
Regulation Gone Amok

Timothy B. Clark

NO OTHERWISE qualified handicapped individual . . . shall . . . be excluded from participation in . . . any program or activity receiving federal financial assistance," states Section 504 of the Rehabilitation Act of 1973. By the time federal agencies get through issuing regulations to carry out that single sentence of law, they will have cost American taxpayers many billions of dollars. With scanty legislative history to guide them, these agencies are filling the *Federal Register* with hundreds of pages of rules affecting nearly every federally subsidized institution in the country: universities, hospitals, state and local governments, and public transportation authorities. The aim is to help the handicapped, a group that in 1974 included 29.3 million Americans, 14 percent of the population.

Some of the rules are eminently sensible. To deny the handicapped access to places and services others can use is discriminatory, if access can be provided without inordinate expense. But other rules emanating from the bureaucracy are so costly, and of benefit to such an infinitesimal minority of handicapped people, that they call into question the wisdom of the law and the common sense of those who administer it.

That is the case with final regulations issued by the U.S. Department of Transportation on May 31, 1979. If Congress and the federal courts allow these rules to stand, taxpayers will spend some \$7 billion over the next thirty years, in 1979 dollars, to benefit a tiny fraction of the population: people confined to wheelchairs. The cost estimate was made last November by the Congressional Budget Office (CBO), which characterized the department's scheme as "very expensive" and said that "relatively

Timothy B. Clark is staff correspondent of the National Journal.

How Many Billions for Wheelchair Transit?

few handicapped persons would benefit from it."

Expensive indeed. If, as CBO estimated, only 14,900 wheelchair users would gain access to buses and 2,077 to subways, then the public would be paying some \$400,000 for each new rider. Each bus or subway trip by a wheelchair user would cost \$38, CBO calculated, whereas if the money were used to provide taxi service or specially equipped automobiles, the cost per ride would be only about \$7. Many more trips would be taken, at a lower total cost, under the alternate plans.

The issue has deeply divided groups representing the handicapped. The American Coalition of Citizens with Disabilities (ACCD), with seventy-five member groups, is the principal lobby supporting the Department of Transportation regulations. It clings stubbornly to the position that wheelchair users should be "mainstreamed"—given access to the same transportation serving everyone else, instead of getting special transportation services. Just as Title VI of the Civil Rights Act of 1964 helped define the basic rights of racial minorities, so Section 504 spelled out the rights of the handicapped, ACCD argues. Separate but equal is not enough.

But many local handicapped groups in cities around the country disagree. "Installing wheelchair lifts on all fixed-route mass transit vehicles to 'help the handicapped' is the craziest idea I've heard yet," wrote Kent Graybill, chairman of the Spokane, Washington, Committee on Transportation for the Elderly and Disabled. Graybill, a cerebral palsy victim who has used a wheelchair all his life, is among those who fear that the new rules will divert money from special dial-a-ride services (provided by most transit authorities in response to laws of the early 1970s), funneling it instead to buses and subways the handicapped will not

be able to use even after they have been made "accessible."

Genesis of the Rules

How did Congress come to its decision to give the handicapped the one paragraph of law they now characterize as a basic grant of civil rights? The answer is found in a word—quickly. Section 504 was not the subject of hearings in either the House of Representatives or the Senate and was not debated on the floor in either chamber. It became law through an amendment offered in the House by Representative Charles Vanik (Democrat, Ohio) and accepted without dissent. Did Congress know what it was doing? The CBO study found virtually no legislative history to show what Congress intended by Section 504, and Representative Vanik, asked by *National Journal* in October 1978 whether he had anticipated the consequences of his amendment, said: "We never had any concept that it would involve such tremendous costs."

Having acted in 1973 without looking ahead, Congress is reluctant now to correct the extravagances resulting from its own deed. But that comes later. First, the tale of the executive branch's reaction to Section 504.

To start with, the executive branch was not enthusiastic. President Nixon twice vetoed the Rehabilitation Act before it was enacted over his objections. Then, it was not until early 1976, some two-and-a-half years after the law's enactment, that President Ford issued an executive order assigning the secretary of the Department of Health, Education, and Welfare (HEW), David Mathews, the task of writing guidelines for a comprehensive, government-wide approach to eliminating discrimination against the handicapped. A few months later, HEW lawyers proposed rules to govern recipients of HEW subsidies. Mathews refused to sign the proposal, arguing that Congress should review it first to make sure that HEW's ideas squared with congressional intent.

