Understanding the Laws Affecting Persons Living with AIDS or HIV

HIV/AIDS AND HOUSING IN NEW JERSEY

A well-developed body of statutory and common law in New Jersey established the rights of both landlords and tenants in such matters as rentals, leases, and evictions. Anti-discrimination laws of both the federal and state governments with regard to housing, and court decisions interpreting those laws, generally and specifically define the housing rights of individuals and classes of citizens who may have previously been or might otherwise be victims of housing discrimination.

For example, the 1968 federal Fair Housing Act forbids discrimination in the sale or rental of housing against, among others, handicapped persons. The Fair Housing Act prohibits discrimination in the sale or rental of housing or in offering housing for sale or rental. The Act likewise prohibits discrimination in real estate lending and brokerage services. Amendments to the Fair Housing Act that became effective in 1991, also require that new multifamily housing construction provide accommodations for the handicapped, such as wheelchair accessibility.

While the Fair Housing Act does not specifically identify HIV infections as a handicap, the federal courts in interpreting this landmark statute, have expressly held that an HIV-infected person qualifies as a handicapped individual entitled to the protections of the Act.

The federal Rehabilitation Act of 1973 similarly prohibits discrimination against the handicapped in any program receiving federal financial assistance or under any program conducted by an executive federal agency. Federal courts have ruled that AIDS is a handicap for purposes of the Rehabilitation Act. This Act is designed to prevent discrimination in comprehensive and coordinated programs in rehabilitation and independent living for those who are handicapped.

The 1992 federal Americans with Disabilities Act (ADA), which has been administratively interpreted to cover HIV-infected persons, bars discrimination in public accommodations based on disability or handicap. Its definition of
public accommodations includes inns, hotels, motels and other places of lodging except for establishments offering no more than five rooms and in which the owner is a resident. The legislative history of the ADA indicates that rental housing was not intended to be covered by its protections. Long-term rented housing is instead covered by the Fair Housing Act and other statutes. Rather, the definition of public accommodations as including hotels, motels and other places of transitional or transitory lodging clearly indicates that the protections of the ADA apply to such short-term housing situations.

Finally, the New Jersey Law Against Discrimination (LAD) specifically prohibits discrimination in public housing and other real property, sales and leases. In 1972 LAD was amended to specifically extend protection to handicapped persons. A state court ruling has held that a person suffering from AIDS is a handicapped person. Thus, an AIDS patient in New Jersey has housing rights under LAD.

In summary, both state and federal laws and prior court rulings in New Jersey give HIV-infected individuals legal rights and remedies against give housing discrimination.

**HIV/AIDS AND INSURANCE**

*The Insurance Coverage Decision*

The short, but unhappy, truth is that medical and life insurers have every right to ask applicants for insurance their HIV or AIDS status and to refuse coverage to persons who are HIV positive or suffering from full blown AIDS.

An application for insurance constitutes an offer to the insurer which it may accept or reject. Based on information contained in the application, an insurer may reject an applicant as an unacceptable risk. To determine the acceptability of the applicant, the insurance company may investigate the applicant, ask questions about the applicant’s medical history and even insist upon a physical examination, including a blood test. An applicant’s medical history is legitimately important in making an underwriting decision.
A decision to reject an applicant cannot be based on discriminatory motives. With respect to life and health insurance, New Jersey law provides that an insurer may not unfairly discriminate between individuals of the same class, equal expectation of life, and "essentially the same hazard" in the availability of insurance, amount of premium, policy fees or rates charged for health insurance. Treating individuals with HIV or AIDS differently than persons without such conditions would not constitute unfair discrimination under these provisions, however. A person with HIV or AIDS does not have an "equal expectation of life" as a person who does not have HIV or AIDS. Because it is clear that the AIDS crisis represents a formidable financial threat of disastrous proportions to health insurers and the public treasury, the denial of health or life insurance coverage to an HIV-positive individual is a lawful and sound underwriting decision.

AIDS, HIV and the Applications for Insurance

If an applicant for medical or life insurance lies about his or her HIV or AIDS status on an insurance application form, the insurance company may lawfully later refuse to pay any claims made by or on behalf of that person. Generally in New Jersey, an insurer may refuse to pay a health or life insurance claim if the applicant for insurance made any untrue statements, declarations or representations that were relied upon in good faith by the insurance company.

