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**"Understanding Access to Higher Education:
The Lessening Impact of Federal Efforts to Address Accessibility
Through Financial Aid, Diversity, and Disability"**

Paul Lowell Haines
©2006 Baker & Daniels, LLP
300 North Meridian Street, Suite 2700
Indianapolis, Indiana 46204
lowell.haines@bakerd.com

Americans have long recognized the value of the higher education experience. Most understand that the earning of an associate, undergraduate, or graduate degree from one of America's institutions of higher education increasingly is becoming foundational, if not a requirement, for improved living and for a stronger and more competitive America. These understandings have resulted in the creation of what generally is considered to be the finest system of higher education in the world.

As the importance of obtaining a higher education degree has increased, Americans generally have shared in the belief that all Americans, despite financial resources, racial or ethnic background, sex, health, or disability should have access to and the opportunity to attend an institution of higher education, and to pursue a degree of their choice. Accordingly, for the last fifty years, America's leaders have worked consistently to provide access to the higher education experience. As noted by Lederman, "[f]or more than half a century, 'access' has been the holy grail of American higher education. Policymakers and educators have taken it as their primary goal to ensure that as many U.S. citizens as possible attend college, which increasingly is seen as the essential pathway to a better life."¹

In this paper, we will consider efforts made by America's national leaders, through the promulgation of laws and the rendering of judicial decisions, to address, directly or

¹ Doug Lederman, "Improving Student Retention and Persistence," AGB Priorities, Fall 2005, Number 26, p. 1.

indirectly, access to higher education issues. Specifically, we will discuss federal efforts to increase access by addressing students' 1) financial need, 2) racial and ethnic differences, and 3) disabilities. We also will consider how those efforts have changed over time and evaluate the likelihood of their continuing influence in the years ahead.

Federal Efforts to Address Accessibility Through Financial Aid

Few people today would dispute that the high cost of attending and obtaining a degree from an institution of higher education is one, if not the primary, factor in discouraging or preventing access to higher education. Average tuition and fees at public institutions for 2005-2006 increased to \$5,491.² At four-year private colleges, tuition and fees for 2005-2006 increased to an average of \$21,235.³ And, the cost at many private colleges is more than double that amount. As recently noted, "on average, tuition and fees in both the public and private sector have grown at more than twice the rate of inflation each year for a quarter century."⁴ Neither grants nor median family incomes have kept pace, creating a growing crisis in affordability and accessibility. Over the years, the Federal government has attempted to address the affordability issue, and thereby provide access to American institutions of higher education, by creating various financial aid programs.

The GI Bill (Servicemen's Readjustment Act of 1944)

The Servicemen's Readjustment Act of 1944, better known as the "GI Bill," was one of the first efforts made by Congress to democratize or "open[] up the possibility of a college-level education to American students in ways that previous generations would have never even dared to dream."⁵ In pertinent part, the GI Bill stated the following:

Any person who served in the active military or naval service on or after September 16, 1940, and prior to the termination of the

² Vaishali Honowar, "Report: College Tuition Pinches Poor Families," Education Week, 2005, Vol. 25, Issue 9, p. 10.

³ Id.

⁴ Arthur M. Hauptman, "College: Still Not for the Needy," The Chronicle of Higher Education, November 11, 2005, B16.

⁵ Vartan Gregorian, "Leading Today's Colleges and Universities: Challenges and Opportunities," The Presidency, Spring 2005, p. 29, 31.

present war, and who shall have been discharged or released therefrom under conditions other than dishonorable, and whose education or training was impeded, delayed, interrupted, or interfered with by reason of his entrance into the service, or who desires a refresher or retraining course, and who either shall have served ninety days or more, exclusive of any period he was assigned for a course of education or training under the Army specialized training program or the Navy college training program, which course was a continuation of his civilian course and was pursued to completion, or as a cadet or midshipman at one of the service academies, or shall have been discharged or released from active service by reason of an actual service-incurred injury or disability, shall be eligible for and entitled to receive education or training under this part.⁶

