INTRODUCTION

The spread of Acquired Immune Deficiency Syndrome ("AIDS") has been described as a potential health "catastrophe." The public has reacted in fear to the disease and its victims. As one court has observed, "AIDS is the modern day equivalent of leprosy." Widespread loathing towards AIDS victims stems from both misconceptions about the contagiousness of the illness and the stigma attached to its victims, primarily homosexuals. Until public perception is altered, AIDS victims will need the protection of the law while they try to lead normal lives.

Congress, state legislatures, and local authorities have as yet generally not responded with laws specifically prohibiting discrimination against AIDS victims. Instead, AIDS victims seeking redress often rely on state and federal statutes which proscribe discrimination against handicapped people. Many state statutes are patterned after section 504 of the Rehabilitation Act (the "Act"), a federal statute prohibiting employment discrimination against the handicapped.

4. See McCarthy, supra note 2, at 1.
5. See infra notes 134-55 and accompanying text.
7. See infra 134-155 and accompanying text.
8. See 29 U.S.C. § 701-99 (1982) (section 504 of the Act has been codified at 29 U.S.C. 794). For example, Massachusetts General Laws state that it is unlawful [f]or any employer, personally or through an agent, to . . . discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business.

   (a) No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each
Section 504 proscribes discrimination against a handicapped person who, in spite of the handicap, can perform the essential tasks of the job with reasonable accommodation from the employer.\textsuperscript{10} This prohibition applies to programs receiving federal assistance,\textsuperscript{11} and a

such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) For the purposes of this section, the term program or activity means all of the operations of -

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship -

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection.

\textit{Id.}

10. See infra notes 44-51 and accompanying text.

11. 29 U.S.C. § 794. In United States Department of Transportation v. Paralyzed Veterans Ass'n, 106 S. Ct. 2705 (1986), the United States Supreme Court held that section 504 did not apply to commercial airlines because the airlines did not receive direct federal funding. \textit{Id.} at 2711. The court rejected arguments that the airlines were subsidized indirectly through the Airway Development Act. \textit{Id.}

Congress recently amended section 504 and expanded its reach by broadening the definition of recipient program. The Civil Rights Restoration Act of 1987 is intended to overrule the result in Grove City College v. Bell, 465 U.S. 555, 573 (1984) that financial aid does not trigger institution-wide coverage of the Act. However, the amendment also provides:

SEC. 7. Nothing in the amendments made by this Act shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act.
violation of section 504 gives rise to a private cause of action.\textsuperscript{12}

Uncertainty presently exists regarding the applicability of the Act to persons with AIDS. In response to this uncertainty, this Comment will address the following issues: first, whether an individual who is infected with the AIDS virus is considered handicapped for purposes of the Act; and,\textsuperscript{13} second, if the infected individual is considered handicapped, whether that person is nevertheless qualified for employment.\textsuperscript{14}

\section*{BACKGROUND}
\section*{STATUTORY AND REGULATORY OVERVIEW}

There are four elements to a cause of action under section 504: (1) the individual must be subjected to discrimination with respect to the benefits of a federally funded activity; (2) the individual must be handicapped within the meaning of the Act; (3) the individual must be otherwise qualified within the meaning of section 504 for the benefits denied; and (4) the discrimination must be based solely on the handicap.\textsuperscript{15} Two elements deserve textual treatment because they are points of controversy in the application of section 504 to persons with AIDS, specifically (1) whether the person is handicapped\textsuperscript{16} and (2) whether the person is otherwise qualified.\textsuperscript{17}

\section*{Definition of Handicap}

The Rehabilitation Act defines a handicapped individual as: "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."\textsuperscript{18}

\begin{itemize}
\item [\textsuperscript{13}] See infra notes 157-200 and accompanying text.
\item [\textsuperscript{14}] See infra notes 201-13 and accompanying text.
\item [\textsuperscript{15}] Doe v. New York University, 666 F.2d 761, 774-75 (1981).
\item [\textsuperscript{16}] See infra notes 18-40 and accompanying text.
\item [\textsuperscript{17}] See infra notes 41-59 and accompanying text.
\item [\textsuperscript{18}] 29 U.S.C. § 706(8)(B) (Supp. 1987). The regulation interpreting this provision provides in part:
\begin{itemize}
\item [(i)] "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
\item [(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 impairments; or (C) has none of
The Department of Health and Human Services ("HHS") issued interpretive regulations defining various terms used in the Act, including "physical or mental impairment" and "major life activities."\(^{19}\) In defining "physical or mental impairment," HHS offers the following guidelines:

"Physical or mental impairment" means (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.\(^{20}\)

Before a condition is considered a handicap within the meaning of the HHS regulations, it must also impair "major life activities."\(^{21}\) These activities are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."\(^{22}\)

Courts have interpreted the term handicapped broadly.\(^{23}\) For example, in *Treadwell v. Alexander*\(^ {24}\) the Eleventh Circuit Court of Appeals determined that an individual who had a nervous condition and had undergone quadruple bypass heart surgery was handicapped.\(^ {25}\) Treadwell was a retired Air Force colonel who had been denied a job with the United States Army Corps of Engineers.\(^ {26}\) The Corps' refusal to hire was upheld, but the court nevertheless considered Treadwell to be a handicapped individual under section 504.\(^ {27}\) Also, in *Doe v. New York University*,\(^ {28}\) mental illness resulting in self-destructive behavior was held by the Second Circuit to be a handicap under the Act.\(^ {29}\)

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45 C.F.R. § 84.3 (1986).
19. 45 C.F.R. § 84.3 (1986).
20. Id.
22. 45 C.F.R. § 84.3 (1986).
23. See infra notes 24-40 and accompanying text.
24. 707 F.2d 473 (11th Cir. 1983).
25. Id. at 474-75.
26. Id. at 474.
27. Id. at 475. Treadwell was not otherwise qualified because other workers would have to perform some of his duties and the employer was therefore not in a position to accommodate. Id. at 478. The court upheld the refusal to hire Treadwell for this reason. Id.
29. Id. at 775.
AIDS DISCRIMINATION

