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Employment Discrimination Under Section 504 of the Rehabilitation Act: Trageser v. Libbie Rehabilitation Center, Inc

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Employment Discrimination Under Section 504 of the Rehabilitation Act: *Trageser v. Libbie Rehabilitation Center, Inc.*[1]—The Libbie Rehabilitation Center (Libbie), a private corporation that operated a nursing home in Richmond, Virginia, received substantial income for patient care from Medicare, Medicaid, Veterans Administration, and welfare payments from both the state and federal governments.[2] The nursing home hired Novella Trageser as a registered nurse in 1971 and promoted her to director of nurses in 1975.[3] Trageser suffered from retinitis pigmentosa, a hereditary and progressive disease that impaired her eyesight.[4]

The Virginia Department of Health periodically inspected the nursing home.[5] On April 28, 1976, during a regular inspection, the certification officer commented to the administrator of the home that Trageser's eyesight had deteriorated since the last inspection, and asked what the home intended to do about it.[6] The administrator communicated this conversation to the board of directors, which resolved at its June 7, 1976 meeting to dismiss Trageser.[7] Upon learning of this decision, Trageser resigned.[8]

Trageser sued the nursing home in federal district court,[9] seeking reinstatement, back pay, and an injunction prohibiting the nursing home from receiving federal financial assistance until she was rehired.[10] She alleged that she was terminated[11] because of her disability,[12] in violation of the fifth[13] and fourteenth amendments to the Constitution,[14] 42 U.S.C. § 1983,[15] and section 504 of the federal Rehabilitation Act of 1973.[16]

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[1] Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

[2] 590 F.2d at 87-88.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Trageser v. Libbie Rehabilitation Center, Inc., 462 F. Supp. 424 (E.D. Va. 1977).

[10] Brief for the United States as Amicus Curiae 3-4, Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

[11] Both the district court and the court of appeals implicitly characterized Trageser's termination by resignation as a constructive discharge. *See* 590 F.2d at 88.

[12] *See* 462 F. Supp. at 425.

[13] U.S. CONST. amend. V. It states in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." *Id.*

[14] U.S. CONST. amend. XIV. It states in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* § 1.

[15] 42 U.S.C. § 1983 (1976). It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[16] 29 U.S.C. § 794 (1976). That provision states:

> No otherwise qualified handicapped individual in the United States . . .

In deciding the case, the district court first considered whether state action necessary to sustain a claim under the fifth and fourteenth amendments and section 1983 was present.[17] The court concluded that neither the regulation of the home by the state, nor the receipt of federal funding constituted state action,[18] and granted the defendant's motion to dismiss.[19] Turning to the section 504 complaint, the court considered whether the nursing home was a "program or activity receiving federal financial assistance"[20] so as to fall within the provision's proscription of discrimination.[21] The court failed to define "Federal financial assistance," but reasoned that the federal funds received by the home constituted payment for services rendered rather than "Federal financial assistance."[22] Consequently the court dismissed the section 504 complaint as well.[23]

On appeal the Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of Trageser's claims.[24] The court agreed with the district court that neither government regulation of the nursing home nor the receipt by the home of Medicaid, Medicare, and Veterans Administration funds was sufficient to constitute the state action necessary to sustain a claim under the fifth and fourteenth amendments to the United States Constitution and section 1983.[25] The appellate court arrived at the same result as the lower court regarding the section 504 claim,[26] but it relied upon a different rationale. It held that a private action to redress employment discrimination could be maintained under section 504 only when a primary objective of the federal financial assistance was to provide employment.[27] Since Trageser was unable to assert that the federal funding received by the nursing home was aimed at providing employment, the court dismissed her section 504 claim.[28]

Trageser is significant because it is the first case to hold that an individual must allege that the primary purpose of federal financial assistance is to provide employment in order to maintain a cause of action under section 504.[29]

> shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Id.

[17] 462 F. Supp. at 425-26.

[18] *Id.* at 426.

[19] *Id.* (by implication).

[20] 29 U.S.C. § 794 (1976), *cited in* 462 F. Supp. at 426.

[21] 462 F. Supp. at 426.

[22] *Id.* The court made an analogy to a federal judge who received a monthly federal salary check. *Id.* In the court's view, this payment would be compensation for performing the duties of a judge rather than federal financial assistance. *Id.* The court seemed to be interpreting the term "federal financial assistance" as involving the subsidization of a program or activity rather than direct payment for services provided.

[23] *Id.* (by implication).

[24] 590 F.2d 87, 90 (4th Cir. 1978), *cert. denied,* 442 U.S. 947 (1979).

[25] *Id.* at 90.

[26] *Id.* at 89-90.

[27] *Id.* at 89.

[28] *Id.* at 89-90.

[29] In Whitaker v. Board of Higher Education, 461 F. Supp. 99, 101, 106-07 (E.D.N.Y. 1978), the court found a private right of action under section 504 for a university professor who alleged that he was denied tenure because he was an al-

If the *Trageser* court's opinion is followed by other circuits,[30] it would drastically curtail the remedies available to individuals charging employment dis-

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coholic. The court did not require the plaintiff to show that the primary purpose of the federal funding received by the university was to provide employment. In Davis v. Bucher, 451 F. Supp. 791, 798 (E.D. Pa. 1978), the court ruled that Philadelphia's blanket refusal to hire former drug addicts constituted a section 504 violation. The court did not distinguish between plaintiffs who applied for jobs funded under the Comprehensive Employment and Training Act, 29 U.S.C. §§ 841-851 (1976) (CETA), and those who applied directly to city departments. 451 F. Supp. at 794, 797. While funding for CETA does meet the criterion of the *Trageser* court, that federal financial assistance must primarily serve to provide employment, there is no indication in the *Davis* opinion that all of the allegedly discriminatory programs operated by the city did satisfy the *Trageser* standard. In Simon v. St. Louis County Police Dep't, 14 E. P. D. 5440, 5441 (E.D. Mo. 1977), the court dismissed the complaint of a paraplegic whose handicap resulted from an injury sustained while employed as a police officer, and who reapplied for his former position with reasonable accommodations for his handicap. The court ruled that the plaintiff must aver that the particular job category in which he was allegedly subject to discrimination was a program or activity receiving federal financial assistance. *Id.* at 5441. However, the court was not faced with the issue of whether the federal funding received in the particular job category must be designated specifically for employment purposes.

The plaintiff in Duran v. City of Tampa, 430 F. Supp. 75, 76 (M.D. Fla. 1977) alleged that he was denied employment with the Tampa Police Department because of a childhood history of epilepsy. Although the court denied his injunction on other grounds, *id.* at 79, the court held that the plaintiff had a meritorious claim under sections 503 and 504. *Id.* at 78. The court did not inquire into the purposes of the federal funding received by the police department.

In Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 810 (E.D. Pa. 1977), an epileptic brought an action against a hospital, under sections 503 and 504, alleging that she was denied employment because of her handicap. Although the court ruled that the plaintiff must exhaust administrative remedies before she was entitled to judicial relief, *id.* at 816-18, the court asserted that section 504 was indeed concerned with employment. *Id.* at 815 n.6. The court found that "contrary to the defendants' contention, both sections [503] and [504] are concerned with employment. The general purposes of the Rehabilitation Act are set forth in 29 U.S.C. § 701(8) and include the promotion and expansion of employment opportunities in the public and private sector." *Id.* Finally in Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977), a case factually analogous to *Trageser*, the court considered the claim of a blind woman seeking a teaching position that the hiring practices of the Philadelphia School System discriminated against visually handicapped persons in violation of section 504. In upholding her claim on other grounds, *id.* at 991-92, the court stated that the refusal to hire a blind person as a teacher was the kind of discrimination which section 504 was intended to prohibit. *Id.* at 989.

[30] In the first post-*Trageser* case which examined the 1978 amendments outside of the Fourth Circuit, the district court declined to follow the Fourth Circuit's reasoning. Hart v. County of Alameda, 485 F. Supp. 66, 72 (N.D. Cal. 1979). The plaintiff, a controlled epileptic, alleged that he was denied employment as a counselor by the Alameda County Probation Department solely because of his handicap. *Id.* at 67. In rejecting the holding of the *Trageser* court, the *Hart* court first concluded that the section 604 limitations clause did not curtail private suits, but only applied to actions by departments or agencies. *Id.* at 72. Second, the court found that the *Trageser* inclusion of the section 604 limitation in any event was contraindicated by the legislative history of the 1978 Amendments which showed an intent to expand the remedies available under the Rehabilitation Act. *Id.* Finally, the court rejected the *Trageser* court's reasoning that, in failing to apply the remedies of title VII to section 504,

crimination against employers who receive federal funds.[31] Furthermore, employers easily could circumvent the reach of section 504 by omitting requests for the funding of staff positions from their applications for federal financial assistance since, under the *Trageser* decision, employment discrimination against handicapped individuals is only actionable where a primary objective of the federal financial assistance is to provide employment.[32] Even if not all federally funded programs within an institution excluded staff positions by grant manipulation, the anomalous situation would exist that within the same institution, certain employees would have a judicial remedy against employment discrimination, while other similarly situated individuals would have no source of relief.[33]

This casenote will focus upon the *Trageser* court's holding that handicapped individuals claiming employment discrimination have a right of action under section 504 of the Rehabilitation Act only if they can show that their employers received federal financial assistance in order to provide employment. It will analyze separately the two fundamental conclusions of law upon which this holding was founded: (1) that this interpretation is mandated under the 1978 amendment of the Rehabilitation Act, which provides to section 504 complainants the remedies, procedures and rights set forth in title VI of the Civil Rights Act of 1964;[34] and (2) that the 1978 amendment may be applied retroactively because it merely confirms, rather than alters, the rem-

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while making these procedures applicable to section 501, Congress meant to provide limited relief for employment discrimination under section 504. *Id.* at 72-73.

But see Silverstein v. Sisters of Charity, 21 F.E.P. Cas. 1077, 1078 (Colo. App. 1979), in which the court held that an epileptic, denied employment at a hospital receiving federal financial assistance, had no cause of action under section 504 because Medicaid and Medicare funds received by the hospital were for the purpose of reimbursing patients' hospital bills, rather than for providing employment.

[31] In September, 1977, the director of HEW's Office for Civil Rights testified that to date 70% of the section 504 complaints which his office received involved employment discrimination. *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 95th Cong., 1st Sess. 303 (1977) (statement of David Tatel). In fiscal year 1978, 640 of the 1,363 complaints registered with HEW by handicapped individuals alleged employment discrimination. Brief for the United States as Amicus Curiae on petition for certiorari at 5 n.6, Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979). The Office for Civil Rights had no information regarding the number of complainants who could allege that the primary purpose of the federal funding received by their employers was to provide jobs.

[32] 590 F.2d at 89.

[33] While some institutions operate a single program funded by only one federal agency, others run many semi-autonomous activities funded by multiple grants. Many large universities even operate multiple campuses. The court in Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969), considered this issue of separate grants as it applied to a school system which had its funding terminated under title VI of the Civil Rights Act. The court held that funding should only be terminated for the particular discriminatory program. *Id.* at 1078-79. The court noted that "there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school . . . is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others." *Id.* at 1078.

[34] 590 F.2d at 89.

edies Congress intended when it originally enacted section 504.[35] Toward this end the casenote first will offer a brief introduction to the Rehabilitation Act and to other provisions upon which section 504 is based. Then this note will review in detail the reasoning contained in the Fourth Circuit's decision. Following this examination, the note will consider the legislative history of the 1978 amendment, and will question the assumptions made by the *Trageser* court concerning the incorporation of the title VI remedies, procedures, and rights. Similarly, this note will examine the language and legislative history of section 504 as originally enacted. It will be demonstrated thereby, that, contrary to the holding of the *Trageser* court, the only plausible interpretation of section 504 as it existed prior to the 1978 amendment is that it broadly prohibited employment discrimination against disabled persons by recipients of federal financial assistance regardless of the primary purpose of the federal funding. Finally, an alternative explanation to that espoused by the *Trageser* court will be submitted. Specifically, it will be proposed that a better reading of the 1978 amendment is that it serves to codify existing administrative practice and to assure administrative due process in the enforcement of section 504. It will be argued that this interpretation is more consistent with the remedial intent of the Rehabilitation Act and the 1978 amendment, and would avoid the practical problems raised by the *Trageser* position.

I. The Origin and Development of Section 504

Legislation to provide rehabilitation services to disabled civilians was first enacted by Congress in 1920.[36] It authorized the provision of training, counseling, and placement services to physically handicapped individuals.[37] Throughout the next 53 years rehabilitation services were expanded in order to better meet the needs of a widening spectrum of persons.[38] The Rehabilitation Act of 1973 replaced previous vocational rehabilitation legislation then expiring.[39] The 1973 act modified and extended the system of grants to states to provide rehabilitation services and authorized programs to conduct research, to solve rehabilitation problems, to assist in the construction of rehabilitation facilities, to promote and expand employment opportunities, and to surmount obstacles caused by architectural and transportation barriers.[40]

Most of the provisions of title V of the Rehabilitation Act, of which section 504 is a part, are aimed at combatting discrimination against handicapped persons.[41] Section 504 in broad terms prohibits discrimination by recipients of federal financial assistance.[42] The language of section 504 is iden-

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[35] *Id.*

[36] S. Rep. No. 318, 93d Cong., 1st Sess. 9, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2076, 2082 (discussing Smith-Fess Act of June 2, 1920, Pub. L. No. 66-236, 41 Stat. 735 (1920)).

