Loyola University Chicago Law Journal

Volume 18
Issue 3 *Spring 1987 Health Care Law Symposium*

Article 7

1987

Discrimination Against Children With Special Health Care Needs: Title V Crippled Children's Services Programs and Section 504 of the Rehabilitation Act of 1973

Phillip H. Snelling
Attorney, Corp. Counsel, City of Chicago, IL

Discrimination Against Children with Special Health Care Needs: Title V Crippled Children's Services Programs and Section 504 of the Rehabilitation Act of 1973

*Phillip H. Snelling**

I. INTRODUCTION

The diagnostic based rationing of health care services to seriously ill and impaired children by most state Crippled Children's Services ("CCS") programs[1] raises serious legal questions. State CCS programs provide publicly funded health benefits to crippled children or children suffering from conditions that lead to crippling.[2] Funds for state CCS programs are small,[3] and the availability of the programs are not well-known.[4]

---

* Attorney, Corporation Council, City of Chicago; formerly attorney, Health Unit, Legal Assistance Foundation of Chicago; B.A., 1972, J.D., 1975, Valparaiso University.

1. The federal authorization for state CCS programs is found at 42 U.S.C. §§ 701-709 (1982). Not all states use the title of Crippled Children's Services program, and thus an inquiry to the state Department of Public Health may be necessary to locate a particular state's CCS program. Indeed, Congress, in the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, Title IX, § 9527, 100 Stat. 219 (1986), acknowledged the outdated name for this program, changing the reference from "crippled children" to "children with special health care needs." For the sake of clarity, however, this article uses the original term "crippled children."

2. 42 U.S.C. § 701(a)(4) (Supp. I 1983).

3. CCS funds are small compared to the funding for other federal programs. Federal funding for the CCS program was initially authorized at $2,850,000 for Fiscal Year ("FY") 1937. In FY 1985 the appropriation for the Maternal and Child Health ("MCH") Block Grant, which includes CCS programs, was $406,300,000. Under the MCH Block Grant, states can decide how much of the MCH federal funds they will allocate to CCS programs. On average they use about 30% of the MCH Block Grant for CCS programs. E. Magee & M. Pratt, 1935-1985: Fifty Years of U.S. Federal Support to Promote the Health of Mothers, Children and Handicapped Children in America 2, 12 (INFORMATION SERVICE RESEARCH INSTITUTE 1985) [hereinafter Magee & Pratt]. The approximately 130 million dollars of federal funds spent on CCS programs in FY 1985 is quite small in comparison to federal Medicaid expenditures for families with dependent children which totalled over $6 billion for 1985. U.S. Health Care Financing Administration, HEALTH CARE FIN. REV. 1985 (28% of Medicaid expenditures used by families with dependent children); U.S. Health Care Financing Administration, HEALTH CARE FIN. REV. 1986 20 ($21.9 billion spent by federal government on Medicaid in 1985).

4. The federal Medicaid program, *see* 42 U.S.C. § 1396 (Supp. I 1983), is a much more well-known assistance program. The availability of this program, however, does not diminish the need for state CCS programs. Medicaid coverage is unavailable throughout the country to large numbers of poor children. D. HUGHES, K. JOHNSON, J.

Accurate numerical estimates of the number of "crippled children" in the United States are difficult to establish. In 1979, the United States National Health Interview Survey found that children with activity limitation due to chronic illnesses constituted 3.9% of the child population younger than seventeen years of age,[5] approximately 2.4 to 2.5 million children.[6] That same year, state CCS programs provided services to 650,000 children at a total cost of approximately $275 million.[7] Although these figures must be viewed with caution, they indicate the limited number of children receiving CCS services compared to estimates of the total number of seriously ill children.

State CCS programs have limited the number of seriously ill or impaired children who are eligible for benefits by restricting eligibility to only certain diagnoses.[8] Children with covered diagnoses or conditions are considered for benefits, while those with equally serious, though uncovered, diagnoses are excluded. A 1984 survey of state CCS programs revealed the following examples of coverage

---

SIMMONS & S. ROSENBAUM, MATERNAL AND CHILD HEALTH DATA BOOK 97 (1986). In 1985, thirty-three states maintained Aid to Families with Dependent Children and Medicaid eligibility standards that were less than 50% of the federal poverty level for a family of three. *Id.* In a 1983 report, the Robert Wood Johnson Foundation concluded that seven million children in the United States have serious difficulty obtaining the medical care they need. THE ROBERT WOOD FOUNDATION, REPORT ON ACCESS TO HEALTH CARE FOR THE AMERICAN PEOPLE 8 (updated 1983). The access to care problem for poor children is amplified by their higher incidence of serious illness. "Chronic illness is much more common among poor children. Children in poverty are admitted to hospitals at a 75 percent greater rate than other children, and once in the hospital they have substantially longer stays." M. TESTA & E. LAWLOR, THE STATE OF THE CHILD 68 (1985) [hereinafter TESTA & LAWLOR].

