HANDICAPPED
Requirements Handbook

Supplement No. 126 **May 1989**

Highlights

Current Developments

House committee eliminates handicap set-aside from vocational education bill

The House Education and Labor Committee approved legislation last month that would eliminate mandated spending on "special populations," such as disabled students, in federal vocational education programs.

The bill, which would reauthorize the Carl D. Perkins Vocational Education Act, would replace set-asides with a formula for distributing federal money to secondary and postsecondary schools. High schools would receive 20 percent of their grants based on a count of handicapped students enrolled. Likewise, community colleges would receive 20 percent of their grants based on the number of students in vocational rehabilitation.The bill (H.R.7) would also require states to provide "special assurances" that disabled, poor and limited English-speaking students are served.

Currently, states must target funds for special populations to ensure that they're being served by vocational education programs. But educators have complained that by the time the grant reaches the local level, it's been whittled down to a meaningless sum.

The proposed change sparked controversy among members of the Education and Labor Committee. Some members praised the move as benefiting the disabled, while others, who are concerned that handicapped students would actually lose out, greeted it with skepticism.

H.R. 7 co-sponsor and ranking member Bill Goodling, R-Pa., said "The handicapped have not been well-served under set-asides. This guarantees that money will go in their direction."

"This is a substantial and progressive move forward for the handicapped," said Rep. William Ford, D-Mich.

Not all members shared this enthusiasm, however. "The handicapped have not reached a point where they're as well protected" to not have these guarantees, said Rep. Major Owens, D-N.Y. Owens had planned to introduce an amendment restoring a 5 percent set-aside for the handicapped that is similar to the ones retained in the bill to ensure sex-equity

and assist displaced homemakers. But he relented when it appeared that it would not pass.

"This (sex-equity) set-aside is a very well-crafted approach which would have been very suitable for people with disabilities," Owens said. "I'm disappointed that this committee could not reach a consensus" on the issue.

But the bill's other co-sponsor, Education and Labor Committee Chairman Augustus Hawkins, D-Calif., stemmed the debate when he declared, "If I thought that this bill did less for the handicapped than the previous situation, I'd have my name stricken from it."

Besides dropping the set asides, H.R. 7 would also change the term "vocational education" to "applied technology education." The bill would also increase federal funding for the Perkins program from $900 million in fiscal 1989 to $1.4 billion in fiscal 1990.

Other provisions would eliminate most matching requirements, set funding to coordinate high school and community college curricula, and create tie-ins between vocational education and the Job Training Partnership Act.

The bill now goes to the full House.

Bush fills OSERS, RSA posts

President Bush has nominated Robert Davila, a vice president at Gallaudet University, to head the Office of Special Education and Rehabilitative Services (OSERS) at the Department of Education. Davila, who is hearing-impaired, has been an administrator at Gallaudet since 1978 and was a teacher at the New York School for the Deaf. He replaces Madeleine Will.

The White House also selected Nell Carney to be commissioner of the Rehabilitation Services Administration (RSA). Carney, a former teacher and counselor, has served as assistant director of the Virginia Department of the Visually Impaired.

Agencies criticized for disabled veterans hiring record

The Disabled Veterans Affirmative Action Program (DVAAP) "has fallen through the cracks" at federal agencies, according to the General Accounting Office's director of federal human resource management issues.

Testifying before the House Veterans Affairs Subcommittee on Education, Training and Employment last month, Bernard Ungar said, "The commitment to the concept is there, but top management lacks the commitment to implement it."

Under DVAAP, federal agencies must have an affirmative action plan to hire and promote disabled veterans, particularly those who are more than 30 percent disabled. But in a report released in February, GAO said the program has considerable shortcomings.

Between 1982 and 1987, employment opportunities decreased for disabled veterans at five federal agencies [the Departments of Labor and Health and Human Services, the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), and the National Aeronautics and Space Administration]. Moreover, many of the veterans

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remained in low-paying positions. "All the agencies could do a better job at promoting veterans," Ungar said.

Ungar added that the agencies lack standards, goals and timetables for the program, and agency reports are increasingly less informative. The majority of DVAAP coordinators at these agencies reported that they spend less than 10 percent of their time working on the program.

OPM and the Labor Department had better program performance records than the other agencies, GAO noted. But Ungar said none of the agencies is aggressive in this area. He suggested that OPM "apply pressure on the other agencies to do a better job."

Officials from four of the five agencies studied testified that the agencies are taking steps to improve their program performance, including recruitment, personnel training and promotion. Subcommittee Chairman Timothy Penny, D-Minn., criticized OBM for not appearing at the hearing. Noting OMB's poor DVAAP performance, he suggested its absence indicated an "apparent lack of commitment" to the program.

Representatives of veterans groups voiced their support of the program, and called on Congress to enact stricter controls over agencies' hiring practices, such as making it illegal for an agency to ignore the law.

NCD to hold hearings on disabled students education

The National Council on Disability (NCD) will hold public hearings May 15 and 17, and June 7 and 8 in Washington, D.C., to discuss several handicapped education issues. As part of the council's national study, "The Education of Students with Disabilities: Where Do We Stand," the sessions will touch on topics such as parental involvement, transition to the work place and education reform. To submit information or participate in the hearings, contact NCD, 800 Independence Ave. S.W., Suite 814, Washington, D.C. 20591; (202) 267-7652.

Kansas sponsors disability issues seminars

The Kansas Advisory Committee on Employment of the Handicapped (KACEH) is offering seminars this summer on three disability issues: in-home care; accessibility and employment (including requirements of Sections 501 and 504 of the Rehabilitation Act); and the legislative process. For more information, contact KACEH, 1430 S.W. Topeka Blvd., Topeka, Kan. 66612-1877; (913) 296-1722.

In the Courts

Court rules hospital may fire nurse for not reporting HIV test result

A hospital did not violate Section 504 of the Rehabilitation Act when it discharged a nurse who refused to disclose the result of his human immunodeficiency virus (HIV) test, the U.S. District Court for the Eastern District of Louisiana has ruled.

The nurse, Leckelt, was tested for HIV infection at the request of the hospital. The hospital repeatedly asked Leckelt to provide the test result. Under hospital policy, employees are required to report cases of communicable disease to the employee health service; this policy is spelled out in the employee manual. When Leckelt refused to provide the test result, the hospital first suspended and then discharged him, citing his failure to follow hospital policy.

Leckelt claimed that he was fired because the hospital suspected he was HIV positive. He sued, arguing that the discharge violated section 504. Under section 504, people who are perceived to be impaired are considered to be individuals with handicaps. (And under the Civil Rights Restoration Act, contagious diseases are considered handicapping conditions.)

The District Court rejected Leckelt's claim. "No evidence was produced that anyone involved in the decision had concluded that he was seropositive," the court said. "The fact

that the hospital repeatedly insisted that the nurse produce his test results flies in the face of a conclusion that it perceived him as being HIV positive."

Further, the hospital was justified in its actions, the court said. Besides the HIV result, Leckelt had not reported that he was a hepatitis B carrier and that he had had syphilis. These facts, as well as the nurse's failure to submit the HIV test result as required, established a legitimate reason for the discharge. "When an employer has a lawful motive for discharging an employee, the employer's coincidental consideration of the employee's handicap does not prevent the employer from acting on its lawful motive," the court said.

If Leckelt had been HIV positive, the hospital would have modified his work duties to protect both him and the patients, the court stated. The hospital fired the nurse not "out of fear and ignorance," the court said, but because he had violated the hospital's infection policy.

The court also rejected Leckelt's section 504 claim on the basis that he was not otherwise qualified. "Hospitals must establish policies and procedures for controlling the risk of transmitting infectious or communicable diseases," the court said. Leckelt's refusal to comply with the policy rendered him not otherwise qualified to perform his job.

This case is *Leckelt v. Board of Commissioners of Hospital District No. 1*, Appendix IV:467.

State must exhaust administrative remedies before suing federal government, court rules

A plaintiff must exhaust administrative remedies before it can sue a federal agency over jurisdiction, the 11th U.S. Circuit Court of Appeals has ruled.

The issue in this case is whether the U.S. Department of Education's Office of Civil Rights (OCR) has the jurisdiction to investigate complaints brought under Section 504 of the Rehabilitation Act regarding educational opportunities for disabled students.

Under the Education of the Handicapped Act (EHA), parents may challenge a state's denial of educational benefits to handicapped children. OCR has the authority to review state and local schools to ensure compliance with section 504. OCR can initiate these reviews periodically or when it receives a complaint, usually from a parent. If the state or local school district refuses to cooperate with the investigation, ED may cut off federal funding.

In response to several section 504 complaints, OCR reviewed the special education programs operated by DeKalb and Chatham counties (Ga.) and the Georgia Department of Education. When county and state officials refused to cooperate, OCR started the process to terminate federal funding for the three handicapped programs.

This prompted the Georgia State Board of Education to sue, charging that OCR was acting beyond its jurisdiction under section 504. OCR moved to dismiss on the grounds that the educators must exhaust administrative remedies before filing suit.

A U.S. District Court ruled in favor of OCR, and the appellate court upheld that decision. Requiring plaintiffs to exhaust administrative appeals, the appeals court said, assures that "courts review ripe controversies, presenting concrete injuries." Until OCR decides to cut off federal funding, the court said, the issues will not be ripe.

The court noted that a plaintiff may pursue a lawsuit without exhausting administrative remedies only if: (1) exhausting administrative remedies clearly results in irreparable injury; (2) the agency's jurisdiction is plainly lacking; and (3) the agency's special expertise is of no help on the question of its jurisdiction.

The Georgia officials failed on all three conditions, the court ruled. First, they did not show that going through administrative channels would cause irreparable harm. Should OCR cut off funding, the Georgia officials could then file suit and ask that any action be stayed until the case is decided, the court noted.

OCR's supervision of the Georgia and county special education programs is "not plainly outside of the agency's jurisdiction," the court found. The EHA provides the appropriate means for a parent to sue a school. However, a federal agency brought the action in this case, the court noted. "Law may allow

— and Congress may have intended — two overlapping, complementary schemes of enforcement: one exercised by private litigants through the provision of the EHA, the other provided by OCR supervisory investigations as authorized under the regulations to section 504," the court said.

Finally, the court concluded that "the Department of Education's expertise in this area will greatly aid judicial review of the issues presented in this case." Without OCR's interpretation of its regulations, the court would have to speculate on the agency's interpretation, and then judge its propriety.

This case is *Rogers v. Bennett*, Appendix IV:468.

Perspective

Attitudinal barriers and the Americans With Disabilities Act

by Charles D. Goldman

Occasionally, we need to examine various attitudes that can engender barriers to people with disabilities. Last year in this space (Supplement No. 116), we examined issues of attitudinal barriers in the context of the enactment of the Civil Rights Restoration Act and the installation of the first deaf president at Gallaudet University. Today we are on the verge of another national debate on disability rights, with the 101st Congress expected to consider a major disability rights bill, the Americans With Disabilities Act.

One of the biggest issues in the bill is how much access there must be to transportation, including whether every new bus must have a lift. (In February, a U.S. appeals court ruled that all new public buses bought with federal funds must be equipped with lifts; see Supplement No. 124.) Other major issues in the bill relate to nondiscrimination in places open to the public, i.e. places of public accommodation, and non-discrimination in private sector employment. In each of these areas are examples of society's biases, the attitudinal barriers toward people with disabilities.

Transportation barriers reflect society's biases

Transportation issues have long been an indication of society's attitude toward disadvantaged people. For years, minorities were relegated to separate buses or to separate sections (the rear) on buses. When minority individuals began to insist on sitting in the front of the bus, they helped set in motion the chain of events that culminated in passage of the Civil Rights Act of 1964.

Today, the issue of how to provide public transportation to disabled individuals remains heated. How many accessible buses must be placed in service? Does service for disabled passengers have to be part of the mainline public transit system, or is a paratransit system acceptable? (Paratransit systems are viewed as secondary to the main service.)

