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LITIGATING FOR THE RIGHTS OF HANDICAPPED PEOPLE

*Sy DuBow**

Litigating the rights of the handicapped is often a case of sensitizing the court to the myriad of obstacles that handicapped people face in contemporary society. As the Legal Director for the National Center for Law and the Deaf, the author has been at the forefront of this emerging specialty. In this Article, Mr. DuBow discusses various litigation strategies, including preparing the handicapped plaintiff for trial, drafting of pleadings and use of pre-suit correspondence, and arguments in opposition to likely defenses.

The ultimate goal of handicap litigation is not merely identical treatment such as admission to federally assisted educational programs, but equivalent treatment, such as providing auxiliary aids to insure equal opportunity to participate in those programs. The unique difficulty in achieving this goal through the judicial system is due to the need to educate and sensitize the court.

Most judges are unaware of all of the obstacles handicapped individuals must face both because of their handicap, and because of society's failure to integrate handicapped individuals. Consequently, many judges do not react with the same degree of insistence on equal treatment with regard to disabled individuals as with other protected classes. Under the Rehabilitation Act of 1973,¹ the entire case from the initial complaint through pretrial briefs and presentation of evidence must be designed to show the trier of fact that the defendant's practice discriminates against qualified handicapped individuals.

This Article will discuss the practical aspects of enforcing, through litigation, the statutory right of handicapped persons to equivalent treatment as provided by Section 504 of the Rehabilitation Act.² The analysis will include both offensive tactics for the handicapped

* Legal Director National Center for Law & the Deaf; B.A. Northwestern University, J.D. George Washington University.

1. 29 U.S.C. §§ 701-794 (1973).

2. 29 U.S.C. § 794 (1973) provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706 (g) 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.

plaintiff as well as suggested strategies for overcoming defenses posed by recipients of federal financial assistance.

PREPARATION FOR TRIAL

Section 504 is a broad policy statement concerning the civil rights of handicapped people. The long delayed³ regulations to Section 504 require recipients of federal financial assistance to provide auxiliary aids to enable qualified handicapped students to participate in a school's educational programs,⁴ to afford a handicapped person an equal opportunity to benefit from health, welfare and other social services,⁵ and to "make reasonable accommodation [in employment] to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee. . . ."⁶

In drafting the complaint under Section 504 for federal court, the attorney must allege that the plaintiff is a handicapped individual within the meaning of the regulations.⁷ It is also essential to allege that the plaintiff is a "qualified handicapped person" as defined in the Section 504 regulations with respect to employment, elementary, secondary, postsecondary and adult education, and health and social services.⁸ Showing that the handicapped person has been accepted by a college program demonstrates that he/she is otherwise qualified or eligible for auxiliary aids.

3. The regulation to Section 504 was signed May 4, 1977, more than four years after the passage of Section 504 of the Rehabilitation Act of 1973.

4. 45 C.F.R. § 84.44(d) (1977) and 45 C.F.R. § 84.34(a) (1977).

5. 45 C.F.R. § 84.52(d) (1977).

6. 45 C.F.R. § 84.12(a) (1977).

7. 45 C.F.R. § 84.3(j) (1977) provides:

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

8. 45 C.F.R. § 84.3(k) (1977) provides:

(k) "Qualified handicapped person" means: (1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question; (2) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act; and (3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity; (4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

In *Davis v. Southeastern Community College*,⁹ the district court, deciding the case approximately six months before the regulations to Section 504 became effective, defined the term "otherwise qualified" in its "ordinary common meaning."¹⁰ The plaintiff had "to [be] otherwise able to function sufficiently in the position in spite of [her] handicap, if proper training facilities [were] suitable and available."¹¹ Applying this definition, the court found that the plaintiff was not "otherwise qualified" to be admitted to a nursing program because her hearing disability would prevent her from completing the required clinical training, and would restrict her effectiveness as a registered nurse after graduation.¹²

On appeal, the Fourth Circuit held that the district court erred by considering the nature of the plaintiff's handicap in order to determine whether or not she was "otherwise qualified" for admittance to the nursing program.¹³ Rather, under the new regulations to Section 504, the handicapped plaintiff is "qualified" if she "meets the *academic* and *technical* standards requisite to admission or participation in the recipient's education program or activity."¹⁴ The circuit court also pointed out that a handicapped person's inability to function effectively in all roles which registered nurses may choose for their careers should not foreclose them from admission. The court noted that there are a number of settings in the medical community where a hearing-impaired person could perform satisfactorily as a registered nurse, such as in industry or a physician's office. A hearing-impaired nurse would be especially sensitive to the medical and emotional needs of hearing-impaired patients.¹⁵

The handicapped plaintiff must also allege that the defendant is a recipient of federal financial assistance. Furthermore, if the defendant is a city or county which receives revenue sharing funds, the complaint should so state, because such municipalities are prohibited from discriminating on the basis of handicap pursuant to the State and Local Fiscal Assistance Amendments of 1976.¹⁶

In cases in which a handicapped individual or group faces an emergency situation requiring prompt injunctive relief,¹⁷ further

9. 424 F. Supp. 1341 (E.D.N.C. 1976).

