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Annual Survey of Virginia Law: Handicap Law

Donald H. Stone
University of Richmond

HANDICAP LAW

*Donald H. Stone**

I. INTRODUCTION

Disabled persons represent approximately fifteen percent of the population of the United States,[1] making this minority group one of the largest in American society. In Virginia, it is estimated that there are 750,000 disabled persons.[2] Most of these people are dependent upon some form of governmental services ranging from state funded residential placement to more subtle accommodation such as a wheelchair ramp to provide access to public buildings. The degree to which handicapped citizens are integrated into the mainstream of society depends upon the availability of these services and the implementation of laws insuring access to them.

Despite the obvious need, the rights of disabled citizens were not recognized by the courts and legislatures until the early 1970s. Prior to this, disabled persons had few resources to which to turn for assistance. Some may have received limited pension or disability coverage through their job, while welfare provided a meager subsistence for persons unable to work. State institutions existed for those requiring residential care, while those not requiring such care were forced to rely on their families for financial support. Many handicapped children were not educated in public schools. Even a simple trip to a public library or a museum was impossible for anyone in a wheelchair. In short, society had disenfranchised millions of persons who could otherwise be productive and contributing members, if accommodated.

The civil rights era of the sixties and early seventies generated new attitudes toward handicapped citizens. Large scale reform began when Congress passed the Rehabilitation Act of 1973,[3] which

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* Director, Youth Advocacy Clinic, T.C. Williams School of Law, University of Richmond; B.A., 1974, Rutgers University; J.D., 1977, Temple University.

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1. 1987-1989 VIRGINIA BOARD FOR RIGHTS OF THE DISABLED BIENNIAL REPORT 4.
2. *Id.*
3. 29 U.S.C. §§ 791-794 (1982).

marked the first in a number of laws creating rights for disabled persons. Although the resulting area of law that has emerged over the past fifteen years is still developing, the advancement of the rights of handicapped citizens has generated a wealth of statutory and case law nationwide.

The purpose of this Survey is two-fold. First, this Survey is intended to provide the general practitioner with a very broad overview of federal and Virginia law addressing the rights of the disabled. Second, the Survey presents a thumbnail sketch of several recent trends and developments in the area of handicapped law.

II. Statutory Law

A. *Federal Statutes*

1. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (the "Rehabilitation Act")[4] is the primary federal law addressing discrimination against the disabled. This statute provides that "[n]o 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 participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[5] In 1974, Congress expanded the definition of "handicapped individual."[6] This definition has been incorporated into the federal regulations which flush out the specific sections of the statute.[7]

The Rehabilitation Act mandates federal standards for rehabilitation programs. It was enacted to enable disabled persons to function at their highest level. The primary focus of this legislation is to provide employment rights to the disabled,[8] nondiscrimination

4. 29 U.S.C. §§ 791-794 (1982).

5. *Id.* § 794.

6. Pub. L. No. 93-516, 88 Stat. 1617 (codified at 29 U.S.C. § 706(7)(B) (1982)). The 1974 amendments to the Act, expanded the definition of handicapped individual to include any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activates, (ii) has a record of such impairment, or (iii) is regarded as having such impairment.

The key difference in the 1974 amendment is the inclusion of mental handicaps. The 1973 Act was limited to physical handicaps.

7. 41 C.F.R. §§ 60.741.1 to .741.30 (1987).

8. 29 U.S.C. § 791.

in the provision of government services,[9] and the correlative rights of access to public buildings, air transportation, and mass transit.[10]

Although the federal definition includes a broad range of physical disabilities, a handicapped individual must be "otherwise qualified" to do the "essential functions" of his or her job.[11] The term "otherwise qualified" involves the issue of whether an employer must make "reasonable accommodation" to assist the disabled worker.[12] "Reasonable accommodation" is balanced against the burden it places on the employer; thus, "undue hardship" may excuse an employer from making certain accommodations.[13]

In *Southeastern Community College v. Davis*[14] and *School Board v. Arline*[15] the Supreme Court addressed these issues. In *Davis*, the Court expressed concern over imposing "undue financial and administrative burdens upon a State."[16] This case was brought by a deaf individual seeking admission to a nursing program. The plaintiff's application was denied on the basis of her handicap. The Court held that the college acted permissibly within the scope of section 504 of the Rehabilitation Act[17] because the ability to hear was a legitimate physical requirement for admission.[18] The Court determined that reasonable accommodations to provide for deaf students required major adjustments in the program and would pose an undue hardship on the school.[19]

In *Arline*, the Court was faced with the issue of whether a contagious disease such as tuberculosis was a handicap under the Rehabilitation Act.[20] In ruling that contagious diseases were protected by the Rehabilitation Act, the Court expanded its mode of inquiry of what constitutes reasonable accommodation within the context of the employment of persons with such diseases.[21] The Court

9. *Id.* § 794.
10. *Id.* § 792(b); *see also* Architectural Barriers Act, 42 U.S.C. §§ 4151-4157 (1982).
11. 45 C.F.R. § 84.3(k)(1) (1987).
12. *Id.* § 84.12; 29 C.F.R. § 1613.704(a) (1987); 41 C.F.R. § 60-741.5(d) (1987).
13. Southwestern Community College v. Davis, 442 U.S. 397, 406 (1979).
14. 442 U.S. 397 (1979).
15. 107 S. Ct. 1123 (1987).
16. *Davis*, 442 U.S. at 412.
17. The Court cites to the Rehabilitation Act by its Public Law numeration. Section 504 was codified at 29 U.S.C. § 794 (1982).
18. *Davis*, 442 U.S. at 412.
19. *Id.* at 412-13.
20. For a more thorough treatment of this issue see *infra* notes 112-16 and accompanying text.
21. *Arline*, 107 S. Ct. at 1131.

adopted the view of the American Medical Association, which submitted an *amicus curiae* brief.[22] That standard includes findings of fact based upon reasonable medical judgment regarding the nature of the risk of transmission, the duration of the risk that the carrier is still contagious, the severity of the risk of potential harm to third parties, and the probability that the disease will not be transmitted.[23]

The Court stressed the need for an individualized inquiry by the lower courts in order for the federal legislation "to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns . . . as avoiding exposing others to significant health and safety risks."[24] The Court also discussed the obligation of the employer to provide reasonable accommodation compared with "a fundamental alteration in the nature of [the] program,"[25] which would be considered an unreasonable accommodation.

