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Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint

by
Robert L. Burgdorf Jr. and Christopher G. Bell

Robert L Burgdorf, Jr is an attorney/advisor of the U.S. Commission on Civil Rights; Christopher G. Bell is an attorney/advisor of the Equal Opportunity Employment Commission. Both wrote the Commission report: Accommodating the Spectrum of Individual Disabilities

The U.S. Congress has enacted nearly thirty laws containing broad prohibitions of discrimination against mentally and physically handicapped people. Despite the strong Congressional commitment to eliminating discrimination on the basis of handicap, the legal standards for analyzing and combatting such discrimination have not been properly delineated within these statutes, leading to inconsistency and confusion when courts and regulators have attempted to interpret and apply the nondiscrimination requirements. In addition, certain shortcomings regarding the scope of coverage and remedies available under such statutes have become apparent.

This article explores some of the problems with federal handicap antidiscrimination laws as they are currently formulated, and suggests some specific ways in which these laws can be strengthened. As a basis for recommending improvements in the legislative scheme, the article examines the nature and sources of handicap discrimination and suggests remedies calculated to fit this particular type of discrimination. The authors have recently written the U.S. Commission on Civil Rights' extensive report on handicap discrimination entitled *Accommodating the Spectrum of Individual Abilities*.[1] The views expressed in the present article are solely those of the authors and not the U.S. Commission on Civil Rights or the Equal Opportunity Employment Commission. The article does rely upon many of the same ideas and approaches presented in the Commission report.

[1] Copies of the report may be obtained at no charge by writing to the Publications Warehouse, U.S. Commission on Civil Rights, 621 North Payne Street, Alexandria, VA 22314.

Differences and Commonalities

A major challenge of handicap civil rights law is to address the problems of discrimination that handicapped people have in common while responding to the tremendous diversity of the persons classified as handicapped. The current federal statutes prohibiting discrimination on the basis of handicap do not adequately come to terms with the commonalities and great differences that occur simultaneously among disabled persons.

Many of the statutes establishing the rights of handicapped persons apply equally to individuals having all types of handicaps. Sections 501, 503, 504, and 505 of the Rehabilitation Act of 1973, as amended,[2] for example, cover all individuals meeting the broad definition of "handicapped individual" in the Act.[3] The Education for All Handicapped Children Act[4] applies to students with all kinds of mental and physical disabilities. Likewise, constitutional theories supporting equal opportunities for disabled individuals generally apply across the board.

Most advocates are aware that the rights of a mentally retarded individual, for example, may be strongly influenced by a court decision determining the principles and procedural requirements to be applied to the case of a blind person, a person with epilepsy, or an individual with some other disability. Effective representation of handicapped clients today requires and awareness of legal precedents, statutes, and regulations covering a broad class of handicapped citizens. The expansion of this publication to the *Mental and Physical Disability Law Reporter* is a laudable step that enhances the breadth of information available to advocates and lends encouragement to initiatives for cross-disability unity.

To escape continued relegation to the status of second class citizens, handicapped people have increasingly realized the value of unified action. Broad alliances of organizations of handicapped persons have coalesced to work on issues of common interest. Faced with entrenched resistance to their full participation in society, disabled individuals have found strength in numbers. Consolidated efforts have often proven efficient in maximizing the impact of the limited resources of particular handicap groups.

Advocates, legal analysts, policymakers, and statute writers should never forget, however, that the class of "handicapped persons" is an exceedingly heterogeneous group. Each of the categories of conditions considered "handicaps" in our society includes individuals with widely differing characteristics, abilities, and limitations. The classification "legally blind," for example, encompasses some persons with a normal visual field but limited ability to see objects at a distance, others with average visual acuity but a very narrow field of vision (so-called tunnel vision), some whose visual problems

[2] 29 U.S.C. §§791, 793, 794, 794(a) (1976 & Supp. V 1981).
[3] 29 U.S.C. §706(7) (Supp. V 1981).
[4] Pub. L. No. 94-142, 89 Stat. 773 (1975).

result from an inability of the eyes to focus in a coordinated fashion (e.g., amblyopia, popularly referred to as "lazy eye"), some who cannot see in bright light, some who cannot see in dim light, a few who have no vision whatever, as well as numerous other variations and degrees of visual impairments. The classifications of "mental illness" and "emotional disturbance" include a plethora of disparate conditions that fill the pages of lengthy psychiatric diagnostic manuals, or the labels "orthopedically" or "mobility-impaired" are applied to individuals having a wide range of skeletal, muscular, and nerve irregularities; such impairments may result from a severed spinal cord, polio, muscular dystrophy, birth defects, amputation, multiple sclerosis, arthritis, or a variety of other causes. A similar diversity occurs within each of the other disability categories.

