

1-1-1996

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Recommended Citation

Kevin J. Zanner, *Dispersion Requirements for the Siting of Group Homes: Reconciling New York's Padavan Law with the Fair Housing Amendments Act of 1988*, 44 Buff. L. Rev. 249 (1996).

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Dispersion Requirements for the Siting of Group Homes: Reconciling New York's Padavan Law with the Fair Housing Amendments Act of 1988

KEVIN J. ZANNER†

Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.¹

INTRODUCTION

The deinstitutionalization of individuals with mental and physical handicaps through the use of residential group home settings has generated a storm of controversy in recent years.² Municipalities and siting agencies have struggled to integrate these individuals into residential communities, often encountering the familiar cry of "not in my backyard."³ A number of states have responded to the group home siting controversy by enacting statutes which codify procedures and criteria for the placement of group homes in residential communities.⁴ While wide ranging in scope, many of these statutes include dispersion requirements which aim to prevent the concentration of group homes in one area.⁵ One such law, New York's Padavan Law, permits municipal-

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1. THE FEDERALIST No. 10, at 45 (James Madison) (Max Beloff ed., 1987).

2. See, e.g., Alex Rodriguez, *Suburban Group Homes Find No Welcome Mats*, CHI. SUN-TIMES, Jan. 1, 1995, at 4; *Greenville Journal*; *Are Six Group Homes Too Many?*, N.Y. TIMES, Sept. 20, 1994, at A16 [hereinafter *Greenville Journal*]; Phil Fairbanks, *City Rejects Plan for Shelter after Protests by Neighbors*, BUFF. NEWS, May 26, 1994, at C1.

3. See Michael B. Gerrard, *The Victims of Nimby*, 21 FORDHAM URB. L.J. 495 (1994).

4. See Lester D. Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study*, 19 URB. LAW. 1, 25-37 (1987). Steinman's article includes an appendix describing each state law in terms of the type of facility covered, the number of residents, zoning requirements, conditions on use, dispersion of facilities, and licensing requirements. *Id.*

5. *Id.*; see ARIZ. REV. STAT. ANN. § 36-582(H) (1986) (requiring that there be 1200 feet between homes); COLO. REV. STAT. §§ 30-28-115(2)(b), 31-23-303(2)(b) (1986 and Supp. 1990) (750 feet between homes); CONN. GEN. STAT. § 8-3f (1994) (1000 feet between homes); DEL. CODE ANN. tit. 9, § 4923(c) (1989) (5000 feet between homes); IND. CODE 12-28-4-7(b)

ities to reject a proposed group home siting for the mentally disabled⁶ upon a showing that establishment of the facility "would result in such a concentration of community residential facilities . . . that the nature and character of the areas within the municipality would be substantially altered."⁷

Federal legislation has also attempted to address the problem of housing discrimination against individuals with handicaps. In 1988, Congress enacted the Fair Housing Amendments Act [FHAA], which prohibits housing discrimination against individuals on the basis of handicap.⁸ The legislation requires that persons with disabilities be treated as individuals, and further prohibits the application of land-use regulations which deny those individuals the right to choose their own residence.⁹

Federal laws prohibiting housing discrimination and state and local legislation which regulate group home siting through distance requirements present different, and possibly conflicting views regarding the treatment of individuals with handicaps in residential communities.¹⁰ This Note will attempt to reconcile the goals of the

(1993) (3000 feet between homes); IOWA CODE § 335.25(3) (1995) (size of a city block between homes); LA. REV. STAT. ANN. § 28:478(B) (West 1989) (1000 feet between homes); ME. REV. STAT. ANN. tit. 30, § 4962-4(4) (West Supp. 1994) (1500 feet between homes; excessive concentration prohibited) (repealed 1987); MICH. COMP. LAWS ANN. §§ 125.216(a)(4), 125.583(b)(4) (West 1986 & Supp. 1995) (1500 feet between residences; 3000 feet in cities over one million in population; no excessive concentration); MO. REV. STAT. § 89.020(2) (1994) (municipality may set reasonable density standard); NEB. REV. STAT. § 18-1746 (1983) (1200 feet between homes) (repealed 1991); N.J. REV. STAT. § 40:55D-66.1 (Supp. 1995) (1500 feet between homes); N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney 1988) (over-concentration of similar residences resulting in a substantial alteration of an area prohibited); N.C. GEN. STAT. § 168-22(a) (Supp. 1994) (.5 mile between homes); TEX. REV. CIV. STAT. ANN. art 1011n (West Supp. 1988) (.5 mile between homes) (repealed 1991); UTAH CODE ANN. § 17-27-602(2)(f) (1991) (.75 mile between homes); VT. STAT. ANN. tit. 24, § 4409(d) (1992) (1000 feet between homes); W. VA. CODE § 27-17-2(a) (1992) (1200 feet between homes outside of municipality).

6. The Padavan Law does not apply to group home sitings for individuals with physical disabilities, persons with AIDS, or recovering substance abusers. N.Y. MENTAL HYG. LAW § 41.34(a)(1) (McKinney 1988). Any reference to the "handicapped" or "disabled" in the Padavan statute refers strictly to individuals with mental or developmental disabilities. *Id.* This comment will not attempt to gauge the legal controversy surrounding group home sitings in New York State which do not fall within the scope of the Padavan Law. However, references to such controversies may be made in light of litigation concerning the discrimination protections for the handicapped under the Fair Housing Amendments Act of 1988. See *infra* note 70.

7. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(C) (McKinney Supp. 1994).

8. 42 U.S.C. §§ 3602-31 (1988 & Supp. 1993).

9. See *infra* note 60.

10. See generally Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987) (arguing that by labeling the disabled as different, efforts to

FHAA and the use of dispersion requirements for group homes for handicapped persons.¹¹ It will be argued that the use of dispersion requirements fails to meet the mandate of the FHAA, which treats all disabled persons as individuals.¹² Particularly problematic are distance limitations enacted through local ordinances, for they can be employed to frustrate the efforts of providers who wish to place group homes in residential communities. However, the use of such requirements through state mandated processes such as the Padavan Law appears to foster the goal of deinstitutionalization by providing a "neutral" method by which group home sites are selected. While state site selection laws do impose burdens on housing for individuals with handicaps, these burdens are reasonably related to the goal of deinstitutionalization, for they provide those individuals with the opportunity to live in communities where local opposition would otherwise foreclose such an opportunity. It will be further argued, however, that state site selection laws can be improved by eliminating rigid distance requirements and adopting a dispersion standard based on reasonableness which better comports with the FHAA mandate.

Part I of this Note will discuss the Padavan Law, focusing first on its history and purpose, then moving to a general discussion of the law itself. Constitutional challenges to the law and the general applicability of the overconcentration provision will be addressed as well.¹³

Part II will address the federal legislation, focusing exclusively on the Fair Housing Amendments Act of 1988. The intent of the

create equality through the law are in effect, undermined).

11. For works which consider related topics, see Alicia Hancock Apfel, Comment, *Cast Adrift: Homeless Mentally Ill, Alcoholic and Drug Addicted*, 44 CATH. U. L. REV. 551 (1995); Harold A. Ellis, Comment, *Neighborhood Opposition and the Permissible Purposes of Zoning*, 7 J. LAND USE & ENVTL. L. 275 (1992); David Bernstein, *From Pesthouses to AIDS Hospices: Neighbors' Irrational Fears of Treatment Facilities for Contagious Diseases*, 22 COLUM. HUM. RTS. L. REV. 1 (1990); Marc B. Goldstein et al., *Public Preferences and Site Location of Residential Treatment Facilities*, 17 J. COMMUNITY PSYCHOL. 186 (1989); Michael P. Seng, *Discrimination Against Families and Handicapped Persons Under the 1988 Amendments to the Fair Housing Act*, 22 J. MARSHALL L. REV. 541 (1989); Paul Fleischut, Comment, *Fair Housing Amendments Act of 1988: A Critical Analysis of "Familial Status"*, 54 MO. L. REV. 393 (1989); James C. Frooman, Comment, *Statutory Analysis of the Familial Status Provision of the Fair Housing Amendments Act of 1988 - or, "Why Do I Have to Live With Those Curtain Climbing Rug Rats?"*, 17 N. KY. L. REV. 215 (1989); William Graham, Note, *There Goes the Neighborhood: The Evolution of "Family" in Local Zoning Ordinances*, 9 TOURO L. REV. 699 (1993); Katherine Baird Russo, Note, *Neighborhood Character and SEQRA: Courts Struggle with Homeless Shelters, Prisons, and the Environment*, 14 COLUM. J. ENVTL. L. 231 (1989).

12. See *infra* notes 65-69 and accompanying text.

13. See discussion *infra* part I.

FHAA will be analyzed, particularly the language of the House Report, which provides strong evidence that dispersion requirements violate the FHAA.¹⁴ Two federal cases, *Familystyle of St. Paul, Inc. v. City of St. Paul*¹⁵ and *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*¹⁶ will be examined at length for their contrasting views regarding the legality of dispersion requirements under the FHAA.¹⁷ In addition, subsequent case law which has relied on the holdings of *Familystyle* and *Horizon House* will be reviewed, with the goal of developing a clear picture of the rationales which anchor both of those decisions.¹⁸

Finally, Part III will return to the Padavan Law to discuss the interaction between the New York's siting procedure and the FHAA. The benefits of the state law will be compared with the burdens it places on group homes to locate within communities. Possible alternative approaches to the saturation provision will be presented as well.¹⁹ Part IV will attempt to bring together the various arguments to present the reader with a concise view of the relationship between dispersion requirements and the FHAA.²⁰

I. THE PADAVAN LAW

A. Historical Overview

The movement to deinstitutionalize individuals with mental handicaps arose in part through the realization that the lives of mentally handicapped individuals could be improved if those individuals were placed in normal residential settings.²¹ Prior to the enactment of the Padavan Law however, there was no state-wide procedure for the siting of group homes for mentally handicapped persons in residential communities. Often, sponsoring agencies²² would be required to show that its particular group home consti-

14. See discussion *infra* part II.A.

15. 728 F. Supp. 1396 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991).

16. 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

17. See discussion *infra* part II.B.

18. See discussion *infra* part II.C.

19. See discussion *infra* part III.

20. See discussion *infra* part IV.

21. For a concise background on the development of both the federal and state policy of deinstitutionalization, see Robert L. Schonfeld, "Five-Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded, 16 FORDHAM URB. L.J. 1, 3-7 (1988) [hereinafter *Unconstitutional Challenges*].

