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The National School Lunch Act: An Unfulfilled Mandate

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THE NATIONAL SCHOOL LUNCH ACT: AN UNFULFILLED MANDATE

For the past thirty years, the National School Lunch Act (Act)[1] has attempted to advance two objectives; the preservation of the health and well-being of the nation's youth and the encouragement of domestic consumption of agricultural commodities.[2] The Act, a descendant of earlier depression-era government programs,[3] pro-

1. 42 U.S.C. §§ 1751-66 (1970), *as amended*, (Supp. IV, 1974) [hereinafter cited as Act]. In 1946 Congress passed the National School Lunch Act, ch. 281, 60 Stat. 230 (1946). The Act has been amended significantly several times. In 1962, a major amendment to the Act was passed by Congress to make the program more effective. Act of Oct. 15, 1962, Pub. L. No. 87-823, §§ 1-6, 76 Stat. 944. A program of special cash assistance payments was authorized under section eleven of the Act. Pub. L. No. 87-823, § 6, 76 Stat. 946 (1962). While the program was first authorized in 1962, it was not funded until 1966 when a two million dollars appropriation was made. S. REP. No. 259, 94th Cong., 1st Sess. 10-11 (1975). [hereinafter cited as S. REP. No. 259].

In 1968, the Act was amended to provide a special food service program for children in nonresidential child-care institutions. Act of May 8, 1968, Pub. L. No. 90-302, § 3, 82 Stat. 117. The entire program was initially funded for the fiscal year 1969 at $8.75 million. S. REP. No. 259, at 13. The funding was increased to $117 million for the fiscal year 1975. *Id.*

In 1970, Congress significantly amended the Act. Act of May 14, 1970, Pub. L. No. 91-248, §§ 1, 3-4, 6-9, 84 Stat. 207. The amended statute established a federal minimum family-size income standard for determining a child's eligibility which replaced varying local standards. *Id.* § 6. The amendments also established a twenty cent "ceiling" on the price of reduced lunches, and they prohibited overt identification of National School Lunch Program (NSLP) recipients. *Id.*

Congress also inserted "poverty priority" language into section nine of the Act which read as follows:

> In providing meals free or at reduced cost to needy children, first priority shall be given to providing free meals to the neediest children.

Id. § 9. To insure that the mandate would be effective, the 1970 amendments required each state, as a prerequisite to the receipt of federal funds, to submit to the United States Department of Agriculture a state plan for the following school year delineating intended program operations. *Id.*

In 1970, Congress also expressly authorized the Department of Agriculture to promulgate regulations governing the NSLP. *Id.* § 8. The Department of Agriculture's regulations attempted to clarify the requirements of the NSLP. *See* 35 Fed. Reg. 753 (1970) (formerly 7 C.F.R. §§ 210.1-.20); *id.* at 14065 (formerly 7 C.F.R. §§ 245.1-.12).

For a detailed discussion of the NSLP, see Comment, *The National School Lunch Program, 1970: Mandate to Feed the Children*, 60 GEO. L.J. 711 (1972).

2. 42 U.S.C. § 1751 (1970).

3. Under the Agricultural Appropriation Act of 1935, 7 U.S.C. § 612c (1970), 30 percent of gross customs receipts may be used by the Secretary of Agriculture to promote the domestic consumption of farm products. The school-lunch program was a part of this program. Similar distribution programs were undertaken by the Works Progress Administration and the Na-

vides for aid to "state educational agencies"[4] that elect to participate in the National School Lunch Program (NSLP).

Participation in the NSLP is purely voluntary.[5] In order to participate, states through their educational agencies must enter into written agreements with the Department of Agriculture and agree to administer the lunch program in accordance with the Act.[6] Additionally, states wishing to participate must be willing to provide basic facilities, either statewide or locally, and to underwrite a substantial portion of the program's costs.[7]

The NSLP requires that the state educational agency which determines the eligibility of schools[8] for participation in the NSLP consider need and attendance.[9] Before funds can be distributed to schools, an agreement must be executed between the educational agency and the local school authority.[10] The Secretary of Agriculture must approve this agreement.[11]

Section 1758 of Title 42 of the United States Code, which is the nutritional and program requirement provision, authorizes the Secretary of Agriculture to prescribe income poverty guidelines each

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tional Youth Administration during the depression years. Comment, *The National School Lunch Program*, 119 U. PA. L. REV. 372 n.3 (1970).

