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THE SCOPE OF THE RIGHT TO MEANINGFUL ACCESS AND THE DEFENSE OF UNDUE BURDENS UNDER DISABILITY CIVIL RIGHTS LAWS

Timothy M. Cook*

I. INTRODUCTION

Section 504 of the Rehabilitation Act of 19731 facially prohibits any exclusion of handicapped persons by reason of a handicap "from the participation in . . . any program or activity receiving Federal financial assistance or . . . any program or activity conducted by any Executive agency" as well as any "deni[al of] the benefits of" any such program or activity, and any "discrimination" in such programs.2 Following enactment of section 504, the lead agencies responsible for enforcing that law—initially the Department of Health, Education and Welfare (HEW), and then the Department of Justice—and numerous other agencies as well, promulgated regulations that permitted burdens to be taken into account in rendering programs accessible to handicapped persons, so long as the disabled community was able to effectively and meaningfully participate in those programs.3

These regulations were based on lengthy administrative records that supported this approach and accumulated evidence that the cost of providing effective access to handicapped persons was exaggerated and that the benefits to disabled people, both pecuniary and nonpecuniary, out-

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2. Section 504 provides in pertinent part:
   No otherwise qualified handicapped individual in the United States, as defined in section 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.
3. See infra notes 64-96, 150-58 and accompanying text.
weighed the costs. In 1984, however, the Department of Justice promulgated a new regulation\(^4\) adopting general waiver provisions that eliminated the duty to take "any action" in situations that "would result . . . in undue financial and administrative burdens."\(^5\) As justification for the action, the Department of Justice stated its belief that judicial interpretation of section 504 compelled it to incorporate the new language.\(^6\)

This Article will evaluate these varying approaches, codified in federal regulations, to determine which approach more closely honors Congress' purpose in enacting section 504. It will also evaluate the findings made by the federal agencies during their promulgation of those rules enforcing that law. The Article will then address the declarations of the Supreme Court in *Alexander v. Choate*,\(^7\) and other decisions that have acknowledged the duty to provide disabled persons "meaningful access" to federal and federally assisted programs.

II. THE LEGISLATIVE AND ADMINISTRATIVE HISTORY OF SECTION 504'S MEANINGFUL ACCESS REQUIREMENT

In evaluating the agencies' constructions of the duty to provide meaningful access embodied in section 504, it is important to consider any "ascertainable" legislative intent to discern Congress' purpose in enacting and amending that section.\(^8\) This is necessary to insure that "the agency properly construes its statutory obligations, and that the policies it adopts and implements are consistent with those duties and not a negation of them."\(^9\) An agency must always ascertain whether the will of Congress has been obeyed.\(^10\)

\(^5\) Id. §§ 39.150(a), 39.160(d).
\(^7\) 469 U.S. 287, 301 (1985).
\(^8\) Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970).
\(^10\) Cf INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) (citing Yakus v. United States, 321 U.S. 414, 425 (1941)). The propriety of administration actions concerning disability rights are to be reviewed in light of the well-settled principle of statutory construction that civil rights laws be liberally construed in order that their beneficent objectives may be realized to the fullest extent possible. Section 504 was intended to be "a 'bill of rights' for the handicapped." 119 CONG. REC. 7105 (1973) (statement of Rep. Peyser). During the debates on the 1978 amendments to § 504, Senator Stafford referred to that law as "the base line civil rights provision for handicapped Americans." 124 CONG. REC. 30,328 (1978). "As is apparent from its language, Section 504 is intended to be part of the general corpus of discrimination law." New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979). According to Professor Sutherland:

There has now come to be widespread agreement, however, that civil rights acts are remedial and should be liberally construed in order that their beneficent objectives may be realized to the fullest extent possible. To this end, courts favor broad and
A. The Original Enactment of Section 504

The legislative history of section 504 as originally enacted suggests three propositions: First, Congress was concerned about the exclusion of handicapped persons from federally financed programs, especially severely handicapped persons. Second, Congress identified architectural and communication barriers as a central cause of that exclusion. Third, Congress determined that the elimination of those barriers would entail costs and burdens, but indicated that the costs of exclusion—in both human and economic terms—were the greater evil.

The evil that section 504 was initially intended to eliminate was the exclusion of handicapped persons from federal and federally assisted programs so that they may benefit from services available to the general public. In introducing the bill, Representative Vanik stated, "regard for the rights of handicapped citizens in our country is one of America's shame-

inclusive application of statutory language by which the coverage of legislation to protect and implement civil rights is defined. This policy has found application in determining such questions as, for example, what activities or circumstances were subject to a prohibition against discrimination, what persons were protected against discrimination, and what constitutes a violation. Correlatively, exceptions and limitations which restrict the operation of such laws are strictly construed.


11. Section 504 originated in bills introduced by Representative Vanik in the House of Representatives and Senators Humphrey and Percy in the Senate to amend Title VI of the Civil Rights Act of 1964 to include handicap among the classes protected by that Act. Congress included the language of those bills in three different versions of the Rehabilitation Acts of 1972 and 1973 (the first two versions were vetoed), carrying through the intent of those bills. See Alexander v. Choate, 469 U.S. 287, 295 n.13 (1985). Senators Humphrey and Percy and Representative Vanik expressed the understanding that § 504 would effectuate the intent of their original bills. 118 CONG. REC. 32,310 (1972) (statement of Sen. Humphrey); 119 CONG. REC. 6497 (1973) (statement of Sen. Percy); 119 CONG. REC. 18,137 (1973) (statement of Rep. Vanik). A unanimous Supreme Court determined that the views of Congressman Vanik and Senators Humphrey and Percy are to be given particular weight in interpreting the legislative history of § 504. Alexander, 469 U.S. at 295 n.13, 296 n.15. See also School Bd. v. Arline, 107 S. Ct. 1123, 1126 & n.2, 1128 & n.9 (1987).
ful oversights . . . The handicapped are . . . hidden . . . Only the most
daring and brave risk the dangers and suffer the humiliations they en-
counter . . . But the time has come when we can no longer tolerate
[their] invisibility."\textsuperscript{12}

Senator Humphrey, explaining the need and purposes behind the
bill, noted that "no longer dare we live with the hypocrisy that the prom-
ise of America should have one major exception: millions of children,
youth, and adults with mental and physical handicaps. We must now
firmly establish their right to share that promise . . . I am insisting that
the civil rights of 40 million Americans now be affirmed and effectively
guaranteed by Congress."\textsuperscript{13}

As the Supreme Court acknowledged in \textit{Alexander v. Choate},\textsuperscript{14} section
504 was designed by its sponsors to launch "a national commitment
to eliminate the 'glaring neglect' of the handicapped,"\textsuperscript{15} "which caused
[them] . . . to live among society 'shunted aside, hidden, and ignored.'"\textsuperscript{16}
"In essence," Senator Percy stressed, "our amendment will give the
handicapped their rightful place in society."\textsuperscript{17} Senator Humphrey re-
marked that the bill would "firmly establish the right of these Americans
to dignity and self-respect as equal and contributing members of society,
and to end the virtual isolation of millions of children and adults from
society."\textsuperscript{18}

Congress was mindful not only of the mildly or moderately disabled,
but also of those with severe disabilities. Congressman Vanik and Sena-
tors Humphrey and Percy each focused upon "the most severely handi-
capped."\textsuperscript{19} Handicapped persons who, because of inaccessible programs
and services, had been forced to stay "behind closed doors,"\textsuperscript{20} "the 'ex-
pendables,'" as Senator Humphrey described them,\textsuperscript{21} were the primary
intended beneficiaries of section 504.\textsuperscript{22} The "tragically overdue goal"

\begin{itemize}
\item \textsuperscript{12} 117 \textsc{Cong. Rec.} 45,974 (1971).
\item \textsuperscript{13} 118 \textsc{Cong. Rec.} 525, 526 (1972).
\item \textsuperscript{14} 469 U.S. 287 (1985).
\item \textsuperscript{15} \textit{Id.} at 296 (quoting 118 \textsc{Cong. Rec.} 526 (1972) (statement of Sen. Percy)).
\item \textsuperscript{16} \textit{Id.} (quoting 117 \textsc{Cong. Rec.} 45,974 (1971) (statement of Rep. Vanik)).
\item \textsuperscript{17} 118 \textsc{Cong. Rec.} 526 (1972).
\item \textsuperscript{18} \textit{Id.} at 32,310.
\item \textsuperscript{19} 117 \textsc{Cong. Rec.} 45,974 (1971); see 118 \textsc{Cong. Rec.} 526, 32,310 (1972).
\item \textsuperscript{20} 117 \textsc{Cong. Rec.} 45,974 (1971) (statement of Rep. Vanik).
\item \textsuperscript{21} 118 \textsc{Cong. Rec.} 9495 (1972).
\item \textsuperscript{22} \textit{See} 119 \textsc{Cong. Rec.} 24,588 (1973) (statement of Sen. Williams). In the Rehabilitation
Act, into which Congress inserted § 504, Congress required that vocational-rehabilitation
"serve[s] first those with the most severe handicaps." 29 \textsc{U.S.C.} § 721(a)(5)(A) (1982) (empha-
sis added); \textit{see also id.} §§ 741(a), 762(a), 772(b)(1), 774(b).

Thus, the Secretary of Health, Education, and Welfare (HEW) announced when he issued
his regulation for § 504 that he would "give particular attention in [his] enforcement of section
was the "full integration of the handicapped into normal community living, working, and service patterns." \(^{23}\)

The sponsors focused on the causes of exclusion and concluded that prime among them were architectural and communications barriers. According to Senator Humphrey, section 504 was necessary because of the "problems of transportation and architectural barriers." \(^{24}\) He insisted that these barriers be eliminated, otherwise "the injustice of exclusion remains." \(^{25}\) Similarly, Representative Seymour shared with Congress a letter from a disabled constituent\(^{26}\) complaining of the barriers to enjoyment of the normal benefits of citizenship caused by the inaccessibility of government programs. While discussing his version of the bill that eventually became section 504, Representative Seymour concluded:

> Only recently have we made any kind of an effort to construct ramps allowing handicapped persons to enter public buildings. Time and again, however, the handicapped person finds that he cannot enter a building because there are too many stairs, or the door is too heavy to open by himself. He finds that public telephones and drinking fountains are too high for him to use from his wheelchair, or that the doors to public restrooms are not wide enough for his wheelchair to pass through.

> It is because this long rollcall of discrimination against the handicapped has existed for too long that I am sponsoring an amendment to the Civil Rights Act of 1964 to specifically include the handicapped. \(^{27}\)

Likewise, Senator Kennedy stated that the law would open up "new avenues of opportunity to millions of handicapped Americans" and remove "unnecessary obstacles from their path; obstacles such as discrimination in Federal employment, obstacles such as architectural barriers... All of these barriers have prevented the handicapped from obtaining employ-

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504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973." 42 Fed. Reg. 22,686 (1977).

25. Id.
26. The letter stated:
   > The disabled cannot petition the government except by letter since most public buildings have no access ways for them. A wheelchair or a person on crutches cannot go up those steps. The City Council and City Hall are off limits to the disabled. I know because I tried, [sic] to see Mayor Lindsey on the few times that he stayed in New York. I was later told that there is a back entrance that nobody knows about and by the way the same is true of the building in which Congress meets.

27. Id.
ment, from attending school, even from voting.”28 Numerous other members of Congress, in addition to the committee report on the bill, agreed.29

The legislative history also articulates Congress’ expectation that although accessibility would entail burdens, eliminating the evil of exclusion would economically and morally outweigh the costs. Congress knew that the success and effectiveness of the vocational services provisions of Title I of the Rehabilitation Act30 depended upon enabling handicapped people to go to work, to contribute to the gross national product and the tax coffers, and to participate in the life of the community as well. In hearings before the Senate Committee on Labor and Public Welfare, testimony was presented indicating that “[s]uch problems as . . . difficulties of access to places of work and treatment centers . . . were voiced repeatedly . . . . The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to eliminate architectural barriers.” Senator Taft, a sponsor of the Rehabilitation Act, agreed:

[If we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward elimination of the most disgraceful barrier of all—discrimination. . . .

. . . The measure before us today provides that opportunity on a sound and positive basis so that our Nation’s handicapped

29. See, e.g., S. REP. No. 318, 93d Cong., 1st Sess. 2-3, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2078; 119 CONG. REC. 17,347 (1973) (statement of Rep. Patten); 119 CONG. REC. 24,588 (statement of Sen. Williams); 119 CONG. REC. 15,331 (statement of Rep. Culver). Senator Williams also made clear the intention to address, for deaf persons, “[d]iscrimination in access to . . . public communication facilities because they cannot make use of more normal modes.” 118 CONG. REC. 3320 (1972). Moreover, on the same day it considered § 504, the Senate Committee on Labor and Public Welfare reported that handicapped individuals often were “denied access to transportation, buildings, and housing because of architectural barriers.” S. REP. No. 319, 93d Cong., 1st Sess. 2 (1973). Aware that “technology exists which would enable many who are handicapped to take advantage of existing transportation, communication, and educational systems,” the Committee indicated its understanding that this area had been addressed in the Rehabilitation Act and stated its belief that “all planning of buildings, public and private, transportation systems, communications systems, and all public programs and services must make provision for the needs of handicapped individuals.” Id. at 6-7; see also S. REP. No. 1139, 93d Cong., 2d Sess. 32, 38 (1974).
30. 29 U.S.C. §§ 720-723. The Supreme Court has frequently directed that related legislation be construed consistent with each other’s purposes. Cf. Albermarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975); see also supra note 22.
31. See S. REP. No. 318, supra note 29, at 2082-85.
may return to their rightful place in their families and communities as effective participating members as well as become contributors to our economy. Thus, Congress concluded that the elimination of architectural and communication barriers was a crucial antecedent to the provision of effective rehabilitation services.

Section 504 also made economic sense by freeing handicapped people from depending on public assistance and expensive institutional care. As Senator Humphrey demanded, "Where is the cost-effectiveness in consigning them to public assistance or 'terminal' care in an institution?" Senator Percy further asked, "What is the cost effectiveness or the sense of banishing our handicapped Americans to life on welfare...?"

Senator Percy observed that the cost of making facilities accessible—even existing facilities—"would not be great." But, he reported, "in strictly economic terms, only 36 percent of this country's handicapped people are employed, compared with 71 percent of the nonhandicapped population." If barriers were eliminated, he estimated, "13 percent of the chronically handicapped population aged 17 to 65—189,000 people—could return to work... resulting in total yearly economic benefits of more than $824 million—a sum large enough to offset the cost of my bill."

Moreover, the lawmakers knew that accessible services could be provided because they were told so in an unprecedented three years of hearings on the modern understanding of the capabilities of severely disabled people, the modern techniques of assisting disabled people to realize them, and the historical and contemporary obstacles to achieving them. Congress' systematic finding underlying section 504 was that severely disabled people, as a matter of fact, can live, learn, and work productively in, and as integral members of, the community if architectural and communications hindrances were removed.

