

October 2017

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### Recommended Citation

William F. Bolan, Jr. (1989) "AIDS: Legal, Public, and Pastoral Implications," *The Catholic Lawyer*. Vol. 32 : No. 3 , Article 13.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol32/iss3/13>

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# AIDS: LEGAL, PUBLIC, AND PASTORAL IMPLICATIONS

WILLIAM F. BOLAN, JR., ESQ.

My purpose here is to explain to you how the policy of the Catholic Diocese of New Jersey on AIDS came about and some of the thinking we had with respect to the provisions in it.

We first established a task force with respect to the school situation and in that posture we were reactive. We had particularly nasty situations in New Jersey in two local public school districts. In one they denied admission, with the blessing of the school board, to a child who had AIDS. In the other district, which was in a small town in a rural county, they denied admission to a child who was the sibling of another child with AIDS. But the child who was denied admission did not have the virus or the Aids Related Complex.

The State Department of Education, reacting to that situation, adopted a policy for the public schools and we essentially adopted the same policy for purposes of a liability standard because it really suited our purposes as well. As we were working on that though, we realized there were a number of other issues that would confront our dioceses with respect to people with AIDS.

I noticed in Business Week that a number of companies in California, principally Levi Strauss and the Bank of America, had issued policies regarding hiring, continued employment and employee education dealing with AIDS. At that time, and this goes back to the end of 1985 and the early part of 1986, New Jersey had the fourth highest number of cases of AIDS. Our persons with AIDS are mostly intravenous drug users and, because of this situation, there are a large number of pediatric AIDS cases in the state.

We opted to use a task force, but not one of those large "debating society type" task forces. It was more of a Noah's Ark approach of getting one of each category that we felt had something to contribute. And we wanted workers and writers, not debaters. We had an attorney in the person of myself, a diocesan insurance manager, a social service director for a Catholic hospital who worked in the AIDS unit, a public health officer for

a large city who is a member of our advisory committee, a physician who specializes in infectious diseases, and an inner city pastor who also ministers to prisoners with AIDS in a prison wing of a hospital adjacent to the main state prison in New Jersey. We had a theologian who was in hospital ministry and we had representatives from several diocesan agencies: family life, schools, Catholic charities and the Haitian apostolate. It turned out, however, in New Jersey at least, our Haitian population did not have a high incidence of AIDS.

Once a first draft of this document was obtained, we circulated it to each diocesan attorney for review and comment, as well as to the chancellors and bishops themselves. We had two missions in mind: one, we wanted a pastoral dimension to the document, and two, we wanted a policy which would pertain to the employees and the clients of our agencies. We released this policy in June 1987 and it is a uniform approach for all the dioceses responding to persons with AIDS. It addresses the four primary relationships of the church to individuals: pastoral minister, employer, educator, and social service provider.

The policy is intentionally broad. We told each diocese that it could establish specific guidelines, especially those based on diocesan personnel practices. When we disseminated the policy, we also recommended that each diocese adopt a policy on life threatening or catastrophic illness of which this policy would become a part. Having that broader policy would promote consistency concerning all diseases and it would prevent the misperception that people with AIDS are receiving excessive attention, while others with equally ravaging illnesses are not being given the same consideration.

Now turning to the document itself, you will note that it does not cover the medical aspects nor does it suggest what our Catholic health agencies should do. From our experience we knew that the Catholic hospitals in the state were already doing a lot. In fact, St. Michael's Hospital in Newark has one of the largest AIDS populations in the state, so its staff really did not need any guidance. They knew what they were about and they were doing it. We stressed in the preamble that it was based on current medical knowledge and current law, and our idea there was that if either one of those aspects changed, we would be free to amend our policy. We were very careful to avoid referring to persons with AIDS as victims or suffering with AIDS, to avoid the suggestion that the disease is some form of divine retribution.

The first section, the Church as Pastoral Minister, commits our church, in a formal way, to providing pastoral ministry to persons with AIDS, their families, friends and associates. It calls for the appointment of at least one pastoral minister to ensure that persons with AIDS are ministered to in a given geographical area which could be a county, a vicariate, or a deanery, depending upon the geography of a particular

area. It calls for education to overcome fear of persons with AIDS, it asks for a support network, and specifically asks Catholic Charities to name one staff member who could counsel and support pastoral ministers because we were told by people in ministry that there is a high burnout rate because of the fact that all of the people you serve die within a relatively short period of time.

