UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE, as Parent and Natural Guardian, on behalf of ADAM DOE, a Minor,	:	07-Civ-5495 (WCC) (GAY)
Plaintiff,	:	
v.	:	
DEER MOUNTAIN DAY CAMP, INC. and DEER MOUNTAIN BASKETBALL ACADEMY,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Jane Doe, as parent and natural guardian of Adam Doe, a minor, respectfully submits this memorandum of law in support of her motion under Fed. R. Civ. P. 56 for summary judgment, on the question of defendants Deer Mountain Day Camp, Inc. and Deer Mountain Basketball Academy's liability under the American with Disabilities Act, 42 U.S.C. § 12101, et seq., and the New York Human Rights Laws, N.Y. Exec. Law § 292, et seq.

PRELIMINARY STATEMENT

Defendants' conduct in this case is precisely what the Americans with Disabilities Act was enacted to prevent: the exclusion of individuals with disabilities because of archaic attitudes and unfounded fear, especially those related to contagion. In the summer of 2004, ten-year old plaintiff, Adam Doe, timely submitted an application (through his mother) to the Deer Mountain Basketball Academy (the "Camp") to attend its one-week basketball day camp. Though HIV-positive since birth, Adam had been asymptomatic since early childhood. Both his pediatrician, Dr. William Bernstein, and HIV specialist, Dr. Natalie Neu, believed he was medically fit to attend the camp without restrictions, and Dr. Bernstein cleared him to attend camp.

The Camp nonetheless denied Adam admission because of his HIV status. Adam's pediatrician disclosed Adam's HIV status and HIV medications on the forms submitted to the camp the Friday before its start date (the following Monday) and in a phone conversation with the Camp director at least one day before that. In neither instance did Dr. Bernstein note a single restriction on Adam's participation, nor a single side effect from his medications. Within 24 hours of receiving the forms the Camp denied him admission.

Defendants' stated reasons for denying Adam admission are discriminatory as a matter of law, in violation of the Americans with Disabilities Act and New York State Human Rights Law. In deposition, the Camp's co-directors testified that they reacted with alarm when they learned

Adam's HIV status and believed that Adam's mother was "dishonest" for wishing to keep it confidential. However, there was no requirement that Adam's mother record his HIV status on the camp application. Adam's mother's conduct was consistent with the recommendation of Dr. Neu and in accordance with long-accepted medical standards that parents and physicians need not reveal a child's HIV status to camps, sports and other educational programs because these entities should use universal precautions. In any event, the Camp did not deny him admission because of an omission on the application, but rather, because the omission was about HIV.

In discovery, the Camp also claimed that it denied Adam admission because another physician in Dr. Bernstein's office, Dr. Levi, to whom it spoke, recommended that Adam swim in a separate pool and use a separate toilet to prevent HIV transmission and because Mrs. Doe purportedly said that Adam had missed camp earlier in the summer due to an illness which Dr. Levi could not corroborate or illuminate. The Camp admits that it had never before denied a child admission for health reasons. There is reason to question whether the co-directors, in fact, acted based on any of these beliefs rather than solely on his HIV.

Plaintiff is entitled to summary judgment because the Camp's stated reasons for denying Adam admission demonstrate discrimination because of Adam's HIV status. The co-directors' purported belief that they needed time to research issues raised by Adam's HIV status, even credited, reflects unfounded stereotypes that violate the ADA. According to objective medical evidence, including the advice of federal and state public health officials, as well as the American Academy of Pediatrics, HIV-positive children should be able to participate fully in school and athletic settings and HIV is not transmitted through pools, toilets, and sports. The directors did not need to speak to Dr. Bernstein yet again, after the completed medical forms gave Adam clearance. The fact that the Camp directors are not medical experts is no excuse

under the ADA for acting contrary to these well-established standards. The Camp's exclusion of Adam Doe, even accepting their version of the facts as true, was discrimination in violation of the ADA and the NYHRL as a matter of law.

FACTUAL BACKGROUND

A. Background Information About the Camps

The Deer Mountain Basketball Academy ("DMBA") was a weeklong basketball day camp held August 23-27, 2004 in Pomona, New York. See RK 11:18-21.[1] The DMBA was held in the same premises and used the same facilities as the Deer Mountain Day Camp ("DMDC" and, with DMBA, the "Camps"), a 39-day camp that did not focus exclusively on basketball activities. Id. at 17:6-11, 95:18-19; CK 6:9-10. The Camps' two owners and directors are sisters Roberta and Carol Katz (the "Katz sisters"). See RK 5:23-6:7; CK 5:20-6:15; see also DMBA Brochure at 1.[2] In the summer of 2004, the Camps hired Steven Loscher as an "outside contractor" to provide basketball coaching for the new DMBA. RK 50:24-53:10.[3]

The Camps did not have any official or unofficial admission criteria in the summer of

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[1] Citations to the record will use abbreviations as they appear in Plaintiff's Statement Pursuant to Rule 56.1.

[2] As the two owners and directors, the Katz sisters act as agents for the Camps, see BLACK'S LAW DICTIONARY 67 (Deluxe 8th Ed. 2004); accordingly, the actions of the Katz sisters may be referred to as the acts of the Camps. Roberta Katz will also be referred to herein as "Ms. Katz."

[3] The Camps shared more than common premises. They used the same application form (except that the DMDC application was longer reflecting the longer duration of and options available in that program), RK 19:14-17, 20:8-12, the same nurse to oversee concerns about children's health, id. at 27:13-17, CK 12:11-17, the same lifeguard, CK 12:11-16, and substantially the same facilities and administrative staff, RK 27:25-28:8, 53:16-54:16. Additionally, the advertisement brochure for the DMBA stated: "Coach Loscher + Deer Mountain Day Camp = DMBA." See DMBA Brochure at 1. Although Loscher is listed as a "director" in that brochure, see id., and although he used some of his own staff to assist him in running the DMBA, two DMDC staff members, as well as the Camps' nurse, lifeguard, and co-directors, remained on site to assist Loscher, see RK 56:21-25; CK 11:11-13:22. Moreover, Loscher did not play any role in deciding admissions to the DMBA, see RK 60:13-14 ("[Loscher] wasn't on-site until the day of the basketball camp."). Finally, the DMBA was not a separately incorporated entity and it did not maintain separate books and records from the DMDC. Id. at 58:13-59:10. Thus, both the DMBA and DMDC are the same entity for purposes of this litigation. Cf. generally EEOC v. Dolphin Cruise Line, Inc., 945 F. Supp. 1550, 1553-54 (S.D. Fla. 1996) (ADA case discussing under what circumstances two entities are treated as "joint employer[s]," and holding that companies marketed together, with common bank accounts, common owners, and that provide services for each other, are considered a single employer as a matter of law).

