

5-1-1978

## Section 504: Private College Receiving Federal Assistance Must Provide Funds for Interpreter Services for Deaf Student

Catherine Miller Barber  
*University of Dayton*

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Barber, Catherine Miller (1978) "Section 504: Private College Receiving Federal Assistance Must Provide Funds for Interpreter Services for Deaf Student," *University of Dayton Law Review*. Vol. 3: No. 2, Article 10. Available at: <https://ecommons.udayton.edu/udlr/vol3/iss2/10>

This Symposium is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact [mschlange1@udayton.edu](mailto:mschlange1@udayton.edu), [ecommons@udayton.edu](mailto:ecommons@udayton.edu).

**SECTION 504: Private College Receiving Federal Assistance Must Provide Funds for Interpreter Services for Deaf Student—*Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977).**

I. INTRODUCTION

“In the 1960’s, a political and legal revolution began because there was a significant minority population which had to sit at the back of the bus. Today it is realized that a significant minority cannot even get on the bus.”<sup>1</sup> This significant minority, which has been estimated to include 20-35 million persons,<sup>2</sup> are the handicapped individuals of America who have at last come forward in great numbers to demand the equal rights and protections which have been denied them for so many years. This most recent social movement has been termed “a new era of civil rights” by Joseph A. Califano, Jr., Secretary of the United States Department of Health, Education, and Welfare (HEW), at a recent White House Conference on Handicapped Individuals.<sup>3</sup>

In response to the growing outcry for an effective government mechanism to oversee enforcement of the laws and regulations passed for handicapped reform, Secretary Califano, under order<sup>4</sup> from President Gerald Ford, recently signed a regulation<sup>5</sup> implementing section 504 of the Rehabilitation Act of 1973,<sup>6</sup> which prohibits discrimination solely on the basis of handicap against otherwise qualified handicapped individuals in programs receiving federal financial assistance.<sup>7</sup> The new section 504 has already presented many unanswered questions regarding the scope of its effect and the liability of those who are subject to it. In *Barnes v. Converse College*,<sup>8</sup> a deaf teacher has sought to enforce section 504. This case may serve as a fundamental guidepost for future litigation by demonstrating how far the courts are willing to go toward enforcement in the area of post-secondary educational aids to the handicapped.

---

1. Achtenberg, “Crips” Unite to Enforce Symbolic Laws: Legal Aid for the Disabled: An Overview, 4 U. SAN FERN. V. L. REV. 161, 163 (1975).

2. TIME, May 30, 1977, at 44, col. 1. The estimates of the number of handicapped individuals in the United States vary greatly depending on the types of disabilities included in the definition of handicapped. For an excellent list of references and statistics regarding these estimates see Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, n.2 (1973).

3. U.S. DEP’T OF HEALTH, EDUC., AND WELFARE, HEW NEWS 3 (1977).

4. Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976).

5. 42 Fed. Reg. 22676 (May 4, 1977) (to be codified as 45 C.F.R. §§ 84.1-.99 (1977)).

6. 29 U.S.C.A. §§ 701-794 (Supp. 1975).

7. *Id.* § 794 (Supp. 1975).

8. 436 F. Supp. 635 (D.S.C. 1977).

## II. STATEMENT OF FACTS

Plaintiff, Nelda K. Barnes, is a deaf English teacher at the Cedar Springs School for the Deaf and Blind, Spartanburg, South Carolina, and is certified in deaf education by the South Carolina Office of Teacher Education and Certification. Barnes is periodically required by the State Department of Education to earn additional college credits to maintain her "out-of-field" permit to teach in the public schools of South Carolina. She must earn six hours of graduate English credit in summer school in order to teach in the fall, and has been accepted academically at Converse College, which is also located in Spartanburg. She cannot, however, make use of the instructional material without an interpreter to translate it into sign language. Having been denied the interpreter services by the South Carolina State Agency of Vocational Rehabilitation because her request did not meet "agency eligibility requirements," Barnes now seeks to have Converse College provide funds for such interpreter. The cost for the interpreter, for the two summer courses at Converse, would be approximately 750 dollars.<sup>9</sup> Since Barnes' tuition for the two courses was \$210.00, the cost for the interpreter services alone would thus be two and one-half times the amount received by the college from Barnes for tuition. Converse College is a private college and a recipient of federal funds.<sup>10</sup> Barnes brings this action under section 504 of the Rehabilitation Act of 1973, which provides: "No otherwise qualified handicapped individual . . . , 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[;]"<sup>11</sup> and Code of Federal Regulations section 84.44, promulgated thereunder, which provides:

