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Abstract

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KEYWORDS: retreat, rehabilitation, college

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The aftermath of the VietNam war found many disabled veterans incapable of readjusting to civilian life. The obvious obstacles confronting them seemed insurmountable and, perhaps, at times they were. Their struggle reawakened the American conscience to the problems of integrating persons with physical and mental impairments into the mainstream of society's activities. In order to accomplish this, however, drastic measures had to be taken to address the existing discriminatory practices aimed at the handicapped.[1] Reacting to such practices, Congress enacted the Rehabilitation Act of 1973.[2] Far reaching ramifications are implied by the Act's removal of physical and social obstacles to education and employment for the handicapped.[3] More particularly, Section 504[4] of that act prohibits any recipient[5] of federal funds from

1. Webster's Third New International Dictionary, 1027 (1971), defines "handicap" as a "disadvantage that makes achievement unusually difficult". When used generically, "handicap" has a narrower meaning, referring to a particular type of disadvantage: a mental, physical, or emotional disability or impairment. Handicapped is both the accepted everyday meaning and a common statutory term of describing persons having such difficulties.

2. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 395, 29 U.S.C. § 794 (1976), *as amended by* the Rehabilitation Act of 1973 Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617 (1974), and the Rehabilitation, Comprehensive Service, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (1978).

3. The Rehabilitation Act of 1973 is a financial problem for the nation's schools and colleges who are concerned with the cost required to provide equal access for a minority of handicapped students. For example, at the University of Minnesota, a campus containing some 300 buildings and a student body of 55,600, it has been estimated that compliance with § 504 will cost $7.2 million dollars. N.Y. Times, Dec. 4, 1977, at 1, col. 1. The Department of HEW predicts that $2.4 billion dollars a year will be required to end handicap discrimination. N.Y. Times, May 1, 1977, at 29, col. 1.

4. The Rehabilitation Act of 1973, § 504 provides:

> [N]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or

discriminating against handicapped individuals. With the ever increasing number of applications being filed by the handicapped,[6] college officials were forced to confront the issue of whether admission could be denied on the basis of a physical impairment. In *Southeastern Community College v. Davis,*[7] a case of first impression, the Supreme Court examined the Rehabilitation Act of 1973, specifically, Section 504, and HELD: A college instituting reasonable physical admission requirements can exclude a deaf individual from entering a clinical nursing program. Mrs. Francis B. Davis, a qualified, licensed practical nurse (LPN) sought to advance her nursing career and, in March, 1973, applied for enrollment in Southeastern Community College's Associate Nursing Program.[8] The college accepted Mrs. Davis for the 1973-74 academic year with advancement to the Clinical Nursing Program contingent upon satisfactory academic progress. The following year, the college informed Mrs. Davis that despite successful completion of her course, she did not qualify for the clinical portion of the Associate Nursing Program. The college refused to accept Mrs. Davis solely because of a hearing impairment.[9]

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be subjected to discrimination under any program or activity receiving Federal financial assistance . . . 29 U.S.C. § 794 (1976).

5. Section 504 applies to every recipient of federal financial assistance regardless of the amount or type of assistance received. This applies to recipients of federal grants, contracts, and other forms of financial assistance. 45 C.F.R. § 84.3 (f) and (h) (1979).

6. The problems of integrating handicapped individuals into society are compounded by the lack of accurate statistics on the handicapped. "The difficulty in obtaining accurate and meaningful statistics is attributable to the inability of statisticians to measure the effect of a defined handicap on the capacity of the handicapped to function normally in society". Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled,* 61 GEO. L.J. 1501 n.2 (1973). Estimates of the number of handicapped Americans range from twenty million by the Department of Labor to thirty-five million by the Department of HEW. *See* Statement of Joseph A. Califano, Sec., Dept. HEW (Apr. 29, 1977).

7. 99 S.Ct. 2361 (1979).

8. As part of Mrs. Davis' application, she submitted a pre-entrance Medical Record, in which the examining physician evaluated her as ". . . mentally and physically able to undertake the program in professional nursing". Brief for Respondent at 5, Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979).

9. *Id.* at 6. Mrs. Davis was interviewed twice, once in April, 1973, and again in March, 1974, as part of Southeastern's evaluation process. As a result of these interviews, the College requested that Mrs. Davis submit to a hearing examination. The

Thereafter, Mrs. Davis requested that the college reevaluate her application. After agreeing to do so, the college sought outside professional opinions as to the effect of a hearing impairment on Mrs. Davis' prospective career. The college consulted the Executive Director of North Carolina's Board of Nursing, who responded unfavorably to the licensing of a deaf woman as a registered nurse (RN): "Mrs. Davis' hearing impairment can preclude her from being safe for practice in any setting allowed by a license as a[n] RN *or by license as a[n] LPN.*"[10] [emphasis added]. The Director of Nursing Services at Southeastern General Hospital, where Mrs. Davis had previously been employed, stated, in contrast, that: "I would employ Mrs. Davis in our Skilled Nursing Facility as an RN if I had a vacancy . . .".[11] Furthermore, the director remarked: "I do not believe that I can truthfully state that she [Mrs. Davis] would not be able to function in any area of nursing with her present determination to continue her education."[12]

