LEGAL ACTION CENTER

VIA CERTIFIED U.S. MAIL

April 26, 2017

Office of the University Counsel
Long Island University
700 Northern Blvd.
Brookville, NY 11548

RE: Policy regarding students with HIV

Dear Sir/Madame:

The Legal Action Center is a non-profit law and policy organization that works to end discrimination against people with HIV/AIDS, substance use disorders and criminal justice histories. We have learned that Long Island University's ("LIU") Surgical Technology Certificate Program (in the School of Continuing Studies in Brooklyn) has a discriminatory policy and practice with respect to students with HIV or AIDS. We urge LIU to rescind this policy and practice immediately because it violates the Americans with Disabilities Act, Rehabilitation Act of 1973, New York Human Rights Law (N.Y. EXEC. LAW §§ 292, *et seq.*), and New York City Human Rights Law (N.Y.C. ADM. CODE §§ 8-101 *et seq.*).

The Student Handbook for the Surgical Technology Certificate Program (the "Handbook") states:

> Students who have been diagnosed as having a positive HIV or AIDS virus may take the didactic portion of the program but should be aware that ALL hospitals do not allow students with that diagnosis to complete the clinical portion of the program. It is required that such a student explore the ramifications of this policy with the Director before committing to the program and perhaps consider other paths to follow. . . .[1]

The Handbook also warns students with AIDS that they are at high risk of serious complications from any exposure to infections diseases and infectious agents.

By warning students with HIV/AIDS that they will be unable to participate in the clinical portion of the program and that they are at heightened risk of infection and by requiring such students to self-disclose their HIV status to the program director and "perhaps consider other paths," this provision violates the New York State and City Human Rights Laws, Americans with Disabilities Act, and the Rehabilitation Act of 1973.

[1] It is my understanding that students may not receive this handbook until they have already enrolled ("committed" to the program), which can make this condition impossible to meet.

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Title III of the Americans with Disabilities Act ("ADA") prohibits any place of public accommodation from discriminating against individuals on the basis of disability. 42 U.S.C. § 12182(a).[2] Discrimination includes denying individuals the ability to participate in or benefit from the place of public accommodation's services, privileges, and advantages, imposing or applying eligibility criteria that screen out or tend to screen out individuals with a disability, and/or using standards of criteria or methods of administration that have the effect of discrimination on the basis of disability. 42 U.S.C. §§ 12182(b(2)(A)(i), 12182(b)(1)(D), 28 C.F.R. 36.202, 36.204, and 36.301(a).

A person with HIV is a person with a "disability" entitled to protection under the ADA. *See Bragdon v. Abbott*, 524 U.S. 624, 641 (1998). LIU, as an "undergraduate . . . school, or other place of education" is a place of public accommodation subject to the ADA's prohibition against discrimination. 41 U.S.C. § 12181(7)(J). By warning students with HIV/AIDS that they will be unable to complete the clinical portion of the program and should "perhaps consider other options to follow" and by requiring them to inform the program director of their HIV status before committing to the program, LIU denies students with HIV the opportunity to participate in the surgical technology program, imposes eligibility criteria that screen out individuals with HIV/AIDS, uses criteria or methods of administration that have the effect of discriminating on the basis of disability, and otherwise discriminates on the basis of disability.

There is no medical, scientific, or legal basis for the policies delineated in LIU's Handbook. As a preliminary matter, it is not our understanding that "all hospitals" prohibit students with HIV/AIDS from participating in clinical portions of surgical technology programs. Therefore, unless LIU only places students in select hospitals that discriminate, we believe that the Handbook is inaccurate. Indeed, such a prohibition would be discriminatory for the same reason that LIU's policy discriminates, as explained below.

To the extent LIU's policy is based on the belief that participation of students living with HIV/AIDS would jeopardize the health of others and/or that hospitals would disqualify them from employment or participation in clinical programs, such a position has no medical or legal justification. The ADA only permits differential treatment of individuals with disabilities when necessary to avert "a direct threat to the health or safety of others." 42 U.S.C. § 12181(b)(3). A "direct threat" exists only if there is "a *significant* risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures . . . ." *Id.* (emphasis added). To determine whether there is a "direct threat," one must make –

> an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

[2] Similar provisions exist in the Rehabilitation Act of 1973, which applies to federally assisted program or activities, the New York Human Rights Law, N.Y. Exec. Law §§ 290 *et seq.*, and the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101 *et seq.*

29 C.F.R. § 36.208. The risk assessment concerning "direct threat" must be based on "medical or other objective evidence" and not on a "good faith" belief lacking such a foundation. *Bragdon v. Abbott*, 524 U.S. 624, 649.

