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Application of the Undue Burden Test to Mass Transportation: Parallel or Pitfall

Recent estimates indicate that there are approximately 31.5 million physically disabled individuals in the United States. Many of these individuals face significant barriers to their use of mass transportation which inhibit their ability to share equally in employment, educational, residential, and recreational opportunities.

This Comment analyzes federal statutes enacted by Congress to guarantee equal access to mass transportation to handicapped individuals. The Comment also tracks the federal regulations implementing

1. 1983 World Almanac 962. Statistics issued by the National Center for Health Statistics, U.S. Department of Health and Human Services, indicate that in 1979 these individuals were limited in their activity by physical handicaps including arthritis, rheumatism, heart conditions, hypertension not related to heart problems, diabetes, asthma, impairments of the back and spine, impairments of the lower extremity or hip, and visual and hearing impairments. Based on unpublished data from the National Health Interview Survey, National Center for Health Statistics, U.S. Department of Health and Human Services, Ninth Revision of the International Classification of Diseases. The report also indicated that approximately 8.1 million individuals were unable to carry on any major activity whatever. Id.

2. 45 C.F.R. § 84.3(i) (1981), a regulation promulgated under title 45 and relating to public welfare, defines physical or mental impairment as: "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."


4. President Nixon, in urging action to guarantee disabled and elderly persons equal access to public transportation, noted: "Isolated from regular contact with society, many of our handicapped citizens lead lives of lonely frustration. Working together, on both private and public levels we can—and must—insure full lives for them. Together we can topple the environmental barriers which prevent the handicapped from entering buildings or using public transportation; . . . and we can bring all of our handicapped fellow citizens into the mainstream of American Life." Proclamation No. 4001, 6 Weekly Comp. Pres. Doc. 1169 (Sept. 8, 1970). Representative Henry C. Reuss, in urging support for the 1970 Urban Mass Transportation Act, see infra notes 12-20, stated: "While we have done our utmost for automobile owners and truckers, we have left the poor, the aged, and the handicapped stranded in our urban centers—stranded by transit systems that if operative at all can take them neither safely, nor speedily nor economically, to the jobs and assistance they need." 116 Cong. Rec. 34174 (1970).

This policy. It then analyzes *American Public Transit Association v. Lewis,* in which the Court of Appeals for the District of Columbia reversed the district court and held that, despite the congressional mandate in section 504 of the Rehabilitation Act of 1973, local governments cannot be forced to make "burdensome modifications" to their facilities in order to accommodate the handicapped. In so holding, the court of appeals sought to apply the rationale used by the United States Supreme Court in *Southeastern Community College v. Davis,* which upheld the right of a college to bar participation of a deaf applicant in its nursing program. This Comment contrasts the more recent decision of *Dopico v. Goldschmidt,* which distinguished the *Southeastern* decision on its facts and held that handicapped persons have a right of reasonable access to mass transit systems under the authority of section 504. The Comment concludes that the *Lewis* decision misapplies the rationale used by the Court in *Southeastern* and that section 504, by itself and in conjunction with other federal statutes, can require local transit authorities to make reasonable modifications to their mainline systems in order to accommodate qualified handicapped individuals.

**Federal Statutes**

**Urban Mass Transportation Act**

Congress has passed several federal statutes directed at solving the problem of access to public transportation by the physically handicapped. The first was the Urban Mass Transportation Act (UMTA), passed in 1964 and amended in 1970. The Act provided state and local governments with federal financial assistance for mass transportation programs.

Notwithstanding this aid, urban transportation systems continued to deteriorate and public transportation within urban centers became a

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6. Primary focus is placed on the "special efforts" requirements of 49 C.F.R. § 613(b) (1976), see infra note 34 & accompanying text, and on the Department of Transportation (DOT) regulations requiring "mainstreaming" of the physically handicapped, codified at 49 C.F.R. § 2781 (1981), see infra note 42 & accompanying text.


13. Id. In 1964, Congress passed a $75 million transportation assistance program to help selected cities preserve their urban transit service by converting failing private companies to public ownership. Id. Between 1966 and 1969, an additional $600 million was authorized for the program. See id. § 1603(b) (1970).
pressing federal concern. In response, Congress passed the Urban Mass Transportation Assistance Act in 1970, which amended the UMTA and substantially increased the funds to be appropriated to ensure that “all citizens” would be able to move quickly and at a reasonable cost. These 1970 amendments permitted the Secretary of Transportation to set aside one and one-half percent of funds available for research, development, and demonstration projects to be used to increase the information and technology available for planning and designing transit systems accessible to the handicapped. Congress also added section 16 to the UMTA, which states that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services. Section 16 authorizes the Secretary of Transportation to make grants and loans to state and local authorities for the purpose of making mass transportation services accessible to the handicapped.

Congress again demonstrated its intent to make transportation accessible in 1975 when, in appropriating funds to implement UMTA for that year, it attached a rider to the bill emphasizing that all funds had to be used to design and purchase accessible transportation modes. The UMTA expresses Congress’ intent that recipients of federal transportation assistance take affirmative steps to provide handicapped individuals with accessible public transportation.

