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Mandatory HIV Status Disclosure for Students in Illinois: A Deterrent to Testing and a Violation of the Americans With Disabilities Act

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MANDATORY HIV STATUS DISCLOSURE FOR STUDENTS IN ILLINOIS: A DETERRENT TO TESTING AND A VIOLATION OF THE AMERICANS WITH DISABILITIES ACT

*Anthony Todd**

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INTRODUCTION

It has been more than thirty years since the first case of HIV/AIDS was reported in the United States.¹ During that time, and thanks to advances in treatment, HIV/AIDS has morphed from a fatal disease to a treatable, if still chronic, condition that often does not seriously impair an infected person's daily life.² New medications allow physicians to control the spread of the disease, both within an infected individual's body and from person to person.³ Our increased understanding of the ways that HIV is spread from person to person, combined with effective prophylactic treatment for those accidentally exposed, means that the medical profession is in a better position to control HIV/AIDS than ever before.⁴

At the same time, however, the stigma surrounding HIV/AIDS is still very real.⁵

Discovery of a person's HIV serostatus has been shown to lead to loss of family ties, friendship, employment, and

¹ See SURGEON GENERAL OF THE UNITED STATES, SURGEON GENERAL'S REPORT TO THE AMERICAN PUBLIC ON HIV INFECTION AND AIDS (1992), available at <http://profiles.nlm.nih.gov/ps/access/NNBBBB.pdf>; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, HIV AND AIDS—UNITED STATES, 1981-2000, 50 MORBIDITY & MORTALITY WEEKLY REPORT 430, 430 (2001).

² Richard J. Wurtman, *What Went Right: Why is HIV a Treatable Infection?* 3 NATURE MED. 714, 714 (1997).

³ There are now more than twenty different medications specifically for the treatment of HIV/AIDS, as well as improved treatment for secondary conditions. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, GUIDE FOR HIV/AIDS CLINICAL CARE 207 (2014), available at <http://hab.hrsa.gov/deliverhivaidscares/clinicalguidelines.html>.

⁴ *Id.*

⁵ See, e.g., Gregory M. Herek et al., *HIV-Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991-1999*, 92 AM. J. PUB. HEALTH 371 (2002).

housing; dismissal from school; and denial of health and life insurance as well as health care.⁶

HIV is still associated with homosexuality and drug use, and misunderstandings about the way that HIV is transmitted are still widespread throughout the general population.⁷ In one study from 1993, 35.7% of individuals surveyed believed that people with AIDS should be “legally separated from others to protect the public health.”⁸ A more recent survey found that negative attitudes toward HIV positive individuals among the general public have decreased over time, but these attitudes still exist.⁹

Throughout the past twenty years, HIV has become a more treatable disease and our knowledge of the ways that the virus spreads has increased.¹⁰ Unfortunately, the spread of the disease has not slowed, at least within certain populations. Especially among adolescents, rates of HIV infection are actually increasing, despite the many scientific advances in treatment.¹¹ Some of this increase may be attributable to reluctance on the part of at-risk individuals to get tested due to the stigma associated with the disease.¹²

All fifty states have laws dealing with HIV/AIDS.¹³ These laws cover matters as diverse as anonymous testing, criminal transmission

⁶ Margaret A. Chesney & Ashley W. Smith, *Critical Delays in HIV Testing and Care: The Potential Role of Stigma*, 42 AM. BEHAVIORAL SCIENTIST 1162, 1165 (1999) (citations omitted).

⁷ Gregory M. Herek, *Thinking about AIDS and Stigma: A Psychologist's Perspective*, 30 J.L. MED. & ETHICS 594, 594 (2002).

⁸ Gregory M. Herek & John P. Capitanio, *Public Reactions to AIDS in the United States: A Second Decade of Stigma*, 83 AM. J. PUB. HEALTH 574, 575 (1993).

⁹ Herek, *supra* note 5, at 596.

¹⁰ U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *supra* note 1.

¹¹ CENTERS FOR DISEASE CONTROL AND PREVENTION, *HIV AMONG YOUTH* (2011).

¹² Chesney & Smith, *supra* note 6, at 1163-64.

¹³ There are two primary surveys of state laws regarding HIV/AIDS in the United States. *State Statutes or Regulations Expressly Governing Disclosure of Fact that Person has Tested Positive for Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS)*, 12 A.L.R. 5TH 149 (1993); Staff of

of HIV, marital testing, confidentiality, employment discrimination, and sexual education.¹⁴ In many cases, the laws reflect a modern understanding of HIV transmission and treatment and are aimed at mitigating or minimizing possible negative effects for those infected. In other cases, laws reflect an out-of-date and discriminatory view of HIV. Not only are the laws problematic, often the actions of local and state officials can also reflect an out-of-date vision of HIV and its consequences. In 2012, an Iowa man was sentenced to twenty years in prison after having protected sex without disclosing his HIV status.¹⁵ The sentence was later reduced on appeal, though the man was still required to register as a sex offender.¹⁶ But more than twenty-five states still have laws on the books that criminalize low-risk behavior, such as having protected sex.¹⁷ In 2013, three students were banned from an Arkansas school (after rumors surfaced that they had HIV) until they provided documentation that they were not infected with the disease.¹⁸ The rate of prosecution for HIV-related crimes has no relationship to the prevalence of HIV-infection in a given state, indicating that stigma plays some role in a prosecutor's choice of charges.¹⁹

Volume 13, *State Statutes Dealing with HIV and AIDS: A Comprehensive State-by-State Summary*, 13 LAW & SEXUALITY 1 (2004).

¹⁴ See Staff of Volume 13, *supra* note 13.

¹⁵ Sandra Young, *Imprisoned Over HIV: One Man's Story*, CNN (Nov. 9, 2012, 8:42 PM), <http://www.cnn.com/2012/08/02/health/criminalizing-hiv/index.html>.

¹⁶ *Id.*

¹⁷ *HIV-Specific Criminal Laws*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/hiv/policies/law/states/exposure.html> (last visited Mar. 11, 2015).

¹⁸ Rebecca Klein, *Arkansas School Tells 3 Students Not To Return After Finding They Could Be HIV-Positive*, HUFFINGTON POST (Sept. 16, 2013, 4:03 PM), http://www.huffingtonpost.com/2013/09/16/arkansas-students-hiv_n_3935952.html.

¹⁹ Iowa and Tennessee, which are not among the states with the most HIV-infections, are the top two states for HIV-related prosecutions. See, e.g., DISCUSSION OF REVISIONS TO IOWA CODE 709C – CRIMINAL TRANSMISSION OF HIV, IOWA DEPARTMENT OF PUBLIC HEALTH (2012), available at <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/709C%20Fact%20Sheet%20for%20IDPH.pdf>.

Illinois has, over the past 30 years, passed several laws that specifically affect individuals who are HIV-positive. One of these statutes, the subject of this Comment, required, until it was repealed in 2013, that the Illinois Department of Public Health notify school principals anytime a child in their school tests positive for HIV.²⁰ That principal was then allowed to disclose the student's HIV status to school health workers, the student's classroom teachers, and others.²¹

No other state in the United States had such a law on the books.²² However, a number of other states have laws that require the disclosure of a student's HIV status to someone within a school system. Florida, South Carolina, Arizona, Maine, Alabama and Nevada, among other states, all have laws that impact the privacy of students with HIV/AIDS.²³ This Comment argues, using the recently repealed Illinois Principal Notification Act as a case study, that these laws violate the Americans with Disabilities Act (ADA) by forcing individuals who are HIV-positive to participate in a public service, public education, on a different basis from those who are not HIV-positive.²⁴ In addition, these laws reflect an outdated vision of the way that HIV is spread and treated—a vision clearly present in the legislative debates surrounding the passage of the Illinois statute, the prime example, in 1987.²⁵ As a public policy matter, these laws may deter adolescents from being tested for HIV, and, if a child is HIV-positive, the laws have the potential to expose children and their families to stigma and ridicule as a result of the disclosure of the child's status.

