AIDS Law: Impact of AIDS on American Schools and Prisons, The

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AIDS LAW: THE IMPACT OF AIDS ON AMERICAN SCHOOLS AND PRISONS

ELIZABETH B. COOPER

INTRODUCTION

The American public largely has responded with fear and hostility rather than with knowledge and compassion to the presence of Acquired Immune Deficiency Syndrome ("AIDS") in society. Although our reactions are changing as we learn more about the syndrome and its causitive virus, some people continue to characterize AIDS as a well-deserved punishment of those groups most often afflicted with AIDS: gay men and intravenous drug users. Many people also persist in their erroneous beliefs that AIDS can be spread through casual contact. Although much remains to be learned about AIDS, there already exists an abun-

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2. Surgeon General's Report, supra note 1, at 6. As of early 1986, approximately 73% of AIDS cases had occurred among gay or bisexual men, some of whom had used intravenous drugs; about 17% were heterosexual intravenous drug users. Bayer, Levine & Wolf, HIV Antibody Screening: An Ethical Framework for Evaluating Proposed Programs, 256 J. A.M.A. 1768 (1986) [hereinafter Bayer, HIV Antibody Screening]. The remaining 10% were recipients of blood transfusions or blood products, heterosexual partners of persons at high risk for AIDS, people without a known risk factor, and people who died before complete case histories could be taken. Id. at 1768 (citing Public Health Service Plan for the Prevention and Control of AIDS and the AIDS Virus, delivered at the Coolfront Planning Conference, Berkeley Springs, W. Va. (June 4-6, 1986)). Although gay men and intravenous drug users constitute the groups most frequently diagnosed with AIDS, it is not one's status as a gay man or an intravenous drug user that puts one at risk for infection. It is participation in high-risk behavior such as oral, anal or vaginal sex without using condoms or sharing of needles without first disinfecting them, that puts one at an increased risk. See generally Surgeon General's Report, supra note 1 (discussing behavior that fosters the spread of AIDS).

3. Surgeon General's Report, supra note 1, at 5. "The first cases of AIDS were reported in this country in 1981. We would know by now if AIDS were passed by casual, non-sexual contact." Id.
dance of information upon which intelligent and compassionate policies and legal decisions can be based.4

This article will discuss how courts and policy-makers develop and examine the different school and prison policies about AIDS. Part I summarizes the medical findings on AIDS and the human immunodeficiency virus ("HIV"), which is the causative agent of most AIDS cases.5 Part II examines judicial decisions and school board policies that protect a seropositive6 child's right to remain in the classroom. Across the country, parents have fought to exclude seropositive children7 from the classroom.8 Generally, however, courts and school boards have refused to exclude such children, basing their decisions on the extraordinary unlikelihood that HIV will be transmitted in a school setting.9

Part III reveals that courts generally will defer to the deci-

4. Id.
5. See notes 12-34 infra and accompanying text.
6. Throughout this article, the term "seropositive" will refer to people who have tested positive for HIV antibodies; the term does not preclude the possibility that these people also have been diagnosed with AIDS or AIDS-related complex ("ARC"). "Seronegative" means there are no indications of antibodies to the HIV virus. The term "seronegative" is used in this article to refer to people who either have tested negative or, were they to be tested, would test negative for the presence of HIV antibodies. See notes 35-156 & 169 infra and accompanying text.
7. As of November, 1987, there were 682 children under age 13 diagnosed with AIDS in the United States; 516 of these children were believed to be infected perinatally. Two Percent Positive Rate Found in Brooklyn Study, 2 AIDS Pol'y & L., Dec. 2, 1987, at 2. Almost 90% of children with AIDS are black or Hispanic. Of those children infected perinatally, almost all are minorities. Half of these children will not survive their first year; few survive to school age. Koop Asks National Effort on AIDS Risk to Children, 2 AIDS Pol'y & L., Apr. 8, 1987, at 2-3. As of September, 1987, there were 229 school-aged children diagnosed with AIDS. Schools Bolster AIDS Curriculums, N.Y. Times, Sept. 10, 1987, at B11, col. 1.
8. See notes 35-147 infra and accompanying text. Across the country, parents have filed suit to prevent school attendance by children with AIDS, have withdrawn their children from school, and have waged protests. See notes 35-135 infra and accompanying text; White Returns to School After Injunction Lifted, 1 AIDS Pol'y & L., Apr. 23, 1986, at 6. The fury of parents have raised against children with AIDS attending school has been exacerbated by two factors. First, AIDS is ultimately fatal. Second, even though most children who are infected with HIV were exposed to the virus perinatally or through blood transfusions, AIDS generally is considered to be a disease of gay men and intravenous drug users. The fear of the influence of gay people and drug abusers appears to be transferred from these groups to all people infected with HIV, including children.
9. See notes 12-16 infra and accompanying text.
sions of prison administrators, whether they favor or oppose the testing and subsequent segregation of prisoners with indications of HIV infection. Therefore, it is the responsibility of prison officials and legislators to establish humane guidelines, based on medical evidence, that presumptively preclude the unwarranted testing and segregation of seropositive inmates.

I

MEDICAL BACKGROUND

AIDS is an infectious condition that is presently considered to be ultimately fatal. It is caused most often by the human immunodeficiency virus ("HIV"). The virus, which cannot be transmitted through casual contact, is spread usually through the use of contaminated blood, blood products, or needles; through anal, oral, or vaginal intercourse with an infected partner where seminal or vaginal fluids or blood is exchanged; and from an infected pregnant woman to her fetus. Some experts believe that a substantial quantity of virus particles is needed to transmit the virus. HIV attacks a person's immune system, making the individual vulnerable to opportunistic and otherwise rare diseases, such as pneumocystis carinii pneumonia ("PCP"), Kaposi's Sarcoma, and meningitis.

People who are infected with HIV are characterized as being

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10. See notes 240-78 infra and accompanying text.
11. See notes 329-35 infra and accompanying text.
13. Gay Men's Health Crisis Productions, Medical Answers About AIDS, May, 1987, at 1-2 [hereinafter Medical Answers]. "HIV" is the term generally used to describe what previously was known as human T-cell lymphotropic virus type III or lymphadenopathy-associated virus (HTLV-III/LAV). See Bayer, HIV Antibody Screening, supra note 2, at 1768.
14. Surgeon General's Report, supra note 1, at 5. See also Medical Answers, supra note 13, at 12. Because the word "contagious" implies the ability to be spread through casual or household contact, "contagious" should not be used to characterize HIV infection, ARC, or AIDS.
15. Medical Answers, supra note 13, at 10, 28.
16. AIDS Hard to Transmit, 1 AIDS Pol'y & L., Apr. 9, 1986, at 8. The HIV virus is found in greatest concentrations in blood and semen. The virus also has been found in saliva and tears, but in significantly lower concentrations; no cases have been attributed to transmission by these fluids. Medical Answers, supra note 13, at 9, 11.
18. Id. PCP is a protozoan infection of the lungs. Kaposi's Sarcoma is an atypical form of cancer affecting blood and lymphatic vessel wall tissues.
asymptomatic, having AIDS-related complex ("ARC"),\textsuperscript{19} or having full-blown AIDS.\textsuperscript{20} An asymptomatic carrier is infected with HIV and is able to transmit it, but still feels and appears healthy.\textsuperscript{21} She may or may not develop ARC or AIDS.\textsuperscript{22} Individuals with ARC generally are considered to have less severe symptoms of HIV infection than those with full-blown AIDS,\textsuperscript{23} but ARC also may be fatal.\textsuperscript{24} Being diagnosed with ARC does not necessarily mean one will be diagnosed later with AIDS.\textsuperscript{25} One is considered to have full-blown AIDS when diagnosed with at least one opportunistic infection, as defined by the Federal Centers for Disease Control ("CDC"),\textsuperscript{26} and laboratory evidence of HIV infection.\textsuperscript{27}

\textsuperscript{19} Id. at 11-12. Although the Federal Centers for Disease Control ("CDC") has never adopted the classification of "ARC," it is a term widely used by health professionals. T. Hammett, AIDS in Correctional Facilities: Issues and Options, National Institute of Justice 6 (1988) (pre-publication copy) [hereinafter NIJ Report, 1988].

\textsuperscript{20} A person will not necessarily progress orderly, or at all, from one form of infection to another. NIJ Report, 1988, supra note 19, at 4.

\textsuperscript{21} Id. at 11. An asymptomatic person is identified through positive results to HIV antibody testing. Id. at 6.

\textsuperscript{22} See notes 31-33 infra and accompanying text.

\textsuperscript{23} Bayer, HIV Antibody Screening, supra note 2. "Signs and symptoms of ARC may include loss of appetite, weight loss, fever, night sweats, skin rashes, diarrhea, tiredness, lack of resistance to infection, or swollen lymph nodes." Surgeon General's Report, supra note 1, at 11.


\textsuperscript{25} See notes 31-33 infra and accompanying text.

\textsuperscript{26} The CDC "is the central repository for AIDS reporting and research in the United States." Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524, 1529 (M.D. Fla. 1987). Effective September, 1987, the CDC implemented an expanded definition of what constitutes AIDS. NIJ Report, 1988, supra note 19, at 5 (citing 36 Morbidity and Mortality Weekly Rep., Aug. 14, 1987, at 48). When the New York City Department of Health recently applied a broadened definition of AIDS to the AIDS-related deaths in the City, the Department determined that of the AIDS deaths in New York City, 53% were intravenous drug users and only 38% were gay and bisexual men. Previous figures, and those then being used by the CDC, had calculated that intravenous drug users comprised only 31% of AIDS deaths, while gay and bisexual men accounted for 55% of the deaths. Sullivan, AIDS Deaths in New York Are Showing New Pattern, N.Y. Times, Oct. 22, 1987, at B1, col. 4. This reassessment has prompted New York City to focus its AIDS education efforts "to addicts and the predominantly black and Hispanic communities in which they live.... Some officials [noted] that public concern about the AIDS epidemic among drug users was slow to develop and had not translated into funds for programs until there were clear warnings that drug addicts constituted a bigger health threat to those outside known risk groups than homosexuals." Sullivan, New York's AIDS Programs Shift Focus to Drug Abusers, N.Y. Times, Oct. 23, 1987, at B3, col. 5.
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Anyone carrying HIV is capable of transmitting it to others; however, the capacity to do so may be reduced in those with full-blown AIDS.28

There currently is no cure for HIV infection, ARC, or AIDS.29 Approximately 1.5 million Americans already are infected with the virus.30 Once infected with HIV, an individual is believed to be infected for life.31 Approximately twenty to forty-five percent of those currently infected will develop ARC or AIDS within five years.32 It is not known why some will develop ARC or AIDS, but a "history of chronic, recurrent or multiple communicable diseases," drug use, and stress may assist the progression of the disease.33 As of November 30, 1987, 47,298 people had been diagnosed with AIDS; 26,848 had died.34

27. Laboratory evidence of HIV infection generally means a person has tested positive for HIV antibodies.

28. The theory underlying the observation that a person with full-blown AIDS may be less capable of transmitting HIV than a person who is asymptomatic is that "the rapid replication of the virus in an AIDS victim will have already infected and thus destroyed a large proportion of the lymphocytes from the seminal body fluids associated with the documented and theoretical modes of transmission." District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 400 502 N.Y.S. 2d 325, 327-28 (Sup. Ct. 1986). It also has been suggested that a person who does not know that she is infected with HIV will be less likely to take precautions against spreading the virus. [Editor’s Note: But see Cooke, Grimmer Outlooks on Hemophiliacs, N.Y. Newsday, June 14, 1988, at 25, col. 3 (study revealed that hemophiliac men with HIV infection seem more capable of transmitting the virus as they get closer to having symptoms of AIDS).]


30. Id. at 12.

31. Bayer, HIV Antibody Screening, supra note 2, at 1768.

32. Surgeon General’s Report, supra note 1, at 12. It still is not known how many other infected individuals will develop AIDS or ARC beyond five years. Bayer, HIV Antibody Screening, supra note 2, at 1769. Some medical experts are reporting a higher rate of conversion after five years. AMA Forum Told that HIV May Always Lead to AIDS, 2 AIDS Pol’y & L., May 6, 1987, at 6.

33. Medical Answers, supra note 13, at 8-9. Other possible co-factors include continued exposure to the virus, unsafe sex practices (sexual activity that involves the exchange of bodily fluids), becoming pregnant, and bearing children. Id. at 7, 28-29.

II
SCHOOL POLICIES ON AIDS

No school district has questioned the right of a child infected with HIV\textsuperscript{35} to receive a free education.\textsuperscript{36} Instead, the question has been how such an education should be provided. School officials have adopted a variety of mechanisms to educate students with AIDS. The policies include mandating school attendance unless the child’s health or the risk of transmission to others in the class do not permit it,\textsuperscript{37} providing a computer link between the child’s home and the classroom,\textsuperscript{38} and arranging for home tutors.\textsuperscript{39}

The majority of judicial decisions in this area recognize a child’s right to remain in the classroom unless the student’s health does not permit classroom attendance. These decisions and policies are based on the evidence that education and normal hygiene procedures\textsuperscript{40} virtually eliminate the possibility of transmission of HIV in the classroom.\textsuperscript{41} A minority of judicial decisions and school policies refuse to acknowledge the current medical evidence on AIDS and therefore allow the automatic exclusion of the seropositive child.\textsuperscript{42}

Judicial Decisions Reviewing the Seropositive Child’s Right to Remain in the Classroom.—In District 27 Community School Board v. Board of

In a Miami study, women lived 6.6 months compared to 12-14 months for men; in California, women lived 40 days after diagnosis on average while men lived more than a year; in New York, women lived about two years, men two and a half. The reasons for the discrepancy are not yet determined; however, some hypothesize that contributing factors may be that women are diagnosed later than men or that women are more likely to be intravenous drug users, a group that does not tend to live as long as gay male patients who have not used intravenous drugs. Id.

