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A Principled Limitation for Section 504 of the Rehabilitation Act: The Intergrity-of-the-Program Test

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A PRINCIPLED LIMITATION FOR SECTION 504 OF THE REHABILITATION ACT: THE INTEGRITY-OF-THE-PROGRAM TEST

INTRODUCTION

Section 504 of the Rehabilitation Act of 1973[1] (Act) was enacted to prohibit a recipient of federal funds[2] from discriminating against a handi-

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1. Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (1982)). The section provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (1982).

2. Whether a particular program or activity is considered to be a recipient of federal funds for the purposes of § 504 of the Rehabilitation Act has often been problematic. To date there is no test or standard to facilitate identification of such recipients for the purpose of determining compliance with that section. The regulations of the Department of Health and Human Services (HHS) define "recipient" 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.

45 C.F.R. § 84.3(f) (1984). "Federal financial assistance" is defined as:

> 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, including:
> (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
> (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

45 C.F.R. § 84.3(h) (1984). When the sole source of federal assistance is medicare and medicaid payments, a program is covered by § 504. *See* United States v. Baylor Univ. Medical Center, 736 F.2d 1039, 1042 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 958 (1985); Bernard B. v. Blue Cross & Blue Shield, Inc., 528 F. Supp. 125, 130-31 (S.D.N.Y. 1981), *aff'd*, 679 F.2d 7 (2d Cir. 1982); 45 C.F.R. § 84, app. A, at 301 (1984). *But see* Silverstein v. Sisters of Charity of Leavenworth Health Servs. Corp., 43 Colo. App. 446, 448-49, 614 P.2d 891, 892-93 (1979) (section 504 not applicable to employment discrimination claim against program when sole federal assistance is medicare or medicaid payments). Other relationships between the federal government and a particular program have been found not to trigger the coverage of § 504. *See, e.g.*, Community Television v. Gottfried, 459 U.S. 498, 509-10 (1983) (receipt of broadcast license); Disabled in Action v. Mayor of Baltimore, 685 F.2d 881, 884-85 (4th Cir. 1982) (rental of stadium built with federal grant); Randolph v. Alabama Inst. for Deaf & Blind, 27 Fair Empl. Prac. Cas. (BNA) 1718, 1721-22 (N.D. Ala. 1982) (federal procurement contracts); Cook v. Budget Rent-a-Car Corp., 502 F. Supp. 494, 500-01 (S.D.N.Y. 1980) (same). Two courts have divided on whether the use of airports built with and receiving federal funds brings airlines under

capped individual[3] "solely by reason of his handicap."[4] The purpose of

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the section. *Compare* Paralyzed Veterans of Am. v. CAB, 752 F.2d 694, 714 (D.C. Cir. 1985) (all airlines using federally assisted airports covered by § 504) *with* Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1213-15 (9th Cir. 1984) (section 504 does not apply to airlines because they pay for use of airports). The District of Columbia Circuit, although it found airport use to trigger § 504 coverage, indicated that the receipt of exclusive operating licenses, favorable tax treatment, and the services of the national air traffic control system did not trigger § 504. *See Paralyzed Veterans of Am.*, 752 F.2d at 707-12; *accord Jacobson*, 742 F.2d at 1208-13.

Many courts, analogizing to the "primary objective" requirement imposed by § 604 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-3 (1982), had held that a plaintiff's employment discrimination claim must arise in a program that provides employment as its primary objective. *See, e.g.*, Scanlon v. Atascadero State Hosp., 677 F.2d 1271, 1272 (9th Cir. 1982), *vacated*, 104 S. Ct. 1583 (1984); United States v. Cabrini Medical Center, 639 F.2d 908, 910-11 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 674-75 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); Trageser v. Libbie Rehab. Center, Inc., 590 F.2d 87, 89-90 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979). The Supreme Court, in holding that an employment claim can be brought against any program receiving federal funds, found that the "primary objective" requirement was inappropriate because such a "drastic limitation on the handicapped individual's right to sue" was not contemplated by Congress, *see* Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1255 (1984) (quoting 42 U.S.C. § 2000d-3 (1982)), notwithstanding the express statutory incorporation of "the remedies, procedures and rights of Title VI" for such claims, *see id.* at 1255 (quoting 29 U.S.C. § 794(a)(2) (1982)). However, the Court did not suggest a framework for defining the programs that would come under § 504's ambit; rather, it indicated that such a procedural definition should be left to the district courts. *See id.*; *cf.* Grove City College v. Bell, 104 S. Ct. 1211, 1220-21 (1984) (grants of financial aid to students give rise to protection of Title IX only with regard to specific program—here the school's financial aid department); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535-40 (1982) (same). The *Darrone* Court also distinguished the indirect aid at issue in *Grove City* from "nonearmarked direct grants," which are usually at issue in employment programs. *See Darrone*, 104 S. Ct. at 1255.

3. The statutory definition for the term "handicapped individuals" reads:

> Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of subchapters IV and V of this Act, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 503 and 504 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(7)(B) (1982).

The HHS regulations amplify this definition. *See* 45 C.F.R. § 84.3(j)(2) (1984) (describing the various " 'physical or mental impairments' " and " 'major life activities' " contemplated by the statute, and explaining what is meant by " 'a record of' " and " 'regarded as having' " such an impairment); *see generally* E.E. Black Ltd. v. Marshall, 497 F. Supp. 1088, 1099-1102 (D. Hawaii 1980) (analyzing statutory definition); Haines, E.E. Black, Ltd. v. Marshall: *A Penetrating Interpretation of "Handicapped Individual" for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Opportunity Statutes*, 16 Loy. L.A.L. Rev. 527 (1983) (general discussion of ambiguous statutory definition of "handicapped"). A transitory illness, for example, has been found not to meet the statutory definition. *See* Stevens v. Stubbs, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) ("impairment" does not encompass illnesses having "no permanent effect on person's health").

the Act is "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living."[5] Handicapped persons are thus guaranteed an equal opportunity to participate in federally funded programs.[6] They are ensured the chance to be judged as every citizen deserves to be judged—on the basis of ability—and to be rewarded as every citizen deserves to be rewarded—on the basis of merit.[7] Handicap *qua* handicap is an unlawful foundation on which to differentiate among potential participants.[8] Handicap alone, however, will not entitle an individual to the protection of the statute: Section 504 expressly requires that the individual be "otherwise qualified" in order to invoke the section's antidiscrimination enforcement mechanisms.[9]

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4. 29 U.S.C. § 794 (1982). The Supreme Court has interpreted this language to mean that the "mere possession of a handicap" is an impermissible basis for discrimination. Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979).

5. 29 U.S.C. § 701 (1982).

6. *See id.* §§ 701, 794. Equal opportunity can be analyzed under two different paradigms: equal treatment, which requires evaluation by objective rules and neutral standards, or equal impact, which treats as presumptively discriminatory behavior or policy that has an adverse impact on the protected group. *See* Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 Harv. L. Rev. 997, 1003-08 (1984) [hereinafter cited as *Legal Evasiveness*]. The content to be given to the guarantee of equal opportunity depends on which paradigm is chosen. *See id.*; *see also* U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 69 (1983) ("Setting this goal [of integrating handicapped persons into society], of course, does not mandate the means of its accomplishment.") [hereinafter cited as Spectrum]. The Supreme Court has described § 504 as mandating "evenhanded treatment," Southeastern Community College v. Davis, 442 U.S. 397, 410-11 (1979), but it has also indicated a willingness to entertain claims arising under the section when a recipient's behavior has disparate effects on handicapped persons, *see* Alexander v. Choate, 105 S. Ct. 712, 720 (1985).

7. Merit has traditionally been the standard upon which judgments and rewards are based. *See* Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. Rev. 815, 815 (1980) ("There is an implicit recognition of the claims of individual merit in the liberal theory of equality of opportunity."). Merit has been described as an "essentially contested concept," *id.* at 822 n.30; *see* Gallie, *Essentially Contested Concepts*, 56 Proc. of the Aristotelian Soc'y 167, 167-68 (1956), because it is both descriptive and evaluative. Although merit is accordingly both objective and subjective, this duality should not pose an obstacle to its use as a standard of evaluation for claims arising under § 504. Among possible standards, merit is the one that most nearly describes the statutory purpose of equal opportunity. *See* D. Bell, The Coming of Post-Industrial Society 425-26 (1973) (principle of equal opportunity precludes allocating employment positions by means "other than fair competition open equally to talent and ambition"). Although merit is the evaluative standard used for federally funded employment and post-secondary education programs in the framework of this Note, ability and merit will generally have no relevance in federally funded service programs. See *infra* note 87 and accompanying text.

8. *See* Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979).

9. 29 U.S.C. § 794 (1982). The HHS regulations give the following definition for a "qualified handicapped person":

> (1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;
>
> (2) With respect to public preschool elementary, secondary, or adult educa-

In recognition of the special problems faced by handicapped persons, the regulations promulgated under section 504 by the Department of Health and Human Services (HHS) have imposed on federal grantees the duty of reasonable accommodation.[10] This duty is intended to remove obstacles that might otherwise prevent able performance or effective par-

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tional services, a handicappped [sic] person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under Section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

45 C.F.R. § 84.3(k) (1984).

HHS' analysis of its regulations explains that the word "otherwise" was omitted in the regulations, although it appears in the statute, because

> read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

45 C.F.R. § 84, app. A, at 304 (1984).

This analysis improperly excludes from consideration any accommodation that would permit a handicapped person to become qualified. In using an improbable example—permitting a blind person to drive—this analysis obscures the real import of the Rehabilitation Act: that a handicap can be a surmountable obstacle. A proper application of the Act's spirit would seem to require an imagination sensitive to the limitless possibilities medical science offers. *See* Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979). It would therefore be appropriate for the analysis to mention that a blind person is unqualified to drive not because he is blind, but because he is not able to navigate safely, even with reasonable accommodation. See *infra* notes 10-12 and accompanying text.

One commentator has identified two paradigms for the interpretation of "otherwise qualified": equal treatment, which would require a handicapped person to be as qualified as a nonhandicapped person, and equal impact, which would interpret "otherwise qualified" to mean qualified except for the handicap. *See Legal Evasiveness*, *supra* note 6, at 1003, 1006. The Supreme Court has expressly rejected the latter construction and instead has interpreted the language "otherwise qualified [handicapped] person" to mean "one who is able to meet all of a program's requirements *in spite of* his handicap." *Davis*, 442 U.S. at 406 (emphasis added). This rejection of the "except for" interpretation, *see id.*, coupled with the Supreme Court's implicit adoption of an "evenhanded treatment" standard, *see id.* at 410-12, lends support to the equal treatment paradigm. *See also* Alexander v. Choate, 105 S. Ct. 712, 720 (1985) (rejecting "boundless notion that all disparate-impact showings constitute prima facie cases under § 504").

10. The duty of accommodation differs with each program. *See* 45 C.F.R. § 84.12 (employment practices); *id.* § 84.22 (program accessibility); *id.* § 84.44 (postsecondary education); *id.* § 84.52 (health, welfare and other social services). A recent government publication has defined reasonable accommodation as "providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity. Individualizing opportunities is this definition's essence." Spectrum, *supra* note 6, at 102.

ticipation by handicapped persons.[11] The Supreme Court has accepted this requirement to the extent that it facilitates "evenhanded treatment of qualified handicapped persons."[12]

Neither the statute nor the regulations, however, provides a scheme from which federal grantees and courts can discern the extent of the nondiscrimination/reasonable accommodation obligation.[13] The responsibility for implementing and enforcing this obligation has thus fallen by default on the judiciary.[14] In the absence of a comprehensive model, the courts' focus has been blurred and their decisions nonuniform.[15] As a result, claims brought under section 504 are often dismissed without a full consideration of the substantive issues.[16]

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11. The term "reasonable accommodation" originally referred only to employment practices that enhanced the employability of handicapped applicants or employees. *See* Spectrum, *supra* note 6, at 104-05. It has come to mean any modification a court may impose on a recipient's program that permits the participation of handicapped persons. *See* Southeastern Community College v. Davis, 442 U.S. 397, 412-13 (1979).