[37] *Id.*

[38] *Id.* at 9-11, *reprinted in* [1973] U.S. Code Cong. & Ad. News at 2082-84.

[39] Pub. L. No. 90-391, 82 Stat. 297, was enacted in 1968 and extended until June 1972. S. Rep. No. 318, 93d Cong., 1st Sess. 11, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2076, 2084.

[40] 29 U.S.C. § 701 (1976).

[41] 29 U.S.C. §§ 790 to 794 (1976).

[42] 29 U.S.C. § 794 (1976). See note 14 *supra* for full text.

tical to that contained in section 601 of the Civil Rights Act of 1964,[43] except that section 504 is aimed at discrimination on the basis of disability, rather than race, color or national origin. Other nondiscrimination provisions of the Rehabilitation Act mandate federal agencies to design affirmative action programs for the hiring, placement, and promotion of handicapped persons[44] and require contractors doing business with the federal government to take affirmative action to employ and advance qualified handicapped individuals.[45]

In 1977, the Department of Health, Education and Welfare (HEW) promulgated regulations pursuant to section 504 of the Rehabilitation Act of 1973.[46] These regulations prohibit discrimination by recipients of funds *inter alia*, employment,[47] health care,[48] welfare,[49] and social services.[50] In order to provide a method of administering and enforcing the regulations, HEW adopted the procedural provisions of title VI of the Civil Rights Act.[51]

In 1978, the Rehabilitation Act was amended.[52] Among other changes, the remedies, procedures, and rights set forth in title VI of the Civil Rights Act were made available to individuals alleging discrimination under section 504 of the Rehabilitation Act.[53] The remedies, procedures, and rights relat-

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[43] 42 U.S.C. § 2000d (1976). The Civil Rights Act, *inter alia*, outlaws discrimination in places of public accommodation, authorizes the Attorney General to initiate civil actions against school boards maintaining segregated schools, and establishes procedures for redressing employment discrimination. Title VI of the Act contains provisions relating to the prohibition of discrimination in federally assisted programs. The broad language of section 601 is qualified by section 604, 42 U.S.C. § 2000d-3, which states that a department or agency is not authorized to act with respect to the employment practices of a funding recipient unless the primary objective of the federal financial assistance is to provide employment. Section 2000e-2 of title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Section 504 also mirrored the wording of section 901 of the Education Amendments of 1972, which prohibited sex discrimination in education programs or activities receiving federal financial assistance, 20 U.S.C. § 1681(a) (1976). The Education Amendments of 1972 authorize the extension of appropriations for higher education and occupational education and include various other amendments to acts related to elementary and secondary education.

[44] 29 U.S.C. § 791 (1976).

[45] 29 U.S.C. § 793 (1976).

[46] 45 C.F.R. Part 84 (1979).

[47] 45 C.F.R. § 84.11(a) (1979).

[48] 45 C.F.R. § 84.51 (1979).

[49] *Id.*

[50] *Id.*

[51] 45 C.F.R. § 84.61 (1979).

[52] Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (to be codified at 29 U.S.C. § 794a). Prior to the 1978 amendment, the Rehabilitation Act was amended in 1974. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617.

[53] Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (to be codified at 29 U.S.C. § 794a(2)). The amendment provides in part:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.

Id.

ing to employment discrimination by the federal government contained in title VII of the Civil Rights Act were made available to individuals alleging discrimination under section 501 of the Rehabilitation Act.[54]

The effect of the 1978 amendment upon the interpretation of section 504 is the subject of this note. One view is that the incorporation of title VI was aimed at clarifying the congressional intent that section 504, when originally enacted, was narrow in scope. Under this reading of the amendment, a disabled person could maintain a cause of action under section 504 only when federal financial assistance was aimed at providing employment. The difficulty with this interpretation is that if Congress was in some way displeased with the manner in which HEW and the courts were construing section 504, it is puzzling that it did not explicitly state its dissatisfaction. A second interpretation is that the 1978 amendment served to codify HEW's enforcement procedures and to guarantee administrative consistency in the methods used by HEW to ensure compliance with nondiscrimination provisions. This view of the 1978 amendment would not impose any limitation upon the scope of section 504. Because the HEW regulations already adopted the procedural provisions of title VI, however, it would seem unnecessary to enact a statute to that effect. In *Trageser,* the Fourth Circuit was faced with the problem of construing the 1978 amendment and ultimately concluded that the amendment narrowed rather than ratified HEW practices.

II. Rationale of the Court: Narrowing Section 504

The Fourth Circuit Court of Appeals held that a disabled individual could maintain a cause of action for employment discrimination under section 504 only when the employer is receiving federal financial assistance aimed at providing employment.[55] In reaching this conclusion, the court reasoned that the 1978 amendment's incorporation of the remedies, procedures, and rights of title VI resulted in the engrafting of a title VI limitation upon the broad scope of the nondiscrimination language of section 504.[56]

The court began its consideration of Trageser's section 504 claim by noting that the section had been amended in 1978 to provide that any person aggrieved by a recipient of federal financial assistance could obtain redress by utilizing the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964.[57] Therefore, in order to determine what remedies, procedures, and rights were in fact available to handicapped persons, the court examined the provisions of title VI.[58] The court noted that the broad language of section 601 of title VI, which prohibited discrimination on the basis

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[54] Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (to be codified at 29 U.S.C. § 794a(1)).

[55] *Trageser,* 590 F.2d at 88.

[56] *Id.*

[57] Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (to be codified at 29 U.S.C. § 794a(2)).

