

## **MENTAL HEALTH TREATMENT—CITIES AND TOWNS—COUNTIES—Release To Less Restrictive Alternative**

**Local governments may not categorically prohibit or restrict the release or less restrictive alternative placement of a person involuntarily committed to a state hospital or facility under RCW 71.05, RCW 10.77, or RCW 71.09. Attempts to do so through local ordinance may risk violating state or federal constitutions or statutes.**

July 27, 2021

The Honorable Dan Bronoske  
State Representative, District 28  
PO Box 40600  
Olympia, WA 98504-0600

Cite As:  
AGO 2021 No. 4

Dear Representative Bronoske:

By letter previously acknowledged, you requested our opinion on the following question<sup>1</sup>:

**May a local government prohibit or contest the release or less restrictive alternative placement of a person involuntarily committed to a state hospital or facility under RCW 71.05, RCW 10.77, or RCW 71.09 to a less restrictive setting, including an adult family home, when the person otherwise qualifies for release or a less restrictive alternative? Please consider in your answer at a minimum the Americans with Disabilities Act and the Federal Fair Housing Act.**

### **BRIEF ANSWER**

State law allows a county, through its county prosecutor, to intervene in the process of releasing or placing in a less restrictive alternative (LRA) a person that the county has committed under RCW 71.05, RCW 10.77, or RCW 71.09. As part of this process, the prosecutor may present evidence indicating that the committed person should not be released or receive an LRA.

There is no provision, however, that allows a local government to categorically prohibit or block a committed person's release or LRA placement. If a local government enacted such a

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<sup>1</sup> You also asked a question about the extent to which state laws may restrict release of persons without violating federal law. This question potentially implicates the validity of enacted state laws, which our Office—by longstanding policy—does not opine in Attorney General Opinions, because it would be our job to defend them in court if they were ever challenged. We have therefore concluded that we cannot answer your second question in the form of an Attorney General Opinion. Our Office is available to advise on these issues in the context of attorney-client privileged advice.

provision, it would be preempted to the extent it applied to sexually violent predators (SVP), whose placement is exclusively controlled by state law. As to other committed persons, such a provision would risk violating statutory and constitutional protections against discrimination on the basis of disability, including the Americans With Disabilities Act (ADA), Federal Fair Housing Act (FFHA), Washington Law Against Discrimination (WLAD), Washington Housing Policy Act (WHPA), equal protection clause of the U.S. Constitution, and privileges and immunities clause of the Washington Constitution.

## BACKGROUND

A person may be involuntarily committed by the state for a variety of reasons. *See* RCW 71.05 (providing for commitment of persons who are gravely disabled or suffer from a mental disorder, substance use disorder, or developmental disability that creates a likelihood of serious harm); RCW 10.77 (providing for commitment of persons who are found not guilty of a crime by reason of insanity); RCW 71.09 (providing for commitment of SVPs). A person committed under any of these chapters has certain constitutional and statutory rights to be considered for treatment in a setting less restrictive than total confinement. “Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection.” *In re Det. of Thorell*, 149 Wn.2d 724, 731, 72 P.3d 708 (2003) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution requires the State to “provide civilly-committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released.” *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000). Further, the Equal Protection Clause prohibits the state from categorically withholding less restrictive alternate treatment from some classes of committed persons while offering it to others. *Thorell*, 149 Wn.2d at 745-46.

In addition to these constitutional protections, the ADA guarantees individuals with developmental disabilities “appropriate treatment, services, and habilitation” that are “provided in the setting that is least restrictive of the individual’s personal liberty.” 42 U.S.C. § 15009(1), (2). Public entities are required to administer their services, programs, and activities in “the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). This means that individuals with disabilities must be allowed to “interact with nondisabled persons to the fullest extent possible[.]” 28 C.F.R. pt. 35, App. B. The “[u]njustified isolation” of a patient constitutes “discrimination based on disability” and is unlawful under the ADA. *Olmstead v. Zimring ex rel. L.C.*, 527 U.S. 581, 597 (1999).

State law requires the State to create a conditional release or discharge plan for persons committed under RCW 71.05, RCW 10.77, or RCW 71.09. RCW 71.05.365 (persons committed under RCW 71.05 must receive an individualized discharge plan when they no longer require inpatient care); Laws of 2021, ch. 263, § 4 (E2SSB 5071) (requiring persons committed under RCW 10.77 to receive conditional release planning starting at admission); RCW 71.09.080, *as amended* by Laws of 2021, ch. 236, § 3 (E2SSB 5163) (any person committed under RCW 71.09 is entitled to an ongoing, clinically appropriate discharge plan). One type of treatment that may be