5. Overall, "[c]hildren are the healthiest segment of the American population." Smyth-Starusch, Breslan, Weltzman & Gortmaker, *Use of Services by Chronically Ill And Disabled Children*, 22 MED. CARE 301-11 (1984). The 3.9% figure is really under-inclusive because seriously ill children whose activity is not limited, for example, children with cystic fibrosis who can function normally in school, are not counted. *Id.* at 311-12. The total number of children suffering handicapping conditions resulting in receipt of special services within the nation's schools for physical, developmental, or educational handicaps comprises about 11% of the elementary and secondary school population. Singer, Butler, & Palfrey, *Health Care Access and Use Among Handicapped Students in Five Public School Systems*, 24 MED. CARE 1 (1986); TESTA & LAWLOR, *supra* note 4, at 66.

6. U.S. DEPT. OF COMMERCE, Bureau of the Census, Statistical Abstract of the United States 1985, at 26 (105th ed.) (listing 1979 figures for Total Population by Age and Sex). This figure was arrived at by using the 3.9 percentage in conjunction with the 1979 census data on the number of children in the United States. *See id.*

7. Ireys, Hauch & Perrin, *Variability Among State Crippled Children's Service Programs: Pluralism Thrives*, 74 A.J. PUB. HEALTH 374 (1985) [hereinafter Ireys, Hauch & Perrin]. The total cost is calcualated by combining the amount of state funds and the amount of federal CCS funds. *Id.*

8. K. DAVIS & D. SCHOEN, HEALTH AND THE WAR ON POVERTY 135-37 (1978) [hereinafter DAVIS & SCHOEN].

variability: (1) full or partial state CCS coverage for diabetes in thirty-one states and no coverage in fifteen states; (2) full or partial coverage of leukemia in twenty-one states and no coverage in twenty-four states; (3) full or partial coverage of multiple sclerosis ("MS") in thirty-two states and no coverage in fourteen states; and (4) full or partial coverage of benign and malignant tumors in twenty-three states, no coverage in twelve states, coverage of only benign tumors in six states, and coverage of only malignant tumors in five states.[9] These diagnostic exclusions are not predicated on the severity of the impairment or need for health services, but simply on the administrative decisions of state CCS programs. The resulting system of covered conditions varies so greatly among state CCS programs that it has been described as "capricious."[10]

This article will analyze the history of the CCS program and the application of Section 504 of the Rehabilitation Act of 1973 ("Section 504") to the diagnostic based eligibility criteria currently used by most state CCS programs. Coverage variability among state CCS programs and inconsistencies with Section 504 requirements then will be discussed. The article will argue that the rationing of state CCS program coverage based on the child's crippling condition is inconsistent with the goals for the CCS program contained in Title V of the Social Security Act.[11] The article will then illustrate that state CCS program exclusions of children based solely on the type of crippling condition with which they are afflicted fails to comply with the prohibition of discrimination based on handicap contained in Section 504,[12] which Congress made explicitly applicable to federally funded CCS programs by amending Title V in the Omnibus Budget Reconciliation Act ("OBRA") of 1981.[13] The article will conclude with suggestions concerning eligibility criteria and program design that meet both state fiscal concerns and the requirements of Section 504.

---

9. Ireys, Hauch & Perrin, *supra* note 7, at 377-78 (from unpublished data for Ireys article collected during period of March 1984 through February 1985; data from four states was not included in the survey).

10. *Id.* at 380.

11. The federal funds provided to the states for CCS programs were intended to enable each state to extend and improve services: for locating crippled children, and for providing medical, surgical, corrective, and other services and care, and facilities for diagnosis, hospitalization, and aftercare, for children who are crippled or who are suffering from conditions which lead to crippling. Social Security Act, ch. 531, Title V, 49 Stat. 629, 631 (1935) (current version at 42 U.S.C. § 701(a)(4) (1982)).

12. The Rehabilitation Act of 1973, § 504, 87 Stat. 394 (current version at 29 U.S.C. § 794 (Supp. III 1985)).

13. 42 U.S.C. § 708 (1982), *amended by* OBRA, Title XXI, § 2192(a), 95 Stat. 825 (1981).