12. *See* Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979); *see also* Alexander v. Choate, 105 S. Ct. 712, 721 (1985) ("to assure meaningful access [to federally funded programs], reasonable accommodations . . . may have to be made").

13. In an often cited outcry against the exasperating lack of guidance provided to courts and federal recipients, one court, presented with a case involving public transportation, lamented:

> How plain is the language of . . . § 504 of the Rehabilitation Act? What must be done to provide handicapped persons with the same right to utilize mass transportation facilities as other persons? Does each bus have to have special capacity? Must each seat on each bus be removable? Must the bus routes be changed to provide stops at all hospitals, therapy centers and nursing homes? Is it required that buses be able to accommodate bedridden persons? Is it discriminatory to answer any of these questions in the negative? Will the operation of hydraulic lifts on buses involve stigmatizing effects on the persons who use them? If so, is that a discrimination solely by reason of handicap within the meaning of § 504?

Atlantis Community, Inc. v. Adams, 453 F. Supp. 825, 831 (D. Colo. 1978); *see* Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 718 F.2d 490, 494 (1st Cir. 1983) ("Because it is both ambiguous and lacking in specifics its scope and effect have been an enigma since section 504 was enacted."); *Legal Evasiveness*, *supra* note 6, at 999 ("The [section's] indeterminate language devolves responsibility for policy choice on courts . . . . As a result of this congressional default, handicapped persons and their actual or potential employers remain without meaningful legal guidelines for interaction.").

14. *See Legal Evasiveness*, *supra* note 6, at 999.

15. *Compare* Upshur v. Love, 474 F. Supp. 332, 342 (N.D. Cal. 1979) (when blind applicant is not otherwise qualified, employer need not consider reasonable accommodation nor hire an aide) *with* Nelson v. Thornburgh, 567 F. Supp. 369, 375-82 (E.D. Pa. 1983) (when blind employees require reasonable accommodation to be qualified, such accommodation must be provided by federal grantee when associated cost does not constitute undue hardship), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 955 (1985).

16. For example, in employment discrimination cases, some courts have dismissed claims when the program's primary objective was not employment. *See, e.g.*, Scanlon v. Atascadero State Hosp., 677 F.2d 1271, 1272 (9th Cir. 1982), *vacated*, 104 S. Ct. 1583 (1984); United States v. Cabrini Medical Center, 639 F.2d 908, 910-11 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 674-75 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); Trageser v. Libbie Rehab. Center, Inc., 590 F.2d 87, 89-90 (4th

The Supreme Court has indicated that a comprehensive scheme must balance the remedial purposes of section 504 against the possibility of a boundless application of the section.[17] Recognizing that a federally funded program has a legitimate interest in preserving its "integrity,"[18] the Court has concluded that not all differentiation based on the presence of a handicap is prohibited by the Act.[19] A federal grantee's duty to accommodate a handicapped individual may therefore be limited by the program's need to achieve the purposes for which it was established.[20]

This Note will present an approach to section 504 claims that permits

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Cir. 1978), *cert. denied*, 442 U.S. 947 (1979). The Supreme Court has held this requirement to be inappropriate for § 504 claims. *See* Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1255 (1984).

Lower education cases are now commonly dismissed on the basis of the Supreme Court's decision in Smith v. Robinson, 104 S. Ct. 3457 (1984), in which the Court ruled that the rights and remedies of a more specific statute—there the Education of All Handicapped Children Act, 20 U.S.C. § 1411-1420 (1982)—are exclusive, and that in such cases resort to the Rehabilitation Act is unavailable. *Smith*, 104 S. Ct. at 3473-74.

A major procedural obstacle to the plaintiff's case is the allocation of burden of proof. This issue has often been analyzed according to a three-part model fashioned after McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), a case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982). Under this model a plaintiff must make out a prima facie case, at which time the burden shifts to the defendant to articulate a legitimate reason for its behavior; the plaintiff is then given an opportunity to rebut the defendant's proof as a mere pretext. *See* Comment, *Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims*, 132 U. Pa. L. Rev. 867, 891 (1984) [hereinafter cited as *Analyzing Employment Discrimination Claims*]; *see, e.g.*, Jasany v. United States Postal Serv., 755 F.2d 1244, 1249-50 (6th Cir. 1985); Norcross v. Sneed, 755 F.2d 113, 117 (8th Cir. 1985); Sisson v. Helms, 751 F.2d 991, 992-93 (9th Cir. 1985); Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981). The dispute over the ultimate burdens of proof and persuasion, *see Analyzing Employment Discrimination Claims*, *supra*, at 891-98, is beyond the scope of this Note.

Procedural models that require the plaintiff to show as part of his prima facie case that he is otherwise qualified "*apart from* his or her handicap," *id.* at 894 (emphasis in original), make consideration of accommodations difficult, if not impossible. Courts often do not permit the plaintiff to introduce the vital issue of available accommodations until after he has proven his prima facie case—even though it will often be impossible for a claimant to show he is otherwise qualified "apart from his handicap" without taking appropriate accommodations into account. *See* Doe v. Region 13 Mental Health-Mental Retardation Comm., 704 F.2d 1402, 1408 n.6 (5th Cir. 1983); *see also* Upshur v. Love, 474 F. Supp. 332, 342 (N.D. Cal. 1979) (when applicant characterized as not otherwise qualified, employer "not obligated to consider what 'reasonable accommodation' would be called for").

17. *See* Alexander v. Choate, 105 S. Ct. 712, 720 (1985); *see also Legal Evasiveness*, *supra* note 6, at 1008 (rejecting criterion of ability gives rise to "conceptually boundless" interpretation of § 504).

18. *See* Alexander v. Choate, 105 S. Ct. 712, 720 (1985).

19. *See id.* (rejecting "boundless notion that all disparate-impact showings constitute prima facie cases under § 504").

20. *See* Southeastern Community College v. Davis, 442 U.S. 397, 410, 411-12 (1979) (rejecting interpretation of § 504 as requiring modifications that would fundamentally alter nature of program); *see also* Alexander v. Choate, 105 S. Ct. 712, 720 (1985) ("*Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of the programs. . . .").

a federal grantee to preserve its program's integrity.[21] Such claims should be subject to a two-step analysis: First, a court must ensure that its finding of unlawful discrimination does not subvert a program's legitimate interest in considering ability or quality of performance in its decisionmaking process when these concerns are relevant.[22] Second, the cost of complying with the section cannot be so prohibitive that the program is unable to carry out its purpose.[23] The analysis posited by this Note focuses on two concerns left unresolved by the statute, legislative history, and regulations: that, unlike the case presented by other classes protected by discrimination law, the condition that triggers the protection of the statute may raise concerns of ability relevant in the decisionmaking process.[24] Moreover, compliance with the nondiscrimination mandate via accommodation can result in considerable cost, to the detriment of

21. This Note is not intended as an introduction or primer on the law under § 504; rather, it is intended to synthesize the present state of the law into a comprehensive and predictable analysis. For a complete discussion of the background and case law under § 504, see Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 Cornell L. Rev. 401 (1984).

22. *See* Southeastern Community College v. Davis, 442 U.S. 397, 413 & n.12 (1979). When quality or ability concerns are subverted in such a situation, the integrity of the program is undermined. See *infra* notes 101-05, 167-84 and accompanying text.

23. *See* Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. Rev. 881, 900-02 (1980) [hereinafter cited as *Meaning of Discrimination*]; *see also* Alexander v. Choate, 105 S. Ct. 712, 725 (1985) (administrative costs associated with required accommodations exceed statutory mandate); *cf.* Wegner, *supra* note 21, at 479 (recognizing "cost-plus defense" when defendant demonstrates either "incapacity to bear the costs of accommodation" or "inadequacy of benefits received in light of costs incurred"). When the cost of complying with § 504 is so great that it impairs the program's ability to function, it constitutes undue hardship. See *infra* notes 151-66, 185-91, 196-99 and accompanying text.

24. *See* Letter from Richard F. Schubert, for the Secretary of Labor, to Sen. Harrison A. Williams, Chairman, Senate Comm. on Labor & Pub. Welfare (Sept. 24, 1974) [hereinafter cited as Letter], *reprinted in* 1974 U.S. Code Cong. & Ad. News 6431, 6434; Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 De Paul L. Rev. 953, 967 (1978); *Meaning of Discrimination*, *supra* note 23, at 883. Although § 504 was "intended to be part of the general corpus of discrimination law," New York State Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644, 649 (2d Cir. 1979); *see* S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6390-91; Wegner, *supra* note 21, at 426-28; *Legal Evasiveness*, *supra* note 6, at 1008, the application of Title VI and Title IX of the Civil Rights Act of 1964 to § 504 is not a smooth one, and has been described as "akin to fitting a square peg into a round hole," Garrity v. Galen, 522 F. Supp. 171, 206 (D.N.H. 1981); *see* Spectrum, *supra* note 6, at 142; Letter, *supra*, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6431, 6434. Acknowledging that program recipients may in fact be justified in taking an applicant's handicap into account, one observer noted that "[r]ace and sex are generally discernible factors unrelated to job qualifications. Physical and mental disabilities, however, are frequently undiscernible and their degree is relevant to whether or not an applicant may be employable and in what capacity." *Id.*, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6431, 6434. The relevance of the handicapping condition in determining participation is evident not only with respect to job qualifications, but also with respect to post-secondary education qualifications, *see* Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979), and service program eligibility requirements, see *infra* note 206 and accompanying text.

the recipient's program.[25]

Evaluating a claim of discrimination[26] brought by a handicapped person can be performed properly by focusing on the nature of the program in which it arises.[27] These programs occur in three broad contexts:[28] (1) employment;[29] (2) post-secondary education;[30] and (3) preschool, elementary and secondary education,[31] and health, welfare and social services (services).[32] These contexts are distinguished by the degree to which the programs are dominated by concerns of performance and service. Consequently, in each context a different standard for determining unlawful behavior should be applied.

Part I of this Note presents an integrity-of-the-program test and examines its origin and design. It proposes definitions for each type of program within the test's ambit and explains that the specific content of the test is determined by the context of the claim. Part II applies the test to those definitions and concludes that employment programs should be subject to a less strict accommodation requirement than are post-secondary education programs, and that of the three, service programs should be subject to the greatest accommodation requirement.

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25. *See Meaning of Discrimination*, *supra* note 23, at 889 ("[s]ection 504 was enacted originally with little consideration of the duties it imposed or the cost of compliance," yet the nondiscrimination mandate results in "potentially costly accommodation efforts").

26. Examination of the procedural issues implicated by such claims—notably, which party must prove the elements of the test and to what degree—is beyond the scope of this Note. For a discussion of the allocation of burdens under section 504 in employment discrimination claims, *see Analyzing Employment Discrimination Claims*, *supra* note 16, at 891-98.

27. *See generally* 45 C.F.R. §§ 84.12, .22, .44 (1984) (differentiating among various types of programs and describing different accommodation requirements for each). The nondiscrimination mandate of § 504 precludes use of a single interpretative approach for all the programs the section covers because of the varying natures of such programs. This Note proposes a comprehensive model that considers each program individually under an integrity-of-the-program test. Other models focus on the type of banned behavior, see Wegner, *supra* note 21, at 405, or on the burdens faced by handicapped claimants, see *Meaning of Discrimination*, *supra* note 23, at 897-900. Neither model sufficiently illuminates the conflict between the statutory objectives and the preservation of the integrity of the recipient's programs. The program-oriented approach posited here focuses the analysis on the tension identified by the Supreme Court's decisions in *Davis* and *Alexander*. See *supra* notes 17-20 and accompanying text.

