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# ENDING DISCRIMINATION AGAINST THE HANDICAPPED OR CREATING NEW PROBLEMS? THE HEW RULES AND REGULATIONS IMPLEMENTING SECTION 504 OF THE REHABILITATION ACT OF 1973

## I. Introduction: The Rehabilitation Act Amendments of 1974

Section 504<sup>1</sup> of the Rehabilitation Act of 1973<sup>2</sup> prohibits any activity or program receiving federal financial assistance from discriminating against handicapped persons solely because of their handicap. Unlike discrimination based on age, race, or sex, the type of discrimination suffered by the handicapped until the early 1970s<sup>3</sup> was generally not intentional. Rather, it stemmed from a failure to recognize the special needs of the handicapped. It was not the intention of architects and officials to deny access to college buildings, courthouses, and elevated trains to the handicapped by making such entrances accessible only via long rows of stairs, an impossible feat for one confined to a wheelchair. The handicapped simply were not considered.<sup>4</sup>

Section 504 seeks to remedy this situation by providing that "[n]o otherwise qualified handicapped individual in the United States . . . 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."<sup>5</sup> The Rehabilitation Act of 1973, prior to the

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1. 29 U.S.C. § 794 (Supp. III 1973).

2. *Id.* §§ 701-794 [hereinafter Rehabilitation Act of 1973].

3. Achtenberg, *Law and the Physically Disabled: An Update with Constitutional Implications*, 8 Sw. U.L. Rev. 847, 848 n. 3 (1976).

4. In the Senate Report accompanying the Rehabilitation Act Amendments of 1974, 29 U.S.C. §§ 701-794 (Supp. V 1975), the observation was made that

[e]stimates of Americans with handicaps range from a low of 28 million to a high of over 50 million. . . . There is no more devastating comment on the nature of our public policy or the lives lived by these individuals than society's inability to provide accurate and current figures on how many individuals are handicapped, what forms of disability they have, and what kind of services they receive or need.

S. REP. NO. 1297, 93d Cong., 2d Sess. 50, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6400.

5. 29 U.S.C. § 794 (Supp. V 1975) [hereinafter section 504].

1974 amendments,<sup>6</sup> defined the term "handicapped individual" exclusively in relation to such individual's likelihood of employment:<sup>7</sup>

The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

Congress realized that such a narrow definition detracted from the purpose of section 504 "to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs."<sup>8</sup> It subsequently enlarged the definition of "handicapped individual" for the purpose of section 504 and certain other provisions of the Act to encompass "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (B) has a record of such impairment, or (C) is regarded as having such an impairment."<sup>9</sup>

Section 504, whose language is strikingly similar to that used in title VI of the Civil Rights Act of 1964,<sup>10</sup> is "the first Federal civil rights law protecting the rights of handicapped persons . . . ."<sup>11</sup> Section 504 reflects a commitment on the part of the federal government to put an end to discrimination based on handicap.<sup>12</sup>

Although it may have been Congress' intention to eradicate discrimination based on handicap, the Rules and Regulations (Regulations) promulgated to implement section 504,<sup>13</sup> by permitting waiv-

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6. *Id.* §§ 701-794, as amended (Supp. V 1975).

7. *Id.* § 706(6) (Supp. III 1973).

8. S. REP. No. 1297, 93d Cong., 2d Sess. 38, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 6388.

9. 29 U.S.C. § 706(6) (Supp. III 1973), as amended (Supp. V 1975).

10. 42 U.S.C. § 2000d (1970) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." See text accompanying note 5 *supra*.

11. 42 Fed. Reg. 22,676 (1977) [hereinafter citations to volume 42 of the Federal Register that are not followed by a parenthetical citation to the codified section in C.F.R. refer either to the Supplementary Information which precedes or to the Analysis of Final Regulation which follows the actual regulations].