(d) *Auxiliary Aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of

---

9. Only \$528.00 was actually paid for the interpreter services to Barnes because she was absent from nine classes. Defendant's Memorandum on Summary Judgment Motion at 1.

10. In fiscal year 1976-77, Converse College received the following grants:

Office of Education, HEW (library grant)	\$3930.00
National Endowment for the Arts (Art Department)	1500.00
South Carolina Arts Commission	750.00
	<hr/>
	TOTAL \$6180.00

*Id.* at 2.

11. 29 U.S.C.A. § 794 (Supp. 1975).

educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include . . . interpreters or other effective methods of making orally delivered materials available to students with hearing impairments. . . .<sup>12</sup>

Barnes filed this action for preliminary and permanent injunctive relief, alleging that Converse College failed to provide her with interpreter services in violation of section 504. Contemporaneously, she moved for a preliminary injunction enjoining defendant from refusing to provide funds for interpreter services. The court granted her motion for preliminary injunction but, at the time of this writing, there has been no decision on the motion for a permanent injunction.

### III. THE COURT'S ORDER

In formulating a proper standard to be followed by the district court in granting preliminary injunctions, the Circuit Court of Appeals for the Fourth Circuit has developed what it terms the "balance-of-hardship" test, which is set out as follows:

[I]t is sufficient [to grant the motion] if the court is satisfied that there is a probable right and a probable danger and that the right may be defeated, unless the injunction is issued, and considerable weight is given to the need of protection to the plaintiff as contrasted with the probable injury to the defendant.<sup>13</sup>

In determining whether Barnes had the requisite "probable right" under which to recover, the court found that she is an "otherwise qualified handicapped" individual, within the meaning of section 504, who could adequately perform in the academic course in which she wished to enroll with the help of an interpreter. As such, it is probable that, under the statute and regulation in question, the defendant is obliged to provide for such "auxiliary aids" as an interpreter.<sup>14</sup> Having found the existence of a probable right in the plaintiff, the court looked to see if there was a probable danger that the right might have been defeated in the absence of the issuance of preliminary relief. It concluded that refusal to grant plaintiff relief at this time would defeat any rights she may have under the statute and regulation, and would cause her immediate and irreparable injury in the form of loss of employment.<sup>15</sup>

---

12. 42 Fed. Reg. 22684 (May 4, 1977) (to be codified as 45 C.F.R. § 84.44 (1977)).

13. *Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42, 45 (4th Cir. 1932).

14. 436 F. Supp. 635, 637 (D.S.C. 1977).

15. *Id.* at 638.

The court responded to defendant's allegation that the plaintiff may not maintain a private right of action under section 504 by examining various cases involving similar acts and the legislative intent of Congress in enacting this particular statute. The court concluded that it is evident that section 504 may be enforced by a private right of action.<sup>16</sup>

Since the requirements of the "balance-of-hardship" test were satisfied, the court granted Barnes a temporary injunction under which Converse College was ordered to procure and compensate a qualified interpreter of its choosing for the purpose of assisting the plaintiff in her summer school classes. To date, the issue of whether or not a permanent injunction should be rendered has not been litigated.

#### IV. ANALYSIS

The decision of the district court has the potential to be economically devastating to small private colleges. Its impact, however, was tempered by language in the order itself which could be construed as an invitation by the court to challenge the decision. In an unusual display of sympathy for the defendant, Judge Hemphill set the stage when he wrote:

Although the danger of future expenditures under this statute is not a proper consideration in this lawsuit, this court is most sympathetic with the plight of defendant as a private institution which may well be forced to make substantial expenditures of private monies to accommodate the federal government's generosity. . . . This is not to say that this court is not entirely sympathetic with the spirit of federal legislation which encourages the expansion of opportunities for the handicapped. This is merely to say that if the federal government, in all its wisdom, decides that money should be spent to provide opportunities for a particular group of people, that government should be willing to spend its own money (*i.e.* our taxes) for such purposes and not require that private educational institutions use their limited funds for such purposes.