34. 118 CONG. REC. 525 (1972).
35. Id. at 11,789. As Senator Javits observed, enabling disabled persons to participate and to work "produces 'cash dividends' by virtue of the handicapped becoming productive and because it turns what could be tax consumers into taxpayers. It is a program with a hard nose as well as a soft heart." 119 CONG. REC. 5887 (1973).
36. 119 CONG. REC. 6496 (1972).
37. Id.
38. Id. at 6497.
39. See Vocational Rehabilitation Services for the Handicapped, Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor, 92d Cong., 2d Sess. 1 (1972); Rehabilitation Act of 1972: Parts I & 2, Hearings Before the Subcomm. on the Hand-
Ultimately, though, the legislation was justified in human and moral terms rather than strict economics. Senator Humphrey asked, "Shall we condemn 2,100 paralyzed Vietnam veterans simply to exist in isolation? Should a wheelchair automatically disqualify 250,000 Americans for jobs? . . . These are harsh questions, but they are questions that must now be forced upon the conscience of America. There can be no further delay in affirming the civil rights of 28 million Americans." Senator Williams likewise pointed to the nation's "failure to recognize the intrinsic rights of the handicapped. For too long, we have been dealing with them out of charity, something that we can do when we have enough time, and enough extra money. This approach has long outlasted its usefulness." Similarly, Representative Hansen appealed to the members of the House to vote "not strictly on the basis of dollars and cents and cost effectiveness, although these items are important. . . . Look at the intent of this bill in terms of human values and life itself. . . . Give not only hope to the handicapped but the possibility of a full and complete life." "If the Nation's architectural and transportation barriers were removed . . . some 200,000 people could return to work," one study reported. But, "of course, in the end, no cost-benefit analysis can ever account for the psychological advantages of self-sufficiency, the social benefits of equal opportunity, or the human costs of continuing to permit existing barriers to further handicap the handicapped."

Representative Vanik acknowledged that the states had "plead[ed] lack of funds," and that providing meaningful educational opportunity...
to handicapped students would be "burdensome to the schools." Thus, from the beginning, Congress was informed that measures to bar the exclusion of disabled people from federally funded programs would be costly and that the financial burden would have to be borne by the institutions receiving federal funds. Nonetheless, Congress decided that those burdens were outweighed by the economic and moral benefits of including handicapped people as United States citizens.

**B. The 1974 Rehabilitation Act Amendments**

In 1974, Congress amended the definition of the term "handicapped individual" as used in section 504 to insure that section 504 would have a broad scope. These amendments are significant for two reasons: First, the amendments affirm Congress' commitment that section 504 be all inclusive and require the elimination of architectural and communication barriers. Second, Congress clarified its intent that the Secretary of HEW promulgate a comprehensive section 504 regulation for recipients of federal assistance.

In hearings conducted by the Senate Subcommittee on the Handicapped on the proposed amendments, HEW officials responded to questions concerning section 504 as follows:

Section 504 . . . enumerates a broad government policy . . . . On the basis of the legislative history, this Department’s Office of the General Counsel has concluded that this provision is clearly mandatory and requires enforcement with respect to all aspects of discrimination . . . . [T]his Department fully intends to treat Section 504 as civil rights legislation that is remedial in design and to construe the legislation broadly to effectuate its purposes, to correct and alleviate conditions adversely affecting handicapped individuals in federally-assisted programs.

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46. 117 CONG. REc. 45,975 (1971).
47. Id.
48. Pub. L. No. 93-516, 88 Stat. 1617 (1974). These were "important amendments that clarified the scope of § 504. . . . [A]s virtually contemporaneous and more specific elaborations of the general norm that Congress had enacted into law the previous year, the amendments and their history do shed significant light on the intent with which § 504 was enacted." Alexander, 469 U.S. at 306 n.27; accord NAACP v. Wilmington Medical Center, 599 F.2d 1247, 1258 n.48 (3d Cir. 1979), cert. denied, 460 U.S. 1052 (1983) ("The 1974 Amendments were enacted to clarify the 1973 Act, and should be accorded great weight when interpreting Congressional intent.").
HEW's view was adopted, almost verbatim, in the Senate Report on the bill.  

The Senate Report further stated that section 504 covered "many forms of potential discrimination" and "was enacted to prevent discrimination against all handicapped individuals, . . . in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs." The Report indicates that section 504 was intended to remedy the injury to "[i]ndividuals with handicaps [who] are all too often excluded from schools and educational programs, . . . [and] denied access to transportation, buildings, and housing because of architectural barriers." With the enactment of the Rehabilitation Act, disabled people were to be provided the "basic human right of full participation in life and society." Thus, as the Supreme Court has recognized, the 1974 amendments "reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.'"  

As Representative Vanik stated, "section 504 . . . guarantees, without qualification, equal rights for the handicapped in federally funded or assisted programs. Its similarity to Title VI of the 1964 Civil Rights Act, in this respect, gives reason to describe section 504 as a Civil Rights Act for the handicapped." Its purpose, he stressed, was to "make available to the handicapped the same government-provided programs and privileges that the nonhandicapped enjoy." In like manner, the Senate Report stated that "[s]ection 504 was patterned after, and is almost

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52. Id. at 50, reprinted in 1974 U.S. Code Cong. & Admin. News at 6400.  
55. 120 Cong. Rec. 11,128 (1974) (emphasis added).  
56. Id. To the same effect, Congress proclaimed that the final goal of the Rehabilitation Act was "the complete integration of all individuals with handicaps into normal community living, working, and service patterns." White House Conference on Handicapped Individuals
identical to" Title VI.\textsuperscript{57}

The legislative history of the 1974 amendments also provides important support for the approach taken in the HEW section 504 regulations. In 1973, six weeks after the enactment of section 504, the members of the Senate Subcommittee on the Handicapped, "as the principal Senate authors of the Act,"\textsuperscript{58} wrote to the Secretary of HEW\textsuperscript{59} urging him to issue regulations to "enforce compliance with the . . . command of the section."\textsuperscript{60} At the hearings on the 1974 amendments, HEW officials responded that they were proposing an executive order pursuant to which "HEW would coordinate the development of a consistent, government-wide approach including the formulation of substantive standards and enforcement strategies," and HEW's Office for Civil Rights was already in the process of "elaborating on the nature and scope of discrimination against handicapped persons."\textsuperscript{61} The Senate Report ratified this approach, noting specifically that "such regulations and enforcement are intended,"\textsuperscript{62} and suggesting that since HEW had "experience in dealing with handicapped persons and with the elimination of discrimination in other areas," that the Department therefore should assume the lead role in implementing section 504.\textsuperscript{63}

C. The HEW Construction

It was April 28, 1977. There were celebrations in the homes and workplaces of disabled people across the nation. The disabled community had demonstrated at each of HEW's ten regional offices and had occupied Secretary Califano's office for twenty-eight hours and the offices of Region IX in San Francisco for twenty-two days.\textsuperscript{64} The Secretary had signed a regulation promising meaningful access to all HEW assisted

\begin{enumerate}
\item \textsuperscript{57} S. Rep. No. 1297, supra note 50, at 39.
\item \textsuperscript{58} The letter is reprinted in the 1974 U.S. Senate Subcomm. on the Handicapped Hearings, supra note 49, at 317.
\item \textsuperscript{59} Id. at 317-19.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id. at 215-16.
\item \textsuperscript{63} S. Rep. No. 1297, supra note 50, at 40.
\item \textsuperscript{64} The events surrounding the promulgation of the regulation are described in the official Department of Education Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973. Office for Civil Rights, Department of Education, OCR Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973, at 18 (1981) [hereinafter Department of Education Handbook]; see also Arline, 107 S. Ct. at 1126 n.3.
\end{enumerate}
programs and activities. That rule would set the standard for every federal agency.

Since the disability community's Magna Carta is the HEW section 504 regulation governing federal grantees, this Article initially discusses that rule's requirements and its factual bases before proceeding to a discussion of the HEW coordination regulation affecting other agencies and HEW's official policy interpretations construing its regulations.

1. The 1977 HEW grantee regulation

On April 28, 1977, HEW promulgated a rule to enforce the rights of handicapped persons to participate in the activities of HEW grantees. The regulation established "a mandate to end discrimination and to bring handicapped persons into the mainstream of American life." The accessibility provisions of the HEW regulation are not waivable. Simultaneously, the HEW regulation creates a long list of ways to provide accessibility and permits any of those methods for providing access.

In drafting a regulation to prohibit exclusion, the Secretary determined that "different or special treatment of handicapped persons, because of their handicaps, may be necessary," for "it is meaningless to 'admit' a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building." The Secretary acknowledged that "providing equal access to programs may involve major burdens on some recipients." Yet the Secretary stressed: "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." The Secretary's section-by-section analysis also addressed the same issue: "The Secretary believes that the standard [for existing facilities] is flexible enough to permit

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65. In a statement accompanying the regulation, the Secretary characterized § 504 as a "charter of equality" to "end the shameful national neglect of handicapped individuals," quoted in DEPARTMENT OF EDUCATION HANDBOOK, supra note 64, at 21.
67. 45 C.F.R. §§ 84.1-84.61 (1986). Following the breakup of HEW, the Department of Education issued its own regulation, 34 C.F.R. §§ 104.1-104.61 (1986), identical to the HEW (now Department of Health and Human Services) rule.
69. Id.
70. Id. (emphasis added).
71. The "analysis of the regulation . . . describes the basis and purpose of each section . . ." 42 Fed. Reg. 22,677 (1977). Such an analysis is entitled to substantial deference since it is issued by the Secretary who not only promulgated the regulations but also was responsible for administering the statutes. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980). The Supreme Court relied upon the Secretary's section-by-section analysis in Southeastern Community College v. Davis, 442 U.S. 397, 406-07 & n.7 (1979), Alexander, 469 U.S. at 305
recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers.”

Describing this principle as “the central requirement of the regulation,” the Secretary emphasized that “[e]very existing facility need not be made physically accessible, but all recipients must ensure that programs conducted in those facilities are made accessible.”

Having set forth the general standard, the Secretary allowed extraordinary flexibility for compliance with the standard. The regulation applied only to “otherwise qualified” handicapped individuals, defined with respect to the provision of services as those who meet the “essential eligibility requirements for the receipt of such services.”

Moreover, section 84.22(b) of the regulation permitted the use of any method that makes a program or activity accessible including “such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities.” The regulation permitted the choice of any of these “means,” but a choice had to be made; the meaningful access requirements could not be waived.

At the same time, section 84.22 expressly provided that structural modifications to existing facilities were not required in order to achieve program accessibility. As the Secretary explained, “[s]tructural changes in existing facilities are required only where there is no other feasible way


73. Id. at 22,677 (emphasis added). The Department of Education Handbook, supra note 64, which was officially “reviewed and [a]pproved for [u]se by the Department of Education, Office for Civil Rights” and “constitutes the legal framework for Section 504,” repeats this requirement. Id. at 3, 182-83, 333. The Handbook states, “Section 504 requires that all buildings and facilities of recipients of Federal financial assistance be made accessible to handicapped persons, insofar as it is necessary to insure that such persons are not denied the benefits of programs or activities.” Id. at 178 (emphasis added).

74. 45 C.F.R. § 84.3(k)(4) (1986).

75. Id. § 84.22(b). HEW allowed small health, welfare and other social service providers an additional method for providing program accessibility in existing facilities. Under § 84.22(c), these providers were permitted to refer a handicapped person to another provider of services who already had an accessible facility. The section-by-section analysis explained the rationale for this option: “The Secretary believes this last resort referral provision is appropriate to avoid imposition of additional costs in the health care area, . . . and to avoid imposing significant costs on small, low-budget providers such as day-care centers or foster homes.” 42 Fed. Reg. 22,689 (1977). “Thus, for example, a pharmacist might arrange to make home deliveries of drugs.” Id.
to make the recipient's program accessible." 76 Even then, the regulation allowed three years to make such changes. 77

Similar flexibility was built into the requirement that grantees eliminate communication barriers:

Auxiliary aides 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. 78

In his section-by-section analysis, the Secretary determined that "the bulk of auxiliary aids" could be obtained without any expenditure by the grantee and that "[i]n those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied." 79

Moreover, the grantee does not need to have all such aids on hand at all times. "Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library." 80 In addition, these requirements only applied to entities with fifteen or more employees. 81

The Secretary built this comprehensive flexibility into the regulation based on his finding that "factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities." 82 The Secretary found that this carefully balanced approach "preserves the essential elements of a strong and effective program for ending discrimination, while avoiding

77. 45 C.F.R. § 84.44(d)(2) (1986). All of these flexible approaches are also embodied in the 1984 Department of Justice regulation. See 28 C.F.R. § 39.150(b), (c) (1986). That regulation, however, additionally allowed the "burdens" waivers in § 39.150(a) and § 39.160(d).
78. 45 C.F.R. § 84.44(d)(2) (1986) (emphasis added).
80. Id.
81. 45 C.F.R. § 84.52(d) (1986). The Secretary explained that "although a small nonprofit neighborhood clinic might not be obligated to have available an interpreter for deaf persons," HEW could "require provision of such aids as may be reasonably available to ensure that qualified handicapped persons are not denied appropriate benefits or services because of their handicaps." 42 Fed. Reg. 22,694 (1977).
the imposition of unnecessary or counterproductive administrative obligations on recipients. The Secretary based this conclusion on a rulemaking record of mammoth proportions compiled over the course of almost a year. In terms of architectural barriers, that record included a study, relied upon by the Secretary and published by him in the Federal Register, which concluded that "because of the flexibility allowed by the regulation, it is expected that most recipients will be able to achieve compliance by altering, at the very most, only one-third of their existing buildings." Analyzing the various alternatives available to the Secretary, the study determined:

The approach finally decided upon, which allows recipients to keep costs minimal by using methods other than physical alteration of all buildings, was believed [by HEW] to constitute the most equitable balance between the interests of excluded handicapped persons and those of recipients. The cost estimates [of this study], when combined with evidence presented elsewhere on the magnitude of the benefits that will be generated, lends support to this decision.

Similarly, the costs associated with the elimination of communication

83. Id. at 22,677.
84. On May 17, 1976, the Secretary published a Notice of Intent to Issue Proposed Rules and sought public comment on 15 identified critical issues. 41 Fed. Reg. 20,296 (1976). A draft proposal of the rule and a statement of the estimated economic and inflationary impact of the draft proposal was attached to the Notice of Intent. In response to the Notice of Intent, over 300 written comments were received and a series of 10 meetings conducted by the Office for Civil Rights were held at various locations across the country.

