1986 WL 728013 (U.S.) (Appellate Brief)
Supreme Court of the United States.

SCHOOL BOARD OF NASSAU COUNTY, Florida, et al., Petitioners,
v.
Gene H. ARLINE, Respondent.

No. 85-1277.
October Term, 1986.
September 19, 1986.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Brief of the Employment Law Center, National Gay Rights Advocates, Bay Area Lawyers for Individual Freedom, and Lambda Legal Defense and Education Fund as Amici Curiae in Support of Respondent

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*i QUESTIONS PRESENTED

1. Whether tuberculosis, like other impairments which substantially limit major life activities, constitutes a "handicap" within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

2. Whether an individual who has tuberculosis is automatically precluded from being "otherwise qualified" for a teaching job, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, without any consideration of how that individual might have been accommodated.

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***1 INTEREST OF AMICI**

Amici are legal rights and professional organizations interested in the protection and furtherance of the rights of disabled individuals, including those who have infectious diseases and those perceived to have infectious diseases.

The Employment Law Center is a project of the Legal Aid Society of San Francisco. For many years the Center has pursued the rights of disabled individuals, including persons with cancer, epilepsy, back problems, vision problems, and, more recently, Acquired Immune Deficiency Syndrome ("AIDS"). These concerns have been the focus of many of the Center's projects, including the Disability Employment Rights Project, the Medical ***2** Standards Project, the Disability and Employment Advocacy Project and the AIDS and Employment Project. The Center also sponsors two projects funded by the California and National American Cancer Societies: the Cancer Employment Law Education Law Education Project and the National Cancer Employment Law Project.

National Gay Rights Advocates ("NGRA") is a public interest legal organization dedicated to the protection and furtherance of the civil rights of gay men and lesbians. NGRA currently represents a number of people with AIDS in employment discrimination litigation.

Bay Area Lawyers for Individual Freedom ("BALIF") is a professional organization of over 400 gay and lesbian attorneys who practice law in Northern California. In the past three years, BALIF members have provided hundreds of hours of *pro bono* legal services to people with AIDS.

Lambda Legal Defense and Education Fund, Inc. ("LAMBDA") is a national public-interest organization which engages in test case litigation and educational programs on issues concerning the rights of lesbians and gay men. Because of the tremendous impact of the AIDS crisis on the gay community, LAMBDA has litigated several test cases involving AIDS-related issues.

Lambda has also been involved in litigation concerning the applicability of handicap discrimination laws to AIDS since the issue first arose.

SUMMARY OF ARGUMENT

This action arises under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1985), which prohibits discrimination against any "otherwise qualified handicapped individual" in any federally-assisted program or activity, or in any program conducted by the federal government. Section 504 was adopted to protect disabled individuals [1] from the irrational prejudice they ***3** often face. The materials submitted by the Petitioners and the United States Department of Justice, however, appeal to the same irrational prejudice that Section 504 is designed to combat.

The Court's Writ of Certiorari is limited to two narrowly-drawn questions: 1) whether tuberculosis constitutes a handicap within the meaning of Section 504; and 2) whether a person with that disease is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of the statute. The Petitioners and the Department of Justice go beyond these questions to discuss imagined consequences of protecting a variety of individuals with different diseases from discrimination. Petitioners have lodged with the Court a recent Department of Justice memorandum entitled "Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus," (June 20, 1986) [2] in an attempt to exploit the public hysteria surrounding the AIDS epidemic. Petitioners raise the issue of AIDS even though this case involves only the very different illness of tuberculosis. Petitioners apparently hope to create an unwarranted fear for public safety to prompt the Court into ruling on issues which are not before it. Yet Petitioners do not advise the Court of the most important fact about AIDS: it cannot be transmitted in the workplace. [3]

***4** Petitioners attempt to convince the Court to adopt a bright-line rule that *no* infectious disease [4] is a "handicap," within the meaning of Section 504. Petitioners and the Department of Justice acknowledge that the physical and mental impairments of a disease may be handicaps. However, a disease cannot be separated from its inherent effects. Petitioners' argument disregards the very language and history of the Rehabilitation Act of 1973. The definition of "handicapped individual" clearly includes a person with an infectious disease.

Petitioners and the Department of Justice also argue that Section 504 does not protect individuals with infectious diseases from employment discrimination where the employer believes that the individual's disease may be communicated to others in the workplace--*even if the employer has no basis in fact for its belief.* Creating such an exception to Section 504 would enable any grantee [5] to defend discrimination against disabled persons by resort to the very stereotypes about disabled persons Section 504 was designed to combat. Unfounded notions about an individual's fitness for a particular position are not accepted as defenses to any other type of action for discrimination. The Court should not make an exception in this case.

A person whose employer can prove that he has a disease which is communicable to others in the workplace, and for whom no "reasonable accommodation" can be made, is excluded from protection under Section 504. The purpose of Section 504--to protect disabled individuals from irrational prejudice and stigma--is served only by case-by-case consideration of the danger that a particular handicapped person will spread a particular illness in a particular environment.

*5 ARGUMENT

I.

INFECTIOUS DISEASES CAN BE "HANDICAPS" WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. § 794

A. The Court of Appeals Correctly Ruled that Tuberculosis Falls Neatly Within the Statutory Scheme

The question in this case is whether Section 504 applies to individuals suffering from infectious diseases. Respondent was discharged as an elementary school teacher by Petitioner when she suffered three relapses of tuberculosis in a 17-month period. The District Court held that contagious diseases were not handicaps under Section 504. (Petitioners' Appendix C. at 14). The Court of Appeals reversed, holding that "persons with contagious diseases are within the coverage of Section 504," *Arline v. School Board of Nassau County*, 712 F.2d 759, 764 (11th Cir. 1985), and remanded the case to develop a factual record to determine whether Respondent was "otherwise qualified" under Section 504. [6] Petitioners and the Department of Justice seek to reinstate the District Court's ruling. [7]

The language of Section 504 and its accompanying regulations outline a broad prohibition of discrimination against the handicapped. Section 504 reads, in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination ***6** under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794. For the purposes of Section 504, a "handicapped individual" is defined as:

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

29 U.S.C. § 706(7)(B). Regulations promulgated by the Department of Health and Human Services ("DHHS") provide detail to the statutory definition. A "physical or mental impairment" is:

> (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i)(1985). "Major life activities" are "functions such as taking care of one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. § 84.3(j)(2)(ii)(1985). [8]

