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Administrative Law - Department of Transportation Regulations Mandating That Mass Transit Systems Be Accessible to the Handicapped Are beyond the Scope of Section 504 of the Rehabilitation Act

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Recent Developments

ADMINISTRATIVE LAW—DEPARTMENT OF TRANSPORTATION
REGULATIONS MANDATING THAT MASS TRANSIT SYSTEMS
BE ACCESSIBLE TO THE HANDICAPPED ARE BEYOND
THE SCOPE OF SECTION 504 OF THE
REHABILITATION ACT.

American Public Transit Association v. Lewis (D.C. Cir. 1981)

The Department of Transportation (DOT) issued regulations¹ on May 31, 1979, requiring that all modes of public transportation² which receive federal funds be made accessible to the handicapped within specified time periods.³ The American Public Transit Association (APTA) and twelve of its transit system members challenged the validity of these regulations in the United States District Court for the District of Columbia.⁴ The plaintiffs alleged that by requiring "mainstreaming" of the handicapped,⁵ the 1979 DOT regulations exceeded the statutory

1. 49 C.F.R. §§ 27.81-27.107 (1980).

2. *Id.* at §§ 27.85-27.93. The regulations contained separate provisions for bus, rapid and commuter rail, light rail, and paratransit systems, as well as a blanket provision covering all other forms of mass transit. *Id.*

The individual modes of transportation supported by federal funds are bus, subway, streetcar, and commuter rail systems. *American Public Transit Ass'n v. Goldschmidt*, 485 F. Supp. 811, 814 (D.D.C. 1980), *rev'd sub nom. American Public Transit Ass'n v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981).

3. *See* 49 C.F.R. §§ 27.81-27.97 (1980). These time periods ranged from three to thirty years. However, special waivers were available for rail systems under certain limited circumstances. *Id.* at § 27.99.

4. *American Public Transit Ass'n v. Goldschmidt*, 485 F. Supp. 811 (D.D.C. 1980), *rev'd sub nom. American Public Transit Ass'n v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) [circuit court decision hereinafter cited as *APTA v. Lewis*]. The American Public Transit Association is a voluntary trade association located in the District of Columbia. The members of APTA who joined as plaintiffs in the district court suit were Boise (Idaho) Urban Stages, Brevard (County, Florida) Transportation Authority, Dallas Transit System, Greater Cleveland Regional Transit Authority, Indianapolis Public Transportation Corporation, Kansas City Area Transportation Authority, Port Authority of Allegheny (Pennsylvania) County, Regional (Chicago) Transportation Authority, Spokane Transit System, Topeka Metropolitan Transit Authority, Transit Authority of the City of Omaha, and Southeastern Michigan Transportation Authority. Brief for Appellants at i-ii, *APTA v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981).

5. "Mainstreaming" is integrating handicapped persons into the same programs that are available to the non-handicapped. 655 F.2d at 1275.

authority of the Secretary of Transportation⁶ under section 504 of the Rehabilitation Act, and were therefore invalid.⁷ Rejecting this argument, the district court granted the defendant's motion for summary judgment.⁸ The United States Court of Appeals for the District of Columbia Circuit reversed the district court and remanded,⁹ holding that if DOT had issued the regulations primarily to enforce section 504 of the Rehabilitation Act, then the challenged regulations, by requiring mainstreaming, exceeded DOT's authority to enforce section

6. *American Public Transit v. Goldschmidt*, 485 F. Supp. 811, 821 (D.D.C. 1980), *rev'd sub nom.* *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981). When suit was brought Neil Goldschmidt was Secretary of the United States Department of Transportation, and therefore was named as a defendant by the plaintiffs. 15 WEEKLY COMP. PRES. DOC. 1317 (July 27, 1979). By the time the appeal was decided, Andrew Lewis had replaced Goldschmidt as Secretary of Transportation. 17 WEEKLY COMP. PRES. DOC. 14 (Jan. 20, 1981). Consequently, Lewis was named as principal defendant in the appellate court's decision. See FED. R. CIV. P. 25(d).

7. *American Public Transit Ass'n v. Goldschmidt*, 485 F. Supp. 811, 823-26 (D.D.C. 1980), *rev'd sub nom.* *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981). The plaintiffs argued that the Secretary of Transportation's statutory authority to promulgate the regulations derived primarily from § 504 of the Rehabilitation Act of 1973. Brief for Appellants at 22-23, *APTA v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981). See 29 U.S.C. § 794 (Supp. III 1979).

It was the plaintiff's contention that a recipient of federal funds under § 504 had no affirmative obligation to "mainstream" handicapped persons. Since DOT's regulations imposed such a burden, the plaintiffs contended that they exceeded the authority of the Secretary of Transportation under § 504. 485 F. Supp. at 823, 826.

8. *American Public Transit Ass'n v. Goldschmidt*, 485 F. Supp. 811, 837 (D.D.C. 1980), *rev'd sub nom.* *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981). The district court found that the Secretary's authority to adopt regulations governing transportation of the handicapped was supported by three statutes: § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (Supp. III 1979); § 16 of the Urban Mass Transportation Act (UMTA) of 1964, 49 U.S.C. § 1612 (1976 & Supp. III 1979); and § 165(b) of the Federal-Aid Highway Act (FAHA) of 1976, 23 U.S.C. § 142 note (1976). 485 F. Supp. at 823-26. The district court stated that the UMTA and FAHA authorized the DOT regulations, so that even if "section 504 would not independently justify the DOT regulations," it did "further buttress the Secretary's exercise of his authority under the Urban Mass Transportation Act and the Federal Highway Act." *Id.* at 826. Given these statutory bases, the court concluded that the DOT regulations did not exceed the Secretary's statutory authority. *Id.*

9. *APTA v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981). The appellants in the case were APTA and eleven of its transit system members who had appeared as plaintiffs in the district court. *Id.* at 1276 n.7. All the original plaintiffs with the exception of the Southeastern Michigan Transportation Authority joined in the appeal. See note 4 and accompanying text *supra*.

The case was heard by Judges MacKinnon, Mikva, and Edwards of the District of Columbia Circuit. Judge Mikva wrote for the majority and Judge Edwards filed a concurring opinion. 655 F.2d at 1273. Although appellants raised several issues on appeal, the court only discussed whether the regulations were a valid way of enforcing § 504 of the Rehabilitation Act. Compare Brief for Appellants, *id.* with 655 F.2d at 1276-77.

504. *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981).

Section 504 of the Rehabilitation Act¹⁰ prohibits discrimination against "otherwise qualified" handicapped individuals in programs or activities which receive federal financial assistance.¹¹ In 1976, DOT issued a set of regulations¹² designed to implement¹³ section 504 of the Rehabilitation Act of 1973,¹⁴ section 16 of the Urban Mass Transportation Act of 1964 (UMTA),¹⁵ and section 165(b) of the Federal-Aid Highway Act of 1973 (FAHA).¹⁶

10. Rehabilitation Act § 504, 29 U.S.C. § 794 (Supp. III 1979). Section 504 of the Rehabilitation Act states 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." *Id.*

11. See note 10 *supra*.

12. 41 Fed. Reg. 18,234 (1976). The 1976 regulations mandated that state and local planners make "special efforts to plan public mass transportation facilities and services" which the elderly and handicapped could effectively use. *Id.* The regulations were accompanied by guidelines illustrating the kinds of plans that satisfied the "special efforts requirement." *Id.* These guidelines were issued jointly by the Urban Mass Transit Administration and the Federal Highway Administration under authority delegated by the Secretary of DOT. *Id.*

The definition of "special efforts" was set forth in the 1976 DOT regulations and added to appendix B of 23 C.F.R. § 450, subpt. A (1980). It states: [T]he term "special efforts" refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair users and semiambulatory persons. With regard to transportation for wheelchair users and others who cannot negotiate steps, "special efforts" in planning means genuine, good-faith progress in planning service for wheelchair users and semiambulatory persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period.

