DOE v. Conty of Centre: Foster Children, AIDS, the Americans with Disabilities Act, and the Direct Threat Exception

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DOE v. COUNTY OF CENTRE: FOSTER CHILDREN, AIDS, THE AMERICANS WITH DISABILITIES ACT, AND THE DIRECT THREAT EXCEPTION

INTRODUCTION

The Americans with Disabilities Act of 19901 (ADA) was designed to promote a clear federal mandate that discrimination on the basis of one's disability in the areas of employment, public accommodations, and public services was intolerable.2 Like most statutes, the ADA has exceptions, or permissible times where disability discrimination will be tolerated. One such exception arises where an "individual poses a direct threat to the health or safety of others."3 This exception was added to the ADA, as well as to its precursor, the Rehabilitation Act of 1973 (Rehabilitation Act),4 in order to recognize that, specifically within the context of contagious diseases, others must be protected from "significant . . . safety risks" that contagious individuals may pose.5 This exception arose just as the Acquired Immune Deficiency Syndrome (AIDS) epidemic was sweeping the nation.6 Thus, many defendants in discrimination cases have attempted to use this exception to justify their disparate treatment of an individual with the human immunodeficiency virus (HIV) or AIDS.7 Although there are legitimate situations where an HIV-positive individual may pose a "di-

6. See Arline, 480 U.S. at 282 n.7. In this case, the Supreme Court established a four-factor test to determine the existence of a significant risk under the Rehabilitation Act—"(a) the nature of the risk . . . (b) the duration of the risk . . . (c) the severity of the risk . . . and (d) the probabilities the disease will be transmitted . . . ." Id. at 288. However, the Court specifically left open the question whether HIV/AIDS was a "handicap" under the Rehabilitation Act. Id. at 282 n.7.
direct threat” to the health and safety of others, courts must be careful not to let this exception overcome the purpose of the ADA.

This Note will discuss the direct threat exception as it has been applied to HIV/AIDS discrimination cases. Part II will discuss the background and history of the AIDS epidemic and the ADA, including the Rehabilitation Act, leading up to a recent application of the direct threat exception in Doe v. County of Centre. Part III will explain the Third Circuit’s rationale in deciding County of Centre. Part IV will critique the Third Circuit’s application of the direct threat exception in that case as well as discuss what should result on remand. Part V will analyze how this case may affect future judicial application of the direct threat exception.

II. BACKGROUND

In order to understand current application of the direct threat exception as it applies to HIV/AIDS cases, a brief history of the disease will be discussed. This section will also address the legislative response to persons with disabilities and how persons with contagious diseases such as HIV/AIDS have been protected under disability laws. How the direct threat exception came into existence and how its application has affected those afforded protection under the ADA and Rehabilitation Act will also be discussed.

A. The History of HIV and AIDS

The early 1980s marked the beginning of a new tragic and deadly disease. In June of 1981, the Centers for Disease Control and Prevention (CDC) received numerous reports of gay men suffering unique diseases as a result of severely depressed immune systems.

8. 242 F.3d 437 (3d Cir. 2001). See infra notes 12-183 and accompanying text.
9. See infra notes 184-248 and accompanying text.
10. See infra notes 249-343 and accompanying text.
11. See infra notes 344-364 and accompanying text.
12. See generally RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE AND THE AIDS EPIDEMIC (1987). The current worldwide rates of HIV and AIDS infection are particularly staggering. The Centers for Disease Control and Prevention estimates that as of the end of the year 2000 there were 36.1 million people living with HIV or AIDS. See http://www.cdc.gov/hiv/stats/international.html (last updated Jan. 2, 2001) (on file with DePaul Law Review). Sixteen point four million are estimated to be women. Id. One point four million are children under the age of fifteen. Id. It is estimated by the Centers for Disease Control that 21.8 million people have died from AIDS since the beginning of the epidemic. Id. Four point three million of these deaths are estimated to be children. See http://www.un.org/ga/aids/bulletin_1.htm (last updated Nov. 2000) (on file with DePaul Law Review).
In July of 1981, the CDC reported over twenty cases of young gay men contracting Kaposi’s sarcoma (KS), a cancer that is rarely found in otherwise healthy individuals.\footnote{14} Other gay men were diagnosed with rare forms of pneumonia, including Pneumocystis carinii pneumonia (PCP).\footnote{15} By August, the CDC received reports of over one hundred cases of these unique conditions.\footnote{16} These reports included ninety-five homosexual men, six heterosexual men, five men of unknown sexual orientation, and one woman.\footnote{17} Within the next year, this still unknown disease began showing up in children and recipients of blood transfusions.\footnote{18} A national panic ensued.\footnote{19}

As reports of these rare diseases made their way from gay men to mainstream populations, fears escalated.\footnote{20} Because people were unaware of how the disease was transmitted, unreasonable fears soon abounded.\footnote{21}

The CDC first named this condition “acquired immune deficiency syndrome” and started using the now infamous acronym “AIDS” in a September 1982 edition of Morbidity and Mortality Weekly.\footnote{22} Now
knowing what to call this mysterious condition, the CDC published general guidelines that were believed to prevent transmission by 1983. By the end of that year, the culprit of the disease was identified as a human retrovirus. This retrovirus was given the name "human immunodeficiency virus," or "HIV." Isolating and identify-

herpes zoster) to malignant neoplasms that cause, as well as result from, immunodeficiency. Conversely, some patients who are considered AIDS cases on the basis of diseases only moderately predictive of cellular immunodeficiency may not actually be immunodeficient and may not be part of the current epidemic. Absence of a reliable, inexpensive, widely available test for AIDS, however, may make the working case definition the best currently available for incidence monitoring.

Id. In 1991, the CDC revised its case definition for AIDS. 1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults, Morbidity and Mortality Weekly Report, Dec. 18, 1992, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/00018871 (last updated July 25, 2001) (on file with DePaul Law Review). This new definition "include[s] all HIV-infected persons with CD4+ T-lymphocyte counts of less than 200 cells/μL or a CD4+ percentage of less than 14." Id. This definition also includes 23 clinical conditions. Id.

23. See Ward, supra note 13, at 376. These guidelines recommended that persons: (1) avoid having sex with persons believed to be infected with the disease; (2) reduce the number of people with whom they have sexual contact; and (3) recommended that persons considered members of "high risk" groups (which in 1983 predominately meant gay men) avoid donating blood. Id. As of June 2000, the highest risk activities for HIV or AIDS reported to the Centers for Disease Control in the United States were: (1) men who have sex with men with 348,657 reported cases; (2) injection drug users with 189,242 reported cases; (3) persons exposed through heterosexual contact with 78,210 reported cases; (4) men who have sex with men and inject drugs with 47,820 reported cases; (5) recipients of blood transfusions or tissues with 8666 reported cases; and (6) hemophiliacs or others with blood disorders with 5121 reported cases. Basic Statistics: Exposure Categories, at http://www.cdc.gov/hiv/stats/exposure.htm (added on Dec. 6, 2000) (on file with DePaul Law Review). The mode of transmission was not identified in 67,387 cases reported to the Centers for Disease Control. Id.

24. See Ward, supra note 13, at 377-78 (noting the controversy over who should get credit for discovery of the retrovirus. Dr. Luc Montagnier of the Pasteur Institute (France) or Dr. Robert Gallo of the National Institutes of Health (United States)). A retrovirus may be distinguished from a regular virus in that a retrovirus produces DNA (deoxyribonucleic acid) from RNA (ribonucleic acid), whereas a regular virus produces RNA from DNA. Id. at 299. See also Shilts, supra note 12; Bragdon v. Abbott, 524 U.S. 624, 633-37 (1998). Justice Anthony Kennedy's majority opinion in Bragdon explained:

The initial stage of HIV infection is known as acute or primary HIV infection. In a typical case, this stage lasts three months. The virus concentrates in the blood. The assault on the immune system is immediate. The victim suffers from a sudden and serious decline in the number of white blood cells. There is no latency period. Mononucleosis-like symptoms often emerge between six days and six weeks after infection, at times accompanied by fever, headache, enlargement of the lymph nodes, . . . muscle pain, . . . rash, lethargy, gastrointestinal disorders, and neurological disorders. Usually these symptoms abate within 14 to 21 days. HIV antibodies appear in the bloodstream within 3 weeks. . . . A person is regarded as having AIDS when his or her CD4+ [white blood cell] count drops below 200 cells/mm3 of blood or when CD4+ cells comprise less than 14% of his or her total lymphocytes . . . . Bragdon, 524 U.S. at 635-36 (citations omitted).

ing this virus was a phenomenal step, as this meant that people could now be tested for the virus before any symptoms materialized.26

Recently, HIV treatments have become increasingly advanced.27 The first HIV treatment drug, Azidothymidine (AZT), a nucleoside analog drug, was developed in 1987.28 Although successful at first, AZT soon lost its effectiveness as HIV became resistant to the drug.29 A second and third type of HIV treatment drug, nonnucleoside reverse transcriptase inhibitors and protease inhibitors, soon followed.30 In recent years, all three types of these drugs have been combined to form a "cocktail."31 This combination therapy is called highly active antiretroviral therapy (HAART).32 As HAART has become more popular, AIDS related deaths have been drastically reduced.33

B. The Americans with Disabilities Act: Background and Application

Before the ADA was enacted in the early 1990s, the Rehabilitation Act was the major federal legislation protecting the rights of the disabled.34 Section 504 of the Rehabilitation Act35 has the closest similarities to the ADA.36 Although section 504 provides protections from disability discrimination to those participating in programs receiving federal funds, more protections were needed for individuals with disabilities in the public sector.37 This section will detail section

26. See WARD, supra note 13, at 379.
28. Id.
29. Id.
30. Id.
31. Id. All three drugs attack the same enzyme, reverse transcriptase. Id. It is this enzyme the HIV virus uses to replicate itself. BARTLETT & FINKBEINER, supra note 27.
32. Id. Though effective in combating HIV, HAART has its own drawbacks. See id. HAART must be taken in a very structured manner and can involve taking up to twenty-five different pills a day. Id. The costs of these drugs are also astronomical, ranging from $50 to $160 per week. Id.
33. Id. (noting that AIDS-related complications dropped sixty to eighty percent over the first two years after HAART was introduced).
34. See David M. Studdert & Troyen A. Brennan, The Americans with Disabilities Act: Social Contract or Special Privilege?: HIV Infection and the Americans with Disabilities Act: An Evolving Interaction, 549 ANNALS 84, 87 (1997) (explaining how it was the intention of the Americans with Disabilities Act to incorporate "existing provisions of the Rehabilitation Act").
37. Id. at 1089-90.
504 of the Rehabilitation Act, the birth of the so-called "direct threat exception," and the effects of both on the ADA.

1. Section 504 of the Rehabilitation Act of 1973

The Rehabilitation Act of 1973\textsuperscript{38} is often described as the precursor to the ADA.\textsuperscript{39} Section 504 of the Rehabilitation Act was passed with the intention of prohibiting any program or entity receiving federal funding from discriminating against persons on the basis of a disability.\textsuperscript{40} Section 504 was not only intended to proscribe disability discrimination in the employment context, but also offered protection against disability discrimination in programs and services offered by the federal government or run by any recipient of federal funding.\textsuperscript{41} The Supreme Court noted in \textit{School Board of Nassau County v. Arline}\textsuperscript{42} that the purpose of enacting section 504 was to protect individuals with disabilities from discrimination based on "the prejudiced attitudes or the ignorance of others."\textsuperscript{43}

For the purpose of this analysis, the Rehabilitation Act defines an "individual with a disability"\textsuperscript{44} as someone 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 impairment; or (iii) is regarded as having such an impairment."\textsuperscript{45} This definition was intended to protect persons with disabilities from discrimination stemming from prejudice as well as archaic assumptions as to the capabilities of persons with disabilities.\textsuperscript{46}

To determine if one is eligible for protection under the Rehabilitation Act, two prongs must be established.\textsuperscript{47} First, it must be decided if

\begin{itemize}
\item \textsuperscript{38} \textit{See} 29 U.S.C. § 794 (1994).
\item \textsuperscript{39} Studdert & Brennan, \textit{supra} note 34, at 87.
\item \textsuperscript{40} Section 504 provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, 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 . . . ." 29 U.S.C. § 794(a) (1994).
\item \textsuperscript{42} 480 U.S. 273 (1987). \textit{See infra} notes 64-66 and accompanying text.
\item \textsuperscript{43} \textit{Arline}, 480 U.S. at 284.
\item \textsuperscript{44} 29 U.S.C. § 705(20) (1994). Until a recent amendment, the Rehabilitation Act read "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving Federal financial assistance." \textit{See Arline}, 480 U.S. at 279 (emphasis added).
\item \textsuperscript{45} 29 U.S.C. § 705(20)(B) (1994).
\item \textsuperscript{46} S. REP. No. 93-1297, at 50 (1974), \textit{quoted in} Arline, 480 U.S. at 279.
\item \textsuperscript{47} \textit{See generally} \textit{Arline}, 480 U.S. at 280-88.
\end{itemize}
the individual is a person with a disability. To determine if this prong is met, it must be established that the individual meets one of the Rehabilitation Act's definitions of "an individual with a disability." Second, it must be decided if the individual is "otherwise qualified" for the employment opportunity, service, or program she was denied.

