

Americans with Disabilities Act & Fair Housing Act



Siting Community Residences for
Individuals Under the Jurisdiction of the PSRB

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**Individuals Under the Jurisdiction
of the Psychiatric Security Review
Board (PSRB)**

Individuals Under the Jurisdiction of the PSRB

- A court orders an individual to be committed to the jurisdiction of the PSRB when an individual is found:
 - Guilty except for insanity; and
 - Would have been guilty of a felony, or of a misdemeanor during a criminal episode in the course of which the person caused physical injury or risk of physical injury to another; and
 - By a preponderance of the evidence the court finds that the individual is affected by mental disease or defect and presents a substantial danger to others requiring commitment.

ORS 161.327(1)(a).

Guilty Except for Insanity (GEI)

- “A person is guilty except for insanity if, as a result of mental disease or defect at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law.”
ORS 161.295
- A person is not GEI merely because of repeated criminal or otherwise antisocial conduct.
- In order to be under PSRB jurisdiction, the person must be actively affected by mental disease or defect, or be in a state of remission as defined in ORS 161.327(3).

GEI is not a judgment of criminal responsibility or a criminal conviction in the traditional sense; and not meant to be punitive in nature.

- GEI is “a legislatively expressed policy that a defendant, even though he or she is guilty of a crime and has carried out all of its elements, is not to be punished as a criminal if the conduct results from a mental disease or defect.” *State v. Olmstead*, 310 Or. 455, 470 (1990).
- “Unlike criminal sentencing, [the] focus [of GEI] is on considerations of care, treatment, supervision and public safety but not on punishment.” *State v. Gile*, 161 Or. App. 146, 152 (1999).
- A “judgment of guilt except for insanity is not a judgment of criminal responsibility and, therefore, is not a conviction in the sense of a criminal judgment pronouncing sentence.” *State v. Gile*, 161 Or. App. 146, 154 (1999).

PSRB Process

- After a hearing, the Board may order that the individual be committed to a state hospital, conditionally released, or discharged from its jurisdiction. ORS 161.336.
- PSRB's jurisdiction over the individual "may not exceed the maximum sentence provided by statute for the crime for which the person was found guilty except for insanity." ORS 161.336(8); *see also* ORS 161.327(1)(b).
- Individuals have the right to notice and an opportunity to be heard before the PSRB makes that determination. *See e.g.*, ORS 161.336, ORS 161.346. The individual also has the right to appeal an adverse decision to the Court of Appeals. ORS 161.385(9)(a).

Discharge & Commitment

- A person is discharged from PSRB jurisdiction: if he is "no longer affected by mental disease or defect or, if so affected, no longer presents a substantial danger to others which requires regular medical care, medication, supervision or treatment."
ORS 161.351(1).
- A person is committed to a state psychiatric hospital: if he is affected by a mental disease or defect and "presents a substantial danger to others and is not a proper subject for conditional release".
ORS 161.341(1).

Conditional Release

- A person is conditionally released if the Board “finds that the person is still affected by a mental disease or defect and is a substantial danger to others, but can be controlled adequately if conditionally released with treatment as a condition of release”; and necessary supervision and treatment are available. ORS 161.346(1)(b); ORS 161.336(1)(a).
- The PSRB’s primary concern is the protection of society. ORS 161.336(1), (10).
- PSRB may place any conditions on the person’s release that “are in the best interests of justice, the protection of society and the welfare of the person”. ORS 161.336.
- A person’s conditional release may be revoked if he fails to follow a condition of his release, his mental status changes, or a concern for public safety arises. ORS 161.336(5)-(6).

Rehabilitation Act Amendments of 1998

- “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a).
- “Individual with a disability” means a person with a “physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment.” 29 USC § 705(20).
- Amended to add ADA’s reasonable accommodation standard. 29 USC § 794(d).



Americans with Disabilities Act

42 U.S.C. § 12101 et seq



Meaning of "Disability"

- "Disability" means an individual with:
 - (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).

- A "qualified individual with a disability" means "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

Anti-discrimination Mandate

“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

Congressional Findings

- “[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”
42 U.S.C. § 12101(a)(2).
- “[D]iscrimination against individuals with disabilities persists in such critical areas as . . . institutionalization”
42 U.S.C. § 12101(a)(3).
- “[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation”
42 U.S.C. § 12101(a)(5).

Integration Regulation

- “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 CFR § 35.130(d) (1998).
- The “most integrated setting appropriate to the needs of qualified individuals with disabilities” means “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.” 28 CFR pt. 35, App. A, p. 450 (1998).

Olmstead v. L.C.

527 US 581 (1999)



- States violate Title II of the ADA by retaining individuals in institutions rather than placing them in community settings when:
 - the State's treatment professionals have determined that community placement is appropriate;
 - the transfer from institutional care to a less restrictive setting is not opposed by the affected individual; and
 - the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Olmstead v. L.C.