In assessing whether an accommodation is reasonable or whether it creates undue hardship, one should consider the size of the employer's program, the nature of the employer's business, and the type and cost of the accommodation requested.[26] For example, a small day care center only may be expected to expend nominal costs such as providing an amplification device for the telephone or modifying a ground floor entrance. On the other hand, a large agency such as a state welfare department may be required to provide an interpreter or install an elevator.[27]

The distinction between illegal discrimination and a lawful refusal to provide special accommodations to handicapped persons is not always clear.[28] Alternative methods of accommodation should be sought to increase the chances of finding a remedy that meets the employer's needs for cost-effectiveness and provides a suitable and productive environment for the handicapped worker.[29] Finding

22. *Id.*
23. *Id.*
24. *Id.* at 1131.
25. *Id.* at 1131 n.17 (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)).
26. 45 C.F.R. § 84.12(c) (1987).
27. 45 C.F.R. §§ 84.22 to .23.
28. *Davis*, 442 U.S. at 412.
29. *See* THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, EMPLOYERS ARE ASKING ABOUT ACCOMMODATING WORKERS WITH DISABILITIES.

alternative methods and the willingness to compromise are crucial in light of the Supreme Court's conclusion that where a person's handicap cannot be overcome by reasonable accommodation, or when such accommodation causes undue hardship on the employer, employment decisions made on the basis of handicap will not be considered illegal discrimination.[30]

Several lower courts have addressed the issues of discrimination and reasonable accommodation by the employer.[31] Reasonable accommodation claims have included requests for re-assignment to alternative work.[32] While the *Arline* decision articulated a progressive approach to the reasonable accommodation standard,[33] the lower courts have been inconsistent in their decisions regarding reassignment.[34]

2. The Education of the Handicapped Act

The Education of the Handicapped Act[35] (the "EHA") is the primary federal law governing education and special services for the handicapped. The landmark cases of *Pennsylvania Association of Retarded Children v. Pennsylvania*[36] and *Mills v. Board of Education*[37] began the movement to give handicapped children equal access to public education that led to passage of the EHA. In *Pennsylvania Association*, the Association of Retarded Children brought suit against the entire public school system of Pennsylva-

30. *Davis*, 442 U.S. at 410-13.

31. Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983) (hearing impaired school bus driver found to be qualified with reasonable accommodation); Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985) (blind workers provided readers by the Pennsylvania Department of Public Welfare).

32. Trimble v. Carlin, 633 F. Supp. 367 (E.D. Pa. 1986) (postal worker assigned to "light" duty after knee injury). *But see* Dancy v. Kline, 639 F. Supp. 1076 (N.D. Ill. 1986) (employee's motion for summary judgment denied because reassignment not mandated as a reasonable accommodation under the Rehabilitation Act of 1973).

33. The *Arline* Court stated that "although [employers] are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." *Arline*, 107 S. Ct. at 1131 n.19.

34. *See, e.g.*, Davis v. Postal Service, 44 Fair Empl. Prac. Cas. (BNA) 1299 (M.D. Pa. 1987); Dexler v. Carlin, 40 Fair Empl. Prac. Cas. (BNA) 633 (D. Conn. 1986); Carty v. Carlin, 623 F. Supp. 1181 (D. Md. 1985); Alderson v. Postmaster General, 598 F. Supp. 49 (W.D. Okla. 1984).

35. 20 U.S.C. §§ 1401-1485 (1982 & Supp. IV 1986).

36. 343 F. Supp. 279 (E.D. Pa. 1972), *modifying* 334 F. Supp. 1257 (E.D. Pa. 1971).

37. 348 F. Supp. 866 (D.D.C. 1972).

nia for providing inadequate programs for the mentally retarded.[38] The suit claimed that the Commonwealth of Pennsylvania had discriminated against 50,000 handicapped children in the public school system. The district court found that when a state undertakes to provide a free public education to all children, it cannot deny mentally retarded children the same educational opportunities without due process. The court held that the Pennsylvania system lacked procedural safeguards to insure notice and an opportunity to be heard.[39] The court expressed a preference toward placing children in a regular classroom setting rather than a separate special education classroom. This preference initiated the standard of least restrictive placement.[40]

In *Mills*, the plaintiffs sought an injunction restraining the Board of Education of the District of Columbia from denying handicapped children in the District publicly supported education. They also sought to compel the school board to provide handicapped children them with immediate and suitable educational facilities or in the alternative, placement at the public expense.[41] The court held that the school board violated the due process clause by denying children who had been labeled mentally retarded publicly supported education while providing such education to other children.[42] Like the court in *Pennsylvania Association*, the *Mills* court held that due process requires a hearing prior to exclusion from regular schooling or specialized instruction.[43]

The principles expressed in these decisions were codified in the EHA. The EHA's purpose is to provide a free, appropriate public education with emphasis on special education designed to meet the unique needs of handicapped children.[44] The term "free appropriate education" means special education and related services which are provided at the public expense, meet the state's educational

38. *Pennsylvania Ass'n*, 343 F. Supp. at 281-82.

39. The court held that the plaintiff's claim that due process required a hearing before retarded children could be excluded from public education established a colorable claim under the due process clause. *Id.* at 295. The court acknowledged that the label "mentally-retarded" served only to stigmatize plaintiffs, and that a due process hearing was required before the state can stigmatize any citizen. *Id.* (citing Wisconsin v. Constantineau, 400 U.S. 433 (1971)).

40. *See id.* at 296.

41. *Mills*, 348 F. Supp. at 868.

42. *Id.* at 875.

43. *Id.*

44. 20 U.S.C. § 1400(c) (1982). In Virginia, educational needs covers ages two through twenty-one. VA. CODE ANN. § 22.1-213 (Repl. Vol. 1985).

standards, provide the least restrictive environment and conform to the individualized education program required by law.[45]

The individual needs of a particular handicapped child are identified through the referral and assessment process within the school system.[46] The child is given a full evaluation by qualified professionals, including at least one teacher or specialist with knowledge of the child's handicap. The evaluation assesses all areas related to the handicap, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.[47] The test reports are then used in determining the child's Individualized Education Plan (the "IEP"). The IEP is a written annual plan outlining the student's educational goals and the strategies proposed to achieve them.[48] The IEP is written by a committee comprised of the student, parents, professionals and school personnel.[49]

When a satisfactory IEP is developed, the school has the additional burden of placing the child in the "least restrictive environment," which means that the child be placed in a setting that most closely approximates a regular classroom surrounding.[50] The purpose of the least restrictive environment is to normalize the handicapped child's educational experience as much as possible. The goal is to integrate the child into the regular school system whenever possible. However, if a separate special education placement is required, the goal must be to insure that the handicapped child achieves the greatest level of access to the non-handicapped community.[51] Thus, self-contained programs and residential placement are considered most restrictive, and must be used only when necessary to meet the child's needs—not out of administrative convenience.[52]

If either the parents or the local school board is dissatisfied with the IEP implementation process, they may appeal by way of a due process administrative hearing.[53] Either party may appeal the decision of the hearing officer to a review officer who conducts an im-

45. 20 U.S.C. § 1401(18).
46. 34 C.F.R. § 300.128 (1987).
47. *Id.* § 300.532(e)-(f).
48. *Id.* § 300.340.
49. *Id.* § 300.344.
50. *Id.* §§ 300.550 to .556.
51. *Id.* § 300.553.
52. *See id.* § 300.552.
53. *Id.* § 300.506.

partial review. Either party may then appeal to the United States District Court for the district in which the school is located,[54] or, if in Virginia, to the circuit court with jurisdiction.[55]

Time considerations are crucial to the appeals process. The administrative hearing officer must issue a decision within 45 calendar days of the request for a hearing. Either party has 30 administrative working days to request a state review of the hearing officer's decision. This decision must be rendered within 30 administrative working days of the request for review.[56]

Of additional importance when litigating is the Handicapped Children's Protection Act of 1986 (the "Handicapped Children's Protection Act"), which provides for the recovery of court costs and attorney's fees when the parent prevails over the school system.[57] The Handicapped Children's Protection Act gives the United States District Courts jurisdiction without regard to the amount in controversy. Although hearing officers may not award attorney's fees directly,[58] fees are recoverable for attorney's work in administrative proceedings,[59] and for preparing litigation following successful action or proceedings.[60]

3. The Vietnam Era Veterans Readjustment Assistance Act

The Vietnam Era Veterans Readjustment Acts of 1972[61] and 1974[62] apply to all disabled veterans who have at least a 30% disability rating from the Veteran's administration, or have been dis-

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54. *See id.* §§ 300.507 to .511 and 300.581 to .586.

