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Panel on AIDS in the Workplace, Insurance and Education — Introduction and Discussion of Education Issues

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Panel on AIDS in the Workplace, Insurance and Education
Introduction and Discussion of Education Issues

Acquired Immune Deficiency Syndrome (AIDS) has been ranked by the United States Public Health Service as the nation's number one health priority. Since it first was identified as a disease in 1981, AIDS has been diagnosed in more than 49,000 Americans, and the number of those afflicted has been growing at an exponential rate. AIDS is almost certainly fatal, and more than 27,000 already have died in the epidemic. In 1987, AIDS accounted for 3,780 deaths in New York City alone, and city officials predict that the death toll for the year 1991 will be 40,000. By 1991, according to national cumulative projections, 270,000 Americans will have contracted Acquired Immune Deficiency Syndrome, and 179,000 will have died from the disease.

AIDS is caused by the Human Immunodeficiency Virus (HIV), which attacks and kills the white blood cells responsible for preventing infectious diseases. A type of pneumonia, rare in persons whose immune systems are working properly, is responsible for more than half the AIDS-related deaths. A cancer called Kaposi's sarcoma is another fatal malady that often follows the collapse of the immune system. On the average, there is a two-year lapse between AIDS diagnosis and death.

According to available literature, infection with the Human Immunodeficiency Virus is followed by one or more of three separate conditions. In order of increasing severity, these conditions are first, the seropositive state; second, AIDS-Related Complex (ARC); and third, AIDS itself. Blood tests have been developed to reveal antibodies to the Virus, indicative of the seropositive state found in more than one and one-half million Americans.

A person in the seropositive condition carries the Virus and can transmit it to others but shows no symptoms. He or she may develop ARC or AIDS. ARC involves some damage to the immune system and manifests itself in various non-specific symptoms, including swelling of the lymph nodes. Neither Kaposi's sarcoma nor the types of infection that occur with AIDS are characteristic of the AIDS-Related Complex stage. AIDS is, of course, the most serious of the three conditions involving the Human Immunodeficiency Virus, but uncertainty remains as to how many persons who test seropositive will reach the final, and fatal, stage.

The Center for Disease Control has concluded that the Virus is transmitted through sexual interaction, homosexual or heterosexual, and through intravenous exposure to infected blood. Although saliva, urine, cerebrospinal fluid and tears have been found to contain the Virus, the general consensus of medical experts is that the Virus is not transmitted through these fluids. The Center has classified those afflicted with AIDS into six

groups: the first, and by far the largest group, consists of sexually active homosexual and bi-sexual men; the second largest consists of heterosexual intravenous drug abusers who share injection needles; the four remaining groups, in order of decreasing size, are heterosexuals who have intercourse with seropositive partners; hemophiliacs who have received contaminated blood-clotting factor products; other people who have received contaminated blood transfusions; and newborn infants of infected mothers.

Transmission of the Virus occurs most frequently when it is contained in semen that comes into contact with mucosal tissues of the recipient and passes into the bloodstream through small tears in that tissue. Transmission is also thought to occur through the vaginal and cervical secretions of seropositive women. The Virus frequently is transmitted by drug abusers through shared needles. Heterosexual males who acquire the Virus in this manner often re-transmit it through sexual intercourse. Conveyance also occurs through contaminated blood and blood products. In utero transmission from infected mothers accounts for the presence of the Virus in the majority of the children who carry it.

It generally is accepted in the medical community, at least within present knowledge, that the Immunodeficiency Virus cannot be transmitted through casual contact. Although AIDS is much less contagious than any number of other diseases, there is a great deal of popular misconception as to the contact necessary

to create a risk of infection. It seems well-established, however, that mere proximity presents no risk of infection whatsoever. Studies indicate that the Virus is difficult to transmit, even through the type of intense, prolonged and direct contact involved in the relationship between health care workers and their AIDS patients.

Giovanni Boccaccio described the terrible devastation of Europe wrought by the bubonic plague in the fourteenth century. "The[se] events," he wrote, "caused various fears among those people who survived, all tending to the same cruel and uncharitable end, which was to avoid the sick and everything that had been near them . . . and the public distress was such that all laws, whether human or divine, were ignored." As judges and lawyers, our special obligation to society compels us to see that human laws, at least, are not ignored because of the distress and fear engendered by this twentieth-century plague.

