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NOTES

ENFORCING SECTION 504 REGULATIONS: THE NEED FOR A PRIVATE CAUSE OF ACTION TO REMEDY DISCRIMINATION AGAINST THE HANDICAPPED

> "A person who is severely impaired never knows his hidden sources of strength until he is treated like a normal human being and encouraged to shape his own life."[1]
>
> Helen Keller

American history is replete with struggles for equality and independence, but the battles fought for these principles by handicapped persons[2] have been singularly difficult. Consistently excluded from social participation and denied rights that most Americans take for granted, handicapped individuals have endured a degree of discrimination which has severely impaired their rights to an independent and creative life.[3] Resort to the courts has provided some measure of relief, but judicial solutions have often been slow and expensive.[4] To remedy the situation,

1. *See* Remarks of Patricia Harris, Secretary of the Department of Housing and Urban Development, The White House Conference on Handicapped Individuals (May 25, 1977).

2. The term "handicapped" encompasses a broad range of disadvantages including those attributable to economic, cultural, and environmental origins. Section 504 of the Rehabilitation Act of 1973 defines a "handicapped individual" as one who "(A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." 29 U.S.C. § 706(6) (Supp. V 1975). A similar, but not identical, definition is used in the regulation issued under § 504. *See* 42 Fed. Reg. 22,678 (1977) (to be codified at 45 C.F.R. § 84.3). For a discussion of differences between the statutory and regulatory definitions, see notes 49-51 & accompanying text *infra*.

3. Many states prohibit marriages between handicapped people and a number of them deny these individuals the right to have children or enter into contracts. In many jurisdictions, handicapped persons are denied the right to vote, to obtain driving, hunting, and fishing licenses, to enter the courts, and to hold public offices. "Ugly laws" deny those who are "diseased, maimed, mutilated," or deformed to the extent of being "an unsightly or disgusting object" a right to use the streets. *See* L. Rigdon, Civil Rights (an awareness paper prepared for The White House Conference on Handicapped Individuals, May 1977).

4. Besides the preliminary barriers of standing, ripeness, and abstention, the problem has been compounded by Supreme Court decisions denying any recognized constitutional right to certain governmental services. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 74

Congress enacted section 504 of the Rehabilitation Act of 1973, which requires recipients of federal financial assistance to operate their programs without discrimination on the basis of handicap.[5]

Despite the strong legislative language mandating nondiscrimination and program participation, section 504's potential has hardly been realized. Although subsequent amendments[6] called for both swift implementation and expanded coverage, the absence of a legislative scheme of enforcement and express authority to issue regulations has made it an "orphan of neglect,"[7] a victim of protracted administrative inaction and noncooperation.[8] Yet on April 27, 1977, after a delay of nearly two-and-one-half years, section 504 was awakened. Pursuant to executive order[9] and public demand,[10] the regulations implementing the statutory prohibition against discrimination on the basis of handicap were issued.[11]

(1972) (housing); Jefferson v. Hackney, 406 U.S. 535, 545-51 (1972) (welfare); and San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (education).

5. 29 U.S.C. § 794 (Supp. V 1975). Section 504 provides that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

6. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, §§ 100-111, 88 Stat. 1617 (1974)(amending 29 U.S.C. §§ 701-794 (Supp. V. 1975)). In the original Act of 1973, a "handicapped individual" was defined in relation to the employment and vocational rehabilitation services described in the Act. Because it was not the intent of Congress to define "handicapped individual" in terms of potential employability or benefit from vocational rehabilitation services, the 1974 Amendments expanded the definition. *See* note 2 *supra*. In addition, the 1974 Amendments stressed that § 504 was patterned after Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (Supp. V 1975) (nondiscrimination on the basis of sex and blindness), and after Title VI of the Civil Rights Act, 42 U.S.C. § 2000d-1 (1970) (nondiscrimination on the basis of race, color, or national origin). Congress intended § 504 to be part of a broad mandatory governmental policy, which would be enforced through regulations in the same way as Titles VI and IX. *See, e.g.*, S. REP. NO. 1139, 93d Cong., 2d Sess. 24-25 (1974); H.R. REP. NO. 1457, 93d Cong., 2d Sess. 27-28 (1974); S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373-6440.

7. *See* 120 CONG. REC. 11,128 (1974) (remarks of Rep. Vanik). *See also* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6391 (confirming the expectation that the § 504 regulations were to be issued by the close of 1974).

8. Administrative inaction resulted in an investigation by a House select subcommittee in late November, 1973. Of the 35 federal agencies contacted in mid-October for suggestions on implementing § 504, only 25 had responded by mid-January of the following year. *See* 120 CONG. REC. E3319 (daily ed. May 28, 1974) (reading by Rep. Brademas of Rep. Vanik's article, *A Law Isn't Enough*); *Vocational Rehabilitation Services: Oversight Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 1-2 (1973-74).

9. Exec. Order No. 11,914, 3 C.F.R. 117 (1977).

10. To force the issuance of the regulations, legal action was initiated by a group of handicapped citizens. *See* Cherry v. Matthews, 419 F. Supp. 922 (D.D.C. 1976).

11. 42 Fed. Reg. 22,676 (1977) (to be codified in 45 C.F.R. § 84).

To translate the broad terms of section 504 into a workable scheme for ending discrimination, the Secretary of the Department of Health, Education, and Welfare (HEW) faced the formidable task of accommodating numerous competing interests. Although the terms of the statute called for an end to discriminatory practices at once and provided no exemptions from its mandate, the technology necessary to implement viable solutions was in its infancy, and immediate enforcement threatened extreme hardship for recipients of HEW funds, many of which are nonprofit institutions.[12] In addition, while the historic segregation of handicapped individuals militated against the use of separate or special treatment, it became clear that the needs of some handicapped individuals might require special treatment to ensure equal opportunity.[13] Most importantly, the effective enforcement essential to secure compliance would strain the Department's already limited resources.

The section 504 regulations attempt to accommodate these conflicting needs and afford an effective method for ending discrimination on the basis of handicap. Therefore, to properly assess their value, the regulations must be viewed in light of this goal and against current strategies to secure civil rights for handicapped persons.

