# Contagious Diseases Are Handicaps Under Section 504 of the Rehabilitation Act

## I. INTRODUCTION

After centuries of struggle for equal opportunity, Congress finally recognized America's handicapped through the enactment of the Rehabilitation Act of 1973 (the Rehabilitation Act).[1] With this legislation, Congress endeavored to "share with handicapped Americans the opportunities for education, transportation, housing, health care, and jobs that other Americans take for granted."[2] In an effort to eradicate the powerful prejudice and ignorance which plagued so many disabled Americans for so

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[1] Pub. L. No. 93-112 § 504, 87 Stat. 355, 394 (1973) (current version at 29 U.S.C. § 794 (1982) *amended by* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, & 103(d)(2)(B), 100 Stat. 1807, 1810 (1986) *and* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9, 102 Stat. 28 (1988)). The Rehabilitation Act (Act) contains three substantial provisions. Section 501(b) requires most federal agencies to take affirmative action to employ the handicapped:

> Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall . . . submit to the Office of Personnel Management and to the [Interagency Committee on Handicapped Employees] an affirmative action program for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. . . .

29 U.S.C.S. § 791 (b) (Law Co-op Supp. 1985). Section 503(a) requires federal contractors to take affirmative action to employ the handicapped:

> Any contract in excess of $2,500 entered into by any federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section [7(7) of this Act]. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal services and nonpersonal services (including construction) for the United States.

29 U.S.C. § 793 (a) (1982). Section 504, which is the primary subject of this Comment, prohibits all organizations receiving federal assistance from discriminating against handicapped individuals:

> No otherwise qualified handicapped individual in the United States, as defined in section [7(7) of this Act], 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 conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (1982).

[2] 123 CONG. REC. 13,515 (1977) (statement of Sen. Humphrey).

long,[3] Congress equipped the Rehabilitation Act with an expansive definition of "handicapped individual," an anti-discrimination provision, and a favorable enforcement procedure.[4] Since its enactment, the statute has typically been broadly construed by administrative agencies[5] and narrowly construed by the judiciary.

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[3] As Senator Taft remarked:

> Too many handicapped Americans are not served at all, too many lack jobs, and too many are underemployed—utilized in capacities well below the levels of their training, education, and ability. . . .
> [I]f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward elimination of the most graceful barrier of all—discrimination.

119 CONG. REC. 24,587 (1973) (remarks of Sen. Taft). *See, e.g.*, Note, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 U. BALT. L. REV. 183, 185-186 (1978) (describing the hardship experienced by the handicapped because of lack of employment); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1501-1502 (1973) (discussing the history of discrimination against the handicapped); ten Broek & Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 814-815 (1966) (comparing disabled to "underprivileged ethnic and religious minority groups").

[4] 29 U.S.C. § 706(7)(B). In 1974, Congress amended the statute to provide an expansive definition of "handicapped individual" for use in § 504 as follows:

> [A]ny 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.

29 U.S.C. § 706(7)(B). This definition was limited somewhat in 1978 when Congress amended the Act to exclude alcoholics and drug abusers from handicapped status under the Act if their "current use of alcohol or drugs prevents . . . [them] from performing the duties of the job in question or . . . [their] employment would constitute a direct threat to property or the safety of others." 124 CONG. REC. 30322 (1978). To enforce the § 504 anti-discrimination provision, the handicapped individual generally need not file a complaint with any federal or state agency. The individual may go directly to federal district court to seek relief. 29 U.S.C. § 794 (1982).

[5] To clarify the statute's vague definitions, the Department of Health and Human Services (previously known as the Department of Health, Education, and Welfare), under the watchful eye of Congress, promulgated a number of regulations. *See* Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634-635 & nn. 14-16 (1984) (discussing Congress' involvement in the Department's promulgation of the regulations). The regulations define two important terms in the Act's definitions of a handicapped individual. "Physical impairment" is defined as follows:

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory; including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine.

45 C.F.R. § 84.3(j)(2)(i) (1985). In addition, the regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. § 84.3(j)(2)(ii) (1985).

While the agency regulations provided encouragement to handicapped litigants, the courts left them uncertain as to when the "opportunities" would arise. Amidst the inconsistency and confusion, the United States Supreme Court rendered a startling decision which clarified further the Act's anti-discrimination provision. Through its step-by-step analysis in *School Board of Nassau County, Florida v. Arline*,[6] the Supreme Court offered more insight into the workings of the statute than fourteen years of case law and regulations had provided. In response to the Court's decision in *Arline*, the legislature in April of 1988 amended the Act.[7] While the amendment subjected more programs and activities to the strictures of the Act,[8] it decreased to some degree the number of individuals protected by the legislation.

The purpose of this comment is to evaluate the Rehabilitation Act, identifying its strengths and weaknesses. In so doing, the comment will review the recent legislative developments as well as the judicial interpretations of the Rehabilitation Act. Finally, the Comment will suggest further amendments to the Act which could increase its social utility.

## II. PRE-*ARLINE* LEGISLATIVE AND ADMINISTRATIVE HISTORY OF SECTION 504

The Rehabilitation Act marked the culmination of the disabled's fight for equality.[9] After years as silent Americans, the handicapped united and demanded the attention of Congress.[10] As a result, Congress enacted legislation which purported to promote rehabilitative services and prevent discrimination.[11] The key to rehabilitation, according to members of the legislature, was the handicapped's integration into the workforce.[12] Yet, sig-

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6 107 S. Ct. 1123 (1987).

7 *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9, 102 Stat. 28 (1988).

8 *See id.*

9 123 CONG. REC. 12,216 (1977) (statement of Sen. Humphrey). Senator Humphrey heralded the Rehabilitation Act as the "civil rights declaration of the handicapped." *Id.* The handicapped legislation marked "[a] historic milestone in the struggle of disabled people for full equality of opportunity in our nation. . . ." *Id.* at 13342 (Sen. Cranston quoting Dr. Frank Bowe, director of the American Coalition of Citizens with Disabilities). The Rehabilitation Act was patterned after Title VI of the Civil Rights Act of 1964. *Arline*, 107 S. Ct. at 1126 & n.2.

10 *See supra* note 3.

11 119 CONG. REC. 635 (1973) (statement of Sen. Humphrey).

12 *See supra* note 3. *See also* S. REP. NO. 1297, 93d Cong., 2d Sess. 38 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6388-90.

nificant psychological and physical obstacles blocked impaired Americans' access to employment. Perhaps the most serious barrier faced by America's handicapped was discrimination in the workplace.[13] To free impaired Americans from the discriminatory acts of ignorant employers and federal grantees, Congress enacted section 504 of the Rehabilitation Act.[14] Section 504 generally prohibits any recipient of federal assistance from discriminating against "otherwise qualified" handicapped individuals.[15] Congress provided a definition for the term "handicapped individual" in section 7(6) of the Act.[16] That provision, as originally enacted, simply defined a handicapped individual as anyone whose "physical or mental disability . . . constitutes or results in a substantial handicap to employment."[17] Together these two provisions have been the subject of considerable judicial and administrative interpretation as well as legislative amendment.[18]

The Department of Health, Education and Welfare (HEW), now the Department of Health and Human Services (HHS), with the direction and encouragement of Congress, promulgated regulations to clarify the vague and complex terms provided in sections 504 and 7(6).[19] Through its regulations, the Department attempted to clarify those persons who Congress intended to protect under section 504.[20] Initially, the HEW regulation defin-

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13 119 CONG. REC. 15133 (1973) (statement of Sen. Pell). *See also* Note, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 U. BALT. L. REV. 183 (1978) (description of handicapped's plight and growth as a group). Today, approximately 8.1% of America's population have some disability which has left them unemployed. United States Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1987*, 362 (107th ed).

14 *See* 119 CONG. REC. 15,133 (1973) (statement of Sen. Pell); *id.* at 635 (statement of Sen. Humphrey); *id.* at 3,028 (remarks of Sen. Dole). Senator Dole offered the statement of a handicapped individual to express his support for the provision: "Separate but equal. It's still discrimination. Discrimination is a reaction to what people see-they see a deformed physique and they react. Maybe worse than [to] seeing a black skin, because they know they're not going to have to be afraid of turning black". *Id.*

15 Pub. L. No. 93-112, § 7(6), 87 Stat. 366, 371 (1973).

16 *See* note 4.

17 *See supra* note 15.

18 *See supra* note 5.

