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Rehabilitation Act of 1973--Application to Postsecondary Educational Programs. Southeastern Community College v. Davis, 99 S. Ct. 2361 (1979)

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REHABILITATION ACT OF 1973—APPLICATION TO POSTSECONDARY EDUCATIONAL PROGRAMS. *Southeastern Community College v. Davis*, 99 S. Ct. 2361 (1979)

In *Southeastern Community College v. Davis*,[1] the United States Supreme Court interpreted section 504 of the Rehabilitation Act of 1973[2] within the narrow context of its application to postsecondary educational programs. Section 504 prohibits discrimination against an otherwise qualified handicapped individual, solely by reason of his handicap, under any program or activity receiving federal financial assistance.[3] At issue in *Davis* was (1) whether an educational institution's refusal to admit an individual who is unable to meet physical qualifications required for participation in a program is discriminatory,[4] and (2) whether the institution is obligated to modify its program to assist an individual in overcoming his handicap.[5]

In basing its first decision under section 504 solely upon an interpretation of the statutory term "otherwise qualified," the Supreme Court did not find it necessary to indicate the method or extent of judicial review to be used in deciding similar cases brought on constitutional grounds, nor did it clearly define the point at which the failure to undertake affirmative action becomes illegal discrimination. Resolution of these questions remains a subject for future litigation, although an analysis of the Court's opinion in *Davis* suggests possible approaches.

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1. 99 S. Ct. 2361 (1979).
2. 29 U.S.C.A. § 794 (West Supp. 1979).
3. The statute provides in full:

> *No otherwise qualified handicapped individual in the United States, as defined in § 706(7) of this title, 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* or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Id. (emphasis added). The unitalicized portion of the section was added by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978 after the commencement of this action and is not involved in respondent's claim. Pub. L. No. 95-602, § 119, 92 Stat. 2982 (1978).

4. 99 S. Ct. at 2364.
5. *Id.* at 2367-68.

I. FACTUAL AND PROCEDURAL BACKGROUND

Davis, a licensed practical nurse[6] with a severe hearing disability,[7] applied for admission to an associate degree program leading to licensure as a registered nurse.[8] Petitioner institution, a recipient of federal financial assistance, refused to admit respondent on the grounds that her hearing impairment prevented her from performing safely, both in the clinical phase of the educational program and in the customary roles of a registered nurse.[9]

Respondent brought suit alleging that Southeastern had discriminated against her based on her handicap in violation of section 504 and the equal protection and due process clauses of the fourteenth amendment.[10] The district court found in favor of Southeastern on the section 504 claim without reaching the constitutional issues.[11] The Fourth Circuit Court of Appeals found the district court's interpretation of the statute erroneous, reversed, and remanded for further proceedings regarding respondent's contention that section 504 required affirmative action by Southeastern to enable respondent to complete the program.[12] On writ of certiorari, the United States Supreme Court unanimously reversed the ruling of the court of appeals.[13] Petitioner did not raise the constitutional claims in the stages of appellate review; therefore, the Court rested its opinion only on an interpretation of section 504.

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6. Respondent was licensed as a practical nurse in North Carolina, but she had not worked in this capacity for several years; even when so employed, she had worked only a limited amount of night duty. *Id.* at 2364 n.1. The Supreme Court indicated that it was possible she could not function as a licensed practical nurse either, but noted the district court's opinion that respondent's ability to function as a practical nurse, but not as a registered nurse, might be explained by the constant supervision afforded licensed practical nurses. *Id.* at 2364-65 n.1.

7. An examination by an audiologist showed that respondent, with the assistance of a hearing aid, was aware of gross sounds in her environment, but could not interpret speech of others without lipreading. She was an excellent lipreader. 424 F. Supp. 1341, 1343 (E.D.N.C. 1976).

8. Admission criteria included an evaluation of the applicant's physical condition. *Id.*

9. *Id.* at 1345.

10. The action was filed pursuant to 42 U.S.C. § 1983 (1976). Although respondent had not followed her claim fully through the institutional grievance procedure, both the district court, 424 F. Supp. at 1344, and court of appeals, 574 F.2d 1158, 1160 (4th Cir. 1978), ruled that her administrative remedies were sufficiently exhausted because any further processing of her grievance would be futile.

