

FEAR AND LOATHING IN THE CLASSROOM: AIDS AND PUBLIC EDUCATION

INTRODUCTION

In 1981 the Centers for Disease Control¹ first identified the pathological condition now known as acquired immune deficiency syndrome, or AIDS.² The number of cases reported in the United States has since risen from the five diagnosed in 1981³ to more than 26,000.⁴ It is likely the incidence of AIDS will continue its geometric increase in the future,⁵ barring any major breakthrough in treatment.

The CDC estimates that as many as 1.5 million people have been infected with AIDS, and 20 percent to 30 percent of these individuals will develop the disease by 1991.⁶ The CDC also estimates that in 1991 more than 174,000 Americans will require hospitalization for AIDS, 54,000 will die of the disease, and another 74,000 will contract the virus.⁷ Addi-

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1. The Centers for Disease Control (CDC) is an arm of the Public Health Service. It is a federal agency charged with protecting the nation's health by providing leadership and direction in the prevention and control of diseases, and by responding to public health emergencies. See OFFICE OF THE FED. REGISTER, THE UNITED STATES GOVERNMENT MANUAL 1984/85 273 (1984).
 2. The Centers for Disease Control originally defined a case of AIDS to be "a reliably diagnosed disease that is at least moderately indicative of an underlying cellular immunodeficiency in a person who has had no known underlying cause of cellular immunodeficiency nor any other cause of reduced resistance reported to be associated with that disease." *Acquired Immune Deficiency Syndrome (AIDS) Update—United States*, 32 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 310 (1983). This definition has since been modified by the CDC. Under the original definition, which counted only severe manifestations of an HTLV-III infection for national reporting purposes, the individual had to be afflicted with an opportunistic infection. Under the modified definition, those not suffering from an opportunistic infection will be counted as AIDS patients for national reporting purposes if they have one of seven other specific disease conditions. *Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting—United States*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 373, 373-74 (1985).
 3. Five practicing homosexual males in Los Angeles contracted and died of *pneumocystis carinii*, a rare form of pneumonia caused by the presence of a protozoan parasite, due to the depressed status of the victims' immune systems. Because the men had previously been healthy with normal immunological systems, the CDC reasoned that the underlying cause of the reduction in their immunological defenses was acquired, not hereditary. See *Pneumocystis Pneumonia—Los Angeles*, 30 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 250 (1981).
 4. *CDC Official Terms AIDS "Worldwide Disease"*, AIDS Policy & Law (BNA) No. 19, at 7 (Oct. 8, 1986).
 5. *Id.* at 7; *Citing "Staggering" Numbers of Cases, PHS Sets Strategy to Combat Epidemic*, AIDS Policy & Law (BNA) No. 11, at 1 (June 18, 1986). Since 1979, the incidence of AIDS has doubled every six months. See U.C.L.A. Conference, *The Acquired Immunodeficiency Syndrome*, 99 ANNALS OF INTERNAL MED. 208, 216 (1983) [hereinafter cited as *U.C.L.A. Conference*]. Experts expect the spread of the disease to continue, with the number of cases doubling yearly. See Krim, *AIDS: The Challenge to Science and Medicine*, HASTINGS CENTER REP. 5, 6 (Supp. Aug. 1984).
 6. *Citing "Staggering" Numbers of Cases, PHS Sets Strategy to Combat Epidemic*, AIDS Policy & Law (BNA) No. 11, at 1 (June 18, 1986).
 7. *CDC Official Terms AIDS "Worldwide Disease"*, AIDS Policy & Law (BNA) No. 19, at 7 (Oct. 8, 1986); *Citing "Staggering" Numbers of Cases, PHS Sets Strategy to Combat Epidemic*, AIDS Policy & Law (BNA) No. 11, at 1 (June 18, 1986).

tionally, by 1991 a total of 270,000 cases of AIDS will have developed, resulting in 179,000 deaths.⁸

The justified public fear of the disease has given rise to some unjustified public responses. Such responses include refusals by medical personnel to care for suspected and confirmed AIDS victims, the shunning and firing of persons in the workplace, and the refusal or contemplated refusal of school authorities to allow children with or suspected of having AIDS to attend public schools. The latter situation raises questions as to the legal standing of school-age children afflicted with AIDS, their schoolmates and the public school system. A number of school districts across the nation have taken on the delicate task of balancing the educational interests of AIDS victims against the health concerns of other students, but a consensus as to which interest should control has yet to emerge.⁹

This note examines the conflict caused by the introduction of an AIDS-infected child into a public classroom in a society that balances the rights of the individual against the authority of a state to protect the health and welfare of its residents. It outlines what is known about the disease and illustrates the effect it has had on society and education. The note also explores the status of public education as a right, what the courts require to justify curtailing access to public education, and the applicability of the constitutional doctrines of equal protection and due process. Finally, the note suggests that, public hysteria aside, legislation less drastic than mandatory expulsion should be implemented to deal with the situation.

THE AIDS VIRUS

As its name suggests, the AIDS virus affects the victim by disabling the body's natural immune system at the cellular level, greatly increasing the individual's susceptibility to other diseases. The virus accomplishes this by suppressing the number of T-4 lymphocytes, a type of white blood cell essential to the proper response of the body's immune system to attacks by infectious agents.¹⁰ Once this defense mechanism has been diminished, the

8. The CDC emphasizes that these figures are probably low by at least 20 percent due to failures in detecting and reporting the disease, and to the fact that the CDC's national reporting system statistics include only severe manifestations of the virus. See *CDC Official Terms AIDS "Worldwide Disease"*, AIDS Policy & Law (BNA) No. 19, at 7 (Oct. 8, 1986); *Citing "Staggering" Numbers of Cases, PHS Sets Strategy to Combat Epidemic*, AIDS Policy & Law (BNA) No. 11, at 1 (June 18, 1986); *Update: Acquired Immunodeficiency Syndrome—United States*, 35 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 17, 17-18 (1986) [hereinafter cited as *Update*].

9. See *infra* notes 42-43 and accompanying text.

10. See Anderson, *Children and AIDS: Implications for Child Welfare*, 63 CHILD WELFARE 62, 63 (1984); Krim, *supra* note 5, at 2-4.

body becomes susceptible to a number of rare opportunistic diseases that would pose no significant health risk to a normal immune system.¹¹

The AIDS virus, designated as Human T-cell Lymphotropic Virus Type III (HTLV-III), poses an especially difficult situation in that it is transmissible,¹² currently beyond our ability to control¹³ and deadly. The AIDS mortality rate (proportion of deaths among reported cases) is fifty-one percent, and the fatality rate (likelihood of an AIDS patient dying of the disease), is 100%.¹⁴ Although temporary remissions are common, no patient has fully recovered from the virus' effects.