19 Exec. Order No. 11,914, 3 C.F.R. 117 (1977), authorizes the Secretary of HEW to ensure consistent enforcement of § 504 by directing all the federal agencies to issue its own regulations implementing § 504. *See* Note, *The Developing Law on Equal Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 U. BALT. L. REV. 183, 197-99. *See also supra* note 5 for a recitation of the regulations' provisions.

20 *See supra* note 5. The regulations defined essential terms in § 706(7)(B)'s defi-

ing "handicapped individual" mirrored the statutory provisions.[21] Congress quickly recognized the limitations of a definition which referred specifically to actual disabilities affecting employment and consequently amended section 7(6) in 1974.[22] Section 7(6)'s definition of "handicapped individual" was significantly expanded to include "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."[23] By way of the amended definition, Congress invited an increased number of handicapped Americans to seek shelter under the Act's protective provisions.[24] The HEW responded to

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nition of "handicapped individual" thereby making it easier to determine which impairments could be considered handicaps within § 504.

[21] *See* 45 C.F.R. § 401.1(i)(1)-(2) (1973). The 1973 regulations defined a "handicapped individual" as follows:

> (1) any individual who has a physical or mental disability and a substantial handicap to employment, which is of such a nature that vocational rehabilitation services (paragraph (2)(1) of this section) may reasonably be expected to render him fit to engage in a gainful occupation, including a gainful occupation which is more consistent with his capacities and abilities.
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> (2) any individual who has a physical or mental disability and a substantial handicap to employment for whom vocational rehabilitation services (paragraph (2)(2) of this section) are necessary for the purpose of extended evaluation to determine rehabilitation potential.

*Id.*

[22] A Senate report stated that:

> It was clearly the intent of the Congress in adopting . . . section 504 (nondiscrimination) that the term "handicapped individual" [that] section[s] was not to be narrowly limited to employment . . . .
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> [A] test of discrimination against a handicapped individual under section 504 should not be couched either in terms of whether such individual's disability is a handicap to employment, or whether such individual can reasonably be expected to benefit, in terms of employment, from vocational rehabilitation services. Such a test is irrelevant to the many forms of potential discrimination covered by section 504.

S. REP. No. 1297, 93d Cong., 2d Sess. 37 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6388.

[23] 29 U.S.C. § 706(7)(B) (1982).

[24] Expressing the specific intent of the amendment, Congress indicated that the provisions should be broadly construed. The Senate report provided that:

> Clause (A) in the new definition eliminates any reference to employment and makes the definition applicable to the provisions of federally-assisted services and programs. Clause (B) is intended to make clearer that the coverage of sections 503 and 504 extends to persons who have recovered—in whole or in part—from a handicapping condition, such as mental or neurological illness, a heart attack, or cancer and to persons who were classified as handicapped (for example, as mentally ill or mentally retarded) but who may be discriminated

the statutory amendment by substantially revising its regulations.[25] Those revised regulations, still in effect today, define the vague and broad terms supplied by Congress. For purposes of the Act, the regulations define "physical or mental impairment" as

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems; neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[26]

The regulations, by identifying specific functions such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working," make clear the meaning of "major life activities."[27] In the broadest terms, the regulations define the phrase "is regarded as having an impairment" as meaning that the individual

> (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated as having such an impairment.[28]

The regulations' detailed listing of physical impairments within the

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against or otherwise be in need of the protection of section 503 and 504.

Clause (C) in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protections of section 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

S. REP. NO. 1297, *supra* note 22, at 38-39, 1974 U.S. CODE CONG. & ADMIN. NEWS at 6389-90.

25 *See* 45 C.F.R. § 84.3 (1974).

26 45 C.F.R. § 84.3(j)(2)(i) (1987).

27 *Id.* at § 84.3(j)(2)(ii).

28 *Id.* at § 84.3(j)(2)(iv).

coverage of section 504 suggested that the provision reached beyond the traditionally recognized handicaps.[29] Armed with the regulations' more expansive interpretation of a "handicap," impaired individuals sought judicial determinations of section 504's scope.[30]

## III. JUDICIAL CONSTRUCTION OF SECTION 504 PRIOR TO *ARLINE*

In 1979, six years after the enactment of the Rehabilitation Act, the United States Supreme Court first considered section 504 of the Rehabilitation Act.[31] In *Southeastern Community College v. Davis*,[32] a woman with a serious hearing disability was denied admission to the nursing program at the community college.[33] The college maintained that because of her hearing disability, Davis could neither participate safely in the clinical training program nor adequately care for patients.[34] Davis responded by bringing an action alleging a violation of section 504 of the Act.[35]

Interpreting the "otherwise qualified" provision of section 504,[36] the Court held that an institution may require a handicapped applicant to meet legitimate physical qualifications.[37] Justice Powell, delivering the opinion of a unanimous Court, found support for this position in the HHS Regulations.[38] The regulations mandated that to participate in certain programs and activities, physical qualifications are essential.[39] The Court found that nursing required the ability to understand speech without

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29 *Id.* In addition to the agency's contribution to the definition of a "handicapped individual," in 1978, Congress amended the Act to exclude alcoholics and drug abusers from handicapped status. Congress supported this action because of the "direct threat to the safety of others" which these individuals posed. 29 U.S.C. 706(7)(B) (1982).

30 *See supra* note 5.

31 *See* Southeastern Comm. College v. Davis, 442 U.S. 397 (1979).

32 *Id.*

33 *Id.* at 401. Davis was diagnosed as having a bilateral, sensori-neural hearing loss. She was unable to understand spoken speech without the use of lipreading. *Id.*

34 *Id.*

35 *Id.* at 402. She also alleged she was denied equal protection and due process. The court dismissed the constitutional claims. *Id.* at 403 n.3.

36 *See supra* note 1.

37 *Southeastern Comm. College*, 442 U.S. at 407.

38 *Id.* at 405. In defining the term "qualified handicapped individual" under § 504, the regulations required that the individual meet *all* academic and technical standards. *Id.* (citing 45 C.F.R. § 84.3(k)(3) (1978) (emphasis added)).

39 *Id.* at 407. The explanatory notes to the regulations provide that "technical standards refers to *all* nonacademic admissions criteria that are essential to participation in the program in question." *Id.* at 406 (citation omitted) (emphasis added). The notes explain that a blind person possessing all the qualifications for driving except the ability to see would so qualify. *Id.* at 407 n.7.

reliance on lipreading.[40] The Court identified numerous situations in which a hearing impaired nurse would be unable to function properly and emphasized the potential harm which could result.[41] Accordingly, the Court determined that a hearing impaired individual such as Davis is not "otherwise qualified" for nursing because she is incapable of meeting the physical qualifications necessary for the competent care of patients.[42] Thus, the Court held that the college was not discriminating in violation of section 504 when it denied Davis admission based on her handicap.[43]

The Court next addressed Davis' claim that section 504 required affirmative conduct on the part of Southeastern to accommodate her.[44] Turning once again to the HHS regulations, the Court recognized that in some circumstances, institutions subject to the strictures of section 504 must make modifications to their programs.[45] The required modifications, however, are limited by the regulations which specifically exclude the provision of "personal services."[46] The Court contemplated the adjustments which Southeastern would have to make to ensure Davis' safe participation in the program[47] and held that section 504 imposed no obligation upon recipients of federal funds to make the substantial modifications necessary to accommodate a handicapped individual such as Davis.[48]

The *Southeastern* decision restricted the amount of protection

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40 *Id.* at 407.

41 *Id.* at 403. The Court reiterated the district court's findings, citing situations in which a hearing impaired individual could not properly function. The Court noted that a nurse is frequently in an operating room or intensive care unit where masks are worn by all medical staff. The individual who is dependent on lipreading for communication could become a danger to the patients in such a situation because of his/her inability to understand a doctor's orders. *Id.*

42 *Id.* at 407.

43 *Id.* at 414.

44 *Id.* at 404.

45 *Id.* at 408-09. The Court took note of regulation provisions applicable to post-secondary education programs which required § 504-covered institutions to make modifications in their programs to accommodate handicapped individuals. The regulation suggested time extensions for completion of degrees, substitution of course, and changes in the manner of class instruction. *Id.* at 408-09 & n.9 (citing 45 C.F.R. § 84.44 (1978)).

46 *Id.* at 409.