17. Id. § 1612(c); see also 116 Cong. Rec. 34,180 (1970) (statement of Rep. Biaggi).
18. Section 16 is codified at 49 U.S.C. § 1612 (1970). It states: “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 (including programs under this Act) should contain provisions implementing this policy.”
19. Id.
20. “None of the funds provided under this Act shall be available for the purchase of passenger rail or subway cars, for the purchase of motor buses or for the construction of related facilities unless such cars, buses, and facilities are designed to meet the mass transportation needs of the elderly and the handicapped.” Department of Transportation and Related Agencies Appropriation Act of 1975, Pub. L. No. 93-391, § 315, 88 Stat. 781 (1974).
21. Representative Biaggi, in introducing § 16 of the UMTA, stated: “Other proposals have been offered that would set up special transportation facilities for the elderly and the handicapped. Others would provide subsidies for the elderly so that these people could use more expensive services such as taxicabs or limousines. However, besides the factor of costs for these programs, they would further serve to segregate the elderly and the handicapped from our society. This Nation has been insensitive to the needs of those Americans for too long. I think it is time this Congress saw to it that equal rights to transportation facilities are extended to these 44 million citizens.” 116 Cong. Rec. 34,180-81 (1970) (emphasis added).
Federal-Aid Highway Act

In the Federal-Aid Highway Act of 1973 (FAHA),\footnote{22} Congress extended its policy of improving mass transportation for all citizens by allowing the use of highway funds for mass transportation projects.\footnote{23} The Senate Report of the 1973 FAHA extends the existing policy of section 16(A) of the UMTA\footnote{24} to bus and rail improvements financed under the Highway Act.\footnote{25}

In 1975, the FAHA was amended to require that mass transit projects funded with federal highway funds be constructed and operated to allow effective utilization by elderly and handicapped persons.\footnote{26} The amendment also directed the Secretary of Transportation not to provide any federal financial assistance to programs or projects that did not comply with these stated goals.\footnote{27} The FAHA therefore reflected a continuing congressional concern with and commitment to integrating handicapped persons into mainstream transportation systems.

Section 504 of the Rehabilitation Act of 1973

Congress also recognized the rights of the handicapped by passing section 504 of the Rehabilitation Act of 1973 (section 504),\footnote{28} which provides that "[n]o otherwise qualified handicapped individual in the Support for accommodating the needs of the handicapped with federal assistance was also noted in the remarks of Senator Magnuson: "[U]rban mass transit is far more than a response to congestion. It serves a population segment—the old, the young, the sick, the handicapped, and the impoverished—which virtually has no other means of travel." Id. at 2255; see also id. at 34,164 (remarks of Rep. Patman). Long after the House had unanimously incorporated § 16 into the UMTA, Representative Biaggi, introducing § 315 of the Department of Transportation and Related Agencies Appropriation Act of 1975, Pub. L. No. 93-391, 88 Stat. 781 (1975), see supra note 20, reaffirmed congressional intent when he noted: "I am offering this amendment to reaffirm our national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services. When this policy was first enunciated in my amendment to the 1970 Urban Mass Transportation Assistance Act, it [was] hailed as the emancipation proclamation for the handicapped. . . . I want to see steps in buses eliminated—and they can be. I want to see escalators and elevators instead of stairways—and they can be put in. I want to see gates instead of turnstyles—and we can have them. I want to see mass transportation for all Americans—and we can have it." 120 CONG. REC. 19,851 (1974) (emphasis added).

25. See supra note 18.
United States . . . shall, solely by reason of his 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.”

The legislative history and language of section 504 reveal Congress’ belief that isolation of the handicapped from mainstream society stemmed from discrimination. Transportation was one area in which this discrimination was evident, and the 1974 amendments to the Act, which expanded the definition of “handicapped individuals” under section 504, indicate that section 504 was intended...
to address discriminatory practices against the physically handicapped in mass transportation and other areas.

Federal Regulations: "Special Efforts" v. Concept of Mainstreaming

In 1976, the Department of Transportation (DOT) issued regulations designed to implement section 504, section 16 of the UMTA, and section 165(b) of the FAHA. The 1976 DOT regulations required that state and local planners make "special efforts" to plan public mass transportation facilities and services that can effectively be utilized by elderly and handicapped persons. Approval of federal project grants was conditioned on these special efforts.

The special efforts regulations were accompanied by guidelines illustrating the kinds of plans that would satisfy the requirements. The guidelines allowed each local authority to choose a plan according to local needs, and it became possible for a community to provide only door-to-door "special services" for the handicapped rather than to make mainline transportation modes accessible.

On April 28, 1976, however, President Ford issued an Executive Order that gave the Secretary of Health, Education, and Welfare the responsibility to "coordinate the implementation of section 504 . . . by all federal departments and agencies . . .," and to "establish guidelines for determining what are discriminatory practices, within the meaning of section 504." The order also directed agencies administering programs providing federal financial assistance to issue

the focus of the lawsuits changed to determining whether DOT's refusal to require access to each bus was reasonable given the state of technology, and whether transit systems were living up to the programming and implementation requirements of DOT's regulations. See Leary v. Crapsey, 566 F.2d 863, 866 (2d Cir. 1977), in which the court of appeals reversed a district court holding that § 504 did not create a private right of action on plaintiff's behalf. The court remanded the case to the district court to consider whether the defendants were complying with the regulation's "special efforts" requirements. See also Vanko v. Finley, 440 F. Supp. 656, 666 (N.D. Ohio 1977); Bartel v. Biernat, 427 F. Supp. 226, 233 (E.D. Wis. 1977); Young v. Coleman, Civ. No. 4-76-201 (D. Conn. Dec. 17, 1976).


34. See 46 Fed. Reg. 17,488 (1981). "Special efforts" continues to be defined in the Code of Federal Regulations as "genuine good faith progress in planning services for wheelchair users and semi-ambulatory handicapped persons, . . . that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the transportation needs of such persons during a reasonable time period." Id.