²⁰ Communicable Disease Prevention Act, 410 ILL. COMP. STAT. 315/2a (repealed 2014).

²¹ *Id.*

²² Staff of Volume 13, *supra* note 13.

²³ *See Infra*, Section IV(A).

²⁴ Title II of the ADA prevents discrimination by public entities or in the delivery of public services. 42 U.S.C.A. § 12132 (1990).

²⁵ *See, e.g.*, Ill. H.R., 85th Gen. Assemb., 49th Legis. Day, 129 (1987) (statement of Rep. Parcells).

Due to the widespread use of “Universal Precautions”²⁶ in public schools whenever school personnel are forced to deal with blood or bodily fluids, these laws serve no useful purpose. Because of these mandatory precautions, school personnel have no actual need to know about an individual child’s HIV status. In addition, advances in the medications used to treat HIV make the chance of inadvertent transmission within a school so minimal as to eliminate the “Direct Threat” exception to the ADA.²⁷

The Illinois statute, the most far-reaching and intrusive on privacy in the nation, was finally repealed in 2013.²⁸ After years of activism by the AIDS Foundation of Chicago, the AIDS Legal Council of Chicago, the ACLU of Illinois and other organizations, the Illinois Communicable Disease Act was modified to remove the provisions that required the disclosure of students HIV status.²⁹

The repeal was first introduced in 2008, but faced opposition from school principals and superintendents.³⁰ Despite continued opposition (including the nay votes of thirteen members of the Illinois Senate),³¹ the repeal passed, partially because of arguments that the law, in addition to being outdated and rarely invoked, was a violation of the Americans with Disabilities Act.³² The arguments contained

²⁶ Bloodborne Pathogens, 29 C.F.R. § 1910.1030 (2012) (“Universal Precautions is an approach to infection control.”)

²⁷ Direct Threat, 28 C.F.R. § 35.139 (2010).

²⁸ Terry Dean, *New Law Protects HIV Students’ Privacy*, OAKPARK.COM (Sept. 10, 2013), <http://www.oakpark.com/News/Articles/9-10-2013/New-law-protects-HIV-students%27-privacy/>.

²⁹ Press Release, AIDS Legal Council of Chicago, State’s Discriminatory HIV Principal Notification Law Finally Repealed, May 23, 2013, *available at* <http://www.aidslegal.com/wp-content/uploads/2013/09/May-23-2013-Discriminatory-HIV-Principal-Notification-Law-Finally-Repealed1.pdf>

³⁰ Dean, *supra* note 28.

³¹ Press Release, *supra* note 29.

³² Much of the research for this article was done in support of this repeal effort while the author was an intern at the AIDS Legal Counsel of Chicago, and several of its arguments, including the potential applicability of the ADA, the importance of existing Universal Precautions policies, and the deterrent effect that the law had on adolescent testing, were presented to members of the Illinois General Assembly to persuade them to support repeal.

within this Comment could potentially be applied in other states where similar laws remain on the books.

There has been very little scholarly attention paid to laws like this one, though issues surrounding HIV, confidentiality, and education have been examined before.³³ One scholar, Diane M. DeGroat, specifically examined a similar law in South Carolina that is significantly narrower than the Illinois statute, and argued for its repeal.³⁴ However, DeGroat argued for a repeal of that law based on the right to privacy found within the Fourteenth Amendment.³⁵

This Comment argues that the ADA, rather than the constitutional right to privacy, is the proper vehicle to challenge these types of laws because constitutional privacy claims are filled with troubles and fraught with politics. The clear statutory scheme established by Congress in the ADA may be more successful. First, this Comment discusses the HIV epidemic, especially the challenges facing adolescents. It examines the history of the Illinois law, other laws dealing with HIV infection in Illinois, and laws about students and HIV on the books in other states. Next, it discusses the way the ADA addresses HIV infection and the way that courts faced with ADA claims from individuals with HIV have decided these matters. Last, this Comment examines the public policy implications of HIV status disclosure requirements.

While this law, and laws like it, may not affect large numbers of individuals, they do reflect the stigma that HIV still carries in United States. Moreover, the ADA was designed, in part, to remove the stigma associated with disability. So, it only seems appropriate to use the ADA as a vehicle with which to challenge statutes that may lead to discrimination against HIV-positive students.

³³ See, e.g., Lynn E. Sudbeck, *Students with AIDS: Protecting an Infected Child's Right to A Classroom Education and Developing A School's AIDS Policy*, 40 S.D.L. REV. 72 (1995).

³⁴ Diane M. DeGroat, *When Students Test Positive, Their Privacy Fails: The Unconstitutionality of South Carolina's HIV/AIDS Reporting Requirement*, 17 AM. U. J. GENDER SOC. POL'Y & L. 751, 753-54 (2009)

³⁵ *Id.*

I. A PARADIGMATIC CASE

It is useful to begin this Comment with an anecdote; names and specific information were omitted to protect confidentiality, but the story is hardly unique. During 2012, a parent contacted the AIDS Legal Council of Chicago (the primary legal service organization for HIV-positive individuals in Illinois) because his teenage daughter had tested positive for HIV. Until that time, there had never been a reported case of HIV in the entire county. That meant the county had no resources for HIV counseling or treatment, so the daughter had been referred to a neighboring county.

For this family, the stigma surrounding HIV quickly became a reality: the parent felt terrified when the Illinois Department of Public Health notified him that his daughter's identity would be disclosed to the school principal; the school principal was also the family's next-door neighbor. Medical advances had not changed the fear of HIV/AIDS that grew during the early days of the epidemic, and there was a good possibility that the daughter would face discrimination at school. The parent was convinced that the entire community would find out his daughter was HIV-positive. He indicated to the AIDS Legal Council that if the required reporting took place the entire family would have to move to a different community.

II. BACKGROUND

A. The Current State of HIV/AIDS Among Adolescents in the United States

UNAIDS, WHO, and UNICEF estimated that, at the end of 2011, around thirty-four million individuals worldwide had been infected with HIV.³⁶ While stereotypically (and historically) HIV has disproportionately affected populations of men who have sex with men (MSM), in recent years the number of adolescents, regardless of

³⁶ *Worldwide HIV & AIDS Statistics*, AVERT, <http://www.avert.org/worlstatinfo.htm> (last visited Jan. 28, 2015).

sexual orientation, that are infected with HIV has increased.³⁷ According to a 2008 report by the Centers for Disease Control (CDC), over 16,000 people aged nineteen or younger were diagnosed with HIV between 2005 and 2008.³⁸ A more recent report indicated that young persons (defined as individuals between the ages of thirteen and twenty-nine) accounted for 39% of all new HIV infections in the United States.³⁹ Individuals between the ages of twenty and twenty-four were the largest group to be diagnosed with HIV infection in 2009 with 6,237 diagnoses.⁴⁰ However, a significant number of individuals between the ages of fifteen and nineteen, 2,036, were diagnosed with HIV in the same year.⁴¹

Why is HIV infection increasing among adolescents? The 2009 “National Youth Risk Behavior Survey” shows the prevalence of many possible risk factors.⁴² 46% of high school students reported that they have had sexual intercourse.⁴³ More than a third of those students reported that they did not use a condom.⁴⁴

At the same time, “research has shown that a large proportion of young people are not concerned about becoming infected with HIV.”⁴⁵ Among sexually experienced youth between the ages of fifteen and seventeen, 12.7% reported being tested for HIV.⁴⁶ 87% of students in the same age group reported being taught about AIDS or HIV in school.⁴⁷ Further, the recent proliferation of abstinence-only sex education does not provide comprehensive education about

³⁷ CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 11.