After weighing the merits of each assessment, the college again rejected her application.[13] In response, Mrs. Davis filed suit alleging, *inter alia,*[14] a violation of Section 504 of the Rehabilitation Act.[15] After

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audiologist's report revealed that Mrs. Davis had a bilateral moderately severe sensorineural hearing loss. However, with a change in her hearing aid, it was expected that Mrs. Davis would be able to detect sound " . . . almost as well as a person would who has normal hearing." *Id.* at 6. Nevertheless, no new interviews were scheduled with Mrs. Davis with her new hearing aid. Instead the College rejected Mr. Davis as not qualified.

10. *Id.* at 7. The Executive Director of the North Carolina Board of Nursing, evidently, did not know that Mrs. Davis had been licensed by the Board as an LPN and had worked for many years.

11. *Id.* at 7.

12. *Id.* at 8.

13. *Id.*

14. Mrs. Davis filed suit based on the Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1976), and under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). Mrs. Davis alleged that Southeastern, in denying her admission solely on account of her hearing impairment, denied her due process and equal protection of the law. The district court disposed of the 1983 claim by noting that Mrs. Davis had failed to exhaust all administrative remedies. 424 F.Supp. 1341 (E.D.N.C. 1976). *See also* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a Suspect Class under the Equal Protection Clause,* 15 SANTA CLARA LAWYER 855 (1975).

15. Mrs. Davis claimed that the College, by denying her admission to the clinical program on account of her hearing disability and by failing to make accommodations

a bench trial, the district court concluded that Mrs. Davis was not within the class covered by Section 504 and ruled in favor of the college.[16] Using the plain meaning approach to statutory construction, the district court interpreted Section 504's "otherwise qualified handicapped person" to mean a person who is ". . . otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available."[17] Thus, Mrs. Davis was adjudged not "otherwise qualified" since she would not be able to function sufficiently as an RN with her handicap.[18]

On appeal, the Fourth Circuit Court of Appeals held that the lower court had erred in its judgment and reversed in part.[19] The panel did not dispute the findings of fact by the district court but held that the lower court misconstrued Section 504 since the district court did not have the benefit of newly promulgated HEW regulations when it rendered its opinion.[20] In contrast to the district court's decision, the

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for her disability, violated § 504. At trial, Southeastern's witnesses admitted that Mrs. Davis could perform adequately in the clinical program with special training and individual supervision. Brief for Respondent at 8, Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979).

16. 424 F.Supp. 1341 (E.D.N.C. 1976).

17. *Id.* at 1345. From the decision, it is apparent that the factual context in which this case arose determined the resolution of the statutory interpretation question. The court pointed out, first, that Mrs. Davis' abilities would be inadequate to identify patients' needs or even to pick up clues regarding a patient's vital signs. According to the Executive Director of North Carolina's Board of Nursing, this fact standing alone would preclude Mrs. Davis from being licensed. Second, this projected inability to be licensed as a Registered Nurse in the state of North Carolina was the single major factor in the College's refusal to allow admission. And third, according to the court, it would have been difficult and even dangerous for Mrs. Davis, as a deaf student, to attempt the clinical portion of the training program.

18. *Id.* The district court finalized its decision with an analogy that, while it would be impermissable to exclude a blind or deaf person from admission to law school, if academically qualified, it would nevertheless be permissible to exclude a person without sight from a position as a truck driver.

19. 574 F.2d 1158 (4th Cir. 1978). The Court of Appeals affirmed the district court's opinion as to Mrs. Davis' claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). However, the denial of Mrs. Davis' claim under the Rehabilitation Act of 1973 was vacated and remanded.

20. *Id.* at 1161. Approximately six months after the district court's decision, on June 3, 1977, HEW Regulations implementing § 504 became effective. These Regulations establish a mechanism for prohibiting discriminatory practices aimed at the handicapped, as mandated by the Rehabilitation Act. The Regulations define a "qualified

court of appeals gave due deference to such administrative regulations.[21]