A federal court considered whether persons with communicable conditions were handicapped in New York State Association for Retarded Children v. Carey.\textsuperscript{30} In Carey, retarded children were tested for hepatitis B and those children found to be carriers were excluded from school.\textsuperscript{31} The Second Circuit held that the children were handicapped, but failed to specify whether the children were handicapped because they had hepatitis or because they were mentally retarded.\textsuperscript{32}

The Act includes in its definition of "handicapped individual" not only those who physically impaired, but also those persons who are regarded as having an impairment that substantially limits major life activities.\textsuperscript{33} An employee can be perceived as having a handicap in two ways: (1) An employee can be mistakenly considered to have a condition that is a handicap, or; (2) an employee can have a condition that is not actually a handicap but mistakenly considered to be one.\textsuperscript{34}

The first federal decision on perceived handicaps was in E.E. Black, Ltd. v. Marshall.\textsuperscript{35} In that action, a job applicant was an apprentice carpenter with several back-related problems.\textsuperscript{36} The applicant had a letter from a doctor stating that if he kept his back muscles in tone, he should be able to work.\textsuperscript{37} However, the employer refused him employment.\textsuperscript{38}

The federal district court held that the applicant was handicapped under the perceived-handicap provisions in the HHS regulations.\textsuperscript{39} The court chose to assume that all contractors would share the perception that the applicant's back condition rendered him unable to work.\textsuperscript{40} The applicant would then be unable to work in his

\begin{itemize}
\item 30. 612 F.2d 644, 646 (2d Cir. 1979).
\item 31. Id. at 647.
\item 32. Id. at 649. It appears that mental retardation was the handicap. The court stated that the children "were excluded from regular public school classes and activities 'solely by reason of their handicap' since only mentally retarded youngsters who were carriers of the hepatitis B antigen were isolated; no effort was made to identify and exclude normal children who were carriers." Id.
\item 35. 497 F. Supp. 1088 (D. Haw. 1980).
\item 36. Id. at 1091.
\item 37. Id. at 1091-92.
\item 38. Id. at 1092.
\item 39. Id. at 1102-03. The court also stated that "[a] person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities." Id. at 1099.
\item 40. Id. at 1100. The court reasoned:
\begin{quote}
Factors that are important in the case-by-case determination are the number and types of jobs from which the impaired individual is disqualified. And the focus cannot be on simply the job criteria or qualifications used by the individual employer, those criteria or qualifications must be assumed to be in use generally. The reason for this is that an employer with some aberrations...\
\end{quote}
\end{itemize}
chosen field and this perception would therefore substantially limit his ability to work.\textsuperscript{41}

\textbf{Definition of “Otherwise Qualified”}

The second element of a section 504 action that merits discussion requires that the plaintiff must be otherwise qualified.\textsuperscript{42} The interpretive regulations issued by the HHS pursuant to the Act define an otherwise qualified individual as one who, in spite of the handicap afflicting the individual, can perform the essential functions of the activity involved with reasonable accommodation from the employer.\textsuperscript{43}

The leading case discussing the term “otherwise qualified” under section 504 is \textit{Southeastern Community College v. Davis}.\textsuperscript{44} In \textit{Davis}, a nursing school denied admittance to a student who had a serious hearing impairment.\textsuperscript{45} The applicant could hear sounds with a hearing aid but not with the distinctness necessary to understand language,\textsuperscript{46} she would have to lip read, and the Supreme Court noted that the ability to understand speech without lipreading was “indispensable for many of the functions that a registered nurse performs.”\textsuperscript{47}

The Court observed that the applicant’s hearing disability would have prevented her from participating in much of the school’s curriculum, unless the school took extraordinary measures to accommodate.\textsuperscript{48} However, the classes in which the applicant was physically able to participate would have provided her with an education sufficient to fill a limited spectrum of nursing positions.\textsuperscript{49}

\textsuperscript{41}Id.
\textsuperscript{42}Id.
\textsuperscript{43}See infra notes 43-59 and accompanying text.
\textsuperscript{44}45 C.F.R. § 84.3 (1986).
\textsuperscript{45}442 U.S. 397 (1979).
\textsuperscript{46}Id. at 402.
\textsuperscript{47}Id. at 401.
\textsuperscript{48}Id. at 407.
\textsuperscript{49}Id. at 413. The Court stated that “the only evidence in the record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if respondent took part in the clinical phase of the nursing program.” Id. at 409.
\textsuperscript{49}Id. at 407-08.
The Court held that the school was not required to either make extraordinary changes in the manner in which the lessons were delivered to the students or to fundamentally alter its curriculum to accommodate the handicapped applicant. The Court, therefore, held that the school did not violate section 504 by denying the plaintiff admission.

The analysis of Davis has been applied to issues that may arise in the context of AIDS. One such issue arises when the handicapped person might, because the AIDS virus is contagious, be a danger to co-workers or customers. An early indication of concern for this potential danger can be found in dicta from Doe v. New York University, which provided: "It would be unreasonable to infer that Congress intended to force institutions to accept or readmit persons who pose a significant risk of harm to themselves or to others." The court in Doe also interpreted section 504 as assigning to potential employees the burden of proving that they were otherwise qualified.

The decision in Doe also addressed an issue that arises when a court reviews the determinations of public health officials as to the danger of contagion: the extent to which courts should defer to the professional judgments of public officials. In Doe, the court wrote that it must consider its "limited ability, as contrasted to that of experienced educational administrators and professionals, to determine an applicant's qualifications."

However, in a previous decision, Carey, the Second Circuit had stated that "deference to a state agency's fact-finding is inappropriate...