Id.

13. 41 Fed. Reg. 18,234 (1976).

14. 29 U.S.C. § 794 (Supp. III 1979). For the relevant text of § 504, see note 10 *supra*.

15. 49 U.S.C. § 1612 (1976 & Supp. III 1979). The relevant portion of this provision states:

(a) It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation . . . should contain provisions implementing this policy.

Id.

16. 23 U.S.C. § 142 note (1976). Section 165(b) of the FAHA provides: (b) The Secretary of Transportation shall require that projects receiving Federal financial assistance . . . shall be planned, designed,

In 1978, pursuant to an executive order,¹⁷ the Secretary of Health, Education, and Welfare (HEW)¹⁸ issued guidelines implementing section 504 of the Rehabilitation Act¹⁹ which other federal agencies were required to follow.²⁰ The HEW guidelines required all recipients of federal funds to integrate, or "mainstream,"²¹ the handicapped into the same programs available to non-handicapped persons.²² Since the 1976 DOT regulations²³ had provided for separate transit services to the handicapped as an alternative to "mainstreaming,"²⁴ they were now inconsistent with the HEW guidelines.²⁵ Consequently, in 1979 DOT promulgated²⁶ new regulations²⁷ relating to mass transit²⁸ bringing them into conformance with the HEW guidelines.²⁹

constructed, and operated to allow effective utilization by elderly or handicapped persons who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, . . . are unable without special facilities or special planning or design to utilize such facilities and services effectively. The Secretary shall not approve any program or project to which this section applies which does not comply with the provisions of this subsection.

Id.

17. 41 Fed. Reg. 17,871 (1976). This Executive Order was issued by President Ford shortly before the 1976 DOT regulations were published in their final form. The Executive Order charged the Secretary of Health, Education, and Welfare with coordinating the implementation of § 504 of the Rehabilitation Act among various federal departments and agencies by establishing guidelines for determining what practices were discriminatory. *Id.*

18. During the period relevant to this case, the department was known as the Department of Health, Education, and Welfare. Since the District of Columbia Court of Appeals refers to the department as HEW in its opinion, that designation has been used here. However, the department has since been renamed the Department of Health and Human Services. See 20 U.S.C. § 3508 (Supp. III 1979).

19. 45 C.F.R. §§ 85.1-85.58 (1980).

20. President Ford's Executive Order directed other federal departments and agencies to issue rules and regulations consistent with the standards and procedures that the Secretary of HEW would ultimately establish. 41 Fed. Reg. 17,871 (1976).

21. See note 5 *supra*.

22. 45 C.F.R. § 85.51 (1980). The HEW guidelines permit separate treatment of the handicapped only if such treatment is necessary to provide handicapped persons with equal opportunity and truly effective benefits and services. *Id.*

23. 41 Fed. Reg. 18,234 (1976).

24. *Id.* The 1976 regulations and their accompanying guidelines allowed each local authority to choose the plan which best suited local needs. *Id.* Thus, a community could provide door-to-door "special services" to the handicapped in lieu of making fixed-route transportation systems accessible. *Id.*

25. Compare 45 C.F.R. §§ 85.1-85.58 (1980) (the HEW guidelines) with 41 Fed. Reg. 18,234 (1976) (the 1976 DOT regulations).

26. Shortly after the HEW guidelines appeared, DOT published a notice of proposed rulemaking which stated that DOT was compelled by the HEW

Prior to the effective date of HEW's guidelines and the issuance of DOT's 1979 regulations, several federal courts had considered the impact of section 504 upon mass transit systems.³⁰ Each of these cases had been brought by handicapped plaintiffs claiming, *inter alia*, that their rights under section 504 had been violated because their local mass transit systems were inaccessible to the handicapped.³¹ The disposition of these cases hinged upon the courts' interpretation of the obligations imposed

guidelines to adopt only "mainstreaming" options in its rules. 43 Fed. Reg. 25,016 (1976).

27. 49 C.F.R. §§ 27.1-129 (1980). The regulations generally required the recipients of financial assistance from DOT to make existing and future programs and facilities accessible to the handicapped. These regulations consisted of six subparts: subpart A, §§ 27.1-29, generally prohibited discrimination toward the handicapped in all federally funded programs; subpart B, §§ 27.31-59 specifically prohibited employment discrimination towards the handicapped in programs receiving federal monies and required that these programs make reasonable accommodations to the handicapped who are "otherwise qualified" employees; subpart C, §§ 27.61-69, stated the accessibility requirements for new and existing facilities; subpart D, §§ 27.71-79, set forth the accessibility requirements for airports, railroads, and highways; subpart E, §§ 27.81-119, covered the accessibility of mass transit to the handicapped; and subpart F, §§ 27.121-129, presented the procedures for enforcing these regulations.

28. *Id.* at § 27.81-119.

29. Compare 45 C.F.R. §§ 85.1-58 (1980) (the HEW guidelines) with 49 C.F.R. §§ 27.1-129 (1980) (the 1979 DOT regulations).

30. See *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *Michigan Paralyzed Veterans of Am. v. Coleman*, 451 F. Supp. 7 (E.D. Mich. 1977); *Vanko v. Finley*, 440 F. Supp. 656 (N.D. Ohio 1977); *Bartels v. Biernat*, 427 F. Supp. 226 (E.D. Wis. 1977); *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd mem.*, 551 F.2d 862 (5th Cir. 1977).

31. See, e.g., *Leary v. Crapsey*, 566 F.2d 863, 864 (2d Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413, 414 (8th Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1279 (7th Cir. 1977); *Michigan Paralyzed Veterans of Am. v. Coleman*, 451 F. Supp. 7, 8 (E.D. Mich. 1977); *Vanko v. Finley*, 440 F. Supp. 656, 658 (N.D. Ohio 1977); *Bartels v. Biernat*, 427 F. Supp. 226, 228 (E.D. Wis. 1977); *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394, 395 (N.D. Ala. 1975), *aff'd mem.*, 551 F.2d 862 (5th Cir. 1977).