Objective medical and scientific evidence—as well as legal authorities—make it clear that prohibiting all HIV-positive individuals from the clinical portion of the surgical technology program, requiring that they self-disclose their status to the program director, and suggesting that they explore "other options" are not measures necessary to avert a "direct threat" to anyone.

The New York State Department of Health's most recent guidance to prevent transmission of bloodborne pathogens from infected health care personnel reaffirmed the state's existing HIV prevention/protection policies, codified into legislation in 1992. *See New York State Dept. of Health Policy Statement and Guidelines to Prevent Transmission of Bloodborne Pathogens from Infected Health Care Personnel through Medical/Dental Procedures* (updated 2011), available at https://www.health.ny.gov/publications/1852/appenb.htm. The guidelines provide:

- "Experts agree that the risk of transmission of [HIV] from infected health care personnel (HCP) to a patient during the provision of routine health care . . . is negligible. . . . Bloodborne pathogen infection alone is not sufficient justification to limit the professional duties of HCP unless specific factors compromise an HCP's ability to meet infection prevention and control standards, or to provide quality patient care." *Id*. at 1.

- "The most effective means of preventing bloodborne pathogen transmission in health care settings is through strict adherence to Standard Precautions, and established infection prevention and control practices." *Id*. at 1.

- The determination of whether an HIV-infected health care worker poses a "significant risk" to patients requires case-by-case evaluation of factors, such as:

    - Physical or mental condition that may interfere with the worker's ability to perform assigned tasks or regular duties;
    - Lack of compliance with established guidelines to prevent disease transmission;
    - The appropriateness of techniques as related to performance of procedures; and
    - Any health condition that would pose a significant risk to others.

    Id. at 3.

- Such an evaluation must be performed in consultation with experts, such as an infectious disease physician and/or epidemiologist with an understanding of HIV, a representative from the infected health care worker's practice area, and the personal physician of the infected worker. *Id*. at 3.

- HIV-infected health care workers are not required to disclose their status to either patients or employers because such a requirement "would only serve as a deterrent to workers seeking voluntary testing and medical evaluations. It also would endanger the professional careers of competent and needed health personnel who pose no risk to patients." *Id*. at 2.

The American College of Surgeons determined that even HIV-positive surgeons have no obligation to disclose their serostatus to anyone and that they may perform invasive procedures and surgical operations "unless there is clear evidence that a significant risk of transmission of infection exists through an inability to meet basic infection control procedures, or the surgeon is functionally unable to care for patients. American College of Surgeons, *Statement of the Surgeon and HIV Infection*. 89 BULL. OF AM. C. OF SURGEONS. N.5, (May 2004) *available at* https://www.facs.org/about-acs/statements/13-hiv-infection.

The American Academy of HIV Medicine (AAHIVM) also opposes policies that ask health care workers living with HIV to disclose their HIV status to employers. AAHIVM expressly opposes "workplace policies that distinguish HIV disease from other comparable diseases as it relates to employment." Embracing the protections of the ADA , the AAHIVM states: "As in the case of any illness, we support the concept as required by the Joint Commission on Accreditation of Health Care Organizations, most hospitals and other health care organizations to ask only that a health care workers is physically and mentally capable of performing the duties of their job, and see no justifiable reason for a health care workers . . . to be asked to disclose their status of HIV infection to their employer." American Academy of HIV Medicine. *The American Academy of HIV Medicine Policy Platform* 2015, at 50, available at https://aahivm.org/wp-content/uploads/2016/12/AAHIVM-PolicyPlatform-Final-2015.pdf.

Even the one professional association that believes restrictions are still necessary in some circumstances does not support prohibiting all HIV-positive health care workers from performing invasive procedures. In 2010, the Society for Health care Epidemiology of American (SHEA) published "SHEA Guideline for Management of Healthcare Workers Who Are Infected with Hepatitis B Virus, Hepatitis C Virus, and/or Human Immunodeficiency Virus." These guidelines recommend that health care workers living with HIV be permitted to do all procedures it delineates as category I ("de minimus risk of bloodborne virus transmission") and category II ("bloodborne virus transmission is theoretically possible but unlikely"), and that those with viral loads under a certain threshold be permitted to perform Category III procedures ("definite risk of bloodborne virus transmission or that have been classified previously as 'exposure-prone'"), subject to certain conditions. David Henderson et al., *SHEA Guideline for Management of Healthcare Workers Who Are Infected with Hepatitis B Virus, Hepatitis C Virus, and/or Human Immunodeficiency Virus*, 31 Infection Control and Hosp. Epidemiology N.3, 203, 206 (Mar. 2010) *available at* http://www.jstor.org/stable/10.1086/650298.[3]

