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WHEN LOCAL GOVERNMENTS WAIVER: GIVING BITE TO STUDENTS WITH DISABILITIES' FEDERAL RIGHT TO AVAIL PHYSICAL EDUCATION

Maliha Ikram*

I. Introduction

Including Students with Disabilities (SWDs) in physical education is a national interest that must be protected. Federal law, codified in the Individuals with Disabilities Education Act (IDEA), articulates that disability is a natural part of the human

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experience, and improving educational results for children with disabilities is an *essential element* of U.S. national policy of ensuring equality of opportunity for individuals with disabilities.¹ With a national policy as profound as equality backing federal legislation for individuals with disabilities, it is surely the case that eliminating or effectively undercutting opportunities for SWDs to participate in physical education programming is a violation of their education rights.² In this Article, the author proposes that physical education is and has always been an integral part of general public school curriculum. As such, SWDs must be provided equal access to physical education in public schools both as a matter of statutory right and national public policy.

The benefits of physical education for students of all levels of ability, especially for SWDs, create a social good which the national government has an interest in protecting and furthering.³ Too often, however, physical education is disregarded by local governments, resulting in a disparity of programming across school districts and students.⁴ School

¹ 20 U.S.C. § 1400 (c)(1) (2010).

² Ian Forster, Comment, *Fair Play for Those Who Need It Most: Athletic Opportunities for High School Student Athletes with Disabilities*, 22 JEFFREY S. MOORAD SPORTS L.J. 693, 696-97 (2015).

³ 20 U.S.C. § 5812 (3)(B)(iv) National Education Goals; *see also* U.S. DEP'T OF HEALTH & HUM. SERV. OFFICE OF DISEASE PREVENTION & HEALTH PROMOTION, PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS MIDCOURSE REPORT STRATEGIES TO INCREASE PHYSICAL ACTIVITY AMONG YOUTH, (Dec. 31, 2012) <https://health.gov/paguidelines/midcourse/pag-mid-course-report-final.pdf>

⁴ Diane Rado, *Many schools skipping some PE classes, despite the law*, CHI TRIB. (Jun. 8, 2016, 5:13 AM), <http://www.chicagotribune.com/news/ct-skipping-phys-ed-classes-met-20160607-story.html>.

districts cite budget cuts, insufficient staffing ability, and other financial pressures as rationales for cutting physical education at the expense of students. While the presence or lack of physical education outright as a good or bad thing is a separate policy matter, if physical education is included in a school's general curriculum—as it historically has been⁵—the obligation is on the local and federal governments to see to it that SWDs are being provided equal opportunity to participate⁶.

First, this article will discuss physical education in public school education and federal laws that codify the importance of protecting SWDs' public education rights through the Individuals with Disabilities Education Act (IDEA) and the obligations that IDEA creates for inclusion of SWDs in physical education curricula. **Second**, it will lay out case law that demonstrates litigation over: the meaning of a Free Appropriate Public Education (FAPE) under IDEA; accommodation of SWDs in physical activities; and the wrongful withdrawal of physical education curricular rights as punishment. **Third**, it will cover state laws that have done well with implementing IDEA's federal mandates, and IDEA's overlap with the U.S. Department of Education's Office for Civil Rights (OCR) when it comes to discriminatory behavior against SWDs in local educational programming. **Fourth**, it will make an example of the Chicago Public School system, which continues to fail to enforce its legally mandated physical education requirements, thus adversely impacting SWDs through selective administration and waiver programs. **Fifth**, and finally, it will articulate national policy interests in fostering physical education programming

⁵ See U.S. DEP'T OF HEALTH & HUM. SERV. OFFICE OF DISEASE PREVENTION & HEALTH PROMOTION, PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS MIDCOURSE REPORT STRATEGIES TO INCREASE PHYSICAL ACTIVITY AMONG YOUTH, (Dec. 12, 2012), <https://health.gov/paguidelines/midcourse/pag-mid-course-report-final.pdf> (last visited Dec. 17, 2017).

⁶ 20 U.S.C. § 1400 (2010).

and how those interests necessitate inclusion of SWDs in physical education given Congress' rationale in enacting IDEA. Due to the long-standing importance and inclusion of physical education curriculum in public schools, SWDs must be given equal opportunity to participate, or schools will be violating national public policy and SWDs' federally-mandated education rights. Such violations should constitute adequate grounds for sanction via an amendment to IDEA that punishes school districts for evading their obligation to provide SWDs the same curricular offerings as their non-disabled peers.

II. The Relationship between Physical Education's Place in Public School Curriculum and the Laws that Protect Students with Disabilities' (SWD) Interests in Attaining Public Education

Physical education has historically been instrumental in "general" public school curriculum.⁷ Scholarly articles discussing physical education and its place in American schools have been published for over ninety years.⁸ This is because contrary to what some may mistakenly believe, physical education opens the mind and elevates a child's learning process.⁹ Thus, its curricular inclusion was not only pervasive

⁷ Jesse F. Williams, *Physical Education in the School*, U. CHI. PRESS. SCH. REV., VOL. 34, NO. 4 285, 292 (1926) (suggesting that physical education arose in the nineteenth century as a reaction to societal shifts in ideology; it is necessary from biological, social, and political standpoints).

⁸ William H. Peacock, *Physical Education and the Curriculum*, U. NC. PRESS HIGH SCH. J., VOL. 33, NO. 3, THE HIGH SCHOOL CURRICULUM 113, 116 (1950) (for instance, the author of this 1950 article articulates that growth in "social, emotional, intellectual, and recreation" areas is "stimulated and accelerated" by physical education, thus fostering the total development of the child).

⁹ Wendell C. Sadler, *Physical Education: Part of the Learning Process*, THE CLEARING HOUSE, VOL. 66, NO. 1, TAYLOR & FRANCIS, LTD. 6 (1992).

but supported.¹⁰ American adults have generally held positive perceptions of physical education and believe that it should be part of general school curriculum.¹¹ The National Association for Sport and Physical Education (NASPE) reported that a study showed that 81% of adults in a sample of 1,000 adults and 500 teens all agreed with the statement that “daily physical education should be mandatory in schools” (NASPE, 2000b, p. 1).¹² This is a clear indication that the public inherently values physical education as part of curriculum.¹³ Often times, children do not have extra-curricular opportunities or home environments that are conducive to participation in physical activity, which necessitates that physical education be provided at the general curricular level.¹⁴ It is through required curricular physical education that a child is taught the basics of physicality which may be foundational for other aspects of the child’s life.¹⁵ Furthermore, curricular physical education should be exactly

¹⁰ U.S. DEP’T OF HEALTH & HUM. SERV. OFFICE OF DISEASE PREVENTION & HEALTH PROMOTION, PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS MIDCOURSE REPORT STRATEGIES TO INCREASE PHYSICAL ACTIVITY AMONG YOUTH, at 23 (DEC. 12, 2012) <https://health.gov/paguidelines/midcourse/> (saying “PE has been an institution in American schools since the late 19th century... most states mandate PE for students”).

¹¹ George Graham, *Children’s & Adults’ Perceptions of Elementary Sch. Physical Educ.*, THE ELEMENTARY SCH. J., VOL. 108, NO. 3 241 (2008).

¹² *Id.* at 242-43 (specifically, NASPE found in a 2003 study that 95% of adults agreed that physical education should be part of the school curriculum, with 81% agreeing that it should be provided daily).

¹³ *Id.* at 241, 242.

¹⁴ *Id.* at 247.

¹⁵ Peacock, *supra* note 8, at 113-114.

that, physical *education*.¹⁶ Physical education is extremely valuable to all students, for their personal well-being and their engagement in the public sphere. It goes without saying that this applies to SWDs as well. Physical education is beneficial to *all* children.¹⁷

Because physical education is sufficiently part and parcel to a general¹⁸ public school curriculum, laws that mandate SWDs' inclusion in, and access to, general public education require inclusion in physical education.¹⁹ It is the school's responsibility to ensure that SWDs have access to physical activity as their non-disabled peers do, whether that means full integration or some variant of adapted integration.²⁰ Though this is not a fundamental right, the *opportunity* to participate is.²¹ Usually, a SWD is assessed for the opportunity to participate in physical activities—physical education in the case at hand—in an Individualized Education Program (IEP). Once that provision for the specific SWD is put in place in their IEP, their participation becomes a federally-protected right, rather than a naked suggestion.²² It is critical to provide SWDs

¹⁶ Graham *supra* note 11, at 246 (it is destructive for children to not appreciate the difference between physical education and recess, as it takes away from their understanding of structured physical activity as opposed to mere “play time”).

¹⁷ *Id.* at 247; *see also* Peacock, *supra* note 8, at 114 (“If competition...is educationally sound for the skilled performer, it certainly must be sound for the average skilled and low-skilled performer”).

¹⁸ 20 U.S.C. § 1400 (c)(5)(A) (2010).

¹⁹ 20 U.S.C. 1412(a)(5)(A); 34 C.F.R. § 300.108

²⁰ Forster, *supra* note 2, at 693, 695-96.

²¹ *Id.*

²² *Id.* at 696-97.

opportunities to be physically active, just like their peers. This is not just because of the benefits to their health, but because of how structured physical activity that physical education curriculum provides can promote the students' "social, emotional, and academic health."²³ The sub-points below articulate the federal bases that give breath to SWDs' rights to avail physical education in ways as meaningful to them as their non-disabled peers enjoy.

A. Individuals with Disabilities Education Act (IDEA)²⁴

The Individuals with Disabilities Education Act (IDEA or "the Act") was enacted in 1975 and reauthorized in 2004.²⁵ When signed into law by President Gerald Ford on November 29, 1975 as the "Education for All Handicapped Children Act (Public Law 94-142)," the Act was meant to serve as a big step for civil rights, opening public schools for millions of children with disabilities to access.²⁶ Prior to its enactment, Congress found that millions of SWDs' educational needs were not being met for the following reasons: they did not receive appropriate educational services; they were excluded entirely from the public school system and from being educated with their peers; their disabilities were left undiagnosed and thus they were prevented from having a successful educational experience; or there was a lack of adequate resources within the public school system such that families were forced to seek services outside of it.²⁷ The Ford administration recognized that giving children

²³ *Id.* at 703.