One municipality, San Antonio, which had opted for a paratransit system rather than making its mainline transit accessible, recently found itself losing the Annual Meeting of the President's Committee on Employment of People with Disabilities due to the lack of accessible mainline bus transit.

But bus service is not the only form of transportation service in which attitudinal barriers persist.

The debate over the regulations to implement the Air Carrier Access Act is replete with examples of attitudinal barriers. Most glaring is the note of the Air Transport Association of America that the proposed regulatory requirement for assisting disabled travelers "smacks of involuntary servitude, which was abolished by the 13th Amendment." To people with disabilities the issue was not slavery but getting reasonable and necessary aid.

Another attitudinal barrier in air traffic may come to the fore when a person with a disability seeks to travel alone ("unaccompanied" in airline jargon). In one case, a student's family wound up suing an airline after it refused to let her fly home alone for Thanksgiving holidays, despite the fact that she had made similar unaccompanied trips on several occasions. To the airline the stated issue was safety. To the individual the airline was discriminating against her and displaying a patronizing attitude.

A more mundane example of the bias against people with disabilities in the transit field is revealed when a person with a disability attempts to hail a taxicab. Even though local codes generally prohibit it, taxicab drivers regularly bypass a person with crutches or in a wheelchair, or a person who is blind (even one holding a "TAXI" sign aloft).

Barriers to public accommodations still exist

The attitudinal barriers to people with disabilities are also manifested in the structural environment that is open to the public. These places, including such facilities as restaurants, hotels, parks, theatres, are known in law as places of public accommodation and had a special role in civil rights history. The Americans With Disabilities Act would be a federal mandate that such facilities not exclude and not discriminate against people with disabilities.

Today, relatively few restaurants or hotels are accessible. Examples of barriers caused by misguided attitudes abound. A disabled person calls a restaurant and is told it is accessible, even though there are steps in the front and the only ramp for patrons in wheelchairs is in the rear. A softball league sought to bar a manager from the field in his wheelchair — even though the manager had successfully managed from the field in his wheelchair for years.

Attitudinal barriers can also manifest themselves in certain public works projects. A municipality may decide to make a series of curb cuts (curb ramps) along a major downtown street. The curb cut may lead the disabled person across the thoroughfare, only to find that the other side of the street is totally inaccessible. (To make things worse, the lack of access to the other side may not be visible until the mobility impaired person is halfway or more across the street.) The attitudinal barrier is in not using common sense to realize that access means making both sides of the street accessible.

Attitudinal barriers in the workplace are common

Common sense is also necessary in employment of people with disabilities who may well be otherwise qualified to do the tasks for which they are hired. The Americans With Disabilities Act would extend the mandate of the non-discrimination to private employers. It would cover, for example, a shoe salesman who performed at a level comparable to that of most of the other salespersons, but who was terminated the day after his seizures on the job. The employer claimed it was because of customer preference that he was fired.

The Americans With Disabilities Act will lead to major debates in Congress over how people with disabilities are faring. There will be anecdotal recitations of discriminatory horror stories by very qualified people with disabilities. We must learn to address not only the factual situations, but the unstated and equally, if not more, important attitudes which such anecdotes illustrate.

Charles D. Goldman, Esq., is a Washington, D.C., attorney who specializes in disabilities issues and who writes regularly for the Handicapped Requirements Handbook. *His book,* Disability Rights Guide, Practical Solutions to Problems Affecting People with Disabilities, *won the 1988 Book Award from the President's Committee on Employment of the Handicapped.*

Agency Briefs

ED amends regulations for deaf-blind children program

The U.S. Department of Education has amended the regulations governing its Services for Deaf-Blind Children and Youth program (34 CFR Part 307). The changes, which incorporate the 1986 amendments to the Education of the Handicapped Act, describe the way the secretary makes awards to state and multi-state projects under the program. (April 17 *Federal Register,* Pages 15308-15313.)

ED proposes rule for technology-related assistance program

ED has proposed regulations to implement the Technology-Related Assistance for Individuals with Disabilities Act of 1988, which provides funding for states to develop technology assistance programs for disabled people. The proposed regulations discuss the purpose of the program, types of activities it would support, application requirements and criteria, and grant requirements. (April 12 *Federal Register*, Pages 14778-14785.)

OCR publishes pamphlet on handicapped rights

The Office of Civil Rights (OCR) at the U.S. Department of Education has published a pamphlet describing the rights and responsibilities under Section 504 of the Rehabilitation Act. To order "The Rights of Individuals with Handicaps Under Federal Law," contact the appropriate OCR regional office. (A list of OCR regional offices appears in the *Handbook* at Appendix II:A:1.)

Funding Opportunities

Department of Education

Deaf-blind children program...ED will award $6 million in several grants for state and multi-state service projects under its Services for Deaf-Blind Children and Youth program. The agency will also award a $600,000 grant to provide technical assistance for transitional services. For more information, contact Joseph Clair, ED, Division of Educational Services, 400 Maryland Ave. S.W., Room 4622, Washington, D.C. 20202; (202) 732-4503. Applications are due June 2. (April 17 *Federal Register,* Page 15314.)

Pediatric rehabilitation center...The National Institute on Disability and Rehabilitation Research has adopted as a final funding priority the establishment of a pediatric Rehabilitation Research Training Center. The center will investigate alternatives to hospitalization, examine the impact of disability on minority children, and study the social and emotional development of disabled children. (April 12 *Federal Register,* Pages 14774-14775.)

Research in education...The Office of Special Education and Rehabilitative Services (OSERS) will award six research grants under its Education of the Handicapped program. OSERS has $550,000 to fund two projects covering science and math curricula and $1 million to fund four projects in teacher planning and adaptation for students with handicaps. Applications are due June 9.

OSERS also set final research priorities for:

- small grants;
- social studies or language arts curricula;
- interventions to support junior high school-aged students with handicaps who are at risk for dropping out of school;
- the delivery of services to students with handicaps from non-English-speaking backgrounds; and
- initial career awards for people entering the research field.

For more information, contact Linda Glidewell, Office of Special Education Programs, 400 Maryland Ave. S.W., Room 3522, Washington, D.C. 20202; (202) 732-1099. (April 4 *Federal Register,* Pages 13608-13629.)

Department of Health and Human Services

Developmental disabilities program...The Office of Human Development Services has funding for universities to establish affiliated or satellite programs for people with development disabilities. Up to four grants will be awarded; only universities in states without such services may apply. For more information, contact Judy Moore, Administration on Developmental Disabilities, Room 5319, 330 Independence Ave. S.W., Washington, D.C. 20201; (202) 245-7719. (March 30 *Federal Register,* Pages 13119-13121.)

Developmental disabilities allotments... The Administration on Developmental Disabilities has announced the fiscal 1990 federal allotment for states with developmental disabilities basic support and protection and

advocacy formula grant programs. The funding levels are based on fiscal 1989 levels and must be approved by Congress. (March 31 *Federal Register,* Page 13239.)

Respite care for disabled children...Funding is available from the the Administration for Children, Youth and Families (ACYF) for states to provide disabled children with temporary, non-medical (respite) care. Respite care relieves families from the pressures of caring for a disabled child, which helps to prevent family stress. The application deadline is June 6. For more information, contact Phyllis Nophlin at ACYF, (202) 245-0624. (April 7 *Federal Register,* Pages 14154-14167.)

AIDS

Minority HIV education...The Office of Minority Health (OMH) at the Public Health Service has funding for community organizations and institutions to develop human immunodeficiency virus (HIV) educational programs for minorities. The grants are intended to curb "high risk" behavior among blacks and Hispanics, especially intravenous (IV) drug use and IV needle sharing, which has become the primary means of HIV transmission in these groups. For more information, contact OMH Grant Office, 8201 Greensboro Drive, Suite 600, McLean, Va. 22102; (703) 821-2487. Applications are due June 26. (April 19 *Federal Register*, Pages 15908-15911.)

Questions & Answers

Question: **A group of senior citizens asked our local housing authority to provide more access for people with disabilities to a particular building. The building is quite old and has steps in the lobby area in front of the elevator. We installed a lift meeting all local code requirements. Now, the seniors seem to be somewhat upset because we did not put in a ramp. Are we in compliance with section 504?**

Answer: Yes. The lift provides sufficient interior access around the problem area in the lobby. Structural changes are not always required to comply with the Rehabilitation Act.

Question: **What type of depression makes an employee a qualified handicapped individual for purposes of the Rehabilitation Act? Everyone gets "depressed" some time or another.**

Answer: As a qualifying handicapping condition, the depression must substantially impair a major life activity, such as employment. Such serious cases of depression usually cause aberrational behavior, such as nonresponsiveness to directions, inability to follow well established office procedures, or inability to communicate or think clearly.

Question: **When an employee claims to be so depressed as to be a qualified handicapped individual, can we in management require documentation of the condition?**

Answer: Yes, employees can be required to provide evidence of their handicapping conditions, including depression. Depression and other mental impairments have categorized DSM (Diagnostic Statistical Manual) codes. The DSM code noted will correspond to a particular condition.

Question: **We operate a private security firm. A long-time employee who had been carrying a weapon as part of his normal duties had a seizure. This was the first time ever. We reassigned him to an unarmed post. He did not object. Was that reasonable accommodation? If he continues to have seizures can we terminate him? A security guard who has seizures does not help our image with clients.**

Answer: Yours is a classic example of reasonable accommodation by modifying an employee's duties, here by changing the employee's position so he does not have to carry a gun. Whether or not you can terminate him if he continues to have seizures depends on the circumstances and whether there are other

reasonable accommodations that would permit the individual to do the job. The question is not what the patrons or clients think. The question relates to what the individual's abilities are in terms of the essential functions of the job. Underlying all anti-discrimination laws are premises that ability is what counts and that what "they" (be they clients, patrons, etc.) think is not determinative. "They" excluded many other persons until laws prohibited that activity.

Question: **Can airlines be sued under the Air Carrier Access Act for excluding individuals with handicapping conditions?**

Answer: Yes. In *Tallarico v. Trans World Airlines,* 693 F.Supp. 785 (1988), the family of a disabled child sued under the act, and the decision clearly established the right to go to court. The child had been barred by the airline from traveling alone ("unattended" in airline parlance). The case is on appeal on a complicated issue of the amount of damages that may be awarded. The airline is appealing on the right to sue.

***Question*: The Uniform Federal Accessibility Standard (UFAS) was issued under the federal Architectural Barriers Act. As a recipient of federal aid, if our institution complies with UFAS, are we essentially in compliance with Section 504 of the Rehabilitation Act?**

Answer: Yes, if your organization complied with UFAS, you will in all likelihood be in compliance with section 504 for structural accessibility concerns. On March 8, 1989, a number of federal agencies proposed to amend their section 504 regulations for federally assisted programs or activities to establish that, with respect to new construction and alternation, compliance with UFAS counts as compliance with section 504. This is consistent with the recommendations made by the Department of Justice, the lead federal civil rights agency.

Question: **May students who are learning disabled be considered for our school's Honor Roll program?**

Answer: Yes. In fact, the honor roll is a program of the school in which the students may participate. To totally exclude students with learning disabilities would be discriminatory.

Question: **One of our faculty members, a lecturer, has brought our office information about a handicapping condition of which we had never heard, trigeminal neuralgia. What is it? Is he eligible for disability retirement from our university?**

Answer: It is a neurological condition that can manifest itself in extreme pain, causing, for example, speech to be delayed or totally impaired. It is quite possible that the faculty member could be eligible for disability retirement, depending on the definition of disability in your institution's employment agreement with the individual (or with the union, if there is a collective bargaining agreement covering this employee) and the medical conditions documented. The delayed or impaired speech can severely impair communication to the point that teaching is totally impeded, both in regard to lecturing and to dialogues with students.

