INTRODUCTION

Nearly forty-four million Americans are physically or mentally handicapped.\(^1\) Their members come from every race, religion, sex, and age group.\(^2\) They include people who are blind, deaf, mentally retarded, and individuals dependent on a wheel chair or crutches. Their handicap may be conferred at birth or come later as a result of disease or accident.\(^3\) Each day members of this group must forego, or suffer indignities in attempting, what many Americans take for granted: using public streets, eating in a restaurant, test driving a car, using an elevator, attending a school of their choice, or holding down a job.\(^4\)

Numerous factors contribute to blocking the handicapped individual's participation in society.\(^5\) However, two of the chief factors are architectural and attitudinal barriers.\(^6\) Examples of architectural barriers include high curbs, cars without hand controls and lack of braille letters in elevators.\(^7\) Attitudinal barriers stem from a feeling of anxiety which causes able-bodied individuals to look away or avoid contacts with disabled people.\(^8\) There is also a feeling that a handicapped individual cannot and should not be required to contribute to society.\(^9\)

In recent years handicapped people have begun a major attack on the factors which block their integration into society's mainstream.\(^10\) As one means of achieving this goal, handicapped individuals have turned to the courts in increasing numbers.\(^11\)

3. Id.
6. See id. at 15-19.
7. Id. at 15.
11. See Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifica-
Congressional concern for the needs of handicapped people led to the introduction of the Rehabilitation Act of 1973. Handicapped individuals hoped that section 504 of the Act would boost their integration effort by imposing affirmative obligations on recipients of federal funds.

In *Southeastern Community College v. Davis* the Supreme Court held that section 504 of the Rehabilitation Act of 1973 did not require an educational institution to make substantial modifications in its program to enable handicapped individuals to participate. The method used by the Court to reach this decision has precluded one type of affirmative obligation under section 504 while leaving open the possibility of a second type. In addition, the decision provided little guidance for resolving disputes under section 504.

To provide a basis for understanding the *Southeastern College* decision and its implications, this casenote examines the origins and early interpretations of section 504 and its implementing regulations, and the double meaning which the Court has imparted to affirmative obligations under section 504.

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14. Section 504 provides: "No otherwise qualified handicapped individual in the United States, as defined in section 706(6) 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." 29 U.S.C. § 794 (1976).

15. This is evidenced by the type of suits brought under section 504. See Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1278-79 (7th Cir. 1977) (class action by mobility-disabled persons to require transportation authority to take affirmative steps regarding transportation system); Haldeman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1977) (class action by mentally retarded force institution to provide education, training and care); Barnes v. Converse College, 436 F. Supp. 635, 636 (D.S.C. 1977) (suit by hearing impaired individual to force college to provide an interpreter); Hairston v. Drosick, 423 F. Supp. 180, 181-82 (S.D. W. Va. 1976) (parents of child with minor physical impairments brought suit to force school district to admit the child to the regular classroom).


17. *Id.* at 2370.

18. See notes 57-75 and accompanying text infra.
The goal of the Rehabilitation Act was to "enable millions of . . . disabled Americans to lead happier, more productive lives and enjoy a greater sense of dignity and self-worth." The provisions of section 504 aid in achieving that goal by prohibiting "discrimination, exclusion or denial of benefits to otherwise qualified handicapped individuals by any program or activity receiving federal financial assistance." The Act was amended in 1974. However, except for a change in definition of a handicapped individual, section 504 was left intact.

The Act did not provide for enforcement procedures or the issuance of regulations. But a Senate Report on the 1974 Amendments states that: "[I]t is clearly mandatory in form, and such regulations and enforcement are intended." The responsibility for coordinating the enforcement efforts under section 504 was given to the Department of Health, Education and Welfare. But the Department had to be prodded by an executive order and a court decision before they issued any regulations. Since then, numerous departments have promulgated or proposed regulations implementing section 504 substantially following the outline and thrust of the HEW regulations.

