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CONCURRENT SESSION ONE

The Disenrollment of Students or Termination of Employees Because of AIDS: A Discussion of the Ruling in Doe v. Washington University

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THE DISENROLLMENT OF STUDENTS
OR TERMINATION OF EMPLOYEES
BECAUSE OF AIDS: A DISCUSSION OF
THE RULING IN DOE V. WASHINGTON
UNIVERSITY

PRESENTED BY:

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Presented at the Stetson University
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LAW AND HIGHER EDUCATION: ISSUES IN 1993
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I. INTRODUCTION: A brief newspaper account from the Associate Press wires, appearing at the end of 1991, underscores why we are here today. The story, headlined "AIDS Epidemic: Number of U.S. Cases Hits 200,000 Mark" observed that the second 100,000 cases came four times as quickly as the first 100,000. The U.S. Centers for Disease Control is Atlanta recorded the 100,000th case in August, 1989. It took just 26 months for the next 100,000 cases to be reported. The death toll from AIDS in San Francisco just reached 10,000. Arthur Ashe, Magic Johnson and many others have brought the impact of this disease into every home.

II. JOHN DOE V. WASHINGTON UNIVERSITY

A. Introduction: As many of you know, John Doe was a student at the Washington University School of Dental Medicine. He disclosed that he was HIV positive during the Spring of 1988, setting in motion a series of events that culminated in the termination of his student status.
The most significant recent developments in *John Doe v. Washington University* include the filing of motion for summary judgment by the University in August of 1990, argument of that motion on December 20, 1990 and the granting of the motion for summary judgment on October 2, 1991 (780 F. Supp. 628 (E.D. Mo. 1991)). An appeal was filed but then withdrawn before any briefs were submitted.

A companion case alleging various negligence claims is pending in state court.

In June of 1989, the University announced it was closing its School of Dental Medicine.

B. The following is a chronology of the process by which Washington University reached the decision that an HIV positive third-year dental student should not be permitted to continue as a candidate for the degree Doctor of Dental Medicine.

April 5, 1988 At a regularly scheduled meeting of the Washington University Medical Center-Communicable Diseases Council ("WUMC-CDC"), a group composed of infectious disease experts, faculty and administrators from the University and its affiliated hospitals, the Chairman of the Washington University Committee on AIDS ("WUCA") informed WUMC-CDC members that a dental student had recently
been found to be HIV positive. On behalf of WUCA, its Chairman asked the WUMC-CDC for guidance regarding how Washington University should proceed in light of this information. After discussion, WUMC-CDC decided to appoint an ad hoc subcommittee consisting of an infectious disease expert, the Director of Student Health, the Dental School Clinic Director, University counsel and a friend/representative of the student to consider the situation and report its recommendations back to WUMC-CDC.

April 19, 1988

The ad hoc subcommittee met to consider the situation. Prior to the meeting, several of the attendees had reviewed pertinent medical literature on HIV and HBC transmission to supplement their general knowledge of the subject. The ad hoc subcommittee decided to forward to WUMC-CDC recommendations that (i) the student should not be permitted to continue as a dental student given the risk to patients; and (ii) in the absence of evidence that the student had injured himself during patient treatment, it was not necessary to notify patients previously seen by the student in the Dental School clinic.
May 3, 1988

An attorney wrote to the Dean of the Dental School to state that he had been contacted by the student and would like to meet with University counsel to discuss the situation involving the student and the Dental School.

May 13, 1988

The WUMC-CDC met to consider the recommendations of its ad hoc subcommittee. Prior to the meeting, several individual WUMC-CDC members had taken it upon themselves to supplement their existing expertise regarding HIV transmission with the review of pertinent medical literature and with informal consultations with colleagues at other universities and at the CDC and NIH. After lengthy discussion, the WUMC-CDC forwarded the following recommendations to WUCA: (i) the student should not be allowed to engage in any invasive procedures; and (ii) patients exposed to the student during his third-year clinical training should be informed that the student might have been HIV positive at the time he provided care.

May 18, 1988

WUCA met to consider the recommendations of the WUMC-CDC. After lengthy discussion, the following recommendations were made by WUCA to the Dental School: (i) the student should not be allowed to engage in
any invasive dental procedures at the School of Dental Medicine; and (ii) patients exposed to the student during his third-year clinical training should be informed of the exposure, counseled and offered testing for HIV infection.

May 24, 1988 Counsel for the University met with counsel for the student to discuss the situation.

May and June, 1988 An ad hoc University AIDS Task Force composed of University administrators met several times to provide guidance to the Dental School on how best to implement the WUCA recommendations and to assist the Dental School in exploring ways in which the student's career objections could be accommodated.

June 8, 1988 The student and his counsel met with the Dean of the Dental School. The Dean reported that there was a "possibility" that the University ultimately would decide that the student should no longer be permitted to perform invasive dental procedures. Thus, it was appropriate to begin to consider career alternatives. The Dean mentioned the Washington University Masters in Health Administration program and an HIV positive dental clinic at another university as possibilities worth exploring. The Dean also proposed an indefinite leave of absence. After
consulting privately with the student, the student’s attorney announced that there was no reason to seriously consider alternatives until the University reached a final decision. The student’s bottom line was that he desired to remain in Dental School at Washington University.

**June 28, 1988**

The Washington University Committee on AIDS met to reconsider its recommendations in this matter. Materials provided by the student’s attorney were made available to Committee members prior to the meeting. The Committee reaffirmed its prior recommendations.

