William & Mary Law Review

Volume 29 (1987-1988)
Issue 4

Article 7

May 1988

Discrimination in the Public Schools: Dick and Jane have AIDS

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DISCRIMINATION IN THE PUBLIC SCHOOLS: DICK AND JANE HAVE AIDS

Acquired Immune Deficiency Syndrome (AIDS) came swiftly to the attention of the American public in the early 1980s. Originally the public believed that AIDS affected only homosexuals and intravenous drug users. In some circles AIDS was believed to be nature's revenge on immoral and unnatural conduct. By now, however, AIDS is recognized as a very real threat to everyone—including children.

The most tragic cases involve children, who are unwilling and defenseless victims of this almost certainly fatal disease. As of September 1987, 563 children had been documented as having AIDS; two thirds of them have died.[1] Further, the U.S. Public Health Service estimates that 2000 children in the United States are presently infected with the AIDS virus.[2] Some scientists project that by 1991, 10,000 to 20,000 American children under thirteen years of age will show symptoms of the disease.[3]

Because AIDS "can be transmitted in life's most basic action—sex, procreation, love . . . there is more emotionalism attached to it than any disease since the Dark Ages."[4] This emotionalism is no less apparent with regard to the issue of admitting children with AIDS to public school classes. In Florida, a public school barred triplets who had AIDS-related complex from enrolling in public school. The school eventually admitted the children, but a volunteer teacher taught them in an isolated school setting.[5] In Indiana, a school excluded a thirteen-year-old hemophiliac with AIDS.[6] In New York, a community school board superintendent

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1. Monmaney, *Kids with AIDS*, NEWSWEEK, Sept. 7, 1987, at 51, 52.
2. *Id.* at 52.
3. *Id.*
4. *AIDS: At the Dawn of Fear*, U.S. NEWS & WORLD REP., Jan. 12, 1987, at 60, 62.
5. *Suit Seeks Class Attendance for Triplets with ARC*, 1 AIDS Pol'y & L. (BNA) No. 15, at 4 (Aug. 13, 1986).
6. Comment, *Undoing A Lesson of Fear in the Classroom: The Legal Recourse of AIDS-Linked Children*, 135 U. PA. L. REV. 193, 194 n.8 (1986).

removed three children because of suspicions that the students' mothers' boyfriends were infected with the virus.[7]

Many localities have established official policies that address the problem of admitting children with AIDS into regular classrooms. A Queens, New York, community school board voted to bar infected children from attending school altogether.[8] In San Mateo County, California, one official proposed segregation of students with AIDS.[9]

Other school districts have adopted a case-by-case approach based on 1985 federal guidelines issued by the Centers for Disease Control (CDC).[10] The guidelines suggest that most infected school-aged children be allowed to attend regular classes. These guidelines exclude only those children whose behavior might expose uninfected children to the AIDS virus and suggest that this determination be made individually by a team consisting of the child's doctor, public health personnel, the child's parent or guardian, and personnel associated with the school.[11] Despite the enlightened approach of some educators, however, the educational plight of children with AIDS is serious. Few cases have come to the courts, and even fewer have been reported.[12]

This Note explores the issue of discrimination against children with the AIDS virus in primary public education.[13] It first reviews

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7. *Id.*

8. Fried, *Queens School Unit Rejects City's Policy on AIDS Screening*, N.Y. Times, Sept. 1, 1985, at 41, col. 1.

9. *School Trustee to Propose Ill Students' Segregation*, 2 AIDS Pol'y & L. (BNA) No. 12, at 9-10 (July 1, 1987).

10. *Illinois Guidelines Oppose Barring Students with AIDS*, 2 AIDS Pol'y & L. (BNA) No. 3, at 10 (Feb. 25, 1987) (advisory guidelines declaring right to free public education, absent special risk factors); *Missouri Develops Policy on AIDS*, 1 AIDS Pol'y & L. (BNA) No. 15, at 5 (Aug. 13, 1986) (case-by-case approach recommending that children with AIDS be allowed to attend school unless they bite or lack toilet training); *See Bills Would Bar Persons With AIDS in Schools*, 1 AIDS Pol'y & L. (BNA) No. 1, at 7 (Jan. 29, 1986) (Bismark, South Dakota adopted a case-by-case approach to decide whether students with AIDS should be allowed to attend regular classes).