36. Id.

37. The Department of Health, Education and Welfare (HEW) is now referred to as the Department of Health and Human Services. 20 U.S.C. § 3508(a) (Supp. IV 1980). This Comment will use the former designation.

regulations consistent with the standards established by the Secretary of HEW.\textsuperscript{39}

HEW issued its guidelines in 1978.\textsuperscript{40} Based upon its analysis of the statute, it concluded that section 504 mandated full accessibility in the most integrated setting appropriate to meet the needs of handicapped persons.\textsuperscript{41} The regulations required that all recipients of federal funds "mainstream" handicapped persons, that is, integrate such persons into the same programs available to others rather than treat them as a separate group requiring "special" programs.\textsuperscript{42} With respect to public transportation, the HEW guidelines required that each individual mode of transportation be accessible to the handicapped and, specifically, that new buses be accessible to wheelchair users.\textsuperscript{43}

In 1979, DOT followed these guidelines in promulgating its own regulations for making mass transportation accessible to the handicapped.\textsuperscript{44} These regulations followed the bold "mainstreaming" initiative of the HEW guidelines by requiring that transit systems receiving federal funds make each mode of public transportation accessible to the handicapped by May 31, 1982.\textsuperscript{45} "Extraordinarily expensive" structural changes to, or replacement of, existing vehicles or facilities, however, could be accomplished over periods of up to ten years.\textsuperscript{46} Moreover, particularly costly structural changes to rail systems could be waived under certain conditions.\textsuperscript{47} The DOT regulations indicated that a transportation mode was accessible when it could be used by a handicapped person in a wheelchair.\textsuperscript{48} Buses purchased after July 2, 1979, were required to have wheelchair lifts and, at the end of ten years, transit systems were obligated to have one-half of their peak-hour bus service accessible to wheelchair users.\textsuperscript{49}

The 1979 DOT regulations replaced the "special efforts" requirements,\textsuperscript{50} which emphasized separate transportation services for the handicapped, with an innovative plan that met the needs of both hand-

\textsuperscript{39} Id. § 2.
\textsuperscript{40} See 45 C.F.R. § 85 (1981).
\textsuperscript{42} See 45 C.F.R. § 85.51 (1981). In the guidelines' preamble, program accessibility was defined as "the concept of prohibiting the exclusion of handicapped persons from programs by virtue of architectural barriers to such facilities as buildings, vehicles, and walks, while not requiring that existing facilities be completely barrier-free." 43 Fed. Reg. 2,135 (1978).
\textsuperscript{43} 45 C.F.R. §§ 85.57(b), 85.58 (1978).
\textsuperscript{45} 49 C.F.R. § 27.83(a)-27.95 (1980).
\textsuperscript{46} Id. § 27.85.
\textsuperscript{47} Id. § 27.99.
\textsuperscript{48} Id. § 27.85.
\textsuperscript{49} Id.
\textsuperscript{50} See supra note 34 & accompanying text.
icapped and nonhandicapped members of the traveling public in an integrated, equal setting. Under the guidelines, “separate treatment” could be provided “only where necessary to ensure equal opportunities and truly effective benefits and services.” Transit authorities were obligated under the 1979 DOT regulations to make mass transportation accessible to all persons, including the handicapped. This process marked a giant step towards incorporating the handicapped into mainstream society.

Court Decisions

American Public Transit Association v. Lewis

In American Public Transit Association v. Lewis, a voluntary trade association and eleven of its transit system members appealed a lower court decision that upheld the validity of the 1979 DOT regulations. Plaintiffs in the district court argued that these regulations were in excess of authority as stated under section 504, section 16 of the UMTA, and section 165(b) of the FAHA. They also contended that the regulations were procedurally defective because DOT had not considered all relevant issues, options, and comments during the rulemaking process, and that the decision to issue the regulations was arbitrary and capricious.

In granting the government’s motion for summary judgment, the district court found that the DOT regulations were a valid exercise of the Transportation Secretary’s authority to establish grant conditions for programs receiving federal financial assistance. The district court further ruled that these statutes imposed upon the Secretary an affirmative obligation to provide mass transportation services for the handicapped. The court noted that a variety of practical factors, including the changing nature of available technology and the heterogeneous nature of the handicapped community had prompted Congress to entrust to the Secretary the choice of means for providing those services.

The court expressly rejected the defendants’ argument that these

52. See supra notes 4, 20-21 & accompanying text.
55. Id. at 821.
56. Id. Petitioners also alleged below that the DOT regulations that were intended to increase accessibility of the handicapped to mass transportation constituted “major federal action” and were violative of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976), because DOT had not prepared an environmental impact statement. 485 F. Supp. at 821.
57. 485 F. Supp. at 823.
58. Id.
59. Id.
statutes required a "local options" approach. Although the court concluded that section 504 formed part of the basis for the Secretary's authority, it predicated its holding in large part upon the transportation statutes relied upon by DOT.

The district court also rejected the argument advanced by plaintiffs that the DOT regulations had been adopted in an arbitrary and capricious manner. Instead, it concluded that DOT had carefully considered a number of alternatives to the mainline accessibility approach embodied in the HEW guidelines and that, in adopting the regulations, the Department had reasonably concluded that the approach to be implemented was technologically feasible.

The Court of Appeals for the District of Columbia reversed the district court decision on the ground that, although section 504 bans discrimination, it does not require a transit authority to make "burdensome modifications" to its existing facilities in order to accommodate the handicapped. The court ruled that section 504 does not give authority to the Secretary to mandate full accessibility of transportation modes to the handicapped, but it reserved judgment on the scope and authority of the UMTA and FAHA. It remanded the case to the district court for a finding on these issues.

In reaching its decision regarding the scope of section 504, the appellate court sought to apply the rationale used by the United States Supreme Court in *Southeastern Community College v. Davis*, a decision that also interpreted section 504. The *Southeastern* decision, however, is inapposite and misleading in the *Lewis* context.

**Southeastern Community College v. Davis**

The plaintiff in *Southeastern*, a deaf student, applied for admission to Southeastern Community College's nursing program. On the basis of an examination of the plaintiff by an audiologist, her application was denied on the ground that, even with a hearing aid, she would be unable to participate fully in the wide range of the program's activities.