2004; applicants were simply required to pay the camp fee and fill out three forms. Id. at 12:19-13:10. Although the Camps' nurse, Ellen Gloskin, sometimes made follow-up questions to an applicant's physician regarding a child's medical conditions, these questions were "not an evaluation to determine admission." Id. at 13:11-14:12; see also EG 37:16-22. Applicants were sometimes admitted even if the three forms arrived as late as the day that the camp began. RK 36:22-37:10. The Katz sisters know of no applicant who was denied admission into either the DMDC or the DMBA on account of the information contained in their medical forms, or for any other reason, until Adam Doe in 2004. Id. at 16:8-13, 41:12-21, 44:17-20; CK 29:5-8.

The first form required in the Camps' application requested general information about the child, including the name of his doctor, his "dietary restrictions or needs," and his allergies. This page then permitted the applicant to provide "Other Health Comments." See Application Form. The second form required a physician to answer questions about an applicant's immunization history, potential problems with major life organs, and then provided an opportunity to submit "any information concerning your child's health that the camp should know." See Medical Report. The third form required a physician to list any medication the child was taking, and, if necessary, authorize a camp nurse to administer these medications. See Medication Report (with the Application Form and the Medical Report, the "Camp Application").[4]

B. The Camps' Refusal to Admit Adam Doe into the DMBA

Plaintiff Jane Doe adopted Adam Doe in 1994 when he was 26 days old. See JD 7:14-20; JD Aff. ¶ 2. Adam was born with the Human Immunodeficiency Virus (HIV), an infection that caused him several respiratory and auditory infections in early childhood, as well as other infectious diseases that required several hospitalizations and outpatient treatments. See WB

[4] Both the Medical Report and the Medication Form bear the DMDC heading because the Camps used the same two forms for both programs. See also supra note 3.

19:8-15; Neu Aff. ¶¶ 31-36; JD Aff. ¶¶ 3-11. Adam enjoyed playing basketball and applied for admission to the DMBA in the summer of 2004. JD 19:18-24. At some point before the August 23 start of camp, plaintiff sent a completed Application Form and the required admission fee. See Adam's Application. No obstacle stood in the way of Adam's participation in the camp.

The Camps' co-directors, however, denied Adam admission based on his HIV-positive status two days before the start of the DMBA. According to Carol Katz, she received a call from Adam's pediatrician, Dr. William Bernstein, the week before camp.[5] She testified that Dr. Bernstein called to inform the Camps that Adam is HIV-positive. CK 16:21-17:25. Carol did not ask Dr. Bernstein any questions about HIV or Adam's medical condition; instead, she relayed the substance of this conversation to Roberta Katz. Id. at 18:8-19:5, 20:6-16. Roberta Katz testified that she and Dr. Bernstein spoke at some point later that day – either Wednesday or Thursday – and that Dr. Bernstein informed her that Adam was HIV-positive, but that his mother did not want him to disclose that in the Medical Report. RK 66:16-25.[6] Dr. Bernstein did not recommend any restriction on Adam's participation in the DMBA, nor disclose any concern about Adam's admissions. WB 27:16-28:4, 55:5-10; see also RK 67:11-15. Ms. Katz reacted to this call with "concern that a parent would want to hide something from [her]." Id. 71:11-12.

Plaintiff had left blank the Application Form's "Other Health Comments" space. See Adam's Application Form. In addition, she testified that she would have preferred that Dr. Bernstein not disclose Adam's HIV status on the Medical Report, given the recommendation of

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[5] In 2004 and as of the time of plaintiff's deposition, Dr. Bernstein was Adam's pediatrician. See JD 29:24-25. Dr. Bernstein also served as an informal consultant whom the Camps used for follow-up questions about an applicant's medical forms and for signing off on health plans. See EG 27:24-29:21; WB 9:18-10:11.

[6] Dr. Bernstein's recollection of the events differs significantly from those of the Katz sisters. For instance, Dr. Bernstein does not recall having initiated any conversation with the Katz sisters and believes they contacted him upon receiving the Medical Report, see WB 54:4-6, 53:18-21; in addition, Dr. Bernstein expressed serious doubts that Jane Doe would have asked him to not disclose Adam's HIV status on the Medical Report, id. at 68:2-15. Plaintiff will assume defendants' version is true only for purposes of this motion.

Adam's HIV-related physician, Dr. Natalie Neu, that she generally did not have to disclose Adam's HIV status, and her fear that Adam might face discrimination. JD 29:7-23, 30:12-20, 35:5-11. Despite medical opinion that a child's HIV status is irrelevant in a school and athletic context, and despite Ms. Katz's understanding of the DMBA's Medical Report as requiring "general health history information and immunization stuff," and of the entire medical evaluation process as designed to elicit only information that "would relate to camp," Ms. Katz testified she viewed plaintiff's desire to maintain her son's HIV status confidential as a "lie[] on the application . . . ." RK 21:4-6, 42:2-9, 101:15-18.[7]

On Friday morning, August 20, 2004, the Camps received Adam's Medical Report, signed and completed by Dr. Bernstein. See EG 59:4-7; EG Notes. The form cleared Adam for participation in the DMBA: it disclosed his HIV status but did not recommend any restriction whatsoever on his ability to participate in or attend the DMBA, due to his HIV status or any other illness. See Adam's Medical Report. Later in the day, the Camps also received Adam's Medication Form, listing three HIV-related drugs and the form and frequency of administration. No other medications were listed. See Adam's Medication Form. Although Dr. Bernstein has completed "several hundred" medical forms for patients attending the DMDC, and has "always" noted side effects of medications, see WB 38:23-40:24, he did not note any side effects of Adam's HIV medications. See Adam's Medication Form.[8]

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[7] Dr. Bernstein made the decision to disclose Adam's HIV status to the Camps because, even though he was aware of the American Academy of Pediatrics' position that HIV-positive children should be permitted to participate in sports, see WB 24:7-25:20, 31:14-21, and even though he did not believe that HIV was transmissible in pools or toilets, id. at 31:22-32:4, he thought the "protocols were probably not in place appropriately at that time." Id. at 31:6-7. He wanted "to make sure there are appropriate things in place, never thinking we'd come to a situation like this where he would or would not be allowed to go to camp . . . ." Id. 30:17-24.

[8] Adam's Medication Form indicated the medications were to be administered orally either once (for Zerit and Epivir) or twice (for Viracept) a day, but they did not need to be administered during camp hours, and nothing in the form indicated otherwise. WB 51:3-21; JD 14:4-15:12 (Adam did not have to take medication at camp).

