



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

May 10, 2016

Electronic submission to www.regulations.gov

Regulations Division
Office of General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0500

**Re: Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas
Docket No. FR-5173-N-08**

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed “Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas,” Vol. 81, Federal Register No. 48, Docket No. FR-5173-N-08 (March 11, 2016). Please accept this letter as the comments of the Co-Chairs of the Consortium for Citizens with Disabilities (CCD) Housing Task Force and the CCD Rights Task Force. CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the approximately 57 million 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.

Our comments are organized into two parts. The first part addresses overall comments regarding the proposed tool and the second provides comments regarding the specific questions and instructions in the proposed tool. Our comments and recommendations apply to all states, regardless of whether the state breaks up its geography into sub-state areas.

GENERAL COMMENTS

The CCD Housing Task Force and Rights Task Force recognize and appreciate efforts by the Department of Housing and Urban Development (HUD) to address in the proposed Assessment Tool for States and Insular Areas some of the comments we submitted previously regarding the Assessment Tool for local governments and certain joint and regional collaborations (finalized December 31, 2015, Vol. 80, Federal Register No. 251). We particularly appreciate some of the additions to Section D3, “Disability and Access Analysis,” related to the integration of people with disabilities living in institutions and other segregated

settings. However, we remain concerned that significant gaps in HUD-provided national data will impede states in adequately assessing and addressing the fair housing needs of people with disabilities. To ensure that people with disabilities are not left out of fair housing planning efforts and deprived of needed housing opportunities, we believe it is critical to strengthen the Assessment Tool in the ways suggested below.

HUD Should Provide Existing Federal Data and Require States to Use Existing State and Local Data Concerning Housing Needs of People with Disabilities

Rather than simply exclude from consideration important data that would capture housing needs of people with disabilities, HUD should provide federal data from the Medicaid program and from its own data collection, and require that the states use local data and local knowledge.¹

While there may not be “uniform” data concerning people with disabilities similar to the data concerning race and ethnicity, the lack of such data is not a reason for fair housing planning to exclude consideration of the major sources of information concerning the needs of people with disabilities. Yet that is precisely the impact that HUD’s failure to provide more data concerning people with disabilities would have. The result would be diminished access to needed housing for people with disabilities and continued violations of their civil rights to live in the most integrated setting appropriate. Existing federal data as well as state and local data would capture some of the housing needs of people with disabilities.

We recommend the following three-part approach to ensure the housing needs of people with disabilities are assessed to the same degree as the housing needs of other protected classes:

1. HUD should provide states with **data that are readily available in federal systems**, including:
 - Data from the Money Follows the Person program for the 40 participating states, as well as from Medicaid home and community-based waiver programs and options, available from the Center for Medicare and Medicaid Services (CMS);
 - Data on people with disabilities living in nursing facilities and intermediate care facilities for individuals with developmental disabilities, available from CMS;²
 - Data on people with disabilities experiencing homelessness, available in the HUD Homeless Management Information System and/or Annual Homeless Assessment Report databases.
2. **Where HUD-provided national data are unavailable, HUD should NOT permit states to assert that “data and knowledge are unavailable,”** which HUD currently proposes to be a potentially “complete and acceptable response.” Instead, HUD should require states to seek out and use “local data” and “local knowledge.” This should include, among other things, data concerning individuals with disabilities served in home or community-based settings (including Medicaid and state-funded services), and those served in institutional settings such as nursing homes, board and care homes (sometimes called “adult homes” or “adult care homes”), and assisted

¹ In the event that a state chooses to break up the state’s geography into sub-state areas, we believe that HUD can also provide federal data for sub-state areas. We note that in those states, “local data” and “local knowledge” will typically be data and knowledge relevant to each sub-state area.

² For nursing facilities, data from the CMS Minimum Data Set on individuals with disabilities living in nursing facilities who have answered “yes” to question Q0500B, “Do you want to talk to someone about the possibility of leaving this facility and returning to live and receive services in the community?”

living facilities, and individuals ready for discharge from psychiatric hospitals. As HUD is providing only very limited disability data, unless HUD requires states to use local data and local knowledge to address the questions in Section D3, “Disability and Access Analysis,” the exercise will be futile and will result in a disparate and potentially disadvantageous consideration of people with disabilities in state Assessment of Fair Housing (AFH) Plans. States allocate large funding amounts and have greater capacity in terms of personnel and access to data, compared to local governments. We cannot imagine any legitimate reason that a state would be unable to secure local data or local knowledge regarding any of the questions under Section D3, “Disability and Access Analysis.”