²⁴ 20 U.S.C. § 1400 (2010).

²⁵ U.S. DEP'T OF EDUC., INDIVIDUALS WITH DISABILITIES EDUC. ACT, <https://sites.ed.gov/idea/about-idea/> (last visited Dec. 14, 2017).

²⁶ *Id.*

²⁷ 20 U.S.C. § 1400 (c)(2)(A)-(D) (2010).

with disabilities the opportunity to develop their capabilities, engage with others, and contribute to their communities was a major social goal that needed to be met.²⁸

The Act, now known as IDEA, guarantees SWDs access to a free appropriate public education (FAPE) in the least restrictive environment (LRE) to every child with a disability pursuant to their unique Individualized Education Program (IEP).²⁹ As the Act has grown and evolved over the years, the focus has been on increasing access to general education curriculum—availed by students who do not have disabilities—as well as setting achievable goals for SWDs as they advance through schooling.³⁰ Since the enactment of the Ford version of the Act, there were still gaps which led to the reauthorization of the Act as IDEA in 2004. Congress found that while the Act had been successful in ensuring SWDs and their family access to a FAPE, expectations of SWDs were kept too low by school districts, and there was insufficient focus on finding methods to best teach SWDs to facilitate learning.³¹ This led Congress to codify in IDEA that for efficacy, SWDs must be met with higher expectations and optimism for their success—which would be possible by *ensuring their access* to the general education curriculum in the regular classroom *to the maximum extent possible*.³² Additionally, efficacy is improved by providing appropriate special education and related services (including highly prepared aids and supports in the regular classroom) and by providing whole-school approaches (such as positive

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ 20 U.S.C. § 1400 (c)(3)

³² 20 U.S.C. § 1400 (c)(5) (A)-(H) (2010).

behavioral interventions³³) to address the learning and behavioral needs of SWDs.³⁴ Congress concedes that the role of local governments and the States is not absolute, and that it is “in the national interest” that the Federal Government have a role in assisting state and local efforts to improve results for SWDs.³⁵ This follows with the overall purpose of IDEA, in which assurance that all SWDs have access to a FAPE that emphasizes special education and services designed to meet their unique needs³⁶ and prepare them for the future is mandated by the federal government.³⁷ Indeed, through IDEA, the federal government places on itself the responsibility of assisting localities in providing for the education of all SWDs and assessing and “ensuring the effectiveness of” efforts to educate SWDs.³⁸

To succeed in meeting IDEA’s goals, integration of SWDs into the general classroom setting is paramount, as the goal of inclusivity is very difficult to measure otherwise.³⁹ But, naturally, with legislation like IDEA, progress is hampered by school districts skirting their obligations to SWDs through

³³ Regarding providing school-wide goals of boosting self-esteem for SWDs so neither they nor their colleagues label them as “disabled” to address their learning and behavioral needs; *see also* 20 U.S.C. § 1400 (c)(5) (F) (2010).

³⁴ 20 U.S.C. § 1400 (c)(6) (2010).

³⁵ *Id.*

³⁶ Forster, *supra* note 2, at 693, 698-99 (2015) (each student’s “needs” are established through a detailed IEP that is customized to that student’s disability).

³⁷ 20 U.S.C. § 1400 (d)(1)(a) (2010).

³⁸ 20 U.S.C. § 1400 (d) (1)-(4) (2010).

³⁹ 34 C.F.R. §104.34 (2007).

inadequate implementation and the government turning a blind eye to remedying local negligence.⁴⁰ This is glaringly the case when it comes to providing physical education, as it is often the first thing to go when the budget gets tight for school districts.⁴¹ What this means for actually achieving a FAPE in a LRE becomes the question. How is it that a SWD can truly get what the federal government mandates under IDEA when school districts are cleverly using budget cuts to selectively choose what curricula is taught and for whom? When school districts cut physical education programs in contravention of their state laws, selectively administer them to certain students, or devise schemes that make it appear as though there is student self-selection into these programs rather than administrative decision-making, SWDs' rights are violated under IDEA.

B. The LRE Mandate requires that SWDs have Physical Education

The Least Restrictive Environment (LRE) mandate is designed to prepare SWDs for life in the real world.⁴² The LRE is a federal requirement that SWDs receive their education to the maximum extent appropriate alongside their non-disabled peers, and that removal of special education students may not happen unless education in regular classes cannot be satisfactorily achieved despite supplemental aids and services.⁴³ The idea is that preparing a SWD for life after schooling can only be accomplished by exposing the child to regular classroom settings; to always restrict a SWD to a segregated special

⁴⁰ Rado, *supra* note 4.

⁴¹ *Id.*

⁴² 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114.

⁴³ *Id.*

programming setting runs in contravention of this goal.⁴⁴ An education that is “adequate” is one that provides the SWD an opportunity to engage in a disabled/non-disabled integrated space save for in outstanding cases of disability. Thus, the FAPE that a school provides necessitates that the education be in the LRE.⁴⁵

What is interesting about the LRE, especially as it pertains to physical education, is that it employs the opposite of an “earn your way in” approach.⁴⁶ Instead, every SWD has the *right* to be in a regular class, including physical education.⁴⁷ The burden is on the school to show and document why the regular class is not the “appropriate” environment for the child given their disability.⁴⁸ Even then, the options are not limited to an “either or,” “regular or special” placement; rather, the focus is on the child’s individualized educational needs, so a spectrum of alternative or customized placement must be contemplated.⁴⁹ The child’s individualized education program (IEP) provides the criteria and trajectory of progression tailored specifically to the SWD and the nature of their disability.⁵⁰ So, for physical education, a child’s particular IEP may range from the SWD being fully integrated in the regular physical education class to needing a more restrictive or “special” environment to achieve

⁴⁴ See Julian U. Stein, *Physical Educ. & Special Educ.—Likely Partners?*, THE J. OF EDUC., VOL. 180, NO. 2, SPECIAL EDUCATION: A TEST FOR LIBERAL DEMOCRACY 77, 81 (1998).

⁴⁵ *Id.*

⁴⁶ *Id.* at 83.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 20 U.S.C. § 1414(d)(1)(A) and (d)(6)); 34 C.F.R. § 300.320(a)(1)-(7).

success.⁵¹ It is not always the interest of the SWD, either, that may determine their inclusion or exclusion from a regular physical education setting. While the safety of the SWD is important, if accommodations are such that the *nature* of the physical activity (i.e. a game of basketball) is changed, or otherwise places the individual with a disability at an unfair advantage or a non-disabled person at a disadvantage, such integration may not be appropriate.⁵² In this way, the LRE is actually a measured approach that weighs the real interests of the SWD and the objectives of the regular classroom, rather than a purely inclusionist approach⁵³ which may not actually benefit the specific SWD or an exclusionist one that isolates the SWD from society at large.⁵⁴

The roots of the recognized importance of physical education for SWDs run deep. Physical education was a specified curricular aspect of special education in the 1971 Education for All Handicapped Children Act and remained as such with the Act's reauthorization as IDEA.⁵⁵ Even still, as far back as the 1950s and 1960s, advocates for physical education for all of all abilities pushed for more robust programming.⁵⁶ The implementation of "adapted" physical education was the outgrowth of relationships between the National Association of State Directors of Special Education (NASDE), the National Consortium for Physical Education and Recreation for Individuals with Disabilities (NCPERID), and the Special

⁵¹ Stein, *supra* note 44, at 83.

⁵² *Id.* at 85.

⁵³ *Id.* at 87. (even the LRE ceiling of inclusivity contemplates this scheme and is called "mainstreaming").

⁵⁴ *Id.* at 86.

⁵⁵ *Id.* at 77.

⁵⁶ *Id.* at 79.

Olympics.⁵⁷ “Adapted” physical education is a means of providing SWDs meaningful physical education through instruction that is competent in administering physical programming based on the students’ ability level.⁵⁸

Congress had always been clear, even prior to passing IDEA,⁵⁹ that SWDs were to receive the same opportunities as non-disabled children through participation in physical education.⁶⁰ This was meant to be active participation in *physical education*, not other rehabilitative, therapeutic, or clinical engagement.⁶¹ The goals of physical education within this legislative scheme include: development of physical and motor fitness; development of fundamental motor skills and patters; development of skills in aquatics, dance, individual and group games, and sport.⁶² It is imperative that schools do not confuse therapeutic services with physical education, as the goals and objectives of therapy and physical education are dissimilar.⁶³ Whether it is conflating therapy with physical education or neglecting physical needs altogether, schools too often disregard the LRE mandate that they provide physical

⁵⁷ Stein, *supra* note 44, at 79.

⁵⁸ See *What is Adapted Physical Education?*, ADAPTED PHYSICAL EDUC. NAT'L STANDARDS, <http://www.apens.org/whatisape.html> (last visited Dec.14, 2017).

⁵⁹ See P.L. 94-142.

⁶⁰ Stein, *supra* note 44, at 80.

⁶¹ *Id.* (Suggesting that these services have always been defined as “related” services under IDEA. Physical education is a primary service—thus, therapies are adjuncts to physical education and cannot supplant it).

⁶² *Id.*

⁶³ *Id.*; see also 20 U.S.C. § 1400 (2010).

education to SWDs pursuant to their right to a FAPE.⁶⁴ In fact, physical education and special education are harmonious in their objectives. They both seek to promote the same philosophies and objectives for students: “attention to the whole child, maximum development of the child’s potential, highest quality [of] life possible, enjoyable use of leisure time, [and] participation to the maximum extent possible in the community and the real world.”⁶⁵ Given that physical education is a necessary and traditionally included part of general curriculum and treated as critical for SWDs by legislation, it is clear that ignoring the FAPE LRE mandate regarding physical education is a violation of SWDs’ rights.

III. Cases of Import: The Framework for Litigating SWD’s Curricular Rights

A. Free “Appropriate” Public Education under IDEA Generally

Laying down the groundwork for SWDs rights in education is perhaps the most logical first step to the later destination of physical education inclusion. *Andrew F. v. Douglas County School District*⁶⁶ is the most recent and significant interpretation of SWDs’ rights at the Supreme Court level. In thinking about IDEA and its requirement that every eligible child receive a FAPE by means of a “uniquely tailored” IEP,⁶⁷ the

⁶⁴ See *M.H. v. New York City Dep’t of Educ.*, 685 F.3d 217, 249 (2d Cir. 2012) (where the court found that the plaintiff child’s IEP—which included adaptive physical education—was insufficient due to a lack of specificity in how to measure annual progress. Thus, plaintiff was denied FAPE: measurement statements should have been included within the IEP to render it compliant).