[58] 590 F.2d at 88.

of race, color, or national origin by recipients of federal financial assistance[59] is narrowed by section 604, which authorizes federal departments or agencies to terminate federal funding or to take other action only when the primary objective of the federal financial assistance is to provide employment.[60] While the express language of section 604 only refers to the acts of departments or agencies, the *Trageser* court ruled that section 604 similarly curtails private suits.[61] The court therefore decided that an individual could seek redress for employment discrimination under title VI only when the employer is receiving federal assistance for the primary purpose of creating jobs or when discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid.[62]

The court held that under the statutory scheme established by the 1978 amendment, the limitation on actions for employment discrimination contained in section 604 of title VI of the Civil Rights Act applies to section 504 of the Rehabilitation Act.[63] In reaching this decision, the court reasoned that Congress must have intended to limit the remedies of handicapped private sector employees because the 1978 amendments specifically made available to handicapped federal employees the remedies, procedures and rights of title VII, rather than title VI.[64] The distinction between these two titles is that title VII is aimed specifically at employment, while title VI contains the section 604 limitation narrowing that title's applicability to employment discrimination. Thus, if Congress had not intended the section 604 restriction to apply, it could have applied title VII to private sector discrimination under section 504 as it had done with federal employees.[65] The court concluded that, in differentiating between the relief made available to federal employees under section 501 and the relief made available to employees of private institutions receiving federal assistance under section 504, Congress must have intended that the limitation on actions for employment contained in section 604 of the Civil Rights Act be incorporated into section 504 of the Rehabilitation Act.[66]

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[59] 42 U.S.C. § 2000d (1976).

[60] 42 U.S.C. § 2000d-3 (1976). That section states:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization *except where a primary objective of the Federal financial assistance is to provide employment.*

Id. (emphasis supplied). *See* Whitaker v. Board of Higher Education, 461 F. Supp. 99, 107-08 (E.D.N.Y. 1978), which states that termination of federal assistance is the principal means of effecting compliance under title VI.

[61] 590 F.2d at 89.

[62] *Id.* The court cited Caulfield v. Board of Education, 583 F.2d 605 (2d Cir. 1978), and United States v. Jefferson County Board of Education, 372 F.2d 836, 883 (5th Cir. 1966), in support of its holding that a judicial remedy existed under title VI when employment discrimination caused discrimination against the primary beneficiaries of federal assistance. 590 F.2d at 89 n.7.

[63] 590 F.2d at 89.

[64] *Id.*

[65] *Id.*

[66] *Id.*

Having decided the effect of the 1978 amendment, the court next turned to the issue of whether the amendment was applicable retroactively to Trageser's 1976 dismissal.[67] The court observed that as a general rule, the law existing at the time of the court's decision rather than the law at the time of the incident should be applied to determine the outcome of a civil suit, unless manifest injustice would result, or a statutory directive or legislative history existed indicating a different intent.[68] In the absense of legislative history to the contrary, the court reasoned that the 1978 amendment merely clarified the scope of section 504 as originally enacted.[69] Because, in the court's view, the amendment changed no rights, the court concluded that it would be fair to apply the amendment to determine the extent of a private cause of action to redress a prior injury.[70] Since Trageser had not alleged and could not claim that the federal funding received by the nursing home was aimed primarily at providing employment,[71] the court dismissed her section 504 complaint.[72]

III. Problems with the Court's Rationale

In deciding *Trageser*, the Fourth Circuit arrived at two important conclusions of law. First, the court held that the 1978 amendment engrafted the limitations of section 604 of the Civil Rights Act onto section 504 of the Rehabilitation Act and thereby restricted the applicability of section 504 to employment discrimination cases.[73] Second, the court concluded that the 1978 amendment did not represent a change in the law, but merely clarified Congressional intent regarding the scope of section 504 as originally enacted.[74] It is questionable whether the court's interpretation is correct. In

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[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 89-90. The court gave no reason for limiting the relief available under section 504 to instances of employment discrimination where federal financial assistance was aimed at providing employment rather than holding that a section 504 action could also be triggered when discrimination in employment resulted in discrimination against the primary beneficiaries of the federal aid. See text at note 57 *supra*. Thus, the court failed to consider whether the nursing home's dismissal of Trageser resulted in discrimination against the nursing home's patients. The court of appeals also did not discuss the lower court's reasoning that the federal funds received by the nursing home constituted payment for services rendered rather than federal financial assistance. See text and notes at notes 18-21 *supra*. Thus, it is unclear whether the court of appeals would adopt such a narrow interpretation. In Bob Jones University v. Johnson, 396 F. Supp. 597, 601-04 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975), the court held that the university was a recipient of federal financial assistance notwithstanding the argument that the federal cash payments involved went directly to students eligible for Veterans' Assistance benefits. Analogizing to *Trageser*, it can be seen that the nursing home would be considered a recipient of federal financial assistance because the monies are used by the patients to receive medical and nursing care from the home.

[73] 590 F.2d at 89.

[74] *Id.*

the following subsection, the court's explanation of Congress' intent in enacting the 1978 amendment will be considered. From this examination, it will be shown that much of the evidence upon which the court relied may be explained in an alternative manner. Then, in the subsection thereafter, the court's conclusion that the 1978 amendment clarified Congress' intent that section 504 be construed narrowly will be scrutinized. By reviewing the legislative history of section 504 and section 601 of the Civil Rights Act, after which section 504 was modeled, it will be shown that at best there was a wide divergence of opinion regarding the scope of section 504.

A. *Title VI v. Title VII*

The Fourth Circuit relied upon two assumptions when it concluded that the 1978 amendment served to confirm a narrow reading of section 504. First, the *Trageser* court found it significant that Congress engrafted the title VI remedies, procedures and rights onto section 504, rather than those prescribed in title VII.[75] Second, the court construed section 604 to cover private suits as well as the actions of departments or agencies.[76] In the subsection below, it will be shown that the court's treatment of these considerations is flawed. The selection of title VI remedies, procedures and rights rather than those available under title VII was logical for reasons other than those offered by the court. Further, the legislative history of the 1978 amendment evidences no intent to give a narrow scope to section 504, but instead suggests an expansive reading. Finally, even if it can be argued that the court was correct in concluding that the section 604 limitation of employment coverage was incorporated into section 504, section 604 seemingly does not apply to private suits such as Trageser's, but relates only to the actions of departments or agencies.

First, it was logical for Congress to apply the title VI remedies, procedures and rights to section 504 of the Rehabilitation Act in light of congressional recognition that the language of section 504 tracked the discrimination prohibitions of section 601 of the Civil Rights Act.[77] Furthermore, HEW's section 504 regulations already incorporated title VI procedures.[78] On the other hand, Congressional application of portions of the title VII remedies to redress violations of section 501 of the Rehabilitation Act followed because the purpose of those sections of title VII, like section 501, was to redress employment discrimination by the federal government.[79] Because section 501 dealt exclusively with employment discrimination,[80] it was reasonable for Congress to turn to title VII as a source of relief. Conversely, section 601 of the Civil Rights Act, encompassing a variety of forms of discrimination, provided a more logical model for relief under section 504 of the Rehabilitation Act, which was not limited to employment.[81]

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[75] *Id.*

[76] *Id.*

[77] S. REP. No. 1297, 93d Cong., 2d Sess. 39, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390; S. REP. No. 890, 95th Cong., 2d Sess. 19 (1978).