The district court was consequently ordered to reconsider Mrs. Davis' application for admission without regard to her disability. The panel asserted that the college might use academic performance as a factor in evaluating an applicant's qualification; however, any factor considered must be used uniformly regardless of its objective or subjective nature.[22] Furthermore, the court noted that Mrs. Davis should not be foreclosed from pursuing a nursing career merely because she is unable to function effectively in all aspects of the nursing profession. Although Mrs. Davis' handicap might preclude her from working in a hospital's operating theatre, where surgical masks would prevent any reliance upon reading lips, there was no basis for prohibiting Mrs. Davis from working in another setting, such as private industry.[23] The Fourth Circuit Court of Appeals remanded and directed the lower court to pay "close attention" to the HEW regulations[24]—requiring the college to modify its program to accommodate Mrs. Davis—even though such compliance may entail considerable expense.[25] From this ruling, Southeastern filed its petition for writ of certiorari to the Supreme Court.[26]

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handicapped person", with regard to post secondary education, as a "handicapped person who meets the academic and technical standards requisite to admission or participation." 45 C.F.R. § 84.3 (k) (3) (1979). Technical standards are considered as "all non-academic admissions criteria that are essential to participation in the program in question." 45 C.F.R. App. A (1979).

21. *Id.* at 1161. Thorpe v. Housing Auth., 393 U.S. 268 (1969); Cort v. Ash, 422 U.S. 66 (1975); Bradley v. Richmond School Bd., 416 U.S. 696 (1974). Other courts of appeals were required to vacate and remand cases, under § 504, to lower tribunals for reconsideration in light of applicable regulations which postdated their decisions. *See* United Handicapped Fed'n, 558 F.2d 413 (8th Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

22. 574 F.2d at 1160.

23. *Id.* at 1161.

24. 45 C.F.R. § 84.42(a) (1979); as per §§ 84.43(c), 84.44(a), 84.44(d) and 84.12(a). *See* text accompanying notes 57-62, *infra.*

In its remand, the 4th Circuit Court, rather than ordering the implementation of modifications mandated by the regulations, only recommended that the above regulations be examined. *See* 574 F.2d at 1162, n. 8, 1163, n. 9. Arguably, this procedural move weakened the lower tribunal's deference to such regulations.

25. 574 F.2d at 1162-63.

26. *Id.* at 1163. Southeastern filed a petition for rehearing and suggestion for

Accepting the case for review,[27] the Supreme Court reversed the Fourth Circuit Court of Appeals and remanded.[28] Writing for a unanimous court, Justice Powell, in an unusually short opinion, held that Southeastern Community College did not violate Section 504 when it denied Mrs. Davis admission to the Clinical Nursing Program.

As opposed to the controversy at the trial level, which involved the determination of Mrs. Davis' status as "otherwise qualified," pursuant to Section 504, the central issue facing the Supreme Court in the case at bar was whether Section 504 ". . . [forbade] professional schools from imposing physical requirements for admission to their clinical program".[29]

Since this was a case of first impression, the Supreme Court was undoubtedly urged to grant review because of the need for a definitive statement regarding the interpretation and scope of Section 504. Conflicting decisions had blurred the intent and impact of Section 504 on both public and private educational institutions. Litigation to enroll a handicapped child stricken with spina bifida[30] in the public schools concluded with contrasting judgments in adjacent circuits.[31] In the fourth circuit, after the Davis district court decision, a different point of view was taken by two district courts in holding that a college must provide

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rehearing en banc. The suggestion failed despite a request for a poll of the judges. Two judges dissented to the denial of rehearing en banc and would have affirmed the district court's judgment.

27. 574 F.2d 1158 (4th Cir. 1978), *cert. granted,* 99 S.Ct. 830 (1979).

28. 99 S.Ct. at 2371.

29. *Id.* at 2364.

30. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1451 (25th ed. 1974), defines spina bifida as " . . . a developmental anomaly characterized by a defective closure of the bony encasement of the spinal cord through which the cord and meninges may . . . protrude". In certain cases, this structural defect entails an inability to control the bladder and bowel. *See also* S. TUREK, ORTHOPAEDICS: PRINCIPLES AND THEIR APPLICATION 869-73 (2d ed. 1967).

31. *Compare* Hairston v. Drosick, 423 F.Supp. 180 (S.D.W.Va. 1976), (exclusion of child from regular classroom without a bona fide educational reason is a violation of the Rehabilitation Act of 1973, § 504); *with* Sherer v. Waier, 457 F.Supp. 1039 (W.D.Mo. 1978), (parents, individually, and on behalf of their daughter who suffered from spina bifida, could not assert a private right of action under § 504 against school officials for failure to provide special individual medical services to the child during school).

interpreter services under Section 504 for deaf students.[32] Furthermore, other areas of daily living were becoming embroiled in litigation as a result of the Rehabilitation Act.[33]

The federal commitment to eradicating discrimination against disabled persons had been piecemeal and sketchy, at best, until the enactment of the Rehabilitation Act of 1973. Initial congressional interest began with returning World War I veterans and their attendant rehabilitative needs. The concern for both disabled war veterans and their civilian counterparts (primarily handicapped industrial workers) led to the Vocational Rehabilitation Program enacted in 1920 when President Woodrow Wilson signed into law the Smith-Fess Act.[34] This act offered limited vocational services.[35] As the definition of "handicapped" evolved from the foundation laid in the Smith-Fess Act, a definition which did not include the mentally ill or mentally retarded, and as the number of those eligible increased, the nature of services provided correspondingly changed.[36] This development, however, was negligible as

32. Barnes v. Converse College, 436 F.Supp. 635 (D.S.C. 1977); Crawford v. Univ. of N.C., 440 F.Supp. 1047 (M.D.N.C. 1977).

