

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Docket No. 05-4353

**NEW DIRECTIONS TREATMENT SERVICES, on
its Own Behalf and on Behalf of its Patients; ANGEL
DOE; DAN COE; JOSEPH JOE; LUIS LOE;
CARLOS POE; PETER VOE.**

Plaintiffs-Appellants,

v.

CITY OF READING,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Pennsylvania,
Civil Action No. 04-CV-1311
Before the Honorable Paul S. Diamond

**BRIEF FOR AMICUS PENNSYLVANIA COMMUNITY PROVIDERS
ASSOCIATION**

Jon Romberg
Seton Hall University School of Law
Center for Social Justice
833 McCarter Highway
Newark, NJ 07102
(973) 642-8700
Attorney for Amicus,
Pennsylvania Community Providers
Association

TABLE OF CONTENTS

Table of Citations..... ii

Corporate Disclosure Statement1

Statement of Interest2

Argument.....5

 Background.....6

 Facial Challenge to 53 PS § 10621.....9

Conclusion17

TABLE OF CITATIONS

Cases

Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9 th Cir. 1999)	10, 12
Chisolm v. McManimon, 275 F.3d 315 (3d Cir. 2001).....	12
City of Cleburne Living Center, 473 U.S. 432 (1985)	6, 15, 16
Doe v. County of Centre, PA, 242 F.3d 437 (3d Cir. 2001).....	12
Innovative Health Systems v. City of White Plains, 117 F.3d 37 (2d Cir. 1997).....	10, 12-14
MX Group, Inc. v. City of Covington, 106 F. Supp. 2d 914 (E.D. Ky. 2000)	10, 11
Newman v. GHS Osteopathic, 60 F.3d 153 (3d Cir. 1995).....	12
Potomac Group Home Corp. Montgomery County, 823 F. Supp. 1285 (D. Md 1993).	12
Smith-Berch, Inc. v. Baltimore County, 68 F. Supp. 2d 602 (D. Md. 1999)	10, 14
Smith-Berch, Inc. v. Baltimore County, 115 F. Supp. 2d 520 (D. Md. 2000)	12
Tsombianidis v. City of West Haven, 129 F. Supp. 2d 136 (D. Conn. 2001).....	10, 12, 14
Tsombanidis v. City of West Haven, 352 F.3d 565 (2d Cir. 2003).....	13
<u>United States Dept. of Agriculture v. Moreno</u> , 413 U.S. 528 (1973).....	15
<u>Zobel v. Williams</u> , 457 U.S. 55 (1982).....	15

Federal Constitutional Provisions

U.S. Const. amend. XIV § 115

Federal Statutes

29 U.S.C. § 794.....6
42 U.S.C. §§ 12101, et seq.....6
42 U.S.C. § 12132.....5, 10

State Statutes

53 P.S. § 10621(a)(1)5, 6
53 PS § 106219, 16
P.L. 8059

Federal Regulations

28 C.F.R. § 35.130(b)(1).....11
28 C.F.R. § 35.130(b)(7).....11
28 C.F.R. § 35.130(b)(8).....12, 14

Other Authorities

Ellen Weber, Bridging the Barriers: Public Health Strategies for Expanding Drug
Treatment in Communities, 57 Rutgers L. Rev. 631.....10, 13, 14

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that the Pennsylvania Community Providers Association is a non-profit corporation exempt from taxation pursuant to Section 501(c)(4) of the Internal Revenue Code and is not a publicly held corporation that issues stock.

STATEMENT OF INTEREST

The Pennsylvania Community Providers Association (PCPA) promotes a community-based, responsive and viable system of agencies providing quality services for individuals receiving mental health, mental retardation, addictive disease and other related human services. The Association consists of 210 members and serves as a forum for the exchange of information and experience, represents providers on legislative and administrative matters, and serves as a point of contact with other related statewide organizations. PCPA is a trade association of community agencies serving persons with mental illness, mental retardation, or substance abuse. Membership is also open to other organizations and individuals concerned about persons with mental disabilities and drug and alcohol disorders.