55. VA. CODE ANN. § 22.1-213(1)(i) (Repl. Vol. 1985).

56. 34 C.F.R. § 300.512.

57. Handicapped Children's Protection Act, Pub. L. No. 99-372, 100 Stat. 796-98 (codified at 20 U.S.C. § 1415(e)(4)(B) (Supp. IV 1986)). For a thorough discussion of this Act, see Guernsey, *The School Pays the Piper, But How Much? Attorney's Fees in Special Education Cases After the Handicapped Children's Protection Act of 1986*, 23 WAKE FOREST L. REV. 237 (1988).

58. Lauren T. v. Crisp County Bd. of Educ., 1986-87 EHLR DEC. 508:298 (GA SEA); Oakland Unified School Dist., 1986-87 EHLR DEC. 508:246 (CA SEA); Newport-Mesa Unified School Dist., 1986-87 EHLR DEC. 508:263 (CA SEA).

59. Webb v. Dyer, 471 U.S. 234 (1985); Gas Light Club, Inc. v. Carey, 447 U.S. 54 (1980); *see also* School Bd. v. Mallone, 662 F. Supp. 999 (E.D. Va. 1987).

60. Moore v. District of Columbia, 666 F. Supp. 263, 265-66 (D.D.C. 1987).

61. Pub. L. No. 93-508, 88 Stat. 1578 (codified as amended in scattered sections of 38 U.S.C.).

62. Pub. L. No. 92-540, 86 Stat. 1074 (codified as amended in scattered sections of 38 U.S.C.).

charged for a service connected disability.[63] The Act of 1972 requires all government contractors and sub-contractors to take affirmative action in their hiring and promotion practices regarding qualified disabled veterans and Vietnam era veterans when awarded a federal contract of $10,000 or more.[64] All job vacancies must be listed with the state employment service and covered veterans must be given priority in referrals.[65]

B. *Virginia Statutory Law*

Closely modeled after the Rehabilitation Act of 1973,[66] the Virginians with Disabilities Act (the "Virginia Act")[67] protects disabled persons in Virginia from discrimination on the basis of handicap.[68] The Virginia Act prohibits handicap discrimination in any program receiving state financial assistance[69] and prohibits employment discrimination against any "otherwise qualified person solely because of disability."[70] Although the Virginia Act uses the term "disability" rather than "handicap," there seems to be no substantive distinction between the two terms. According to the Virginia Act, a disabled person is defined as "any person who has a physical or mental impairment which substantially limits one or more of his major activities or has a record of such impairment."[71]

Unlike the federal provisions, the Virginia Act is silent as to discrimination based on a perceived handicapped. Only persons with present or past handicaps are protected.[72] Another interesting distinction is the Virginia Act's treatment of "otherwise qualified person" when referring to the fitness of a handicapped person to a particular job. Prior to an amendment of 1988, the Virginia Act defined the term "otherwise qualified person" as a handicapped person who could function without accommodation in the work-

63. 38 U.S.C. §2011(1)(1982).

64. *Id.* § 2012(a); 41 C.F.R. § 250 (1987). This amount differs from the Rehabilitation Act of 1973, which sets the contract minimum amount at $2,500. 29 U.S.C. § 793(a) (1982).

65. 41 C.F.R. § 60-250.4.

66. 29 U.S.C. §§ 791-794 (1982).

67. VA. CODE ANN. §§ 51.01-1 to -46 (Cum. Supp. 1987).

68. *Id.* § 51.01-40.

69. *Id.* §§ 51.01-40 to -45.

70. *Id.* § 51.01-41.

71. *Id.* § 51.01-3.

72. *Compare id.* § 51.01-3 *with* 29 U.S.C. § 706(7)(B) (1982). The federal statute defines handicapped individual as any person who "is *regarded* as having such an impairment," whereas, the Virginia statute does not. 29 U.S.C. § 706(7)(B) (1982) (emphasis added).

place. This definition, which was soundly criticized, was amended by the 1988 session of the Virginia Assembly.[73] The amended definition includes handicapped persons who are qualified to perform the job with reasonable accommodation to the known physical or neutral impairments of the person.[74]

III. Substantive Rights, Remedies, and Procedural Issues

A. *Federal Statutes*

Under the Rehabilitation Act,[75] both the federal and state governments are required to develop policies which give disabled persons in the United States greater access to facilities and employment opportunities.[76] For example, the Rehabilitation Act creates the Architectural and Transportation Compliance Board which enforces the architectural accessibility requirements of federally funded buildings and transportation systems.[77] These requirements were created by the Architectural Barriers Act,[78] but do not apply to buildings constructed, leased, or renovated before August 12, 1968. Furthermore, the requirements only apply to those buildings constructed, leased, or renovated on behalf of the United States.[79]

Whether mandatory, or voluntary, accessibility takes many forms. Simple modifications may include parking spaces on the ground floor and near the building, braille plates placed on elevators and on public telephones, and improvement of ground floor entrances. More extensive modifications may include ramps and elevators designed for wheelchair use or bathroom facilities that can accommodate a wheelchair.

Section 503 of the Rehabilitation Act also requires that all government contractors and subcontractors take affirmative action to employ and promote qualified handicapped individuals.[80] The Department of Labor's Office of Federal Contract Compliance Program (the "OFCCP"), is responsible for enforcing compliance with

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73. Act of March 6, 1988, ch. 44, 1988 Va. Acts 48 (amending Va. Code Ann. § 51.01-3). The amended version eliminated the language "without accommodation."

74. *See id.*

75. 29 U.S.C. §§ 791-794 (1982).

76. *Id.*

77. *Id.* § 792(b).

78. 42 U.S.C. §§ 4151-4157 (1982).

79. *Id.* § 4151.

80. 29 U.S.C. § 793; *see also* 41 C.F.R. §§ 60-741.1 to -741.30 (1987).

the requirements and regulations promulgated by this provision.[81] It should be noted that there does not exist a private right of action under this section. The sole recourse is through the OFCCP.

