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OPENING THE SCHOOLHOUSE DOOR FOR CHILDREN WITH AIDS: THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

Margot R. Bodine*

I. INTRODUCTION

Acquired immune deficiency syndrome (AIDS) is a fatal disease of limited communicability that destroys the body's natural ability to protect itself from infection.¹ At this writing, over 21,000 AIDS cases have already been reported in the United States with an estimated 40,000 additional cases expected to develop in the next two years. While initially the disease was thought to infect only homosexual men, AIDS has now struck virtually every sector of American society, including women, children and even a 66 year old nun.² AIDS thus presents a significant public health issue that threatens the safety of the environment if its spread remains unchecked.

Attendant to the spread of the disease is an understandable, albeit somewhat irrational, public fear resulting in the exclusion of persons with AIDS from jobs, schools and social activities.³ Such discriminatory actions have spawned numerous legal battles,⁴ the most re-

* Solicitations, Articles, and Book Review Editor, 1986-1987, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

² Wallis, supra note 1, at 44.
³ In addition to the exclusion of AIDS children from public school classrooms, there are many legal disputes involving employment discrimination claims, child custody fights, evictions, insurance coverage, and public accommodation discrimination claims. For example, in Los Angeles an attorney suffered a heart attack. The paramedics who answered the call falsely thought he had AIDS and refused to touch him or otherwise assist him; in May of 1984, he filed a $1 million suit against the City of Los Angeles. See Flaherty, A Legal Emergency Brewing Over AIDS, 6 NAT'L L. J. at 1, col. 2, (July 9, 1984) citing Bergman v. City of L.A., C497793 (L.A. County Superior Ct. 1984).
⁴ A spokesman for Rep. Henry A. Waxman, D-Cal., House Health Sub-Committee Chair-
cent of which involves the exclusion of school children infected with the AIDS virus from a public school classroom. School districts in at least eight states and the District of Columbia have faced the issue. In academic year 1985-1986, children with AIDS were excluded from the public classroom in California, Colorado, Connecticut, Georgia, Indiana, Massachusetts, New Jersey and New York. Only Massachusetts and New York resolved the issue by allowing the children back in the classroom. Nationwide, the strong public reaction to AIDS has led to the psychological stigmatization and social ostracism of children with AIDS which seriously affects their educational and emotional development.

As more and more children are diagnosed as having AIDS, legal advocates increasingly will be called upon to represent such children. Local school boards possess a long-recognized and broad authority to manage the public schools and to exclude children deemed to pose a health hazard to other children in the classroom. Furthermore, the Supreme Court has held that public education is not a funda-

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5 Tarr, AIDS: The Legal Issues Widen, 8 NAT'L J.I. col. 1–2, at 1, 29 (Nov. 25, 1985).
6 This social ostracism has been termed the “leper syndrome” by Dr. David Cohn of Denver Disease Control. In the Queens case, the identity of one of the four children with AIDS was disclosed; the child was taken out of school to avoid “psychological damage from harassment.” Adler, Greenberg, Hager, McKillup & Namuth, The AIDS Conflict, CVI NEWSWEEK 18, 20 (Sept. 23, 1985) [hereinafter Adler]. Similarly, in Carmel, California, an eight-year-old hemophiliac who was infected with AIDS through contaminated blood was removed from school to avoid the psychological ill effects of the schoolchildren’s and officials’ reaction to his disease. See id. The Centers for Disease Control (CDC) in its recommendations on the education and care of AIDS infected children noted the “potential for social isolation should the child’s condition become known to others in the care of educational setting,” and thus reiterated the need for confidentiality in these cases, CDC, Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III / Lymphadenopathy-Associated Virus, 34 MORTALITY AND MORTALITY WEEKLY REP. (“MMWR”) 517, 518 (Aug. 30, 1985) [hereinafter Education]. Furthermore, the American Psychological Association adopted a resolution on Feb. 1, 1986 condemning indiscriminate testing to detect exposure to AIDS. The psychologists recommended that psychosocial and mental health aspects should be stressed in treatment and should be made widely available to AIDS patients. 1 AIDS POLICY & LAW 5 (Feb. 12, 1986). AIDS POLICY & LAW, (APL), is a bi-weekly newspaper published by Buraff Publications, Inc., a subsidiary of the Bureau of National Affairs, Inc., focusing on the most current practical and legal developments with regard to AIDS. AIDS POLICY & LAW is a major source of information for employers, practitioners and scholars researching AIDS-related issues.
7 As of Feb. 11, 1986, at least 191 cases were reported to the CDC. These cases represent only the most severe form of the infection, thus, an even greater number of children may have a milder form of the disease or may be asymptomatic. Dist. 27 Community School Bd. v. Bd. of Education of New York City, No. 14940/85, slip op. at 1 (N.Y. Sup. Ct. Feb. 11, 1986).
8 See, e.g., MASS. GEN. LAWS ANN. ch. 71, § 55 (West 1982).
mental right that is explicitly or implicitly guaranteed by the Constitution. These obstacles, as well as a provincial attitude taken by courts in past disease cases, have caused the legal community to recognize that protecting the rights of these children to be educated with their peers is a significant, although problematic, legal challenge.

New York City's celebrated battle to keep children with AIDS in the classroom was not easily won. The New York City Board of Education's announcement that it would not automatically exclude children with AIDS touched off a lawsuit by the local school boards and parents and caused a boycott of the schools by at least 18,000 children. After a five week trial and three months of deliberation, the Queens Supreme Court endorsed the City's decision. In *District 27 Community School Board v. Board of Education of New York City*, the court held that the City had not violated state or local public health laws for several reasons: AIDS had not been legislatively classified as a communicable disease; it did not pose a health threat in the classroom if certain precautions were taken; and children with AIDS are handicapped within the meaning of the Rehabilitation Act of 1973. At this writing, the Queens Supreme Court is the only court to rule on the school exclusion issue.

As state legislatures begin to react to the public fear of the syndrome by amending laws to exclude persons with AIDS from schools and public accommodations, the efficacy of legislative remedies such as...
as the Rehabilitation Act becomes apparent. Statutory classification of AIDS as a handicap safeguards the AIDS child's right to education where constitutional theories fall short. Successful classification of AIDS as a handicap in the employment discrimination context, as well as the application of the Rehabilitation Act to tuberculosis, further suggest that the classification of certain contagious diseases as handicaps is gaining increased acceptance in the legal community. After District 27 Community School Board, the central inquiry includes not only whether AIDS can be classified as a handicap, but what statute best accommodates the AIDS child in the education context. At the federal level, there are two applicable statutes: the Rehabilitation Act of 1973 (§ 504) and the Education for All Handicapped Children Act of 1975 (EAHCA).

While the Rehabilitation Act ultimately proves an effective theory upon which to base an AIDS child's claim, it simply prohibits dis-

The second bill, introduced in the Senate, is similar to the House bill but in addition would require the state Department of Health and Rehabilitative Services to inform school boards of students and employees reported to have the disease. The Senate bill would also require pre-employment testing and would apply to kitchen workers as well. 1 APL 7 (Jan. 29, 1986).

While the state of New Jersey has implemented a policy which permits a medical panel to decide on a case-by-case basis whether students with AIDS can attend school, two New Jersey school districts have mounted an appellate challenge, arguing that this policy is an infringement on local school boards' authority to set local school policy in state appellate court. The decision is pending. 1 APL 7 (Jan. 29, 1986).


17 Arline v. School Bd. of Nassau County, 772 F.2d 759, 764 (11th Cir. 1985).

18 See Mancusi, AIDS Fear Spawns Legal Battles, Boston Globe, Sept. 29, 1985, at 1, 18, col. 6. See also Flaherty, supra note 3, at 44, col. 4; Blodgett, Despite the Public's Hands-off Attitude Toward AIDS, Those Who Discriminate Against the Disease's Victims Are Finding No Immunity From the Law, 12 STUD. L. 8 (Jan. 1984).


19 No. 14940/85, slip op. The school boards are not appealing the decision. 1 APL 7 (Feb. 26, 1986).


cmmutation on the basis of handicap. It provides neither supportive services to aid the handicapped child, nor procedural safeguards to protect the child's rights at the outset or during the pendency of an appeal. The result is that the child with AIDS may remain excluded from the classroom for many months. Since there is currently no known cure for AIDS, the excluded child's battle to return to the classroom is essentially a battle against time; if his rights are not protected while he pursues his claim, he may not live long enough to exercise them once vindicated.

This article suggests that a child with AIDS may more effectively litigate his case if he is classified as handicapped under the Education for All Handicapped Children Act of 1975 as well as the Rehabilitation Act of 1973. EAHCA is broad, remedial legislation that protects the rights of handicapped children to a “free appropriate education” in a classroom with their peers “to the maximum extent possible.” The focus of this article is on the applicability of EAHCA to AIDS as an additional legislative protection for an excluded child. The application of EAHCA to the AIDS child would entitle the child to a panoply of federally mandated procedural safeguards that he does not necessarily receive when proceeding solely under the Rehabilitation Act. Classification of AIDS as a handicap under EAHCA’s narrower definition will foster acceptance of the concept by administrative bodies in the initial evaluation of AIDS children. Marshalling the protections of two federal acts for the handicapped strengthens the AIDS child’s claims. Application of EAHCA avoids the onus and expense of constitutional litigation and encourages a successful and speedy resolution of these cases by administrative bodies on the local level. In addition, the Act provides the handicapped child with a private right of action to the federal courts once his administrative remedies are exhausted.

The first section of the article describes the disease including its transmissibility and treatment. The next section presents the legal controversy involved, discussing both the past judicial treatment of diseased persons and the inadequacies of traditional constitutional arguments in protecting the rights of children with AIDS. The article next suggests the more cogent analysis of classifying AIDS as a handicap rather than as a disease, focusing on EAHCA and the protections it provides. This section analyzes how EAHCA’s statutory language and its regulations permit a similar classification of AIDS. The section also compares the child’s protections under EAHCA with those offered under the Rehabilitation Act. Finally, the article suggests both a model for judicial implementation of AIDS
as a handicap under EAHCA and the proper standard of review to be adopted by administrative bodies and courts.

II. THE DISEASE

AIDS directly inhibits the body's immune system, specifically its capacity to produce antibodies to fight infection. When a foreign agent enters the body, a healthy immune system identifies it and forms antibodies to fight it. AIDS is caused by a virus, usually accompanied by a number of incompletely identified co-factors, that enters the body to attack and eventually destroy helper-T lymphocyte cells, the cells which, under normal circumstances, initiate the production of antibodies when a foreign agent is present. Without the healthy functioning of the helper-T cells to destroy foreign agents, fatal infections or rare cancers known as opportunistic infections are able to develop unimpeded.

The opportunistic infections associated with the acute form of AIDS are Kaposi's sarcoma (KS), a rare form of skin cancer, and Pneumocystis carinii pneumonia (PCP), a parasitic infection of the lungs. These infections vary in intensity. Many individuals exposed to the virus develop less severe physical symptoms, generally known as AIDS-related complex (ARC). These symptoms, which may precurse acute AIDS, include swollen glands, weight loss, extreme fatigue, night sweats, diarrhea, and a decrease in helper-T lympho-

24 For a layman's explanation of how AIDS affects the body's immune system, see Wallis, supra note 1, at 43.
25 Approximately 85% of all AIDS patients studied have one or both of these diseases. KS usually manifests itself in the form of blue-violet or brownish bruise-like spots on the skin or in the mouth. PCP, a form of severe pneumonia, is characterized by cough, fever and breathing difficulties. Other opportunistic infections associated with AIDS are cytomegalovirus, herpesvirus, and parasites such as toxoplasma or cryptosporidia. "Facts About AIDS," U.S. Dept. of Health and Human Services--Public Health Service, fact sheet (August 1985). In the fall of 1985, another research team found that in a minority of cases, the AIDS virus directly attacks the spinal cord and the brain causing dementia and severe motor dysfunction. Serrill, A Scourge Spreads Panic, TIME, Oct. 28, 1985, at 50-51; Schmeck, Grim New Ravage of AIDS: Brain Damage, N.Y. Times, Oct. 15, 1985, at C1, col. 2.
26 Wallis, supra note 1, at 42.
27 The CDC has defined AIDS as "a reliably diagnosed disease that is at least modererately indicative of an underlying cellular immunodeficiency in a person who has had no known underlying cause of cellular immunodeficiency nor any cause of reduced resistance reported to be associated with that disease. Acquired Immune Deficiency Syndrome (AIDS) Update--United States, 32 CDC, MMWR 310 (June 24, 1983).
cyte cell counts. Still others who have been exposed to the virus either never develop the disease or do not develop symptoms of AIDS for several years. While exposure to the virus thus does not invariably lead to death, the sometimes lengthy incubation period can mask the fact that a person has the disease. The infected person may then unwittingly place other persons at risk. An unknown but potentially large number of individuals may therefore be at risk.

The first case of AIDS, as defined by the Centers for Disease Control (CDC) in Atlanta, was reported in 1981. As of June 1986, over 21,000 cases had been reported in the United States, with an estimated 500,000 to one million persons already exposed to the virus. One hundred ninety-one of these cases were reported among children under 18 years of age. Thirty-six per cent of the cases in the United States are reported from the state of New York; approx-

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29 According to estimates by the CDC, the Nat'l Cancer Inst. and other private researchers, persons exposed to the AIDS virus have a 10–30% chance of developing severe AIDS, generally characterized by the appearance of KS and/or PCP. In addition, researchers agree that 20–30% of those exposed will develop ARC, while the balance of those infected will never develop symptoms. GAY MEN'S HEALTH CRISIS, INC., Health Letter No. 5, at 3 (May 1985) [hereinafter GMHC-5]. The GMHC is a non-profit organization formed in 1982 by homosexual men in New York City to respond to the AIDS epidemic. In addition to publishing the health letter, which contains the most recent information on AIDS, the GMHC counsels patients, provides legal services and informs the public. Leonard, supra note 16, at 681–82 n.3.
30 At the point when 17,000 cases had been reported, over 8800 resulted in fatality. Eckholm, Study of AIDS Victims' Families Doubts Disease is Transmitted Casually, N. Y. Times, Feb. 6, 1986, at B7, col. 2.
31 The incubation period is thought to range from six months to five years and possibly longer. "Facts About AIDS," supra note 25.
32 The CDC, established in 1973 as an operating health agency within the Public Health Service, is the federal agency charged with "protecting the public health of the Nation by providing leadership and direction in the prevention and control of diseases and other preventable conditions . . . ." Part of its function is to develop and implement programs to deal with environmental health problems. THE UNITED STATES GOVERNMENT MANUAL 1984/85, 273 (May 1, 1984).
34 This is most likely a conservative estimate. NEWSWEEK magazine noted that the CDC "has quietly been referring to an upper limit of 2 million." Adler, supra note 6, at 18. In addition, recent studies conducted at the National Institute of Health indicate that the CDC's figures "may be a significant underestimate, given emerging data concerning unexpectedly high rates of seropositivity [indicating a presence of infection] in some risk groups . . . ." Wong-Staal & Gallo, Human T-lymphotropic retroviruses, 317 NATURE 395, 401 (Oct. 3, 1985).
35 See Dist. 27 Community School Bd., No. 14940/85, slip op. at 1.
imately twenty-three per cent are reported from California.\footnote{Facts About AIDS, supra note 25.} Cases have been reported in 46 states, the District of Columbia, Puerto Rico, and more than 35 other countries.\footnote{Id. For a more detailed account of the history of the AIDS epidemic, see Comment, AIDS: A Legal Epidemic?, 17 Akron L. Rev. 717, 718–22 (1984).} There is currently no known cure for the disease.\footnote{Vigorous research in several countries continues in a search for an anti-viral drug to kill the AIDS virus, as well as for drugs that will resolve the disease manifestations and/or will resolve immune imbalance in patients. Some anti-viral drugs which have been effective in inhibiting the AIDS virus have produced debilitating side effects such as kidney damage. These drugs include HPA-23, Suramin and interferon-alpha. Although no treatment has been successful in restoring the immune system of an AIDS patient, doctors have had some success in using drugs, chemotherapy and surgery to treat the opportunistic infections of AIDS patients. Facts About AIDS, supra note 25; GMHC-5, supra note 29, at 4; Wallis, supra note 1, at 47.}

