Denver Law Review

Volume 69
Issue 3 *Symposium - Children's Law*

Article 4

February 2021

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AIDS AND "AFRAIDS" IN OUR SCHOOLS: WHITHER OUR CHILDREN?

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INTRODUCTION

The disease now threatening our society is almost unprecedented in human history. It does not discriminate and is so widespread that it affects all countries and all people. If you think that it is Acquired Immune Deficiency Syndrome (AIDS),[1] you are wrong. AIDS is a terrible threat, but it can be controlled. Unfortunately, however, nothing prevents the spread of the Acute FeaR of AIDS, or AFRAIDS. It is this AIDS hysteria that is the truly great danger to society.

Americans are more fearful today than they were in the early twentieth century when polio crippled so many. At that time, the fear had some basis. Polio spread from child to child, and for a long time no one knew how. AIDS is incurable,[2] but its means of transmission is well understood. It spreads from person to person only when bodily fluids, blood or sexual secretions are shared.[3]

The cure for AIDS hysteria, and for AIDS itself, is the understanding, enlightenment and modification of behavior that will come with learning the truth about the disease. We can reduce the fear of AIDS by educating people about how to prevent the spread of the disease—most transmissions are preventable[4]—and by dispelling the myth that AIDS is

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1. AIDS is a disease of the immune system. It destroys the body's ability to combat certain opportunistic infections and cancers. For a more complete description of the disease, see AMERICAN BAR ASS'N, LEGAL, MEDICAL AND GOVERNMENTAL PERSPECTIVE ON AIDS AS A DISABILITY (David Rapoport et al. eds., 1987) [hereinafter PERSPECTIVE ON AIDS].

2. AIDS fatality figures are often presented in an inadvertently misleading manner. At any given moment, the total number of reported cases of AIDS is much larger than the total number of people who have died from the disease. Thus, if a report states that 9,000 deaths have occurred out of 18,000 reported cases, the inference is that only half of those who develop AIDS will die as a result of the disease. Yet, the truth is that the 9,000 victims who are still alive are simply the more recent cases. Eventually they too will die. Robert Roden, Note, *Educating Through the Law: The Los Angeles AIDS Discrimination Ordinance*, 33 UCLA L. REV. 1410, 1416 n.48 (1986).

By 1986, 25,000 known AIDS victims had died. By November 10, 1991, 202,843 cases of AIDS had been reported, resulting in 130,687 deaths. CENTERS FOR DISEASE CONTROL, AIDS WEEKLY SURVEILLANCE REPORT (November 30, 1991). Statistics are available from the Centers for Disease Control by telephone at (404) 330-3020. These numbers undoubtedly will continue to increase. AIDS is the most severe disease that has ever affected mankind.

3. ROBERTA WEINER, AIDS: IMPACT ON THE SCHOOLS 10 (1986). The virus is easily killed outside the body, since it is more fragile than bacteria, and can be destroyed by common disinfectants such as bleach and Lysol. CENTERS FOR DISEASE CONTROL, RECOMMENDATIONS FOR PREVENTING THE TRANSMISSION OF AIDS IN THE WORKPLACE, INCLUDING SCHOOLS (reproduced in WEINER, *supra* at 135, 146). *See also* PERSPECTIVE ON AIDS, *supra* note 1, at 3 (stating that intact skin is an absolute barrier to the AIDS virus).

4. PERSPECTIVE ON AIDS, *supra* note 1, at 8.

exclusively the disease of homosexuals and intravenous (IV) drug users. AIDS is now a global problem, and its victims come from all levels and segments of society.[5]

Compounding the problem is the fact that an increasingly disproportionate number of AIDS victims in the United States are members of minorities, especially children. Blacks and Hispanics account for over forty percent of reported AIDS cases.[6]

This Article examines the impact of AIDS on schools and on the lives of school children. The discussion focuses on recent developments in AIDS law and the effects of these developments on primary and secondary public education, where the Fourteenth Amendment guarantees of due process and equal protection attach directly. It analyzes state and local statutes[7] and AIDS policies, as well as national policies such as those recommended by the Centers for Disease Control, in light of medical research, economics, politics and the United States Constitution. It also discusses discrimination against the handicapped, statutory enactments, mandatory testing, board of education rules, the authority of departments of health and other school district issues. The Article closes with a series of recommendations regarding AIDS education in the schools.

I. SCHOOL CHILDREN WITH AIDS

A. *Incidence and Means of Transmission*

The number of AIDS cases among boys and girls who were under thirteen when they contracted the disease is growing at an alarming rate. The Centers for Disease Control reported 3,426 cases among children as of November 30, 1991.[8] Nearly one-fourth of these children acquired the disease through IV drug use or sexual contact. Most children with AIDS, however, contracted it *in utero*.[9] This suggests that at least one parent was an IV drug user with AIDS. As IV drug use increases, resulting in more AIDS cases, the number of children with AIDS is also likely to increase.

Pre-school children who have Human Immune Deficiency Virus (HIV)—the virus that causes AIDS—acquired it in one of two ways: they were born to infected mothers[10] or they received infusions of infected

5. Although linked in the United States with male homosexuals, who were its primary victims at first, AIDS has been discovered in heterosexuals, infants, women and minorities. Roden, *supra* note 2, at 1413.

6. Centers for Disease Control, *supra* note 2. *See also* Samuel R. Friedman et al., *The AIDS Epidemic Among Blacks and Hispanics*, 65 MILBANK Q. 455 (1987).

7. Ohio education statutes, which are similar to those of many other states, will be used in this Article to illustrate state policy regarding AIDS in the schools.

8. CENTERS FOR DISEASE CONTROL, *supra* note 2.

9. Laurence Lavin et al., *Health Benefits: How the System is Responding to Aids*, 22 CLEARINGHOUSE REV. 724 (1988) [hereinafter *Health Benefits*].

10. HIV can be transmitted only under very specific conditions. Carried in the blood, it is most often spread through sexual contact or the use of infected IV needles. It can also be transmitted from an infected mother to a fetus developing *in utero* or to a newborn infant. The most direct means of exposure to infected blood is a blood transfusion. PER-

blood.[11] Most AIDS cases transmitted this way are diagnosed by age two.[12] Children born with the virus may become ill, periodically, with one of the physical conditions associated with AIDS, such as a depressed immune system.[13] Many die less than a year after they are attacked by an opportunistic infection, but some ultimately recover and remain well. There is no reason why a child whose physical stamina is excellent should not be allowed to remain in school with his or her unaffected peers.[14]

The argument usually made for keeping children with AIDS out of school is that they will spread the disease to others. The only valid argument, however, is that the child with AIDS needs protection. The chance that a classmate or school employee will "catch" AIDS is negligible compared with the chance that the student with AIDS will "catch" an opportunistic infection like a cold, or any other germ, and die.[15]

Much of the fear that school children will infect their peers centers on the possibility that a sick child will bite a healthy one.[16] The medical consensus, however, is that biting is an unlikely route of transmission. The concentration of the virus is low in saliva, and young children have a minimum capacity to penetrate the skin deeply enough for the virus to enter the circulatory system through the wound.[17] In fact, no record exists of a child having received HIV from another child, either at home

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SPECTIVE ON AIDS, *supra* note 1, at 4; AIDS AND THE LAW: A GUIDE FOR THE PUBLIC (Harlon L. Dalton et al. eds., 1987) at 31 [hereinafter AIDS AND THE LAW].

11. AIDS AND THE LAW, *supra* note 10, at 24.

12. WEINER, *supra* note 3, at 19.

13. AIDS-affected individuals include asymptomatic carriers, persons with AIDS-Related Complex (ARC) and persons with AIDS. Asymptomatic carriers of the HIV virus—those in whom the virus is dormant—are extremely dangerous because they have no reason to believe they are infected. They do not change their behavior and may unknowingly transmit the disease to others. The Centers for Disease Control estimate that more than one million people are asymptomatic carriers of the virus. WEINER, *supra* note 3, at 14.

Persons with ARC have symptoms indicating lowered immunity, such as weight loss, fatigue and swollen lymph nodes. ARC can eventually develop into a full-blown case of AIDS. Persons with AIDS are unable to resist infection because their immune systems are affected by opportunistic diseases such as pneumocystis pneumonia, tuberculosis and Karposi's sarcoma, a type of cancer that attacks the skin and then spreads to the lymph nodes, lungs and gastrointestinal tract. The incubation period for the disease—the time between the initial infection of the virus and the onset of AIDS—is more than nine years. AIDS is fatal, on average, two years after diagnosis.

There are many fewer persons with AIDS than there are asymptomatic carriers and persons with ARC. Ironically, people who are afraid of AIDS fear acquiring the disease from a person with AIDS, even though asymptomatic carriers or those with ARC can as easily infect others. U.S. DEP'T OF HEALTH & HUMAN SERVICES, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME (1986).

14. District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325, 339 (N.Y. Sup. Ct. 1986).

15. Verla S. Neslund et al., *The Role of CDC in the Development of AIDS Recommendations and Guidelines*, AMA J. LAW, MED. & HEALTH CARE, Summer 1987, at 76; WEINER, *supra* note 3, at 29.

16. Acting on the recommendation of their AIDS medical teams, some schools have placed AIDS children who have a history of biting in home instruction. Yet research data and medical opinion support this approach only in the cases of HIV-infected children who are physically assaultive or incontinent or have weeping (wet) skin lesions. WEINER, *supra* note 3, at 29.