4. The Act defines the term "state educational agency" as either "(A) the chief State school officer . . . or (B) a board of education controlling the State department of education." 42 U.S.C. § 1760(d)(2) (Supp. IV, 1974).

5. *See* Shaw v. Governing Bd., 310 F. Supp. 1282 (E.D. Cal. 1970) (the court held that participation in the NSLP is purely voluntary and any school district which feels it cannot afford to meet the requirements of the program is entitled to drop out).

6. 42 U.S.C. § 1756 (1970), *as amended*, (Supp. IV, 1974); 7 C.F.R. § 210.3(c) (1975).

7. 42 U.S.C. § 1756 (1970), *as amended*, (Supp. IV, 1974); 7 C.F.R. §§ 210.3(c), 210.6 (1975). The program was designed to encourage the states to assume a greater burden of the cost as time progressed. For each dollar of federal money distributed to a state between the years 1947 and 1951, that state was required to match it with one dollar of its own funds. From 1951 to 1955, the state had to provide one-and-a half dollars for each federal dollar. Now, a state must provide three dollars for every federal dollar disbursed to it. It should be noted, however, that this formula is not so rigid where the per capita income of the state is less than that of the United States. 42 U.S.C. § 1756 (1970), *as amended*, (Supp. IV, 1974).

8. The Act defines the term "school" as "any public or nonprofit private school of high school grade or under . . . ." 42 U.S.C. § 1760(d)(7) (Supp. IV, 1974).

The regulations define "school" as "an educational unit of high school grade or under operating under public or nonprofit private ownership in a single building or complex of buildings . . . ." 7 C.F.R. § 210.2(o) (1975).

9. 42 U.S.C. § 1757 (1970), *as amended*, (Supp. IV, 1974).

10. *Id.*; 7 C.F.R. § 210.8(a) (1975).

11. 42 U.S.C. § 1757 (1970), *as amended*, (Supp. IV, 1974); 7 C.F.R. § 210.4a(a) (1975).

fiscal year in order to establish a national standard of eligibility for free lunches.[12] Section 1758 mandates that:[13]

> Any child who is a member of a household which has an annual income not above the applicable family-size income level set forth in the income poverty guidelines . . . shall be served a free lunch.

The provisions of sections 1758, however, are couched in terms of "[l]unches served by schools participating in the school-lunch program."[14] Whether the mandate of section 1758 applies to individual participating schools or entire school districts with at least one participating school has been the issue of frequent litigation.[15] The

12. 42 U.S.C. § 1758(b) (Supp. IV, 1974). If a child's household has an income not above the applicable family-size level, as prescribed by the guidelines, the child is eligible for a free lunch. 42 U.S.C. § 1758(b) (Supp. IV, 1974).

Prior to the 1970 amendments, the minimum eligibility standards for the receipt of free or reduced price lunches was left to the discretion of each local school authority. Therefore, it was possible for the same child to meet the eligibility requirements of one school but not another's. *See* National School Lunch Act, ch. 281, § 9, 60 Stat. 233 (1946). The Department of Agriculture published a set of recommended guidelines in October, 1968, but these were not mandatory. *See* 33 Fed. Reg. 15,674-76 (1968).

Effective January 1, 1976, the Secretary is required to issue, not later than June 1 of each fiscal year, revised income poverty guidelines. The revised guidelines are to be used during the subsequent twelve month period from July through June. The 1975 amendments permit a state educational agency to fix its income poverty guidelines 25 percent above the applicable family-size income level prescribed by the Secretary in determining a child's eligibility for a free lunch. For reduced price lunches, a state educational agency can fix its eligibility guidelines 95 percent above the Secretary's guidelines. 42 U.S.C.A. § 1758 (Supp. 1976).

The Federal Income Poverty Guidelines, as prescribed by the Secretary, which apply to 48 states, excluding Alaska and Hawaii, are set out in Table I:

TABLE I

Family-Size	1976 Guideline	25% Above Guideline	95% Above Guideline
3	$4,200	$5,250	$ 8,200
4	$5,010	$6,260	$ 9,770
5	$5,750	$7,190	$11,210
6	$6,490	$8,110	$12,650

Interview with Les Powell, Food Program Specialist, United States Depertment of Agriculture, in Washington, D.C., March 24, 1976.

The State of New York has elected to set its guidelines 25 percent above the Secretary's guidelines for free lunches, and 95 percent above for reduced price lunches.

13. 42 U.S.C. § 1758(b) (Supp. IV, 1974).

14. *Id.* § 1758(a).