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24. Id.
25. Id. at 40, reprinted in [1974] U S. CODE CONG. & AD. NEWS 6373, 6391. The Department of Health, Education and Welfare is hereinafter referred to as "HEW".
29. The Transportation Department has already promulgated regulations, 49 C.F.R. § 27.1-27.129 (1979). The other departments have merely proposed regulations. See 44 Fed. Reg. 4620-29 (1979) (Agriculture); 43 Fed. Reg. 53765-67 (1978) (Commerce); 43 Fed. Reg. 16652-69 (1978) (Housing and Urban Development); 44 Fed. Reg. 22372-82 (1979) (Interior). The regulations provide guidelines in the areas of employment, program accessibility, education, and health, welfare and social services. They provide numerous examples of situations in which the effect of the activity on handicapped people must be considered, and, where necessary, the kind of corrective action to be taken. See, e.g., id.
With handicapped individuals hopeful that section 504 would impose affirmative obligations on the recipients of federal funds, and recipients fearful that the section would prove costly as well as technically impossible, it was inevitable that much litigation would ensue.

Since the regulations lagged behind the passage of the Act by three years, the first court decisions were issued without consideration for the regulations. The early decisions interpreting the requirements of section 504 held its provisions were satisfied simply by allowing handicapped persons to participate in an activity without providing any aid for them. However, this trend was reversed beginning with a West Virginia decision which held affirmative efforts must be made to include handicapped people within the program. Once the regulations were issued, this approach became the dominant one.

Prior to Southeastern College, only one court had addressed the validity of the regulations. That court upheld their validity because the regulations were reasonably related to the statute’s purpose. In Southeastern College the questions of affirmative ob-

30. See note 15 and accompanying text supra.
31. BUSINESS WEEK, July 3, 1978, at 22. A transportation planning engineer stated it would take $1.5 billion to make New York’s subway system accessible to handicapped people while it was estimated that it would cost $2 billion to adapt Chicago’s city transit and commuter rail service. Id.
33. United Handicapped Fed’n v. Andre, 409 F. Supp. 1297-1301 (D. Minn. 1976), vacated, 558 F.2d 413, 416 (8th Cir. 1977); Snowden v. Birmingham-Jefferson County Transit Auth., 407 F. Supp. 394, 397 (N.D. Ala. 1975), aff’d, 551 F.2d 862 (5th Cir. 1977) (in both cases the courts held that section 504 was satisfied by simply allowing the handicapped to ride on the bus even though they would have to furnish their own means of getting on and off the bus).
34. See Hairston v. Drosick, 423 F. Supp. 180, 184 (S.D. W.Va. 1976) (which held that school officials must make every effort to include minimally handicapped children within the regular public classroom situation even at great expense to the school system). This approach was followed by a second court in Bartels v. Biernat, 427 F. Supp. 226, 233 (E.D. Wis. 1977). In Bartels the court granted an injunction restraining the county transit board from owning or operating any public mass transit system which does not assure the availability of mass transportation to handicapped individuals. Id.
37. Id.
CIVIL RIGHTS

1979

SOUTHEASTERN COMMUNITY COLLEGE v. DAVIS

In 1974 Francis B. Davis applied to the Associate Degree Nursing Program at Southeastern College. Because Ms. Davis had a severe hearing disability, the college determined that she was incapable of serving in the program and she would be unable to serve as a registered nurse even if she did complete the program.

Ms. Davis brought suit under section 504 of the Rehabilitation Act of 1973 alleging that she was discriminated against because the college had denied her admission on the basis of her hearing disability.

The district court found Ms. Davis did not satisfy the "otherwise qualified" requirement of section 504. The Fourth Circuit Court of Appeals remanded the section 504 claim to the district court to consider whether Ms. Davis was "otherwise qualified" without regard to her hearing disability. This conclusion was based on the HEW implementing regulations which were promulgated six months after the district court's decision. In addition, the circuit court discussed Ms. Davis' claim that the college was required to modify its program so as to accommodate her and the special difficulties caused by her disability. The court concluded that the requirement of affirmative conduct was supported by the implementing regulations and precedent.

