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CRS REPORT FOR CONGRESS

LEGAL IMPLICATIONS OF THE CONTAGIOUS DISEASE OR INFECTIONS AMENDMENT TO
THE CIVIL RIGHTS RESTORATION ACT, S. 557

Nancy Lee Jones
Legislative Attorney
American Law Division



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ABSTRACT

S. 557, 100th Congress, as it passed the House and Senate contained an amendment to the definitional section of the Rehabilitation Act discussing the applicability of section 504 as it relates to the employment of persons with contagious diseases or infections. This provision would most likely be interpreted as codifying the existing standards relating to section 504 interpretation concerning discrimination against individuals with handicaps.

EXECUTIVE SUMMARY

S. 557, 100th Congress, as it passed the House and Senate contained an amendment to the definitional section of the Rehabilitation Act discussing the applicability of section 504 as it relates to the employment of persons with contagious diseases or infections. Section 504, 29 U.S.C. §794, is the major federal provision concerning discrimination against individuals with handicaps. This amendment would most likely be interpreted as codifying the existing standards applicable to section 504. However, there is some ambiguity concerning whether the amendment would indicate that persons who are only contagious or infectious but manifest no physical symptoms of their disease are covered by these section 504 standards. There is specific legislative language in the House debates supporting the argument that such persons would be covered but the most significant piece of legislative history — the colloquy between the two co-sponsors -- is silent on this point although it does not apparently contradict this interpretation.

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LEGAL IMPLICATIONS OF THE CONTAGIOUS DISEASE OR INFECTIONS AMENDMENT TO
THE CIVIL RIGHTS RESTORATION ACT, S. 557

I. INTRODUCTION

The Civil Rights Restoration Act, S. 557, passed the Senate on January 28, 1988 and the House on March 2, 1988.^{1/} An amendment was added during Senate floor debate to section 7(8), 29 U.S.C. §706(8), the definitional section of the Rehabilitation Act discussing the applicability of section 504 as it relates to employment of persons with contagious diseases or infections. This report will analyze the legal implications of the contagious disease amendment but first there will be a brief discussion of the background of the legislation.

II. BACKGROUND

S. 557 was introduced in response to a Supreme Court decision, Grove City College v. Bell, 465 U.S. 555 (1984), where the Supreme Court found that an educational institution is covered by the nondiscrimination provisions of title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a), if some of its students receive federal grants to pay for their education. However, the receipt of these grants was found not to trigger institution-wide coverage but rather, since the grants represent financial assistance to the College's financial aid program, it was found to be only that program which may be regulated by title IX. Since the provisions of section 901 of title IX

^{1/} 134 Cong. Rec. S.266 (Jan. 28, 1988); 134 Cong. Rec. H. 598 (March 2, 1988).

are very similar to those of three other civil rights statutes -- section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794; section 601 of title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000d; and the Age Discrimination Act, 42 U.S.C. §6102 -- the holding in Grove City has implications for how the program specificity issue is to be determined for these statutes. S. 557 would amend these four statutes by defining the term program or activity in a broader manner than the Supreme Court's interpretation. At this point, it is important to note the statutory requirements of section 504: section 504 prohibits discrimination against an otherwise qualified handicapped person solely by reason of handicap in any program or activity that receives federal financial assistance or in an executive agency or the United States Postal Service.

III. LEGISLATIVE HISTORY OF THE AMENDMENT ON CONTAGIOUS DISEASES AND INFECTIONS

A. Introduction

Having discussed S. 557 generally, we will now turn specifically to the legislative history of the floor amendment on contagious diseases and infections which was jointly introduced by Senators Humphrey and Harkin. The amendment, No. 1396, was introduced with a notation of the following purpose: "(Purpose: To provide a clarification for otherwise qualified individuals with handicaps in the employment context)."^{2/} As passed by Congress, this provision states:

(C) For the purpose of sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason

^{2/} 134 Cong. Rec. S.256 (January 28, 1988).

of the currently contagious disease or infection, is unable to perform the duties of the job.

B. Senate Legislative History

The amendment was the subject of a floor colloquy between Senators Humphrey and Harkin upon its introduction. Three main points were made in this colloquy.

(1) The amendment was "designed to address an issue comparable to the one faced by Congress in 1978 with regard to coverage of alcohol and drug abusers under section 504 of the Rehabilitation Act. That, is, Congress wish(ed) to assure employers that they are not required to retain or hire individuals with a contagious disease or infection when such individuals pose a direct threat to the health or safety of other individuals or cannot perform the essential duties of a job."^{3/} (2) It was understood that the amendment "does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps."^{4/} (3) Finally, the colloquy indicated that it was understood that "as we stated in 1978 with respect to alcohol and drug abusers, ... the two-step process in section 504 applies in the situation under which it was first determined that a person was handicapped and then it is determined that a person is otherwise qualified."^{5/} Since this colloquy was between the two sponsors of the amendment, it is entitled to significant weight in terms of its interpretation of the meaning of the provision.

There are several other discussions of section 504 and contagious diseases generally and the Senate amendment specifically throughout the legislative

^{3/} 134 Cong. Rec. S. 256 - S. 257 (Jan. 28, 1988).