10. *Id.* at 1345.

11. *Id.*

12. *Id.* at 1345-56.

13. *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978).

14. 45 C.F.R. § 84.3(k)(3) (1977), *quoted with approval* at 574 F.2d at 1161.

15. 574 F.2d at 1161 n.6.

16. 31 U.S.C. § 1242(a)(1) (West Supp. 1978).

17. *See Williams v. Illinois Dep't of Public Aid* (N.D. Ill., filed Feb. 21, 1978) (deaf woman needed an interpreter to be qualified for food stamps); *Barnes v. Converse College*, 436 F.

elements must be alleged. The requisite elements will depend however on where the action is brought because courts vary in the tests they apply before granting a preliminary injunction. Most circuits require that the following four prerequisites be alleged and proved:¹⁸

(1) a substantial likelihood the plaintiff will prevail on the merits; (2) the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to the defendant; (3) granting the preliminary injunction will not disserve the public interest; (4) a substantial threat that the plaintiff will suffer irreparable harm if the injunction is not granted.¹⁹

Some circuits, however, follow the less rigorous "balance of hardship" test,²⁰ under which the court need be satisfied only that the plaintiff has a "probable" right under which he/she may recover." The court then must "balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant and if they decide the balance of hardship should appear in the plaintiff's favor then the injunction must issue."²¹ Furthermore, "considerable weight is given to the need of protection to the plaintiff as is contrasted with the probable injury to the defendant."²² Unlike the four prerequisites test, the "balance of hardship" test does not require proof of likelihood of success on the merits, but only that the recovering party has a probable right under which he/she can recover. Whichever test the court applies, the moving party must always prove that he/she will suffer irreparable harm if the injunction

Supp. 635 (D.S.C. 1977) (deaf student needed interpreter services in class to keep her job); *Bartel v. Biernat*, 427 F. Supp. 226 (E.D. Wis. 1977) (handicapped group confronted a public transit company which was about to order inaccessible buses); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd* 556 F.2d 184 (3d Cir. 1977) (blind teacher applied for a job vacancy that was about to be filled).

18. *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976); *S.E.C. v. Senex Corp.*, 534 F.2d 1240 (6th Cir. 1976); *Hudson Tire Mart, Inc., v. Aetna Cas. and Sur. Co.*, 518 F.2d 671 (2d Cir. 1975); *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567 (5th Cir. 1974); *Pennsylvania ex rel. Creamer v. U.S.D.A.*, 426 F.2d 1387 (3rd Cir. 1972); *S.E.C. v. Pearson*, 426 F.2d 1339 (10th Cir. 1970); *Automatic Radio Mfg. Co. v. Ford Motor Co.*, 390 F.2d 113 (1st Cir. 1968), *cert. denied*, 391 U.S. 914 (1968); *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958); *Ross-Whitney Corp. v. Smith, Kline and French Labs.*, 207 F.2d 190 (9th Cir. 1953).

19. *Duran v. City of Tampa*, 430 F. Supp. 75, 77 (M.D. Fla. 1977), *citing Morgan v. Fletcher*, 512 F.2d 236, 239 (5th Cir. 1975).

20. *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189 (4th Cir. 1977); *Sinclair Ref. Co. v. Midland Oil Co.*, 55 F.2d 42 (4th Cir. 1932).

21. *Barnes v. Converse College*, 436 F. Supp. 635, 637 (D.S.C. 1977).

22. *Sinclair Ref. Co. v. Midland Oil Co.*, 55 F.2d 42, 45 (4th Cir. 1932).

does not issue.²³ This is the most crucial prerequisite to the granting of a preliminary injunction.