**June 29, 1988**

The Dental School’s Promotions Committee and then its Executive Faculty approved the WUCA recommendations that the student not be allowed to continue to perform invasive dental procedures. Given the curriculum of the Dental School and its heavy emphasis on clinical training in invasive procedures during the third and fourth years of dental education, the Executive Faculty approved the recommendation of the Promotions Committee that the student be offered an indefinite leave of absence or be dismissed from the School if the leave of absence was not accepted. There was now a final decision upon which the University could act.
July 12, 1988  The *ad hoc* University AIDS Task Force met to consider how to implement the final decisions in this matter.

July 19, 1988  The student’s attorney was notified of the University’s decisions. It was proposed that the student take an indefinite leave of absence from the Dental School. The University offered to assist the student in exploring career alternatives and in addressing his student loan situation.

August 2, 1988  At the request of the student’s attorney, the Dean of the Dental School wrote directly to the student to advise the student of the University’s decision.

August 11, 1988  The patient notification process commenced. Because of an anonymous tip to the press about the presence of an HIV positive individual within the Dental School, this occurred several days earlier than planned.


December 29, 1988  The University removed the suit to federal court.

December 30, 1988  The University filed its Answer to the suit.

February 22, 1989  The student filed a second suit in state court against the University and others alleging breach of physician/patient confidentiality, invasion of privacy and defamation.
April 24, 1989 The University filed in state court a motion to dismiss the second suit without prejudice or, in the alternative, a plea in abatement.

October 2, 1991 Summary judgment granted in §504 case.

C. Issue Checklist

In the course of developing a rational response to the knowledge that John Doe, a third year dental student, was HIV positive, the following matters were addressed and issues considered:

1. John Doe's Student Status
   a. Seek expert medical advice on HIV infection.
   b. Seek information on the nature of the Dental School curriculum.
   c. Evaluate John Doe's current academic status.
   d. Make or defer decision on John Doe's ability to complete the Dental School Curriculum.
   e. Appoint and brief Dental School faculty member to serve as official contact with John Doe.
   f. Explore other Dental School, degree, and employment options for John Doe.
   g. Review John Doe's eligibility for student health benefits.
   h. Review John Doe's eligibility for cancellation of student loans.
   i. Review John Doe's housing situation.
j. Decide to what extent Dental School faculty should be informed of situation.

k. Decide to what extent, if any, University should provide financial support to John Doe.

l. Keep in touch with John Doe's lawyer.

2. Possibility of HIV Transmission from John Doe to Others

a. Seek expert medical advice on HIV infection.

b. Seek medical and ethical guidance regarding whether John Doe's patients should be contacted and informed of their prior treatment by a School clinic worker who has tested HIV positive.

(1) Develop protocol for contacting John Doe's patients.

(2) Consider how to minimize patient anxiety.

(3) Consider how to protect John Doe's identity.

   (a) Carefully educate all personnel involved in process.

   (b) Stress need for confidentiality.

   (c) Develop guidelines for counseling patients.

   (d) Develop guidelines for appropriate medical/dental record entries.

c. Develop informed consent form.

d. Identify patients on whom John Doe performed invasive procedures.

e. Notify patients.
f. Counsel patients.
g. Test patients who elect to be tested.
h. Meet again with patients to deliver test results.
i. Determine internal budget source to support counseling and testing effort.
j. Consider possibility that a patient will test HIV positive.
k. Consider identifying and testing former sexual partners to the extent they are Washington University students or faculty.
l. Notify University's general liability insurer.

3. Miscellaneous

a. Consider how to minimize general anxiety about HIV infection and AIDS among students, faculty, staff and general patient population of the Dental School.

b. Confirm that Dental School students, faculty and staff are well-educated about HIV infection and AIDS and that all appropriate barrier protections are available to and used by dental personnel working in the Dental School Clinic.

c. Consider how to minimize negative impact on Dental School.

d. Determine how to respond to media inquiries.

e. Inform Chancellor.

f. Notify Trustees.

g. Brief other Medical Center institutions.
h. Notify the Centers for Disease Control, the American Dental Association and the Surgeon General’s Office so that they will be familiar with our actions if contacted by the media.

i. Maintain chronology of key events and decision-making.

III. POLICY DEVELOPMENT

A. Introduction: While AIDS is currently the infectious or contagious disease receiving the most attention, others exist or may be coming. Institutions need to develop policies to address infectious disease issues.

B. Policy Considerations:

1. Composition of decision making body.
2. Determine lines of internal reporting.
3. Assign responsibility for following issues.
4. Education efforts needed.
5. Environmental safety concerns.
6. Availability of testing.
7. Screening requirements.
10. Availability of medical care and counseling.
11. Reasonable accommodation of infected persons.
12. Health and disability insurance coverage.
14. Housing assignments.
15. Participation in athletics.
16. Statements in organization’s printed material.
17. Relationship with local media.

IV. CONTAGIOUS DISEASES AND FEDERAL LAW

A. Specific Statutory Provisions

1. Individuals with a "Currently Contagious Disease" -- The Rehabilitation Act of 1973

In 1986, the Rehabilitation Act was amended. The amended statute specifically provides that, in the employment context, the definition of an "individual with handicaps" does not include an individual who has a currently contagious disease 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. Sec. 706(8)(C). Thus, in circumstances where a person with a currently contagious disease poses a direct threat to others, the infected person will not be deemed to be "handicapped" within the meaning of the statute and will not be entitled to the Section 504’s protection.
2. **Individuals Who Pose a "Direct Threat" -- The Americans with Disabilities Act**

Under the ADA, an employer will be permitted to require that an individual not pose a direct threat to the health or safety of other individuals in the workplace. 42 U.S.C. Sec. 12113. The ADA defines "direct threat" to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. Sec. 12111. In order to reject an applicant or employee on this basis, an employer must consider the (a) duration of the risk, (b) the nature and severity of the potential harm, and (c) the likelihood that the potential harm will occur. The employer’s decisions in this regard must also be based on either valid medical analysis or on other objective evidence individualized for the particular individual and job.

