollands, however, could not ignore their desire for Rachel to at least participate in an integrated setting every day, even if it was just recess, instead of sitting indoors listlessly watching television while her non-disabled peers learned indoors and socialized outdoors. Careful not to agitate any school administrators, the Hollands carefully requested that the school adhere to this accommodation. After a year of tip-toeing around the subject and playing what Kim would later describe as a perverse game of "mother may I,"[3] the Holland's and Rachel's Individual Education Program (IEP)[4] team finally agreed that Rachel could participate daily in recess with the Crocker Riverside general education population.

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[3] *Id.*

[4] An Individual Education Program, an IEP, is a legal agreement, crafted by the parents of the child and the administrators of the school, which defines a child's special education needs and objectives. The IEP team must include the following people:

(1) One or both of the child's parents, a representative selected by the parent, or both.
(2) At least one general education teacher if the child is or may be in a general education environment.
(3) At least one special education teacher or service provider.
(4) A school district representative who is: qualified to provide or supervise the provision of specialized instruction; knowledgeable about the general curriculum; and knowledgeable about the resources of the district.
(5) The individual who conducted the assessments of the student, or someone who is knowledgeable about the assessment procedure.
(6) Potentially other people with specific expertise or knowledge of the student.
(7) The student whenever necessary

The IEP generally contains a list of yearly goals and objectives and an outline of supplementary aids and accommodations necessary to assist the child meet these goals and objective. The IEP must be agreed upon and signed by the parents of the student in order for it to be official. An IEP meeting must be held at least annually. In addition, an IEP meeting must be held when a student has received a formal initial assessment, when a student demonstrates a lack of anticipated progress, or when a parent or teacher requests an IEP meeting to develop, review or revise a student's individualized education program.

The Hollands were pleased with this outcome and were eager for their daughter to make friends outside of the confines of her special education classroom. However, the administrators at Crocker Riverside never intended to comply with Rachel's IEP. Despite having agreed to an integrated recess, the Hollands were devastated when they came to visit Rachel in the spring, only to discover that the school had kept their daughter indoors every single recess of the school year. Kim and Robert were livid. They demanded to know why the school had unilaterally deviated from Rachel's IEP. Rachel's teacher contended that their daughter simply was not ready to attend recess and that instead of making new friends and spending time outdoors, Rachel's time would be better spent "practicing recess indoors."[5] Rachel's teacher was certain that her presence on the playground "would retard the progress of the other children."[6]

The trajectory of special education development placed Rachel's experience at Crocker Riverside within a unique historical context. A decade before Rachel's birth in 1982, a rapidly evolving disability advocacy movement had taken shape. A groundswell of fiery disability advocates secured rights for people with disabilities through litigation, legislation, and political and social activism. However, the movement, symbolized by groundbreaking victories, was also marred by substantial opposition and devastating indifference. What makes Rachel's story so special is that one generation later, the movement had effectively navigated this storm of opposition and indifference to the extent that Rachel and her parents had access to the necessary supports and resources to enact broad change to the disability discrimination they faced.

Rachel's story also marks a distressingly familiar tale for parents of children with disabilities. Far too often, school districts make unilateral decisions for students with disabilities. Circumventing parents and special education law, these decisions often serve the best interest of

[5] Telephone Interview with Kim Holland (Mar. 3, 2011).
[6] *Id.*

the school and not the child. The proactive course of action taken by the Hollands, however, is distressingly unfamiliar and because of the relatively minor attention Rachel's story received outside the world of disability activism, the narrative is all the more important to tell. After a year of politely and passively engaging in an unproductive back and forth with the school, Kim and Robert Holland had reached their "boiling point" and the "gloves were off."[7] Rachel's teacher's comments were malicious, insulting, and unfounded. Then and there, the Hollands decided that Rachel belonged in a regular education setting. If Rachel couldn't thrive in a structured classroom environment, what hope did she have in the future as an adult? The Hollands had admittedly set their aspirations for Rachel far too low and they decided to pursue legal action to ensure that their daughter would be taught in a full-time general education classroom. What began as a reasonable request by naïve and well-meaning parents swiftly evolved into the most progressive special education decisions under the Ninth Circuit. The *Holland* factors, born from the case, continue to define the legal standard for the integration of many disabled students and Rachel's story has set an example for disability activists to aspire to and for school districts to respect.

Institutionalized Segregation – An Early History of Special Education

Before conducting a thorough exploration of Rachel's story, it is important to acknowledge the overwhelmingly negative cultural attitudes that have historically affected people with disabilities. There is a longstanding history of abuse, neglect and exclusion associated with the brief history of educating students with disabilities.[8] Prior to the inception of the first federal special education laws in the 1970s, children with disabilities who were lucky

[7] Telephone Interview with Robert Holland (Mar. 3, 2011).
[8] Daniel J. Melvin II, *The Desegregation of Children with Disabilities*, 44 DePaul L. Rev. 599, 603 (1995).

enough to receive any form of schooling, were educated almost entirely outside the walls of traditional public schools in separate specialized institutions.[9] However, even the prospect of separate specialized institutions was a far deviation from the norm for the majority of children with disabilities. In 1969, only seven states were educating more than fifty-one percent of their disabled children.[10] Before the passage of the Education for All Handicapped Children Act[11] in 1975, U.S. schools educated only one in five children with disabilities, and many states had shaped education laws excluding certain students, including "children who were deaf, blind, emotionally disturbed, or mentally retarded."[12] In 1975, at least one million children with disabilities in the United States were denied any form of public education, and at least four million more were segregated from their non-disabled peers.[13]

In response to the aforementioned academic inequities, the disability rights movement mimicked advocacy efforts of the civil rights movement, particularly the push to meaningfully participate in public education. With this in mind, one of the most influential court decisions used by special education advocates did not directly involve special education at all. The 1954 Supreme Court case, *Brown v. Board of Education of Topeka*,[14] which explicitly banned racial segregation of public education facilities, formed the basis for the integration of children with disabilities into regular education settings.

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[9] Peter David Blanck, Eve Hill, Charles D. Siegal & Michael Waterstone, *Disability Civil Rights Law and Policy: Cases and Materials* 941 (2005).
[10] Jeffrey J. Zettel & Joseph Ballard, *The Education for All Handicapped Children Act of 1975 (P.L. 94-142): Its History, Origins, and Concepts, in Special Education In America: Its Legal and Governmental Foundations* 11, 12 (1982).
[11] The Education for All Handicapped Children Act is widely regarded as the most important piece of litigation for children with disabilities and will be detailed in the next section
[12] U.S. Department of Education Office of Special Education and Rehabilitative Services, *History: Twenty-Five Years of Progress in Educating Children with Disabilities through IDEA* (2007).
[13] *Id.*
[14] *Brown v. Bd. of Educ*., 347 U.S. 483 (1954).

Chief Justice Warren led the unanimous decision in *Brown* and declared that "in the field of public education the doctrine 'separate but equal' has no place and that separate education facilities are inherently unequal."[15] The holding that race-based facilities were inherently unequal soon after formed the basis for disability advocates to argue that the unnecessary segregation or of children with disabilities was similarly violative of the Fourteenth Amendment's Equal Protection and Due Process Clauses.[16]

In an ironic declaration, John W. Davis, a one time Democratic presidential candidate and one of the leading lawyers for the Board of Education of Topeka, accurately predicted in his opening statements[17] that if the appellant's interpretation of the Fourteenth Amendment were to prevail that he would be "unable to see why a state would have any further right to segregate its pupils on the ground of sex or on the ground of age or on the ground of mental capacity."[18]

Less than twenty years after the *Brown* decision, Davis' prescient concerns came to fruition when courts in Pennsylvania and the District of Columbia mandated the integration of students with disabilities in public education in two separate landmark cases. In 1971, a District Court for the Eastern District of Pennsylvania consent decree in *Pennsylvania Association for Retarded Children v. Pennsylvania* (PARC)[19] established that the Equal Protection Clause required the state of Pennsylvania to provide all "mentally retarded" children with "a free, public program of education and training appropriate to the child's capacity."[20] The court determined that schools should operate under the presumption that "placement in a regular public school is

[15] *Id.* at 495.
[16] Blanck, Hill, Siegal & Waterstone at 941.
[17] Davis argued a total of 140 cases before the Supreme Court.
[18] Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55, at 51 (Leon Friedman ed., 1969).
[19] *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F.Supp. 1257 (E.D. Pa. 1971).
[20] *Id.* at 1260.

preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training."[21]

Very soon after the *PARC* decision, the District of Colombia District Court heard *Mills v. Board of Education of the District of Columbia*[22] and granted summary judgment to a class of children with disabilities, finding that the Equal Protection Clause assured that all children, regardless of the type of disability, were entitled to a free public education and that the financial burden of educating students with disabilities was not an adequate defense.[23] In doing so, the court favored "a presumption that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class."[24]

Both *PARC* and *Mills* broadly addressed the benefits of integrated classrooms for students with disabilities and they both acknowledged that successful inclusion would require specialized resources. However, they did so without providing specific language concerning how to achieve successful implementation. While this absence is notable, the decisions catalyzed a shift in special education advocacy. Unlike *Brown v. Board of Education*, which served an important role in desegregation but did not result in the Civil Rights Act of 1964 for another ten years, the *PARC* and *Mills* decisions were followed almost immediately by Congressional action, which would lay the groundwork for a fundamental reshaping of special education possibilities.