In a suit charging violation of section 504, the district court held that

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60. *Id.* at 824-25.
61. *Id.* at 823.
62. *Id.* at 824-25.
63. *Id.*
64. 655 F.2d 1272, 1278 (D.C. Cir. 1981).
65. *Id.* at 1280.
66. *Id.* The court ordered a determination by the DOT of the validity of the regulations under other statutes because it concluded that a reviewing court may not presume that an administrator would have made the same decision on other grounds. *Id.* at 1278 (citing SEC v. Chenery Corp., 332 U.S. 194 (1947)).
68. *Id.* at 400-01.
plaintiff was not an “otherwise qualified handicapped individual” within the meaning of the statute because she was unable to function “sufficiently” in the program in spite of her handicap. The Court of Appeals for the Fourth Circuit, although not disputing the district court’s finding of fact, ruled that the lower court had misconstrued section 504 and, in light of new regulations promulgated after the lower court’s decision, concluded that Southeastern College had to consider plaintiff’s application for admission without regard to her hearing disability.

In reviewing the school’s actions, the Supreme Court held that, in making admissions decisions, the school could consider physical qualifications necessary for the safe and successful completion of its nursing program. The Court stated that an “otherwise qualified person” under section 504 means a person able to meet all the requirements of a program despite possessing a handicap. The Court concluded that, under section 504, a program need not take substantial affirmative action to remove barriers for the handicapped. This ruling, however, was notably qualified. It did not eliminate the possibility that program modifications would, in some instances, be required in order to comply with the nondiscrimination mandate of section 504. The Court emphasized that reliance upon past practices and failure to remove barriers that unnecessarily impede the handicapped could, in some instances, be regarded as discrimination against qualified handicapped individuals. The Court, however, upheld the school’s right to deny the plaintiff’s application based on the particular facts involved.


70. 574 F.2d 1158, 1161 (4th Cir. 1978).

71. 442 U.S. at 405-07.

72. Id. at 406.

73. Id. at 410-12. The Supreme Court reserved judgment on whether the statute created a private right of action. Id. at 404 n.5.

74. See id. at 412-13.

75. The Court carefully noted: “We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped . . . without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.” Id. (emphasis added).

76. Id. at 414.
The *Southeastern* decision did not establish a sweeping prohibition against requiring program modification as a condition to receipt of federal funds. On the contrary, the Court held only that "substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals" were not required by section 504. The Court suggested that imposition of "undue financial and administrative burdens" upon a state might dictate against requiring certain kinds of program modifications. Nonetheless, this language implicitly recognizes that certain programmatic adjustments might be necessary to avoid discrimination against the handicapped.

*Southeastern* established a flexible standard for determining when modifications are required. This standard requires that modifications be made where necessary to accommodate qualified handicapped persons. It applies not only to determining the extent of affirmative action required, but also to determining which areas of human activity require programmatic adjustments to accommodate "otherwise qualified" handicapped persons. The Court, in referring to situations in which a lawful refusal to modify a program might be unreasonable and unlawful, recognizes that varying degrees of program modification may be required in different contexts. Thus, the Court emphasized that the scope of section 504, though limited, was flexible enough to require a greater or lesser degree of affirmative action based on "technological advances" and practical considerations in a particular field. For this reason, the result reached by the Supreme Court in the context of education is not necessarily defensible in the transportation arena. The "undue burdens" that the Court sought to restrict in the educational context in *Southeastern* are not necessarily relevant when considering mass transportation programs. As Judge Edwards noted in *Lewis*, "in considering the accessibility of public transportation to otherwise qualified handicapped persons, it is much more difficult to avoid 'discrimi-

77. *Id.* at 410 (emphasis added).
78. *Id.* at 412.
79. *Id.* at 412-13.
80. *Id.* See *supra* note 75.
82. In his concurring opinion in *Lewis*, Judge Edwards noted: "I express no opinion here on the extremely complicated question of whether the regulations exceed the permissible scope of section 504 of the Rehabilitation Act by imposing on transit authorities a requirement of 'affirmative action' as opposed to one of 'non-discrimination.' In my opinion, the application of section 504 to public transportation systems raises some questions that are significantly different from those considered by the Supreme Court in the higher education setting in *Southeastern Community College v. Davis*.” However, the judge agreed with the majority that the case should be remanded so that DOT could clarify its proper statutory authority for the regulations. 655 F.2d 1272, 1281 (D.C. Cir. 1981). (Edwards, J., concurring) (citations omitted) (emphasis added).
nation' without taking some kind of 'affirmative action.'”

*Southeastern* also can be distinguished from *Lewis* on its facts. In *Southeastern*, the plaintiff required immediate hearing aid assistance and special attention from instructors in order to complete the nursing program offered by the school. The plaintiff essentially was unable to take part in the clinical phase of the nursing program because of her hearing disability and would not have received even a rough equivalent of the normal training. The Court found that a fundamental alteration such as that required to enable the plaintiff to participate in the program was more than the “modification” the regulation required. It noted:

> [O]n the present record it appears unlikely respondent could benefit from any affirmative action that the regulation reasonably could be interpreted as requiring . . . . [T]he record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if respondent took part in the clinical phase of the nursing program. . . . In light of respondent's inability to function in clinical courses without close supervision, Southeastern, with prudence, could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives.

Contrary to the necessity of immediate modification in *Southeastern*, the regulations at issue in *Lewis* required local transit authorities to make modifications in their systems, but allowed up to ten years to meet the requirements. In addition, the regulations included exceptions such as a special waiver that allowed rail transit systems to plan an alternative method of service in conjunction with handicapped consultants.

