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School Faces Heavy Burden in HIV-Positive Teen's Bias Suit

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Special to the Legal

On Nov. 30, 2011, Mother Smith, on behalf of herself and her minor son, Abraham Smith (pseudonyms), filed an action against the Milton Hershey School in the Eastern District of Pennsylvania alleging a violation of the Americans with Disabilities Act (42 U.S.C. §12182 et seq., 28 C.F.R. §36.102 et seq.). Title III of the ADA prohibits discrimination against individuals on the basis of disability in the full and equal enjoyment of the services of any place of public accommodation. A private school, such as MHS, falls within the statutory definition of "public accommodation."

According to the complaint in *Smith v. Milton Hershey School*, MHS, which houses poor children in group homes of 10 to 12 children supervised by a married couple as house parents, rejected the application of an otherwise qualified 13-year-old boy who is HIV-positive. The boy is treated with a regimen of drugs that would not be the financial responsibility of MHS. The boy is an honor student and athlete. The sole reason given by MHS for exclusion from the admissions process is the child's HIV-positive status, presenting a clearly defined issue for the court. It is settled law that HIV-positive status is a disability and MHS concedes this issue. (See the U.S. Supreme Court's 1998 opinion in *Bragdon v. Abbott*.)

Thus, there is facial discrimination by MHS solely on account of a disability. No child who is HIV-positive will be admitted into MHS. This is the type of purposeful unequal treatment addressed by the ADA because it is "based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of the individual to participate in, and contribute to society." (See 42 U.S.C. §12101(a)(7).)

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The defense to the discrimination offered by MHS is based on the exception in 42 U.S.C. §12182(b)(3). This section provides that an individual can be denied participation in or benefit from a private school such as MHS where "such individual poses a direct threat to the health or safety of others." The statute defines "direct threat" to mean "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."

An MHS spokesperson has been quite clear that the "direct threat" in this case is solely the risk of transmission of HIV by sexual contact, i.e., unprotected sex with a schoolmate at MHS. The U.S. Supreme Court has stated: "Because few, if any, activities in life are risk-free ... the ADA does not ask whether a risk exists, but whether it is significant." Thus, courts and entities deciding to exclude the disabled must rely on evidence that "assess[es] the level of risk" for the "question ... is one of statistical likelihood." (See *Bragdon*.)

There are several things wrong with the MHS approach that will likely result in a successful outcome for Abraham Smith. First, while asserting to the contrary, there is no evidence that MHS made any individualized assessment of the risk posed by Abraham. MHS statements reveal only a generalized assessment of the risks of the disability, together with an acknowledgement that "the risks presented by an HIV-positive individual who is on medication is low." (See H.R. Rep. No. 101-485, at 45 (1990): "Decisions are not permitted to be based on generalizations about the disability.") No interview has revealed that Abraham is prone to risky sexual behavior, is of poor character, or is an irresponsible child unaware of the precautions necessary to avoid transmission of the virus. In fact, his statements have been quite to the contrary. Instead, MHS answers that all HIV-positive children pose a direct threat to the health and safety of others, no matter how responsible they may be.

This approach, I dare say, is unlawful. Regulations adopted under the ADA mandate that in determining whether an individual poses a direct threat, MHS "must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will

actually occur; and whether reasonable modification of policies, practices, or procedures will mitigate the risk." (See 28 C.F.R. §36.208(c).) The Milton S. Hershey Medical Center is down the road from MHS. It operates an HIV/AIDS program (Opt-In for Life HIV/AIDS Specialized Care Services), serving 728 patients, and whose stated goal is for patients "to lead normal lives." Over 85 percent of its patients now have undetectable levels of the virus because of treatment, according to the center's website. It is inconceivable that MHS sought out this knowledge source and was advised that Abraham is a "direct threat."

Furthermore, MHS may not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying MHS, unless such criteria can be shown to be necessary for the provision of the accommodation being offered by MHS. (See 28 C.F.R. §36.301(a).) Therefore, absent an "unprotected sex club," it is difficult to legally justify any blanket exclusion of HIV-positive children from any public accommodation.

MHS presumably has rules prohibiting sexual activity on campus; therefore, one would first have to assume that an HIV-positive child will not follow the pre-established rules applicable to everyone, and then assume that if Abraham breaks that rule, he would act irresponsibly in having unprotected sex. Finally, one would have to assume that Abraham would find a partner who would similarly violate school rules and ignore just-in-case guidance that the school presumably dispenses to all MHS students about the dangers of unsafe sex. This is not the type of direct threat contemplated by the ADA.

The U.S. Department of Justice, civil rights division, disability rights section, has published on its website "Questions and Answers: The Americans with Disabilities Act and Persons with HIV/AIDS." In Q&A-7 of this publication, the DOJ states that "in almost every instance," a public accommodation may not "exclude a person with HIV/AIDS because that person allegedly poses a direct threat to the health and safety of others. ... Persons with HIV/AIDS will rarely, if ever, pose a direct threat in the public accommodation context." The DOJ states the direct threat determination must consider "the particular activity and the actual abilities and disabilities of the individual."

The ADA's goals include 'equality of opportunity' and avoiding 'intentional exclusion' on account of 'overprotective rules and policies.'

The activity of MHS is the residential care and schooling of children, not sexual activity. There would not seem to be any reason this child could not participate in the activities of MHS based on HIV-positive status. In fact, the child needs no apparent accommodations, other than the opportunity to take his medications. The DOJ gives an example of a day care center that refuses to admit a child who is HIV-positive because of a fear that the child might bite and might therefore transmit HIV to other children. The DOJ concludes that this violates the ADA, first because it is incorrect to assume that all young children bite, and second because current medical evidence indicates that HIV is not transmitted by saliva. Similarly, it is incorrect to assume that all MHS children have sex with other MHS children, and it is incorrect to assume that if they did engage in sexual activity that both partners would agree to engage in the activity without protection.

The 3rd U.S. Circuit Court of Appeals 2001 case of *John Doe v. County of Centre, Pa.*, is also instructive. A married couple with an adopted son with AIDS were denied the opportunity to become foster parents of any HIV-negative child. The 3rd Circuit found that the lower court's finding of a "high probability that [HIV] will be transmitted [through sexual contact] to children placed in foster care with the Does" violated the ADA because it relied upon a generalized set of statistics, lacking in individual specificity. The 3rd Circuit found that the risk of transmission could be remote and speculative in this case and remanded for further findings.

Regardless of one's personal view or legitimate concerns of transmission, a dispassionate examination of the law in this area should result in MHS reversing its decision and admitting responsible, intelligent, HIV-positive children of good character.

A conclusion that Abraham could be excluded from MHS would endorse discrimination by any private boarding school, and perhaps even extend to college settings, where the risk of unprotected sexual conduct may be even greater than junior and senior high schools. The ADA's goals include "equality of opportunity" and avoiding "intentional exclusion" on account of "overprotective rules and policies." As stated by Margo Kaplan on her *Center for HIV Law and Policy* blog, "stigmatizing these students puts teenagers at greater risk by teaching them that avoiding HIV is not a matter of avoiding risky activities but rather avoiding 'risky people.'" Should MHS not concentrate on educating its students to avoid risky behavior, rather than adopting an overprotective policy to shield them from contact with HIV-positive persons? •