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Cast Adrift: Homeless Mentally Ill, Alcoholic and Drug Addicted

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COMMENTS

CAST ADRIFT: HOMELESS MENTALLY ILL, ALCOHOLIC AND DRUG ADDICTED

In the 1980s, both government and the public recognized the need to address the lack of housing that confronts vulnerable segments of the population.¹ Such efforts, however, have resulted in mere indiscriminate warehousing of the homeless, regardless of the particular needs of different groups within the homeless population.² With decreasing public and private funds³ and sagging public sympathy,⁴ private and public shelter and service providers increasingly focus their efforts on those groups that are easiest to assist.⁵ Simultaneously, localities attempt to hide the general homeless population by relying on law enforcement⁶ and by limiting

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3. See Baum & Burnes, supra note 2, at 108; Collier, supra note 1, at 13.
4. See Baum & Burnes, supra note 2, at 108; Collier, supra note 1, at 13; see also Larry Rohter, Homelessness Defies Every City's Remedy, N.Y. TIMES, Nov. 22, 1992, sec. 4, at 3.
5. Such groups include families and individuals homeless for the first time due to economic hardship or abusive situations. Baum & Burnes, supra note 2, at 5, 81-82; Collier, supra note 1, at 10.
6. Such enforcement results in harassment. See Pottinger v. City of Miami, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) (holding that the City's policy of arresting the homeless for "performing essential, life-sustaining acts in public when they have absolutely no place to go effectively infringes on their fundamental right to travel in violation of the equal protection clause"). During a three-year period, the City arrested homeless persons for misdemeanors such as standing, sleeping or sitting on sidewalks, sleeping in public, and loitering or prowling, resulting in approximately 3,500 arrests. Id. at 1559-60. The City's police force raided parks, where they arrested the homeless and confiscated and destroyed their personal property. Id.; see also Frances Schwartzkopff & Kathy Scruggs, Atlanta Homeless Jailed When Company Comes?, ATLANTA J. & CONST., Oct. 18, 1993, at B2 (revealing that police arrested the homeless to sweep them off the streets days before large conventions began); Jenifer Warren, Compassionate S.F. Turns Cool to Homeless, L.A. TIMES, Aug. 30, 1993, at A1 (noting that the Mayor of San Francisco launched a crackdown on the homeless, resulting in over 400 arrests for crimes in less than 30 days and that such "get-tough" strategies are becoming more popular in cities throughout the country).


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shelter sites and services. This results in further segregation and clustering of the homeless population.

The need for housing is particularly acute for homeless persons who suffer from disabilities such as mental illness, alcoholism, drug addiction, and AIDS. Collier, supra note 1, at 10 (noting two aspects of the response to the homeless: "to target expanded social services to the most salvageable homeless, making shelters more upscale and selective; and to attempt, through a combination of tougher policing policies and neglect, to push the majority of the homeless, those with the most intractable problems, out of sight").

Shelters have been placed in poorer, often minority, neighborhoods, which previously were the path of least resistance. Santiago O'Donnell, Welcome Mat Not Out For Many Projects, L.A. TIMES (Ventura Co.), Oct. 20, 1991, at B1, available in LEXIS, News Library, ARCNWS File; Home for the Homeless, SAN DIEGO UNION-TRIB., July 26, 1993, at B6.

Others have found the numbers to be significantly higher. Id. at 358-59. She also stated that a supportive environment was necessary because "when you need somebody to talk to, you need another recovering alcoholic or addict to talk to; a normal person that doesn't know addiction or recovery wouldn't understand some of the problems that we go through." Id. at 359. As the court stated in Easter Seals Soc. v. Township of North Bergen: "[w]ithout proper care, supervision and peer support each [plaintiff] could easily suffer a
diction, and HIV or AIDS. For the homeless disabled, access to shelters and services is the first step toward permanent, stable housing in small group homes and, eventually, to independent living arrangements. Yet, a major obstacle to the provision of shelters and services for the homeless disabled population is community opposition to services for the homeless in general. Increasingly, local officials respond to community opposition by directly or indirectly controlling the placement of such shelters and services. The underlying policies and concerns of the local

relapse. For these alcoholics, a relapse threatens not only a potentially irremediable reversion to chronic alcohol abuse but immediate physical harm or death." Easter Seals Soc'y v. Township of North Bergen, 798 F. Supp. 228, 237 (D.N.J. 1992) (quoting Sullivan v. Pittsburgh, 811 F.2d 171, 179 (3d Cir. 1987), cert denied, 484 U.S. 849 (1987)). The Easter Seals court "previously . . . had occasion to conclude that interference with the establishment of a functioning community residence for recovering chemical abusers threatens those individuals with the irreparable harm of a relapse." Id.

13. See supra note 12. For those who suffer from both mental illness and substance addiction, the need for a dwelling is overwhelming. See Easter Seals, 798 F. Supp. at 237; see infra note 54 (discussing facts and holding of Easter Seals).

14. For those with HIV or AIDS, affordable and appropriate housing is a critical need. Felicia R. Lee, Cuts Set Off Debate Helping Homeless with AIDS, N.Y. TIMES, Mar. 21, 1995, at B1 (discussing the debate set off by proposed cuts to the Department of Housing and Urban Development housing program for persons with AIDS, noting that one-third to one-half of all persons with AIDS are either homeless or are in imminent danger of homelessness and that such persons need supportive housing which provides medical care, drug treatment and assistance with housekeeping and personal care); see also Stewart B. McKinney Found., Inc. v. Town Planning & Zoning Comm'n, 790 F. Supp. 1197, 1202-03 (D. Conn. 1992) (noting that evidence presented to the court revealed that "HIV-infected people in Connecticut face serious shortages of housing . . . Affordable, adequate, and appropriate housing is one of their most critical needs").

15. BAUM & BURNES, supra note 2, at 138 (arguing that one cause of homelessness is society's refusal to recognize that homelessness flows, in significant part, from the reduction of services for the most severely disabled); see also Nancy K. Rhoden, The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory, 31 EMORY L.J. 375, 415-420 (1982) (arguing that the mentally ill homeless' need for housing cannot be separated from their need for mental health treatment); Lucie White, Representing "The Real Deal", 45 U. MIAMI L. REV. 271, 278-79 (1990-91) (arguing that immediate access to supportive housing is essential to the success of any homeless prevention program). Rhoden notes that experts on homelessness have found that the mentally ill homeless need decent shelter as much as mental health services "because their therapeutic and survival needs are inseparable and because pathologies of place compound disorders of the mind." Rhoden, supra, at 416 (footnote omitted).


17. See Franklin, supra note 8, at 7B; Beverly Stewart, Church Outreach, Suburban Zoning Often At Odds, CHI. TRIB., Feb. 24, 1989, at C-8.
governments, when making such decisions, rarely take into account the detrimental impact on the homeless disabled population.\textsuperscript{18}

One significant barrier to ensuring legal protection for homeless disabled persons is the difficulty of determining whether community animus is directed at the disabilities most common among the homeless or at the class of homeless as a whole.\textsuperscript{19} A second obstacle is reduced willingness of governmental bodies to provide services to those persons with certain disabilities.\textsuperscript{20} As a result, a significant portion of this population comprises a high percentage of the homeless.\textsuperscript{21} An examination of the judicial interpretation of the federal disability laws reveals that these disabled persons, who become the most vulnerable disabled as a result of their homeless status, have fallen through the cracks of the federal disability laws.

This Comment focuses on the federal disabilities laws and the way in which the courts have interpreted and applied them. Next, this Comment demonstrates that the federal disabilities laws cover the homeless disabled, the most vulnerable disabled class. This Comment then examines the limitations of the federal disabilities laws as applied to challenging governmental actions directed at homeless shelters and services. Finally, this Comment argues that the federal disability laws do not offer relief from discriminatory acts directed at services and shelters, thus toward homeless disabled persons. This Comment asserts that the federal courts must show greater sensitivity to the nature of homelessness as an outgrowth of the disability itself, and must recognize that animus towards disabilities often is the root of what appears to be merely class animus directed at the homeless population in general.

\textsuperscript{18} Baum \& Burnes, supra note 2, at 3-4, 87-88. Baum and Burnes argue that policymakers will not acknowledge or, at least, are unaware of both the mental illness and substance addiction among the homeless as well as the need to ensure access for the homeless disabled to healthcare, therapy, and rehabilitation services. Id. at 3, 87-88. They also argue that a primary cause of homelessness is not a lack of affordable housing, but a lack of access to such services. Id. at 3.


\textsuperscript{20} See Johnson v. Dixon, 786 F. Supp. 1, 2-3 (D.D.C. 1991); Williams v. Secretary of the Executive Office of Human Serv., 609 N.E.2d 447, 453 (Mass. 1993); see also, Baum \& Burnes, supra note 2, at 3-4 (noting that policymakers’ approach to dealing with the homeless is “selective,” in that social remedies focus on those persons who are the easiest to assist, yet ignore the homeless mentally ill and substance addicted and their need for healthcare and rehabilitation needs).

\textsuperscript{21} See supra note 10 and accompanying text (describing the number of disabled homeless comprising the homeless population).
I. COVERAGE OF THE HOMELESS DISABLED POPULATION UNDER FEDERAL DISABILITY LAWS

Three federal statutes theoretically provide the most significant protection to homeless persons with disabilities.22 The Fair Housing Act of 1968, as amended in 1988, prohibits discrimination in the area of housing on the basis of disability.23 Section 504 of the Rehabilitation Act of 1973 prohibits discrimination in programs or services receiving federal assistance.24 The Americans with Disabilities Act of 1990 prohibits discrimination in both the private and public sectors, regardless of receipt of federal assistance.25

A. Fair Housing Act: Prohibiting Housing Discrimination

Under the Fair Housing Act (FHA), it is unlawful to discriminate on the basis of disability in the sale or rental of residential property.26 Furthermore, it is unlawful "to otherwise make unavailable or deny" residential property to persons protected under the FHA.27 The persons with


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[\text{[t]o 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—}]

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\begin{align*}
&\hspace{1cm} \text{(A) the buyer or renter,} \\
&\hspace{1cm} \text{(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available or,} \\
&\hspace{1cm} \text{(C) any person associated with that buyer or renter.} \\
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disabilities whom the FHA protects include buyers or renters, individuals residing or intending to reside on the property, or individuals associated with the renter or buyer.\textsuperscript{28}

In addition, the FHA expressly prohibits acts that "coerce, intimidate, threaten, or interfere" with any individual's rights under the FHA as well as such acts directed at others "having aided or encouraged" the exercise or enjoyment of such rights.\textsuperscript{29} Finally, the FHA imposes an affirmative duty to make reasonable accommodations to comply with the FHA's prohibition against discriminatory effect.\textsuperscript{30} Refusal to comply with the FHA's reasonable accommodation requirement is considered a discriminatory act.\textsuperscript{31}

The federal courts aggressively enforce the FHA against government officials who employ zoning schemes to deprive persons with disabilities of housing.\textsuperscript{32} To date, the majority of FHA claims concern group homes

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\item 28. \textit{Id.}
\item 29. 42 U.S.C. § 3617.
\item 30. A governmental body must "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); see, e.g., United States v. Commission of Puerto Rico & Regulations & Permit Admin., 764 F. Supp. 220, 224 (D.P.R. 1991) (holding that reasonable accommodation includes waiver of compliance with certain zoning requirements).
\item 32. See United States v. Southern Management Corp., 955 F.2d 914, 923 (4th Cir. 1992) (affirming injunction against real estate management company that had refused to rent apartments to recovering substance abusers who were clients of a substance abuse program); Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1289 (D. Md. 1993) (holding that an "exceptional person" zoning rule resulted in disparate treatment of elderly persons with disabilities and thus was a FHA violation); Support Ministries for Person with AIDS, Inc. v. Village of Waterford, 808 F. Supp. 120, 139 (N.D.N.Y. 1992) (holding that the passage of a zoning ordinance that intended to prevent a group home for persons with AIDS violated the FHA); City of Peekskill v. Rehabilitation Support Serv., Inc., 806 F. Supp. 1147, 1156 (S.D.N.Y. 1992) (supporting the denial of a motion for a preliminary injunction against the establishment of a group home for homeless mentally ill persons by stating that "[p]reventing housing for disabled persons on the grounds that the City has already provided its fair share . . . comes perilously close to violating the Fair Housing Act" and is possibly "contrary to the recently enacted Americans with Disabilities Act"); Horizon House Developmental Serv., Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 700 (E.D. Pa. 1992) (holding that a city ordinance's distance requirement imposed upon group homes and passed in response to a proposed use of a residence for persons with mental disabilities was facially discriminatory in violation of the FHA), \textit{aff'd}, 995 F.2d 217 (3d Cir. 1993); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 452 (D.N.J. 1992) (granting a preliminary injunction enjoining the township from interfering with the immediate occupancy of a group home for recovering alcoholics and substance abusers on the grounds that the home failed to meet the definition of a "single family" under its zoning ordinance); Easter Seals Soc'y, Inc. v. North Bergen, 798 F. Supp. 228, 234 (D.N.J. 1992) (holding that deviations from normal procedures and substantive criteria in the permit process justified enjoining the town from further interference with the establishment and operation of a group home for persons with mental illness
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for the homeless disabled or persons who risk homelessness because of their disability.\textsuperscript{33}

Direct evidence of intentional discrimination based on disability is not always available, thus the federal courts apply an analytical framework, comprised of two tests, which has evolved under race discrimination in housing.\textsuperscript{34} The first test permits proof of intentional discrimination through circumstantial evidence, as articulated in \textit{Village of Arlington Heights v. Metropolitan Housing Development Corp.}\textsuperscript{35} The second test permits proof of discrimination by a showing of disparate impact, as articulated in \textit{Huntington Branch, NAACP v. Town of Huntington.}\textsuperscript{36}

With regard to intentional discrimination cases, courts have found zoning decisions to be discriminatory acts when they are intended to appease private citizens holding discriminatory attitudes toward persons with disabilities.\textsuperscript{37} Federal courts rely significantly on evidence of community ani-

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\item \textsuperscript{33} See supra note 32 (citing cases involving zoning schemes).
\item \textsuperscript{34} See supra note 32 (citing cases that have employed the two tests).
\item \textsuperscript{35} 429 U.S. 252 (1977); see also United States v. City of Birmingham, 727 F.2d 560, 564 (6th Cir. 1984) (describing the circumstantial evidence that led to the trial court's finding of intentional discrimination), \textit{cert. denied}, 469 U.S. 821 (1984); \textit{Stewart B. McKinney Found.}, 790 F. Supp. at 1211 (listing the \textit{Arlington} factors from which a discriminatory purpose may be gleaned).
\item \textsuperscript{36} 844 F. 2d 926, 933 (2d Cir.), \textit{aff'd}, 488 U.S. 15 (1988).
\item \textsuperscript{37} As the court stated in \textit{Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.}, a decisionmaker has a duty not to allow illegal prejudices of the majority to influence the decision making process. A racially discriminatory act would be no less
mus to infer that the government's actions were an impermissible response to community opposition. 8 Furthermore, the courts uniformly find it unnecessary for plaintiffs to show that some purposeful, malicious desire to discriminate, nor the disability, itself, predominately motivated the local government. 9 A plaintiff must show only that the disability was one motivating factor in the local government's decisions and actions. 40

Courts also uniformly hold that evidence based solely upon the derogatory or discriminatory comments of citizens is insufficient to prove the discriminatory intent of local officials. 41 Thus, the Arlington Heights test intends to expose the government's underlying motivation by examining the historical background of the government's decision, the sequence of events leading to the decision, and the government's departure from nor-

illegal simply because it enjoys broad political support. Likewise, if an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter.


