UIC Law Review

Volume 27 | Issue 2 Article 13

Winter 1994

AIDS: Coping with HIV on Campus, 27 J. Marshall L. Rev. 449 (1994)

Jane D. Oswald

Robert G. Johnston

Mark E. Wojcik
mwojcik@uic.edu

AIDS: COPING WITH HIV ON CAMPUS

JANE D. OSWALD*
ROBERT GILBERT JOHNSTON**
AND MARK E. WOJCIK***

> I always heard about AIDS but I never really paid attention. I saw the posters but they didn't really affect me. I didn't really worry about AIDS. Then I tested positive. I was nineteen years old. Why me? Why me?
>
> A student

Students are getting HIV. Educational institutions can accept or deny that fact. Our belief is that acceptance will benefit both institutions and students. If acceptance leads to HIV-prevention programs on campus as well, it may save some students from becoming infected with HIV. A comprehensive HIV policy also will protect the human rights and dignity of faculty and staff who may contract HIV. It also will benefit students, staff and faculty who are HIV-negative, but who recognize that HIV is no longer "someone else's problem."

Educational institutions must accept their roles to educate students, faculty, staff and even alumni about HIV. Some states require schools to provide education about HIV.[1] Educational institutions must plan to handle persons with HIV in college or university health services and medical clinics. Additional planning is also necessary for institutions where athletic programs include contact sports.

I. HIV ON CAMPUS

HIV is not spread by casual contact. It is spread by casual sex. Risk factors associated with the spread of HIV on campus include a young adult's new found sexual independence, sexual experimenta-

* Associate Dean for Academic Services, The John Marshall Law School. A.B., Valparaiso University; M.A., Roosevelt University; M.B.A., Loyola University.

** Associate Dean for Academic Affairs and Professor of Law, The John Marshall Law School. J.D., The University of Chicago Law School.

*** Assistant Professor of Law, The John Marshall Law School. B.A., *cum laude*, Bradley University; J.D., *with distinction*, The John Marshall Law School; LL.M. (Trade Regulation), New York University School of Law.

1. *See, e.g.*, 105 ILCS 5/27-9.1 and 5/27-9.2 (1992) (requiring HIV education for grades 6-12).

tion, and unprotected sex with multiple partners.[2] The use of alcohol and other drugs can impair decision-making and lead to behavior that increases the risk of HIV-transmission.[3] Intravenous drug use on campuses appears to be far less prevalent than the use of other drugs,[4] although there are reports of increasing intravenous drug use.[5] The relatively lower prevalence does not mean that information about intravenous drug use is irrelevant to students or that it need not be considered as a factor for campus HIV policies.

II. CRAFTING A CAMPUS HIV POLICY

Several principles can guide administrators in preparing rational and effective policies on HIV. First, discrimination in services to or employment of persons with HIV is illegal under the Americans with Disabilities Act (ADA),[6] the amended Rehabilitation Act of 1973,[7] state human rights acts,[8] and some county[9] and municipal ordinances.[10] Claims of HIV-related discrimination also may arise under the Individuals With Disabilities Education Act (IDEA).[11] However, claims for HIV-related discrimination under the IDEA are unlikely against post-secondary institutions because of the complex administrative procedures required under such Act. Such procedural requirements are absent from the Americans with Disabilities Act.[12] The ADA is therefore more useful to potential litigants. Under the ADA and other statutes and ordinances, institutions may not exclude students with HIV, nor may they limit

2. Helene D. Gayle et al., *Prevalence of the Human Immunodeficiency Virus Among University Students*, 323 NEW ENG. J. MED. 1538, 1540-41 (1990).

3. *Id.*

4. *Id.*

5. *See* Malia Boyd, *Horse Play, in* LINGUA FRANCA 6 (July/Aug. 1993) (reporting increased campus heroin use but also noting that "snorting" heroin is "the preferred method for the recreational user anxious to avoid the stigma of needle marks and the threat of AIDS").

6. 42 U.S.C. §§ 12101 et seq. (1992); *see also* Wayne A. Hill, *Americans with Disabilities Act of 1990: Significant Overlap with Section 504 for Colleges and Universities*, 18 J.C. & U.L. 389 (1992).

7. 29 U.S.C. §§ 794 *et seq.* (1988); 45 C.F.R. §§ 84.4(a) and 84.44 (1993); *see also* Doe v. Dolton Elementary Sch. Dist., 694 F. Supp. 440, 449 (N.D. Ill. 1988) (enjoining school from excluding a student with AIDS).

