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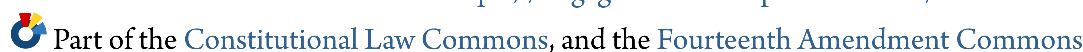
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STATE CONSTITUTIONAL PROTECTION OF CHILDREN WITH AIDS AND THE RIGHT TO A PUBLIC EDUCATION

JEFFREY M. CROASDELL[1]

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I. INTRODUCTION

As the number of people diagnosed with Acquired Immunological Deficiency Syndrome (hereinafter AIDS) increases, so increases the potential conflicts between those who have the disease and those who do not. One conflict that has been prevalent during the last seven to ten years is the dispute over whether to allow children with AIDS to attend public school in an unrestricted setting. Few doubt the importance of education in America, but

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many believe that education is secondary to the interests of public safety.[2] Should schools allow the risk of the possible transmission of AIDS from one child to another by allowing AIDS-inflicted students to learn in an unrestricted setting?

There have been several federal and state cases that have addressed this problem and have, for the most part, required schools to allow students with AIDS to attend in an unrestricted setting.[3] The analysis in these cases is troubling, however, because the courts have based their rulings on statutes or on weak federal equal protection grounds.[4] The right to free education seems tenuously balanced against the will of the legislature. To strengthen the rights of children with AIDS, courts must use different, more stable, bases to support their legal analysis. The best support can be found in state constitutions. Every state in the United States has a provision in its constitution that calls for the protection of the right to education.[5] Courts can use these provisions to enforce the right of children with AIDS to a free public education.

The purpose of this article is to examine the problem that the American public school system is facing with respect to children with AIDS. In addition, this paper will examine how the courts are analyzing this issue and show why the current trend of analysis is weaker than it should be. Finally, this paper will look at how state constitutions are more frequently being used to protect individual rights and how the state constitutions could be used to protect the right of children with AIDS to free public education.

II. THE PROBLEM

A. AIDS in General

In 1981, the Center for Disease Control (hereinafter CDC) reported the first known cases of AIDS.[6] In its report, the CDC noted several cases in which previously healthy homosexual men became inflicted with pneumonia or

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[2]Certainly in some cases the interests of public safety definitely would outweigh the importance of education, especially in cases in which allowing the child into the school system would cause certain death to other children. The problem that arises around children with AIDS, however, is that these children are banned from school because of medically unsubstantiated fears, implying that the supposed interest in public safety is, for the most part, irrational.

[3]*See, e.g.,* Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 381-82 (C.D. Cal. 1987); District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325, 335-37 (N.Y. Sup. Ct. 1986).

[4]*See, e.g., Thomas*, 662 F. Supp. at 381-82 (holding that child with AIDS fell within protection of Section 504 of the Rehabilitation Act of 1973); *District 27*, 502 N.Y.S.2d at 337-38 (applying equal protection clause and finding no rational basis for exclusion of children who are known carriers of AIDS).

[5]*See infra* note 104.

[6]*See* Anthony S. Fauci, *The Acquired Immunodeficiency Syndrome: An Update*, 102 ANNALS INTERNAL MED. 800 (1985).

Kaposi's sarcoma, a rare skin cancer.[7] Since that time, the reported number of cases has skyrocketed; in 1993 alone, health departments reported 103,500 cases of AIDS in persons ages 13 or older.[8]

The term AIDS is somewhat of a misnomer because it actually encompasses several stages and deficiencies.[9] Under any name, the disease is deadly because it invades healthy cells, reproduces itself, and destroys the host cell.[10] Without the healthy host cells, the immune system becomes dysfunctional making even the commonest of colds life threatening.[11]

AIDS victims are typically classified into three different categories based upon the stage of the disease and the symptoms.[12] Those individuals with fully developed AIDS test HIV-positive and are inflicted with one or more of the diseases that typically cause AIDS-related deaths.[13] In addition, these individuals have multiple symptoms and severely impaired bodies.[14] Individuals with AIDS Related Complex (hereinafter ARC) are those who test HIV-positive but who manifest less severe signs and symptoms of AIDS (such as weight loss, chronic diarrhea, and lack of energy).[15] Finally, individuals with a seropositive infection test HIV-positive but have no symptoms of AIDS. These individuals are not considered truly to have AIDS because their bodies have not been attacked by any of the opportunistic diseases like Kaposi's sarcoma.[16]

B. Children and AIDS

Although the percentage of children who fall into any of the three defining categories is relatively small when compared to that number of persons

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[7] *Id.*

[8] Center for Disease Control, *Update: Impact of the Expanded AIDS Surveillance Case Definition for Adolescents and Adults on Case Reporting-United States, 1993*, 13 JAMA 975 (1994).

[9] *See* Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 379 (C.D. Cal. 1987) (noting that the term AIDS encompassed the terms Human T-Lymphotropic Virus Type III (HTLV-III), Lymphodenopathy Associated Virus (LAV), and AIDS Associated Retrovirus (ARV)). Other commentators include within the definition of AIDS the Human Immunodeficiency Virus (HIV). *See* Gretchen Martin, *HIV/AIDS and Adolescents: Implications for School Policies*, 20 J.L. & EDUC. 325, 327 (1991).

[10] *See* Edna R. Vincent, *Children with AIDS: Protecting Their Rights in the Classroom Through the Arline Decision and Department of Education Enforcement of the Rehabilitation Act of 1973*, 2 ADMIN. L.J. 391, 396 (1988).

[11] *Id.*

[12] *See id.*; Maureen Ann MacFarlane, *Equal Opportunities: Protecting the Rights of AIDS-Linked Children in the Classroom*, 14 AM. J.L. & MED. 377, 380 (1989).

[13] Vincent, *supra* note 10, at 396.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 397.

actually infected with the virus,[17] the number of persons under the age of nineteen who have contracted the disease is astonishing.[18] As of 1993 more than 4,000 children (ages under thirteen) and 1,000 adolescents (ages thirteen to nineteen) have been diagnosed with AIDS and at least 10,000 more children have been infected with the HIV virus.[19] Experts assert that for every reported case of a child with AIDS, three to five more cases will go unreported.[20]

With these statistics in mind, it is not hard to imagine the nightmare that school administrators have to go through in trying to deal with the problem. For every child with AIDS, there is a school system that has to try to accommodate him or her. What is probably worse, however, is that for every school system that tries to accommodate children with AIDS, there are numerous parents and interest groups who, out of fear for their children's safety, would pull their children from the system rather than run the risk of their children contracting the AIDS virus.