At some point that Friday morning, plaintiff called the Camps and spoke to Nurse Gloskin concerning the medical forms. Plaintiff authorized the Camps to speak to Dr. Bernstein. EG 62:19-63:11. Nurse Gloskin testified that plaintiff also indicated that Adam had missed another camp because he had been sick. Id. at 63:21-64:2.[9] After this conversation and after receiving the completed application, Nurse Gloskin phoned Dr. Bernstein's office, allegedly to find out more about the prior illness. Id. at 72:4-9, 73:13-16. Dr. Bernstein was not available; Nurse Gloskin instead spoke to Dr. David Levi, another physician in Dr. Bernstein's practice. Id. at 72:18-73:10. According to Nurse Gloskin, Dr. Levi would not provide specific information about Adam because he was not his primary physician, id. at 77:6-9, and "didn't know" why Adam had missed an earlier camp, only that "he may have had a virus." Id. at 78:22, 79:17-21. Nurse Gloskin stated that she then inquired about possible side effects from the medications used to treat the alleged illness. See id. at 81:21-23, 82:15-84:6. Per her notes taken in 2004, she asked Dr. Levi "if [Adam Doe] had an accident (urinate) in pool would pool be safe," and Dr. Levi said: "[i]t would only be a problem if blood in urine [or] if [Adam bled] in bathroom it would have to be cleaned appropriately." See EG Notes.[10] Although Carol Katz testified that the Camps' staff is trained on "universal precautions" to avoid exposure to blood-born pathogens, see CK 30:19-31:14, 36:16-20, Nurse Gloskin voiced concern about whether, if there was blood in the pool, "it would be safe for anyone else using the pool." EG 87:24-88:2.

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[9] Plaintiff denies having told Nurse Gloskin that Adam had missed another camp due to illness and states that Adam did *not* miss a camp earlier in 2004 for any reason. JD Aff. ¶ 14.

[10] In his deposition, Dr. Levi recalled answering a camp nurse's questions about HIV transmission in the pool, toilet, and through contact during basketball. He testified that he did not recommend a separate pool or toilet for Adam or for any other HIV-positive child. He testified that he told the nurse that HIV transmission through a toilet or pool was "[e]xtremely unlikely" and that if a child had the "gross amounts of blood" that might result in transmission he would be "too sick to attend camp," and that chlorine in the pool would likely kill the HIV virus. See DL 36:16-41:2. He also stated that the nurse did not ask any questions about restricting Adam's activities at the DMBA, about his HIV or any other medications, or about his missing a camp earlier that summer. Id. at 35:20-44:14.

Gloskin testified that after her conversation with Dr. Levi, she informed Ms. Katz that she did not have the information she needed regarding the potential side effects of medications Adam may have been on, id. at 83:8-84:6, 90:24-91:3; RK 78:12-79:17, and that the Camps did not have enough time to provide the accommodations recommended by Dr. Levi, EG 94:15-17.

Ms. Katz claims that she then phoned Dr. Levi to find out "more about the case," specifically "Adam's HIV status." RK 82:8, 83:7-12. Ms. Katz alleged that Dr. Levi did not know why Adam had missed camp the previous summer, but thought it was because of a virus, id. at 87:18-88:9, and that Dr. Levi recommended a separate pool and toilet because there was "some sort of a transmission issue." Id. at 88:17-89:8, 90:4-5, 91:15-21.[11] She testified that the Camps did not have time to provide the separate accommodation, id. at 92:18-93:4.

Other than calling Dr. Bernstein's office that day, Ms. Katz took no steps to learn about potential concerns that a child's HIV status may raise at camp: she did not consult any public health authorities, any doctors (including Adam's HIV specialist), or the American Camp Association – not after the call with Dr. Bernstein earlier in the week, informing her of Adam's HIV status, nor after receiving the medical forms that Friday. See RK 74:18-75:4, 100:23-25.

The next morning (Saturday), after consulting with her sister Carol, Ms. Katz decided that the Camps would reject Adam's application. Id. at 96:4-12. Ms. Katz described herself as the "primar[y]" decision-maker on the matter, id., and testified in her deposition that there wasn't a "definitive way [in which she] made the decision." Id. at 97:12-14. Rather, a "number of things" figured into the decision, id. at 104:25, including (1) the need for a separate pool and toilet because of the "transmission issue," but the lack of time to hire the staff required to supervise these accommodations id. at 96:19-22, 104:15-105:6; (2) her concern with plaintiff's "lack of honesty" regarding "[Adam's] HIV status," id. at 100:19-22, 101:14-23; and (3) her

[11] Dr. Levi also denies any recollection of a conversation with Roberta Katz. See DL 51:14-21.

concern with keeping Adam safe. Id. at 102:12-105:18.[12]

On Saturday, August 21, 2004, Roberta Katz phoned Jane Doe to inform her that Adam would not be admitted. Ms. Katz bluntly told plaintiff that because the Camps "didn't have time to do all the research that [they] ordinarily would do, it would be too difficult to make reasonable accommodations" for Adam. Id. at 112:11-16. According to plaintiff, she was informed that Adam could not go to camp because the camp "didn't have [time to perform] enough medical research," JD 39:5-7, because there was a concern about "feces that can get in the pool," id. at 40:23-25, and because the camp believed that Adam "[could] get hurt." Id. at 39:10, 40:6-8.

ARGUMENT

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) ("Title III"). To prevail on the Title III claim, plaintiff must establish that, at the time of the events in question, (1) Adam Doe was disabled; (2) the Camps were a place of public accommodation; and (3) the Camps denied admission to Adam "on the basis of" his disability. See, e.g., Cotz v. Mastroeni, 476 F. Supp. 2d 332, 368 (S.D.N.Y. 2007) (citing Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 85 (2d Cir. 2004)).[13] There is no genuine issue of material fact as to any

[12] Carol Katz testified that she was concerned with Adam's safety, with possible side effects of his medications, as well as with "issues for other campers" stemming from the possibility of blood in stool and urine. CK 34:17-35:20, 38:5-10. It is unclear from the record whether Roberta Katz was concerned solely with side effects of medication Adam might have been taking for the alleged illness, or also with side effects of his HIV medication. See, e.g., RK 88:10-23.