In most cases involving § 504 claims, the plaintiffs typically have also alleged violations of the UMTA, FAHA, and the equal protection clause of the fourteenth amendment. See, e.g., *Leary v. Crapsey*, 566 F.2d at 864 (UMTA claim); *United Handicapped Fed'n v. Andre*, 558 F.2d at 414 (UMTA, FAHA, and fourteenth amendment violations); *Lloyd v. Regional Transp. Auth.*, 548 F.2d at 1279 (UMTA, equal protection, and Architectural Barriers Act of 1968 violations); *Michigan Paralyzed Veterans of Am. v. Coleman*, 451 F. Supp. at 859 (UMTA, equal protection, Department of Transportation and Related Agencies Appropriations Act of 1975 violations); *Vanko v. Finley*, 440 F. Supp. at 658 (UMTA, Department of Transportation and Related Agencies Appropriations Act of 1975, fifth and fourteenth amendment violations); *Bartels v. Biernat*, 427 F. Supp. at 228-29 (UMTA, fifth and fourteenth amendments, and Department of Transportation and Related Agencies Appropriation Act of 1975

by section 504.³² The courts generally agreed that transit systems had to show that "special efforts" were being made to meet the mass transit needs of handicapped persons.³³ However, the courts differed with regard to the specific nature and scope of the "special efforts" required by section 504.

In *Snowden v. Birmingham-Jefferson County Transit Authority*,³⁴ the United States District Court for the Northern District of Alabama held that section 504 had not been violated so long as mobility-disabled persons could use defendant's transportation vehicles with the assistance of others.³⁵ Another view of the "special efforts" requirement was adopted by the courts in *Vanko v. Finley*,³⁶ *Leary v. Crapsey*,³⁷ and

violations); *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. at 395, *aff'd mem.*, 551 F.2d 862 (5th Cir. 1977) (UMTA, fifth and fourteenth amendment violations).

32. See, e.g., *Leary v. Crapsey*, 566 F.2d 863, 865-66 (2d Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1280-84 (7th Cir. 1977); *Michigan Paralyzed Veterans of Am. v. Coleman*, 451 F. Supp. 7, 10-11 (E.D. Mich. 1977); *Vanko v. Finley*, 440 F. Supp. 656, 666 (N.D. Ohio 1977); *Bartels v. Biernat*, 427 F. Supp. 226, 232-33 (E.D. Wis. 1977); *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394, 397 (N.D. Ala. 1975), *aff'd mem.*, 551 F.2d 862 (5th Cir. 1977).

33. *Leary v. Crapsey*, 566 F.2d 863, 865-66 (2d Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413, 415-16 (8th Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1282-83 (7th Cir. 1977); *Michigan Paralyzed Veterans of Am. v. Coleman*, 451 F. Supp. 7, 10-11 (E.D. Mich. 1977); *Vanko v. Finley*, 440 F. Supp. 656, 666 (N.D. Ohio 1977); *Bartels v. Biernat*, 427 F. Supp. 226, 232-33 n.8 (E.D. Wis. 1977); *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394, 396-97 (N.D. Ala. 1975), *aff'd mem.*, 551 F.2d 862 (5th Cir. 1977).

34. 407 F. Supp. 394 (N.D. Ala. 1975). The wheelchair-bound plaintiff in *Snowden* sought declaratory relief, an injunction restraining defendant DOT from giving defendant Transit Authority federal funds, and an injunction restraining the Transit Authority from acquiring mass transit vehicles that were inaccessible to the handicapped. *Id.* at 395. The plaintiff alleged that the defendant Transit Authority's failure to make its bus system accessible to the handicapped was a violation of § 16 of the UMTA, § 504 of the Rehabilitation Act, and the equal protection clause of the fourteenth amendment. *Id.* The court granted the defendants' motion for summary judgment after concluding that the Transit Authority had made sufficient "special efforts" towards aiding handicapped persons other than those confined in wheelchairs. *Id.* at 396-98.

35. *Id.* at 397. Crucial to the court's decision was the fact that there was at that time no safe, reliable device on the market for making buses accessible to unassisted persons in wheelchairs. *Id.* at 396.

36. 440 F. Supp. 656 (N.D. Ohio 1977). In *Vanko*, a wheelchair-bound plaintiff sought injunctive and declaratory relief. *Id.* at 658. He claimed that the "special efforts" requirement of the UMTA required the defendants to make all mass transit vehicles and facilities accessible to handicapped persons, and that by failing to do so, the defendants had violated § 504 of the Rehabilitation Act and § 16 of the UMTA. *Id.* at 660, 662-63. The court disagreed with the plaintiff's interpretation of the "special efforts" requirement and granted the defendant's motion for summary judgment. *Id.* at 665-70. According to the *Vanko* court, the "special efforts" requirement was satisfied by good

Bartels v. Biernat.³⁸ These courts construed section 504 as mandating the same "special efforts" requirement imposed by the UMTA³⁹ and its implementing regulations—"good faith progress" in planning service for the handicapped which is reasonably comparable to service for the general public.⁴⁰

A broader reading of the requirements of section 504 appeared in *Lloyd v. Regional Transportation Authority*.⁴¹ In *Lloyd*, the Seventh Circuit held that section 504, when considered with its implementing regulations,⁴² established affirmative rights in the handicapped,⁴³ and suggested a concomitant duty upon transit systems to embark on sub-

faith progress in developing a comparable mass transit system for the handicapped. *Id.* at 665-66.

37. 566 F.2d 863 (2d Cir. 1977). The handicapped plaintiffs in *Leary* sought equitable and declaratory relief and damages. *Id.* at 865. They alleged that the defendant transit system's failure to provide them with an accessible bus system violated both the UMTA and § 504 of the Rehabilitation Act. *Id.* at 864-65. The court remanded the case to allow the lower court to determine whether the defendant's special efforts complied with the Urban Mass Transit Administration's regulations. *Id.* at 864-66.

38. 427 F. Supp. 226 (E.D. Wis. 1977). The *Bartel* court enjoined the Milwaukee County Transit Board from acquiring buses inaccessible to the handicapped until the Board could show that "special efforts," as set forth in the 1976 DOT regulations, had been made to ensure that mass transit facilities equivalent to those enjoyed by the rest of the community were available to the handicapped. *Id.* at 231-33. See 49 C.F.R. § 613.204 (1980).

39. The Urban Mass Transit Administration is a component part of DOT. *U.S. Government Manual* 445 (1978).

40. *Leary v. Crapsey*, 566 F.2d at 865-66; *Vanko v. Finley*, 440 F. Supp. at 666; *Bartels v. Biernat*, 427 F. Supp. at 232-33. The regulations implementing the UMTA included the 1976 DOT regulations promulgated by the Urban Mass Transportation Administrator under authority delegated by the Secretary of DOT and under the authority of § 504 of the Rehabilitation Act, § 16 of the UMTA, and § 165(b) of the FAHA. 41 Fed. Reg. 18,234 (1976). According to part of the 1976 regulations, "[t]he Urban Mass Transportation Administrator will grant project approvals pursuant to 23 C.F.R. § 450.320(a)(3) only if: (a) The urban transportation planning process exhibits satisfactory special efforts in planning public mass transportation facilities and services that can be utilized by elderly and handicapped persons." 49 C.F.R. § 613.204 (1980). For the statutory definition of "special efforts," see note 12 and accompanying text *supra*.

