

ORIGINAL

In the  
Supreme Court of the United States

SOUTHEASTERN COMMUNITY COLLEGE,

PETITIONER,

v.

FRANCES B. DAVIS,

RESPONDENT.

No. 78-711

Washington, D. C.  
April 23, 1979

Pages 1 thru 45

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Petitioner, :

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No. 78-711

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Respondent. :

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Washington, D. C.

Monday, April 23, 1979

The above-entitled matter came on for argument at  
10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

EUGENE GRESSMAN, ESQ., School of Law, University  
of North Carolina, Chapel Hill, North Carolina  
27514; on behalf of the Petitioner

MARC P. CHARMATZ, ESQ., National Association of  
the Deaf Legal Defense Fund, 7th Street and  
Florida Avenue, N. E., Washington, D. C. 20002;  
on behalf of the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 78-711, Southeastern Community College v. Davis.

Mr. Gressman, you may proceed whenever you are ready.

ORAL ARGUMENT OF EUGENE GRESSMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GRESSMAN: Mr. Chief Justice, and may it please the Court:

This is a case of first impression as far as this Court is concerned. It is a case involving the interpretation and application of section 504 of the Rehabilitation Act of 1973 which establishes a broad duty on recipients of federal aid and assistance not to discriminate against handicapped persons, against qualified handicapped persons solely because of their handicap.

I think it essential at the outset to note that this is not a case of discrimination against a handicapped person. This is a case, rather, of a handicapped person who has been found not qualified to participate in the program or activity to which she sought admission.

The uncontested facts as found by the District Court after an evidentiary hearing, facts and findings which have not been challenged in the lower courts or



essentially before this Court, establish that the respondent, Frances Davis, by concession had a severe hearing handicap which made it impossible for her to communicate with other people other than with the use of a hearing aid and the ability and necessity to read the lips of the person to whom she is talking, and she must apparently be face-to-face with the talker.

QUESTION: Are you telling us that the hearing aid did not compensate fully or substantially for the handicap?

MR. GRESSMAN: That is essentially the finding implicit in the District Court's opinion, yes. It was a combination though of the hearing aid plus the necessity to read lips, and even then that was found to be an inadequate compensation for the severity of the hearing handicap. Now --

QUESTION: Mr. Gressman, she was a licensed practical nurse, was she not, for some years?

MR. GRESSMAN: That is true, apparently about ten years previously.

QUESTION: And is there anything in the record which indicates that she was unable to perform those duties or that she did so with hazard to the patients?

MR. GRESSMAN: There is nothing in the record one way or the other on that. We do not know, for example,

even whether her hearing handicap was that severe at the time she wanted the LPN license.

QUESTION: Well, that leads me to my next question. Is there anything in the record that protects the public when a licensed registered nurse becomes handicapped as this respondent was after her licensure had been obtained?

MR. GRESSMAN: Yes. Under the North Carolina statutes, the state licensing bureau is authorized to revoke any license it has previously granted because of incompetent or inadequate nursing practice under any license, whether it be an LPN license or an RN license. That is very clearly set forth in the statutes and I would assume that is a fairly universal provision with respect to any licensing activity.

QUESTION: Are they fulfilled in actual practice? Does the record show that?

MR. GRESSMAN: Do you mean if they have lifted licenses?

QUESTION: That licenses have been terminated or revoked.

MR. GRESSMAN: There is nothing in this record, no. This is solely, you might say, an ad hoc factual development solely related to this particular individual. We have no evidence as to the general practices of the licensing authorities.

Now, the court made the critical determinations in terms of this respondent's lack of qualifications either to participate in the training program or in her ultimate profession as a registered nurse. The court specifically found that her hearing handicap actually prevents her from safely performing in both her training program and her proposed registered nurse profession. And the court found and concluded that there are numerous situations where her hearing disability would render her unable to function properly in a clinical situation, in a nurse-patient relationship. And finally the court emphasized that what was a particular concern to this court was the potential danger to the patients in the hospitals who would be unable to in many situations communicate effectively with this particular nurse trainee or ultimately the professional nurse. Many patients obviously are incapable of addressing the nurse face-to-face so that her lips could be read, or there might be situations where various crises develop that could not be heard by the nurse who had her back turned in a particular situation.

QUESTION: Mr. Gressman, you spoke of the nurse's activities in terms of a hospital. There are some nurses who function in private homes taking care of patients, too, are there not?

MR. GRESSMAN: That is true, but in the nurses

training program they only have this clinical program in the hospital.

QUESTION: Is there any statute giving a cause of action against an individual who would refuse to employ a nurse, a registered nurse on the grounds that the registered nurse had a handicap of this kind?

MR. GRESSMAN: Well --

QUESTION: Would that be discriminatory under any federal statute?

MR. GRESSMAN: It could be discriminatory under 504 even in that employment relationship, if you decline to employ a qualified handicapped person solely because of his handicap.

QUESTION: If you are receiving federal financial aid.

MR. GRESSMAN: Federal financial aid, that is right. Now, there are other --

QUESTION: I am talking about an individual. I was addressing my question to an individual in the private home.