[13] The elements of plaintiff's NYHRL claim are the same as the Title III elements. Under the NYHRL, "[i]t shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation . . . because of the . . . disability . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . ." N.Y. Exec. Law. § 296-2(a). With one notable exception,

of these elements and plaintiff is entitled to summary judgment.[14]

I. ADAM DOE IS DISABLED UNDER THE ADA AND THE NYHRL

Adam Doe, as a child with HIV, has a "disability" as a matter of law. The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The NYHRL defines "disability" even more broadly by requiring simply an "impairment."[15] Adam Doe satisfies both definitions.

Adam Doe's HIV infection constitutes a "physical impairment." See Bragdon v. Abbott, 524 U.S. 624 (1998); 28 C.F.R. § 36.104.[16] The same holds true under the NYHRL's "broader definition of disability . . . ." Giordano v. City of New York, 274 F.3d 740, 743 (2d Cir. 2001) (internal quotation marks and citation omitted).[17]

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described below, the elements of a claim under both the ADA and the NYHRL are analyzed together. See, e.g., Torrico v. Int'l Bus. Machs. Corp., 319 F. Supp. 2d 390, 409 (S.D.N.Y. 2004) (citation omitted).

[14] Under Rule 56(c) of the Federal Rules of Civil Procedure, a court must grant summary judgment if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must establish the absence of any genuine issue of material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party meets this burden, the burden shifts to the non-moving party to set forth "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). A "genuine issue of material fact" exists if, after "resolv[ing] all ambiguities and draw[ing] all reasonable inferences in the light most favorable to the [non-moving] party," Cifarelli v. Vill. of Babylon, 93 F.3d 47, 51 (2d Cir. 1996), the evidence is such that a reasonable fact-finder could find in favor of the non-moving party. Holtz v. Rockefeller & Co., 258 F.3d 62, 69 (2d Cir. 2001). The non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), by setting forth specific facts showing a genuine issue exists.

[15] Under the NYHRL the term "disability" means "(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment." N.Y. Exec. Law §292(21). See also Treglia v. Town of Manlius, 313 F.3d 713, 723-24 (2d Cir. 2002).

[16] "As the agency directed by Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b), the Department's views are entitled to deference." Bragdon, 524 U.S. at 646 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

[17] New York courts routinely hold that HIV is a disability under the NYHRL. See, e.g., Petri v. Bank of N.Y. Co., 582 N.Y.S.2d 608, 611 (1992); Scardace v. Mid Island Hosp., Inc., 800 N.Y.S.2d 42, 43 (2d Dep't 2005)

Adam Doe's HIV impairment was a "current" disability when he was denied admission to the DMBA. HIV is an incurable and ultimately fatal disease that substantially limits a number of major life activities, including education, employment, and family and financial undertakings, see Bragdon, 524 U.S. at 656 (Ginsburg, J., concurring), that warrants a finding of disability per se. Though Adam's HIV was asymptomatic in 2004, see Neu Aff. ¶¶ 37-38, the Department of Justice notes that asymptomatic HIV substantially limits a major life activity, either because of its actual effect on the individual or because of the reaction of others. See 28 C.F.R. Pt. 36, App. B; see also Bragdon, 524 U.S. at 656 ("[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination when . . . not yet visible"); United States v. Morvant, 898 F. Supp. 1157, 1161 (E.D. La. 1995) (it is "beyond cavil" that HIV-positive individual is disabled under the ADA); 29 C.F.R. pt. 1630, App., p. 350 (1997) (view of EEOC that HIV infection is "inherently substantially limiting") (quoted in Bragdon, 524 U.S. at 647).[18]

Adam Doe also has a "record of" HIV substantially limiting his major life activities of breathing, eating, and caring for oneself.[19] In Thomas v. Atascadero Unified School District, 662 F. Supp. 376, 379-80 (C.D. Cal. 1987), the court held that HIV-related complications in a

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("Although Scardace was not infected with the HIV-virus, he may nevertheless seek redress pursuant to Executive Law § 296(1)(a), on the theory that, having been mistakenly evaluated as being at a higher than normal risk of HIV infection, he was incorrectly thought to be affected by a disability") (internal quotation marks and citations omitted).

[18] This argument is even more compelling under the recent ADA Amendments Act of 2008 ("ADAAA"), which defines disability without respect to mitigating measures such as medication. See Pub. L. No. 110-325, 122 Stat. 3553 (2008). See Jenkins v. Nat'l Bd. of Med. Exam'rs, No. 08-5371, slip op. (6th Cir. Feb. 11, 2009), http://www.ca6.uscourts.gov/opinions.pdf/09a0117n-06.pdf (holding ADAAA expands definition of disability in ADA cases seeking prospective relief and pending as of the date the ADAAA was enacted). Prior to taking HIV medications, Adam's HIV substantially affected a number of major life activities, see "record of" discussion, infra pp. 11-12, and undoubtedly would have continued to do so (had Adam even lived) through 2004.

[19] The DOJ regulations implementing Title III provide an illustrative (not exhaustive) list of "major life activities" that includes "caring for one's self, . . . breathing, learning, and working." 28 C.F.R. § 36.104; see also Bragdon, 524 U.S. at 638-39 (quoting 45 C.F.R. § 84.3(j)(2)(ii) (1997) (regulations under Rehabilitation Act of 1973); 28 C.F.R. § 41.31(b)(2) (1997)).

child's first four years, including pneumonia and recurrent ear infections, substantially limited major life activities and constituted a "record of" disability even though medical treatment had rendered him asymptomatic at the time of his exclusion from school. Id. at 379-80, 383.[20] Cf. Doe v. County of Centre, PA, 242 F.3d 437, 447 (3d Cir. 2001) (HIV-positive child was disabled under the ADA because the virus has caused eating and digestive disorders).

Likewise, it is undisputed that when Adam Doe was very young, he was "quite sick with pneumonia many times, [suffered] recurrent ear infections, and several times requir[ed] hospitalization . . . the classical pattern of a youngster [infected] with [HIV]." WB 19:8-15. Adam was hospitalized at least three times in his first three years of life – twice for pneumonia and once for recurring chicken pox and had recurrent ear infections and thrush, meeting the criteria for being "mildly immunocompromised." Neu Aff. ¶¶ 31-35. During these hospitalizations, one of which lasted at least two weeks, Adam had substantial trouble breathing and eating. When inflicted with shingles, he had blisters all over his stomach and could not even be held. JD Aff. ¶ 10. Accordingly, Adam has a record of an impairment that substantially limits the major life activities of breathing, eating, and caring for oneself as a matter of law.

