/* The following opinion, dated April 5, 1990, states the position of the Office of Civil Rights of the Department of Justice. Numbers in squared brackets (e.g., "[1]") refer to footnotes found at the end of the file. */

This memorandum is intended primarily to assist regional offices in addressing situations where school districts have a formal or informal policy regarding the placement of children with Acquired Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC), or otherwise infected with Human Immunodeficiency virus (HIV-infected). (All of these children will be referred to herein as children with AIDS, in light of the opinion of the Surgeon General of the United States that it is medically inappropriate to think of HIV infection as many discrete conditions such as ARC or "full blown" AIDS. According to the Surgeon General, AIDS should be regarded as a single disease which progresses through a variable range of stages. [1] The memorandum provides guidance on the application of the regulation implementing Section 504 of the Rehabilitation Act of 1973 to children with AIDS in elementary and secondary schools and is necessary particularly because Congress and the Supreme Court have provided specific guidance only with respect to employment. Although lower appellant /*sic-should be appellate*/ courts have ruled uniformly that Section 504 prohibits schools from excluding children with AIDS, the legal standard applied has not always been clear.

This memorandum addresses five issues: (1) Is a child with AIDS handicapped? (2) If so, is a child with AIDS qualified"? (3) If so, how should the child be provided a free appropriate public education (FAPE)? (4) Does a child with AIDS have a right to Section 504 procedural safeguards? (5) Does a child with AIDS have a right to confidentiality?

I. Are Children with AIDS Handicapped Persons?

The Section 504 regulation at 34 C.F.R. § 104.3(j)(l) defines a handicapped person as any person who

(i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Among the impairments specified in the regulation at 34 C.F.R. Section 104.3(j)(1) defines a handicapped person as any person who
(i) has a physical or mental impairment which substantially

limits one or more major life activities
(ii) has a record such an impairment, or (iii) is regarded as having such an impairment.

Among the impairments specified in the regulation at 34 C.F.R. Section 104.3(j)(2) is any physiological disorder or condition ... affecting the hemic and lymphatic system...." AIDS fits this definition. Doe v. Dolton Elementary School District No. 148, 694 F.Supp. 440, 444 (N.D. Ill. 1988) (Dolton). Thomas v. Atascadero United School District, 662 F. Supp. 376 (C.D. Cal. 1987) (Thomas). See also Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from the Office of Legal Counsel, U.S. Department of Justice, "Application of Section 504 of the Rehabilitation Act to HIV-Infected Individual," September 27, 1988, page 8. This Office of Legal Counsel memorandum states that, with respect to the nonemployment context, Section 504 protects symptomatic and asymptomatic HIV-infected individuals alike "on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity- so long as the HIV infected individual is 'otherwise qualified' to participate in the program or activity" (pp. 1.2).[2]

In AIDS cases, [3] most courts have based determinations of handicap on findings that persons with AIDS were in fact substantially limited in a major life activity due to physical impairment. Children have acquired AIDS primarily by transmission from their mothers in utero or as a result of transfusions of contaminated blood products. Because blood for transfusion was rarely screened for AIDS before 1985, most of the school cases that have reached the courts have been of the latter category. In Thomas, a child acquired AIDS from transfusion due to complications of premature birth. The court specifically found that the child fit the Section 504 definition because he suffered from significant impairment of his hemic and reproductive systems. 662 F. Supp. at 379, 381. Similarly, in Martinez v. School Board of Hillsborough County, Florida, 675 F.Supp. 1574 (M.D. FL 1987), 692 F.Supp. 1293 (1988), vacated and remanded, 861 F. 2d 1502 (11th Cir. 1988), on remand, 711 F. Supp. 1066 (1989) (Martinez), a child acquired AIDS after having been administered 39 blood transfusions shortly after she was born. Although she was handicapped also on the basis of mental retardation, the appellate court, relying on its reading of Arsine, ruled that the child was handicapped on the basis of her contagious disease of AIDS. 861 F. 2d at 1505.