47 *Id.*

48 *Id.* at 411. The Court seems to suggest that there must be a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of grantees in preserving the integrity of their programs. *Id.* at 412-14.

section 504 afforded handicapped individuals.[49] Additionally, *Southeastern* established that an institution has virtually no affirmative duty under section 504 to substantially modify its program in order to accommodate the handicapped.[50] Consequently, to obtain protection from discrimination under section 504, a handicapped individual must meet all of a program's requirements, including any physical qualifications.[51] A handicapped individual, thus, could legally be barred from certain programs or activities if he was incapable of performing some of the program's physical tasks.[52]

For several years after *Southeastern*, the Supreme Court failed to adjudicate a section 504 case causing some legal scholars to speculate as to whether the statute had been drained of its strength.[53] In 1984, however, new life was breathed into section 504 by the Supreme Court's decision in *Consolidated Rail Corporation v. Darrone*.[54] The *Consolidated Rail* decision marked the first time that the Court applied section 504 in an employment context.[55] In *Consolidated Rail*, a locomotive engineer who had been injured while employed by Consolidated Rail Corporation (Conrail) brought suit alleging his section 504 rights had been violated.[56] Darrone's claim was based on the fact that after the accident Conrail refused to employ him, although he was still capable of working.[57]

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49 *See generally*, Note, *Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern*, 80 COLUM. L. REV. 171 (1980). The *Southeastern* decision advocated a more stringent application process for handicapped individuals. As the author suggests, handicapped individuals must go through a two-step analysis of their qualifications. First, they must meet the same admissions criteria as nonhandicapped individuals. Then, they must meet the school's determination that it can reasonably accommodate them. *Id.* at 188.

50 *Southeastern Comm. College*, 442 U.S. at 411.

51 *Id.* at 406.

52 *See id.*

53 *See supra* note 49.

54 465 U.S. 624 (1984).

55 *Id.* at 631-32. Although Congress clearly indicated that § 504 applied to employment discrimination, no cases involving employment and § 504 were brought to the Supreme Court. Most cases died in the appellate courts because the agency did not receive financial assistance for employment purposes. *Id.* at 629 n.6, 632 n.12. *See also* Note, *Handicap Discrimination in Employment: The Rehabilitation Act of 1973*, 39 ARK. L. REV. 1, 14-15 (1985) (discussing the non-existence of § 504 application in employment situations before *Consolidated*).

56 *Consolidated Rail*, 465 U.S. at 628. Darrone worked for Erie Lackawanna Railroad which Consolidated acquired pursuant to Subchapter III of the Regional Rail Reorganization Act of 1973. *Id.* at 627.

57 *Id.* at 628. Darrone was injured while working for the railroad. Due to the accident, his left hand and forearm had to be amputated. *Id.*

The *Consolidated Rail* Court held that section 504's bar on employment discrimination was not limited to programs that received federal financial assistance primarily to promote employment.[58] Rejecting the trend of the circuit courts which had consistently held that section 504's nondiscrimination requirement was only applicable to employment situations where employment was a primary objective of the federal assistance,[59] the Court found in favor of Darrone despite the fact that Conrail had received assistance for reorganization purposes only.[60] In reaching that decision, the Court invalidated the commonly held view that the 1978 amendments to the Act incorporated Title VI of the Civil Rights Act and thereby restricted the purview of the antidiscrimination provision.[61] Examining the legislative history of section 504, the Court found no trace of an intent to make Title VI's "primary objective" limitation applicable to section 504.[62] Instead, the Court discovered broad language condemning discrimination against the handicapped for "*any* program or activity receiving [f]ederal financial assistance."[63] The amendments had been intended to mirror only the remedial provisions of Title VI

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58 *Id.* at 625. The Court rejected the district court's holding that § 504's applicability was limited by the Title VI "primary objective" requirement. *Id.*

59 *See, e.g.*, Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Carmi v. Metro. St. Louis Sewer District, 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); Trageser v. Libbie Rehabilitation Center, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979). This view was based on the idea that by patterning § 505 after Title VI of the Civil Rights Act of 1964, Congress intended to incorporate Title VI in its entirety into the Rehabilitation Act. Section 604 of Title VI limits the applicability of Title VI to "employment practice[s] . . . where a primary objective of the Federal assistance is to provide employment." *Consolidated Rail*, 465 U.S. at 631. The appellate courts appeared to view this limitation as incorporated into § 504, making the antidiscrimination provision applicable only to programs or activities receiving federal assistance with employment as the primary objective. *Id.* at 630 n.6.

60 *Consolidated Rail*, 465 U.S. at 627.

61 *Id.* at 632.

62 *Id.* The Court found that Congress intended only to use § 604 of Title VI as a model for § 505 in terms of providing suggested remedies for a § 504 violation. *Id.*

63 *Id.* at 632-35 (emphasis in original). The Court first turned to § 504 itself for support, quoting the language which identified to whom the prohibition applied. The Court then referred to statements made by Senators Cranston, Taft, and Williams concerning the "profound effect" employment discrimination could have on the provision of rehabilitative services. The Court further remarked that other sections of the Act involving employment discrimination require all federal agencies and employers to act affirmatively to eliminate discrimination. *Id.* at 635 n.12. In addition, the Court took notice of the fact that the Act's amendments were actually the codification of the HEW's regulations, which applied to all programs obtaining federal assistance for any purpose. *Id.* at 635.

and to codify the HHS regulations.[64] The HHS, the Court emphasized, had consistently interpreted section 504 to apply to all recipients of federal financial aid.[65] Discerning no limiting language in either the legislative history or executive interpretations of section 504, the Court concluded that the provision prohibited employment discrimination on the basis of handicap by any program, activity or employer receiving federal assistance for any purpose.[66]

The *Consolidated Rail* decision restored some of section 504's strength[67] and removed the restriction which had been placed on section 504 by the lower courts.[68] It became evident that section 504 governed the conduct of more employers than had previously been acknowledged.[69] More handicapped Americans came forward to defend their right to be free from discrimination in the workplace.[70] *Consolidated Rail* had named section 504 as the weapon for fighting employment discrimination.[71] Not surprisingly, it was not long before the Supreme Court was again confronted with a section 504 employment discrimination claim.[72]

One year after the *Consolidated Rail* decision, the Court in *Atascadero State Hospital v. Scanlon* adjudicated a section 504 employment discrimination case in which the State of California was the accused employer.[73] In *Atascadero*, the plaintiff was a graduate student who suffered from diabetes mellitus and blindness in one eye.[74] The student had applied to the state hospital for a position as an assistant recreational therapist but was denied employment.[75] Alleging discriminatory treatment on the basis of handicap, he initiated an action against the state under section 504 of the Rehabilitation Act.[76] The defendant state of Califor-

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64 *Id.*

65 *Id.* at 634 nn. 14-15. Justice Powell also placed great weight on the HEW regulations in the *Southeastern* opinion. Here, he again used the regulations as a tool for interpreting the scope of § 504. *Id. See supra* note 45 and accompanying text.

66 *Consolidated Rail*, 465 U.S. at 625.

67 *See id.*

68 *See supra* note 66 and accompanying text.

69 *See Consolidated Rail*, 465 U.S. at 624.

70 *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Shuttleworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986).

71 *See Consolidated Rail*, 465 U.S. at 625.

72 *See Atascadero*, 473 U.S. at 234.

73 473 U.S. 234 (1985).

74 *Id.* at 236.

75 *Id.*

76 *Id.*

nia raised the eleventh amendment as a defense and the issue reached the United States Supreme Court.[77]

Justice Powell, writing for the majority,[78] recognized the importance and utility of the amendment and thereafter identified certain limited situations in which the state would not be protected from suit.[79] The Court reasoned that Congress may abrogate the states' constitutional immunity from suit "only by making its intention unmistakably clear in the language of the statute."[80] The Court then looked to the Rehabilitation Act to determine if Congress had met this stringent test.[81] Examining only the wording of the relevant provisions, the Court found the general language of the statute insufficient to override the amendment's grant of immunity.[82] Moreover, the Court refused to recognize the states' acceptance of funds as consent to suits under the Act.[83] The *Atascadero* Court thus concluded that although a state receives significant financial assistance under the Act, it will not be subject to punishment for violation of the Act's provisions.[84]

In a lengthy dissent, Justice Brennan joined by Justices Marshall, Blackmun and Stevens criticized the majority for "exempting the States from compliance with laws that bind every other legal actor in our Nation."[85] Justice Brennan maintained that the majority had placed unreasonable demands on Congress by requiring it to provide specific language in the statute in order to abrogate the states' immunity.[86] He suggested that the proper approach was to examine the legislative history of the Act to de-

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77 *Id.* at 236-37. The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Through its grant of sovereign immunity, the amendment limits judicial authority. *Id.*

78 *Atascadero*, 473 U.S. at 235. Joining Justice Powell for the majority were Chief Justice Burger and Justices White, Rehnquist, and O'Connor.