⁶⁵ Stein, *supra* note 44, at 92.

⁶⁶ See *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1., 137 S. Ct. 988, 998 (2017).

⁶⁷ 20 U. S. C. §§1401(9)(D), 1412(a)(1).

Court built upon the first Supreme Court case covering the FAPE requirement, *Board of Ed. of Hendrick Hudson Central School Dist., Westchester City. v. Rowley*.⁶⁸ While *Rowley* failed to establish a test for determining the “adequacy” of educational benefits provided to the child, it did so based on an assumption of the facts of the case.⁶⁹ For a fully-integrated child, the IEP would have to “reasonably calculated” so the child could “achieve passing marks and advance from grade to grade.”⁷⁰ The *Rowley* court found the IEP to be adequate in providing a FAPE to the plaintiff because it conferred an “educational benefit [that is] merely...more than *de minimis*.”⁷¹

The *Endrew* Court rearticulated that IDEA requires that every IEP must:

“ [include] a statement of the child’s present levels of academic achievement and functional performance,” describe “how the child’s disability affects the child’s involvement and progress in the general education curriculum,” and set out “measurable annual goals, including academic and functional goals,” along with a “description of how the child’s progress toward meeting” those goals will be gauged⁷² ... [and] “special education

⁶⁸ See *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982).

⁶⁹ *Endrew* 137 S. Ct. at 996.

⁷⁰ *Id.*; see also *Id.* at 1001 (it is also worth noting that the Supreme Court in *Endrew* would not require “grade level” advancement, as it is at odds with an otherwise *de minimis* requirement; courts “will not attempt to elaborate on what ‘appropriate’ progress will look like from case to case”).

⁷¹ *Id.* at 997.

⁷² *Endrew* 137 S. Ct. at 994.; see also 20 U.S.C. §§1414(d)(1)(A)(i)(I)–(III).

and related services . . . that will be provided” so that the child may “advance appropriately toward attaining the annual goals” and, when possible, “be involved in and make progress in the general education curriculum.”⁷³

The Plaintiff Endrew had an IEP drafted to reflect his disability status and address his educational needs. Out of concern that his progress was lacking, his parents sought review of the IEP in the hope that they would receive a more comprehensive one conducive to advancement.⁷⁴ When this failed, and Endrew did better at a private school for children with autism, his parents again sought a new IEP from the public school to address his needs.⁷⁵ After this too proved inadequate for Endrew’s parents, they sought relief in the form of reimbursement for tuition at a private school.⁷⁶ The parents stated that the public school did not provide a FAPE⁷⁷ while he was enrolled there, and that the final IEP proposed was “not reasonably calculated to enable [Endrew] to receive educational benefits.”⁷⁸ Both the Federal District Court of Colorado and the Tenth Circuit held that all the *Rowley* precedent required was that children with disabilities receive “some educational benefit;” furthermore, Endrew’s IEP was “reasonably calculated to enable [him] to make some progress.”⁷⁹ So, Endrew did—according to the lower courts—receive a FAPE. Given this background, the Supreme Court held that IDEA does not

⁷³ 20 U.S.C. §1414(d)(1)(A)(i)(IV).

⁷⁴ *Endrew* 137 S. Ct. at 997.

⁷⁵ *Id.* at 996.

⁷⁶ *Id.* at 997.

⁷⁷ *Id.* at 995 (Emphasis on “appropriate.”).

⁷⁸ *Id.* at 997.

⁷⁹ *Id.*

guarantee a particular level of education, but instead “simply reflects the unobjectionable proposition that IDEA cannot and does not promise” any particular outcome.⁸⁰ Additionally, since the IEP must only be reasonably calculated to enable a child to progress given their unique circumstances, IEP review must “appreciate” that the question is not about ideals, but about whether or not the IEP is “reasonable.”⁸¹ The “progress” contemplated by an IEP must be appropriate *in light of the child’s circumstances*;⁸² because of this, Andrew’s IEP would need to be evaluated for whether it was “appropriately ambitious” given his disability.⁸³

The key takeaway from *Andrew* is that as much of an affront as it may seem to not have a benchmark for guaranteeing a higher level of education, this is because of how much the Court emphasized IDEA as reflecting *individual* outcomes for SWDs.⁸⁴ It is crucial, then, that IEPs be carefully drafted with full attention to realistic goals for *that* specific child.⁸⁵ Therefore, the normative conclusion is that a plaintiff SWD cannot rely on jurisprudence to seek relief for being excluded or otherwise kept from their potential if their plan only promises “x” amount of progress. As a result, for physical education it is

⁸⁰ *Andrew* 137 S. Ct. at 998.

⁸¹ *Id.* at 999.

⁸² *Id.* at 1000. This is because an IEP for a SWD that includes physical education should contemplate what level of rigor *that* student is able to have given their ability level; it cannot just be the same blanket physical education given to multiple students on their IEPs if their ability levels vary.

⁸³ *Id.* at 1000.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1001 (“The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”).

especially important that IEPs thoroughly contemplate what the SWD needs to participate in physical education curriculum such that they receive their full educational benefit. While there are some shortcomings in the Supreme Court's framework,⁸⁶ they can be somewhat mitigated by ensuring that the IEP is fully-informed as it pertains to the student's "unique" capabilities.⁸⁷ For physical education and beyond, the Supreme Court would have it that the SWD's educational program be appropriately ambitious in light of their circumstances.⁸⁸ Beyond that, nothing is promised. It is up to the school, caregivers, and professionals to fight for an IEP that gives the student the opportunities they deserve and can achieve.

B. Accommodating SWDs in Physical Activities

Though the body of case-law for SWDs and physical education is not very robust, key cases have established rules that give guidance as to how to incorporate SWDs into physical activities.⁸⁹ One of the more significant cases regarding disabilities and athletic competition is *PGA Tour, Inc. v. Martin*⁹⁰, in which the Supreme Court established a "highly individualized" balancing test to accommodate special needs athletes within competitive sports.⁹¹ The ruling established the

⁸⁶ Such as providing an IEP that perhaps does not adequately assess the child's ability to progress with their disability, or a lack of "cogent" explanations for the decisions in the IEP.

⁸⁷ *Endrew* 137 S. Ct. at 1001.

⁸⁸ *See Endrew* 137 S. Ct. at 1000.

⁸⁹ Forster, *supra* note 2, at 705-06 (this is namely in the context of athletic participation rather than physical education).

⁹⁰ *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 668 (2001).

⁹¹ Ian Forster, Comment, *Fair Play for Those Who Need It Most: Athletic Opportunities for High School Student Athletes with Disabilities*, 22 JEFFREY S. MOORAD SPORTS L.J. 693, 705-06 (2015).

guidelines for courts to follow for all athletes with disabilities, student athletes in high-school included.⁹² These guidelines as to how and when SWDs may be accommodated include the following considerations:

(1) [whether] fundamental alterations exist where a requested accommodation alters an essential aspect of the game or creates a competitive advantage; (2) individualized assessments must be made to determine whether the specific modification for a particular athlete's disability creates a fundamental alteration; (3) some administrative burdens are acceptable to incur in making this determination⁹³

The “balancing”⁹⁴ then, is between the “integrity” of the competitive sport and the importance of inclusivity for SWDs during their schooling.⁹⁵ To put it more explicitly, the opportunity to participate in physical activities is critical for a SWD’s holistic development; even still, offering such an opportunity to a SWD cannot infringe on the rights of non-disabled students to avail the full benefit of the physical activity.⁹⁶ There have been instances in which the SWD poses a

⁹² *Id.*

⁹³ *Martin*, 532 U.S. at 690.

⁹⁴ Ian Forster, Comment, *Fair Play for Those Who Need It Most: Athletic Opportunities for High School Student Athletes with Disabilities*, 22 JEFFREY S. MOORAD SPORTS L.J. 693, 707 (2015) (“Balancing” meaning a policy of inclusion for all students regardless of disability with opportunity for non-disabled students to engage in the physical activities without fundamental alteration that would diminish the experience for them.).

⁹⁵ Forster, *supra* note 2, at 707 (this is namely in the context of athletic participation rather than physical education).

⁹⁶ *Id.*

danger or other disadvantage to non-disabled students, and the SWD has been determined to pose a rupture in the integrity of the activity despite being given the opportunity to participate.⁹⁷ This balance is appropriate for schools to follow, and of course invokes the aforementioned importance of developing IEP plans for the individual⁹⁸ student so that accommodations can be made—whether it is full integration, modification,⁹⁹ adapted integration, or as a last resort, a separate accommodation.¹⁰⁰ If the IEP requires a certain amount of immersion in physical education, then the school must see to it that the requirement is adhered to—save for *Martin* guidelines on balancing—or the student will have their right to a FAPE wrongly infringed.¹⁰¹

C. Infringing Rights to Physical Education Curriculum under IDEA as a Means of Punishment

A glaring example of schools perverting the mandate that SWDs receive general education under IDEA is foregoing access to physical education as a form of punishment.¹⁰² The *Farrin v.*

⁹⁷ See *Baisden v. W. Virginia Secondary Sch. Activities Comm'n*, 568 S.E.2d 32, 43 (W. Va. 2002).

⁹⁸ Forster, *supra* note 2, at 709 (suggesting that this “individualized” focus is most consistent with the congressional intent behind the Americans with Disabilities Act (ADA)).

⁹⁹ *Badgett v. Ala. High Sch. Athletic Ass'n*, No. 2:07-CV-00572-KOB, 2007 WL 2461928 (N.D. Ala. 2007) (saying that the modification adopted does not have to be the “best” one, but one that is reasonable).

¹⁰⁰ Ian Forster, Comment, *Fair Play for Those Who Need It Most: Athletic Opportunities for High School Student Athletes with Disabilities*, 22 JEFFREY S. MOORAD SPORTS L.J. 693, 720 (2015).