II. BACKGROUND

A. Sheppard-Towner Act of 1921

Until the early part of this century, the federal government did not involve itself in assuring American citizens, particularly children, access to health care. One of the federal government's first efforts toward helping children receive health care was the passage of the Sheppard-Towner Act of 1921, known as the Maternity and Infancy Act.[14] The legislation was intended to promote the welfare and hygiene of mothers and infants.[15] Under this program, the federal government appropriated $1.2 million in grants which the states could receive to create programs for maternal and infant care by matching the federal grant with state funds.[16] This early effort at federal and state cooperation in the health area was terminated after eight years.[17]

B. Title V Crippled Children's Services Program

With the demise of the Maternity and Infancy Act and the declining state of children's health during the Depression,[18] Congress enacted Title V of the Social Security Act of 1935.[19] Title V contained three programs for children: maternal and child health, crippled children services ("CCS"), and child welfare services.[20] The economic hardships of the Depression induced all states to participate in the CCS program within nine months of Title V's enactment.[21]

---

14. Sheppard-Towner Act of 1921, Pub. L. No. 67-97, 42 Stat. 224 (1921), *repealed*, Jan. 22, 1927, 44 Stat. 1024 (1927).

15. A. FOLTZ, AN OUNCE OF PREVENTION 13 (1982), [hereinafter FOLTZ]. The program spent less than a million dollars before it ended in 1929. Interestingly, Illinois, along with Connecticut and Massachusetts, refused to accept federal grants through the program because of the belief that the program violated states' rights. *Id.* at 14.

16. DAVIS & SCHOEN, *supra* note 8, at 122.

17. *Id.*; FOLTZ, *supra* note 15, at 14. The successful opposition of the American Medical Association ("AMA") helped terminate this program. To protest the AMA's action, some physicians broke away to form the American Academy of Pediatrics. H. Ireys, *The Crippled Children's Service* 14-15 (Aug. 1980) (unpublished manuscript available from Vanderbilt Institute for Public Studies) [hereinafter Ireys].

18. DAVIS & SCHOEN, *supra* note 8, at 122.

19. Social Security Act, ch. 531, Title V, 49 Stat. 629 (1935) (current version at 42 U.S.C. § 701-709 (1982)).

20. The maternal and child health ("MCH") component was concerned with reducing maternal and infant mortality. The child welfare section of Title V dealt with such matters as adoption procedures and standards for juvenile detention facilities. DAVIS & SCHOEN, *supra* note 8, at 122.

21. *Id.* at 123.

C. *The Absence of Definition*

The purpose of the CCS program under Title V is to locate children who are crippled or who are suffering from conditions that lead to crippling and to provide medical, surgical, and other services to these children.[22] Initially, state CCS programs were directed primarily at orthopedic problems.[23] With the advent of new technology and outbreaks of serious illnesses, including rheumatic heart condition in the 1940's, most states began to broaden covered illnesses, including within their coverage diseases of the heart, cerebral palsy, and cystic fibrosis.[24] As state CCS program coverage grew, the variability of covered services among the states also increased.[25] Two factors contributing to the disparity in covered conditions were the absence of a definition of "crippled children" in Title V[26] and Title V's broad mandate to provide benefits to crippled and potentially crippled children.[27]

Although Title V did not originally define crippled children, the total allotment of CCS funds to a state depended, and still depends, on the number of crippled children in that state.[28] As one recent study noted,[29] the federal government has relied on the proportion of children under twenty-one in each state to deduce the crippled children population, because the number of crippled children has "never been known."[30]

---

22. *See supra* note 12.

23. FOLTZ, *supra* note 15, at 15; DAVIS & SCHOEN, *supra* note 8, at 124.

24. *Id.*

25. *See supra* text accompanying note 9.

26. Congress' failure to define "crippled children" in Title V no doubt reflects the difficulty in passing any type of child health legislation in the pre-World War II era. The Chief of the Children's Bureau, the federal agency which administered the MCH and CCS programs from 1935 to 1969, was Martha Elliott during the mid-1950's. She is reported to have noted:

> [t]hat the development of two programs [MCH and CCS] rather than one — with large numbers of sick children left out — was entirely a programmatic one, borne of political realities. The medical profession could not publicly oppose a program to benefit crippled children, and they were willing to go along with publicly subsidized well-child care. But they were adamantly opposed to publicly subsidized comprehensive medical care for all children.

Ireys, *supra* note 17, at 14-15.

27. 42 U.S.C. § 701(a)(4) (1982). *See supra* note 11.