35. See note 13 supra.
36. Although the Supreme Court has held that children do not have a constitutional right to a public education, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), many states provide for this right in their respective constitutions. See id. at 35.
37. See, e.g., District 27, 130 Misc. 2d at 418-19, 502 N.Y.S.2d at 339.
38. See White Returns to School After Injunction Lifted, 1 AIDS Pol’y & L., Apr. 23, 1987, at 6 (ten-year old child in Indiana “attended” school via a computer link to his classroom until he was allowed to return to classes).
39. Id.
40. HIV “is a relatively fragile virus,” which is “inactivated by ordinary household disinfectants.” 130 Misc. 2d at 405, 502 N.Y.S.2d at 330.
41. See notes 58-60 infra and accompanying text.
42. See notes 100-13 & 142-47 infra and accompanying text.
Education, the New York Supreme Court held that a child with AIDS could not be excluded automatically from the classroom. The New York City Board of Education policy concerning children with AIDS had established a presumption that children with AIDS or suspected of having AIDS would be admitted to their regular classroom unless a case-by-case review by a panel of experts determined that the individual child's "physical, neurological, developmental or behavioral condition" precluded attendance at school in an unrestricted setting. Just prior to the 1985-86 school year, the Board of Education adopted a designated panel's recommendation that a child, who had been diagnosed with AIDS three years before, should continue to attend school.

In response to this decision, two community school boards brought an action to expel the unidentified child from school and to mandate that the identity of the child and the school which the child was attending be revealed. Following the trial, yet before

44. The New York Supreme Court is the trial court in New York State.
45. 130 Misc. 2d at 413, 502 N.Y.S.2d at 335. The District 27 decision provides detailed information on the genesis and transmission of HIV, ARC, and AIDS. The court systematically compared and contrasted scientific information with irrational perception and reaction. Id. at 399-408, 502 N.Y.S.2d at 327-32.
46. Kass, Schoolchildren with AIDS, AIDS and the Law 72 (H. Dalton & S. Burris eds. 1987). In the fall of 1985, it was estimated that between 200 and 2,000 school-aged children (5-18 years old) were asymptomatic carriers of the virus. 130 Misc. 2d at 400, 502 N.Y.S.2d at 327.
47. The CDC and New York State Health Department recommend that the panel be comprised of the child's physician, public health personnel, the child's parent or guardian, and personnel associated with the proposed care or educational facility. 130 Misc. 2d at 417, 502 N.Y.S.2d at 338.
48. Id. at 401, 411, 502 N.Y.S.2d at 328, 334.
49. Id. at 401, 502 N.Y.S.2d at 328. The policy, developed jointly by New York City's Department of Education and Department of Health was not finalized until August 30, 1985 for the 1985-86 school year. Id. at 400-01, 502 N.Y.S.2d at 328. The panel also decided that the child's identity should remain confidential. Id. at 401, 502 N.Y.S.2d at 328. See note 51 infra.
50. The President of one of the plaintiff school boards was one of the plaintiffs and also was the father of two children attending New York City public schools. 130 Misc. 2d at 401, 502 N.Y.S.2d at 328.
51. Id. The court left unresolved the issue of the confidentiality of the child's identity. By statute, information gathered for epidemiological studies are confidential, id. at 419-23, 502 N.Y.S.2d at 339-41 (citing N.Y. Comp. Codes R. & Regs. tit. 10, §§ 24-1.1, 24-2.2 & N.Y. Pub. Health Law § 206(1)(j) (McKinney 1971)), and cannot be used to reveal the identity of children suspected of having AIDS. Id. at 421-23, 502 N.Y.S.2d at 341-42. Although the legislature has the power to change this policy, the court suggested that the legislature refrain from
the court rendered its decision, a panel of experts determined that the child in question was indeed seropositive for HIV antibodies, but did not have AIDS. The court could have dismissed the case at that point because the New York City policy applied only to those children with AIDS or those suspected of having AIDS. Instead, the court chose to address the issues that would be present if the child had AIDS, noting that these subjects were of sufficient public importance and interest and were likely to recur. After conducting a "broad-ranging, aggressive inquiry," the court concluded that the Commissioner's policy of not automatically excluding children with AIDS from the classroom was neither arbitrary nor an abuse of discretion in light of the relevant medical evidence.

In reaching its conclusion, the court first conducted factual findings on the risk that HIV could be transmitted in a classroom setting. The court noted that "the experts unanimously agreed that the virus is not transmitted by casual interpersonal contact or airborne spread, such as breathing, sneezing, coughing, shaking hands or hugging." Other than infants born to infected mothers and sexual partners of people infected with HIV, no household members of people with AIDS, ARC, or HIV have contracted the disease.

The medical testimony introduced at the trial showed that there was virtually no danger that one child could infect another

so doing in order to maintain a system that facilitates tracking the history of certain diseases. Id. at 422, 502 N.Y.S.2d at 341 (citing In re Love Canal, 112 Misc. 2d 861, 863, 449 N.Y.S.2d 194 (1982), aff'd. 92 A.D.2d 416, 460 N.Y.S.2d 850 (App. Div. 1983)).

52. See notes 168-69 infra and accompanying text (discussing HIV antibody testing).
54. Id. at 401, 502 N.Y.S.2d at 328.
55. Id. at 402, 502 N.Y.S.2d at 329 (citing Storar v. Storar, 52 N.Y.2d 363, 359-70, 498 N.Y.S.2d 266, 268-69, 420 N.E.2d 64, 66-67 (Ct. App. 1981)). Because of the interest in the case and the importance of the issues, the court invoked its "rarely utilized power to require a trial of the facts rather than resolve this [judicial review of an administrative] proceeding on the papers alone." Id. at 402-03, 502 N.Y.S.2d at 329.
56. Id. at 403, 502 N.Y.S.2d at 329.
57. Id. at 413, 502 N.Y.S.2d at 335.
58. Id. at 403-08, 502 N.Y.S.2d at 330-32.
59. Id. at 405, 502 N.Y.S.2d at 330.
60. Id. at 405-06, 502 N.Y.S.2d at 331. It should be noted that sharing needles with seropositive individuals can transmit HIV. See note 15 supra and accompanying text.
through biting or as a result of a playground brawl or other common school-day occurrence. The only expert witness who testified that children with AIDS should be excluded, Dr. Lionel Resnick, did so not on epidemiological grounds, but on what he described as a ""philosophical difference' as to the sufficiency of the data 'at this moment in time.'"62

The court then rejected the automatic exclusion rule proposed by the plaintiffs and the New York City policy of differentiating between children with AIDS and those with ARC or those who are only seropositive by examining: (1) the state and local health statutes and regulations; (2) the medical evidence presented and the policies suggested by the CDC and the New York State Education Department; (3) the Federal Rehabilitation Act of 1973; and (4) the equal protection clause of the fourteenth amendment.63

The petitioners argued that children with AIDS should be excluded from the classroom because the New York City Health Code and New York State law prohibit individuals from spreading communicable diseases.64 The court found, however, that these provisions were inapplicable because they failed to classify AIDS as a communicable disease.65 AIDS is a ""reportable"" disease under local and state law, but the court stressed that this does not make it ""communicable"" or ""infectious"" or ""contagious."66

The court then observed that the Board of Education's policy in large part paralleled the guidelines offered by the New York

61. Id. at 407-08, 502 N.Y.S.2d at 332. For the virus to be transmitted in this context, an infected child's blood probably would have to pass into a seronegative child's open cut. Id. Doctors noted the improbability of this factual scenario. Even granting that such an incident could occur, however, the likelihood of infection is dramatically minimized, according to the court, because it is possible to wash away HIV and because the skin's natural healing process works to prevent any virus from entering the bloodstream. Id. at 407-08, 502 N.Y.S.2d at 332.

62. Id. at 412, 502 N.Y.S.2d at 335. In assessing the weight of this evidence, the court stated that ""[t]he fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong and that science may yet show it to be wrong is not conclusive." Id. at 412-13, 502 N.Y.S. 2d at 335 (citing Viemeister v. White, 79 N.Y. 235, 241, 72 N.E. 97, 99 (1904)).

63. Id. at 408-17, 502 N.Y.S.2d at 332-38.

64. Id. at 408-09, 502 N.Y.S.2d at 332-33.

65. Id. at 409-10, 502 N.Y.S.2d at 333. Petitioners argued that the respondents were required by law to exclude all HIV-infected children from the schoolroom. Id. at 409, 502 N.Y.S.2d at 333.

66. Id. at 410, 502 N.Y.S.2d at 334.
State Board of Education and the CDC. The CDC guidelines recommend the admission of most HIV-infected children following an evaluation by a team of experts. This team should evaluate the child's behavior, neurological development, physical condition, and manner of interaction with others in a school setting. The CDC recommends that most children who are infected with the virus should be admitted to the classroom because "the benefits of an unrestricted [school] setting . . . outweigh the risks of [the HIV-infected child's] acquiring potentially harmful infections" and because the risk of transmitting HIV in that environment is "apparently non-existent."

The court concluded further that the automatic exclusion of children with AIDS would violate the Federal Rehabilitation Act of 1973. The Act provides that recipients of federal funds may not discriminate against any individual who has a "physical impairment," or one who is treated "as having such an impairment." A child with AIDS may have a "physical impairment" because HIV impairs the lymphatic system, weakens the immune system and increases susceptibility to opportunistic infections. In addition, children would be treated "as having such an impairment" if they were excluded from school. The court found additional support for its analysis in a prior federal court decision that interpreted the Rehabilitation Act as preventing schools from excluding children with hepatitis-B from the classroom.

67. Id. at 411, 502 N.Y.S.2d at 334.
68. Id. at 417, 502 N.Y.S.2d at 338 (citing CDC Recommendation 1).
69. Id. at 411, 502 N.Y.S.2d at 334.
70. Id. at 413, 502 N.Y.S.2d at 335.
71. Id. at 413, 502 N.Y.S.2d at 335 (citing 29 U.S.C.A. § 794 (West Supp. 1988)). The Rehabilitation Act provides, in part, that "[n]o otherwise qualified handicapped individual in the United States . . . 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 conducted by any Executive agency or by the United States Postal Service." 29 U.S.C.A § 794. Although the Justice Department has issued a memorandum stating that the Rehabilitation Act does not apply to people with AIDS, the recent Supreme Court decision in School Bd. of Nassau County v. Arline, 107 S. Ct. 1123 (1987), indicates that the Justice Department memorandum is incorrect. See note 77 infra and accompanying text for a brief discussion of Arline.
73. Id.
74. Id. (citing 34 C.F.R. § 104.3(j)(2)(i)(A) (1987)).
75. Id.
76. Id. (citing New York State Ass'n for Retarded Children, Inc. v. Carey, 466 F. Supp. 479 (E.D.N.Y. 1978), aff'd, 612 F.2d 644 (2d Cir. 1979)).
court reasoned that if a nonexclusionary policy was appropriate in cases involving the more easily communicable hepatitis-B, such a policy certainly would be appropriate where AIDS was concerned.77

Finally, the court determined that the part of the New York City policy which provided for the exclusion of children with AIDS, but not children with ARC or those who are only infected with HIV, violates the equal protection clause of the fourteenth amendment.78 Free public education, the court emphasized, "must be available to all on equal terms" once a state chooses to provide it.79 The court applied a rational basis test to determine whether New York City could justify the exclusion of children with AIDS from the schools while children with ARC and asymptomatic carriers of HIV were permitted to attend.80 Because medical evidence conclusively shows that HIV-infected children and those with ARC are as able to transmit the virus as children with full-blown AIDS,81 the court found no rational justification for excluding only children with full-blown AIDS.82

The District 27 holding has helped other courts to react

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77. Id. at 414, 502 N.Y.S.2d at 336. The recent Supreme Court decision in School Board of Nassau County v. Arline, in which the Court held that the Rehabilitation Act applies to individuals with contagious diseases, lends significant support to the District 27 analysis and conclusion. 107 S. Ct. 1123 (1987). The plaintiff in Arline was a school employee who was infected with tuberculosis, a disease considered to be significantly more communicable than AIDS. Although the Arline court refused to state whether people infected with HIV, yet who did not have ARC or AIDS, would come within the purview of the Court's holding, 107 S. Ct. at 1128, n.7, lower courts have interpreted Arline as being applicable to such people. See, e.g., Little v. Bryce, 44 Empl. Prac. Dec. (CCH) ¶¶ 37,330, 44,498-99 (Tex. Ct. App. June 11, 1987) (Levy, J., concurring); Board of Educ. v. Cooperman, 105 N.J. 587, 697 n.2, 523 A.2d 655, 660 n.2 (1987).

78. 130 Misc. 2d at 417, 502 N.Y.S.2d at 338.

79. Id. at 416, 502 N.Y.S.2d at 337 (citing Brown v. Board of Educ., 347 U.S. 483, 493 (1954)). Although not permitting a child into the classroom is different from not providing an education, "the legal system recognized education's impact upon the 'social ... intellectual and psychological well-being' of the child, (Plyler v. Doe, 457 U.S. 202, 222 (1982)), and the benefits the child derives from the socialization process in the regular classroom." Id. at 416, 502 N.Y.S.2d at 337 (citing Hairston v. Drosick, 423 F. Supp. 180, 183 (S.D.W. Va. 1976)).

80. Id. at 416, 502 N.Y.S.2d at 337.

81. Id. at 416, 502 N.Y.S.2d at 338. Cf. note 28 supra.

82. 130 Misc. 2d at 417, 502 N.Y.S.2d at 338.
pragmatically to the presence of children infected with HIV in classrooms across the country.\textsuperscript{83} For example, in \textit{Thomas v. Atascadero Unified School District},\textsuperscript{84} a federal district court enjoined a California school from excluding a four-year-old boy with AIDS from his kindergarten class.\textsuperscript{85} The child was removed from school after biting a classmate in the leg of his pants.\textsuperscript{86} In reaching its decision, the court relied on the abundant medical evidence showing that the child posed no risk of harm to his classmates and teachers\textsuperscript{87} and on having classifying the child as a "handicapped person" under the Federal Rehabilitation Act of 1973.\textsuperscript{88} The logic employed by the court largely followed that used in \textit{District 27}.\textsuperscript{89}

Similarly, in \textit{Ray v. School District of Desoto County},\textsuperscript{90} the court enjoined a Florida school district from excluding three hemophiliac brothers carrying HIV.\textsuperscript{91} The children were barred from school when their parents voluntarily revealed that the boys were seropositive.\textsuperscript{92} The court granted an injunction, concluding that the plaintiffs were likely to prevail on the merits.\textsuperscript{93} In reaching its conclusion, the court relied on the "clear weight of medical evidence and opinion,"\textsuperscript{94} the \textit{District 27} decision,\textsuperscript{95} and the Federal

\textsuperscript{83} See, e.g., Phipps v. Saddleback Valley Unified School Dist., No. 474981, slip op. (Cal. Sup. Ct. Feb. 20, 1986); Two Students Resume Classes; One Barred, 1 AIDS Pol'y & L., Feb. 26, 1986, at 6 (eleven-year-old boy who tested HIV positive was readmitted to school after being taught at home, holding that he could not be treated differently than his peers).