available to persons committed under these chapters is a less restrictive alternative, or LRA. RCW 71.05.240(4)(c) (person may receive an LRA if “treatment in a less restrictive setting than detention is in the best interest of such person or others”); RCW 71.05.320 (same); RCW 10.77.110 (defendant who is a substantial danger to others, unless kept under control by the court or other persons or institutions, must be hospitalized or given an appropriate LRA treatment); RCW 71.09.090 (person may receive an LRA if an LRA would be in the best interest of the person and conditions can be imposed that would adequately protect the community).<sup>2</sup> A person found not guilty of a criminal offense by reason of insanity, or committed because they were charged with a violent criminal offense but found incompetent to stand trial, may be released to an LRA only under the continued supervision of a multidisciplinary treatment team. RCW 10.77.150(4), *as amended by* Laws of 2021, ch. 263, § 1; RCW 71.05.320(6), *as amended by* Laws of 2021, ch. 263, §§ 2, 3.

Options for LRA treatment may include placement in an adult family home. *See* RCW 70.128. An adult family home is a business located in a residential home that provides long-term care services. *See* RCW 70.128.010(1). Any “adult in need of personal or special care” may be a “resident” of an adult family home. RCW 70.128.010(10). A person requires personal care if that person needs physical or verbal assistance with daily living due to a functional disability. RCW 74.39A.009(24). A functional disability is “a recognized chronic physical or mental condition or disease, including chemical dependency or developmental disability . . . .” RCW 74.39A.009(23). Adult family homes are licensed and regulated by the Department of Social and Health Services (DSHS). RCW 70.128.050. So long as an applicant and home meet the statutory and regulatory requirements to be certified as an adult family home, DSHS is required to issue a license. RCW 70.128.060(2). In addition, adult family homes are deemed a residential use of property, and must be permitted in all residential and commercial zones, including zones otherwise reserved for single-family homes. RCW 70.128.140. However, persons committed under RCW 71.09 are subject to additional residency restrictions as may be ordered by a court, including but not limited to a minimum distance restriction of 500 feet on the proximity of their residence to child care facilities and public or private schools providing K-12 education. RCW 71.09.096(4)(a), *as amended by* Laws of 2021, ch. 236, § 6 (E2SSB 5163).

LRA treatment may also take place in an enhanced services facility. *See* RCW 70.97. Enhanced services facilities are intended for patients who are “inappropriate for placement in other licensed facilities due to the complex needs that result in behavioral and security issues.” RCW 70.97.010(5). A person is eligible for treatment in an enhanced services facility if that person has “(a) a mental disorder, chemical dependency disorder, or both; (b) an organic or traumatic brain injury; or (c) a cognitive impairment that results in symptoms or behaviors requiring supervision and facility services . . . .” Former RCW 70.97.030(2) (2018), *amended by* Laws of 2020, ch. 278, § 2. Enhanced services facilities are licensed and regulated by DSHS. *See* WAC 388-107. An existing nursing home, assisted living facility, or adult family home may be

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<sup>2</sup> Alternatively, a person who no longer fits the definition of an SVP is eligible for an unconditional release. RCW 71.09.080(7).

converted into an enhanced services facility, and is “deemed to meet the applicable state and local rules, regulations, permits, and code requirements.” RCW 70.97.060(4).

Finally, persons committed under RCW 71.09 may receive LRA treatment in a secure community transition facility.<sup>3</sup> RCW 71.09.250. Secure community transition facilities are required to have “supervision and security, and either provide[] or ensure[] the provision of sex offender treatment services.” RCW 71.09.020(15). Secure community transition facilities are highly regulated and must comply with various security and placement requirements. *See* RCW 71.09.250-903. DSHS must ensure that placements in secure community transition facilities are “equitably distributed among the counties” to the greatest extent possible. RCW 71.09.265(2). Similarly, whenever DSHS proposes to release a person committed under RCW 71.09 outside of the county where they were committed, a court must consider whether such release or placement would be consistent with fair share principles of release. RCW 71.09.092, *as amended by* Laws of 2021, ch. 236, § 5. Fair share principles of release means that each county has adequate options for conditional release placements in a number generally equivalent to the number of residents from that county who are committed under RCW 71.09. RCW 71.09.020, *as amended by* Laws of 2021, ch. 236, § 2.

### ANALYSIS

**May a local government prohibit or contest the release or less restrictive alternative placement of a person involuntarily committed to a state hospital or facility under RCW 71.05, RCW 10.77, or RCW 71.09 to a less restrictive setting, including an adult family home, when the person otherwise qualifies for release or a less restrictive alternative? Please consider in your answer at a minimum the Americans with Disabilities Act and the Federal Fair Housing Act.**

**a. A county prosecutor may participate in the release or LRA process for a person committed by that county**

State law defines the process for considering a release or LRA for persons committed under RCW 71.05, RCW 10.77, or RCW 71.09. While the specifics of the process vary depending on which chapter the person was committed under, all three chapters permit the county responsible for the person’s commitment to participate and oppose the release or placement.