17. If a biting does occur, the virus can be destroyed by carefully washing the wound

or in school.[18]

Although biting is not considered dangerous by the medical profession, school boards take such occurrences seriously. A child with AIDS who bites an uninfected child may cause hysteria among parents and stigma for the families involved. This parental concern is real in the sense that HIV is found in saliva.[19] Thus, an AIDS-infected child's history of biting is a valid criterion for denying that child admission to school.

B. *The AIDS Crisis and Students' Civil Rights*

School officials should be sensitive to the fear and social stigma that children or school personnel with AIDS may experience if information about their condition is released, or if false information is transmitted.[20] They should also be mindful of other rights of persons with AIDS and of the concerns of children and employees about contracting AIDS in the school environment, and they need to make realistic plans for managing the school in light of the disease.

Recent United States Supreme Court decisions have restricted some of the rights of school children, compared with those of adults, possibly because the Court believes that educators need authority to control and regulate increasingly aggressive, crime-prone youth. In *New Jersey v. T.L.O.*,[21] the Court reduced the adult standard of probable cause to "reasonable suspicion" in a Fourth Amendment challenge of a student search. In *Bethel School District No. 403 v. Fraser*,[22] the Court allowed a school to regulate sexually explicit language through its "disruptive conduct rule." *Bethel* clearly gave school officials much greater discretion in controlling student expression than government agencies ordinarily would be allowed in controlling adult expression. *Hazelwood School District v. Kuhlmeier*[23] upheld a high school principal's decision to prevent publication of portions of the school newspaper. A reasonableness standard, not strict scrutiny, was applied to this curtailment of minors' freedom of speech in a school setting. Evidently the landmark 1969 *Tinker* decision,[24] which extended students' rights, has been seriously eroded, challenged, and some would argue, eviscerated as a result of these recent Court rulings.

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with soap and water, followed by a disinfectant such as alcohol. WEINER, *supra* note 3, at 189.

18. AIDS AND THE LAW, *supra* note 10, at 35.

19. WEINER, *supra* note 3, at 19.

20. Falsely accusing someone of having a "loathesome disease" such as AIDS consititutes defamation in most states. A school employee or a prospective employee could sue for defamation if he or she were wrongly accused of having AIDS or referred to in derogatory comments about lifestyle or job performance.

21. 469 U.S. 325 (1985).

22. 478 U.S. 675 (1986).

23. 484 U.S. 260 (1988).

24. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (holding that school officials' ban against students wearing black armbands was an unreasonable regulation of the students' form of expression).

1. The Right to Privacy

When a student (or another person) with AIDS is publicly identified, his or her constitutional right to privacy[25] may be violated. In some states, students generally are protected by a statute providing that school officials may not release or permit access to personally identifying information (other than directory information) concerning any pupil attending a public school, without the written consent of a parent, guardian or custodian, or the written consent of a pupil who is over eighteen years old.[26]

Student records receive additional federal protection. The Family Educational Rights and Privacy Act (FERPA)[27] is much more detailed than most of the state rights and privacy acts that track FERPA. This federal law, known as the Buckley Amendment, provides students over eighteen years of age and their parents the right to inspect and review educational records,[28] to challenge information[29] and to prohibit the disclosure of selected records.[30]

State privacy protections such as the Ohio Public Records Act[31] and the Ohio Privacy Act[32] usually do not extend to the administrative use of public school records by authorized school employees, a court or the federal government.[33] This creates a problem when a student's records are transferred to another school. To forward student records in the standard manner may violate the student's constitutional right of privacy by making it possible for his condition to become public knowledge without his consent.[34] Therefore, the records of a student with AIDS should be transmitted under special cover directly to an official in the receiving school who has a "need to know." Otherwise, no one should be privy to the information.

In *Doe v. Borough of Barrington*,[35] a federal district court held that disclosure of an AIDS victim's condition to people with whom the victim had not even had casual contact violated that person's Fourteenth Amendment right to privacy. An earlier Fourth Circuit opinion acknowledged the right to privacy but held that the student plaintiff's privacy was not invaded by a school board policy of AIDS disclosure in

25. *See Doe v. Coughlin*, 518 N.E.2d 536, 539 (N.Y. 1987) (listing court decisions that have found a constitutional right to privacy regarding decisions relating to marriage, procreation, contraception and personal contact).

26. OHIO REV. CODE ANN. § 3319.321 (Anderson Supp. 1991). Interestingly, Ohio law provides less protection for school employees' records than for students' records, since the public's "right to know" allows anyone to see the public record of a school employee, with some exceptions.

27. 20 U.S.C. § 1232g (1984).

28. 20 U.S.C. § 1232g (a)(1)(A) (1984).

29. 20 U.S.C. § 1232g (a)(2) (1984).

30. 20 U.S.C. §§ 1232g(b)(1)-(2) (1984).

31. OHIO REV. CODE ANN. § 149.43(B) (Anderson 1990).

32. OHIO REV. CODE ANN. §§ 1347.01-1347.09 (Anderson Supp. 1991).

33. OHIO REV. CODE ANN. § 3319.321(C) (Anderson Supp. 1991).

34. WEINER, *supra* note 3, at 92.

35. 729 F. Supp. 376 (D.N.J. 1990).

untraceable and general terms.[36]

2. The Right to Education

Schools must also deal with the right of students with AIDS to attend school. Courts rarely disturb the judgment of a school board in the exercise of its duties as long as it acted in good faith and its decision was not arbitrary, unreasonable or in clear violation of the law.[37] A court might intervene, however, when a school tries to exclude pupils with AIDS or ARC. Injunctive relief has been granted liberally to children with AIDS who wish to attend regular school classes,[38] and courts have overturned school board attempts to exclude students with AIDS from the classroom. In California, for example, parents of an infected child brought an action against school officials who denied the child attendance in regular kindergarten classes.[39] The court held that in the absence of evidence that he posed a significant risk of harm to his kindergarten classmates or teachers, the child could attend regular classes. In Florida, parents of three hemophiliac, asymptomatic school children sought a preliminary injunction against the school's segregation of the children from a regular classroom setting, alleging violations of the federal Rehabilitation Act, Florida statutes and the Florida and United States Constitutions.[40] The court granted the injunction, unless and until it could be established that the children posed a real and valid threat to the school population. In Illinois, a student with AIDS was excluded from classes and given a home tutor. Alleging discrimination, the student brought suit against the school district and board of education. The court held that the student was not required to exhaust administrative remedies before bringing an action against the district and the board.[41]

3. Equal Protection

Children with AIDS may seek admission to a classroom setting under the Equal Protection Clause,[42] which prohibits state governments from treating similarly situated persons differently. Children with AIDS or ARC and children who have had no exposure to the virus may be considered similarly situated because neither group can transmit the dis-

36. Child v. Spillane, 875 F.2d 314 (Table) (4th Cir. 1989) (text in WESTLAW).

37. *See, e.g.*, Brannon v. Board of Educ., 124 N.E. 235 (Ohio 1919). *See also* 68 AM. JUR. 2D *Schools* § 52 (1973).

38. *See, e.g.*, Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988); Phipps v. Saddleback Valley Unified Sch. Dist., 251 Cal. Rptr. 720 (Cal. Ct. App. 1988); Robertson v. Granite City Community Unit Sch. Dist. No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988).

39. Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987). *See also* Board of Educ. v. Cooperman, 523 A.2d 655 (N.J. 1987) (court upheld state commissioner's decision to overrule local school boards' exclusion of students with AIDS).

40. Ray v. School Dist. of Desoto County, 666 F. Supp. 1524 (M.D. Fla. 1987). One child was given homebound instruction; the others were segregated from their classmates at school.

41. Doe v. Belleville Public Sch. Dist. No. 118, 672 F. Supp. 342 (S.D. Ill. 1987).

42. U.S. CONST. amend. XIV, § 1.

ease in a normal, unrestricted school setting. Whether, in a particular case, segregating children with AIDS violates their right to equal protection will be decided according to the standard the court applies—strict scrutiny or rational basis.

Strict scrutiny is the highest level of review employed when equal protection is at issue. It requires a close relation between the state interest and the means chosen to achieve it. The state could attempt to justify barring children with AIDS from regular classrooms by claiming a compelling government interest in preventing the spread of AIDS. Since the overwhelming weight of medical authority indicates that AIDS cannot be spread by causal contact, however, the state's action would not survive the strict scrutiny test.[43] In any event, the Court has applied strict scrutiny only when a fundamental right is affected. Education is not explicitly protected by the United States Constitution and, therefore, does not merit protection as a fundamental right.[44]

When a classification does not merit strict scrutiny, the courts apply the rational basis test. The test is whether a reasonable basis exists for treating children with AIDS differently from noninfected children in the context of regular classroom attendance.[45] Courts usually defer to a state assertion of power to protect the public health.[46] Medical opinion cannot guarantee that AIDS will not be transmitted in a classroom setting. A state may be justified, therefore, under the rational basis test, in barring or segregating children with AIDS from regular classroom attendance, even though such action might be deemed "unwise" or have an "unequal result."