^{4/} 134 Cong. Rec. S. 257 (Jan. 28, 1988).

^{5/} Id. The complete version of the colloquy is reproduced as an appendix to this report.

history of S. 557. These statements differ in their interpretation of the language of the amendment and indicate the political divisiveness created by the issue. The weight which would be accorded to these statements by a court -- even those subsequent statements by sponsors of the legislation -- would most likely be less than that accorded to the colloquy by the sponsors made at the time of introduction.^{6/} However, since courts could look to these statements to aid in interpretation, they will be examined.^{7/}

The first comments made during the January 28th debate on S. 557 regarding section 504 and contagious diseases were those of Senator Simon. He noted his support of the Supreme Court's decision in School Board of Nassau County v. Arline, 94 L.Ed.2d 307 (1987), and opposed any changes in the coverage indicated by this decision. First, he observed that there was "no need to change the law in order to protect the public health."^{8/} Second, he argued that "as the Supreme Court noted, the purpose of section 504 is to ensure that individuals with handicaps are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others, and this purpose is not served if persons with contagious diseases are automatically excluded."^{9/} These remarks do not appear to be focused on the particular amendment which was later introduced but rather discuss the general philosophy concerning section 504 coverage.

^{6/} Singer, 2A Sutherland Statutes and Statutory Construction §§48.13, 48.15 (4th Ed. 1984).

^{7/} Id. §48.13.

^{8/} 134 Cong. Rec. 249 (Jan. 28, 1988).

^{9/} 134 Cong. Rec. 250 (Jan. 28, 1988).

Similarly, prior to the actual introduction of the amendment, Senator Armstrong discussed his general philosophy concerning section 504 coverage, a philosophy which differed from Senator Simon's.^{10/} He indicated dissatisfaction with the Supreme Court's interpretation of the coverage of contagious diseases by section 504 in School Board of Nassau County v. Arline for two main reasons: (1) medical knowledge is uncertain and "constantly changing, even reversing itself,"^{11/} and (2) the approach of the Court arguably puts a financial and administrative burden on school districts which may deter their seeking removal of an allegedly contagious individual. Senator Armstrong also discussed the Humphrey-Hawkins amendment although he indicated that he had not seen its exact language. He observed that, from his perspective, "if we adopt the Humphrey amendment and it is signed into law, and that is all we do, we are making a very marginal improvement in a very bad situation."^{12/} Senators Armstrong and Humphrey discussed the amendment and it was noted by Senator Armstrong that an amendment of "a more sweeping nature, more along the lines that I believe would be in order"^{13/} was offered in committee was did not pass.

The amendment was then discussed by Senator Wilson who stated that "this compromise deserves support because it does afford to us legal protection for

^{10/} 134 Cong. Rec. S. 251 - 255 (Jan. 28, 1988).

^{11/} 134 Cong. Rec. S. 254 (Jan. 28, 1988).

^{12/} 134 Cong. Rec. S. 254 (Jan. 28, 1988).

^{13/} 134 Cong. Rec. S. 255 (Jan. 28, 1988) (Remarks of Senator Armstrong).

the handicapped person and legal protection as well as public health protection for the public in terms of the public health threat that might exist."^{14/} He further described what he thought the amendment would accomplish.

...what it does is to state that there will be an adjustment in the definition of the phrase "handicapped person," to take into account that someone who is currently afflicted with the contagious disease or an infection and who by reason of that would constitute a threat to public health or to public safety or by reason of that affliction would be unable to perform the duties that person will not have the protection that exists for those who simply suffer a handicap and pose no threat of harm to others. I think what this language will do is to require of the local employer, let us say the local school district, the local park and recreation board, that they seek to get the best possible medical evidence. ^{15/}

The contagious disease amendment was also discussed by Senator Kerry during debate on S. 557; however, this discussion was subsequent to the vote on the amendment so its interpretative significance may be somewhat less. Senator Kerry stated:

I am pleased that a compromise has been reached with respect to provisions concerning the Arline decision and its ramifications. I would object to any effort to add an amendment to this bill which would overturn the Supreme Court's decision in the Arline case. The Arline decision, handed down on March 3, 1987, by a 7-to-2 margin, protects the rights of handicapped persons. It holds that, under section 504 of the Rehabilitation Act, a person with a contagious disease like tuberculosis is considered a handicapped person.

The Supreme Court concluded that all handicapped persons, including those with contagious disease, have a constitutional right to go to court and have a fair hearing. The Court did not state that all such persons are automatically entitled to a job. Only those persons who do not pose a health or safety risk would be so entitled. There is nothing in Arline which threatens public health or safety. The decision simply protects the

^{14/} 134 Cong. Rec. S. 255 (Jan. 28, 1988).