On July 16, 1976, after analyzing comments received on the critical issues identified in the Notice of Intent, the Secretary published a Notice of Proposed Rulemaking and set forth a revised proposed regulation for public comment. 41 Fed. Reg. 29,548 (1976). In response to numerous requests, the initial 60-day comment period was extended until October 14, 1976, and additional comments received after that date were also considered. A total of more than 700 comments were received in response to the July 16 Notice of Proposed Rulemaking. These were analyzed along with approximately 150 comments sent in response to the May 17 Notice that had been received too late to be analyzed during the first period for comment. An additional 22 public meetings were held after publication of the July 16 Notice to inform interested persons and organizations of the proposed regulation and to solicit their comments and recommendations. Transcripts of all these meetings were made, and analyzed along with the written comments. 42 Fed. Reg. 22,676-77 (1977). For a further discussion of the depth and thoughtfulness of the rulemaking process, see Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 169, 239, 292-94 (1977) [hereinafter 1977 Section 504 Implementation Hearings].

86. Id. at 20,337.
barriers were determined to be "not . . . substantial" since "[a]ids and services can often be provided at minimum expense by making them available" in a central location like a library or resource center.\textsuperscript{87} The overall "conclusion of the analysis" was that:

the benefits forthcoming (psychic as well as pecuniary) provide a substantial offset to the costs that will be incurred. The costs involved will not be as great as is widely thought and the compelling situation of some of the handicapped persons involved tips the balance in favor of proceeding with immediate implementation of the regulation.\textsuperscript{88}

"[I]n all cases," the study determined, "there was evidence for pecuniary benefits that provide substantial offsets to the pecuniary cost involved. Indeed, even if non-pecuniary benefits are not added, the balance of benefits and costs appears [to be] in favor of implementation of the regulation."\textsuperscript{89}

2. The 1978 HEW coordination regulation

On April 28, 1976, President Ford issued Executive Order No. 11,914,\textsuperscript{90} directing the Secretary of HEW to coordinate the implementation of section 504 by all federal departments and agencies extending financial assistance. The Executive Order required the Secretary to establish "standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of Section 504."\textsuperscript{91}

Closely on the heels of the initial HEW grantee regulation, HEW issued a proposed rule on June 24, 1977, to carry out its responsibility under the Executive Order. HEW promulgated a final rule enforcing the

\textsuperscript{87} Id. at 20,361. In terms of the benefits of the regulation, the study concluded that: [In purely economic terms,] [i]ncreased building accessibility will generate benefits in three areas: (1) reduced costs of providing elementary and secondary education to some handicapped children; (2) increased lifetime earning capacity of those additional handicapped youngsters who will now go on to college and (3) the increased earnings capacity of handicapped workers who can now find better employment of their skills in jobs located in newly accessible buildings.

\textsuperscript{88} Id. at 20,337.

\textsuperscript{89} Id. at 20,320.


\textsuperscript{91} Exec. Order No. 11,914, § 1, 41 Fed. Reg. 17,871 (1976).
Executive Order on January 13, 1978.92

This regulation, consistent with the earlier HEW grantee regulation, permitted no waivers. In the same flexible manner as the previous regulation, it required that other agencies' regulations prohibit exclusion based on architectural and communication barriers.93 As the official HEW analysis explained, the rule "does not prohibit architectural barriers; it does prohibit exclusion of handicapped people from federally assisted programs and activities by virtue of such barriers."94

The heads of numerous other federal agencies95 have promulgated the same requirements and compiled their own administrative records that factually supported this approach.96


93. 28 C.F.R. § 41.57 (1986).


96. To take just one of the rulemaking records associated with the regulations compiled in note 95, supra, by way of illustration, the Department of Labor's regulatory analysis determined that "about 105,000 additional handicapped individuals would benefit from more accessible employment and training facilities." 45 Fed. Reg. 66,721 (1980). The Department of Labor concluded that the rule would have a substantial beneficial effect on "persons with severe physical handicaps who are not currently using employment and training services because of architectural or communications barriers but who would avail themselves of these services if they were offered in more accessible facilities." Id. Moreover, "other benefits" would "accrue to society as a result of increased participation by the handicapped" in the form of a reduced need for veterans benefits, rehabilitation, disability, medical and food stamp payments. Id. at 66,718. The Department also acknowledged "intangible benefits such as greater independence for handicapped individuals, a more productive workforce and a larger pool of
3. The 1978 HEW policy interpretations

A department’s interpretation of its prior regulation is entitled to particular deference. After enforcing its regulation for over a year, HEW’s Office for Civil Rights issued two policy interpretations on August 14, 1978.

In Policy Interpretation No. 3, HEW stated that “[b]ecause of the administrative impossibility of continually determining . . . whether mobility impaired individuals will be entitled to services by a given recipient,” the absence of mobility impaired persons residing in an area “cannot be used as the test of whether programs and activities must be made accessible.” After carefully reviewing the problems of smaller grantees and its own enforcement effort to date, and noting the referral option in section 84.22(c) for small employees and the extremely wide range of permissible options available for providing accessible services, the Policy Interpretation provided: “The Department concludes, as it did when the section 504 regulation was adopted, that because the ‘standard (for program accessibility) is flexible’ the regulation ‘does not allow for waivers.’”

Policy Interpretation No. 4 recognized, moreover, that the regulation did not require the impossible, and that isolated hardships and conflicting laws and policies may arise even when the rule was uniformly applied in the vast majority of cases. Thus, the agency permitted grantees to provide physically handicapped persons access to certain of their programs, by means of carrying them, under two circumstances. First, carrying was deemed an appropriate alternative as an interim measure in those instances “when program accessibility can be achieved only through structural changes.”

skilled taxpaying workers.” Id. “[W]hen individuals move from being recipients of various types of welfare payments to skilled taxpaying workers, there are obviously many benefits not only for the individuals but for the whole society.” Id. at 66,721. “The capital costs would largely be one time expenditures while the number of beneficiaries would increase over time.” Id. at 66,718. Moreover, the regulatory analysis stated that the Labor Department, like HEW, permitted small grantees to comply by referral in order to avoid any “undue burden on their limited resources.” Id. at 66,719. The rule would “provide a wider range of employment and training services to the physically handicapped who have difficulties with architectural barriers,” but “excessive financial burdens are not placed on local jurisdictions.” Id. at 66,721.

99. Id. (emphasis added).
100. Id. at 36,035.
Second, carrying was also accepted in "manifestly exceptional cases," situations in which "structural changes" that were "prohibitively expensive or unavailable" would be required. Thus, like its regulation, HEW's policy interpretations thoughtfully struck a sensitive balance between the right of handicapped persons to access and the burdens entailed in providing that right while prohibiting exemptions or waivers of the statutory duty to provide meaningful program accessibility.

D. The 1978 Rehabilitation Act Amendments

In January, 1977, the members of the Ninety-Fifth Congress assembled in Washington. Before a gavel had dropped and before a speech had been delivered, a package appeared on each member's desk with a letter from outgoing HEW Secretary Mathews. The letter stated that the section 504 regulations were completed but he had left office without signing them because he believed it was "in the public interest to lay them before the Congress." Noting that it was "obvious that the requirements under this statute could occasion expenditures by a number of institutions," Secretary Mathews expressed his desire that "the Executive and Legislative branches . . . work together so that it cannot be said that the Executive Branch had pursued policy beyond or in contradiction to what Congress authorized." He asked "the Congress [to] provide whatever clarification is appropriate." 

101. Id. The Office for Civil Rights stated that an example of such a "manifestly exceptional case" was a class in oceanography that of necessity took place in a diving bell. Id.  
102. The Agency has taken the same common sense approach in numerous reported enforcement actions. See, e.g., Letter from A. Hamlin, Assistant General Counsel to Paul J. Forch (May 5, 1978) (sign language interpreters must be made available by schools for tutoring deaf students only if the institution provides tutors as a free service to all students), reprinted in DEPARTMENT OF EDUCATION HANDBOOK, supra note 64, at 190-91; OCR Memorandum from Melvyn Leventhal to Cindy Brown (Sept. 29, 1978) (doors or freight elevators are acceptable means of ingress and egress to existing facilities), reprinted in DEPARTMENT OF EDUCATION HANDBOOK, supra note 64, at 194; OCR Memorandum from Ned Stutman to Ed Redman (Dec. 6, 1979) (lowering water fountains and elevator control buttons for wheelchair users not required in existing facility so long as handicapped persons not denied program access), reprinted in DEPARTMENT OF EDUCATION HANDBOOK, supra note 64, at 190; Letter from David S. Tatel to Robert J. Bolger (June 20, 1977) (inaccessible drug store in existing facility may comply by providing deliveries of drugs outside the store), reprinted in DEPARTMENT OF EDUCATION HANDBOOK, supra note 64, at 211; OCR Memorandum from Burton Taylor to Cindy Brown (Sept. 22, 1978) (public telephone equipped for hearing disabled, special room markers for use of visually disabled, or lowering of mirrors, dispensers, and fire alarms for wheelchair users not required in existing facility), reprinted in DEPARTMENT OF EDUCATION HANDBOOK, supra note 64, at 190-91.  
103. 1977 Section 504 Implementation Hearings, supra note 84, at 73-75.  
104. Id.  
105. Secretary Mathews' action was discussed during the oversight hearings on § 504 con-
In response, Congress indicated that the regulation properly and faithfully conformed to the statutory requirements, and extended those requirements to the Executive. In the twenty-two month period that closely corresponded to the life of the Ninety-Fifth Congress, the regulation was extensively discussed and analyzed on the House and Senate floor. No one spoke in opposition to the prohibition of waivers in the accessibility mandates of those rules. This busy period for section 504 culminated in 1978 with the passage of comprehensive amendments to the Rehabilitation Act. In enacting these amendments, Congress reviewed, affirmed and adopted HEW's course of construction in ten ways:

First, Congress added a provision to section 504 to extend its coverage, and that of the HEW regulation, to federally conducted and grantee programs. This was done to establish a uniform national effort to provide access and to remedy the unfairness of subjecting federal grantees to burdens from which the Executive itself was immune.

Second, Congress made available under section 504 the "remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964" in order to codify the substance of the HEW rule and the

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106. The Ninety-Fourth Congress also had participated actively in and was constantly kept abreast of the HEW regulation. See, e.g., H.R. REP. No. 721, 94th Cong., 1st Sess. 4 (1975). Martin H. Gerry, the Director of HEW's Office for Civil Rights, presented extensive testimony at oversight hearings conducted by the Senate Subcommittee on the Handicapped concerning § 504 and the approach HEW was taking in drafting its regulation. HEW was in the process of "confront[ing] and attempt[ing] to resolve various major policy issues," he stated, so that the regulation "will provide recipients accurate and adequate notice of their specific obligations and will minimize the need to make ad hoc decisions on these questions in the future." Rehabilitation of the Handicapped Programs, 1976: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., pt. 3, at 1491 (1976) [hereinafter 1976 Rehabilitation of the Handicapped Programs]. In addition to dozens of national organizations representing grantees and disabled people, HEW consulted numerous experts on all aspects of the regulation, such as the requirements concerning architectural barriers, in order to "solicit information and opinion to enable us to ensure that specific sections of the regulation adequately deal with areas in which discrimination against handicapped persons has been identified." Id. at 1496-98, 1503-05.

107. See infra notes 144-48 and accompanying text.

108. 29 U.S.C. § 794a(a)(2) (1982) (emphasis added). This provision was designed to "enhance the ability of handicapped individuals to assure compliance with the civil rights provisions of title V." S. REP. No. 890, 95th Cong., 2d Sess. 18 (1978).

109. The Senate Report stated that this provision "codifies existing practice as a specific statutory requirement." Id. at 19 (emphasis added). In Consolidated Rail Corp. v. Darrone, the Supreme Court ruled that "the legislative history reveals that this section was intended to codify the regulations of [HEW] regarding enforcement of § 504." 465 U.S. 624, 635 (1984). Accord Alexander v. Choate, 469 U.S. 287, 304 n.24 (1985) (noting the Consolidated holding that the "1978 Amendments to the Act were intended to codify the regulations enforcing § 504").
intent previously expressed in the 1974 Senate Report that HEW was to promulgate regulations to enforce the broad mandate of section 504.

Third, Congress established an Interagency Coordinating Council to “maximize effort[s]” and insure uniform “implementation and enforcement” of section 504, including “the regulations prescribed thereunder.”

Next, Congress clarified the HEW regulation to confirm its coverage of persons addicted to alcohol or drugs, but excluded for the purposes of employment those whose “current use of alcohol or drugs prevents such individual from performing the duties of the job in question or . . . would constitute a direct threat to property or the safety of others.” This clarification was enacted to alleviate the concern of several members of Congress about the scope of the HEW regulation regarding that issue.

Fifth, Congress authorized the Architectural and Transportation Barriers Compliance Board (ATBCB) to “provide appropriate technical assistance to any . . . entity affected by regulations” promulgated pursuant to section 504 “with respect overcoming to [sic] architectural, transportation, and communication barriers.”

Sixth, in order to aid federal grantees in their compliance with the HEW section 504 regulations, Congress authorized “financial assistance

110. 29 U.S.C. § 794c (Supp. III 1985) (emphasis added). Section 794a(a)(2), of course, does not exhaust the basis for the holdings in Consolidated and Alexander. Section 794c, and each of the other ten statutory provisions, also provide equally sound bases for those holdings.