On certiorari, a unanimous United States Supreme Court reversed. This was the first opportunity the Court had to interpret section 504. From an examination of the statutory language, the

39. Id. at 1343. Ms. Davis suffers from a bilateral sensoreneural hearing loss. She has a speech discrimination loss which results in difficulty in understanding speech. She is aware of gross sounds occurring in the area but can only understand speech which is spoken to her. She is an excellent lip reader. Use of a hearing aid improves her hearing level to the outer limits of normal hearing levels. Id.
40. Id.
42. 424 F. Supp. at 1345-46.
43. Davis v. Southeastern Community College, 574 F.2d 1158, 1160 (4th Cir. 1978).
44. Id. at 1161.
45. Id. at 1162.
46. Id.
49. Id.
Court concluded section 504 did not require educational institutions to disregard the disabilities of handicapped persons. Therefore, an otherwise qualified person under section 504 is one who is able to meet all of a program’s requirements in spite of his handicap. This definition was reinforced by the implementing regulations.

The Court next focused on the argument that section 504 compelled the institution to substantially modify its program to accommodate handicapped people. The Court found the regulations did not appear to require substantial modification. Such interpretation would go beyond the statute’s authorization, for neither the language, purpose, nor history of section 504 revealed an intent to impose an affirmative obligation on all recipients of federal funds.

AFFIRMATIVE ACTION OR AFFIRMATIVE STEPS

The Southeastern College decision leaves the future of affirmative action obligations under section 504 unclear. This conclusion follows from the varying senses in which the Court uses the word affirmative action and the Court's failure to discuss the legislative history of section 504.

Affirmative action is characteristically a program aimed at remedying past discrimination through the discriminatee's advancement in employment or education. It typically involves a "decision to go beyond the mere adoption of passive, prospective, nondiscriminatory principles and to focus on the active implementation of specific procedures designed to promote the status or number of discriminatees in a given setting." The remedy may be imposed upon a finding of discrimination by the judiciary, the legislature, or the individual institution. Quota systems and seniority relief are methods often used in affirmative action programs.

At the same time, affirmative action has also been defined as steps taken "to avoid, to a reasonable extent, placing minority

50. Id. at 2367.
51. Id.
52. Id.
53. Id. at 2368.
54. Id. at 2369.
55. Id. at 2369-70.
57. Id. at 582-83.
58. Id. at 583.
59. See id. at 586, 597-98.
group members at a competitive disadvantage because of the characteristics that put them in the minority.\textsuperscript{60} Under this definition, it has been suggested that affirmative action means something different in each case according to the nature of the particular type of discrimination, such as sex, race, or religion.\textsuperscript{61}

In order to understand when this latter form of affirmative action may be required, it is necessary to understand two different types of discrimination. The prohibition against discrimination is usually understood "to apply to the intentional deprivation of certain persons rights that are accorded others, or the unequal treatment of essentially equal classes of persons."\textsuperscript{62} There are situations, however, which do not fit into that framework.\textsuperscript{63} One example is providing a person with equal services when that person is by nature incapable of making effective use of the services.\textsuperscript{64} In such circumstances, the institution providing the services may be working a passive discrimination against that person,\textsuperscript{65} and it may be required to take affirmative steps to eliminate or avoid such discrimination.\textsuperscript{66}

Hence, the difference between the two definitions of affirmative action is one of emphasis. The first one indicates an overall program aimed at increasing the discriminatee's position or number in a program. The second definition simply makes it easier for the discriminatee to participate in the program.

After comparing section 504, which makes no reference to affirmative action, with other sections of the Act, which do specifically refer to affirmative action, the Court concluded Congress knew how to provide for affirmative action when it wanted to do so.\textsuperscript{67} From the other sections of the Act cited, it is clear the Court was here referring to the type of affirmative action where the aim is to increase the handicapped's status or number in a given setting.\textsuperscript{68} Even though the Court refrains from specifically stating it, the \textit{Southeastern College} decision apparently precludes this type