¹⁰¹ See *Cruz ex. Rel. Cruz v. Pa. Interscholastic Athletic Ass'n*, 157 F. Supp. 2d 485, 499 (E.D. Pa. 2001).

¹⁰² *Farrin v. Maine Sch. Admin. Dist. No. 59*, 165 F.Supp.2d 37 (2001).

Maine School Administrative Dist. No. 59 case is a cruel precedent that delivers a huge blow to the integrity of IDEA as it pertains to ensuring that SWDs receive equal opportunity to avail their general education via a FAPE. The parents of an eighth-grade student with a learning disability, Jacob Farrin, appealed the decision of a special education due process hearing issued pursuant to IDEA and Maine’s Special Education Law provisions¹⁰³ after the student was expelled for a drug violation.¹⁰⁴ IDEA contains disciplinary procedures for suspension or expulsion that the school must follow in the event of a SWD misbehaving.¹⁰⁵ “School personnel” are given the unilateral power to suspend a child with a disability for up to ten days as they would a non-disabled child...without providing the child with an ‘alternative educational setting.’”¹⁰⁶ Alternatively, if the student brings drugs or weapons to school, IDEA authorizes the student’s removal to an “interim alternative educational setting” for up to an additional forty-five days.¹⁰⁷

IDEA also allows a school to discipline a SWD for more than ten days if the student’s misbehavior was not a “manifestation” of his disability.¹⁰⁸ So, a SWD may be disciplined first for the ten-day suspension without alternative educational services, then he may serve the additional forty-five day suspension with alternative educational services, or be suspended or expelled under school disciplinary rules assuming “his behavior was not a manifestation of his disability.”¹⁰⁹ What

¹⁰³ 20–A M.R.S.A. § 7001 et seq.

¹⁰⁴ See *Farrin* 165 F.Supp.2d at 46.

¹⁰⁵ See 20 U.S.C. § 1415(k)(1)(B).

¹⁰⁶ *Id.*

¹⁰⁷ See 20 U.S.C. § 1415(k)(1)(C).

¹⁰⁸ See 20 U.S.C. § 1415(k)(1)(e).

¹⁰⁹ *Farrin* 165 F.Supp.2d at 42.

is most important in this situation is the alternative educational setting that is provided to the student after the ten-day period. The setting “must be sufficient to allow the student to ‘continue to progress in the general curriculum.’”¹¹⁰ This is where the student’s IEP team comes in; they must convene to determine whether the behavior was a manifestation of the student’s disability. However, and most shockingly, despite the otherwise robust safeguards for SWDs’ rights and IEP plan development there is no rule as to what educational services need to be provided in the alternative setting.¹¹¹ This is a huge omission in IDEA, where instead of federal rules, comments to the regulations defer to *state* guidance.

Farrin had a learning disability related to language-based skills and impulsive behavior; there is no evidence that he had any physical motor skills disabilities.¹¹² In fact, Farrin played football in his eighth grade year and routinely participated in extracurricular activities and sports.¹¹³ When Farrin was found selling marijuana, disciplinary actions commenced and resulted in expulsion (seemingly unindicated to Farrin’s parents).¹¹⁴ Farrin’s IEP team determined that the drug sale was not a manifestation of his disability (this decision, too, was not fully informed, being that the team did not consider the results of Farrin’s “Burks test” indicating impulsiveness as stemming from his disability).¹¹⁵ The IEP plan that the team adopted—the “expulsion IEP”—supplanted Farrin’s regular school curriculum

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 44.

¹¹³ *Id.* at 45.

¹¹⁴ *Id.* at 46-47.

¹¹⁵ *Farrin*, 165 F. Supp. 2d at 46-47.

and IEP with two hours per day of at-home, one-on-one instruction in his *core* classes (reading, English, science, geography, and mathematics) and two hours per week of one-on-one reading instruction.¹¹⁶ Notably missing were replacements for Farrin’s physical education courses.¹¹⁷

This loophole, in citing a “core” class versus the “general” curriculum that FAPE requires,¹¹⁸ is one that needs remedying via revising IDEA. Indeed, the court made an obvious error in holding that the “expulsion IEP” provided Farrin with FAPE, considering it mandates “appropriate progress in the general curriculum.”¹¹⁹ The question then, is why “core” classes were used in the plan instead of the “general” curriculum that included physical education? The court appears to come out saying that the state’s own idea of general curriculum bears more weight than a federal notion of “general curriculum.”¹²⁰ This is plainly incongruous with IDEA’s scheme that all SWDs be provided with FAPE.¹²¹ While the Farrins argued that the “expulsion IEP” was inadequate for FAPE because of the exclusion of physical education (along with art and computer science), the court agreed with the defendant school, agreeing that in that school those courses were not “general” in that they

¹¹⁶ *Id.* at 47.

¹¹⁷ *Id.* at 47-48.

¹¹⁸ 20 U.S.C. § 1400 (c)(5)(A) (2010).

¹¹⁹ *Farrin*, 165 F. Supp. 2d at 48.

¹²⁰ *Id.* at 53.

¹²¹ 20 U.S.C. § 1400 (d)(1)(A) (2010) (worth noting is that this section says “free appropriate public education that emphasizes special education.” The “Special Education” definition section of IDEA, 20 U.S.C. § 1401 (29) Special Education, specifically includes “physical education” as a component of Special Education. This further emphasizes that physical education is meant to be included in FAPE).

were not grade-level requirements.¹²² The focus, then, was placed on “appropriate progress” through *grade levels* generally (a benchmark that is now rejected in dicta in *Endrew*¹²³) and how though Maine *requires* physical education, only one credit is mandatory.¹²⁴ Because the loss of physical education from Farrin’s IEP did not “foreclose” his ability to obtain the credit later or graduate, “progress” was met by the “expulsion IEP.”¹²⁵

All this hoop jumping suggests that the school was actively working to prevent Farrin from truly achieving a holistic, “general” education via a FAPE. The holding is a perversion of IDEA’s mandate and widely accepted interpretation that physical education is indeed part of general curriculum.¹²⁶ Farrin’s loss of physical education curriculum is an example of IDEA’s lack of verbatim instruction as to the word “general” being abused to punish a SWD that is physically able. For this reason, it is critical that IDEA implement an enforcement mechanism that ensures that states and their schools do not try to wiggle their way out of a common-sense, national government understanding of “general curriculum” via sham “federalism” concerns over the power to engage in wordplay.

¹²² *Farrin*, 165 F. Supp. 2d at 53.

¹²³ *See Endrew* 137 S. Ct. at 1000-1001.

¹²⁴ *Farrin*, 165 F. Supp. 2d at 53.

¹²⁵ *Id.*

¹²⁶ *See* 34 C.F.R. § 300.108(a) (first saying physical education services are part of FAPE, then leaving a gap for the *public agency to exercise discretion* to forego physical education altogether and thus nullify its place in a FAPE).

IV. Physical Education Protection for SWDs: State Statutes that are Closest to Getting It Right

Given the potential for abuse through the holes that IDEA leaves in explicitly ensuring that general curriculum include physical education, certain states have exemplified remarkable initiative in doing right by SWDs. Maryland and New Jersey are two states that have codified equal opportunity for SWDs to participate in physical education and athletic programs.¹²⁷ The steps taken by these two states most closely reflect legislative intent behind IDEA—ensuring that SWDs get the same meaningful opportunities to participate in curricular offerings as their non-disabled colleagues. As aforementioned, since Congress and the American public have long-acknowledged physical education’s role in the public school general curriculum scheme, it follows that IDEA should be modified to include the safeguards for SWDs that Maryland and New Jersey education laws provide for. This is further informed by other federal, quasi-legislative bodies, namely the Department of Education’s (DOE) Office of Civil Rights (OCR). The goal of the OCR is to protect equal access to educational opportunities, and it has taken steps to address school districts’ legal obligation to provide such equal access to physical and extracurricular activities.¹²⁸ The OCR has now given official guidance as to how states can fairly provide SWDs the equal opportunity to participate in physical activities along with their peers.¹²⁹

¹²⁷ See MD. CODE ANN., Educ., § 7-4B-02; N.J.S.A. 18A: 11-3.7.

¹²⁸ U.S. DEP’T OF EDUC., PROTECTING STUDENTS WITH DISABILITIES FREQUENTLY ASKED QUESTIONS ABOUT SECTION 504 AND THE EDUCATION OF CHILDREN WITH DISABILITIES (2015), <https://www2.ed.gov/about/offices/list/ocr/504faq.html#interrelationship> (last visited Sep. 20, 2017).

¹²⁹ Simone Pathe, *Law Enables Students With Disabilities to Play Sports*, PBS NEWSHOUR EXTRA (Feb. 18, 2013),

A. Maryland

The Maryland Code is perhaps the most comprehensive and inclusive state legislation for physical education for SWDs. § 7-4B-02(a)(1)(i)-(ii) lays out that the state board and each county board shall ensure that students with disabilities have “an equal opportunity to” participate in mainstream physical education programs and to try out for and participate in mainstream athletic programs if selected.¹³⁰ Additionally, under § 7-4B-02(a)(2), SWDs must be provided with reasonable accommodations necessary to allow them to participate in mainstream physical education and athletic programs to the fullest extent possible.¹³¹ And to further demonstrate inclusivity and awareness as to SWDs that may not be able to participate in the “mainstream” or “regular” setting, § 7-4B-02(a)(3) ensures that “adapted, allied, or unified” physical education and athletic programs are available and adequately funded by the county board.¹³²

Given that there are inherent concerns as to unfair advantages, safety risks, or “fundamental alterations” to the “nature” of the physical activity, the Code provides for exceptions to subpart (a) with subpart (b), in which an exception may be made when the inclusion of a SWD 1) presents an objective safety risk to the student or to others based on an individualized assessment of the student; or, 2) fundamentally alters the nature of the school’s mainstream physical education or mainstream athletic program.¹³³ Finally, the Code further

<http://www.pbs.org/newshour/extra/2013/02/law-enables-students-with-disabilities-to-play-sports/>.

¹³⁰ MD. CODE ANN., Educ., § 7-4B-02(a)(1)(i)-(ii).

¹³¹ *Id.* at § 7-4B-02(a)(2).

