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Legal Obligations Toward the Post-Secondary Learning Disabled Student

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LEGAL OBLIGATIONS TOWARD THE POST-SECONDARY LEARNING DISABLED STUDENT

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CONTENTS

Far from being an anomalous case, there exists in America today a surprisingly large population of students doing college work despite the presence of a handicap which impairs their ability to learn. For the

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most part, post-secondary institutions have not responded to this population in a systematic fashion; services are available sporadically and awareness of their availability appears often to be a matter of mere fortuity. Congress has addressed legislation to the needs of the handicapped, the needs of the adult learner, and the needs of higher education generally. Although only one of these many enactments, the Rehabilitation Act of 1973,[1] is applicable to learning disabled post-secondary students, it is demonstrably clear that those students are entitled to supportive services from schools receiving federal financial assistance. This article will deal with the legal obligation of institutions of higher learning to provide appropriate services to their learning disabled students.

This article will first explain the concept of learning disabilities and the prevalence of specific learning disabilities among post-secondary students. After canvassing the disarray of sophisticated responses to their needs, the legal mandates will be explored. Congressional intent, as well as administrative and judicial interpretation of the relevant statutes, will be discussed with a special emphasis on the narrow problem of the learning disabled post-secondary student and enforcement of the perceived legal obligation. Finally, this article will set forth the parameters of an educationally sound institutional response and its consistency with the legal obligation imposed on institutions of higher learning.

I. THE LEARNING DISABLED STUDENT AT THE POST-SECONDARY LEVEL

The term "learning disabled" was first defined by Congress with reference to children:

> [T]hose children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.[2]

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1. 29 U.S.C. §§ 701-96 (1976 & Supp. III 1979). 29 U.S.C. § 794 (1976 & Supp. III 1979) mandates nondiscrimination under federal grants and programs.

2. Elementary and Secondary Education Amendments of 1970, Pub. L. No.

In 1975, Congress enacted Pub. L. No. 94-142,[3] providing a process for financially aiding states in the provision of education for all handicapped children. At this time, the legislature also established uniform national standards for implementing special education programs for affected children in elementary and secondary schools. The congressional mandate was comprehensive. It included referral and identification processes, an individualized education plan for the child, and formation of an educational planning and placement committee.

As can be seen from the definition, learning disabilities are impediments to learning, but are not absolute barriers to substantial academic achievement. Moreover, it should be stressed that learning disabled students are nevertheless individuals who score in the average or above average range on tests of intellectual ability (I.Q. tests). Additionally, students who have a learning disability may be weak in verbal skills yet may still excel in other areas such as mathematics or the creative arts.

Estimates of the number of learning disabled students vary widely. Some studies cite as many as fifteen percent of the general population as being learning disabled.[4] Another study claims that in 1974 there were approximately "ten million elementary and secondary school children [who] exhibit one or more types of learning disabilities."[5] Given the magnitude of the learning disabled pre-college population, it is a virtual certainty that many of these children continue their studies on a college level.[6] In fact, the most comprehensive study of learning disabled adults supports the assertion that a large number of learning disabled students do continue their studies beyond the high school level.[7] Interestingly, of ninety-one students in the Cove School in Evanston, Illinois who received an average of three years of remediation for learning disabilities during their elementary and

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91-230, tit. VI, § 602(15), 84 Stat. 175 (1970), *as amended by*, Pub. L. No. 94-142, § 4(a)(3), 89 Stat. 775 (1975) (codified at 20 U.S.C. § 1401(15) (1976)).

3. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 775 (1975) (codified at 20 U.S.C. §§ 1401-61 (1976)).

4. Paper by G. Nelson, A Proposed System for Developing Individualized Education Programs for Learning Disabled Adults at Vancouver Community College, King Edward Campus, presented in First Stirling, Scotland (June 25- July 1, 1978) (ERIC No. ED 158 521). *See also* Paper presented by B. Spear, Yes, There's Hope for Adults with Learning Disabilities, in San Francisco, Calif. (Mar. 3, 1979) (ERIC No. ED 175 508).

5. Paper by R. Andrulis & J. Alio, Preliminary Investigation into Learning Disabilities in Adults, presented in Wash. D.C. (Sept 3-7, 1976) (ERIC No. ED 137 663) [hereinafter R. Andrulis & J. Alio].

6. Schoolfield, *Limitations of the College Entry Learning Disability Model*, 13 ACADEMIC THERAPY 423 (1978) (clarifies that all high school disabled students are not "college-bound").

7. L. Rogan & L. Hartman, A Follow-Up Study of Learning Disabled Children as Adults, Final Report (Cove School Research Office, Evanston, Ill., Dec. 1976) (ERIC No. ED 163 728) [hereinafter L. Rogan & L. Hartman].

secondary years, forty-seven percent entered college and thirty-six percent completed college or were pursuing an undergraduate degree. Of those completing college, eight percent have completed or were pursuing a graduate degree.[8]

The prominence of learning disabled students at the college level is likely to be obscured by the ability of these students to compensate for their disability.[9] Learning disabled students who have made it to the college level have had to adapt to their language difficulties throughout school. They often have a high degree of motivation and may represent a select group of learning disabled students.[10] The ability of these students to succeed in spite of their handicap, however, is inadequate reason for institutional failure to meet their needs. It seems fair to predict, that if identified and served, this population would be even more successful in their college studies.[11]

It is difficult to precisely ascertain the current availability of supportive services to learning disabled college students. Nevertheless, there is clearly a distinct lack of widespread programmatic responses. For example, a listing of services for post-secondary learning disabled adults,[12] includes only fifteen colleges offering programs to learning disabled students. This is in response to a questionnaire mailed to

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8. *Id.* 59. While the Cove School is perhaps unusual because it caters to serving children with special needs, it seems fair to infer that children with prior and continuing learning disabilities are entering the nation's colleges.

9. Paper by J.M. Matthews & M. Pugh, Neuro-psychological Screening at the College Level, presented in Boston, Mass. (April 1980) (on file at offices of Wayne Law Review.)

10. Paper at the National Convention of the American College Personnel Association, University Counseling Center of Colorado State Univ., presented in Boston, Mass. (April 1980) (on file at offices of WAYNE LAW REVIEW).

11. This prediction is corroborated by a study sponsored by the Minnesota Higher Education Coordinating Commission. *See* R. Ugland & G. Duane, Serving Students with Specific Learning Disabilities in Higher Education—A Demonstration Project at Three Minnesota Community Colleges, Normandale Comm. Coll. in Bloomington, Minn. (Nov. 1976) (ERIC No. ED 135 434) [hereinafter R. Ugland & G. Duane].