Most other children with AIDS have required multiple transfusions

of a blood clotting product because of hemophilia, another severe impairment of the hemic system. Courts have expressed no doubt in deciding that these children also were handicapped as defined by Section 504. See Doe v. Belleville Public School District No. 118, 672 F. Supp. 342 (S.D. Ill. 1987) (Belleville); Robertson v. Granite City Community Unit School District No. 9, 684 E Supp. 1002, 1004, 1007 (S.D. Ill. 1988) (Robertson); Ray v. School District of De Soto County, 666 F.Supp. 1524, 1527 (M.D. Fla. 1987) (Ray). [4]

Other courts have found that persons with AIDS were substantially limited in a major life activity due to the reaction of others to their perceived contagiousness. See, e.g., Dolton, 694 F. Supp. at 444 ("Surely no physical problem has created greater public fear and misapprehension than AIDS. That fear includes a perception that a person with AIDS is substantially impaired in his ability to interact with others, e.g., to attend public school. Such interaction is a major life activity.") As the Court noted in Arline, by including within the definition of handicapped persons those who are "regarded as" impaired, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 107 S.Ct. at 1129. The Court in Arline did not reach the issue of whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person.

In a case outside the context of public schools, Doe v. Centinela Hospital, CV 87-2514 PAR (PX), 1988 WL 81776 (C.D. Cal. June 30, 1988), a district court ruled that Doe could not be excluded from a residential alcohol and drug rehabilitation program solely on the basis of a positive test for the presence of the HIV virus. According to the court, Arline "clearly states that discrimination based solely on fear of contagion is discrimination based on handicap when the impairment has that effect on others." Slip op. at 12. Doe was handicapped because Section 504 "contemplates coverage of those whose condition does not substantially limit a function such as working or learning, but which is treated as constituting such a limitation," as occurred when be was excluded from the program. Id. at 14.

No case law has been identified, either in school or employment contexts, in which a person with AIDS was not considered handicapped according to the Section 504 definition.

II. Are Children with AIDS "Qualified Handicapped Persons"?

The Section 504 regulation at 34 C.F.R. § 104.3(k)(2) defines a qualified handicapped person with respect to public preschool, elementary, secondary, or adult educational services as a handicapped person

(i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act[.]

Thus, in the case of elementary and secondary school children, "qualified" is defined in terms of age. [5] Some case law applying Section 504 to persons with AIDS, having only the Supreme Court's decision in Arline, an employment case, as guidance, addresses issues of contagiouness and potential risks to classmates in terms of 'reasonable accommodation" and whether a child is "otherwise qualified." [6] Since these terms are not pert of the definition of "qualified" for public elementary and secondary school children, the analytical approach described below discusses contagion and risk, not in terms of the definition of "qualified," but in terms of the substantive requirements of the regulation.

III. How Should a Free Appropriate Public Education Be Provided to Children with AIDS?

The general nondiscrimination provision of the Section 504 regulation at 34 C.F.R. § 104.4 applies to all qualified handicapped persons. In addition, Subpart D of the regulation applies to preschool, elementary, and secondary education.

The regulation states at 34 C.F.R. § 104.33(a):

> A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

A school district, therefore, would be required to provide FAPE to a child identified as having AIDS who meets the age requirements of the regulation. The regulation sets out a process for designing an appropriate education to meet the individual

needs of handicapped children. Each qualified handicapped person must be educated with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. Thus, the handicapped child is placed in the regular educational environment unless it is demonstrated that the child cannot be educated there, even with the use of supplementary aids and services. 34 C.F.R. § 104.34(a).

For a child handicapped solely because he or she has AIDS, the full evaluation and placement process detailed in the regulation at § 104.35 will not be applicable unless it is believed that the child needs special education or related services. One reading of the regulation at 34 C.F.R. § 104.35 would seem to require that recipients conduct a complete evaluation of all qualified handicapped children. However, we do not believe that the regulation writers, who were concerned with ensuring consistency between Section 504 and EHA regulations, were thinking in terms of handicapped children who might not need special education, since these children would not be covered by the EHA. To require a full evaluation of children whom neither recipients nor parents believe need special education or related aids would be asking recipients to take on a completely unnecessary burden.

Since the evaluation and placement process would differ in some respects from that specified in § 104.35, case law has been examined for guidance as to two questions: (a) Where should the child be educated before the initial placement decision is made? and, (b) How and by whom should the placement decision be made?