^{15/} 134 Cong. Rec. S. 255 (Jan. 28, 1988).

constitutional rights of handicapped persons, and it should be respected by the Senate. ^{16/}

On February 4, 1988, subsequent to the passage of S. 557 by the Senate, Senator Cranston made some comments regarding his interpretation of section 504, the Arline decision, and the amendment concerning contagious diseases. He first noted the statements made by Senators Armstrong and Wilson and observed that "I believe that a number of points they made regarding the case and coverage for handicapped individuals under section 504 warrant a response, and thus, as the Senate co-author with Senator Stafford of section 504, I am taking this opportunity to respond and to seek to clarify the issues involved."^{17/} Senator Cranston first discussed the history of section 504, concluding that the purpose of the section "was to ensure that individuals are evaluated individually based on their abilities--rather than only on any disabilities that they might have--and that unfair, blanket assumptions were not made about any individual, or categories of individuals, because of a real or perceived handicapping condition."^{18/} Senator Cranston then proceeded to discuss the 1978 amendment regarding drug addicts and alcoholics and emphasized that the 1978 amendment did not change existing law but simply codified interpretations of the Attorney General and the Secretary of Health, Education, and Welfare. He also discussed the relationship of the definition and the term "otherwise qualified."

Although the 1978 amendment literally stated that, for purposes of sections 503 and 504 as they relate to

^{16/} 134 Cong. Rec. S.262 (Jan. 28, 1988)(remarks of Senator Kerry).

^{17/} 134 Cong. Rec. S.723 (Feb. 4, 1988).

^{18/} Id.

employment, the definition of "handicapped individual" did not include an alcoholic or drug abuser whose current use prevented performance of the job or constituted a direct threat to property or safety, that amendment did not result in any basic change in the process under section 504 by which it is determined whether the individual claiming unlawful discrimination is handicapped and whether that individual is "otherwise qualified," taking into account--as in the case of all other handicapped persons--any reasonable accommodations that should be made to enable him or her to perform the job satisfactorily. The practical effect, therefore, is the same as it would have been if the amendment had provided an exclusion from a definition of the term "otherwise handicapped"--which is not defined statutorily. ^{19/}

Senator Cranston discussed the Supreme Court's decision in Arline and emphasized that "neither the Supreme Court in the Arline decision nor I am suggesting that the rights of handicapped individuals should be protected to the detriment of the public health or that other individuals should be placed at risk of harm."^{20/} He then quoted Senator Wilson's remarks on the amendment during the debate on S. 557 which indicated that the amendment would make an adjustment in the definition of handicapped person. Senator Cranston stated that he found that comment to be misleading since he felt that the amendment "should result in no substantive change in the law."^{21/} Senator Cranston concluded his comments with a comparison of the amendment to S. 557 with the 1978 Rehabilitation Act amendment on drug addicts and alcoholics. "[J]ust as the 1978 law provided a sensible and balanced solution to the concerns raised, so does the Harkin-Humphrey amendment. It would

^{19/} 134 Cong. Rec. S. 724 (Feb. 4, 1988).

^{20/} Id.

^{21/} 134 Cong. Rec. S. 725 (Feb. 4, 1988).

help allay concerns that employers may have about employees with contagious diseases and infections and would still provide protection against discrimination for handicapped individuals."^{22/}

The weight which a court would give to Senator Cranston's remarks is somewhat uncertain. Since they were not made during the actual debate, they would most likely be accorded less weight than remarks made during the debate itself.^{23/} However, Senator Cranston's position as one of the original Senator sponsors of section 504 would tend to lend more weight to his interpretation of the history of that provision.

Senator Inouye made several remarks concerning section 504 and contagious diseases and the amendment to S. 557. His first remarks, entitled "Statement on Amendment No. 1396 to the Civil Rights Restoration Act," supported the approach the Supreme Court took in the Arline case and stated: "[i]n adopting an amendment contrary to the Arline decision, we would embody the prejudices that we overcame and precluded in the Rehabilitation Act."^{24/} This language could have been interpreted to support the contention that the amendment as adopted changed current law; however, Senator Inouye clarified his remarks on February 16. He noted then that his statement "concerned a proposed amendment denying people with infectious diseases protection under the Rehabilitation Act of 1973. It was inadvertently printed under the title 'Statement on Amendment No.

^{22/} Id.

^{23/} Singer, 2A Sutherland Statutes and Statutory Construction §48.13 (4th Ed. 1984).

^{24/} 134 Cong. Rec. S.321 (February 1, 1988).

1396,' which is completely harmonious with the Arline decision. I supported the amendment numbered 1396, as adopted."^{25/}

Senator Humphrey, one of the cosponsors of the contagious disease amendment, responded to Senator Cranston's remarks on February 18, 1988.^{26/} He observed that the amendment was the result of a compromise and "[l]ike most compromises, the measure was not entirely satisfactory to either side, rather it sought to strike a balance that would address a legislative problem in a manner acceptable to both sides."^{27/} Senator Humphrey proceeded to quote from the language of the amendment and the colloquy. He then discussed Senator Cranston's remarks and indicated that they

inaccurately assess(ed) the effect of the Humphrey-Harkin amendment.... [T]he remarks placed in the Record by the senior Senator from California do not reflect my intent in offering this amendment nor the actual effect of the language approved by the Senate. If the Humphrey-Harkin amendment had not resulted in some substantive change in the law, it would have been a pointless exercise. In fact, the amendment did modify substantive law by specifying that persons with contagious diseases creating direct health threats are not to be classified as "individuals with handicaps" under the employment provisions of the Rehabilitation Act. In that respect, I must point out that the language of this amendment is virtually identical to that contained in H.R. 1396, a measure introduced in the House by Representative Dannemeyer dealing with this same problem of contagious diseases. Neither the Humphrey-Harkin amendment nor the Dannemeyer bill were, or are intended merely to codify the status quo in this area. The language of these measures is quite clear, and post facto interpretations should not be construed to alter their actual intent or effect. 28/

25/ 134 Cong. Rec. S.772 (Feb. 16, 1988).