Parental and societal fears[21] spark the debate over what to do with the children who have been inflicted with the virus. On one side, parents and society fear that their healthy children will become infected. The state has a police power/public health duty to protect these parents' interests. On the other side, children with AIDS have a right and a need to be educated in the least restrictive setting possible. The state has a duty to make sure the children's interests are protected.

At the end of the debate the school administrators are basically left with three options.[22] The most drastic measure is to ban children with AIDS from

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[17]*See* Myra S. Chickering, *AIDS in the Classroom: A New Perspective on Educating School-Age Children Infected with HIV*, 9 REV. LITIG. 149, 155 (1990).

[18]Some scientists have projected that there are as many as 10,000 to 20,000 cases of children with AIDS in the United States. *See* Susan A. Winchell, *Discrimination in the Public Schools: Dick and Jane Have AIDS*, 29 WM. & MARY L. REV. 881, 881 (1988).

[19]Russell B. Van Dyke, *Pediatric Human Immunodeficiency Virus Infection and the Acquired Immunodeficiency Syndrome: A Progress Report*, AM. J. DISEASES CHILDREN, May 1993, at 524.

[20]Chickering, *supra* note 17, at 155.

[21]One commentator has stated that "[m]uch of the fear and differential treatment surrounding AIDS is grounded on misinformation concerning how the disease is transmitted." Vincent, *supra* note 10, at 393. Another commentator pointed out that a recent poll showed that over one-half of the American public believes AIDS can be transmitted through casual contact, despite strong medical evidence to the contrary. Lisa J. Sotto, Comment, *Undoing a Lesson of Fear in the Classroom: The Legal Recourse of AIDS-Linked Children*, 135 U. PA. L. REV. 193, 193 (1986). In Queens, New York, concerned parents did in fact keep their children away from the public schools in protest of the New York public school's policy of admitting children with AIDS. *See* Faye A. Silas, *Is School For All?*, 71 A.B.A.J. 18 (Nov. 1985).

[22]Martin, *supra* note 9, at 332.

attending school.[23] These children are forced to study at home or find another school that will allow them to attend—either way the children are left feeling ostracized and unwanted. Another option would be to allow the children to attend public school but quarantine them rather than admitting them into classes with other children.[24] Again, however, the children are unfairly punished because of society's irrational fear that the disease can be spread through casual contact. The last option would be to admit the children into the classroom setting with only minimal restrictions. This would allow the children to become educated in the same setting as other children and would not compromise the school's need to protect the health of other students.

So which option should schools choose? Obviously, the third option is the best for both the children and the school for the reasons stated above. Yet, many schools choose to ban children with any form of AIDS from the public school system.[25] Children and parents are then forced to bring legal action against the school system to force the school system to allow the children to attend in an unrestricted setting.

III. CURRENT SOLUTIONS AND THEIR PROBLEMS

Parents and children who have sued to get back into the school system have based their actions on various statutory and constitutional grounds. The most common and most successful basis for attack has been Section 504 of the Rehabilitation Act of 1973.[26] Many courts have used this Act to prevent schools from banning children with AIDS from school.[27] Other children have based their actions on the Education for All Handicapped Children Act of 1976.[28] Finally, some of those who have brought actions under the Fourteenth Amendment as a way of enforcing their right to an education.[29] This section

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[23]Several schools districts chose this option in the mid-1980s. The choice to ban children ultimately ended up in the courtroom. *See* Vincent, *supra* note 10, at 398.

[24]One court ordered a school system to admit a child with AIDS into a normal classroom because otherwise the child would experience irreparable harm if the school continued to keep him in a separate classroom in which he was the only student. *See* Robertson v. Granite City Community Unit Sch. Dist., 684 F. Supp. 1002, 1005-07 (S.D. Ill. 1988); *see also* Carolyn J. Kasler, *Reading, Writing, But No Biting: Isolating School Children with Aids*, 37 CLEV. ST. L. REV. 337, 347 (1989) (explaining the problems associated with quarantining AIDS victims).

[25]*See, e.g.*, Frederick A.O. Schwarz, Jr. & Frederick P. Shaffer, *AIDS in the Classroom*, 14 HOFSTRA L. REV. 163, 165-66 (1985) (two school boards in Queens, New York passed regulations banning children with AIDS from the school system).

[26]29 U.S.C. § 794 (1988).

[27]*See, e.g.*, Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 381-83 (C.D. Cal. 1987); District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325, 335-37 (N.Y. Sup. Ct. 1986).

[28]20 U.S.C. § 1412 (1988).

[29]*See, e.g.*, *District 27*, 502 N.Y.S.2d at 337-38.

will attempt to set out the basic arguments for each of these and show why these arguments may not stand the test of time.

A. Section 504 of the Rehabilitation Act of 1973

The most successful argument that children with AIDS have relied on to preclude states from banning them from school is based upon Section 504 of the Rehabilitation Act of 1973.[30] This section reads:

> No otherwise qualified individual with handicaps . . . 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.[31]

Although the Act originally pertained only to employment, courts have used it to protect the rights of children with AIDS.[32]

The principle behind Section 504 is that if a person is a "handicapped individual," then that person is entitled to federal protection. The seminal case defining "handicapped individual" is *School Board of Nassau County v. Arline*.[33] In *Arline*, the United States Supreme Court addressed the issue whether a teacher who had been diagnosed with tuberculosis was a "handicapped individual" within the meaning of the Act.[34] The Court analyzed regulations promulgated by the Department of Health and Human Services and approved by Congress.[35] The regulations defined "handicapped individual" as a person with a physical impairment that substantially affects one or more of life's major activities.[36]

The school board in *Arline* argued that contagious diseases do not fall within the Section 504 definition of handicap. The Court rejected this argument and stated:

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[30] 29 U.S.C. § 794 (1988 & Supp. IV 1992); *see* Beth A. Krusen, *AIDS in the Classroom: Room for Reason Amidst Paranoia*, 91 DICK. L. REV. 1055, 1063-64 (1987).

[31] 29 U.S.C. § 794 (1988 & Supp. IV 1992).

[32] *See, e.g.*, *District 27*, 502 N.Y.S.2d at 335-37.

[33] 480 U.S. 273 (1987).

[34] *Id.* at 275.

[35] *Id.* at 279-80.

