

HIV Discrimination, Privacy and Confidentiality: Impact on the Delivery of Oral Healthcare

Presented by:

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Legal Concerns

- HIV Discrimination, Privacy and Confidentiality
- Persons with HIV (PWH) are protected by a variety of state and federal laws against discrimination, especially in places of public accommodation. The 1990 Americans with Disabilities Act codified this as a national mandate to eliminate discrimination against persons with disabilities.
- We will discuss the impact of these on the delivery of oral healthcare.

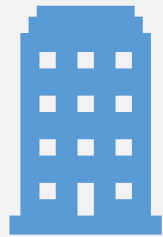
A large, abstract blue watercolor splash graphic on the left side of the slide, with various shades of blue and white ink-like textures.

State Laws on Public Accommodation

This prohibits discrimination based on a person's disability in access to or treatment in a place of public accommodation.

State statutes usually define a “public accommodation” in more general terms than federal law, such as any business or service establishment that is open to the public and accepts public patronage.

What is a public accommodation?



A PUBLIC ACCOMMODATION IS A PRIVATE ENTITY THAT OWNS, OPERATES, OR LEASES TO A PLACE OF BUSINESS OR BUILDINGS THAT ARE OPEN TO THE PUBLIC.



PLACES OF PUBLIC ACCOMMODATION INCLUDE A WIDE RANGE OF ENTITIES, SUCH AS RESTAURANTS, HOTELS, THEATERS, DOCTOR'S OFFICES, DENTIST'S OFFICES, HOSPITALS, RETAIL STORES, HEALTH CLUBS, MUSEUMS, LIBRARIES, PRIVATE SCHOOLS, AND DAY CARE CENTERS.

State Laws on Privacy Protection

Provides that “a person shall have a right against unreasonable, substantial or serious interference with his privacy.”

Courts have tried to determine if there is any legitimate business reason for a disclosure; and if so, courts will balance the legitimate reason against the nature and substantiality of the intrusion into privacy.

This law applies to employees as well as patients.



Privacy Protection Best Practices

Train all staff and employees on privacy law.

Only staff with direct clinical care should have access to protected medical information

Limit access to protected medical information.

Be cautious in your progress notes but include all information about patient and visit.

Create your own medical records or information release form.

Make sure every record that goes out is inspected.

Be wary of subpoenas. Consult an attorney, consult your patient, get permission to talk to your patient's attorney.

Prudent to err on the side of requesting an HIV-specific release.



Federal Law:

Disability
Discrimination
Laws

People with HIV are protected under federal laws:

1. The Americans with Disabilities Act (ADA) of 1990
2. The Rehabilitation Act of 1973



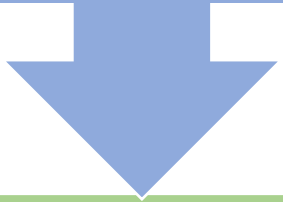
Definition of a Disability

1. A physical or mental impairment that substantially limits one or more of the major life activities of such individual
2. A record of such impairment
3. Being regarded as having such impairment.

The “regarded as” prong of the definition covers individuals with asymptomatic HIV even if they are not limited in *any* major life activity but, are excluded from services based on the negative perceptions or reactions of others to their physical impairment.

What constitutes discrimination?

Discrimination is the failure to give a person with a disability the equal opportunity to use or enjoy the public accommodation's goods, services, or facilities.



Examples of ADA violations would include:

A dentist who categorically refused to treat all persons with HIV or AIDS.



The Federal Rehabilitation Act of 1973

In 1987 a clarifying position was added to Section 504.

Section 504 prohibits discrimination against people with disabilities from agencies or programs who receive *federal funds*, including private dental or medical offices and hospitals that accept Medicare or Medicaid.

Only applies to places which receive federal funds. If any program in an institution receives federal funds (even federal research monies), then all programs and employees are covered by the Rehabilitation Act.

The Federal Rehabilitation Act of 1973: Enforcement Provisions



Enforcement Provisions are stronger than the ADA. Plaintiffs may obtain injunctive relief, emotional distress, and other compensatory damages.

Punitive damages may be awarded in the jury's discretion to "deter egregious discriminatory conduct."

The Americans with Disabilities Act of July 26, 1990

Is a comprehensive federal law aimed at eliminating discrimination against people with disabilities, including people with HIV.