The identification of the AIDS virus in 1983-84,\footnote{In 1983, a French research team led by Dr. Luc Montagnier at the Pasteur Institute in Paris discovered a new virus called Lymphadenopathy-Associated Virus (LAV) thought to be the suspected cause of AIDS. In April of 1984, a federal research team led by Dr. Robert C. Gallo at the Nat'l Inst. of Health identified another virus, human T-celllymphotrophic virus (variant III) (HTLV-III), as the conclusive virus causing AIDS. Gallo contends that the two viruses are variants of the same virus; Montagnier contends that the two viruses are identical. In sum, there is some disagreement over who deserves credit for the actual discovery of the virus which causes AIDS. Leonard, supra note 16, at 684 n.12; Comment, supra note 37, at 724 n.87; Wallis, supra note 1, at 42.} combined with the discovery of AIDS in hemophiliacs and recipients of donor blood in addition to homosexual men and intravenous drug users,\footnote{Consonant with the established modes of transmission, the CDC has identified specific, publicly identifiable high risk groups, namely, 1) sexually active homosexual and bisexual men with multiple partners (73% of all cases); 2) present or past intravenous drug users (17%); 3) individuals who have had transfusions with blood or blood products (2%); 4) individuals with hemophilia or other coagulation disorders (1%); and 5) heterosexual contacts of an individual with AIDS or at risk for AIDS (1%). 6% of all AIDS patients do not appear to fall into any of these categories. “Facts About AIDS,” supra note 25. See also Evatt, Coincidental Appearance of LAV/HTLV-III Antibodies in Hemophiliacs and the Onset of the AIDS Epidemic, 312 New Eng. J. Med. 483 (Feb. 21, 1985). Haitians, once thought to be a high risk group, were dropped by the CDC as a high risk category in early 1985 when the CDC discovered that many of the Haitian men, though not avowed homosexuals, had peddled sex to gay men because they were impoverished. Wallis, supra note 1, at 42.} confirmed medical findings that AIDS is communicated through an exchange of body fluids. Researchers then isolated high concentrations of the organism in the blood and semen of AIDS patients.
The primary modes of transmission of the AIDS virus are: 1) sexual intercourse with an infected person;41 2) transfusions of infected blood;42 3) parenteral penetration through use of a contaminated needle;43 and 4) in the case of a newborn, through childbirth; a fetus can be infected in utero or during birth from its mother's blood.44

The majority of children with AIDS contract the virus from their infected mothers in the perinatal stage. Seventy per cent of the pediatric cases reported involve children whose parent either had AIDS or was a member of a high risk group for AIDS; twenty per cent of all AIDS children contracted the virus from receiving blood or blood products; for the remaining ten per cent, investigations are incomplete.45

While low concentrations of the AIDS virus have been isolated in tears and saliva, no cases have been contracted through either of these fluids.46 Although saliva and tears are highly inefficient methods of transmission,47 they have not been conclusively ruled out as

41 Infected semen that comes in contact with broken blood vessels or lesions in the anus or vagina during intercourse is by far the leading mode of infection. Accordingly, certain patterns regarding sexual transmission have developed: men can transmit AIDS to other men through anal intercourse; men can transmit AIDS to women through vaginal intercourse. While HTLV-III/LAV is carried in women's blood, whether it is present in vaginal secretions is still being studied. A recent Swedish study of patrons of an AIDS-infected prostitute supports the theory that women can transmit the virus to men. Brody, Separating the Myths and Fears from the Facts on How AIDS Is and Isn't Transmitted, N.Y. Times, Feb. 12, 1986, at C6, col. 3. Thus far, women have not given the virus to other women sexually. Church, Not an Easy Disease to Come By, TIME, Sept. 23, 1985, at 27; "Facts About AIDS," supra note 25.

42 "Facts About AIDS," supra note 25. Medical researchers have developed a test which is 99% accurate in detecting whether HTLV-III/LAV antibodies are present in blood; this screening mechanism at blood donation sites is effectively eradicating future cases of AIDS caused by infected blood transfusions. The test is known as the enzyme-linked immunosorbent assay (ELISA). Id. While termed a break-through in AIDS research, the screening test poses grave privacy issues as health authorities, insurance companies and employers seek to use the test to identify potential carriers in spite of their present good health. Adler, supra note 6, at 18. See also, South Florida Blood Service v. Rasmussen, 467 So.2d 798, 802 (Fla. Dist. Ct. App. 1986)(plaintiff in tort litigation, who suffered AIDS after transfusion, denied order seeking names of blood donors as violative of zone of privacy.); Osterholm, Screening Donated Blood and Plasma for HTLV-III Antibody: Facing More Than One Crisis?, 312 NEW ENG. J. MED. 1185 (May 2, 1986); Landesman, The AIDS Epidemic, 312 NEW ENG. J. MED. 521 (Feb. 21, 1985).

44 Id.
45 Education, supra note 6, at 518.
46 Id.
47 Adler, supra note 6, at 21. Nevertheless, the GMHC cautioned in its newsletter that because saliva may harbor infected lymphocytes, "so-called 'deep kissing', involving an exchange of saliva, may present some degree of risk, however low." GMHC-5, supra note 29, at 4.
a means of communication. Researchers state that exposure to much higher levels of the virus is necessary to cause infection; the possibility that an abundance of an AIDS patient's tears could enter the blood stream of another is extremely low. The virus has not been detected in perspiration, urine or feces. The lifespan of the virus outside of the human body is short. It cannot be spread through contact with door knobs, dishes, utensils, or toilet seats. Once the virus is dry, it is dead.

Of the over 17,000 reported AIDS cases in the United States, none are known to have been transmitted in the school, day-care, foster-care or health care settings. Similarly, there are no reports of the virus developing between an AIDS patient and members of his family with whom he has maintained an intimate but non-sexual relationship. In sum, epidemiological studies show that, in order to contract AIDS, there must be either sexual contact or blood-to-blood contact.

Based on these findings, the casual person-to-person contact that would occur among schoolchildren — being in the same room with an AIDS child, sharing a meal or a bathroom with him, hugging or socially kissing him — does not pose a risk of transmitting AIDS. As a precaution, the CDC and numerous state and local health organizations have developed detailed guidelines for the education

49 Carey, U.S. NEWS & WORLD REP., Sept. 30, 1985, at 48. The virus has also not been isolated in breast milk, but researchers are pursuing this route. Id.
50 Seligmann with Gosnell, supra note 48, at 21.
51 Education, supra note 6, at 518. In Britain, a nurse did contract the disease when she was accidentally pricked with a contaminated needle, not through the casual contact of nursing an AIDS victim. Church, supra note 41, at 27.
52 Church, supra note 41, at 27. In fact, a recent research study analyzing members of the families of AIDS patients provides conclusive evidence that AIDS cannot be spread through close, day-to-day contact. The Montefiore Medical Center study conducted in cooperation with the CDC examined 101 household members who had hugged and kissed AIDS patients and shared toothbrushes, drinking glasses, beds, towels and toilets with them. No family member of any victim of the disease has developed AIDS apart from those who had sexual relations with a carrier, abused intravenous drugs, or contracted it by any other established mode of transmission. Friedland, Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients With AIDS or AIDS-Related Complex with Oral Candidiasis, 314 NEW ENG. J. MED. 344-49 (Feb. 6, 1986). See also Eckholm, supra note 30, at B7, col. 1.
53 Federal health officials have reported, however, one known case of the transmission of the AIDS virus by a child to his parent, but "emphasized that the situation was an unusual one that did not contradict evidence that AIDS is not spread through normal household contact." The child's mother was a nurse who was described by the CDC as "closely involved in the child's care during hospitalization and at home." Boston Globe, Feb. 7, 1986, at 3, col. 4.
54 Education, supra note 6, at 519; Friedland, supra note 52, passim.
of AIDS children.\textsuperscript{54} For example, if an AIDS child has skin eruptions or open lesions, exhibits inappropriate behavior that would increase the likelihood of transmission, such as a propensity to bite or frequent incontinence, or if the child’s immune status is at a point where he himself is at a greater risk of encountering infectious agents, that child cannot attend school.\textsuperscript{55} These guidelines protect healthy school children from any theoretical transmission that could result from exposure of open skin lesions or mucous membranes to blood or other body fluids of an infected child.\textsuperscript{56} While medical experts cannot prove that AIDS will never be transmitted through casual contact,\textsuperscript{57} five years of research\textsuperscript{58} and tracking of the disease have not produced a single case that has been transmitted other than through sexual intercourse or an exchange of blood, activities which do not occur in the public school classroom.

III. THE AIDS CHILD’S RIGHT TO EDUCATION — THE LEGAL OBSTACLES

While the social, emotional and medical controversies surrounding the AIDS epidemic continue to preoccupy the media, it is the legal basis of the AIDS child’s right to attend public school that is the more significant courtroom controversy. The conflict involves two legal arguments. School boards argue that the presence of AIDS children within the public schools is injurious to the public health,

\textsuperscript{54} See, e.g., \textit{Education}, supra note 6, at 519–20; “AIDS/Acquired Immune Deficiency Syndrome School Attendance Policy,” published by Mass. Dept. of Pub. Health (Sept. 6, 1985)(not intended for day care); “Guidelines for Children with AIDS/ARC Attending School,” published by the Ind. State Bd. of Health, (July 1985). These guidelines also provide standard operating asepsis procedures for when an AIDS child has an accident or injury at school or when vomitus, blood, or urine must be cleaned up by staff.

\textsuperscript{55} Id.

\textsuperscript{56} \textit{Education}, supra note 6, at 519.

\textsuperscript{57} Medical testimony in the Queens case correctly pointed out that medical science never has been governed by a “no risk” standard. To do so would effect “utter paralysis” upon treatment of disease and medical research. As one expert testified,

It’s hard for me to conjure up any of the important prevention or treatment activity that we engage in that is risk free. Whether it’s the risk associated with polio immunization, where we know that we have changed dramatically the health of the United States and much of the world . . . or the risk of serious allergic reaction to penicillin which may be fatal, [w]e accept that risk.

\textit{Dist. 27 Community School Bd.}, No. 14940/85, slip op. at 48.

\textsuperscript{58} The federal allocation of funds for AIDS research has sky-rocketed from $5.5 million in 1982 to $106.5 million for 1985. A House appropriations subcommittee recently approved about $196 million for AIDS research and education programs, including $141 million for the National Institutes of Health in Washington, D.C. Thomas, \textit{The New Untouchables}, \textit{TIME}, Sept. 23, 1985, at 26.
therefore the state's police power justifies their exclusion. While conceding that transmission of AIDS by means other than sexual contact or exposure to infected blood products appears unlikely, the school boards next argue that there is still some risk of transmission of AIDS through the normal school contacts and accidents children routinely experience. Essentially, because medical knowledge of the disease is only in its incipient stages, the medical evidence cannot establish that allowing children with AIDS in the schools is entirely risk-free. Where even a slight risk of such devastating character exists, the school board argues that it is bound by state law to exclude AIDS children in the interests of public health and welfare.

In response, the AIDS child, his parents, and the state boards of health and education assert that a local school board's exclusion of an AIDS child is an unreasonable exercise of the board's authority. This argument is based primarily upon the existing knowledge regarding the disease — namely, that AIDS is not communicable through casual contact and thus would not cause a public health threat in the school context. Since AIDS cannot be transmitted through such everyday contact as would occur in the classroom, the school board's means — total exclusion from the classroom — are not justified by its end purpose of preventing the spread of AIDS in the schools. In pending cases, attorneys are arguing that such exclusion violates the child's civil rights under the equal protection and due process clauses of both the state and federal constitutions.

Numerous legal obstacles confront the advocate who represents a child infected with AIDS. He must determine what rights a child with a contagious, infectious disease has to attend public school, and how the applicable standard of review under the Constitution will affect his case. He must contend with 1) the state's broad power to regulate in the contagious disease context pursuant to its common law police power and 2) the school board's long recognized authority to manage the public schools and to exclude children with infectious diseases. He must also assess his chances of success in view of the rather provincial judicial treatment of past disease cases. Until recently, courts have not applied an objective standard of review in cases involving diseased persons. In sum, he must recognize the weak legal protections afforded diseased persons under the law and scrutinize alternative legal classifications that provide a sounder legal footing for protecting his client's rights.

This section explores the inefficacy of arguing that a child with AIDS has the right to attend public school under the equal protection

to equal treatment and rights with other persons as citizens of the United States, in the use and enjoyment of the facilities of said schools and to equal treatment with other persons and equal protection of the laws in the use and enjoyment of such privileges as provided and afforded to other persons at all times when the same is open and used by them. Therefore, . . . Defendants . . . violated Plaintiff's civil rights and denied him equal protection of the law as guaranteed by the United States Constitution and the Indiana Constitution." Complaint, supra note 62, at 5-6.

66 The Rehabilitation Act of 1973 is discussed more fully infra notes 213-42 and accompanying text.
69 See infra notes 106-37 and accompanying text.
70 See infra notes 138-48 and accompanying text.
71 See infra notes 83-105 and accompanying text.
72 Id.
73 One alternative legal standard that could operate as an effective analogue with AIDS is the involuntary institutionalization standard. Before a state may commit an individual to a mental institution, the due process clause requires the state to afford that individual a hearing and to justify the confinement by clear and convincing proof "more substantial than a mere preponderance of the evidence." Addington v. Texas, 441 U.S. 418, 427 (1979). The state must prove that the individual is mentally ill, and that he is dangerous to himself and/or others. Id. at 420. By analogy, the assignment of an AIDS child to a separate classroom or alternative educational placement outside the mainstream is a form of involuntary commitment which similarly requires due process safeguards — a hearing judged according to the clear and convincing proof standard. While this standard may create a higher burden of proof for school boards, it is undesirable because it requires judicial intervention in the first instance in lieu of allowing local administrative bodies their right to determine the child's educational placement.
74 See infra notes 150-230 and accompanying text.
and due process clauses of the Constitution. First, there is a brief discussion of society's perception of disease, and then an analysis of how courts have decided exclusion cases involving diseased persons through the application of a subjective, rather than objective standard of review. The next section of the article analyzes the status of a claimed right to education under the Constitution, as well as the inviolability of equal protection and substantive due process theories as remedies. The next section focuses on the state's common law police power to exclude persons with contagious diseases as well as the statutory power of school boards to so regulate. The section concludes with the proposition that traditional constitutional theories are not the AIDS child's strongest protection against exclusionary school policies because the rational basis standard of review inherent to these theories presents an easily surmountable burden for school boards.

A. Past Judicial Treatment of Disease Cases

Disease evokes a negative social reaction; it inspires fear and denial. Adults with AIDS suffer from social stigmatization as a result of the disease's association with lifestyles considered deviant by many. A similarly repellant response to the development of AIDS in children is, however, inexplicable where the disease is not the result of sexual or social practices, or where the child is not diseased at all, but merely is a carrier of the virus.

Apart from any moral censure, AIDS provokes negative social reaction because it is both fatal and imprecisely understood; it is a medical mystery in a profession that operates on the premise that diseases can be cured. As Susan Sontag observes in *Illness as Metaphor*,

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75 See generally S. SONTAG, *ILLNESS AS METAPHOR* (1978) and Robinson v. California, 370 U.S. 665, 668–69 (1962), Douglas, J., concurring (discussion of ancient beliefs that disease represented punishment for sin). Despite the highly sophisticated and technical state of medical science, society still tends to shy away from confronting some diseases. A stroke of apoplexy is still commonly referred to as a “shock.” WEBSTER’S THIRD NEW INT’L DICTIONARY 2099 (1981). Sontag cites Dr. Karl Menninger's observation that “the very word ‘cancer’ is said to kill some patients who would not have succumbed (so quickly) to the malignancy.” Id. at 6. Sontag posits that tuberculosis had a similar effect in the nineteenth century. Id.

76 “Public Health Fact Sheet,” supra note 22. The disease is identified with its high risk groups: homosexual men, drug addicts, and prostitutes who have sexual relations with members of the high risk groups.

77 SONTAG, supra note 75, at 5.

78 SONTAG, supra note 75.
disease itself . . . arouses thoroughly old-fashioned kinds of
dread. Any disease that is treated as a mystery and acutely
enough feared will be felt to be morally, if not literally, conta­
gious . . . . Contact with someone afflicted with a disease re­
garded as a mysterious malevolency inevitably feels like a tres­
pass; worse, like the violation of a taboo . . . . [Disease] is felt to
be obscene — in the original meaning of that word: ill-omened,
abominable, repugnant to the senses . . . . The metaphors at­
tached to [disease] imply living processes of a particularly reso­
nant and horrid kind.79

While the disease metes out the death sentence, it is the patient
who is made culpable.80 Diseases with such lethal effects are an evil
"not to be managed and treated," but "to be attacked."81 While
desiring to punish disease, society instead punishes its victims; dis­
eease as a demonic enemy is not only fatal but shameful.82 Society's
fear of AIDS and other fatal diseases thus provokes an anathematic
response, even where the infected person shows no symptoms and
the risk of contagion is minimal. The diseased are socially excluded
before they are legislatively or judicially excluded.