[36] 45 C.F.R. § 84.3(j)(2) (1993). The regulations define "physical impairment" as "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, genito-urinary; hemic and lymphatic; skin; and endocrine." *Id.* § 84.3(j)(2)(i)(A). "Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 84.3(j)(2)(ii).

> Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of section 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.[37]

As a basis for this statement, the Court also explained that the possibility of contagiousness gives rise to "public fear and misapprehension" and that the Act was designed to "replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments."[38]

Many courts have used this language to strike down bans that prohibit children with AIDS from attending school in a normal setting.[39] Basically, the courts have held that children with AIDS meet the two-factor criteria of "handicapped individual" as defined by the Rehabilitation Act.[40] To be classified as a handicapped individual under this definition, one must have (1) a physical impairment that substantially limits one or more of a person's major life activities and (2) have a record of such an impairment, or be regarded as having such an impairment.[41]

The courts have held that individuals who are HIV-positive are "physically impaired" within the meaning of the Act because the AIDS virus will eventually strike at the lymphatic and hematic systems.[42] Those individuals who are categorized as having fully developed AIDS also have difficulties with their respiratory and neurological systems.[43] Once a person reaches a certain stage in the AIDS virus, the person will have difficulty breathing, walking, seeing, etc., implying that the AIDS virus will eventually substantially limit one or more of the person's major life activities.[44] Thus, the first requirement of the Act is met.[45]

The *Arline* Court stated that the second requirement of having a record of impairment is met if a person is hospitalized for his or her disease.[46]

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37 *Arline,* 480 U.S. at 284-85.

38 *Id.*

39 *See, e.g.,* Thomas v. Atascadero Sch. Dist., 662 F. Supp. 376, 381-83 (C.D. Cal. 1987); *District 27,* 502 N.Y.S.2d at 336-38.

40 29 U.S.C. § 706(8)(b) (1988 & Supp. IV 1992).

41 *Id.*

42 *See, e.g., District 27,* 502 N.Y.S.2d at 336 (stating that person with AIDS has "physical impairment" because disease destroys lymphocytes); *see also* Vincent, *supra* note 10, at 407.

43 Vincent, *supra* note 10, at 408.

44 *Id.* at 409. For a definition of "major life activities" see *supra* note 36.

45 Vincent, *supra* note 10, at 407-08.

46 *Arline,* 480 U.S. at 281. In *Arline,* the petitioner had been hospitalized for tuberculosis at one point in her life so she had a record of impairment. *Id.*

Commentators have extended the Court's statement to all medical treatment indicating that if a person can establish that he or she has sought medical treatment for AIDS, then that person has a record of impairment.[47] The analogy need not be extended for people who have fully developed AIDS because they are often hospitalized and would fit within the *Arline* definition. The analogy is intended to benefit those who have ARC or who are seropositive. Even if the analogy is not extended, some commentators argue that individuals who have ARC or are seropositive are "regarded as" having the disease because they are discriminated against and deserve the protection of the Act.[48]

There are several problems with extending Section 504 of the Rehabilitation Act to include children with AIDS. Perhaps the most obvious problem is that the *Arline* Court expressly refused to address the question whether AIDS carriers were protected by Section 504.[49] The Court could have made a broad ruling that would allow the lower courts to justify the analogy between tuberculosis and AIDS, but it chose not to do so.[50] One possible reason for this is that most contagious diseases are treatable, whereas AIDS is not.[51] The potential of harm and death that accompany AIDS, and its current incurability, distinguishes it from other contagious diseases. Therefore, even if *Arline* can be extended to many contagious diseases, arguably it does apply to AIDS.

Another problem with using Section 504 as a basis to protect the rights of children with AIDS is that the United States Congress has either refused or neglected to amend the Act to include those diseases that directly affect the immune system. Congress recently passed the Americans with Disability Act (hereinafter ADA) and used Section 504 as its standard for defining "disability".[52] Congress did not change the definition found in Section 504 to include individuals with incurable contagious diseases. This easily could be construed as legislative intent to exclude persons with AIDS from the definition. Given that the ADA was meant to give similar protection as Section

[47] Vincent, *supra* note 10, at 411.

[48] *See* Chickering, *supra* note 17, at 167; Vincent, *supra* note 10, at 411; MacFarlane, *supra* note 12, at 394-95.

[49] *Arline,* 480 U.S. at 282 n.7.

[50] In an amicus brief the United States argued that Section 504 would not protect individuals who merely carried a contagious disease such as AIDS. *Id.* The Court, however, refused to address the contention that "discrimination solely on the basis of contagiousness is never discrimination on the basis of a handicap" because the plaintiff in *Arline* suffered from both contagiousness and physical impairment. *Id.* In doing so, the Court chose not to make a broad ruling that would cover all individuals with AIDS, including those that are HIV positive but show no physical symptoms.

[51] *See* Kasler, *supra* note 24, at 355.

[52] *See* Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview,* 22 N.M. L. REV. 13, 18 (1992).

504,[53] Congress should have included AIDS as a handicap within its definition if it wanted persons with AIDS to be covered.

Finally, all categories of persons with AIDS do not appear to fit the basic criteria of "handicapped individuals" as defined by the Rehabilitation Act. Most would agree that children with fully developed AIDS would fall within the scope of the Act, but these individuals probably are not "otherwise qualified"[54] to attend school because they require constant supervision and medical treatment. In contrast, children who are categorized as having ARC or who are seropositive may be well qualified to attend school in a normal unrestricted setting, but are these individuals handicapped within the meaning of the Act? Medical evidence shows that many individuals who test HIV-positive are only carriers and may never reach the fully-developed stage.[55] Arguably, these individuals are not handicapped because they will never have the typical "physical impairments" that are associated with the AIDS virus and are not protected by the Act. These individuals, however, are discriminated against because they are HIV-positive.

Thus, unless the Supreme Court expressly extends the holding in *Arline* to cover AIDS as a contagious disease, or until the U.S. Congress amends the definition of "handicapped individual" in the Rehabilitation Act, Section 504 cannot be used as a faultless basis to protect the rights of children with AIDS. Other bases must be examined.

B. *The Education for All Handicapped Children Act*

Another statute that has been used to secure the right of children with AIDS to a public education in an unrestricted setting is the Education for All Handicapped Children Act (hereinafter EAHCA).[56] Similar to Section 504, the EAHCA will only protect those individuals who fall within the Act's definition

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[53] *Id.* at 104.