28. Each state initially received a uniform $20,000 grant which could be increased depending on the number of crippled children in the state. Social Security Act, ch. 531, Title V, § 502(a), 49 Stat. 629 (current version at 42 U.S.C. § 704 (1982) (changing uniform grant to $70,000)).

29. Magee & Pratt, *supra* note 3, at 3.

30. *Id.* at 3 n.2 ("The proportion of children under 21 years in each state is used to estimate the proportion of crippled children on the assumption that the incidence of crippling conditions is the same in each state.").

D. Definition Found and Lost

In 1967, Congress amended Title V, defining a crippled child as "an individual under the age of [twenty-one] who has an organic disease, defect, or condition which may hinder the achievement of normal growth and development."[31] The legislative history to the Title V Social Security Act Amendment of 1967 demonstrated congressional awareness of the under-inclusiveness of coverage under the state CCS programs and the need for improvement.[32]

Nevertheless, the definition of crippled children contained in Title V was short-lived; Congress, in the OBRA amendments of 1981, dropped the definition of "crippled children."[33] Instead, Congress extended the protection of Section 504 to crippled children seeking benefits under state CCS programs.[34] The OBRA amendment, which eliminated the definition of "crippled children"[35] referenced to organic disease, illustrated that Congress no longer wished to permit limitation of CCS programs to narrowly defined categories of "crippled children," but wanted to extend benefits to handicapped children without regard to the diagnostic category into which their handicapping condition fell.[36] The inclusion of Section 504 added explicit protection for any crippled child whose exclusion from benefits under a state CCS program was based solely on his or her handicap.[37] The OBRA amendments, in

---

31. 42 U.S.C. § 714 (1976) (amended Jan 2, 1968, § 514, 81 Stat. 928).

32. S. REP. NO. 744, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2834, 3032. "States will be required to make more vigorous efforts to screen and treat children with disabling conditions . . . . Many handicapped children or children with potentially crippling conditions fail to receive needed care because their conditions may not be included under the States' programs." *Id.* This report also notes that the definition of "crippled child" was added to assure that there would be no duplication of CCS services by those provided through community mental health programs. *Id.*

33. 42 U.S.C. § 714 (1976), *amended by* OBRA, Title XXI, 2192(a), 95 Stat. 818 (1981). The reason for the deletion of the "crippled children" definition from Title V is unclear. The legislative history to the OBRA amendments equated the terms "crippled" and "handicapped." The Senate Report on OBRA noted that: "Title V services for crippled children include . . . (2) facilities for diagnosis, hospitalization, and aftercare for crippled children and children with potentially handicapping conditions." S. REP. NO. 97-139, 97th Cong., 1st Sess. 482, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 748. The House Conference Report similarly notes that expenditure of Title V block grant funds is prohibited for inpatient hospital service, "other than inpatient services provided to handicapped children . . . ." H. R. CONF. REP. NO. 97-208, 97th Cong., 1st Sess. 789, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 1010, 1151.

34. For an extended discussion of Section 504, *see infra* notes 42-85 and accompanying text.

35. *See supra* note 33.

36. *See id.*

37. *See infra* notes 42-85 and accompanying text.

Section 508 of Title V,[38] made the handicap non-discrimination provisions to the Rehabilitation Act of 1973[39] applicable to programs and activities funded under Title V.

Congress further emphasized the children to be served by state CCS programs in the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA")[40] amendments to Title V of the Social Security Act. In the COBRA amendments to Title V, Congress eliminated all references to "crippled children" and referred instead to "children with special health care needs" or "children who are suffering from conditions leading to such status."[41]

III. Section 504 and Diagnostic Exclusions

Section 504[42] prohibits discrimination solely on the basis of handicap under any program receiving federal financial assistance.[43] The section defines a handicapped individual as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."[44]

A. Amendments to the Rehabilitation Act

A year after passing the Rehabilitation Act of 1973, Congress enacted the Rehabilitation Act Amendments of 1974, expanding the definition of "handicapped individual" beyond its original reference to employment to its current focus on "major life activi-

38. 42 U.S.C. § 708 (1983), *amended* by OBRA, Title XXI, § 2192(a), 95 Stat. 825 (1981). This section provides:

> For the purpose of applying the prohibitions against discrimination . . . on the basis of handicap under section 504 of the Rehabilitation Act of 1973 . . . programs and activities funded in whole or in part with funds made available under this subchapter are considered to be programs and activities receiving Federal financial assistance.