12. *Id.*

13. See notes 16-20 and accompanying text *infra*.

ers under certain circumstances,<sup>14</sup> fall short of accomplishing this noble goal. In addition, the Second Circuit has carved out an exception which is found neither in the Regulations nor in the Act<sup>15</sup> and which may have the effect of emasculating the Act.

This Note will present an overview of the Regulations, discuss their ramifications, and will examine the small, but increasing number of cases decided under the Act.

## II. HEW Rules and Regulations

### A. Authorization and Provisions for Waivers

While section 504 does not specifically require that regulations be issued or that enforcement procedures be adopted, "it is clearly mandatory in form, and such regulations and enforcement are intended."<sup>16</sup> After spending several years in a court battle,<sup>17</sup> drafting the Notice of Intent to Issue Proposed Rules,<sup>18</sup> soliciting comments thereto, and promulgating the Notice of Proposed Rulemaking,<sup>19</sup> the Secretary of the Department of Health, Education, and Welfare (HEW) signed the final Rules and Regulations on April 28, 1977.<sup>20</sup>

In formulating these final Regulations, HEW recognized that Congress sought to eradicate discrimination aimed at the handicapped,<sup>21</sup> but it found that Congress did not intend that section 504

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14. See notes 23-27 and accompanying text *infra*.

15. See notes 70-83 and accompanying text *infra*.

16. S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 6390; accord, *Cherry v. Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976) (holding that 29 U.S.C. § 780(b) (Supp. V 1975) requires the Secretary of the Department of Health, Education, and Welfare to promulgate regulations implementing section 504 since the "discrimination prohibitions were certainly not intended to be self-executing").

Exec. Order No. 11,914, 3 C.F.R. 117 (1977) provides, in part:

Section 1. The Secretary of Health, Education, and Welfare shall coordinate the implementation of section 504 of the Rehabilitation Act of 1973, as amended, hereinafter referred to as section 504, by all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity. The Secretary shall establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504.

17. *Cherry v. Mathews*, 419 F. Supp. 922, 924 n. 2 (D.D.C. 1976). See note 16 *supra*.

18. 41 Fed. Reg. 20,296 (1976).

19. 41 Fed. Reg. 29,548 (1976).

20. 42 Fed. Reg. 22,676 (1977) (to be codified in 45 C.F.R. §§ 84.1 to 84.99).

21. *Id.* See also *Bartels v. Biernat*, 405 F. Supp. 1012, 1018 (E.D. Wis. 1975), observing that "[p]ursuant [to section 504] it is necessary that no handicapped individual, as defined at 29 U.S.C. § 706(6), be excluded from, denied the benefits of, or be subjected to discrimination under any program receiving federal financial aid."

be enforced strictly regardless of the consequences to recipients<sup>22</sup> of federal financial aid.<sup>23</sup> Accordingly, certain requirements of the Regulations are waivable if the recipient can demonstrate that compliance would impose an "undue hardship."<sup>24</sup> Although the Regulations do not define "undue hardship," they do set forth some of the factors to be considered by the Director of HEW's Office for Civil Rights in deciding whether to grant a waiver.<sup>25</sup> These factors include the relative size of the recipient's program and the cost of implementing the requirement.<sup>26</sup>

The Regulations mandate equality of opportunity for the handicapped.<sup>27</sup> To create such equality, the Regulations require that recipients of federal financial assistance institute affirmative action

22. "Recipient" is defined in 42 Fed. Reg. at 22,678 (to be codified in 45 C.F.R. § 84.3(f)) as:

any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance [i.e., the handicapped person].

23. The introduction to the Regulations, 42 Fed. Reg. at 22,676 states: "But it is also clear that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination . . . ."

24. See, e.g., 42 Fed. Reg. at 22,680 (to be codified in 45 C.F.R. § 84.12(a)). Less stringent demands are made of recipients employing less than fifteen employees. See, e.g., 42 Fed. Reg. at 22,681 (to be codified in 45 C.F.R. § 84.22(c)).