There are exceptions. In the life insurance context, the insurer may not contest the validity of the policy for any reason other than nonpayment of premiums once two years have passed after the date the policy was issued, so long as the insured did not die within the two-year period. Thus, if the insurance company does not seek to void the life insurance policy within two years of its issuance on the grounds of a factual misstatement in the application, it will ordinarily be barred from doing so later.

Thee rules are slightly different in the medical insurance context. There, the insurance company can deny coverage based upon any factual misstatement, intentional or unintentional, within two years of the issuance of the policy. Thereafter, the insurer may still deny coverage based upon an untrue statement in the application but only if the insurance company proves the statement was intentionally and knowingly untrue.

Finally, it is worth noting that an applicant for insurance has no obligation to volunteer information about his or her medical status. The applicant’s only duty is to answer truthfully objective questions about his or her medical history and condition.
In sum, if the application asks questions about an applicant's HIV or AIDS status, the applicant must answer those questions truthfully or run the risk that insurance coverage will be denied later. If the question is not asked, however, the information need not be volunteered.

*Modifications of Medical Plans by Employers*

Another critical issue is whether an employer can alter the coverage to which employees are entitled under the employer's self-insurance or group plan upon learning that an employee is HIV-positive. Although the law on this issue is not well-settled, it does appear that an employer can change his medical insurance plans to exclude coverage for AIDS.

Generally speaking, employers are free to create, modify or terminate the terms and conditions of employee benefits plans without governmental interference. Federal law does not prohibit welfare plan discrimination between or among categories of diseases. Further, it does not mandate that if some, or most, or even virtually all, catastrophic illnesses are covered, AIDS (or any other particular catastrophic illness) must be among them. Employers are generally free to modify benefits under group insurance plans. If they could not, they would be unable to maintain their plan in the face of the cost of covering each and every catastrophic illness.

The law may be changing in this area, however. For example, some help may be available under the Americans With Disabilities Act (ADA), which prohibits employment discrimination against persons who have disabilities as defined by the ADA or who are perceived as having disabilities. HIV and AIDS are recognized disabilities. The Equal Employment Opportunity Commission (EEOC), which processes ADA complaints, is prepared to give fast-track status to complaints challenging the legality under the ADA of self-insured companies setting health insurance caps for employees with the HIV disease. To date, however, there are no reported decisions addressing this argument under the ADA.

*Confidentiality Issues*

Generally, a person's HIV or AIDS status is a private matter and any person has a right to insist that such information be kept confidential. With certain exceptions, if the confidentiality of such information is breached without the PWA's permission, he or she may even be able to sue successfully for money damages.

Thus, New Jersey recognizes an action for invasion of privacy. An injured party may bring such an action when the matters revealed were actually private, the dissemination of such facts would be offensive to a reasonable person, and there is no legitimate public interest in disclosure of the publicized facts. Clearly, HIV positivity is a private matter, except in those limited circumstances in which disclosure is compelled as a public health matter or by order.
of a court or, arguably, where the patient is a public figure. Similarly, the relevant statutes and decided cases have recognized that dissemination of a person's HIV or AIDS status would be offensive to an ordinary person, that protection of a PWA's confidentiality rights is of substantial importance and that disclosure without the PWA's consent can rarely, if ever, be justified. In short, a person with HIV or AIDS whose status is disclosed without permission is likely to have a good cause of action for invasion of privacy.

There are exceptions, however. Some legal authorities suggest that a limited disclosure to one person or a very small group of persons may not be actionable. More significantly, the doctor-patient privilege is not absolute. For example, the matter of public health may require doctors to disclose information about their patients. With respect to HIV and AIDS, New Jersey law requires that "all diagnosed cases of AIDS and all diagnosed cases of HIV infection shall be reported to the [Department of Health] along with identifying information for the person diagnosed." Thus, within 24 hours of (1) receiving a lab report indicating HIV positivity or (2) the time AIDS is diagnosed, an attending physician must report those events to the Department of Health. Those reporting requirements apply also to hospitals, sanitaria, nursing homes, penal institutions, clinics, blood banks and HIV counseling and testing facilities. It is important to note, however, that the records maintained by the Department of Health, local health departments, health care providers and facilities, blood banks, laboratories or any other similar institution or person containing identifying information about a person who has or is suspected of having AIDS or the HIV infection are confidential. Those records may only be disclosed for the limited public purposes authorized by state law.