2. Arline, Section 504, and Contagious Diseases: The Birth of the Direct Threat Exception

In School Board of Nassau County v. Arline, the United States Supreme Court considered whether a person suffering from the contagious disease tuberculosis was an individual with a disability for purposes of section 504 of the Rehabilitation Act. Arline, an elementary school teacher, was discharged from her job after suffering a recurrence of tuberculosis. Arline argued her termination by the school board was solely based on her tuberculosis, and that tuberculosis qualified her as disabled. Thus, she argued her termination was a violation of section 504 of the Rehabilitation Act.

The defendant School Board argued that although the Rehabilitation Act may apply to persons with contagious diseases, tuberculosis should not be considered a disability because of the threat this contagious condition "posed to the health of others." Although the district court found that Arline suffered from a disability, it found she did not qualify for protection under the Rehabilitation Act. The district court did not believe that it was Congress's intention that the definition of individuals with disabilities includes persons with contagious diseases.

48. Id. at 280.
49. See supra notes 44-45 and accompanying text.
52. Id. at 275.
53. Id. at 276 (noting that after Arline suffered her third recurrence of the disease she was suspended, with pay, from finishing the remainder of the school term).
54. Id.
55. Arline, 480 U.S. at 276.
56. Id. at 281.
57. Id. at 277. Chief Justice Rehnquist agreed with this finding of the district court. Id. at 291-92 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist believed, by looking to the legislative history of the Rehabilitation Act, "that contagiousness is not a handicap within the meaning of [section] 504." Id. at 292 (Rehnquist, C.J., dissenting).
58. Id. at 277.
finding that persons with contagious diseases were eligible for protection under section 504. However, the Eleventh Circuit remanded the case to see if Arline was "otherwise qualified" to teach children in a school with such a disease.

The School Board appealed to the United States Supreme Court, which granted certiorari. The Supreme Court further found that Arline was handicapped under the Rehabilitation Act. The Court found that she suffered a "physical impairment" in that her tuberculosis affected her respiratory system. This "impairment" required hospitalization on numerous occasions, thereby substantially limiting one or more of her major life activities. Moreover, the Court noted that discrimination on the basis of contagiousness was contradictory to the purpose of the Act. The Court noted that Congress, in enacting section 504, realized "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness."

However, because the Act requires a finding not only that the plaintiff is "an individual with a disability" but is also "otherwise qualified," the Court remanded for a further factual finding. The Court directed that the following test be used to determine if an individual with a contagious disease is otherwise qualified, or if the individual poses a direct threat to the health of others. The Court directed district courts to make an individualized inquiry, based on the reasonable medical judgments of public health officials, as to:

(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the se-

59. Arline, 480 U.S. at 277.
60. Id.
63. Id.
64. Id.
65. Id. at 284-85 (noting "[t]he fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the act all persons with actual or perceived contagious diseases").
66. Id. at 284. However, the Supreme Court specifically left open the question whether AIDS is to be considered a disability under the Rehabilitation Act. Id. at 282 n.7. Justice Brennan's majority opinion noted:

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.

Arline, 480 U.S. at 282 n.7. The Court answered the question that a person with HIV (even in the asymptomatic stage) is indeed a person with a disability in Bragdon v. Abbott, 524 U.S. 624, 643-44 (1998). See infra notes 165-174 and accompanying text.
68. Id. at 288.
verity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.69

Because the factual finding of the district court did not provide enough information to apply the above test, the Supreme Court affirmed the Eleventh Circuit's decision to remand to the district court on the question of whether Arline was otherwise qualified to teach.70 Congress later amended the Rehabilitation Act to include the above four-part test, and the "direct threat" exception was born.71

3. The Americans with Disabilities Act of 1990

The shortfall of the Rehabilitation Act was that it only pertained to recipients of federal funds.72 No protection was offered to persons with disabilities from discrimination in the private sector or in most state-run agencies.73 Protections for individuals with disabilities also fell short as the Supreme Court held that persons with mental disabilities were neither a suspect nor quasi-suspect class for purposes of federal equal protection analysis.74 Therefore, as long as the

69. Id. The Court adopted this test from an amicus curiae brief submitted by the American Medical Association. Id.
70. Id. at 289.
71. The Rehabilitation Act was amended and currently reads: "For the purposes of sections [503 and 504] . . . [individuals with a disability] 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 . . . ." 29 U.S.C. § 705 (20)(D) (1994).
72. 29 U.S.C. § 794(a) (1999). The Rehabilitation Act reads "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely, by reason of her or his disability, 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 . . . ." Id. (emphasis added).
73. Weber, supra note 36, at 1109-10 (explaining that the Rehabilitation Act is applicable to any entity that is a recipient of federal funds). This may be distinguished from Title II of the Americans with Disabilities Act, which applies to all entities of state or local governments regardless of whether or not federal funds are received. Id.
74. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). However, the ADA states:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.
42 U.S.C. § 12101(a)(7) (1994). From this finding, one may argue that individuals with disabilities do indeed comprise a suspect classification for equal protection analysis. See United States v. Carolene Prods. Co., 304 U.S. 144, 153-54 n.4 (1938). The Supreme Court has, however, addressed the consequences private fears and prejudices have on protected liberty interests. See Palmore v. Sidoti, 466 U.S. 429, 433 (1984). This is significant to the ADA, as a major goal of the ADA is to protect individuals from such fears. See 42 U.S.C. § 12101(a)(7). See infra notes 297-302 and accompanying text.
discriminatory agency was not funded federally, persons with disabilities had little protection.\textsuperscript{75}

In 1990, Congress enacted the Americans with Disabilities Act, which has five titles.\textsuperscript{76} The titles pertinent to this analysis are the first three, with an emphasis on Title II. Title I prohibits discrimination in the employment context.\textsuperscript{77} Title II prohibits disability discrimination in the context of public services.\textsuperscript{78} Title II expanded the application of section 504 of the Rehabilitation Act by not basing protection on whether the entity was a recipient of federal funds.\textsuperscript{79} Thus, Title II prohibits all state and local entities from discriminating on the basis of an individual's disability, regardless of funding.\textsuperscript{80} Title III prohibits disability discrimination in the context of public accommodations.\textsuperscript{81}


\textsuperscript{77} 42 U.S.C. §§ 12131-12165.

\textsuperscript{78} 42 U.S.C. §§ 12131-12165. A state-run foster care program is an example of a public service under Title II. \textit{See County of Ctr.}, 242 F.3d at 445.


\textit{The ADA extends the protections of section 504 of the Rehabilitation Act, prohibiting discrimination in federally funded programs, to all programs, activities and services of State or local governments, regardless of the receipt of Federal financial assistance. Section 504 served as the first step toward breaking down the barriers that, for too long, kept persons with disabilities out of the American mainstream. By extending section 504 to all public entities, we benefit from the successful history and lessons of the Rehabilitation Act. By enacting title II, we cover those remaining government entities that were not covered in the past.}

\textit{Id.}

\textsuperscript{80} Title II mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1994). See also 42 U.S.C. § 12131 (1994) (defining a "public entity" as: "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority . . . "). See generally Weber, supra note 36, at 1089; John J. Coleman, III & Marcel L. Debruge, \textit{A Practitioner's Introduction to ADA Title II}, 45 ALA. L. REV. 55 (1983).

\textsuperscript{81} 42 U.S.C. §§ 12181-12189 (1995). Included among Title III public accommodations are: inn[s] and hotel[s], . . . restaurant[s], bar[s], . . . theatre[s], concert hall[s], stadium[s], . . . . auditorium[s], convention center[s], lecture hall[s], . . . . baker[ies], grocery store[s], clothing store[s], hardware store[s], shopping center[s], . . . . laundromat[s], dry-
As public fears and discrimination against persons with HIV or AIDS grew in the mid to late 1980s, the ADA was essential to protect infected persons from discrimination.\textsuperscript{82} Many HIV-positive individuals lobbied for the passage of the ADA.\textsuperscript{83} Congress heard testimony from many infected individuals regarding the discrimination they experienced, from employment situations\textsuperscript{84} to everyday social interactions.\textsuperscript{85}

In passing the ADA, Congress included the same direct threat language that was developed in \textit{Arline} and later written into section 504 of the Rehabilitation Act.\textsuperscript{86} Title I defines a direct threat as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”\textsuperscript{87} The use of the same language that the Supreme Court used in \textit{Arline} shows that Congress intended to include the \textit{Arline} factor test in the ADA.\textsuperscript{88} Title III also incorporates the direct threat defense.\textsuperscript{89} Title II, which applies to public services and will be discussed in detail below, did not incorporate the direct threat defense.

\textsuperscript{82} Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988 Before the Subcomm. on Select Educ. of the Comm. on Educ. and Labor, 100th Cong. (1990), reprinted in \textit{1 Legislative History of the Americans with Disabilities Act of 1990, Comm. on Educ. and Labor, U.S. House of Representatives 101st Cong.,} at 1236-39 (hearing testimony of HIV infected individuals and the discrimination they have faced in the realm of housing and employment). For an explanation of how HIV/AIDS is a disability under the ADA (even in the asymptomatic stage) see \textit{Bragdon}, 524 U.S. at 630-37 (explaining how HIV constitutes a “physical or mental impairment that substantially limits one or more major life activities” from the moment of infection). \textit{See supra} note 24.

\textsuperscript{83} Id. at 1259 (statement of James Brooks, Paralegal, Disability Law Center).

\textsuperscript{84} Id. at 1259 (statement of Jerry Johnson, Names Project New England).


\textsuperscript{86} Id. at 1259 (statement of James Brooks, Paralegal, Disability Law Center).

\textsuperscript{87} See 42 U.S.C. § 12111(3) (1994) (defining a “direct threat” for purposes of Title I).

\textsuperscript{88} Id.

\textsuperscript{89} 42 U.S.C. § 12182(b)(3) (1994):
threat defense into the language of the title.\textsuperscript{90} However, the Department of Justice (DOJ), which has regulatory authority over Title II,\textsuperscript{91} has interpreted that the direct threat exception applies to Title II.\textsuperscript{92}

C. The Direct Threat Exception in Application

Many defendants in either ADA or Rehabilitation Act cases have relied on the direct threat defense, especially in cases where the alleged discrimination was on account of an individual’s HIV or AIDS status.\textsuperscript{93} Courts have had to decide, using the Arline factor test, whether HIV-positive health care workers are “otherwise qualified” to continue their jobs or whether they pose a “direct threat” to the health and safety of others.\textsuperscript{94} The direct threat defense has also come up in the context of prison segregation of HIV-positive inmates\textsuperscript{95} as well as whether an HIV-positive teacher is “otherwise qualified” to teach young students.\textsuperscript{96}

As will be discussed in detail below, the Court of Appeals for the Third Circuit in Doe v. County of Centre has noted that when weighing the Arline factors to determine if a contagious disease poses a direct threat to others, federal courts of appeals have approached the issue in one of two ways.\textsuperscript{97} Some courts will find a significant risk of transmission, and thereby invoke the direct threat exception if there is any “amount of risk through a ‘specific and theoretically sound means

\textsuperscript{91} See Coleman & Debruge, supra note 80, at 57.
\textsuperscript{92} 28 C.F.R. pt. 35, app. A (2001), cited in County of Ctr., 242 F.3d at 447 (stating “[a] ‘direct threat’ is 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”).
\textsuperscript{95} Hopper. 171 F.3d at 1289.
\textsuperscript{96} Chalk, 840 F.2d at 701.
\textsuperscript{97} County of Ctr., 242 F.3d at 450. See infra notes 101-183 and accompanying text.
of transmission.’”98 Other courts will invoke the direct threat exception using a “more exacting standard, requiring some actual risk of transmission including documented cases.”99 Because the direct threat defense is applied in basically the same way if the case was brought under the ADA or Rehabilitation Act, cases brought under either act will be discussed together.100