Extended disability discrimination protection to private places of public accommodation.

“Is perhaps the most sweeping civil rights legislation passed since the enactment of the Civil Rights Act of 1965.”

Provides “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and picks up where Section 504 left off.

What is the ADA?

The Americans with Disabilities Act (ADA) gives federal civil rights protections to individuals with disabilities like those provided to individuals based on race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications.

ADA Titles I, II, III

The ADA prohibits discrimination against people with disabilities under:



Title I: employers



Title II: state and local
governments

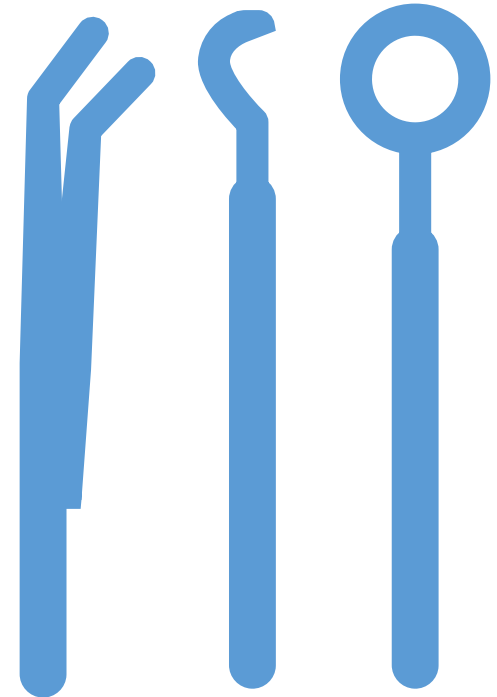


Title III: privately owned
businesses referred to as
“places of public
accommodation”

ADA Title III

As it applies to dentistry, it is illegal to:

- Deny an HIV-positive person the “full and equal enjoyment” of dental services or to deny an HIV-positive person the “opportunity to benefit” from dental services in the same manner as other patients.
- Establish “eligibility criteria” for the privilege of receiving dental services. These criteria tend to screen out persons who have tested positive for HIV.
- Provide “different or separate” services to patients who are HIV positive or fail to provide services to patients in the most “integrated setting.”
- Deny equal services to a person who is known to have a “relationship” or “association” to a person with HIV, such as a spouse, partner, child, or friend.



Applying these specific provisions of the ADA to dentistry, the following practices are illegal:



A dentist cannot decline to treat a person with HIV based on a perceived risk of HIV transmission or because the dentist simply does not feel comfortable treating a person with HIV.



A dentist cannot agree to treat a patient only in a treatment setting outside the dentist's regular office, such as a special hospital dental clinic.



A dentist cannot require that a patient take an HIV test prior to providing dental treatment.



The ADA requires that referrals of HIV-positive patients be made on the same basis as are referrals for other patients.



Under certain circumstances, it may well be an ADA violation to use unnecessary additional precautions which tend to stigmatize a patient simply on the basis of HIV status.



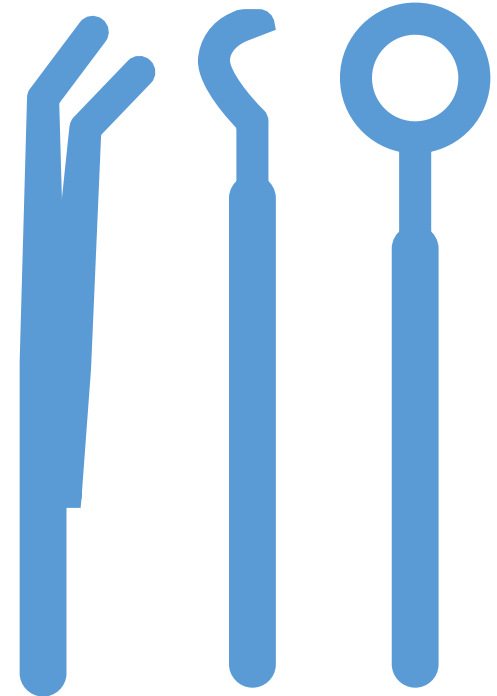
A dentist cannot limit the scheduled times for treating HIV-positive patients, such as insisting that an HIV-positive patient come in at the end of the day.