\textsuperscript{84} 662 F. Supp. 376 (C.D. Cal. 1987).

\textsuperscript{85} Id. at 377. A permanent injunction was issued later. Id. at 382.

\textsuperscript{86} Id. at 380. No skin was broken as a result of the bite. Id.

\textsuperscript{87} Id. "The overwhelming weight of medical evidence is that the AIDS virus is not transmitted by human bites, even bites that break the skin." Id. See also note 61 supra and accompanying text.

\textsuperscript{88} 29 U.S.C.A. § 794.

\textsuperscript{89} 662 F. Supp. at 381.

\textsuperscript{90} 666 F. Supp. 1524 (M.D. Fla. 1987).

\textsuperscript{91} Id. at 1526.

\textsuperscript{92} Id. at 1524. Even the noninfected sister of the seropositive boys was barred from school for a short period. Id.

\textsuperscript{93} Id. at 1536. The court ruled in favor of the plaintiffs because they satisfied the requirements for a preliminary injunction in the Eleventh Circuit by showing that: (1) the injury to their children was irreparable; (2) the potential harm caused to the opposing parties and to the public or to others was insignificant; and (3) the moving party was likely to prevail on the merits. Id. at 1534-1536 (citing United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983)).

\textsuperscript{94} Id. at 1535.

\textsuperscript{95} Id. at 1536.
Rehabilitation Act of 1973. The court also ordered the brothers to follow safety precautions and required the school to develop an AIDS education program for the parents of all school children. In addition, the court strongly urged the school district to establish an AIDS education program for the entire school system.

However, not all courts have followed the lead of the District 27 court. In Board of Education of the City of Plainfield v. Coopenman, two local school boards sought to overturn policies instituted by the State Board of Education that permitted all children carrying HIV to attend school with other children unless they were incontinent, unable to control drooling, not toilettained, or were unusually physically aggressive, with a documented history of biting or harming others. The school boards argued that these guidelines were not promulgated in compliance with the State Administrative Procedure Act. The school boards also sought to enjoin orders of the Education Commissioner to admit a child with AIDS and another child with

96. Id.
97. Id. at 1537. The boys were prohibited from participating in contact sports at school and were ordered to receive sex education, particularly delineating how HIV can spread through sexual contact. Id.
98. Id.
99. Id. at 1532. The court further commented that it "may not be guided by . . . community fear, parental pressure, and the possibility of lawsuits. These obstacles, real as they may be, cannot be allowed to violate the rights" of the infected children. Id. at 1535 (emphasis in original) (citing New York Ass'n for Retarded Children, Inc., 466 F. Supp. at 485). In August, 1987, news reports announced that the Rays had lost their home to fire. Initial reports noted that arson was suspected and believed to be related to the court's order that the boys return to the classroom. The Ray family moved shortly after the fire. Family Linked to AIDS Quitting Town After a Fire, N.Y. Times, Aug. 30, 1987, at § 1, 1, col. 1. Later reports indicated that the fire might not have been related to the court order. Boys With AIDS Get Mixed Welcome at School (picture caption), N.Y. Times, Sept. 24, 1987, at A14, col. 3.
101. The two local school boards that brought suit are the Plainfield School Board and the Washington Borough School Board. 209 N.J. Super. at 180, 507 A.2d at 256.
102. Id. at 183, 507 A.2d at 257-58.
103. Id. at 180, 507 A.2d at 256.
104. Id. at 181, 507 A.2d at 256. The child with AIDS was referred to as I.C. Id. at 180, 507 A.2d at 256. Dr. Oleske, an AIDS expert familiar with I.C.'s case, noted that I.C. "ha[s] stabilized and appears clinically well enough to attend school." Id. at 187, 507 A.2d at 260. Dr. Oleske made this recommendation following the assessment by a "child study team" that despite I.C.'s
ARC into the public schools. The boards contended that the Commissioner's orders failed to satisfy due process because the parties were not given the opportunity to be heard or to cross-examine witnesses before the orders were issued.

The court ruled for the plaintiffs. On the first procedural claim, the court held that the guidelines were administrative rules that should have been promulgated according to the State Administrative Procedure Act. Further, the court held that the "Commissioner did not afford local boards of education procedural due process" in issuing his orders that the boards admit neurological impairment and difficulty with dyspnea (labored breathing) she should attend school because she is toilet-trained, unaggressive, and would not pose a danger to others in the school environment. Id. at 184-85, 507 A.2d at 259-60. This part of the decision, however, is moot because I.C. was admitted to school as part of a settlement agreement following a suit by the Division of Youth and Family Services against school officials. 105 N.J. at 594-95, 523 A.2d at 659.

105. 209 N.J. Super. at 192, 507 A.2d at 263. The child with ARC was referred to as Jane Doe. 209 N.J. Super. at 190, 507 A.2d at 262. Jane Doe appeared to have no physical symptoms, but tested positive for the HIV antibody. Her treating physician had diagnosed her with "ARC, not full AIDS." Id. at 192, 507 A.2d at 263 (quoting letter from Dr. Oleske to the Superintendent of the Washington Borough Schools (Aug. 20, 1985)). Jane Doe's doctor commented that, "[i]n my opinion, and that expressed by the New Jersey State AIDS Advisory Committee to the Commissioner of Health, children like [Jane Doe] are not a public health risk to other pupils, staff and teachers. She should be allowed to matriculate in a normal public school setting." Id. (quoting letter from Dr. Oleske to the Superintendent of the Washington Borough Schools (Aug. 20, 1985)). During much of the time Jane Doe was excluded from school, her nine-year-old brother also was barred from attendance, based largely on his sister's positive HIV status. Id. at 193-94, 507 A.2d at 263. The decision on Jane Doe is also moot because she has since moved. 105 N.J. at 595, 523 A.2d at 659.

106. 209 N.J. Super. at 212, 507 A.2d at 275.

107. Id. at 210, 507 A.2d at 273. On direct appeal, the New Jersey Supreme Court upheld the regulations which had been proposed by the State Board of Education in response to the lower court's decision. These new regulations established procedures for exclusion of HIV-infected children from school, 105 N.J. at 601, 523 A.2d at 662 (1987), yet are essentially the same as those originally promulgated by Commissioner Cooperman. The new policy was adopted after opportunity was given for public comment. Id. at 597 & n.3, 523 A.2d at 660 & n.3 (citations omitted).

108. 209 N.J. Super. at 213-14, 507 A.2d at 275. On appeal, the New Jersey Supreme Court held that because the school boards are state agencies, and therefore themselves are agents of the state, "it would be a misstatement . . . to ascribe to school boards due process rights against improper state action." 105 N.J. at 598 n.5, 523 A.2d at 661 n.5. Therefore, the only due process that could be implicated is that of "the individual parties involved in the dispute." Id.
the children in question.

Having invalidated the statewide guidelines and the Commissioner’s orders, the court determined that the children should not be allowed to attend school until hearings were held because the medical evidence presented established that there was a “potential risk of exposure to contagious disease” to noninfected children if seropositive children were to attend school. The court began this part of its decision by noting that children have a right to a “thorough and efficient” education under New Jersey’s Constitution.110 Moreover, the court recognized that children should receive their education in a classroom setting when appropriate.111 The court noted, however, that noninfected children, teachers, and staff have an “equally important interest in being reasonably free from the risk of exposure to contagious disease which may be spread by students attending public schools.”112 Based on the medical evidence presented, the court concluded that a potential risk of exposure to HIV required that hearings be held to determine whether the children in question should be admitted into the classroom.113

Judge Gaulkin, concurring in part and dissenting in part, agreed that the Board of Education’s policy was improperly promulgated and that the Commissioner’s orders violated the board’s due process rights.114 However, he found the majority’s conclusion that hearings should be held before the children could be admitted to classroom attendance to be “wholly unsupportable.”115 He reached this conclusion on the grounds that the evidence presented to the court did not “constitute even a prima facie showing”116 that either child posed a threat to the health of others at school. Judge Gaulkin also noted that despite the majority’s apparent concern for due process, barring “the children from school until ‘applicable procedural requirements’ are satisfied is to turn due process on its head.”117

Judge Gaulkin contrasted the conclusive epidemiological evi-

110. Id. at 214, 507 A.2d at 276 (quoting N.J. Const. art. VIII, § IV, para. 1).
111. Id. at 215, 507 A.2d at 276.
112. Id.
113. Id. at 216, 507 A.2d at 277. The court mandated that the hearings be held immediately. Id.
114. Id. at 217, 507 A.2d at 277.
115. Id. at 218, 507 A.2d at 278.
116. Id. at 219, 507 A.2d at 278.
117. Id. at 220, 507 A.2d at 279 (quoting id. at 213, 507 A.2d at 275).
dence reported by the CDC and other health experts with the scant record supporting the exclusion of the infected children.\textsuperscript{118} Information from the CDC revealed that none of the known cases of HIV infection occurred in a school or day-care setting and that casual contact of the type expected among school children "appears to pose no risk."\textsuperscript{119} Indeed, the CDC recommended that, "[f]or 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 non-existent risk of HTLV-III/LAV. These children should be allowed to attend school in an unrestricted setting."\textsuperscript{120} The CDC also recommended that decisions concerning school attendance of HIV-infected children should "be based 'on the behaviour, neurological development, and physical condition of the child, [as well as on] the expected type of interaction with others in that setting.'"\textsuperscript{121}

Judge Gaulkin noted that the testimony presented by the Plainfield school district's regular physician,\textsuperscript{122} Dr. Hampton, who supported barring HIV-infected children from school, focused primarily on the danger of school attendance to the infected child.\textsuperscript{123} In his limited assessment of the risk of transmission of HIV in the classroom, however, Dr. Hampton

\begin{footnotes}
\item[118] Id. at 218-20, 507 A.2d at 278-79.
\item[119] Id. at 198, 507 A.2d at 266.
\item[120] Id. (quoting Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus, 34 Morbidity and Mortality Weekly Report of U.S. Centers for Disease Control 517-19 (1985) [hereinafter Education]).
\item[121] Id. at 198, 507 A.2d at 266 (quoting Education, supra note 120, at 519). Because there has been little study of transmission of the virus among younger or neurologically handicapped children, which is the context in which "a theoretical potential for transmission would be greatest," the CDC analogizes to other communicable diseases. Id. at 198-199, 507 A.2d at 266 (quoting Education, supra note 120, at 519). Taking this into account, the CDC has recommended that infected preschool-age children and neurologically handicapped children who lack control of their bodily secretions or who exhibit aggressive behavior or oozing lesions, be placed in a more restrictive school environment. Id. at 199, 507 A.2d at 266-67. Yet, in the instant cases, neither child was of preschool age and I.C. had been determined to be nonaggressive, albeit neurologically impaired. See note 104 supra and accompanying text.
\item[122] 209 N.J. Super. at 191, 507 A.2d at 262.
\item[123] Id. at 219, 507 A.2d at 278. Dr. Hampton concluded that I.C. appeared to be acutely and chronically ill and too sick to attend a public school. Id. at 186, 507 A.2d at 259. The doctor also reported that regardless of I.C.'s having AIDS, her multiple handicaps and her tendency towards infection were sufficient grounds for excluding her from school. Id.
\end{footnotes}
noted that any transfer of the virus likely would be through saliva and he conceded that "there are no proven cases of such a transmission."124 Dr. Resnick, the school boards' other expert witness, did not challenge the testimony presented by the other experts, but instead questioned the reliability of the epidemiological evidence that AIDS cannot be transmitted casually. Dr. Resnick argued that such evidence was tentative, that it was based on a small sample size, and that it lacked a long history.125 He also argued that elementary school was not a casual setting126 and thus he would not rule out the influence of either genetic or environmental factors in the transmission of the virus.127

Judge Gaulkin correctly pointed out that the majority erred in its assessment of the medical evidence. Extensive medical information was presented at pre-trial hearings, in letters and memorandum, and other evidence before the court concerning the low risk that HIV would be transmitted in the classroom.128 The court was presented with the prevailing medical opinion that children infected with HIV "should not be kept out of school and do not seem to pose a risk to other children in their environment."129

Grounded in the New Jersey Constitution is a preference for children to attend school with their peers.130 During the Plainfield trial, medical experts testified that the benefits HIV-infected children receive by attending school in a regular classroom in most cases far outweigh the risk of illness to the infected children.131

124. Id. at 191, 507 A.2d at 262 (quoting letter from Dr. Hampton to the Superintendent of the Washington Borough Schools (July 25, 1985)).
125. 209 N.J. Super. at 199, 507 A.2d at 267. Dr. Resnick is a Research Associate in Dermatology and Pathology at Mt. Sinai Hospital in Miami, Fla. and an Assistant Professor of Immunology and Microbiology at the University of Miami. Id. Dr. Lionel Resnick also testified for the plaintiffs in the District 27 case. See note 62 supra and accompanying text.
126. Id. at 200, 507 A.2d at 267. Dr. Resnick based this assertion on his uncertainty "of the consequences of the children biting, being bitten, kissing or engaging in other such conduct." Id.
127. Id.
128. See notes 59-61 supra and accompanying text. The court heard testimony from two of the leading specialists in New Jersey on AIDS: Dr. James M. Oleske, the Director of the Division of Allergy, Immunology and Infectious Diseases at University of Medicine and Dentistry of New Jersey, and Dr. Lawrence D. Frenkel, a professor of Clinical Pediatrics and Director of the Division of Immunology, Allergy and Infectious Diseases at Rutgers Medical School. 209 N.J. Super. at 181-82, 507 A.2d at 256-57.
129. 209 N.J. Super. at 182, 507 A.2d at 257 (quoting report of Dr. Frenkel to the Plainfield School Board (Mar. 2, 1984)) (emphasis in original).
130. Id. at 220, 507 A.2d at 279.
131. See notes 110-11 supra and accompanying text.
Furthermore, every physician who testified agreed that there was no evidence that AIDS was spread casually.\textsuperscript{132} Therefore, the court's concern that the right of members of the school community to be free from the risk of exposure to contagious disease is protected even if children carrying the HIV virus attend school with their peers. Consequently, the \textit{Plainfield} majority erred in its decision to exclude the infected children until hearings could be held.