The GI Bill was "conceived as a partial solution to potential post war chaos and as a reward for military service. The latter purpose has lived on in subsequent, though less generous, versions for Korean War and Vietnam War veterans and now as an enlistment incentive for all volunteer military personnel under the Montgomery GI Bill."⁷ The GI Bill provided significant educational opportunities to service veterans, including: "collegiate, vocational, or on-the-job apprenticeships - with tuition, fees, and books paid for, and supporting stipends for living expenses provided, for up to 48 months depending upon length of service."⁸

The initial GI Bill was an unqualified success. In 1940, approximately 1.5 million students were enrolled at all colleges and universities, and less than 200,000 earned college degrees. In 1950, after the GI Bill took effect, the number of enrolled students grew to approximately 2.7 million students and almost 500,000 college degrees were awarded.⁹ As Greenberg notes:

[i]t is appropriate to ascribe this growth [the growth in student population] to the major legacy of the GI Bill: the opening of the

⁶ Servicemen's Readjustment Act of 1944 (G.I. Bill of Rights), ch. 268, 58 Stat. 284 (codified as amended at 38 s 1801 et seq.).

⁷ Milton Greenberg, "How the GI Bill Changed Higher Education," *The Chronicle of Higher Education*, June 18, 2004, Vol. 50, Issue 41, p. B9-B11.

⁸ Id.

⁹ Id.

academy to all classes of people and turning what had been a limited privilege to a generalized public expectation.¹⁰

In addition to the increase in numbers, however, the GI Bill resulted in a more fundamental change in American higher education. "Among the more socially significant revolutions wrought by the GI Bill was the impact upon discriminatory practices. Blacks and Jews in particular were able to use the GI Bill to break barriers to their participation in higher education."¹¹

The GI Bill and its successors "opened wide the doors of higher education to a host of veterans who otherwise would never have been able to consider a college education."¹² In effect it became the first federal government effort to increase access to higher education. Greenberg also notes:

the major legacy of the GI Bill is the idea that, given the opportunity, any person can undertake higher education for both personal and societal benefit. . . . The issue now is not whether we should support that legacy, but rather for whom and at what cost it should be provided. Absent now, happily, are the desperate social conditions that evolved from the Great Depression and WWII. But the real differences now lie in the vast competition for available public funds and the lost shared sense of great national purpose which marked post-World War II America.¹³

The National Defense Education Act of 1958

In 1958, Congress enacted a new law, the National Defense Education Act ("NDEA"), the purpose of which was to educate exceptional students or specialists. The NDEA was enacted in response to increasing concern regarding America's ability to compete with the Soviet Union, especially in science and technology.

In pertinent part, the statute stated the following regarding its purposes:

¹⁰ Id.

¹¹ Id.

¹² James T. Harris, III, "Higher Education, College Rankings, and Access for Lower-Income Students," *Black Issues in Higher Education*, January 13, 2005, Vol. 21, Issue 24, p. 103.

¹³ Greenberg, supra note 7, at B9-B11.

The Congress hereby finds and declares that the security of the Nation requires the fullest development of the mental resources and technical skills of its young men and women. The present emergency demands that additional and more adequate educational opportunities be made available. The defense of this Nation depends upon the mastery of modern techniques developed from complex scientific principles. It depends as well upon the discovery and development of new principles, new techniques, and new knowledge.

We must increase our efforts to identify and educate more of the talent of our Nation. This requires programs that will give assurance that no student of ability will be denied an opportunity for higher education because of financial need; will correct as rapidly as possible the existing imbalances in our educational programs which have led to an insufficient proportion of our population educated in science, mathematics, and modern foreign languages and trained in technology.

The Congress reaffirms the principle and declares that the States and local communities have and must retain control over and primary responsibility for public education. The national interest requires, however, that the Federal Government give assistance to education for programs which are important to our defense.