Grade point averages for specific learning disabilities students active in the remediation programs of the participating community colleges rose, on the average, from 2.60 to 2.74. "Students who were involved in the program three or more quarters were found to have higher [grade point averages] . . . than students who were involved two quarters or less. . . . [T]hose who did not follow through with program services after diagnosis achieved even lower [grade point averages]." *Id.* 33.

In G. Bingham, D. Yaroz & A. Darkenwald, Educational Assessment and Instructional Strategies for Adult Exceptional Learners, Final Report, (Rutgers University, 1978) (ERIC No. ED 167 724), a significant increase in performance was reported in the areas of math and word recognition between assessment and post-test scores of 17 students involved in a remediation program. *See also* Paper by M. Cant, J. Kelly & G. Nelson, Individualized Educational Program for Learning Disabled Adults presented in Wolfville, Nova Scotia (May 29, 1980) (ERIC No. ED 192 491).

12. ACADEMIC THERAPY PUBLICATIONS, LISTING OF SERVICES FOR POSTSECONDARY LEARNING DISABLED ADULTS (1st ed. 1980) (ERIC No. ED 193 850).

more than 2000 individuals and facilities. An HEW funded task force whose charge was to interpret and study section 504 of the Rehabilitation Act of 1973 surveyed approximately 1000 schools. Of the 900 responding schools, public institutions had identified an average of nine post-secondary learning disabled students each, while private institutions averaged only six such students.[13] In a survey of sixty-six state colleges and universities conducted by one of the authors, of the thirty-eight responding schools, only thirteen had an established program and had identified students with learning disabilities. Another eight schools offered services through more general programs. Seven schools claimed to have programs but no learning disabled students, and ten schools had no program whatsoever.[14]

Finally, review of the education literature leads to the same inductive generalization. While there are a few articles describing services rendered to individual students at various colleges and universities, the literature is largely devoid of systematic widespread responses. To the extent that there are comprehensive responses to this problem, they occur at the community college level.[15]

Accordingly, it is reasonable to conclude that not only is there a significant learning disabled college population, but further, that this population would be substantially benefitted by receiving appropriate educational services. At present, only a few coordinated efforts appear to be underway. This state of affairs is unlikely to change in the absence of recognition that there is already an existing obligation on all institutions of higher education receiving federal financial assistance to provide such services.

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13. NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS, DEP'T OF EDUC., Management of Accessibility for Handicapped Students in Higher Education 80, 85 (1981).

14. Questionnaire administered by one of the authors to state colleges and universities (copies of the responses received are on file at offices of Wayne Law Review). [hereinafter Author's Questionnaire]. The student use figures obtained are in line with the task force numbers. The average was 14 learning disabled students in each identified program. See note 13 & accompanying text *supra*. Three schools, however, accounted for 63% of the total number of identified students.

15. For example, California has adopted a plan which established and funded programs for disabled students enrolled in the community colleges of the states. "These services usually include: assisting with registration . . . paying readers, interpreters, note takers, and other personnel; counselling; and providing specialized equipment." Note, *Equal Educational Opportunity for the Handicapped—An Unfilled Promise*, 12 LOYOLA L.A.L. REV. 683, 715 (1979), *quoting* CALIFORNIA COMMUNITY COLLEGE CHANCELLOR'S OFFICE, OPERATIONAL GUIDELINE: PROGRAMS FOR THE HANDICAPPED § 2.2 (1977).

The California regulations also provide that support services and programs for students may include "assessment of basic skills and potential." 5 CAL. AD. CODE § 56002 (1980). California does, however, require documentation of the handicap by a qualified expert prior to requiring services. *Id.* § 56352(d).

II. LEGAL ENTITLEMENT TO SERVICES

A. The Attenuated Interest of Congress in the Learning Disabled Post-Secondary Student

Congress has enacted major pieces of legislation which concern either adult education or learning disabled students. Neither the Adult Education Act[16] nor Pub. L. No. 94-142, the Education for All Handicapped Children Act of 1975,[17] extends its coverage to the post-secondary learning disabled student. Instead, Congress has addressed the educational needs of this population only obliquely through the Rehabilitation Act of 1973. As will be demonstrated below, the failure of Congress to frontally attack the problem may be moot considering the broad scope of section 504 of the Rehabilitation Act. Congressional inattention is likely symptomatic of the low level of visibility of this population and, possibly, of a lack of appreciation of their educational abilities and needs.

In general, it is satisfactory to explain the congressionally prescribed coverage pattern as the logical outgrowth of a concern for *basic* education on the one hand and *children* on the other. For example, in the Adult Education Act, the term "adult education" is currently, and has always been, defined with reference to instruction below the college level.[18] Congress accordingly offers financial assistance to provide this type of instruction. Almost invariably, provision occurs through specialized programs outside of the post-secondary system. Thus, Congress appears chiefly concerned with universal attainment of high school level skills. What Congress has overlooked is that many learning disabled students entering college frequently score below a high school competency levels in one or more subject areas on standardized tests.

The legislative history of Pub. L. No. 94-142, the Education for All Handicapped Children Act, also demonstrates Congress' inattention to the subject population. Senate debate on providing federal funds to the states under the law for children aged three to five and eighteen to twenty-one focused solely on the youngsters. Both the testimony of Senator Williams and the combined views of Senators Stafford, Javits, Schweiker, Kennedy and Hathaway stressed that "preschool education is very important—for handicapped children

16. 20 U.S.C. §§ 1201-11c (1976 & Supp. 1979).
17. 20 U.S.C. §§ 1401-61 (1976).
18. *See* 20 U.S.C. § 1202(b) (1976 & Supp. III 1979). The definition originates in Pub. L. No. 89-750, tit. III, § 303(b), 80 Stat. 1216 (1966). Further, statutory amendments to 20 U.S.C. § 1202(c) (1976), which defines "adult basic education," reinforces the intent to limit the Act to pre-college levels. *Compare* 20 U.S.C. § 1202(c) (1976), *with* Pub. L. No. 89-750, tit. III, § 303(c), 80 Stat. 1216 (1966). The newer language inserts the phrase "adult education for adults," which is defined to exclude post-secondary education from the term "education for adults," which failed to exclude such education.

preschool is perhaps the most important educational experience of their lives."[19] The eighteen to twenty-one-year-old population is included in the legislation, but states are free to obey the dictates of state law if state law does not require public education for that age group.[20] While three to five-year-olds are treated similarly in that regard, a special set of incentive grants are provided to encourage state provision of services to preschool-age children.[21]

The resulting conclusion, that Congress is little concerned with learning disabled post-secondary students, is reinforced by examination of the one governing statute, the Rehabilitation Act. Prior to 1973, the relevant statute was called the Vocational Rehabilitation Act.[22] These provisions have always been codified among the labor laws[23] and the Act's own statement of purpose first stresses "current and future needs for providing *vocational* rehabilitation services. . . ."[24] The bulk of the Rehabilitation Act is reflective of a means-end orientation; the Act is a means to achieve the end of preparing the handicapped for jobs that maximally utilize their abilities.[25]

Accordingly, the Act funds training and subsequent placement opportunities for the handicapped.[26] Moreover, Congress seemed most concerned with high visibility handicaps, such as blindness, deafness or physical disabilities. This emphasis of concern is sounded both in the legislative history of Pub. L. No. 93-112[27] and in some specific anti-impediment provisions. For example, one statutory provision is wholly addressed to generally removing access barriers in public facilities for people in wheelchairs.[28]

Colleges and universities come under federal legal obligation[29] to

19. 121 CONG. REC. 19492 (1975) (testimony of Senator Williams). *See also id.* at 19493 (statement of Senators Stafford, Javits, Schweiker, Kennedy, and Hathaway).

