Compensating the Handicapped: An Approach to Determining the Appropriateness of Damages for Violations of Section 504

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Enacted as a relatively minor part of a comprehensive package of federal assistance programs for the handicapped, section 504 of the Rehabilitation Act of 1973 has become the principal weapon in the fight for civil rights for the handicapped. This statutory declaration of federal anti-discrimination policy, like earlier prohibitions of discrimination based on race and sex, simply banned discrimination against the handicapped in programs receiving federal funds: "No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." For nearly one in eleven Americans, section 504 promised vastly
increased access to government and society.

A general statement of a policy prohibiting discrimination, however, could not, without an effective sanction or remedy, bring the changes in government and society that the enactment of section 504 contemplated. The promulgation of an Executive order authorizing the withdrawal of federal funds from programs discriminating against the handicapped\(^7\) did little to help those who felt they deserved something more than they had received under earlier federal statutes, which provided assistance programs but neglected handicapped rights.\(^8\) Turning to the courts to enforce section 504, handicapped citizens attempted to force changes in such areas as mass transit planning,\(^9\) university handicapped assistance programs,\(^10\) and employment practices.\(^11\) Each court hearing a section 504 suit initially faced the question of whether a private right of action existed under section 504.\(^12\) So far, "every court of appeals which [has] considered the issue [has] found a private right of action under Section 504."\(^13\)

Despite the courts' willingness to protect the rights of the

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8. The predecessors of the Rehabilitation Act, referred to as the vocational rehabilitation acts, did not address the question of the rights of the handicapped, but rather concentrated on establishing programs to "rehabilitate" them, i.e., to make them employable in competition with non-handicapped persons. S. Rep. No. 318, 93d Cong., 1st Sess. 4-5, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2078-79.
12. The Rehabilitation Act of 1973 did not mention the existence of a private remedy for violation of § 504. Before granting relief to private litigants, courts have been forced to find that a private right of action was implied in the enactment of § 504.
13. Camenisch v. University of Tex., 616 F.2d 127, 129 (5th Cir. 1980), rev'd on other grounds, ___ U.S. ___ (1981). Despite the blanket assertion in Camenisch, two Circuit Courts of Appeals have found that private rights of action under § 504 do not exist in some cases where the wrong to be remedied is employment discrimination. Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir. 1980); Trageser v. Libbie Rehabilitation Center, 590 F.2d 87 (4th Cir. 1978). Both courts based their decision on the provision, added in 1978, that Title VI remedies would be available to § 504 plaintiffs. 620 F.2d at 674-75; 590 F.2d at 89. That reasoning was explicitly rejected in a recent employment suit brought in a federal district court. Hart v. County of Alameda, 485 F. Supp. 66 (N.D. Cal. 1979). The problem involves Title VI's restriction of private actions in employment cases to those in which employment was the primary purpose of the federal financial assistance. Since Title VI, unlike Title IX, was aimed at employment discrimination, the restriction serves a different purpose in Title VI suits. If it is to apply at all in § 504 cases, it should apply only to cases involving employment discrimination.
handicapped by enforcing private rights of action under section 504, remedies for handicapped plaintiffs have been almost exclusively limited to prospective relief in the form of injunctions and declaratory judgments.\textsuperscript{14} A few plaintiffs found that prospective relief was not enough and asked to be compensated for the losses they suffered as a result of the section 504 violations. In decisions filed in early 1980, two United States district courts came to opposite conclusions concerning the availability of damages as a remedy. This Comment suggests that the proper approach to deal with requests for damages for section 504 violations is found in \textit{Davis v. Passman,}\textsuperscript{18} a 1979 U.S. Supreme Court decision allowing damages in a constitutionally implied action for discrimination based on sex.