ADA Title III

Illegal Referrals and/or Refusals to Treat

In terms of referral, regulations by the United States DOJ state that a **healthcare** provider may refer a patient with a disability only if:

1. The treatment being sought is outside the referring provider's area of specialization.
2. In the normal course of operations, the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.



Are health care providers required to treat all persons with HIV or AIDS, regardless of whether the treatment being sought is within the provider's area of expertise?



No. A health care provider is not required to treat a person who is seeking or requires treatment or services outside the provider's area of expertise. However, a health care provider cannot refer a patient with HIV or AIDS to another provider simply because the patient has HIV or AIDS.

The referral must be based upon treatment being outside the expertise of the provider. Not the patient's HIV status.



Example:

A person with HIV goes to the dentist for a prophylaxis. The dentist refers this individual to another dental office because he/she is “not equipped” to treat persons with HIV.

Because there is no special equipment necessary for providing routine dental care to those with HIV/AIDS beyond universal precautions that a provider should use when treating all patients, this “referral” would violate the ADA.



Can a public accommodation charge for reasonable modifications in its policies, practices, or procedures, or for the provision of communication aids and services?

No, a public accommodation may not impose a surcharge on an individual with a disability or any group of individuals with disabilities to cover the costs necessary to provide nondiscriminatory treatment.



Direct Threat

A direct threat is defined as a “significant risk to the health and safety of others that cannot be eliminated by a modification of policies, practices, or procedures.”

Assessment of a direct threat is made on the basis of reasonable judgment that relies on current medical knowledge or on the best available objective evidence to:

1. The nature, duration, and severity of the risk.
2. The probability that a potential injury will occur.
3. Whether reasonable modifications to policies, practices, and procedures will mitigate the risk.

The Supreme Court ruling that included HIV, non-AIDS, in the ADA involved a dentist and a patient

15 Years of ADA Protections for People with HIV

GLAD's 1998 culture-shifting U.S. Supreme Court victory in *Bragdon v. Abbott* established that:

People living with HIV are protected against discrimination by the federal Americans with Disabilities Act.

This protection applies to:

- employment,
- public services, and
- public accommodations.

Medical providers cannot refuse to treat patients with HIV based on their own fear of contracting HIV.

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GAY & LESBIAN ADVOCATES & DEFENDERS

Reliance on Rehabilitation Act

- HIV infection is not included in the list of specific disorders constituting physical impairments, in part because HIV was not identified as the cause of AIDS until 1983. In this case, Congress did more than suggest this construction; it adopted a specific statutory provision in the ADA directing as follows:
- “Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 ([29 U.S.C. 790](#) et seq.) or the regulations issued by Federal agencies pursuant to such title.” [42 U.S.C. § 12201\(a\)](#).
- The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.
- Respondent’s claim throughout this case has been that the HIV infection placed a substantial limitation on her ability to reproduce and to bear children. Which was argued as a limitation of a major life activity although that was not on the original HEW list of major life activities when this Act was passed. Reproduction falls well within the phrase “major life activity.” Reproduction and the sexual dynamics surrounding it are central to the life process itself. The Act addresses substantial limitations on major life activities, not utter incapacities. Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation.

Review of Significant Cases

United States v. Drew B. Morvant D.M.D.: United States District Court for the Eastern District of Louisiana, March 23, 1995

The court ruled that a general dentist violated the ADA when he referred a patient with HIV to another dentist because of the false belief that routine dental care for a patient with HIV requires a specialist. They agreed with dental experts that no special training, other than that possessed by a general dentist, is required to provide general dental care to patients with HIV. No such specialty is recognized by the dental profession. The court specifically rejected the dentist's argument that he had not kept up with the literature and training necessary to treat patients with HIV. The court specifically noted the extensive educational materials available to dentists and said that Dr. Morvant "chose to ignore the information and in doing so ran afoul of the law as it now stands."

D.B. v. Howard
Bloom, D.D.S.:
United States
District Court for
the District of
New Jersey,
August 15, 1995

A federal court in New Jersey ruled that a dentist violated the ADA and New Jersey state law by refusing to treat a patient with HIV and referring him to a “special clinic for HIV,” someone “better suited to take care of [his] needs.” The court ruled the referral “a pretext for discrimination because no specialized skills are required to treat patients who are HIV-positive.” The court also found that as general dentists, the defendants “had sufficient expertise and training to provide general dental care to persons with HIV/AIDS.” In addition, the court found the defendant’s actions to be “particularly offensive in light of [the dentists] status as licensed healthcare providers who ought to be aware of and practice universal precautions.”

