



National Council on the Handicapped

800 Independence Avenue, S.W.
Suite 814
Washington, DC 20591
202-453-3846
202-267-3232 TDD

An Independent
Federal Agency

To: National Council on the Handicapped
From: Robert L. Burgdorf Jr., Attorney/Research Specialist
(Handwritten initials appear after name and title)
Subject: Briefing Materials on AIDS

At the May, 1988, quarterly meeting of the Council, I agreed to provide Council members with "in-depth briefing materials" on the issue of AIDS (Minutes of May meeting, p. 17). This memorandum is in response to that commitment. Some of the information provided here will also be included in the detailed Questions and Answers packet on the Americans with Disabilities Act (ADA). There have been some important developments since the May meeting, including the issuance of the report of the President's AIDS Commission (officially, the Presidential commission on the Human Immunodeficiency Virus Epidemic) which expressly endorses the ADA, the national mailing to all households of the AIDS information packet, and Vice President Bush's endorsement of the need for antidiscrimination protection for people with AIDS. There appears to be developing an increased national consensus in favor of nondiscrimination protection for individuals infected with the AIDS virus.

Basic information about the Human Immunodeficiency Virus (HIV) or AIDS virus, its transmission, and the course of the AIDS disease were presented in the AIDS information packet

mailed to all U.S. households by the Federal Government. More in-depth information is presented in the President's AIDS Commission report. A copy of the Commission's report is enclosed for your information. In the interest of brevity, such general factual information is not reiterated in this memorandum.

I. NEED FOR ANTIDISCRIMINATION PROTECTION FOR PEOPLE WITH AIDS

In the early years of our nation's experience with AIDS, initiatives to prohibit discrimination against HIV-infected persons were controversial. Some individuals misunderstood the impact of nondiscrimination laws and mistakenly thought that such laws might force the inclusion of people with AIDS into dangerous situations or into positions where they they could not competently perform necessary duties. such misunderstandings of the law, coupled with ignorance and misguided fears about the AIDS virus and its transmission, led some to vociferously oppose nondiscrimination protection for those infected by the AIDS virus. Recently, with more information and education (including the nationwide mailing to all households of the AIDS information packet and the issuance of the report of the Presidential commission on the Human Immunodeficiency Virus Epidemic), a consensus seems to be emerging in favor of antidiscrimination measures to protect HIV-infected people. Proponents of such nondiscrimination protection include the U.S. Surgeon General, C. Everett Koop; the Presidential Commission on the Human Immunodeficiency Virus Epidemic; the Secretary of Health and Human Services; the American Medical Association; the Public Health Service; the Centers for Disease Control; the National Institutes of Health; and Vice President George Bush.

The Presidential Commission concluded that antidiscrimination measures were necessary not only as a matter of justice or equity, but also for pragmatic reasons; without such protection, the Nation's efforts to control the AIDS epidemic could not succeed. The Commission stated:

Throughout our investigation of the spread of HIV in the United States, the Commission has been confronted with the problem of discrimination against individuals with HIV seropositivity and all stages of HIV infection, including AIDS. At virtually every Commission hearing, witnesses have attested to discrimination's occurrence and its serious repercussions for both the individual who experiences it and for this nation's efforts to control the epidemic. Many witnesses have indicated that addressing discrimination is the first critical step in the nation's response to the epidemic.

HIV-related discrimination is impairing this nation's ability to limit the spread of the epidemic. Crucial to this effort are epidemiological studies to track the epidemic as well as the education, testing, and counseling of those who have been exposed to the virus. Public health officials will not be able to gain the confidence and cooperation of infected individuals or those at high risk for infection if such individuals fear that they will be unable to retain their jobs and their housing, and that they will be unable to obtain the medical and support services they need because of discrimination based on a positive HIV antibody test.

As long as discrimination occurs, and no strong national policy with rapid, and effective remedies against discrimination is established, individuals who are infected with the HIV will be reluctant to come forward for testing, counseling, and care.

Subsequent to the issuance of the Commission's report, Vice President George Bush was one of many public officials who endorsed the Commission's call for antidiscrimination protection for people with HIV infection.

The Commission's formal recommendations called for:

Comprehensive federal anti-discrimination legislation which prohibits discrimination against persons with disabilities in the public and private sectors, including employment, housing, public accommodations, and participation in

government programs, should be enacted. All persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation.

