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Death Knell for Trageser: Section 504 of the Rehabilitation Act in Light of North Haven

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DEATH KNELL FOR TRAGESER: SECTION 504 OF THE REHABILITATION ACT IN LIGHT OF NORTH HAVEN

I. INTRODUCTION

The Rehabilitation Act of 1973 has been in existence for almost a decade and covers some forty to sixty-eight million handicapped people. The Act was intended to be the first stroke in a broad campaign to eliminate handicap discrimination. While the handicapped have become a more visible minority since the Act was passed, the promise of equal employment outside the arena of federal government and federal contractors has been largely illusory.

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap by the recipients of federal money. Unfortunately, the enforcement of this provision has been impeded, because most jurisdictions have carved out an exception to this broad prohibition in the field of employment. The basis for this exception comes from the belief that, since the language of section 504 is the same as that used in Title VI of the Civil Rights Act, it was meant to have the same scope as Title VI. Title VI does not cover employment practices unless funds were received by the program for the primary purpose of providing employment. Due to the similarity between the two antidiscrimination provisions, courts have held that this limitation applies to section 504 of the Rehabilitation Act as well.

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3 Statistics on the number of handicapped persons are uncertain. At the time of the passage of the Rehabilitation Act its sponsors estimated that there were 22 million physically handicapped adults. Of this number 14 million would be able to work if given the opportunity. 118 Cong. Rec. 3321 (1972). Of 5.6 million mentally retarded persons, 90% would be able to work with proper assistance. Id. The following figures were estimated for those handicapped employed: of 150,000 blind adults, approximately 50,000 were employed; of 60,000 paraplegics, approximately 16-20% were employed; and, of those 200,000 adults with cerebral palsy, only a handful were working. Id. For a discussion of these figures see Wolff, at 28-32.
4 Section 504 is codified at 29 U.S.C. § 794 (1976 & Supp. IV 1980). It provides that “No otherwise qualified handicapped individual in the United States...shall, solely by reason of handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”
6 The provisions of Title VI are limited by 42 U.S.C. § 2000d-3 (1976). It provides: “Nothing contained in this title shall be construed to authorize action under this title of any employment practice of any employer, employment agency or labor organization except where a primary objective of the federal financial assistance is to provide employment.” This section is known as section 604 of the Civil Rights Act.
7 See supra note 5.
The issue of section 504's coverage has never been squarely faced by the United States Supreme Court. But, in May, 1982 the Court did rule that the employment limitation of Title VI is inapplicable to suits brought under section 901 of the Education Amendments, which is another statute modeled after the antidiscrimination provision contained in Title VI. The Court's resolution of the Education Amendments' coverage will obviously affect future interpretation of the Rehabilitation Act.

This note will examine the interplay between Title VI of the Civil Rights Act, section 901 of the Education Amendments and section 504 of the Rehabilitation Act for the purposes of analyzing whether section 504 is meant to cover suits for employment discrimination. The prevailing view has been that the employment limitation has been engrafted onto section 504 by the 1978 Amendments to the Rehabilitation Act. The analysis in this article will focus upon the rationale for this view by fully examining the holding of the Fourth Circuit Court of Appeals in Trageser v. Libbie Rehabilitation Center, Inc. This Note will argue that the employment limitation of Title VI was never intended by Congress to apply to suits brought under section 504 of the Rehabilitation Act. It will further argue that such an application frustrates the statutory scheme of the Act to remedy employment discrimination on the basis of handicap.

To bolster these arguments, this Note will apply the analysis used by the Supreme Court in North Haven Board of Education v. Bell, on the issue of Education Amendments' coverage, to the coverage issue under the Rehabilitation Act. From there it will be argued that the ruling in Trageser should be reexamined and that the anti-discrimination provision of section 504, like that contained in the Education Amendments, was intended by Congress to act as a broad prohibition against all forms of discrimination.

Finally, the restrictive test set forth by the Seventh Circuit Court of Appeals in Simpson v. Reynolds Metal Co. for all suits brought under the anti-discrimination provision of the Rehabilitation Act, not merely employment suits, will be analyzed. In order to prove a case under the Simpson standard, the plaintiff must show (1) that he or she is a direct or indirect beneficiary of a federally funded program, and (2) that the alleged discrimination was "in connection with that program or activity." It will be argued that, while Simpson sets forth a fairer test than does Trageser, it nevertheless frustrates Congress' desire to remove barriers which discriminate against the handicapped in federal programs.

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* Section 901 of the Education Amendments is codified at 20 U.S.C. § 1681 (1976). It provides: "No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance. . . ."
* See supra note 5.
* 102 S. Ct. 1912 (1982).
* 629 F.2d 1226 (7th Cir. 1980).
* Simpson, 629 F.2d at 1232.
II. CRITICAL PROVISIONS OF THE CIVIL RIGHTS ACT OF 1964

In 1964 Congress enacted the Civil Rights Act to address discrimination on the basis of race, color and national origin. Title VI of the Act contains a broad prohibition against discrimination by federal grant recipients. Section 601 provides that: "No person in the United States shall, on the basis of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving any federal financial assistance." The ultimate remedy under Title VI for a violation of the Act is termination of the offending party's federal funding.

