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Equal Educational Opportunity for the Handicapped—An Unfulfilled Promise

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EQUAL EDUCATIONAL OPPORTUNITY FOR THE HANDICAPPED—AN UNFULFILLED PROMISE†

I. INTRODUCTION

Historically, the handicapped have been either entirely excluded from education or provided with an education inappropriate or inadequate to meet their needs.[1] In recent years, this situation has attracted some attention, and efforts have been made to afford the handicapped equal educational opportunity. This comment will first trace the judicial and legislative developments in this area on the federal level. Once the scope of the law on the federal level has been defined, the real issue becomes: how should the states respond to the federal mandates in providing education to the handicapped? Therefore, this comment will next focus on the approach that has been followed in California. When the positive and negative aspects of the California experience have been explored, some conclusions will be drawn about how states should and should not deal with the education of their handicapped citizens.

Reforms in the education of disabled children in grades kindergarten through twelve were made in response to several specific criticisms of the special education system. First, in the past, many disabled children were completely excluded from any form of education.[2] Second, in the present, children who do not need special education are often assigned to such programs because of improper identification procedures,[3] while students who need special help are overlooked.[4] Third, the type of in-

1. Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 875 (1975) [hereinafter cited as *History of Unequal Treatment*]. There are approximately seven million school age children requiring special education, of whom one million receive no formal education. Only 50% of the remainder receive special education. *Id.*

2. *Id.*

3. Regular classroom teachers identify students who are aberrant and recommend them for testing and special placement. Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 103 (1974) [hereinafter cited as *Legal Reform*]. In addition, "definitions of what is tolerable deviation from expected behavior vary markedly from teacher to teacher." *Id.* The use of culturally biased tests, *id.* at 50, and teacher selection lead to the overrepresentation of boys, the aggressive, and the nonwhite in special education programs. *Id.* at 44.

4. The selection system "may lead the school both to ignore the special needs of students who do not disrupt the classroom and to underestimate the educational potential of minority students." *Id.*

structional setting selected for a disabled student is often inappropriate.[5] Finally, the very act of labeling a child as "disabled" and placing him or her in a separate program has a stigmatizing effect[6] and often produces an education of inferior quality.[7]

On the postsecondary level, outright or de facto exclusion remains a problem, although the concerns are somewhat different. One primary area of difficulty for handicapped students is that of obtaining physical access to campus facilities. This involves the removal of architectural barriers,[8] as well as providing attendants or other assistance where modification is impossible.[9] As to academic programs, one concern is that the requirements for admission[10] and obtaining a degree[11] be nondiscriminatory. In addition, disabled students require special equipment and services in order to make academic and other campus programs truly accessible.[12]

II. DEFINITIONS AND TERMINOLOGY

A threshold question involves determining what people with mental or physical abnormalities should be called. The most traditional and common answer has been that these people are "handicapped." But some people have become concerned that this label implies limitation and lack of ability. This concern has given rise to the use of a variety of terms such as "inconvenienced," "special," "exceptional," and "disabled." Because these labels seem to be fruits of a pointless search for the right euphemism, the authors have decided to use the terms "handicapped" and "disabled" interchangeably throughout this comment.

Once a label has been attached to the population in question, one must next determine how to define that term. Early attempts to define

5. Comment, *Public Instruction to the Learning Disabled: Higher Hurdles for the Handicapped*, 8 U.S.F.L. REV. 113, 121 (1973) [hereinafter cited as *Higher Hurdles*].

6. Jones, *Labels and Stigma in Special Education*, 38 EXCEPTIONAL CHILDREN 553, 560-61 (1972) [hereinafter cited as *Labels and Stigma*].

7. "[D]espite the additional resources in special programs, special classes generally have either no effect or a slightly adverse effect on both the motivation and achievement of students assigned to them." *Legal Reform, supra* note 3, at 44.

8. California State University and Colleges, Task Force on Disabled Students 6-7 (Dec. 1974).

9. "For example, if a physically disabled person requires assistance to get in and out of his/her vehicle or to use restroom facilities, then such services are necessary to give that student access to the educational programs and facilities." Disabled Students Coalition, Position Paper: The Application of Section 504 to Higher Education 2-3 (Aug. 15, 1978) [hereinafter cited as DSC Position Paper].

10. *See, e.g.*, 45 C.F.R. § 84.42 (1977).

11. *See, e.g., id.* § 84.44.

12. *Id.*

the handicapped focused on medical definitions of disability.[13] The more modern approach defines disability in functional terms.[14] An advantage of definitions that are either wholly or partly functional is that they de-emphasize the use of specific labels which can lead to stigmatization of the handicapped individual.[15] The drawback of functional definitions is that they tend to be vague and difficult to apply in actual practice. Despite this disadvantage, this comment will adopt the definitions provided in the federal law,[16] because these are the definitions which presumably will be accepted throughout the country for most purposes in the future.

III. ELEMENTARY AND SECONDARY EDUCATION

A. Federal Law

1. Judicial Interpretations

Education has traditionally been thought of as purely a state function. For this reason, federal courts have been reluctant to hear challenges to state practices regarding the education of the disabled.[17] However, some federal courts have been willing to hear such cases and have thus established the basis for the development of judicial doctrine in this area.[18] The courts have been asked to resolve several major issues to be explored separately in the following text.

a. Is there a constitutional right to education?

The starting point for much of the litigation concerning the field of education is the landmark decision of *Brown v. Board of Education*.[19]

13. "Handicapped students are persons with . . . [a professionally] verified physical, communication or learning disability." California Community Colleges, Operational Guideline: Programs for the Handicapped 2.3 (Fall 1977).

14. 45 C.F.R. § 84.3(j)(1) (1977) provides: " 'Handicapped persons' means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 20 U.S.C. § 1401(1) (1978) provides:

> The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

15. *See Labels and Stigma*, *supra* note 6.

16. *See* note 14 *supra*.

17. *Higher Hurdles*, *supra* note 5, at 124.

18. *See, e.g.*, Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (court refused to abstain even though state statutes unclear and uninterpreted by state courts).

19. 347 U.S. 483 (1954).

In *Brown*, the United States Supreme Court held that education is such an important function that, if a state has undertaken to provide it, education must be made available to all citizens on an equal basis.[20] While this decision did not dictate an absolute and constitutionally guaranteed right to education, it did have an analogous effect for all states have undertaken to provide education. In a subsequent and definitive opinion, *Rodriguez v. San Antonio School District*,[21] the Court specifically held that the United States Constitution does not guarantee education as a fundamental right.[22] The Court, however, did imply that there may be some minimum level of education, which can be considered fundamental, because it is necessary for the meaningful exercise of other rights that are guaranteed.[23]

Advocates for disabled children have attempted to use the concept of a right to education to prevent the exclusion of such children from publicly supported education. The first major case to take this approach was *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*.[24] The Pennsylvania Association for Retarded Children brought suit in district court on behalf of thousands of school-age mentally retarded children who had been totally excluded from public education because they were believed to be incapable of benefiting from education.[25] The court never reached the constitutional question but did approve a consent decree that insured the right to a publicly supported education for all disabled children and established procedural safeguards to protect this right.[26] In *Mills v. Board of Education*,[27] the district court for the District of Columbia also found a right to education that prevented continued exclusion of disabled children.[28] Al-

20. *Id.* at 493. Several cases have reached conclusions similar to that in *Brown*. *See, e.g.*, Van Dusartz v. Hatfield, 334 F. Supp. 870, 875 (D. Minn. 1971) (education a "truly fundamental" interest); Serrano v. Priest, 18 Cal. 3d 728, 766-68, 557 P.2d 929, 951, 135 Cal. Rptr. 345, 366 (1976) (education a fundamental interest); Milliken v. Green, 203 N.W.2d, 457, 468-69 (Mich. 1972) (education a fundamental interest under state constitution); Robinson v. Cahill, 287 A.2d 187, 213 (N.J. 1972), *cert. denied*, 414 U.S. 976 (1973) (free education a state function).

21. 411 U.S. 1 (1973).

22. *Id.* at 35.

23. *Id.* at 35-36.

24. 343 F. Supp. 279 (E.D. Pa. 1972).

25. *Id.* at 281-82.

26. *Id.* at 302-03.

27. 348 F. Supp. 866 (D.D.C. 1972).

28. "The court need not belabor the fact that requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children. The Board of Education is required to make such opportunity available." *Id.* at 874.

though statutory developments[29] have eliminated the necessity for reliance on this judicially created right to education, it seems reasonable to assume that this precedent remains viable despite the *Rodriguez* decision, at least in an instance of total exclusion.

b. What does equality of education mean?

Even in the absence of an absolute right to education, *Brown* seems to require that whatever education that is provided must be provided equally.[30] However, a major definitional question arises when an attempt is made to measure equality of education. In *McInnis v. Shapiro*,[31] a federal court rejected the contention that equality of education means equal expenditures.[32] But the *McInnis* court also rejected the idea that equality of education means expenditures based on pupils' needs, because this standard is unduly vague.[33] Another standard that has been suggested defines equality of education as maximizing the potential of all students.[34] In the *Rodriguez* decision the Supreme Court came very close to resolving these conflicting concepts of equality by condoning the Texas system that allocated resources differentially.[35] Thus, at least beyond some minimum level, equality of expenditures or inputs does not seem to be required by the Federal Constitution.

c. Should the disabled be afforded equal educational opportunity?

As already indicated, the disabled have been held entitled to *some* form of publicly supported education.[36] Once the disabled are part of the student population, the issue becomes whether or not they should be afforded equality of educational opportunity, and if so, in what manner.