38. See Support Ministries for Persons with AIDS, 808 F. Supp. at 134; Borough of Audubon, 797 F. Supp. at 361-62; Association of Relatives and Friends of AIDS Patients, 740 F. Supp. at 104-05; see also Stewart B. McKinney Found., 790 F. Supp. at 1211 (describing the community's organizing actions against a group home as evidence of animus to which the town officials responded).

As stated in Borough of Audubon, "[d]iscriminatory intent may be established where animus towards a protected group is a significant factor in the community opposition to which the [local government] is responding." Borough of Audubon, 797 F. Supp. at 361.

39. Stewart B. McKinney Found., 790 F. Supp. at 1210-11; Association of Relatives & Friends of AIDS Patients, 740 F. Supp. at 104 (stating that it is irrelevant whether the decision maker had any personal bias when the decision maker's motive was to appease private parties' discriminatory views).


41. See, e.g., United States v. City of Birmingham, 727 F.2d 560, 564 (6th Cir.), cert. denied, 469 U.S. 821 (1984); see also Stewart B. McKinney Found., 790 F. Supp. at 1212 (stating that a decision maker cannot be held accountable for expressions of prejudice by the community she serves unless circumstantial evidence demonstrates that the decision maker took such prejudice into account); Association of Relatives & Friends of AIDS Patients, 740 F. Supp. at 104 (same). At issue is whether the local government "bowed to the political pressure" of private citizens during its decision-making process. Stewart B. McKinney Found., 790 F. Supp. at 1212; see also United States v. City of Blackjack, 508 F.2d 1179, 1185 (8th Cir. 1974); Association of Relatives & Friends of AIDS Patients, 740 F. Supp. at 104.
mal procedures and substantive criteria when making its decision. Through the application of the *Arlington Heights* factors, coupled with a strong showing of community animus, courts have determined that local officials were aware of the discriminatory nature of the community opposition and acted, even partly, to satisfy the community's demands.

Through the application of the *Huntington Branch* test, courts will find a discriminatory, disparate impact from otherwise facially neutral policies or practices that may be employed by local governments to deter or restrict persons with disabilities from residing in their towns or neighborhoods. Upon a finding of discriminatory impact, courts en-

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42. *Arlington Heights*, 429 U.S. at 265-68. Under the *Arlington Heights* test, the courts consider the following factors in determining whether an invidious discriminatory purpose pervaded the decisions and actions taken by local officials: (1) discriminatory impact; (2) the historical background of the decision; (3) the sequence of events leading up to the challenged decision; (4) departures from normal procedural sequences; and (5) departures from normal substantive criteria. *Id.; see also City of Birmingham*, 727 F.2d at 564 (listing the above factors); *Stewart B. McKinney Found.*, 790 F. Supp. at 1211 (same).

43. *Arlington Heights*, 429 U.S. at 267-68.

44. *City of Birmingham*, 727 F.2d at 560. The Sixth Circuit also stated that the plaintiff need only show that the local government’s desire to appease the community was a motivating factor in its decision making. *Id.; see also United States v. Borough of Audubon*, 797 F. Supp. 353, 361 n.6 (D.N.J. 1991).

45. The first prong of the test is the strength of the plaintiff’s showing of discriminatory effect. See *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 935 (2d Cir.), *aff’d*, 488 U.S. 15 (1988). The second prong, called the least important prong, is whether there is some evidence of discriminatory intent. See *Huntington Branch, NAACP*, 844 F.2d at 935-36 (holding that plaintiffs need not show any evidence of discriminatory intent to establish a prima facie case under disparate impact analysis); *Association of Relatives & Friends of AIDS Patients*, 740 F. Supp. at 106; *Baxter v. City of Belleville*, 720 F. Supp. 720, 732 (S.D. Ill. 1989). The third prong is an inquiry into the defendant’s professed interest in taking the disputed action. See *Association of Relatives & Friends of AIDS Patients*, 740 F. Supp. at 107 (finding that the defendant is required to prove that its action furthers, “in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect”) (quoting *Huntington Branch, NAACP*, 844 F.2d at 936). The final prong considers “whether the plaintiff sees the defendant as the defendant to affirmatively provide housing for members of a protected class or merely seeks to restrain the defendant from interfering with individual property owners wishing to provide such housing.” *Id.* at 106 (citing Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978)).


47. Such requirements are justified as a legitimate exercise of a local government’s power to protect safety and health. See, e.g., *Stewart B. McKinney Found., Inc. v. Town Planning & Zoning Comm’n*, 790 F. Supp. 1197, 1218 (D. Conn. 1992) (explaining that local governments impose or enforce the health, safety or land-use requirements for group living arrangements for the disabled on supposedly nondiscriminatory grounds); *see also Support Ministries for Persons With AIDS*, 808 F. Supp. at 120 (holding residents were
force the FHA's reasonable accommodation requirement by ordering modifications or exceptions to zoning practices in order to permit persons with disabilities to obtain housing.\textsuperscript{48}

\textit{Baxter v. City of Belleville}\textsuperscript{49} set the precedent for the uniform adoption of the \textit{Arlington Heights} test to prove intentional discrimination towards disabled persons.\textsuperscript{50} In \textit{Baxter}, the plaintiff, seeking to establish a group home, successfully challenged the denial of a special use permit by arguing that an irrational fear of AIDS precipitated the denial.\textsuperscript{51} The United States District Court for the Southern District of Illinois found that the city's actions were "both intentional and specifically designed to prevent persons with HIV from residing" in the home leased by the plaintiff.\textsuperscript{52} The \textit{Baxter} court also set precedent by finding that the denial of the permit resulted in an impermissible disparate impact under the \textit{Huntington Branch} test.\textsuperscript{53} A succession of federal cases that followed \textit{Baxter} provide a strong body of law upon which to build a case against local officials who interfere with the provision of housing for persons with disabilities.\textsuperscript{54}
In Stewart B. McKinney Foundation, Inc. v. Town Plan & Zoning Comm’n, 790 F. Supp. 1197 (D. Conn. 1992), the plaintiff challenged a local zoning commission’s determination that a special exception from the zoning code was required for the establishment of a residence for persons with AIDS who were homeless or at risk of becoming homeless. *Id.* at 1200-03. The special use permit was laden with certain requirements and conditions subject to the significant discretion of the zoning commission. *Id.* at 1219-20. The United States District Court for the District of Connecticut held that the zoning commission’s requirement of a special use permit had a discriminatory impact on persons with AIDS. *Id.* at 1219. This requirement placed future tenants under public scrutiny in such a manner that unrelated, nondisabled infected persons would not be placed. *Id.* The court stated that the imposed burdens perpetuated the segregation of persons with AIDS. *Id.* at 1220. The Court also held that the zoning commission failed to provide a legitimate justification for its decision to require a special exception. *Id.* at 1221.

In Easter Seals Society v. Township of North Bergen, 798 F. Supp. 228 (D.N.J. 1992), the district court granted a preliminary injunction to an organization seeking a construction permit to build a community residence for persons diagnosed primarily with a psychiatric disorder and, secondarily, with substance abuse, referred to as Mentally Ill Chemical Abusers (MICA). *Id.* at 230. The record was replete with evidence of community animus towards the MICA residents. *Id.* In addition, the township required that the plaintiff send notices of appeal to all property owners in the vicinity of the proposed site even though such notice was not required for an appeals hearing regarding construction permits. *Id.* at 231-32. Upon advice of counsel, the zoning board deferred the appeal as long as possible so that the Board of Commissioners could amend the zoning ordinance to require community residences such as the proposed facility to acquire a conditional permit laden with significant and costly conditions. *Id.* at 232. Deviations from normal procedural and substantive sequences, as well as the evidence of community animus and the local officials’ reassuring comments at public meetings added up to discriminatory intent. *Id.* at 234-35.

In United States v. Borough of Audubon, 797 F. Supp. 353 (D.N.J. 1991), town officials, through excessive enforcement of local zoning ordinances, harassed the renter of a home where recovering alcoholics and drug addicts resided. *Id.* at 360-61. After the borough’s zoning enforcement officer made repeated visits to the group home, he issued weekly citations for ordinance violations regarding parking, noise, occupancy permits, and zoning. *Id.* at 356-57. Finally, the borough served a Notice of Violation and Order to Terminate to the group home. *Id.* at 357. While the United States District Court for the District of New Jersey found that zealous enforcement alone did not constitute discrimination, a discriminatory motive became clear in the light of the borough’s previous enforcement practices. *Id.* at 360. Whereas the borough historically had not enforced its code, all branches of the borough government conspired to enforce the code against the renter. *Id.* at 361. In addition, certain comments made by the Mayor and other borough officials at public meetings that irate citizens attended, revealed that the borough had mobilized to deter the continuing occupation of the home even though none of the speakers made explicit reference to the residents’ disabilities. *Id.* at 360. The court found that the historical background of the acts and the deviations from normal procedures revealed that an animus against the house residents on the basis of their disabilities motivated the local government. *Id.* at 360-61. The court found a discriminatory animus regardless of whether the local officials shared the community’s animus or were merely acting in response to the community’s animus. *Id.* The court enjoined the local government from interfering with the house’s operation or any other similar living arrangement for persons with disabilities that may arise in the future. *Id.* at 363.

Similarly, in Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992), the United States District Court for the District of New Jersey also found a discriminatory impact upon disabled persons, which resulted from the township’s interpretation of “family” in its zoning ordinance. *Id.* at 461. The township imposed more stringent require-
B. Section 504: Prohibiting Discrimination in Federally Funded Programs

Section 504 of the Rehabilitation Act of 1973 provides that no individual with a disability, who is otherwise qualified, shall, solely on the basis of disability, be excluded from or denied the benefits of any program or activity receiving federal assistance nor be subjected to discrimination by such program or activity. With the passage of section 504, Congress

ments upon unrelated persons sharing the same dwelling than persons related by blood or marriage sharing a dwelling. Id. Yet, the court stated:

Because people who are handicapped by alcoholism or drug abuse are more likely to need a living arrangement such as the one Oxford House provides, in which groups of unrelated individuals reside together in residential neighborhoods for mutual support during the recovery process, Cherry Hill’s application of this ordinance has a disparate impact on such handicapped people. Id. at 461 (footnote omitted).

The court rejected the township’s justification of its requirements on the ground that the residents of the group home lacked the “permanency and stability” necessary to qualify as a family unit. Id. at 462. Yet, even if the zoning commission articulated a legitimate justification, the court stated that the zoning commission would have to waive the requirement in order to comply with the FHA’s reasonable accommodation requirement. Id.


55. See supra note 26 and accompanying text (explaining the use of the term “individual with a disability” rather than the term “individual with a handicap” as employed in section 504).

56. Specifically, section 504 states that “[n]o 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 (1988). Note also that the Department of Health and Human Services (HHS) regulations define “federal financial assistance” as “any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available.” 45 C.F.R. § 84.3(h) (1993).

HHS regulations issued pursuant to section 504 define “recipient” as:

any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.
intended to ensure that persons with disabilities are provided equal opportunity and are not segregated through any service or program provided by a recipient of federal assistance. The regulations promulgated under section 504 provide more specific prohibitions. For example, section 504 prescribes siting determinations, program criteria and administrative procedures that tend to either screen out disabled persons or defeat or substantially impair the objectives of the program or service. Finally, the regulations provide a broad prohibition against interference with any disabled person’s ability to enjoy “any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.”

1. Limited Applicability to Disabilities Giving Rise to Public Services

In Alexander v. Choate, the Supreme Court stated that Congress clearly sought to rectify both intentional discrimination and discrimina-

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45 C.F.R. § 84.3(f).

57. 29 U.S.C. § 794; see also Timothy M. Cook, The Americans With Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 398 (1991) (stating that Congress, fully informed of the historical practices of discrimination against and segregation of the disabled, “adopted, as the ADA’s statutory purpose, the provision of a ‘clear’ mandate to end all forms of segregation and discrimination”).