[78] 45 C.F.R. § 84.61 (1979).

[79] 42 U.S.C. § 2000e-16 (1976).

[80] 29 U.S.C. § 791 (1976).

[81] *See, e.g.*, Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1286-87 (7th Cir. 1977) (transportation); Howard S. v. Friendswood Independent School District, 454 F.

Second, the legislative history of the 1978 amendment reveals no intent to limit the relief afforded disabled persons to the extent decided by the court. To the contrary, the 1978 amendment was conceived as an attempt to expand the opportunities of the handicapped[82] and to assist in the goal of affording their "full participation" in society.[83] Congress, aware of the difficulties handicapped individuals faced in obtaining employment, singled out that area as a source of "unconscionable discrimination."[84]

Third, even if one of the purposes of the 1978 amendment was to engraft the section 604 limitation of the Civil Rights Act onto section 504 of the Rehabilitation Act, it is by no means clear, as the *Trageser* court assumed, that section 604 restricted the authority of individuals to maintain private actions.[85] The language of section 604 expressly limited the ability of federal departments or agencies to terminate funding,[86] but was silent concerning private actions.[87] It would be logical to draw a distinction between the actions of federal agencies and private individuals in light of the different remedies each would be likely to pursue.[88] Under title VI the simplest recourse for a federal department or agency that can not obtain voluntary compliance with its request to end discriminatory practices is to terminate financial assistance.[89] Such an action necessarily would curtail the provision of needed services to innocent beneficiaries of federal aid. An individual seeking relief because she was discharged from her job as a result of employment discrimination, however, presents a different case. Such a person would be likely to seek relief in the form of reinstatement or back pay, both of which would

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Supp. 634, 640 (S.D. Tex. 1978) (education); National Association for the Advancement of Colored People v. Wilmington Medical Center, Inc., 453 F. Supp. 280, 290-91 (D. Del. 1978) (medical care). *See generally* Hart v. County of Alameda, *supra* note 30, at 72-73.

[82] 124 CONG. REC. S19,001 (daily ed. Oct. 14, 1978) (remarks of Senator Cranston).

[83] *Id.* "Provisions in the conference bill such as attorney's fees, certain application of appropriate civil rights remedies . . . should be important steps in our continuing efforts toward full participation in society by handicapped Americans." *Id.* When Congress considered the applicability of section 504 to alcoholics and drug abusers, it evidenced no intent to limit the section's coverage of employment. 124 CONG. REC. S15,568 (daily ed. Sept. 20, 1978) (remarks of Senator Hathaway). During the debate over an amendment which would have set a ceiling upon the amount of relief available to handicapped individuals in suits against the federal government, it was acknowledged that federal grantees, like the federal government, were required to be "equal opportunity employers." 124 CONG. REC. S15,665-66 (daily ed. Sept. 21, 1978) (remarks of Senator Cranston).

[84] 124 CONG. REC. S15,548 (daily ed. Sept. 20, 1978) (remarks of Senator Randolph). He stated: "One of the areas where handicapped Americans have been subjected to unconscionable discrimination, in that they have been unable to secure their rightful role as independent citizens, has been in the area of employment." *Id.*

[85] 590 F.2d at 89.

[86] 42 U.S.C. § 2000d-3 (1976). See note 44 *supra* for full text.

[87] It is now well established that a private cause of action exists under title VI. *See* Cannon v. University of Chicago, 441 U.S. 677, 696 (1979).

[88] *See id.* at 704-06. The *Cannon* Court reasoned that title IX, like title VI, sought to accomplish two objectives. *Id.* at 704. First, Congress did not want to support discriminatory practices by granting federal funds. *Id.* Second, Congress wanted to protect individual citizens against discrimination. *Id.*

[89] 42 U.S.C. § 2000d-1 (1976). See note 60 *supra*.

have a minimal disruptive impact upon the continued operation of federally funded programs and activities.[90] Thus, by allowing an individual to maintain a private action for employment discrimination on the basis of handicap regardless of the purpose of federal financial assistance, the goals of the Rehabilitation Act would be realized without disrupting the federal aid program.[91]

B. *The Intent of Congress in Initially Enacting Section 504*

The *Trageser* court stated that no manifest injustice would result from applying the 1978 amendment to Trageser's 1976 dismissal because the incorporation of section 604 of the Civil Rights Act merely confirmed a plausible reading of section 504 as originally enacted.[92] Thus it was the court's position that the 1978 amendment did not produce any change in the law. The court asserted that prior to the enactment of the 1978 amendment, section 504 was intended to create a cause of action for employment discrimination only when the employer received federal funding to create jobs, and that the 1978 amendment served to clarify this original intent.[93] This narrow reading of section 504, however, is inconsistent with the stated purpose of the Rehabilitation Act of 1973 and its legislative history.

The general aim of vocational rehabilitation is to enable handicapped individuals to work and live independently.[94] It was declared expressly in the Act's statement of purposes that one of the primary goals of the Rehabilitation Act was to promote the employment of handicapped persons.[95] Additionally, although the House and Senate reports accompanying the Rehabilita-

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[90] *See* Cannon v. University of Chicago, 441 U.S. at 704-05. To the extent that Trageser sought an injunction prohibiting the nursing home from receiving federal financial assistance until she was rehired, the court correctly denied the relief requested.

[91] At least one court has concluded that section 604 does not restrict private suits, but only pertains to the actions of departments or agencies. *See* Hart v. County of Alameda, 485 F. Supp. 66, 72 (N.D. Cal. 1979). Other courts considering actions for employment discrimination brought by private individuals apparently have ignored section 604. Afro American Patrolmens League v. Duck, 503 F.2d 294 (6th Cir. 1974); Ortiz v. Bach, 14 F.E.P. Cas. 1019 (D. Colo. 1977). *But see* Feliciano v. Romney, 363 F. Supp. 656, 672 (S.D.N.Y. 1973); Quiroz v. City of Santa Ana, 17 E.P.D. 7218, 7221 (C.D. Cal. 1978).

[92] 590 F.2d at 89.

[93] *Id.*

[94] 119 CONG. REC. 24587 (1973) (remarks of Senator Taft). Although the word "vocational" was dropped from the short title of the act so as not to exclude severely handicapped individuals for whom a vocational goal might not be feasible, the focus of the act remained vocational. S. REP. No. 318, 93d Cong., 1st Sess. 19 (1973), *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2092.