\section{I. Private Rights of Action Under Section 504}

\subsection{A. Legislative History of Section 504}

After several drafts, two Presidential vetoes,\textsuperscript{16} and thousands of hours of research and negotiations Congress passed the Rehabilitation Act of 1973.\textsuperscript{17} The Act’s passage indicated that the federal government had finally awakened to the needs of handicapped citizens. The Act’s predecessor, the Vocational Rehabilitation Act,\textsuperscript{18} had been designed to direct federal assistance to those handicapped individuals who, with additional training and assistance, could become employable.\textsuperscript{19} The new statute was more comprehensive. It included assistance even for those so seriously disabled that their employment was apparently impossible.\textsuperscript{20}

While the rest of the new Rehabilitation Act outlined a

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\textsuperscript{15} 442 U.S. 228 (1979).
\textsuperscript{17} "The \textit{[Rehabilitation]} Act thus represents the first federal attempt to prohibit discrimination against the handicapped outside the civil service." \textit{Implied Rights of Action, supra} note 1, at 1229 (footnotes omitted).
\textsuperscript{19} Id. at 5, \textit{reprinted in [1973] U.S. CODE CONG. & AD. NEWS} at 2079.
\textsuperscript{20} Id. at 9, \textit{reprinted in [1973] U.S. CODE CONG. & AD. NEWS} at 2092.
}
comprehensive package of federally managed or assisted programs, section 504 addressed the civil rights of the handicapped individuals to whom those programs were to be directed. Section 504's ban against discrimination extended beyond the Rehabilitation Act's programs, proscribing "discrimination under any program or activity receiving Federal financial assistance." That language was soon amended to include federally operated as well as federally assisted programs within section 504's anti-discrimination mandate.

The broad language of section 504 paralleled earlier federal efforts to prevent discrimination on the basis of sex in educational programs receiving federal funds: Title IX required schools to provide equal facilities for men and women; section 504 forced institutions receiving federal funds to modify structures to provide equal access for blind, deaf, paraplegic, and other handicapped individuals. Administrative interpretation of section 504 stipulated that "[e]ach program and activity [receiving federal funds], when viewed in its entirety, must be readily accessible to handicapped persons." Hence, new structures would have to be built to accommodate any handicapped person wishing to participate in the programs the structure would house.

The threat of huge financial burdens resulting from these

22. Congress added to the coverage of federally assisted programs “any program or activity conducted by any Executive agency or by the United States Postal Service.” Rehabilitation Act Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2982 (amending 29 U.S.C. § 794 (1976)).
24. Although Title IX did not explicitly refer to equal facilities, subsequent administrative interpretations consistently have required equal facilities for men's and women's programs. For example, HEW regulations regarding athletic facilities require the following:

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services ... .

34 C.F.R. § 106.41(c) (1980).
26. Id.
27. Id. at 9.
construction requirements led to considerable debate on the merits of restricting the broad section 504 mandate. However, whereas debate over Title IX resulted in the enactment of significant limitations on the reach of federal sex discrimination bans into the functioning of the nation's schools, few limitations have been placed on the range of activities covered by section 504.

B. Enforcement of Section 504

The legislative history of section 504 indicates that it was modeled after Title VI of the Civil Rights Act and Title IX of the Education Amendments of 1972. Since Congress had not included a method for enforcing section 504 in the Rehabilitation Act of 1973, the basic remedy used in enforcing Title VI and Title IX was applied to section 504 by an Executive order issued in 1976: "Whenever the appropriate department or agency determines . . . that any recipient of, or applicant for, Federal financial assistance is in noncompliance . . . compliance with section 504 may be effected by the suspension or termination of, or refusal to award Federal financial assistance . . . ."

Under this enforcement scheme, funds were withdrawn from the specific program found to be violating the statute's anti-discrimination requirement. Other programs operated by the same agency or institution continued to receive federal assistance un-

28. The principal area of concern, primarily because of the amount of money involved, has been mass transit. See, e.g., Mass Transit for the Disabled, 66 A.B.A.J. 425 (1980). So far, § 504 has not been amended to reflect that concern.

29. Title IX exempts a number of groups and institutions from its equal-opportunity mandate: religious institutions, military and merchant marine academies, single-sex colleges, some fraternities, sororities and voluntary youth service organizations (such as Boy Scouts), Boys' and Girls' State activities, father-son and mother-daughter activities, and some beauty pageants. 20 U.S.C. § 1681(a)(3)-(9) (1976).

30. It is important to note that the § 504 mandate extended only to "otherwise qualified" handicapped individuals. Although there is little in the legislative history to clarify the meaning of this term, the Supreme Court has used it to limit the coverage of § 504. Southeastern Community College v. Davis, 442 U.S. 397, 405-07 (1979).


til they had each been shown to violate the requirement.34

The relief provided by the Executive order, and later by administrative rules,35 was limited to the withdrawal of or refusal to provide federal funds to offending programs. For ongoing programs funding continued until a finding was made that discrimination had taken place, at which time federal assistance was discontinued. The remedy was entirely prospective; no provision was made for providing relief to those who had already suffered as a result of violations.