Most challenges to discriminatory treatment within the educational system have been based on the equal protection clause of the fourteenth amendment[37] and the 1964 Civil Rights Act.[38] Thus, a key issue

29. *See* 20 U.S.C. §§ 1401-1461 (1976); 29 U.S.C. § 794 (1976).
30. Brown v. Board of Educ., 347 U.S. at 493.
31. 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd per curiam*, 394 U.S. 322 (1969).
32. *Id.* at 335.
33. *Id.* at 335-36.
34. Tesser & Stodolsky, *Equal Opportunity for Maximum Development*, HARV. ED. REV. 126, 134 (1969).
35. 411 U.S. at 28.
36. *See* notes 24-28 *supra* and accompanying text.
37. U.S. Const. amend XIV, § 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . ."
38. 42 U.S.C. § 1983 (1976) provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage,

is whether the disabled should be treated as a suspect class for the purpose of applying the equal protection clause. If the disabled are found to be a suspect class, then strict judicial scrutiny is required and unequal treatment can be justified only by the existence of a compelling state interest in such treatment.[39] Absent suspect class status, the state is free to treat the disabled differently as long as there is some rational basis for such a scheme.[40]

In 1974, the North Dakota Supreme Court decided *In re G.H.*,[41] one of the first cases to regard the disabled as a suspect class requiring the use of strict judicial scrutiny.[42] In 1975, in *Fialkowski v. Schapp*,[43] the district court for the Eastern District of Pennsylvania stated that the disabled ought to qualify as a suspect class.[44] A year later the same court developed this analysis further by stating that the plaintiffs in *Fredrick L. v. Thomas*[45] had some of the characteristics of a suspect class, such as minority status and political weakness.[46] In view of these decisions, it seems likely, though not certain,[47] that the disabled qualify as a suspect class for purposes of applying the equal protection clause.

One approach to challenging inadequate education has been to claim that it amounts to constructive exclusion. This theory seems to have been first employed in an educational setting in *Lau v. Nichols*,[48] where

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of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

39. *History of Unequal Treatment, supra* note 1, at 900-01.

40. *Id.* at 901.

41. 218 N.W. 2d 441 (N.D. 1974) (school district held responsible for continuing payment of handicapped child's educational expenses even though child had been declared a ward of state).

42. *Id.* at 447.

> We are confident that the [Supreme Court] would have held that G.H.'s terrible handicaps were just the sort of "immutable characteristic determined solely by the accident of birth" to which the "inherently suspect" classification would be applied, and . . . would be the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy and sex.

43. 405 F. Supp. 946 (E.D. Pa. 1975).

44. *Id.* at 959 (dictum) (retarded children meet several indicia of strict scrutiny test: precluded from political process; neglected by state legislatures; stigmatized).

45. 408 F. Supp. 832 (E.D. Pa. 1976), *aff'd*, 557 F.2d 373 (3d Cir. 1977).

46. *Id.* at 836. However, the court specifically found that the handicapped children were not members of a suspect class meriting strict scrutiny, but instead suggested that "the Supreme Court . . . would apply the . . . middle test of equal protection, sometimes referred to as 'strict rationality'." *Id.*

47. *See* Brewer & Armstrong, *Is the Constitution Handicapped?*, 14 TRIAL, June 1978, at 52 [hereinafter cited as *Is the Constitution Handicapped?*]. *See also History of Unequal Treatment, supra* note 1.

48. 414 U.S. 563 (1973).

students of Chinese ancestry were held to have been constructively excluded from education by placement in classes taught only in English.[49] The plaintiffs in both *Fialkowski* and *Fredrick L.* applied this theory in an effort to strike down educational schemes that provided the disabled with inadequate or inappropriate education.[50]

The primary defense of many school systems against providing education for the disabled is that of limited financial resources.[51] But, in *Mills*, lack of funds was held to be an insufficient justification for exclusion or inappropriate placement of disabled children.[52] The *Mills* decision clearly indicated that if a school district does not have sufficient funds to provide optimum education for all, it must nevertheless distribute those funds available in a fashion that insures disabled students equal educational opportunity.[53] Unfortunately, the soundness of this holding is now somewhat questionable for *Rodriguez* subsequently held that differential funding is permissible as long as all students are provided with some minimally necessary education.[54]

There are reasons, however, for not applying the *Rodriguez* analysis to the disabled. *Rodriguez* assumes that all children will receive some minimal education (which is not true for many disabled children) and that this minimal level of education will be sufficient to give all children the basic skills they need. However, because of their special needs, disabled children cannot benefit from an educational environment that is not enriched and adapted to accommodate their disabili-

49. *Id.* The *Lau* Court specifically refused to decide the equal protection argument and based its decision on statutory interpretation. California state law required a minimum level of proficiency in English for high school graduation; therefore, because the Chinese children were precluded from receiving any meaningful instruction due to the language barriers, it was the responsibility of the school to remedy that situation. *Id.* at 565-68.

50. Haggerty & Sacks, *Education of the Handicapped: Toward a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 976, 979 (1977) [hereinafter cited as *Definition of Appropriate Education*].

51. *See, e.g.*, Rodriguez v. San Antonio School Dist., 411 U.S. 1 (1973); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

52. 348 F. Supp. at 876.

53. *Id.* The *Mills* court stated:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly can not be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

Id.

54. *See* notes 22-23 *supra* and accompanying text.

ties. Thus, while *Rodriguez* may provide an adequate approach for most children, it is not, or should not be, applicable to the disabled.

d. What is an appropriate education for the disabled?

In light of the confusion over how to measure and define equality of educational opportunity,[55] the only manageable approach seems to be to require that the disabled be provided with an education appropriate to their needs.[56] The *PARC* and *Mills* decisions did much to develop a specific list of steps to be followed in affording the disabled an appropriate education. Each child has a right to an individualized assessment before placement[57] that must utilize fair and unbiased testing procedures.[58] Based on this assessment, an individualized educational plan must be developed to meet the particular needs of the student.[59] Whenever a child's placement is to be changed, a thorough reevaluation is required.[60] Furthermore, regular periodic reevaluations should be conducted to prevent placement in special education from becoming permanent.[61] Overlaying this scheme is the general requirement that disabled children be placed in the least restrictive alternative setting.[62] The use of the least restrictive alternative, or "mainstreaming," means that the disabled child must be placed in a program that will integrate him or her as fully as possible into a regular classroom environment with nondisabled students.[63]

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55. *See* notes 30-35 *supra* and accompanying text.

56. Pennsylvania Ass'n of Retarded Children v. Pennsylvania, 343 F. Supp. at 307.

57. Mills v. Board of Educ., 348 F. Supp. at 879.

58. Because of culturally and linguistically biased testing procedures, minorities are vastly overrepresented in special education programs. *See Legal Reform, supra* note 3. In Diana v. State Bd. of Educ., No. C-70-37 (N.D. Cal., filed Jan. 7, 1970), the state, in a consent decree, agreed to use Spanish language I.Q. tests in testing Hispanic children for placement in educable mentally retarded classes. Following the 1970 consent decree, the *Diana* case has focused on the proper standards for measurement of minority enrollment and methods of enforcing the consent decree. In Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), the court denounced the administration of standard I.Q. tests to black students as "concededly irrational." *Id.* at 1313.

59. *Definition of Appropriate Education, supra* note 50, at 976 n.83.

60. Pennsylvania Ass'n of Retarded Children v. Pennsylvania, 343 F. Supp. at 303-06.

61. *Id.*

62. Mills v. Board of Educ., 348 F. Supp. at 880 ("placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class"); Pennsylvania Ass'n of Retarded Children v. Pennsylvania, 343 F. Supp. at 302 (order enjoining enforcement of state law prohibiting mentally retarded children access to program of free education and training).

63. This policy means that "among all alternatives for placement within a general educational system, handicapped children should be placed where they can obtain the best education at the least distance away from mainstream society." Note, *The Education for All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. REV. L. & SOC.

Case law has also developed a series of procedural safeguards to protect these rights. Parents must be given notice and an opportunity to be heard whenever their child is to be evaluated or reevaluated.[64] Parents may obtain an independent evaluation of the child, examine school records, present witnesses at the hearings, and be represented by counsel.[65] In *Mills*, the burden of proof on all issues was placed on the school district.[66] However, this placement of the burden of proof does not appear to be a universally recognized element of the due process rights afforded a student.[67]

2. Federal Statutory Provisions

a. The Education of All Handicapped Children Act of 1975

The earliest federal legislative attention to the problem of education for the disabled involved minor provisions in the 1966 amendments to the Elementary and Secondary Education Act.[68] In 1968, Congress passed the Education of the Handicapped Act.[69] The volume of litigation in the early 1970's demonstrated that these statutory provisions were inadequate, and Congress undertook to codify the judicial doctrines that had developed.[70] The resulting legislation was the Education of All Handicapped Children Act of 1975 (the Act).[71] This Act requires that each state adopt a plan for the identification, evaluation, and education of all handicapped children.[72] Those who have been totally excluded from public education are designated as having first priority in the expenditure of funds.[73] Second priority is given to the severely disabled who are not receiving an adequate or appropriate education.[74] There must be full evaluation before placement or any

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CHANGE 43, 48 (1976) (citing Molloy, *Law and the Handicapped*, SCI. & CHILDREN, March, 1976, at 9) [hereinafter cited as *Education for All*].

64. Pennsylvania Ass'n of Retarded Children v. Pennsylvania, 343 F. Supp. at 303-06.

65. *Id.*

66. 348 F. Supp. at 881.

67. *Higher Hurdles, supra* note 5, at 122.

68. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191 (codified at 20 U.S.C. § 841 (1976)).

69. 20 U.S.C. §§ 1401, 1405, 1406, 1411-1420 (1976). For a general discussion of the history of early federal legislative efforts in the area of education for the disabled, see *Education for All, supra* note 63, at 45-48.

70. *Education for All, supra* note 63, at 46. The compliance date for the Federal Act was September 1978. 20 U.S.C. § 1412(2)(B) (1976).

71. 20 U.S.C. § 1401-1461 (1976).

72. *Id.* § 1413.

73. 45 C.F.R. § 121 a.320(a) (1977).

