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83-6343

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Petitioner

v.

UNIVERSITY HOSPITAL OF THE STATE UNIVERSITY
OF NEW YORK AT STONY BROOK, et al.,

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING EN BANC

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QUESTION PRESENTED

Whether the panel misconstrued Section 504 of the Rehabilitation Act of 1973,[1/] as amended, in holding that the statute does not forbid discrimination based on handicap by recipients of federal financial assistance insofar as "treatment decisions involving defective newborn infants" are concerned.

1/ Section 504 provides that:

> No otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *.

29 U.S.C. 794.

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JURISDICTION

The petition for rehearing, with a suggestion of rehearing en banc, is filed pursuant to F.R. App. P. 35, 40. The district court (Honorable Leonard D. Wexler) entered a judgment dismissing the United States' complaint in this case on November 17, 1983. On February 23, 1983, a panel of this court (Circuit Judges Winter and Pratt and District Judge Metzner) affirmed (Winter, J., Dissenting).

STATEMENT

The United States seeks rehearing of this Court's ruling that Section 504 of the Rehabilitation Act of 1973 does not prohibit discrimination on the basis of handicap in the provision of federally assisted health care services to handicapped infants. We suggest that the case be reheard en banc because of the exceptional importance of the issues presented.

Factual Background

Baby Jane Doe was born on October 11, 1983, with multiple birth defects including myleomeningocele (exposed spinal cord membranes commonly known as spina bifida) microcephaly (abnormally small head), and hydrocephalus (accumulation of fluid in the cranial vault) (slip. op. at 1905). On advice of her initial pediatrician, Baby Jane Doe was admitted to University Hospital for corrective surgeries. Her parents, after consulting with physicians at University Hospital, withheld consent to surgeries to treat the spinal defect and to drain the water from the infant's skull, opting instead to administer antibiotics and dress the exposed spinal sac (id. at 1905-06). University Hospital acquiesced in this decision.

HHS received a complaint on October 19, 1983, alleging that Baby Jane Doe was being discriminatorily denied medically indicated treatment on the basis of her handicap.[2/] (id. at 1907). From October 22, 1983, until November 2, 1983, HHS officials repeatedly requested University Hospital officials to provide access to Baby Jane Doe's medical records since October 19, 1983.[3/] Access was denied (id. at 1908-09).

2/ When HHS received the complaint state courts were reviewing a guardian's suit seeking a court order requiring corrective surgery. The trial court ordered surgery but that decision was reversed by an intermediate appellate court. The New York Court of Appeals affirmed the reversal. Officials of HHS obtained a copy of the record of the state court proceedings, which contained the child's medical records through October 19, 1983 (slip op. 1906-07).

3/ HHS based its request for records on Section 504 and HHS's Section 504 regulation (45 C.F.R. 84.61) which expressly incorporates the Department's Title VI regulation:

(cont'd)

This suit was filed on November 2, 1983, to obtain access to Baby Jane Doe's medical records (id. at 1909). The Surgeon General of the United States, Dr. C. Everett Koop, a pediatric surgeon, determined that failure to surgically relieve the increasing pressure on the child's brain caused by the hydrocephalus "may be medically unjustified and based upon considerations of the infant's handicapping condition associated with the myelomeningocele" (U.S. Br. at 5-6) and that access to the infant's current (i.e., post-October 19; see note 2, supra) medical records and other relevant information was essential to resolve the issue. (See slip op. at 8).

The District Court Decision

The district court, on November 17, 1983, denied access to the records, reasoning that the hospital "failed to perform the surgical procedures in question, not because Baby Jane Doe is handicapped, but because her parents have refused to consent to such procedures" and that the hospital "lacks the legal right to perform such procedures" in the absence of parental consent (id. at 1910).[4]

3/ (cont'd)

> Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts and other sources of information, and its facilities as may be pertinent to ascertaining compliance with this part * * *.