11. *Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 MORBIDITY & MORTALITY WEEKLY REP. 517, 519 (1985) [hereinafter *Education and Foster Care*].

12. Jones, *The Education for All Handicapped Children Act: Coverage of Children with Acquired Immune Deficiency Syndrome*, 15 J. L. EDUC. 195, 203 (1986).

13. The scope of this Note is limited to children. High schools may have special concerns regarding transmission of AIDS because of the possibility of sexual activity among students.

medical evidence regarding communicability of AIDS in the classroom setting and concludes that AIDS does not represent a threat to noninfected children in this setting. The Note then explores the rights of infected children under the equal protection clause of the United States Constitution. It also discusses whether these children are protected under section 504 of the Rehabilitation Act of 1973[14] and in particular whether asymptomatic carriers of the AIDS virus can be classified as "handicapped." This Note concludes that children with AIDS should not be excluded from attending public school, that they probably are protected by the equal protection clause in this regard, and that section 504 covers asysmptomatic carriers of the AIDS virus as well as victims of AIDS and AIDS-related complex.

MEDICAL OVERVIEW

The Center for Disease Control (CDC) defines AIDS as a syndrome associated with exposure to human T-cell lymphotropic retrovirus type III (HTLV-III).[15] This definition, which identifies cases that manifest the disease fully, requires the presence of certain associated conditions, including opportunistic infection, Kaposi's sarcoma (a malignant skin lesion), and non-Hodgkins lymphoma of high-grade pathogenicity.[16] Those who carry the virus but are not afflicted with the associated diseases are considered to have AIDS-related complex (ARC).[17] A third group, those who have been exposed to the AIDS virus but do not manifest any physical symptoms, are asymptomatic carriers.

The AIDS virus has been found in a number of body fluids, including blood, semen, breast milk,[18] vaginal fluids, saliva, and tears.[19] Scientists have not documented transmission of the virus via saliva and tears.[20] Children usually acquire the disease from

14. Because of its focus on discrimination analysis, this Note does not discuss the Education for All Handicapped Children Act.

15. Sicklick & Rubenstein, *A Medical Review of AIDS*, 14 HOFSTRA L. REV. 5, 5 (1985).

16. *Id.*

17. *Id.* at 5-6.

18. Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739, 747 (1986).

19. Sicklick & Rubenstein, *supra* note 15, at 7.

20. *Id.*

their infected mothers or from blood transfusions.[21] AIDS attacks and undermines its victims' immune systems,[22] and no cure is presently known.[23] The average AIDS patient, once diagnosed, lives eighteen months to three years. AIDS-related complex is not fatal, but it may progress to AIDS.[24] Asymptomatic carriers of the AIDS virus may never develop the disease.[25]

Experts agree that the AIDS virus cannot be spread through casual contact.[26] Authorities have never documented a case of transmission of the virus to family members in the homes of AIDS patients.[27] Further, no data support a conclusion that AIDS can be spread through day-to-day contact in school, day care, or foster care settings.[28] Although scientists will never say "never,"[29] the adoption by many states of the CDC case-by-case approach to the problem of AIDS in the classroom suggests that these public school officials consider the risk to be negligible.[30]

EQUAL PROTECTION CLAUSE

The equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[31] This provision prohibits state governments from treating "similarly situated" persons "dissimilarly."[32] Initially, the states decide what is similar or dissimilar.[33] In the context of public education, the question is whether children with AIDS are "dissimi-

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21. *Id.* at 7-8.

22. Merritt, *supra* note 18, at 742.

23. *Id.*

24. *Id.*

25. *Id.* at 744.

26. District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 405, 502 N.Y.S.2d 325, 330 (N.Y. Sup. Ct. 1986).

27. *Id.*, 502 N.Y.S.2d at 331.

28. *Id.* at 407, N.Y.S.2d at 331.

29. *Boards Urged Not To Bar Students with AIDS*, 1 AIDS Pol'y & L. (BNA) No. 4, at 3 (Mar. 12, 1985) (quoting a New York doctor who nonetheless characterized the risk of contagion from casual contact in the school setting as "beyond the remotest possibility").

30. *See Education and Foster Care*, *supra* note 11, at 519.