58. See supra note 57.

59. See 45 C.F.R. § 84.4 (1993). Regulations issued under section 504 by the Department of Health, Education and Welfare, now known as “Health and Human Services” or “HHS,” while applicable only to HHS funded programs, were intended to serve as a prototype for all other sets of regulations issued by other federal agencies. W.A. Harrington, Annotation, Construction and Effect of § 504 of the Rehabilitation Act of 1973 (29 USCS § 794) Prohibiting Discrimination Against Otherwise Qualified Handicapped Individuals in Specified Programs or Activities, 44 A.L.R. Fed. 148, 152 n.2 (1979).

For example, the regulations prohibit denying the opportunity to participate or providing an opportunity that is not equal to that provided to others. 45 C.F.R. § 84.4(b)(1)(i), (ii). The regulations make clear that for benefits and services to be considered equally effective, they are not required to produce identical results or levels of achievement for disabled and non-disabled persons. 45 C.F.R. § 84.4(b)(2). They must merely provide such persons with an equal opportunity to obtain the same result or gain the same benefit in the most integrated setting appropriate to the person’s needs. Id.; see also Alexander v. Choate, 469 U.S. 287, 304 (1985) (stating that the purpose of the Rehabilitation Act was to ensure equal opportunity to participate and provide even-handed treatment, but not to guarantee equal results). Other prohibitions include providing an aid, benefit or service that is not as effective as those provided to others or providing different or separate aids, benefits, or services unless necessary to make them as effective as those provided to others. 45 C.F.R. § 84.4(b)(1)(iii), (iv).

60. 45 C.F.R. § 84.4(b)(4), (5).

61. 45 C.F.R. § 84.4(b)(1)(vii).

tion that results from apathy and benign neglect. Therefore, challenges may be brought to intentionally discriminatory actions or policies as well as facially neutral actions or policies that have a disparate impact on an otherwise qualified person.

Treatment of intentional discrimination against disabled persons differs from other types of discrimination, such as race discrimination, in that an individual's disability may be taken into account when determining the individual's eligibility for a particular public program or service. As stated in *Teahan v. Metro-North Commuter Railroad*, a court can presume that an adverse action was based solely on the disability if the defendant articulates factors that are established as causally related to the disability, and if it is shown that the defendant was aware of the disability at the time of the alleged discrimination. Upon such a showing, the defendant must rebut an inference of impermissible discrimination by

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63. *Id.* at 295. The Court noted that statements made in the Congressional Record "would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." *Id.* at 297 (footnote omitted).

64. *Id.* at 296-97.


66. 951 F.2d 511 (2d Cir. 1991).

67. *Id.* at 514; *see also* Cushing v. Moore, 970 F.2d 1103, 1108 (2d Cir. 1992). For example, in *Teahan*, an employer fired an individual with alcoholism for absenteeism. The United States District Court for the Southern District of New York held that the plaintiff had not met his burden of showing that the employer had used absenteeism as a pretext for firing him. *Teahan*, 951 F.2d at 514. As a result, the trial court held that the employer had not fired the plaintiff solely on the basis of his disability. *Id.* On appeal, the plaintiff argued that his absenteeism was conduct that manifested from his disability, and therefore his employer's adverse action against him was based solely on the disability. *Id.* The United States Court of Appeals for the Second Circuit agreed, holding that when an employer admits that it based its actions on conduct manifesting from the disability, the employer has directed such action solely at the disability as long as the employer knew of the disability at the time of the adverse action. *Id.* at 515.

If factors causally unrelated to the disability justify an adverse action taken against a person with a disability, the plaintiff must then show that such explanation is pretextual. *Id.* at 514; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (explaining that the burden shifts back to the plaintiff who must show that defendant's reason is merely pretext for a discriminatory reason).

To show a prima facie case of discrimination under Section 504, the plaintiff must prove: (1) that the program or service receives federal assistance; (2) he or she is disabled, as defined in Section 504; (3) that the action or decision was made solely on the basis of the disability; and (4) he or she was otherwise qualified for the assistance. *Teahan*, 951 F.2d at 514; *see Cushing v. Moore*, 970 F.2d 1103, 1107 (2d Cir. 1992); Doe v. New York Univ., 666 F.2d 761, 774 (2d Cir. 1981); Ass'a'd-Faltas v. Virginia, 738 F. Supp. 982, 987 (E.D. Va.), *aff'd*, 902 F.2d 1564 (4th Cir. 1990).
demonstrating that such factors were relevant to the essential eligibility requirements.68

*Cushing v. Moore*69 exemplifies the proper analysis of a potential violation in the provision of public services. It also demonstrates that section 504 challenges cannot be sustained when the challenge is against administrative policies that directly relate to the provision of services where the disability itself, "gives rise to the need of services in question."70 In *Cushing*, the plaintiffs alleged that a methadone clinic's newly-instituted policy precluding unemployed persons from continued participation in its "take-home" methadone program was discriminatory.71 The plaintiffs argued that because their drug addiction precluded their employment, their termination was based solely on their disability.72 The district court found that the plaintiffs' admission that their employment status terminated their privileges was fatal to their claim73 because the determination was based on characteristics other than their disability.74 On appeal, the Second Circuit stated that the district court ended its inquiry prematurely and should have applied the analysis set forth in *Teahan*.75

The Second Circuit explained that while the plaintiffs' employment status was causally related to their drug addiction, the drug addiction itself was the very factor giving rise to the service offered.76 The court continued by stating that "section 504 prohibits discrimination against a [dis-

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68. The inquiry is whether the defendant properly determined that the disability precluded the individual from meeting the eligibility criteria of the service or program. See *Teahan*, 952 F.2d at 515, 520. This inquiry examines whether the disability or conduct flowing from the disability is relevant to the essential eligibility requirements. *Id.*
70. *Cushing*, 970 F.2d at 1109.
71. *Cushing*, 783 F. Supp. at 731. Through the "take-home" program, participants acquired "take-home" privileges allowing them to acquire dosages of methadone in amounts covering an increasing number of days as they progressed through the program. *Id.* at 730. This program eliminated the difficult obstacle of daily travel to the clinic, rewarded the recovering addict for her progress and ensured continued success in recovery. *Id.* at 730-31. The policy change deprived the plaintiffs, who were in the program prior to the change, of the "take-home" privilege and required them to visit the clinic daily for methadone. *Id.* at 730. At various stages of recovery, some plaintiffs were homeless and unemployed, while others, unemployed at the time the policy went into effect, faced eviction from their homes. *Id.* at 731. The time required to travel to the clinic and wait for the treatment on a daily basis precluded their gaining employment. *Id.* Others, due to the disability, were unable to acquire employment at that stage of their recovery. *Id.*
72. *Id.*
73. *Id.* at 735.
74. *Id.* at 734.
75. *Cushing v. Moore*, 970 F.2d 1103, 1107-08 (2d Cir. 1992); see supra notes 66-68 and accompanying text (describing the *Teahan* analysis).
76. *Cushing*, 970 F.2d at 1108.
abled] person only where the [disability] is unrelated to, and thus, improper to consideration of, the services in question."77 Regarding the program’s eligibility requirements, the court held that the clinic’s policy of requiring persons who are unemployed because of their addiction to undergo “the more intensive treatment of daily visits to the clinic” was justifiable.78 Assuming that their drug addiction was the sole cause of their termination, the Second Circuit held that the plaintiffs’ argument that they were otherwise qualified could not be sustained under section 504.79 The court stated, however, that if the plaintiffs could show that a disability other than drug addiction prevented their employment, they could prevail under Section 504 since the disability giving rise to their employment status would be unrelated to the eligibility requirements for the “take-home” program.80

2. “Reasonable Accommodation” Defense Narrows Reach of Section 504

One possible barrier to a section 504 claim is that reasonable accommodation may not be required even though there is proof of a disparate impact or intentional discrimination.81 The Supreme Court has established a balancing test to determine when reasonable accommodation is required.82 In Alexander v. Choate,83 the Supreme Court held that disparate treatment or impact may not always be actionable in light of two countervailing objectives.84 The Court recognized that the statutory scheme requires reasonable modifications to ensure the protection of statutory rights and integration of persons with disabilities.85 The Court held, nevertheless, that the analysis must balance disabled person’s statutory rights

77. Id. at 1109.
78. Id.
79. Id. at 1108.
80. Id. at 1109.
81. The Supreme Court first addressed this issue in Southeastern Community College v. Davis, 422 U.S. 397 (1979), where it held that a defendant nursing school’s refusal to admit the plaintiff, a deaf person, did not violate section 504. Id. at 414. The Court reasoned that both the close supervision necessary to accommodate the plaintiff and the waiver of certain course and training requirements would compromise the essential nature of the nursing program. Id. at 409-10. Furthermore, the plaintiff still would not gain meaningful access to the program because, after modification, it would no longer meet the nursing program’s current educational standards. Id. at 410.
84. Id. at 299. The two countervailing objectives are “the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds.” Id.
85. Id. at 299-300.
with the grantee’s interest in the integrity of programs or services provided to the community-at-large.86 Thus, the government must make reasonable modifications only when “meaningful access” to a benefit can be provided without an undue financial burden on a program or without fundamentally altering the essential nature of the program.87

C. Americans with Disabilities Act: Prohibiting Discrimination in the Public and Private Sectors

The Americans with Disabilities Act of 1990 (ADA) has been called the “bill of rights for the disabled.”88 The ADA extends the rights of the disabled into the areas of public and private employment, public services and transportation, and private sector accommodations and services.89 The drafters intended the ADA to end the segregation and isolation of disabled persons and to ensure equal opportunities for them throughout society.90

86. Id. see also Davis, 442 U.S. at 413-14 (holding that the modifications sought by the plaintiff would compromise the essential nature of the defendant’s nursing program); supra note 81 (discussing the Supreme Court’s reasoning in Davis).

87. Id. The Alexander Court stated that “Section 504 does not require the State to alter this definition of the benefit being offered;” rather section 504 is intended to ensure evenhanded treatment, not services or benefits specifically tailored to give equal results. Id. at 303-04. In Alexander, the plaintiffs challenged a proposed fourteen-day limit on Medicaid coverage of in-patient hospital care on the ground that persons with disabilities had a greater need for prolonged in-patient care. Id. at 290-91, 302. Thus, the plaintiffs argued that the fourteen-day rule denied them meaningful access to medical care provided through Medicaid. Id. The Court rejected this argument by finding that facially, the fourteen-day rule did not utilize a criteria that distinguished the disabled from the abled. Id. at 302. The Court reasoned that there is no criteria such as “test[s], judgment[s] or trait[s] that the handicapped as a class are less capable of meeting or less likely of having.” Id. The Alexander Court found that the services and benefits under the Medicaid program were equally available to both the disabled and abled, and the same limited duration of coverage applied to both classes. Id. The Court held that section 504 does not require modification of the benefit provided “simply to meet the reality that the handicapped have greater medical needs.” Id. at 303. The Court stated that to require the State to modify the benefits to meet the needs of the disabled would require the State to guarantee medical care specifically tailored to an individual’s particular needs. Id. at 303-04.

88. Julie Brandford, Note, Undue Hardship: Title I of the Americans with Disabilities Act, 59 FORDHAM L. REV. 113, 116-17 (1990). Hopefully, the legislation will remedy some of section 504’s inherent limitations especially because the receipt of federal financial assistance is not necessary to trigger protection. See Cook, supra note 57, at 415.


One of the most debilitating forms of discrimination is segregation imposed by others . . . .

Discrimination also includes exclusion, or denial of benefits, services, or other opportunities that are not as effective and meaningful as those provided to others.
1. **Title II: Public Services or Programs**

Title II of the ADA extends the prohibitions of section 504 against discrimination based on disability to cover all services, programs, and activities provided or made available by state and local governments, regardless of whether they receive federal financial assistance.\(^9\) Congress intended Title II to ensure not only that disabled persons have access to public benefits and services,\(^9\) but also to encourage disabled persons' integration into society.\(^9\) In addition, the ADA drafters intended Title II to prevent blatant discrimination against disabled persons based on stereotypes.\(^9\) Finally, the regulations promulgated under Title II require reasonable accommodation to achieve such objectives.\(^9\)

Congress intended Title II to be interpreted consistently with section 504 as well as with the Court's holdings in *Alexander* and *Davis*.\(^9\) As a result, the same problems under section 504 regarding the feasibility of

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Discrimination also includes harms affecting individuals with a history of disability, and those regarded by others as having a disability as well as persons associated with such individuals that are based on false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies.

In conclusion, there is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. Finally, there is a need to ensure that the Federal Government plays a central role in enforcing these standards on behalf of individuals with disabilities.

S. REP. No. 116, supra, 6-7, 20; see also Cook, supra note 57, at 415, 417-18 (arguing that Congress recognized the limited effectiveness of section 504 in eliminating discrimination against and segregation of the disabled, and thus intended to make clear that a more aggressive effort to protect the disabled should occur under the ADA and that the ADA was not merely a reenactment of prior legislation).

91. 28 C.F.R. § 35.102 (1994); see also 28 C.F.R. app. A to pt. 35, § 35.102 (1994). Title II states that "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 (Supp. V 1993). The definition of "public entity" includes "any State or local government" as well as "any department, agency, special purpose district, or other instrumentality of a State... or local government." 42 U.S.C. § 12131(1)(A), (B).


93. See supra note 90 (discussing the legislative intent underlying the ADA).


95. 28 C.F.R. § 35.130(b)(7). Section 504 regulations supplied a model for Department of Justice regulations that provide specific prohibitions. Id. § 35.130.

96. 42 U.S.C. § 12134(b).
reasonable accommodation exist under the ADA. Because ADA case law is in its infancy, uncertainty remains regarding whether courts will continue to interpret "meaningful access" narrowly and "undue financial or administrative burden" broadly. In light of the ADA's legislative history, courts should be more aggressive in enforcing the protection this statute provides.