I. CURRENT ATTEMPTS TO COMBAT DISCRIMINATION

A. Constitutional Arguments

While there is no constitutional right to be free of all discrimination, constitutional safeguards against arbitrary and unreasonable governmental action are guaranteed by the fifth and fourteenth amendments.[14] Since these amendments protect only against governmental action,[15]

12. The three major classes of recipients are public school systems, colleges and universities, and health, welfare, and other social service providers. 42 Fed. Reg. 22,677 (1977). *See also* Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977) (small private college); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200, 204 (N.D. Tex. 1977) (grants go primarily to public entities).

13. 42 Fed. Reg. 22,676 (1977); 41 Fed. Reg. 20,296 (1976).

14. U.S. CONST. amends. V and XIV, § 1. The fifth amendment prohibits the federal government from depriving any person of life, liberty, or property without due process of law, and the fourteenth amendment extends similar prohibitions to the states.

15. Governmental action has been found in a wide variety of situations. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (private corporations carrying out a public function); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (private business located in a public building devoted to public service); Shelley v. Kramer, 334 U.S. 1 (1948) (judicial enforcement of a private deed covenant). *See generally* Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the* Civil Rights Cases *and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977);

litigation prior to the enactment of section 504 concentrated on state-sponsored services. Successful efforts to attack the differential treatment accorded handicapped persons in public programs and services have, therefore, focused upon two basic constitutional arguments: denial of equal protection and denial of due process, either as direct causes of action or pursuant to Section 1983, part of the Civil Rights Act of 1871.[16]

Depending on the nature of the benefit involved, courts have applied traditional equal protection tests to determine whether the exclusive or differential treatment of handicapped persons in a public program can withstand constitutional challenge. Under the less stringent rational basis test,[17] handicapped individuals may receive different treatment only if such treatment is justified by a legitimate state objective and bears a rational relationship to the goal sought.[18] However, when fundamental interests[19] or suspect classifications[20] are involved, discriminatory practices are examined more closely, and the state must show an interest sufficiently compelling to overcome a presumption of constitutional invalidity. Despite the varying degrees of judicial scrutiny, equal protection challenges by the handicapped have been generally successful and have established a right of access to publicly operated programs and services.

Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501 (1973).

16. 42 U.S.C. § 1983 (1970) provides that

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

17. While the Supreme Court has recognized that the fourteenth amendment allows states to treat different classes of people differently, it denies them the power to discriminate on the basis of irrelevant criteria. *E.g.*, Reed v. Reed, 404 U.S. 71, 75-76 (1971) (statutory sex-based classification for administering estates unreasonable).

18. *E.g.*, United Handicapped Fed'n v. Andre, 409 F. Supp. 1297 (D. Minn. 1976), *vacated and remanded*, 558 F.2d 413 (8th Cir. 1977).

19. Fundamental interests include travel, voting, criminal procedure, marriage, and procreation. Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Reynolds v. Sims, 377 U.S. 533 (1964) (voting); Douglas v. California, 372 U.S. 353 (1963) (criminal procedure); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (marriage and procreation).

20. Although suspect classes have been held to include race, alienage, national origin, and occasionally, sex, arguments have also been made to include the handicapped among this group. *See, e.g.*, M. & R. Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 902-08 (1975). *But see* United Handicapped Fed'n v. Andre, 409 F. Supp. 1297 (D. Minn. 1976), *vacated and remanded*, 558 F.2d 413 (8th Cir. 1977).

Public employment selection criteria have been particularly vulnerable to constitutional challenges when they were not reasonably related to the requirements of the job in question.[21] Judicial decisions have invalidated the use of scores from tests arbitrarily constructed,[22] prohibited use of physical fitness criteria unrelated to relevant skills,[23] and eliminated various job requirements unrelated to the duties performed.[24] Equal protection arguments have also been successful in preventing educational discrimination against handicapped children.[25] Although the Supreme Court has declined to characterize education as a fundamental right,[26] lower court cases indicate that handicapped children have a constitutional right to a minimally adequate level of public education, and that neither cost savings nor administrative convenience can justify the deprivation of these educational services.[27]

Alternative constitutional grounds for protecting the rights of the handicapped have been raised in an effort to eliminate some of the definitional and jurisprudential difficulties inherent in analyses based on fundamental interest and suspect classes.[28] The irrebutable presumption

21. *See* National Employment Law Project, Inc., Employment Rights of the Handicapped (June 1, 1976). *See also* Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977).

22. Tests or other selection criteria must be job-related and measure a handicapped person's ability to perform on the job rather than reflect the nature of a handicap. *See, e.g.*, Armstead v. Starkville Mun. Separate School Dist., 461 F.2d 276 (5th Cir. 1972); Baker v. Columbus Mun. Separate School Dist., 329 F. Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F. 2d 1112 (5th Cir. 1972).

23. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

24. For a comprehensive list of cases, see Employment Rights of the Handicapped, *supra* note 21.

25. Litigation involving constitutional claims to a free and appropriate education for handicapped children has produced an explosion of cases and scholarly research. For an extensive list of strategies and cases, see Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016; *see also* National Center for Law and the Handicapped, The Right to an Appropriate Education (April 20, 1977); Comment, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637 (1976); Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J 1087 (1973).

26. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

27. *Cf.* Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) (all children are entitled to a publicly supported education, regardless of handicap, cost, or administrative difficulty). *Accord* Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972). The same arguments, however, have not sustained constitutional attacks in the area of mass transportation. *See, e.g.*, United Handicapped Fed'n v. Andre, 409 F. Supp. 1297 (D. Minn. 1976), *vacated and remanded*, 558 F.2d 413 (8th Cir. 1977); Snowden v. Birmingham-Jefferson County Transit Auth., 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977).