74. *Id.* § 121 a.320(b).

change in the child's program.[75] In addition, a reevaluation is required at least annually.[76] All evaluations must be based on more than one testing instrument,[77] and such tests cannot be biased.[78] The Act requires mainstreaming[79] and allows deviation from this principle only as a measure of last resort.[80]

The Act also includes a series of procedural safeguards. Parents must be notified by the school of pending actions regarding the disabled child.[81] Parents are entitled to file a complaint and receive an impartial hearing if they choose to contest the school's placement decision.[82] Unfortunately, there is no prohibition against a school official serving as a hearing officer, and this provision could create a source of potential bias.[83] Parents have the right to examine school records.[84] Parents may obtain a free independent evaluation,[85] but if the school's evaluation is proved to be proper, the parents must pay for the outside evaluation.[86] Both parents and teachers are permitted to have the assistance of counsel at hearings.[87] If parents are dissatisfied with the results of the hearing, they have the right of appeal to the state educational agency and ultimately the right to bring a civil action in state or federal court.[88]

In addition to these provisions, which closely resemble the judicially created standards,[89] the Act also contains some innovative provisions. States must establish an advisory committee to oversee and monitor the implementation of the state plan.[90] Incentive grants are offered to those states that provide educational programs for preschool-aged disabled children.[91] Preschool children are also afforded the minimum

75. *Id.* § 84.35(a).
76. *See generally* 20 U.S.C. § 1412(3)-(5)(B) (1976).
77. *Id.* § 1412(5)(C).
78. *Id.*
79. *Id.* § 1412(3)-(5).
80. *Definition of Appropriate Education, supra* note 50, at 987.
81. 20 U.S.C. § 1415(b)(1)(C) (1976).
82. *Id.* § 1415(b)(2).
83. The Federal Act only precludes state educational officials or employees "involved in the education or care of the child" from acting as a hearing officer. *Id.* Thus, a teacher other than the child's teacher or a principal from a different school can serve as a hearing officer.
84. *Id.* § 1415(b)(1)(A).
85. 45 C.F.R. § 121 a.503(b) (1977).
86. *Id.*
87. 20 U.S.C. § 1415(d)(1) (1976).
88. *Id.* § 1415(e)(2).
89. *See* notes 57-66 *supra* and accompanying text.
90. 20 U.S.C. § 1413(a)(12) (1976).
91. Funds are received under 20 U.S.C. § 1411(a)(1); however, § 1419 gives states an ad-

due process safeguards established for all handicapped children covered under the Act.[92] Finally, the Act authorizes funding for the removal of architectural barriers.[93]

Under the Act, funds are authorized according to the number of disabled children a state serves.[94] A graduated funding scheme will increase the federal contribution each year until it amounts to forty percent of the state's expenditure per average daily attendance for each disabled child.[95] However, the percentage of students that the state may claim as disabled cannot exceed twelve percent.[96]

It is estimated that four billion dollars ultimately will be needed to implement the Act.[97] The federal funds authorized under the Act would, if appropriated, cover only perhaps twenty-five percent of this total cost.[98] The states seem incapable and unwilling to supply the necessary funding for implementation of the law.[99] Even more disturbing are indications that the limited federal funds authorized under the Act may not be appropriated at all.[100]

Under the Act, the federal government will disburse the funds, but the states will administer the program.[101] This system was designed to avoid objections that the federal government could intervene in education, traditionally a state function.[102] Local agencies will receive seventy-five percent of the funds directly from the federal government, and the states will retain control over the remaining twenty-five percent.[103] The states also must match the federal allocations.[104] This scheme was designed to provide flexibility and preserve local autonomy while providing some national uniformity.[105] But, it may also lead to

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ditional $300 per year for each three- to five- year old child receiving special education. Thus, § 1419 provides an incentive for preschool services.

92. *Id.* § 1415.

93. *Id.* § 1406.

94. *Id.* § 1411(a)(1)(A)-(B).

95. *Id.* § 1411(a)(1)(B)(v).

96. *Id.* § 1411(a)(5)(A)(i).

97. 121 CONG. REC. H7150 (daily ed. July 21, 1975) (remarks of Rep. Jeffords).

98. *Id.* at H7760 (daily ed. July 29, 1975) (remarks of Rep. Perkins).

99. Note, *Enforcing Section 504 Regulations: The Need For a Private Cause of Action to Remedy Discrimination Against the Handicapped*, 27 CATH. U.L. REV. 345, 357 (1978) [hereinafter cited as *Enforcing Section 504*].

100. *Education for All, supra* note 63, at 50-51.

101. 20 U.S.C. § 1412(6) (1976).

102. 121 CONG. REC. S10,976 (daily ed. June 18, 1975) (remarks of Sen. Dole).

103. 20 U.S.C. § 1411(c)(1)(A)-(B) (1976).

104. *Id.* § 1411(c)(2)(B).

105. *Id.* §§ 1412-1413.

coordination problems and inequities.[106]

As will be seen, at least in California, inequities do exist between districts in terms of the types of special education services available to disabled children,[107] and there have been significant coordination problems in implementing reforms in California.[108] However, because compliance with the Act has only been mandatory since September 1978,[109] it is difficult to determine to what extent these problems will increase or decrease once the Act has been fully implemented. In addition, assessing the impact of the Act is complicated by the fact that California has simultaneously enacted and implemented state legislation designed to reform special education.[110] But, it is worth noting that, in California, the inequitable distribution of educational funding was held to violate the state constitution in *Serrano v. Priest*.[111] If and when the redistribution of educational funds contemplated in *Serrano* occurs, many of the present and potential inequities of special education programming in California should be eliminated as well.

b. The Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973[112] prohibits discrimination by any federal contractor on the basis of disability.[113] Since most schools receive federal funds and are therefore covered by section 504, its provisions overlap considerably with those of the Education of All Handicapped Children Act of 1975, which applies to all elementary and secondary schools.[114] One major difference is that section 504 applies even when a state does not apply for funding under the Act.[115] Section 504 also requires that private schools make accommodations

106. *Education for All, supra* note 63, at 51.

107. There are differences between districts in California because some districts have already implemented the Master Plan and some have not. *See* note 173 *infra* and accompanying text.

108. *See* text accompanying notes 194-95 *infra*.

109. *See* note 70 *supra*.

110. *See* text accompanying notes 155-71 *infra*.

111. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977).

112. 29 U.S.C. § 794 (1976). "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." *Id.* [hereinafter cited as section 504]. In 1978 Congress passed Public Law 95-602, which amended the Rehabilitation Act of 1973, but did not make any substantial modification of Section 504.

113. 29 U.S.C. § 794 (1976).

114. *Definition of Appropriate Education, supra* note 50, at 984.

115. 20 U.S.C. §§ 1401-1461 (1976).

under certain circumstances.[116] In addition, section 504 does not provide the due process standards or the incentive grants for preschool children that are included in the Act.[117] The regulations under section 504[118] contain provisions virtually identical to those previously discussed with regard to the Act. However, the slight differences between the two statutes and their regulations make their combined coverage broader and more effective than either statute acting alone.[119]

B. California Law

1. California Constitutional and Early Statutory Provisions

The California Constitution charges the legislature with disseminating education and encouraging the development of school systems.[120] Judicial interpretation has construed this constitutional provision to guarantee California's citizens a right to education.[121]

The special education system in California is the result of several decades of statutory evolution. This section will discuss the statutory scheme that existed prior to the enactment of the Master Plan. The new Master Plan system is discussed in detail in the next section. However, the older law is of more than historical importance because it is still in effect in those districts where the Master Plan has not yet been implemented. It should also be noted that when the legislature enacted the Master Plan, it made certain modifications in the law affecting non-Master Plan districts. These changes are discussed below.

The earliest special education programs for the disabled were those for the mentally retarded.[122] Programs for the educable mentally retarded and the trainable mentally retarded were mandatory in all school systems under the California Code of Education,[123] for all schools in California are governed by these statutes.[124] Because of the concern over the effective permanence of placement,[125] a plan was

116. 45 C.F.R. § 84.39(a)-(b) (1977).

117. *See* notes 91-92 *supra* and accompanying text.

118. 45 C.F.R. §§ 84.31-84.40 (1977).

119. *Education for All, supra* note 63, at 61.

120. CAL. CONST. art. IX, § 1.

121. Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924); Ward v. Flood, 48 Cal. 36 (1874).

122. *Legal Reform, supra* note 3, at 96.

123. CAL. EDUC. CODE § 56515 (West 1978).

124. CAL. EDUC. CODE §§ 33000-60670 (West 1978) govern elementary and secondary education. Postsecondary education is subject to CAL. EDUC. CODE §§ 66000-94500 (West 1978).

125. *See* note 7 *supra*.

adopted, pursuant to the expressed legislative intent,[126] to gradually return the retarded to regular classes. Placement in programs for the retarded had been based primarily on the child's score on intelligence tests.[127] In the wake of the decisions in *Diana v. State Board of Education*[128] and *Larry P. v. Riles*[129] prohibiting use of culturally biased tests, the legislature required districts to specifically justify any overrepresentation of minorities in programs for the retarded.[130] This reform and the requirement of parental consent before placement[131] probably account for the decrease in enrollments in programs for the educable mentally retarded.[132]

The second major component of the California approach to special education was the creation of development centers for the severely handicapped.[133] These were self-contained facilities designed to give specialized assistance to the severely retarded, physically handicapped, and others who were not provided with an education in the regular schools.[134] The Education Code required that local school districts and counties establish these special centers and classes.[135] Presently, over twenty-nine of the fifty-eight counties in the state continue to provide such programs.[136]

The Education Code also provided for centers and programs for the educationally handicapped.[137] The "educationally handicapped" were individuals with relatively minor learning disabilities.[138] These programs were recently made mandatory.[139] Educationally handicapped children could have been placed in special day classes or learning disability groups.[140] But, whatever the instructional setting, schools were supposed to return educationally handicapped children to regular classes as quickly as possible.[141] Until recently, only two percent of a