20. *See* 20 U.S.C. § 1411(a)(1) (1976).

21. *See* 20 U.S.C. § 1419(a)(3) (1976). *See also* 20 U.S.C. § 1412(2)(B) (1976).

22. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973). (Preamble begins "AN ACT To replace the Vocational Rehabilitation Act . . . .").

23. Title 29 of the United States Code is entitled "Labor." It includes such major labor laws as the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1976) and the Taft-Hartley Act, 29 U.S.C. §§ 141-87 (1976).

24. Pub. L. No. 93-112, § 2(1), 87 Stat. 357 (1973), *superseded by* 29 U.S.C. § 701 (1976 & Supp. III 1979) (emphasis added).

25. For example, the preamble to the portion of the Act authorizing federal grants stated: "The purpose of this subchapter is to authorize grants to assist states to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities." Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. I, § 100, 87 Stat. 363 (1973) (codified at 29 U.S.C. § 720(a) (1976)).

26. *See, e.g.*, 29 U.S.C. § 791 (1976). *See generally* 29 U.S.C. §§ 701-96i (1976 & Supp. III 1979).

27. *See, e.g.*, S. REP. No. 93-318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2099, 2109-13.

28. *See* 29 U.S.C. § 792 (1976).

29. State law may impose additional obligations. The California approach is notable. *See* 1976 Cal. Stats. ch. 275 (A.B. 1977).

provide services to learning disabled students only as a result of the general anti-discrimination provision of the Rehabilitation Act, section 504. It states in relevant part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[30]

The consistent administrative interpretation of the scope of revelant handicaps includes individuals having "specific learning disabilities."[31] Thus, post-secondary institutions receiving federal funds for their programs or activities must avoid discrimination against learning disabled students.

B. The Evolution of Legal Obligations under Section 504

There has been relatively little serious dispute that section 504 places colleges and universities receiving federal funds under obligations to aid handicapped students. A number of factors have contributed to this situation, including the tenor of the federal regulations involved[32] and the attitude of the judiciary towards litigation involving the Rehabilitation Act.[33] In spite of the general agreement that sec-

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30. 29 U.S.C. § 794 (1976 & Supp. III 1979). The quoted language was originally enacted as the Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. V, § 504, 87 Stat. 394 (1973), and is most frequently referred to by that designation.

31. *See* 45 C.F.R. § 84.3(j)(2)(i)(B) (1980). This regulation is currently administered by the Department of Health and Human Services. The language of the regulation is identical to the predecessor regulation authored by the Department of Health, Education and Welfare. The relevant subsection in its entirety reads as follows:

> (j) "Handicapped person," (1) "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.
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> (2) As used in paragraph (j)(1) of this section, the phrase: (i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal, special sense organs; respiratory including speech organs; cardiovascular, reproductive, digestive, genito-urinary; hematic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

32. *See* 41 Fed. Reg. 20,296 (1976) (draft regulations) 42 Fed. Reg. 22,675 (1977) (final regulations) (codified at 45 C.F.R. pt. 84 (1980); 43 Fed. Reg. 19,884 (1978) (codified at 45 C.F.R. pt. 1232 (1980)) (policies and procedures to assure nondiscrimination).

33. *See, e.g.*, Crawford v. University of N.C., 440 F. Supp. 1047 (M.D.N.C. 1977); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977). *But see* University

tion 504 creates legal obligations, careful analysis leads to similar but, more guarded conclusions.

1. *Placing Conditions Upon the Receipt of Federal Funds*

The power of Congress and the federal government to impose conditions on institutions receiving federal funds stems from and is theoretically limited by the spending power of the U.S. Constitution. The relevant clause of the Constitution states that: "The Congress shall have Power To . . . pay the Debts and provide for the common Defense and general Welfare of the United States . . . ."[34] This language was interpreted in the famous case of *United States v. Butler*.[35] The *Butler* court allowed Congress to expend funds for purposes not expressly granted by another provision of the Constitution. In the words of the Court, "[the spending power's] confines are set in the clause which confers it . . . ."[36] Reliance on the "general welfare" language of the clause as a limit on congressional coercive spending proved unworkable and has been generally ignored in modern times.[37] The practice of conditioning receipt of federal financial assistance on non-discrimination is not unique to funds spent under the Rehabilitation Act, rather the practice is common and used extensively in the civil rights area.[38]

The step from legitimate exercise of congressional power to effective response to the needs of handicapped individuals was not painless. Despite the clear anti-discrimination language of section 504, it is not self-executing. Deciding who must not discriminate, determining what handicaps qualify, defining discrimination and enforcing the available remedies for violation are not addressed by the statute. Here, as is typical in other areas, these issues are comprehensively addressed by the federal administrative agency given jurisdiction over the program.[39] Usually, the agency will respond by promulgating regulations. At first, however, after the passage of the Rehabilitation Act of 1973, the Department of Health, Education and Welfare failed to act. Only after then Secretary Mathews was successfully sued in federal court[40]

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of Tex. v. Camenisch, 101 S. Ct. 1830, 1835 (1981) (Burger, C.J., concurring) (noting doubts about duty to affirmatively engage in extensive program modifications to benefit handicapped students but not questioning the applicability of the provision to the institutions involved); Southeastern Community College v. Davis, 442 U.S. 397 (1979).

