LEGAL DEPARTMENT
LESBIAN & GAY
RIGHTS PROJECT
AIDS PROJECT

June 2, 2005

BY FACSIMILE AND MAIL

Linda Whitlow
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AMERICAN CIVIL LIBERTIES UNION FOUNDATION
LESBIAN & GAY RIGHTS PROJECT
AIDS PROJECT

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RICHARD ZACKS
TREASURER

Re: Unlawful discrimination based on HIV status

Dear Ms. Whitlow:

We at the American Civil Liberties Union Foundation AIDS Project and the Arkansas Civil Liberties Union Foundation are writing to you because Hair Tech Beauty College, a cosmetology school in Paragould, Arkansas, has invoked an Arkansas Board of Cosmetology regulation to justify its disenrollment of former student Allan Dugas based on his HIV status in violation of federal and state disability discrimination laws. We urge you to take immediate action to clarify for Hair Tech Beauty College and all others subject to your oversight that the regulation at issue may not be invoked to justify such unlawful discrimination.

<u>Allan Dugas and Hair Tech Beauty College</u>

On or about January 4, 2005, Mr. Dugas, who is HIV-positive, enrolled at Hair Tech Beauty College, in pursuit of training in the art of cosmetology.[1] On or about January 27, 2005, Mr. Dugas disclosed his HIV

[1] "(1) Arranging, dressing, curling, waving, machineless permanent waving, permanent waving, cleansing, cutting, singeing, bleaching, tinting, coloring, straightening, dyeing, brushing, beautifying, or otherwise treating by any means the hair of any person or wigs or hairpieces; (2) Massaging, cleaning, or stimulating the scalp, face, neck, arms, bust, or upper part of the human body, by means of the hands, devices, apparatus, or appliances, with or without the use of cosmetic preparations, antiseptics, tonics, lotions, or creams; (3) Beautifying the face, neck, arm, bust, or upper part of the human

status to his instructor. The next day, Brenda Gulley, the owner of Hair Tech Beauty College, met with Mr. Dugas and informed him that Hair Tech Beauty College was disenrolling him based on his HIV status.

Upon request, Ms. Gulley provided Mr. Dugas with written confirmation: "[Mr. Dugas] was dropped due to [the] health condition of HIV *which [the] Arkansas State Board of Cosmetology does not allow*. I have enclosed a copy of their regulations regarding this matter" (emphasis added) (copy enclosed). The regulation at issue provides that "[n]o person afflicted with an infectious or communicable disease, *which may be transmitted during the performance of the acts of cosmetology or any of its branches*, . . . shall be permitted to work or train in a school or in a salon." Ark. Bd. of Cosmetology Reg. 17-23-401(2)(C)(17) (emphasis added).

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Thereafter, Mr. Dugas contacted the Arkansas Board of Cosmetology, but it declined to intercede.

Hair Tech Beauty College disenrolled Mr. Dugas notwithstanding the fact that he did not pose a significant risk to the health or safety of others, the applicable legal standard. In other words, it disenrolled him notwithstanding the fact that HIV is not a disease that, in any significant way, "may be transmitted during the performance of the acts of cosmetology or any of its branches." Simply put, Mr. Dugas did not pose *any* meaningful risk of HIV transmission.[2] Thus, its invocation of Ark. Bd. of Cosmetology Reg. 17-23-401(2)(C)(17) notwithstanding, Hair Tech Beauty College disenrolled Mr. Dugas in violation of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12182), the Rehabilitation Act of 1973 (29 U.S.C. § 794), and the Arkansas Civil Rights Act of 1993 (Ark. Code Ann. § 16-123-107). To the extent that Hair Tech Beauty College correctly understood Ark. Bd. of Cosmetology Reg. 17-23-401(2)(C)(17) to require or allow its

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body, by use of cosmetic preparations, antiseptics, tonics, lotions, or creams; (4) Removing, temporarily, superfluous hair from the body of any person by the use of depilatories or by the use of tweezers, chemicals, or preparations or by the use of devices or appliances of any kind or description, except by the use of light waves, commonly known as rays; (5) Cutting, trimming, polishing, tinting, coloring, cleansing, or manicuring the nails of any person; and (6) Massaging, cleansing, or beautifying the nails of any person." Ark. Code Ann. 17-26-102(b).