The court system, in its own treatment of diseased persons, has
to a certain extent mirrored social sentiment. As far back as the
Middle Ages,83 the law has handled diseased persons with a similar

79 Id. at 6, 9.
80 Id. at 57, 81.
81 Id. at 81.
82 Id. at 57.
83 Individuals with leprosy were dealt with particularly severely in the Middle Ages. Termed
simply "lepers" as their personal identities and physical maladies merged in the eyes of society,
lepers were quarantined in colonies or lazars, hospitals for lepers. Once diagnosed with
leprosy, the leper became a social excommunicate. Not only was he unwelcomed by his peers,
but his interaction with society was legally enjoined by the use of a leprozi amorendo, an
ancient writ whose function was to permit forcible removal of a leper who "thrust himself into
the company of his neighbors in any parish." Lepers lost their legal rights to devise, bequeath,
contract, and inherit; these rights were abrogated by law upon contracting the disease.
BOUVIER'S LAW DICTIONARY, VOL. II, 1929 (Rawle's Third Revision 1914); 1 F. POLLACK &
F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 480–81 (2d
ed. 1923). The onslaught of the Bubonic Plague in the mid-1300s inspired the English legis­
lature to enact strict quarantine statutes. One such statute, 1 Jac. I c.31, precluded any person
infected with the plague from venturing out of his home. The strictness with which the English
legislature enforced these laws is reflected in the penal sanctions for breach of quarantine.
Anyone so quarantined who ventured from his home, even if "he ha[d] no plague upon him"
was punished by whipping; anyone who broke quarantine who had "any infectious sore upon
him uncured" suffered death as a felon — that is, without benefit of clergy. Thus, once any
individual was classified as disease-ridden by health officials, regardless of whether he actually
carried the disease, his individual right to liberty was subrogated to the public good until such
time as the quarantine was lifted. Similar broad-based statutes were enacted to prevent the
spread of Indian cholera in 1832 and to require mandatory vaccination of citizens against
degree of fear and intolerance. While purporting to exclude ill persons for health and safety reasons, closer examination of late nineteenth and early twentieth century case law demonstrates that exclusion was at least partially guided by a collective anathema for the diseased condition. 84

The right to exclude the diseased has not always been subject to an objective standard of review exemplified by a balancing of relative harms. For example, throughout the late nineteenth and early twentieth centuries, American courts upheld the common carrier’s right to exclude sick or insane passengers. 85 This right of exclusion ostensibly was based on a reasonable threat to the public health. As the District of Columbia Supreme Court enunciated in Lemont v. Washington & Georgetown R.R., 86 the common carrier’s right to exclude a passenger was based on a duty to “maintain the peace and safety of the vehicles intact.” Interestingly, the court simultaneously maintained that a safeguard against the abuse of such power limited its exercise only to situations “where it can be satisfactorily proved that the condition or conduct of a person is such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers if . . . allowed to remain.” 87 The court’s language demonstrates that the objective criteria behind a justified expulsion decision based on the preservation of the “peace and safety of the vehicles,” developed into a more subjective determination based on the “discomfort and annoyance” a diseased person created by his presence.

In Pullman Co. v. Krauss, 88 the plaintiff, who suffered from “syphilitic eczema,” booked passage from Memphis to Birmingham. After the conductor received complaints from passengers that plaintiff had a “contagious and loathsome” 89 disease; that his hands and

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84 But see Robinson, 370 U.S. at 666 (California statute making status of narcotic addiction in the absence of the commission of an illegal act a criminal offense struck down under Eighth Amendment Cruel and Unusual Punishment Clause); cf. Powell v. Texas, 392 U.S. 514, 533 (1968) (criminal penalties may be imposed on chronic alcoholic where accused has behaved or committed an act which society has interest in preventing, i.e. public drunkenness).


86 Lemont, 47 Amer.Rep. at 239.

87 Id.

88 145 Ala. 395, 40 So. 398 (1906).

89 The import of the court’s choice of the word loathsome to describe plaintiff’s condition is highlighted by resort to WEBSTER’S THIRD NEW INT’L DICTIONARY. Loathsome is defined
arms were wrapped in cloth; and that there were eruptions upon a
part of his body that were visible," plaintiff was refused passage on
the train. The court found that syphilitic eczema was a contagious
disease. In articulating the rule of law regarding exclusion of con-
tagious individuals, the court noted that the "right of a person to a
berth or passage on a sleeping car is . . . subject to such reasonable
regulation as . . . prescribed for the due accommodation of passen-
gers and for the safety and comfort of passengers." The court did
not discuss the public health threat which the plaintiff's condition
allegedly posed to passengers, but noted in dicta that:

[s]leeping car companies are not bound to admit persons as pas-
sengers on its cars who are guilty of gross and vulgar habits or
conduct, or who make disturbances on board, and, a fortiori,
persons who are afflicted with contagious or infectious disease

That the court associated guilt, grossness, and vulgarity with the
diseased is clear; that the court upheld the exclusion on the basis of
a threat to passenger safety is not. The court quoted with approval:

[T]he carrier of passengers . . . may refuse to accept persons
offering themselves as passengers who are unfit to be carried
either because such person . . . from bad character, from being
afflicted by contagious disease, from apprehended evil designs
. . . or from drunkenness or insanity, would be unfit associates
for them or unsafe for the carrier.

The absence of any discussion of the public health threats posed by
the alleged contagiousness of the plaintiff's condition indicates that
the court's decision was influenced partly by its subjective classifi-
cation of the diseased as "unfit associates."

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as: "Disgusting: a: offensive to the senses: Nauseating, Foul . . . b: repulsive to sensibility or

"Syphilitic eczema" is not listed in STEDMAN'S MEDICAL DICTIONARY (5TH ED. 1982),
however, it does define syphilis as "an acute chronic, infectious disease . . . transmitted by
direct contact, through sexual intercourse." Id. at 1399. It defines eczema as a "[g]eneric term
for acute or chronic inflammatory conditions of the skin . . ." Id. at 443. WEBSTER'S defines
eczema as "an acute or chronic noncontagious inflammatory condition of the skin . . ." Supra
note 75, at 721 (emphasis added). Thus, because eczema, which is a symptom of syphilis, does
not appear ever to be contagious, and syphilis is contagious only through sexual contact, it is
not clear whether 1) syphilitic eczema is contagious at all or 2) whether it is contagious upon
casual contact. The court did not discuss the basis for its statement.

Id.

Pullman Co., 145 Ala. at 400, 40 So. at 400.

Id., quoting HUTCHINSON ON CARRIERS § 540 (2d ed. n.p. n.d.).
Nor was the right to passage the only individual right of the diseased abridged in the interest of public health. In 1905, the Supreme Court of Errors of Connecticut upheld against an equal protection attack a Connecticut statute forbidding the marriage of epileptics. The goal of the statute was to prevent the congenital perpetuation of the disease by preventing female epileptics from bearing children. The court justified the constitutionality of the law by noting that:

[t]o impose such a restriction . . . is no invasion of the equality of all men before the law, if it applies to all, under the same circumstances, who belong to a certain class of persons, which class can reasonably be regarded as one requiring special legislation either for their protection or for the protection from them of the community at large.

While the Gould court adopted a somewhat patronizing and indiscriminate attitude toward epileptics, unlike the court in Pullman Co., it did reflect on the public health threat connected with the perpetuation of epilepsy:

[the law] cannot be pronounced by the judiciary to be intrinsically unreasonable if it should be regarded as a determination by the General Assembly that a law of this kind is necessary for the preservation of the public health . . . The class of persons to whom the statute applies is not one arbitrarily formed to suit its purpose. It is certain and definite. It is a class capable of endangering the health of families and adding greatly to the sum of human suffering.

Gould v. Gould, 78 Conn. 242, 61 A. 604 (1905). Pub. Acts 1895 c. 325, § 1: "No man or woman, either of whom is epileptic, imbecile, or feeble-minded, shall intermarry, or live together as husband and wife, when the woman is under forty-five years of age. Any person violating or attempting to violate any of the provisions of this section shall be imprisoned in the state prison not less than three years." 78 Conn. at 243, 61 A. at 604. By 1905, four other states had enacted similar statutes: Michigan, Minnesota, Kansas and Ohio. 78 Conn. at 245, 61 A. at 605. The court was indiscriminate in that it lumped epileptics with "imbeciles" and the "feeble-minded." It was patronizing in assuming that epileptics were incapable of making such individual decisions for themselves. While epilepsy is a disease of the brain involving neurological problems causing convulsions, it does not have intellectual manifestations impacting the capacity to make rational decisions regarding self-protection. See generally Stedman's, supra note 92, at 473–74, Webster's, supra note 75, at 763. Furthermore, epilepsy is not always genetically based; it may be caused by an "organic lesion of the brain produced by tumor, injury, toxic agents, or glandular disturbances." Webster's, supra note 75, at 763.

Gould, 78 Conn. at 245, 61 A. at 605.
The court nonetheless indulged in a subjective characterization of epilepsy as "a disease of a peculiarly serious and revolting character." Again, the court's words implied that the noxiousness of the disease was rooted in the public's forced observance of it.

Similarly, the impact of disease on others was cited as a basis for excluding a child from the Wisconsin public schools. In 1919, the Wisconsin Supreme Court in *Beattie v. Board of Education of the City of Antigo* held that an academically capable cerebral palsied child, who was slow in speech and unable to control his facial contortions and drooling, could be excluded from the public school system because "his physical condition and ailment produce[d] a depressing and nauseating effect upon the teachers and school children." The school board's determination could not be abrogated by the judiciary, the court held, unless the school board had acted "illegally or unreasonably." The court held that "[t]he right of a child of school age to attend the public schools of this state cannot be insisted upon when its presence therein is harmful to the best interests of the school." The court's subjective approach broadened the school board's exclusionary powers; "depressing" or "nauseating" conditions sufficient to justify exclusion could not be standardized, hence, the resulting rule of law was difficult to apply consistently. The right of a diseased child to attend public school was thus found to be dependent upon the school board's absolute discretion.

The *Beattie* decision may have been the product of a less enlightened era to which modern courts would not fall prey. In actuality, the same problem would not arise because the AIDS child, unlike a cerebral palsied child, would in most cases not exhibit any physical manifestations which a school board could find "depressing" or "nauseating." The fact remains, however, that AIDS is a disease that engenders great fear and which often evokes suspicion of lifestyles that may be unacceptable to some persons. This intolerance could motivate exclusionary treatment of persons with AIDS that might not result from cases involving a less controversial disease. In the absence of a statutory scheme, the judicial precedent behind the treatment of diseased persons becomes acutely important, especially

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100 78 Conn. at 244, 61 A. at 604.
101 169 Wis. 231, 172 N.W. 153 (1919).
102 169 Wis. at 232, 172 N.W. at 154.
103 169 Wis. at 233–34, 172 N.W. at 155.
104 169 Wis. at 233–34, 172 N.W. at 155.
where the right to an equal education is at stake. The following sections examine the claim of a Constitutional right to education as well as the judicial deference accorded to local control of the public school systems.

**B. The Right to Education Under the Constitution**

Education is one of the most essential values of American society. The right to an equal education is of paramount importance is reflected in both the expenditures made in United States schools and in state compulsory attendance laws. The United States Supreme Court has stated that “education is perhaps the most important function of state and local governments,” yet it also declared that education is not a fundamental right explicitly or implicitly guaranteed by the Constitution. The state of the law regarding the right to education is largely the result of two cases: *Brown v. Board of Education* and *San Antonio School District v. Rodriguez*. These two cases shed light on the modern Court’s view of the legal status of the right to education and provide a framework for analysis of the AIDS child’s right to education under the equal protection and due process clauses.

Fourteenth Amendment equal protection analysis applies whenever the state treats an identifiable group differently from another. In determining the existence of a Constitutional violation, the Court has developed two basic standards, “strict scrutiny” and “rational basis.” If the interest affected is a “fundamental right,” or if the group allegedly deprived of a right is deemed to be “suspect,” then the Court will strictly scrutinize the law or policy. Under this standard of review, the government has a more stringent burden of proof in sustaining the law and must show that the law is justified by a compelling state interest. This burden is rarely, if ever,

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111 411 U.S. 1 (1972).
113 Id.
114 Id.
Fundamental rights recognized by the Court include the right to vote,^116 the right to interstate travel,^117 the right to marry,^118 and the right to marital privacy and procreation.^119 Suspect classifications include racial groups,^120 aliens,^121 and groups of different national origin.^122

If the state action complained of neither infringes on a fundamental interest, nor operates on a suspect class, then the state, in meeting its burden of proof, need only show that the practice is "rationally related" to a legitimate state interest,^123 which is a more lenient standard.

Similarly, Fourteenth Amendment substantive due process analysis, which requires the Court to review independently the legitimacy of a law or policy, operates only when the law or policy affects fundamental rights.^124 If the Court finds that the case involves a fundamental right, it applies the same strict scrutiny standard of review applied in its equal protection analysis. If no fundamental right is involved, the Court will not exercise independent review, as long as the law or policy is rationally related to a legitimate state goal.^125 From the plaintiff's point of view, strict scrutiny is thus the more desirable standard of review in the AIDS exclusion context since a school board exclusion policy will have difficulty meeting the higher standard of review where the CDC guidelines present a less restrictive alternative. Strict scrutiny is, however, also the more unlikely standard of review because the Court has declined to include education within the limited class of fundamental rights.

In Brown v. Board of Education,^126 the Court held that, once a state undertook to provide educational opportunities, it must make

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115 Id.
123 Roos, supra note 112, at 567.
125 Id.
126 347 U.S. at 483. The Supreme Court struck down "separate but equal" discriminatory educational facilities for racial groups as a violation of the equal protection clause of the Fourteenth Amendment. The case involved the consolidation of class actions originating in
those opportunities “available to all on equal terms.” In reaching its holding, the Court reflected on the “intangible” aspects of education that it found vital to the formation of individuals:

[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education . . . . To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that will affect their hearts and minds in a way unlikely ever to be undone.

The Brown decision required equal educational opportunities by focusing on the importance of education and the psychological implication of segregation. In Brown, race was recognized by the Court as a suspect class. The Court did not reach the issue of whether education was a fundamental right implicitly guaranteed by the Constitution.

In 1973, the Court held in San Antonio School District v. Rodriguez that education was not a fundamental right explicitly or implicitly guaranteed by the Constitution. Since it was not a fundamental right, under equal protection analysis, the Texas educational funding law was not subject to strict judicial scrutiny but

four states in which minor Negro plaintiffs sought admission to public schools on a non-segregated basis.

127 Id. at 493.
128 Id. at 493-94.
129 Id. at 493.
130 411 U.S. 1 (1972). In Rodriguez, the plaintiffs brought a class action on behalf of school children residing in “poor” school districts with a low property tax base. Id. at 5. Plaintiffs claimed that the Texas educational funding scheme based on local property tax bases favored the affluent and resulted in substantial interdistrict disparities in per-pupil expenditures due to the disparity in property values among the districts, thereby offending equal protection notions. Id.

The Court held that district property wealth was not a suspect classification for equal protection purposes where education in some form was provided, id. at 18, and distinguished the instant case from Griffin v. Illinois, 351 U.S. 12 (1956)(state law preventing indigent criminal from acquiring transcript of trial for appeal process struck down as violative of fundamental right), Douglas v. California, 372 U.S. 353 (1963)(indigent defendants guaranteed right to counsel on direct appeal), and Bullock v. Carter, 405 U.S. 134 (1972)(Texas filing fee requirements for candidates in primary elections disallowed where there was an absolute deprivation of a right).

131 411 U.S. at 35.
rather to the rational basis test. The Texas scheme thus survived judicial review. 132

The holdings in Brown and Rodriguez as applied to the excluded AIDS child are of limited utility. The right to education is not a fundamental right under Rodriguez, nor has the Court recognized children with AIDS or any type of disease as a suspect class for purposes of strict scrutiny equal protection analysis. 133 The strict scrutiny standard of review is therefore inapplicable, and a school board's policy of exclusion would be assessed according to the rational basis test. While educational segregation based on any kind of definable group characteristic could engender the feelings of inferiority that the Brown court found impermissible, strict scrutiny is never applied in the absence of a recognized suspect class.