¹³² *Id.* at § 7-4B-02(a)(3).

¹³³ *Id.* at § 7-4B-02(b)(1)-(2).

drives the point that even in the event that mainstream programming is not appropriate for the SWD, the provision of “adapted, allied, or unified” programs for SWDs does not minimize the duty of the county board to provide an individual SWD an equal opportunity to be fully included in mainstream physical education and athletic programs.¹³⁴ Maryland’s Code thoroughly considers the fundamental nature of physical education in educational curriculum and the necessity of SWDs to avail it with equal opportunity. This mandate is at the pinnacle of current legislation for protecting SWDs’ inclusion in physical education.

B. New Jersey

In 2015 the New Jersey Legislature found that access to and participation in athletic opportunities provide important benefits to all students, particularly SWDs.¹³⁵ In recognizing that SWDs were not being given equal opportunities to participate, New Jersey codified that students with intellectual, developmental, physical and other forms of disabilities “should consistently have opportunities to participate” in athletics “equal to those” of other students.¹³⁶ Under N.J.S.A. 18A:11-3.7(a)(1), each school district must—notwithstanding exceptions in subsection (b)—ensure that a SWD has an equal opportunity to participate in physical education programs; participate in existing classroom activities that involve physical activity; and try out for and participate in athletic programs (if selected) in an integrated manner to the maximum extent appropriate to the needs of the student.¹³⁷ Additionally, under N.J.S.A. 18A:11-3.7(a)(2), the school district shall ensure the “provision of reasonable modifications or aids or services necessary to

¹³⁴ *Id.* at § 7-4B-02(c).

¹³⁵ N.J.S.A. 18A:11-3.5.

¹³⁶ *Id.*

¹³⁷ N.J.S.A. 18A:11-3.7(a)(1).

provide a student with a disability an equal opportunity to participate in Physical Education programs,” existing classroom activities that involve physical activity, and athletic programs.¹³⁸

Like Maryland’s Code, the exceptions to the mandate of subsection (a) are listed in subsection (b). These exceptions may be made if inclusion of the SWD presents an “objective” health or safety risk to the student or to others based on an individualized assessment of the student, or fundamentally alters the nature of the physical education program or athletic program in accordance with the Americans with Disabilities Act of 1990.¹³⁹ These exceptions, like those in the Maryland Code, carve out narrow exceptions that still require objective proof, making it difficult to exclude a SWD from equal opportunity to participate.

Both the New Jersey legislation and the Maryland Code give credence to the position that IDEA requires physical education be available to SWDs. By explicitly providing for physical education curriculum for SWDs, this in turn would make it more difficult for the states of New Jersey and Maryland to suggest that FAPE does not include physical education. In fact, the contrary outcome is more likely the case, in which a law requiring equal opportunity for physical education informs the word “general” in general education. Thus, a state that treats physical education at the level of general curriculum and equal inclusivity demands that it be part of a FAPE. IDEA should be amended at the federal level to include language like that contained in Maryland or New Jersey law.

¹³⁸ N.J.S.A. 18A:11-3.7(a)(2).

¹³⁹ N.J.S.A. 18A:11-3.7(b)(1)-(2).

C. State Law Overlap with the U.S. Department of Education's Office for Civil Rights (OCR)

The Department of Education's (DOE) Office of Civil Rights (OCR)¹⁴⁰ has instituted guidance in documents articulating the existing legal obligations of schools in regards to providing SWDs opportunities to participate in school athletics.¹⁴¹ The OCR uses *Martin* guidelines to require school districts to make reasonable accommodations based on situations where the modification proposed will not fundamentally change the nature of the activity.¹⁴² The OCR suggestions recognize that there is a spectrum in what may be practicable for different students, and sometimes mainstreaming is not the reasonable route, but rather an adapted activity or in certain circumstances, an activity separate from non-disabled students. The OCR's vision in the domain of physical activity for SWDs is to see to it that school districts cultivate opportunities for them in physical education.¹⁴³

In addition to IDEA, the legislation that gives breath to the OCR's enforcement power as it pertains to SWDs' inclusion in physical activities is the Rehabilitation Act of 1973 (Section 504¹⁴⁴) and the Americans with Disabilities Act of 1990 (ADA).

¹⁴⁰ U.S. DEP'T OF EDUC., *supra* note 128.

¹⁴¹ Forster, *supra* note 2, at 719.

¹⁴² *Id.*

¹⁴³ *Id.* at 720.

¹⁴⁴ Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education (ED); see U.S. DEP'T OF EDUC., *supra* note 128; see also U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, PARENT AND EDUCATOR RESOURCE GUIDE TO SECTION 504 IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS (2016),

What separates these pieces of legislation is that their focus is not on FAPE as it is for IDEA,¹⁴⁵ but rather on nondiscrimination, accessibility, and equal opportunity generally.¹⁴⁶ Thus, schools must take affirmative actions to ensure access for SWDs to participate in physical activities and extracurricular athletics with reasonable accommodations. As mentioned prior, such modifications may be “unreasonable” or state-statutorily exempt if they constitute a fundamental alteration of the activity, impose undue burden on the school system or governing body, or pose health and safety risks to the student or other participants.¹⁴⁷ Still, the OCR recommends that all school districts be aware of their legal obligations to provide equal access and suggests “reasonable modifications” that schools can take, such as providing visual cues alongside starter pistols, and creating exceptions to “two-hand-touch” rules for students with hearing impairment or only one hand, respectively.¹⁴⁸ If the nature of the mainstream physical activity will be fundamentally altered in some way with such modifications, schools are encouraged to create alternative activities such as adapted or separate programs, not unlike the Maryland and New Jersey statutes mandate.¹⁴⁹

<https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf> .

¹⁴⁵ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, PARENT AND EDUCATOR RESOURCE GUIDE TO SECTION 504 IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS 41 (2016).

¹⁴⁶ Michael L. Williams, *Accommodating Disabled Students into Athletic Programs*, CMAA (July 27, 2014), <https://www.nfhs.org/articles/accommodating-disabled-students-into-athletic-programs/>.

¹⁴⁷ *Id.*

¹⁴⁸ Pathe, *supra* note 129.

¹⁴⁹ *Id.*

It is worth clarifying that alternative programming is not a mandate but an encouraged course of action. As such, it is not a requirement on the school district, but rather an “urging” for when full inclusion may not be practicable for all parties involved.¹⁵⁰ If an issue of noncompliance with federal law by the school district arises, the OCR will attempt to negotiate with the district to bring it to voluntary compliance, or initiate an enforcement action in which the DOE may either terminate financial assistance to the recipient, or the Department of Justice (DOJ) will commence judicial proceedings.¹⁵¹ If states follow Maryland and New Jersey’s lead—in the event that the federal statute itself does not—then they will be in conformity with both the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. This will lead to fair, equal opportunities for SWDs to access the physical education they deserve with limited exceptions.

V. When School Districts Fail to Enforce Their Legally Mandated Physical Education Requirements, Every Child Suffers—Especially SWDs: The Chicago Public School (CPS) Disaster

Illinois School Code 105 ILCS 5/27-6 is legislation that requires Chicago Public Schools (CPS) to offer courses in physical education daily.¹⁵² The law articulated that a school board may determine the frequency of physical education courses so long as each student engages in a course for a

¹⁵⁰ *Id.* (The deputy press secretary for the DOE elaborated on the guidance not imposing requirements but rather, urging suggestions to better comply with the law of equal access).

¹⁵¹ U.S. DEP’T OF EDUC., *supra* note 128.

¹⁵² 105 ILL. COMP. STAT. ANN. 5/27-6 (LexisNexis 2017).

minimum of three days per week.¹⁵³ Subsequent policy has been codified to now require CPS-wide daily physical education.¹⁵⁴ Despite this provision, the Code itself left a significant loophole for school boards to entertain: students may be excused from physical education courses if they so request, typically through a waiver program for certain categories of approved excusal.¹⁵⁵ These excusals take the form of waivers,¹⁵⁶ which are put in place by the mandatory physical education law so that students may be excused from physical education if they meet certain criteria as to what the alternative arrangement is.¹⁵⁷

The outward goal is to allow certain students to pursue other interests that may conflict with physical education class or render it redundant; thus, the waiver system is masked as a way to keep parents and students happy by allowing them to cultivate other opportunities. However, the implicit goal is to provide CPS a way of skirting its obligations to provide a daily resource by farming out the burden to an outside entity or a different academic department or extracurricular group in the school. Essentially, this waiver provision is the local legislature's way of allowing CPS leeway in *not* requiring daily physical education administration to certain categories of students—which directly undermines a “daily” physical education “requirement” for all students. Among these groups of categorical exclusions are SWDs, and therein lies part of the

¹⁵³ 105 ILL. COMP. STAT. ANN. 5/27-6(a).

¹⁵⁴ CHICAGO PUBLIC SCHOOLS POLICY MANUAL: PHYSICAL EDUCATION § 605.9 (2014).

¹⁵⁵ 105 ILL. COMP. STAT. ANN. 5/27-6(b).

¹⁵⁶ *Id.*

¹⁵⁷ 105 ILL. COMP. STAT. ANN. 5/27-6(b) (the mandatory physical education law lists reasons why a school board can excuse students from participating in physical education class).

problem with CPS' initiative as it pertains to actually ensuring daily physical education for all.

A. The Issue Itself: Making the Mandatory Discretionary

In January 2014, the Chicago Board of Education unanimously voted to adopt a new physical education policy that solidifies its place as a core subject in Chicago Public Schools (CPS) pursuant to 105 ILCS 5/27-6.¹⁵⁸ The policy was geared towards ensuring that students receive physical education in a manner equivalent to other core courses daily.¹⁵⁹ CPS has not had a daily physical education requirement of all of its students for roughly two decades.¹⁶⁰ Under the new policy, CPS schools will have to offer thirty minutes of daily physical education or 150 minutes a week for kindergarten through eighth grade students, and forty two minutes of physical education daily for high school students.¹⁶¹ Given that this is a major change in the way CPS operates its physical education courses—traditionally an abysmal once a week physical education period for elementary school children—there is a plan to roll out and implement the plan over three years' time. With obesity rates rising higher than forty percent and the correlation between

¹⁵⁸ *CPS Votes to Require Daily Physical Education for All Students*, HEALTHY SCHOOLS CAMPAIGN (Jan. 23, 2014), <https://healthyschoolscampaign.org/chicago-focus/cps-votes-to-require-daily-physical-education-for-all-students-5790/>.

