The Next Minority Takes to the Air: The FAA and CAB Regulations for Air Transportation of the Handicapped

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THE NEXT MINORITY TAKES TO THE AIR: 
THE FAA AND CAB REGULATIONS FOR AIR TRANSPORTATION OF THE HANDICAPPED 

ELIZABETH G. THORNBURG 

During the last decade, the United States has experienced rising demands from various groups for equal enjoyment of basic human rights. Women, homosexuals, and ethnic minorities are working to achieve equal access to education, jobs, and housing. Recently, a new minority has arisen. Handicapped people are beginning to demand what a majority of Americans have long taken for granted: the ability to get on or off a bus, to fly in an airplane, to get in and out of a building, to take full part in the community, and to live independent lives with dignity. "In the past, the handicapped have sat back and let others speak for them. Now there is increasing militancy on the part of the handicapped themselves. [They] are the next minority."

Part of this movement emerged as a large volume of letters to the Civil Aeronautics Board (CAB) which criticized the treatment of handicapped individuals by air carriers. As a response to this criticism, the Federal Aviation Administration (FAA) and the CAB each issued a series of new regulations which went into effect in 1977. Although these regulations were adopted to ensure that the handicapped would be denied carriage only in the interest of air safety, the amendments which were incorporated during the rulemaking process and the difficulty of enforcement may cause the new regulations to have little, if any, effect. By examining the gen-

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eral background of the regulations, the amendment process, and related legal principles, one can see the problems which must be overcome before any real change in the availability of air transportation for the handicapped will come about.

I. BACKGROUND: OTHER LAWS FOR THE HANDICAPPED

In the 1960's and 1970's, primarily at the behest of vocational rehabilitation and health professionals,6 Congress passed a series of laws requiring that certain facilities be made accessible to the handicapped. The Architectural Barriers Act7 requires public facilities built after 1968 with federal funds to be accessible to the disabled. The Rehabilitation Act of 19738 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." On April 28, 1977, years after these acts were passed, the Secretary of Health, Education and Welfare (HEW) signed into law regulations requiring their enforcement.9

These regulations deal with program accessibility, education, social services, and employment. Programs which receive HEW funding must be accessible to handicapped persons. Institutions were given three years to complete structural changes to their physical plants to accomplish this end: nonstructural changes were required to be made by August 2, 1977.10 In the field of education, the regulations direct that no handicapped child may be excluded from a public education because of disability. In addition, handicapped students must be educated with non-handicapped students "to the maximum extent appropriate to their needs." At colleges and other post-secondary institutions, recruitment, admissions, and the

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6 Kellogg and McGee, supra note 1, at 74.
12 Id. at 2-3.
treatment of students must be free of discrimination based upon handicap.\textsuperscript{13} Health, welfare, and social service benefits may not be denied on the basis of handicap, and the services provided the disabled must be equal in quality to those in the institution's overall program. Equitable standards of eligibility are required.\textsuperscript{14} Employers may not refuse to hire or promote handicapped persons solely because of their disability, and reasonable accommodation may have to be made to the person's handicap.\textsuperscript{15}

More recently, the Department of Transportation issued a notice of proposed rulemaking under the authority of the Rehabilitation Act.\textsuperscript{16} The new regulations, if adopted, will require all federally-funded airports to take specified measures to aid handicapped travelers.\textsuperscript{17} All new terminals must be designed in accordance with standards established by the American National Standards Institute,\textsuperscript{18} and must provide jetways or lifts for boarding, telephones with volume control, teletypewriters for communication with the deaf, vehicular loading and unloading areas, accessible parking space, and accessible toilets.\textsuperscript{19} Existing terminals will be given three years to make the necessary structural changes.\textsuperscript{20}

Congress also showed its concern with the transportation problems of disabled city dwellers. The Urban Mass Transit Act (UMTA) of 1964\textsuperscript{21} declares it to be "national policy" that elderly and handicapped persons have a right to equal access to mass tran-

\textsuperscript{13} Id. at 4.
\textsuperscript{14} Id. at 5.
\textsuperscript{15} Id. at 6.
\textsuperscript{17} Id. Final comments on these proposed regulations were due on October 20, 1978. 43 Fed. Reg. 30,585 (1978).
\textsuperscript{18} \textsc{American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped}, published by ANSI, Inc. (ANSI A117.1—1961 (R1971)). Copies of these standards are available from ANSI, Inc., 1430 Broadway, New York, N.Y. 10018.
\textsuperscript{20} Id. The FAA has published a guide to the facilities for the disabled, currently available in 220 airport terminals in 27 countries. It details parking, exterior circulation, arrival and departure facilities, elevators, stairs, ramps, doors, airplane boarding, rest rooms, telephones, and other services. The brochure, called \textit{Access Travel: Airports}, is available free of charge from the Consumer Information Center, Pueblo, Colo. 81009.
\textsuperscript{21} 49 U.S.C. § 1612(a) (1976).
sit facilities and mandates "special efforts" in planning and design to assure such accessibility. Unfortunately, the Act for many years had no implementing provisions, and mass transportation facilities continued to be built which the handicapped were unable to use. Federal regulations under this statute require the urban transportation planning process of state and local governments to include "special efforts" to plan public mass transportation facilities which can be effectively used by the elderly and handicapped. In addition, new regulations require that all local transit buses purchased with federal grants after September 30, 1979, be the new "transbus" type, equipped with low floors, ramps for wheel chairs, and other aids for the disabled.