41. 548 F.2d 1277 (7th Cir. 1977). In *Lloyd*, mobility-handicapped plaintiffs sought a preliminary injunction to restrain defendant transit authority from designing or operating any new federally funded facilities that were inaccessible to the handicapped. *Id.* at 1279. The plaintiffs also requested a mandatory injunction compelling the defendants to make existing transportation accessible to the mobility-disabled. *Id.* The plaintiffs claimed that the defendants had violated § 504 of the Rehabilitation Act by denying handicapped persons meaningful use of federally funded mass transportation facilities. *Id.*

42. See note 12 *supra*.

43. 548 F.2d at 1281. These affirmative rights allow the handicapped to bring a private cause of action to vindicate or protect those rights. *Id.*

stantial remedial programs.⁴⁴ The *Lloyd* court stated that the remedial program must comply with the "special efforts" requirements of the 1976 DOT regulations.⁴⁵ In addition, however, the court stated that the requirements of the then proposed HEW guidelines,⁴⁶ if finalized, should also be used in deciding whether the plaintiffs were entitled to remedial action.⁴⁷

The court in *Michigan Paralyzed Veterans of America v. Coleman*⁴⁸ also considered the scope of the "special efforts" requirement of section 504 of the Rehabilitation Act.⁴⁹ Since buses with wheelchair accessibility options were now on the market,⁵⁰ the court questioned, but did not resolve, whether the defendants had an obligation under the "special efforts" requirement to order such buses immediately.⁵¹

These decisions indicate that the federal courts were not in accord in their interpretation of the obligations which section 504 imposed.⁵²

44. *Id.* at 1282-83.

45. *Id.* The *Lloyd* court cited the appendix of 49 C.F.R. app. § 613, subpt. B (1980) as providing several examples of the level of effort needed to satisfy the "special efforts" requirement. 548 F.2d at 1282. The examples given were: a program for wheelchair users involving the average annual expenditure of five percent of the funds appropriated to an urban area; the purchase of only wheelchair-accessible equipment until one-half of the vehicles are accessible; or the provision of a comparable substitute system which would provide 10 round trips per week at fares comparable to those charged on standard buses. 49 C.F.R. app. § 613, subpt. B (1980), quoted in 548 F.2d at 1282-83 n.17.

46. See notes 21-22 and accompanying text *supra*.

47. 548 F.2d at 1288. The Seventh Circuit remanded the case and instructed the district court to consider whether the defendants had complied with § 504 and its implementing regulations, including the proposed HEW regulations should they become effective by the time further proceedings were conducted in the district court. *Id.* at 1287-88. Accord, *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977).

48. 451 F. Supp. 7 (E.D. Mich. 1977).

49. The plaintiffs in *Coleman* sought to enjoin the Southeastern Michigan Transit Authority from purchasing vehicles inaccessible to the mobility-handicapped. *Id.* at 8.

50. *Id.* The *Coleman* court thereby distinguished *Snowden*, where such buses had not yet been developed. *Id.* at 11. See generally notes 34-35 and accompanying text *supra*.

51. 451 F. Supp. 7, 10-11 (E.D. Mich. 1977). The court denied the defendant's motion for summary judgment, stating that "[t]he question remains whether the defendants are required by the Urban Mass Transportation Act or the regulations promulgated thereunder to order such buses immediately, since buses with wheelchair accessibility options were available." *Id.* at 10-11.

The court decided to permit the plaintiffs to amend their complaint in light of its opinion, and in light of developments in the law since the motion was argued. *Id.* at 11.

52. Illustrative of the difficulties courts experience in interpreting § 504 is *Atlantis Community, Inc. v. Davis*, 453 F. Supp. 825 (D. Colo. 1978). In *Atlantis*, the plaintiffs brought a class action on behalf of handicapped persons against the Secretary of DOT, the Administrator of the Urban Mass Transportation

However, shortly before the effective date of DOT's 1979 regulations,⁵³ the Supreme Court was given its first opportunity to construe the scope and meaning of section 504 in *Southeastern Community College v. Davis*.⁵⁴ In *Davis*, the plaintiff suffered from a severe hearing disability.⁵⁵ Southeastern Community College had denied her admission to its nursing program on the grounds that the plaintiff's disability not only would preclude her participation in the clinical program, but also would prevent her from safely performing in her proposed profession.⁵⁶ The Court concluded that the college had not violated section 504 because respondent Davis was not an "otherwise qualified handicapped individual" within the meaning of section 504.⁵⁷

The *Davis* Court also rejected the respondent's argument that HEW's guidelines required Southeastern Community College to make extensive modifications to accommodate disabled persons in its program.⁵⁸ According to the Court, neither section 504,⁵⁹ nor the HEW guidelines implementing section 504,⁶⁰ imposed an affirmative obligation

Administration, and other defendants. *Id.* The plaintiffs sought to enjoin the delivery and use of 213 buses which were inaccessible to the handicapped. Unlike other courts, the *Atlantis* court made no attempt to determine the duties which § 504 imposed. In rendering a declaratory judgment, the court stated that "the federal statutes [§ 504 of the Rehabilitation Act and § 16 of the UMTA] under which plaintiffs claim do not provide a sufficient definition of the duties of the federal defendants to enable this court to give direction to them." *Id.* at 831.

53. The effective date of the 1979 DOT regulations was July 2, 1979. 44 Fed. Reg. 31,443 (1979).

54. 442 U.S. 397 (1979).

55. *Id.* at 400-01. An audiologist's report stated that plaintiff, with a hearing aid, could detect sounds, but that she could not discriminate sufficiently among sounds to understand normal speech. *Id.* at 401, 403. To understand speech, plaintiff had to look directly at the person talking and lipread. *Id.* at 401.

56. *Id.* at 401-02.

57. *Id.* at 405-07. For the text of § 504, see note 10 *supra*. The Court stated that "[a]n otherwise qualified handicapped individual is one who is able to meet all of a program's requirements in spite of his handicap." 442 U.S. at 406.

58. 442 U.S. at 407-12. Davis felt that the program should be adjusted to her hearing disability. *Id.* at 407-08. The college argued that those modifications which would be necessary to enable Davis to safely participate in the program would prevent her from receiving the benefits of the program. *Id.* at 401-02.

59. *Id.* at 410-11. The Court stated that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." *Id.* at 411 (footnote omitted).

60. *Id.* at 409-10. The Court concluded that if the HEW guidelines required "substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, . . . they would constitute an unauthorized extension of the obligations imposed by that statute." *Id.* at 410.

upon all recipients of federal funds.⁶¹ As a result, Southeastern Community College had no duty to make substantial modifications in its nursing program in order to allow respondent to effectively participate.⁶²

Although *Davis* was set in the context of a professional school program,⁶³ two recent decisions⁶⁴—*Simon v. St. Louis County*⁶⁵ and *Upshur v. Love*⁶⁶—have applied the *Davis* Court's repudiation of an affirmative

61. *Id.* at 407-12.

62. *Id.* at 409-10 & 413. The *Davis* Court was careful to point out that "the line between a lawful refusal to extend affirmative action and illegal discrimination against the handicapped" was not always clear. *Id.* at 412. There are situations, the Court said, where "refusal to modify an existing program might become unreasonable and discriminatory." *Id.* at 413. The Court, however, declined to define or describe such situations, preferring to leave this responsibility to HEW. *Id.*

63. The language of the Court suggests that the case only resolved the obligations which § 504 imposes upon educational institutions: "Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate." *Id.* at 405.