Yet, the differences between individuals classified as having the same handicap are overshadowed by the even greater variations among different disability categories. Two individuals with hearing impairments may differ markedly from one another, but they will presumably have even less in common with mentally ill, orthopedically impaired, or blind persons. A U.S. Court of Appeals has declared: "'the handicapped'…are not a homogeneous group, and all that those who come within the rubric 'handicapped' share is some trait outside the normal range of capabilities for that trait."[5]

Many disabled people have substantial reasons for wishing to disassociate their disability from other handicapping conditions. Persons with speech impairments, for example, may want it made clear that their condition does not entail mental retardation. Blind people are often miffed that some sighted individuals consider it necessary to speak unusually loudly to them, as if blindness must necessarily be accompanied by impaired hearing as well. Persons with epilepsy are anxious not to have their seizure conditions confused with mental illnesses. Persons with various physical handicaps are quick to emphasize that they are not handicapped mentally.

To counter confusion and misinterpretations about particular handicaps, the desire to disassociate one's disability from other handicapping conditions is quite understandable. Like other people, a handicapped person wishes to be viewed as a unique individual with a particular combination of characteristics, interests, and abilities. The desire to avoid the taint and stereotypes associated with handicaps prompts some individuals to insist that their particular condition is different, not like those other "real" handicaps.

Although there is great diversity among disabled persons and good reasons for being aware of the dissimilarity between various particular conditions, handicapped persons do share a label and a host of common difficulties:

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[5] *Shirey v. Devine*, 670 F.2d 1188, 1204 (D.C. Cir. 1982).

> Whatever characteristics such individuals may or may not have had in common prior to their classification, it is their involvement in the classification process that has generated the characteristics they all share – their social fate as members of a status category. [6]

The most significant consequence from a legal perspective of being considered handicapped is that those so identified have been subjected to severe and pervasive discrimination. In response to this problem of discrimination shared by handicapped people, Congress has passed laws imposing, in certain contexts, broadly worded prohibitions of discrimination against this class of persons.

Civil Rights Laws and Handicap Discrimination

A convenient model for efforts to outlaw discrimination on the basis of handicap was provided by previous civil rights laws. In 1969, in an article entitled "Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro,"[7] Professor Leonard Kriegel suggested that handicapped persons copy the model of black persons in their quest for identity and equality. In the same year, Professor Richard Allen published a monograph entitled *Legal Rights of the Disabled and Disadvantaged*[8] that provided a blueprint for much of the legislative and litigative activity of the following decade. Allen suggested that disabled persons, a group he defined to include physically and mentally handicapped and elderly people, had much in common with "disadvantaged" persons, a category he defined to include minority racial and ethnic groups, convicted offenders, and poor people:

> They share a host of deprivations: of education, of job opportunities, of social participation, and of basic rights of citizenship…And they have a common right to full enjoyment of that fundamental concept of our jurisprudence; *Equal Justice Under Law*; they who have for so long had precious little of either equality or justice. [9]

He outlined certain basic principles – concepts of normalization, fairness, and respect for the dignity and worth of the individual – that he posited are basic elements of the legal rights of all minority groups. He then proceeded to discuss the ramifications of these general principles in terms of specific legal rights, and strategies for implementing the rights, of subgroups of disabled and disadvantaged persons, i.e., those who are mentally retarded, mentally ill, physically handicapped, elderly, alcoholics and drug addicts, racial and ethnic minorities, offenders, and poor.

The special education litigation of the early seventies, the *P.A.R.C.*[10] case and its progeny, was consciously patterned upon racial desegregation cases. In addition to legal theories, handicapped persons

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[6] Rains, Kitsuse, Duster, & Friedson, The Labeling Approach to Deviance, *Issues in the Classification of Children*, ed. Hobbs (Sand Francisco: Jossey-Bass, 1971), Vol. 1, pp.91-92.
[7] 38 *American Scholar* 412 (1969).
[8] U.S. Government Printing Office, 1969, 0-360-797.
[9] *Id,* at p. 1.
[10] *Pennsylvania Association for Retarded Children v Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa 1972).

also copied many of the other tactical approaches and persuasive techniques of racial minorities and women, including rallies, consciousness-raising activities, sit-ins, and other public demonstrations.

It was only natural, therefore, that statutes establishing civil rights protections for handicapped people were modeled upon prior civil rights laws. Sections 503 and 504 of the Rehabilitation Act of 1973,[11] for example, were directly patterned upon and track the language of sections of the 1964 Civil Rights Act, and were included as part of the Rehabilitation Act only after attempts to amend the 1964 Act to incorporate handicapped persons failed in the Congress.

In drafting such laws, Congress viewed the problem of discrimination faced by disabled individuals as essentially the same as discrimination condemned in prior civil rights laws.