II. THE NEW REGULATIONS

A. The Civil Aeronautics Board's Initiative

During the late 1960's, the CAB received an increasing volume of complaints from disabled persons and groups expressing dissatisfaction with air carriers' overall treatment of paraplegics, quadriplegics, the blind, and other handicapped persons. It also noted several informal complaints that carriers had refused to carry disabled individuals although a reasonable interpretation of existing regulations indicated that they should have been carried.

In response to this criticism of the standards themselves and the inconsistency in their enforcement, the CAB on October 14, 1971, issued an advance notice of proposed rulemaking, inviting participation by physically handicapped individuals, organizations representing the handicapped, government agencies, the airline industry, and the general public. The object of this notice was to determine the scope of the problem, to decide whether promulgation of rules

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55 Id.

56 There was, for example, an accessibility suit brought against the Urban Mass Transportation Administration in Washington, D.C., because there were no elevators for the handicapped in its new subway system. Washington Urban League, Inc. v. Washington Metropolitan Transit Authority, Inc., CA No. 776-72 (D.D.C. 1973).

57 23 C.F.R. § 450.120 (1978).


60 See text accompanying notes 52-54 infra.

would be appropriate, and if so, to develop proposed rules. After a review of the comments, the CAB decided there was a need for clearly defined safety standards for transportation of the handicapped and referred the question to the FAA.

B. The FAA Preliminaries

On May 30, 1973, the FAA issued its own advance notice of proposed rulemaking entitled, “Air Transportation of Handicapped Persons.” Due to the significant public interest in the subject, six public hearings on transportation of the handicapped were held throughout the United States. Comments at these hearings stressed that the individual’s freedom to travel should be preserved, and many speakers encouraged the adoption of regulations which would safely maximize the transportation of handicapped persons.

Based on this response the FAA issued a notice of proposed rulemaking in July of 1974. The proposed regulations were issued pursuant to Section 1111 of the Federal Aviation Act which authorizes carriers “to refuse transportation to a passenger . . . when, in the opinion of the air carrier, such transportation would or might be inimical to safety of flight.” The announced premise of the proposed regulations was that “the carriage of handicapped persons should be limited in the interest of air safety only when those persons need the assistance of other persons to expeditiously evacuate the airplane.” Accordingly, it was proposed to amend Parts 121 and 135 of the Federal Aviation Regulations to specifically provide for the carriage of handicapped persons.

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39 Fed. Reg. 20,309 (1971). The Board received 20 comments from organizations representing disabled persons, five from government agencies, 19 from disabled individuals, six from miscellaneous organizations, two from scheduled air carriers, and one each from the Air Transportation Association of America, the Airline Pilots Association, the Aviation Consumer Action Project, and the Administrator of the Federal Aviation Administration.

36 In view of the wide variety of aircraft operated by Part 135 certificate holders, the regulations under this section require the establishment of evacuation procedures for the disabled tailored to each carrier’s own operations rather than imposing specific provisions. The section also requires crew member training in the evacuation of the handicapped.
C. The Regulations Themselves

1. Definitions of "Handicapped Person"

A perennial problem in drafting regulations is defining the group to be protected. The FAA chose to define "handicapped person" in terms of its own purpose in promulgating the proposed regulations. The adopted regulations, therefore, define a handicapped person as "a person who may need the assistance of another person to expeditiously move to an exit in the event of an emergency evacuation." This definition was criticized by former Senator John Tunney as "so vague and general that anyone from one's grandmother to a skier with a broken ankle could be classed as handicapped."

In the tariff rules which the airlines have adopted pursuant to the adopted FAA and CAB regulations, carriers have further classified disabled passengers into two groups: "non-ambulatory" and "physically handicapped." Non-ambulatory passengers are those who are unable to walk or who need the help of another person to walk, but who are otherwise capable of caring for themselves throughout the flight. A passenger who uses a wheelchair "for convenience" is not considered to be non-ambulatory. A physically handicapped passenger is a person "with any impairment or physical disability which would cause such person to require special attention or assistance from carrier personnel."

Some commentators point to the definition in the UMTA as

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37 See text accompanying notes 33-36 supra.
38 14 C.F.R. § 121.571(a) (1978).
40 Rules 15(A) and 16(H), CAB Rules Tariff PR-6, at 142 (1978) [hereinafter cited by the specific rule]. This tariff was issued September 28, 1978 to be effective November 12, 1978. The definition cited applies only to two airlines. See Rule 15(A)(2). Many other carriers, such as American Airlines and United Airlines, modify this definition slightly. See Rule 16(H), Exception 2.
41 Rule 15(A)(2), supra note 40.
42 Rule 16(H), supra note 40. This definition also varies greatly. Two carriers, for example, define "physically handicapped passenger" as "a person who has a physical impairment (other than drug addiction or alcoholism) which substantially limits one or more major life activities." Rule 16(H), Exception 1, supra note 40.
43 See, e.g., Achtenberg, supra note 39.
44 49 U.S.C. § 1612 (1976). The UMTA definition is not at all controlling here; its definition has merely been suggested as an alternative to that chosen by
superior: "any individual who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, is unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected." This latter definition is more specific as to the persons in the class to be protected by the act. It has, in addition, two other advantages over the adopted FAA definition. First, the UMTA defines handicapped people in terms of their own characteristics as well as in relation to others. Second, while the adopted FAA definition speaks in terms of existing conditions, the UMTA definition implies an affirmative duty to adapt facilities to meet the needs of the handicapped.