31. U.S. CONST. amend. XIV, § 1.

32. *See* Comment, *supra* note 6, at 213 (suggesting that AIDS-linked children are similarly situated to children with no exposure to the virus because "neither group can transfer the disease in the normal, unrestricted school setting").

33. Plyler v. Doe, 457 U.S. 202, 216 (1982).

lar" from noninfected children in the public classroom. The outcome of this issue ultimately depends on the applicable standard of review. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[34] However, courts have formulated several exceptions to this general rule.

Strict Scrutiny

Strict scrutiny is the highest level of review employed under equal protection analysis. Under this standard, a state is required to "demonstrate that its classification has been precisely tailored to serve a compelling government interest."[35] State action to categorically remove children with AIDS from regular classroom attendance would fail under strict scrutiny because the state cannot demonstrate the necessary tight fit between the compelling government interest and the proposed remedy.

A state certainly has an interest in protecting children in public schools from the risk of infection. The state might argue that because AIDS is contagious and causes disruption and fear in the classroom and community, AIDS-infected children should be excluded from the classroom. Neither of these concerns will survive the strict scrutiny test, however. First, the overwhelming weight of medical authority indicates that AIDS cannot be spread by casual contact.[36] In fact, federal guidelines recognize that the danger of spreading AIDS in the classroom is virtually nonexistent. Under the CDC guidelines, only special situations merit the exclusion of children with AIDS from regular classroom attendance.[37] Children with AIDS therefore are no more likely to spread the virus than children without AIDS.

Second, traditional equal protection analysis has never accepted fear and disruption as a basis for treating a class of individuals dissimilarly. The United States Supreme Court has condemned the

34. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985) (citations omitted).

35. *Plyler*, 457 U.S. at 217.

36. District 27 Community School Bd. v. Board of Educ., 398 Misc. 2d 398, 405, 502 N.Y.S.2d 325, 330 (N.Y. Sup. Ct. 1986).

37. *Education and Foster Care*, *supra* note 11, at 519.

notion that the popular opinion of any segment of the community could override the strictures of the equal protection clause.[38] "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[39] In school desegregation cases the Supreme Court implicitly recognized that disruption might follow the protection of the rights of children to receive an education in a racially nondiscrimatory school system. The Court made local governments responsible for implementing desegregation so that "local conditions" and "local problems" could be dealt with effectively.[40]

Even if a state's interest in barring children with AIDS from public school attendance could meet the requirements of the strict scrutiny test, this standard probably will not be applied to such cases. The Supreme Court has applied strict scrutiny only when state classification affects a fundamental right or a suspect class of individuals.[41] "In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, [the Court] looks to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein."[42] Although the Supreme Court has recognized the vital importance of education in society,[43] education is not explicitly or implicitly protected by the Constitution[44] and therefore does not merit protection as a fundamental right.[45]

The Supreme Court has also recognized the need for heightened judicial review in cases involving suspect classes. The Court recognized that "prejudice against discrete and insular minorities may be a special condition."[46] Traditionally, a class has been considered suspect if it has been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the

38. *City of Cleburne*, 473 U.S. at 448.
39. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).
40. Brown v. Board of Educ., 349 U.S. 294, 298-99 (1955).
41. Plyler v. Doe, 457 U.S. 202, 216-17 (1982).
42. *Id.* at 217 n.15.
43. Brown v. Board of Educ., 347 U.S. 483, 493 (1953).
44. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
45. *Id.* at 37.
46. United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

majoritarian political process."[47] Under this criterion, the Court has recognized race, alienage, and national origin as suspect classes.[48] In contrast to these classes, children with the AIDS virus have not suffered a "history of purposeful unequal treatment," nor are they in a position of political powerlessness. The widespread occurrence of AIDS is a recent phenomenon, and almost from the beginning this disease has received both attention and funding from federal and state governments.

Rational Basis

When a classification does not merit strict scrutiny, the courts have applied a rational basis test. Under this test, legislation mandating dissimilar treatment of a class is presumed constitutional and is held invalid only if the classification is not "rationally related" to a state purpose. In cases involving social and economic benefit, the Supreme Court has "consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn."[49]

> In the area of . . . social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."[50]

Here the question is whether a "reasonable basis" exists to treat children with AIDS differently from noninfected children in the context of regular classroom attendance. A state classifies a child as AIDS infected or noninfected to protect public health, and the states traditionally have the authority to exercise their police power in the area of public health. In 1904, the Supreme Court stated in *Jacobson v. Massachusetts*:

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47. *Rodriguez*, 411 U.S. at 28.

48. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

49. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980).

50. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoting Lindsley v. Natural Carbonic Gas, 220 U.S. 61, 79 (1911)).

> [The Court] has distinctly recognized the authority of a State to enact . . . "health laws of every description." . . . According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.[51]

After *Jacobson*, the North Dakota Supreme Court held that the school's denial of admission of children with a contagious eye infection as well as those suspected of having the infection was not unreasonable.[52] In that case, the state resolved any doubt whether children were infected in favor of public health. As recently as 1972, the Alaska Supreme Court noted in dicta that schools could exclude students with contagious diseases from class.[53] *Jacobson* is still the law, and courts give states great deference in the assertion of their police power to protect the public health.[54]

Medical opinion cannot absolutely guarantee that AIDS will not be transmitted in a classroom setting. States therefore may have sufficient justification under the rational basis test for barring or segregating children with AIDS from regular classroom attendance, even though such action might be deemed "unwise" or have "unequal result."

Intermediate Scrutiny

Courts cannot apply strict scrutiny to the issue of children with AIDS in the classroom, and the traditional rational basis test probably will not invalidate any state practice intended to protect the public health. In some cases, however, the Supreme Court has applied a middle level of scrutiny—"intermediate" or "ad hoc" review. This standard might be applied to protect AIDS victims from discrimination under the equal protection clause.

In *Plyler v. Doe*,[55] the Supreme Court reviewed a Texas law that completely barred children of illegal aliens from attending public

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51. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

52. Martin v. Craig, 42 N.D. 213, 173 N.W. 787 (1919).

53. Breese v. Smith, 501 P.2d 159, 170 n.44 (Alaska 1972).

54. *See* Note, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL'Y REV. 479 (1985).

55. 457 U.S. 202 (1982).

school. The Court required the state to show a "substantial" interest justifying the legislation.[56] The Court balanced society's vital interest in basic education and Texas's stated interests in protecting against an influx of illegal immigrants and coping with the likelihood that these children would not stay in the jurisdiction as well as with the special burdens that admittance of these children would place on the state's ability to provide high-quality education.[57]

Focusing on the law's complete denial of public education to alien children, the Court pointed out that the children involved were not responsible for their plight. "[The legislation] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."[58] The Court continued:

> We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.
>
> . . .[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.[59]

Children with AIDS are similar to the alien children in *Plyler* in that they are not responsible for their own situation. Most children with AIDS contract it from blood transfusions or from mothers who have AIDS prior to giving birth. Barring or segregating children with AIDS from the regular classroom imposes a "lifetime hardship" and condones the irrational fear and disruption often associated with society's reaction to AIDS. Based on the current weight of authority that says AIDS cannot spread through casual contact in the classroom, preventing children with AIDS from attending regular classes is a governmental barrier presenting an "unreasonable" obstacle to these children in their pursuit of an education.

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56. *Id.* at 218-19.
57. *Id.* at 228-30.
58. *Id.* at 223.
59. *Id.* at 221-22.

If school systems completely barred children with AIDS from receiving basic education, *Plyler* would be compelling precedent. Instead, children with AIDS are more likely to be segregated from classmates than completely barred from school.[60] In *Plyler*, the Court focused on the Texas legislation's complete bar to even a basic public education for alien children. Although the Court in *Plyler* recognized socialization as an important aspect of regular public classroom attendance,[61] the main thrust of the case is the effect on children and society of a complete denial of basic education.[62]

The Supreme Court addressed the evils of segregation in *Brown v. Board of Education*.[63] Although *Brown* dealt with racial segregation, the Court's attention to "intangible" factors, including stigmatization and feelings of inferiority in segregated students,[64] applies as well to children with AIDS who are segregated from the regular classroom. A synthesis of *Brown* and *Plyler* suggests that whether barred or simply segregated, school children with AIDS should be protected from discrimination by heightened scrutiny under the equal protection clause.