> Recognizing the parallels between the discrimination suffered by the handicapped and other minority groups, manifested particularly through their segregation from the rest of society, members of Congress sought to combat the problems through a remedy which had proven successful in the past, civil rights legislation. [12]

Handicapped people, racial minorities, and women do share general goals of combatting discrimination and eliminating stereotyping and other biased attitudes, and of achieving integration and increased participation in society. Such common interests provide a basis for cooperation and unity of handicapped persons with members of other disadvantaged groups. Eleanor Holmes Norton has declared:

> This essential unity among the protected classes is both a practical and a moral imperative. It is a moral imperative because any decent system of values knows no priorities among people deprived of their essential humanity. The only way to approach the eradication of the evil of discrimination is to face the high truth that we are all equal – black and brown, female and disabled. If that equality is not attained internally among us, the essential lesson of equality we are trying to impart to the rest of society will be lost. [13]

In short, in struggling toward the common goal of eliminating discrimination, all disadvantaged groups are in the same boat and cannot countenance the continuation of discrimination against other classes any more than one could prudently say that "your end of the rowboat is sinking."

But the common purposes that handicapped people share with other groups afforded civil rights protection do not mean that the problems of discrimination faced by handicapped persons are identical to those faced by these other classes. Measures addressing discrimination against handicapped individuals should be tailored to the distinctive features of the problem they seek to remedy. Current statutes prohibiting discrimination on the basis of handicap are not so tailored and have a number of resulting weaknesses and inadequacies. The sections that follow examine the specific nature of handicap

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[11] 29 U.S.C. §§793, 794, (1976 & Supp. V 1981).
[12] *Garrity v. Gallen*, 522 F. Supp 171, 205 (D.N.H. 1981).
[13] May 1979 statement to President's Committee on Employment of the Handicapped, quoted in U.S. Commission on Civil Rights, *Civil Rights Issues of Handicapped Americans* (1980), p. 142.

discrimination and suggest the major components of an antidiscrimination statue that would establish clear and effective standards for eliminating discrimination against persons with handicaps.

The Nature of Discrimination and Some Implications for Handicap Civil Rights Law

While there are many competing views about discrimination against handicapped people, two define the most extreme positions. On the one hand, some people believe that opportunities for handicapped people are inherently limited by their handicaps. One commentator, mirroring this view, contrasted handicapped people with the "healthy" and the "majority of people who are the workers and the earners."[14] Under this view, the inability of a person in a wheelchair to enter a building with stairs or move through a narrow doorway is the result of a handicap. There is little or no real discrimination; handicapped people are simply not capable of achieving equal opportunity. An opposing view holds that handicapped people are handicapped by society, not by their functional limitations. Proponents of this view point to the routine and unnecessary utilization of steps and narrow doorways in buildings as examples of purely societal obstacles to achievement.

These contrasting views center on the ability of handicapped people to contribute to society. Unlike race, color, or sex, handicaps frequently do limit one's ability to participate in particular activities. Effective antidiscrimination law must consequently be founded upon principles that distinguish between situations in which a handicapped person cannot participate in an activity and those situations in which irrational or unnecessary practices or attitudes limit participation. Understanding the complex way in which society's needs can be fulfilled by varying human abilities is the key to drafting a handicap antidiscrimination law.

Defining Capabilities and Social Needs

The spectrum of human abilities is the starting point. This principle states what seems obvious: for every human ability or function, there is a possible range of performance from excellent to nonexistent. This principle holds true for seeing, thinking, hearing, moving, limbs, and other functions. Clusters of various abilities may make up different functions. Walking involves coordinated movement of the leg bones, joints and muscles; muscle and bone strength; balance and some orientation. Everyone has unique physical and mental abilities. Some people have marvelous physical coordination while others are all thumbs. Some excel in abstract thought, others think best in concrete terms, while still other master only simple tasks. Some physical and mental differences from the norm, such as perfect pitch or photographic memory, are considered positive traits. Other variations from the norm may constitute functional impairments or limitations. Even such impairments, however, fall within a spectrum of abilities. The wide

[14] *Accommodating the Spectrum of Individual Abilities*, p. 97, quoting Henry Fairlie, Overdoing Help for the Handicapped, *The Washington Post*, June 1, 1980, p. D-3.

variation of sight encompassed within the definition of "legally-blind," discussed above, is a perfect example of this principle.

Wide variations also occur in the applicability of techniques and devices to cope with various functional limitations. Eyeglasses, hearing-aids, crutches, canes, braces, and many other such devices affect functional ability. Personal motivation, experience, education, and many other factors also play an important role in dealing with handicaps.