Although they were developed in response to complaints from the handicapped of inadequate access to air travel, the adopted FAA regulations dealing with the right to carriage are phrased in an essentially negative manner. One commentator on the proposed regulations requested that the phrasing be remodeled so as to become an affirmative statement of a carrier's obligation to serve the handicapped. While it was felt that the negative wording was more appropriate, the agency agreed in substance with the comment that a carrier has an obligation to provide transportation upon reasonable request, and that the fact that a passenger is disabled in some way does not make the request unreasonable.

2. Pre-Flight Considerations

Closely related to definitional issues is the crucial question of who may fly and who may not. Before the newly adopted regula-
tions went into effect in May of 1977, certificated air carriers operated under a tariff rule which allowed them to refuse to accept for transportation any person whose physical condition rendered him incapable of caring for himself without assistance, unless the person was accompanied by an attendant for the duration of the flight. In addition, the CAB in 1962 approved an inter-carrier agreement which provided medical and lay criteria for the interline transportation of handicapped persons.

The criteria approved in this agreement provided that airlines would not accept passengers with malodorous conditions, gross disfigurement, or contagious diseases. Although variations existed in the number and type of disabled persons accepted on each flight, there was some uniformity with respect to those not normally accepted by most airlines. Those frequently excluded were people who needed care from a third person, people who could not sit in a seat and fasten a safety belt, mentally retarded children, infants less than seven days old, people who required injections en route, and people who needed to carry supplemental oxygen.

The proposed regulations issued by the FAA in July of 1974 would have changed this situation to some degree. They provided that carriers could not refuse to carry a person on the basis of a handicap if the person had a recent written statement from a licensed physician to the effect that he or she did not need assistance to evacuate the plane. Nor could the carrier refuse to carry someone solely because that person was blind or deaf. The proposed regulations also imposed limitations on the number of disabled persons who could be carried on the same flight. The total number of handicapped persons carried could not exceed the number of emergency exits, the number accompanied by attendants could not exceed the number of floor level exits, and only one person on a stretcher was permitted on any flight. It was thought that these

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50 See text accompanying note 4 supra.
54 Id.
56 Id.
57 Id.
numbers limitations would maximize safety and efficiency in the event of an emergency evacuation.\textsuperscript{88}

The FAA received much criticism of this proposal, particularly with respect to the requirement of a doctor's statement and to the numerical limitations.\textsuperscript{89} Because of this criticism and the results of tests conducted by the Civil Aeromedical Institute,\textsuperscript{90} the FAA in 1977 completely revamped its proposed regulations. Section 121.586, "Authority to refuse transportation," was substituted for the above-described provisions.

This section, as adopted, requires that each certificate holder establish procedures, including reasonable notice requirements, for carrying handicapped persons on its aircraft. These procedures must be filed with the FAA district office charged with the overall inspection of the carrier's operations.\textsuperscript{91} The carrier may not refuse to carry a handicapped passenger on the basis of flight safety unless the passenger fails to comply with the notice requirements or cannot be carried in accordance with the certificate holder's procedures.\textsuperscript{92} The proposed regulations were adopted in this form,\textsuperscript{93} and they therefore give each carrier greater discretion both to agree and to refuse to carry handicapped persons than did the regulations as originally proposed.\textsuperscript{94}

The procedures adopted by the airlines in response to the newly adopted regulations vary, but there are some common factors. Most carriers require a twenty-four to seventy-two hour advance notice of the nature of the passenger's handicap and the assistance required.\textsuperscript{95} As under the old tariff rule, some carriers will not accept

\textsuperscript{89} 42 Fed. Reg. 18,392, 18,393 (1977).
\textsuperscript{90} See text accompanying note 76 infra.
\textsuperscript{91} The Administrator may require changes in the carrier's procedures if he finds it to be "in the interests of safety or in the public interest." 14 C.F.R. § 121.586(c) (1978).
\textsuperscript{92} 14 C.F.R. § 121.586(a) (1978).
\textsuperscript{93} See text accompanying note 4 supra.
\textsuperscript{94} It should be noted that nothing in these regulations affects the authority of the pilot in command under 14 C.F.R. § 91.3 (1978): "(a) The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft. (b) In an emergency requiring immediate action, the pilot in command may deviate from any rule . . . to the extent required to meet that emergency."
\textsuperscript{95} Rule 16(H), Exception 2(a)(1), supra note 40.
as passengers those persons incapable of caring for themselves without assistance unless accompanied by an attendant. For example, three of the airlines refuse to carry those unable to sit in a seat with the seat belt fastened.