In making this recommendation, the Commission expressly endorsed the Americans with Disabilities Act as proposed by the Council; the report declared:

The National Council on the Handicapped, an independent federal agency comprised of 15 members appointed by the President to make recommendations on public policy issues affecting people with disabilities, included a proposal for a comprehensive federal law of this kind in their January 1988 report to the President. Their proposal, the Americans with Disabilities Act of 1988, was recently introduced in the United States Congress. The Commission believes that this type of comprehensive, disability anti-discrimination legislation should serve as a model for federal legislation in this area.

Nondiscrimination measures have already been developed in regard to the Federal workplace. In 1986, a Task Force of the General Accounting Office, appointed by the Comptroller General, proposed employment policies to assure that HIV-infected employees be treated "fairly and humanely." Following up on that proposal, in March of 1988, the Office of Personnel Management (OPM) issued comprehensive guidelines which outline employment policies for federal workers who are HIV-infected. The OPM guidelines include statements that "HIV-infected employees should be allowed to continue working as long as they are able to maintain acceptable performance and do not pose a safety or health threat to themselves or others in the workplace," and that "agencies are encouraged to consider accommodation of employees' AIDS-related conditions in the same manner as they would other medical conditions which warrant such consideration." Further, the guidelines declare, "there is no

medical basis for employees refusing to work with such fellow employees or agency clients who are HIV-infected."

The foregoing exemplify a growing consensus against discriminatory treatment of persons infected with the AIDS virus and in favor of legal prohibitions of such discrimination.

II. AIDS AND THE NATIONAL COUNCIL ON THE HANDICAPPED

In its authorizing statute, the purpose of the Council ("to promote the full integration, independence, and productivity of individuals with handicaps in the community, schools, the workplace and all other aspects of American life") and the Council's enumerated duties are framed with regard to "individuals with handicaps." Individuals with handicaps are the constituency whose interests are statutorily assigned to the Council.

For purposes of Title IV (which establishes the Council) and Title V (which includes Sections 501, 502, 503, 504, etc.) of the Rehabilitation Act, the statute provides the following definition of the phrase "individual with handicaps:"

any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

As will be discussed in detail below, this language has been interpreted as including AIDS-infected persons. Therefore, such persons are among the groups that the Council has been charged with representing. The Council has consistently sought to represent the interests of its broad constituency, and has never attempted to differentiate between subcategories, diagnoses, or causation of those it has been assigned to represent.

Amendments to the definitions section of the Rehabilitation Act make it clear that on those occasions on which Congress considered the question of coverage of AIDS infection, it intended for the Council's charge to include persons with AIDS. The definition quoted above has been amended twice in regard to sections 503 and 504 as they apply to employment, but not in regard to the definition as it applies to the Council's authority. Congress expressly left the Title IV (NCH) definition unchanged. The 1978 amendment stated that for purposes of sections 503 and 504 as they relate to employment, the definition would not include persons whose current alcohol or drug abuse prevents them from performing job duties or constitutes a direct threat to others. More pertinent, in 1988, the Harkin-Humphrey amendment incorporated in the civil Rights Restoration Act added the following language to the definitions section of the Rehabilitation Act:

for the purposes of sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

By making this change to the coverage of sections 503 and 504, Congress acknowledged that prior to this amendment the definition of individual with handicaps included persons with infections and contagious diseases, and, by not making a similar change to the definition governing the Council, Congress clearly implied that such persons were within the constituency to be served by the Council.

The National Council on the Handicapped has recognized the breadth of its statutory responsibility and has consistently characterized itself as "the only Federal agency with the mandated responsibility to address, analyze, and make recommendations on issues of public policy which affect people with disabilities regardless of age, disability type, perceived employment potential, perceived economic need, specific functional ability, status as a veteran, or other individual circumstances" (Toward Independence, p. iv; On the Threshold of Independence, p. viii). Thus, the Council has viewed itself as serving a very broad constituency without regard to "disability type" or "other individual circumstances." Whenever there has been any suggestion that the Council was not paying adequate attention to a particular constituency group -- e.g., people with hearing impairments, children with disabilities, elderly persons with disabilities, American Indians with disabilities, or other "minorities" within the class of people with disabilities -- the Council has taken strong and effective action to consider and address the interests of these subgroups. Such an inclusive approach would be hard to square with any interpretation that would seek to exclude people with AIDS from the Council's purview.

The inclusion of people infected with the AIDS virus in the Council's constituency is also supported by a recognition that there are very large areas of overlap of this group with people having what might be considered more traditional disabilities. For example, people with hemophilia are among those at the

highest risk of infection with the AIDS virus. Likewise, any person whose medical condition necessitated them to obtain blood transfusions during the period when blood supplies were not effectively screened is at risk of AIDS virus infection. Infants who receive the AIDS virus through transmission from their mothers during pregnancy and birth are most likely on a statistical basis to be born in situations of poverty and poor prenatal and medical care, just the situations that are linked to increased risks of birth defects and developmental impairments.