³⁸ CENTERS FOR DISEASE CONTROL, DIAGNOSES OF HIV INFECTION AND AIDS IN THE UNITED STATES AND DEPENDENT AREAS, Table 1a (2008).

³⁹ CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 11.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Centers for Disease Control and Prevention, *Youth Risk Behavior Surveillance—United States, 2009*, 59 MORBIDITY & MORTALITY WEEKLY REPORT 20-23 (2010).

⁴³ *Id.* at 20.

⁴⁴ *Id.* at 21.

⁴⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 11.

⁴⁶ Centers for Disease Control and Prevention, *supra* note 42, at 23.

⁴⁷ *Id.*

sexually transmitted infections.⁴⁸ But whatever the cause, there is no doubt that adolescent infection rates are significant and increasing.

Other problems particular to adolescents include the lack of anonymous testing options in some states and the parental consent and notification requirements that impede young people from getting tested for HIV.⁴⁹ As Janine P. Felsman stated in a 1997 article about adolescent testing in the *Journal of Law & Policy*, “[t]here may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protections accorded to adults nor the solicitous care or regenerative treatment postulated for children.”⁵⁰ Felsman also pointed out that, while many states do authorize minors to consent to testing for sexually transmitted diseases, others do not.⁵¹ Further, others states still “remain ambiguous as to the level of confidentiality given to the test and its results.”⁵² The potential impediments to testing are of particular concern when combined with the deterrent effect of the principal and administrator notification laws because students may be less likely to get tested if they know their HIV-status will be disclosed.

B. Laws Surrounding HIV/AIDS in the United States

⁴⁸ See John Santelli et al., *Abstinence and Abstinence-Only Education: A Review of U.S. Policies and Programs*, 38 J. ADOLESCENT HEALTH 72, 77 (2006); Maki Somosot, *HIV Infections Among Young Black New Orleanians Traced to Abstinence-Only Sex Education*, NEW ORLEANS TIMES-PICAYUNE (Aug. 19, 2012, 6:45 AM), http://www.nola.com/education/index.ssf/2012/08/hiv_infections_among_young_black.html; Chris Collins et al., *Abstinence Only vs. Comprehensive Sex Education: What are the Arguments? What is the Evidence?* AIDS RESEARCH INSTITUTE POLICY MONOGRAPH SERIES 14-15, March 2002.

⁴⁹ See generally Janine P. Felsman, *Eliminating Parental Consent and Notification for Adolescent HIV Testing: A Legitimate Statutory Response to the AIDS Epidemic*, 5 J.L. & POL'Y 339 (1997).

⁵⁰ *Id.* at 339 (quoting *Kent v. United States*, 383 U.S. 541, 556 (1966)).

⁵¹ *Id.* at 356.

⁵² *Id.*

Every state in the United States, the District of Columbia, Puerto Rico and the U.S. Virgin Islands has laws on the books that concern HIV/AIDS.⁵³ These laws run the gamut from criminal law to laws concerning education, employment, testing, and confidentiality. But they often reflect an out-of-date vision of HIV and its transmission, or are discriminatory against infected individuals. What follows are just some examples of those laws:

- In Alabama, no one infected with any “venereal disease” is allowed to be a barber or manicurist.⁵⁴
- In Illinois⁵⁵ (and in Iowa until 2014⁵⁶) it is a criminal act for any person infected with HIV to engage in “intimate contact” (not limited to sexual intercourse) with an uninfected individual without explicitly disclosing their HIV status and gaining the express consent of the other party. The infected individual’s use of a condom or treatment status is not considered relevant, and transmission of HIV is not required for the infected individual to be convicted.⁵⁷
- In Kentucky, any individual convicted of prostitution or procurement is forcibly tested for HIV and subjected to treatment without their

⁵³ Staff of Volume 13, *supra* note 13. Most of the statutes that follow were originally drawn from the same collection and then independently confirmed within each state code.

⁵⁴ Ala. Code 1975 § 22-17-8 (2014) (“Service by persons having skin or venereal disease”).

⁵⁵ Illinois Criminal Transmission of HIV, 720 ILL. COMP. STAT. 5/12-5.01 (2012).

⁵⁶ Criminal Transmission of Human Immunodeficiency Virus, IOWA CODE § 709C.1 (repealed 2014).

⁵⁷ *Id.*

consent as a condition of release from incarceration.⁵⁸

- In Arizona, and many other states, parents are statutorily permitted to prevent their children from learning about HIV/AIDS or other sexually transmitted infections in public schools.⁵⁹

At the same time, many states have laws explicitly designed to protect HIV-positive individuals from discrimination or involuntary disclosure of their HIV status. For example, the Illinois AIDS Confidentiality Act is one of the strongest HIV confidentiality statutes in the United States.⁶⁰ The Act makes the disclosure of an infected individual's HIV status without his or her consent a class-A misdemeanor and allows the victim of disclosure to recover damages: \$2,000 for each instance of negligent disclosure and \$10,000 for each instance of reckless or intentional disclosure.⁶¹ Given the stigma that still surrounds the disease, the Illinois AIDS Confidentiality Act provides an important protection for HIV-positive individuals by creating strong incentives to keep HIV-related information confidential. Illinois also requires each course on comprehensive sex education to include instruction on AIDS prevention.⁶²

⁵⁸ Ky. Rev. Stat. Ann. § 529.090 (West 2014) (“Person convicted required to submit to screening for HIV infection – Prostitution or procuring prostitution with knowledge of sexually transmitted disease or HIV.”).

⁵⁹ See, e.g., Ariz. Rev. Stat. Ann. § 15-716 (2014) (“At the request of a parent, a pupil shall be excused from instruction on the acquired immune deficiency syndrome and the human immunodeficiency virus as provided in subsection A of this section. The school district shall notify all parents of their ability to withdraw their child from the instruction.”).

⁶⁰ See generally AIDS Confidentiality Act, 410 ILL. COMP. STAT. 305/1 (2014).

⁶¹ *Id.*

⁶² Sex Education, 105 ILL. COMP. STAT. 5/27-9.1 (2014).