First, a person may be committed under RCW 71.05.280(3) for committing a felony, where the person has been determined to be incompetent to stand trial and as a result of behavioral health disorder, presents a substantial likelihood of re-offending. When a person committed in this way is considered for a temporary leave from the treatment facility, an early release from involuntary treatment, a modification of a commitment order, or a conditional release into outpatient care, the

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<sup>3</sup> This is not to say that secure community transition facilities are the *only* facility where an SVP may be placed. *See* RCW 71.09.345 (“Nothing in chapter 12, Laws of 2001 2nd sp. sess. shall operate to restrict a court’s authority to make less restrictive alternative placements to a committed person’s individual residence or to a *setting less restrictive than a secure community transition facility.*” (Emphasis added.)).

prosecutor of the county where the criminal charges were dismissed (for incompetency to stand trial) must receive advance notice. RCW 71.05.325(2)(a), .330(2), .335, .340(1)(b). The prosecutor may then intervene in any motion to modify a commitment under RCW 71.05.280(3) that includes an LRA. RCW 71.05.335. (Note that the person may be placed in a different county from the county responsible for the original commitment.) The county prosecutor may also petition for a hearing prior to the conditional release of a committed person. RCW 71.05.340(1)(b). “The issue to be determined at the hearing is whether or not the person may be conditionally released without substantial danger to other persons, or substantial likelihood of committing criminal acts jeopardizing public safety or security.” RCW 71.05.340(1)(b). When the commitment is based on a violent felony as defined in RCW 9.94A.030, in addition to notifying the county prosecutor, the proposed release or discharge is reviewed by the Independent Public Safety Review Panel. RCW 71.05.280(3)(b); RCW 10.77.270. In addition, when the commitment is based on a sex, violent, or felony harassment offense, the treatment facility must notify not only the county prosecutor, but also the chief of police of the city where the person will reside and the sheriff of the county where the person will reside. RCW 71.05.425(1).

Similarly, whenever a person committed under RCW 10.77 petitions for a conditional release, or DSHS recommends such a release, a hearing must be held to determine “whether or not the person may be released conditionally without substantial danger to other persons, or substantial likelihood of committing criminal acts jeopardizing public safety or security.” RCW 10.77.150(3)(c). The prosecutor for the county that ordered the person’s commitment is responsible for representing the State in this hearing, and has the right to order an examination of the committed person. RCW 10.77.150(3)(a)-(b).

Finally, a person committed under RCW 71.09 may petition for an LRA. This may be done with or without the approval of DSHS. DSHS may authorize the committed person to petition for an LRA if DSHS determines that the person’s condition has so changed that release to an LRA is in their best interest and conditions can be imposed that adequately protect the community. RCW 71.09.090(1)(b), *as amended by* Laws of 2021, ch. 236, § 4. Upon such a petition, DSHS must identify an LRA placement for the person and notify the prosecuting attorney responsible for the original commitment. Alternatively, the person may petition for an LRA without the approval of DSHS, which triggers a show cause hearing at which the state must produce prima facie evidence that an LRA is not appropriate. RCW 71.09.090(2). If the state is not able to do so, or if DSHS authorizes the petition, then the court holds a hearing to consider the committed person or DSHS’s proposed plan for an LRA release. At this hearing, the prosecutor responsible for the original commitment may represent the State (although in practice most counties contract with the Attorney General’s Office to provide this representation) and has the right to demand a jury trial. RCW 71.09.090(3)(a).

These statutes give a county government, through its prosecutor, the opportunity to participate in the process for release or LRA placement of a person that the county has committed. However, no statute permits a county or other local government to categorically prohibit the placement of a committed person. Any such prohibition by a local government would raise a number of statutory and constitutional issues, which are discussed below.

**b. State law preempts any local law pertaining to residency restrictions for sex offenders and SVPs**

The State reserves exclusive authority to decide where SVPs committed under RCW 71.09 may reside.<sup>4</sup> Release of an SVP to an LRA requires several judicial findings, including that

housing exists in Washington that complies with distance restrictions is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center if the person leaves the housing to which he or she has been assigned without authorization[.]