Statistics show the number of AIDS cases is rising geometrically.¹⁵ Moreover, the Centers for Disease Control report that statistical estimates may be deceptively low because of uncertainty and variability of the incubation period of the virus, failures in reporting and detecting the disease, and the stringent requirements of the CDC's definition of a case of AIDS.¹⁶ The incubation period typically ranges between six months and two years but may take up to seven years.¹⁷ Once infected, the victim becomes a carrier and is able to transmit the virus.¹⁸

The fatality of AIDS and the absence of an effective treatment have caused a great deal of justifiable public concern. The virus has also, however, kindled fear and confusion regarding the ease and mode of its transmission. The AIDS virus has been isolated in blood, semen, saliva,

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11. These diseases are called "opportunistic" because they are found to occur only in individuals suffering from severe immune deficiencies. See Krim, *supra* note 5, at 2. The most common of these opportunistic infections are *pneumocystis carinii* pneumonia, a rare and highly fatal form of pneumonia caused by a parasitic lung infection, and *Kaposi's sarcoma*, a rare form of skin cancer that attacks the liver and lungs. Among AIDS patients, 63% have been diagnosed as having *pneumocystis carinii* pneumonia and 24% with *Kaposi's sarcoma*. *Update, supra* note 8, at 17-18. These diseases usually occur only when an individual's immune system has been artificially suppressed by medications used in cancer therapy or organ transplants. See Anderson, *supra* note 10, at 63; Batchelor, *AIDS: A Public Health and Psychological Emergency*, 39 AM. PSYCH., 1279, 1279-84 (Nov. 1984).
 12. The virus is known to be transmissible through intimate sexual conduct, contaminated hypodermic needles, contaminated blood or blood products, and in utero or at birth from a mother to child. See *Public Health Service Plan for the Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS)*, 100 PUB. HEALTH REP. 453 (1985). See also *infra* notes 19-26 and accompanying text.
 13. "Although some of the opportunistic infections associated with AIDS can be treated or controlled, there is no effective long-term treatment for life-threatening cancers or infections, and no treatment at all for AIDS itself." See Batchelor, *supra* note 11, at 1279-84.
 14. Eighty percent of those infected die within two years of diagnosis. The prognosis for the 20 percent who do not die within two years is that they will die of the disease within five years of diagnosis. See Krim, *supra* note 5, at 6; *U.C.L.A. Conference, supra* note 5, at 216; *Update, supra* note 8, at 17-18; Batchelor, *supra* note 11, at 1279-84.
 15. See *supra* note 5 and accompanying text.
 16. See *supra* notes 2 and 6 and accompanying text.
 17. Studies report that 10 percent of the individuals testing positive for the virus develop AIDS within two years, but the CDC has determined that the incubation period may range from one to seven years. See *Update, supra* note 8, at 20; *Public Health Service Plan for the Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS)*, 100 PUB. HEALTH REP. 453 (1985); Krim, *supra* note 5, at 5.
 18. See Krim, *supra* note 5, at 5.

tears, breast milk and urine, and it is likely to be isolated in other bodily fluids, secretions and excretions.¹⁹ Only blood and semen, however, have been implicated in the transmission of AIDS.²⁰

The CDC identifies the four known means of contracting the virus as being (1) from an infected sexual partner through exchange of body fluids, (2) through equipment used to administer intravenous drugs, (3) through contaminated blood and blood products, and (4) from infected mothers to infants at or before birth.²¹ Where none of these factors exist, there appears to be no risk of transmission.²²

There is no indication that the virus is transmissible through contact with food, water, air or environmental surfaces handled by or located near infected individuals, even in health care settings in which AIDS patients are treated.²³ Additionally, CDC figures indicate that none of the family members of more than 12,000 AIDS patients have contracted AIDS, other than sexual partners of infected patients and infants born to infected mothers.²⁴

Due to the limited means of transmission, ninety-four percent of AIDS victims in the United States fall into six groups that suggest a possible means of disease acquisition: (1) sixty-five percent are homosexual or bisexual men who are not intravenous drug users; (2) seventeen percent are heterosexual intravenous drug users; (3) eight percent are homosexual or bisexual men who are intravenous drug users; (4) two percent are reci-

19. See *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 682 (1985) [hereinafter cited as *Transmission in the Workplace*]; *Recommendations for Preventing Possible Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy Associated Virus from Tears*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 533 (1985).

20. *Transmission in the Workplace*, *supra* note 19, at 682; Batchelor, *supra* note 11, at 1279.

21. See *Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Inter-Agency Recommendations*, 32 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 101 (1983); *Public Health Service Plan for the Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS)*, 100 PUB. HEALTH REP. 453 (1985); Krim, *supra* note 5, at 4; *U.C.L.A. Conference*, *supra* note 5, at 216; *AIDS: Casual Contact Exonerated*, 128 SCI. NEWS 213 (1985); Batchelor, *supra* note 11, at 1279-84; *Recommendations for Assisting in the Prevention of Perinatal Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus and Acquired Immunodeficiency Syndrome*, 34 MORBIDITY AND MORTALITY WEEKLY REP. 721 (1985) [hereinafter cited as *Perinatal Transmission*].

22. The virus "must be virtually injected into the bloodstream, and then encounter cells in which it can multiply." Krim, *supra* note 5, at 4. Present research indicates the only cells in which this is possible are activated T-4 lymphocytes, certain B lymphocytes, and cells of the central nervous system. See *id.*

23. See *U.C.L.A. Conference*, *supra* note 5, at 216; *Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 517, 518 (1985) [hereinafter cited as *Education and Foster Care*].

24. See *Education and Foster Care*, *supra* note 23, at 518-19; *Household Contact Found Low Risk*, AIDS Policy & Law (BNA) No. 15, at 6 (Aug. 13, 1986).

pipients of transfused blood or blood components;²⁵ (5) one percent are hemophiliacs; and (6) one percent are the heterosexual partners of persons with AIDS or at risk for AIDS.²⁶

Pediatric AIDS

Concern for and fear of the disease have resulted in disparate treatment of AIDS victims and lawsuits in numerous situations, including employment discrimination.²⁷ Although discrimination is undesirable anywhere it