39. Pub. L. No. 93-112, Title V, 87 Stat. 390 (1973) (current version at 29 U.S.C. §§ 791-794) (1982 & Supp. III 1985)).

40. COBRA, Pub. L. No. 99-272, 9527, 100 Stat. 219 (1986).

41. The legislative history to the COBRA amendments indicates that the elimination of "crippled children" was merely a "technical change" to more appropriately describe the covered population. H. R. Rep. No. 3128, 99th Cong., 1st Sess., *reprinted in* CCH Special 4, Medicare & Medicaid Guide (CCH) ¶ 560 (January 13, 1986).

42. 29 U.S.C. § 794 (1982 & Supp. III 1985). Section 504 states in relevant part that "[n]o otherwise qualified handicapped individual, in the United States, as defined in section 706(7) of this title, 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 . . . ." *Id.*

43. *Id.*

44. 29 U.S.C. § 706(7)(B) (1982).

ties."[45] The Senate Report accompanying the 1974 amendments noted that "Section 504 was enacted to prevent discrimination against all handicapped individuals, . . . in relation to federal assistance in . . . health services, or any other Federally aided programs."[46]

The federal regulations implementing Section 504 are especially useful in interpreting the congressional intent behind its passage.[47] The regulations prohibit a program receiving federal funding from denying a qualified handicapped person the opportunity to participate in or benefit from the program.[48] The regulations also state that such programs cannot provide services to a qualified handicapped person in an amount or manner that is not equal to or as effective as that afforded others.[49] In addition, the regulations prohibit the provision of different benefits to handicapped persons, or to any class of handicapped persons.[50] Thus, the fact that state CCS programs discriminate with respect to children suffering from only certain handicapping conditions does not render CCS programs immune from Section 504 analysis. Though state CCS programs provide important services to many handicapped children, they can nevertheless discriminate illegally against those handicapped children who suffer from non-covered diagnostic

45. Pub. L. No. 93-516, § 111(a), 88 Stat. 1619 (1974) (current version at 29 U.S.C. § 706(7)(B) (1982)).

46. S. REP. NO. 1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6388.

47. *See* School Bd. of Nassau County v. Arline, 107 S. Ct. 1123, 1127 (1987); Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984) (the court noted that responsible congressional committees participated in the formation of the Section 504 regulations; those committees and Congress as a whole endorsed the final product).

48. 45 C.F.R. § 84.4(a) (1986). The Section 504 regulations define in relevant part the discriminatory actions prohibited as follows:

> A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
>
> (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
>
> (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;
>
> (iv) Provide different or separate aid, benefits, or services to handicapped persons or *to any class of handicapped persons* unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others. . . .

45 C.F.R. § 84.4(b)(1) (1986) (emphasis added).

49. *See id.* at § 84.4(b)(1)(ii), (iii).

50. *See id.* at § 84.4(b)(1)(iv).

categories.[51]

B. Elements of a Section 504 Claim

To state a Section 504 claim for a crippled child denied CCS services based on a diagnostic exclusion, the following elements must be alleged: (1) the program or activity in question receives federal financial assistance; (2) the plaintiff is an intended beneficiary of the federal assistance; and (3) the plaintiff is a qualified handicapped person, who solely by reason of his or her handicap has been excluded from participation in, been denied the benefits of, or otherwise been subjected to discrimination under such program or activity.[52]

A child with a crippling condition that is excluded from state CCS program coverage easily satisfies the first and second elements of the Section 504 test. Title V states that programs receiving funding under this section are considered to be programs receiving federal financial assistance.[53] Thus, all state CCS programs are programs receiving federal financial assistance and are subject to Section 504. Similarly, the Title V statute makes clear that "crippled children" and children with "conditions leading to crippling" are the intended beneficiaries of state CCS programs.[54]

The difficult hurdle for a Section 504 claim under the Title V CCS program concerns the third element - that the qualified handicapped individual must have been excluded from CCS participation and benefits solely because of his or her handicap.[55] This element breaks down into the following inquiries: (1) whether the plaintiff is "handicapped" within the meaning of the Rehabilitation Act; (2) whether the plaintiff is "otherwise qualified" for the services sought; and (3) whether the plaintiff was excluded from the services sought solely by reason of his or her handicap.

---

51. The argument that CCS programs excluding certain categories of handicapped children violate section 504 does not imply that other federally funded programs directed solely to a particular condition, for example, hemophilia, cannot exclude seriously ill persons who suffer from other conditions. The exclusion of specific classes of handicapped persons from a program limited by federal law to a different class of handicapped persons is permitted. *See id.* at § 84.4(c).

52. John A. v. Gill, 565 F. Supp. 372, 384 (N.D. Ill. 1983). *See also* Strathie v. Department of Transp., 716 F.2d 227, 230 (3d Cir. 1983), and Doe v. New York Univ., 666 F.2d 761, 774-75 (2d Cir. 1981) (requiring only first and third elements).