11. 424 F. Supp. at 1346.

12. 574 F.2d at 1161-62.

13. 99 S. Ct. at 2371.

The Court disposed of the case on the merits without reaching the issue of whether section 504 permits a private cause of action.[14] Most lower courts that have ruled on this issue have allowed a private cause of action, but the supporting theories are varied.[15] Although resolution of this question arguably remains a threshold issue in future actions brought pursuant to this statute, the Court's approach reflects a tacit approval of a private cause of action under section 504.[16] The related issues of primary jurisdiction and exhaustion of remedies were not addressed in this case and, therefore, remain unresolved.[17]

II. SECTION 504 CLAIM

To be entitled to protection from discrimination under section 504, an individual must be an "otherwise qualified handicapped individual."[18] For purposes of that section a "handicapped individual" is anyone "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."[19] The Court's opinion centers around a determination of which of

14. *Id.* at 2366 n.5.

15. *E.g.*, Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) (combined analogy to private cause of action allowed in Lau v. Nichols, 414 U.S. 563 (1974) under section 601 of the Civil Rights Act of 1964 with the four-pronged analysis set forth in Cort v. Ash, 422 U.S. 66 (1975)); Crawford v. University of N.C., 440 F. Supp. 1047 (M.D.N.C. 1977) (used contractual theory); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977) (used analogy to *Lau*). *See generally* Note, *Enforcing Section 504 Regulations: The Need for a Private Cause of Action to Remedy Discrimination Against the Handicapped,* 27 CATH. U.L. REV. 345 (1978); Comment, *§ 504 and the HEW Regulations: Effectuating the Rights of the Handicapped,* 5 OHIO N.U.L. REV. 107 (1978); Comment, *Toward Equal Rights for Handicapped Individuals: Judicial Enforcement of Section 504 of the Rehabilitation Act of 1973,* 38 OHIO ST. L.J. 676 (1977).

16. It is unclear whether a recently enacted section of the Act lends support to the validity of a private cause of action by making available to any person aggrieved under section 504 the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964. 29 U.S.C.A. § 794a (West Supp. 1979). Congressional statements at the time of amendments to the Act in 1974 reflect approval of a judicial remedy through private action under section 504. S. REP. No. 93-1297, 93d Cong., 2d Sess. 40, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6391.

17. Both lower courts in this case did not reach the issue of exhaustion of remedies, but stated that in respondent's case any further processing of the grievance would be futile. 574 F.2d at 1160; 424 F. Supp. at 1344. *See also* Sherer v. Waier, 457 F. Supp. 1039, 1045 (W.D. Mo. 1978); Crawford v. University of N.C., 440 F. Supp. 1047, 1056 (M.D.N.C. 1977).

18. 29 U.S.C.A. § 794 (West Supp. 1979).

19. *Id.* § 706(7)(B).

these handicapped persons are, in addition, "otherwise qualified" within the meaning of the statute.

The court of appeals ruled that "otherwise qualified handicapped person(s)" were those who could meet the requirements of a program in all respects *except* for limitations imposed by their handicap.[20] The Fourth Circuit found support for this view in a regulation stating that to be "otherwise qualified" to pursue postsecondary education an individual must meet academic and technical admission requirements;[21] the court did not believe physical qualifications were included in the term "technical standards."[22] Under this interpretation postsecondary educational institutions could not take into account the nature of or limitations resulting from a handicap in determining whether an individual was qualified for admission. Such a literal interpretation of the regulation is of questionable validity. Clearly the performance of certain activities requires specific physical abilities; for example, sight is necessary for driving a motor vehicle.[23]

The Supreme Court rejected the Fourth Circuit's interpretation and accepted the district court's view as being closer to the plain meaning of the statute. The Court ruled that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements *in spite* of his handicap."[24] Citing the same regulation as the Fourth Circuit, the Court determined that the term "technical standards" included legitimate physical qualifications.[25] Postsecondary educational institutions, therefore, are permitted to take into account certain physical as well as academic qualifications of applicants for admission to their programs.