B. **Application of the Law**

1. **Is AIDS or HIV Infection a Handicap/Disability?**
   a. **AIDS.** AIDS has been found to be a "handicap" under the Rehabilitation Act of 1973. In *Chalk v. US District Court*, 840 F.2d 701 (9th Cir. 1988), a federal court of appeals ruled that AIDS was a handicap covered by the Rehabilitation Act and held that the dismissal of an elementary school teacher because he had AIDS violated the Act. There have also been a number of federal suits involving elementary school children with AIDS. In virtually
all of these cases, the courts have deemed the children to be protected by the Rehabilitation Act and the federal Education for All Handicapped Children Act and have ultimately ordered school systems to permit such children to attend school in normal classroom settings. See Thomas v. Atascadero Unified School District, 662 F. Supp. 376 (C.D. Cal. 1987).

b. **Asymptomatic HIV-Infection.** The analysis is more difficult as to whether HIV infection alone is a "handicap" or "disability." Many people who are infected by HIV appear to be healthy; they have no physical or mental symptoms which incapacitate them. Nonetheless, the Rehabilitation Act and the ADA protect not only individuals who are handicapped, but also individuals who are perceived to be handicapped. It is safe to assume that, in most cases, asymptomatic HIV infection—like AIDS—will be deemed a "handicap" or "disability" protected under federal law.

Protection under the Federal Rehabilitation Act was afforded a fire fighter applicant who was HIV positive. The plaintiff’s expert testified that "... an asymptomatic HIV infected person should be able to perform all of the functions of a fire fighter..." The expert’s testimony was uncontroversed and the court found that the District’s withdrawal of employment violated the Rehabilitation

2. **Is an Individual with HIV Infection or AIDS "Otherwise Qualified?"**

In order to fall within the protection of federal law, it is not enough to be an "individual with handicaps"; one must also be "otherwise qualified."

The U.S. Supreme Court has stated that "[a] person who poses a significant risk of communicating an infectious disease to others in the work place will not be otherwise qualified for his or her job if reasonable accommodation with not eliminate that risk." School Board of Nassau County v. Arline, 480 U.S. 273, 287 (1987). Thus, in evaluating whether an employee or student with HIV infection is "otherwise qualified," a two step analysis is required.

a. **Significant Risk.** First, an institution must decide if the employee or student poses a significant risk of communicating HIV to others.

(1) The U.S. Supreme Court has enumerated four factors that must be considered in determining whether a person poses a "significant risk" of transmitting a communicable disease to others. Those four factors are as follows:

(a) The nature of the risk (how the disease is transmitted);
(b) The duration of the risk (how long the carrier is infectious);

(c) The severity of the risk (the potential harm to third parties); and

(d) The probability that the disease will be transmitted and will cause the varying degrees of harm.

In evaluating these factors, sound medical advice should be sought. It was important to the Court that decisions in this area be based on reasonable medical judgments.

b. **Reasonable Accommodation.** Second, if there is a "significant risk" to others, an institution must determine if reasonable accommodation would eliminate that risk. According to the Supreme Court in *Arline*, an accommodation will not be deemed reasonable if it either (1) poses undue financial and administrative burdens on an institution, or (2) requires a fundamental alteration in the nature of the institution's programs.

The *Arline* decision revisited the analysis of reasonable accommodation contained in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In *Davis*, a prospective nursing
student with impaired hearing was rejected by the college. In sustaining the college's action, the court observed that §504's protection extends only to persons "able to meet all of a program's requirements in spite of [their] handicap." (at 406).


*Sections II.B, C and IV were prepared primarily by Deputy General Counsel Leslie Chambers Strohm of Washington University. Her assistance is gratefully acknowledged.

V. TERMINATION OF EMPLOYEES WITH AIDS

A. Estate of Behringer v. Medical Center at Princeton, 592 A.2d 1251 (Sup. Ct. N.J. 1991). An ENT was diagnosed at the hospital where he practiced as having AIDS. The hospital allowed the information to "leak." The hospital restrained the doctor's surgical privileges, requiring informed consent of patients, and eventually rescinded his privileges. The physician brought action for, inter alia, violation of the New Jersey law against discrimination through imposition of conditions on his continued performance. The court held that the hospital acted
properly in initially suspending the privileges, requiring informed consent and 
eventually barring surgical privileges.

B. In re Application of the Milton S. Hershey Medical Center of Penn State 
order of the Court of Common Pleas of Dauphin County which permitted two 
hospitals to disclose the physician's identity and his HIV positive status to certain 
colleagues and to his patients. Appellate court affirmed lower court's decision, 
holding that the hospitals sustained their burden of demonstrating "compelling 
need" for disclosure of the physician's HIV status under the Confidentiality of 
HIV-Related Information Act.

While, ostensibly, Hershey deals with confidentiality, in this context isn't 
disclosure tantamount to termination?

C. Leckelt v. Board of Commissioners of Hospital District No. 1, 714 F.Supp. 1377 
(E.D. La. 1989), aff'd, 909 F.2d 820 (5th Dir. 1990). A LPN brought suit 
against hospital, commissioners and employees alleging violation of Rehabilitation 
Act, Louisiana Civil Rights for Handicapped Persons Act and Fourth and 
Fourteenth Amendments. Court held that discharge did not violate the Rehab or 
Louisiana Act, and hospital's requirement for testing of infectious diseases did not 
violate equal protection or employee's right to privacy. The LPN failed to 
establish that the hospital perceived him as HIV positive and therefore did not 
have a prima facie case of discrimination under the Rehab Act. Found that LPN
was fired for failure to follow hospital policy which required employee to notify employer of infectious diseases, specifically hepatitis B and syphilis in plaintiff's case. Hospital policy also required employee to have HIV testing following an exposure to AIDS, whether inside or outside the work place. LPN refused hospital testing and refused to divulge results of testing performed outside the hospital. On appeal, the court held that the LPN could not be considered handicapped for purposes of the Rehab Act if he did not divulge the results of his HIV testing.