25. The Director is charged with taking remedial action against recipients who discriminate against the handicapped in violation of section 504 or of the HEW Regulations. 42 Fed. Reg. at 22,679 (to be codified in 45 C.F.R. § 84.6(a)).

26. *Id.* at 22,680 (to be codified in 45 C.F.R. § 84.12(c)) enumerates the factors which are to be considered in determining whether the accommodation would impose an undue hardship:

(c) In determining . . . whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

Although the Regulations state that these are factors to be *included* in the Director's decision, the Analysis of Final Regulation indicates that this is an all-inclusive list ("[p]aragraph (c) of [§ 84.12] sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship"). *Id.* at 22,688 (emphasis added).

27. *Id.* at 22,679 (to be codified in 45 C.F.R. § 84.4(b)(2)).

programs<sup>28</sup> (although HEW refuses to use the term "affirmative action")<sup>29</sup> and "make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee" (absent a showing of undue hardship created by such accommodation).<sup>30</sup>

## B. The Breadth of the Definitions

The Regulations, which are divided into seven subparts,<sup>31</sup> define "handicapped person"<sup>32</sup> in terms almost identical to those used in the statute.<sup>33</sup> They then attempt to clarify what is meant by what HEW admits are broad terms.<sup>34</sup> "Physical or mental impairment"<sup>35</sup>

28. See, e.g., 42 Fed. Reg. at 22,680 (to be codified in 45 C.F.R. § 84.11(a)(2)).

29. *Id.* at 22,688. *Contra*, S. REP. NO. 1297, 93d Cong., 2d Sess. 39, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 6390 ("Where applicable, section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination").

30. *Id.* at 22,680 (to be codified in 45 C.F.R. § 84.12(a)). "Reasonable accommodation," defined in 42 Fed. Reg. at 22,680 (to be codified in 45 C.F.R. § 84.12(b)) "may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions."

See also notes 24-26 and accompanying text *supra*. It is submitted that HEW exercise the utmost care in deciding whether a recipient would be unduly burdened by compliance, lest the Regulations become meaningless.

31. The seven subparts are as follows: subparts A (General Provisions), 42 Fed. Reg. at 22,678-80 (to be codified in 45 C.F.R. §§ 84.1-.10), B (Employment Practices), *Id.* at 22,680-81 (to be codified in 45 C.F.R. §§ 84.11-.20), C (Program Accessibility), *Id.* at 22,681-82 (to be codified in 45 C.F.R. §§ 84.21-.30), and G, *Id.* at 22,685 (to be codified in 45 C.F.R. §§ 84.61-99) (which incorporates into the Regulations HEW's procedures under title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1970), regulations at 45 C.F.R. §§ 80.1-.10 and Part 81 (1976)) apply to all recipients of financial assistance from HEW. 42 Fed. Reg. at 22,677. The remaining subparts of the Rules and Regulations (D (Preschool, Elementary, and Secondary Education), *Id.* at 22,682-83 (to be codified in 45 C.F.R. §§ 84.31-.40), E (Postsecondary Education), *Id.* at 22,683-84 (to be codified in 45 C.F.R. §§ 84.41-.50), and F (Health, Welfare, and Social Services), *Id.* at 22,684-85 (to be codified in 45 C.F.R. §§ 84.51-.60)) contain the general principles of the first three subparts, made more specific in relation to the three major classes of recipients.

32. 42 Fed. Reg. at 22,678 (to be codified in 45 C.F.R. § 84.3(j)(i)) provides: "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

33. See text accompanying note 9 *supra*.

34. See Appendix A - Analysis of Final Regulation, 42 Fed. Reg. at 22,685-86.

35. *Id.* at 22,678 (to be codified in 45 C.F.R. § 84.3 (j)(2)(i)) provides:

"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; hemic and lym-

is not defined in terms of specific diseases and conditions because HEW feared that doing so would create an incomplete and restrictive category.<sup>36</sup> Thus, the term "handicapped person" is not limited to those suffering from the "traditional" handicaps, such as muscular dystrophy and other crippling afflictions, and those having visual, speech, and hearing deficiencies, epilepsy, cancer, heart disease, mental retardation and emotional illness. It also includes drug addicts and alcoholics.<sup>37</sup> Realizing that the potential number of persons included in such wide-ranging descriptions is enormous,<sup>38</sup> HEW emphasizes that "a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities."<sup>39</sup> There must be a causal connection between the impairment and its effect on the individual's ability to carry on one of life's major activities.

"Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>40</sup>

HEW does not make an attempt to define "substantial limitation",<sup>41</sup> and thus considerable litigation on this issue will probably ensue.<sup>42</sup> HEW does state, however, that it intends "to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973."<sup>43</sup>

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phatic; 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.

36. *Id.* at 22,685-86.

37. *Id.* at 22,677, 22,685.

A civil action was recently filed by a college professor who described himself as a "recovering alcoholic" against Brooklyn College for having demoted him. *N.Y. Times*, Nov. 20, 1977, § 1, at 51, col. 1.

38. Estimates range as high as one quarter of the population. S. REP. NO. 1297, 93d Cong., 2d Sess. 50, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 6400.

39. 42 Fed. Reg. at 22,685.

40. *Id.* at 22,678 (to be codified in 45 C.F.R. § 84.3(j)(2)(ii)).

41. 42 Fed. Reg. at 22,685. See note 39 and accompanying text *supra*.

42. Institutions of higher education, currently charging the highest tuition rates in the nation's history, seem particularly perplexed as to what they are required to do under the Regulations. *N.Y. Times*, Dec. 4, 1977, § 1, at 1, col. 1; *Time*, Dec. 5, 1977, at 34; *Wall St. J.*, Oct. 21, 1977, at 40, col. 1.

43. *Id.* at 22,686. "Severe handicap" is defined in 29 U.S.C. § 706(12) (Supp. V 1975) as

The remaining parts of the definition of "handicapped person"<sup>44</sup> further extend the list of those protected against discrimination to persons discriminated against because they are classified or labelled, correctly or not, as handicapped.<sup>45</sup> Thus, the potential number of persons who may successfully file claims of discrimination is gargantuan; even those with a limp are included within HEW's definition of "handicapped person."<sup>46</sup>

Similarly, the term "recipient of Federal financial assistance"<sup>47</sup> as used in the Regulations is not limited to those receiving federal funds, but may even extend to those who have no more connection with the federal government than borrowing a map.<sup>48</sup> While this is an unlikely result, it is nevertheless possible under these broad HEW definitions.

### C. Providing an Opportunity to Achieve Equal Results

#### 1. Integration

The Regulations require that a "qualified handicapped person"<sup>49</sup>

disability which requires multiple services over an extended period of time and results from amputation, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia and other spinal chord conditions, renal failure, respiratory or pulmonary dysfunction, and any other disability specified by the Secretary [of HEW] . . . .

44. 42 Fed. Reg. at 22,678 (to be codified in 45 C.F.R. § 84.3(j)).

45. *Id.* (to be codified in 45 C.F.R. § 84.3(j)(2)(iii)-(iv)).

46. *Id.* at 22,686.

47. *Id.* at 22,678 (to be codified in 45 C.F.R. § 84.2).

48. *Id.* (to be codified in 45 C.F.R. § 84.3(h)) states that:

"Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

- (1) Funds;
- (2) Services of Federal personnel; or
- (3) Real and personal property or any interest in or use of such property . . . .

(emphasis added).

49. "Qualified handicapped person" defined in 42 Fed. Reg. at 22,678 (to be codified in 45 C.F.R. § 84.3(k)).

The term "otherwise qualified handicapped individual," (emphasis added) as used in section 504, was not used in the Regulations because HEW feared that "read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap [(for example, a blind bus-driver)]." *Id.* at 22,686.

