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# POSTSECONDARY AND VOCATIONAL EDUCATION PROGRAMS AND THE "OTHERWISE QUALIFIED" PROVISION OF SECTION 504 OF THE REHABILITATION ACT OF 1973

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Title V of the Rehabilitation Act of 1973<sup>1</sup> represents the first major civil rights law for this nation's physically and mentally disabled citizens.<sup>2</sup> Congress has realized that handicapped Americans have often been denied the benefits and fundamental rights of our society.<sup>3</sup> With the "complete integration of all individuals with handicaps into normal community living, working, and service patterns as a final objective,"<sup>4</sup> Congress has insisted that handicapped persons be assured of equality of opportunity, equal access to all aspects of our society, and equal rights.<sup>5</sup> Thus, Title V contains an

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<sup>1</sup> 29 U.S.C. §§ 791-794 (1976), as amended by the Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1619 (1974) [hereinafter referred to as the 1974 Amendments] and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (1978) [hereinafter referred to as the 1978 Amendments].

<sup>2</sup> Congressional estimates of the number of handicapped persons vary. See 120 CONG. REC. 35,007 (1974) (7 million children, 28 million adults); 119 CONG. REC. 24,562-63 (1973) (7 to 12 million); and 119 CONG. REC. 24,442 (1973) (28 to 50 million). In the context of employment discrimination against handicapped people, Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 U. BALT. L. REV. 183, 185 (1978), estimates that approximately 11 million people between the ages of 16 and 64 in the United States may be considered handicapped. The Department of Labor places the figure at 20 million. Turney, *Defining the Handicapped*, 3 DAYTON L. REV. 391, 393 n.21 (1978). See also Wolff, *Protecting the Disabled Minority: Rights and Remedies under Sections 503 and 504 of the Rehabilitation Act of 1973*, 22 ST. LOUIS L.J. 25, 30 nn.28 & 29 (1978); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1501 n.2 (1973).

<sup>3</sup> See 119 CONG. REC. 24,566, 24,589 (1973). See also White House Conference on Handicapped Individuals Act of 1974, Pub. L. No. 93-516, tit. III, 88 Stat. 1631 (1974), reprinted at 29 U.S.C.A. § 701 note (West 1975). For an analysis of the earlier efforts to meet the needs of this nation's disabled citizens, see Cook, *Nondiscrimination in Employment under the Rehabilitation Act of 1973*, 27 AM. U.L. REV. 31, 37-41 (1977); O'Donnell, *Nondiscrimination under Federal Grants - Striving Toward Equal Employment Opportunities for Handicapped Individuals*, 3 DAYTON L. REV. 405, 405-06 nn.2 & 5 (1978).

<sup>4</sup> See White House Conference on Handicapped Individuals Act of 1974, Pub. L. No. 93-516, tit. III, 88 Stat. 1631 (1974).

<sup>5</sup> *Id.*

all-encompassing series of antidiscrimination provisions to protect disabled citizens.<sup>6</sup>

The most significant and far reaching of Title V's provisions is section 504, which states:

No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of the 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 programs or activities receiving federal financial assistance, or under any program or activity conducted by an Executive agency or by the U.S. Postal Service . . . .<sup>7</sup>

Section 504 covers all public and private bodies which receive federal support as well as federal agencies.<sup>8</sup> For example, within the context of secondary education nearly all colleges and universities — community, state, and private — receive assistance from the federal government.<sup>9</sup> Section 504 prohibits employment discrimination, building inaccessibility, and all forms of discrimination in every aspect of a recipient's programs and activities.<sup>10</sup>

The implications and potential impact of section 504 are staggering. The legislative history suggests that Congress intended section 504 to be just such a revolutionary law.<sup>11</sup> Moreover, when Con-

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<sup>6</sup> The four sections of the Rehabilitation Act of 1973 require federal agencies, 29 U.S.C. § 791 (1976), federal contractors, *id.* § 793, and recipients of federal financial assistance, *id.* § 794, to take affirmative action to hire and promote qualified handicapped persons, and to make federal buildings, programs, and services, *id.* § 792, accessible to handicapped people.

<sup>7</sup> 29 U.S.C. § 794 (1976), as amended by the 1978 Amendments, *supra* note 1.

<sup>8</sup> As originally enacted, § 794 did not apply to the federal government. The 1978 Amendments now apply § 794's broad prohibitions against discrimination to the federal agencies. Significant aspects of these Amendments include:

- (1) Codification of the existing practice of applying all rights, remedies, and procedures available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (1976), to § 794.
- (2) Application of all rights, remedies, and procedures available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1976), to § 791.
- (3) Authorization of attorneys' fees in suits to enforce any section of Title V of the Rehabilitation Act of 1973. 1978 Amendments, *supra* note 1, at § 120.

<sup>9</sup> Regional Rehabilitation Research Institute on Attitudinal, Legal, and Leisure Barriers, *Planning for Implementation of Section 504 at Colleges and Universities 2* (March, 1978) (unpublished, available at The George Washington University, 1828 L Street, N.W., Suite 704, Washington, D.C. 20036).

<sup>10</sup> Section 504 was enacted to prevent discrimination against all handicapped individuals in relation to federal assistance in employment, housing, education, health services, or any other program. [1974] U.S. CODE CONG. & AD. NEWS 6373, 6388.

<sup>11</sup> The remarks of Senator Humphrey in support of the original version of § 504 express this intent:

I introduce . . . a bill . . . to insure equal opportunities for the handicapped by prohibiting needless discrimination in programs receiving Federal financial assistance . . . . The time has come when we can no longer tolerate the invisibility of the handicapped in America . . . . These people have the right to live, to work to the best of their ability — to know the dignity to which every human being is entitled . . . . These are people who can and must be helped to help themselves.

gress passed section 504, it was aware of the existence of arbitrary barriers which have excluded disabled persons from programs or activities in the past.<sup>12</sup> By imposing a duty not to discriminate on recipients of federal financial assistance, Congress intended them to remove those barriers and take into account the capabilities of disabled persons.<sup>13</sup>

Section 504, however, contains one important limitation in that it only protects "otherwise qualified handicapped individuals." The term "handicapped individual" is defined very broadly as any person who: (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (B) has a record of such impairment; or (C) is regarded as having such an impairment.<sup>14</sup> The term "physical or mental impairment" in-

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118 CONG. REC. 525 (1972), cited with approval in *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1977). See also *Oversight Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies under the Rehabilitation Act of 1973: Hearings Before the Subcomm. on the Handicapped of the House Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 1502 (1976) (Congress intended, in passing the legislation, to bring the force of the federal government to bear in remedying discrimination against handicapped persons); Statement of Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, Press Release (Apr. 29, 1977) (on file with the *Journal of Law Reform*) (implementing the unequivocal congressional statute opens a new era of civil rights in America).

<sup>12</sup> The Senate Report accompanying the 1974 Amendments recognized that assumptions concerning the inability of handicapped persons to participate fully and contribute meaningfully to society had "all too often resulted in the violation of their basic rights as human beings, and had condemned them to live useless lives." Disabled persons were simply "barred from employment or . . . underemployed because of archaic attitudes and laws." S. REP. NO. 1297, 93d Cong., 2d Sess. 50, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6400.

<sup>13</sup> The Senate Report accompanying the 1974 Amendments stated that § 504 "constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap." S. REP. NO. 1297, 93d Cong., 2d Sess. 39, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390.

<sup>14</sup> 29 U.S.C. § 706(6) (1976).

The reason for these three categories is expressed in the Senate Report accompanying the 1974 Amendments: "The . . . definition takes cognizance of the fact that handicapped persons are discriminated against in a number of ways. First, they are discriminated against when they are, in fact, handicapped . . . Third, they are discriminated against if they are regarded as handicapped, regardless of whether they are in fact handicapped." S. REP. NO. 1297, 93d Cong., 2d Sess. 38, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6389. This broad definition of the term "handicapped" was added by Congress in the 1974 Amendments to the Act. Originally, the term was defined narrowly as follows:

any individual who (a) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment, and (b) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to [Title I and III] of this Act.