With regard to insurance companies, state law regulates the collection, use and disclosure of information gathered in connection with insurance policies. New Jersey law strictly limits the release of medical information about insured persons and applicants for insurance. Essentially, absent the subject’s written authorization, medical information such HIV status may not be disclosed by an as a person’s insurance company.

HIV/AIDS AND CHILD CUSTODY, VISITATION AND GUARDIANSHIP IN NEW JERSEY

In New Jersey, as indeed throughout the United States, there are no statutes that address or specifically set down legal guidance for questions arising in connection with child custody, visitation and guardianship with respect to persons who are HIV positive or who are sick with AIDS. Issues of child custody, visitation and guardianship arising in connection with HIV/AIDS must be evaluated in the context of existing more general statutes and case law.

In New Jersey, the guiding principle in deciding issues with regard to child custody, visitation and guardianship is to the best interests of the child. The New Jersey Supreme Court has declared in matters involving child custody or
visitation rights that the "Welfare of the child is the primary, paramount and controlling consideration ... The legal rights and claims of either parent must yield, if opposed to what the court, in the discharge of its duty, regards the welfare of the child to be."

This principle applies equally in matters in which the incidence of HIV/AIDS in a parent, in both parents, or in a child becomes one of the facts, or the overriding fact, that a court must determine and weigh in reaching a judgment.

Laws with regard to child custody, and related questions like parental visitation rights and guardianship, represent society's best effort to establish a system of objective rules and decision-making to sort out very subjective, emotional issues. In this context, HIV/AIDS in a parent or child becomes one of the facts that a court must establish and weigh in reaching a decision.

In general, courts in New Jersey are reluctant to terminate a parent's rights. Termination of parental rights requires a substantial showing that a parent is unfit for custody or visitation rights. This is a heavy burden of proof.

Public policy in New Jersey generally favors participation by both parents in the upbringing of a child where and when that is possible and advisable.

The state supreme court has established several factors for judges to weigh in reaching these decisions, including whether a child has a close relationship with both parents, whether a child recognizes both parents as sources of security and love, and whether a child expresses a desire to continue to have relationships with both parents.

These factors apply as well in cases of child custody and visitation when a child is born out of wedlock or when parents are already separated at the time of the birth of the child.

Concerning child visitation, the law in New Jersey strongly favors the right of a non-custodial parent to visit with the child or children in the custody of the other parent. Visitation is denied only when granting such rights to a parent will clearly pose physical or emotional harm to a child.

In both custody and visitation matters, courts will also take into consideration the preferences and desires of children who are old enough to form and express their feelings with sufficient independence.

Once a custody decree has been entered by a court, it can be changed by a further court order if there is a change of circumstances that the court agrees justifies a change in the custody arrangement. One of the factors upon which a court can base such a change is an illness or death that makes it impossible for the parent originally granted custody to continue to care for the child. However, in cases involving the death of the custodial parent, as in all such matters involving a possible change in a custody arrangement, custody will not automatically revert to the noncustodial parent. Such a change will only be made with the approval of the court. In the interim, a court may
order temporary custody arrangements, either with the surviving parent, or with another responsible family member or other party approved by the court.

The fact that a parent is HIV positive or suffers from AIDS is likely to be a significant factor in many courts' child custody and even visitation decisions. For example, given what the medical community knows today about the incidence and transmission of HIV/AIDS, child custody and related decisions in which HIV/AIDS becomes a critical fact may also tend to involve other issues that courts will weigh, including the sexual orientation of a parent or evidence that a parent is an intravenous drug user.

To date, there have been no reported custody or related cases in New Jersey focusing on or involving HIV/AIDS, and few have been reported in other states. In 1990, a New York state court ruled in a case in which a father sought to regain custody of his daughter because the custodial mother had contracted HIV. The court noted that overwhelming medical testimony demonstrates that HIV is not spread by casual contact and concluded that the father had not shown a sufficient change in circumstances to justify changing custody. Similarly, in 1988 another New York state court held that a father could not be ordered to be tested for HIV without a showing that there was a compelling need, and further, that even if the father tested positive for HIV, that fact alone would not just removing his children from his custody.

There are no reported cases considering the issue of the custody of an HIV-infected child but it is clear that such a fact would be central in determining which parent could best meet the medical and other needs of a child caught in a custody fight.

Generally, courts have said that the physical handicap of a parent cannot be the basis for showing that a parent is unfit or that placing custody of a child with a handicapped parent will harm the child.