126. CAL. EDUC. CODE § 56504 (West 1978).
127. *Id.* § 56505.
128. No. C-70-37 (N.D. Cal., filed Jan. 7, 1970).
129. 343 F. Supp. 1306 (N.D. Cal. 1972).
130. CAL. EDUC. CODE § 56508 (West 1978).
131. *Id.* § 56506.
132. *Legal Reform, supra* note 3, at 99.
133. CAL. EDUC. CODE §§ 56800-56865 (West 1978).
134. *Id.*
135. *Id.* § 56602.
136. *Higher Hurdles, supra* note 5, at 116.
137. CAL. EDUC. CODE §§ 56600-56619 (West 1978).
138. *Higher Hurdles, supra* note 5, at 116.
139. CAL. EDUC. CODE § 56602 (West 1978) (amending CAL. EDUC. CODE § 6751 (West 1969)).
140. *Legal Reform, supra* note 3, at 97.
141. CAL. EDUC. CODE § 56602 (West 1978).

district's students could be classified as educationally handicapped,[142] and enrollments could increase by no more than twenty percent annually.[143] These rules were apparently designed to discourage the tendency of school officials to put any difficult child into educationally handicapped programs.[144]

Another aspect of the California system was the use of tuition vouchers.[145] Under this system, parents of children who were not served by the public schools received tuition vouchers to cover the cost of placing their children in a private school.[146] Such grants were mandatory for most types of handicapped children except those categorized as educationally handicapped.[147] Not only was attendance at a private school for the handicapped a poor substitute for the mainstreamed public education guaranteed by federal law,[148] but various procedural constraints made tuition vouchers available to a very limited number of parents.[149] Another problem with the voucher system was that grants were calculated according to the amount expended by the local district.[150] This practice created hardships for disadvantaged families who tend to reside in districts where per pupil expenditures are low and resulted in inequities.[151]

As already indicated, in California, parental consent was and is required prior to placement of a student in special education.[152] An additional safeguard was the establishment of admission committees consisting of special educators, teachers, and parents who had to review the placement of a child.[153] There were also further procedural rights afforded to parents and children categorized as educationally handicapped or educable mentally retarded.[154]

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142. CAL. EDUC. CODE § 6752 (West 1969) (repealed 1977) (current version at CAL. EDUC. CODE § 56605 (West 1978)).

143. *Id.* § 6752.1 (West 1969) (repealed 1977) (current version at CAL. EDUC. CODE § 56606 (West 1978)).

144. *Legal Reform, supra* note 3, at 99.

145. CAL. EDUC. CODE § 6870 (West 1969) (current version at CAL. EDUC. CODE § 56030 (WEST 1978)).

146. *Id.*

147. CAL. EDUC. CODE § 56600 (West 1978).

148. *See* notes 79-80 *supra.*

149. *Higher Hurdles, supra* note 5, at 118-20.

150. *Id.* at 120.

151. *Id.* In Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977), inequities caused by property tax funding of education were declared unconstitutional.

152. *See* note 131 *supra.*

153. *Legal Reform, supra* note 3, at 98-99.

154. *Id.* at 101.

2. The Master Plan

Despite the extensive statutory scheme in existence at the time, many disabled children were left unserved by the public schools in the early 1970's.[155] Still others were provided with inadequate and inappropriate educational programs.[156] Spurred by this failure, educators, parents of students, and legislators began to develop a reorganized and revitalized special education program for California.[157] This effort resulted in the California Master Plan for Special Education which was adopted on a pilot program basis by the legislature in 1974.[158]

The Master Plan involves several substantive reforms. One of the most important is the elimination of the categorized programs which resulted in the labeling of students.[159] It was hoped that the elimination of labeling would help prevent the stigmatizing effects that are known to accompany that practice.[160] Districts are required to make the full range of special educational programs available to their students,[161] while mainstreaming disabled students wherever possible.[162] The Master Plan further requires regular reevaluations of the progress of each student.[163]

The Master Plan also involves procedural reforms. Chief among these are the requirements that individualized educational programs (IEP's) be developed with parental involvement.[164]

In 1977, the California legislature passed Assembly Bill 1250,[165] amending the Master Plan, in order to eliminate the July 1, 1978 termination date of the pilot program.[166] Assembly Bill 1250 provides for a comprehensive phase-in program to extend the Master Plan throughout

155. CAL. STATE DEP'T OF EDUC., CALIFORNIA MASTER PLAN FOR SPECIAL EDUCATION: THIRD ANNUAL EVALUATION REPORT 1976-77 at 1 [hereinafter cited as SPED REPORT I]. This report was used because the draft of the subsequent 1977-78 report, CAL. STATE DEP'T OF EDUC., CALIFORNIA MASTER PLAN FOR SPECIAL EDUCATION: EVALUATION REPORT 1977-78 (Tent. Draft) [hereinafter cited as SPED REPORT II], omits data regarding the level of integration achieved under the Master Plan and comparisons between Master Plan and non-Master Plan districts. Without this critical data, the effectiveness of the Master Plan in mainstreaming disabled students cannot be determined.

156. SPED REPORT I, *supra* note 155.

157. *Id.*

158. 1974 Cal. Stats., ch. 1532 (A.B. 4040).

159. *Legal Reform, supra* note 3, at 111.

160. *Labels and Stigma, supra* note 6, at 560-61.

161. *Legal Reform, supra* note 3, at 111.

162. *Id.*

163. *Id.*

164. *See* SPED REPORT I, *supra* note 155, at 2.

165. 1977 Cal. Stats., ch. 1247 (A.B. 1250).

166. CALIFORNIA LEGISLATIVE COUNSEL, DIGEST OF A.B. 1250, at 2 (1977).

the state.[167] This bill also expands the due process procedures and requires that fair hearing panels be established to review parents' complaints about their child's placement.[168]

In addition to its amendment of the Master Plan, Assembly Bill 1250 requires changes in special education programs provided by school districts that presently have not implemented the Master Plan. Most notable among these changes is that programs for the educationally handicapped become mandatory.[169] In addition, the old two percent limit on enrollments in programs for the educationally handicapped has been eliminated.[170] Finally, the bill provides that allotments under the various categories of special education programs shall increase by six percent annually.[171]

C. Analysis of the California System in Operation

1. Non-Master Plan Districts

The implementation of the Master Plan is being accomplished on a phase-in basis.[172] Even today, the majority of disabled children in California are not covered by the Master Plan.[173] Thus, pre-Master Plan special education programs are still of considerable, though decreasing, importance.

The Master Plan was developed because previously existing programs in California were inadequate to meet the needs of handicapped children.[174] Because Assembly Bill 1250 made only minor modifications in non-Master Plan programs, it would follow that these programs are, even now, inadequate and do not comply with The Education of All Handicappped Children Act or section 504. This belief is confirmed by an examination of the actual operation of the non-Master Plan programs. Some handicapped students are still completely excluded from public education.[175] These programs are, therefore, vio-

167. CAL. EDUC. CODE § 56301 (West 1978).

168. *Id.* §§ 56036, 56336-56341.4.

169. *Id.* § 56602.

170. *Id.* § 56605.

171. CALIFORNIA LEGISLATIVE COUNSEL, DIGEST OF A.B. 1250, at 2 (1977).

172. CAL. EDUC. CODE § 56301 (West 1978).

173. Interview with Gail Imobersteg, Chief Administrative Analyst of the Special Education Division, California Department of Education, in Sacramento, California (Jan. 12, 1979). As of the 1978-79 school year, only 27.7% of all special education students are enrolled in districts currently implementing the Master Plan. *Id.*

174. *See* SPED REPORT I, *supra* note 155, at 1.

175. 10,240 or 23% of all disabled students who had been identified were not being served during 1976-77 in the non-Master Plan districts. *See* SPED REPORT I, *supra* note 155, at 24-25 (Tables 2-3).

lative of the major provisions of the federal statutes protecting the educational rights of the disabled.

2. Master Plan Districts

In order to eliminate the stigma caused by labeling,[176] the Master Plan was designed to abolish the variety of specific categories in special education programs and to treat all disabled children as "individuals with exceptional needs."[177] But, the abolition of specific categories really amounts to little more than a bit of legislative sleight of hand, for "individuals with exceptional needs" are defined in terms of the old labels.[178] Furthermore, data for the Master Plan evaluation report are collected according to the type of disability.[179] Thus, it is clear that the schools continue to give disabled children specific labels.[180]

One major objective of the Master Plan was to afford all disabled students access to free and appropriate public education.[181] Significant

176. *See* note 6 *supra* and accompanying text.

177. CAL. EDUC. CODE § 56301(h) (West 1978).

178. The term "individuals with exceptional needs" is defined as including "all pupils whose special education needs cannot be met by the regular classroom teacher with modification of the regular school program, who require the benefit of special education services." CAL. EDUC. CODE § 56302(c) (West 1978). Thus, individuals with exceptional needs are those who need special education. Special education is defined as those

> programs or services specially designed to meet the requirements of individuals with exceptional needs. Programs for the communicatively handicapped serve those pupils with disabilities in one or more of the communication skills such as language, speech, and hearing. Programs for the physically handicapped serve those pupils with physical disability such as vision . . . mobility . . . or other health impairments. Programs for the learning handicapped serve pupils with significant disabilities in learning or behavior . . . . Programs for the severely handicapped serve pupils with profound disabilities and who require intensive instruction and training such as the developmentally disabled, trainable mentally retarded, autistic, and seriously emotionally disturbed.

Id. § 56302(g). In the same subsection, the legislature indicates its recognition of the problems involved in classification and labeling by stating:

> It is the intent of the Legislature in this definition to provide general classifications of special education programs. The Legislature also recognizes that a pupil may appropriately require services from more than one classification of program and that the examples given for each classification do not imply that such pupils can be grouped in a class or program without regard to the individual educational needs of the pupils served.

Id. Despite this cautionary language, it appears that special education under the Master Plan has continued to be handled through strict use of classifications and labeling. A careful examination of the data presented in the SPED REPORT I, *supra* note 155, indicates that statistics are kept on the number of students in each category and that all students are assigned to one of the four categories defined in CAL. EDUC. CODE § 56352 (West 1978).