Financial damages were awarded as well as a signage requirement for the waiting room under both the ADA and The Rehabilitation Act

State of Minnesota v. Clausen (1992)

G.S. v. Karin Baksh, Illinois Human Rights Commission July 1994

In a 1992 decision, the Minnesota Supreme Court upheld a finding by the Minnesota Human Rights Commission that a dentist had illegally discriminated against an asymptomatic HIV-positive patient by refusing treatment and referring the patient to the University of Minnesota dental clinic. The court noted that the intended dental procedure was within the dentist's area of expertise and that the dentist would not have made the referral for a person who was not HIV-infected.

In this case a dentist referred a patient to Northeastern University dental clinic, and in so doing violated his rights under provisions of the Illinois Human Rights Commission. They ruled the dentist acted out of "fear and ignorance."

Castle Dental - Houston

Was settled with a consent decree to pay compensatory damages for refusal to treat an HIV-positive patient. The agreement included staff training and sending monitoring reports to the DOJ.). The complaint alleges that the Defendants, who lease and operate a chain of dental and orthodontic facilities, have violated title III of the ADA by excluding persons who have tested positive for the Human Immunodeficiency Virus (HIV) from receiving services from there can testify to an event in which a Castle Dental Center employee physically threw him out of the Castle office, despite his being in great pain from an abscessed tooth, because of his HIV.

East Hartford, CT

In settling a complaint against a dentist for allegedly refusing to treat a patient with AIDS, the dentists agreed to implement a policy that they would not discriminate based on HIV/AIDS. There were civil penalties since this was under the ADA and Section 504 of the Rehab Act

Woodlawn
Family
Dentistry –
Alexandria VA

Violation of Title III of ADA

Dental Office is a Place of Public Accommodation

United States determined they discriminated against patient when failing to offer the same options in appointment scheduling as offered to other patients.

Actions

- Woodlawn Family Dentistry shall not discriminate on the basis of disability, including HIV
- They shall not discriminate on appointment scheduling
- They must draft and implement a policy stating that they do not discriminate and once approved by the DOJ, it shall be posted in the waiting area
- Within 60 days and then annually, all employees must be trained on Title III
- They shall pay a civil penalty of \$3,000 to vindicate the public interest

Night and Day Dental – N. Carolina

- Thursday, June 17, 2021
- Justice Department Settles with North Carolina Dental Offices Over HIV Discrimination
- The Justice Department announced today that it has reached a settlement to resolve a claim that Night and Day Dental Inc. discriminated against a woman with HIV in violation of the Americans with Disabilities Act (ADA).
- Night and Day Dental must pay \$30,000 to the victim of the discrimination.
- In addition, Night and Day Dental must train its staff on the ADA, develop and use a non-discrimination policy, and report and explain to the department every time it either refuses to treat a person with HIV or stops providing treatment after learning of a patient's HIV

Night and Day Dental – N. Carolina

- On March 5, 2019, Night and Day Dental refused to see the Complainant for a new patient routine dental care appointment scheduled for that day after she disclosed on her patient intake forms that she has HIV.
- Night and Day Dental asked the Complainant to provide bloodwork laboratory results it perceived to be related to her HIV status. The Complainant asked the office of her treating physician to fax bloodwork laboratory results to Night and Day Dental.
- After Night and Day Dental reviewed the faxed results, and had the Complainant wait for an extended period, the Complainant was told she could not be seen for her scheduled appointment.
- Night and Day Dental has a policy of requiring certain bloodwork results from patients with HIV before deciding whether to provide care, according to the Justice Department.

ACTIONS TO BE TAKEN BY NIGHT AND DAY DENTAL

**UNDER THE DOJ RULING THERE ARE
GENERAL OBLIGATIONS TO NOT
DISCRIMINATE ON THE BASIS OF HIV OR
IMPOSE ELIGIBILITY REQUIREMENTS
THAT WOULD SCREEN ON PWH**

NON-DISCRIMINATION POLICIES AND PROCEDURES

Night and Day Dental shall submit a draft non-discrimination policy to the United States for its review and approval. Additionally, Night and Day Dental shall amend or remove any existing policies or statements that deny or limit treatment for individuals with HIV, which includes rescinding its policy and practice of routinely requesting bloodwork laboratory results from patients with HIV before providing dental care.