Shortly after the Civil Rights Act was enacted, Congress amended Title VI to exempt most employment practices from its coverage. Section 604 provides that actions may not be brought under Title VI for discriminatory employment practices except where a primary objective of the federal funds received by the agency is to provide employment. The effect of the section 604 restriction is that individuals with employment claims must seek redress under Title VII. Title VII deals solely with discriminatory employment practices. Its remedies are significantly different from the termination of funding remedy in Title VI. Under Title VII, courts may enjoin the discriminatory practice and order affirmative action. Courts may also order that the party violating the Act reinstate employees, with or without back pay, as well as provide any equitable relief which it determines appropriate.

The fact that section 604 was added after the Civil Rights Act was passed has been a source of debate for those interpreting its effect upon later antidiscrimination statutes. It has been argued that the provision clarified the original scope of Title VI, because it was never intended to cover employment practices. Others have argued that Title VI did reach employment practices before section 604 was added, and therefore the exemption was a substantive change in Title VI.

III. A BRIEF OVERVIEW OF THE REHABILITATION ACT

In 1973, Congress formally recognized that, while much of the population in the United States enjoys a high quality of life, society's benefits are often denied to the millions of children and adults with mental and physical handi-
Traditionally, the primary responsibility for coping with these handicaps has fallen on the individual and his or her family. With the passage of the Rehabilitation Act, however, Congress acknowledged that, to completely integrate the handicapped into normal "living, working and service patterns," government must share the responsibility.

To spearhead the effort against handicap discrimination, Congress enacted Title V of the Rehabilitation Act. Title V, in three sections, forbids discrimination against the handicapped in federally funded activities by a) the federal government, b) federal contractors, and c) recipients of federal grants. Sections 501 and 503, respectively, prohibit the federal government and federal contractors from treating the handicapped any differently than other workers. In fact, these two classes of employers have an affirmative duty under the Act to hire the disabled. Federal grant recipients are governed by section 504 of the Act, which is patterned after the antidiscrimination provisions of the Civil Rights Act.

In 1977, the Department of Health, Education and Welfare (HEW) promulgated regulations to implement section 504's prohibition against handicap discrimination after being prodded by an Executive Order from President Carter. The regulations outline four areas in which discrimination is prohibited by recipients of federal funding: 1) employment, 2) preschool, elementary and secondary education, 3) post-secondary education, and 4) health, welfare and social services. These regulations apply to each recipient of federal financial assistance and to each program or activity that benefits from such assistance.

To enforce these regulations, HEW adopted the procedural provisions of Title VI of the Civil Rights Act. These procedures provide for compliance reviews, investigations into alleged violations of the Act, and termination of funds where discriminatory practices are confirmed. In 1978 Congress amended the Rehabilitation Act to make all remedies, procedures and rights set forth in Title V available to individuals alleging discrimination under section 504 of the Act.

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22 Id. at § 301(7).
29 45 C.F.R. § 84.31 (1981).
IV. A COMPARISON OF THE REMEDIAL PROVISIONS OF THE CIVIL RIGHTS ACT AND THE REHABILITATION ACT

The statutory scheme under the Rehabilitation Act is different than the one provided under the Civil Rights Act of 1964. Under the Civil Rights Act, claims for employment discrimination on the basis of race, color or national origin are brought under Title VII of the Act. The remedial provisions of Title VII provide that courts may enjoin employers from continuing an unlawful employment practice, and order appropriate affirmative relief "which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." For whatever reasons, Congress did not include the "handicapped" among the categories of workers protected by Title VII. Nevertheless, many of the remedies of Title VII are available to the handicapped when they are federal employees.

Under section 504 of the Rehabilitation Act, coverage for handicap-based employment discrimination is extended only on the basis of the receipt of federal grants by the employer. This means that relief for the handicapped employee under section 504 depends upon the employer's status as a federal grantee. To hold that individual actions under the statute are restricted by Title VI's employment exemption, as some courts have done, effectively removes a large number of suits from the coverage of the Rehabilitation Act. Under the Civil Rights Act, section 604's restriction merely means that individuals must proceed under Title VII. Under the Rehabilitation Act, however, the same restriction denies any remedy at all to many victims of handicap-based discrimination. Such a result can only frustrate the statutory scheme enacted by Congress to redress invidious employment practices.

V. Trageser v. Libbie Rehabilitation Center: Section 604 Becomes a Part of Section 504

A. The Case

Trageser v. Libbie Rehabilitation Center, Inc., was the first case to hold that the employment limitation provision contained in Title VI of the Civil Rights Act applied to section 504 of the Rehabilitation Act. Trageser was employed as the director of nursing by the Libbie Rehabilitation Center. She suffered from retinitis pigmentosa, a hereditary and progressive disease that impairs eyesight. During a regular inspection by the Department of Health, the inspector noted that Trageser's eyesight had deteriorated since the last inspec-
tion. He asked the administration what they intended to do about Trageser’s condition. As a result of these comments, the board of directors resolved to dismiss her approximately six weeks later.\textsuperscript{41}

Trageser brought an action under section 504 of the Rehabilitation Act, claiming that the center had violated the statute by firing her because of her visual handicap. She accused the corporation’s acceptance of substantial funds in the form of medicaid, medicare, veteran’s administration reimbursement and welfare payments brought them under the purview of section 504.\textsuperscript{42} But the Fourth Circuit Court of Appeals disagreed. According to the majority opinion, Trageser did not state a cause of action under section 504 because the financial assistance received by the Center was not money given for the primary purpose of providing employment. Rather, it was given for the purpose of compensating the center for the treatment of patients entitled to the benefits of that aid.\textsuperscript{43}