64. See notes 65 & 66 and accompanying text *infra*.

Since *Davis*, the only court other than the District of Columbia Circuit in *APTA* which considered the relationship between § 504 and mass transportation in any detail was the Southern District of New York in *Dopico v. Goldschmidt*, 518 F. Supp. 1161 (S.D.N.Y. 1981). See note 119 and accompanying text *infra*.

65. 497 F. Supp. 141 (E.D. Mo. 1980), *aff'd in part, rev'd in part*, 656 F.2d 316 (8th Cir. 1981). The plaintiff in *Simon* was a police officer who had become a paraplegic after receiving a gunshot wound. 656 F.2d at 318. When the department failed to rehire him, he brought suit under several federal statutes, including § 504. *Id.* The defendants argued that in order to accommodate plaintiff as an employee, the police department would need to make the following substantial modifications in its employment programs: restructure the transfer policy; provide the plaintiff with extra support staff; and keep plaintiff in a small area. 497 F. Supp. at 151.

In reviewing the district court's decision, the Eighth Circuit in *Simon* interpreted *Davis*'s prohibition against affirmative action as applicable only when handicapped plaintiffs were not "otherwise qualified" individuals, such as when they did not meet a federally funded program's *legitimate* physical requirements. 656 F.2d at 320. Since the *Simon* court found substantial evidence in the record indicating that the St. Louis County Police Department's requirements were neither necessary, nor required of all officers, the court in *Simon* suggested that their case might be distinguishable from *Davis* because the plaintiff in *Simon* might be an "otherwise qualified" handicapped individual. *Id.* at 320-21. The court also questioned whether the accommodations necessary to accommodate the plaintiff were substantial ones. Consequently, the *Simon* court remanded the case for consideration of these two issues. *Id.* at 321.

66. 474 F. Supp. 332 (N.D. Cal. 1979). In *Upshur*, the plaintiff, a blind teacher, had applied for a school administrative job. *Id.* at 334. When he was not placed upon the list of candidates eligible for administrative positions within the school district, he brought suit under § 504. *Id.* at 333.

In determining whether to place the plaintiff on its eligibility list, the School District's Administrative Committee had asked the plaintiff how he would cope with his handicap in fulfilling particular responsibilities. *Id.* at 335. Upshur had responded that he expected to be assigned an aide who was fully qualified to perform a wide range of administrative duties and that he would simply rely upon the aide. *Id.* The school district, however, was not prepared

obligation to an employment situation.⁶⁷ Both courts concluded that an employer is under no obligation to make substantial modifications in a work situation in order to accommodate a handicapped individual.⁶⁸

However, the Fifth Circuit in *Camenisch v. University of Texas*⁶⁹ and *Tatro v. Texas*⁷⁰ and the District Court for Connecticut in *Lynch v. Maher*,⁷¹ have interpreted the *Davis* holding more narrowly.⁷² These courts interpreted *Davis* as stating that where an individual's handicap would preclude his benefiting from the program in question, section 504 imposes no obligation of affirmative action upon the recipient of federal funds.⁷³ Thus, the courts in these three cases distinguished *Davis* on the ground that each of the three suits involved plaintiffs who could benefit from the federally funded program in spite of their handicap.⁷⁴

to hire an aide who was fully qualified to serve as an administrator. *Id.* at 342. School officials thus concluded that the plaintiff's blindness would present significant problems, and since they were not confident that the plaintiff could deal with those problems, the committee did not place him on the eligibility list. *Id.* at 335, 342.

67. See notes 65, 66 & 68 and accompanying text *supra*.

68. *Simon v. St. Louis County*, 656 F.2d at 321; *Upshur v. Love*, 474 F. Supp. at 341-42. After reviewing the record, the *Upshur* court concluded that the school district had no obligation to hire an aide who was fully qualified as an administrator in order to accommodate plaintiff's blindness and stated that "[p]articularly in light of the *Davis* decision, . . . section 504 does not require that degree of accommodation to the needs of handicapped individuals." *Id.* at 342.

69. 616 F.2d 127 (5th Cir. 1980), *vacated as moot*, 49 U.S.L.W. 4468 (April 29, 1981).

70. 625 F.2d 557 (5th Cir. 1980).

71. 507 F. Supp. 1268 (D. Conn. 1981).

72. See notes 73-75 and accompanying text *infra*.

73. *Tatro v. State*, 625 F.2d at 564; *Camenisch v. University of Texas*, 616 F.2d at 132-33; *Lynch v. Maher*, 507 F. Supp. at 1280. For a more detailed discussion supporting this analysis of *Davis*, see Note, *Defining the Rights of the Handicapped Under Section 504 of the Rehabilitation Act of 1973*: Southeastern Community College v. Davis, 24 St. Louis L.J. 159 (1979).

74. *Tatro v. State*, 625 F.2d at 564; *Camenisch v. University of Texas*, 616 F.2d at 133; *Lynch v. Maher*, 507 F. Supp. at 1280.

In *Camenisch*, the plaintiff, a deaf graduate student, alleged that the University of Texas had violated § 504 of the Rehabilitation Act when it failed to provide him with sign language interpreter services. 616 F.2d at 129. The Fifth Circuit, *inter alia*, upheld the district court's preliminary injunction which required the University to procure and compensate a qualified interpreter for the plaintiff. *Id.*

The *Tatro* court, relying on the decision in *Camenisch*, decided that a school district's failure to provide a child suffering from spinal bifida with clean instrument catheterization violated § 504 of the Rehabilitation Act. 625 F.2d at 564.

The plaintiff in *Lynch*, a quadriplegic, brought suit under § 504 after the Connecticut Department of Income Maintenance informed the plaintiff that it would no longer pay for the home health care services he needed. 507 F. Supp. at 1270. The court granted plaintiff's request for a preliminary injunction re-

Each court concluded that if a handicapped person could benefit from the federally funded activity, then failure to make modifications to accommodate him would constitute a violation of section 504.⁷⁵

It was against this background that the United States Court of Appeals for the District of Columbia Circuit began its analysis in *APTA v. Lewis* of whether DOT's 1979 regulations exceeded the scope of section 504 of the Rehabilitation Act.⁷⁶ The court began by examining the circumstances surrounding the issuance of the 1979 DOT regulations, and concluded that the statutory bases for these regulations were section 504 and the related HEW guidelines.⁷⁷

To determine whether the 1979 regulations were within the scope of the government's power to enforce section 504, the *APTA* court relied heavily upon the *Davis* decision.⁷⁸ It interpreted *Davis* as holding that section 504 bans discrimination, but does not mandate affirmative action to accommodate the handicapped.⁷⁹ It then applied the *Davis* holding to the mass transit situation⁸⁰ and examined DOT's regulations to determine whether they required affirmative action.⁸¹

The District of Columbia Circuit found that DOT's regulations did require extensive modifications of existing transit systems in order to make them accessible to the handicapped.⁸² These modifications would

quiring defendant to pay for plaintiff's home care, after distinguishing the case from *Davis*. *Id.* at 1280. The court concluded that, unlike the situation in *Davis*, providing Lynch with home care services would not require changing the purpose or goal of the program. *Id.*

75. *Tatro v. State*, 625 F.2d at 564-65; *Camenisch v. University of Texas*, 616 F.2d at 132-33; *Lynch v. Maher*, 507 F. Supp. at 1279-80.