28. The contexts described in this Note are those identified by the HHS regulations. *See* 45 C.F.R. pt. 84 (1984). The regulations also identify Program Accessibility as an issue of interest under § 504, *see id.* at §§ 84.21-.23, but this area involves physical and architectural barriers that arise within one of the other contexts, and as such would be subject to the analysis appropriate to the context in which it arises. As a practical matter, the three contexts described are the only ones in which litigation under § 504 has arisen to date.

29. *See* 45 C.F.R. §§ 84.11-.14 (1984).

30. *See id.* §§ 84.41-.47.

31. *See id.* §§ 84.31-.39.

32. *See id.* §§ 84.51-.55. Because of the conceptual similarities between lower education programs and service programs, this Note will analyze them as a unit.

I. A PRINCIPLED LIMITATION ON DISCRIMINATION: PRESERVING THE INTEGRITY OF THE PROGRAM

A. *Overview*

The test of the lawfulness of allegedly discriminatory behavior should be whether the preservation of the integrity of the grantee's program requires the behavior.[33] The Supreme Court implied such a test when it recognized "a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs."[34] The test would properly focus attention on "the two powerful but countervailing considerations"[35] that arise when interpreting the nondiscrimination mandate: the remedial objectives of the section and the need to avoid the boundless implementation of those objectives.[36]

There are compelling reasons for using this test. First, it would protect victims of discriminatory policies from having otherwise meritorious claims dismissed simply because the recipient's possibly spurious defense of necessity survives a rational basis level of scrutiny.[37] The proposed integrity test would require courts to extend the inquiry into the challenged behavior beyond the search for a rational basis; thus, a recipient will not be permitted to act in an ostensibly rational manner if such action is discriminatory and does not preserve the integrity of its program.[38]

Second, by balancing the interests of handicapped persons against the recipients' interest in protecting the integrity of their programs, this test

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33. This test is derived from the need recognized by the Supreme Court to balance the statutory objectives and the preservation of federally funded programs. *See* Alexander v. Choate, 105 S. Ct. 712, 720 (1985); Southeastern Community College v. Davis, 442 U.S. 397, 413 & n.12 (1979). The test gives effect to this balance of interests by accepting or rejecting the legitimacy of an interest that the grantee holds out as deserving of preservation. The Department of Justice has recently promulgated regulations that reflect the integrity test suggested by *Davis*. *See* Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs, 49 Fed. Reg. 35,724, 35,724-39 (1984) (to be codified at 28 C.F.R. pt. 39).

34. Alexander v. Choate, 105 S. Ct. 712, 720 (1985).

35. *Id.*

36. *See id.*; Southeastern Community College v. Davis, 442 U.S. 397, 412-13 (1979).

37. For examples of courts invoking a rational basis level of scrutiny, see Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1412 (5th Cir. 1983); Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977); Pinkerton v. Moye, 509 F. Supp. 107, 114 (W.D. Va. 1981). It is not clear whether the defenses interposed by the defendants in these cases were spurious or not, because in each case the court did not inquire further once it discerned a rational basis for the defendants' decision. *See Analyzing Employment Discrimination Claims, supra* note 16, at 888-91; *see also* Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983) (criticizing rational basis test).

38. *See* Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1383 (10th Cir. 1981); Simon v. St. Louis County, 656 F.2d 316, 320 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); *Analyzing Employment Discrimination Claims, supra* note 16, at 886-91.

provides the manageability necessary to avoid the potentially boundless obligations that a different interpretation of section 504 might impose.[39] Because the duties under section 504 would arise only when they do not undermine the integrity of the recipient's program, this test alleviates the danger of uncontrolled and unpredictable applications of the section.[40] The grantee may preserve the integrity of the program because section 504 does not embrace an affirmative action requirement[41] and does not prohibit recipients from taking disability into account in their decisionmaking.[42]

Under an integrity-of-the-program test, handicap-based differentiation would not be unlawful if no level of accommodation would qualify a handicapped person for participation in the program.[43] Similarly, even if the person can qualify with accommodation, a refusal to accommodate would not be unlawful if the associated cost is such that the program is unable to perform its organizational purpose.[44] It is essential to a fair implementation of the section that considerations of quality and cost be kept distinct.[45] If these considerations become overly entwined, the in-

39. *See* Alexander v. Choate, 105 S. Ct. 712, 720 (1985); Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979); *see also Legal Evasiveness, supra* note 6, at 1010 (limiting principle must balance equal treatment and equal impact paradigms).

40. *See Legal Evasiveness, supra* note 6, at 1008 ("[The equal effects] paradigm evokes fears of tremendous social costs: potentially unlimited investments in special equipment, massive industrial reorganization, loss of workplace efficiency, and increased safety risks."). A particularly short-sighted enforcement of a state nondiscrimination law pertaining to the handicapped involved a blind applicant for a school's playground supervisor position. *See* Zorick v. Tynes, 372 So. 2d 133 (Fla. Dist. Ct. App. 1979). The court held that the nondiscrimination duty of the statute required the school to employ the applicant on a trial basis until he was proven not to be otherwise qualified—presumably when the school's concerns for the safety of the children were borne out. *See id.* at 142.

41. *See* Southeastern Community College v. Davis, 442 U.S. 397, 410-11 (1979) (if Congress intended § 504 to have an affirmative action requirement, it would have expressly provided one). *Compare* 29 U.S.C. § 794 (1982) (contains no affirmative action requirement) *with id.* §§ 791(b), 793(a) (contains affirmative action requirement).

42. *See* Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979) ("Section 504 by its terms does not compel [a federally funded program] to disregard the disabilities of handicapped individuals . . . to allow disabled persons to participate [in their programs]."); 29 U.S.C. § 794 (1982) (affording protection only to "otherwise qualified handicapped individual[s]").

43. See *infra* notes 128-34, 178-84 and accompanying text.

44. See *infra* notes 149-66, 185-91, 196-99 and accompanying text.

45. The HHS regulations fail to make clear this distinction. The regulations indicate that a handicapped person is "qualified" for the purpose of invoking the protections of the statute if he can perform the essential functions of the job with the aid of "reasonable" accommodations. *See* 45 C.F.R. § 84.3(k)(1) (1984). The regulation's use of the qualifier "reasonable" introduces considerations of cost, *see id.* § 84.12(c)(3) (accommodations are reasonable unless they inflict "undue hardship" on program), that are inappropriate to whether a handicapped person is qualified for the job.

Although there is some cost involved in any sacrifice of ability, *see Legal Evasiveness, supra* note 6, at 1012, this cost must be considered independently. If considerations of cost are permitted to influence the quality inquiry, invariably quality can be found to have suffered, and the goal of preserving quality would reduce § 504 to a nullity. When cost is entirely excluded from the quality inquiry, quality can be preserved and a court can then focus on what costs Congress intended federal grantees to incur.

quiry loses its focus and neither federal recipients nor handicapped persons receives any guidance concerning rights and obligations under the section.

Although the test proposed here proceeds against the background principle that the program's integrity must be preserved, each of the three types of programs—employment; post-secondary education; and services—requires a separate analysis.[46] The specific inquiry in the employment context should be a two-step process to determine, first, whether a putative employee is qualified in light of appropriate accommodations; and second, whether such accommodations constitute undue hardship.[47] In the post-secondary education context, the two-step process should determine, first, whether the applicant is qualified for admission after balancing the program's interest in admitting the best qualified applicants against the service aspects of the program and evaluating the applicant in light of appropriate accommodations; and second, whether the cost associated with the accommodations constitutes undue hardship.[48] In the services context, the inquiry should determine, first, whether the handicapped claimant is entitled to the benefits he seeks; and second, whether accommodation constitutes undue hardship.[49] The operative concepts—"qualified" and "undue hardship"— will gain content by evaluating them on the basis of the integrity of the program involved.[50]

The integrity test acquires much of its substantive effect when the relevant program is defined.[51] Vital issues of policy suggest a myriad of possible definitions;[52] courts must be aware that their definition of the

46. See *supra* note 27 and accompanying text.

47. See *infra* Pt. II.A. The inquiry described here is similar to a model suggested by another commentator. *See* Comment, *Employment Discrimination—Analyzing Handicap Discrimination Claims: The Right Tools for the Job*, 62 N.C.L. Rev. 535, 537 n.15 (1984) [hereinafter cited as *The Right Tools for the Job*]. This linear model permits the best effectuation of the integrity test because it permits consideration of accommodation and separates the quality and cost issues.

48. See *infra* Pt. II.B.

49. See *infra* Pt. II.C.

50. The regulations recognize that the meaning of these terms will vary according to the program in which they arise. *See, e.g.*, 45 C.F.R. §§ 84.3(k), 84.12(a), (c) (1984). The terms "qualified" and "undue" are notions that must refer to a context, that is, "qualified for something" and "undue because of something." It would therefore be meaningless to give them content outside the context of a particular program. *See Meaning of Discrimination*, *supra* note 23, at 900-01 (the meaning of undue hardship must be determined in reference to its effect on particular program).

51. *See, e.g.*, Alexander v. Choate, 105 S. Ct. 712, 722 (1985) (defining medicare program as "a particular package of health care services" instead of " 'adequate health care' " permitted state program to limit in-hospital patient coverage); Strathie v. Department of Transp., 716 F.2d 227, 232 (3d Cir. 1983) (defining goal of school bus driver licensing program as the prevention of appreciable risks to passenger safety rather than the elimination of all risks).

52. The interests of "social integration, efficiency, personal dignity, merit, freedom, and equality," *see Legal Evasiveness*, *supra* note 6, at 1015, coalesce in different proportions in formulating a definition of these programs.

program will embrace a particular vision of society.[53] Until Congress supplies statutory definitions of the types of programs subject to section 504,[54] courts must exercise great care in imposing their own definitions.

B. *Defining the Program*

1. Employment Programs

A definition of the employment program should identify those employer interests that must be protected to maintain the integrity of the program. Under the proposed test, the interests excluded from the definition may be sacrificed to further the interests of the remedial purposes of the section.

An employer requires discretion to decide whom to employ.[55] This discretion is particularly important when evaluating both the requirements of a job and the ability of candidates to meet those requirements.[56] Ability is always measured against the task: An individual with proven skills in one area may be ill-equipped in another.[57] If an employer is

53. *See id.* at 999. This Note chooses merit as the evaluative standard for effectuating the statutory vision of equal opportunity. Contrary views as to policy may interpret differently the vision intended by the statute; this Note merely proposes a framework to permit these considerations of policy and suggests a particular vision.

54. A congressional definition preempts judicial scrutiny into such a definition. *See* Alexander v. Choate, 105 S. Ct. 712, 722 (1985); 45 C.F.R. § 84.4(c) (1984); *cf.* Smith v. Robinson, 104 S. Ct. 3457, 3473-74 (1984) (judicial construction of legislative intent of Education of All Handicapped Children Act determines rights and remedies available under public lower education program to the exclusion of rights and remedies available under § 504). The enactment of precise statutory definitions of employment, post-secondary education and service programs might therefore resolve much of the confusion and controversy involved in enforcing the nondiscrimination mandate of § 504.

55. *See* Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1410 (5th Cir. 1983); *cf.* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937) (recognizing strong element of employer discretion in union discrimination cases); Paramount Mining Corp. v. NLRB, 631 F.2d 346, 348 (4th Cir. 1980) (same); Sioux Quality Packers v. NLRB, 581 F.2d 153, 156 (8th Cir. 1978) (same); Note, *Discriminatory Discharge in a Sports Context: A Reassessment of the Burden of Proof and Remedies Under the National Labor Relations Act*, 53 Fordham L. Rev. 615, 615 & n.2 (1984) (discussing importance of employer discretion in sports context).