On appeal, the New Jersey Supreme Court upheld the rules of the Education Commissioner that had been repromulgated in the interim.\textsuperscript{133} These rules are virtually identical to those promulgated originally.\textsuperscript{134} Thus, New Jersey schools must admit seropositive children unless they are droolers, incontinent, not toilet-trained, or have a documented history of biting or harming others.\textsuperscript{135} Because medical experts believe that transmission through saliva in a classroom setting is unlikely, it seems that the exceptions to the guidelines will overcome the heavy presumption of attendance only where infected children lack control over their bodily fluids or are extremely aggressive. This is unlikely to occur on a regular basis, and it therefore appears that few seropositive children will be excluded from their classrooms under the New Jersey guidelines. Thus, there is little doubt that had the guidelines, old or new, been applied to the \textit{Plainfield} children, they would have been admitted to the classroom.

\textit{School Board Policies Concerning the Seropositive Child's Right to Remain in the Classroom}.—The District 27 decision also has had a significant impact on school boards throughout the country. Most school boards now ground their conclusions on comprehensive medical findings and presume that a child infected with HIV will attend school in a regular classroom, so long as the child is healthy enough to do so.\textsuperscript{136}

For example, two cities in North Dakota have decided to admit seropositive students to their classrooms following a case-by-

\textsuperscript{132} "'It is an educational fact that the maximum benefits to a child are received by placement in as normal [an] environment as possible.'" 209 N.J. Super. at 215, 507 A.2d at 276 (quoting Hairston v. Drosick, 423 F. Supp. 180, 183 (S.D.W. Va. 1976)).

\textsuperscript{133} See notes 107-08 supra.

\textsuperscript{134} See note 107 supra.

\textsuperscript{135} See note 102 supra.

\textsuperscript{136} See notes 137-41 infra and accompanying text. See also Board Rebuffs Union for Barring Student, 1 AIDS Pol'y & L., Mar. 12, 1986, at 8 (school district refuses to remove from school a retarded student who tested positive for HIV antibodies).
case review, provided they do not exhibit behavior that might endanger others.137 Missouri138 and Illinois139 have adopted similar policies on a state-wide basis. As a result of the District 27 decision, six of the thirteen school-age children in New York City known to have AIDS or ARC were admitted to public school during the 1986-87 academic year.140 As of October, 1987, the New York City Health Department knew of ten to twenty children with AIDS in the public schools.141

A Georgia school district is among the few to approve a policy banning seropositive students from the classroom.142 The policy was adopted to exclude a fifth grade student who had contracted HIV through a blood transfusion.143 The school board stated that it had studied the guidelines of other states and the recommendations of both the Federal Centers for Disease Control and the Academy of Pediatrics before it adopted the policy.144

The school board’s policy, however, does not appear to have been the product of a thorough investigation into previously established guidelines, but rather the result of community fears. At

141. The identities of seropositive children attending school are kept confidential. The City Health Commissioner estimates that approximately 100 other school children have AIDS or ARC and have not been identified. Id.
142. Georgia School Board Bans Students, Teachers with AIDS, 1 AIDS Pol’y & L., Aug. 27, 1986, at 3 [hereinafter Georgia School Board Bans Students]. The Carroll County, Georgia Board of Education approved the policy unanimously. Id. Georgia adopted this policy following its decision to mandate tests for HIV antibodies for all teachers and students in secondary schools who are suspected of having AIDS. Georgia Education Board Approves Mandatory Tests, 2 AIDS Pol’y & L., June 17, 1987, at 3. New Haven, Connecticut also has a policy of excluding children with AIDS from the classroom. Schools’ AIDS Ban Is Facing Attack, N.Y. Times, Nov. 8, 1987, at § 1, 65, col. 1. In addition, a member of President Reagan’s AIDS Commission recently stated that children with AIDS should not be allowed to attend school because they might spread secondary infections to their classmates. Talan, No School for Kids with AIDS, N.Y. Newsday, Nov. 1, 1987, at 5, col. 3. The Commissioner, Dr. Theresa Crenshaw, acknowledged that her views were “unpopular” and that she had been severely criticized by AIDS experts for her remark. Id.
143. Georgia School Board Bans Students, supra note 142, at 3.
144. Id.
the time the policy was adopted in August, 1986, the District 27 holding was available and a number of states had issued policies opposing exclusion. 145 Thus, the district was aware that seropositive children have legal rights to attend school in a regular classroom setting under the Rehabilitation Act and the equal protection clause. Moreover, the CDC's recommendation, which the Georgia school district claimed it considered, advocates that most HIV-infected school-age children be allowed to attend school in an unrestricted setting. 146 The school district chose to disregard the CDC's recommendation, however, claiming that "efforts to reassure parents . . . that AIDS is not transmissible through casual contact were fruitless." 147

Conclusion.—Many school boards and state legislatures have adopted policies mandating that seropositive children attend school with their peers following a case-by-case review by a committee of medical, educational, and psychological experts. Only those seropositive children that pose a direct harm to others are excluded under such policies. 148

This approach, which is recommended by the Federal Centers for Disease Control, 149 is the most logical: it is based on medical and psychological evidence and statutory, constitutional, and case law arguments. First, AIDS cannot be transmitted through casual, nonsexual contact. 150 The risk of transmission in a school setting is extraordinarily small; to date, no cases of AIDS have been linked to the presence of seropositive individuals in a school setting. 151 Second, experts concur that the seropositive child benefits emotionally and developmentally by being in a regular classroom setting; this benefit generally exceeds the risk the child assumes by attending school with those carrying common childhood diseases. 152 Also, seronegative children in the classroom could benefit by learning "important lessons about the value of education and the right to fair and equal treatment." 153 Third, courts increasingly are holding that the Rehabilitation Act and the equal protection clause prevent the exclusion of most seroposi-

145. See notes 49 & 137-39 supra and accompanying text.
146. See notes 68-70 & 120-21 supra and accompanying text.
149. See notes 68-70 & 120-21 supra and accompanying text.
150. See notes 14-16 supra and accompanying text.
151. See notes 58-61, 70 & 119 supra and accompanying text.
152. See notes 68-70 & 119-21 supra and accompanying text.
tive students from the classroom.\textsuperscript{154} Fourth, federal and state agencies have distributed a plethora of educational materials on AIDS\textsuperscript{155} that can be used to help educate parents, students, and school personnel about AIDS, thereby further diminishing the negligible risk of infection and reducing the unwarranted fear of the transmissibility of HIV in the classroom.

Education is the key to preventing the spread of AIDS.\textsuperscript{156} Al-

\begin{itemize}
\item \textsuperscript{154} See notes 71-77, 87-88 & 93-96 supra and accompanying text. In addition, courts recently have held that state laws prohibiting discrimination based on handicap and sexual orientation protect school employees with AIDS. See Chalk v. District Court for the Cent. Dist. of Cal., 45 Fair Empl. Prac. Cas. (BNA) 518. Chalk, a teacher who had been diagnosed with AIDS, was found to be otherwise qualified to perform his job and to pose virtually no risk to others; he was reinstated as a teacher for hearing-impaired children upon the court's granting its preliminary injunction. See also Racine Educ. Ass'n v. Racine Unified School Dist., No. 8650279, slip op. (Equal Rights Div. Oct. 9, 1987). In this case, an administrative law judge ("ALJ") held that the Racine school district policy to exclude district staff members with AIDS or ARC from attendance at work violates the Wisconsin Fair Employment Act. The ALJ ordered that the policy be withdrawn. Id. It is unclear what impact this decision will have on the section of the policy that provides for the exclusion of students with AIDS or ARC.

\item \textsuperscript{155} Most large school districts in the United States are conducting AIDS education programs, although most do not target preadolescent student. 2 AIDS Pol'y & L., Jan. 28, 1987, at 6. See also NEA Urges AIDS Curriculum, Opposes Testing and Bias, 2 AIDS Pol'y & L., July 15, 1987, at 4-5. (The National Education Association, the largest teachers' union in the United States, supporting the development and implementation of a comprehensive AIDS curriculum); Pennsylvania Schools Set For Mandatory AIDS Teaching, 2 AIDS Pol'y & L., Sept. 9, 1987, at 3 (AIDS education is mandated for all students except kindergarteners. The extent and type of education is determined by each school district, "as long as they include essential details of the disease."); New York Regents Require Instruction for All Students, 2 AIDS Pol'y & L., Oct. 7, 1987, at 3 (All elementary and secondary schools must provide AIDS education "as part of regular health education, under regulations approved ... by the New York Board of Regents."). Local advisory committees, composed of parents, school board members, school personnel, community representatives and representatives from religious groups, "will recommend curriculum content based on community values."); Seattle Classroom Supplies Includes Gloves, 2 AIDS Pol'y & L., Sept. 23, 1987 at 11 (the Seattle school district conducts AIDS orientation sessions for its teachers, nurses, and librarians. In addition, AIDS education programs are being developed for Seattle's middle schools and high schools. The Seattle School District also recently received a grant from the CDC to help institute their AIDS education program); Schools Bolster AIDS Curriculum, N.Y. Times, Sept. 10, 1987, at B11, col. 1 (Oklahoma, Massachusetts, Maryland and Arizona also are conducting AIDS education programs in the schools.).

\item \textsuperscript{156} See generally Surgeon General's Report, supra note 1 (discussing how ignorance of AIDS and its modes of transmission increases the spread of the disease).
\end{itemize}
lowing misplaced fears to form the basis for excluding seropositive children from school is untenable. It is imperative that the facts about AIDS be disseminated, that compassion for those who are seropositive is fostered and maintained, and that sensitivity to the realistic concerns of those who are seronegative is developed but not exaggerated. The approaches developed by the District 27 court, the Commissioner in Plainfield, and the CDC must continue to be adopted in school districts throughout the country.

III
AIDS AND PRISONS

Health officials,157 penology experts,158 and the courts159 have expressed concern that the confluence of male homosexuality, intravenous drug use, and sexual assault in prisons160 would create conditions facilitating the rapid spread of AIDS among prison inmates.161 Although nationally the number of prisoners with AIDS is significant and growing,162 the expected explosive spread of AIDS within prisons has not occurred.163 Between 1985 and 1986 the percentage of prison AIDS cases increased at a


160. Throughout this article the terms “prisons,” “jails,” and “correctional facilities” are used interchangeably, except where accuracy demands that a distinction be made.


162. AIDS was the leading cause of death in New York State prisons in early 1987. Hard Questions, supra note 157, at B6, col. 2; New York State Paroles 50 Men Sick With AIDS, N.Y. Times, Mar. 7, 1987, at A1, col. 2. According to a study conducted by the National Institute of Justice (“NIJ”) in October, 1987, there were cumulatively 1,964 prisoners diagnosed with AIDS: 1,320 of these people were in state and federal prisons and the remainder in 331 large city and county jails. NIJ Report, 1988, supra note 19, at xiv. Currently, 295 inmates of state and federal prisons are diagnosed with AIDS, as are 126 large city and county jail inmates. No figures are available for inmates who are only seropositive or have ARC. Id.

slower rate than the percentage of AIDS cases in the nonincarcerated population. 164 Further, over eighty percent of prison AIDS cases are found in only six states. 165 Nevertheless, questions about how to manage the treatment of prisoners with AIDS continue to confront prison administrators. Legislatures and courts across the country have examined issues surrounding the testing and counselling of inmates, the segregation of prisoners carrying the HIV virus, AIDS education in prison, and health care for HIV-infected inmates. 166

The response of the judiciary and the prison system to the presence of AIDS in prison is the focus of this section. After first exploring current prison conditions and the deferential review courts have accorded to the policies of prison administrators, the article examines the policies of mass testing and subsequent segregation of seropositive prisoners and prisoners with ARC and AIDS. The article concludes that such policies should not be implemented and then proposes guidelines that prison administrators and legislators should consider in formulating policies concerning prisons and AIDS. Because courts are particularly deferential to prison administrative policies, attempts to change the treatment of HIV-infected inmates must be directed toward legislators and prison administrators.

**Background: Testing and Segregation of Prison Inmates.—** There is no single test to diagnose whether a person has AIDS. 167 A test exists which detects the HIV virus in an individual, but this test is extraordinarily expensive and not in common use. 168 More frequently, a series of tests is used to detect the presence of antibodies to HIV. 169 Although improved testing methodology

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164. Between November, 1985 and October, 1986, a 61% increase in prisoners with AIDS was found among federal, state, and local prison systems. The Nation as a whole experienced a 79% increase during the same period. Wald, Slow Rise, supra note 157. Experts are unsure whether this slowed growth is the start of a pattern or is just "a fluke." Id. at col. 2.

165. Wald, Slow Rise, supra note 157. These figures do not include AIDS prisoners in the federal prison system. It has been calculated that 70% of prison AIDS cases have occurred in only 4% of the Nation's prisons. AIDS in Prison Surveyed in Justice Report, 1 AIDS Pol'y & L., Feb. 26, 1986, at 5-6.

166. See notes 194-278 infra and accompanying text.

167. AIDS is a diagnosis of a condition whereby a person has one or more rare opportunistic diseases and usually has positive indications for HIV, see supra note 26 and accompanying text; therefore, there is no test for AIDS.


169. The basic test is an enzyme-linked immunosorbent assay ("ELISA") test and usually is performed twice if the first test reveals the presence of HIV antibodies. Id. at 2-3. Antibodies indicate the body's attempt to fight infection.
increasingly yields accurate results, the antibody tests still "label an undetermined number of persons tested as falsely positive or falsely negative." Current research also indicates that antibodies to HIV may not be detectable for up to one year after infection. In addition, there is no way to test which of those people who are seropositive will develop ARC or AIDS.

Numerous correctional facilities currently are considering various plans that include the mandatory testing of inmates for the presence of HIV antibodies. The federal government has indicated that it favors a form of mandatory HIV antibody testing. Currently, the Federal Bureau of Prisons (the "Bureau") requires federal prisons to test all inmates at least sixty days prior to their discharge. Under this policy, the correctional facilities also test inmates who demonstrate predatory or promiscuous behavior and upon request.

The Bureau's policy differs from the policies of most state correctional facilities. The four states with the greatest number of seropositive inmates test only if there is a reasonable belief that a prisoner has AIDS or a related condition. These

If the second ELISA test is positive, a more accurate test, the Western Blot, normally is performed. Id. Yet there are accuracy problems even with this three-test series. Id. at 132.

170. Medical Answers, supra note 13, at 20.


173. "Predatory behavior involves someone who has been known to rape other inmates." U.S. to Segregate 'Predatory' Prisoners With the AIDS Virus, N.Y. Times, Oct. 24, 1987, at 34, col. 1 (citing Patricia Sledge, a spokeswoman for the Federal Bureau of Prisons). The definition of promiscuous behavior in prison is open to interpretation; it appears that consensual sexual activity may fall within the definition of "promiscuous." Id. (citing Urvashi Vaid, spokeswoman for the National Prison Project of the American Civil Liberties Union ("ACLU")).