45 C.F.R. 80.6(c).

4/ The district court also ruled (1) that the suit was not barred by laches; (2) that no doctor-patient evidentiary privilege prevented the government from obtaining access to the records;

(cont'd)

The Panel Decision

A panel of this court affirmed. Over a dissenting opinion by Judge Winter, the panel majority held that Section 504 does not prohibit federally assisted health care providers from discriminating on the basis of handicap with respect to "treatment decisions involving defective newborn infants" (id. at 1938). The court found that although Baby Jane Doe is a "handicapped individual" (id. at 1927), she could not be considered "otherwise qualified" or "subjected to discrimination" as those terms are used in Section 504[5/] (id. at 1927-29). "[T]he phrase otherwise qualified is geared toward relatively static programs or activities such as education * * * employment * * * and transportation systems * * *. As a result, the phrase cannot be applied in the comparatively fluid context of medical treatment decisions without distorting its plain meaning" (id. at 1928-29). Nor could the child be considered "subjected to discrimination" because "[w]here the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory'" (id. at 1929).

4/ (cont'd)

(3) that medicare and medicaid constitute "Federal financial assistance" within the meaning of Section 504 (slip op. at 1910); and (4) that "defendants' reliance upon the constitutional right of privacy is extremely weak" (J.A. 324).

5/ The court assumed without deciding that the hospital was a recipient of "federal financial assistance" and that the "program or activity" is the entire hospital (slip op. at 1915; id. at 1944 (Winter, J., dissenting)).

The panel majority accorded no deference to the administering agency's regulatory interpretation of the statute (id. at 1924) and determined from the Act's legislative history that "congress was primarily concerned with affording the handicapped access to federally funded programs and activities, and that congress never envisioned that HEW (or HHS) would attempt to apply Section 504 to treatment decisions" (id. at 1933-34). Finally, the majority reasoned (id. at 1937-38) that requiring a hospital to provide life-saving treatment despite parental non-consent, or to seek judicially to override the parents' decision, would impose an "affirmative action burden" on the hospital, contrary to Southeastern Community College v. Davis, 442 U.S. 397 (1979).

Judge Winter found that the statute and its legislative history unambiguously "include[s] the provision of medical services to handicapped infants" (id. at 1940). Since Congress had patterned Section 504 on a similar statute (Title VI of the 1964 Civil Rights Act) outlawing race discrimination in federally funded programs, Judge Winter agreed with the United States that just as "a judgment not to perform certain surgery because a person is black is not a bona fide medical judgment," neither is a discriminatory judgment based on a person's handicapping condition (id. at 1941). "[A] decision not to correct a life threatening digestive problem because an infant has Down's Syndrome is not a bona fide medical judgment "(id. at 1941-42). He faulted the majority opinion for creating ambiguity as to which handicapped persons and services are protected by the Act (id. at 1942) and for failing to apply Title VI principles in resolving this case as Congress had intended (id. at 1943).

ARGUMENT

1. As Judge Winter points out (slip. op. at 1941), the United States has never maintained that Section 504 authorizes federal intervention in health care decisions based on medical judgments. To the contrary, we contend only that Section 504 was intended to authorize -- indeed, to require -- federal intervention in discriminatory health care decisions based on handicap. In other words, just as Title VI prohibits recipients of federal funds from engaging in decisionmaking based on race (as opposed to decisionmaking based on bona fide medical judgment or on other nonracial grounds) in federally funded programs, Section 504's identically worded nondiscrimination command prohibits recipients from engaging in discriminatory decisionmaking based on a person's handicap(s). Neither Title VI nor Section 504 reach decisions based on bona fide medical judgments; a health care decision based on a bona fide, professionally acceptable medical judgment would not be based on handicap, which is all that Section 504 forbids.

Section 504 and Title VI plainly do apply, however, in those narrow instances in which the race or handicap of the patient is the basis for a treatment decision, or a decision not to treat. For example, a physician in a federally funded health care program may legitimately decide not to perform heart surgery on a black, down's syndrome child because, in his professional judgment, it is medically contraindicated. If, however, the doctor decides not to perform surgery because the child is and will be mentally handicapped, or because the child is black, the decision constitutes handicap-based or race-based discrimination in violation of Section 504 or Title VI.