15. *See, e.g.*, Justice v. Board of Educ., 351 F. Supp. 1252 (S.D.N.Y. 1972); Jones v. Board

denial of free lunches to a student based on the school he attends has also been challenged as an arbitrary classification of students in violation of the equal protection clause of the fourteenth amendment.[16]

Case law[17] prior to the enactment of the 1970 amendments[18] adhered to the view that "schools participating in the school-lunch program" included only individual "attendance units,"[19] rather than the school district as a whole participating in the NSLP. Under this view, eligible children at a participating school would receive free or reduced priced lunches, while eligible children at a non-participating school within the same district would not.

The leading case adhering to this view is *Briggs v. Kerrigan*.[20] The complaint in *Briggs* alleged that in Boston the NSLP was confined to those schools, generally in the more affluent communities, which contained facilities "adequate" to accommodate the program.[21] Plaintiffs, potential beneficiaries of the NSLP, contended that the Boston program was administered in violation both of the Act and of their fifth and fourteenth amendment rights since discrimination on the basis of "adequate" facilities was arbitrary and not rationally related to the purposes of the Act.[22]

Relying upon the statutory language of the Act and its 1946 legislative history, the court concluded:[23]

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of Educ., 348 F. Supp. 1269 (N.D. Ohio 1972), *rev'd on other grounds*, 474 F.2d 1232 (6th Cir. 1973); Ayala v. District 60 School Bd., 327 F. Supp. 980 (D. Colo. 1971).

16. *See, e.g.*, Richmond Welfare Rights Organization v. Snodgrass, No. 73-2778 (9th Cir., Oct. 15, 1975); Davis v. Robinson, 346 F. Supp. 847 (D.R.I. 1972); Briggs v. Kerrigan, 307 F. Supp. 295 (D. Mass. 1969), *aff'd*, 431 F.2d 967 (1st Cir. 1970) (per curiam).

17. Ayala v. District 60 School Bd., 327 F. Supp. 980 (D. Colo. 1971); Briggs v. Kerrigan, 307 F. Supp. 295 (D. Mass. 1969), *aff'd*, 431 F.2d 967 (1st Cir. 1970) (per curiam).

18. Act of May 14, 1970, Pub. L. No. 91-248, §§ 1, 3-4, 6-9, 84 Stat. 207.

19. *See, e.g.*, Briggs v. Kerrigan, 307 F. Supp. 295, 301 (D. Mass. 1969), *aff'd*, 431 F.2d 967 (1st Cir. 1970) (per curiam).

20. 307 F. Supp. 295 (D. Mass. 1969), *aff'd*, 431 F.2d 967 (1st Cir. 1970) (per curiam).

21. 307 F. Supp. at 299. Of the 51 schools which offered lunch programs, only 39 had "adequate" facilities to prepare lunches on their own premises. These schools contained kitchens with refrigerators, cooking facilities, storage areas, and cafeterias. The remaining twelve schools had lunches trucked in from nearby schools with facilities. However, none of the twelve schools had cafeterias. *Id.*

22. 307 F. Supp. at 299. The Supreme Court established a standard for classifications which demanded that they be neither arbitrary nor creative of an invidious discrimination when judged in light of the objectives of the legislation. *See* Rinaldi v. Yeager, 384 U.S. 305 (1966); McGowan v. Maryland, 366 U.S. 420 (1961).

23. 307 F. Supp. at 301.

> [T]hat neither the purpose nor the language of the statute, as construed in the light of its legislative history, supports the plaintiffs' contention that there is an express or implied statutory requirement that lunches be made available to schools and students according to economic need.

Although the Act required state educational agencies to determine eligibility for participation based on need and attendance, the court reasoned that the Act did not require these agencies to select areas of economic need before other areas.[24] *Briggs* concluded that "[a] priority of such significance would not be couched in such ambiguous terms,"[25] but rather it would be clearly expressed as in section four of the Child Nutrition Act.[26]

The *Briggs* court also stated that section 1758 should be construed to apply only to individual "attendance units" which are participating in the NSLP.[27] It reasoned that the "plain language of the section" only refers to "schools participating in the school-lunch program" and therefore it should not be construed as applying to the entire school district.[28] The Boston school system fulfilled the 1758 mandate by providing lunches to all eligible children at those individual schools which participated.[29]

In concluding that Boston's NSLP did not violate the plaintiff's constitutional rights, the court explained that the ineligibility which resulted from the classification was unfortunate, but that the classification was neither arbitrary nor an invidious discrimination since it was not wholly irrelevant to the achievement of the

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24. *Id.* The Act did not contain "poverty priority" language prior to the 1970 amendments. *See* National School Lunch Act, ch. 281, § 9, 60 Stat. 233 (1946).