[95] 29 U.S.C. § 701 (1976). The text reads "The purpose of this Act is to . . . authorize programs to . . . (8) promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." *Id. See also* 119 CONG. REC. 6145 (1973) (remarks of Senator Humphrey). He stated: "It is precisely the intent of the present legislation . . . to achieve the central goal of providing vocational services to handicapped individuals to encourage and enable them to obtain gainful employment." *Id.*

tion Act[96] and the debates in each chamber did not address directly the issue of the intended scope of section 504, several statements acknowledged that discrimination posed a barrier toward the achievement of rehabilitation. These statements strongly support the view that section 504 extended to employment discrimination without any implied limitation. Discrimination was seen as one of the most serious barriers to rehabilitation.[97] Employment discrimination was highlighted as an obstacle to participation in society by handicapped persons.[98] Furthermore, it was recognized that handicapped individuals could not derive full benefit from the vocational rehabilitation program established by the Act until discrimination was eliminated.[99] The conclusion that section 504 covers employment without limitation is buttressed by a Senate report accompanying 1974 amendments to the Rehabilitation Act,[100] which stated that section 504 was enacted to prevent discrimination against all handicapped individuals in relation to federal assistance in *inter alia, "employment,* housing, transportation and education."[101] Viewing these statements together with the goal of the Rehabilitation Act, the only logical interpretation of section 504 is that its broad language was intended to prohibit discrimination in employment by federal funding recipients.[102]

This reading of Section 504 of the Rehabilitation Act is consistent with section 601 of the Civil Rights Act, after which it was patterned.[103] A reading of section 504 to exclude coverage of employment discrimination except when federal funding is aimed at providing employment is not compelled by either the express language of section 601 or its legislative history. On its face, the prohibitory language of section 601 might well be construed to encompass employment discrimination.[104] Furthermore, there is nothing contained in

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[96] S. REP. NO. 93-318, 93d Cong., 1st Sess. (1973); H. CONF. REP. NO. 93-500, 93d Cong., 1st Sess. (1973). The House bill (H.R. 8070) was passed in lieu of the Senate bill (S. 1875) after substituting for its language much of the text of the Senate bill. [1973] U.S. CODE CONG. & AD. NEWS 2076.

[97] 119 CONG. REC. 24587 (1973) (remarks of Senator Taft).

[98] S. REP. NO. 318, 93d Cong., 1st Sess. 4 (1973), *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2078.

[99] 119 CONG. REC. 24587 (1973) (remarks of Senator Taft). "[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 the elimination of the most disgraceful barrier of all—discrimination." *Id.*

[100] Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617 (amending 29 U.S.C. §§ 701-794 (Supp. III 1973)).

[101] S. REP. NO. 1297, 93d Cong., 2d Sess. 38 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6388 (emphasis added).

[102] Civil rights acts are remedial and should be liberally construed to realize their curative objectives. United States v. El Camino Community College District, 454 F. Supp. 825, 829 (C.D. Cal. 1978), *aff'd,* 600 F.2d 1258 (9th Cir. 1979). The Rehabilitation Act was designed to promote the civil rights of handicapped individuals. 119 CONG. REC. 6145 (1973) (remarks of Senator Humphrey).

[103] S. REP. NO. 1297, 93d Cong., 2d Sess. 39, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390.

[104] Because the broad language of section 601 is narrowed by section 604, courts have not been faced with the issue of interpreting section 601 when deciding cases under the Civil Rights Act of 1964. However, courts interpreting the nearly identical language of section 504 of the Rehabilitation act prior to the *Trageser* decision, uni-

the legislative history of title VI of the Civil Rights Act that would preclude the view that the language of section 601 encompassed employment discrimi-

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formly have concluded that it encompassed employment discrimination. See text and note at note 29 *supra*. On the other hand, the enacting Congress and the courts that have interpreted the language of Title IX, 20 U.S.C. § 1681(a) (1976), which prohibits discrimination on the basis of sex in educational programs receiving federal financial assistance, have been divided as to whether it encompasses employees regardless of the purpose of the federal aid. *Compare* 118 CONG. REC. 5803, 5807, 5812 (1972) (remarks of Senator Bayh); Piascik v. Cleveland Museum of Art, 426 F. Supp. 779, 780-81 n.1 (N.D. Ohio 1976) (title IX provides cause of action for a woman alleging denial of employment because of sex discrimination who was seeking a job as a guard in a museum receiving federal assistance for its education program); *with* McCarthy v. Burkholder, 448 F. Supp. 41, 42-44 (D. Kan. 1978) (teacher alleging discrimination on the basis of pregnancy in school system receiving federal funds has no valid claim under title IX); Romeo Community Schools v. United States Department of Health, Education, and Welfare, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979). In *Romeo* the district court concluded that the language of title IX did not include employment. 438 F. Supp. at 1032. The court held:

> Teachers participate in these programs only to the extent that they may teach and help administer some of them; teachers benefit from these programs only to the extent that the funds for them may be used to pay their salaries; teachers are "subjected to discrimination *under*" these programs (emphasis added), only to the extent that the programs themselves may be established and operated in an employment-related discriminatory way. Teachers, in short, are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face.

Id. at 1031-32.

Similarly, the court in Islesboro School Committee v. Califano, 593 F.2d 424, 426 (1st Cir. 1979), *cert. denied sub nom.* Harris v. Islesboro School Committee, 444 U.S. 972 (1979), decided that the title IX language excluded most employment. The court singled out that part of the statutory language referring to individuals receiving the benefits of programs or activities, 593 F.2d at 426, and seemingly ignored the rest of the provision which includes program participants and individuals suffering discrimination under federally funded activities. The court said that: "The language . . . on its face, is aimed at the beneficiaries of the federal monies. . . . *Id. See also* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 56-62 (1976) (legislative history supports view that title IX does not cover employment).

It may be speculated whether the courts which held that title IX did not include employment discrimination would have analyzed the language in the same way if no other remedies were available. *See, e.g.*, Romeo Community Schools v. United States Department of Health, Education and Welfare, 438 F. Supp. at 1034: "An even more persuasive indication that Congress did not intend to regulate employment practices under § 1681 is the fact that Congress specifically provided for such regulation under both Title VII and the Equal Pay Act else in the very same legislation." *Id.*