***7** As the Court of Appeals ruled below, a person suffering from tuberculosis fits "neatly" into this statutory framework. *Arline*, 772 F.2d at 764. (Pet. App. A at 8). Tuberculosis constitutes a physical impairment within Section 504 since it affects the lymphatic and respiratory systems. Joint Appendix ("J.A.") at 7; Brief of the American Medical Association as *Amicus Curiae* Supporting Petitioners at 4-8. Further, as Respondent's personal history reveals, tuberculosis substantially limits "major

life activities," such as breathing and working, at some point. Although Respondent is apparently not currently suffering the debilitating physical effects of tuberculosis (*see* J.A. at 20, 31), she is still "handicapped." [9]

Petitioners argue that even if an infectious disease is a handicapping condition, discrimination against a person with a disease does not constitute discrimination against a "handicapped individual" if that discrimination is motivated by a fear (whether or not medically justified) that the victim is contagious. This argument is more bluntly asserted in the brief submitted by the United States Department of Justice as *Amicus Curiae* Supporting Petitioners at 10-23. [10] The Court should reject the Petitioners' ***8** invitation to create a common-law "fear of contagion" exception to the scope of Section 504.

The flaw in the Petitioners' and Department of Justice's reasoning is in separating the effects of a disease from the disease itself. Such a distinction is inconsistent with the legislative history of Section 504. [11] Moreover, the Department of Justice's reasoning, if applied to all handicaps, would allow discrimination based upon irrational stereotypes about handicapped persons because such stereotypes may concern matters other than the physical or mental effects of a particular handicap. For example, an employer who honestly (but irrationally) believes that individuals suffering from diabetes, cancer or glaucoma are contagious would be free to discriminate against individuals with these conditions. [12] Such ***9** licensed discrimination on the basis of irrational stereotypes would defeat the purpose of Section 504. [13] *See Strathie v. Department of Transportation*, 716 F.2d 227, 231 (3d Cir. 1983) (Section 504 protects handicapped individuals from employment discrimination based on irrational prejudice and stigmatizing stereotypes.)

While a court must evaluate the effects of a disease to determine if it is a physical impairment which substantially limits a major life activity, or is regarded as such, once that evaluation is made, the disease itself can be classified as a handicap. Discrimination against a person who is (or is perceived to be) contagious is discrimination based solely upon the disease and therefore solely upon the handicap.

The Department of Justice also argues that an individual with an infectious disease is not "handicapped" within the meaning of Section 504 unless the disease causes "an inability to perform certain physical or mental functions." *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, at 16 n.14. This argument is contrary to the express language of Section 504. It would exclude from the scope of Section 504 an individual who has a history of a handicap or who is regarded as having a handicap. Such an individual is clearly protected by Section 504. 29 U.S.C. § 706(7)(B) (1985).

Moreover, societal aversion to a disability may alone make it a handicap. For example, the Department of Health and Human Services has found that a "cosmetic disfigurement" may be a handicap. 45 C.F.R. § 84.3(j)(2)(i). [14] Although this type of ***10** disability may have no direct physical or mental effect on an individual, irrational societal stereotypes may substantially limit his work opportunities or other major life activities. [15] Finally, the cases cited by the Department of Justice to support its strained reading of Section 504 either are inapposite or support our analysis of that section. [16]

***11 B. Congress Enacted the Rehabilitation Act With a Strong Remedial Purpose and Intended It To Be Broadly Construed and Applied**

Section 504 is specifically designed to include unforeseen handicaps. "The definition [of 'handicapped individual'] does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list." 45 C.F.R. Part 84, App. A., at 310. Thus, contrary to Petitioners' suggestion, Petitioners' Brief at 23-25, Congress' failure to explicitly *list* tuberculosis or other infectious diseases indicates that Congress intended to create a broader definition of handicap by *describing* handicapping conditions rather than listing them. [17] In fact, Congress explicitly intended to include within Section 504 individuals who had recovered--in whole or in part--from medical

disorders. [18] Section 504 was also meant to combat discrimination against disabled persons stemming from ignorance and indifference as well as malice. [19]

The Supreme Court has read Section 504 broadly to give effect to its purpose. In *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), the Court held that Section 504 applied to all programs receiving federal aid and not just to employment-related ***12** programs. [20] The Supreme Court has also held that Section 504 requires grantees to provide "meaningful access" to program benefits, *Alexander*, 105 S. Ct. at 721, and "reasonable" modifications to existing programs. *Southeastern Community College v. Davis*, 442 U.S. at 412-13.

The amendments to the Rehabilitation Act also evidence an intent of broad coverage. As originally enacted in 1973, the statute focused its definition of handicap almost exclusively on employability. "Handicapped individual" included only an individual "who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment *and* (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services...." Rehabilitation Act of 1973, Pub. L. 93-112, § 7(6), 87 Stat. 355, 361 (emphasis added).

Realizing that a definition of handicap based upon employability was inadequate, Congress amended the Act in 1974 to include all handicaps which "substantially limit[ ] ... major life activities ..." Rehabilitation Act Amendments of 1974, Pub. L. 93-516, § 111(a), 88 Stat. 1617, 1619. The amendment was intended "to include within Section 504 individuals who may have been unintentionally excluded from its protection by the original definition of handicapped individuals which over-emphasized employability." *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1285 n.25 (7th Cir. 1977). [21] Indeed, Congress noted that employability was "irrelevant to the many forms of potential discrimination covered by Section 504." S. REP. NO. 1297, 1974 U.S. CODE CONG. & AD. NEWS at 6388. That Congress rejected a narrow definition of "handicapped individual" ***13** in favor of a much broader definition demonstrates its broad remedial goals. [22]

In 1978, Congress reaffirmed its broad view of Section 504 with further amendments. It added a new section to the Rehabilitation Act, now codified at 29 U.S.C. § 794a, which confirmed its intention to create a private right of action for violations of the Rehabilitation Act anti-discrimination provisions. Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978, Pub. L. 95-602, Title I, § 120(a), 92 Stat. 2995, 2982. *See Prewitt v. United States Postal Service*, 662 F.2d 292, 302-03 (5th Cir. 1981) (discussing the private right of action following the 1978 amendments). [23]

***14** Where Congress wished to exclude specific conditions from Section 504 protection, it did so explicitly. In 1978, Congress amended the Rehabilitation Act to remove individuals:

> whose current use of alcohol or drugs prevents [them] from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Pub. L. 95-602, § 122(a)(1), 92 Stat. at 2984-2985. [24] Congress' failure to specifically exclude infectious diseases leaves them within the scope of Section 504.