Thus, courts probably will apply a rational basis test, not strict scrutiny, to the issue of whether children with AIDS should be allowed in the classroom. Further, courts using the traditional rational basis test are likely to support any state practice intended to protect the public health. Interestingly, a New York court used a rational basis test to uphold an anti-discriminatory school board policy.[47] The plaintiffs were not ag-

43. Alternatively, the state might argue that fear of AIDS and its disruptive consequences are an adequate reason for dissimilar treatment of a similarly situated class. As yet, however, the Supreme Court has not endorsed the view that popular opinion should override the Equal Protection Clause. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985).

44. Ambach v. Norwick, 441 U.S. 68 (1979); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Street v. Cobb County Sch. Dist., 520 F. Supp. 1170 (N.D. Ga. 1981).

45. Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954) can be interpreted to suggest that school children with AIDS should be protected from discrimination by heightened scrutiny under the Equal Protection Clause. In *Brown*, the Supreme Court recognized "intangible" factors in segregating students, including stigmatization and feelings of inferiority. These intangible factors also apply to children with AIDS who are segregated from the regular classroom. For an extended discussion, see Susan A. Winchell, *Discrimination in the Public Schools: Dick and Jane Have AIDS*, 29 WM. & MARY L. REV. 881 (1988).

46. E.g., Breese v. Smith, 501 P.2d 159, 170 n.44 (Alaska 1972) (schools may exclude students with contagious diseases from class).

47. District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986).

grieved students, but two local community school boards. Based on a New York City Board of Education policy that forbade the automatic exclusion of students with AIDS from the city schools,[48] a seven-year-old student with AIDS was permitted to remain in school. The local community boards sought injunctive relief to prevent the student's attendance and to require disclosure of the student's name and school. The court found that an automatic exclusion was not required because AIDS is not a communicable disease under city or state health statutes;[49] that using the required case-by-case determination of the placement of students with AIDS did not violate state or federal laws relating to handicapped children;[50] and that the requested disclosure of the name of the child with AIDS would violate city and state health laws.[51]

Under traditional equal protection analysis, a court should determine whether a rational basis exists for refusing to admit any category of AIDS patient to school. Because medical experts agree that AIDS "is not transmitted by casual interpersonal contact or airborne spread,"[52] there is no rational basis to support a decision to exclude a typical student with AIDS.

4. Other Theories that Favor Keeping AIDS-Infected Children in School

Other theories appear viable for the purpose of protecting students with AIDS, though they have not yet been developed in any reported cases. The Due Process Clause[53] requires that proper notice and hearing be given before a person is deprived of a property right such as school attendance, or the liberty rights of privacy and reputation. Because of the emotion involved in AIDS situations, victims' procedural due process rights may be ignored. Further, given the unanimity of medical testimony, a decision to remove or segregate a student with AIDS is arbitrary, capricious and a violation of the student's substantive due process rights.

Using the federal guidelines issued in 1985 by the Centers for Disease Control,[54] many school districts have adopted a case-by-case ap-

48. *Id.* at 328. No change in placement could occur except when recommended by a committee that had reviewed the case to determine whether the child posed a threat to others.

49. *Id.* at 333. In 1979, the Second Circuit prevented the New York City School Board from segregating 50 children with hepatitis B, which is far more communicable than AIDS. New York State Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2d Cir. 1979).

50. *District 27 Community Sch. Bd.*, 502 N.Y.S.2d at 339.

51. *Id.* at 340-41.

52. *Id.* at 330. *See also* Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987); and Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524 (M.D. Fla. 1987).

53. U.S. CONST. amend. V, applied to the states by amend. XIV, § 1.

54. In August 1985, the Centers for Disease Control published two sets of guidelines for schools—one for employees, based on the Centers' general guidelines for the transmission of AIDS in the workplace, and one for students. The guidelines advise schools to keep students with the virus in the classroom. For most school-age children with AIDS, the benefits of attending school outweigh the risk of catching infections from other stu-

proach. The guidelines suggest that schools exclude only children whose behavior might expose uninfected children to the virus. They also suggest that a team composed of the child's doctor, a public health official, the child's parent or guardian and a representative of the school make that determination.

Unless intervention is warranted,[55] schools officials can ease the psychological pain suffered by a student with AIDS by allowing him or her to remain at school, free of the stigma associated with the disease.[56] Many terminal cancer patients live much longer than expected when they are given support to pursue as many of their normal activities as they can. By analogy, the same would be true for AIDS-infected children. Engaging in their normal activities enhances not only the quality of their lives but also their will to live.

C. *Federal Protection for Handicapped Children*

The Rehabilitation Act[57] was enacted in 1973 to protect handicapped people. Section 504 has been used successfully in AIDS cases.[58] The Education for All Handicapped Children Act of 1975 (P.L. 94-142),[59] like the Rehabilitation Act, was intended to discourage institutions from discriminating against the handicapped. While both § 504 and P.L. 94-142 protect individuals with physical, emotional or intellectual handicaps, § 504 goes beyond these handicaps to include individuals addicted to alcohol or drugs. Additionally, while P.L. 94-142 has jurisdiction over handicapped students ages three to twenty-one, § 504 extends their civil rights protection to the adult work environment. To qualify as handicapped under P.L. 94-142, students initially must complete a formal evaluation establishing them as students with specific conditions. In contrast, § 504 does not require anyone to be formally evaluated before being designated as handicapped; being perceived as having a handicap is sufficient.

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dents, and the benefits certainly outweigh "the apparent nonexistent risk" of other students contracting AIDS from them. A more restricted environment is recommended for pre-school age children, neurologically handicapped children and those who lack control of their body secretions, who bite others or who have open lesions. For a more complete discussion see PERSPECTIVE ON AIDS, *supra* note 1, at 38-40. The two sets of guidelines are reproduced in WEINER, *supra* note 3, at 127-50.

55. In Ohio, a rarely-used provision grants emergency power to a city health district. In cases of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, a city board of health may issue orders and regulations, effective immediately, necessary for the public health or the prevention or restriction of disease. OHIO REV. CODE ANN. § 3709.20 (Anderson 1992).

56. WEINER, *supra* note 3, at 126.

57. 29 U.S.C. §§ 701-796 (1988).

58. The Ninth Circuit strongly supported the use of § 504 in Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988). The court declared that Victor Chalk, a teacher who had "full-blown" AIDS, was handicapped but otherwise qualified to teach. Chalk was permitted to return to his classroom.

59. 20 U.S.C. §§ 1401-1485 (1988).

1. The Rehabilitation Act

Section 504 provides that "[n]o otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or 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 . . . ."[60] The Act defines a handicapped person as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, and (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[61] An "otherwise qualified" person is "able to meet all of a program's requirements in spite of this handicap."[62]

Section 504 requires an employer—or an educational agency—to make any "reasonable accommodation" necessary that allows the person to perform the assigned tasks, thereby making the person "otherwise qualified" under the Act.[63] The Supreme Court has defined "reasonable accommodation" as not imposing undue financial and administrative burdens, or not requiring "a fundamental alteration in the nature of [the] program."[64]

What must a school district do, under § 504, to provide a free, equitable and nondiscriminatory education for students with AIDS? In *Ray v. School District of DeSoto County*, a federal district court ordered a school district to enroll three brothers—hemophiliacs who carried the AIDS virus—in a regular classroom setting "[u]nless and until it can be established that these boys pose a real and valid threat to the school population of DeSoto County."[65] Although it did not address family homebound instruction directly, the court determined that this alternative would violate § 504 because the brothers were otherwise qualified for regular classroom placement.[66]

In *Martinez v. School Board of Hillsbrough County, Florida*, however, the same court decided that a six-year-old mentally retarded student with AIDS-related complex (ARC) should be placed in a homebound program rather than in a regular classroom.[67] Along with her other disabilities, she was incontinent, drooled continually and sucked her thumb or

60. 29 U.S.C. § 794(a) (1988).

61. *Id.* § 706(8)(B). A "physical impairment" is "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." 45 C.F.R. § 84.3(j)(2)(i) (1991). "Major life activities" are "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1991).

62. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

63. 45 C.F.R. § 84.3(k)(1) (1991).

64. *Davis*, 442 U.S. at 410.

65. 666 F. Supp. 1524, 1535 (M.D. Fla. 1987).

66. *See also* Doe v. Belleville Pub. Sch. Dist. No. 118, 672 F. Supp. 342 (S.D. Ill. 1987) (a student with AIDS was otherwise qualified to attend school in a regular classroom setting rather than with the home tutor that the school district offered).