The foregoing provides strong legal and pragmatic reasons for the conclusion that people infected with the AIDS virus are individuals with handicaps within the jurisdiction and responsibility of the National Council on the Handicapped. Given this scope of responsibility, the Council may not "pick and choose" among the members of its constituency; it is responsible for equally representing the interests of all people with disabilities, including those people who are infected by the AIDS virus.

III. AIDS AND THE AMERICANS WITH DISABILITIES ACT

In developing the proposed Americans with Disabilities Act, the Council consciously sought to avoid the quagmire of trying to develop a new definition of physical and mental impairment. The definitions of those terms under section 504 established in the Rehabilitation Act of 1973 and regulations issued in 1978 were the product of much thought and negotiation, and have been widely accepted since their promulgation. For the most part, these definitions have served well. The Council's various drafts of the ADA consistently adopted verbatim the definitions of physical and mental impairment contained in the section 504 regulations.

In choosing the section 504 formulation, the Council was not only acting consistently with its own statutory mandate as discussed above, but was avoiding the highly controversial and risky process of trying to "reinvent the wheel" by formulating a new definition. Creating new language and confronting organizations and individuals representing numerous diverse disabilities with the question whether they are or are not included in this new definition would have been a laborious and divisive prospect. The use of the section 504 definitional wording avoided controversy and made use of terminology familiar to Congress, administrators, the courts, legal commentators, and people with disabilities and the organizations that represent them. The use of accepted definitional language helped to

engender unity in support of the bill, with the result that over 50 national organizations representing persons with disabilities had endorsed it at the time of its introduction.

In adopting the section 504 definition of physical or mental impairment, the Council appropriated terminology with an established history of judicial and administrative interpretation. The expectation that the prior interpretation of this definition would guide its interpretation under the ADA was expressly stated by Senator Weicker and other sponsors of the bill during their introductory remarks. One aspect of that interpretation is the inclusion of people infected by the AIDS virus. At the time of the introduction of the bill, the Council, the Congressional sponsors of the bill, and the endorsing disability organizations were all aware of the judicial interpretation of the section 504 definition to include persons infected with the AIDS virus. The interpretation of the Section 504 definition to include AIDS will be examined in detail in part III of this memorandum.

It is important to underscore that the inclusion of someone as having a condition that meets the definition of a physical or mental impairment is not the end of the inquiry under the ADA. Even though a person qualifies as having a physical or mental impairment, that individual may still be excluded or otherwise treated unequally in certain circumstances. An individual with a physical or mental impairment may be excluded or disadvantaged for some other reason having no connection to the existence of the impairment. And perhaps more significantly, a person may be

treated unequally because of a physical or mental impairment if this is pursuant to the legitimate application of qualifications standards, selection criteria, performance standards, or eligibility criteria, as for example a vision criterion for a job as bus driver. Such standards that disadvantage people with particular disabilities must be both necessary and substantially related to the ability to perform or participate in the essential components of the particular job or activity in question.

Therefore, under the ADA, inquiries regarding unequal treatment of persons with disabilities can be viewed as entailing two different levels. First, is the individual being treated unequally because of a physical or mental impairment, perceived impairment, or record of impairment? This determination is based upon the definition of physical or mental impairment drawn from the section 504 regulations and upon the facts of the case. Second, is the unequal treatment permitted under the Act? This will depend upon whether there are legitimate standards or criteria justifying the unequal treatment, whether such standards are necessary and can be shown to be sufficiently connected to essential components of the job or activity, and whether such criteria or standards have been properly applied to the particular individual with a disability.

If an employer or service provider could show, in particular circumstances, that a person with a certain disability such as AIDS poses a substantial risk to the health or safety of

co-workers or other participants, it would be permissible to establish qualifications standards or selection criteria that screen out such individuals. The employer or service provider would, however, have to have adequate evidence to establish that such standards or criteria were necessary and that they were substantially related to the essential components of the job or activity. The employer or service provider would also have to demonstrate that the particular individual in question failed to meet the standards or criteria, e.g., that the individual really did endanger the health or safety of others. Mere irrational prejudice or unfounded fears could not justify such an exclusion or unequal treatment.

It is clear that a person who is infected with the AIDS virus qualifies as a person with a physical or mental impairment, perceived impairment, or record of impairment under the ADA. But any impression that the ADA mandates the automatic inclusion in jobs, programs, and activities of people who pose a real, demonstrable threat to others represents a basic and serious misunderstanding of the requirements of the statute.