56. *See, e.g.*, Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1410, 1412 (5th Cir. 1983) (upholding employer's subjective judgment that applicant could not satisfy job requirement of emotional stability); *cf.* Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981) (recognizing importance of subjective evaluative criteria in post-secondary education). Business necessity is an acceptable basis for employment decisions. *See* 45 C.F.R. pt. 84, app. A, ¶ 16, at 308 (1984).

57. One court gave a particularly colorful and convincing summation of this point:

> Most citizens would be handicapped in playing baseball as compared to Carl Yastrzemski, in singing as compared to Beverly Sills, in abstract thinking as compared to Albert Einstein, and in the development of a sense of humor as compared to Woody Allen. Human talent takes many forms, and within each talent is a continuum of achievement. While one individual might be on the high end of the scale of achievement in one area, that same individual might rank very low in another area. Woody Allen will probably never win the Triple Crown, and Carl Yastrzemski is not likely to perform "Aida." In sum, the identification of various gradations of handicap is not an easy task, especially if

deprived of his freedom to determine on the basis of ability who is qualified to perform designated tasks, the notion of employer discretion is potentially reduced to a nullity.[58]

Of course, this discretion should not be boundless. Courts must recognize that under section 504 there are impermissible grounds for rejecting a job applicant,[59] and that it is their duty to guard against unlawful discrimination.[60] For example, an employer may not reject a handicapped applicant because he fears the public's reaction to the applicant's condition.[61] Nevertheless, it is still provident to include in the definition of employment an element accounting for the employer discretion[62] necessary to satisfy legitimate concerns.[63]

The employment program will be defined here as *the performance of tasks in a manner consistent with the employer's legitimate expectation of benefits from the successful completion of those tasks.* Under this definition, unlawful discrimination will be present when acts or decisions discriminate on the basis of one's handicap and do not serve to protect the quality of performance or expected benefits.

It could be argued that employment confers a benefit not only to the

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such is attempted in a vacuum. Assessing the capability of various individuals to perform without knowledge of the particular task under consideration and its various requirements, or without an individualized determination of their strengths and weaknesses would appear to be impossible.

Garrity v. Galen, 522 F. Supp. 171, 206 (D.N.H. 1981).

58. *See Legal Evasiveness*, *supra* note 6, at 1008 ("If inability to perform . . . is not a valid basis for exclusion from employment, what basis is valid? Must employers distribute jobs by lot?").

59. *See* Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 622-23 (9th Cir. 1982) (spurious job criterion that employee maintain blood sugar below specified level); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1383 (10th Cir. 1981) (improper speculation that applicant was emotionally unstable); *see also* Nelson v. Thornburgh, 567 F. Supp. 369, 379-82 (E.D. Pa. 1983) (refusal to provide reasonable accommodation to otherwise qualified handicapped person), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 955 (1985).

60. The level of scrutiny a court should give to employment discrimination claims under § 504 is unsettled. *Compare* Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983) (rejecting rational basis standard, which requires "factual basis . . . reasonably demonstrating" that conduct was not discriminatory) *and* Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1383-87 (10th Cir. 1981) (rejecting rational basis standard and adopting series of burdens procedure) *with* Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1412 (5th Cir. 1983) (applying "reasonable justification" test) *and* Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981) (applying "reasonable basis" test). *See Analyzing Employment Discrimination Claims*, *supra* note 16, at 884-91.

61. *See* Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1387, 1390 (10th Cir. 1981) (defendants' fear of patients' reactions to residency program applicant's condition of multiple sclerosis not permissible basis for rejecting applicant). In such a situation, the expectation of the employer—to have employees who do not offend the public—should not be considered legitimate.

62. *See* Spectrum, *supra* note 6, at 121. See *supra* notes 55-58 and accompanying text.

63. The use of the qualifier "legitimate" permits a court to reduce or eliminate employer discretion concerning impermissible grounds for rejection. For examples of impermissible employment criteria, see *supra* note 59.

employer, but in the social setting also to the employee, and that its relation to section 504 should account for this social benefit.[64] This view, however, would lead to unmanageable consequences because it would require an employer to make the employment decision not in terms of his expected benefits,[65] but rather in terms of the provision of opportunities to the population at large.[66] The employer under such circumstances would be unable to fill a position without impinging on the "rights" of every other potential employee.[67] Moreover, such a view is contrary to the notion of the job market as a meritocracy:[68] A job is earned, not granted.[69] In the absence of an affirmative action requirement,[70] it is more reasonable to view the ends of employment in terms of the benefits expected by the employer.

2. Post-Secondary Education Programs

A definition of post-secondary education programs should encompass two sometimes competing interests: the student's performance in the course of study[71] and the school's provision of educational opportunity and services.[72]

Quality performance serves two important interests: It protects and enhances the school's reputation[73] and it assures potential employers that

64. *See Legal Evasiveness, supra* note 6, at 1014-15.

65. *See* Spectrum, *supra* note 6, at 121, 127.

66. *See* Fallon, *supra* note 7, at 831-34 (discussing alternatives to merit distribution).

67. *See Legal Evasiveness, supra* note 6, at 1008.

68. See *supra* note 7 and accompanying text.

69. *See* Spectrum, *supra* note 6, at 121 ("[N]o handicapped person is entitled to a particular job; nondiscrimination merely means that handicapped people may not be rejected solely because of their handicaps.").

70. Courts and commentators have criticized the *Davis* Court's confusion of "affirmative action" with "affirmative efforts." *See* Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982); Note, *Accommodating the Handicapped: Rehabilitating Section 504 After* Southeastern, 80 Colum. L. Rev. 171, 185-86 (1980) [hereinafter cited as *Accommodating the Handicapped*]; *Meaning of Discrimination, supra* note 23, at 885-86. The Court clarified its language by equating affirmative action not required by the section with substantial modifications that cause the integrity of the program to suffer. *See* Alexander v. Choate, 105 S. Ct. 712, 721 & n.20 (1985).

71. *See* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (applicant must meet program's requirements for performing in course of study); Doe v. New York Univ., 666 F.2d 761, 775-76 (2d Cir. 1981) (same).

72. *See* 29 U.S.C. § 723(a)(3) (1982) (post-secondary education treated as vocational rehabilitation service); *Accommodating the Handicapped, supra* note 70, at 179 & n.55 (post-secondary education is important in the rehabilitation process). Although this aspect is absent in the employment context, see *supra* notes 64-70 and accompanying text, it is an important aspect of post-secondary education. See *infra* notes 76-77 and accompanying text.

73. *See* Doe v. New York Univ., 666 F.2d 761, 777 (2d Cir. 1981). A post-secondary educational institution is frequently evaluated by published sources on the basis of its student body's past academic achievements and standarized test scores. *See generally* E. Epstein, J. Shostak & L. Troy, Barron's Guide to Law Schools (5th ed. 1983) (directory of American law schools providing such evaluative data). For a general and candid discussion of the undergraduate admissions process and its relation to the school's reputation, see generally Ledger, *The Application Stops Here*, 84 Pa. Gazette 30 (Mar. 1985).

graduates have a particular level of competence.[74] In order to preserve these interests, the definition of the program should allow significant discretion in the admissions process.[75] Making available post-secondary education, however, is a necessary responsibility of these institutions, because of their role in facilitating the integration of handicapped persons into the mainstream of society.[76] Thus, while institutions should be permitted discretion to make admission decisions on the basis of performance, this discretion must be tempered to preserve the strong societal policy that educational opportunities and services be provided to handicapped persons as part of the rehabilitative process.[77] The definition of a post-secondary education program should therefore guide courts in resolving the tension between these competing interests.

There are strong reasons for preferring the performance interests when they conflict with the service interests. The value of a post-secondary education is largely derived from the credibility attached to the degree or certification that the school confers.[78] When performance is compromised, this credibility suffers.[79] As a result, potential employers are less able to rely on a graduate's degree, schools are less able to maintain the reputation on which their continued existence depends, and graduates—handicapped and nonhandicapped alike—find the value of their achievement diluted and subject to question. The risk of such a result overshadows the interest in public access to post-secondary education and would in fact undermine that interest. In the absence of an affirmative action mandate,[80] section 504 should not be read to produce such a result.

The Supreme Court in *Southeastern Community College v. Davis*[81] indicated that the performance aspects of post-secondary education programs should take precedence.[82] The Court found no violation of section 504 when the applicant to a nursing program, who suffered from a seri-

74. *See* Southeastern Community College v. Davis, 442 U.S. 397, 413 n.12 (1979); *see also* Davis v. Southeastern Community College, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976) ("it is completely reasonable and logical for the state to limit enrollment to such persons as are able to meet professional qualifications upon graduation"), *aff'd in part, vacated in part*, 574 F.2d 1158 (4th Cir. 1978), *rev'd*, 442 U.S. 397 (1979).

75. *See* Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981) ("considerable judicial deference must be paid to the evaluation made by the institution"); *cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1977) ("[t]he freedom of a university to make its own judgment as to education includes the selection of its student body") (plurality opinion of Powell, J.); Martin v. Helstad, 578 F. Supp. 1473, 1482 (W.D. Wis. 1983) ("Academic institutions are accorded great deference in their freedom to determine who may be admitted to study at the institution.").

76. *See* 29 U.S.C. § 723(a)(3) (1982) (post-secondary education treated as vocational rehabilitation service); *Accommodating the Handicapped*, *supra* note 70, at 179 & n.55 (post-secondary education is important in the rehabilitation process).

77. *See Accommodating the Handicapped*, *supra* note 70, at 179.

78. *See* Southeastern Community College v. Davis, 442 U.S. 397, 413 & n.12 (1979).

79. *See id.*

80. See *supra* note 41 and accompanying text.

81. 442 U.S. 397 (1979).

82. *See id.* at 410, 413 & n.12.

ous hearing disability, was denied admission because she could not have successfully performed all the relevant tasks required in the course of study.[83] In the Court's view, excusing the applicant from the tasks she could not have performed would produce a "fundamental alteration in the nature of the program."[84] Accordingly, the school did not unlawfully discriminate against the applicant in refusing to admit and subsequently accommodate her.[85] The service aspect of educational opportunity did not outweigh the school's performance concerns.[86] If it had, the Court would have ordered the school to admit the student notwithstanding the diminished quality of performance.

Because it is necessary both to preserve performance and service interests and to recognize the priority of performance concerns, the definition of the post-secondary education program should be *the provision of educational opportunities and services in a manner that does not reduce the quality of performance of the tasks involved in the course of study.* Under this definition, unlawful discrimination will be present when acts or decisions discriminate on the basis of handicap and do not protect performance and service interests.

3. Preschool, Elementary and Secondary Education, and Health, Welfare and Social Services

These programs have been grouped together here because they share the common feature that performance by beneficiaries is generally not a requirement for participation in the program.[87] The nature of these programs depends on the services provided and the intended beneficiaries.

Defining these two elements is a prerequisite to formulating a definition of the program, but it is a difficult task because in most instances these programs involve the distribution of limited resources[88] and because defining the services and beneficiaries will determine how that allo-

83. *See id.* at 409-10.

84. *Id.* at 410.

85. *Id.* at 414.

86. *See id.* at 410, 413.

87. Lower education, as distinguished from post-secondary education, is entirely a service oriented program; an integrity-of-the-program test should therefore proceed the same way for these programs as for health, welfare and social service programs. An arguable exception to the lack of a performance requirement occurs in lower education programs, which are permitted to place students according to their demonstrated ability. *See, e.g.*, Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983); Parents in Action on Special Educ. v. Hannon, 506 F. Supp. 831, 883 (N.D. Ill. 1980). Nonperformance by the student does not bar him from participating in the service—education; rather, he is prevented from obtaining a particular benefit—a regular classroom setting. In this case, performance is more properly viewed as an eligibility requirement. See *infra* text accompanying notes 205-06. It must be noted that the continuing vitality of § 504 claims in the lower education setting is currently in doubt in light of Smith v. Robinson, 104 S. Ct. 3457 (1984), which held that the Rehabilitation Act's remedies are unavailable when a more specific statutory scheme provides a remedy. *Id.* at 3473-74.