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The United States Supreme Court found:

- Confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.
- Unjustified institutional isolation of people with disabilities is a form of discrimination “based on disability” prohibited by the ADA.
- By continuing to institutionalize a person who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.

Reasonable Accommodation

- “A public entity *shall* make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 CFR § 35.130(b)(7) (1998).
- States or political subdivisions have a duty to make reasonable accommodations to facially neutral policies that may unduly burden disabled persons.

Olmstead Plan: Meeting the Reasonable Accommodation Standard

“States can comply with the ADA by demonstrating that it has a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated.”

Fundamental Alteration Exception

- States do not have to provide reasonable accommodations if the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.
- Courts will consider 3 factors in a State's fundamental alteration defence:
 - Cost of providing services in the most integrated setting
 - Resources available to the state
 - How the provision of services affects the ability of the state to meet the needs of others with disabilities

Oregon's Commitment to Olmstead

- ORS 430.071. "The Department of Human Services shall adopt a policy that supports and promotes self-determination for persons receiving mental health services. The policy shall be designed to remove barriers that:
 - (1) Segregate persons with disabilities from full participation in the community in **the most integrated setting** in accordance with the United States Supreme Court decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999); and
 - (2) Prevent persons with disabilities from enjoying a meaningful life, the benefits of community involvement and citizen rights guaranteed by law."
- "[C]itizens with disabilities are entitled to live lives of maximum freedom and independence." ORS 410.010(1).
- State must "[a]ssure that health and social services be available that [a]llow the . . . citizen with a disability to live independently at home or with others as long as the citizen desires without requiring inappropriate or premature institutionalization." ORS 410.020(3).

Olmstead Litigation

- Most states have an Olmstead Plan and have integration-related law suits.
- Olmstead Integration Regulation Lawsuits: Most cases usually arise because of a lack of community placements. States will generally be successful if they have a proper Olmstead plan.
- *Arc of Washington State Inc. v. Ludwignson*, 427 F.3d 615, 620 (9th Cir 2005): State did not violate the ADA by placing a cap on the number of community placement slots for disabled individuals. It had a proper Olmstead plan and did not categorically refuse to integrate an entire segment of disabled persons into community-based programs. *See also Townsend v. Quasim*, 328 F.3d 511, 514-18 (9th Cir. 2003).

Individuals Under PSRB Jurisdiction are Protected by the ADA

- Meet all 3 definitions for "individuals with a disability"
- Are "qualified individuals with a disability":
 - Current statutory law makes them eligible for community placements
 - Meet all of the Olmstead criteria
 - Particularized finding that the individual can be treated safely in the community
 - Their past criminal conduct and GEI status are a direct result of their disability
- The additional supervision and treatment necessary to allow community placement for these individuals should be viewed as reasonable accommodations under the ADA.
- Fundamental alteration is not an appropriate defense.

Relevant Case Law

- *In re the Commitment of J.W.*, 672 A.2d 199 (N.J. Super. App. Div. 1996): The court invalidated a law that excluded mentally ill persons who had been found not guilty by reason of insanity (NGRI) from community placements for the mentally ill without a particularized finding that the person is dangerous. *Id.* at 203.
- *Greist v. Norristown State Hospital*, 1997 US Dist. LEXIS 16320 (1997): ADA's integration mandate is not violated by continuing to institutionalize a person who is not a "qualified individual with disabilities." The plaintiff (who had been found NGRI for several violent crimes) had a recent particularized finding that he represented a danger to the public .

Penalties

- Termination or denial of federal funds.
- Remedies both at law and in equity.
- States are not immune from liability for ADA violations under the 11th Amendment. *Tenn v. Lane*, 541 US 509 (2004); *see also Miranda B.* (CV-00-01753-AJB Ninth Circuit opinion).

Fair Housing Amendments Act

42 U.S.C. §§ 3601-3631



Policy Considerations

- The underlying objective of the FHAA is to "extend[] the principle of equal housing opportunity to handicapped persons," H.R. Rep. No. 100-711 at 13, and end discrimination against the handicapped in the provision of housing based on prejudice, stereotypes, and ignorance, *id.* at 18. Removing discrimination in housing promotes "the goal of independent living" and is part of Congress's larger "commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1504 (10th Cir. 1995).
- "It seems to the Court that the very purpose of the Fair Housing Amendments Act . . . is to ensure that housing for people with disabilities, such as the community residences at issue, can, in fact, be sited in complete and total disregard of [neighbors and municipality's objections to its location in a residential area, close to a church, a synagogue and a grammar school]." *Township of West Orange et al v. Whitman et al.*, 8 F.Supp.2d 408, 426 (D.N.J. 1998).