The matter rested there as the 1976 presidential campaign began. Carter, campaigning, attacked Ford for stalling on the guidelines. Section 504 "means very little until an administration in full accord with their spirit stands behind the law," he said, adding that "no compassionate administration" would leave the

handicapped in the lurch. The next year, Carter's administration had not been in office four months when small but militant groups of handicapped people in wheelchairs staged a "wheel-in" outside of HEW Secretary Joseph A. Califano's office and in regional HEW offices around the country. Califano promised to review the proposed rules, pointedly noting that "the previous administration took two-and-a-half years to produce complex regulations that it then refused to sign." Califano kept his word.

There was a hint of what was to come in the field of transportation when, in April 1977, HEW issued regulations governing its own programs at colleges, hospitals, and other institutions. The expected cost of implementing those rules was huge. By HEW's own estimate at the time, institutions covered by the regulation would have to invest some \$400 million in capital improvements and spend fully \$2 billion a year on added services to the handicapped.

HEW's guidelines for other federal agencies came along in January 1978. Five months later, pursuant to those guidelines, Transportation Secretary Brock Adams proposed rules to govern accessibility to federally subsidized transportation.

Rules and Rail

The Department of Transportation's proposal of June 8, 1978, filled fifty-one pages of the *Federal Register* with fine print. There were rules on rest rooms, rules on telephones and typewriters, rules on sleeping cars and waiting areas, rules on pedestrian overpasses, on ticketing and on displaying of the international accessibility symbol. By necessity, the rules began by defining the handicapped population they were aiming to help. They made it clear that "passengers requiring life support equipment" and "bed-ridden and stretcher-bound passengers" were not included. But, in a key decision, the department proposed that transit programs be fully accessible to "persons unable to climb steps." That, of course, means people who use wheelchairs—and it means that there must be some way to get the wheelchair and its user down into underground subway stations, up onto elevated platforms, and up into trolleys, buses, and railroad cars. It means elevators in stations and terminals, and it means a lift or a ramp for vehicles whose floors are not even

with curbs or loading platforms. Every mode of public transportation would be affected: subways, bus lines, inter-city trains, commuter rail, trolleys, and airports.

The immense cost and complexity of the proposal touched off immediate controversy. A proposed requirement that "where telephones are provided in train stations, teletype-telephones also be provided for the deaf" was labeled "rulemaking gone amok" by Representative Robert W. Edgar (Democrat, Pennsylvania). Edgar represents the suburbs of Philadelphia, one of five big cities that would have to undertake expensive modifications of their aging rail systems under provisions of the regulations. Indeed, the cost issue was initially drawn in these big cities.

When Adams proposed his rules in June 1978, he estimated they would cost \$1.8 billion in capital expenditures—with \$1.6 billion of that needed to retrofit the aging rapid rail systems of New York, Philadelphia, Chicago, Boston, and Cleveland—plus \$74 million in increased annual operating costs. Transportation officials in these cities immediately protested that the estimate was much too low. The Chicago Transit Authority said the retrofit project would cost Chicago \$910 million—more than all the capital invested in its system since 1890. Boston said it would have to spend \$70 million; Cleveland, \$53 million; and Philadelphia, \$650 million. But the big problem was in the Big Apple, where Mayor Edward I. Koch said that the department's rules, unless accompanied by a large federal subsidy, would "bankrupt" his financially shaky city. New York's Metropolitan Transportation Authority serves a third of the nation's subway riders—3.6 million a day—and also operates 4,868 buses carrying 2.2 million riders a day and commuter rail systems with 410,000 daily riders. The authority estimated that the total cost of implementing the proposed rules in New York City would range between \$1.5 billion and \$2.5 billion. Spread over thirty years and assuming just a 7 percent inflation rate, the higher figure would escalate to \$9.6 billion. The difficulties of acquiring land and sinking elevators into the ancient subway tubes beneath the city can easily be imagined by anyone who has ridden New York's subways.