III. ANALYSIS

A. Principal Notification in Illinois and Other States

This Illinois law covered HIV disclosure in school-age children until its repeal 2013:

Whenever a child of school age is reported to the Department⁶³ or a local health department as having been diagnosed with HIV or AIDS infection, prompt and confidential notice of the identity of the child to the principal of the school in which the child is enrolled shall be given. If the child is enrolled in a public school, the principal shall disclose the identity of the child to the superintendent of the school district where the child resides. The principal may, as necessary, disclose the identity of an infected child to: the school nurse; the classroom teachers in whose classes the child is enrolled; and those persons who, pursuant to federal or state law, are required to decide the placement or educational program of the child. In addition, the principal may inform such other persons as may be necessary that an infected child is enrolled at that school, so long as the child's identity is not revealed.⁶⁴

Looking at this statute in more detail, the extent of its potential effects becomes clear. The primary contact point for the Department of Public Health was the school principal, not a health official or district administrator.⁶⁵ The principal was not required to have any training in either HIV/AIDS or the confidentiality of health

⁶³ In this statute, the “Department” refers to the Illinois Department of Public Health.

⁶⁴ Communicable Disease Prevention Act, 410 ILL. COMP. STAT. 315/2a (repealed 2014).

⁶⁵ *Id.*

information. A principal may not have known the legal or personal ramifications of HIV disclosure.

After being informed, the principal was required to provide the information to the superintendent of the school district.⁶⁶ The principal “may, as necessary,” disclose the identity of the child, not just the fact that an infected child is present in the school, to the school nurse and classroom teachers.⁶⁷ It was possible that a principal would choose not to disclose a student’s HIV status; however, even disclosure to a single person could still have negatively affected a student’s educational experience.

While the Department of Public Health was required to give “prompt and confidential notice” of the child’s identity to the principal, there was no statement about confidentiality in the discussion between the principal and the teachers or other personnel.⁶⁸ The privacy of the student’s HIV status depended entirely on the principal’s personal discretion, rather than upon any confidentiality rules or regulations.

Finally, allowing the principal to inform “such other persons” as may be necessary that an infected child is enrolled at the school⁶⁹ is ambiguous and troubling. How those persons are identified or how “necessary” is defined is not found in the statute.⁷⁰ It is not clear if “necessary” relates to the student’s health care, school security, or other reasoning. The potential justifications for disclosure are unjustly vast.

Looking to other states’ laws that cover HIV-positive individuals shows just how distinctive and far-reaching the Illinois law actually was. Alabama⁷¹ and Nevada⁷² require disclosure of an

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ ALA. CODE § 22-11A-38(c).

⁷² NEV. REV. STAT. ANN. § 441A.190(1)-(2) (1991). Nevada’s law is unique in that, while it requires that principals be notified when a health authority knows that a student has a communicable disease, it specifically singles out HIV and requires

HIV-positive student's status to the superintendent of the school district in which they are enrolled. In South Carolina, similar to the repealed Illinois law, superintendents, school nurses, and health personnel must be notified.⁷³ But in South Carolina, only top level administrators (superintendents) and health personnel (nurses) have access to the information, not school principals, classroom teachers or "other persons."⁷⁴

Conversely, many states have somewhat similar types of laws that show a more serious commitment to consent and confidentiality. In Florida, the identity of HIV-positive students may be given to school district superintendents, but only with the consent of the student that has been tested.⁷⁵ In Maine, while the health records of a transfer student follow them to their new school, their HIV-status only follows their medical records if the student consents.⁷⁶ In Arizona, school districts (not principals or teachers) are notified, but only if the Department of Health Services is satisfied "that the school district has an appropriate policy relating to nondiscrimination of the infected pupil and confidentiality of test results."⁷⁷ In Oklahoma, health department officials "may convene a confidential meeting of a multidisciplinary team for recommendation on school placement of a student who is infected with human immunodeficiency virus."⁷⁸ Each member of the team and each member of the local school board having jurisdiction over the student shall be responsible for protecting the student's confidentiality.⁷⁹ In Virginia, if a superintendent finds out about a student's HIV status, they are required to keep it confidential.⁸⁰

only that superintendents be notified. Similarly, if a principal finds out that a student in their school is HIV-positive, he must notify the superintendent. *Id.*

⁷³ S.C. CODE ANN. § 44-29-135(f) (2002).

⁷⁴ *Id.*

⁷⁵ FLA. STAT. ANN. § 384.25(3)(c) (2012).

⁷⁶ ME. REV. STAT. tit. 20-A, § 6001-B(2).

⁷⁷ ARIZ. REV. STAT. ANN. § 36-136(L).

⁷⁸ OKLA. STAT. ANN. tit. 63, § 1-502.2(C)(1).

⁷⁹ *Id.*

⁸⁰ VA. CODE ANN. § 22.1-271.3(D).

In no other state are principals, let alone classroom teachers, the persons who “decide the placement or educational program of the child” or determine who else should be told about a student’s HIV status.⁸¹ It is also worth noting the strong concern for confidentiality in other states that have similar laws, even at the expense of the transmission of the information to school administrators, and for the consent of the infected student. Only Illinois had such a sweeping notification law that gave little heed to confidentiality and exempted students from any requirement of consent.⁸²

B. Legislative History of the Illinois Law

The legislative history of the Illinois principal notification law helps to illuminate some of the motives for passage of the statute, as well as the reasons that it posed such a danger to confidentiality. The statute was originally proposed in 1987 as part of Public Act 85-935, “an act in relation to blood and acquired immunodeficiency syndrome.”⁸³ This bill was an attempt at a comprehensive response to the then-disastrous HIV epidemic. It included a number of sections in addition the principal notification law, Section 2a.⁸⁴

Section One of the Act strengthened protections for health data, requiring that health data for individuals with HIV/AIDS be “stored and processed in the most secure manner available.”⁸⁵ Section Three of the Act required that anyone applying for a marriage license be tested for HIV, and that if either potential spouse tested positive, the physician would notify the other spouse and it would not be a violation of confidentiality.⁸⁶ This section of the law has since been

⁸¹ Communicable Disease Prevention Act, 410 ILL. COMP. STAT. 315/2a (repealed 2014).

⁸² *Id.*

⁸³ An Act in relation to blood and acquired immune deficiency syndrome, Pub. Act 85-935, 1987 Ill. Laws 4035 (1987).

⁸⁴ *Id.* § 2a.

⁸⁵ *Id.* § 1(e).

⁸⁶ *Id.* § 3, 1987 Ill. Laws at 4036-37.

repealed.⁸⁷ Section Four of the law addressed the criminal transmission of HIV⁸⁸ and Section Five exempted prisoners who tested positive upon incarceration from confidentiality protections.⁸⁹

Even in 1987, there were already concerns about confidentiality and the potential deterrent effect of mandatory disclosures of status on HIV testing. In the very first round of debate on Section One of the law, Representatives White⁹⁰ and Cullerton⁹¹ spoke in opposition to the provision that provided data on HIV infection to the Department of Public Health. Representative Cullerton reminded the House: “[i]t appears to me that this expands, actually breaks down the confidentiality of AIDS results, and that’s something that you definitely don’t want to vote for.”⁹² Representative Levin addressed the potential deterrent head on:

I think we all want to encourage people to voluntarily take the AIDS test if they think they may possibly have been exposed to AIDS. The best way of insuring that people will, in fact, voluntarily take the test, is by guaranteeing confidentiality and limiting access to the test results. . . . This amendment unfortunately goes in the opposite direction. It expands the number of people that have access to the test results. And the consequence of that is that it is going to discourage people from voluntarily taking the test.⁹³

The section of the bill passed 62 to 48.⁹⁴

⁸⁷ 410 ILL. COMP. STAT. 315 (repealed 2014).

⁸⁸ Pub. Act 85-935 § 4, 1987 Ill. Laws at 4037-40.