33. In the 7th and 8th Circuits, the purchase of public transportation buses without hydraulic lifts and wheelchair securing devices was held to be handicap discrimination, in violation of § 504. Yet, in the 10th Circuit, similar handicap discrimination was found not to be a violation of the Rehabilitation Act. *Compare* Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); *with* Atlantis Community, Inc. v. Adams, 453 F.Supp. 825 (1975).

Compare Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977), (students with vision in only one eye denied preliminary injunction to participate in contact sports) *with* Borden v. Rohr, No. C2 75-844 (S.D.Ohio Dec. 30, 1975) (in an oral decision the court granted a preliminary injunction to allow a state university student, blind in one eye, to play intercollegiate basketball), *and* Evans v. Looney, No. 77-6052-CV-SJ (W.D.Mo. 1977), (refusal to permit plaintiffs blind in one eye the right to participate in college football held to be both a denial of due process and equal protection).

34. Vocational Rehabilitation (Smith-Fess) Act of 1920, Pub. L. No. 66-236, 29 U.S.C. §§ 31-42 (1970).

35. The Smith-Fess Act initially offered only services for the physically handicapped, such as counseling, some training, and placement services. The Vocational Rehabilitation Program was considered a temporary measure which was loosely funded until the passage of the Social Security Act in 1935. Pub. L. No. 74-271, 42 U.S.C. § 301 (1976). Therein Congress allocated permanent funding. *See* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2082.

36. Due to the impact of World War II, Congress amended the Vocational Re-

the Act focused mainly on vocational rehabilitation training without addressing the aspects of discrimination which confronted trained handicapped individuals.

Initial recognition of social bias against the disabled began in 1948 when Congress enacted a law prohibiting the Federal Civil Service from discriminating against any person due to a physical handicap.[37] Continuing with these efforts, in 1971, an attempt was launched to incorporate the handicapped within the provisions of the Civil Rights Act of 1964.[38] However, not until early 1972, during the 92nd Congress, did extensive debate begin on providing handicapped individuals with more comprehensive rehabilitative services, including civil rights protections.[39]

That year, the House Committee on Education and Labor responded to problems inherent in the Vocational Rehabilitation Program by submitting H.R. 8395,[40] which passed both houses of Congress by October, 1972. However, during that same month, President Nixon announced his pocket veto of the bill.[41] Following the 1972-73 Christmas recess, the Senate Committee on Labor and Public Welfare revised a version of the previous house bill which passed both the Senate and House.[42] On March 27, 1973, President Nixon vetoed bill S.7, de-

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habilitation Act in 1943 to provide medical services for reducing or eliminating an individual's disability and expanded the definition of "handicapped" to include the mentally ill and retarded. Vocational Rehabilitation Act Amendments of 1943, Pub. L. No. 78-113. The 1954 amendments added new federal funding techniques for state rehabilitative services (Pub. L. No. 83-565). In 1965, further amendments (Pub. L. No. 89-333) expanded the program and liberalized federal funding to encourage matching state appropriations. The medicare provisions of the Social Security Act made funds available for rehabilitative services for the elderly. In 1967, a major reorganization in HEW developed the Bureau of Social and Rehabilitative Services. In 1968, Congress extended the act to include follow-up services, services to families, construction of rehabilitation facilities, and employment opportunities for the handicapped. (Pub. L. No. 90-341). *See* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2082-84.

37. Civil Service Act, 22 Stat. 403 (1883) *as amended by* the Civil Service Act Amendment of 1948, Pub. L. No. 48-617, 62 Stat. 351, 5 U.S.C. § 7153 (1970).

38. 119 Cong. Rec. 7114 (1973) (remarks of Rep. Vanik).

39. *See* S.REP. NO. 318, 93rd Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2078.

40. *Id.* at 2087.

41. *Id.*

42. *Id.*

nouncing Congress as masking "bad legislation beneath alluding labels."[43] Although both presidential vetoes centered on the cost of the proposed legislation, the President also objected to the legislation's divergence from strictly vocational objectives.[44]

After a final attempt by the Senate to override the President's veto,[45] members of the Labor and Public Welfare Committee met with administrative officials to work out a compromise.[46] An amended version of the two previously vetoed bills was quietly adopted by both House and Senate. Thus, with little debate or commentary,[47] Congress passed the Rehabilitation Act of 1973.[48]

With the passage of the Rehabilitation Act of 1973, the Federal Government undertook a comprehensive program, the effects of which would ultimately open the door to equality for the nation's handicapped.[49] The greatest impact for the handicapped lies within three sections of Title V of the Act: Section 501,[50] mandating non-discrimination by the Federal Government in its own hiring practices; Section 503,[51] prohibiting discrimination and requiring affirmative action on the

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43. *Id.* at 2088.