The panel majority determined that this analogy to racial discrimination "breaks down," reasoning that "[w]here the handicapping condition is related to the condition[s] to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory'" (id. at 1929). Even assuming the validity of this observation, it says nothing about those instances in which the handicapping condition is unrelated to the condition(s) to be treated. Vivid examples of discrimination on account of handicap are provided by the "do not feed" cases -- cases in which a newborn, because it is handicapped, is simply not fed. See U.S. Br. at 19. We submit that it is possible to say, with certainty, that such a decision is discriminatory, for had the child not been handicapped it certainly would have been fed.

Similarly, in the recent and widely publicized "Bloomington Baby Doe" case a decision was made to forego routine surgery on an intestinal blockage of a newborn down's syndrome child because such treatment would not "cure the child's mental retardation." The child starved to death.[6/] Clearly, had the infant not been handicapped, the decision to withhold routine corrective surgery would not have been made. The "treatment" decision was thus based not on a bona fide medical judgment, but on the existence of the infant's handicapping condition.

6/ In re Infant Doe, No. GU 8204-00 (Cir. Ct., Monroe Co., Ind., Apr. 12, 1982), writ of mandamus dismissed sub nom. State ex rel. Infant Doe v. Baker, No. 482 S140 (Ind., May 27, 1982) (case mooted by child's death). There are other documented instances of down's syndrome children being denied routine corrective surgery for intestinal blockages. See 48 Fed. Reg. at 30847 (July 5, 1983).

Accordingly, the fact that a hospital's actions relate to the health care of a handicapped infant and therefore may be based on bona fide medical judgment does not preclude the possibility that its actions were based instead on the child's handicapping conditions.[7/] The Government makes no claim in this case that defendant University Hospital discriminated on account of handicap in actions taken, or not taken, with respect to Baby Jane Doe. We seek only access to information necessary to determine the answer to that issue. The panel majority plainly erred in foreclosing HHS's inquiry by concluding that handicapped infants cannot be "subjected to discrimination" with respect to health care decisions.

2. Contrary to the panel majority's decision, both the plain language of the statute and Supreme Court precedent establish that a handicapped infant is "otherwise qualified" in the context of health care services if, in spite of present or anticipated physical or mental impairment, the infant is able to benefit medically from such services.[8/] The Supreme Court has defined

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7/ The fact that proving discrimination could entail "lengthy litigation primarily involving conflicting expert testimony " (slip op. 1929) hardly justifies a construction of the statute that vitiates its very purpose -- to eliminate discriminatory decisions based on stereotypes and prejudices against handicapped individuals. As Judge Winter points out (id. at 1941), Congress was aware of the problems of proving discrimination when it patterned Section 504 on other civil rights statutes that require proof of discrimination on the basis of race or sex. Congress expected federal agencies to use that body of law in guiding their interpretation and enforcement of Section 504. Conflicting expert testimony is hardly new to civil rights litigation, and Congress could not have intended judicial repeal of the law in this context simply because evidentiary problems might be encountered.

8/ "If the handicapped person is able to benefit medically from the treatment or service, in spite of the person's handicap, the individual is 'otherwise qualified' to receive that treatment or service, and it may not be denied solely on the basis of the handicap." 49 Fed. Reg. at 1636; see also id. at 1630.

"otherwise qualified" handicapped person as "one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). In Davis a deaf student was, because of her handicap, not qualified for admission to nursing school because she could not meet some of the educational program's basic physical requirements. In the context of a health care program, there are no qualifications other than the ability, despite handicap(s), to benefit from medical treatment. If Baby Jane Doe's handicapping conditions (microcephaly and spina bifida) do not prevent her from benefitting from surgery to correct hydrocephalus, she must be considered "otherwise qualified."

The majority's conclusion that the phrase "otherwise qualified" is geared toward "static programs" and therefore "cannot be applied in the comparatively fluid context of medical treatment decisions without distorting its plain meaning"[9/] (slip op. at 1928-29), is at odds with the language and purpose of the statute. See Steelworkers v. Weber, 443 U.S. 193, 201-202 (1979). Congress intended to eliminate all the "many forms of potential discrimination" against handicapped persons through "the establishment of a broad governmental policy." S. Rep. No. 1297, 93d Cong., 2d Sess. 38 (1974); see Consolidated Rail Corp. v. Darrone, No.