To meet the present educational emergency requires additional effort at all levels of government. It is therefore the purpose of this Act to provide substantial assistance in various forms to individuals, and to States and their subdivisions, in order to insure trained manpower of sufficient quality and quantity to meet the national defense needs of the United States.¹⁴

Through the provision of various student loans and aid programs, and financial support provided for specific educational programs and facilities, the NDEA, like the GI Bill, increased access to higher education. The NDEA ". . . opened the gates to federal support for higher education. Congress appropriated money for mathematics, science, and language education, as well as campus facilities, because of the relationship of those academic areas to national defense. In fact, the legislation ultimately benefited all of higher education as the notion of defense was expanded to include most disciplines and fields of study."¹⁵ In addition, the

¹⁴ National Defense Education Act of 1958, Pub. L. No. 85-864; 72 Stat. 1580, Title I, Sec. 101.

¹⁵ Michael D. Parsons, "Higher Education is Just Another Special Interest," *The Chronicle of Higher Education*, February 4, 2005, Vol. 51, Issue 22, p. B20.

NDEA expanded the pre-existing, but limited, state efforts to address the specific financial needs of gifted and talented students to all states.¹⁶

Higher Education Act of 1965

The HEA's Financial Aid Programs. The Higher Education Act of 1965 ("HEA") was the first enactment of Congress that provided grants to qualified needy students. The purpose of the Act, in part, was:

. . . to provide, through institutions of higher education, educational opportunity grants to assist in making available the benefits of higher education to qualified high school graduates of exceptional financial need, who for lack of financial means of their own or of their families would be unable to obtain such benefits without such aid.¹⁷

The HEA, like the NDEA, also made provisions for loans to students desiring to obtain a higher education degree. The relevant part of the statute states the following:

The purpose of this part is to enable the Commissioner (1) to encourage States and nonprofit private institutions and organizations to establish adequate loan insurance programs for students in eligible institutions (as defined in section 435), (2) to provide a Federal program of student loan insurance for students who do not have reasonable access to a State or private nonprofit program of student loan insurance covered by an agreement under section 428(b), and (3) to pay a portion of the interest on loans to qualified students which are made by a State under a direct loan program meeting the requirements of section 428(a)(1)(B), or which are insured under this part or under a program of a State or of a nonprofit private institution or organization which meets the requirements of section 428(a)(1)(C).¹⁸

The HEA also amended and clarified the Economic Opportunity Act of 1964 (Public Law 88-452), enacted a year earlier which created the first Work Study Program. In relevant part, the HEA stated:

¹⁶ Thomas Oakland and Eric Rossen, "A 21st-Century Model for Identifying Students for Gifted and Talented Programs in Light of National Conditions: An Emphasis on Race and Ethnicity," *Gifted Child Today Magazine*, Fall 2005, Vol. 28, Issue 4, p. 56-63.

¹⁷ The Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, Title IV, § 401(a).

The purpose of this part is to stimulate and promote the part-time employment of students, particularly students from low-income families, in institutions of higher education who are in need of the earnings from such employment to pursue courses of study at such institutions. . . . The Commissioner is authorized to enter into agreements with institutions of higher education under which the Commissioner will make grants to such institutions to assist in the operation of work-study programs as hereinafter provided.¹⁹

The HEA's Success. The HEA, which has been amended and reauthorized over the years generally has been seen, until recently, to be a resounding success. Originally enacted at the height of the War on Poverty and the Civil Rights Movement, the HEA "committed the federal government to the goal of opening college doors to all, regardless of family income or wealth."²⁰ As noted by Gladieux and Watson, "[f]ederal student aid and related efforts have helped fuel a half century of explosive growth in college attendance and educational attainment. . . . Overall, public policy has done a good job of boosting entry into the postsecondary system. Postsecondary participation rates for 18- to 24-year old high school graduates over the past 25 years are up for all income groups."²¹

The results speak for themselves. According to the National Center for Education statistics, the percent of high school students enrolled in postsecondary education increased from 55% in 1972, to 77% in 1992.²² Most ethnic and socioeconomic groups shared in this growth and their student population increased sharply.²³

The Gathering Storm. Despite the federal aid programs' great successes in increasing student access to higher education over the last half century, the last decade has evidenced reason for significant concern. As noted by Hauptman:

Although college participation rates of low-income students and minority students have increased sharply since the financial aid

¹⁸ Id. at § 421(a).

¹⁹ Id. at § 441(2) and § 123(a).