MR. GRESSMAN: Do you mean the individual --

QUESTION: Is it a restriction or does it violate any statute, civil rights or otherwise, for a person who is ill, for the family of that person to refuse to hire a registered nurse on the ground that she is hard of hearing?

MR. GRESSMAN: I would assume not, that is no form of state action which any kind of a statute could reach as essential basis for imposing any kind of an anti-discrimination policy.

QUESTION: But there are statutes about employment which do not involve state action, are there not?

MR. GRESSMAN: Well, there are in employment situations where the employer has a contractual relationship with the federal government or with the state, and as a condition to the maintenance of that contractual relationship they may be prohibited from refusing to employ a handicapped person who is qualified solely because of his handicap. But you would have to have some relationship with a government agency or program, either through contract or through express coverage. But as far as a purely private individual who is ill at home, I would assume that there is nothing to prohibit that person from discriminating as to whom he wants to employ as a nurse.

QUESTION: Mr. Gressman, does section 504 apply to hospitals as well as schools if they receive federal --

MR. GRESSMAN: If it is a federally funded program of some sort, yes. Now --

QUESTION: Do you think the result of 504 and the valid regulations promulgated pursuant to it would be to prevent a hospital from saying we will hire only registered



nurses who have become registered under the North Carolina laws?

MR. GRESSMAN: Well, you have something of that problem, I understand, in the pending petition for certiorari in the Traveser case where a private hospital allegedly discriminated and refused to hire a handicapped nurse. There are cases of that nature where if the hospital is in some way related to a federally funded program for employment purposes, that that hospital would be subject to 504.

QUESTION: But there is nothing in 504 that would in any way require North Carolina to alter its standards for licensing registered or licensing nurses?

MR. GRESSMAN: Not a bit, not in any way, Your Honor. I think that 504 is very broad in scope and it makes no pretense at revising or altering or conditioning state licensing laws that may be appropriate for certain professions that happen to involve handicapped persons. There is not a word on the face of this statute or in its intent or purpose that would indicate that Congress meant to revise or alter the reasonable and necessary state licensing laws with respect to the practice of nursing by registered nurses who are qualified and capable of fully performing safe nursing practices.

QUESTION: Mr. Gressman, could I ask you a question. There are two separate things that she might

not be qualified to do. One is to be a registered nurse because it might be dangerous for her if she couldn't hear properly; and, secondly, she might not be able to do the study program adequately. Now, I understood you to say that the District Court found that she could not do either.

MR. GRESSMAN: That's right.

QUESTION: And some of the findings are ambiguous, but my interpretation of it was that the District Court found that she could not progress satisfactorily with the training because upon completion of the program she could not safely perform her duties as a nurse. Do you also read the finding as saying that if you put to one side how she performed as a nurse, she still wouldn't be able to complete the program because she was unable to hear?

MR. GRESSMAN: To complete the training program?

QUESTION: Yes.

MR. GRESSMAN: Yes, she could not effectively complete the training program because of her handicap. The state licensing bureau head who wrote a letter -- it is in the record -- said that she could not exactly predict what would be the situation two or three years hence when this person, if she got through the training program, would then be eligible to take a licensing examination. But she said that on the basis of her present knowledge, she assumed that it would be improper and perhaps run undue risk to

permit her to participate in the training program, and the likelihood was that if this condition remained the same after she were to have completed her training program, there would be a serious question of whether they would let her take the licensing examination.

You see, the licensing authorities do not have any independent sifting out process. They simply take the graduates of the nursing schools that have been certified to them as fully competent, fully qualified nurses, nurse candidates who are completely able to fulfill all of the requirements that a registered nurse must have, and they simply take that and allow them on the basis of that certification from an accredited nursing program to take the licensing exam, which is simply a written examination, there is no physical test made by the licensing authorities, then that person if she passes the written examination is given an RN license.

Now, I think it is essential to see how the structure of section 504 comes into play at this point. It is a very simple proposition. The opening words of 504 say that no otherwise qualified handicapped individual shall solely by reason of his handicap be excluded from participation or otherwise discriminated against in any federally funded program or activity.

Now, the essential predicate, in other words, for

504 coming into operation at all is that the person be otherwise qualified. Those are the predicate words that bring 504 into operation. Unless you have a qualified handicapped person, you can never have the kind of discrimination against that person that 504 is talking about.

QUESTION: Well, except that 504 is talking about not a qualified but an otherwise qualified person.

MR. GRESSMAN: That is true, Your Honor, and that is really the problem in this case. But I think however you view the words "otherwise qualified," it is essential to understand that 504 is not talking about the unqualified handicapped person, otherwise or not. The qualification --

QUESTION: Well, one could read it as saying the person -- and indeed it is the natural reading -- that a person who is qualified except for his handicap shall not be excluded because of his handicap, and I gather none of the parties here are suggesting it should be read that way.

MR. GRESSMAN: Nobody --

QUESTION: The blind bus driver and the moronic graduate student and so on.

MR. GRESSMAN: That's right, that is what we call the absurd reading --

QUESTION: Right.

MR. GRESSMAN: -- the literal reading of that

language produces the impossible situation, and that is that you have to disregard all kinds of handicaps in terms of --

QUESTION: Right.