112. 29 U.S.C. § 792(d)(3) (1982) (emphasis added). Representative Jeffords, the sponsor of this provision, stated on the floor of the House that the purpose of the section was to “help [grantee] . . . eliminate architectural, transportation, and communication barriers where ever they exist,” and noted the Architectural and Transportation Barriers Compliance Board’s (ATBCB) expertise in providing assistance regarding that aspect of 504. 124 Cong. Rec. 13,603 (1978). The legislative history for this section further reveals that ATBCB’s focus was to be on structural modifications required by the HEW regulation “in achieving the desired goals of Section 504” and delineated what it considered “[n]on-structural methods of removing or eliminating barriers” by verbatim reference to the HEW program accessibility regulation: “reassignment of classes or other services to accessible buildings; assignment of aides; home visits; delivery of health, welfare, and other such services at alternate accessible sites; and other such methods short of physical alteration that are permitted in order to achieve program accessibility under Section 504 regulations.” S. Rep. No. 890, 95th Cong., 2d Sess. 17 (1978) (emphasis added). Compare 45 C.F.R. § 84.22 (1986). This definitive statement in the Senate Report leaves little room for disagreement concerning Congress’ awareness and approval of the program accessibility requirement, including its intense flexibility.
... for the purpose of removing architectural, transportation, and communication barriers,” but only upon a demonstration of the “need” for such assistance.113 In addition, Congress also directed the ATBCB to conduct an “assessment of the amounts required to be expended ... to provide handicapped [sic] individuals with full access to all programs and activities receiving Federal assistance.”114

Next, Congress authorized grants for local rehabilitation centers “to provide a focal point in communities” for the distribution of “information and technical assistance,” encompassing specific aids to eliminate communication barriers “such as interpreters for the deaf,” in order to “assist” the “local governmental units” and “nonprofit entities” to “comply with this [Act], particularly the requirements of section [504].”115

114. 29 U.S.C. § 792(h)(1) (1982) (emphasis added). These provisions originated in a proposed amendment to the Labor-HEW Appropriations bill, H.R. 7555, proposed by Representative Jeffords, two weeks after the HEW regulation was issued, which would have authorized $2.4 billion for barrier removal. See 123 CONG. REC. 19,051 (1977). As a result of the 1977 Section 504 Implementation Hearings, supra note 84, however, Representative Jeffords became convinced that “there is still great uncertainty about specifically how much full implementation will cost.” 123 CONG. REC. 37,772 (1977). The studies referenced in § 792(h)(1) were later conducted. See 44 Fed. Reg. 54,954 n.3 (1979); 45 Fed. Reg. 37,629 n.7 (1980). As a result of this report, Congress in 1979 provided an initial $25 million in grants “to assist institutions . . . in the removal of architectural barriers for the handicapped” as a result of “the demands placed on institutions resulting from Section 504 regulations.” H.R. REP. No. 244, 96th Cong., 1st Sess. 85 (1979) (emphasis added). More substantial sums were made available in Title VII of the Education Amendments of 1980 to assist grantees “with the requirements of [section 504].” 20 U.S.C. § 1132a(2)(B) (1983). The intent was to help institutions to comply with § 504. H.R. REP. No. 520, 96th Cong., 1st Sess. 77 (1979).
115. 29 U.S.C. § 775(a)(1), (2) (emphasis added). In keeping with the understanding that compliance with § 504 required providing aids to eliminate communication barriers, as required by the HEW rule, Congress took a number of steps to improve the availability of such services and to ease the financial burden of compliance. For example, Congress authorized grants to assist public or private nonprofit organizations in establishing or operating 12 programs “[f]or the purpose of training a sufficient number of interpreters to meet the communications needs of deaf individuals.” 29 U.S.C. § 774(d)(1) (1982). Section 774(d) was enacted, in part, “in response to the requirements imposed by section 504.” S. REP. No. 890, supra note 112, at 41 (emphasis added). In addition, Congress authorized the Commissioner of the Rehabilitation Services Administration to make grants for the purpose of “expand[ing] the quality and scope of reading services available to blind persons” and “establish[ing] within each State a program of interpreter services (including interpreter referral services) which shall be made available to deaf individuals and to any public agency or private nonprofit organization involved in the delivery of assistance or services to deaf individuals.” 29 U.S.C. §§ 777d(a)(2), 777e(a) (1982).

The legislative history of the 1978 amendments contains voluminous materials demonstrating Congress’ awareness of and special concern for communication barriers. See H.R. REP. No. 1149, 95th Cong., 2d Sess. 12, 16-17, (1978); S. REP. No. 890, supra note 112, at 4, 21, 41-42, 45, 70-71; H.R. CONF. REP. No. 1780, 95th Cong., 2d Sess. 76, 78-79, 81-82 (1978);
Eighth, Congress amended section 501 of the Act\textsuperscript{116} to provide that "[i]n fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation,"\textsuperscript{117} as the HEW Section 504 employment regulation had already permitted. Congress, however, refused to permit that approach to be grafted into section 504's other accessibility guarantees.


\textsuperscript{117} 29 U.S.C. § 794a(a)(1) (1982). Senator McClure's amendment, as originally offered, was a significantly broader proviso "that no equitable relief or affirmative action remedy disproportionately exceeding actual damages in the case shall be available under this section." \textsuperscript{124} CONG. REC. 30,576 (1978). The proposed amendment was vigorously opposed by both the majority and minority Senate managers of the bill. In particular, Senator Stafford stated his concern:

"This amendment . . . would put a ceiling, in my judgment, on the remedy which a person may be entitled to under section 504 of the 1973 Rehabilitation Act. I am concerned about any action which seeks to place a limit upon an individual's civil rights and rights of access.

After hundreds of years of being alienated, degraded, insulted, and otherwise ignored by society, the Congress of the United States has given the handicapped population access to their civil rights in section 504 of the Rehabilitation Act of 1973. This amendment, I fear, would take away part of their rights as individuals.

Id. at 30,578 (emphasis added); see also id. at 30,577-78 (statement of Sen. Cranston). As a result of this opposition, compromise language was agreed upon confining the exclusion to "work place accommodation." 29 U.S.C. § 794a(a)(1). This eliminated any ambiguity about the unqualified right to access under § 504. The debate over the McClure amendment and the action taken on that amendment to modify it illustrates the congressional intent to insure handicapped persons' access to federally assisted activities.

The HEW regulation, consistent with this approach, already had included, for reasons discussed infra at notes 253-65 and accompanying text, an exception to the meaningful access requirement of its employment regulation only, allowing employers to assert an "undue hardship" defense. 45 C.F.R. § 84.12(a) (1986). The HEW coordination regulation also provided for this exception, as did the 1984 Department of Justice regulation. \textit{See} 28 C.F.R. § 41.53 (1986); 28 C.F.R. § 39.140 (1986) (incorporating by reference 29 C.F.R. § 1616.201-1613.806 (1986)).
Ninth, in order to encourage private suits and enforce the HEW regulation, Congress authorized attorney's fees awards for handicapped plaintiffs who prevail in section 504 claims.\footnote{118}

Finally, Congress proclaimed a new congressional declaration of purpose for the Act, "the guarantee of equal opportunity,"\footnote{119} in order to leave no room for gainsayers.

Thus, by these ten discrete statutory actions, Congress demonstrated not only its awareness but also its approval of the HEW regulation. During the Ninety-Fifth Congress and prior to the Secretary's final action on the regulation, disabled Americans had demonstrated at the ten HEW regional offices and in Washington in April 1977, in an attempt to obtain a strong rule. Concurrently, Congress already had been paying

\footnote{118} 29 U.S.C. § 794a(b) (1982). This provision traces its origins to a bill introduced by Representative Koch on August 5, 1977, inspired by the promulgation of the HEW regulations. Representative Koch noted the significance of the HEW rule: "Until recently, many of the rights, guarantees [sic] by title V, often termed the 'Civil Rights Act for the Disabled,' were meaningless because there were no regulations to implement section 504 of that title." However that changed "[t]his spring," he stated, when "Secretary Califano developed and signed these regulations, and a broad antidiscrimination program could finally be set into motion." 123 CONG. REC. 27,821 (1977).

Disabled people had "worked long and hard to obtain these regulations," Representative Koch observed. \textit{Id.} But court actions would also be necessary, he believed, "to guarantee compliance" with those requirements. \textit{Id.} A law regarding attorney's fees, he stated, would make "the courts a viable avenue of recourse for disabled Americans whose civil rights are violated"—those who want "access to a program," or who "face attitudinal and architectural barriers." \textit{Id.}

\footnote{119} 29 U.S.C. § 701 (1982). By this language, the Congress has explicitly stated, in the statutory language itself, its intent to act pursuant to § 5 of the fourteenth amendment, thereby according § 504 all of the dignity bequeathed by the foremost guarantee of our Constitution. See \textit{Fitzpatrick v. Bitzer}, 427 U.S. 445 (1976); \textit{Oregon v. Mitchell}, 400 U.S. 112 (1970); \textit{Katzenbach v. Morgan}, 384 U.S. 641 (1966). Numerous statements were made during the course of debate on the 1978 amendments concerning the problem of barriers and the great benefits to be gained by handicapped people by guaranteeing their access. \textit{E.g.}, 124 CONG. REC. 13,903 (statement of Rep. Gilman); \textit{id.} at 30,311-12 (statement of Sen. Stafford).

In the 1986 Rehabilitation Act Amendments, Congress once again amended the Act's statement of purpose to leave no doubt that for all "individuals with handicaps" the intent of the Congress was "to maximize their employability, independence, and integration into the workplace and the community." 132 CONG. REC. S12,089 (daily ed. Sept. 8, 1986) (quoting § 101 of the Rehabilitation Act Amendments of 1986). Senator Lowell Weicker, Chairman of the Senate Subcommittee on the Handicapped, and the sponsor of this measure, explained: "[Y]ou cannot pin a price tag on human dignity. The dignity of working, of being independent, or becoming part of our towns and communities—that is what the Rehabilitation Act is all about for the people of our country who happen to be handicapped." 132 CONG. REC. S12,096 (daily ed. Sept. 8, 1986) (statement of Sen. Weicker). The purpose of the amendments was "to reaffirm our commitment to the millions of disabled individuals in this country... in their efforts to obtain and maintain employment, achieve independence, and become fully integrated into community life." \textit{Id.} at S12,097.
close attention to the regulation. The issue, as early as then, was waivers. Representative Koch inserted into the record a statement by Dr. Frank Bowe, Director of the American Coalition of Citizens with Disabilities, expressing strong concern over reports that the Secretary was pondering the “inclusion of waivers and loopholes” in the regulation. Senator Cranston, responding to what he termed “reports—or rumors,” wrote a letter to the Secretary and inserted it into the Record. “We in Congress remain firmly committed to ending completely the present segregation of . . . handicapped individuals in our society,” the letter stated. “Section 504—which, as you know, I coauthored with Senators Randolph, Stafford, Williams, and Javits—embodies that commitment.” Senator Cranston made known to the new Secretary his strong approval of the Mathews draft of the regulation that had been sent to Congress the preceding January for review:

Tough, effective regulations implementing section 504 should be issued now, and they should be fully and forcefully implemented so as to achieve the objectives of section 504 at the earliest possible moment. For far too long, handicapped individuals have been closed off from the mainstream of life’s opportunities. Section 504, and the regulations you must approve for its implementation, are their way into our society. Every potential barrier should be cleared from the path of disabled Americans who are desperately and courageously fighting for the basic human rights and freedoms to which, as Americans, they are fully entitled.

Therefore, I categorically reject any notion that a “separate but equal” approach is an acceptable way of dealing with the civil rights of disabled persons.

Access is the key to full participation in our society. Failure to achieve full access for all citizens to activities receiving Federal financial assistance is unacceptable to handicapped Americans, unacceptable to me, and I trust, unacceptable to you as well.

Finally, I view as unacceptable any attempt to load the regulations with avenues for waivers and exceptions that can serve only to generate paperwork and litigation at the expense

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120. E.g., 123 CONG. REC. 10,292 (1977) (statement of Rep. Koch). Representative Koch observed that “the handicapped community has found it necessary to express their dissatisfaction directly to the Department of Health, Education, and Welfare. Tomorrow . . . the handicapped strike . . . I wish the[m] . . . success.” Id.
121. 123 CONG. REC. 10,455 (1977).
of investigation, compliance, and enforcement activities. 122

On April 28, 1977, when Secretary Califano finally issued the long-awaited regulation mandating access and prohibiting waivers, he, as had his predecessor, transmitted a copy to each member of Congress with a cover letter stating:

A number of you have urged me to sign a strong regulation. This regulation is strong. In many cases it calls for dramatic changes in the actions and attitudes of institutions and individuals who are recipients of HEW funds. In implementing the unequivocal Congressional statute, this regulation opens a new era of civil rights in America. . . . I think it especially important that Congress evaluate the regulation, and the implementation process, to ensure that they conform to the will of Congress. 123

Congress responded with approval and acknowledgment that the regulation would entail burdens. 124

Representative Nolan placed in the Record a statement by the Secretary which stressed that "[n]o exceptions to the program accessibility requirement will be allowed." 125 In terms of the elimination of communication barriers, Congress reiterated the Secretary's requirement that "programs must provide auxiliary aids, such as readers in school libraries or interpreters for the deaf, to ensure full participation of handicapped persons." 126

In September, 1977, the Subcommittee on Select Education of the House Committee on Education and Labor held oversight hearings con-

122. Id. at 12,410 (1977) (emphasis added). Furthermore, Representative Dodd criticized a report that the Secretary was "considering major changes which would permit him, in certain cases, to waive the requirement that recipients of Federal assistance make the facilities in which they provide their services accessible to the handicapped." Id. at 10,823 (emphasis added).
123. 1977 Section 504 Implementation Hearings, supra note 84, at 76 (emphasis added).
124. E.g., Rehabilitation Extension Amendments of 1977: Hearings on S. 1712 and S. 1596 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 726-27 (1977) (statement of Sen. Dole); 123 CONG. REC. 13,022-23 (statement of Rep. Nolan) ("all HEW-funded programs . . . will have to be made accessible"); id. at 14,388 (statement of Rep. Oakar) ("need to pay the price to assure to the handicapped the rights of full citizenship"). Representative Brademas placed in the Record a column by George F. Will, who, despite his general antipathy for federal regulation supported this one: "[T]he significance of the regulations is that now the nation must stop rationing citizenship, must stop allocating to the handicapped only as much as is convenient." Id. at 13,927. By mandating changes to "thoughtlessly designed facilities that provide no convenient access for wheelchairs, facilities that shout society's indifference . . ., [t]he new regulations announce the beginning of a costly but welcome era." Id.
126. Id. at 18,760 (emphasis added); see also id. at 19,332.
cerning the implementation of the section 504 regulation. Representative Brademas, Chairperson of the Subcommittee, opened the hearings by stating:

With the publication of the regulations for Section 504, disabled people can look forward to their rightful opportunity for full participation in our society.

Central to the implementation of these regulations must be the realization that what handicapped people want is access to programs. Inevitably, enforcement of and compliance with Section 504 will cause some readjustment problems. Costs may be incurred and modifications might be required.

There was no dispute among any of the witnesses, including those subject to the regulation and the disabled community, about the regulation’s mandate. The obligation to eliminate architectural and communication barriers was assumed by committee members and witnesses alike. The debate centered instead upon the questions of how much it would cost and whether the federal government should or should not provide assistance to ease the burden.

Bills were introduced in both the Senate and the House regarding the costs of implementing the regulation. Floor debate on those bills focused on the need for better information about the costs; again, no member questioned whether HEW had correctly interpreted the scope of the

127. The hearings may have been prompted in part by numerous letters sent to HEW and Congress and numerous newspaper articles expressing concern over the costs of complying with the HEW regulation. See DEPARTMENT OF EDUCATION HANDBOOK, supra note 64, at 181. The Director of HEW’s Office for Civil Rights, David Tatel, issued a statement addressing the concerns:

[S]ome people seem to skim over the regulations and explanatory materials and start fretting about the widening of thousands of doors or installation of high and low water fountains in every facility at every conceivable point. A result of the misunderstanding is a rising exaggeration of the potential costs of making programs accessible . . . . There will be some costs and some burden on the institutions, fully anticipated by Congress in the enactment of the law, and the legitimate costs will pose a serious enough problem without the additional headaches caused to administrators by unfounded fears. A recent report by Mainstream, Inc., a private nonprofit organization that encourages compliance with the Rehabilitation Act, indicates that the cost of making 34 facilities accessible in a survey they conducted totaled one cent per square foot. These same facilities spend 13 cents a square foot to clean and polish their floors.