Even before the Executive order was issued, enforcement of the section 504 mandate had begun. As early as 1976, suits by private parties resulted in verdicts in favor of handicapped plaintiffs.36 Although the promulgation of regulations under section 504 in 1977 may have had some negative effect on private section 504 enforcement actions,37 such actions continue to be successfully litigated.38

Private litigants prevailed in a number of federal district courts and courts of appeals before Southeastern Community College v. Davis39 presented the Supreme Court with its first opportunity to decide a section 504 case. Davis, a hearing-impaired student, alleged that Southeastern Community College, a recipient of federal financial assistance, refused her application to enter a nursing program because of her handicap.40 The Court decided that Davis was not an “otherwise qualified handicapped individual” within the meaning of the statute.41 By determining that Davis’ alleged right to enter the nursing program was not a right protected by section 504, the Court avoided deciding the question of the existence of a private right of action.42

Had the Court decided the private right of action question in Davis, it probably would have followed the precedent it had set only four weeks earlier in a case involving sex discrimination

34. See id.
37. Miener suggests that it may be more difficult to successfully pursue private actions for enforcement of § 504 now that the administrative enforcement machinery is in place. Miener v. Missouri, 498 F. Supp. 944, 947 (E.D. Mo. 1980).
38. The most recent decision supporting the existence of a private right of action under § 504 is Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980).
40. Id. at 402.
41. Id. at 405-07, 413-14.
42. Id. at 404-05 n.5.
in violation of a similar anti-discrimination statute, Title IX. In Cannon v. University of Chicago, the Court found that Congress' failure to specifically provide a private right of action did not prevent the courts from finding that such a right did exist when it was asserted under a statute focusing on a specific benefitted class and when the plaintiff was a member of that class. The Court would presumably resolve a section 504 suit by applying the Cannon approach to protect handicapped individuals in the same manner that women are protected under Title IX. The result would be to uphold the various circuit courts of appeals in their decisions that a private right of action exists under section 504. Partially as a result of its analysis of Cannon, the circuit court that has most recently considered the question concluded that "both the legislative history of the Rehabilitation Act and the analogy to Title VI of the Civil Rights Act of 1964 . . . [support] the existence of [a private] right [of action]."

C. Remedies Available Under Section 504

Although federal courts have agreed that a private right of action may properly be implied under section 504, there is still considerable debate over the remedies available to those exerting such a right. The legislative history of section 504 makes no reference to private remedies. Even when amending the statute to specifically allow recovery of attorneys fees, Congress did not give any indication of the direction courts should take in evaluating the appropriateness of different remedies. Although courts have found injunctive relief to be appropriate where private rights of action have been upheld, they have not agreed on the availability of compensation in the form of damages.

On January 25, 1980, two United States district courts were

43. 441 U.S. 677 (1979).
44. Id. at 689-709, 717.
46. In fact, there is little mention of § 504 in the legislative history of the Rehabilitation Act. The language in the committee reports simply suggests that the provision was modeled after Title VI and Title IX and was intended to reach similar goals. S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390.
48. See, e.g., Kling v. County of Los Angeles, 633 F.2d at 880; Camenisch v. University of Tex., 616 F.2d at 130.
petitioned to provide a damages remedy for section 504 violations. Both cases involved handicapped children who had allegedly been denied appropriate educational opportunities by programs receiving federal financial assistance. Both courts faced the issue on motions to dismiss the section 504 claims. One court found that damages may be an appropriate remedy when a cause of action under section 504 has been established; the other court adamantly denied such a remedy.

1. Miener v. Missouri

The availability of a damages remedy was rejected by the United States District Court for the Eastern District of Missouri in Miener v. Missouri. Terri Ann Miener was a child who needed educational facilities that the local public schools (which received federal funds) refused to provide. Her father sued the State of Missouri and local school officials in her behalf, alleging that the defendants had been discriminating against the plaintiff because of her serious physical and emotional disorders. The defendants moved to dismiss the section 504 claim on the ground that a private right of action for damages did not exist under section 504.

The court conceded that, as the plaintiff had argued, "[p]rior to the adoption of [the section 504] regulations, it was generally held that Section 504 could be enforced through a private cause of action." The court then distinguished Miener's claim from earlier suits in which handicapped individuals had successfully asserted section 504 claims on two grounds: the earlier suits had been decided before regulations had been promulgated and they had not involved claims for damages.