1. Cases Where “Any Amount of Risk Through a ‘Specific and Theoretically Sound Means of Transmission’ Constitutes a Significant Risk”101

In the following cases, courts have found that a significant risk of transmission of a contagious disease exists (and thus the direct threat exception applies) in situations where any risk of transmission may be shown, even if only through a “specific and theoretically sound means of transmission.”102

a. Bradley v. University of Texas M.D. Anderson Cancer Center103

In Bradley, a surgical assistant at the University of Texas M.D. Anderson Cancer Center was reassigned to a non-medical position after revealing to a local newspaper that he was HIV-positive.104 Bradley brought suit against the hospital under section 504 of the Rehabilitation Act, among other things105 The Court of Appeals for the Fifth Circuit considered whether Bradley was “otherwise qualified” to be a surgical technician.106 The court held that Bradley was not otherwise qualified for the job because of the “catastrophic consequences” his infection would cause to patients if they were infected with his disease.107 The Fifth Circuit reasoned that, under the Arline factor test, there was a significant risk that Bradley would transmit HIV to others.108 The court’s decision focused on the fourth Arline factor, the

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98. County of Ctr., 242 F.3d at 450 (quoting Onishea, 171 F.3d at 1297-99).
99. Id. at 450.
100. See Univ. of Md. Med. Sys. Corp., 50 F.3d at 1264 n.9 (noting that because the ADA and Rehabilitation Act have language that is “substantially the same,” a single analysis may be done applying both statutes); Aden, supra note 7, at 408.
101. County of Ctr., 242 F.3d at 450 (quoting Onishea, 171 F.3d at 1297-99).
102. Id. (quoting Onishea, 171 F.3d at 1297-99).
103. 3 F.3d 922 (5th Cir. 1993), cert. denied, 510 U.S. 1119 (1994).
104. Id. at 923. Bradley was reassigned to a position in the purchasing department. Id.
105. Id. Bradley also brought suit under the First Amendment since he believed he was fired for revealing his health status to a local newspaper. Id.
106. Id. at 924.
107. Bradley, 3 F.3d at 924.
108. Id.
"probability of transmitting the virus." The court found that Bradley's job required that he come within inches of open wounds during surgery, as he would need to place his hands in an open body cavity as often as once a day. Thus, it was theoretically possible that Bradley's blood could come into contact with the body cavity or open wound of a patient, thereby transmitting the HIV virus. The Fifth Circuit did not, however, base this finding of a significant risk on any documented cases of health care worker to patient transmission.

b. Doe v. University of Maryland Medical Systems Corp.

In University of Maryland Medical Systems Corp., a third-year neurosurgical resident, Dr. Doe, who was stuck by a needle contaminated with the blood of a patient believed to have HIV, was suspended from surgery after he tested positive for the virus. Doe was later terminated from his position. Doe brought suit under, among other things, section 504 of the Rehabilitation Act and Title II of the ADA alleging discrimination from a public entity. The Court of Appeals for the Fourth Circuit considered whether Doe's condition constituted a significant risk or direct threat that could not be eliminated by reasonable accommodation. The court held that Doe posed a direct threat to the health and safety of others that could not be eliminated by reasonable accommodation. Like Bradley, the

109. Id.
110. Id.
111. Id. The court noted that although the CDC found the risk of transmission from an HIV-infected health care worker to a patient smaller than the risk of transmitting Hepatitis B, the fact that Bradley was constantly around sharp instruments made the risk of transmission even greater. Id. See infra text accompanying notes 353-361.
112. Bradley, 3 F.3d at 924. The Fifth Circuit noted that even though the risk of transmission was small, it was not small enough to overcome the "catastrophic consequences of an accident." Id.
113. 50 F.3d 1261 (4th Cir. 1995).
114. Id. at 1262.
115. Id. at 1263. The defendant University suspended Doe from practice while awaiting recommendations from a panel comprised of experts on blood-borne pathogens. Id. at 1262. The panel recommended that Doe be allowed to return to work as long as he followed certain precautions. Id. These precautions included forbidding Doe from participating in procedures which use "exposed wire" as the panel found the risk to patients to be too great that the HIV virus would be transmitted. Id. It was also recommended that Doe be required to report to a supervisor if his blood ever came into contact with the "non-intact skin" of a patient. Univ. of Md. Med. Sys., 50 F.3d at 1262. The expert panel did not find it necessary that Doe receive the "informed consent of his patients" before surgery. Id. The University, however, did not follow the recommendations of the panel but instead terminated Doe after he refused an offer to be reassigned. Id.
116. Id. at 1264.
117. Id. at 1265.
118. Id. at 1266.
court’s determination that the direct threat exception applied centered on the fourth Arline factor, the probability of transmission.\textsuperscript{120} The Fourth Circuit reasoned that it should not substitute its judgment for that of the University, and that the University had the ability to decide whether or not Doe’s responsibilities were “exposure-prone” under CDC guidelines.\textsuperscript{121} The CDC gave authority to individual hospitals to determine which techniques were “exposure-prone.”\textsuperscript{122} Like Bradley, the court allowed discrimination to take place on the basis of a theoretical risk of transmission.\textsuperscript{123}

c. Estate of Mauro v. Borgess Medical Center\textsuperscript{124}

\textit{Estate of Mauro} is another case in which a court decided that a health care worker’s termination was legal because it was believed that the worker’s HIV-positive status posed a direct threat to the health and safety of others.\textsuperscript{125} Again, the deciding court’s decision was focused on the fourth Arline factor—the probability of transmission.\textsuperscript{126} The Court of Appeals for the Sixth Circuit considered whether Mauro was otherwise qualified for his job as a surgical techni-

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\item \textsuperscript{119} See supra notes 103-112 and accompanying text.
\item \textsuperscript{120} \textit{Univ. of Md. Med. Sys.}, 50 F.3d at 1265. The University argued that “the catastrophic effects of infection with HIV combined with a minimal but nevertheless ascertainable risk of transmission form a sufficient basis upon which to conclude that Doe is not otherwise qualified for a residency in neurosurgery.” Id. Doe countered that although there does exist a risk that he will transmit HIV to one of his patients, that risk is “so infinitesimal that it cannot, regardless of the degree of harm involved, be considered a significant risk.” \textit{Id.} at 1266.
\item \textsuperscript{121} \textit{Id.} The CDC has classified some procedures as “exposure-prone.” \textit{Id.} at 1263. The CDC has not identified those procedures it finds to be “exposure-prone;” instead the CDC has relied on the following definition:
\begin{quote}
Characteristics of exposure-prone procedures include digital palpation of a needle tip in a body cavity or the simultaneous presence of the HCW’s [health care worker’s] fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomic site. Performance of exposure-prone procedures presents a recognized risk of percutaneous injury to the HCW, and—if such an injury occurs—the HCW’s blood is likely to contact the patient’s body cavity, subcutaneous tissues, and/or mucous membranes.
\end{quote}
\textit{Id. at 1263} (quoting Centers for Disease Control, \textit{Recommendations for Preventing Transmission of the Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures}, 40 \textit{MORBIDITY & MORTALITY Wkly.}, July 12, 1991, at 3-4). The court noted that the CDC recommended that HIV-positive surgeons be allowed to practice invasive procedures, but may be prevented from practicing “exposure-prone” procedures. \textit{Univ. of Md. Med. Sys.}, 50 F.3d at 1263.
\item \textsuperscript{122} \textit{Id.} at 1264.
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} 137 F.3d 398 (6th Cir. 1998), cert. denied, 525 U.S. 815 (1998).
\item \textsuperscript{125} \textit{Id.} at 407. The plaintiff in \textit{Estate of Mauro} brought suit under section 504 of the Rehabilitation Act and the ADA when he was terminated from his position as an operating room technician after it was revealed that he was HIV-positive. \textit{Id.} at 407.
\item \textsuperscript{126} \textit{Id.} at 403. See supra notes 109, 120, and accompanying text.

\end{enumerate}
\end{footnotesize}
cian or whether he posed a direct threat to the health and safety of others.\textsuperscript{127} The court found that because Mauro would sometimes need to place his fingers in the body cavity of a patient during surgery, which constituted a theoretical way that HIV could be transmitted, he posed a direct threat or significant risk under both the Rehabilitation Act and ADA.\textsuperscript{128} The court, in deferring to "reasonable medical judgments"\textsuperscript{129} of public health officials as required by \textit{Arline}, found that Mauro's position mandated that he participate in "exposure-prone procedures" under CDC guidelines.\textsuperscript{130} Thus, agreeing with the Fourth and Fifth Circuits that no documented cases were necessary for a risk of transmission to be "significant," the Sixth Circuit affirmed the district court's grant of summary judgment in favor of the defendant hospital even though the actual risk of transmission from an HIV-positive \textit{surgeon} to a patient is between 1 in 42,000 and 1 in 420,000.\textsuperscript{131} A dissenting opinion noted that the likelihood of transmission from an HIV-positive operating room \textit{technician} would be far less, as technicians do not have as much contact with the patient as does the surgeon.\textsuperscript{132}

d. \textit{Onishea v. Hopper}\textsuperscript{133}

In \textit{Onishea}, an HIV disability discrimination case not centered on the health care profession, prison inmates argued that the Alabama prison system's segregation plan violated section 504 of the Rehabilitation Act.\textsuperscript{134} The district court ruled that under the Rehabilitation Act, HIV-positive inmates were not otherwise qualified to participate in programs with the general population because there was a signifi-

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  \item \textsuperscript{127} \textit{Estate of Mauro}, 137 F.3d at 402.
  \item \textsuperscript{128} \textit{Id.} at 406-07. Mauro testified in the lower court:
       Usually if I have my hands near the wound, it would be to like, on an abdominal inci-
       sion, to kind of put your finger in and hold—kind of pull down on the muscle tissue and
       that—where the two met in like a V shape at the bottom and the top, and pull that
       back. But it happened very, very rarely because they had retractors to do that.
       \textit{Id.} at 404.
  \item \textsuperscript{129} \textit{Arline}, 480 U.S. at 288.
  \item \textsuperscript{130} \textit{Estate of Mauro}, 137 F.3d at 404.
  \item \textsuperscript{131} \textit{Id.} at 405. This figure came from CDC reports. \textit{Id.}
  \item \textsuperscript{132} \textit{Id.} at 409-10 (Boggs, J., dissenting).
  \item \textsuperscript{133} 171 F.3d 1289 (11th Cir. 1999). \textit{cert. denied}, 528 U.S. 1114 (2000). The Eleventh Circuit upheld its application of the direct threat exception as outlined in \textit{Onishea} and its finding that the exception is made out if it is evident: "(1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease” and thus held that an HIV-positive dental hygienist posed a direct threat to his patients. Waddell v. Valley Forge Dental Assocs., 276 F.3d 1275, 1281 (11th Cir. 2001) (quoting \textit{Onishea}, 171 F.3d at 1299).
  \item \textsuperscript{134} \textit{Onishea}, 171 F.3d at 1292. The prison system segregated inmates by sex, then by HIV status. \textit{Id.} This was done for the purpose of preventing the spread of AIDS in prisons. \textit{Id.}
\end{itemize}
cant risk that HIV-positive inmates would infect HIV-negative inmates, and thus granted summary judgment in favor of the defendant prison system. The Eleventh Circuit considered whether there was a significant risk that HIV transmission would occur in a non-segregated prison setting. The Eleventh Circuit, following the "cautious approach" of the Fourth, Fifth and Sixth Circuits, held that because the transmission of HIV would result in death, HIV-positive inmates posed a significant risk to the health and safety of others under the Rehabilitation Act. The court reasoned that because the evidence presented to the district court showed both the possibility that a transmitting event could occur (such as unprotected sex, needle sharing, or bloodshed from fist fights) and that medical opinion recognized that such an event could transmit HIV, a significant risk was presented. Thus, HIV-positive inmates, though disabled, were not otherwise qualified to participate in programs with the general population.