²⁰ Lawrence E. Gladieux and Scott Watson, "Beyond Access: Improving the Odds of College Success," *Phi Delta Kappan*, May 2000, Vol. 81, Issue 9, p. 688.

²¹ Id.

²² Lederman, supra note 1, at 2.

²³ Hauptman, supra note 4, at B16.

programs were enacted in the 60s and early 70s, the gap between rich and poor remains the same -- and may even have worsened. Degree-completion rates for all American students, and particularly for those from low-income backgrounds, remain below the rates of many other industrialized countries. And, on average, tuition and fees in both the public and private sector have grown at more than twice the rate of inflation each year for a quarter century, making any growth in financial aid less effective in providing greater affordability.²⁴

In addition, higher education is experiencing a significant shift from need-based and to merit based aid. Needy, but less gifted, students who once had a shot at a college degree are increasingly seeing aid that once would have come in their direction, go to brighter, more talented students. Federal funds, which were plentiful in the early days of aid programs, have become scarcer and financial aid budgets have been frozen, or reduced for much of the last decade.²⁵ Pell grants, the most popular of the federal aid programs, have now been frozen for four years in a row, and, according to the College Board, the proportion of college expense covered by grant aid has declined in each year since 2001. As a result, students are depending more and more on loans to pay for their education. As the costs of education skyrocket, the corresponding debt load carried by graduates is also reaching extremes.

Recognizing these concerns, Reed and Szymanski note another disturbing trend:

[H]igher education [today] shows all the signs of following the disturbing trends that are fueling economic polarization in society in general. In fact, higher education is now part of this process of shifting income to the top. Here's how it works.

Rising tuition is not just a statistic. Together with the current structure of financial aid, it is furthering the transfer of money to wealthy families and the financial sector. Specifically, as tuition rises, access to college is limited to those who can afford increasing amounts of interest-bearing loans. As tuition rises, colleges are offering more merit-based aid, which tends to benefit wealthier families. As tuition rises, students and their families are

²⁴ Id.

²⁵ On December 21, 2005, Congress passed a \$602 billion spending bill for education and health programs in 2006 that froze most federal student aid programs, including the Pell grant award (which, as of 2006, will have been frozen at the same level for four years). Jeffrey Brainard, "Congress Approves Final 2006 Spending Plan for Student Aid and NIH Research," *The Chronicle of Higher Education*, December 22, 2005.

taking on huge loan debt, which transfers money to financial and credit-card companies. As tuition rises, more pressure is put on financially strapped states and public colleges to fulfill the push to privatize public services, including higher education.

Thus not only is an entire financial sector growing and society's most affluent members personally benefiting from the income shift taking place in higher education, but concerns over rising tuition are also being used to promote the privatization of yet another public service--public higher education.²⁶

Observation - The Federal Efforts to Address Affordability. The rationale for the multiple federal efforts to address the affordability issue has been clear:

[e]ducation creates an informed citizenry and helps ensure that workers have the skills, knowledge, and critical thinking to thrive in an ever-changing economy. So throwing open the doors of higher education is a sound investment in the country's future and that of its citizens.²⁷

This rationale and the corresponding aggressive actions by Congress to make higher education accessible to all Americans has resulted in significant increases in higher education enrollment: from four percent (4%) of the college-age population in 1900 to sixty-five percent (65%) of the college age population at the end of the twentieth century.²⁸ This increased access to higher education has paid numerous dividends for America and its citizenry.

Unfortunately events of the last decade suggest that the ability of the federal government to continue to adequately address the affordability and accessibility issues are coming, or have come, to an end. The rapidly increasing cost of higher education, the competing priorities in Congress, the ongoing reduction in funds available for aid, and the changing strategies for attracting students do not paint a pretty picture. For fifty years the federal government has been the key player in making education affordable for all Americans. As it begins to temper or moderate that role, accessibility to higher education will become its first victim.

²⁶ Adolph Reed, Jr. and Sharon Szymanski, "Free Higher Education," *Academe*, July/August 2004, Vol. 90, Issue 4, p. 39-43.

²⁷ Lederman, *supra* note 1, at p. 2.

²⁸ *See* Gregorian, *supra* note 5, at 31.