"Irreparable harm" is an elusive term, usually defined on a case by case basis. However, there are certain general characteristics of "irreparable harm" which help define the concept. The alleged injury must be such that it could not adequately be redressed by final relief after the trial.²⁴ Thus, if the trial on the merits can be held before the occurrence of the injury, there is no irreparable harm.²⁵ Similarly, if money damages at trial could adequately compensate plaintiff for the alleged injury there is no irreparable harm. However, if the type of injury cannot be readily measured in monetary terms, e.g., damages to reputation, emotional distress, or speculative loss of future profits, then there is a greater likelihood that irreparable harm will be found.²⁶ Even when money damages are adequately and easily ascertainable, if the potential economic loss is as great, courts are more likely to find irreparable harm.²⁷ When plaintiff alleges deprivation of constitutional rights, he/she need not show irreparable harm; irreparable harm is presumed.²⁸

What constitutes irreparable harm in an action brought on Section 504? In *Barnes v. Converse College*²⁹ the court found irreparable harm in plaintiff's imminent loss of employment as a teacher if she was not able to succeed in her courses.³⁰ In *Duran v. City of Tampa*,³¹ the court refused to find irreparable harm from mere loss of income or damage to reputation.³² In that case, an epileptic individual applied for a position in the police force and was rejected solely because of his handicap. He brought an action under Section 504 and sought a preliminary injunction. The court was convinced that alleged injuries could be adequately redressed by final relief after a trial on the merits. This holding seems contrary to the general princi-

23. *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2948, at 431 (1973) [hereinafter cited as C. WRIGHT & A. MILLER].

24. *New York Path. & X-Ray Labs., Inc., v. Immigration & Naturalization Serv.*, 523 F.2d 79, 81 (2d Cir. 1975).

25. *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977).

26. *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958).

27. *New York Path. & X-Ray Labs., Inc. v. Immigration & Naturalization Serv.*, 523 F.2d at 81.

28. *American Fed'n of Gov't Employees, Local 1858 v. Callaway*, 398 F. Supp. 176, 194 (N.D. Ala. 1975); 11 C. WRIGHT & A. MILLER, *supra* note 23, at 440.

29. *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977).

30. *Id.* at 638.

31. *Duran v. City of Tampa*, 430 F. Supp. 75 (1977).

32. *Id.* at 79.

ple that money cannot fully compensate a person for damage to reputation. The most significant factor in the *Duran* court's decision not to issue a preliminary injunction was that "an almost immediate trial of these issues [was] anticipated."³³ This fact makes the court's decision more consistent with the principles governing issuance of a preliminary injunction. The court simply reflected the general reluctance to impose such a drastic prior restraint when plaintiff's claim would soon be redressed at a trial on the merits.

Pre-suit correspondence is another important aspect of handicapped litigation. In drafting the statement of facts, it is crucial to list the pre-suit correspondence in chronological order. This should include the client's first written request for auxiliary aids, accommodations or services, and the defendant's reasons for denial. Of course, subsequent written requests for auxiliary aids should be noted. The correspondence will frequently show that the recipient did not try to seek other funding sources, as is required by the regulations, but put the burden on the handicapped person. The pre-suit correspondence may also reveal that the defendant's sole basis for denial was due to the plaintiff's handicap. This should be alleged in a separate clause. Usually, defendants will readily admit that the disability³⁴ was the sole cause, but will justify their actions for reasons of cost of accommodation, job-relatedness, safety, or that the individual didn't satisfy financial prerequisites for auxiliary aids.

The plaintiff frequently is the most effective witness. Through live testimony, he/she can demonstrate to the court whether he/she needs an auxiliary aid; why participation in a classroom would be difficult without one; why other alternatives are not feasible; and what irreparable employment, career, and economic consequences to be faced without an accommodation. For example, in *Barnes*, the plaintiff's testimony through an interpreter showed the court her need for a qualified interpreter to fully understand and participate in a classroom situation.³⁵

The plaintiff's live testimony can also help remove any stereotype or misconceptions the court may have about the person's handicap. Plaintiff's testimony will help the judge understand the nature of the

33. *Id.*

34. In some cases, the defendants had a policy against hiring handicapped persons. See, e.g., *Gurmankin v. Costanzo*, 556 F.2d 184 (3rd Cir. 1977) and *King-Smith v. Aaron*, 455 F.2d 378 (3rd Cir. 1972). In *Davis*, the defendants readily stated disability as the sole reason for not accepting a deaf woman in their nursing program. *Davis v. Southeastern Community College*, 574 F.2d at 1162.

35. *Barnes v. Converse College*, 436 F. Supp. 635, 636-37 (D.S.C.: 1977).

problem and demonstrate how a handicapped person can participate in an educational program with auxiliary aids or perform in a particular job with a reasonable accommodation. Reasonable accommodation may include job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, and the provision of readers or interpreters.³⁶ The acquisition of telecommunication devices can help a deaf person use the telephone.³⁷ For a hard-of-hearing person, the modification of telephone equipment with an amplifier can enable them to communicate through the telephone.