174. By contrast, the Bureau's prior policy required testing of all entering inmates and all departing inmates prior to their discharge. The test was to be administered every six months if the initial results were negative. Oper. Mem. of the U.S. Dep't of Justice, Fed. Bureau of Prisons, No. 73-87 (June 24, 1987). The Bureau's initial policy required testing only when the Chief of Health Programs found it to be necessary for clinical reasons. Oper. Mem. of the U.S. Dep't of Justice, Fed. Bureau of Prisons, No. 10-87 (Jan. 20, 1987).


176. Id. These states are New York, New Jersey, Florida, and Texas. Id.
facilities do not conduct mass testing.\textsuperscript{177} Although only three state facilities test all incoming inmates for HIV antibodies,\textsuperscript{178} an increasing number of facilities test those inmates perceived to be “at risk,”\textsuperscript{179} including gay men, intravenous drug users, and prostitutes.\textsuperscript{180} Most state institutions perform only one test, instead of the scientifically preferred three-step confirmation testing process.\textsuperscript{181} As a result, an unnecessary number of false positives are reported. In addition, only a few institutions provide education and counselling along with testing.\textsuperscript{182}

Most prison inmates diagnosed with full-blown AIDS are placed in prison wards of hospitals,\textsuperscript{183} infirmaries,\textsuperscript{184} or an AIDS wing in the prison.\textsuperscript{185} Fewer facilities currently hospitalize or seg-

\textsuperscript{177} NIJ Report, 1988, supra note 19, at 123.
\textsuperscript{178} Id.
\textsuperscript{179} Id. Medical experts refer to “risk behavior” rather than “risk groups.” NIJ Report, 1988, supra note 19, at 127. The risk behavior occurring in prisons would be both intravenous drug use and homosexual sexual activity. See note 2 supra.
\textsuperscript{180} Corrections Dig., supra note 175, at 7. Although the governor of Illinois recently rejected legislation mandating the testing of all prison inmates, Johnson, Broad AIDS Laws Signed in Illinois, N.Y. Times, Sept. 22, 1987, at B7, col. 1, convicted sex offenders and convicted intravenous drug users in Illinois now face mandatory HIV antibody testing. 2 AIDS Pol’y & L., Sept. 23, 1987, at 6. See also 2 AIDS Pol’y & L., Nov. 4, 1987, at 3. Mayor Feinstein of San Francisco recently called for routine testing of prisoners in county jails. However, this proposal is problematic because there are not adequate facilities for separate housing and it conflicts with California “state law, which prohibits involuntary HIV antibody tests.” Prostitutes Tested Under City’s AIDS Prevention Plan, 2 AIDS Pol’y & L., Feb. 11, 1987, at 6. Arrested prostitutes and drug abusers can be tested on a voluntary basis in Allentown, Pennsylvania. Id. “The prostitutes are also counseled on safe sex practices.” Id.
\textsuperscript{181} See note 169 supra.
\textsuperscript{182} Id. Some inmates are led to believe falsely that testing positive means that one has AIDS. Interview with Urvashi Vaid, former staff attorney with the ACLU National Prisons Project, Mar. 1987-Mar. 1988 [hereinafter Interview with Urvashi Vaid].
\textsuperscript{183} Corrections Dig., supra note 175, at 7 (citing NIJ Update, 1987). See also Inmates to Receive Hospital Treatment, 2 AIDS Pol’y & L., Feb. 11, 1987, at 8 (St. Clare’s Hospital in New York City treats state prison inmates with AIDS); Where the Sick Lie in Chains, N.Y. Times, Nov. 1, 1987, at A24, col. 1 (editorial) (Patient-prisoners, including those with AIDS, of New York City correctional facilities who are hospitalized in the nonsecured wings of city hospitals are shackled to their beds with leg irons.)
\textsuperscript{184} See, e.g., Hard Questions, supra note 157.
\textsuperscript{185} See, e.g., telephone interview with Anita P. Arriola, Attorney at Public Advocates, Inc., San Francisco, (Oct. 1987-Feb. 1988). Federal prisoners with ARC or AIDS are sent to one of two gender-segregated medical centers that are part of federal correctional facilities. Although this practice may serve to im-
regate inmates diagnosed with ARC or those who are asymptomatic carriers.\textsuperscript{186}

When prisoners are removed to a separate AIDS wing, the nature of their incarceration changes. Frequently, segregated prisoners are denied access to privileges and facilities available to other prisoners. For example, inmates who are segregated for AIDS-related reasons often have reduced access to recreation,\textsuperscript{187} telephones,\textsuperscript{188} the prison library,\textsuperscript{189} religious practice,\textsuperscript{190} work release programs,\textsuperscript{191} and conjugal visitation programs.\textsuperscript{192} Segregation to an AIDS wing also implicitly indicates a breach of the prisoner's confidentiality concerning her health status.\textsuperscript{193} Addi-

prove medical care, less frequent contact between an inmate and his or her family and friends is another result of the practice. Vaid, Prisons, supra note 161, at 241, 247 (citing telephone interview with Dan Kelly, Deputy Director, Medical Services Division of the Federal Bureau of Prisons (Oct. 6, 1986)).

186. Corrections Dig., supra note 175, at 7 (citing NIJ Update, 1987).

187. See notes 254 & 257-60 infra and accompanying text.

188. See id.

189. See id.

190. See notes 271-76 infra and accompanying text.

191. In Williams v. Sumner, 648 F. Supp. 510 (D. Nev. 1986), an inmate of the Northern Nevada Correctional Center was removed from his employment in a community trustee work program after he tested positive for HIV antibodies. As a result, he lost the opportunity to earn money and to accumulate "work time" credits, which are used to reduce an inmate's sentence. The court held that the prison acted lawfully because prisoner participation in the program was not mandated by state, federal, or constitutional law, and therefore removal of the prisoner from the program did not deprive him of any vested due process right. Id. at 512. It is noteworthy that although the prisoner tested positive three times, shortly after the third test an independent medical firm made the diagnosis that the plaintiff was not infected with HIV. Id. at 511.

192. The New York State Court of Appeals, the state's highest court, recently denied an inmate and his wife the right to participate in the Auburn Correctional Facility's Family Reunion Program. New York High Court Okays Denial of Conjugal Visits, 2 AIDS Pol'y & L., Dec. 2, 1987, at 5 (citing Doe v. Coughlin, 71 N.Y.2d 48 518 N.E.2d 536, 523 N.Y.S.2d 782 (Ct. App. 1987)).

tional ramifications of segregation will be explored in further detail below.

*A Survey of Prison Policies Concerning AIDS.*—Prison officials are striving to establish policies and programs to care for and to protect both seronegative and seropositive inmates. A large number of correctional facilities have adopted policies that allow for testing of pregnant inmates, prisoners with symptoms of AIDS, and prisoners who request to be tested. Many prisons segregate prisoners with full-blown AIDS, but different facilities are less uniform in their treatment of inmates who have ARC or who are asymptomatic.

In Connecticut state prisons, prisoners with ARC are allowed to participate in all prison programs, except those involving minors who are unrelated to the prisoner.194 Prisoners with ARC wishing to participate in the familial and conjugal visitation program must inform their spouses of their illness.195 Prisoners with full-blown AIDS are hospitalized in the state prison hospital as part of the standard procedure used for any critically-ill inmate.196 Finally, Connecticut Department of Corrections officials stress that education about AIDS, for both inmates and guards, is strongly emphasized.197

New Jersey state prisons test only those inmates "who exhibit symptoms of HIV infection, plus pregnant women and recipients of hemodialysis," and individuals who request testing.198 In 1987, the New Jersey Department of Corrections ("DOC") transferred prisoners with nonacute cases of AIDS to an isolated unit at the Trenton State Prison. Prisoners with more active AIDS remained in the prison medical unit of St. Francis Hospital in Trenton.199 The New Jersey DOC cited overcrowding as the reason for the transfer, but two other factors appear to have motivated the policy. First, some inmates had threatened harm to any in-

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194. Connecticut Adopts Plan on Prisoners with AIDS, 1 AIDS Pol’y & L., Mar. 26, 1986, at 7. Because medical evidence shows that AIDS is not transmitted casually, see text accompanying notes 14-16 supra, there is no justification either for barring prisoners from interacting with children or for distinguishing between children who are family members and those who are not.


196. Id.

197. Id.


mate with AIDS who was returned to the general prison population.\textsuperscript{200} Second, some New Jersey Corrections officials indicated that they believed that the only effective way to handle prisoners with AIDS was to keep them hospitalized and isolated.\textsuperscript{201} However, asymptomatic carriers and people with ARC were allowed to remain in the general prison population.\textsuperscript{202}

New Jersey recently instituted a policy whereby previously incarcerated drug offenders who violate probation terms under the state’s Intensive Supervision Program ("ISP") will be required to write 250-word essays on the link between intravenous drug use and AIDS.\textsuperscript{203} Education on the hazards of drug use and the risk of AIDS also is a major part of the ISP program.\textsuperscript{204}

In Pennsylvania, state prison inmates are not tested for antibodies to HIV unless they display symptoms of AIDS-related illness.\textsuperscript{205} The Pennsylvania Commissioner of Corrections has called for a mandatory AIDS education program for all Pennsylvania inmates and prison system employees.\textsuperscript{206}

Missouri also has rejected the proposal that all inmates be tested for HIV infection.\textsuperscript{207} Individuals perceived to be at higher risk of being seropositive, however, are tested and those who do test positive "‘are isolated from the general prison population.’”\textsuperscript{208} The Governor of Missouri rejected a proposal for more widespread testing because of the "‘low infection rates among the prison population and lack of consensus in the medical com-

\textsuperscript{200} Id.
\textsuperscript{201} A spokesperson for the New Jersey Corrections Department was quoted as saying, "‘If they were civilians, they wouldn’t have to stay in bed, but some of them are doing life for murder, and they have to be kept in a secure facility.’” Id.
\textsuperscript{202} Inmates Charge Improper AIDS Protection, supra note 198. Inmates have filed suit to increase access to HIV antibody testing and to mandate segregation of all seropositive inmates. Id.
\textsuperscript{204} Id. To further AIDS education in prisons, inmates at the Taconic Correctional Facility produced an Emmy award winning film, "‘AIDS: A Bad Way to Die.’” Ex-Inmates Cherish Emmy Award for Program Filmed in Sing Sing, N.Y. Times, Sept. 27, 1987, at § 1, 36, col. 3.
\textsuperscript{205} Convict Seeks Release or Assurance of No Risk, 1 AIDS Pol’y & L., Mar. 12, 1986, at 2.
\textsuperscript{206} Pennsylvania Orders Education, 1 AIDS Pol’y & L., Nov. 5, 1986, at 5. The education program includes videotapes, a question-and-answer session and information from the CDC. Id.
\textsuperscript{208} Id. (quoting Missouri Governor, John Ashcroft).
munity over the value of antibody testing in slowing the spread of the disease.’”

Iowa had adopted a policy of testing all incoming prisoners for HIV antibodies, but when no one tested positive after six months, the program was discontinued. However, the diagnosis of two inmates as being seropositive has prompted officials to consider the reintroduction of mandatory testing. In addition, each new inmate attends a class about AIDS and receives “a brochure which explains what AIDS is, what causes it, and how to prevent getting it.” Staff members and their families also are taught about AIDS.

A few prison systems have started to make available condoms to inmates. Use of condoms during sexual activity has been recognized by medical experts as a way to substantially reduce the risk of transmission of HIV. Vermont was the first state prison system to distribute condoms, upon individual request, to inmates. New York City currently is doing the same in a pilot

209. Id. It is interesting to note that the legislator who proposed mandatory uniform testing wanted inmates tested upon departure from correctional facilities, “[b]ecause . . . the prevalence of homosexual behavior in prisons” would create a greater number of people who could generate the spread of AIDS, id. (quoting letter from Representative Charles Quincy Troupe to Governor John Ashcroft), and not out of concern for preventing the spread of AIDS in prison. His proposal appears similar to the program adopted by the Federal Bureau of Prisons in October, 1987. See notes 172-74 supra and accompanying text.

211. Id.
212. Id.
214. Slow Rise, supra note 157, at A18, col. 1. Vermont began offering condoms to prison inmates in early 1987. Vermont Dep’t of Corrections, Medical Procedures: Sexually Transmitted Diseases, No. 412]J (addendum) (Mar. 18, 1987). See also Gay Community News, Mar. 8, 1987, at 2. At the time this policy went into effect there were no confirmed cases of AIDS in Vermont’s six regional jails. The Corrections Commissioner of Vermont was quoted as saying, “Who’s kidding who? For a corrections official to say that homosexuality doesn’t exist in a jail facility is totally absurd. . . . [I]t does exist, notwithstanding the rules. . . . I’m not condoning homosexuality but I’m not going to stand in the way of best medical practices, because I don’t want this deadly disease in my system.” Id. Other prison experts have recognized the practicality of distributing condoms in prison. See, e.g., Inmates in N.J. Charge Improper AIDS Protection, supra note 198, at 5-6.
program at its facility at Rikers Island. In Mississippi, condoms are distributed to inmates participating in the state's conjugal visitation program, in which inmates with AIDS can participate and there also are plans to make condoms available for sale to all Mississippi state prison inmates. Other jurisdictions have refused to distribute condoms on the grounds that sexual relations between inmates is illegal and distribution of condoms by the prison would encourage prisoners to break prison rules and the law.

It also has been shown that the shared use of unsterile needles is one of the major modes of transmission of HIV. Prison officials, however, are unwilling thus far to distribute to prisoners clean syringes, or bleach to sterilize used syringes, despite the recognition that drug use occurs among prison inmates.

During the past year, legislators in many states have introduced bills concerning prisoners with AIDS. For example, a bill introduced in the California State Legislature requires the establishment of policies for the identification, placement, and treatment of prisoners with AIDS. A bill introduced in the New York State Legislature would require inmate blood-testing and isolation of those who test positive for HIV antibodies.

Judicial Review of Prison Policies Concerning AIDS.—Both seronegative and seropositive inmates have brought actions challenging prison AIDS policies. Seronegative prisoners have attempted to have prison administrators institute segregation or isolation

215. Interview with Urvashi Vaid, supra note 182. The condom distribution program will be expanded soon. N.I. Report, 1988, supra note 19, at 163.