2. Cases Where "Some Actual Risk of Transmission Including Documented Cases" Constitutes a Significant Risk

In contrast to the cases discussed above, the following cases have applied a "more exacting standard" to ascertain what a significant risk
risk/direct threat must constitute. In the cases discussed below, courts
have determined the existence of a significant risk requires "some ac-
tual risk of transmission including documented cases."\textsuperscript{146}

a. \textit{Chalk v. United States District Court}\textsuperscript{147}

In \textit{Chalk}, an HIV-positive teacher of hearing-impaired students was
reassigned to an administrative position after his diagnosis became
known.\textsuperscript{148} On motion for a preliminary injunction, the United States
District Court for the Central District of California found that Chalk
would not likely succeed on the merits of his section 504 claim be-
cause he posed a significant risk to others based on the \emph{Arlene} factor
test.\textsuperscript{149} The district court found that although Chalk presented evi-
dence regarding the nature and transmission of AIDS, including over
one hundred articles from prestigious medical journals\textsuperscript{150} and declara-
tions from AIDS experts,\textsuperscript{151} medical science did not yet know enough
about AIDS and its transmission to say that Chalk did not pose a sig-
nificant risk to others.\textsuperscript{152}

\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} 840 F.2d 701 (9th Cir. 1988).
\textsuperscript{149} Id. at 703. Chalk argued his reassignment violated section 504 of the Rehabilitation Act
and filed for a preliminary and permanent injunction in order to prohibit the Department of
Education from barring him from the classroom. Id. The district court denied Chalk’s motion
for a preliminary injunction. Id.
\textsuperscript{149} Id. at 707.
\textsuperscript{150} Id. at 706. Chalk presented evidence regarding HIV/AIDS, the nature of the disease,
and how the virus is transmitted. \textit{Chalk}, 840 F.2d at 706. The evidence reported that HIV is a
retrovirus that attacks an individual’s immune system. Id. Infected individuals may not show
any symptoms. Id. Known symptoms include: “swollen lymph nodes, fever, weight loss, fatigue
and night sweats.” Id. An infected individual’s immune system will become so weakened that
the person may become susceptible to various infections. Id. It is these infections that often
result in death. Id. The reports Chalk presented included information that HIV transmission is
known to occur through one of the following three ways: (1) through unprotected sexual contact
with a person testing positive for HIV antibodies; (2) through invasive exposure to blood or
other body fluids of an infected person; or (3) through vertical transmission (i.e. from mother to
child). \textit{Chalk}, 840 F.2d at 706. One report relied upon by Chalk noted that at the time of trial,
there were no known cases of HIV transmission by casual contact, and no HIV cases reported in
the United States have occurred between children in either schools, day care, or foster care
settings. Id.
\textsuperscript{151} Id. The American Medical Association submitted an \textit{amicus} brief supporting Chalk. Id.
In its brief, the American Medical Association reported that “there is no evidence in the rele-
vant medical literature that demonstrates any appreciable risk of transmitting the AIDS virus
under the circumstances likely to occur in the ordinary school setting.” Id. at 707. The Orange
County Department of Education, however, presented an expert witness, Dr. Steven Armen-
truit, who found that “there is a probability, small though it is, that there are vectors of trans-
mission as yet not clearly defined.” Id.
\textsuperscript{152} \textit{Chalk}, 840 F.2d at 707.
The Court of Appeals for the Ninth Circuit reversed, finding that Chalk would likely succeed on the merits of his section 504 claim. The Ninth Circuit noted that the district court, in not following Arline's direction to defer to medical judgments of health officials, placed an impossible burden of proof on Chalk. The Ninth Circuit went on to note that no reported AIDS cases in the United States were known to have been transmitted from one child to another in situations of foster care, day care, or school. Thus, the Ninth Circuit was hesitant to rule that Chalk's condition posed a significant threat to children in his classroom without any evidence that HIV transmission had occurred before in a similar setting.

b. Abbott v. Bragdon

Bragdon was a milestone in HIV/AIDS discrimination cases. The case, starting in the United States District Court for the District of Maine, went all the way to the United States Supreme Court. Abbott had gone to see her dentist Dr. Bragdon. Upon finding a cavity that needed filling, Bragdon informed Abbott about his policy against filling cavities of HIV-positive patients in his office; instead preferring to fill them at the hospital where he had access to equipment that would decrease his risk of becoming infected. Abbott refused to comply with this policy and brought suit under Title III of the ADA, claiming that Bragdon discriminated against her based solely on her HIV status. Bragdon attempted, unsuccessfully, to raise the direct threat exception as a defense. The United States District Court for the District of Maine granted summary judgment in favor of Abbott, finding that her asymptomatic HIV constituted a dis-

153. Id. at 709.
154. Id. The Ninth Circuit found that “little in science can be proved with complete certainty, and section 504 does not require such a test.” Id. at 707.
155. Id. at 708.
156. Id.
157. 163 F.3d 87 (1st Cir. 1998).
158. Bragdon v. Abbott, 524 U.S. 624 (1998). It was this case where the Supreme Court settled a circuit split and decided that asymptomatic HIV could be considered a disability under the ADA. Id. at 641.
159. Id. at 628. She filled out on a medical evaluation form and revealed that she was HIV-positive. Id. at 628-29.
160. Id. at 629. Bragdon would not charge more for this procedure, but Abbott would be responsible for the hospital costs of the visit. Id.
162. See id. at 630.
ability under the ADA. The Court of Appeals for the First Circuit affirmed.

The United States Supreme Court affirmed that asymptomatic HIV could constitute a disability under the ADA. The Court ruled that asymptomatic HIV was "a physical or mental impairment that substantially limits one or more of the major life activities of such individuals" under one of the ADA's definitions of disability. First, the Court found that HIV was a "physical impairment" because the virus began to infect an individual's immune system at the moment of infection, even if these symptoms are not manifested for many years. Second, the "life activity" that HIV placed a substantial limitation upon was Abbott's ability to reproduce and to bear children. Third, the Court decided that Abbott's physical impairment placed a substantial limitation on the major life activity of reproduction. The Court reasoned that this was so because an HIV-positive woman who tries to conceive a child imposes on her partner a significant risk of infection. This risk is also posed to her child during pregnancy and childbirth.

The Supreme Court, however, remanded the case back to the First Circuit to decide the issue of whether Abbott presented a direct threat to Bragdon, thereby justifying his discrimination under the ADA. The Court ruled that it was necessary for the First Circuit to deter-

163 Id. The district court also held that Bragdon did not raise any "genuine issue of material fact" as to whether filing an HIV-positive individual's cavity posed a direct threat to the health or safety of others. Id.
165. Bragdon, 524 U.S. at 641.
168. Id. at 632-37.
169. Id. at 637. See infra note 172 and accompanying text.
171. Id.
173. Bragdon, 524 U.S. at 655. In order to guide the First Circuit, the Supreme Court noted that "[b]ecause few, if any, activities are risk free, Arline and the ADA do not ask whether a risk exists, but whether it is significant." Id. at 649. At least one commentator has expressed dissatisfaction with the Supreme Court's evaluation of the direct threat question posed in the case. See Leading Cases, 112 Harv. L. Rev. 283, 293 (1998) [hereinafter Leading Cases]. This commentator noted that:

In Bragdon, the Justices differed substantially on whether the risk [of HIV transmission] was significant, but none of them explained what a "significant" risk is, which implies that they only "know it when [they] see it." Without a clear and uniform stan-
mine from conflicting studies presented from both parties whether Bragdon presented a genuine issue of fact regarding the significance of risk.174

On remand, the First Circuit held that Bragdon did not present a triable issue of fact regarding risk and affirmed summary judgment in favor of Abbott.175 The First Circuit, as it did when it first heard this case, relied on two studies.176 One study was the CDC's Dentistry Guidelines.177 The other was an American Dental Association's Policy on AIDS, HIV Infection and the Practice of Dentistry.178 Both concluded that if universal precautions were followed, the risk of fill-

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174. Bragdon, 524 U.S. at 655. Onishea was decided after Bragdon. When faced with the direct threat question, the Eleventh Circuit found the following guidance from the Supreme Court's decision in Bragdon:

We know that the relevant scientific knowledge is that at the time of the discrimination: that an unreasonable offer of accommodation merits no weight; that public health statements recommending certain precautions are of scant value because they do "not assess the level of risk": that professional organizations' opinions may be too intertwined with matters (such as ethics) to give objective medical evaluations of risk; that the testimony of health experts may be of some value; that inconclusive scientific studies deserve little weight; that evidence of seven cases of patient-to-doctor transmission is not necessarily sufficient. "standing alone" to show the risk to be significant . . . .

Onishea, 171 F.3d at 1298 (citations omitted). See supra text accompanying notes 133-142.

175. Abbott v. Bragdon, 163 F.3d 87, 90 (1st Cir. 1998).

176. Id. at 88.

177. Id. The CDC Guidelines stated that using universal precautions "should reduce the risk of disease transmitted in the dental environment." Id. at 89 (quoting 1993 CDC Dentistry Guidelines). So-called "universal precautions" include "the routine use of barriers (such as gloves and/or goggles) when anticipating contact with blood or body fluids, washing hands and other skin surfaces immediately after contact with blood or body fluids, and the careful handling and disposing of sharp instruments during and after use." Preventing Occupational HIV Transmission to Healthcare Personnel, at http://www.cdc.gov/hiv/pubs/facts/hcwprev.htm (last updated Sept. 19, 2001) (on file with DePaul Law Review). A 1986 version of the Guidelines found that following universal precautions was an effective way to prevent the spread of blood borne viruses, including the HIV virus. Bragdon, 163 F.3d at 89. A 1987 version of the guidelines found that following universal precautions eliminated the need to follow previously endorsed precautions when handling blood. Id. The First Circuit did not find that a 1993 version of the CDC Guidelines meant to depart from these views of the earlier guidelines. Id. The First Circuit then concluded that the type of care Abbott was seeking was safe, as long as universal precautions were followed. Id.

178. Id. at 88. The Supreme Court had expressed concern that the American Dental Association's Policy was based on the organizations view of the ethical obligations and not on scientific evaluation, as the ADA requires. Id. at 89. See also Bragdon, 524 U.S. at 652.
ing the cavity of an HIV-positive individual posed an insignificant risk.\textsuperscript{179}

Following the Supreme Court's direction, the First Circuit re-examined Bragdon's evidence, a CDC report that seven dental workers had possibly been infected with HIV on the job.\textsuperscript{180} The CDC's definition of "possible" cases included individuals with unknown modes of infection.\textsuperscript{181} However, since the ADA requires that "direct threat" risk assessment be decided in light of available medical evidence at the time the discrimination took place and the CDC's broad definition of "possible" was available to Bragdon at the time of Abbott's appointment, these "possible" cases were too speculative to constitute a genuine issue of fact regarding a direct threat.\textsuperscript{182} Thus, Abbott's evidence that dental treatment was safe made a finding of a direct threat improper.\textsuperscript{183}

III. Subject Opinion

In \textit{Doe v. County of Centre},\textsuperscript{184} the Third Circuit faced a case involving discrimination against a family because of one member's HIV-positive status.\textsuperscript{185} This section will explore how the District Court for the Middle District of Pennsylvania arrived at its decision to grant summary judgment in favor of the defendant County, holding that the direct threat exception applied in the situation where a county adoption program enacted a blanket prohibition against placing foster children in families with members who have tested HIV-positive. The Third Circuit's reversal of this finding and its reasoning will also be discussed.