D. **Severino v N. Ft. Myers Fire Control District**, 935 F. 2d 1179 (11th Cir. 1991) held that assignment of an HIV positive fire fighter to limited duties was a reasonable accommodation, allowing him "... to continue working with some restrictions to reduce the risk of his safety and the safety of others." (at 1182) The failure of the fire fighter to produce medical evidence in support of his insistence on a return to full duty was a major factor in the rejection of his Rehabilitation Act Claim.


F. **Cain v. Hyatt**, 734 F. Supp. 671 (E.D. Pa. 1990). In finding that Hyatt Legal Services violated a Pennsylvania statute protecting persons with handicaps by firing an HIV positive staff lawyer, the court emphatically stated that the handicap
was not job related: "Excluding health care professionals who perform invasive procedures, AIDS cannot be transmitted through work place exposure." (at 679).

The plaintiff received, from the judge, $42,888.18 in lost wages and interest; $65,000 for mental anguish and humiliation; and $50,000 in punitive damages.

VI. AIDS ON CAMPUS: POSSIBLE LIABILITY ISSUES

A. Medical Malpractice:


2. Standard of duty normally is to exercise appropriate care, skill and knowledge.

3. Liability found when a departure from required standard of care occurs. Can include diagnosis as well as treatment issues.

4. Tarasoff and AIDS: Is there a duty to notify 3rd parties?

B. Products Liability: Should condoms be provided?

1. Henningsen v. Bloomfield Motors, Inc. 161 A.2d 69 (N.J. 1960) was a source of development of modern law of products liability. Cause of action for implied warranty created, unfettered by former boiler-plate liability restrictions. One offering for sale a product implicitly guaranteed it was reasonably safe for use by the eventual purchaser.
2. Strict liability (responsibility without showing of fault) and warranty concepts dominant in this field of law. Often improper use by the consumer not a defense.

3. Principal responsibility on manufacturer. Uniform Commercial Code creates two implied warranties from seller to purchaser: merchantability and fitness for a particular purpose.

4. Possible Defenses for Universities:
   a. Sales not made in ordinary course of business.
   b. Commercial-Professional distinction can avoid imposition of strict liability.

5. Free distribution is not a defense.

6. For strict liability to occur plaintiff must show that product was faulty at the time of injury and that the condition existed when the product was held by each party against whom liability is asserted.

7. Recent legislation limits products liability exposure.

C. Environmental Requirements:

1. Awareness needed of Federal (and state - if applicable) requirements for infectious waste handling and disposal.

2. Review applicable OSHA standards.
D. Defamation:

1. Defamation actions arise when one's reputation is damaged.

"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

The Restatement 2nd, Torts Section 559

2. Slander is the expression of defamatory words verbally or in other non-written form.

3. Libel is the publication of defamatory matter in writing.

4. Slander/Libel Per Se - defamatory utterances or writings so serious and detrimental to the individual that no proof of economic damage is necessary. Category could include reference to a "loathsome disease" or serious sexual misconduct.

5. Defenses traditionally include truth, consent and privilege.

E. Emotional Injury:

1. Growing area of law that has expanded from a limited element of damages in a negligence action in which other injuries were sustained to an independent cause of action in which no injury or peril to the plaintiff is required.
2. Can arise from negligent or intentional conduct. Elements of an intentional claim are:
   a. Intentional conduct by defendant that is "extreme and outrageous."
   b. Severe emotional distress caused by the conduct.
3. Frequently combined with other claims, particularly those arising from discipline and discharge of students and employees.

F. Confidentiality Issues

1. Statutes generally define the nature, extent and persons protected by claims of confidentiality or privilege. Within the profession, ethical canons or principles provide further guidance.
2. Breach of confidentiality or waiver of privilege can occur expressly or implicitly. Statutory measures frequently regulate the extent of disclosure of information about persons with AIDS.
3. The general rule is that physicians, psychologists and those working closely with them have a duty to keep confidential any disclosure made by a patient during their professional relationship.
4. Invasion of privacy is recognized as a tort. Elements include:
   a. Public disclosure of embarrassing private facts;
   b. Unreasonable intrusion into the plaintiff's private life.
5. Right to confidentiality is not absolute. A balancing test is often employed, using the following factors, among others:
   a. Person's expectation that information would not be disclosed;
   b. How significant is the need to disclose?;
   c. How are third parties impacted by disclosure or non-disclosure?
   d. Can disclosure occur in a minimal way?; and
   e. What are the applicable community or professional standards?

6. A major unresolved question for the 90's is when the duty to warn (Tarasoff) outweighs interests of confidentiality.

VI. ADDITIONAL MATERIALS: A more extensive elaboration of the liability issues may be found in a leading legal encyclopedia such as American Jurisprudence or Corpus Juris Secundum. Treatises that are particularly useful include Restatement 2nd, Torts and Modern Tort Law by J.D. Lee and Barry Lindahl. William A. Kaplin's The Law of Higher Education and the 1985-90 Update co-authored by Barbara A. Lee of Rutgers, are excellent general volumes.