The Court suggested that allowing the imposition of physical requirements would not render all handicapped persons unable to qualify. In its view, certain individuals who fall under the definition of handicapped,[26] can also be "otherwise qualified" because they have no present incapacity or possess other abilities that permit them to function sufficiently in spite of their handicap.[27]

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20. 574 F.2d at 1160-61.

21. 45 C.F.R. § 84.3(k)(3) (1978). These regulations became effective after the district court's decision in this case.

22. *See* 574 F.2d at 1161.

23. 45 C.F.R. § 84 App. A at 405 (1978).

24. 99 S. Ct. at 2367 (emphasis added).

25. *Id.* (citing 45 C.F.R. § 84.3(k)(3) (1978)).

26. 29 U.S.C.A. § 706(7)(B) (West Supp. 1979).

27. 99 S. Ct. at 2366-67 n.6. For cases in which handicapped individuals were found

Through the imposition of physical requirements, institutions may adopt a classification of persons, in this case the nonhearing, whom they consider unqualified for admission to their programs. A danger exists that institutions will draw this classification too broadly and exclude individuals who can be "otherwise qualified" under the Court's interpretation.

The Court stated that institutions could require *legitimate* physical qualifications,[28] but did not indicate the proper standard for determining legitimacy. Certainly, educational institutions, or any other program or activity for that matter, cannot impose physical requirements arbitrarily. The requirement should be related to valid institutional purposes or goals and the manner in which it is applied should distinguish between those individuals who are qualified in spite of their handicaps and those who are not.

The Court accepted, without detailed examination, Southeastern's decision that the ability to hear speech was essential for successful completion of the nursing program.[29] In its view, therefore, respondent was not "otherwise qualified"; consequently, she was not entitled, under the statute, to protection from discrimination. The Court's limited analysis of the validity of the classification created by petitioner lessens the usefulness of the opinion for developing clear guidelines for institutional requirements or for predicting the extent and result of future judicial review of similar cases. Through an examination of the Court's language, as well as its approach in cases brought under similar statutes and its analysis in reviewing other arguably discriminatory classifications, a concept of the proper standard of review under section 504 emerges.

III. Constitutional Standard of Review

At least one court has suggested that section 504 codifies the constitutional right to equal protection.[30] The Supreme Court did not expressly support that view in *Davis* as it did in *Regents of*

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to be otherwise qualified, see Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977).

28. 99 S. Ct. at 2367.

29. *Id.*

30. Halderman v. Pennhurst State School and Hosp., 446 F. Supp. 1295, 1323 (E.D. Pa. 1977).

the University of California v. Bakke,[31] when it determined the standard of review under section 601 of the Civil Rights Act of 1964,[32] a statute almost identical in wording to section 504. Because of a strongly supportive legislative history, the Court in *Bakke* first found that section 601 codified the equal protection clause and then interpreted that statute utilizing an equal protection analysis.[33] The Court in *Davis* expressly relied on an interpretation of the statutory term, "otherwise qualified handicapped individual," but the Court's language shows an equal protection orientation. The *Davis* decision, therefore, may well have constitutional underpinnings.

In *Davis,* the Supreme Court used the words "legitimate,"[34] "reasonable,"[35] and "necessary"[36] to describe the physical qualifications that institutions may require for admission. The Court has used these same words in applying the reasonableness standard of review to equal protection cases in which the classification in question is neither suspect nor infringes upon a fundamental right.[37] Since lower courts have not considered suspect a classification based on handicap,[38] and have not regarded as fundamental the right to an education,[39] the use of the reasonableness standard of review seems appropriate. Nonetheless, this standard results in only minimal scrutiny of state goals and the relationship of the classification to realization of those goals. The cursory analysis in *Davis,* viewed as an example of the application of this standard, suggests that the standard of scrutiny should be raised to the intermediate or strict level.[40]

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31. 438 U.S. 265 (1978).

32. 42 U.S.C. § 2000d (1976).

33. 438 U.S. at 285-87.

34. 99 S. Ct. at 2367.

35. *Id.* at 2371.

36. *Id.* at 2367.

37. *E.g.,* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

38. *E.g.,* Doe v. Colautti, 454 F. Supp. 621 (E.D. Pa. 1978); United Handicapped Fed'n v. Andre, 409 F. Supp. 1297 (D. Minn. 1976), *rev'd on other grounds and remanded,* 558 F.2d 413 (8th Cir. 1977). *But see* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" under the Equal Protection Clause,* 15 SANTA CLARA L. REV. 855 (1975).