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25. Infection via transfusion occurs when the recipient of a transfusion receives blood or blood products from a carrier of the AIDS virus. See Curran, Lawrence & Jaffe, *Acquired Immunodeficiency Syndrome (AIDS) Associated With Transfusions*, 310 NEW ENG. J. MED. 69, at 69-75 (1984). Although the U.S. Public Health Service estimates the likelihood of such an occurrence as one in 1 million, public fear of such contamination has caused the Public Health Service to issue suggested guidelines for the collection of blood donations. These recommendations seek to exclude from the donor pool members of groups with a high risk of carrying the AIDS virus. Additionally, the use of tests for the virus in donated blood is advocated, although existing tests are not 100 percent accurate. See Levine and Bayer, *Screening Blood: Public Health and Medical Uncertainty*, HASTINGS CENTER REP. 1, at 8 (Supp. Aug. 1984).
 26. See *Update*, *supra* note 8, at 17-18. By considering these six groups in conjunction with transmission in utero or at birth, all segments of the population become open to infection. See Curran, Lawrence & Jaffe, *supra* note 25, at 69-75; Thomas, Jaffe, Spira, Reiss, Guerrero & Auerbach, *Unexplained Immunodeficiency in Children*, 252 J. A.M.A. 639 (1984). Doctors have detected the disease in all major racial and ethnic groups in the United States. Whites account for 60 percent of all adult cases, blacks 25 percent, and Hispanics 14 percent. Seven percent of all cases have occurred in women. All age groups have been affected, although most victims fall in the 25-44 age bracket. See *Update* *supra* note 8, at 17; Batchelor, *supra* note 11, at 1279-84.
 27. Discrimination based on AIDS has arisen in numerous areas, including the armed forces (discharge without benefits from Air Force based on AIDS being proof of misconduct), universities (refusal to rehire a professor with AIDS), media (television technicians refused to assist in the taping of a program on which AIDS victims appeared), transportation industry (flight attendant suspected of having AIDS fired), family situations (woman attempted to cut off ex-husband's child visitation rights because she suspected he might have or contract AIDS), and health care (medical personnel refusing to treat AIDS patients or enter their hospital rooms). Thus far, suits arising from discrimination based on AIDS have been decided in favor of the AIDS victim, usually in out-of-court settlements. See Batchelor, *supra* note 11, at 1283; Volberding and Abrams, *Clinical Care and Research in AIDS*, HASTINGS CENTER REP. 16-17 (Supp. Aug. 1984); Comment, *AIDS: A Legal Epidemic?*, 17 AKRON L. REV. 717, 733-35 (1984).

Prisons have also presented a difficult situation in that experts recognize prisons as high risk areas for the transmission of AIDS due to the high incidence of homosexuality and intravenous drug use, in addition to the common denominators of age and sex. *AIDS in Correctional Facilities: A Report of the National Institute of Justice and the American Correctional Association*, 35 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 195, 198-99 (1986). In *La Rocca v. Dalsheim*, 120 Misc. 2d 679, 702; 467 N.Y.S.2d 302, 306 (1983), inmates of New York's Downstate Correctional Facility brought suit requesting an injunction be issued forcing prison officials to halt all inmate and employee movement in and out of the prison until both groups could be examined to ensure that the disease had not spread, and to move all infected prisoners out of the prison to a hospital for treatment. The court declined to issue the requested injunction, holding that the state authorities had adequately segregated the prisoners with the virus in light of the medical evidence that casual contact posed no health risk. *Id.* at 702-11.

An emerging area of potential discrimination involves the health insurance field. On the average, annual health care for an AIDS victim costs \$140,000. With the number of cases increasing geometrically, insurance industry lawyers estimate that the disease will cost the in-

occurs, it is most tragic where AIDS victims have been infected through no affirmative act or fault of their own, as is true of children with AIDS.²⁸

Cases of children with AIDS, often referred to as pediatric AIDS,²⁹ account for one percent of all reported cases of the disease.³⁰ The Centers for Disease Control expect the number of children with the virus to double yearly.³¹ Seventy-six percent of children with AIDS contracted the virus from infected mothers, either in utero or at birth.³² Eighteen percent were infected through transfusions³³ with contaminated blood or blood products.³⁴ Fifty-nine percent of infected children have died.³⁵ In Centers for Disease Control studies of nonsexual household contacts, no family

surance industry \$150 billion over the next five years. Faced with this scenario, many health and life insurers want to test insurance applicants to determine if the person has been exposed to the virus. Currently, the insurance industry carries out such screening to determine if applicants have fatal diseases or smoke; where a company finds such factors, they may set higher premiums or deny coverage altogether. Insurance companies state that unless they can conduct such tests, and those with AIDS or with a greater risk of contracting AIDS assessed with higher premiums, all policyholders will bear the brunt of the increased costs. Additionally, some insurance companies may exclude AIDS from coverage altogether if they cannot test for the virus.

Opponents of such testing point out that testing for AIDS differs from testing for heart disease because the stigma attached with AIDS goes beyond the medical determination. A person might never develop the disease, yet the knowledge that the person is a carrier could cause loss of employment and social ostracism. Although confidentiality of medical records is the general rule, where an infected party is insured through an employer, the medical records are open to inspection by that employer. Such concerns have prompted the California Legislature to ban AIDS testing for insurance or employment purposes. Other states, however, have decided to allow such testing. See Tarr, *AIDS: The Legal Issues Widen*, NAT'L L.J., Nov. 25, 1985, at 1, 28-29.

28. The general precept of not penalizing innocent children for circumstances over which they had no control is supported, independent of other legal precepts, by the Supreme Court in *Plyler v. Doe*, 457 U.S. 202 (1982). In *Plyler*, Texas withheld funds for the education of children illegally within the United States. In striking down the statute, the Court indicated that it would not condone arbitrary penalization of children for the actions of their parents. The court stated that "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." 457 U.S. at 220.
29. The CDC defines a case of "pediatric AIDS" as a child who has had: "1) A reliably diagnosed disease at least moderately indicative of underlying cellular immunodeficiency, and 2) No known cause of underlying cellular immunodeficiency or any other reduced resistance reported to be associated with that disease." *Education and Foster Care*, *supra* note 23, at 518.
30. The CDC, however, feels this figure may be deceptively low. The 231 cases of pediatric AIDS reported as of 1986 represented only the more severe manifestations of the virus, which medical personnel are required to report to the board of health. Currently no such reporting requirement exists for cases of AIDS-related complex (ARC), which encompasses the less severe manifestations of the AIDS virus. Of pediatric AIDS patients, 60 percent are black, 19 percent are white, and 20 percent are Hispanic; 55 percent are male. See *Update*, *supra* note 8, at 19; *Education and Foster Care*, *supra* note 23, at 518-19.
31. See *Education and Foster Care*, *supra* note 23, at 518-19.
32. This 76 percent figure refers to the 231 pediatric AIDS cases reported to the CDC in children 13 years of age and under. See *Update*, *supra* note 8, at 17. See also *Perinatal Transmission*, *supra* note 21, at 722; *Education and Foster Care*, *supra* note 23, at 518.
33. Contamination through transfusion accounts for one percent of the overall incidence of AIDS, but accounts for 18 percent of the instances of pediatric AIDS. See Batchelor, *supra* note 11, at 1279-84; *Perinatal Transmission*, *supra* note 21, at 722; *Education and Foster Care*, *supra* note 23, at 518; Curran, Lawrence & Jaffe, *supra* note 25, at 70-74.
34. The remaining six percent were not investigated. See *Perinatal Transmission*, *supra* note 21, at 722.
35. See *Update*, *supra* note 8, at 11.

member of an AIDS patient has contracted AIDS through casual contact,³⁶ nor have there been any detected instances of transmission in a school or similar setting where casual, person-to-person contact with infected individuals occurs.³⁷

In light of such evidence, the Centers for Disease Control have recommended guidelines regarding the care and education of children and infants with AIDS.³⁸ The guidelines advise that a case-by-case analysis be used in deciding whether an infected child should attend regular classes, with special consideration given to children who have a history of biting, lack of control of their bodily secretions, or have uncoverable oozing lesions.³⁹ The Centers for Disease Control emphasize that the benefits an infected student receives from an unrestricted educational setting outweigh the apparently nonexistent risk of transmission.⁴⁰ The National Education Association, the nation's largest teachers union, has developed guidelines that closely resemble those of the Centers for Disease Control, with the additional suggestion that in cases where a child is excluded from the classroom for good cause, alternative instruction should be provided.⁴¹

Although some school districts have adopted the Centers for Disease

36. See *supra* notes 23-24 and accompanying text.

37. See *Education and Foster Care*, *supra* note 23, at 518; *Recommendations for Preventing Possible Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy Associated Virus from Tears*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 533, 534 (1985); Krim, *supra* note 5, at 4.