Each carrier has also adopted maximum numbers of non-ambulatory passengers without attendants who will be accepted on any one flight. These vary according to aircraft size and seating configuration. In general, the maximum number of escorted and unescorted non-ambulatory passengers is either the number of floor level exits or the number arrived at by counting the seating rows on the aircraft, minus the number of exit rows, times the number of aisles.

A different portion of the proposed regulations dealt more directly with the safety of the handicapped passenger. Proposed Section 121.571(a)(3) stated that before and after each takeoff "an individual briefing of each [handicapped person] and his attendant, if any, shall be made concerning the procedures to be followed in the event of an emergency evacuation." There were, however, a number of criticisms of this proposal. It was thought that the proposed regulation was not sufficiently specific as to the content of the briefing and that a briefing would be annoying to both passengers and crew at each leg of a long flight on the same airplane.

The regulation which was adopted was therefore clarified to provide that flight attendants should brief handicapped passengers on the proper route to the exits and the time to move, and should inquire as to the most appropriate manner of assisting the person so as to prevent pain and further injury. Further, the adopted regulations state that a person who has been given a briefing on a previous leg of a flight in the same aircraft need not be rebriefed if the flight attendants on duty have been informed of the most appropriate manner of assisting the handicapped passenger.

68 Id.
69 Rule 16(H), Exception 2(a)(ii)(bb)(2) and (ff)(2), supra note 40.
70 Rules 15(A)(2), 16(H) Exception 2(b), supra note 40.
71 Id.
3. In-Flight Procedures

The regulations originally proposed by the FAA were quite specific in indicating the proper seat locations for disabled passengers. They could not sit in the two seats nearest an exit; if they sat in a row adjacent to an exit, they were required to sit in the farthest seat from the exit in that row. The Civil Aeromedical Institute (CAMI), however, was employed to evaluate the proposed regulations. It carried out simulated aircraft evacuations using individuals with actual handicaps, alone and in groups of persons without handicaps. The tests were designed to determine which seat locations should be recommended for the disabled.

The results indicated that the proposed regulations, especially with regard to non-ambulatory persons, would not be appropriate. Due to the variety of design in aircraft interiors, more flexible plans for seating the handicapped were needed. CAMI also examined carrier accident files for the years 1961 to 1976 and found no reference to significant delays in evacuations created by handicapped persons. The seating requirements were therefore eliminated from the regulations as adopted. Most airlines have provided in the tariff rules only that disabled passengers must agree to sit in seats designated by the carrier.

A related issue is the proper position for the seatback once the handicapped passenger is shown to a seat. Before the advent of the newly adopted regulations, Section 121.311 of the Federal Aviation Regulations required all seats to be in an upright position for takeoffs and landings. The FAA, in its proposed regulations, amended the requirement to permit persons who were unable to sit erect for medical reasons to place seats in a reclined position for takeoff and landing so long as the seat back did not obstruct any passenger’s access to the aisle or to any emergency exit. Although one commentator objected to this proposed regulation, the FAA believed that a reclined seat back would not be an obstruction if the disabled person were seated in the last row before a partition, and

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"42 Fed. Reg. 18,392, 18,393 (1977)."
"Rule 16(H), supra note 40."
"14 C.F.R. § 121.311( 1978)."
"42 Fed. Reg. 18,392, 18,393 (1977)."
so the regulation was adopted as proposed. 86

A third proposed regulation relating to the in-flight convenience of handicapped passengers dealt with crutches and canes. The proposed regulations required that these devices be stowed where they would be readily accessible. 87 This proposal received favorable comment, but CAMI research indicated that the use of a crutch or cane in an emergency could lead to delay; handicapped passengers in the simulated evacuations moved faster using seatbacks for support. Also, canes and crutches were found to damage evacuation slides. 88 The proposed regulation, therefore, was eliminated, and canes and crutches will be stowed, pursuant to the existing regulations, in the same way as other carry-on luggage. 89

One final regulation that was adopted is an added requirement for crew members. Their emergency training must now include instructions on the evacuation of persons who may need the assistance of another person to move quickly to an exit. 90 Other than this, the FAA felt it unnecessary to propose changes in emergency evacuation procedure. 91

As an additional guideline for airline crews, the FAA has issued an Advisory Circular 92 based on information gained from the CAMI research and from comments on the proposed regulations. The circular indicates which attitudes of flight attendants have disturbed handicapped passengers in the past. It points out that the average handicapped passenger may need little, if any, assistance and will be able to tell the flight attendant the manner in which he or she can best be helped. The circular also discusses nine different types of disabilities and suggests the most thoughtful and efficient way of assisting persons so affected. 93

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88 42 Fed. Reg. 18,392, 18,394 (1977). Because of vociferous protests from the handicapped, the FAA is reconsidering these rules restricting the use of canes. CAMI will restudy the possible hazards presented by canes, and the FAA will examine the use of folding canes. See 238 Av. Daily 14 (1978).
89 14 C.F.R. § 121.589(a) (1978).
93 The categories are: (1) persons with limited endurance, (2) persons with arms or legs in a cast, (3) persons lacking muscular control, (4) persons with paralysis of arms and/or legs, (5) persons affected by stroke, (6) blind persons,
D. The Civil Aeronautics Board's Reaction

In accordance with the CAB’s earlier decision to issue a tariff rule once the FAA had developed safety standards, the CAB issued a notice of proposed rulemaking on August 9, 1974. This notice proposed the adoption of a regulation that would require that all tariffs applicable to the transportation of physically handicapped persons conform to the forthcoming FAA regulations. The proposal emphasized that no provision of the CAB’s regulations should be construed to permit a carrier to refuse transportation to a handicapped person other than under circumstances governed by the new FAA regulations.