28. *See* notes 4 & 18 *supra*. *See generally* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

doctrine,[29] which outlaws discriminatory practices premised upon broad generalizations that are neither necessarily nor universally true, has been an effective theory for attacking policies that flatly exclude the handicapped. Consequently, employment practices such as the refusal of a school district to consider blind persons for teaching positions have been outlawed, despite the legitimate concerns involved.[30] Similarly, a flat hiring prohibition against persons experiencing epileptic seizures within two years of their application for public employment raises a presumption of constitutional invalidity,[31] as does a school district's broad presumption that handicapped children cannot be educated.[32] Several commentators have suggested that these exclusionary practices violate constitutionally protected liberty and property interests,[33] as well as procedural due process guarantees traditionally attached to certain public benefits and services. These approaches have been particularly valuable in establishing the right to challenge the adequacy of placement proceedings, as well as the content of an educational program.[34]

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29. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

30. Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977). *See also* Beazer v. New York City Transit Auth., 399 F. Supp. 1032 (S.D.N.Y. 1975); King-Smith v. Aaron, 455 F.2d 378 (3d Cir. 1972). In *Beazer*, the court held that exclusion from employment of all former heroin addicts participating in methadone maintenance programs violated the due process and equal protection clauses of the fourteenth amendment. *See also* Employment Rights of the Handicapped, *supra* note 21.

31. Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977); Duran v. Tampa, 430 F. Supp. 75 (M.D. Fla. 1977). *But see* Spencer v. Touissiant, 408 F. Supp. 1067 (E.D. Mich. 1976) (denial of employment as a city bus driver on the basis of prior mental illness not violative of the fourteenth amendment).

32. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972). *See also* Frederick L. v. Thomas, 408 F. Supp. 832 (E.D. Pa. 1976) (motion to dismiss denied), 419 F. Supp. 960 (E.D. Pa. 1976). The right-to-education cases, *supra* note 25, have established that every child can benefit from an education and have focused on this capacity to benefit rather than on the ability of the schools to educate.

33. *See generally* Krass, *supra* note 25. The arbitrary labeling and the consequent exclusion of handicapped children from school or from certain educational programs has been adjudged a stigma. The stigma of exclusion combined with the stigma of being uneducated in a literate society damages an individual's name, reputation, and status, and interferes with an individual's opportunity to obtain future education or employment, which are protected liberty interests. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 574-75 (1975); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972). In addition, several commentators have suggested that when a state forces a child to attend school, a property interest in public education is created which then merits due process protection. *See, e.g.*, Krass, *supra* note 25, at 1032-33. *Compare* Goss v. Lopez, 419 U.S. at 574 (students facing temporary suspension have property interests qualifying for due process protection) *with* Davis v. Southeastern Community College, 424 F. Supp. 1341 (E.D.N.C. 1976) (admission to a state community college is not, by itself, a property right so long as rules and regulations for admission are neither arbitrary nor unreasonable).

34. P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974)

B. The Civil Rights Statutes

Fourteenth amendment challenges are often accompanied by requests for specific relief under section 1983.[35] As a result, handicapped persons have been able to claim damages for discriminatory actions and request declaratory[36] and injunctive relief.[37] Mobility-handicapped individuals seeking greater access to public mass transit systems have enjoined bus company officials from accepting bids to construct vehicles inaccessible to the physically disabled.[38] Parents of multiply handicapped children have used section 1983 to assert claims for damages against local school officials for the harm caused by an inadequate educational program.[39] While the potential for providing relief is significant, actions brought under section 1983 involve major concerns of federalism, comity, and equity.[40] Recovery is therefore somewhat hampered by the traditional reluctance of the federal courts to enjoin state actions.

C. Specific Legislation To Protect The Handicapped

Because the difficulties in securing rights under the Constitution and section 1983 are formidable,[41] Congress has attempted to proscribe discrimination in federally funded projects.[42] Through such legislation, a

(testing and classification); Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975) (right to an adequate and appropriate education). *See also* note 27 *supra*.

35. 42 U.S.C. § 1983 (1970). For the text of the provision, see note 16 *supra*.

36. 28 U.S.C. §§ 2201, 2202 (1970). The declaratory judgment statutes cannot grant jurisdiction. They provide a remedy if only a court has jurisdiction independently. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

37. *See, e.g.*, Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977).

38. *See id.* (permanent injunction for violating *inter alia*, Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1975)). *See* United Handicapped Fed'n v. Andre, 558 F.2d 413 (5th Cir. 1977), vacating lower court's order for summary judgment and remanding for appropriate equitable relief in light of the Decision of Brock Adams, Secretary of Transportation, to Mandate Transbus (May 19, 1977) (available from the Department of Transportation).

39. Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975).

40. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973). *See also* Annot., 43 L. Ed. 2d 833 (1975).

41. In addition to the threshold considerations of standing, ripeness, and mootness, the concerns of federalism and comity are paramount. Moreover, litigation is extremely time consuming and compliance with court mandates extremely slow. *See, e.g.*, Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

42. The authority to attach preconditions to the receipt of federal funds has been upheld in the courts and has also been construed to imply a cause of action for the statutory beneficiaries involved. *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974) (non-English speaking students alleging unequal educational opportunities under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000-01 (1970)); Lemon v. Bossier Parish School Bd., 240 F. Supp. 709 (W.D. La. 1965) (right of black children to attend desegregated schools).

wide range of discriminatory practices has been outlawed, and the opportunities for greater participation in society by handicapped persons have been increased.[43]

Despite the panoply of rights created by this legislation, enforcement has been somewhat haphazard.[44] If vigorously enforced, Section 504 would guarantee handicapped individuals access to all federally assisted programs. Section 504 has been little used, however, and courts are divided over its importance. Some courts have used it to redress the exclusion of handicapped persons from federally funded programs and services.[45] Others have recognized it as providing a colorable cause of action but have either stayed proceedings pending administrative action[46]

43. To eliminate environmental barriers, federally funded buildings must meet accessibility standards and similar requirements have been attached to grants for mass transit facilities. Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4156 (1970); *see also* § 16 of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1612 (1970); § 165(b) of the Federal-Aid Highway Act of 1973 and § 105 of the 1974 Amendment thereto, 23 U.S.C. § 142 (Supp. V 1975); § 315 of the Department of Transportation and Related Agencies Appropriation Act, 1975, 49 U.S.C. § 22 (Supp. V 1975); § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1975). Discriminatory employment practices are prohibited by § 503 of The Rehabilitation Act of 1973, 29 U.S.C. § 793 (Supp. V 1975) (requiring affirmative action by federal contractors) and by § 501 of The Rehabilitation Act of 1973, 29 U.S.C § 791 (Supp. V 1975) (requiring affirmative action by federal agencies.).