22. "'Sponsoring agency' means an agency or unit of government, a voluntary agency or any other person or organization which intends to establish or operate a community residential facility for the disabled." N.Y. MENTAL HYG. LAW § 41.34(a)(2) (McKinney 1994).

tuted a "family" for purposes of the local zoning ordinance.²³ Recognizing that the "establishment of clearly defined procedures" for the selection of sites would foster "communication and cooperation between the various state agencies, local agencies, and local communities," the New York Legislature passed the Padavan Law.²⁴ It was hoped that the law would ease the difficulties that sponsoring agencies faced in making community residence placements in the face of community resistance.²⁵

The Padavan Law attempts to balance the housing rights of individuals with mental handicaps and the interests of the community in where the home is to be located.²⁶ To this end, the law provides for community input into the siting of group home facilities. The statute authorizes municipal involvement through a man-

23. Terry Rice, *Group Home Site Selection Arouses Opposition*, N.Y.L.J. June 10, 1992, at S-1.

24. 1978 New York Laws ch. 468 (McKinney). The declaration of legislative findings and intent states:

The legislature hereby finds and determines that mentally disabled individuals have the right to attain the benefits of normal residential surroundings. It is further found that the opportunities for mentally disabled individuals will be enhanced, and the delivery of services improved, by providing these individuals with the least restrictive environment that is consistent with their needs, and that such environment will foster the development of maximum capabilities. It is the intention of this legislation to meet the needs of the mentally disabled in New York state by providing, whenever possible, that such persons remain in normal community settings, receiving such treatment, care, rehabilitation, and education, as may be appropriate to each individual. It is further intended that communication and cooperation between the various state agencies, local agencies, and local communities be fostered by this legislation, and that this will be best achieved by establishment of clearly defined procedures for the selection of locations for community residences, to best protect the interests of the mentally disabled and ensure acceptance of community residences by local communities. In the establishment of such community residences, the legislature recognizes the need to avoid, wherever practicable, a disproportionate distribution of community residences and other similar facilities.

Id.

25. 1978 N.Y. State Legis. Annual 275 (memorandum of Senator Frank E. Padavan).

26. *Id.* This balancing of interests permits the municipality to object to a proposed site if the establishment of the facility would result in an overconcentration of such facilities in the municipality. It is certainly open to question whether such an objection is sound since it accepts the premise that the disabled are to be treated differently from other individuals who live in a residential community. The Padavan Law mandates that group homes be considered a family for purposes of the statute. If such a home is a family for the purpose of local laws and ordinances, then why should these same homes be dispersed? A response to this argument is that it is the group home itself that brings the nonresidential character to a community. This argument, however, holds little water when a sponsoring agency has purchased an older home and converts it to group home use. See generally Minow, *supra* note 10.

dated notice requirement,²⁷ a forty day response period to analyze the proposal,²⁸ a provision for public hearings,²⁹ and the opportunity for a hearing before the Commissioner³⁰ on the issue of over-concentration should the municipality object upon those grounds.³¹ The municipality is further entitled to judicial review of the Commissioner's decision by means of an Article 78 proceeding.³²

B. *Constitutional Challenges to the Padavan Law*

The Padavan Law survived constitutional challenge in *Incorporated Village of Old Field v. Introne*.³³ The Village of Old Field argued that the law: (1) was an unconstitutional delegation of power by the Legislature because its definition of "substantial alteration" lacked criteria for the determination of such an occurrence, (2) was void for vagueness, (3) was violative of plaintiff's right to due process and equal protection, and (4) disregarded village zoning ordinances.³⁴ The New York Supreme Court rejected each of these claims.

The court recognized that the Legislature could not delegate its lawmaking power to an administrative agency, but found there

27. After the site has been selected, the sponsoring agency shall "notify the chief executive officer of the municipality in writing and include in such notice the specific address of the site, the type of community residence, the number of residents and the community support requirements of the program." N.Y. MENTAL HYG. LAW § 41.34(c)(1) (McKinney 1994). For a detailed study of the Padavan Law's procedures and related case law, see Robert L. Schonfeld, "Not in My Neighborhood:" *Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State*, 13 FORDHAM URB. L.J. 281 (1985) [hereinafter *Not in My Neighborhood*]; See also Rice, *supra* note 23.

28. The municipality shall have forty days after the receipt of such notice to: (A) [a]pprove the site recommended . . . ; (B) suggest one or more suitable sites within its jurisdiction which could accommodate such a facility; or (C) object to the establishment of a facility . . . because to do so would result in such a concentration of community residential facilities for the mentally disabled . . . that the nature and character of the areas within the municipality would be substantially altered.

N.Y. MENTAL HYG. LAW § 41.34(c)(1)(A-C).

29. *Id.* at § 41.34(c)(2).

30. The Commissioner, as defined by the Mental Hygiene Law, is "the commissioner of the office of the department responsible for issuance of license and operating certificate to the proposed community residential facility." N.Y. MENTAL HYG. LAW § 41.34(a)(4) (McKinney 1994). Often, this means the Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities or the Commissioner of the New York State Office of Mental Health.

31. *Id.* at § 41.34(c)(5).

32. N.Y. CIV. PRAC. L. & R. 7801-06 (McKinney 1994). See also N.Y. MENTAL HYG. LAW § 41.34(d) (McKinney 1994).

33. 430 N.Y.S.2d 192 (Sup. Ct. 1980).

34. *Id.* at 194.

was no such delegation in the instant case. The Legislature, in defining substantial alteration, was required only to "lay[] down an 'intelligent principle' specifying the standards . . . in as detailed a fashion as is reasonably practicable . . ." ³⁵ A precise formula for the implementation of legislative policy was not necessary where variable conditions require flexibility and adaptability. ³⁶

The court further found that the statute was not void for vagueness, noting that the statute expressed the intent of the Legislature by setting forth procedures by which communities can air their objections, and specifying the factors the Commissioner must take into consideration when making a site selection decision. ³⁷

The court also ruled that neither equal protection nor due process was violated by the enactment of the statute. The court noted at the onset that it was questionable whether a municipal corporation such as the Village of Old Field could even claim a violation of these principles. ³⁸ Even assuming that the village could make such a claim, the court refused to find a violation. Characterizing the "opportunity to be heard . . . [as] an essential" part of due process, the court held that the Padavan Law passed muster under due process challenge because the statute provided for a hearing and judicial review of the Commissioner's decision. ³⁹ The court rejected the equal protection challenge stating that the plaintiff "does not even suggest that the statute is without a rational basis or differentiates in a palpably arbitrary manner." ⁴⁰

Finally, the court addressed the plaintiff's claim that the Padavan Law disregarded the village zoning ordinance. The court noted that where local ordinances conflict with and hinder State public policy, such ordinances will be held as void. ⁴¹ According to the court, the State is permitted to involve itself in local matters that are of substantial State concern. The police power of the State may then be used to effectuate State policy, acting to override any local countervailing concerns. ⁴² Because the policy of deinstitutionalization is a matter of substantial State concern, the Padavan Law, written to bring about the integration of individuals with

35. *Id.* at 195. (quoting *City of Utica v. Water Pollution Control Bd.*, 156 N.E.2d 301, 304 (N.Y. 1959)).

36. *Id.*

37. *Id.*

38. *Id.* at 195-96.

39. *Id.*

40. *Id.* at 196.

41. *Id.*

42. *Id.* "The police power of the state has never been questioned when it dealt with a matter of public health and welfare and it should not be limited or whittled away by local objection." *Id.*

mental handicaps into residential communities, will preempt any local ordinance which conflicts with this policy.⁴³

Constitutional challenges claiming that persons with mental handicaps are denied equal protection and due process by virtue of the Padavan Law have also failed. In *Di Biase v. Piscitelli*⁴⁴, the New York State Association for Retarded Children [NYSARC] cross-claimed against the Commissioners of both the Office of Mental Health and the Office of Mental Retardation and Developmental Disabilities arguing that section 41.34 of the Mental Hygiene Law was unconstitutional.⁴⁵

NYSARC's principal argument was that the Padavan Law violated due process and equal protection rights of individuals with mental handicaps by interfering with their right to purchase and occupy residential property.⁴⁶ NYSARC's theory was that by requiring consultation between the sponsor of a proposed community residence and the municipality in which the home was to be located, the State prevented individuals with mental disabilities from purchasing residential property of their own.⁴⁷ The Appellate Division, Second Department rejected this claim, holding that the site selection procedure was rationally related⁴⁸ to the public policy

43. See, e.g., *Gedney Assoc. v. State of N.Y. Dep't of Ment. Hyg.*, 446 N.Y.S.2d 876 (Sup. Ct. 1982) (holding that the State is exempt from local building code requirement which would have affected the proposed construction of eight community homes by the Department of Mental Hygiene for the mentally disabled).

44. 448 N.Y.S.2d 35 (App. Div. 1982).

45. *Id.* at 35-36.

46. *Id.* at 36.

47. *Id.* NYSARC's due process claim was based on the "fundamental right" to property. The equal protection claim was premised on the contention that those with mental handicaps were not permitted to purchase and occupy property as those who were not mentally disabled. *Id.* at 36.

48. The rational basis standard of review employed by the *Di Biase* court is the same standard of review employed by the United States Supreme Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In that case, a Texas city denied a special use permit for a group home for the mentally retarded pursuant to its ordinance which required permits for group homes. The Supreme Court reversed the Fifth Circuit's determination that mental retardation was a suspect classification entitled to an intermediate level of judicial scrutiny. *Id.* at 442-47. Instead, the Court held that "[t]o withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose." *Id.* at 446. The Court further stated that such a standard "affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner." *Id.* Despite applying only rational basis review, the Court struck down the requirement because other uses with similar spillovers such as boarding houses, apartments, and nursing homes were permitted as of right in the particular residential district while the group home was subject to a permit requirement. Because the legitimate interests of the city (street congestion, fire hazards, safety concerns) are no more threatened by the location of a group

of deinstitutionalization which the Legislature wished to implement. The local participation requirement was designed to ensure that the needs of those with handicaps would be met by establishing group homes "through a process of joint discussion and accommodation" between sponsoring agencies and community representatives.⁴⁹

The failure of the challenges in *Old Field* and *Di Biase* clarifies the constitutional parameters within which the Padavan Law operates. *Old Field* established the relationship between the Padavan Law and the state policy of deinstitutionalization. Because deinstitutionalization is a matter of "substantial state concern," New York, through the Padavan Law, has sharply limited local municipal control over the placement of such facilities.⁵⁰ In effect, *Old Field* upheld New York's decision to preempt local zoning of group homes for individuals with mental handicaps in favor of a state mandated process for site selection.