53. 42 U.S.C. § 708(a)(1) (1982).

54. *Id.* at § 701(a)(4). *See supra* notes 40-41, 49 and accompanying text.

55. *See supra* notes 42, 52 and accompanying text.

1. WHO IS HANDICAPPED?

The Rehabilitation Act defines a handicapped individual as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment."[56] Included within the ambit of "physical impairment" is any disorder or condition affecting a "body system."[57] The United States Department of Health and Human Services ("HHS") interprets Section 504 regulations to mean that multiple sclerosis, cancer, and diabetes[58] are considered handicapping. Courts also have accepted specific diseases and conditions as handicapping.[59]

HHS has failed to define the term "substantially limits"[60] with respect to "major life activities." HHS, however, has defined "major life activities" to include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[61] A Second Circuit court specifically determined that children, including newborns, can meet the definition of handicapped individual even though many of the "major life activities" listed by HHS are inapplicable to very young children.[62]

The Supreme Court's decision in *Bowen v. American Hospital Association*,[63] concerning hospital care rendered to a congenitally

---

56. 29 U.S.C. § 706(7)(B) (1982).

57. 45 C.F.R. § 84.3(j)(2)(i) (1986). The regulations implementing Section 504 state that "physical impairment" includes "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genital-urinary, hemic and lymphatic, skin and endocrine." *Id.*

58. In the HHS analysis of the final Section 504 regulations, the Department states:

> The definition [of handicapped persons] does not set forth a list of specific diseases and conditions that constitute physical and mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, . . . drug addiction and alcoholism.

45 C.F.R. § 84 App. A, at 325.

59. *See, e.g.*, School Bd. of Nassau County v. Arline, 107 S. Ct. 1123 (1987) (tuberculosis); Bentivenga v. U.S. Dept. of Labor, 694 F.2d 619 (9th Cir. 1982) (diabetes); Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984) (nocturnal epilepsy, dyslexia, cerebral palsy).

60. *See supra* note 40. HHS states that it "does not believe that a definition of this term is possible at this time." 45 C.F.R. § 84 App. A, at 325 (1986).

61. 42 C.F.R. § 84.3(j)(2)(ii) (1986).

62. United States v. University Hosp., 729 F.2d 144, 155 (2d Cir. 1984).

63. 106 S. Ct. 2101 (1986).

defective newborn, aids the Section 504 analysis of state CCS program exclusion of children with specific illnesses. The Court stated:

> The Solicitor General is correct that "handicapped individual" as used in § 504 includes an infant who is born with a congenital defect . . . . § 504 protects him from discrimination "solely by reason of his handicap." It follows, under our decision in *Alexander v. Choate* . . . that handicapped infants are entitled to "meaningful access" to medical services provided by hospitals, and that a hospital rule or state policy denying or limiting such access would be subject to challenge under § 504.[64]

Under the Supreme Court's analysis, state CCS policies excluding otherwise eligible crippled children solely because their illnesses are excluded from state coverage also should "be subject to challenge under Section 504."[65]

2. Who Is "Otherwise Qualified?"

In meeting the standards for a Section 504 claim, the crippled child must not only be handicapped but also "otherwise qualified" for CCS program benefits.[66] The otherwise qualified analysis includes a determination of whether the child meets the other, nonhandicap related, eligibility criteria of the CCS program. These criteria include state residence, age, and income eligibility standards.[67] In the context of employment or admission policies of educational facilities,[68] additional criteria related to ability or

---

64. *Id.* at 2111 (citations omitted).

65. *Id.* The specificity of exclusion from state CCS programs is demonstrated by the Illinois CCS program's proposed regulations:

> The [Illinois] Advisory Board has acknowledged that other primary physical health impairments in children would merit consideration upon availability of sufficient resources but due to fiscal limitations need be excluded. Among such exclusions are the following:
>
> 1) Malignances;
> 2) Isolated birth or acquired defects or disease of abdominal organs;
> 3) Isolated birth or acquired defects or disease of the lung;
> 4) Isolated birth or acquired defects or disease of the renal system;
> 5) Other metabolic disorders exclusive of In-Born Errors e.g., diabetes, endocrine disorders . . . .

10 ILL. REG. 3528, 3545 (1986) (proposed Feb. 14, 1986). Adopted rules deleted the foregoing language, but still failed to cover the above noted conditions. 11 ILL. REG. 3508 (1987) (effective Feb. 10, 1987).