216. Mississippi Board Approves Condoms for Conjugal Visits, 2 AIDS Pol'y & L., July 29, 1987, at 7. State facilities in Mississippi also test all inmates with clinical symptoms of AIDS, segregate all seropositive inmates, hospitalize inmates when necessary, and provide education and counselling to all prisoners, visitors, and Corrections Department employees. Id.

217. See, e.g., Iowa Won't Alter Policy of Prohibiting Condoms, supra note 210. This attitude should be contrasted with the fact that most sex in prisons is consensual. Inmates in N.J. Charge Improper AIDS Protection, supra note 198, at 6-7.

218. JAMA Cites Precautions in Stemming Spread of AIDS, supra note 213.

219. Interview with Urvashi Vaid, supra note 182. Many prison officials tend to focus on the criminalized aspect of the behavior rather than on preventing the spread of HIV in prisons. Id.

220. California Bill Fails; Other Proposals Entered, 1 AIDS Pol'y & L., Apr. 9, 1986, at 7.

221. Id.

222. It is important to note that a person may appear healthy yet still be infected with HIV. Therefore, someone who believes she is seronegative may not be. See note 21 supra and accompanying text.
programs for seropositive prisoners. Seropositive inmates have sought to end their segregation, or, at a minimum, to regain the privileges lost upon being segregated. Traditionally, courts have accorded great deference to the judgment of prison administrators. Courts continue to apply this low standard of review in prison AIDS cases.

In *Foy v. Owens*, a seronegative inmate brought an action under 42 U.S.C. section 1983 ("section 1983"), arguing that prison officials violated his constitutional rights by failing to move "possible" AIDS carriers from the area of the prison where he was housed. The court recognized the constitutional right of inmates to be free from exposure to communicable diseases, but dismissed the action as frivolous because the plaintiff failed to show that he was "at risk of contracting AIDS such that constitutional rights [were] involved." The court concluded that there was no evidence that the inmate had been threatened directly and that the mere presence of inmates who engage in sodomy did not constitute a valid claim under section 1983.

In *Jarrett v. Faulkner*, seronegative inmates sought injunctive relief pursuant to section 1983, based on rights protected by the eighth and fourteenth amendments. The plaintiffs argued that prison officials violated their constitutional rights by failing to test all inmates and by failing to segregate all homosexual pris-

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225. No. 85-6909, slip op. at 1.
226. Id. (citing Lareau v. Manson, 651 F.2d 96, 109 (1st Cir. 1981) (failure to screen adequately newly-arrived inmates for communicable diseases violates inmates' due process rights; it is unnecessary to require evidence that an infectious disease has actually spread in an overcrowded jail before issuing a remedy); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (unnecessary to require that all incoming prisoners be given a medical examination within 36 hours of incarceration in the absence of reasonable grounds to suspect that an inmate requires such examination to protect himself or others)).
228. No. 85-6909, slip op. at 2.
230. Id. at 929. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The fourteenth amendment provides, in part, that no "state shall deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV.
The plaintiffs brought their action after prison officials confirmed that an inmate was suspected of having AIDS. Like the Foy court, the court in Faulkner acknowledged that prisoners have a constitutional right to be reasonably free from exposure to communicable diseases. The court granted the defendant's motion to dismiss, however, because the plaintiffs failed to show that the "class is so at risk of contracting AIDS that constitutional rights are implicated and injunctive relief is necessary." In reaching this conclusion, the court stressed that federal courts are not equipped to solve prison administration problems and thus must grant prison officials greater discretion.

Foy and Faulkner illustrate the extraordinary deference that courts afford to policy decisions made by prison officials. In neither case had the prison established a segregation policy, and neither court compelled the prison to institute such a policy. These cases indicate that inmates, presumably seronegative, bringing suits seeking to institute compulsory segregation and testing will be unsuccessful unless they can establish a clear nexus of harm between the failure to test, the failure to segregate, and the threat of transmission of HIV. However, it is difficult to make such a showing because HIV cannot be transmitted through casual contact. Therefore, for plaintiff-inmates to succeed, they would have to show that they are exposed to a high risk of assault that would involve the exchange of bodily fluids. In the absence of such a showing, it is unlikely that nonsegregation policies will be held to infringe on the noninfected inmates' constitutional right to be reasonably free from the threat of contagious diseases. Arguments against mass segregation are bolstered be-

231. 662 F. Supp. at 929. Indiana prison regulations provide for HIV antibody tests for those prisoners requesting it and to those who show symptoms of AIDS or ARC. Gay male and intravenous drug using inmates are encouraged to take the test, but are not required to do so. Judge Rules Federal Courts Inappropriate Jurisdiction, 2 AIDS Pol'y & L., July 29, 1987, at 5-6.
232. 662 F. Supp. at 929.
233. See note 226 supra and accompanying text.
234. 662 F. Supp. at 929 (citations omitted). A parallel concern was expressed in Plainfield about the right of seronegative children, teachers, and staff to be free from the threat of disease. See notes 108-12 supra and accompanying text. Notably, segregation, in effect, was ordered in Plainfield, see note 112 supra and accompanying text, but not in Faulkner. 662 F. Supp. at 929.
235. 662 F. Supp. at 929 (citing O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2404-05 (1987)).
236. Id. (citing Procunier v. Martinez, 416 U.S. 396 (1974)).
237. See notes 227 & 234 supra and accompanying text.
238. See notes 13-16 supra and accompanying text.
cause the threat of assault can be reduced more effectively by prison administrators' segregating inmates on the basis of aggressive behavior, regardless of their HIV status, and by establishing adequate staffing and supervision guidelines.\textsuperscript{239}

In \textit{LaRocca v. Dalsheim},\textsuperscript{240} seronegative prisoners in Downstate, a New York correctional facility, sought to have all inmates and employees screened for AIDS and to have all inmates with AIDS removed to a separate hospital facility.\textsuperscript{241} The court denied the plaintiffs' requests.\textsuperscript{242} Because, at the time, there was no test available to detect HIV antibodies, let alone AIDS, the court could not explore the merits of screening prison inmates and employees.\textsuperscript{243} The court also found that the prison's policy of placing inmates with AIDS in the prison infirmary was an appropriate and sufficient response to the presence of prisoners with AIDS within the facility.\textsuperscript{244} Because the prison infirmary's hygienic procedures were similar to the regime designed for the more contagious hepatitis-B virus, the court held that prison nurses and inmate porters were protected adequately against AIDS. The court concluded that there was no need to remove prisoners with AIDS to a civil hospital.\textsuperscript{245}

\textsuperscript{239} Segregation of aggressive prisoners currently occurs, but not efficiently enough. Vaid, Prisons, supra note 161, at 238. In addition, it must be acknowledged that those inmates who are threatened directly may be too intimidated to seek assistance from prison officials. These facts alone, however, do not justify the automatic segregation of all prisoners who test HIV positive.

\textsuperscript{240} 120 Misc. 2d 697, 467 N.Y.S.2d 302 (Sup. Ct. 1983).

\textsuperscript{241} Id. at 698, 467 N.Y.S.2d at 304. The Downstate facility is a reception and classification center. Id. at 701, 467 N.Y.S.2d at 306. The plaintiffs brought their claims pursuant to N.Y. Civ. Prac. L. & R. §§ 7801-7806 (McKinney 1981 & Supp. 1988). 120 Misc. 2d at 698, 467 N.Y.S.2d at 304.

\textsuperscript{242} 120 Misc. 2d at 708-09, 467 N.Y.S.2d at 310-11.

\textsuperscript{243} Id. at 708, 467 N.Y.S.2d at 310. Although there currently is a test to detect antibodies for HIV, there still is no way to test for AIDS, because it is a clinical diagnosis of a complex syndrome rather than a disease. See notes 26-27 & 169 supra and accompanying text. There also is no way currently to determine which people who are asymptomatic and seropositive eventually will be diagnosed with AIDS. See notes 31-33 supra and accompanying text.

\textsuperscript{244} 120 Misc. 2d at 708-09, 467 N.Y.S.2d at 310-11. The court declined to invoke § 141 of the Correction Law. This section authorizes a court to order the removal of inmates from a correctional facility "in case pestilence or contagious disease will break out among the inmates." 120 Misc. 2d at 709, 467 N.Y.S.2d at 310 (quoting N.Y. Correction Law § 141 (McKinney 1988)).

\textsuperscript{245} 120 Misc. 2d at 704-06, 709, 467 N.Y.S.2d at 308-09, 311. These precautions include wearing masks, gloves, or gowns when a porter cleans the room of an AIDS patient; double-bagging the garbage from an AIDS patient's room; avoiding wounds through AIDS-contaminated instruments; taking precautions
Although the *LaRocca* court refused to endorse the removal of prisoners with AIDS to a hospital, it implicitly sanctioned the segregation of prisoners with AIDS from the rest of the prison population. The court based its decision on “the State’s obligation to provide a safe and humane place of confinement for its inmates.”\(^{246}\) Such segregation, concluded the court, would minimize the risk of transmission of AIDS through sexual assault.\(^{247}\) The court noted its belief that sex in prison “often” is compelled.\(^{248}\) Therefore, it appears that the *LaRocca* court in part structured its opinion to alleviate the fears of sexual assault articulated by the noninfected prisoners.\(^{249}\) The court never examined why prison officials segregated inmates with AIDS instead of segregating aggressive inmates, regardless of their HIV status; nor did the court address the possible threat of violence against prisoners with AIDS. However, to help dispel any irrational fears of inmates, the court ordered *sua sponte* the prison-wide distribution of brochures about AIDS prepared by the New York State Department of Health.\(^{250}\)

In *LaRocca* the plaintiffs did not establish the nexus of harm between the failure to remove inmates with AIDS to a civil hospital and the threat of transmission of AIDS. In all likelihood, this is because the court relied on the “current medical evidence” that AIDS is not likely to be spread through sexual contact. Because this nexus was not established, there was no reason for the court to order the transfer of inmates with AIDS to a separate hospital facility. However, the *LaRocca* court did uphold the existing segregation policy by asserting that it helps to minimize the spread of the disease.\(^{251}\) These elements of the *LaRocca* court’s holding also exemplify the deference that courts will show to existing prison policies.\(^{252}\)

In *Cordero v. Coughlin*,\(^ {253}\) inmates with AIDS sought to enjoin the segregation policy and the concomitant lack of social, recreational, and rehabilitative opportunities at the Downstate facility in handling needles and syringes, blood and other bodily fluids; hand washing; and labeling fluids. Id. at 704-06, 467 N.Y.S.2d at 308-09.

\(^{246}\) 120 Misc. 2d at 708, 467 N.Y.S. 2d at 310 (citing N.Y. Correction Law §§ 70(2), 23(2) (McKinney 1987)).

\(^{247}\) Id. at 707-08, 467 N.Y.S.2d at 309-10.

\(^{248}\) Id. at 702-07, 467 N.Y.S.2d at 306-09. But cf. note 217 supra.

\(^{249}\) 120 Misc. 2d at 707, 467 N.Y.S.2d at 309.

\(^{250}\) Id. at 707, 467 N.Y.S.2d at 310.

\(^{251}\) See notes 244-47 supra and accompanying text.

\(^{252}\) See notes 223-51 & 253-78 supra and accompanying text.

New York.254 The plaintiffs argued that this policy violated their rights under the first, eighth and fourteenth amendments of the United States Constitution, and that it was violative of the New York law governing the administration of correctional facilities.255 The federal district court denied the plaintiffs' motion for injunctive relief and rejected all of their constitutional claims,256 thereby explicitly condoning the segregation in the Downstate facility which was approved tacitly in LaRocca in the state court.

The court rejected the prisoners' equal protection claim for two reasons. First, the court determined that because the prisoners with AIDS were not similarly situated to the rest of the prison population, the equal protection clause was inapplicable.257 Second, even if the equal protection clause were applicable, the prison's segregation policy satisfied the rational basis test because it was rationally related to the state's objective of protecting both seronegative and seropositive prisoners from the tensions and harm that could result from the seronegative prisoners' fears, real or imagined.258 The court stated that a higher level of review was not appropriate because people with AIDS do not constitute a suspect class.259

The court also rejected the prisoners' fourteenth amendment due process claim, noting that placing an inmate in "'less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.'"260 The court also concluded that the applicable New York law did not require a hearing before prisoners are

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254. Id. at 10-11.
256. 607 F. Supp. at 10.
257. Id. (citing Francis v. INS, 532 F.2d 268, 272-73 (2d Cir. 1976)).
258. Id. "[A]s long as there is a legitimate government end and the means used are rationally related to that end, the Equal Protection Clause is not violated." Id. (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)).
260. 607 F. Supp. at 10. (quoting Hewitt v. Helms, 459 U.S. 460, 468 (1983) (as long as the conditions or degree of confinement is within the purview of the sentence imposed and does not otherwise violate the Constitution, the due process clause does not subject an inmate's treatment by prison authorities to judicial review)).
segregated. With respect to the eighth amendment claim, the court asserted that the prisoners’ rights to be free from cruel and unusual punishment was satisfied as long as they receive “‘adequate food, clothing, shelter, sanitation, medical care and personal safety.’” Because the plaintiffs did not contend that these essentials were lacking, the court dismissed this claim.

Finally, the court considered the plaintiffs’ argument that the segregation policy violated their first amendment rights to privacy, free expression and free association. Rejecting these claims as well, the court held that the prisoners’ first amendment rights were limited by “‘the fact of confinement’” and the prison’s needs.

LaRocca and Cordero both were decided in the early 1980s, a time when less information was known about AIDS than is known today. Yet, even though La Rocca was decided prior to Cordero, it was the LaRocca court which based its decision largely on the medical evidence before it, while giving limited credence to the fears of some inmates of sexual assault. The Cordero decision, on the other hand, gave considerable deference to the fears, “realistic or not,” of the prisoners. Although the Cordero court ostensibly was concerned with the “genesis and transmission” of AIDS, its decision did not reflect an extensive examination of the available medical evidence about AIDS. Deference to the seronegative inmates, as well as deference to prison policy, prevailed.

In Powell v. Department of Corrections, a gay inmate who tested positive for HIV brought a section 1983 action against the Oklahoma Department of Corrections (“DOC”). The inmate asserted that prison officials infringed on his constitutional rights.