179. CAL. EDUC. CODE § 56352 (West 1978). *See generally* SPED REPORT I, *supra* note 155.

180. Interview with Cathy Blakemore, Chief Counsel for Special Education Project, Los Angeles Legal Aid Foundation, in Los Angeles, California (Jan. 9, 1979) [hereinafter cited as Blakemore Interview].

181. SPED REPORT II, *supra* note 155, at 1.

progress has been made in this area. In 1976-1977, only twenty-three disabled students were excluded from special education programs.[182]

The Federal Act requires that all disabled students be given an individualized assessment and educational program.[183] The Master Plan provides that individual educational plans (IEP's) must be drawn up for each student.[184] However, in practice, the IEP is nothing more than a standardized program designed for a particular type of disability,[185] often permitting very little modification or individualization.[186] This unsatisfactory procedure is perpetuated by the continued use of specific disability labels.[187]

The mainstreaming required under both the Act and the Master Plan can be effective and helpful to disabled students by aiding them in learning the skills necessary to function in a non-handicapped society.[188] In many cases, it should also be less expensive for schools to integrate handicapped students into regular classes than to maintain them in expensive special programs.[189] In short, mainstreaming is a technique that is cost beneficial for disabled students and for society as a whole.[190] Although full integration into a regular classroom setting may not be appropriate for all disabled children, the Act makes mainstreaming the favored procedure from which a school may deviate only in the last resort.[191]

Unfortunately, the results of the practical application of mainstreaming have been dismal. Statistics indicate that the level of integration (measured by the amount of time a disabled student spends in a regular classroom) changed very little upon implementation of the Master Plan in California.[192] Presumably, if mainstreaming were working, regular

182. SPED REPORT I, *supra* note 155, at 7.
183. *See* notes 75-78 *supra* and accompanying text.
184. SPED REPORT I, *supra* note 155, at 2.
185. Blakemore Interview, *supra* note 180.
186. *Id.*
187. *See* notes 178-80 *supra* and accompanying text.
188. *Education for All, supra* note 63 at 59.
189. *Id.* at 58.
190. "A denial of education burdens handicapped children for life, forcing them as adults to seek welfare assistance or placement in state or city institutions. Lifetime institutionalization can cost as much as $400 thousand per person . . . ." *Id.*
191. *Definition of Appropriate Education, supra* note 50, at 987.
192. Increases in time spent in the regular classroom were insignificant for the learning handicapped and the severely handicapped. The level of integration for the communicatively handicapped initially increased but then slightly declined during the second year of Master Plan implementation. Integration levels for the physically handicapped declined markedly during both years of Master Plan implementation. The failure of the implementation of mainstreaming is underscored by the fact that these statistics include only those stu-

classroom teachers would now be more aware of the needs of disabled students and the programs available to assist such students. The figures indicate, however, that the level of awareness among regular classroom teachers has not increased but, rather, has actually decreased with continued implementation of the Master Plan.[193] Thus, it is relatively clear that, at least in California, mainstreaming has been implemented in theory alone.

In an extensive review of legal reforms in special education, Professor Kirp, a noted author in the field, and his colleagues concluded that legal mandates of interagency coordination are virtually unenforceable because courts and legislatures cannot effectively police the cooperation agreements they mandate.[194] The results of Master Plan implementation confirm this conclusion. Coordination between local school districts and the offices of county superintendents of education was poor during the first three years of implementation of the Master Plan.[195]

Both the Federal Act[196] and the Master Plan[197] provide for expanded procedural rights for disabled students and their parents. One problem with these procedures is that they do not specify by what rules or regulations the fair hearing panels should operate.[198] The same problem existed with the admissions committees that operated under pre-Master Plan provisions.[199] This lack of guidelines leads to inconsistent results and the use of questionable informal procedures.[200]

An additional problem under the Master Plan is that fair hearing panels are comprised of one representative from the school district, one member appointed by the parent, and a third member selected by the first two.[201] This procedure might work well enough except that, if the third member is not appointed within a specified period of time, the county superintendent of schools may appoint the third member.[202]

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dents who spent part of their school day in a regular classroom. Therefore the statistics do not reflect the approximately 2,000 special education pupils who were completely segregated from regular classes. *See* SPED REPORT I, *supra* note 155, at 23, 31 (Tables 1 & 7).

193. While regular teachers were more aware after the first year of inplementation of the Master Plan, awareness decreased during the second year. In non-Master Plan districts awareness levels also declined. *See id.* at 45 (Table 19).

194. *Legal Reform, supra* note 3, at 92-93.

195. SPED REPORT II, *supra* note 155, at 7.

196. *See* notes 81-88 *supra* and accompanying text.

197. *See* notes 163-64 *supra* and accompanying text.

198. Blakemore Interview, *supra* note 180.

199. *Legal Reform, supra* note 3, at 102-03.

200. *Id.*

201. CAL. EDUC. CODE § 56341.3 (West 1978).

202. *Id.*

This provision encourages the original member appointed by the school to procrastinate such that the default mechanism, which favors the school, will be triggered.[203]

These and other problems with the due process mechanisms of the Master Plan have resulted in the limited effectiveness of changes in this area. The procedures can be made to work by a capable and persistent parent but afford little protection for the unsophisticated or passive parent.[204] But, this same situation existed before the implementation of the Master Plan.[205] Furthermore, schools often fail to inform parents of special education services available under the Master Plan.[206] These problems underscore the need for effective parent groups capable of carrying on active advocacy for the rights of disabled children.[207]

The existence of a separate system of special education inherently discourages meaningful improvement in the education of disabled children.[208] Lack of change occurs because the existence of special education programs gives regular classroom teachers a tempting opportunity to dispense with children whom they find difficult to handle.[209] At the same time, special educators resist reforms that lessen the role of special education because such changes threaten their livelihood.[210] Thus, the continued existence of separate programs of special education is a convenient solution for all educators.

The validity of this thesis in the context of the "real world" is borne out by the limited effect that Master Plan implementation has had on programs for disabled children. The most persuasive evidence is that implementation of mainstreaming has been unsuccessful,[211] probably because mainstreaming is the aspect of special education reform that regular classroom teachers are most likely to resist.[212]

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203. Blakemore Interview, *supra* note 180.
204. *Id.*
205. *Legal Reform, supra* note 3, at 105-06.
206. SPED REPORT II, *supra* note 155, at 7.
207. *Legal Reform supra* note 3, at 114. In California two groups exist that assist parents and are active in advocacy for disabled students in special education. These are the California Association for the Retarded and the California Association for Neurologically Handicapped Children. *Id.* at 106 & n.294.
208. *Id.* at 53.
209. *Id.* at 113.
210. *Id.*
211. *See* notes 192-93 *supra* and accompanying text.
212. *Education for All, supra* note 63, at 53.

IV. POSTSECONDARY EDUCATION AND THE DISABLED

A. Postsecondary Education Distinguished from Elementary and Secondary Education

The *Rodriguez* decision[213] dealt exclusively with elementary and secondary education; it provided no basis for asserting a "right" to higher education. Even if, as *Rodriguez* implies,[214] there may be a constitutionally guaranteed minimum level of education, that education would fall short of that provided by colleges and universities.[215] Thus, the precedent prohibiting exclusion of the disabled based on a right to an education[216] is inapplicable in the context of postsecondary education.

Disabled students in higher education tend to be only those with physical, perceptual, or communicative disorders.[217] This result occurs presumably because colleges and universities have entrance requirements based on academic achievement that students with serious learning disabilities or pronounced mental retardation are unable to meet.

While mainstreaming is a recent innovation in elementary and secondary education,[218] it is a commonplace and almost universally accepted procedure in postsecondary education.[219] In postsecondary education, the emphasis is on providing disabled students with the support services necessary to allow them to function normally in the classroom and in the nonacademic environment of the campus.[220]

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213. 411 U.S. 1 (1973).

214. *See* note 23 *supra* and accompanying text.

215. Because the *Rodriguez* Court found that the Texas system of elementary and secondary education provided "each child with an opportunity to acquire . . . basic minimal skills," 411 U.S. at 36, any constitutionally guaranteed right to education must be confined to a relatively low level of academic skills. Undoubtedly any college or university would offer education far in excess of this minimum level.

216. *See* notes 24-27 *supra* and accompanying text.

217. In the California State University and College system (the only system presently maintaining such statistics), 90% of all identified disabled students fall into these categories. OFFICE OF THE CHANCELLOR, CALIFORNIA STATE UNIVERSITIES AND COLLEGES, DISABLED STUDENTS AND EMPLOYEE PROGRAM CHANGE PROPOSAL FOR 1979-80 at 16 (Table 2) (1978) [hereinafter cited as PROGRAM CHANGE PROPOSAL].

218. *See* notes 62-63 *supra* and accompanying text.

219. *"The Commission believes that the objective of this statewide plan—and the objective of all segmental planning to provide education to students with disabilities—should be to integrate or 'mainstream' the student into the general campus programs and activities as far and as quickly as possible."* CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, A STATE PLAN FOR INCREASING THE REPRESENTATION OF STUDENTS WITH DISABILITIES IN PUBLIC HIGHER EDUCATION 3 (1978) (emphasis in original) [hereinafter cited as CPEC PLAN].