66. 29 U.S.C. § 794 (1985).

67. 45 C.F.R. § 84.3(k)(1986) defines "qualified handicapped person" with respect to employment, education services, and all other services. For all other services, a qualified handicapped person is a "handicapped person who meets the essential eligibility requirements for the receipt of such services." 45 C.F.R. § 84.3(k)(4).

68. *See id.* at §§ 84.11-84.47.

educational attainment also could be applied.[69]

One circuit has determined that the standard used to determine whether an individual is otherwise qualified under Section 504 must exclude those requirements that are "unreasonable and discriminating."[70] This point was emphasized by the Supreme Court in *Alexander v. Choate*.[71] The *Choate* Court stated that a program's benefits could not be defined in a manner that "effectively denies otherwise qualified individuals the meaningful access to which they are entitled."[72] Thus, for example, state CCS programs cannot justify discrimination against seriously ill children with diabetes or multiple sclerosis by defining the state CCS program benefits as consisting solely of care for children with orthopedic or cardiovascular impairments.

3. Is Exclusion from Benefits Due Solely to Handicap?

Perhaps the most difficult inquiry under the Section 504 analysis is whether a crippled child denied CCS benefits due to a diagnostic exclusion is denied benefits solely due to his handicapping condition. As discussed earlier,[73] state CCS programs clearly exclude specific illnesses and conditions from coverage under their programs.[74] The reasons for such exclusions include historic coverage patterns, areas of staff expertise, program inertia, and perhaps most importantly, insufficient funding.[75] While insufficient funding explains the inability of children to obtain services through a CCS program, it neither explains nor justifies the exclusion of certain diagnostic categories. At least one federal court has noted that the terms of Section 504 do not allow a state program to promote legit-

69. *Id.* at § 84.3(k)(2),(3). The limited application of the "otherwise qualified" criteria to the area of health benefits has been noted by at least one court. In United States v. University Hosp., 729 F.2d 144 (2d Cir. 1984), the court stated that "the phrase 'otherwise qualified' is geared toward relatively static programs or activities such as education, and transportation systems. As a result the phrase cannot be applied in the comparatively fluid context of medical treatment decisions." *University Hosp.*, 729 F.2d at 156 (citations omitted).

70. *See* Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1205 (9th Cir. 1984).

71. 469 U.S. 287 (1985).

72. *Id.* at 301.

73. *See supra* notes 8-10 and accompanying text.

74. While state CCS programs clearly intend to exclude certain categories of crippled children, a showing of intent to discriminate is not necessarily required to succeed on a Section 504 claim. In *Choate*, the Court "assumed without deciding that Section 504 reaches at least some conduct that has unjustifiable disparate impact upon the handicapped." 469 U.S. at 299.

75. *See supra* note 65 (discussing Illinois CCS proposed regulations expressing the desire to cover more impairments but noting the insufficiency of financial resources).

imate purposes by utilizing discriminatory policies in providing federally funded benefits.[76] Section 504 prohibits discrimination on the basis of handicap, regardless of whether a rational basis for discrimination exists.[77]

Few cases have considered whether Section 504 applies to claims of discrimination between different groups of handicapped persons in the provision of publicly funded services. In *Garrity v. Gallen*,[78] residents of a school for the mentally retarded alleged that treatment and placement decisions were being discriminatorily made, based on the residents' particular handicapping conditions. In ruling favorably for the school residents, the court rejected the state's lack of resources defense and found that the state had violated Section 504.[79] The *Garrity* court observed that the defendants made placements and disbursed services based on a general assumption that certain groups of persons, including non-ambulatory and profoundly retarded individuals, could not benefit from particular activities and services.[80] The court enjoined the defendants from denying services to those individuals merely because they fell into one of the disfavored categories.[81] The defendants were further ordered to formulate eligibility decisions based on an individualized assessment of each resident.[82]

Similarly, in *Clark v. Cohen*,[83] the court stated that Section 504 prohibits discrimination among classes of handicapped persons.[84] The court dismissed the state and county defendants' argument that inadequate funds permitted discrimination in services based on the type of handicap.[85] In *Clark*, the plaintiff alleged that she was denied an opportunity to participate in a community living arrangement. The court denied the plaintiff's Section 504 claim because she failed to allege that the denial resulted from the fact that she was mildly retarded, rather than severely or borderline

76. Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1383 (10th Cir. 1981) (affirmed injunctive relief under Section 504 to individual with multiple sclerosis denied admittance to a psychiatric residency program due to his handicap).

77. *Id.*

78. 522 F. Supp. 171 (D.N.H. 1981).