A. Relevant Facts and the District Court's Decision

The Does provided a family for eight foster children with special needs, seven of whom were adopted.\textsuperscript{186} One of these children, Adam, was HIV-positive.\textsuperscript{187} In January of 1998, the Does, seeking to adopt another child, contacted the defendants, the Office of Children and Youth Services of Centre County (CYS), the County of Centre, as

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\item 179. \textit{Bragdon}, 163 F.3d at 89.
\item 180. \textit{Id.} at 89-90.
\item 181. \textit{Id.} at 90.
\item 182. \textit{Id.}
\item 183. \textit{Id.}
\item 184. 242 F.3d 437 (3d Cir. 2001).
\item 185. \textit{Id.}
\item 186. \textit{Id.} at 441. Two of these children still lived with the Does. \textit{Id.}
\item 187. \textit{Id.} Adam contracted the virus from his birth mother. \textit{Id.}
\end{itemize}
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well as individual County Board members and CYS officials (the County).\textsuperscript{188}

Centre County operated a foster care program.\textsuperscript{189} Out of this operation arose a statutory duty to investigate foster parents to ensure the "physical and emotional" health of each foster child.\textsuperscript{190} The County adopted a five-step procedure to become a foster parent.\textsuperscript{191} The second step mandated that the County undertake a preliminary home study.\textsuperscript{192} It was during this home study that the Does revealed to the County that Adam was HIV-positive and had AIDS.\textsuperscript{193} This prompted the County to enact the following blanket prohibition:

C) Placement of Children with Serious Infectious Diseases . . . If a child with a serious infectious disease is placed in a foster home, or if there is a family member of the foster family who has a serious infectious disease, only children with the same . . . infectious disease will be considered for placement in that home. The only exception to this policy would be for a parent/guardian of a child in the care and custody of [CYS] to sign an informed consent for the placement of the their non-infected child in such a home . . . . For this exception to occur, the foster parents would have to voluntarily agree to release information to the child's parents that a member of the foster family has been diagnosed with a specific serious infectious disease.\textsuperscript{194}

Under the policy, the Does were ineligible to care for any other (HIV-negative) foster children because Adam was HIV-positive. The County enacted this policy after discovering that County foster children often displayed physical and sexually abusive characteristics after

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\textsuperscript{188} County of Ctr., 242 F.3d at 443.
\textsuperscript{189} Id. at 441.
\textsuperscript{190} Id. at 443. See 23 PA. CONS. STAT. § 6344 (2001), cited in County of Ctr., 242 F.3d at 443 (requiring that prospective foster parents as well as prospective adoptive parents submit to the administrators of various child care services any criminal history, including a criminal record, and information to ascertain whether the prospective foster parent or adoptive parent is named as a registered sex offender); 23 PA. CONS. STAT. § 2530 (2001) (requiring an investigation into the "home environment, family life, parenting skills, age, physical and mental health, social, cultural and religious background, facilities and resources of the adoptive parents and their ability to manage their resources").
\textsuperscript{191} County of Ctr., 242 F.3d at 443. The first step involves an initial phone call between the county and the potential foster parents. Id. The second step is a preliminary home study done by an employee of the county. Id. The third step involves six weeks of pre-service training for foster parents. Id. The fourth step is a meeting between the potential foster parents and an employee of the county in order to establish a final assessment. Id. The fifth step involves a meeting between two employees of the county already involved with the screening of the potential foster parents in which the potential foster parents' application is approved or disapproved. Id.
\textsuperscript{192} County of Ctr., 242 F.3d at 443.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 444-45.
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being placed with families. Specifically, the County revealed that of the 125 children the County had in placement, 61 children (49%) displayed “behavioral or emotional problems,” 30 children (24%) were sexual abuse victims, 6 children (5%) were sexual abuse perpetrators, and 9 children (7%) were sexual abuse victims as well as perpetrators. The County also noted that because in some instances placement accommodations needed to be made right away, the County could not identify which children were likely to display such characteristics.

Adam was eleven years old at the time of the enactment of the policy. Adam’s disease resulted in various disabilities. However, Adam’s viral loads of HIV were undetectable. He was at no greater risk of contracting an opportunistic infection than an HIV-negative child.

Adam’s parents brought suit against the County under both Title II of the ADA and section 504 of the Rehabilitation Act in the District Court for the Middle District of Pennsylvania. At the district court level, the Does sought a preliminary injunction declaring the County policy unlawful and asked that they be able to complete the County’s adoption procedures. The district court held that because Adam likely posed a direct threat to other foster children placed in the Does’ home, the Does did not show a reasonable probability of success on the merits of their case as required to be granted a preliminary injunction.
The district court reasoned that Adam was disabled under both the Rehabilitation Act and ADA. The court also concluded that because Adam's parents were denied the opportunity of "employment" as foster parents, a public service, based on their "known . . . relationship or association" with Adam, they were entitled to protection under both the ADA and section 504 of the Rehabilitation Act.

The court then considered whether the Does showed a likelihood of success on the merits of their disability discrimination claim. To determine if this standard for a preliminary injunction was made, the court applied the Arline factor test. If Adam likely posed a direct threat to other children, the Does would not show a reasonable likelihood of success on the merits.

As to the first factor, the nature of the risk, the court concluded that HIV is transmitted through contact with bodily fluids such as "blood, semen, and vaginal . . . secretions," and that HIV transmission is known to occur during unprotected "sexual intercourse . . . , intravenous drug use, and transfusion of blood and blood products." For the second factor, the duration of the risk, the court determined that once an individual is infected with HIV, that individual carries the virus until death. As to the severity of the risk, the third factor, the court found that although the harm to others is life threatening, it is widely accepted that HIV cannot be transmitted through casual contact.

Regarding the fourth factor, the probability that the disease will be transmitted, the district court ruled that there was a "high probability" that HIV would be transmitted to other children placed in the Doe's

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208. *County of Ctr.*, 60 F. Supp. 2d at 427. The Supreme Court has previously addressed the administration of a state run foster care program. See Smith v. Org. of Foster Families for Equal. and Reform (OFFER). 431 U.S. 816, 826 (1977) (explaining that "[f]oster parents, who are licensed by the State or an authorized foster-care agency . . . provide care under a contractual arrangement with the agency, and are compensated for their services.")) (citations omitted).

209. *County of Ctr.*, 60 F. Supp. 2d at 426.

210. *Id.* at 428-29.

211. *Id.* at 428.

212. *Id.*

213. *Id.* Casual contact, in the district court's definition, includes sharing toothbrushes and razors. *Id.*

214. *County of Ctr.*, 60 F. Supp. 2d at 428. The district court noted that no reported AIDS case in Pennsylvania had been transmitted through casual contact. *Id.*
household. The court, looking to the statistics of child behavior offered by the County, noted that there was no way of “assuring that contact between [Adam] and a foster child will be indeed casual.”

The court further noted that because Adam had mental and physical deficiencies, he would not be able to defend himself from a sexual attack from another child. The court held that because Adam posed a threat to other foster children placed with the Does, the policy reasonably protected foster children from the significant risk of harm that could result from being placed in a home with someone with a serious contagious disease. Therefore, the court ruled that a preliminary injunction was improper.

The County then submitted a motion for summary judgment. The district court granted the motion, finding that, under the Arline factor test there was no genuine issue of material fact that Adam constituted a direct threat to any HIV-negative foster child placed in the Does’ home. The district court based its decision on the statistics the County offered regarding sexual and physical behavior among foster children. The court concluded that the County’s policy was justified by the direct threat/significant risk exceptions because other children might sexually assault Adam and contract HIV.

B. The Decision of the Third Circuit

The Third Circuit reversed, holding that there was a question of fact as to whether Adam posed a significant risk of harm to other would be foster children. Like the cases discussed above, the Third Circuit’s
finding of a direct threat centered on the fourth Arline factor, the probability of transmission.\textsuperscript{224}

The Third Circuit did not agree with the district court’s finding that a high probability of HIV transmission existed when placing foster children with the Does.\textsuperscript{225} Rather, the Third Circuit found that a genuine issue of fact was presented regarding this fourth factor.\textsuperscript{226} The Third Circuit based its finding on the following.\textsuperscript{227}

First, the Third Circuit noted that neither the County nor the district court participated in an “individualized inquiry” of the existence of a direct threat as mandated by the ADA.\textsuperscript{228} Rather, the district court relied solely on the statistics presented by the County regarding foster children’s propensity toward sexual aggression.\textsuperscript{229} The Third Circuit found this to be “a bland and generalized set of statistics,” and certainly not enough to constitute an “individualized inquiry.”\textsuperscript{230}

Second, the Third Circuit noted that although these statistics indicated that twelve percent\textsuperscript{231} of CYS children had participated in some sort of sexual abuse, the County’s interpretation of “sexual abuse” included activities that posed no risk of transmitting the HIV virus.\textsuperscript{232}

The Third Circuit also found it significant that the Does had communicated to the County their preference for children under twelve years old.\textsuperscript{233} The court found that because most children under twelve had not yet reached puberty, they were “extremely unlikely”\textsuperscript{234} to participate in behavior that could transmit HIV.\textsuperscript{235} Moreover, because of Adam’s physical disabilities, the court found no evidence indicating that Adam would initiate such contact.\textsuperscript{236}

The County argued that even if the probability of transmission was small, the placement policy was justified because when dealing with a disease with life-threatening consequences that has no cure, such as HIV, even one lost life is too great.\textsuperscript{237} The Third Circuit then reiterated the different standards used among the circuits to determine if
HIV constituted a significant risk. On the one hand, some appellate courts, such as the Fourth, Fifth and Sixth Circuits, have held that when facing a disease as deadly as HIV "any amount of risk through a 'specific and theoretically sound means of transmission' constitutes a significant risk, allowing invocation of the direct threat exception." On the other hand, other appellate courts, such as the First and Ninth Circuits, have required "a more exacting standard, requiring some actual risk of transmission including documented cases" to find a significant risk of transmission. The Third Circuit did not adopt either standard, as a reasonable fact finder could find that there was no probability of transmission from Adam to another child using the more cautious rule of the Fourth, Fifth and Sixth Circuits. The Third Circuit noted that a reasonable fact finder could easily find that the risk of Adam infecting another child because of forced sexual activity was the "type of remote and speculative risk . . . insufficient for a finding of significant risk."

The County attempted to distinguish the placing of a child in a private home with an HIV-positive individual from the more typical ADA situation of an HIV-positive individual demanding access to public life. The County argued that the private realm is harder to monitor and involves more intimate contact. Because of this distinction, the County argued the court should apply the more stringent standard.

The Third Circuit did not find this argument persuasive in justifying the County's blanket prohibition. The court rejected the notion that monitoring and intimacy had any bearing on the significance of risk analysis necessary under the direct threat defense. Thus, the Third Circuit reversed the district court's grant of summary judgment in favor of the County.

238. Id. at 450-51.
239. County of Cir., 242 F.3d at 450 (quoting Onishea, 171 F.3d at 1297). See supra text accompanying notes 103-142.
240. County of Cir., 242 F.3d at 450. See supra notes 147-183 and accompanying text.
241. County of Cir., 242 F.3d at 450.
242. Id.
243. Id. at 451.
244. Id.
245. Id.
246. Id.
248. Id.
IV. Analysis

This section will evaluate the Third Circuit’s decision in *Doe v. County of Centre* in terms of its application of the direct threat exception. Three main arguments will be asserted. First, the Third Circuit correctly evaluated the “significance of risk” on objective evidence as required under both the Rehabilitation Act and ADA. Second, because a blanket prohibition such as the one enacted by the County is contrary to the goals of the ADA, the Third Circuit was correct in reversing summary judgment granted by the district court in favor of the defendants. Third, the Third Circuit missed the opportunity to define how the “probability of transmission” factor is to be interpreted for the Third Circuit. A recommendation will also be suggested as to the proper standard to be applied by the district court on remand.

A. The “Significance of the Risk” Must Be Objectively Evaluated

The Third Circuit properly interpreted the Supreme Court’s ruling in *Arline* that the “significance of the risk” (as then interpreted under section 504 of the Rehabilitation Act and since adapted into the ADA) be evaluated on objective evidence.

Since the Does were denied the opportunity of becoming foster parents (a public service) by the County based on their relation to Adam, a person with a disability, they were eligible for relief under Title II of the ADA. The Supreme Court in *Bragdon* has interpreted the direct threat exception to apply to Title II even though it is not specifically stated in the text. Thus, the United States Supreme Court's interpretation of the direct threat exception in *Bragdon*, although a Title III case, applies to Title II cases as well.

In *Bragdon*, the Supreme Court stressed that the inquiry made into the possible existence of a direct threat be based on objective evidence. The Supreme Court also noted in *Bragdon* that under a di-

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249. *Id.* at 447 (noting that “the protections of the ADA extend to ‘qualified individuals’ who are discriminated against because of their relationship or association with individuals who have a known disability”). See also 28 C.F.R. 35.130(g) (2001), cited in *County of Ctr.*, 242 F.3d at 447 (noting “[a] public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association”).

250. See supra notes 89-92 and accompanying text. See also 28 C.F.R. § 35.130, app. A, p. 479, quoted in *County of Ctr.*, 60 F. Supp. 2d at 427.

251. See *Bragdon*, 524 U.S. at 649 (explaining “[t]he existence, or nonexistence of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence” (citing *Arline*, 480 U.S. at 288)). See also Aden, supra note 7, at 406; *Leading Cases*, supra note 173.
rect threat analysis, "Arline and the ADA do not ask whether a risk exists, but whether it is significant."252 In County of Centre, the Third Circuit properly followed this rule, as its decision was based on objective medical evidence presented at the district court hearing, and not on "stereotypes or fear . . . [or] on speculation about the risk or harm to others."253

The Third Circuit addressed whether the district court applied the Arline factor test with the necessary objectivity mandated by Arline and Bragdon. The Third Circuit found that the district court analyzed the first three factors correctly based on the evidence. As to the first factor, the nature of the risk, the district court found that "HIV . . . has been proven to be transmitted through sexual intercourse . . . intravenous drug use, and transfusion of blood and blood products."254 As to the second factor, the duration of the risk, the Third Circuit did not question the district court's finding that "AIDS is a terminal disease for which there is no cure."255 The Third Circuit was also in agreement with the district court's finding that "[t]he harm to third parties is life-threatening"256 regarding the third Arline factor, the severity of the risk.