Even if the language of title IX is interpreted to preclude coverage of employees except when the primary purpose of federal funding is to provide employment, the same meaning need not be ascribed to section 504. The Education Amendments, unlike the Rehabilitation Act, were not aimed primarily at redressing employment needs. While it is a general rule of statutory construction that when two statutes are enacted for like purposes, similar terms contained in each should receive the same interpretation, Hallenbeck v. Penn Mutual Life Insurance Company, 323 F.2d 566, 571 (4th Cir. 1963); Northern Pac. Ry. Co. v. United States, 156 F.2d 346, 350 (7th Cir. 1946), this rule is not to be applied blindly. United Shoe Workers of America, AFL-CIO v. Bedell, 506 F.2d 174, 188 (D.C. Cir. 1974). Even related pieces of legislation must be examined for the purposes which they serve. *Id.* When statutes which relate to the

nation regardless of the purpose of federal financial assistance. Indeed, it appears that there was substantial confusion as to the scope of section 601.[105] While some spokesmen for the Act claimed that section 601 would not affect the employment practices of individual federal beneficiaries,[106] other Congressmen asserted that the plain language of section 601 encompassed discrimination in employment in programs financed by the federal government.[107] Because of the confusion regarding the section's coverage of employment discrimination, it was necessary to add section 604 in order to clarify the scope of section 601.[108]

Significantly, a limitations section similar to section 604 was not included in the Rehabilitation Act. From this omission it is reasonable to assume that Congress did not intend originally to apply the section 604 limitation to section 504.[109] In light of the purpose of the Rehabilitation Act to promote

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same subject matter have significantly different purposes, then they are not to be read *in pari materia*. *Id.* Courts generally interpret the language of civil rights statutes broadly, when determining such questions as which individuals were meant to be protected. *See, e.g.*, Hackett v. McGuire Brothers, Inc., 445 F.2d 442, 446 (3d Cir. 1971). Limitations on rights granted under civil rights acts are to be narrowly construed. Weeks v. Southern Bell Telephone & Telegraph Company, 408 F.2d 228, 232 (5th Cir. 1969); Pullen v. Otis Elevator Company, 292 F. Supp. 715, 717 (N.D. Ga. 1968). The *Pullen* court stated that "[i]n construing a remedial statute, it is felt that limitations which would take away a right from one for whom the statute was passed must be express and not subject to varying interpretations." *Id.* at 717.

[105] It was not until section 604 was introduced as part of the Dirksen-Mansfield amendments, Amend. No. 656 to H.R. 7152, 110 CONG. REC. 11926, 11930 (1964), some months after the formulation of section 601, that the relation of title VI to employment was stated definitively.

[106] *See, e.g.*, 110 CONG. REC. 1521 (1964) (remarks of Representative Celler); 110 CONG. REC. 7060 (1964) (remarks of Senator Pastore).

[107] *See, e.g., Hearings on H. R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 379 (1964) (remarks of Rep. Poff); *id.* at 504 (remarks of Rep. Cramer).

[108] In response to an inquiry by Senator Cooper, Attorney General Robert Kennedy stated that section 601 was limited to discrimination against the beneficiaries of federal assistance programs so that it would apply to employment practices only when employees were the intended beneficiaries of federal aid. 110 CONG. REC. 19976 (1964). The attorney general did not address the remainder of the language of section 601 which referred to individuals suffering from "discrimination under" programs or activities receiving federal financial assistance. It may be interpreted that he thought that the phrase was synonymous with the language referring to beneficiaries. Notwithstanding this response, Senator Cooper feared that title VI would be used to enforce Title VII and introduced an amendment that would prohibit action under title VI when title VII was also applicable. Amend. No. 604, 110 CONG. REC. 11225-26 (1964) (remarks of Senator Cooper). Senator Humphrey acknowledged that title VI might require the elimination of racial discrimination in the employment of teachers, doctors, or nurses, although he denied that it would affect the employment practices of recipients of direct assistance payments such as veterans benefits or social security. *Id.* at 6545-46.

[109] *See* General Elec. Co. v. Southern Constr. Co., 383 F.2d 135, 138 n.4 (5th Cir. 1967); City of Port Hueneme v. City of Oxnard, 52 Cal. 2d 385, 395, 341 P.2d 318, 324 (1959). "Where a statute, with reference to one subject contains a given provision, the omission of such a provision from a similar statute concerning a related subject shows that a different intention existed." *Id.* (quoting People v. Town of Corte Madera, 97 Cal. App. 2d 726, 729, 218 P.2d 810, 813 (1959)).

employment and to afford the disabled full participation in society, it is plausible to conclude only that section 504, as originally enacted, was intended to prohibit employment discrimination against disabled individuals regardless of the purpose of federal financial assistance.

IV. Alternative Interpretation of the 1978 Amendment

An alternative interpretation of the purpose and effect of the 1978 amendment to that espoused by the *Trageser* court is that the amendment was designed to promote administrative consistency and to assure administrative due process by engrafting the remedies, procedures, and rights of title VI onto section 504 of the Rehabilitation Act.[110]

Section 504 as originally enacted did not specifically require the promulgation of regulations and did not detail enforcement procedures.[111] Nevertheless, Congress expressed the belief that a compliance mechanism should be created.[112] Envisioned was a system, similar to that in effect under title VI of the Civil Rights Act,[113] in which HEW issued regulations governing procedures such as pre-grant analysis of potential funding recipients, investigation and review of complaints, attempts to achieve voluntary compliance, and imposition of sanctions.[114]

The HEW section 504 regulations were adopted in 1977[115] pursuant to executive order.[116] The regulations outlined areas in which discrimination was prohibited, specifically enumerating employment.[117] In order to enforce section 504, the regulations incorporated the procedural provisions of title VI covering, *inter alia*, the conduct of investigations, the requirements for hearings, and the method of terminating federal financial assistance.[118]

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[110] S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978). "[A]pplication of the provisions relating to discrimination on the basis of race, creed, color, or national origin would assure administrative due process, and provide for administrative consistency within the Federal Government." *Id.*

[111] S. Rep. No. 1297, 93d Cong., 2d Sess. 39 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373, 6390.

[112] *Id.* at 39-40, *reprinted in* [1974] U.S. Code Cong. & Ad. News at 6390.

[113] *Id.*

[114] *See* Nondiscrimination under Programs Receiving Federal Assistance through the Department of Health, Education, and Welfare Effectuation of Title VI of the Civil Rights Acts of 1964, 45 C.F.R. Parts 80-81 (1979).

[115] Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. Part 84 (1979).

[116] Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976), *reprinted in* 29 U.S.C. § 794 (1976).

[117] 45 C.F.R. § 84.11 (1979).