[21] *Id.* at 1260.
[22] *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972).
[23] *Id.* at 876.
[24] *Id.* at 876.

Ending the Virtual Isolation of Millions of Children and Adults – Congressional Action

The *PARC* and *Mills* decisions ushered in Congressional action that sought to afford people with disabilities unprecedented protections. Seemingly unimaginable just a decade before, Congress implemented groundbreaking legislation that attributed legitimacy and legal protections for people with disabilities. Two laws, PL 94-142 and Section 504, in broad strokes, laid a foundation of national legitimacy to the disability movement.

In 1973, Congress enacted § 504 of the Rehabilitation Act, 29 U.S.C. § 794. Section 504, the first civil rights statute for people with disabilities, recognized people with disabilities as a legitimate class, subject to protection from discrimination as a collective entity. At the time of ratification, Senator of Minnesota and former Vice President, Hubert Humphrey, who had made earlier attempts to pass disability rights litigation,[25] underscored the importance of adopting the new legislation, declaring that "the time has come to firmly establish the right of disabled Americans to dignity and self-respect as equal and contributing members of society and to end the virtual isolation of millions of children and adults."[26] As the primary sponsor of the bill, Humphrey highlighted the stakes at hand, explaining that "the fundamental fact that one confronts is…the segregation of millions of Americans from society…suggesting a disturbing viewpoint that these people are not only forgotten but perhaps expendable."[27]

The new legislation crafted an protective umbrella status for all people with disabilities, acknowledging that a large portion of the population, regardless of the classification of the specific disability, were facing similar discrimination in employment, education, and access to society. Specifically, the Act prohibited recipients of federal support from discriminating against

[25] In 1972, Humphrey advocated to amend the Civil Rights Act of 1964 to include people with disabilities. His grandchild had Down Syndrome and protection of people with disabilities had become a deeply personal matter.
[26] 118 Cong. Rec. 525 (1972) (statement of Sen. Humphrey).
[27] *Id.*

persons "solely by reason of … handicap."[28] While limited in its scope, the fact that most states were receiving federal financing for public education, § 504 governed most public schools.

Despite the strong protections afforded to people with disabilities, the law was passed somewhat haphazardly and with little detailed planning as a byproduct of some Senate staffers who were working on reauthorization of the Vocational Rehabilitation Act Amendments of 1954.[29] Problematically, the legislation failed to clarify what level of services states had to provide different education services for children with disabilities.[30] It was not surprising then that the regulations implementing § 504 were not issued for an additional five years in 1978.[31] Without clear guidance for implementation, schools were left in the lurch without a clear understanding of how to satisfy their obligations and were certainly willing to wait.

Whereas § 504 of the Rehabilitation Act signaled an advancement of the disability advocacy effort on a national level, P.L. 94-142 (the Education for All Handicapped Children Act),[32] passed three years afterwards, truly launched the special education movement and is widely considered the single most important piece of litigation for children with disabilities. The Act guaranteed students with disabilities two quintessential protections that continue to be synonymous with disability education. First, the act ordered that a free, appropriate, public education (FAPE)[33] must be provided for all students with disabilities regardless of the nature or

[28] 29 U.S.C. § 794.
[29] Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* (1984).
[30] Blanck, Hill, Siegal & Waterstone at 943.
[31] Executive Order No. 11,914, 41 Fed. Ref. 17871 (1976).
[32] The Education for All Handicapped Children Act was renamed the Individuals with Disabilities Education Act (IDEA - Pub. L. No. 101-476, 104 Stat. 1142) on October 30, 1990.
[33] FAPE is defined as "the provision of regular or special education and related aids and services that are designed to meet individual needs of handicapped persons as well as the needs of non-handicapped persons are met and based on adherence to procedural safeguards outlined in the law." This mandates that schools provide all students with an educational program that is individualized to a specific child, designed to meet that child's unique needs, provides access to the general curriculum, meets the grade-level standards established by the state, and from which the child receives educational benefit.

severity of their disabilities in the least restrictive environment (LRE).[34] [35] Second, the Act ordered that IEPs must be established and implemented for each student eligible for special education services.[36] In 1990, the Act switched names to the Individuals with Disabilities Act (IDEA) and was again amended to provide protections for a broader spectrum of disabilities.[37]

At the time, P.L. 94-142 represented a staggeringly different perspective of what education should look like for students with disabilities. States previously had complete autonomy to fashion and open or close the doors of their schools to children with disabilities with complete impunity. This lack of federal oversight coupled with the absence of structured protections ensured that children with developmental, behavioral, and emotional problems would continue to be excluded almost entirely from classrooms.

Congress established a number of extensive safeguards to ensure that people with disabilities would have meaningful access to an appropriate education. However, despite specific provisions for robust and detailed protections, implementation, again, was another story all together and many of the protections were sporadically enforced, as a litany of stumbling blocks still stood in the way of the successful implementation of the law, stumbling blocks which would require a substantial push from the disability community to overcome.

[34] A LRE mandates that a student who has a disability should have the opportunity to be educated with in a general education setting, to the greatest extent appropriate. All disabled students should have access to the general education curriculum, extracurricular activities, or any other program that non-disabled peers would be able to access. In order to achieve this sort of placement, the student should be provided with supplementary aids and services necessary to achieve educational goals.
[35] Pub. L. 94-142, 89 Stat. 773.
[36] *Id.*
[37] Pub. L. No. 102-119, 105 Stat. 587.

Laying Seeds of Change – The Disability Movement Takes Shape

The presence of disability laws was one matter. Ensuring their implementation was another matter all together. While Section 504 and P.L. 94-142 provided legitimacy to the disability rights movement, a groundswell of carefully orchestrated grassroots efforts coordinated by disability rights advocates truly spurred the disability movement.

Perhaps the most notable grassroots disability movement consisted of a number of nation-wide sit-ins that occurred in 1977. After § 504 was passed, the Department of Health, Education and Welfare (HEW) failed to enforce and define the regulations for several years, essentially rendering much of the legislation useless. In response to this inactivity, On April 5, 1977, disability activists across the country staged a sat-in in various HEW offices found in regions including New York City, Los Angeles, Boston, Denver, Chicago, Philadelphia, and Atlanta.[38]

University of California Berkeley Public Health graduate student, Judith Heumann, led the longest and most impactful sit-in in San Francisco. Under her oversight and coordination, close to 120 disability activists staged a 28-day sit-in within the HEW building. HEW shut off water supplies in an attempt to cut the protests short, but the activists received support and resources from a wide range of groups.[39] George Musconi, then mayor of San Francisco, sent portable shower stalls to the HEW building for the demonstrators, and labor unions and other political groups supported the movement.

Heumann would reiterate the objective of the sit-in during a Congressional hearing, in which she emphatically stated, "we will no longer allow the government to oppress disabled individuals. We want the law enforced. We want no more segregation. We will accept no more

[38] Doris Fleischer, *The Disability Rights Movement: From Charity to Confrontation* 29 (2000).
[39] Kathi Wolfe, *Disability Rights Group: 30 Years as a Force for Change*, Independence Today, Oct. 2, 2009, http://www.itodaynews.com/october2009/2-DREDF101209.htm.

discussions of segregation."[40] In response to a nameless congressman's nodding understanding, Heumann, perceiving an empty acknowledgement, struck back in anger, "I would appreciate it if you would stop shaking your head in agreement when I do not think you know what we are talking about."[41] Under considerable pressure from the unprecedented mobilization of the disability community, Joseph Califano, Director of HEW, finally signed the regulations and they were issued on May 4, 1977.[42]

For many participants, the sit-in was the first mass-disability protest they had taken part in. Current executive director of the Disability Rights Education Defense Fund (DREDF), Mary Lou Breslin, noted that "the demonstrations made it clear that it was possible to effect change on disability issues using traditional civil rights tactics. It coalesced around cross-disability issues."[43] Beverly Bertaina, demonstrator and, at the time of the protests, parent of a four year-old child with developmental disabilities, noted that the demonstration was the first time she had been around a group of people with disabilities for a prolonged period. At the Congressional hearing, Bertaina shared her preconceived fears and notions concerning parenting a child with disabilities, recalling that,