At presstime: A revised Americans with Disabilities Act was introduced in Congress on May 9. Three hearings covering employment, transportation and other accessibility issues were held. Co-sponsors Sen. Tom Harkin, D-Iowa, and Rep. Tony Coelho, D-Calif., said they hope to have a final vote in Congress before the August recess. A full story will appear in the June supplement.

Conference Calendar

• *May 22-24:* "Advocacy and Action into the '90s," Coalition of Citizens with Disabilities in Illinois, Springfield, Ill. Contact Springfield Center for Independent Living (217) 523-2587.

• *May 28-June 2:* Annual Meeting, American Association on Mental Retardation, Chicago. Contact Steven Stidinger (202) 387-1968.

• *June 1-6:* Annual Meeting, American Diabetes Association, Detroit. Contact ADA (703) 549-1500.

• *June 10:* Statewide Self-Advocacy Conference, New Jersey Self-Advocacy Project, Piscataway, N.J. Contact (201) 469-6333.

• *June 30-July 2:* "Rehabilitation Policy: Thriving or Surviving?," National Association of Rehabilitation Facilities, Washington, D.C. Contact NARF (703) 648-9300.

• *July 1-8:* 28th Annual Convention, American Council of the Blind, Richmond, Va. Contact ACB (202) 393-3666.

• *July 9-14* "The Deaf Way: An International Festival and Conference on the Language, Culture and History of Deaf People," Gallaudet University, Washington, D.C. Contact G.U. (202) 651-5400.

Handbook Page Changes in Supplement No.126

May 1989

Pages to be DISCARDED	Pages to be ADDED (Dated May 1989)	Description of Revisions
v & vi (April 1989)	v & vi	Contents of Basic 504 Compliance Guide
Chapter 200 Entire Tab (Various dates)	Chapter 200 Table of Contents pp. 201: 1-2 210: 1 220: 1-10 230: 1-6 240: 1-4 250: 1 260: 1 270: 1-6	Update of chapter contents
Appendix IV pp. 243-244 (April 1989)	Appendix IV p. 243-245	Addition of court case Nos. 467-468

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

Contents of Basic 504 Compliance Guide

The following is a listing of all pages that make up the Basic 504 Compliance Guide of the *Handicapped Requirements Handbook* with the inclusion of the May 1989, Supplement No. 126 update pages.

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CHAPTER 200: OVERVIEW OF SECTION 504 AND THE GOVERNMENT-WIDE REGULATIONS

¶201 Background Of Section 504 Of The Rehabilitation Act And Resultant Regulations

With passage of the Rehabilitation Act of 1973, Congress required that federal fund recipients make their programs and activities accessible to the handicapped. In April 1976 Executive Order 11914 (Appendix III:D) was issued. It called upon the then-Department of Health, Education and Welfare (HEW) to issue general standards and procedures to serve as guidelines for all funding agencies in developing individual sets of section 504 regulations. The general standards and procedures (the guidelines) to be followed by all federal funding agencies were published in the Jan. 13, 1978, *Federal Register*. In 1980 President Carter signed Executive Order 12250, transferring lead agency coordination authority from HEW (now the Department of Health and Human Services) to the Department of Justice (see Appendix III:D). The Justice Department reissued the regulations for government-wide enforcement of section 504 (see Appendix III:B) on Aug. 11, 1981, but it made no changes from the original HEW regulations.

These government-wide regulations include specific requirements related to agency regulations and interagency cooperation which are analyzed in this chapter. It must be noted, however, that these standards and procedures are *minimum* requirements which may be exceeded in the rules of individual agencies. Agencies may impose additional standards or require additional procedures for their recipients, depending on the nature of their funded programs.

Coverage extended to include federal government agencies

Although the *Handbook* specifically addresses regulations governing ''recipients'' of federal financial assistance and federal contractors (covered by section 503 and discussed at Chapter 700), some mention should be made of the protections against discrimination based on handicap applicable to federal executive agencies. In 1978, Congress passed the Rehabilitation, Comprehensive Services and Developmental Disabilities Act; among other things, it amended the Rehabilitation Act of 1973 and extended coverage of section 504 to include ''any program or activity conducted by an Executive agency or by the United States Postal Service'' (see Appendix III:A:3). The 1978 amendments further require that ''the head of each agency shall promulgate such regulations as may be necessary to carry out the [intent of the] amendments.'' As lead agency for section 504 enforcement and implementation, the Department of Justice prepared a ''prototype'' guideline for use by federal funding agencies.

Although federal agencies are required to issue section 504 regulations, courts have held that federal offices such as the Federal Communications Commission have no such responsibility. (See cases abstracted at Appendix IV:255 and 443.)

Federal agencies are also required by section 501 of the Rehabilitation Act of 1973 (Appendix III:A) to prepare ''an affirmative action plan for the hiring, placement, and advancement of handi-

capped individuals in such department, agency or instrumentality.'' Section 501 also created an Interagency Committee on Handicapped Employees to oversee federal activity in this area.

Appendix IV of the *Handbook* contains federal court rulings in various suits alleging discrimination on the basis of handicap by federal agencies. For discussions relating to these court actions, see ¶270 (private right to sue and exhaustion of administrative remedies) and ¶860 (awards of damages and attorneys' fees). For discussions of other issues relating to employment, see Chapter 600.

¶210 Source of Government-Wide Regulations

The *Handbook's* Basic 504 Compliance Guide focuses on the government-wide regulations that have shaped the handicapped-related requirements issued by each individual granting agency for its recipients. These standards, referred to as ''government-wide guidelines,'' were issued on Jan. 13, 1978, and reissued Aug. 11, 1981, by the Department of Justice (Appendix III:B). Information cited from the ''Summary of Rule and Analysis of Comments,'' which precedes the final regulations, is referred to throughout as ''the government-wide interpretation.''

It should be repeated that the government-wide regulations are directed to federal agencies, and not to fund recipients. However, they contain basic information regarding standards and procedures that are likely to appear in individual agency rules and thus apply to all recipients of federal financial assistance. *While a recipient should base its action under section 504 on the final regulations issued by its funding agencies, a review of the government-wide regulations affords recipients an opportunity identify and coordinate what is required of them.*

The *Handbook's* Basic 504 Compliance Guide also refers to the regulations which the Department of Health and Human Services issued for its own grantees (Appendix III:C) when these rules clarify or further delineate issues of eventual concern to all recipients.

¶220 Purpose, Application And Coverage

The government-wide guidelines (Appendix III:B) are designed to coordinate the implementation of section 504 through the federal government. The regulations, applicable to each federal department and agency empowered to extend federal financial assistance (§41.2), cover:

- Definitions (§41.3)
- Issuance of agency regulations (§41.4)
- Enforcement (§41.5)
- Interagency cooperation (§41.6)
- Coordination with sections 502 and 503 (§41.7)
- Standards for determining who are handicapped persons (§§41.31–41.32)
- Guidelines for determining discriminatory practices. Within ''Guidelines for determining discriminatory practices,'' major subparts of the regulations are devoted to:
  - General prohibitions (§41.51)
  - Employment (§§41.51–41.55)
  - Program (and facility) accessibility (§§41.56–41.58)

Program accessibility, facility accessibility, employment and enforcement are covered in separate chapters of the *Handbook* (see Chapters 300, 400, 600 and 800, respectively) for the sake of clarity. All other parts of the regulations (as listed above) are treated in this chapter. Several definitions of terms essential to an understanding of and compliance with section 504 are discussed in this paragraph.

Only parties receiving ''federal financial assistance'' must comply

Section 504 regulations are designed to eliminate discrimination on the basis of handicap in programs and activities receiving federal financial assistance. For purposes of section 504, ''federal financial assistance'' (§41.3(e)) is any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) funds;

(2) services of federal personnel; or

(3) real or personal property or any interest in or use of such property, including:

(a) transfers or leases of such property for less than fair market value or for reduced consideration; and

(b) proceeds from a subsequent transfer or lease of such property if the federal share of its fair market value is not returned to the federal government.

In the interpretation following the then-HEW section 504 regulations, that agency clarified its position on two questions about the definition of federal financial assistance (see Appendix III:C:x).

The department maintains that Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries and therefore is not covered by section 504. Courts have ruled similarly that section 504 does not apply to the hospital where Medicare and Medicaid funds are the only form of federal assistance received by the hospital (see Appendix IV:59 and 389). Other federal courts (both at the district and appellate levels) have ruled, however, that Medicaid and Medicare funds are considered federal financial assistance for purposes of triggering section 504 coverage (see Appendix IV:204, 248, 285, 320 and 407.) Procurement contracts, not covered by section 504, are covered by the affirmative action requirements of section 503 (see Chapter 700). (See also Appendix IV:94, 126, 288, 289 and 359.)

Organizations which receive ''significant assistance'' from a federal fund recipient are also covered by section 504. However, primary responsibility for ensuring compliance with section 504 rests with the recipient organization (see ¶230).

Courts have ruled differently on the question of whether airlines which use federally funded airports are covered by section 504 (see Appendix IV:126, 158 and 1018). The guiding decision on this issue, however, is *United States Department of Transportation v. Paralyzed Veterans of America* (Appendix IV:274), in which the Supreme Court on appeal found that federal financial assistance to airport operators is not an extension of federal funds to commercial air carriers (see discussion at ¶310).

A court has ruled that a baseball club's use of a municipal stadium (where the city is a recipient of federal funds) does not constitute receipt of federal assistance for purposes of triggering section 504 coverage (see Appendix IV:193). For discussions of whether the granting of a license by the Federal Communications Commission constitutes receipt of federal funds for purposes of complying with section 504, see Appendix IV:124, 247, 255, 436 and 443.

''Program or Activity''

The language of section 504 prohibits discrimination in a ''program or activity'' which receives federal finanical assistance. The Civil Rights Restoration Act of 1988, enacted on March 22, 1988, amends section 504 by defining the term ''program or activity'' to include: state and local government agencies and entities that receive funds from such agencies; entire colleges, universities or school systems; corporations or other private organizations that are engaged in providing education, health care, housing, social services, or parks and recreation, or that receive federal financial assistance as a whole; and any other organization that is established by two or more of the entities described above. The new law was specifically designed to overturn the Supreme Court's 1984 *Grove City College v. Bell* decision (Appendix IV:902) by restoring institution-wide coverage to four federal civil rights statutes: Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972 (sex discrimination), the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964 (race, color, religion and national origin discrimination).

In *Grove City College v. Bell,* the Court specifically declined to interpret direct grants of financial aid to students (through the Basic Educational Opportunity Grant (BEOG) or Pell Grant program) as non-earmarked, direct grants to the college. The Court determined that receipt of such grants by some of the students triggered coverage of Title IX, but that such coverage did not extend throughout the institution. The Court interpreted the receipt of BEOG grants as ''assistance to the college's own financial aid program, and it is that program that may properly be regulated under Title IX.'' The fact that such funds might have eventually reached the college's general operating budget did not subject it to institution-wide coverage. Because the language of Title IX is almost identical to that of section 504 it was generally assumed that *Grove City* applied to section 504, as well.

After *Grove City,* the term ''program or activity'' in section 504 was interpreted very narrowly by the courts. For instance, in *Doyle v. University of Alabama* (Appendix IV:171), an appeals court held that a handicapped plaintiff did not have standing to sue the university because, even though the university as a whole received federal financial assistance, the particular program that employed her did not directly benefit from federal funding. The Civil Rights Restoration Act widens the scope of section 504 and the other federal civil rights statutes by making them applicable to entire institutions.

A further discussion of the definition of ''program or activity'' appears at ¶310. For the text of section 504 as amended by the Civil Rights Restoration Act, see Appendix III:A:4.

Who is a ''handicapped'' person?

Section 504 protects handicapped persons from discrimination based on their handicap status. A person is ''handicapped'' within the meaning of section 504 (§41.3) if he or she:

(1) has a mental or physical impairment which substantially limits one or more of such person's major life activities;

(2) has a record of such impairment; or

(3) is regarded as having such an impairment.