C. States With Physical Handicap Laws Analogous to Section 504 Have Interpreted Those Laws to Apply to AIDS

All states, and the District of Columbia, currently have laws or executive orders which prohibit discrimination on the basis of handicap. [25] Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681, 690 (1985). Though the definitional language varies among the states, the most common terminology is borrowed from the federal Act: a "handicapped individual" is one who "has a physical or mental impairment which substantially limits one or more of such

person's ***15** major life activities." [26] *Id.* at 691. Some other s?? provide different, but equally wide-ranging definitions. *id.* at 692-95 (concluding that AIDS would textually qualify under m??st state statutes); five states provide no statutory definiti?? "handicap." *Id.* at 692 n.48.

Only two states explicitly exclude "communi??e ??ses" from their definition of "handicap." Ga. Code Ann. § ??(b) (1982); Ky. Rev. Stat. Ann. § 207.140(2)(c) (B?? 1981)?? The implication of these exclusions is clear?? explicit legislative intent, the definition of "handicap" encom??asses communicable diseases such as AIDS. [27] Indeed?? enforcement and human rights agencies in at least thirty-one jurisdi?? have concluded that communicable diseases are pro?? handicaps under state law or are willing to accept AIDS comp??. [28]

In at least three states decisions have been render?? persons with AIDS. In *People v. 49 West 12 Tenan?? Corp.*, No?? 43604/83 (N.Y. Sup. Ct. Oct. 7, 1983), the New York State ***16** Attorney General, having determined that AIDS was a protected disability within the New York Human Rights Law, N.Y. Exec. Law §§ 290-301, FAIR EMPL. PRAC. LAWS (BNA) No. 531, at 455:3005-3018 (Jan. 1, 1986) [29] brought suit against a cooperative for its refusal to renew the lease of a doctor who treated AIDS patients. *See* N.Y.L.J., October 14, 1983, at 1, col. 1. The court denied a motion to dismiss for failure to state a claim, concurring with the Attorney General's conclusion that AIDS fits within the statutory framework. [30]

In *Shuttleworth v. Broward County Office of Mgmt. & Budget*, 2 EMPL. PRAC. GUIDE (CCH) ¶ 5014 (F.C.H.R. Dec. 11, 1985), the Florida Commission on Human Relations issued an opinion that AIDS is "within the coverage" of the Florida Human Rights Act, Fla. Stat. §§ 760.01-760.10 (1985). The Florida law does not define "handicap," but the Commission applied a "meaning accorded by common usage" to determine that persons afflicted with AIDS are protected from discrimination by state law. 2 EMPL. PRAC. GUIDE (CCH) ¶ 5014, at 6027. The Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations reached a similar conclusion in its recent ***17** finding of illegal employment discrimination based on AIDS. *Racine Education Association v. Racine United School District*, 1 AIDS POL. & L. (BNA) No. 9, at 1 (ERD--Wis. DILHR April 30, 1986).

In most other states, cases involving AIDS and other infectious diseases have not yet reached a decision phase. Nevertheless, in at least twenty-eight other jurisdictions, the administrative agency charged with enforcing the physical handicap discrimination laws has determined that AIDS is a protected handicap, [31] or has ***18** indicated its willingness to accept AIDS-based discrimination complaints. [32] The states' interpretations of their own antidiscrimination laws as covering infectious diseases demonstrates that the application of Section 504 to disease handicaps would not conflict with state public health laws.

D. Prohibiting Irrational Discrimination Against Disabled Persons Would Not Thwart Public Health Laws

The Department of Justice argues that public health laws would be hampered were the Court to fail to create a "fear of contagion" exception to the scope of Section 504. Brief for the ***19** United States as *Amicus Curiae* Supporting Petitioners, at 17-18. Yet all states have statutes or regulations prohibiting discrimination against otherwise qualified handicapped persons, and most of the states with such laws recognize that persons with infectious diseases are "handicapped." No state which recognizes that discrimination against a person with an infectious disease is discrimination against a "handicapped person" has created a wholesale "fear of contagion" exception to its antidiscrimination laws. This is because there is no contradiction between reasonable public health measures designed to control the spread of infectious disease and legal protection from discrimination of "otherwise qualified" persons with infectious diseases who pose no significant risk to the safety of others. [33]

Public health laws contemplate isolation for only a very few diseases. *See* discussion in Brief of the State of California as *Amicus Curiae* Supporting Respondent at Section I. A. In California, complete isolation is required only for victims of bubonic plague, cholera and diptheria. *Id.* A person with one of these diseases is likely to pose a significant risk to the safety of others in the workplace which cannot be reduced through modifications and therefore is probably not protected by Section 504.

Nor can it be argued that the understanding of Section 504 advanced in this brief would for the first time subject public health regulation to judicial scrutiny. Courts have long reviewed the exercise of state police powers in the public health context to insure compliance with federal constitutional requirements. *E.g.*, *Camara v. Municipal Court of The City and County of San Francisco*, 387 U.S. 523 (1967) (warrantless residential health, fire and housing inspections held unconstitutional); ***20** *Jacobson v. Massachusetts*, 197 U.S. 11, 38-39 (1905) (mandatory vaccination statute upheld, with the suggestion that compulsory vaccination of adults medically unable to withstand vaccination is impermissible); *Jew Ho v. Williamson*, 103 F. 10 (C.C.D. 1900) (quarantine of entire Chinatown district of San Francisco invalidated). *See generally* Burris, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL. REV. 479, 484-96 (1985).

Moreover, courts reviewing public health actions typically insist that such actions be justified by medical necessity and supported by medical evidence. *E.g.*. *Jew Ho v. Williamson*, 103 F. at 21-23. *See generally* Burris, 3 YALE L. & POL. REV. at 484-96. There is no reason the Supreme Court should permit a lower standard for determining whether an individual is protected by Section 504. [34] The Supreme Court would not permit a state to impose restrictive public health measures on the basis of a good faith but medically unfounded belief that an individual poses a risk to the health and safety of others. Similarly, it should not permit grantees to discriminate on the basis of such a belief. [35]

***21 II.**

RESPONDENT MAY BE "OTHERWISE QUALIFIED" FOR HER JOB GIVEN "REASONABLE ACCOMMODATION" OF HER HANDICAP BY PETITIONERS

A. Determining Whether a "Handicapped Individual" Is "Otherwise Qualified" Requires a Case-By-Case Analysis

Courts consider the particular facts of a case in determining whether a disabled individual is "otherwise qualified" for the position sought. [36] The Supreme Court has reasoned that:

the question of who is "otherwise qualified" and what actions constitute "discrimination" under [Section 504] would seem to be two sides of the same coin; *the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped.*

Alexander v. Choate, 105 S. Ct. at 720 n.19 (emphasis added). Consequently, Section 504 involves a balancing of the facts on a case-by-case basis. In *Alexander*, the Supreme Court concluded that:

> *Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.

