LATE TESTIMONY

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011

ON THE FOLLOWING MEASURE:
H.B. NO. 65, RELATING TO SPECIAL TREATMENT FACILITIES.

BEFORE THE:
HOUSE COMMITTEE ON HEALTH

DATE: Friday, February 11, 2011 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): David M. Louie, Attorney General, or
Andrea J. Armitage, Deputy Attorney General

Chair Yamane and Members of the Committee:

The Attorney General opposes this bill because it violates federal laws that prohibit states from discriminating against persons with disabilities when licensing community-based group homes. The onerous public notice and hearing requirements proposed in this bill only affect group homes for persons with disabilities. It would provide a disincentive to providers wanting to establish new special treatment facilities, or to renew existing special treatment facilities, and would discriminate against community-based residential services for persons with disabilities.

The bill amends chapter 321, Hawaii Revised Statutes (HRS), by adding to part I four new sections concerning the licensing of special treatment facilities (STF). The existing statute, section 321-16.5, HRS, requires that the Department of Health (DOH) license STFs in order "to ensure the health, safety, and welfare of the individuals placed therein." STFs are group homes that "provide care, diagnosis, treatment, or rehabilitation for socially or emotionally distressed persons[1],

[1] Section 321-16.5(c) provides: "'Socially or emotionally distressed person' means an individual who is experiencing psychiatric symptomatology that may be acute or chronic in nature, which requires therapeutic or rehabilitative services."

mentally ill persons, persons suffering from substance abuse, and developmentally disabled persons." Section 321-16.5(b)(1), Hawaii Revised Statutes.

The bill would require all new STF license applicants, and all applicants wishing to renew an existing STF license, at the their own expense, to give notice of a public hearing to at least two-thirds of the owners and lessees of record of real estate, all resident managers of condominiums, and all school principals of schools, located within a mile radius of the proposed STF. Any persons living in or owning property within a mile of the STF, and the principal of any school also within a mile of the facility, have a right to protest the licensing of the STF in writing or by giving oral testimony at the public hearing. The applicant then would have thirty days to submit to the Director a plan to address each protest. The Director would then consider the applicant's plan and decide whether to grant the application. However, if a majority of the owners, lessees, residents, and school principals submit a protest against the STF, the Director must deny the application. In addition, if a successful applicant fails to adhere to the plan submitted and approved by the Director, the Director shall give notice of a public hearing to determine whether or not to revoke or suspend the applicant's license.

STFs are programs that allow adults and children with disabilities, including but not limited to mental illness, substance abuse, and developmental disabilities, to be integrated into the community rather than being placed in an institution. Such institutions include the Hawaii State Hospital and psychiatric wards of other hospitals, the Hawaii Youth Correctional Facility, and residential programs on the mainland. Since the closing of Waimano Training School and

Hospital, the State has no institution for persons with developmental disabilities and STFs are included in the community facilities available to them. STFs provide community-based residential services that are part of the array of community-based services required by Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132. The United States Supreme Court in Olmstead v. Zimring, 527 U.S. 581 (1999), held that the ADA's proscription of discrimination requires placement of persons with mental disabilities in community settings, rather than in institutions, when treatment professionals have determined that community placement is appropriate.

Hawaii's shortage of community-based services for children and youth covered by the Individuals with Disabilities Education Act (IDEA) was the basis for the Felix consent decree. Hawaii's shortage of community-based placements for mentally ill adults, who no longer required hospitalization at Hawaii State Hospital, led to expansion of the federal government's oversight of mental health services during the Department of Justice's lawsuit against the State. The expansion of residential placements for adults and youth was a necessary element in terminating both consent decrees. This measure would create a disincentive for providers to open new, or renew existing STFs.

This bill would also violate the federal Fair Housing Amendments Act of 1988 (FHAA), codified in 42 U.S.C. sections 3601 to 3631, by creating an impediment to starting or renewing STFs, that community group homes for those who do not have disabilities would not have to encounter.

The FHAA prohibits discrimination against persons with any "handicap" (now referred to as a "disability"). This is defined very broadly to mean any person who has "(1) a physical or

mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment . . . ." 42 U.S.C. §3602(h). The FHAA's purposes include ending segregation of the housing available to people with disabilities and giving people with disabilities the right to choose where they wish to live.