The importance of the spectrum of human abilities lies in the frequency with which it is ignored. Instead of discerning individual ability, society tends to classify or categorize people as handicapped or normal, mentally retarded or not mentally retarded, deaf or not deaf. In organizing institutions, programs and activities, instead of bearing in mind the incredible diversity of the spectrum of individual ability, society has designed its structures and tasks for people whose abilities fall only within the normal range.

Despite the very real existence of functional impairments or limitations, handicaps have little significance outside of a social context. Depending on the circumstances, some abilities will be essential, others unimportant. For every task or activity, some combination of functional abilities is required. But it follows that for any given task or activity, some functions or abilities are not required, and a person having a functional impairment that is not needed for a given task is no more handicapped in performing that task than a "normal" person.

Everyone is "handicapped" in doing some activities in the sense that the social setting affects their performance. In the words of a federal district court judge:

> Most citizens would be handicapped in playing baseball as compared to Carl Yastrzemski, in singing as compared to Beverly Sills, in abstract thinking as compared to Albert Einstein, and in the development of a sense of humor as compared to Woody Allen. Human talent takes many forms and within each talent is a continuum of achievement. While one individual might be on the high end of the scale of achievement in one area, that same individual might rank very low in another area. Woody Allen will probably never win the Triple Crown, and Carl Yastrzemski is not likely to perform "Aida." In sum, the identification of various graduations of handicap is not an easy task, especially if such is attempted in a vacuum. Assessing the capabilities of various individuals to perform without knowledge of the particular task under consideration and its various requirements, or without an individualized determination of their strengths and weaknesses would appear to be impossible. [15]

Concepts of disability or ability and handicapped or normal have little utility in the absence of a concrete situation to which they might apply. Even where terms are appropriately used, a large variety of options to ameliorate the functional limitations remain. One might substitute a function or ability for one that is impaired, use a device or technique, modify the activity, or by other means eliminate or reduce the

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[15] *Garrity v. Gallen*, 522 F. Supp 171, 206 (D.N.H. 1981); *See also: E.E. Black Ltd v. Marshall,* 497 F. Supp. 1088, 1100 (D. Hawaii 1980).

importance of the impairment to a particular activity. Requests for such changes may meet resistance. Alteration in the way tasks are "normally" performed are frequently difficult to make because "things have always been done that way."

Society has a great deal more flexibility in the way tasks and activities are organized than is commonly appreciated. Consider the metamorphosis that computers and computer-assisted design and manufacturing have produced in how we live, work and play. In many instances, industry has been forced from comfortable, familiar habits of management and production by foreign competition or other necessity. The integration of handicapped people into all aspects of social, political and economic life is equally essential, and achievable if we look for new ways of doing needed or desirable activities. Take a secretarial position, for example. Many secretarial positions require the incumbent to be a receptionist, answer the telephone, type, take dictation, file, and order office supplies. These traditional tasks are not, however, inherent in the position of secretary. In an office with several secretaries, the tasks may be reordered to take account of various individuals' differing abilities and limitations. A person with no hearing might perform typing and filing, but not answer the telephone or greet visitors.

A great variety of options also exist with respect to the ways different tasks are accomplished. A totally blind person may take dictation with a tape recorder or braille, type accurately with a word processor that vocalizes letters and words, and even do filing using an optacon, a device that translates print into intelligible combinations of raised dots. In each case, other functional abilities are substituted for one that is impaired, or the task is modified so that its essential components are accomplished.

The many combinations of ways in which individuals may be matched with activities raised serious questions about traditional qualifications, eligibility and selection criteria. Some qualifications standards use traditional disability categories, e.g., blind, deaf, mentally retarded, or quadriplegic, to screen out handicapped persons. Such exclusionary classifications reflect assumptions about correlations between physical and mental impairments and the ability of the individual so labeled to perform certain activities or jobs. Because such assumptions are often incorrect, disability status categories are overinclusive, including people who are qualified to perform or participate in activities with or without modifications.

Selection criteria, requirements that purport to measure physical or mental abilities or the ability to perform certain tasks or activities, may also exclude handicapped people. Such criteria differ from stigmatizing disability classifications in that they substitute measures of ability for labels of ability. Examples of selection criteria include I.Q. test scores required for educational placement, and visual acuity requirements for certain teaching positions. Needless discrimination occurs when selection criteria inaccurately measure abilities, accurately measure abilities but such abilities are not necessary for the activity in question, or fail to appreciate options that permit participation by the handicapped person.

Architectural, transportation, and communication barriers are prominent monuments to society's failure to appreciate the variety of ways human ability can meet with seemingly insurmountable social obstacles. Stairs, curbs, and narrow doorways are no more compelled by social demands than ramps, curb cuts or wide doorways. Verbal announcements combined with signs or written text are neither incompatible nor unfeasible if foresight is used.