261. Id. (citing Hewitt, 459 U.S. at 469, and N.Y. Comp. Codes R. & Regs. tit. 7, pts. 250-300 (1987)).
262. Id. at 11 (quoting Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978)).
263. Id. The prisoners contended that their separation violated their rights to be free from cruel and unusual punishment because they were deprived of social, recreational, and rehabilitative opportunities. Id. at 10.
264. “Courts shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . . or the right of the people peaceably to assemble.” U.S. Const. amend. I.
265. 607 F. Supp. at 11.
267. Id. at 10.
268. Id.
by denying him access to numerous prison privileges. Specifically, the inmate asserted that he was segregated from the general prison population and was denied the right to visit with his family, to attend worship services, to participate in adequate physical exercise, and to have access to a law library; he also asserted that he was denied his equal protection rights because no other homosexual inmate had been tested or removed from the general prison population.\footnote{271}

According to a DOC report, Powell indicated during a routine medical examination when he first entered the prison that he might be infected with HIV.\footnote{272} After Powell tested positive for HIV antibodies, the DOC isolated him from the general prison population. The DOC justified its action on the grounds that segregation would prevent a possible spread of the virus and would protect the plaintiff from possible assault.\footnote{273}

The court denied Powell’s request to be returned to the general prison population. First, it held that he did not have a federal constitutional right to live in the general prison population.\footnote{274} Second, the court determined that Powell’s due process claim would succeed only if his “conditions or degree of confinement violated the Constitution.”\footnote{275} Because the plaintiff failed to show the existence of such conditions, because he was segregated in order to further legitimate objectives, and because the DOC Report, which the court in essence adopted, noted that the plaintiff did have limited access to all programs and services at the facility, his request was denied by the court.\footnote{276}

\begin{footnotes}
\item 271. 647 F. Supp. at 968. Powell sought to be released from the custody of the Department of Corrections, to be returned to the general prison population, to be transferred to a minimum security institution, to be awarded damages of $105,000, and to be classified for work release. Id. at 969-70.
\item 272. Id. at 970.
\item 273. Id. The court found that the isolation of the plaintiff was not for punitive reasons. Id.
\item 274. Id. (citing Hewitt v. Helms, 459 U.S. 460 (1983)). In Hewitt, the Court denied the inmate’s request to be removed from administrative segregation where he was being confined while the prison investigated the inmate’s role in a prison riot. Justice Rehnquist, writing for the Court, based his opinion on the principle that prison officials have broad administrative and discretionary authority over the prisons they manage. 459 U.S. at 467. The Court specifically rejected the argument that a prisoner has a constitutionally-based interest in being confined with the general population. Id. at 466-67.
\item 275. 647 F. Supp. at 970 (citing Hewitt, 459 U.S. at 468).
\item 276. Id. at 970-71. The court found Powell to have had sufficient access to a law library because he had been offered the opportunity to transfer to another facility with such a library but refused the transfer. Id. at 971.
\end{footnotes}
The court rejected Powell’s first amendment claim on the grounds that the restrictions on his right to worship furthered the prison’s goals of maintaining the health of other inmates and protecting Powell from “threatened harm.”\textsuperscript{277} The court rejected Powell’s equal protection argument, which he based on his status as a homosexual, because he failed to show that he was treated differently from other prisoners who were known HIV carriers.\textsuperscript{278} Central to the Powell court’s analysis is its implicit assumption that isolating the plaintiff accomplished the prison’s legitimate objectives of protecting the plaintiff from assault and preventing the spread of AIDS.

The decisions in Cordero and Powell demonstrate that challenges to prison segregation policies likely will fail unless a clear showing of unconstitutional treatment or conditions is made.\textsuperscript{279} Because it is difficult to make such a showing, courts are likely to defer to prison officials and to uphold prison segregation policies by asserting that such policies help to minimize the spread of the disease.\textsuperscript{280} This appears to be the rationale behind the courts’ holdings in LaRocca, Cordero, and Powell. These cases further indicate that segregation policies, once put in place by prison officials, are likely to be upheld, regardless of whether seronegative prisoners or seropositive prisoners bring the suit.

The opinions in LaRocca, Cordero, and Powell compare with those in Foy and Faulkner on three grounds. First, each case showed extraordinary deference to prison officials and upheld already existing prison policies. Second, the Foy and Faulkner courts appear more familiar with the medical evidence that AIDS is not casually transmitted and are willing to credit that evidence

\textsuperscript{277} Id. The Chaplain visited the medical unit once a week and upon request. This frequency was deemed sufficient to satisfy the plaintiff’s first amendment rights, which may be limited by the prison’s “legitimate policies and goals.” Id. at 971 (citing Pell v. Procunier, 417 U.S. 817, 822 (1974) and Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

\textsuperscript{278} Id. It is noteworthy that Powell based his equal protection claim on his status as a gay man, but the court chose to define his classification by his seropositive status rather than by his sexuality. Still, the court could have applied intermediate scrutiny to determine whether the segregation policy imposed a stigma for which there is no substantial state purpose. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982).

\textsuperscript{279} Additional factors that affect whether a prisoner will succeed in a challenge to prison policies include whether she is proceeding pro se, as many prisoners do, or the extent of proof available to the prisoner to present. Interview with Urvashi Vaid, supra note 182.

\textsuperscript{280} Note that the Cordero and Powell courts reached the same conclusion even though Cordero had AIDS and Powell was seropositive.
more than they credit the fears of healthy inmates. Third, La-Rocca, Cordero, and Powell involved prisoners known to be sero-positive or to have AIDS; in Foy and Faulkner, the inmates were only "suspected of having AIDS." This, however, should not prevent other courts from employing the reasoning used by the Foy and Faulkner courts in refusing to mandate segregation. Both cases establish that segregation is not justified without a clear nexus of harm between not testing for HIV antibodies and segregating those prisoners who test positive, and the threat of transmission. Because AIDS is not casually transmitted, courts should focus on whether a seropositive inmate poses a direct threat to other inmates before mandating segregation. Segregation of seropositive prisoners should not be upheld based on the mere existence of such prisoners in the facility. Furthermore, because there will be "possible AIDS carriers" in all correctional facilities, the logic used by the courts in Foy and Faulkner can be used by other courts to uphold nonsegregation policies in other prisons when facts exist that are similar to those present in these cases.

Criticisms of Mass Testing and Segregation Programs.—Cases brought by both seronegative and seropositive inmates show that courts are unwilling to overturn prison testing and segregation policies. Although there may not be a constitutional basis for prohibiting prison officials from isolating prisoners with AIDS, a persuasive rationale does not exist to support mandatory uniform testing or segregation of seropositive inmates or of inmates with ARC or AIDS.

Like testing for the nonincarcerated population, testing prisoners is generally considered to be impractical, ineffective and unrealistic. First, neither a facility’s awareness of an inmate’s HIV status nor the inmate’s knowledge of his or her status prevents the spread of the virus through sexual activity, sexual assault, or drug use. Studies have shown that it is education and counselling that change behavior, not testing. Second, testing often results in discriminatory treatment of inmates.

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281. See notes 222-80 supra and accompanying text.
282. Interview with Urvashi Vaid, supra note 182. Advocates of testing argue that identifying HIV-positive prisoners will help control the spread of the virus inside prison walls. There are, however, numerous problems with this proposition. See notes 283-93 infra and accompanying text.
285. See notes 296-305 infra and accompanying text. In Maryland, a prisoner was placed in an isolation unit three different times, ranging from a few
tion of seropositive prisoners, and its concomitant loss of privileges and access to facilities, usually follows testing. Isolating seropositive inmates is a program with only cosmetic effect, however, because an inmate may be infected, yet not test positive. There are better solutions than segregation to managing AIDS in prison and its associated problems.\(^{286}\)

Third, testing for HIV antibodies reveals only those who are infected at a particular time\(^ {287}\) and cannot serve to predict who ultimately will develop ARC or AIDS. In addition, because there is no medical treatment currently available to prevent full-blown AIDS from developing once a person is seropositive, this knowledge, even if it were available, would not be useful.\(^ {288}\) Fourth, the staggering administrative and financial costs of a comprehensive prison testing program would outweigh its usefulness. Because it can take up to a year after infection to test positive, and because risk behavior occurs in prisons,\(^ {289}\) prison officials would

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days to just less than six weeks, to test him for HIV antibodies after he suffered from various illnesses and weight loss. Judd v. Packard, 669 F. Supp. 741 (D. Md. 1987). The federal district court upheld the prison's actions. Id. at 742-43. In so holding, the court noted that, "it may well be that prison officials might face a § 1983 suit for failing to isolate a known AIDS patient or carrier, if the carrier infects another inmate who could show that such failure to isolate constituted grossly negligent or reckless conduct on the part of such officials." Id. at 743. However, "[i]n order to show that the correctional system provided inadequate protection, the inmate would have to prove that he became infected with the AIDS virus through activity that could reasonably be assumed to be under the control of prison officials. This, in turn, requires a prisoner to engage in the nearly impossible task of identifying the specific episode (or episodes) during which he became infected." Vaid, Prisons, supra note 161, at 246 (citation omitted).

286. See notes 329-34 infra and accompanying text. For example, in McDuffie v. Rikers Island Medical Dep't, 668 F. Supp. 328 (S.D.N.Y. 1987), a prisoner in the New York State prison system was segregated from the rest of the prison population based on incorrect information that he had AIDS. The court refused to classify the prison's actions as deliberate indifference to serious medical needs. Id. at 329-30. Commenting that the issue "potentially before this court is the degree of care that prison officials must exercise in confirming a medical diagnosis of AIDS before segregating an inmate," the court, citing Cordero, also noted the right of prison administrators to segregate inmates with AIDS. Id. at 330.

287. It may take up to one year following infection for an individual to test positive for HIV antibodies. See note 171 supra and accompanying text.


289. Vaid, Prisons, supra note 161, at 238-239. Consensual sex, the most prevalent form of sexual activity in prisons, id. at 238, as well as coerced sex and rape, occur in prisons; so does intravenous drug use. Id. at 239. Although male
have to retest inmates every six to twelve months. Moreover, to minimize the number of false positives, confirmation tests must be performed on all who test positive.\textsuperscript{290} Next, testing programs, which exacerbate fear of AIDS, might undermine efforts to educate prisoners about AIDS.\textsuperscript{291} Finally, such testing, in and of itself, may violate constitutional rights of prisoners.\textsuperscript{292} Funds available for widespread testing would be spent more effectively if used to educate inmates, guards, and visitors\textsuperscript{293} about AIDS and to improve medical care for the infected inmates.

The CDC has taken a position against segregation of seropositive inmates unless it is for the inmate's own protection or unless an inmate requires hospital care; otherwise, segregation is considered to be unnecessary because AIDS is not spread through casual contact.\textsuperscript{294} Programs which segregate prisoners with AIDS depart from standard prison policies which require prisoners to be isolated based on disruptive behavior patterns. Standard prison policies are based on the belief that the one who threatens violence should bear the burden of isolation.\textsuperscript{295} As exemplified in the cases brought by segregated prisoners, the negative effects of segregation are substantial. First, a prisoner's confidentiality implicitly is breached upon segregation, if this has not already occurred upon testing.\textsuperscript{296} This breach then puts the inmate at greater risk of emotional and physical harassment and assault.\textsuperscript{297} Segregated prisoners receive differential treatment from guards and other prison officials and are subjected to an increased likelihood of physical and verbal harassment, especially if they later are returned to the general prison population.\textsuperscript{298} AIDS homosexual activity is far more likely to transmit HIV than is lesbian sexual activity, women prisoners do have AIDS and they are capable of transmitting the virus through intravenous drug use. Telephone interview with Anita P. Arriola, supra note 185.

\textsuperscript{290} See note 169 supra.
\textsuperscript{291} Slow Rise, supra note 157, at A18.
\textsuperscript{292} Telephone interview with Anita P. Arriola, supra note 185.
\textsuperscript{293} Vaid, Balanced Response, supra note 193, at 4; see also Bar Report, supra note 193, at 12-13.
\textsuperscript{294} Interview with Urvashi Vaid, supra note 182.
\textsuperscript{295} Grogan, supra note 288, at 7.
\textsuperscript{296} NIJ Report, 1988, supra note 19, at 133.
\textsuperscript{297} See note 273 supra and accompanying text.
\textsuperscript{298} Id. Inmates justifiably may fear harassment and assault from other prisoners. See, e.g., Fenton v. City of Philadelphia, No. 86-3529, slip op., (E.D. Pa. Sept. 22, 1986) (the prisoner-plaintiff was beaten by guards and other prisoners in jail; he alleged that arresting officers told prison officials that he had AIDS and that this knowledge led to his being beaten); Slow Rise, supra note
is a stigma in and of itself; thus, segregation further subjects an inmate to dangerous and irreversible stigmatization. Second, a segregated prisoner often loses privileges and access to facilities available to other prisoners. Therefore, even if not intended as punishment, segregation does punish an inmate purely on the basis of health. This effect is particularly severe when it is understood that many prisoners with AIDS will be serving “life sentences” because their prison sentence is longer than their life expectancy.

Third, prison officials do not generally classify AIDS-segregated inmates according to their degree of illness, unless they require hospitalization, or by the crimes for which they have been convicted. Thus, inmates convicted of petty larceny may be housed with those who have committed capital crimes. This arrangement would not make sense in any prison setting, but it is particularly unreasonable in an AIDS wing where inmates already are under tremendous physical and psychological stress and may feel as though they have nothing to lose by engaging in violence, rape, or unsafe sex. Also, to the extent that such activities occur, and to the extent AIDS and ARC involve susceptibility to infection, those inmates in the AIDS wing may be put at greater risk of progressing to more life-threatening stages of HIV infection. Finally, the poor environment in which most prisoners with AIDS are housed can only exacerbate their failing health.