34. U.S. CONST., art. I, § 8, cl. 1.
35. 297 U.S. 1 (1936).
36. *Id.* 66.
37. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 249-50 (1978).
38. *See, e.g.*, U.S.C. §§ 2000d, 2000d-1 (1976) (prohibiting recipients of federal assistance from discriminating on the basis of race, color or national origin).
39. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 5.03 (3d ed. 1972).
40. Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976).

did the agency perform its crucial function.[41] As noted previously, once issued, the implementing regulations were forceful, following the model provided by the anti-discrimination regulations previously promulgated to enforce nondiscrimination provisions of civil rights laws.[42]

2. *Applicability—Programmatic or Institutional*

The section of the regulations entitled "Application" states: "This part [45 C.F.R. pt. 84] applies to each *recipient* of Federal financial assistance from the Department of Health and Human Services *and* to each program or activity that receives or benefits from such assistance."[43]

Written in this manner, the regulation appears to apply to *all* activities of any institution receiving any kind of federal assistance from the Department of Health and Human Services. This is usefully desribed as an institutional approach. Thus, for example, if a university is receiving Health and Human Services (HHS) funds for physical therapy programs in its medical school, it cannot discriminate against its learning disabled undergraduate students. Since the vast majority of all post-secondary institutions receive funds from one or more programs administered by HHS,[44] the applicability of the nondiscrimination rules under such an interpretation is broad indeed.

One major objection to such broad interpretation of anti-discrimination law is that it represents a patent misreading of statutory language found in section 504. Section 504 bans discrimination in *programs* receiving federal assistance, not in all phases of the operations of institutions that have programs getting federal aid. This distinction can be referred to as being between programmatic and institutional views of applicability. Recent judicial decisions have embraced programmatic arguments in regard to sex discrimination under Title IX

41. See note 32 *supra*. One might further document the reluctance of HEW by noting that the judicial decision was buttressed by Executive Order No. 11,914, 3 C.F.R. 117 (1980), in which President Ford ordered the Department to promulgate the regulations.

42. *Compare* 45 C.F.R. pts. 84 & 85 (1980) (handicap regulations) *with* 45 C.F.R. pt. 80 (1980) (civil rights regulations).

43. 45 C.F.R. § 84.2 (1980) (emphasis supplied).

44. A list of 154 programs, which fall within this ambit, follows the HHS regulation to effectuate Title VI of the Civil Rights Act of 1964. *See* 45 C.F.R. pt. 80 app. A (1980). Many of these programs are of obvious importance to American higher education. *See, e.g.*, 20 U.S.C. §§ 421-29 (1976 & Supp. III 1979) (Higher Education Student Loan Program); 42 U.S.C. §§ 2751-55 (1976 & Supp. III 1979) (College Work-Study Program); 20 U.S.C. § 1051 (1976 & Supp. III 1979) (Grants for Strengthening Institutions of Higher Education). *But cf.* Hillsdale College v. Department of Health, Educ. & Welfare, No. 80-3207 (6th Cir., filed March 31, 1980) (pending appeal from unfavorable agency ruling on attempt to gain exemption by college receiving aid only in respect to student tuition loans).

of the Education Amendments of 1972.[45] This is significant because the statutory language of Title IX at issue is indistinguishable from that of section 504.[46] In one very recent example, *Othen v. Ann Arbor School Board*,[47] a female high school student alleged discrimination as a result of being excluded from a men's golf team representing a high school that received federal assistance only for programs wholly unrelated to athletics. The court's opinion catalogued all prior decisions which had confronted the programmatic/institutional distinction[48] and concluded as follows:

> After evaluating all of the Title IX cases cited by the parties, the court finds that case authority interpreting Title IX is consistent with the program specific language of the Act and supports the interpretation of the Act announced today by the court. Since none of the school system's athletic programs have received any federal financial assistance, the regulations promulgated under Title IX cannot reach those programs. HEW's regulations respecting athletics are overbroad and invalid to the extent that they apply to athletic programs or activities which do not receive direct federal financial assistance. Therefore, since, in this case, none of the athletic programs or activities of the defendant receives direct federal financial assistance, neither Title IX nor the HEW regulations provides a legal basis upon which the plaintiff can maintain an action against the defendant.[49]

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45. *See, e.g.*, Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979); Romeo Community Schools v. United States Dep't of Health, Educ. & Welfare, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981).

46. *Compare* 29 U.S.C. § 794 (1976 & Supp. III 1979), *with* 20 U.S.C. § 1681 (1976), which provides in pertinent part that, "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." The relevant administrative regulation governing "programs and activities" is 45 C.F.R. § 86.31 (1980) which states in part that, "no person shall, on the basis of sex . . . be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives of [*sic*] benefits from federal financial assistance." This section is *not* identical to 45 C.F.R. § 84.2 (1980). See text at note 43 *supra*.

47. No. 79-73709 (E.D. Mich. Feb. 23, 1981).

48. *Id.* 18-24.

49. *Id.* 24 (footnote omitted).

It is significant that the majority of Title IX suits involve attempted claims of discrimination by "indirect" beneficiaries of the federal funds, most often employees of the recipient institution. *See, e.g.*, Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979); Romeo Community Schools v. United States Dep't of Health, Educ. & Welfare, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 927 (1979); Othen v. Ann Arbor School

Interestingly, the programmatic/institutional distinction has yet to be litigated in section 504 suits brought by post-secondary students.[50] Given the linguistic similarity to Title IX, the analogy would seem inexorably correct, leading to a conclusion that section 504 is programmatic in its congressionally intended applicability.[51] The magnitude and variety of federal funds that reach post-secondary schools, however, may drastically limit the force of a programmatic reading of section 504. Vast sums are involved. In 1979, the range of federal awards to the 100 largest educational recipients ran from 291 million dollars, down to 15.6 million dollars.[52] More importantly, universities usually receive funds from a myriad of federal programs of general applicability to the student population, such as library acquisitions,[53] and grants for work-study.[54]

Thus, the variety, magnitude and pervasiveness of federal funds received by an institution leads to a difficulty in distinguishing, with precision, where programmatic support ends and institutional support begins.[55] In such cases, it does not seem unfair to regard the institution as the relevant unit in which Congress barred discrimination.

One alternative in avoiding the possible programmatic limitation of section 504 in the post-secondary context is the adoption of a broad interpretation of the term "a program." For instance, virtually all institutions of higher education participate in federal student loan programs.[56] An excessively narrow reading of programmatic non-

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Bd., 507 F. Supp. 1376, 1384-85 (E.D. Mich. 1981) (citing cases). *Othen* is, in that regard, atypical of most Title IX cases. It is likewise significant that many Title IX cases involve elementary and secondary education where the scope and extent of federal fiscal involvement is more limited than it is in the post-secondary field. See text at notes 52-54 *infra*.

50. In almost all reported § 504 cases, the general applicability of § 504 has been stipulated by the parties. This has been true without regard to the context of such suits, that is, without regard to the type of institution (school, etc.) and without regard to the class of claimant (student, employee, etc.). The notable exception is Hillsdale College v. United States Dep't. of Health, Educ. & Welfare, No. 80-3207 (6th Cir. March 31, 1980).