The Fourth Circuit Court of Appeals justified its restrictive reading of the Rehabilitation Act’s coverage by pointing to the 1978 amendments.\textsuperscript{44} Among other things, those amendments expressly state that any person injured by the discriminatory employment practices of a federal recipient is entitled to the same remedies, procedures and rights available under Title VI of the Civil Rights Act.\textsuperscript{45} To the court, Congress’ selection of Title VI remedies “could not have been inadvertent.”\textsuperscript{46} Rather, the court reasoned, the selection further illustrated that Title VI served as more than a model for the Rehabilitation Act; it was the stone from which the handicapped discrimination provisions were chiseled. In all respects, the court concluded, the two acts were intended to have identical coverage.\textsuperscript{47}

The court further noted that the most important limitation placed on Title VI’s coverage was section 604.\textsuperscript{48} That section restricts enforcement of employment activities under the Civil Rights Act to those programs which have received federal money for the purpose of providing employment.\textsuperscript{49} According to the Trageser court, Congress intended this limitation to be carried over to the Rehabilitation Act. Hence, a handicapped person cannot gain judicial relief from employment discrimination unless one of two conditions is met: either the offending employer must have received federal assistance for the primary objective of providing employment, or the aggrieved party must have been an intended beneficiary of the federal aid.\textsuperscript{50} Plaintiffs who cannot meet either of these conditions, the Trageser court explained, would not be entitled to relief were they suing under Title VI of the Civil Rights Act; and, consequently, they

\textsuperscript{41} Trageser, 590 F.2d at 88.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 88-89.
\textsuperscript{44} Id. at 88.
\textsuperscript{46} Trageser, 590 F.2d at 89.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 88.
\textsuperscript{50} Trageser, 590 F.2d at 89.
are not entitled to relief under the identically worded Rehabilitation Act.

B. The Analysis

Although Trageser’s reasoning has been accepted by other jurisdictions,\(^{51}\) Hart v. County of Alameda\(^{52}\) offers a more plausible explanation for the differential treatment given to the different sections of the Rehabilitation Act by Congress. In Hart, the court noted that the language of the antidiscrimination provisions of Title VI and section 504 is, indeed, identical. The court also noted that both statutes were designed to redress employment discrimination and, hence, share a kinship of purpose. It is not surprising, then, that Congress looked to Title VI when it was attempting to supplement the remedial components of the Rehabilitation Act.\(^{63}\) Because Congress used Title VI as a model, however, does not mean that every aspect of Title VI was engrafted onto the Rehabilitation Act. Had that been Congress’ intent, it could have simply amended Title VI to include the handicapped.

A major part of Trageser’s conclusion was based upon the rationale that the employment exclusion did not limit section 504, but merely confirmed the original narrow meaning of that section.\(^{64}\) But neither the legislative history, nor the case law prior to Trageser support the theory that section 504 was intended to give rise to a cause of action for employment discrimination only when the employer received federal funding for the purpose of providing jobs.

The legislative history of the Rehabilitation Act confirms that section 504 was patterned after section 601, not the whole of Title VI.\(^{65}\) Neither section 604, nor a similar provision limiting employment coverage, was included in Title V of the Rehabilitation Act. This absence, with the strong focus of the Act on employment opportunities for the handicapped, argues against the conclusion that section 504 was intended originally to provide only limited relief to victims of employment discrimination under programs in receipt of federal monies.

Moreover, the holding in Trageser ignores precedent. The first case to deal with discrimination under section 504 was an employment case, Gurmankin v. Costanzo.\(^{66}\) Relying on the Act’s statement of purpose,\(^{67}\) the court there found...
that a refusal to hire a blind person as a teacher was the kind of discrimination that section 504 was meant to prohibit. The same court later held that the remedy of ordering the employment of a "plaintiff and members of her class in positions from which they were purportedly excluded in violation of [section 504] could not better foster the goals of the [Act]." In upholding these claims, the issue of funding was not explored by the court.

In a later case, Davis v. Bucher, the court ruled that a blanket refusal to hire former drug addicts constituted a violation under section 504. Although the plaintiff had applied for a position with the city under Title II of the Comprehensive Employment and Training Act, there was no indication in the Davis opinion that all of the allegedly discriminatory programs operated by the city satisfied the standard in Trageser. Similarly, the plaintiff in Whitaker v. Board of Higher Education alleged that his college employer had violated section 504 when it denied him tenure because of his alcoholism. His claim was upheld without requiring proof that the primary purpose of federal funding received by the school was to provide employment.

In addition, the legislative history of the 1978 Amendments reveals no intent to narrow the Rehabilitation Act's broad prohibition against handicapped discrimination. The committee report on the proposed amendments expressed approval of the HEW regulations which provided broad relief for employment discrimination. The Amendments were intended to codify these regulations, which already utilized the Title VI remedial procedures. They were not intended to inhibit their effectiveness. Congress was dissatisfied with the resistance the handicapped were encountering in attempting to vindicate their rights under section 504. Its 1978 Amendments were intended to remedy this situation by expanding enforcement of the Act through private suits. Yet, the Trageser decision had the opposite effect.