[54] Vincent, *supra* note 10, at 412 (setting out standard for "otherwise qualified").

[55] The *Arline* Court stated in a footnote that it would not address the question whether a carrier fell within the meaning of the Act. *Arline,* 480 U.S. at 282 n.7. The Court distinguished the petitioner because she was both a carrier and had been physically impaired within the meaning of the Act for several years. *Id.* at 276-77, 281-82.

[56] 20 U.S.C. § 1412(3)[5] (1988). The statute states:

> In order to qualify for assistance . . . a State shall demonstrate . . . that it has established . . . procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes . . . cannot be achieved satisfactorily . . . .

Id.

of "handicapped".[57] As will be shown, the definition of "handicapped" within the EAHCA is more restrictive than its counterpart in Section 504.[58]

The primary purpose of the EAHCA is to insure that all children with disabilities receive "a free, appropriate public education which emphasizes special education and related services designated to meet their unique needs."[59] This purpose is to be accomplished through the extension of federal grants to state education departments.[60] The Supreme Court has interpreted this purpose as meaning that all states which participate in EAHCA programs must provide free access to a "basic floor of opportunity" education, but not necessarily access to the "best" educational program.[61]

To fall within the EAHCA's definition of handicapped, a child must be

> mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or having specific learning disabilities, who because of those impairments need special education and related services.[62]

The EAHCA defines "other health impaired" as

> having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.[63]

Applying these definitions to children with AIDS, some commentators argue that children with AIDS are "other health impaired" because the AIDS virus, as an acute health problem, can lead to a loss of strength and vitality.[64] This application, however, calls for a broad reading of the EAHCA that courts have not readily accepted.[65]

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[57] *See* District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325, 339 (N.Y. Sup. Ct. 1986) ("The pivotal question [under the EAHCA] is whether a child diagnosed as having AIDS would fall within the definition of a 'handicapped individual'."); Krusen, *supra* note 30, at 1079-80.

[58] *See* Krusen, *supra* note 30, at 1080.

[59] 20 U.S.C. § 1400(c) (1988).

[60] *Id.* § 1400(b)(8).

[61] *See* Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200-210 (1982).

[62] 34 C.F.R. § 300.5(a) (1991).

[63] *Id.* § 300.5(b)(7)(ii).

[64] Leslie N. Brockman, *Enforcing the Right to a Public Education for Children Afflicted with AIDS*, 36 EMORY L.J. 603, 632 (1987).

[65] *See, e.g., District 27*, 502 N.Y.S.2d at 339 (stating that while children with AIDS may become handicapped under EAHCA as their physical condition deteriorates, fact that

In *District 27 Community School Board v. Board of Education,*[66] a New York Superior Court addressed the issue whether the EAHCA protected all children with AIDS. The court recognized that the EAHCA's definition of handicapped was more restrictive than Section 504's definition because the purpose of the EAHCA is not to help all children but only those children with special needs.[67] Given this, the court held that while children may be covered by the EAHCA if they suffer from the disabling effects of the AIDS virus, children who are seropositive and do not display symptoms of the disease will not be protected by the EAHCA.[68]

The *District 27* decision is a good example of why the EAHCA is not the best method to be used to protect the rights of children with AIDS. The main problem with the EAHCA is that it limits itself to those children who are physically or mentally disabled as a result of the disease. Typically, however, if the children are physically or mentally disabled, the school system will be more justified in separating them from the normal classroom setting because they require extra assistance.[69]

Another reason why the EAHCA is not the best method of attack is because the administrative decisionmaking process associated with the Act is both tedious and time-consuming.[70] Generally, once a child has been diagnosed as having fully-developed AIDS, that child has less than two years to live.[71] Two years is not that long when one considers that litigants must start out in a board of education hearing, exhaust their administrative remedies, appeal to a district court, then work the case through the appellate system.[72] In addition, the

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person is carrier is not enough to bring child within definition of "handicapped" under EAHCA).

[66]502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986).

[67]*Id.* at 338.

[68]*Id.* at 339; Krusen, *supra* note 30, at 1080.

[69]The Center for Disease Control established a set of guidelines to help school systems make decisions regarding the placement of children with AIDS. The CDC said that all children should be admitted into the school systems unless the children lack control over bodily secretions, exhibit aggressive behavior such as biting, or have open skin sores that cannot be covered. *See* Center for Disease Control, *Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/ Lymphadenopathy-Associated Virus,* 254 JAMA 1430, 1434 (1985). Those children who are physically or mentally disabled will typically fall within one or more of the CDC's exception categories. Therefore, these children may be restricted from the normal classroom setting.

[70]Maureen M. Murphy, *Special Education Children with HIV Infection: Standards and Strategies for Admission to the Classroom,* 19 J.L. & EDUC. 345, 359 (1990).

[71]*Id.*

[72]One must recognize that all litigious methods of enforcing rights are time-consuming, but the EAHCA is particularly slow given that it only protects those children with AIDS that are already almost dead from the disease.

EAHCA has a "stay put" provision stating that the child challenging the school's placement must remain in the education program that the school chooses until the child proves that the program violates his right to a free public education.[73] Even though a court may find that the child's right to an education under the EAHCA was violated, this decision would come after years of litigation during which the child's right would be continually inhibited.[74] Therefore, the EAHCA does not provide the full protection that children with AIDS need because it is limited to those children who have special needs and because the enforcement process is so time-consuming with the burden of proof on the child.

C. *The Equal Protection Clause of the Fourteenth Amendment*

A third method that has been used to challenge the exclusion of children with AIDS from the normal classroom setting is the Equal Protection Clause of the Fourteenth Amendment.[75] This challenge has been brought in one of two forms: either the petitioner argues that his fundamental right to an education has been infringed or the petitioner argues that she has been discriminated against on the basis of her disability in violation of the U.S. Constitution.[76]

If a petitioner challenges a school's placement on the grounds that it violates his fundamental right to an education, he must show that this right is protected by the U.S. Constitution. The Supreme Court, however, has been somewhat schizophrenic in its evaluation of the importance of education. In *Brown v. Board of Education*,[77] the Court stated, "[E]ducation is perhaps the most important function of state and local government."[78] Yet, in *San Antonio Independent School District v. Rodriguez*,[79] the Court refused to find that the right to an education

[73] 20 U.S.C. § 1415(e)(3) (1988).