To be an effective witness, the plaintiff must be thoroughly prepared on what to expect in the court proceedings, including the type of questions that may be asked from the defendant's counsel on cross-examination. For a deaf plaintiff or witness, a pre-trial orientation with the interpreter is essential to ensure that they both fully understand one another and to enable the interpreter to determine the client's level of communication. For example, if the deaf person only uses American Sign Language (ASL), the interpreter must be qualified to interpret in ASL. If the interpreter has difficulty reading the signs of the deaf person, it may be necessary to have a deaf person, skilled in reading signs, appointed to reverse interpret.

In preparation for trial, counsel for the plaintiff should gather various types of documentary evidence. If defendants question the plaintiff's disability, attorneys for the plaintiff should have current medical reports establishing the person's disability. In the case of a hearing-impaired plaintiff, a recent audiologist's report showing the level and range of hearing loss and the extent to which it is correctable with a hearing aid should be introduced. Evidence should also be gathered showing that handicapped people have worked successfully in a particular field. Evidence was introduced in *Gurmankin* to show that numerous blind teachers functioned well in the classroom, thereby challenging the justification for blanket exclusion of blind teachers. To further support the irrebuttable presumption argument, the plaintiff's attorney should try to call as witnesses handicapped individuals who have successfully completed an academic program, such as nursing school or medical school, or successfully performed in careers in which the defendant has excluded handicapped people.³⁸ When recip-

36. 45 C.F.R. § 84.12(b) (1977).

37. The telecommunication device for the deaf enables hearing-impaired people to communicate over ordinary telephone lines by typing on a keyboard which prints on a similar device at the other end of the telephone.

38. For example, it might have changed the judge's mind in *Davis*, if deaf licensed registered nurses testified how they successfully performed in the clinic aspects of nursing school programs and how they are able to successfully work in various nursing positions after gradua-

ients speculate as to astronomical costs for providing auxiliary aids and reasonable accommodations, attorneys for handicapped individuals should present expert testimony from interpreters and readers, manufacturers of auxiliary aids, or spokespersons from institutions that have made their programs accessible at reasonable expense.

Expert witnesses should also be used to analyze and testify as to the validation and job-relatedness of challenged tests. The Regulation requires that a test be job-related for the position in question and does not reflect the applicant's or employee's impaired sensory, manual or speaking skills.³⁹ An admissions test or admissions criterion for colleges and universities may not be used if it has a disproportionate, adverse effect on handicapped persons, unless the test or criterion has been validated as a predictor of success in the educational program. The tests must not measure the applicant's impaired sensory, manual, or speaking skills.⁴⁰

An attorney on a tight budget and with limited resources should try to enter into a stipulation with defendant on several issues. A few examples are agreeing that the plaintiff is handicapped; that the defendant receives federal financial assistance; and that the sole reason for excluding the plaintiff was his/her disability. The attorney should also enlist the help of handicapped groups in gathering data and witnesses, as well as informing counsel on ways to deflate the defendant's cost estimates for accommodations. Handicapped individuals and groups may provide several innovative solutions because they have confronted these problems most of their lives.⁴¹ The President's

tion such as in an infirmary at a college or school for deaf students, in a teaching position, in an industrial nursing setting or in a doctor's office.

39. 45 C.F.R. § 84.13 (1977) provides:

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where these skills are the factors that the test purports to measure).

40. 45 C.F.R. § 84.42 (b)(3) (1977).

41. See *Hearings Before the Subcommittee on Select Education of the Commission of Education and Labor*, 95th Cong., 1st Sess. III-V (1977).

Commission on Employment for the Handicapped maintains a directory of organizations of and for the handicapped that an attorney can use.

THE DEFENSES

A typical defense raised by recipients for noncompliance with Section 504 is that the accommodation for handicapped people will be too costly. Plaintiff's counsel must point out that according to the Secretary of HEW, costs for accommodations provide no basis for exemption from Section 504 and the regulation.⁴² In *Davis*, the court of appeals found that the regulation and case law⁴³ "supports the requirements of affirmative conduct on the part of certain entities under Section 504, even when such modifications become expensive."⁴⁴ The appeals court advised the district court to give close attention on remand to the affirmative modifications set out in the regulation.⁴⁵

42. Secretary of HEW Califano stated in his introduction to the regulation the following: ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this Regulation: Congress' mandate to end discrimination is clear. 42 Fed. Reg. 22676 (1977).