2. Title III: Private Sector Accommodations and Services

Title III of the ADA extends the general prohibitions of section 504 of the Rehabilitation Act to the private sector. Title III expressly prohibits discrimination against disabled persons with regard to goods and services provided by any place of public accommodation. Privately operated shelters which provide temporary housing fall under Title III as places of public accommodation, whereas, the FHA covers facilities such as group homes which provide residential, long-term housing.

97. See infra notes 174-88, 227-44 and accompanying text (discussing several recent cases brought under the ADA that exemplify the courts' reluctance to enforce the reasonable accommodation provision in certain circumstances).


99. See supra note 90 and accompanying text (discussing the legislative intent underlying the ADA).

100. S. REP. No. 116, supra note 90, at 58 (explaining the purpose of Title III).

101. Title III prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182 (Supp. V 1993); 28 C.F.R. § 36.201(a) (1993).

102. 28 C.F.R. §§ 36.104, 36.130 (1994). The definition of "public accommodation" includes shelters and day centers, either as social service center establishments or as places of lodging. Id.; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM. & THE U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT HANDBOOK, III-29 to III-30 (1992) [hereinafter ADA HANDBOOK]. "The category of social service center establishments would include not only the types of establishments listed, day care centers . . . homeless shelters, food banks . . . but also establishments such as substance abuse treatment centers . . . and halfway houses." ADA HANDBOOK, supra, at III-28.

The Department of Justice's analysis of Title III's coverage of lodging clarifies the relation between the FHA and Title III with regard to residential facilities and residential hotels that also may include facilities offered as homeless shelters. Id. at III-29 to III-30. The factors that distinguish facilities covered by the FHA from those covered by Title III are the length of stay and the provision of social services. Id. If a shelter provides only long-term residential stays, such facility is not a "place of lodging," and, thus is not a "place of public accommodation" under Title III. Id. Only the FHA covers such residential facilities. Id. Yet, if the same facility also offers social services, then the facility is likewise subject to Title III as a "social service center establishment," which is a "place of accommodation" regardless of length of stay. Id.
ADA drafters intended Title III to end the private sector's discrimination against and segregation of disabled individuals that results from the refusal by places of public accommodation to accommodate or provide services to such individuals. Congress primarily sought to ensure that disabled persons have access to and the opportunity to participate in "the economic and social mainstream of American life." The specific prohibitions found in Title III regulations mirror those found in both section 504 of the Rehabilitation Act and Title II of the ADA. In general, a place of public accommodation may not deny participation or opportunity, provide less equal services or accommodations, including segregated services or accommodations unless necessary, or utilize administrative criteria or methods that tend to screen out disabled persons. Title III regulations also prohibit retaliatory actions directed

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On the other hand, if a facility offers only short term stays, it is a "place of lodging," and thus, also subject to Title III. Facilities such as "single room occupancy hotels," which provide housing on a short-term basis, are considered "places of lodging" under Title III. If the short-term stay facility also offers social services, the facility falls under Title III as both a "place of lodging" and a "social service center establishment." Title III regulations and the Department of Justice's administrative analysis, however, do not clearly establish what the terms of distinction are for short and long stays. Id.

104. Id. at 38. In effect, Title III joins previous legislation that prohibits discrimination on the basis of race, color, gender, national origin or religion by including disability as a protected class. See ADA HANDBOOK, supra note 102, at III-3, III-41. Relying upon its Commerce Clause powers, Congress ensured that Title III reaches nearly all places of public accommodation with a few express exceptions. See 42 U.S.C. § 12181(1), (7); see also Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (regarding Congress' broad Commerce Clause powers to address discrimination in public accommodations and services offered by the private sector).

The regulations under Title III define a "place of public accommodation" as a "facility, operated by a private entity, whose operations affect commerce and fall within at least one of [twelve specified] categories." 28 C.F.R. § 36.104. Such categories are expressly listed in the Americans with Disabilities Act and are

(1) [p]laces of lodging[,] (2) [e]stablishments serving food or drink[,] (3) [p]laces of exhibition or entertainment[,] (4) [p]laces of public gathering[,] (5) [s]ales or rental establishments[,] (6) [s]ervice establishments[,] (7) [s]tations used for specified public transportation[,] (8) [p]laces of public display or collection[,] (9) [p]laces of recreation[,] (10) [p]laces of education[,] (11) [s]ocial service center establishments [and] (12) [p]laces of exercise or recreation.

ADA HANDBOOK, supra note 102, at III-27; see 42 U.S.C. § 12181(7). The regulations provide examples of each category, yet such examples are not intended to be exhaustive. ADA HANDBOOK, supra note 102, at III-27. In effect, the Title III prohibitions extend to all places of public accommodation with a few notable exceptions such as private clubs, religious entities, and rooming houses occupied by the proprietor and with not more than five rooms for rent. 28 C.F.R. § 36.102; 28 C.F.R. § 36.104(5).

106. 42 U.S.C. § 12182(b)(1)(2); 28 C.F.R. §§ 36.201 to 36.204; see also S. Rep. No. 116, supra note 90, at 60 (discussing the purposes of the ADA’s anti-discrimination provisions that are imposed on places of public accommodations).
at any individual, with or without a disability, who expresses opposition
to unlawful practices or who aids or encourages another to exercise her
rights under the ADA. 107 Furthermore, the ADA prohibits coercive or
intimidating acts that are intended to interfere with an individual's exer-
cise or enjoyment of any right under the Act. 108

D. Mental Illness, Alcoholism, and Drug Addiction as Recognized
Disabilities

Although federal disabilities laws generally require an individualized
inquiry as to whether a plaintiff is an "individual with a disability," 109
these laws protect the most vulnerable of the homeless population as a
class. 110 The definition of physical or mental impairment specifically in-
cludes emotional or mental illness, alcoholism, and drug addiction. 111

107. 28 C.F.R. § 36.206.
108. Id.
United States v. Southern Management Corp., 955 F.2d 914, 918-19 (4th Cir. 1992) (hold-
ing that a premature ruling did not short circuit the individualized inquiry).
110. Under section 504 regulations, a "qualified individual with a disability" means a
"[disabled] person who meets the essential eligibility requirements for the receipt of such
services." 45 C.F.R. § 84.3(k)(4). The definition of "individual with a disability" under
Title II of the ADA is similar to that in section 504, and Congress intended that its inter-
pretation be consistent with regulations issued under section 504. H.R. Rep. No. 711,
the courts have relied on section 504 interpretations of the term. See Southern Manage-
ment, 955 F.2d at 918; United States v. Borough of Audubon, 797 F. Supp. 353, 358 (D.N.J.
1991). Due to confusion under the section 504 definition regarding the relationship be-
tween accommodation and eligibility, Title II's regulations define a "qualified individual
with a disability" as "an individual with a disability who, with or without reasonable modifi-
cations . . . meets the essential eligibility requirements." 28 C.F.R. § 35.104 (emphasis ad-
ded). Qualifying the definition serves two functions. First, it ensures that the definition of
an individual with a disability does not exclude a person whose disability may be mitigated
by auxiliary aids or services. 28 C.F.R. app. A to pt. 35, § 35.104. Second, it ensures that a
disabled person is not precluded from meeting eligibility requirements because of a lack of
auxiliary aids or services or due to a failure to make reasonable modifications to rules or
policies. Id. The definition of an individual with a disability under the FHA and Title III
of the ADA is not qualified by an "eligibility requirement" as found under section 504 and
111. 24 C.F.R. § 100.201(a)(2) (1994) (defining physical or mental impairment under
the FHA); 28 C.F.R. § 35.104 (1994) (defining physical or mental impairment under the
Although section 504 does not explicitly include alcoholism or drug addiction as disabili-
ties, courts have consistently recognized alcoholism and drug addiction as disabilities under
the Rehabilitation Act. See Rodgers v. Lehman, 869 F.2d 253, 258 (4th Cir. 1989); Crewe
v. U.S. Office of Personnel Management, 834 F.2d 140, 141 (8th Cir. 1987); Sullivan v. City
of Pittsburgh, 811 F.2d 171, 182 (3d Cir.), cert. denied, 484 U.S. 849 (1987); Oxford House,
Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 459 (D.N.J. 1992); United States v. Bor-
ough of Audubon, 797 F. Supp. 353, 358 (D.N.J. 1991) (noting that courts have uniformly
The definition of an "individual with a disability," however, explicitly excludes an individual currently engaged in the illegal use of drugs and, thus, permits discrimination on such basis.\textsuperscript{112}

1. Three Tests May Be Applied to Determine Coverage

The regulations promulgated under section 504, the FHA, and the ADA explicitly provide three different tests that may deem a person "an individual with a disability."\textsuperscript{113} Under the definition of disability, a person is disabled if he or she (1) has a physical or mental impairment that substantially limits one or more of the major life activities\textsuperscript{114} of such individual; (2) has a record of having such an impairment; (3) or is regarded as having such an impairment.\textsuperscript{115}

Under the first test, a physical or mental impairment substantially limits one or more of a person's major life activities if such activities are "restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."\textsuperscript{116} Therefore, this test would protect homeless individuals whose emotional or mental illness or alcoholism substantially limits their ability to work or care for themselves.\textsuperscript{117} Under certain circumstances, this test would also protect homeless individuals who suffer from a drug addiction that substantially limits a major life activity.\textsuperscript{118}

The second test—"a record of such impairment"—intends to prohibit discrimination on the basis of a past impairment.\textsuperscript{119} This test protects persons who have a record of an impairment from which they have recov-
such as persons with a history of emotional or mental illness. Furthermore, it also protects recovering alcoholics and drug addicts.

The third test, "being regarded as having such an impairment," protects individuals who are treated as if they have "an impairment that substantially limits a major life activity, regardless of whether [such persons have] an impairment." The key element of the third test is the defendant's perception of the individual. This test is applicable particularly to the stereotypic views and stigmatizing perceptions of the homeless as dangerous, unstable addicts, which results in discrimination against disabled persons who happen to be homeless. In addition, this test also covers homeless persons who are not disabled but who are treated adversely as a result of stigmatizing perceptions held by others of disabilities most common among the homeless.

The Fourth Circuit employed this third test to bypass analysis under the first test of whether unidentified, prospective tenants of an apartment complex were, in fact, impaired individuals. In United States v. Southern Management Corp., the Fourth Circuit relied on the Supreme Court's holding in School Board of Nassau County v. Arline to find that an individualized inquiry as to whether prospective tenants had an actual impairment was unnecessary because the prospective tenants met the definition of disabled as a result of the defendant's perception that they had such an impairment. This perception, therefore, limited the

120. Id.
121. 42 U.S.C. § 3602(h); 28 C.F.R. § 35.104; 45 C.F.R. § 84.3(j).
122. 28 C.F.R. app. A to pt. 35, § 35.104 (discussing Test B for meeting the definition of "disability").
123. Id. (setting out the third test, Test C, for meeting the definition of "disability").
124. Id.
125. Id. The Department of Justice stated in its preamble to the final regulations promulgated under Title II of the Americans with Disabilities Act, a person who is denied services or benefits by a public entity because of myths, fears, and stereotypes associated with disabilities would be covered under this third test whether or not the person's physical or mental condition would be considered a disability under the first or second test in the definition.

Id.
126. Id.
128. 955 F.2d 914 (4th Cir. 1992).
129. 480 U.S. 273 (1987). In Arline, the Supreme Court recognized that a defendant's discriminatory perception of an individual can substantially limit certain life activities of that individual. Id. at 284.
130. Southern Management Corp., 955 F.2d at 918-19.
prospective tenants' participation in the major life activity of obtaining housing.\textsuperscript{131}

Other courts prefer a more conservative approach than the Fourth Circuit's bootstrap analysis.\textsuperscript{132} Even this more orthodox approach, however, minimizes the need for an individualized inquiry.\textsuperscript{133} In \textit{Oxford House v. Township of Cherry Hill},\textsuperscript{134} the United States District Court for the District of New Jersey held that alcoholism and drug addiction are impairments, but it refused to employ the bootstrap approach with regard to whether such impairments substantially limited a major life activity.\textsuperscript{135} Instead, the court, relying on a factual showing of the limitations that recovering alcoholics and substance abusers faced, found that such impairments substantially limited major life activities and, thus, held that the plaintiffs were "individuals with disabilities."\textsuperscript{136}

\textbf{2. Limited Protection for Current Illegal Drug Use}

Although the federal disabilities laws recognize drug addiction as a disability, they only fully protect those individuals who suffer from drug addiction but who are not currently using drugs illegally.\textsuperscript{137} Individuals currently using drugs illegally receive limited protection.\textsuperscript{138}
To enjoy the protection afforded under the disability laws, the regulations specifically require that the individual show either successful completion of a supervised drug rehabilitation program, otherwise successful rehabilitation, or participation in a supervised rehabilitation program.\textsuperscript{139} In addition, the laws protect a person who is erroneously regarded as using drugs illegally.\textsuperscript{140}

Section 504 and the ADA allow public and private entities to discriminate on the basis of current illegal drug use.\textsuperscript{141} The exception to this permissible discrimination under section 504 and the ADA states that a public or private entity may not deny health or drug rehabilitation services to an individual on the basis of that individual's current illegal drug use if the individual is otherwise entitled to such services.\textsuperscript{142} Nevertheless, the regulations entitle a drug rehabilitation or treatment program to terminate the participation of individuals who engage in illegal drug use while in the program.\textsuperscript{143}

\textsuperscript{139} 28 C.F.R. § 35.131(a)(2).
\textsuperscript{140} Id. § 35.131(a)(2)(iii).
\textsuperscript{142} 28 C.F.R. § 35.131(b).
\textsuperscript{143} Id. § 35.131(b)(2); see also 28 C.F.R. app. A to pt. 35, § 35.131.
II. FAIR HOUSING ACT AND SECTION 504 PROVIDE LIMITED PROTECTION TO HOMELESS DISABLED PERSONS WITH REGARD TO ACCESS

A. Fair Housing Act: Barriers Posed by Statutory Language and Judicial Interpretation of Access

In the context of group homes, the FHA has successfully challenged discriminatory local governmental actions taken against disabled persons in response to community opposition. Despite such success, the statutory interpretation of “dwelling” as well as the class of persons that the FHA intends to protect hinder attempts to protect disabled persons who utilize shelters and day centers. The significant difficulty in proving discrimination on the basis of disability presents an additional obstacle. Finally, courts have focused on political and budgetary concerns in evaluating whether claims are justiciable.