79 *Id.* at 237-40. The Court listed certain exceptions to the reach of the eleventh amendment, such as (1) if a State waives its immunity and consents to suit in federal court through express language or "overwhelming implication from the text as [will] leave no room for any other reasonable construction" or (2) if Congress acts pursuant to its powers under the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity through unequivocal language in the statute. *Id.*

80 *Id.* at 242.

81 *Id.* at 244-46.

82 *Id.* The Court examined the language of §§ 504 and 505. *Id.*

83 *Id.* at 246-47.

84 *See id.*

85 *Id.* at 248 (Brennan, J., dissenting).

86 *Id.* at 254 (Brennan, J., dissenting).

termine Congress' intent regarding the states.[87] Citing the statements of numerous senators, Justice Brennan provided evidence of a Congressional intent to include the states within the strictures of section 504.[88] Additionally, Justice Brennan criticized the majority's reliance on the constitutional significance of the eleventh amendment.[89] Engaging in an extensive review of recent research, Justice Brennan characterized eleventh amendment doctrine as being "anachronistic" and based on a mistaken historical premise.[90] In conclusion, Justice Brennan stressed that the majority rule obstructed the will of Congress and insulated the states from the consequences of their illegal conduct.[91]

*Atascadero* represented a significant defeat for the handicapped.[92] The Court preserved an "anachronistic"[93] constitutional doctrine at the expense of millions of Americans' rights.[94] Section 504 had been rendered powerless against the states and their eleventh amendment immunity.[95] Within a year, the Court had taken away much of what it had conferred upon the handi-

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87 *Id.* at 248 (Brennan, J., dissenting). Justice Powell, in the earlier § 504 cases, had consistently turned to the legislative history and administrative interpretations. This was the first time he overlooked the history. *See* Consolidated Rail v. Darrone, 465 U.S. 624 (1984); Southeastern Community College v. Davis, 442 U.S. 397 (1979).

88 *Atascadero*, 473 U.S. at 248-58 (Brennan, J., dissenting)). Justice Brennan quoted Senator Cranston with respect to liability under § 504:

> [W]ith respect to State and local bodies or local officials, attorney's fees, similar to cost, would be collected from the official, in his official capacity from funds of his or her agency or under his or her control; or from the State or local government-regardless of whether such agency of government is a named party.

*Id.* at 252 (Brennan, J., dissenting) (citing 124 CONG. REC. 30,347 (1978)). He also pointed to a statement made by Representative Jeffords, in describing another section of the Act, that the section "applies 504 to the Federal Government as well as State and local recipients of Federal dollars." *Id.* at 251 (Brennan, J., dissenting) (citing 124 CONG. REC. 13,901 (1978)). Representative Jeffords further stated, "It did not seem right to me that the Federal Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves." *Id.* at 251 n.4. (Brennan, J., dissenting) (citing 124 CONG. REC. 38,551 (1978)). In addition, Justice Brennan emphasized the words of Representative Vanik that "[O]ur Governments tax [handicapped] people, their parents and relatives, but fail to provide services for them. . . . The opportunities provided by the Government almost always exclude the handicapped." *Id.* at 249 (Brennan, J., dissenting) (citing 117 CONG. REC. 45,974 (1971)).

89 *See id.* at 258-59 (Brennan, J., dissenting).

90 *Id.* at 258-59, 302 (Brennan, J., dissenting).

91 *Id.* at 258 & n.7 (Brennan, J., dissenting).

92 *See id.*

93 *See infra* note 97 and accompanying text.

94 *See id. See supra* note 29.

95 *See id.*

capped in *Consolidated Rail*.[96] This was not the only blow the Court had dealt to section 504 in 1985.[97] Several months before the *Atascadero* decision, the Supreme Court in *Alexander v. Choate* expressed an unwillingness to extend section 504 to a different type of discrimination.[98]

In *Alexander*, a group of Tennessee Medicaid[99] recipients brought suit seeking declaratory and injunctive relief from the state's proposed benefit reduction plan.[100] The group contended that the planned reduction of paid inpatient hospital days would have a disproportionate impact on the handicapped recipients.[101] Asserting that any global limitation of the number of paid inpatient days would be discriminatory, given the special needs of the handicapped,[102] the group argued that such disparate impact discrimination was a violation of section 504 of the Act.[103]

Reverting back to its practice of studying legislative and administrative directives,[104] the Court recognized that some claims of disparate-impact discrimination could be redressed under section 504.[105] Nevertheless, the Court held that the effect of the Tennessee Medicaid reduction plan was not an actionable disparate-impact claim.[106] The Court reasoned that the antidis-

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96 *See Consolidated Rail*, 465 U.S. at 624.

97 *See* Alexander v. Choate, 469 U.S. 287 (1985).

98 *See id.*

99 *Id.* at 287. The Court defines Medicaid as:

> [A] joint state-federal funding program for medical assistance in which the Federal Government approves a state plan for the funding of medical services for the needy and then subsidizes a significant portion of the financial obligations the State has agreed to assume.

*Id.* at 287 n.1. The Court furthered indicated that "[o]nce a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations. *Id.* (citing Harris v. McRae, 448 U.S. 297, 301 (1980)).

100 *Id.* at 289. The plaintiffs were not seeking compensatory damages. Therefore the eleventh amendment issue would be decided in *Atascadero*.

101 *Id.* at 290. The plan called for a reduction from 20 to 14 paid annual inpatient hospital days. The plan was offered as a cost-saving measure. *Id.* at 289.

102 *Id.* at 290. The plaintiffs offered statistical evidence in support of their position. *Id.*

103 *Id.*

104 *See Southeastern*, 442 U.S. at 397; *Consolidated Rail*, 465 U.S. at 624. The Court in *Southeastern* and *Consolidated Rail* relied heavily on legislative and administrative materials. The Court later abandoned this practice in *Atascadero*, focusing more on the overriding importance of protecting the eleventh amendment.

105 *Alexander*, 469 U.S. at 297-98. The Court hinted that such claims in the areas of employment, education, and elimination of physical barriers to access might be more successful. The Court referred to various statements made by Senators which refer to these areas. *Id.* at 307.

106 *Id.* at 287.

crimination provision required that handicapped individuals be given equal, meaningful *access* to the provided benefit.[107] The Act did not guarantee the handicapped *equal results* from the benefit.[108] The Court found that since all of Tennessee's Medicaid recipients received identical benefits, section 504's mandate had been satisfied.[109] Additionally, the Court rejected the group's proposal that the state eliminate the durational limitations altogether.[110] Citing *Southeastern*,[111] the Court pointed out that the administrative cost of modifying the plan would exceed the accommodations required by section 504.[112] While the *Alexander* Court found the potential administrative burden on the state to be more compelling than the handicapped's need for medical treatment,[113] the decision provided some assurance that section 504 would be instrumental in battling future disparate impacts on the handicapped.[114] This avenue remained unexplored as the disheartened handicapped wondered exactly who or what section 504 protected.[115]

Perhaps the most discouraging aspect of the *Alexander* decision was not the denial of extra Medicaid benefits to the handicapped[116] but rather the refusal of the Court to set workable guidelines to aid handicapped litigants.[117] *Alexander* was not the first defeat the handicapped had faced, nor was it the first time that the Court had declined an opportunity to define the boundaries of section 504.[118] After more than a decade in existence, section 504 remained a vain attempt by Congress to provide handicap reform.[119] It was against this background that the Supreme Court decided *School Board of Nassau County, Florida v.*

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107 *Id.* at 301.

108 *Id.* at 304.

109 *Id.* at 302-303.

110 *Id.* at 306.

111 *Southeastern*, 442 U.S. at 397.

112 *Alexander*, 469 U.S. at 308.

113 *See id.*

114 *Id.* at 297-98. The Court appeared to reject this claim because the states have traditionally been given broad discretion concerning Medicaid. *See id.* at 303. *See also* Rebell, *Structural Discrimination and the Rights of the Disabled* 74 GEO. L.J. 1435 (1986).