HEW's fears were unfounded, however, as one federal court, using the "ordinary common

be offered aids, benefits, and services that are as effective as those offered to the non-handicapped.<sup>50</sup> Nor may handicapped persons be relegated to facilities where they are isolated from and have no opportunity to interact with the non-handicapped.<sup>51</sup> The Regulations stress that it is not identical *results* that are required for both the handicapped and non-handicapped,<sup>52</sup> rather, what is required is the *opportunity* to achieve equal results by means of reasonable accommodations that compensate for the deficiencies caused by the handicap.<sup>53</sup>

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meaning" of the words, defined "otherwise qualified" to mean "otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976), *rev'd and remanded*, No. 77-1237(4th Cir. Mar. 28, 1978).

In *Davis*, the Southeastern Community College refused to admit Ms. Davis, a licensed practical nurse, into its registered nurse program on the ground that her hearing was severely impaired. 424 F. Supp. at 1343. The district court, using the "ordinary common meaning" of the words, held that the deaf plaintiff was not qualified to be a nurse because her handicap "prevent[ed] her from safely performing in both her training program and her proposed profession." *Id.* at 1345.

In reversing, the Court of Appeals for the Fourth Circuit, noting that *Davis* had been decided in the district court before the Regulations were promulgated, rejected the district court's definition of "otherwise qualified." No. 77-1237, slip op. at 6-7. The Fourth Circuit relied on 42 Fed. Reg. at 22,678 (to be codified in 45 C.F.R. § 84.3(k)(3)), which defines "qualified handicapped person" within the context of postsecondary and vocational education services as "a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity . . . ." The Fourth Circuit held that the district court had "erred by considering the nature of the plaintiff's handicap in order to determine whether or not she was 'otherwise qualified' for admittance to the nursing program . . . ." No. 77-1237, slip op. at 8.

In attempting to eradicate discrimination aimed at the handicapped, the Fourth Circuit has ignored the fact that the term "technical standards," as used in 45 C.F.R. § 84.3(k)(3), "refers to all nonacademic admissions criteria that are essential to participation in the program in question." 42 Fed. Reg. at 22,687. While an interpreter might suffice in classroom lectures, there can be no substitute for good hearing when one, in the course of training, is called upon to assist a surgeon during an operation. In situations such as the one in *Davis*, where the *absence* of a certain handicap is "essential to participation in the program in question," the Regulations permit, and indeed require, the particular handicap to be taken into consideration in determining whether or not the individual is a "qualified handicapped person."

50. 42 Fed. Reg. at 22,678 (to be codified in 45 C.F.R. § 84.4(b)(1)(iii)).

51. *Id.* at 22,679 (to be codified in 45 C.F.R. § 84.4(b)(3)).

52. *Id.* (to be codified in 45 C.F.R. § 84.4(b)(2)).

53. See 42 Fed. Reg. at 22,687. See also *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), provides a private right of action). Because of the linguistic similarity between section 504 and the Civil Rights Act of 1964, see note 10 and accompanying text *supra*, *Lau* has often been cited in support of the proposition that section 504 also provides a private right of action. See, e.g., *Lloyd v. Regional*

## 2. *Physical Accessibility of Existing Facilities*

The "central requirement"<sup>54</sup> of the Regulations is that a recipient must "operate each program or activity [to which the Regulations apply] so that the program or activity, *when viewed in its entirety*, is readily accessible to handicapped persons."<sup>55</sup> This does not require that every building be accessible to the handicapped; rather, the program conducted within that building must be accessible.<sup>56</sup> Structural changes must be made only if alternatives, such as reassignment of classes or other services to other buildings, or home visits, are not feasible. In attaining the goal of program accessibility, recipients are to "give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate."<sup>57</sup> HEW finds that this standard provides enough flexibility to allow recipients to comply without entailing "extremely expensive or impractical physical changes in facilities. Accordingly, the section [affecting physical accessibility of existing facilities] does not allow for waivers,"<sup>58</sup> although HEW refuses to go so far as to mandate the removal of *all* architectural barriers at this time.<sup>59</sup>

Transp. Auth., 548 F.2d 1277, 1280-81 (7th Cir. 1977) and cases cited in note 64 *infra*. But see *Crawford v. University of N.C.*, 440 F. Supp. 1047, 1055 (M.D.N.C. 1977) (questioning the universal applicability of *Lloyd*).