[74] *See, e.g.*, Martinez v. School Bd. of Hillsborough County, 861 F.2d 1502, 1503-04 (11th Cir. 1988). In *Martinez*, a seven-year-old mentally retarded girl who was diagnosed as having ARC spent nearly two years battling in the courts for her rights. *Id.* Even after those two years, the Eleventh Circuit Court of Appeals did not make a ruling on whether the EAHCA required the school system to place the girl in an unrestricted setting. *Id.* at 1506-07.

[75] U.S. CONST. amend. XIV, § 1.

[76] *See, e.g.*, Ray v. School Dist., 666 F. Supp. 1524, 1525-26 (M.D. Fal. 1987) (stating that complaint alleged deprivation of right to education and deprivation of equal protection and due process rights because of discrimination on basis of handicap).

[77] 347 U.S. 483 (1954).

[78] *Id.* at 493.

[79] 411 U.S. 1 (1973).

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is a fundamental right protected by the U.S. Constitution.[80] Given the Court's ruling in *Rodriguez*, a petitioner is forced to find another basis for protection.

Many commentators have suggested that the Court should use a *Plyler v. Doe*[81] type of analysis when examining the exclusion of children with AIDS from the classroom.[82] In *Plyler*, the Court applied intermediate scrutiny[83] and held that children of illegal aliens could not be barred from attending public school.[84] The primary basis for the Court's rationale was that it did not want to punish the children for the misdeeds of the parents.[85]

Applying this rationale to children with AIDS, one could argue that children who have AIDS are victims of someone else's misdeed. If either the parents of the child have AIDS or the child contracted AIDS through tainted blood, then the child had nothing to do with his or her condition, much like the children of illegal aliens who had no control over their status or the status of their parents. Thus, because most children with AIDS are not responsible for their condition and because of the importance of education, the Equal Protection Clause should prevent these children from being excluded from the public school system.

The problem with applying *Plyler* to children with AIDS is two-fold. First, the Supreme Court has almost expressly stated that *Plyler* is limited to its facts.[86] Thus, it would be very difficult to extend the holding to this scenario. Second, discrimination against children with AIDS has more of a rational basis than discrimination against children of illegal aliens. School systems are faced with a public health/safety concern when assessing whether to allow a child with AIDS into the classroom. Officials do not have the same concerns when attempting to exclude the children of illegal aliens. Thus, even if *Plyler* can be extended, there is a good chance that the Court would find that the exclusion of children with AIDS is necessary to meet the important goal of preventing the spread of a deadly disease.

If the petitioner challenges the school's placement on the basis that she is being discriminated against because of her handicap, she must show that she

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[80]One author has suggested adding a right to education provision into the Constitution to avoid this problem. *See* BARRY KRUSCH, THE 21ST CENTURY CONSTITUTION 173 (1992).

[81]457 U.S. 202 (1982).

[82]*See* Sotto, *supra* note 21, at 214; MacFarlane, *supra* note 12, at 421.

[83]The Court was unwilling to apply strict scrutiny because of its holding in *Rodriguez* but was also unwilling to apply rational relation scrutiny because of the importance of education and because the children were being completely excluded from the school system. *Plyler*, 457 U.S. at 223.

[84]*Id.* at 230.

[85]*Id.*

[86]*See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 459-60 (1988) (refusing to extend *Plyler* beyond its "unique circumstances").

belongs to a class protected by the Constitution.[87] In *City of Cleburne v. Cleburne Living Center*,[88] the Court applied a "rational basis test with a bite"[89] and held that a zoning regulation that discriminated against mentally retarded citizens was unconstitutional. In essence, the Court held that it was irrational to discriminate against individuals with disabilities by excluding them from the neighborhood.[90] As one commentator has written, "The Court would not give effect to actions which were based on negative attitudes and unsubstantiated fears about the mentally retarded."[91]

In applying this reasoning to the exclusion of children with AIDS, the exclusion of children with AIDS from the normal classroom setting is based upon irrational and unsubstantiated fears. The Supreme Court's statement in *School Board of Nassau County v. Arline*[92] that the possibility of contagiousness brings on "fear and misapprehension" appears to support this argument. There is, however, some rational basis for excluding some children who are infected with the AIDS virus. Even the Center for Disease Control's guidelines provide exceptions to the admission of children with AIDS into a normal classroom setting.[93] Therefore, the state's interest in protecting the health of its citizens, coupled with the fact that the fears that accompany AIDS are not unsubstantiated in all cases, would probably be enough to get past the rational-basis-test-with-a-bite standard, and the Fourteenth Amendment would not provide the necessary protection.

D. Conclusion

The current solutions to the dilemma are not foolproof. The Rehabilitation Act analysis is based upon a Supreme Court case that the Supreme Court expressly limited. The EAHCA analysis falters because the Act does not cover all children with AIDS but only those that have developed mental or physical problems such that they have special needs. Finally, the Fourteenth

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[87] *See* JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW ch. 16, § I, at 592 (2d ed. 1983) (stating that strict srutiny applies only when a person belongs in a class set apart by a "trait which itself seems to contravene established constitutional principles").

[88] 473 U.S. 432 (1985).

[89] MacFarlane, *supra* note 12, at 419. The Court stated that it was applying the rational basis standard of scrutiny but still found the zoning regulation to be unconstitutional, a holding that is almost impossible given the minimal amount of reasoning needed to support a law under the rational basis test. *Cleburne*, 473 U.S. at 442. The Court could not apply strict scrutiny because individuals with disabilities are not a suspect class. *Id.* Furthermore, the Court could not apply intermediate scrutiny because this standard is reserved for quasi-suspect classes like gender and illegitimacy. *Id.*

[90] *Cleburne*, 473 U.S. at 450. The Court stated that the zoning requirement in this case "appears to us to rest on an irrational prejudice against the mentally retarded." *Id.*

[91] MacFarlane, *supra* note 12, at 420.

[92] 480 U.S. 273, 285 (1987).

[93] *District 27*, 502 N.Y.S.2d at 338.

Amendment protection has been limited in both the area of education and with regard to individuals with disabilities. Therefore, it will be necessary to analyze one more possible basis of protection—state constitutions.

IV. State Constitutional Analysis

State constitutional provisions currently are receiving more attention than they ever have before. During the 1980s and 1990s, we have seen the United States Supreme Court carve away at some of the protections that were established by the Warren Court in the 1950s and 1960s. Because of this, petitioners have tried to find other avenues to protect individual rights. State constitutions have become one of the most used avenues.

