

OCTOBER 1995  
VOL. 29 ■ NO. 6

# CLEARINGHOUSE REVIEW

JOURNAL OF POVERTY LAW

INSIDE

Income Security

Health Care and the  
Right to Be Heard

Guardianship Law  
and Practice

Elder Abuse Protection

Housing Rights

Setting Priorities



## Elder Law

## **Housing Rights of Group Home and Nursing Facility Residents**

*By Stephanie Edelstein, Vicki Gottlich, Dorothy Siemon, and Bruce Vignery*

Stephanie Edelstein is an attorney with the American Bar Association Commission on Legal Problems of the Elderly, 740 15th St. NW, Washington D.C. 20005; (202) 662-8694. Vicki Gottlich is an attorney with the National Senior Citizens Law Center, 1815 H St. NW, Suite 700, Washington DC 20006; (202) 887-5280. Dorothy Siemon and Bruce Vignery are attorneys with AARP Legal Counsel for the Elderly, 501 E St. NW, Washington DC 20049; (202) 424-2277.

### **I. Introduction**

Housing options for persons who are unable to live independently include a variety of supervised living programs, ranging from small board-and-care programs to continuing care facilities, nursing facilities, and, the most recent trend, assisted living. /1/ Residents may encounter discrimination in the form of zoning and land-use restrictions, licensing, or health and safety regulations. This article discusses the ways in which federal civil rights laws are being used to challenge this discrimination in the context of group homes and nursing facilities.

#### **A. Overview of Relevant Statutes**

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability or perceived disability in any program or activity that receives federal financial assistance, including public and subsidized housing programs and nursing facilities that receive Medicare or Medicaid funding. Section 504 requires that such programs be accessible to and usable by persons who are "handicapped" or who have disabilities. /2/ The Fair Housing Amendments Act of 1988 (FHAA) prohibits discrimination in almost all housing activities or transactions, whether in the public or private sector; in the provision of services or facilities in connection with a dwelling; and in the application of zoning, land use, or health and safety regulations. /3/ These laws are complemented by the Americans with Disabilities Act (ADA). /4/ Although Titles II (state and local programs) and III (public accommodations) of the ADA do not specifically cover housing (and indeed specifically exclude entities covered by the FHAA), they apply to nonhousing functions of a facility, such as meeting rooms, meal sites, adult day care, or long-term care. Under all three statutes, discrimination includes a refusal to make reasonable accommodations (adjustments to rules or procedures) or modifications (changes in the physical premises) upon request. /5/

The three statutes use virtually the same definition of "handicap" or "disability." Individuals are protected if they (1) have a physical or mental impairment that substantially limits one or more major life activities, such as performing manual tasks, walking, seeing, hearing, speaking, or personal care; (2) have a record of having such an impairment, whether or not the impairment still exists; or (3) are regarded as having such an impairment, whether or not the perception is accurate.

/6/

While age alone does not equal disability, the symptoms and conditions of the aging process may cause an individual to meet these definitions. The protections extend to persons who are "frail," described in the Older Americans Act as being 60 years of age or older and unable to perform without assistance (i.e., verbal reminder, physical cue, or supervision) at least two activities of daily living. /7/ The protections also extend to persons who, due to a cognitive or other mental impairment, require substantial supervision because of behavior that poses a serious health or safety hazard to themselves or others. /8/

## ***B. Zoning and Land-Use Restrictions***

In recent years, advocates have used federal law to challenge municipal zoning and occupancy ordinances on the grounds that they discriminate against persons with disabilities by restricting the location of group homes and by limiting the allowable number of unrelated residents in a dwelling.

The dispersion rules under consideration in *Horizon House Development Services v. Upper Southampton Township* are typical. /9/ In 1992, a district court in Pennsylvania found that a requirement that group homes for persons with disabilities be located at least 1,000 feet from one another intentionally discriminated against a protected group by creating "an explicit classification based on handicap with no rational basis or legitimate government interest." /10/ The court ruled that the restrictions unlawfully limited the number of people with disabilities who could reside in the township, thereby restricting their access to essential community services. Rejecting the town's argument that dispersion requirements were utilized to promote integration, the court found that even if prevention of "clustering" could ever be a rationale for disparate treatment the 1,000-foot rule was still overbroad.

