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Anne McMillin Milton

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AIDS as a Disability: Its Effect on the Removal of HIV-Positive Teachers from the Classroom

The spread of acquired immune deficiency syndrome (AIDS) has reached epidemic proportions and has begun to invade every facet of society. A particularly divisive issue is whether primary and special education teachers who have tested positive for the AIDS virus may be excluded from the classroom on the basis of their being carriers of the disease. Rightfully or wrongfully, parents and school boards are uneasy about the presence of AIDS carriers in the classroom.

The core issue of whether a teacher may be removed from a public classroom solely on the basis of his or her status as an AIDS carrier has almost completely been resolved. The Federal Vocational Rehabilitation Act, which applies to institutions receiving federal funds forbids dismissal on that basis. However, this area of the law is far from settled. Answers to questions remaining on several subissues, the nature of accommodation of AIDS carriers, for example, remain unclear. Poorly funded school districts may be restricted in their ability to accommodate teachers with AIDS. Further, the effect that the only recently enacted Americans with Disabilities Act will have is unknown.

In order to comprehend the questions left unanswered by the current statutory and case law, it is necessary to have an understanding of the disease itself. AIDS is caused by human immunodeficiency virus (HIV). Haseltine and Wong-Staal, *The Molecular Biology of AIDS*, SCI. AM., Oct. 1988, at 34. A key characteristic of the disease is its transmissibility: AIDS is transmitted through sexual contact, exposure to blood and blood products or bodily fluids, and in the womb. It cannot be transmitted through casual contact. Heyward and Curran, *The Epidemiology of AIDS in the U.S.*, SCI. AM., Oct. 1988, at 74. In the primary classroom the most likely chance of exposure would be through blood, while in special education classes there could also be exposure to bodily fluids in general.

Educators should be aware of current case law, the Vocational Rehabilitation Act of 1973 (Rehabilitation Act), and the Americans with Disabilities Act (Disabilities Act) when addressing the issue of HIV-positive teachers in the classroom. The main purpose for the Rehabilitation Act is to promote the hiring of persons with disabilities. 29 U.S.C. § 794 (1982). More importantly, it prohibits discrimination on the basis of physical disability if the employee is otherwise able to perform the job. Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or, be subjected to discrimination under any program or activity receiving

Federal financial assistance. . . ." 29 U.S.C. § 794(a). Clearly, any public school system would be subject to these provisions.

The definition of a handicapped person under the Rehabilitation Act and its expansive regulations led to the suggestion that the Rehabilitation Act was applicable to contagious diseases such as AIDS. *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987); *District 27 Community Sch. Bd. vs. Board of Educ.*, 502 N.Y.S.2d 325 (Supp. 1986). Under the Rehabilitation Act, an "individual with a disability" is an individual who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706 (8)(B). The Department of Health and Human Services defines physical or mental impairment as "any physiological disorder or condition . . . affecting one or more of the following body systems: . . . hemic and lymphatic; skin; and endocrine." 45 C.F.R. § 84.3(j)(2)(i) (1987).

The first application of the Rehabilitation Act to contagious disease came in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987), *reh'g denied*, 481 U.S. 1024. The United States Supreme Court felt "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient . . . to justify discriminatory treatment." *Id.* at 282. After determining that a person afflicted with tuberculosis could be considered a handicapped individual within the meaning of Section 504, the Court fashioned a method for determining whether the plaintiff was "otherwise qualified" for her position as required by the Rehabilitation Act. *Id.* Using the premise that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap," the Court held that the inquiry into qualification should include "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and cause varying degrees of harm." *Id.* at 287 n.17, 288, quoting *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). The Court also noted: "When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions." *Id.* at 287 n.17. "Accommodation is not reasonable if it either imposes 'undue financial and administrative

burdens' on a grantee, or requires 'a fundamental alteration in the nature of [the] program.'" *Id.*

Although the Court was unable to show by example how it would decide the "otherwise qualified" accommodation issue, it indicated that at a certain point contagiousness will be a determinative factor. The Court noted outright that the Rehabilitation Act would not require a school to place a teacher with active tuberculosis in the classroom. *Id.* at 287 n.16. Then, as a codicil to its analysis of "otherwise qualified," the Court stated: "A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." *Id.*

Despite the Court's specific refusal to comment on the AIDS issue, many felt the *Arline* decision was applicable. Their interpretation of the scope of the decision was reinforced by the Ninth Circuit Court of Appeals in 1987. See, *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir. 1988). The court in *Chalk* assumed without discussion that Section 504 of the Rehabilitation Act was applicable to AIDS carriers. *Id.* The court also adopted as given three of the four factors for qualification set out in *Arline*. The main focus on the court's inquiry was the fourth factor, the probability that the disease would be transmitted.

The plaintiff in *Chalk*, a certified teacher of hearing impaired students, was diagnosed as having the AIDS virus. After the plaintiff was released to return to teaching, the defendant school system refused to allow him to do so but, as an alternative, offered him an administrative position. *Id.* at 703. The court of appeals reversed the district court and granted a preliminary injunction to reinstate the plaintiff to his classroom duties. The appeals court, feeling that the district judge had misapplied the *Arline* analysis, chastised him for his rejection of "the overwhelming consensus of medical opinion" in basing his decision on the idea that science has not determined all methods of transmission of the disease. *Id.* at 708. It held that the plaintiff was not required to disprove every theoretical possibility of harm and that the district court's fear of the reaction of parents, students and coworkers was not grounds to deny the preliminary injunction. *Id.* at 711.