25. 307 F. Supp. at 301.

26. *Id.* The *Briggs* court was referring to the following statutory language:

> In selecting schools [for participation], the State educational agency shall, to the extent practicable, give first consideration to those schools drawing attendance from areas in which poor economic conditions exist . . . .

Act of Oct. 11, 1966, Pub. L. No. 89-642, § 4, 80 Stat. 886. *See also* Child Nutrition Act, Pub. L. No. 94-105, §§ 2-3, 14-18, 23, 89 Stat. 511 (1975).

The Child Nutrition Act of 1966 was enacted by Congress to provide cash assistance to help schools in low-income areas acquire food service equipment, and to establish, maintain, or expand food service programs. Act of Oct. 11, 1966, Pub. L. No. 89-642, § 5, 80 Stat. 887. The Child Nutrition Act of 1966 also established a school breakfast program, and a special milk program to encourage the consumption of fluid milk by children. *Id.* §§ 3-4. *See also* S. REP. No. 259, at 11-12.

27. 307 F. Supp. at 301.

28. *Id.*

29. *Id.*

state's purpose.[30] Additionally, the decision not to undertake immediate capital expenditures to build kitchen facilities was "not so unreasonable as to reach constitutional dimensions."[31]

In 1970, Congress significantly amended the Act.[32] The 1970 amendments established a national standard of eligibility for free lunches,[33] gave first priority to the neediest children[34] and authorized the Department of Agriculture to promulgate regulations which would govern the NSLP.[35] Relying on the 1970 amendments, several cases[36] have held that the NSLP required school districts with a participating school to provide free or reduced price lunches to all of their eligible children, whether or not they attended a participating school.[37] The decisions in these cases were based primarily upon three considerations: the new statutory language; the 1970 legislative history; and the Department of Agriculture's regulations.

The *Briggs* decision may be contrasted with that of *Davis v. Robinson*.[38] Plaintiffs in *Davis* brought a civil rights action against

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30. *Id.* at 302. The *Briggs* court cited the following passage from McGowan v. Maryland, 366 U.S. 420 (1961), to support its holding:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

307 F. Supp. at 302, *quoting* McGowan v. Maryland, *supra* at 425-26; *see* note 22 *supra*.

31. 307 F. Supp. at 303.

32. Act of May 14, 1970, Pub. L. No. 91-248, §§ 1, 3-4, 6-9, 84 Stat. 207.

33. *Id.* § 6.

34. *Id.*

35. *Id.* § 8.

36. Justice v. Board of Educ., 351 F. Supp. 1252 (S.D.N.Y. 1972); Jones v. Board of Educ., 348 F. Supp. 1269 (N.D. Ohio 1972), *rev'd on other grounds*, 474 F.2d 1232 (6th Cir. 1973); Davis v. Robinson, 346 F. Supp. 847 (D.R.I. 1972).

37. *See, e.g.*, Justice v. Board of Educ., 351 F. Supp. 1252 (S.D.N.Y. 1972). In *Justice* the primary issue was to what extent may needy children be excluded from a lunch program administered by a school or other local unit. The defendant, the Board of Education of Mount Vernon, New York, maintained a school-lunch program in only four of its fourteen schools. The four schools were selected because they had cafeterias or other lunch program facilities. Under the defendant's lunch program, schools with relatively few needy children had a lunch program, while schools with a 90 percent concentration of poor children did not. *Id.* at 1255. The *Justice* court held, relying upon the 1970 amendments and its congressional history, that the limitation of the NSLP to four schools, selected on the basis of facilities rather than concentration of poor children, violates the provisions of the Act. *Id.* at 1257.

38. 346 F. Supp. 847 (D.R.I. 1972).

state officials on behalf of impoverished school children who were not receiving free or reduced price lunches. Plaintiffs contended that the refusal of state officials to expand the NSLP to needy schools on the basis of inadequate facilities violated the provisions of the Act and the equal protection clause of the fourteenth amendment. The state officials, relying on *Briggs*, claimed that the lack of adequate facilities at certain schools was sufficient justification for not expanding the NSLP to those schools.[39]

Section 1758, at the time of the *Davis* decision, contained "poverty priority" language which mandated that the neediest children be provided for first.[40] The *Davis* court was required to decide whether this mandate was directed to the voluntary participating school, the school district with one or more participating schools, or state officials.[41] The *Davis* court concluded that the mandate was directed to the school district as a whole.[42]

The *Davis* court noted that the Department of Agriculture regulations substituted the phrase "school food authority" for the term "school" wherever reference was made to local NSLP obligations in the Act.[43] The regulations define the phrase "school food authority" as[44]

> the governing body which is responsible for the administration of one or more schools and which has the legal authority to operate a lunch program therein.