MR. GRESSMAN: -- and admit them to perform the most physically demanding jobs or activities known to man. Now, this cannot be.

QUESTION: Well, to disqualify a person, it must be a job-related handicap, must it not?

MR. GRESSMAN: Of course, Your Honor, Now, I think this brings --

QUESTION: A blind person would be obviously disqualified from being a bus driver or a taxi driver but not necessarily from being an elevator operator perhaps.

MR. GRESSMAN: That's true. I always like to think of the example of a law school who freely admits blind people, deaf people, paraplegics primarily because there is no physical qualification for entering into an academic-type program of that nature. Therefore, you have to approach this whole problem on an ad hoc basis. You have to look at the qualifications for a particular activity, you have to look at the particular nature of the handicap and see whether that is relevant to the qualifications, and you have to look at and determine whether ultimately there has been discrimination against the person



once he has been determined he is qualified. We never get to that point in this case because we never got above or beyond the predicate requirement that the person be otherwise qualified.

Now, the whole problem in this case is one of confusion and I think, as Mr. Justice Stewart said, these words "otherwise qualified" have a rather ambiguous note to them. But I think the whole thing becomes crystal-clear if you understand that there are two basic kinds of programs or activities that may be funded by the federal government. The broad type of programs that are covered are in the academic type programs running from pre-school education to primary schools, secondary schools and post-graduate and post-secondary schools, the great mass of the undergraduate collegiate programs, 95 percent of which, I assume, would be largely academic in nature.

In those types of programs which are the great mass that are covered by 504, there ordinarily are not any physical qualifications.

QUESTION: But surely a person who is blind in a program that required a substantial amount of reading, which I assume most academic programs do, or writing or listening, a person who was deaf would hardly be qualified in the absence of affirmative special assistance to that person, isn't that correct?

MR. GRESSMAN: That is exactly true, and 504 regulations issued by HEW to require that certain kinds of auxilliary aids and assistance be given --

QUESTION: Under that statute as so worded --

MR. GRESSMAN: The regulations under this statute.

QUESTION: Under the simple language of this statute --

MR. GRESSMAN: That's right.

QUESTION: -- there has been found a requirement for expenditure of funds for special --

MR. GRESSMAN: Well, it is referred to in the opinion of the Fourth Circuit below here that on remand of this case the court should give consideration to certain HEW regulations which require, one, auxilliary aids to be provided to the handicapped person, or, two, to make modifications in the academic programs.

QUESTION: And those regulations have been promulgated under the authority of this statute, the words of which --

MR. GRESSMAN: That's right, Your Honor, they were promulgated in 1977.

QUESTION: Certainly the statute itself gives no indication of a duty to undertake affirmative action.

MR. GRESSMAN: No, it does not, Your Honor, and this is in direct contrast with the preceding two sections,

501 and 503. 501 relates to federal employees; 503 relates to government contractors who employ individuals that may be handicapped, and both of those cases Congress specifically says that affirmative action and accommodation shall be made in the course of enforcing that non-discrimination policy. But Your Honor is exactly right, there is not one word on the face of 504 that establishes any duty to make affirmative accommodation.

QUESTION: Do you challenge the validity of the regulations insofar as they are promulgated pursuant to section 504?

MR. GRESSMAN: Not at this point, Your Honor. I think we don't arrive at that point yet in this case. You would make affirmative accommodation, if at all, only if you have an otherwise qualified individual in a program or activity where no physical qualifications are at issue and where the handicap does not affect his qualification.

QUESTION: Mr. Gressman, was section 504 pleaded?

MR. GRESSMAN: In the District Court?

QUESTION: Yes.

MR. GRESSMAN: Yes, it was. There was an alternative claim under 1983 which was a constitutional claim, but then there was the statutory claim which requested that she be admitted to the --

QUESTION: Was there actual reference to 504?

MR. GRESSMAN: Well, there is a -- it came in rather obliquely, I believe, in the --

QUESTION: I should ask your opposition this, of course, but I take it you are not making any point and you accept the presence of the 504 issue here?

MR. GRESSMAN: That's right, Your Honor. I think particularly in the -- there are several references to it in some of the preliminary pleadings in this case, but --

QUESTION: What is the effect of the reference at 15a in the pretrial order?

MR. GRESSMAN: Well, I think that was an elaboration, clarification of her -- I don't think the complaint was all that clearly drawn, frankly, and I think it became clarified in the pretrial proceedings and the order.

QUESTION: You are quite right, if it came in at all, it came in rather indirectly.

MR. GRESSMAN: Yes.

QUESTION: Mr. Gressman, are you going to address the implied cause of action point?

MR. GRESSMAN: Yes, I will, Your Honor.

QUESTION: Your time is getting a bit short.

MR. GRESSMAN: I would say one final word as to the interpretation of 504. It simply does not apply, in my judgment, to a cause of action which involves a person who is found to be not qualified, and I think the person

who is not qualified in his work for participation in a clinical program raises a most serious policy consideration, because once you leave the academic area where physical qualifications are no longer an issue and go into the clinical areas where physical qualifications may be important to the public safety, health and welfare, then it seems to me you are outside the intended scope of the language and the purpose of 504.