67. 675 F. Supp. 1574 (M.D. Fla. 1987).

finger.[68] The court held that it must weigh the public interest in protecting health against the child's interest in an education:

> [T]he specific potential harm to others clearly outweighs the interests of plaintiff, and . . . the public interest in this case weighs in favor of *not* returning Eliana Martinez to a classroom setting. *Where, as here, there is any question as to whether the public safety and welfare is threatened, the Court must rule on the side of that public interest.*[69]

Whether a child infected with AIDS was otherwise qualified to attend a regular kindergarten class, within the meaning of § 504, was at issue in a recent California case.[70] Ryan Thomas, who had AIDS, attended a regular kindergarten class without incident for three days. On the fourth day he bit another child on the leg. Although the other child's skin was not broken, Ryan was removed from the classroom and was required to undergo a psychological evaluation.[71] The court concluded that Ryan was handicapped within the meaning of § 504 but was otherwise qualified to attend the regular kindergarten class.[72] The ruling was based on a psychologist's finding that though Ryan might be prone to aggressive behavior because of his undeveloped language and social skills, there was no indication that he would bite another student again.[73] Weighing Ryan's rights and needs against the safety of the other students, the court concluded that Ryan's rights should prevail.[74]

When local school boards challenged the New York City Board of Education's policy against automatic exclusion of children with AIDS, a state court upheld the policy, basing its decision, in part, on § 504.[75] The court agreed with the New York City Board that no rational basis existed for automatically excluding all students with AIDS and that each student was entitled to a review to determine whether he or she was otherwise qualified to attend school in a regular setting.[76]

Section 504 was used successfully to force a federally financed vocational instruction center to admit a known Hepatitis B carrier.[77] The plaintiff, Kohl, a blind, mentally retarded adult, exhibited behavior problems, including scratching and biting. He claimed that he met the § 504 criteria for handicap and that he was otherwise qualified for admission to the program. The court agreed, finding that Kohl, was entitled to admission to the vocational program despite his behavior problems. Further, the accommodation required for his enrollment was

68. *Id.* at 1576.
69. *Id.* at 1582.
70. Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987).
71. *Id.* at 380.
72. *Id.* at 381.
73. *Id.* at 380-81.
74. *Id.* at 381-82.
75. District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325, 336 (N.Y. Sup. Ct. 1986).
76. *Id.* at 335.
77. Kohl v. Woodhaven Learning Ctr., 672 F. Supp. 1221 (W.D. Mo. 1987) *cert. denied*, 493 U.S. 892 (1989).

reasonable in view of the defendant school's four million-dollar budget and the minimal cost of inoculating the affected employees.[78] The court's reasoning in *Kohl*, if applied, would protect persons with AIDS in public schools, since public schools are instrumentalities of the state.

2. The Education for All Handicapped Children Act

The Education for All Handicapped Children Act of 1975 (P.L. 94-142)[79] was enacted to ensure that handicapped individuals between the ages of three and twenty-one would receive a free and appropriate public education.[80] Public Law 94-142 defines special education as "specially designed instruction at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."[81] The Act requires that each student be provided an individual education program[82] that specifies the least restrictive environment in which his or her education can effectively take place.[83] Mainstreaming, where the student is placed in a regular program for as much time as possible, is strongly encouraged.[84]

Case law has established that if P.L. 94-142 is to apply in an AIDS case, the child must display "limited strength, vitality, or alertness, which adversely affects [his] educatonal performance."[85] A handicapped child who has AIDS cannot be refused admission to the least restrictive environment for the handicapping condition.[86] The Act entitles all handicapped children to a public education, regardless of the severity of their handicapping condition.[87]

A mentally handicapped child with Down's syndrome who was also a Hepatitis B carrier successfully relied on P.L. 94-142 in *Community High School District v. Denz*.[88] The court upheld an independent hearing of-

78. *Id.* at 1232-33. The cost for inoculation was projected at $10,000 to $12,000 initially plus $4,500 for each future year based on expected employee turnover.

79. 20 U.S.C. §§ 1401-1485 (1988).

80. The purpose of the Act was to assure that all handicapped children have access to a free appropriate public education "which emphasizes special education and related services designed to meet their needs;" to protect the rights of handicapped children and their parents and to assist states and localities in providing for the education of handicapped children. *Id.* § 1400(c).

81. *Id.* § 1401(16) (1988).

82. *Id.* § 1401(19) (1988).

83. *Id.* § 1412(5)(1988).

84. *Id.* (states required to establish procedures to assure that, "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped").

85. Doe v. Belleville Public Sch. Dist. No. 118, 672 F. Supp. 342, 344 (S.D. Ill. 1987).

86. Parents of Child, Code No. 870901W v. Coker, 676 F. Supp. 1072, 1074 (E.D. Okla. 1987). The child had been diagnosed with emotional problems and had also tested positive for the HIV virus. The court held that the student was handicapped under the definitions of P.L. 94-142, that the emotional disability classroom was the least restrictive environment and that the student could not be refused admission to the school system's class for emotionally disturbed students.

87. Timothy W. v. Rochester, N.H., Sch. Dist., 875 F.2d 954 (1st Cir.), *cert. denied*, 493 U.S. 983 (1989).

88. 463 N.E.2d 998 (1984).

ficer's order requiring mainstreaming in a special education center, which was the least restrictive environment for the child's educational needs. The court held that in view of the child's behavioral history and the individualized instruction program at the center, the risk of transmitting hepatitis did not outweigh the injury to the student if she remained isolated from her peers.[89]

A plaintiff who brings an action under P.L. 94-142 usually is required to exhaust all administrative remedies prior to a judicial hearing. Courts have begun to recognize, however, that for AIDS victims, the procedural sequence specified in P.L. 94-142 must perforce be circumvented.[90] Time is the most valuable commodity of children with AIDS, and society must ensure that time is used to make their lives as normal and comfortable as possible.

II. TEACHERS AND OTHER EMPLOYEES

A. *The Right to Privacy*

Like students, teachers[91] and other school employees who may have AIDS or who are concerned about infection have a right to privacy. Their personnel records are protected by state statutes.[92] School employees' personnel records are provided additional protections in many states by collective bargaining agreements between boards of education and teachers' unions. Nevertheless, much of the information in a teacher's personnel file is available to the public on request in states where state law considers a public employee's personnel file a "public record."[93] In these states the general public's right to know usually prevails over a school employee's right of privacy.[94]

Although untested, it seems clear that in Ohio, at least, a school employee with AIDS could protect his or her records based on a three-part balancing test analysis used in non-AIDS cases to resolve potential conflicts between the privacy act and the public records statute. The test requires the court to consider whether disclosure of the information would result in an invasion of privacy and, if so, how serious the invasion would be; whether the public would be served by disclosure and whether the information is available from other sources.[95] Doubt as to whether disclosure is proper is resolved in favor of disclosure of "public

89. *Id.* at 1004.

90. *See supra* notes 38-41 and accompanying text.

91. In Ohio, the term "teacher" includes all persons certified to teach who are employed as instructors, principals, supervisors or superintendents, or in any other position requiring certification. OHIO REV. CODE ANN. § 3319.09(A) (Anderson 1990).

92. For example, in Ohio such protection is found in the Ohio Privacy Act, OHIO REV. CODE ANN. §§ 1347.01-1347.09 (Anderson Supp. 1991).

93. In Ohio, virtually every record kept by a public entity, including school districts, county divisions, state offices and administrative agencies, is a public record. OHIO REV. CODE ANN. § 149.43(A)(1) (Anderson 1990).

94. In Ohio, the statute unequivocally gives preference to public access. OHIO REV. CODE ANN. § 1347.08(E)(1) (Anderson Supp. 1991).

95. Wooster Republican Printing Co. v. City of Wooster, 383 N.E.2d 124, 129 (Ohio 1978).

records."[96] Although the Ohio Supreme Court subsequently reduced the weight of an "invasion of privacy" in the balancing test,[97] the generally heightened concern for the privacy of persons with AIDS should, on balance, prevail.

Medical records are specifically excluded from the operation of the Ohio public records law,[98] but it is unclear whether it is the medical record in the doctor's office or the medical record in the personnel file that is exempt from disclosure. If it is the medical record given to the employer by the AIDS patient's doctor, then that record would not have to be released by a public agency under existing Ohio law. It is also unclear what a school district should do when one of its employees tests positive for AIDS. Should the information be placed in his or her file? Should it be communicated? To whom?

The conditions under which a person with AIDS would prevail in a tort action based on a privacy violation have not been specifically determined,[99] though several cases have addressed students' privacy concerns.[100] Unless it has a malicious intent, a statement is not actionable when made within the context of a qualified or conditional privilege, that is, where a commonality of interest exists between the publisher and the recipient, and the communication is a kind reasonably calculated to protect or further that interest.[101] Frequently, in such cases, "there is a legal, as well as a moral, obligation to speak."[102] An actionable invasion of the right of privacy is the

> "*unwarranted* appropriation or exploitation of one's personalty, the publicizing of one's private affairs with which *the public has no legitimate concern*, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary

96. *Id.* at 129-30.

97. State *ex rel.* Dispatch Printing Co. v. Wells, 481 N.E.2d 632, 635 (Ohio 1985) (the public's right of access to a public employee's personnel file may not in any way be restricted by the terms of a collective bargaining agreement or be otherwise withheld from the public or the news media).

98. OHIO REV. CODE ANN. § 149.43(A)(1) (Anderson 1990).

99. One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1977). Comment d states that "[w]hen the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy."

100. *See supra* notes 34-36.

101. The essential elements of a conditionally privileged communication are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and proper publication to proper parties only. West v. People's Banking & Trust Co., 236 N.E.2d 679, 681 (Ohio Ct. App. 1967).