Because of the flexibility inherent in many tasks and activities, there is no direct and uniform correlation between one's handicap and one's ability to participate in society. Physical and mental differences are not always functional limitations. Functional limitations do not necessarily result in activity restrictions and activity restrictions do not necessarily result in vocational or avocational limitations. The reality is that limitations in vocation or avocation result from a complex interaction of varying human abilities in a particular social context. Society has not recognized this complexity. A large discrepancy exists between the capabilities of handicapped people and the degree to which they have been permitted to participate fully in society. This discrepancy is discrimination.

Ironically, discrimination occurs when people overreact to a functional limitation and when people underreact to functional limitations. Prejudice, pre-judging, is the common cause of overreacting to handicaps. People overreact to functional limitations by ascribing to handicapped people greater differences or limitations than actually exist. One example is zoning restrictions on the establishment of group homes for former residents of mental health facilities. Such assumptions rest on commonly held beliefs that handicapped people are limited beings whose existence in the community is fraught with perils.

Underreaction to functional limitations is equally common but usually unintentional. Historical isolation or segregation of handicapped people make it unlikely that their needs would be considered. As Frank Bowe put it: "Our buildings, communications technologies, modes of transportation, and other programs were developed to meet the needs of people who lived in the community; disabled individuals, who did not, were not considered in the planning of these facilities and services."[16] The underreaction phenomenon is sometimes predicated on the mistaken assumption that equality means treating everyone exactly alike. Such an approach would eliminate some forms of prejudice, but it ignores the existence of varying abilities and society's failure to plan its programs and activities for the participation of people with different abilities.

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[16] *Accommodating the Spectrum of Individual Abilities*, p. 97, quoting Frank Bowe, statement, *Civil Rights Issues of Handicapped Americans: Public Policy Implications*, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., May 13-14, 1980, p. 10.

Handicap discrimination law must, to be sure, acknowledge the existence of functional impairments, but it must also focus on ways society can reasonably adapt to a wider range of mental and physical differences than the handicapped-or-normal dichotomy has permitted. Society inaccurately generalizes about correlations between impairments and ability to perform tasks on the one hand and the ability of society to adapt to physical and mental differences on the other hand. In order for handicapped people to gain full participation, society must adopt a more appropriate "handicap-conscious" attitude.

Individualization

Individualization, the assessment of a particular person's ability in a particular setting, is the most effective means of dealing with overgeneralization about handicapped people. Tailoring practices, procedures, and equipment to match the unique abilities of a specific handicapped person so that he or she may successfully participate and the program or activity successfully attain its objectives is the essence of individualization. Equally important, society must deliberately modify existing programs and its design for future programs with the certain knowledge that people of varying abilities will seek to participate.

Several federal laws have already adopted individualization requirements. Under the Education for All Handicapped Children Act, [17] for example, public schools are required to develop a written individualized education program for each handicapped child to tailor programs to a child's unique needs. [18] Similarly, the Rehabilitation Act requires agencies to develop an "individualized written rehabilitation program" [19] for each handicapped client. Federally-funded developmental disabilities programs must fashion a written habilitation plan" for each developmentally disabled being served.[20]

Reasonable accommodation, correctly understood, is an individualization requirement. The term "accommodation" has been broadly used to mean adjustments or modifications of opportunities to permit handicapped people to participate fully in activities. Doctrines governing the duty to render reasonable accommodation remain in their early stage of development. Neither regulations nor judicial decisions clearly define this essential legal concept. This lack of definition has caused considerable confusion over what the term encompasses and what are the standards for its application. Found originally in regulations issued under sections 503 and 504 of the Rehabilitation Act,[21] as applied to employment, this term has also been used with respect to the elimination of architectural barriers and in other areas.

In a 1983 monograph, *Accommodating the Spectrum of Individual Abilities*, the U.S. Commission on Civil Rights analyzed the meaning and scope of the reasonable accommodation mandate in light of

[17] 20 U.S.C. §§1401-1461 (1976 and Supp. V 1981).
[18] 20 U.S.C. §1401(19) (1976).
[19] 29 U.S.C. §721(a) (1976).
[20] 42 U.S.C. §6011(a) (1976).
[21] *See* current versions at 41 C.F.R. §61-741.6(d) (1983); 28 C.F.R §41.12(b) (1983).

existing law and its understanding of handicap discrimination. The Commission suggested a working definition of reasonable accommodation as "providing or modifying devices, services, or facilities, or changing practices or procedures in order to match a particular person with a particular program or activity.[22]