Similarly, because no fundamental right is at issue, strict scrutiny cannot be invoked under a substantive due process theory. Under the lower standard of review, school boards would have little difficulty in proving that a policy of exclusion was rationally related to the legitimate state interest in preventing the spread of AIDS in the schools.

Nor would a nexus argument linking the right to free speech or the right to vote with education be any more successful in the AIDS context than it was in Rodriguez. 134 The nexus argument in Rodriguez was rejected because the children in Texas received "adequate" education and were not completely deprived of all educational opportunity. 135 As school districts that have excluded AIDS children provide alternative educational methods, in separate classrooms or through audio-visual aids which may be deemed "adequate," it is unlikely that the equal protection nexus argument would succeed.

132 Id. at 55.
133 Nor have homosexuality or handicaps been held to be suspect classifications by the Supreme Court.
134 Although the Court noted the strong nexus between education and First Amendment rights and fundamental interests such as free speech and the vote, it did not find a serious undermining of those rights where Texas was providing an adequate education which did not result in an absolute denial of educational opportunity. Rodriguez, 411 U.S. at 37. Where, however, a state plan completely deprives an individual of educational opportunity, it will not survive the rational basis test. See Plyler v. Doe, 457 U.S. 202, 230 (1981)(Texas statute excluding children of undocumented workers from local schools held not rationally related to legitimate state interest).
135 Rodriguez, 411 U.S. at 37.
136 In Washington, a child with AIDS excluded from the classroom with his peers is tutored alone in a separate classroom in the school. Thomas, supra note 58, at 25.
137 In Kokomo, Indiana, Ryan White received instruction at home through a telephone hookup mechanism. Id.
in establishing education in the public school classroom as a fundamental right. Under an equal protection and/or due process rational relation standard of review, an attorney representing an AIDS child faces a heavy burden to prove the unreasonableness of such a policy, especially where the risk is not certain, the effects are deadly and the cure is nonexistent.

C. The Power to Exclude Children From School

In addition to the lower standard of review inherent in equal protection and due process analysis, an advocate representing an AIDS child must also face the considerable obstacle posed by judicial deference to state and local control over schools. Management of the public school systems\textsuperscript{138} and police power regulation for the general health and welfare of the community\textsuperscript{139} are bastions of local control with which courts will rarely interfere unless there exists a flagrant abuse of discretion.\textsuperscript{140}

The seminal case on state authority to regulate in the contagious disease context is \textit{Jacobson v. Massachusetts.}\textsuperscript{141} In 1904, the first Justice Harlan wrote that, "[u]pon the principle of self defense, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."\textsuperscript{142} In \textit{Jacobson}, the Court held that a compulsory smallpox vaccination law did not contravene the personal liberties secured by the Fourteenth Amendment.\textsuperscript{143} Vaccination was presumed to prevent smallpox, thus the law was held to be a reasonable restriction in the interest of public


\textsuperscript{139} Lawton v. Steele, 152 U.S. 133, 140 (1893); New Orleans Gas Co. v. Louisiana Light Co. 115 U.S. 650, 661 (1885); Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877); Railroad Co. v. Husen, 95 U.S. 465, 470–71 (1877).

\textsuperscript{140} See, e.g., San Antonio School District, 411 U.S. at 42–43 ("educational policy . . . [is an] area in which this Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgements made at the state and local levels . . . [T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."); Kirk, 83 S.C. at 380, 65 S.E. at 390, ("[T]he courts cannot invade the province of the legislative government. . . . In all judicial inquiry with respect to health laws and regulations, every intendment is to be allowed in favor of the validity of the statute").

\textsuperscript{141} 197 U.S. 11 (1905).

\textsuperscript{142} Id. at 27.

\textsuperscript{143} See id. at 35.
safety. As a result, states enacted statutes excluding unvaccinated children from the public schools as a public health measure.

The police power is not without limitation; to be valid, a state's exclusion must pass the traditional rational basis test. If the power is exercised in circumstances where there is no actual health threat, if exercised with regard to particular persons in an arbitrary, unreasonable manner, or is unduly restrictive, the courts must intervene to protect the individual rights at risk.

In addition to the state's general police power authority to regulate in the contagious disease context, states are explicitly charged with the management of the public schools. Specifically, many state statutes delegate to local school boards the express authority to exclude any child infected with a contagious disease who poses a danger to public health. To the public mind, AIDS is a deadly, contagious disease which threatens to be the next public health epidemic. Requesting a court to allow an excluded AIDS child to attend school thus requires judicial abrogation of the express authority conferred by the legislature on the school boards, which is a clear departure from a major tenet of judicial review, deference to

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144 Id.

145 See Blue v. Beach, 155 Ind. 121, 56 N.E. 89 (1900)(compulsory vaccination law requiring exclusion of unvaccinated pupils from public schools held valid). See also Allen v. Ingalls, 182 Ark. 991, 33 S.W.2d 1099 (1930); Anderson v. State, 84 Ga. App. 259, 65 S.E.2d 848 (1951); Hartman v. May, 168 Miss. 477, 151 So. 737 (1934); Sadlock v. Bd. of Educ., 137 N.J. Law 85, 58 A.2d 218 (1948); In re Whitmore, 47 N.Y.S.2d 143 (N.Y.Fam. Ct. 1944); State v. Barberton Board of Education, 76 Ohio St. 297, 81 N.E. 568 (1907).

146 197 U.S. at 28. See also Dobbins v. Los Angeles, 195 U.S. 225, 226–28 (1904)(gasworks ordinance excluding plant in process of construction based upon no change in neighborhood or conditions held void as arbitrary and discriminatory exercise of police power); Jew Ho v. Williamson, 103 F. 10, 23 (1900)(quarantine regulation voided as violation of equal protection where it was enforced only against Chinese residents and other races within its limits); Wong Wai v. Williamson, 103 F. 1, 7 (1900)(San Francisco board of health restrained from inoculating only Chinese residents with bubonic plague serum where action had no reasonable relation to protection of public health); Eddy v. Bd. of Health, 10 Phila. 94 (Phila. Ct. C.P. 1873)(eviction of tenants and closing up of houses held unlawful where there was no actual existence of contagious disease); Kirk, 83 S.C. at 379, 65 S.E. at 390 (board of health restrained from committing to unsanitary pest house individual who suffered from only slightly contagious form of leprosy).

147 Goldman, 47 Ohio App. at 422–24, 191 N.E. at 916–17; Hodgkins, 105 Mass. at 475–76.

148 See, e.g., MASS. GEN. LAWS ANN., ch. 71, § 55 (West 1982). See also Duffield v. Williamsport School Dist., 162 Pa. 476, 483–84, 29 A. 742, 743 (1894)(city school board has authority to adopt reasonable health regulations for the benefit of the pupils and the general public); In re Carroll Tp. School Dist., 15 Pa. D. 711, 712, 31 Pa. Co. 573, (C.P. Cambria County 1905)(statute granting power to school directors to prevent introduction and spread of contagious diseases in the schools is not subject to judicial review if the power is reasonably exercised).
the legislature. In light of such deference, the rationality of such statutes will almost always immunize them from challenge.

In summary, neither Fourteenth Amendment equal protection nor due process theories provide a strong legal basis for attacking AIDS school exclusion policies where the rationality of a statute is the standard of review. Deference to the legislative and the judicially recognized state authority to regulate in the contagious disease context militates against a court's finding a school board exclusion policy irrational. Where the epidemiology of the disease is uncertain, where fear and controversy surround the disease, and where the theoretical effect of error could be fatal, it is unlikely that a court will carve out protections for these children. The following section of this article outlines a possible statutory resolution of these issues. The substantive and procedural protections afforded handicapped children under the Education for All Handicapped Children Act are discussed. The section suggests that AIDS may be classified as a handicap under EAHCA.\(^{149}\) In conclusion, the section compares the utility of proceeding under EAHCA with the utility of proceeding under the Rehabilitation Act.

IV. THE EFFICACY OF PROCEEDING UNDER EAHCA

A. Handicapped Rights to Education Pursuant to EAHCA

During the late 1960s and early 1970s, educational needs of handicapped children had so increased that states were unable to meet their statutory obligations in the absence of concentrated federal aid.\(^{150}\) Motivated by the decisions in \textit{PARC}\(^{151}\) and \textit{Mills},\(^{152}\) the two cases that established a handicapped child's right to equal educa-

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\(^{149}\) See infra notes 184–212 and accompanying text.

\(^{150}\) 121 \textit{CONG. REC.} 25,540 (1975). Ten years earlier, Congress had already begun enlarging the federal government's involvement in the assurance of equal educational opportunity for the handicapped. Congress' initial allocation of federal funds to educational programs for handicapped children occurred in the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, legislation focused primarily on the economically disadvantaged. The following year, Congress amended the Act to include an independent title specifically aimed at providing funding for educational opportunities for the handicapped, Pub. L. No. 89 750, 80 Stat. 1191 (1966), marking the first federal recognition of the educational disadvantages of handicapped children as a group.


tional opportunity, Congress enacted Public Law 94-142, the Education for All Handicapped Children Act of 1975. EAHCA allocates federal money to each state that makes a bona fide effort to provide equal education to the handicapped. Congress found that, out of the more than eight million handicapped children in the United States, four million of those children did not receive appropriate educational services "that would enable them to have full equality of opportunity." Moreover, at least one million children were "excluded entirely from the public school system and [would] not go through the educational process with their peers." Acknowledging the needs of handicapped children as well as the inadequate state resources to meet those needs, Congress pledged federal assistance

153 The court in PARC explicitly overruled the traditional assumption that mentally retarded persons were incapable of benefiting from a program of education and training, and required free public education for all mentally retarded children. Among the alternative programs available, placement in a regular school class with appropriate ancillary services was preferable to placement elsewhere. 343 F. Supp. at 307. Mills, the companion case to PARC, held that the due process clause required all handicapped children to be provided with a free, publicly supported educational program suited to their needs. 348 F. Supp. at 878. The adopted consent decrees included a full panoply of procedural safeguards to prevent arbitrary mental retardation labeling and denial of access to public education. The courts in both cases relied on the parties' consent decrees. 343 F. Supp. at 303; 348 F. Supp. at 880–81. After PARC and Mills, numerous commentators reflected on the constitutional basis of the right of the handicapped to public school education. For a thorough discussion of potential due process and equal protection arguments on this point, see Large, supra note 105, at 218; Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate, 1976 LAW F. 1016, 1023–42 (1976); Herr, Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded, 23 SYRACUSE L. REV. 996 (1972); Kirp, Buss & Kuriloff, Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 CALIF. L. REV. 40 (1974); Schwartz, The Education of Handicapped Children: Emerging Legal Doctrines, 7 CLEARINGHOUSE REV. 125 (1973); Weintraub & Abdson, Appropriate Education for All Handicapped Children: A Growing Issue, 23 SYRACUSE L. REV. 1037 (1972); Yudof, Equal Educational Opportunity and the Courts, 51 TEX. L. REV. 411 (1973); Comment, The Right to Education for Mentally Retarded Children, 43 UMKC L. REV. 79, 81–96 (1974); Note, The Right of Handicapped Children to an Education: The Phoenix of Rodrigues, 59 CORNELL L. REV. 519 (1974); Comment, Toward a Legal Theory of the Right to Education of the Mentally Retarded, 34 OHIO ST. L.J. 554 (1973); Comment, Public Instruction to the Learning Disabled: Higher Hurdles for the Handicapped, 8 U.S.F.L. REV. 113 (1973). See also In Interest of G.H., 218 N.W.2d 441 (N.D. 1974)(strict scrutiny equal protection analysis applies to physically handicapped person as physical handicap is an immutable characteristic of birth). For evidence of congressional recognition of PARC and Mills during debate over the EAHCA see e.g., 121 CONG. REC. 19,485 (1975).


156 Id. § 1400(b)(1),(3),(4).

157 Id.
to state and local efforts to address the needs of handicapped children “in order to assure equal protection of the law.”\textsuperscript{158} In enacting EAHCA, Congress explicitly recognized that the equal protection clause guaranteed a free, appropriate public education to handicapped children,\textsuperscript{159} and integrated the protections of that clause into the statute.\textsuperscript{160} The right of any child covered by EAHCA to a free public school education thus receives the combined protections of a federal statute and the Constitution.

As its name implies, EAHCA protects a broad spectrum of handicapped children. EAHCA defines handicapped children as “mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities who by reason thereof require special education and related services” (emphasis added).\textsuperscript{161} The Act covers children between the ages of five and eighteen and encourages pre-school educational programs as well as instruction up to age twenty-one if not inconsistent with state law.\textsuperscript{162} All such children are entitled to “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

\textsuperscript{158} Id. § 1401(b)(5)-(9).
\textsuperscript{159} Congress’ commitment to meet the educational needs of handicapped children under § 1401(b)(9) in order to assure “equal protection of the law” has been interpreted by some commentators as an “acceptance of the argument that a right to free public education exists under the equal protection clause.” See Krass, supra note 153, at 1064. In as much as this statement mirrors the general mandates of Brown v. Board of Education that once a state undertakes to provide an opportunity for public education, it must make that opportunity available to all on equal terms, this is an accurate proposition; whether a “right” to free public education exists (i.e. a fundamental right or interest) under the equal protection clause or the Constitution in general is dubious after Rodriguez. See supra notes 106---37 and accompanying text. But see 121 Cong.Rec. 25,534 (1975)(statement of Rep. Brademas, “free public education . . . is a right that is theirs [handicapped children’s] under the Constitution); 121 Cong. Rec. 19,504 (1975) (statement of Sen. Schweiker, “[handicapped] children . . . are being denied services which are guaranteed under the Constitution).

\textsuperscript{160} Congress is authorized to enforce the prohibitions of the equal protection clause by appropriate legislation under the enforcement clause of the Fourteenth Amendment. U.S. Const., amend. XIV, § 5. See also Katzenbach v. Morgan, 384 U.S. 643, 648 (1966).

In Katzenbach, Justice Brennan, writing for the majority, limited the scope of congressional power under the enforcement clause to the adoption of measures to promote fourteenth amendment guarantees. Better known as the “Ratchet Argument,” Congress has only the power to enforce or enlarge protections but not to dilute, abrogate or restrict such guarantees. 384 U.S. at 651, n. 10.

\textsuperscript{162} Id. § 1412(2)(B).
instruction in hospitals and institutions, as well as related services such as transportation and psychological services.

The focal point of EAHCA is its funding mechanism. In order to be eligible for federal funds under EAHCA, a state must fulfill several conditions. First, a state must implement a policy assuring equal education for handicapped children and must submit a plan of compliance to the Secretary of Education. This plan must detail the procedures the state has or will adopt, which includes both timetables for implementation and identification procedures, as well as notice requirements to parents, guardians and the general public for any amendment to the plan prior to submission.

Second, EAHCA's eligibility provisions require states to establish priorities for providing educational services first to those handicapped children who currently do not receive public educational services. Next, the state must offer special assistance to severely handicapped children who have received an inadequate education. Most importantly, the state must establish procedures to assure that, to the maximum extent appropriate, handicapped children including children in public or private care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature of severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

163 Id. § 1401(16).
164 Id. § 1401(17).
165 20 U.S.C. § 1400(c) provides that the purpose of EAHCA is:
   to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.


167 Id. § 1412(1),(2)(A),(C),(E).
168 Id. § 1412(3).
169 Id.
170 Id. § 1412(5). See Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 52 (N.D.Ala. 1981)(removal of 18 year old boy from regular classroom educational placement struck down as his mental retardation did not interfere with satisfactory regular class edu-
This provision reflects the modern goal of "mainstreaming," or integration of the handicapped with the non-handicapped. The priority placed on mainstreaming as a prerequisite for funding under the Act is particularly useful to the AIDS child.

While much of EAHCA focuses on special education and special services, the mainstreaming provision requires placement in the regular classroom environment and is thus the dispositive statutory provision in the AIDS context. The CDC and state department of public health guidelines are designed to mitigate any theoretical risk of AIDS transmission through casual contact, consequently the severity of the risk of contagion by permitting an AIDS child in the classroom is not "such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." The CDC guidelines are, by analogy, a "supplementary aid or service" under EAHCA which make possible the concurrent education of the AIDS child with his peers.