In evaluating the validity of Miener's claim for compensatory relief, the court looked at the damages action in light of the criteria outlined by the Supreme Court in Cort v. Ash. Applied in virtually every implied right of action case since Cort was decided, these four criteria constituted the test to be used in deter-

50. Id. at 945-46.
51. Id. at 945.
52. Id. at 946.
53. Id. at 947.
54. Id. at 946-47.
55. Id. at 948.
mining whether a private right of action could be found implied in a statute:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . ? Second, is there any indication of the legislative intent, explicit or implicit, either to create such a remedy or to deny one ? . . . Third, is it consistent with the underlying purpose 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 . . . ?\textsuperscript{57}

In *Miener*, the court found that the plaintiff was "undoubtedly" a member of the special class for which the statute had been enacted\textsuperscript{58} and that discrimination against the handicapped was "not an area of primary concern to the States."\textsuperscript{59} But the court found that the legislative history of section 504 did not contain "the slightest indication" that private damage suits were contemplated by its enactment,\textsuperscript{60} and that "[t]he implication of such damage suits would also be inconsistent with the legislative scheme."\textsuperscript{61} The court's application of the second and third *Cort* factors led it to conclude that a private right of action could not be implied. The plaintiff's claims under section 504 were dismissed, leaving the case to be tried on the remaining causes of action.\textsuperscript{62}

2. *Patton v. Dumpson*

Rather than join the Eastern District of Missouri in rejecting a claim for damages under section 504, the Southern District of New York found in *Patton v. Dumpson*\textsuperscript{63} that damages could appropriately be granted to a handicapped plaintiff. The fact situation was similar to that of *Miener*: A handicapped child did not receive the education to which he was entitled from an agency that received federal financial assistance.\textsuperscript{64} Because William Patton had been abandoned by his parents, he

\textsuperscript{57} Id. at 78 (citations omitted).
\textsuperscript{58} 498 F. Supp. at 948.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 949. In another opinion, the *Miener* court found that even a grant of compensatory relief in the form of additional future educational assistance to Terri Ann Miener would not be permissible. *Miener v. Missouri*, 498 F. Supp. 949 (E.D. Mo. 1980).
\textsuperscript{63} 498 F. Supp. 933 (S.D.N.Y. 1980).
\textsuperscript{64} Id. at 936.
was the legal responsibility of certain public and private welfare agencies in New York City. Suit was brought in his behalf against those agencies, alleging that Patton had been "denied an education solely because he suffered from certain physical and mental handicaps."

Rather than apply the Cort criteria, the Patton court found that the existence of an implied right of action under section 504 had already been established by the various circuit courts of appeals that had considered the question. Then, separating the question of the existence of the right of action from that of the appropriate remedy, the court found that there was "no precedent for limiting a private right of action under Section 504 to suits for injunctive relief in the absence of a Congressional directive to that effect." Damages had been granted in cases involving "virtually every other statute designed to protect against unlawful discrimination."

Where the Miener court had found that the establishment of a private right of action for injunctive relief could not be extended to cover a damages remedy, the Patton court pointed out that earlier civil rights cases, whether arising under statutes or the Constitution, provided "no support . . . for the defendants' position that the underlying right to sue should be limited by the relief sought."

II. Separating the Question of the Appropriate Remedy From That of the Existence of a Right of Action

A. The Power of the Federal Courts to Fashion Remedies: Bell v. Hood

The availability of damages under section 504 depends on the authority of the courts to fashion remedies in cases based on rights of action implied rather than explicit in statutes. The Supreme Court has dealt with a closely analogous problem in cases based on private rights of action implied in the Constitution. In Bell v. Hood, the Court found that a damages remedy could be

65. Id. at 935 n.2.
66. Id. at 936.
67. Id. at 936-37.
68. Id. at 937.
69. Id.
70. Id. at 938.
71. 327 U.S. 678 (1946).
appropriate when it was necessary to protect individual rights implied in the Constitution. The Court spoke broadly of the power of the federal courts to grant compensatory relief:

[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.72

The Court affirmed the Bell doctrine in two later cases. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,73 the Court pointed out that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."74 Bivens established the right of a citizen to recover damages based on the Fourth Amendment.75