The new FAA regulations, in their final form, were issued on March 25, 1977, to be effective May 16 of the same year. The CAB therefore felt it appropriate to take action on its notice of proposed rulemaking, and adopted its tariff rule exactly as it had been proposed in August of 1974. In so adopting the tariff rule, the CAB set out its understanding of the manner in which the resulting arrangement between the FAA and the CAB will operate. Under FAA rules, the carriers have a duty to provide the FAA with proposed procedures for dealing with handicapped persons, and these procedures will be reviewed to determine their consistency with safety and the public interest. Thus, the regulations and procedures which will ultimately become tariff rules under the primary

(7) deaf persons, (8) elderly persons, and (9) persons who have had laryngectomies. The circular also gives instructions in dealing with guide dogs and lists sources of crew-training information.

89 Id.
90 For certificated air carriers, the rules and regulations relating to the transportation of persons who may need assistance to evacuate the aircraft during an emergency. All such provisions shall be in conformity with Part 121 of the Federal Aviation Regulations (14 C.F.R. Part 121), as amended or revised from time to time: Provided, That no provision of the Board’s regulations issued under this part or elsewhere shall be construed to permit the filing of any tariff rules limiting or conditioning a carrier’s obligation to provide transportation and services in connection therewith upon reasonable request therefor to a person who may require assistance of another person in expeditiously moving to an emergency exit of the aircraft in the event of an evacuation, except as provided for in said Part 121.

The CAB noted, however, that the duty of carriers to provide air transportation on a nondiscriminatory basis is so fundamental that it is not relinquishing its responsibility to suspend any rule that is in violation of the public interest standards of the Federal Aviation Act.97 In fact, the CAB exercised this authority. A number of certificated carriers had proposed amendments to Rules 15 and 16, which control the authority of airlines to refuse to transport passengers, to become effective November 28, 1977.96 The CAB did not approve these regulations as filed, and informed the airline industry that the rules as drawn were "too indefinite and too confusing in their organization to be accepted under CAB regulations"98 since the resulting confusion might lead to misinterpretation and misapplication. It was stressed that the rejection was not to affect the manner in which service is currently provided to handicapped persons, nor did it relieve airlines of the obligation to file an amended tariff.99 In the fall of 1978 the carriers filed their revised regulations, in a somewhat less confusing form. These became effective on November 12, 1978.100

While it did not disapprove the 1962 inter-carrier agreement setting out criteria for the carriage of handicapped persons,97 the CAB did note that many of the agreement's provisions must be reconsidered in light of the newly adopted FAA rules.98 At a minimum, the agreement will have to be amended to reflect the fact that no disabled or handicapped person can be denied transportation on the grounds of disability other than when done in accordance with the newly adopted FAA rules.99 Certain provisions of the agreement, such as the requirement of continued acceptance of an interline passenger who has commenced his journey, are believed by the CAB to be in the public interest and will therefore be preserved.100

93 Rules 15 and 16, supra note 40.
95 Id.
96 Rules 15 and 16, supra note 40.
97 See text accompanying notes 45-46 supra.
99 Id.
100 Id.
A final matter considered by the CAB in its rulemaking process was the fare to be charged for attendants accompanying handicapped passengers and for disabled persons on stretchers. Several commentators argued that requiring handicapped passengers to pay for an attendant required by the airline was unjust and unreasonable. In such cases, they said, free or reduced-rate transportation should be provided. Certain of these commentators also contended that charging multiple fares for carriage of stretcher passengers was unjust.

The CAB met these complaints with two arguments. First, it did not believe the practices to be unreasonable as the handicapped passenger or attendant would merely be paying for the capacity actually used. Second, the CAB contended that offering reduced-rate transportation to attendants would violate the Federal Aviation Act. Section 404 (b) of the Act prohibits carriers from granting any person any undue or unreasonable preference or advantage and from subjecting any person to unjust discrimination. This section has been construed to prohibit preferential rates created to further broad social policies unless those policies are specifically included in the Act. Accordingly, the CAB ruled that the economic needs of the handicapped could not justify a reduced fare as any such reduction would be based solely on the status of the passenger rather than on the cost of transporting him.

In response to this situation, Congress amended the Federal Avi-

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101 The Board, in its advance notice of proposed rulemaking, asked interested persons to answer two questions: (1) "Is the charging of a full fare to an attendant accompanying a disabled person unreasonable or unjustly discriminatory, and if so, what fare or charge should be paid by such attendant?" (2) "Are the current air carrier tariffs, which provide for the charging of multiple fares for a stretcher passenger, unreasonable or unjustly discriminatory, and if so, what fare or charge should be paid by such passengers?" CAB Docket No. 23,904, at 5 n.6 (August 9, 1974).