The American Public Transit Association (APTA) estimated in 1978 that rapid rail retrofitting in the five cities would cost between \$3

billion and \$5 billion. Later that year, the Department of Transportation moved closer to APTA's estimate, boosting its own rail estimate to \$2.8 billion. The final rule required retrofits *only* for "key" subway stations, and the department said this would cost \$1.3 billion over thirty years. Then, in mid-April 1980, the department released a congressionally mandated study that raised this estimate to more than \$5 billion over fifty years.

How many people would benefit from these large expenditures? That is a matter of controversy. In 1978 DOT spent \$2 million on a study to find the answer, and the results were disappointing to those who advocate full access for the handicapped. APTA, using the study's data, calculated that only about 131,000 of the severely handicapped people in cities with subways cannot now use public transit. If, as the study found, only 3 percent of these people, many of whom are in wheelchairs, would be able to use the subways if the department's rules were implemented, then only about 4,000 people would gain access to the subways. The CBO report was even gloomier, predicting that the new rules would open the subways to only 2,077 wheelchair users. As CBO said, "most wheelchair users or otherwise severely handicapped persons who do not use transit today cannot get to bus stops and rail stations, or have difficulty in doing so; many cannot travel without the assistance of another person."

These estimates are disputed by the American Coalition of Citizens with Disabilities. Once society makes other changes to help wheelchair users get around—including sidewalk curb cuts and reliable, accessible bus service to feed subway stations—ridership would boom in the subways, the group says. And Frank G. Bowe, its director, pointed out that accessible transit "can help anyone with a mobility problem: mothers with baby carriages, pregnant women, people shopping, people with sprained ankles."

But experience in the nation's only two accessible subway systems, those of San Francisco and Washington, D.C., does not support the view that wheelchair users would reap substantial benefits under the Transportation Department rules. The Bay Area Rapid Transit District in San Francisco reports that, in 1978, its rapid rail system served an average of 145,000 patrons a day, with only about 100 elevator trips by people in wheelchairs. The Wash-

ington Metropolitan Area Transit Authority, reporting on its May 1979 survey, found only 34 wheelchair users a day riding its subway elevators, out of total daily ridership of 200,000.

The Special Problem of Buses

In recent months, concerns about the huge costs of retrofitting the five aging rail systems have given way to complaints from scores of smaller cities arguing that the department rules pose a far more immediate—and expensive—problem for their bus systems.

The regulations give the five rail cities thirty years to comply with the retrofit requirements, but demand quicker action in other cities. Half the buses in a city's fleet must be accessible within six years. Since buses have an average life of twelve years, this means adding wheelchair lifts, at a cost of about \$15,000 each, to existing buses. All new buses also have to have lifts—again at \$15,000 apiece.

The story of the bus requirements is in many ways a comedy of errors. When Adams issued his proposed rules in 1978, he assumed that the department's long and expensive effort to develop a new "Transbus" would soon bear fruit. Transbus was to be a modern, roomy bus with a variety of features of use to all riders, including wide front doors, low floor height, and low steps. In addition, it would be equipped with two special features for the handicapped—a "kneeling" mechanism that would allow the bus floor to sink within eighteen inches of the pavement at the front door and a ramp or a lift at the front door. Three cities—Los Angeles, Philadelphia, and Miami—formed a consortium to order 530 of these buses. As the May 2, 1979, deadline for bids approached, General Motors Corp. and Grumman Flexible Corp., the only two U.S. manufacturers of full-size buses, dropped out. And no foreign firms entered bids.

Adams called the companies' decision not to bid "shocking" and immediately ordered the National Research Council (operating arm of the National Academy of Sciences) to study the technological feasibility of his department's specifications. If Adams saw that move as offering hope of justifying the department's position on Transbus, he was disappointed when the council issued its report on September 6. "The bus defined in the Transbus procurement requirements could not be procured, nor can it

be procured with only modest changes" in the requirements, the council said. "The decisions of U.S. bus manufacturers not to bid were reasonable and understandable business judgments." Supporting complaints from public transit operators about wheelchair lifts, the council also said that no existing lift is "completely satisfactory."