43. *Davis v. Southeastern Community College*, 574 F.2d 1158, 1162 (4th Cir. 1978), citing *United Handicapped Fed'n v. Andre*, 558 F.2d 413, 415-16 (8th Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1281-84 (7th Cir. 1977); *Barnes v. Converse College*, 436 F. Supp. 635, 637 (D.S.C. 1977); *Hairston v. Drosick*, 423 F. Supp. 180, 184 (S.D. W. Va. 1976).

44. 574 F.2d at 1162.

45. *Id.* 45 C.F.R. § 84.44(a) (1977) provides:

Academic requirements. A recipient 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.

45 C.F.R. § 84.44(d)(1) provides:

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.

Courts have also recognized that cost is not a defense to providing equal educational opportunity to handicapped children,⁴⁶ or equal access to public transportation for handicapped people.⁴⁷ Plaintiff's counsel should indicate that defendants often can reduce substantially the cost of making their programs accessible by using available tax deductions. Under Section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to \$25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons.⁴⁸

In the case of colleges and universities, the regulation to Section 504 requires the educational institution to assist students in finding other resources for auxiliary aids. However, the ultimate responsibility for providing the auxiliary aids rests with the college or university.⁴⁹ Some colleges and universities have argued that handicapped individuals must also prove financial need to obtain auxiliary aids.

46. In *Mills v. Board of Ed.*, 348 F. Supp. 866 (D.D.C. 1972), the Federal District Court ruled that an alleged lack of money did not excuse the defendant school board's failure to meet the Constitutional and statutory obligations to provide public education for handicapped children. The court held as follows:

[i]f sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be extended equitably . . . the inadequacies of the District of Columbia Public School System . . . cannot be permitted to bear more heavily on the 'exceptional' or handicapped person than on the normal child.

348 F. Supp. at 876.

In *Hairston v. Drosick*, 423 F. Supp. 180, 184 (S.D. W. Va. 1976) the court held school officials must make every effort to include such "minimally handicapped" children within the regular public classroom situation even at great expense to the school system.

47. In *Washington Urban League v. Washington Metro. Area Transit Auth. No.*, 776-72 (D.D.C. 1973), a court ruled that it violated the federal architectural barrier law for Metro to construct without elevators twenty subway stations since it made them inaccessible to physically handicapped persons. The court ordered that the stations be remodelled at a cost of 65 million dollars. See also *Weiss, Equal Employment and the Disabled*, 10 COLUM. J.L. & SOC. PROBS. 457, 491 (1974); *Bartels v. Biernat*, 427 F. Supp. 226 (E.D. Wis. 1977). The court in *Bartels* enjoined acquisition of new mass transit vehicles unless designed for accessibility. The court only permitted acquiring non-accessible vehicles with federal funds if defendant showed a compelling necessity such as "that a failure of the system would result." 427 F. Supp. at 233.

48. See 42 Fed. Reg. 17870 (1977) adopting 26 C.F.R. § 7.0 (1976). South Carolina's income tax law includes a tax deduction for making buildings intended for public use accessible to physically disabled people. S.C. CODE § 12-7-700(16) (1976). Such tax benefits weaken a recipient's cost excuses for not hiring or providing services for handicapped people.

In negotiating a case with a recipient, plaintiff's attorney may suggest that recipients hard pressed for funds explore other sources to pay for accommodations, such as the state Vocational Rehabilitation (V.R.) Agency and charitable organizations. State V.R. Agencies are required under Section 101 of the Rehabilitation Act of 1973 to provide a specified level of rehabilitation services. Those services must include: (1) interpreter services for deaf persons; (2) reader services for blind persons; and (3) telecommunication and other sensory devices on the job. 29 U.S.C. §§ 701-794 (Supp. V 1975).

49. 45 C.F.R. § 84.44(d) (1977) and the analysis at 42 Fed. Reg. 22692, 22693 (1977).

However, a deaf student's ability to pay for his own interpreter is not a valid reason to deny his request. The regulations to Section 504 require recipients of federal aid to make their programs equally accessible to qualified handicapped persons through the use of auxiliary aids,⁵⁰ a duty not contingent upon the financial needs of the handicapped individual involved.