The Education for all Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1424a (Supp. V 1975), codifies the gains of significant judicial decisions and provides large federal grants to secure free and appropriate educations for all handicapped children. Other statutes prohibiting discrimination in education are also in effect. *See, e.g.*, 20 U.S.C. § 1684 (Supp. V 1975) (outlawing admission discrimination against the blind). In addition, specific legislation aids the developmentally disabled and provides an advocacy program to vindicate their rights. The Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (Supp. V 1975).

44. *See* National Center for Law and the Handicapped, Nondiscrimination on the Basis of Handicap—Comments (June 15, 1976). The Architectural Barriers Act, for example, has been in effect for several years but has only been marginally effective in making buildings barrier-free. *See* Farber, note 58 *infra*.

45. *See, e.g.*, Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976) (exclusion of minimally handicapped child from regular public classroom without bona fide educational reason violates § 504); Sites v. MacKenzie, 423 F. Supp. 1190 (N.D.W. Va. 1976) (exclusion of state prisoner from vocational rehabilitation because of an alleged mental impairment violates § 504). *But see* Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) (exclusion of handicapped children is not improper if there exists substantial justification for the school's policy); Coleman v. Darden, EMPL. PRAC. GUIDE (CCH) 13 Empl. Prac. Dec. ¶ 11,502, Nov. 16, 1976 (D. Colo. Jan 19, 1977) (requirement of sufficient visual acuity to read is legitimate job-related skill and does not violate § 504).

46. *See, e.g.*, Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) (remanded to Department of Labor to consider § 504); NAACP v. Wilmington Medical Center, 426 F. Supp. 919 (D. Del. 1977) (retained jurisdiction but directed the Secretary of HEW to determine whether § 504 or Title VI was violated and to file a report indicating manner in which he would proceed).

or have decided the complaint on other grounds.[47] Since the legislative history indicates that section 504 was not intended to be self-enforcing,[48] its effectiveness has been hampered by the lack of regulations. Recently issued regulations, however, add an administrative scheme of enforcement and promise to expand the rights of the handicapped by attaching important prerequisites to the receipt of HEW funds.

II. THE SECTION 504 REGULATIONS

While the regulations promulgated under section 504 broaden the statutory classification of handicapped persons by including drug addicts and alcoholics among the handicapped,[49] the regulatory emphasis on physical and mental handicaps excludes those individuals handicapped by environmental, cultural, and economic disadvantage, as well as those handicapped by age, homosexuality, or prison record.[50] Since the regulatory definition will also affect the employment practices of the federal government and federal contractors,[51] these definitional differences could have far-reaching effects.

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47. The courts in both Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977), and Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977), decided the claim on constitutional grounds. In Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) and Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977), however, the court looked to regulations promulgated by the Department of Transportation.

48. Cherry v. Matthews, 419 F. Supp. 922 (D.D.C. 1976). *See also* 120 CONG. REC. 30,551 (1974) (remarks of Sen. Stafford).

49. 42 Fed. Reg. 22,685-86 (1977) (to be codified in 45 C.F.R. § 84.3(j)). HEW has had a longstanding practice of treating drug addicts and alcoholics as eligible for rehabilitation services under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (Supp. V 1975). *See Oversight Hearings*, pt. 1 at 73, *supra* note 8. Discrimination in hospital admission and treatment against drug addicts and alcoholics is prohibited by the Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. § 1174 (Supp. V 1975), and § 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 42 U.S.C. § 4581 (Supp. V 1975). *See also* Opinion of the Attorney General (April 12, 1977) (unpublished, available at the Department of Justice) (coverage for alcoholics and drug addicts implied in the Department's treatment of these groups).

50. 42 Fed. Reg. 22,686 (1977). The § 504 regulations include children with specific learning disabilities as defined in § 602 of the Education of the Handicapped Act, 20 U.S.C. § 1401(15) (Supp. V 1975), and consequently exclude children with learning problems which are the result of visual, hearing, or motor handicaps. This interpretation, however, is inconsistent both with the definition of a "handicapped person" as defined in § 84.3(j) of the regulations and with HEW's emphasis on physical and mental handicaps. *See* 42 Fed. Reg. 22,685-86 (1977). *See also* National Center for Law and the Handicapped, Comments on the Proposed Regulations (July 16, 1976).

51. The Department of Health, Education, and Welfare expects to incorporate its definition of handicapped persons into general standards for other departments and agencies of the federal government in determining what persons are covered by § 504. 42 Fed. Reg. 22,677 (1977).

To increase employment opportunities, the regulations require grantees of federal assistance to accommodate the physical and mental impairments of otherwise qualified individuals by adjusting their programs, unless such adjustments would create an undue hardship.[52] Although the requirement can be met in numerous ways, no financial resources are available to assist in compliance. Given the potential burdens compliance could create, a number of factors are considered in determining undue hardship,[53] but in their absence, employment accommodation must be made. The regulations also condemn employment practices which discriminate on the basis of handicap. Preemployment inquiries about the existence or extent of a handicapping condition[54] are specifically prohibited, as are the use of tests which do not accurately measure an employee's relevant skills.[55]

Because handicapped persons are regularly denied full participation in programs and activities when the facilities housing them are inaccessible or impossible to use, a key feature of the regulations addresses the problems in achieving accessibility. To resolve the tensions between total accessibility and the costs of achieving it, the regulations require that a service or activity, when viewed in its entirety, be accessible to handicapped persons. The regulations do not demand a barrier-free environment and do not require every facility to be totally accessible.[56] Instead, flexible alternatives to extensive renovation are stressed,[57] and

52. Reasonable accommodation includes making facilities readily accessible, job restructuring, part-time and modified work schedules, and the acquisition or modification of equipment and devices. 42 Fed. Reg. 22,688 (1977) (to be codified in 45 C.F.R. § 84.12(a)). *See also* Bevan v. New York State Teachers' Retirement Sys., 74 Misc. 2d 443, 345 N.Y.S. 2d. 921 (1973). HEW has stressed that the reasonable accommodation provision will require minimal cash outlays by employers, although it recognizes situations in which the accommodation could require significant financial outlays, risks, and potential disruptions. *See* D. O'Neill, Discrimination Against Handicapped Persons: The Costs, Benefits, and Economic Impact of Implementing § 504 of the Rehabilitation Act of 1973 at 5-14 (May 4, 1977) (available from HEW). Whether an accommodation will be required will depend on such factors as the size and cost of a recipient's operation and the nature and cost of needed accommodations. *See* 42 Fed. Reg. 22,680 (1977) (to be codified at 45 C.F.R. § 84.12(c)).