50. Id. at 409-10. Compare Carty v. Carlin, 623 F. Supp. 1181, 1188 (D. Md. 1985) (holding that the duty to reasonably accommodate does not require employer to place handicapped employee in new position) with Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985), aff'd, 107 S. Ct. 1123 (1987) (reasoning that an employer may be obligated to provide a new job if the present job is unadaptable). Carty involved a postal worker who had various physical problems which contributed to his depression. Carty, 623 F. Supp. at 1183. The last of several positions he held was as a laborer, the duties of which exacerbated his condition. Id. The previous job changes were made to accommodate this condition, and his doctor ultimately recommended the employer take a clerical position. Id. The district court held that the post office was not required to offer the employee a position as a clerk, and stated that the reasonable accommodation requirement was put in place to protect not only employers but other applicants for the position. Id. at 1188-89. The court stated that requiring a change of positions forecloses other applicants from an opportunity for the position and that section 504 did not intend that result. Id. at 1189. Supporting its position, the court cited to the regulations requiring accommodation for "that position." Id. at 1188-89.
51. Davis, 442 U.S. at 414.
52. See infra notes 54-59 and accompanying text.
53. See infra notes 134-55 and accompanying text.
54. 666 F.2d at 777.
55. Id. at 780.
56. See infra 137.
57. Doe, 666 F.2d at 775.
once that agency is the defendant in a discrimination suit." 58 After
analogizing the Act to the Civil Rights Act of 1964, the court also
assigned to the discriminating entity the burden of proving that the
applicant was not otherwise qualified. 59

Before AIDS became a widespread problem, courts had the op-
portunity to apply the Rehabilitation Act to certain issues partially
analogous to the issues raised by AIDS. Whether the Act applies di-
rectly to AIDS is a controversial question that must be addressed
with respect to the medical effects of the disease. 60

MEDICAL DESCRIPTION OF AIDS

AIDS is caused by a virus called "HIV," which weakens the im-
mune system. 61 The weakened state of the AIDS victim's immune
system may allow disease that could not otherwise survive in a
healthy immune system to eventually kill the victim. 62 The two most
common of parasitic diseases are a type of pneumonia and a form of
cancer called Kaposi's Sarcoma. 63 As the illness advances, the cen-
tral nervous system is often affected. 64

Although people who only carry the HIV virus are often said to
have AIDS, the clinical definition of AIDS is much narrower. 65 What
is commonly called AIDS is actually a progression of stages of HIV
infection, each stage having different symptoms and possibly differ-
ent prognoses. 66 The main stages are commonly classified as full-

58. Carey, 612 F.2d at 649. The court stated "[t]hat the question is one of fact does
not relieve us of the duty to determine whether in truth a federal right has been de-
nied" (quoting Norris v. Alabama, 294 U.S. 587, 589-90 (1935)).
59. Id. The court arrived at this conclusion by analogizing the Rehabilitation Act
to the Civil Rights Act of 1964, which requires that the defendant who has discrimi-
nated on the basis of race must rebut the presumption of illegality. Id.
60. See infra notes 61-79 and accompanying text.
61. Update: Acquired Immunodeficiency Syndrome - United States, 35 MORBI-
DITY & MORTALITY WEEKLY REP. 757, 758 (Dec. 12, 1986). The report provided that
"[t]he designation 'human immunodeficiency virus' ("HIV") has been accepted by a
subcommittee of the International Committee for the Taxonomy of Viruses as the ap-
propriate name for the retrovirus that has been implicated as the causative agent of
AIDS." Id. (citations omitted). Other labels for the virus include "LAV," "HTLV-
IIILAV," and "ARV." Id.
62. D. Greenspan, J., Greenspan, J. Pindborg & Morten Schiodt, AIDS AND
THE DENTAL TEAM 29 (1986) [hereinafter Greenspan].
63. Update on Acquired Immune Deficiency Syndrome (AIDS) - United States, 31 MOR-
BIDITY & MORTALITY WEEKLY REP. 507, 507 (Sept. 24, 1982). An analysis of AIDS
showed that 51% of AIDS victims had pneumocystis carinii pneumonia, 30% had
Kaposi's Sarcoma and 7% had both. Id.
64. Greenspan, supra note 62, at 13.
65. Revision of the Case Definition of Acquired Immunodeficiency Syndrome for
National Reporting - United States, 34 MORBIDITY & MORTALITY WEEKLY REP. 373, 373
(June 28, 1985).
blown AIDS, AIDS-Related Complex ("ARC"), and asymptomatic presence of the HIV virus.\textsuperscript{67}

The Centers for Disease Control define the infectious syndrome as AIDS only after a parasitic disease has afflicted the patient.\textsuperscript{68} AIDS is invariably fatal at this stage, and death typically results within two years.\textsuperscript{69} Persons who do not have AIDS, but show chronic symptoms such as fever, weight loss and fatigue may have ARC.\textsuperscript{70} Also, people have often tested positive for presence of the HIV virus in their bloodstream, yet exhibit none of the symptoms of full-blown AIDS.\textsuperscript{71} These people are sometimes referred to as asymptomatic carriers.\textsuperscript{72} Reports are not conclusive as to what percentage of asymptomatic carriers will contract AIDS.\textsuperscript{73}

The HIV virus is not casually transmitted.\textsuperscript{74} The only proven methods of transmission occur during pregnancy, sexual contact, or from a transfer of blood.\textsuperscript{75} Thus there is no known risk of transmission of the disease in office, school, or factory settings.\textsuperscript{76}

These basic medical conclusions about AIDS have been generally accepted as evidenced by those cases involving the disease.\textsuperscript{77} The Department of Justice accepted a similar description of the workings of

\textsuperscript{67} Id. at 16, 36. In 1986, the Centers for Disease Control added an additional classification which includes transient symptoms that appear shortly after initial infection with HIV. Id. at 16.

\textsuperscript{68} Id. at 12.

\textsuperscript{69} Id. at 14.

\textsuperscript{70} Id. at 15.

\textsuperscript{71} Id. at 29.

\textsuperscript{72} R. BROWN, AIDS, CANCER AND THE MEDICAL ESTABLISHMENT 20 (1986).

\textsuperscript{73} See GREENSPAN, supra note 62, at 34. However, a recent study that characterized itself as "conservative" predicted that one half of all HIV carriers will develop AIDS within nine years of infection. Moss, Bacchetti, Osmond, Krampf, Chaisson, Stites, Wilber, Allain, and Carlsson, Seropositivity for HIV and the Development of AIDS or AIDS Related Condition: Three Year Follow Up of the San Francisco General Cohort, 296 BRITISH MED. J. 745, 749 (1988). The study also predicted that three quarters of all HIV carriers will progress to ARC within nine years of infection. Id. The study concluded that at least three quarters of the HIV carriers in the test group will eventually develop AIDS and that "progression to clinical AIDS after infection with HIV [should be regarded] as the norm rather than the exception." Id. at 750.