The modification required by the regulations at issue in *Lewis* did not amount to a fundamental alteration in the nature of a mass transit system. The regulations did not, for example, require changes in scheduling or in the number of buses or trains in the system, nor did they interfere with day-to-day management of a system. They merely required the implementation, over a long period of time, of available devices allowing wheelchair access to public transit vehicles. Such de-

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83. *Id.*
84. 442 U.S. at 408-09.
85. *Id.* at 409-10.
86. *Id.*
88. 44 Fed. Reg. at 31,480; 49 C.F.R. § 27.99. In *Lewis*, the district court found in the record that the DOT had a reasonable basis for believing that feasible wheelchair-lifts were either currently available or would be available by the time any new buses were ready for delivery. The district court also found "substantial" evidence concerning the feasibility of accessible rail systems. 428 F. Supp. 811, 829 (D.D.C. 1980).
vices are necessary to enable an otherwise qualified group of citizens to make use of the system.

**Dopico v. Goldschmidt**

This distinction was recognized in a recent Second Circuit decision, *Dopico v. Goldschmidt*. In this action, plaintiffs, individually and as representatives of all wheelchair-bound persons in New York City, initiated two consolidated class actions in the district court seeking declaratory and injunctive relief. The principal local defendants were the New York City Transit Authority, the Metropolitan Transportation Authority, and the New York City Department of Transportation. The federal defendants were officials of the United States Department of Transportation (DOT) and the Urban Mass Transportation Administration.

Plaintiffs claimed that the local defendants, recipients of federal mass transit assistance funds, failed to provide wheelchair users with accessible mass transportation. Plaintiffs also contended that the federal defendants approved transit grants to the local defendants although they knew or should have known that those defendants had failed to make satisfactory "special efforts" as required by the statute.

The district court granted the local defendants' motion to dismiss for failure to state a claim for which relief could be granted and also entered summary judgment in favor of the federal defendants. It ruled that section 16 of the UMTA does not create a private right of action when considered in light of the United States Supreme Court decision in *Cori v. Ash*, and plaintiffs conceded that section 165(b) of the FAHA did not create a private right of action in their favor.

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90. 518 F. Supp. at 1163.
91. *Id*. at 1165-66.
92. *Id*. at 1166. See supra note 34.
93. 518 F. Supp. at 1190.
94. *Id*. at 1171-74. In *Cori v. Ash*, 422 U.S. 66 (1975), the Supreme Court found several factors relevant in determining whether a private remedy is implicit in a statute not expressly providing one. "First, is the plaintiff 'one of the class for whose special benefit the statute was enacted'... that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create a remedy or to deny one?... Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?... And, finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id*. at 78.
95. 518 F. Supp. at 1174 n.49. The court also ruled that § 1983 of the Civil Rights Act, 42 U.S.C. § 1983 (1976), did not authorize suit for violation of these statutory provisions because neither § 16 of the UMTA nor § 165(b) of the FAHA created substantive rights enforceable under § 1983. *Id*. at 1176-78. The court also held that plaintiff had not stated a
The district court further ruled that section 504 was limited and thus could not be used to authorize the kind of "massive relief" that plaintiffs sought in this action. The court analogized plaintiffs' request with the "kind of burdensome modifications" that the Southeastern court held to be beyond the scope of section 504. The district court cited the Lewis decision with approval in reaching its conclusion.

The Court of Appeals for the Second Circuit affirmed the district court's ruling in regard to section 16 of the UMTA, section 165(b) of the FAHA, and the constitutional issues. However, it reversed the district court's dismissal of plaintiffs' claim under section 504 and the summary judgment granted in favor of the federal defendants. The court ruled that even if plaintiffs' prayer for relief could be characterized as excessive under the 1979 DOT mainstreaming regulations, the district court still had inherent power to fashion less ambitious intermediate relief if a violation of section 504 was found. The court distinguished Southeastern by noting that in that action, nothing short of fundamental modifications would have accomplished plaintiffs' admission to the defendant's nursing program, whereas in the present action, a wide range of prospective relief was available to meet at least some of plaintiffs' concerns if they proved their allegations. Therefore, even if plaintiffs' prayer for relief could be deemed to exceed the mandate of section 504, more modest relief within the limits of Southeastern was still available. Moreover, the court noted that plaintiffs also had alleged violations of the 1976 "special efforts" regulations, which, though superfluous after the later amendments, were never officially withdrawn by DOT and remained in effect as possible support for plaintiffs' valid equal protection claim because defendants' actions were rational and not arbitrary or capricious. Id. at 1178-79.

97. Id. at 1175-76.
98. Id.
99. Id. at 1175.
100. 687 F.2d at 648-49.
101. Id. at 650.
102. Id.
103. Id. The court in Dopico also distinguished the recent decision of Board of Educ. v. Rowley, 102 S. Ct. 3034 (1982), in which the United States Supreme Court ruled that the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. § 1401 (1976), did not require a local school district to provide a sign-language interpreter for a deaf child already receiving sufficient educational benefits. The Court held that the EAHCA was not structured like § 504 and so could not impair that section's authority to require some degree of "positive effort" to expand availability of federally funded programs to otherwise qualified handicapped persons. 687 F.2d at 643 n.6. Moreover, the Dopico court indicated that in Rowley, the United States Supreme Court concluded that the specific relief that had been ordered exceeded the educational benefit already being provided to the plaintiff whereas, in this action, the plaintiffs had not yet been heard on the issue of whether the statutory requirements of § 504 have been met. Id.
claims.  

The court of appeals also noted that use of the term "affirmative action" as used by the United States Supreme Court in Southeastern was particularly misleading in the transportation context. Dopico did not involve a challenged program that had set goals for the hiring or enrollment of compensatory numbers of a disadvantaged class. Instead, the issue in that action involved a public service that plaintiffs were entitled to use but that was not practically available to them. Moreover, the court emphasized in this regard that the action was free of the question of reverse discrimination and the associated problem of changes in selection criteria necessary to widen the pool of qualified applicants. Thus, it concluded that the issue involved was purely economic and administrative, and that the primary consideration was one of practicality rather than entitlement, merit or restitution.