220. *Id.*

B. Federal Law

1. Regulatory Framework

Section 504 of the Rehabilitation Act of 1973[221] can be relied upon frequently to prohibit disability-based discrimination in postsecondary education because the statute applies to all agencies receiving federal funds. Under the regulations implementing section 504, institutions of higher learning are required to make their programs accessible to the disabled.[222] Meeting these requirements may involve the removal of architectural barriers if programs are housed in inaccessible facilities.[223] Academic and career counseling must be nonrestrictive and must not unduly limit the choices available to disabled students.[224] It is further required that disabled students be educated in the most integrated setting possible.[225] Each institution must perform a self-evaluation to determine whether it is in compliance with these provisions.[226] If not, the campus must develop a transition plan that will bring it into compliance with the regulations.[227]

Although the regulations promulgated under section 504 have only been in effect since May 1977, there are already a number of serious questions about their interpretation. One problem involves the language of section 84.44(d) of the regulations. This section requires that a deaf student be provided with an interpreter or other effective means of making orally presented materials available.[228] This ambiguous wording has encouraged some institutions to attempt to avoid providing interpreters for deaf students. Two deaf students at California State University, Hayward, have filed suit in district court for the Northern District of California, seeking to force the university to make interpreter services available.[229] At this writing, the school is still resisting the use of interpreters and has, instead, provided the plaintiffs with tape recorders to record their courses.[230] This solution will permit lectures to be transcribed after class but denies the deaf student the

221. 29 U.S.C. § 794 (1976). For the text of § 504, see note 112 *supra*.
222. 45 C.F.R. §§ 84.42-84.44 (1977).
223. *Id.* §§ 84.21-84.22.
224. *Id.* § 84.47(b).
225. *Id.* § 84.44.
226. *Id.* § 84.6(c)(1)(i).
227. *Id.* § 84.6(c)(1)(ii)-(iii).
228. *Id.* § 84.44(d).
229. Herbold v. Trustees, No. C-78-1358 (N.D. Cal., filed June 21, 1978).
230. Address by David Huerta, Chief Enforcement Officer for Section 504, Department of Health, Education and Welfare, Office of Civil Rights, Region IX, to Disabled Students Coalition Fall Conference, in Palo Alto, California (Oct. 20, 1978).

opportunity to participate in classroom discussions and to question or clarify statements made by the instructor.

Section 84.44(d) of the regulations also states that schools need not provide attendants or readers for personal use or study.[231] Because the term "personal use" is left undefined, there are a number of questions about the interpretation of this provision. While leisure reading might reasonably be considered the "personal use" of a reader, arguably, research required for a course could also be termed "personal use," yet schools clearly should cover reader service for such purposes. Moreover, there may be some uses of attendants, such as transferring a chair-bound individual from an automobile to a wheelchair, that are essential to afford a disabled student access to campus. Even though such functions are nonacademic in nature, services that are so essential to participation in the academic program should not be classified as "personal use" and should be provided by the educational institution.[232]

2. Judicial Interpretation

The leading case regarding the application of section 504 to postsecondary education is *Davis v. Southeastern Community College*.[233] In *Davis*, the plaintiff, a deaf student, sought admission to a training program for registered nurses at the defendant college.[234] When admission was denied, plaintiff brought suit in federal court for the Eastern District of North Carolina alleging a violation of her rights under section 504. The trial court ruled for the defendant,[235] the Fourth Circuit reversed,[236] and the United States Supreme Court granted certiorari, handing down its landmark decision on June 11, 1979. The decision attempts, with only partial success, to deal with a number of the issues raised under section 504.

A major issue addressed by the Court was whether disability may legitimately be considered when determining whether a person is "otherwise qualified" within the meaning of section 504. The thrust of section 504 is that no otherwise qualified handicapped person may be subjected to discrimination in any program receiving federal assistance.[237] The district court had held that "[o]therwise qualified can only

231. 45 C.F.R. § 84.44(d)(2) (1977).
232. *See* DSC Position Paper, *supra* note 9.
233. 99 S. Ct. 2361 (1979).
234. *Id.* at 2364.
235. Davis v. Southeastern Community College, 424 F. Supp. 1341 (E.D.N.C. 1976).
236. Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978).
237. 29 U.S.C. § 794 (1976). See note 112 *supra* for the text of the statute.

be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, *if proper training and facilities are suitable and available*."[238] The Fourth Circuit had ruled that "otherwise qualified" meant that the college should consider plaintiff's admission without regard to her disability.[239] The Supreme Court chose to adopt the view of the district court, concluding that educational institutions are free to impose "reasonable physical qualifications" for admission to their programs.[240]

This conclusion is suspect for several reasons. First, the Court relied heavily on commentary by the Department of Health, Education, and Welfare (HEW) regarding the definition of a qualified handicapped person under the Department's regulations.[241] The regulations indicate that a disabled student must meet all the academic and technical standards requisite to admission to a school's program.[242] The appendix cited by the Court indicates that this includes all standards that are essential to participation in the program in question.[243] Indeed, the Court itself stated, "We think it clear, therefore that HEW interprets the 'other' qualifications which a handicapped person may be required to meet as including *necessary* physical qualifications."[244] But, from this the Court moved without analysis or justification to the conclusion that any reasonable physical qualification is acceptable.[245]

In certain cases there may well be a difference between a qualification that is reasonable and one that is actually necessary. However, the use of the "reasonableness" approach becomes untenable, for the Court indicated that educational institutions will have broad discretion to define the legitimate purposes of its programs.[246] Thus, as in *Davis*, if a school defines the purposes of its program carefully, it may claim that "reasonable" physical qualifications exist that exclude disabled students.

Finally, it should be noted that, while the Court adopted the view of the district court on this issue, a significant phrase from the opinion of the district court was not discussed. The language of the trial court

238. Davis v. Southeastern Community College, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976) (emphasis added).
239. Davis v. Southeastern Community College, 574 F.2d 1158, 1160 (4th Cir. 1978).
240. 99 S. Ct. at 2371.
241. *Id.* at 2367.
242. 45 C.F.R. § 84.3(k)(3) (1977).
243. *Id.* app. A, A(5) at 405.
244. 99 S. Ct. at 2367 (emphasis added).
245. *Id.* at 2371.
246. *Id.* at 2370.

includes a phrase that indicates that a handicapped person can only be expected to meet all program requirements if suitable training and facilities are available.[247] Presumably, the Supreme Court intended to incorporate this limitation when it adopted the position that disabled applicants must meet all standards requisite to admission to the program. If not, the Court's position goes beyond the determinations made by the trial court.

The Court next considered whether section 504 imposes an obligation on educational institutions to undertake "affirmative conduct" in order to assist the disabled.[248] The Court concluded that educational institutions were not obliged to act affirmatively by lowering standards or substantially modifying program requirements in order to insure access to the disabled.[249] This becomes a keystone of the decision, for the Court determined that the plaintiff would not have been able to participate in the defendant's program given the type of accommodation defendant was obliged to make.[250] However, it should be noted that this conclusion was not based on any factual determination made by the trial court. HEW had not issued regulations until *after* the trial court had completed its deliberations; thus no finding was ever made on whether the plaintiff could have benefited from accommodations required under those regulations.[251]

While affirmative conduct may not be required, section 504 does expressly prohibit discrimination on the basis of handicap.[252] The issue thus becomes one of defining the line between lawful refusal to extend affirmative assistance and illegal discrimination. The Court recognized that this line will not always be clear and that there may be instances when affirmative conduct will be necessary to avoid discrimination.[253] Yet, in *Davis*, the Justices indicated that the defendant's failure to modify its standards did not constitute discrimination because those stan-

247. *See* text accompanying note 238 *supra* (italicized phrase).

248. 99 S. Ct. at 2369.

249. *Id.* at 2371.

250. *Id.* at 2368-69. The Court stated:

Furthermore, it is reasonably clear that § 84.44(a) does not encompass the kind of curricular changes that would be necessary to accomodate respondent in the nursing program. In light of respondent's inability to function in clinical courses without close supervision, Southeastern with prudence could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the "modification" the regulation requires.

251. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, OFFICE OF THE SECRETARY, ANALYSIS: *SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS* 6 (June 18, 1979) [hereinafter cited as HEW DAVIS ANALYSIS].

252. 29 U.S.C. § 794 (1976). *See* note 112 *supra* for text of the statute.

253. 99 S. Ct. at 2370.

dards were legitimate ones accepted by many institutions with similar programs.[254] Again, this approach gives to those accused of discrimination the power to define for themselves the standards by which they will be judged.

At this writing, it is impossible to assess the ultimate impact of the *Davis* decision. The scope of the decision may very well be limited by the fact that *Davis* involved issues of public health and safety.[255] The Court also indicated a willingness to believe that handicapped persons, through technological or other advances, might be able to function in certain roles not now possible.[256] At the same time, the decision does include language that could weaken the regulations promulgated by HEW.[257] In effect, the Court stated that if the regulations impose affirmative conduct obligations on educational institutions, then the regulations are invalid as unauthorized extensions of the statute.[258] HEW has rejected the implication that the regulations may be invalid[259] but has taken the position that the purposes of programs as defined by the educational institution must be given considerable deference.[260] Despite some indecision on this point, it seems fairly certain that the Court upheld the regulations because it relied heavily on them to support parts of its analysis,[261] and because, in the end, the Court applied the regulations to the facts of the case.

3. Unresolved Issues

Although services to disabled students in higher education have traditionally been provided through vocational rehabilitation agencies, the regulations seem to indicate that responsibility for funding these services has been shifted to the educational institutions.[262] Indeed, rehabilitation agencies are now contemplating withdrawing or reducing their support for disabled students.[263] However, this interpretation is not explicitly supported by the regulations, and financial pressures have prompted educational administrators to look to rehabilitation agencies and other sources for continued support.[264] HEW, the agency charged

254. *Id.* at 2370-71.
255. *Id.* n.12.
256. *Id.* at 2370.
257. *Id.* at 2369-70 & n.11.
258. *Id.*
259. HEW DAVIS ANALYSIS, *supra* note 251, at 8.
260. *Id.* at 6.
261. *See* notes 241-44 *supra* and accompanying text.
262. "[These regulations apply] to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance." 45 C.F.R. § 84.2 (1977).
263. *See* PROGRAM CHANGE PROPOSAL, *supra* note 217, at 8.
264. *Id.* at 8-9.

with enforcement of section 504 as it applies to education, has issued a memorandum indicating that, until a permanent policy is established, rehabilitation agencies may continue to support disabled students where necessary.[265] Clearly, this funding conflict must be resolved. Some agency must bear ultimate responsibility for providing the services required under section 504 and its regulations.