> When your kids are little you only see parents and handicapped kids and you reinforced each other's fears. Afraid to take risks. You exchange fears. Hard to be brave and take risks with your kids. I was always taught that parents are to take care of their kids and I have learned how to expand the meaning of that. I have learned about the fantastic capabilities of handicapped people. It has to hit home before I will do anything.[44]

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[40] Reprinted from the Independent Congressional Hearings in the Federal Building, Friday April 15, 1977, conducted by Congresspersons Phil Burton and George Miller
[41] *Id.*
[42] Peter Coppelman,, *A Layperson's Guide to Section 504,* The Independent, Summer 1977, http://www.dredf.org/504site/504guide.html.
[43] Kathi Wolfe, *Disability Rights Group: 30 Years as a Force for Change*, Independence Today, Oct. 2, 2009, http://www.itodaynews.com/october2009/2-DREDF101209.htm**.**
[44] Reprinted from the Independent *Congressional Hearings in the Federal Building, Friday April 15, 1977, conducted by Congresspersons Phil Burton and George Miller*

While the sit-ins garnered the disability movement considerable publicity and bolstered the cause's following, they also symbolized the strength of the movement as a cohesive effort and demonstrated greater potential for change. Unbeknownst to the Hollands, Rachel was born amidst a radical new era for people with disabilities. While the Hollands' legal battle would surely prove to be contentious and difficult, a decade's worth of litigation, legislation and activism would help secure the necessary resources and precedent for a legal victory.

The Crux of the Debate – Inclusive Education

In order to best understand the crux of the *Holland* debate, it is essential to first examine what exactly inclusive education consists of and to explore the deep divide between proponents and opponents of the practice.

Inclusive education is an approach to educating students with intellectual disabilities in which these students spend more or all of their time with non-disabled students in a regular education environment. In order to educate students with special needs, the school provides appropriate supports and services as detailed by an IEP.

To be denied any form of education is obviously extraordinarily detrimental. Education is, to be put quite simply, a training-ground for adulthood. For this reason, it is also fairly easy to imagine the negative consequences of restrictive educational opportunities, both emotionally and academically. Segregated, disability-only classrooms can stunt the academic and social development of students with disabilities. Often times in segregated learning environments, teachers lower their academic and social expectations. As a result, the lower expectations of the students themselves can result in poor achievement.[45] Furthermore, segregation of students can

[45] Madeline Will, Assistant Secretary, Office of Special Education and Rehabilitative Services *Educating Students with Learning Problems – A Shared Responsibility, A Report to the Secretary*, (1986).

result in stigmatization, reinforcing traditional negative stereotypes regarding people with disabilities.[46]

The inclusion of children with disabilities within general education programs is considered one of the most critical steps in achieving an eventual goal of full integration into society. Integrated schools provide students with disabilities with the opportunity to learn the skills necessary to succeed as adults in mainstream society and students with disabilities can experience the "greatest development of social, vocational, academic and communication skills when they participate in integrated programs."[47] Preparation for life in the community best occurs when all students, regardless of background or disability, are granted the opportunity to socialize together in classrooms and receive instruction designed to develop and enhance successful living within the community.[48] Additionally, students with significant disabilities, on a whole, demonstrate greater success in achieving IEP goals within inclusive classroom settings than did matched students in traditional segregated programs.[49]

The Office of Special Education Programs has collected similar data concerning the benefits of inclusive education for non-disabled students. The report claims that students with disabilities in a general classroom do not cause disruptions to classroom and inclusion of students with disabilities has not demonstrate a correlation with the decline in the academic or behavioral performance of students without disabilities.[50] Furthermore, the presence of students with intellectual disabilities in the classroom poses added benefits for non-disabled students as well, promoting 1) reduced fear of human differences accompanied by increased comfort and

[46] Sheryl Dicker & Mark I. Soler, *Stepping Stones: Successful Advocacy for Children* 116 (1990).
[47] *Id.* at 118.
[48] J. D. Smith, *Inclusion : Schools for All Students*, 12 (1998).
[49] *Id.*
[50] *Id.* at 332.

awareness, 2) growth in social cognition, 3) improvement in self-concept, 4) development of personal principles, and 5) warmer and caring friendships.[51]

These views on inclusive education, while fairly well established, are not universally shared. Sacramento City Unified School District's stance against including Rachel within the general education classroom setting is hardly unique. In fact, nearly twenty years later, critics of inclusionary practices for students with intellectual disabilities cite to fears and concerns strikingly similar to those listed by Sacramento City Unified in the *Holland* case. A large number of inclusion opponents view the practice as philosophically attractive yet impractical for a number of reasons and instead continue to advocate for segregated special education programs.

There are essentially four categories of criticisms concerning inclusive special education practices that critics often cite to. As a disclaimer, this not an exhaustive list and not all critics share all of these beliefs. However, this broad survey helps to illustrate the stance against inclusion taken by Sacramento City Unified and likeminded inclusion critics.

First, inclusion opponents contend that IDEA has posed an inoperable financial strain on schools and that the costs of inclusive education services have drained funds for general education resources. These critics contend that IDEA and its provisions have resulted in an unfunded mandate in which the federal government has dictated inclusive instruction without providing adequate funding for implementation.[52] Essentially, opponents argue, IDEA pits parents demanding legal rights they are entitled to on behalf of the children against school administrators that don't have the finances to provide the legally mandated education resources.

[51] *Id.* at 331.

[52] According to the New America Foundation, IDEA federal funding covered 17.1 percent of the estimated excess cost of educating children with disabilities, the same as in FY 2007 and less than in FY 2006 when federal funding covered 17.7 percent of the cost. Initially, Congress set a maximum target for the federal contribution to special education spending equal to 40 percent of the estimated excess cost of educating children with disabilities.

Second, critics argue that students lack the resources and professional training to successfully educate students with intellectual disabilities in general education classrooms.[53] In turn, teachers maintain that school districts fail to adequately prepare general education staff to meet the needs to children with special needs, essentially preventing academic and social progress.[54] As a result, special education teachers are not always eager to implement inclusive education practices.

Third, opponents of inclusive education argue that many disabled children require highly specialized skills and attention from their teachers. As a result, these students draw disproportionately high attention from general education teachers at the detriment to the rest of the classroom.[55] Although students with disabilities in inclusion settings often have access to classroom aids, this concern is fairly common.

Lastly, critics contend that segregated classrooms provide a better academic and social environment for students with intellectual disabilities. A surprising number of inclusion critics consist of parents of children with intellectual disabilities. Some parents fear inclusive placements because they think their children will be ridiculed by other students or will be unable to develop regular life skills in an academic classroom. Additionally, some parents think that students with intellectual disabilities require an environment consisting of students with intellectual disabilities. This cohesion, some inclusion opponents argue, ensures a sense of stability and belonging and prevents children from being thrust into the mainstream and left to fend for themselves.[56]

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[53] Inclusive Education at Work: Students with Disabilities in Mainstream Schools: Salamanca Declaration UNESCO 15 (1994).
[54] Lech Wisniewski and Richard M. Gargiulo, Occupational Stress and Burnout among Special Educators: A Review of the Literature - Journal of Special Education, 333 Vol. 31/No. 3 (1997).
[55] Levin, Roxanne. Staff Attitudes Regarding Full Inclusion of Special Needs Children in Regular Education Classrooms. Diss. Loyola Univ. of Chicago, 4, (1995).
[56] *Id.* at 4.

Two Options – One Reality

Slowly but surely, Kim and Robert Holland began to notice that their first child, Rachel, was not meeting many of the traditional developmental milestones for an infant. Although born with a clean bill of health in 1982, it soon became increasingly clear to Kim and Robert that Rachel had a fairly severe developmental disability and that Rachel's life trajectory would likely differ substantially from their initial expectations. Regardless, Kim, a state government employee, and Robert, a small business owner, welcomingly embraced the challenges that would undoubtedly unfold.