53. *Id.* at 22,680 (1977)(to be codified at 45 C.F.R. § 84.12(c)).

54. *Id.* at 22,680-81, 22,689 (1977) (to be codified at 45 C.F.R. § 84.14). In addition, the regulations prohibit discrimination in recruitment, selection, and promotion procedures, as well as discrimination in compensation or fringe benefits. *Id.* at 22,680 (1977) (to be codified at 45 C.F.R. § 84.11).

55. *See* 42 Fed. Reg. at 22,680-81, 22,688 (1977) (to be codified at 45 C.F.R. § 84.13).

56. *See* 42 Fed. Reg. 22,681 (1977) (to be codified at 45 C.F.R. §§ 84.21-84.23).

57. *Id.* (to be codified at 45 C.F.R. § 84.22(b)). A recipient may comply with the accessibility requirement through such methods as the redesign of equipment, reassignment of classes or services to accessible buildings, use of aides, and home visits. A recipient is not required to make structural changes in existing facilities when other

compliance may be achieved without providing actual physical access.[58]

As with other antidiscrimination statutes, an informal approach to resolving complaints under the section 504 regulations is emphasized. Upon receipt of a complaint, HEW must give notice of a failure to comply before taking enforcement action against any recipient.[59] Should voluntary efforts to secure compliance fail, HEW may either cut off the flow of federal funds or proceed by "any other means authorized by law."[60] While the length of time and nature of attempts to secure voluntary compliance are not specified but are within HEW's discretion, decisions in other areas indicate that the limit for voluntary resolution is not indefinite and the amount of agency discretion is not absolute.[61]

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methods are effective in achieving compliance with this section. 42 Fed. Reg. 22,681 (1977) (to be codified at 45 C.F.R. § 84.22(b)).

58. If a recipient is confronted with an impossible situation or one that involves clearly excessive cost, he may comply with the regulations by providing a reasonable substitute for actual physical access. Small providers may actually refer handicapped person elsewhere as a last resort if significant alterations would be necessary. *See* 42 Fed. Reg. at 22,689 (1977). During implementation, moreover, a recipient is not obligated to provide any alternate services to compensate for the lack of accessibility. Despite the regulatory emphasis on eliminating needless concentration, isolation, or separation of the handicapped (*see, e.g.*, 45 C.F.R. §§ 84.4(b)(1)(iv), 84.34, & 84.43(d)), the availability of substitutes for total access has led to several consumer concerns: first, that the thrust of the regulations is not with the statutory requirement of accessibility but with alternatives to it; second, that flexibility will encourage procrastination and delay compliance; third, that the architectural accessibility standards for barrier-free design are being set, not by the appropriate government agency, the Architectural and Transportation Barriers Compliance Board, but by a private group, the American National Standards Institute (ANSI), which has no obligation to consult consumer groups. *See* National Center for Law and the Handicapped, Nondiscrimination on The Basis of Handicap—Comments on the proposed regulations (June 15, 1976); *see generally* Farber, *The Handicapped Plead for Entrance—Will Anyone Answer?*, 64 KY. L.J. 99 (1975).

59. The regulations incorporate by reference the complaint and enforcement procedures used in other antidiscrimination regulations. 42 Fed. Reg. 22,685 (1977) (to be codified at 45 C.F.R. § 84.61). *See* 45 C.F.R. §§ 80.6-80.10, 45 C.F.R. § 81 (1977). In addition, they require recipients to give assurances of compliance which will allow handicapped persons to seek judicial enforcement under a third-party beneficiary theory. *See* Lemon v. Bossier Parish School Bd., 240 F. Supp. 709, *rehearing denied*, 240 F. Supp. 743 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967) (pupil may enforce school board's agreement with a government and so compel desegregation).

60. 42 Fed. Reg. 22,695 (1977) (to be codified at 45 C.F.R. § 80.8). Such other means include a referral to the Department of Justice for judicial action or the use of any applicable proceeding under state or local law.

61. *See* Adams v. Richardson, 351 F. Supp. 636, 641 (D.D.C. 1972) (discretion in seeking voluntary compliance is limited), 356 F. Supp. 92 (D.D.C. 1972), *aff'd*, 480 F.2d 1159 (D.C. Cir. 1973) (consistent failure by agencies to act constitutes a dereliction of duty reviewable by the courts). *Cf.* Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969) (agency action unreviewable because personal rights and liberties, constitutional claims, or rights expressly granted by statute were not involved).

III. IMPACT OF THE SECTION 504 REGULATIONS

The regulations have the potential to obliterate a wide range of discriminatory practices by imposing affirmative obligations. Because recipients of HEW funds receive notice of their legal responsibilities in advance, they can conform their actions to the requirements of the regulatory provisions. Since many of the provisions duplicate preexisting legislative obligations and codify landmark court decisions,[62] the regulations basically provide an enforcement system and deter continued discrimination by imposing the additional threat of withdrawing funds.

The regulations recognize both the needs of the handicapped and the problems of recipients, and attempt to strike a balance between them. While some handicapped individuals will benefit more from the regulations than will others,[63] the provisions will benefit non-handicapped persons as well. All students should benefit from the emphasis on individual programing,[64] and all should be better served by its de-emphasis of standardized testing[65] as the primary means for measuring educational achievements. Other groups, especially the elderly, should find that the emphasis on barrier-free construction will produce more easily accessible buildings and services. The regulations also promise to assimilate the handicapped into the mainstream of society; accordingly, society as a whole will be enriched by the contributions of another group of citizens.