105 S. Ct. at 720. The language of Section 504, its implementing regulations, the evidence of Congressional intent, and the Supreme ***22** Court's construction all require individualized consideration of a person's handicap.

Handicaps come in almost infinite varieties and degrees. [37] The feasibility of accommodating handicaps in different working situations, and educational and other programs, is just as varied. The balance required by *Alexander* can only be struck through careful consideration of what is reasonable in individual cases. Since the evaluation of whether a disability is a handicap under Section 504 is so fact specific, the Supreme Court should not render a blanket ruling that diseases thought to be contagious are not handicaps. Such a blanket ruling would eviscerate the Act. Courts "cannot, in the absence of an unmistakable directive,

construe [a statute] in a manner which runs counter to the broad goals which Congress intended it to effectuate." *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1967) (Clayton Act as amended by Robinson-Patman Act).

B. Petitioner Bears the Burden of Proving that Accommodation Is "Unreasonable"

The language of Section 504 makes it apparent that Congress intended it to be part of the general corpus of discrimination law. *New York State Association for Retarded Children, Inc. v. Carey*, 612 F.2d at 649. It is a well-established principle of discrimination law that once the plaintiff has established a *prima facie* case that he has suffered discrimination, the defendant must present evidence to rebut the inference of illegality. *E.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (Title VII of the 1964 Civil Rights Act). [38] The DHHS regulations implementing Section 504 provide that:

***23** A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee *unless the recipient can demonstrate* that the accommodation would impose an undue hardship on the operation of its program.

45 C.F.R. § 84.12(a) (1985) (emphasis added).

Following the Supreme Court's decision in *Davis*, the Fifth Circuit in *Prewitt* held that the burden of showing inability to accommodate a handicap rests with the employer because:

> The employer has greater knowledge of the essentials of the job than does the handicapped applicant. The employer can look to its own experience, or, if that is not helpful, to that of other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question. Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources.

662 F.2d at 308. Persons with disabilities who can perform the required work with reasonable accommodation are "otherwise qualified" and thus protected by the Rehabilitation Act. [39] Similarly, an individual may be "otherwise qualified" even if he or she cannot meet all of a program's requirements. "This is the case when the refusal to modify an existing program to accommodate the handicapped individual would be unreasonable ..." *Strathie v. Department of Transportation*, 716 F.2d 227, 230 (3d Cir. 1983).

***24** Section 504 is designed to insure that decisions about the handicapped are not made as a result of fear, stereotypes or prejudice. S. REP. No. 1297, 93 Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373. Accordingly, grantees are obligated to make reasonable decisions based on rational, individualized, medical judgments about the nature, degree and duration of the handicap and the risk to third parties. In this respect, we agree with the position taken by the American Medical Association as *amicus curiae* in this case:

> rather than allowing employers to act irrationally toward such handicapped individuals based on a fear of a perceived danger to third parties, the better course, as set forth in *Southeastern Community College [v. Davis]* is to focus on the issue of whether the handicapped individual is "otherwise qualified."

Brief for American Medical Association As *Amicus Curiae* Supporting Petitioners at 25.

A grantee's decisions often have been subjected to judicial scrutiny to effect Section 504. For example, in *Pushkin v. Regents of the University of Colorado*, the defendant university had denied the plaintiff admission to its psychiatric residency program because of his multiple sclerosis. The university argued that its assessment of Pushkin's capabilities were entitled to great

deference and could only be reversed if shown to be not reasonably related to a legitimate state purpose. 658 F.2d at 1383. [40] The *Pushkin* court explicitly rejected such a "rational basis" analysis, reasoning that Section 504 places a higher burden on a defendant once a plaintiff has established a *prima facie* case of handicap discrimination. *Id.* at 1384-85. Judicial deference to a grantee's apparently discriminatory decision is simply at odds with the purpose of Section 504 since any grantee could insure itself an ***25** absolute defense by rationalizing its decision upon a seemingly non-discriminatory ground. [41]

A grantee may argue, as an *affirmative defense* to an action under Section 504, that an individual is not otherwise qualified because his presence in the workplace would pose a significant risk to the safety of others. *See New York State Association for Retarded Children, Inc. v. Carey,* 612 F.2d at 650 (exclusion of hepatitis B carrier children from public school barred by section 504 because school board unable to demonstrate that a serious possibility of transmittal existed); Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of The Rehabilitation Act of 1973,* 69 CORNELL L. REV. 401, 463-67 (1984). The "public safety" defense thus permits a grantee to refuse to employ an individual with a contagious disease if it can prove, with reliable medical evidence, that the individual poses a significant possibility of transmitting the disease in the workplace, despite the grantee's reasonable efforts to reduce that possibility.

Petitioners, and the Department of Justice as *amicus curiae,* would have the courts abdicate their duty to scrutinize grantee decisions about persons with handicaps. Petitioners' Brief at 39-41; Brief for the United States as *Amicus Curiae* Supporting Petitioners, at 26 ("we see no basis for second-guessing either the school board's assessment of the health risks presented [by Respondent's handicap] or its determination that those risks were unacceptably high"). In a similar vein, the Department of Justice would allow grantees to affirmatively discriminate against persons with communicable diseases, more specifically those with AIDS, based on nothing more than the grantee's claim of a fear of contagion--whether reasonable or not. DOJ Opinion at 31. This strained interpretation of the statute does violence to the fundamental congressional purpose of Section 504, which is to protect handicapped persons against discrimination based on irrational stereotypes.

***26** It is axiomatic that Section 504 requires employers to do something more for the handicapped than for the non-handicapped. To read the statute otherwise would reduce its language to a hollow platitude because "the handicapped typically are not similarly situated to the non-handicapped." *Alexander,* 105 S. Ct. at 719.

> Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance.... *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers.

Alexander, 105 S. Ct. at 722; *see also Holland v. Boeing Co.,* 583 P.2d 621, 623 (Wash. 1978) ("Identical treatment may be a source of discrimination in the case of the handicapped...").