The AIDS crisis already has spawned a variety of novel legal questions requiring our attention. Courts and lawyers now have confronted AIDS-related legal issues in matters of employment, education, prisoners' rights, sentencing, housing, insurance, blood testing and health services. Indeed, judges have been faced with challenges to the very presence of AIDS patients in the courtroom.

Our panel this morning will discuss AIDS-related legal problems in education, in insurance, and in the workplace. Carol Ziegler will handle the workplace issues, Kevin Porter will talk

about the insurance issues, and I shall address some problems in the area of education. We hope to leave at least a half hour for questions and comments from the floor concerning these and other legal questions presented by the AIDS epidemic.

According to the Guidelines for School Districts issued by the Center for Disease Control, most children with AIDS should be permitted to attend school. The Guidelines advise, however, that a restricted environment be considered for children who are prone to biting or unable to control bodily secretions. No case of AIDS has yet been identified as transmitted in a school setting, where the risks of transmission are thought to be minimal. Yet, given the fear and panic that have attended the spread of the disease, it is small wonder that some schools have denied all access to children with AIDS. Various legal theories have been employed to challenge exclusion from the classroom.

The Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The Act defines a handicapped individual as one who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

Those who rely on the Rehabilitation Act as a basis for challenging the exclusion of AIDS-linked children from schools find comfort in a decision issued by the Supreme Court last March. In School Board of Nassau County, Florida v. Arline, the Court was confronted with the Rehabilitation Act claim of an elementary school teacher who was discharged from her employment after suffering a third relapse of tuberculosis within two years. In remanding for a determination as to whether the teacher was "otherwise qualified" for employment in light of reasonable medical judgment, the Supreme Court specifically held that the Act applies to one afflicted with a contagious disease. It is important to note, however, that Ms. Arline's tuberculosis also involved a physical impairment. In footnote 7 of the Arline opinion, Justice Brennan wrote the following:

This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.

Whether school children who only carry the AIDS virus or who have non-impairing forms of AIDS-related complex would be covered by the Act therefore remains an open question.

The Rehabilitation Act of 1973 was applied in a 1979 Second Circuit case involving an infectious disease. In New York State Association for Retarded Children v. Carey, our circuit sustained a challenge to a Board of Education decision to exclude certain mentally retarded children from regular school classes because

they were carriers of serum hepatitis. It appears that the children previously had been identified as carriers while residents of the Willowbrook Facility. The panel referred to the lack of any evidence of a serious possibility of transmittal and to the lack of any Board of Education effort to identify all the school children, or even all the mentally retarded school children, who might be carriers of the disease. Since the children all were mentally impaired, there is a serious question whether this case can serve as a precedent to protect children who suffer from no physical or mental disability but merely are carriers of the AIDS virus. The Carey case includes this interesting caveat: "We wish to make clear, however, that the Board is not barred from returning to court at some point in the future when it has evidence to support any plan appropriate to a significant health risk." I think that this is an important recognition of the need for continuing re-evaluation in light of the expanding frontiers of medical knowledge. The concept is especially important in the AIDS context, where scientific research is only beginning.

The Education of the Handicapped Act of 1975, or "EHA," was enacted by Congress to meet the needs of handicapped children in the public schools. It requires school boards receiving federal funding to establish policies assuring handicapped children the right to free appropriate public education. The EHA requires placement in the regular classroom environment, unless the severity of the handicap is such that education cannot be

satisfactorily accomplished there. The statute defines handicapped children to include those with certain specified impairments "or other health impaired children." AIDS is not specifically mentioned as a handicapping condition, but regulations implementing the EHA define "other health impaired children" to include those who suffer from limited strength or vitality owing to acute or chronic health problems. It seems obvious that those with AIDS would meet this definition.