¹⁵⁹ CHICAGO PUBLIC SCHOOLS POLICY MANUAL: PHYSICAL EDUCATION § 605.9 (2014).

¹⁶⁰ *CPS Physical Education: District Proposes Adding Daily Gym Classes to Meet State Mandate*; HUFFINGTON POST (Jan 25, 2014, 3:34 PM), https://www.huffingtonpost.com/2014/01/18/cps-physical-education_n_4624205.html.

¹⁶¹ *Id.*

physical activity and improved cognition, the uphill battle was determined to be worth the difficulty of implementation.¹⁶²

B. What does this mean for SWDs? The Danger of Selective Administration of Physical Education

When it comes to SWDs, 105 ILCS 5/27-6 articulates that school boards may, on a case-by-case basis, excuse children eligible for special education in grades three through twelve from participation in required physical education programs if the child's parent or guardian *agrees* that the SWD utilize that time to receive other special education support.¹⁶³ The "utilization" of the time for other special education support must be part of the child's IEP.¹⁶⁴ If the IEP plan says that the child needs adapted physical education, then it is the school's responsibility to provide it. However, if an IEP excuses the SWD from physical education because the student participates in an adaptive athletic program outside of the school, the school board has authority to excuse the student from physical education.¹⁶⁵ While these excusal efforts do contemplate the role of an IEP, one can see how there is potential for strong-arming an IEP team or parents into hastily making decisions for the SWD in regards to their guaranteed physical education courses.

This of course suggests that some coercive efforts are possible on the part of the school board and a child's IEP team—one can imagine a scenario in which the school may not want to fund a particular SWD's physical education needs so it

¹⁶² *Id.*

¹⁶³ 105 ILL. COMP. STAT. ANN. 5/27-6(b).

¹⁶⁴ CHICAGO PUBLIC SCHOOLS POLICY MANUAL: PHYSICAL EDUCATION § 605.9 (2014).

¹⁶⁵ *Id.*

encourages parents to view the time allotted for physical education as a way to fulfill other services for the child. Alternatively, the school may point the child's family towards an outside-of-school opportunity for athletics. What the school and IEP team do not contemplate is the event of the SWD's family no longer being able to provide the alternative physical activity. If the child is not getting it any more, then it becomes the school district's duty to see to it that physical education is provided anew. The likelihood that schools are behaving so judiciously is slim. This is why perhaps the biggest flaw of 105 ILCS 5/27-6 is its large excusal provision, through which schools are functionally finding ways to avoid daily physical education for both disabled and non-disabled students alike. And, as with most education initiatives, SWDs are missing out the most.

C. Waiver Programs are a way to Skirt the Physical Education Mandate—Pushing SWDs out First

CPS "Waiver Request Forms" are the documents contemplated by the Illinois School Code to avail its specific exemptions from the daily physical education requirement.¹⁶⁶ The student may receive a waiver based on the authorized exceptions in the Code. The waiver requests are subject to qualification requirements and approved accordingly on a case-by-case basis by school staff. Waivers that are approved apply only to the current school year, and, in the case of 11th and 12th grade exceptions, require the student to enroll in another academic course in lieu of physical education.¹⁶⁷

¹⁶⁶ See 105 ILL. COMP. STAT. ANN. 5/27-6(b); see also CHICAGO PUBLIC SCHOOLS, PHYSICAL EDUCATION WAIVER REQUEST FORM FOR 11TH AND 12TH GRADE STUDENTS, (available at <http://www.northsideprep.org/pdf/2015%20-%2016%20PE%20Individual%20Student%20Waiver%20Form.pdf>).

¹⁶⁷ CHICAGO PUBLIC SCHOOLS, *supra* note 154.

The form itself is minimally detailed, merely providing a checklist to select the sole box that pertains to the individual's "Waiver request reason," followed by blank lines for a brief explanation behind the selection, and signature lines.¹⁶⁸ SWDs fall into two of the seven categories. The first (#5) is "ongoing participation in an adaptive athletic program outside the school setting"; the second (#6) is "IEP specifies time for special education supports and services in lieu of physical education." For the former, category #5, the IEP must have a provision that specifically requires adaptive physical education; for the latter, category #6, the student must have an IEP in place generally.

The responsibilities for category #5 pertain to the student and parent/guardian as well as the principal or designee. While the responsibilities state that the parent or guardian "present documentation of ongoing participation in an adaptive athletic program outside the school setting," it does not state how often this should be provided. Athletic Directors are not involved in any part of the responsibilities and Principals merely sign and approve the waiver and "verify IEP requirements for adaptive PE" and "verify student's adaptive athletic program documentation."¹⁶⁹ In this way, school administrators are rubber stamps¹⁷⁰ and the entire burden to ensure the student is in an alternative adaptive athletic program on an "ongoing" basis falls on the parents or guardians of the SWD. Many

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* It is worth noting that principals and other school officials should have some role in comprehending the unique needs of students who are utilizing waives, especially as they pertain to SWDs. Even if there are waiver programs in place and they are not being eradicated, the school officials administering them should receive some training before the academic year for assessing whether the alternative program is adequate to merit forgoing physical education, and whether it will actually be benefitting the student.

parents do not have the finances, awareness, time, or mental wherewithal to ensure their child is not falling through the cracks of this waiver. There is no guarantee that they can keep the child in outside-of-school adaptive programming, and a failure to articulate this in a timely fashion means the school may have no idea that the child is not meeting this requirement—since the school itself functionally turns a blind eye after the initial annual approval of the waiver.

The category #6 waiver exemption has similar responsibilities on the parent or guardian. The thrust of the responsibility here is that the parent or guardian provide IEP documentation that “specifies that the time set aside for physical education courses is needed for the student to receive special education supports and services.”¹⁷¹ This responsibility is rife with problems on the IEP administration front. Indeed, the child’s IEP team itself is not even given an administrative role in the waiver process. Too often, IEPs are inadequate in ways that are unsatisfactory to the family of the SWD (a heavily litigated issue), or, they are not updated in any meaningful way to really assess the SWD’s changing needs year to year. It may be that while a SWD was better suited for alternative programming in lieu of physical education at one point, in a matter of months or a year the student may advance better in daily physical education. If the parents or IEP team are not on top of reevaluating the plan or are disinterested in some way, a SWD may lose out on daily physical education due to sheer negligence over his or her needs. Under this category too, athletic directors are not involved in any part of the responsibilities and principles merely sign and approve the waiver and “verify IEP requirements” generally.¹⁷²

The reason why SWDs lose out the most under these categorical exemption waivers is because they have to go

¹⁷¹ *Id.*

¹⁷² *Id.*

through the IEP and their IEP team—which is often problematic in itself. Furthermore, neither of these categories have any meaningful administrative involvement on the part of the school: there is zero involvement from the Athletic Director and the principal does little more than sign a piece of paper. The other five out of the seven categories of waivers, however, are different. They either: 1) do not have the additional hurdle that another plan (like an IEP with its own hang-ups) imposes, or 2) have increased administrative involvement. Categories #1 and #2 pertain to enrollment in the schools Junior Reserve Officer's Training Corps (JROTC) Program and enrollment in academic classes required for “on-track” high school graduation, respectively.¹⁷³ Both of these waivers do not even involve parents or guardians (who may sometimes be detached from the child's schooling). Instead, they are initiated by the school *counselor*, an individual paid by the school who has a vested interest (job security) in making sure that the student has a truly valid and imperative reason for forgoing daily physical education. Furthermore, for category #2, the principal has the additional responsibility of documenting a schedule that confirms that the student will not be able to take certain courses and still graduate, thus conferring a duty on the principal that requires more than a signature.

Waivers from categories #4 and #7 pertain to extracurricular activities that likely meet daily physical activity anyway; they are ongoing interscholastic athletic programs and marching band, respectively. Despite both of these activities having administrators overseeing the student's participation daily, category #4 additionally involves the athletic director in overseeing the student's interscholastic athletic program completion. Finally, for category #3 “enrollment in academic classes required for college admission,” the principal has a heavy burden to document the student's schedule as in category #2 but with the added task of retaining all college admission

¹⁷³ CHICAGO PUBLIC SCHOOLS, *supra* note 154.

documentation for the student pursuing this route. The five categories of student waivers for situations not involving SWDs are far more administratively comprehensive. The waiver categories for SWDs are more likely to allow SWDs to slip through the cracks of daily physical education. They put the impetus for safeguarding the SWD's rights entirely on the parents with minimal administrative oversight.

D. Waiver Abuse for SWDs in Action

A large reason as to why states are not meeting their physical education requirements is their utilization of waivers for students to abscond those courses for alternative classes or programs instead—as such, this outcome is usually cheaper for the school. What is particularly puzzling, however, is that Chicago Public Schools all have a mandate to provide daily physical education, and they are deliberately behaving against the law in evading that obligation. Dr. Rebecca Unger, a pediatrician at Northwestern Children's Practice and Ann & Robert H. Lurie Children's Hospital of Chicago, opined on the significance of physical education programs and why Chicago schools are failing to meet their mandate.¹⁷⁴ While she notes that physical education programs are a “meaningful contributor to the development of healthy, active children” and “provide the safe, supervised, structured environment children need to learn and practice physically active behaviors,” Illinois is giving them short shrift via waivers.