EAHCA requires the state to establish procedural safeguards which enable the handicapped child and his parents to participate in each child's individualized education plan and to appeal any classification or change of classification. Such procedural rights include written prior notice of any proposed change in placement by the state or local educational agency, free access to the child's records, and an opportunity to present complaints. Upon receipt of a complaint, the parents or guardian of the handicapped child may have an impartial hearing before a neutral examiner during which each party has the right to be represented by counsel and experts. The parties may subpoena, confront, and cross-examine witnesses. Finally, the reviewing officer is required to provide the parties with a written transcript or electronic tape recording of the hearing, and...
must issue written findings of fact and decision as a basis for any subsequent appeal. 178

EAHCA provides an extensive appeal process. Aggrieved parties may appeal decisions rendered by a local educational agency to the state educational agency review officer who must then make an independent decision based on his review of the facts. 179 Following review by the state agency, a party may bring a civil action in state court or in federal district court; EAHCA provides for federal jurisdiction without regard to the amount in controversy. 180

EAHCA is a major step in ensuring that all handicapped children receive a comprehensive public education. Its provisions are particularly helpful in the AIDS context. In addition to an affirmative mandate for equal educational opportunities in the regular school classroom, EAHCA provides for specially designed instruction for the applicable students. It also provides for instruction in hospitals, a therapeutic service for the AIDS child whose immune status prevents his attendance in public school under the CDC guidelines. EAHCA reduces the cost to states of instituting individualized education programs; a school board thus may not argue that cost considerations preclude implementation of the CDC guidelines. Since EAHCA requires that children remain in the educational placement during the pendency of the appeal, the child's education is not disrupted. 181 Likewise, the provision precludes a school board from achieving the exclusionary result by a delayed appeal process. 182 Finally, EAHCA frees the excluded AIDS child from expensive and

178 Id. § 1415(d)(3), (4).
179 Id. § 1415(c).
180 Id. § 1415(e)(2), (4). The court's powers of review are a composite of de novo review and review of the administrative record. The de novo review power conferred on the court under the Act is somewhat obfuscated, however, by the apparent "stamp of finality" given to the ultimate decision by the state administrative body. See § 1415(e)(1) of EAHCA which indicates that "[a] decision made in a hearing conducted pursuant to . . . this section shall be final . . . ."
The court then determines the appropriate relief based on the preponderance of the evidence. Id. § 1415(e)(2). Under this hybrid standard, it seems clear that a handicapped child would have to prove that the state agency's decision was based upon insufficient evidence or that it violated procedural due process in order to surmount the deference generally accorded such administrative findings. Krass, supra note 153, at 1069.

In order to protect the interests of the child during the pendency of the litigation or administrative review process, EAHCA directs that the child remain in his current educational placement. If the child applies for initial admission to the school, the child must be admitted, subject to parental consent, to the school until all proceedings are completed. 20 U.S.C. § 1415(e)(3) (1982 & Supp. 1985). The purpose of this provision is to provide the child with the educational placement he is seeking during the often lengthy review procedure. 181 Id. § 1415(e)(3).

182 See supra notes 173–80 and accompanying text.
lengthy litigation by providing this direct and cost-free administrative appeal process.\textsuperscript{183} It is a logical and efficient means of handling the education of children with AIDS.

\textbf{B. EAHCA Applied to the AIDS Child}

The preceding discussion illustrates the comprehensive, remedial nature of EAHCA’s regulatory scheme.\textsuperscript{184} Its elaborate procedural framework safeguards the handicapped child's rights to the maximum extent possible in an area where the regulatory power of the school board is broad and entitled to considerable deference. To benefit from EAHCA’s protections, the AIDS child and his advocate must establish that acquired immune deficiency syndrome is a handicap, and that a child afflicted with AIDS comes within the purview of EAHCA. Such an application is not axiomatic. Analysis of the common law reflects an absence of cases interpreting EAHCA with regard to illness or communicable diseases. While the statute's definition of handicapped children neither affirmatively includes nor excludes children with communicable diseases, handicaps and disabilities are not usually perceived to be contagious. This section examines the language of the statute as well as the federal regulations promulgated pursuant to it by the Department of Education.

As stated earlier, in the AIDS context, the relevant language from the laundry list of disabilities covered under EAHCA’s definition of handicapped children is “other health impaired children.”\textsuperscript{185} The applicability of the statute’s protection thus depends on whether AIDS constitutes a health impairment. AIDS arguably constitutes a handicap under EAHCA. AIDS is a health impairment that affects the essential healthy function of the immune system by frustrating its ability to fight infection. AIDS consequently fits within EAHCA’s definition of “handicapped.”

Though the simplicity of this argument is attractive, the statute does not specifically list infectious, communicable diseases; with the exception of “seriously emotionally disturbed,” the conditions listed are noncommunicable disabilities, all of which are more commonly thought of as handicaps. The legislative history of EAHCA does not

\textsuperscript{183} Id.

\textsuperscript{184} S-1 v. Turlington, 635 F.2d 342, 347 (5th Cir. 1981)(“EAHCA, as [a] remedial statute, should be broadly applied and liberally construed in favor of providing a free and appropriate education to handicapped students”); Espino v. Besteiro, 520 F. Supp. 905 (S.D.Tex. 1981)(“EAHCA is a remedial statute and should be broadly applied and liberally construed”).

address what conditions are covered by the term "other health impairments," but it consistently expresses an intent to provide equal educational opportunity to all children having unique educational needs. 186

The interpretive regulations promulgated by the Office of Special Education and Rehabilitative Services of the Department of Education (DOE), the agency entrusted with enforcement of the statute, are instructive as to the meaning of the term "other health impaired children." The DOE regulations define "other health impaired children" as:

(i) having an autistic condition which is manifested by severe communication and other developmental and educational prob-

186 See, e.g., 121 CONG. REC. 25,536 (1975)(statement of Rep. Fenwick): "I think all of us approved a widening of the number of handicaps covered under the legislation. We included . . . the perceptually handicapped child who is often overlooked and not recognized as being in need of help."

Resort to the legislative history of EAHCA does not provide a definitive answer on whether Congress envisioned that contagious diseases would be covered by the Act. The legislative history of the term "other health impaired children" is convoluted and short. While an abundance of material exists with regard to the funding mechanisms and procedural framework of the Act, Congress did not explicitly debate what conditions were contemplated as "other health impairments" when it enacted EAHCA in 1975. Instead, Congress carried over the language from Public Law 91-230, the Elementary, Secondary, and Other Educational Amendments of 1970 (ESEA), a piece of legislation which consolidated into one act a number of previously separate federal grant authorities relating to handicapped children. The legislative history of Public Law 91-230 indicates that "the definitions for the act . . . are taken from section 801 of the Elementary and Secondary Education Act of 1965 [Pub. L. No. 89-10] and from various statutes relating to the education of the handicapped." 1970 U.S. CODE CONG. & AD. NEWS 2768, 2833. The language "other health impaired children" does appear in the amendments to that Act, 1966 U.S. CODE CONG. & AD. NEWS 1392, 1408, 3844, 3898, but the legislative history does not discuss how or why the language was used.

Public Law 88-164, the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 (MRF), Pub. L. No. 88-164, 77 Stat. 282 (1963); 20 U.S.C. §§ 611-618, repealed by Pub. L. No. 91-230, title VI, § 662(2),(4), 84 Stat. 188 (1970), is one of the "various statutes relating to the education of the handicapped" in which the language "other health impaired children" first appears. The MRF amended the Public Health Service Act, Pub. L. No. 85-926, 42 U.S.C. §§ 201-300(z)(10) (1958), to provide assistance in combating mental retardation through grants for construction of research centers and to improve mental health through grants for construction of community mental health centers. Title III was adopted to extend and expand the program "to include the training of teachers of other handicapped children." 1963 U.S. CODE CONG. & AD. NEWS 1054, 1055. In lieu of "mentally retarded children," the amended language extended appropriations to teachers of "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education . . . ." Id. at 323(emphasis added). The legislative history discusses the needs of "handicapped children" and includes within its definition of that group "children who are blind, partially blind, deaf, hard of hearing, speech impaired, crippled, emotionally disturbed, mentally retarded, and children who have special health problems." Id. at 1068 (emphasis added). The language is maintained consistently in EAHCA, 20 U.S.C. § 1401(1) (1982 & Supp. 1985).
lems; or (ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic [sic] fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia or diabetes, which adversely affects a child's educational performance.187

Clause (i) provides only that autism is a health impairment, and is therefore not instrumental to the AIDS analysis. Clause (ii), on the other hand, lists specific conditions that qualify as "other health impairments." This regulation is significant for four reasons. First, it is noteworthy that AIDS is a health problem known to sap strength, vitality and alertness. Second, the regulation adds that the health problem must "adversely affect[s] a child's educational performance." The debilitating and degenerative effects of AIDS clearly adversely affect a child's strength and vitality and thus his educational performance. For the child diagnosed as an AIDS carrier, the psychological stigma of the disease combined with the social ostracism practiced against individuals with AIDS adversely affects his educational performance. This effect is exacerbated if he is excluded from the classroom. Third, the regulation lists specific physical diseases and ailments, thus expanding the generic handicap/disability definition listed in EAHCA. Fourth and most importantly, not only does the provision contemplate congenital and acquired diseases, but it specifically lists tuberculosis as a health impairment subject to the protections of the Act.188

Legislative intent that tuberculosis is a handicap covered by the statute lends crucial support to the similar classification of AIDS as a handicap under EAHCA. Tuberculosis, like AIDS, is a communicable, infectious disease characterized by toxic symptoms such as fever, night sweats, and loss of weight.189 The leading mode of transmission in humans is through inhalation of airborne particles containing tubercle bacilli expelled by an individual when he coughs, sneezes or talks.190

187 34 C.F.R. § 300.5(b)(7)(1985).
188 Id.
190 Stead, supra note 189, at 6; Lincoln & Sewell, supra note 189, at 18; Hetherington & Eshleman, supra note 189, at 221-24.
AIDS, like tuberculosis, should be considered a health impairment under EAHCA's definition of handicap. Both diseases pose a de minimis risk of contagion, impair major life functions by sapping strength and vitality, adversely affect a child's educational performance, and stigmatize a child so as to damage his psychological development. That the DOE regulations specifically contemplated tuberculosis, a contagious disease, is compelling evidence that AIDS also qualifies for the Act's general protections. The list of

191 See supra notes 22-58 and accompanying text; see supra notes 189-90 and accompanying text; see infra notes 268-79 and accompanying text.

192 See supra note 189, at 15 ("[I]t is important from a psychologic point of view that the stigma of contagion should be removed from children with asymptomatic nonprogressive pulmonary primary tuberculosis, both for the sake of the child and his family."); MYERS, supra note 189, at 91 ("Perhaps equally severe a complication is the development of the stigma of being contaminated. This is felt by both the patient and the public . . . ."). On the stigma associated with AIDS, see discussion supra note 6.

193 An argument could be made that the DOE's inclusion of tuberculosis within the definition of health impaired in § 300.5(b)(7) did not refer to contagious chronic tuberculosis but rather to the after-effects of the disease once put in remission, such as respiratory or ambulatory difficulties. However, in § 300.5(b)(6), in its definition of "orthopedically impaired" children, the DOE included "impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.)." This separate provision dealing with the after-effects of viral, infectious diseases supports the conclusion that the DOE was referring to chronic tuberculosis in its definition of health impairment handicaps in § 300.5(b)(7).

194 EAHCA was revised in 1985 and the DOE regulations were likewise revised in July of 1985, yet AIDS was not specifically added in either revision. The argument could be made that the absence of AIDS as a listed health impairment is a conspicuous sign that Congress did not want to include AIDS in the classification, especially in light of the fact that in July of 1985 over 12,000 cases of AIDS had been reported to the CDC. Education, supra note 6, at 517. The omission of AIDS in the 1985 revision of the DOE regulations might seem dispositive of the issue were it not for § 300.6 which specifies as follows:

As used in this part, the term 'include' means that the items named are not all of the possible items that are covered, whether like or unlike the ones named. 34 C.F.R. § 300.6 (1985).

This section indicates that the DOE did not intend the conditions it listed to be exhaustive. Though the word "include" does not appear prior to the § 300.5(b)(7) list of health conditions under "other health impaired," the words "such as" do appear. The word "include" is used within the definitional listing section four times in the affirmative ("includes") and four times in the negative ("does not include"); that the DOE chose the words "such as" in lieu of "include" for a ninth time is neither surprising from a syntactical standpoint nor dispositive from a substantive one. "Such as" arguably has the same legislative intent behind it as "include" as an antecedent to a list of conditions comprehended within a given definition; its very definition suggests "something similar to or of the same type" in contrast to a limitation only to a specific enumeration of listed items. WEBSTER'S, supra note 75, at 2283. Rather, the general concept behind § 300.6 suggests that the DOE, in promulgating its regulations, had purposely not limited the protections of EAHCA only to the conditions mentioned, but implicitly extended the Act's aid to all children with impairments demanding "special education and related services." 34 C.F.R. § 300.6 (1985).
conditions within the definition of “handicapped” and “other health impaired” as carried over through legislation indicates that Congress did not intend to limit EAHCA’s coverage to commonplace handicaps; it consistently included the broad provisions “other health impairments” to provide for those children not covered by specific and readily identifiable disabilities. The rulemakers’ specific inclusion of tuberculosis in the list of conditions covered by the statute is concrete evidence that AIDS also should be presumed to be a handicap under EAHCA.

Although thus far few cases involving AIDS school children have yet been argued in court, the United States District Court for the District of Indiana relied on EAHCA’s procedural requirements when confronted with an AIDS child’s challenge to his exclusion from the regular classroom. In White v. Western School Corp., the plaintiff, a thirteen year old hemophiliac who contracted AIDS through a blood transfusion, filed suit in the federal court in Indianapolis when the superintendent and school board refused to readmit him because he had the disease. The plaintiff sought injunctive relief and brought claims under the equal protection and due process clauses of the United States Constitution, the Civil Rights Act, the Rehabilitation Act of 1973, and the Education for All Handicapped Children Act. He argued that hemophilia — and AIDS — were handicaps under the statute. The court denied the plaintiff’s motion for a preliminary injunction for failure to exhaust available administrative remedies and granted the school board’s motion to stay the proceeding until the administrative process was exhausted.

In arriving at its decision, the court made four interesting rulings. First, relying on the recent Supreme Court case Smith v. Robinson, the court held that “if EAHCA is available to the handicapped

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197 White, No. IP-85-1192-C, slip op. at 1.
198 Complaint, supra note 62, at 1.
202 Complaint, supra note 62, at 6.
child, then it is "the exclusive avenue through which the child and his parents or guardian can pursue their claim." Second, the court found that EAHCA required a plaintiff to exhaust all state administrative remedies before seeking review by a court, and that the court in the instant case was thereby precluded from rendering judgment. Third, given the facts presented, the court held that there was no indication that the state administrative process was inherently biased or that pursuit of such remedy would be futile. Fourth, the court sought to avoid the duplication of evidence and expense occasioned by two different fact finding bodies ruling on the same question and reiterated that the needs of handicapped children with regard to educational placement were best resolved at the local level.

While the court did not explicitly hold that AIDS was a handicap under EAHCA, it did apply EAHCA to White, the plaintiff in Western School Corp. That the court was silent with regard to the plaintiff's five other claims indicates the court's implicit acceptance of the argument that AIDS is a handicap, that EAHCA is therefore applicable, and that it is the plaintiff's exclusive remedy. The court's preference for resolving the case under EAHCA indicates the superiority of proceeding under a statute that encourages local determination of the child's placement before resort to the courts. The court's decision to stay the judicial proceeding pending administrative resolution of the dispute was correct.

White's case has not yet been resolved. Nearly six months later, White was readmitted to classes by local authorities after a county medical officer acting on behalf of the Indiana Board of Special Education Appeals ruled that he posed no health threat to his fellow classmates. While perhaps not the speediest nor even the most

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205 White, No. IP-85–1192–C, slip op. at 3., quoting Smith, 104 S. Ct. at 3470.
208 Id.
209 At White's hearing before the Indiana Board of Special Education Appeals, the panel ordered Western Middle School to request a health certificate from Dr. Alan J. Adler, chief medical officer for Howard County, and to admit White contingent on Dr. Adler's recommendation. Dr. Adler performed a regular physical examination of White, but "looked more into
conclusive resolution of the matter in this particular case, the court's decision to force the plaintiff to utilize EAHCA's administrative apparatus established the process for handling future claims. The court's application of EAHCA in the AIDS context and potential successful result accompanying it suggests that EAHCA may be invoked successfully by future plaintiffs.