1. Statutory Language Creates Significant Barriers

A suit challenging animus directed at shelters or day centers and their occupants can be easily dismissed as not falling under the FHA, thus a limited number of cases have been brought under the FHA. The Dis-

144. See supra note 32 and accompanying text (describing the strong body of case law that has developed under the FHA in the context of discrimination against group homes). Successful claims also have been brought under the Equal Protection clause of the Fourteenth Amendment. In Sullivan v. City of Pittsburgh, a local government denied the conditional use permit applications of an organization that operated facilities providing shelter and treatment programs for homeless alcoholics. Sullivan v. City of Pittsburgh, 617 F. Supp. 1488, 1490 (W.D. Pa. 1985), aff'd, 811 F.2d 171 (3d Cir.), cert. denied, 484 U.S. 849 (1987). The district court held that this denial violated the plaintiffs' right to equal protection because the decision was not rationally related to any legitimate government interest. Id. at 1499; see also City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447-50 (1985).

145. Johnson v. Dixon, 786 F. Supp. 1, 4 (D.D.C. 1991) (expressing grave doubt that the FHA applies to shelters and that shelter residents fall under the class intended to be protected).

146. See infra notes 154-73 and accompanying text (discussing the difficulty of proving discrimination against the homeless disabled).

147. Johnson, 786 F. Supp. at 1. Residents of a homeless shelter filed suit on a number of counts including FHA violations and constitutional violations to enjoin the shelter's closure. Id. The court cast the issue under the political question doctrine and denied the motion for a preliminary injunction. Id. at 6-7. The court stated that the “District of Columbia is ... a governmental body acting within the ambit of legitimately derived authority, both fiscal and legislative, and the relief sought is not merely a waiver of a regulatory requirement, but, rather, a ‘massive judicial intrusion’ upon that governmental autonomy.” Id. at 7.

148. See Johnson, 786 F. Supp. at 4 n.8. Most challenges to the use of local zoning ordinances to prevent or control the siting of shelters are brought to the local level through local appeal of zoning board decisions. Then, the cases generally advance to the state or
District Court for the District of Columbia exemplifies the chilling effect of the narrow interpretation of "dwelling."

In *Johnson v. Dixon*, the court stated that the plaintiffs' reliance on the FHA to challenge the closure of two shelters was a "questionable" application of the statute, and that it was "doubtful" that the shelters could be deemed a "'dwelling' within the meaning of the Act, even if it may seem like home" to the plaintiffs. The court, in finding that a preliminary injunction was unwarranted, stressed that the closures were a political decision best left to the district government.

The second problem that the FHA's statutory language poses concerns standing. The *Johnson* court noted that because the FHA primarily protects only "buyers" and "renters," the FHA did not cover disabled persons who use shelters since they are neither renters or buyers. Courts also appear unwilling to view the homeless disabled as "residents" of shelters or day centers.

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150. *Id.* at 4.
151. *Id.* at 6-7.
152. *Id.* at 4.
153. *See id.* Yet, a private party seeking to provide shelter to disabled persons in the face of hostile zoning decisions could bring a claim on behalf of disabled persons if the party could successfully argue that the shelter met the definition of dwelling and could prove discriminatory intent or impact. 42 U.S.C. § 3604(f)(1)(B) (1988). Section 3604(f) of the Fair Housing Act, as amended, makes it unlawful "[t]o 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 person residing in or intending to reside in that dwelling after it is so sold, rented, or made available." *Id.* (emphasis added). A private party who intended to provide a shelter could also bring a claim against a local government that leased property to it, assuming the above mentioned difficulties are overcome. *Id.*
2. Barrier Posed By Proving Community Animus

Even if the obstacles posed by the FHA's statutory language could be overcome, a plaintiff must still prove that the government actions that limited or eliminated the use of the property as a shelter were directed against disabled users and were not motivated by budgetary concerns or community animus toward the homeless population in general.154 Most shelters that a significant number of homeless disabled use are open to the general homeless population.155 The major distinction between group homes and shelters is that group homes selectively target potential residents with specific disabilities, which become known to the community.156 Thus, community animus is clearly directed toward the disability.157 Yet, community opposition to shelters for the general homeless population is more difficult to define.158

Often, such opposition is couched in abstract terms such as concerns about property value reductions, public safety, or public nuisances.159 Comments often made about the homeless reflect broad stereotypes, such as “they” look or smell bad, are destructive, are dangerous, behave irrationally or make “me” feel uncomfortable, or refuse to be self-sufficient.160 These characterizations are also stereotypes of homeless dis-

154. The greatest hurdle in a successful FHA claim is proving that either (1) the governmental action directed at a shelter or day center was motivated in part by community animus toward the homeless disabled who use or would use the shelter, or (2) that the action resulted in or would result in a disparate impact on the homeless disabled which warrants reasonable accommodation. See Stewart B. McKinney Found., Inc. v. Town Planning & Zoning Comm., 790 F. Supp. 1197, 1211, 1218 (D. Conn. 1992); see also Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-68; Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935-36 (2d Cir.), aff’d, 488 U.S. 15 (1988).
155. See BAUM & BURNES, supra note 2, at 74-75.
156. See supra note 32 and accompanying text (citing examples of community animus directed at group homes for persons with specific disabilities).
157. See supra note 32 and accompanying text.
158. See CHANDLER, supra note 19, at 49; Seicshnaydre, supra note 19, at 1974; infra note 162 (discussing the difficulty of showing a nexus between community animus toward the general homeless population and the real or perceived behavior resulting from disabilities left untreated).
159. See Armory Park Neighborhood Ass’n v. Episcopal Community Serv., 712 P.2d 914, 921 (Ariz. 1985) (neighborhood association closed down a church center’s meal program for the homeless based on public nuisance); accord Seide v. Prevost, 536 F. Supp. 1121, 1137 (S.D.N.Y. 1982) (state board of visitors for a children’s psychiatric hospital attempted unsuccessfully to prevent the development of a homeless shelter for men close to the hospital on the ground that the institutionalized children had a constitutional guaranty of safety while in the state’s custody).
160. Some of these characterizations may be true. A significant number of homeless have become fearful of shelters, which have become havens for drug dealers, recently released convicts or other persons with dubious character. Ryan McCarthy, Ozenick: Board Lacks “Guts” on Homeless Issue, SACRAMENTO BEE, May 20, 1993, at N1, available in
abled persons.161 The difficulty of proving discrimination under the FHA is showing the requisite nexus between these perceptions and the real or perceived behavior that untreated disabilities cause.162 A plaintiff’s failure to prove that the root of community animus is fear or a misunderstanding of the most common disabilities among the homeless disabled will ultimately defeat a FHA claim because it is then impossible to prove that the local governmental took action to appease that community animus.163 Community animus, which may be a product of misunderstanding and stereotypical fear of certain disabilities, is buried in what superficially appears to be simply class animus.164

Similarly, a disparate impact claim can fail due to an insufficient showing of community animus directed at the homeless disabled. While this showing is called the “least important” prong of the Huntington Branch


It is important to consider that community animus may also be rooted in racism. In these situations, similar difficulties may arise in proving discriminatory intent. An examination of the availability of federal protection from discrimination on the basis of race for homeless persons, however, is beyond the scope of this Comment.

161. See BAUM & BURNES, supra note 2, at 154-55.

162. While a number of studies examine the public’s perception of the homeless problem and its causes, this author could not identify any studies that specifically demonstrate the nexus between public perception of the homeless, as well as community opposition to shelters, and animus towards the real or perceived behavior of persons with untreated or destabilizing disabilities such as mental illness or substance addiction. JON ERICKSON & CHARLES WILHELM EDs., HOUSING THE HOMELESS (New Brunswick, N.J.: Center for Urban Policy Research, 1986) (providing account of current images of homeless and the role of the media in shaping these images); Beth D. Jarrett & Wes Daniel, Law and the Homeless: An Annotated Bibliography, 85 LAW LIBR. J. 463 (1993) (providing an extensive bibliography of writings and studies on homelessness). Studies that demonstrate community reaction to local psychiatric facilities that service low income and homeless mentally ill may prove helpful. See Judith G. Rabkin, Community Attitudes and Local Psychiatric Facilities, in THE CHRONIC MENTAL PATIENT: FIVE YEARS LATER, 325, 326, 328-29 (John A. Talbott ed., 1984). Rabkin reports that persons with mental illness who were least acceptable to mainstream society are those who are assaultive, of lower social, economic, and educational status, members of ethnic minorities, male, with few social or family ties, whose behavior is visibly disturbed, and who display behavioral rather than physical symptoms. Id. at 326. For the most part, these characteristics easily describe a certain portion of the homeless disabled population.

163. See supra notes 37-44 and accompanying text (noting that federal courts rely significantly on evidence of community animus to persons with disabilities to infer that the local government actions were imbued with discriminatory intent).

164. Class discrimination clearly is not actionable under federal law or the Constitution. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (finding that the poor are not a suspect class for strict scrutiny).
analysis, such proof is nonetheless necessary to overcome the apparently legitimate governmental concerns with public safety, the community's zoning scheme, property values, and budgetary constraints.

If a plaintiff cannot provide proof of community animus, the adverse impact that results from the siting or loss of the shelters or day centers must be clearly demonstrated and sufficient to warrant reasonable accommodation. To convince a court of such disparate impact, two major presumptions must be overcome. The first presumption is that the homeless disabled will seek shelter regardless of where it is offered. The second presumption is that there is no nexus between the siting of shelters and the continued stigmatization of the disabled. Siting shelters away from the mainstream of society, or in poorer neighborhoods, perpetuates the regime of isolation and segregation of disabled per-


166. The common presumption is that if "this" town, city, district or neighborhood, does not shelter the homeless, then they will move to another one where such services are provided. The court's assessment of the impact on the homeless disabled resulting from shelter closures in Johnson v. Dixon, 786 F. Supp. 1, 16 (D.D.C. 1991), exemplifies this presumption. See Baum & Burnes, supra note 2, at 28 (noting that local officials fear attracting large numbers of homeless from around the country if they provide "better than average services and shelters" and that the numbers show that more than 70% of the homeless have lived in the same city for at least one year and over 60% for at least ten years); McCarthy, supra note 160, at N1 (describing a local community debate regarding whether to move a temporary homeless shelter and considering it better to keep the shelter in its present location where most of the homeless are).

In addition, familiarity and routine can be very important to those with severe mental or emotional disabilities. Rhoden, supra note 15, at 416 n.184; see also Deirdre Carmody, The Tangled Life and Mind of Judy, Whose Home is the Street, N.Y. TIMES, Dec. 17, 1984, at B1 (describing the daily rituals of a homeless woman in New York City). In many instances, once a homeless person with such disabilities develops familiarity with and a routine within a particular neighborhood, he or she will remain even if the shelter does not. Id.; Patti Doten, On the Streets Where They Live, BOSTON GLOBE, Mar. 24, 1989, at 39 (profiling an author and her studies of the homeless that find the homeless rooted in routine).

167. See Franklin, supra note 8, at 7B; see also, Cook, supra note 57, at 399-414 (describing the historical practice of siting services and institutions for the disabled in locations isolated from the mainstream to ensure segregation).


169. See Cook, supra note 57, at 399-414.
The disabled who are the most vulnerable and least cared for by the system are those who rely on shelters for both literal shelter and connection to supportive services. Siting shelters or day centers, however, in close proximity to supportive services located outside of the shelter or center is crucial to re-integration. At a minimum, proximity to services is necessary to stabilize disabling illnesses, so some level of self-sufficiency can be attained.

3. "Separation of Powers" Barrier

Gaining sympathy from the courts is also a significant hurdle to overcome. **Johnson v. Dixon** illustrates the difficulty of using FHA claims to force the continued operation of local or state funded shelters so as to avoid the sometimes severe impact upon disabled persons when shelters close and when the disruption of services occurs.

In **Johnson**, four homeless disabled persons challenged the closing of two public shelters in the District of Columbia. The plaintiffs alleged that the District violated the FHA by yielding to community animus toward the mental and physical disabilities of the shelter occupants. The

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170. By hiding the homeless, a significant number of disabled persons are also kept apart from mainstream America. See BAUM & BURNES, supra note 2, at 74-75 (stating that society is in denial by hiding the homeless in shelters and ignoring the realities of homelessness); supra note 10 (noting the number of disabled persons comprising the homeless population).

171. **See Klostermann v. Cuomo**, 481 N.Y.S.2d 580, 584 (N.Y. Sup. Ct. 1984). In a complaint filed by homeless dischargees of state psychiatric facilities who demanded residential placement, the court noted that defendants do in fact provide appropriate residential placement, care and supervision to some patients who are discharged . . . but that plaintiffs, by virtue of the greater severity of their illnesses, are refused such treatment and consigned to life on the New York City streets. Such a paradoxical administration of public charitable resources — that the more severely handicapped are allotted, *for that reason*, less assistance than to others in the same class - has been held violative to both New York and federal equal protection guarantees. **Id.** at 584. The court sustained the plaintiffs' claim under section 504 of the Rehabilitation Act. **Id.; see also BAUM & BURNES, supra** note 2, at 74-75, 178 (noting that even shelters do not offer sufficient rehabilitative services to the mentally ill and substance addicted and arguing that outreach to this population must occur at shelter sites in order to immediately connect it to appropriate treatment programs).