157, at B6, col. 1. See also Cordero, 607 F. Supp. at 11 (quoting Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978)).
299. Interview with Urvashi Vaid, supra note 182. See also, NIJ Report, 1988, supra note 19, at 133, 152-53.
300. See, e.g., note 271 supra and accompanying text.
301. “[I]n New York correctional facilities between 1981 and 1986 (where the majority of inmates who died of AIDS had pneumocystis carinii pneumonia, the average length of time from the onset of AIDS-related symptoms in an inmate to confirmation of a diagnosis of AIDS was three to four months; the average length of time from confirmation of that diagnosis to death ranged from five to six months.” Bar Report, supra note 193, at 9-10 (citing New York State Commission of Correction, Acquired Immune Deficiency Syndrome: A Demographic Profile of New York State Inmate Mortalities, 1981-1985 23, 31 (1986)).
302. Telephone interview with Anita P. Arriola, supra note 185.
303. Interview with Urvashi Vaid, supra note 182. See also NIJ Report, 1988, supra note 19, at 132.
304. See note 33 supra and accompanying text (discussing co-factors that may increase the likelihood of the onset of AIDS). See also NIJ Report, 1988, supra note 19, at 180.
305. It appears as if prisoners with AIDS have approximately half the life span from diagnosis as do people with AIDS and similar opportunistic diseases who are not in prison. Compare Bar Report, supra note 193, at 9-10 with Ko-
Legal Challenges to Testing and Segregation Policies Are Unlikely to Succeed.—Seropositive inmates, as well as those with ARC or AIDS, wishing to challenge prison segregation policies, might consider bringing claims based on the equal protection clause, the due process clause of the fourteenth amendment, or the eighth amendment. The decisions in Powell and Cordero indicate, however, that infected inmates will not succeed on an equal protection challenge, as long as courts apply only a rational basis standard of review. Moreover, these decisions indicate that courts will resist using a higher level of scrutiny,\textsuperscript{306} despite persuasive arguments for the application of such analysis.\textsuperscript{307}

Seropositive inmates also might assert a fourteenth amendment due process claim that nonmedical segregation policies based on seropositivity, having ARC, or having AIDS, impinge on their rights as guaranteed by the federal or relevant state constitution, statute, or regulation.\textsuperscript{308} If a court determines that the

\textsuperscript{306} Telephone interview with Anita P. Arriola, supra note 185.

\textsuperscript{307} The application of a higher level of scrutiny can be justified on the grounds that HIV-infected prisoners possess some of the crucial attributes of groups traditionally treated with intermediate or strict scrutiny. These attributes include: clarity of category, political powerlessness, unequal treatment, immutability, and stereotyping. See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S.1, 28 (1973); Plyler v. Doe, 457 U.S. 202 (1982); United States v. Caroleine Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). Although AIDS is a new disease, discrimination against those with the disease is as old as the disease itself. Visibility of characteristics, another common measure of whether a group needs heightened protection, is no longer an issue once testing is instituted because of the lack of confidentiality usually found in prisons and because it is on the basis of such tests that segregation and other prison policies are instituted. The irrationality of treating those infected with the virus differently than those not infected for non-health care related reasons would be apparent if extensive education programs for prisoners and prison personnel were instituted and if prisons were administered so as to protect adequately the welfare of all prisoners.

It is established that asymptomatic carriers can transmit HIV at least as well as those with ARC or AIDS. If a prison segregates only those with ARC or AIDS, those segregated prisoners might try to raise an equal protection claim on the grounds that similarly situated people are treated differently. The goal, of course, would be to end all nonmedical segregation based on HIV status, not to segregate those who are asymptomatic.

\textsuperscript{308} Meachum v. Fano, 427 U.S. 215, 226, 229 (1975) (citing Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974)). The "touchstone of due process is protection of the individual against arbitrary action of government," 418 U.S. at 558 (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889)), therefore, a prisoner also might rest a due process claim on a court order or on prison standards,
prisoner has alleged an infringement of her liberty interest,\textsuperscript{309} the court will evaluate the prison regulation to determine whether "it is reasonably related to legitimate penological interests."\textsuperscript{310} This standard accords significant deference to prison administrators.\textsuperscript{311} Applying a \textit{Mathews v. Eldridge}\textsuperscript{312} due process analysis, a court will consider three factors: the private interest that will be affected by the official action; the governmental interests involved, including the fiscal and administrative burdens that the additional or substitute procedures would entail; and the value and adequacy of procedural requirements in the given situation.\textsuperscript{313} "'Due Process is flexible and calls for such procedural protections as the particular situation demands.'"\textsuperscript{314}

First, unless a state has provided specifically that inmates have a right to remain in the general prison population, a court is unlikely to find that an inmate's liberty interest is significant.\textsuperscript{315} Second, the government's stated interest in maintaining security and in reducing the spread of HIV in prison is likely to be accorded great weight. Finally, although other alternatives are available,\textsuperscript{316} a court's low level of review of prison policies is likely to result in a court's upholding prison policies of segregating

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practices, and customs. Telephone interview with Anita P. Arriola, supra note 185.
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\textsuperscript{310} 107 S. Ct. at 2261.

\textsuperscript{311} Id. at 2261. The deferential "standard is necessary if 'prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operation.'" Id. (quoting Jones v. North Carolina Prisoners' Union 433 U.S. 119, 128 (1977)).

\textsuperscript{312} 424 U.S. 319 (1976).

\textsuperscript{313} Id. at 335; \textit{Hewitt}, 459 U.S. 473. As part of the "reasonableness analysis" a court may consider "the presence or absence of alternative accommodations of prisoners' rights." O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2404-05 n.** (1987).

\textsuperscript{314} 424 U.S. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).


\textsuperscript{316} See notes 329-34 infra and accompanying text.
prisoners based on their being seropositive, having ARC, or having AIDS.\textsuperscript{317} Segregation policies are likely to be upheld even when the conditions of confinement in segregation are significantly more sensory depriving than those in the rest of the prison.\textsuperscript{318} As was shown by the decisions in Cordero and Powell, generally courts are unwilling to find a due process violation if the prison’s actions are not arbitrary or do not violate the seropositive inmate’s other constitutional rights.\textsuperscript{319}

A seropositive inmate also might bring an eighth amendment claim of cruel and unusual punishment, challenging either the conditions of confinement, the medical care provided for the inmate, or both. Shelter, food, sanitation, clothing, personal safety, and medical care are the core areas of almost all eighth amendment claims.\textsuperscript{320} “A state must provide an inmate with shelter which does not cause his degeneration or threaten his mental and physical well being.”\textsuperscript{321}

Courts usually decide challenges to poor confinement condition by applying a “totality of circumstances” test.\textsuperscript{322} Because conditions of confinement generally are considered to fall within a prison’s concern for security, the decisions of prison administrators in this realm are accorded great deference.\textsuperscript{323} Therefore, most plaintiffs, like the plaintiff in Cordero, fail in their attempts to raise an eighth amendment claim challenging the conditions of confinement.\textsuperscript{324}

\textsuperscript{317} See note 307 supra for a discussion of the validity of treating prisoners differently based on their status of being asymptomatic, having ARC, or having AIDS.

\textsuperscript{318} See notes 253-78 supra and accompanying text.

\textsuperscript{319} See id. Compare Hewitt, 459 U.S. 460 (inmate’s request to be removed from administrative segregation where he was being confined while the prison investigated the inmate’s role in a prison riot denied on the grounds of the broad administrative and discretionary authority accorded prison officials) with Bounds v. Smith, 430 U.S. 817 (1977) (prisoner cannot be denied access to prison law library because of prisoner’s fundamental constitutional right of access to the courts).

\textsuperscript{320} See, e.g., Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).

\textsuperscript{321} Id. at 568 (citing Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977)).

\textsuperscript{322} Telephone interview with Anita P. Arriola, supra note 185. See also Rhodes v. Chapman, 452 U.S. 337, 362-63 (1981) (general conditions of imprisonment not establishing that the inmates were subject to cruel and unusual punishment).

\textsuperscript{323} Telephone interview with Anita P. Arriola, supra note 185.

\textsuperscript{324} Id.
A more predictable standard, deliberate indifference to serious medical needs, is used by courts to assess inmates' claims of inadequate medical care.\textsuperscript{325} Because courts tend to accord less deference to prison officials on claims concerning medical treatment, and because prison medical treatment is generally inadequate,\textsuperscript{326} inmates' challenges to poor medical care are more likely to succeed.\textsuperscript{327} Therefore, at a minimum, a successful eighth amendment claim could provide seropositive prisoners, as well as those with AIDS and ARC, better access to medical care, which often is the most pressing issue faced by such prisoners.\textsuperscript{328}

\textbf{Suggested Guidelines for Consideration in the Development of Policies Concerning Prisons and AIDS.}—Although there may be no constitutional basis for prohibiting prison officials from isolating prisoners with AIDS, there is no persuasive rationale to support segregation. Instead of widespread testing and segregation, it would be more appropriate for prisons to develop policies and programs based on the following principles: (1) Prisoners should be tested for antibodies to HIV only for medical diagnostic and treatment purposes, to conduct voluntary, confidential epidemiological studies, or upon request; (2) There should exist a

\textsuperscript{325} Vaid, Prisons, supra note 161, at 246 (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976) (eighth amendment's prohibition on the "unnecessary and wanton infliction of pain" has been violated when there exists "deliberate indifference to serious medical needs of prisoners").) Courts have interpreted this standard to require "such systemic and gross deficiencies in staffing, facilities, equipment or procedures that the inmate population is effectively denied access to adequate medical care." Id. at 246 (quoting Ramos, 639 F.2d at 575). Telephone interview with Anita P. Arriola, supra note 185; Interview with Urvashi Vaid, supra note 182.

\textsuperscript{326} Telephone interview with Anita P. Arriola, supra note 185. See also Vaid, Prisons, supra note 161, at 246.

\textsuperscript{327} Vaid, Prisons, supra note 161, at 246.

\textsuperscript{328} For example, the Legal Aid Society has charged that inmates with AIDS being housed at the Bellevue Hospital Center's Psychiatric Unit have "been shackled to their beds without regard to physical condition." Lambert, Legal Group Says Bellevue Abuses Its Prison Patients, N.Y. Times, Oct. 8, 1987, at B1, col. 5. At least one prisoner held at New York City's Rikers Island facility, waiting to be sentenced for petty larceny, had to go to court to obtain AZT, a drug used to retard the development of AIDS. Officials claimed the delay was caused by correction officials' needing to verify the prisoner's medical history. The lawyer for the prisoner claims that "immediate verification" could have been obtained and that it was because AIDS was involved that the delay occurred. It is interesting that "[o]fficials at three city agencies . . . declined to accept responsibility for determining the form of medical care that should be given to an inmate with AIDS." Johnson, Court Orders City to Provide Drug for Inmate With AIDS, N.Y. Times, Oct. 22, 1987, at B4, col. 5.
presumption that seropositive inmates will remain in the general prison population unless they (a) request to be moved;329 (b) need to be moved to obtain medical care otherwise unavailable, or (c) have a history of aggressive behavior; (3) Prisons must improve and enforce classification systems whereby aggressive prisoners, seropositive or not, are removed from the general prison population;330 (4) Prison administrators, prisoners, guards, and visitors must be educated about the modes of transmission of HIV and risk-reducing behavior;331 (5) Counselling, both upon diagnosis and afterwards, must be made available to all seropositive inmates; furthermore, counselling should be available for inmates and guards to deal with their fears of developing AIDS;332 (6) Condoms, bleach and needles should be made available to prisoners upon request and drug treatment programs must be made more available to inmates;333 (7) If and when segregation is used by prison administrators, it must occur on humane terms, without the denial of privileges that often accompanies current segregation programs;334 (8) Quality health care must be provided to all inmates; and (9) Further measures must be implemented to help guarantee prisoner confidentiality.

To help ensure that such a program could be implemented, legislators, prison administrators, and judges must be educated about AIDS. The CDC and some prison medical directors already oppose widespread testing and segregation of seropositive inmates and support the expansion of AIDS education programs

329. A seropositive prisoner who requests removal from the general prison population could be placed in protective custody. In fact, a prison has a legal obligation to protect a prisoner from direct threats. Vaid, Prisons, supra note 161, at 245-46.

330. A proper classification system should identify violent inmates and segregate them rather than automatically segregating seropositive inmates. See notes 295 & 307 supra and accompanying text. Prison officials in federal institutions recently were authorized “to place an inmate in ‘controlled housing status’ when an inmate ‘indicates by his actions or verbally a disposition to engage in conduct which poses a significant threat to transmit the virus to another person.’ ” 2 AIDS Poly & L., Oct. 25, 1987, at 5 (citations omitted).

331. Some prison experts have recognized the necessity for education in prison and have called for it to begin immediately. Interview with Urvashi Vaid, supra note 182. See, e.g., LaRocca, 120 Misc. 2d 697, 467 N.Y.S.2d 302.

332. Health Parley Consensus Appears to Oppose Mandatory AIDS Tests, N.Y. Times, Feb. 25, 1987, at A1, col. 3. AIDS medical experts have commented on the necessity of allocating resources to provide lengthy and necessary counselling for those who are being tested for the presence of HIV antibodies. Id. at A18, col. 5.

333. See notes 213-19 supra and accompanying text.

334. See notes 253-78 supra and accompanying text.
and the distribution of condoms. The program outlined above would be consistent with prison policies of maintaining peace, order, and the health and well being of inmates and prison officials, and would uphold constitutional principles underlying the rights of all prisoners.

CONCLUSION

Following the lead of District 27, courts and school boards generally have refused to exclude children infected with HIV from the classroom. In recent prison cases, however, courts have deferred to the judgment of prison administrators, refusing to strike down existing segregation policies but refusing as well to institute such policies where none previously existed. It appears as though courts will refuse to institute segregation policies as long as there does not exist a direct threat to seronegative prisoners. So far, no court has found such a threat to exist.

Despite the obvious differences between prisons and schools, similar guidelines can be developed in both institutions to deal with the impact of AIDS. First, AIDS education programs must be instituted. Second, widespread mandatory testing should not be adopted. Third, a presumption should exist that people who are seropositive should be allowed to remain in the general population, be that the classroom or general population wings of the prison. However, a case-by-case review of known seropositive individuals should be conducted to determine whether the person is likely to be harmed or to harm others. In the prison context, aggressive prisoners should be segregated, as appropriate, whether seropositive or not. Prisoners should not be segregated merely because they are seropositive. Fourth, it is illogical for policies to distinguish among seropositive individuals, people with ARC, or people with AIDS, unless it is to provide appropriate medical treatment or to protect a person’s health.

Finally, courts, legislatures, and administrators must credit the available medical evidence, which conclusively shows that AIDS cannot be spread through casual, nonsexual contact. Policies based on the guidelines outlined above should involve minimal governmental interference and should act to ensure the fair and rational treatment and protection of all people. Policies are

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336. See notes 83-99 & 133-41 supra and accompanying text.
337. See notes 253-78 supra and accompanying text.
available that protect and care for both the seronegative person and the seropositive person.

In the past, untruths and misconceptions about AIDS have generated widespread fear. These misconceptions must be dispelled so that schools, prisons, and other institutions can develop rational and legally sound policies that not only protect the healthy but also treat the afflicted with compassion.