The Supreme Court also appeared to apply a heightened level of review in *City of Cleburne v. Cleburne Living Center, Inc.*[65] In that case the city government, pursuant to a zoning ordinance, required a special use permit for operation of a group home for retarded adults. The city denied the permit. The group challenged the zoning ordinance as an unconstitutional violation of the equal protection clause.[66] The Court declined to identify retarded adults as a suspect or quasi-suspect class and appeared to apply the ra-

60. *E.g.*, White v. Western School Bd., No. 85-1192 (S.D. Ind. Aug. 23, 1985) (Ryan White, a 13-year-old hemophiliac with AIDS, communicated with his classroom via telephone).

61. *Plyler*, 457 U.S. at 222 n.20.

62. *Id.* at 220-21.

63. 347 U.S. 483 (1954).

64. *Id.* at 493-94.

65. 473 U.S. 432 (1985).

66. *Id.* at 437.

tional basis test,[67] but nonetheless held the zoning ordinance unconstitutional.[68]

The purported interests of the local government in *City of Cleburne* were the negative attitudes of property owners, the location of the facility in a residential area, and the size of the home and number of occupants.[69] The Court first noted that only certain types of establishments required the special use permit.[70] It went on to state that mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.[71] The Court did not accept the city's justifications concerning location and number of occupants because these concerns would apply equally to types of establishments not requiring a special use permit.[72] In sum, the Court concluded that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[73]

Whether schools may exclude children with AIDS from regular classroom attendance is similar to the situation in *City of Cleburne*. Because AIDS is a public health concern, its victims are members of a group of individuals who "have distinguishing characteristics relevant to interests the State has the authority to implement."[74] Under the *City of Cleburne* rational basis test, victims

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67. "[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441-42.

68. *Id.* at 450.

69. *Id.* at 448-49.

70. A special zoning permit was required of "[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions." *City of Cleburne*, 473 U.S. at 436 (quoting § 16 of the Cleburne zoning ordinance). The Court pointed out in its analysis that this ordinance therefore would not require a special permit for other multiple-occupancy uses, such as apartment houses, multiple dwellings, boarding houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, some nursing homes, homes for the aged, or private clubs. *Id.* at 447.

71. *Id.* at 448.

72. *Id.* at 450.

73. *Id.*

74. *Id.* at 441.

of AIDS could not be classified as dissimilar merely on the basis of "irrational prejudice."

In *City of Cleburne*, the city did not require many types of establishments to have a special use permit even though these establishments posed the same risks as those used to justify the ordinance. Similarly, the only children excluded from public school because they have AIDS are those known to have AIDS. Schools have not implemented mandatory testing to survey the entire population of school children and identify asymptomatic carriers. In *District 27 Community School Board v. Board of Education*, a New York court focused on this fact to determine that a proposal to exclude children with AIDS, without excluding children with AIDS-related complex, violated the equal protection clause.[75] The trial judge applied a heightened level of scrutiny under the guise of rational basis analysis and concluded that "[a]bsent any rational basis for petitioner's proposed exclusion of only known AIDS cases or carriers of the virus . . . [the] proposal must be deemed a denial of the equal protection of the laws."[76]

Recall the argument that "[children with AIDS] and healthy children with no link to AIDS are similarly situated with regard to AIDS because neither group can transfer the disease in the normal, unrestricted school setting."[77] Although case law suggests that schools cannot categorically exclude children with AIDS from regular classroom attendance, an equal protection challenge would be time consuming to pursue and children with AIDS need an immediate avenue of response. The next section looks at the most prominently discussed protection for school children with AIDS—the Rehabilitation Act of 1973.[78]

The Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by

75. District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 416, 502 N.Y.S.2d 325, 337 (N.Y. Sup. Ct. 1986).

76. *Id.*

77. Comment, *supra* note 6, at 213. *See supra* text accompanying notes 26-30.

78. 29 U.S.C. §§ 701-96 (1982).

> reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[79]

The threshold question in determining whether section 504 applies to AIDS-infected children is whether they are "handicapped" as defined by the Act. The Act defines a "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[80] An "impairment" is defined as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: . . . [including] hemic and lymphatic . . . ."[81]

Children who actually manifest symptoms of AIDS should fall within the meaning of "handicapped individuals" because they have a physiological disorder affecting the lymphatic system. They are handicapped within the meaning of the Act because of their physical impairment, not because of the contagious nature of the disease. Asymptomatic AIDS carriers, however, have no manifested physiological symptoms of AIDS; they simply carry the virus. In this section, this Note discusses whether asymptomatic AIDS carriers should be considered "handicapped" under section 504.