The people PCPA providers serve are among society's most vulnerable. People with mental illness, mental retardation, and addiction disorders rely on high-quality professional community care to enable them to participate as members of society and to avoid the need for placement in restrictive and costly residential facilities. In particular, people with addictive disorders rely on community treatment to enable them to live productive, law-abiding lives.

PCPA's governing body is composed of 16 regional representatives elected from four regions, and the officers of the Association. Each region designates a chairperson who is responsible for organizing regional membership meetings.

Through these local meetings, the Association obtains broader membership input and networking.

PCPA has been active in efforts to ensure that individuals receive accessible, affordable, and appropriate treatment and services for drug and alcohol addiction in Pennsylvania. PCPA's accomplishments include: publishing "A Blueprint for Children's Drug and Alcohol Services," bringing legal action to increase funding for outpatient clinics, assisting with the development of the Legislative, Budget, and Finance Committee report on drug and alcohol treatment services, contributing to the development of the Pennsylvania Client Placement Criteria for substance abuse services, presenting an Annual Conference which is the largest gathering of drug and alcohol, mental health and mental retardation providers within the state, and outlining recommendations for the restructuring of drug and alcohol and mental health service systems in Pennsylvania.

In response to a proposal submitted in May, 2004, PCPA obtained funding for fiscal year 2005 from the Pennsylvania Association for the Treatment of Opioid Dependence to initiate an education campaign aimed at increasing awareness of both the effectiveness of methadone treatment and the savings to the state if treatment is supported. This program was devised to combat oppression and stigmatization against citizens suffering from opioid addiction, and particularly, the lack of awareness of the enormous success of methadone treatment. This program

seeks to communicate to government officials and the public that the 30-year history of methadone treatment demonstrates that it has significantly lowered illicit opiate drug use, reduced crime related to the addiction, prevented HIV infection, and enhanced social productivity and overall health.

The Association is a member of the National Community Behavioral Healthcare Council (www.nccbh.org) which provides a national perspective on mental health and substance abuse issues. Given its expertise, PCPA believes its perspectives would be helpful to this Court in resolving the issues presented in this case. Both parties have consented to PCPA's filing this *amicus* brief.

ARGUMENT

This case requires the Court to determine whether the Equal Protection Clause of the Fourteenth Amendment and the Americans with Disabilities Act, 42 U.S.C. § 12132, permit the State of Pennsylvania to impose uniquely stringent siting regulations upon methadone treatment facilities. The May 1999 amendment to the Pennsylvania Municipalities Planning Code, 53 P.S. § 10621(a)(1), prohibits the location of methadone treatment facilities in certain locations, unless written notice is provided to all persons within 500 feet, a public hearing is held, and the municipal governing body votes affirmatively. 53 P.S. § 10621(a)(1).¹ *Amicus* Pennsylvania Community Providers Association submits this brief because of its concern that this statute stigmatizes and discriminates against people obtaining methadone treatment and will severely imperil effective treatment for recovering heroin addicts in Pennsylvania.

Congress has enacted a series of civil rights laws to protect individuals with disabilities, including those with histories of drug dependency who are seeking

¹ Specifically, the state prohibits any:

Methadone treatment facility from being established or operated within 500 feet of an existing school, public playground, public park, residential housing area, child-care facility, church, meetinghouse or actual place of regularly stated religious worship established prior to the proposed methadone treatment facility.

53 P.S. § 10621(a)(1).

treatment.² The Supreme Court has also construed the Equal Protection Clause to prohibit governments from singling out for special procedures land uses that serve disfavored classes of people.³ If affirmed, the District Court’s decision would undermine Congress’s goals, as well as the Supreme Court’s equality ideals.