Furthermore, as Judge McMillian notes in his concurring opinion in Carmi...
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v. Metropolitan St. Louis Sewer District, the 1978 Amendments refer to Title VI only insofar as it applies to "a person aggrieved." The language of the employment restriction contained in Title VI is specifically limited to departments and agencies, a category into which a private individual bringing suit does not fit. Therefore, the language of the Rehabilitation Act Amendments argues against the incorporation of the Title VI employment limitation. Congress did not intend to hamper the remedies available to individuals aggrieved by a restriction expressly limited to actions by agencies and departments.

C. Section 604 and Individual Suits

The holding in Trageser affects the status of private causes of action brought under section 504. In its decision, the Fourth Circuit Court of Appeals assumes that, although the "employment limitation" expressly curtails the authority of only federal departments and agencies, Congress implicitly intended to restrict private suits as well. Unfortunately, the court extends the employment limitation to private suits without citing any authority whatsoever, or even providing reasoning to support the extension. A number of courts have followed Trageser in the holding, but none have offered any justification for the conclusion that this restriction applies to private suits.

The most obvious argument against extending this provision to section 504 is its language. It refers only to departments and agencies. There is no mention of limiting suits brought by individuals. Second, the language of the 1978 Amendments to the Rehabilitation Act applies Title VI remedies, procedures and rights to any person aggrieved by any act or failure to act of any recipient. This language indicates that the employment limitation was not intended to apply to section 504 at all, let alone to individuals aggrieved by a violation of the Act.

D. Enforcing Section 504 Through Private Suits

Although a private cause of action is not expressly created by section 504, every United States Court of Appeals which has considered the issue has ruled that the Rehabilitation Act is enforceable by private suit. The United States
Supreme Court has never dealt with the issue in the Rehabilitation Act context, but it has ruled that civil actions are allowable under Title IX of the Education Amendments. Because of the similarity between the anti-discrimination provisions of Title IX and section 504, a majority of federal courts have held that the principles set forth in Cannon v. University of Chicago are determinative of the same issue under section 504. In Cannon, the Supreme Court observed the goals of the statute:

Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both purposes were repeatedly identified in the debates on the two statutes.

The first purpose is generally served by the administrative enforcement scheme. This provides the Secretary of HEW with the power, upon a finding of non-compliance with the antidiscrimination provision, to require compliance with the section either by informal means or by the termination of federal funding. This remedy is severe and is not appropriate for satisfying the second purpose given in Cannon, nor is it intended to provide a forum for individuals to press claims of discrimination against grant recipients. First, the very fact that the remedy of termination of funding is severe may cause HEW to be reluctant to invoke it. Second, the situation may not be remediable by termination of funding. In instances where federal assistance is provided under a one-time grant, for example, the threat of discontinued subsequent-year funding is a harmless threat. Third, and perhaps most significantly, the remedy granted by HEW procedures is not designed to aid individuals wronged by discrimination. In Cannon, the Supreme Court was particularly impressed by the fact that HEW complaint procedures did not allow the complainant to participate in the administrative investigation or enforcement proceedings. If a violation was found, the resulting compliance agreement might not include relief for the complainant harmed by the violation of the Act. Finally, the decision to terminate funding may actually work to the disadvantage of the beneficiaries of the funding, since cutting off the funding may mean that no further service will be available to them. Legislative history shows that Congress, aware of the severity of the remedy, intended it to be “a last resort, all else—including lawsuits—failing.”

The holding and the rationale of the Supreme Court in Cannon demon-
strate that the antidiscriminatory provisions, Title VI, Title IX and section 504, were intended to provide broad relief to individuals who pursue violations of those provisions by federal grantees. To hold, as *Trageser* does, that the original intent of Congress was to eliminate employment discrimination suits from coverage under section 504 ignores the purposes of the Act and the rationale behind the holding in *Cannon*, which has been held to apply to section 504.60

VI. *North Haven Board of Education v. Bell*: TITLE IX ADDRESSES THE EMPLOYMENT ISSUE

In May of 1982 the United States Supreme Court addressed the question of whether Title IX of the Education Amendments was restricted by section 604 of the Civil Rights Act, the same issue *Trageser* considered with respect to the Rehabilitation Act. *North Haven Board of Education v. Bell* involved two employment discrimination claims against school boards under Title IX of the Education Amendments.61 In one case, a female teacher alleged that the school had violated Title IX when it refused to rehire her after a one-year maternity leave.62 In the other case, a female guidance counselor claimed that she had been discriminated against on the basis of gender with respect to job assignment, working conditions and the school board's failure to renew her contract.63

HEW threatened to take administrative action in both cases unless the schools corrected their discriminatory employment practices. In response, both school boards brought suit seeking to have HEW's employment regulations declared invalid because HEW lacked authority under Title IX to regulate employment practices.64

The Court began its analysis by tracing the history of section 901. It noted that Congress enacted Title IX of the Education Amendments of 1972 to proscribe gender discrimination in education programs receiving federal assistance.65 Title IX has two primary provisions. The first, section 901, is modeled after section 601 of the Civil Rights Act and provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."66

The second provision contains enforcement procedures for the Act. Section 902 authorizes each agency awarding federal grants to education programs to promulgate regulations to insure that recipients abide by section 901. The ultimate sanction for violating the provisions of section 901 is termination of

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60 See supra note 71.
63 Id.
64 Id.
65 Id. at 1917.
federal funds or a denial of future grants.\textsuperscript{67}

In 1975 HEW issued regulations to implement section 901.\textsuperscript{88} Subpart E of these regulations deals with employment practices. Generally, that section forbids discrimination in employment, recruitment, consideration or selection of employees under any education program or activity operated by a recipient which receives or benefits from federal financial assistance.\textsuperscript{89} It was these regulations which the school boards in \textit{North Haven} sought to have declared invalid under the theory that Title IX was not intended to deal with employment practices at all, but was limited to remedying gender discrimination against students.