Read in the light of this definition, the term "school" as used in the Act would not refer to the individual "attendance units" described in *Briggs*, but to the entire school district.[45] Since the Department of Agriculture was authorized by the Act to promulgate regulations which would govern the NSLP, the *Davis* court found the administrative interpretation persuasive.[46]

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39. *Id.* at 848-49.

40. Act of May 14, 1970, Pub. L. No. 91-248, § 6, 84 Stat. 210 (1970); *see* note 1 *supra*.

41. 346 F. Supp. at 855.

42. *Id.* at 857.

43. *See* 7 C.F.R. §§ 210.2, 245.10 (1975). At the time of the *Davis* decision, the regulations contained the following language: "Each school food authority shall serve lunches free or at a reduced price to all children whom it determines . . . are unable to pay the full price of the lunch." 35 Fed. Reg. 14066 (1970).

44. 7 C.F.R. § 210.2(p) (1975).

45. *Id.*; *see* Briggs v. Kerrigan, 307 F. Supp. 295, 301 (D. Mass. 1969), *aff'd*, 431 F.2d 967 (1st Cir. 1970) (per curiam).

46. 346 F. Supp. at 856. *See also* Zuber v. Allen, 396 U.S. 168, 192-94 (1969).

Section 1758 does not contain any phrase similar to the Department of Agriculture phrase "school food authority." The Senate Committee on Agriculture and Forestry decided not to incorporate analogous terminology because it thought that the local contracting agent had always been the school district.[47] The committee also feared that the insertion of similar terminology in the Act might result in the extension of the NSLP beyond secondary and primary schools to junior colleges or other educational institutions administered by the local contracting agent.[48] The issue of whether the term "school" encompasses school districts as a whole rather than individual participating schools, turns on whether the Department of Agriculture's regulations are to be followed.

Relying upon the congressional committee reports and debates, the *Davis* court stated:[49]

> The legislative history of the 1970 Amendments evidences a clear Congressional intent that "any child at poverty level must receive a free or reduced price lunch and priority . . . must be given to neediest children."

The *Davis* court reasoned that the purpose of the 1970 amendments was "to combat hunger in the classroom and malnutrition," and to achieve this goal by requiring school districts to provide for their neediest children first.[50]

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47. S. REP. No. 641, 91st Cong., 2d Sess. 3 (1970) [hereinafter cited as S. REP. No. 641]; *see* Comment, *supra* note 1, at 721 nn.55 & 56. In rejecting Senator McGovern's proposal to substitute the phrase "local educational agency" (school district) for the Act's term "school," the committee gave the following reason:

> Senator McGovern's objective in substituting "local educational agency" for "school" is to "put an end to the State and local option of having individual schools rather than school districts to be contracting agencies . . . ."
>
> The amendment would not accomplish its objective in this respect. The Department of Agriculture advises that the school district is already the contracting agency in every case . . . .

S. REP. No. 641, at 3.

48. S. REP. No. 641, at 4; *see* Comment, *supra* note 1, at 722 n.57.

49. 346 F. Supp. at 857, *quoting* Senator Javits, 116 CONG. REC. 13607 (1970).

50. 346 F. Supp. at 857. The vital language of section 1758 which the *Davis* court relies on is as follows:

> [A]ny child who is a member of a household which has an annual income not above the applicable family-size income level set forth in the income poverty guidelines shall be served meals free or at a reduced cost. . . . In providing meals free or at reduced cost to needy children, first priority shall be given to providing free meals to the neediest children.

42 U.S.C. § 1758 (1970), *as amended*, 42 U.S.C. § 1758(b) (Supp. IV, 1974).

In light of the 1970 legislative history of the Act, the *Davis* court concluded that it was not reasonable to read the Act as allowing "school boards to install national school lunch programs in the wealthier schools under their jurisdiction but not in the poorer schools."[51] *Davis* also observed that leaving discretion to participate in the NSLP to the individual school would not necessarily result in the extension of benefits to the neediest children first.[52] Therefore, the *Davis* court concluded that the Department of Agriculture was correct in interpreting section 1758 as applying to school districts as a whole.[53] Having disposed of the claim on these grounds, the court was not required to decide the constitutional aspects of the problem.[54]

Recently, the Ninth Circuit in *Richmond Welfare Rights Organization v. Snodgrass*[55] held that section 1758 required that only individual "participating schools" provide free or reduced price lunches to their eligible children.[56] Thus, the Ninth Circuit is the first court, since the 1970 amendments, to adhere to the *Briggs* view of the NSLP requirements.