\textsuperscript{60} Note, \textit{Affirmative Action Toward Hiring Qualified Handicapped Individuals}, 49 S. Cal. L. Rev. 785, 791 (1976).
\textsuperscript{61} \textit{Id.} at 801.
\textsuperscript{64} \textit{Id.} at 564-68.
\textsuperscript{65} \textit{Toward Equal Rights, supra note 63, at 687.}
\textsuperscript{67} 99 S. Ct. at 2369.
\textsuperscript{68} Other sections of the Act mandate inclusion and advancement of handicapped individuals. See, e.g., 29 U.S.C. § 793 (1976).
of affirmative action under section 504.69

In its concluding remarks the Court discussed the difficulty of distinguishing between illegal discrimination and lawful refusal to extend affirmative action70 and noted that technological advances may make it possible to enhance opportunities for the handicapped without imposing financial and administrative burdens.71 Thus, a point might be reached "where a refusal to modify an existing program might become unreasonable and discriminatory."72 In this context the Court pointed out that a recipient of federal funds under section 504 may, at some point, have to take affirmative steps to avoid discrimination, that is, take steps to reduce the competitive disadvantage that handicapped individuals suffer because of their handicapping characteristics.73

Southeastern College was not such a case because substantial modification would have been required74 and the Court doubted the respondent could benefit from the modification.75 However, apart from the facts of the Southeastern College case and the Court's brief reference to "undue financial and administrative burdens," no guidance is given as to when such affirmative steps might be required.76

As a consequence the Court left open the possibilities in a number of situations which have already arisen under section 504 and others which are quite likely to arise. For instance, what happens when the handicapped individual could benefit from the modification but the recipient would have to spend $750 to $1000 for the modification.77 Is that amount of money substantial, and even if it is, would the recipient be required to make the modification because the handicapped individual would benefit from it?

Questions regarding mass transportation, especially buses, have been frequently litigated under section 504. The early decisions held that section 504 was satisfied if handicapped people were simply allowed to use the transportation vehicles even though they might have to make their own arrangements for get-

69. From its discussion the court could have drawn the conclusion that since section section 504 made no reference to affirmative action, none could have been intended. Yet the Court refrained from taking this final step. Id.
70. Id. at 2370.
71. Id.
72. Id.
73. Id.
74. Id. at 2368, 2370.
75. Id. at 2368.
76. See id. at 2362-70.
77. See Barnes v. Converse College, 436 F. Supp. 635, 636-39 (D.S.C. 1977) (the plaintiff was a hearing impaired teacher at a School for the Deaf and Blind in a state which periodically required teachers to earn additional college credits).
ting on and off the buses. These decisions were primarily based on the state of available bus technology. Meanwhile, the Department of Transportation instituted the Transbus Project which was "designed to develop a new generation of buses for general use in federally assisted urban mass transportation service in the United States." As part of this project, design and experimental use of low-floored, ramped buses (transbuses) was begun with a view to their safe and efficient operation in day-to-day transit services. The Transbus Project was intended to effect only new buses with special interim services, such as vans and small buses, meeting the handicapped's immediate needs. By 1977, the state of the art had developed to such a point that transbus deliveries could begin in three and one-half years. Under these circumstances a group of handicapped individuals attempted, through litigation, to force a transit authority to include transbuses in its order for new buses. The issue was not resolved in that case and the Southeastern College decision moves us no closer to an answer.

A second dilemma, given the Department of Transportation's commitment to transbuses, persists. What happens when equipment and operational techniques—hydraulic lifts and wheelchair securing devices—sufficient to refit existing buses become readily available? Would a recipient of federal funds fall within section 504's requirements by relying solely on transbuses or must some effort be made to adjust buses already in use?

Furthermore, a recipient's obligation to make changes which are small on an individual basis but which might, on a larger scale, involve a considerable expenditure of time and money remains in doubt. It is conceivable that modifying the height of door knobs or the width of doors throughout a complex of buildings could be financially burdensome in a particular case and perhaps the resolution of the problem in that situation would turn on the number of

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78. See note 33 and accompanying text supra.
81. Id.
84. Id. at 8.
85. Id. at 11 (the court concluded the defendants' motion for summary judgment was premature).
potential beneficiaries of the change. For example, in *Southeastern College* Ms. Davis would have been the sole beneficiary whereas adjusting the width of doors could potentially benefit a significant number of handicapped individuals.