III. AIDS AND THE SECTION 504 DEFINITION

The legal battles about AIDS coverage under Section 504 are still continuing, but the weight of existing legal precedents is strongly in favor of the interpretation that people infected with the AIDS virus are included in the scope of persons protected by the Act. The broad legal framework on this issue was established by the decision of the United States Supreme Court in School Board of Nassau County v. Arline, a case that involved a schoolteacher with an infectious form of tuberculosis. The Supreme Court ruled that a person with a contagious disease is covered under the definition of a handicapped individual in Section 504. The Court stated that a basic purpose of section 504 is "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." The holding that an individual with an infectious disease is a handicapped individual under section 504 does not mean, however, that such an individual will necessarily prevail on his or her Section 504 claim. The Arline decision indicates that an individual must also demonstrate that he or she is "otherwise qualified" for the position or activity in question. In the context of the Arline case itself, the Supreme Court sent the case back to the lower courts for consideration of this second question.

The lower courts have applied the principles established by the Supreme Court in the Arline decision to the context of AIDS. The recent report of the President's Aids Commission (the

Presidential Commission on the Human Immunodeficiency Virus Epidemic) summarized the results as follows: "the lower courts have consistently held that the range of HIV-related impairments, including asymptomatic HIV infection, are covered under section 504" (citations omitted). In the case of Local 1812, Am. Fed. of Gov. Emp. v. Dept. of State, a Federal court in the District of Columbia noted the parties' agreement that HIV-infected persons are "physically impaired" and "handicapped" under section 504, "due to measurable deficiencies in their immune systems even where disease symptoms have not yet developed." On June 30, 1988, a Federal District Court in California applied the principles established by the Supreme Court in Arline to an AIDS case. The court ruled, in the case of Doe v. Centinela Hospital, that a healthy person who had tested positive as carrying the AIDS virus was a handicapped individual under section 504, stating, "No matter what else Arline may fairly be read to hold, it clearly states that discrimination based solely on fear of contagion is discrimination based on a handicap when the impairment has that effect on others."

Congressional statements have also consistently indicated that persons infected with the AIDS virus are included in the section 504 definition of individuals with handicaps. This was the viewpoint expressed by both supporters and opponents of the civil Rights Restoration Act, that was passed into law in March, over the veto of President Reagan. Recognition that AIDS and other contagious diseases or infections are covered by Section

504 prompted the compromise amendment (discussed in part II above) that clarified that in the employment context, such coverage would not extend to situations in which a contagious disease or infection would either pose a direct threat to the health or safety of others or would prevent an individual from performing the duties of a job. Were AIDS and other infectious and contagious diseases not covered under section 504, then this amendment would make no sense.

The Fair Housing Act Amendments of 1988 bill that has passed the House of Representatives and is currently pending in the Senate also incorporates the definition of individual with handicaps from Section 504. The House Committee Report accompanying the passage of the bill could hardly have made clearer the Congressional understanding that the definition encompasses infection with the AIDS virus: "AIDS and infection with the Human Immunodeficiency Virus (HIV) are covered under this Act" (Report 100-711, p. 22, n. 55). In his statement on the House Floor during the debates on this bill, Congressman Major Owens declared that "The definition of "handicap" presented in section (b) (h) neither expands nor restricts the current interpretation of "individuals with handicaps" as it is used in section 504. All of the physical or mental impairments that constitute handicaps under section 504 will also constitute handicaps under this bill." He went on to state:

It is important to underscore that this definition clearly intends to include persons with AIDS and all who are infected with the HIV virus, whether or not they show symptoms of the disease. Various classifications and terminology have been used, but individuals are included if

they have AIDS, AIDS-related-complex, or seropositivity, whether they have symptoms of the disease or are asymptomatic. The definition is intended to reflect a developing consensus in case law and administrative determinations that all who test positive for the AIDS virus have a "handicap" and are within the scope of protection afforded by such laws against discrimination on the basis of handicap.

Numerous other Representatives, both opponents and proponents of the Fair Housing Amendments bill, made similar statements acknowledging that the section 504 definition includes persons who are infected by HIV (See, Congressional Record, June 29, 1988, pp. H 4918-4930).

For all of these reasons, existing legal precedents and Congressional statements strongly indicate that persons with AIDS or infected with the AIDS virus are covered by Section 504 and protected from discrimination on the basis of their handicap.

V. ENCLOSURES

Enclosed for your information is a copy of the report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic. There have been a number of pieces of legislation introduced in Congress that deal in one way or another with AIDS. I am enclosing a copy of a Legislative Summary that describes all such legislation in the current Congress.