Congress' positive reaction to *Arline* and *Chalk* left no doubt that their interpretation of the intent of the Rehabilitation Act was correct. The Rehabilitation Act was amended to reflect the qualifications regarding contagious diseases set out in *Arline*. Section 706(8)(D) now reads "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." 29 U.S.C. § 706(8)(D).

Arline, Chalk, and Section 706 make it clear that the Rehabilitation Act does apply to carriers of the AIDS virus, but there are still issues left unresolved. Unsettled is the issue of accommodation. "Reasonable accommodation" is required by the Rehabilitation Act to overcome the effects of a person's handicap. This requirement is tempered by the limitation that the accommodation is not reasonable if it either causes "undue financial and administrative burdens" or "requires a fundamental alteration in the nature of the program." *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979). This formulation could conceivably result in inequitable treatment for teachers employed by small school districts, as well as hardships in the schools themselves. School districts with limited budgets and small teaching staffs are less flexible in terms of accommodation.

Schools do have an out when accommodation becomes financially unreasonable. In *Kohl by Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989), the parents of a severely retarded hepatitis B carrier brought suit when their son was refused admission to a state facility on the basis of his carrier status. The Court of Appeals for the Eighth Circuit overturned the district court's determination that the inoculation of the staff against the virus was reasonable. The appellate court felt that, in light of the learning center's limited budget, the long-term costs of the inoculations were economically infeasible and warranted reversal. *Id.* at 938.

Schools are unlikely to be able to argue that AIDS carriers pose a significant risk, one not likely to be overcome by accommodation. Because of the difficulty of transmitting the disease, accommodation for teachers who are AIDS carriers is relatively simple. At the junior high and high school levels virtually no accommodation is necessary because there is little physical contact. However, in primary and special education classes, where the situation is not necessarily the same, more creative approaches may be called for. Teachers in the primary grades are often called upon to treat the cuts and scrapes that are so much a part of childhood, and special education teachers must perform innumerable tasks from changing diapers to administering medication. Such teachers are much more likely to be at risk for transferring the disease. Schools have several options in this respect. One solution is to give other classroom teachers duties that pose a risk if performed by the teacher who is an AIDS carrier. Another teacher could be called in to treat any students who are injured or a teacher's aide could be placed permanently in the classroom. In the primary grades, the curriculum could be altered to allow for less "hands-on" assistance from the infected teacher.

But, even though seemingly innocuous, these accommodations may be unreasonable in their effect on the school system because they may fun-

damentally alter the school's programs, particularly on the primary level. Further, accommodations may be financially difficult for many school districts. So much of the primary grades' purpose is to foster a caring and nurturing atmosphere so that the children will enjoy learning. Although these possible accommodations would not make children less apt to enjoy the classroom experience, they would certainly alter children's perception of educators. The alternatives of hiring a teacher's aide or transferring an AIDS-infected teacher to a higher grade would decrease the need for hands-on contact with the students. But both solutions could cause financial difficulty in poorly funded districts. Many schools would have a valid argument that the accommodation is prohibitively expensive. The trade-off here makes this argument much more likely to be accepted in the education area than in the business field. The accommodation that allows a teacher to continue in his or her capacity results in a loss of funding in other areas of education. Because the accommodation essentially lets the teacher do the same job, there is no resulting benefit to the system for the increased expenditure. School systems with limited funds will find it easy to argue and courts easy to accept that an expenditure for accommodation is unreasonable when it reduces funding for another program without providing a corresponding benefit.

The recently enacted Americans With Disabilities Act is another unknown factor. Since the Act became effective in July of 1992, there has to date been no litigation that indicates how courts will allow it to be used in situations such as those suggested here. On the one hand, the Disabilities Act indicates that it will be a private sector version of the Rehabilitation Act. However, the Disabilities Act contains a section, the inclusion of which, may result in its giving less protection to AIDS carriers than does the Rehabilitation Act. The Disabilities Act includes the *Arline* analysis; but rather than being a part of the qualification for the protections of the statute, it is a defense to its application. The Act states that an employer's qualification standards "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). A direct threat is defined by the Disabilities Act as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. 12111(3). If this language is interpreted as intended by the *Arline* court and by Congress in its analogous amendment to the Rehabilitation Act, then the Disabilities Act will have essentially the same effect.

Although many questions surrounding the issue remain unanswered, the fundamental problem has been settled. Under the Rehabilitation Act it is very unlikely that a court would uphold a school's removal of a classroom teacher for the sole reason that the teacher has tested positive

for the AIDS virus. Before taking action on such situations in their own schools educators must take a hard look at the factors set out in *Arline*, the reasoning in *Chalk*, and the medical evidence, while shielding themselves from their personal fears and prejudices. It is an emotionally charged issue for both parents and educators; but with adherence to the guidelines set out in the statutes and case law and creativity in working out a solution, it is possible to arrive at an arrangement satisfactory to all.

ANNE MILTON McMILLIN