44. *Id.* at 2088-89. *See also* 119 CONG. REC. 7107 (1973) (remarks of Rep. Landgrebe).

45. On April 3, 1973, the Senate failed to override the President's veto. The vote was sixty (60) in favor to override and thirty-six (36) against. 119 CONG. REC. 10822 (1973).

46. [1973] U.S. CODE CONG. & AD. NEWS at 2082.

47 "[C]ongress enacted the legislation without legislative hearing and virtually no floor debate in either house. There is thus little Congressional guidance on the host of complex questions presented by § 504's far-reaching prohibition against discrimination." Statement of Joseph A. Califano, Sec., Dept. HEW (Apr. 29, 1977).

48. 29 U.S.C. §§ 701-794 (1976), as amended. The Rehabilitation Act of 1973 repealed all the provisions and amendments of the Vocational Rehabilitation Act and substituted its own provisions. 29 U.S.C. § 790 (1976). *See also, A Legislative History of Section 504,* in 2 AMICUS 34 (1977).

49. See, e.g., Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D.Pa. 1976), *aff'd,* 556 F.2d 184 (3rd Cir. 1977), (denial to a blind woman of employment as a school teacher was discrimination in employment and contrary to § 504); Davis v. Bucher, 451 F.Supp. 791 (E.D.Pa. 1978), (the denial of public employment to applicants with histories of drug abuse held to violate § 504).

50. 29 U.S.C. § 791 (1976).

51. 29 U.S.C. § 793 (1976). For a comparison of § 503 and § 504, *see* Ochoa, *Sections 503 & 504: New Employment Rights for Individuals with Handicaps,* 2 AMICUS 38 (1977).

part of federal contractors who receive more than $2,500 in contracts; and Section 504,[52] which prohibits discrimination against handicapped individuals in any federally funded program or activity. Hence, whereas previous legislation centered on the very limited goal of providing strictly vocational services, Title V of the Rehabilitation Act offered, for the first time, specific civil rights protections by barring the expenditure of federal funds in programs discriminating against the handicapped.[53]

As initially passed, Section 504 consisted of a single sentence, unaccompanied by any explanation concerning its scope of coverage or limitations. Congressional intent was simply to enact a provision prohibiting discrimination against the handicapped in programs receiving federal funds.[54] Congress later amended the act,[55] broadening its

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52. 29 U.S.C. § 794 (1976). *See*, Comment, *Toward Equal Rights for Handicapped Individuals: Judicial Enforcement of Section 504 of the Rehabilitation Act*, 38 OHIO ST. L.J. 677 (1977).

53. "[S]ection 504 was patterned after, and is almost identical to, the anti-discrimination language of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, relating to race, color, or national origin . . ." S. Rep. No. 1297, 93rd Cong., 1st Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390. In the 1978 Amendments to the Rehabilitation Act of 1973, Pub. L. No. 95-602, 92 Stat. 2982, 29 U.S.C. § 794 (1976 & Supp. II 1979), § 504 states that the rights and procedures contained in the Civil Rights Act of 1964, Title VI and VII, § 717 and § 706 (f) through 706 (k), are included in § 501, and § 504. In addition, legislation has been enacted to amend Title VII of the Civil Rights Act to prohibit discrimination against the handicapped. *See* S.446, H.R. 373, and S.346 (9th Cong., 1979) in 3 M.D.L.R. 119, 123 (1979).

54. The Senate Report accompanying the 1973 Act shows § 504 " . . . proclaiming a policy of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance". S.Rep. No. 318, 93rd Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2123. After the HEW Regulations for § 504 were issued, Congress amended the section and added new subsections providing for attorneys fees, expert consultation on architectual barriers, and a council to review new regulations. The Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, 29 U.S.C. § 794 (a), (b), & (c) (1976 & Supp. II 1979).