Now, we have in this situation a reflection of this concern by the District Court for the safety of the patients, and I think that a person who is unqualified to provide safe nursing care for the great mass of individuals who are ill and sick raises a serious question as to whether this 504 duty should be imposed indiscriminately upon that kind of program or activity.

Congress has from the very beginning established a policy that is very much in point here, and I refer to the statutes in my reply brief. Under the Nurse Training Act of 1964, which provides for financial assistance to nursing schools and which is the very assistance that was given to Southeastern Community College in this case, that is why it is federally funded. It was federally funded to provide safe nursing practice and training.

But Congress in that Act said that in no event shall there be any condition or imposition by the federal



authorities of any changes in the curricular, in other words any kind of affirmative accommodation that Your Honor spoke of a few minutes ago. They were concerned that you maintain the quality and the safety of nurse training programs, and there was to be no interference with changing the curricular or the administration of these highly important and high risk type of clinical training programs in the nursing school.

And Congress has also told us in another statute, in the Education Amendments of 1974, that if the handicapped people want to participate in these kinds of clinical programs, Congress authorizes grants and expenditures to community colleges and other institutions to establish specially designed programs for the seriously handicapped who cannot be qualified in terms of the ordinary program.

QUESTION: You are not leaving yourself much time for the implied cause of action.

MR. GRESSMAN: I would say as to the implied cause of action, Your Honor, that not only has it been fully briefed, but I would emphasize what I think is the conclusive factor in that respect. In 1978, the Rehabilitation Act was amended to provide for two specific kinds of private causes of action with respect, to wit, the federal employees and those who are employed by a recipient of federal funds in the narrow employment context, where

the primary purpose of the grant is to foster and provide for creating employment relationships.

Now, it seems to me that the very specificity with which it authorized private causes of action in those two instances by necessary implication leaves out any kind of private cause of action for other situations such as we have here. Since we do not have a federal employee or do we have an employment-type situation, Congress has said as clearly as it can, I assume, that there are to be no other types of private causes of action. Otherwise there is absolutely nothing in the language, in the history of 504 that permits the standards -- that permits an implication of a private cause of action.

There are a few isolated statements by Senators and perhaps by a committee or two unrelated in time to the original enactment of this statute --

QUESTION: Mr. Gressman, your case on that isn't any stronger than it would be under title VI, is it, except for the '78 amendments?

MR. GRESSMAN: I think the '78 amendments do make a vital distinction.

QUESTION: But absent those, your case is no stronger than it would be under title VI or IX, would it?

MR. GRESSMAN: No, except that I think there may be some differences perhaps with respect to a spending

program and with respect to the fact that you are dealing with an enormous regulatory system that has been developed in the HEW.

QUESTION: Let me ask you this. Put aside the '78 amendments for the moment. This is a state agency, we have the state involved here.

MR. GRESSMAN: That's right.

QUESTION: I suppose that even if there were not a private cause of action that would have arose directly under title V, that you might be able to state a cause of action under 1983, relying on title V.

MR. GRESSMAN: You mean on 504?

QUESTION: Yes, on 504, under the provision of --

MR. GRESSMAN: Well, I am not aware, Your Honor, that this Court or any court has ever addressed this problem which I assume has been raised in the Solicitor General's brief here as to whether you can have a cause of action under 1983 premised upon a violation of another statute which gives no cause of action in and of itself. Now, I think this is a highly dangerous or questionable doctrine because that would mean that you could under 1983, assuming some kind of state action, you could create causes of action under all of the provisions of the United States Code, regardless of whether courts had held that there is no right of action under a specific --

QUESTION: On the other hand, if the other statute does give a cause of action, you don't need 1983, do you?

MR. GRESSMAN: You're exactly right. Exactly right. So I think it is somewhat a circular and self-defeating proposition in the end. All I can say is that there is absolutely no authority at least in this Court for permitting, to raise yourself up by your bootstraps, by using a 1983 cause of action to create a cause of action that doesn't otherwise exist.

MR. CHIEF JUSTICE BURGER: Your time is expired, Mr. Gressman.

MR. GRESSMAN: All right. Your Honor, would it be possible for me to have leave to supply a reply to the Solicitor General's brief?

MR. CHIEF JUSTICE BURGER: Yes. That was a late filing.

MR. GRESSMAN: That was, yes.

MR. CHIEF JUSTICE BURGER: Yes, you may.

MR. GRESSMAN: Yes, I would like to file a very brief reply to that.

MR. CHIEF JUSTICE BURGER: And as promptly as possible.

MR. GRESSMAN: Yes, indeed.

MR. CHIEF JUSTICE BURGER: Mr. Charmatz.

## ORAL ARGUMENT OF MARC P. CHARMATZ, ESQ.,

## ON BEHALF OF THE RESPONDENT

MR. CHARMATZ: Mr. Chief Justice, and may it please the Court:

Frances Davis is a licensed practical nurse. She seeks to enroll in the Southeastern Community College nursing program and to advance in her education and to reach her full potential. She is a hearing impaired woman. But the college has refused her that opportunity solely on the basis of her hearing impairment and without any consideration of possible program modifications to be made in this case.