3. HUD should provide **additional Guidance to states** as to the types of local data and local knowledge that are likely to be available and how to find these.

Relationship between the State and Local Assessment Process

While *Olmstead* planning is primarily a state activity, local governments also have *Olmstead* obligations, and in some states disability service systems are largely controlled by local government agencies. Moreover, state efforts to assist people with disabilities to move from institutions or homelessness into affordable, accessible, integrated housing cannot be achieved without the participation of local governments and local housing agencies. The Assessment Tool for Local Governments and HUD’s Affirmatively Furthering Fair Housing Rule Guidebook provide very little guidance in this regard. We recommend HUD develop additional Guidance to better ensure that connections are made between the state and local governments engaged in AFH planning.

SPECIFIC COMMENTS

The following provides specific comments on the questions and instructions in the proposed tool.

Disability and Access Analysis (Section D) of Proposed Tool

Section D2. Housing Accessibility

Question 2(a) asks the state to describe the geographic areas where affordable accessible housing units are located. The instructions indicate that “HUD is unable to provide data at this time, as there is limited nationally available disability-related data at this time, including data relating to accessible housing”.

As discussed in the Instructions, as a result of the Federal Fair Housing Amendments Act of 1988 and the 1998 promulgation by HUD of regulations on Section 504 of the Rehabilitation Act, the vast majority of *affordable* rental housing *should* currently be accessible to persons with physical and/or sensory disabilities, although we believe there is significant non-compliance with these rules. The question of where these units are located was answered in Section C. Public Supported Housing Analysis.

In this Disability and Access analysis section, we suggest the critical questions are whether the state has been *implementing* these federal requirements to ensure that all new construction or substantial rehabilitation since 1991 is accessible and that housing that has federal financial assistance complies with Section 504.

We recommend substituting the following questions:

2(a). How does the state ensure that projects comply with federal and state accessibility requirements? Does the state monitor or inspect construction funded through the state? Does the state provide training for architects and developers as well as state and local staff? How does the state enforce these laws when noncompliance is identified?

Are these units near accessible transportation and other critical amenities? Are there any one-bedroom accessible units that are not in housing designated primarily or entirely for the elderly? Are there any one-bedroom non-accessible units that are not in housing designated primarily or entirely for the elderly?

Question 2b states “Describe the extent to which the supply of accessible housing aligns with the demand for such housing in particular areas within the State. Include the extent to which individuals with disabilities who require accessible housing move out of or into the State to obtain accessible housing.”

We recommend the second sentence be deleted. This question would be very difficult – if not impossible – for most states to determine and it would be a distraction for states to spend time trying to determine this information rather than to spend it in more fruitful ways.

The instructions for Question 2b state: “For question (2)(b) HUD is unable to provide data at this time. Single-family housing is generally not accessible to persons with disabilities unless state or local law requires it to be accessible or the housing is part of a HUD-funded program or other program providing for accessibility features. The Fair Housing Act requires that most multifamily properties built after 1991 meet federal accessibility standards. As a result, multifamily housing built after this date, if built in compliance with federal law would meet this minimum level of accessibility, while buildings built before this date generally would not be accessible. The age of housing stock can be a useful measure in answering this question. In addition, affordable housing subject to Section 504 of the Rehabilitation Act must include a percentage of units accessible for individuals with mobility impairments and units accessible for individuals with hearing or vision impairments. Map 5, which shows the location of four types of publicly supported housing, may also be useful in answering this question.”

As discussed above, the age of the housing stock is a reasonable proxy for number of accessible units ONLY if one can assume that new construction and substantially rehabilitated or altered projects are nearly always in compliance with Section 504 and the Fair Housing Act. Complaints received by HUD and local fair housing agencies, as well as our experience, indicate this is not always the case.