The state interest in deinstitutionalization demonstrated in *Old Field* also operates to place burdens on individuals with mental handicaps. *Di Biase* recognized these burdens, but found that the interest furthered by providing a site selection process outweighed any detrimental impact on the rights of individuals with mental handicaps. The decision to permit such burdens appears warranted especially in light of the benefits the Padavan Law has imparted upon site selection of group homes in New York State.⁵¹

C. Application of the Padavan Law

The site selection process mandated by the Padavan Law has had a powerful impact in terms of its effectiveness in placing group homes in residential communities. While procedural challenges

home in the community as opposed to a nursing home, for instance, the permit requirement had no rational basis, and was therefore, invalid as it applied to the group home. *Id.* at 449-50. For articles commenting on or criticizing the Court's rejection of a quasi suspect classification for the mentally retarded, see Minow, *supra* note 10; *Unconstitutional Challenges*, *supra* note 21; Joel Tornari, Comment, *City of Cleburne v. Cleburne Living Center: Equal Protection for the Mentally Retarded?*, 9 HARV. J.L. & PUB. POL'Y 231 (1986); John D. Wilson, Comment, *Cleburne: An Evolutionary Step in Equal Protection Analysis*, 46 MD. L. REV. 163 (1986).

49. *Di Biase v. Piscitelli*, 448 N.Y.S.2d 35, 36 (App. Div. 1982); see also *Normal Life of La., Inc. v. Jefferson Parish Dep't of Inspection & Code Enforcement*, 483 So. 2d 1123 (La. Ct. App. 1986) (upholding a statute requiring sponsor of a proposed community home for the mentally disabled to secure approval from local governing authority having jurisdiction over the proposed site).

50. See N.Y. MENTAL HYG. LAW § 41.34(c)(1)(A-C) (McKinney 1994).

51. See *infra* part III.

such as the failure to provide adequate notice have met with some success,⁵² no New York court has ruled against a proposed siting where a municipality has objected on grounds of overconcentration.⁵³ Illustrative of this unblemished record is *Town of Brunswick v. Webb*.⁵⁴ In that case, the town presented the testimony of a real estate expert who concluded that property values would depreciate if the community residence was established, resulting in a substantial alteration in the character of the community.⁵⁵ The town further presented residents' concerns over fire and traffic safety.⁵⁶ The court rejected this evidence, finding the testimony conclusory and insufficient to show a substantial change in the character of the community.⁵⁷ Other cases are clearly in accord with *Town of Brunswick*, often emphasizing the burden a chal-

52. See *Town of Dewitt v. Surlis*, 561 N.Y.S.2d 1009, 1010 (App. Div. 1990) (holding that the Commissioner of the New York State Office of Mental Health failed to give proper section 41.34 notice to plaintiff town by failing to provide "the most recently published data" concerning the existence of previously established facilities in the surrounding area, and failing to disclose the the existence of eight group homes previously established in the area, including four within town limits). But see *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Office*, 459 N.Y.S.2d 109, 112 (App. Div. 1983) (holding that failure of Commissioner to conduct a hearing within fifteen days of request by the town did not invalidate site selection because the time requirements under the Padavan Law in this case were "directory rather than mandatory"; the delay in conducting the hearing gave the town more time to prepare and "did not frustrate the purpose of section 41.34, to foster communication and co-operation between State and local agencies and communities . . .").

53. See *Town of Mt. Pleasant v. New York State Office of Mental Health*, 606 N.Y.S.2d 296 (App. Div. 1994); *Town of Hempstead v. Comm'r of N.Y. Office of Mental Health*, 595 N.Y.S.2d 96 (App. Div. 1993); *City of Beacon v. Surlis*, 558 N.Y.S.2d 196 (App. Div. 1990); *Town of Poughkeepsie v. Webb*, 549 N.Y.S.2d 765 (App. Div. 1990); *Paino v. Webb*, 544 N.Y.S.2d 159 (App. Div. 1989); *Incorporated Village of Freeport v. Webb*, 538 N.Y.S.2d 306 (App. Div.), *appeal denied*, 547 N.E.2d 103 (N.Y. 1989); *Town of Bedford v. State Office of Mental Retardation & Developmental Disabilities*, 533 N.Y.S.2d 994 (App. Div. 1988); *Fisher v. Webb*, 523 N.Y.S.2d 639 (App. Div. 1988); *Town of Hempstead v. Comm'r of N.Y. Office of Mental Retardation & Developmental Disabilities*, 517 N.Y.S.2d 29 (App. Div. 1987); *Town of Oyster Bay v. Office of Mental Retardation & Developmental Disabilities*, 503 N.Y.S.2d 100 (App. Div. 1986); *Town of Hempstead v. Comm'r of N.Y. Office of Mental Retardation & Developmental Disabilities*, 503 N.Y.S.2d 98 (App. Div. 1986); *Town of Oyster Bay v. State Office of Mental Retardation & Developmental Disabilities*, 496 N.Y.S.2d 61 (App. Div. 1985); *Town of Hempstead v. Comm'r of N.Y. Office of Mental Retardation & Developmental Disabilities*, 493 N.Y.S.2d 29 (App. Div. 1985); *Spielman v. Introne*, 451 N.Y.S.2d 194 (App. Div. 1982); *Roberts v. Selzak*, 452 N.Y.S.2d 113 (App. Div. 1982); *Town of Hempstead v. Comm'r of N.Y. Office of Mental Retardation & Developmental Disabilities* 432 N.Y.S.2d 399 (App. Div. 1980); *Collin v. Community Bd. of N.Y.*, 566 N.Y.S.2d 848 (Sup. Ct. 1991); *Gedney Assoc. v. State Dep't of Mental Hygiene*, 446 N.Y.S.2d 876 (Sup. Ct. 1982).

54. 535 N.Y.S.2d 831 (App. Div. 1988).

55. *Id.* at 833.

56. *Id.*

57. *Id.*

lenger to a proposed siting must meet.⁵⁸

While the Padavan Law has been successful in selecting group home sites, it appears that challenges will become more forceful in the years to come. As the number of group homes in residential communities increase, New York courts will eventually face a factual concentration which could warrant the finding of overconcentration.⁵⁹ By permitting municipalities to object on grounds of overconcentration, the Padavan Law acknowledges that municipalities are empowered to reject a group home within its boundaries. Is it possible then that the Padavan Law could become a vehicle for resistance to group homes in the future? The question which will be addressed in the following material is whether in light of this possibility, the overconcentration provision is consistent with the policy of deinstitutionalization and should be upheld, or should be rejected as violative of federal fair housing laws protecting individuals with handicaps.

II. THE FAIR HOUSING AMENDMENTS ACT

A. *Legislative Intent: The House Judiciary Report*

The Fair Housing Amendments Act of 1988⁶⁰ extended to individuals with handicaps and families with children⁶¹ the same

58. See, e.g., *Town of Mt. Pleasant v. New York Office of Mental Health*, 606 N.Y.S.2d 296 (App. Div. 1994). The court held that:

[t]he party contesting the establishment of a community residential facility must show that it would result in a concentration of the same or similar facilities such that the nature and character of the area would be altered. Such challenges may be sustained only when the evidence offered in opposition is *clear and of a convincing nature*.

Id. at 298 (emphasis added) (citation omitted); *Incorporated Village of Freeport v. Webb* 538 N.Y.S.2d 306 (App. Div. 1989) ("Contrary to the petitioner's contentions, the Commissioner's determination which rejected its objections to the establishment of a community residential facility at the location selected by the respondents is supported by substantial evidence.").

59. See *Greenville Journal*, *supra* note 2; *Rice*, *supra* note 23, at S-3.

60. The FHAA provides that it is 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) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter.

42 U.S.C. § 3604(f)(1) (1988). Furthermore: "[f]or purposes of this subsection, discrimination includes— . . . (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . ." 42 U.S.C. § 3604(f)(3)(B) (1988).

61. For works discussing the FHAA provisions barring housing discrimination against

protections that the Fair Housing Act⁶² had provided twenty years earlier in prohibiting housing discrimination based on race, color, religion, national origin and sex.⁶³ While the Act does not specifically refer to the problem of group home siting, local laws which have restricted group homes through the use of zoning regulations have been challenged as violative of the FHAA.⁶⁴

The House Judiciary Committee Report accompanying the amendments provides the strongest evidence that Congress intended to prevent discrimination in housing through the use of restrictive or exclusionary zoning decisions. The Report broadly states the FHAA's "national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."⁶⁵ To implement this, the House Committee specifically called for the "prohibition against discrimination against those with handicaps apply to *zoning decisions and practices*," and further provided examples of zoning actions which would fall under the jurisdiction of the Act.⁶⁶ Furthermore, the use or enforcement of otherwise neutral regulations and rules based on incorrect or over-protective assumptions or fears was prohibited.⁶⁷

families with children, see *supra* note 11.

62. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (Supp. 1994)).

63. The Fair Housing Act was amended in 1974 to include gender as a class protected under the statute. Act of Aug. 22, 1974, Pub. L. No. 93-383, § 808(b)(1)-(3), 88 Stat. 729 (amending 42 U.S.C. §§ 3604-3606).

64. Cindy L. Soper, Comment, *The Fair Housing Act Amendments of 1988: New Zoning Rules For Group Homes For the Handicapped*, 37 St. Louis U. L.J. 1033 (1993). See, e.g., Support Ministries for Persons with AIDS Inc. v. Village of Waterford, 799 F. Supp. 272 (1992), *aff'd*, 808 F. Supp. 120 (1992) (local zoning law amended to prevent the siting of a group home for AIDS sufferers violated FHAA); Stewart B. McKinney Found. v. Town Plan & Zoning Comm'n of Fairfield, 790 F. Supp. 1197 (1992) (holding, in proceeding for preliminary injunction, that special exception requirement based on the HIV status of the prospective tenants was potentially violative of the FHAA).

65. H.R. REP. No. 711, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.A.N. 2173, 2179 [hereinafter HOUSE REPORT].

66. *Id.* at 2185 (emphasis added).

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.

Id.