26/ 134 Cong. Rec. S.970 (Feb. 18, 1988).

27/ Id.

28/ Id.

Senator Humphrey's statement was not joined by the other cosponsor of the amendment, Senator Harkin. Rather, Senator Harkin inserted his own statement in the Record.^{29/} In his statement, Senator Harkin agreed with Senator Humphrey that the intent and effect of the amendment were made clear by the language of the amendment itself. However, although he did note that a new part to the statute was added by the amendment, he stated that "the purpose of the amendment was to clarify -- and not to modify in any way -- the protections of section 504, as they apply to individuals with contagious diseases or infections."^{30/} In addition, Senator Harkin specifically stated that "we believed that it was appropriate to clarify the applicability of section 504 to persons with contagious diseases and infections. It was not our intent to change the substantive standards of section 504, as they apply to such individuals."^{31/} He reiterated the three points made in the colloquy -- that the amendment language was to deal with a concern comparable to that dealt with in the 1978 amendments, that the amendment did nothing to change the requirements regarding reasonable accommodations, and that the two-step process of section 504 continues to apply in this situation -- and emphasized that the amendment's purpose, like that of the 1978 amendments "was to reassure employers" regarding the requirements that currently existed in law to protect public health and safety."^{32/}

^{29/} 134 Cong. Rec. S. 1738 (March 2, 1988).

^{30/} 134 Cong. Rec. S. 1739 (March 2, 1988).

^{31/} Id.

^{32/} 134 Cong. Rec. S. 1740 (March 2, 1988).

C. House Legislative History

The House debated and passed S. 557 on March 2, 1988. Under the rules for debate, no amendments were allowed to the Senate bill except for an amendment in the nature of a substitute which did not pass.^{33/} The remarks made in the House on the contagious disease or infection amendment largely parallel the points made in the Senate Humphrey-Harkin colloquy. Several members who spoke in support of the amendment made the points that the amendment put the Arline standards into statutory language,^{34/} that the amendment was patterned after the 1978 amendment on alcoholism and drug abuse,^{35/} that the amendment codified the otherwise qualified standard,^{36/} that the amendment did not change the requirements for reasonable accommodation,^{37/} and that the two-step process of determining whether there is discrimination under section 504 is unchanged.^{38/}

^{33/} 134 Cong. Rec. H. 555 (March 2, 1988).

^{34/} 134 Cong. Rec. H. 560 (March 2, 1988)(remarks of Rep. Coelho); 134 Cong. Rec. H. 567 (March 2, 1988)(remarks of Rep. Hawkins); 134 Cong. Rec. H. 571 (March 2, 1988)(remarks of Rep. Jeffords); 134 Cong. Rec. H. 574 (March 2, 1988)(remarks of Rep. Owens); 134 Cong. Rec. H. 573 (March 2, 1988) (remarks of Rep. Weiss); 134 Cong. Rec. H. 575 (March 2, 1988)(remarks of Rep. Waxman); 134 Cong. Rec. H. 583-584 (March 2, 1988)(remarks of Rep. Edwards).

^{35/} 134 Cong. Rec. H. 560 (March 2, 1988)(remarks of Rep. Coelho); 134 Cong. Rec. H. 567 (March 2, 1988)(remarks of Rep. Hawkins); 134 Cong. Rec. H. 571 (March 2, 1988)(remarks of Rep. Jeffords); 134 Cong. Rec. H. 573 (March 2, 1988)(remarks of Rep. Weiss).

^{36/} 134 Cong. Rec. H. 567 (March 2, 1988)(remarks of Rep. Hawkins); 134 Cong. Rec. H. 583-584 (March 2, 1988)(remarks of Rep. Edwards).

^{37/} 134 Cong. Rec. H. 573 (March 2, 1988)(remarks of Rep. Weiss); 134 Cong. Rec. H. 575 (March 2, 1988)(remarks of Rep. Waxman); 134 Cong. Rec. H. 583-584 (March 2, 1988)(remarks of Rep. Edwards).

^{38/} 134 Cong. Rec. H. 573 March 2, 1988)(remarks of Rep. Weiss); 134 Cong. Rec. H. 575 (March 2, 1988)(remarks of Rep. Waxman).

Several of the remarks in the House debate specifically indicated that the language of the contagious disease amendment was intended to assure that HIV infected persons, including those who were not manifesting physical symptoms of their disease, were covered under section 504.^{39/}

Representative Dannemeyer spoke in opposition to the contagious disease amendment.^{40/} He indicated that in the 1978 Rehabilitation Act amendments concerning drug addicts and alcoholics Congress had corrected the "aberration" of including drug addicts and alcoholics under section 504 "by saying as a matter of policy that the definition of a handicapped person did not extend to a drug addict or an alcoholic."^{41/} Mr. Dannemeyer argued that since medical science is not exact, the federal government should not enforce nondiscrimination protections for persons with AIDS. He concluded by arguing that the Arline decision should not be allowed to stand.