29 U.S.C. § 706(6) (Supp. IV 1974).

The Congressional Conference Report on the 1974 Amendments explained the need for the amendment:

That [original] definition has proven to be troublesome in its application to provisions of the Act such as Sections 503 and 504 because of its orientation toward employment and its relation to vocational rehabilitation services. It was clearly the intent of the Congress in adopting Section 503 (affirmative action) and Section 504

cludes such conditions as speech, hearing, visual or orthopedic impairments, cerebral palsy, muscular dystrophy, multiple sclerosis, cancer, diabetes, heart disease, mental retardation, perceptual handicaps, dyslexia, minimal brain disfunctioning, and developmental aphasia.<sup>15</sup> "Major life activities" are not defined in the Act or elsewhere, but apparently include walking, seeing, hearing, speaking, working, and learning.<sup>16</sup>

While the Rehabilitation Act defines a "handicapped individual," neither the language of section 504 nor its legislative history sheds much light on the exact meaning of the term "otherwise qualified handicapped individual."<sup>17</sup> This article will argue that the definition of this term must be broad enough to include severely handicapped persons, the primary group that Congress intended to benefit and protect in enacting section 504. Focussing on the area of postsecondary education, this article will argue that the interpretation developed in the Department of Health, Education and Welfare (HEW) Regulation<sup>18</sup> most effectively fulfills the purposes which Congress intended in enacting section 504. The article examines who is a qualified handicapped student entitled to non-discriminatory admission to and participation in college, university, and vocational programs. The article also examines the challenges to affirmative duties placed upon schools which admit handicapped applicants.

## I. THE DEVELOPING INTERPRETATION OF "OTHERWISE QUALIFIED"

### A. *General Discussion*

HEW did not adopt final regulations implementing section 504 until May 4, 1977, more than three years after section 504 was

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(non-discrimination) that the term "handicapped individual" in those sections was not to be narrowly limited to employment (in the case of 504), nor to the individual's potential benefit from vocational rehabilitation services . . . (in the case of both sections 503 and 504)."

S. REP. NO. 1297, 93d Cong., 2d Sess. 37, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6388-89.

<sup>15</sup> OFFICE FOR CIVIL RIGHTS OF U.S. DEPT. OF HEW, SECTION 504 OF THE REHABILITATION ACT OF 1973 FACT SHEET: HANDICAPPED PERSON'S RIGHTS UNDER FEDERAL LAWS I (1977) (on file with the *Journal of Law Reform*).

<sup>16</sup> *Id.* at 1-6.

<sup>17</sup> There is no explanation in the legislative history of Congress' use of the phrase "otherwise qualified handicapped individual" in § 504. The HEW regulation promulgated to implement section 504, 45 C.F.R. pt. 84 (1977), uses the term "qualified handicapped person." HEW construes "qualified handicapped person" and "otherwise qualified handicapped person" synonymously under its regulation. 45 C.F.R. pt. 84 app. A, at 376 (1977).

<sup>18</sup> 45 C.F.R. pt. 84 (1977).

enacted.<sup>19</sup> Absent HEW regulations, courts developed their own interpretations of the term "otherwise qualified." Relying on the fact that section 504 proclaims "a policy of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance,"<sup>20</sup> courts began defining "otherwise qualified" in terms of the federally assisted activity at issue,<sup>21</sup> albeit with differing results.

### B. Pre-Regulation Case Law

1. *Postsecondary Education*—In *Davis v. Southeastern Community College*,<sup>22</sup> a federal district court held that the failure of a community college to admit a hearing-impaired applicant to the college's nursing program solely because of the applicant's hearing loss did not violate section 504.<sup>23</sup> The district court noted that Ms.

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<sup>19</sup> The Senate Report to the 1974 Amendments indicates that Congress saw a need to implement 29 U.S.C. § 794 (Supp. V 1975) through a comprehensive set of regulations. S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390 (1974). It was not until 1976, however, that the federal government took the first steps to begin implementation of § 504 and, thus, shed some light on the term "otherwise qualified." On April 28, 1976, President Ford issued Executive Order 11914, requiring each federal agency to propose and adopt regulations implementing § 504. 41 Fed. Reg. 17,871 (1976). Executive Order 11914 authorized HEW and other federal agencies dispensing financial assistance to adopt rules, regulations, and orders to insure that recipients of federal financial aid are in compliance with § 504. HEW was charged with coordinating federal agency implementation of § 504 and with establishing standards to guide the agencies in their federal tasks.

In issuing the regulation to § 504, HEW Secretary Califano noted:

The 504 Regulation . . . reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law.

The 504 Regulation will work fundamental changes in many facets of American life. In many cases this regulation calls for dramatic changes in the action and attitudes of institutions and individuals who are recipients of HEW funds. In implementing the unequivocal Congressional statute, this regulation opens a new era of civil rights in America.

Statement of Joseph A. Califano, Jr., Secretary of HEW, Press Release (April 29, 1977)(on file with the *Journal of Law Reform*).

<sup>20</sup> S. REP. NO. 318, 93d Cong., 1st Sess. 50, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2076, 2123. See also Section by Section Analysis of Report, *id.* at 51, 70, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2125, 2143.

<sup>21</sup> Indeed, this is exactly what HEW concluded when it, too, found it necessary to develop four different definitions for "qualified handicapped person" in employment; elementary, secondary, and adult education; postsecondary education; and health, welfare and social services. See 45 C.F.R. § 84.3(k)(1)-(4) (1977) and notes 39-51 and accompanying text *infra*.

<sup>22</sup> 424 F. Supp. 1341 (E.D.N.C. 1976), *aff'd in part, vacated in part, and remanded*, 574 F.2d 1158 (4th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3451 (Jan. 9, 1979)(No. 78-711).

<sup>23</sup> Unlike the other applicants, Ms. Davis was required, as a part of the college selection process, to undergo an evaluation of her hearing by an audiologist. Brief in Opposition to Petition for Certiorari at 8, *Southeastern Community College v. Davis*, No. 78-711, *cert.*

Davis was a handicapped person under the statutory definition,<sup>24</sup> but found no violation of section 504, because the court concluded that she was not "otherwise qualified" for admission.<sup>25</sup> The district court construed "otherwise qualified" to mean "otherwise able to function sufficiently in the position sought in spite of the handicap. . . ."<sup>26</sup> The district court looked beyond Ms. Davis' participation in the college nursing program and concluded that Ms. Davis' hearing disability would, after graduation, restrict her in the pursuit of her proposed profession as a registered nurse.<sup>27</sup> In other words, the court perceived that Ms. Davis was not "otherwise qualified" in part because she might not secure employment as a registered nurse after graduation from the nursing program.<sup>28</sup> The Fourth Circuit reversed the district court decision in *Davis* after HEW issued its Regulation.<sup>29</sup>

2. *Elementary and Secondary Education*—In *Hairston v. Drosick*,<sup>30</sup> a federal court ordered a public school to permit a handicapped child to attend school on the same basis as other children.<sup>31</sup> Unlike the district court in *Davis*, the *Hairston* court con-

*granted*, 47 U.S.L.W. 3451 (Jan. 9, 1979) (on file with the *Journal of Law Reform*). The college also requested an opinion of the North Carolina Board of Nursing and required that Ms. Davis submit letters from potential employers regarding employability following successful completion of the college program and licensing by the state. The audiologist reported that, with a newly prescribed hearing aid, Ms. Davis' performance was interpreted as satisfactory in that the hearing aid improved her hearing to within the outer limits of normal. The State Board of Nursing stated that it would not predict eligibility or ineligibility for the registered nurse licensing exam "should Ms. Davis enroll in, and be allowed to complete the program." *Id.* at 8-10. Southeastern General Hospital advised the college that they would have employed Ms. Davis as a registered nurse if they had a vacancy. *Id.* at 10-11. Ms. Davis was also required to submit a pre-entrance medical record which reflected that although she had some deficiency in hearing, she was considered by her examining physician as mentally and physically able to undertake the program in nursing. *Id.* at 7.