RCW 71.09.092(3), *as amended by* Laws of 2021, ch. 236, § 5. Further, “if the department [of social and health services] has proposed housing that is outside of the county of commitment, a documented effort was made by the department to ensure that placement is consistent with fair share principles of release[.]” RCW 71.09.092(4), *as amended by* Laws of 2021, ch. 236, § 5. The question of whether an LRA proposed by an SVP meets statutory requirements is a question for a court or jury. RCW 71.09.094(2). If a court or jury approves a release to an LRA, then the court shall direct such a release upon imposition of conditions that the court finds would adequately protect the community. RCW 71.09.096(1). Such conditions must include a restriction on the proximity of the SVP’s residence to K-12 schools as well as child care facilities, and may also include other distance restrictions based on the person’s specific risk factors and criminogenic needs. RCW 71.09.096(4)(a), *as amended by* Laws of 2021, ch. 236, § 5. If the court approves such a plan, the Department of Corrections will further investigate the LRA, which may include a report back to the court recommending additional LRA conditions for the court to incorporate if the court so chooses. RCW 71.09.096(4).

Release of an SVP to an LRA, as well as the conditions on the SVP’s residency, is a matter for determination in the specific judicial proceeding governing that person’s civil commitment. A local ordinance purporting to provide differently as to LRAs for SVPs would accordingly conflict with the court’s statutory role in approving such a plan.

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<sup>4</sup> We understand this question to relate to those individuals civilly committed as SVPs pursuant to RCW 71.09. However, a separate statutory scheme addresses persons criminally convicted of sex crimes and in the custody of the Department of Corrections. Under RCW 9.94A.8445, the Department of Corrections’ placement process supersedes and preempts any local rules, regulations, codes, statutes, or ordinances regarding residency restrictions for anyone who has been convicted of a sex offense upon release from total confinement. A local law on the same subject matter, that is, on where a sex offender may or may not reside, would run afoul of RCW 9.94A.8445, so long as it was passed on or after march 1, 2006.

**c. Committed persons are protected from discrimination under state and federal statutes**

A committed person is likely to have, or to be perceived as having, a disability protected by statutes like the ADA, Rehabilitation Act, FFHA, WLAD, or WHPA. This may be particularly true of those committed under RCW 71.05 or RCW 10.77, but could include some committed under RCW 71.09 as well. Any action that intentionally discriminates against persons with disabilities would risk violating these statutes unless it could be established that the action was in fact beneficial to persons with disabilities, or that the individual posed a direct threat. Any action that disproportionately impacts persons with disabilities—regardless of the government’s intent—would risk violating these statutes unless it could be established that the action was justified by a substantial, legitimate, and non-discriminatory government interest.

**(1) Persons with a qualifying disability are protected by the ADA, Rehabilitation Act, and FFHA**

The ADA, 42 U.S.C. §§ 12101-12213, provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. This means that a public entity may not “utilize criteria or methods of administration: (i) [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability[.]” 28 C.F.R. § 35.130(b)(3)(i).

Similarly, the Rehabilitation Act of 1973 provides:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a). The Rehabilitation Act and the ADA provide substantially the same rights, so they are typically read in tandem. *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002).

The FFHA, 42 U.S.C. §§ 3601-3609, as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(a), 102 Stat. 1619 (1988), makes it unlawful to

discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—(A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter.

42 U.S.C. § 3604(f)(1); see *Larkin v. Mich. Dep’t of Soc. Servs.*, 89 F.3d 285, 288 (6th Cir. 1996). The FFHA is a broad remedial statute intended to “protect the right of handicapped persons to live

in the residence of their choice in the community.” *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1994) (citing H.R. Rep. No. 711 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2185). The FFHA preempts any state law that “purports to require or permit any action that would be a discriminatory housing practice under this subchapter[.]” 42 U.S.C. § 3615.

Like the Rehabilitation Act, the FFHA is typically read in tandem with the ADA. *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1157 (9th Cir. 2013) (citing *Tsombanidis v. West Haven Fire Dep’t*, 352 F.3d 565, 573 n.4 (2d Cir. 2003)). Accordingly, we will analyze the ADA, Rehabilitation Act, and FFHA together.

**(a) Definition of “disability” under ADA or “handicap” under FFHA**

The ADA defines a “disability” as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3)).” 42 U.S.C. § 12102.<sup>5</sup> A “mental impairment” may include “[a]ny mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.” 28 C.F.R. § 35.108(b)(1)(ii). Similarly, the FFHA defines a “handicap” as “(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment[.]” 42 U.S.C. § 3602(h)(1)-(3). The courts regard the terms “handicap” or “handicapped” and “disability” or “disabled” as interchangeable. *Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1146 n.2 (9th Cir. 2003). This analysis will use the preferred terms, “disabled” and “disability.” *See id.*

In order to be committed under RCW 71.05, a person must suffer from a mental or substance abuse disorder, and as a result be gravely disabled or a danger to self or others. RCW 71.05.150, .153, .280, .320. Under RCW 71.05.020:

(23) “Gravely disabled” means a condition in which a person, as a result of a behavioral health disorder: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or