\textsuperscript{74} Recommendations for Preventing Transmission of Infection with Human T-Lymphotrophic Virus Type III (Lymphadenopathy-Associated Virus in the Workplace, 34 MORBIDITY AND MORTALITY WEEKLY REP. 681, 681 (Nov. 15, 1985) [hereinafter Recommendations]. There have been incidents indicating an increased danger of transmission in the health-care setting. Update: Human Immunodeficiency Virus Infections in Health-Care Workers Exposed to Blood of Infected Patients, 36 MORBIDITY AND MORTALITY WEEKLY REP. 285, 285 (1987). One health-care worker contracted the virus after a "small amount of blood [was] on her index finger for about 20 minutes before washing her hands." Id. The worker's finger was chapped, which increased the danger of the virus penetrating the skin. Id. at 288.

\textsuperscript{75} Recommendations, 34 MORBIDITY AND MORTALITY WEEKLY REP. at 682-83.

\textsuperscript{76} Id. at 681.

\textsuperscript{77} See infra notes 134-43, 146-55 and accompanying text.
the HIV virus when it issued a memorandum on the application of the Act to AIDS.  

DEPARTMENT OF JUSTICE MEMORANDUM ON AIDS

One of the first materials relating AIDS and the Rehabilitation Act together was the Department of Justice Memorandum issued in 1986. The Department memo initially analyzed the physical effects of the various stages of HIV infection to determine whether they rise to the level of a physical impairment. Full-blown AIDS was readily found to be a handicap. The determination of whether an employee with ARC was handicapped required an individualized inquiry into the physical condition of that employee. An asymptomatic carrier was found to have no physical impairment.

The Department of Justice also concluded that the Act would offer no protection unless the employee was actually handicapped or mistakenly considered to have a condition that is a handicap. In reaching this conclusion the Department criticized the perceived-handicap regulation as being an unwarranted extension of the statutory definition of handicapped. In support of this conclusion, the Department cited de la Torres v. Bolger and Tudyman v. United Airlines, two federal cases that raised issues regarding the perceived-handicap regulations.

In de la Torres, the employer was alleged to have discriminated because the employee was left-handed. The Fifth Circuit held that no proof had been offered that the employer viewed left-handedness as an impairment even though this condition may have led to the employee's discharge. In the second case, Tudyman, a district court refused to consider a bodybuilder who missed an airline's employee weight requirement as being handicapped. The court stated that it

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78. See infra notes 67-92 and accompanying text.
80. Id. at D-7.
81. Id.
82. Id. at D-9.
83. Id.
84. Id. at D-8.
85. Id. See supra note 18 and accompanying text.
86. 781 F.2d 1134 (5th Cir. 1986).
88. Cooper, supra note 79, at D-6.
89. De la Torres, 781 F.2d at 1135.
90. Id. at 1138.
"refus[ed] to make the term handicapped a meaningless phrase."

Based on these two holdings, the Department concluded that a physical condition will not be a handicap merely because "an employer regards it as relevant to the plaintiff's job qualifications." Furthermore, the Department asserted that the Act does not contemplate protecting those who have contagious diseases such as AIDS. Three reasons supported this assertion. First, Congress has enacted a body of law that is specifically designed to combat the spread of contagious diseases, whereby HHS is empowered to issue regulations on reporting and quarantine. Second, states have historically regulated communicable diseases allowing for flexibility in regulation. Third, the original definition of "handicapped individual" clearly excluded a person with a contagious disease, and no evidence of legislative intent to include communicability can be found in the present definition.

In its memo, the Department of Justice also argued that a person with AIDS would probably not be otherwise qualified and therefore could be justifiably denied employment. The Department observed that even a small probability of the transmission of AIDS may create an unacceptable risk to others because the potential harm is so great.

The conclusions reached by the Department of Justice can be summed thus: Congress did not intend that discrimination on the basis of the communicability of diseases such as AIDS be scrutinized under the Act; full-blown AIDS would qualify as a physical im-

92. Id. at 746. The court also stated: "There is . . . no authority for the proposition that failure to qualify for a single job because of some impairment that a plaintiff would otherwise be qualified for constitutes being limited in a major life activity." Id. at 745.
93. Cooper, supra note 79, at D-6.
94. Id. at D-16.
95. See infra notes 96-98 and accompanying text.
96. Cooper, supra note 79, at D-14.
97. Id. at D-13.
98. Id. at D-15. The original definition of handicapped individual was one "who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services." Id. (quoting 29 U.S.C. § 706(7)(A) (Supp. 1973)).
99. Id. at D-13.
100. Id. at D-12. The memo read: "Obviously, the extent of the harm that would be caused by a contagious disease bears an inverse relationship to the degree of risk of transmission that a normal person would be willing, or can be required, to assume." Id. The memo continued: "We do not believe that Congress intended that enactment of section 504 to substantially rearrange human conduct with regard to contagious illnesses." Id. at D-13.
101. See supra notes 94-98 and accompanying text.
pairment while mere presence of the HIV virus would not; cases of ARC would have to be investigated individually to determine if there was a physical impairment that substantially limits a major life activity, when discrimination is premised on fear of contagion, the Act offers no protection even to a person who is physically impaired, because the discrimination must be based solely on the handicap; the Act protects only those who are actually impaired or who are mistakenly regarded as having an actual impairment; and carriers of AIDS may pose an unacceptable risk to others and would therefore not otherwise qualify.

The memo was written after School Board of Nassau County v. Arline had been decided in the Eleventh Circuit but before the case was argued before the Supreme Court. Some conclusions drawn by the Eleventh Circuit differed from those drawn by the Department of Justice, and the Department criticized the holding in the Arline case. The state of the law with respect to certain issues was settled by the Supreme Court's opinion in the case.