<sup>24</sup> 29 U.S.C. § 706(6) (1976).

<sup>25</sup> 424 F. Supp. at 1345.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1345-46. Note that the subsequently enacted regulation forbids consideration of future compatibility. See 45 C.F.R. § 84.10(b) (1977), which states that a recipient's obligation to comply with the regulation is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than nonhandicapped persons.

<sup>28</sup> In the only other postsecondary education case decided prior to the promulgation of the HEW regulation, the court in *Borden v. Rohr*, No. C2-75-844 (S.D. Ohio Dec. 30, 1975), as cited in *Kampmeier v. Nyquist*, 553 F.2d 296, 300 n.9 (2d Cir. 1977), held that a university's refusal to allow a student to play varsity basketball because he had only one eye violated § 504. The subsequently enacted HEW Regulation strongly supports *Rohr*. See 45 C.F.R. § 84.47(a) (1977).

<sup>29</sup> 574 F.2d 1158 (4th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3451 (Jan. 9, 1979) (No. 78-711). See notes 61, 62, 74-76 and accompanying text *infra*.

<sup>30</sup> 423 F. Supp. 180 (S.D. W. Va. 1976).

<sup>31</sup> The court held the following:

The exclusion of a minimally handicapped child from a regular public classroom situation without a bonafide educational reason is in violation of Title V of Public Law 93-112, "The Rehabilitation Act of 1973," 29 U.S.C. § 794. The federal statute prohibits discrimination against handicapped individuals in any program receiving federal financial assistance. To deny to a handicapped child access to a regular pub-

cluded that school age children under section 504 cannot be deprived of educational opportunity because of their handicaps.<sup>32</sup> Implicit in *Hairston* is the notion that a handicapped child is "otherwise qualified" to receive a free appropriate public school education if the handicapped child is of the same age at which non-handicapped children are eligible for public school education.<sup>33</sup>

3. *Employment*—In *Duran v. City of Tampa*,<sup>34</sup> a police department had advised an applicant for a policeman's job that his past history of epilepsy automatically excluded him from consideration. Although the court denied preliminary relief to the applicant because of his failure to show irreparable injury, the court noted that

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lic school classroom in receipt of federal financial assistance *without compelling educational justification* constitutes discrimination and a denial of the benefits of such program in violation of the statute.

*Id.* at 184 (emphasis added).

<sup>32</sup> See also *Rhode Island Soc'y for Autistic Children v. Board of Regents*, C.A. No. 5081 (D.R.I. Aug. 1, 1975) (on file with the *Journal of Law Reform*), where the court states: "[T]he clear language of the statute . . . [and] the broad definition of handicapped individual and the lack of any limiting language in sec. [504] indicates, contrary to defendants' analysis, that the statute should be applied to correct discriminatory practices in any federally assisted program." *Id.* at 7-8. But see *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977), where the court held that the exclusion of a one-eyed student from varsity athletics was not improper if the school had a substantial justification for its policy. "Section 504 prohibits only the exclusion of handicapped persons who are 'otherwise qualified.' Here, the defendants have relied on medical opinion [that] to play in contact sports [created] a high risk of eye injury." *Id.* at 299. *Kampmeier* distinguished *Rohr* by stating that in *Rohr* the student was old enough to weigh the risks and make the decision himself. *Id.* at 300. For a comparison of the district court decision in *Davis* with the appellate court opinion in *Kampmeier*, see Miller, § 504 and the HEW Regulations: *Effectuating the Rights of the Handicapped*, 5 OHIO N.U.L. REV. 107, 117-18 (1978). The author concludes that the *Davis* district court interpretation is the more appropriate interpretation in light of the intent of the statute. This analysis was made prior to the appellate court decision in *Davis*. In addition, the author did not have the benefit of HEW Policy Interpretation No. 5 (Participation of Handicapped Students in Contact Sports): "The exclusion from contact sports of students who have lost an organ, limb, or an appendage . . . but who are otherwise qualified is a denial of equal opportunity. It denies participation not on the basis of ability but because of handicap." U.S. Dept. HEW, *Non-discrimination in Federally Assisted Programs*, 43 Fed. Reg. 36,034, 36,035 (1978). See 45 C.F.R. § 84.37(c)(1)(1978). The HEW interpretation, thus, contradicts the holding in *Kampmeier*.

<sup>33</sup> The court's reasoning in *Hairston* comports with the subsequently enacted HEW Regulation. HEW recognizes that its Regulation conforms to the standards established for the education of handicapped persons in *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); and *Lebanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973), as well as the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1461 (1970), as amended by Pub. L. No. 94-142, 89 Stat. 773 (1975), in that these cases and the HEW Regulation require: (1) that handicapped persons, regardless of the nature or severity of their handicap be provided with a free appropriate public education, and (2) that handicapped students be educated, to the maximum extent appropriate to their needs, with non-handicapped students. 45 C.F.R. pt. 84 app. A, at 384 (1977).

<sup>34</sup> 430 F. Supp. 75 (M.D. Fla. 1977). On June 15, 1978, the court ruled that the Tampa police could not deny employment to an individual with a history of epilepsy solely because of his former condition (Case No. 76-683) (on file with the *Journal of Law Reform*). *Duran* is in accord with the subsequently enacted HEW Regulation in that there was no evidence that *Duran* could not perform the essential functions of the job. See Part II *infra*.



the applicant's section 504 claim was meritorious because he was "otherwise qualified."<sup>35</sup>

The court reasoned that it was in the public interest to "ferret out discrimination against individuals whose past handicap [sic] continue to effect their present ability to find and retain employment. The clearly enunciated purpose of the Rehabilitation Act of 1973 is to 'promote and expand employment opportunities in the public and private sectors for handicapped individuals . . . in employment.'"<sup>36</sup> Finally, the *Duran* court noted that it was also in the public interest that all individuals capable of performing a particular task be placed on an equal footing in acquiring such positions, and that society was "diminished when the valuable contributions of such individuals are not put to good use."<sup>37</sup>

These differing court definitions of the term "otherwise qualified" provide part of the background to the HEW decision to define "qualified handicapped person" in four different ways depending upon the type of federally assisted program at issue. The HEW section 504 Regulation, if followed by the courts, would cure conflicting court interpretations and provide the necessary guidance to educators and employers as well as the courts.<sup>38</sup>

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<sup>35</sup> 430 F. Supp. at 78.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 79. See also *Gurmankin v. Castanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977), in which a blind woman alleged discriminatory hiring practices in the Philadelphia public schools. Although the district court based its decision on constitutional grounds, the court noted that the refusal to hire a blind teacher was

the kind of discrimination which that section was meant to prohibit. A blind person certainly is a "handicapped individual" as defined in the Act . . . . A strong argument also can be made that the school district's testing procedures violated section 504. . . . Although that section protects only "otherwise qualified" handicapped individuals, whether Ms. Gurmankin meets that requirement clearly requires a nondiscriminatory evaluation of her competency. In this regard the special problems encountered by blind teachers certainly must be considered, but. . . Ms. Gurmankin's blindness does not automatically prevent her from being "otherwise qualified."

*Id.* at 992. In *Gurmankin*, the court noted that § 504 was not dispositive of the issues because most of the discriminatory acts had taken place prior to the enactment of the law in 1973. *Id.* at 989. See also *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977), where an epileptic was denied employment on the basis of her handicap, despite her claim that she was a qualified lab technician. The court in *Drennon* required plaintiff to exhaust her administrative remedies with the Department of Labor.

<sup>38</sup> "The administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). See also *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, (1974).