The controversy in this case, as is common in HIV/AIDS discrimination cases, surrounded the fourth Arline factor, the probability of transmission.257 The district court found "a high probability that [HIV] will be transmitted [through sexual contact] to children placed in foster care with the Does."258 The Third Circuit, however, in analyzing the objective evidence presented at trial as mandated by Bragdon,259 did not agree with this finding.

The evidence regarding the probability of transmission that was presented to the district court is as follows. First, CYS officials presented evidence that children in the County's foster care program have a high tendency to sexually abuse other children.260 However, as noted previously, the County's definition of what constituted "sexual abuse" included activities that posed virtually no risk of transmission

252. Bragdon, 524 at 649.
254. County of Ctr., 242 F.3d at 449 (quoting County of Ctr., 60 F. Supp. 2d at 428).
255. Id.
256. Id.
257. See supra text accompanying notes 109, 120, 136.
258. County of Ctr., 242 F.3d at 449 (quoting County of Ctr., 60 F. Supp. 2d at 428).
259. See supra note 173.
260. County of Ctr., 242 F.2d at 449. See supra note 196 and accompanying text.
of HIV. Second, CYS stated that they were unable to tell which children were likely to participate in such abuse before placement. Third, the district court heard the testimony of two medical experts concerning AIDS. These experts testified to the following facts: First, normal sibling activities present virtually no risk of HIV transmission. Second, with regard to transmission through sexual activity, the probability of HIV transmission is dependent on the kind of sexual activity, what sexual roles the infected and uninfected persons play, and the level of HIV virus detectable in the infected person.

One expert, Dr. Swenson, explained the following statistics regarding the risk of HIV transmission in various sexual acts: The probability of transmission to an infected partner who performs oral sex on an uninfected partner is about 1 in 2500 for each occurrence. The probability of transmission "from a receptive HIV-positive partner to an insertive HIV-negative partner in anal sex is about 1 in 1666." The doctor also testified that the probability of transmission "from an insertive HIV-positive partner to a receptive HIV-negative partner . . . is much higher, about 1 in 120."

It was on the basis of this evidence that the Third Circuit found that there was a genuine issue of fact as to the probability of transmission, thereby reversing summary judgment in favor of the defendants. With regard to the statistics provided by CYS stating that twelve percent of CYS foster children had a history of perpetrating some kind of sexual abuse, the Third Circuit properly identified these statistics as "a bland and generalized set of statistics, lacking in individual specificity." First, the Third Circuit noted that the defendant's definition of sexual abuse was not limited to activities that could result in HIV transmission. This reliance on a "bland set of statistics" is contrary to the Supreme Court's ruling in Bragdon that a finding of "significant
risk” be based on “medical or other objective evidence.” Clearly, if a court finds that no triable issue of fact exists regarding the probability of transmission of a virus, even one as deadly as HIV, the evidence that the court bases its decision on must be indicative of even a possibility of transmission. It makes no sense to weigh the fourth Arline factor in favor of the County where the evidence presented includes generalized activities that will not result in transmission of the disease.

For this reason, the Third Circuit correctly relied on the objective evidence presented at trial and found that reasonable minds may differ as to whether the defendants satisfied the fourth Arline factor, the probability of transmission.

B. Blanket Prohibitions Are Contrary to the Goals of the ADA

The type of blanket rule the County enacted in attempt to prohibit the Does from bringing another child into their home is contrary to the goals of the ADA. First, one purpose of the ADA is to prevent “purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.” A blanket prohibition such as the one enacted by the County is, by definition, based on such “stereotypic assumptions” and not on the specific facts of any one case.

The legislative history of the ADA details many stories of prejudice arising from irrational fears and misconceptions about HIV and AIDS. One story involved a Kentucky woman who had been fired from her job when it was revealed to her employer that her HIV-positive son had moved into her home so she could care for him. Other examples involved “instances where people have been evicted by landlords . . . [struggled] for medical treatment [or] for acceptance by family and friends.” After discussing the proper meaning to give to the direct threat defense, a Judiciary Committee Report concluded:

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275. Id.
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 of harm to others. Decisions are not permitted to be based on generalizations about the disability but rather must be based on the facts of an individual case.\textsuperscript{278}

From these statements, as well as from stories of discrimination affecting others with disabilities,\textsuperscript{279} it is clear that discrimination against persons with disabilities often results from irrational fears, ignorance, and misperceptions.\textsuperscript{280} It is exactly these attitudes that the ADA and Rehabilitation Act were enacted to prevent.

Nothing legitimizes such discriminating beliefs more effectively than a blanket prohibition. A blanket rule prohibiting the placement of foster children in a family where a member is diagnosed with a contagious disease, although most likely enacted out of a good faith attempt to protect foster children from contracting diseases, erodes the core of the ADA (as well as the Rehabilitation Act).\textsuperscript{281} Moreover,\textsuperscript{282}
a blanket prohibition by definition does not effectuate its rule "based on the facts of an individual case." 282

The County policy was enacted based on the kind of misrepresentations and irrational fears against which the ADA and Rehabilitation Act were designed to protect. A blanket prohibition makes clear that under almost no circumstances may a family with a member who has a contagious disease care for a foster child. Significantly, this prohibition was enacted only after Adam’s disease was discovered. Even though numerous state policies forbade segregating or otherwise discriminating against children with HIV or AIDS, the County felt it necessary to enact the prohibition at issue. 283 This is because it was faced directly with the situation not only of a child with a "serious infectious disease" but also of a child with AIDS. Although basing the enactment of the policy on documented cases of sexual assault instigated by foster children on other children in the placement homes, 284 the provision contains only one exception to its prohibition. This exception may be invoked if foster parents in the Does’ position voluntarily release information to the would-be adoptive child’s natural parents regarding the health status of the family member diagnosed with the infectious disease. 285 Although beyond the scope of this Note, it should be mentioned that many states have enacted legislation to pro-


283. See County of Ctr., 242 F.3d at 443 (discussing numerous policies enacted by many public agencies of Pennsylvania, such as the Department of Public Welfare, stating “HIV positive children should not be segregated in day care facilities, foster homes, group homes, residential placements, or institutions based on their HIV status alone,” and the Department of Services for Children, Youth and their Families stating “[e]xcept where the presence or risk of [HIV infection from a foster child] presents specialized care needs, the presence or risk of [HIV] should not be the mitigating factor in the placement decisions”). The Third Circuit concluded that “[i]n these policies generally state that family services agencies should neither apply blanket prohibitions against placing HIV-positive foster children with HIV-negative children, nor segregate HIV-positive foster children from HIV-negative children without analyzing the particular circumstances of each case.” Id. at 443.

284. See supra note 231 and accompanying text.

285. County of Ctr., 242 F.3d at 435.
tect HIV-positive individuals from exactly this kind of mandatory disclosure concerning their HIV status.\(^\text{286}\)

The prohibition does not take into consideration the "facts of an individual case"\(^\text{287}\) in another sense. As noted by the Third Circuit, the Does stated that their preference was for foster children under the age of twelve.\(^\text{288}\) The court then found that children under twelve are children the defendants may be able to identify as unlikely to engage in the type of activity that may lead to the transmission of HIV.\(^\text{289}\) Also, if Adam's other disabilities were better addressed, the district court should have realized that the likelihood of Adam being physically able to sexually assault another child was remote at best. The expert opinion in this case laid out different scenarios of HIV transmission. The highest risk of transmission (1 in 120) would arise if Adam were to perform anal sex on another child.\(^\text{290}\) Yet Adam's various disabilities make it most unlikely that such activity would be possible.\(^\text{291}\) The actual risk that Adam will infect another with HIV lies in the circumstances where another child was to perform insertive anal sex on Adam. Dr. Swenson placed this risk at about 1 in 1666.\(^\text{292}\) However, as noted even by the district court, this risk is even less where the HIV-positive individual has very low viral loads, as does

\(^{286}\) The Illinois AIDS Confidentiality Act is one example of such an enactment. See 410 ILL. COMP. STAT. 305/9 (1997). The Act provides, with a few enumerated exceptions that, "[n]o person may disclose or be compelled to disclose the identity of any person upon whom a[n HIV] test is performed, or the results of such a [n HIV] test in a manner which permits identification of the subject of the test." Id. The Act also provides (with an enumerated exception) that "[n]o person to whom the result of a test have been disclosed may disclose the test results to another person." 410 ILL. COMP. STAT. 305/10 (1997). See also N.Y. PUB. HEALTH LAW § 2782 (McKinney 2002) (prohibiting the disclosure of an individual's HIV-positive status except to enumerated persons or agencies). For more information about how confidentiality may be kept while assuring public health data may be collected, see Lawrence O. Gostin & James G. Hodge, Jr., The "Names Debate": The Case for National HIV Reporting in the United States, 61 ALB. L. REV. 679 (1998).

\(^{287}\) See supra note 282.

\(^{288}\) County of Ctr., 242 F.3d at 450.

\(^{289}\) Id. The Third Circuit noted:

Foster children of tender age—i.e., infants and children who have not reached puberty—are extremely unlikely to commit forcible sexual intercourse leading to the transmission of HIV. Moreover, as noted there is no evidence indicating that Adam is at all likely to commit such an assault, and much evidence suggesting that this is most unlikely. Thus, we believe that the probability of HIV transmission from Adam to a tender-aged child placed in the Does' home appears to be insignificant.

\(^{290}\) See supra note 268 and accompanying text.

\(^{291}\) See County of Ctr., 60 F. Supp. 2d. at 423 (noting that Adam suffers from learning disabilities which have "left him unable to care for himself." he "verbalizes very little." he "shows symptoms of autism and mental retardation." and required the assistance of his parents with all of his hygienic care).

\(^{292}\) See supra note 267 and accompanying text.
Adam. If the County looked to the facts specific to this situation, including Adam's physical limitations, it should be clear that there really is not a significant risk of transmission.

The County also defended its policy on the basis of its inability to tell which children in need of placement were likely to be sexually aggressive toward other children. This is because children in the County's care often need to be placed with a family as quickly as possible. A blanket prohibition such as the one enacted should not be necessary to cure this inability of the County. Rather, as pointed out by the Third Circuit, child placement with the Does could be done in situations where emergency placement was not necessary. The County should have also concluded that because of Adam's other disabilities, it is extremely unlikely that he would be the instigator of any type of sexual assault that may lead to HIV transmission. Yet the County, which enacted this prohibition specifically out of the facts of this case, found it necessary to enact a blanket prohibition.

Second, the blanket prohibition enacted by the County does little more than give effect to private fears and prejudices aimed toward individuals with HIV or AIDS. The Supreme Court has already noted in Palmore v. Sidoti that such private prejudices should not be given legitimate effect. In Sidoti, the Supreme Court considered whether private racial biases may be considered in determining if a home is suitable for a child. The Court ruled that these private biases concerned with the "social stigmatization" a child may feel from growing up in a multi-racial home may not be considered, holding although "[p]rivate biases may be outside of reach of the law . . . the law cannot, directly or indirectly, give them effect." Although Sidoti is an equal

293. County of Ctr., 80 F. Supp. 2d at 443. However, the Sixth Circuit would still consider a 1 in 1666 chance significant, as a 1 in 42,000 to a 1 in 420,000 chance of transmission was still found to be a significant risk of transmission in the eyes of the majority. See Estate of Mauro, 137 F.3d at 405. This author does not intend to imply that a 1 in 1666 chance of transmitting the HIV virus should not be taken seriously.

294. County of Ctr., 242 F.3d at 450.

295. Id. at 444 (explaining that the County enacted the policy due to "the emergency nature of foster child placement").

296. Id. at 452. The Supreme Court has noted that "the distinctive features of foster care are, first, that it is care in a family, it is noninstitutional substitute care, and second, that it for a planned period—either temporary or extended." Org. of Foster Families for Equal. and Reform (OFFER), 431 U.S. at 824 (emphasis added).