Background

Heroin is among the more addictive forms of illegal drugs. According to the 2003 National Survey on Drug Use and Health, which may underestimate heroin use, “an estimated 3.7 million people had used heroin at some time in their lives, and over 119,000 of them reported using it within the month preceding the survey. An estimated 314,000 Americans used heroin in the past year, and the group that represented the highest number of those users were 26 or older.” National Institute on Drug Abuse, Research and Report Series, <http://www.nida.nih.gov/ResearchReports>. The NIDA report emphasized the powerfully addictive nature of heroin, finding that in 2003, 57.4 percent of past-year heroin users were classified with dependence on or abuse of heroin. *Id.*

The National Institute on Drug Abuse Addiction reports that abuse and addiction differ dramatically from mere use. Addiction is “a chronic, relapsing disease, characterized in glossary by compulsive drug seeking and use, and by

² The Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Americans with Disabilities Act 42 U.S.C. §§ 12101, et seq.

³ See City of Cleburne Living Center, 473 U.S. 432, 450 (1985).

neurochemical and molecular changes in the brain.” Id. Once a person becomes addicted to heroin, “the heroin abusers' primary purpose in life becomes seeking and using drugs. The drugs literally change their brains and their behavior.”

The long-term effects of heroin abuse are dire. They include “scarred and/or collapsed veins, bacterial infections of the blood vessels and heart valves, abscesses (boils) and other soft-tissue infections, and liver or kidney disease.” Id. In addition, heroin abusers often have serious lung complications, including various types of pneumonia and tuberculosis. Id. The medical complications are not experienced by the abuser alone. Heroin abusers often contract blood-borne viruses from needle-sharing, including hepatitis B and C, HIV, which they then pass on to their sexual partners and children. Id. The drug-seeking behavior leads many untreated heroin addicts to engage in crimes such as prostitution and property crimes, imposing costs on themselves and, obviously, their communities.

While heroin abuse exacts enormous costs, the National Institute of Health has concluded that many of these costs can be mitigated through effective treatment.

<http://www.nida.nih.gov/ResearchReports/Heroin/heroin5.html#treatment>. The most successful form of treatment, according to the NIH, is methadone. Id.

According to a recent report:

Methadone treatment has been used for more than 30 years to effectively and safely treat opioid addiction. Properly prescribed methadone is not intoxicating or sedating, and its effects do not interfere with ordinary activities such as driving a car. The medication is taken orally and it suppresses narcotic withdrawal for 24 to 36 hours. Patients are able to perceive pain and have emotional reactions. Most important, methadone relieves the craving associated with heroin addiction; craving is a major reason for relapse. Among methadone patients, it has been found that normal street doses of heroin are ineffective at producing euphoria, thus making the use of heroin more easily extinguishable.

Id. Methadone may be used safely for 10 years or more. Combined with other supportive services, it allows patients to stop using heroin and “return to more stable and productive lives.” Id. The Executive Office of the President’s Office of Drug Control Policy concurs in this assessment of the efficacy of methadone treatment. See www.whitehousedrugpolicy.gov/publications/factsht/methadone.

Along with the benefits of decreasing reliance on heroin, methadone has been found to have other significant benefits:

Methadone costs about \$13 per day and is considered a cost-effective alternative to incarceration (Office of National Drug Control Policy, 1998a).

Methadone has a benefit-cost ratio of 4:1, meaning \$4 in economic benefit accrues for every \$1 spent on MMT (COMPA, 1997).

Methadone has a significant effect on the spread of HIV/AIDS infection, hepatitis B and C, tuberculosis, and sexually transmitted diseases (COMPA, 1997). Heroin users are known to share needles and participate in at-risk sexual activity and prostitution, which are

significant factors in the spread of many diseases. Research suggests that MMT significantly decreases the rate of HIV infection for those patients participating in MMT programs (Firshein, 1998).