Some confusion exists among courts and commentators regarding the applicability of section 504 to AIDS. One author coined the phrase "AIDS-linked children," which she defined to mean children diagnosed as having AIDS, children with ARC, children who have tested positive for the HTLV-III virus but have no symptoms, and children in high-risk groups or who have family members in high-risk groups.[82] This author essentially avoided the definitional issue by assuming that all "AIDS-linked children" are handicapped under Section 504.

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79. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794.
80. 29 U.S.C. § 706(7)(B).
81. 45 C.F.R. § 84.2 (j)(2)(i) (1987).
82. Comment, *supra* note 6, at 193, 194 n.10.

In a case frequently relied on by courts and commentators addressing whether AIDS is a handicap under section 504,[83] the United States Court of Appeals for the Second Circuit dealt with segregation of retarded children who were carriers of hepatitis-B, a contagious disease.[84] The court held that section 504 protected these children from discrimination, but the handicap was retardation, not the virus.[85]

The Justice Department has addressed whether AIDS is a handicap under section 504 and has concluded that a "hypothetical immune carrier" of the AIDS virus is not handicapped under the Act.[86] The memorandum reasoned that the presence of the active virus has no adverse consequence to the carrier, and thus no physical impairment exists.[87] "[The] mere fact that [the immune carrier] is, was, or is thought to be able to communicate a debilitating disease, standing alone, is not enough."[88] Further, the Justice Department found no basis for a different conclusion with regard to contagiousness where an asymptomatic carrier was involved.[89] Critics of the Justice Department memorandum point to the recent Supreme Court decision in *School Board v. Arline*[90] in support of their position that section 504 should protect all individuals in all the various stages of AIDS.[91]

In *Arline*, the Supreme Court addressed whether contagiousness arising from tuberculosis was a handicap under section 504. In that case, a school fired a teacher who experienced a relapse of tuberculosis after twenty years. The Court determined that prior treatment for tuberculosis constituted a record of impairment and that

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83. *See* District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 416-17, 502 N.Y.S.2d 325, 337-38 (N.Y. Sup. Ct. 1986); Schwarz & Schaffer, *AIDS in the Classroom*, 14 HOFSTRA L. REV. 163, 177 (1985); Comment, *supra* note 6, at 205.

84. New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979).

85. *Id.* at 649.

86. U.S. Department of Justice, Memorandum for Ronald E. Robertson 23 (June 20, 1986). The memorandum deals specifically with the issue of AIDS in the workplace, but the analysis is applicable to victims of AIDS generally, including children.

87. *Id.* at 24.

88. *Id.* at 26.

89. *Id.* at 27.

90. 107 S. Ct. 1123 (1987).

91. *Justice's Opinion Termed "Instruction to Bigots,"* 1 AIDS Pol'y & L. (BNA) No. 14, at 8 (July 30, 1986). Congressman Barney Frank referred to the memorandum as "one of the most intellectually dishonest efforts to protect bigotry to come from a federal agency." *Id.*

"the contagious effects of a disease [cannot] be meaningfully distinguished from the disease's physical effects on a claimant . . ."[92] The Court expressly reserved the question whether contagiousness alone would constitute a handicap under section 504.

> This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.[93]

Critics of the Justice Department memorandum hailed the *Arline* decision. "The Court set guidelines 'that basically indicated that an employer cannot fire someone based on fears. . . . The reasoning of the case would clearly protect sero positive people. . . .' "[94] This reasoning can also be applied to children who are excluded from regular classrooms because they carry the AIDS virus.

Arline has set the stage for the Supreme Court to decide that contagiousness alone may be considered a handicap under section 504. In concluding that contagiousness was an effect that arose out of a record of physical impairment and could not be distinguished meaningfully from that impairment, the Court looked to section 504's underlying policy. "[A]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of section 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."[95] The Court recognized that the definition of "handicapped individual" under section 504 was amended in 1974 "to include not only those who are actually physically impaired, but also those who are regarded as impaired." In amending the definition of handicap, Congress stated that persons might be "discriminated against if they are regarded as handicapped, regardless of whether they are in fact

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92. *Arline*, 107 S. Ct at 1128.

93. *Id.* at 1128 n.7.