While classification of AIDS as a handicap under EAHCA does not in and of itself ensure that every AIDS child may attend public school in the regular classroom, it does establish the right to a free appropriate education for all children with AIDS. Once that right attaches under EAHCA, it cannot arbitrarily be altered or taken away. The applicability of the Act is limited to those handicaps where education in regular classes with the use of supplementary aids and services can be achieved satisfactorily. Whether the AIDS child poses a risk to other students, and whether implementation of the CDC guidelines mitigate such risk so that concurrent education of the AIDS child could be satisfactorily achieved, are fact-specific issues that courts are obligated to scrutinize. Classification of AIDS under EAHCA would impose on the courts and future local administrative bodies an affirmative duty to make a “well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives,” in contrast with the subjective approach employed in past cases involving diseased persons. The next section compares the Rehabilitation Act to EAHCA and discusses the benefits of asserting that AIDS is a handicap under EAHCA.

C. EAHCA Versus the Rehabilitation Act

In contrast to EAHCA, the Rehabilitation Act (Section 504) is a broad civil rights law that proscribes discrimination against any

210 Whether White may continue to attend school with his peers is still being debated at this writing. While White returned to school on February 21, 1986, by the end of the school day, Howard County Circuit Court Judge R. Alan Brubaker held, on a motion for preliminary injunction brought by three of White's classmates, that a 1949 state law covering communicable diseases might apply to White's case. Judge Brubaker again barred White from class until he could hold a hearing on whether the state law covers AIDS as a communicable disease. 1 APL 7 (Feb. 26, 1986).

211 See discussion of procedural safeguards, supra notes 173-183 and accompanying text.

212 Arline, 772 F.2d at 765.

handicapped individual by any federally funded entity. The Act provides in pertinent part:

> [n]o otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

Notably, the statute does not on its face impose specific requirements for the educational context. In its regulatory framework, however, the Department of Health, Education and Welfare specified that public schools must provide a free, appropriate public education to each qualified handicapped person in their jurisdiction or, if necessary, must make available a private residential placement providing such an appropriate education. In addition, the regulations require the recipient to place the handicapped child in a regular classroom to the maximum extent possible, and to implement procedural safeguards, including notice, an opportunity to review records, an impartial hearing allowing parental participation and counsel, and a review procedure. In sum, the statutory language bans discrimination on the basis of handicap, but it does not provide affirmative measures to prevent such discrimination. The specific provisions regarding the Rehabilitation Act's applicability to the education of handicapped children are regulatory rather than statutory.

While the Rehabilitation Act perhaps establishes the right of handicapped persons not to be discriminated against in the school context, it fails to provide the remedy. In its regulatory framework, the Act presumes substantive and procedural safeguards; it does not affirmatively require them.

The inadequacy of the Rehabilitation Act's protection was demonstrated by the June 1986 Department of Justice (DOJ) ruling on

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214 Id.
215 The regulations to the Rehabilitation Act were promulgated by the Secretary of HEW. 42 Fed.Reg. 22676 (1977). HEW's functions under the Act were transferred in 1979 to the Secretary of Education under the Department of Education Organization Act, § 301(a), 93 Stat. 677, 20 U.S.C. § 3441(a) (1979).
216 34 C.F.R. § 104.33(a),(c) (1985).
217 Id. § 104.36. HEW declined to require the exact procedures set out in EAHCA because those procedures might be inappropriate for some recipients not subject to EAHCA. Id. § 104.61. However, the agency indicated that compliance with EAHCA procedures would satisfy the regulation. Id. § 104.36.
the application of section 504 to persons with AIDS. Applying abstruse logic, the DOJ concluded that the disabling effects of AIDS constituted a handicap under section 504, but that discrimination on the basis of the communicability of AIDS was insufficient to qualify as a handicapping condition under the statute. According to the DOJ, an individual with AIDS may be handicapped under the Rehabilitation Act but his exclusion due to fear that he will spread the disease is not protected under the same statute. The DOJ further limited the Act’s protections by stating that plaintiffs under section 504 may not challenge the reasonableness of the defendant’s judgment about the risk that he will spread the disease; defendants are not prohibited by section 504 from making incorrect, and even irrational, decisions so long as their decisions are not based on handicap.

The DOJ’s weighty, though not binding, interpretation of section 504’s applicability to persons with AIDS thus mandates that the statute applies to AIDS patients only where discrimination is based on the disabling physical effects of AIDS on its host, but not where it is based on a concern about contagion. The DOJ cemented the artificiality of the distinction by finding that “there is no a priori reason to presume that assertions of fear of contagion are especially likely to be pretextual.” This interpretation of section 504 invites state and local bodies to deny protection to persons with AIDS without similarly requiring them to justify the rationality of their decision. The opinion makes patently obvious the Rehabilitation Act’s inability to safeguard substantively or procedurally the rights of children with AIDS to attend public school.

On the other hand, EAHCA statutorily provides for the right of a handicapped child to be educated with his peers to the maximum extent appropriate, as well as the right to remain in the desired educational setting. The omission of these two requirements could motivate abuse by school boards should the Rehabilitation Act remain the sole legislative protection applicable to AIDS-infected children. Under the Rehabilitation Act, in the absence of EAHCA's
mainstreaming provision, a school board is only barred from discriminating on the basis of handicap; the provision of equal or superior public school education in separate classrooms for AIDS children or exclusion based on a fear of contagion would thus not violate the statute. Without EAHCA's affirmative mandate requiring an excluded AIDS child to be placed in the regular classroom during his appeal process, a school board could successfully bar the child's attendance for many months or until such time that 1) the child's disease progressed to the stage where the CDC guidelines prescribed his attendance, or 2) the child died. In addition, if EAHCA and its administrative process were deemed inapplicable to AIDS, a section 504 claim would make it less likely that these disputes would be disposed of on the local level, which is a costly alternative for the AIDS child, as well as a direct undermining of congressional intent under EAHCA.

Under the Rehabilitation Act, a handicapped individual is defined 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 impairment, or (iii) is regarded as having such impairment.

This definition is significantly broader than the definition of handicap under EAHCA. The Rehabilitation Act regulations define "physical or mental impairment" to mean:

(A) 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; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

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AIDS falls within this regulatory definition because the HTLV-III/LAV virus destroys lymphocytes in the blood, and thus constitutes a physiological disorder affecting the hemic and lymphatic systems. The regulations further define the phrase “has a record of such an impairment” as having a history of physical impairment. HEW directs that the phrase “is regarded as having an impairment” applies to all individuals who have an impairment which may not actually limit a life activity but which is treated as a handicap by society. These regulations neatly encompass AIDS carriers and AIDS children in remission. Excluded school children who are carriers, though they are not in the acute stage of the disease, are even treated as having an impairment. Excluded children in remission have a “history of” physical impairment.

While AIDS satisfies the statutory definitions of handicapped under section 504, it is not entirely clear that Congress or HEW intended these general definitions to apply to children with AIDS in the school context. In a separate paragraph, section 104.3(k)(2), HEW specified that in the school context, a handicapped individual who qualifies for relief under section 504 is one who qualifies for a free appropriate education under EAHCA. HEW made a specific regulatory provision for the definition of a qualified handicapped person in the school context which is consonant with the definition specified in EAHCA's statutory framework. This reference by HEW indicates a presumption by the Rehabilitation Act's regulatory agency that EAHCA is either the dispositive stat-

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227 Id. § 104.3(j)(2)(iii). (iii) "Has a record of such an impairment" means has a history of, or [having] been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. Id. See also DOJ Opin., supra note 33, at D–7.

228 Id. § 104.3(j)(2)(iv). (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment. Id.

229 For discussion of Congressional intent behind § 504, see DOJ Opin., supra note 33, at D–13–D–16.

230 With respect to public preschool, elementary, secondary or adult educational services, a "qualified handicapped person" means a handicapped person . . . (iii)to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act [EAHCA]. 34 C.F.R. at § 104.3(k)(2) (1985).
ute in the education context, or that the two Acts are to be read conjunctively.

Courts have indeed held that diseases may constitute handicaps under the Rehabilitation Act. In September 1985, the Eleventh Circuit held in *Arline v. School Board of Nassau County* that tuberculosis constituted a handicap for purposes of the Rehabilitation Act of 1973. The plaintiff, a teacher who was fired from her public elementary school job after several relapses of tuberculosis, contended that her susceptibility to tuberculosis made her a handicapped individual within the terms of the Rehabilitation Act, and that the school board therefore violated the Act because it fired her even though she was "otherwise qualified if given reasonable accommodation." On appeal, the Eleventh Circuit held that tuberculosis was a handicap under the statute in this case, but, more importantly, that contagious diseases as a whole could be covered by section 504.

Unlike the DOE interpretive regulations under EAHCA, tuberculosis was not explicitly listed as a contemplated handicap in the language of either the Rehabilitation Act or its agency regulations. If tuberculosis is a handicap under section 504, it should also be considered a handicap under EAHCA. If EAHCA applies to tuberculosis, a contagious disease, it should similarly apply to AIDS.

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231 772 F.2d 759 (11th Cir. 1985) cert. granted, No. 85–1277 (April 21, 1986).
233 *Arline*, 773 F.2d at 760–61.
234 The *Arline* court noted that:
[t]he language of these provisions [the Rehabilitation Act and 45 C.F.R. § 84.3(j)(2)] in every respect supports a conclusion that persons with contagious diseases are within the coverage of section 504. As the record in this case makes clear, a person with tuberculosis is, when afflicted with the disease, one who 'has a physical or mental impairment which substantially limits . . . major life activities, . . . since the disease can significantly impair respiratory functions as well as other major body systems. Even when not directly affected by tuberculosis, Arline falls within the coverage of section 504 because she "has a record of such an impairment" . . . and "is regarded as having such an impairment" by her employer [citation omitted].

*Id.* at 764.
235 In the employment discrimination context, advocates are arguing that AIDS constitutes a handicap under state handicapped employment discrimination statutes as well as the Rehabilitation Act. The fear generated by the outbreak of AIDS has caused employers to separate, suspend, or terminate individuals having or suspected of having AIDS, ostensibly in the interest of public health. See Comment, * supra* note 37, at 735 (relating that gay employee lost job when he took time off from work to go to the doctor because his employer knew he was gay, assumed he had AIDS, and fired him); Wallis, * supra* note 1, at 45 (discussing the case of Johnny Greene, a writer, who was fired from an editing job at McDermott International, Inc. after writing an article for *People* magazine about his own suspected case of AIDS); Flaherty, * supra* note 3, at 1, *citing* Case v. County of Tulare, 111532 (Tulare County Superior
In finding that tuberculosis fit within the broad definition of handicap, the Arline court noted that coverage of the disease as a handicap

Court) (male hairdresser sued employer charging that he was dismissed because he was suspected of having AIDS).

Individuals have filed suit in state and federal court, as well as with administrative agencies, though no case has been litigated to an appellate level in any jurisdiction. Leonard, supra note 16, at 683. In a number of these cases, advocates have argued that AIDS constitutes a handicap, requiring protection under handicap/disability discrimination statutes.

Several state human rights commissions, administrative agencies enforcing statutes prohibiting discrimination against the handicapped or disabled, have made the threshold determination that persons with AIDS are protected under the state statutes and administrative regulations. Id.; cf. DOJ Opin., supra note 33, at D-7 et seq; supra notes 235-41 and accompanying text.

Specifically, the New York State Attorney General determined that AIDS was a handicap protected by New York Human Rights law and accordingly brought suit for damages and injunctive relief against the cooperative apartment board of directors that refused to renew the lease of a gay doctor who had treated AIDS patients on the premises. Although the doctor successfully settled for damages, attorneys fees and a new lease without going to trial, the trial judge, in an unpublished opinion, overruled a motion to dismiss for failure to state a claim under the state statute, a tacit acceptance that AIDS is covered under the handicap discrimination law. Leonard, supra note 16, at 683 n.9, citing People v. 49 West 12 Tenants Corp., No. 43604/83 (N.Y. Sup. Ct., Oct. 17, 1983); Telephone interview with Arthur S. Leonard, Assoc. Prof. of Law, N.Y. U. (Sept. 24, 1985).

In Florida, the Commission on Human Relations found that AIDS fit the meaning of handicap under Florida law. The Commission then held that Broward County officials had acted illegally when they fired a budget analyst in September, 1984 after learning he had AIDS. Boston Globe, Dec. 14, 1985, at 9, col. 2. Unless the employer can show that the employee with AIDS is a threat to others, then such discrimination is unacceptable under Florida handicapped law. Id.

Although the Rehabilitation Act of 1973 prohibits the federal government from discriminating against handicapped individuals who are otherwise qualified to perform their jobs, there is no national, comprehensive, regulatory prohibition of private sector discrimination. See, e.g., DOJ Opin., supra note 33, at D-7. The majority of states and the District of Columbia have responded to this void by enacting statues which ban handicapped discrimination in the private and public sector. Compare ALA. CODE § 21-7-1 to 21-7-10 (1984), ARK. STAT. ANN. § 82-2901 (1985), IDAHO CODE §§ 56-701 to 57-707 (1984), MISS. CODE ANN. § 43-6-1 to 43-6-105 (1981 & Supp. 1985), S.D. CODIFIED LAWS ANN. § 20-13-10, 20-13-10.1 (1979 & Supp. 1985) prohibiting discrimination of the handicapped only in the public sector, and Arizona, Delaware and Wyoming which have not spoken on the subject. Significantly, two states expressly exclude protection of individuals suffering from "communicable diseases." See GA. CODE ANN. § 34-6A-3(b)(2) (1982), KY. REV. STAT. § 207.140 (2)(c) (1984), and one state excludes protection for disability by virtue of illness. See N.H. REV. STAT. ANN. § 354-A:3(XIII) (1985). While coverage of AIDS sufferers is arguable in the 47 states prohibiting discrimination against the handicapped, coverage in the latter three jurisdictions appears prohibited.

The definitional language of "handicapped" contained in the federal Rehabilitation Act is repeated with minor variations in many of the state handicap employment discrimination laws. While statutory definitions of "handicapped" are generally broad in scope, they do vary and there is little or no case law interpreting the exact parameters of the term. Courts have found that diseases can constitute a handicap under the law. See, e.g., Chrysler Outboard Corp. v. Dept' of Indus. Labor & Human Relations, 14 FAIR EMPL. PRAC. CAS. (BNA) 344, 345 (Wis. Cir. Ct. 1976)("Acute lymphocytic leukemia 'clearly constitutes a handicap' within the meaning
promoted congressional intent, and thus the court refused to exempt tuberculosis from coverage under section 504 without further legislative direction.236

While the Arline court applied the Rehabilitation Act to tuberculosis, it declined to apply a specific remedy. The court noted that the scope of section 504 is to prevent arbitrary decision-making by state authorities that deprives genuinely qualified handicapped persons from participating in federally funded programs.237 The court remanded to the lower court the question of whether the teacher posed too great a health risk to be otherwise accommodated.238

The court in District 27 Community School Board239 found that AIDS is a contagious disease that represents a handicap in the school context. This Queens, New York superior court case represents the only court decision to date to address explicitly the issues of exclusion of AIDS children from public schools and whether AIDS may be considered a handicap under the federal laws protecting the handicapped. The court in District 27 Community School Board held that children with AIDS are protected against exclusion by both the Rehabilitation Act and the equal protection clause of the Fourteenth Amendment.240 Although the court found that AIDS was a handicap


236 In reaching its decision, the Arline court stated:
When a fact pattern falls so neatly within the statutory and regulatory framework, and when coverage would so clearly serve to promote Congress' intent to reduce instances of unthinking and unnecessary discrimination against those who are the focus of the statute's concern, we would be hard pressed to find an exemption without further legislative direction.

772 F.2d at 764.

For further discussion of the analogy of AIDS and tuberculosis as handicaps under the EAHCA and with regard to the risk of contagion, see infra notes 268–79 and accompanying text.

237 Arline, 772 F.2d at 765.

238 Id.

239 Dist. 27 Community School Bd., No. 14949/85, slip op. at 55.

240 Noting that public school education is not a fundamental right, the court found that the school boards' exclusion plan violated the fourteenth amendment in that it failed the Brown
under the Rehabilitation Act, it found that the syndrome was not a handicap under EAHCA. The court’s classification of AIDS as a handicap under the Rehabilitation Act is an analytical stepping stone, but the utility of this holding is limited. Finding AIDS to be a handicap under the Rehabilitation Act is necessary but not sufficient. The court reached the just result in *District 27 Community School Board*, but it failed to establish a systemic remedy to be applied by the local school boards who indisputably retain the power to manage the public schools. By denying the applicability of EAHCA to AIDS,241 AIDS will not be treated as a handicap on the criteria of making the provided state benefit available to all on equal terms — the boards’ plan called for excluding only known AIDS cases or carriers without imposing similar exclusion on ARC patients or asymptomatic carriers. The court thus found that the plan lacked a rational basis. Id. at 56–57.