We put in a section on the sacraments which emphasizes that persons with AIDS have the right to the sacraments and a Christian burial in accord with canon law. Unfortunately, we were told that there was at least one occasion in our state where a priest refused to bury a person with AIDS and that is why it is in there. Hopefully, that will be the only one. In this section, as well as each and every section in the policy, we have a strong statement on confidentiality: the identity of the person with AIDS must be kept confidential.

In the section on the Church as employer, we dealt with hiring as well as continued employment. The operative principle states that there should be no discrimination on the basis of AIDS, "unless the nature and extent of the illness reasonably precludes the performance of such employment or impairs any of the operations of the employing agency."

Now you may recognize the first part; it is drawn directly from our anti-discrimination statute.<sup>1</sup> The second part, which speaks to the impairment of any of the operations of the employing agency, was added by one diocesan attorney to broaden our options. He had in mind principally the situation where the identity of a person with AIDS was known. For example, he posited the situation where a teacher had AIDS and this was known to the locality; people started pulling their children out of school due to fear of contagion. Personally, I am not convinced that that language would be accepted by a court.

Both the diocesan attorney and his Bishop were worried by a Supreme Court decision in our state, *Woolley v. Hoffmann-La Roche, Inc.*,<sup>2</sup> which held that absent a clear disclaimer, a personnel manual's policy provisions on disciplining, counseling and termination policies were binding on the employer and the failure to comply with those policies in firing an employee constituted a breach of contract for which damages could be awarded. Now they feared that we had locked ourselves into AIDS as a handicap and a non-ground for dismissal before a court so ruled. They were right. But, it was our conscious choice to take the compassionate route on that particular point. Subsequently, our New Jersey Division of Civil Rights ruled that AIDS was a handicap and a court has reached the same conclusion.<sup>3</sup>

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<sup>1</sup> N.J. STAT. ANN. § 10:5-4.1 (West Supp. 1988).

<sup>2</sup> 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

<sup>3</sup> *Poff v. Caro*, 228 N.J. Super. 370, 549 A.2d 900 (Law Div. 1987).

So I would stress then in drafting this sort of section on unemployment that you pay very close attention to what your state discrimination laws require. In the employment realm we also call for the continuation of benefits, counseling and employee education to quell any fear of contagion.

In the education portion of the policy, we opted for the general rule which comes out of our state public school policy which is that a child with AIDS be admitted to school or to a parish religious education class. There are exclusions in the following situations: if the child is not toilet trained or is incontinent, if the child is an uncontrollable drooler, or if the child is unusually physically aggressive with a documented history of biting or harming others. We made this section applicable to day-care and homeless shelters as well.

In the social service provider section, we stressed again that there should be no discrimination in accepting persons with AIDS as clients. An employee is not free to refuse to deal with a person with AIDS, nor is an employee entitled to be reassigned from working with persons with AIDS unless that employee can demonstrate a burnout situation, in which case he would be entitled to some relief.

The last two sections are hortatory in nature: primarily they ask the dioceses to provide out-of-hospital care through facilities or home health care if there are resources available, and secondly, to be advocates for development and public funding of community-based services for persons with AIDS. We have had about ten months of experience with the policy, and I can report that each diocese has identified and trained pastoral ministers to serve as a special ministry to persons with AIDS on the geographical bases that we have outlined. Also, prison chaplains, because of the number of prisoners who have AIDS, have done a great deal of work in this area. Our Catholic Charities agencies have been dealing with persons with AIDS and continue to do so.

In the Trenton diocese, a telephone hotline was just established in each of the four counties which is tied into ten priests who have received training for AIDS ministry. Shortly before coming here I polled our dioceses to find out what experience, if any, they have had with the employment provisions. According to them, there has been only one experience so far. In one diocese a cemetery worker contracted AIDS and his supervisor was instructed on the policy and told not to disclose the fact of the illness and to allow the man to work as long as he was physically able. He did work, and when he eventually became too ill to do so he was put on disability. He later died, and the family reported to the diocese how much it had meant to him to be able to work as long as he was able. All of our dioceses have conducted some form of employee education regarding AIDS in order to, among other things, dispel the fear that this disease can be caught through casual work contact.

In conclusion, I would suggest that attorneys may disagree on individual rules here. We certainly have enough attorneys to have different opinions on it. However, what is significant about this document in my view is that it represents planning; it represents grappling with an issue before it becomes a full-blown problem. I think that is something important to do and I think we ought to do more of it.