67. *Id.*

Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or over-protective as-

Besides ensuring access to housing, the House Report also emphasized the importance of treating the disabled as individuals. The clear import of the House Report is that, barring a showing that a regulation limiting access to housing for individuals with handicaps is designed to protect safety and health,⁶⁸ those individuals should have the right to reside in a neighborhood of their choice, just as any other person.⁶⁹

B. *Dispersion Requirements and the FHAA*

The intention of Congress to scrutinize local zoning practices has resulted in voluminous litigation with conflicting results.⁷⁰ Dispersion requirements for group homes are among the zoning practices which have been challenged as violative of the FHAA. Two important cases which address this issue squarely are *Familystyle of St. Paul, Inc. v. City of St. Paul*⁷¹ and *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*.⁷² While both cases represent substantially different views of

assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.

Id.

68. *Id.* The House Report recognized the legitimacy of the safety and health justification, as well as the ability of state and local governments to regulate land, but noted that this "authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities." When used to impose requirements on congregate living arrangements for non-related persons with disabilities, they have the effect of discriminating against the handicapped. *Id.* With this language, the House Report explicitly incorporated the holding of *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) which rejected a zoning requirement which was imposed on the non-related handicapped persons, but not upon families of similar size. There is also some argument that a substantial detrimental impact on a neighborhood could also permit the erection of legal barriers to housing for the handicapped. See Robert L. Schonfeld & Seth P. Stein, *Fighting Municipal Tag-Team: The Federal Fair Housing Amendments Act and its Use in Obtaining Access to Housing for Persons with Disabilities*, 21 FORDHAM URB. L.J. 299, 303-04 (1994) [hereinafter *Municipal Tag Team*].

69. *Municipal Tag Team*, *supra* note 68, at 304.

70. See, e.g., *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (town improperly relied on its zoning laws to exclude home for former substance abusers); *United States v. City of Taylor*, 798 F. Supp. 442 (E.D. Mich. 1992) (opposition to group home based on purported violations of zoning laws, traffic congestion); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991) (city argued that group home of nine former substance abusers did not constitute a family for purposes of zoning ordinance). *Contra Elliot v. City of Athens*, 960 F.2d 975 (11th Cir. 1992) (ordinance permitting a maximum of four unrelated individuals to occupy a single residence upheld; any disparate impact on handicapped individuals is overcome by city's legitimate interest in controlling noise, traffic, and density).

71. 728 F. Supp. 1396 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991).

72. 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

the relationship between dispersion requirements and the FHAA, they are distinguished on grounds that *Familystyle* involved the application of a state distance requirement while *Horizon House* centered on the use of a locally enacted distance limitation. This distinction is important because it recognizes that dispersion requirements may serve to meet the goal of deinstitutionalization if enacted on a prospective, state-wide basis.

1. *Familystyle of St. Paul, Inc. v. City of St. Paul*. In *Familystyle of St. Paul, Inc. v. City of St. Paul*, a state law which required a distance of 1320 feet between community group homes was challenged as violative of the FHAA.⁷³ *Familystyle*, a provider of mental health services, leased three properties which were not permitted to operate as community residences because they failed to meet the zoning code definition of a nonconforming use.⁷⁴ When *Familystyle* requested special use permits, the permits were denied on grounds that operating the facilities would violate the spacing requirement.⁷⁵ *Familystyle* appealed to the City Council, which granted issuance of the permits conditioned by the requirement that *Familystyle* work to disperse its facilities before October 1, 1988, at which time the permits would expire.⁷⁶ *Familystyle* responded by applying for a renewal of conditional use permits for the facilities, but the Planning Commission denied these permits and declined to modify the spacing requirement.⁷⁷ At approximately the same time, the Fair Housing Act was amended to prohibit housing discrimination against individuals with handicaps.⁷⁸ *Familystyle* subsequently filed suit, contending that the dispersion requirement contained in both the Minnesota Human Services Licensing Act⁷⁹ and the St. Paul Zoning Code⁸⁰ conflicted with § 3615

73. *Familystyle*, 728 F. Supp. at 1398.

74. *Id.* A nonconforming use is defined as “[a] structure the size, dimension or location of which was lawful prior to the adoption, revision, or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment.” BLACK’S LAW DICTIONARY 1051 (6th ed. 1990).

75. *Familystyle*, 728 F. Supp. at 1398.

76. *Id.*

77. *Id.*

78. *Id.* at 1399.

79. MINN. STAT. § 245A (1994). “The commissioner shall not grant an initial license to any residential program if the residential program will be within 1320 feet of an existing residential program, unless the town, municipality, or county zoning authority grants the residential program a conditional use or special use permit.” *Id.* § 245A.11, subd. 4.

80. *Familystyle*, 728 F. Supp. at 1398. “The City of St. Paul Zoning Code similarly provides that community residential facilities serving six or fewer people are permitted, ‘subject to the condition that a minimum distance of 1320 feet will be required between

of the FHAA.⁸¹

The district court first turned to the issue of whether the FHAA preempted state and local laws.⁸² The court pointed out that the state and local laws do not prohibit mentally ill persons from buying or renting homes within 1320 feet of a residential facility.⁸³ These laws "only relate to the licensure and placement of residential programs."⁸⁴ The court further noted that while the House Report demonstrated an intent to invalidate the state and local laws such as the ones at issue, the Act did not prohibit the application of "any and all state laws which have some impact on the handicapped."⁸⁵ The court rejected the contention that Congress, in prohibiting housing discrimination against individuals with handicaps, meant to preempt all local regulation of community residential facilities.⁸⁶ The court concluded that there was a "significant difference between laws which directly regulate individuals and laws which regulate institutions."⁸⁷

Having disposed of the preemption issue, the court next addressed plaintiff's claim that the defendant's action in adopting the spacing requirement was done so with discriminatory intent to exclude individuals with handicaps. In making this determination, the court relied on the disparate treatment test employed in *Inter-*

zoning lots used for community residential facilities." *Id.*

81. *Id.* at 1400. The relevant portion of the FHAA reads,

[n]othing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this title shall be effective, that grants, guarantees, or protects the same rights as are granted by this title; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid.

42 U.S.C. § 3615 (Supp. 1994) (emphasis added).

82. *Familystyle*, 728 F. Supp. at 1400. Preemption is a "[d]octrine adopted by U.S. Supreme Court holding that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state [or local laws]. As such, a state may not pass a law inconsistent with the federal law." BLACK'S LAW DICTIONARY 1177 (6th ed. 1990).

83. *Familystyle*, 728 F. Supp. at 1400.

84. *Id.* The court noted that the challenged laws were licensing procedures for the operation of residential facilities and did not directly prohibit persons with mental illness or retardation from purchasing or renting homes on their own. *Id.* But see *Smith & Lee Assocs. v. City of Taylor, Mich.*, 13 F.3d 920, 931 (6th Cir. 1993) (stating that "[w]e recognize that the handicapped may have little choice but to live in a commercial home if they desire to live in a residential neighborhood.>").

85. *Familystyle*, 728 F. Supp. at 1401.

86. *Id.* "Surely the Congress intended states to maintain some control over such facilities. The spacing requirements are a part of Minnesota's licensing process and the zoning code builds on those requirements in implementing its system." *Id.*

87. *Id.*

national Brotherhood of Teamsters v. United States.⁸⁸ Analyzing the state law and its legislative history, the court found that the purpose of the legislation was to deinstitutionalize individuals with handicaps.⁸⁹ From this premise, the court found that such a policy was furthered by the dispersal of facilities because it was part of an overall commitment to benefit both those individuals with handicaps and the entire community.⁹⁰ In short, the court rejected plaintiff's contention that the law was enacted to discriminate against the handicapped by limiting their choice of housing.

Last, the court addressed *Familystyle's* contention that the dispersion requirement had a discriminatory effect, or disparate impact on handicapped individuals seeking housing. The court relied on *United States v. City of Blackjack*⁹¹ to provide the test for a prima facie case of disparate impact. In *Blackjack*, a prima facie case is made where the practice of the defendant complained of "actually or predictably results in . . . discrimination; in other words, that it has a discriminatory effect."⁹² The court determined that *Familystyle* had made out a prima facie case of disparate impact because the dispersion requirement did not limit the housing choices of any individuals other than those with handicaps.⁹³

Continuing its *Blackjack* analysis, the court shifted the burden to the defendant to demonstrate that a compelling governmental interest⁹⁴ was served by the dispersion requirement.⁹⁵ The court

88. 431 U.S. 324 (1977). In *International Brotherhood of Teamsters*, the court was concerned with the disparate impact of an employer's actions. In *Familystyle*, the court employed the test to address the impact of the action of the Legislature in passing the law in question.

89. *Familystyle*, 728 F. Supp. at 1402.

90. *Id.* at 1402-03.

91. 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

92. *Id.* at 1184.

93. *Familystyle*, 728 F. Supp. at 1403.

Although the laws do not directly regulate the handicapped, they do limit some facilities where handicapped people would choose to live. . . . [C]ertain handicapped individuals may want to reside at one of the three residences, in a residential program setting, and not be able to do so because of these laws. If there is even one person in that situation, the law has a discriminatory effect on that person—it limits the freedom of that individual to live where he or she would wish.

Id.

94. *Id.* at 1403-04. The district court expressed confusion as to which standard of review it should apply to evaluate the interest of the government in dispersal of group homes for the handicapped. *Id.* at 1404 n.10. The court concluded that because *Blackjack* provided for strict scrutiny (although in the context of racial discrimination), and no other Eighth Circuit case had narrowed the test developed in *Blackjack*, it was the proper standard to employ. *Id.* After *Familystyle* appealed the ruling of the district court, the Eighth Circuit made it clear that the level of scrutiny appropriate for a disparate impact claim in a Title VIII case concerning handicap discrimination was the standard set forth in *City of Cleburne*

concluded that the government had met its burden of proof. With regard to the first prong of the *Blackjack* test requiring that the law furthered the interests asserted, the court, as it had done with its analysis of disparate treatment, found that the purpose of the spacial requirement was to prevent clustering of facilities which could result in segregation from the mainstream community.⁹⁶

The court then found that there was little private detriment in applying the dispersion requirement to Familystyle as there was no evidence that a handicapped person had been turned away because of the permit denial.⁹⁷ When balancing the private detriment to the plaintiff with the government's interest in deinstitutionalization and the prevention of clustering, the government interest outweighed the private interest because the "laws fostering deinstitutionalization seek to enhance the individual lives of all handicapped and to improve society as a whole through integration of these people into the mainstream."⁹⁸ The court then concluded its analysis, finding that less drastic means were not available to further the interest of deinstitutionalization.⁹⁹

On appeal, the Eighth Circuit affirmed the district court's decision.¹⁰⁰ The court rejected Familystyle's assertion that the dispersion requirements were invalid because they limited the housing choices of individuals with mental handicaps in violation of the FHAA.¹⁰¹ Instead, the court held the "goals of non-discrimination

v. Cleburne Living Center, 473 U.S. 432 (1985). *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91, 94 (8th Cir. 1991). Hence, the proper test according to the Eighth Circuit after a plaintiff has made out a prima facie case of disparate impact is "whether the legislation which distinguishes between the mentally impaired and others is 'rationally related to a legitimate governmental purpose.'" *Id.* (quoting *City of Cleburne*, 473 U.S. at 446).