Some jurisdictions require group homes to obtain a permit and/or to notify neighbors before locating in residential neighborhoods. In *Potomac Group Home Corp. v. Montgomery County, Maryland*, a district court found that a requirement that applicants for a group home license notify prospective neighbors of their application created a classification based on disability that the county could not justify. /11/ The court ruled that the provision of community board review of the application, while not invalid on its face, had a discriminatory effect and held people with disabilities up to public scrutiny in a way not experienced by groups of nondisabled persons. Ironically, the court also found that the proposed facility already was a permitted use under county zoning laws.

Barriers to group homes for persons with disabilities frequently occur in the form of ordinances restricting the number of unrelated people who may live together in an area zoned for single-family dwellings. In *City of Edmonds v. Oxford House*, the Supreme Court distinguished between land-use restrictions designed to preserve the family character of neighborhoods and health and safety restrictions that cap the number of occupants per dwelling, typically in relation to floor space or number of rooms. /12/ Oxford House operates a group home for ten to twelve adults in a neighborhood zoned for single-family residences. The city argued that its code, which limited to five the number of unrelated persons permitted to reside in a single-family dwelling, was an occupancy limitation and therefore exempt from the FHAA. The Court disagreed and held that the

code provision was not exempt from scrutiny because it applied only to unrelated persons. Unlike an occupancy limitation, the City of Edmonds code provision did not address the fundamental question of how many persons could safely occupy a dwelling.

### **C. Health and Safety Codes**

Group homes for persons with disabilities may be licensed, regulated, or certified beyond basic housing and safety codes. At times, this licensing or regulation is unduly restrictive. In *Marbrunak, Inc. v. City of Stow, Ohio*, the city required a home for women with developmental disabilities to meet fire and safety requirements that were not imposed on single-family dwellings. /13/ The Sixth Circuit found that the city's heightened requirements for the home were not tailored to the unique and specific needs and abilities of the residents in violation of the FHAA.

Other safety regulations that have not survived FHAA challenges include those barring residency by persons who cannot exit the building unassisted in an emergency. In *Potomac Group Home Corp. v. Montgomery County, Maryland*, /14/ the county's fire and safety codes required an individual who used a wheelchair to be able to transfer to the wheelchair and exit the building without assistance. /15/ The court found that the county's rules violated the FHAA by failing to take into account alternative safety measures (staffing, sprinkler systems, and smoke detectors) and the needs and abilities of the residents. Soon after the decision in *Potomac Group Home*, the Maryland attorney general advised that applying heightened safety requirements to a family-style group home, but not to similar single-family dwellings, violates the FHAA. /16/

## **II. Standards of Proof**

What are the standards for proving that government entities discriminated by failing to make adjustments to zoning and licensing rules?

### **A. Reasonable-Accommodation Discrimination**

In *Bangerter v. Orem City Corp.*, the Tenth Circuit held that plaintiff did not state a valid claim that the City of Orem's refusal to waive special restrictions on group homes for disabled persons constituted a refusal by the city to make a reasonable accommodation. /17/ The challenged regulations required providers of group homes for persons with mental retardation to ensure 24-hour supervision and to establish a community advisory board to address neighborhood concerns. /18/ The court ruled that a reasonable-accommodation claim must involve an affirmative change to an otherwise valid rule of general applicability to make the rule less onerous to individuals with disabilities. /19/ Moreover, since the challenged ordinance in *Bangerter* applied only to group homes for persons with disabilities, it was not generally applicable, and the court found the claim for reasonable accommodation to be inappropriate. /20/