⁸⁹ *Id.* § 5, 1987 Ill. Laws at 4040-41.

⁹⁰ Ill. H. Rep., 85th General Assemb., 48th Legis. Day, 133 (1987) (Statement of Rep. White).

⁹¹ *Id.* at 134 (Statement of Rep. Cullerton).

⁹² *Id.*

⁹³ *Id.* at 135 (Statement of Rep. Levin).

⁹⁴ *Id.*

The debate on the principal notification section took place the next day. The sponsor, Representative Parcels, explained her motivations.

This was prompted because, in my district in Wilmette, there was a case of AIDS in a child and some of the parents[.] . . . [I]f the parents of this child with AIDS had not notified the school that the child had AIDS, there would be no way for the school to know and take necessary precautions. The other parents in the community asked me and suggested that this would be a very fine idea to have Public Health notify the superintendent and head of the school board.⁹⁵

The parents in the community were part of Representative Parcels's reason for proposing the bill.⁹⁶ Under the law that was eventually passed, parents would not be entitled to know if a child in their school district were infected with HIV/AIDS, but especially in a small community, news might be expected to travel. Representative Stephens spoke in support of the bill. He indicated that he supported the bill, at least partially, to inform the community:

[O]ne of our local school districts had to deal with the issue of a child who had AIDS and they found, through their own wisdom, that dealing with the issue openly, transmitting all the knowledge that they had about the issue, making sure that the parents were well informed was the right way to go. . . . I'm sure that the child is better off. The community feels better about itself for having dealt with the issue openingly [sic].⁹⁷

⁹⁵ Ill. H. Rep., 85th General Assemb., 49th Legis. Day, 129 (1987) (Statement of Rep. Parcels).

⁹⁶ *Id.*

⁹⁷ *Id.* at 129-30 (Statement of Rep. Stephens).

Especially given the existing concerns about confidentiality, this is a troubling statement. The text of the bill did not provide for “the community” to be informed or for the issue to be dealt with openly, but that seems to be the implication. According to Representative Stephens, a child was thought to be “better off” because their health information was disclosed to the entire community.

In the original bill, only school district superintendents were to be informed. However, Representative Currie argued that the principal needed to know in order to best protect the child. The sponsor argued that the superintendent would be able to inform the principal if he or she saw fit.⁹⁸

It became clear very rapidly that, just like in the earlier debate, many representatives were concerned with confidentiality and the potential stigma that disclosure of status would attach to students. Representative White told this story:

I teach at a school and as it turned out, a young lady came to me and she indicated that she had been raped by her uncle. And I shared this information with the principal. She shared it with the assistant principal. The assistant principal shared it with the teacher, and the teacher was overheard sharing this information with another teacher, *and the next thing we knew, 600 kids within that school knew that this young lady had been raped.* The bottom line is . . . I’m afraid that following this procedure that some young person who may have contracted AIDS may get hurt.⁹⁹

Stories like this one are precisely the reason why, more than twenty-five years later, AIDS advocacy organizations have worked to repeal this law— the extreme difficulty of keeping sensitive information confidential within a school environment.

⁹⁸ *Id.* at 131 (Statement of Rep. Parcels).

⁹⁹ *Id.* at 132 (Statement of Rep. White) (emphasis added).

In addition, one representative spoke of the importance of teachers being able to “take steps to be sure that there is the kind of decorum in class that will not provide for transmission.”¹⁰⁰ While universal precautions will be addressed later in the paper, it might be speculated that a teacher would find it difficult to maintain this sort of decorum only in specific classrooms with specific groups, and not with others, without indicating an ulterior motive. Put another way, if a teacher only required students to avoid roughhousing or playing sports when a particular individual was in the room, it would likely not take long for the school community to realize that something was different about that individual. If teachers were to keep this level of decorum with all students at all times, then the law would be unnecessary. Clearly, the implication is that a teacher who knows that they have a student with HIV in their class would behave differently.

Despite the statements in opposition, the bill passed 82-32.¹⁰¹ Governor James Thompson then used his amendatory veto to revise the bill to change superintendent notification to principal notification.¹⁰² Governor Thompson stated in his message to the General Assembly that he believed that “we have a responsibility to the most unwitting victim of this dreadful virus, the children, and *we have an obligation to protect our healthy children.*”¹⁰³ He believed it was essential to develop “coordinated community action plans” to work with parents and school officials.¹⁰⁴

However, Thompson’s change did not actually do that; it simply provided for principal notification. Note in the above quotation, that while there may be a responsibility to infected children, there is an “obligation to protect healthy children.” The privacy of HIV-positive children would be sacrificed on the altar of child protection. The Illinois General Assembly ratified this change and the bill became law later in 1987.¹⁰⁵

¹⁰⁰ *Id.* (Statement of Representative Pullen).

¹⁰¹ *Id.* at 134.

¹⁰² Journal of the Senate, 85th General Assembly (1987), 6204-06.

¹⁰³ *Id.* at 6205 (emphasis added).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 6206.

The legislative history is particularly informative with regards to this bill. The same concerns that this Comment addresses—confidentiality, stigma, and the potential deterrent to testing—were discussed and dismissed during the debate in 1987. Furthermore, the language the legislators used made it clear that they did not fully understand the confidentiality implications of the law or that there was a tacit, unspoken understanding that once a student’s status was disclosed to a school, it would become known within the larger community.

C. HIV, Public Schools, and the Americans with Disabilities Act

When the Americans with Disabilities Act was initially passed, it was unclear whether or not it would apply to individuals who were HIV-positive. Was HIV a disability? Did it entitle individuals to accommodations?

The ADA defines a disability as “a physical or mental impairment that substantially limits one or more major life activities of such individual.”¹⁰⁶ Physical impairment is defined as “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular; reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.”¹⁰⁷ Since HIV had not been identified when the original regulations were drafted, it was not mentioned; indeed, a specific list of conditions was never part of the statute.

To even begin a lawsuit under the ADA, a plaintiff must pass a relatively high bar. Unlike Title VII¹⁰⁸, the Age Discrimination in Employment Act¹⁰⁹, the Pregnancy Discrimination Act¹¹⁰ and other employment discrimination statutes, an ADA claimant must prove

¹⁰⁶ 42 U.S.C.A. § 12102(1) (2014).

¹⁰⁷ 28 C.F.R. § 35.104 (2011).

¹⁰⁸ 42 U.S.C.A. § 2000e-2 (1991).

¹⁰⁹ 29 U.S.C.A. § 623 (2014).

¹¹⁰ 42 U.S.C.A. § 2000e (1991).

that the plaintiff is disabled under the definition in the statute. Early Supreme Court decisions on the ADA focused on this “classification” step rather than whether a requested accommodation was reasonable or overly costly.¹¹¹ The Court was seemingly hostile to an overly broad definition of disability, and was unwilling to extend the definition of disability to conditions it considered marginal.¹¹²

Given this hostility, it was unclear if HIV (especially asymptomatic HIV) would be accepted as a disability by the Court. In 1998, the Supreme Court addressed the applicability of the ADA to HIV-positive individuals. A dentist had refused to fill a cavity of an HIV-positive patient unless the patient was willing to bear the additional cost of having the procedure performed in a hospital.¹¹³ The patient refused and brought suit under Section 302 of the ADA, which prohibits discrimination on the basis of disability in public accommodations.¹¹⁴

The Court found that HIV was a disability.¹¹⁵ The Court pointed out “we have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities,” but in deciding the case, the Court limited the resolution to the specific claim raised by the petitioner.¹¹⁶ In this situation, the petitioner claimed that HIV specifically affected the major life activity of “reproduction” and the Court agreed.¹¹⁷ The Court decided that because HIV substantially limited a person’s ability to reproduce, the ADA standard was met.¹¹⁸

This decision led to much scholarly handwringing, as well as the development of some tests in various Federal Circuits to apply the

¹¹¹ See, e.g., *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

¹¹² *Toyota*, 534 U.S. at 193-96.