The National Association of College and University Attorneys (NACUA), One Dupont Circle, N.W., Suite 620, Washington, D.C. 20036 (Phone 202-833-8390) publishes two works that will be helpful: Am I Liable?, an examination of campus liability issues and Leslie Strohm's AIDS on Campus. The latter includes several useful resources from the American College Health Association.
DISENROLLMENT OF STUDENTS BECAUSE OF AIDS; A DISCUSSION OF
DOE v WASHINGTON UNIVERSITY, 780 F Supp 628 (1991)

PRESENTED BY:

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DISENROLLMENT OF STUDENTS BECAUSE OF AIDS; A DISCUSSION OF DOE v WASHINGTON UNIVERSITY, 780 F Supp 628 (1991)

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In March 1988, Washington University learned that one of its dental students had tested HIV positive. Because the student was entering the clinical phase of the dental curriculum and would be required to perform numerous invasive procedures on patients in order to comply with the University's requirements for the DDS degree, the University determined that the student, John Doe, should be disenrolled. It did so after a lengthy and thorough review of scientific and medical literature and opinion, a process in which 48 professionals participated.

The upshot of the University's review was that Mr. Doe presented a risk that he might, in the course of performing an invasive procedure, sustain a needle-stick or other wound which would permit his blood to enter his patient's mouth. Mr. Doe argued that the risk was statistically negligible and that the use of barriers such as double surgical gloves would make it virtually nonexistent. The University disagreed, concluding
that any risk, however small, was unacceptable, given the potential severity of an infection.

In November 1988, Mr. Doe filed suit in Federal Court for the Eastern District of Missouri, asserting that the University's action violated §504 of the Rehabilitation Act of 1973, 29 USC §794. After assembling requisite supporting affidavits and deposition testimony, the University filed a motion for summary judgment which was argued in December 1990. Judge Cahill's judgment was something less than "summary;" he did not file his opinion granting the motion until October 2, 1991. But he wrote a strong, well-reasoned opinion. A copy is attached for easy reference.

Defendants argued (and the court agreed) that their decision to dismiss Doe was "academic," not "medical" and was thus within the judicial deference rule of Regents of the University of Michigan v Ewing, 474 US 214 (1985). Defendants alternatively argued that even if their decision were considered "medical" it was still entitled to judicial deference. They reminded the court that in Board of Curators of the University of Missouri v Horowitz, 435 US 78 (1978), the Supreme Court had characterized as "academic" considerations Ms. Horowitz's inability to accept criticism, erratic attendance, inadequate interpersonal skills and lack of concern for personal hygiene. Moreover, in addressing the substantive due process rights of persons involuntarily committed to a
state mental institution, the Supreme Court had explained the approach to be taken by the federal judiciary in evaluating decisions made by mental health professionals. Younberg v Romeo, 457 US 307 (1982). In ruling that decisions of such professionals are presumptively valid, the court wrote:

"...in determining what is 'reasonable'...we emphasize that courts must show deference to the judgment exercised by a qualified professional...moreover there certainly is no reason to think that judges or juries are better qualified than appropriate professionals in making such decisions...for these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." (Emphasis supplied).

Id. at 322-323).

The court rejected plaintiff's claim that summary judgment was inappropriate in a §504 case. Plaintiff argued that under School Board of Nassau County v Arline, 480 US 273 (1987), he was entitled to an "individualized inquiry" to determine whether he was "otherwise qualified" to continue his dental education. Plaintiff reasoned that the individualized inquiry requirement would necessarily raise disputed questions of material fact and thus that summary judgment could not be granted. Disagreeing, the court pointed out that while the Arline individualized inquiry requirement was said by the
Supreme Court to be required "in most cases," it did not require the court to substitute its judgment for that of defendants as to whether plaintiff was otherwise academically qualified. 780 F Supp at 632.

The court employed Arline's four-element inquiry, concluding that:

1. Plaintiff is a handicapped person as defined by the Act.

2. Plaintiff was excluded from participation in the Dental School program solely because of his handicap.

3. The program was receiving federal funding.

4. Plaintiff was not otherwise qualified for participation in the Dental School program.

Only the latter factor was in dispute. In resolving the dispute, the court again used a four-factor analysis:

1. The disease could be transmitted if plaintiff's blood entered a patient's mouth.

2. The duration of the risk is indefinite since there is no known cure for HIV infection.

3. The severity of the risk is significant since HIV leads to AIDS, which is fatal.

4. The possibility that the disease would be transmitted, although arguably remote, was real.

Again, only the fourth factor was considered problematic
by the court. Rejecting plaintiff’s contention that he did not represent an unacceptable risk to patients, the court took judicial notice of the death of Kimberly Bergalis:

"Plaintiff asserts, however, that if proper barrier techniques are used an HIV-infected doctor or dentist presents no threat of infecting his patients. This absolute is refuted in the light of the Bergalis tragedy in which a Florida dentist infected five of his patients with the same virus/strain of AIDS that caused the dentist’s death. The court is convinced that although the risk of transmission of HIV from an infected dental worker to a patient may be minimal, there is still some risk of transmission." (Emphasis by court).

780 F Supp 633.

Judge Cahill also offered the following wry observation:

"While doctors emphasize that the danger, statistically, is slight, the victim of infection by this rare but fatal infection can hardly be consoled by the odds."

780 F Supp 634.

Possibly with some relief, the court concluded that it was not its job to weigh the medical odds.

"The court does not, however, have to reach this conclusion; the issue before this court is the narrow question of whether the academic decision by the university officials was properly decided.

Therefore, the only remaining question before this court is whether the record shows that
the university acted arbitrarily in dismissing plaintiff..."

780 F Supp 634.

Observing that "...nothing in the language or history of §504 indicates an intention to limit the ability of an educational institution from (sic) requiring reasonable physical qualifications for participation in a clinical training program," the court held that the action of the defendants in dismissing Mr. Doe was "academic," was not arbitrary and irrational and was therefore entitled to judicial deference under the rule of Ewing, supra.