IV. EFFECT ON CURRENT LAW OF THE AMENDMENT ON CONTAGIOUS DISEASES AND INFECTIONS

A. Introduction

The major issue presented by the contagious disease amendment and by its legislative history is to what extent, if any, the amendment would change current law. It would appear that the present law would not be contradicted by such an amendment but that, in the words of the Humphrey-Harkin colloquy, the amendment indicates a congressional wish "to assure employers that

^{39/} 134 Cong. Rec. H. 561 (March 2, 1988)(remarks of Rep. Coelho); 134 Cong. Rec. H. 573 (March 2, 1988)(remarks of Rep. Weiss); 134 Cong. Rec. H. 574 (March 2, 1988)(remarks of Rep. Owens); 134 Cong. Rec. H. 575 (March 2, 1988) (remarks of Rep. Waxman).

^{40/} 134 Cong. Rec. H. 579-580 (March 2, 1988).

^{41/} 134 Cong. Rec. H. 579 (March 2, 1988).

they are not required to hire or retain individuals with a contagious disease or infection when such individuals pose a direct threat to the health or safety of other individuals."^{42/} However, arguably there are a few ambiguities raised by the amendment, particularly concerning the extent to which the amendment attempts to determine the issue of section 504 applicability to persons who are only contagious and who have no physical manifestations of disease, the analogy to the 1978 Rehabilitation Act amendment concerning drug addicts and alcoholics, and the interpretation of the otherwise qualified and reasonable accommodation requirements. In order to explore these ambiguities, it is first necessary to briefly examine the current state of section 504 interpretation with specific emphasis on the Supreme Court's ruling in School Board of Nassau County v. Arline, 94 L.Ed.2d 307 (1987).

In Arline, the Supreme Court held that a person with the contagious disease of tuberculosis may be a handicapped individual under section 504 and that the fact that a person with a record of an impairment is also contagious does not limit the coverage of the section. The Court further found that the issue of whether such contagious individuals are protected by section 504 is determined by whether such an individual is "otherwise qualified." The Court specifically noted that the case presented did not raise the issue of "whether a carrier of a contagious disease such as AIDS

^{42/} 134 Cong. Rec. S.256 (Jan. 28, 1988)(emphasis added).

could be considered to have a physical impairment, or whether such a person would be considered, solely on the basis of contagiousness, a handicapped person as defined in the Act."

Section 504 was described by the Court in Arline as "carefully structured." The definition of individual with handicaps is broad but section 504 covers only individuals who are both handicapped and otherwise qualified. "The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases." The Court also observed in footnote 14 that the "carefully structured" approach of section 504 was reaffirmed by Congress in the 1978 amendments.

The question of whether an individual is otherwise qualified was found to necessitate an individualized two-step process. First, findings of fact must be made concerning the nature of the risk, the duration of the risk, the severity of the risk, and the probabilities the disease will be transmitted. Second, courts are to evaluate, in the light of these medical findings, whether reasonable accommodation by the employer is possible.^{43/}

The other element of existing section 504 interpretation which is relevant to the discussion of the contagious disease amendment is the interpretation of the Rehabilitation Act provision relating to drug addicts and alcoholics.

^{43/} For a more detailed discussion of Arline see Jones, "School Board of Nassau v. Arline: A Person with the Contagious Disease of Tuberculosis May Be Covered Under Section 504 of the Rehabilitation Act of 1973," CRS Rept. No. 87-238A (March 4, 1987).

This provision is also found in the definition of handicapped individual and states that the general definition of handicapped person does not include for the purposes of sections 503 and 504 "any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual 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."^{44/} The legislative history of this provision indicates that it was "designed to clear up some misunderstandings about the employment rights of alcoholics and drug addicts under the act, and to make absolutely clear that employers covered by the act must not discriminate against those persons having a history or condition of alcoholism or drug abuse who are qualified for the particular employment they seek."^{45/} The legislative history also indicated that the amendment was in effect codifying the interpretation given to section 504 by the Attorney General in an Attorney General's opinion.^{46/} The cases which have discussed

^{44/} 29 U.S.C. §706(8).

^{45/} 124 Cong. Rec. 37509 (1978)(Statement of Senator Williams).

^{46/} 124 Cong. Rec. S. 19001 (Oct. 14, 1978)(Remarks of Sen. Williams). The Attorney General's opinion, 43 O.A.G. No. 12 (April 12, 1977), concluded that alcoholics and drug addicts were covered under section 504 if they were discriminated against solely because of their status as drug addicts or alcoholics and stated: "our conclusion that alcoholics and drug addicts are 'handicapped individuals' for purposes of section 504 does not mean that such a person must be hired or permitted to participate in a federally assisted program if the manifestations of his conditions prevent him from effectively performing the job in question or participation would be unduly disruptive to others, and section 504 presumably would not require unrealistic accommodations in such a situation." At 2.

section 504 coverage regarding employment discrimination against alcoholics and drug addicts have generally followed the interpretation which was given by the Attorney General's opinion.^{47/} It should be noted that the 1978 amendment, like the contagious disease amendment to S. 557, is limited to employment. It does not discuss situations such as access to educational benefits although it has been argued that by implication the provision indicates that drug addiction and alcoholism are included as handicapping conditions for contexts other than employment.^{48/} The Supreme Court has recently heard oral argument in a case involving whether a Veterans Administration regulation that defines alcoholism as "willful misconduct" violates section 504 by discriminating against handicapped persons.^{49/} The Court's resolution of this case could provide

^{47/} Davis v. Bucher, 451 F. Supp. 791 (E.D.Pa. 1978); Whitaker v. Board of Higher Education of the City of New York, 461 F. Supp. 99 (E.D.N.Y. 1978); Healy v. Bergman, 609 F. Supp. 1448 (D. Mass. 1985).