The regulations had been consistently struck down by federal courts considering the issue.\textsuperscript{90} Indeed, the validity of the regulations was even questioned by their maker, the Department of Education. The Department had sought in 1981 to change the regulations to exclude from coverage employees of federal programs not in receipt of federal money given to provide employment. But the attorney general, given the power to approve such changes, refused to allow the revision.\textsuperscript{91}

Writing for the plurality in \textit{North Haven}, Justice Blackmun began with an examination of the statutory language of section 901. The district court had held the section extended its protections to students only, as they were the only logical beneficiaries of education programs.\textsuperscript{92} Blackmun found, however, that the broad directive of section 901 that “no person” be discriminated against on the basis of gender could be read to include employees, as well as students.\textsuperscript{93} If Title IX is to be given “the scope that its origins dictate, we must accord it a sweep as broad as its language.”\textsuperscript{94} The language of the Act was silent on the employment practices issue, so Justice Blackmun turned to the legislative history to discern congressional intent.\textsuperscript{95}

As part of this analysis, Justice Blackmun addressed the school board's

\textsuperscript{88} HEW was initially given responsibility to promulgate regulations for Title IX. In 1979 HEW's functions under Title IX were transferred to the Department of Education. Therefore, the regulations, which were originally printed at 34 C.F.R. pt. 86, were later recodified at 45 Fed. Reg. 30802 (1980). \textit{See North Haven}, 102 S. Ct. at 1915 n.4 & 5.
\textsuperscript{89} 34 C.F.R. § 106.51(a)(1) (1980).
\textsuperscript{91} \textit{See North Haven}, 102 S. Ct. at 1918 n.12.
\textsuperscript{93} \textit{North Haven}, 102 S. Ct. at 1917.
\textsuperscript{94} \textit{Id.} at 1917-18 (quoting United States v. Price, 383 U.S. 787, 801 (1966)).
\textsuperscript{95} \textit{Id.} at 1918.
contention that section 901 was intended to have the same scope as its model, section 601, which had never been interpreted to cover employment because of the limiting language of section 604. It was the school board's contention that because the Education Amendments borrowed the language of section 601, they also adopted the limitations on coverage contained in section 604.96

Justice Blackmun disagreed. His reasoning was concisely broken down into four sound points. First, the emphasis put on the history of Title VI was misplaced, in Blackmun's view.97 Looking to Title VI's legislative history, he argued, deflects attention from the truly relevant time frame for discerning congressional intent.98 It is Congress' intention in 1972, at the passage of the Education Amendments which is significant in interpreting the Statute, and not their intention in 1964, when they enacted Title VI.99

Second, although the meaning and applicability of Title VI are useful in construing Title IX, they are useful only insofar as the language and history of Title IX do not suggest a contrary interpretation.100 In Blackmun's opinion, both the pre-enactment101 and post-enactment102 legislative history showed that Title IX was clearly meant to address employment practices in education.

Blackmun's third, and perhaps most decisive point, dealt with the absence of a specific limitation on suits for employment discrimination under Title IX. Debate as to whether section 604 clarified the original meaning of section 601, or limited it, was irrelevant.103 The critical factor was "that section 601 alone was not considered adequate to exclude employees from the statute's coverage.

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96 Id. at 1922.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
103 Justice Blackmun relied on pre-enactment remarks by Title IX's sponsor, Senator Bayh. The Senator described section 901 as the "heart" of his amendment and stated that it was aimed at employment discrimination. 118 Cong. Rec. 5803 (1972), cited in North Haven, 102 S. Ct. at 1919.

In addition, the House's version of the bill included a section parallel to a section of 604 of the Civil Rights Act, section 1004. That section was later deleted when submitted to the conference committee. Blackmun found this persuasive that the Senate Bill must have prevailed for substantive reasons. North Haven, 102 S. Ct. at 1922.

The dissent, on the other hand, argued that the inclusion of section 604 in the House Bill was really a drafting error. It was eliminated to avoid an inconsistent reading of portions of the Act that related to the Equal Pay Act and Title VII. The House had determined that section 604 had been a mere clarification of Title VII. Since Title IX was modeled after section 601 no equivalent to section 604 was needed to restrict employment suits from Title IX's coverage; it would merely have the same scope as its model. North Haven, 102 S. Ct. at 1931.

104 HEW submitted its regulations to Congress for approval, as required by the General Education Provisions Act, Pub. L. 93-380, 88 Stat. 567, as amended, 20 U.S.C. § 1232(d)(1). Under the statutory procedure, if no resolutions of disapproval of the regulations were adopted within forty-five days, the regulations would become effective. While there were resolutions of disapproval introduced, none dealt with the employment regulations. North Haven, 102 S. Ct. at 1923.