102. Creps v. Waltz, 450 N.E.2d 716, 718 (Ohio Ct. App. 1982) (quoting Hahn v. Kotten, 331 N.E.2d 713, 718 (Ohio 1975)). In *Hahn*, the trial court was required to grant a directed verdict for defendants if the statements at issue met the conditionally privileged communication definition and if the record contained no evidence of actual malice on defendants' part. *Id.* at 721.

sensibilities."[103]

The Ohio Court of Appeals has held that a medical examiner may not disclose information about a patient to anyone without first seeking the patient's permission.[104] Only certain aspects of the doctor/patient relationship are protected, however. For example, a secretary working at a medical center wrongfully divulged confidential information about a patient during her lunch hour, but the center was held not liable. The court held that corporations are liable for injuries caused by the wrongful acts of their employees only if the act was done within the scope of employment.[105]

B. *Employment Discrimination*

Are teachers and other employees with AIDS afforded the same protection against discrimination that students with AIDS enjoy? In 1988, the Ninth Circuit did extend protection to teachers, holding that a school system may not discriminate against a teacher infected with AIDS.[106]

Chalk, a teacher of hearing-impaired students, was hospitalized with pneumonia and diagnosed as having AIDS. After several months of treatment and recuperation, he was declared able to return to work, but his Orange County, California school district put him on administrative leave for the remainder of that year and then offered him an administrative job with the same salary and benefits that he would have received teaching. Chalk rejected this offer, preferring to return to the classroom. A federal district court refused to issue an injunction requiring that Chalk be allowed to teach. The Ninth Circuit unanimously reversed, relying on *School Board of Nassau County v. Arline*.[107] The court concluded that Chalk was "otherwise qualified" to teach under § 504 despite having AIDS and a history of previous physical impairment from AIDS. The "otherwise qualified" determination depended on whether a reasonable accommodation would eliminate any risk that Chalk would communicate an infectious disease to others in the workplace. The

103. Killilea v. Sears, Roebuck & Co., 499 N.E.2d 1291, 1294 (Ohio Ct. App. 1985) (quoting Housh v. Peth, 133 N.E.2d 340 (Ohio 1956) (emphasis added)).

104. Levias v. United Airlines, 500 N.E.2d 370, 374-75 (Ohio Ct. App. 1985) ("The discloser has no privilege unless he has reason to believe that the recipient has a real need to know, not mere curiosity.").

105. Knecht v. Vandalia Medical Ctr., Inc., 470 N.E.2d 230, 233 (Ohio Ct. App. 1984).

106. Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988). In fact, a school may face a wrongful discharge claim if it terminates an employee with AIDS merely because he or she is perceived to be a threat to co-workers. The 1985 Centers for Disease Control guidelines regarding the transmission of AIDS in the workplace state that an infected employee should not be restricted from working solely because he or she has AIDS. CENTERS FOR DISEASE CONTROL, GUIDELINES FOR EMPLOYEES, cited in WEINER, *supra* note 2, at 148.

107. 480 U.S. 273 (1987) (establishing that § 504 of the Rehabilitation Act applies to public employees who are infected with a contagious disease, in Arline's case tuberculosis, and who have a history of previous physical impairment from the disease, even if they do not currently suffer from the impairment).

court reviewed the four *Arline* factors[108] before deciding that Chalk's return to the classroom would not pose a *significant* risk that he would communicate an infectious disease to his students.[109] Even though the potential harm resulting from AIDS is catastrophic and the duration of the risk of infection is indefinite (two of the *Arline* factors) the court found "an overwhelming evidentiary consensus of medical and scientific opinion regarding the nature and transmission of AIDS."[110]

While the Ninth Circuit ruling was not unexpected after *Arline*, it does mean that a school district should consider its decision carefully before arbitrarily reassigning a teacher with AIDS. By the same token, however, it must continue to monitor the condition of a teacher with AIDS who is allowed to remain in the classroom. For example, it was highly probable that Chalk's immune system would deteriorate over time, making him very susceptible to opportunistic infections. While these infections do not cause AIDS, they are contagious in a classroom setting. Eventually, if Chalk did not voluntarily leave the classroom, his school board would have to exercise its power to control, regulate and protect.

Many states have enacted strict handicap provisions that would protect teachers. For example, the Ohio Civil Rights Act prohibits discrimination against the handicapped and is even more pervasive and protective than the federal statutes.[111] Its provisions are enforced by the Ohio Civil Rights Commission (OCRC).[112] In cooperation with the Department of Education, OCRC must prepare a comprehensive education program for the public schools "to eliminate prejudice on the basis of . . . handicap."[113] State entities like OCRC can accept and investigate charges alleging discrimination on the basis of AIDS. Such charges would be analyzed under the commonly-accepted legal standards applied to other handicaps.

Finally, teachers do not have an option to leave when a person with AIDS enters the school,[114] but they may legitimately expect the school

108. *See infra* note 126 and accompanying text.

109. Since Chalk had physical symptoms and a previous physical impairment from AIDS, he was not asymptomatic, but fully met the *Arline* conditions. 480 U.S. at 288. The Ninth Circuit, therefore, did not address the critical question of protection for a staff member who is asymptomatic.

110. 840 F.2d at 706. Essentially, this is a finding that there is no known risk of transmitting AIDS through the nonsexual, noninvasive, day-to-day interaction between teachers and students in the classroom.

111. OHIO REV. CODE ANN. § 4112 (Anderson 1991).

112. *Id.* § 4112.04.

113. *Id.* § 4112.04(A)(9).

114. A difficult question is whether employees who object to working with an AIDS victim—or someone whom they fear will expose them to the disease—are protected against employer discipline for engaging in concerted activity, which is allowed under the National Labor Relations Act (29 U.S.C. §§ 151-169 (1988)). In an AIDS situation, such activity could conceivably consist of teachers refusing to work because a coworker who had AIDS was allowed to continue working in the school. This is a hypothetical situation; the author knows of no such present case. The author believes, however, that such an action would *not* be protected under the "concerted action" provisions of the NLRA. *See* 29 U.S.C. § 157 (1947).

district to provide adequate training to ensure that they understand AIDS and know how to act to avoid unreasonable danger. Their fears will diminish if they are taught to use the so-called "universal precautions."[115]

C. *The 1973 Rehabilitation Act*

Numerous state statutes prohibit employment discrimination against the handicapped; some of these extend protection to persons with AIDS.[116] Many of these statutes protect both public and private employees. The federal government also has adopted laws intended to integrate the handicapped into the social mainstream.[117] To determine coverage for the handicapped, therefore, persons with AIDS and schools should examine both sets of laws.

The model statute on disability discrimination is the federal Rehabilitation Act of 1973.[118] It is the vehicle most often used to redress claims of handicap discrimination in employment.[119] It applies to federal employees and contractors and to all programs receiving federal financial assistance. Its fundamental principle[120] is that an "otherwise qualified handicapped individual" may not be denied an opportunity to participate in any federally funded program or activity.[121] Under the federal definition, not only AIDS carriers but those who are victimized because they are thought to have AIDS or who seem likely to get AIDS could be protected.[122] Although no specific case law protects people in

115. "Universal precautions" consist of treating every situation as if it were one in which a person could, without proper precautions, become infected by someone with the HIV virus. In the school setting, this would mean, for example, that a teacher wears rubber gloves when helping any child who has suffered an injury that could cause an AIDS infection. This protects the teacher regardless of whether the child is infected.

Doctors disagree as to the risk that the virus will be transmitted through contact with blood during a fight or an injury that may occur at school. Studies have shown that to infect another person would require a large amount of blood, containing a large quantity of the virus particles, entering the other person's bloodstream. Furthermore, with the type of injuries that occur on a school ground, the body immediately begins to heal the open wound through the clotting process. This process, it has been argued, creates a natural barrier that prevents commingling of the two individuals' blood and thus forms a natural barrier to the virus. WEINER, *supra* note 3, at 190.

116. Arthur S. Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681, 689-96 (1985).

117. *See, e.g., id.* at 689-90 n.35; *see also* Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1991).

118. 29 U.S.C. §§ 701-796 (1991).

119. Although much debate surrounds whether § 504 applies to AIDS, Congress could not possibly have intended the Rehabilitation Act to cover AIDS because AIDS was not yet diagnosed in 1973 when the Act was passed. In *Arline*, the Supreme Court reviewed the scope of § 504 and specifically refrained from commenting on its applicability to AIDS. This was a purposeful decision on the Court's part, based on "ripeness." In a 1986 memorandum, however, the Office of Legal Counsel of the Department of Justice ruled that AIDS and disabling symptoms of ARC were "handicaps" under § 504. Daily Lab. Rep. (BNA) No. 122, at D-1 (June 25, 1986).

120. As enunciated in § 504.

121. 29 U.S.C. § 791(b) (1991).

122. People who are infected by the virus but have not experienced debilitating symptoms appear to be covered by the final section of the Rehabilitation Act's definition, which refers to people who "are regarded as having such an impairment." 29 U.S.C. § 706(8)(B).

the latter two categories, § 504 probably will be extended to them, because the Act unambiguously refers to physical impairments that substantially limit life activities.[123]

In *Arline*, the school board argued that discrimination against a handicapped person could be lawful if it is based on fears deriving from the handicap's contagious nature.[124] The Supreme Court rejected that argument and held instead that a school teacher afflicted with the contagious disease of tuberculosis is a "handicapped individual" within the meaning of the Rehabilitation Act. This means that a federally-funded state program may not discriminate against a person with tuberculosis solely because of the tuberculosis. As to whether an employer may discharge an individual who suffering from a contagious disease because of "fear of contagion," when the disease is defined as a handicap, the Court concluded that while school districts can protect an individual with AIDS from the irrational fears of others, only medical professionals can separate irrational fear from just cause. The school argued, unsuccessfully, that Arline had been discharged not because of her diminished physical capacity but because her tuberculosis posed a threat to the health of others. The Court ruled that the Rehabilitation Act does not consider conditions that could "impair the health of others" a handicap.[125]

The *Arline* Court did not determine whether the Rehabilitation Act protects a person with the HIV antibody. Instead, the Court adopted a four-part test recommended by the American Medical Association in its amicus brief. In remanding the case to the district court to determine whether Arline was "otherwise qualified," the Court required that the trial court base its decision on:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[126]

The *Arline* decision protects individuals against irrational fear or prejudice on the part of employees or fellow workers, but it does not require an employer to hire someone who has a contagious disease. The Court said only that individuals who are both handicapped and otherwise qualified are eligible for relief under § 504. Later, in *Chalk*, the Ninth Circuit held that a teacher with AIDS was handicapped and otherwise qualified for employment under § 504.[127]

In fact, members of high risk groups who are *not* infected (or not known to be infected), but who are treated adversely in employment because they are perceived as threatening to infect others with AIDS, could be protected by the "regarded as" category.