^{48/} Burgdorf, The Legal Rights of Handicapped Persons 26 (1980).

^{49/} Traynor v. Turnage, 791 F.2d 226 (2d Cir. 1986); McKelvey v. Turnage, 792 F.2d 194 (D.C.Cir. 1984), cases consolidated and cert. granted, No. 86-737 (March 9, 1987). Another issue presented by the case is whether 38 U.S.C. §211(a), which states that the decision of the VA Administrator on any question of law or fact under any law administered by the VA providing benefits for veterans shall be final, precludes the federal courts from determining whether the VA's willful misconduct regulation violates section 504. For a more detailed discussion of the 1978 amendment concerning drug addicts and alcoholics see Jones, "Proposed Amendment to the Definition of Handicapped Persons Regarding Alcoholics and Drug Abusers," CRS Rept. (September 26, 1986).

some definitive guidance on the section 504 coverage of alcoholics and drug addicts in nonemployment situations. To the extent that the contagious disease amendment to S. 557 is found to be patterned on the 1978 amendment, the Court's language could have an effect on this interpretation as well. Obviously, language in the legislative history of S. 557 concerning this issue could be of crucial importance in resolving the issue.

B. Codification of Section 504 Standards

The interpretation of the contagious disease amendment to S. 557 should begin with an interpretation of the language of the amendment itself. As stated earlier, the amendment specifically provides that as section 503 and 504 relate to employment, the term "does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job." Arguably, this language is a codification of the Supreme Court's interpretation of section 504 standards as expressed in Arline where the Court noted that in order to be covered by section 504, a handicapped individual must be otherwise qualified and that this requirement incorporated questions concerning the risks posed by the individual and the concept of reasonable accommodation. On the other hand, it could be argued that, by amending the definitional section, the contagious disease amendment would limit from coverage any person with a contagious disease who poses a direct threat prior to reaching the issue of whether that individual was otherwise qualified. This, it could be argued, would eliminate the requirement that an employer determine if reasonable

accommodation might eliminate the risk since the concept of reasonable accommodation is part of the "otherwise qualified" test as enunciated by the Supreme Court. It would appear from an examination of the language of the contagious disease amendment and its legislative history that the first argument that the language is a codification of existing law is the stronger argument. Although the amendment is placed in the definitional section of the statute, it, like the 1978 amendment, is directed only towards sections 503 and 504. However, it does not eliminate the requirements of the more general definition which appears prior to the 1978 amendment.^{50/} It could be argued that the contagious disease amendment is more akin to the section 504 substantive requirement that handicapped individuals be otherwise qualified than it is to the more general definition and that therefore it should be viewed as part of the second step of the two step section 504 analysis.^{51/} The legislative history of the contagious disease amendment would also appear to support this argument.

The most significant piece of legislative history regarding the contagious disease amendment is the colloquy between the two sponsors of the legislation,

^{50/} This part of the existing definition states: "Subject to the second sentence of this subparagraph, the term 'handicapped individual' means, for purposes of subchapters IV and V of this chapter, 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 impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. §706(8)(B).

^{51/} As has been noted in the debates on the contagious disease amendment, the two-step process involves first determining whether the individual alleging discrimination under section 504 is handicapped and then determining whether he or she is otherwise qualified.

Senators Humphrey and Hawkins.^{52/} As noted in the preceding section on legislative history, this colloquy specifically states that the amendment would do nothing to change current law regarding reasonable accommodation. Subsequently the colloquy stated that the amendment does not change the two-step process by which under section 504 a person is first determined to be handicapped and then questions concerning otherwise qualified are addressed. It could be argued that this second statement could affect the reasonable accommodation requirement but this argument would probably not be successful since reasonable accommodation is more specifically addressed elsewhere in the colloquy. The colloquy also emphasizes a similarity with the 1978 amendment concerning drug addicts and alcoholics and the legislative history of this 1978 provision indicates that this provision was added simply to codify existing law, not to change it. Thus, this colloquy language, like the statutory language, would support the argument that the amendment restates existing law.