Judge Cahill's opinion has received widespread attention and has apparently been considered persuasive by other potential plaintiffs; of the 25 §504 AIDS cases reported since 1990, none have involved academic dismissals.

It remains to be seen whether the Americans With Disabilities Act which took effect in July 1992, will provoke similar litigation in the employment context. The legislative history of the Act specifically mentions that infection with HIV is included in its definition of a disability. The definition of a disability is virtually identical with that contained in the Rehabilitation Act and some reported dicta suggest that the ADA will apply to people with AIDS. See, e.g., Support Ministries v Village of Waterford, N.Y., 92-CV-539 RWS, N.D. New York, Dec. 4, 1992.
MEMORANDUM AND ORDER

CAHILL, District Judge.

This matter comes before the Court on defendants' motion for summary judgment.

Plaintiff brings this complaint for damages pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Specifically, plaintiff alleges that his dismissal from the dental school at Washington University after the defendants' discovery that plaintiff had tested positive for human immunodeficiency virus (HIV) was discriminatory and in violation of Section
DOE v. WASHINGTON UNIVERSITY
(Cite as 780 F.Supp. 628 (E.D. Mo. 1991))

504. Defendants filed a motion for summary judgment on August 8, 1990, pursuant to Fed.R.Civ.P. 56(c), to which plaintiff filed a response on October 2, 1990. Defendants then filed a reply to plaintiff's brief in opposition on October 24, 1990. After careful review and consideration of all the affidavits, exhibits, and memoranda of law currently on file, the Court does now consider the merits of defendants' motion for summary judgment.

1. Factual Background.

Plaintiff John Doe was a third-year dental student at Washington University. In late March of 1988 the chairman of the Washington University Committee on AIDS (WUCA), Dr. J.A. Little, learned that John Doe was infected with human immunodeficiency virus. Acting in his capacity as chairman of the WUCA, Dr. Little brought to the attention of the Washington University Medical Center Communicable Diseases Council (WUMC-CDC) the fact that an unnamed dental student had tested positive for antibodies to HIV and requested guidance from WUMC-CDC as to how the University should proceed.

The committee engaged in a lengthy discussion centering on the relevant guidelines and recommendations promulgated by the federal Centers for Disease Control (CDC). An ad hoc committee was established which included the Director of the University's Student Health Services (who was the dental student's personal physician), the Director of the University's School of Dental Medicine Clinic, a University administrator, and a member of the dental school's faculty who had been personally selected by the student.

The committee met on April 19, 1988, and focused on the then current medical/scientific understanding of HIV infection and transmission, the student's strong desire to become a dentist, the large number of invasive procedures required to be performed by this student in order to complete the clinical component of the dental school's graduation requirement, and the frequency of self-injury experienced by dentists. The ad hoc subcommittee unanimously recommended to the WUMC-CDC that the student not be permitted to continue in dental school because of the risk that he could transmit HIV to patients should his hands and/or fingers be injured while performing one or more of the many invasive procedures required by the curriculum of the dental school.

On May 13, 1988, the WUMC-CDC met to consider the recommendation of the ad hoc subcommittee. The WUMC-CDC considered many factors, including but not limited to the then current medical and scientific understanding of HIV infection and transmission as well as HIV transmission in relation to hepatitis B transmission.

The WUMC-CDC forwarded a recommendation to the WUCA that, given the risk of transmission of HIV from an HIV-infected dental student to a patient during the performance of invasive procedures, made by the health-care worker's personal physician in conjunction with the medical directors and personnel health service staff of the employing institution or hospital.

3. In order to satisfy the dental school's graduation requirements, a student at Washington University would need to complete at a minimum some 1,643 clinical procedure hours and demonstrate a level of proficiency in each of a number of clinical disciplines.

4. HIV and hepatitis B are transmitted in the same manner and transmission of hepatitis B from a dental worker to patients is well documented. Both are transmitted by percutaneous contact (via an open wound, nonintact skin, or mucous membranes) with infected blood or blood-contaminated body fluids.
the dental student should not be allowed to engage in any invasive dental procedures. The WUCA met on May 18, 1988, to consider this recommendation. The WUCA is also a university committee composed of infectious disease experts, faculty from medicine, dental medicine, and the sciences, as well as numerous university administrators. The WUCA recommended to the School of Dental Medicine that the student not be allowed to continue to perform invasive dental procedures because of a perceived risk that, should the dental student be injured by cutting or nicking his fingers/hands in the course of invasive dental procedures, HIV might be transmitted to patients. On June 28, 1988, the WUCA reaffirmed its recommendation from the May 18, 1988 meeting.

During May and June of 1988, an ad hoc University AIDS task force composed of senior University administrators met several times to provide guidance to the dental school on how best to implement the WUCA recommendation as well as to assist the dental school in exploring ways in which the student’s career objectives might still be accommodated in the event the dental school decided that the student could not satisfy the requirements for the award of the Doctor of Dental Medicine degree without continuing to perform invasive procedures.

Additionally, the task force reviewed opportunities for admission to a dental school which operated a clinic solely for HIV-infected patients. Furthermore, the University offered the plaintiff admission to other related medical career programs at Washington University not requiring invasive techniques.

Finally, the dental school’s Promotions Committee and its executive faculty approved the WUCA recommendation and concluded that it would not be possible for the student to satisfy the dental school’s graduation requirements. The student was offered an indefinite leave of absence from the dental school, but after several months without a response the student was dismissed from the dental school. Subsequently, the student did not respond to any of the University’s offers of assistance in alternative career opportunities. In November, 1988, this action was filed alleging discrimination by the University against the student in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

In support of their motion for summary judgment, defendants argue that no issue exists as to a material fact, and, therefore, summary judgment is properly before this Court. The defendants further argue that the decision not to permit the plaintiff to continue in dental school was not arbitrary or irrational, but rather was a careful, professional, and deliberate decision based on the then currently scientific and medical opinion available. Consequently, the defendants argue that this evidence supplied ample basis to find that plaintiff posed an unacceptable risk to the health of clinical patients and thus plaintiff was not qualified to continue as a student in the dental school.