State constitutions can be used to protect the right of children with AIDS to have a free public education in the least restrictive setting possible. Courts could do this by examining the importance of state constitutions, by examining the importance of the state role in education and public welfare, and by determining that children with AIDS should be protected by the unique provisions of state constitutions.

A. The Importance of State Constitutions

As described above, the federal courts have been unwilling to hold that the right to an education is a fundamental right guaranteed to all citizens.[94] The Supreme Court expressly held in *San Antonio Independent School District v. Rodriguez*[95] that the right to an education is not fundamental because it is not explicitly or implicitly guaranteed by the United States Constitution.[96] Because of this, federal courts need only apply the rational basis test to determine if the state's exclusion of children with AIDS surpasses constitutional scrutiny. Needless to say, individuals are not afforded much protection against state regulation of education.[97]

If the federal courts are not willing to protect the education rights of children with AIDS, then those individuals must look to the state constitutions to find constitutional protection. The Supreme Court has consistently held that the federal constitution provides a minimum "floor" of protection.[98] State courts may not provide less protection than that found in the federal constitution, but

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[94] *See* text accompanying notes 75-86.

[95] 411 U.S. 1 (1973).

[96] *Id.* at 30-44.

[97] If one examines the history of the Supreme Court and its rulings regarding education, it is not difficult to see that the Court will only protect an individual's right to an education if that individual has been irrationally excluded from the school system. *See* Plyler v. Doe, 457 U.S. 202 (1982); *see also* notes 75-86 and accompanying discussion.

[98] *See* Cooper v. California, 386 U.S. 58, 62 (1967).

state constitutions may afford more protection.[99] If a state court bases its decision on "independent and adquate" state constitutional grounds, and the decision does not drop protection below that found in the federal constitution, then the Supreme Court cannot overturn the decision, even if the state court affords more protection than that afforded by the U.S. Constitution.[100] In essence, decisions based on state constitutional law that provide more protection than the federal minimum floor are insulated from federal review.[101]

Because state courts can insulate their decisions from federal review by relying solely on the state constitution, state constitutions take on a powerful role in jurisprudence. This role does not diminish in the area of education but actually takes on a more important part. As will be shown, because the state and local governments play such a central role in the education of the United States citizenry, the state constitutions play an equally important role in making sure the government does it right.

B. The Role of the State Government and State Constitutions in Education

Traditionally, state and local governments have controlled the regulation of both education[102] and public health.[103] With regard to education, states not only control access to education but also have the responsibility to provide every child with a free, appropriate education. This responsibility comes from the fact that every state in the union has a state constitutional provision that mandates the creation and maintenance of a public educational system.[104] In

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99*Id.*; *see also* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (stating that U.S. Supreme Court decisions do not limit a state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution").

100*See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983) (reviewing basis for principle that Court will not review decisions of state courts that rest on independent and adequate state grounds).

101*See Pruneyard Shopping Center*, 447 U.S. at 81.

102*See* Annette C. Hamburger, *Public Schools and Public Health: Exclusion of Children With AIDS*, 5 J.L. & POL. 604, 612 (1989).

103*See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).

104*See* ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art VII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art IX, § 1; ILL. CONST. art X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, § 3; KAN. CONST. art VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 2; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1(3); NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. art. LXXXIII; N.J. CONST. art. VIII, § 4(1); N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2(1); N.D. CONST. art. VIII, § 1; OHIO CONST. art VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST.

addition, the U.S. Supreme Court has held that if a state creates a public educational system, the right to attend "is a right which must be made available to all on equal terms."[105]

Many state courts have used their state constitutions to strike down discriminatory laws that would survive federal scrutiny. For example, the disparate school financing scheme that the Supreme Court upheld in *Rodriguez* has been struck down in many states because it violated the state constitution.[106] Many courts have actually gone so far as to declare that the right to education is fundamental.[107] The basis for these declarations is that, unlike the federal constitution, the state constitutions expressly define the importance of education to citizenry. Therefore, state constitutions and state courts should recognize the fundamental right to an education.

C. *Using the State Constitution to Protect the Right of Children with AIDS to a Public Education*

State courts can use the education provisions in state constitutions in one of two ways. The court could use the provision to heighten the level of scrutiny under an equal-protection analysis. Alternatively, state courts could declare that the education provisions in state constitutions carry with them substantive rights that do not depend on an equal protection analysis. The difference is subtle but important. If courts find that the right to education provisions have substantive meaning, children with AIDS become entitled to both access to education and a certain quality of education.

1. Equal Protection Analysis

The fact that states have constitutional provisions that establish the importance of education is crucial to constitutional analysis. In *Rodriguez* the Supreme Court stated that education was not a fundamental right under the Equal Protection Clause because it was not explicitly or implicitly mentioned in the U.S. Constitution. State courts cannot say the same thing about state constitutions. If one accepts the rationale of *Rodriguez*, the right to an education should be fundamental under every state constitution.[108] With this, the state

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§ 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1; *see also* Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96-101 (1989).

[105]Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

[106]Hubsch, *supra* note 104, at 115-21.

[107]*See, e.g.*, Pauley v. Kelly, 255 S.E.2d 859, 867 (W. Va. 1979). The *Pauley* court determined that "excellence was the goal [for the standard of education], rather than mediocrity; and that education of the public was intended to be a fundamental function of the state government and a fundamental right. . . ." *Id.*

[108]Hubsch, *supra* note 104, at 122. The only way that this would not be true is if the state had a separate constitutional provision that explicitly denied the persons of the

constitutions become valuable tools to those children with AIDS who are banned from the public education system because they can use the state constitutions to enforce their right to an equal education.

The courts that have declared that the right to an education is fundamental under their state constitution have done so because of the importance of both an adequate and *equal* educational opportunity for all citizens of the state.[109] The U.S. Supreme Court also has stressed the importance of equal educational opportunities with its ruling in *Brown v. Board of Education*.[110] In *Brown*, the Court struck down the racially disparate treatment accorded students because to separate minority children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[111] The same can be said about the effects that exclusion from the normal classroom setting would have on children with AIDS. Therefore, children with AIDS are entitled to the same educational opportunity as other children. Under state constitutions, this entitlement becomes a fundamental right.[112]

If the right to an equal education is fundamental under the state constitutions, those state courts that have accepted the federal three-tiered equal protection scrutiny standards would have to apply the strict scrutiny standard to any regulation that deprives students of this right.[113] If school officials ban children with AIDS from the normal classroom setting in an effort to regulate public health, this regulation would violate the students' fundamental right to an education. Therefore, the burden would fall upon the state to prove that the ban would be the necessary means to further a compelling state interest.[114]

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state the right to an education. *See, e.g.*, ALA. CONST. amend. 111 ("[N]othing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense. . . ."). Some courts have held that disparate financing schemes are not unconstitutional under the state's equal protection clause because persons who are impoverished are not a suspect class. *See* Lujan v. Colorado, 649 P.2d 1005, 1022 (Colo. 1982).