*Bangerter* suggests that reasonable accommodation cannot be requested when a rule or policy is directed at persons with disabilities or a particular class of persons with disabilities because these

rules are not applicable to the general population. Further, even if a rule is generally applicable it must be otherwise valid -- although it is not clear what the court means by "valid." This analysis is inconsistent with the decisions in other cases, including *Potomac Group Home Corp. and City of Edmonds v. Washington State Building Code Council*, which have construed the FHAA as imposing an affirmative duty upon local or state governments that create and enforce zoning restrictions reasonably to accommodate the needs of persons with disabilities. /21/ Those courts found that the key question for reasonable-accommodation analysis is whether a zoning restriction has the potential to deny persons an equal opportunity to use and enjoy a dwelling because of their disability. It is clear that the challenged provisions in *Bangerter* met this standard.

## ***B. Disparate-Treatment Analysis***

*Bangerter* also involved claims of disparate treatment and disparate impact, in that special conditions were imposed on group home residents with disabilities but not on those without disabilities. /22/ Disparate-treatment analysis requires an examination of whether similarly situated persons or groups of persons are subject to differential treatment. /23/ Disparate-impact analysis examines a facially neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group. The court in *Bangerter* explained the difference between the two claims as the difference between facially discriminatory actions and the effects of facially neutral actions. Because *Bangerter* challenged facially discriminatory actions, the court analyzed plaintiff's claim as one of disparate treatment.

The court began its disparate treatment analysis by making clear that the appropriate legal standard for such analysis was provided by the FHAA, not the Fourteenth Amendment's Equal Protection Clause. The district court, using an equal protection analysis and relying on the Eighth Circuit's decision in *Familystyle of St. Paul v. City of St. Paul*, had ruled that restrictions on group homes for persons with disabilities should be upheld if rationally related to a legitimate governmental purpose. /24/ In *Familystyle*, the Eighth Circuit had held that persons with disabilities are not a suspect class for constitutional purposes and therefore government restrictions on them as a group are not entitled to heightened scrutiny. /25/ Reversing, the Tenth Circuit found that, while persons with disabilities may not be a protected class for constitutional purposes, the FHAA specifically creates a protected class of persons with disabilities. /26/ Under this standard, the court held that the plaintiff established a prima facie case of intentional discrimination.

In considering whether the discrimination against plaintiffs could be justified, the *Bangerter* court looked to the language of the statute and to other courts' analyses of analogous provisions of Title VII. The FHAA provides that public health and safety concerns may be a legitimate justification for differential treatment of a "person with a handicap." Specifically, the law exempts from coverage ". . . an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." /27/ However, the court reasoned that, because housing can be denied altogether due to public safety concerns, it is permissible to place "reasonable restrictions on the terms or conditions of housing when justified by public safety concerns." /28/ Further, the court found that not all special restrictions on persons with disabilities must be struck down because, just as race-conscious affirmative action permissibly promotes the statutory goal of Title VII, some restrictions on persons

with disabilities may actually advance their housing opportunities and therefore meet one of the goals of the FHAA. The court held that defendants could justify their conduct if they could prove that they "furthered, in theory and in practice, a legitimate bona fide governmental interest and that no alternative would serve the interest with less discriminatory effect." /29/

Assuming that reasonable restrictions based on health and safety are justified, they should be narrowly construed. /30/ Thus, "[r]estrictions predicated on public safety cannot be based on stereotypes about the handicapped" /31/ but must be tailored to particularized concerns (i.e., actual needs or abilities) of the individual residents on whom they are imposed. /32/

### **III. Protection for Nursing Facility Residents Under the Americans with Disabilities Act and Section 504**

#### ***A. Nursing Facilities as Entities Subject to Section 504 and the Americans with Disabilities Act***

Nursing facilities must comply with federal laws that prohibit discrimination on the basis of disability. In fact, several common nursing facility practices, including admission and discharge, use of special care units, eligibility for activities and services, imposition of additional costs, and retaliation, may be redressable under the ADA /33/ and Section 504 /34/ in combination with or in lieu of other laws, such as the Nursing Home Reform Law. /35/