''Major life activities'' include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

The judgment whether any given person is ''substantially limited'' depends upon the nature and severity of that person's handicapping condition. For example, a federal district court held that persons who suffer from ''any pulmonary problem, however minor, or all persons who are harmed or irritated by tobacco smoke'' are not handicapped as defined by section 504 (see Appendix IV:53). Temporary disabilities arguably fall within the definition of ''handicapped person'' to the extent they ''substantially limit one or more major life activities,'' according to the Department of Education. For court rulings to the contrary, however, see Appendix IV:24, 26, 27, 83 and 244.

When a condition does not substantially limit a major life activity, the individual will not be a qualified handicapped individual. This principle was applied in *Forisi v. Heckler* (Appendix

IV:341) to a plaintiff who had acrophobia (fear of heights). It was also applied in *Pridemore v. Legal Aid Society of Dayton* and *Pridemore v. Rural Legal Aid Society* (Appendix IV:352), to preclude the claims of an individual who had a mild case of cerebral palsy. In *De la Torres v. Bolger* (Appendix IV:327), the court held that lefthandedness was not a condition protected by the Rehabilitation Act.

In a policy memorandum issued by the then-Department of Health, Education and Welfare, that agency ruled that pregnancy was not considered a handicap for purposes of section 504 (see OSPR Memorandum of April 20, 1979, Appendix III:C:3:ii).

If an individual's handicap cannot be verified or its substantiality ascertained by ordinary observation, an employer may ask for medical verification of the existence of a handicapping condition. Such information must be kept confidential and should be accorded the same protections regarding the use of preemployment information under section 504 (see discussion at ¶660 and chart at Appendix VII).

Cases have arisen where courts have found handicap discrimination to have taken place despite the fact that the plaintiffs do not regard themselves as being handicapped. This has occurred when employers and school officials have discriminated against job applicants or students on the basis of a *perceived* handicap in violation of section 504 (see Appendix IV:54 and 379).

''Physical or mental impairments'' that fall within discrimination prohibitions *include*: (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term ''phsyical or mental impairment'' includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

Courts rule on coverage of substance abusers under section 504

Section 7(6)(A) of the Rehabilitation Act provides some guidance on this issue. The Act provides here that ''the term 'handicapped individual' means, for purposes of titles IV and V of this Act, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of section 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others'' (Appendix III:A:4).

When the provisions of section 7(6)(A) were proposed [it was added to the Rehabilitation Act in 1978], HEW received a number of negative comments from employers who were concerned that the act would provide undue protection to alcoholics and drug abusers in the workforce. Responding to this criticism, HEW stated that ''[t]he fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities...if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question'' (Appendix III:C:xi).

The courts have interpreted section 7(6)(A) in a fairly consistent manner, finding that employment discrimination against former alcoholics or drug abusers is prohibited, while ruling in favor of employers in cases where the employee's alcohol or drug abuse is clearly affecting job performance. Still, questions continue to arise. A description of cases where the courts have attempted to determine the circumstances under which substance abusers should be afforded the protection of sections 503 and 504 appears below. A substance abuse case decided under section 501 (*Whitlock v. Donovan,* Appendix IV:271), which mandates affirmative action on behalf of handicapped federal employees, is also included.

In *Simpson v. Reynolds Metals Co., Inc.* (Appendix IV:83), an alcoholic who was discharged after missing work several times because of his drinking problem filed suit against his former employer under sections 503 and 504. The court found that the plaintiff qualified as a handicapped individual, although it stated that the defendants could have disputed this finding. The court further determined that the plaintiff had no standing to sue under section 504 because the metals company did not receive federal funding for any program which he participated in or could have participated in. The plaintiff's section 503 claim was also dismissed; the court noted that Congress did not intend to create a private right of action under section 503.

* The Department of Veterans Affairs has been the defendant in a number of court cases involving alcoholics, most notably, *Traynor v. Turnage* (Appendix IV: 304). In this case (which was consolidated with *McKelvey v. Turnage,* Appendix IV:346), the Supreme Court found that a VA regulation defining alcoholism as ''willful misconduct'' in the absence of an underlying psychiatric disorder does not conflict with anti-discrimination provisions of section 504.

* Traynor and McKelvey had asked the VA to extend their eligibility to receive G.I. educational benefits, explaining that alcoholism prevented them from taking advantage of the program within the allotted 10-year period. But the VA denied their applications on the grounds that their drinking was the result of willful misconduct, not a disease.

* While the Court found that the VA's willful misconduct provision did not undermine section 504, it sidestepped the issue of alcoholism as a handicapping condition and instead based its

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* Indicates new or revised material.

decision on an interpretation of legislation. The Court ruled that amendments passed in 1978 that extended section 504 protection to ''any program or activity conducted by any executive agency'' did not repeal the willful misconduct provision.

* The Court did observe that there was a ''substantial body of medical literature that contests the proposition that alcoholism is a disease...for which the victim bears no responsibility.'' But the Court also noted that there was significant debate on the medical issues and that it did not have to decide them.

* (In 1988, Congress effectively overturned *Traynor* when it voted to extend eligibility for VA education and rehabilitation benefits beyond the 10-year period to veterans whose dependency on alcohol prevents them from participating. Disabilities associated with alcoholism would not be considered a product of willful misconduct.)

The plaintiff in *Tinch v. Walters* (Appendix IV:239) was honorably discharged from the military in December 1957 and his entitlement to Veterans Administration (VA) educational benefits was to extend through June 1, 1976. This date could be extended, under VA procedures, if the plaintiff was prevented from completing his education by a physical or mental impairment that was not the result of his own ''willful misconduct.''

The plaintiff sought an extension of his delimiting date on the basis that he was prevented from completing his education from 1966 to 1974 because he is an alcoholic. The VA refused, citing the 1977 GI Bill Improvements Act, which terms the excessive drinking of alcoholic beverages as ''willful misconduct.''

A Tennessee district court found in 1983 that the VA violated section 504 by discriminating against the plaintiff on the basis of his alcoholism, which the court determined to be a protected handicap. The VA appealed, but in 1985 the 6th Circuit affirmed the district court's ruling.

In *Heron v. McGuire* (Appendix IV:370), the U.S. Court of Appeals for the 2nd Circuit affirmed the ruling of a New York district court, finding that a police officer whose current use of heroin prevents him from performing job duties is not an ''otherwise qualified'' handicapped individual under Section 504 of the Rehabilitation Act. The appeals court also found that the New York City Police Department's practice of dismissing heroin addicts and treating alcoholics did not violate equal protection laws. Noting that past drug addiction may be considered a handicap under section 504, the court of appeals affirmed the district court's grant of summary judgment for the defendants.

In *Davis v. Butcher* (Appendix IV:26), a Pennsylvania district court determined that the city of Philadelphia violated the Rehabilitation Act by denying employment to three former drug users. The court stated that drug addiction is a protected handicap and that the Rehabilitation Act conferred a private right of action on the plaintiffs. After reviewing the supporting case law, the court

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* Indicates new or revised material.

also granted the plaintiffs' request to represent a class of all persons who had been denied employment by Philadelphia solely on the basis of previous drug use or addiction. The city of Philadelphia was ordered to review its employment records for similar instances of discrimination, and to establish an impartial administrative tribunal to determine the individual claims of class members.

The plaintiff in *Whitaker v. Board of Higher Education of the City of New York* (Appendix IV:27), a professor who suffered from alcoholism, sued Brooklyn College and the board of higher education on the basis of illegal employment discrimination under section 504. The plaintiff's claim rested on his assertion that, although he was an alcoholic, his handicap did not affect his performance of essential job duties. The defendants sought a dismissal of the complaint on the grounds that the professor failed to exhaust administrative remedies before filing suit under the Rehabilitation Act. The district court ruled that, according to HEW regulations, a private right of action exists under section 504 and plaintiffs are not required to exhaust administrative remedies. Based on this finding, the court denied the defendants' motion to dismiss. However, the court also denied the plaintiff's motion for a preliminary injunction, since the plaintiff had left Brooklyn College for employment elsewhere and the status quo could therefore not have been preserved.

In *Huff v. Israel* (Appendix IV:243), the plaintiff was fired from his job after his third conviction for driving under the influence of alcohol (DUI). He filed suit alleging that he was an alcoholic and that his termination violated Section 504 of the Rehabilitation Act.

The court disagreed, finding that the plaintiff was fired not because of his alcoholism, but because he had received three DUI convictions. The court, referring to section 7(6)(A)'s ''current use'' provision, stated that the plaintiff could not function effectively in his law enforcement position when he himself could not comply with the law as evidenced by the three DUI convictions. Judgment was entered in favor of the defendants.

A district court in *Whitlock v. Donovan* (Appendix IV:271) determined that federal employers are required under Section 501 of the Rehabilitation Act to provide the opportunity for intensive, long-term treatment for alcoholic employees. The court found that the U.S. Department of Labor ''fell short of the statutory mandate for accommodating handicapped employees'' by not presenting a lapsed alcoholic who had been treated once with the ''firm choice'' option of reentering an appropriate treatment program or being dismissed. In its concluding remarks, the court stated that ''This is not to say that in every instance where an agency confronts an alcoholic employee who has failed in treatment that it must offer leave without pay or some other specific arrangement. But if there is evidence...that such a leave...might have been beneficial, the reasonable accommodation duty requires the agency to evaluate whether such a leave...would have imposed an undue hardship on the agency. The agency made no such evaluation.'' The court allowed the plaintiff to reapply for the same or similar position with the Labor Department and ruled that the plaintiff should be eligible to seek disability retirement in the event he failed a fitness-for-duty examination.

The plaintiff in *Johnson v. Smith* (Appendix IV:340) was a job applicant at the Director of Prisons, where he was rejected, despite high qualifying scores, on the basis of a past history of

drug and alcohol dependency. A district court in Minnesota found that the plaintiff was at least minimally qualified for the job and had been discriminated against on the basis of a handicap protected under section 504. However, questions of fact remained as to whether the plaintiff was as qualified as other applicants and whether his handicap would prevent adequate performance of the job of correctional officer. The district court rejected the defendants' motion for summary judgment.

* A U.S. District Court in New York ruled that drug abusers who are not rehabilitated or currently seeking treatment are not qualified handicapped individuals under section 504 (*Burka v. New York City Transit Authority,* Appendix IV:439). The plaintiffs, who had tested positive for marijuana use in the New York City Transit Authority's drug testing program, argued that the 1978 amendments to the Rehabilitation Act protected them from dismissal, unless it could be shown that they could not perform their jobs. The court disagreed, saying that Congress did not intend for section 504 to protect all drug abusers, only those who were seeking or received rehabilitation.

In *McCleod v. City of Detroit* (Appendix IV:343), firefighter job applicants who were rejected because of positive marijuana use test results brought suit against the city alleging handicap discrimination in violation of the Rehabilitation Act. The city argued that the plaintiffs were not handicapped persons within the meaning of the Act and that there is a rational relationship between the positive test results for marijuana and disqualification for the job of firefighter. The court agreed with the city and dismissed the claims.

The district court based its dismissal on the basis that the ''impairment'' caused by marijuana use only affected the plaintiffs' ability to be employed as firefighters, not general major life activities. The court therefore concluded that the plaintiffs were not handicapped for purposes of the Act, and that the challenged criteria were job related and required by business necessity.

* Similarly, the court in *Copeland v. Philadelphia Police Department* (Appendix IV:440) ruled that even if a police officer who tested positive for marijuana use can be considered a handicapped individual under section 504, he is not otherwise qualified for a law enforcement position. The court said ''accommodating a drug user within the ranks of the police department would constitute a 'substantial modification' of the essential functions of the police department and would cast doubt upon the integrity of the police force.''