[109]*See, e.g.*, Seattle Sch. Dist. v. State, 585 P.2d 71, 87 (1978); *see also* Serrano v. Priest, 487 P.2d 1241, 1255-59 (Cal. 1973); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

[110]347 U.S. 483 (1954).

[111]*Id.* at 494.

[112]*See Serrano*, 487 P.2d at 1255-59. In *Serrano*, the California Supreme Court stated that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a fundamental interest." *Id.* at 1258.

[113]Most states have accepted the three-tiered standard (strict scrutiny, intermediate scrutiny, and rational relation test) and have used the standards to do state constitutional analysis. *See, e.g.*, Richardson v. Carnegie Library Restaurant, Inc., 763 P.2d 1153, 1157-58 (N.M. 1988) (federal constitutional standards and New Mexico constitutional standards are the same).

[114]*See* NOWAK, *supra* note 87, ch. 16, § I, at 592 (describing strict scrutiny review).

The United States Supreme Court has said that the protection of the public health and welfare is a compelling state interest.[115] Even with this being true, however, the state would need to prove that banning the children with AIDS from school or quarantining the children in school is the least drastic means available or most narrowly tailored means available for protecting the compelling interest.[116] Looking at all of the possible options, it appears that the banning or quarantining of all children with AIDS would not pass state constitutional scrutiny.

According to the Center for Disease Control guidelines, children with AIDS are not a threat to the health and welfare of other children unless the HIV-positive children lack control over bodily secretions, exhibit aggressive behavior such as biting, or have open skin sores that cannot be covered.[117] Given the fact that these guidelines come from a governmental agency, the maximum that a state could do is ban or quarantine those children that fall within the CDC exception.[118] School systems that attempt to do more than this could be held civilly liable.[119] Therefore, almost all children with AIDS would be protected from discrimination at school and have the right to attend school in an unrestricted setting, especially those children who are only seropositive or have ARC and are not otherwise disabled.

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[115] *See* Carolene Prods., Co. v. United States, 323 U.S. 18, 23 (1944).

[116] *See* NOWAK, *supra* note 87, ch. 16, § I, at 592.

[117] *See* Center for Disease Control, *supra* note 69, at 1434.

[118] One commentator cited medical evidence that there really is no risk of transmission even if a child has a habit of biting. *See* Schwarz & Shaffer, *supra* note 25, at 171-72. This would imply that even some of the children that fit within the CDC exception may be able to challenge a school's decision to place the children in a more restrictive setting.

Furthermore, those children who do fall within the CDC exception do not lose their state constitutional equal protection rights and could challenge any placement in a restrictive setting. Although the school systems may be able to show a compelling state interest, it is unlikely that the schools could completely ban these children from school. The children would still enjoy constitutional protection because the right to an education is fundamental. The school officials would be hard-pressed to show how excluding these children from school would be less drastic than placing the children in a more restrictive classroom setting. Although the school officials might argue that a lack of resources prevents them from placing the children in a restrictive in-school setting, they could not overcome the fact that lack of resources has never been a valid basis for violating constitutional rights. In addition, the importance of allowing a child to study in the least restrictive, social, in-school setting should outweigh any financial concerns that the state might have. Therefore, these children would also be able to attend school and would not have to face the real possibility of receiving a sub-standard, discriminatory education.

[119] *Cf.* Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 382 (C.D. Cal. 1987) (holding school district liable for attorney's fees and costs).

2. Substantive Rights Analysis

Most of the time when state courts rely on state constitutional provisions to protect rights, the courts are reacting to some "previously articulated federal doctrines."[120] As a result, most state constitutional cases that uphold the right to an education do so on equal protection grounds because that is what the U.S. Supreme Court has addressed.[121] There are, however, a few state courts that have stepped outside of the equal protection analysis and have analyzed state education provisions as substantive rights. By doing this, the state courts guarantee rights independent of, and additional to, the equal protection guarantees.

The seminal case in this area is *Pauley v. Kelly*.[122] In *Pauley*, the West Virginia Supreme Court analyzed the history of its education article and determined that "excellence was the goal rather than mediocrity."[123] The Court concluded that, based on the history of the provision and precedent case law, the West Virginia Constitution required both a certain level of equality and a certain level of quality in education.[124] In essence, the court made it mandatory for the state legislature to develop and implement educational quality standards that would assure a meaningful education to all of the school-age citizens of the state.

Other state courts have also declared that the education provisions of their constitutions have substantive meaning.[125] In holding that its state education article had substantive meaning, the Washington Supreme Court declared:

> The constitutional right to have the State "make ample provision for the education of all [resident] children" would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas.[126]

Similarly, the New Jersey Supreme Court gave its education article substantive meaning when it stated, "The Constitution's guarantee must be understood to

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[120] Hubsch, *supra* note 104, at 94.

[121] *Id.* at 127. Mr. Hubsch notes that many of the plaintiff's in right to education litigation "have presented the education article claims as surrogates for equal protection claims—suggesting that the state constitutional language which addresses itself directly to quality should be read to require equality." *Id.*

[122] 255 S.E.2d 859 (W. Va. 1979).

[123] *Id.* at 867.

[124] *Id.* at 869. The court found that the state constitution required the state to provide a system that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship." *Id.* at 877.

[125] *See* Robinson v. Cahill, 303 A.2d 273, 291-95 (N.J. 1973); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 85 (Wash. 1978).

[126] *Seattle Sch. Dist.*, 585 P.2d at 94.

embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[127] Thus, the courts that have given their education articles substantive meaning have done so on the basis that quality of education is just as important as equality of education.