298. Id. at 433. See supra note 74 and accompanying text.

299. Sidoti, 466 U.S. at 433.

300. Id. at 431.

301. Id. at 433.
protection case concerning race,\textsuperscript{302} \emph{County of Centre} may be analogized to it on the basis that in the familiar context, private fears, prejudices, and stigmatizations may arise when household members are perceived to be different from one another. However, it is when these private beliefs come into play that the protection of the law is most crucial.

\textbf{C. Some Actual Risk of Transmission Should Be Required for a Finding of a Direct Threat}

In reversing summary judgment granted in favor of the defendant County, the Third Circuit correctly ruled that Adam did not necessarily pose a direct threat to any child placed with the Does. As discussed above, the Third Circuit gave effect to the ADA by not allowing prejudices or fears determine the risks an HIV-positive boy poses to other children.\textsuperscript{303} However, in remanding the case back to the District Court for the Middle District of Pennsylvania, the Third Circuit fell short in providing guidance on the proper interpretation of a direct threat/significant risk, especially with regard to the controversial fourth \emph{Arline} factor, the risk of transmission.

Although noting that some courts have followed a cautious rule allowing any theoretical risk of transmission to constitute a significant risk of transmission,\textsuperscript{304} while others have demanded that the fourth factor could not be satisfied without providing evidence of known cases of transmission,\textsuperscript{305} the court chose not to decide which (if either) of these standards was to be the rule for the Third Circuit.\textsuperscript{306} In not deciding on the proper standard to be used, the Third Circuit left the door open for the district court to find that Adam constitutes a direct threat on a standard that does not fully effectuate the goals of the ADA. This argument is based on two observations. First, it appears, based on the cases discussed above,\textsuperscript{307} that when the "more cautious rule" of the Fourth, Fifth, Sixth and Eleventh Circuits is applied, undue weight is given to the third \emph{Arline} factor, the severity of the risk. Second, this "cautious rule" really fails to give proper weight to the fourth \emph{Arline} factor, the probability of transmission. \emph{Arline}'s test can be molded to let the direct threat "exception" to the ADA swallow

\begin{itemize}
  \item \textsuperscript{302} See \emph{Loving v. Virginia}. 388 U.S. 1, 10 (1967) (noting "the clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the [s]tates").
  \item \textsuperscript{303} See supra notes 290-296 and accompanying text.
  \item \textsuperscript{304} \emph{County of Ctr.}, 242 F.3d at 450. See supra notes 103-142 and accompanying text.
  \item \textsuperscript{305} \emph{County of Ctr.}, 242 F.3d at 450. See supra notes 143-183 and accompanying text.
  \item \textsuperscript{306} \emph{County of Ctr.}, 242 F.3d at 450.
  \item \textsuperscript{307} See supra notes 103-142 and accompanying text.
\end{itemize}
the rule, thus permitting discrimination against those in society who need protection most.

1. Undue Weight Given to the Severity of the Risk

"The decision to exclude cannot be based on merely 'an elevated risk of injury.'"\textsuperscript{308} As noted by the Third Circuit in \textit{County of Centre}, some courts, when faced with the "life-threatening consequences of HIV"\textsuperscript{309} will find any possibility (as opposed to probability as required by \textit{Arlene}) of transmission to constitute a significant risk.\textsuperscript{310} However, courts that have applied the \textit{Arlene} test when considering the significance of risk involved with HIV have put undue weight on the third factor, the severity of the risk.\textsuperscript{311} Science, the media, and public health facilities across the world have made great efforts to inform the general public that HIV causes AIDS, which is usually fatal.\textsuperscript{312} There is no doubt that HIV is a disease that still has catastrophic results, even when taking into consideration new discoveries and treatments.\textsuperscript{313} However, \textit{Arlene}'s test, as written into the Rehabilitation Act and judically applied to the ADA, does not require only a showing of a "severe risk" to invoke the direct threat exception. Rather, all four factors must be considered. Neither the purposes of the Rehabilitation Act nor those of the ADA are served by allowing one factor to overwhelm the entire test.

\textsuperscript{308} Hubbard, \textit{supra} note 278, at 1349 (quoting H.R. REP. No. 101-485, pt. 3, at 46 (1990), (9th Cir. 1985)) (quoting Mantolete v. Bolger, 767 F.2d 1416, 1422).

\textsuperscript{309} \textit{County of Ct.}, 242 F.3d at 450.

\textsuperscript{310} \textit{Id.}

\textsuperscript{311} \textit{See Onishea,} 171 F.3d at 1306 (Barkett, J., dissenting) (noting that "the fatal consequences of a contagious disease, in the majority's view, suffice to render a transmission risk significant even if the probabilities of transmission are so low as to approach zero, so long as transmission could theoretically occur, letting one factor overwhelm the entire \textit{Arlene} analysis") Hubbard, \textit{supra} note 278, at 1321. For an example of an analysis allowing the severity of the risk factor overwhelm the \textit{Arlene} factor test, see \textit{Bragdon,} 524 U.S. at 664. Chief Justice Rehnquist explained:

\begin{quote}
Given the "severity of the risk" involved here, i.e. near certain death, and the fact that no public health authority had outlined a protocol for eliminating this risk in the context of routine dental treatment, it seems likely that petitioner can establish that it was objectively reasonable for him to conclude that treating respondent in his office posed a "direct threat" to his safety.
\end{quote}

\textit{Id.} (Rehnquist, C.J., dissenting) (emphasis in original).

\textsuperscript{312} Although the vast majority of the public has accepted this scientific model that HIV is a virus that leads to the disease called AIDS, there are challenges to this predominate view. See Neville Hodgkinson. \textit{Molecular Miscarriage}. \textit{Mothering Mag.}, Sept.-Oct. 2001, at 59, 61-64 (arguing that there is no concrete proof that HIV exists as a virus or that it is the cause of what is commonly called AIDS). Thabo Mbeki, the current president of South Africa, is one world leader who has subscribed to this idea. \textit{Policy and Practice Economic Trends: South Africa-AIDS Inaction Concerns Investors}. \textit{FIN. TIMES.}, Sept. 1, 2001 (on file with DePaul Law Review).

\textsuperscript{313} \textit{See supra} notes 27-33 and accompanying text.
By allowing persons with HIV to be discriminated against based on the nature of his or her disease and its consequences, the direct threat exception may be invoked in any situation where an HIV-positive person faces discrimination. This will essentially write HIV-positive individuals out of both the ADA and Rehabilitation Act. Individuals who are HIV-positive will not have the benefit of the “balance” that the Arline factor test is intended to reach between protecting society from the spread of diseases and protecting the rights of the disabled. Clearly, HIV and the stigmatization that accompanies the disease show that society is not yet ready to accept individuals infected with HIV into mainstream society. It is of no surprise that HIV-positive individuals are in great need of protection through the ADA (and Rehabilitation Act). Thus, courts should not allow the direct threat exception to swallow protections of the law that are desperately needed by HIV-positive individuals.

2. Probability of Transmission Insufficiently Weighed

As noted in Bragdon and discussed in the legislative history of the ADA, a person eligible for protection under the ADA need not prove that “he or she poses no risk.” Rather, the key to both the ADA and Rehabilitation Act is that the risk not be significant. One factor that must be considered, as mandated by Arline, is the probability of transmission, not merely the possibility of transmission.

314. See supra notes 67-69 and accompanying text. See Hubbard, supra note 278, at 319-20 (citations omitted).
315. See supra notes 173-174 and accompanying text.
316. See supra note 308 and accompanying text.
As stated in Chalk v. U.S. District Court, “little in science can be proved with complete certainty, and section 504 does not require such a test. As authoritatively construed by the Supreme Court, section 504 allows the exclusion of an employee only if there is ‘a significant risk . . . to others.’”
Id. (emphasis in original).
318. See supra notes 173-174 and accompanying text.
319. See Hubbard, supra note 278, at 1321-22. Courts have used some colorful language in aiding their decision about what amount of risk of transmission is enough to constitute a significant risk. See Benjamin R., 390 S.E.2d at 820 (Neely, C.J., concurring) (explaining that “the tension” surrounding the amount of risk that is enough to constitute a significant risk in the ordinary person’s eyes can be explained by “lifeboat ethics”). Chief Judge Neely explained:
If there are twenty people in a lifeboat, and the likelihood is fifty percent that an additional person will capsize the boat, acting compassionately is logically foreclosed. On the other hand, if the likelihood of capsize with an additional person is but one in a thousand, than almost everyone would welcome an additional stranded swimmer into the lifeboat.
Id. See also Onishea, 171 F.3d at 1297:
Just because HIV transmission in any given situation is possible certainly does not mean it is probable.\(^{320}\)

In County of Centre, the evidence presented by the defendant County regarding statistics that may show children in foster care are sexually aggressive may very well prove that it is possible that Adam could transmit HIV to another child. This does not mean that the likelihood of transmission is probable. It seems as though the only way to clearly establish whether the likelihood of transmission is probable is to require a showing that there is an actual probability of transmission. The only way to show this probability is to require documented cases. When courts invoke the direct threat exception based on "specific and theoretically sound means of transmission,"\(^{321}\) what is really being considered is the possibility of transmission and not its probability.

It may be argued that requiring actual recorded cases showing an actual risk of transmission to satisfy the probability of HIV transmission is "a 'somebody has to die first' standard."\(^{322}\) This is not the case. This argument was a main contention between the majority and dissenting opinions of Onishea.\(^{323}\) As addressed above, in Onishea, the Eleventh Circuit adopted the "more cautious" direct threat application by allowing a "showing of specific and theoretically sound means of possible transmission" to constitute a significant risk.\(^{324}\) The majority defended its position by referring to the requirement that documented cases be required for a showing of a direct threat as a "somebody has to die first standard."\(^{325}\) The Eleventh Circuit defended its policy on the basis that the "more cautious rule" first protects people with disabilities from "unfounded fears and prejudices."\(^{326}\)

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\(^{320}\) See Martinez, 861 F.2d at 1506 (holding the "remote theoretical possibility" that a mentally retarded seven year-old would transmit the AIDS virus to others through tears, saliva, and urine does not arise to the level of significance that is required under section 504 of the Rehabilitation Act). See also Estate of Mauro, 137 F.3d at 403, which noted:

The risk can only be considered when it poses a significant risk, i.e. high probability, of substantial harm . . . [t]hus, our analysis in the instant case must not consider the possibility of HIV transmission, but rather focus on the probability of transmission weighed with the other three factors of the Arline test.

\(^{321}\) County of Cir., 242 F.3d at 450.

\(^{322}\) Onishea, 171 F.3d at 1299. See supra notes 134-142 and accompanying text.

\(^{323}\) Onishea, 171 F.3d at 1299. See supra notes 134-142 and accompanying text.

\(^{324}\) Onishea, 171 F.3d at 1297.

\(^{325}\) Id. at 1299.

\(^{326}\) Id. at 1298 (emphasis in original).
of others and second protects entities which must follow the ADA from "well-founded worries that deaths can result." However, Judge Barkett's dissenting opinion took issue with the language of the majority opinion.

Judge Barkett's opinion, joined by Chief Judge Hatchett, advocated for the adoption of the latter interpretation of the direct threat exception. In doing so, the opinion criticized the majority's ruling that the test requiring actual documented cases was a "somebody has to die first standard." Rather, the dissent argued, this test required "evidence that particular conduct will transmit the disease and a reasonable likelihood that the conduct will actually take place in the particular program at issue." This does not mean that before the risk can be considered significant, someone must die. Rather, the "noble goals" of the ADA are achieved by "prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks" and not by "absurdly concluding that Congress has decreed even a few painful deaths in service of the Act's noble goals."

Further support for the requirement that actual cases of transmission be documented before a finding of a direct threat can be found in Bragdon. Although the Bragdon majority specifically left open the question of whether Abbott posed a significant risk to the health or safety of her dentist, Dr. Bragdon, in dicta the court indicated that documented cases may be required in order to find a significant risk of transmission. The Supreme Court briefly considered evidence presented by Bragdon that indicated a possibility that seven dental workers had been infected by HIV in the course of their employment. The Court instead remanded the issue to the Court of Appeals for the First Circuit. This decision was based on the fact that the Supreme Court had not been briefed on the direct threat issue and heard no arguments concerning the matter.