39. *E.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

40. For a discussion of the various standards of review used in equal protection cases, see J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 522-27 (1978); Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?,* 1976 B.Y.U.L. REV. 89.

Under a reasonableness standard, the state's action must be *rationally* related to the achievement of a *legitimate* state goal.[41] Southeastern's stated goals were: to train persons to serve the nursing profession in all customary roles, to prepare persons to be licensed under the laws of the state, and, most importantly, to ensure safety for patients.[42] The rational relationship between the petitioner's physical requirements and these goals is not facially apparent, notwithstanding the Court's view to the contrary. First, the court of appeals accepted respondent's contention that a number of settings existed in which she could function satisfactorily as a registered nurse.[43] If this view is correct, respondent's exclusion from the basic educational training program unnecessarily excludes her from an entire professional field[44]—a harsh result under a statute enacted to increase opportunities rather than limit them. Second, none of the courts considering this case examined the state statutes pertaining to registered-nurse licensure to determine whether, in fact, the state could deny licensure to respondent based on her handicap.[45] Finally, those patient-contact situations presented in which respondent allegedly could not function safely were limited in number and scope.[46] Even if Southeastern's goals are conceded to be legitimate, the question remains whether the exclusion of handicapped individuals like respondent is rationally related to the achievement of these goals.

Yet another approach is open to the Court in examining actions of institutions under section 504. In several lower court cases, automatic exclusion of handicapped persons was held invalid as creating an irrebuttable presumption.[47] The question

41. *E.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

42. 424 F. Supp. at 1344-45.

43. 574 F.2d at 1161 n.6.

44. *Cf.* Callaghan, *Bona Fide Occupation Qualifications and the Military Employer: Opportunities for Females and the Handicapped,* 11 AKRON L. REV. 182 (1977) (women and handicapped persons can perform many jobs in the military, and therefore should not be excluded because of inability to complete basic training program).

45. N.C. GEN. STAT. §§ 90-158 to -171.18 (1975). Section 90-171.5(7) does require that applicants for licensure be mentally and physically competent, but no statute expressly requires that an applicant be able to function in all possible settings.

46. 424 F. Supp. at 1343. The specific situations discussed were operating rooms where the wearing of masks precludes lipreading and "situations . . . where the physician would be unable to get the nurses' attention by other than vocal means." *Id.*

47. *E.g.*, Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1978) (preliminary injunction denied because plaintiff failed to show irreparable injury); Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976). *See also* Comment, *Constitutional Law: Irrebuttable Presumption Doctrine—Right of Blind Teacher to Take Teacher's Examination,* 23 WAYNE L. REV. 1295 (1977).

that arises is to what extent an individual must receive consideration in determining his inability to function in a particular setting. For a court to uphold an institution's automatic exclusion of an individual on the presumption that his handicap would prevent him from performing adequately, the presumption must be true in a significant number of cases.[48] Surely the possession of certain handicaps would justify automatic exclusion, for example, excluding a blind person from employment as a bus driver. At the other end of the continuum are physical and mental conditions that have little or no relation to adequate functioning in a particular program.[49]

At the midpoint are cases such as *Davis* in which a handicap may or may not affect functioning, depending on the severity of the handicap and the requirements of the program or activity. If the institution has, through policy or otherwise, excluded all persons possessing the handicap merely on the basis of such possession, without consideration of that *individual's* abilities, this automatic exclusion creates an irrebuttable presumption. The Supreme Court has struck down irrebuttable presumptions as violative of the due process clause of the fourteenth amendment.[50] Under the due process clause, a person is entitled to an objective *individual* consideration of his ability to successfully participate in a program.

In *Davis,* the Court said, "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context."[51] Although that language suggests possible reliance upon the doctrine of irrebuttable presumptions,[52] the Court did not inquire whether respondent received an adequate consideration of her individual abilities. This lack of inquiry is disturbing, particularly since both the district court and court of appeals indicated that further pursuit of the action by respondent through the institution's grievance procedure would have been futile.[53] This view seems to suggest that *any* additional evidence presented by petitioner would not have changed the result.