Despite the obvious inequities inherent in the enforcement of this regulation with respect to private institutions, there has been no challenge to its validity and this court is bound by law to give it effect.<sup>17</sup>

Converse College has chosen not to appeal the temporary injunction, but to continue the contest on its merits.<sup>18</sup> Certainly, a

---

16. *Id.*

17. *Id.* at 638-39.

18. On the motion of Converse College, the South Carolina State Agency of Vocational

challenge to the constitutionality of the statute and regulation could be formulated using several policy and legal arguments.

A. A "Taking" of Private Property.

Although the cost to the defendant college in this particular action is relatively small, the real concern to the defendant is that, due to its close proximity to the South Carolina state-supported school for the deaf and blind, it may ultimately have to bear an enormous financial burden as the result of compliance with section 504. Herbert Hammett, an attorney for the college, explains: "We aren't talking about Nelda Barnes. We're talking about (the setting of) a principle. The real question is who will come up with the money."<sup>19</sup>

Converse College is subject to regulation under section 504 because it receives federal financial assistance.<sup>20</sup> As the court stressed, however, none of this federal money was given to the college for the purpose of providing auxiliary aids for the handicapped.<sup>21</sup> Nevertheless, one of the strings attached to the receiving of any federal money is that private colleges and universities then come within the scope and authority of federal regulation. "The executive branch of the federal government has shown a marked desire to use the existence of federal subsidies as a springboard for federal regulation, not only of the programs subsidized, but of all programs within the institution,"<sup>22</sup> the result being that often, remote or non-affiliated agencies, bureaus, commissions, and departments charged with the overseeing of the federally mandated social programs of the college, actually become the policy makers for the college.<sup>23</sup> The acceptance of the slightest amount of federal financial assistance by a private college—even the money received when a single student goes to school by use of the GI Bill or a federally insured loan—results in the staggering regulation of every educational program or activity of that college.

---

Rehabilitation has been made a third-party defendant to the suit, served with a third-party complaint by the college and with an amended complaint by the plaintiff (also ordered on the college's motion). The plaintiff and the college have filed cross-motions for summary judgment and the agency has made a motion to dismiss the complaint as to it and the third-party complaint for failure to state a cause of action.

19. The Wall Street Journal, Oct. 21, 1977, at 40, col. 1.

20. See note 10, *supra*.

21. 436 F. Supp. at 638.

22. Faccenda & Ross, *Constitutional and Statutory Regulation of Private Colleges and Universities*, 9 VAL. U. L. REV. 539, 549 (1975).

23. See Oaks, *A Private University Looks at Government Regulation: The First Amendment and the School*, 42 VITAL SPEECHES OF THE DAY 722 (1976).

The outcome is that, in order to accommodate the government's generosity of a relatively small gift of less than \$6200.00, Converse College may be forced to expend a substantial amount of its private money to comply with federal mandates. For private colleges, which cannot rely on state funds,<sup>24</sup> this additional financial burden could be very severe, if not fatal. The financial impact to the college could range from an increase in tuition, a cost which must then be passed along to the students themselves, to instability of costs resulting from difficulties in financial management and budget balance or a decrease in revenue due to a drop in student enrollment. The legality of forcing the college to pay for these aids, that is, to accomplish objectives which are completely unrelated to the purpose for which the government money was given, must therefore be questioned.