54. *Id.* at 22,677.

55. *Id.* at 22,681 (to be codified in 45 C.F.R. § 84.22 (a)) (emphasis added). See also *id.* (to be codified in 45 C.F.R. § 84.22(b)).

56. This means, for example, that if a college offers several sections of the same course, at least one section must be held in a room accessible to a handicapped person (such as in a first floor classroom which will not require the use of stairs). *Id.* at 22,689.

57. *Id.* (to be codified in 45 C.F.R. § 84.22(b)).

58. *Id.* at 22,689.

59. *Id.* at 22,690. It should also be noted that new facilities or parts thereof constructed by, or on behalf of, or for the use of recipients subsequent to the June 3, 1977 effective date of the Regulations must be designed or constructed so as to be readily accessible to and usable by the handicapped. *Id.* at 22,681 (to be codified in 45 C.F.R. § 84.23(a)).

29 U.S.C. § 792 (Supp. V 1975) creates the Architectural and Transportation Barriers Compliance Board, which is entrusted with securing compliance with the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-56 (1970), an Act to ensure that the physically handicapped have ready access to, and use of, certain governmentally-subsidized buildings.

A bill introduced into Congress in 1976 would provide six billion dollars in federal grants to assist institutions in fulfilling the requirements of the Regulations. Wall St. J., Oct. 21, 1977, at 40, col. 1. If passed, this will be very significant, because by not having appropriated funds to cover the costs of compliance with section 504 and the Regulations, Congress has cheated either the handicapped or the beneficiaries of previously established programs (by diverting monies that might otherwise have been used to pay for their programs).

No one would deny that the handicapped should be able to use what the non-handicapped often take for granted, such as a water fountain or a schoolroom desk. Those confined to cumbersome wheelchairs, however, may be denied access to such facilities. Although the decision was a difficult one because of the cost often concomitant with such accommodations, HEW has decided that there can be no excuses,<sup>60</sup> regardless of cost, for denying the handicapped access to programs and facilities readily available to the non-handicapped.<sup>61</sup>

### 3. *Discriminatory Employment Practices*

The need to make reasonable accommodation may not be used by a recipient of federal financial aid as the sole reason for denying employment to a qualified handicapped individual,<sup>62</sup> and a recipient may not utilize tests or selection criteria that screen out or tend to screen out handicapped persons unless the tests or criteria are shown to be job-related and non-discriminatory alternative tests or criteria are not available.<sup>63</sup>

### 4. *Barnes: Educational Opportunities and Judicial Resentment*

Section 504 and the Regulations have created a Bill of Rights for the Handicapped. Of the increasing number of cases decided in the federal courts involving section 504, most have held that a private

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As a first step, § 190 of the Internal Revenue Code has been enacted, which allows a deduction of up to \$25,000 per year for any taxpayer who has paid or incurred during that year qualified architectural and transportation barrier removal expenses. I.R.C. § 190.

60. See note 58 and accompanying text *supra*.

61. Colleges and universities have been particularly vocal in lamenting the cost of implementing the physical accessibility aspect of the Regulations. See note 42 *supra*. Many expensive construction projects could be avoided, however, if colleges and all other entities to which the Regulations apply would take the time to consider all the alternatives available to them, such as installing papercup dispensers near standard-height water fountains in lieu of lowering the fountains. See Time, Dec. 5, 1977, at 34.

62. 42 Fed. Reg. at 22,680 (to be codified in 45 C.F.R. § 84.12(d)).