Plaintiff in *Snodgrass* alleged that the Richmond Unified School District had violated the provisions of section 1758 by incorporating less than all of its schools into the NSLP.[57] The defendant district

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In referring to the 1970 amendments of section 1758, Senator Javits stated that the new statutory language "makes the intent of the Congress crystal clear that poor children can no longer be denied free or reduced cost lunches." 116 CONG. REC. 13607 (1970) (remarks of Senator Javits).

51. 346 F. Supp. at 857.

52. *Id.*

53. *Id.* at 858.

54. The courts which grant relief under the Act, do not have to decide the constitutional problems posed by their cases. When these courts, such as the *Davis* court, decided that there were violations of a federal statute, namely the Act, they were justified in avoiding the constitutional issues since relief has already been granted. *See* King v. Smith, 392 U.S. 309 (1968).

55. No. 75-2778 (9th Cir., Oct. 15, 1975).

56. *Id.* at 2. The plaintiff's also claimed that the defendant violated section 245.6(b) of the regulations by denying free lunches to eligible children transferring from a participating to a non-participating school within the same district. *Id.*; *see* 7 C.F.R. § 245.6(b) (1975). In dismissing this claim, the court of appeals stated that the regulation applied only to participating schools. No. 73-2778, at 12.

57. No. 73-2778, at 2. The plaintiffs relied on the section 1758 mandate which basically states that any child who qualifies under the income poverty guidelines shall be served a free lunch. 42 U.S.C. § 1758(b) (Supp. IV, 1974). As the "poverty priority" language of section 1758(b) was removed in 1972, Act of Sept. 13, 1972, Pub. L. No. 92-433, § 5, 86 Stat. 726, the

had for some years administered the NSLP in all of its twelve secondary schools but later expanded its lunch program to include only six of its 49 elementary schools. These six schools had the highest concentration of students qualifying under the income poverty guidelines,[58] but the defendant nevertheless served only one out of every five of the eligible children in the school district.

In reversing the holding of the district court, the court of appeals stated that the lower court committed fundamental error by failing to distinguish between statutory provisions concerning participation in the NSLP, and those concerning eligibility.[59] The court of appeals concluded that the district court had quoted the following language of section 1758 out of context:[60]

> Any child who is a member of a household which has an annual income not above the applicable family-size income . . . shall be served a free lunch.

Relying upon this language, the district court contended that a school district with one or more participating schools must serve free lunches to all of its eligible children.[61] The court of appeals reasoned that the section 1758 mandate is limited by the first sentence of the section which begins with the phrase "[l]unches served by schools participating in the school-lunch program."[62] Therefore, as the court of appeals concluded, section 1758 does not require free or reduced price lunches to be served to all eligible children within a school

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court of appeals is not confronted with the same problem as the *Davis* court since a participant in the NSLP is no longer required to provide for its neediest children first. *See* text accompanying notes 49-52 *supra*.

58. *See* note 12 *supra*.

59. No. 73-2778, at 2. One month after the district court entered its decree, the defendant district announced that it would withdraw from the NSLP the following year. The court of appeals enjoined the termination of the defendant's lunch program until the district court adjudicated the plaintiff's fourteenth amendment claims. *Id.* at 14-15. *See also* Shaw v. Governing Bd., 310 F. Supp. 1282 (E.D. Cal. 1970).

60. No. 73-2778, at 7-8; *see* 42 U.S.C. § 1758(b) (Supp. IV, 1974).

61. No. 73-2778, at 5.

62. *Id.* at 8; *see* 42 U.S.C. § 1758(a) (Supp. IV, 1974). The court of appeals supports its statement by citing to the congressional debates. In the House, the following was asked:

> Is there any requirement in this bill that if a State provides a school lunch program for some children that it must also provide a school lunch program for all children?

115 CONG. REC. 7045 (1969) (remarks of Representative Griffiths). The answer was "[n]o." *Id.* (remark of Representative Steiger).