Accordingly, courts must scrutinize grantee policies or job requirements which adversely affect disabled persons. Allegations that challenged policies are justified by potential injury to others must be based on informed and reasoned judgment about the particular handicapping condition of the particular individual affected. In this case, Petitioners have made no medically-defensible showing that Respondent's condition poses a significant risk to others. Rather, in the courts below, they have relied on broad conclusions about tuberculosis in general (J.A. at 11-12). The case should be remanded to develop the particular facts of Respondent's condition.

Once a person with a disease has established a *prima facie* case of discrimination, the burden shifts to the grantee to demonstrate, with sound medical evidence, that the disabled person cannot be reasonably accommodated in its program without significant risk to others. [42] To allow grantees to exclude persons from programs ***27** based upon a fear of contagion without reliable

medical evidence of any significant harm would permit the very discrimination based upon irrational beliefs which Section 504 prohibits.

C. The Accommodation Respondent Requests May Be "Reasonable" Under Section 504

The District Court erred in concluding that Respondent was not "otherwise qualified" without considering the available means of minimizing any risk she posed. The types of accommodation Respondent requests Petitioner to consider are facially reasonable under the relevant regulations. A leave of absence or a change in teaching duties to allow Respondent to teach older children would not necessarily impose undue financial or administrative burdens on the school system. The DHHS regulations state that:

> Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) *job restructuring, part-time or modified work schedules,* acquisition or modification of ***28** equipment or devices, the provision of readers or interpreters, and other similar actions.

45 C.F.R. § 84.12(b) (1985) (emphasis added). Further, "[j]ob restructuring may entail shifting nonessential duties to other employees." 45 C.F.R. § 84, App. A, at 316 (1985). While this listing of actions that constitute reasonable accommodation in Section 84 of the regulations is some guide for the courts, "[t]he list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed." *Id.* at 315. A modified work schedule could include a temporary leave of absence. Job restructuring could include changing Respondent's duties to allow her to teach older children or perform administrative tasks. The range of reasonable restructuring may be reflected in an employer's existing policy of providing its workers with employment alternatives.

The range of reasonable restructuring is ultimately determined by a balancing of its effectiveness in allowing the particular handicapped person "meaningful participation" in the workplace environment and the administrative and financial burdens it will impose on the employer. In applying Section 504, courts have performed just such a case-by-case balancing. [43]

In this case, no court has yet addressed the feasibility and reasonableness of the particular types of accommodation Respondent requests. Nor has any court considered whether that accommodation is, under Section 504, a reasonable means to allow a person with her particular disability to be productively employed. Most importantly, however, the District Court record in this case is far from sufficient to permit the informed balancing that Section 504 requires to determine if accommodation of Respondent's handicap is feasible and reasonable.

***29 CONCLUSION**

Amici Employment Law Center, NGRA, BALIF and LAMBDA respectfully submit that the applicability of Section 504 to grantees' decisions affecting persons with infectious diseases should be assessed on an individual basis. Grantees should be required to prove with reliable medical evidence a potential for significant harm, which cannot be avoided through reasonable accommodation, to justify excluding handicapped persons with infectious diseases from their programs. For these reasons, the decision of the Court of Appeals remanding the action for further development of the record should be affirmed.

Footnotes

* Counsel of Record

1 Throughout this brief we use the terms "disabled" and "handicapped" interchangeably. Both are meant to include persons protected by Section 504 because they have impairments which substantially limit major life activities. The disabled community prefers the term "disabled."

2 Hereinafter the "DOJ Opinion."

3 It is now generally understood that although AIDS is an infectious disease, the AIDS virus is spread only by the transfer of body fluids, principally semen and blood, through sexual contact, blood transfusions, sharing needles, or from mother to child in the womb. *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy--Associated Virus in the Workplace*, 34 Morbidity and Mortality Weekly Report 681 (The Centers for Disease Control, November 15, 1985). For a concise description of the epidemiology of AIDS, *see* Burris, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL. REV. 479, 504-08 (1985); Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 684-89 (1985).

4 An "infectious disease" is simply a disease caused by an infectious agent, such as a virus or bacteria. TABER'S CYCLOPEDIC MEDICAL DICTIONARY at 725 (14th ed. 1981). The classification of a disease as "infectious" does not indicate whether or to what extent the disease is contagious. *Id. See also* Brief of the State of California as *Amicus Curiae* Supporting Respondent at Section I. A.

5 As used in this brief, the term "grantee" includes employers and all other recipients of federal funds who are subject to Section 504.

6 The poor development of the factual record regarding the nature of Respondent's tuberculosis and the steps that could have been taken to accommodate her make any final decision by the Supreme Court impossible. *Amici* believe that certiorari was improvidently granted in this case.

7 *See* Petitioners' Brief at 26-28 and Brief of the United States as *Amicus Curiae* Supporting Petitioners at 10-23. Both would implement a subjective "fear of contagion" exception that would eviscerate Section 504's protection of disabled persons who have diseases.

8 The Supreme Court has noted that Section 504 authorizes executive agencies to promulgate regulations prohibiting discrimination against the handicapped. *Bowen v. American Hospital Ass'n*, 106 S. Ct. 2101, 2120 (1986). Thus, the Court has recognized the DHHS regulations, codified at 45 C.F.R. Part 84, as "an important source of guidance on the meaning of § 504." *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712, 722 n.24 (1985) (finding that the 1974 amendments to Section 504 provided executive agencies with "substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination"). Consequently, these regulations are entitled to judicial deference. *Nelson v. Thornburgh*, 567 F. Supp. 369, 379 (E.D. Pa. 1983), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 955 (1985) (DHHS regulations interpreting Section 504 entitled to deference "if consistent with the purposes of the statute."). *See also Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (DHHS regulations entitled to deference). They are certainly entitled to greater deference than is WEBSTER'S THIRD INTERNATIONAL DICTIONARY, selected by the Department of Justice as the source for its definition of "impairment." *See* Brief of the United States as *Amicus Curiae* Supporting Petitioners at 15 n.12.

9 Even though she has been in remission for more than five years, Respondent still has tuberculosis. Others whose diseases (such as cancer) are cured may also be handicapped because they may have a record of or regarded as having a disease. *See* 45 C.F.R. § 84.3(j)(2)(iii) and (iv) (1985).

10 The Department of Justice's argument concludes that "[S]ection 504 simply does not reach decisions based on fear of contagion--*whether reasonable or not*--so long as it is not in truth a pretext for discrimination on account of handicap." DOJ Opinion at 34 (emphasis added).