63. *Id.* (to be codified in 45 C.F.R. § 84.13(a)). Even before the Regulations were issued, such practices were prohibited. *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977) (plaintiff, whose last epileptic seizure occurred sixteen years before he sought to become a Tampa policeman, and who was, at the trial, declared cured by two neurologists, was automatically excluded from consideration as a police officer. Court held that an irrebuttable presumption regarding disqualification for certain employment of handicapped persons violated the due process clause of the fourteenth amendment); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977) (school district's refusal to consider blind persons to serve as teachers of sighted students violated what is now prohibited by 42 Fed. Reg. at 22,680 (to be codified in 45 C.F.R. § 84.13(a))).

right of action exists under the statute.<sup>64</sup> In addition, an administrative remedy is available, in accordance with congressional intent,<sup>65</sup> through the Office for Civil Rights of HEW.

In *Barnes v. Converse College*,<sup>66</sup> the first case to be decided under the Regulations, the district court ordered Converse College, a small, private institution receiving federal financial assistance,<sup>67</sup> to provide funds for the deaf plaintiff's interpreter services to facilitate her earning the additional college credits she needed to maintain her South Carolina teacher's permit.<sup>68</sup>

The court awarded the relief grudgingly, stating that it was

64. *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977); *Sites v. McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977) (basing recovery solely on plaintiff's fourteenth amendment claim). Each of these cases involved a claim based not only on section 504 and the other statutes protecting the rights of the handicapped, but also (with the exception of *Barnes*) an allegation of denial of due process or equal protection under the fourteenth amendment. Except for *Gurmankin*, as noted above, each case also decided that a private right of action existed under section 504 and that plaintiffs, as handicapped persons, had standing to sue. It is also significant that only in *Kampmeier* and *Barnes* was the action not brought as a class action.

*But c.f.* *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977) (no private cause of action under 29 U.S.C. § 793 (Supp. V 1975)); *Drennon v. Phil. Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977) (directed that plaintiff, an epileptic, exhaust administrative relief under 29 U.S.C. § 793(b) (Supp. V 1975), which, unlike section 504, specifically authorizes an administrative remedy for handicapped persons discriminated against in employment by those holding federal government contracts in excess of \$2,500. The district court still retained jurisdiction of the action, however).

65. S. REP. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6391.

HEW expressly refused to either grant or deny a private right of action, alluding to the separation of powers which prevents the executive branch from conferring such a right; but HEW did cite a number of cases which have held that a private right of action *does* exist. 42 Fed. Reg. at 22,687.

66. 436 F. Supp. 635 (D.S.C. 1977).

67. *Id.* at 636-37.

68. *Id.* at 639. 42 Fed. Reg. at 22,684 (to be codified in 45 C.F.R. § 84.44(d)), upon which the *Barnes* court relied, 436 F. Supp. at 637, provides:

(d) *Auxiliary aids.* (1) A recipient [who provides postsecondary education] 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 auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include . . . interpreters or other effective methods of making orally delivered materials available to students with hearing impairments . . .

most sympathetic with the plight of defendant as a private institution which may well be forced to make substantial expenditures of private monies to accommodate the federal government's generosity . . . . None of this federal financial assistance [received by Converse College] was given [to it] for the purpose of providing auxiliary aids for the handicapped. . . . [I]f the federal government, in all its wisdom, decides that money should be spent to provide opportunities for a particular group of people, that government should be willing to spend its own money (i.e. our taxes) for such purposes and not require that private educational institutions use their limited funds for such purposes.<sup>69</sup>

### III. *Kampmeier* and the "Substantial Justification" Exception

Two weeks before the Regulations were issued in their final form, the Court of Appeals for the Second Circuit in *Kampmeier v. Nyquist*<sup>70</sup> refused to issue a preliminary injunction which would have ordered public school officials to permit plaintiffs—junior high school students with sight in only one eye—to participate in contact sports. The plaintiffs merely sought the opportunity to enjoy the sport of their choice and, inasmuch as their parents had already provided them with the necessary safety glasses,<sup>71</sup> they did not ask that any special accommodations be made for them, as they would be entitled to do under the Regulations.<sup>72</sup>