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<sup>5</sup> The ADA excludes a number of conditions from the definition of “disability,” including “sexual behavior disorders” and “psychoactive substance use disorders resulting from current illegal use of drugs.” 42 U.S.C. § 12211; *see also* 42 U.S.C. § 3602(h) (“handicap” under the FFHA excludes “current, illegal use of or addiction to a controlled substance”). Therefore, this analysis does not apply to the extent persons are treated differently because of a sexual behavior disorder. We note, however, that a person may suffer from both a sexual behavior disorder and also a qualifying disability under 42 U.S.C. § 12211. Such a person would still be protected by the ADA and related laws to the extent they are treated differently as a result of a qualifying disability and not a sexual behavior disorder. In addition, while current drug or alcohol use is not a protected disability, substance use *treatment* programs and facilities are protected by both the ADA and the FFHA. *See City of Edmonds*, 18 F.3d at 804; *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir 1999); *Pac. Shores Props.*, 730 F.3d 1142.

(b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety;

...

(37) “Mental disorder” means any organic, mental, or emotional impairment which has substantial adverse effects on a person’s cognitive or volitional functions;

...

(52) “Substance use disorder” means a cluster of cognitive, behavioral, and physiological symptoms indicating that an individual continues using the substance despite significant substance-related problems . . . .

Under RCW 71A.10.020:

(5) “Developmental disability” means a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary to be closely related to an intellectual disability or to require treatment similar to that required for individuals with intellectual disabilities, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial limitation to the individual. . . .

Because these conditions constitute mental or physical impairments that substantially limit various aspects of a person’s basic life functions, a court would likely find that any of them constitutes a “disability” as that term is used within the ADA. *See Wagner ex rel. Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1010 (3d Cir. 1995); *Pac. Shores Props.*, 730 F.3d at 1156-57.

In order to be committed under RCW 10.77, a person must be “criminally insane,” meaning that person has been “acquitted of a crime charged by reason of insanity, and thereupon found to be a substantial danger to other persons or to present a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other persons or institutions.” RCW 10.77.010(4). In turn, a person may be acquitted by reason of insanity only if

[a]t the time of the commission of the offense, as a result of *mental disease or defect*, the mind of the actor was affected to such an extent that: (a) He or she was unable to perceive the nature and quality of the act with which he or she is charged; or (b) He or she was unable to tell right from wrong with reference to the particular act charged.

RCW 9A.12.010(1)(a)-(b) (emphasis added). An acquittal by reason of insanity, standing alone, does not constitute a mental impairment under the ADA. *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2005). However, a person who has been acquitted by reason of insanity—as anyone committed under RCW 10.77 has been—is still protected by the ADA to the extent that person is *perceived* as having a substantially limiting mental disability. *Id.* at 1063. Assuming that a person is dangerous because of a previous acquittal by reason of insanity, and discriminating against the person on that basis, violates the ADA. *Id.* at 1063-64.

There are two ways in which a law or policy can discriminate against people with disabilities in violation of the ADA and FFHA. First, the law may call for “disparate treatment”: it may intentionally discriminate against people with disabilities. *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 502 (9th Cir. 2016). Disparate treatment may include, but is not limited to, a government blocking the construction of housing for a disfavored group, or imposing requirements on such housing that are not imposed upon housing for similarly situated persons outside the disfavored group. *See, e.g., Pac. Shores Props.*, 730 F.3d 1142 (holding that moratorium on group homes was disparate treatment); *Ave. 6E Invs.*, 818 F.3d 493 (holding that denial of rezoning for developer perceived as catering to Hispanics was disparate treatment); *Child.’s All. v. City of Bellevue*, 950 F. Supp. 1491, 1499-1500 (W.D. Wash. 1997) (holding that occupancy limit on group homes for homeless youth was disparate treatment). Disparate treatment is unlawful whether the challenged law explicitly applies less favorably to people with disabilities, or is merely motivated by a discriminatory intent or applied in a discriminatory way. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995); *Pac. Shores Props.*, 730 F.3d at 1158-60.

Second, the challenged law may have a “disparate impact” on people with disabilities, meaning that it has a “disproportionately adverse effect on minorities” and is not justified by a legitimate rationale. *Tex. Dep’t of Housing & Cmty. Affairs v. Inclusive Cmty. Proj.*, 576 U.S. 519, 524-25 (2015) (citing *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)). Disparate impact may include, but is not limited to, disproportionately approving tax credits for low-income housing within areas populated by minorities, or making zoning decisions that prevent a higher proportion of minorities from purchasing homes. *Id.* at 524-25; *Ave. 6E Invs.*, 818 F.3d at 511. We explain the differing legal tests below.