Though some waivers exempt students who are getting physical activity elsewhere, as mentioned in Part V Section C of this Article, they still do not adequately supplant what physical *education* offers. Even though a child may be getting physical activity elsewhere, they are not getting teacher input; thus, the

¹⁷⁴ Kristen Thometz, *How Does Physical Education in Illinois Measure Up?*, CHI. TONIGHT (Apr. 15, 2016, 1:35 pm), <https://chicagotonight.wttw.com/2016/04/15/how-does-physical-education-illinois-measure> .

focus is not on education or tutelage in conjunction with physical activity, but physical activity alone. The teacher's role is lost in translation through the waiver program. "There are so many waivers that continue to be in place that daily physical activity is not really a reality," Unger says.¹⁷⁵ Furthermore, when it comes to waivers for SWDs with IEPs, exemptions should no longer be provided that put the impetus on parents and caregivers to seek alternate solutions. Rather, schools should do a better job to provide modifications or adapted physical education courses *in the school setting* to meet SWDs' needs. It is unfair for schools to implement such waivers and then not take the time to ensure that parents have a true understanding of where they can actually seek such alternative resources in the community. Schools must do their part to increase opportunities for SWDs within the school rather than farm them out to avoid implementing internal changes.¹⁷⁶

1. New York City

This trend of waiver abuse for SWDs is not just problematic in Chicago, but extends to other states as well. Though not explicitly about physical education, a New York City program made parents of SWDs responsible for finding their own special education services.¹⁷⁷ This program resulted in the

¹⁷⁵ *Id.*

¹⁷⁶ *See Id.* Thus, any waiver system for SWDs to get out of school-time physical education should be a last ditch effort; in general, it should be the school's job because providing this educational resource pursuant to an IEP is a federal requirement. Still, if there is an able-paying parent of a child that needs something so specific for physical education that the school cannot carry that burden of accommodation, there should be a narrow exception for a waiver that is diligently documented and revisited frequently by school administrators.

¹⁷⁷ Alex Zimmerman, *Lawsuit targets New York City program that strands poor students without required special ed services*, CHALKBEAT (Jul. 27, 2017), <https://www.chalkbeat.org/posts/ny/2017/07/27/lawsuit-targets->

students getting no services at all, opening up the program to legal attack. In July 2017, a lawsuit was filed over federal provisions for SWDs to receive “related services”¹⁷⁸ in school. The city instituted a “voucher” system for instances in which the city’s education department cannot offer those services itself. Parents given this voucher can use it to pay an outside provider. The problem with this, not unlike the waiver programs in CPS, is that for parents or guardians of SWDs, the burden is placed on the family to find providers for the children when the federal expectation is that the school will provide these resources.¹⁷⁹ Because of this, parents were often unable to find providers and approximately half of the 9,164 vouchers issued were unused—meaning the SWDs very well may have gone without their guaranteed “related services.”¹⁸⁰

Families face a slew of obstacles to both finding community resources and then using the vouchers; these can range from a struggle to find nearby providers, difficulty in transportation and reimbursement, and only finding nonresponsive providers.¹⁸¹ The lawsuit capitalizes on the fundamental flaw with the voucher system: that cities and their school districts cannot offer a voucher program to supplant their federal obligation to provide special education services. Students must actually receive their guaranteed services; for a state to issue a voucher and then turn a blind eye without ensuring that the educational benefit reaches the SWD is a

[new-york-city-program-that-strands-poor-students-without-required-special-ed-services/](#).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

violation of federal law guaranteeing SWDs a FAPE.¹⁸² A lawsuit like the one initiated by New York advocates and parents would likely be similarly fruitful in Chicago, given that at the very least it would shine a light on the dangers of farming out federally mandated programming for SWDs.

2. Local Government Laziness

Not only is the existence of waivers itself a significant deterrent to daily physical education, but also the complete apathy of local governments and their officials. Federal enforcement mechanisms are crucial to avoid such willful neglect of legal obligation. Hundreds verging on thousands of schools throughout Illinois have been reducing physical education days, despite the law that requires such courses daily. The reason for this? Nobody is sanctioning them.¹⁸³ Barely sixty percent of Illinois schools reported that they were offering physical education all five days of the school week in compliance with the law. That means roughly forty percent of schools were violating the law, in part because “lawmakers allowed it or the state looked the other way.”¹⁸⁴ More broadly, what this means is that Illinois schools have made the decision to provide physical education as a daily part of their *general curriculum*; thus, SWDs’ right to physical education as part of their FAPE is triggered—if non-disabled students are given this curricular right, then SWDs must have the opportunity as well.

In large part, state officials’ backwards thinking in regards to the significance of physical education is to blame. Despite all of the science, studies, public opinion, and policy of

¹⁸² *Id.*

¹⁸³ Diane Rado, *Many schools skipping some PE classes, despite the law*, CHI. TRIB. (Jun. 8, 2016, 5:13 AM), <http://www.chicagotribune.com/news/ct-skipping-phys-ed-classes-met-20160607-story.html>.

¹⁸⁴ *Id.*

all kinds to the contrary, Illinois Governor Bruce Rauner said he wants to lift the daily physical education mandate; the logic for this is likely short-term, in which he may not want schools to immediately face “tough choices” on how to spend resources.¹⁸⁵ Tough choices, however, are part of any living, breathing public education system. Perhaps even more shocking than this individual official’s stance is the Illinois State Board of Education’s (ISBE) utter disregard of the current law, conjecture to do away with it aside. Spokespeople from various school districts have come forward and said that the ISBE is “well aware we are not in compliance.”¹⁸⁶ This is a grave loss for young students. Representatives from the Illinois Association for Health, Physical Education, Recreation and Dance (IAHPERD) said that while the waiver program is a big issue in its creating avenues for school districts to get away with offering less physical education, *it is possible* to meet a daily physical education requirement with better scheduling and “creativity.”¹⁸⁷

3. Waiving the Waiver

Illinois schools will never take the ameliorative road as long as they do not face consequences for their noncompliance with the law. Currently, the ISBE has “no plans to sanction districts over the PE issue,” their spokeswoman said. The priority is instead physical education information collection. Moreover, the state itself is to blame for the proliferation of waiver approvals in the local physical education law.¹⁸⁸ This leaves SWDs without access to physical education both under federal law and under state law in Illinois. With federal statutes like IDEA, it becomes incumbent on states to provide SWDs the

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

resources they need to succeed. If physical education is cut for all students, that means SWDs are taking an additional hit, being that it may be infeasible or uneconomical for their families to seek similar opportunities outside of the public school system.

While federal law will not meddle in a state's willful negligence in sanctioning violations of mandatory local laws,¹⁸⁹ the federal government can say that "waiving out" education services for SWDs is unacceptable under IDEA. If a school has made physical education a part of the general curriculum, then SWDs should be able to freely avail it pursuant to their individual ability and IEP. By issuing a waiver that functionally removes the school from the obligation to provide physical education, the school is engaging in a practice that should be sanctioned via IDEA. It is the school's obligation to provide a FAPE, not an outside community provider.¹⁹⁰

¹⁸⁹ This does not foreclose citizens of the state from bringing a suit themselves to enforce the physical education law; see Jane Meredith Adams, *Lawsuit agreement to force schools to provide physical education*, EDSOURCE (Feb. 1, 2015), <https://edsource.org/2015/lawsuit-agreement-to-force-schools-to-provide-physical-education/73544> (regarding a California lawsuit to force schools to provide physical education).

¹⁹⁰ See *supra* Part V (arguing that schools should provide physical education for SWDs themselves rather than outsourcing it through waivers); see also Thometz, *supra* note 174 (stating that outside providers should only be utilized in extreme cases).

VI. National Policy Interests align with the Benefits that Physical Education furthers: Inclusion of SWDs in Physical Education is Necessitated by those National Policy Interests

A. Academic and Holistic benefits of Physical Education

Concern over the health of American children is no new issue.¹⁹¹ The obesity epidemic has created much stress in schools, particularly in what schools can do to help mitigate the issue. In addition to traditional academic courses, parents and health experts want schools to combat obesity through providing regular participation in physical activity.¹⁹² This activity for children is recommended to be “moderately to vigorously physically active (MVPA)” for sixty minutes or more most days of the week to attain health benefits.¹⁹³ Regular moderate-to-vigorous physical activity has been shown to: improve children’s muscular strength, flexibility, endurance, body composition, and cardiovascular endurance; maintain healthy weight; reduce risk of cardiovascular disease; reduce risk for type two diabetes; and improve mental health and stress reduction.¹⁹⁴

¹⁹¹ George Graham, *Children’s and Adults’ Perceptions of Elementary School Physical Education*, 108-3 THE ELEMENTARY SCH. J. 241, 241-42 (2008) (stating that the Surgeon General’s report “Physical Activity and Health (U.S. Department of Health and Human Services [USDHHS], 1996)” gives credence to the significant link between regular participation in physical activity and good health).

¹⁹² *Id.* at 241.

¹⁹³ *Id.* at 242.

¹⁹⁴ Chicago Public Schools, *Physical Education: Foundation for Academic Achievement*.

Additionally, there is a significant correlation between physical activity and brain function. Brain scans of children taking the same test both after sitting versus after a twenty-minute walk depicted far greater brain activity and increased scores for the students who took the test after physical activity.¹⁹⁵ Test scores and behavior are improved with increased physical activity and fitness as well.¹⁹⁶ In all, there is overwhelming evidence that the increased physical activity and bodily and mental discipline that physical education provides protects children from adverse health effects long-term and improves academic performance.¹⁹⁷

B. Setting the Tone for Healthy Habits Earlier in Life Reduces the Likelihood of Future Health Concerns

The U.S. Department of Health and Human Services (HHS) collaborated with the President's Council on Fitness, Sports & Nutrition (PCFSN) and the Centers for Disease Control (CDC) to compile an expert report to determine strategies to increase physical activity among children and adolescents.¹⁹⁸ The agencies explicitly stated that the "youth population was

¹⁹⁵ *Id.* (citing research and scans from Dr. Chuck Hillman from the University of Illinois).

¹⁹⁶ THE MOVEMENT MOVEMENT: A STRATEGIC PLAN TO STRENGTHEN PHYSICAL EDUCATION IN CHICAGO PUBLIC SCHOOLS, CHI. PUB. SCHOOLS. (pg. 4 citing Active Living Research, Active Education: Physical Education, Physical Activity and Academic Performance Research Brief (2006) and Nelson, Melissa C., Gordon-Larsen, Penny, Physical activity and sedentary behavior patterns are associated with selected adolescent health risk behaviors. *Journal of the American Academy of Pediatrics*, 117(4), 1281-1290. (2006)).