48. *Compare* Craig v. Boren, 429 U.S. 190, 201-02 (1976), *reh. denied,* 429 U.S. 1124 (1977) *and* 429 U.S. at 214 (Stevens, J., concurring) *with id.* at 227-28 (Rehnquist, J., dissenting).

49. *See* Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978).

50. *E.g.,* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

51. 99 S. Ct. at 2366.

52. *See* text accompanying note 50 *supra.*

53. 574 F.2d at 1160; 424 F. Supp. at 1344.

The Supreme Court's reliance on the literal language of the statute as the basis for its decision is disappointing. An equal protection analysis seems more appropriate in light of the Court's approach in similar cases.[54] The Court's acceptance of Southeastern's actions in *Davis* without detailed examination may be the result of the respondent's failure to challenge the institution's findings and, more significantly, the Court's deference to the interest of the institution in setting up curricula, determining methods of study, and selecting students.[55] In the past, the Supreme Court has recognized and accepted the opinions of educational institutions in the interest of academic freedom and has not subjected them to judicial review.[56] It is hoped that in future cases, particularly those encompassing constitutional claims, the Court will scrutinize more closely allegedly discriminatory actions against handicapped individuals.

IV. REQUIREMENT OF AFFIRMATIVE ACTION

Respondent contended that "§ 504, properly interpreted, compels Southeastern to undertake affirmative action that would dispense with the need for effective oral communication."[57] Davis suggested that Southeastern could provide her with individual supervision when she was performing direct patient care and that, since it was not necessary to train her to function in all possible employment roles of a registered nurse, Southeastern could dispense with certain required courses.[58] Respondent garnered support for her argument in the regulations accompanying section 504.

One regulation requires postsecondary educational institutions covered by section 504 to provide auxiliary aids such as sign

54. *E.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

55. In discussing the need for a formalized hearing for academic dismissal, the Court stated that "the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making . . . . We decline to further enlarge the judicial presence in the academic community . . . ." Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978). Furthermore, the Court has recognized that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

56. *See* note 55 *supra*.

57. 99 S. Ct. at 2368.

58. *Id.*

language interpreters; it reads, however, that an institution "need not provide . . . devices or services of a personal nature."[59] The Supreme Court said that, under a reasonable interpretation of the regulation, individual supervision did not come within the meaning of auxiliary aids, but rather was a service of a personal nature.[60] Another regulatory provision requires institutions to make modifications in academic requirements that are necessary to ensure that the requirements do not discriminate.[61] According to the Court, this regulation does not encompass a curricular change such as that encouraged by Davis.[62] The regulation also expressly exempts institutions from modifying academic requirements that are essential either to a program or to a licensing statute.[63]

The Court found the modifications suggested by respondent beyond the obligations imposed by the regulations. It also found

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59. 45 C.F.R. § 84.44(d) (1978). The regulation provides in full:

Auxiliary aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

Id.

60. 99 S. Ct. at 2368-69.

61. 45 C.F.R. § 84.44(a) (1978). The regulation states in full:

Academic requirements. A recipient [of federal funds] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

Id.

62. 99 S. Ct. at 2369.

63. *See* note 61 *supra.*

that any interpretation of the regulations that required affirmative efforts to overcome disabilities rather than efforts to ensure evenhanded treatment of qualified handicapped persons was of questionable validity.[64] The Court went beyond mere interpretation of the regulations and concluded that nothing in the language, purpose, or history of the statute imposed an affirmative action obligation on all recipients of federal funds.[65] To support this conclusion, the Court pointed to: (1) the *virtual* absence of legislative history accompanying section 504 at the time of enactment and the *clear* absence of legislative history relating to affirmative action;[66] (2) statements made by Congressional committee members at the time of amendment in 1974 and 1978, which, even if construed in favor of respondent's position, could not substitute for a timely showing of intent;[67] (3) regulations which can be accorded no deference since formulated involuntarily by the Department of Health, Education and Welfare;[68] and (4) Congressional provision for affirmative action in other sections of the Act, which indicates the ability of Congress to so provide in a clear manner.[69]

A comparison of section 504 with another, though unrelated, antidiscrimination statute aids in resolving the affirmative action issue in *Davis*. The language of section 504 is almost identical to that of section 601 of the Civil Rights Act of 1964;[70] however, in

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64. 99 S. Ct. at 2369. This view finds support in 45 C.F.R. § 84.4(b)(2) (1978) which states:

> For purposes of this part, aids, benefits and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

65. 99 S. Ct. at 2369-70. The government in an amicus curiae brief disagreed with the Court. *Id.* at 2370 n.11.