95. *Familystyle*, 728 F. Supp. at 1403-04. In determining a compelling interest, the *Blackjack* court evaluated three factors: (1) whether the ordinance furthered the interest asserted, (2) whether the public interest served by the ordinance was constitutionally permissible and substantial enough to outweigh the private harm caused by it, and (3) whether there were less drastic means available to attain that interest. *Blackjack*, 508 F.2d at 1186-87.

96. *Familystyle*, 728 F. Supp. at 1404. The court accepted the argument that the law prevented the clustering of facilities, and that this served the policy of deinstitutionalization by stopping facilities from locating so close to each other that handicapped individuals do not "interact with the community mainstream." *Id.*

97. *Id.*

98. *Id.* at 1405.

99. *Id.* Interestingly, the court speculates that an argument for reducing the distance requirement might have more force in the future when the number of homes has grown to the point where locating such home cannot be done without violating the dispersion requirement. However, the court rejects the proposal that reducing the spacing requirement would be a less drastic means in this case. *Id.*

100. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991).

101. *Id.* at 93-94.

and deinstitutionalization to be compatible."¹⁰² The court stated that the dispersion requirement:

guarantees that residential treatment facilities will, in fact, be "in the community," rather than in neighborhoods completely made up of group homes that recreate an institutional environment We cannot agree that Congress intended the Fair Housing Amendment Act of 1988 to contribute to the segregation of the mentally ill from the mainstream of our society.¹⁰³

The court also rejected *Familystyle's* disparate impact claim,¹⁰⁴ and further held that the appropriate level of scrutiny was not to be measured by the compelling interest standard of *Blackjack*, but rather by the rational basis standard announced by the Supreme Court in *City of Cleburne v. Cleburne Living Center*.¹⁰⁵

2. *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*. In *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*,¹⁰⁶ the Eastern District of Pennsylvania addressed a 1000 foot dispersion requirement for group homes. In 1988, Horizon House, a group home provider, announced its intention to open two group homes in Upper Southampton, which had no dispersion requirement at the time.¹⁰⁷ The plan met with strong objections from the neighborhood, and the Township Manager was directed by the Board of Supervisors to draft a group home ordinance.¹⁰⁸ The first completed group home ordinance contained a 2000 foot separation requirement.¹⁰⁹ The town directed Horizon House to comply with the ordinance by applying for a use permit allowing the two homes to be located within 800 feet of one another.¹¹⁰ When this procedure proved fruitless, Horizon House applied for a variance which was also de-

102. *Id.*

103. *Id.* at 94.

104. *Id.*

105. *Id.* See *Cleburne*, 473 U.S. 432 (1985). See also *supra* note 94.

106. 804 F. Supp. 683, 685 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

107. *Id.* at 687.

108. *Id.* It is noteworthy that the town drafted an ordinance specifically for the placement of group homes for the mentally retarded. A legislative act such as the drawing up of an ordinance is presumptively valid under the principles of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). See DANIEL R. MANDELKER, *LAND USE LAW* § 1.12 (1988). However, Mandelker notes that in some instances, the presumption of constitutionality has been reversed, especially in litigation involving exclusionary zoning or ordinances which exclude unrelated families or group homes from single family zoned districts. *Id.* The net result is that the local government has the burden to justify the land use regulation. *Id.* § 1.16.

109. *Horizon House*, 804 F. Supp. at 687-88.

110. *Id.* at 688.

nied.¹¹¹ The town enacted two additional group home ordinances, both of which had the effect of eliminating plaintiff's group home proposal because of the dispersion criteria.¹¹² A fourth ordinance with a 1000 foot dispersion requirement was drafted shortly after, an attempt later characterized by the district court as an effort by the Town to achieve facial neutrality by deleting all reference to disability.¹¹³

Unlike the decision in *Familystyle*, the district court did not address preemption, assuming instead that local zoning practices such as the dispersion requirement in question fell within the provisions of the FHAA.¹¹⁴ The district court held that the 1000 foot spacial requirement violated the Fair Housing Act because the requirement created on its face an explicit classification based on handicap which restricted the ability of persons with handicaps to live in a community of their choice.¹¹⁵ The court further found that the plaintiff had proven a FHAA violation under both the disparate impact and disparate treatment theories.¹¹⁶

111. *Id.* The Zoning Hearing Board denied the variance because the homes violated the 3000 foot requirement, and Horizon House had not made a sufficient showing of hardship to justify the granting of a variance. *Id.*

112. *Id.* at 689.

113. *Id.* at 689-90. The town's attempt to achieve facial neutrality began when it wrote the third group home ordinance. That ordinance eliminated all references to the types of disabilities covered which had been specified in the first two ordinances. *Id.* at 689. The language of the third ordinance did not delete the phrase "permanent care or professional supervision" leading the court to find that the Town's policy was to exclude persons with disabilities. *Id.* at 694. The drafting of the fourth ordinance similarly included the phrase, the only change in the ordinance being a reduction of the distance requirement from 2500 feet to 1000 feet. *Id.* at 689-90.

114. This is in accord with the FHAA legislative history. "The Act is intended to prohibit the application of special requirements through land use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." HOUSE REPORT, *supra* note 65, at 2185. Instead of discussing preemption, the court addressed the application of the FHAA to the zoning practices of Upper Southampton in the context of standing: "The FHAA makes clear that providers [such as Horizon House] have standing to challenge state or local laws that discriminate against them 'because of handicap' of the 'person[s] residing in or intending to reside' in their group homes." *Horizon House*, 804 F. Supp. at 692 (quoting 42 U.S.C. § 3604(f)(2)(B)). The court cited *Baxter v. Belleville*, 720 F. Supp. 720, 730-31 (S.D. Ill. 1989), for the proposition that "a person who is not himself handicapped, but is prevented from providing housing for handicapped persons by a municipality's discriminatory acts, has standing to sue under the FHAA." *Id.* It is clear from the court's analysis that it did not accept the distinction made in *Familystyle* between location and placement of group home facilities and the individual right of handicapped persons to live where they wish.

115. *Horizon House*, 804 F. Supp. at 693-94.

116. *Id.* at 695-98. The court presents the following standard for evaluating a FHAA claim:

The first issue addressed by the court was the facial validity of the group home ordinance. In determining whether the ordinance was valid on its face, the court, citing *International Union v. Johnson Controls, Inc.*,¹¹⁷ looked to the explicit terms of the ordinance, noting that by "using the words 'permanent care' or 'professional supervision,' the individuals singled out for disparate treatment are those unable to live on their own, who, in the language of the Fair Housing Act, are 'handicapped.'"¹¹⁸ By requiring on the face of the ordinance that group homes for handicapped individuals be located at least 1000 feet apart, the ordinance discriminated against those individuals by limiting their choices of where to live, in violation of the FHAA.¹¹⁹

An ordinance may create an explicit classification on its face as long as it is enacted for a legitimate governmental purpose.¹²⁰ The court therefore addressed the town's justification for the ordinance. Recognizing the town's rationale as promoting the integration of handicapped individuals into the community, the court applied a rational basis test¹²¹ and found that the town had provided

A violation of the FHAA can be established by demonstrating that the challenged statute is (sic) discriminates against the handicap on its face and serves no legitimate government interest. A violation of the FHAA may also be established by demonstrating a "disparate treatment" which occurs when "the defendant was motivated by an intent to discriminate because of a handicap," or by demonstrating a "disparate impact" which requires plaintiff to prove, "absent a discriminatory intent on the part of the defendant, the effects of defendant's actions were nonetheless discriminatory."

Id. at 693 (citing *United States v. Schuylkill Township*, No. 90-2165, 1990 U.S. Dist. LEXIS 15555, at *18 (E.D. Pa. Nov. 16, 1990)).

117. 499 U.S. 187 (1991). The court quoted the *Johnson Controls* court: the absence of a malevolent motive [in drafting an ordinance] does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.

Horizon House, 804 F. Supp. at 694. While the court in *Johnson Controls* was referring to an employment situation, the same principles apply. An ordinance that creates an explicit classification through its very terms will be scrutinized if the classification involves a group that is statutorily protected as the handicapped are under the FHAA.

118. *Horizon House*, 804 F. Supp. at 694.

119. *Id.* "The language of the ordinance clearly refers to people with handicaps. It extends to 'any facility' where 'permanent care or professional supervision is present.' Its reach coincides with the breadth of the definition of 'handicap' under the Fair Housing Act." *Id.*

120. See *supra* notes 88-90 and accompanying text.

121. See *supra* notes 48, 95. Although the court did not cite to *Cleburne*, the court used a similar rationale, finding that the town's rationale was "based upon unsupported notions or fears about people with handicaps." *Horizon House*, 804 F. Supp. at 695. The failure to provide a rational basis for the decision to implement the distance requirement for group

no evidence that this justification was the basis for the decision to enact the ordinance.¹²² More importantly, the court found that integration through dispersion was not an adequate justification under the FHAA. The court cited *United States v. Starett City Associates*¹²³ and likened the 1000 foot rule to a "ceiling quota imposed on minorities for integration maintenance purposes."¹²⁴ Because the dispersion requirement imposed controls which deny housing on the basis of handicap, the government's purpose, even if benign, could not be upheld. The court further stated that it was irrelevant that the spacing requirement also incidentally affected group homes for non-handicapped individuals.¹²⁵ Thus, the ordinance on its face restricted the housing choices of individuals based on their handicaps and constituted a quota on the number of individuals with handicaps who can reside in the Township.¹²⁶

The court next held that the town had exhibited discriminatory intent by the way in which the town had drafted the ordinance. Under the FHAA, a claim of intentional discrimination, or disparate treatment, is shown where there is an "intentional denial of housing based on an individual's race, color, religion, sex, na-

homes for individuals with mental handicaps where a similar requirement is not imposed on other group home facilities can be analogized to the failure of the City of Cleburne to justify a special permit for a group home when similar uses such as nursing homes did not require a permit.

122. *Horizon House*, 804 F. Supp. at 695. The town enacted the first group home ordinance after a public meeting showed strong community opposition to the homes. Residents were concerned that property values would decline and that their children would be unsafe. Others expressly objected to the presence of people with mental retardation living in their community. *Id.* at 687.