¹¹³ *Bragdon v. Abbott*, 524 U.S. 624, 628-29, (1989).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 624-25.

¹¹⁶ *Id.* at 637-38.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 639.

ADA when an individual's HIV infection was asymptomatic.¹¹⁹ Indeed, in the Seventh Circuit, whose jurisdiction would cover any challenge to the Illinois Principal Notification statute, the court decided that the asymptomatic HIV infection was not a disability. Despite the decision in *Bragdon*, the Seventh Circuit in *E.E.O.C. v. Lee's Log Cabin, Inc.* declined to adopt a rule that HIV was a per se disability, instead preferring to evaluate the actual symptoms associated with HIV/AIDS on a case-by-case basis.¹²⁰

In 2008, the passage of the Americans With Disabilities Amendment Act (ADAAA) made it clear that the ADA was meant to cover all cases of HIV, including asymptomatic HIV.¹²¹ The ADAAA changed the ADA to include major bodily functions within the definition of disability impairments, and "functions of the immune system" within the list of functions.¹²² Furthermore, a 2011 amendment specifically included "HIV Disease" within the phrase "physical or mental impairment" within the ADA.¹²³ While *Lee's Log Cabin* has not been specifically overruled, a challenge to the Illinois Principal Notification Act today would fall under the new standards of the ADAAA and, as such, would presumably be much easier to argue that even asymptomatic HIV satisfies the new definition of disability.

¹¹⁹ See Katrina Atkins & Richard Bales, *HIV and the Direct Threat Defense*, 91 KY. L.J. 859 (2003); Dawn-Marie Harmon, *HIV and the ADA: What Is A Direct Threat?*, 55 ME. L. REV. 391 (2003); Jody Marcucci, *Doe v. County of Centre: Foster Children, AIDS, the Americans with Disabilities Act, and the Direct Threat Exception*, 52 DEPAUL L. REV. 945 (2003); Dorota K. Gasienica, *AIDS Treatment and Medical Technology: The Supreme Court Abandons the CDC*, *Bragdon v. Abbott*, 524 U.S. 624 (1998), 18 TEMP. ENVTL. L. & TECH. J. 191 (2000); Mary Anne Bobinski, *The Expanding Domain of the ADA: The Supreme Court's Decision in Abbott v. Bragdon*, 61 TEX. B.J. 918 (1998); Deborah L. Slowata, *Quantifying A Direct Threat: Risks That Health Care Providers Must Take While Treating Infectious Patients—Bragdon v. Abbott*, 20 PACE L. REV. 569 (2000).

¹²⁰ *E.E.O.C. v. Lee's Log Cabin, Inc.*, 546 F.3d 438, 445-46 (7th Cir. 2008).

¹²¹ Americans with Disabilities Amendments Act of 2008, 110 P.L. 325, 122 Stat. 3553.

¹²² 42 U.S.C.A. § 12102(2)(B) (2008).

¹²³ 28 C.F.R. § 35.104 (2011).

Further, the ADA applies to public schools.¹²⁴ Title II of the ADA deals with the activities of state and local governments and provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹²⁵ A public entity is defined as “any State or local government” or “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”¹²⁶ A local school board falls under this definition, and thus would be subject to the prohibition against discrimination contained within Title II of the ADA.

D. The Illinois Law and Others Like it Violate the ADA

The Illinois law that requires principal notification was a clear violation of the ADA; other laws like it may be as well. While the text of the ADA itself is not explicit on this precise point, as it only prohibits “discrimination” under Title II,¹²⁷ the specific restrictions and definitions that apply are laid out in the Code of Federal Regulations that apply to the ADA.¹²⁸ There, the general prohibition against discrimination is expanded and detailed.

Two provisions in particular apply to this situation. First, “[a] public entity, in providing any aid, benefit, or service, may not... afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.”¹²⁹ In addition, that same public entity may not “[o]therwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.”¹³⁰

¹²⁴ 42 U.S.C.A. § 12131 (1990).

¹²⁵ *Id.* at § 12132.

¹²⁶ *Id.* at § 12131.

¹²⁷ 42 U.S.C.A. § 12132 (1990).

¹²⁸ 28 C.F.R. § 35.101 (2012).

¹²⁹ 28 C.F.R. § 35.130(b)(1)(ii).

¹³⁰ 28 C.F.R. § 35.130(b)(1)(vii).

This indicates that discrimination can take many forms and is not limited to exclusion from public services, such as public education in the present case. A public school would certainly be discriminating against an HIV-positive student if it excluded him from school, but it is also prohibited from giving him “an opportunity to participate in” public education that is “not equal to that afforded others.” Since non-disabled individuals are not required to disclose their health status to their principals, superintendents, teachers, and other “necessary” persons, the principal notification statute would appear to have violated this section, as would other similar laws.

At the same time, the second provision cited above also applies. A student who is forced to disclose his or her HIV status to a superintendent, principal, teacher, or school nurse is certainly limited “in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving the aid, benefit or service.” The right that is limited is the right to attend public school without disclosing private health information, a right that other students possess.

According to one scholar, “[t]o date, the ADA has not played a major role in school-related litigation” as related to HIV, possibly because the ADAAA is a recent law.¹³¹ The case law that does exist on this question is wide and varied, but it seems to bear out the interpretation of the regulations discussed above. Several principles seem to be well established. First, under Title II “discrimination” is not limited to denial of services or exclusion from public services. Discrimination can also include imposing an undue burden in order to participate in these services. For instance in one case, the failure to provide specialized machines to allow visually-impaired voters to vote privately was found to be a violation of Title II even though the individuals involved were not denied their right to vote.¹³² In another case, a court’s refusal to provide interpreters for the hearing impaired during a wedding ceremony constituted a violation of Title II even

¹³¹ Charles J. Russo, *HIV/AIDS and K-12 Education: Neither Out of Sight Nor Out of Mind*, 267 ED. LAW REP. 1, 6 (2011).

¹³² Nat’l Org. on Disability v. Tartaglione, CIV. A. 01-1923, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001).

though the individuals involved were still able to be married.¹³³ Title II discrimination is also not limited to intentional discrimination.¹³⁴

In the case of these notification laws, students with HIV are having their private health information disclosed to school personnel. While they are not being excluded from public schools on the basis of disability, they are certainly being forced to participate in public education on a different basis compared with students who are not similarly disabled. The disclosure may cause a breach of confidentiality that will expose students to stigma and ridicule. It also may cause difficulties in the interaction between teachers and school officials who are informed of a student's HIV status and the student.

It is also worth noting that Illinois law did not impose a blanket "health conditions" disclosure requirement.¹³⁵ While different districts may have different policies with regard to communicable diseases, medications and other health-related concerns, this is the only condition that state law specifically required students to disclose to school officials, without regard to the consent of the student or her parents. Other potentially more communicable diseases, such as Hepatitis, were not covered under the law. This reinforces the presumption that individuals with this particular disability were being singled out for discrimination and unequal treatment.