The Hollands were intent on providing Rachel with the opportunity to belong to a strong community support system.[57] The Hollands had decided well before Rachel's birth that the Jewish faith would play a prominent role in their family and when Rachel turned three, Kim and Robert enrolled Rachel in the Shalom School, a local Jewish community day school, committed to three main tenants for its students: "to instill in children knowledge of Judaism and the world; to foster positive feelings about themselves as individuals and as Jews; to develop a sense of commitment to the Jewish community and society; and to prepare them for success in adulthood through the acquisition of knowledge and academic skills."[58] In essence, the Shalom School was a perfect fit for Hollands. At the time of Rachel's enrollment, one of the Rabbi's that worked for the school had a deaf daughter who attended the school, and this was especially comforting for the Hollands.[59] Additionally, the school placed a strong emphasis on the "concept of the

[57] Telephone Interview with Kim Holland (Mar. 3, 2011).
[58] Shalomschool.com, Mission Statement for the Shalom School, http://www.shalomschool.org/about/ (last visited Mar. 15, 2011).
[59] Telephone Interview with Kim Holland (Mar. 3, 2011).

uniqueness and individuality of each child"[60] and Rachel was openly welcomed by her teacher and her fellow students within the integrated classroom setting.[61]

Despite this smooth beginning to Rachel's education, the Hollands believed that a public school education would best provide Rachel with the social opportunities she required.[62] Kim and Robert wanted to prepare her for living independently to the greatest extent possible. They weren't entirely sure what this would look like, but the Hollands placed a premium on teaching Rachel "how to navigate a school campus, a community street, how to read at a functional level, how to have friends, how to be safe, how to have good life experiences."[63]

Once Rachel had reached kindergarten age, the Hollands enrolled Rachel into the Sacramento City Unified School District. The district assigned Rachel to Crocker Riverside Elementary and placed her in a segregated special education classroom. The Hollands weren't thrilled with the prospect of Rachel spending her time outside of a regular education classroom, but were eager for Rachel to have a stable learning environment for the duration of elementary school and figured that with some perseverance, they might be able to work with the school to carve out some time for Rachel to participate in an inclusive education setting.[64]

It became clear fairly quickly to the Hollands that there was an enormous disparity between the services that Rachel was receiving in her classroom and that Rachel's non-disabled peers were receiving in the regular education classroom. The two classrooms, adjacent to one another, illustrated a stark contrast of resources and attitude. Dianne Lipton, the Holland's attorney, would later describe the disheartening atmosphere of the room, stating, "just walking

[60] Shalomschool.com, Philosophy for the Shalom School, http://www.shalomschool.org/about/index.php?page=622 (last visited Mar. 15, 2011).
[61] Telephone Interview with Robert Holland (Mar. 3, 2011).
[62] Telephone Interview with Kim Holland (Mar. 3, 2011).
[63] Telephone Interview with Kim Holland (Mar. 3, 2011).
[64] Telephone Interview with Robert Holland (Mar. 3, 2011).

into the room was depressing."[65] Lipton explained that the class operated and appeared completely differently than the neighboring kindergarten class "where you'd go in and there was a lot of bustle of activity, and kids doing a variety of things, and moving from table to table, and having beautiful, in this particular school, had very nice materials, and everything."[66]

A Second Opinion – Due Process

As previously touched upon, it took the Hollands about a year to convince school administrators to finally agree on paper to allow Rachel to attend recess through her IEP only to never follow through with the agreement. After Rachel's teacher expressed a concern that Rachel's presence on the playground would "retard" the progress of other students, the Hollands felt completely betrayed and lost total faith in the administrators at Crocker Riverside.

Exacerbating the Holland's outrage, the neighboring school district, Davis Joint Unified, was currently integrating students beginning in preschool through a program run through University of California – Davis.[67] The Hollands knew that it would be easy to pack up their bags and head twenty miles east on I-80 to this welcoming school environment, but Kim and Robert liked their neighborhood, they had made close friends, and they were devoted members of the local Jewish Federation. But most importantly, the Hollands took personal offense to how they were being treated by the district. They didn't want what was happening to Rachel happen to anyone else's child.[68]

[65] Interview by Denise Jacobson with Diane Lipton, Special Education Advocate for the Center for Independent Living's Disability Law Resource Center, and Attorney for the Disability Rights Education and Defense Fund, *Disability Rights and Independent Living Movement Oral History Project*. (2001).
[66] *Id.*
[67] Telephone Interview with Kim Holland (Mar. 3, 2011).
[68] *Id.*

Fed up with their lack of progress, the Hollands decided to pursue a due process hearing against the school in 1989.[69] Before the actual hearing was scheduled, both parties participated in a mediation session. The mediation accomplished two objectives. First, both sides were able to agree upon an IEP.[70] Second, the district arrived at a compromised proposal of allowing Rachel to participate in a part-time integrated program. The proposed placement plan divided Rachel's time between a regular integrated class for nonacademic activities - such as art, music, lunch, and recess - and a separate special education class for all traditional academic subjects. Ultimately, the plan would have required moving Rachel back and forth between the two classrooms at least six times.[71] The Hollands believed that this routine ran the risk of creating a chaotic learning environment and could potentially label Rachel as an outsider and would likely deprive Rachel of the primary benefit of an inclusive education. The Hollands refused the compromise, returned Rachel to the Shalom School, and pursued a Due Process Hearing.[72]

The Hollands and the district underwent a fourteen day Due Process Hearing in front of a California Special Education (CSE) hearing officer.[73] The hearing officer sifted through testimony from Rachel's teachers at the Shalom school, indicating that Rachel was fitting in well at the private school as well as testimony by district witnesses, who testified that Rachel's experience at the Shalom School had proven counterproductive. Rachel's teacher, Nina Crone expressed that the she was learning a lot, that the kids accepted her and that she was imitating

[69] Among the various protections afforded to students and parents under IDEA, parents have the right to file Compliance Complaints when school districts do not provide services and supports as agreed to in an IEP, or otherwise violate IDEA.
[70] The agreed objectives included: speaking in four or five word sentences; repeating instructions of complex tasks; initiating and terminating conversations; verbally stating her name, address, and telephone number; participating in a personal safety program with classmates; developing a 24-word sight vocabulary; counting to 25; printing her first and last name and the alphabet; playing cooperatively; participating in lunch without teacher supervision; identifying upper and lower case letters and sounds associated with them; and following her schedule of daily activities.
[71] Board of Educ. v. Holland, 786 F. Supp. 874, 876 (E.D. Cal. 1992).
[72] *Id.*
[73] *Id.* at 875.

what the other kids were doing.[74] On August 15, 1990, the CSE officer sided with the Hollands and found that the district had failed to adequately educate Rachel in a regular education classroom as required by IDEA. The officer determined that Rachel had benefited from a regular classroom and that she was motivated to learn and that she learned by imitation.[75] The officer ordered the district to place Rachel in a regular education classroom with appropriate support services, which included both a part-time special education consultant and a part-time classroom aide.[76] The district appealed the hearing officer's decision that Rachel be placed in a full-time placement in regular education environment complied with IDEA.[77]

The Other Side of the Fence

The Hollands turned to DREDF for representation. Founded in 1979, just two years after the HEW protests, the majority of staff and volunteers had participated in the sit-ins and the surrounding activism. A product of the rapidly growing disability movement, DREDF had firmly established a decade long reputation as a leading national civil rights law and policy center by the time Kim and Robert had contacted them.

In addition to litigation, DREDF had, since its inception, hosted a series of special education training sessions for parents with disabilities, one of which Kim and had attended. Kim had left the training session impressed and immediately of contacting DREDF for help when it looked as though the situation at Crocker Riverside might turn litigious.[78]

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Telephone Interview with Kim Holland (Mar. 3, 2011).
[78] Telephone Interview with Kim Holland (Mar. 3, 2011).

The Holland's plight resonated deeply with Diane Lipton, a DREDF lawyer, who had plenty in common with Kim and Robert. Lipton's daughter, Chloe, like Rachel, also had severe developmental disabilities, including cerebral palsy.[79] Lipton, however, was fortunate to have a strong collection of friends that had an understanding of what it meant to have children with disabilities. The Holland's future attorney noted that many of these friends, "who were used to dealing with people who are different. It didn't frighten them."[80] Later in her life, Lipton would describe the importance of the support system. She explained, "even now, I could go to a conference on education and meet another parent with a kid with significant disabilities and there's an immediate kind of connection and understanding between us."[81]

While this support system may have differed from the Holland's support system, Lipton's experience enrolling Chloe in school proved quite similar. Lipton accompanied Chloe to join her for her first day of preschool at an inclusive setting. Mindful that this was an enormous transition for any child, Lipton wanted the new experience to go as seamlessly as possible. But as Lipton and her daughter entered the school, Chloe's new principal made her stance on children with developmental disabilities very clear, saying, according to Lipton, "If your daughter can't cut it here, she's going to have to go back to the development center."[82] The principle had never met Chloe or Lipton, but was more than willing to extend an incredibly unwelcoming gesture.