D.S. Tatel, Complying with Section 504—The Costs Have Been Exaggerated, reprinted in DEPARTMENT OF EDUCATION HANDBOOK, supra note 64, at 181-82.

128. 1977 Section 504 Implementation Hearings, supra note 84, at 1; see also id. at 169, 289.


130. Id. at 361.
law. Senator Eagleton stated that with the publication of the section 504 regulation, "it became HEW policy that all recipients of HEW funds must provide equal access for the handicapped to their services and employment—or lose their Federal funds. On this basic principle, there must be no turning back." No one disagreed. The resolution of the issue was the provision in the 1978 Rehabilitation Act Amendments providing for federal assistance conditioned on demonstration of need, as noted above. In both the House and Senate Reports on the 1978 amendments, the 1978 amendments themselves, and in final floor debate, the HEW regulations were discussed again, but no one argued about the validity of their content except for the concerns for coverage of persons addicted to alcohol or drugs.

Of particular importance was Representative James Jeffords' understanding of the law since he sponsored the provision adding the Executive to section 504 coverage. Like every other member of Congress, Representative Jeffords had received copies of the regulation in January, 1977, when Secretary Mathews sent him the proposed rule, and again in April, 1977, when Secretary Califano sent him the final rule. However, because he led the effort to obtain funds to assist with section 504 compliance, Representative Jeffords appears to have been more cognizant than other members to the regulation's prohibition of waivers.

Six weeks after the waiverless HEW regulation was issued, Representative Jeffords introduced a bill to assist with the costs of compliance. Citing the architectural accessibility requirements and quoting at length from the regulatory provision requiring auxiliary aids to eliminate communication barriers, he verbalized his understanding of the law that "[r]amps will have to be installed, doors will have to be widened, bathrooms will have to be modified, and in many cases, elevators will have to be installed" because the regulations "have the force of law" and "[n]o one is exempt." His concern was not that it was required to get done,

132. Id. at 37,243.
133. See supra notes 113-14 and accompanying text.
135. S. REP. No. 890, supra note 112, at 18, 19, 36, 55.
137. See supra notes 103-05 & 123 and accompanying text.
138. As ranking minority member of the Subcommittee on Select Education, and as a manager of the 1978 Rehabilitation Act Amendments, Representative Jeffords was required to pay special attention to § 504 issues as part of his responsibilities.
139. 123 CONG. REC. 19,051 (1977) (emphasis added). Quoting from the preamble to the
but that "cities and States" would be required "to bear 100 percent of the costs to carry out the federal mandate." ¹⁴⁰

Representative Jeffords participated actively in the 1977 section 504 Implementation Hearings,¹⁴¹ during which he developed greater skepticism concerning the costs of compliance, recognized that these costs were being exaggerated, and finally allowed that more specific and "technical answers" were needed.¹⁴² He agreed generally, though, that the benefits that would accrue from the HEW rule would far exceed the cost. Questioning David Tatel, the Director of HEW's Office for Civil Rights, Representative Jeffords noted that HEW had "made a commitment to full implementation of 504, with which I fully agreed, and enforcement of it."¹⁴³

The Mark-Up Session on H.R. 12407, the House version of the 1978 Amendments, was held on May 9, 1978. At that session, Representative Jeffords announced a desire to "offer an amendment to say that the Federal government as well as everyone else will comply with the regulations which are under Section 504."¹⁴⁴

On May 5, 1978, on the House floor, Representative Jeffords discussed his amendment to extend section 504 to the Executive, stating that the bill "should go a long way toward developing a uniform and equitable national policy for eliminating discrimination."¹⁴⁵

Representative Jeffords also sponsored amendments regarding the provision of services to eliminate communication barriers:

Many of those amendments stem from section 504 of the act, and address 504, and needs which come as a result of that section of the act. As a result of section 504 it has become clear to many that 504 means more than just removing architectural barriers for the physically handicapped. While this is certainly a priority goal, there are many other types of disabilities to which 504 applies and to which attention must be paid. People who are deaf face communication barriers which are just as great as the architectural barriers faced by those in

¹⁴⁰ Id. at 19,051.
¹⁴¹ See supra note 84.
¹⁴² Id. at 273.
¹⁴³ Id. at 368.
¹⁴⁴ Committee on Education and Labor, Mark-Up Session, H.R. 12,467 and H.R. 12,511, at 22 (May 9, 1978) (stenographic transcript) (emphasis added).
wheelchairs.  

He discussed a number of other similar provisions and then stated:

I must emphasize so that there is no misunderstanding that my insistence that the Federal Government pay part of the cost is in no way to negate or minimize the removal of barriers for the handicapped, or in any way to halt or delay action until the Federal Government puts up some money. My goal is clear and it is to get the Federal Government, which made the law, which wrote the regulations, to pay for at least part of the costs so that the full burden does not fall on the State or local governments or on public or private institutions throughout the country.  

He then immediately addressed Executive coverage:

Somehow it did not seem right to me that the Federal Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves. So I developed a provision which is in this conference report that extends coverage of section 504 to include any function or activity in every department or agency of the Federal Government.  

No one disagreed with any of these sentiments. Moments later, the ten distinct provisions, including section 504 coverage of the Executive, all of which suggested full congressional awareness of the HEW regulation, were enacted with near unanimity, as they had been earlier in the Senate.

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146. Id. at 38,550 (emphasis added).
147. Id. at 38,551 (emphasis added).
148. Id. (emphasis added); cf. Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (it is "unthinkable that the same Constitution would impose a lesser duty on the Federal Government").
149. The vote was 81-1 in the Senate, 124 CONG. REC. 30,508 (1978), and 365-62 in the House, id. at 38,553. Numerous expressions of support for the HEW regulations were also heard after the President's Task Force on Regulatory Review announced its plenary review of them. See, e.g., 128 CONG. REC. S4201-02 (daily ed. Apr. 28, 1982) (statement of Sen. Cohen); id. at S4240-41 (daily ed. Apr. 28, 1982) (statement of Sen. Weicker); id. at S4245-46 (daily ed. Apr. 28, 1982) (statement of Sen. Mitchell). After Vice President Bush announced the decision of the Task Force that the HEW regulation would not be modified, see infra notes 159-67 and accompanying text, the Justice Department insisted on maintaining the right to allow waivers in its regulations for federally conducted programs. Representative Vento observed that "the Civil Rights Division of the Department of Justice took action which contradicts the Vice President's statement," and that these regulations "ignore congressional intent in passing the 1978 amendments to section 504 by allowing a broad defense against compliance with the law if allowing handicapped people to participate in a program would cause 'financial or administrative burdens' to the Federal agency." In short, Representative Vento concluded, "re-
E. The 1980 Department of Justice Regulation

Undertaking an in-depth review of its legal and factual bases, the Attorney General in 1980 reaffirmed and adopted for his own grantees the substantive content of the HEW construction that prohibited waivers and loopholes in the meaningful access guarantee.\textsuperscript{150} This action was consistent with HEW's construction of section 504.

In his Notice of Proposed Rulemaking for his 1980 regulation, the Attorney General requested comments on the "burdens" issue, requesting in particular "the submission of cost studies regarding structural and nonstructural modifications to provide for the participation of the handicapped in programs relevant to this subpart."\textsuperscript{151} As a result of his careful analysis of the cost issue concerning architectural and communication barriers, the Attorney General concluded that no waivers were necessary. He did, however, add a provision permitting small providers of services to comply with the regulation by referring handicapped persons to other providers.\textsuperscript{152}

Regarding architectural barriers, the Attorney General determined that "[w]ith respect to compliance costs associated with structured modifications, it is crucial to keep . . . in mind . . . that structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible to handicapped persons."\textsuperscript{153} He went on to explain in an appendix to the regulation his understanding that "accessibility is probably the area of greatest concern to recipients because of the perceived economic cost associated with the elimination of

\textsuperscript{150} 28 C.F.R. §§ 42.501-42.540 (1986).
\textsuperscript{151} 44 Fed. Reg. 54,958 (1979).
\textsuperscript{152} 28 C.F.R. § 42.521(c) (1986).
such barriers."\textsuperscript{154} But, he determined, "[i]t has been HEW's [three year] experience that its recipients have erroneously exaggerated the actual cost of compliance due, in part, to a misunderstanding of the extent to which structural changes are required under section 504."\textsuperscript{155} The Attorney General explained in a detailed manner the various ways that recipients of Justice Department funds could comply with the program's accessibility requirement "to underscore the options available to recipients for moderating the costs of compliance while providing full program accessibility to qualified handicapped persons."\textsuperscript{156}

Similarly, with regard to communication barriers, the Attorney General set forth additional important factual determinations regarding the cost issue. "One obvious example of eliminating communications barriers would be the installation of teletypewriters (TTY's). . . . The cost of a TTY is relatively modest and would be even less so where a TTY is shared by a number of public agencies hooked up to a central TTY number."\textsuperscript{157} The provision of sign language interpreters in various settings was also, in the Attorney General's view, an important method of ameliorating the communications barriers experienced by speaking and hearing-impaired individuals. He concluded that a "recipient's need for an interpreter is usually not on a continuing basis, and the overall compliance cost would not be substantial."\textsuperscript{158}

\textbf{F. The 1983 Cost-Benefit Analysis of the Presidential Task Force on Regulatory Relief}

On February 17, 1981, President Reagan signed Executive Order No. 12,291.\textsuperscript{159} Pursuant to that executive order, which covered the "revie[w] of new as well as existing regulations"\textsuperscript{160} the HEW section 504 regulations were subjected to a searching, in-depth, two-year scrutiny to determine "the need for" them,\textsuperscript{161} whether the approach "chosen" would "maximize the net benefits to society"\textsuperscript{162} and whether there were "alternative approaches . . . involving the least net cost to society."\textsuperscript{163} These

\begin{flushleft}
\textsuperscript{154} Id. at 37,629. \\
\textsuperscript{155} Id. \\
\textsuperscript{156} Id. at 37,629-31. \\
\textsuperscript{157} Id. at 37,621. \\
\textsuperscript{158} Id. \\
\textsuperscript{160} Id. § 2. \\
\textsuperscript{161} Id. § 2(a). \\
\textsuperscript{162} Id. § 2(c). \\
\textsuperscript{163} Id. § 2(d). \\
\end{flushleft}
determinations were to be made "to the extent permitted by law."\textsuperscript{164}

In a March 21, 1983, letter to Senator Lowell Weicker, Chairperson of the Subcommittee on the Handicapped, the chairperson of the Task Force, Vice-President Bush, announced that the Task Force and the Justice Department had "decided not to issue a revised set of coordination guidelines" for section 504 grantees.\textsuperscript{165} The letter stated that the decision was based upon

a lengthy regulatory review process during which the Administration examined the existing regulatory structure under Section 504, studied recent judicial precedents and talked extensively with Members of Congress and of the handicapped community. Especially important were the personal views and experience of those most directly affected by these regulations. The comments of handicapped individuals, as well as their families, provided an invaluable insight into the impact of the 504 guidelines.\textsuperscript{166}

Since the Task Force's purpose was to modify HEW's regulation, the Task Force's considerations and judgments, especially the reaffirmation of the determinations HEW made when it promulgated its rule in 1977, supports the wisdom of HEW's consistent, continuing construction.

Senator Weicker stated that the Task Force's decision to leave the regulation alone was "of great importance to disabled Americans" and that the "letter comes as a great relief to disabled Americans and all who advocate for their cause" since "Section 504 of the Rehabilitation Act is a cornerstone in the construction of equal rights for the disabled."\textsuperscript{167}

III. THE JUDICIAL CONSTRUCTIONS OF SECTION 504'S MEANINGFUL ACCESS REQUIREMENT

The federal courts have not yet resolved the question of precisely what role "burdens" should play in limiting the duty to provide disabled persons meaningful access to federal and federally assisted activities. While one Supreme Court decision seems to suggest that "burdens" can be an important consideration,\textsuperscript{168} others have indicated that "Congress apparently determined that it would require . . . grantees to bear the costs" of eliminating barriers that prevented disabled people from participating in and benefiting from federal assisted programs "as a quid pro

\textsuperscript{164} Id. § 2.

\textsuperscript{165} 129 CONG. REC. S3672 (daily ed. Mar. 22, 1983).

\textsuperscript{166} Id.

\textsuperscript{167} Id.

quo for the receipt of federal funds,”\(^{169}\) and that section 504 “requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit . . . offer[ed].”\(^{170}\)

One problem with any attempt to make sense of these decisions is that the Supreme Court has only recently begun to fully consider section 504’s legislative and administrative history.\(^{171}\) The following sections of this Article seek to harmonize the court decisions in light of that history and to show that HEW’s construction of section 504 is correct.

**A. The Case Law Supporting the Meaningful Access Approach of the HEW Rule**

It has been judicially recognized that the HEW regulation was the end-product of “a series of compromises,”\(^{172}\) a result of “years of discussions and negotiations among all interested parties.”\(^{173}\) Although neither the disabled community\(^{174}\) nor HEW’s grantees\(^{175}\) were ecstatic with the regulation, everyone recognized that the regulation was fair. The regulation promulgated by HEW thus reflects a conscious effort to guarantee handicapped persons an equal opportunity to participate in federally assisted programs but at the same time to avoid the imposition of prohibitively expensive or impractical burdens.\(^{176}\) That is perhaps the reason why, eight years later, the Supreme Court was able to state that it was “unaware of any case challenging the facial validity of these regulations.”\(^{177}\)

The Supreme Court has now enthusiastically approved the HEW regulation and, in particular, the regulation’s program accessibility section and its prohibition of waivers and exceptions. In its earliest con-

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171. Indeed, until the Consolidated, Alexander and Arline decisions corrected erroneous dictum from Davis, see supra notes 11, 48, 53-54, 109 and infra notes 172-96 and accompanying text, it was unclear what if any weight was to be given the pre-enactment legislative history of § 504 or the legislative history of the 1974 and 1978 amendments to § 504.
172. 1977 Section 504 Implementation Hearings, supra note 84, at 241.
174. 1977 Section 504 Implementation Hearings, supra note 84, at 33 (regulation “represents a leniency that the National Center for Law and the Handicapped does not necessarily agree with”); id. at 36 (“The concept of program accessibility found in these final regulations is a compromise. It allows for the consideration of the financial burden [sic] on the recipient in fashioning a remedy . . . .”); id. at 254 (“these regulations do not contain everything handicapped citizens would have wanted”).
175. E.g., id. at 4-10 (testimony of John W. Adams, Council of Chief State School Officers).
176. See supra notes 74-89 and accompanying text.
struction of section 504, *Southeastern Community College v. Davis*, the Court proceeded on the basis that the HEW rule was proper.\(^1\)\(^7\)\(^9\) Indeed, one court recently ruled that “[t]o advance the inquiry whether unwillingness to accommodate amounts to discrimination, *Davis* instructs that the administrative regulations implementing section 504 should be examined.”\(^1\)\(^8\)\(^0\)

In *Consolidated Rail Corp. v. Darrone*, the Court determined that section 504 applied to all employment discrimination by recipients of federal assistance. It based its decision on the HEW regulation. The Court approved the HEW regulation in its *substantive* requirements, not merely its procedural requirements. The unanimous Court held: “The [HEW section 504] regulations particularly merit deference in the present case: the responsible congressional Committees participated in their formulation, and both these Committees and Congress itself endorsed the regulations in their final form.”\(^1\)\(^8\)\(^2\) Leaving no room for misinterpretation, the Court emphasized that “[i]n adopting § 505(a)(2) in the amendments of 1978, Congress incorporated the *substance* of the Department’s [§ 504] regulations into the statute.”\(^1\)\(^8\)\(^3\) Thus, the Supreme Court, in affirming

\(^{178}\) 442 U.S. 397 (1979).