Whether these promises can be realized, however, depends totally on effective enforcement. The regulations emphasize voluntary compliance

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62. *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974) (quality of equivalent services affording equal opportunity); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (tests and selection criteria); LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973) (right to consideration of remedial action for past deprivation); Mills v. Board of Ed., 348 F. Supp. 866 (D.D.C. 1972) (right to a free public education and due process protection); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (right to a free and appropriate public education). *See* Rehabilitation Act Amendments of 1974 § 111(a), 29 U.S.C. § 706 (6) (Supp. V 1975) (definition of handicapped persons); Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1424a (Supp. V 1975) (defines "handicapped children;" extended age range for free education, definition of appropriate educational program, incorporation of due process procedures, and incorporation of timetables); Drug Abuse Office and Treatment Act of 1972 § 407, 21 U.S.C. § 1174 (Supp. V 1975) (prohibition of hospital refusal to admit drug addicts); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 42 U.S.C. § 4581 (Supp. V 1975) (discrimination against alcoholics). In addition, many of the regulatory provisions already exist in state laws. *See generally* Note, *supra* note 15.

63. For example, the "zero-based reject policy" directs the state to assume the educational costs for handicapped students in residential settings. 42 Fed. Reg. 22,685 (1977) (to be codified at 45 C.F.R. § 84.54).

64. *See, e.g.*, 42 Fed. Reg. 22,682 (1977) (to be codified at 45 C.F.R. § 84.33).

65. *See* 42 Fed. Reg. 22,682-83 (1977) (to be codified at 45 C.F.R. §§ 84.35, 84.36). *See also id.* at 22,683 (to be codified at 45 C.F.R. § 84.42).

as a means of resolving complaints.[66] Ideally, recipients of HEW assistance will comply with the regulatory obligations in order to retain federal funds. At best, voluntary compliance avoids protracted and expensive litigation by providing a flexible and conciliatory environment for the resolution of disputes. In addition, it reduces the possibility of undue agency interference in matters of local management. At worst, however, voluntary compliance unnecessarily delays the enforcement of rights and severely compromises the rights at issue.

Experience has shown that voluntary compliance often falls far short of the statutory mandate. Agency enforcement of other antidiscrimination statutes has demonstrated that voluntary compliance causes unreasonable delay in rectifying racially discriminatory educational practices.[67] Similar problems exist with respect to discrimination based on sex.[68] In addition, successful compliance with the regulatory provisions involves a heavy burden for some recipients, many of whom are already beset by financial difficulties.[69] Although the effective date for implementing the regulations has passed, no additional resources have been made available. As a result, many of these recipients may be forced to make substantial expenditures and to provide special services for handicapped persons choosing to enroll in any given program. Without additional funds, voluntary compliance by these institutions is unlikely.

66. 45 C.F.R. §§ 80.7(c) & 80.8 (1976). Congress envisioned the implementation of a compliance program similar to those used in other antidiscrimination statutes. *See* note 6 *supra*; 120 CONG. REC. S16215 (daily ed. Sept. 10, 1974) (remarks of Sen. Stafford). Courts have also noted that the philosophy behind these statutes is to secure as much voluntary compliance as possible. *See* Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346, 351 (M.D. Ala. 1967).

67. Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975). *Accord*, Brown v. Weinberger, 417 F. Supp. 1215 (D.D.C. 1976). *See also* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973); Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977).

68. A recent study by the Project on Equal Education Rights reveals that in the four-year period from 1972-1976, HEW's Office for Civil Rights [OCR] resolved only one-fifth of the 871 discrimination complaints it received and "did almost nothing" to enforce the law. The report's accuracy was confirmed by the director of OCR and is based upon a review of every discrimination complaint filed with OCR field offices from 1972 through October, 1976. *See* Wash. Post, Nov. 8, 1977, at A1, col. 3.

69. Montgomery County, Maryland, one of the wealthiest counties in the nation, is already about $700,000 behind in payments to private schools that educate the handicapped who cannot be served adequately by the public schools. Wash. Post, June 10, 1977, at C1, col. 3. *See also* Discrimination Against Handicapped Persons, *supra* note 52. Some burdens will be exceptionally difficult, especially for colleges and universities. Although no assistance is envisioned under the regulations, however, other federal statutes do exist to aid recipients in meeting their financial burdens. *See, e.g.*, Education for All Handicapped Children Act of 1975, § 5(a), 20 U.S.C. § 1411 (Supp. V 1975) (grants to states who aid handicapped children); I.R.C. § 190 (tax deductions of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons).

Moreover, both Congress and the President intended HEW to oversee the implementation of section 504, both by issuing regulations and by firmly enforcing its provisions.[70] While the regulatory preference for voluntary compliance does not relieve the agency of its responsibility to enforce the regulation by alternative means,[71] the absence of a statutorily mandated scheme of enforcement gives the agency a significant amount of discretion[72] and, at the same time, fails to limit the time within which voluntary compliance may be sought. Consequently, considerable delays from attempts to enforce the regulations through voluntary compliance may occur before handicapped persons may seek redress in the courts.[73]

Effective enforcement also entails use of HEW resources for compliance responsibilities indirectly related to the investigation of complaints.[74] Detailed supervision may indeed be necessary, for HEW officials have been required to police recipients' programs to prevent discrimination by federally funded state or local agencies.[75] In addition, one court has suggested that the regulations could require the Secretary to conduct a compliance study before disbursing federal funds to ensure that proposed construction projects will not adversely affect the handicapped.[76]

The drain on HEW resources is formidable and may, for all practical purposes, be unmanageable, given present agency duties. Even before the issuance of the regulations, HEW lacked the resources to process existing complaints under the various antidiscrimination statutes.[77] The agency has admitted that its increase in staff cannot keep pace with the

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70. *See* Exec. Order 11,914, 41 Fed. Reg. 17,871 (1976). *See also* H.R. REP. No. 1457, 93d Cong., 2d Sess. 27-28 (1974); S. REP. NO. 1139, 93d Cong., 2d Sess. 24-25 (1974); S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40 (1974).

71. Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

72. In Title VI, 42 U.S.C. § 2000d-1 (1970), specific procedures and requirements are spelled out. Similar directions are set forth in § 503 of the Rehabilitation Act, 29 U.S.C. § 793 (Supp. V 1975). Because of the vagueness in § 504, agency enforcement procedures should arguably merit more discretion, notwithstanding the subsequent declaration of congressional intent. *But see* note 60 *supra*.