38. See *Education and Foster Care*, *supra* note 23, at 519-20. The portions of the Centers for Disease Control's recommended guidelines for the care and education of infected children most applicable to AIDS in the classroom are reprinted in the appendix to this note. The guidelines were drafted by the CDC with the assistance of representatives from the Conference of State and Territorial Epidemiologists, the Association of State and Territorial Health Officers, the National Association of County Health Officers, the Division of Maternal and Child Health (Health Resources and Services Administration), the National Association for Elementary School Principals, the National Association of State School Nurse Consultants, the National Congress of Parents and Teachers, the Children's Aid Society, and the parent of a child with AIDS. *Education and Foster Care*, *supra* note 23, at 519-20.

39. See Appendix, provisions 2-3. The Centers for Disease Control and the American Academy of Pediatrics emphasize that casual person-to-person contact, as among schoolchildren, appears to pose no risk to others, thus infected children should be allowed to attend regular classes if an evaluation of the case finds none of the aforementioned manifestations to be present. Due to the virus' detrimental effect on a child's immunological system, the party at greatest risk in a school environment is the AIDS-infected child. As the AIDS-infected child's ability to combat infection decreases, the child runs a greater risk of suffering severe complications from infections such as chicken pox, cytomegalovirus, tuberculosis, herpes simplex and measles. The CDC guidelines state that "for most infected school-aged children, the benefits of an unrestricted setting would outweigh the risks of their acquiring potentially harmful infections in the setting and the apparent nonexistent risk of transmission of the (AIDS virus)." See *Education and Foster Care*, *supra* note 23, at 519.

40. See Tarr, *supra* note 27, at 11; *Education and Foster Care*, *supra* note 23, at 519.

41. The National Education Association guidelines express the view that schools ought to be empowered to require tests to screen students and workers for exposure to AIDS when the school has "reasonable cause" to suspect infection. The organization felt "reasonable cause" exists where a spouse of a school employee has AIDS, or a school employee gives birth to a child with AIDS. The guidelines do not require disclosure of sexual orientation, nor could sexual orientation be a grounds for testing, absent other factors. The guidelines also urge the use of a case-by-case analysis, confidentiality, and alternative instruction be provided by the school where a child

Control guidelines in some form and are allowing infected children into regular classes,⁴² others have declined to do so.⁴³ The concern for non-infected students' health and safety is understandable, but the refusal by some school districts to allow students with AIDS to attend regular public school classes raises legal questions regarding the applicability of the fourteenth amendment due process and equal protection provisions, as well as the Rehabilitation Act of 1973.

THE RIGHT TO EDUCATION

The Supreme Court has declined to hold that publicly financed primary and secondary education constitutes a fundamental right. In *San Antonio Independent School District v. Rodriguez*⁴⁴ the Court emphasized that a fundamental right is a specific, judicially defined civil liberty that courts will find to be present only when explicitly or implicitly guaranteed by the Constitution.⁴⁵ Because education is not a fundamental right under the

is removed from regular classes due to infection. See *New Guidelines Issued by NEA On Teachers, Students with AIDS*, AIDS Policy & Law (BNA) No. 13, at 1 (July 16, 1986).

42. Swansea, Mass., became the nation's first school district to allow children with AIDS to attend regular classes. The student in question, a 12-year-old boy, had contracted the disease from contaminated blood products used in the treatment of his hemophilia. Unlike the citywide panic that broke out in the Queens section of New York when a child with AIDS was admitted, the Swansea decision did not generate picketing, protests or threats. See *infra* note 43 and accompanying text. See also *Is School for All?*, A.B.A. J., Nov. 1985, at 18-19; Tarr, *AIDS Victims Face Bias, Too*, NAT'L L.J., Sept. 16, 1985, at 30. Additionally, school districts in Indiana, Kansas, Minnesota, New Jersey and New York have decided to allow infected students to attend regular classes. See *Six Children Admitted In New York*, AIDS Policy & Law (BNA) No. 17, at 5 (Sept. 10, 1986); *In Brief*, AIDS Policy & Law (BNA) No. 16, at 6 (Aug. 27, 1986); *New Jersey Child To Attend Class*, AIDS Policy & Law (BNA) No. 14, at 4 (July 30, 1986); *In Brief*, AIDS Policy & Law (BNA) No. 11, at 6 (June 18, 1986).
43. School districts in California, Colorado, Connecticut, the District of Columbia, Florida, Indiana, New Jersey, New York and Virginia have barred AIDS-infected children from regular classes. One student whose plight has attracted widespread attention is 13-year-old Ryan White of Kokomo, Ind., who, in December 1984, was diagnosed as having AIDS, contracted from contaminated blood products used in the treatment of hemophilia. He was promptly banned from attending regular classes by Kokomo's Western School Corporation, over the objection of Ryan's doctor, the Centers for Disease Control and Indiana state health officials, who had adopted guidelines similar to those issued by the Centers for Disease Control. Ryan missed the remainder of his sixth-grade school year. See Tarr, *supra* note 27, at 29. Ryan has since returned to school, thanks to favorable court decisions. The citizenry who so vehemently opposed his return to the classroom have directed their efforts to the creation of a legislative ban on students with AIDS attending regular classes. *In Brief*, AIDS Policy & Law (BNA) No. 16, p. 6 (Aug. 27, 1986).
44. 411 U.S. 1 (1973). The Court upheld the use of local property taxes to finance a public school system in Texas, even though the funding method allowed disparities in the amount spent per student to exist within the school district. The plaintiffs had argued that this disparity, caused by the differing levels of affluence of the respective residents, constituted an equal protection violation. The Court declined to apply the strict scrutiny standard (under which an action will not be upheld unless it is necessary to promote a constitutionally compelling end), holding it was arguably reasonable for the Legislature to utilize local property taxes to provide for local educational needs. The Court found no substantial and direct correlation between the amount expended for educational materials and instruction, and the quality of education received. *Id.* at 35.
45. 411 U.S. at 33-34.