103 Id.

104 Id.

105 Id.

106 49 U.S.C. § 1374(b) (1976). Ironically, it is this same section which, by prohibiting discrimination, mandates the carriage of the handicapped.

107 Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967).

ation Act to allow reduced-rate transportation "on a space-available basis . . . to any handicapped person." The House Committee on Public Works and Transportation noted that this amendment will remove the presumption of unlawful discrimination and allow the CAB to approve reduced fares for the handicapped if the fares meet the economic tests generally applied to discount fares. The CAB issued a notice of proposed rulemaking to define "handicapped" for the purpose of this statute. The definition proposed, based on the HEW definition adopted for the purpose of the Rehabilitation Act of 1973, included "any person who has a physical or mental impairment (other than drug addiction or alcoholism), which substantially limits one or more major life activities."

Based on the comments it received from air carriers and the handicapped themselves, the CAB modified its proposal slightly before adopting the new regulations. First, because five carriers complained that the breadth of the definition posed formidable administrative difficulties, the CAB will not require airlines who choose to offer reduced rates to the handicapped to adopt the CAB's broad definition. A new provision was therefore added to the regulation: "[A] carrier's rules need not entitle all passengers falling within the Board's definition of handicapped to reduced fares, if the differences between the CAB's definition and the scope of the carrier's rules are reasonably related to the carrier's administrative needs." Second, the CAB clarified the meaning of "required attendant" for reduced fare purposes. Explaining that the

110 See text accompanying notes 105-107 supra.
114 43 Fed. Reg. 8266 (1978) (to be codified in 14 C.F.R. § 223.1). The CAB definition of "handicapped" is very different from the provisions of the FAA safety regulations which determine who may fly and who may not. See text accompanying notes 38-49 supra. The CAB explained that "[t]he rules proposed here are not intended to modify or otherwise affect those safety-related tariff rules, of course, but are rather intended to apply to those handicapped persons who may . . . be safely carried in accordance with the carrier's rules on that subject." Id.
116 Id.
term should be interpreted broadly, the new regulation defines attendant as "any attendant required by a handicapped passenger in order to travel, whether or not the attendant's services are required while the handicapped passenger is in an aircraft." If the airlines choose to avail themselves of these amended provisions, some airfare relief should be available to all handicapped persons.

III. ENFORCEMENT PROBLEMS

The new regulations, if conscientiously enforced, might improve the ability of a handicapped person to secure air transportation. Other regulations for the benefit of the disabled, however, have met with substantial enforcement problems, and the new FAA regulations may share the same fate. One problem is the sheer cost of adaptation and enforcement. HEW, for example, estimates the cost of applying its new guidelines at $2.4 billion by September 1, 1980. Other estimates have run as high as $10 billion. The cost of adapting mass transit equipment such as buses with lifts to make them accessible to the disabled will be more than $6,000 per vehicle. The total estimated capital cost of making airport terminal facilities accessible under the new regulations is $40 million.

Enforcement of most laws protecting the handicapped has proven difficult. Many such laws have administrative remedies which are either bogged down or nonexistent. One federal judge, for example, ruled that a handicapped plaintiff had no cause of action under the Rehabilitation Act of 1973, holding that the administrative procedures specified in the act were intended by Congress to be the exclusive remedy. Yet the Labor Department officials who are to administer the Rehabilitation Act by December of

118 Id.
119 U. S. NEWS & WORLD REP., May 9, 1977, at 84.
120 Id.
121 Dennis Cannon, Special Consultant on Handicapped Matters, Los Angeles Rapid Transit District, quoted in Achtenberg, supra note 39 at 175, n.37.
122 43 Fed. Reg. 25,041 (1978). For a detailed breakdown of these costs see id. at 25,043.
123 See text accompanying notes 124-25 infra.
1976 had disposed of only 904 of the 1,853 discrimination complaints they had received.\textsuperscript{125}

Often the implementing provisions for congressional acts are much delayed. The board which oversees the Architectural Barriers Act of 1968 was not created until 1973,\textsuperscript{126} and the administrative regulations for that act's enforcement were not implemented until June 1, 1977. The rules requiring air terminals to be accessible to the handicapped were not proposed until five years after the Rehabilitation Act on which they were based was passed.\textsuperscript{127}

Another enforcement problem revolves around the scarcity of private rights of action under the Federal Aviation Act. The new FAA regulations were enacted as safety regulations. The Third Circuit recently ruled that no implied private action exists for a violation of FAA safety regulations resulting only in economic injury.\textsuperscript{128} The court concluded that the safety provisions of the Act were intended to protect passengers and crew members and those on the ground who might be endangered by accidents resulting from unsafe aircraft.\textsuperscript{129} It does not seem that this purpose will justify a suit on behalf of a handicapped person who has been denied transportation.

A handicapped plaintiff might fare better under the discrimination section of the Act. First he must exhaust his administrative remedies. One who feels that the Act is being violated may seek an order from the CAB compelling future compliance.\textsuperscript{130} This order, however, will be prospective in nature and will not remedy violations which have already taken place.\textsuperscript{131} If the CAB's order is unsatisfactory, a handicapped passenger may seek review in a federal court of appeals.\textsuperscript{132} Failure to enforce the discrimination provisions of the Act results in preference of one class of passengers to the

\textsuperscript{125} Kellogg and McGee, \textit{supra} note 1, at 74. These figures reflect the situation in December of 1976.