Anti-discrimination Mandate

"[I]t shall be unlawful . . .

- (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of-- (A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter.
- (2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of - (A) that person; or (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that person."

42 U.S.C. § 3604(f)(1)-(2).

Anti-discrimination Mandate

- A person has a handicap if he has “(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment”. 42 U.S.C. § 3602(h).
- FHAA also prohibits discrimination in housing related to familial status. 42 U.S.C. § 3604.
- Discrimination includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling”. 42 U.S.C. § 3604(f)(3)(B).

Direct Threat Exception

“Nothing in this subsection requires that a dwelling be made available to 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.” 42 U.S.C. § 3604(f)(9).

Arline Caveat to the Direct Threat Exception

- *Arline* Caveat: a person only represents a “direct threat” for purposes of the FHAA if that threat cannot be sufficiently minimized or eliminated by reasonable accommodations. See *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

- Legislative history for the FHAA specifically cites the *Arline* decision and states that under the amended Act:

“a dwelling need not be made available to an individual whose tenancy can be shown to constitute a direct threat and a significant risk of harm to the health or safety of others. If a reasonable accommodation could eliminate the risk, entities covered under this Act are required to engage in such accommodation”.

H.R. Rep No. 711, 100th Cong., 2d Sess. 9 (1988), reprinted 1988 U.S.C.C.A.N. 2173, 2190.

- See, e.g., *Roe v. Sugar River Mills Assoc*, 820 F. Supp. 636 (D.N.H. 1993); *Roe v. Housing Authority of the City of Boulder*, 909 F. Supp. 814 (D. Co. 1995).

Individualized Assessment Required

- The direct threat exception must be based on an individualized analysis about a particular person, and not based on general stereotypes or prejudices about the nature of disabilities or a segment of the disabled population.
- “The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases... [T]hey would be vulnerable to discrimination on the basis of mythology -- precisely the type of injury Congress sought to prevent.” *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 285-286 (1987).
- “Restrictions predicated on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents. **FHAA legislative history `repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals.** Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.” *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503-1504 (10th Cir. 1995).

Analysis of FHAA Claims (9th Circuit)

Facial Discrimination/Disparate treatment

- Plaintiff must show that a protected group has been subjected to explicitly differential -- i.e. discriminatory -- treatment. No additional evidence must be submitted proving the malice or discriminatory animus of the defendant.
- Burden of proof shifts to defendant to show that either (1) the law benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes. Safety concerns will be considered regarding the specific person.

Disparate Impact:

- Plaintiff must show that the defendant's action had a discriminatory effect on the protected group.
- Defendant is required to make reasonable accommodations under the law.

Discrimination Case Law

- “As to the concern for public safety, that too must fail because the Court finds that defendant is operating under stereotyped notions about certain types of group home residents rather than specific concerns raised by individuals. For example, Bellevue's city attorney stated that the evidence of crime committed by individuals with a prior criminal history prompted Bellevue's concern for public safety. ... But Bellevue offers no evidence showing that residents of Class II facilities are more dangerous than if they lived with their relatives or than the residents of Class I facilities. Defendant's public safety rationale does not stand up under scrutiny and defendant cannot invoke the statutory exemption from the FHA found in 42 U.S.C. § 3604(f)(9) because it has not demonstrated how any specific individuals attempting to reside in a Class II facility constitute a ‘direct threat.’” *Children’s Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1499 (W.D. Wa. 1997).
- *See, e.g., Oconomowoc Residential Programs, Inc. et al. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002) (Spacing and density restrictions invalid); *In re the Commitment of J.W.*, 672 A.2d 199 (N.J. Super. App. Div. 1996) (law excluding NGRI persons from community residences invalid).

Penalties

- Administrative action brought by US Secretary: potential fines between \$11,000 to \$55,000 plus reasonable attorney fees and costs.
- Civil action brought by private party: actual and punitive damages; injunction, restraining order, or other order; and reasonable attorney fees and costs.
- Pattern & practice lawsuit brought by US Attorney General: potential fines of \$55,000 to \$110,000; monetary damages to aggrieved individuals; injunction, restraining order, or other order; and reasonable attorney fees and costs.
- 42 USC § 3617: It is unlawful and a civil offense "to coerce, intimidate, threaten, or interfere" with a person's exercise of his or her FHAA rights.

