Restricting Access of HIV-Infected Patients to Infertility Services

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It is estimated that in 2006 fewer than ten centers in the United States providing infertility services grant access to HIV-infected patients.¹ Some IVF centers even have published policies expressly denying HIV-infected women access to IVF services based on the justification of the risk of vertical transmission of HIV to the infant and concerns over liability from wrongful birth prosecution.² Moreover, a survey of clinic directors of in vitro fertilization (IVF) centers in the United States revealed that 81.5% would not offer infertility services to women infected with HIV and 12% were unsure.³ A recent publication in Fertility and Sterility expressed concerns over denial of services to HIV-infected patients seeking infertility treatment in the United States.⁴

The denial of infertility services to HIV-infected patients may need to be reevaluated taking into consideration federal statutes and case law precedent that prohibit denial of medical services to HIV-infected patients. Also, with the initiation of antiviral therapy during pregnancy, the risk of transmission to the baby is now greatly reduced. Currently, the risk of vertical transmission from the mother to baby during pregnancy is estimated to be reduced from 25% to less than 2% with the combined use of antiviral therapy and an elective cesarean section.⁵ For serodiscordant couples in which the man is infected with HIV, sperm preparation using density gradients and swim-up techniques to isolate HIV free sperm followed by polymerase chain reaction (PCR) analysis to confirm absence of detectable HIV virus in the specimen to be used for insemination virtually eliminates the risk of horizontal transmission to the females.⁶

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⁴ Eric S. Daar & Judith F. Daar, Human Immunodeficiency Virus and Fertility Care: Embarking on a Path Of Knowledge and Access, 85 FERTIL. STERIL. 298-300 (2006).
Legal Analysis

Individuals with HIV are afforded protection from discrimination based on their HIV status under the provisions of the American with Disabilities Act (ADA), 42 U.S.C.A § 12102 and the Rehabilitation Act, 45 CFR § 84.3. The ADA defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” In *Bragdon v. Abbott*, 524 U.S. 624 (1998) the United States Supreme Court extended protection to asymptomatic HIV-infected individuals on the premise that HIV impaired one’s ability to procreate and thus was an “impairment that substantially limits one or more of the major life activities.” The Rehabilitation Act is applicable to any program or activity that receives Federal financial assistance while the ADA is applicable to any place of public accommodation which includes “the professional office of a health care provider.”7 Thus the protections afforded to HIV-infected patients is applicable to HIV-infected patients who seek the services of physician specializing in the treatment of infertility whether the physician is in private practice or in a university setting.

Despite the protections provided for by federal statutes and the United States Supreme Court decision in *Bragdon v. Abbott*, there is a narrow exception in which it may be permissible for a physician to refer an HIV-infected patient to another provider. In *Lesley v. Chie*, 250 F.3d 47 (1st Cir. 2001), the Court of Appeals in Massachusetts found in favor of an obstetrician-gynecologist who was sued for discrimination by a HIV-infected pregnant patient after he referred her to another provider. The physician in this case had never delivered the baby of a woman who was infected with HIV and believed it was in the patient’s and her baby’s best interest that the patient be cared for by a provider with more experience in treating HIV-infected pregnant patients. The basis of the court’s decision in favor of the obstetrician-gynecologist was that the physician had a medical justification for referring the patient to another provider that had more experience in treating HIV-infected patients. The court, in distinguishing this case from the United States Supreme Court decision in *Bragdon v. Abbott*, emphasized that the issue was the health the patient herself and not the risk of HIV transmission to others which can be minimized by universal precautions.

Guidelines from the American Medical Association, American Society of Reproductive Medicine and the American College of Obstetricians and Gynecologists

The American Medical Association (AMA) has guidelines which may help support a physician’s decision to refer a HIV-infected patient to another provider with more experience. A provision in AMA Code of Ethics, E-9.131, entitled *HIV-Infected Patients and Physicians*, states the following:

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7 Section 12183(7)(F) of the Americans with Disability Act provides that a “public accommodation” does include the “professional office of a health care provider.”
A physician may not ethically refuse to treat a patient whose condition is within the physician’s current realm of competence solely because the patient is seropositive for HIV. Persons who are seropositive should not be subjected to discrimination based on fear or prejudice. When physicians are unable to provide the services required by an HIV-infected patient, they should make appropriate referrals to those physicians or facilities equipped to provide such services.8

Similarly, the American Society of Reproductive Medicine (ASRM) in an ethics committee opinion states the following:

Unless health care workers can show they lacked the skills and facilities to treat HIV positive patients safely...they may be legally as well as ethically obligated to provide requested reproductive assistance.9

The American College of Obstetricians and Gynecologists (ACOG) Committee on Ethics provides the following:

Assisted reproductive technology should not be denied to HIV-infected couples solely on the basis of their positive serostatus...Patients should be cared for by practitioners who have current knowledge and expertise in this field.10

The ethical guidelines of the AMA, ASRM and ACOG are all consistent the court’s holding in Lesley v. Chie, 250 F.3d 47 (1st Cir. 2001). A provider of health services cannot refuse to treat a patient based solely on their HIV status but may refer the HIV-infected patient to another provider if there is a medical justification that will benefit the patient.

Conclusion

The law is clear that individuals infected with HIV cannot be denied access health care services based solely on their HIV status. Whether the protection afforded to HIV-infected individuals seeking health care services should also include infertility services has never been directly addressed. A search using Westlaw and LexisNexis commercial research engines failed to reveal any cases where an infertility provider was sued for refusing to provide services to an HIV-infected individual. However, the broad provisions of the Americans with Disability Act, the Rehabilitation Act and the precedent set by the United States Supreme Court in Bragdon v. Abbott prohibiting discrimination

9 The Ethics Committee of the American Society for Reproductive Medicine, Human Immunodeficiency Virus and Infertility Treatment, 82 FERTIL. STERIL. S228-231 (2004).
of HIV-infected individuals are likely to apply to physicians that provide infertility services. In addition ethical guidelines provided by the American Society of Reproductive Medicine and the American College of Obstetricians and Gynecologists support the concept that HIV-infected individuals should not be denied infertility services solely based on their HIV status.

In lieu of the narrow exception in which it may be legally permissible to refer an HIV-infected individual to a provider with more expertise, physicians providing infertility services have an ethical obligation to ensure that the justification for the referral is genuinely in the patient’s best interest and not just a pretext. By referring HIV-infected patients to other clinics, more of a burden is placed on those clinics that provide infertility services to HIV-infected patients. Moreover, since it is estimated that 97% of centers registered with the American Society of Reproductive Medicine do not provide services to HIV-infected individuals, it may not be feasible for HIV-infected patients to receive infertility service once turned away by an infertility specialist in their community.\textsuperscript{11}

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\footnotesize{\textsuperscript{11} Mark V. Sauer, \textit{American Physicians Remain Slow to Embrace the Reproductive Needs of Human Immunodeficiency Virus-Infected Patients}. 85 FERTIL. STERIL. 295-297 (2006).}