73. *See* note 67 *supra*.

74. *See* 41 Fed. Reg. 18,394 (1976).

75. *Cf.* NAACP, Western Region v. Brennan, 360 F. Supp. 1006 (D.D.C. 1973) (federal officials required to police operations by a state to prevent discrimination by recipients of federal grants).

76. In NAACP v. Wilmington Medical Center, Inc., 426 F. Supp. 919 (D. Del. 1977), the court suggested compliance studies might be necessary to assess the impact of proposed construction sites on handicapped individuals, since HEW was required to approve the construction of hospitals that received Medicare and Medicaid reimbursements. *Id.* at 922-26.

77. *Id.* at 924-25. *See* Adams v. Mathews, 536 F.2d 417 (D.C. Cir. 1976) (difficulties with processing Title IX complaints) and cases cited, note 67 *supra*.

rising volume of complaints, and it anticipates escalation of the upward trend.[78] To assist in effecting compliance and to prevent the dilution of rights, a private cause of action as an alternative to administrative remedies is essential.[79]

IV. THE NEED FOR A PRIVATE RIGHT OF ACTION

Although no private right of action is expressly authorized in the statute, several courts have recognized that one may be implied.[80] In determining whether a private remedy is implicit in a federal statute not expressly providing one, the Supreme Court has looked to four relevant factors: whether the plaintiff is within the class for whose benefit the statute was created; whether there is any evidence of legislative intent, either explicit or implicit, to create or to deny such a remedy; whether implying a remedy for the plaintiff would be consistent with the legislative scheme; and whether the creation of a remedy would unnecessarily interfere with the relationship between federal and state law.[81] Because section 504 actions meet these criteria, a strong argument for implying a private cause of action exists.

First, the statute defines the members of the class,[82] and establishes affirmative rights for persons included.[83] Second, the legislative history expressly indicates that a private right of action was intended as part of a pervasive scheme to prohibit discrimination on the basis of handicap.[84] Third, the creation of a private cause of action is essential to deter discrimination and to provide an effective avenue for redress in light of agency difficulties with enforcement.[85] Finally, because civil rights ac-

78. 41 Fed. Reg. 18,394 (1976).

79. *See* Gilhool, *The Right to Community Services*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 192, 200 (1976) (reliance upon administrative mechanisms is starkly ineffective). *See generally* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

80. See cases cited notes 45-47 *supra*. *See also* Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977), HEW also recognizes the existence of the right. 42 Fed. Reg. 22,687 (1977).

81. Cort v. Ash, 422 U.S. 66 (1975). *See also* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

82. 29 U.S.C. § 706(6) (Supp. V 1975). Note, however, that neither drug addicts or alcoholics are mentioned. *But see* Opinion of the Attorney General (April 12, 1977), *supra* note 49.

83. While the statute does not explicitly establish affirmative rights, *see* notes 2 & 5 *supra*, courts have declared that affirmative rights exist. Cases cited note 80 *supra*.

84. [1974] U.S. CODE CONG. & AD. NEWS 6391; 120 CONG. REC. S. 18879 (daily ed. Oct. 10, 1974). *See also* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1285-86 (7th Cir. 1977), Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977).

85. The implication of a private cause of action is particularly favored if it appears that a private remedy will have a healthy deterrent effect and when the agency empowered to

tions are traditionally within the province of federal courts, it would be entirely appropriate to imply a federal remedy. The policy considerations of federalism are not at issue, since state courts have previously recognized the federal government's interest in preventing discrimination in federally assisted programs.[86]

However, the regulations themselves may restrict access to the courts. Before they were promulgated, several courts found it unnecessary to require that plaintiffs exhaust administrative remedies prior to judicial review, since no remedial mechanism existed.[87] Promulgation of the section 504 regulations raises the problem of whether courts will preserve this independent cause of action or require the exhaustion of administrative remedies as a prerequisite to judicial access. Confronted with an apparent conflict between the congressional intent to afford a judicial remedy to handicapped persons victimized by discrimination and the strong preference of Congress for resolving disputes through conciliation rather than by court action, courts have been divided on the need to exhaust administrative remedies. Traditional principles of administrative law suggest several arguments in favor of postponing judicial review until an agency determination has been made,[88] and because a section 504 violation may also involve other statutory provisions,[89] an administrative construction may be necessary to separate the claims. The flexible standards for achieving reasonable accommodation and program accessibility could influence a court to require an initial agency determination before considering the problem of compliance. Moreover, the

enforce an act is not completely effective in doing so. Allen v. State Bd. of Elections, 393 U.S. 544, 554-57 (1969). *But see* Rogers v. Frito-Lay, Inc., 433 F. Supp. 200, 204 (N.D Tex. 1977) (courts may not presume that the regulations will be inadequate, particularly when suits might impair and delay the orderly development of enforcement precedent and interfere with conciliation efforts).

86. State courts have traditionally recognized the federal government's interest in preventing discrimination in federally assisted programs and have consequently implied a right of action under Title VI, 42 U.S.C. § 2000d (1970). *See* Lemon v. Bossier Parish School Bd., 240 F. Supp. 709, *rehearing denied*, 240 F. Supp. 743 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967).

87. Lloyd v. Regional Transp. Auth., 548 F.2d at 1286; Rogers v. Frito-Lay, Inc., 443 F. Supp. 200, 204 (N.D. Tex. 1977).

88. Referral to the agency achieves uniformity, consistency, and efficiency. MCI Communications Corp. v. AT&T, 496 F.2d 214, 219-223 (3d Cir. 1974); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200, 203 (N.D. Tex. 1977). In addition, administrative guidelines are entitled to great deference and agency constructions are given great weight in court decisions. Under the doctrine of primary jurisdiction, courts refrain from exercising jurisdiction and defer to agency expertise to avoid potentially conflicting rulings. *See generally* Annot., 1 L.Ed.2d 1596 (1956); Annot., 38 L.Ed.2d 796 (1974).