123. 840 F.2d 1096 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988).

124. *Horizon House*, 804 F. Supp. at 695. In *Starett City*, the Second Circuit struck down a quota designed to maintain racial integration in an apartment complex. The justification for the quota was based on the phenomenon known as "tipping," which occurs when the amount of minorities in a given area exceeds a perceived balance and results in white flight, where white people move from the area. The quota had resulted in minority applicants having to wait up to ten times longer than white applicants for apartments. *Starett City*, 840 F.2d at 1098-99. The court found that the Fair Housing Act was not intended to promote racial integration in housing through the use of controls which deny housing on the basis of race if nondiscriminatory policies are likely to result in resegregation. Tipping "cannot serve to justify attempts to maintain integration at Starett City through inflexible racial quotas that are neither temporary in nature nor used to remedy past discrimination or imbalance within the complex." *Id.* at 1100-1102.

125. *Horizon House*, 804 F. Supp. at 694. This logic may be flawed. If an ordinance imposes requirements that all group homes and other similar uses must meet certain requirements in order to be permitted in an otherwise incompatible zone, it can be argued that the individuals with handicaps have no less a right to locate in the community than do other non-handicapped individuals. In this instance, the ordinance is applied uniformly as a function of the general power of legislatures to decide what is an incompatible use.

126. *Horizon House*, 804 F. Supp. at 694.

tional origin, or handicap."¹²⁷ The court recognized that although a hostile motive is not necessary to prove discriminatory intent, discriminatory animus was clearly demonstrated by the circumstances surrounding the development of the dispersion requirement.¹²⁸ The court found that the spacing requirement arose as a direct "response to community opposition and to outmoded fears about people with mental retardation."¹²⁹ Because the town's action in enacting an ordinance based on such fears does not support a rational basis for the regulation, the FHAA was violated.¹³⁰

Finally, the court discussed the discriminatory effect or disparate impact that the dispersion requirement had on handicapped individuals seeking housing in the township. The court looked to the disparate impact test formulated in *Arlington Heights*¹³¹ for guidance on discriminatory effect in the housing context. The four pronged *Arlington* test included an evaluation of (1) the strength of the plaintiff's showing of discriminatory effect, (2) whether there is evidence of discriminatory intent in some form, (3) whether the defendant's interest in taking the action complained of is legitimate, and (4) whether the plaintiff is asking the court to force the defendant to affirmatively provide housing for a protected class, or is asking the court to prevent the defendant from interfering with individual property owners who wish to provide such housing.¹³² Applying this test, the court held that the 1000 foot distance requirement had a discriminatory effect on the housing choices of handicapped individuals.¹³³

Addressing the first prong of the test regarding plaintiff's showing of discriminatory effect, the court noted that the spacing requirement had the effect of limiting the number of handicapped people in the town, their choices of where to live, and their access to community resources.¹³⁴ Furthermore, the requirement affected

127. *Id.* at 696 (quoting Schylkill Township, No. 90-2165, 1990 U.S. Dist. LEXIS 15555, at *20 (E.D. Pa. Nov. 16, 1990))

128. *Id.* at 696.

129. *Id.*

130. *Id.* at 697. The court stated:

[t]hese views are unfounded and are not based on any credible opinion or evidence concerning group homes and people with mental retardation. The evidence . . . shows that group homes have no adverse impact on the property values . . . ; they do not impose a greater burden on public services . . . than other single family dwellings; they are not noisier or denser than a single family residence.

Id. at 696-97.

131. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

132. *Id.* at 1290.

133. *Horizon House*, 804 F. Supp. at 697.

134. *Id.*

providers such as Horizon House, who would be precluded from establishing additional homes even though both the sites and the funding were available.¹³⁵ The second prong, a showing of some discriminatory intent, was fulfilled by Horizon House based on the evidence that the ordinance was enacted as a result of community fears about people with mental retardation.¹³⁶

In determining whether the town's interest was sufficient to justify the drafting of the dispersion requirement, the court noted that *Arlington* placed the burden upon the defendant to prove that its actions furthered "a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."¹³⁷ The court specifically addressed one of the rationales discussed in *Familystyle*, that dispersion requirements act to prevent a clustering of group homes which produce a ghettoization effect. In dismissing the Township's argument that avoidance of clustering was a legitimate governmental interest, the court noted that "[t]he FHAA rejects any notion that a Township can somehow avoid the anti-discrimination mandate by accepting some sort of 'fair share' or apportionment of people with disabilities."¹³⁸ More importantly, the court held that there is no evidence "that people with handicaps living close to one another is per se detrimental," and that "meaningful integration" can only be accomplished if the handicapped persons are included physically in the community and are not restricted in deciding where to live.¹³⁹ Even if the avoidance of clustering was a legitimate interest, the court noted that there were less discriminatory ways to accomplish this goal.¹⁴⁰

Plaintiffs have proved that there are discriminatory effects directly related to the 1000-foot requirement. The spacing requirement limits the numbers of people with handicaps within the Township, limits their choices on where to live, limits their access to essential community resources, and thwarts the efforts to treat people with handicaps equally in the community negatively affecting their self-esteem.

Id.

135. *Id.* at 697-98.

136. *Id.* at 698. See *supra* note 117 and accompanying text.

137. *Id.* (quoting *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 936 (2d Cir.), *aff'd*, 488 U.S. 15 (1988)).

138. *Horizon House*, 804 F. Supp. at 698. See also *City of Peekskill v. Rehabilitation Support Servs.*, 806 F. Supp. 1147 (S.D.N.Y. 1992) (stating that "[p]reventing housing for disabled people on the grounds that the City has already provided its fair share . . . comes perilously close to violating the Fair Housing Act.").

139. *Horizon House*, 804 F. Supp. at 698.

140. *Id.* at 698-99. The court found that the 1000 foot rule was overbroad. For example, the requirement would prevent two homes which happened to be on opposite sides of a lake from locating 1000 feet from one another, despite the fact that the homes are in two sepa-

Lastly, the court held that the relief sought by Horizon House declaring the ordinance unconstitutional did not ask that the town affirmatively establish housing, only that the town no longer restrict Horizon House from locating its housing within a certain distance of other similar housing.¹⁴¹

3. *Analysis of the Familystyle and Horizon House Decisions.* The different approaches to dispersion requirements expressed in *Familystyle* and *Horizon House* reflect the difficulties which courts face in evaluating municipal and state zoning practices concerning the establishment of group homes for handicapped persons under the FHAA. It may be useful to further distinguish the two cases so that a clearer picture is developed regarding this issue.

One obvious difference between the two opinions lies in the acceptance of the government's rationale for imposing dispersion requirements. In both instances, the government attempted to rely on the rationale that dispersion of group home facilities would necessitate the integration of handicapped individuals into mainstream society. Requiring dispersal would prevent the ghettoization and clustering of group home facilities and resegregation.¹⁴²

The apparent conflict between the two courts regarding the legitimacy of the government's purpose may lie in the circumstances of the two situations. In *Familystyle*, the court was charged with reviewing a state licensing law (similar to the Padavan Law) designed to provide individuals with mental illness with the "benefits of normal residential surroundings."¹⁴³ In contrast, the *Horizon House* court addressed a town ordinance which was enacted to regulate group home location through local level decision-making.¹⁴⁴

The fact that *Familystyle* was concerned with a state law while *Horizon House* addressed a local ordinance plays into each court's analysis of the dispersion requirement as it relates to the FHAA. The *Familystyle* court emphasized that it was the state's interest in deinstitutionalization which was at stake. The court noted that state zoning statutes such as the one at issue "guarantee that local governments cannot frustrate state and national policy of permitting mentally retarded persons to participate in nor-

rate neighborhoods and clustering would not be a concern.

141. *Id.* at 699.

142. *See id.* at 694-95; *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp 1396, 1402-03 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991).

143. *Familystyle*, 923 F.2d at 93 (quoting MINN. STAT. § 245A.11, subd. 1 (1994)).

144. *Horizon House*, 804 F. Supp. at 683.

mal residential communities."¹⁴⁵ Underlying the court's opinion is the belief that a state mandated policy can serve to protect the interests of handicapped persons by providing a mechanism by which group homes can forego the local zoning procedures for placing a group home in a residential community. There is a strong argument that without such a procedure, access to normal residential settings for individuals with handicaps would be far more difficult.

The concern that the *Familystyle* court expressed over local zoning for group homes appears to manifest itself in the facts before the *Horizon House* court. In *Horizon House*, the court invalidated a local ordinance as violative of the FHAA in part because the motives of the local governmental body clearly showed an intent to prevent *Horizon House* from establishing group homes in the town.¹⁴⁶ The court found that the ordinance was passed in response to community opposition to the *Horizon House* group home proposal.¹⁴⁷ It is this type of local zoning practice which led states such as Minnesota to pass state mandated group home placement legislation.¹⁴⁸

While the state's purpose in imposing dispersion requirements may be regarded as more benign (i.e., not enacted with discriminatory intent) than a similar requirement enacted locally, there is still the issue of whether the requirement has a discriminatory effect on housing choices for handicapped persons. As the *Familystyle* court recognized, state mandated procedures on their face discriminate against individuals with handicaps by virtue of placing requirements on their choice of housing to which no other group is subject.¹⁴⁹ A challenge to state laws mandating procedures for group home sitings can be mounted as it was in *Familystyle*, but disparate impact analysis turns on the strength of the government interest in the action taken,¹⁵⁰ which as previously explained, may be given more weight when a state law, which is enacted to circumvent the normal politics of zoning, places certain conditions on the group protected under the statute. On the other hand, evidence that a law was enacted with improper motive, as in *Horizon House*, could improve a disparate impact claim. Such evidence would

145. *Familystyle*, 728 F. Supp. at 1402 (quoting *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 27 (Minn. 1981)).

146. *Horizon House*, 804 F. Supp. at 695-97.

147. *Id.* at 696. Under the state mandated procedure for siting group homes, such community opposition would theoretically have less of an impact on the eventual placement of the group home in the community.

148. *Familystyle*, 728 F. Supp. at 1402.

149. *Id.* at 1403.

150. *Id.* at 1403-04.

clearly detract from the stated legitimate purpose of the government in enacting the provision.