Finally, as a matter of law, defendants regarded Adam Doe as having a disability because they regarded his HIV as substantially limiting his major life activities of learning and playing *and* because defendants' own misperceptions and myths about HIV did substantially limit these activities. The Department of Justice regulations implementing Title III provide –

(4) The phrase "*is regarded as having an impairment*" means --

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[20] A record of hospitalization for pneumonia in and of itself establishes a record of a disability. See Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 281 (1987) (holding that plaintiff's hospitalization for tuberculosis 22 years before being fired for tuberculosis constituted a "record of" a handicap under the Rehabilitation Act). Rehabilitation Act cases are relevant in interpreting the ADA as the statutes are normally construed identically. See infra note 26.

> (i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation;
>
> (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment . . . .

28 C.F.R. § 36.104. The "regarded as" provision in the ADA stems from the similar provision in the Rehabilitation Act, in recognition that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations . . . ." Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987) (citing S. Rep. No. 93-1297, at 50).[21]

The Department of Justice's ADA Technical Assistance Manual provides two pertinent illustrations of "regarded as" coverage. In the first, a summer camp bars an individual from participation in certain sports because of her mild and medically controlled diabetes. "Even though [the individual] does not actually have an impairment that substantially limits a major life activity, she is protected under the ADA because she is treated as though she does." U.S. Dep't of Justice, Civil Rights Division, Americans with Disabilities Act: ADA Title III Technical Assistance Manual § III-2.6000(1), available at http://www.ada.gov/taman3.html (last visited Feb. 10, 2009) (hereinafter "TAM").

In the second illustration, a day care program refuses admission to a child with a prominent facial disfigurement because her presence might upset other children. The TAM concludes that her impairment substantially limits her major life activities "only as the result of the attitudes of others toward her impairment." TAM § III-2.6000(2) (emphasis in original). This conclusion is consistent with that reached by court in United States v. Happy Time Day

[21] In the Preamble to the Title III regulations, the Department of Justice notes that if a person is refused admission by a public accommodation because of an actual or perceived physical condition, without a legitimate reason, "a perceived concern about admitting persons with disabilities could be inferred and that individual would qualify for coverage under the 'regarded as' test." 28 C.F.R. pt. 36, App. B.

Care Center, 6 F. Supp. 2d 1073, 1084 (W.D. Wis. 1998), where an HIV-positive three-year old was excluded from day care centers because of his HIV status. "Just as the negative reaction of an employer to a contagious disease can substantially limit an individual's ability to work, the ability of L.W. to learn has been substantially limited because defendants' misapprehensions and fears have prevented him from enrolling in day care." Id.; see also Dist. 27 Cmty. Sch. Bd. v. Bd. of Educ., 502 N.Y.S.2d 325, 336-37 (1986) (students with AIDS were disabled under the Rehabilitation Act because if they were automatically excluded from school, they would clearly be "treated as having such an impairment").

Defendants here plainly regarded Adam as disabled: a child who could not share a toilet or pool is substantially limited in learning and playing. Moreover, their attitudes did substantially limit these activities, as he could not attend camp.

II. DEFENDANT CAMPS ARE PUBLIC ACCOMMODATIONS UNDER THE ADA AND THE NYRHL

The Camps are subject to both Title III of the ADA and to the NYHRL as owners and operators of a "place of public accommodation." 42 U.S.C. § 12182(a); N.Y. Exec. Law §§ 296(2), 292(9). The Camps fall under the plain statutory definitions.

The ADA defines "place of public accommodation" by reference to twelve illustrative but extensive categories that the ADA's legislative history indicates "should be construed liberally." See, e.g., PGA Tour, Inc. v. Martin, 532 U.S. 661, 676 (2001) (citing S. Rep. No. 101-116, at 59 (1989); H.R. Rep. No. 101-485, pt. 2, at 100 (1990); U.S. Code Cong. & Admin. News, pt. 2, at 303, 382-383 (1990)). The Camps comfortably fall under several of the categories, including "place[s] of recreation," "place[s] of education" and "other place[s] of exercise or recreation." 42 U.S.C. §§ 12181(7)(I), (J), & (L); see also 28 C.F.R. § 36.104(9),

(10), & (12).[22] The DOJ'S TAM pointedly invokes a summer camp to illustrate prohibited discrimination in two separate instances, see TAM §§ III-2.6000(1), 4-1300, a view entitled to deference. See supra note 16.

Defendants likewise fall under the NYHRL's definition of "public accommodation" through its catchall phrase for "all places . . . and establishments dealing with . . . services of any kind." N.Y. Exec. Law § 292(9). This provision must also be construed broadly. See, e.g., U.S. Power Squadrons v. State Human Rights Appeal Bd., 59 N.Y.2d 401, 410 (1983); see also Cahill v. Rosa, 89 N.Y.2d 14, 21 (1996). The term has thus been held to apply to dentist offices, Cahill, 89 N.Y.2d at 21-22, and to boating clubs based on the openness to the public of their accommodations, and because they promoted their educational programs widely, see Power Squadrons, 59 N.Y.2d at 409-10.

Defendants do not appear to dispute that they operate a "place of public accommodation" under both the ADA and NYHRL. Defendants operate day camps open to the public and the DMBA was open to all children in grades 2 through 9. Prior to denying Adam admission, the Camps admitted all applicants who paid the fees and completed the paperwork. RK 12:19-13:10, CK 29:5-8; see also DMBA Brochure (advertising DMBA to the public).

III. DEFENDANTS DISCRIMINATED AGAINST ADAM DOE ON THE BASIS OF HIS DISABILITY

The third and final element plaintiff must establish is that the Camps' refusal of Adam was "on the basis of [his] disability." 42 U.S.C. § 12182(a). Even crediting defendants' reasons for denying Adam admission, they are intrinsically related to Adam's HIV status and demonstrate discrimination under the ADA and NYHRL.

[22] Oxford's English Dictionary defines "summer camp" as "a camp providing recreational and sporting facilities during the summer holiday period, usually for children." SHORTER OXFORD ENGLISH DICTIONARY 3103 (6TH ED. 2007).

A. The Camps Intentionally Discriminated "On the Basis of a Disability"

In an intentional discrimination ("disparate treatment") case, a plaintiff need only show that disability was "a motivating factor" in defendants' decision to deny admission. Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 579 (2d Cir. 2003) (emphasis added). Given the ADA's "mandate for the elimination of discrimination against individuals with disabilities", a "mixed-motive theory of causation" is applicable in intentional discrimination cases under the ADA. Parker v. Columbia Pictures Indus., 204 F.3d 326, 336-37 (2d Cir. 2000). Thus, a plaintiff "need not demonstrate that disability was the sole cause of the adverse . . . action. Rather, [plaintiff] must show only that disability played a motivating role in the decision." Id. at 337; see also Innovative Health Sys., Inc. v. City of White Plains, 931 F. Supp. 222, 241 (S.D.N.Y. 1996) (plaintiff need not establish that defendants were motivated "solely, primarily, or even predominately by . . . disability"), aff'd, 117 F.3d 37 (2d Cir. 1997); Henrietta D. v. Bloomberg, 331 F.3d 261, 278 (2d Cir. 2003) ("the existence of additional factors causing an injury does not necessarily negate the fact that the defendant's wrong is also the legal cause of the injury.").