Recipients may also argue that they are complying with the regulations by providing as an interpreter a person with a limited knowledge of sign language. Hospitals, social service offices and schools occasionally use as interpreters staff people or volunteers who know only how to fingerspell and cannot read the signs of a deaf person. The regulation, however, requires effective communication, meaning that qualified interpreters who can readily communicate with a deaf person must be provided.⁵¹

Another tactic used by colleges and universities is urging the handicapped individual to go to other schools,⁵² or to participate in the programs of the one school in a geographic area which is to be made accessible to handicapped persons. Other colleges and universities in that area would also participate in that school's program. HEW has stated in its analysis to the regulations that such an educational consortium for the postsecondary education of handicapped students would not constitute compliance with the regulation on program accessibility.⁵³

Safety is a frequent defense in handicap employment discrimination cases. Safety, however, is often used by employers too broadly. The plaintiff's lawyer must present evidence on how the individual plaintiff, or other similarly situated handicapped people, have been able to perform the job without endangering the lives of their co-workers or themselves. In *Milwaukee R.R. v. Wisconsin Department of Industry, Labor and Human Relations*,⁵⁴ the Wisconsin Supreme Court held

50. 45 C.F.R. § 84.44(d) (1977).

51. 45 C.F.R. § 84.44(d)(2) (1977) and 45 C.F.R. § 84.52 (c) (1977).

52. In the *Barnes* case, the defendant college suggested that other schools or correspondence courses would be a reasonable alternative for the plaintiff.

53. The analysis to the Regulation states:

The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with § 84.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

42 Fed. Reg. 22689 (1977).

54. *Milwaukee R.R. v. Wisconsin Dep't. of Indus., Labor, and Human Relations*, 8 Fair Empl. Prac. Cas. 938 (Wis. Sup. Ct. 1974). See also *Milwaukee R.R. v. Washington Human Rights Comm.*, 11 Fair Empl. Prac. Cas. 854 (Wash. Super. Ct. 1975); Lang, *Employment Rights of the Handicapped*, 11 CLEARINGHOUSE REV. 703 (Dec., 1977).

that a person with asthma and possible back problems would not, because of these disabilities, necessarily endanger his safety in working as a laborer in a diesel house. The court noted the plaintiff's previous competency on jobs requiring strenuous labor and the absence of medical testimony "that the working conditions were or would be in the future, hazardous to his health."⁵⁵

Another common defense tactic in a discrimination case under Section 504 is urging that plaintiffs exhaust their administrative remedies with HEW. However, the United States Supreme Court and the Court of Appeals for the Fourth Circuit have recognized as well-settled that administrative remedies need not be sought if they are inadequate or applied in such a manner as to, in effect, deny petitioners their rights.⁵⁶ It is equally well established that excessive and undue federal agency delays may make an administrative remedy inadequate.⁵⁷ Cases have held that administrative delays of one and two years were sufficiently excessive to justify waiver of exhaustion.⁵⁸ The 1978 Annual Operating Plan of the Office of Civil Rights (OCR), HEW's investigatory and enforcement organization, dem-

55. 8 Fair Empl. Prac. Cas. at 941.

56. *United States v. Anthony Grace & Sons*, 384 U.S. 424 (1965); *McCoy v. Greensboro City Bd. of Educ.*, 283 F.2d 667 (4th Cir. 1960).

57. In *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290 (1923), Justice Holmes indicated that the Court, in waiving the exhaustion requirement because of excessive delays by the administrative agency, would look not only at the state administrative procedure as it existed in statute, but also at how the agency functioned in fact. See also *Adkins v. School Bd. of Newport News*, 148 F. Supp. 430, 443 (E.D. Va. 1957), *aff'd*, 246 F.2d 325 (4th Cir. 1957), *cert. denied*, 355 U.S. 855 (1957).

In *Camenisch v. University of Texas*, No. A-78-CA-061 (W.D. Tex. May 17, 1978), Federal Judge Jack Roberts found that the court must consider the time involved for HEW exhaustion and the effect on the plaintiff. The court noted that:

[t]he applicable HEW regulations contain no provisions for providing emergency relief of the nature requested by plaintiff. All administrative complaints are treated similarly. Plaintiff submits . . . The Office for Civil Rights' Annual Operating Plan for Fiscal Year 1978 reveals that only 26 of 756 handicap complaints filed in 1978 will be investigated. An HEW finding in plaintiff's favor one or two years from now will give him no effective relief whatsoever, for, as the stipulations show, he may very well have lost his employment by then.

Id. at 2-3.