A federal district court in New Jersey found in *Moore v. Borough of Monmouth Beach* (Appendix IV:371) that a municipal clerk for the borough who was suffering from alcoholism was protected by Section 504 of the Rehabilitation Act and the New Jersey Law Against Discrimination. Finding that the plaintiff held a cognizable property right in a salary increase that was denied her as a result of her handicap, the court refused to grant the defendants' motion to dismiss the plaintiff's claims.

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* Indicates new or revised material.

***Protections afforded persons with contagious diseases, such as AIDS, under section 504**

In 1988, Congress passed the Civil Rights Restoration Act, which amended the Rehabilitation Act to ensure protection against discrimination for persons with contagious diseases, such as AIDS and tuberculosis. The amendment says that sections 503 and 504 protect affected individuals, unless their infection or disease would constitute a direct threat to the health and safety of others, or persons who, because of their condition, could not perform their job (see Appendix III:A:4 and ¶310).

The basis for this amendment was *Arline v. School Board of Nassau County* (Appendix IV:329), in which the Supreme Court found in favor of Gene Arline, an elementary school teacher who was dismissed from her job due to the ''continued recurrence of tuberculosis.'' The Court held that the contagious effects of a disease could not be separated from its physical effects in a case in which contagiousness and physical impairment resulted from the same condition. The justices also ruled that persons with contagious diseases must be evaluated individually to determine if they are otherwise qualified for a job or program.

The ruling was highly publicized because AIDS, like tuberculosis, is a contagious disease that is not easily transmitted. While the court explicitly refused to rule whether AIDS would be considered a handicapping condition, the decision served as a catalyst for subsequent interpretations of the law.

In 1988 the Department of Justice, the agency responsible for government-wide enforcement of section 504, issued an opinion which said persons with AIDS and persons infected with the human immunodeficiency virus (HIV) are considered individuals with handicaps and covered by section 504. This reversed an earlier DOJ opinion that AIDS was not a protected handicap and that fear of catching the disease, whether reasonable or not, abrogated section 504 coverage.

The memo prohibits both federal employers and federally funded programs and activities from discriminating against an HIV carrier, so long as the infected individual poses no health or safety risk or performance problem. In some situations where the risk of transmission is slight, infection may still render someone not otherwise qualified. For example, AIDS is known to cause dementia, and the risk of an afflicted air traffic controller suffering an attack could be especially dangerous.

If someone with AIDS is otherwise qualified, then an employer or program administrator must make reasonable accommodations. Employment examples would be limiting an HIV-infected surgeon to teaching-only duties at a hospital or assigning a police officer a job where there is little chance of bloodshed. For program accessibility, an example would be accepting an HIV-infected person as a tenant in public housing, provided the applicant could meet the terms of the lease (such as paying the rent on time).

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* Indicates new or revised material.

Following the DOJ opinion, the Office of Federal Contract Compliance Programs issued a memorandum which extends section 503 protection to otherwise qualified persons with AIDS in federal contracts and subcontracts (see ¶720).

¶230 General Prohibitions Affecting Recipients Of Federal Funds

This paragraph covers general prohibitions against discrimination based on handicap as outlined in the government-wide regulations under ''Guidelines for determining discriminatory practices'' (Appendix III:B, §41.51). Subscribers are reminded that any recipient organization or institution is covered by section 504 if it receives *any* federal financial assistance, regardless of the type of assistance or from which agency(ies) it comes.

The government-wide guidelines begin with a slight rephrasing of the statutory language of section 504 and include a blanket prohibition against any discrimination based on handicap (Appendix III:B, §41.51(a)):

> No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

Section 41.51(b) of the government-wide rules contains prohibitions related to aid, benefits and services that incorporate basic principles developed by the Department of Health and Human Services (HHS) and used in its regulations for HHS recipients (Appendix III:C). These include the standard that a recipient, in providing any aid, benefit or service, *may not*, directly or through contractual, licensing or other arrangement, *on the basis of handicap:*

- deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit or service (§41.51(b)(1)(i));
- afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded others (§41.51(b)(1)(ii));
- provide a qualified handicapped person with an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others (§41.51(b)(1)(iii)); or
- provide different or separate aid, benefits or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits or services that are as effective as those provided to others (§41.51(b)(1)(iv)).

Only ''qualified handicapped persons'' are protected

Only ''qualified handicapped individuals'' are protected from discrimination by section 504 (and section 503, see Chapter 700). (For a discussion of who is a ''handicapped'' person, see p. 220:3.) For purposes of section 504, ''qualified handicapped person,'' as defined in the government-wide guidelines at §41.32, means—

(1) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question (see p. 601:3); and

(2) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services (see p. 301:1).

In *Southeastern Community College v. Davis*, the Supreme Court ruled on the question of who is a ''qualified handicapped person.'' The Court held: ''[A]n otherwise qualified handicapped person is one who is able to meet all the program's requirements in spite of his handicap'' (see Appendix IV:22). The *Davis* Court further held that: ''Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate.'' This opinion has been much cited by lower courts when ruling on the question of whether the plaintiff in a suit is a qualifed handicapped person and, therefore, protected by section 504.

Equal opportunity, not merely equal treatment

As pointed out in the HHS interpretation preceding its regulations, section 504 prohibits not only those practices that are overtly discriminatory, but also those that have the *effect* of discriminating (see discussion below). Equal opportunity, and not merely equal treatment, is essential to the elimination of discrimination. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory. Identical treatment will not in some cases provide handicapped persons with the adjustments or accommodations that they require to achieve equal opportunity. On the other hand, separate or different treatment is permitted under section 504 only where it is necessary to ensure equal opportunity and truly effective benefits and services. (See discussion below regarding the delivery of aid, benefits and services in the ''most integrated setting appropriate.'')

Three Department of Education (ED) policy memoranda serve to clarify what is meant by providing an equal opportunity for participation by disabled persons. A local school district refused to provide late bus service to permit a deaf student's participation in after-school extracurricular activities (transportation during regular commuting hours was provided). ED ruled that under its section 504 regulations, the school district was expected to make whatever special transportation arrangements are necessary to permit handicapped students' participation in extracurricular activities. Handicapped children must be afforded an opportunity to engage in such activities equal to that provided to nonhandicapped children. (For a copy of the complete memorandum, see Appendix III:C:3:xxiii.)

In another situation, ED was asked to rule if section 504 requires a school district to establish intramural athletic programs to accommodate handicapped students who are unable to successfully compete with non-handicapped students for placement in the district's regular competitive interscholastic program. ED replied that section 504 does not require the creation of any ''new athletic programs'' to accommodate students who are unable to successfully compete for placement in the school district's regular athletic program, providing the ''opportunity'' for handicapped students to compete does exist. (For a copy of the complete memorandum, see Appendix III:C:3:xxx.)

A third case involved a rule of a state high school athletic association that prohibited students over the age of 19 from competing in varsity sports. The complaint was made on behalf of a hearing-impaired student who could not compete on varsity teams because of his age. Although the state high school athletic association is neutral on its face and, therefore, is not *per se* discriminatory, its effect in particular situations, however, may be. If the reason that a particular student is 19 years old at the beginning of his or her senior year is because the school system has discriminated against that student on the basis of handicap, the rule may not be applied to that student. In this case, the student was 19 at the beginning of his senior year because he had been required, as were all handicapped students, to repeat both first and second grades. ED based its ruling on the ''equal opportunity'' and ''significant assistance'' clauses of its regulations. (For a copy of the complete memorandum, see Appendix III:C:3:xvii; for a contrary view, see court case at Appendix IV:233.)

Prohibitions against practices which have the ''effect'' of discriminating

A recipient may not directly, or through contractual or other arrangements, use criteria or methods of administration that (according to §41.51(b)(3)):

- have the effect of subjecting qualified handicapped persons to discrimination based on handicap;
- have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the recipient's program with respect to handicapped persons; or
- perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

As noted in the government-wide interpretation, this provision applies primarily to state agencies that receive federal funds and then distribute funds to other entities. These state agencies are obligated to develop methods of administering the distribution of federal funds so as to ensure that handicapped persons are not subjected to discrimination either by second-tier recipients or by the manner in which the funds are distributed. These prohibitions apply not only to direct actions of a recipient but also to actions committed through contractual agreements or similar arrangements. This provision is based on the premise that a recipient should not be able to do indirectly that which it cannot do directly.

Recipients may not, in determining the site or location of a facility, make selections that have (§85.51(b)(b)):

- the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from federal financial assistance; or
- the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

As pointed out in the interpretation that accompanied the regulations for HHS recipients, this requirement regarding the site selection is not intended to prohibit a recipient which is located on hilly terrain from erecting any buildings or new facilites at its present site (Appendix III:C:xiv).

The exclusion of nonhandicapped persons from the benefits of a program limited by federal statute or executive order to handicapped persons, or the exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicappped persons, is not prohibited by section 504 (§41.51(c)).

A recipient is prohibited from perpetuating discrimination on the basis of handicap in any program or activity of a federally funded secondary recipient. A recipient should, therefore, make certain that organizations funded are aware of its policy of nondiscriminiation and do not, themselves, discriminate on the basis of handicap. To this end, a recipient could ask secondary recipients to complete a self-evaluation of programs and activities, and return a copy of the document to the primary recipient. Another approach may be to ask secondary recipients to sign an ''assurance of compliance'' for attesting to its compliance with the section 504 mandate of nondiscrimnation on the basis of handicap. In preparing funding agreements between primary and secondary recipients, primary recipients could fashion an agreement that encompasses the following items and assurances:

- a formal request submitted prior to formal consideration of a budget;
- full disclosure of a secondary recipient's budget;
- audit coverage; and
- compliance with civil rights/nondiscrimination requirements (including nondiscrmination on the basis of race, color, creed, national origin, sex, age and handicapped status). Whatever approach is taken, it is suggested that any documentation provided by the secondary recipient should be kept on file and attached to the primary recipient's self-evaluation materials.

The concept of ''equally effective''

The concept of an ''equally effective'' aid, benefit or service is an important one that is not addressed in the government-wide guidelines or the government-wide interpretation that precedes these rules. However, the HHS regulations (Appendix III:C) and the interpretation appended to the rules include a more detailed discussion of ''equally effective'' aids, benefits and services. The term ''equally effective'' is intended to encompass the concept of ''equivalent,'' as opposed to ''identical.'' In order to be ''equally effective,'' an aid, benefit or service need not produce the identical result or level of achievement for handicapped and nonhandicapped persons; it merely must afford equal *opportunities* to achieve equal results, or to gain equivalent benefits and reach the same level of achievement.

Prohibitions against perpetuating discrimination through ''significant assistance''

Recipients are prohibited (§41.51(b)(1)(v)) from aiding or perpetuating discrimination against a qualified handicapped person by providing ''significant assistance'' to an agency, organization or

person that discriminates based on handicap in providing any aid, benefit or service to beneficiaries of the recipient's program.

Although the concept is not addressed in the government-wide regulations, recipients may have to develop standards for measuring the ''substantiality'' of their assistance to other organizations or persons. Criteria to be considered may *include* financial support by the recipient and whether the activities of the outside organization or person are so closely related to those of the recipient that, fairly, they should be considered activities of the recipient itself. Also, it may be relevant to ask whether an outside organization could continue to exist without the recipient's support. The prohibition against providing significant assistance to organizations or persons that discriminate based on handicap should initiate an analysis of all external relationships maintained by the recipient.

Ensuring that discrimination does not exist may require the recipient to communicate its policy of nondiscrimination to all outside organizations and persons with which it deals; to receive written assurances from such organizations; and to take whatever other steps may be required to ensure an absence of discrimination against participants in the recipient's programs and activities. Relationships that may require scrutiny *include* those with labor unions and other organizations representing or serving employees (including referral agencies), those providing insurance and other employee benefits, and social or recreational organizations that provide programs or activities to the employees and other participants in the recipient's programs and activities. (For a further discussion of ''outside'' organizations used in the employment process, see ¶610).