The U.S. Supreme Court's controversial and complex section 504 decision in *Southeastern Community College v. Davis,*[23] is consistent with this definition, according to the agency's analysis.[24] Davis, a hearing-impaired licensed practical nurse, was denied admission to Southeastern Community College's Associate Degree nursing program because of her hearing problem. The college contended that Davis could not safely participate in the school's clinical program or safely practice her profession without the ability to understand speech without relying on lip-reading. Davis sought as an accommodation either the elimination of the clinical training requirement or individualized faculty supervision. The Supreme Court ruled against Davis. It held in a "fundamental alteration in the nature of" the program and that additional faculty supervision was not required by existing regulations.[25] In addition to the "fundamental alteration" limitation, the Court suggested that section 504 could not require changes that would result in "undue financial and administrative burden."[26]

The *Davis* decision has created a great deal of confusion among the federal courts over the nature and extent of the duty to render reasonable accommodations to handicapped people. Contradictory language within the opinion raises questions about the degree to which section 504's nondiscrimination mandate places an obligation upon recipients of federal financial assistance to render reasonable accommodation.[27] While many courts and the Commission on Civil Rights have read *Davis* as sanctioning some accommodation, the issue may best be resolved by a more specific legislative mandate to that effect.

Particularly troublesome has been divining the limitations on the duty to accommodate. The threshold question is whether there should be any limitations. As analyzed here, reasonable accommodation is really a compromise between the one extreme of completely ignoring that society is primarily and needlessly structured for people whose abilities fall in the normal range, and the other extreme of doing everything possible, no matter how costly or drastic, to permit full participation. Preserving a program's viability and its primary benefit or objective maybe one place to draw the line. The "fundamental alteration" terminology used by *Davis* suggests such a qualitative restriction. Under this standard, incidental or nonessential components of the program might be altered as a reasonable accommodation. A

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[22] *Accommodating the Spectrum of Individual Abilities*, p. 102.
[23] 442 U.S. 397 (1979).
[24] *Accommodating the Spectrum of Individual Abilities*, p. 108-113.
[25] 442 U.S. at 410, 408 n. 9.
[26] 442 U.S. at 412.
[27] *Compare* 442 U.S. at 410 and 442 U.S. at 412.

quantitative restriction is implied by the "undue financial and administrative burdens strictures. By its terms, some costs or difficulty are countenanced, but the Court's opinion offers little guidance as to the acceptable boundaries.

Whatever standards apply must also reflect the demands of differing situations. The *Davis* court was concerned with preserving academic standards and patient safety. A reasonable accommodation found to be a fundamental alteration in that context might not be so considered if the issue was access to emergency medical care or employment with an international organization. If accommodation is individualization, the legal standard governing its application must vary with the unique demands of particular contexts and the matters at stake.

Defining reasonable accommodations as individualization has important implications for legal standards governing the removal of architectural, transportation and communication barriers. Although the removal of architectural and other barriers responds to the spectrum of individual abilities, it does not focus upon an assessment of the particular abilities of any one person. As noted earlier, the removal of such barriers is frequently a precondition to gaining access to an individualized assessment of abilities. But removing barriers tends to be a long-term change that presents considerations of costs, planning and implementation different from those of individualized accommodation. Moreover, removing barriers from existing facilities or designing barrier-free programs does not require the presence of a specific person, but can be required and accomplished before a handicapped person appears on the scene. Similar logic applies to the elimination of discriminatory selection criteria and qualifications, although in the case of such criteria, all that is sometimes required is a decision to stop using such standards.

What Should a Handicap Antidiscrimination Statute Contain?

Writing legislation that embodies a realistic appreciation of the diversity of human abilities and the flexibility inherent in society to better acknowledge differences in abilities is admittedly a very difficult undertaking. Individualization and the elimination of architectural and other barriers and discriminatory qualifications provide the theoretical underpinnings for handicap civil rights legislation tailored to remedying the needless obstacles blocking the full participation of handicapped people in our society. This section bridges the gap between the theory and how that theory might be translated into appropriate legislation. What follows in an outline of certain topics that the foregoing analysis and ten years of experience with the Rehabilitation Act suggest should be included in any new legislative proposals addressing handicap discrimination generally. The areas covered are not meant to be exclusive, and each issue is deserving of greater exploration than space permits here.

One shortcoming of current antidiscrimination statutes is that they prohibit discrimination without explaining or defining that term. In passing section 504 of the Rehabilitation Act of 1973, for example, "Congress apparently relied on the assumption that section 504 would be enforced as had previous civil rights legislation."[28] The inference that definitions of discrimination under prior civil rights laws could serve to define discrimination on the basis of handicap was not well-founded due to unique aspects of handicap discrimination as discussed above.

The failure of the handicap civil rights laws to define discrimination has often led to confusion and anomalous legal reasoning. A lack of appreciation of the nature of handicap discrimination is evident in an attempt by the United States Supreme Court to distinguish between "even handed treatment of qualified handicapped persons" and "affirmative efforts to overcome the disabilities caused by handicaps." [29] The purported distinction fails to account for requirements such as the removal of architectural, transportation, and communication barriers that exclude handicapped people and reasonable accommodations that are essential elements of eliminating discrimination against handicapped persons. Lower courts have struggled with such questions as the necessity for demonstrating "personal bias" [30] or "as hostile discriminatory purpose or subjective intent to discriminate"[31] in order to establish a cause of action for discrimination on the basis of handicap.