105 Section 604 was added to Title VI shortly after the Civil Rights Act was enacted. The reason for its enactment, as to whether it clarified the original scope of Title VI, or restricted it, has been the subject of lengthy analysis in both Title IX and section 504 litigation. See North Haven, 102 S. Ct. at 1922 n.20.
If Congress had intended that Title IX have the same reach as Title VI, . . . we assume that it would have enacted counterparts to both section 601 and section 604.\textsuperscript{104}

Finally, Blackmun noted that while the two statutes “may be similar in language and objective, we must not fail to give effect to the differences between them.”\textsuperscript{105} The differences between the two statutes were sufficient, in Blackmun’s eyes, to give the acts contrary meanings. The legislative history of Title IX showed that Congress intended to address employment discrimination against women through Title IX. The statutory language, which applied to “any person,” and did not contain a restriction on employment coverage similar to section 604, was indicative that Congress intended Title IX to have a broader reach than Title VI. Therefore, Blackmun concluded “that employment discrimination comes within the prohibition of Title IX.”\textsuperscript{106}

VII. A Reexamination of Trageser, In Light of North Haven

In applying the North Haven analysis to section 504, it must first be noted that the issue of section 604’s application to the Rehabilitation Act arises in a slightly different context than it did in Title IX. Proponents of section 604 incorporation into section 901 of the Education Amendments argued that, because section 901 was modeled after section 601, it was intended to be interpreted within the same boundaries as section 601. In section 504 analysis, however, the issue of section 604 incorporation hinges on the meaning of the 1978 Amendments to the Rehabilitation Act, which granted to those harmed by discriminatory practices the rights and remedies of Title VI. Thus, the issue raised is whether Congress intended the Amendments to narrow the scope of section 504 by deliberately connecting section 504 with Title VI.

Despite the mechanical difference in the way the section 604 issue arises between Title IX and section 504, the North Haven analysis is equally appropriate for analyzing section 504. It addresses the basic issues of congressional intent and statutory construction which are critical in both statutes. By using that analysis here, it will be argued that Trageser’s restrictive interpretation of the 1978 Amendments is contrary to the legislative history and statutory remedial scheme given to section 504 and that the 1978 Amendments were not intended to preclude remedy to handicapped individuals denied access to that part of the job market controlled by federal grant recipients.

Under the North Haven approach, congressional intent at the time the Rehabilitation Act was enacted in 1973 is significant in interpreting whether section 504 was meant to remedy discriminatory employment practices by federal grantees. Legislative history clearly shows that Congress intended the Act to serve as a springboard toward the complete integration of the forty to sixty-eight million handicapped children and adults into normal living, working and

\textsuperscript{104} North Haven, 102 S. Ct. at 1922.
\textsuperscript{105} Id. (citing Lorillard v. Pons, 434 U.S. 575, 584-85 (1978)).
\textsuperscript{106} North Haven, 102 S. Ct. at 1922-23.
service patterns. This broad congressional purpose would obviously be disserved if the Act was shackled in the manner approved by the Trageser court.

With respect to the second factor in the Blackmun analysis, the language and history of section 504 are strikingly contrary to the interpretation given Title VI. As Congress had done with the administrative regulations interpreting Title IX, they examined HEW's regulations interpreting section 504. These regulations extended the remedies of Title VI to all forms of discrimination against the handicapped, including invidious employment practices. In the case of section 504, Congress had explicitly approved HEW's interpretation by amending the Act in 1978 to codify those regulations. This kind of action by Congress carries great weight in interpreting the meaning of the Act. In North Haven the Court gave deference to similar action by Congress. They stated that "where an agency's statutory construction has been fully brought to the attention of the public and the Congress and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."

Blackmun's third factor underscores the most obvious difference between the two statutes: there is no counterpart to section 604 in section 504. Surely, if Congress found it necessary to modify the language of the Civil Rights Act to exempt employment practices from its coverage, it would express its reservations about the identically worded Rehabilitation Act in the same manner.

Although the differences in the legislative intent behind section 504 and Title VI are substantial, there is an even greater contrast between the statutory remedial schemes given to those harmed by violations of section 601 and section 504, respectively. As noted previously, a denial of remedy under Title VI merely means victims of employment discrimination must file suit under Title VII. A similar denial of remedy under section 504 is a complete denial of remedy.

A comparison of the remedies open to one harmed by violations of Title IX casts further doubt on the appropriateness of applying section 604 to section 504. Title IX was proposed as only one part of a measure that provided remedies for sex discrimination in employment under three statutes: (1) The mechanism utilized in Title VII of the Civil Rights Act, (2) the Equal Pay Act, and (3) the Education Amendments.

The schools in North Haven argued that the existence of alternative remedies, plus the severity of the consequences for violating section 901—the termination of funds—militated against the application of section 901 to remedy employment discrimination. Justice Blackmun found that, even if the Court were to agree that such a policy was unwise, it was not free to reexamine con-

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108 See supra note 102.
109 See supra note 58 and accompanying text.
110 North Haven, 102 S. Ct. at 1925 (quoting United States v. Rutherford, 442 U.S. 544 (1979) and Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)).
gressional policy decisions. Nor was the Court free to ignore the language and history of Title IX which indicated Congress had intentionally applied section 901 to such suits. Moreover, Congress had repeatedly provided a variety of remedies, at times overlapping, to eradicate other forms of employment discrimination.111 Given the Court's recognition in North Haven, and prior cases, that Congress regards the goal of eliminating employment discrimination important enough to justify numerous remedies, it is anomalous to argue that Congress intended to deny the handicapped the same remedies as the able-bodied when they suffer the sting of discrimination.