## **(b) Disparate Treatment**

### **(i) Facial discrimination**

A law that discriminates on its face against a member of a protected class is invalid unless the government can show either “(1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes.” *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007) (citing *Larkin*, 89 F.3d at 290; *Bangerter*, 46 F.3d at 1503-04). Evidence of the government’s discriminatory animus against people with disabilities is not required. *Child.’s All.*, 950 F. Supp. at 1495 (citing *Bangerter*, 46 F.3d at 1500-01). Rather, the government would bear the burden of

proving that the restriction benefited people with disabilities, or was based on documented safety concerns. *Cnty. House, Inc.*, 490 F.3d at 1051.

Whether a hypothetical law would be justified under this test cannot be answered in the abstract, and is beyond the scope of this opinion. We point out, however, that the psychological profession generally considers treatment in a community setting as beneficial to rehabilitation. See, e.g., Rohini Pahwa, Ph.D., et al., *Relationship of Community Integration of Persons with Severe Mental Illness and Mental Health Service Intensity*, 65 *Psychiatric Servs.* 822 (Jun 2014), <https://doi.org/10.1176/appi.ps.201300233> (“Community integration has been recognized as an essential component of recovery, an important outcome of mental health treatment . . .”); see also K.S. Jacob, *Recovery Model of Mental Illness: A Complementary Approach to Psychiatric Care*, *Indian J. Psychol. Med.* 117 (Apr-Jun 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4418239/>. A locality attempting to block a committed person’s or group of persons’ release or placement would need to overcome this scientific evidence and show that continued treatment within an institutional setting would benefit people with disabilities. Alternatively, the locality would need to demonstrate the existence of a legitimate safety concern through documentation like police reports, incident reports, or other evidence demonstrating the danger that the challenged law would avoid. *Cnty. House, Inc.*, 490 F.3d at 1051. A “[g]eneralized interest[] in public safety, stability, and tranquility” is not enough, absent a showing that these interests are actually threatened by the person burdened by the challenged law. *Child. ’s All.*, 950 F. Supp. at 1498.

**(ii) Facially neutral measures**

A law that purports to be neutral on its face, but that operates to bar group homes for people with disabilities from operating in certain areas, may violate the FFHA. *City of Edmonds*, 18 F.3d at 805. A plaintiff may prove that a facially neutral law is in fact discriminatory in two ways. First, the plaintiff may show that a similarly situated entity was treated more favorably than the plaintiff. *Pac. Shores Props.*, 730 F.3d at 1158 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). For example, a law that imposes occupancy limits on group homes for youths, but not on family homes, violates the FFHA. *Child. ’s All.*, 950 F. Supp. at 1499-1500.

Second, the plaintiff may “‘simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated’ the defendant and that the defendant’s actions adversely affected the plaintiff in some way.” *Pac. Shores Props.*, 730 F.3d at 1158 (quoting *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004)). To determine whether a challenged law is motivated by discriminatory intent, the courts consider

whether the defendant’s actions were motivated by a discriminatory purpose by examining (1) statistics demonstrating a “clear pattern unexplainable on grounds other than” discriminatory ones, (2) “the historical background of the decision,” (3) “the specific sequence of events leading up to the challenged decision,” (4) the defendant’s departures from its normal procedures or substantive conclusions, and (5) relevant “legislative or administrative history.”

*Pac. Shores Props.*, 730 F.3d at 1158-59 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)).

Again, whether some hypothetical law would pass this test is beyond the scope of this opinion. We point out, however, that the events leading up to a challenged law and the legislative history behind it may serve as evidence of whether the law has a discriminatory purpose. *Ave. 6E Invs.*, 818 F.3d at 504. For example, when a city has previously attempted to pass a moratorium against group homes for persons with disabilities, that history may be evidence that an otherwise facially neutral law was enacted for a discriminatory purpose. *Pac. Shores Props.*, 730 F.3d at 1162. For example, because the City of Lakewood has previously attempted to pass a moratorium on new adult family homes, there is a risk that a court may find further actions against adult family homes or their residents to be motivated by discriminatory intent. See *City of Lakewood Substitute Ordinance No. 682* (2018), <https://lakewood.municipal.codes/enactments/Ord682/media/original.pdf>.

Where a purportedly neutral law is disproportionately enforced against group homes, that disparity can also help to show discriminatory intent. *Pac. Shores Props.*, 730 F.3d at 1162. Therefore, governments should ensure that housing laws are applied in an evenhanded way that does not single out adult family homes or other facilities for persons with disabilities.