123. *See, e.g.*, PERSPECTIVES ON AIDS, *supra* note 1, at 22-31.

124. *Arline*, 480 U.S. 273, 282.

125. *Id.* at 284-85.

126. *Id.* at 288.

127. 840 F.2d at 711.

Arline provided the commonly-used rationale for expressly rejecting the application of a standard of law based on the communicability of AIDS as opposed to the impairment itself. This is the legal crux of the AIDS issue, because *a person with AIDS may not be impaired at all.* If, in the specific case, medical opinion indicates that there is no likelihood or probability of communicating the disease through casual social contact, a person with AIDS probably will not be treated as handicapped. Thus, an asymptomatic carrier would not be treated as handicapped because of the low probability of communicating the disease through casual contact. As the danger of contagion increases, however, as for example with AIDS-Related Complex and certainly with full-blown AIDS, handicapped status will likely attach.

D. *The Americans with Disabilities Act of 1990*

The 1990 Americans with Disabilities Act (ADA) is effective on July 26, 1992. The Act makes it unlawful for private employers, state and local governments, employment agencies and labor unions to discriminate against qualified individuals with disabilities in the job application process or in hiring, firing, promotion, training, compensation or other terms and conditions of employment.[128]

Coverage under the ADA is parallel to that under the 1973 Rehabilitation Act with regard to definitions of disability and qualified individuals. Both statutes allow the option of being "regarded as having such an impairment." Although AIDS is not mentioned in the statute, it is clear from the legislative history that Congress intended the Act to protect persons with AIDS and those with HIV from discriminatory acts.[129]

III. PREVENTING THE SPREAD OF AIDS

Like everyone else, school employees and pupils have a duty to prevent the spread of a contagious disease. Many states have laws requiring that a person who knows or has reasonable cause to believe that he is suffering from a dangerous and contagious disease must take reasonable measures to prevent exposing others to the disease.[130] Thus, in states that have enacted this type of law, a person with AIDS who knowingly fails to take such reasonable measures could be found guilty of a criminal offense and could be subject to selective isolation. Many believe that a person with AIDS who has knowingly infected others[131] should be isolated. Selective isolation not only would prevent offenders from infecting more people, but also would highlight public concern about the spread of AIDS and might even deter potential offenders.

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128. 42 U.S.C. §§ 12101-12213 (1991).

129. CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: QUESTIONS AND ANSWERS (1991).

130. *See, e.g.*, OHIO REV. CODE ANN. § 3701.81 (Anderson 1988). A violation of this statute is a second degree misdemeanor. OHIO REV. CODE ANN. § 3701.99 (Anderson 1988).

131. Gaetan Dugas, a Canadian airline steward, is a well-known example. See RANDY SHILTS, AND THE BAND PLAYED ON 78-79, 438-39 (1987).

Some acts by AIDS carriers are regularly prosecuted as violations of existing criminal laws. For example, several persons have been charged with assault, attempted assault and reckless endangerment for allegedly biting or spitting at police or prison officers who tried to restrain them while they were in custody.[132] Simply exposing someone other than one's spouse to HIV infection through sexual activity constitutes a criminal offense in some states.[133] One court has indicated that a sex act by an AIDS carrier constitutes assault with a dangerous weapon or attempted murder.[134] In 1987, a West German court convicted an American serviceman with AIDS of causing bodily harm with "dangerous treatment" because he had had intercourse with several partners.[135]

In addition to invoking existing criminal laws in the new context of AIDS, some states have passed new legislation specific to AIDS transmission. Some forms of AIDS transmission, such as donating blood and having sexual intercourse without informing the partner, have already been criminalized.[136] Future state action criminalizing various forms of AIDS transmission might include making it a felony to engage in acts of prostitution while knowing one was infected with HIV, aggravating punishment for rape committed by someone who knows he is infected with HIV, and criminalizing sexual intercourse by a knowing AIDS carrier or the knowing commission of any act a person knows is likely to transmit AIDS to another.

In the wake of the AIDS epidemic, calls for mandatory testing and quarantine have mounted. The federal government now tests immigrants, federal prisoners, military personnel and federal employees in the Peace Corps, Job Corps and State Department Foreign Service. The testing of foreign service personnel was upheld, although the Job Corps' AIDS testing policy has been challenged.[137] The key question is whether mandatory testing violates an employee's Fourth Amendment rights against unreasonable search and seizure. Case law remains unclear, though one state case appears to limit the right to require testing.[138]

In addition, numerous states have passed laws that require testing of prisoners and convicted prostitutes, sex offenders and IV drug

132. Robert O. Boorstin, *Criminal and Civil Litigation on Spread of AIDS Appears*, N.Y. TIMES, June 19, 1987, at A1.

133. FLA. STAT. ANN. § 384.24 (1990); LA. REV. STAT ANN. § 14:43.5 (1987).

134. Berner v. Caldwell, 543 So.2d 686 (Ala. 1989). In this Herpes transmission case, the court specifically stated that the transmission of AIDS would also be construed as battery.

135. Serge Schmemann, *Bavarian Court Convicts American in AIDS Case*, N.Y. TIMES, November 17, 1987, at A5.

136. FLA. STAT. ANN. 384.24 (West Supp. 1986) prohibits a person infected with HIV from having sexual intercourse without informing his or her partner of the infection; IDAHO CODE § 39-601 (1986) prohibits a person with AIDS or an AIDS carrier from knowingly or willfully exposing another to AIDS, ARC or HIV; TENN. CODE ANN. § 68-32-104 (1986) prohibits AIDS carriers from donating blood.

137. Doreen Weisenhaus, *The Shaping of AIDS Law*, NAT'L L.J., August 1, 1988, at 1.

138. Guardianship of Anthony, 524 N.E.2d 1361 (Mass. 1988) (a sexually active retarded man who exhibited no symptoms of AIDS could not be tested for the disease).

users.[139] Illinois and Louisiana enacted mandatory testing for marriage-license applicants, but only four of the first 12,000 applicants tested positive for HIV, while the number of applicants for marriage licenses was significantly reduced.[140]

Quarantine of persons with AIDS has also been suggested. A 1986 Newsweek poll indicated that fifty-four percent of those surveyed favored quarantining people with AIDS.[141] Proposals for quarantine, however, represent an outdated medical practice. Quarantine is highly discretionary and relatively unconstrained by strict norms of notice, fair warning and due process. Nevertheless, many state health laws enacted during earlier epidemics were routinely upheld as an appropriate exercise of the state's police power. These laws have been largely unused, however, because antibiotics have proved more effective than quarantine in stopping most epidemics.

Several states have amended their public health laws to authorize some form of isolation for some AIDS carriers.[142] Other possible state actions might include permitting quarantine of any seropositive HIV carrier who knowingly exposes another person to the virus and authorizing quarantine of persons with AIDS and persons suspected of being infected with HIV pending testing. State lawmakers are likely to allow public health authorities to quarantine or isolate persons designated as diseased upon a showing that their conduct exposes others to the disease and that confinement is necessary to prevent its spread.

The substantive constitutional constraints that apply to criminal sanctions have not been applied to processes of quarantine, commitment and preventive detention.[143] Civil commitment, however, may involve greater deprivation of liberty than criminal punishment,[144] and quarantine of AIDS patients or carriers may violate their right to due

139. *Id.* at 30.

140. *Id.* Because of this experience, several states have instituted premarital education programs in lieu of testing.

141. *Growing Concern, Greater Precaution*, NEWSWEEK, Nov. 24, 1986, at 32. In 1986, California voters defeated a notorious pro-quarantine initiative that would have added AIDS and exposure to the HIV virus to the list of diseases reportable to the state health authorities. The authorities, in turn, would have been authorized to quarantine persons with AIDS or AIDS carriers. People living with or visiting AIDS patients or carriers would have been subject to criminal penalties if they failed to report this contact to public health authorities.

142. COLO. REV. STAT. § 24-4-1406(2)(c) (Supp. 1991) authorizes public health officials to order persons infected with HIV whose behavior endangers others to cease and desist, and in the event that they violate such orders, to apply restrictions necessary to stop them; IDAHO CODE § 39-601 (1986) adds AIDS, ARC and other manifestations of HIV infection to the list of diseases subject to quarantine; KY. REV. STAT. ANN. § 214.410 (Baldwin 1991) classifies AIDS as a sexually transmitted disease subject to quarantine or isolation.