8. *See, e.g.*, 775 ILCS 5/1-101 to 103 (1993).

9. *See, e.g.*, Cook County, Ill., Human Rights Ordinance (effective Mar. 16, 1993).

10. *See, e.g.*, CHICAGO, ILL., HUMAN RIGHTS ORDINANCE §§ 2-160-010 to 120 (1990).

11. 20 U.S.C. § 1400 (1988 & Supp. IV 1992); *see also* Martinez v. School Bd. of Hillsborough County, Fla., 711 F. Supp. 1066, 1072 (M.D. Fla. 1989) (ordering defendant schoolboard to admit student with HIV); District 27 Community Sch. Bd. v. Board of Educ. of City of N.Y., 502 N.Y.S.2d 325, 339 (N.Y. Sup. Ct. 1986) (discussing application of Act to children with HIV).

12. *See generally* ROBERT M. JARVIS ET AL., AIDS LAW IN A NUTSHELL 85-88 (1992) (discussing cases brought under the Act).

their participation in academic programs.[13] There are unresolved questions as to whether a university may limit participation in athletic programs. The experience of Magic Johnson teaches us that the presence of HIV should not limit a student's ability to play basketball, even though basketball is considered to be a contact sport. With non-contact sports, such as tennis, track, or swimming, there should be no question that the presence of HIV should not prevent an otherwise qualified student athlete from participating in the sport. All such decisions should embrace the first principle of avoiding discrimination against persons with HIV.

A second principle to guide administrators in crafting HIV policies is the absolute protection of the privacy rights of persons with HIV. The failure to protect privacy rights can lead to discrimination, which may result in institutional liability for unlawful discrimination. Additionally, the failure to protect information about the HIV status of a student or employee may itself be actionable under state statutes[14] or tort actions for the invasion of privacy.

Claims may also arise under the General Education Provisions Act,[15] which contains provisions addressing generally what information may be placed in and disclosed from a student's academic file. The Act may prohibit placing any HIV-related information in a student's academic file without the student's consent. However, assuming the information about HIV is placed in a student's academic file, the Act prohibits disclosure of that information without the student's consent or in the absence of "exceptional circumstances." An institution may find exceptional circumstances when another person confronts a substantial risk of contracting HIV if a disclosure is not made. Even in these "exceptional circumstances," however, the institution should disclose the information to the public health authorities rather than to the person perceived to be at risk.

This alternative is desirable for three reasons. First, state statutes may prohibit disclosure of information on HIV to third persons but allow disclosure to public health officials. Second, public health officials may have more experience in warning individuals about potential exposure to HIV. Third, the public health officials may have more information about whether there is an actual risk of exposure to HIV. The university's own judgment, though well-inten-

13. An exception may exist for medical programs where students may be involved in clinical invasive procedures. *See* Doe v. Washington Univ., 780 F. Supp. 628, 634 (E.D. Mo. 1991).

14. *See, e.g.*, 419 ILCS 305/9 and 305/13 (1992). The public policy behind these statutes is that the protection of information will encourage voluntary HIV antibody testing, and that this, in turn, will enable individuals to monitor their own health more effectively.

15. 20 U.S.C. § 1232g (1988 & Supp. IV 1992).

tioned, may be incorrect. If so, the idea of "better safe than sorry" may lead to legal liability if the disclosure was an unwarranted breach of an individual's privacy. Liability may also fall upon the individual who makes the disclosure. Furthermore, institutions may encounter liability for defamation if they falsely report that an individual is HIV positive or has AIDS.

A third principle to guide administrators in crafting HIV policies is implicit in the first two principles. The third principle is that HIV is a reality for all institutions of higher education. All policy statements should begin with statements that recognize the HIV pandemic and the likelihood of its presence at the institution. Denial of the actual or potential presence of HIV is counter-productive and illusory in the second decade of AIDS. The educational institution must accept the reality of HIV on campus and consider the proper parameters of an institutional response.