Constitution, the responsibility for providing a public system of education falls upon the states.⁴⁶

Traditionally, public education was considered a privilege bestowed upon an individual. As a privilege, it could be withdrawn or restricted by the state on the basis of race, religion, handicap or other grounds, with no requirement that just cause be shown.⁴⁷ This policy changed in 1954 when the Supreme Court held in *Brown v. Board of Education*⁴⁸ that school segregation on the basis of race violated the fourteenth amendment. In *Brown*, the Court altered the ability of states to place restrictions on public education. The Court held that when a state undertakes to provide public education, it must make it available to everyone on an equal basis.⁴⁹ This was the Court's first indication that it would apply the equal protection and due process guarantees to public education.

While it has refused to find that education constitutes a fundamental right, the Court has acknowledged a property interest in it when a state undertakes to provide public education.⁵⁰ The willingness to acknowledge this interest stemmed from the Court's development of a fourteenth amendment property right in some government-provided services.⁵¹ In

46. Forty-eight states make some provision for education in their constitutions. See Ratner, *A New Legal Duty for Urban Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16 (1985). The degree of emphasis and importance that various state constitutions attach to education ranges from establishing only a general requirement as to the provision of education, to making it a paramount duty of the state to provide the greatest amount of education possible. See *id.* at 814-22. State legislatures have the power to create school systems or to delegate such creative authority to local authorities. Such authority extends to system financing, age restrictions applicable to students, length of school sessions, and the qualifications, duties, and wages of personnel. See E. REUTTERI JR. AND R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* 87 (1976). State legislators can take any action they desire regarding education, so long as the action does not violate the federal Constitution. See generally Campbell, *An Analysis of Provisions of State Constitutions Affecting Financial Support of Public Schools*, in *LEGAL ISSUES IN EDUCATION*, (E. Bolmeir ed. 1970).

47. Referred to as the "right/privilege dichotomy," the Court distinguished between state and federal government-provided services and individual rights grounded in constitutional or common law. Any privileges granted by the government could be withdrawn without the use of a hearing or other procedural protection. *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). See, e.g., *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1982); *Gonzales v. Freeman*, 118 U.S. App. D.C. 180, 334 F.2d 570 (1964); *Graham v. Richardson*, 403 U.S. 365, 374; *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6; *Pickering v. Board of Education*, 391 U.S. 563, 568.

48. 347 U.S. 483 (1954).

49. *Id.* at 493.

50. The willingness to make this concession has come from the Court's development of a fourteenth amendment property right in some government-provided services in a line of cases beginning with *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Mills v. Board of Education*, 348 F. Supp. 866 (1972), the United States District Court for the District of Columbia held that no child eligible to receive a public education can be excluded from receiving one unless adequate alternative educational services suited to their needs are provided, as well as a prior hearing on the action to be taken. *Id.* at 878. See also *Pennsylvania Association for Retarded Children v. Pennsylvania* (343 F. Supp. 279 (1972)).

51. In a line of cases beginning with *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court moved away from its previous position that government-provided services were privileges that could be restricted or withdrawn at the whim of the provider, with little or no requirement that reasonable criteria or procedures be utilized. In *Goldberg*, the Court stated that the question of whether due

Goss v. Lopez,⁵² the Court struck down an Ohio statute allowing local school authorities to impose short-term suspensions on students. In finding an improper deprivation of property, the Court determined that the combination of a system of free public education and the enactment of compulsory education laws created an entitlement on the part of the student to a public education.⁵³ The Court also held that where such a property interest arises, fourteenth amendment protections guard against its arbitrary or unreasonable removal.⁵⁴

RESTRICTION OF ACCESS TO EDUCATION

The Scope of State Regulatory Authority

Once created, the property right of a child to attend public schools remains subject to reasonable regulation.⁵⁵ It has long been recognized that a state can protect the health, safety and welfare of citizens by means of legislation promulgated and enforced pursuant to the police power, impliedly granted to the states by the tenth amendment.⁵⁶ This police power

process protections apply is determined based on the importance of the benefit to the individual. Where the benefits are significant, and the harms from removal constitute a "grievous loss," the property interest the individual has in the benefit dictates that fourteenth amendment protections apply. *Id.* at 262-63. The Court followed up on this property right theory in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), where the Court adopted the position that the existence of a protected property right will be found only where there is an entitlement to a benefit under state law. In determining whether the party is entitled to the benefit, courts look to the effect and intent of local law and whether a claim to the benefit is created. If entitlement is found to exist, the government granting the property interest cannot destroy or substantially alter it without affording the party reasonable notice and a chance to voice objections, as required by the due process clause. In both cases the Court determined that entitlement arises where the federal, state, or local law governing the dispensing of a benefit defines that benefit in such a way that the person enjoying it is eligible to receive it, and has a continuing eligibility and reliance interest in receiving it.

52. 419 U.S. 565 (1975).

53. Compulsory education laws have been enacted to require all minors of school age to spend a minimum set number of hours and days each year in school buildings. Although such a restriction infringes on the individual's right to freedom of movement and association, this infringement has been viewed as justified by the importance of the motive of compulsory education laws. See Ratner, *A New Legal Duty for Urban Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 823-24 (1985).

54. *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).

55. *Id.* at 581.

56. The tenth amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Court has interpreted this to create a "police power" by which the states can control intrastate functions that the federal government has not been granted authority over. The concept of a state's "police power" was first expressed by Chief Justice Marshall in *Gibbons v. Ogden*, where he alluded to "[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens." 22 U.S. (9 Wheat.) 1, 208 (1824). The roots of the police power concept thus lie in early confrontations between state and federal government regarding the regulation of commerce. The theory soon began to assert itself as a source of authority under which a state could, as is the case today, enact and enforce legislation

can be used to safeguard public health, even at the expense of individual rights, so long as the state has a reasonable basis for doing so.⁵⁷ Where a regulation is found to be reasonable, the court will defer to local or state authorities.⁵⁸

When balancing individual rights against a state's use of police power to protect public health, courts have traditionally applied a rational basis test, under which the court presumes the regulation to be valid and defers to the state's authority unless the regulation bears no reasonable relationship to a legitimate state interest, or is arbitrary, capricious or unreasonable.⁵⁹ Courts have, however, determined "rational basis" to be too low a standard of review for cases involving the deprivation of a public education, due to its importance to the individual and society.⁶⁰

In *Plyler v. Doe*,⁶¹ the Court struck down a Texas statute permitting school authorities to refuse to enroll the children of illegal aliens in public schools. In holding that the law violated the equal protection clause of the

to protect and promote the health, safety, morals, order and general welfare of the state. In *Willson v. The Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1929), decided five years after Marshall first mentioned police power in *Gibbons*, the Court upheld a Delaware police power action involving the damming of a navigable waterway in order to protect the health of nearby residents. See also *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905).

57. *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905); *Hartman v. May*, 168 Miss. 477, 151 So. 737 (1934). See also *infra* note 68 and accompanying text.