Like Rachel, Chloe was able to attend an inclusive preschool, but when she moved on to elementary school within the Richmond Unified School District, she was placed in a full-time developmental learning center.[83] Although directly adjacent to the neighborhood elementary

[79] Chloe was only one of three surviving triplets. She was born after only thirty weeks and had immediate digestive and liver problems. About a year after, she was diagnosed with cerebral palsy, causing cognitive and physical disabilities.
[80] *Disability Rights and Independent Living Movement Oral History Project*. (2001).
[81] *Id.*
[82] *Id.*
[83] *Id.*

school, the developmental center was decisively separated by a chain link fence. There was no contact between the two schools, except for the annual Halloween parade, notably the one holiday that involves concealing identities.[84] Lipton described this almost perverse holiday tradition saying, "they would let handicapped kids in their costumes walk at the end of the parade. But that was like once a year on Halloween. I just thought maybe, because they're all wearing costumes, everyone looks freaky anyway. Other than that, there was no contact."[85]

Chloe had started school in the late 70's soon after the passage of P.L. 94-142. Lipton and other parents began to attend trainings concerning the new legislation and quickly realized that Chloe's school was not following the law. Their children didn't have IEPs and services were being cut across the boards. After seeing the HEW sit-ins at the federal building on television and becoming a little more aware of the disability movement, Lipton and other parents demanded that the school district restore the special education services and amend complaint procedures for parents.[86] After eight years of advocacy, Lipton and other parents were able to collectively orchestrate the closing of all four disability-segregated schools in the district.[87]

As a parent advocate, Lipton joined DREDF in 1980 in the role of a volunteer organizer. Soon after her victory in Richmond, Lipton decided to go to law school at Golden Gate University so she could fight for the rights of all children with disabilities.[88] Upon graduation, Lipton returned to DREDF as the Director of the Children and Family Advocacy Project, a position she held until the end her death on August 8, 2002, after a two-year battle with cancer.[89] The late Senator Ted Kennedy paid tribute to her after her passing: "We have lost one of our

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[84] *Id.*
[85] *Id.*
[86] Douglas Martin, Diane Lipton, 57, Champion of the Disabled, N.Y. Times, Aug. 16, 2002, http://www.nytimes.com/2002/08/16/us/diane-lipton-57-champion-of-the-disabled.html.
[87] DREDF, *Summer News Letter*, (2003).
[88] *Id.*
[89] *Id.*

heroes, a woman who fought valiantly not only for her own child with cerebral palsy, but for all children across the nation."[90]

Three Other Families – The Procedural History

In 1982, ten years prior to the *Holland* case, the Supreme Court heard the *Board of Education of the Hendrick Hudson Central School District v. Rowley*,[91] its first special education case. The case concerned a hearing impaired girl named Amy Rowley, who had minimal residual hearing and was an excellent lip reader. Amy successfully completed her kindergarten year in a regular education classroom after several administrators prepared for her arrival by attending a course in sign language interpretation and installing a teletype machine in the principal's office to facilitate communication with her parents, who were also deaf.[92]

As required by IDEA, an IEP was prepared for Amy during the fall of her first grade year. The plan provided that Amy should continue to be educated in a regular classroom and receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week.[93] The Rowley's agreed with parts of the IEP, but insisted that Amy also be provided a qualified sign language interpreter in all her academic classes instead of the carve-out assistance being proposed. The school granted an interpreter for a two-week experimental period, but ultimately decided that such a service was unneeded.[94] The Rowley's challenged the decision, arguing that a denial of the sign language interpreter constituted a denial of the "free appropriate public education" guaranteed by IDEA, and subsequent litigation led to the Supreme Court.

[90] Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1039 (5th Cir. Tex. 1989).
[91] Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).
[92] *Id.* at 184.
[93] *Id.* at 185.
[94] *Id.*

The United States Supreme Court declared that under the IDEA a FAPE must be designed to meet a student's unique needs, to provide services that provide an "educational benefit" to the disabled student, and be provided in conformity with the student's IEP.[95] In addition, the FAPE placement must be provided to the maximum extent appropriate in the least restrictive environment.[96] However, a FAPE does not entitle a student to the "best" possible educational program or a "potentially maximizing" education. Accordingly, the court determined that the school district had satisfied the FAPE requirement by providing personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction.[97]

The *Rowley* case was notable for the *Holland* case for two primary reasons. It affirmed that IDEA ensured that all students were entitled to a FAPE and it mandated that the FAPE be provided in the LRE. However, *Rowley* did not provide explicit guidance on how to fulfill the LRE requirement of IDEA. As such, various Circuit Courts have since laid out the instructional groundwork.

Prior to 1989 most courts reviewing LRE issues agreed that where appropriate, LRE issues should be applied to the maximum extent feasible, but they also agreed that LRE placements were not mandatory for all students with disabilities.[98] While acknowledging the social benefits of inclusion, most courts resisted placements in general education solely for the sake of inclusion, ultimately, siding with segregated services in many legal disputes.[99]

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[95] *Id.* at 201.
[96] *Id.* at 198.
[97] *Id.*
[98] Charles J. Russo & Allan G. Osborne, *Essential Concepts and School-Based Cases in Special Education Law* 104 (2007).
[99] *Id.*

The Sixth Circuit, however, treaded a different path and outlined what has since become known as the "portability standard." The portability standard notes that if aids and supplemental could be provided in less segregated settings, then a more restrictive placement would be inappropriate.[100] The Fourth and Eighth Circuits proceeded to adopt the standard. In the case, the Arlitt Child Development Center determined that Neil Roncker would benefit from contact with non-handicapped children.[101] However, after conducting an IEP for Roncker, "classified as Trainable Mentally Retarded," the school district decided to place him a county school, an exclusively segregated campus for special education children.[102] The Ronckers refused the placement and sought a due process hearing before an impartial hearing. The hearing officer ordered that Neil be placed within the appropriate special education class in the regular elementary school setting.[103] The school district appealed to the Ohio State Board of Education, which also found that that he required the educational opportunities provided by the county school. However, the Board also found that Neil's education required interaction with non-handicapped children during lunch, recess and transportation to and from school. Ultimately, this decision required a pullout placement in which Neil would attend the county school, while also having opportunities to interact with the regular education population during designated periods of the day on the general education classroom.

After the Board's determination, Neil's mother filed an action against the school district. Both sides agreed that Neil required special instruction, but the Ronckers contended that Neil could be provided the special instruction within a regular education setting. The school district, however, contended that Neil "could not benefit significantly from mainstreaming and that any

[100] Roncker on behalf of Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. Ohio 1983).
[101] *Id.* at 1060.
[102] *Id.*
[103] *Id.* at 1061.

minimal benefits would be greatly outweighed by the educational benefits of the county school."[104] The district court found in favor of the school district, interpreting the mainstreaming requirements of the EHA as allowing school districts with broad discretion regarding the placement of students with disabilities.[105] Ultimately, the court developed the portability standard, stating that "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."[106] The Sixth Circuit ordered that the district court must determine whether Neill's educational, physical or emotional needs require "some service which could not feasibly be provided in a class for handicapped children within a regular school or in the type of split program advocated by the State Board of Education."[107]

Soon after the *Roncker* decision, the LRE provision of the IDEA began to pick up steam and started to play a more prominent role in litigation concerning the educational placement of students with disabilities, even those with severe developmental disabilities. With this new trend, courts began to shift towards favoring inclusive programming for students with disabilities.

The Third and Eleventh Circuits adopted a separate test outlined by the Fifth Circuit test formed under *Daniel R.R. v. State Board of Education*. The Fifth Circuit examined the case of Daniel, a boy with Down Syndrome.[108] Daniel was a six year-old boy whose developmental age was between the age of two and three years. He was initially placed in a pre-kindergarten class for half of the day and a special education class of the other half. Soon after this placement

[104] *Id.*
[105] *Id.*
[106] *Id.* at 1063. See Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989); A.W. v. Nw. R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987).
[107] 700 F.2d at 1063.
[108] 874 F.2d at 1039.

decision, Daniel's kindergarten teacher began to have reservations about the arrangement and reported that the placement was requiring almost constant attention and that Daniel was not mastering the skills for children his age group.[109] Accordingly, the school wanted to place him in special education for the entire duration of the day.[110] Despite protests from Daniel's parents, a hearing officer found in favor of the school district on the grounds that Daniel was receiving very little educational benefit from the regular class and he required constant individual attention from the teacher.

The Fifth Circuit held that a substantially separate class was appropriate for Daniel because of his specific disability. However, the court provided a two-part general test for evaluating when students could be removed from education settings. First, the court has to determine "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily."[111] If the court determines that this standard can be achieved satisfactorily and the school intends to provide special education or to remove the child from regular education, the court must ask "whether the school has mainstreamed the child to the maximum extent appropriate."[112] The court found that the school district had implemented several alternatives to accommodate Daniel within the regular classroom setting and affirmed that the district had complied with the mainstreaming preference expressed in the EHA and affirmed the decisions of the hearing officer and the district court.[113]

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[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] This formulation was also adopted by the 3rd Circuit in Oberti v. Board of Education of the Borough of Clementon School District and by the 11th Circuit in Greer v. Rome City School District Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991) (opinion withdrawn in Greer v. Rome City Sch. Dist., 956 F.2d 1025 (11th Cir. 1992) because of a question of jurisdiction; later reinstated in relevant part in Greer v. Rome City Sch. Dist., 967 F.2d 470 (11th Cir. 1992)).