76. 655 F.2d 1272 (D.C. Cir. 1981).

77. *Id.* at 1279-80. The court pointed out that the 1976 DOT regulations which were intended to implement § 504 of the Rehabilitation Act, § 16 of the UMTA, and § 165(b) of the FAHA, did not mandate "mainstreaming." *Id.* at 1279. However, after the HEW guidelines were published in 1978, DOT stated that it was bound by them, and evaluated options for consistency with the HEW guidelines. *Id.* at 1275, 1279. The court found it significant that the 1979 regulations differed substantially from the 1976 regulations, although both purported to implement the same statutory provisions. *Id.* at 1279. Furthermore, DOT's 1979 regulations were not promulgated until after the Secretary of HEW approved them as being consistent with the HEW guidelines, and the formal promulgation of the regulations explains them in terms of the HEW guidelines enforcing § 504. *Id.* All of this evidence led the court to conclude that if HEW had not issued guidelines inconsistent with DOT's 1976 regulations, DOT probably would not have issued new regulations. *Id.* at 1279-80.

78. *Id.* at 1277-78. See notes 54-62 and accompanying text *supra*.

79. 655 F.2d at 1277. The *APTA* court also stated that the *Davis* Court had recognized a fine line between impermissible discrimination and permissible affirmative action. *Id.* See note 62 *supra*.

80. 655 F.2d at 1278. For a discussion of the applicability of this standard to mass transit, see notes 99-105 and accompanying text *infra*.

81. 655 F.2d at 1278.

82. *Id.* at 1275-76, 1278. A transportation mode generally is considered "accessible" when it can be used by wheelchair users. *Id.* at 1276. The court

impose heavy burdens on local authorities.⁸³ In the court's view, the changes mandated by the regulations constituted exactly the kind of burdensome program modifications that the *Davis* Court had found to be beyond the scope of section 504.⁸⁴ Consequently, the court decided that the regulations exceeded DOT's authority to enforce section 504 and were therefore invalid.⁸⁵

Having concluded that DOT had relied primarily upon section 504 in drafting the regulations,⁸⁶ the court remanded⁸⁷ the case to DOT.

examined DOT's 1979 regulations, and observed that they required every bus purchased after July 2, 1979 to be equipped with a wheelchair lift. *Id.* Furthermore, half of the buses on any mass transit system had to be accessible to wheelchair users at the end of ten years. *Id.* See 49 C.F.R. § 27.85 (1980).

The requirements for subway and other rail systems were found to be equally stringent. 655 F.2d at 1276. Subways and rail systems had to be retrofitted with elevators and "gap-closing" equipment which would enable wheelchair users to board trains. *Id.* "Key" subway and commuter rail stations, which would comprise forty percent of all stations, had to be made accessible to the handicapped, and connector service between key stations and other stations had to be provided. *Id.* In addition, new subway cars acquired after July 2, 1979, and new commuter rail cars acquired after January 1, 1983, had to be made accessible to wheelchair users so that the mobility-handicapped could use at least one car per train. *Id.* Existing subway, commuter rail, and streetcar systems could, however, apply for a special waiver if the metropolitan planning organization, handicapped persons, and their representative organizations had planned an alternative service substantially as good as an accessible rail system. *Id.* at 1276. See 49 C.F.R. §§ 27.87, 27.89, 27.99.

83. 655 F.2d at 1278 & n.12. DOT estimated that local authorities would pay \$460 million over 30 years in order to comply with the regulations. *Id.* at n.12. However, the court felt that this estimate was too low because DOT had only projected the total program cost at \$3.2 billion while the Congressional Budget Office had estimated that the total cost of the program would be \$7.1 billion. *Id.* APTA estimated the costs to local authorities over the same period to be \$4.5 billion. Both estimates of the cost to local authorities were based upon federal subsidies continuing at the level of 80% of the total program cost, although there is no guarantee that the federal government will continue its subsidies. *Id.*

84. *Id.* at 1278.

85. *Id.* at 1280. The District of Columbia Circuit thus reversed the decision of the district court which had found the regulations to be a valid exercise of DOT's statutory authority. *APTA v. Goldschmidt*, 485 F. Supp. 811, 826 (D.D.C. 1980), *rev'd sub nom.* *APTA v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981). See note 8 and accompanying text *supra*.

86. See note 77 and accompanying text *supra*. The *APTA* court noted that the fact that the Secretary of DOT had followed HEW's § 504 guidelines did not mean that he could not have made an independent policy decision to take the same approach in enforcing other statutes. The court said that it was merely holding that the events surrounding the promulgation of the 1979 regulations strongly suggested that the Secretary of DOT did not make such an independent decision. 655 F.2d at 1280.

87. 655 F.2d at 1280. The *APTA* court discussed whether DOT's reliance upon § 504 in promulgating the regulations warranted remanding the proceedings to DOT rather than considering the validity of the regulations under other statutes. *Id.* at 1278-80. The 1979 DOT regulations had, in fact, cited as authority not only § 504 of the Rehabilitation Act, but also § 16(a) of the UMTA, and § 165(b) of the FAHA. See 49 C.F.R. § 27 (1980).

According to the *APTA* court, the remand would give the Secretary of Transportation an opportunity to explain whether the 1979 regulations had been based upon statutes other than section 504.⁸⁸

Concurring, Judge Edwards stated that a remand was proper because the statutory basis for the regulations was ambiguous.⁸⁹ He also suggested that the application of section 504 to public transportation raised questions significantly different from those considered in the educational setting of *Davis*.⁹⁰ According to Judge Edwards, some affirmative action may in fact be necessary to avoid discrimination in public transportation.⁹¹ Consequently, he advised that the limits to the affirmative action

However, the District of Columbia Court of Appeals found improper the district court's assumption that statutes other than § 504 supported DOT's regulations. The court stated that "[w]hen an administrative decision is based upon inadequate or improper grounds, a reviewing court may not presume that the administrator would not have made the same decision on other, valid grounds." 655 F.2d at 1278, citing *SEC v. Chenery Corp.* (II), 332 U.S. 194, 196 (1947); *SEC v. Chenery Corp.* (I), 318 U.S. 80 (1943). Since DOT had primarily relied upon § 504, the *APTA* court concluded that established principles of administrative law precluded the court from finding an alternative basis for the DOT Secretary's action. 655 F.2d at 2278-80. See, e.g., *SEC v. Chenery Corp.* (II), 332 U.S. 194, 196 (1947); *SEC v. Chenery Corp.* (I), 318 U.S. 80, 88 (1943).

The *APTA* court rejected the government's argument that *Chenery* was inapplicable when the administrator had erred in interpreting a statute. Relying upon *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), the circuit court asserted that as a reviewing court, it must determine whether the administrator properly construed the scope of his statutory authority in making his decision. The court then said "[w]hen it is likely an administrator would not have enforced one statute the way he enforced another, a decision promulgated on the basis of the wrong statute should be remanded for his consideration." 655 F.2d at 1279. Thus, the court found it necessary to remand the case to DOT. *Id.* at 1280.