58. *Hartman v. May*, 168 Miss. 477, 151 So. 737 (1934); *Zucht v. King*, 260 U.S. 174 (1922); *Vonnegut v. Baun*, 206 Ind. 172, 188 N.E. 677 (1934); *Mathews v. Kalamazoo Board of Education*, 127 Mich. 530, 86 N.W. 1036 (1901); *Kenney v. Gurley*, 208 Ala. 623, 95 So. 34 (1923); *Nutt v. Board of Education*, 128 Kan. 507, 278 P. 1065 (1929); *Bright v. Beard*, 132 Minn. 375, 157 N.W. 501 (1916); *Barsky v. Board of Regents*, 347 U.S. 442 (1954).

59. Under the "rational basis" standard, courts will not review legislative decisions, and will defer to the legislature's judgment, so long as the action conceivably bears a rational relationship to a governmental end not prohibited by the Constitution. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* ch. 13 § IV; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-2, § 16-2, § 16-3, § 16-6 (1978). When reviewing regulations designed to protect the public health, it has been suggested that courts examine the law in light of the following considerations:

1. Does the state have a duty to protect the public health? 2. Is that duty a legitimate legislative subject? 3. Does the health statute under consideration bear a rational and direct relationship to the objective? 4. Is the statute arbitrary or capricious? 5. If legislative classification results, is that classification rationally related to a legitimate state interest? 6. Does the sweep of the statute go beyond what is required to achieve the objective? 7. Is either a suspect classification or a fundamental right involved?

Damme, *Controlling Genetic Disease Through Law*, 15 U.C. DAVIS L. REV. 801, 805 (1982).

60. As the Supreme Court has stated:

Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle 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 reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

61. 457 U.S. 202 (1982).

fourteenth amendment, the Court emphasized that education was of special importance to an individual's development.⁶² By stating that public education provides the primary means by which a child learns the values and structure of our political system and society, the Court seemed to be flirting with the possibility of education constituting a fundamental right where its denial runs the risk of hampering an individual's ability to comprehend, participate in and function in our society and political system.⁶³

Based on the importance of the benefit denied and the powerlessness of the group excluded in such controversies, the Court determined that education warranted different treatment than other government-provided services, and an intermediate, or heightened, level of review should be applied where the deprivation of public education⁶⁴ or a quasi-suspect class is involved.⁶⁵ Under this intermediate level, falling between strict scrutiny and rational basis, the court will uphold a statute if the classification utilized by the legislature serves important governmental objectives and is substantially related to their achievement.⁶⁶

The Supreme Court noted in *Jacobson v. Massachusetts*⁶⁷ that the rights of individuals may be restrained where there exists a public necessity. Such a regulation must, however, deal with that necessity reasonably, infringe on individual rights as minimally as the situation will permit, and not be exercised in an arbitrary or oppressive manner.⁶⁸ Since *Jacobson*,

62. The Court stated:

Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Id. at 221.

63. *Id.* at 221.

64. *Id.* at 219-22, 230.

65. The possibility of an intermediate level of scrutiny was first broached in *Reed v. Reed*, 404 U.S. 71 (1971), where the Court first indicated it would no longer examine gender-based discrimination cases under the rational basis test. The Court solidified this attitude in *Craig v. Boren*, 429 U.S. 190 (1976), where the Court stated that "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

66. See *supra* notes 44, 59-60 and accompanying text.

67. 197 U.S. 11 (1905). In *Jacobson*, health authorities in Cambridge, Massachusetts, enacted a law making vaccination for smallpox mandatory in response to the increase of smallpox in the city and its believed transmissibility. *Jacobson* refused to comply, claiming an invasion of personal liberty and a lack of evidence of a need for the law. *Id.* at 29. The Court rejected these claims, citing medical authority to the contrary, the public's past experience with the disease, its severity and the rise in the occurrence of the disease in the area. *Id.* at 26, 28-31.

68. *Id.* at 26-27, 28-31. The Court quoted its opinion in *Crowley v. Christensen*, 137 U.S. 86, 89 (1890), where the Court stated that "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only

courts have upheld vaccination requirements as prerequisites to admission to public schools, even where no epidemic or immediate threat of an outbreak was present.⁶⁹ The regulation, however, must be justified when reviewed in light of medical evidence. This is an objective medical question answered, where a disease is involved, by looking at the severity of the disease and the manner and likelihood of its transmission.⁷⁰ These factors will determine whether the regulation is necessary and, if so, how broad the regulation should be.⁷¹

AIDS As a Basis for Restricting Access

In the context of a regulation prohibiting school attendance by pupils with AIDS, the questions for a court are whether the exclusion of the class in question (AIDS-infected children) serves an important governmental objective (prevention of the spread of contagious disease) and whether the means are substantially related to the governmental objective. The protection of public health within a school district or state is recognized as an important governmental objective, whether dealt with by state or school district authorities.⁷² Courts and legislatures have recognized the power of school authorities to prescribe health measures as a condition for school attendance in order to deal with a potential health threat.⁷³ When a threat is reasonably perceived, such regulations have been deemed not to run afoul of statutory or constitutional provisions protecting the property right to education, so long as the means chosen substantially relate to the governmental objective.

freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by the law." 197 U.S. at 26-27.

69. In *Hartman v. May*, 168 Miss. 477, 151 So. 737 (1934), the Mississippi Supreme Court upheld such a vaccination requirement on the grounds that, although smallpox was not present, the dangerous and contagious nature of the disease made the law a reasonable step to safeguard public health. Based on increased medical knowledge and faith in the vaccine, the court accepted the notion that regulations directed at preventing the introduction, as well as the spread, of contagious diseases was neither arbitrary nor unreasonable. See also *People v. Robertson*, 302 Ill. 422, 134 N.E. 815, 817-18 (1922).

70. Under current court procedures, when confronted with the task of reviewing a health regulation, a court will first determine whether there exists an actual or potential need for it. In *Jacobson*, the Court considered both medical and lay opinion in arriving at a decision. The subsequent trend has been to place great weight on medical evidence and testimony when making evaluations as to the existence of a health risk. This increased reliance on medical experts can be seen in the willingness of courts to allow state and local health authorities to decide on the necessity for regulation and corresponding scope and form of that regulation. In *People v. Robertson*, the Supreme Court of Illinois indicated that the state health authorities were empowered to isolate individuals and enact regulations where they have a reasonable belief that a threat exists, and the power of such authorities will be liberally construed. 302 Ill. 422; 134 N.E. 815, 817-19 (1922).

71. In *Jacobson*, the Court stated that when faced with a health concern a community might enact protective regulations that, in the course of protecting the general public, go beyond the realm of necessity and affect certain persons in an arbitrary and unreasonable manner. A regulation of this type would be invalid as an impermissible and excessive use of police power. 197 U.S. at 28.