9/ The majority's reasoning would appear to exclude from Section 504 coverage all medical treatment decisions, not just those involving infants. The majority's intent in this regard, however, is unclear. As Judge Winter's opinion points out, "[a]ll one can know for certain is that some medical services may be denied to some handicapped persons, without running afoul of Section 504" (Slip Op. at 1942).

82-862 (S. Ct. Feb. 28, 1984) slip op. at 1. The statute by its terms applies to all federally funded programs, including those providing "health services" (id.), and is not limited to so-called "static programs." 45 C.F.R. 84.3(h) (1983). Consolidated Rail Corp., supra, at 7.

Moreover, the distinction between activities described by the majority respectively as "static" and "fluid" is not readily apparent. By using the term "fluid" to describe "medical treatment decisions," the majority apparently means that a handicapped infant's need for a particular course of treatment may vary with changes in the child's physical condition.[10/] But there was nothing "fluid" about the Bloomington Baby Doe's need for corrective esophageal surgery to enable him to receive nourishment. Nor can the educational needs of handicapped students reasonably be termed "static." In short, the majority's profferred "static" - "fluid" distinction is supported neither by statute nor by logic.

3. The majority based its erroneous interpretation of Section 504 largely on negative inferences drawn from the fact that the statute's legislative history contains no express discussion of Section 504's application to health care decisions involving handicapped infants. According to the majority, Section 504 does not apply in this case because "congress was primarily concerned

10/ HHS' guidelines relating to health care for handicapped infants recognize that such factors are properly to be taken into consideration in formulating a bona fide medical judgment. See 49 Fed. Reg. 1622, 1637 (Jan. 12, 1984) (discussion of how to evaluate a decision on whether to perform corrective surgery on a child with spina bifida); id. at 1653 (App. C, §(a)(3)).

with affording the handicapped access to federally funded programs and activities and . . . congress never envisioned that HEW (or HHS) would attempt to apply section 504 to treatment decisions"[11/] (slip op. at 41). Thus, the majority acknowledged but failed to adhere to the well established principle that Congress' failure to consider an application which the words and purposes of statute clearly embrace does not negate that application. See, e.g., Jefferson Cty. Pharm. Ass'n v. Abbott Labs, 51 U.S.L.W. 4195, 4198 n. 18 (U.S. Feb. 21, 1983), and cases cited therein.

The majority's miserly interpretation of Section 504's purpose simply cannot be squared with the irrefutable evidence that Congress intended Section 504 to outlaw all of the "many forms of potential discrimination" against handicapped persons, including discrimination in "health services." S. Rep. No. 1297, supra, at 38 (1974).[12/] The principal evidence concerning Congress' intent, of course, is the statute's language, which plainly formulates the nondiscrimination guaranty in terms broader than the narrow "access" focus. Section 504 contains three specific

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11/ The court cited with approval the district court's summary of Section 504's legislative history in American Academy of Pediatrics v. Heckler, 561 F. Supp. 395 (D.D.C. 1983). However, that district court went on to say that "[g]iven the language of the statute and its similarity to other civil rights statutes which have been broadly read, it cannot be said that Section 504 does not authorize some regulation of the provision of some types of medical care to handicapped newborns" (id. at 402).

12/ The 1974 Senate Report (pp. 39-40) also makes clear that Section 504 "constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap."

protections for handicapped persons. They may not, on account of handicap,

> (a) be excluded from participation in,
> (b) be denied the benefits of, or
> (c) be subjected to discrimination under

any program or activity receiving federal financial assistance. 29 U.S.C. 794, see note 1, supra. See also 45 C.F.R. 84.4; App. A. ¶6 (1983). The majority, by limiting Section 504 to questions of access, would ignore the second and third protections.[13/] As the Supreme Court recently recognized in Grove City College v. Bell, supra, slip op. 8, federal statutes outlawing discrimination in federally assisted programs should be "accord[ed] a sweep as broad as [their] language" and courts should not "read into [the statute] a limitation not apparent on [its] face."