In response, plaintiff argues that there does exist an issue of material fact in dispute between the parties. Specifically, plaintiff argues that within the context of Section 504, the United States Supreme Court has required lower courts to make individualized inquiry into the impact of plaintiff’s handicap upon his qualifications for the benefit or job denied, citing School Board of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). Furthermore, plaintiff argues that judicial deference to defendants’ decision to disenroll plaintiff is not appropriate and requires an individualized inquiry into the basis of the decision.

Moreover, plaintiff argues that the defendants’ characterization of their decision as academic rather than medical is without merit. Plaintiff argues that the decision to exclude plaintiff was based purely upon plaintiff’s infectious status and, thus, was inappropriate.

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II. Analysis.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law." The party supporting a motion for summary judgment must demonstrate to the Court that the record before it does not disclose a genuine dispute on a material fact. Celotex v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); City of Mt. Pleasant, Iowa v. Associated Electrical Cooperative, Inc., 838 F.2d 268 (8th Cir.1988).

Once the moving party has met its burden, the opponent must show the Court that there is a genuine dispute on a material issue. City of Mt. Pleasant, 838 F.2d at 274. Where the record could not lead a rational trier of facts to find for the non-moving party, there is then no "genuine issue for trial." Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

[1-3] Traditionally, in cases involving academic dismissal, educational institutions have the right to receive summary judgment unless there is evidence from which a jury could conclude that there was no rational basis for the decision or that it was motivated by bad faith or ill will unrelated to academic performance. See Ikpeazu v. University of Nebraska, 775 F.2d 250 (8th Cir.1985); see also Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). In reviewing the substance of academic decision, courts should show great deference to the opinions of educators and normally will not overturn such decisions unless they are such "a substantial departure from accepted academic norms as to demonstrate that the person or committee

5. Mr. Chief Justice Rehnquist went on to note that "...personal hygiene and timeliness may be as important factors in a school's determination of whether a student will make a good

responsible did not actually exercise professional judgment." See Regents of the University of Michigan v. Ewing, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 89 L.Ed.2d 523 (1985). The Court notes that in opposition to defendants' motion for summary judgment, plaintiff argues that defendants' decision to dismiss the plaintiff should not be characterized as academic, but as a medical decision. Consequently, plaintiff argues that such decisions that are not "academic" are inappropriate for judicial deference. The Court, however, is not persuaded by plaintiff's argument. This Court is of the opinion that, under these facts, defendants' decision to disenroll plaintiff based on plaintiff's positive HIV status was wholly an "academic" decision, not a medical decision as characterized by the plaintiff. See Bd. of Curators of the University of Missouri v. Horowitz, 435 U.S. at 91, 98 S.Ct. at 955. Defendants are charged with the duty to evaluate each student as a whole. If any element of that individual severely limits his or her ability to provide competent, conscientious service, it is clearly the duty of the faculty and administration to identify these problems and pursue ameliorating alternatives.

Section 504 of the Rehabilitation Act reads in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance...." 29 U.S.C. § 794.

A handicapped individual, for use in § 504, is defined as: "[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B).

medical doctor as the student's ability to take a case history or diagnose an illness." Horowitz, 435 U.S. at 91, n. 6, 98 S.Ct. at 955, n. 6.
Section 504 is fully applicable to individuals who suffer from contagious diseases. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987); Chalk v. U.S. Dist. Court Cent. Dist. of California, 840 F.2d 701 (9th Cir.1988).

Under Section 504 the elements of inquiry include: (1) is plaintiff a "handicapped person" under the Act? (2) is plaintiff "otherwise qualified" for participation in the program? (3) is plaintiff being excluded from participation in the program solely because of his handicap? and (4) is the program receiving federal funding? See Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir.1988); Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir.1981).

The Court agrees with the parties that a prime element of this inquiry is whether, in spite of his handicap, plaintiff was "otherwise qualified" to continue with his dental education.

The Supreme Court has outlined the applicable analysis necessary in the employment context for Section 504 cases of a claim of discrimination on the basis of a communicable disease.

The remaining question is whether, if plaintiff is otherwise qualified for the job... To answer this question in most cases, the District Court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if Section 504 is 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 of grantees as avoiding exposing others to significant health and safety risks. (Emphasis added.)

School Bd. of Nassau County v. Arline, 480 U.S. at 287, 107 S.Ct. at 1130–31. The following factors were identified as factors to be considered:

(a) nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infections), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted... Id. at 288.

These determinations must be based on "reasonable medical judgments given the state of medical knowledge" of each. Id. at 289, 107 S.Ct. at 1131.

The first of these factors, the nature of the risk, is not at issue in the case at bar. All parties acknowledge that HIV could be transmitted to a patient if the plaintiff's blood were to enter the patient's mouth accidentally. The second factor, the duration of the risk, is equally not refuted since presently there is no known cure for the HIV infected individual and plaintiff consequently will remain infectious for the remainder of his life. Nor is the third factor, the severity of the risk to third parties, at issue since HIV is the precursor to AIDS which is, for all practical purposes, 100% fatal.