The college position as stated in its reply brief is clear, nurse trainees must be drawn from the national pool of those who are able-bodied in the fullest physical sense. Applying this criteria to Mrs. Davis, we have the situation as indicated in the reply brief that the college has applied the rule saying that Mrs. Davis must possess hearing to the fullest degree without substantial impairment in order to qualify.

Quite frankly, Your Honors, this would apply to Mrs. Davis as an LPN, and under this status, under this way of looking at it, Mrs. Davis would not have the opportunity to be an LPN where she has safely and efficiently functioned now for twelve years.



It has been assumed by the college --

QUESTION: Do we know what her physical condition was when she originally acquired her license as an LPN?

MR. CHARMATZ: I think we do, Mr. Justice. The audiologist's report indicates that Ms. Davis has sustained a hearing loss for many years. The pre-entrance medical exam also indicates that Ms. Davis has some decrease in hearing. The pre-entrance medical exam found her physically and mentally qualified to undertake the nursing program.

QUESTION: It seems to me then we don't. It doesn't say how many years. It could be five or six or twelve or twenty. However, proceed.

MR. CHARMATZ: It has been assumed by the college that people with hearing impairments which cannot be fully corrected, people with impairments similar or worse than Mrs. Davis' cannot function as a nurse, and it is precisely this assumption which Congress has recognized is incorrect in enacting section 504, the assumption that a hearing impaired person cannot be a nurse.

The federal government employs over 150 hearing impaired nurses and over 300 nursing assistants.

QUESTION: There is nothing in this record to show the degree of the impairment of these other 300, is there?

MR. CHARMATZ: No, but the audiologist's report

indicates that Mrs. Davis is successful in communicating with people.

QUESTION: If she can lip-read, didn't it say that?

MR. CHARMATZ: It said that she can.

QUESTION: But she is only effective if she can lip-read?

MR. CHARMATZ: And her hearing aid improves her hearing.

QUESTION: She is efficient if she has a hearing aid and -- a-n-d -- she can lip-read?

MR. CHARMATZ: That is correct. The --

QUESTION: And how do you do that through a gauze that you wear in certain parts of the hospital, a gauze mask, how can you lip-read?

MR. CHARMATZ: Well, the Fourth Circuit in this case vacated and remanded the decision of the District Court to ask what accommodations could be made for Mrs. Davis and what accommodations would be necessary that could --

QUESTION: And you don't object to that?

MR. CHARMATZ: We do not object to --

QUESTION: Obviously you didn't --

MR. CHARMATZ: No.

QUESTION: But the vacation was not for purposes

of seeing what accommodations could be made for her in the operating room, but in the Southeastern Community College, wasn't it?

MR. CHARMATZ: That's correct.

QUESTION: And I understood Justice Marshall's question to go to her functioning in a hospital.

MR. CHARMATZ: Well, from the record we have the statement of the nursing director at Southeastern Community Hospital, who indicated that she did not know any area that Ms. Davis couldn't function given her present determination to continue her education. And indeed Ms. Davis at the present time obviously can't function in any capacity as a registered nurse, and by going into the clinical program she attempts to advance her education so that she could function in areas as a registered nurse.

QUESTION: Could she under present North Carolina law be certified as a registered nurse?

MR. CHARMATZ: We think that we might not have to reach that question, but the indication is that she could.

QUESTION: Didn't the District Court find against you on that point?

MR. CHARMATZ: I think the District Court found that the feelings of the college that she couldn't be a registered nurse were one of the reasons that the college refused her. But the report from the nursing director is

very difficult to understand. At one point it certainly indicates that there may be some problems for Ms. Davis, no questions about that from the report. But at another point in the nursing statement it indicates that Ms. Davis might not be licensed as a licensed practical nurse, and what has happened since her application, she has been re-licensed by the state as a licensed practical nurse. At the end, of course, the nursing director for the state said that they could not predict the eligibility because the eligibility would be determined on how she does in the clinical program.

We have also demonstrated in amicus briefs that there are a number of areas where hearing impaired and handicapped citizens perform safely and effectively in the medical community, functioning in hospitals as hearing impaired people.

QUESTION: Well, when you say you have demonstrated something in amicus briefs, I thought the place you usually demonstrate something in a lawsuit is in the record before the trial court.

MR. CHARMATZ: What I meant to say was that it is obvious that hearing impaired people can perform in hospital situations.

QUESTION: Even a deaf mute might perform in a laboratory carrying out laboratory tests, where there is no

contact with the patients. Do you acknowledge that there is that difference in availability?

MR. CHARMATZ: Well, the question is that Ms. Davis has performed as a licensed practical nurse where she is in contact with patients.

QUESTION: What about the operating room?

MR. CHARMATZ: The operating room, again we have to look at it in terms of the clinical aspects of the program and to determine whether or not the clinical aspects can be accommodated. The indication is -- and again we have to see what hearing impaired people are doing -- is that they are performing in the operating room because they have received from their clinical instruction, they have received training, they have received evaluation and they have received supervision and this is --

QUESTION: Are you answering my question? Mr. Justice Marshall brought out the fact that she can perform with a hearing aid and so long as she is in a position to read lips. In the operating room, the operating surgeons wear masks.