FACTS AND HOLDING OF ARLINE

Gene Arline, a school teacher in a public school district, suffered from tuberculosis, a communicable disease with debilitating effects. She had tuberculosis for thirty years, and at the time of the case was suffering the third recurrence of the disease. The school district fired her "because of the threat that her relapses of tuberculosis posed to the health of others." She then instituted a section 504 action, alleging that she was handicapped because of the tuberculosis and had been the victim of discrimination. The federal district court dismissed Arline's claim stating that she was not...
handicapped under section 504, but the court of appeals reversed.\textsuperscript{116} The Supreme Court in \textit{Arline} affirmed the court of appeals decision in holding that one who has a debilitating disease that is communicable is handicapped.\textsuperscript{117} The Court also held that the contagious aspects of a disease cannot be "meaningfully distinguished from the disease's physical effects" for purposes of analysis under the Act.\textsuperscript{118} The Court wrote that "[the legislative] history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual."\textsuperscript{119} The Court concluded that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of [section] 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."\textsuperscript{120}

Chief Justice Rehnquist dissented, arguing that Congress must make conditions for federal grants unambiguous because such an imposition of conditions is "much in the nature of a contract."\textsuperscript{121} Since the states have a history of regulating communicable diseases, Congress should make its intent to disturb this body of law clear.\textsuperscript{122} Rehnquist reasoned that absent an express intent, "Congress . . . will not be deemed to have significantly changed the federal-state balance."\textsuperscript{123}

The Chief Justice further argued that nothing in the legislative history indicated a Congressional intent to include communicable diseases under the Act.\textsuperscript{124} He asserted that "even in an ordinary case of statutory construction, such meager proof of congressional intent would not be determinative."\textsuperscript{125}

The majority remanded the case to the district court, and gave the lower court some guidelines as to whether a patient with a communicable disease is "otherwise qualified."\textsuperscript{126} The Court announced that the inquiry should include these factors: (1) method of transmission, (2) duration of the risk, (3) possible harm to third parties, and

\begin{footnotes}
\item[116.] \textit{Id.}
\item[117.] \textit{Id.} at 1132.
\item[118.] \textit{Id.} at 1128.
\item[119.] \textit{Id.}
\item[120.] \textit{Id.} at 1129.
\item[121.] \textit{Id.} at 1132.
\item[122.] \textit{Id.}
\item[123.] \textit{Id.} at 1133 (quoting Bowen v. American Hosp. Ass'n, 106 S. Ct. 2101, 2121 (1986)).
\item[124.] \textit{Id.}
\item[125.] \textit{Id.} at 1134.
\item[126.] \textit{Id.} at 1132.
\end{footnotes}
(4) probability of transmission.\textsuperscript{127}

The Court also attempted to provide a guide on other issues.\textsuperscript{128} Regarding the lower court’s fact-finding competence, the Court in \textit{Arline} wrote that “courts normally should defer to the reasonable medical judgments of public health officials.”\textsuperscript{129} The Court also referred to its decision in \textit{Southeastern Community College v. Davis} as a guide regarding what action section 504 will require the school board to take to accommodate Arline’s handicap.\textsuperscript{130}

One question was specifically left open in \textit{Arline}: whether a condition such as an asymptomatic infection with HIV can be a handicap merely because it is contagious.\textsuperscript{131} The Court, in a footnote in the \textit{Arline} decision, approved the HHS interpretation in writing that “Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one’s ability to work.”\textsuperscript{132} \textsuperscript{133}

\textbf{CASES INVOLVING AIDS — IS AIDS A HANDICAP?}

One of the most authoritative decisions relating AIDS directly to the Act is the decision of a federal district court in \textit{Thomas v. Atascadero Unified School District},\textsuperscript{134} a case involving a child who was infected with HIV and had been excluded from school.\textsuperscript{135} The child had physical problems as a result of his infection, but the court made a factual finding that all persons infected with HIV were physically impaired.\textsuperscript{136} Therefore, the court held that the child was handicapped under the Act.\textsuperscript{137}

Although the child had a history of biting, the court found that the virus is not even transmitted when a bite by an infected person penetrates the skin of another.\textsuperscript{138} Further, the court assigned to the

\textsuperscript{127} \textit{Id.} at 1131. The Court quoted these factors from the \textit{Amicus Curiae} Brief from the American Medical Association in support of respondent. \textit{Id.}
\textsuperscript{128} \textit{See infra} notes 129-30 and accompanying text.
\textsuperscript{129} \textit{Arline}, 107 S. Ct. at 1131.
\textsuperscript{130} \textit{Id.} at 1131 n.17. \textit{See supra} notes 44-51 and accompanying text.
\textsuperscript{131} \textit{Id.} at 1128 n.7. The Court stated:

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

\textit{Id.}

\textsuperscript{132} \textit{Id.} at 1129 n.10.
\textsuperscript{133} \textit{See infra} notes 114-38 and accompanying text.
\textsuperscript{134} 662 F. Supp. 376 (C.D. Cal. 1987).
\textsuperscript{135} \textit{Id.} at 380.
\textsuperscript{136} \textit{Id.} at 379.
\textsuperscript{137} \textit{Id.} at 381.
\textsuperscript{138} \textit{Id.} at 380.
school the burden of proving that the student is not otherwise qualified and ruled that Ryan Thomas was qualified to attend regular classes.139

The Act was interpreted to include AIDS as a handicap in District 27 Community School Board v. Board of Education.140 A New York state court reasoned that an AIDS patient is in fact physically impaired or is treated as such by the employer.141 The court further ruled that it is irrational and a violation of the equal protection clause for the District to differentiate between AIDS and ARC victims.142 The Court determined that ARC is at least as contagious as AIDS, and stated that any differential treatment between those who carry the virus and those who actually have AIDS is irrational.143

Decisions Under State Statutes Analogous To Section 504

Many state statutes are patterned after section 504, either adopt-

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139. Id. at 381-82. The Court specifically found that the school district had acted reasonably in excluding Ryan Thomas from school. Id. at 381. The district followed guidelines issued by the Center for Disease Control in excluding the child from class. Id. The County Public Health official abstained from the district's decision to exclude Thomas. Id. See also Ray v. DeSoto School Dist., 666 F. Supp. 1524, 1538 (M.D. Fla. 1987) (following Thomas and granting a preliminary injunction to three school children who were asymptomatic carriers). But in Martinez v. School Bd. of Hillsborough County, 675 F. Supp. 1574, 1583 (M.D. Fla. 1987), the judge who decided Ray refused a preliminary injunction to an incontinent and mentally retarded child with ARC. The child's treating physician had recommended that the child not be placed in a classroom and instruction was effected at her home. Id. at 1576-77. Also, CDC guidelines indicated that she should not be allowed in class. Id. at 1580. The court acknowledged the possibility of irreparable harm but held that the child had failed to show a likelihood of success on the merits. Id. at 1592. The court reasoned: "Where, as here, there is any question as to whether the public safety and welfare is threatened, the Court must rule on the side of the public interest." Id.