Four Steps in a New Direction – The Trial

The *Holland* case joined the wave of other Circuit decisions, but also stood out by providing the most inclusive-friendly and student focused language. Attorney Diane Lipton was assisted at trial by attorneys Arlene Mayerson and Sid Wolinksy, both also from DREDF. At the time of the trial, Mayerson had served as the Directing Attorney of DREDF for over ten years after graduating from the University of California, Berkeley Law School. As one of the nation's leading experts in disability rights law, she had played a substantial role in the disability movement as a key advisor to both Congress and the disability community on major disability rights legislation, including the Handicapped Children's Protection Act in 1986.[114]

Sid Wolinsky, an attorney at DREDF, would later co-found Disability Rights Advocates, another bay area disability advocacy organization. Wolinsky, a graduate from Yale Law School in 1961, brought to DREDF a background as a specialist in class action and high-impact litigation and rights of people with disabilities, both nationally and internationally. He had previously served as the Director of Litigation and a co-founder of Public Advocates, Inc. and was the Director of Litigation at San Francisco Neighborhood Legal Assistance Foundation.[115]

Judge David F. Levi oversaw the District Court proceedings. Widely considered as a strikingly intelligent and fair-minded judge, Levi was also known for his staunch conservatism. Lipton and her team worried about his conservative political leanings, which Wolinksy described

[114] The bill, a major civil rights victory, amended the Education for All Handicapped Children Act (P.L. 94-142) to provide for the payment of legal fees for parties who successfully sue under the Act. P.L. 94-142 provides funds to assist states and local agencies in educating handicapped children. Parents must be allowed to assist in the development of an Individual Education Plan (IEP) for their children and are entitled to a hearing by the state education agency in the event they find the IEP inappropriate. If dissatisfied with the hearing decision, they can file suit in state or federal district court.

[115] DRAlegal.org, Staff Profile: Sid Wolinsky, http://www.dralegal.org/about/profiles/wolinsky.php, (last visited May 1, 2011).

as lying way off to the right of the political spectrum."[116] In 1986 he was appointed by President Ronald Reagan as the United States Attorney for the Eastern District of California.[117] Levi was then appointed to serve as a judge of the District Court of the Eastern District of California on October 1, 1990, by President George H. W. Bush.[118] With these initial misgivings and considering the Ninth Circuit lacked precedent concerning LRE placements, Lipton and her team knew they had to "bring the judge along, educate him along the way."[119] They would do this by providing expert testimony, but perhaps more importantly, by having Rachel's teacher and mother bring anecdotes concerning Rachel's improvement to life.

The trial produced conflicting narratives about a little girl. Expert witnesses on both sides painted Rachel in entirely different shades and differed greatly in assessing Rachel's competency and her ability to integrate within the classroom.[120] Through one lens, Rachel had benefited greatly from her time at the Shalom school and had taken marked developmental steps both academically and socially. Through the other, Rachel had made no progress. Her time in a regular education setting had curbed her development and the placement was potentially causing irreparable harm.

At the trial, Rachel's second grade teacher, Nina Crone delivered emotional and compelling testimony about her experience teaching Rachel. She admitted that she had never before worked with a child with disabilities and that she was initially frightened about the prospect of teaching Rachel.[121] Crone acknowledged that Rachel's goals and objectives differed

[116] Interview with Sid Wolinsky, Director of Litigation at Disability Rights Advocates, in Berkeley, CA. (May 1, 2011).
[117] Law.duke.edu, Faculty Profile: David Levi, http://www.law.duke.edu/fac/levi/, (last visited Apr. 20, 2011).
[118] *Id.*
[119] Interview with Sid Wolinsky, Director of Litigation at Disability Rights Advocates, in Berkeley, CA. (May 1, 2011).
[120] Disability Rights and Independent Living Movement Oral History Project. (2001).
[121] Direct Examination of Nina Crone, Second Grade Teacher of Rachel Holland, Sacramento City Unified School District v. Rachel Holland, 786 F. Supp. 874, P 415.

from the rest of the class. Rachel didn't read at the same level, her math skills fell short of her peers.[122] But ultimately, Crone determined that none of this mattered. From her experience, the goal of second grade was to learn how to socialize with kids, develop language skills and learn to interact with other people and children, goals shared by Rachel and her class mates.[123]

The district had an entirely different view about Rachel, which they had formed partially through the assistance of the California Diagnostic Center CDC, an organization that offers "individualized services to special education students, their families and school districts"[124] in the Northern California Region. The CDC monitored Rachel closely at the Shalom School and determined that Rachel was vastly outmatched by her surroundings at school.[125]

Experts from both sides of the case had the opportunity to observe Rachel at the Shalom School at the same time and both sides arrived at entirely different conclusions regarding her competency, even during the exact same incident. As an example, experts from both sides observed Rachel, while walking along the school's courtyard during recess with several of her classmates, see a piece of paper on the ground several feet from her classmates, pick it up and toss it in a nearby trashcan. Through the eyes of the district expert, this was conclusive evidence that Rachel was incapable of sustaining interaction with her classmates. Easily distracted, Rachel had proven herself to incapably follow along with her classmates. To the other expert, noticing a piece of trash, picking it up and tossing it in the garbage, was not only an appropriate action to undertake, but a commendable action to take.[126] These conflicting findings themselves represented the fundamental conflict in the case.

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[122] Crone Testimony 394-395
[123] Crone Testimony 417
[124]DCN-CDE.ca.gov, About Diagnostic Center of Northern California, http://www.dcn-cde.ca.gov, (last visited April 15, 2011).
[125] 786 F. Supp. at 880.
[126] Disability Rights and Independent Living Movement Oral History Project. (2001).

Levi began his opinion by painting a glowing picture of Rachel, describing her as "well behaved and popular with her second grade classmates."[127] Levi also noted that Rachel enjoyed school and was motivated to learn."[128] The judge clearly outlined that IDEA ensures that every child with a disability has the presumed right to be educated with children who are not disabled. In order to make this decision, Levi drafted four factors, each of which has become the standard for the Ninth Circuit:

> "(1) the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom; (2) the non-academic benefits to the handicapped child of interaction with nonhandicapped children; (3) the effect of the presence of the handicapped child on the teacher and other children in the regular classroom; and (4) the costs of supplementary aids and services necessary to mainstream the handicapped child in a regular classroom setting."[129]

The factors chosen are notable because they are more expansive than the standards set forth in *Daniel R.R.* and *Roncker*. Whereas the *Daniel R.R.* test required a generalized inquiry into whether services in the segregated classroom could be emulated in an integrated setting and the *Roncker* test mandated an inquiry into whether the school had mainstreamed the child to the maximum extent possible, the *Holland* factors required the school to take a holistic view of the child in order to determine the best educational outcome possible.

Factor One – Educational Benefits to Rachel:

The Holland experts and Rachel's teachers testified that all of Rachel's IEP goals, most of which related to communication, could best be taught by exposure to other non-disabled children. The experts also noted that Rachel had taken significant academic strides at the Shalom

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[127] 786 F. Supp. at 876.
[128] 786 F. Supp. at 876.
[129] Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991); Barnett v. Fairfax County Sch. Bd., 927 F.2d [146] 153-54 (4th Cir.), cert. denied, 112 S. Ct. 175, 116 L. Ed. 2d 138 (1991); Daniel R.R., 874 F.2d at 1048-50; Roncker v. Walter, 700 F.2d 1058 (6th Cir.), cert. denied, 464 U.S. 864, 104 S. Ct. 196, 78 L. Ed. 2d 171 (1983).