The most recent extension of the broad Bell statement concerning authority to grant a damages remedy, Davis v. Passman,76 involved a damages claim asserted under the Fifth Amendment.77 In Passman, the Court again looked at the history of damages remedies since Bell and attempted to distinguish between the question of implying a right of action and that of determining the appropriate remedy to be granted once the right has been found to exist: "[T]he question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive."78 The Passman Court criticized the court of appeals for confusing the two questions, pointing out that "[a] plaintiff may have a cause of action even though he be entitled to no relief at all."79 In other words, the Supreme Court outlined a two-step approach to resolving the question of whether damages may be an appropriate remedy for private rights of action based on the Constitution: First, a court should determine whether or not the

72. Id. at 684 (footnotes omitted).
73. 403 U.S. 388 (1971).
74. Id. at 395.
75. Id. at 397.
76. 442 U.S. 228 (1979).
77. Id. at 231.
78. Id. at 239. This distinction has been criticized. See 1980 B.Y.U. L. Rev. 165, 180-82.
79. 442 U.S. at 239-40 n.18.
right of action asserted by the plaintiff may be properly inferred from the Constitution; and, second, if a right can be inferred, a court should determine whether or not damages is an appropriate remedy.

B. Remedies in Statutorily Implied Rights of Action

The Supreme Court's two-step approach in Passman is readily adapted to the determination of appropriate remedies for rights of action implied in a statute. The Court's traditional broad recognition of the federal courts' authority to choose between remedies was applied to cases involving statutorily implied rights of action as part of the argument in Bivens. In his concurring opinion, Justice Harlan relied on the federal courts' general authority to fashion appropriate remedies for statutorily implied private rights of action to justify the Court's determination that damages could be appropriate when the Constitution was the source of the right:

The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. Thus, in suits for damages based on violation of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute.

. . . I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy. . . . [T]he federal judiciary [is] . . . competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies . . . .

Justice Harlan found his authority in a number of earlier decisions in which the Court granted relief in suits brought on the basis of private rights of action implied in statutes. The principal authority cited by Justice Harlan was J. I. Case Co. v.

80. 403 U.S. at 402-03 (Harlan, J., concurring) (citations omitted).
Borak,81 "an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal cause of action."82

The Court in J. I. Case decided a claim based on a failure to comply with the Securities Exchange Act of 1934.83 The Act had made various trading practices illegal without providing private remedies for some of them.84 The Court recognized its duty to "be alert to provide such remedies as are necessary to make effective the congressional purpose" by finding that the effective enforcement of the Act required more than the resources and authority of the Securities and Exchange Commission could provide.85 Private damage suits were found to be an appropriate method of securing proper enforcement and effectuating the stated goals of the statute.86

Since J. I. Case, federal courts have taken a mixed view of the appropriateness of granting damages in implied right of action cases.87 The differing results may be explained by the nature of the statutes and the rights they were designed to protect. The courts have been more willing to recognize private rights of action in cases based on statutes intended to protect individual rights than in cases based on statutes designed for economic regulation.88 This distinction was most graphically illustrated in 1970, when the Supreme Court sustained a lower court's finding that a private right of action was not implied in an economic regulation statute.89 Only twelve days earlier the Court had held that a private right of action was implied in Title VI of the Civil Rights Act,90 one of the statutes on which section 504 was

82. 403 U.S. at 402 n.4 (Harlan, J., concurring).
83. 377 U.S. at 429-30.
84. See id. at 431-32.
85. Id. at 432-34.
86. Id. at 434-35.
modeled.

The Court’s refusal to find implied actions in two 1979 decisions involving economic regulation,91 in contrast to its treatment of a civil rights case in the same year,92 suggests that the distinction retains its validity. The two cases based on economic regulation statutes showed the Court moving toward a strict statutory construction approach to implied rights of action.93 On the other hand, the Court did not use that strict approach when it held that a private right of action was implied in Title IX.

Section 504 is the kind of civil rights statute that requires the more liberal approach. The federal courts, applying the two-step analysis outlined in Passman, should recognize first that, as various circuit courts have indicated, a private right of action is implied in section 504 and, second, that damages may be an appropriate remedy for vindicating section 504 rights.