### (c) Disparate Impact

Even if a law is not facially discriminatory or motivated by discriminatory intent, it may still violate the FFHA if it causes or predictably will cause a discriminatory effect on a protected class without sufficient justification. 24 C.F.R. § 100.500(c)(1). A law causes a disparate impact when it bears more heavily on a minority group than on other groups. *Ave. 6E Invs.*, 818 F.3d at 508. A disparate impact may exist even when similar housing is available in the general area: a law violates the FFHA even if it only contributes to making housing unavailable to protected individuals. *Id.* at 509 (citing *Pac. Shores Props.*, 730 F.3d at 1157). However, the existence of “truly comparable housing” in close proximity to the housing being denied to a protected individual may be evidence against disparate impact. *Id.* at 512.

When a law causes a disparate impact on persons with disabilities or another minority group, the government must prove that the law is necessary to achieve a substantial, legitimate, and non-discriminatory interest. 24 C.F.R. § 100.500(c)(2). A law that causes a disparate impact may still be permissible if it is aimed at achieving legitimate objectives, such as compliance with health and safety codes, and there is no alternative means that has less disparate impact. *Tex. Dep’t of Hous.*, 576 U.S. at 533, 543-44 (citing *Ricci*, 557 U.S. at 578). Conversely, a law is invalid if it imposes an “artificial, arbitrary, and unnecessary barrier[.]” to protected individuals finding housing. *Id.* at 540 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

It is difficult to say in the abstract whether a court would determine that some hypothetical law is sufficiently justified by a non-discriminatory interest to survive the disparate impact test. To manage the risk of a disparate impact challenge, governments should carefully consider

whether their housing-related regulations disproportionately affect residences for persons with disabilities, and whether there are ways to meet their goals that have less of an impact on such persons.

**(d) Direct threat exception**

The fact that a policy or law discriminates against, or has a disparate impact upon, persons with disabilities does not end the ADA or FFHA inquiry. The ADA excludes from its protection individuals who “pose[] a direct threat to the health or safety of others.” 28 C.F.R. § 35.139(a). Similarly, the FFHA provides that a dwelling need not be made available to “an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.” 42 U.S.C. § 3604(f)(9). As an exception to the broad remedial scheme of the FFHA, the direct threat exception is read narrowly. 42 U.S.C. § 3601; *Bangerter*, 46 F.3d at 1503 (citing *Elliott v. City of Athens, Ga.*, 960 F.2d 975, 978-79 (11th Cir.) (1992)). Furthermore, because the direct threat exception is an affirmative defense, the government bears the burden of proving that the person it is trying to exclude is a direct threat. *See Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999).

A direct threat is defined as a “‘significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity’s modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services.’” *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 736 (9th Cir. 1999) (quoting *The Americans with Disabilities Act: Title II Technical Assistance Manual* § II-2.8000 (1993)). A significant risk under this test may include “a reasonable likelihood of a significant increase in crime.” *Id.* at 737. However, the government may not rely on a “hypothetical or presumed risk.” *Id.* Rather, the government must make an

individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 35.139(b). The government may satisfy this test by producing “objective evidence from the person’s prior behavior that the person has committed overt acts which caused harm or which directly threatened harm.” H.R. Rep. No. 711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2190. However, in evaluating a person’s prior overt acts, the government must also consider whether the person has received intervening treatment or medication that would eliminate the threat. *Simmons v. T.M. Assocs. Mgmt., Inc.*, 287 F. Supp. 3d 600, 605 (W.D. Va. 2018).

Once a significant risk has been established, the court must determine whether a reasonable modification can counteract the risk. *Bay Area Addiction Research*, 179 F.3d at 736; *see* 42 U.S.C. § 3604(f)(3)(B) (requiring reasonable accommodations in rules, policies, practices, or services, where necessary to afford persons with disabilities equal opportunity to use and enjoy a dwelling).

Whether a particular person poses a direct threat, such that the person is not protected by the ADA or FFHA, is a factual question that is beyond the scope of this opinion. As a general matter, we point out that any action to prohibit a person from taking residence in a group home would require—at a minimum—a showing through objective and individualized evidence that a person poses an actual and significant risk to the health or safety of the community, and that this risk is not mitigated by the treatment the person is receiving, in order to survive ADA and FFHA review. We also note that we have found no case in which a court has applied the direct threat defense on a group basis. A law that purported to exclude whole categories of persons with disabilities, without taking into account their individual circumstances, would probably not be supported by the direct threat defense.

**(2) The WHPA prohibits different treatment of structures occupied by people who are “disabled” under the FFHA and ADA**

In addition to the ADA and FFHA, another statute to consider is the WHPA, RCW 35A.63.240. This statute prohibits a city from treating structures occupied by disabled people (as defined in the FFHA) differently from other, similar structures. Unlike the FFHA, however, the WHPA does not consider whether the government intended to discriminate against persons with disabilities, nor does it require the government to reasonably accommodate a person’s disability. *Sunderland Family Treatment Servs. v. City of Pasco*, 107 Wn. App. 109, 119, 26 P.3d 955 (2001). The WHPA considers simply whether a city ordinance, practice, or policy treats a dwelling occupied by handicapped persons “differently” from a similar dwelling. *Id.*

For WHPA purposes, two dwellings are similar if the physical characteristics of the structure are similar: the “living arrangements and supervision” within the dwelling are not relevant. *Sunderland Family Treatment Servs.*, 107 Wn. App. at 124. Therefore, the fact that a group home may require more supervision than a family home, standing alone, does not make it dissimilar and does not justify differential treatment. *Id.* A regulatory scheme that imposed additional burdens on residential care facilities for disabled persons, versus similar homes for families, would violate the WHPA. *Id.* at 122-23.