\(^{179}\) The Court in *Davis* did not dispute the Secretary’s authority to promulgate regulations under § 504. The Court stated, however, that “[f]or the first three years after the section was enacted, HEW maintained the position that Congress had not intended any regulations to be issued.” *Davis*, 442 U.S. at 412 n.11. The Court further stated that the agency “altered its stand only after having been enjoined to do so.” *Id.* (citing the district court’s ruling in *Cherry v. Matthews*, 419 F. Supp. 922, 924 (D.D.C. 1976)).

However, as the Solicitor General informed the Court in 1981:

> We know of no basis for the court’s remarks concerning HEW’s perception of its obligations under Section 504. It is our understanding that issuance of the Section 504 regulations was delayed not because HEW did not believe such regulations should be issued, but because development of the regulations was a difficult and time-consuming process.

Brief for the United States as Amicus Curiae at 20, University of Texas v. Camenish, 451 U.S. 390 (1981); *see also 1976 Rehabilitation of the Handicapped Programs, supra* note 106, part 1, at 347 (“process of preparing the proposed regulation for section 504 has been time-consuming for a number of reasons”). In *School Board v. Arline*, the Supreme Court finally acknowledged this fact, correcting its earlier statement in *Davis*. 107 S.Ct. 1123, 1126 n.3 (1987).


\(^{182}\) *Id.* at 634.

\(^{183}\) *Id.* at 634 n.15 (emphasis added). This Article previously listed the ten statutory undertakings of the Congress in the 1978 section 504 amendments. *See supra* notes 107-19 and accompanying text. The court’s confused statement in Disabled in Action of Pennsylvania v. Pierce, 606 F. Supp. 310, 316 (E.D. Pa. 1985), that the 1978 amendments incorporate *only* that provision of the HEW regulation that adopts the remedies, procedures and rights of Title VI, arose because that court misread “the substance of the Department’s [§ 504] regulations” as if it read “incorporates the substance of the Department’s [Title VI] regulation.” The latter is
the decision of the court of appeals in *Le Strange v. Consolidated Rail Corp.*, not only approved the Third Circuit’s close attention to HEW’s “recently issued regulations,” and the circuit court’s holding that “[t]hese regulations are particularly noteworthy because HEW was assigned the task, by executive order, of coordinating the issuance of regulations enforcing § 504 by all federal departments and agencies,” but also adopted the lower court’s view that the Congress had in the 1978 amendments approved the HEW regulation.

In *Alexander v. Choate*, the Supreme Court’s second plenary explanation of the meaning of section 504, the Court “recognized these regulations as an important source of guidance on the meaning of § 504,” and noted that the Congress had made clear that “those charged with administering the Act had substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination.” The Court concluded that the “elimination of architectural barriers was one of the central aims” of Congress in enacting section 504 and, thus, those barriers must constitute particularly significant problems within the meaning of *Alexander.*

Furthermore, the Court specifically quoted with obvious approval the very provision of the HEW regulation that permitted no waivers. The Court expressly stated that the “regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access,” and expressed approval of section 84.22, which it described as “requiring that . . . existing facilities eventually be operated so that a program or activity inside is, ‘when viewed in its entirety,’ readily accessible.”

In *Alexander*, the Court relied upon the HEW regulation throughout, analyzed the legislative history, and observed that “[i]n enacting the Rehabilitation Act and in subsequent amendments, Congress did focus on several substantive areas—employment, education, and the elimination of physical barriers to access—in which it considered the societal and personal costs of refusals to provide meaningful access to the handi-

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187. Id. at 297.
188. Id. at 301 n.21 (quoting 45 C.F.R. § 84.22(a) (1986)).
capped to be particularly high." Thus, the Court concluded that a qualified handicapped individual "must be provided with meaningful access to the benefit that the grantee offers."

The Court stated in a footnote that "a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped." However, the Court explained that such modifications rise to the level of being "fundamental" or "substantial" only if they threaten to vitiate the very "integrity of their programs," or compromise "the essential nature" of those programs.

Most recently, in School Board v. Arline, the Supreme Court reemphasized that the HEW rule is "of significant assistance" in interpreting section 504 since "these regulations were drafted with the oversight and approval of Congress." The amendments to section 504, the Court observed, "reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps.'" Thus, "[i]n enacting and amending the Act, Congress enlisted all programs receiving federal funds in an effort 'to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted.' "

Similar to the Supreme Court's interpretation of Title VI of the Civil Rights Act of 1964, the HEW regulation takes a common sense approach while insuring "meaningful access." Indeed, the Alexander Court explicitly relied upon its leading decision construing Title VI, Lau v. Nichols, for its holding that section 504 requires that "handicapped individual[s] must be provided with meaningful access to the benefit that the grantee offers." In Lau, the Court had ruled that the provision of

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189. Id. at 306-07 (emphasis added) (footnotes omitted).
190. Id. at 301 (emphasis added).
191. Alexander, 469 U.S. at 300 & n. 20.
192. Id. at 300.
194. Id. at 1127 (citing Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634-35 & nn.14-16 (1984)); see also id. at 1126 n.3 (noting that the 1974 Rehabilitation Act amendments stemmed from Congress' review of HEW's "attempts to devise regulations to implement the Act").
196. Id. (quoting 123 Cong. Rec. 13,515 (1977) (statement of Sen. Humphrey)).
198. Alexander, 469 U.S. at 301.
education solely in English to non-English-speaking students violated Title VI. The lower court had opined that:

[T]he determination of what special educational difficulties faced by some students within a State or School District will be afforded extraordinary curative action, and the intensity of the measures to be taken, is a complex decision, calling for significant executive and legislative expertise and non-judicial value judgments. . . .

. . . States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their command . . . 199

The Supreme Court reversed, ordering that "meaningful access" to educational services be provided, observing that the students in Lau "ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation" as required by Title VI,200 and held that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."201 The Court further concluded: "It seems obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program . . ."202

Moreover, Justice White recently observed that the students' claim in Lau, upon which "[t]his Court, reversing the Court of Appeals, gave

199. Lau v. Nichols, 483 F.2d 791, 799 (9th Cir. 1973), rev'd, 414 U.S. 563 (1974). Judge Hufstedler, writing in dissent, stated: "Access to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it. They are functionally deaf and mute." Id. at 805 (Hufstedler, J., dissenting). "[D]iscrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk." Id. at 806 (Hufstedler, J., dissenting).
200. Lau, 414 U.S. at 565 (emphasis added).
201. Id. at 566.
202. Id. at 568. Akin to Lau's analysis of Title VI of the Civil Rights Act of 1964 is Chief Justice Burger's analysis of Title VII of that Act in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Construing a plain statutory mandate against discrimination in employment, the Chief Justice wrote:

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use.

Id. at 431 (emphasis added).
relief under Title VI,"\(^{203}\) was that the students "should be taught the English language, that instructions should proceed in Chinese, or that some other way be provided to afford them equal educational opportunity."\(^{204}\)

Just as school districts need not build new schools in minority or white neighborhoods to remedy race discrimination that violates Title VI, but may use student reassignment and transportation as remedies,\(^{205}\) the HEW regulation does not require every building in a program to be accessible so long as the benefits of the program are made available to handicapped persons. It is permissible to choose the least expensive means of providing racial or ethnic minorities or handicapped persons "meaningful access" to federal or federally assisted activities, but under Alexander, Lau, and Guardians, a means that does so must be chosen.

As the court of appeals concluded in *Lloyd v. Regional Transporta-


\(^{204}\) Id. (emphasis added). In *Alexander*, the Court recognized as a "basic premise" that "the evolution of Title VI regulatory and judicial law is . . . relevant to ascertaining the intended scope of § 504." 469 U.S. at 293 n.7. *See also* Community Television v. Gottfried, 459 U.S. 498, 509 (1983); *Arlene*, 107 S. Ct. at 1128. As the Senate Report accompanying the 1974 amendments states, "Section 504 was patterned after and is almost identical to" Title VI. S. Rep. No. 1297, supra note 50, at 39-40.

A key event affecting Title VI regulatory and judicial law was the Supreme Court's ruling in *Lau*. In *Lau*, the Court recognized that expensive aids and services would sometimes be necessary to eliminate the language and communications barriers affecting some ethnic minorities and to provide them effective and meaningful access to federally assisted services. 414 U.S. at 566-68. *Lau*, like the federal regulations enforcing Title VI relied upon in that decision, permitted no waivers to this requirement.

*Lau* was decided a few months before the 1974 amendments to section 504 were enacted. It can be assumed that Congress was aware of such contemporaneous decisions under Title VI affecting the scope of section 504. *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 649 & n.5 (2d Cir. 1979).

Although, of course, there are some "distinctions between Title VI and § 504," *Alexander*, 469 U.S. at 294 & n.11, the Court ruled the coverage of § 504 was intended to be broader than Title VI, in that the latter statute was held in Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983), not to reach more than intentional discrimination. *See also Arline*, 107 S. Ct. at 1126 n.2. In *Alexander*, the Court specifically relied upon the "meaningful access" requirement as set forth in *Lau*. 469 U.S. at 301 n.21. Moreover, in *Alexander*, the Court relied upon the government's concession there that "special measures for the handicapped, as the *Lau* case shows, may sometimes be necessary." \(^{Id.}\)

\(^{205}\) *Cf.* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25-31 (1971). It is doubtful, though, that if upheld, a general undue burdens defense could be confined to disability discrimination. It could also affect, for example, the requirement in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, that federal grantees provide meaningful access to their educational programs without regard to gender, if the remedy involved, for example, the provision of additional locker space for female athletes. The defense might also affect the requirement under Title VI acknowledged in *Lau*, 414 U.S. at 566-69, that meaningful access must be provided to minorities by eliminating language barriers.
tion Authority, section 504 "establishes affirmative rights." Ruling that "Lau is dispositive" of the content of those rights, Judge Cummings paraphrased Justice Douglas' opinion in Lau as follows: "Under these [federal] standards there is no equality of treatment merely by providing [the handicapped] with the same facilities [as ambulatory persons]. . . .; for [handicapped persons] who [can] not [gain access to such facilities] are effectively foreclosed from any meaningful [public transportation]." The HEW regulation, which also relied upon Lau, "deserve[s] particular deference," in view of its resolution of the important "quasi-legislative compromise between competing interests," and in view of the "extended rule-making process carried out in 1976 and 1977," resulting in "regulations [that] reflect a conscious effort at balancing the needs of the handicapped with the budgetary realities of programs receiving federal funds."

As previously discussed, the Congress took ten discrete, legislative actions that indicated its awareness and approval of the waiverless HEW regulatory approach. Judge Pollak recently pointed to just one of these provisions, and concluded that "the 1978 amendments to the Act strongly suggest that Congress was well aware that compliance with section 504 could be costly."

Courts have viewed the Senate Report on the 1978 amendments as

206. 548 F.2d 1277 (7th Cir. 1977).
207. Id. at 1281.
209. The Secretary's section-by-section analysis specifically cited and relied upon Lau v. Nichols. Discussing the term "equally effective" appearing in 45 C.F.R. § 84.4(b)(2), the Secretary explained that that term was intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that, in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See Lau v. Nichols, 414 U.S. 563 (1974).
211. Id. at 379.
212. Id. at 379 & n.19.
213. See supra notes 107-19 and accompanying text.
particularly important. That Report "explicitly referred to, and approved, the regulations promulgated under § 504."\textsuperscript{216} The "Congress expressed no disapproval of the regulations defining reasonable accommodation and undue burden."\textsuperscript{217} "No member of the House or Senate committee raised any question regarding § 504's . . . coverage."\textsuperscript{218} "The committee report contains nothing that would indicate it felt HEW exceeded its statutory authority . . . in its recently promulgated regulations. Similarly, no one during the debate in the Senate or House suggested HEW had gone too far."\textsuperscript{219} The 1978 amendments, in short, "demonstrate[] a widespread understanding on the part of Congress" of the content of the HEW regulations.\textsuperscript{220} "Congress was very much aware of HEW's interpretation."\textsuperscript{221} As the Court concluded in \textit{Consolidated}, "[t]he regulations particularly merit deference in the present case: the responsible congressional Committees participated in their formulation, and both these Committees and Congress itself endorsed the regulations in their final form."\textsuperscript{222}

The deference owed to an agency's prior construction of a statute "is particularly appropriate where . . . an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception."\textsuperscript{223} Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."\textsuperscript{224} The Court has stated:

Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged

\textsuperscript{216} Smith v. Robinson, 468 U.S. 992, 1028 (1984) (Brennan, J., joined by Marshall & Stevens, JJ., dissenting). The dissent in \textit{Smith} has become particularly important in view of the recent action by the Congress explicitly overruling that decision and adopting the position of Justice Brennan's dissent. "As it turned out, Justice Brennan was more attuned to the intention of Congress than were the six justices in the \textit{Smith} majority." Board of Educ. v. Diamond, 808 F.2d 987, 993 (3d Cir. 1986).

\textsuperscript{217} Nelson, 567 F. Supp. at 380.

\textsuperscript{218} Smith, 468 U.S. at 1028 (Brennan, J., joined by Marshall & Stevens, JJ., dissenting). See supra note 216.


\textsuperscript{220} Id. at 776.

\textsuperscript{221} Smith, 468 U.S. at 1027 (Brennan, J., joined by Marshall & Stevens, JJ., dissenting).

\textsuperscript{222} Consolidated, 465 U.S. at 634.

\textsuperscript{223} United States v. Rutherford, 442 U.S. 544, 554 & n.10 (1979).