55. The Rehabilitation Act of 1973, 29 U.S.C. § 706 (6) (1976) *as amended by* The Rehabilitation Act of 1973 Amendments of 1974, Pub. L. No. 93-651 (Nov. 20, 1974), 89 Stat. 2-3 (1974). Before this amendment, the Rehabilitation Act of 1973 defined "handicapped individual" as:

Any individual who (A) has a physical or mental disability which for such indi-

scope of eligibility by redefining "handicapped" to include one who:

> A. Has a physical or mental impairment which substantially limits one or more of such person's major life activities,
> B. Has a record of such an impairment, or
> C. Is regarded as having such an impairment.[56]

The protection afforded this expanded class of handicapped individuals is modified, to a certain degree, by the HEW interpretative regulations pertaining to the Act.[57]

The Rehabilitation Act does not specify enforcement procedures since Congress intended HEW to promulgate regulations in this area. Swift implementation of such regulations was anticipated.[58] Yet, four years passed before the Secretary of HEW, after considerable hesitation,[59] issued the regulations.[60]

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vidual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. 29 U.S.C. § 706(6) (1970 & Supp. II 1973). This definition in effect limited § 504 to disabled persons capable of employment through vocational rehabilitation.

56. The Rehabilitation Act of 1973, 29 U.S.C. § 706 (6) (1976).

57. The HEW Regulations implementing § 504 define "qualified handicapped person", in the employment context, as " . . . a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question". 45 C.F.R. § 84.3 (k) (1) (1979). In contrast, regarding post secondary education, a "qualified handicapped person" means a " . . . handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." 45 C.F.R. § 84.3 (k) (3) (1979). The Regulations use the term "qualified handicapped person" and "otherwise qualified handicapped person" synonymously. HEW considered that the omission of the word "otherwise" was necessary in order to conform with the intention of the statute, because " . . . read literally, otherwise qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' ". 45 C.F.R. § 84 App. A at 376 (1977).

58. S.Rep. No. 1297, 93rd Cong., 1st Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390.

59. In April, 1976, President Gerald R. Ford ordered HEW to " . . . coordinate the implementation of § 504 . . . by all Federal departments and agencies . . . so that consistent policies, practices, and procedures are adopted with respect to the enforcement of § 504 . . . " Exec. Order No. 11,914, 3 C.F.R. § 117 (1976). In Cherry v. Mathews, 419 F.Supp. 922 (D.D.C. 1976), District Court Judge John Lewis Smith

Throughout the regulations, it is clear that emphasis is placed upon evaluating handicapped individuals on the basis of their qualifications and not on their disabilities. In education, preadmission inquiries into an applicant's handicap are prohibited. After admission, but before enrollment, an institution may consider an applicant's disability in order to determine what academic adjustments must be made to ensure full student participation.[61] Academic requirements can be modified, if necessary, to ensure that they do not discriminate, or have the effect of discriminating against a qualified handicapped student.[62]

In *Davis,* the Supreme Court analyzed Section 504's language and found that it neither compels schools to disregard a participant's handicap nor requires them to modify their programs especially for the handicapped. Section 504 demands only that schools not exclude "otherwise qualified persons" solely on account of their disability. In essence, Section 504 signifies that "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context."[63]

The question of whether Section 504 allows an aggrieved handicapped person a private right of action was not answered by the court. Justice Powell acknowledged the issue in a footnote, but declined to

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ordered HEW to promulgate regulations implementing § 504 without undue delay. Nevertheless, HEW Sec. Mathews refused to issue the final regulations until Congress reviewed them. Judge Smith considered holding Mathews in contempt, but an appeal of the order gave Mathews enough time to avoid issuing the regulations before the inauguration of the Carter administration. Additional postponement provoked Handicap Rights' organizations to stage demonstrations and occupy various federal offices in an attempt to publicize the delay. *See* "Hire the Handicapped", NEWSWEEK, May 9, 1977 at 39.

60. In announcing the Regulations, Sec. Califano declared, "In sum, the regulations issued today reflects my best judgment of how Congress intended that the broad uncompromising statutory command of § 504 should be translated into specific rules that vindicate the rights of handicapped citizens and that deal firmly, yet sensibly with those recipients of federal funds who will be subjected to significant new requirements". Statement of Joseph A. Califano, Sec., Dept. HEW (Apr. 29, 1979).

61. 45 C.F.R. § 84.42 (b) (4) (1979).

62. 45 C.F.R. § 84.44 (a) and (d) (1979). Such modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and the use of auxillary educational aids, i.e., typewriters, tape recorders, and print enlargers.

63. 99 S.Ct. at 2366.

address the problem in light of the court's disposition of the case, i.e. finding Mrs. Davis not "otherwise qualified" and thus not entitled to protection under the Act.[64] It is interesting to note that although the court meandered their way out of addressing this point, they still heard Mrs. Davis' claim under Section 504.[65] Eight circuits which have considered the issue have found a private right of action to exist.[66]

Moreover, the Supreme Court reassessed the Fourth Circuit Court of Appeals definition of an "otherwise qualified" handicapped person; a definition which regarded a person as "otherwise qualified" if, regardless of their respective handicap, such person met the academic and technical standards requisite for admission. The Supreme Court perceived this to mean that one need not meet legitimate physical requirements in order to be adjudged "otherwise qualified." Justice Powell

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64. 99 S.Ct. 2361, 2366 n.5.