**(3) Persons protected by the ADA and FFHA, and potentially some who are not, are protected by the WLAD**

One final statute to consider is the WLAD, RCW 49.60. Like the ADA, the WLAD protects people from discrimination on the basis of mental or physical disabilities, among other protected traits. RCW 49.60.030(1). And like the FFHA, the WLAD makes it unlawful for any “person” (including state or local governments) to “make unavailable or deny” a dwelling on the basis of disability. RCW 49.60.222(1)(f); RCW 49.60.040(19); *see Sunderland Family Treatment Servs.*, 107 Wn. App. at 112.

The WLAD defines a “disability” as “the presence of a sensory, mental, or physical impairment that: (i) Is medically cognizable or diagnosable; or (ii) Exists as a record or history; or (iii) Is perceived to exist whether or not it exists in fact.” RCW 49.60.040(7)(a). An “impairment” may include “[a]ny mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” RCW 49.60.040(7)(c)(ii). A disability under the WLAD may be temporary or permanent, and unlike federal law, there is no requirement that the disability impair a major life activity. RCW 49.60.040(7)(b). We conclude that a person who has a disability under the FFHA and ADA would also have a disability under the WLAD.

The WLAD is generally at least as protective as its equivalent federal statutes. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 491, 325 P.3d 193 (2014). Therefore, if a government violates the FFHA, it probably also violates the WLAD. *See Child. ’s All.*, 950 F. Supp. at 1495 n.3 (determination that city violated FFHA by blocking children’s group care facility applied equally to claims arising under WLAD).

There may also be circumstances where the WLAD protects persons or groups who are *not* protected by the equivalent federal statutes. *See, e.g., Taylor v. Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 617, 444 P.3d 606 (2019) (holding that obesity is a disability that is always covered by the WLAD, even though it is not under federal law); *Phillips v. City of Seattle*, 111 Wn.2d 903, 910, 766 P.2d 1099 (1989) (holding that whether alcoholism is a disability under RCW 49.60 is a jury question, even though it is excluded under federal law). Considering the scarcity of case law interpreting the WLAD in the context of restrictions on group homes, we will not comment in the abstract on the merits of a hypothetical WLAD challenge by a person not otherwise within the scope of the FFHA and ADA, other than to point out that governments should be aware of the legal uncertainty surrounding the issue.

#### **d. Constitutional issues**

In addition to the statutes described above, any action to block or prohibit a committed person from placement within a locality would implicate the state and federal constitutions.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” Similarly, the Washington Constitution provides that “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Const. art. I, § 12. Outside the context of special-interest legislation, the Equal Protection Clause of the federal constitution and the privileges and immunities clause of the state constitution apply in substantially the same way. *Schroeder v. Weighall*, 179 Wn.2d 566, 577, 316 P.3d 482 (2014) (when “addressing laws that burden vulnerable groups . . . our state equal protection cases based on article I, section 12 . . . have characterized article I, section 12 analysis as ‘substantially similar’ to federal equal protection analysis” (quoting *Seeley v. State*, 132 Wn.2d 776, 787 n.7, 940 P.2d 604 (1997))).

The Equal Protection Clause demands that “all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). This means that laws that distinguish between persons with intellectual disabilities and persons without “must be rationally related to a legitimate governmental purpose.” *Id.* at 446. It is not permissible to treat a home for persons with intellectual disabilities differently from other homes based on “mere negative attitudes, or fear . . . .” *Id.* at 448. Rather, the municipality must show that residents with intellectual disabilities would present some “different or specific hazard” that other persons not subject to the restriction do not. *Id.* at 449. Whether this standard can be met with regard to a particular committed person is beyond the scope of this opinion, but local governments should be mindful of these principles and ensure that they act evenhandedly, on the basis of documented evidence, when dealing with committed persons.

Whether a particular person may be lawfully excluded from adult family homes or similar facilities is a fact-specific question that is beyond the scope of this opinion. As a general matter, we reiterate that governments should be careful to ensure that any restrictions on the residency of a committed person are grounded in objective evidence of the person’s treatment needs and risk to the community.

We trust that the foregoing will be useful to you.



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