The Dopico decision supports the view that section 504 by itself, and in conjunction with other statutes, can be used to require local transit authorities to make reasonable modifications to their systems in order to accommodate qualified handicapped persons. The court's conclusion that practicality rather than entitlement is the primary consideration in deciding cases of accessible transportation suggests that reasonable modifications within the Southeastern guidelines could practically include accessibility options on mainline transit systems similar to those established by the 1979 DOT regulations. In fact, such accessibility options on mainline systems are less "burdensome" than the immediate modifications that were required in Southeastern because of the extent of available federal funding for mass transportation. No such funds were available to Southeastern at the time respondent sought admission to its nursing program.

Factors of Costs and Federal Funding

The Southeastern Court noted that the amended provisions of section 504 recognized that on occasion the elimination of discrimination might involve some costs, and therefore authorized grants to the states. However, no such grants were available to Southeastern to defray the costs of program modification. The Court nevertheless explicitly recognized that "in some future case" the availability of funds to re-

104. The 1976 "special efforts" regulations remained in the Code of Federal Regulations throughout the brief life of the 1979 regulations. See 46 Fed. Reg. 17,488 (1981). See also supra note 34. The court of appeals therefore concluded that they were superseded only in the sense of being rendered superfluous but were never voided. 687 F.2d at 650-51.
105. 687 F.2d at 652.
106. Id. at 653.
107. Id.
108. 442 U.S. at 411 n.10.
109. Id.
move barriers that unnecessarily impede the handicapped would be an appropriate factor to consider when determining the existence of unlawful discrimination.\textsuperscript{110} In \textit{Lewis}, the court stressed the costs of the required modifications but neglected to examine the availability of federal funding for such modifications. In fact, extensive funding was available in the form of grants authorized by several statutory sources\textsuperscript{111} and such funding was conditioned on compliance with the requirements of section 504.\textsuperscript{112} The legislative history of the transportation statutes and of section 504, coupled with the amount of federal funding available for mass transit systems, leads to the conclusion that Congress intended to impose mainstreaming as a condition to receipt of such funds.

The subject of conditional grants was discussed by the Supreme Court recently in \textit{Pennhurst State School \& Hospital v. Halderman}.\textsuperscript{113} In \textit{Pennhurst}, the respondent, a retarded resident of Pennhurst State

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} Federal financial assistance for mass transportation programs comes from three statutory sources. The first is the “discretionary capital grant” program administered by DOT under § 3 of the UMTA, 49 U.S.C. § 1602. Under that program, the Secretary is authorized to approve applications by states or local bodies for discretionary grants “on such terms and conditions as he may prescribe” for the construction of mass transportation facilities and for the purchase of rolling stock, including buses. \textit{Id.} § 1602(a)(1). Under that program, DOT pays for 80% of the project’s costs. \textit{Id.} § 1603(a). The discretionary capital grant program constitutes a major source of funds for public transit programs. In a 1978 amendment to the UMTA, Pub. L. No. 599 § 303, 92 Stat. 2737, 2737-38 (1978) (codified at 49 U.S.C. § 1603(c)(3)(A)), Congress authorized appropriations for over $1.3 billion for fiscal year 1979 for the capital grants authorized by § 3. Authorizations increase for future years and currently extend through fiscal year 1982. Of the amounts authorized in fiscal year 1979, Congress appropriated over $1.2 billion. Pub. L. No. 75-335, 92 Stat. 443 (1978).

The second major statutory source of funds for mass transit programs is found in § 5 of the UMTA, 49 U.S.C. § 1604 (1976), the “formula grant” program. Section 5 authorizes the Secretary “on such terms and conditions as he may prescribe” to approve applications for grants based on a statutory formula for the purchase of buses and other capital expenses and to assist mass transportation systems to pay operating expenses. \textit{Id.} § 1604(d)(1). Under this program, DOT’s share of an operating assistance grant is a maximum of 50%. \textit{Id.} § 1604(e). As with the discretionary grant program, the Department’s share of a grant for buses or other capital facilities is 80%. In the formula grant program, Congress authorized appropriations of over $1.5 billion for fiscal 1979. \textit{Id.} § 1604. The amount of funds each urbanized area is eligible to receive varies according to such factors as population and population density.

Finally, under the interstate substitution program authorized by the Federal-Aid Highway Act, 23 U.S.C. § 103(e)(4) (1976), the Secretary is authorized to use federal highway funds for mass transportation program grants. At a state’s request, federal funds that would otherwise be available for interstate highways may instead be used, with DOT’s approval, for the construction of public mass transit projects. \textit{Id.} § 142(a), (b).

\textsuperscript{112} \textit{See supra} notes 20 & 26.

School, brought a class action suit in federal district court on behalf of herself and all other Pennhurst residents against that institution and various officials responsible for its operation. Respondent alleged that conditions at the institution were unsanitary, inhumane, and dangerous, and that the institution denied the class members equal protection under the law.\textsuperscript{114} Suit was brought under the eighth and fourteenth amendments of the United States Constitution, section 504, the Developmentally Disabled Assistance and Bill of Rights Act of 1975,\textsuperscript{115} and the Pennsylvania Mental Health and Mental Retardation Act of 1966.\textsuperscript{116} The district court held that the mentally retarded have a constitutional right to be provided with "minimally adequate habilitation" in the "least restrictive environment."\textsuperscript{117} The court held that both section 504 and the Pennsylvania Mental Health and Mental Retardation Act of 1966 also provided such a right.\textsuperscript{118}

Although the Court of Appeals for the Third Circuit affirmed the lower court order, it avoided the constitutional questions raised. The court premised its ruling on the Developmentally Disabled Assistance and Bill of Rights Act, which the court found created an implied right of action on behalf of mentally retarded persons.\textsuperscript{119} The Supreme Court reversed, stating that there was "nothing in the Act or its legislative history to suggest that Congress intended to require [s]tates to assume the high cost of providing 'appropriate treatment' in the 'least restrictive environment'."\textsuperscript{120} Instead, the Court concluded that the Act's language and structure demonstrated that it was a voluntary federal-state funding statute and rejected the argument that its provisions were made compulsory pursuant to Congress' power to enact legislation under the spending power\textsuperscript{121} or the fourteenth amendment.\textsuperscript{122}