All facilities that receive Medicaid and/or Medicare funds are subject to Section 504. /36/ Facilities run by state or local governments are subject to Title II of the ADA, regardless of whether they receive federal funding. /37/ Privately operated nursing facilities are subject to Title III of the ADA, which prohibits discrimination by public accommodations that fall within one of 12 enumerated categories. /38/ Depending on their operating structure, nursing facilities controlled by religious organizations may not be covered under Title III of the ADA, since religious entities are specifically exempt from the statute. /39/

A nursing facility may not discriminate by (1) denying an individual the opportunity to participate in its services because of the person's disability; (2) segregating the person by providing services in a segregated setting; (3) applying eligibility criteria that serve to screen out individuals or classes of persons with disabilities. In considering whether the ADA applies to a particular situation, it is important to keep in mind three questions: What is the service being denied? What is the nature of the discrimination? Against whom is the facility discriminating?

#### ***B. Admission***

In *Wagner v. Fair Acres Geriatric Center*, the Third Circuit recently ruled in favor of a woman with Alzheimer's disease who was denied admission to a county-run nursing facility. /40/ The issue was not why plaintiff sought access to the service provided by the nursing facility, but why she was denied access. That aggressive behaviors associated with plaintiff's Alzheimer's disease made her

"a challenging and demanding patient" did not by itself make her not "otherwise qualified" for admission /41/ or justify her exclusion from the nursing facility. /42/ Both Section 504 and the ADA require a facility to make reasonable accommodations or modifications for those behaviors in order for her to take advantage of the facility's services. The court found, however, that the facility had presented little or no evidence of the accommodations it would need to provide her with nursing care. Nor had the facility shown that plaintiff's admission would have changed the facility's essential nature as a nursing home or imposed an undue burden, financial or otherwise, on the facility. Rather, the facility alleged that accommodating the woman would create a health and safety risk to staff and patients. The court found that, because of plaintiff's weakened physical condition, the facility's health and safety concerns were slight. /43/

The Third Circuit distinguished admission to a nursing facility from medical treatment cases that may not be subject to scrutiny under Section 504. Medical treatment cases involve complex assessments of medical needs, benefits, and risks of providing invasive medical care. The issue in a case challenging denial of admission to a nursing facility, however, involves administrative decision-making and not medical judgment. The question to be decided is whether providing skilled nursing care to a particular person would alter the essential nature of the facility's program or impose an undue burden on the program. /44/ That the nursing facility admitted other individuals with Alzheimer's disease also had no impact on plaintiff's Section 504 claim. Section 504 does not apply to programs choosing among similarly disabled people but does apply to discrimination between distinct classes of people with disabilities. /45/

### **C. Special Care Units and Integrated Settings**

The ADA requires services to be provided "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." /46/ Special care units segregate people with dementia from the rest of the nursing facility population in conflict with this fundamental ADA concept. While the ADA does not preclude a nursing facility from offering a program designed to meet the special needs of people with dementia, /47/ difficulties arise when admission to the facility is limited to the special unit. Since unnecessary segregation is itself a form of discrimination, a requirement that certain applicants be admitted only to a special care unit is actionable under the ADA. /48/ Similarly, it may be discriminatory if a facility requires a resident to transfer to a special care unit based on the resident's diagnosis.

### **D. Transfer and Discharge**

Residents who face transfer or discharge from a facility because of their medical needs or behavior also benefit from an ADA analysis. They are denied, on the basis of disability, the opportunity to participate in nursing care and services. Before a resident is transferred or discharged, the facility should show that no modification of policies or practices could be made to obviate the need for the discharge or transfer. Viewed another way, the reasonable modification standards reinforce the nursing home reform requirement that a resident's care plan be revised when the resident's needs change. /49/ As with denial of admission, if the facility raises safety concerns to justify a transfer or discharge, it must demonstrate actual safety risks that cannot be mitigated in other ways.

## IV. Conclusion

Despite legislative and judicial developments during the past few years, older persons with disabilities continue to encounter discrimination that limits their housing choices. Although the case law is still evolving and does not yet provide complete guidance for resolving the range of potential conflicts involving land use, safety issues, and the rights of group home and nursing facility residents, federal antidiscrimination laws are valuable tools for challenging this discrimination.