The Court believes that it is the fourth factor, the probability the disease will be transmitted, that is really at issue. This area is at the heart of this country's debate surrounding HIV infected individuals, as there has been only limited study of the risk of HIV transmission from infected health-care workers to patients. Although since the filing of this lawsuit a number of cases have been publicized that indicate the realistic possibility of transmission of HIV from an infected health care worker to a patient, there is no nationwide consensus on the precise probability that an HIV-infected dental student will transmit HIV to a patient. Defendant argues that when faced with an HIV-infected individual who desires to continue to perform invasive procedures, the decision maker(s) can only make the best informed, reasoned judgment which balances the interests of the individual against the interests of his patients.

In Chalk, the Court noted that it must weigh the interests between the parties and the difficulties "... which confront a handicapped person, an employer, and the public in dealing with the possibility of contagion in the workplace. The problem
is in reconciling the needs for protection of other persons, continuation of the work mission, and reasonable accommodation—if possible—of the afflicted individual." Calk, 840 F.2d at 705.

The parties have submitted evidence to this Court which includes many articles from prestigious medical journals, affidavits, and deposition testimony, as well as guidelines from the U.S. Department of Health and Human Services and the Center for Disease Control. These submissions reveal an overwhelming consensus of medical and scientific opinion regarding the nature and transmission of AIDS. All parties agree that clinical treatment can bring the dental student into contact with a patient’s blood and tissue and AIDS can be transmitted through contact with an infected person’s blood or other bodily fluids. The CDC has reported in an article titled Recommendation for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy Associated Virus in the Workplace, (MMWR 1985, 34:591) that:

... a risk of transmission of HTLV-III/LAV [early name for HIV] infection from HCWS [health care workers] to patients would exist in situations where there is both (1) a high degree of trauma to the patient that would provide a portal of entry for the virus (e.g., during invasive procedures), and (2) access of blood or serous fluid from the infected HCW to the open tissue of a patient, as could occur if the HCW sustains a needle stick or scalpel injury during an invasive procedure.

Furthermore, during the performance of dental procedures, trauma to dental workers’ hands is common. The CDC in an article entitled Update: Universal Precautions for Prevention of Transmission of Human Immunodeficiency Virus, Hepa-

7. Prior to defendants’ decision to terminate plaintiff’s clinical program, plaintiff had already completed some 431 clinical hours of required training.

8. The Court notes that since the initiation of plaintiff’s action, the Centers for Disease Control have reported what appears to be the first documented case of transmission of HIV from a dentist to a patient during an invasive dental procedure. Subsequently, multiple cases of possible transmission of HIV in similar situations have been reported. See Possible Transmission of Human Immunodeficiency Virus to a Patient During an Invasive Dental Procedure. MMWR 1990; 39 (No. 29) 4389-491.
the safety of patients would appear to be morally unacceptable and contrary to the fiduciary responsibilities of the medical profession. While doctors emphasize that the danger, statistically, is slight, the victim of infection by this rare but fatal infection can hardly be consolated by the odds. The public clearly believes that because of the uncertainty of today’s medical knowledge, HIV-positive health care workers should not perform invasive medical or dental procedures. The Court does not, however, have to reach this conclusion: the issue before this Court is the narrow question of whether the academic decision by the University officials was properly decided.

Therefore, the only remaining question before this Court is whether the record shows that the University acted arbitrarily in dismissing plaintiff from the dental school without permitting completion of the required clinical phase. See Regents of the University of Michigan v. Ewing, 474 U.S. at 225, 106 S.Ct. at 513 (1985). Plaintiff alleges in his complaint that his dismissal was arbitrary and irrational and was unsupported by reasonable medical or scientific opinion or evidence.

Rule 56(c) requires summary judgment to be entered when the record “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id.

Nothing in the record before this Court indicates that the University’s decision was based on stereotypes or prejudices about individuals with HIV. In point of fact, the University extended opportunities to the plaintiff to further his medical career by offering alternative programs not requiring invasive techniques. This was commendable. The University’s decision focused on the potential of possible exposure of HIV to third parties. The University, with the aid of more than 40 professionals, 33 of whom were from the medical field, considered all current relevant medical information available while balancing the rights of the plaintiff against the rights of his patients.

A university empowered with the special responsibility of a teaching medical school has an inherent obligation to do no harm to those least able to protect themselves. Most of the persons utilizing the services and skills of the dental clinic rely heavily on the wisdom and experience of the University faculty. After all, these patients do not have a choice or selection of dental technicians. They must rely upon the supervisor of the faculty and administrator of the university—and indeed, the reputation and esteem of that university is always at risk if it favors a students’ needs more than those of the patients. The university must proceed with due care and caution, always regarding the rights of individuals as human beings more than the recognition of academic rank or professional prestige.

The Court in Arline noted that... “a person who poses a significant risk of communicating an infectious disease will not be otherwise qualified for his or her job if reasonable accommodations will not eliminate that risk.” Arline, 107 S.Ct. at 1131 (n. 16). “[I]t would be unreasonable to infer that Congress intended to force institutions to accept or readmit persons who pose a significant risk of harm to themselves or others.” See Doe v. New York University, 666 F.2d 761 (2d Cir.1981). So, too, in the case at bar, this Court believes that the circumstances surrounding plaintiff’s HIV status presented little alternative to those charged with evaluating plaintiff’s ability to qualify as a dental student.

Furthermore, nothing in the language or history of § 504 indicates an intention to limit the ability of an educational institution from requiring reasonable physical qualifications for participation in a clinical training program. Southeastern Community College v. Davis, 442 U.S. 397, 414, 99 S.Ct. 2361, 2371, 60 L.Ed.2d 980 (1979); see also Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir.1982), cert. denied, 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481
Consequently, plaintiff has failed to establish that he was "otherwise qualified" for participation in the program. Accordingly, defendant's motion for summary judgment on plaintiff's complaint must be and is granted.