11 In the Senate Report accompanying the bill which adopted the current definition, diseases such as cancer--*and not merely their effects*--are noted as examples of "handicapping conditions." S. REP. NO. 1297, 93d Cong., 2d Sess, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6389. This view of handicaps was detailed in the implementing regulations, where an illustrative list of diseases *constituting* physical impairments under Section 504 was provided. 45 C.F.R. Part 84, App. A, at 310.

12 Indeed, one commentator demonstrated the weakness of Petitioners' and the Justice Department's analysis by applying it to actions arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e to 2000e-17 (1981). Moore, *An Invitation to Senseless AIDS Bias*, L.A. Times, June 29, 1986, Part V, at 5, col. 4-6. Applied to an action alleging racial discrimination in hiring, the analysis would require a court to distinguish between discrimination on the basis of a job applicant's race *per se* and discrimination on the basis of what the employer believes are the characteristics of the applicant's racial group. Discrimination against an applicant simply because he or she is black would remain illegal. If, however, an employer irrationally believes blacks to be inherently "lazy" and refuses to hire a black applicant on account of his or her assumed "laziness," rather than on account of his or her skin color, the employer would be in compliance with the law. Such a result would, of course, frustrate the very purpose of Title VII.

13 Discrimination based upon fear of contagion, aversion to death, and fear of increased insurance costs are the most common problems cancer patients face. McKenna, *Employment and Insurance Issues for the Cancer Patient*, Proceedings of the Fourth National Conference on Cancer and Nursing at 36-38 (1984); *see also* Canellos, *Ill-Founded Notions: Job Discrimination Against Cancer Patients*, The Boston Phoenix, January 15, 1985, at 1.

14 Another example is Hansen's Disease (leprosy). With treatment, this disease often does not interfere with a person's physical or mental functioning. Nor is it easily transmitted. TABER'S CYCLOPEDIC MEDICAL DICTIONARY, at 808 (14th ed. 1981). Nevertheless, individuals with Hansen's Disease are often shunned because of misconceptions about the disease.

15 The Rehabilitation Act was expressly designed to combat such reactions to a person's condition. Congressman Vanik, in explaining the need for the Act, told of a court ruling excluding a cerebral palsied child from school even though he had no physical problems "because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates." 117 CONG. REC. 45974 (1971) (remarks of Rep. Vanik). Similarly, Senator Humphrey spoke of a desire to prevent discrimination against individuals regarded as "different" or "disturbing." 118 CONG. REC. 525 (1972) (remarks of Sen. Humphrey). Serious burn victims are another example. Congress clearly intended to combat discrimination resulting from aversion to the disabled as well as discrimination based on physical or mental disabilities. *See* text accompanying footnotes 21 and 22, *infra.*

16 *See de la Torres v. Bolger,* 781 F.2d 1134 (5th Cir. 1986) (left-handedness not a job-related impairment; plaintiff dismissed because of poor performance); *Jasany v. U.S. Postal Service,* 755 F.2d 1244, 1250 (6th Cir. 1985) (person with eye impairment not considered handicapped where he was unable to perform only one job using a certain type of machine); *Tudyman v. United Air Lines,* 608 F.Supp. 739 (C.D. Cal. 1984) (individual's exceptionally muscular build causing him to exceed defendant's weight limit was not a handicap because it disqualified plaintiff from only one particular job); *Oesterling v. Walters,* 760 F.2d 859, 861 (8th Cir. 1985) (varicose veins held not to be a handicap because they did not "substantially limit ... major life activities"). These cases hold only that conditions which do not substantially impair an individual's major life activities are not handicaps. None of the authorities cited by the Department of Justice suggest that working is not a major life activity or that individuals who do not currently suffer a physical or mental disability are necessarily not handicapped. In arguing that the definition of "handicapped individual be limited to persons whose ability to perform a physical or mental task" is impaired, the Department of Justice is seeking to return to the employability criterion which Congress explicitly rejected. *See* text accompanying footnotes 21 and 22, *infra.*

17 Even the Department of Justice acknowledges that "courts have generally construed the term ['handicapped'] quite broadly." DOJ Opinion at 18.

18 *See* authority cited in footnote 11, *supra.*

19 The Department of Justice attempts to turn this broad intent on its head, implying that Congress' concentration on indifferent discrimination indicates that it was tolerant of intentional discrimination. Brief for the United States as *Amicus Curiae,* at 8-9. As the Supreme Court noted in *Alexander,* however, Congress' attention to thoughtless discrimination merely indicated a receptivity to disparate impact claims, without in any way diminishing Section 504's prohibition of denials based on discriminatory animus. 105 S. Ct. at 716-17.

20 Section 504 therefore covers all participants--both teachers and pupils--in an educational program receiving federal financial assistance. *E.g., Pushkin v. Regents of the University of Colorado,* 658 F.2d 1372 (10th Cir. 1981) (applying Section 504 to admission policies at a medical school). Both Section 504 and state health laws take public safety into account.

21 *See* detailed discussions of the legislative history in the briefs of members of Congress as *amici curiae* supporting respondent.

22 The Supreme Court has acknowledged the importance of the 1974 amendments:
While these [1974] amendments and their history cannot substitute for a clear expression of legislative intent at the time of enactment, as virtually contemporaneous and more specific elaborations of the general norm that Congress had enacted into law the previous year, the amendments and their history do shed significant light on the intent with which § 504 was enacted.
Alexander, 105 S.Ct. at 724 n.27 (citations omitted).

23 Lower courts have followed Congress' intent by applying Section 504 to a wide variety of medical conditions. *E.g., Treadwell v. Alexander,* 707 F.2d 473 (11th Cir. 1983) (heart condition including coronary by-pass and use of pacemaker); *Doe v. Region 13 Mental Health-Mental Retardation Commission,* 704 F.2d 1402 (5th Cir. 1983) (anxiety, depression and insomnia); *Bentivegna v. U.S. Dep't. of Labor,* 694 F.2d 619 (9th Cir. 1982) (diabetes mellitus); *Pushkin v. Regents of the University of Colorado,* 658 F.2d 1372 (10th Cir. 1981) (multiple sclerosis); *Drennon v. Philadelphia General Hospital,* 428 F. Supp. 809 (E.D. Pa. 1977) (epilepsy); *Kling v. County of Los Angeles,* 769 F.2d 532 (9th Cir.), *rev'd on other grounds,* 88 L. Ed. 2d 277 (1985) (Krohn's disease: a bowel disorder resulting in loss of weight, nausea, vomiting, headaches and abdominal pain). When courts have found that conditions are not statutory "handicaps," it is invariably because they do not substantially impair a major life activity.