51. In consequence of a programmatic reading of § 504, the clearly institutional administrative interpretation embodied in 45 C.F.R. §§ 84.2 & 84.41 (1980) would fail as *ultra vires*. Alternatively, if the scope of § 504 is found to belie its narrow language and is to be interpreted as either programmatic in a broad or institutional sense (see text at note 58 *infra*) then the administrative interpretation should enjoy the same force as a statute. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 5.03 (3d ed. 1972).

52. THE CHRONICAL OF HIGHER EDUCATION, April 27, 1981, at 10 (on file at offices of WAYNE L. REV.).

53. *See* 20 U.S.C. § 1021 (1976 & Supp. III 1979).

54. *See* 42 U.S.C. §§ 2751-55 (1976 & Supp. III 1979).

55. This argument should not be confused with the so-called "infection" theory. Under that theory, a whole institution is "infected" by discrimination in a key program, such as admissions. *See, e.g.*, Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

56. *See* 20 U.S.C. §§ 421-29 (1976 & Supp. III 1979) (establishing the National Defense Education Student Loan Program).

discrimination would require only that the school, as recipient,[57] not discriminate against the handicapped in its ministerial functions pertaining to loan applications, certification of attendance and eligibility. A more plausible interpretation, however, would view the "program" in question as being the course of study supported by the funds granted to the student involved. While Congress chose programmatic language for section 504, its purpose was not penurious.[58] It is entirely plausible that Congress intended to benefit handicapped students using the term quite broadly (*e.g.*, undergraduate education program).

3. *Prohibited Discrimination and a Variant Form of Affirmative Action*

Most litigation involving the application of section 504 to higher education has sought definition of the extent of institutional accommodation which must be made for the benefit of the handicapped.[59] As in the previous section, the ultimate task remains the same, to discern congressional intent. Unlike the programmatic/institutional distinction, discussion in this area is aided by the attention given to the problem by the United States Supreme Court in *Southeastern Community College v. Davis*.[60] Of central moment is the question of whether the affirmative steps or actions which post-secondary institutions must undertake include all that is necessary to provide an educationally sound program for learning disabled students.[61] In discussions of institutional obligations, the Court[62] and several commentators[63] have made an unfelicitous choice in referring to accommodation of handicapped students as "affirmative action." The label brings to mind con-

57. Although the loan is to the student, it is difficult to imagine the schools as not being a beneficiary of the funds so provided. *See* 45 C.F.R. § 84.3(f) (1980) (defining recipient of assistance as one receiving funds directly or indirectly through another). *But cf.* Hillsdale College v. United States Dep't. of Health, Educ. & Welfare, No. 80-3207 (6th Cir. March 31, 1980).

58. *See* S. Res. 3044, 92d Cong., 2d Sess., 118 CONG. REC. 525 (1972), wherein Senator Humphrey remarked: "I introduce . . . a bill . . . to insure equal opportunities for the handicapped by prohibiting needless discrimination in programs receiving federal financial assistance." *Id. See* Note, *A Campus Handicap? Disabled Students and the Right to Higher Education—Southeastern Community College v. Davis*, 9 REV. OF L. & SOC. CHANGE 163, 164-65 (1979-80) [hereinafter *A Campus Handicap?*].

59. *See, e.g.*, Doe v. New York Univ., 442 F. Supp. 522 (S.D.N.Y. 1978); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977).

60. 442 U.S. 397 (1979).

61. See text at notes 93-114 *infra*.

62. *See* Community College v. Davis, 442 U.S. 397, 412-13 (1979).

63. *See, e.g.*, *A Campus Handicap? supra* note 58. *But see* Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse College*, 29 MERCER L. REV. 745 (1978) (adopting terms such as "affirmative obligations" or "affirmative conduct").

troversial policies developed in the racial context of preferring students for admission based on their membership in a relevant minority group.[64] Inherent in such racial preference is disfavored status for those who are not members of the benefitted minority. Obligating post-secondary institutions to affirmatively aid their handicapped student populations does not carry the same trappings; there is no parallel denial of a benefit to non-handicapped students.[65] The "affirmative action" involved in implementing section 504 is the provision of services and facilities that simply are not relevant to the non-handicapped population. Even if the devotion of limited fiscal resources to accommodating handicapped students depletes the funds available for other uses, the magnitude of the sums needed to serve learning disabled students is not overly large.[66]

Defining the scope of required affirmative undertakings for the benefit of handicapped post-secondary students, like the problem of applicability of section 504, begins with the administrative regulations promulgated to enforce the Rehabilitation Act. Once again the relevant general regulations paint with a broad brush:

> A recipient [of Federal financial assistance], in providing any aid, benefit, or service, may not . . . on the basis of handicap:
>
> . . . .
>
> (iii) [p]rovide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;
>
> . . . .
>
> For the purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and non-handicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.[67]

More importantly, however, the regulations specifically addressed to

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64. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

65. Unlike the competitive admissions paradigm, no one is identifiably worse off as a result of expenditure for handicapped students. The injury to other students is highly speculative for it is almost impossible to establish the uses which would have been made of otherwise available funds.

66. See text at notes 93-114 *infra*.

67. 45 C.F.R. §§ 84.4(b)(1)(iii) & (b)(2) (1980).

post-secondary education speak of "academic adjustments" including "adaption of the manner in which specific courses are conducted."[68]

If valid, these regulations would be adequate to create a legal obligation to provide at least the type of educationally sound program for learning disabled students that is advocated herein. The general regulations speak in terms of opportunity to obtain equivalent levels of academic achievement, a result that will not occur without providing supportive services for the affected students. The more detailed types of institutional accommodation that are demanded of post-secondary schools would provide sufficient flexibility to meet the unique needs of individuals having learning disabilities. Thus, the pertinent question is whether the regulations are valid as applied to requiring services for

68. 45 C.F.R. § 84.44(a) (1980). The entire section is relevant to the possible accomodations which can be required. It reads:

§ 84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) Other rules. A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) Course examinations. In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) Auxiliary aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxillary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

learning disabled students.[69] Oddly, in contrast to the applicability issue where administrative authority to regulate broadly was doubtful yet seldom if ever challenged, here the reverse seems to be true. Attacks of the affirmative action requirements have gained notoriety and some limited success, but legally, the regulations appear to rest on a much firmer interpretive foundation despite the result in the *Davis*[70] case.