At least one commentator considers that children having the Virus or ARC, without any of the debilitating manifestations of AIDS itself, also fall within the definition. In a comment in the University of Pennsylvania Law Review, Lisa J. Scotto argues that "AIDS-linked children must shoulder the psychological burdens and stigma inflicted by association with AIDS even when they are outwardly healthy." She contends that the educational performance of children can be affected adversely by such factors and that they therefore should be entitled to the benefits of the EHA. This argument does not seem to have gained much currency in any of the reported cases. It is difficult to justify the application of the EHA to those who have not suffered the loss of strength or vitality. In any event, the exhaustion of administrative procedures required by the EHA is so burdensome and time-consuming as to cause particular hardship to victims of AIDS-related conditions who seek relief under the Act.

In 1985 the New York City Board of Education announced a policy of not excluding children with AIDS from public schools

and of reviewing the situations of those children on a case-by-case basis. A panel was established to review the conditions of those with AIDS or ARC in order to decide if they could attend school on an unrestricted basis. An Article 78 proceeding was instituted in New York County to require the expulsion of one seven-year-old child, who was permitted to remain in school in accordance with the panel's recommendation. The proceeding gave rise to an extensive legal and factual analysis by Justice Harold Hyman in the New York Supreme Court. Justice Hyman concluded that the petitioners failed to demonstrate that the challenged action of the Board of Education was arbitrary, capricious or an abuse of discretion, as required by the Article 78 standard. He also declared that a policy of excluding all AIDS children would violate the Rehabilitation Act and the rights of the children to equal protection of the laws.

Several findings were made in the New York decision, which is reported as District 27 Community School Board v. Board of Education in the New York Miscellaneous Reports for 1986. The court found that there were adequate precautions in the New York public schools to deal with the risk of transmission through bites or bleeding injuries. There was also a finding that the panel's case-by-case method of decision would allow an exception to the general policy of non-exclusion where warranted. It was further found that the confidentiality required by state and city laws prevented the disclosure of the identities of children with AIDS.

In holding that the automatic exclusion of children with AIDS would violate the Rehabilitation Act of 1973, Justice Hyman concluded that students with AIDS were handicapped within the meaning of the Act. This conclusion was based on physical impairments arising from the destruction of lymphocytes by the Virus. It was also based on the finding that students automatically excluded for AIDS are "regarded as having an impairment," which is one of the statutory definitions of handicap. The court's observation as to physical impairment seems inconsistent with its statement that the seven-year-old child in question "has remained well and done well in school for the past three years." The finding as to perception of impairment determines an issue expressly left open by the Supreme Court, namely, whether a contagious disease without physical or mental impairment can be considered a handicapping condition at all.

The lack of a rational basis for the exclusion of children with AIDS formed the basis for Justice Hyman's conclusion that exclusion would violate the Equal Protection Clause. He wrote as follows: "It is difficult to conceive of a rational justification imposing a discriminatory burden on known carriers of [the Virus] while untested and unidentified carriers still remain in the classroom where they pose the same theoretical (though undocumented) risks of transmitting the virus to normal children." It seems to me that the rational basis test may have been brushed aside too lightly here in view of the great

deference customarily accorded to public authorities in matters of public health. Courts have long upheld, where reasonable, such measures as compulsory vaccination for smallpox, isolation of typhoid carriers, exclusion from school of children infected with known communicable diseases and testing of prostitutes for venereal disease.

Justice Hyman did reject the Education of the Handicapped Act as a basis for his decision. He suggested that the term "handicapped child" is more narrowly defined in the Education of the Handicapped Act than in the Rehabilitation Act. According to his analysis, children are not handicapped for purposes of the EHA merely because they have AIDS, ARC or are infected with the Virus, although a handicap could result from deterioration of those conditions.

I bring my remarks to a close by expressing the opinion that there is not presently in place any statutory scheme properly designed to maintain the delicate balance between the rights of afflicted children and those of non-afflicted children in the schoolroom setting. The entire issue of testing remains open, and medical knowledge regarding communicability is subject to change. These concerns must be taken into account, along with many others. Amendments to federal legislation would be helpful. Better yet, the states might exercise their traditional police powers for protection of the public health by innovative lawmaking in this area. Given the ever-increasing reluctance of legislators to deal with controversial issues, however, it seems

that AIDS-related issues, in the classroom as well as elsewhere,
will occupy the courts for many years to come.