79. *Id.* at 214.

80. *Id.*

81. *Id.* at 240.

82. *Id.*

83. 613 F. Supp. 684 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3d Cir. 1985), *cert. denied*, 107 S. Ct. 459 (1986).

84. *Id.* at 692-93. *Cf.* Colin K. *by* John K. v. Schmidt, 715 F.2d 1, 9 (1st Cir. 1983) (hesitantly suppports proposition by suggesting its possible application to learning-disabled individuals).

85. *See Clark v. Cohen*, 613 F. Supp. 684, 692-93.

retarded.[86] The Section 504 analyses in *Garrity* and *Clark* are applicable to the practices of state CCS programs in denying benefits to categories of crippled children solely on the basis of their handicap.

IV. ANALYSIS

State CCS programs that deny Title V CCS benefits to categories of crippled children solely because their crippling conditions are not covered under the state program violate Section 504. Such handicap specific eligibility criteria do not meet the "evenhanded treatment of qualified handicapped persons" standard at the heart of Section 504.[87] Moreover, eligibility criteria excluding specific handicapping conditions,[88] clearly are not "neutral" on their face,[89] but pointedly exclude certain groups of children based on their handicapping conditions. Indeed, the *Choate* court specifically stated that the day limitation on Medicaid hospital inpatient care at issue in that case did "not apply to only particular handicapped conditions," raising the inference that such a handicap specific limitation would run afoul of Section 504.[90]

The impermissibility of handicap specific exclusions does not mean that state CCS programs cannot apply across-the-board criteria. CCS programs can provide uniform criteria with respect to severity of illness or medical utility standards aimed at assuring a reasonable likelihood of beneficial results from services provided through the program. Scarce CCS resources should be used neither to assist with routine adolescent injuries, nor to provide procedures for children whose medical conditions would clearly not be improved by the procedures.

Categorical exclusions of crippled children that vary capriciously[91] among the state CCS programs, however, do not serve as legitimate, facially neutral methods of triage in allocating program

86. *Id.* at 693. The court noted that "[i]f plaintiff had alleged and proved that she was denied CLA [community living arrangement] because of her handicap and that the provision of services was operating to deny her a benefit on the basis of that handicap, she would have stated a claim under the Act." *Id.*

87. Southeastern Comm. College v. Davis, 442 U.S. 397, 410 (1979).

88. *See supra* text accompanying note 9.

89. *See* Alexander v. Choate, 469 U.S. 287, 302 (1985).

90. *Id.* at 302 n.22.

91. *See supra* note 10. In its FY 1985 plan, the Illinois CCS program provides "[t]he term Crippled Children is derived from federal statutes establishing State Crippled Children's Services (CCS). Currently, most children served by CCS are not crippled." Fiscal Year 1985 Plan, Illinois Human Services Data Report, *University of Illinois Division of Services for Crippled Children* 1 n.1.

funds. While any form of rationing needed medical care to seriously impaired children is unfortunate and incomprehensible in this wealthiest of nations, funding inadequacies in state CCS programs can be addressed through other, non-handicap specific, eligibility criteria. These criteria include income eligibility, utility of treatment, or severity of impairment, applied to all conditions. Such screening criteria are used, for example, by the Medicaid program to limit eligibility for services.[92] Placing a cap on the amount spent per child is another legitimate means of conserving funds.

V. CONCLUSION

When Title V CCS programs arbitrarily exclude seriously ill children with certain crippling conditions from receiving program benefits, they violate the requirements of Section 504. Though Section 504 prohibits discrimination on the basis of handicap, most state CCS programs continue to exclude children with specific handicapping conditions from their program benefits. Use of this arbitrary disbursement system has been used to mask the funding problems of state CCS programs. Perhaps a system open to all crippled children needing care on a "first-come first-served" basis would quickly exhaust CCS funds. Nevertheless, it would also clearly focus public and legislative attention on the many seriously ill children who need state CCS programs to provide access to medical care, but are denied due to funding inadequacy. As Judge Hugett in *Clark v. Cohen* observed: "A society is perhaps best measured by how it treats those who through no fault of their own, are forced to rely on its mercy and generosity."[93] This sentiment is especially true when those seeking society's help are its chronically ill children.

92. *See* 42 C.F.R. § 435.540-.541 (1986) (Medicaid disability criteria); 42 C.F.R. §§ 435.600-.852 (1986) (Medicaid financial eligibility criteria); *see also* 42 C.F.R. § 440.230(d) (1986) (authorizes medical necessity and utilization control procedures for Medicaid).

93. 613 F. Supp. at 707.