Several other statements were made prior or after the introduction of S. 557; however, the weight which is given to these statements is less than that which would be given to statements by sponsors. The rationale for this

^{52/} The statements of a sponsor of a bill have been described as "pregnant with significance." Newell v. Federal Energy Administration, 445 F. Supp. 80 (D.D.C. 1977). However, the leading treatise on statutory construction has indicated that the statements of sponsors should be carefully evaluated for two reasons: (1) in actual practice the legislator may not be an expert on the bill and (2) even where the sponsor has specific knowledge of the bill, his statements "may sacrifice complete candor to partisan interest in enactment of the bill." Singer, 2A Sutherland Statutes and Statutory Construction §48.15 (4th Ed. 1984).

is that legislative debates express the individual views of legislators and do not necessarily indicate agreement or disagreement by other members of the legislature.^{53/} The remarks may be entitled to some weight although the exact weight may depend on an analysis of how well the remarks seem to represent the views of the entire legislature.^{54/}

The statement by Senator Wilson prior to the actual introduction of the contagious disease amendment where he indicates that it would make "an adjustment in the definition of the phrase 'handicapped person'...."^{55/} could be used to support an argument that the amendment makes some change in current law. On the other hand, the comments of Senator Armstrong indicated that the amendment would make a marginal difference.^{56/} This comment could be interpreted as either meaning there has been a slight change or, more probably in light of the colloquy language, as meaning the amendment simply codifies existing law regarding section 504 standards. The comments made by Senator Cranston following the passage of S. 557 are probably not entitled to significant weight since they were not made during debate on the provision but it could be argued that they support the interpretation that the amendment codifies existing law. Similarly, the comments made by Senator Inouye could be read as supporting the argument that the amendment was consistent with Arline. In addition, the

^{53/} Id. §48.13.

^{54/} Id.

^{55/} 134 Cong. Rec. S. 255 (Jan. 28, 1988).

^{56/} 134 Cong. Rec. S. 254 (Jan. 28, 1988).

statements made in the House debates would appear to support the argument that the amendment codifies section 504 standards as described by the Supreme Court in Arline.^{57/}

In addition to the colloquy, both of the sponsors of the contagious disease amendment made separate floor statements subsequent to the passage of S. 557. A comparison of these floor statements illustrates the political nature of the compromise and the statements appear to be contradictory concerning the intent of Congress about changing existing standards under section 504. Senator Humphrey indicated that the amendment was not intended to codify the status quo but was not specific about the exact differences; Senator Harkin indicated that the intent was not to modify in any way the protections of section 504 as they apply to persons with contagious diseases or infections. Although it could be argued that comments made by the sponsors of the amendment are entitled to weight when interpreting a provision, the conflicting comments and the general rules of statutory construction governing the statements of sponsors would appear to mitigate against great weight being given to either of these statements. As was noted above, statements by sponsors must be evaluated cautiously since the sponsor may not in fact be as familiar with the legislation as might be assumed and even where the sponsor is familiar with the legislation, he or she may be attempting to advance a certain partisan interest.^{58/}

^{57/} See supra, n. 34.

^{58/} Singer, 2A Sutherland Statutes and Statutory Construction §48.15 (4th ed. 1984)

In light of the seeming contradictions and the obviously political nature of the compromise, it would appear that caution should be exercised in placing weight on either of these statements and that the colloquy where both sponsors were in agreement is the more definitive piece of legislative history. This colloquy would appear to support the argument that the amendment codified existing section 504 standards.

C. Section 504 Coverage of Persons who are Contagious or Infectious but who do not Manifest Physical Symptoms of their Disease

It would appear that from the language of the contagious disease amendment and from its legislative history that the intent was to codify the existing standards applicable to section 504 interpretation. The question can be raised, however, concerning what these standards are. To some extent, the answer is fairly straight-forward: the existing section 504 standards are those discussed by the Supreme Court in Arline. However, an interesting issue is raised by the use of the phrase "currently contagious disease or infection" in the amendment. In Arline, the Supreme Court specifically refused to decide whether persons who were contagious but did not manifest physical symptoms of their disease, such as those persons who test positive for HIV antibodies, would be considered to be handicapped persons under section 504. It could be argued that the use of the phrase "currently contagious disease or infection" would indicate that such persons would be covered by section 504. To buttress this argument, it could be noted that the colloquy does not negate this interpretation and that such an interpretation would not

necessarily change present law since there is some lower court support for including only contagious persons within coverage of section 504.^{59/} Statements made during the House consideration of S. 557 could also be used to support this argument. In addition, it could be argued that the contagious disease amendment would codify only the section 504 standards, that is step two of the two step process,^{60/} but not step one relating to who is considered a handicapped person.

On the other hand, it would appear clear from the amendment introduced by Senator Humphrey in committee and the general comments by Senator Armstrong that their preferred approach was to limit the effect of the Arline decision. The interpretation of the language in the contagious disease amendment that was passed to include persons with positive HIV tests would appear to not contradict Arline but would expand upon the interpretation given in the decision. The Court in Arline specifically refused to rule on the issue of whether such persons were covered by section 504. It could be argued that it would have been unlikely for Senator Humphrey to have changed his position from that of limiting Arline to expanding upon the interpretation to include

^{59/} In Local 1812, American Federal of Government Employees v. United States Department of State, 662 F. Supp. 50 (D.D.C. 1987), a post-Arline decision, the issue was raised concerning whether section 504 covered HIV positive persons seeking certain positions in the State Department. Although the district court denied a motion for a preliminary injunction finding that the use of the test for HIV infection by the State Department "appears rational and closely related to fitness for duty" and that antibody positive persons were not "otherwise qualified" under section 504 for employment in this situation, the court appeared to assume that such individuals would meet the threshold requirement of being handicapped under the statute.