School and her motivation stemmed from learning language and social skills from her peers.[130] The district, on the other hand, focused primarily on Rachel's limitations due to her disability, but failed to establish that the opportunities a segregated classroom would provide were in any form superior or equal to those available in the regular education classroom.[131]

The differing viewpoints demonstrated what Levi described as "clear conflicting educational philosophies."[132] Like the trash anecdote, Levi was particularly struck by one sharply contrasting evaluation of Rachel. During an assessment at the Shalom School, a CDC member noted that Rachel was sitting in class and holding a book upside down. The district's expert considered this conclusive evidence that she was not benefiting from the class. The Holland expert drew an entirely different conclusion after observing the same incident. This witness noted that one of Rachel's classmates had noticed her mistake and helped her right the book and find her place. From this incident, the expert determined that this interaction was indicative of Rachel's ability to benefit from her non-disabled peers and of extreme importance in her day to day education.[133]

Levi emphasized that he found no criticism on behalf of either side's perspective, but also noted that both viewpoints were hardly objective. With this in mind, he lent greater credibility to the Holland's witnesses for three reasons. First, he noted that the Holland witnesses had more experience evaluating children with disabilities. Second, he determined that the CDC testing may have been overly formalized and the circumstances had resulted in Rachel's discomfort. Finally, the judge reiterated that in implementing IDEA, Congress preferred mainstreaming.[134] Regardless of these findings, Levi decided that this conflict made the testimony of Rachel's

[130] 786 F. Supp. at 880-881.
[131] 786 F. Supp. at 880.
[132] *Id.*
[133] *Id.*
[134] *Id.*

second-grade teacher, Ms. Crone, all the more important. Crone testified that Rachel was actively making progress on her IEP goals, citing, for example, that Rachel was learning one-to-one correspondence in counting.[135] Crone added that Rachel could recite both the English and Hebrew alphabets and that her communication abilities were improving.[136] Perhaps most importantly, Crone noted that Rachel was in many ways a typical second grader, eager to participate in class and highly motivated to be involved. As a result, Rachel's confidence and independence had risen.[137] Based on these findings, the court determined that all of Rachel's IEP goals could be implemented in a "regular education setting with some modification to the curriculum and with the assistance of a part-time aide."[138]

Factor Two – Non-academic Benefits to Rachel

Under the second factor, Levi again sided with the Hollands, finding that Rachel could derive significant non-academic benefits from her non-disabled peers. The district contended that Rachel was not benefiting from regular exposure to non-disabled peers and that she was in fact isolated from her classmates, while the Hollands supported the finding that Rachel had substantially developed her social and communication skills in the regular classroom. Ultimately, in another determination of subjectivity, the court mostly bypassed the battle of the experts, attributing the conflicting findings as a reflection of "the predisposition of the evaluators and determined that testimony by Crone and Rachel's mother carried the most weight."[139] Judge Levi appeared perfectly content relying on these two witnesses, who both attested to Rachel's improved positive attitude, her excitement about school and her improved self-confidence. Conceding the fact that Kim could not be considered an objective observer, Levi still weighed

[135] Crone Testimony, 415.
[136] *Id. at* 412
[137] *Id.*
[138] 786 F. Supp. at 882.
[139] 786 F. Supp. at 883.

her opinion and testimony about the new friendships Rachel had developed in the Shalom School above the scope of the district's expert testimony, and accordingly determined the second favor also weighed in favor of placing Rachel in a regular classroom.[140]

Factor Three – Effect on the Teacher and Other Children

The court followed suit on the third factor, citing to the fact that neither side had presented any evidence indicating that Rachel has a discipline problem at school or that her presence in the classroom had distracted any of the other students. In fact, both sides had agreed upon one thing, Rachel was a well-behaved child who followed directions.[141] Additionally, the court determined that the special attention that Rachel did require had not caused the other students to suffer from a lack of attention. Again, Crone's testimony was particularly germane, testifying that she did not find that Rachel's presence interfered with her teaching in the slightest.[142]

Factor Four – Cost

Finally, the court accused the Distinct of inflating costs and failing to truly address the true comparison between the costs of a regular education and special education placement. The district had argued that it would cost $109,000 to educate Rachel full-time in a regular classroom. This finding was based on the assumption that Rachel would require a full-time aid and that the district would have to pay over $80,000 to provide school-wide sensitivity training.[143] The court took issue with the district's calculations entirely. Citing the fact that no evidence had been presented suggesting Rachel would need a full-time aid, the court determined that this cost was wildly exaggerated. Additionally, the court determined that sensitivity training

[140] *Id.*
[141] Sid Wolinsky would later point out that this was an important factor in the case. Rachel was very much an ideal plaintiff because she was well-behaved, generally passive, and curious in the classroom.
[142] 786 F. Supp. at 883.
[143] *Id.*

would not be necessary, and if for whatever reason it would be, that evidence presented by the California Department of Education demonstrated that the training could be had at no cost.[144] Furthermore, should training be necessary at a cost, the court determined that it would be inappropriate to assign the total cost of the training to Rachel when other students would surely benefit.[145]

Ultimately, having ruled in the Hollands favor for each of the four factors, Judge Levi ruled that the school district had not met its burden of establishing that the costs of mainstreaming the child outweighed the benefits. Accordingly, Levi determined that under IDEA that Rachel's appropriate placement was in a regular second grade classroom, with some supplemental services, as a full-time member of that class.[146] Sacramento City Unified proceeded to appeal to the Ninth Circuit.

Reinforcements

Notably, Judy Heumann, leader of the HEW protests, was serving as the U.S. Education Department's Assistant Secretary for Special Education and Rehabilitative Services at the time of the Ninth Circuit appeal. Like Rachel, Heumann had also faced discrimination due to a disability at a young age. As a child, Heumann's school district in New York had denied her admission for four years because she had polio.[147] Catching wind of the Holland case, Heumann convinced the U.S. Justice Department, under the watch of the Clinton Administration, to file an

[144] *Id.*
[145] *Id.*
[146] *Id.* at 884.
[147] Elaine Elinson and Stan Yogi, *Wherever There's a Fight: How Runaway Slaves, Suffragists, Immigrants, Strikers and Poets Shaped Civil Liberties in California* 364 (2011).

amicus brief on behalf of Rachel.[148] The brief highlighted the fact that during the 1989-90 school year, California schools were only educating 3.16 percent of developmentally disabled children in regular classrooms.[149] Heumann outlined the stance of the Clinton Administration, "We believe in inclusion for children with disabilities, and we will look for cases where we can be supportive….This case illustrated a much broader problem than just one affecting the Holland child. My hope is that there's a message in our becoming involved in a case like this."[150] Ultimately, the Court of Appeals determined that Levi's test directly addressed "the issue of the appropriate placement for a child with disabilities under the requirements of IDEA."[151] In affirming the decision, the Ninth Circuit officially adopted *Holland* test to analyze LRE compliance under IDEA. Sacramento City Unified appealed the Ninth Circuit decision to the Supreme Court, only to be denied review.

The Least Restrictive Environment

It has been seventeen years since the Ninth Circuit upheld Judge Levi's four factor test in *Holland* and thirty-six years since the passage of the Education for All Handicapped Children Act. Remarkably, the Supreme Court has still not decided a case regarding the LRE provision of the IDEA. As it stands, there are three different tests being used by federal courts to assess IDEA compliance. The Fourth, Sixth, and Eight Circuits all follow the *Roncker* test. The *Daniel R.R.* test is followed by the Third, Fifth, and Eleventh Circuit. The *Holland* test is used by the Ninth Circuit and has since been adopted by a Seventh Circuit District Court.[152]

[148] Debra Viadero, *Administration Backs Disabled Girl in 'Inclusion' Case*, Education Weekly, (September 15, 1992).
[149] Elaine Elinson and Stan Yogi at 364.
[150] *Id.*
[151] Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. by & Through Holland, 14 F.3d 1398, 1399 (Ninth Cir. Cal. 1994)
[152] D.F. v. Western Sch. Corp., No. IP 94-0853-C H/S, 1996 WL 164439, at *5 (S.D. Ind. Mar. 29, 1996).

The *Roncker* court first established a solid framework from the other circuits to work from, including the Ninth Circuit through the *Holland* test. Several other circuits have chosen instead to rely on the *Daniel R.R.* test because the factors "adhere so closely to the language of the Act [IDEA] and, therefore, clearly reflects the Congressional intent."[153] These factors, as well, were incorporated into the *Holland* test.