To some degree this will require that the institution recognize its role in the HIV pandemic. An institution is not liable for the private activities of its students. A college cannot be responsible if students engage in unprotected (unsafe) sexual intercourse or if they share needles for intravenous drugs. A university likewise cannot be responsible if a student contracts HIV by a blood transfusion, unless that transfusion was given in the university's own hospital or health service facility. A university should also be free from products liability if it makes condoms available to students, unless it has reason to know that the condoms are defective. These de facto limitations of legal liability for educational institutions do not mean that an institution has no legal or moral responsibilities, however. For example, an institution may face *Tarasoff*-type issues if a counselor or teacher learns that an HIV-positive student intends to infect another student.[16] The duty to warn may be unclear in these situations where statutes specifically prohibit the disclosure of information regarding HIV to another individual. Any duty to disclose, if it ever arises, may be discharged by informing the responsible public health authorities who can, in turn, exercise their judgment and expertise to warn the person of perceived risk. Disclosure should be only to public health officials, and not to police departments that may not handle the information properly.

16. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) (en banc); *see also* Behringer v. Medical Ctr. at Princeton, 592 A.2d 1251, 1269 n.10 (N.J. Super. Ct. 1991) (noting debate over "duty to warn" in cases of HIV); Kenneth E. Lebowitz, *Beyond Tarasoff: AIDS and the Obligation to Breach Confidentiality*, 9 ST. LOUIS U. PUB. L. REV. 495 (1990) (discussing negligence cases against health care providers who fail to inform others of risk of infection through contact with patients); Michael L. Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 L. & PSYCHOL. REV. 29 (1992) (focusing on relationship between *Tarasoff* and malpractice litigation).

Should a different standard arise where there is an emergency situation? Should the school advise paramedics at an accident scene? Care must be exercised even here. State HIV confidentiality laws may permit, but not necessarily require, disclosure to emergency personnel. The paramedics should nonetheless be using the universal precautions that will protect them from known and unknown viral risks, not only for HIV, but also for other viruses such as hepatitis B and hepatitis C.

A fourth principle to guide administrators in forming AIDS policies is to recognize that the purpose of educational institutions is to educate. Education is presently the only available vaccine to curb the spread of AIDS. Education is cost effective in promoting public health. Education also is an area where students themselves can organize peer-education groups that are especially effective in teaching about HIV and its transmission.

Educational programs should provide extensive information about sexually transmitted infections (STIs) and drug abuse, as these are likely catalysts to spread HIV on campus. These programs should include education on the proper use of condoms[17] and dental dams, the use of sterilized needles, and counseling on alcohol and other drug abuse that may impair judgment. Education should provide information on choices that can empower women, including use of the new female condom.[18] Educational programs should discuss the benefits of anonymous HIV-antibody testing. Institutions should decide whether to provide a voluntary HIV antibody testing program for students.[19] Such a program may provide useful information for the institution and the individuals tested. The institution must inform the individuals tested about the efficacy of HIV testing and provide pre- and post-test counseling (even where results are negative). If a program is adopted, anonymous testing is preferred to avoid any possible risks of inadvertent disclosure of an individual's HIV status. An anonymous program would protect students who test negative as well because the simple fact of having taken the HIV-antibody test can imply a risk of contracting AIDS.

An institution must likewise consider the consequences of having a distraught student commit suicide due to an erroneous test result or due to a result given with inadequate counseling. Addi-

17. Where abstinence is not possible it is not enough to teach that condoms must be used. Programs must stress that condoms must be used *properly*. For example, a condom must be latex if it is to provide an effective barrier to HIV. If lubrications are used, they must be water-based because petroleum-based lubricants will cause a latex condom to break.

18. Questions raised at the International AIDS Conference in Berlin (June 1993) may lead to further research on the female condom. At present, the relatively high cost of the female condom may be prohibitive for all students.

19. *See* Felicia R. Lee, *On Campuses, AIDS Testing Is Becoming More Common*, N.Y. TIMES, Oct. 4, 1993, at A1.

tionally, the failure to provide proper pre-test counseling may produce the result of many young people not returning to pick up their test results. Proper pre-test counseling requires much more than a short speech about the HIV-antibody test. Proper pre-test counseling must be an interactive process often guided by questions from the students.

In all cases the university must maintain strict confidentiality with regard to any HIV-antibody testing. The failure to do so can be devastating. For example, in one case a female student who was raped was denied health insurance after testing for the HIV antibody. This was true even though her test was negative. The simple fact that she had a notation of an HIV negative antibody test in her medical records was enough for the health insurance company to deny her coverage.