[2] Ironically, Hair Tech Beauty College instructs its students to take universal precautions at all times during the performance of the acts of cosmetology precisely because *any* individual in a school or a salon – whether a customer, an employee, or a student – could be HIV-positive.

disenrollment of Mr. Dugas, the Arkansas Board of Cosmetology has similarly violated federal and state disability discrimination laws. The Arkansas Board of Cosmetology may not categorically and unjustifiably exclude an entire class of capable individuals from a whole field of professional endeavor in this way.

The Law

The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq.*,[3] provides an exception to its protections for individuals with disabilities where "[an] individual poses a direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3). A "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." *Id.*; *see also* 28 C.F.R. § 36.208(b).

In determining whether an individual poses a direct threat, one "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, or procedures will mitigate the risk." 28 C.F.R. § 36.208(c) (emphases added). In particular, one must examine data that "assess the level of risk," because "the question under the statute is one of statistical likelihood." *Bragdon v. Abbott*, 524 U.S. 624, 652 (1998). "[B]ecause few, if any, activities in life are risk free, . . . the ADA do[es] not ask whether a risk exists, but whether it is *significant*." *Id.* at 649 (citations and footnote omitted) (emphasis added); *see also* H.R. Rep. No. 101-485(III), at 46 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 469 ("The decision to exclude cannot be based on merely 'an elevated risk of injury.' This amendment adopted by the Committee sets a clear, defined standard which requires actual proof of significant risk to others."); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (2d Cir. 2001) ("The risk can only be considered when it poses a significant risk, i.e.[,] high probability, of substantial harm; a speculative or remote risk is insufficient.") (quotation omitted).

Applying this legal standard to HIV-positive persons, courts have held that, where the risk of HIV transmission in a particular setting is

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[3] Although we focus our discussion on the ADA, we note that the Rehabilitation Act of 1973 and the Arkansas Civil Rights Act of 1993 afford comparable protections for individuals with disabilities.

unsupported by medical evidence or otherwise speculative, a direct threat does not exist. *See, e.g., Doe v. County of Centre*, 242 F.3d 437, 450 (3d Cir. 2001) (holding, in a case involving an HIV-positive foster sibling, that a "remote and speculative risk" of HIV transmission of HIV was "insufficient for a finding of significant risk, and insufficient for the invocation of the direct threat exception"); *Abbott v. Bragdon*, 163 F.3d 87 (1st Cir. 1998) (holding on remand that an HIV-positive dental patient was not a direct threat to her dentist); *Chalk v. United States D. Ct. for the C.D. of Cal.*, 840 F.2d 701, 709 (9th Cir. 1988) (holding, in a case involving an HIV-positive teacher, that "it was error to require that every theoretical possibility of harm be disproved").

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As discussed below, Mr. Dugas did not pose a significant risk to the health or safety of others.

The science

Courts have looked to the recommendations of the Centers for Disease Control and Prevention (CDC) for guidance in determining whether an individual poses a direct threat. *See, e.g.*, *Bragdon*, 167 F.3d at 89 ("[T]he [CDC] Guidelines are competent evidence that public health authorities considered treatment of the kind that Ms. Abbott required to be safe, if undertaken using universal precautions."). The CDC has concluded that "[c]urrently available data provide no basis for recommendations to restrict the practice of [individuals] infected with HIV . . . who perform invasive procedures not identified as exposure-prone." *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, M.M.W.R. vol. 40 (July 12, 1991). Exposure-prone procedures are defined as follows:

> Characteristics of exposure-prone procedures include digital palpation of a needle tip *in a body cavity* or the simultaneous presence of [an individual's] fingers and a needle or other sharp instrument or object *in a poorly visualized or highly confined anatomic site.* Performance of such exposure-prone procedures presents a recognized risk of percutaneous injury to the [individual] and – if such injury occurs – the [individual's] blood is likely to contact the patient's body cavity, subcutaneous tissues, and/or mucous membranes. Thus, the CDC recommends that [individuals] with HIV . . . not perform *exposure-prone* procedures.

Id. (emphases added). Applying this definition, courts have recognized that a wide range of activities are not exposure-prone, including firefighters who perform mouth-to-mouth resuscitation and first aid, *see, e.g., Roe v. District of Columbia*, 842 F. Supp. 563, 570 (D.D.C. 1993), and rough-housing by children, *see, e.g., County of Centre*, 242 F.3d at 450.