88. 655 F.2d at 1280. The Secretary was instructed that if, on remand, he indicated that the regulations enforced other statutes, he should identify the provisions of the UMTA or the FAHA or any other act that are enforced by the regulations, and justify the regulations in terms of the cited provisions. *Id.*

89. *Id.* at 1280-81 (Edwards, J., concurring). Judge Edwards pointed out that the government had maintained in the district court and in its brief on appeal, that § 504 alone provided sufficient authority for the challenged regulations. *Id.* at 1280 (Edwards, J., concurring). During oral argument, however, DOT seemed to urge that the regulations were justified on the combined authority of § 504, the UMTA, and the FAHA. *Id.* DOT then devoted most of its argument to justifying the regulations under the UMTA, although at one point government counsel suggested that each statute provided an independent basis for justifying the regulations. *Id.* at 1281 (Edwards, J., concurring). Consequently, Judge Edwards felt that the government's position was ambiguous and, therefore, the case should be remanded for a clearer explanation of the government's position. *Id.*

90. *Id.* See note 91 and accompanying text *infra*.

91. 655 F.2d at 1281 (Edwards, J., concurring). According to Judge Edwards, "in considering the accessibility of public transportation to otherwise qualified handicapped persons, it is much more difficult to avoid 'discrimination' without taking some kind of 'affirmative action.'" *Id.*

that the government may order as a condition to granting federal funds be defined.⁹²

In evaluating the *APTA* court's decision, it should be noted that the Court of Appeals for the District of Columbia Circuit applied the rationale of *Davis* to the facts in *APTA*, without considering whether such an application was warranted.⁹³ It is submitted that the *APTA* court's reliance upon *Davis* is subject to criticism in two respects. First, it is suggested that the *APTA* court gave the *Davis* decision a far more sweeping scope than the Supreme Court had intended. The language in *Davis* strongly suggests that the Court was only defining the obligations of professional schools under section 504, rather than interpreting the effect of 504 upon all federally funded programs.⁹⁴ Consequently, it is proposed that the applicability of the *Davis* decision should be restricted to two situations: those in which the plaintiffs would ultimately derive no benefit from the program in question;⁹⁵ and those where specific admissions criteria are relevant to the purpose and maintenance of the program.⁹⁶ A broader interpretation of *Davis* is not warranted

92. *Id.* Judge Edwards stated that this resolution should be made on a proper administrative record which unequivocally sets forth the statutory authority and factual basis for the action taken. *Id.*

93. *See id.* at 1278. The facts of *Davis* involved an educational institution. *See* note 63 and accompanying text *supra*.

94. *See* note 63 *supra*. The Supreme Court, in fact, began its opinion by stating that the issue confronting the court was "[w]hether § 504 of the Rehabilitation Act of 1973 . . . forbids professional schools from imposing physical qualifications for admission to their clinical program." *Southeastern Community College v. Davis*, 442 U.S. at 400 (emphasis added). The *Davis* Court further asserted that "[s]ection 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Id.* at 413 (emphasis added) (footnote omitted). Significantly, the court concluded its opinion by stating that "[n]othing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program." *Id.* at 414 (emphasis added). For a further discussion that the *Davis* holding be read narrowly, *see generally* Note, *supra* note 73.

95. *See* notes 73-75 and accompanying text *supra*. Since handicapped persons would benefit from accessible public transportation, it is submitted that the *Davis* decision should not have determined the outcome in *APTA*. Additional support for the benefit that handicapped persons would receive from the 1979 DOT regulations mandating "mainstreaming" comes from studies showing that separate but equal treatment can cause psychological damage to the handicapped. 655 F.2d at 1275 n.5.

96. *See* notes 65-68 and accompanying text *supra*. The employment situation is similar to the admissions process at post-secondary schools. In both situations there are predetermined criteria relevant to performance in the job or program, which all applicants must meet. In the *Davis*, *Upshur*, and *Simon* cases, the plaintiffs were not "otherwise qualified handicapped individuals" if they did not meet the necessary standards required for admission to the program. Thus, the factual similarities between these two situations warrant an application of *Davis*'s rationale to cases like *Upshur* and *Simon* which involve

because neither *Davis* nor any post-*Davis* decision suggests that the decision should automatically be applied to all cases brought under section 504 of the Rehabilitation Act.⁹⁷ Furthermore, to interpret *Davis* more broadly would, in effect, sanction separate treatment for handicapped persons and thus frustrate one of the primary purposes of section 504.⁹⁸

Secondly, it is submitted that the *APTA* court ignored the factual differences between the *APTA* and *Davis* cases, as Judge Edwards noted in his concurring opinion.⁹⁹ In *Davis*, and in the two cases which applied the *Davis* holding to the employment situation, the plaintiffs were not "otherwise qualified handicapped individuals."¹⁰⁰ In sharp contrast are the *Lynch*, *Tatro*, and *Camenisch* cases,¹⁰¹ in which the plaintiffs were "otherwise qualified,"¹⁰² and the courts required the federally funded program to accommodate their special needs.¹⁰³

It is submitted that a handicapped person seeking to use mass transit is an "otherwise qualified individual,"¹⁰⁴ thus making the mass

the employee selection process when the requirements are legitimate and necessary for the job. *Simon v. St. Louis County*, 656 F.2d at 320-21; *Upshur v. Love*, 474 F. Supp. at 341-42. For a discussion of *Simon* and *Upshur*, see notes 65-68 and accompanying text *supra*.

In the mass transit situation, the only requirement relevant to the purpose and maintenance of the program is possession of the fare. Consequently, it is submitted that requiring that mass transit users be ambulatory is not relevant, and therefore the *Davis* rationale is inapplicable to the *APTA* situation.

97. See notes 65-75 and accompanying text *supra*.

98. The purpose of § 504 cannot be served by separate but equal treatment, because such treatment can, in itself, be discriminatory. See *Lloyd v. Regional Transp. Auth.*, 548 F.2d at 1283-84 n.20, 43 Fed. Reg. 2134 (1978). Thus, separate but equal treatment of the handicapped runs counter to one of the stated purposes of § 504, that of preventing federally funded programs from discriminating against the handicapped solely on the basis of their handicap. See note 10 and accompanying text *supra*.

99. 655 F.2d at 1281 (Edwards, J., concurring).

100. See notes 65-68 and accompanying text *supra*. *Southeastern Community College v. Davis*, 442 U.S. 397, 405-07, 413 (1979); *Simon v. St. Louis County*, 497 F. Supp. 141 (E.D. Mo. 1980); *Upshur v. Simon*, 474 F. Supp. 332, 341-42 (N.D. Cal. 1979). Lending support to this interpretation is the fact that on appeal, the *Simon* court questioned whether *Davis* was applicable to the facts of the *Simon* case because the record contained evidence suggesting that the plaintiff was, in fact, an otherwise qualified handicapped individual. 656 F.2d at 320-21. See note 65 and accompanying text *supra*.

101. See notes 73-75 and accompanying text *supra*.

102. See *Tatro v. Texas*, 625 F.2d at 564; *Camenisch v. University of Texas*, 616 F.2d at 132-33; *Lynch v. Maher*, 507 F. Supp. at 1279.

103. *Tatro v. Texas*, 625 F.2d at 564-65; *Camenisch v. University of Texas*, 616 F.2d at 136; *Lynch v. Maher*, 507 F. Supp. at 1280-81.