### Footnotes

/1/ The term "assisted living" is applied to programs ranging in size from fewer than 5 to more than 100 residents. Assisted living offers a variety of services for residents with a range of functional and cognitive impairments.

/2/ 29 U.S.C. Sec. 794, as amended.

/3/ Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. Secs. 3601 et seq. While the FHAA does not specifically prohibit restrictions on group homes for persons with disabilities, the legislative history makes clear Congress' intent. H.R. Rep. No. 711, 100th Cong., 2d Sess. 24, reprinted in 1988 U.S.C.C.A.N. 2185.

/4/ 42 U.S.C. Secs. 12101 et seq. The U.S. Department of Justice explains the relationship between the FHAA and the Americans with Disabilities Act (ADA) in app. to pt. 36, Interpretative Guidance, 28 C.F.R. pt. 36, app. B.

/5/ 42 U.S.C. Sec. 3604f(3); 29 U.S.C. Sec. 794, as amended; 24 C.F.R. pt. 8, subpt. C; 42 U.S.C. Secs. 12131, 12132.

/6/ FHAA, 42 U.S.C. Sec. 3602(h); ADA, 42 U.S.C. Sec. 12102; 29 U.S.C. Sec. 706(8).

/7/ 42 U.S.C. Sec. 3002.

/8/ Id.

/9/ *Horizon House Dev. Servs. v. Upper Southampton Township*, 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd* without opinion, No. 92-1791 (3d Cir. May 10, 1993) (Clearinghouse No. 45,191). See also *Larkin v. Michigan*, 369 N.W.2d 882 (E.D. Mich. 1995), in which the court struck down state statutes prohibiting the location of adult foster care homes within 1,500 feet of another such facility and requiring notice to neighbors of the proposed site. The court found that the state statutes violated the FHAA and the Equal Protection Clause.

/10/ Horizon House Dev. Servs., 804 F. Supp. at 693 -- 94.

/11/ Potomac Group Home Corp. v. Montgomery County, Md., 823 F. Supp. 1285 (D. Md. 1993) (Clearinghouse No. 49,082). See also Casa Marie, Inc. v. Superior Court of Puerto Rico for the Dist. of Arecibo, 752 F. Supp. 1152 (D.P.R. 1990) (Clearinghouse No. 46,262).

/12/ City of Edmonds v. Oxford House, 115 S. Ct. 1776 (1995) (Clearinghouse No. 50,748).

/13/ Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43 (6th Cir. 1992) (Clearinghouse No. 47,223).

/14/ Potomac Group Home Corp., 823 F. Supp. 1285.

/15/ Occupancy standards based on the 1988 edition of the National Fire Protection Association Life Code are utilized by communities throughout the United States.

/16/ Md. Attorney General Opinion No. 93-022, 1993 WL 343611 (June 25, 1993).

/17/ Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995).

/18/ Id. at 1494, 1496.

/19/ Id. at 1502 (citing Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992)).

/20/ Id.

/21/ City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 806 (9th Cir. 1994); United States v. City of Taylor, 872 F. Supp. 423, 436 (E.D. Mich. 1995); see also H.R. Rep. No. 711, 100th Cong., 2d Sess. 1, 25 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2186.

/22/ Bangerter, 46 F.3d at 1500 -- 1501.

/23/ Stewart B. McKinney Found., Inc., v. Town Plan & Zoning Comm'n, 790 F. Supp. 1197, 1211 (D. Conn. 1992); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 933 (2d Cir. 1988) (Title VII case).

/24/ Bangerter v. Orem City Corp., 797 F. Supp. 918, 922 (D. Utah 1992) (citing Familystyle of St. Paul v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991) (Clearinghouse No. 46,162)).

/25/ See also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (persons with mental retardation are not a suspect class).

/26/ Bangerter, 46 F.3d at 1503.

/27/ 42 U.S.C. Sec. 3604(f)(9).