Without citing any prior authority to support its conclusion, the court in *Kampmeier* held that "exclusion of handicapped children from a school activity is not improper if there exists a substantial justification for the school's policy."<sup>73</sup> Although the children were athletically gifted,<sup>74</sup> the court, relying on the language of section 504, found that they were not "otherwise qualified" within the meaning of the statute. The plaintiffs and their parents were willing to accept the risk of possible further injury, but the court held that the risk constituted a "substantial justification"<sup>75</sup> for the exclusion,

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69. *Id.* at 638-39 (dictum).

70. 553 F.2d 296 (2d Cir. 1977).

71. *Id.* at 298. The parents of one of the children were even willing to release the school from liability for negligence should the good eye become damaged. *Id.*

72. See notes 49-53 and accompanying text *supra*.

73. 553 F.2d at 299.

74. *Id.* at 298.

75. *Id.* at 299.

although an eye specialist testified that he did not anticipate any great risk.<sup>76</sup>

Under the Regulations the *Kampmeier* plaintiffs are "qualified handicapped persons."<sup>77</sup> In addition, in the context of providing an education, it is the need of the handicapped individual that is the focus of concern under the Regulations.<sup>78</sup> Thus, it appears likely that under the Regulations, if the *Kampmeier* plaintiffs could prove irreparable harm or probable success on the merits,<sup>79</sup> they would be granted a preliminary injunction.

Section 504, if read literally, admits of no exceptions to its provisions.<sup>80</sup> The Regulations, whose specific provisions implement the generalizations of section 504,<sup>81</sup> recognize "substantial justification" for waivers only in terms of undue hardship.<sup>82</sup> The accommodations, if any, necessary for the *Kampmeier* plaintiffs do not constitute an undue hardship under the Regulations.<sup>83</sup>

#### IV. Conclusion

If recipients<sup>84</sup> of federal financial assistance<sup>85</sup> make an effort to comply with the Regulations, instead of searching for loopholes, then section 504 and the Regulations may have truly accomplished something. But if courts expand the concept of undue hardship<sup>86</sup> or, as in *Kampmeier v. Nyquist*,<sup>87</sup> infer from section 504 a "substantial

76. *Id.* at 299 n. 6.

77. 42 Fed. Reg. at 22,678 (to be codified in 45 C.F.R. § 84.3(k)(2)(i)).

78. "[A] recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question." *Id.* at 22,682 (to be codified in 45 C.F.R. § 84.34(b)) (emphasis added). See also 42 Fed. Reg. at 22,683 (to be codified in 45 C.F.R. § 84.37(c)(1), (2)); *id.* at 22,691-92.

79. 553 F.2d at 299.

80. See note 21 *supra*.

81. See note 16 *supra*.

82. 42 Fed. Reg. at 22,680 (to be codified in 45 C.F.R. § 84.12(c)), quoted in note 26 *supra*. These factors stress monetary considerations, such as the budget of the facility and the cost of the accommodation.

83. The factors in deciding whether undue hardship would result from compliance do not involve the possibility of tort liability on the part of the recipient should an accident befall a participant or employee. See the discussion in note 26 *supra*.

84. See note 22 *supra*.

85. See note 48 *supra*.

86. See notes 24-26 and accompanying text *supra*.

87. See notes 70-76 and accompanying text *supra*. See also *Crawford v. University of N.C.*, 440 F. Supp. at 1053-54 for a discussion of *Kampmeier*.

justification" exception, the Regulations could become meaningless. If our institutions and our courts are not assiduous in applying the spirit as well as the letter of the law, then perhaps, after years of struggle by the handicapped, their efforts may prove as futile as those of a person confined to a thirty-inch wheelchair attempting to pass through a twenty-eight inch doorway.

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