In one of its policy memorandum, the Department of Education (ED) offers an example of what is meant by ''significant assistance.'' An art college operates a Saturday morning class for young children. The class is offered on the college campus and is taught by undergraduate students. A primary purpose of the program is to provide training for student instructors. The workshop does not receive direct federal assistance but the college does. ED ruled that the children's workshop program is an integral part of the postsecondary education program operated by the recipient. The recipient provides the teachers and facilities for the program and requires its students to teach in the program as a condition for graduation. Therefore, the workshop is subject to the requirements of section 504, and it is the recipient's duty to ensure compliance. (See Appendix III:C:3:i for a copy of the complete memorandum.)

Handicapped participation ''in the most integrated setting appropriate''

In general, recipients may not limit a qualified handicapped person in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving the aid, benefit or service (§41.51(b)(1)(vii)). The regulations (§41.51(b)(2)) further state that recipients may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities. The purpose of this requirement is to allow each individual to participate in existing programs and activities (those in which nonhandicapped persons are participating) to the extent that he or she is

capable and desires. Accommodations or adjustments that are made for one handicapped person may not be necessary or desirable for another handicapped person who has a similar disability. Separate programs or activities that may be required to ensure equal opportunity for one handicapped person may not be necessary or desirable for another handicapped person who has a similar disability. Also, *individuals* should be free to participate in programs or activities with only slight modifications or adjustments, even in cases where major modifications or adjustments are being made for other persons with similar disabilities. (For a more detailed discussion and explanation of the most integrated setting appropriate, particularly as it relates to program accessibility, see ¶340.)

Communications—a major emphasis of 504 compliance

Recipients must take appropriate steps to ensure that communications with their applicants, employees and beneficiaries are available to persons with impaired vision and hearing (§41.51(e)). Adequate communications to handicapped persons (particularly those who are blind and deaf) will be essential to the full participation of such persons in the recipient's programs and activities. Regardless of the accommodations and adjustments that are (or would be) made by the recipient for handicapped persons, equal opportunity will not be achieved in individual instances unless handicapped persons are aware that such accommodations and adjustments have been or will be made. Communications, in general, should be a major emphasis in the recipient's compliance with section 504. Alternate methods of communication, in particular, will be essential in individual instances if persons with vision and hearing impairment are to have equal opportunities and participate fully in the recipient's programs and activities.

Designation of section 504 coordinator

The lead requirement with respect to the designation of a section 504 coordinator is found in the HHS (and ED) section 504 regulations at §84.7 (see Appendix III:C:v). The requirement states that recipients employing 15 or more persons must name at least one person to coordinate compliance with section 504 rules. Other federal agencies in their section 504 regulations have adopted a similar provision. (One notable exception is the Department of Justice, which sets 50 as the minimum number of persons recipients must employ before they are subject to the requirement.) This coordinator should help ensure that the organization's self-evaluation and transition plan (see Chapters 300 and 400) are effectively completed.

¶240 Timetable and Procedures for Issuance of Individual Agency Regulations

The government-wide regulations state that each agency shall, after notice and opportunity for comment, issue a regulation to implement section 504 with respect to the programs and activities for which it provides assistance (§41.4). These agency regulations are to be consistent with the government-wide regulations (see Appendix III:B).

In accordance with the government-wide rules, each agency was required to issue a notice of proposed rulemaking (notice is issued when the proposed rules are published in the *Federal Register*) no later than 90 days after the effective date of the government-wide regulations; thus, no later than April 11, 1978, since the government-wide rules were published on Jan. 13, 1978, and became effective immediately. The government-wide rules further state that each agency shall issue final regulations no later than 135 days after the end of the period for comment on its proposed regulation, provided that the agency shall submit its proposed final regulations for ''review'' at least 45 days before they are to be issued. Pursuant to Executive Order 12250 (see Appendix III:D), signed by President Carter in November 1980, the Department of Justice is the agency responsible for ''reviewing'' an agency's rules before they become final.

Required content of agency regulations

Standards in the government-wide regulations stipulate that each agency's regulations shall:

- define appropriate terms, consistent with the definitions (§41.3) and the standards for determining who are ''handicapped persons'' (§41.31-§41.32) set forth in the government-wide regulations (see ¶210 of this *Handbook* and the Appendix I Glossary); and
- prohibit discriminatory practices against qualified handicapped persons in employment and in the provision of aid, benefits or services, consistent with the guidelines set forth in §41.51-§41.55 of the government-wide regulations (see ¶220 and Chapters 300, 400 and 600 of this *Handbook*).

Agency regulations must also include, where appropriate, specific provisions adapted to the particular programs and activities receiving financial assistance from the agency. In the interpretations preceding the government-wide regulations, agencies are encouraged to examine §84.1-§84.23 of the Department of Education's and Department of Health and Human Services' agency rules (Appendix III:C) to determine whether their regulations should include any of the more detailed provisions to be found there. In addition, each agency is invited to examine the programs and activities to which it provides assistance in order to determine whether detailed requirements concerning any such program or activity should be included.

In general, federal agencies have closely followed the government-wide guidelines and the ED/HHS agency rules in promulgating their own regulations under section 504. (A listing of where in the *Federal Register* to find federal agencies' section 504 rulemakings is included at

Page 240:3.) To determine the individual requirements of a particular funding agency's section 504 rules, a recipient could consult the appropriate Agency Requirements Chapter of the *Handicapped Requirements Handbook*.

For a discussion of rulemakings with respect to section 504 coverage of federally conducted programs and activities, see ¶201.

Section 504 Rulemaking Chart (for federal recipients)

Agency/Department	Status*	Date in *Federal Register*
ACTION	F	May 30, 1979
	P	Sept. 19, 1980 (complaint handling)
International Development	F	Oct. 6, 1980
Agriculture	F	June 16, 1982
Commerce	F	April 23, 1982
Defense	F	April 8, 1982
Energy	F	June 13, 1980
Environmental Protection	F	Jan. 12, 1984
General Services	F	June 11, 1982
Education	F	May 4, 1977
Health & Human Services	F	May 4, 1977
Education (voc. ed.)	F	March 4, 1979
Government-wide regulations	F	Jan. 13, 1978
Housing and Urban Development	F	June 2, 1988
Interstate Commerce Commission	F	June 23, 1986
Interior	F	July 7, 1982
Labor	F	Oct. 7, 1980
Justice	F	June 3, 1980
Legal Services Corporation	F	Sept. 25, 1979
	P	March 23, 1981

(continued on next page)

* F - final
P - proposed

Agency/Department	Status*	Date in *Federal Register*
Arts Endowment	F	Apr. 17, 1979
Humanities Endowment	F	Nov. 12, 1981
National Science Foundation	F	March 1, 1982
Nuclear Regulatory Commission	F	March 6, 1980
Office of Revenue Sharing	F	Oct. 17, 1983
Small Business Administration	F	Apr. 4, 1979
State	F	Oct. 21, 1980
Tennessee Valley Authority	F	Apr. 4, 1980
Transportation	F	May 30, 1979
	F	May 23, 1986 (mass transit)
Veterans Affairs	F	Sept. 24, 1980

* F - final
P - proposed

¶250 Requirements For Interagency Cooperation

The government-wide regulations address issues related to interagency cooperation on section 504 (see ¶41.6). Where each of a substantial number of recipients is receiving assistance for similar or related purposes from two or more agencies, or where two or more agencies cooperate in administering assistance for a given class of recipients, the agencies shall:

- coordinate compliance with section 504; and
- designate one of the agencies as the primary agency for section 504 compliance purposes.

Also, any agency conducting a compliance review or investigating a complaint of an alleged section 504 violation shall notify any other affected agency upon discovery of its jurisdiction and shall inform it of the findings made. Reviews or investigations may be made on a joint basis.

The government-wide interpretation points out that a potential problem exists for recipients who receive grants from more than one agency, and may be subjected to multiple assurance forms, inconsistent regulations or enforcement procedures, and multiple investigations. To deal with these problems, agencies are encouraged to extend existing Title VI enforcement procedures to section 504 (see ¶840). Also, ensuring that consistent regulations are promulgated by the individual agencies should alleviate the problem.

In promulgating the government-wide rules (see Appendix III:B), the government (represented by the Department of Health, Education, and Welfare) envisioned a ''primary agency'' approach to be used in cases in which a recipient would have one primary agency designated for purposes of compliance with section 504, presumably the agency from which it receives the most funding. (See ¶41.6, ''Interagency Cooperation,'' Appendix III:B:2; see also interpretative comment related to ¶41.6, Appendix III:B:8.)

In their compliance efforts, recipients should be aware of the section 504 guidelines of other agencies from which funding is received, particularly to the extent that requirements may vary from agency to agency and program to program. Problems with multi-agency funding and compliance will be most difficult in cases where recipients receive funding from agencies with jurisdiction over programs that are significantly different. This is true because the section 504 rules of such agencies will vary to reflect the unique nature of the different programs (e.g., education, transportation, housing).

Role of the Interagency Coordinating Council

The Interagency Coordinating Council (ICC) was established by section 507 of the Rehabilitation Amendments of 1978 (P.L. 95-602, see Appendix III:A:5). The Council has the responsibility for developing and implementing agreements, policies and practices to create uniformity and to solve jurisdictional disputes between the various federal agencies responsible for section 504 implementation and enforcement.

¶260 Coordination With Sections 502 and 503

The government-wide guidelines (at §41.7, Appendix III:C) cover matters related to coordination between section 504 compliance activities and those related to Sections 502 and 503 of the Rehabilitation Act of 1973, as amended.

The rules require agencies to ''consult'' with the Architectural and Transportation Barriers Compliance Board (A&TBCB) in developing requirements for the accessibility of new facilities and alterations (§41.58). Agencies must also coordinate with the A&TBCB in enforcing such requirements with respect to facilities that are subject to Sections 502 *and* 504 of the Rehabilitation Act. (The relationship between sections 502 and 504 is further discussed in ¶510.)

Agencies are also required to ''coordinate'' with the Department of Labor (Office of Federal Contract Compliance Programs) in enforcing requirements concerning employment discrimination with respect to recipients that are also federal contractors subject to section 503 (see ¶720). To further this aim, many agencies have included statements in their section 504 rules claiming that recipients who are in compliance with the employment provisions of section 503 are also in compliance with the employment provisions of these agencies' section 504 regulations. The reverse, however, would not necessarily be true, since section 503 mandates *affirmative action* in employment, while section 504 requires only *nondiscrimination.* (For a brief discussion of these terms, consult the Glossary, Appendix I.)

The government-wide interpretation reveals that the words ''consult'' and ''coordinate,'' as used above, are not intended to specify any explicit procedures. Requirements related to sections 502 and 503 are the subject of separate sections of this *Handbook* — Chapters 500 and 700 respectively.

¶270 Private Civil Actions

Sections 503 and 504 of the Rehabilitation Act do not explicitly create or authorize private civil litigation by handicapped persons against a recipient of a federal contract (section 503) or federal financial assistance (section 504). Nevertheless, judicial decisions occasionally recognize the right of private persons to sue in federal courts for alleged violations of statutes which do not explicitly permit private suits. The Supreme Court has long recognized this ''implication doctrine'' as necessary to effective enforcement of certain laws and has set out four tests to judge whether it is appropriate to imply such private rights. These include:

(1) reviewing the legislative history of the statute to ascertain whether Congress intended to permit private enforcement;
(2) determining whether the complainant is a special or intended beneficiary of the statute;
(3) determining whether permitting a private action would be consistent with the broad purposes of the statute; and
(4) analyzing whether the area of law is one which is primarily reserved to the states for enforcement or if it is one primarily covered by federal laws.

The Supreme Court did not indicate that all four of these tests must be met, nor did it assess the relative weight to be given to any particular factor. (See *Cort v. Ash,* Appendix IV:900.)