72. See *supra* note 59 and accompanying text.

73. *Id.*

The governmental objective of school authorities prohibiting AIDS-infected students from attending regular classes has been alleged to be the prevention of the disease's transmission. This is an important governmental objective, so long as an appreciable, medically recognized potential for transmission exists in the environment to be regulated. Absent an actual threat, exclusionary actions become open to question where they deny the child equal protection of the law.

The Threat of AIDS Transmission in the Classroom

The success or failure of an AIDS-infected child's equal protection argument will depend on whether the regulation is justified by a threat of transmission of the disease in an educational setting. The answer lies in the ease and ability of the disease to be transmitted by casual contact. Based on current medical evidence, there is no risk of transmission of the AIDS virus in a classroom setting or other circumstances involving casual contact.⁷⁴

Although AIDS poses a new and unique problem in that it is transmissible, fatal and presently incurable, it is not the first disease to surface in public schools. The medical community points out that AIDS has much in common with hepatitis B, or serum hepatitis, and much that has been learned about the hepatitis B virus can be applied to understanding the risk of transmission of the AIDS virus.⁷⁵ Hepatitis B, like HTLV-III, can be transmitted through sexual contact, exposure to contaminated blood or blood products, drug abuse and prenatal transmission from infected mother to children.⁷⁶ Moreover, neither has been shown to be transmissible through casual contact, nor through contaminated food or water.⁷⁷ Hepatitis B differs, however, in that it is hardier and more infectious than the HTLV-III virus.⁷⁸

Confronted with children carrying the hepatitis B virus, school boards have in the past enacted regulations prohibiting infected children from attending regular classes. In *New York State Association for Retarded Children v. Carey*,⁷⁹ a New York school board prohibited certain retarded children who were carriers of the hepatitis B virus from attending regular classes for fear the disease would spread to other students. The Court of Appeals for the Second Circuit held the regulation invalid in light of the board of education's failure to demonstrate that the health hazard posed by the hepatitis B carrier children was anything more than a remote

74. See *supra* notes 12-26 and accompanying text.

75. See *Transmission in the Workplace*, *supra* note 19, at 681-82.

76. See *id.*

77. See *id.* at 683.

78. See *id.* at 681.

79. 612 F.2d 644 (2d Cir. 1979).

possibility.⁸⁰ The court also held that excluding or isolating the infected students would constitute a violation of their rights under the Rehabilitation Act of 1973.⁸¹

A regulation directed at protecting a legitimate state interest, such as public health, can infringe upon and limit the entitlement to education if that regulation is based upon an actual threat.⁸² Such a regulation cannot be premised on irrational panic and groundless fear. The first major decision on the ability to exclude an AIDS-infected child from a public school is *District 27 Community School Board v. Board of Education*.⁸³ In 1985, the New York City Health Department received a copy of the CDC's recommendations on the education and care of children infected with the AIDS virus.⁸⁴ Based on that and other information, the city announced it would adhere to a policy of not automatically excluding infected children from public schools. Instead it relied on a case-by-case analysis to determine the child's ability to remain in a regular classroom.⁸⁵ This policy drew strong opposition from some citizens and, when it was announced that a seven-year-old child with AIDS would be allowed to attend regular classes, a suit was brought seeking to enjoin the admission of the child or, alternatively, to have his or her identity revealed.⁸⁶ The petitioners in *District 27* alleged that city law required the commissioner of health and chancellor of the board of education to exclude any children infected with AIDS under a provision of the New York City Public Health Code that prohibited "the intentional or negligent spread of disease by persons who are cases or carriers of communicable disease."⁸⁷

In upholding the city's policy, the Supreme Court for Queens County, after extensive medical testimony, pointed out that "the experts unanimously agree that the virus is not transmitted by casual interpersonal contact or airborne spread, such as breathing, sneezing, coughing, shaking hands or hugging."⁸⁸ The court also noted the absence of documented incidences of the virus being contracted through casual contact in a

80. *Id.* at 650-61.

81. *Id.* at 649-51. Such a violation occurs whenever an individual is excluded, solely on the basis of a handicap, from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving federal assistance. Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). Recent court decisions such as *School Board v. Arline*, ___ U.S. ___, 94 L. Ed. 2d 307 (1987); *E.D. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980), and *District 27 Community School Board v. Board of Education*, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. 1986) have interpreted the statutory language of the Rehabilitation Act to include diseases such as hepatitis B and AIDS as statutory handicaps for purposes of the Act's protective provisions.

82. For example, a regulation preventing children not vaccinated for smallpox from attending school is valid where there is an appreciable potential for transmission in an educational setting. Conversely, a regulation banning attendance by children with leukemia would not be valid.

83. 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. 1986).

84. *Education and Foster Care*, *supra* note 23, at 519.

85. 130 Misc. 2d at 400-01, 502 N.Y.S.2d at 328.

86. *Id.* at 401, 502 N.Y.S.2d at 328.

87. *Id.* at 408-10, 502 N.Y.S.2d at 332-34.

88. *Id.* at 404-05, 502 N.Y.S.2d at 330-31.

school, home or similar setting, and the extreme unlikelihood of it being possible to contract the disease from a bite or the mixing of blood in a fight.⁸⁹ Based on "the apparent nonexistent risk of transmission of HTLV-III/LAV in the school setting," the court held that the city's policy of not automatically excluding infected children was not arbitrary, capricious nor an abuse of discretion, and should stand.⁹⁰ Additionally, the court held that in light of the medical evidence, a policy that automatically excluded children with AIDS from the classroom would violate their rights under the Federal Rehabilitation Act of 1973 and their rights to equal protection of the law.⁹¹

RISK OF AIDS TRANSMISSION VS. NEED FOR SOCIALIZATION

The court in *District 27* took note of an additional consideration to be weighed in favor of keeping an infected child in a regular classroom when possible—the importance of a group education environment to an individual's social, intellectual and psychological well-being.⁹² It has been the general view of the courts, legislators and sociologists that it is desirable to keep a student in a regular classroom setting whenever possible. Such considerations arise where, as in pediatric AIDS cases, educational authorities seek to exclude a student from the classroom and establish an alternative educational setting. Sociologists emphasize the importance of keeping students in the regular classroom and allowing them to interact with others. It is generally agreed that a child's social environment greatly affects the development of personality.⁹³ A way by which students acquire the motives, values, knowledge and behavior patterns needed for functioning in adult society is through the socialization experienced in schools through contact with peers.⁹⁴

In *Mills v. Board of Education of District of Columbia*,⁹⁵ a federal

89. *Id.* at 405-07, 502 N.Y.S.2d at 330-32.

90. *Id.* at 413, 502 N.Y.S.2d at 335.

91. *Id.* at 413-14, 502 N.Y.S.2d at 335-36.

92. *Id.* at 413-14, 502 N.Y.S.2d 337.