<http://www.whitehousedrugpolicy.gov/publications/factsht/methadone>. The Executive Office of the President's Office of Drug Control Policy has also found that methadone treatment decreases criminal activity by 52%, and increases full-time employment by 24%. Id. Indeed, in the Office notes that in one study, researchers found that "rates of illegal drug use, criminal activity, and hospitalization were lower for methadone patients than for addicts in any other types of drug treatment." Id.

Facial Challenge to 53 PS § 10621

Pennsylvania, like most states, delegates most land use decisions to municipal governments. See P.L. 805 (the Pennsylvania Municipalities Planning Code). However, in May, 1999, the State enacted 53 P.S. § 10621, which prohibits the location of methadone treatment facilities within 500 feet of various favored land uses, unless notice is provided to all residents within 500 feet, a public hearing is held, and the municipal government agrees by majority vote. 53 P.S. § 10621. In other words, Pennsylvania imposed a super-siting requirement exclusively for methadone treatment centers. This legislation flies in the face of

Congress's prohibition against discrimination on the basis of disability, the guarantees of the Equal Protection Clause, and sound policy.

Title II of the Americans with Disabilities Act prohibits public entities from discriminating against individuals with a disability or denying them the benefit of or participation in services, programs, or activities on the basis of disability. 42 U.S.C. § 12132.⁴ Multiple courts have concluded that government decisions imposing siting hurdles upon methadone treatment facilities are subject to Title II's protections.⁵ The issue for this Court is whether Pennsylvania's methadone siting statute violates Title II's prohibition against public discrimination.

According to Department of Justice regulations, Title II prohibits public entities, including state governments, from (1) "denying a qualified individual with a disability the opportunity to participate in or benefit from the . . . service;" (2) affording "an opportunity to participate in or benefit from the . . . service that is not equal to that afforded others;" (3) providing a "service that is not as effective in

⁴ The ADA 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.

⁵ Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730 (9th Cir. 1999); Innovative Health Systems v. City of White Plains, 117 F.3d 37, 44-46 (2d Cir. 1997); Tsombanidis v. City of West Haven, 129 F. Sup. 2d 136 150-151; MX Group, Inc. v. City of Covington, 106 F. Supp. 2d 914, 920 (E.D. Ky. 2000), *aff'd* 293 F.3d 326 (6th Cir. 2002); Smith-Berch, Inc. v. Baltimore County, 68 F. Supp. 2d 602, 623 (D. Md. 1999). For a discussion of these cases, see Weber, 57 Rutgers L. Rev. at 660-631.

affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;” or (4) otherwise limiting “the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the . . . service.” 28 C.F.R. § 35.130(b)(1)(i),(ii),(iii),(vii) (quoted in Ellen Weber, Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities, 57 Rutgers L. Rev. 631, 671.)

Indeed, the DOJ regulations require public entities to administer programs in the most integrated setting appropriate and sometimes to “make reasonable modifications” when necessary to avoid disability discrimination. 28 C.F.R. § 35.130(b)(7).

Pennsylvania’s methadone siting statute violates these regulations.

Pennsylvania has chosen to isolate methadone treatment facilities for special notification, public hearing, and voting requirements. To single out methadone for unique requirements is facially discriminatory and a violation of Title II. See MX Group, Inc., 106 F. Supp.2d at 917-18, 920 (finding ordinance imposing on methadone treatment programs maximum occupancy requirement of one person per 200 square feet discriminatory on face and violative of the ADA); cf. Potomac Group Home Corp. Montgomery County, 823 F. Supp. 1285, 1302 (D. Md. 1993) (finding special notification requirements for group homes for persons with disabilities facially discriminatory under the Fair Housing Act).