Both the United States Department of Justice (DOJ) and the United States Department of Housing and Urban Development (HUD) have determined that the FHAA applies to state and local licensing laws, and both federal agencies take an active role in enforcing the FHAA. Because of the great amount of litigation in this area over the years and across the country, the federal government issued a "Joint Statement of the Department of Justice and the Department of Housing and Urban Development: Group Homes, Local Land Use, and the Fair Housing Act." It is very informative and can be found in its entirety at:
http://www.usdoj.gov/crt/housing/final8_1.htm
It addresses the issue of state licensing laws that require public hearings and input for group homes for persons with disabilities. It provides in part:

> **Q. Can a local government consider the feelings of neighbors in making a decision about granting a permit to a group home to locate in a residential neighborhood?**
>
> In the same way a local government would break the law if it rejected low-income housing in a community because of neighbors' fears that such housing would be occupied by racial minorities, a local government can violate the Fair Housing Act if it blocks a group home or denies a requested reasonable accommodation in response to neighbors' stereotypical fears or prejudices about persons with disabilities. This is so even if the individual government decision-makers

> are not themselves personally prejudiced against persons with disabilities. If the evidence shows that the decision-makers were responding to the wishes of their constituents, and that the constituents were motivated in substantial part by discriminatory concerns, that could be enough to prove a violation.
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> . . .
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> For example, neighbors and local government officials may be legitimately concerned that a group home for adults in certain circumstances may create more demand for on-street parking than would a typical family. It is not a violation of the Fair Housing Act for neighbors or officials to raise this concern and to ask the provider to respond. A valid unaddressed concern about inadequate parking facilities could justify denying the application, if another type of facility would ordinarily be denied a permit for such parking problems. However, if a group of individuals with disabilities or a group home operator shows by credible and unrebutted evidence that the home will not create a need for more parking spaces, or submits a plan to provide whatever off-street parking may be needed, then parking concerns would not support a decision to deny the home a permit.

The courts have also addressed the issues of public notice and hearing requirements prior to a local government allowing community-based housing for persons with disabilities. In U.S. v. City of Chicago Heights, 161 F. Supp. 2d 819 (N.D. Ill. 2001), the United States District Court for the Northern District of Illinois held that denying a request for a special use permit for a group home for persons with mental illness due to the zoning board's consideration of public testimony against the group homes violated the FHAA. The decision describes the public testimony: "The comments generally reflected concern over 'crazy people' wandering the neighborhoods and devaluing of property in the neighborhood." The court went on to hold: "This court agrees that community opposition is not relevant to

the issue of reasonable accommodation, and therefore, cannot and will not consider that evidence in ruling on the Government's motion for summary judgment." Id. at 831. See also, Larkin v. State of Michigan Department of Social Services, 80 F.3d 285 (6th Cir. 1996).

Applicants for STFs are required to obtain a certificate of need pursuant to part V of chapter 323D, HRS, before they may be licensed. Section 11-186-5(2)(K), Hawaii Administrative Rules. The process for obtaining a certificate of need includes notice and public hearings. Thus, there is already a public notice and public hearing process in place for new STFs (323D, part V, HRS, does not apply to licensing renewals). The public hearing notice provisions in chapter 323D are not nearly as burdensome on the applicant as the ones provided for in this bill. Further, neither the State Health Planning and Development Agency nor the three advisory committees that conduct the public hearings are required to act on the majority of the testifiers' concerns.

In conclusion, the FHAA, as interpreted by the DOJ, HUD, and courts, prohibits discrimination against community-based group homes for persons who have disabilities. This bill would mandate extensive public notice and hearing requirements for STFs that are not required for any other type of group living facility. Because STFs are living facilities to provide treatment for children and adults with mental illness, substance abuse problems, or developmental disabilities, we believe the onerous public notice and hearing requirements proposed in this bill violate the FHAA, and we respectfully oppose this bill. We request that this bill be held.

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LATE TESTIMONY

From: arlyn yoshinaga [arlyn9@hotmail.com]
Sent: Friday, February 11, 2011 8:01 AM
To: HLTtestimony
Subject: Testimony in Favor of HB No 65

2/11/11

Committee on Health Re: HB No.65 Relating to Special Treatment Facilities
Chair: Ryan Yamane
Hearing Date: 2/11/11

Testimony in FAVOR of HB No.65

Worse than squawking peacocks, electric leaf blowers and amplified subwoofers combined is living in constant, agonizing fear near a
residential home out of control.

We ask that you not give non-profits the advantage of sneaking into any community.

My family is in TOTAL support of HB No.65.

Thank you,

Arlyn Yoshinaga
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Kristyn Yoshinaga
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