Another problem is that section 504 mandates compliance with certain standards but does not provide federal funding for bringing educational institutions into compliance. Costs for compliance with section 504 will be substantial and states may be unwilling or unable to finance programs on their own.[266] The issue was addressed in *Barnes v. Converse College*.[267] In *Barnes*, a deaf student brought suit against a private college to obtain the interpreter she required.[268] The court granted the relief sought, partly because the defendant could not show financial hardship[269] sufficient to trigger the exception provided by the regulations.[270] The *Barnes* court went on to point out that the potential hardship of future compliance with section 504 (that which the defendant feared most) is not a proper consideration under the statute.[271]

Another issue with respect to section 504 is whether individuals have a private right of action under the statute. Although nothing in the statute explicitly permits a private cause of action, several federal courts have already held that such a right does exist under section 504.[272] However, an article entitled *Private College*[273] questions those

265. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, OFFICE OF HUMAN DEVELOPMENT SERVICES, SECTION 504 — AUXILIARY AIDS MATTER: INTERIM POLICY STATEMENT 1 (1977).

266. *See* notes 97-100 *supra* and accompanying text.

267. 436 F. Supp. 635 (D.S.C. 1977).

268. *Id.* at 639.

269. "Defendant, Converse College, would, in this action, be faced with the relatively minor financial damage of an interpreter's fee which has been estimated at somewhat less than $1,000." *Id.* at 638.

270. The regulations provide that "[a] recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 45 C.F.R. § 84.12(a) (1977).

271. "[T]he danger of future expenditures . . . is not a proper consideration in this lawsuit . . . ." 436 F. Supp. at 638.

272. Leary v. Crapsey, 556 F.2d 863 (2nd Cir. 1977); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977); Bartells v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976); Sites v. McKenzie, 423 F. Supp. 1190 (N.D.W. Va. 1976); Germankin v. Costanza, 411 F. Supp. 982 (E.D. Pa. 1976).

273. Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College*: Barnes

decisions.

Private College first suggests that the results reached in *Lloyd v. Regional Transportation Authority*[274] and other similar cases may be suspect because of their reliance on *Lau v. Nichols*[275] in which the issue of plaintiffs' right to bring a private action was not raised.[276] The *Lloyd* decision relied on the phrase, "and permit a judicial remedy through a private action," from a Senate report[277] on section 504 as indicative of congressional intent to create a private cause of action.[278] *Private College* argues that this phrase should be construed to refer only to judicial review of final administrative actions and not to a court hearing held prior to the exhaustion of plaintiff's administrative remedies.[279] To support this contention, *Private College* quotes the following language from *Lloyd*:

> "We expressly leave open . . . the question of whether, after consolidated procedural enforcement regulations are issued to implement section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. . . . But assuming a meaningful administrative enforcement mechanism, the private cause of action under section 504 should be limited to *a posteriori* judicial review."[280]

As the issue was expressly reserved, the second sentence of the above quotation is dictum. Even if *Lloyd* does tentatively limit judicial review to post-administrative action, it does so only if meaningful administrative enforcement mechanisms exist. There are indications that the present administrative mechanisms for section 504 enforcement are not

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v. Converse College, 29 MERCER L. REV. 745, 752-56 (1978) [hereinafter cited as *Private College*].

274. 548 F.2d 1277 (9th Cir. 1977). In *Lloyd*, physically disabled plaintiffs sought access to mass public transportation under section 504. This leading case held that individual plaintiffs could maintain a private cause of action under section 504.

275. 414 U.S. 563 (1974). In *Lau*, the plaintiffs, students of Chinese ancestry, brought an action under § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), and succeeded in obtaining compensatory bilingual educational programs.

276. *Private College, supra* note 273, at 751-52. Although *Lau* did not explicitly hold that a private right of action exists, it is inconceivable that the Supreme Court did not realize the significance of allowing the suit to proceed on this previously unprecedented basis. Though it is not legally required to raise such issues, the Court presumably understood the logical implications of its silence on this issue and tacitly authorized the private right of action.

277. S. Rep. No. 93-1270, 93d Cong., 1st Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & ADMIN. NEWS 6373, 6390-91.

278. 548 F.2d at 1286.

279. *Private College, supra* note 273, at 755.

280. *Id.* (quoting Lloyd v. Regional Transp. Auth., 548 F.2d at 1286 n.29).

effective.[281] It should also be noted that the statement of legislative intent relied on in *Lloyd*[282] could easily be read to give immediate recourse to the federal courts without the necessity of exhausting administrative remedies. Given the inadequacies of the existing administrative enforcement scheme,[283] such an interpretation may be both necessary and desirable[284] in order to give effect to the broad purposes of section 504.

Private College raises another major issue about section 504 by contending that the HEW regulations on postsecondary education are unconstitutional because they exceed congressional authorization.[285] The premise of this argument is that the Constitution prohibits Congress from delegating legislative authority and that administrative agencies, therefore, cannot promulgate regulations.[286] *Private College* concedes that this theory has practically never been used to strike down regulations[287] and that the Supreme Court will sustain the validity of regulations promulgated under an empowering provision of a statute as long as the regulations are reasonably related to the statutory purposes.[288]

Nevertheless, *Private College* contends that the section 504 regulations should be subject to stricter scrutiny because they have been promulgated under implied congressional authorization.[289] This argument is based on *General Electric v. Gilbert*,[290] which involved regulations promulgated pursuant to Title VII of the Civil Rights Act of 1964 under an authorization similar to that of Section 504. The *Gilbert* Court stated:

> Congress, in enacting Title VII, did not confer upon the EEOC authority to promulate rules or regulations pursuant to that title . . . . This does

281. *See* Comment, *Rehabilitating the Rehabilitation Act of 1973*, 58 B.U.L. Rev. 247, 265-74 (1978); *Enforcing Section 504, supra* note 99, at 359 n.79.

282. *See* note 277 *supra* and accompanying text.

283. *See* authorities cited note 281 *supra*.

284. For a general discussion of the legal and practical arguments favoring a private right of action without the necessity of administrative action, see *Enforcing Section 504, supra* note 99, at 361-62.

285. *Private College, supra* note 273, at 756-59.

286. *Id.* at 756.

287. *Id.* (citing Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). These cases were decided during the controversy over New Deal legislation and, because of these unique circumstances, they have never been accorded the weight of controlling precedent. 1 K. DAVIS, ADMINISTRATIVE LAW § 2.06 at 99-101 (1958) [hereinafter cited as DAVIS].

288. *Private College, supra* note 273, at 756-57 (citing Mourning v. Family Serv. Pubs., Inc., 411 U.S. 356 (1973); Thrope v. Housing Auth., 393 U.S. 268 (1969); American Trucking Ass'ns v. United States, 344 U.S. 298 (1953)).

289. *Private College, supra* note 273, at 757.

290. 429 U.S. 125 (1976).

> not mean that the EEOC guidelines are not entitled to consideration in determining legislative intent. . . . But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law.[291]

A careful reading of this language fails to reveal any justification for *Private College*'s conclusion that such regulations should be subjected to strict scrutiny. In *Gilbert*, the court was clearly discussing the weight to be accorded administrative regulations in determining congressional legislative intent and, in this context, congressional ratification would, of course, be an important factor. But the question of how courts should judge the constitutionality of such regulations is an entirely separate issue not addressed in *Gilbert*. Moreover, the *Gilbert* Court makes clear that while interpretive rules (rules promulgated under implied congressional authorization) are generally accorded great deference,[292] the peculiar defects of the rule at issue in that case were so extraordinary that the rule could not be regarded as controlling.[293] Since there is no evidence that the HEW regulations under section 504 have any of the serious defects found in *Gilbert*, these regulations certainly should not be disregarded or subjected to extraordinary judicial scrutiny. The regulations need only be related to the purposes of the statute.

The *Private College* argument is further flawed by the fact that it ignores the realities of federal funding. *Private College* apparently fears that private schools will be forced to used their own funds to provide services to disabled students.[294] In a technical sense, this contention may be true. But, because section 504 only applies to recipients of federal funds,[295] only those educational institutions receiving federal funds are required to expend some of that money to insure access for disabled students. For example, if a private school receives $10,000 for research and expends $1,000 for an interpreter, as required by section 504, it is as if the federal research grant were for $9,000 and the govern-

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291. *Id.* at 141.

292. *Id.* at 141-42. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring); Udall v. Tallman, 380 U.S. 1, 16 (1965); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). *See generally* DAVIS, *supra* note 287, § 5.05 at 314-15.

293. In *Gilbert*, the Court noted that the EEOC guideline upon which the plaintiff relied was promulgated nearly eight years after the enactment of the statute and could not, therefore, be regarded as contemporaneous (a criterion important in determining legislative intent). 429 U.S. at 142. The Court also indicated that the EEOC guideline was in direct conflict with earlier interpretations by that same agency and with authoritative interpretations by other agencies. *Id.* at 144-45.

294. *See Private College, supra* note 273, at 757-59.

295. *See* note 112 *supra*.

ment were paying the school $1,000 to provide the interpreter. Indeed, requiring institutions to make affirmative expenditures to insure equality for disadvantaged groups is an accepted procedure under other analogous statutes.[296]

In addition, *Private College* appears to misread the decision in *Barnes v. Converse College*.[297] It argues that the regulations, as interpreted in *Barnes*, are unconstitutional because they impose undue hardship on private institutions and are, therefore, probably beyond the intent of Congress in enacting section 504.[298] However, the regulations do provide an exception for financial hardship.[299] *Barnes* does not contravene this provision or require private institutions to provide services to disabled students without regard to the institution's ability to pay. Rather, the *Barnes* court merely found that, in the case before it, the defendant college would not sustain undue financial hardship.[300] The court distinguished present financial hardship, which can be considered, and future potential hardship, which cannot.[301] In light of the *Barnes* decision, the *Private College* argument that Congress knew of the plight of private schools and could not have intended that section 504 apply to these institutions cuts both ways. Assuming that Congress was aware of the fiscal condition of private schools, its failure to exempt them from coverage under the statute might reasonably be construed as a deliberate act.