Night and Day Dental shall adopt and implement the non-discrimination policy, and any other new and/or modified policies and practices and shall disseminate a copy of its new and/or modified policies and practices to all employees. Night and Day Dental shall conspicuously post the non-discrimination policy in the reception area and as a link on the company's main webpage

TRAINING

Night and Day Dental shall provide ADA training within 90 calendar days of the effective and every year thereafter for the Term of this Agreement, to all of its management and employees who interact with new or current patients.

Night and Day Dental shall provide all written or electronic training materials to the United States. The ADA Training shall address:

Training Continued

Training shall be conducted by an individual or individuals with substantive knowledge of the ADA. Night and Day Dental must get pre-approval of the said individual.

For each session of the ADA Training conducted under this Agreement, Night and Day Dental shall maintain attendance logs reflecting the date of the training, names and titles of attendees, and the attendees' signatures.

REPORTING

- Initial Regular Report: Must confirm the non-discrimination policy and attach a log of all those trained.
- Subsequent Regular Reports: For the Term of this Agreement, every year on the anniversary of the due date of the Initial Regular Report, and two months before the termination of this Agreement, Night and Day Dental shall submit a Subsequent Regular Report to the Department regarding its compliance with this Agreement.
- Immediate reports are required if services are denied to any PWH indicating the reason for denial or discontinuation of treatment

Monetary Relief

As mentioned in the settlement, Night and Day Dental shall send a check in the amount of thirty thousand dollars (\$30,000.00) made out to the Complainant. This check is compensation to the Complainant for the effects of the discrimination and the harm she has endured, including, but not limited to, emotional distress

How have courts and medical experts responded to Courts and medical experts have responded to these arguments in the following ways: these arguments?

- **Treating People with HIV is Dangerous”** — Doctors and dentists may claim that a refusal to treat a patient with HIV is legitimate because they fear they might contract HIV themselves through needle sticks or other exposures to blood.
- However, studies of health care workers have concluded that risk of contracting HIV from occupational exposure is minuscule, especially with the use of standard precautions.

How have courts and medical experts responded to Courts and medical experts have responded to these arguments in the following ways: these arguments?

- For this reason, in 1998, the United States Supreme Court ruled in the case *Brigdon v. Abbott* that health care providers cannot refuse to treat people with HIV based on concerns or fears about HIV transmission. In addition to the legal perspective, both the American Medical Association and the American Dental Association, and many other professional health care organizations, have issued policies that it is unethical to refuse treatment to a person with HIV.

How have courts and medical experts responded to Courts and medical experts have responded to these arguments in the following ways: these arguments?

- **“Treating People with HIV Requires Special Expertise”** — In these cases, the merits of a discrimination claim depend upon whether, based on objective medical evidence, the services or treatment needed by the patient require a referral to a specialist or are within the scope of services and competence of the provider. In *United States v. Morvant*, a federal trial court rejected a dentist’s claim that patients with HIV require a specialist for routine dental care.

How have courts and medical experts responded to these arguments?

Courts and medical experts have responded to these arguments in the following ways:


- The court agreed with the testimony of experts who said that no special training or expertise, other than that possessed by a general dentist, is required to provide dental treatment to people with HIV. The court specifically rejected the dentist's arguments that he was unqualified because he had not kept up with the literature and training necessary to treat patients with HIV. While this case arose in the context of dental care, it is applicable to other medical settings as well.

- By refusing to provide dental services to the Complainant because she has HIV, and by requiring the Complainant, as a condition of service, to provide bloodwork laboratory results the practice perceived to be related to her HIV, Night and Day Dental discriminated against her on the basis of disability in the full enjoyment of the dental practice's goods, services, facilities, privileges, advantages or accommodations.
- By turning away the Complainant, and any other prospective patients with HIV, Night and Day Dental imposed eligibility criteria that screen out or tend to screen out individuals with HIV.

- Turning away patients with HIV or requiring them to provide information that is not medically recommended creates unfair barriers to healthcare for people with HIV," said Kristen Clarke, assistant attorney for the Justice Department's Civil Rights Division. "The ADA requires healthcare providers to treat patients based on current medical knowledge about their particular health conditions, and not based on stereotypes or misconceptions about a disability."
- The Justice Department is committed to ensuring that people with HIV do not face discrimination in health care settings or other areas of life."