115 *See* Rebell, *supra* note 114, at 1435.

116 *See id.*

117 *See id.* at 1447.

118 *See Southeastern*, 442 U.S. at 397.

119 *See id. See also* Jasany v. United States Postal Serv., 755 F.2d 1244 (1985); Daubert v. United States Postal Serv., 733 F.2d 1367 (1984); Tudyman v. United Airlines, 608 F. Supp. 739 (D.C. Cal. 1984).

*Arline*.[120]

## IV. THE *ARLINE* DECISION

In 1957, Gene Arline contracted infectious tuberculosis and was hospitalized for treatment.[121] For the following twenty years, Arline's disease remained in remission.[122] During this time, Arline acquired a position as an elementary school teacher in Nassau County, Florida.[123] She was a highly regarded employee[124] and continued to teach in Nassau County for thirteen years.[125] Arline's term of employment was interrupted on three occasions when she suffered relapses of tuberculosis.[126] Each time, the School Board suspended Arline with pay for the remainder of the school year.[127] After the 1978-1979 school year had ended, however, the School Board decided to make Arline's suspension permanent.[128] The Board did not cite either misconduct or inability as the reason for her dismissal.[129] Instead, the Board named Arline's "continued recurrence of tuberculosis" as cause for employment termination.[130]

Arline sought to have the School Board's decision reversed through state administrative proceedings.[131] After she was de-

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120 107 S. Ct. 1123 (1987).

121 *Id.* at 1125. Tuberculosis is defined as "[a] specific disease . . . [w]hich may affect almost any tissue or organ of the body, the most common seat of the disease being the lungs . . . The local symptoms vary according to the part affected, the general symptoms vary according to the part affected, the general symptoms are those of . . . hectic fever, sweats, and emaciation." STEDMAN'S MEDICAL DICTIONARY 1498 (5th ed. 1982).

122 *Arline*, 107 S. Ct. at 1125.

123 *Id.* Arline began working for the Nassau County, Florida school department in 1966. *Id.*

124 Brief for Petitioner at 8, School Bd. of Nassau County, Fla. v. Arline, 107 S. Ct. 1123 (1987) (No. 86-1277). Arline was a tenured teacher with the Nassau County School Department. *Id.*

125 *Arline*, 107 S. Ct. at 1125. Arline worked for Nassau County from 1966 to 1979. *Id.*

126 *Id.* Tuberculosis was discovered in Arline's system in 1977. This was the first of three relapses to occur within a year. She had a second relapse in the Spring of 1978 and her third in November of 1978. *Id.*

127 *Id.*

128 *Id.* The School Board held a hearing at which it decided to terminate her employment. *Id.*

129 *See id.*

130 *Id.* The School Board did not dispute that Arline was dismissed solely on the basis of her illness. Instead, it reasoned that their action was justified because Arline posed a health risk to her students. Brief for Petitioner, *supra* note 124, at 15.

131 School Bd. of Nassau County, Fla. v. Arline, 772 F.2d 759, 760 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1123 (1987). Arline had a hearing before the State Board of Education. She was denied relief. Pursuant to a state law concerning administra-

nied relief, she initiated an action in federal court, alleging a violation of section 504.[132] Arline contended that her susceptibility to tuberculosis made her a "handicapped individual" within the meaning of the Act and that by dismissing her solely because of her illness, the School Board violated section 504.[133] The School Board contended, however, that Arline's dismissal was justified because of the substantial health risk she posed to the school children.[134] The United States District Court for the Middle District of Florida accepted this rationale and denied Arline's request for relief.[135] The United States Court of Appeals for the Eighth Circuit reversed the trial court's decision, finding that contagious diseases are handicaps within the coverage of section 504.[136] Specifically, the court held that Arline's condition fell "neatly within the statutory and regulatory framework" of the Act.[137] The United States Supreme Court granted the School Board's petition for certiorari[138] and subsequently affirmed the appellate court's decision.[139]

The Court began its analysis as it had in prior decisions by

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tive practices, Arline appealed to the First District Court of Appeals in Florida, which also ruled against her. 772 F.2d at 760 n.3.

132 *Id.* at 760. Arline also brought a claim under 42 U.S.C. § 1983, alleging that she was denied due process under the fourteenth amendment. Both of the lower courts rejected this claim. Arline did not present the issue to the Supreme Court. *Id.* at 760 n.3.

133 *Id.* at 761. Arline first argued that her handicap "created no barrier at all to her continued employment because the risk that she would infect her students was so minimal." *Id.* Alternatively, she claimed that "if nonsusceptibility to tuberculosis was a necessary physical qualification for teaching small children, the school district should have offered her 'reasonable accommodation.'" *Id.* Arline suggested that she could have taught older, less susceptible children or that she could have done an administrative job. *Id.*

134 Brief for Petitioner, *supra* note 124, at 14-15. At trial, a physician specializing in tuberculosis testified concerning Arline's condition and the infectious nature of the disease. Dr. Marianne McEuen, M.D. described tuberculosis as "an infectious disease which is capable of being transmitted from one individual to another by means of breathing, coughing, sneezing, or other respiratory activity." *Id.* at 8. Children, she emphasized, are particularly susceptible to the disease. *Id.*

135 *Arline*, 772 F.2d at 761. Inferring legislative intent, the court held first that a contagious disease such as tuberculosis was not a handicap within the meaning of the Rehabilitation Act. It then went on to conclude that even if an individual with a contagious disease could be considered handicapped, Arline was not "otherwise qualified" to teach elementary school because of the potential danger to the children. In addition, the court found that the Nassau County School Department did not meet the federal funding test of § 504 and therefore could not be bound by it. *Id.* at 761-62.

136 *Id.* at 764.

137 *Id.*

138 School Bd. of Nassau Cty, Fla. v. Arline, 106 S. Ct. 1633 (1986).

139 *Arline*, 107 S. Ct. at 1126.

examining the legislative and administrative history of section 504.[140] Writing for the majority, Justice Brennan emphasized the legislature's effort to protect impaired Americans from the ignorance and archaic attitudes of society.[141] The Justice pointed with approval to the 1974 amendments to the Act which included individuals erroneously labelled "handicapped" within section 504's coverage.[142] In addition, the Court recognized the insight that the HHS regulations provided to the meaning of "handicapped individual" under section 504.[143] Relying on this legislative and administrative history, the Court considered the merits of Arline's claim.[144]

The Court first addressed the issue of whether Arline was a handicapped individual within the meaning of the statute.[145] Arline's tuberculosis affected her respiratory system and caused her to be hospitalized.[146] Scrutinizing the definitions supplied by the regulations, the Court found that Arline had a "physical impairment" which substantially limited one or more of her "major life activities."[147] The Court reasoned that Arline's hospitalization for the disease demonstrated that she had a "record of . . . impairment" for purposes of the statute.[148] Conceding that Arline had such record, the School Board contended, however, that it was irrelevant since Arline was not discharged due to her physical incapabilities, but rather because she posed a health risk to others.[149] Accordingly, the School Board argued that Arline was not a handicapped individual within the purview of the statute.

The Court dismissed the School Board's contention with little effort.[150] Referring once again to the 1974 amendments to the Act, the Court maintained that the Legislature never intended to permit an employer to "seize upon the distinction" between "the contagious effects of a disease" and the "disease's physical effects on a [patient]."[151] By extending coverage to indi-

140 *Id.* at 1126-27. *See Alexander*, 469 U.S. at 287; *Consolidated Rail*, 465 U.S. at 624; *Southeastern*, 442 U.S. at 397.
141 *Arline*, 107 S. Ct. at 1126.
142 *Id.*
143 *Id.* at 1127.
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.* at 1128.
150 *See id.* at 1128-29.
151 *Id.* at 1128.

viduals "regarded as having" a physical impairment, the Court declared that Congress was concerned that society's fears concerning disease and disability would create a handicapping condition.[152] Noting the discriminatory treatment historically given to those who were perceived as contagious,[153] the Court emphasized that the Rehabilitation Act was designed to replace irrational, reflexive reactions to handicaps with actions based on informed medically-sound judgments.[154] From this interpretation of legislative intent, the Court concluded that excluding all individuals with actual or perceived contagious diseases from section 504's coverage would result in "discrimination on the basis of mythology."[155] Instead, the Court suggested that these individuals should be evaluated in light of medical evidence.[156] Accordingly, the Court concluded that an individual suffering from a contagious disease can be a handicapped person within the meaning of the Rehabilitation Act. Before section 504 relief may be granted, however, the individual must be otherwise qualified for the position.[157]

In order to determine whether Arline was otherwise qualified for the job of elementary school teacher, the Court remanded the case and directed the lower court to conduct an "individualized inquiry" in order to make appropriate factual findings.[158] The Court explained that such an inquiry was necessary to achieve the goal of section 504—protecting the handicapped from deprivations based on ignorance and prejudice while respecting the interests of grantees in preventing the infection of others.[159] To aid the lower court in conducting this inquiry, the Court enunciated a three-pronged method for determining if an individual is otherwise qualified.[160] First, the

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152 *Id.* at 1129.