Court decisions in New Jersey based on the New Jersey Law Against Discrimination have held that HIV/AIDS is a "severe handicap" subject to the statute's prohibition of discrimination based on physical handicap. This rule has not been tested in a case involving a custody claim by or challenge to an HIV/AIDS parent.
HIV/AIDS is a medical condition that necessarily calls for realistic appraisal of its effects, including those it may have on the children of persons infected with the virus or afflicted with AIDS. Thus, one other area of child welfare law and practice must be considered: What will happen in the event a child is left without either parent because of their deaths from AIDS. This involves the issue of legal guardianship. Parents can try to decide this issue in advance by designating a suitable guardian in a will. If no such provision has been made, surviving children become the ward of the court which must endeavor to grant guardianship to a suitable, responsible surviving relative or family friend. Thus it appears highly advisable, if not incumbent on parents, when both have HIV or are afflicted with AIDS, to execute a will that clearly provides for the future care and custody of their children.

In summary, HIV/AIDS presents further complications for the already emotionally charged questions of child custody, guardianship and visitation. In New Jersey, existing statute and case law provide little express guidance for resolving such issues when a parent or child is HIV positive or suffers from AIDS. The courts should avoid stereotypes and unfounded fears about AIDS in making their decisions. Parents and children, guided by sensitive and sensible legal counsel, may well have to educate the courts, however, to make sure that the best interests of the children do not get lost in myths, rather than facts, about AIDS.

**HIV/AIDS AND EDUCATION IN NEW JERSEY**

In New Jersey, the state Departments of Health and Education make the rules, subject to statutory authority, concerning access to schools by persons infected with HIV or who have AIDS.

Current and proposed regulations of both departments prohibit the exclusion of persons with HIV or AIDS either as students or employees in schools for grades Kindergarten through 12. An exception permits any person to be barred from a school, regardless of whether they are HIV positive or have AIDS, if they exhibit weeping skin lesions that cannot be covered.

Similar rules prohibit barring any student or employee from schools because they live with or are related to any individual who is HIV infected or has AIDS.

The New Jersey Law Against Discrimination (LAD) governs attendance or employment at public colleges, universities and postsecondary schools, LAD prohibits certain forms of discrimination, such as discrimination on the basis of age, sex, race or handicap, in employment and public accommodations, including schools, colleges and universities. In January 1992, LAD was amended to include persons who are HIV positive or who have AIDS in the definition of the handicapped.

The new federal Americans with Disabilities Act (ADA), which took effect July 1, 1992, also defines AIDS as a handicap and prohibits employment discrimination against persons with AIDS by certain employers including state
and local governments and their agencies, such as school districts. That means that, unless the applicant or employee's HIV or AIDS status makes him or her incapable of performing necessary job duties, they must be treated the same as any other applicant or employee.

All school employees, including those engaged in the transportation of students or in school food service operations, are protected against discrimination on the basis of their HIV or AIDS status.

New Jersey law and regulation do not require school districts to be notified that an individual is HIV infected. The law provides that, if such a notification is received by school personnel, it must be kept confidential. In the case of students, such confidential information can be shared only with the written consent of a student's parent or guardian, and then may be shared only with those who need to know to shape a proper program of education for the student.

Under New Jersey law, every student must periodically be physically examined and tested. There is no requirement for students to be tested for HIV/AIDS; there is also no prohibition on such testing. However, no such tests have ever been ordered, to the best of our knowledge, and the question of whether such testing should be permitted has never been before the courts and could implicate individual constitutional rights should such a case arise. Restrictions under the ADA make it unlikely that candidates for school employment could or would be tested to determine if they are HIV infected.

In summary, persons who are HIV infected or who have AIDS cannot be discriminated against on the basis of their infection or illness in the public schools, colleges, and universities of New Jersey, and cannot be barred from attending as students or from being employed as faculty and staff, absent some medically justifiable basis for doing so.

About the AIDS Center at Hope House

The AIDS Center at Hope House was established in February 1987 to take up the tasks of AIDS Education and of comprehensive support services to People With AIDS (PWAs), their families, friends, concerned others and the community at large. The AIDS Center at Hope House serves primarily the Morris County area and its environs, although services are denied to no one.

Further information about legal issues affecting PWAs or about the services available at The AIDS Center at Hope House can be obtained by calling the center at (201) 361-7232.
Practice:

Health Care Law