A. Where Should the Child Be Before the Initial Placement Decision?

In each case, the first issue presented to the court was whether to grant a preliminary injunction admitting a child with AIDS to a classroom with other children. The standard for granting a preliminary injunction is strict. A court must find (1) the plaintiff will probably succeed on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is not granted; and (3) the hardship to the child outweighs any harm to the school. The court also weighs the public interest, if any, e.g., potential harm to other children. In each case that was upheld on appeal of the merits or the injunction issue, the trial court examined the medical evidence discussed below and required the immediate admission of the AIDS-infected child to the classroom.

Thus, case law would lead to the conclusion that, unless the child currently presents a risk of contagion due to the stage of

the disease (e.g., a contagious opportunistic infection, open lesions that cannot be covered) or parents and school agree on an alternative, a child infected with AIDS would remain in the regular classroom before the placement decision is made. Where a child is temporarily excluded from school because of current risk of contagion, the exclusion would continue no longer than the duration of the contagious condition. Moreover, the exclusion for reasons of current contagiousness should not preclude or delay proceeding with the placement decisionmaking process.

B. How and by Whom Should the Placement Decision Be Made?

If the evaluation and placement provisions of the regulation are fully applicable, § 104.35(c)(3) requires that placement decisions be made by a group of persons, including persons knowledgeable about the child, the meaning of evaluation data, and the placement options. The group would draw upon information from a variety of sources, such as tests, teacher recommendations and the child's physical condition. To determine the extent to which a recipient school district must apply the process described in the regulation, it is useful to examine the approach taken by district judges faced with similar decisions.

One case, Martinez, will be discussed in some detail because it was considered on its merits, received appellate review, and relied ultimately on the most recent public health information available. The legal standard applied by the court of appeals borrowed from Arline., requiring the trial court to balance the risks and weigh whether "reasonable accommodations" could be provided, in order to determine whether the child was "otherwise qualified." 861 F.2d at 1505. As noted above, this terminology is not found in Subpart D of the Section 504 regulation. Nevertheless, similar considerations would come into play as a recipient determines whether a child can be placed "in the regular environment with the use of supplementary aids and service," as required by the regulation at 34 CFR. § 104.34(a).

In September 1987, Mrs. Martinez brought suit on behalf of her six-year old trainable mentally handicapped (TMH) child, Eliana, because the Hillsborough County school district placed her in a homebound program, rather than the regular TMH program. Eliana apparently contracted AIDS from multiple blood transfusions administered in infancy. Although no special precautions were taken, no member of her family contracted AIDS. While Eliana was enrolled in nonpublic preschools, Mrs. Martinez always kept her child home when she had skin lesions. Mrs. Martinez sought a preliminary injunction to prevent the district's placing Eliana

in a homebound program.

Several facts weighed heavily with Judge Elizabeth Kovachevich in her decision: Eliana was incontinent; she drooled and sucked her fingers continually; the doctors who examined Eliana expressed differing opinions on whether she should be placed in an integrated classroom; and the school's interdisciplinary team, which was upheld in the school's due process procedure, recommended homebound instruction. 675 F.Supp. at 1567-77.

The judge reviewed what was then the best public health information, drawing on her own summary of August 1987 in Ray, supra, 675 F.Supp. at 1578-81. She discussed the Centers for Disease Control's description of the various stages of AIDS, from merely testing seropositive to full-blown AIDS with opportunistic infections, and differentiated the facts in Martinez, where full-blown AIDS was present, from Ray, where it was not; (She also relied on the U.S. Department of Justice Memorandum for General Counsel, June 20, 1986, which was superseded by the September 27, 1988, memorandum, supra. and quoted heavily from a recent Readers Digest article.) The judge noted that although the virus has been isolated in a wide range of body fluids (blood, semen, saliva, tears, breast milk, and urine), the risk of communication is known to have occurred only from sexual intercourse, invasive exposure to contaminated blood or blood products (eg., intravenous drug use [of shared needles], transfusions) or perinatal exposure from infected mother to infant. She also observed that the Surgeon General has stated very recently in a July 31, 1987, interview that we should regard the presence of the virus in body fluids other than blood, semen, and breast milk as if it were not there. The judge cited a brief submitted by the American Medical Association and the Report of the Surgeon General stating that research found no apparent risk of infection from close nonsexual contact, such as shaking hands, giving a bath, kissing on the lips, or sharing household items like toothbrushes, eating utensils, baths, and toilets.