In the Senate, it was asked if there was a requirement forcing schools to participate. The answer was "[w]e cannot force it." 116 CONG. REC. 4410 (1970) (remarks of Senator McGovern).

district.[63] In support of this conclusion, the court explained the 1970 Amendments as follows:[64]

> A careful reading of the history confirms that Congress recognized that the 1970 Amendments would not compel all schools to participate, despite an abundance of broad statements to the effect that all needy children would be fed.

This reasoning is consonant with *Briggs'* interpretation of the Act in that it limits the section 1758 mandate to individual participating schools.

The rationale of those cases which overrule *Briggs v. Kerrigan*[65] has likewise been considerably weakened by the 1975 amendments to the Act and the regulations.[66] Section 1758 no longer contains the "poverty priority" language which the *Davis* court cited as supporting its conclusion that individual schools alone could not provide for the neediest children effectively.[67] However, the legislative history to the 1975 amendments contains statements similar to those relied upon by the *Davis* court. Therefore, under the *Davis* rationale and the 1975 amendments, it can be argued that the purpose of the Act is "making sure that all American children receive basic foods at lunchtime . . . ."[68]

The amendments of the Department of Agriculture regulations,[69] on the other hand, delete the phrase "[e]ach school food authority shall serve lunches free or at a reduced price to all children," and thus vitiate the *Davis* argument that the Department was correct in interpreting section 1758 as applying to school districts as a whole.[70] Since the phrase "school food authority" is no longer used in a context similar to the section 1758 mandate, the Department of Agriculture may be interpreting the section 1758 mandate as applying only to individual participating schools.

On the basis of the subsequent amendments to the Act[71] and the

63. No. 73-2778, at 16.
64. *Id.* at 9.
65. 307 F. Supp. 295 (D. Mass. 1969).
66. *See* text accompanying notes 67-73 *infra*.
67. *See* 346 F. Supp. at 855.
68. 121 CONG. REC. 17697 (daily ed. Oct. 7, 1975) (remarks of Senator Montoyo).
69. *See, e.g.*, 7 C.F.R. § 245.3(a) (1975).
70. *Id.*; *see* Davis v. Robinson, 346 F. Supp. 847, 857 (D.R.I. 1972).
71. *See* note 47 *supra*.

regulations,[72] the Ninth Circuit seems to be correct in limiting the section 1758 mandate to individual participating schools alone. If Congress intended to provide all eligible children within a school district with a free lunch, it should have inserted the phrase "school food authority" into the opening sentence of section 1758. Since the term "school" is limited by the Act and the regulations[73] to high school grades or under, the insertion of the phrase "school food authority" would not necessarily result in the expansion of the NSLP to junior colleges or other educational institutions within the school district's jurisdiction.

The possibility of constitutional attack does, of course, remain, but the chances of success are not encouraging in spite of the recent decision of the court in *Torres v. Butz*.[74] In *Torres* the court concluded that the Child Nutrition Act breakfast program which provided free breakfasts to eligible children based on the "fortuitous circumstance" of whether the child attended a participating school was arbitrary and violative of the fourteenth amendment.[75] The NSLP cases are similar to the *Torres* case since both involve a voluntary program where a participant is allowed to provide free meals to its eligible children who attend a participating school within the school district. If the NSLP does not provide free lunches to all eligible children within a school district, the statute, under the reasoning of the *Torres* case, arbitrarily classifies students in violation of the fourteenth amendment. There is, however, serious question as to whether the reasoning of *Torres* will be sustained on appeal.

The Supreme Court's decision in *Dandridge v. Williams*[76] poses serious problems for the constitutional argument that was successful in *Torres*. The Court in *Dandridge* held that a Maryland regulation which put a maximum limitation on the monthly grant which a family could receive under the Aid to Families with Dependant Children Program (AFDC) did not contravene either the Social Security Act or the equal protection clause of the fourteenth amend-

72. *See* 7 C.F.R. § 245.3(a) (1975).

73. *See* note 8 *supra*.

74. 397 F. Supp. 1015 (N.D. Ill. 1975).

75. *Id.* at 1025 (dictum).

76. 397 U.S. 471 (1970); *see* Comment, *The National School Lunch Act and the 1970 Amendments: Renaissance or Rhetoric?*, 17 WAYNE L. REV. 955, 987-93 (1971).

ment.[77] Under the regulation, a "ceiling" of $250 per month was imposed on AFDC grants regardless of the size of the family and its needs.[78] The Supreme Court concluded that the regulation did not violate the statute.[79]

In upholding the regulation on constitutional grounds, the Supreme Court stated:[80]

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

The Court also stated that the Constitution did not give it the power to "second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[81] Based upon these considerations, the Court concluded that Maryland's decision to support all of its eligible families, although some less adequately than others, was reasonable in view of the state's limited resources.[82]

The NSLP cases[83] are dissimilar to *Dandridge* since needy children are denied all benefits, whereas in *Dandridge* all eligible families received benefits to some extent. There are cases[84] which have

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77. 397 U.S. at 487.