\textsuperscript{114} 451 U.S. at 6.
\textsuperscript{115} 42 U.S.C. §§ 6000-6081 (1976).
\textsuperscript{116} PA. STAT. ANN. tit. 50 §§ 4101-4704 (Purdon 1966).
\textsuperscript{117} 446 F. Supp. at 1314-20.
\textsuperscript{118} Id. at 1322-24. The district court also held that respondent's constitutional right under the eighth amendment "to be free from harm" had been violated and that respondent was also entitled to be provided with "non-discriminatory habilitation" under the equal protection clause. Id. at 1320-22.
\textsuperscript{119} 612 F.2d 84, 107 (3d Cir. 1979).
\textsuperscript{120} 451 U.S. at 18.
\textsuperscript{121} Id. at 17-19. The spending power incorporated in article I, section 8, clause 1, of the Constitution provides: "Congress shall have power to . . . provide for the . . . general welfare of the United States." The Supreme Court recognizes Congress' power to fix the terms and conditions on which it grants federal money to the states. See, e.g., Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947).
\textsuperscript{122} 451 U.S. at 18. Section 5 of the fourteenth amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." For decisions on Congress' power to secure the guarantees of this amendment, see Fitzpatrick v.
The Court stated that, under the rule of statutory construction, "Congress must clearly express its intent to impose conditions on the grant of federal funds so that the states can knowingly decide whether or not to accept those funds." This rule is particularly applicable in cases where the states' potential obligation is undetermined. Therefore, if Congress does not clearly impose conditions on the states' receipt of federal funds, states have no obligation to fund the federally mandated policies.

The Court also noted that the relatively small amount of federal aid that was appropriated to Pennsylvania in this instance indicated that Congress had not intended to create substantive rights for individuals covered by the Act. In fact, the Secretary of Health and Human Services, the official responsible for administering the Act, admitted that he had no authority to withhold funds from states that failed to meet the provisions of the Act. The Court ruled that this was conclusive that Congress did not intend that the provisions of the Act be mandatory.

It is clear, however, that Congress did intend the provisions of section 504, in the context of mass transportation, to be mandatory. Con-


123. 451 U.S. at 24.

124. Id.

125. Id. at 17. The Court made brief reference to its holding in Southeastern and noted: "The Court below failed to recognize the well-settled distinction between Congressional 'encouragement' of state programs and the imposition of binding obligations on the states. . . . Relying on that distinction, this court in Southeastern Community College v. Davis . . . rejected a claim that Section 504 of the Rehabilitation Act of 1973, which bars discrimination against handicapped persons in federally funded programs, obligated schools to take affirmative steps to eliminate problems raised by an applicant's hearing disability. Finding that 'state agencies such as Southeastern are only encourage[d] . . . to adopt such policies and procedures, . . . ' we stressed that Congress understood that accommodations of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." Id. at 27. See supra notes 75, 82 & accompanying text.

126. 451 U.S. at 24: "The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing 'appropriate' treatment in the 'least restrictive' setting, confirms that Congress must have had a limited purpose in enacting section 6010. When Congress does impose affirmative obligations on the states, it usually makes a far more substantial contribution to defray the costs."

127. Id.

128. Id. On remand, the court of appeals held that Pennsylvania's Mental Health and Mental Retardation Act provided adequate support, independent of federal law, for the federal court's order enjoining institutionalization of mentally retarded citizens. 673 F.2d at 656. The court also held that the eleventh amendment did not bar the federal court from entering its order enjoining institutionalization of mentally retarded citizens. Id. at 659, cert. granted, 102 S. Ct. 2956 (1982).
competence has strongly indicated that mass transportation accessible to a
wide cross-section of the population is a national priority. This concern is reflected in statements by members of Congress and in the extent of federal funding for accessible mass transit systems which, in some instances, covers up to eighty percent of capital costs.

The conditional terms under which states receive federal transportation funds and the authority granted to the Secretary of Transportation to condition grants on local compliance with section 504 and other statutes support the view that Congress clearly expressed its intent that mass transportation be made accessible and that states that accept federal funding knowingly undertake their share of that obligation. Congressional policy in this area, therefore, cannot be viewed as "only wishful thinking on the part of Congress or as some fanciful role in the implementation" of accessible mass transportation.

It is also clear that Congress understood the provisions of section 504 to require mainstreaming in mass transportation. The legislative history and the language of section 504 reflect a belief that the isolation of handicapped persons from mainstream society stems from discrimination. In addition, subsequent legislation indicates a congressional understanding that, at least with respect to mass transit, mainstreaming is required to end discrimination.

In *Southeastern,* plaintiffs introduced into evidence the statements of certain members of Congress indicating that they viewed section 504 as requiring affirmative efforts. The Court found that these statements, made after the passage of section 504, did not constitute valid evidence of congressional intent and noted: "Nor do these comments, none of which represents the will of Congress as a whole, constitute subsequent 'legislation' such as this court might weigh in construing the meaning of an earlier enactment."