Such confusion could be avoided if the statutes provided a clear definition of discrimination. At a minimum, such a definition should include the following elements of discrimination: intentional exclusion; unintentional exclusion; segregation; unequal or inferior services, benefits, or activities; less effective services, benefits, or activities; and the use of screening criteria with a disparate impact that do not correlate with actual ability.[32] Given that handicapped people may be excluded by a barrier erected thoughtlessly, e.g., stairs or narrow doorways, as effectively as if they were purposefully kept out, the statutory language should make clear that intent is not an essential element of proving discrimination on the basis of handicap.

New handicap antidiscrimination legislation should give reasonable accommodation a federal statutory base. To avoid any possible confusion, reasonable accommodation should be explicitly required as part of the duty not to discriminate, and the duty to accommodate should extend to all areas encompassed by the statute rather than being confined to employment. The phrase should be defined to emphasize that the focus of accommodation is on an identified individual and a specific task or activity. Examples of accommodation should be included. Reasonable accommodation provisions should also

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[28] *Garrity v. Gallen*, 522 F. Supp 171, 205 (D.N.H. 1981).
[29] *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979).
[30] *Bey v. Bolger*, 540 F. Supp. 910, 925 (E.D. Pa. 1982).
[31] *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372, 1385 (10th Cir. 1981).
[32] *Cf.* 45 C.F.R. §84.4(b) (1982).

exclude changes made to remove architectural or other barriers to groups of handicapped people which can be done without regard to a particular person. The statue should also contain limitations on the duty to render reasonable accommodation. With the important caveats mentioned below, no "fundamental alteration in the nature of a program" nor "undue financial burdens" should be required.

Of course, many possible phrasings could meet these criteria. Reasonable accommodation might be defined as "provision or modification of devices, services, or facilities or changing practices or procedures for the purpose of responding to the specific functional abilities of a particular handicapped person in order to provide an equal opportunity to participate in a particular activity. Illustrative examples could then be provided. Administrative agencies could define by regulation the factors to be considered or the process to be followed in determining the appropriate accommodations in differing areas such as elementary and secondary education, higher education, housing, and employment. Regulations might also require specified reasonable accommodations for particular situations, as they do now with respect to the delivery of emergency health care to persons with hearing impairments.[33]

Defining the limitations on the duty to accommodate is a difficult task but one that should be attempted by Congress, and such limitations should be drafted to keep the defenses limited. Preserving the primary purpose or benefit of the activity or program is one element of the goal of protecting the essence of the activity or task involved. Protecting the necessary or essential means by which the purpose or benefits are achieved is the other component of these limitations. "Fundamental alteration in the nature or a program or activity" might be defined as "(1) a substantial change in the primary purpose or benefit of a program or activity; or (2) a substantial impairment of necessary or essential components required to achieve a program or activity's primary purpose or benefit."

Cost issues are complex because of the many factors that must be considered in assessing whether a particular accommodation might be unduly expensive in a particular instance. Obviously, a General Motors can absorb many accommodation costs that a small concern could not afford. The current Department of Health and Human Services' section 504 coordination regulations provide an "undue hardship" defense to reasonable accommodation in employment. That definition requires consideration of the following factors: "(1) the overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget; (2) the type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) the nature and cost of the accommodation needed."[34] Modified to cover activities besides employment, these factors offer a solid base to build upon. Additional considerations might include whether tax advantages or external funding

[33] 45 C.F.R. §84.52(c) (1983).
[34] 45 C.F.R. §84.12(c) (1983).

earmarked for accommodation have been or can be made available, the number of persons potentially benefitted by the reasonable accommodation and whether the cost involves a one-time or continuing expenditure. Regulations could provide other or further factors to be considered in particular situations.

The statute should recognize that there are situations in which a cost defense to individualizing should not be permitted. Individualizing is required under the Education for All Handicapped Children Act, which guarantees all handicapped children the right to a free appropriate public education.[35] Other entitlements and fundamental rights such as voting, should also be excluded from the cost defense.

Qualifications, selection and eligibility criteria issues should also be explicitly covered by legislation. Criteria that exclude whole classes of handicapped people without regard to an individual's actual ability should be prohibited. An irrebuttable presumption of inability to participate in a task or activity should be allowed only if a given functional impairment or handicap would in all cases prevent a person, even with a reasonable accommodation, from participating in or performing the task or activity. Qualification standards that have an adverse impact upon the equal opportunity of handicapped persons to participate should also be prohibited unless it is demonstrated that modification of such a standard would result in a fundamental alteration of a given program or activity. Safety-related qualifications have posed some difficulty for courts in recent years.[36] One solution might be to preclude safety criteria except those necessary to prevent a substantial existing risk of injury to the handicapped person involved or to others after considering possible accommodations.