Medical Implications

- Night and Day Dental has a policy and practice of requesting bloodwork laboratory results only from patients with HIV in order to review the absolute neutrophil count (ANC) before providing dental care, which Night and Day Dental states is to assess whether to provide an antibiotic prophylaxis prior to dental treatment. This request is typically made after a patient with HIV arrives for a new patient appointment and before providing care.
- 



Medical Implications

- There are just a few health conditions for which antibiotic prophylaxis prior to dental treatment is recommended, as confirmed by the American Dental Association. Having HIV is not one of them.
- Night and Day Dental acknowledged to the Department of Justice that if a patient with HIV does not provide ANC results, this is not a reason not to be seen, stating as follows with respect to the Complainant: “The patient’s medical history states [the Complainant] has HIV/AIDS and we request patients provide a copy of their most recent labs to determine if an antibiotic premedication is needed prior to treatment, but lack of labs is not a reason to not be seen.”

NEAETC Online HIV Resource Library

- NEAETC's [HIV Resource Library](#) is a compilation of curated information resources and education packets on HIV, viral hepatitis, and related public health topics.



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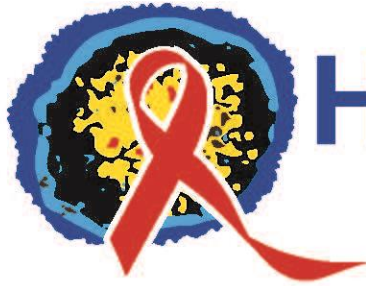
- Information resources on PrEP are available at <https://www.neaetc.org/p/pre-exposure-prophylaxis-prep-orl-page>.

National AETCs: NCRC

National Coordinating Resource Center

François-Xavier Bagnoud Center, Rutgers School of Nursing

- Centralizes free training and clinical materials through a virtual library: aidsetc.org
- Maintains the AETC Program Directory
- Fosters collaboration and group facilitation among AETCs and with external partners
- Provides AETC Program promotional, marketing and communications services
- Coordinates the annual Ryan White HIV/AIDS Program Clinical Conference