## II. HEW REGULATION: DEFINITION OF "QUALIFIED HANDICAPPED PERSON"

### A. General Discussion

Because of the diversity of types of handicaps, as well as the wide variety of settings in which programs financed by HEW are offered,<sup>39</sup> HEW recognized the need to define "qualified handicapped person"<sup>40</sup> in four ways, depending upon the type of federally assisted program at issue — (1) employment;<sup>41</sup> (2) preschool, secondary, and adult education;<sup>42</sup> (3) postsecondary education;<sup>43</sup> and (4) program accessibility and health, education, welfare, and social services.<sup>44</sup> This comports with the overall structure of the Regulation, which is divided into similar subparts in order to deal effectively with the unique discriminatory problems faced in each federally assisted program.<sup>45</sup>

The congressional purpose of complete integration of all hand-

<sup>39</sup> 42 Fed. Reg. 22,676 (1977).

<sup>40</sup> HEW construes the term "qualified" and "otherwise qualified" synonymously under the Regulation. 45 C.F.R. pt. 84 app. A, at 376 (1977). See also *Davis v. Southeastern Community College*, 574 F.2d 1158, 1161 n.7 (4th Cir. 1978), cert. granted, 47 U.S.L.W. 3451 (Jan. 9, 1979) (No. 78-711).

<sup>41</sup> 45 C.F.R. § 84.3(k)(1) (1977).

<sup>42</sup> *Id.* § 84.3(k)(2).

<sup>43</sup> *Id.* § 84.3(k)(3).

<sup>44</sup> *Id.* § 84.3(k)(4). Although the same definition of "qualified handicapped person" is used for program accessibility and other services, program accessibility is covered in Subpart C, *id.* §§ 84.21-23, while the other services are covered in Subpart F, *id.* §§ 84.51-54. See note 45 *infra*.

Other federal agencies also define qualified handicapped person in terms of the type of federally assisted program at issue. See, e.g., the § 501 Civil Service Commission regulation which prohibits discrimination in federal employment, 43 Fed. Reg. 12,295 (1978) (to be codified as 5 C.F.R. § 713.702 (f)). A qualified handicapped person is there defined as:

with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) meets the experience and/or educational requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

*Id.* HEW, as part of its responsibility to coordinate federal agency enforcement of § 504, defines qualified handicapped person as, "[w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question," 45 C.F.R. § 84.3(k)(1) (1977); "[w]ith 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)(4) (1977). HUD has adopted this definition in its proposed rules. 43 Fed. Reg. 16,650, 16,657 (1978). One commentator has noted that "qualified handicapped person" should be interpreted differently when applied in the context of federally financed education programs as compared to employment. See Guy, *supra* note 2.

<sup>45</sup> The Regulation is divided into the following Subparts: (1) program accessibility, 45 C.F.R. §§ 84.21-23 (1977); (2) employment practices, 45 C.F.R. §§ 84.11-14 (1977); (3) preschool, elementary, and secondary education, 45 C.F.R. §§ 84.31-39 (1977); (4) postsecondary education, 45 C.F.R. §§ 84.41-47 (1977); and (5) health, welfare, and social services, 45 C.F.R. §§ 84.51-54 (1977).

icapped individuals into normal community living, working, and service patterns<sup>46</sup> could not have been realized had HEW defined "qualified handicapped person" in only one way. The same definition of "qualified handicapped person" for all the different programs and activities funded by HEW would not make any practical sense. A handicapped person who is "qualified" for social service benefits<sup>47</sup> may not be "qualified" for a particular job. Conversely, a handicapped person who is "qualified" for and employed at a particular job<sup>48</sup> would not be "qualified" for social service benefits, such as food stamps.

It also would be counterproductive to define "qualified handicapped person" in the same way for postsecondary education<sup>49</sup> as for employment. A handicapped person may not be qualified for a particular job until after that person has been educated in certain skills.<sup>50</sup> While an employer has a valid interest in hiring qualified persons, exclusion of handicapped applicants from admission to colleges and universities impedes rather than promotes this interest. By defining "qualified handicapped person" differently in the context of postsecondary education and employment, HEW sought to avoid the cause and effect relationship in which discrimination in education perpetuates unemployment and underemployment of handicapped persons. Therefore, the definition of "qualified handicapped person" with respect to postsecondary education focusses on the handicapped person's academic and technical qualifications and not on whether the handicapped person can perform the essential functions of a particular job.

Thus, there are practical and policy justifications for HEW to define "qualified handicapped person" in four different ways. All four definitions are, however, broad enough to achieve the con-

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<sup>46</sup> See White House Conference on Handicapped Individuals Act of 1974, Pub. L. No. 93-516, 88 Stat. 1631 (1974).

<sup>47</sup> 45 C.F.R. § 84.3(k)(4) (1977). A "qualified handicapped person" means "[w]ith respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services."

<sup>48</sup> 45 C.F.R. § 84.3(k)(1) (1977). A "qualified handicapped person" means "[w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question."

<sup>49</sup> 45 C.F.R. § 84.3(k)(3) (1977). A "qualified handicapped person" means "[w]ith 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."

<sup>50</sup> For example, there are obviously different qualifications required for a law school applicant than for a person applying for a position as a lawyer. Indeed, a law school degree is one prerequisite to obtaining employment as a lawyer. A law school would not condition its acceptance of an applicant upon the applicant's assurance of future employment because no law firm would provide the applicant with that assurance prior to entering law school.

gressional goal of complete integration of all handicapped persons.<sup>51</sup>

*B. Postsecondary Education – Definition of  
“Qualified Handicapped Person”*

Subpart E of the HEW Regulation<sup>52</sup> contains guidelines for admitting handicapped students into postsecondary education programs. A major thrust of Subpart E is to eliminate handicap as an admission criterion. In general, a qualified handicapped person may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment.<sup>53</sup> Specifically, under the Regulation, a postsecondary educational institution may not limit the number of handicapped students to be admitted to its programs,<sup>54</sup> may not use any tests or criteria for admission that have a disproportionately adverse effect on handicapped persons,<sup>55</sup> and may not inquire as to whether any applicant is handicapped.<sup>56</sup> Instead, the relevant definition of “qualified handi-

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<sup>51</sup> See White House Conference on Handicapped Individuals Act of 1974, Pub. L. No. 93-516, 88 Stat. 1631 (1974). The Senate Report states that the following persons are entitled to the protections of Title V: “physically or mentally handicapped children who may be denied admission to Federally-supported school systems on the basis of their handicap . . . and those persons whose vocational rehabilitation is complete but who may nevertheless be discriminated against in certain Federally-assisted activities.” S. REP. No. 1297, 93d Cong., 2d Sess. 38, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6389. The Senate Report also states that the language of the statute cannot be “fulfilled by the expediency of hiring or limiting services to persons marginally or previously handicapped.” *Id.* at 39, [1974] U.S. CODE CONG. & AD. NEWS at 6390. See Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S. CAL. L. REV. 785 (1976). This author concludes that the “use of the adjective ‘qualified’ in conjunction with the mandate [to end discrimination] should not reduce the involved minority to those handicapped individuals with no physical or mental barriers . . . . Indeed, such a reduced minority would include only those handicapped individuals who have least need for assistance.” *Id.* at 807-08.

<sup>52</sup> Subpart E applies to postsecondary education programs and activities, including postsecondary vocational educational programs and activities, that receive or benefit from federal financial assistance. 45 C.F.R. §§ 84.41-.47 (1977).

<sup>53</sup> A recent HEW report emphasized that “[t]he premise underlying this subsection of the Regulation is that an applicant’s handicap is *not* relevant with respect to admission or recruitment. The recipient must establish and apply policies which do *not* take into account the existence of a person’s handicap.” Office of the Secretary of the Department of HEW, Section 504 Policy Problems Encountered During Onsite Compliance Reviews 14 (Sept. 29, 1978) (memorandum on file with the *Journal of Law Reform*).

<sup>54</sup> 45 C.F.R. § 84.42(b)(1) (1977).

<sup>55</sup> *Id.* § 84.42(b)(2).