153 *Id.* at 1129 & nn.12-13.

154 *Id.* at 1129.

155 *Id.* at 1130.

156 *Id.*

157 *Id.* at 1131.

158 *Id.*

159 *Id.* at 1131 & n.16. The Court explicitly stated that:

> A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children.

*Id.*

160 *Id.* at 1131.

court should establish the nature and extent of the risk associated with the disease.[161] Second, in making these findings of fact, the court should "defer to the medical judgments of public health officials."[162] As a final step, the court must consider whether the employer/grantee could reasonably accommodate the individual.[163]

Chief Justice Rehnquist, joined by Justice Scalia, dissented from the majority opinion.[164] According to the dissent, the majority ignored precedent by extending the Rehabilitation Act's protection to contagious diseases.[165] Chief Justice Rehnquist posited that the language of the Act was ambiguous and therefore did not provide notice to grantees that such a condition would be placed on receipt of federal funds.[166] In support of his position, the Chief Justice cited case law concerning placement of conditions on federal funds as well as federal and state legislation pertaining to contagious diseases.[167] The dissent advocated a strict adherence to the provisions of the statute without reference to legislative intent.[168] The Chief Justice concluded that because neither the Act nor the regulations explicitly mentioned contagiousness, it could not be considered a handicap within section 504.[169] The dissent further criticized the majority's interpretation of legislative intent.[170] Referring to the 1978 amendments to the Act, [171] the Chief Justice construed the exclusion of drug abusers and alcoholics as manifesting an intent to keep the Rehabilitation Act from interfering with public health and safety con-

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161 *Id.* The Court adopted a proposal submitted by the American Medical Association as amicus, which suggested that the inquiry should include:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

*Id.* (citations omitted).

162 *Id.* at 1130 & n.15.

163 *Id.* at 1131. The Court cited *Southeastern* and its standards for what constitutes "reasonable accommodation." *Id.* at 1131 n.17. The Court also states that "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee." *Id.* at 1131 n.19.

164 *See id.* at 1132 (Rehnquist, C.J., dissenting).

165 *Id.*

166 *Id.* at 1132-33 (Rehnquist, C.J., dissenting).

167 *Id.* at 1132 (Rehnquist, C.J., dissenting).

168 *See id.* at 1133 (Rehnquist, C.J., dissenting).

169 *Id.*

170 *Id.* at 1133-34 (Rehnquist, C.J., dissenting).

171 *Id. See supra* note 4.

cerns.[172] According to the dissent, the majority's decision directly contradicted this legislative intent.[173] In a final comment, Chief Justice Rehnquist accused the majority of extending section 504 beyond manageable bounds.[174]

In light of the Supreme Court's prior decisions, *Arline* could be considered a tremendous victory for the handicapped.[175] Following legislative intent, the Court broadly construed section 504 to include contagious individuals as handicapped.[176] *Arline*, therefore, cleared the way for section 504 litigation by those discriminated against on the basis of contagion.[177] Moreover, the *Arline* Court furnished handicapped litigants with guidelines for the ambiguous antidiscrimination provision.[178] Through its step-by-step analysis of the *Arline* case, the Court developed a method for resolving section 504 cases.[179]

## V. POST-*ARLINE* LEGISLATIVE AND JUDICIAL DEVELOPMENTS

While the Supreme Court was fervently developing its version of "legislative intent," the drafters of the Rehabilitation Act were desperately attempting to "restore" the law's vitality.[180] The Act's original sponsors noted the Supreme Court's misconstruction of the anti-discrimination legislation at an early date and expressed concern that the early decisions marked a "shameful back-sliding on civil rights."[181] In 1984, the civil rights advo-

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172 *Arline*, 107 S. Ct. at 1134 (Rehnquist, C.J., dissenting).

173 *Id.* at 1134 n.5 (Rehnquist, C.J., dissenting).

174 *Id.* at 1134 (Rehnquist, C.J., dissenting).

175 *Compare Arline*, 107 S. Ct. at 1123 *with Atascadero*, 473 U.S. at 234 (exempting states from punishment for § 504 violations); *Alexander*, 469 U.S. at 287 (denying handicapped relief under § 504 for disparate-impact discrimination because of the administrative burden which a change of the plan would cause); *Southeastern*, 442 U.S. at 397 (limiting § 504 by allowing physical qualifications of an impaired individual to be considered and by minimizing the amount of accommodation required of grantees for handicapped individuals).

176 *See Arline*, 107 S. Ct. at 1127-32.

177 *See id.*

178 *See id.*

179 *See id.*

180 In 1984, the Committee on Labor and Human Resources recognized that the Supreme Court had not properly construed section 504 of the Act. The Court's decisions in Grove City College v. Bell, 465 U.S. 555 (1984) and Consolidated Rail v. Darrone, 465 U.S. 624 (1984) sparked new Congressional interest in the civil rights laws. From 1984 to 1987, the drafters of the original Rehabilitation Act struggled to obtain majority approval of the Civil Rights Restoration Act. *See Civil Rights Restoration Act of 1987: Hearings Before the Committee on Labor and Human Resources of the U.S. Senate*, 100th Cong., 1st Sess. 1-3 (1987) (statement of Sen. Kennedy).

181 *Civil Rights Hearings*, *supra* note 180, at 2.

cates in Congress introduced legislation intended to restore "the broad civil rights protections" originally granted through section 504 of the Act.[182] The 1984 bill was rejected by Congress.[183] Throughout the three years that followed, the original drafters of the Act struggled, without success, to shepherd the civil rights legislation through the Congress.[184] The enactment of the Civil Rights Restoration Act of 1987[185] (the Restoration Act) signified a long overdue victory for the drafters and millions of oppressed handicapped Americans.

Although the Restoration Act did not actually broaden the substantive civil rights provisions,[186] it supplied the handicapped with additional protection from discrimination by restoring the Act to its "pre-judicial interpretation" status. Specifically, the Restoration Act clarified two essential provisions of the Rehabilitation Act, legislatively overruling the *Atascadero*[187] decision, expanding the Supreme Court's holding in *Consolidated Rail*,[188] and codifying its decision in *Arline*.[189] The Restoration Act amended section 504 by clearly defining the programs and activities governed by the Act.[190] The amendment provides that a program or activity will include all of the operations of:

> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a state or local government;
> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or
> (B) a local educational agency . . ., system of vocational education, or other school system;

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182 *See id.* at 3 (statement of Sen. Simon).

183 *Id.* at 1-3. Prior bills proposing amendments to the Act were effectively "held hostage by a campaign of obfuscation and misinformation." *Id.* at 6. Some members of the Congress entangled the proposed amendments in a mass of confusion by suggesting that the legislation involved issues such as abortion, religion, and restraints on business. *Id.* at 6-7.

184 *Id.*

185 Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 31 (1988).

186 *Civil Rights Hearings*, *supra* note 180, at 3.

187 473 U.S. 234 (1985).

188 465 U.S. 624 (1984).

189 107 S. Ct. 1123 (1987).