Federal Efforts to Address Accessibility By Encouraging Diversity

More than a quarter of a century ago in the historic decision of Regents of the University of California v. Bakke, 438 US 265, 98 S. Ct. 2733, 1978, the Supreme Court first approved the use of race to further an interest in student body diversity in the context of public higher education. In the Bakke decision, written by Justice Powell, the Court noted:

[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded As the interest of diversity is compelling in the context of a university's admission program, the question remains whether the . . . program's racial classification is necessary to promote this interest. In re Griffiths, 413 U.S., at 721-722, 93 S. Ct. at 2854-2855.

98 S. Ct. at 2760-2761.

The Bakke decision ushered in 25 years of increasing use of race and ethnicity as selection criteria in higher education admissions and financial aid programs. Those decades evidenced significant advances in minority student access to higher education. Institutions of higher education throughout the country created admission and financial aid programs that had race as a selection criteria and that focused on minority recruitment and enrollment. These programs resulted in significant gains in minority participation in higher education.

Since the 1990's, however, "efforts of anti-affirmative action groups have slowly chipped away at the precedential weight of Bakke, so that educational institutions operate in a legal landscape with uncertain landmarks and constantly shifting terrain."²⁹ The period has evidenced a number of court rulings and decisions that have limited consideration of race by educational institutions in admissions and financial aid selection criteria.³⁰ This uncertainty has

²⁹ D. Frank Vinik, Laura Kumin, and James P. O'Brien, Jr., "Affirmative Action in College Admissions: Practical Advice to Public and Private Institutions for Dealing with the Changing Landscape," *The Journal of College and University Law*, Winter 2000, Vol. 26, No. 3, p. 395, 398.

³⁰ See Hopwood v. Texas, 78 F. 3rd 932 (5th Cir. 1996), cert. denied, Texas v Hopwood, 518 U.S. 1033 (1996) (rejecting the diversity rationale as applied to admissions at the University of Texas Law School); Adarand Constructors v. Peña, 515 U.S. 200 (1995) (applying strict scrutiny to racial classifications in federal programs);

been exacerbated by the fact that the Department of Education's interpretation of various affirmative action laws "has varied according to the ideological views of its presidentially-appointed top officials."³¹

On June 23, 2003, the Supreme Court again addressed these issues by issuing decisions in two cases, Grutter v Bollinger, et. al. and Gratz v Bollinger, et. al.,³² which focused on the consideration of race as one of many factors in the admissions processes at the University of Michigan's law school and undergraduate program. In the Grutter decision, the Court held that diversity is a compelling state interest in higher education that can justify the consideration of race as a plus factor that can be taken into account in university admissions. In Gratz, the Court held that while race can be considered as a plus factor and as one of a number of factors that can be considered in undergraduate admissions, the review of such factors must be individualized. The Court ruled in both cases that the use of race is subject to strict scrutiny and that use of race as a selection criterion must be narrowly tailored to achieve a compelling state interest.

Although the Grutter and Gratz decisions are hailed as victories for institutions of higher education who have traditionally espoused the virtue and importance of diversity on campus, they also have led to a significant review of existing affirmative action programs in admissions and financial aid. Colleges and universities around the country have been evaluating existing admissions and financial aid programs in light of the clarifications rendered in the recent Supreme Court decisions. In many cases, affirmative action programs in both admissions and financial aid have been discontinued, revised, or changed. In the eyes of an increasing number of scholars, the Michigan cases have, in practice, "constrained the use of race in admissions,"³³ and also in financial aid programs.

Podberesky v. Kirwin, 38 F. 3d. 147 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995) (applying strict scrutiny and narrow tailoring to financial aid programs).

³¹ Vinik, supra note 29, at 418.

³² Grutter v Bollinger, et. al., 123 S. Ct. 2325 (2003) (law school admissions); Gratz v Bollinger, et. al., 123 S.Ct. 2411 (2003) (undergraduate admissions).

³³ Edward P. St.John, Michael B. Paulsen, and Deborah Faye Carter, "Diversity, College Costs, and Postsecondary Opportunity: An Examination of the Financial Nexus Between College Choice and Persistence for African Americans and Whites," The Journal of Higher Education, September/October 2005, Vol. 76, No. 5, p. 565.