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130. See *supra* note 21.
132. The Secretary is authorized to approve applications by states or local bodies for grants "on such terms and conditions as he may prescribe." 49 U.S.C. § 1602(a)(1) (1976) (emphasis added). See *supra* notes 20 & 111.
134. 451 U.S. at 40. (White, Brennan, and Marshall, JJ. dissenting). The dissenter in *Pennhurst* argued that Congress intended state compliance with § 6010 to be a precondition of receipt of federal funds. *Id.*
135. See *supra* notes 30 & 32.
136. See *supra* notes 20 & 26.
137. 442 U.S. at 411-12 n.11.
138. *Id.*
In *Lewis*, however, there was valid evidence of congressional intent. Section 504 was passed in 1973. In 1975, Congress amended the FAHA to require that mass transit projects funded with federal highway funds be constructed and operated to allow effective utilization by handicapped persons.\(^{139}\) In addition, when appropriating the UMTA budget for 1975, Congress attached a rider to the bill emphasizing that all funds had to be used to design and purchase accessible means of transportation.\(^{140}\) These amendments constitute the type of subsequent legislation referred to in *Southeastern* and demonstrate Congress' understanding of the actions necessary to eliminate discrimination against the handicapped in the area of mass transportation.

In addition to the amendments to the UMTA and the FAHA, Congress demonstrated its intent to require "mainstreaming" each time after 1978 that it appropriated money under those statutes and conditioned grants of such money on compliance with section 504.\(^{141}\) Once HEW had issued regulations mandating mainstreaming, the continued conditioning of money upon compliance with section 504 can be viewed as an indication of Congress' understanding that such mainstreaming was required by the section. Thus, congressional intent that handicapped persons be mainstreamed into mass transit systems was well demonstrated before the implementation of the 1979 DOT regulations.

Moreover, although the Supreme Court in *Southeastern* held that "substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals" were not required by section 504,\(^{142}\) it is doubtful whether mainstreaming in the area of mass transportation could be accomplished without modifications such as those required by the 1979 DOT regulations. Once the idea of separate transportation facilities for otherwise qualified handicapped persons is rejected as inherently discriminatory, making existing systems accessible to all individuals is the only viable way to prevent the discrimination forbidden by section 504.

The Court in *Southeastern* suggested that the imposition of "undue financial and administrative burdens" upon a state may dictate against requiring certain kinds of program modifications.\(^{143}\) The *Lewis* court found that such burdens were imposed by the 1979 DOT regulations.\(^{144}\) However, the court failed to consider that the financial bur-

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\(^{140}\) See *supra* note 20.

\(^{141}\) The terms for congressional funding of accessible mass transportation remained unchanged after passage of the mainstreaming requirements. See *supra* note 111.

\(^{142}\) 442 U.S. at 410.

\(^{143}\) Id. at 412.

\(^{144}\) 655 F.2d at 1278.
dens were alleviated by federal funding, a factor not present in *Southeastern*. In addition, the court could point to no fundamental alteration of the nature of the program such as would create administrative burdens. It is because of the court’s failure to distinguish the issues involved in *Lewis* from those raised in the context of education that a mechanical application of the *Southeastern* analysis and an erroneous and inequitable result were inevitable.

**Conclusion**

Millions of individuals depend upon mass transportation for their livelihood. It is central to the survival of trade and human interaction. Practical considerations reflecting the national interest demand that such an integral system be geared to accommodate the needs of most, if not all, of the population. Such an approach has distinct economic benefits since it encourages greater numbers of individuals to become involved in the economic and social fabric of mainstream society. Moreover, this approach denounces the policy of separate accommodations for the handicapped wherever feasible, as well as the stigma associated with such treatment. The 1979 DOT regulations mirrored congressional intent in this regard and their promulgation was an important step in achieving these goals.

The *Lewis* decision, on the other hand, will have a debilitating effect on efforts to make transportation modes accessible to the handicapped. The Court of Appeals for the District of Columbia failed to define “undue financial and administrative burdens” in the transportation area. The ambiguity involving such a central issue creates the opportunity for conflicting interpretations at both the federal and local levels and could be a springboard for further litigation on this issue.

In attempting to answer the different questions raised in the mass transportation arena, the *Lewis* court applied an inflexible standard that is unworkable and inappropriate in the transportation context.

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145. See supra note 111 & accompanying text.


147. See supra notes 4, 21, 30 & accompanying text.

148. The HEW guidelines which laid the foundation for the DOT regulations stated: “[S]eparate or different treatment can be permitted only where necessary to ensure equal opportunity and truly effective benefits and services.” 43 Fed. Reg. 2134 (emphasis added). See supra note 26.

149. See Jones, Labels and Stigma in Special Education, 38 Exceptional Children 553, 560-61 (1972) (very act of labeling a child as “disabled” and placing him or her in a separate program has a stigmatizing effect and often produces an education of inferior quality).

150. 655 F.2d at 1278. See supra notes 75 & 82.
The decision is contrary to the intent of section 504 and other related statutes and misapplies the Supreme Court's ruling in Southeastern. The court failed to recognize that the nature of mass transportation demands greater "affirmative efforts" in order to accommodate "otherwise qualified" handicapped persons than are required in an area such as education. Undue reliance on separate accommodations, rather than mainstream transportation facilities for all qualified individuals, is discriminatory and intolerable. Society can no longer allow separate standards for different segments of its citizenry.151

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151. See Burgdorf & Burgdorf, A History of Unequal Treatment: The Qualification of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause, 15 SANTA CLARA L. REV. 855 (1975). Congress now has before it for its review and consideration the challenged DOT regulations. Both Houses of Congress have also proposed legislation to permit alternate methods of satisfying § 504 and § 16 of the UMTA short of mainline accessibility. See Federal Public Transportation Act of 1980, S. 2720, and Surface Transportation Act of 1980, H.R. 6417, 96th Cong. 2d Sess. (1980). See 126 CONG. REC. 8150-57 (June 25, 1980). The framework of these legislative proposals, along with the reports and debates, indicates Congress' recognition that, absent modifying legislation, the Secretary of Transportation does have authority to ensure mass transportation services for the handicapped. Therefore, the challenged DOT regulations constituted a legitimate exercise of the Secretary's authority. The Presidential Task Force on Regulatory Relief has also included the DOT regulations and the HEW guidelines in its list of regulations scheduled for review and possible modification pursuant to Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

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