Neither must plaintiff show that defendants "were motivated by some purposeful, malicious desire to discriminate . . . ." Innovative Health Sys., 931 F. Supp. at 241. In fact, the ADA, a remedial statute that must be "construed broadly," Henrietta D., 331 F.3d at 279 (citation omitted), is meant "to address the discriminatory effect of benign actions or inaction . . . ." Morvant, 898 F. Supp. at 1166 (emphasis in original); see also Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 206 (E.D.N.Y. 2000) (collecting cases). It is also designed to eliminate actions based on arcane views, "stereotypes or fear [or] . . . generalizations about [people with] disabilit[ies]." County of Centre, 242 F.3d at 448 (quoting H.R. Rep. No. 101-485(III), at 45

(1990), reprinted in 1990 U.S.C.C.A.N. 445, 468); Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000) (ADA prohibits judging people "based on unfounded fear, prejudice, ignorance, or mythologies") (internal quotation marks and citation omitted).

Even crediting each of defendants' various reasons for denying Adam admission, none is independent of Adam's HIV status; rather, they are all based on stereotypes and irrational fear about people with HIV. They thus violate the ADA and the NYHRL as a matter of law.

1. The Alleged Recommendation for a Separate Pool and Toilet

The Camps argue that their decision to deny Adam admission to the DMBA was motivated in part by Dr. Levi's supposed recommendation for a separate pool and a separate toilet, which they did not have time to provide. See, e.g., EG Notes, EG 87:24-88:1, RK 90:4-93:4. At trial, plaintiff would argue these reasons were pretextual.

However, crediting them, not only is the Camps' reliance on the supposed need for a separate pool and toilet directly related to HIV, but it is also discriminatory as a matter of law. If this premise were accepted, any place of public accommodation with pools or toilets would be able freely to discriminate against all individuals with HIV on the premise presented here that the defendant would have to provide a separate pool or toilet. In fact, by the time Adam applied to the DMBA, public health authorities, such as the Center for Disease Control, the New York Department of Health, and the Surgeon General, had recognized for almost 20 years that HIV cannot be transmitted through the use of pools or toilets,[23] and thus had placed no restriction on an HIV-positive child's participation in schools or athletic programs.[24] The notion that a child with HIV would warrant a separate pool or toilet flies in the face of medical and public health

[23] See Plaintiff's Statement Pursuant to Local Rule 56.1 at ¶¶ 91-98; see also Dist. 27, 502 N.Y.S.2d at 330 (describing HIV virus as "relatively fragile[,]. . . inactivated by disinfectants, such as household bleach").

[24] See Plaintiff's Statement Pursuant to Local Rule 56.1 at ¶¶ 99-104.

standards, recognized by public health authorities whose views are entitled to "special weight and authority." Bragdon, 524 U.S. at 650. There is nothing but myth to support the notion that Adam might require separate facilities, and denying Adam on the basis of such "stereotypes or fear" and "speculation about the risk or harm to others" is precisely what the ADA prohibits. See County of Centre, 242 F.3d at 448 (quoting H.R. Rep. No. 101-485(III), at 45 (1990)); see also Arline, 480 U.S. at 279 (Rehabilitation Act is meant to protect "against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws'") (citation omitted). Decisions about admitting an HIV-positive person must be based on an individualized assessment of an applicant's condition, and on "medical or other objective evidence." Bragdon, 524 U.S. at 649.[25]

Citing the overwhelming medical evidence that an HIV-positive child poses no danger in the school and athletic contexts, courts since the 1980s have held that excluding children from schools and childcare programs on the basis of HIV-status is discriminatory. See, e.g., Dist. 27, 502 N.Y.S.2d at 334-35 (holding that to exclude children on the basis of HIV status violates the Rehabilitation Act); Chalk v. U.S. Dist. Ct., 840 F.2d 701, 706-09 (9th Cir. 1988) (citing "overwhelming consensus of medical opinion" that HIV is not transmittable in school setting, and granting a preliminary injunction against school's attempt to exclude HIV-positive children); Ray v. Sch. Dist. of DeSoto County, 666 F. Supp. 1524, 1531 (M.D. Fla. 1987) (granting preliminary injunction against school seeking to ban HIV-positive, hemophiliac children from attending); Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440, 446 (N.D. Ill. 1988)

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[25] See also Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248 (9th Cir. 1999) ("[t]o protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, the Supreme Court has required an . . . inquiry [under the ADA] that relies on the best current medical or other objective evidence") (citing Bragdon, 524 U.S. at 649). Although this standard is generally applied to analyze whether a defendant has properly relied on the so-called "direct threat" defense in Title III cases, see 42 U.S.C. § 12182(b)(3), courts have also applied it where defendants acted on the basis of medical views that were not objective or reasonable. See infra p. 21.

(finding plaintiff likely to succeed on claim that excluding HIV-positive children from a regular classroom violated Rehabilitation Act).[26]

The Camps' views were plainly contrary to these well-established medical views and thus violated the ADA and the NYHRL. The Camps cannot shield themselves from liability by arguing that they were "handcuff[ed]" by Dr. Levi's recommendations. RK 94:5-10. This "honest belief" defense has been rejected time and time again when used by employers who relied on faulty medical opinions to deny jobs to disabled people.[27] Likewise, camp directors must base decisions on the best available, objective and reasonable medical evidence. "[T]here is no defense of reasonable mistake [because] [a]ny other outcome would defeat the ADA's attempt to eradicate what may be deeply rooted and seemingly rational presumptions about the . . . disabled." Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 193 (3d Cir. 1999). They must also educate themselves about HIV. See, e.g., Holiday, 206 F.3d at 644 (holding that there was sufficient evidence that municipality violated ADA when it refused to hire an HIV-positive applicant to the police force by relying on a cursory medical opinion without educating themselves about HIV).[28]

In Gillen v. Fallon Ambulance Service, Inc., 283 F.3d 11 (1st Cir. 2002), a genetic amputee with only one functioning arm brought an ADA claim against an ambulance service that

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[26] Cases interpreting the Rehabilitation Act of 1973, 29 U.S.C. § 790, et seq., which prohibits disability-based discrimination in federally-assisted programs and activities, see generally Powell, 364 F.3d at 85, provide useful guidance as to the meaning of discrimination "by reason of disability" under Title III. See, e.g., Henrietta D., 331 F.3d at 272 (noting that courts "treat claims under the [ADA and Rehabilitation Acts] identically").