In disputing the granting of a permanent injunction, Converse College should argue that section 504 and regulation 84 violate the fifth amendment<sup>25</sup> ban on the "taking" of private property, in this case the college's money, for what HEW deems a public service, an interpreter for a deaf person, without just compensation. The thrust of the argument lies in the fact that, although the statute and regulation are proper and within the power of Congress, the means which Congress has employed to effectuate the statute are unconstitutional. Based upon the police power granted by the general welfare clause of the Constitution,<sup>26</sup> although there is no set formula to determine where regulation ends and taking begins, the means which Congress may use to rectify what it determines to be public evils is still subject to the classic rule stated in *Lawton v. Steele*:<sup>27</sup> "[I]t must appear . . . that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."<sup>28</sup> In this case, the requirement that Converse College pay for an interpreter is: 1) not necessary because Congress has provided<sup>29</sup> funding for state agencies to accomplish precisely the

---

24. For a good discussion of the reluctance of states to grant aid to private colleges, see Smith, *Emerging Consequences of Financing Private Colleges with Public Money*, 9 VAL. U. L. REV. 561 (1965).

25. U.S. CONST. amend. V provides, in pertinent part: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

26. U.S. CONST. art I, § 8, cl. 1 provides, in pertinent part: "The Congress shall have Power To lay and collect Taxes . . . to . . . provide for the . . . general Welfare of the United States. . . ."

27. 152 U.S. 133 (1894).

28. *Id.* at 137. See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962).

29. Rehabilitation Act of 1973, 29 U.S.C.A. §§ 720-776 (Supp. 1975).

same legislative purpose which HEW seeks to accomplish at the expense of Converse; and 2) unduly oppressive for Converse because, (a) Congress provides no funds for Converse to hire an interpreter, and (b) the cost of the interpreter is much greater than plaintiff's tuition.<sup>30</sup>

The general welfare clause is also limiting in that it only authorizes expenditures of *public* monies for public purposes.<sup>31</sup> In this case, the statutory requirement that private funds of a private college be used for the purpose of satisfying the general welfare-based dictates of section 504 could be shown to be so unreasonable that it must necessarily constitute a violation of the fifth amendment prohibition against the taking of private property for public use without just compensation.<sup>32</sup>

### B. *The Meaning of "Handicapped."*<sup>33</sup>

In the district court's preliminary hearing, the defendant college offered no evidence to refute Barnes' evidence of disability. Based on the plaintiff's testimony, the judge found that she was indeed handicapped. It is unfortunate that this point was not placed into contention by the defendant because a strong argument could be made that Barnes, despite her deafness, does not meet the "otherwise qualified handicapped" individual requirement within the meaning of section 504.

Although it must now be conceded that Mrs. Barnes qualifies as being "handicapped," section 504 could still be challenged as being void for vagueness and overbroad since what an "otherwise qualified handicapped" individual is has never been clearly enunciated. The overbreadth doctrine ensures that a statute be drawn with requisite clarity in order to be enforceable and that no statute have such a "broad sweep" as to allow discriminatory enforcement.<sup>34</sup>

The definition of a handicapped individual, as set out in the regulation,<sup>35</sup> and as explained in the analysis of the regulation,<sup>36</sup> has three parts, the first of which includes persons who have a physical

30. Defendant's Memorandum on Summary Judgment Motion at 22.

31. "[T]he power of Congress to authorize expenditure of public moneys [sic] for public purposes is not limited by the direct grants of legislative power found in the Constitution." *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976), quoting *United States v. Butler*, 297 U.S. 1, 66 (1936).

32. Defendant's Memorandum on Summary Judgment Motion at 21.

33. This point is discussed in greater detail in Comment, *Defining the Handicapped: Section 504 of the Rehabilitation Act*, 3 U. DAYTON L. REV. 391 (1978).

34. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

35. 42 Fed. Reg. 22678 (May 4, 1977) (to be codified as 45 C.F.R. § 84.3(j) (1977)).

36. 42 Fed. Reg. 22676, 22685-86 (May 4, 1977).

or mental impairment that "substantially limits one or more major life activities."<sup>37</sup> Despite the vital significance of the "substantially limits" restriction, this term was neither defined nor confined.<sup>38</sup> No comprehensive list of includible impairments was compiled by HEW. Specifically excluded from the first part of this definition, however, are the environmentally, culturally, and economically disadvantaged, as well as those individuals with prison records, the aged, and homosexuals,<sup>39</sup> unless, of course, these persons can prove that they can meet the requirements of the definition in the inclusion section.