143. *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962) (civil commitment is not subject to the constraints of the Eighth Amendment's prohibition against cruel and unusual punishment). To invoke criminal sanctions would entail a more serious deprivation of individual liberties than civil sanctions such as quarantine, commitment and preventive detention.

144. *See, e.g.*, Powell v. Texas, 392 U.S. 514 (1968) (from an alcoholic's point of view, compulsory commitment for alcoholism "can hardly be considered a less severe penalty" than jail).

process and equal protection. In any event, quarantine of persons with AIDS is unreasonable because the AIDS virus is not easily communicated.[145] Quarantine, like isolation and placarding, is an extreme measure that should be implemented only when no less restrictive alternative is available to control transmission.[146]

A state board of health may have the responsibility to inspect schools and may close any school for health reasons.[147] When a dangerous communicable disease is unusually prevalent, as would be the case if AIDS were to become an epidemic, or a school or community is threatened with epidemic conditions, an Ohio statute permits the state board of health to close any school and even prohibit public gatherings for such time as is necessary. While medical knowledge about AIDS suggests that this action would be inappropriate, state law neverthess provides the authority for it in Ohio.[148]

IV. THE ROLE OF SCHOOL BOARDS

School board members are vested with management and control of all the public schools in their district.[149] Although a school board receives its power from the state, local boards are given broad authority in the conduct and management of their schools.[150] Absent gross abuse, a court has no authority to control the discretion vested in the board or to substitute its judgment for that of the board.[151]

A school board should develop policies before an AIDS crisis devel-

145. For a more extensive discussion of the quarantine issue see John A. Gleason, *Quarantine: An Unreasonable Solution to the AIDS Dilemma*, 55 U. CIN. L. REV. 217 (1986); Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985); Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139 (1988).

146. Case law has allowed such restraint of prisoners. For example, a New York court dismissed an attempt by prisoners who suffered from AIDS to enjoin their segregation from the general prison population. The court held that segregation of prisoners with AIDS from the general prison population bore a rational relation to prison officials' objective of protecting both AIDS sufferers and other prisoners from tension and harm that could result from other prisoners' fears. Further, the segregation did not inflict cruel and unusual punishment, deny prisoners with AIDS due process or violate their rights to privacy, free expression and free association. Cordero v. Coughlin, 607 F. Supp. 9 (S.D.N.Y. 1984).

When an inmate with AIDS was denied conjugal visits through the New York Prison Family Reunion Program, the inmate and his wife brought a mandamus proceeding to review the ruling and obtain declaratory relief. The court found that an inmate retains only those rights not inconsistent with the institution and his status. The inmate claimed that denying him visitation invaded an area of personal decision making. But the court held that the denial was appropriate as long as prison officials had a rational basis for it. In this case, prison regulations set forth 15 guidelines for consideration and balancing. The court noted that the guidelines, many of which were subjective, did not create an entitlement to the conjugal visits, and found, inter alia, that the inmate's AIDS was an appropriate reason for prison officials to deny his conjugal visits. Doe v. Coughlin, 518 N.E.2d 536 (N.Y. Ct. App. 1987).

147. *See, e.g.*, OHIO REV. CODE ANN. § 3707.26 (Anderson 1988).

148. *Id.* Such action may create rather than reduce the mass hysteria and fear of contagion that accompanies AIDS.

149. *See, e.g.*, OHIO REV. CODE ANN. § 3313.47 (Anderson 1990).

150. Greco v. Roper, 61 N.E.2d 307 (Ohio 1945).

151. State *ex rel.* Evans v. Fry, 230 N.E.2d 363 (1967).

ops. As elected officials, board members are under immediate political pressure when it becomes public knowledge that a person or child with AIDS is in school. There is simply no time for rational action once AIDS hysteria begins. Responsible school board planning in advance is particularly important because a school board may only take official actions in concert during an official session.[152] An individual board member has no authority to act on behalf of the entire board.

In developing policies to deal with AIDS, board members should review state and federal law regarding the treatment of persons with handicaps or infectious diseases. Although education is not a federal constitutional right,[153] it is a right under many state constitutions. Ohio, for example, provides public education as a right for citizens between the ages of five and twenty-one;[154] students cannot be deprived of this right without due process.[155] Without these statutory protections, students with AIDS would have no recourse if a school district excluded them in the misguided belief that its action is necessary to protect others.

Financial assistance in meeting the educational needs of handicapped children is available to states under P.L. 94-142, the Education for All Handicapped Children Act.[156] Federal assistance also is available for early childhood education under P.L. 99-457.[157] Some states have gone beyond the federal statute in providing assistance and protection for handicapped children. For example, the Ohio Administrative Code was revised in 1976 to establish an elaborate system of regulations and statutes regarding the handicapped.[158]

The Education for All Handicapped Children Act (P.L. 94-142) established handicapped children's right to be educated in the same classroom as nonhandicapped children, when this is feasible. School boards should consider this "mainstreaming" concept[159] in determining how to educate children with AIDS, ARC or the HIV antibody. The first issue to be resolved is whether AIDS would qualify as a handicapping condition under a provision regarding children who are "health impaired or who have specific learning disabilities requiring special education."[160]

If a student with AIDS is covered by special education provisions, the school district is required to provide for all the costs of that student's individualized educational plan. In Ohio, this includes "required related services and instruction specifically designed to meet the unique needs of a handicapped child, including classroom instruction, home instruction, and instruction in hospitals and institutions."[161] The concept

152. 68 AM. JUR. 2D *Schools* § 53 (1973).
153. City of San Antonio v. Rodriguez, 411 U.S. 1 (1973).
154. OHIO REV. CODE ANN. § 3313.48 (Anderson 1990).
155. OHIO REV. CODE ANN. § 3313.661 (Anderson Supp. 1991).
156. 20 U.S.C. §§ 1401-1485 (1990).
157. Early Education for Handicapped Children, 20 U.S.C. § 1423.
158. OHIO ADMIN. CODE §§ 3301-51-01 to -30 (1990).
159. 20 U.S.C. § 1412 (5)(B).
160. OHIO REV. CODE ANN. § 3323.01(A) (Anderson 1987).
161. OHIO REV. CODE ANN. § 3323.01(B) (Anderson Supp. 1990).

of an individualized education program is eminently useful for a child with AIDS.

Superintendents typically have a statutory right and duty to assign children.[162] Because of this responsibility, the superintendent must make the difficult decisions regarding the assignment of a student with AIDS. Each case should be dealt with on an ad hoc basis and each child should receive adequate substantive and procedural due process. Before excluding a child with AIDS, a school district should notify the child and institute a hearing of some kind, based on written board procedure or policy.

Substantive due process requires that a school district do more than merely review the facts. It requires the district to listen to the best medical and legal advice available and then make the best decision possible. Many school districts have established AIDS panels. Ideally, theses panels include at least one infectious disease specialist, a county health official, a medical doctor, a physician for the child with AIDS and an educator from the school district.[163] With four medical people on such a panel, the decision on an AIDS case would be likely to reflect the medical community's determination that the risk of AIDS transmission through casual contact in a school setting is minimal. A disturbing practice developing in some school districts, however, is to increase the number of non-medical school district personnel on these panels. Such panels are likely to favor the school, giving the school district greater leverage than the child when a sensitive AIDS decision must be made. This practice could create potential legal problems. If educators base their decisions solely on educational, rather than informed medical grounds, ignoring medical experts' testimony, their decisions may not hold up in the lawsuits to which they are likely to give rise.

The future regarding AIDS and the schools is far from bright. Most persons with AIDS, children included, will face discrimination and ill-treatment. Children will continue to face legal battles to stay in school, and teachers and staff will continue to lose their jobs. Discriminatory practices will increase as the fear and trauma of potential infection from AIDS is amplified and inflamed by the news media and imaginary fears. School systems must be at the forefront of concern and change, if for no other reason than the length of AIDS incubation. With a seven-to-ten year dormancy period (some studies indicate that it might be fifteen years or more),[164] many of those unknowingly infected with the virus will have children. Many of these children born with AIDS will enter schools in the mid-1990s.

A fundamental underpinning of our federal system is the belief that

162. *See, e.g.*, OHIO REV. CODE ANN. § 3319.01 (Anderson 1990).

163. The author discussed the proposed procedure with dozens of school superintendents at the 1991 American Association of School Administrators conference in New Orleans, La., March 2, 1991 during an open forum session. The consensus was that a medical panel recommendation was the best tactic, and in fact, the superintendents' school attorneys had recommended it.

164. *Health Benefits*, *supra* note 9.

the federal government should help with problems that are too big for local government to handle. This philosophy has resulted in federal initiatives in areas of defense, commerce and civil rights. At present, however, no federal law deals with AIDS and no federal plan addresses the AIDS crisis, despite the fact that a report by the Presidential Commission on AIDS called for sweeping measures, including voluntary testing and anti-discrimination laws.[165] Courts are still struggling with the appropriate application of the Rehabilitation Act to persons with AIDS, and while an explosion of litigation has occurred in state courts, federal courts have provided little guidance.