The language concerning risk assessment by the Martinez court can be compared to the language in the only United States Court of Appeals opinion concerning AIDS and the Act. The Ninth Circuit reversed the refusal of a district to grant a preliminary injunction to a teacher with AIDS in Chalk v. United States District Court, No. 87-6418 (9th Cir. Feb. 28, 1988) (LEXIS, Genfed Lib., Dist. file). The teacher, Vincent Chalk, had *pneumocystis carinii*. Chalk filed suit after he was cleared by his doctor for classroom duty and the school district transferred him to an administrative position with the same pay and benefits. Id.

The district court had refused to grant the preliminary injunction, while acknowledging that "the risk is small, because "it's too early to draw a definite conclusion . . . about the extent of the risk." Id. The lower court also had found that Chalk had failed to show irreparable harm. The majority opinion on appeal quoted language in Arline indicating that the risk of transmission must be significant. The panel also reasoned that a different standard for showing irreparable harm applied in discrimination cases and that psychic harm should be considered. Thus, the Ninth Circuit found that a preliminary injunction should have been granted. Id.

141. Id. at —, 502 N.Y.S.2d at 336.
142. Id. at —, 502 N.Y.S.2d at 337.
143. Id.
ing the statutory language verbatim or incorporating the language of

certain HHS regulations into the particular statute.\footnote{144} Courts in

de these states often consider their own statutes in light of how federal

courts have interpreted section 504.\footnote{145}

In \textit{Cronan v. New England Telephone Co.},\footnote{146} the dispute involved

an employee who confided that he had ARC to his immediate super-

ior after confidentiality had been promised.\footnote{147} The superior, how-

ever, disclosed the employee's condition and he thereafter became a

recipient of threats from co-workers, causing him to quit.\footnote{148} The em-

ployee brought suit under the relevant state handicap statute.\footnote{149} The
court observed that persons with AIDS are physically impaired and

that the employee had been treated as if he was handicapped.\footnote{150} As a
result the court determined that the employee was handicapped

under the state statute based on either of these observations.\footnote{151}

State administrative decisions have followed the same pattern.\footnote{152}

One of the first of these decisions was \textit{Shuttleworth v. Broward

County Office of Budget and Management Policy}.\footnote{153} In \textit{Shut-

tleworth}, the Florida Commission on Human Relations found that an

AIDS patient "does not enjoy in some manner, the full and normal

use of his . . . faculties."\footnote{154} The Commission therefore held that the

employee was handicapped under a state statute analogous to section

504.\footnote{155}

\textbf{ANALYSIS}

\textbf{AIDS AS A PHYSICAL HANDICAP}

The first step in determining whether a physical condition is a

handicap is to examine the regulations issued pursuant to the Act.\footnote{156}
It is clear that the regulations manifest a desire to stretch the term

"handicapped" to a meaning beyond that found in normal usage.\footnote{157}
The regulations list few specific illnesses.\footnote{158} Rather, the purpose of

\begin{footnotes}
\item[144] See Leonard, 10 U. DAYTON L. REV. at 689-90.
\item[145] See \textit{infra} notes 131-38.
\item[146] 41 Fair Empl. Prac. Cas. (BNA) 1273 (1986).
\item[147] Id. at 1273.
\item[148] Id. at 1274.
\item[149] Id.
\item[150] Id.
\item[151] Id. at 1277.
\item[152] See \textit{infra} notes 153-55.
\item[154] Id. at E-1.
\item[155] Id. in the decision, the Commission reviewed the federal regulations which

expand on the definition of a handicapped individual. \textit{Id.} at E-5.
\item[158] 45 C.F.R. § 84.3 (1986).
\end{footnotes}
the regulations is to set forth neutral analytical principles which can be applied to the specific condition in question.159

One decision directly involving full-blown AIDS was Shuttleworth v. Broward County Office of Budget and Management Policy.160 In Shuttleworth, the debilitating effects of full-blown AIDS were examined and it was concluded that the affliction rises to the level of a physical impairment that substantially limits major life activities.161 Language from other cases indicates a similar result. For example, in Thomas v. Atascadero Unified School District162 the federal district court stated that AIDS is a physical impairment that substantially limits a major life activity.163

Depending on the particular opportunistic infection, full-blown AIDS affects a multitude of body systems.164 Because the condition is serious enough to require hospitalization and will eventually kill those who develop it, there is little argument that full-blown AIDS substantially impairs a major life activity.165 The cases holding that full-blown AIDS is a handicap are therefore consistent with the regulations defining handicapped.166

**HIV Infection as a Perceived Handicap**

The perceived-handicap provision of the Act may have broad implications for a person infected with the HIV virus.167 The HHS regulations articulate alternative rationales under which an employee who is mistakenly treated as handicapped might be handicapped under the Act.168

The regulations define handicapped to include one who is mistakenly believed to have a condition known to be a handicap.169 Moreover, they include an employee who has an impairment that substantially limits a major life activity merely because of society's prejudice.170 The Department of Justice, however, questioned the latter definition. The Department instead asserted that the Act's def-
inition includes only those persons who are actually handicapped or are perceived to have a condition known to be a handicap.\textsuperscript{171}