65. *Supra* note 14, at 14.

66. Aggrieved individuals first secured a private right of action under § 504 in Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977), wherein the court enjoined local authorities from purchasing buses that were inaccessible to the physically handicapped. The Seventh Circuit Court of Appeals relied on Lau v. Nichols, 414 U.S. 563 (1973) and Cort v. Ash, 422 U.S. 66 (1975) to hold that 504 confers affirmative rights on handicapped individuals and, in addition, a private right of action to enforce these rights.

See NAACP v. Medical Center, Inc., 599 F.2d 1247 (3rd Cir. 1979) (minority groups and handicapped rights associations were given a private right of action under § 504 to contest relocation of medical facility); Doe v. Colautti, 592 F.2d 704 (3rd Cir. 1979) (mentally ill patient seeking state benefits in a private hospital has private right of action under § 504); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds,* (1979) (deaf LPN seeking RN degree has a private right of action under § 504); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977) (mobility-handicapped individuals and association of disabled persons have a private right of action under § 504 to enjoin public transportation system from purchasing mass transit equipment that is inacessible to handicapped persons); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) (students blind in one eye were allowed to claim a private right of action to enjoin a denial of participation in contact sports); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977) (*Per curiam*) (mobility-handicapped persons have a private right of action under § 504 to bring suit for an accessible bus transportation system); Gurmankin v. Costanzo, 556 F.2d 184 (3rd Cir. 1977) (blind teacher seeking public school position conferred private right of action under § 504); *Contra:* Trageser v. Libbie Rehabilitation Center, Inc., 590 F2d 87 (4th Cir. 1978), *cert. denied,* 99 S.Ct. 2895 (1979) (RN with deteriorating eyesight, terminated from nursing home position, denied a private right of action). *See also* Comment, Toward Equal Rights for Handicapped Individuals, *supra,* note 52.

took exception to this view. He believed that the district court's interpretation of "otherwise qualified", requiring disabled individuals to satisfy all requirements in spite of their handicap, more accurately reflected the true statutory meaning.[67] This position, Powell reasoned, is supported by the HEW regulations which implement the Act. Such regulations mandate that a handicapped student meet academic and technical standards requisite for admission or participation.[68] If physical qualifications are essential to a particular program, "technical standards" for admission may encompass reasonable physical requirements. Thus, a qualified handicapped person would need to meet academic, technical, *and* physical requirements.

Another issue under consideration by the Supreme Court concerned the appellate court's ruling requiring the college to modify its programs and provide auxillary aids to facilitate participation by the handicapped. This requirement was held to be excessive. Justice Powell observed, first of all, that despite program modifications, Mrs. Davis would not likely benefit to the same degree as a nonhandicapped participant. Moreover, any interpretation of the regulations requiring substantial adjustments beyond those necessary to eliminate discrimination against "otherwise qualified" handicapped individuals, "would constitute an unauthorized extension of the obligations imposed by that statute."[69] Secondly, Section 504 is silent as to matters of affirmative action, in direct contrast to Sections 501 and 503, both of which contain explicit language authorizing affirmative action.[70] Therefore, the court reasoned that Congress intended to limit affirmative action to certain circumstances prescribed by the Act. HEW, through its regulations, cannot create an obligation not otherwise provided for under Section 504. Even though an administrative agency's interpretation is to be given some deference, "*neither the language, purpose, nor history,* of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. [Emphasis added]."[71]

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67. 99 S.Ct. at 2369.

68. *See* notes 61 and 62 and accompanying text, *supra.*

69. 99 S.Ct. at 2369.

70. *See* Note, *Rehabilitating the Rehabilitation Act of 1973*, 58 B.U.L. Rev. 247, 252-54 (1978).

71. 99 S.Ct. at 2369. The Solicitor General of the United States, in an amicus curiae brief for the respondent, cited congressional reports and statements by individual members of Congress during the 1978 amendments debate, in support of the argu-

The Supreme Court's decision, in the instant case, holding that the college's actions were not in anywise discriminatory, was based on a narrow interpretation of Section 504. The ramifications of such an interpretation are far-reaching. Justice Powell contended that there would be situations where modifications could be made accommodating the handicapped without imposing "undue financial and administrative burdens".[72] Refusal to modify in those circumstances would be considered unreasonable and discriminatory. However, in the present case, such a refusal was not considered discriminatory, as Mrs. Davis could not have fully participated on account of hearing impairment. The court did not establish any guidelines in this regard, and only asserted that ". . . the line between illegal handicap discrimination and lawful refusal to extend affirmative action will [not] always be clear."[73] Consequently, the handicap provision of Section 504 was determined not to "limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program."[74]