\textsuperscript{126} Id.

\textsuperscript{127} See text accompanying notes 16-20 \textit{supra}.


\textsuperscript{129} 548 F.2d at 458.

\textsuperscript{130} 49 U.S.C. § 1482(a) and (c) (1976).

\textsuperscript{131} Id.

prejudice of others, and it thus harms the travelling public. A person seeking review of the action of the CAB in allowing discriminatory refusal to transport, therefore, would be acting in the interest of the public and for the protection of a public right. This public interest has been held to give standing to challenge discriminatory treatment in transportation, and it is possible, under this rationale, that an organization created to benefit the handicapped might also have standing to challenge discriminatory denial of transportation.

Even if standing to sue is granted, another barrier remains to private enforcement of the new regulations: the cost of litigation. It costs, for example, from $10,000 to $20,000 in attorney time alone to research and bring a major mass transit case as far as the demurrer stage. Airline cases would require similar expenditures due to the novelty of the legal issues and the need for multiple expert witnesses in the fields of medicine, engineering, and aviation. The cost barrier becomes even more insurmountable when the handicapped person also has a low income. This is often the case, as many of the disabled are underemployed (ironically, this is often due in part to transportation difficulties).

It is unlikely that this problem will be alleviated through court-awarded attorneys' fees. The Supreme Court has ruled that under the "American rule" the prevailing party may recover attorneys' fees only against a party who has acted in bad faith or where such a recovery would spread the cost to those persons benefitting from the suit. Otherwise, attorneys' fees are to be awarded only where Congress has made specific and explicit provisions for them.

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183 Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466, 475 (5th Cir. 1967).
184 Id.
186 This is figured at the modest rate of $30 per hour. See Achtenberg, supra note 39, at 204 n.154.
187 Id. at 176 n.39. Whereas 71% of the non-handicapped between the ages of 17 and 64 have jobs, only 36% of the handicapped of that age group are employed.
189 Id. at 260.
Court specifically rejected arguments that allowance of fees would deter future violations; it also refused to award fees where the plaintiffs had acted as "private attorneys general" to promote adherence to the law in question.\textsuperscript{140} Even associations representing the handicapped are therefore unlikely to be able to recover attorneys' fees from a defendant shown to discriminate against the handicapped.\textsuperscript{141}

IV. Alternatives: A Constitutional Right?

At one time, legal theorists speculated that, even absent regulations such as those just issued by the FAA, the handicapped could look to the equal protection clause of the fourteenth amendment\textsuperscript{142} to protect themselves against government-sanctioned discrimination.\textsuperscript{143} Recent Supreme Court decisions, however, make it unlikely that the handicapped would succeed in a challenge based on this provision. Equal protection analysis comes into play when some activity involving state action uses a classification; it involves a comparison of whether the state can lawfully do one thing and not another. Ordinarily, the command of equal protection is only that the government must not impose differences in treatment "except upon some reasonable differentiation fairly related to the object of regulation."\textsuperscript{144} This rational relationship requirement is satisfied fairly readily: the courts do not demand a close fit between classification and purpose.\textsuperscript{145}

In addition, there are two circumstances in which a stricter standard is applied. The first, and most universally accepted, is usually

\textsuperscript{140} Id. The only possibility of a change in this area would be for Congress to make a specific provision for the award of attorney fees. After the Alyeska decision, for example, Congress passed a law allowing the recovery of attorney fees in tax litigation where the taxpayer has been harassed by the Internal Revenue Service, and for certain suits under the Civil Rights Acts. 42 U.S.C. § 1988 (Supp. 1977). In 1978, Congress amended the Rehabilitation Act to add a section allowing attorney fees in suits brought under 29 U.S.C. §§ 793 and 794. Act of Nov. 6, 1978, Pub. L. No. 95-602, 92 Stat. 2955 (to be codified in 29 U.S.C. § 795).


\textsuperscript{142} U.S. Const. art. XIV.

\textsuperscript{143} See Note, Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled, 61 Geo. L. J. 1501 (1973) [hereinafter cited as Note].


\textsuperscript{145} G. Gunther, Constitutional Law 657 (9th ed. 1975).
referred to as the "suspect classification." The justification for more demanding analyses in these cases stems from Chief Justice Stone's opinion in *United States v. Carolene Products Company* which stated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial inquiry." Traditionally, the classifications treated as deserving of intensified scrutiny have been those based on race, national origin, "alienage," and, to a lesser degree, illegitimacy and gender.

Some writers have suggested that a classification which distinguishes handicapped from non-handicapped individuals should likewise be suspect. They argue that the handicapped as a group are saddled with such disabilities, subjected to a history of such purposeful discrimination, and relegated to a position of such political weakness as to require special protection. The stigma of inferiority, which has proven so important in some race cases, is also present in the situation of the disabled. Another similarity stems from the fact that the basis of discrimination (the handicap) is often an unalterable trait. The Supreme Court, however, has not accepted this argument and it is unlikely that it will do so. Recent opinions seem to have adopted a "this much but no further" approach to equal protection and have refused to expand the boundaries of the suspect classification strand of analysis.