III. Determining the Appropriateness of Damages for Violations of Section 504

When a federal court finds that there is a private right of action implied in section 504 and that damages may be an appropriate remedy, it must still determine whether or not damages should be allowed in the particular case with which it is presented. Unlike situations in which Congress has explicitly provided for a damages remedy, courts facing implied private rights of action cannot simply say that compensatory relief is appropriate and proceed to grant it.

The decision whether to grant damages, like that of the existence of the private right of action itself, depends on whether the remedy is essential to achieve the statutory purpose. That determination has two elements: First, the proof that there is no mechanism provided which can achieve the purpose; and, second, the showing that the damages remedy would, given the policy considerations involved, achieve a purpose within the contemplation of Congress at the time the statute was enacted.

A. Absence of a Mechanism to Enforce Section 504 Rights

1. Failure to provide an adequate statutory remedy

The Supreme Court has sustained damages awards where "damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute."94 In order to show that a damages remedy is "necessary," it is essential that there be no statutory mechanism that can effectuate the statutory purpose. The failure to provide such a mechanism may be either direct or indirect. Congress may fail completely to provide a mechanism for relief, directly preventing the implementation of the policy without judicial enforcement.95 Or, Congress may provide a remedy but limit it or its application in ways that make vindication of the statutory right impossible. The limitations may be either a failure to provide the resources necessary for enforcement (as in J.I. Case Co. v. Borak96) or a restriction of the remedies granted to the enforcing agency to those designed "solely to benefit the agencies themselves or the Federal government as a whole" (i.e., to enable agencies to comply with the law) rather than to benefit those individuals to be protected by the statutory policy.97 When Congress so acts, it may indirectly negate its own policy, often forcing the courts to produce means of enforcement.

Sometimes, however, in the situation where the statute itself does not provide a remedy, a remedy may be provided by Executive order. But the Executive order may also fail to achieve the purpose of the statute, and it may neglect to provide an effective mechanism for the vindication of individual rights guaranteed by the order. Or, even if an effective mechanism is provided, there may be a failure to dedicate to that remedy the resources necessary for its effectuation. Either failure would be sufficient to make judicial provision of an effective remedy "necessary."

2. Failure of administrative and injunctive relief

Section 504 declared a federal policy opposing discrimina-
tion against the handicapped but did not specify a preventative mechanism. The remedy provided by Executive Order No. 11914 for violations of section 504 was the withdrawal of federal funds from the offending program.\textsuperscript{98} The Department of Health and Human Services (HHS)\textsuperscript{99} has been unable to provide the kind of supervision of federal grant programs necessary to ensure that federal funds are not used in programs which discriminate against handicapped persons. HHS is forced to rely on individual complaints to initiate investigations, and even when such complaints are filed "there is 'a large backlog . . . and there is no guarantee that any newly filed complaint can be investigated and resolved in an expeditious manner.'"\textsuperscript{100}

Even if HHS could keep up with the incoming complaints and effectively police federally funded programs, the remedy provided by the Executive order is inadequate to provide relief to those injured by section 504 violations.\textsuperscript{101} The situations presented in \textit{Miener} and \textit{Patton} are illustrative. Terri Ann Miener and William Patton had been deprived of appropriate


\textsuperscript{99} Id. The responsibility for enforcement, originally delegated to the Department of Health, Education and Welfare, now resides in its successor, the Department of Health and Human Services (HHS).

\textsuperscript{100} Whitaker v. Board of Higher Educ. 461 F. Supp. 99, 108 (E.D.N.Y. 1978) (citing Justice Department's amicus brief) (footnote omitted). A similar situation exists in Title IX enforcement. "Federal enforcement has hardly been energetic: more than a hundred complaints are backed up and no school has lost a dime for noncompliance." Of Sports, Sex and Money, \textit{Newsweek}, Mar. 16, 1981, at 98, 100. Proposed cuts in budgets of federal agencies, including HHS, will make reduction of the backlog difficult if not impossible.