Adams, of course, did not know what the National Research Council would conclude when he issued the May 31 regulations. He breezily brushed aside his assumption that Transbus would be available by the time transit operators had to begin ordering new, accessible buses, and simply required that the new buses be equipped with wheelchair lifts. Since then, some 2,000 buses have been ordered by cities across the country, all with lifts that raise the cost of the bus by more than 10 percent, even though lifts have a history of malfunction.

Back in 1978, Adams had minimized the cost of the bus program, saying it would contribute only about 10 percent of the total cost of the Section 504 regulations. The department justified this position by attributing most of the bus costs to its earlier ruling on Transbus. The Congressional Budget Office's study, however, unwilling to make that fine distinction, estimated that the bus requirement would cost considerably more than the rail program. Whereas rail retrofit would cost only \$833 million (on CBO's assumption that the department would grant waivers for about half of the key stations in the five old rail cities), the bus program would cost \$4.8 billion, not including annual operating costs of \$182 million. (In comments on the CBO study, the department argued that the estimate was overstated.)

Since the early 1970s, transportation laws have obligated public transit authorities to serve the handicapped, and most have responded by providing special dial-a-ride services. On a day's notice, vans will pick up a wheelchair user, deliver him to his destination, and return him to his home. The handicapped, especially those who are elderly, are devoted to this service. And they see a threat to its continuance in the department's rules. They have good reason, since many of the local bus authorities have said they cannot afford to provide lift-equipped buses and still continue the dial-a-ride services.

Erie County, in western Pennsylvania, pro-

vides a good example. In the fall of 1979, the county's Transportation Council for the Elderly and Handicapped surveyed every wheelchair user in its jurisdiction and reported "100 percent total rejection of the lift concept. . . ." Ac-

Erie County . . . surveyed every wheelchair user in its jurisdiction and reported "100 percent total rejection of the lift concept. . . ."

cording to the survey, "Lifts on buses would not meet even 5 percent of the needs of the wheelchair-bound transportation consumer." The mayor of Erie and other local officials protested in November that the Erie Metropolitan Transportation Authority's recent order for fifteen buses, at a total cost of \$1,950,000, would have been \$172,500 less if wheelchair lifts had not been specified. The authority asked the department for a waiver from its rules.

So far, fourteen cities have asked for waivers. Three requests have been denied and the others are being considered by Adams's successor, Secretary Neil E. Goldschmidt. It is unlikely that any will be approved, since the applications are not made under Section 504, but rather under general Department of Transportation waiver rules that have rarely, if ever, been used. The fourteen cities, and the APTA as well, would like to return to the system that prevailed before the rules were promulgated, a system that allowed each city to decide on its own how to provide transportation for the handicapped. They make a persuasive case. Cities built on hilly terrain are simply not negotiable for people in wheelchairs; and in northern cities, the weather makes getting to and waiting at a bus stop close to impossible for most wheelchair users about half the year.

Under the local option system, a few cities have in fact chosen to order buses equipped with wheelchair lifts. Most have regretted it.

- St. Louis has had 158 lift-equipped buses for two-and-a-half years, providing round trips for eight to ten wheelchair users a week. A year ago, the Bi-State Development Authority, which runs the service, said that 40 percent of the buses were out of commission at any given time and that unplanned maintenance costs on these vehicles had totaled \$600,000.

- The Milwaukee County Transit System began lift-equipped service last April, having added lifts to 100 of its 548 buses. It averaged one-and-a-half wheelchair rides per day during the summer months but, with colder weather, this ridership declined to six in October and nine in November. The buses provide an average of 7,916,000 passenger trips per month.

- Like St. Louis, other cities with lift-equipped buses have reported substantial operating and maintenance problems. And some have complained that regular passengers resent the time it takes (about five minutes) to load a wheelchair user on or off the bus.

Ducking the Issue

The federal government's treatment of the handicapped transportation issue has offered a series of profiles in political cowardice.