VIII. Simpson v. Reynolds Metal Co.: More Limitations on Suits Under Section 504

The Trageser standards require the handicapped plaintiff to meet two tests before his action may proceed under section 504. In addition, he must now meet the test of Simpson v. Reynolds Metal Co.,112 which applies to all suits brought under section 504, even those which do not allege employment discrimination. Simpson imposes a substantial limitation on the broad language of section 504 by merely relying on statutory construction; the decision does not involve the issue of section 604 application to section 504. That issue is relevant only to employment practices. Simpson is the current standard for all claims brought under section 504 whether Trageser stands or fails, and it will be examined here in terms of its effect on federally funded programs.

Simpson brought an action for employment discrimination under the Rehabilitation Act. The court found that, although the plaintiff had standing under the Act as a handicapped individual,113 and that the receipt of veterans benefits in the company's on-the-job training program might constitute federal financial assistance within the meaning of the Act,114 the plaintiff had a more fundamental obstacle to standing. Relying on the wording of section 504, the court found that Simpson had not demonstrated any nexus between his discharge and federal assistance.115 Simpson did not allege he had ever sought to participate in the apprenticeship program, or that he was denied admittance to the program. He was not a veteran, therefore, he could not have been a participant in the veteran's benefit program that he claimed constituted federal assistance to his employer. Finally, he was not able to show any connection between his employment and the apprenticeship program, and, hence, failed to prove that he was "subjected to discrimination under any program or activity receiving federal financial assistance."116

111 North Haven, 102 S. Ct. at 1925 n.26.
112 629 F.2d 1226 (7th Cir. 1980).
113 Simpson, 629 F.2d at 1231 n.8. The Rehabilitation Act defines "handicapped person" for the purposes of section 504 as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment." 29 U.S.C. § 706(7)(B) (Supp. II 1978).
114 Simpson, 629 F.2d at 1232 n.9.
115 Id. at 1231.
116 Id.
In reviewing the lower court's decision, the Seventh Circuit Court of Appeals held that section 504 does not constitute a general prohibition of discrimination against the handicapped by recipients of federal assistance. The very terms of section 504:

[r]equire that the discrimination must have some direct or indirect effect on the handicapped persons in the program or activity receiving federal financial assistance. To be actionable the discrimination must come in the operation of the program or manifest itself in a handicapped person's exclusion from the program or a diminution of the benefits he would otherwise receive from the program.

In short, the discrimination must be in connection with a federally-funded program or activity. The one exception to “the connection test,” the court explained, is in those cases where discrimination against nonbeneficiaries affects the beneficiaries of the assistance.

The Simpson court agreed with Trageser in the application of section 604 to section 504, but did not find the case controlling because of factual differences between the two cases. Rather, the court relied upon legislative history which gave strong support to the conclusion that Congress did not intend to extend protection beyond anyone who was an intended beneficiary of federal financial assistance. In addition, the court found that other courts deciding the same issue under the identical language of section 601 of the Civil Rights Act required the plaintiff to be an intended beneficiary of, an applicant for, or a participant in, a federally funded program.

The court fails to discuss earlier cases holding that claims under section 504 were valid simply because they alleged discrimination in violation of the Act. Simpson obviously constitutes a substantial retreat from the broad prohibition against handicapped discrimination found in those earlier cases. Nonetheless, it does appear to have the support of a substantial number of jurisdictions which have required a nexus between the alleged discrimination and the federally-funded program when dealing with Title VI, Title IX and section 504. Moreover, it seems to constitute at least one reasonable in-

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117 Id. at 1232.
118 Id.
119 Id. at 1235 n.16.
120 Id. at 1235. In Simpson the funding alleged to provide federal financial assistance was for the purpose of providing employment.
121 Id. at 1235-36.
122 Id. See also N.A.A.C.P. v. Wilmington Medical Center, Inc., 599 F.2d 1247, 1252 (3d Cir. 1979); Flora v. Moore, 461 F. Supp. 1104, 1115 (N.D. Miss. 1978).
123 See supra notes 50-57 and accompanying text.
126 See, e.g., United States v. Cabrini Medical Center, 639 F.2d 908, 911 (2d Cir. 1981); Carmi, 620 F.2d at 674; Sabol, 510 F. Supp. at 895.
terpretation of the statutory language.

Even though *Simpson* narrows the reach of section 504, it allows a broader application of the statute than does *Trageser*. A handicapped individual who alleges employment discrimination in violation of section 504 would appear to have a greater likelihood of success in maintaining a cause of action under *Simpson* than *Trageser*. While *Trageser* requires that defendants be the recipients of financial assistance specifically targeted for providing employment, *Simpson* seems to tolerate suits against parties connected directly or indirectly with the federally funded program or activity.

Although *Simpson* seems reasonable on its face, the result is troubling in that it allows for the establishment of two different standards of treatment by the recipient. Those persons participating in the federally funded program are protected against handicap discrimination, while federal recipients are free to discriminate against persons included in programs within the same entity, but not run with the benefit of federal funds. Surely Congress did not intend this anomalous result.