88. *See* Alexander v. Choate, 105 S. Ct. 712, 725 (1985) (the allocation of medicaid

cation will proceed.[89] In effect, the courts are determining the potential beneficiaries of the pie and the size of their slices. This is properly a legislative function,[90] but when Congress is silent the courts must supply that determination.

In the services context, a distinction should be made between the services to be provided and the particular benefits offered to beneficiaries. The services, as defined in this Note, are of a general character: They are the goals and purposes of the program. The benefits, as defined here, are merely the means by which the services are rendered. The services must be maintained if the integrity of the program is to be preserved; the particular benefits, however, can and should be altered when necessary to fulfill the nondiscrimination mandate of section 504.[91]

The discretion to determine the specific package of benefits may be conferred upon the federal grantee by statute.[92] When Congress expressly provides for such discretion, there is no need for courts to scrutinize the grantee's determination of the particular benefits provided even

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benefits is a "broad based distributive decision"); Dopico v. Goldschmidt, 687 F.2d 644, 647 (2d Cir. 1982) (describing fund allocation procedures for public transit programs).

89. *See* Alexander v. Choate, 105 S. Ct. 712, 722 (1985) (by defining services as particular benefits to be determined by state, court permitted state to decrease in-hospital medicaid coverage); Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1567-68 (11th Cir. 1983) (by defining lower education program as free education serving particular needs of handicapped children, year-round services are required when appropriate), *vacated on other grounds*, 104 S. Ct. 3581 (1984).

90. *See* Alexander v. Choate, 105 S. Ct. 712, 722 (1985); 45 C.F.R. § 84.4(c) (1984). Under the heading "Programs limited by Federal law," the HHS regulations observe:

> The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited . . . .

Id.

91. *See* Alexander v. Choate, 105 S. Ct. 712, 721 (1985). Distinguishing the benefits of a service program from its goals or purposes is not always a simple matter. In fact, the Supreme Court in *Alexander* had some difficulty making this distinction. Tennessee had reduced its medicaid in-hospital coverage from twenty to fourteen days per year. *Alexander*, 105 S. Ct. at 715. This action was alleged to violate § 504 on the grounds that it had a discriminatory effect on handicapped beneficiaries. *Id.* The Court recognized that "[t]he benefit itself . . . cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Id.* at 721. *But see id.* at 725 (grantee need not alter its benefits even if doing so would achieve program's objectives and permit greater participation by handicapped persons). The Court further determined, however, that the intended beneficiaries are entitled not to broadly conceived "adequate health care," but to a narrowly conceived "particular package of health care services" that may be defined by the organization that provides them—in this case, the state. *See id.* at 722. Such a posture could, as the Court acknowledged, render the nondiscrimination mandate empty of meaning. *See id.* at 721 n.21. Although it recognized that the Act gives the states substantial discretion to select a particular package of benefits, *id.* at 722 (citing 42 U.S.C. § 1396a(a)(19) (1982)), *Alexander* should not be construed to grant broad discretion to other service programs when there is no equivalent congressional authorization.

92. *See* Alexander v. Choate, 105 S. Ct. 712, 722 (1985); 45 C.F.R. § 84.4(c) (1984).

when certain groups may not be adequately served by them.[93] The only requirement section 504 imposes in such circumstances is that the benefits be dispensed without a denial of meaningful access.[94] When Congress is silent, however, courts must scrutinize the determination of the benefits[95] and should alter them if doing so permits handicapped persons to participate and does not undermine the ability of the program to function.[96]

The intended beneficiaries of the program must also be identified. When Congress expressly provides a statutory definition of intended beneficiaries,[97] no judicial construction is necessary or appropriate.[98] When Congress is silent on the matter, however, a judicial construction—not one provided by the grantee—should be provided to define the set of beneficiaries.[99] This construction should be one that permits the greatest participation by handicapped persons without impairing the ability of the program to serve other intended beneficiaries.[100]

The definition of the nature of these service programs should thus be contextual: *the provision of X services to Y beneficiaries.* The variables will be provided either by statute or by judicial construction. Under the integrity-of-the-program test, a violation of section 504 will be present when the services are provided in a discriminatory manner that is not necessary to preserve the ability of the program to provide the services.

II. THE DETERMINATION OF UNLAWFUL DISCRIMINATION: APPLYING THE INTEGRITY TEST TO THE PROGRAM DEFINITIONS

The process of defining federally funded programs is a crucial stage in

93. *See* Alexander v. Choate, 105 S. Ct. 712, 725 (1985). The Court indicated that under *Davis* individual consideration of the needs of handicapped persons would not be required if the cost of such consideration would be excessive. *See id.* This approach meets the integrity-of-the-program test because costs that impair the ability of the program to carry out its purpose are not required. *See Meaning of Discrimination*, *supra* note 23, at 900-02 (advocating a "program impairment" defense for § 504 claims).

When Congress provides for more specific rights and remedies in another statute, resort to § 504 is not available; thus, a § 504 scrutiny is not necessary. *See* Smith v. Robinson, 104 S. Ct. 3457, 3473-74 (1984). Relief under such circumstances must comply with the intent of the more specific statute. *Id.*

94. *See* Alexander v. Choate, 105 S. Ct. 712, 721-22 (1985).

95. *See id.* at 721.

96. *See Meaning of Discrimination*, *supra* note 23, at 900-02.

97. For example, the Education of All Handicapped Children Act, 20 U.S.C. §§ 1411-1420 (1982), requires a recipient's program to include as beneficiaries handicapped children between the ages of three and twenty-one, *see id.* § 1412(2).

98. *See* 45 C.F.R. § 84.4(c) (1984).

99. Just as it could be discriminatory, in the absence of a grant of discretion by Congress, to permit a grantee to define the benefits it provides, *see* Alexander v. Choate, 105 S. Ct. 712, 721 n.21 (1985), it could be equally discriminatory to permit the grantee to define the beneficiaries who will receive them. *See* 45 C.F.R. § 84.4(c) (1984).

100. *See Meaning of Discrimination*, *supra* note 23, at 900-02; *cf.* Alexander v. Choate, 105 S. Ct. 712, 721 (1985) (handicapped person must be provided meaningful access to participation in the program).

developing a principled and comprehensive approach to section 504, but it remains to develop schematic models that will permit consideration of the concepts "reasonable accommodation," "undue hardship," and "otherwise qualified handicapped individuals" within each context. These models will necessarily differ according to the type of program involved because the features requiring preservation will vary.

A. *Employment Programs*

The ability of a handicapped applicant to perform the job's tasks is a relevant and legitimate concern in employment decisions;[101] any interpretation of section 504 that would diminish the role of ability in an employer's decisionmaking process would not only ignore the Supreme Court's desire to permit federal recipients to preserve the integrity of their programs[102] but would also misconstrue the import of the statute itself.[103] Although the regulations impose a reasonable accommodation requirement on employers,[104] an affirmative action requirement implying some compromise of standards on the part of the employer is conspicuously absent from the language of the statute.[105] Accordingly, any interpretation of section 504 must preserve an employer's discretion to base decisions on concerns of ability.

Two issues that are best kept distinct arise in evaluating employment discrimination claims under section 504. The first is the issue of quality of performance, which under the integrity-of-the-program test is considered after the appropriate accommodations to the applicant's handicap are identified. The second, which under the test is considered only after the accommodated applicant is determined to be qualified, addresses whether the cost of these accommodations constitutes undue hardship on the employer. If the applicant is not qualifed, the issue of cost should never arise; likewise, the issue of quality should not be influenced by concerns of cost. A court should take great care not to blur the distinction between the two issues.

1. Quality in View of Appropriate Accommodations

The issue of quality—defined here as the satisfaction of the employer's expectation of benefits[106]—cannot be divorced from section 504's policy of nondiscrimination. The statute itself extends its protection to "other-

101. See *supra* notes 55-63 and accompanying text.

102. *See* Alexander v. Choate, 105 S. Ct. 712, 720 (1985); Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979). Because performance is the central element in the employment program definition, a requirement that an employer hire less than the best capable applicant would constitute a "fundamental alteration in the nature of the program" and would be an unacceptable extension of § 504's meaning. *See id.*

103. See *supra* notes 5-7 and accompanying text.

104. See *supra* note 10 and accompanying text.

105. See *supra* note 41.

106. *See* Spectrum, *supra* note 6, at 121, 127.

wise qualified handicapped individuals."[107] This standard simultaneously calls for individualized consideration of a particular applicant's qualifications in relation to the desired job,[108] and recognition that an employer may demand a particular level of performance above mere competence.[109]

The notion "handicapped," which involves a characteristic of the applicant's relation to the rest of the human species, must therefore be distinguished from the notion "incapable," which involves a much more specific relationship: that between the person and the task.[110] So understood, an incapable applicant is one who, for whatever reason, cannot perform the designated tasks as required. Denial of employment to such an applicant should not be unlawful.[111] There would be a violation of the statute, however, if an applicant's capability were not meaningfully considered and he were simply presumed—by virtue of his handicap—to be inadequate.[112]

The HHS regulations on this issue embrace two extremes and are both inconsistent and overinclusive. Under the first approach, section 504 is violated any time an applicant who is not incapable is denied employment.[113] The employer would arguably be obligated to hire that applicant even if he hoped to or actually was able to find a more qualified candidate.[114] By requiring an employer to hire a less qualified handicapped individual over a more qualified nonhandicapped—or even hand-

107. 29 U.S.C. § 794 (1982). See *supra* note 9 and accompanying text.

108. *See* Spectrum, *supra* note 6, at 100-01; *see, e.g.*, Longoria v. Harris, 554 F. Supp. 102, 108 (S.D. Tex. 1982) (leg amputees cannot be categorically excluded as school bus drivers); Doe v. Syracuse School Dist., 508 F. Supp. 333, 337 (N.D.N.Y. 1981) (mental illness deemed an invalid exclusionary criterion when irrelevant to job requirements); Coleman v. Casey County Bd. of Educ., 510 F. Supp. 301, 303 (W.D. Ky. 1980) (state regulation requiring two natural legs for school bus driver license unlawfully excluded otherwise qualified handicapped persons). See *infra* notes 121-25 and accompanying text.

109. *See* Norcross v. Sneed, 573 F. Supp. 533, 544 (W.D. Ark. 1983) (employer may hire better qualified applicant), *aff'd*, 755 F.2d 113 (8th Cir. 1985).

110. *See* Burgdorf, *Who are "Handicapped" Persons?*, in The Legal Rights of Handicapped Persons 4-10 (R. Burgdorf, Jr. ed. 1980) (distinguishing "disabled" from "handicapped"); *see also* 45 C.F.R. §§ 84.13, .14 (1984) (employment criteria and preemployment inquiries must be stated in job-related terms).

111. See *supra* notes 9, 109 and accompanying text.

112. See *infra* notes 121-25 and accompanying text.

113. *See* 45 C.F.R. §§ 84.3(k)(1), 84.12(b) (1984). Because the mere ability to perform essential job tasks is the evaluative standard, and because job modification/restructuring is among the reasonable accommodations contemplated, a capable candidate, with accommodation, is arguably never less capable to perform redefined tasks.