When the result in both cases is examined, it appears that the approach to dispersion requirements in *Horizon House* best fits the goals and purposes of the FHAA. Unlike *Familystyle*, the *Horizon House* analysis places determinative emphasis on access by the handicapped to housing of their choice, and does not make the assumption that individuals with handicaps should be restricted from certain areas of the community for their own good.¹⁵¹ Such an attitude toward handicapped persons can serve to foster stereotypes about them. Further, the rationale that dispersion is a legitimate method to promote integration was found to be an inadequate justification under the FHAA.¹⁵² A quota to maintain integration of individuals with handicaps should be treated no differently than a racial quota designed to prevent white flight.¹⁵³ Both have the effect of excluding individuals from residing in the community of their choice.

However, strong arguments also exist for the continuation of the policy of deinstitutionalization through the use of state mandated siting procedures. Most important is that state laws can operate to stifle the "not in my backyard" syndrome which plagues group home projects by preempting local zoning procedures. With the involvement of the state, facilities can be readily placed in more diverse settings, allowing meaningful integration into mainstream living. The problem with state mandated procedures are the conditions which are attached to the siting of a group home, such as the rigid 1320 foot dispersion requirement in *Familystyle*. Requiring that group homes be dispersed may fit the general policy of deinstitutionalization, but dispersion requirements appear to go against the general mandate of the FHAA that handicapped individuals be permitted access to housing of their choice. As indicated by the *Familystyle* case, however, the courts appear willing to accept such requirements as long as they are enacted to further the goal of deinstitutionalization.¹⁵⁴ Whether a state law imposing a

151. *Municipal Tag Team*, *supra* note 68, at 329-30.

152. *Horizon House Developmental Servs., Inc. v. Township of Upper Southhampton*, 804 F. Supp. 683, 695, *aff'd*, 995 F.2d 217 (3d Cir. 1993). The court cited *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1989).

153. *Horizon House*, 804 F. Supp. at 695.

154. *Familystyle* is cited without comment or approval in a number of cases. See *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802 (9th Cir. 1994) (cited for the proposition that Congress did not intend to segregate the mentally ill from mainstream society); *Oxford House v. City of St. Louis*, 843 F. Supp. 1556 (E.D. Mo. 1994) (court applied *Familystyle* discriminatory impact theory); *Martin v. Constance*, 843 F. Supp. 1321 (E.D. Mo. 1994) (rejecting a broadening of *Familystyle* rationale which would permit a site

strict numerical distance limitation between community residences is therefore justified is a different question, a topic discussed in Part III *infra*.

C. *Dispersion Requirements in the Wake of Familystyle and Horizon House*

Subsequent cases examining the legitimacy of dispersion requirements have not resolved the issues addressed in *Familystyle* and *Horizon House*. Whether the FHAA preempts state and local laws regarding the licensure and location of group homes is still an open question. At least two cases have followed *Familystyle's* holding that state and local licensing laws are not preempted by the FHAA.¹⁵⁵ In *Plymouth Charter Township v. Department of Social Services*,¹⁵⁶ a challenge to Michigan's Adult Foster Care Facility Licensing Act [AFCFLA]¹⁵⁷ which provided for among other things, a 1500 foot dispersion requirement, was held not to conflict with the FHAA.¹⁵⁸ As in *Familystyle*, the court distinguished state procedures regulating the licensure of facilities, and legislation prohibiting individuals from residing wherever they choose.¹⁵⁹ Sim-

rejection based on the fact that other homes existed in the state); *North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie*, 827 F. Supp. 497 (N.D. Ill. 1993) (citing *Familystyle's* use of the rational relationship standard of scrutiny); *Plymouth Charter Township v. Dep't of Social Servs.*, 501 N.W.2d 186 (Mich. Ct. App. 1993) (relying on *Familystyle* holding that FHAA did not preempt challenged state statutes); *In re Township of Warren*, 622 A.2d 1257 (N.J. 1993); *Elliot v. City of Athens*, 960 F.2d 975 (11th Cir. 1992); *Stewart B. McKinney Found. v. Town Plan & Zoning Comm'n of Fairfield*, 790 F. Supp. 1197 (D. Conn. 1992) (indicating that plaintiff can make out both discriminatory impact and discriminatory intent claims when litigating a FHAA claim); *Growth Horizons, Inc. v. Delaware County, Pa.*, 784 F. Supp. 258 (E.D. Pa. 1992); *Bangerter v. Orem City Corp.* 797 F. Supp. 918 (C.D. Utah 1992) (also holding that state statutes not preempted by FHAA), *rev'd*, 46 F.3d 1491 (10th Cir. 1995).

155. *Bangerter v. Orem City Corp.*, 797 F. Supp. 918 (D. Utah 1992), *rev'd*, 46 F.3d 1491 (10th Cir. 1995); *Plymouth Charter Township v. Dep't of Social Servs.*, 501 N.W.2d 186 (Mich. 1993).

156. 501 N.W.2d 186.

157. MICH. COMP. LAWS §§ 400.701-737. (1988 & Supp. 1995). Under this law, the Department of Social Services was required to (1) notify the clerk of the local government forty-five days before the issuance of the license that it had received the license application, (2) assess the concentration of adult foster care facilities in the local governmental unit, (3) assess whether a licensed adult foster care facility exists within a 1500 foot radius of the proposed site and (4) give notice to property owners located within 1500 feet of the proposed site. *Plymouth Charter*, 501 N.W.2d at 187.

158. *Plymouth Charter*, 501 N.W.2d at 188.

159. *Id.*

In this regard, we fully agree with the observation of the Eighth Circuit Court of Appeals that 'Congress did not abrogate a state's power to determine how facilities for the mentally ill must meet licensing standards.' If Congress wants to ex-

ilarly, in *Bangerter v. Orem City Corp.*,¹⁶⁰ a state law which allowed municipalities to attach conditions to use permits required for group homes to operate was held not to conflict with the FHAA because of Utah's interest that "the handicapped be integrated into normal surroundings."¹⁶¹

The principles underlying the *Horizon House* decision have led other courts to reject state laws which regulate the licensing and placement of group homes.¹⁶² In *Larkin v. State of Michi-*

pand the scope of the federal act to include commercial enterprises or organizations, then Congress should say so.

Id. at 188-89 (quoting *Familystyle* of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991)).

160. 797 F. Supp. 918 (D. Utah 1992), *rev'd*, 46 F.3d 1491 (10th Cir. 1995).

161. *Id.* at 922. In *Bangerter*, the group home provider applied for a permit to operate the home pursuant to UTAH CODE ANN. § 10-9-2.5 (1953). *Id.* at 920. The permit was granted on two conditions: that the group home provider "provide assurances that the residents of the facility will be properly supervised on a 24-hour basis; and the operator of the facility establish a community advisory committee" through which complaints could be addressed. *Id.* *Bangerter* brought suit alleging violations of the FHAA, arguing that the adopted ordinance had a discriminatory effect on individuals with handicaps. *Id.* at 923. The court first held that the state licensing laws were not preempted by the FHAA because the regulations "only placed restrictions on residential programs seeking to provide housing for groups of handicapped individuals." *Id.* at 922 (quoting *Familystyle* of St. Paul, Inc., v. City of St. Paul, 728 F. Supp. 1396, 1400 (D. Minn 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991)). The court then turned to *Bangerter's* discriminatory impact claim, noting that a *prima facie* case had been made by the plaintiff because the ordinance facially treated the handicapped residents differently from non-handicapped residents. *Id.* The burden then shifted to the defendants to demonstrate that "the distinction made by the challenged ordinance between the mentally impaired and others [was] 'rationally related to a legitimate government purpose.'" *Id.* (quoting *Familystyle*, 923 F.2d at 94). The court determined that the government had met this burden—the purpose of integrating the handicapped into residential surroundings was met by the requirement that the residents be properly supervised on a 24 hour basis. *Id.* at 922-23. The district court's decision was subsequently reversed by the United States Court of Appeals for the Tenth Circuit. *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995). Rejecting the district court's preemption analysis, the court noted that while the FHAA "does not completely preempt all state and local regulations of housing of the disabled," such regulations are preempted "to the extent they violate the Fair Housing Act." *Id.* at 1500. The court also found that the district court had erred in failing to recognize that *Bangerter* had made out a *prima facie* case for intentional discrimination by demonstrating that the ordinance was facially discriminatory. The court noted that in a housing discrimination context, "a plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination. Where the defendant expressly treats someone protected by the FHAA in a different manner than others." *Id.* at 1501. Accordingly, the court remanded the case for consideration of *Bangerter's* intentional discrimination claims. *Id.* at 1502.

162. See *Larkin v. State of Michigan*, 883 F. Supp. 172 (E.D. Mich. 1994) (invalidating state statutory scheme which set a 1500 foot distance requirement and banned excessive concentration of adult foster care homes); *Association for Advancement of the Mentally Handicapped v. City of Elizabeth*, 876 F. Supp. 614 (D.N.J. 1994) (invalidating provision of state law permitting the denial of conditional use permits where proposed home is within

gan,¹⁶³ a federal district court in Michigan came to a conclusion contrary to that of *Plymouth Charter Township*¹⁶⁴ in holding that the AFCFLA violated the FHAA.¹⁶⁵ The plaintiff, who wished to open an adult foster care home for four handicapped individuals, applied for a license pursuant to the process required under the AFCFLA.¹⁶⁶ The application was denied because another facility was located within 1500 feet of the proposed facility.¹⁶⁷ The plaintiff brought suit, alleging that the 1500 foot dispersion requirement violated the FHAA, as well as the Equal Protection and Due Process Clauses of the United States Constitution.¹⁶⁸

Predictably, plaintiff's arguments employed the rationale set forth in *Horizon House* while the defendant relied on *Familystyle* to argue the validity of the state law. As in *Familystyle*, the defendants argued that the statutory scheme was not preempted by the FHAA because the the state law was directed at regulating commercial facilities, not the ability of handicapped persons to live where they choose.¹⁶⁹ In contrast to *Familystyle*, however, the court rejected this argument, finding the distinction "illusory" based on the legislative intent of the FHAA.¹⁷⁰

1500 feet of another community residence); *Cf.* *United States v. Village of Marshall*, 787 F. Supp. 872 (W.D. Wisc. 1991) (holding that failure to grant exception to 2500 foot requirement violated FHAA, but not deciding as to validity of dispersion requirement); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993) (invalidating county licensing scheme as violative of the FHAA).

163. 883 F. Supp. 172 (E.D. Mich. 1994).

164. 501 N.W.2d 186 (Mich. 1993).

165. *Larkin*, 883 F. Supp. at 179-80.

166. *Id.* at 174.