The judge then relied on 1986 guidelines established by the American Academy of Pediatrics (AAP). While agreeing with other authorities that most school children infected with the AIDS virus should attend school without restrictions, with the approval of the child's physician, the AAP added that children who lack control of their body secretions, who bite, or who have open skin sores which cannot be covered require a more restricted school environment until more is known about the transmission of the virus in these special circumstances. All schools should adopt routine procedures for handling blood or body fluids,

regardless of whether students known to have AIDS are enrolled.

The judge denied a preliminary injunction because the potential harm to the public from Eliana's lack of control of her bodily secretions outweighed the harm to her. The case went to trial, where the medical authorities relied upon were virtually the same, with the significant new evidence that the Centers for Disease Control had revised the universal precautions for health care workers; universal precautions were required only for bodily fluids containing visible blood. Still relying, nevertheless, on the AAP recommendations as to school children (all bodily secretions), the judge ruled that, until Eliana is continent and ceases mouthing her fingers, she must be placed in a separate glassed-in room, in auditory and visual contact with the TMH classroom. Even when she is allowed in the classroom, she was to have a full-time aide to ensure reasonable separation from other children. 692 F. Supp. 1293.

The Eleventh Circuit vacated and remanded the decision. Interpreting Arline and the EHA, the court of appeals set the following guidelines for trial courts: 1) decide what an appropriate education is were it not for AIDS; (2) decide if the child is "otherwise qualified" for that placement, that is, if reasonable medical judgment and the state of medical knowledge indicate a significant risk of contagion. Do this by assessing (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk, (c) the severity of the harm, and (d) the probability of transmission which will cause varying degrees of harm; (3) determine if reasonable accommodation would reduce the risk and make the individual otherwise qualified, bearing in mind the requirement that to the maximum extent appropriate, the child is to be educated in the least restrictive environment. The court ruled that Judge Kovachevich had not made an overall assessment of risk, and could not conclude there was a significant risk having found only a "remote theoretical possibility" of transmission of AIDS by tears, saliva and urine. Moreover, the trial court must assess the effect (including psychological and educational effect) of the proposed accommodation on the child.

On remand, Judge Kovachevich received additional evidence. Significantly, in 1988, the AAP had amended its recommendations to state that "[s]tudents who display biting behavior or who have exudative, weeping skin sores that can-not be covered require a more restrictive school environment until more is known about the transmission of the virus in these circumstances," eliminating the reference to control of bodily secretions. Also, one of

Eliana's doctors changed his assessment of the risk to other children, although he found a full-time aide necessary to protect Eliana from infection. While the judge might have rested her decision on the new position of the AAP, she gave weight to the fact that Eliana's behavior had improved, such that there was substantial compliance with the judge's previously stated condition for Eliana's return to the classroom. Thus, the judge determined that, following the court of appeals' standard, there was no significant risk requiring Eliana's exclusion from the classroom, so there was no need to assess the effect of any accommodations. She reiterated that the school nurse should be consulted if any question were to arise about Eliana's attendance in the classroom on a particular day.

Based on then-current medical information from the Surgeon General of the United States, the Centers for Disease Control, the American Red Cross, the American Medical Association, and the AAP, all other courts have uniformly found that a child with AIDS should be placed immediately in the regular classroom. In issuing an injunction to require admission of a child to a regular kindergarten class, the judge in Thomas stated, "There are no reported cases of the transmission of the AIDS virus in a school ... . The overwhelming weight of medical evidence is that the AIDS virus is not transmitted by human bites, even bites that break the skin. ... Ryan poses no risk of harm to his classmates and teachers. Any theoretical risk of transmission of AIDS virus by Ryan in connection with his attendance in regular kindergarten class is so remote that it cannot form the basis for any exclusionary action by the School District;" 662 F. Supp. at 380.