The Department interpreted the district court decision in \textit{Tudyman v. United Airlines},\textsuperscript{172} and the Fifth Circuit decision in \textit{de la Torres v. Bolger},\textsuperscript{173} to be a general rejection of that portion of the regulation that considers an employee handicapped because of societal prejudice.\textsuperscript{174} The Department asserted that such a regulation would make the term handicapped "meaningless."\textsuperscript{175}

The holdings of \textit{Tudyman} and \textit{de la Torres}, however, do not stand for the proposition that one must either have, or be perceived as having, a physical impairment that in fact substantially limits a major life activity to be considered a handicapped individual. Rather, these decisions simply refused to extend the perceived-handicap rationale to situations in which the plaintiff was neither physically handicapped nor likely to be treated as such by even a small number of potential employers.\textsuperscript{176}

The perceived handicap provision was discussed in \textit{School Board of Nassau County v. Arline}.\textsuperscript{177} This provision was approved in dicta from \textit{Arline} at least to the extent that attitudes of employers substantially limit the employee's ability to work.\textsuperscript{178} However, if one employer denies a person a job, it does not necessarily follow that the employer is treating the applicant as "impaired" or that the person's ability to work is substantially limited. As the Department noted, \textit{Tudyman} and \textit{de la Torres} rejected that proposition.\textsuperscript{179}

Thus the holdings in these cases are in harmony with the dicta of \textit{Arline}.\textsuperscript{180} Case law under section 504 supports the proposition that a carrier of HIV should be handicapped under the perceived handicap regulations if societal prejudice will substantially impair that person's ability to work.\textsuperscript{181} This prejudice will probably exist in most instances.\textsuperscript{182} Therefore, an individual with any stage of HIV infection will fall within the ambit of section 504, regardless of the individual's actual physical condition.\textsuperscript{183}

\begin{itemize}
  \item \textsuperscript{171} Cooper, \textit{supra} note 79, at D-6.
  \item \textsuperscript{172} 608 F. Supp. 739 (C.D. Cal. 1984).
  \item \textsuperscript{173} 781 F.2d 1134 (5th Cir. 1986).
  \item \textsuperscript{174} \textit{See supra} notes 85-93 and accompanying text.
  \item \textsuperscript{175} Cooper, \textit{supra} note 79, at D-6 (citing \textit{Tudyman v. United Airlines}, 608 F. Supp. 739, 746 (1984)).
  \item \textsuperscript{176} \textit{See supra} notes 89-91 and accompanying text.
  \item \textsuperscript{177} 107 S. Ct. 1123, 1129 (1987).
  \item \textsuperscript{178} \textit{See id.} at 1128-29 n.10.
  \item \textsuperscript{179} \textit{See Cooper, supra} note 79, at D-6.
  \item \textsuperscript{180} \textit{See supra} notes 176-79 and accompanying text.
  \item \textsuperscript{181} \textit{See supra} notes 169-80 and accompanying text.
  \item \textsuperscript{182} \textit{See supra} notes 1-5 and accompanying text.
  \item \textsuperscript{183} \textit{See supra} notes 169-82 and accompanying text. The protections offered by
\end{itemize}
The decisions in the cases involving AIDS all indicate that those who have not developed an opportunistic infection — even those who simply carry the virus — are handicapped under the Act.\textsuperscript{184} The holding in \textit{Cronan v. New England Telephone Co.}\textsuperscript{185} was premised on the reasoning that the employee was actually handicapped or was being treated that way.\textsuperscript{186} In \textit{District 27 Community School Board v. Board of Education},\textsuperscript{187} the court reasoned similarly in holding that an AIDS victim was handicapped.\textsuperscript{188}

It appears that societal prejudice was limiting major life activities in both cases. Because the infected person in \textit{Cronan} lost his job, his ability to work was impaired.\textsuperscript{189} Attending school was arguably the major life activity impaired in \textit{District 27} since the case involved the exclusion of a child from school.\textsuperscript{190} The decisions in these cases are therefore correct in concluding that carriers, regardless of the particular stage of infection, face substantial limitations in major life activities and are therefore handicapped under the Act.\textsuperscript{191}

\section*{A Communicable Disease as a Handicap}

The fact that AIDS is communicable has not deterred courts from determining that it is a handicap under the Act. The employee section 504 could change in some respects if the recent study concluding that HIV carriers are virtually certain to develop AIDS, and presumably die from it, is accepted in the medical community. \textit{See supra} note 73. First, a court could conclude that HIV infection is a handicap because it will substantially limit a major life activity in the future. The Department of Justice memo rejected the future handicap argument because contemporary medical knowledge indicated only an increased risk of a debilitating disease. Cooper, \textit{supra} note 79, at D-9 n.73. Thus, asymptomatic infection would have been no more a handicap than high blood cholesterol. \textit{Id.}

On the other hand, a situation could arise in which the carrier's productive life expectancy is too short to recover costs of education. The carrier would not be otherwise qualified if one defines qualified as having the potential to create net social benefit. Such an argument would not be valid to the extent that the carrier finances the education and most employers probably do not finance such intensive training. A situation could arise, however, in which a university would be permitted to deny a scholarship to a carrier because there would not be time for society to recover the costs of education.

\textsuperscript{184} \textit{See supra} notes 185-91 and accompanying text.
\textsuperscript{185} 41 Fair Empl. Prac. Cas. (BNA) 1273 (1986).
\textsuperscript{186} \textit{Id.} at 1275-76.
\textsuperscript{187} 139 Misc. 2d 398, 502 N.Y.S.2d 325 (1986).
\textsuperscript{188} 139 Misc. 2d at —, 502 N.Y.S.2d at 336.
\textsuperscript{189} 41 Fair Empl. Prac. Cas. (BNA) at 1274.
\textsuperscript{190} \textit{District 27}, 139 Misc. 2d at —, 502 N.Y.S. at 328.
\textsuperscript{191} \textit{See supra} notes 185-92 and accompanying text. In \textit{Thomas}, the court stated that asymptomatic carriers are physically impaired because the presence of the virus would substantially impair major activities such as childbearing. \textit{Thomas}, 662 F. Supp. at 379. Medically correct or not, a finding that asymptomatic carriers are physically impaired should not be necessary in determining that they are handicapped within the meaning of the Act.
in Shuttleworth had full-blown AIDS and the employer discharged him because of potential contagion.\textsuperscript{192} It was found that this act must be scrutinized under the state statute patterned after section 504.\textsuperscript{193} Similarly, the AIDS victim in District 27 was sought to be excluded from school for fear of contagion.\textsuperscript{194} The court, however, refused to order this exclusion.\textsuperscript{195} These results are consistent with Arline wherein the Supreme Court held that employers cannot act irrationally with respect to employees who have debilitating and communicable diseases, even when the employer purports to protect others from the contagion.\textsuperscript{196} Under the analysis set forth in the Department of Justice memo, any action based on fear of contagion would not fall within the preview of the Act.\textsuperscript{197} The holdings in Arline and those cases involving AIDS have rejected the Department's position that one can differentiate between the debilitating effects of the disease and its communicability.\textsuperscript{198}