It is still too early to tell what long term impact the Grutter and Gratz decisions will have on minority access to higher education. However, with all the program review that is taking place throughout higher education as a result of the decisions, it is likely that they will have an impact, and that the impact will be, in the words of St.John, Paulsen, and Carter, to "constrain" the use of race in admission and financial aid programs. If that prediction becomes reality, then one tool that has been used with success for 25 years to increase minority access to higher education will no longer be available (at least not in the present form), and the corresponding result likely will be a restriction in minority access to higher education.

Federal Efforts to Address Accessibility Through Disability Laws

The Acts. In 1973, Congress passed Section 504 of the Rehabilitation Act of 1973 ("Section 504").³⁴ Section 504 prohibits discrimination on the basis of physical or mental disability and applies to all recipients of funding from the United States Department of Education, which includes most, if not all, colleges, universities, postsecondary vocational education and adult education programs. Section 504 states in relevant part:

No otherwise qualified individual with a disability in the United States . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance³⁵

Failure to provide auxiliary aids and services to students with disabilities that results in denial of a program benefit is a discriminatory and prohibited act under Section 504.

The Americans With Disabilities Act of 1990 (the "ADA"),³⁶ passed almost two decades after Section 504, again prohibited discrimination on the basis of disability, but extended the law's reach to many more organizations. The legislative history of the ADA states:

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and bring persons with disabilities into the economic

³⁴ Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C.A. § 794 (West Supp. 1991)).

³⁵ 29 U.S.C. Section 794(a).

³⁶ Public L. No. 101-336, 104 Stat. 327 (1990) (as codified at 42 U.S.C.A. § 12101-12213 (West. Supp. 1991)).

and social mainstream of American life, to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.³⁷

Title II of the ADA prohibits state and local governments (and their related instrumentalities and agencies) from discriminating in any programs on the basis of disability. Moreover, Title II extends coverage to all public entities that provide public transportation, regardless of whether they receive federal aid.³⁸ Title II is enforceable against public colleges, universities, and graduate and professional schools regardless of whether the institutions received federal financial assistance. The requirements regarding the provision of auxiliary aids and services described in Section 504 are generally included in the general nondiscrimination provision of Title II.

For those institutions of higher education not covered by Title II of the ADA, Title III likely is applicable. Educational institutions (including undergraduate and post-graduate institutions), are considered "public accommodations" within the scope of Title III. 42 U.S.C. § 12181(7)(J). This includes private colleges and universities. PGA Tour, Inc. v. Martin, 532 US 661, 672-73 & n. 18 (2001).

Title III of the ADA prescribes that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" 42 USC § 12182(a). "Discrimination" is specifically defined to include "a failure to make reasonable modification in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii).

³⁷ Note: "Americans With Disabilities Act of 1990: Significant Overlap with Section 504 for Colleges and Universities," 18 Journal of College and University Law 389, 398 (1992). (citing S. Rep. No. 116, 101st Cong., 1st Sess. 2 (1989)).

³⁸ Id. at p. 407.

Section 504 and Titles II and III of the ADA have radically altered the waterfront of higher education. Under their provisions, all institutions of higher education have had to respond appropriately to the unique needs of students with disabilities. Disabled students can not be discriminated against. Institutions, when confronted with a disabled student or prospective disabled student, must examine, on a case by case basis, disabled student requests for potential accommodations, and where reasonable, make those accommodations. Although the laws do not require institutions to fundamentally alter the nature of their programs, the required modifications can be significant.³⁹

The Success of the Disability Laws. Without question, Section 504 and the ADA have been very successful in increasing disabled student access to institutions of higher education. As noted by Kennedy:

At the dawn of a new century, schools and universities, like the rest of society, have come a long way in how they view people with disabilities. Instead of refusing to accommodate students or shunting them off to a separate and often inadequate facility, education institutions have grown comfortable with the idea of bringing students with disabilities into the mainstream of education.

A major factor in bringing about that change of attitude is the Americans with Disabilities Act (ADA). Enacted in 1990, it requires public institutions to offer services to people with disabilities if they are available to people without disabilities, and mandates that public accommodations must be accessible to people with disabilities.