89. *Cf.* Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 817-18 (E.D. Pa. 1977) (potential violation of 29 U.S.C. § 793(b) (Supp. V 1975)). In addition, § 504 does overlap with other statutory provisions. *See* note 62 *supra*.

legislative history evinces some intent that judicial review follow an agency determination, given congressional and judicial preference for conciliation as a means to resolve disputes.[90]

There are urgent reasons, however, why the two procedures should augment each other and not be relegated to a specific order. Section 504 is not a precisely drawn statute which precludes judicial relief, and it does not attach preconditions to the rights of an aggrieved individual. It neither expressly provides for the separation of administrative and judicial remedies, nor imposes rigorous administrative exhaustion requirements. There is evidence that Congress did not intend an exclusive remedy,[91] and the preservation of a private right of action independent of administrative negotiation is essential to provide all plaintiffs with a workable means of redress and to prevent the dilution of constitutional rights.

Nothing in the statutory language indicates that Congress required HEW to sue anyone,[92] except as the Department deems advantageous. Consequently, HEW may utilize broad discretion to determine which suits it will bring and which it will leave to be brought by private parties. Because HEW has indicated it will place a high priority on investigating claims which show a pattern or practice of discrimination,[93] retention of a private cause of action as an alternative to administrative enforcement

90. *See* 120 CONG. REC. S18,879 (daily ed. Oct. 10, 1974). "Providing a private right of action for noncompliance under § 794 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1975), would insure administrative due process, provide for administrative consistency within the Federal Government as well as relative ease of implementation, and permit a judicial remedy through private action." *Id.* This approach to the implementation of § 504 was used by the *Lloyd* court in implying a private right of action and closely follows the models of other antidiscrimination provisions. *See* note 6 *supra*; Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977). *See also* 42 Fed. Reg. 22,695 (1977) (sections 503 & 504 should be administered in such a manner that a consistent, uniform, and effective federal approach to discrimination against handicapped persons would result.).

91. Other antidiscrimination statutes differ from § 504 insofar as they grant explicit administrative remedies. *See, e.g.*, Title VI, 42 U.S.C. § 2000d-1 (1970). While Congress envisioned a scheme "similar" to that of Title VI, *see, e.g.*, note 6 *supra*, its use of the word "similar" precludes the interpretation that it intended a scheme "identical to" the earlier statute. *See generally* 2A SUTHERLAND, STATUTORY CONSTRUCTION §§ 47.23, 51.01-51.03 (3d ed. C. Sands 1973). Moreover, repeated efforts to devise feasible methods of implementing § 504 suggest that no exclusive remedy was intended. *See, e.g.*, 120 CONG. REC. E3319 (daily ed. May 28, 1974) (reading of article written by Rep. Vanik); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200, 202 (N.D. Tex. 1977) (numerous unsuccessful attempts to amend other civil rights statutes to include the handicapped).

92. Moreover, several congressmen thought the Department of Justice would be responsible for the statutory implementation. *See* 120 CONG. REC. 11128 (1974).

93. 42 Fed. Reg. 22,677 (1977).

is necessary for individuals to redress their rights in isolated cases of discrimination.[94]

Courts have traditionally waived the prerequisite exhaustion of administrative remedies when resort to them would prove futile. One court has suggested that exhaustion would not be required if it were clear that enforcement difficulties interfered with agency handling of the complaint,[95] and several have waived the prerequisite when the relief sought could not be granted by the administrative authority.[96] Despite the range and design of the regulatory mechanism as a comprehensive solution for problems of discrimination, a handicapped individual has other remedies available to redress a multitude of discriminatory actions, all of which are not available under the regulations.[97] Because both equitable and legal relief might be appropriate to redress violations, a strong public interest is served by permitting a multiplicity of forums to deal with discriminatory practices.

Equally significant is the effect of the regulations on previously established rights. Prior litigation established that handicapped individuals are entitled to equal protection, and courts have demanded justification for any separate or different treatment.[98] The substitution of program accessibility for actual physical access raises serious constitutional questions, for there is strong judicial precedent against allowing financial burdens to interfere with the exercise of constitutional rights.[99] Consequently, there is a need for the courts, as traditional guardians of civil rights, to ensure that the flexibility inherent in the regulatory provisions does not dilute the impact of statutorily established rights,[100] and that the need for total integration is not compromised.

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94. *See, e.g.*, Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). *See also* Albert, *supra* note 79, at 453-54.

95. NAACP v. Wilmington Medical Center, 426 F. Supp. at 924-25.

96. *See, e.g.*, Fialkowski v. Schapp, 405 F. Supp. 946, 956-57 (E.D. Pa. 1975). Moreover,

> Absent contrary legislative intent, courts have allowed private actions by those whom the statute was designed to protect when there has been a breach of the statutory command or duty . . . . The intricate administrative and regulatory factors in these cases would appear strongly to militate against the creation of private actions. Instead, this is a marked presumption in favor of implying such actions . . . . The more clearly it is established that alternative remedies fail in theory and practice, the stronger the case for implying private actions.

Albert, *supra* note 79, at 453-54.

97. *See* notes 35-39 *supra*.

98. *See* notes 21-34 & accompanying text *supra*.

99. *See, e.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972). For an excellent discussion of accessibility and first amendment rights, *see*, Note, *supra* note 15.

100. *See* Comments of the National Center for Law and the Handicapped, cited notes 44 & 50 *supra*. *See also* Public Util. Comm'n v. United States, 355 U.S. 534 (1958). If an

V. CONCLUSION

Through the section 504 regulations, the Department of Health, Education, and Welfare has attempted to provide a workable scheme for ending discrimination on the basis of handicap by recipients of federal financial assistance. The regulations reflect the need of the handicapped to be free of discrimination and are sensitive to the problems faced by recipients in their attempts to comply.

Whether the promises are realized, however, will depend on efficient and effective enforcement, and for this, the recognition of an independent cause of action is essential. Lack of funding and strain upon agency resources will undoubtedly affect a recipient's ability to comply. Resort to the courts as an independent alternative is essential for preventing the regulations from becoming a list of empty promises and for helping the handicapped to lead independent and creative lives.

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administrative proceeding might leave no remnant of a constitutional question for decision by the courts, the administrative remedy should be pursued. If, however, only a procedural issue is at stake, then the administrative agency may be defied and judicial relief sought as the only effective way of protecting asserted constitutional rights. *Id.* at 539-40.