114. The regulations, by articulating job qualification as a set of minimum specifications, do not permit evaluation and differentiation on the basis of ability above the regulated minimum. *See* 1 Handicapped Requirements Handbook ¶ 630:1 (Federal Programs Advisory Service July 1983). Having determined, for example, that the "occasional lifting of 50 pound boxes" is nonessential and can be performed by another employee, *see id.*, a court has no basis to differentiate between the accommodated applicant and the applicant who is suddenly no longer better qualified.

icapped[115]—applicant, this approach exceeds the scope of the statute's nondiscrimination mandate. The absence of an affirmative action requirement[116] suggests that section 504 does not compel this low threshold of quality. Moreover, imposing this threshold would effectively strip the employer of his decisionmaking authority with respect not only to those he chooses to hire but also to the tasks he requires his employees to perform. Section 504's application would be virtually limitless.[117]

At the other extreme are the regulations that tolerate blanket exclusions of all individuals possessing a particular characteristic—regardless of whether an individual within the group is in fact capable—if the employer can articulate a rationale for such an exclusion.[118] This approach enables an employer to avoid considering a candidate's actual ability entirely and permits the inference that the mere presence of a handicap renders a candidate unworthy of the job.[119] As such, it undermines the statutory purpose of the Rehabilitation Act: to guarantee equal opportunity to handicapped persons.[120] Equal opportunity requires that each applicant receive individual consideration;[121] without this minimum, discrimination perpetuated by stereotyping will never be eradicated.[122] Moreover, blanket exclusions draw bright lines that artificially distin-

115. This absurd result merely takes the approach described in note 114, *supra*, to its unprohibited extreme.

116. See *supra* note 41 and accompanying text.

117. *See Legal Evasiveness*, *supra* note 6, at 1008.

118. *See* 45 C.F.R. § 84.13(a) (1984) (tests or criteria that exclude on basis of handicap need only be shown to be job-related).

119. An example of blanket exclusions in a context other than employment can be found at 49 C.F.R. § 391.41(b) (1984). The Department of Transportation lists various medical infirmities that are deemed to render an individual incapable of holding a valid interstate commercial driver's license. Thus, a diabetic on insulin, *id.* § 391.41(b)(3), and an epileptic, *id.* § 391.41(b)(8), may not be employed as interstate truck drivers, no matter how well controlled their afflictions are. *See* Costner v. United States, 720 F.2d 539, 543 (8th Cir. 1983); Monnier v. United States Dep't of Transp., 465 F. Supp. 718, 724 (E.D. Wis. 1979). These cases do not trigger § 504 because there is no recipient of federal funds involved. *See* 29 U.S.C. § 794 (1982).

120. *See* 29 U.S.C. § 701 (1982).

121. *See* Spectrum, *supra* note 6, at 101 ("The concern is individual ability, not the presence or absence of a label."); *Accommodating the Handicapped*, *supra* note 70, at 175 ("the statutory scheme contemplates that employers . . . will base their determinations of whether a disabled applicant is 'otherwise qualified' for a particular program upon the individual's actual capability . . . ."); *see, e.g.*, Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 621 (9th Cir. 1982) ("Blanket requirements must . . . be subject to the same rigorous scrutiny as any individual decision denying employment to a handicapped person."); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1383 (10th Cir. 1981) (upholding trial court's determination that applicant was improperly excluded on basis of handicap when assumptions about relation of handicap to job were incorrect); Davis v. Bucher, 451 F. Supp. 791, 796 (E.D. Pa. 1978) (applicants who meet every other selection criteria cannot be categorically excluded by reason of their former drug abuse). Moreover, reasonable accommodation requires the elimination of blanket exclusions. *See* Gittler, *supra* note 24, at 980.

122. *See* Spectrum, *supra* note 6, at 100; *Accommodating the Handicapped*, *supra* note 70, at 174-75.

guish between degrees of disability.[123] The practice of labeling an individual as qualified or unqualified simply because he falls on one side or the other of this arbitrary line ignores the fact that ability is distributed across a spectrum, not in discrete categories.[124] As a result of such practices, an individual might be denied employment on the basis of a condition that does not in fact impair his performance of the particular tasks.[125]

The integrity-of-the-program test suggested here exercises a principled limitation on each of these extreme interpretations of section 504. By affording an employer the flexibility to consider not merely whether, but how well, an applicant can perform the job's tasks, the test ensures that quality will not be compromised and that the job's integrity will not be impaired.[126] Similarly, by requiring an employer to look beyond the mere existence of an applicant's handicap, consideration is given to the particular applicant's ability to perform the tasks associated with a job.[127] Thus, under the integrity-of-the-program test, individual consideration of ability is a threshold requirement of section 504.

Discrimination on the basis of ability, although permitted by the statute[128] and regulations,[129] is nevertheless limited by the statute's purpose and design: to remedy practices that discriminate solely on the basis of one's handicap[130] and to require reasonable accommodations for handicapped individuals seeking employment.[131] Under the regulations, an employer evaluating an applicant for employment is required to consider

123. *See* Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 620 (9th Cir. 1982) (employer, by requiring blood sugar to be maintained at or below a particular level, drew a line that medical opinion found to distinguish unreasonably between applicant's ability and health risk); *see generally* Spectrum, *supra* note 6, at 86-101 (describing degrees of handicap as a spectrum).

124. *See* Spectrum, *supra* note 6, at 87-89.

125. See *supra* note 119.

126. An employer is always justified in preserving the integrity of the job by choosing the best qualified candidate. *Cf.* 45 C.F.R. § 84.3(k)(1) (1984) (permitting employer to protect "essential functions" of job). Protecting this discretion therefore requires a very narrow construction not only of what constitutes a nonessential job function, but also of the job-restructuring requirement. See *infra* notes 146-48 and accompanying text.

127. See *supra* note 121 and accompanying text.

128. Discrimination is unlawful only if the applicant is "otherwise qualified." 29 U.S.C. § 794 (1982). The Supreme Court has interpreted "otherwise qualified" to mean "able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

129. *See* 45 C.F.R. § 84.3(k) (1984). See *supra* note 9.

130. See *supra* notes 4-7 and accompanying text.

131. See *supra* note 10. In amendments to the Rehabilitation Act, Congress recognized the need for reasonable accommodation to help handicapped persons. *See* S. Rep. No. 890, 95th Cong., 2d Sess. 16, 16-17; S. Rep. No. 1297, 93d Cong., 2d Sess. 56, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6406; *Meaning of Discrimination*, *supra* note 23, at 890 & n.43. The Supreme Court has also recognized the duty to accommodate. *See* Southeastern Community College v. Davis, 442 U.S. 397, 412-13 (1979) (dictum). The reasonableness of the accommodations required by § 504 should depend on the performance of the accommodated employee and the cost of accommodation to the employer. See *supra* notes 106-09, *infra* notes 149-57 and accompanying text.

ways to adapt job requirements, make physical alterations, and in other ways provide reasonable accommodations for handicapped individuals.[132] Intended to redress the problems faced by handicapped persons in the job market, this obligation affords a handicapped applicant equal opportunity to meet the job's specifications.[133] It follows, therefore, that an applicant's qualifications for a particular job should not be assessed until accommodations that may qualify the applicant are identified.

Once the potential accommodations are taken into account, a court should then determine whether the applicant's employment will undermine the integrity of the program. The applicant should be able to perform the job's tasks in a manner consistent with the employer's expectation of benefits from the successful completion of those tasks.[134] If the applicant cannot meet this standard even with accommodation, it would not be unlawful to deny him employment.

Competence always affects a determination of quality; it should therefore always be considered to be a legitimate expectation.[135] An employer's expectation of safety[136] and organizational efficiency[137] may similarly affect the overall determination of quality. A court should protect these expectations if it determines that the integrity of the program requires such protection. Expectations that do not preserve the integrity of the program should be regarded as impermissible grounds for rejecting an applicant.

The safety of third persons and the protection of property should be considered legitimate expectations.[138] An employer has both the right to

132. *See* 45 C.F.R. § 84.12(b) (1984).

133. See *supra* notes 10-12 and accompanying text. One commentator has proposed an "equal-burdens" standard for determining whether accommodations are required. Under this standard, handicapped persons would be required to "confront the same burdens as nonhandicapped persons." *See Meaning of Discrimination*, *supra* note 23, at 899. This approach fails to address two problems identified by the Supreme Court: First, because the standard requires that employers reduce their expectations to the lowest common denominator by presenting all applicants, no matter how disabled, "equal burdens," it is an impermissible extension of the section in the absence of an affirmative action requirement; second, because the standard does not create meaningful limits to the application of the section, the varying degrees of disability create a bottomless lowest common denominator. A principled limitation must focus on the performance demanded by the employer; a focus merely on the capabilities of the applicant/employee is as open-ended as the varying number and degrees of handicaps.

134. *See* Spectrum, *supra* note 6, at 121, 127.

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

136. See *infra* notes 138-45 and accompanying text.

137. See *infra* notes 146-48 and accompanying text.

138. Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 623 n.3 (9th Cir. 1982). The statutory definition of "handicapped individual" explicitly takes this into account for alcohol and drug abusers, by excluding those alcohol and drug abusers from the protection of § 504 who "would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B) (1982). This concern is equally valid for other classes of handicapped individuals.

It is important to note that § 706(7)(B) permits exclusion of only those alcohol and drug users whose use constitutes a *direct* safety threat. *See* 29 U.S.C. § 706(7)(B) (1982). The use of the qualifier "direct" makes it clear that a mere "remote possibility" of injury

expect safe performance by his employees[139] and the duty to guard against injury to persons and property.[140] A court should therefore protect the integrity of the job by permitting an employer to insist on a level of performance that avoids such injury.[141]

When the employer is concerned with the threat of injuries to the applicant/employee rather than to third persons, different issues arise. The employer has a stake in the health of his employees.[142] On the other hand, an individual has a right to expose himself to risk.[143] When these interests clash, a court must determine which has priority. In light of the purpose of the Rehabilitation Act—to afford equal opportunity to handicapped individuals[144]—the employer's interests should be secondary to the autonomy of the handicapped applicant.[145]

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is not a permissible ground for rejection. *See* Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983); *Analyzing Employment Discrimination Claims, supra* note 16, at 887.

Because a claimant's qualification for the task is a threshold issue that determines whether he has standing to assert his claim, evaluating the safety issue at this stage is unfair to the claimant because it precludes consideration of possible accommodations that might eliminate the safety risks and, hence, render the job applicant qualified. The safety concerns should be considered not at the stage of determining whether the applicant is a handicapped person under the statutory definition before accommodations are considered, but rather at the stage when the applicant is determined to be qualified or not in light of these potential accommoations. *See The Right Tools for the Job, supra* note 47, at 537 n.15, 546 (suggesting linear model of analysis similar to the model proposed in this Note).

139. *See* Gittler, *supra* note 24, at 980; *The Right Tools for the Job, supra* note 47, at 551-52.

140. *See* Restatement (Second) of Agency § 219 (1957); Restatement (Second) of Torts § 317 (1976); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts, § 70, at 501-02 (5th ed. 1984). *But cf.* Ross v. Gama Shoes, Inc., 28 Fair Empl. Prac. Cas. (BNA) 150, 152 (D.C. Sup. Ct. 1980) (in action brought under District of Columbia handicap discrimination law, employer found to have no liability under respondeat superior theory because employee's actions were involuntary epilleptic seizures outside scope of employment).

141. Obviously, an employer cannot insist on the elimination of all safety risks, because this would eliminate from consideration all candidates—handicapped and nonhandicapped alike. *See* Strathie v. Department of Transp., 716 F.2d 227, 232 (3d Cir. 1983) (elimination not of all risks but merely "appreciable" risks is proper concern of school bus driver licensing program, or else anyone who wore eyeglasses would pose a risk and be rejected); *The Right Tools for the Job, supra* note 47, at 561 ("Total deference to the safety-of-others defense is unwarranted."). See *supra* note 138. Moreover, these concerns must not legitimize a blanket exclusion that avoids individual consideration and possible accommodations. *See* Gittler, *supra* note 24, at 979; *The Right Tools for the Job, supra* note 47, at 561-62.