¹⁹⁷ *Id.*

¹⁹⁸ See U.S. DEP'T OF HEALTH AND HUM. SERV. OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, *supra* note 5.

chosen because this is a time when lifelong physical activity habits can be initiated and fostered.”¹⁹⁹ The youth Guidelines provided the foundation upon which former First Lady Michelle Obama’s “Let’s Move!” initiative and the White House Childhood Obesity Task Force Report were built.²⁰⁰ Furthermore, policymakers have growing interest in youth physical activity; improved physical activity levels are now seen as a goal in themselves, along with being an important aspect in addressing childhood obesity.²⁰¹ Given this backdrop, the guidelines in the report elucidate the strong national policy of fostering healthy habits early in life; thus, they seek to prevent unhealthy and inactive lifestyles for Americans later in life.

Among the key findings in the report was that the school setting is the site of the most “realistic and evidence-based” opportunity to increase physical activity among youth; therefore, the school setting should be a “key part of national strategy” to increase physical activity.²⁰² It has been proven through research that children who are physically active have higher levels of cardiorespiratory fitness.²⁰³ Additionally, they typically have lower body fat and have stronger bones and reduced symptoms of anxiety and depression.²⁰⁴ Regular physical activity reduces the likelihood that risk factors and chronic diseases will develop in active children, suggesting that

¹⁹⁹ See U.S. DEP’T OF HEALTH AND HUM. SERV. OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION (Letter to Secretary Sebelius, December 31, 2012)

²⁰⁰ *Id.*

²⁰¹ *Id.* at 23.

²⁰² *Id.* at vii.

²⁰³ *Id.* at 1; *see id.* 28-32 (citing significant research on the subject).

²⁰⁴ U.S. DEP’T OF HEALTH AND HUM. SERV. OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, *supra* note 5.

they will be more likely to remain healthy in adulthood.²⁰⁵ The HHS, too, suggests that students get at least sixty minutes of moderate-to-vigorous physical activity each day of the school week.²⁰⁶

The school setting is so significant in providing youth with physical activity because more than fifty-five million students are expected to attend school for six to seven hours a day; this means it is an ideal setting to provide the most physical activity to the most students.²⁰⁷ Home or extracurricular settings are too variable in terms of what children's families can provide, thus the public school setting is the most democratic and far-reaching opportunity to give students consistent access to physical activity. The HHS said that "promoting physical activity in schools has traditionally been a part of the U.S. education system," which results in school-based activities that provide students substantial physical activity and opportunities to enhance their "motor skill development, fitness, and decision making, cooperation, and conflict resolution skills."²⁰⁸ Additionally, schools are such an integral setting for physical activity through physical education because of the major association between physical activity and academic performance.²⁰⁹ The report even articulates ways to make physical education programs more robust, through increasing physical activity time in class, adding more physical education to the curriculum, lengthening physical education class time, and most notably, "meeting the physical activity needs of all

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 9.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

students, including those with disabilities.”²¹⁰ If the goal is to allow children to be children through enjoying physical activities while gaining knowledge and skills they can use life-long, it follows that all children, SWDs included, get equal access to such initiatives.

C. Physical Education for SWDs Creates a Social Good which the National Government has an Interest in Protecting and Furthering—It’s Time to Ensure They Get It.

The Department of Education (DOE) has emphasized the importance of supporting school districts’ physical activity offerings.²¹¹ In 2010, a report from the United States Government Accountability Office to Congressional Requesters was published that concluded that all students, *including* those with disabilities, benefit from physical activity and the positive effects that it has on their health, self-esteem, and overall social well-being.²¹² Most notably, the DOE responded by drafting the document “Creating Equal Opportunities for Children and Youth With Disabilities to Participate in Physical Education and Extracurricular Athletics,” which suggests that schools and states can increase participation by “reducing and eliminating common barriers to participation.”²¹³

Individuals with disabilities are more likely to face health risks like obesity.²¹⁴ The rates of obesity are thirty-eight percent

²¹⁰ U.S. DEP’T OF HEALTH AND HUM. SERV. OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, *supra* note 5.

²¹¹ Forster, *supra* note 2, at 718.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Overweight and Obesity Among People with Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (2010),

higher for children with disabilities than their non-disabled peers.²¹⁵ The way to remedy the issue is to ensure that SWDs get physical activity opportunities through physical education curriculum at school. The CDC recommends comprehensive physical education to meet increased physical activity guidelines for children; this includes children with disabilities.²¹⁶ But still, despite all the guidelines from various governmental agencies and Congress, recommendations are not enough. There need to be changes from the ground up, with moves to make IEPs better and have more bite in terms of enforcement.

Take for example the current Trump Administration. It appears that the trend towards prioritizing SWDs equal access to education under IEPs will likely continue, as Secretary of Education Betsy DeVos initiated a new Q&A guideline²¹⁷ on December 7, 2017 to further clarify the meaning of *Endrew* and IEP requirements. The guidelines sharpen the mandate conferred by *Endrew* for what IEPs should include. The document says that IEPs must include goals that “aim to improve both functional and educational performance.”²¹⁸

<https://www.cdc.gov/ncbddd/disabilityandhealth/documents/obesityFactsheet2010.pdf> .

²¹⁵ *Id.* (citing the 2003-2008 National Health and Nutrition Examination Survey (NHANES)).

²¹⁶ NAT'L CTR FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION: DIVISION OF NUTRITION, PHYSICAL ACTIVITY, AND OBESITY, 2014 STATE INDICATOR REPORT ON PHYSICAL ACTIVITY (2014).

²¹⁷ U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS (Q&A) ON U. S. SUPREME COURT CASE DECISION *ENDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT RE-1* (Dec. 7, 2017) (available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-endrewcase-12-07-2017.pdf>).

²¹⁸ Michelle Diament, *Trump Administration Weighs In On FAPE, IEPs*, DISABILITYSCOOP (Dec. 11, 2017),

However, this move by DeVos is coupled with prior extreme behavior perceived as antagonistic to the SWD cause as well—in October 2017, the Secretary of Education rescinded seventy-two guidance documents outlining rights for SWDs.²¹⁹ The rationale behind this move was to eliminate “unnecessary regulatory burdens” and make it easier for the current administration to operate.²²⁰

Obviously, the fear from advocates of SWDs felt that this elimination move was a very harsh measure, functionally eradicating helpful guidance from decades past; however, they say that if new guidance is instituted that retains the same guidance as before and adds to it in a more concise way, that may be fine.²²¹ Given the vacillation in behavior by DeVos, it is unclear whether moves are being made in a positive or negative direction to advance rights for SWDs, especially as they pertain to physical education. Still, it appears that this most recent Q&A guidelines document is being accepted as one that hones and strengthens the administration’s interpretation of *Endrew* and the force of IEPs.²²² It is a good start, but the scheme to ensure that SWDs actually receive the education that their schools provide in their general curriculum needs to be bolstered.

IDEA must be amended to contain a trigger so that SWDs who attend schools that do include physical education as a

<https://www.disabilitycoop.com/2017/12/11/trump-administration-fape-ieps/24510/>.

²¹⁹ Moriah Balingit, *DeVos rescinds 72 guidance documents outlining rights for students with disabilities*, CHI. TRIB. (Oct. 21, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-devos-disabled-students-20171021-story.html> .

²²⁰ *Id.*

²²¹ *Id.*

²²² Diament, *supra* note 218.

general curriculum course in accordance with suggested daily thresholds are not excluded. Such a solution may be to contain an additional clause through which the state entity providing these necessary services gets a penalty if SWDs are not receiving the programming. If the federal government does indeed have such a robust national policy encouraging physical activity through public education courses such as physical education, it is time to create a meaningful enforcement mechanism in IDEA to remedy the issue of SWDs not getting the benefit of the courses to the same extent as their non-disabled peers.

VII. Conclusion

If physical education is included in a school's general curriculum—as it historically has been—the obligation is on the local and federal governments to see to it that SWDs are being provided equal opportunity to avail it. However, as practice has shown, local governments are often uncommitted to following through with their legal mandates. Even those school districts that have daily physical education requirements blatantly violate the law and fail to provide the required courses as they should. But, since such local governments legitimize physical education's place in general curriculum, IDEA is implicated as it pertains to a student's right to a FAPE. If physical education is generally provided to non-disabled students, then it must be included in a SWD's FAPE, pursuant to their unique IEP.

Time and precedent have shown that even though a SWD has the opportunity to litigate and attempt to prove that they are not receiving a FAPE, courts do not often look too favorably on the issue.²²³ They tend to rest their decisions on the school district and give a loose meaning to FAPE. Because of this taxing and often inconsequential path to attaining guaranteed physical education, the federal government must implement a safeguard in IDEA that puts the incentive on the *school district* to cooperate outside of litigation. If a school district has

²²³ See *supra* Part III.

physical education as a daily part of its curriculum, then it must be penalized for forgoing that obligation. Additionally, doing away with waivers or clever mechanisms of the like to avoid providing physical education to SWDs and other categories of students will also be imperative in this process. If schools do not phase out such waivers immediately, then until they do they must place an increased obligation on the part of the administrators to diligently document and check up on whether SWDs are actually getting physical activity from outside programming. But without remedying the problem of not actually providing physical education through elimination of waivers or making implementation of curricular programming a priority, a penalty must be provided.

Such a penalty²²⁴ could take the form of a mandatory disclaimer for the school, such as a federally-christened status of being “Legally Noncompliant” or “Unfit for Students with Disabilities.” Because school districts want to stay afloat and supported by their community members, the stain on the school as being noncompliant in some way will influence both non-disabled and disabled students’ families and guardians alike when they make the choice of where to send their children to school. If schools turn a blind eye to actually providing the education that they have an obligation to provide, then that means they operate on the assumption that nobody else is watching either.²²⁵ Once the federal government lights a fire under them to comply or else earn the ire and shame of both national and local governments, it is likely that schools will begin to take their own mandates more seriously. Since improving educational results for children with disabilities is an essential element of U.S. national policy of ensuring equality of opportunity for individuals with disabilities, IDEA needs to have

²²⁴ Though financial cuts through restricting federal grants also serve a penalty function, they are likely to serve a regressive function and not actually benefit anyone.

²²⁵ See *supra* Part V.

its teeth sharpened. Physical education is and has been of paramount importance to general public school curriculum, and SWDs must be provided equal access to physical education as a matter of statutory right and national public policy. To make sure this happens, IDEA must have a stronger bite on willfully negligent school districts.