241 Id. at 66. The disposition of the EAHCA claim by the Queens court (Hyman, J.) is somewhat curious. In *District 27*, the school boards challenged the appropriateness of the City’s referral of the AIDS children to a committee instituted by the Department of Health rather than to the local school districts’ Committee on the Handicapped, established pursuant to the EAHCA and the N.Y. EDUC. LAW § 4401(1). “The pivotal question,” the court noted, “is whether a child diagnosed as having AIDS would fall within the definition of handicapped child.” *Dist. 27 Community School Bd.*, No. 14940/85, slip op. at 66. The court held that while a child with AIDS could become handicapped as a result of deterioration in his or her condition, the evidence clearly supports the determination that such children are not handicapped for purposes of referral to a Committee on the Handicapped merely because they have AIDS/ARC or are infected with the HTLV-III/LAV virus.

Id.

The court’s rather summary analysis perhaps explains the result. The court noted that EAHCA definition of handicapped was narrower than that of the Rehabilitation Act, but did not adequately explore the statutory definitions or the regulations. While many AIDS carriers do not continuously exhibit signs of “limited strength, alertness or vitality,” neither do children with tuberculosis, epilepsy, or diabetes, diseases characterized by remission and relapse, which are all contemplated handicaps in the regulations. While agency regulations are not dispositive, they are entitled to considerable weight. *St. Louis Dev. Dist. Treatment Center v. Mallory*, 591 F. Supp. 1416, 1444 (W.D.Mo. 1984). The Queens court never addressed or distinguished AIDS from these diseases.

Nor does the court adequately address the New York Education Law, promulgated under EAHCA, which defines a child with a handicapping condition as one “who, because of mental, physical or emotional reasons can receive appropriate educational opportunities from special services and programs . . . .” N.Y. Educ. Law § 4401(1)(1984). Given the court’s own concern for confidentiality of AIDS diagnosis, *Dist. 27 Community School Bd.*, No. 14940/85, slip op. at 77–79, and the fact that one of the four identified New York City school children with AIDS was removed from public school due to the potential psychological damage attendant to the disclosure of her illness, it is surprising that the court failed to find that an AIDS carrier could be handicapped due to mental or emotional impairment as a result of stigma.

Furthermore, the court’s suggestion that a child with AIDS must wait until his condition deteriorates to be entitled to the protections of EAHCA is untenable; this is precisely the time when an AIDS child in all likelihood should not be in school or when he would be barred from attendance by the CDC recommendations. Under this analysis, an essentially healthy AIDS child could theoretically be excluded at a time when concurrent education was possible because he was not covered by the EAHCA, and then as he became more ill, he could establish he was handicapped and begin his appeal process. If the child’s condition was deteriorating,
local level on a regular basis. Since the AIDS child is not accorded the regular class placement under EAHCA, as are other handicapped children, he requires a different educational placement process; essentially he remains "different" even under a handicapped classification. A finding that AIDS constituted a handicap under both statutes would have given teeth to the holding by making compliance with it a prerequisite for receiving any federal funds for a district's handicapped population. 242

The United States Supreme Court has acknowledged the interplay between the Rehabilitation Act and EAHCA. In Smith v. Robinson, 243 the Court held that, where EAHCA is available to the handicapped child, it is the exclusive avenue through which the child may pursue his claim. 244 The Court found that Congress intended that each child's educational needs be determined on the local level, and therefore that it enacted EAHCA replete with explicit procedural safeguards with a later right to judicial review once all administrative remedies had been exhausted. 245

he might not survive his appeal process, and the local school boards would have established a de facto exclusion.

It is also not clear whether Judge Hyman meant to limit his holding that children with AIDS are not handicapped under EAHCA only "for purposes of referral to a Committee on the Handicapped" rather than a Public Health committee as opposed to a global rejection of the statute's applicability. If the former interpretation applies, this difficulty could be relieved by placing medical experts and public health officials on the Handicapped Committee to specifically review AIDS children's claims and still entitle them to EAHCA protections. In its concluding statement on the issue, the court noted that "to hold [that an AIDS child could be referred to a Committee on the Handicapped] would be tantamount to publicly fostering the picture of such children as 'damaged goods.'" Id. at 66-67. The court's reasoning is obscured by its implication that all other handicapped children subject to the EAHCA are "damaged goods," a notion which explicitly runs counter to EAHCA's objective to unify all children as equals in the public educational process.

242 EAHCA's funding to states is not so large an amount of money that a state would be fiscally crippled if it opted not to accept the funding. Such a move would, however, be political suicide, as it would cut off federal funding for all handicapped children in the state. The Massachusetts Department of Education estimates that EAHCA provides approximately $220 per year per handicapped child in Massachusetts. Telephone interview with Sandra Moooy, Esq., Mass. Dep't. of Educ., Legal Office, Quincy, MA (Feb. 10, 1986).


244 Id. at 3468.

245 The Court stated:

[EAHCA] establishes an elaborate procedural mechanism to protect the rights of handicapped children. The procedures . . . effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review . . . . Congress did not intend to have the EHA scheme circumvented by resort to the more general provisions of § 1983. We reach the same conclusion regarding petitioner's § 504 claim.

Id. at 3469, 3472.
The Court focused on the interrelationship between section 504 and EAHCA with regard to the handicapped child's right to a publicly financed education. The Court noted that section 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination. By contrast EAHCA guarantees a right to a free appropriate education and imposes affirmative requirements. Significantly, the Court held that EAHCA controlled the handicapped child's claim in the education context.

AIDS should be classified as a handicap under EAHCA in determining school exclusion cases. EAHCA specifically addresses the educational placement of handicapped children. Since the Court declared that EAHCA is the sole avenue for pursuing the educational claims of handicapped children, and because AIDS has been classified as a handicap under section 504, EAHCA should be available to protect the rights of the AIDS child.

V. JUDICIAL IMPLEMENTATION OF AIDS AS A HANDICAP UNDER EAHCA

A. The Standard of Review for Administrative Bodies and Courts

EAHCA recognizes that not every handicapped child can be educated successfully in the public school systems with supplementary aids and services. The mainstreaming provision establishes a strong congressional preference for integrating handicapped and non-handicapped children; however, integration is not an absolute require-

246 Id. at 3473.
247 The Court's language is explicit:
Section 504 and the EHA are different substantive statutes. While the EHA guarantees a right to a free appropriate public education, § 504 simply prevents discrimination on the basis of handicap . . . . [A]lthough both statutes begin with an equal protection premise that handicapped children must be given access to public education, it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA.

Id. at 3472.
248 In reaching this result, the Court explained that [EAHCA ensures]
that equal access to a public education is not an empty guarantee, but offers some benefit to a handicapped child . . . . Even assuming that the reach of § 504 is coextensive with that of the EHA, there is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate education.

Id. at 3473.
ment where it would not result in the best educational placement for the child or it could not be successfully accomplished. The statute does not require a free, appropriate education for handicapped children in the regular classroom environment where the "nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Where a handicapped child's integration is challenged, EAHCA requires a particularized inquiry that weighs the costs and benefits of an alternative private placement to determine if education in the regular classroom cannot be achieved satisfactorily.

Just as EAHCA does not mandate that all handicapped children are categorically entitled to attend public school in the regular classroom environment, neither should all children with contagious diseases be so entitled. The severity of a particular child's disease, or the risk he poses to others, may render education of that child in the regular school environment unsatisfactory. Whether a child excluded for having a AIDS or any other contagious disease may successfully be classified as a handicapped child under EAHCA involves a two-pronged inquiry. First, does the child's disease function as a handicap for purposes of safeguarding the child's right to equal educational opportunity consonant with the legislative intent of EAHCA? This first inquiry requires analysis of whether the disease impairs educational performance, the longevity of the disease, the degree of contagion and the modes of transmission in the school context. Only certain diseases will meet the first prong's requirements. However, these requirements will be met more readily in subsequent cases once a court determines that a particular disease constitutes a handicap under the statute.

250 Rowley, 458 U.S. at 181 n.4; Roncker, 700 F.2d at 1063; St. Louis, 591 F. Supp. at 1443; Denz, 124 Ill. App. 3d at 135, 463 N.E. 2d at 1003.
252 St. Louis, 591 F. Supp. at 1440 ("Fundamental to the guarantee of a free appropriate education is a requirement that each handicapped child be considered as an individual . . . . This congressional recognition carried over into the requirements of the Education Act.").

While the review process is unique to each child, the courts do not have an unlimited power of review to determine the adequacy of state educational policies. Congress vested primary responsibility for formulating the educational policy for handicapped children to the state and local educational agencies in cooperation with the child's parents. 20 U.S.C. § 1413(a)(3)(1982 & Supp. 1985). In a proceeding conducted pursuant to § 1415(e)(2), a state must give due deference to the state administrative proceedings in reaching its decisions. Roncker, 700 F.2d at 1062. Once it determines that the requirements of the Act have been met, questions of methodology are for resolution by the States. Rowley, 458 U.S. at 208. However, the Act does not command unlimited deference to local determinations. See Talladega City Bd. of Educ., 518 F. Supp. at 53 n.9 (preponderance of evidence standard reflects congressional decision to accord greater role in the enforcement scheme to the federal courts).
The second inquiry queries whether the severity of the particular child's disease, or his own behavior patterns, increase the risk of transmission so as to prevent satisfactory education in the regular school environment, even with the use of supplementary services. This second prong will always require the court or administrative body to make a particularized case-by-case inquiry, objectively balancing both the specific child's physical condition and the effectiveness of prophylactic measures against the costs of social isolation, stigmatization, and the child's right to attend public school. If the costs to the child are significant while supplementary measures minimize the risk of his disease spreading in school, courts could find that, on balance, concurrent education may be achieved satisfactorily. If, however, the risks of contagion even with supplementary services outweigh the interests of the child, the child would not be entitled to the protections of section 1412(B)(5) under the Act.

B. Models of Analysis

In *New York State Association for Retarded Children, Inc. v. Carey*,253 the New York City Board of Education excluded forty-two mentally retarded children who were carriers of the hepatitis-B virus from special education programs in public school.254 The Board stated that the presence of these children in the classroom increased the risk of transmission of hepatitis-B. The Board argued that the "sufficient unhygienic personal behavior" exhibited by the mentally retarded children255 increased the chances of contagion. The federal court enjoined the Board's action and held that the risk of contagion of hepatitis-B was not substantial enough to justify the exclusion256 in light of the prophylactic measures available.257

254 466 F. Supp. at 481.
255 Among the behavior listed, the Board noted the following: 1) mouthing of objects; 2) interpersonal hand to mouth contact; 3) scratching which drew blood; 4) drooling; 5) bleeding of the gums; 6) self-abuse drawing blood; 7) slobbering; 8) kissing; and 9) biting. 466 F. Supp. at 483–84.
256 Id. at 486. The court also found that the Board violated the EAHCA. The fact that the EAHCA was applied to a case involving hepatitis B, an infectious, communicable disease, is negated somewhat by the fact that the plaintiff class was also mentally retarded, and would thus automatically fall under the protections of the Act.
257 These prophylactic measures incorporated the suggested guidelines of both the United States Public Health Service, Center for Disease Control and the Department of Health task force. The guidelines required students to be tested at appropriate intervals and classified them as carriers, immunes or susceptibles for "cohorting" purposes. Susceptibles were to take their meals separate from carriers, and schoolbuses were to be monitored to prevent hazardous
Characterizing the Board’s action as an overreaction which “none of the medical experts countenance,” the court criticized the implementation of such an exclusionary policy that resulted from “parental pressure, [and a] fear of publicity and lawsuits . . . .” These obstacles, real as they may be, cannot be allowed to vitiate the rights of these handicapped schoolchildren. Integral to the court’s decision was the traumatic effect and irreparable harm that the Board’s policy would have on the children. The court’s decision rested on the absence of established causation. Presented with a situation in which medical evidence failed to demonstrate a causal relationship between the classroom setting and transmission of the virus, and where the threat to the public health was “purely theoretical,” the court held that the educational needs of the affected children outweighed the countervailing public interest.

Contact between the two groups. In addition, good personal hygiene was to be encouraged, sinks were to be made available in each classroom and unhygienic personal contact was to be discouraged. In sum, the control measures were largely based on magnified personal hygiene and caution in the handling of blood-contaminated items. 

Id. at 485.

Id.

Id.

Id.

The court stated that:

[the Board’s] overreaction has caused and will continue to cause irreparable harm to the children involved . . . . The traumatic effect of being told at the last minute that they can no longer participate in the schools where many of them have already spent two or three years is extremely great. To this must be added that . . . . many of the excluded children are simply remaining at home while their peers and co-residents go to school. However, the most serious consequences of the Board’s plan would be felt if the pupils were sent to school in developmental centers. The Court is convinced that this would have a severely retrogressive effect on the development of these children . . . .

Id.

New York State Ass’n for Retarded Children, Inc. v. Carey, 466 F. Supp. 487, 500 (E.D.N.Y. 1979)(Motion for declaratory judgment) [hereinafter Carey II].

466 F. Supp. at 485. A different result was reached by the United States District Court for the District of Maryland in a similar situation. In Ely v. Howard County Bd. of Educ., No. M81-3072 (D.Md. Jan. 11, 1982), reprinted in 3 EHLR 553:288 (Feb. 5, 1982), the parents of a mentally retarded student infected with hepatitis B sought an injunction to force the school to permit his attendance. Noting the hardship the plaintiff child would endure as a result of the forced separation from interaction with his peers, the court held that the probability that the child’s saliva would reach the mucous membranes or open skin of either staff or other students, though minimal under proper hygienic precautions, was too great to permit the child’s attendance in school. Certain factual mutations may have justified the different result: a member of the child’s household “has or did contract Hepatitis B apparently from contact with [the child], the majority of the school employees were female, three of whom were pregnant at the time, and the court relied heavily on the Gibbon study conclusion that saliva carries the virus. The court’s summary discussion of prophylactic measures, and its complete substantive avoidance of the Carey decision, a case in point decided three year's
In a similar case, *Community High School District 155 v. Denz*, an Illinois state appellate court affirmed the decision of the Illinois Superintendent of Education to mainstream a mentally handicapped child with Down’s syndrome who was also a carrier of hepatitis B. Although Ingrid Denz was educationally qualified to attend a special public school facility, her school district excluded her because she was a carrier of hepatitis B. She was then placed in a homebound educational program where she received her education through a tutor. The school district argued that the “inappropriate” behavior of the children in the special education school posed potential transmission routes for the disease if the respondent were integrated. The court affirmed her placement in the public school facility in light of her “personal characteristics, the relatively low risk of transmission of the disease as testified to by the experts, and [the facility’s] ability to fashion an individualized program for [the respondent] and the other students which could further reduce that risk.” As in *Carey*, the Denz court emphasized the importance of the socialization and peer interaction processes that occur among children in the regular classroom. On balance, where the minimal risks of transmission were mitigated by both prophylactic measures and the particular child’s behavior patterns, the benefits of integration outweighed the risk of contagion.

These cases stand for the proposition that contagious disease may be the basis for exclusion only if an adjudicatory body determines upon particularized analysis that the risk of infection, even when mitigated by prophylactic measures or individual behavior patterns, outweighs the costs to the child of such exclusion. This type of analysis prevents a global categorization of all diseased persons and allows a court to distinguish between different types of diseases and

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before by another federal court, is somewhat curious. Interestingly, Ely cited *Carey* for the proposition that the court had acted within its discretion to exercise subject matter jurisdiction over the request for interim relief. If nothing else, the court manifested its awareness of the *Carey* decision, which makes the absence of discussion even more conspicuous. “As to [the risk of transmissibility],” the court noted, “there is no hard evidence. It is a matter of opinion, based on fact.” In the face of the *Carey* precedent and the avoidance of distinguishing discussion, the court’s opinion seems determined to favor its own result. *See also In re Santa Clara Superintendent of Schools*, 3 EHLR 503: 252 (1982).

265 124 Ill. App. 3d at 140, 463 N.E.2d at 1005.
266 124 Ill. App. 3d at 131, 463 N.E.2d at 1000.
267 Id.
268 124 Ill. App. 3d at 136, 463 N.E.2d at 1003.
269 124 Ill. App. 3d at 137–38, 463 N.E.2d at 1004.
their individual characteristics in order properly to assess which diseases are analogous to handicaps.