Specifically, section 503 of the Rehabilitation Act requires that any contract entered into with the United States government for the procurement of personal property, or non-personal services (including construction) in excess of $2,500, contain a provision that the contracting party take affirmative action in the employment of qualified handicapped individuals.[82] Although this provision is interpreted broadly, some contracts such as those for personal consultants, real estate or non-essential products or services may not be covered. In addition, despite the broad range of contracts covered, OFCCP does not provide sophisticated tracking of subcontractors beyond the first or second tier. Therefore, an attorney should assist the client in discovering whether a contractual relationship between the government and the employer falls within the statutory criteria of the Rehabilitation Act and the applicable regulations.

Violations of the Rehabilitation Act's federal contract compliance requirements and regulations are filed with the OFCCP. An aggrieved party has 180 days from the date of the alleged violation in which to file a complaint.[83] Complaints can be filed with the OFCCP in Washington, D.C., or any of OFCCP's regional offices. If a complaint refers to a particular contractor, the OFCCP may refer the complaint to the contractor to resolve the matter. The OFCCP must be notified of any action taken within 60 days. If the issue is not properly resolved, OFCCP can refer the case to the Office of the Solicitor for consideration of legal enforcement proceedings.[84]

In order to protect the handicapped from discrimination in the procurement of grant federal government services, Section 504 of the Rehabilitation Act mandates that no otherwise qualified handicapped individual be excluded from or denied the benefits of any program or activity that receives federal financial assistance.[85] This section of the Rehabilitation Act is regulated by each federal

81. 29 U.S.C. § 793; *see also* 41 C.F.R. §§ 60-741.1 to -741.30 (1987).

82. 29 U.S.C. § 793(a); *see also* 41 C.F.R. § 60-741.3.

83. *Id.* § 60-741.23(a).

84. *Id.* § 60-741.23(g).

85. 29 U.S.C. § 794. For a detailed description of discriminatory practices, see Guidelines for Determining Discriminatory Practices, 28 C.F.R. §§ 41.51 to .58 (1987).

agency that issues federal grants.[86] For example, the Department of Housing and Urban Development would investigate complaints of discrimination dealing with publicly funded housing programs, and the Department of Education would handle complaints regarding federally funded universities. When a grantee charged with discrimination is the recipient of funds from several agencies, the regulations require cooperation among the agencies involved, with one designated as the primary enforcement agency.[87]

The remedies, procedures and rights provided by Section 504 of the Rehabilitation Act include termination of federal financial assistance, injunctive relief and compensatory damages.[88] Unlike under Section 503, courts have permitted a private right of action under Section 504.[89]

Additionally, the rights, remedies, and procedures of Section 504 are available to any person aggrieved by "any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance."[90] A court may use its discretion to award attorney's fees to any prevailing party other than the United States.[91]

B. *Virginia Statutory Law*

The Virginia Act,[92] which resembles the Rehabilitation Act, specifies six separate areas of prohibited discrimination. Similar to the federal statute, the Virginia Act prohibits discrimination of any kind by any recipient of state grants.[93]

For example, the Virginia Act prohibits employment discrimination if the employer receives state grants.[94] Under this provision of the Virginia Act, like the Rehabilitation Act, the employer may raise the defense of undue hardship[95] whenever a plaintiff brings a claim for reasonable accommodation. Although a private right of

86. 29 U.S.C. § 794; 28 C.F.R. § 41.4 (1987).
87. 28 C.F.R. § 41.6.
88. 29 U.S.C. § 794(a).
89. 29 U.S.C. § 794(a)(1). When fashioning an equitable or affirmative remedy under the Rehabilitation Act, courts may take into consideration the reasonable accommodation standard and the undue hardship standard. *Id. See supra* notes 14-34 and accompanying text.
90. 29 U.S.C. § 794(a)(2).
91. 29 U.S.C. § 794(b).
92. VA. CODE ANN. §§ 51.01-1 to -46 (Cum. Supp. 1987).
93. *Id.* § 51.01-40.
94. *Id.* § 51.01-41.
95. *Id.* § 51.01-41(C).

action is specified, this provision of the Virginia Act is limited by the requirement that it not be applied to any employer covered by the Rehabilitation Act.[96] The Virginia Act gives a circuit court with chancery jurisdiction the power to order affirmative equitable relief, compensatory damages, and reasonable attorney's fees.[97] In addition, the Virginia Act establishes that the plaintiff must file an action in circuit court within one year of the alleged violation or the claim will be barred.[98] However, there exists the additional requirement that the claimant has filed by registered mail a written statement of the nature of the claim with the potential defendant with 180 days of the occurrence of the alleged violation. The high cost of litigation may discourage the prosecution of claims involving low wages or minor damages.

The Virginia Act regulates the duty of public schools to provide free and appropriate education of handicapped students.[99] The Virginia Act prohibits discrimination based upon a handicap in the admission or participation in public education.[100]

The Virginia Act also prohibits discrimination against a handicapped person who seeks to buy or lease housing.[101] There are, however, several exceptions, such as renting a single room in a single family home.[102] Guide dogs are allowed despite any pet policies the landlord may have.[103] However, housing is not required to be modified, nor do landlords have a duty to provide a higher degree of care for their handicapped tenants.[104]

The Virginia Act provides, in part, that the handicapped have access to roads, sidewalks, public buildings, and public transportation.[105] Although the Virginia Act resembles federal law dealing with architectural and transportation barriers, it goes further by providing that disabled persons have access to all common carriers, hotels, restaurants, resorts or places where the general public is in-

96. *Id.* § 51.01-41(F).
97. *Id.* § 51.01-46(A). However, attorney's fees will not be awarded for a frivolous claim or one brought in bad faith. The Virginia Act explicitly excludes pain and suffering as recoverable compensatory damages and prohibits the recovery of punitive damages. *Id.*
98. *Id.* § 51.01-46(B).
99. *Id.* § 51.01-42.
100. *Id.*
101. *Id.* § 51.01-45.
102. *Id.* § 51.01-45(A).
103. *Id.* § 51.01-45(B).
104. *Id.* § 51.01-45(C).
105. *Id.* § 51.01-44.

vited.[106] One exception is historical buildings to which such access may not be required to be provided.[107] Although the power of this provision has not yet been fully tested, its effects are potentially widespread. Retail stores, nursing homes, and other privately run places which do business with the general public may be affected. For example, a physician's office was considered a public place.[108] The Virginia Act creates the State Department for the Rights of the Disabled, under the Secretary of Human Resources, to monitor compliance to the applicable Virginia statute.[109] The agency was created to mediate complaints. However, if mediation fails, the agency can provide legal or administrative remedies. One source of controversy regarding this agency's purpose is the requirement that court action cannot be pursued without express permission of the Governor.[110] However, a private attorney can pursue court action without going through this agency.[111]

IV. Recent Developments

A. *Employment*

1. Contagious Diseases as a Handicapping Condition

In the landmark case of *School Board of v. Arline*,[112] the United States Supreme Court by a 7-2 majority found that tuberculosis and, in all probability, other contagious diseases such as AIDS, are handicapping conditions as defined by section 504 of the Rehabilitation Act of 1973. The Court first looked at the definition of "handicapped individual" and noted that it includes "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."[113]