[3] The Center for Disease Control ("CDC") has withdrawn and archived as "outdated" its 1991 recommendations that HIV infected health care workers be restricted when performing "exposure prone" invasive procedures. (In contrast, the CDC's 1991 recommendations suggested *no* restrictions for HIV-infected health care worker performing "non-

The federal government has brought numerous ADA enforcement actions against higher educational institutions' health care worker programs and health care facilities that prohibited participation/employment of individuals living with HIV in ways similar to LIU:

- In 2014, the United States Department of Justice ("DOJ") reached a settlement with Gwinnett College after the college forced a student to withdraw from its Medical Assistant program because of her HIV status. The DOJ determined that Gwinnett College's actions were illegal discrimination that violated the ADA. The settlement agreement required the college to afford applicants and students with disabilities, including those with HIV, "an equal opportunity to participate in or benefit from" the services, facilities, privileges, and advantages provided by the College, and to financially compensate the student. A copy of the settlement agreement is available at https://www.ada.gov/gwinnett-col-sa.htm.

- The Office for Civil Rights ("OCR") of the United States Department of Health and Human Services ("HHS") determined that a public health facility's termination of an HIV-positive woman from a phlebotomy externship constituted discrimination in violation of the Rehabilitation Act and the ADA. *See Johnson-Heath v. Los Angeles County Department of Health and Human Services*, OCR Docket No. 09-99-3077 (1999). OCR required the employer to reinstate the student and compensate her for any monetary losses.

- In 2015, DOJ reached a settlement with Compass Career Management, LLC, a college practical nursing program, after charging the college with violating the ADA. Among other things, the settlement required the college to stop asking about HIV status for application or enrollment purposes, amend its non-discrimination policy to reference HIV, and refrain from imposing any additional burdens or requirements on applicants or students with HIV, including warning applicants of "hardships" the College believed that having HIV might cause in earning a degree and becoming employed following graduation. A copy of the consent decree is available at https://www.ada.gov/compass_career_mgmt/compass_cd.html.

- The United States Equal Employment Opportunity Commission ("EEOC") has brought and settled cases against health care providers who discriminated against phlebotomists and other health care workers infected with HIV. *See, e.g., EEOC v. Trimar Hollywood, Inc.*, LA CV 03-9399 (S.D. Cal.), settled on January 14, 2004, (alleged discriminatory refusal to hire an applicant for phlebotomist position because he was HIV-positive).

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exposure prone" invasive procedures.) In archiving the recommendations, the CDC acknowledged that medical and scientific groups have developed positions and guidance based on more current scientific findings. (See attached letter dated November 21, 2014).

These federal enforcement agencies also have issued guidances with respect to health care workers and students living with HIV. The EEOC has stated that HIV-positive phlebotomists do not pose a "direct threat" and that "their HIV-positive status would not justify reassigning these employees to different positions or terminating them." *See Questions and Answers about Health Care Workers and the Americans with Disabilities Act,* http://www.eeoc.gov/facts/health_care_workers.html ("Since the best available medical evidence . . . indicates that HIV-positive health care workers in these types of positions [phlebotomists and nurse's aides] do not pose a direct threat to the safety of patients if they adhere to universal precautions, neither poses a direct threat in their positions based on their HIV-positive status"). In 2011, DOJ issued letters to the attorneys general of all 50 states to request their assistance in addressing the illegal exclusion of individuals with HIV/AIDS from occupational training. In its press release, the DOJ stated that, "because HIV cannot be transmitted by casual contact or by the circumstances present in these occupations, HIV-positive status is irrelevant." U.S. Dept. of Justice, *Justice Department Issues Letter Regarding Illegal Exclusion of Individuals with HIV/AIDS from Occupational Training and State Licensing* (Mar. 21, 2011), http://www.justice.gov/opa/pr/justice-department-issues-letter-regarding-illegal-exclusion-individuals-hivaids-occupational.

While these enforcement actions did not involve surgical technology programs, the underlying principals are equally applicable to LIU's surgical technology program in light of the medical and public health standards cited above. Decades old case law holding otherwise does not reflect these evolving standards. The current legal and medical authority makes it clear that LIU's policies and procedures with respect to students living with HIV are discriminatory.

Please inform me within ten business days what measures LIU intends to take to remove these discriminatory requirements from the Handbook and from the program generally and to re-train its staff regarding the revised policies and practices.

Very truly yours,

Sally Friedman
Legal Director

Enc.