172. BAUM & BURNES, supra note 2, at 75 (stating that “[r]esearch shows that homeless individuals are not very likely to keep referral appointments or to be able to negotiate often arcane and geographically dispersed social service bureaucracies without considerable assistance”).

173. **Id.** at 79-80.


175. **Id.** at 1.

176. **Id.** at 1-2. The two shelters provided overnight shelter and significant ancillary services such as medical and rehabilitative services, which included a substance abuse pro-
court, confronted with a request for a preliminary injunction, examined whether the plaintiffs could succeed under a FHA disparate impact claim. The court expressed serious doubt as to whether this type of claim could be brought under the FHA. The court stated that the FHA did not protect the inhabitants of the shelters because they were neither "renters" nor "buyers." The court also stated that it was highly unlikely that a shelter could satisfy the FHA's definition of "dwelling."

The court declined to enjoin the closure of the shelters and refused to order the District to make accommodations. The court did recognize, however, that the closure of the shelters, without adequate notice or measures taken to assist the residents in transferring to another shelter, resulted in a significant disruption of services. This disruption caused a

177. A preliminary injunction may be granted if the plaintiff satisfies the following factors: (1) the plaintiff is likely to succeed on the merits; (2) the plaintiff is subject to irreparable harm while the litigation is pending; (3) the defendant will not suffer substantial harm as the result of the requested injunctive relief; and (4) the requested relief is in the public interest. Sullivan v. City of Pittsburgh, 811 F.2d 171, 181 (3d Cir.), cert. denied, 484 U.S. 849 (1987); see also Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 457 (D.N.J. 1992) (applying the four factors when considering a preliminary injunction); Easter Seals Soc'y of New Jersey, Inc. v. Township of North Bergen, 798 F. Supp. 228, 233 (D.N.J. 1992) (applying the four factors when considering a preliminary injunction). A preliminary injunction is considered an extreme remedy, therefore a thorough inquiry of the merits of the plaintiff's claim is required. Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Comm'n, 790 F. Supp. 1191, 1207 (D. Conn. 1992).

178. Johnson, 786 F. Supp. at 1-2. The plaintiffs, unable to prove discriminatory intent, relied on evidence that showed disparate impact in order to try to prove discrimination under the FHA. Id. The plaintiffs sought relief in the form of an order enjoining the closure of the shelters or some other form of alternative shelter and services to individuals affected by the closures. Id.

179. Id. at 4.

180. Id. The court recognized that a substantial number of the persons who inhabited the shelter and relied on its services were mentally ill, chronically ill and/or substance addicted and, thus, were disabled. Id. at 2-3.

181. Id. at 4.

182. Id. at 7.

183. The facilities simply were closed and the residents were "left to their own devices to adjust to the absence of their customary habitations." Id. at 5. The district made no arrangements to transfer medical and rehabilitation records to other service providers. Id. The district neither arranged for the disabled to participate in other city programs, nor informed the staff where to deliver the residents' records. Id. This significantly disrupted the disabled's use of rehabilitative services, endangering both a disabled participant's progress and health. Id. The district also failed to provide sufficient notice or means to permit the residents' mail to be forwarded, and thus significantly cut off public assistance for a period of time. Id. The district neither provided space for them at other shelters nor did it schedule transportation to take them to another facility. Id. Finally, the district failed to
severe, detrimental impact on those who relied upon it.\textsuperscript{184} Yet, the court found that accommodations were already available.\textsuperscript{185} The court reasoned that the former residents could find openings in other shelters in the District if they sought them out; transportation could be provided if the District found it necessary; and continuity of health care, individual counseling and substance abuse programs could be reestablished to the extent financially feasible.\textsuperscript{186} The court accepted the District's harsh treatment\textsuperscript{187} as a legitimate exercise of its fiscal responsibilities and held that the closure was ultimately a political decision.\textsuperscript{188}

\textbf{B. Section 504: Significant Leeway In the Provision of Services}

While the Supreme Court in \textit{Alexander v. Choate}\textsuperscript{189} fully recognized that section 504 was intended to end the treatment of the disabled that "caused the handicapped to live among society 'shunted aside, hidden, and ignored,'"\textsuperscript{190} the \textit{Alexander} Court also noted that Congress did not provide them with both individual counseling to instruct them as to where other services were available and information regarding how to access such services. Id.

\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} Id. Also, the court assumed that the homeless disabled would seek out available shelter. Nevertheless, the court noted that "given their personal limitations, physical, mental, and economic, [the plaintiffs] were incapable of doing so." Id. at 6.

\textsuperscript{187} The district had recently amended its Emergency Overnight Shelter Act of 1984 and, in doing so, significantly reduced the existing program providing shelters and services. Id. at 3, 6. Unlike the original Act, the amendments ensured that emergency shelter would no longer be considered an entitlement. Id. at 3.

\textsuperscript{188} The \textit{Johnson} court stated that "[i]t has, by its elected officials, made a governmental judgment to assign the homeless a lesser priority than they may have had in the past, and it appears to have the right to do so without any judicial second-guessing, at least by the federal judiciary." Id. at 6. The court quoted Judge Bork, in \textit{Williams v. Barry}, 708 F.2d 789, 793 (D.C. Cir. 1983):

\textit{"The Mayor is an elected official and his decision on shelters is a political one. From the beginning of judicial review it has been understood that such decisions need not be surrounded and hemmed in with judicially imposed processes. Indeed, the reasons for judges not interfering with the methods by which political decisions are arrived at are closely akin, if not identical, to the considerations underlying the political question doctrine, a doctrine which denies the courts jurisdiction even to enter into certain areas."}

\textit{Id.}

\textsuperscript{189} 469 U.S. 287 (1985).

\textsuperscript{190} \textit{Alexander}, 469 U.S. at 295-96 (citing 117 CONG. REC. 45974 (1971) (statement of Rep. Vanik introducing the predecessor of section 504 to the House of Representatives)); \textit{see also} 118 CONG. REC. 525-26 (1972) (describing Senator Humphrey’s belief that the invisibility of the disabled in America should no longer be tolerated); 119 CONG. REC. 5880, 5883 (1973) (describing Senator Cranston's contention that the Act's purpose is to redress the previously neglected disabled).
intend to require states or local governments to provide services.\textsuperscript{191} Rather, Congress' intent was to ensure that services were not administered in a discriminatory fashion\textsuperscript{192}—intent that plays a significant role in section 504 claims regarding services provided to homeless, disabled persons.

Another potential obstacle erected by the statutory language of section 504 is that discrimination, whether intentional or by disparate impact, must be based solely on the disability.\textsuperscript{193} Concerns such as budgetary constraints, property values, or zoning issues, however, defend most governmental decisions regarding the reduction or elimination of services, the geographical siting of shelters or day centers, and other actions that affect services to the homeless disabled.\textsuperscript{194} Unless proffered governmental interests are clearly pretextual, a claim will fail because the courts give significant leeway to government decisions pertaining to the provision for and siting of services for the disabled and the homeless.\textsuperscript{195}

1. "Unmeaningful" Access: Judicial Reluctance to Interfere with "Political and Budgetary" Decision Making

Both the types of services available and the physical and geographical accessibility of services to the disabled comprises "access to services."\textsuperscript{196} When a community opposes the siting of a shelter or day center, local officials respond in a number of ways. They either invoke discriminatory zoning measures, tie available funding to where such shelters or day centers will be sited, or reduce or eliminate services.\textsuperscript{197} These actions inten-

\textsuperscript{191} Alexander, 469 U.S. at 303-07; see also Williams v. Secretary of the Executive Office of Human Servs., 609 N.E.2d 447, 452-54 (Mass. 1993) (stating that neither the ADA nor section 504 require that deinstitutionalized persons be given integrated residential placement or provided with specific services). It is also important to recall that the Alexander Court limited the manner in which reasonable accommodation be demanded even if discriminatory intent or disparate impact is found. See supra notes to 82-87 and accompanying text (discussing the balance struck by the Supreme Court in Alexander v. Choate between the statutory rights of the disabled and the integrity of public services and programs).

\textsuperscript{192} Alexander, 469 U.S. at 303-07.

\textsuperscript{193} 29 U.S.C. § 794 (1988); see supra notes 67-68 and accompanying text (discussing the Second Circuit's approach to determining whether the discrimination is based solely on the disability).

\textsuperscript{194} Collier, supra note 1, at 10.

\textsuperscript{195} See Alexander, 469 U.S. at 308-09; P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990); Jackson v. Conway, 476 F. Supp. 896, 905 (E.D. Mo. 1979), aff'd, 620 F.2d 680 (8th Cir. 1980).

\textsuperscript{196} Such access is fundamental to the homeless disabled. BAUM & BURNES, supra note 2, at 184.

tionally discriminate against disabled persons and have an adverse impact. Only a few cases have been brought under section 504 regarding shelter services.\textsuperscript{198} Cases brought attacking state services for those disabled persons who have become homeless as a result of insufficient social services and residential placement reveal that section 504 does not hold much promise for challenging actions directed at shelters and day centers.\textsuperscript{199}

With regard to the availability of governmental services, the \textit{Alexander} Court made clear that section 504 does not mandate that the government provide services.\textsuperscript{200} If such services are provided, the administration of such services must be nondiscriminatory.\textsuperscript{201} It is reasonable to recognize that the disabled population has different needs and that a balancing is necessary to keep section 504 within "manageable bounds."\textsuperscript{202} The \textit{Alexander} opinion, however, has resulted in a split among the courts concerning the understanding of differential treatment.\textsuperscript{203} This causes confusion concerning section 504's application to disparities in services provided for the disabled.\textsuperscript{204} A significant number of courts have interpreted \textit{Alexander} to mean that section 504 does not apply to the differential treatment between classes of disabled persons, but only to differential treatment be-

\textsuperscript{198} Williams v. Secretary of the Executive Office of Human Servs., 609 N.E.2d 447 (Mass. 1993) (holding that a claim brought under Title II extended section 504 coverage to public services and programs not receiving federal financial assistance); Johnson, 786 F. Supp. at 1 (discussing the sole issue of the plaintiffs' Fair Housing Act claim).

\textsuperscript{199} P.C., 913 F.2d at 1041 (striking down a mildly mentally disabled man's section 504 claim while noting that section 504 does not obligate the state to provide even-handed treatment among the disabled); Williams, 609 N.E.2d at 447 (striking down two claims under section 504).

\textsuperscript{200} Alexander v. Choate, 469 U.S. 287, 303-06 (1985).

\textsuperscript{201} Id.

\textsuperscript{202} Id. at 299.

\textsuperscript{203} See, e.g., P.C., 913 F.2d at 1041 (stating that section 504 does not obligate the state to provide even-handed treatment among the disabled); Flight v. Gloeckler, No. 93-CV-1206 (FJS) (GJD), 1995 U.S. Dist. LEXIS 3293, *5 (N.D.N.Y. Mar. 13, 1995) (stating that it is doubtful that Congress intended section 504 to allow claims for discrimination vis-a-vis other disabled persons); Williams, 609 N.E.2d at 454 (stating that the focus of the federal disabilities laws is discrimination between the disabled and non-disabled, rather than disparate treatment among the disabled). But see, e.g., McGuire v. Switzer, 734 F. Supp. 99, 114-15 (S.D.N.Y. 1990) (stating that a claim challenging a disparity in benefits provided to one class of disabled compared to another can be sustained under section 504); Clark v. Cohen, 613 F. Supp. 684, 692 n.6 (E.D. Pa. 1985) (stating that discrimination vis-a-vis other disabled persons is cognizable under section 504), aff'd, 794 F.2d 79 (3d Cir.), cert. denied, 479 U.S. 962 (1986); Goebel v. Colorado Dep't of Institutions, 764 P.2d 785, 804 (Colo. 1988) (recognizing a section 504 claim by persons who allegedly were deprived of community mental health services as a result of their more severe impairments).

\textsuperscript{204} See supra note 203.
tween disabled and non-disabled persons. Others, however, have held that differential treatment among classes of disabled persons is accounta-

ble under section 504. Such a significant split renders uncertain any challenge to a government's reduction of services to the homeless.

205. See P.C., 913 F.2d at 1041; Flight, 1995 U.S. Dist. LEXIS 3293, at *5; Williams, 609 N.E.2d at 454.


207. For example, in Goebel v. Colorado Department of Institutions, the Colorado Supreme Court held that while section 504 did not require the provision of additional services to the disabled to "bring the handicapped up to the level of normal," it did require the State to ensure that persons with more severe mental illnesses received full access to community services. Goebel, 764 P.2d at 805-06 (quoting Parks v. Pavkovic, 753 F.2d 1397, 1409 (7th Cir.), cert. denied, 973 U.S. 906 (1985)). The State had been providing lesser services to persons with more severe disabilities within a particular region of the state. Id. at 791. The court found that the state's administration of services was "both overtly and covertly selective and discriminatory" and overturned the trial court's "inexplicab[e]" dismissal of the section 504 claim. Id. at 803-04. Yet the Goebel court's sensitivity was tempered by its instructions to the trial court to require the State "to make only those accommodations reasonably necessary to assure meaningful access to the mental health programs available in the [particular region] for those members of the plaintiff class who can realize the benefits of such programs." Id. at 805-06. This guidance assured the trial court significant discretion in responding to a section 504 violation. This decision dealt with one of several related and complicated suits that plaintiffs and others brought against the same defendant. This author could locate neither a trial order or evidence of continued court supervision pertaining to the Colorado Supreme Court's holding regarding the plaintiff's section 504 claim.