In *Camenisch*, a deaf student moved for a preliminary injunction in federal court to obtain interpreter services without first filing an HEW complaint. Judge Roberts pointed out that "[s]everal courts have held that despite failure to seek an administrative recourse, administrative exhaustion should not be imposed in all instances if there is no realistic possibility of a meaningful remedy." *Alexander v. Yale*, No. N-77-277 (D. Conn. Dec. 21, 1977); *Grossman v. Texas Tech Univ.*, No. CA-5-77-23, slip op. at 2 (N.D. Tex. Nov. 18, 1977), Judge Roberts issued a preliminary injunction against the University of Texas to procure an interpreter for the plaintiff during his completion of his Master's work at the University of Texas and as a condition of preliminary injunctive relief. Plaintiff was required to initiate a complaint with HEW.

58. *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591 (1926).

onstrates the futility of exhaustion.⁵⁹ The operating plan stated that out of the projected 664 handicap complaints within OCR jurisdiction to be filed in Fiscal Year 1978, only 26 will be investigated⁶⁰ with several regions not investigating any new handicap complaints.⁶¹ Of the 453 backlogged handicap complaints only 14 will be investigated.⁶²

Another argument for the plaintiff is that a litigant need not exhaust his administrative remedies if such remedies do not exist. Thus, when the handicapped plaintiff needs emergency relief, such as to avoid termination of employment, as in *Barnes*, administrative remedies are not available since OCR has no provision in the regulations nor any established administrative mechanism to provide emergency relief.⁶³ It should be also noted that private suits by per-

59. 43 Fed. Reg. 7048 (1978). See also *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977). (date of decision was November 1, 1977 and five months after plaintiff's counsel filed a complaint with OCR pursuant to court order, OCR still had not investigated the Crawford complaint).

60. 43 Fed. Reg. 7054 (1978).

61. Region I in Boston, Region III in Philadelphia, Region IV in Atlanta, Region V in Chicago, Region VII in Kansas City, Region IX in San Francisco and Region X in Seattle. Information from tables prepared by HEW, Office of Civil Rights.

62. 43 Fed. Reg. 7054. "Backlog Complaints" means complaints on hand as of 10/1/77 in which the investigation had not begun.

OCR will give the highest investigative priority to carryover complaints, which are complaints in which investigations began prior to October 1, 1977, 43 Fed. Reg. 7050 (1978). There were 112 carryover handicap complaints and OCR hopes to finish investigation of 101 of these.

OCR's record on resolving complaints for violations of Title VI and Title IX is dismal. IN STALLED AT THE START: GOVERNMENT ACTION ON SEX BIAS IN THE SCHOOLS, PROJECT ON EQUAL EDUCATION RIGHTS, NATIONAL ORGANIZATION OF WOMEN'S LEGAL DEFENSE FUND (Nov. 1977). A study conducted on Title IX showed that from 1973 to 1976, OCR investigated and resolved only 179 complaints out of 973 complaints filed for violations of Title IX, which prohibits discrimination based on sex in federally funded schools and colleges. In *Adams v. Weinberger* (now *Adams v. Califano*), 391 F. Supp. 269 (D.D.C. 1975), the court held that the failures of HEW to enforce statutes prohibiting segregation and to bring to the attention of the courts information concerning failures to comply with judicial desegregation orders required the granting of future injunctive relief. Judge Pratt found that:

HEW has often delayed too long in ascertaining whether a complaint or other information of racial discrimination constitutes a violation of Title VI. HEW has also frequently failed to commence enforcement proceedings by administrative notice of hearing or any other means authorized by law although the efforts to obtain voluntary compliance have not succeeded during a substantial period of time. As shown in Section D above, in 39 'unresolved' Swann districts, HEW, having failed during a substantial period of time to achieve voluntary compliance has not commenced enforcement procedures by administrative notice of hearing or any other means authorized by law. Apart from the school districts expressly covered by this Court's February 16, 1973 Order, HEW has not initiated a single administrative enforcement proceeding against a southern school district since the issuance of this Court's Order 25 months ago.

391 F. Supp. at 273.

63. See *Camensisch*, slip op. at 2.

sons acting as private attorneys general "are an invaluable supplement to governmental enforcement and help to vindicate the nondiscrimination policies to which Congress afforded a high priority. In view of the large number of recipients of federal financial assistance who are covered by the nondiscrimination provision of Section 504, the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the [federal government]." ⁶⁴

Finally, recipients can be expected to argue that the regulation as applied constitutes a deprivation of their property without due process of law, in violation of the Fifth Amendment of the Constitution. These recipients will assert that the regulations take their money for a public service without just compensation. Plaintiff's counsel should argue that the regulations do not constitute a taking but are simply a congressional exercise of its constitutional power to impose reasonable regulations on recipients of federal financial assistance. The power of Congress to enact legislation of this sort is based upon the General Welfare Clause of the Constitution.⁶⁵ This clause is expansive in scope, giving Congress wide discretionary power.⁶⁶ It has been the basis for a host of regulations, including those which place conditions on the recipients of federal financial assistance.⁶⁷ The Supreme Court in

64. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). See also *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968).