66. *Id.* S. REP. No. 93-318, 93d Cong., 1st Sess. 70, 133, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2123, 2143; H. CONF. REP. No. 93-500, 93d Cong., 1st Sess. 41, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2143, 2154.

67. 99 S. Ct. at 2370 n.11. S. REP. No. 93-1297, 93d Cong., 2d Sess. 39-41, *reprinted in*, [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390-91.

68. 99 S. Ct. at 2370 n.11. The Department of Health, Education and Welfare (HEW) did not voluntarily issue any regulations under section 504. *Id.* It formulated these regulations only after Cherry v. Matthews, 419 F. Supp. 922 (D.C.D.C. 1976) (a suit brought to force such formulation) and Exec. Order No. 11914, 41 Fed. Reg. 17,871 (Apr. 29, 1976) (an order directing HEW to formulate regulations).

69. 99 S. Ct. at 2369. Affirmative action is required under 29 U.S.C. § 791(b) & (c) (1976).

70. 42 U.S.C. § 2000d (1976).

Lau v. Nichols,[71] the Supreme Court found that section 601 imposed affirmative duties. In *Lau,* Justice Stewart concluded that the language of section 601 alone was insufficient; only with support of the accompanying regulations were such affirmative duties imposed.[72] Justice Blackmun stressed that the large number of persons affected by the alleged discrimination was of major importance in requiring affirmative action.[73] The difference in result between *Lau* and *Davis* can be attributed to the degree of deference given the regulations, the varying extent of legislative history, and the number of persons involved.

In the context of a classification based on handicap, use of a test that rests upon the "number of persons affected" to trigger an affirmative action requirement is problematic. Although the *number* of handicapped individuals seeking admission to an educational program may be large, the modifications necessary to accommodate these individuals will vary with each type of impairment. A class of "handicapped" persons includes those with varying motor and sensory impairments, mental handicaps, debilitating diseases, and even alcoholism and drug addiction.[74] To require an institution to modify its curriculum or method of instruction to account for each type of handicap would impose a tremendous burden on the institution.

No lower court case decided exclusively under section 504 has required an institution to aid a handicapped individual in *overcoming* his handicap when the individual was not "otherwise qualified." In two cases, however, preliminary injunctions were granted requiring educational institutions to provide sign language interpreters for deaf students who were found to be "otherwise qualified" for admission.[75] This suggests that, at least

71. 414 U.S. 563 (1974).

72. *Id.* at 570 (Stewart, J., concurring).

73. *Id.* at 572 (Blackmun, J., concurring). In *Lau* the alleged discrimination affected 1800 Chinese school children.

74. In the *employment* context, however, certain alcohol and drug abusers do not come within the definition of "handicapped individual" for the purposes of 29 U.S.C.A. § 794 (West Supp. 1979). 29 U.S.C.A. § 706(7)(B) (West Supp. 1979).

75. Crawford v. University of N.C., 440 F. Supp. 1047 (M.D.N.C. 1977); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977). *See also* Comment, *Civil Rights—Handicapped Discrimination—Private College Required to Provide Interpreter Service for Deaf Student Under Section 504 of the Rehabilitation Act of 1973.* Barnes v. Converse, *436 F. Supp. 635 (D.S.C. 1977),* 8 CUM. L. REV. 979 (1978); Comment, *Section 504 of the Rehabilitation Act of 1973 and the Private College:* Barnes v. Converse, 29 MERCER L. REV. 745 (1978).

for those individuals who can function effectively in a program in spite of their handicap, an institution may be required to provide assistance with auxiliary aids. This notion finds support in a 1978 amendment to the Act, which authorizes grants to state programs to pay for sign language interpreters for the deaf.[76]

Some courts have required transportation authorities to make "special efforts" in providing modes of transportation that are accessible to handicapped persons.[77] Although the courts in these cases have felt that section 504 created affirmative duties and although regulations requiring special efforts under section 16 of the Urban Mass Transportation Act of 1964[78] were promulgated partially under the authority of section 504,[79] the UMTA itself required the special efforts.[80] These cases, therefore, lend little support for the imposition of affirmative obligations solely under section 504.

