



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

October 18, 2019

Submitted via Regulations.gov

Ms. Anna Maria Farías
Assistant Secretary for Fair Housing and Equal Opportunity
Department of Housing and Urban Development
451 7th Street, SW
Washington, D.C. 20410

Re: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard Notice of Proposed Rulemaking, HUD-2019-0067, RIN 2529-AA98

Dear Assistant Secretary Farías,

Thank you for the opportunity to comment regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" Notice of Proposed Rulemaking (NPRM). On behalf of the undersigned members of the Consortium for Citizens with Disabilities (CCD), we submit the following response for your consideration.

CCD is a coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the millions of children and adults with disabilities and their families living in the United States. CCD advocates for national public policy that ensures full equality, self-determination, independence, empowerment, integration, and inclusion of children and adults with disabilities in all aspects of society.

We strongly oppose this proposed interpretation of the disparate impact standard under the Fair Housing Act (FHA). The existing disparate impact rule efficiently and successfully serves the American public as a tool for challenging the structural inequalities that persist in housing and financial markets. The proposed rule will, instead, create overwhelming obstacles for people who experience discrimination and seek to enforce their rights based on a disparate impact claim.

People with disabilities and their families already face a national shortage of accessible and affordable housing,¹ particularly the lowest-income people with disabilities.² People with disabilities often have few financial resources and remain among the country's poorest, and far

¹ See, e.g., U.S. Dept. Of Housing and Urban Development, "Worst Case Housing Needs 2017 Report to Congress" (2017) at: <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf> (of the renter households with worst case needs in 2015, 1.4 million included one or more nonelderly person with disabilities).

² See, e.g., Technical Assistance Collaborative, Inc., et al, "Priced Out: The Housing Crisis for People with Disabilities" (2017) at: <http://www.tacinc.org/media/59493/priced-out-in-2016.pdf>.

too frequently, encounter discrimination when seeking housing.³ The lack of sufficient safe, accessible, affordable housing is a continuing and significant barrier to integrated community living, making it difficult for people with disabilities to move from segregated facilities into the community, and putting many people with disabilities at risk of unnecessary institutionalization or homelessness. It remains crucially important to work toward inclusive housing in the community for people with disabilities, and to protect the rights guaranteed under the FHA.

Disparate impact claims are an important tool in remedying certain types of discrimination. As we expressed in response to the related Advanced Notice of Proposed Rulemaking in 2016, the current rule⁴ is consistent with the Supreme Court’s decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*,⁵ and requires no further modification. In that case, the Supreme Court established that housing decisions with a disparate impact are prohibited under the FHA, and disparate impact liability also “permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classifications,”⁶ and in that way “may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.”⁷

The current burden-shifting framework established under the 2013 final rule adequately and appropriately accommodates legitimate justification and defenses. The proposed rule, by contrast, is fundamentally inconsistent with the framework established in *Inclusive Communities Project*. The proposed rule, if finalized as written, risks permitting covert discriminatory practices to proliferate without the appropriate and necessary enforcement tool of disparate impact liability. The proposed rule miscalculates the balance of interests by weighting the process unfairly against individuals alleging discrimination, obstructing accountability, making it prohibitively difficult for people facing discrimination to access an appropriate and timely remedy, and dismantling a key tool for addressing systemic discrimination under the FHA. The proposed disparate impact rule would effectively preclude individuals with disabilities from using disparate impact claims to address situations such as the following:

- a city that accuses a non-profit of violating a zoning ordinance by operating a “group home” in a single-family residential neighborhood though the house was purchased for use by a man with intellectual and physical disabilities, who is the only resident of the property and receives services from the non-profit on a round the clock basis when he’s home;
- a housing provider who operates a separate office that deals with applicants who will be using a housing subsidy program to pay their rent, and requires burdensome documentation attesting to future payment in order to consider rental applications from people with disabilities;

³ National Fair Housing Alliance, “2018 Fair Housing Trends Report” 52 (2018) *at*: <https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report.pdf> (“As has been the case in past years, the majority of complaints [of housing discrimination] from 2017 involved housing discrimination against people with disabilities.”)

⁴ 24 C.F.R. 100.

⁵ 135 S. Ct. 2507 (2015).

⁶ *Id.* at 2522.

⁷ *Id.*

- a town that prohibits several unrelated people with addiction histories from living together in a house in a “single-family” zoning district, an ordinance that treats them less favorably than a similarly-sized family related by blood or marriage; or
- a government agency refuses to issue a permit to an AIDS public interest group to open and run a hospice for clients with AIDS, claiming that the land is zoned exclusively for agricultural purposes.

The proposed revisions in §100.500 will drastically increase the burden of bringing a case to address prohibited discrimination for the plaintiff. In the proposed rule, the current burden-shifting standard is replaced with a five-part component set of tests, placing nearly all of the burden on the people who are intended to be protected from discrimination under the Fair Housing Act. For example, people experiencing discrimination may be asked to essentially identify the justifications the defendant will raise and address them. A plaintiff may be required to prove by the preponderance of evidence that “a less discriminatory policy or practice would serve the interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.” The proposed rule not only sets a much higher bar for a person experiencing discrimination to meet, but one based on information that only the entity with the discriminatory policy may have.

The proposed changes include additional elements that are fundamentally inconsistent with nondiscrimination protections. For example, a model or methodology may be “standard in the industry” and still serve to perpetuate discrimination in its outcome or application. We are also concerned about the use of algorithms as related to the defenses in § 100.500 (c)(2), particularly as the datasets algorithms rely on were created in an environment that includes a long history of inequality and injustice. The proposed rule may also disincentivize data collection to minimize potential liability

To move forward with the rule as proposed will create confusion and increase uncertainty, and would be counter to the purpose and policy of the law - to provide, within constitutional limitations, for fair housing throughout the United States.⁸ It would also work counter to HUD’s mission to “create strong, sustainable, inclusive communities and quality affordable homes for all”⁹ and its work to “build inclusive and sustainable communities free from discrimination...”¹⁰ We urge HUD to withdraw this proposed rule, and leave intact important, existing protections for people with disabilities and others under the Fair Housing Act.

Sincerely,

American Dance Therapy Association
 American Network of Community Options and Resources (ANCOR)
 Autism Society of America
 Autistic Self Advocacy Network
 Bazelon Center for Mental Health Law
 Center for Public Representation

⁸ 42 U.S.C. §3601.

⁹ U.S. Dep’t. of Housing and Urban Development, “Mission,” at: <https://www.hud.gov/about/mission> (last visited Sept. 9, 2019).

¹⁰ *Id.*

Children and Adults with Attention-Deficit/Hyperactivity Disorder
Council of Administrators of Special Education
Council of State Administrators of Vocational Rehabilitation (CSAVR)
Disability Rights Education and Defense Fund
Easterseals
Justice in Aging
Learning Disabilities Association of America
Lutheran Services in America-Disability Network
National Alliance on Mental Illness
National Association of Councils on Developmental Disabilities
National Center for Learning Disabilities
National Council on Independent Living
National Disability Rights Network
National Down Syndrome Congress
National Health Law Program
National Low Income Housing Coalition
Paralyzed Veterans of America
RespectAbility
School Social Work Association of America
Technical Assistance Collaborative
The Arc of the United States
United Spinal Association