The substantive right to education can be used as both an alternative and as an additional remedy to the equal protection right to education. The *Robinson* Court used the New Jersey education article as an alternative to the equal protection analysis when it held that substantively the article required the state to provide both an equal education and a quality education to all of the students in the state.[128] The Court did not even attempt to do a three-tiered equal protection analysis to reach this conclusion. Therefore, courts can forego the standard fundamental right/equal protection analysis and, in the alternative, find that the education article of the state constitution mandates that the state give both an equal education and a quality education.

In contrast, courts can use the education articles to add to the rights that would be granted through an equal protection analysis. In *Seattle School District No. 1 v. State* the court appeared to use the Washington education article in this manner.[129] The Court did somewhat of an equal protection type analysis to declare that the state's school financing system was unconstitutional.[130] Then, the Court used the state education article to support their holding that all children are entitled to a certain quality of education.[131] In this way, the Court used the education article to provide rights that were in addition to those rights guaranteed by equal protection.

Children with AIDS benefit from this substantive type of analysis for two reasons. First, by using the substantive right as an alternative to equal protection analysis, the children can argue that they cannot be denied access to education. As an alternative to the equal protection right, the substantive right would guarantee both an equal education and a quality education for all children. Banning children with AIDS from school would violate the state education article because it would deny children with AIDS access to an equal education. A court could not say that all children have a right to free public education and then deny that right to children with AIDS. School officials may argue that they can provide the children with a quality education outside the school system; however, as the Supreme Court stated in *Brown*, separating children from the classroom denies those children of an equal education

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[127] *Robinson*, 303 A.2d at 295.

[128] *See id.* at 283 (stating that the court "hesitate[s] to turn this case upon the State equal protection clause").

[129] *Seattle Sch. Dist. No. 1*, 585 P.2d at 91-95.

[130] *Id.* at 92 (discussing right to education as "constitutionally paramount"). The Court's use of the language "constiutionally paramount" is similar to calling the right to education fundamental.

[131] *Id.* at 94.

because it "generates a feeling of inferiority . . . in a way unlikely ever to be undone."[132] Therefore, if the articles have substantive meaning the schools should have to provide children with AIDS access to public education.

Second, if the state education articles have substantive meaning and are used as a way of creating additional rights to the equal protection guarantees, children with AIDS can argue that they have a right to a certain quality of education. The West Virginia, Washington, and New Jersey courts have held that schools are required to give students a certain quality of education so that the students could perform adequately in society.[133] Children with AIDS could argue that a ban or quarantine would violate their substantive right to an education because they would not be in an environment that is of a quality most conducive to their learning. States could argue that these children would actually be given a higher quality education because they would be receiving one-on-one contact in their homes or a better ratio of contact in a restricted classroom setting. This argument, however, ignores the fact that exclusion still creates a feeling of inferiority, as stated in *Brown*, and ignores the fact that although the children may become "book smart," they will not learn how to function in society. How can these children learn to perform adequately in society if society excludes them from participating? The truth is these children will not be adequately prepared to enter the labor force or to participate in society unless they are placed in a non-restrictive setting and allowed to learn along side other students.

D. Conclusion

State constitution education articles can be used to protect the right to education for children with AIDS in two ways. First, the state courts could use the education article as a surrogate for the equal protection clause. Then, children with AIDS cannot be denied equal access to education. Second, the state courts could give the education articles substantive meaning. Then, children with AIDS are guaranteed both access to education and a certain quality of education.

The legal benefits of using the state constitutions to protect the rights of children with AIDS are twofold. First, by using the state constitution to establish the fundamental right of education, petitioners ensure that all children will receive an equal and adequate education. Second, if courts rely on their state constitutions rather than other statutory or constitutional grounds, their decisions will be insulated from federal review or legislative amendment, and the decisions have a better chance of weathering the test of time.

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[132] 347 U.S. 483, 494 (1954). Although *Brown* did apply to exclusions based on race, exclusions based on disability would generate the same feelings of inferiority.

[133] *See* Robinson v. Cahill, 303 A.2d 273, 291-95 (N.J. 1973); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 85 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).

The practical benefits of allowing children with AIDS to attend school in an unrestricted setting are plentiful. The student is allowed to study with other children in an open social environment. This gives the child the opportunity to grow both intellectually and socially and prevents the child from feeling ostracized and unwanted. Further, the school system benefits because it does not have to spend the resources that would be necessary to educate the child at home or in a restrictive setting.[134] Additionally, other children benefit because it gives them a first-hand chance to learn more about the frightening disease. As the children and school system become more educated about AIDS, the fear and misapprehension surrounding the disease that causes discrimination should disappear.

V. CONCLUSION

Throughout history only a few diseases have caused more public animosity and fear than AIDS. The most unfortunate victims of this public unrest are the children who become infected with this deadly disease. These children face exclusion or quarantine from many activities and organizations, one of which is the public school system.

Much has been done to try to protect the right to an education for these children. Many courts have held that the children are handicapped as defined by Section 504 of the Rehabilitation Act of 1973 and are entitled to the protection of that Act. Other courts have used the Education of All Handicapped Children Act to protect the interests of those children with AIDS that have special needs. Finally, some courts and commentators have held or argued that the Equal Protection Clause of the Fourteenth Amendment precludes states from excluding children with AIDS from the school system.

Yet, each of the above approaches has inherent problems. All have limitations that preclude them from protecting all of the children with AIDS to the fullest extent possible. In addition, arguments based on any of these grounds require the tenuous extension of legal concepts that the Supreme Court and the U.S. Congress have neglected to or are unwilling to make. A more stable means of protecting the rights of children is needed.

The constitutions of each state provide more stable grounds for the protection of children with AIDS. Every state has a section or article that recognizes that importance and necessity of education.[135] State courts have used these clauses either to declare that the right to education is fundamental through an equal protection analysis or to declare that the right is substantive and that children are entitled to both equal education and to a certain quality of education. Because of this, children with AIDS should have the right to attend school in the least restrictive setting possible.

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[134] *See* Emily Couric, *A New "Class" For School Law*, NAT'L L.J., Dec. 15, 1986, at 1 (discussing the financial bind that many schools face in terms of hiring and retaining teachers).

[135] *See supra* note 104.

What is important to recognize is that even if children with AIDS are allowed into the school system, this will not necessarily end the discrimination against them. They will still face some difficulties because of fears based on the misinformation that surrounds AIDS. Allowing children with AIDS into the public school system, however, will be the first step in breaking down the barriers of misapprehension and fear. Once children with AIDS are freely admitted into the school system, other children will become educated about the disease, and discrimination should fall by the wayside.