78. *Id.* at 474.

79. *Id.* at 480-82.

80. *Id.* at 485, *quoting* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). The plaintiffs in *Snodgrass* claim that the defendant district violated the equal protection clause by operating its lunch program on a discriminatory basis. No. 73-2778, at 3. The defendant maintained lunch programs in its segregated schools but not in its desegregated schools. *Id.* If the district court finds that there is racial discrimination in the defendant's lunch program, it will have to subject the defendant's classifications to the strictest judicial scrutiny. Loving v. Virginia, 388 U.S. 1, 10-11 (1967). Classifications based on race, religion, and national origin demand a compelling interest in order to be constitutional. *Id.*

81. 397 U.S. 471, 487 (1970).

82. *Id.*

83. *See, e.g.*, Richmond Welfare Rights Organization v. Snodgrass, No. 73-2778, (9th Cir., Oct. 15, 1975); Justice v. Board of Educ., 351 F. Supp. 1269 (S.D.N.Y. 1972); Davis v. Robinson, 346 F. Supp. 847 (D.R.I. 1972).

84. *See* Jimenez v. Weinberger, 417 U.S. 628 (1974) where the Supreme Court held that a Social Security classification which denied disability benefits only to dependent illegitimates born after the onset of their parent's disability was not rationally related to the governmental interest of preventing spurious claims. *Id.* at 637. This classification permitted illegitimates to receive disability benefits without any showing of dependency if: (1) state law permitted them to inherit from their wage-earner parent; (2) their illegitimacy resulted solely

held that classifications denying benefits to a needy group are "underinclusive," and thus violate the needy group's fourteenth amendment rights. Despite the differences between *Dandridge* and these cases, it seems that NSLPs which have a "reasonable basis" will not be declared unconstitutional under the *Dandridge* rationale. As the Supreme Court stated in *Dandridge*, "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[85] Given the doubtful success of a constitutional attack, it would appear the Act's general mandate that every eligible child shall receive a free lunch can only be effectuated if Congress decides to amend the statute by inserting the phrase "school food authority" into section 1758.

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from a formal, nonobvious defect in their parents' ceremonial marriage; or (3) they were legitimated in accordance with state law. *Id.* at 631 n.2. Otherwise, illegitimates who did not meet the foregoing conditions could only qualify for benefits only if their wage-earner parent contributed to their support, or lived with them prior to the disability.

In the *Jimenez* opinion, *Dandridge* was not controlling since the classification of illegitimates was not necessitated by an "allocation of finite resources." *Id.* at 634. Therefore, a denial of all benefits to afterborn illegitimates was a denial of equal protection to these children. Thus, the subclass in *Jimenez* was unconstitutional because it was "underinclusive." *Id.* at 637.

Similarly, it can also be argued that *Dandridge* should not control when applied to the NSLP. The provisions of section 1758 permit a state educational agency to fix its income guidelines 25 percent above the applicable family-size income level prescribed by the Secretary of Agriculture in the income poverty guidelines, and 95 percent above the same standard for reduced-price lunches. 42 U.S.C.A. § 1758(b) (Supp. 1976). If a state educational agency permits a school district to provide free lunches to children from households which have an income 25 percent above the applicable family-size poverty level, then the denial of free lunches to children at poverty level would appear to be arbitrary and irrational under *Jimenez*. The allocation of a school district's NSLP resources might not be considered reasonable if it results in a denial of benefits to more needy eligible children while providing lunches to others. Thus, the income guidelines are arguably "underinclusive" because unlike *Dandridge* where all families received some aid, children from poor families might receive no free lunch support. *See also* Rhodes v. Weinberger, 388 F. Supp. 437 (E.D. Pa. 1975); Burrell v. Norton, 381 F. Supp. 339 (D. Conn. 1974); Norton v. Richardson, 52 F. Supp. 596 (D. Md. 1972), *vacated*, 418 U.S. 902 (1974) (mem.). *But cf.* Stanton v. Weinberger, 502 F.2d 315 (10th Cir. 1974).

85. 397 U.S. at 486-87, *citing* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); *see* Geduldig v. Aiello, 417 U.S. 484 (1974).