In *Davis*, the Supreme Court reviewed a Fourth Circuit opinion[71] which had ordered the college to reconsider a deaf individual's application for admission to its registered nursing program "without regard to her hearing ability."[72] Additional dicta in the Fourth Circuit opinion suggested that the college would be obligated to modify its program to accommodate handicapped applicants "even when such modifications become expensive."[73] Justice Powell, writing for a unanimous Court, reversed the Fourth Circuit decision both as to the interpretation to be given to section 504 language referring to "an otherwise qualified handicapped individual,"[74] and also as to the suggestion that expensive program modification might be mandatory.[75] The former discussion is highly relevant insofar as it seems to shed light on the general validity of the implementing regulations mandating reasonable levels of affirmative action.[76]

In providing future guidance about affirmative duties under section 504 Justice Powell refused to provide a clear line:

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69. In Southeastern Community College v. Davis, 442 U.S. 397 (1979), discussed in text at notes 70-84 *infra*, the Court addressed this issue without clearly resolving it in any general way. *See also* University of Tex. v. Camenisch, 101 S. Ct. 1830 (1981) (remand of case presenting issue without discussion of merits). *But cf. id.* 1835 (Burger, C.J., concurring, indicating hostility to HEW regulations in issue).

70. 442 U.S. 397 (1979).

71. Davis v. Southeastern Comm. Coll., 574 F.2d 1158 (4th Cir. 1978), *rev'd*, 442 U.S. 397 (1979).

72. *Id.* 1160.

73. *Id.* 1162 (citations omitted).

74. 442 U.S. 397, 406-07 (1979). Disputes over the proper meaning of the congressional phrase "otherwise qualified handicapped individual" will most often arise in disputes over admission to existing programs, rather than in disputes over the provision of additional services to students already admitted to, or participating in ongoing programs. Obviously, the focus of present concern is on those learning disabled students already in attendance.

75. *Id.* 410-12.

76. The interesting issues in *Davis* are really bound up with the narrowness of the construction given to § 504 and the extent to which *Davis* should be read as freeing post-secondary institutions from major expenditures when needed to assist a handicapped student who, unlike Ms. Davis, appears to be otherwise qualified. There is already a rich journal literature addressing these more interesting aspects of the *Davis* decision. *See, e.g.*, Cook & Laski, *Beyond Davis: Equality of Opportunity for Higher Education for Disabled Students Under the Rehabilitation Act of 1973*, 15 HARV. C.R.-C.L. L. REV. 415 (1980); Note, *Accomodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171 (1980); *A Campus Handicap? supra* note 58.

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.[77]

Read in conjunction with a previous discussion[78] contrasting section 504 with other sections of the Rehabilitation Act containing express affirmative action requirements for federal hiring[79] and federal contractor's hiring,[80] it is possible to assert that the *Davis* dicta support only a narrow range of affirmative action for handicapped students. Some commentators opposing this view stress that Justice Powell's language is mere dicta rendered in a case involving extreme facts and that a more generous ambit for affirmative action is appropriate.[81] Other commentators have incisively criticized the rectitude of Powell's reasoning regarding congressional intent, finding it incorrect, unhelpful, and internally contradictory in its approval of mandatory provision of auxiliary aids.[82] Even if one were to adopt a narrow view of affirmative obligation under section 504, the program modifications necessary to benefit the learning disabled seldom entail materials beyond those tacitly approved by Powell in approving the "auxiliary aids" requirement. Likewise, course-specific accommodations are not likely to result in the type of undue burdens illustrated by Powell's reference to accommodating Ms. Davis in clinical settings.[83] In short,

77. Southeastern Community College v. Davis, 442 U.S. 397, 412-13 (1979).
78. *Id.* 410-12.
79. 29 U.S.C. § 791 (1976 & Supp. III 1979), enacted as the Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. V, § 501, 87 Stat. 390 (1973).
80. 29 U.S.C. § 793 (1976 & Supp. III 1979), enacted as the Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. V, § 503, 87 Stat. 393 (1973).
81. *See, e.g., A Campus Handicap? supra* note 58, at 173-74, 177-79.
82. *See* Cook & Laski, *supra* note 76, at 455-59. Auxiliary aids are required by HHS regulation. *See* 45 C.F.R. 84.44(d) (1980).
83. *See* 442 U.S. at 409-10.

even narrow readings of *Davis* seem to leave post-secondary institutions under a legal obligation to provide services to learning disabled students.[84]

4. *Vindicating Section 504 Rights to Services*

Handicapped persons have consistently been held to enjoy an implied private cause of action[85] to enforce their rights under section 504.[86] As demonstrated in the Title IX sex discrimination case of *Cannon v. University of Chicago*,[87] implied private actions are a valuable means of statutory enforcement on an individual level. It is not certain, however, that private litigation is a satisfactory remedy for learning diabled post-secondary students. For the individual learning disabled college student to prosecute and vindicate section 504 rights by private suit, a great deal of good luck is required. All the normal barriers to litigation, such as delay and expense, must be surmounted. These barriers may be uniquely difficult in this context because of the relative lack of organized groups concerned with the rights of the learning disabled. When present, such groups often help defray the litigation expense while providing an ongoing interest in the outcome that transcends the short term needs of a single student and avoids the mootness problem which might arise if the individual plaintiff graduates prior to the completion of the lawsuit.[88] Additionally, the low level of visibility of the problem[89] makes it possible that the affected students will be unaware of being a handicapped individual, to whom the school owes a legal obligation to provide services. It is also possible to speculate that the low level of recognition of the problems of learning disabled post-secondary students will diminish the ability of a judge to identify and enforce an appropriate remedy.

Apart from individual suits for enforcement of the anti-discrimination provisions, the Federal Office for Civil Rights is empowered and funded to undertake efforts to secure compliance with these laws generally. In the wake of the *Davis* decision, the Office has stated its intention to devote substantial efforts to both investigating complaints of section 504 violations at the post-secondary level and to

84. *But see* University of Tex. v. Camenisch, 101 S. Ct. 1830, 1835 (1981) (Burger, C.J., concurring).

85. *See generally* Cort v. Ash, 422 U.S. 66 (1975) (identifying factors relevant to finding implied private cause of action).

86. *See, e.g.*, Crawford v. University of N.C., 440 F. Supp. 1047 (M.D.N.C. 1977); Camenisch v. University of Tex. 616 F.2d 127 (5th Cir. 1980), *vacated and remanded on other grounds*, 101 S. Ct. 1830 (1981). *See also* Cook & Laski, *supra* note 76, at 421 n.24; Schoenfield, *Civil Rights for the Handicapped Under the Constitution and Section 504 of the Rehabilitation Act*, 49 CIN. L. REV. 580, 583-85 (1980).

87. 441 U.S. 677, 717 (1979).

88. *See, e.g.*, University of Tex. v. Camenisch, 101 S. Ct. 1830 (1981).