The District Court failed actually to analyze whether the statute violates the ADA. Instead, in a cursory paragraph, the District Court distinguished Pennsylvania's methadone siting statute from the statute at issue in Bay Area Addiction Research & Treatment, Inc., 179 F.3d at 725. (Order at 22). The District Court seemed to hold that the fact that the statute did not wholly preclude the siting of methadone treatment facilities rendered it compliant with Title II. Id. This narrow reading of Title II is plainly in error.⁶

Title II and its regulations protect people with disabilities from public acts that impose additional or extra burdens. 28 C.F.R. § 35.130(b)(8) (2003); see, e.g., Smith-Berch, Inc. v. Baltimore County, 115 F. Supp. 2d 520, 523 (D. Md. 2000). Here, Pennsylvania enacted a statute that discriminates on its face against protected individuals (opiate addicted persons seeking methadone treatment), by imposing

⁶ In its analysis of the City Council's decision to deny the permit, the District Court also applied an incorrect legal standard under ADA. While some courts have held that under Section 504 of the Rehabilitation Act, a plaintiff must show that discrimination is the sole reason for a decision, under Title II, it is beyond cavil that a plaintiff need only show that the governmental decision is motivated, at least in part, by the disabled status of individuals. Newman v. GHS Osteopathic, 60 F.3d 153, 158 (3d Cir. 1995) (under Title II, illicit factor need only 'play a role' in the decision); Tsombanidis v. City of West Haven, 129 F. Supp. 2d 136, 151 (D. Conn. 2001), aff'd in part, rev'd in part, 352 F.3d 565, 579-80 (2d Cir. 2003)(to "establish intentional discrimination, plaintiff [] must prove that a motivating factor behind the city's decision was the residents' status as recovering drug addicts and alcoholics"); see also, e.g., Chisolm v. McManimon, 275 F.3d 315 (3d Cir. 2001); Doe v. County of Centre, PA, 242 F.3d 437 (3d Cir. 2001); Bay Area Addiction Research & Treatment, Inc., 179 F.3d at 725 (9th Cir. 1999); Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37 (2d Cir. 1997).

siting hurdles not faced by other land uses. The District Court ignored the question at issue, which is whether Pennsylvania engaged in intentional discrimination in enacting a statute that imposes significant hurdles upon protected individuals.

Sadly, here, there is ample evidence, both direct and indirect, that discriminatory animus motivated the methadone siting statute. The direct evidence includes comments from legislators:

It is unfortunate that we have to have methadone treatment facilities at all . . . and these facilities . . . , do not benefit anyone but the heroin addict, and they should be located either in a community that welcomes this kind of facility or out in an area away from people who have kept themselves clean and free of drugs and should not be confronted by this kind of pollution in their community.

A-598 (comment by Representative Serafini). This is precisely the kind of animus that Title II prohibits. Even though most of the legislators did not make such bald statements of discrimination, courts have held that discriminatory animus exists when officials base their decisions upon “stereotypical fears of increased crime and decreased property values that are not supported by facts.” Weber, 57 Rutgers L. Rev. 631 (citing, e.g., Innovative Health Systems v. City of White Plains, 931 F. Supp. at 243 (complaints that alcohol and drug program would affect residents’ quality of life, security, tranquility and value of their property)). The legislative history to Pennsylvania’s methadone siting statute is replete with such

generalizations – and contains no actual evidence that methadone treatment facilities have such effects. Indeed, as noted above, there is ample evidence that methadone treatment *decreases* crime and improves the quality of life of both former users and their communities. In Innovative Health Systems v. City of White Plains, the Second Circuit rejected speculative justifications for the denial of a permit for a alcohol and drug-treatment facility. 117 F.3d 37, 49 (2d Cir. 1997). *Amicus* PCPA urges this Court to do the same.

The fact that the statute is intentionally discriminatory is enough to disqualify it under Title II, but it is also significant that the statute has a discriminatory effect upon protected individuals that cannot be justified. See Weber, 57 Rutgers L. Rev. at 680 (citing, e.g., Smith-Berch, Inc. v. Baltimore County, 68 F. Supp. 2d 602) (court invalidated public hearing requirement imposed on methadone treatment facility as having a disparate impact); Tsombianidis v. City of West Haven, 129 F. Supp. 2d 136 at 155-159 (D. Conn. 2001) (applying both a disparate treatment and disparate impact analysis to city’s classification of group recovery home as “boarding house” which resulted in more stringent building standards). The question here is whether the imposition of special requirements is necessary for the state’s zoning scheme. See 28 C.F.R. § 35.130(b)(8) (2003). In its Municipal Planning Code, Pennsylvania entrusts local governments to enact zoning schemes that serve the interests of each community.