In Duc Van Le v. Ibarra, the Colorado Supreme Court, ironically, took the opposite position in an opinion later withdrawn after rehearing the case and affirming the judgment of the district court by order as a result of an evenly divided court (one justice did not participate). Duc Van Le v. Ibarra, 843 P.2d 15 (Colo. 1992). In Duc Van Le, the State of Colorado participated in a federal "Home and Community Based Services" program which extended services to its elderly, blind, and physically or mentally disabled population, but not to its mentally ill population. Duc Van Le v. Ibarra, No. 91-5SC189, 1992 Colo. LEXIS 385, at *14, 36 (Colo. Apr. 20, 1992), reh'g granted, op. withdrawn, No. 91SC189 1992 Colo. LEXIS 447 (Colo. May 28, 1992). The Colorado Supreme Court held that such differential treatment was permissible because the State, by deciding not to request federal funds for the participation of the mentally ill, was "not in a position to accept or reject the obligations of section 504," and therefore, "the nondiscrimination provision of section 504 was not triggered." Id. at *36-37. The trial court held that Colorado's decision not to seek funds for this select class of disabled was impermissible differential treatment. See id. at *14-16. The lower court rejected the State's defense of "scarce public dollars" in light of the availability of federal funds. Id. at *16. Yet, the State's highest court apparently found that the state's decision itself was not a violation of section 504. Id. at *36.

It is difficult to reconcile the court's willingness to find disparate treatment of the more severely mentally ill compared to the less mentally ill in Goebel with its initial reluctance to do so in Duc Van Le with regard to the mentally ill as a class compared to the physically and mentally disabled. This inconsistency is troublesome particularly when state funds were not at issue in Duc Van Le. Duc Van Le, 1992 Colo. LEXIS 385, at *36.
Section 504 claims concerning siting of services also have resulted in inconsistent findings. Thus far, such claims have addressed the closure and relocation of hospitals and medical services. In *Jackson v. Conway*, the plaintiffs challenged the closure of an urban hospital and the siting of consolidated medical services in a suburban facility, asserting that the move denied the disabled access to local government medical benefits and services. The court held, however, that the plaintiffs failed to provide sufficient evidence that the lack of proximity alone created a greater barrier to services for the disabled, solely on the basis of disability. The court further stated that even if such evidence had been offered, the defendants would have prevailed in light of the costs saved from the consolidation and improvement of services at the suburban facility.

The courts’ reasoning behind their refusal to find a section 504 violation can easily defeat a claim on behalf of shelters and services. Local governments can justify the reduction or relocation of shelters and services for the homeless on a number of grounds. First, they may claim that no obligation exists to provide such services or that they decided to relocate the shelters or services so as to assist homeless persons in a different district or neighborhood. Alternatively, they may rely on the assumption that homeless persons, as an undifferentiated whole, will seek out the new site. Such rationales perpetuate the presumption that the homeless disabled will go to where services are made available. This presumption fosters communities’ fears of becoming magnets for such

209. See Wilmington Medical Center, 491 F. Supp. at 291; Jackson, 476 F. Supp. at 898.
211. Id. at 905.
212. Id.
213. Id.
214. See Traynor v. Trunage, 485 U.S. 535 (1987) (stating that “nothing in the Rehabilitation Act . . . requires that any benefit extended to one category of [disabled] persons also be extended to all other categories of [disabled] persons”); see also supra note 207 (regarding the reasoning by which the Colorado Supreme Court initially rejected a section 504 claim alleging disparate treatment between categories of the disabled in *Duc Van Le v. Ibarra*).
216. See supra notes 182-88 and accompanying text (providing an example of a court refusing to recognize a discriminatory disparate impact on the homeless disabled by accepting the defendant’s argument that other services may be available to the homeless should they seek them out).
groups and also fuels the growing desire to herd, isolate, and segregate the homeless disabled.\textsuperscript{217} 

2. \textit{Linking Federal Financial Support to Services Provided}

Two issues arise when attempting to directly challenge the provision of services by local government. First, the service or program must be linked to federal funds because section 504 reaches only recipients of federal assistance.\textsuperscript{218} Second, courts generally are reluctant to interfere with local fiscal decision making.\textsuperscript{219}

Local governments can and do exercise influence over the location of shelters and services provided by private parties.\textsuperscript{220} Even though private parties may receive local government support, it may be difficult to establish a connection between that local financial support and general federal funds that the local government receive.\textsuperscript{221} Congress addressed this difficulty in the Civil Rights Restoration Act of 1987, which amended section 504's definition of "program or activity" receiving federal assistance.\textsuperscript{222} The amended definition covers all operations of a state or local govern-

\textsuperscript{217} See supra notes 166-73 and accompanying text (discussing two major presumptions that perpetuate the segregation and isolation of the homeless disabled).


\textsuperscript{220} See, e.g., Village of Nyack v. Daytop Village, Inc., 583 N.E.2d 928, 929-30 (N.Y. 1991) (village attempting to prevent the operation of a residential substance abuse treatment program in a former hotel by arguing that its use as a residential facility was not permitted in the commercial zone in which the former hotel was located); see also Terry Rice, \textit{Zoning and Land Use}, 43 \textit{SYRACUSE L. REV.} 615, 628-30 (1992) (discussing \textit{Nyack} and the degree of local government control over the siting of private services); supra note 32 (citing cases where local governments attempt to control siting through their zoning laws).


ment department or agency, as well as any state or local government entity that distributes or receives federal assistance, and any part of which receives federal assistance. \(^{223}\) This amended definition alleviates much of the difficulty in establishing a link to federal funds to enjoy the protection afforded under section 504. \(^{224}\)

If federal funds do support local governmental services, it may be impossible to prove that local governmental actions violated conditions attached to federal funds. \(^{225}\) Again, courts are reluctant to interfere not only with local government actions and policies regarding general zoning or budgetary issues, but also with "political" decision making that relates to the homeless. \(^{226}\)

III. AMERICANS WITH DISABILITIES ACT: TITLE II REMAINS AN ELUSIVE TOOL

A. Title II Carries the Barriers ERECTED UNDER SECTION 504

Two of the most recent Title II challenges to discriminatory governmental acts reveal that Title II has not remedied the shortcomings of section 504 with regard to public services and programs. In Williams v. Secretary of the Executive Office of Human Services, \(^{227}\) the Massachusetts Supreme Court held that the ADA did not require the State's Department of Mental Health to provide residential placement and services to the more severely mentally disabled. \(^{228}\) Due to the absence of such services, individuals became homeless upon discharge from mental health facilities operated by Massachusetts's Department of Mental Health. \(^{229}\)

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\(^{224}\) But cf. Schroeder, 715 F. Supp. at 225 (finding that the definition of "program or activity" did not encompass the City of Chicago, itself, but rather a department, agency or entity of that municipality receiving federal funds).

\(^{225}\) See supra note 207 (regarding the reasoning employed by the Colorado Supreme Court in Duc Van Le v. Ibarra).

\(^{226}\) See Johnson v. Dixon, 786 F. Supp. 1, 6 (D.D.C. 1991) (providing an example of judicial reluctance to interfere with budgetary decision making and thus refusal to find violations of the disabilities laws when access to services are reduced); see also Alexander v. Choate, 469 U.S. 287, 308-09 (1984) (warning that provision of services necessary to accommodate the disabled must be kept within reasonable administrative and fiscal bounds); Williams v. Secretary of the Executive Office of Human Servs., 609 N.E.2d 447, 452-53 (Mass. 1993) (noting that the Alexander Court rejected the argument that section 504 restricted state discretion in determining the "proper mix of amount, scope, and durational limitations on State-funded services").

\(^{227}\) 609 N.E.2d at 447.

\(^{228}\) Id. at 454-55. The plaintiffs suffered from severe multiple disabilities, including mental illness and substance abuse, and required significant support outside of psychiatric institutions. Id. at 451-52.

\(^{229}\) Id. at 453-55.
The court also held that the ADA did not require even-handed treatment within the disabled population. Thus, the ADA did not mandate the state to provide integrated residential placement when it chose to offer this service. The court reasoned that because the ADA did not require services that the state already provided to the general mentally disabled population, the state was free to provide lesser services to those more severely disabled without violating the federal disabilities laws.

A Pennsylvania federal district court in Helen L. v. Albert Didario followed the “separation of powers” reasoning that the Massachusetts Supreme Court employed in Williams. In Helen L., the plaintiffs challenged a state agency's refusal to provide attendant care services that would permit plaintiffs to live at home in their communities rather than in a nursing home for the disabled. The plaintiffs argued that this refusal violated the integration mandate of Title II. The state agency argued that it complied with Title II as long as the plaintiffs received benefits for which they qualified.

Guided by the reasoning of Williams, the court agreed that the ADA does not mandate the provision of services in an integrated setting. Furthermore, the court, based on the separation of powers reasoning invoked in Williams, rejected the plaintiffs' argument that the provision of services in an integrated setting would be of a greater benefit to the plaintiffs. Finally, the court held that the state's denial of services was based on a lack of funds, not on disability. Ironically, the state agency con-

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230. Id. at 454. 
231. Id. at 452-53. Thus, the state was essentially left free to perpetuate the segregation of its disabled population. Id. 
232. Id. 
235. Id. at *16. 
236. Id. at *11-12. 
237. Id. The plaintiffs argued that although the state provided essentially the same services through two different methods, Title II requires that “those services [be furnished] in the setting that best integrates plaintiffs into their community.” Id. The plaintiffs were eligible for attendant care service, yet had been informed that the state lacked the funds to provide this service. Id. at *7. The state agency conceded, however, that providing the plaintiffs with attendant care would cost significantly less than maintaining their current care in the nursing home. Id. at *8-9. The cost for the nursing home care provided was $45,000, 56% of which federal reimbursement covered. Id. Federal reimbursement fully covered the cost for the requested attendant care service that totaled $10,500. Id. 
238. Id. at *13. The state agency further argued that the courts “cannot otherwise dictate how defendants provide those services.” Id. 
239. Id. at *13-14. 
240. Id. at *16. The defendant conceded that it was “less salutary for plaintiffs to remain in a nursing home rather than receive attendant care services.” Id. 
241. Id. at *15.
ceded that the integrated service would be a cost-saving benefit for the state.\textsuperscript{242}

Judicial interpretation of Title II has not lessened the judicially imposed barriers under section 504. The courts' continued insensitivity to the adverse impact of policy decisions on the disabled preclude fulfilling the goal of ending segregation of the disabled.\textsuperscript{243} Furthermore, the separation of powers reasoning, as exemplified in \textit{Johnson}, \textit{Williams}, and \textit{Helen L.} provides the courts with a convenient justification for refusing to enforce section 504 or Title II with regard to access or integration.\textsuperscript{244}

\textbf{B. Challenging Acts of Intimidation or Coercion Directed at Private Shelters and Services for the Homeless}

Title II offers a possible approach to challenge government actions that are directed against private sector shelters and day centers.\textsuperscript{245} Title II may also offer protection against a government that denies that its financial support of such facilities makes the program a “public service” under Title II.\textsuperscript{246}

Like the FHA, which reaches local governments that interfere with an individual’s right to housing,\textsuperscript{247} Title II also expressly prohibits public entities from intimidating or coercing those who provide services to the disabled and also prohibits policies or practices of public entities that interfere with disabled persons’ rights provided under the ADA, or with access to services provided by the private or charitable sector.\textsuperscript{248} Thus, a

\textsuperscript{242} Id. at *12, 15-16; see supra note 237 (discussing funding for the attendant care services).

\textsuperscript{243} Helen L., 1994 U.S. Dist. LEXIS, at *16.

\textsuperscript{244} Judge Patricia M. Wald, \textit{Ten Admonitions for Legal Services Advocates Contemplating Federal Litigation}, CLEARINGHOUSE REV., May 1993, at 11, 16. Judge Wald, who sits on the United States Court of Appeals for the District of Columbia Circuit, traces this development of judicial resistance to the Supreme Court’s holding in \textit{Heckler v. Cheney}, 470 U.S. 821 (1985). She noted that the lower courts have broadened the holding’s scope so as to create a formidable obstacle to challenges of government decisions and policies. \textit{Id.} Judge Wald refers to several cases relating to homeless shelters and services which arose on her circuit as examples. \textit{Id.} at 11-12.

\textsuperscript{245} See 28 C.F.R. §§ 36.130(g), 35.134(b) (1994).

\textsuperscript{246} See supra notes 218-26 and accompanying text (discussing section 504’s requirement that services or programs be linked to federal funds in order to trigger section 504’s anti-discrimination provisions and providing examples that local governmental aid to homeless shelters may not be sufficient to deem them “public services” under section 504 or the ADA).

\textsuperscript{247} See supra note 32. Note that the prohibition clauses regarding acts of intimidation, coercion or interference under the ADA are modeled after those found in regulations promulgated under the FHA. \textit{ADA HANDBOOK}, supra note 102, at III-54.

\textsuperscript{248} 28 C.F.R. § 35.130(g), 35.134(b) (1994). Private individuals or entities that act to prevent access to services can also be reached by the ADA under Title III. 28 C.F.R. § 36.206(b) (1994); see also \textit{ADA HANDBOOK}, supra note 102, at III-55. The Department
Title II claim could challenge local government measures to prevent or control the siting of shelters in response to community opposition.

Selective zoning enforcement is one common method of obstructing group homes for the disabled. Likewise, local governments usually

of Justice gives the following example to illustrate the reach of the prohibitionary clauses regarding retaliation or coercion under Title III: "[I]t would be a violation of the Act and this part for a private individual, e.g., a restaurant customer, to harass or intimidate an individual with a disability in an effort to prevent that individual from patronizing the restaurant." ADA HANDBOOK, supra note 102, at III-55.