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146 *304 U.S. 144* (1938).
147 *Id.* at 152 n.4.
153 *Kriegel, supra* note 46.
156 The importance of this factor was suggested in such cases as *Sugarman v. Dougall*, 413 U.S. 631, 650 (1973) (Rehnquist, J., dissenting).
The second group of cases in which a heightened degree of scrutiny is applied involve classifications which impinge on fundamental rights and interests. Of greatest importance to the rights of handicapped travellers is the line of cases which has held the right to interstate travel and the right to use instrumentalities of interstate commerce to be fundamental under the Constitution. The Court has not ascribed the source of this right to a particular constitutional provision; it is felt to be part of the very nature and structure of the federal union.

In the past, the Court has applied strict scrutiny to laws which infringe this right to travel. If this mode of analysis is used, the government would have to show a compelling interest in the enforcement of its restrictions on the handicapped's right to travel. Lately, however, the emphasis of the Court's analysis has been changing from this absolutist approach. It now appears that the majority uses a kind of balancing test, under which the state's interest in the restriction is balanced against the individual interests of those whose right to travel is infringed. This standard lowers the burden somewhat for the public transportation company which excludes the handicapped and makes a successful challenge by the disabled would-be traveller more difficult. In any case, the equal protection approach can only be implemented where the exclusion is done by publicly-owned companies or by private companies with such significant ties to government that their activities constitute state action.


In Snowden v. Birmingham-Jefferson County Transit Auth., 407 F. Supp. 394 (N.D. Ala. 1975), aff'd without opinion, 551 F.2d 862 (5th Cir. 1977), the court rejected out of hand any equal protection claim based on the right to travel. "Plaintiff cannot credibly maintain that access to public transportation facilities is a 'fundamental right' . . . ." Id. at 398. The court therefore applied the "rational basis" test and upheld the city's refusal to provide bus transportation for those in wheel chairs.

V. Conclusion

Statutory and constitutional law offer only limited protection for the rights of the handicapped. The newly adopted FAA regulations are a case in point. Part of the difficulty lies in the rulemaking process itself. It took almost six years from the time of the CAB's original notice of intent to issue rules for the final regulations to become effective. In addition, the requirement that the handicapped be carried was watered down in the progression from proposed to final regulations.163

When the regulations were issued, compliance did not follow "as the day the night." Even in the face of a CAB directive that the tariff rules filed with it could restrict transportation of the handicapped only in conformance with FAA safety rules,164 some airlines tried to impose additional limitations on the carriage of disabled passengers. Some carriers, for example, have announced that they will refuse transportation to anyone who cannot occupy a cabin seat in an upright position,165 despite the fact that the FAA specifically rejected this requirement.166

Should the regulation tangle be straightened out, enforcement problems may easily arise. First, there may be a problem establishing the existence of a private right of action under the regulations.167 Second, the new regulations, like other laws aimed at the handicapped, may be interpreted as "symbolic laws."168 These laws are sometimes said merely to declare national policy or to set out administrative guidelines rather than to provide a private remedy.169

Because of such constructions, litigation under the laws for the handicapped has proven difficult. Even when they get past the de-

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165 Rule 16(H), Exception 2(a)(ii)(aa), supra note 40.


167 See text accompanying notes 128-33 supra.

168 Achtenberg, supra note 39, at 161-62.

murrer stage, cases such as those in which the plaintiff seeks access to mass transit systems have not fared particularly well. A Washington judge held that it was neither a violation of Washington's state anti-discrimination law nor of the federal Constitution to fail to provide mass transit facilities for the disabled. 170 A federal district court in Alabama ruled that the Urban Mass Transit Act did not require installation of facilities for those in wheelchairs, provided that some effort had been made by the transit authority to make it easier on the walking disabled. In response to an equal protection argument, the court found no unconstitutional deprivation and discrimination provided the plaintiffs were not prohibited from riding on the bus. 171 It concluded, rather, that any lack of equal access came from the transit authority's failure to affirmatively provide vehicles designed for the disabled and that such affirmative action was not required. 172

What protection, then, is left for the handicapped? Little remains besides a moral imperative to recognize the rights of the handicapped as human beings. If laws are to be interpreted as mere expressions of national policy, at least the policy exists. Although some airlines may seek to restrict air travel opportunities as much as possible, others may accept the challenge to develop their duty to serve the public in this new context. Some have already done so. The CAB may seriously enforce its announced policy that no discrimination based on handicap alone will be permitted in airline tariffs. Most important, the handicapped themselves are becoming an increasingly vocal and cohesive minority. The disabled are refusing the invisibility thrust over them by a society made uncomfortable by their presence and are demanding the simple right to move from place to place, an essential element of personal liberty. 173 It is to be hoped, then, that interpretation and enforcement of the new FAA and CAB regulations will be such as to further rather than to frustrate that search for freedom.

170 Martin v. Seattle King County Metropolitan Transit Comm'n, No. 795,806 (Wash. Super. Ct., King County, filed June 30, 1975).


172 Id.

173 W. BLACKSTONE, COMMENTARIES 231 (Jones ed. 1916).