167. *Id.*

168. *Id.* Specifically, the plaintiff argued "that the notice, distancing, and excessive concentration requirements [of] the Adult Foster Care Facility Licensing Act (AFCFLA) have a disparate impact [upon those individuals] with disabilities." *Id.* at 176. The notice requirement required the Department of Social Services to notify the municipality of its intention to site a facility within its boundaries, and the municipality to then inform all neighbors within 1500 feet of the proposed site. *Id.* Plaintiff further argued that this requirement often provoked negative responses from neighbors, thereby restricting housing options. *Id.* With respect to the excessive concentration and 1500 foot dispersion requirement, the plaintiff argued that both provisions acted to limit the housing choices of the handicapped by restricting the number and location of homes that can exist within a municipality. *Id.*

169. *Id.* at 178.

170. *Id.*

Notwithstanding the decisions in *Familystyle* and *Plymouth*, this court finds that by regulating residential facilities, the Michigan statutes inherently regulate, and consequently, discriminate against handicapped individuals. The House Report . . . outlines the types of local zoning regulations that the FHAA is intended to prohibit. . . . As such, the Michigan statutory scheme conflicts with and is preempted by the FHAA.

Id. at 178-79.

The court then analyzed the government's rationale for implementing the statutory scheme. The defendant maintained that the state law prevented the "formation of 'ghettos' of AFC homes," thereby resulting in reinstitutionalization.¹⁷¹ The court rejected this assertion as well, relying in part on the analysis employed in *Horizon House* which analogized dispersion requirements to racial quotas.¹⁷² As such, the court held that there was no rational basis for either the 1500 foot dispersion requirement or the neighbor notification requirement and invalidated those provisions of the state law.¹⁷³

Whether the *Larkin* court's treatment of state statutory schemes which include dispersion requirements will be followed remains to be seen. Despite the court's holding, questions remain regarding the relationship between state regulation of community residences and the FHAA. With regard to the Padavan Law, Part III will examine how the decisions in *Horizon House* and *Larkin* may not act to similarly invalidate New York's site selection process.

III. THE PADAVAN LAW AND THE FHAA

The relationship between the Padavan Law and the FHAA has not yet been determined. Because New York State providers have not been faced with a determination that a substantial alteration of an area has occurred due to overconcentration,¹⁷⁴ there has been no opportunity for a provider to challenge the legality of the overconcentration provision as violative of the FHAA.

The fact that the overconcentration provision of the Padavan Law has not been challenged under the FHAA does not mean that such a challenge cannot be mounted. As explained previously, the increased number of group homes could eventually lead to a determination by the Commissioner of overconcentration.¹⁷⁵ The question which remains is whether the overconcentration language of the Padavan Law should be held violative of the FHAA as discriminating against individuals with mental handicaps on the basis of

171. *Id.* at 176. The defendants further asserted that the dispersion requirements were necessary to provide a normal environment for handicapped persons, and allow for integration into mainstream society. *Id.* at 177-78.

172. *Id.* at 177.

173. *Id.* The court further found that defendants, the State of Michigan and the Michigan Department of Social Services, violated the Equal Protection Clause by enacting and enforcing the now invalidated provisions which had a discriminatory effect on individuals with handicaps. *Id.*

174. See cases cited *supra* note 53 and accompanying text.

175. Rice, *supra* note 23, at S-8.

disability.

While the question is not easy, strong arguments can be made that the Padavan Law's overconcentration provision is the proper standard to apply in furthering New York State's goal of deinstitutionalization. First and foremost, the provision lacks precise definition, recognizing only that the municipality has some say in where group homes are placed.¹⁷⁶ In lieu of a clear definition, courts have interpreted the provision liberally in favor of group home providers, satisfying the Legislature's intent by rejecting most overconcentration arguments summarily.¹⁷⁷

A hypothetical will illustrate why the imprecise language of the overconcentration provision promotes the State policy of deinstitutionalization. Suppose a group home provider wishes to locate a home which is located within 1000 feet of a similar group home in the same community. Under the rigid 1320 feet dispersion requirement in *Familystyle*, the group home provider would be required to obtain a special permit in order to place the group home at that location.¹⁷⁸ This is true even if the homes are separated by a river, highway, or other obstacle which places the home in different neighborhoods respectively.¹⁷⁹

Using the same set of facts under the overconcentration provision of the Padavan Law, the second group home will not be barred from locating within 1000 feet of the other group home. The language of the overconcentration provision is broad enough that group homes can locate any distance from one another, even next door. In the hypothetical, the fact that the homes would be located in two different neighborhoods would be taken into ac-

176. See *supra* note 28. See generally, *Not in my Neighborhood*, *supra* note 27, at 330. In making his recommendations for changes in the Padavan Law, Schonfeld specifically argued that "the statute *not* be changed to include a definition of the term 'substantial alteration' since any definition would be inadequate to encompass the myriad neighborhood situations in New York State . . ." *Id.*

177. See cases cited *supra* note 51 and accompanying text. The claim that the term 'substantial alteration' is too vague has been rejected by the courts. See *supra* notes 35-36 and accompanying text.

178. MINN. STAT. § 245A.11 (1988).

179. See *United States v. Village of Marshall*, 787 F. Supp. 872 (W.D. Wis. 1991). In *Village of Marshall*, an exception to a 2500 foot dispersion requirement was denied by the Village Board which had such discretion to do so under the state law. *Id.* at 873. In holding that the denial of the exception violated the FHAA, the court noted that the Board, in adhering rigidly to the 2500 foot requirement, failed to account for the fact that the "effective distance between the properties was in excess of the 2500 foot requirement by virtue of the Menausha River." *Id.* at 879. The court rejected the Village's argument that it was merely adhering to the state requirement, finding that an "an exception in this case would [not] undermine the purpose of the statute." *Id.* at 879.

count when determining overconcentration.¹⁸⁰ As the cases demonstrate, it is almost a certain rule that no overconcentration exists on these facts.¹⁸¹ Clearly, the Legislature's intent to place individuals with mental handicaps in residential communities is being fostered by the site selection procedure in the Padavan Law.¹⁸²

The overconcentration provision is also flexible enough to recognize that too many homes in one place can be detrimental to the goal of deinstitutionalization. Suppose group homes have been consistently locating in Town "X" for a number of years, with "Y Street" having fifteen such homes on a street of twenty total homes. On these facts, a challenge that overconcentration and a substantial alteration in the community has occurred could very well succeed.¹⁸³ While it can be argued that denying the sixteenth group home on grounds of overconcentration restricts the housing choices of those with mental handicaps, the result should nevertheless be regarded as proper. Because the goal of deinstitutionalization is to bring individuals with mental handicaps into mainstream society, permitting group homes to cluster defeats this purpose by resegregating those individuals. While this contradicts the *Horizon House* holding that integration is not an adequate justification under the FHAA,¹⁸⁴ that rationale was arguably based on the fact that the town enacted a rigid dispersion requirement not unlike the *Familystyle* limitation, which acted as a quota on the number of people who could live in the town. The Padavan Law enacts no such quota, leaving it to the Commissioner¹⁸⁵ and the reviewing courts¹⁸⁶ to look at the particular circumstances of each case to de-

180. See *Fisher v. Webb*, 523 N.Y.S.2d 639 (App. Div. 1988). In holding that petitioner had failed to show that the establishment of a community residence would result in a substantial alteration of the community where three community residences would exist within one mile of each other, the court stated, "the record demonstrates that the proposed site is 'isolated sufficiently from other similar facilities so as to avoid undue concentration in the relevant geographical area' and is in a separate and discrete neighborhood unaffected by the other existing community residences . . ." *Id.* at 640 (emphasis added) (quoting *Matter of Inc. Village of Westbury v. Prevost*, 467 N.Y.S.2d 70, 71 (App. Div. 1983) and citing *Matter of City of Newburgh v. Webb*, 507 N.Y.S.2d 314 (App. Div. 1986)).

181. See *supra* cases cited note 53 and accompanying text.

182. See source cited *supra* note 24 and accompanying text.

183. Because the New York courts have not found an overconcentration of facilities resulting in a substantial alteration of the community, it is conceded that it is speculative whether such finding would be made given these facts. See, e.g., *Fisher*, 523 N.Y.S.2d at 640 (finding that the character of the neighborhood would not be changed where a group home of eight severely handicapped individuals was to be located on a street where only fourteen individuals resided).

184. *Horizon House Developmental Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 698 (E.D. Penn. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

185. N.Y. MENTAL HYG. § 41.34(c)(5) (McKinney 1994).

186. *Id.* § 41.34(d).

termine whether overconcentration and substantial alteration in the character of the community has resulted.

The proposition that the Padavan Law's benefits outweigh any detrimental effects it has on housing choices for handicapped persons is further supported by the positive impact of the law in terms of placing homes in residential communities.¹⁸⁷ Opposition to group homes is not going to disappear as stereotypes continue to exist toward individuals with handicaps.¹⁸⁸ Without the law, handicapped persons will undoubtedly find it harder to locate in residential communities. While one can argue that only the overconcentration provision be eliminated from the law, thereby ensuring a site selection process without a requirement to avoid undue concentration, the provision has been demonstrated to effectuate state policy goals and should not be stricken from the statute.

Even if the overconcentration provision were invoked and a provider subsequently sued, claiming that the provision violated the FHAA, prior precedent would suggest that the provision will be upheld. *Familystyle* dealt with a similar state law which was upheld by the Eighth Circuit, and that particular law can be characterized as far more rigid and subject to challenge than the overconcentration provision of the Padavan Law. Other cases have relied on the rationale of *Familystyle*,¹⁸⁹ lending further credence to the argument that a challenge to the Padavan Law's overconcentration provision would likely fail.

IV. CONCLUSION

The use of dispersion requirements on group homes for individuals with handicaps is a troublesome issue which has been addressed with differing results. While any requirement that limits the ability of an individual to live where he or she wishes is problematic, state laws which impose distance requirements between group homes as part of a policy to deinstitutionalize handicapped individuals are quite different in nature from dispersion requirements enacted on a local level which purport to serve the same purpose. It is recommended that such state laws, however, be amended to eliminate dispersion requirements which rigidly impose numerical distance limitations between community residences. An example of a better alternative is seen in the Padavan Law, which employs a standard which is flexible enough to meet

187. See cases cited *supra* notes 53-58 and accompanying text.

188. See *supra* note 2.

189. *Familystyle* of St. Paul, Inc. v. City of St. Paul, 728 F. Supp. 1396, 1403 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991).

the important goal of deinstitutionalization without imposing inflexible burdens on the housing choices of individuals with handicaps.