24 Recovered alcoholics, and current alcoholics who perform their jobs adequately, are still fully protected. *See, e.g., Tinch v. Walters,* 765 F.2d 599 (6th Cir. 1985) (striking down Veterans Administration regulations which discriminated against alcoholics); *McKelvey v. Walters,* 596 F. Supp. 1317 (D.D.C. 1984) (same).

25 Most state laws pertaining to handicap discrimination are collected in LAB. REL. REP. (BNA), 8A FAIR EMPL. PRAC. MANUAL, and in 3 EMPL. PRAC. GUIDE (CCH). Forty-two of these states, and the District of Columbia, have laws which govern both private and public sector discrimination; five other states protect only public employees. Leonard, 10 U. DAYTON L. REV. at 690 n.36. In addition, two recently passed laws and one executive order block handicap discrimination. *See* Ariz. Rev. Stat. Ann. §§ 41-1461 to 41-1463 (West 1985) (public and private sectors); Delaware Gubernatorial Order discussed in Philadelphia Gay News, January 3-9, 1986 (public sector); Wyo. Stat. 16-3-101 to 16-3-115; §§ 27-9-101 to 27-9-108 (1985) (public and private sectors).

26 Thirteen jurisdictions use this language. Colo. Rev. Stat. § ?? 301 (1982) (does not include mental handicaps); Ga. Code Ann. § ?? 19-22(3) (1982); La. Rev. Stat. Ann. § 46-2253(1)(West ?? Gen. Laws Ann. ch. 151B, ¶ 1 (West Supp. 1985); M?? Stat?? § 363.01(25) (West Supp. 1984); N.M. Stat. Ann. § ?? (1978); Okla. Stat. Ann. tit. 25, § 1301(4) (West Supp. ?? Or. Rev. Stat. § 659.400(2) (1983); R.I. Gen. Laws § 8-5-?? (Supp. 1984); Utah Code Ann. § 34-25-2(14) (Supp. 1983); Vt. Stat. Ann. ?? 21, § 495d(5) (Supp. 1984); W.Va. Code § 5-11-3(t) (Supp. 1984 ?? Pa. Admin. Code § 44.4. *See* Leonard, 10 U. DAYTON L. Rev. ?? n.39.

27 Even where communicable diseases are statutorily exclude?? extent of that exclusion is not clear. In Georgia, for instance the Department of Human Resources continues to advise employers ?? dismiss persons with AIDS because it is not clear that AIDS (which cannot be transmitted through casual contact) qualifies as a ?? "communicable disease." Letter from James W. Alley, Di??on Division of Public Health, Georgia Dep't. of Human Resources to Benjamin Schatz (June 19, 1986).

28 *See* discussion at footnotes 31 and 32 and accompanying text.

29 Section 292 of that law defines "disability" much like Section 504 of the Rehabilitation Act defines "handicap:" "(a) a physical ... impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function ... or (b) a record of such impairment or (c) a condition regarded by others as such an impairment ...." FAIR EMPL. PRAC. LAWS (BNA) No. 531, at 455:3006.

30 Later, the action settled favorably for the plaintiff. Leonard, 10 U. DAYTON L. REV. at 683 n.9. More recently, the New York State Division of Human Rights issued a policy statement which indicates it agrees AIDS is a handicap. Fact Sheet, New York State Division of Human Rights, *reprinted in* 8A LAB. REL. REP. (BNA), FAIR EMPL. PRAC. MANUAL No. 536, at 3081-82. The statement reads, in part: "Acquired Immune Deficiency Syndrome (AIDS) is a medical condition considered a disability under the New York State Human Rights Law." The Human Rights Division has announced that it is accepting and processing discrimination complaints from people who have, or are perceived to have, AIDS.

31 A survey by NGRA of state agencies revealed that, in addition to the 3 states which have rendered decisions on the subject, the following 20 agencies also consider AIDS a handicap: California, Department's Post-Hearing Brief, *California Dep't. of Fair Employment & Housing in re Estate of Chadbourne v. Raytheon Co.*, No. FEP 83-84, L1-0310p, L-33998 (F.E.H.C. April 4, 1986); Colorado, Minutes of the Colorado Civil Rights Commission, March 28, 1986; Connecticut, Letter from Arthur L. Green, Director, Connecticut Comm. on Human Rights and Opportunities, to Benjamin Schatz (July 22, 1986); District of Columbia, Opinion Letter of John H. Suda, Acting Corporation Counsel, Government of the District of Columbia (Oct. 15, 1985); Illinois, Letter from Shelvin L. Hall, General Counsel, Illinois Dept. of Human Rights, to Benjamin Schatz (June 27, 1986); Maine, Testimony of Patricia E. Ryan, Exec. Director, Maine Human Rights Comm. before the Joint Standing Committee on Human Resources (Mar. 17, 1986), *reprinted in* 2 EMPL. PRAC. GUIDE (CCH) ¶ 5023; Massachusetts, Policy Statement, Massachusetts Comm. Against Discrimination (Jan. 1986), *reprinted in* 2 EMPL. PRAC. GUIDE (CCH) ¶ 5024; Michigan, Report of the Michigan Public Health Advisory Council to Governor James Blanchard at 32 (March 18, 1986); Minnesota, Letter from Walter C. Barwick, Deputy Commissioner, Minnesota Dept. of Human Rights, to Benjamin Schatz (June 3, 1986); Missouri, 1 AIDS POL. & L. (BNA) at 3 (June 18, 1986); Montana, Letter from Janice Doggett, Staff Attorney, Montana Human Rights Comm., to Benjamin Schatz (July 28, 1986); New Hampshire, Letter from Merryl Gibbs, Exec. Director, New Hampshire Comm. for Human Rights, to Benjamin Schatz (June 23, 1986); New Jersey, Announcement by the New Jersey Division on Civil Rights, *reprinted in* 2 EMPL. PRAC. GUIDE (CCH) ¶ 5026; New Mexico, Letter from David F. Montoya, Exec. Director, Human Rights Commission of New Mexico, to Benjamin Schatz (June 18, 1986); Oregon, Letter from Mary Roberts, Commissioner, Oregon Bureau of Labor and Industries, to James M. Campbell (Mar. 13, 1986), *reprinted in* 2 EMPL. PRAC. GUIDE (CCH) ¶ 5020; Pennsylvania, Letter from Louise Oncley, Special Ass't. to the Exec. Director, Pennsylvania Human Relations Comm., to Benjamin Schatz (July 15, 1986); Rhode Island, Letter from Eugene L. Booth, Exec. Director, Rhode Island Comm. for Human Rights, to Benjamin Schatz (June 25, 1986); Texas, Montrose Voice, Nov. 8, 1985; Washington, Letter from Mary Devlin, Unit Supervisor, Washington State Human Rights Comm., to Benjamin Schatz (June 6, 1986); West Virginia, Telephone conversation between Norman Lindell, Compliance Director of the West Virginia Human Rights Comm., and Benjamin Schatz (August 28, 1986)