The more plausible rationale is that Congress intended to effect the entire discriminatory policy of the recipient of federal funding. Legislative history shows that it was the intent of Congress to make the federal government the forerunner, and thus the model, in nondiscrimination against the handicapped.\(^\text{127}\) Naturally, through the granting of federal money to private entities, lawmakers expected to establish a standard for nondiscrimination outside the federal government which would eventually become the norm in the private sector. Support for the view that Congress intended to effect the entirety of recipient's institution is found in the Senate reports accompanying the enactment of the statute: "Implementation of section 504 would also include pregrant analysis of recipients to ensure that federal funds are not initially provided to those who discriminate against handicapped individuals."\(^\text{128}\) The language indicates that Congress would not authorize money for those who were engaged in handicapped discrimination; it does not limit protection to beneficiaries of federally-funded programs. Congressional intent, as evidenced by this language, is clear: federal aid is not to be given to agencies which practice discrimination, whether their discriminatory practices began after the receipt of federal aid, or were hidden from the government during pregnant analysis. Despite the obvious message this language conveys, *Simpson* dismisses the Senate report by saying that any discrimination practiced by an employer prior to the receipt of federal funds was obviously not in connection with a federally-funded program or activity.\(^\text{129}\) Such cursory treatment of the issue misses the point of Congress' focus on preventing future discrimination.

*Simpson*'s narrow definition of "program," as constituting one program in receipt of federal money within a multiprogram setting, seems to be accepted

\(^{127}\) See *supra* notes 18-20 and accompanying text.
\(^{129}\) *Simpson*, 629 F.2d at 1232 n.10.
by a number of courts. Courts reason that Congress did not intend for a program, run properly, "within a state, county, district, or even a school, to suffer for the sins of others." Each program must be considered on its own merit.\(^130\)

Hence, a federal recipient of two grants may be violating section 504 in one program and still not jeopardize its other funding.

Section 504's coverage has been further narrowed by the varying interpretations given to the term "federal assistance." In \(\text{Rogers v. Frito Lay, Inc.,}\) the court stated in dicta that the term "federal financial assistance" does not comprehend government procurement contracts, but rather refers to the form of grant assistance that goes primarily to the public entities.\(^131\) A similarly narrow interpretation was stated in \(\text{Cook v. Budget Rent-A-Car,}\) where the plaintiff brought suit after the corporation refused to rent him a car solely on the basis of his handicap. He claimed that the federal assistance requirement was met when Budget received funds from the government under automobile rental contracts with various federal agencies. But the court rejected this argument, explaining that assistance does not include procurement contracts where the government sells or purchases goods or services for its own account. Rather, assistance means a transfer by way of subsidy or sale of government assets at a reduced consideration.\(^132\)

Similarly, federal subsidies to airports may subject the airports to section 504, but not the airlines who use the airports.\(^133\) However, licenses granted by the federal government to commercial broadcasters do not constitute federal assistance within the meaning of the statute.\(^134\) Finally, \(\text{United States v. Cabrini Medical Center,}\) indicates that the receipt of medicare, medicaid, and veteran's benefits paid for patient care will not fall under the term financial assistance within the meaning of section 504.

The confusion created by the term financial assistance has also spilled over into education. In \(\text{Bob Jones University v. Johnson,}\) for example, direct payments made to veterans enrolled at the university were held to constitute federal assistance. There it was held that direct payments to the university (receiver) were not necessary to constitute the receipt of financial assistance. The pertinent questions were: (1) whether the federally subsidized [benefi-
ciary] participated in a program or activity and, (2) if so, whether that program or activity was in receipt of federal financial assistance. The university was considered a recipient because the money paid to the student released institutional funds which would otherwise be spent on assisting students with educational costs. The benefits paid to the veterans also enlarged the pool of applicants upon which the school could draw.

IX. Conclusion

In light of the Supreme Court’s decision in *North Haven* the current standard for suits challenging employment practices under the Rehabilitation Act is erroneous and should be reevaluated. *North Haven*’s emphasis on Congress’ intent in passing the Act is refreshing. The legislative history of the Rehabilitation Act shows that Congress intended to equalize employment opportunities for the handicapped. Yet *Trageser* permits the employment restriction to deny all remedy to most victims of handicap discrimination.

The standard utilized by *Simpson* would also be aided by such an examination. While the standard may comport with the language of the statute, it frustrates Congress’ goal of setting nondiscriminatory standards in agencies receiving federal money. *Simpson* allows a dual standard of treatment for the handicapped by forbidding discrimination of those involved in the programs utilizing the federal money, but condoning such treatment in nonfederally funded programs within the same agency. Such a system of review is an insult to the congressional goal of equal opportunity for the handicapped under section 504.

With the enactment of the Rehabilitation Act, Congress intended to remove the consequences of handicap-based employment discrimination. For generations families have been left to carry the burden of handicapped members who are unable to provide for themselves. When the family is no longer able to provide for the handicapped member he or she becomes dependent on the state. For many handicapped persons too severely disabled to work this cycle will continue. But for millions of handicapped persons dependency on others is unnecessary, because they are able to work productively in the job market and lead meaningful lives. Once in the job market the handicapped person has the economic ability to provide for himself independent of family and government.

With section 504, Congress has provided the handicapped with increased mobility, education and access to many more opportunities taken for granted in the daily life of the nonhandicapped American. But somewhere in the midst of complex statutory analysis courts interpreting section 504 have lost sight of the goals of the Act. Section 504 is of little assistance to the handicapped

139 *Id.*
140 *Id.* at 603.
youth, trained, educated and transported to the doorstep of his adult working life, if employers may refuse to let him in.

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