HIV/HCV Co-infection: An AETC National Curriculum

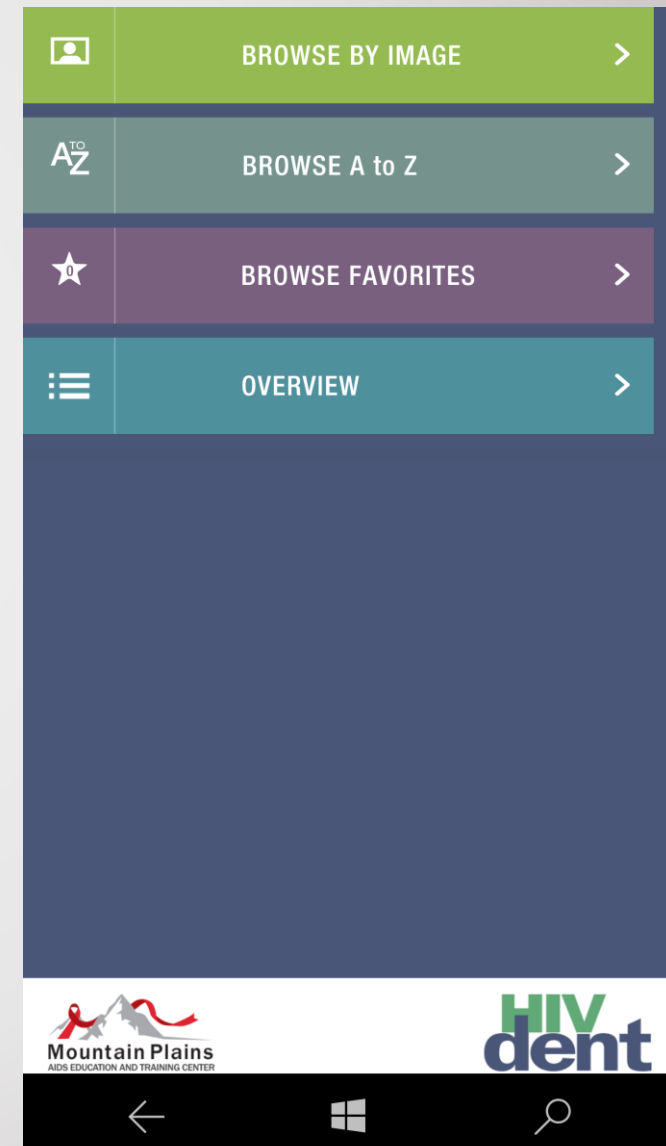
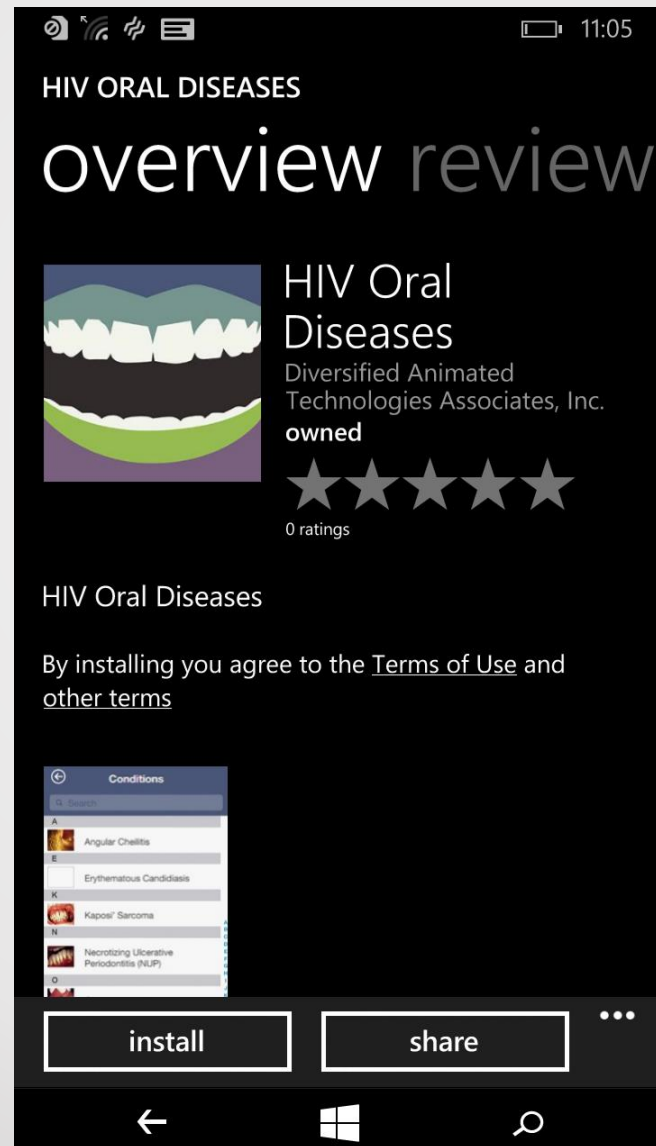
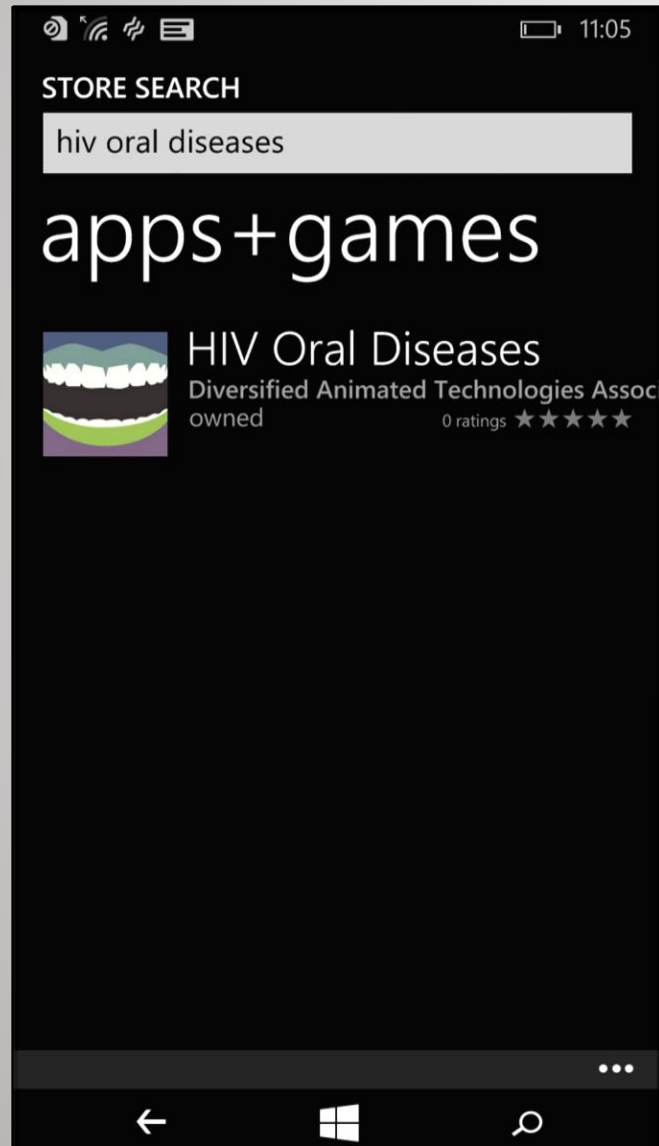
COVERING 6 CORE COMPETENCIES