In Dolton, the court concluded that "there is no significant risk of transmission of AIDS in the classroom setting." 694 F. Supp. at 445. The court quoted the Surgeon General:

> None of the identified cases of AIDS in the United States are known or are suspected to have been transmitted from one child to another in school, day care or foster care settings. Transmission would necessitate exposure of open cuts to the blood or other body fluids of the infected child, a highly unlikely occurrence. Even then, routine safety procedures for handling blood or other body fluids ... would be effective in preventing transmission from children with AIDS to other children in school. ... Casual social contact between children and persons infected with the AIDS virus is not dangerous.

694 F. Supp. at 446, citing U.S. Public Health Service, Surgeon

General's Report on Acquired Immune Deficiency Syndrome (1986) at pages 23-24.

In Ray, Judge Kovachevich ordered placement of hemophiliac, AIDS-infected boys in an integrated classroom, with added stipulations that open lesions he covered, contact sports be avoided, and the boys be provided clear sex education on the transmission of AIDS. Like other judges, she quoted the Centers for Disease Control:

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

666 F. Supp. at 1532.

Similarly, in a case regarding a teacher with AIDS, Chalk v. U.S. District Court, Central District of California, 840 F. 2d 701(9th Cir. 1987), the court found no risk from the teacher's presence in the classroom. Relying on similar authorities, such as the Surgeon General, the Centers for Disease Control, the American Medical Association, and the Institute of Medicine of the National Academy of Sciences, the court ordered the teacher returned to the classroom immediately. 840 F.2d at 712.

In every case, courts have relied on then current medical knowledge, recognizing that changes in that knowledge would necessitate reassessment of a decision. It is notable that the placement process required by Section 504 is consistent with the team approach recommended by medical authorities for determining the appropriate education and setting for a child with AIDS. Moreover, the standard applied by the courts in determining whether a child is "otherwise qualified" is similar to considerations of a placement team deciding whether a child can be educated in the regular educational environment with the use of supplementary aids and services.

The case law strongly suggests that placement decisions should be made by a group of persons similar to that required by the regulation. In all placement decisions, the information needed by

the placement team tends to vary with the handicapping condition. In the case of a child identified as having AIDS, the placement group must have the benefit of the latest reliable public health information with regard to the risks that the disease entails. This information would be considered along with information on the child's medical condition, behavior, and so forth.

IV. Does a Child With AIDS Have a Right to Section 504 Procedural Safeguards?

The Section 504 regulation at 34 C.F.R. § 104.36 states:

> Procedural safeguards. A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

Section § 104.33(a), quoted earlier, requires that school districts provide children with AIDS a free appropriate public education. Section 104.33(b) states that an appropriate education is based on adherence to procedures that satisfy the requirements of §§ 104.34. 104.35 and 104.36. This would appear to mean that children with AIDS have a clear right to procedural safeguards as a necessary component to the provision of FAPE.

A contrary reading of § 104.36, however, might suggest that children who need neither special education nor related services could not avail themselves of procedural safeguards. We believe such a ruling would not comport with the philosophy of the regulation or the constitutional rights of handicapped children. First, the exact words used in the regulation should be noted. Section 104.36, without mentioning "special education," states that procedural safeguards are available to handicapped persons "believed to need special instruction or related services." (Emphasis added.) "Special instruction" includes any restriction or modification to the program the child would have had were he or she free of AIDS.

Second, and more important, fundamental fairness suggests that any attempt to stigmatize a child handicapped by AIDS by excluding or isolating the child impinges on a liberty interest that triggers a constitutional right to due process. The case law regarding children with AIDS cited above emphasizes the trauma and stigma that would result from isolating the child (Robertson, 684 E Supp. at 1005; Ray, 666 F. Supp. at 1535; Dolton, 694 F. Supp. at 447) and the inherent right to attend school with other children (Martinez, 711 E Supp. at 1071). Moreover, provision of procedural safeguards, regardless of whether a child is in special education," is strongly buttressed by the constitutional roots of Section 504 and the EHA. In enacting the EHA, Congress drew on the case law establishing a constitutional right of handicapped children to FAPE. The writers of the Section 504 regulation relied on that same case law.