Moreover, the *Davis* court suggested that should administrative exhaustion be applicable, a court could consider if a plaintiff may be awarded any relief *pendente lite*:

On remand, and since the advent of the HEW regulations, the district court might also deem it advisable to consider other legal issues which we did not reach in this opinion, namely: (1) What is the effective date concerning the relevant sections of the HEW regulations, if any? (2) Did the promulgation of the Section 504 regulations by HEW, and specifically, 45 C.F.R. §§ 84.6-84.10, and separately 45 C.F.R. §§ 80.6-80.10 and 45 C.F.R. Part 81 create administrative relief that must be exhausted? (3) Is the doctrine of "primary jurisdiction" applicable, and if so, how? (4) Should administrative exhaustion and/or "primary jurisdiction" be applicable, should plaintiff be awarded any relief *pendente lite*?

Of course, we express no opinion on the merits concerning these issues, but at least one court has grappled with these issues that are not before us. *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C.-Magistrate's Findings and Order adopting same, entered Sept. 1, 1977, and Nov. 1, 1977, respectively; C-77-173-D; Ward, U.S.D.J.) (deaf handicapped graduate student seeking to compel provision of an interpreter to aid him in completing his school work); see also *Lloyd v. Regional Transportation Authority*, 548 F.2d at 1286, n.29.

Davis v. Southeastern Community College, 574 F.2d 1158, 1163 n.9 (4th Cir. 1978).

65. U.S. CONST. art. I, § 8.

66. *Buckley v. Valeo*, 424 U.S. 1 (1976).

67. *Lau v. Nichols*, 414 U.S. 563 (1974); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947).

Oklahoma v. United States Civil Service Commission,⁶⁸ stated flatly that the United States "does have the power to fix the terms upon which its money allotments to states shall be disbursed."⁶⁹ In *Lau v. Nichols*,⁷⁰ the Supreme Court specifically approved federal legislation which attached anti-discrimination conditions to money allotted to the states.⁷¹ This type of regulation has been upheld in both Title VI and Title IX cases, after which Section 504 was patterned.⁷²

In addition to their constitutional obligation to conform to the requirements of Section 504, recipients are bound by a contractual obligation. HEW sends to each recipient an Assurance of Compliance Agreement in which recipients consent to comply with Section 504 and its regulations, guidelines, and interpretations. The agreement states that federal financial assistance is extended to a recipient in reliance on this Assurance of Compliance. This acts as a binding obligation upon the recipient for the period during which federal financial assistance is extended. A recipient's failure to comply with the requirements of Section 504 constitutes a breach of this agreement with HEW. Having signed this Assurance of Compliance, a recipient cannot subsequently argue that one of the terms of the contract constitutes a taking without just compensation.

Justice Stewart's concurring opinion in *Lau v. Nichols*,⁷³ with which Chief Justice Burger and Justice Blackmun joined, stated that plaintiffs could sue as third party beneficiaries of the contract between HEW and a school district receiving Title VI money. The federal judge in *Crawford v. University of North Carolina*,⁷⁴ relied on this third party beneficiary statement to find a probable right of action for a deaf graduate student to enforce the Regulation to Section 504.

68. 330 U.S. 127 (1947).

69. *Id.* at 143.

70. 414 U.S. 563 (1973).

71. *Id.* at 569.

72. See *Contractor's Ass'n v. Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967). See also *Joyce v. McCrane*, 320 F. Supp. 1284 (D.N.J. 1970).

As a result, regulation by the federal government of the manner in which the defendant spends its resources is not a taking in the classic sense of the concept. See *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *United States v. Causby*, 328 U.S. 256 (1946); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

73. *Lau v. Nichols*, 414 U.S. 563, 571, n.2 (1974).

74. 440 F. Supp. 1047 (M.D.N.C. 1977).

CONCLUSION

Through proper preparation of the handicapped plaintiff for trial, skillful drafting of pleadings and the careful use of presuit correspondence, attorneys can aggressively defend the rights of handicapped people as provided by the Rehabilitation Act of 1973. Only then will Section 504 truly create "a mandate to end discrimination [that will] bring handicapped persons into the mainstream of American life. . . ." ⁷⁵

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75. 42 Fed. Reg. 22676 (1977).