4. Congress authorized HHS to issue regulations governing the application of Section 504. See S. Rep. No. 1297, supra, at 39-40. HHS's original Section 504 rules did not specifically address the application of Section 504 to treatment decisions involving handicapped children. Before this case was decided, however, HHS adopted final rules which clearly interpret Section 504 to apply to the facts of this case. See 49 Fed. Reg. 1622 et seq. (1984). This regulatory interpretation of the statute

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13/ The majority's reading of Section 504 would presumably apply as well to other identically worded federal statutes outlawing race and sex discrimination in federally funded programs. Thus, the majority's interpretation would appear to allow racial segregation within a facility so long as persons of all races were allowed access to it (Cf. 45 C.F.R. 80.3(b)(1)(i)). It would also apparently allow discrimination in the provision of services based on race, sex, or handicap so long as all were admitted to a facility. We need not belabor the point that such a result is at odds with the language and intent of those statutes.

by the agency charged with its administration is entitled to substantial judicial deference. E.g., United States v. Rutherford, 442 U.S. 544, 553 (1979); see Andrus v. Sierra Club, 442 U.S. 347 (1979).

The panel majority declined, however, to afford deference to HHS' Section 504 rules because it found they were neither longstanding nor consistent (slip op. 1924). Contrary to the majority's determination, there is no inconsistency between HEW's decision not to regulate the treatment of institutionalized persons and HHS' recent regulation requiring that hospitalized handicapped infants be accorded nondiscriminatory treatment. The enforcement agency's rules have always stated that health care providers who receive federal financial assistance must treat handicapped individuals evenhandedly. See 45 C.F.R. 84.52; see also 49 Fed. Reg. at 1635-36 (HHS's previous interpretations of Section 504 are consistent with its present position on handicapped infants).[14/] This case is therefore not one in which an enforcement agency has adopted a rule pertaining to a specific issue and then reversed its position. Compare, General Electric Co. v. Gilbert, 429 U.S. 125, 142-43 (1976). Accordingly, the majority erred in failing to accord proper -- here, controlling -- deference to applicable agency rules.

14/ "The rule making history related to the 1977 promulgation of the Department's Section 504 regulations explained that the Department was not seeking to regulate with respect to the highly controversial issue of the rights of institutionalized persons to receive treatment for the condition which led to their institutionalization." 49 Fed. Reg. at 1636.

5. The majority's determination that requiring a hospital to contest parental nonconsent to life-saving treatment would constitute an impermissible "affirmative action burden" on the hospital (slip. op. at 1938), is based on a misunderstanding of the government's position and a misinterpretation of Southeastern Community College v. Davis, supra. Davis held that Section 504 does not obligate a university to make "substantial modifications" in its nursing program to accommodate the needs of a deaf student (442 U.S. at 410). It has been our consistent position that Section 504 requires a hospital to seek to override parental nonconsent to life-saving treatment in a case involving handicapped children, only if it would have done so in a case involving a nonhandicapped child (U.S. Br. at 29-30).[15/] Under this traditional theory of discrimination, University Hospital would not have to make any modifications in its program.

15/ The inquiry under Section 504 is thus: "What would the defendant hospital have done if the alleged discriminatee had not been handicapped?" In this connection, although the need rarely arises, hospitals are plainly capable of contesting a denial of parental consent to treatment when such a denial is clearly not in the best medical interest of the child. Virtually all hospitals are prepared to and do seek court-ordered treatment when, for example, religious convictions prohibit the parents of a newborn infant from consenting to medical treatment necessary to the child's survival. Nor is there any doubt that most if not all hospitals would not hesitate to seek a judicial order overriding a parental refusal to consent to a routine procedure, such as a blood transfusion, necessary to save the life of an otherwise normal and healthy child.

To depart from established approaches in cases involving handicapped infants, and simply acquiesce in the parents' decision, is an abdication by the hospital of its Section 504 responsibility not to discriminate on account of handicap.

CONCLUSION

The petition for rehearing should be granted and the case should be reheard en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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