\textsuperscript{224} Id. at 544 n.10 (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940)).
with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has . . . not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.\footnote{Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-82 (1969) (footnotes omitted).}

The Supreme Court thought that an unusually strong case of legislative acquiescence and ratification occurred in \textit{Bob Jones University v. United States}, where Congress also had held hearings “on this precise issue” that the regulation concerned.\footnote{\textit{Id.} at 600-01.} The Ninety-Fifth Congress did much more than hold hearings on section 504. From the day they arrived at the Capitol, through both sessions and through the enactment of ten distinct provisions of the 1978 amendments, they were continuously concerned with the regulation. As in \textit{Bob Jones}, “[i]t is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on.”\footnote{\textit{Id.} at 600-01.}

\textbf{B. The Case Law Relied Upon by the Department of Justice for a Broader “Burdens” Defense}

Despite the approval of the HEW construction by the Congress and the Supreme Court, the Department of Justice promulgated a new regulation in 1984 covering that agency’s own activities. The 1984 rule, contrary to the HEW approach, absolved federal agencies from the obligation to take “any action” which they deem too burdensome.\footnote{28 C.F.R. §§ 39.150(a)(2), 39.160(d) (1986).}

The principal argument in support of this exception to section 504 is that \textit{Davis}\footnote{442 U.S. 397 (1979).} required it. As the Department of Justice stated in its section-by-section analysis of its 1984 rule:

The “undue financial and administrative burdens” language is based on the Supreme Court’s \textit{Davis} holding that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court’s statement that section 504 does not require modifications that would result in “undue financial and administrative burdens.”\footnote{49 Fed. Reg. 35,729-30 (1984) (quoting Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979)).}

The text of the “burdens” passage in \textit{Davis}, from which the Justice De-
department's rule was derived is quite different, however: "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."231

This statement may have been only an observation by the Court, intended simply as discourse. This possibility becomes apparent by reading the quotation in context rather than with the gloss placed upon the passage by the Attorney General's analysis. The "Court's statement" was not "that section 504 does not require modifications that would result in 'undue financial and administrative burdens,'"232 Absent the metaphrasing, the passage can fairly be read as simple digression, a reassuring statement for grantees perhaps, that technological advances eventually may make it less burdensome for them to comply with section 504.

Moreover, the Davis language was in any event not the holding of the case, but merely "the Court's statement," as the Attorney General has had to acknowledge.233 The discussion of "burdens" was not necessary to the decision in the case, and thus was pure obiter dictum.234 The Court concluded that the plaintiff in that case, Davis, was not an otherwise qualified handicapped individual.235 The "burdens" passage added nothing to the result.236

231. Davis, 442 U.S. at 412.
233. Id.
234. The discernable congressional interpretation of Davis is consistent with this view. Noting that "the Court emphasized that schools may not exclude a handicapped applicant solely because of disability," Representative Simon stated on the floor of the House that "[w]e must be careful not to read the Court's decision into situations beyond the specific facts of the case. The Davis ruling is a limited decision and should not be interpreted broadly." 125 CONG. REC. 16,247 (1979). Moreover, on August 17, 1979, Senator Cranston sent a letter to the President regarding Davis, and a copy of the letter appeared in the September 14, 1979 Congressional Record. 125 CONG. REC. 24,707 (1979). Senator Cranston reported:

On July 18, I convened in the Senate offices a meeting of officials from the Departments of Health, Education, and Welfare, Labor, the Equal Employment Opportunity Commission, Justice, your domestic policy staff, and various Congressional offices for the purpose of discussing the implications of the Davis case . . . . The meeting was very well attended. There seemed to be a clear consensus among all the participants that, from a legal standpoint, the Davis decision on its particular facts could and should be carefully analyzed and probably had only a rather narrow application insofar as title V protections are concerned.

Id.

236. Such language binds no other courts but is merely a "statement of law in the opinion which could not logically be a major premise of the selected facts of the decision." R. Cross, PRECEDENT IN ENGLISH LAW 80 (2d ed. 1968).
The "burdens" statement may have arisen simply from the Court's earlier determination that section 504 does not require "fundamental alteration[s] in the nature of a program" or substantial modifications of standards. The Attorney General stated in his 1984 analysis that "in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity that the refusal to undertake the accommodations is not discriminatory." This is an unexceptional proposition, reflecting, in fact, the holding in Davis. That holding does not necessarily require a rule that permits "burdens" to nullify the duty to provide meaningful access, however.

The "burdens" statement also may have been derived from the Secretary's preamble to the HEW regulation. In that preamble, the Secretary stated that it was "clear that factors of burden and cost had to be taken into account in the regulation." This was the first statement of its type that had appeared on any administrative or legislative record.

In Davis, the Court showed that it was well-acquainted with the HEW regulation. Having determined that Ms. Davis was not qualified for the position in question, the Court stated that "regulations promulgated by HEW... to interpret § 504 reinforce... this conclusion." It then cited the definition of "qualified" in section 84.3(k)(3) of the regulation and quoted extensively from the Secretary's section-by-section analysis. The opinion also quoted at length from section 84.44 of the regulation, which, the Court agreed, "require[d] covered institutions to make 'modifications' in their programs to accommodate handicapped persons, and to provide 'auxiliary aids' such as sign-language interpreters"—apparently with no possibility of waiver or exemption—but concluded that "§ 84.44 does not encompass the kind of curricular changes that would be necessary to accommodate respondent." The Court's conclusion was made not because of any "burden" that would be imposed but because the changes would have fundamentally altered the nature of the program.

The Court in Davis continued to defer to HEW's judgment: "Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped persons", 237. Davis, 442 U.S. at 410.


240. Davis, 442 U.S. at 406.

241. Id. at 406-07 & n.7.

242. Id. at 408-09 & n.9.

243. Id. at 409.
continues to be an important responsibility of HEW." Given the Court's obvious familiarity with the regulation, it is quite possible that it was simply acknowledging the Secretary's statement in the preamble on "burdens" and not carving out a major exception to section 504. The Court may have been echoing, and probably approving, the Secretary's and Congress' judgment that burdens from the regulation and technological advances are closely conjoined. Davis did not suspend the "attainment of th[e] goals," but reinforced their attainment by approving the HEW rule.

The "undue financial and administrative burdens" language of Davis was repeated, again in dictum and without any analysis of its origin, in a footnote in Arline. Unlike the Davis dictum, the Arline dictum appears at first blush to indicate that the Court may be inclined to adopt a

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244. Id. at 423 (emphasis added).
245. Id. at 412.
246. The "burdens" statement also may be rooted in concepts of comity and federalism. It is possible that the language was meant to be limited to only those requirements that imposed "undue financial and administrative burdens upon a State." Id. (emphasis added). In Pennhurst State School & Hosp. v. Halderman, the Supreme Court cautioned against imposition of "congressional policy on a State involuntarily" and "implicit attempt[s] to impose massive financial obligations on the States." 451 U.S. 1, 16-17 (1981).

While the states of course may be recipients of federal assistance for the purposes of § 504, "given their constitutional role, the States are not like any other class of recipients of federal aid." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985). Thus, it is certainly possible that the Davis court, by using the qualifying phrase "upon a State," anticipated Atascadero's holding that the eleventh amendment bars federal suits under § 504 against the states.


247. The footnote states:

"An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). In the employment context, an "otherwise qualified person is one who can perform "the essential functions" of the job in question. 45 C.F.R. § 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. Ibid. Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, Southeastern Community College v. Davis, supra, at 412, 99 S. Ct. at 2730, or requires "a fundamental alteration in the nature of [the] program" id. at 410. See 45 CFR § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship); 45 CFR pt. 84, App. A, p. 315 (1985) ("where reasonable accommodation does not overcome the effects of a person's handicap to the employer, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination"); Davis, supra, at 410-13, 99 S. Ct., at 2369-70; Alexander v. Choate, 469 U.S., at 299-301, and n.19, 105 S. Ct., at 720, and n.19; Strathie v. Department of Transportation, [716 F.2d 227, 231 (3d Cir. 1983)].

broader "burdens" exception than that incorporated in the HEW regulation, as advocated by the Department of Justice in its 1984 rule.

The Arline dictum's applicability was limited by the Court's own terms, however, to "the employment context."\(^{248}\) Because Arline concerned only employment discrimination, the opinion only discussed HEW's employment regulation,\(^{249}\) which itself explicitly permits an exception for "undue hardship"\(^{250}\) and permits such considerations as the "cost of the accommodation needed"\(^{251}\) in some cases to nullify the right to obtain employment in a federally assisted program because it would impose such a hardship.\(^{252}\)

This undue hardship exception appears only in the employment subpart of the HEW rule.\(^{253}\) It was incorporated into the employment provisions, according to the Secretary's section-by-section analysis,\(^{254}\) in order to make HEW's employment regulation consistent with the previously issued Department of Labor regulation enforcing section 503 of the Rehabilitation Act,\(^{255}\) which is limited in its coverage to handicap employment discrimination. Congress intended this uniformity.\(^{256}\)

The 1978 Rehabilitation Act amendments also provide support for HEW's unique treatment of employment. As discussed above, Senator McClure's amendment authorized waivers based upon cost in the context of discrimination in employment only, and a broader waiver was explicitly considered and rejected by the Senate.\(^{257}\)

\(^{248}\) Id.

\(^{249}\) 45 C.F.R. §§ 84.11-84.14 (1986).

\(^{250}\) Id. § 84.12(c)(3).

\(^{251}\) Id. § 84.12(c).

\(^{252}\) Compare id. §§ 84.11-84.14 (subpt. B) (employment) with id. §§ 84.21-84.23 (subpt. C) (program accessibility), id. §§ 84.31-84.38 (subpt. D) (elementary and secondary education), id. §§ 84.41-84.47 (subpt. E) (postsecondary education) and id. §§ 84.51-84.55 (subpt. F) (health, welfare and social services).


\(^{255}\) See 1974 U.S. Senate Subcomm. on the Handicapped Hearings, supra note 49, at 12; S. REP. No. 1297, supra note 50. The undue hardship language in the § 503 regulation, in turn, can be traced to Representative Quie's amendment to § 503 limiting the obligations under that section—but not § 504—to larger contractors otherwise "it would cause an undue hardship for them." 119 CONG. REC. 7136 (1973).

The Arline dictum connected accommodations with qualifications. It is only "[w]hen a handicapped person is not able to perform the essential functions of the job" due to his or her handicap that "the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions."258 Only at the second stage of this process does the question of "burdens" arise. It is important to recognize, however, that HEW's definition of "qualified handicapped person" differs substantially from subpart to subpart of the regulation.259 The subpart dealing with employment defines that term to include only "handicapped persons who, with reasonable accommodations, can perform the essential functions of the job in question."260 Obviously, in the employment context, a person's handicap may have the effect of interfering with a person's job qualifications. The same is not true, however, for the purposes of benefiting from public services, and so handicapped persons are deemed by the regulation to be "qualified" for such services if they meet "the essential eligibility requirements for the receipt of such services."261 For services such as recreational facilities, where there are no eligibility requirements, or where those requirements consist of such criteria as indigency or residency, a person's handicap, logically, can never have the effect of interfering with the qualifications for receipt of those services.

Similarly, for the purposes of participating in elementary and secondary education programs, handicapped children are deemed "qualified" by the HEW rule so long as they are within the proper ages of eligibility.262 Unlike the area of employment, a child's handicap cannot itself have the effect of rendering a child unqualified for primary and secondary educational programs.

As stated by the court in Dopico v. Goldschmidt,263 section 504 does not demand that

the physical qualifications for the job of bus driver or motorman be altered so that the handicapped are not excluded. The existing barriers to the "participation" of the wheelchair-bound [sic] are incidental to the design of facilities and the allocation of services, rather than integral to the nature of public transportation itself, just as a flight of stairs is incidental to a law

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258. Arline, 107 S. Ct. at 1131 n.17 (quoting 45 C.F.R. § 84.3(k) (1985)).
259. 45 C.F.R. § 84.3(k) (1986).
260. Id. § 84.3(k)(1); see Arline, 107 S. Ct. at 1131 n.17.
261. 45 C.F.R. § 84.3(k)(4) (1986).
262. Id. § 84.3(k)(2).
263. 687 F.2d 644 (2d Cir. 1982).
school's construction but has no bearing on the ability of an otherwise qualified handicapped student to study law.\textsuperscript{264}

Thus, under the order of analysis suggested by the \textit{Arline} dictum and under the HEW rule itself, the burdens issue would not arise when the issue is the exclusion of handicapped citizens from public services or educational activities or other programs universally available to all citizens. By contrast, eligibility for employment programs is based upon individual qualifications, and in that context "the physical effect of one's handicap" could interfere with a person's employment qualifications.\textsuperscript{265}

Courts that have given thoughtful scrutiny to the language of section 504 and its legislative history have honored Congress' intent, supported the HEW approach, and rejected the one urged by the Department of Justice. For example, in \textit{Georgia Association for Retarded Citizens v. McDaniel}, the Eleventh Circuit Court of Appeals ruled, on the basis of "§ 504's broad recognition of the impermissibility of the 'denial' of 'benefits,'" that disabled people seeking relief under section 504 need only show that they "would benefit from" the program that has excluded them and that they seek the same "scope of services" provided the rest of us "as envisioned by \textit{Davis}."\textsuperscript{266} Significantly, the Department of Justice filed an amicus brief in \textit{McDaniel} arguing that the programming requested constituted an "undue burden" on the educational system and thus was not required by section 504. The circuit court obdurately rejected the Department of Justice's position in a footnote stating "[t]he United States, invited to file a brief as amicus curiae has blown hot, cold and hot as to the coverage under Section 504."\textsuperscript{267}

\textsuperscript{264} \textit{Id.} at 653. \textit{Dopico} was cited with approval in \textit{Alexander v. Choate}, 469 U.S. 287, 300 n.20 (1985).

\textsuperscript{265} \textit{Arline}, 107 S. Ct. at 1129 n.10. The citation of Southeastern Community College v. Davis, 442 U.S. 397 (1979), a postsecondary education case, in support of the "burdens" dictum in footnote 17 of \textit{Arline}, is consistent with this analysis since a handicapped person's participation in a postsecondary education program (except in a program that offers open admissions) is, like employment, based upon individual qualifications to meet "academic and technical standards." 45 C.F.R. § 84.3(k)(3) (1986); \textit{see Davis}, 442 U.S. at 406-07.

The fact that HEW nonetheless chose to incorporate an "undue hardship" provision in the employment subpart of its regulation, but not in the postsecondary education subpart, reflects the Secretary's \textit{factual} administrative determination that no such waiver was necessary outside of the employment context. \textit{See supra} notes \textsuperscript{74-89} and accompanying text.

\textsuperscript{266} 716 F.2d 1565, 1580 (11th Cir. 1983), \textit{vaccated on other grounds}, 468 U.S. 1213 (1984) (emphasis in original); \textit{accord Camenisch v. University of Tex.}, 616 F.2d 127, 133 (5th Cir. 1980), \textit{vaccated on other grounds}, 451 U.S. 390 (1981) ("Southeastern Community College says only that section 504 does not require [recipients of federal funds] to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefit").