Present state and federal laws may protect people with AIDS who hold public sector positions, but in far too many states, individuals in private sector jobs have only limited protection. At first glance, protective legislation for people with AIDS may not seem as important as assistance in fighting the disease itself. Unfortunately, this is a shortsighted view. Persons with AIDS and their families—who also are not assured that they are secure in their jobs and apartments and safe from quarantine—will not come forward for testing and treatment. Because the threat of discrimination makes it unrealistic for a person to volunteer to be tested for AIDS before having children, many asymptomatic carriers will continue to have children who are born with the virus. Thus, the number of infected people will continue to grow, and the number of children with AIDS will continue to increase.

In the fifties, the dangers of drugs were featured in federal reports, journal articles and local publicity, yet we did nothing because vested interests were not affected. Drugs, it was said, were a black ghetto problem that did not concern the "good" kids. The result of this avoidance is that we now have a drug problem that is beyond the ability of any city, state or even the federal government to resolve. Similarly, the much needed, far-reaching federal AIDS initiative will not occur as long as people believe that AIDS is only a disease of homosexuals and drug abusers.

V. RECOMMENDATIONS

The following recommendations regarding AIDS policies, practices and procedures are intended for school boards, administrators, teachers and staff to use as they develop local practices. The recommended policies and procedures may help school officials avoid serious legal and community problems without jeopardizing the rights of people with AIDS.

AIDS policies must be in place in advance of a potentially critical situation. A school district has no time to develop a well-reasoned series of actions after an AIDS emergency develops, and community pressure and concern may lead to incorrect and possibly illegal actions. An AIDS advisory team composed predominately of medical experts should be in

165. *See* Weisenhaus, *supra* note 137, at 1.

place to recommend actions to the superintendent and school board. Expert medical advice is critical in protecting and insulating the school district, as well as in protecting the rights of a person with AIDS. An AIDS advisory team should include the child's or employee's doctor as well as county and district medical officials and a district educational representative.

A school district should communicate its AIDS policies and the underlying rationale to the public *before* a crisis occurs. For example, the public may be informed that medical evidence has ruled out transmission of AIDS by casual social contact and that there is no evidence of virus transmission within the classroom situation. This practice serves as a community education program and provides a basis for avoiding panic reactions if a crisis occurs.

As a general rule, discrimination against a person with AIDS in a school setting is irrational, unreasonable and probably unlawful as long as medical research continues to demonstrate that AIDS cannot be contracted through casual social contact. A school board should not transfer or fire a seropositive student or employee, or one with ARC or AIDS, merely because of that person's medical status. The medical team's recommendations should be the controlling factor in a decision regarding transfer or termination. Recent court action[166] indicates that transfer should only occur after a medical team decision based on the communicability and risk of transmission of the AIDS virus. Rarely, if ever, should a student be turned away or a school employee be fired because of medical status.

A school district should always explore the options of home instruction for a student and assignment to a nonteaching position for an employee. Student and staff may actually prefer an alternative in which they are not involved with the public and thereby avoid exposure to opportunistic infections. If the parents of the student with AIDS accept home instruction, or if an employee is willing to accept an assignment to a nonteaching position, the district is relieved of responsibility and liability.

Even when parents opt for home instruction, a school district must allow a child with AIDS to attend school. A child has a right to be educated among his or her peers. An exception should be made only when the child is a danger to others, as in the case of a young child with AIDS who has a history of biting others.

A school district may not exclude an employee because of the "fear" that he or she will spread the AIDS virus. *Arline* settled this question.[167] An employer may not discriminate simply because of an unfounded fear of transmission. Only when there is convincing evidence that a person with AIDS is a threat to others may an employer take pro-

166. Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988); *see supra* notes 65-78 and accompanying text.

167. See *supra* notes 125-26 and accompanying text.

tective action. Fear of contagion, alone, is not enough to justify discrimination.

An employer may not terminate an employee with AIDS without convincing evidence of a threat of contagion, but the same employer must take care in acting against people who object to continued employment with a person with AIDS. Workers engaged in "concerted activity" are protected by the National Labor Relations Act (NLRA)[168] whether or not they are members of a collective bargaining unit. Therefore, a school district may not arbitrarily terminate employees who complain about the perceived safety hazard of working with a person with AIDS. Of course, the employees must be reasonable in their beliefs and act in good faith. Since the medical facts at this time indicate that the disease is transmissible only through intimate physical contact, which would not occur in the performance of an employee's job, a court probably would find that fear of AIDS in this situation is not reasonable. Furthermore, the NLRA probably would not protect a "concerted activity" where the person with AIDS had previously been defined as handicapped, since a handicapped person is protected from discrimination under state and federal law.

Treating individuals with AIDS or ARC differently from those who are seropositive is an equal protection violation. It would be unconstitutionally discriminatory for a school board to terminate an employee or exclude a student with a given AIDS-linked condition while treating those in another category differently. Excluding all categories of AIDS victims also would fail. While education is not a "fundamental right," states that choose to provide a public education must make equal services available to all. Again, the behavior and physical condition of the person with AIDS must be the determining factor.

School district and employee insurance policies should be examined to determine the extent of coverage and protection. In most cases, insurance plans exclude or limit benefits for a pre-existing injury or sickness. Thus, an insurance company must continue to provide coverage for an individual who contracts AIDS during his or her employment, with no prior knowledge, as it does for a person who contracts cancer while employed. Some insurance companies have used a positive antibody test to justify denying coverage. This practice appears to be a departure from traditional group underwriting practices and therefore may trigger a charge of employment discrimination.

An AIDS condition should be kept confidential whenever a question arises as to whether information should be released. Confidentiality is implicated when an AIDS test is required, when an employee notifies the district of a positive test result and when a child with AIDS enters the school system. These results must not be released without consent, nor should they be used to determine insurability or suitability for employment. State laws vary, but revealing medical information could be a

168. 29 U.S.C. § 157 (1947).

clear invasion of the privacy of a student or employee. The general policy should be that if there is no need to fear AIDS, there is no rational reason to intrude on the right to privacy of a person with AIDS.

A school district must make a reasonable effort to accommodate an employee with AIDS. Because persons with advanced AIDS are likely to be considered handicapped, employers must make reasonable accommodations for their physical or mental limitations, unless those accommodations would impose an undue hardship—not merely an inconvenience—on the employer's business. Since AIDS is not spread by casual social contact, a school district would find it difficult to argue undue hardship.

A school district should take immediate action to eliminate or curtail students' drug activity, since the fastest growing cause of AIDS infection is intravenous drug use, and to initiate and sustain AIDS-prevention education programs. Teenagers are a high-risk group for AIDS because they tend to experiment with sex and drugs. Their impulsive behavior and lack of knowledge about long-term consequences make them especially vulnerable. A comprehensive program of AIDS education, which enhances personal awareness and instructs students on protective behavior, may reduce the number of students who acquire the disease. Since the incidence of AIDS among Hispanics and Blacks is far higher than in the general population,[169] education programs should include specialized AIDS instruction for minority children, geared to their cultural values.

Staff development programs focusing on AIDS education should be instituted at the same time as AIDS-prevention education programs for students. Many teachers are unaware of many facts about AIDS and many also are unable to deal with the complexity of students' concern and questions about AIDS prevention. Most adults are simply not comfortable talking about such AIDS concerns as anal intercourse, safe sex, and condom use. Only through proper in-service training, followed by on-going staff development based on open communication, will teachers develop the knowledge and ability to share critical AIDS information with students. Teachers and all staff who communicate with students should receive this training.

CONCLUSION

The present attitude of many people regarding AIDS is similar to the prevalent attitude in the 1950s regarding drugs. Religious fundamentalists are not the only ones who believe that AIDS may be a punishment for the sexual behavior of homosexuals or for the excesses of intravenous drug abusers. Medical science has established, however, that AIDS attacks everyone, not just homosexuals and drug addicts. Unfortunately, the "democratic" nature of the AIDS virus will so compound the problem that even comprehensive federal legislation may

169. *See supra* note 5 and accompanying text.

come too late to save most people who are infected by AIDS. The costs will be astronomical. Our health providers may be unable to meet the nationwide need. Likewise, our social systems—including public school systems—are ill-prepared to meet the interpersonal needs of AIDS patients, their families, and a hysterical public. The national will seems inadequate to provide both a coordinated federal AIDS effort and a stronger research effort; it may not even be strong enough to force lawmakers to enact additional supportive legislation.

The only realistic solution is prevention, and prevention requires education. Children are educated both at home and in school. With a comprehensive awareness program, the spread of both diseases, AIDS and AFRAIDS, can be slowed. Children will learn if they are taught effectively. Teaching about AIDS requires a sincere effort and a general acceptance of the lessons to be learned.[170] This is possible, but who will teach the parents, teachers and administrators who teach the children? Whither our future?

170. For additional information on schools and AIDS, see the following: Leah Hammett, *Protecting Children with AIDS Against Arbitrary Exclusion from School*, 74 CALIF. L. REV. 1373 (1986); Edward Knox Proctor, Delconte v. State: *Some Thoughts on Home Education*, 64 N.C. L. REV. 1302 (1986); Frederick A. O. Schwartz, Jr. & Frederick P. Schaffer, *AIDS in the Classroom*, 14 HOFSTRA L. REV. 163 (1985); Lisa J. Sotto, *Undoing a Lesson of Fear in the Classroom: The Legal Recourse of AIDS-Linked Children*, 135 U. PA. L. REV. 193 (1986); Matthew J. Welker, *The Impact of AIDS Upon Public Schools: A Problem for Jurisprudence*, 33 EDUC. L. REP. 603 (1986).