MR. CHARMATZ: The question of whether or not she can perform in the operating room may be premature in that we first have to see how she would perform in the clinical setting. The question also is what accommodations might be made to enable her to perform in --



QUESTION: What do you mean by the clinical setting? Are you excluding the operating room in the clinical setting?

MR. CHARMATZ: No. I think it has to be identified what are the essential parts of the clinical program which has not yet been done here and which would be proper on vacating and remanding.

QUESTION: Well, is there any registered nurse program that does not take the candidates into the operating room?

MR. CHARMATZ: Not that I know of.

QUESTION: You were the plaintiff in this case, isn't the burden on you at the trial stage to demonstrate what you are talking about now will be demonstrated on remand?

MR. CHARMATZ: The question is though -- the problem was that the college refused to make any modification. That was their position and the District Court accepted that, that the college refused to make any modification.

QUESTION: Well, where in section 504 is there imposed any duty to make any modifications?

MR. CHARMATZ: In the statute --

QUESTION: I am asking about the statute.

MR. CHARMATZ: The statute does not say. In the legislative history of section 504, in the legislative

history the same Congress that enacted section 504, the committee reports indicate that section 504 was meant to have a requirement of affirmative relief.

QUESTION: But there is no such requirement in the language of the statute?

MR. CHARMATZ: In the language of the statute, no. But with the legislative history and also the HEW regulation which has gone through congressional oversight hearings, and again the '78 amendments, there is --

QUESTION: While we are turned to the legislative history, we must be confronted with a statute that is ambiguous. Do you suggest that section 504 is ambiguous on this aspect?

MR. CHARMATZ: We suggest that it is a broadly worded statute that is similar to title VI and to title XI and in --

QUESTION: Is it clearly worded?

MR. CHARMATZ: We think in terms of an otherwise qualified individual, it is one that HEW found required a number of different definitions because of the different program activities. But the purpose of section 504 is to avoid the exclusion, to make modifications, as found by HEW and as found in the Senate reports to section 504. The legislative history is that handicapped people cannot be excluded on the basis of stereotypes and cannot be excluded

because of failures to make modifications.

In particular, in one Senate report it states that special attention must be paid to the needs of those individuals who through no fault of their own have not received adequate education. These individuals, young adults and adults like, must be afforded the equal opportunity and access to higher educational services. The committee is aware at the present time that most of these avenues have not been available to people with handicaps.

QUESTION: Mr. Charmatz, on the question of the clinical program Mr. Justice Blackmun was asking you about, the District Court found from the evidence presented at trial that it appears that it would be difficult and in fact dangerous for the plaintiff to even attempt the clinical portion of the training program. Do you challenge that finding?

MR. CHARMATZ: We think that the District Court asked the wrong questions, that the --

QUESTION: Do you challenge that finding?

MR. CHARMATZ: We can't say that it is -- we do not allege that the findings are clearly erroneous, but we think that they ask the wrong questions -- one, an accommodation; and, two, certainly consideration of whether Ms. Davis as a licensed practical nurse should enter into the picture.

QUESTION: At the time of the District Court decision, was there a regulation that raised this question with the District Court?

MR. CHARMATZ: The HEW regulation was promulgated in June of 1977 and the District Court hearing was in October of 1976.

QUESTION: So the District Court at that time didn't ask the wrong question, what you are in effect arguing, that later regulations raise a question that they should have anticipated, the District Judge should have anticipated.

MR. CHARMATZ: That and also that from the legislative history, it seems that you should also consider accommodation questions which were not asked by the District Court.

The Fourth Circuit's decision, a very narrow one, decided on statutory grounds rather than constitutional grounds, recognizes that a prejudgment solely on disability is incorrect. And first the Fourth Circuit is saying look at the admissions standards, the academic standards to see if they can be considered, so that we do not screen out handicapped individuals. If the decision is in the affirmative then we have to look to see if there are program modifications that can be made. If the person does not meet the academic standards, the person will not be admitted.

If there is no program modification to be made, then the person may not be admitted.

But the point is that we have to at least consider those and in this case that was not done. I think this approach is consistent with section 504, its legislative history, and consistent with the HEW regulation.

The college position as found by the Fourth Circuit was no modification. They didn't consider that issue, and the Fourth Circuit suggested that they give close attention on remand to it. At that point there also should be consideration of the academic standards which were not considered at all in this case.

I think even the amicus of the American Association of Medical Colleges recognizes that the sole focus on disability conducted by the college and conducted by the District Court was inappropriate, because the District Court did not consider the issue of accommodation and because the District Court did not consider the academic standards in this case.

There is no indication -- in fact, I think the record reveals that an evaluation of whether Ms. Davis was a licensed practical nurse did not enter into the evaluation in this case.

In addition, it would seem that Ms. Davis, as a person who is licensed for now twelve years, may be an ideal



candidate to be able to participate in a registered nurse program.

QUESTION: Well, didn't the District Court find that LPN's perform their services only under the supervision of someone with superior medical training in the immediate supervision?