142. *See* Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 623 (9th Cir. 1982) (citing importance of "consistent attendence and an expectation of continuity" to employer). An employee's health will bear directly on his rate of absenteeism and length of career, *see id.*, and indirectly on the employer's expense for worker's compensation claims, *see The Right Tools for the Job, supra* note 47, at 558.

143. *See* Spectrum, *supra* note 6, at 85; *cf.* Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 953-54 (D.N.J. 1980) (lower education context).

144. 29 U.S.C. § 701 (1982).

145. *See* Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 623 (9th Cir. 1982); *The Right Tools for the Job, supra* note 47, at 561; *cf.* Poole v. South Plainfield Bd.

An employer's interest in preserving his organizational efficiency could also justify denial of employment to a handicapped applicant. The organizational structure enables an employer to design the allocation and performance of tasks in a way that promotes an integrated and well-supervised workplace.[146] Although a handicapped person may be able to perform some of the tasks an employer assigns to a job, his inability to perform other tasks could, under the HHS regulations, require the employer to restructure his plant design or the allocation of tasks as an accommodation for the applicant.[147] When this accommodation adversely affects the quality of the workplace's output, a court should consider the accommodation unreasonable;[148] a refusal to restructure would thus not constitute a violation of section 504.

2. Cost of Accommodation

Considerations of cost have no relevance to whether a candidate is qualified for a particular job.[149] Cost is, however, a significant factor in determining the reasonableness of the accommodations that qualify the applicant for the job.[150] Having established that the quality of performance will not suffer if the applicant is employed, a court must still be satisfied that the cost of accommodation will not constitute undue hardship to the employer's overall program.[151]

The issue of cost should be examined in the larger context of the organization in which the job exists.[152] Here, the nature of the program refers not to the performance of tasks and the expectation of benefits, but

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of Educ., 490 F. Supp. 948, 953-54 (D.N.J. 1980) (in lower education context "[t]he purpose of § 504 . . . is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them").

146. *See* Simon v. St. Louis County, 563 F. Supp. 76, 80-81 (E.D. Mo. 1983), *aff'd*, 735 F.2d 1082 (8th Cir. 1984); *The Right Tools for the Job*, *supra* note 47, at 551-52.

147. See 45 C.F.R. § 84.12(b) (1984).

148. *See* Simon v. St. Louis County, 563 F. Supp. 76, 80-81 (E.D. Mo. 1983) (accommodations that would adversely affect morale and efficiency of police department are unreasonable), *aff'd*, 735 F.2d 1082 (8th Cir. 1984); 1 Handicapped Requirements Handbook ¶ 640.4 (Federal Programs Advisory Service Jan. 1983) (alteration of workplace that defeats objectives of facility would be unreasonable).

149. See *supra* note 45 and accompanying text.

150. *See* Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979); 45 C.F.R. § 84.12(a), (c) (1984); *Meaning of Discrimination*, *supra* note 23, at 900-02; *The Right Tools for the Job*, *supra* note 47, at 556.

151. *See* 45 C.F.R. § 84.12(a), (c) (1984); *The Right Tools for the Job*, *supra* note 47, at 537 n.15.

152. *See Meaning of Discrimination*, *supra* note 23, at 900-02 (arguing for a strict definition of undue hardship to protect the statutory purpose). Because marginal cost will commonly be incurred with any accommodation, *see Legal Evasiveness*, *supra* note 6, at 1012, such a strict definition is necessary. Organizational restructuring as an accommodation for one applicant may subject the organization to similar accommodations throughout its structure. Evaluating the burden involved, however, should not be influenced by the cumulative effect of future accommodations because at the point accommodations become onerous, they constitute undue hardship and will not be required.

rather to the particular purpose of the organization receiving federal funds.[153] When the cost of accommodation is so substantial that the organization will have to fundamentally alter its overall program in order to absorb it,[154] the cost constitutes undue hardship and is therefore unreasonable. The undue hardship standard therefore should be relative to each organization,[155] and should be measured by whether the integrity of the program is endangered.[156] For example, if a medical clinic does not have the resources to transcribe all of its records into braille so that a blind clerk can be hired, but a major metropolitan hospital does, the cost associated with the accommodation should constitute undue hardship for the clinic but not for the hospital.[157]

Cost to the program includes not only direct expenditures of money, but also the consequences of a less efficient organizational structure.[158] The HHS regulations identify job restructuring as a possible accommodation to qualify the handicapped applicant for employment.[159] The nature of the program determines the reasonableness of a particular restructuring accommodation. If the requested restructuring would result in an impairment of the program's ability to carry out its organizational purpose, a court should consider the accommodations unreasonable.[160] Accordingly, it should find no violation if a handicapped applicant is rejected under these circumstances.

The regulations speak in terms of "incidental" and "essential" job functions: When the restructuring involves only the elimination or modification of incidental tasks, the accommodations are reasonable and the employer has an obligation to implement them;[161] when the restructuring entails the elimination or modification of tasks deemed essential, however, the accommodations are neither reasonable nor required.[162] The characterization of a task as "incidental" or "essential" to a particular

153. *See Meaning of Discrimination*, *supra* note 23, at 900-02.

154. *See* Alexander v. Choate, 105 S. Ct. 712, 720 (1985) (quoting Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979)).

155. *See Meaning of Discrimination*, *supra* note 23, at 901.

156. *Id.* at 900-01 (cost alone is insufficient to establish undue hardship; cost must impair ability of program to carry out its purpose); *see* Wegner, *supra* note 21, at 479 (recognizing "cost-plus defense" focusing on either ability of defendant to bear costs or disproportion of costs to benefit).

157. Examples used by the HHS analysis of final regulations indicate similar results: Small day care center may only be required to expend small amount to re-equip telephone for hearing-impaired applicant, while school district may have to provide an aide for blind applicant to teaching position, *see* 45 C.F.R. pt. 84, app. A, ¶ 16, at 308 (1984); provision of interpreter for deaf employee could be reasonable for state welfare agency, yet undue hardship for foster home care services, *id.*

158. *See* Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983); Simon v. St. Louis County, 563 F. Supp 76, 80-81 (E.D. Mo. 1983), *aff'd*, 735 F.2d 1082 (8th Cir. 1984); *The Right Tools for the Job*, *supra* note 47, at 551-52.

159. *See* 45 C.F.R. § 84.12(b) (1984).

160. See *supra* notes 155-57 and accompanying text.

161. *See* 45 C.F.R. § 84.3(k)(1) (1984).

162. *See Legal Evasiveness*, *supra* note 6, at 1011. When the restructuring eliminates or modifies essential tasks, the integrity of the program is impaired, even if the program

employment context often requires subjective evaluation;[163] accordingly, the employer's characterization should be accorded great respect.[164] The consequences of interfering with job structure go beyond the limited context of one particular job: If one job must be restructured, it may be difficult, if not impossible, to contain this obligation, and the employer could conceivably lose the ability to structure his workplace at all.[165] At the same time, invidious discrimination should not be permitted under the guise of organizational structure; when the existing structure does not best preserve the integrity of the organization, the duty to reasonably accommodate may require restructuring.[166]

B. *Post-Secondary Education Programs*

Admission decisions in post-secondary education programs rest heavily on evaluations of ability[167] and raise many of the issues that are pertinent in the employment program context.[168] Although post-secondary educational institutions have a public responsibility to provide educational opportunities and resources,[169] society's interest in preserving the quality of post-secondary education demands that a school's insistence on able performance take precedence over its service function if these interests conflict.[170] Nevertheless, because of the school's service function, under the integrity-of-the-program test proposed here the duty to accommodate[171] contemplates greater affirmative efforts on the part of these programs than are required in the employment context.[172]

A school should not exclude an applicant from consideration for admission solely on the basis of his handicap.[173] These blanket exclusions should be considered impermissible because individual consideration is the minimum that equal opportunity demands.[174] At the same time,

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can survive the restructuring. The employer should be permitted to best organize his workplace, not merely to organize it well. See *supra* notes 55-63 and accompanying text.

163. This recognizes that the employer is in the best position to know his requirements. *See Analyzing Employment Discrimination Claims*, *supra* note 16, at 896-97.

164. If the employer is penalized for his superior knowledge of the workplace by carrying the burden of proof concerning accommodations, *see id.*, he should likewise be accorded deference to his superior knowledge as to which job functions are essential.

165. This would undermine the integrity of the program by vitiating employer discretion. See *supra* notes 55-63 and accompanying text.

166. *See* 45 C.F.R. § 84.12(b)(2) (1984); *see also Legal Evasiveness*, *supra* note 6, at 1012 (normative assumptions about the design of the workplace should be flexible to achieve greater participation by handicapped persons).

167. See *supra* notes 73-75, 78-86 and accompanying text.

168. *See* Southeastern Community College v. Davis, 442 U.S. 397, 413 & n.12 (1979). Post-secondary education programs typically involve some aspect of job training. *See The Right Tools for the Job*, *supra* note 47, at 556 n.167.

169. See *supra* notes 76-77 and accompanying text.

170. See *supra* notes 78-86 and accompanying text.

171. See *supra* notes 10-12 and accompanying text.

172. *See Accommodating the Handicapped*, *supra* note 70, at 179.

173. *See* 29 U.S.C. § 794 (1982).

174. See *supra* notes 118-25 and accompanying text.

however, the school should not be required to admit an applicant who is just minimally capable.[175] The school and the students, as well as society, have a legitimate interest in seeking the best qualified students;[176] tolerating a lower standard of performance by handicapped students, in the absence of an affirmative action requirement, would impermissibly jeopardize the integrity of the program.[177]

A school should not determine whether an applicant is qualified for the course of study, however, without fully considering appropriate accommodations.[178] Although not required to sacrifice the overall quality of its student body or teaching practices, a school may nevertheless be required to alter considerably its presentation of services in order to permit participation by the handicapped applicant.[179] For example, if a blind person, in order to facilitate his studies, requests exemption from a school policy prohibiting the taping of lectures, a court should find it reasonable and in keeping with the spirit of the statute to require the

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175. One federal court recognized this:

> Another factor which must be taken into account is that the qualification of a handicapped person for admission to an institution turns not only on whether he or she meets its reasonable standards but whether the individual, where a few (in this case 170) must be chosen out of thousands of applicants, is as well qualified despite the handicap as others accepted for one of the limited number of openings. In performing the difficult task, where there are more qualified applicants than places available, of making comparative judgments to determine which are the most promising candidates, the institution is not required to accept a qualified handicapped person if the handicap renders that individual less qualified than other qualified applicants.

Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981). The United States Commission on Civil Rights has also recognized this:

> Unlike elementary and secondary education, there is no right to enrollment in college or a vocational training program, per se. Admission to higher education programs raises threshold issues of merit and competition that are not a factor at earlier levels of schooling. Consequently, the right to individualized opportunity in higher education, although extensive, is not as sweeping.

Spectrum, *supra* note 6, at 120.

176. *See* Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981). See *supra* notes 78-86 and accompanying text.

177. Considerations of quality in the post-secondary education context, as in the employment setting, often involve concerns of safety. *See* Southeastern Community College v. Davis, 442 U.S. 397, 413 n.12 (1979); Grimard v. Carlston, 567 F.2d 1171, 1174 (1st Cir. 1978); Wright v. Columbia Univ., 520 F. Supp. 789, 791 (E.D. Pa. 1981). The same standards should apply to academic and employment programs in determining whether safety is a protectable interest for the school. See *supra* notes 138-45 and accompanying text.

178. *See* Southeastern Community College v. Davis, 442 U.S. 397, 412-13 (1979); Camenisch v. University of Tex., 616 F.2d 127, 133 (5th Cir. 1980), *vacated as moot and remanded*, 451 U.S. 390 (1981); Crawford v. University of N.C., 440 F. Supp. 1047, 1059 (M.D.N.C. 1977); Barnes v. Converse College, 436 F. Supp. 635, 637 (D.S.C. 1977); 45 C.F.R. § 84.44 (1984).