190 Pub. L. No. 100-259, § 4.

> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—
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> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
>
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
>
> (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
>
> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2) or (3); any part of which is extended Federal financial assistance.[191]

The Restoration Act effectively overrules the *Atascadero*[192] decision by explicitly naming the states as covered programs, thus abrogating their eleventh amendment immunity in "unmistakably clear . . . language."[193] The *Consolidated Rail*[194] holding is clarified and expanded by the Restoration Act's inclusion of *all* entities receiving *any* federal financial assistance within section 504's coverage.[195] Congress recognized the hardship which could potentially be placed on small programs receiving federal assistance and provided an exception to this all-encompassing provision.[196] According to the amendment, "small providers are not required . . . to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available."[197] Finally, Congress addressed the issues raised in *Arline*[198] and amended section 7(6) of the Rehabilitation Act.[199] Clarifying the definition of "handicapped individual" for purposes of employment, section nine states that the term "does not include an individual who has a currently contagious disease or infection and who, by reason of such diseases or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is

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191 *Id.*
192 473 U.S. 234 (1985).
193 *See supra* note 79 and accompanying text.
194 465 U.S. 624 (1984).
195 *See supra* notes 58-72 and accompanying text. *See also* Pub. L. No. 100-259, § 4.
196 *Id.* at § 4(2)(C).
197 *Id.*
198 *Arline*, 107 S. Ct. at 1123.
199 Pub. L. No. 100-259 § 9.

unable to perform the duties of the job."[200] The amendment codifies the *Arline* decision by recognizing contagious individuals as handicapped.[201] Additionally, the amendment places a limitation on "otherwise qualified" findings by excluding dangerously contagious individuals from the definition of handicapped individual.[202] At long last, the Restoration Act actually seemed to rehabilitate the judicially disabled anti-discrimination provision.

Since the illuminating *Arline* opinion and the enactment of the Restoration Act in early 1988, a number of section 504 cases have been decided. These decisions indicate that despite its renewed promise of protection, the new and improved section 504 may still be the victim of judicial battering. Shortly after the enactment of the Restoration Act, the Supreme Court decided *Traynor v. Turnage*.[203]

The plaintiffs in *Traynor* were honorably discharged veterans who, because of their alcoholism, did not exhaust their educational benefits under the G.I. Bill.[204] They requested an extension generally available to veterans who were prevented from using their benefits due to "a physical or mental disability which was not the result of . . . [their] own willful misconduct."[205] The Veterans' Administration (VA) interpreted the term "willful misconduct" in a regulation to include alcoholism which is not the result of an underlying psychiatric disorder, identified as "primary alcoholism."[206] Pursuant to this regulation, the VA denied plaintiffs their requested extensions.[207] Alleging violations of constitutionally protected rights and

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200 *Id.*

201 *See supra* notes 145-157 and accompanying text.

202 *See supra* notes 158-165 and accompanying text.

203 108 S. Ct. 1372 (1988).

204 *Id.* at 1376.

205 *Id.* (citing Pub. L. No. 95-202, Tit. II, § 203 (a)(1), 91 Stat. 1429, 38 U.S.C. § 1662(a)(7)). Veterans generally have ten years in which to take advantage of the benefits. *Id.*

206 *Id.* (citing 38 C.F.R. § 3.301(c)(2) (1987)). The regulation provides:

> *Alcoholism*: The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately [sic] and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

*Id.*

207 *Traynor*, 108 S. Ct. at 1376.

the Rehabilitation Act, the plaintiffs brought separate actions in the United States District Court for the Southern District of New York and the District Court for the District of Columbia.[208] Both district courts applied the Rehabilitation Act and held in favor of the plaintiffs.[209] On appeal, the respective courts of appeals rendered conflicting opinions.[210] The Supreme Court granted certiorari.[211]

As a preliminary matter, the Supreme Court established that VA decisions which are challenged under the Rehabilitation Act are subject to judicial review.[212] The Court then considered the discrimination claim.[213] Referring to the legislative history of the VA's benefit extension provision, the Court concluded that if Congress had intended to exclude primary alcoholism from the willful misconduct classification, it "most certainly would have said so."[214] The Court pointed out that Congress did not repeal, amend, or criticize the VA's willful misconduct provision in any of its amendments to the Rehabilitation Act.[215] Moreover, the Court opined that the regulation's preclusion of primary alcoholics from using the exten-

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208 *Id.* at 1377. Traynor brought suit in the United States District Court for the Southern District of New York. *See* Traynor v. Walters, 606 F. Supp. 391 (S.D.N.Y. 1985). McKelvey brought suit in the District Court for the District of Columbia. *See* McKelvey v. Walters, 596 F. Supp. 1317 (D.D.C. 1984).

209 *Id.* In *Traynor*, the district court rejected the constitutional claims based on due process and equal protection. The court adopted the plaintiff's Rehabilitation Act argument and held that alcoholism is a handicap under the Act. The court then found that the VA had discriminated against Traynor in violation of the Act. In *McKelvey*, the district court invalidated 38 C.F.R. § 3.301(C)(2) (1987) as contrary to the Rehabilitation Act and directed the VA to determine whether McKelvey was disabled without referring to the regulation. *Traynor*, 108 S. Ct. at 1377.

210 *Id.* The Court of Appeals for the Second Circuit in *Traynor* reversed the lower court, finding that judicial review of the Rehabilitation Act claim was barred by 38 U.S.C. § 211(a). The statutory provision bars judicial review of "the decisions of the Administration on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans." *Traynor*, 108 S. Ct. at 1377 (citing Traynor v. Walters, 606 F. Supp. 391, 396 (S.D.N.Y. 1985)). The Court of Appeals for the District of Columbia Circuit in *McKelvey* determined that judicial review was not barred by section 211(a) but reversed the lower court's decision, finding that the regulation was consistent with the Act. *Traynor*, 108 S. Ct. at 1377-78 (citing McKelvey v. Turnage, 792 F.2d 194 (D.C. Cir. 1986).

211 *Traynor*, 108 S. Ct. at 1378.

212 *Id.* at 1378-80. The Court noted "the strong presumption that Congress intends judicial review of administrative action." *Id.* at 1378 (quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986)). The Court then examined the legislative history of § 211(a) to determine congressional intent. *Id.* at 1379. The Court concluded that claims challenging VA decisions based on the Act were not barred by § 211(a). *Id.* at 1380.

213 *Id.*

214 *Id.* at 1381.

215 *Id.*

sion was "not inconsistent" with the Rehabilitation Act.[216] In making that finding, the Court rejected the plaintiffs' assertion that the regulation's categorization of disabled veterans based on "generalized determinations" was inconsistent with section 504's mandate of "individualized inquiry."[217] The Court determined that section 504 required no individualized determination of willfulness for veterans disabled by alcoholism.[218] According to the Court, the VA's classification of primary alcoholism as "willful misconduct" was reasonable in light of the conflicting medical evidence regarding the cause of alcoholism.[219] The Court upheld the regulation's classification of alcoholism as willful misconduct.[220]

In a scathing dissent, Justice Blackmun, joined by Justices Brennan and Marshall, rejected the majority's validation of the regulation.[221] Justice Blackmun criticized the majority for establishing a rebuttable presumption that primary alcoholism is always the result of willful misconduct.[222] The Justice emphasized that section 504 "bars the generic treatment of any group of individuals with handicaps based on archaic or simplistic stereotypes about attributes associated with their disabling conditions."[223] According to Justice Blackmun, the majority "ignore[d] the lesson of *Arline*, and the clear dictate of the Rehabilitation Act."[224] Citing *Arline*, Justice Blackmun stated that section 504 requires an individualized inquiry regarding each claimant's qualifications, "based on reasoned and medically sound judgments."[225] He maintained that the majority had instead made broad generalizations and supplied its own judgment as to the causes of alcoholism.[226] Justice Blackmun analogized the School Board's firing of Arline based on the generalization that *all* tuberculosis sufferers were contagious and dangerous to the VA's presumption that *all* primary alcoholics became disabled due to their own willful misconduct.[227] The Justice emphasized that reliance on even

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216 *Id.* at 1382.
217 *Id.* at 1383.
218 *Id.*
219 *See id.*
220 *Id.* at 1384.
221 *Traynor*, 108 S. Ct. at 1384 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun concurred with the majority's position regarding judicial review.
222 *Id.*
223 *Id.* at 1385 (Blackmun, J., concurring in part and dissenting in part).
224 *Id.*
225 *Id.* (citing School Board of Nassau County v. Arline, 107 S. Ct. 1123, 1129 (1987)).
226 *Id.* at 1385 (Blackmun, J., concurring in part and dissenting in part).
227 *Id.* at 1388 (Blackmun, J., concurring in part and dissenting in part).