The Supreme Court summarized its views on the issue of affirmative action under section 504 by saying:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a refusal to modify an

76. 29 U.S.C.A. § 775(a)(2) (West Supp. 1979).

77. *Compare* Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) (requiring commitment to an affirmative remedial program of substantial scope) *and* Bartels v. Biernat, 405 F. Supp. 1012 (E.D. Wis. 1975) (requiring special efforts to make public transportation system accessible to the handicapped) *with* Vanko v. Finley, 440 F. Supp. 656 (N.D. Ohio 1977) (requiring special efforts only to the extent of providing service that is reasonable in comparison with that afforded to the general public, not to providing total access) *and* Snowden v. Birmingham-Jefferson City Transit Auth., 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977) (requiring special efforts only within the limits of existing technology; assistance in getting on and off vehicles does not have to be provided).

78. 49 U.S.C. § 1612 (1976) and 49 U.S.C.A. § 1612 (West Supp. 1979).

79. *E.g.*, United Handicapped Fed'n v. Andre, 558 F.2d 413, 415 (8th Cir. 1977); Atlantis Community, Inc. v. Adams, 453 F. Supp. 825, 828 (D. Colo. 1978).

80. 49 U.S.C. § 1612 (1976) and 49 U.S.C.A. § 1612 (West Supp. 1979).

existing program might become unreasonable and discriminatory.[81]

Although the Court concluded that affirmative duties are not imposed by section 504, it at least suggested that, when adequate technology exists and when the financial burden is not excessive, an institution's failure to modify a program may constitute discrimination. Beyond that, the Court's language suggests no concrete guidelines for those persons in charge of programs and activities receiving federal financial assistance in their effort to prevent discrimination against the handicapped.

V. Conclusion

The opinion of the Court in *Davis* at the least suggests a framework for lower courts in handling actions under section 504. The statutory interpretation hinges on the definition of the words "otherwise qualified handicapped individual." To be "otherwise qualified" an individual must be able to function sufficiently in the program or activity *in spite* of his handicap.[82] Those handicapped persons who do not fall within the definition of "otherwise qualified" are not protected from discrimination under the statute.

Institutions may require certain physical qualifications for participants as long as these qualifications are legitimate or reasonable.[83] The process and standard to be used under the statute in reviewing this legitimacy is less clear, particularly when an educational program is involved, because of the Court's tendency to defer to institutional decisions in the interest of academic freedom. When a noneducational institution is involved, the Court's analysis may be more intensive. In reviewing, under the fourteenth amendment, cases involving classifications of handicapped persons, the Court may follow lower courts in using the reasonableness standard of review for equal protection challenges[84] and an irrebuttable presumption test for due process challenges.[85]

When the physical requirements imposed are found to be

81. 99 S. Ct. at 2370.
82. *Id.* at 2367.
83. *Id.*
84. *See* notes 34-46 and accompanying text *supra.*
85. *See* notes 47-53 and accompanying text *supra.*

legitimate, an educational institution is not affirmatively obligated to modify its program to enable an individual to overcome his handicap.[86] The Court suggested, however, that at some point an institution's failure to modify may become discriminatory, but did not indicate where this point lies. The Court did present, without elaboration, factors relevant to this determination: the technological ability to accommodate the handicapped and the extent of the administrative and financial burden on the institution in making modifications.[87] Refusals to make relatively minor and inexpensive changes may constitute illegal discrimination.

Unfortunately, the Supreme Court's opinion in *Southeastern Community College v. Davis* provides limited guidance for institutions in planning admission and curricular requirements and for lower courts in deciding similar cases. Hence, those who are interested in evaluating the impact of the Rehabilitation Act of 1973 on opportunities for the handicapped must await future judicial interpretation.

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86. 99 S. Ct. at 2370.
87. *Id.*