\textsuperscript{267} \textit{McDaniel}, 716 F.2d at 1580 n.15. The final "hot" referred to a Department of Education policy memorandum that was provided to the court by plaintiffs' attorneys. \textit{See also}
In its 1984 regulatory revision, the Department of Justice heavily relied upon the mass transportation cases, *American Public Transit Association v. Lewis* and its progeny. Regardless of the correctness of these rulings, they do not speak directly to the issue. The *Lewis* decision invalidated only the mass transit provisions of a Department of Transportation regulation requiring accessible mass transit systems. Although *Lewis* cast some doubt on the validity of the HEW coordination regulation's mass transit provision, it did not invalidate it. The Departments of Justice and Transportation believed that the regulation had not been invalidated. This is evidenced by their actions in response to *Lewis*.

Following the *Lewis* decision, the government neither appealed the decision nor pursued the issues left open on remand. Instead, the government swiftly dismantled the mass transit regulations, without following the requirements of Executive Order No. 12,250, the section 504 coordination authority. The Department of Transportation's response to *Lewis* was to promulgate an "interim final rule." However, that rule only purported to affect the mass transit provision of the Department of Transportation section 504 regulation. The Department of Transportation, of course, could have at that time promulgated a general "burdens" exception to its entire regulation. It did not believe it was compelled to do so, though, and its failure to take such action left its

NAACP v. Wilmington Medical Center, 657 F.2d 1322, 1331 (3d Cir. 1981) (Congress' "legislative aim" in enacting § 504 was to "eliminat[e] discrimination.").


269. The holding of *Lewis* and its progeny would appear to be negated by the Supreme Court's construction of § 504 as requiring "meaningful access." *Alexander*, 469 U.S. at 301. Moreover, to have a good understanding of the *Lewis* result, it is important to candidly recognize that the Justice Department did not zealously defend the transportation regulation under siege in that case. Indeed, having successfully defended the regulation in the district court, at the oral argument of the appeal, the Justice Department abandoned the position it had adopted in its briefs that the transportation regulation was required and conceded that "local option" was not only a permissible choice, but also was a choice the government was considering adopting, that is, the American Public Transit Association's position. *Lewis*, 655 F.2d at 1280 n.14. Thus, it is not completely surprising that the court ruled as it did, and it is somewhat misleading for the Department of Justice to state in its section-by-section analysis that "[in *Lewis,*] the Department had argued a position similar to that advocated by the commenters." 49 Fed. Reg. 35,725 (1984).

270. *Lewis*, 655 F.2d at 1278.

271. *Id.*

272. *Id.* at 1280 n.13.

273. See *Id.* at 1280.

274. For an interesting exchange of memoranda between the Departments of Justice and Transportation regarding this issue, see 127 CONG. REC. 19,288-291 (1981).

communication and architectural accessibility obligations intact. Since the Department of Transportation regulation was modified solely in response to Lewis, the Department of Transportation apparently did not believe that Lewis required any other alteration.

Similarly, the Attorney General's response to Lewis was to suspend the 1978 coordination regulation. However, he too only suspended the mass transit provisions, leaving all of the communications and program accessibility obligations of that rule intact; he apparently believed Lewis required no other action.

The transportation cases are additionally distinguishable because Congress all along has provided much less leeway and much more specific guidance to the Department of Transportation with regard to section 504's mass transit requirements. Particularly revealing is Congress' decision to overrule Department of Transportation's 1981 rescission of its uniform national mass transit accessibility standards. The Department of Transportation had used the Lewis decision as its excuse for that rescission. But in section 317(c) of the Surface Transportation Assistance Act of 1982, Congress required the Department of Transportation to again promulgate "minimum criteria" to enforce section 504. Congress implicitly rejected Lewis and expressly rejected the action the agency took in response to that decision as "an abdication of Federal responsibility for protecting handicapped persons from discrimination and inadequate services."280 Thus, whatever precedential value Lewis

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276. Cf. id. at 40,687.
277. Moreover, several federal agencies promulgated § 504 grantee regulations after Lewis, but those agencies did not believe they were compelled by that decision to include any "burdens" exceptions in their regulations. See supra note 95.
278. As early as the time of the debate on the McClure amendment in 1978, see supra note 117, this issue arose when that amendment's sponsor inserted into the Record two articles concerning the high cost of making mass transit systems accessible to handicapped persons. In a colloquy with Senator McClure, Senator Randolph, the Chairperson of the Subcommittee on the Handicapped, pointed out that "as to the matter of the mass transit facilities for the Handicapped . . . is that a matter that is actually being considered in the Banking and Currency Committee of the Senate?" 124 CONG. REC. 30,579 (1978). The resulting legislation emanating from that committee provided that, for the purposes of § 504, municipalities with populations less than 50,000 were permitted to rely on paratransit services exclusively, municipalities with populations of 50,000-750,000 were required to insure that 50% of new buses purchased were fully accessible to handicapped persons, and municipalities with populations in excess of 750,000 were required to insure that 100% of new buses purchased were accessible. Department of Transportation Appropriations Act of 1981, Pub. L. No. 96-400, § 324, 94 Stat. 1681 (1980).
280. 128 CONG. REC. S15,714 (daily ed. Dec. 20, 1982) (statement of co-sponsor Sen. Riegle). Co-sponsor Senator Cranston said the statute was necessary to remedy "a most unfortunate situation [existing] in which the Department of Transportation’s hands-off, local-op-
C. The Case Law Requiring a Factual Basis for Governmental Rulemaking

At their broadest, the dicta in Davis and Arline and the decision in Lewis could in any event only authorize a "burdens" waiver if there were a factual determination by the agency head of its necessity, especially since the Secretary of HEW, the Attorney General, the Secretary of Labor, and numerous other agency heads, acting upon substantial rulemaking records, determined that there was no factual necessity for a general waiver of section 504's accessibility guarantee. In Bowen v. American Hospital Association, the Supreme Court invalidated a regulation issued to enforce section 504 of the Rehabilitation Act for this reason. Justice Stevens grounded his opinion in Bowen upon the "axiom of administrative law that an agency's explanation of the basis for its decision must include 'a rational connection between the facts found and the choice made.'"

He then explained:

Agency deference has not come so far that we will uphold regulations whenever it is possible to "conceive a basis" for administrative action. To the contrary, the "presumption of regularity afforded an agency in fulfilling its statutory man-

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281. See supra notes 74-89 and accompanying text.
282. See supra notes 150-58 and accompanying text.
283. See supra note 96 and accompanying text.
284. See supra note 95 and accompanying text.
date,” is not equivalent to “the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause.” Thus, the mere fact that there is “some rational basis within the knowledge and experience of the [regulators],” under which they “might have concluded” that the regulation was necessary to discharge their statutorily-authorized mission, will not suffice to validate agency decisionmaking. Our recognition of Congress’ need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency’s judgment in both.\footnote{287}

On the basis of these settled principles of construction, the Bowen court determined that the promulgation of an interim regulation pursuant to section 504 concerning the provision of medical care to handicapped infants was not valid since the government failed to provide an adequate factual basis for the coverage of the rule.\footnote{288} What obtains for the coverage of a regulation must of course also obtain for any exception to such coverage that may be available, such as the burdens exceptions contained in the 1984 Department of Justice rule.

The burden on the agency in this context is different from what it would be if the agency had been writing on a clean slate. “Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change . . . .”\footnote{289}

When there is such a reversal of direction as has occurred in the Justice Department’s 1984 rule, there is always a greater burden of explanation created by the agency action. “[T]he presumption is against changes in established policy that are not justified by the rulemaking record.”\footnote{290} When “an agency has sharply changed its substantive policy, then, judicial review of its action, while deferential, will involve a scrutiny of the reasons given by the agency for the change. . . . That reversal itself constitutes a danger signal.”\footnote{291} The rulemaker is required to give sound reasons for the change.\footnote{292}

\footnotesize{287. \textit{Bowen}, 106 S. Ct. at 2112-13 (citations omitted) (emphasis added).}
\footnotesize{288. \textit{Id.} at 2123.}
\footnotesize{291. \textit{NRDC v. EPA}, 683 F.2d 752, 760 (3d Cir. 1982).}
\footnotesize{292. \textit{See Public Citizen v. Steed}, 733 F.2d 93, 99 (D.C. Cir. 1984).}
Application of these principles to the 1984 Department of Justice rule makes it very clear that there was no attempt by the Attorney General to factually justify its policy shift. As one court of appeals concluded in analogous circumstances, "no conclusion [was] ever reached by the [agency head] in this record that its resources are or would be overstrained." As in Bowen v. American Hospital Association, there was an "absence of evidentiary support" for the burdens provisions contained in the 1984 rule. The Attorney General marshalled "no evidence" that government agencies would be unduly burdened if required to provide handicapped participants meaningful access.

D. The Case Law Prohibiting Administrative Waivers when Congress intended Uniform National Standards

"[T]he intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Representative James M. Jeffords," the Attorney General stated in his analysis of the 1984 regulation, was "that the Federal government should have the same section 504 obligations as recipients of Federal financial assistance." This was not, however, the only intent of the amendment. The primary purpose appears to have been the development of a "uniform and equitable national policy

293. Office of Communications of the United Church of Christ v. FCC, 560 F.2d 529, 533 (2d Cir. 1977).
295. Id. at 2115.

As the Supreme Court emphasized in State Farm, when an agency follows a "settled course," it signals that it is carrying out the congressional mandate, and that by adhering to the settled path it best carries out congressional policy. 463 U.S. at 41 (quoting Atchinson, Topkea & Santa Fe Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973)). Accord United States v. Clark, 454 U.S. 555, 565 (1982); United States v. NASD, 422 U.S. 694, 718-19 (1975); Morton v. Ruiz, 415 U.S. 199, 237 (1974); Traficante v. Metropolitan Life Ins., 409 U.S. 205, 210 (1972). The weight to be assigned to an agency's rule may be somewhat "dissipated by the agency's presentation . . . of . . . contrary construction[s]." Cerro Metal Prod. v. Marshall, 620 F.2d 964, 981 (3d Cir. 1980). Of course, agencies sometimes make mistakes and disavow prior positions, but a call for deference to administrative expertise for regulatory provisions as egregiously inconsistent as those of the Department of Justice's 1984 rule has a rather hollow ring.

for eliminating discrimination."

This issue was addressed by the Supreme Court in *E.I. du Pont de Nemours & Co. v. Train.* There, the appellate court had ruled that "[p]rovisions for variances, modifications, and exceptions are appropriate to the regulatory process." Justice Stevens, in a unanimous opinion reversing the lower court, stated that "[t]he question . . . is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations." The legislation in question in *DuPont*, like section 504, contained "no statutory provision for variances." When faced with such a statute, the Court ruled, an agency's decision to add "a variance provision would be inappropriate in a standard that was intended to insure national uniformity."

The *DuPont* reasoning appears to be fully applicable to section 504 administrative regulations. Each federal agency is ultimately responsible for promulgating its own section 504 regulation and for enforcing it. Eventually, there will be over ninety agency rules. Each, presumably, would follow the Justice Department's lead with a standardless waiver provision. Mid-level agency managers, given the availability of the "burdens" exception, may be tempted to take the opportunity to use this exception when any visible inconvenience appears. Disabled persons cannot be comforted by the assurance that "undue burdens" decisions are "to be made by the Attorney General or his designee[s]." Assuming other agencies also limit the number of final "undue burdens" decision makers, and that the decision makers actually scrutinize all of the.

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301. 430 U.S. at 138 (emphasis in original).
302. *Id.* It is well-settled that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510 (1981) (emphasis added). On the face of § 504, there is no limitation other than the requirement that a handicapped person must be "otherwise qualified." The reason for the absence of such a limitation is plain from the legislative history: Congress already balanced factors and concluded that the harms of exclusion outweighed the burdens of compliance. The HEW regulation respected that intent while permitting grantees flexibility in choosing their methods of complying. As the legislative history shows, Congress "ranked other values higher than efficiency" in the course of its adoption of § 504. INS v. Chadha, 462 U.S. 919, 959 (1983). Congress has denominated "meaningful access" as the right involved here and the right that "must be provided." Alexander v. Choate, 469 U.S. 287, 301-02 (1985).
303. 430 U.S. at 138 (emphasis added).
entreaties that arrive in Washington from their regional offices, that still would permit hundreds of different persons making decisions without the benefit of any standard. It takes little imagination to envision the chaos that could easily result.

When HEW, then the coordinating authority, formulated its regulation, it was well-aware of the importance of setting forth in its rule “specific obligations.” Similarly, Senator Cranston expressed his concern to the HEW Secretary on the eve of the regulation’s issuance that “waivers and exceptions . . . can serve only to generate paperwork and litigation at the expense of investigation, compliance and enforcement activities.”

IV. CONCLUSION

The legislative history to section 504 appears to leave little doubt that the Congress intended to codify—or, at a minimum, to approve—a flexible standard that would permit “burdens” to be taken into account. However, Congress desired that the costs of compliance with section 504 would not outweigh the right to meaningful access to federal and federally assisted programs.

Although scattered judicial dicta would appear to support a broader “burdens” defense to the duty to provide disabled people meaningful access to federal and federally assisted programs, the better view—and one adopted by the Secretary of HEW, which successfully reconciles the cases and the competing interests involved and honors the legislative history of section 504—is that the burdens of providing accessibility can be considered so long as they are not used to nullify the right of disabled people to meaningful access.

305. 1976 Rehabilitation of the Handicapped Programs, supra note 106, at 1491 (testimony of Martin Gerry, Director of HEW’s Office for Civil Rights).

306. 123 Cong. Rec. 12,410 (1977) (statement of Sen. Cranston); see id. at 14,133-34 (statement of Sen. Koch) (noting that following the issuance of the regulation the Secretary had heeded his earlier advice); see also 1977 Section 504 Implementation Hearings, supra note 84, at 292 (testimony of David Tatel, Director of HEW’s Office for Civil Rights). The lack of uniformity might be exacerbated because the Attorney General stated in his Preamble to the 1984 regulation that he intends to apply the new standard to grantees as well without modifying the grantee regulation. 49 Fed. Reg. 35,725 (1984). Such a policy might be especially unfair to the numerous grantees who, for ten years now, have been complying, voluntarily, with the HEW mandate. Moreover, in an amicus brief to the Supreme Court, the Department of Justice has explained that monitoring the policies of grantees in such a manner would require a “serious intrusion into the affairs” of federal grantees. Brief for the United States as Amicus Curiae at 30, University of Texas v. Camenisch, 451 U.S. 390 (1981). For example, grantees might be required to open their financial records to government civil rights compliance officers. Such a requirement could further “creat[e] a lack of uniformity in the administration of Section 504 . . . .” Id.