/28/ Bangerter, 46 F.3d at 1503. See also City of Edmonds, 115 S. Ct. 1776 (maximum occupancy limitation applicable to all persons based on health and safety grounds would presumably meet the statutory exemption).

/29/ Id. at 1504 -- 5 (citing Huntington Branch, NAACP, 844 F.2d at 936).

/30/ City of Edmonds, 115 S. Ct. at 1780.

/31/ Bangerter, 46 F.3d at 1503

/32/ Id. See also Marbrunak, Inc., 974 F.2d 43, 47 (6th Cir, 1992); Potomac Group Home Corp., 823 F. Supp. 1285, 1299.

/33/ 42 U.S.C. Secs. 12101 et seq.

/34/ 29 U.S.C. Sec. 794.

/35/ 42 U.S.C. Secs. 1395r-i(3)(a) -- (h), 1396r(a) -- (h).

/36/ Individuals "who may be denied admission to Federally-assisted nursing homes on the basis of their handicap" may experience discrimination in receipt of federally funded services. S. Rep. No. 1297, 93d Cong., 2d Sess., reprinted in U.S.C.C.A.N. 6376, 6388 -- 89 (1974). See also Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002 (3d Cir. 1995) (Clearinghouse No. 49,717).

/37/ Title II protects a qualified individual with a disability who meets the "essential eligibility requirements" of the service or program. 29 U.S.C. Sec. 12132; 28 C.F.R. pt. 35. It incorporates Section 504 and extends its principles to state and local governments. Helen L. v. Didario, 46 F.3d 325 (3d Cir. 1995).

/38/ 29 U.S.C. Secs. 12181(7), 12182. Nursing facilities fall within the category for health care providers, hospitals, or other service establishments. Since they also provide social services to residents, they can be covered under the category that includes social service establishments.

/39/ 29 U.S.C. Sec. 12187. The relevant issue is whether the religious organization operates the business; the type of activity or service provided and the individuals being served are not considered. A facility exempt from the ADA as a religious entity may be covered by Section 504 if it receives Medicare or Medicaid funding.

/40/ Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002 (3d Cir. 1995). By agreement of the parties, only the claims under Section 504 were presented to the jury, since standards and proofs under Section 504 and Title II are similar. Id. at 1006 n.3.

/41/ Both Section 504 and Title II of the ADA protect qualified individuals with disabilities. 29 U.S.C. Sec. 794; 42 U.S.C. Secs. 12131, 12132. Title III applies generally to everyone who meets the definition of a person with a disability. 42 U.S.C. Secs. 12181, 12182.

/42/ Wagner, 49 F.3d at 1015.

/43/ Id. at 1016 -- 17. Health and safety considerations must be based on actual risk and not on fear or stereotypes. The facility must also assess whether the risks can be mitigated by a reasonable modification of policies and practices. *Anderson v. Little League Baseball*, 794 F. Supp. 342 (D. Ariz. 1992).

/44/ The district court in this case, citing *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986), and *United States v. SUNY at Stony Brook*, 729 F.2d 144 (2d. Cir. 1984), held that the decision not to admit Mrs. Wagner to the nursing facility was a medical treatment decision "immune from scrutiny under section 504." *Wagner v. Fair Acres Geriatric Ctr.*, 859 F.Supp. 776 (E.D. Pa. 1994). See Wagner, 49 F.3d at 1011, 1012.

/45/ Wagner, 49 F.3d at 1016 n.15. The court cited several cases that found discrimination based on severity of the disability.

/46/ 28 C.F.R. Sec. 36.203.

/47/ 28 C.F.R. Part 35, Appendix A, and Part 36, Appendix A.

/48/ *Didario*, 46 F.3d 325. In that case the court ruled that the priority given by Pennsylvania to nursing home care over home-based care violated the integration provisions of Title II. The court, holding that the state legislature is also subject to the ADA, rejected the state's justification based on separate appropriations for the two programs.

/49/ 42 U.S.C. Sec. 1396r(b).