Although the disease at issue in this case was tuberculosis, the Court's analysis suggests a broad interpretation which may include contagious diseases in general.[114] The Court stated that "[a]llowing

106. *Id.* § 51.01-44(B).
107. *Id.* § 51.01-44(D).
108. Lyons v. Gunther, 218 Va. 630, 239 S.E.2d 103 (1977).
109. Va. Code Ann. §§ 51.01-36 to -39.
110. *Id.* § 51.01-37(5).
111. *See id.* § 51.01-39.
112. 107 S. Ct. 1123 (1987).
113. 29 U.S.C. § 706(7)(B) (1982).
114. *Arline*, 107 S. Ct. at 1129-30.

discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to insure that handicapped individuals are not denied jobs or other benefits because of the prejudicial attitudes or the ignorance of others."[115]

Based on this language, it seems probable that this protection would apply to the victims of AIDS. Within the last several years, this disease has generated so much attention and controversy, much of which is based on ignorance and misinformation. Yet despite this misinformation, the disease has great potential to inflict harm if transmitted. However, as the Court noted:

> The fact that *some* persons who have contagious diseases may pose a serious threat to others under certain circumstances does not justify excluding [them] from the coverage of the Act. . . . Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were otherwise qualified.[116]

2. Epilepsy as a Handicapping Condition

Two federal courts have addressed the question of whether employees with epilepsy are handicapped within the meaning of the Rehabilitation Act. In *Reynolds v. Brock*,[117] the Ninth Circuit found that persons with epilepsy met the definition of handicapping condition under the Rehabilitation Act.[118] The employee, a clerk-typist, had several seizures while at work. She had made several requests for additional training and a change in work hours, but these requests were denied by her employer. The court noted the supervisors of the employee were overtly hostile to her after it was learned she suffered from epilepsy. In addition, the Court found unrealistically high production demands were made on the employee.[119]

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115. *Id.* at 1129.
116. *Id.* at 1130.
117. 815 F.2d 571 (9th Cir. 1987).
118. *Id.* at 573.
119. *Id.* at 574-75.

In a second case involving an employee with epilepsy, the court in *Salmon Pineiro v. Lehman*[120] upheld the decision by the U.S. Department of the Navy to terminate a criminal investigator because he had epilepsy. The employee was faced with the difficult burden to show that the government could make reasonable accommodations, which were found to be impossible under the circumstances since the position was classified as hazardous.[121] The employer's medical requirements necessitated a showing that a person with epilepsy employed in such a hazardous job must be seizure-free without medication for two years. The employee suffered a seizure during basic training and was found not to be medically qualified.[122]

3. Alcoholism as a Handicapping Condition

Two federal courts have struggled with the issue of persons suffering from alcoholism and its impact in the work place. In *Crewe v. United States Office of Personnel Management*,[123] an applicant for a government position claimed she was discriminated against by the federal government based on its refusal to hire her because she was an alcoholic. The Eighth Circuit explained that alcoholism is a handicap under the Rehabilitation Act.[124] However, the court noted that the act excluded from the definition of handicap "any individual who is an alcoholic . . . whose current use of alcohol . . . prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol . . . abuse, would constitute a direct threat to property or the safety of others."[125] Nevertheless, the court held that this exclusion did not apply under section 501 of the Rehabilitation Act.[126] The court found that this exclusion applies to private employers who have contracts with the federal government, under section 503 of the Rehabilitation Act[127] and to programs and activities receiving federal funds under section 504 of the Rehabilitation Act.[128]

The court was unwilling to extend the specific exclusion to the

120. 653 F. Supp. 483 (D.P.R. 1987).
121. *Id.* at 491.
122. *Id.* at 494.
123. 834 F.2d 140 (8th Cir. 1987).
124. *Id.* at 141.
125. *Id.* at 142 (quoting 29 U.S.C. § 706(7)(B) (1982)).
126. *Id.*
127. *Id.*
128. *Id.*

federal government as an employer. The court noted that the federal government was intended by section 501 to be a model employer of handicapped persons.[129] Thus, the federal government possessed a greater affirmative duty in hiring the handicapped than other employers.[130]

Nevertheless, the court found that the Office of Personnel Management could deny Crewe employment based on three factors: the applicant's delinquency in prior employment, dishonest conduct, and excessive alcohol abuse.[131] The Court stated that it was not expressing an opinion of whether an alcoholic's drinking permitted denial of employment when actual job performance was not affected. Finally, the Court was convinced that the federal government could not reasonably accommodate Crewe's alcoholism, basing this finding on the applicant's failure in past treatment efforts.[132]

In a second case dealing with alcoholism, the United States Supreme Court in *Traynor v. Turnage*[133] found that alcoholism without mental illness is not a protected disability. The Veterans Administration denied benefits to a claimant suffering from alcoholism. The plaintiff attempted to obtain veterans benefits under the G.I. Bill subsequent to the limitation of benefits obtainable only within ten years after military service. The Veterans Administration reasoned that there was an irrebuttable presumption that a diagnosis of primary alcoholism was due to willful misconduct that fell outside the exception.

The Court noted that the claimants were not denied benefits due to their handicap, but because they engaged with some degree of willfulness in the conduct that caused them to become disabled. In addition, the Court held that the Veterans Administration's provision relating to the ten-year time limit for veterans to issue them benefits did not deny extensions of time to all alcoholics, "but only to those whose drinking was not attributable to an underlying psychiatric disorder."[134]

There is considerable debate as to whether or not alcoholism is

129. *Id.*
130. *Id.*
131. *Id.* at 142-43.
132. *Id.* at 143.
133. 108 S. Ct. 1372 (1988).
134. *Id.* at 1382.

considered a mental illness. Furthermore, the question of the involuntary nature of the consumption of alcohol is widely contested. The Court noted that twenty to thirty percent of all alcoholism is caused by mental illness,[135] thus excluding a majority of those persons viewed as suffering from alcoholism.

4. Job Reassignment as a Reasonable Accommodation

In *Rhone v. United States Department of the Army*,[136] a federal district court held that the Army violated section 501 of the Rehabilitation Act by refusing to reassign a handicapped computer assistant to a different shift, or to a job at a lower salary rather than dismissing him.[137] The court felt that the mandate of "reasonable accommodations" included reassignment for employees who could no longer perform the essential duties of their present job. The court found that the Army failed to make a substantial effort to find for the plaintiff, who suffered from a physical condition exhibiting anorexia and fatigue, a position in which he could perform satisfactorily. In particular, the court concluded that while there were jobs available that fit the employee's qualifications and physical requirements, the Army had failed to arrange for the reassignment.[138]

5. Denial of Insurance Benefits

The Eighth Circuit held in *Beauford v. Father Flanagan's Boys' Home*[139] that an employer may cancel health, dental and other benefits to a handicapped employee who is no longer able to perform the essential functions of her job. The court noted that the Rehabilitation Act was designed to prohibit discrimination within the context of the employment relationship in which the employee is potentially able to do the job in question.[140] However, the court also suggested that the plaintiff could pursue an action in state court based on her employer's violation of the employment contract with her.[141] The failure to provide fringe benefits may arguably constitute such a violation. Nevertheless, the court did not be-

135. *Id.*
136. 665 F. Supp. 734 (E.D. Mo. 1987).
137. *Id.* at 746-48.
138. *Id.* at 747.
139. 831 F.2d 768 (8th Cir. 1987).
140. *Id.* at 771.
141. *Id.* at 773.

lieve that section 504 of the Rehabilitation Act protected the employee from this form of discrimination.