\textsuperscript{101} This cutting off of funds is, effectively, the only sanction that H.E.W. can impose. Nowhere is the H.E.W. authorized to issue a binding order that damages be paid to an individual who has suffered by reason of a section 504 violation. Nor is the H.E.W. authorized to order the reinstatement of an individual who has been discharged in violation of that section. Moreover, while an individual may file a complaint and thereby possibly trigger an H.E.W. investigation, he does not become a party to any proceedings between the H.E.W. and the alleged violator. 45 C.F.R. § 81.23. Indeed, the only relationship that he may have with these proceedings is the receipt of a notice that an administrative hearing is going to be held to determine whether funds should be cut off. In short, while the administrative process may effectively provide, by way of the threat of a funding termination, an incentive to comply with section 504, it provides no means by which an individual can obtain personal redress for a section 504 violation. Thus, by their very terms, the regulations do not provide a "meaningful enforcement mechanism" for the vindication of personal rights. 461 F. Supp. at 107-08 (footnotes omitted).
educational opportunities for a number of years before their suits reached trial. Withdrawal of federal funds from their respective school systems, the only remedy open to HHS, would do nothing to remedy their losses. In fact, withdrawal of funds might prevent the school systems from providing future assistance to Miener, Patton, and other handicapped children by removing the resources necessary to provide that assistance; the administrative remedy might be worse than no remedy at all.

Intervention by the courts would not change the situation; withdrawing federal funds would not achieve the purposes of the statute. If the courts refuse compensatory relief, they would in effect be sanctioning the decision of the school systems to delay compliance with section 504 until forced to do so by court order. But refusal to end funding, without providing another remedy, would be worse. It would sanction continued discrimination. Such approval would defeat the purposes of section 504. Compensation in the form of damages, therefore, is arguably "essential" or "indispensable for vindicating" the rights guaranteed by section 504.

B. Policy Considerations in Determining the Appropriateness of Damages

1. Establishment of appropriate policy criteria: Passman

The traditional "necessity" test allows the courts to look not only at the existence of statutory, administrative, and injunctive remedies but at the policy implications of allowing a damages recovery as well. This analysis is an essential part of the second half of the necessity approach. The remedy must be necessary to effectuate the congressional purpose. Mr. Justice Harlan pointed out in Bivens that the necessity question was essential, but that "[i]n resolving that question, it seems . . . that the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy."\(^{103}\)

The policy considerations involved in section 504 are significant. The indispensability of the damages remedy must be bal-

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anced against the potential impact of that remedy on federally funded programs. Even without the additional cost of providing damages to victims of discrimination, recipients of federal funds will spend millions of dollars complying with the section 504 requirements.\textsuperscript{104} The added burden imposed by making damages available to handicapped plaintiffs requires that courts closely scrutinize the facts giving rise to the damages claim.

The Supreme Court provided an outline of the policy considerations to be used in that scrutiny when it sustained a damages award in \textit{Davis v. Passman}.\textsuperscript{105} Davis had been employed on the staff of United States Representative Otto Passman. Fired from her position as deputy administrative assistant, Davis alleged that her removal was solely because of her sex.\textsuperscript{106} Because she was employed by the House of Representatives, which had exempted itself from statutory coverage,\textsuperscript{107} Davis was unable to assert a statutory claim. The Court found her right of action implied in the Constitution.\textsuperscript{108}

The Court in \textit{Passman} used four criteria\textsuperscript{109} to evaluate the merits of Davis' claim for compensatory relief. First, the Court looked at the historical basis for recovery of damages in similar suits.\textsuperscript{110} Since courts have traditionally granted such recovery in employment discrimination cases, the Court found no barrier to a damages award in Davis' case. Second, the Court considered the practicality of determining the amount to be paid as damages.\textsuperscript{111} Again, the traditional use of damages as a remedy for employment discrimination had given the courts sufficient ex-

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\item[104.] For example, the cost of making the New York Metropolitan Transit Authority facilities accessible to the handicapped would be at least $1.5 billion, plus an additional $100,000,000 in maintenance costs. \textit{Wall St. J.}, Sept. 29, 1980, at 30, col. 1.
\item[105.] \textit{442 U.S.} 228 (1979).
\item[106.] After being dismissed from her position on Representative Passman's staff, Ms. Davis received a letter giving the reasons for her dismissal:

"Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion."

\textit{Id.} at 320-31 n.3.
\item[107.] Although there was no specific exemption in the statute, it was carefully drawn so as to exclude any coverage of congressional employees. \textit{Civil Rights Act of 1964}, § 717, 42 U.S.C. § 2000e—16 (1976).
\item[108.] \textit{442 U.S.} at 244.
\item[109.] \textit{Id.} at 245-48.
\item[110.] \textit{Id.} at 245.
\item[111.] \textit{Id.}
\end{enumerate}
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pertise in determining the kind of backpay awards required in damages recovery. The Court next reviewed the relevant legislative history of employment discrimination statutes for indications that Congress might have explicitly declared that such recovery could not be given. Finally, since there was no such statement in the history, the Court moved to consideration of the impact that granting damages recovery in such cases would have on the judiciary. The Court rejected the contention of the court of appeals that granting damages to Davis would "delug[e] the federal courts with claims."