Cases directly on this point are quite rare, but at least one does exist outside of Illinois. In 2001, the Third Circuit heard a somewhat similar case.¹³⁶ Parents of a HIV-positive child (identified as the Does) wished to host foster children.¹³⁷

¹³³ *Soto v. City of Newark*, 72 F. Supp. 2d 489 (D.N.J. 1999).

¹³⁴ The Supreme Court decided in 1985 that disparate impact claims were available under the Rehabilitation Act, and all rehabilitation act claims were incorporated into Title II of the ADA. "We assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." *Alexander v. Choate*, 469 U.S. 287, 299 (1985). Disparate impact claims, which can be the result of facially-neutral policies without any discriminatory intent, are cognizable under ADA. *Ratheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003).

¹³⁵ 410 ILL. COMP. STAT. 305/9(a) (2014).

¹³⁶ *Doe v. County of Centre, PA*, 242 F.3d 437 (3d Cir. 2001).

¹³⁷ *Id.* at 441.

County officials responded by adopting a policy providing that foster families whose members have “serious infectious diseases” may care only for children with the same disease. The policy would permit the Does to care for uninfected children only if the Does agreed to release information regarding their son and the biological parents executed a written consent releasing the County from potential liability.¹³⁸

In other words, in order to participate in a public accommodation (foster care) these parents would be required to release the HIV-status of their child. This would constitute participating in the public benefit on a different basis than others without the disability. The Does sued, claiming a violation of Title II of the ADA.¹³⁹

The Third Circuit found that the disclosure requirement constituted an ADA violation.

CYS's policy requires notification of and consent from the biological or custodial parents of HIV-negative foster children when placing those children in homes with HIV-positive individuals. The policy therefore treats John and Mary Doe differently during the foster parent application process solely on the basis of Adam's [their son's] HIV and AIDS. As a facial matter, then, the policy constitutes disability discrimination against the Does under the ADA.¹⁴⁰

The reasoning used by the court seems relatively simple and adheres to other ADA jurisprudence indicating that any burden upon a disabled person's participation in a public program can be a violation.¹⁴¹ The foster parent application process is akin to attending

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 447.

¹⁴¹ *See, e.g., id.*

public school in that a student is forced to disclose their disability in order to participate in a public program.

As indicated above, cases that are directly on point with regard to this issue are very rare, possibly because no other state has such a broad HIV-notification law. It seems, however, that mandatory disclosure of a student's disability status could plausibly create a claim for violation of the ADA.

E. Universal Precautions: Why Principal Notification Does Not Fall Within The Direct Threat Exception

As mentioned above, the ADA contains an exception for "Direct Threats" in Title I,¹⁴² which covers employment, and Title III.¹⁴³ Title II, which deals with public services, does not; but, the Regulations contain the same Direct Threat defense. The Regulations state,

This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a *direct threat* to the health or safety of others.¹⁴⁴

There has been a debate, in the wake of *Bragdon v. Abbott*, as to whether HIV counts as a direct threat to others.¹⁴⁵ Much of this debate has focused on the particular circumstances in which the HIV-positive individual is operating, an office versus an operating room, for instance. This falls in line with the second regulatory requirement for the direct threat exception, individualized assessment.

In determining whether an individual poses a direct threat to the health or safety of others, a public entity

¹⁴² 42 U.S.C.A. Ch. 126, Subch. I.

¹⁴³ 42 U.S.C.A. Ch. 126, Subch. III.

¹⁴⁴ 28 C.F.R. § 35.139(a) (emphasis added).

¹⁴⁵ See, e.g., Katrina Atkins & Richard Bales, *supra* note 119.

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 modifications of policies, practices, procedures or the provision of auxiliary aids or services will mitigate the risk.¹⁴⁶

This section contains several provisions that relate to students who are HIV-positive. First, the direct threat in question must be based on “reasonable judgment” based on “current medical knowledge.”¹⁴⁷ This may, for instance, include statistics about the likelihood of transmission through casual contact, the effectiveness of HIV medication on reducing transmission, and the chances that students engaged in everyday activities will have blood-to-blood contact with each other.

Different Circuits have dealt with HIV and the Direct Threat defense differently.¹⁴⁸ The Eleventh Circuit has held that if there is any chance of transmission, no matter how small, that HIV could be transmitted the direct threat defense is allowed.¹⁴⁹ Since the consequence of infection is death, the court reasons, even a tiny chance of transmission is an unacceptable risk.¹⁵⁰ However, this approach is an outlier. The Ninth Circuit has held that in order for the direct threat defense to apply, there must have been a documented case of transmission.¹⁵¹ The Third Circuit appears to have come closest to the intent expressed by the ADA itself, requiring a certain probability for HIV transmission to exist in order for the direct threat

¹⁴⁶ 28 C.F.R. § 35.139(b).

¹⁴⁷ *Id.*

¹⁴⁸ See Katrina Atkins & Richard Bales, *supra* note 119, at 879-90 for a good overview of the circuit split.

¹⁴⁹ *Onishea v. Hopper*, 171 F.3d 1289, 1297-99 (11th Cir. 1999).

¹⁵⁰ *Id.*

¹⁵¹ *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701, 710-12 (9th Cir. 1988).

defense to apply.¹⁵² The Third Circuit rejected an all-or-nothing approach, noting that the ADA did not ask whether a risk existed, but whether or not it was significant.¹⁵³

There has never been a documented case of HIV transmission within a school.¹⁵⁴ The CDC has found that casual contact cannot spread HIV,¹⁵⁵ and there are no documented cases of HIV transmission from sports.¹⁵⁶ Under this approach, using any but the Eleventh Circuit approach, an HIV-positive student would not seem to give rise to a direct threat defense.

At the same time, existing policies mitigate the risk such that HIV in a school environment cannot be considered a Direct Threat. Regulations from the Occupational Safety and Health Administration require what are called “Universal Precautions.”¹⁵⁷ All employers are required to have an exposure plan in place to prevent exposure to blood and body fluids and communicable diseases contained therein. “Universal Precautions shall be observed to prevent contact with blood or other potentially infectious materials. Under circumstances in which differentiation between body fluid types is difficult or impossible, all body fluids shall be considered potentially infectious materials.”¹⁵⁸ Universal Precautions is also defined in the same section: “Universal Precautions is an approach to infection control. According to the concept of Universal Precautions, all human blood and certain human body fluids are treated as if known to be infectious for HIV, HBV, and other blood borne pathogens.”¹⁵⁹

¹⁵² Doe v. County of Centre, PA, 242 F.3d 437, 447-48 (3d Cir. 2001).

¹⁵³ *Id.*

¹⁵⁴ Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 380 (C.D. Cal. 1986).

¹⁵⁵ *HIV Transmission*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Apr. 7, 2015).

¹⁵⁶ R. Kordi & W.A. Wallace, *Blood Borne Infections in Sport: Risks of Transmission, Methods of Prevention, and Recommendations for Hepatitis B Vaccination*. 38 BR. J. SPORTS. MED 678 (2004).

¹⁵⁷ 29 C.F.R. § 1910.1030 (2012).

¹⁵⁸ *Id.* § 1910.1030(d)(1).

¹⁵⁹ *Id.* § 1910.1030(b).