However, both the *Roncker* and *Daniel R.R.* tests demonstrate substantial shortcomings. The *Roncker* test fails to clearly acknowledge that both academic and non-academic benefits must be considered by the court.[154] This is problematic considering that the IDEA underscores that its "strong preference"[155] for mainstreaming is not only founded on academic achievement, but also on social achievement as well.[156]

While the *Daniel R.R.* test has been favored in some instances due to its adherence to statutory language, this very strict adherence, may in fact, be its primary shortcoming. The broad statutory language is simply not "user friendly" for parents and school administrators who are attempting to comply with IDEA.[157] Additionally, the *Daniel R.R.* court explicitly stated that the list of factors was not exhaustive, and by not providing well-defined criteria, compliance becomes a much more difficult proposal.[158]

Alternatively, the *Holland* test has incorporated the most relevant factors identified by the prior Circuit tests and mandates the most comprehensive inquiry into the appropriateness of the educational environment for the student. The test explores the totality of the available information concerning the student and demands specific focus on that student's individual

[153] Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991).
[154] 65 UMKC L. Rev. at 311.
[155] 786 F. Supp. at 878.
[156] 65 UMKC L. Rev. at 311.
[157] *Id.*
[158] *Id.*

needs.[159] Furthermore, the criteria laid out by the Ninth Circuit is clear, simple, and provides parents and school administrators with a better understanding of what precisely constitutes IDEA compliance.[160]

A Distinctively Different Life

The duration of the litigation lasted for over six years, longer if you include the time the Hollands initially spent discussing educational options with Crocker Riverside. Throughout the entire Due Process and legal process, the Hollands were spending money on Rachel's private school. Once the matter was finally resolved, the school district had to reimburse the Hollands for the cost of the schooling and for attorney's fees. Ultimately, Sacramento City Unified spent over a million dollars to unsuccessfully prevent Rachel from attending a general education classroom as mandated by IDEA.[161]

In September 1994, an eleven-year-old Rachel Holland began fifth grade at the Leonardo da Vinci School, an Arts and Science based K-8 with a stated mission to develop the "whole child as a curious and inventive person, responsible for preserving and creating beauty in our cultural and natural environments."[162] It is somewhat remarkable that the Hollands were still willing to send their daughter to school in a district that fought desperately to exclude her from the general education program, but this can be chalked up to the determination that pushed the Hollands through the entire legal process. By the time the matter had headed to litigation, the

[159] *Id.*
[160] *Id.*
[161] Wayne Sailor, *Devolution, School/Community/Family Partnerships, and Inclusive Education*, 7-25, New York, NY: Teachers College, Columbia University (2002).
[162] Leonardo Davinci School of Art and Science, http://schools.scusd.edu/leonardodavinci/, (last visited Apr. 20, 2011).

Hollands were convinced that the district was in the wrong and that their policies needed to change.

Rachel thrived after the court case and completed high school fairly seamlessly. While Rachel's academic curriculum varied from her classmates, she fit in socially and still connects with many of these friends in person and on Facebook.[163] After completing her Sacramento City Unified education, Rachel went to a local community college to participate in a life skills transition program.[164] About five years ago, Rachel moved into an apartment where she lives independently with one other roommate, a friend who also has developmental disabilities. She currently juggles two part-time jobs at two different hair salons, while also selling jewelry on the side.[165] Rachel's progress as an independent adult has completely shattered the district's conception of her abilities. Rachel has achieved and surpassed all of the goals that her parents hoped for her. Robert recently reflected, "I always thought that even though she has a distinctive disability, there is no need for her to have a distinctively different life."[166] Rachel certainly took note. She learned to navigate a school campus, to take public education, to read at a functional level, and she most definitely learned to create good life experiences for herself.

Sixteen Years Later

Fast forward sixteen years and the Sacramento City Unified, like many school districts, is still grappling with how to appropriately provide education to students with developmental disabilities. The district currently serves 5,632 special-needs students, about 12 percent of its overall student population. A third of these students are still taught exclusively in self-contained

[163] Telephone Interview with Kim Holland (Mar. 3, 2011).
[164] *Id.*
[165] *Id.*
[166] Telephone Interview with Robert Holland (Mar. 3, 2011).

special education classes.[167] However, Sacramento City Unified is currently redirecting many students in self-contained classrooms or independent learning centers to general education settings, as Sacramento City Unified looks cut costs and revisit how to improve their learning environment.[168] This past fall, the district reintegrated 69 special-needs students in a move the district hopes will save millions of dollars.[169]

Becky Bryant, director of special education services at Sacramento City Unified estimated that the district pays $35,000 annually for one child to attend an independent learning environment and that the district has 357 students in this situation. Alternatively, Bryant contends, the average cost of educating a special-needs student within the regular education setting is about $17,000.[170]

To handle this transition, the district will implement the School-wide, Application Model, SAM, a data-based program early intervention program.[171] Richard Villa, who assists districts across the country on inclusive education practices, notes that districts across the country have moved away from separate classes for special-needs students and that the results for children in integrated settings have improved markedly.[172] Despite this commitment, the district has only allocated $79,000 to begin training teachers and staff members on the SAM model.

Inclusion based special education services which were deemed too expensive less than 20 years ago, are now fiscally favored in a state where education dollars are hard to come by. It is unclear what the direct affect of the *Holland* litigation has had on these recent shifts or whether

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[167] M. Gutierrez, *Sac City, Elk Grove Follow Trend of Bringing Special-Ed Students Back to Neighborhood Schools*, Sacramento Bee, Aug. 16, 2010, http://www.sacbee.com/2010/08/16/v-print/2961066/sac-city-elk-grove-follow-trend.html.
[168] *Id.*
[169] It is unclear whether these initial placements were in violation of IDEA or not.
[170] *Sac City, Elk Grove Follow Trend of Bringing Special-Ed Students Back to Neighborhood Schools*
[171] *Id.*
[172] *Id.*

these district-wide changes are financially or philosophically rooted. What they do show, however, is that the special education landscape is far from settled.

Conclusion

Rachel's victory represents a high-water mark of the inclusion movement. Wolinksy explained that the case was "earth shaking."[173] It created an environment of fear for school districts and was monumentally effective for the Hollands. The case symbolized a new launching pad for disability rights. The case forced districts to look at segregation and parents and advocates used the ruling to push for full inclusion.[174]

The national special education landscape has made significant strides since the wave of LRE cases took off. According to the U.S. Department of Education, students with moderate mental retardation, such as Rachel, are faring much better twenty years later. Whereas the Hollands had to endure agonizing and costly litigation for years to ensure that their daughter would receive her entitled educational placement, 82.4 percent of all students with mental retardation are receiving at least 20 percent of their class time in a general education classroom with nearly 50 percent receiving at least 60 percent of their class time in an inclusive setting.[175]

However, as policy makers and advocates continue their push to include more students with intellectual disabilities into general classrooms and as inclusion has steadily become the norm, increased numbers of parents are staunchly resisting inclusive placements.[176] This trend,

[173] Interview with Sid Wolinsky, Director of Litigation at Disability Rights Advocates, in Berkeley, CA. (May 1, 2011).
[174] Interview with Alene Mayerson, Director of Litigation at DREDF, in Berkeley, CA. (Apr. 20, 2011).
[175] U.S. Department of Education, National Center for Education Statistics. (2010). *The Digest of Education Statistics 2009* (NCES 2009-013), http://nces.ed.gov/fastfacts/display.asp?id=59.
[176] Robert Tomsho, *Parents of Disabled Students Push for Separate Classes*, Wall Street Journal, Nov. 27, 2007, http://online.wsj.com/article/SB119610348432004184.html.

while surprising, demonstrates how broad of an impact the *Holland* case and other LRE decisions have had.

It has become common place for advocates for the disabled to overwhelmingly argue that special-education students benefit both academically and socially within an inclusive setting. Legislators often side with these advocates, arguing that mainstreaming is beneficial for students and cost-effective for taxpayers.[177] However, whereas some teachers and administrators have often served as vocal opponents to inclusive practices due to a lack of training and resources, more parents are joining in as dissenters. In a marked shift in philosophy, some parents are demanding a complete reversion to a pre-*Holland* era classroom, demanding segregated teaching environments and even separate schools.[178]

This growing dissatisfaction is rooted in the belief, touched upon earlier, that some parents believe that a segregated learning environment can actually best provide necessary academic and social benefits. These parents operate under the assumption that special education teachers have higher expectations and can better provide individualized attention for their students, that special education curricula are appropriate for their intended students, and that regular education teachers and students do not want special needs students in their classrooms.[179]

This change in philosophy shows that the pendulum of change may be retreating somewhat, but it is important to note that this perspective is by no means universal. If anything, this new wave of inclusion opponents shows how far parents of students of disabilities have come since the *Holland* case. The range of choices for students with disabilities has never been so expansive. Whereas the Hollands were simply presented with one option, parents of children

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[177] *Id.*
[178] *Id.*
[179] Richard Thompkins and Pat Deloney, *Inclusion: The Pros and Cons Underlying Assumptions Surrounding Greater Versus Lesser Inclusion,* Southwest Educational Development Laboratory Vol. 4, No. 3 (1995).

with intellectual disabilities now have the autonomy and a recognized legitimacy to effectively advocate for a wide variety of options for their children.

The Hollands admittedly never dreamed of the stakes that were on the line when they were trying to secure a placement in a general education classroom that they were comfortable with. Unbeknownst to Kim and Robert, their fight left a lasting mark in the disability advocacy movement and drastically altered perceptions and best practices of schools regarding children with disabilities. This new wave of advocacy has firmly etched itself within the moral and ethical underpinnings of social consciousness and has pushed schools closer to a full embrace of the equality of opportunity for people with disabilities.