Architectural, transportation and communication barriers must also be dealt with more specifically by handicap and civil rights legislation. Experience with transportation accessibility in particular has demonstrated that broadly worded national policy statements that "elderly and handicapped persons have the same right as other persons"[37] to use mass transit are meaningless. A more specific, comprehensive program is needed to produce over the long-term buildings, buses, and communication media that are designed at the outset to be used by people with differing physical and mental abilities. We must accept that removal of such barriers must occur over a long time period, perhaps even thirty years. Such a time frame is adequate to plan, pay for, and produce accessible programs. Cost in that extended time frame should be neither a legitimate moral nor legal excuse.

Although some issues have been resolved by caselaw and amending legislation, gaps in the statutes have resulted in serious questions about enforcement procedures and standards. If, in accordance with existing case precedents, handicap nondiscrimination laws give rise to a private cause of action in the

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[35] 20 U.S.C. §1412(1) (1976).
[36] *Accommodating the Spectrum of Individual Abilities*, p. 132-133.
[37] 42 U.S.C. §1612(a) (1976).

federal courts by aggrieved handicapped persons, then the statutory language should declare the existence of such a right. The statutes should also provide for the availability of adequate equitable and legal relief, including monetary damages and attorneys' fees in appropriate cases, when a case of discrimination is successfully proven by a handicapped person. If Congress does not intend it to be necessary to exhaust federal agency administrative procedures prior to filing a court suit alleging discrimination, then the statutes should express this intention explicitly.

To the prohibition of discrimination, exclusion, and denial of benefits in existing handicap civil rights laws, the limitation of "*solely* on the basis of handicap" is added. The word "*solely*" does not appear in other types of civil rights legislation, and was apparently incorporated in the Rehabilitation Act of 1973 as some form of compromise in the Congress. The effect of the additional word is to permit discrimination, exclusion, and denial of benefits where discrimination on the bases of handicap is only one of the justifications for the action taken. The goal of such laws should be to eliminate discrimination against handicapped persons from the decisionmaking process, not to eliminate such discrimination only when it is found in a pristine, isolated form. As in nondiscrimination laws protecting other groups, the word "solely" is unnecessary and should not be included in statutes prohibiting discrimination on the basis of handicap.

Finally, a substantial difference between handicap nondiscrimination laws and other civil rights legislation occurs in regard to the scope of their coverage. In some civil rights measures, particularly the Civil Rights Act of 1964, Congress has made use of its authority to regulate interstate commerce to prohibit discrimination in all agencies and businesses that affect interstate commerce. To date, laws prohibiting discrimination against handicapped people have applied only to federal agencies and recipients of federal grants, contracts, and other forms of federal assistance. Discrimination against handicapped persons should be prohibited in all the contexts where Congress has seen fit to outlaw other forms of discrimination. Congress should invoke its interstate commerce authority to expand the coverage of handicap discrimination laws to all entities that affect interstate commerce. Such delineation of the scope of coverage of handicap civil rights laws should prevent unfortunate attempts by some to narrow the application of such laws by restrictive interpretations of terms such as "program or activity" or "recipient of federal financial assistance" to which the present statutes apply. In addition, the application of the Commerce Clause regulatory jurisdiction would end the lengthy litigative battle over whether statutes such as section 504 apply to employment discrimination in programs or activities not having employment as the primary goal of the federal assistance provided. As under the Civil Rights Act of 1964, prohibiting discrimination in employment practices should be a major element of laws outlawing discrimination against handicapped persons. Of course, even such broadened coverage would leave large

areas of private conduct unregulated; discrimination on the basis of handicap not subject to federal authority will be eliminated only through state and local laws or through voluntary efforts.

The preceding suggestions for components of handicap antidiscrimination statutes do not, of course, provide an exhaustive list from which a perfect law could be drafted. It is our hope, however, that we have identified some major shortcomings of the present statutes and have suggested some better approaches based upon an examination of the nature of discrimination against handicapped persons. The experiences of women and racial and ethnic minorities in battling for civil rights in our society have provided an invaluable model for handicapped people's civil rights efforts. But the remedies for the discrimination faced by handicapped people cannot be achieved by merely copying the remedial legislation secured by previous civil rights groups. Improvements to existing legislation providing civil rights protections for handicapped people can be framed only by focusing on the great diversity of disabled people, the common experience of discrimination they share, the nature, sources, and dynamics of that discrimination, and the ways in which existing legislation has failed to adequately address and eliminate such discrimination.