The following is an example of how a Title III claim may be used both to defend against community legal actions directed at shelters and day centers as well as a weapon against such acts of intimidation. In Armory Park Neighborhood Ass'n. v. Episcopal Community Servs., 712 P.2d 914 (Ariz. 1985), a neighborhood association successfully closed down a church center providing meals to the homeless on the ground that it posed a public nuisance. Id. at 915. While the court recognized the value of the Center's charitable enterprise, it stated that it did not "believe that the law allows the cost of a charitable enterprise to be visited in their entirety upon the residents of a single neighborhood. The problems of dealing with the unemployed, homeless and the mentally ill are also matters of community or governmental responsibility." Id. at 921.

This scenario exemplifies the tension between service providers and the communities in which such services are sited. This also serves as an example of when a countervailing pressure point could be introduced under Title III. A community may intend to close or prevent a center or shelter sitting through the dissemination of literature opposing the facility or lawsuits intended to interfere with access to programs or accommodations provided by private or charitable initiative. Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin., 740 F. Supp. 96, 99 (D.P.R. 1990) (where a neighborhood association expressed opposition to a facility for persons with AIDS via petitions, graffiti, picket lines, letters to public officials, an administrative complaint, local court action and local television appearances); Armory Park Neighborhood Ass'n., 712 P.2d at 915 (where a neighborhood association filed a public nuisance suit to enjoin the operation of a church meal program for the homeless). Local residents may also take such action to intimidate disabled individuals and those persons attempting to provide them with public accommodations. See, e.g., People Helpers Found., Inc. v. City of Richmond, 781 F. Supp. 1132, 1133 (E.D. Va. 1992). In People Helpers Foundation, a neighbor to a group home allegedly attempted to intimidate the private provider by organizing in a threatening manner in front of the house with other neighbors, while volunteers assisted residents move into the facility, and by taking photographs of the residents and the volunteers. Id. Recent FHA investigations by the Department of Housing and Urban Development of private individuals or entities opposed to group homes for the homeless disabled, however, have come under fire due to First Amendment concerns. See Guy Gugliotta, ACLU Alleges Free Speech Violations in HUD Probes, WASH. POST, Aug. 17, 1994, at A20; Nat Hentoff, HUD's Attack on the First Amendment, WASH. POST, Sept. 17, 1994, at A15; U.S. May Sue Foes of Plan for the Homeless, N.Y. TIMES, July 31, 1994, sec. 1, at 18. As a result, HUD has issued proposed guidelines that forbid investigation of persons who oppose facilities for the homeless disabled if the actions taken fall under the umbrella of "petitioning the local government." James H. Andrews, U.S. Housing Agency to Issue Guidelines Protecting Free Speech in Bias Probe, CHRISTIAN SCI. MONITOR, Sept. 1, 1994, at 3. The guidelines, however, would still permit investigations when such private individuals or groups initiate lawsuits. Id.

249. See supra note 32 and accompanying text (citing examples of selective zoning enforcement employed to obstruct siting of group homes for the disabled).
employ this method to prevent or control the siting of shelters or day centers. 250 Under Title II, a claim could be brought against a local zoning board or agency for its policies or decisions that are designed to control or preclude the siting of a shelter or service in response to community animus. 251

Furthermore, many private and charitable initiatives depend on the largesse of government, whether in the form of facilitating federal grants 252 or providing buildings for nominal rent. 253 Therefore, such initiatives are vulnerable to government’s coercive measures that tie support to siting and thus dictate the location of such services. Title II prohibits practices that intimidate those individuals that attempt to provide public accommodations to disabled individuals. 254 Thus, when public financial assistance does not rise to the level of contracting out public services, Title II could provide the grounds to challenge measures that are intended to prevent or control the charitable or private services or shelter. 255

The legal analysis brought to such discriminatory or coercive acts under the FHA could be applied to claims brought under Title II, assuming that plaintiffs can overcome certain difficulties in presenting a claim. For example, it remains difficult for plaintiffs to prove not only that the government took such coercive measures to pacify other community or business interests, but also that animus towards those homeless disabled persons to be served by the program motived community opposition. 256 Judicial sensitivity to the characterization of the homeless disabled would allow Title II to fully blossom as a weapon to counteract such local government manipulation. 257 As revealed in the judicial treatment of dis-

251. 28 C.F.R. § 35.130(g).
252. See ADA HANDBOOK, supra note 102, at III-30.
253. See Melton v. Community for Creative Non-Violence, No. 93-0757, 1993 U.S. Dist. LEXIS 12235, at *7 (D.C. Cir. Aug. 31, 1993). The District of Columbia rented a building for use as a shelter to the CCNV for one dollar per year and provided other benefits to the shelter. Id. Such support, however, does not raise it to the level of treating the shelter as a public service or program under Title II. Id.
254. 28 C.F.R. § 35.134(b) (1994).
255. Id.; see ADA HANDBOOK, supra note 102, at II-52, III-30.
256. See supra notes 154-73 and accompanying text (discussing the difficulty of proving that governmental actions were taken in response to community animus towards disabilities most common among the homeless, opposed to animus towards the homeless in general).
257. See supra notes 32-54 and accompanying text (discussing the analytical approach taken in FHA cases and providing an examples of the judicial sensitivity to the stereotypical perceptions of the disabled held by communities opposed to housing for the disabled). The court in Seide v. Provost, 536 F. Supp. 1121 (S.D.N.Y. 1982), exemplifies the level of
ability claims under section 504 and Title II thus far, a significant number of courts remain insensitive to what may superficially appear to be class animus, but is in fact animus against those with disabilities such as mental illness or substance addiction—disabilities most common among the homeless population.258

IV. Judicial Sensitivity to the Relationship Between Disability and Homelessness Is Necessary

Homeless individuals with disabilities are members of a protected class under the federal disabilities laws.259 The homeless, disabled population, however, faces significant difficulties when it seeks court protection under these laws.260 The case law that has evolved in the area of housing reveals that the FHA is a strong weapon against governmental officials' discrimi-

understanding that could be brought to disability claims of the homeless population by the judicial branch. Id. at 1125. District Judge Sweet, writing for the court, noted that the court was confronted by a dispute between a city homeless shelter and a state psychiatric hospital, and he thus stated:

I am compelled to note the poignancy of the position of these populations, each to a very large extent the product of the swift, conflicting currents of our society, each without a political constituency to which they can refer their suffering, each driven to resort to the courts for enforcement . . . to achieve humane treatment at the hands of the society. While the impropriety of judges determining social policy is frequently sounded by those with loud trumpets, nonetheless, in the context of the needs of the homeless and the mentally disturbed, it is the court that must decide the issues brought before it and seek to achieve a just result and do so promptly. Despite the intricacy of the social issues involved, I conclude that here as in other areas, it is better to have a court resolution than none at all.

Id.

In Seide, members of the Board of Visitors of a psychiatric hospital argued that psychiatric patients had a constitutional right to safety while in the custody of the state. Id. at 1134-35. The members asserted that the plans of the city government to expand an existing shelter in close proximity to a psychiatric hospital posed a safety risk to the hospital's patients. Id. Fifty percent of the total population of shelter users, including those who used the shelter in question, had a history of mental illness and hospitalization. Id. at 1128-29. As the court noted, "the mentally disturbed and the homeless, although not incarcerated, have been rejected by the community of the City and are now pitted against one another in a contest for the isolated turf of Ward's Island." Id. at 1125. The court held that sufficient security existed to ensure the safety of the institutionalized patients, and that the presence of the shelter in close proximity did not curtail the patients' care. Id. at 1137.

258. See supra notes 203-07 and accompanying text (discussing the split among the federal courts regarding differential treatment among classes of disabled, and that refusal to recognize discriminatory treatment among such classes is often based on budgetary decision making). As a result, a governmental response to community animus against the disabled may remain buried under a rational distribution of funds argument.

259. See supra notes 109-43 and accompanying text (discussing the extent of recognized disabilities).

260. See supra notes 148-53, 174-88, 199-207, 227-44 and accompanying text (analyzing the barriers the disabled population faces under the FHA, section 504 and Title II).
natory actions that are a response to community opposition to group homes for the disabled, who also happen to be homeless or are in risk of homelessness. The federal courts have enforced vigilantly the FHA to protect persons with disabilities, particularly those who find the least sympathy from society. Under the FHA’s current interpretation, however, the act has limited applicability to discrimination against the provision of shelters or day centers that are often the first link toward rehabilitation programs, group homes, and permanent housing. The FHA poses statutory barriers for persons who seek access to shelters and day centers and impedes the nondiscriminatory siting of shelters or centers. Generally, the courts are unwilling to expand the definition of “dwelling” to include such facilities. Furthermore, the FHA cannot protect homeless disabled persons because they are neither “buyers” nor “renters,” and the courts resist viewing them as “residents.” The legal analysis and judicial sensitivity that has developed under the FHA in the group home context, however, could be extended to claims brought under Title II. Such claims would be based on impermissible coercion, intimidation and interference by a public agency or entity, which ultimately deter or prevent the siting of private shelters and services for the homeless.

It is unlikely that the courts will increase their hospitality towards section 504 or Title II claims brought by the homeless disabled with regard to public shelters or services. Proving a nexus between community animus and perceived behavior of the homeless disabled is difficult. Even if plaintiffs prove that community animus toward disabilities motivated the local government’s decision making, the local government could easily defeat a section 504 or Title II claim by arguing that budgetary constraints or selective treatment of the disabled population actually

261. See supra notes 32, 54 and accompanying text (discussing the court’s treatment of actions brought by disabled groups that have traditionally received little sympathy from society).
262. Id.
263. See supra notes 148-53, 174-88 and accompanying text (exploring the barriers to bringing a successful action under the FHA).
264. See supra note 15.
266. Id. at 4.
267. Id.
268. See supra note 257 (discussing the judicial sensitivity exemplified in Seide v. Provost).
269. 28 C.F.R. §§ 35.130(g), 35.134(b) (1994).
270. See supra notes 199-244 and accompanying text (discussing the barriers and inconsistent rulings by the courts with respect to Title II and section 504 actions).
271. See supra notes 154-73 and accompanying text.
motivated the challenged reduction or resiting of services. Such a defense will prevail because of the significant leeway that courts allow governments to receive when providing services to the disabled population at different levels. The courts fully sanction unequal treatment among the disabled population, which results in isolation and segregation. Therefore, individuals who have disabilities that are more difficult to treat or are less socially acceptable will rarely receive relief from discrimination. Going beyond Congress' intent that federal disabilities laws should not force local and state governments to take affirmative action, the courts have, in effect, erected a barrier based on the separation of powers doctrine, which is well suited to avoid claims by the disabled who are more difficult to treat and, particularly, the resulting homeless disabled.

V. Conclusion

For a majority of the homeless disabled, the first step towards reaching a group home is connecting with services located in shelters that target

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272. See, e.g., P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990) (stating that section 504 did not obligate the defendant to meet the plaintiff's needs vis-a-vis other disabled individuals); Jackson v. Conway, 476 F. Supp. 896, 905 (E.D. Md. 1979), aff'd, 620 F.2d 680 (8th Cir. 1980); (noting that consolidation of healthcare facilities resulted in improved care and cost-saving) Williams v. Secretary of the Executive Office of Human Servs, 609 N.E.2d 447, 452-53 (Mass. 1993) (stating that the ADA does not require a state to provide services in the first place, thus it may selectively offer integrated residential placement). The courts' continued insensitivity to the regime of segregation and isolation of the disabled produced by public administration of services remains. See Helen L. v. Didario, No. 92-6054, 1994 U.S. Dist. LEXIS 595, at *15 (E.D. Pa. 1994); see also Cook, supra note 57, at 394-95 (noting that section 504 has succeeded in reducing physical barriers to access and ensuring provision of auxiliary aids, yet, the courts permit segregation and isolation of the disabled in the context of the provision of residential and community services). While a major distinction between Title II and section 504 is that federal financial assistance is not necessary to trigger Title II coverage, the substantive analysis of claims brought under Title II continues to follow section 504. Williams, 609 N.E.2d at 452-53; see also ADA HANDBOOK, supra note 102, at II-11 (stating that Title II standards are generally equivalent to those adopted under section 504).


274. See supra note 203.

275. See, e.g., P.C., 913 F.2d at 1041-42; Johnson, 786 F. Supp. at 6; Williams, 609 N.E.2d at 454-57.

276. See, e.g., Johnson, 786 F. Supp. at 6 (stating that the decision to close shelters is solely a political one); Williams, 609 N.E.2d at 454 (stating that the courts are not responsible for determining whether the provision of services or the allocation of resources is appropriate, thus, disparate allocation of resources among the disabled is insufficient to demonstrate a violation of the ADA); see also supra note 244 and accompanying text (noting Judge Wald's concern with the "separation of powers" doctrine as it is applied to the allocation of services and resources).
persons with mental illness, alcoholism and drug addiction. Under current case law, if government action deprives or interferes with the right of a homeless disabled person to reside in a group home, the court focuses on whether such governmental action is in response to the disability. Yet, when governmental actions to deter a shelter's establishment deprive the same person of the opportunity to find a shelter and its supportive services, the focus shifts away from the person's disability to concerns of protecting the integrity of a locality's zoning system, property rights and public fiscal demands. In sum, the focus shifts to issues of class animus, not disability. The provision of shelter and services in an integrated and fair manner also has been denied under the guise of the "separation of powers" doctrine that the courts have erected. The judiciary must be willing to view homelessness not as a class issue, but as an outgrowth of the disability itself and the public and private sectors's resistance to confront the failure of community placement programs that were to follow deinstitutionalization.

One clear message of the legislative histories of the FHA, section 504 and the ADA is that the judicial branch must protect the disabled from indifference, ignorance, benign neglect and majority decision making based on stereotypes and fears about persons with disabilities. Yet, the federal disabilities laws are not protecting the most vulnerable members of our disabled population from community animus exercised through their elected officials. It is essential for the judiciary to gain greater sensitivity and to begin to aggressively enforce the federal disability laws in order to protect society's most vulnerable citizens.

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