[118] 45 C.F.R. § 84.61 (1979). "The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part." *Id.* The regulations then refer to sections 45 C.F.R. §§ 80.6-80.10 and Part 81. *Id.* The cited sections pertain to compliance information, *id.* at § 80.6; conduct of investigations, *id.* at § 80.7; procedure for effective compliance, *id.* at § 80.8; hearings, *id.* at § 80.9; decisions and notice, *id.* at § 80.10; and practice and procedure for hearings, *id.* at Part 81. Section 80.8(c) is entitled "Termination of or refusal to grant or to continue Federal financial assistance." *Id.* at § 80.8(c). The section limits termination to the specific agency found to be discriminatory, but does not mention that in cases of employment discrimination the funding must be for the purpose of providing employment. *Id.*

During discussions over the adoption of the 1978 amendment, Congress indicated its approval of HEW's section 504 regulations. According to the Senate report, the purpose of the amendment making available the remedies, procedures, and rights of title VI of the Civil Rights Act was to codify existing practice.[119] That practice included the prohibition of employment discrimination against handicapped persons regardless of the purpose of federal financial aid.[120] Congress implicitly endorsed the HEW section 504 regulations when it stated that one of its accomplishments was to guarantee that federal funding recipients would not discriminate against handicapped persons.[121] Rather than intending to limit the remedies available to handicapped persons alleging employment discrimination, as held by the *Trageser* court, Congress sought to strengthen the rights of handicapped persons by giving the HEW regulations the force of a "specific statutory requirement."[122]

When interpreting a statute, courts should give deference to the construction of the administrative agency charged with enforcing it.[123] The apparent position of HEW, that employment discrimination against handicapped persons by recipients of federal financial assistance is prohibited regardless of the purpose of federal funding,[124] is entitled to particular respect since Congress voiced its approval of the HEW regulations in the course of amending section 504.[125]

In *United States v. City of Chicago*,[126] a district court faced with an analogous question of statutory construction, concluded that a provision in the State and Local Assistance Act[127] incorporating the "powers and functions" of title VI[128] did not limit substantively the relief available to individuals aggrieved under the Act.[129] The defendant, the City of Chicago, challenged

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[119] S. REP. No. 890, 95th Cong., 2d Sess. 19 (1978). "It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement." *Id.*

[120] See text and note at note 117 *supra*.

[121] 124 CONG. REC. S15,562 (daily ed. Sept. 20, 1978) (remarks of Senator Williams). He stated: "With the signing of the regulations implementing section 504 of the Rehabilitation Act of 1973 by the Secretary of Health, Education and Welfare, this administration has assured prohibitions on discrimination for persons with disabilities by anyone receiving Federal funds." *Id.*

[122] S. REP. No. 890, 95th Cong., 2d Sess. 19 (1978).

[123] Zemel v. Rusk, 381 U.S. 1, 11 (1964).

[124] *See* 45 C.F.R. § 84.11 (1979).

[125] *See* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 380-82 (1969).

[126] 395 F. Supp. 329 (N.D. Ill. 1975), *aff'd*, 525 F.2d 695 (7th Cir. 1975).

[127] 31 U.S.C. §§ 1221-1263 (Supp. III 1973).

[128] 31 U.S.C. § 1242(a) (Supp. III 1973) provides:

> No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under subchapter I of this chapter.

Id. Subsection (b) authorizes the Secretary of the Treasury to "exercise the powers and functions provided by title VI of the Civil Rights Act of 1964[.]" 31 U.S.C. § 1242(b) (Supp. III 1973).

[129] 395 F. Supp. at 344.

the withholding of federal revenue sharing funds upon a judicial finding of employment discrimination in the city police department.[130] The State and Local Assistance Act of 1972 contained wording identical to section 504 of the Rehabilitation Act except that it proscribed discrimination on the basis of race, national origin, or sex, rather than handicap.[131] To enforce this provision, the Act made available the "powers and functions" of title VI.[132] The court rejected the defendant's argument that section 604 of title VI should be incorporated into the State and Local Assistance Act so that revenue sharing funds could be terminated upon a finding of employment discrimination only when the federal assistance was aimed at providing employment.[133] Instead the court adopted the view that section 604 would not act as a restraint upon the relief available under the State and Local Assistance Act.[134] According to the court, the reference to title VI could not be used to restrict the broad nondiscrimination provision contained in the State and Local Assistance Act, but merely served to provide an enforcement mechanism.[135]

The interpretation of the *City of Chicago* court that section 604 of the Civil Rights Act did not impose a limitation upon the prohibition against discrimination contained in the State and Local Assistance Act should have been adopted by the *Trageser* court in resolving the analogous problem of interpreting the effect of the 1978 amendment upon section 504. The similarities between the two acts are striking. Both the State and Local Assistance Act and the Rehabilitation Act contain almost identical language, prohibiting discrimination by federal funding recipients.[136] Moreover, the State and Local Assistance Act and the 1978 amendment suggested that title VI was available[137] to individuals experiencing discrimination, implying that title VI should serve as a supplement to enforcement, rather than as a limitation upon judicial relief. If Congress had intended to limit relief through the application of title VI, it is more likely that it would have chosen words stating that each act was "governed by" or "subject to" the provisions of that title.

Conclusion

The holding of the *Trageser* court, that a handicapped individual alleging employment discrimination under section 504 has a private right of action only when the primary purpose of federal funding was to provide employ-

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[130] *Id.* at 335-37.

[131] See text and note at note 128 *supra.*

[132] 395 F. Supp. at 343-44.

[133] *Id.* at 344.

[134] *Id.*

[135] *Id.*

[136] See note 128 *supra.*

[137] 395 F. Supp. at 343. See note 53 *supra.* The State and Local Assistance Act provided:

> [T]he Secretary is authorized (1) to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; (2) to exercise the powers and functions provided by title VI of the Civil Rights Act of 1964; or (3) to take such other actions as may be provided by 31 U.S.C. § 1242(b) (1973 Supp.).

But see Islesboro School Comm. v. Califano, 593 F.2d 424, 429-30 (1st Cir. 1979), *cert.*

ment, would frustrate the purpose of the 1973 Rehabilitation Act and read into the 1978 amendment an intent not demonstrated by its language or legislative history. The incorporation of section 604 of title VI would affect the rights of disabled individuals by restricting recovery against federal funding recipients to situations in which federal assistance was aimed at providing employment. Yet, when Congress incorporated the remedies, procedures, and rights of title VI of the Civil Rights Act into section 504 of the Rehabilitation Act, it meant only to codify existing administrative practice under section 504, which included the prohibition of discrimination in employment on the basis of handicap, regardless of the purposes for which federal funding was received. The remedies, procedures, and rights referred to in the amendment are the agency promulgation of regulations, the investigation of violations, and the conduct of hearings. Accordingly, courts that consider this issue in the future should be hesitant to adopt the *Trageser* approach, which runs counter to the language and legislative history of the Rehabilitation Act.

RACHEL KURSHAN

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denied sub nom. Harris v. Islesboro School Comm., 444 U.S. 972 (1979), wherein the Court rejected HEW's argument that the reasoning of *City of Chicago* could be applied in a title IX case.