104. Mass transit is intended to serve the general public, and the only requirement for admission is payment of the fare. Thus, handicapped persons seeking to use mass transit are, unlike the plaintiff in *Davis*, "otherwise quali-

transit situation analogous to the facts of the *Lynch*, *Tatro*, and *Camenisch* cases.¹⁰⁵ By not considering these decisions construing *Davis*, the *APTA* court avoided an important question—whether the *Davis* rationale is applicable to a situation where potential plaintiffs are “otherwise qualified individuals.”

Another fundamental problem inherent in the *APTA* decision is the court’s failure to draw a clear line between impermissible and permissible affirmative action.¹⁰⁶ It is submitted that by stating that impermissible affirmative action occurs when section 504 is implemented through large expenditures,¹⁰⁷ the *APTA* court has not resolved the problem. Comparable alternative transit systems for the handicapped, as authorized by the 1976 DOT regulations,¹⁰⁸ or the “special efforts” requirement of the new 1981 interim DOT regulations,¹⁰⁹ would also result in costly expenditures.¹¹⁰ By providing no guidelines as to what constitutes a “modest expenditure” which does not exceed the scope of section 504, the *APTA* decision subjects every accommodation made on behalf of handicapped persons to potential challenge in the courts.¹¹¹

fied” handicapped individuals once they are able to pay the fare. For the *Davis* court’s definition of an “otherwise qualified” handicapped individual, *see* note 57 and accompanying text *supra*.

105. The plaintiffs in *Lynch*, *Tatro*, and *Camenisch* were otherwise qualified handicapped individuals as defined by *Davis*. In *Lynch*, the plaintiff sought to continue participating in a federally funded program for the homebound. 507 F. Supp. at 1270. The plaintiff in *Tatro* sought admission to a public school, while the plaintiff in *Camenisch* was enrolled in the University’s graduate program. *Tatro v. Texas*, 625 F.2d at 558-60; *Camenisch v. University of Texas*, 616 F.2d at 129.

106. *See* 655 F.2d at 1278.

107. *Id.*

108. *See* note 24 and accompanying text *supra*.

109. 46 Fed. Reg. 37,489 (1981) (to be codified in 149 C.F.R. pt. 27). DOT promulgated these 1981 interim regulations in response to the *APTA* decision. They are a slightly modified version of the 1976 regulations.

110. *See APTA v. Goldschmidt*, 485 F. Supp. 811, 816 n.9 (D.D.C. 1980) *rev’d sub nom. APTA v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981); 44 Fed. Reg. 31,456 (1976). *APTA* estimated that the annual operating cost of a dial-a-ride paratransit service for the handicapped would be \$159 million. 485 F. Supp. at 816 n.9.

111. It seems unlikely that the cost of an alternative transit system for the handicapped, estimated by *APTA* at \$159 million annually, would constitute a modest expenditure. *See* note 110 *supra*. Thus, it is submitted that the *APTA* decision leaves open the possibility that even the “special efforts” requirements of the DOT regulations and the 1981 interim DOT regulations could also be construed as “affirmative action.”

It should be noted that the *Lloyd* and *Andre* courts spoke of compliance with the “special efforts” requirement of the 1976 regulations as affirmative action. *See Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1282-83 (7th Cir. 1977); *United Handicapped Fed’n v. Andre*, 558 F.2d 413, 416 (8th Cir. 1977). If the “special efforts” requirement constitutes substantial affirmative action, as it

It is maintained that the court should have considered, as Judge Edwards suggested, the type and degree of affirmative action that the government may mandate in the mass transit situation.¹¹² Crucial to such a determination would be the consideration of the purpose underlying mass transit, and how it differs from the purpose of other programs affected by section 504.¹¹³ It is further suggested that more than "modest affirmative steps"¹¹⁴ are necessary if mass transit systems are to conform with section 504, because neither alternative transit systems nor modifications in existing systems can be accomplished without large expenditures.¹¹⁵ The need for mass transit systems to engage in affirmative action on behalf of the handicapped was correctly recognized by the *Lloyd* court.¹¹⁶ By failing to analyze whether it was possible for mass transit systems to accommodate the handicapped absent substantial affirmative action, the District of Columbia Court of Appeals has not provided future courts with any guidance as to what constitutes permissible affirmative action in the mass transit situation.¹¹⁷ Consequently, the decision invites court challenges to all accommodations mass transit systems make on behalf of handicapped persons which cost money, because such expenditures might possibly constitute impermissible affirmative action outside the scope of section 504.

In conclusion, it is submitted that the *APTA* decision has raised more questions than it has answered concerning the obligations which section 504 of the Rehabilitation Act imposes upon mass transit.¹¹⁸

most assuredly does given the estimated cost of alternative transit programs for the handicapped, then the 1981 DOT regulations could be successfully challenged and invalidated under the rationale set forth in *APTA*. As the costs of alternative transit programs increase, the probability that a transit system will bring a suit claiming that the "special efforts" requirement constitutes impermissible affirmative action also increases.

112. See 655 F.2d at 1281 (Edwards, J., concurring).

113. See notes 96, 104 and accompanying text *supra*. Mass transit systems attempt to attract as many riders as possible, whereas the employee selection process and admissions procedures for professional schools are characterized by exclusivity and selectiveness.

114. 655 F.2d at 1278. The *APTA* court would allow modest expenditures to accommodate the handicapped on mass transit. *Id.*

115. See note 110 *supra*.

116. See notes 45, 47 & 111 and accompanying text *supra*.

117. See note 114 and accompanying text *supra*. It is submitted that a more useful approach would have been for the *APTA* court to specify the percentage of a transit system's budget that must be expended to avoid impermissible discrimination. Additionally the court should have stated, in a percentage, the upper limit of amounts that transit systems could spend on behalf of the handicapped without the spending being challenged as burdensome affirmative action in violation of *Davis*.

118. See notes 106-16 and accompanying text *supra*.

Furthermore, the *APTA* decision may have deprived handicapped plaintiffs from judicially seeking greater access to mass transit under section 504 of the Rehabilitation Act.¹¹⁹

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119. A recent decision suggests that this may be the *APTA* court's contribution to the case law surrounding § 504 of the Rehabilitation Act. In *Dopico v. Goldschmidt*, 518 F. Supp. 1161 (S.D.N.Y. 1981), handicapped plaintiffs brought suit against their local mass transit system claiming that local defendants had violated, *inter alia*, § 504 of the Rehabilitation Act by failing to provide plaintiffs with an accessible mass transit system. *Id.* at 1165-67. The plaintiffs sought injunctive and declaratory relief to compel defendants to comply with various statutes and regulations enacted by Congress on behalf of the handicapped. *Id.* at 1166-67. Included among these statutes and regulations, were the "special efforts" requirement of § 16 of the UMTA, and the 1976 DOT regulations which construed "special efforts" as genuine, good faith progress in planning service for wheelchair users that was comparable to service provided for the general public. *Id.* See note 12 and accompanying text *supra*.

The district court dismissed plaintiff's section 504 claim, stating: "Regardless of what *APTA* has done to the 1979 DOT regulations, it has clearly held that § 504 does not permit the kind of massive modifications that the regulations require and plaintiffs seek to compel in this action . . . § 504 cannot serve as a basis for the relief requested." 518 F. Supp. at 1176.