The second part of the statutory and regulatory definition of a handicapped person includes anyone who has a record of a physical or mental impairment that substantially limits a major life activity, as well as a person who has been incorrectly classified as having such a condition.<sup>40</sup> The variability in the results of mental and physical examinations could play a large role in determining who is qualified under this part of the definition. Realizing that doctors' opinions of a particular patient's condition can vary significantly, it is conceivable that an individual desiring a "handicapped" classification could visit several physicians until he finally gets the diagnosis necessary to qualify him. Even if this diagnosis is later shown to have been incorrect, the individual retains his classification. Again, the undefined "substantially limits" restriction could become a problem.

The third, and perhaps most complicated, part of the definition includes some persons who might not ordinarily be considered handicapped, but are treated by the recipient of the federal financial assistance as if they were handicapped.<sup>41</sup> Under this definition, virtually anyone could come within the mandates of section 504, so long as he shows that the recipient "treats" him as handicapped. This part places an inordinate amount of discretion in the hands of HEW, as well as the financial recipient, to determine who to include in the definition. For example, short people, fat people and/or ugly people could all claim to be "treated" as having a physical impairment by the recipient and demand the special treatment and protections afforded the handicapped in section 504. Even those people specifically excluded under part one could qualify under part three

---

37. 42 Fed. Reg. 22678 (May 4, 1977) (to be codified as 45 C.F.R. § 84.3(j)(2)(i) (1977)).

38. 42 Fed. Reg. at 22685. "The Department does not believe that a definition of this term is possible at this time." *Id.*

39. *Id.* at 22686.

40. *Id.*

41. *Id.*

if they show that because of obvious physical peculiarities brought about by an advanced age, for example, the recipient treats them as being physically impaired. Since active alcoholics and drug addicts are expressly included within the definition of a handicapped individual if their impairment substantially limits one of their major life activities,<sup>42</sup> a previously excluded former convict could conceivably be deemed "handicapped" upon a showing that he is now an active drug addict.

The definitions set forth in the regulation are unreasonably broad and subjective, allowing far too much arbitrary and discriminatory enforcement to HEW. The ramifications of how far the liability to "handicapped" individuals extends are limitless without precise and definite guidelines to follow.

### C. *Balancing the Equities.*

Denying Barnes the money for an interpreter need not be a harsh decision since there has been no showing that the refusal of Converse College to provide these funds would cause her an absolute denial of education. It was established through her own testimony that she can afford to pay for the interpreter services without the financial support of the college. Also, Converse is not the only college which offers the courses which Barnes must complete. Although it would be convenient for her to attend a school so close to home, without a showing of indigency or extreme hardship in obtaining a substantially similar education at a state supported school, Converse College should not be expected to finance her additional expenses with its private funds.

## V. CONCLUSION

*Barnes v. Converse College* has generated considerable interest in educational circles. Colleges and universities are anxiously awaiting the outcome of the litigation so that they can allocate their budgets to meet the requirements of section 504. New regulations are subject to strict scrutiny in the first test cases which challenge their validity. Similar challenges to section 504 are appearing on the dockets<sup>43</sup> of many state courts and *Barnes* is being looked to for guidelines in the enforcement of this most important civil rights legislation.

The district court was clearly unhappy with the preliminary decision it was forced to make in *Barnes* and was openly critical of

---

42. *Id.*

43. Some of these cases are cited in 11 CLEARINGHOUSE REV. 148, 491, 580 (1977).

the policies behind the mandated fund provision. "No educational administrator needs to be reminded of the sad fact that federal money means pervasive, bureaucratic federal control; and for pervasive, tyrannical bureaucratic federal control, the Department of Health, Education and Welfare knows no equal or superior."<sup>44</sup> It will be interesting to see if the court continues the order which they so reluctantly made, or breaks new ground by declaring that this new legislation cannot endure the policy and legal challenges made against it.

*Catherine Miller Barber*

---

44. 436 F. Supp. 635, 638 (D.S.C. 1977).