Davis is a major setback for both the Federal Government and the Handicap Rights Organizations, whose efforts were instrumental in enacting the Rehabilitation Act of 1973. The Court's decision allowing the consideration of physical admission requirements circumvents Section 504's regulations prohibiting preadmission inquiry into an applicant's handicap.[75] If physical ability, such as hearing or sight, is considered an admission requirement, an applicant could be excluded at the outset of the admission process, regardless of whether or not some academic adjustment could be made which would enable a student to effectively participate. For example, since law materials are printed and not usually found in Braille, law schools could require sight as either a technical or physical requirement, and exclude all blind applicants. Clearly HEW intended to prohibit such preadmission handicap

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ment that § 504 entails affirmative action. *See* United States of America, Amicus Curiae Brief, Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979). Justice Powell, however, asserted that since these statements were all made after the enactment of the Rehabilitation Act, they were not proper expressions of legislatvie intent. 99 S.Ct. 2361, 2370 n.11.

72. 99 S.Ct. at 2370.
73. *Id.*
74. *Id.* at 2371.
75. *See* note 60 and accompanying text, *supra.*

inquiries.

Davis represents but another "handicap rights" decision founded on considerations of safety and cost.[76] The safety of both Mrs. Davis, practicing as an RN and of any potential patients under her care, overshadowed the controversy of handicap discrimination.[77] The court opined that Mrs. Davis' handicap prevented her from safely rendering adequate nursing services. Unfortunately, this decision ignores the contributions made by many hearing-impaired persons performing safely and effectively in society, such as doctors, nurses, and dentists.[78] Advances in medical technology have enabled many hearing-impaired registered nurses and doctors to care for their patients without risk or jeopardy.[79] Furthermore, the concern for handicapped workers' safety has too often been a myth used by employers to reject qualified handicapped workers.[80]

Along these lines, federal courts have recognized that cost is not a justification for denying equal education to handicapped children,[81] nor is it grounds for preventing public transportation for handicapped persons.[82] It seems illogical, then, to exclude a handicapped applicant from professional education programs because of "undue financial burdens".[83]

Powell's decision has greatly emasculated the opportunity for ad-

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76. *See, e.g.,* Barnes v. Converse College, 436 F. Supp. at 638; S. Dubow, *Litigation for the Rights of the Handicapped People*, 4 DePaul L.R. 943 (1978).

77. *See* 3 M.D.L.R. 190 (1979).

78. The U.S. Civil Service Commission Report, *Employment of Handicapped Individuals Including Disabled Veterans in the Federal Government* (Sept. 30, 1978), found over 150 hearing-impaired nurses working for the Federal Government.

79. *E.g.,* an electronic amplifying stethescope to hear lung sounds; a sphygomonometer to measure blood pressure; teletypewriters. *See also* Ridden, Davis, and Brown, *Science for Handicapped Students in Higher Education,* American Association for the Advancement of Science, (AAAS) pub. 78-R-2 (1978).

80. The myth that handicapped workers present additional safety hazards has been disproven in practice. *See* Sears, *The Able Disabled,* CHEMTECH, 713-15, (Dec. 1974); Kalenik, *Myths About Hiring the Physically Handicapped,* 2 JOB SAFETY AND HEALTH 9 (1974).

81. *See* Mills v. Bd. of Educ. of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972).

82. *See* Bartels v. Niernat, 427 F.Supp. 226 (E.D.Wisc. 1977); United Handicap Fed'n v. Andre, *supra,* note 66.

83. 99 S.Ct. at 2370.

vancement in professional schools by the nation's handicapped.[84] Southeastern Community College, assisted by numerous amici curiae, was successful in diverting the court's attention away from the issue of handicap discrimination by emphasizing the necessity of physical qualifications for admission. One amicus rashly asserted that sustaining the appellate court would entail colleges admitting ". . . the profoundly mentally retarded to graduate programs or the quadraplegic to forestry programs."[85] Such an extremist view in all probability played a decisive role in guiding the court to its decision.

A final point must be made regarding the Act's purported guarantee of civil rights protections to the handicapped. The Supreme Court seems to have underscored that purpose in its review of Mrs. Davis' allegation of such discrimination. It appears that the court, in essence, perceived Mrs. Davis' status as being akin to the "profoundly mentally retarded [in graduate programs] or the quadraplegic [in forestry programs]."[86] This decision raises the question of whether a blind or deaf individual is less of a citizen with fewer rights because of his or her disability. *Davis* emphasizes the discrimination, demeaning practices, and injustices that must be overcome by those Americans burdened with mental or physical impairments.

Clyde Mabry Collins, Jr.

84. The language in Davis suggests that the holding is confined to professional training programs having reasonable and essential physical requirements. Those being unable to meet such physical prerequisites, despite their respective qualifications or skills, would be foreclosed from pursuing professional careers.

85. The Association of American Colleges, Amicus Curiae Brief, at 7, Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979).

86. *Id.*