Cosmetological procedures are not exposure-prone procedures. Such procedures never involve the simultaneous presence of finger tips and sharp objects in a body cavity or a poorly visualized or confined anatomic site. Thus, consistent with the CDC's recommendations, which constitute objective evidence of standards of public health and safety, Mr. Dugas can safely perform cosmetological procedures, especially where universal precautions are taken, as Hair Tech Beauty College's students do at all times. Simply put, the statistical likelihood of Mr. Dugas, during the performance of a cosmetological procedure, accidentally drawing his own blood *and* accidentally drawing the blood of another individual *and* commingling his blood with the other individual's blood, is virtually non-existent. Indeed, it is so minimal as to be purely hypothetical.

In light of current medical knowledge and the best available objective evidence, the risk of HIV transmission in the cosmetological setting is so remote and speculative as to provide no justification for Hair Tech Beauty College's disenrollment of Mr. Dugas.

The policy

To the extent that Hair Tech Beauty College correctly understood Ark. Bd. of Cosmetology Reg. 17-23-401(2)(C)(17) to require or allow its disenrollment of Mr. Dugas, the regulation furthers the very stereotypes that federal and state disability discrimination laws were intended to eradicate, while providing no meaningful advances in public health and safety.

In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the United States Supreme Court observed that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a [disability] give rise to the same level of public fear and misapprehension as contagiousness." *Id.* at 284. To eliminate "discrimination on the basis of mythology – precisely the type of injury Congress sought to prevent," federal and state disability discrimination laws insist that "irrational fears" be replaced "with actions based on reasoned and medically sound judgments." *Id.* at 284, 285; *see also* H.R. Rep. No. 101-485(III), at 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 468 ("A person with a

disability must not be excluded, or found to be unqualified, based on stereotypes or fear. Nor may a decision be based on speculation about the risk or harm to others.").

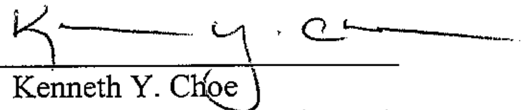
Reasoned and medically sound judgment can take the place of irrational fears, as federal and state disability discrimination laws intended, only if the direct threat inquiry looks to whether there is a *significant* risk to the health or safety of others. There is, of course, some risk in all activity. In any situation, it is possible to imagine a scenario in which a potential for injury exists, but we do not live our lives cowed by fear of these remote and speculative risks. If individuals with disabilities were required to disprove the existence of any remote or speculative risk, they alone would face the burden of guaranteeing the impossible. *Cf. Bragdon*, 524 U.S. at 653 (rejecting the position that the absence of contrary evidence can be equated with positive data showing that a risk exists); *Chalk*, 840 F.2d at 707 (describing a requirement of proving the impossibility of HIV transmission as "an impossible burden of proof" and noting that "[l]ittle in science can be proved with complete certainty"); *see also* H.R. Rep. No. 101-485(III), at 45 ("The plaintiff is not required to prove that he or she poses no risk.").

Mr. Dugas did not pose any meaningful risk of HIV transmission. It is in precisely this type of circumstance – where the mistaken perception of risk has no correlation with the actual likelihood of harm – that the protections of federal and state disability discrimination laws are most necessary. Myths about the contagiousness of HIV must not be allowed to triumph over fact.

Conclusion

We trust that you share our concern, and that you will take immediate action to clarify that Ark. Bd. of Cosmetology Reg. 17-23-401(2)(C)(17) does not apply to HIV-positive persons. However, if you do not take such action, we will be compelled to conclude that you are administering your program in violation of federal and state disability discrimination laws. Please contact us within the next week so that we may resolve this matter without resort to litigation.

Sincerely,



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02/

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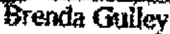
2-1-05

Allan Dugas was enrolled fulltime the month of January 2005. He received 88 hours for the month. He was dropped due to health condition of HIV which Arkansas State Board of Cosmetology does not allow. I have enclosed a copy of their regulations regarding this matter. If you have any further questions regarding this matter please contact our office.

Thank You,



Brenda Gulley
Owner/Operator