Together with . . . Section 504 of the Rehabilitation Act, the ADA has heightened educators' awareness of the needs of people with disabilities and has prompted significant progress in reshaping thinking and removing barriers.⁴⁰

Lex Frieden, Chairperson of the National Council on Disability, has stated:

The Americans with Disabilities Act (ADA) of 1990 was the watershed event for advancing the civil rights of people with disabilities. The ADA's "clear and comprehensive national

³⁹ Lex Collegii, Spring 1997, Vol. 20, No. 4, at 1.

⁴⁰ Mike Kennedy, "Gaining Access," American School & University Magazine, December 2000, p. 14.

mandate for the elimination of discrimination against people with disabilities" in which sweeping protections were provided in employment, public services, public accommodations and services operated by private entities, transportation and telecommunications has been the impetus for a revolution in the inclusion, integration and empowerment of Americans with disabilities.⁴¹

The Concern Over Funding. Although Section 504 and the ADA have been very successful in accomplishing their purposes (greater access for the disabled to society (and education)), the progress has not been without significant cost. Thousands of ramps, automatic door openers, elevators, curb cuts, modified restrooms, computer software programs, sign language interpreters, and expanded door frames have been expensive, and the acts are relatively silent as to where the responsibility for payment lies. Accordingly, colleges, universities, state vocational rehabilitation agencies, other governmental entities, and disabled students and their families have regularly struggled with reaching agreement on who should pay the cost of accommodation.⁴²

Over the years, court decisions and the Office of Civil Rights have provided some assistance in obtaining greater clarification regarding payment obligations. The reality, however, has been that colleges and universities have assumed a large portion of the costs to campuses created under Section 504 and ADA requirements.

In an era of limited financial resources and rapidly expanding costs, these additional costs necessarily have been passed on to students in increasing tuition and fees. In effect, although Section 504 and the ADA have created significant access to a previously unserved or underserved population, in so doing they also have caused increases in college costs that may have restricted access to other students who are unable to meet rising tuition costs.

Section 504 and the ADA are only two of many federal statutes (FERPA, Title IX, OSHA, and HIPAA, to name a few) that have made college life more accessible, more equitable, safer, and more respectful of privacy. But each, while accomplishing those purposes, has made higher education and institutions of higher education more expensive. The cost of

⁴¹ Lex Frieden, "NCD and the Americans with Disabilities Act: 15 Years of Progress," July 26, 2005, (Paper Presented to the National Council on Disability).

⁴² See generally, Kennedy, *supra* note 40, at 16.

compliance has been passed on to the student, thereby, to some degree, making higher education less accessible.

Conclusion

There is little dispute that all three branches of the federal government have, over the years, played a significant, if not pivotal and wildly successful role, in making higher education available to the masses. As Lederman noted, in policy, ruling, and practice access has been the "holy grail" of American higher education. The end result has been that millions of Americans, veterans, and students of every color, creed, sex, ability, or disability have been assisted in pursuing their studies and achieving their dreams of obtaining a degree in higher education.

But the federal government's ability to throw higher education's doors open to all appears to be reaching its limits. The higher education lobby can no longer keep up with competing political pressures, and federal financial aid programs are declining in their ability to make a quality higher education experience affordable to many. The Supreme Court's recent rulings in Grutter and Gratz, although confirming diversity as a compelling interest, have chilled recruiting efforts of minority students, and institutions of higher education are having to rethink their methods, and retool in their efforts to achieve diversity on campus. Other federal efforts to increase access, and improve higher education, like Section 504 and the ADA, have undeniably achieved their goals, but at a price to institutions of higher education that has had to be passed on to students, thereby increasing the student's cost for education at the very time funding resources are becoming more scarce.

On balance, federal efforts over the years to increase access to higher education have been admirable. But the rapidly increasing costs of higher education, the limited resources available to meet those costs, the expansion of competing interests, and the slow maturation of the law regarding affirmative action and diversity suggest the federal government's role likely will become less effective in addressing the issue. Higher education will increasingly have to meet the challenge on its own.