179. The regulations indicate possible accommodations or modifications, including "changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted." 45 C.F.R. § 84.44(a) (1984).

school to accommodate him.[180] The change in policy would have no effect on the integrity of the program, because the applicant so accommodated would satisfy the school's performance requirements. Thus, in the absence of any other performance concern, the school could not lawfully deny the applicant admission.

A school may, however, refuse to admit the handicapped applicant if accommodation would not render the applicant qualified.[181] This was the situation faced by the school in *Southeastern Community College v. Davis*.[182] An applicant to the school's nursing program had a serious hearing disability. The suggested accommodations—the elimination of independent clinical courses—would have forced the school to admit, and ultimately to certify as capable, a less qualified student, who "would not receive even a rough equivalent of the training" the school normally provided its graduates.[183] Under such circumstances, a refusal to accommodate is necessary to protect the integrity of the program and therefore should be considered lawful.[184]

Once appropriate accommodations are identified and the applicant is found to be qualified, denial of admission should be unlawful unless the cost associated with the accommodations constitutes undue hardship to the post-secondary school's program.[185] Undue hardship should be found when the associated cost undermines the program's ability to perform its organizational purpose.[186] Under this standard, if a student requires particularly expensive technology in order to become qualified, a school may lawfully refuse to accommodate the student with such technology if the expense is beyond the school's budget.[187]

A post-secondary school's public service function requires these programs to make greater efforts than employers to accommodate handicapped applicants;[188] however, like employment programs, undue

180. *See* 45 C.F.R § 84.44(b) (1984).

181. *See* Southeastern Community College v. Davis, 442 U.S. 397, 414 (1979).

182. 442 U.S. 397 (1979).

183. *Id.* at 410.

184. Although it has been argued that the school could have modified its program to fit the abilities of Ms. Davis, *see The Right Tools for the Job*, *supra* note 47, at 554-55, such a view would allow the integrity of the program to be impaired and would upset the priority of performance interests and admission discretion over service interests. See *supra* notes 73-86 and accompanying text.

185. *See* Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979); *Meaning of Discrimination*, *supra* note 23, at 900-02. *But see Accommodating the Handicapped*, *supra* note 70, at 179 (inferring that cost is not a factor in requiring post-secondary education institutions to effect modifications); *see also* Barnes v. Converse College, 436 F. Supp. 635, 638 (D.S.C. 1977) (despite possible financial burden, accommodations are required).

186. *See Meaning of Discrimination*, *supra* note 23, at 900-02.

187. To effect such accommodations, the school would have to divert resources earmarked to serve other students to permit the handicapped student admission. When the resources are substantial, it would constitute "a fundamental alteration in the nature of [the] program" and hence would exceed the scope of § 504. Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979).

188. *See Accommodating the Handicapped*, *supra* note 70, at 179.

hardship depends on the post-secondary school's ability to absorb the cost of accommodation.[189] The determination of undue hardship will directly affect the allocation of a school's scarce resources.[190] If the cost of accommodating a handicapped applicant would impair the ability of the school to serve the needs of its other students, a court would have to balance the interests of the handicapped students against those of the non-handicapped students; the absence of an affirmative action requirement should normally permit a school to refuse to accommodate.[191]

C. *Services*

The process of limiting the application of section 504 to preserve the integrity of federal programs is somewhat simplified in the context of lower education and health, welfare and social services.[192] Because receipt of benefits is not conditioned on a participant's performance,[193] individual ability is irrelevant. The program's sole purpose is to provide particular services to intended beneficiaries.[194]

Once these services and beneficiaries have been defined, the viability of a section 504 claim against the program should depend on the determination of two threshold questions: whether the specific benefits sought by the handicapped claimant are within the ambit of the defined services, and whether the claimant is an intended beneficiary. If the court finds the handicapped claimant to be entitled to the particular benefits he seeks, the federal grantee generally cannot assert that accommodations will undermine the integrity of the program, because service is the program's only function.[195] The federal grantee can, however, refuse to ac-

189. For a discussion of undue hardship in the employment context, see *supra* notes 154-57 and accompanying text.

190. The determination is problematic and contextual; nevertheless a court should not find a violation for failure to allocate these resources to accommodations when it finds the integrity of the program would suffer. This guideline could prevent the dilemma faced by one district court:

> Defendant institution . . . is justifiably concerned with the financial burden which it may ultimately have to bear as a result of compliance with § 794 in the future. Although the danger of future expenditures under this statute is not a proper consideration in this lawsuit, this court is 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.

Barnes v. Converse College, 436 F. Supp. 635, 638 (D.S.C. 1977). Under the integrity-of-the-program test, such cumulative burdens are properly considered by the court only when they actually constitute undue hardship.

191. See *supra* notes 41, 70 and accompanying text.

192. The application of § 504 to lower education programs is limited by the more specific remedies available under the Education of all Handicapped Children Act; resort should be had not to § 504 but to the more specific remedies available under the more specific statute. *See* Smith v. Robinson, 104 S. Ct. 3457, 3473-74 (1984).

193. See *supra* note 87 and accompanying text.

194. See *supra* note 91 and accompanying text.

195. An exception arises when permitting participation by the applicant poses a safety hazard to other intended beneficiaries. *See* Paralyzed Veterans of Am. v. CAB, 752 F.2d

commodate the handicapped claimant, even if he is an intended beneficiary, when the cost of accommodation constitutes undue hardship.[196]

Undue hardship should be found when the cost of accommodation impairs the ability of the program to function—that is, to provide services to its intended beneficiaries. Undue hardship invariably reflects the problem of scarce resources.[197] This problem is particularly acute when a program is funded entirely by public monies, as the programs in this catagory often are.[198] The determination of undue hardship should vary according to the particular program and should reflect the intent of section 504 that available funds be spent in a nondiscriminatory manner.[199]

The mass transit setting provides a good illustration of the proper application of this framework. A local transit authority should not be permitted to define its services as "riding on the subways, buses and other presently available modes," because such a definition might prevent the participation of handicapped persons. This narrow definition is not necessary to limit the receipt of services to the population of intended beneficiaries, because everyone—or at least everyone who can pay the fare—is intended to benefit. In the absence of a legislative determination,[200] the services should be termed "transportation"; this broader definition increases the likelihood that handicapped persons can participate in the program, because accommodations need not be limited to presently available modes of transportation. Accommodations may not be required under this broader definition, however, when particular modes already exist and there are no funds available to develop alternative methods of transportation that will permit greater participation by the handicapped. In such a situation, the transit authority can properly claim that the in-

694, 720-21 (D.C. Cir. 1985); Jacobson v. Delta Airlines, 742 F.2d 1202, 1206 (9th Cir. 1984); Cavallaro v. Ambach, 575 F. Supp. 171, 175 (W.D.N.Y. 1983). The standard for safety as a protectable interest should be the same as in the employment context. For a discussion of safety in the employment context, see *supra* notes 136-43 and accompanying text.

196. *See* Alexander v. Choate, 105 S. Ct. 712, 725 (1985); *Meaning of Discrimination*, *supra* note 23, at 900-02.

197. *See, e.g.*, Dopico v. Goldschmidt, 687 F.2d 644, 653 (2d Cir. 1982); American Public Transit Ass'n v. Lewis, 655 F.2d 1272, 1278 (D.C. Cir. 1981); Bartels v. Biernat, 427 F. Supp. 226, 232 (E.D. Wis. 1977).

198. Most of these cases arise with regard to lower education, public transit settings, and public health programs, all of which are primarily supported by public monies.

199. The regulations provide a framework for analyzing the actions of federal recipients. *See* 45 C.F.R. § 84.4 (1984). Among the provisions is the following:

> [A]ids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

Id. § 84.4(b)(2). Whether § 504 extends to the disparate effects analysis implied by the regulations was an issue expressly not reached by the Supreme Court. *See* Alexander v. Choate, 105 S. Ct. 712, 720 (1985).

200. See *supra* note 54.

tegrity of its program—that is, its ability to provide transportation—will be substantially undermined if required to develop these alternative methods. Even under this definition, however, when the transit authority possesses or is granted more funds than are necessary to maintain the present system, those funds should be used in a manner that affords handicapped persons the greatest participation.[201]

Determining a legitimate allocation of resources may impose significant burdens on service program administrators. The Court in *Alexander v. Choate*[202] indicated that federal grantees were not obligated to prepare "handicapped impact statements" for every action that might adversely affect access to the service.[203] A federal grantee may escape these administrative burdens by allocating resources in a reasonable manner.[204] If at some later time, however, it becomes apparent that the chosen allocation violates section 504, the federal grantee should change its allocation. Failing this, a court must not shy away from requiring such a change if the section is to have its intended effect.

The two components of the service program—the services and the intended beneficiaries—must be preserved if the program is to carry out its organizational purpose.[205] The program may often impose eligibility requirements in order to limit its services to its intended beneficiaries.[206] To be lawful, an eligibility requirement should be articulated in service-related terms. It should protect the availability of the services by limiting their receipt to the intended beneficiaries, and it should be found necessary to protect the quality of the service intended. To uphold an eligibility requirement, a court should find that without the exclusionary criteria, the integrity of the program would be substantially undermined, either because permitting participation would substantially diminish the quality of service received by other beneficiaries, or because the expense of accommodation would create undue hardship.

Consider, for example, a program the service of which is the education of elementary school age children. It would be appropriate to base eligibility on age because that requirement is service-related and, as such, necessary to ensure that the service is limited to its intended beneficiaries. In contrast, an eligibility requirement that would entitle only continent, elementary school age children[207] to the benefits of elementary school

201. A similar analysis results from an "equal-burdens" test. *See Meaning of Discrimination*, *supra* note 23, at 904-05.

202. 105 S. Ct. 712 (1985).

203. *Id.* at 725.

204. In other words, the recipient should be permitted to control the process of administering his funds.

205. See *supra* Pt. I.B.3.

206. *See* 45 C.F.R. § 84.3(k)(4) (1984).

207. These were essentially the facts presented in Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), *aff'd in part, rev'd in part sub nom.* Irving Indep. School Dist. v. Tatro, 104 S. Ct. 3371 (1984). In light of the Supreme Court decision in Smith v. Robinson, 104 S. Ct. 3457 (1984), holding that resort to the remedies provided under the Rehabilitation Act are not available when a more specific statutory scheme controls the claim, cases arising

education is not service-related; the intended beneficiaries are not limited to continent, elementary school age children but extend to all children of that age. Furthermore, requiring the program to serve children who cannot fulfill the continence requirement does not constitute undue hardship, because the expense necessary to tend to the needs of incontinent children does not impair the program's ability to serve its other intended beneficiaries. Thus, this eligibility requirement is not needed to protect the integrity of the program and should consequently be found unlawful.

CONCLUSION

Section 504 of the Rehabilitation Act expresses society's desire to eliminate systematic and prejudicial discrimination against handicapped persons in federally funded programs. This worthwhile and ambitious goal should not be thwarted by the practice of blanket exclusions, which unfortunately associates an inablility to participate with possessing a particular handicap. On the other hand, federal grantees must be permitted some discretion to determine participation in their programs on the basis of valid and objective criteria; often, this will involve a determination of an applicant's ability. The balance between the interests of federal grantees and handicapped persons is best struck by analyzing discrimination claims under an integrity-of-the-program test, which permits discriminating criteria if they are necessary to preserve the integrity of the federally funded program. Because the integrity of a particular program is open to legislative or judicial definition, this test will permit the flexiblity necessary to address the factual contexts in which discrimination claims arise.

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in lower education settings may not implicate rights and remedies available under the Rehabilitation Act. *See id.* at 3473-74.