There has been general agreement among the federal circuit courts of appeals that there is a private right of action under section 504 (see discussion below). Those courts have generally reached the opposite conclusion with respect to section 503, however (see discussion at ¶770). Once a court determines that a private cause of action should be implied as existing in an otherwise silent statute, a private party may generally seek any form of relief available under the statute. These may include temporary restraining orders, preliminary or permanent injunctions, suspension or termination of federal funds, and, in some cases, monetary damages. (For a discussion of these remedies, see ¶860.)

Private right of action under section 504

The Supreme Court has now recognized that private plaintiffs have standing to sue for violations of section 504, at least in the context of employment discrimination (see *Consolidated Rail Corp. v. Darrone,* Appendix IV:95 and discussion at ¶601). While the Court's holding in *Conrail* is limited to a case involving employment discrimination, Justice Powell, writing for the Court, phrased the case as one ''to clarify the scope of the private right of action to enforce §504.'' This seems to imply that the Court had no doubt that private rights are implicit in the statute, only that some question exists as to how broadly those private rights are to be interpreted.

Further support for this position lies in the High Court's ruling in another section 504 case, *Southeastern Community College v. Davis* (Appendix IV:22). Although the Court did not discuss

private rights of action in its opinion, an individual whose application for admission to the College's nursing program was rejected was permitted to sue the College under section 504.

To more fully understand this concept, some background into the earlier cases may be helpful. One of the earliest cases on private rights to sue under section 504 is *Lloyd v. Regional Transportation Authority* (Appendix IV:5), in which the 7th Circuit saw the similarity between section 504 and the affirmative rights found in Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) as it was construed by the Supreme Court in *Lau v. Nichols,* 414 U.S. 563 (1974). In further support of its analysis, the *Lloyd* court also concluded that section 504 satisfies the legal tests relevant to determining whether a private right of action is implicit in a statute, as dictated by the Supreme Court in *Cort v. Ash, supra.* The Supreme Court's ruling in *Cannon v. University of Chicago* (441 U.S. 677 (1979)), that Title IX of the Education Amendments of 1973 grants a private right of action, has also been cited by a number of courts in support of the proposition that section 504 provides private remedies because of the similarity in the language of the two statutes.

All 11 circuit courts of appeal have held that section 504 permits private actions.* A long line of federal district courts has also concluded that section 504 should be privately enforced. Most of these decisions rely on the *Lloyd* analysis and the *Cort v. Ash* factors to conclude that the purposes of the Rehabilitation Act would be severely frustrated by denying to handicapped persons who are discriminated against the right to a remedy in the federal courts.

** The only judicial limitations to the scope of private suits under section 504 to date have involved employment (see ¶601), damages (see ¶860), and suits against government agencies. In four recent cases, the rule has emerged that individuals may indeed bring section 504 suits against agencies of the federal government concerning regulatory practices. (See *Cousins v. Secretary of*

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* All 11 circuit courts have implied private cause of actions under section 504:

1st	*Cousins v. Secretary of Transportation*	IV:457
2nd	*Leary v. Crapsey*	IV:17
	Jose P. v. Ambach	IV:162
3rd	*Pennhurst State School and Hosp. v. Halderman*	IV:33
	NAACP v. Medical Center	IV:41
4th	*Trageser v. Libbie Rehab. Center Inc.*	IV:31
	Southeastern Community College v. Davis	IV:22
5th	*University of Texas v. Camenish*	IV:46
6th	*Jennings v. Alexander*	IV:130
7th	*Lloyd v. RegionalTrans. Auth.*	IV:5
	Simpson v. Reynolds Metals, Inc.	IV:83
8th	*Carmi v. Metropolitan St. Louis Sewer Dist.*	IV:51
	United Handicapped Federation v. Andre	IV:2
9th	*Kling v. County of Los Angeles*	IV:93
10th	*Pushkin v. Regents of Univ. of Colorado*	IV:96
11th	*Jones v. MARTA*	IV:142

** Indicates new or revised material.

Transportation, Appendix IV:457). However, such suits may not be considered to compel agency administrative action, such as termination of funding (*Eastern Paralyzed Veterans Association v. Southeastern Pennsylvania Transportation Authority,* Appendix IV:373), or to overturn an administrative decision not to seek relief (*Salvador v. Bell,* Appendix IV:333, and *Marlow v. Department of Education,* Appendix IV:412).

* From all these cases it is clear that handicapped individuals may seek to enforce the provisions of section 504 in the courts without fear of dismissal initially for lack of standing. Of course the other jurisdictional requirements must still be met, *i.e.*, the handicapped plaintiff must be ''otherwise qualified'' and the defendant must be a recipient of federal financial assistance.

Exhaustion of administrative remedies under section 504

The majority of district and appeals courts which have considered it have concluded that exhaustion of administrative remedies is not a prerequisite to judicial action under section 504. Decisions repeatedly cite the traditionally accepted exception to the exhaustion doctrine, that a plaintiff will not be required to pursue administrative action which cannot provide him or her relief, or where such remedy would be inadequate. Courts also rely on the Supreme Court's decision in *Cannon v. University of Chicago* (441 U.S. 677 (1979)), dealing with similar language from Title IX of the Education Amendments of 1972, that exhaustion is not required. For example, the court in *Medley v. Ginsburg* (Appendix IV:85) held that the administrative enforcement scheme of section 504 is intended to be complementary to and independent of private actions. See also *Peterson v. Gentry, Jose P. v. Ambach, Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California* (Appendix IV:156, 162, and 247, respectively). (See below for discussions relating to exhaustion of adminstrative remedies when claims are filed under section 504 and the Education for All Handicapped Children Act and sections 504 and 501.)

When claims are brought under section 504 and the EAHCA

Prior to 1986, plaintiffs who sued under the Education for All Handicapped Children Act (EAHCA) and pressed a related claim under section 504 were required by the courts to first exhaust administrative remedies under the EAHCA. The EAHCA and the regulations promulgated under it set out a detailed administrative scheme to protect the rights of handicapped children and afford frequent interaction between parents and school authorities. Since it also provides for several levels of appeals in the event a parent is dissatisfied, courts reasoned, allowing a plaintiff to come directly into court under a closely related section 504 claim ''would work to eviscerate the procedural safeguards set forth in [the EAHCA] for the court would be asked to make in the first instance the same determination which would be made at the administrative level'' *Davis v. Maine Endwell Central School District,* Appendix IV:181. (See also *Lombardi v. Ambach, Reinemann v.*

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* Indicates new or revised material.

Valley View Community School District, Turillo v. Tyson, Colin K. v. Schmidt, and *Mitchell v. Walter,* Appendix IV:150, 160, 169, 170, and 173, respectively.)

In June 1984 the Supreme Court in *Smith v. Robinson* (Appendix IV:213) wrote: ''Allowing a plaintiff to circumvent the [EAHCA] administrative remedies would be inconsistent with Congress's carefully tailored scheme.'' The Court went on to hold that the EAHCA is the ''exclusive avenue'' through which a claim of denial of a free appropriate public education can be pursued, and section 504 ''is inapplicable when relief is available under the [EAHCA] to remedy a denial of educational services.'' Bringing a suit under both the EAHCA and section 504 to obtain attorneys' fees, for example, which were recoverable under section 504 but (pre-1986) not available under the EAHCA, would therefore not be allowed in accordance with *Smith.* (See also the Supreme Court's ruling in *Irving Independent School District v. Tatro,* IV:63.)

In its ruling in *Smith,* the Supreme Court warned of the ''narrowness'' of its decision and that its holding that the EAHCA is the exclusive remedy for redressing such claims may be inappropriate in certain circumstances. The Court wrote: ''We do not address a situation where the [EAHCA] is not available or where 504 guarantees substantive rights greater than those available under the [EAHCA].'' An example of when this might occur can be found in the appellate court ruling in *Students of California School for the Blind v. Honig,* in which section 504 was found to provide ''greater substantive rights'' than the EAHCA to the plaintiffs because unlike the EAHCA, section 504 contains provisions specifically addressing the issue of facility accessibility. (See Appendix IV:266.) (See also *Georgia State Conference of Branches of NAACP v. Georgia*, Appendix IV:336).

To correct this deficiency in the EAHCA, the Handicapped Children's Protection Act of 1986 was signed into law on Aug. 5, 1986. The law overturns the parts of the Supreme Court's decision in *Smith v. Robinson* (Appendix IV:213) barring the award of reasonable attorneys' fees in cases brought under the EAHCA by holding section 504 inapplicable when relief is available under the EAHCA. The language of the EAHCA as originally enacted did not contain a provision for the award of attorneys' fees for successful challenges brought under the statute. The act modified the EAHCA in two ways:

- First, the act provides for the award of reasonable attorneys' fees to parents or guardians of handicapped children who prevail in suits brought under the EAHCA. These awards may be made for cases filed after *Smith,* or which were pending at the time of the *Smith* decision.
- Second, the act provides that relief may be sought under section 504, even though relief is also available under the EAHCA, provided that administrative remedies under the EAHCA are first exhausted.

Two district courts in New York ruled the same year in cases involving the act. In *J.G. v. Board of Education* 648 F. Supp. 1452 (W.D.N.Y. 1986) the court awarded attorneys' fees to the plaintiffs on the basis of the retroactive application of the attorneys' fees provision in the Act. In

Taylor v. Board of Education, (Appendix IV:398) the court dismissed the plaintiff's claim under section 504 because relief was also available under the EAHCA and, unlike the specific retroactive provision dealing with attorneys' fees in the act, the remaining provisions of the act did not become effective until they were signed into law.

* At least two federal district courts have ruled on the second requirement of the act, that potential plaintiffs must first exhaust EAHCA administrative remedies before bringing a section 504 action in federal court. (See *School Committee of Town of Acton v. Bennett*, Appendix IV:411, and *G.C. v. Coler*, Appendix IV:427). In the *Town of Acton* case, the court ruled this requirement applies to government agencies such as the Office of Civil Rights, as well as to private plaintiffs.

Where claims are brought under sections 504 and 501

Coverage of section 504 was extended to include ''any program or activity conducted by an Executive agency or by the United States Postal Service'' by the Rehabilitation Amendments of 1978. Federal agencies are also required by Section 501 of the Rehabilitation Act of 1973 to take affirmative action in the hiring, placement, and advancement of handicapped individuals (Appendix III:7). Although courts have ruled both ways as to whether there is a private cause in section 504 cases involving federal agencies, recent court decisions have held that: (1) section 501 is the proper statute, not section 504, for redressing charges of discrimination by disabled federal employees; and (2) exhaustion of administrative remedies under section 501 (those pursuant to Title VII of the Civil Rights Act of 1964) must precede a right of action. The leading case in this area is *Prewitt v. U.S. Postal Service* (Appendix IV:146), in which the court ruled that a complainant must exhaust mandatory administrative procedures under section 501, and has a private right to sue in court only after having done so. (For courts which have ruled similarly, see Appendix IV:25, 50, 73, 237, 271 (where, however, there is no discusison of exhaustion of administrative remedies), 275, 276, 282, 283, 284, and 287.) A few courts have ruled on claims brought only under section 504 against a federal agency by a disabled employee (see Appendix IV:123, 141, 195, 206, 232, and 239). Where a plaintiff is suing a federal agency alleging discrimination not in employment, but in access to a program (Appendix IV:118) or a facility (Appendix IV:203), courts have allowed actions brought under section 504.

(For discussions of awards of damages and attorneys' fees in actions against federal agencies, see ¶860. For a discussion of employment practices under federally conducted programs and activities, see ¶601.)

Section 504 and the 11th Amendment

The Supreme Court ruled in *Scanlon v. Atasadero State Hospital* (Appendix IV:172) that states are protected from suits based upon the Rehabilitation Act by the provisions of the 11th Amend-

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* Indicates new or revised material.

ment, and that the traditional exceptions to the Amendment do not apply to section 504. In reversing the decision of the 9th Circuit Court of Appeals, the Supreme Court determined that the general authorizing language of sections 504 and 505, which provides for suits to be filed in federal courts, does not rise to the level of specificity required to abrogate the 11th Amendment's immunity. According to the Court, "Congress may abrogate the states' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the 11th Amendment dictates this conclusion."