89. See text at notes 8-9 *supra*.

compliance reviews of such institutions that were receiving funds.[90] This latter vehicle, compliance reviews, is undoubtedly the best suited for promoting widespread institutional change. If, for the present, the Office for Civil Rights consistently cites post-secondary institutions for failure to establish learning disabilities programs, the threat of termination of federal funds as a subsequent sanction for failure to establish such programs should be sufficient.[91] This prediction is premised on the view, stated earlier, that there does not appear to be broad resistance to provide post-secondary learning disabilities programs, rather, nonprovision is a function of the low visibility of the problem. Further, given the rather modest accommodations usually involved, it is unlikely that substantial institutional resistance will arise. Thus, enforcement of the legal obligation seems best achieved by an institutional shifting of the inertial mass toward compliance. One device that has also proven valuable in this regard is the use of incentive grants.[92] Thereafter, private suits and drastic administrative remedies such as funding cut-offs should be unnecessary.

III. PARAMETERS OF A LEARNING DISABILITY PROGRAM AT THE POST-SECONDARY LEVEL

If, as argued above, there must be university sponsored programs[93] to alleviate the post-secondary learning disabled students' barriers to success, a description of the parameters of an educationally sound program is necessary. A survey of the available literature shows broad agreement that an effective plan for service delivery to learning disabled college students includes four basic components: identification, individualized planning, implementation, and evaluation.[94] These components closely parallel the standards and procedures that are man-

90. *See* Office for Civil Rights, Proposed Annual Operating Plan for Fiscal Year 1980, 44 Fed. Reg. 45, 255-56 (1979). A cogent summary of OCR enforcement plans is set out in Cook & Laski, *supra* note 76, at 421 n.24.

91. Additional provisions detailing coordinating and enforcement of § 504 by the Attorney General were recently promulgated by Executive Order. The provisions do not alter the role of the Office of Civil Rights regarding compliance reviews. *See* § 1-201 of Executive Order 12,250 (November 2, 1980), 45 Fed. Reg. 72,995 (1980).

92. *See, e.g.*, 20 U.S.C. § 1419 (1976).

93. Attempts by universities to refer learning disabled students to outside sources for services are generally unsuccessful. One study noted "eligibility of the learning disabled for services from the State Vocational Rehabilitation agency (34 referrals) is questionable at this time unless they have another documented disability." R. Ugland & G. Duane, *supra* note 11, at 31.

94. *See, e.g.*, Miller, McKinley & Ryan, *College Students: Learning Disabilities and Services*, 58 PERSONNEL & GUIDANCE J. 154-58 (1979); Paper by G. Nelson, A Proposed System for Developing Individualized Education Programs for Learning Disabled Adults at Vancouver Community College King Edward Campus, *supra* note 4; S. Bury, Learning Disabilities and Adult Basic Education (1976) (ERIC No. ED 159 137).

dated by the Education For All Handicapped Children Act of 1975.[95] Beyond the four components, a final element is the integration of the program with ongoing university functions so that students and their professors are aware of the program and its potential.

A. Procedures for Identification of Learning Disabled Students

There are two distinct groups of adults found in the relevant student population: those who have been previously identified as learning disabled and those who are unaware of their handicap.[96] As to the former group, identification is easily accomplished. Many colleges currently distribute confidential questionnaires to incoming students asking about known handicaps and needed services.[97] Apart from possible stigmatization of students who participate in a learning disabilities program, there is no reason why this method of identification is not fully adequate.[98]

The federal mandate of services to learning disabled elementary and high school students has undoubtedly resulted in the identification of many learning disabled students.[99] Nevertheless, "[i]t remains very probable that a number of learning disabled adolescents complete [high] school undiagnosed."[100] Ferreting out this population raises difficult problems. Ideally, a diagnostician/consultant team would test and interview every entering student. While this may not be economically or administratively feasible for all schools, it is not invariably impossible. Many schools have begun programs of competency testing in the areas of English and Math. While these programs may identify low levels of achievement, learning disabilities classification depends upon the student having an I.Q. in the average range of general ability or higher. Accurate I.Q. measurement requires individual testing administered by a certified psychologist. The cost of this testing is substantial. Further, it seems dysfunctional to subject the majority of students who are not in fact learning disabled to unnecessary and time-consuming testing. An appropriate and reasonably cost-

95. Pub. L. No. 94-12, 89 Stat. 775 (1975) (codified at 20 U.S.C. §§ 1401-61 (1976)).

96. *See* R. Andrulis & J. Alio, *supra* note 5, at 6. It should be recalled that learning disabilities are not physical handicaps and many learning disabled students who have reached college level will have developed adaptive responses which may well obscure their own ability to recognize their own handicap. See text at notes 1-8 *supra*.

97. *See*, Author's Questionnaire, *supra* note 14.

98. Moreover, the problem of stigma may well be a thing of the past. In light of the universal mandate for special education at the elementary and secondary level, much of the stigma associated with learning disabilities has been obviated. *See generally* 20 U.S.C. §§ 1401-61 (1976).

99. Colleges should not be required to accept a prior classification of a student as being learning disabled. In practice, however, it is probably easier to accept a classification rather than to contest the prior evaluation.

100. *See* R. Andrulis & J. Alio, *supra* note 5.

effective balance could be struck by having all students take a group-administered battery of standardized achievement tests followed by selective administration of individual tests to those whose scores are significantly below the relevant norms.[101]

A complete program for screening needs a final component based on referral from other sectors of the university, most importantly faculty members who become aware of a student having difficulty with a particular skill. The successful operation of this part of the program is bound up with integration of the learning disabilities program with the school as a whole.[102]

B. Individualized Educational Planning and Implementation

Two major topics are embraced by the concept of individualized educational planning: identification of problem areas and determination of necessary assistance. Initially, interpretive analysis of the test results which led to identification of the student as learning disabled is the primary guide to determining the areas of difficulty. This should be supplemented by an interview with the identified student. This allows for better definition of the nature of the learning disability and, equally important, it engages the student in the formative stages of remediation.[103] The economic viability of this course of action is assured by the relatively small number of students identified as being learning disabled. Present levels of identification render the economic burden trivial.[104] To move toward an individualized plan, the support personnel should consider involving faculty and, if necessary, outside social service agencies with experience in responding to the specific problem. As with all types of service functions, the quality of the services rendered will be determined largely by the abilities and ingenuity of the university's support staff. Institutionally, however, some quality control is possible by keeping the caseloads of the support staff manageable and, if scale permits, by including at least one person with training in the learning disabilities field on the staff. Finally, to

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101. Although many of the widely used and currently available standardized tests, such as the Wide Range Achievement Test, are not normed for the adult population, the adjustments which would be required would not be inordinate.