MR. CHARMATZ: I think that is correct, that they do perform their training under the supervision of a registered nurse. In fact, there is a North Carolina statute which defines the duties of a licensed practical nurse and defines the duties of a registered nurse, and certainly the duties of a licensed practical nurse include patient care. There is a degree in responsibility and supervision which is really the key difference between a registered nurse and a licensed practical nurse.

QUESTION: Could I ask, what do you think the Court of Appeals meant when it said that we vacate and remand that portion of the District Court judgment which has not been affirmed here and hold that the college must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability?

MR. CHARMATZ: I think --

QUESTION: That means that you put that aside entirely?

MR. CHARMATZ: I think --

QUESTION: That isn't the way I understand your argument.

MR. CHARMATZ: I think it means that you look at the academic standards first and you see if the person meets the academic standards without regard to disability.

QUESTION: And then you look at the technical --

MR. CHARMATZ: Then you look at the technical, your program, and then you see whether or not that program could be accommodated.

QUESTION: Well, that isn't what this -- you don't suggest then that the Court of Appeals, if the Court of appeals meant to say that if this person satisfies the academic and technical requirements she is automatically admitted to the program?

MR. CHARMATZ: No.

QUESTION: Well, if that is what the Court of Appeals meant, you think it is wrong?

MR. CHARMATZ: I don't think the Court of Appeals meant that --

QUESTION: Well, unless one includes technical requirements, physical requirements.

MR. CHARMATZ: That's correct.

QUESTION: Well, what do you think it meant by technical?

MR. CHARMATZ: I think it meant by technical,

work experience --

QUESTION: I mean hearing?

MR. CHARMATZ: No.

QUESTION: No. It couldn't have or you would be out of court now.

MR. CHARMATZ: That's right. We think that that is the appropriate consideration.

QUESTION: Except the HEW regulations I think -- you correct me if I am mistaken -- they define technical as non-academic, is that correct?

MR. CHARMATZ: That's correct.

QUESTION: So that would include physical, wouldn't it?

MR. CHARMATZ: Well, we think that that should be construed in terms of the accommodation. It would be silly, for example, to have a lawyer --

QUESTION: Well, it would be helpful if -- I know you think it can be construed that way or the other, but if technical means everything except academic, it would include physical, wouldn't it?

MR. CHARMATZ: If it means everything -- yes.

QUESTION: In which event the HEW construction would be right in your teeth?

MR. CHARMATZ: Except that when we look at the technical we have to look to see if there can be

accommodations.

QUESTION: I gather you concede then that there wouldn't be automatic admission just because academic requirements were satisfied and the technical requirements as you understand them were satisfied?

MR. CHARMATZ: There would not be an automatic admission. I do not think the Fourth Circuit opinion reads that all handicapped people must be admitted into programs.

QUESTION: Do you agree that HEW construes qualified and otherwise qualified to be exactly the same?

MR. CHARMATZ: I think they do. I think they indicate that they do.

QUESTION: Well, isn't that -- that is not the way you read otherwise qualified, is it?

MR. CHARMATZ: Well, we read otherwise qualified or qualified handicapped person to be one that can perform the academic and technical standards.

QUESTION: Despite his handicap, his or her handicap?

MR. CHARMATZ: Not despite his handicap.

QUESTION: Well, certainly the statute doesn't mean that he could do it except for his handicap, his or her handicap. It couldn't mean that.

MR. CHARMATZ: It does not mean the blind bus driver.

QUESTION: No.

MR. CHARMATZ: No.

QUESTION: So it must mean something else.

MR. CHARMATZ: It does not mean the blind bus driver.

QUESTION: Right.

QUESTION: It means, if I understand you, that he is qualified to perform the technical requirements if the technical requirements were somewhat different.

MR. CHARMATZ: I'm sorry?

QUESTION: It means that he has to be able to perform the technical aspects of the program if they were somewhat different than they are. That is what it means under your view, isn't it?

MR. CHARMATZ: I believe so, yes.

QUESTION: If the respondent had been totally deaf, stone deaf, would you make the same argument?

MR. CHARMATZ: I think that we would.

QUESTION: What level of handicap would cause you to conclude that 504 was inapplicable?

MR. CHARMATZ: I think --

QUESTION: Suppose it was an individual who had lost both hands, sight and capacity to hear.

MR. CHARMATZ: Well, the initial question would be whether or not he meets the academic requirements, and



the second question would be whether or not there can be any accommodation to him. I would doubt seriously that there could be accommodation in that situation and therefore the person would not be admitted. This is the way we look at the blind bus driver, whether he could perform the essential functions of a job as a blind bus driver is the initial question. I wouldn't think he could. And the second question is whether there can be an accommodation, and again I don't think he could.

The conclusion that we draw in this case is that a college in this instance was blind to the ability of handicapped people to perform, such as Ms. Davis, and to contribute meaningfully to society.

QUESTION: Suppose it were concluded on remand that this lady could not perform at all in the operating room, that it would be -- we are trying to see if there can be accommodation between the demands of the operating room and being deaf to this degree, and the answer is, no, there can't be any accommodation. But all that means that she shouldn't be performing in an operating room. Would you suggest that she nevertheless should be in the training program because she can perform in every other context?