The executive branch, though deeply split on the issue, has made only the smallest of concessions to those who complain about the regulations' tremendous cost. Within the Department of Transportation, top officials were divided when the regulations were being written, with General Counsel Linda Kamm arguing strongly for total accessibility and Assistant Secretary for Legislation Terrence L. Bracy raising the concerns of local transit authorities. Adams took the easy way out, giving the handicapped most of what they wanted and relying on the lame argument that he was forced to do so by immutable HEW guidelines. There was also concern within the White House. In 1978, the Regulatory Analysis Review Group, led by (former) Council of Economic Advisers mem-

The federal government's treatment of the handicapped transportation issue has offered a series of profiles in political cowardice.

ber William D. Nordhaus, estimated that the department's plan would be much more expensive than alternate, special service schemes. But President Carter chose not to intervene. Back in May 1977, addressing the White House Conference on Handicapped Individuals, Carter had promised to "enforce the regulations that tear down the barriers of transportation." At

the same time, of course, Carter again and again has complained of the inflationary impact of inefficient regulations.

The U.S. District Court for the District of Columbia has likewise ducked the issue. Last summer APTA filed suit against the government, arguing that the Transportation Department had exceeded its authority by ranging beyond the intent of Congress. It pinned its hopes in part on the Supreme Court's 1979 ruling in *Southeastern Community College v. Davis* that the college did not have to take "affirmative action" to include a deaf woman in its nurse training program. Judge Louis F. Oberdorfer of the court took four months to resolve what he told attorneys in the case was one of the "most perplexing" issues he had ever encountered. He finally ruled on February 7 that the regulations should stand, though he did order an environmental impact statement. "If the Department of Transportation regulations here at issue had rested solely on Section 504, *Davis* might create serious doubts about their validity," Oberdorfer wrote. But he said that other provisions of transportation law dictated his conclusion, including Section 16 of the Urban Mass Transportation Act of 1964, which says that "special efforts shall be made in the planning and design of mass transportation facilities and services to ensure the availability to the elderly and handicapped of mass transportation they can effectively use. Oberdorfer added that

while the legislative history of Section 504 does not indicate that Congress conceived itself as enacting or authorizing programs involving large expenditures, this may be more the result of congressional inattention . . . than a congressional determination that such expenditures would not be necessary to effectuate that policy.

Oberdorfer repeatedly remarked that Congress could change the policy and that Congress currently has the cost issue under consideration. APTA decided in April to appeal to higher judicial authorities.

To say that the issue is currently before Congress is to engage in hyperbole. Like Carter, members of Congress are politicians, a breed innately reluctant to curry the wrath of vocal minorities in an election year.

The Congressional Budget Office study was originally requested by the chairman and the

ranking minority member of the Senate Budget Committee, Senators Edmund S. Muskie (Democrat, Maine) and Henry Bellmon (Republican, Oklahoma). But what has happened in the Senate in the wake of its release? Nothing. And spokesmen for the Budget Committee say that nothing is likely to happen—noting that the issue is outside the committee's jurisdiction.

In the House, a few lonely voices have protested the cost of the rules. One is Representative Edgar's. In 1978, he sponsored legislation that ordered new Transportation Department studies of the costs of retrofitting rail systems; the studies will not be completed until August. Another is Representative Robert Duncan (Democrat, Oregon) chairman of the Appropriations Committee's transportation subcommittee. Last year, he added a provision to the department's appropriations bill specifying that no money could be spent on rail retrofits during fiscal 1980, pending results of the Edgar studies. A member of Duncan's staff says this provision, possibly broadened to cover buses, may be extended to fiscal 1981.

But do not count on it. The Washington-based ACCD is ready to beat back all threats to the benefits it has already secured. Just before the onset of the presidential primaries, the group wrote to every presidential candidate asking his position on a wide range of handicapped issues. Predictably, most of them responded that they supported ACCD's goals.

Among the Republicans, George Bush and John B. Anderson voiced concerns about the costs of added services to the handicapped. And Bush said that providing door-to-door transportation might make more sense than spending "billions in retrofitting . . . existing bus and urban rail systems." Ronald Reagan said only that "laws mandating an accessible America" must be "implemented fully, forcefully and with dispatch."

Democrats Carter and Edward M. Kennedy vied for the group's support. "We appreciate the opportunity . . . to reaffirm the administration's support and commitment in these areas," wrote Ellen L. Goldstein, assistant director of the Domestic Policy Staff, at the end of an eight-page letter. Kennedy, stressing "that the President [must] be recognized as the chief advocate in the nation for the disabled and handicapped," added: "President Carter has not provided that voice." ■