Further support for the requirement that actual cases of transmission be documented before a finding of a direct threat can be found in Bragdon. Although the Bragdon majority specifically left open the question of whether Abbott posed a significant risk to the health or safety of her dentist, Dr. Bragdon, in dicta the court indicated that documented cases may be required in order to find a significant risk of transmission. The Supreme Court briefly considered evidence presented by Bragdon that indicated a possibility that seven dental workers had been infected by HIV in the course of their employment. The Court concluded that even if the seven dental workers had contacted HIV in the course of their employment, these seven

327. Id. at 1298-99 (emphasis in original).
328. Id. at 1307. See infra note 329 and accompanying text.
330. Id.
331. Id. at 1307 (Barkett, J., dissenting).
332. Id. at 1299.
334. Onishea, 171 F.3d at 1299.
335. Bragdon, 524 U.S. at 654. The Court instead remanded the issue to the Court of Appeals for the First Circuit. This decision was based on the fact that the Supreme Court had not been briefed on the direct threat issue and heard no arguments concerning the matter. Id.
336. See supra text accompanying notes 180-181. However the CDC was not able to conclude whether their infection was actually obtained during the course of their employment as the health care workers did not show up for testing at the necessary post-exposure time. Bragdon, 524 U.S. at 654.
cases would not "standing alone . . . meet the objective, scientific basis for finding a significant risk to [Bragdon]."337 This seems to indicate that in at least one situation, seven documented cases may not be enough for a showing of a significant risk.338 If this is so, it seems to follow that a theoretical risk of transmission substantiated by no documented cases would not satisfy the requirements of the ADA.

It is interesting to note the changing interpretation of significant risk under the ADA and Rehabilitation Act as applied to cases of HIV/AIDS over time. Early cases of HIV discrimination such as Martinez v. School Board339 and Chalk340 represented the view that a theoretical risk of transmission was not enough. When the ADA was still in its infancy, one commentator noted "[t]he ADA and Rehabilitation Act define a significant risk as one that is more than 'theoretical,' 'remote,' 'potential,' 'speculative,' or 'merely an elevated risk.' To be significant, a risk must be 'appreciable' or 'substantial' and it must create a significant risk of harm."341 However, some later cases have shown that at least a theoretical risk of transmission is enough to constitute a direct threat.342 It seems that the more is known about HIV/AIDS and its transmission, the more we want to limit the public sphere from those who suffer from the disease. This is in spite of our progressed knowledge of the disease, including how the disease is transmitted. Today, unlike the days when Martinez and Chalk were decided, we know that HIV will not be transmitted through saliva or through casual contact.343

When these older HIV discrimination cases were decided, however, courts were not gifted with this scientific knowledge. However, courts were willing to give more weight to antidiscrimination standards when less was known than the present day, when our knowledge (as well as our fears) are (or at least should be) more rationally based. It seems as though the opposite result should be expected. It seems that courts should have expressed more concern and have had more fears about the risks that individuals pose when the risk of transmission was less known. Now that more is known about the actual risk of transmission, it should be expected that courts would look to the actual probability of transmission as

337. Id.
338. See Hubbard, supra note 278, at 1320-21.
339. 861 F.2d 1502 (11th Cir. 1988). See supra note 141.
340. 840 F.2d 701 (9th Cir. 1988). See supra notes 147-156 and accompanying text.
342. See supra notes 103-142 and accompanying text.
343. See supra note 21 and accompanying text.
proved by *actual cases* in order to decide whether or not a specific risk is significant.

**D. A Suggestion for the District Court for the Middle District of Pennsylvania on Remand**

Although the Third Circuit declined to adhere to either interpretation of what constitutes a significant risk of transmission, the district court should fully effectuate the goals of the ADA on remand. In order to do this, the district court should opt for the position of the First and Ninth Circuits and require a showing of actual, documented cases in order to show a significant risk of transmission. This is the only way to protect Adam and his family from the stigmatizing effects of his disease and allow his case to be *individually* judged. Thus, in order for the County to succeed in proving that Adam poses a direct threat to any other child that may be placed with the Does, the County must be able to point to a specific documented case of a child in foster care contracting HIV from being placed in a family with an HIV-positive child. Only then may the County claim to give proper respect to the goals of the ADA.

**V. IMPACT**

*Doe v. County of Centre* is a small accomplishment for disabled Americans, especially those infected with HIV. *County of Centre* signifies a fresh application of the direct threat exception and the ADA in the private realm of family, opposed to the traditional application in the public employment context, most significantly the health care setting, and may breathe new life into the recently limited powers of the ADA.

Since the ADA was enacted in the early 1990s, its protections have slowly been etched away.\(^{344}\) In a recent Supreme Court case, *Toyota Motor Manufacturing v. Williams*,\(^ {345}\) a Title III case, the Court significantly reduced the number of people who would be eligible for coverage under the ADA. In its unanimous decision, the Court ruled that

\(^{344}\) See Jan Crawford Greenburg, *Top Court Limits Disabilities Law*, CHI. TRIB., Jan. 23, 2002, § 1, at 1 (discussing a recent United States Supreme Court ADA case, *Toyota Motor Mfg. v. Williams*, 122 S. Ct. 681 (2002), which upheld a more stringent standard “to assess whether a person qualifies as disabled under the Americans with Disabilities Act,” the threshold question of the ADA). Greenburg commented that many disability rights advocates saw the decision as “the latest in a string of Supreme Court rulings that have narrowed the reach of the law.” Greenburg, *supra*. One expert commented that the *Williams* decision was one in a series of “cases [that] are a distortion of what Congress intended to do when it passed the ADA.” *Id.*

\(^{345}\) 122 S. Ct. 681 (2002).
in order to show a "substantial limitation" as required by the ADA, a plaintiff must show that his or her impairment substantially limits "activities that are of central importance to most people's daily lives" and not just activities which are essential to one's job, as the Sixth Circuit had previously ruled. Thus, protections under the ADA seem to be dwindling. The Third Circuit should therefore reinforce the congressional intent that "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" be developed to protect those with disabilities.

If the Third Circuit were to adopt the First and Ninth Circuit rule requiring that some actual risk of transmission be shown by documented cases, the resulting split among the circuits could give the Supreme Court the opportunity to decide the issue it left open in Bragdon. Hopefully, the Supreme Court would make the correct decision and reinforce protections to which Congress has already decided the disabled are entitled.

The Third Circuit's failure to adopt the rule of the First and Ninth Circuits will also likely lead to further judicial confusion regarding the proper interpretation of what may constitute a significant risk of transmission. Courts should require a showing of actual documented cases of transmission in a similar context. This keeps the power of deciding how diseases may be transmitted with those who have the knowledge and resources to decide such matters—health care agencies such as the CDC. Such decisions about actual risks of transmission cannot be expected to be made by our courts and cannot be left to discretionary interpretation. Evidence needs to be provided indicating that transmission in any given situation is actually probable in that it has been documented to have happened before.

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346. See 42 U.S.C. § 12102(2)(A) (1995) (defining “disability” as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”).
347. Williams, 122 S. Ct. at 691.
349. See also Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (holding that individuals were not constitutionally permitted to bring Title I cases against state employers because Congress, when enacting the ADA, did not properly abrogate state Eleventh Amendment immunity).
351. See Hubbard, supra note 278, at 1321-22. Hubbard explained the existence of a: disturbing tendency among lower federal courts to conclude that any risk, even a remote risk, satisfies the direct threat standard where the alleged harm is severe... Because there is as yet no cure for AIDS, lower courts have readily accepted the direct threat defense when there is any risk of transmission, without stopping to ask whether that risk is appreciable or significant.
Many will likely continue to believe that this is a "somebody has to die first standard." To alleviate these fears, this author suggests that when dealing with a disease such as HIV, which has no cure and will likely result in death, a surrogate may be used. Under a surrogate theory, a disease that has modes of transmission similar to those of HIV, could be substituted for HIV when considering the probability of transmission factor. The likely surrogate for HIV infection is the Hepatitis B virus (HBV). These two viruses, HIV and HBV, share many similarities. Both viruses are transmitted by blood. Modes of transmitting HBV are similar to those of HIV: unprotected sex with an infected individual, sharing needles, and transmission from mother to child. The virus has also been passed from patient to doctor by accidental needle sticks. Based on these similarities, when using the approach of finding a significant risk of transmission through documented cases, HBV may be used as a surrogate for HIV. Thus, in a situation like Adam's, if the County were able to prove by actual documented cases that children in foster care in a situation similar to Adam's have transmitted HBV to other children, the County's burden of proving the fourth Arline factor could be met.

There are, however, numerous problems with this approach. First, HBV is transmitted much more readily than HIV. Because of this, one would expect to find cases of HBV transmission in situations where the risk of HIV transmission, although present, is not significant. Second, HBV may be transmitted in ways where no HIV transmission has been shown. For example, Hepatitis B has been shown to

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352. See supra notes 322-334 and accompanying text.
353. This approach is based on Sidney D. Watson's "Comparative Risk" approach. See Watson, supra note 341, at 794-806. Watson's approach requires that in terms of the health care setting, an HIV-positive health care worker may not be dismissed as a significant risk to prospective patients without first comparing the risks posed by an HIV-positive health care worker to the risks presented by other health care workers. Id. One factor to look at is whether other health care workers are infected with Hepatitis B. Id. Watson concludes: "If the risk posed by an HIV infected health care worker is equal to or less than other risks normally tolerated, then the worker does not pose a significant risk." Id. at 795.
355. Viral Hepatitis B, supra note 354.
356. Id.
357. Watson, supra note 341, at 799.
be transmitted through "household contacts." "

Such contacts include sharing toothbrushes. Thus, not only is HBV more readily transmitted than HIV, it may be done in more casual ways. Certainly in the foster care setting there is a risk that children will use the same toothbrush or other personal items. This risk likely rises above the "type of remote and speculative risk that is insufficient for a finding of significant risk." Perhaps the biggest flaw with using HBV as a surrogate for HIV is that a surrogate test may in fact be nothing more than the cautious standard relied on by the Fourth, Fifth, Sixth and Eleventh Circuits in disguise. Using a substitute for HIV, the disability in question in cases like County of Centre, almost by definition constitutes only a "theoretically sound risk of transmission." Using a surrogate virus for HIV also will likely raise issues about the individualized inquiry requirement of Arline. In order to tell if there is a risk of transmission of HIV it will likely be necessary to look only at HIV. Thus, a surrogate model will likely fail.

The manner in which courts determine the fourth Arline factor, the probability of transmission, may also affect the interpretation of other legislation focused on the AIDS epidemic. One such statute is the Illinois Criminal Transmission of HIV statute. When dealing with a contagious disease such as HIV/AIDS, a disease with no cure that is widely misunderstood and carries with it a great stigmatizing effect, it is easy to allow fears of contracting the disease to overwhelm one's senses, but this is precisely why the ADA was enacted. Courts need guidance in deciding exactly what constitutes a significant risk of transmission. Persons facing discrimination based on their HIV-positive status need clear, consistent protections. By allowing the direct threat exception to overwhelm the fundamental rule of the ADA, that

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359. Viral Hepatitis B, supra note 354.
360. Id.
361. County of Ctr., 242 F.3d at 450.
362. See supra notes 140-141.
363. 720 Ill. Comp. Stat. 5/12-16.2 (2002). The statute states:

Criminal Transmission of HIV (a) A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV: (1) engages in intimate contact with another; (2) transfers, donates, or provides his or her blood, tissue, semen, organs, or other potentially infectious body fluids for transfusion, transplantation, insemination, or other administration to another, or (3) dispenses, delivers, exchanges, sells, or in any other way transfers to another any nonsterile intravenous or intramuscular drug paraphernalia.

Id. It later defines "intimate contact with another" as "the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV." Id. (emphasis added).
"no qualified individual with a disability shall, by reason of such disabil-
ity, be excluded from participation in or be denied the benefits of
the services, programs, or activities of a public entity, or be subjected
to discrimination by any such entity,\textsuperscript{364} persons with HIV will essen-
tially be written out of the Act.

VI. Conclusion

Based on the above analysis, the Third Circuit was correct in revers-
ing the district court's grant of summary judgment in favor of the de-
fendant County. Enacting a blanket prohibition against placing foster
children in a home where a family member has HIV/AIDS is a viola-
tion of the ADA and section 504 of the Rehabilitation Act. However,
the court should have done more and joined the First and Ninth Cir-
cuits in holding that in order to constitute a direct threat/significant
risk to others, there must be some actual risk of transmitting a disease
to others. This risk must be shown by documented cases of transmis-
sion in a similar context. This is the only way to give effect to the
ADA's goal of "protecting disabled individuals from discrimination
based on prejudice, stereotypes, or unfounded fear."\textsuperscript{365}

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\textsuperscript{365} 28 C.F.R. § 35.130(g), app., at 479, \textit{cited in County of Ctr.}, 242 F.3d at 447.
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