6. The Virginians with Disabilities Act

Two Virginia Circuit Courts have addressed the Virginia Act.[142] In *Wolfe v. Tidewater Pizza, Inc.*,[143] the employee was unsuccessful in persuading the court that he was a "person with a disability."[144] Wolfe attempted to convince the court that although he did not have AIDS, he was perceived as suffering from this condition. The court rejected the notion that rumors that Wolfe had AIDS was sufficient to come under the statutory definition of "persons with a disability."

The decision in *Wolfe* illustrates a significant distinction between the Rehabilitation Act and the Virginians with Disabilities Act. Under federal law, a person fits the definition of handicapped if such a person is *regarded* as having any impairment, whereas under the Virginia statute, a person does not.[145]

Ellis v. Virginia Electric & Power Co.,[146] held that the Virginia Act does not apply to employers covered by the Rehabilitation Act. Therefore, attorneys should inquire as early as possible into the presence or absence of contracts an employer may have with the federal government.

B. *Civil Rights Restoration Act*

On March 23, 1988, by a Senate vote of 73-24 and a vote in the House of 292-133, Congress successfully overrode President Reagan's veto of the Civil Rights Restoration Act of 1987 (the "Restoration Act").[147] In doing so, Congress set aside the United States Supreme Court's decision in *Grove City College v. Bell*,[148] which had severely limited the application of federal laws prohibiting re-

142. VA. CODE ANN. § 51.01-40 to -46 (Cum. Supp. 1987).

143. No. C 87-662 (Norfolk Cir. 1987).

144. Under Va. Code Ann. § 51.01-3 (Repl. Vol. 1982), a person with a disability is defined as "any person who has a physical or mental impairment which substantially limits one or more of his major life activities or has a record of such [an] impairment." The definition fails to mirror the federal definition of handicapped individual under the Rehabilitation Act by deleting the category of persons regarded as having such an impairment.

145. *See supra* notes 72-73 and accompanying text.

146. No. C101563 (Fairfax County Cir. 1987).

147. Pub. L. No. 100-259, 102 Stat. 28 (1988).

148. 104 S. Ct. 1211 (1984).

cipients of federal financial assistance from discriminating against handicapped persons, women, minorities or the elderly. The limitation in *Grove City* stemmed from the fact that the Court had narrowly defined the term "recipient of federal funds" to include only the particular school programs that directly receive funding rather than the entire college or university.

President Reagan's veto of the Restoration Act prompted outcries of support for the Restoration Act from three vocal groups—women, minorities and the disabled. Because of the strong support for this important legislation and the impending election, both houses easily mustered the necessary two-thirds majority to override the president's veto.

The Restoration Act requires that an entire institution receiving federal funds—not only the specific program or activity receiving the funds—is prohibited from discriminating on the basis of handicap, race, sex or age. An amendment was added to this significant legislation whereby federally funded universities and hospitals are permitted to refuse to perform or to pay for abortions.

C. *Special Education*

1. School Discipline of Handicapped Children

In *Honig v. Doe*,[149] the United States Supreme Court prohibited an emotionally disturbed student's expulsion from public school. The Court found that even if the student had been dangerous or disruptive, any permanent change in the educational placement required the completion of review proceedings.[150] School officials are still permitted to temporarily suspend a handicapped child for up to ten days during which time the due process proceedings must take place.[151] However, suspension is only permitted in those instances where the student causes an immediate threat to the safety of others.[152]

The Court ruled that during the pendency of any proceedings initiated under the EHA,[153] unless the school and the parents of a handicapped child otherwise agree, the child shall remain in the

149. 108 S. Ct. 592 (1988).
150. *Id.* at 601-04.
151. *Id.* at 605.
152. *Id.*
153. 20 U.S.C. §§ 1401-1485 (1982 & Supp. IV 1986).

current educational placement. Thus, the Court did not find a dangerousness exception to this stay-put rule.

The Court recognized that the stay-put rule did not prohibit schools from using normal procedures such as time-outs, detention or restriction of privileges to deal with dangerous children.[154] More drastically, where a student did create an immediate threat to the safety of others, school officials could temporarily suspend the child for up to ten days. This short period of removal would provide the parents and school officials an opportunity to agree on an interim placement.[155] The Court left the door open for either the parent or the school to seek injunctive relief without exhausting administrative remedies in appropriate cases.

2. Exhaustion of Administrative Remedies

Prior to the United States Supreme Court's decision in *Honig v. Doe*, a federal district court in Virginia heard the case of *Doe v. Rockingham County School Board*.[156] The Court held that a learning-disabled student who was suspended from school after a disruptive incident was not required to exhaust administrative remedies to file a claim under the EHA.

Similarly, the court in *Davenport v. Rockbridge County School Board*[157] dismissed a suit claiming that the Rockbridge County school system failed to provide a handicapped child with a free appropriate public education. The plaintiff did not exhaust administrative remedies prior to filing suit in court, and the court failed to find evidence that school officials wilfully withheld educational opportunities from the plaintiff.

A twist to the exhaustion of administrative remedies requirement was seen in the case of *DeVries v. Spillane*.[158] The case involved an autistic student who was placed in the Leary School, a private institution, by the Fairfax County Schools. The parents objected, demanding placement in the neighborhood school program at Annandale High School. Both the local level hearing officer and state review officer affirmed the placement at the Leary School and the parents appealed to federal court.

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154. *Honig*, 108 S. Ct. at 605.
155. *Id.*
156. 658 F. Supp. 403 (W.D. Va. 1987).
157. 658 F. Supp. 132 (W.D. Va. 1987).
158. No. 88-1506 (4th Cir. 1988).

While the case was pending in federal court, the Fairfax County Schools transferred the student to a second special education placement at West Potomac High School, a public school. The federal district court dismissed the student's complaint because no administrative hearing was held to determine whether the second special education program was appropriate, and therefore no record existed for the court to consider. The Fourth Circuit held that the scope of the district court's review under cases challenging the EHA is more broad than the usual judicial review of administrative decisions. In addition, the court held that the plaintiff was not required to re-exhaust administrative remedies.