Finally, even if one accepts *Private College's* analysis of congressional intent, the conclusion reached is anomalous and indefensible. It concludes that private schools should not have to provide interpreters or other auxiliary aids but may satisfy their obligations under section 504 by admitting the disabled student and providing a barrier-free environment.[302] This view reflects a limited understanding of disability, namely, that the only real problems encountered by the handicapped in general are physical obstacles. The fact that the lack of an interpreter is

296. *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974) (compensatory bilingual instruction required for students of Chinese ancestry pursuant to § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976)).

297. 436 F. Supp. 635 (D.S.C. 1977).

298. *Private College, supra* note 273, at 757. The article suggests that the Rehabilitation Act of 1973 was intended to apply only to state and federal rehabilitation programs, but the sole support for this assertion is the mention of a few illustrative provisions of the Act. *Id.* These illustrations are not indicative of the purposes of § 504 in particular.

299. 45 C.F.R. § 84.12 (1977).

300. 436 F. Supp. at 638. *See also* note 269 *supra.*

301. 436 F. Supp. at 638-39. *See* also note 271 *supra*

302. *Private College, supra* note 273, at 758.

as much of a barrier to a deaf person as the lack of an elevator is to a physically disabled person is ignored.

Private College goes on to state that failure to provide an interpreter does not deny access "solely" on the basis of disability but, rather, denies access merely because of the absence of a person or thing, a form of discrimination *Private College* asserts is not covered by section 504.[303] Surely, section 504 does not require that barriers caused by the physical presence of a thing, such as a flight of stairs leading into a building, and those caused by the absence of a person or thing, such as an interpreter, an elevator, or a braille marker, be distinguished. Such a reading of section 504 would lead to complex litigation based on subtle semantic arguments, inequitable application of the law, and the eventual effective repeal of the statute.

C. The California Approach

1. Community College Programs: Assembly Bill 77

In 1976, the California legislature passed Assembly Bill 77,[304] which established and funded programs for disabled students enrolled in the community colleges of the state. This legislation provides for many of the same services that are now required under section 504. Assembly Bill 77 also provides funding for a program on each campus.[305] A campus enabler coordinates all services to disabled students and helps each student receive the services he or she needs.[306] These services usually include: assisting with registration; relocating classes scheduled in inaccessible facilities; paying readers, interpreters, note takers, and other personnel; counseling; and providing specialized equipment.[307]

The primary difficulty with the legislation is that it allocates funds based on total student enrollment.[308] In recent years, total student enrollment has decreased while disabled student enrollment has increased.[309] This practice has resulted in inadequate funding for disabled student service programs and has spurred the community college system to request a change in the funding base and an increase in

303. *Id.*

304. 1976 Cal. Stats., ch. 275 (A.B. 77).

305. CAL. EDUC. CODE § 84850 (West 1978).

306. CALIFORNIA COMMUNITY COLLEGE CHANCELLOR'S OFFICE, OPERATIONAL GUIDELINE: PROGRAMS FOR THE HANDICAPPED § 2.2 (1977).

307. *Id.*

308. CAL. EDUC. CODE § 84301 (West 1978).

309. Interview with Susan Hunter, Assistant Dean for Student Affairs, California State Universities and Colleges, in Long Beach, California (Jan. 19, 1979) [hereinafter cited as Hunter Interview].

allocations.[310]

2. Other Programs in Higher Education

Neither the California State University and College system (CSUC) nor the University of California system (UC) has received the substantial funding provided to the community colleges under Assembly Bill 77.[311] For the year 1978-1979, the CSUC system received approximately $475,000 in state funds for disabled student service programs and an additional $500,000 for the removal of architectural barriers.[312] Both the CSUC and UC systems have been forced to rely on the California Department of Rehabilitation, federal and state grants, and a variety of other sources to provide their students with the services they require. Both systems requested substantial increases in funding for the 1979-1980 fiscal year,[313] and these funds have been allocated.[314]

3. Legislative Response

In 1974, the California legislature passed a resolution calling upon the various state systems of public higher education to develop plans to correct the underrepresentation of women, ethnic, and racial minorities in their student populations.[315] In 1976, a similar resolution, Assembly Concurrent Resolution 201, was passed that called for plans to overcome the underrepresentation of disabled students.[316] In developing these plans, the systems were asked to consider means of locating and contacting prospective disabled students, alternative means of assessing the "student potential" of disabled students, new methods for providing financial assistance to these students, and improving counseling for the disabled.[317]

Assembly Concurrent Resolution 201 requested that the California Postsecondary Education Commission compile the plans submitted by the various systems and transmit them to the legislature with comments.[318] On June 12, 1978, the Commission adopted a final report to

310. *Id.*
311. *See* CPEC PLAN, *supra* note 219, at 6.
312. *See* PROGRAM CHANGE PROPOSAL, *supra* note 217, at 1.
313. Hunter Interview, *supra* note 309.
314. *See* 1979 Cal. Stats., § 2 Item 346 (Univ. of California); *id.*, Items 359, 359.1 (California Univ. & State Colleges); *Id.*, Item 364 (California Community Colleges). *See also* CAL. EDUC. CODE § 84730 (West. 1979).
315. Assembly Con. Res. 151 (1974).
316. 1976 Cal. Stats., res. ch. 158.
317. *Id.*
318. *Id.*

accompany these plans.[319] The report emphasized that the plans for complying with Assembly Concurrent Resolution 201 should reflect a strong commitment to the fullest possible integration of disabled students into the regular academic program.[320] The report also suggested that each system of higher education should include a systemwide coordinator, a program coordinator for each campus, support staff, and an advisory committee representing students with a variety of different disabilities in its program.[321]

V. CONCLUSION

In practice, little has changed with regard to providing appropriate education for disabled students at the elementary and secondary levels. The implementation of the Master Plan in California has reduced the outright exclusion of disabled students in those few areas in which it has been implemented, but exclusion remains a problem in non-Master Plan districts. Although segregation of disabled students is a counterproductive and outmoded procedure,[322] the attempted implementation of mainstreaming has been markedly unsuccessful. While procedural safeguards have been established, there are many serious problems that render these procedures ineffective.

These problems are partly attributable to the fact that the nondisabled often are apprehensive when dealing with the disabled[323] and the existence of a separate special education system gives teachers and school administrators an opportunity to avoid the issue. At the same time, special educators resist reforms that might lessen their prestige or threaten their careers. Section 504 and the Education of All Handicapped Children Act are well-intentioned attempts to bring about laudable and comprehensive changes in education for the disabled. But, students, parents, and courts will have to be vigilant in enforcing both the spirit and the letter of the law. Otherwise, the attitudes of the nondisabled and the inherent nature of the special education system will continue to prevent meaningful change. In short, educators must suppress their misgivings and personal interests in order to give the new system a chance to succeed.

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319. CPEC PLAN, *supra* note 219.
320. *Id.* at 3.
321. *Id.* at 7.
322. *Id.* at 2.
323. "Handicapped people are members of a minority group that inspires not merely sympathy but fear, guilt, terror, and superstition. It is the one minority group that you or I could join at a moments notice." *Is the Constitution Handicapped?, supra* note 47, at 52 (quoting Bethel, *Wheelchair Justice*, 8 THE WASH. MONTHLY 51, 53 (1976)).

With respect to postsecondary education, the *Davis* decision states that physical ability may be considered and that, beyond a certain level, affirmative conduct is not required by the educational institution. However, the decision does not consider other major issues. An obvious problem still unresolved is funding. On its face, section 504 appears to make its provisions mandatory for any state that wishes to receive federal funding. But, the federal government has not appropriated any funding to assist states in the implementation of section 504. Even if Congress were to authorize and appropriate adequate funding for section 504 during the 1979 session, such funds would not begin to be available to the states until the beginning of the following fiscal year in October 1980.

This time lag presents two problems. First, the regulations under section 504 require that all aspects of compliance, including the removal of architectural barriers, be completed by June 1980. Second, if the federal government does not provide any funding for section 504, that fact may not be finally apparent in time for states to make appropriate modifications in their budgets to cover compliance costs. The only feasible solution to the problem is for the states to proceed on the assumption that no federal funding will be available. However, the states are reluctant to take this approach since this attitude might discourage the federal government from shouldering the burden of funding compliance under section 504.

Thus, for practical purposes, there is a stalemate situation in which no governmental entity wants to assume responsibility for funding the implementation of section 504. Certainly, if the stalemate is not broken soon, the disabled will be the ultimate losers. The federal government must make a final determination as to which agencies are responsible for funding compliance programs and Congress should appropriate funds to assist these agencies in fulfilling their responsibilities under the law. Without these actions, much of the beneficial impact of section 504 will be lost forever.

Another area of concern is that of insuring that disabled students provide input regarding the operation of their educational program. Section 504 requires that disabled students be involved in the formulation of self-evaluation and transition plans.[324] In California, the Postsecondary Education Commission report on Assembly Concurrent Resolution 201 also recommends that advisory committees be established with disabled students as members.[325] Even though section 504

324. 45 C.F.R. § 84.6(c) (1977).
325. *See* CPEC PLAN, *supra* note 219, at 7.

mandates this participation and Assembly Concurrent Resolution 201 recommends it, this aspect of the program has been ignored.[326] Participation by handicapped students is important at the elementary and secondary level and is even more important in postsecondary education. These students are adults and should, ultimately, have some choice in the nature and design of the programs established to serve them.[327]

Ralph Black
Lisa Coyne

326. *See* DSC Position Paper, *supra* note 9, at 2.

327. *See* CPEC PLAN, *supra* note 219, at 3. One of the best examples of consumer organization participation in postsecondary education is provided by the statewide Disabled Students Coalition (DSC). The DSC has worked closely with college and university administrators and has achieved considerable success in improving conditions for disabled students in higher education since its inception in 1972. Letter from Glenn S. Dumke, Chancellor, California State Universities and Colleges to Lisa Coyne, Southern Co-Chairperson DSC (Oct. 31, 1978).