32 The following 8 states' enforcement agencies are willing to accept AIDS complaints: Alaska, Letter from Janet L. Bradley, Exec. Dir. of the Alaska Human Rights Comm., to Benjamin Schatz (June 30, 1986); Delaware, Letter from Andrew J. Turner, Jr., Dir., Delaware Div. of Human Relations, to Benjamin Schatz (August 20, 1986); Kansas, Letter from Roger W. Lovett, Chief Legal Counsel, Kansas Comm. on Civil Rights, to Benjamin Schatz (June 9, 1986); Nebraska, Letter from Lawrence R. Myers, Exec. Dir., Nebraska Equal Opportunity Comm., to Benjamin Schatz (June 3, 1986); Ohio, Letter from Robert D. Brown, Exec. Dir., Ohio Civil Rights Comm., to Benjamin Schatz (July 14, 1986); Tennessee, Telephone conversation between Charles Akens, General Counsel to the Tennessee Human Rights Comm., and Benjamin Schatz (August 28, 1986); Vermont, Letter from Denise R. Johnson, Chief, Public Protection Division, Vermont Office of the Attorney General, to Benjamin Schatz (July 14, 1986); Wyoming, Letter from Charles A. Rando, Supervisor, Labor Standards/Fair Employment Div., Wyoming Dept. of Labor and Statistics, to Benjamin Schatz (June 11, 1986).

33 Whether an individual suffering from an infectious disease is subject to state health regulations or even quarantine often depends upon the medical evaluation of his case by public health officials. The bright-line distinction offered by the Petitioners and the Department of Justice, in contrast to the case-by-case approach we suggest, is entirely inconsistent with State law. It substitutes the grantee's judgment for that of public health officials by allowing grantees to effectively isolate persons with diseases based upon irrational fears not shared by public health officials.

34 Indeed, courts have applied strict standards of medical necessity in recent Section 504 decisions. *See New York State Ass'n. for Retarded Children, Inc. v. Carey*, 612 F.2d 644 (2d Cir 1979) (no medical justification for the educational segregation of mentally retarded children infected with hepatitis B); *Grube v. Bethlehem Area School District*, 550 F. Supp. 418 (E.D. Pa. 1982) (no medical basis for excluding a boy with one kidney from his high school football team); *Poole v. South Plainfield Board of Education*, 490 F. Supp. 948 (D.N.J. 1980) (insufficient medical justification for excluding a boy with one kidney from his school's wrestling program).

35 In fact, health and safety decisions made by grantees should be subject to greater scrutiny than state public health measures. The latter typically are made on the advice of professional public health workers; the former often are made by persons lacking medical expertise.

36 Section 504 protects only "otherwise qualified handicapped individual(s)" from discrimination. 29 U.S.C. § 794 (1985) (emphasis added). The DHHS regulations define a "qualified handicapped person" as one who "*with reasonable accommodation* can perform the essential functions of the job in question...." 45 C.F.R. § 84.3(k)(1) (1985) (emphasis added).

37 In particular, the class of known infectious diseases is very large. The effects of particular diseases vary greatly in terms of their causes, debilitating effects, and degree of contagion. *See* Brief for American Medical Association as *Amicus Curiae* Supporting Petitioners at 2-3. Like other types of handicaps, it is impossible to issue a blanket ruling regarding their accommodation under Section 504.

38 The Rehabilitation Act of 1973 was enacted by Congress within a few months of the Supreme Court's decision in *McDonnell Douglas*. "Congress must have been aware that the discrimination law language of Section 504 would have obvious implications for the burden of proof issue." *New York State Ass'n. for Retarded Children, Inc. v. Carey*, 612 F.2d at 649 n.5. Further, Section 120(a) of the 1978 Amendments to the Rehabilitation Act, 92 Stat. at 2983, makes the rights, remedies and procedures available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, applicable to Section 504 of the 1973 Rehabilitation Act, clearly reflecting congressional intent that burdens under Section 504 be treated like those in other discrimination actions.

39 Of course, many disabled individuals can safely perform all job functions with no accommodation at all.

40 The defendant argued that judicial deference should give way to its decision as long as its decision was rationally related to its legitimate need to select applicants for its programs.

41 *See also* cases cited in footnote 42, *infra.*

42 A number of courts have already imposed a burden on a grantee to provide evidence supporting assertions that a handicapped person cannot be accommodated. *See, e.g., Jasany v. U.S. Postal Service*, 755 F.2d at 1249-50 ("Once a *prima facie* case has been presented, the burden shifts to the defendant employer to demonstrate that challenged criteria are job related and required by business necessity, and that reasonable accommodation is not possible."); *Strathie v. Department of Transportation*, 716 F.2d at 230-31 (Section 504 requires recipients of federal funding to show "a factual basis in the record reasonably demonstrating that accommodating [the handicapped] individual would require either a modification of the essential nature of the program, or impose an undue burden on the recipient;" no harm shown in employing deaf person as bus driver where his hearing could be brought within limits with a hearing aid); *Treadwell v. Alexander*, 707 F.2d at 475, 478 ("Once a plaintiff shows an employer denied him employment because of phyical condition, the burden of persuasion shifts to the ... employer to show that the criteria used are job related and that the plaintiff could not safely and efficiently perform the essentials of the job, ... the ... employer has the ultimate burden of persuasion in showing an inability to accommodate"); *Doe v. New York University*, 666 F.2d 761, 776-77 (2d Cir. 1981) (once the plaintiff has established a *prima facie* case, "[t]he burden then shifts to the institution or employer to rebut the inference that the handicap was improperly taken into account ..."); *Pushkin* (no harm shown in allowing psychiatrist with multiple sclerosis to complete a residency); *New York State Ass'n. for Retarded Children, Inc. v. Carey (no harm proven in allowing other children to attend school with hepatitis B carriers).*

43 *See, e.g., Alexander; Strathie v. Department of Transportation* (alteration of state policy against bus driver's use of hearing aid while driving would not endanger public safety); *see also* cases cited in footnote 42, *supra*, and discussion of *Pushkin* at text accompanying footnotes 40-41.

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