"reasonable" generalizations was "clearly prohibited under *Arline*."[228] Further, Justice Blackmun noted the sparsity and inaccuracy of the medical evidence relied on by the majority.[229] In conclusion, the Justice maintained that the plaintiffs' cases should have been remanded to the VA for "individualized determinations, based on sound medical judgments" of whether they were "otherwise qualified" to receive an extension of their benefits.[230]

The United States District Court for the Eastern District of Pennsylvania in the case of *Davis v. Meese*[231] analyzed a section 504 claim in a manner similar to the *Traynor* majority. In *Davis*, an insulin-dependent diabetic challenged the Federal Bureau of Investigation's (FBI) policy of prohibiting all insulin-dependent diabetics from holding special agent or investigative specialist positions.[232] At trial, the court heard medical testimony as to the effects and treatment of diabetes.[233] Relying on this testimony, the court found that some diabetics have severe hypoglycemic reactions which could at least temporarily debilitate them.[234] The court identified the risk of a hypoglycemic reaction as the only danger facing a diabetic serving in the specified FBI positions.[235] To control the problem, medical experts suggested that an "insulin infusion test" could be used to detect a susceptibility to hypoglycemia.[236]

While the *Davis* court effortlessly found diabetics to be "handicapped" within the meaning of the Act, it exhausted considerably more energy in deciding the "otherwise qualified" issue.[237] The court acknowledged that the Act and *Arline* mandated an individualized fact-specific inquiry for "otherwise qualified" determinations.[238] Nevertheless, the court upheld the FBI's blanket exclusion of insulin-dependent diabetics.[239] Citing *Southeastern*, the court reasoned that even physical qualifications which exclude an entire class are valid if they are directly related to "concerns" about safety and job performance.[240] The court suggested that if a test were devised

228 *Id.*
229 *Id.* at 1389 (Blackmun, J., concurring in part and dissenting in part).
230 *Id.* at 1391-92 (Blackmun, J., concurring in part and dissenting in part).
231 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).
232 *Id.* at 506.
233 *Id.* at 513-16.
234 *Id.* at 513.
235 *Id.* at 516.
236 *Id.* at 518.
237 *Id.* at 517-20.
238 *Id.* at 517.
239 *Id.* at 518.
240 *Id.* at 517.

which could predict which diabetics presented *very little* or *no* risk of hypoglycemia then a blanket exclusion would be invalid.[241] According to the court, even the "small" likelihood that a diabetic would have a reaction while on the job was enough to justify the generalized exclusion.[242] Moreover, the court rejected plaintiff's suggestion that the FBI should fulfill its "reasonable accommodation" obligation by placing qualified diabetics on limited duty.[243] Pointing to the financial constraints placed on the FBI by Congress, the court reasoned that the accommodation of diabetics would impose an undue hardship on the FBI.[244] Further, the court remarked that the special agent job required the ability to perform all duties and assignments.[245] The court cited *Southeastern* in support of the proposition that only a "reasonable" accommodation was required by the statutes.[246] According to the *Davis* court, no reasonable accommodation was possible.

The *Traynor* and *Davis* decisions suggest that the courts still have not "caught on" to Congressional intent. Once again, the Supreme Court seemed to be eroding civil rights. However, subsequent decisions by several circuit courts indicate that at least some courts have heeded Congressional directives. The United States Court of Appeals for the Eleventh Circuit in *Martinez v. School Board of Hillsborough County, Florida*[247] properly conducted the individualized inquiry set forth in *Arline*.[248] In determining whether a mentally handicapped AIDS victim was "otherwise qualified" for admission to public school, the *Martinez* court considered the "risk" to others based on medical evidence.[249] The court concluded that a "remote theoretical possibility" of transmission was not a sufficient risk to warrant the child's exclusion from class.[250] Contrary to the *Davis* court's holding regarding risk, the *Martinez* court indicated that only a significant risk would render the handicapped individual unqualified.[251]

The United States Court of Appeals for the Seventh Circuit in

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241 *Id.* at 518, 520.
242 *Id.* at 520.
243 *Id.* at 519.
244 *Id.*
245 *Id.* at 519-20.
246 *Id.*
247 861 F.2d 1502 (11th Cir. 1988).
248 *Id.* at 1505.
249 *Id.* at 1505-06.
250 *Id.* at 1506.
251 *Id.*

*Carter v. Casa Central*,[252] likewise found that only a significant risk to others could disqualify a handicapped individual.[253] In *Carter*, the handicapped plaintiff was dismissed by her employer who erroneously believed that she posed a risk to others.[254] Detecting no evidence of risk, the *Carter* court stressed that "[i]t is precisely this type of uninformed generalization based upon stereotypes and prejudices which the Rehabilitation Act is designed to counteract."[255] The court therefore advocated a detailed factual inquiry into the nature of the disability and the requirements of the job.[256]

Similarly, the United States Court of Appeals for the Sixth Circuit adopted *Arline*'s in-depth factual inquiry.[257] In *Hall v. United States Postal Service*,[258] the handicapped plaintiff was denied a postal position based on a job description which required heavy lifting.[259] The *Hall* court admonished the district court for accepting the job description as conclusive and for granting summary judgment.[260] Quoting extensively from *Arline*, the court maintained that the "otherwise qualified" analysis was two-tiered.[261] First, the court must determine whether the physical qualifications are essential to the job.[262] Second, the court must decide whether the handicapped plaintiff could reasonably be accommodated to perform the job.[263] The *Hall* court emphasized that each tier required a "highly fact-specific inquiry" into the actual circumstances and requirements of the job.[264] The purpose of the "individualized inquiry," according to the court, is "to ensure that the employer's justifications 'reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives.' "[265] While the courts of appeal were once again "on the march towards equal rights for everyone,"[266] the Supreme Court had reverted back to its earlier practice of narrowly construing the Act.[267]

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252 849 F.2d 1048 (7th Cir. 1988).
253 *Id.* at 1054-55.
254 *Id.*
255 *Id.* at 1055.
256 *See id.*
257 *See* Hall v. United States Postal Serv., 857 F.2d 1073 (6th Cir. 1988).
258 *Id.*
259 *Id.* at 1075.
260 *Id.* at 1078-79.
261 *See id.*
262 *Id.* at 1079.
263 *Id.* at 1080.
264 *Id.* at 1079.
265 *Id.* at 1080 (quoting *Arline*, 772 F.2d at 765).
266 *Civil Rights Hearings*, *supra* note 180, at 7 (statement of Sen. Metzenbaum).
267 *See supra* notes 205-236 and accompanying text.

## VI. CONCLUSION

After years of uncertainty and inconsistency in the construction of the Rehabilitation Act, the Supreme Court provided guidance in *Arline* by setting forth a step-by-step approach to resolving section 504 claims. Shortly thereafter, Congress enacted the Restoration Act, which renewed the hope of civil rights for the handicapped. It bolstered the Rehabilitation Act's antidiscrimination provision to its pre-judicial interpretation status. Despite the clarity of the Restoration Act, the direction of *Arline*, and the unmistakably clear expression of intent by Congress, the future effectiveness of the statute is once again questionable. The Supreme Court seems to have forgotten the *Arline* mandate and to have ignored Congressional reaffirmations of intent. Yet, lower federal courts are generally following the Congressionally paved path.

It appears that Congress still has left too much to judicial interpretation. While the *Southeastern* decision remains good law, the *Traynor* and *Davis* cases are examples of how *Southeastern* can still be used to circumvent the statutory directives. The "potential risk of harm" consideration adopted by the Court in *Southeastern* and *Arline* has already been used improperly by the courts to side-step section 504 liability. The danger of this element of the "otherwise qualified" provision is that "potential harm" could almost always be found in any situation. Further amendments to the Act must explicitly confine the courts to rely on only significant risks proven to exist by medically sound judgments.

The question of reasonable accommodation is also subject to judicial construction. The "reasonableness" standard leaves much to interpretation. Congress provided some insight regarding the parameters of the reasonable accommodation requirement when it enacted the Restoration Act's small provider exception. The exception excuses small providers from making "significant structural alterations to their existing facilities."[268] While the exception is helpful in establishing the limits of reasonable accommodation for small providers, Congress should have ventured further. Future amendments to the Act should provide workable boundaries for reasonableness of accommodation. Perhaps Congress could establish the outer limits of reasonableness and list a number of factors to be taken into consideration. Addi-

[268] Pub. L. No. 100-259, § 4(2)(C).

tional guidelines must be furnished in order to prevent judicial deterioration of the accommodation requirement.

Unless Congress further amends the Act, handicapped individuals will remain subject to the whims of the judiciary. The Rehabilitation Act may once again become a fascinating tool, which unfortunately is virtually useless for most purposes.

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