Appendix A to the regulation makes abundantly clear that the Department of Education will not review placement and other educational decisions except in extraordinary circumstances. The provision of procedural safeguards is a primary method by which OCR avoids intrusion into this sensitive area. Further, the procedural provisions in § 104.36 of the Section 504 regulation embody the important concept of parental participation which is otherwise absent from Subpart D. As stated in the Appendix, OCR's emphasis is on ensuring that school districts comply with the "process" requirements of Subpart D. We conclude that, consistent with the requirement of § 104.33(b) that provision of an appropriate education requires adherence to § 104.36, the procedural safeguards afforded by the regulation ought to be applied to children handicapped solely because of AIDS.

V. Does a Child with AIDS Have a Right to Confidentiality?

The Section 504 regulation contains no provision regarding confidentiality, although other Federal laws have confidentiality requirements. [7] However, the regulation at 34 CFR § 104.4(b)(1)(iv) states that a recipient may not

> Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

Singling out children handicapped with AIDS for treatment that differs from that provided to nonhandicapped children or children

with other kinds of handicapping conditions with respect to confidentiality would constitute different treatment on the basis of handicap, in violation of the regulatory provision cited above.

While this provision would not affect state and local public health rules as to the duty to report specified diseases to public health departments, the medical authorities and case law cited herein suggest that AIDS would not ordinarily be the basis for public health exclusion on the basis of contagiousness. If the parents or the child's doctor believes the child has a contagious opportunistic infection warranting exclusion, the child would be treated like nonhandicapped children with the same disease.

Conclusion

The following policies will be applied to children handicapped solely by reason of AIDS:

· The regulatory definition of a handicapped person will be applied to children with AIDS, who are virtually always "regarded as handicapped" within the meaning of this definition.

· Children handicapped solely by reason of AIDS are "qualified" if they meet the age-related regulatory definition.

· Unless currently presenting a risk of contagion due to the stage of the disease, a child with AIDS will remain in the regular classroom.

· A full evaluation is not required when neither recipients nor parents believe that a child is in need of special education or related services.

· In all other respects, school districts should apply to children with AIDS the process and procedures required by the Section 504 regulation. Placement decisions must be made drawing on all relevant sources mentioned in the regulation, including the latest medical information on AIDS. The group of persons making the placement decision must include persons knowledgeable about the meaning of that information.

· All procedural safeguards required in Subpart D of the regulation apply to children handicapped solely by reason of AIDS.

· Children with AIDS may not be subjected to different treatment with respect to confidentiality.

If you have questions about the content of this memorandum, you may call Cathy H. Lewis at 732-1635 of Jean P. Peelan at 632-1641.

NOTES:

[1] Letter from C. Everett Koop, M.D., Surgeon General, to Douglas Kamiec, Esq., Acting Assistant Attorney General, Office of legal Counsel, Department of Justice. July 29, 1988.

[2] The memorandum, noting also the physical inability to by healthy children, applied the standard developed by the Supreme Court in School Board of Nassau County v. Arline, 107 S.Ct. 1123 (1987) (Arline, an employment case, to the definition of "otherwise qualified" in all nonemployment contexts. As discussed below, a more careful application of the various specific regulatory definitions of "qualified" is required.)

[3] The analysis in this memorandum focuses on AIDS cases in schools, although cases in all other contexts have been reviewed.

[4] In some cases, courts have found that the child, not needing special education, was not handicapped for purposes of the Education of the Handicapped Act (EHA). Robertson, 684 P. Supp. at 1007 (plaintiff, not handicapped under EHA, is handicapped and otherwise qualified within meaning of Section 504); Belleville, 672 F. Supp. at 345-46 (no action under EHA, but Section 504 complaint would not be dismissed) (NB.: both cases are S.D. Ill.) See also District 27 Community School Board v. New York City Board of Education, 502 N.Y.S. 2d 325 (Sup. 1986) (handicapped under Section 504, not EHA).

[5] Appendix A to the Section 504 regulation explains why the regulation does not employ the statutory language "otherwise qualified handicapped person," in order to comport with statutory intent (App. A ¶ 5).

[6] Similarly, the Department of Justice memorandum of September 27, 1988, referenced above, which concludes that Section 504 protects victims of the AIDS virus, applies to school children language more appropriate to employment cases.

[7] The recipient can contact the Office of Special Education and Rehabilitative Services and the Family Policy and Regulatory

Staff in the Department of Education for guidance on Federal confidentiality requirements.