The Civil Rights Restoration Act of 1987 altered the coverage in section 504 of contagious diseases in employment contexts. The amendment reads:

\begin{quote}
(C) for the purpose of sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.
\end{quote}

The impact of this amendment cannot be determined with any certainty because no cases have been litigated thereunder. The legislative history indicates that the amendment was intended to allay employer fears after the Supreme Court's decision in School Bd. of Nassau County v. Arline. At the same time, however, by excluding only part of the group included within the definition of persons with handicaps by the Arline result, the amendments implicitly affirmed Arline interpretation with regard to other aspects of section 504 coverage.

The amendment was patterned after a 1978 amendment relating to alcoholics and drug abusers. 134 CONG. REC. S-256 (Jan. 25, 1988). The legislative history of the 1978 amendment indicates that it was intended to "exclude alcoholics and drug abusers in need of rehabilitation from the definition of 'handicapped individual.'" H.R. REP. 1149, 95 Cong. 2d Sess. 22-23 reprinted in 1978 U.S. CONG. AND ADMIN. NEWS, 7312, 7333-34. Courts have interpreted the 1978 amendment as excluding from protection those who have a current problem with alcohol or drugs. See Railway Labor Executives Ass'n v. Burnley, 839 F.2d 575 (3d Cir. 1988) (stating that "only alcoholics or drug abusers whose problems are under control are protected"); Whitlock v. Donovan, 598 F. Supp. 126, 129-30 n.3 (D.D.C. 1984) (summarily rejecting practicing alcoholic's section 504 claim). Thus, the recent amendment might be interpreted as excluding all currently contagious carriers from protection against employment discrimination.

However, the language of the statute and the legislative history do not show an intent to exclude all carriers, but only those who "pose a direct threat to the health or
Deference to Medical Fact-finding

The courts directly facing the issue have agreed that a carrier of HIV does not pose an unacceptable risk to other people.\textsuperscript{199} These findings are in accordance with current medical information regarding the virus.\textsuperscript{200} The legal issue arises when judges rather than public health officials make that final determination. The opinion in \textit{Arline} commanded that reasonable decisions of public health officials be given deference, but the actual review in \textit{Thomas} appeared to be more rigorous.\textsuperscript{201}

In \textit{Thomas}, the public health official abstained from the school board decision.\textsuperscript{202} The board followed CDC guidelines in excluding the child from school, and the court specifically found that the actions of the board were reasonable.\textsuperscript{203} The exclusion of the child, however, was held to be in violation of section 504 because the child was otherwise qualified.\textsuperscript{204} To meet the requirement of \textit{Arline} that reasonable decisions of public health officials be given deference, it therefore appears that such an official be involved in the actual medical decision regarding the particular carrier.

\textsuperscript{199} See \textit{Thomas}, 662 F. Supp. at 380; \textit{District 27}, 130 Misc. 2d at —, 502 N.Y.S.2d at 337.

\textsuperscript{200} See supra note 74 and accompanying text.

\textsuperscript{201} See supra note 110 and accompanying text.

\textsuperscript{202} \textit{Thomas}, 662 F. Supp. at 381. See supra note 139.

\textsuperscript{203} Id. at 381. See supra note 139. \textit{But see Martinez}, 675 F. Supp. at 1582 (following CDC guidelines currently in place despite testimony that they were outdated and about to be revised).

\textsuperscript{204} Id. at 381.
Reasonable Accommodation

The medical fact that AIDS is not casually transmitted makes the determination as to whether an employee is otherwise qualified similar to one involving any terminal, noncommunicable disease. As outlined in Southeastern Community College v. Davis, an employer is required to make reasonable accommodations rather than take any action deemed feasible. The employer therefore is not required to incur large losses or tolerate undue disruption in accommodating an AIDS victim. In most cases, the measures required to protect against contagion would be minimal if at all required.

CONCLUSION

Courts facing the issue have held that section 504 applies to persons with AIDS, and it is clear that these holdings are consistent with the Supreme Court's decision in Arline. Furthermore, asymptomatic carriers of HIV will be considered to be handicapped, possibly because of findings that those carriers have physical impairments that substantially limit major life activities. Infection with HIV should be a handicap because it is a physical condition and societal prejudice substantially limits the carrier's ability to work.

The medical evidence clearly indicates that there is only a theoretical risk of transmission in a normal work place setting. The risk of transmission is insignificant and therefore should not be the basis for finding a carrier not to be otherwise qualified. In this manner, section 504 should be used to protect from discrimination those who carry the HIV virus or suffer from its effects.

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206. See supra note 50 and accompanying text. When the person with the virus becomes unable to fulfill the requirements of the position, the employer should not be required to offer the employee a new position. Carty v. Carlin, 623 F. Supp. 1181 (C.D. Md. 1985). See supra note 50 and accompanying text. To require an employer to find a new position for the employee even if this requirement would not pose an unreasonable burden on the employer creates a job preference for persons with handicaps because they are excused from competing with nonhandicapped individuals for the new position. Carty, 623 F. Supp. at 1188. There is no evidence that Congress intended to create a job preference with section 504. Id.
207. See supra note 50 and accompanying text.
208. See supra notes 74-76 and accompanying text.