102. See text at notes 109-11 *infra*.

103. It should be pointed out that the choice of remedial methodology cannot be mechanistically determined. The lack of consensus has prompted one author to comment, "there is still no general agreement as to what constitutes effective and appropriate training for the learning disabled." R. Andrulis & J. Alio, *supra* note 5, at 6.

104. For example, in the author's study of thirteen schools that had an established program, the largest program had only 60 students, and it had twice as many as other programs. *See* Author's Questionnaire, *supra* note 14. Even as the number of identified students rises, it is unlikely that the demands would outstrip the caseload of a single professional.

allow for modifications suited to any perceptable change in the student's needs or to curricular changes, some periodic review of each student's educational plan is appropriate.[105]

Just as there is no single effective plan, neither can there be any single method of implementation. Beyond common sense, an institution should be prepared to accept various modifications of its program which might be called for by individual academic plans. For example, faculty flexibility as to the manner in which tests are administered should be encouraged. Likewise, faculty familiarity with and willingness to recommend alternative textbooks appropriate to a learning disabled student's reading ability can be extremely helpful. On a more general level, course-specific tutorial programs and provision of reading and study-skills help should be available for the learning disabled student. These programs can easily be integrated into the general academic support programs of the college or university. If possible, it is advantageous to integrate these functions and make available study aids such as tape recordings, films, and video tapes which parallel or supplement course coverage. It is worth noting that many of the aids provided on a general basis to learning disabled students are of value to a significant portion of the non-learning disabled population as either curricular enrichment or as a means of improving academic performance. Finally, it should be remembered that the entire premise for provision of service is that a learning disability is a handicap. In gauging the appropriate response, one writer has urged: "Learning disabilities in the adult must be viewed as a handicap similar to and as serious as the sensory impairments of blindness and deafness."[106] It must be stressed, however, that while it is appropriate to view learning disabilities as a handicap for remedial service purposes, provision of services is not as costly and drastic as that necessitated by severe physical handicaps.[107]

C. *Individual and Programmatic Evaluation*

Two areas must be assessed: 1) the student's academic progress and 2) the program's success in aiding the learning disabled. Obvious measures of student success include examination scores and grade point average. Less obvious, but also important, is the student's sub-

105. This later step parallels the periodic review of Individualized Education Programs mandated by Pub. L. No. 94-142 for elementary and secondary school children. See text at note 2 *supra*. It is, however, even more important in the post-secondary context because there is less continuity between subjects and courses. Similarly, it is unlikely that the same faculty members will have continuing contact with a student over the student's entire post-secondary career.

106. Cox, *The Learning Disabled Adult*, 13 ACADEMIC THERAPY 79, 83-84 (1977).

107. See text at notes 83-84 *supra*.

jective perception of improved ability to respond in an academic setting.[108] This can best be ascertained through an interview with the student.

Evaluating programmatic success and efficiency is much more difficult. Some objective measures can be devised and should be undertaken. For example, a careful breakdown of costs should be compiled. This allows calculations of cost per student as well as providing part of the data base upon which to make decisions regarding what methods are cost-effective. Subjective data should be solicited from students in the program and faculty who have instructed those students. The goal of such inquiries is identification of "what works" both for the individual student and more generally "what works" in the particular institutional setting. From a programmatic point of view, data detailing successes is particularly valuable in persuading the institution to continue or expand supportive programs of this nature.[109]

D. Integration of the Learning Disabilities Program into the Institutional Setting

This most amorphous component of a sound program is perhaps the most important. Encompassed within it are the many elements needed to acclimate the university to the presence of a special type of disabled population. Likewise, the learning disabled students in most instances require more than academic support to fully adjust to higher education.

Publicity about the program is of course important. It fosters awareness of available services and provides information about those services which render them less threatening to students and faculty alike. Information alone, however, is insufficient in a number of respects. By its nature, mere information is passive; acceptance of a learning disabilities program requires active advocacy and affirmative action.

Advocacy must have as its first target, the faculty of the institution. Faculty should be persuaded to regard the program as a supplement to their efforts on the student's behalf, not as a necessary administrative chore. Encouraging the faculty to participate in program planning and the selection of alternative curricular materials for a particular student can achieve the desired relationship. Winning that sort of faculty cooperation, however, requires skillful prior com-

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108. See text at notes 110-14 *infra*.

109. The demonstration that these services influence retention of students is, in the short term, a tremendously valuable piece of evidence. It allows the program to be viewed as indirectly generating the opportunity for additional revenues in the form of credit hour production.

munications designed to interest the faculty member in the program's capabilities. In-service programs can be a valuable tool in this effort.

A second form of advocacy involves becoming an advocate for the learning disabled student within the university at large as well as in regard to the individualized academic plan. As these students lack a visible handicap, it is easy to forget that their learning disabilities frequently stand as an impediment in areas other than in academic achievement. Even the most successful of post-secondary learning disabled students, in reflecting on their own experience, have "expressed concerns about lack of self-confidence, ability to take pressures, coping, patience and the like."[110] Given the predictable lack of self-confidence shared by many learning disabled college students, the role of being their advocate evolves upon the support personnel. This will include seeking funds and materials from the administration and intercession with the faculty members to seek academic adjustments for individual students.

It is easy to see how the advocacy role lapses into a counseling role. Much needs to be done to improve the learning disabled student's self-image. Students who have not been identified as learning disabled previously in their academic carrers will frequently have been told that their poor academic performance was due to stupidity or laziness. To encourage a student with this type of personal history to adopt an agressive academic program is obviously a difficult and sensitive task. It is plain, however, that such counseling is appropriate given the potential possessed by this group of talented but handicapped students.

The combination of services discussed above provides the basis for an educationally sound program for assisting learning disabled post-secondary students.[111] These services closely parallel the standards and procedures mandated by the Education For All Handicapped Children Act of 1975. Although the 1975 Act does not extend its coverage to post-secondary learning disabled students,[112] the similarity between the congressionally mandated program and the educational program suggested herein illustrates the reasonableness of the latter.

Taken together, the five elements are not only the basis for a sound program, they are the basis for an affordable, reasonable and efficient program which can be implemented "without imposing undue financial and administrative burdens"[113] upon a school receiving federal funds. Accordingly, the failure or refusal to incorporate serv-

110. L. Rogan & L. Hartman, *supra* note 7, at 83.

111. While other devices, such as advisory boards, are a successful addition to this type of program, as evidenced by the California experience (see note 14 *supra*) such additions are salutory but not necessary.

112. See text at notes 19-21 *supra*.

113. Southeastern Comm. Coll. v. Davis, 442 U.S. 397, 412-13 (1979).

ices for the learning disabled is a situation where "a refusal to modify an existing program might become unreasonable and discriminatory"[114] in violation of section 504.

114. *Id.*