The Carey and Denz courts' analysis of hepatitis B is especially germane to the AIDS context. The medical evidence regarding non-communicability in the classroom setting, the availability of prophylactic measures to guard against any theoretical risk, and the degenerative effect of segregation on the infected children are the paradigmatic AIDS situation. Moreover, the Carey analysis should transfer more readily to the AIDS context, as AIDS children are less likely than mentally retarded children to engage in behavior conducive to transfer of the virus.\textsuperscript{271} Since AIDS is more sensationalized and stigmatized by society than is hepatitis-B, courts' refusal to sanction exclusion based on parental pressure and fear is even more compelling. Combined with their reliance on statutes protecting the handicapped, courts' objective analysis of the medical risk of transmission effectively protected these carrier children's right to be educated in public schools with their peers.\textsuperscript{272} Similar analysis should be adopted in the AIDS cases.

\textbf{C. Characteristics of Diseases That Motivate a Handicap Classification}

Apart from the type of analytical approach a court or administrative body should follow in determining whether a disease constitutes a handicap for purposes of EAHCA, the characteristics of the disease itself will determine whether such classification is justified. By listing

\textsuperscript{271} Carey, 466 F. Supp. at 484. The court heard conflicting evidence on whether these children actually did exhibit behavior conducive to transfer of the virus. However, it is presumable that children of average to above average mental and emotional capacity are better capable of controlling physical behavior.

\textsuperscript{272} The court found that the New York City Board of Education's plan violated the Rehabilitation Act, EAHCA and the Fourteenth Amendment Equal Protection Clause. The court rejected the theory that retarded children constituted a suspect class, but found that the Board's segregation plan was without rational basis under traditional equal protection analysis. Carey II, 466 F. Supp. at 504.

Although the court also found that the Board had violated the Rehabilitation Act and EAHCA, the clarity of the holding is negated somewhat by the fact that the plaintiff class was also mentally retarded and would thus automatically fall under the protections of the Act. However, in Denz, the court was reviewing a similar fact pattern to that of Carey and indicated that the application of EAHCA could pertain to the child's diseased condition:

\[ \text{Regardless of whether its decision was based on a physical disease rather than Ingrid's handicap, it is . . . clear . . . that the school district's decision had the effect of infringing upon Ingrid's right to be mainstreamed under the EAHCA . . .} \]

\textit{Denz}, 124 Ill. App. 3d at 138, 463 N.E.2d at 1004. Arguably, the court viewed Ingrid's hepatitis B health impairment as a handicap under the EAHCA.
tuberculosis as a health impairment covered under its regulations, the DOE has already determined that tuberculosis qualifies as a handicap. Similarly, by allowing children with hepatitis B to attend public school, the Carey and Denz courts have found that hepatitis B would qualify as a handicap under EAHCA. Analysis of the characteristics of these diseases is useful in determining whether AIDS may be covered by EAHCA.

Tuberculosis is an infectious disease that attacks the lungs and causes extreme tissue damage. Usually it is transmitted through inhalation of droplets of mucus or saliva that contain tubercle bacilli expelled by an adult with chronic tuberculosis when he coughs, sneezes or talks. The droplets remain suspended in the air, float with air currents, and may infect others who are a distance away, even after an interval of one or two hours from the time the droplets were expelled. Significantly, only tuberculous adults produce and disseminate large numbers of bacilli. Almost all children who test positive for tuberculosis contract non-progressive pulmonary primary tuberculosis, the primary phase of tuberculosis. Primary tuberculosis is not contagious because it generally does not advance to the stage where it liquefies tissues; the majority of children with primary tuberculosis do not cough, do not produce sputum, and therefore do not expel bacteria into the atmosphere. Primary tuberculosis in children is thus not considered contagious.

273 See supra note 227.
274 See supra note 190.
275 Hetherington & Eshleman, supra note 190, at 221–22; Stead, supra note 190, at 6. Tuberculosis may be spread person to person in ways other than inhalation of wet droplets through the air: 1) inhalation of dust containing tubercle bacilli originating from dried sputum droplets swept into the air by air currents; 2) swallowing of tubercle bacilli that have lodged on the lips or mucous membranes by kissing, contaminated eating or drinking facilities, or from contaminated hands of individuals who perform personal services for tuberculous patients; 3) inoculation of tubercle bacilli through a wound or through an error in technique. Hetherington & Eshleman, supra note 190, at 223–24.
276 See Stead, supra note 190, at 21; Lincoln & Sewell, supra note 190, at 14–15.
277 Id. Once the tubercle bacilli are inhaled, they begin to slowly multiply without eliciting any reaction. After several weeks, an allergy develops to the bacilli which produces an inflammatory reaction at the site of the infection. This allergy initiates the body’s immune response. In primary tuberculosis, the immune system effectively controls the infection so that it causes no illness, produces no tubercle bacilli, and heals without diagnosis unless a tuberculin test is administered. This is the stage of tuberculosis must commonly found in children. As the infection heals, it leaves dormant lesions which can “reawaken” and develop into active tuberculosis in later life when body resistance is lowered. This is the chronic tuberculosis stage which is serious and contagious. Tubercle bacilli multiply rapidly, cause liquefaction of tissue and in turn this contagious liquid is expelled in the environment. See generally id.
278 Stead, supra note 190, at 21; Lincoln & Sewell, supra note 190, at 14–15.
While medical authorities agree that non-progressive pulmonary primary tuberculosis in children poses "almost no danger" of contamination, there remains a small risk that the bacteria could be spread into the atmosphere. This can occur in the rare instance when a child develops chronic or "adult" tuberculosis, when tubercle bacilli are present in the bronchi of a child with primary pulmonary tuberculosis and he coughs or sneezes, or at a time when the primary tuberculosis diagnosed child is suffering from a severe upper respiratory or non-tubercular pulmonary infection. Since tuberculosis is a relapsing disease, it is technically incurable. The development and perfection of chemotherapy treatment, however, effectively keeps the disease in remission and has resulted in a 95% recovery rate for tuberculous patients. In addition, the vaccination for tuberculosis has proven 80% effective in preventing infection and virtually 100% effective in making the infections which it cannot prevent less virulent.

Hepatitis B is a virus that has a devastating effect on the liver. It is characterized by fatigue, loss of appetite, nausea, jaundice, fever and inflammation of the liver and spleen. Hepatitis B has a similar epidemiology to AIDS; it is transmitted parenterally by means of transfusions of infected blood products, by use of a contaminated needle, or through sexual intercourse which causes a break in a membrane. Hepatitis B, like AIDS, is a disease of limited communicability that does not pose a risk of contagion in the classroom. While medical authorities agree that sexual or blood contact is required for transmission of the virus, the hepatitis B antigen has been isolated in a number of body secretions, most notably saliva.

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280 Lincoln & Sewell, supra note 190, at 15. See also Stead, supra note 190, at 21.
281 Id. See id.
282 Id. In the average laboratory, bacilli are recovered in approximately 25% of children with primary tuberculosis but such cultures generally contain a low concentration of the bacteria. Lincoln & Sewell, supra note 190, at 15.
283 Myers, supra note 190, at 86.
284 Stead, supra note 190, at 14.
285 Id. at 22.
286 Myers, supra note 190, at 13.
287 Raymond S. Koff, M.D., Viral Hepatitis (1978), passim.; Myers, supra note 190, at 152–53; Carey, 466 F. Supp. at 483; Denz, 124 Ill. App. 3d at 136, 463 N.E.2d at 1003.
288 Koff, supra note 287, at 19. The hepatitis B virus (HBV) has been isolated with variable frequency and little consistency in the following body secretions: feces, urine, saliva, sneeze droplets, nasopharyngeal secretions, tears, anterior chamber eye fluid, sweat, semen, vaginal secretions, amniotic fluid, pleural effusions, gastric juice, bile, intestinal fluid, colostrum, cerebrospinal fluid, ascitic fluid, and synovial fluid. See id. citations, at 50–60.

One commentator notes that, while "circumstantial epidemiologic data do not support the notion that these fluids represent important sources of infectivity, . . . [u]ntil further evidence substantiates their noninfectivity it is reasonable to treat all biologic fluids as potentially
In the laboratory, researchers postulate that hepatitis B may be transmitted orally through direct contact with infected saliva, for example by kissing, or indirectly through contact with inanimate objects, for example by sharing toothbrushes or baby toys. Most experts find, however, that saliva or other body secretions contain such a low concentration of the antigen that transmission through these fluids is highly inefficient. As with AIDS, transmission through saliva would require that large amounts of the infected fluid be placed in an open wound or mucous membrane; even under these unlikely circumstances, transmission most often does not occur. Saliva poses a speculative risk of contagion which can be mitigated by proper hygiene and monitoring procedures.

The acute stage of hepatitis B, though quite rare, can be serious and may lead to death if untreated. The disease may also pose a high risk to unborn fetuses of women who contract hepatitis B in the latter stages of pregnancy — the fetus may have a greater susceptibility to cancer of the liver upon birth. As with AIDS, not all individuals who test positive for the antigen contract the disease. In children, the acute stage of the disease may be so mild that it is mistaken for a passing flu or fever. Generally, hepatitis B may be cured with several weeks of hospitalization and treatment with a nutritious diet. There is currently no safe and effective vaccine available.

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infectious and to exercise care in the handling of secretions, regardless of their nature or origin. Id. at 19–20.

Id. at 90. If peroral transmission is possible, it is presumably facilitated by the minute lesions in the mouth or mucous membranes which would permit direct access to the circulation. Id.

Denz, 124 Ill. App. 3d at 136, 463 N.E.2d at 1003.

Id.

124 Ill. App. 3d at 137, 463 N.E.2d at 1004; Carey, 466 F. Supp. at 486.

Carey, 466 F. Supp. at 482. When the hepatitis B virus is introduced into a person, it undergoes a two to three month incubation period. At this point one of three things can happen. The rarest occurrence as noted is the immediate development of the acute stage of the disease. Next, if the patient has developed enough antibodies, the hepatitis B antigen will be eliminated, the antibodies will be stored, and the patient will be immune for some time. If the patient does not build up enough antibodies to eliminate the antigen, he reaches an equilibrium where the patient still carries the antigen but is asymptomatic of the disease. As in AIDS, one carrier can transmit the virus to another person without either person going through the acute stage of the disease. Carriers may appear healthy but may undergo severe debilitation over time. Id. at 482–83.


Carey, 466 F. Supp. at 482.

MYERS, supra note 190, at 153. Some people do not heal completely and develop chronic hepatitis which is manifested by a persistent, low-grade infection of the liver. Id. Chronic
The similarities between AIDS and these diseases suggest the proper balancing factors. Under the first prong of the inquiry, for a contagious disease to be covered as a handicap under EAHCA it must adversely impact a child’s educational performance on a long term basis, both in the carrier and acute stage. In the acute stage, the debilitating physical effects of tuberculosis, hepatitis B or AIDS lower educational performance. As a carrier, the child not only suffers certain physical symptoms, but also the stigma of suffering from a contagious disease. These factors combine to psychologically, if not physically, burden a child in his educational development even before he contracts the disease.

Additionally, for a contagious disease to qualify as a handicap, it must pose a nonexistent or minimal risk of contagion. Because tuberculosis is airborne, it is highly transmissible should one of the rare infectious events occur. However, the fact that children rarely produce or expel the bacteria that cause the disease negates the ease with which tuberculosis could be transmitted in the school context. Tuberculosis, therefore, poses a low risk of contagion. Hepatitis B and AIDS are far less transmissible in the school context than tuberculosis because their transmission requires sexual or blood contact. There is some doubt, however, over the role of saliva in communicability. This doubt was balanced out in Denz, Carey and District 27 School Board by the preponderance of medical evidence against transmission through saliva, as well as by the effective mitigation of any such risk through the use of prophylactic measures. Thus, only diseases that both adversely affect a child’s educational performance, and which pose little or no risk of transmission in the school context, may qualify as a handicap under this analysis.

Under the second prong of the EAHCA inquiry, once a court determines that a particular disease constitutes a handicap under the risk analysis, it must then scrutinize that particular child’s behavior and the stage of his disease to assess whether education of that child with healthy children may be achieved safely and satisfactorily. Any child suffering the acute stage of tuberculosis, hepatitis B or AIDS would probably be too ill to attend school. Certain carrier children or diseased children who do not feel ill may nonetheless still

hepatitis may be kept in remission with prolonged rest and treatment with cortisone drugs. Occasionally, it requires a permanent restriction on strenuous, physical activity. Id.

Diseases such as chicken pox or the mumps obviously would not fit this test because, though contagious, they are short-lived and would not present a calculable impact on educational performance.
be lawfully excluded. For instance, a tuberculous child suffering from any stage of an upper respiratory infection that theoretically could produce tubercle bacilli, or an AIDS or hepatitis B child with an open wound could be excluded. These types of individual physical manifestations would bar concurrent education.

Similarly, a child whose disease qualified as a handicap in the initial analysis would not satisfy the second test if his personal behavior patterns tended to increase the risk of exposure to infected bodily fluids. Such behavior patterns might include frequent incontinence, a tendency to bite, aggressive behavior which could draw blood, self-mutilation, scratching, bleeding of the gums and excessive or uncontrollable drooling. Such children could not survive this analysis and a court would be justified in excluding them until such a condition changed. The converse of this principle, where the child's sanitary habits further mitigated the risk of contagion, would indicate that concurrent education could be successfully achieved, as exemplified by the habits of the plaintiff child in Denz.

In sum, classification of a contagious disease under EAHCA would be limited to diseases that function as handicaps in the school context. This grouping consists of diseases adversely affecting a child's educational performance and which pose a low risk of infection with the use of supplementary measures. Moreover, the stage of the disease in conjunction with that particular child's personal behavior patterns must not pose any additional risk of transmission that would render education with healthy children unsafe or unsatisfactory.

VI. CONCLUSION

During the next several years, the number of children with AIDS in the public schools will grow as the number of AIDS cases in the general population increases. As more and more children are diagnosed with the syndrome, advocates will be called upon with greater frequency to represent the interests of these children and to assert their right to public school education with their peers. The newness of the disease, the inconclusiveness of the medical research, and the public furor and controversy focused on AIDS, will mean that the litigation of these rights must be grounded in an objective legal scheme that cannot be undermined by societal pressure or judicial subjectivity. Children with contagious diseases do not constitute a recognized suspect class, discrimination against them thus cannot be analyzed under the strict scrutiny equal protection doctrine. Similarly, education is not a fundamental right, thus, no strict scrutiny
analysis is available under the fundamental rights doctrine. The rational basis standard of review applicable to rulings that exclude children with AIDS presents a readily surmountable burden of proof for a school board.

The Education for All Handicapped Children Act requires a free appropriate public school education for all children, handicapped or non-handicapped, on an equal basis. Unlike the Rehabilitation Act that establishes only a right to attend public school, EAHCA provides a remedy. Its substantive provisions and elaborate procedural safeguards ensure that equal public education for the handicapped is not an empty guarantee. By analogy, AIDS should be classified as a handicap pursuant to EAHCA.

Under the Act, a “health impaired” child is a handicapped child. Analysis of the statutory language, Department of Education regulations and legislative intent demonstrates that AIDS constitutes a health impairment under the statute. While not all diseases could qualify as a handicap under the statute, AIDS “functions” like a handicap. AIDS adversely impacts a child’s educational performance and at the same time does not present a tangible risk of contagion to other school children.

Once an AIDS child qualifies as handicapped under the statute, he is presumptively entitled to attend public school in a regular classroom with his peers unless his “handicap” prevents satisfactory education in this environment even with supplemental aids or services such as the CDC or state department of public health guidelines.

A school board may lawfully argue that AIDS children must be excluded under its authority to regulate to protect public health. Yet, under EAHCA, any exclusionary policy is subject to a particularized inquiry, balancing the disruption, isolation and stigma such exclusion would work on the students against the risk of transmission. As one court noted in addressing the hepatitis B context, “[t]he risk of contagion cannot be ignored, but there are prophylactic measures, not necessarily as stringent . . . which can be taken in order to reduce the risks to a de minimis level. It is not necessary to close the schoolhouse door to these children.” By classifying AIDS as a handicap under both the Rehabilitation Act and EAHCA, children with AIDS may receive the education they need and deserve on the local level with less frequent resort to the courts.

298 Carey, 466 F. Sup. at 486.