<sup>56</sup> *Id.* § 84.42(b)(4). There is one exception, however. “When the recipient is taking remedial action to correct the effects of past discrimination . . . or . . . taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program. . . , the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped.” 45 C.F.R. § 84.42(c) (1977). Compare this preadmission inquiry exception with 45 C.F.R. § 84.14 (1977) regarding pre-employment inquiries. While pre-employment inquiries are generally limited, an employer may make pre-employment inquiry as to an applicant’s ability to perform job related tasks. This narrow area of inquiry in the employment context is not applicable to postsecondary education.

capped person" requires that postsecondary educational institutions look only to an individual's academic and technical qualifications to determine whether the individual is qualified.<sup>57</sup>

The HEW prohibition of preadmission inquiry can be an effective way of preventing covert discrimination. For example, it may be tempting for a school with financial pressures or a limited budget to reject a known handicapped applicant, and falsely state that the applicant was unqualified, thereby avoiding the costs of any auxiliary aid or other affirmative obligation.<sup>58</sup> Stereotyped misconceptions and prejudices about the abilities of a known handicapped applicant also could be the unstated reason for rejection, despite academic qualifications.<sup>59</sup>

The ban on preadmission inquiry precludes such discrimination and assures the applicant that his or her handicap will not be considered by the school in its admission decision. The ban on preadmission inquiry also avoids the chilling effect on the many potential applicants who are reluctant to apply for admission for fear that they must disclose their handicaps while seeking admission. The Regulation delays any inquiry into an applicant's disability until after the applicant has been found qualified.<sup>60</sup> Thus, the Regulation's definition of "qualified handicapped person" for postsecondary education plays a crucial part in assuring a nondiscriminatory admission procedure. This definition works in tandem with the ban on preadmission inquiry to force schools to consider an applicant's academic and technical qualifications, not his or her handicap. These provisions comport closely with an expansive reading of the statutory term "otherwise qualified handicapped individual."

### *C. Academic and Technical Standards*

The HEW Regulation does not establish guidelines on the specific types of academic and technical standards a school may set. However, in the first case testing the Regulation, the appeal of

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<sup>57</sup> 45 C.F.R. § 84.3(k)(3) (1977). The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the postsecondary education program. 45 C.F.R. pt. 34 app. A, at 377 (1977).

<sup>58</sup> See Part III A *infra*.

<sup>59</sup> See Cook, *supra* note 3, at 35-36: "Although architectural barriers play an important role in restricting employment possibilities [for handicapped people], the most important single barrier lies in employer attitudes. Qualified job applicants or employees are often rejected for positions or promotions solely because of the presence of a disability." See also Lang, *Employment Rights of the Handicapped*, 11 CLEARINGHOUSE REV. 703, 703 nn.3-4 (1977).

<sup>60</sup> See Part III A *infra*.

*Davis v. Southeastern Community College*,<sup>61</sup> the Fourth Circuit addressed the question of requirements by stating that a college may use only the same objective and subjective factors it used to evaluate other, presumably nonhandicapped, applicants for admission.<sup>62</sup> Specifically, the court held that the college could not consider the applicant's hearing impairment in deciding whether or not to admit her to a nursing program.

Southeastern Community College argued, however, that a school should be able to consider the nature of an applicant's handicap, and then decide whether the applicant is qualified to function in the education program "in spite of" that handicap.<sup>63</sup> Support for this argument is found, not in any section of the Regulation, but in the HEW analysis accompanying the Regulation. The analysis explains that the Regulation uses the term "qualified handicapped person" instead of the statutory term "otherwise qualified handicapped person" because, "read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for 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."<sup>64</sup> As presented in the HEW analysis, the blind bus driver example has relevance only in the context of the Regulation's definition of "qualified handicapped person" for employment and provides justification for the limited pre-employment inquiry allowed under the Regulation.<sup>65</sup> To ascertain whether a person is qualified for a job, the Regulation permits employers to make limited pre-employment inquiries into an applicant's ability to perform essential, job-related functions.<sup>66</sup> However, direct pre-employment inquiries about an applicant's handicap are still prohibited.<sup>67</sup>

To use HEW's blind bus driver example to justify pre-

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<sup>61</sup> 574 F.2d 1158 (4th Cir. 1978), cert. granted, 47 U.S.L.W. 3451 (Jan. 9, 1979) (No. 78-711).

<sup>62</sup> 574 F.2d at 1160.

<sup>63</sup> See *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976), aff'd in part, vacated in part, and remanded, 574 F.2d 1158, 1161 (4th Cir. 1978), cert. granted, 47 U.S.L.W. 3451 (Jan. 9, 1979) (No. 78-711). See also *Southeastern Community College Petition for Certiorari in Davis, id.* (on file at the *Journal of Law Reform*).

<sup>64</sup> 45 C.F.R. pt. 84 app. A, at 376 (1977).

<sup>65</sup> 45 C.F.R. § 84.3(k)(1) (1977). See also *Guy, supra* note 2, at 245-47.

<sup>66</sup> 45 C.F.R. § 84.14 (1977).

<sup>67</sup> 45 C.F.R. pt. 84 app. A, at 381 (1977). For example, although an employer cannot ask whether a person applying to be a bus driver is visually impaired, the regulation does permit the employer to ask whether the applicant can drive a bus, if that is a necessary qualification for the job. Thus, the hiring process must be nondiscriminatory, for as the court in *Gurmankin* noted, "[m]erely requiring blind persons to be considered for teaching positions will be a meaningless gesture if such applicants are not evaluated fairly." *Gurmankin v. Castanzo*, 411 F. Supp. 982, 992 (E.D. Pa. 1976), aff'd, 556 F.2d 184 (3d Cir. 1977). In *Gurmankin*, the defendant was found to lack information on the capabilities of blind teachers and the kinds of adjustments that blind teachers would make to overcome apparent problems.

admissions inquiry by schools is misleading and inconsistent with the provisions of the Regulation. In the postsecondary education context, the Regulation prohibits any consideration of an applicant's handicap in determining the applicant's qualifications for admission.<sup>68</sup> An evaluation of the applicant's academic and technical qualifications is the only permissible inquiry.

The "in spite of" argument is also inconsistent with the Regulation section on academic adjustments. If a college or university need only consider whether a handicapped applicant is qualified in spite of his or her ability, that college or university would not have to make the academic adjustments required by section 84.44 of the HEW Regulation.<sup>69</sup> A handicapped applicant who is qualified in spite of his or her disability requires few, if any, academic adjustments; this section of the Regulation would become a nullity if this interpretation of "otherwise qualified" were adopted.

Finally, and perhaps most importantly, an "in spite of" definition of "qualified handicapped person" would frustrate the congressional goal of "complete integration" of all handicapped persons into our society.<sup>70</sup> This narrow definition would protect only minimally handicapped persons, not the severely handicapped persons whom the Act was intended to benefit.<sup>71</sup> Title V was enacted against a background of extensive discrimination against all handicapped persons.<sup>72</sup> A definition which reduces the number of handicapped persons to those least in need of the Act's protections does

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<sup>68</sup> See notes 41-43 and accompanying text *supra*. A college cannot, on the one hand, refrain from inquiring about a person's disability prior to admission, as required by 45 C.F.R. § 84.42(b)(4) (1977), and, at the same time, inquire about the nature of a person's disability in evaluating academic and technical standards.

<sup>69</sup> 45 C.F.R. § 84.44 (1977).

<sup>70</sup> See note 51 and accompanying text *supra*. For a contrary view, see Miller, *supra* note 32, who argues: "It is more consistent with the statute to recognize an interpretation which means basically that *in spite of* a person's handicap, he is in other respects still qualified to participate in a program or activity and should not be denied the participation solely on the basis of his handicap." *Id.* at 118.

<sup>71</sup> See note 51 *supra*.