[27] Cases interpreting Titles I and II of the ADA also provide useful guidance as to the meaning of discrimination "by reason of disability" under Title III. See, e.g., Henrietta D., 331 F.3d at 274 n.7 (holding that because the term "discrimination" of Title II is not defined, it "may take its meaning from Title I"); Lowe v. Ala. Power Co., 244 F.3d 1305, 1308-09 (11th Cir. 2001) (applying Title III direct threat standard to Title I case).

[28] See also Pathmark Stores, 177 F.3d at 192 ("under the ADA, it is the employer's burden to educate itself about the varying nature of impairment"); EEOC v. Browning-Ferris, Inc., 262 F. Supp. 2d 577, 591 (D. Md. 2002) (faulting employer for not seeking "input from any medical doctors with expertise in the disability involved" in the employee's application).

refused to hire her based on the view that she was not qualified to perform the job of emergency medical technician. The defendants relied in part on the opinion of a doctor, who had expertise in emergency medicine, that plaintiff was not able to perform the required duties. However, the doctor had not even met with plaintiff or conducted a physical examination, and had instead relied solely on his review of another doctor's files and opinions about the plaintiff. Id. at 16-19. The First Circuit rejected the defense, noting that it was inapplicable when the "physician neglected fully to examine the applicant or to conduct an individualized examination of the effects of a known disability – and the [decision-maker] knew as much," and if "the physician offered his opinion without citing objective evidence to show how the disability would affect the particular applicant's [employment]." Id. at 32. The court thus held that an employer "cannot evade its obligations under the ADA" by "slavishly defer[ring] to a physician's opinion without first pausing to assess the objective reasonableness of [the] conclusions." Id. at 31.[29]

Here too Roberta Katz, like the defendant in Gillen, acted "slavishly" on the basis of statements from a person not the primary physician that were blatantly inconsistent with the overwhelming medical standards in effect for 20 years, without assessing the objective

[29] See also Browning-Ferris, 262 F. Supp. 2d at 591 (rejecting employer's "good faith" reliance on opinion of doctor who had "minimal experience" with the disability at issue, spent only fifteen minutes examining the applicant, and based his opinion on "neither the most current medical knowledge or the best available objective evidence"); Ollie v. Titan Tire Corp., 336 F.3d 680, 686-87 (8th Cir. 2003) (affirming judgment that employer violated the ADA by relying "on its own [broad] interpretation of the doctor's advice and its own opinion that [plaintiff] could not perform all essential functions of [the job]"); Lowe, 244 F.3d at 1308-09 (rejecting defense of employer's good faith reliance on doctor's advice when it was not based on the "best available objective evidence").

The rejection of the so-called "honest belief rule" applies with equal force in Title III cases because it stems from the Supreme Court's decision in the leading HIV/Title III case, Bragdon, 524 U.S. at 649, that a health care provider could not escape liability for refusing to treat an HIV-positive patient under a good faith belief that there was a risk of harm. Instead, the decision must be based on medical or other objective scientific evidence. See also Sumes v. Andres, 938 F. Supp. 9, 12 (D.D.C. 1996) (holding that defendant doctor violated ADA for refusing to treat plaintiff based on stereotypes and fear, and noting that "[a] strict rule of deference [to a doctor's medical opinion] would enable doctors to offer merely pretextual medical opinions to cover up discriminatory decisions" particularly if the reasons "encompass[] unjustified consideration of the handicap itself") (internal quotation marks and citations omitted).

reasonableness of the statements or engaging in a particularized assessment of Adam's condition (based on his completed medical forms) and thus violated the ADA.

Indeed, the ADA elsewhere provides an affirmative defense permitting a defendant to rebut a claim of discrimination by proof that a significant risk of contagion exists "based on medical or other objective evidence." See 42 U.S.C. § 12182(b)(3). This direct threat defense allows entities to exclude disabled individuals not when "*a* risk [of contagion] exists, but [when] it is *significant.*" Bragdon, 524 U.S. at 649 (emphasis added). Accepting the Camps' argument here would eviscerate the direct threat defense. A defendant who could not prove the objective reasonableness of its decision that there was a significant risk of contagion would argue – as the Camp does here – that it had not discriminated because its decision was based on good faith reliance on another party.

Not only is the supposed recommendation of Dr. Levi not a shield to liability, but the Camps' reliance on a physician's opinion for which there is no "objective medical and scientific support" is itself evidence of discrimination "because of" a disability. Holiday, 206 F.3d at 646-47; see also Lesley v. Hee Man Chie, 250 F.3d 47, 55 (1st Cir. 2001) (noting that a decision can be "discriminatory on its face, [to the extent] it rested on stereotypes of the disabled"); Gillen, 283 F.3d at 29 (holding that if "assumptions about an applicant's disability are unreasonable . . . refusal to hire will engender liability under the ADA").

2. Plaintiff's Desire to Keep Adam's HIV Status Confidential

Defendants also place great emphasis on the fact that plaintiff did not list Adam's HIV status on Adam's Application and that, according to Ms. Katz's testimony, plaintiff did not want Dr. Bernstein to record it in Adam's Medical Report. See, e.g., RK 71:11-72:5, 101:14-22. These reasons for denying Adam's admission violated the ADA as a matter of law, for the same

reasons the concern with the need for a separate pool and toilet.

First, the Camps' concern relates to Adam's disability on its face: the evidence is that it was not that Mrs. Doe failed to complete the application but what she omitted (Adam's HIV status) that caused the Camps to deny him admission. Had Adam not been HIV-positive, this reason for excluding Adam would not have existed.

Second, denying Adam admission because his mother wanted to keep his HIV status confidential is discriminatory as a matter of law. The Application Form, which plaintiff completed, allowed an applicant to list general "Other Health Comments." The Medical Report, which Dr. Bernstein completed, sought "any information concerning your child's health that the camp should know." Under the objective medical standards prevailing since the mid-1980s and in 2004, plaintiff and Adam's pediatrician were not required to disclose Adam's HIV status as a result of either of those questions.[30] Consistent with this standard, Adam Doe's HIV-doctor, Dr. Natalie Neu, has attested that it is her practice not to disclose her minor patients' HIV status to school programs or camp. See Neu Aff. ¶¶ 20-23. The Camps' view that plaintiff's desire to maintain confidential Adam's HIV status constitutes concern-worthy dishonesty demonstrates that it was Adam's HIV status and the Camps' preconceptions about the disease that was the basis for its unlawful decision. See supra at III.A.1.