Because the Court did not clarify the basis for imposing or precluding affirmative action aimed at reducing handicapped individual's competitive disadvantage, it is difficult to resolve both real and hypothetical disputes under section 504.

Additionally, the uncertainty created by the Court's murky distinction between affirmative action and nondiscrimination raises questions about the continued validity of implementing regulations promulgated by agencies of the federal government. The regulations involved in the *Southeastern College* decision were upheld because they did not require extensive modification. However, the validity of the remaining regulations is dependent upon what action they require. The regulations can go no further than the statute authorizes. Hence, if the regulations call for an affirmative program to increase the status or number of handicapped individuals in a given setting, they will be invalid. If, however, they direct a recipient to take affirmative steps in order to enhance the opportunities for handicapped people without imposing undue financial and administrative burdens, they will be valid. Since the Court has provided little insight into what situations are encompassed in the second category, the status of the implementing regulations is undecided.

AN ANALOGY TO SECTION 601 OF THE CIVIL RIGHTS ACT

The Court left open an alternative method for imposing the second type of affirmative action under section 504. This results from the Court's failure to discuss the legislative history of section 504 even though the Court concludes the legislative history reveals no intent to impose affirmative obligations on all recipients of federal funds.

Of the two legislative comments on section 504, the only in-
constructive one states:

Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, and section 901 of the Education Amendments of 1972. The section therefore constitutes the establishment of a broad government policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap. . . .

If the Court had concentrated on the similarity of section 504 to section 601 of the Civil Rights Act of 1964, the Southeastern College outcome may have been different. Section 601's language also does not make specific reference to affirmative action obligations, but substantial obligations have been imposed under that statute.

In *Lau v. Nichols* a class action suit was brought by non-English-speaking Chinese students who received no supplemental instruction in the English language. The group charged that they were effectively being excluded from participation in an educational program and sought to have the situation rectified. The Supreme Court determined that section 601 required the school district to take affirmative steps to correct the language deficiency.

Congress made specific reference to section 504's similarity to section 601. Since the Court did not address this issue in its decision in Southeastern College, this approach may still be viable.

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98. No case has dealt with affirmative obligations under § 901 of the Education Amendments of 1972.
100. *Id.*
101. *Id.* at 564.
102. *Id.* at 566.
103. *Id.* at 565.
104. *Id.* at 568-69. The Court remanded the action to the circuit court for the fashioning of appropriate relief. *Id.*
105. See note 97 and accompanying text *supra*.
106. In the past the Court has been willing to reexamine a statute's legislative history even though it had previously interpreted the statute. Compare *Monell v. Department of Social Service*, 436 U.S. 658, 690-92 (1978) with *Monroe v. Pape*, 365 U.S. 167, 180-87 (1961) and *id.* at 211-23 (Frankfurter, J., concurring in part, dissenting in part).
It holds out some chance of success since affirmative obligations have been imposed under section 601.

CONCLUSION

In its first opportunity to interpret section 504 of the Rehabilitation Act of 1973, the Supreme Court drew a distinction between (1) affirmative action aimed at increasing the number or status of handicapped people in a program, and (2) affirmative action aimed at reducing the competitive disadvantage which handicapped individuals suffer because of their handicap. The Court eliminated the first type of affirmative action as a requirement under section 504. The second type of affirmative action may be necessary in order to comply with section 504. However, the Court provided an inadequate basis for determining the circumstances which require a recipient of federal funds to act affirmatively. Since recipients will be anxious to clarify their obligations, while handicapped people will be anxious to further define the benefits they can expect, further litigation of section 504 is inevitable. In implementing the Southeastern College decision, the lower courts are likely to reach divergent outcomes on substantially similar facts. For this reason, the obligations imposed by section 504 will continue to fluctuate until the Supreme Court has a second opportunity to clarify them.

Betty L. Egan—'81

107. For example one court might conclude that the expenditure of $1000 on the part of a small, private college is substantial while another court might not. See note 77 and accompanying text supra.