What does this mean in a school environment? Teachers and other employees must treat all students as if their blood was infected with HIV or another blood borne pathogen and act accordingly. This significantly reduces the utility of the Illinois law. Notification serves little purpose if teachers are required to treat all students as if they may have HIV or another blood borne infection. In fact, notification might actually increase risk. Since such a relatively low percentage of students are being tested for HIV,¹⁶⁰ notification that a particular student has HIV may decrease the amount of care a teacher takes with other students, creating a false sense of security. There may be other students with undiagnosed HIV (or other communicable diseases) in the teacher's class that require the same level of care. This is precisely why Universal Precautions standards exist; they reinforce the idea that there is no way to tell what the dangers of disease transmission are in a given situation.

F. Policy Reasons for Why Notification Laws Should be Repealed

There are many reasons aside from the potential violation of the ADA why the notification requirements should be repealed. From a policy standpoint, there are at least four major concerns: inconsistency with other state laws, inconsistency with federal law on students with disabilities, the potential deterrent effect notification may have on HIV testing, and the potential liability that disclosure may impose on local school districts.

First, this law was inconsistent with laws in Illinois and other states, especially the laws that regard HIV. In Illinois, the marital testing requirement, part of the same bill within which principal notification was passed, has been repealed, as views of HIV have changed.¹⁶¹ The Illinois AIDS Confidentiality Act instead contains a provision for spouses that provides that only physicians may (not

¹⁶⁰ Chesney & Smith, *supra* note 6, at 1163-64.

¹⁶¹ *Aids Test Rule Brings 14% Drop in Illinois Marriages*, L.A. TIMES (Apr. 28, 1991), http://articles.latimes.com/1991-04-28/news/mn-1459_1_illinois-marriage-license.

shall) notify a person if their spouse tests positive for HIV, subject to the physician's judgment.¹⁶²

This legal change is part of the modernization of the law surrounding HIV, reflected in other states' approach to students with HIV. Rather than a blanket requirement, the new marital disclosure law respects both the confidentiality of health information and the need to know of those who may be affected.¹⁶³ A similar revision in principal notification requirements, like those in other states, could be imagined; one that limited the scope of the disclosure, ensured confidentiality, allowed for discretion based on the situation, and focused on potentially high-risk situations.¹⁶⁴

Furthermore, this Illinois law, as well as others like it, is inconsistent with federal law. In addition to the ADA problems discussed throughout this Comment, this law seemingly contradicts the purposes and provisions of the Individuals with Disabilities Education Act.¹⁶⁵ This Act, passed in 2010, found that before the Education for All Handicapped Children Act of 1975, children with disabilities were not receiving appropriate educational services.¹⁶⁶ The purpose of the law, which provides funding to states for special education, renovations and other programs, is to ensure that the rights of children with disabilities and parents of such children are protected; the law also requires states, localities, educational service agencies, and federal agencies to provide for the "education of all children with disabilities."¹⁶⁷ In addition to the specifics of the law, it re-emphasizes the nation's commitment to accessible, appropriate education for students with disabilities.¹⁶⁸ A state requirement that students with disabilities disclose their private health information, in violation of the ADA, would also contravene the principles behind

¹⁶² 410 ILL. COMP. STAT. 305/9(a) (2014).

¹⁶³ *Id.*

¹⁶⁴ For example, Oklahoma's law that explicitly protects student confidentiality and makes a risk assessment. *See* OKLA. STAT. ANN. tit. 63, § 1-502.2(C)(1).

¹⁶⁵ Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 (2010).

¹⁶⁶ *Id.* at § 1400(c)(5)(C).

¹⁶⁷ *Id.* at § 1400(d)(1)(C).

¹⁶⁸ *Id.* at § 1400(d)(1).

this Act. It also may be a violation of the family educational and privacy rights statute if policies are not in place to keep this information confidential.¹⁶⁹

Laws like this may also discourage adolescents from getting tested. Adolescents are one of the fastest growing populations of individuals with HIV.¹⁷⁰ Many scholars have argued that the key to adolescent HIV testing (indeed, the key to many adolescent health issues) is confidentiality,¹⁷¹ and, as one article in Behavioral Science put it, “[t]he stigmatizing nature of HIV and AIDS is a factor that affects delayed HIV testing by at-risk persons.”¹⁷² It is a relatively simple inference that, due to the association of HIV with sexual activity and drug use, if a student knew that their superintendent, principal, nurse, or classroom teacher would find out about their HIV status, it might prove a deterrent to testing. Since early testing and treatment is key to dealing with adolescent HIV infection, this is a significant fear.

Furthermore, with no requirement in most states that superintendents, principals, teachers, and other school personnel have any education about HIV/AIDS, HIPAA, confidentiality or other requirements of privacy law, these types of disclosure laws are opening up local school districts to enormous potential liability under the privacy statutes like the AIDS Confidentiality Act.¹⁷³

Without further training, and given the propensity of people to discuss information within a school, disclosure of this information could result in significant liability.

CONCLUSION

¹⁶⁹ Federal Educational and Privacy Rights, 20 U.S.C.A. § 1232g (2013).

¹⁷⁰ CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 11.

¹⁷¹ *See, e.g.*, Kenneth R. Ginsburg et al., *Adolescents' Perceptions of Factors Affecting Their Decisions to Seek Health Care*, 273 JAMA 1913, 1917 (1995); Rhonda Gay Hartman, *AIDS and Adolescents*, 7 J. HEALTH CARE L. & POL'Y 280, 289-90 (2004); Susan G. Millstein, *Risk Factors For AIDS Among Adolescents*, 50 NEW DIRECTIONS CHILD DEV. 3, 4-5 (1990).

¹⁷² Chesney & Smith, *supra* note 6, at 1163 (citations omitted).

¹⁷³ AIDS Confidentiality Act, 410 ILL. COMP. STAT. 305/1 (2014).

Congress finds that:

[P]hysical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination...It is the purpose of this chapter...to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.¹⁷⁴

The ADA was explicitly designed to eliminate discrimination against individuals with disabilities to “provide a clear and comprehensive national mandate.” Recall the anecdote that was presented above. The congressional findings and purposes behind the Americans with Disabilities Act seem to be perfectly oriented towards eliminating situations of this nature.

While the struggle in Illinois is over, other states also compromise the privacy of students with HIV/AIDS. All of the legal arguments in this Comment apply to that and similar situations. Discrimination against HIV-positive students is a violation of federal law, with extremely limited exceptions.

The story of this law’s passage and repeal in Illinois is a particularly illuminating case. It shows the continued stigma that surrounds HIV, as lawmakers and interest groups opposed the repeal of a law that was both legally and ethically problematic. It exposed the lack of a coherent countervailing policy rationale for the law and others like it.

There is no reason, from a policy perspective, why principal, teacher, or superintendent notification makes anyone safer. Disclosing this information should not affect the way that students are treated in school because of the requirements of Universal Precautions.

¹⁷⁴ 42 U.S.C.A. § 12101.

However, these laws still require students to live with the disclosure of their private health information to school officials. At the same time, the existence of these laws may deter adolescents from being tested for HIV and expose schools to significant liability.

The Americans with Disabilities Act made clear the nation's commitment to equal treatment of individuals with disabilities in educational settings. As long as children are required to disclose this potentially stigmatizing disability to their principals, teachers and other school personnel, they are not being allowed to participate equally in public education. In order for all students, with and without disabilities, to be treated equally, laws that discriminate against students with HIV must be repealed.