^{60/} See supra, p. 3.

persons who are solely contagious or infectious. However, this argument is speculative and the best indications for the interpretation of the language remain the language itself and the colloquy.

D. 1978 Amendments Concerning Drug Addicts and Alcoholics

At several points during the Senate and House debates on S. 557 the similarity between the 1978 Rehabilitation Act amendments concerning drug addicts and alcoholics and the contagious disease and infections amendment is stressed.^{61/} The main issue raised by this patterning of the contagious disease amendment on the 1978 amendment is to what extent, if any, this would have implications in areas other than employment. As noted above,^{62/} the Supreme Court has recently heard oral argument on the issue of whether a Veterans Administration regulation that defines alcoholism as "willful misconduct" violates section 504. It could be argued that the Supreme Court's resolution of this case could have implications for the section 504 coverage of persons with contagious diseases or infections if S. 557 were signed into law.

V. SUMMARY

S. 557 as it passed the House and Senate contained an amendment to the definitional section of the Rehabilitation Act discussing the applicability of section 504 as it relates to the employment of persons with contagious diseases or infections. This amendment would most likely be interpreted as

^{61/} See supra, pp. 3-13.

^{62/} See supra, p. 17.

codifying the existing standards applicable to section 504. However, there is some ambiguity concerning whether the amendment would indicate that persons who are only contagious or infectious but manifest no physical symptoms of their disease are covered by these section 504 standards. There is specific legislative language in the House debates supporting the argument that such persons would be covered but the most significant piece of legislative history -- the colloquy between the two co-sponsors -- is silent on this point although it does not apparently contradict this interpretation.


Nancy Lee Jones
Legislative Attorney

APPENDIX

CIVIL RIGHTS RESTORATION
ACT

The Senate continued with consideration of the bill.

AMENDMENT NO. 1396

(Purpose: To provide a clarification for otherwise qualified individuals with handicaps in the employment context)

Mr. HUMPHREY. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from New Hampshire [Mr. HUMPHREY] for himself and Mr. HARKIN, proposes an amendment numbered 1396.

At the end of the bill insert the following:

CLARIFICATION OF INDIVIDUALS WITH
HANDICAPS IN THE EMPLOYMENT CONTEXT

Sec. . . (a) Section 7(8) of the Rehabilitation Act of 1973 is amended by adding after subparagraph (B) the following:

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

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I understand under the UC agreement there was time set aside for the consideration of a Humphrey amendment. Am I correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. KENNEDY. As I understand the situation at the present time, that there has been an amendment which has just been read which is a Harkin-Humphrey amendment, and I would ask consent that it be in order for the Senate to consider that measure at this particular time.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from New Hampshire.

Mr. HUMPHREY. Mr. President, I thank the Senator from Iowa and the floor managers and others, the staff involved, for working diligently to come to compromise language and likewise I thank my colleagues not involved for their patience.

Mr. President, I would like to address several questions to the Senator from Iowa, relative to his understanding of this amendment. Is the Senator prepared? Do I have the attention of the Senator from Iowa?

Is it your understanding that this amendment is designed to address an issue comparable to the one faced by Congress in 1978 with regard to coverage of alcohol and drug abusers under section 504 of the Rehabilitation Act? That is, Congress wishes to assure employers that they are not required to retain or hire individuals with a contagious disease or infection when such individuals pose a direct threat to the health or safety of other individuals or cannot perform the essential duties of a job.

Mr. HARKIN. If the Senator would yield, yes, Senator, that is my understanding.

Mr. HUMPHREY. I thank the Senator for that response. Inquiring further, is it the Senator's understanding that this amendment does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps who cannot perform the duties of the job?

Mr. HARKIN. If the Senator would yield, there seems to be a bit of a difference here. On my copy of the compromise, which again I would just compliment the Senator from New Hampshire and his staff for working on so diligently to reach a compromise in this, the language that I have here basically has a question mark after the word "handicaps." That is in the third sentence, "to individuals with handicaps." That is why I did not understand the last little clause that was added and I would have to have some time to think about that. I am sorry.

Mr. HUMPHREY. Somehow we got two different copies here. I would be happy to end my question with the question mark after the word "handicaps."

Mr. HARKIN. I appreciate that. I am not certain that I know what exactly that does, but, if the Senator would, I would appreciate if and I would respond, then, to the Senator's question by saying that: Yes, indeed, that is my understanding.

Mr. HUMPHREY. Finally, is it the Senator's understanding, as we stated in 1978 with respect to alcohol and drug abusers, that the two-step process in section 504 applies in the situation under which it was first determined that a person was handicapped and then it is determined that a person is otherwise qualified?

Mr. HARKIN. Yes. I do understand—yes, that is my understanding.

Mr. HUMPHREY. Mr. President, the form of agreement is that, at least on the part of the Senator from Iowa and the Senator from New Hampshire, there would be no further debate or discussion at this point. Unless other Senators wish to do so, I think we are ready to dispose of it. A voice vote is acceptable.