3. Attorneys' Fees

In *School Board v. Malone*,[159] a federal district court awarded retroactive attorneys' fees, rejecting the local school district's argument that it was unconstitutional to apply the HCPA[160] retroactively. The HCPA clearly states that attorneys' fees are available "with respect to actions or proceedings brought under section 615(e) of the Education for All Handicapped Children Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984 . . . which were pending on July 4, 1984."[161]

In *Malone*, the parents were successful in the United States Fourth Circuit Court of Appeals in May, 1985, and on November 6, 1986, defendants filed for attorney's fees. The court found that the $100 hourly rate charged by the parents' attorney on work at the administrative hearing and in court was reasonable.

Some courts have decided further that a parent who prevails in an administrative proceeding to determine the appropriate educational placement of a handicapped child may recover attorneys' fees involved in that proceeding. The court in *Prescott v. Palos Verdes Peninsula Unified School District*[162] recognized that attorneys' fees were available to the parents as a prevailing party in any action or proceeding. Thus the court found that an award of attorneys' fees is available in both judicial and administrative proceedings.

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159. 662 F. Supp. 999 (E.D. Va. 1987).

160. Pub. L. No. 99-372, 100 Stat. 796 (amending 20 U.S.C. §§ 1415(e)(4), 1415(f) (Supp. IV 1986)).

161. Pub. L. No. 99-732, §5, 100 Stat. 796, 798 (1986).

162. 659 F. Supp. 921 (C.D. Cal. 1987).

4. Private Residential Placement

In *Rouse v. Wilson*,[163] the court refused to reimburse the parent of a handicapped child who paid tuition to a private school because it found that the local school district offered to provide the student with an appropriate public education program.[164] The local school district funded a private placement for the student from 1982 to 1984. Satisfactory progress was made in the private school, and the public school proposed an individualized education plan providing for a self-contained learning disabilities class in the public school system. The parent objected to the proposed plan, and her son remained in private school for the 1984-1985 school year.[165]

A hearing officer found the plan proposed by the public school was appropriate and denied tuition reimbursement. The court found that the school's plan was designed to meet the student's unique needs. This finding was based on the facts that the structured classes were small, the teacher was qualified, and the private school program was more restrictive than the public school environment because all the children at the private school were handicapped.[166]

In *Spielberg v. Henrico County Public Schools*,[167] the parents of a severely retarded nineteen year old were successful in seeking continued funding for a private residential placement. The court determined that Henrico County School's decision to place Jonathan Spielberg in a public school program was made before developing an IEP on which to base that placement. The court noted that this sequence of placement prior to developing an IEP violated the spirit and intent of the EHA, which encouraged parental participation in IEP development.[168]

5. Statue of Limitations

In *Schimmel v. Spillane*,[169] the Fourth Circuit determined that claims in Virginia pursuant to the EHA[170] were governed by a one

163. 675 F. Supp. 1012 (W.D. Va. 1987).
164. *Id.* at 1019.
165. *Id.* at 1014-16.
166. *Id.* at 1017-18.
167. No. 87-3640 (4th Cir. 1988).
168. *Id.* at 8.
169. 819 F.2d 477 (4th Cir. 1987).
170. 20 U.S.C. §§ 1400-1461 (1982).

year statute of limitations. The parents filed an action in federal court eight months after the state administrative decision. The court noted that the EHA provided no statute of limitations. It therefore utilized the one year period applicable to all personal actions for which no limitations period is otherwise prescribed.[171]

D. *AIDS*

Courts have addressed a variety of issues relating to AIDS, both in the schoolhouse and in the work place.

1. AIDS in the Classroom

In *Thomas v. Atascadero Unified School District*,[172] the parents of a child diagnosed as having the AIDS virus successfully litigated an action under section 504 of the Rehabilitation Act of 1973. School officials were required to admit the child into regular kindergarten classes and pay the parents over $42,000 in attorneys' fees and costs.[173]

The plaintiff, Ryan Thomas, suffered from AIDS. He was recommended by school officials for admission to kindergarten. During a fight in his first week of school, Ryan bit another child's leg, but did not break the skin. A psychologist evaluated Ryan after this incident and found that Ryan behaved aggressively because of low language skills and a lack of maturity. The school committee subsequently recommended homebound tutoring and excluding Ryan from school.[174]

However, the court found that in the absence of significant health risks to other children, the child was "otherwise qualified" to attend public school. In finding in favor of Ryan and his parents, the court observed that according to the Centers for Disease Control there was no medical evidence that transmission of the virus by biting was possible. The court weighed the risks and benefits, and found that for this individual child the benefits outweighed the risks.[175]

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171. *Schimmel*, 819 F.2d at 480-83.
172. 662 F. Supp. 376 (C.D. Cal. 1986).
173. *Id.* at 382.
174. *Id.* at 379-81.
175. *Id.* at 381-83.

The child's functioning level was a deciding factor in the case of *Martinez v. School Board* .[176] Eliana Martinez, a mentally retarded child, contracted AIDS Related Complex ("ARC") through a blood transfusion.[177] The school board recommended a homebound program while the child's mother sought an in-school program. The crucial factors in this case were the child's incontinence and continuous drooling.[178]

In denying plaintiff's motion for a preliminary injunction, the court balanced the harm to the child from denial of an education against the potential harm to other people. The Centers for Disease Control, which stated that most children with the AIDS virus could attend school without creating a significant risk of harm to other children, recommended a more restrictive school setting for an incontinent child like Eliana. The court, in balancing between the harm to Eliana and the potential harm to her fellow students, denied the child admission to the center-based public school program on the basis of public safety.[179]

The issue of exhaustion of administrative remedies was addressed in another AIDS case, *Doe v. Belleville Public School District No. 118.*[180] In this case, a hemophiliac child contracted the AIDS virus as a result of a blood transfusion. The school district unsuccessfully argued that the plaintiff was required to exhaust administrative remedies pursuant to the EHA prior to filing an action in court. The court ruled that since the child's condition did not adversely affect his educational performance and the EHA did not apply, he was not required to exhaust administrative remedies.[181]

2. AIDS in the Work Place

In *Chalk v. United States District Court Central District of California,*[182] the Ninth Circuit considered the claim of a school

176. 675 F. Supp. 1574 (M.D. Fla. 1987).

177. AIDS related complex differs from AIDS. ARC can cause severe illness, but it is not fatal like AIDS. People with ARC are carriers of the HIV virus, and can transmit the virus to others. Once transmitted, HIV can develop into ARC or AIDS in its new host. *Id.* at 1578-81.

178. *Id.* at 1582.

179. *Id.*

180. 672 F. Supp. 342 (S.D. Ill. 1987).

181. *Id.* at 345-46.

182. 840 F.2d 701 (9th Cir. 1988).

teacher diagnosed as having AIDS who was barred from the classroom. The court noted that section 504 of the Rehabilitation Act of 1973 applies to individuals who suffer from contagious diseases and sets out a standard for determining when an individual is not otherwise qualified for a particular job. Disqualification from employment can occur only when a person poses a significant risk of transmitting the disease to fellow employees and no reasonable accommodation would eliminate that risk.[183]

The court enunciated four key factors: the nature of the risk; the duration of the risk; the severity of the risk; and the probability of transmitting the disease and the likely harm.[184] The court held that since it was likely that Vincent Chalk would prevail on his section 504 claim, he was entitled to a preliminary inunction restoring him to his classroom teaching responsibilities.