We recommend that the following instructions currently under Question 3 be added to the instructions for Question 2b:

“Topics for consideration may include the length of wait lists for accessible units in publicly supported housing, availability of accessible units in non-publicly supported housing available to HCV participants, whether public funding (e.g. CDBG funds) or tax credits are available for reasonable modifications in rental units and/or for homeowners, whether accessible units are

occupied by households requiring accessibility features, and whether publicly supported housing is in compliance with accessibility requirements.”

The instructions for Question 2c refer to Table 15. **Sample Tables provided on the HUD Exchange website do not include Table 15. Therefore we are not able to comment on this information.** We are concerned that these data do not distinguish between units available only to elderly persons with disabilities and those available to persons with disabilities under age 62. Such a differentiation is important to assess the true availability of housing for various populations.

Most of the limited disability data provided to states is not provided by age group. **We recommend** all disability data be provided by age group. HUD should require states to consider this distinction in their analyses.

Question 2d asks the state to “describe any disability-specific housing programs”.

We recommend that HUD redraft the question to read as follows:

What programs or incentives does the state provide in order to create or target housing assistance for people with disabilities to live in integrated, affordable housing in the community, including accessible housing?

There are currently no instructions for Question 2d.

We recommend that HUD add instructions that state:

In responding to Question 2d, the state could consider a variety of incentives or opportunities including but not limited to: targeting Housing Choice Vouchers (HCV) to Non-Elderly Adults with Disabilities (NED); creating preferences in rental assistance programs such as state rental assistance or HCV programs for people with disabilities; including incentives in housing development programs such as the Low Income Housing Tax Credit Program, HOME Program, National Housing Trust Fund, state bond funds, etc. for integrated, affordable units for people with disabilities.

Section D3. Integration of Persons with Disabilities Living in Institutions and Other Segregated Settings

We applaud the inclusion of this section, including a number of new questions for states, and strongly recommend that HUD retain this section with the expanded state questions in the final Assessment Tool.

We recommend that HUD add the following under Question 3(f):

Include a description of the state’s Money Follows the Person Program, if any, as well as any Medicaid home and community-based waivers or options, and other state programs or services serving people with disabilities in integrated settings.

Under Question 3(f), **we recommend** that HUD remove the phrase “supported employment services” or replace it with the phrase “*sheltered workshops*,” since supported employment services are generally provided in integrated settings.

We recommend that HUD add the following under Question 3(h):

Describe any pending or settled Olmstead–related law suits, settlements or Olmstead initiatives not involving litigation.

HUD’s proposed instructions for Section 3 are as follows:

“Local data and knowledge will likely be particularly useful in answering questions (3)(a) and (b). Sources of location data and local knowledge may include, among others, individuals with disabilities, federally-funded independent living centers, protection and advocacy organizations, advocacy organizations representing the spectrum of disabilities, state developmental disability councils and agencies, and state mental health/behavioral health agencies. Topics for consideration may include the length of wait lists for accessible units in publicly supported housing, availability of accessible units in non-publicly supported housing available to HCV participants, whether public funding (e.g. CDBG funds) or tax credits are available for reasonable modifications in rental units and/or for homeowners, whether accessible units are occupied by households requiring accessibility features, and whether publicly supported housing is in compliance with accessibility requirements.

The Fair Housing Act, Section 504, and the ADA contain mandates related to integrated settings for persons with disabilities. Integrated settings are those that enable individuals with disabilities to live and interact with individuals without disabilities to the greatest extent possible and receive the healthcare and supportive services from the provider of their choice. To answer questions (3)(a) and (b), refer to HUD’s “Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of *Olmstead*.”

Local data and local knowledge will likely be particularly useful in answering these questions. To ensure meaningful analysis of these questions, program participants may need to obtain information from state disability service authorities, which may include, for example, the developmental disabilities authority, mental health authority, social or human services department, and the state Medicaid agency, each of which is likely to have ready access to reliable information concerning the location and frequency of individuals with disabilities. A state’s Olmstead Plan may contain useful information in answering these questions.”