Nor is it a valid defense that Dr. Bernstein may have, for the first time in his relationship with the Camps, called to disclose an applicant's health information when the applicant wished to keep such information confidential. Any alarmism Ms. Katz experienced as a result of that call stemmed from her ignorance of the relevant medical standard. Moreover, to the extent Ms. Katz was concerned about Dr. Bernstein's call, she had an obligation, which she eschewed, to

[30] See Plaintiff's Statement Pursuant to Local Rule 56.1 ¶¶ 105-109.

gather objectively reasonable information about how to assess Dr. Bernstein's comments. Gillen, 283 F.3d at 31-32 (noting obligation of "pausing to assess the objective reasonableness of the physician's conclusion") (citing Holiday, 206 F.3d at 645); see also supra note 28. The Camps do not deny that they failed to meet this standard. See supra at III.A.1.

Plaintiff does not argue that the Camps are not permitted under the ADA to ask questions about an applicant's health. What the ADA does not tolerate, however, is reacting to such information based on "stereotypes or fear," H.R. Rep. No. 101-485(III), at 45 (1990). As succinctly stated in the DOJ's Technical Assistance Manual interpreting the ADA:

> "[t]he ADA prohibits unnecessary inquiries into the existence of a disability. ILLUSTRATION 1: A private summer camp requires parents to fill out a questionnaire and to submit medical documentation regarding their children's ability to participate in various camp activities. The questionnaire is acceptable if the summer camp can demonstrate that each piece of information requested is needed to ensure safe participation in camp activities. *The camp, however, may not use this information to screen out children with disabilities from admittance to camp.*"

TAM § III-4.1300 (emphasis added); see also U.S. Dep't of Justice, Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act, at Q.17 (Oct. 1997) (noting that children with HIV and AIDS may not be excluded from day care centers), available at http://www.ada.gov/childq%26a.htm (last visited Feb. 10, 2009). The Camps thus violated the ADA and the NYHRL by using plaintiff's desire for confidentiality as a basis for denying Adam admission, and by failing to take the necessary steps to put Dr. Bernstein's call into context.[31]

B. Defendants' Concern with an Alleged Prior Illness Does Not Absolve Them of Liability

Finally, the Camps aver that another one of the "number of things" that figured into the decision to exclude Adam was that they "didn't have any information" about why Adam had

[31] In any event, at trial plaintiff would argue that the Camps did not deny Adam admission on the basis of the mother's decision to withhold information, but rather because of Adam's HIV status alone.

missed an earlier summer camp, and about side effects of Adam's medication. See RK 88:5-23, 102:12-103:8, CK 34:17-35:20.[32] Notably, the Camps never expressed this concern to plaintiff when explaining the reasons for Adam's denial.[33]

As the Second Circuit has recognized, the ADA does not require that impermissible motivations be the only factors that caused a denial that violates the ADA. See supra p. 16. In Henrietta D., 331 F.3d at 265, HIV-positive plaintiffs brought suit against state agencies charged with providing social services to HIV-positive individuals, arguing that the services were such that plaintiffs had difficulty accessing them because of their disability, in violation of Title II of the ADA. Defendants argued that the denial of services was not "because of . . . disabilit[y]," but rather due to "systemic problems that create obstacles to access for everyone." Id. at 277. The Second Circuit rejected this contention and affirmed the judgment for the plaintiffs, holding that "[e]ven accepting [defendants'] contention as true, we could still be faced with a situation where either of the two alleged causes of denial of access would independently deny meaningful access even were the other fixed. Traditional concepts of causation suggest that under such circumstances, the existence of the 'disability cause' alone is enough to sustain the plaintiffs' claims." Id. at 278. The court thus rejected the defendants' contention that the disability was not the "cause" of the denial simply because the denial would have resulted in any case due to other

[32] It is unclear whether the Camps' argument is that its concern with side effects of medication is also concern about Adam's HIV medication, see RK 88:10-23 (asking Dr. Levi questions about HIV medication listed in Medication Form), or a concern about the medications that relate to the supposed illness that made Adam missed camp, see EG 99:20-25. The concern about side effects of HIV medication is, on its face, "based on" Adam's disability. Moreover, for the reasons outlined in section III.A.1, the concern flies in the face of medical opinion that recommends no school and sports setting restriction on HIV-positive children. Finally, the concern is also directly contrary to the objective medical evidence received from Adam's pediatrician, Dr. Bernstein, who listed no side effects of the medication, and recommended no restriction on Adam's ability to attend camp. The concern about side effects of the other alleged medication is, as discussed herein, insufficient to shield the Camps from liability.

[33] As noted, plaintiff denies that she informed the Camps that Adam had been missed a camp due to illness. See JD Aff. ¶ 14. However, plaintiff does not, and could not at summary judgment, ask the Court to make a credibility assessment as to whether the proffered reason actually entered into the Camps' calculations. Instead, plaintiff argues that this reason, even if true, is insufficient to absolve the Camps of liability for violating the ADA with their discriminatory reactions after learning about Adam's HIV status.

reasons, noting: "the existence of additional factors causing an injury does not necessarily negate the fact that the defendant's wrong is also the legal cause of the injury." Id.; see also Parker, 204 F.3d at 336-37; Innovative Health Sys., 931 F. Supp. at 241; Howe v. Hull, 874 F. Supp. 779, 789 (N.D. Ohio 1994) (noting that Title III explicitly differs from the Rehabilitation Act in that it does not require that the improper reason be the sole reason for the denial of services); cf. Knutson v. AG Processing, Inc., 273 F. Supp. 2d 961, 995 (D. Iowa 2003) (ADA "does not require that disability discrimination be the sole cause of an adverse employment action").

Defendants have argued that their decision to deny Adam admission was based on a "number of things." RK 104:25. As established in section III.A, supra, the various other "things" were all based on Adam's disability and on impermissible stereotypes about that disability, and thus suffice to establish liability. It is immaterial whether the Camps' apparent belief that Adam missed a prior camp was an additional reason for its denial. Henrietta D., 331 F.3d at 278; Howe, 874 F. Supp. at 789. Moreover, this reason is itself about Adam's HIV status – the Camps' denial was not because this was a child who had had a virus (all children have viruses, and the Camps admit they had never denied a child admission); rather, the denial was because Adam was a child *with HIV* that had had a virus.

CONCLUSION

For the foregoing reasons, the Court should grant plaintiff's motion for summary judgment.

Dated: New York, New York
February 13, 2009

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