The legislature provided no reason to alter this scheme for methadone treatment facilities other than thinly veiled prejudice and hostility.

Pennsylvania's methadone siting statute also violates the equality guarantee of the Equal Protection Clause. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. Although classifications based upon non-suspect classifications need only be rationally related to a legitimate government goal, the Supreme Court has held that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985) (citing Zobel v. Williams, 457 U.S. 55, 61-63 (1982); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 535 (1973)).

The Pennsylvania legislature did not rely on statistical or any other evidence to support its decision to enact the methadone siting statute. Instead, it relied upon stereotypes, and "a bare... desire to harm a politically unpopular group." City of Cleburne, 473 U.S. 432 at 446. In Cleburne, the Supreme Court rejected a similar attempt to impose special siting procedures on a home for the mentally retarded. While the Court acknowledged that those suffering from mental retardation may be different from those not similarly afflicted, the Court found those differences "largely irrelevant" if the "record does not reveal any rational basis for believing

that the[y] would pose any special threat to the city's legitimate interests.” Id. at 449. The Court then probed the reasons proffered by the government and found them to be pretexts for “vague, undifferentiated fears.” Id. The record here evidences the same pattern.

In contrast to the assumptions about its ill-effects, as detailed above, the benefits of methadone treatment are legion. Pennsylvania’s methadone siting statute will have the effect of limiting the availability of this treatment to those in need. This Court must not allow legislation rooted in stereotypes and prejudices to pass constitutional muster. For these reasons, Amicus PCPA respectfully asks this Court to reverse the District Court’s decision upholding the validity of 53 P.S. § 10621 under Title II of the ADA and the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, as well as those urged by Plaintiffs-Appellants, amicus PCPA respectfully requests that the judgment below be reversed.

Respectfully submitted,

/s/ Jon Romberg
Jon Romberg
Counsel for Amicus PCPA
Seton Hall Law School
Center for Social Justice
833 McCarter Hwy.
Newark, NJ 07102

Dated: January 24, 2006

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.4, I hereby certify that Jon Romberg is a member of the bar of this Court.

Jon Romberg

Dated: January 24, 2006

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief is 3,432 words long and is in compliance with FRAP 32(a)(7)(c)(1).

Jon Romberg

Dated: January 24, 2006

**CERTIFICATION OF IDENTICAL COMPLIANCE OF E-BRIEF AND
HARD COPY OF BRIEF**

I hereby certify that the text of the E-brief and the Hard Copies of the brief that were filed on January 24, 2006 are identical.

I further certify that a virus check was performed with Symantec Antivirus software.

Jon Romberg

Dated: January 24, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this day I served via United States mail an original and 10 copies of this brief on the Court of Appeals, and two copies on counsel for Appellants and on counsel for Appellees, as well as simultaneously served an electronic copy of the brief on each.

Jon Romberg

Dated: January 24, 2006

Court of Appeals:

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

US Court of Appeals
Docket No.: 05-4353
Case Manager: Latoya Corprew
267-299-4915

Counsel for Appellees:

Counsel for the City of Reading
Steven K. Ludwig, Esquire
Fox Rothschild LLP
2000 Market Street, 10th Floor
Philadelphia, PA 19103-3291
215.299.2164 (voice)
215.299.2150 (fax)
610.416.8995 (mobile)
SLudwig@FoxRothschild.com

Counsel for Appellants:

Barbara E. Ransom
Michael Churchill
Public Interest Law Center of Philadelphia
125 S. 9th St., 7th Floor
Philadelphia, PA 19107
215-627-7100
bransom@pilcop.org