- 1. Epidemiological background** of HIV/HCV co-infection in the US.
- 2. Primary and secondary prevention** of viral hepatitis among people with HIV in the US.
- 3. Screening, testing and diagnosis** of HCV infection among people with HIV.
- 4. HCV treatment guidelines** for adults (≥ 18 years) with HIV.
- 5. Recommendations** for subpopulations of HIV/HCV co-infected people.
- 6. Recommendations** to address barriers related to screening, testing, treatment and care of HCV co-infected people with HIV.

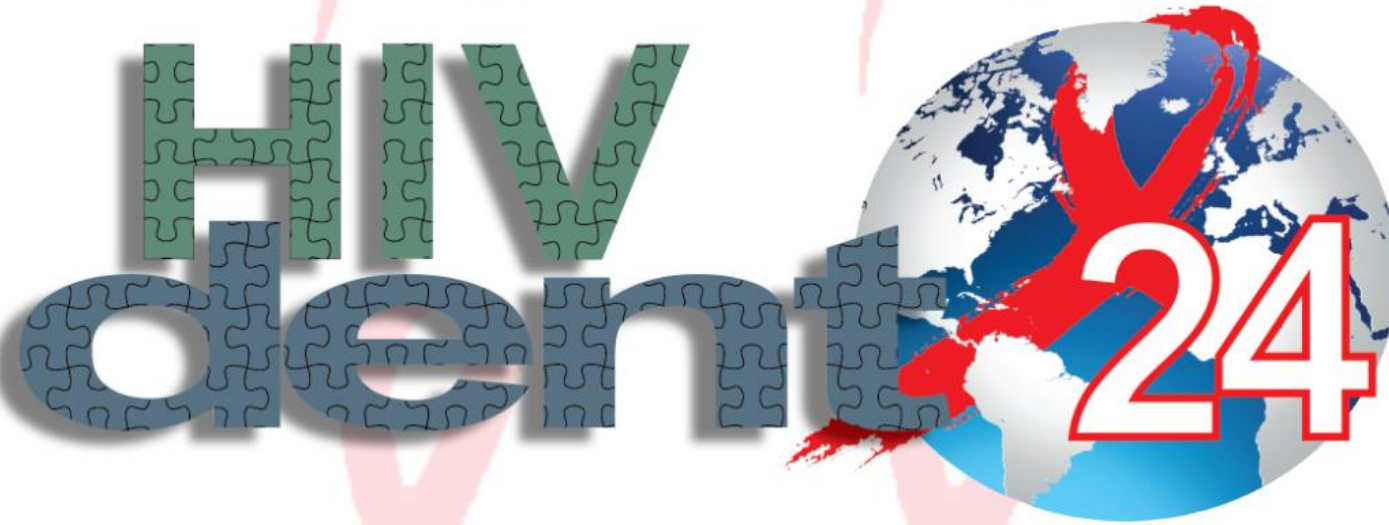
FREE CME/CNE credits available
<https://aidsetc.org/hivhcv>



HIV Oral Diseases App



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Oral Healthcare Resource**



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