The Court also rejected the argument that the state implicitly consented to suit in *Scanlon* by accepting Rehabilitation Act funds. Even this, according to the Court, "falls short of manifesting a clear intent to condition participation in the programs . . . on a state's consent to waive its constitutional immunity."

This ruling is consistent with earlier decisions of the 1st and 8th Circuits in *Ciampa v. Massachusetts Rehabilitation Comm'n* and *Meiner v. Missouri* (Appendix IV:238 and 69, respectively). The decision applies only to suits in federal courts, however, not to suits brought in state courts to enforce state nondiscrimination laws. The decision is significant for it precludes the broader federal remedies, such as recovery of attorneys' fees and injunctive relief, that are often unavailable under state laws.

For other cases construing the bar to section 504 suits on the basis of the 11th Amendment sovereign immunity, see Appendix IV: 335, 392 and 429.

is limited to a specific activity that receives federal funds. In this case, the training program didn't receive federal funds, so it was not subject to section 504, said the department.

The court upheld Schmidt's right to bring suit on the basis that disputes over program specificity belong in the realm of summary judgment motions. Citing *Byers v. Rockford Mass Transit District* (Appendix IV:369), it said "the issue of program specificity cannot be properly analyzed in the abstract, but instead requires a concrete set of facts." These facts, the court noted, would be the subject of a motion for summary judgment.

Schmidt's claim that the Police Department receives federal assistance is sufficient to survive a motion to dismiss, the court said. But it left open the possibility of the department raising the issue again on summary judgment should "facts come to light that make the challenge appropriate." (Editor's note: The Civil Rights Restoration Act of 1988 applies federal civil rights statutes to all programs of a federal funds recipient, not just the program receiving the money — see ¶310.)

The court also affirmed Schmidt's claims under title VII of the Civil Rights Act, the 14th amendment and the equal protection clause. It dismissed a due process claim she brought against the Police Department.

465 *Leake v. Long Island Jewish Medical Center*, No. 88-7815, (2nd Cir. 1989)

Civil Rights Restoration Act applies retroactively to suits pending at time of enactment

The 2nd U.S. Circuit Court of Appeals has ruled that Congress intended the 1988 Civil Rights Restoration Act to apply retroactively to suits pending at the time of enactment.

This case involves Robert Leake, a man with one arm who was discharged in 1985 from his job at Long Island Jewish Medical Center. After exhausting administrative remedies, Leake sued the medical center in 1987 under Section 504 of the Rehabilitation Act.

When the suit was filed, the Supreme Court's *Grove City College v. Bell* decision prevailed. In that case, the Court interpreted section 504 to cover only the specific programs that received federal financial assistance, and not other programs that did not receive federal funding within the same institution.

In 1988, however, Congress passed the Civil Rights Restoration Act, which overturned *Grove City* and amended section 504. The law extends federal civil rights coverage, including that provided by the Rehabilitation Act, to all programs of a federal funds recipient, not just to the ones receiving federal funding.

Contending that the law does not apply retroactively, the medical center filed for summary judgment. But the District Court denied the motion, ruling that Congress did intend the act to cover suits pending when it was passed. The appellate court affirmed this decision, and remanded the case for further proceedings.

466 *Hall v. United States Postal Service*, 857 F.2nd 1073 (6th Cir. 1988)

Postal Service failed to demonstrate that reasonable accommodation is not possible with a particular handicapped employee

The U.S. Postal Service failed to demonstrate that it could not reasonably accommodate a disabled employee who applied for a clerk position that required heavy lifting, the 6th U.S. Circuit Court of Appeals ruled.

Odis Hall was a letter carrier with the Postal Service who would perform clerk work in the main post office during Christmas "rush" periods. She said the clerk job mostly involved sorting mail, but never heavy lifting. In 1973 while on her route, Hall was hit by a car and suffered hip, foot and back injuries. When her worker's compensation expired, she asked to be reinstated as a distribution clerk.

According to the job description, distribution clerks are required to kneel, bend and lift up to 70 pounds. Because both her doctor and the Postal Service physician said such activity would pose a serious risk to Hall's health, the Postal Service rejected her application.

However, Hall claimed that the physical requirements were not essential to the clerk job as she remembered it. She filed a complaint against the Postal Service in the U.S. District Court for the Eastern District of Michigan, charging that she had been denied the clerk's job because of a physical handicap in violation of the Rehabilitation Act.

The Postal Service argued that Hall had no claim under the Rehabilitation Act because she was not an otherwise qualified handicapped person. It said lifting was an essential function of the clerk's job, and that under the Rehabilitation Act, it was not required to eliminate such a task to accommodate a disabled employee. The District Court agreed and granted summary judgment.

The appellate court, however, rejected that decision, because "there are genuine issues of material fact as to whether Hall could perform the essential functions of the distribution clerk position and, if she could not, whether a reasonable accommodation would enable her to perform those functions."

As required by *Arline v. Nassau County School Board* (Appendix IV:329), the Postal Service should have conducted an individual inquiry because questions of physical qualifications were raised, the court held. "Such a determination should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved," it said.

Hall raised a legitimate factual dispute about whether the 70-pound lifting requirement was indeed essential, the court said, adding that the Postal Service produced no evidence to refute Hall's observation that no clerk ever did any heavy lifting when she worked in a clerk capacity.

The court noted that federal employers have the "affirmative obligation to make reasonable accommodations for handicapped employees," and that the burden rests with them to prove that such an accommodation is not possible in a particular situation.

"In this case," the court said, "the Postal Service failed to introduce any evidence suggesting that it could not reasonably accommodate Hall."

Finally, the court criticized both the District Court and the Postal Service for operating "under the assumption that *every* accommodation relating to an essential function of a position necessarily *eliminates* that function (emphasis included)." This, the court said, "is simply not the law."

The dissent found that summary judgment was appropriate because, it said, Hall failed to follow the proper administrative procedures and because she *"has never claimed or demonstrated any filing of a written complaint asserting handicap discrimination* as is required (emphasis included)." Further, the dissent noted, "there was no factual material

issue as to Hall's inability to perform that job as to one or more of its essential functions. The grant of summary judgment was clearly indicated.''

The summary judgment was reversed and the case remanded for further proceedings.

467 *Leckelt v. Board of Commissioners of Hospital District No. 1,* No. 86-4235, (E.D. La., 1989)

Hospital's need to monitor employee infection and protect patients precludes finding that discharge of employee who refused to supply HIV test results violates section 504

A hospital did not violate Section 504 of the Rehabilitation Act when it discharged a nurse who refused to disclose his human immunodeficiency virus (HIV) test results, the U.S. District Court for the Eastern District of Louisiana has ruled.

At the request of the hospital, the nurse, Leckelt, was tested for HIV infection. The hospital requires employees to report any infectious or communicable disease to the employee health service; this policy is spelled out in the employee manual. For three weeks, the hospital asked Leckelt to produce his test result, but he refused. The hospital first suspended and then discharged him, citing his failure to comply with hospital policy.

Leckelt claimed that the hospital fired him because it suspected he tested positive for HIV. He sued, claiming the discharge violated section 504. Under section 504, people who are perceived to be impaired are considered to be individuals with handicaps. (And under the Civil Rights Restoration Act, contagious diseases are considered handicapping conditions.)

The court dismissed Leckelt's claim, saying he failed to prove that the discharge was based on a perceived handicap. ''The fact that the hospital repeatedly insisted that the nurse produce his test results flies in the face of a conclusion that it perceived him as being HIV positive,'' the court said. ''No evidence was produced that anyone involved in the decision had concluded that he was seropositive.''

During this period, the hospital learned that Leckelt had not reported that he was a hepatitis B carrier and that he had had syphilis, the court noted. These facts, as well as the nurse's failure to submit the HIV test results in compliance with hospital policy, established a legitimate motive for the discharge. ''When an employer has a lawful motive for discharging an employee, the employer's coincidental consideration of the employee's handicap does not prevent the employer from acting on its lawful motive,'' the court said.

If the hospital had known Leckelt's HIV status, then it would have been able to accommodate him like any other affected employee, the court said. Hospital policy for infected employees includes leave of absence and change in work assignments. Were Leckelt to be HIV positive, the hospital could modify his work duties to protect both him and the patients, the court said. The hospital fired the nurse not ''out of fear and ignorance,'' the court said, but because he had violated the hospital's infection policy.

The court also rejected Leckelt's section 504 claim on the basis that he was not otherwise qualified. ''Hospitals must establish policies and procedures for controlling the risk of transmitting infectious or communicable diseases,'' the court said, and Leckelt's refusal to comply with that policy rendered him not otherwise qualified to perform his job.

468 *Rogers v. Bennett,* 868 F.2d 415 (11th Cir. 1989)

State must exhaust administrative remedies before suing Department of Education over jurisdiction to investigate complaints under section 504

A plaintiff must exhaust administrative remedies before it brings suit against a federal agency for lack of jurisdiction, the 11th U.S. Circuit Court of Appeals has ruled.

The dispute here, between the U.S. Department of Education's (ED) Office of Civil Rights (OCR) and Georgia education officials, is whether OCR has the jurisdiction to investigate complaints brought under Section 504 of the Rehabilitation Act regarding educational opportunities for disabled students.

Parents have an exclusive procedure under the Education of the Handicapped Act (EHA) to challenge a state's denial of educational benefits to handicapped children. OCR also has the authority to review state and local schools to ensure compliance with section 504. OCR can initiate these reviews periodically or when it receives a complaint, usually from a parent. If the state or local school district refuses to cooperate with the investigation, ED may terminate federal funding.

In this case, OCR, responding to several complaints filed under section 504, initiated investigations of special education programs operated by DeKalb and Chatham counties (Ga.) and the state department of education. However, both the county and state officials refused to cooperate. Consequently, OCR began administrative proceedings to terminate federal funding for the three handicapped programs.

The Georgia State Board of Education and the county administrators sued, charging that OCR was acting beyond its jurisdiction under section 504. OCR moved to dismiss on the grounds that the Georgia educators must exhaust administrative remedies as a precondition to adjudication.

The District Court ruled in favor of OCR, and the appellate court upheld that decision. Requiring plaintiffs to exhaust administrative appeals, the appeals court said, assures that ''courts review ripe controversies, presenting concrete injuries.'' Until OCR decides whether or not to cut off federal funding, the court said, ''the issues presented by this action will not be ripe for adjudication.''

The court noted that a plaintiff may pursue a lawsuit without exhausting administrative remedies only if: (1) exhausting administrative remedies clearly will result in irreparable injury; (2) the agency's jurisdiction is plainly lacking; and (3) the agency's special expertise is of no help on the question of its jurisdiction.

The Georgia educators failed on all three conditions. ''The appellants in this case have failed to demonstrate that they will be irreparably injured'' if they fulfill the first condition, the court said. Should OCR terminate funding, the Georgia officials could then file suit challenging OCR's jurisdiction, the court noted. The state could avoid injury to the handicapped students by asking a court to stay the termination until the case is decided.

Second, the court found that OCR's exercise of supervisory power over the Georgia special education programs is ''not plainly outside of the agency's jurisdiction.'' Examining the interplay between EHA and section 504, the court

determined that EHA provides the appropriate remedy when a parent files suit against a school. But in this case a federal agency is bringing the action. ''Law may allow — and Congress may have intended — two overlapping, complementary schemes of enforcement: one exercised by private litigants through the provision of the EHA, the other provided by OCR supervisory investigations as authorized under the regulations to section 504,'' the court said.

Finally, the court concluded that ''the Department of Education's expertise in this area will greatly aid judicial review of the issues presented in this case.'' Without OCR's official interpretation of its regulations, a court is faced with the ''difficult task of guessing what the agency's interpretation will be, and then passing on its propriety,'' the court said.