In the context of employment discrimination against "qualified handicapped persons," one commentator has pointed out that "if Congress intended to require contractors to take affirmative action only with respect to those handicapped individuals who need no accommodation, then handicap affirmative action assumes a purely remedial aspect similar to that in the race context; in that case any reasonable accommodation requirement would be inappropriate." Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, *supra* note 51, at 805. The commentator adds, "In other words, affirmative action would respond only to employer attitude problems and not to physical or mental limitations, which constitute the distinctive minority characteristic in the handicap context." The commentator concludes that Congress did not intend that the number of handicapped individuals protected against discrimination be so narrowly limited. *Id.* at 807 n.97.

<sup>72</sup> See Note, *Abroad in the Land*, *supra* note 2. See also Burgdorf & Burgdorf, *A History of Unequal Treatment: the Qualifications of Handicapped Persons as a Suspect Class Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975).

not meet the congressional mandate to end discrimination.<sup>73</sup>

The Fourth Circuit in *Davis* followed the Regulation in rejecting the "in spite of" argument. The college was required to reconsider Ms. Davis' qualifications "without regard to her hearing disability."<sup>74</sup> Although the court did little more than reverse the trial court on this issue,<sup>75</sup> this case represents important judicial support for the goal of nondiscrimination in federally funded programs.<sup>76</sup>

### III. AFFIRMATIVE RELIEF

#### *A. Requirements in the HEW Regulation*

The Regulation definition of "qualified handicapped person" in the postsecondary education context precludes any consideration of the applicant's handicap in the admission evaluation process. Only after the applicant has been admitted can the school inquire as to the nature of the applicant's handicap, and only for the purpose of determining the necessary program modifications the school must make to accommodate the student's disability. The college's duty to modify its program is one of many substantial affirmative obligations which the Regulation imposes upon recipients in order to effect the statute's purpose of nondiscrimination. The Regulation recognized that often handicapped persons are not provided an equal opportunity merely by providing them with the same facilities, the same programs, and the same teachers provided to nonhandicapped persons. Thus, the Regulation requires recipients to provide special services to ensure that handicapped per-

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<sup>73</sup> HEW "intends . . . to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973." 45 C.F.R. pt. 84 app. A, at 375 (1977).

<sup>74</sup> 574 F.2d at 1160.

<sup>75</sup> The appellate court did not order Ms. Davis' admission into the college of nursing program, and did not express any opinion on the scholastic suitability of Ms. Davis to pursue her studies toward a registered nurse license. The court noted that the "application and interpretation of HEW regulations lie, in the first instance, with the district court." *Id.* at 1162 n.8. The court did not wish to expand upon the regulations, their reasonableness, or their scope, absent a more fully developed record. *Id.* at 1161-62 n.7a.

<sup>76</sup> This case has drawn widespread attention. An amicus brief in support of Southeastern Community College's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was filed by the American Council on Education (representing 1,291 nonprofit institutions of higher education and 169 national and regional educational associations and organizations) on behalf of itself and the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the States of Alaska, Arizona, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Washington, and West Virginia. The Petition for Certiorari was granted by the Supreme Court on January 8, 1979, 45 U.S.L.W. 3451 (Jan. 9, 1979) (No. 78-711).



sons receive equally effective benefits and treatment.<sup>77</sup>

The Regulation imposes specific affirmative duties upon recipients depending on the type of program they operate. In the context of postsecondary education, the Regulation requires colleges and universities to modify discriminatory academic course requirements.<sup>78</sup> Modifications include changes in the length of time permitted to complete degree requirements, substitution of specific courses, and adaptation of the manner in which specific courses are conducted.<sup>79</sup> The Regulation further requires colleges and universities to provide auxiliary learning aids for students with impaired sensory, manual, or speaking skills.<sup>80</sup> Auxiliary aids include qualified sign language interpreters or other effective means of making orally delivered materials available to students with impaired hearing, readers for blind students, and classroom equipment adapted for use by students with manual impairments.<sup>81</sup> The affirmative duty provisions of the Regulation have been challenged on several grounds which will be discussed in the following section.

## B. Challenges to the Regulation

1. *Statutory Authority for Affirmative Duty*— Affirmative obligation requirements are specified throughout the Regulation.<sup>82</sup> In at-

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<sup>77</sup> 45 C.F.R. §§ 84.4(b)(1)(iii), .4(b)(2) (1977). The HEW analysis of the Regulation explains that:

In this context, the term "equally effective" . . . is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that, in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients.

45 C.F.R. pt. 84 app. A. at 377 (1977).

<sup>78</sup> 45 C.F.R. §84.44(a) (1977). Academic requirements that the recipient can demonstrate are essential to the program of instruction or to any directly related licensing requirement need not be changed. *Id.* It is significant to note that the defendant college in *Davis* was not prepared and could not act to make any program modifications to accommodate Ms. Davis' hearing impairment. *Davis*, 574 F.2d at 1162.

<sup>79</sup> 45 C.F.R. § 84.44(a) (1977).

<sup>80</sup> *Id.* § 84.44(d)(1).

<sup>81</sup> *Id.* § 84.44(d)(2). Pursuant to § 84.44(d), several courts have ordered colleges to pay for interpreters for their deaf students' classes. See *Barnes v. Converse College*, 436 F. Supp. 635, 639 (D.S.C. 1977); *Crawford v. University of N. C.*, 440 F. Supp. 1047, 1059 (M.D. N.C. 1977); *Camenisch v. University of Tex.*, No. A-78-CA-961 (W.D. Tex. May 17, 1978), *appeal filed*, 5th Cir. May 17, 1978 (copy of notice of appeal on file with the *Journal of Law Reform*); *Herbold v. Trustees of Cal. State Univs. and Colleges*, C-78-1358 RHS (N.D. Cal. July 17, 1978).

<sup>82</sup> See 45 C.F.R. § 84.6(a) (1977) (remedial action required of all recipients to overcome the effects of discrimination); 45 C.F.R. §§ 84.31-.37 (1977) (duty of public elementary and secondary schools to provide free, appropriate public education to all handicapped chil-

tacking the validity of these requirements some recipients of federal monies have argued that the affirmative duty regulations far exceed the intended scope of section 504.<sup>83</sup> According to this argument, the language of section 504, unlike its counterpart section 503, contains no affirmative action obligation. The statutory language mandates only a negative duty not to discriminate.

An examination of the statute and its legislative and judicial interpretation indicates this statutory interpretation is invalid. The Senate Report accompanying the 1974 Amendments to the Rehabilitation Act expressly states that "[w]here applicable, section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination."<sup>84</sup> The Senate Report further recognizes that section 504 rights, remedies, and procedures are intended to closely parallel those available under Title VI of the Civil Rights Act of 1964,<sup>85</sup> which requires affirmative relief to prevent discrimination against students who do not speak English as their native language. In *Lau v. Nichols*,<sup>86</sup> which held that such

dren); 45 C.F.R. § 84.52(c) (1977) (hospital's duty to establish procedure for effective communications with deaf patients in emergency health care situations); 45 C.F.R. § 84.52(d) (1977) (duty of health, welfare and social service agencies with 15 or more employees to provide appropriate auxiliary aids to persons with impaired sensory, manual or speaking skills); 45 C.F.R. §§ 84.21-.23 (1977) (duty of all recipients to make their programs and facilities readily accessible to and usable by handicapped persons); 45 C.F.R. § 84.12 (1977) (employers' duty to make "reasonable accommodations" for the physical and mental limitations of qualified handicapped employees and applicants.)

<sup>83</sup> See Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse College*, 29 MERCER L. REV. 745, 757 (1978). The author contends that because the HEW regulations were not issued pursuant to an express statutory delegation of authority, they are entitled to less weight and subject to stricter judicial scrutiny. *Id.* at 756-57. See also *General Elec. v. Gilbert*, 429 U.S. 125, 141 (1977). However, with the passage of the 1978 Amendments, *supra* note 1, there is now express statutory authority for promulgation of regulations. Section 505(a)(1) of the 1978 Amendments makes the rights, remedies, and procedures available under Title VI equally applicable to § 504. Title VI also contains an express statutory delegation of authority for promulgation of regulations. See note 8 *supra*.