MR. CHARMATZ: I think we are. I mean I don't think we have to reach that issue here --

QUESTION: No, part of the training program is operating room procedures.

MR. CHARMATZ: I think that if that were the case, we would say that there are many opportunities available to handicapped citizens as registered nurses and they should be able to participate. I don't think --

QUESTION: One of them being laboratory technicians for which she could qualify.

MR. CHARMATZ: That's correct, or the doctor's office or private duty nursing or a number of other settings.

QUESTION: Isn't this program entitled to make the decision on the basis of adaptability for any one of these activities?

MR. CHARMATZ: Well, again I think that is correct, they have to check on the adaptability of these activities.

QUESTION: Well, I thought you conceded that she was not adaptable for operating room performance.

MR. CHARMATZ: I don't think we conceded that point. I think that, given the testimony or given the evidence of the director of the Southeastern Community Hospital, and given the examples that are in the amicus of people who are severely hearing impaired performing in the operating room, that that question is open.

QUESTION: Going back to my Brother Rehnquist, how much of this evidence in the amicus briefs are we obliged to use? And I say evidence -- or we restricted to the record?

MR. CHARMATZ: I think that you are not obliged to --

QUESTION: Well, do you go to my second point, we are restricted to the record?

MR. CHARMATZ: I think that since the District Court asked the wrong questions, that the matter should be vacated and remanded. I think that you might be restricted to the record, but insofar as the record indicates that the questions that the District Court asked and that the college asked were incorrect, I think that is the basis for the Fourth Circuit decision.

QUESTION: But you have the burden of proof. I mean it is up to you to persuade the District Court to ask the right questions and introduce the evidence that is necessary to support your claim under the law as it is properly applied.

MR. CHARMATZ: We have the burden of proof, but when both the college and the District Court would not consider modifications for Ms. Davis, the only effort is what she did, she tried as best she could to give the information about her abilities as an LPN from the information

from the hospital that she worked at.

QUESTION: Mr. Charmatz, I am still somewhat concerned about the posture of the District Judge when he tried the case and what your contentions were there. Did you take the position in the District Court that the hospital had a duty or the program had a duty to engage in affirmative action that would change the technical aspects of the program? I don't read the pretrial order as describing your contentions that way.

MR. CHARMATZ: I think that the inquiry and testimony was whether or not with adequate supervision Ms. Davis could perform the duties in the clinical program.

QUESTION: To complete the educational program offered by the college.

MR. CHARMATZ: That's correct.

QUESTION: And the District Court found that she could not because there would be dangerous situations.

MR. CHARMATZ: But the District Court found that --

QUESTION: Asked the wrong question, but you didn't tell it to ask any other questions, that is my problem.

MR. CHARMATZ: But the District Court, again, it said that as far as accommodations were concerned or supervision was concerned, they weren't going to consider

it, and that was the problem of the college. The college said, well, with adequate supervision maybe Ms. Davis can perform but we are not going to make adequate supervision, we're not going to do that.

QUESTION: I take it the Court of Appeals thought the issue was properly in the case?

MR. CHARMATZ: That's correct.

QUESTION: At least the way you read the Court of Appeals?

MR. CHARMATZ: That's correct.

I want to speak just briefly on private right of action because it was addressed by the court. The amendments referred to indicate in any action or proceeding to enforce or charge a violation of a provision of title V, the court may allow attorneys fees, to enforce or charge a violation. In addition, the committee reports indicate that the committee believes that handicapped individuals under title V are and will remain in need of vigilance by handicapped individuals to assure compliance and the availability of attorneys fees should assist in vindicating private rights of action.

The Senate committee report in 1974 indicated that there was a private right of action. The amendments did not take that private right of action away. In fact, by having attorneys fees and by additional legislative



language by the Senate committee, comments from Senator Cranston, the floor leader, all indicate that there is a private right of action.

QUESTION: Well, where do you say the private right of action was originally created, it was then not taken away?

MR. CHARMATZ: Initially in the Senate committee report in 1974.

QUESTION: Well, committee reports don't create causes of action, it is laws, isn't it?

MR. CHARMATZ: That's correct.

QUESTION: And where --

MR. CHARMATZ: But insofar as the indication of Congress that they considered that a private right of action was necessary to vindicate the rights of handicapped individuals --

QUESTION: Some members of Congress, some members. It speaks through its statutes, not through its reports.

QUESTION: But you conceded that if there is a private right of action, as you contend there is, it is an implied one, it is not an explicit one?

MR. CHARMATZ: That's correct.

QUESTION: I notice you cite --

QUESTION: Everybody agrees, it is not explicitly in the statute.

MR. CHARMATZ: That's correct.

QUESTION: You cite Borak v. J. I. Case in your brief, do you think that case is still good law, after Amtrak and Cort and Barbour?

MR. CHARMATZ: Well, we think for the purposes of this case, for section 504, that the private right of action should be implied.

QUESTION: You don't feel you have to rely on Borak?

MR. CHARMATZ: No.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
The case is submitted.

(Whereupon, at 11:05 o'clock a.m., the case in the above-entitled matter was submitted.)

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