We recommend the following re-ordering and modifications to clarify the instructions for this section:

The Fair Housing Act, Section 504, and the ADA contain mandates related to integrated settings for persons with disabilities. Integrated settings are those that enable individuals with disabilities to live and interact with individuals without disabilities to the greatest extent possible and

receive the healthcare and supportive services from the provider of their choice. States should refer to HUD's "Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of Olmstead" for more information.

In Tables X, and X, HUD provides states with

- CMS data from the Money Follows the Person program (if any) as well as other Medicaid home and community-based waivers or options in your state;
- CMS data on people with disabilities living in nursing facilities and intermediate care facilities for individuals with developmental disabilities; and
- HUD data on people with disabilities experiencing homelessness.

To ensure meaningful analysis of these questions, program participants will need to obtain additional information from state disability service authorities, which may include, for example, the developmental disabilities authority, mental health authority, social or human services department, and the state Medicaid agency, each of which is likely to have ready access to reliable information concerning the location and frequency of individuals with disabilities. Your state's Olmstead Plan may contain useful information in answering these questions.

Other sources of local data and local knowledge may include, among others, individuals with disabilities, federally-funded independent living centers, protection and advocacy organizations, advocacy organizations representing the spectrum of disabilities, state developmental disability councils and agencies, and state mental health/behavioral health agencies.

Section D4. Disparities in Access to Opportunity

The factors identified under Question 4a related to "major barriers" to opportunity are similar to the factors identified in Section B(iii), "Disparities in Access to Opportunity".

To ensure that states consider the same major barriers to opportunity for people with disabilities as for the other protected classes, **we recommend** adding the following under Question 4a:

- Access to schools that are accessible to students and parents with disabilities and proficient in educating students with disabilities in integrated classrooms
- Access to employment opportunities
- Access to low poverty areas
- Access to environmentally healthy areas within the state

We recommend adding the following to the instructions for Question 4b:

The ADA Title II requires equal access to all of the programs, services and activities listed in Question 4a as well as the housing programs discussed in this Disability and Access Analysis Section. This includes the right to request and receive reasonable accommodations in order to fully participate in these programs, services and activities.

Section D7. Disabilities and Access Issues Contributing Factors

To ensure that states consider the same major barriers to opportunity for people with disabilities as for the other protected classes, **we recommend** adding the following additional contributing factors:

- *Community opposition*
- *Location and type of affordable housing*
- *Occupancy codes and restrictions*
- *Private discrimination*
- *Access to financial services*
- *Availability, type, frequency and reliability of public transportation*
- *Lack of state, regional or other intergovernmental cooperation*
- *Admissions and occupancy policies and procedures including preferences in publicly supported housing*
- *Impediments to mobility*
- *Lack of private investment in specific areas within the State*
- *Lack of public investment in specific areas within the State including services and amenities*
- *Siting selection policies, practices and decisions for publicly supported housing*
- *Source of income discrimination*

The first bullet under Section 7 currently reads “Access to proficient schools for persons with disabilities.”

We are concerned that this will be interpreted to refer to segregated schools for individuals with disabilities. It is critical that children with disabilities have access to equal educational opportunity in their neighborhood schools, as required by federal law. While many neighborhood schools may not be complying with the ADA, Section 504, and the Individuals with Disabilities Education Act (IDEA), determining such compliance would be outside of the grasp of fair housing planners. In light of this as well as the suggestion that a separate reference to proficiency for persons with disabilities means that general proficiency need not include proficiency in educating students with disabilities, **we recommend** this be revised to read:

Access to schools that are accessible to students and parents with disabilities and proficient in educating students with disabilities in integrated classrooms

Publicly Supported Housing Analysis (Section C) of Proposed Tool

Under Low Income Housing Tax Credits Section C(1)(i)(5), **we recommend** the example be revised as follows:

(e.g. points for permanent supportive housing projects, points for increased affordability)

Qualified PHA Service Area (Section F) of Proposed Tool

Under Section F(6), “Disability and Access”, **we recommend** asking PHAs to describe the extent to which they provide waiting list preferences for Non-Elderly person with Disabilities (NED) and any regulations and policies they have implemented to promote compliance with Section 504 and the Americans with Disabilities Act.

Thank you for the opportunity to comment on Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas, Vol. 81, Federal Register No. 48 (March 11, 2016).

Sincerely,

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