Some have also tried to argue that Congress neither expressly nor impliedly ever intended for any regulations to be promulgated under § 504. This is clearly erroneous, as the Senate Report on the 1974 Amendments to the Act explains: "[Section 504] does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended." S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390. See also S. REP. NO. 1139, 93d Cong., 2d Sess. 24-25 (1974); H.R. REP. NO. 1457, 93d Cong., 2d Sess. 27-28 (1974). Not only were regulations intended by Congress and issued pursuant to Executive Order 11914, 41 Fed. Reg. 17,871 (1976), but they were also ordered by a federal district court in *Cherry v. Mathews*, 419 F. Supp. 922 (D.D.C. 1976). Stating that § 504 was not intended to be self-enforcing, the judge in *Cherry* ordered the Secretary of HEW to promulgate regulations without further delay. 419 F. Supp. at 924.

<sup>84</sup>S. REP. NO. 1297, 93d Cong., 2d Sess. 39, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390. Courts have long adhered to the principle that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) (footnote omitted). See also *FHA v. Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962); *Regents of Univ. of Cal. v. Bakke*, 98 S. Ct. 2733 (1978).

<sup>85</sup> 42 U.S.C. § 2000d (1976).

<sup>86</sup> 414 U.S. 563 (1974).

relief was required, the Supreme Court said, "[t]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."<sup>87</sup> One circuit court, noting the parallels between Title VI and the Rehabilitation Act, paraphrased the quoted passage from *Lau* in requiring that public transportation facilities be made accessible to handicapped people.<sup>88</sup>

The 1978 Amendments to the Rehabilitation Act expressly codify the parallel to Title VI.<sup>89</sup> By this time the HEW Regulation had been issued, and nothing in the 1978 Amendments overrules the Regulation. Congressional failure to revise or repeal an agency interpretation has long been recognized as indicative of congressional acquiescence in the agency interpretation.<sup>90</sup>

2. *Costs as a Defense Excusing the Duty to Provide Affirmative Relief* — One problem of particular concern to recipients is the potentially burdensome effect of the costs required to meet the affirmative obligations imposed by section 504.<sup>91</sup> Within the contexts of education, program accessibility, and social and health services, the Regulation contains no provision recognizing costs as a de-

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<sup>87</sup> *Id.* at 566. In his concurring opinion, Justice Stewart explained that "[t]he Department [of HEW] has reasonably and consistently interpreted § 601 to require affirmative remedial efforts to give special attention to linguistically deprived children." *Id.* at 571. The Court also specifically upheld the power of Congress to attach antidiscrimination and affirmative relief conditions to the granting of federal funds. "Whatever may be the limits of that power [to attach conditions] . . . they have not been reached here . . . . 'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.'" *Id.* at 569 (quoting remarks of Sen. Humphrey, 110 CONG. REC. 6543 (1964)).

<sup>88</sup> *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1284 (7th Cir. 1977). See also *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), cert. granted, 47 U.S.L.W. 3451 (Jan. 9, 1979) (No. 78-711); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977); *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977).

<sup>89</sup> See note 8 *supra*. Legislative intent to require affirmative conduct can be inferred from the *Congressional Oversight Hearings on Section 504, Report on Implementation of Section 504 of the Rehabilitation Act of 1973*, 95th Cong., 1st Sess. (1977), in which the use of an assurance form was discussed. The testimony of David Tatel, Director of the HEW Office for Civil Rights, reveals that Congress was clearly aware of the affirmative duties imposed by the HEW Regulation. *Id.* at 298, 358, 367.

The Assurance of Compliance Form used by HEW (sample on file with the *Journal of Law Reform*) has the recipient of federal funds agree to comply with "all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84)," including those requiring affirmative conduct.

<sup>90</sup> *Commissioner v. Estate of Noel*, 380 U.S. 678, 682 (1965); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-66 (1951); *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 313 (1933); *Constanzo v. Tillinghast*, 287 U.S. 341, 345 (1932).

<sup>91</sup> See 45 C.F.R. pt. 84 app. A, at 382-84 (1977). See also O'Neill, *Discrimination Against Handicapped Persons — The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance*, 41 Fed. Reg. 20,312 (1976).

fense.<sup>92</sup> The Fourth Circuit opinion in *Davis* accepts this interpretation of the statutory intent and finds support in earlier cases for "the requirement of affirmative conduct on the part of certain entities under section 504 *even when such modifications become expensive.*"<sup>93</sup> Only in the employment context does the regulation allow recipients to argue that the costs of accommodating an applicant or employee constitute an undue hardship. However, the recipient bears the burden of proving undue hardship.<sup>94</sup>

By not allowing costs to be a defense in the education context, the Regulation arguably might be invalid as not reasonably related to the purposes of the statute.<sup>95</sup> If Congress did not intend to require private institutions to expend their own scarce funds to provide program modifications and accommodations, the Regulation, by failing to consider costs, imposes an unreasonably severe bur-

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<sup>92</sup> In the introductory comments to the Regulation, HEW Secretary Joseph Califano, Jr. declares: "Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this regulation: Congress' mandate to end discrimination is clear." 42 Fed. Reg. 22,676 (1977).

In the postsecondary education context, one university tried to argue that it did not have to pay for interpreters for a deaf student's classes because the student was financially able to pay for the interpreter himself. The university contended that it never gave financial assistance to students who did not meet its financial aid eligibility requirements. However, the court in *Camenisch v. University of Tex.*, No. A-78-CA-961 (W.D. Tex. May 17, 1978), *appeal filed*, 5th Cir. May 17, 1978 (copy of notice of appeal on file with the *Journal of Law Reform*), rejected this argument and issued a preliminary order for the university to pay for this auxiliary learning aid, pursuant to 45 C.F.R. § 84.44(d)(1977). It is inappropriate for a university to try to shift the obligations imposed by § 504 upon handicapped persons designed to be protected under the statute. Moreover, the fact that the student does not meet the school's financial eligibility requirements is irrelevant to his or her statutory right to an interpreter or other auxiliary learning aid. Payment for auxiliary aids is a statutory and contractual obligation imposed on the university by § 504, the HEW Regulation to § 504, and the Assurance of Compliance Form signed by all recipients of federal financial assistance (sample form on file with the *Journal of Law Reform*).

<sup>93</sup> 574 F.2d at 1162 (emphasis added), citing *United Handicapped Fed'n v. Andre*, 558 F.2d 413, 415-16 (8th Cir. 1977) (transit commission must make mass transit facilities accessible to all handicapped persons); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1281-84 (7th Cir. 1977) (similar holding on similar facts); *Barnes v. Converse College*, 436 F. Supp. 635, 637 (D.S.C. 1977) (college required to provide interpreter services to a deaf student. "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." *Id.* at 638); *Hairston v. Drosdick*, 423 F. Supp. 180, 184 (S.D. W.Va. 1976) (student with a minor disability must be admitted to the public classroom "even at great expense to the school system." *Id.* at 186).

<sup>94</sup> See 45 C.F.R. § 84.12(c) (1977):

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

- (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
- (2) The type of the recipient's operation, including the composition and structure of the recipient's work force; and
- (3) The nature and cost of the accommodation needed.

<sup>95</sup> See *Brooks*, *supra* note 83, at 756-57.

den.<sup>96</sup> There is evidence that HEW did take costs into account. In its introductory comments on the Regulation, HEW asserts that it had carefully evaluated the economic and inflationary impact of the Regulation.<sup>97</sup> A specific example of cost considerations is found in the context of the requirement that postsecondary schools provide auxiliary learning aids.<sup>98</sup> The HEW analysis of the Regulation indicates that schools can usually meet this obligation by assisting students in finding outside help from state vocational rehabilitation agencies and private charitable institutions.<sup>99</sup> More importantly, studies have indicated that the costs required to provide affirmative relief will not normally impose a severe economic burden on recipients.<sup>100</sup> One authoritative analysis concluded that the major expense imposed on postsecondary institutions by the HEW Regulation will be the cost of building accessibility. "It is not expected that subpart E . . . will impose significant additional costs on higher education as a whole,"<sup>101</sup> because, for many of the 200,000 handicapped students who would potentially attend such institutions in any given year, simply making the building accessible would be the only real expense in ending discrimination.<sup>102</sup>

<sup>96</sup> *But see* discussion of legislative intent to require affirmative relief under § 504, notes 84-88 and accompanying text *supra*. See also *Mourning v. Family Publications Serv. Inc.*, 411 U.S. 356, 371 (1973); *Thorpe v. Housing Auth.*, 393 U.S. 268, 278 (1969).