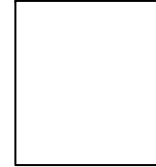
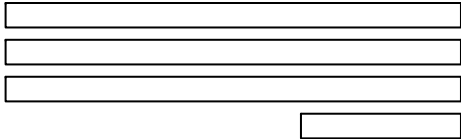
State Law: ORS 197.660 to 197.670

- FHAA explicitly preempts state law. 42 U.S.C. § 3615.
- ORS 197.663: Oregon Legislature has stated that:
 - Persons with disabilities are entitled to live within communities and should not be excluded because their disability requires them to live in groups.
 - Recognized a growing need for residential homes and residential facilities to prevent unjustified institutionalization; and local zoning regulations often make it difficult to site these residences.
- State law allows “residential homes” and “residential facilities” to be placed in any zone that allows a single-family dwelling or multi-family dwelling respectively. *See* ORS 197.665-197.667.
- Cities and counties cannot prohibit a residential home or facility to be sited in a zone that state law allows; and must amend their zoning ordinances to be consistent with these provisions. *See* ORS 197.670.

Individuals Under PSRB Jurisdiction are Covered by the FHAA

- Meet the definition of individuals with a “handicap”; and may also be protected in group home settings under “familial status” protections.
- Their disability may be considered the reason they must live in group home settings.
- Direct threat exception will unlikely be a successful defense. Every individual conditionally released under PSRB supervision has been found to be able to be safely treated in the community. The state must make reasonable accommodations that would eliminate or sufficiently minimize any risk that the individual may pose to others based on his disability.

Community Notification



Community
Residences for
Individuals Under
PSRB Jurisdiction

Health Insurance Portability and Accountability Act (HIPAA)

- Federal law prohibits the use or disclosure of an individual's protected health information without the individual's consent unless specifically permitted by law. *See 42 USC 1320d et seq.; 45 CFR Part 160 to 164.*
- Protected health information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
- A person who knowingly discloses, uses or obtains an individual's health information is subject to civil and criminal penalties.
- HIPAA preempts contrary state law.

HIPAA Exceptions

- Limited disclosure of information is permitted to law enforcement officials: 45 CFR 164.512(f).
 - pursuant to legal process
 - for identifying or locating a suspect, fugitive, material witness or missing person
 - regarding an individual who is a victim of a crime
 - regarding a decedent if there is a suspicion that the death resulted from criminal conduct
 - if there is evidence of criminal conduct on the premises
 - in an emergency to alert law enforcement to the commission of a crime, the location of crime or victims of such crime, and the identity, description and location of the perpetrator

HIPAA Exceptions

- Limited disclosure of information is permitted to avert a serious threat to health or safety: 45 CFR 164.512(j)
 - If necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat; or
 - If necessary for law enforcement authorities to identify or apprehend an individual: (A) Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim; or (B) Where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody.

State Confidentiality Laws

- Information used or disclosed in a PSRB hearing may not be disclosed to the public. Limited information may be given to the victim, case manager, DA from committing county, judge who signed judgment order, and AG's office, individual and his attorney. *See, e.g.,* ORS 161.336.
- ORS 179.505 prohibits an entity that contracts with the Department of Human Services to provide services to individuals with mental or emotional disturbances from disclosing health information that:
 - Identifies an individual or that can be used to identify an individual and
 - Relates to the past, present or future mental health condition of an individual or the provision of health care to an individual.
- ORS 192.512 to 192.529: A health care provider or state health plan are prohibited from disclosing protected health information to the public.
- In addition, if a placement in a residential treatment facility is considered public assistance, then the state is prohibited from providing information about it to the public. *See* ORS 411.320.

Community Notification Case Law

Community notification may require due process protections be given to an individual because of the potential serious consequences of "social ostracism, loss of job prospects, and significantly increased likelihood of verbal and even physical harassment."

Nobel v. Board of Parole and Post-Prison Supervision, 327 Or 485, 497 (1997).

Community Notification Case Law

Michigan Department of Social Services (MDSS)

"has failed to provide an adequate justification for the notice requirements. MDSS merely offers the same justifications for the notice requirements as it offers for the spacing requirements, i.e., integration and deinstitutionalization. Notifying the municipality or the neighbors of the proposed AFC facility seems to have little relationship to the advancement of these goals. **In fact, such notice would more likely have quite the opposite effect, as it would facilitate the organized opposition to the home, and animosity towards its residents.** See *Potomac*, 823 F. Supp. at 1296. Furthermore, MDSS has offered no evidence that the needs of the handicapped would warrant such notice. We find that the notice requirements violate the FHAA and are preempted by it."

Larkin v. Michigan Dep't of Social Servs., 89 F.3d 285, 292 (6th Cir. Mich. 1996).

Application to PSRB Individuals

- May violate state and federal laws regarding protected health information.
- Requiring special community notification for GEI individuals conditionally released into the community will likely be found invalid by a court as facial discrimination. It may be found to rely on generalized stereotypes about a group of disabled individuals, rather than resulting from particularized concerns for a specific resident.
- Disparate Impact: if laws are modified to require community notification for all types of group homes or treatment facilities it may still violate state and federal laws. Reasonable accommodations may be required.

Questions?