94. *Lawyers, Legislators See Justice Department Setback*, 2 AIDS Pol'y & L. (BNA) No. 4, at 4 (Mar. 11, 1987) (quoting Benjamin Schatz, director of the AIDS Civil Rights Project at the San Francisco based National Gay Rights Advocates).

95. *Arline*, 107 S. Ct. at 1129.

handicapped . . . [therefore] the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped."[96]

Children who are known to carry the AIDS virus and who are denied the full benefits of attending regular classes are the victims of discrimination based on fear and ignorance. Under the rationale of *Arline*, these children would be protected from discrimination in public schools under the Rehabilitation Act of 1973. A logical extension of the Supreme Court's reasoning in *Arline* would also protect the asymptomatic AIDS carrier under the third part of the amended section 504 definition of handicap. The public perceives these children to have AIDS—a physical impairment—and these children are discriminated against because of the perceived contagiousness of the disease. As Congress recognized when it amended the definition of handicapped individual, distinguishing the effect of the impairment from the perceived impairment would be unreasonable. Similarly, distinguishing victims of AIDS and ARC, who clearly are protected under section 504, from asymptomatic carriers of the AIDS virus would be unreasonable when the root cause of the discrimination is the same—groundless fear of contagiousness.

The legislative history of section 504 supports this position. As the Supreme Court pointed out in *Arline*, "Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual."[97] Representative Vanik stated that discriminating against a child with cerebral palsy "because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates" was not proper.[98] Senator Mondale pointed to the case of a woman with arthritis who was denied a job because "college trustees [thought] . . . 'normal students shouldn't see her' " as an example of impermissible discrimination.[99] According to the regulations promulgated under section 504 to clarify the scope of the third part of the definition of impairment, "this part of the definition also includes some persons who might not ordina-

96. S. REP. No. 1297, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6389.

97. *Arline*, 107 S. Ct. at 1128.

98. 117 CONG. REC. 45,974 (1971) (statement of Representative Vanik).

99. 118 CONG. REC. 36,761 (1972) (statement of Senator Mondale).

rily be considered handicapped, such as persons with disfiguring scars . . . ."[100] Regardless of whether a physical impairment exists or is simply perceived, courts should prohibit discrimination when the effect of that real or perceived impairment is distasteful or frightening. Based on the Supreme Court's interpretation in *Arline* and the underlying purpose of section 504, courts should consider all AIDS victims, including asymptomatic carriers, as handicapped under section 504 of the Rehabilitation Act of 1973.

CONCLUSION

There is no sadder tragedy than school children with AIDS. Under both the equal protection clause and the Rehabilitation Act of 1973, courts should prohibit discrimination against these children in public school classrooms. Although many states and school districts have adopted a case-by-case approach, the fear and emotionalism among parents in the affected communities will continue. School boards as well as parents of victims should be aware of the constitutional and statutory prohibitions of categorical discrimination against children with AIDS.

The foregoing analysis suggests that the equal protection clause should protect children with AIDS from being categorically excluded from attending public school classes. Although strict scrutiny analysis would not be applicable and the rational basis test would provide no protection, the Supreme Court may apply heightened scrutiny in this situation. The cases in which the Court has applied heightened scrutiny suggest that school children with AIDS might be protected.

A more direct and less time consuming attack on discrimination against school children with AIDS can be found under section 504 of the Rehabilitation Act of 1973. Victims of AIDS and ARC are, by definition, handicapped under the Act. Following the Supreme Court's reasoning in *Arline*, asymptomatic carriers should be covered as well. Therefore, public schools that receive federal money risk losing that money if they categorically exclude children with AIDS.

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100. 45 C.F.R. § 84.2 (j)(2)(i) app. A (A)(3) at 345.

The analysis under section 504 is particularly appropriate in light of the parallel approach in federal policy reflected in the guidelines issued by the Centers for Disease Control. Under the guidelines, children with AIDS should not be categorically excluded from school or foster care, but can be excluded if behavioral or other factors make the risk of their attendance viable. Under section 504, children should not be discriminated against by exclusion from public school attendance unless they are not "otherwise qualified."

Public schools, as well as the parents of all children, are understandably concerned about AIDS. Frighteningly, the problem of AIDS in the classroom promises to get much worse before it gets better. In light of known medical facts about the disease, both the CDC guidelines and protection against discrimination under section 504 provide an appropriate balance for addressing those concerns.

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