<sup>97</sup> 42 Fed. Reg. 22,676, 22,677 (1977).

<sup>98</sup> 45 C.F.R. § 84.44(d) (1977).

<sup>99</sup> 45 C.F.R. pt. 84 app. A, at 388-89 (1977). Some schools have tried to argue that this portion of the HEW analysis indicates that under 45 C.F.R. § 84.44(d) (1977), the responsibility to provide auxiliary aids rests with vocational rehabilitation offices and private agencies; the school's only responsibility is to refer handicapped students to these outside sources of funds. This argument ignores the express language of 45 C.F.R. § 84.44(d) (1977): "A recipient . . . shall take such steps as are necessary [to provide auxiliary aids]." While the HEW analysis "anticipates" that outside agencies will usually pay for auxiliary aids, both the courts and HEW have made it clear that if those outside sources of funds are not available, ultimate responsibility to pay for the aids rests with the university. See *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3451 (Jan. 9, 1979) (No. 78-711); *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977); *Camenisch v. University of Tex.*, No. A-78-CA-961 (W.D. Tex. May 17, 1978), *appeal filed*, 5th Cir. May 17, 1978 (copy of notice of appeal on file with the *Journal of Law Reform*); *Crawford v. University of N.C.*, 440 F. Supp. 1047 (M.D.N.C. 1977); *Herbold v. Trustees of the Cal. State Univ. and Colleges*, No. C-78-1358 RHS (N.D. Cal. July 17, 1978). See also 45 C.F.R. § 84.12(a) (1977) (proof of undue hardship can excuse employer's duty to make reasonable accommodation); 45 C.F.R. § 84.52(d)(2) (1977) (health, welfare and social service agencies with less than 15 employees are exempt from duty to provide auxiliary aids where exemption would not significantly impair the ability of the recipient to provide its benefits or services). The HEW analysis of program accessibility requirements states that the program accessibility standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. 45 C.F.R. pt. 84 app. A, at 382-84 (1977).

<sup>100</sup> There are many ways of lessening the economic burden. For example, profit-making recipients who make their facilities accessible can take advantage of federal tax deductions. I.R.C. § 190. Federal funds are available to public schools under the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1424 (1976), to pay for the costs of complying with Subpart D of the HEW Regulation.

<sup>101</sup> O'Neill, *supra* note 91, at 20,312.

<sup>102</sup> *Id.*

3. *Academic Freedom* — Criticism of the Regulation's affirmative relief requirement might also focus on the argument that it constitutes undue interference with a university's freedom to decide curriculum content, teaching methodology, hiring practices, and admissions policies. As such, the regulation arguably infringes upon academic freedom in violation of the first amendment.<sup>103</sup>

The courts have recognized the vital role that institutions of higher education play in preserving democratic freedoms,<sup>104</sup> and have been loath to uphold any actions which constitute a threat to those freedoms.<sup>105</sup> In identifying the academic contribution to democracy which is being protected, the Supreme Court has spoken in terms of safeguarding the right "to inquire, to study and to evaluate, to gain new maturity and understanding."<sup>106</sup> Moreover, the rights of both teachers and students are to be protected.<sup>107</sup> In testing the Regulation under the Rehabilitation Act against this standard, the essence of academic freedom — the right to freely pursue ideas and beliefs — is in no way being challenged. The Regulation addresses itself only to making the arena where academic freedom may be exercised — learning institutions — open to those handicapped people previously precluded from it. The Regulation does not dictate the content of ideas and beliefs which may be presented in a classroom by either students or teachers. The Regulation, rather than infringing on academic freedoms, extends the exercise of academic freedoms to those previously excluded.

The courts have long recognized that the discretionary powers of

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<sup>103</sup> Another constitutional law challenge to the affirmative relief requirements has been that they constitute reverse discrimination, in violation of the equal protection clause of the fourteenth amendment. See American Council on Educ., Amicus Brief in Support of Petition for Certiorari in *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), cert. granted, 47 U.S.L.W. 3451 (Jan. 9, 1979) (No. 78-711). See also note 76 *supra*. The affirmative obligations imposed by § 504 and the HEW Regulation are distinguishable from the admissions quota program struck down by the Supreme Court in *Regents of the Univ. of Cal. v. Bakke*, 98 S. Ct. 2733 (1978), the leading case on reverse discrimination. The affirmative relief provisions of § 504 require schools to make adjustments in academic programs other than admissions for handicapped students who have met the same admission standards required of nonhandicapped students. It is ironic that the admissions policy which the Supreme Court struck down in *Bakke* used race as a positive admissions criterion, whereas the whole thrust of the § 504 regulation is to eliminate handicap as a negative factor in admissions. See note 68 and accompanying text *supra*.

Rather than establishing special admissions standards as in *Bakke*, the affirmative obligations under § 504 are imposed only to prevent the situation where "identical treatment . . . is itself discriminatory." 43 Fed. Reg. 2134 (1978). See discussion of "equally effective" treatment at notes 77-78 and accompanying text *supra*. As one commentator noted, "[t]he expenditure of funds to accommodate the needs of disabled employees under Section 504 is no more than a function of the non-discrimination requirements of the statute." Cook, *supra* note 3, at 59 n.174.

<sup>104</sup> See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Greene v. Howard Univ.*, 271 F. Supp. 609, 615 (D.D.C. 1967).

<sup>105</sup> *Id.*

<sup>106</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>107</sup> *Id.*

a university are not absolute. For example, public institutions, in carrying out hiring, firing, and disciplinary actions, are bound by applicable constitutional limits protecting the individual rights of both students and faculty.<sup>108</sup> Moreover, the courts have upheld congressional powers to condition receipt of federal funds on compliance with specified conditions, as long as the conditions are constitutional.<sup>109</sup> As noted above, it is hard to argue that the affirmative relief requirements constitute a first amendment intrusion. In *Lau*, a case with many of the same elements as the *Davis* case, the Supreme Court upheld as within congressional spending power the imposition of affirmative relief as a condition for receiving federal funds under a statute with a nondiscriminatory purpose.<sup>110</sup> In both *Davis* and *Lau*, Congress had prohibited discrimination against a specific group, and the courts found that effectively equal treatment would only be realized by providing supportive programs which enabled the protected group to participate fully in programs funded with federal monies.

#### IV. CONCLUSION

The HEW Regulation establishes clear guidelines for non-discriminatory treatment of "otherwise qualified handicapped individuals." Many institutions of postsecondary education argue that they should be allowed to treat handicapped applicants and students differently from other students and from the treatment delineated in the Regulation. The forthcoming Supreme Court decision in *Davis* should resolve the differences between HEW and such institutions.

Before the Rehabilitation Act became effective, people with severe handicaps were for the most part excluded from many educational programs and employment opportunities. The legislative history of the Act shows a concern for helping more than the minimally handicapped for whom little, if any, academic adjustment is necessary. Education, as the key to desirable jobs, can be crucial to allowing severely handicapped persons to break old barriers. By barring preadmission inquiry and requiring equally effective treatment for handicapped students, the HEW Regulation thus arguably effectuates the congressional purpose of allowing all handicapped students to achieve their full intellectual and economic potentials.

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<sup>108</sup> See, e.g., *Perry v. Sinderman*, 408 U.S. 593 (1972); *Soglin v. Kauffman*, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969). But see *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

<sup>109</sup> *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

<sup>110</sup> 414 U.S. at 569. See notes 86-90 and accompanying text *supra*.

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