3. Fear of HIV Contagion

In the first ruling of its kind, the court in *Doe v. Centinela Hospital*,[185] held that the Rehabilitation covers discrimination against individuals infected with the human immunodeficiency virus (HIV) based on fear of contagion. An asymptomatic carrier of the AIDS virus was wrongfully excluded from a federally funded hospital's residential drug and alcohol treatment program because of the fear he could transmit the disease. In light of the Supreme Court's holding in *School Board v. Arline*,[186] the court held that such an individual was handicapped within the definition of the Rehabilitation Act because discrimination based on contagion, is discrimination based on a handicap.[187]

The court noted that HIV is the cause of AIDS. Persons who test positive on an antibody test are presumed to be both infected with the HIV virus and capable of transmitting the virus to others. The two most recognized means of transmission are sexual contact and sharing intravenous drug paraphernalia, both of which occur in the hospital's residential drug dependency program.[188]

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183. *Id.* at 710-12.
184. *Chalk*, 840 F.2d at 705.
185. 57 U.S.L.W. 2034 (D.C. Cal. July 19, 1988).
186. 107 S. Ct. 1123 (1987).
187. *Doe*, 57 U.S.L.W. at 2034.
188. *Id.*

E. *Mobility and Architectural Accessibility*

The financial cost of providing accessible transportation services has been a hotly contested issue for several years. In *Lloyd v. Illinois Regional Transportation Authority*,[189] disabled persons unsuccessfully sought the provision of completely accessible subway transportation. In 1984, another unsuccessful attempt was made to mainstream the bus transportation system of Baltimore in the case of *Disabled in Action v. Budwell*.[190] In response to these shortcomings, Congress amended the Urban Mass Transportation Assistance Act of 1970[191] in 1983 to establish minimum criteria for the provision of transportation services to the handicapped.

In *Americans Disabled for Accessible Public Transportation v. Dole*,[192] a federal district court struck down United States Department of Transportation regulations limiting spending for accessible transportation for handicapped persons to three percent of the transit authority's total annual operating costs. The limitation was seen by the court as arbitrary and capricious.[193] This case may send an optimistic note to handicapped advocacy groups seeking a larger share of the transportation pie. This case, however, did permit the reconsideration of cost in implementing accessible transportation programs.[194]

In the first case of its kind in Virginia, a Norfolk circuit court addressed the issue of accessibility to transportation services under the Virginia Act.[195] The Tidewater Transportation District provided an alternative transportation program for handicapped riders instead of equipping its operational bus fleet with special lift equipment. The court found that the lift equipment would add $10,000 to $15,000 to the cost of each bus to be purchased in the future. Evidence was presented that ridership by the handicapped was 1.3 percent of the total riders per year and the anticipated cost for making the transportation system accessible would involve about 9.3 percent of the total expenditures for public transportation. The court held that a person with a disability was entitled to equal accommodations on common carriers but not necessarily the

189. 548 F. Supp. 575 (N.D. Ill. 1982).
190. 593 F. Supp. 1241 (D. Md. 1984), *appeal dismissed*, 820 F.2d 1219 (1987).
191. 49 U.S.C. § 1612 (c) (1982).
192. 676 F. Supp. 635 (E.D. Pa. 1988).
193. *Id.* at 642.
194. *Id.* at 640.
195. Wolfe v. Tidewater Pizza, Inc., No. C87-662 (Norfolk Cir. 1987).

same accommodations; thus the alternative system of transportation for disabled persons in Norfolk was acceptable.

In Philadelphia, a handicapped person who rides the subway can gain access to the street from the subway station by way of an elevator. In *Disabled in Action v. Sykes*,[196] the Third Circuit held that the City of Philadelphia had a duty to make its proposed renovation of a subway station accessible to handicapped individuals.

V. Conclusion

There are many aspects to the federal and Virginia statues addressing handicapped individuals that lend themselves to controversy and differing interpretation. The pivotal issues generated by the Rehabilitation Act are the product of interpretation of the terms "otherwise qualified handicapped person," "solely because of disability," "reasonable accommodation" and "undue hardship." Each of these terms contains vast potential for conflict between the interests of employers and employees.

Another area of dispute is the expansion of recognized handicapped conditions within the meaning of the federal definition. In *School Board v. Arline*,[197] the Supreme Court accepted that a school teacher's predisposition toward tuberculosis was a handicap within the meaning of the federal statute. This decision is the predecessor to a number of current cases involving the question of whether AIDS may be considered a handicap.[198] Despite the stipulation that an "otherwise qualified person" is never one who endangers the health or safety of others,[199] a person carrying a noninfectious disease such as dormant tuberculosis, or AIDS has just begun to be officially recognized within the federal definition of disability.

The types of accommodations required of employers, the degree of accessibility to public housing, the availability of support services, job opportunities, and public education depends to a great extent, on whether a handicapped person accepts discrimination,

196. 833 F.2d 1113 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988).

197. 851 F.2d 730 (4th Cir. 1988).

198. 107 S. Ct. 1123 (1987).

199. *See* Chalk v. United States Dist. Court, 832 F.2d 1158 (9th Cir. 1987); Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987); Comment, *AIDS and Employment Discrimination under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. Rich. L. Rev. 425 (1986).

or challenges it. Representation by counsel is sometimes the most powerful tool available for making the available remedies responsive to an individual's needs.

During the last several years, courts have struggled with these issues. In the area of special education, courts have been asked to decide how far a public school must go in providing special education to the most severely disabled children in our society. Often, schools are being required to expend thousands of dollars on private residential placements. With the ability of medical science to allow severely disabled children to survive, school systems will see an increasing demand to educate these children. The passage of the Handicapped Children's Protection Act has opened the door to the private bar in litigating, often for the first time, new and creative special education cases.

The question of AIDS in the school has been litigated extensively in the past few years. New issues may surface in regard to handicapped children with AIDS. The courts will be asked to decide when a school can exclude a child with AIDS where behavior is less predictable and potentially violent.

In the field of employment, the AIDS epidemic has begun to impact on the rights of employees suffering from AIDS to seek and obtain gainful employment. Employers are beginning to face the challenge of deciding whether or not to retain employees suffering from AIDS on their payroll. The future holds a definite increase in litigation in this significant area of the law.

Courts may, in the future, be asked to decide whether certain voluntary handicapping are protected under the Rehabilitation Act. The question of alcoholism's voluntary nature has been addressed this past year. The next question may be whether a person who contracted AIDS by the use of intravenous needles due to drug dependency incurred the condition voluntarily. If so, could this group of people be excluded from protection under the Rehabilitation Act?

Under the Virginia Act, very few cases have been litigated. In the area of real estate, for example, persons with disabilities are often discriminated against in the housing area. The private landlord and tenant relationship seems ripe for litigation on a variety of fronts, as well as the issue of handicapped people seeking to purchase real estate being denied the opportunity to purchase the home of their choice.