2. Application of the Passman policy criteria to section 504

The use of the Passman criteria, applied as part of the traditional necessity test, would provide federal courts with an approach to determining whether damages would be an appropriate remedy for section 504 violations. This approach lies somewhere between those taken in Miener and Patton. Miener relied on the Cort criteria to simultaneously determine the question of the existence of a private right of action and the question of the remedy to be granted. Concluding that any damages award would be inconsistent with the purpose of section 504, the Miener court's approach neglected to address the policy factors essential to fairly answering the question of the necessity of a damages remedy to achieve the declared purpose of section 504's broad mandate. The Patton approach, relying on the determination that Congress did not preclude a damages remedy and that damages would be necessary to redress the wrongs allegedly suffered by William Patton, also ignored the essential policy considerations that must enter into a determination of the potential adverse impacts of section 504 damages awards.

The Passman approach would allow recovery of damages only if the court were to find, after evaluating the appropriate policy considerations, that damages were essential to achieving the integration of handicapped citizens into programs as Congress intended. If necessity alone, without policy considerations,

112. Id. at 246-47.
113. Id. at 248.
114. Id.
115. 498 F. Supp. at 948.
116. Id.
117. Id. at 937-38.
118. Id. at 939.
were to be the test, damages would be appropriate in all cases because the mechanism set up to remedy section 504 violations contains no provision for addressing individual wrongs. The addition of the Passman policy considerations qualifies that result, allowing damages awards in those cases where they are consistent with the policies underlying the statute.

In the Miener and Patton situations, it is far from certain that courts properly evaluating the four policy criteria would grant damages. First, plaintiffs would have to show that damages have historically been awarded for the kinds of discrimination demonstrated. Although such proof may be found, it is certainly less extant than in employment discrimination cases such as Passman. Second, the plaintiffs must show that damages awards are "practical." Again, the difference between employment discrimination and the failure of a school system to provide educational opportunities is significant; although a court can determine the wages a person has lost due to discrimination in employment, there is no easy formula for determining the value of lost educational opportunity. Can any award truly compensate for the years of educational assistance a plaintiff should have received? Third, the plaintiffs will have to demonstrate that the legislative history contains no indication that a damages remedy was to be precluded—a point some have disputed when looking at section 504's history, despite the lack of a clear indication of any legislative intent in passing the statute.119 Finally, the court will have to look at the impact allowing damages would have on the judiciary. Despite the large number of prospective plaintiffs,120 the small number of damage suits brought so far suggests that the burden on the judiciary of allowing damages under section 504 would not alone justify denial of this remedy.

IV. CONCLUSION

Although federal courts have been willing to use injunctive relief to protect the rights granted to handicapped citizens under section 504 of the Rehabilitation Act of 1973, they have

119. See, e.g., 498 F. Supp. at 948.
120. "The [1970] Census also showed there were 11,265,000 persons [16 to 64 years old] . . . with disabilities which existed for six months or longer. Excluded were persons in institutions." President's Committee on Employment of the Handicapped, One in Eleven 2 (1975).
had trouble resolving the question of compensatory relief. The courts that have faced the question have treated the issues of the existence of an implied private right of action under the statute and the appropriateness of a damages remedy as a single issue.

The Supreme Court's decision in *Davis v. Passman*, although directed to a constitutionally implied private right of action, provides courts with a model for a step-by-step analysis of the issue. The court should first determine whether a private right of action can be fairly implied under section 504. Only if such a right is found to exist should the court then proceed to answer the separate question of the appropriateness of damages. *Davis v. Passman* provides criteria that courts can use to determine the appropriateness of damages in specific cases. The court should consider the historical use of damages as a remedy in similar cases, the practicality of determining the amount of damages to be granted, the legislative history of the statute giving rise to the implied private right of action, and the impact of the availability of a damages remedy on the judiciary. These factors provide the policy considerations that courts must consider in deciding whether to extend the coverage of section 504 and similar statutes to include compensatory relief.

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