93. As one commentator notes:

Nature has ordained that man cannot prosper in isolation. Social experience, with its companionship, its challenge, and its motivation assures an individual the opportunity for civilized living and the capacity for assuming social responsibility. The child must be oriented and inducted into this pattern of life. Acquisition of manners and morals, use of communication, utilization of institutions for his own welfare and the group welfare contribute to his developing personal-social relationships and responsibilities. By adopting patterns of his group, the individual receives the approval of his fellows and thereby achieves a feeling of belongingness. These two are basic dynamic needs which can be achieved only through group living.

C. MILLARD, *CHILD GROWTH AND DEVELOPMENT* 208 (1951).

94. Reohr, *Friendship: An Important Part of Education*, EDUC. DIGEST 31-33 (Feb. 1985).

95. 348 F. Supp. 866 (D.C.D.C. 1972).

district court established a right to access to education where a state undertook to provide it.⁹⁶ A child could not be excluded for improper reasons, and where legitimate reasons existed, the state must provide an adequate alternative educational program geared to that child's needs.⁹⁷ Although such educational alternatives can be justified, many legislators and sociologists agree with the *Mills* court view that such alternatives are inadequate.⁹⁸

The Supreme Court has recognized the important role education and the classroom plays in socialization. In *Goss v. Lopez*,⁹⁹ the Court established that a student has liberty interests that are also protected by due process.¹⁰⁰ The Court's concern centered on the potential for damage to a student's associational relationships with fellow students and teachers, and the long-term effects on the educational and employment opportunities of the student that an administrative removal from school could precipitate.¹⁰¹ Because of the gravity of the property interest at stake and the harm a student could potentially suffer from a suspension, the Court determined that procedural protections were necessary in order to assure that any disciplinary actions taken are warranted and reasonable, and the student must be given notice of allegations, as well as an opportunity to be heard.¹⁰² In *Brown v. Board of Education*,¹⁰³ the landmark case ordering an end to racial segregation and the use of the "separate but equal" doctrine, the Court recognized that intangibles, such as peer contact and educational atmosphere, were as important to the educational process as such tangibles as books and buildings.¹⁰⁴

In the context of children with AIDS, the potential for infringement of liberty through damage to name, reputation and future education and employment is typified by the picketing of schools, job discrimination and social outcasting caused by the public's fear of individuals with AIDS.¹⁰⁵ The stigma attached to the disease can have permanent and serious impact on the infected party.¹⁰⁶

96. See *supra* note 50 and accompanying text.

97. 348 F. Supp. at 878-79.

98. See C. MILLARD, *supra* note 93, at 375-78.

99. 419 U.S. 565 (1974).

100. *Id.* at 574-76.

101. *Id.* at 574-75.

102. *Id.* at 574-76.

103. 347 U.S. 483 (1954).

104. The use of "separate but equal" facilities was held to be inherently unequal due to the fact that segregation of students based on race, or arguably any unalterable characteristic, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 492-94.

105. See *supra* notes 24, 42-43 and accompanying text.

106. The damage would most likely be the result of the emotional trauma of being shunned, and from the lack of contact with peers. See *supra* notes 93-94 and 97-101 and accompanying text.

CONCLUSION

According to constitutional, statutory and judicial mandate, a protected property right to public education exists. Although this right is subject to modification or loss, any restriction must be reasonable and grounded on facts clearly evidencing a need for restriction. Even where such a restriction is valid, the party denied the benefit must be afforded fourteenth amendment protections.

In the context of pediatric AIDS, the vast majority of cases lack the requisite justification. A restriction on a child's access to the classroom based on the presence of AIDS should be justifiable only if it is shown that there exists a risk of the disease being transmitted in the classroom setting. In the absence of any discernible risk of transmission, as adjudged by medical standards, infected children should be permitted to attend regular public school classes. Those children who pose a significant risk of transmission—due to the presence of habitual biting, lack of control of bodily functions, or the presence of open lesions—should be excluded, as the CDC guidelines advise.

To detect those children posing a risk, guidelines similar to those proposed by the Centers for Disease Control should be added on a state-by-state basis to state health laws and education regulations.¹⁰⁷ By codifying such guidelines and establishing a state review board comprised of educators, medical personnel and parents, a state would be able to conduct a case-by-case analysis of an infected child's medical and educational circumstances in order to arrive at a rational, medically sound determination as to any risk posed by the child's inclusion in a regular classroom.

It is the Centers for Disease Control's recommendation that the review board consist of the child's doctor, a parent or guardian, public health personnel and representatives of the school involved. The board would be charged with reviewing the child's physical, neurological and behavioral development, as well as the type and amount of interpersonal interaction likely to occur in the educational setting. All considerations would be weighed in light of existing medical knowledge, not extraneous or unfounded public fear. Furthermore, the diverse makeup of the board would ensure that competing concerns would be heard.

The CDC guidelines have been drafted by medical experts and recommended by the National Education Association. The guidelines offer the most comprehensive and advantageous proposal by which to protect the public, while providing education to all who have the right and ability to receive it.

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107. The applicable provisions of the CDC's proposed guidelines are reprinted in the appendix to this note.

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APPENDIX

The provisions of the Centers for Disease Control's recommended guidelines for the care of infected children which are applicable to educational settings are:

1. Decisions regarding the type of educational and care setting for HTLV-III/LAV-infected children should be based on the behavior, neurologic development, and physical condition of the child and the expected type of interaction with others in that setting. These decisions are best made using the team approach including the child's physician, public health personnel, the child's parent or guardian, and personnel associated with the proposed care or educational setting. In each case, risks and benefits to both the infected child and to others in the setting should be weighed.

2. For most infected school-aged children, the benefits of an unrestricted setting would outweigh the risks of their acquiring potentially harmful infections in the setting and the apparent nonexistent risk of transmission of HTLV-III/LAV. These children should be allowed to attend school and after-school day-care and to be placed in a foster home in an unrestricted setting.

3. For the infected preschool-aged child and for some neurologically handicapped children who lack control of their body secretions or who display behavior, such as biting, and those children who have uncoverable, oozing lesions, a more restricted environment is advisable until more is known about transmission in these settings. Children infected with HTLV-III/LAV should be cared for and educated in settings that minimize exposure of other children to blood or body fluids.

....

6. The hygienic practices of children with HTLV-III/LAV infection may improve as the child matures. Alternatively, the hygienic practices may deteriorate if the child's condition worsens. Evaluation to assess the need for a restricted environment should be performed regularly.

....

9. Mandatory screening as a condition for school entry is not warranted based on available data.

10. Persons involved in the care and education of HTLV-III/LAV-infected children should respect the child's right to privacy, including maintaining confidential records. The number of personnel who are aware of the child's condition should be kept at a minimum needed to assure proper care of the child and to detect situations where the potential for transmission may increase (e.g., bleeding injury).

11. All educational and public health departments, regardless of whether HTLV-III/LAV-infected children are involved, are strongly encouraged to inform parents, children, and educators regarding HTLV-III/LAV and its transmission. Such education would greatly assist efforts to provide the best care and education for infected children while minimizing the risk of transmission to others.