In many cases, an educational institution may decide against providing voluntary HIV testing if anonymous testing sites are available near the campus. Many testing programs are available at no cost to the students and offer anonymous or confidential testing. If an institution decides to make referrals for HIV-antibody testing it should compile a list of verified locations for testing. The list should indicate whether there is any charge for the test, whether the testing is anonymous or confidential, and whether pre-and post-test counseling is available. This list should be available to students without having to make a special request. It may be posted in dormitories and student lounges or distributed in orientation packets. The university would be wise to offer counseling even if it does not offer testing. Often the counseling resources of anonymous testing sites are insufficient to meet the many needs of young adults.

Schools also should consider whether they should make condoms available on campus. The concept is generally popular with students. There is no law that prevents colleges or universities from distributing condoms. However, in a public debate in New York City opponents of condom distribution raised the specter of potential product liability claims against high schools for distributing condoms. The argument was raised only to discourage condom distribution; it was not raised as a legitimate threat to the school district.

The decision as to whether to distribute condoms on campus is one that may, in some cases, be delegated to student government associations. They may advise administrators as to the most effective means of condom distribution. The advice may be simply to allow outside distributors to place condom machines in men's and women's bathrooms.[20] Whatever plan is adopted for condom distri-

20. Male condoms should also be available for women because their availability can empower women in insisting that their sexual partners use condoms.

bution, it is not necessary to announce that plan with press releases. This is a matter that can be done quickly and quietly. When students are involved in providing advice as well, the distribution is more likely to be effective and accepted.

III. Conclusion

The principles we have outlined stress the avoidance of discrimination, the protection of privacy, the recognition of the problem of AIDS, and the development of appropriate educational responses. Guided by these principles, administrators can establish policies on HIV and provide HIV education for students, staff, and faculty. If HIV policies are already in place, institutions should review them to ensure that all aspects of the policy comply with current laws and medical knowledge about HIV and AIDS. Policies adopted three or four years ago may no longer be valid in all respects. Review of policies also would demonstrate commitment to the principles of non-discrimination, protection of privacy, legitimate concern for the welfare of persons with HIV, and the need to further curb the spread of the virus.

Institutions also must review policies in their capacities as employers of staff and faculty who may contract HIV. This review may include health insurance policies as well. As an employer, a university may consider its potential exposure to HIV-related health claims under employee health insurance policies. A recent court decision found that an employer did not violate ERISA by limiting HIV-related claims under a self-insured policy. That decision, *McGann v. H & H Music*,[21] considered liability only under ERISA because the case arose before the Americans With Disabilities Act came into effect.[22] The same action that did not violate ERISA may well violate the ADA, a state human rights act, or a local human rights ordinance. It also may invite much unwanted publicity. It is safer, and more humane, to change the policies to prevent discrimination against persons with HIV.

---

21. 742 F. Supp. 392 (S.D. Tex. 1990), *aff'd*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

22. In the first case to deal with health insurance benefits under the ADA, the Southern District of New York ruled that a union welfare fund could be sued for excluding coverage for AIDS and AIDS-related illnesses in July 1991. *Mason Tenders Dist. Council Welfare Fund v. Donaghey*, No. 93 Civ. 1154 (S.D.N.Y. July 19, 1993). This case holds potentially dire consequences for covered entities, including educational institutions, who try to reduce health care costs by using disability-based distinctions. *See Federal Court Denies Summary Judgment to Fund that Cut Off Coverage for AIDS*, 223 Daily L. Rep. (BNA) d4 (Nov. 22, 1993); *see generally*, Thomas E. Bartrum, Note, *Fear, Discrimination and Dying in the Workplace: AIDS and the Capping of Employees' Health Insurance Benefits*, 82 Ky. L.J. 249 (1993) (regarding similiar issues).

HIV policies should provide for the continuing participation of students in the process of education. A person who contracts HIV will often stay otherwise healthy for ten to fifteen years.[23] This period will likely expand given scientific advancements in HIV therapy.[24] Many students with HIV will enter and leave educational institutions without ever developing a disease associated with AIDS. We know of one college student who tested positive and then decided to enter law school. He graduated, passed the bar, and is now a practicing attorney. His experience demonstrates that stereotypes about limitations of persons with HIV are unwarranted. The truth is that persons with HIV can combat the virus with the support of institutions and individuals.

23. *See Study Finds People With HIV Are Living About a Year Longer*, N.Y. TIMES, Apr. 13, 1994, at A10 (stating that preventive measures have increased survivial periods of HIV-positive individuals during that last ten years).

24. *See, e.g.*, Margaret I. Johnston & Daniel F. Hoth, *Present Status and Future Prospects for HIV Therapies*, 260 SCI. 1286 (1993).