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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RAY JAINNINEY, <i>et al.</i> ,)	
)	CASE NO. 00CV0879
Plaintiff,)	
)	
v.)	MAGISTRATE JUDGE VECCHIARELLI
)	
MAXIMUM INDEPENDENT LIVING, <i>et al.</i> ,)	
)	
Defendant.)	<u>MEMORANDUM OF OPINION</u>

This case is before the Magistrate Judge upon the consent of the parties pursuant to 28 U.S.C. § 636(c). Before this Court are cross-motions for partial summary judgment. For the reasons stated below, Defendants’ motion for partial summary judgment (ECF No. 28) is DENIED and Plaintiffs’ motion (ECF No. 29) is GRANTED .

I. Background

Ray Jainniney, Debra Jainniney, and Metropolitan Strategy Group (“MSG”) (collectively “Plaintiffs”) initiated this action against Maximum Independent Living, Inc. (“MIL”), Maximum Independent Living – Circle (“MIL-Circle”), Maximum Independent Living – Lake (“MIL-Lake”),

Maximum Independent Living – Avon (“MIL-Avon”), Maximum Independent Living – West (“MIL-West”), Maximum Independent Living – Sheffield (“MIL-Sheffield”), Cynthia Bishof, and Stephen Hansler (collectively “Defendants”). Plaintiffs allege four causes of action: (1) Defendants violated 42 U.S.C. § 3604(f)(1) and § 3604(f)(3)(B) by discriminating against Plaintiffs on the basis of Mr. Jainnney’s disability; (2) Defendants violated 42 U.S.C. § 3617 in that the Defendants interfered with the Plaintiffs’ ability to exercise rights granted by the Fair Housing Act of 1988; (3) Defendants violated Chapter 4112 of the Ohio Revised Code by discriminating against the Plaintiffs in the terms and privileges of renting and occupying an apartment; and (4) Defendants frustrated MSG in its efforts to assist individuals to gain equal access to housing.

Plaintiffs allege the following in their complaint. Mr. Jainnney suffers from a spinal injury which causes him to be paralyzed from the waist down. Ms. Jainnney resides with Mr. Jainnney and provides personal care services. MSG is a private, non-profit corporation which provides fair housing educational and enforcement services to residents of Cuyahoga County, Ohio.

MIL-Circle, MIL-Lake, MIL-Avon, MIL-West, and MIL-Sheffield are the owners of five apartment complexes. MIL is the management company that manages these five properties and acts as an agent for the owner entity of each complex. Each of the MIL properties offer housing subsidized by the federal government. Ms. Bishof and Mr. Hansler were employees of MIL. Plaintiffs assert that prior to and continuing to the present date, Mr. Jainnney has resided in housing that is not wheelchair accessible, which renders him completely dependent upon

family members and neighbors to carry him into and out of the housing. Shortly before his application to MIL, Mr. Janniney lived with his daughter, son-in-law, and Ms. Janniney in Orville, Ohio. However, his daughter and son-in-law moved out of the dwelling. At this point, Mr. Janniney was left alone during the day. During the day, Mr. Janniney was unable to leave the dwelling unless he was able to obtain assistance from a neighbor or EMS.

Plaintiffs claim that in February 1999, Mr. Janniney applied to MIL to rent a dwelling at any of the five apartment complexes managed by MIL. Mr. Janniney sought housing from MIL so that he could be closer to needed medical treatment and Ms. Janniney could be closer to her place of employment.

On March 17, 1999, MIL representatives – Mr. Hansler, Ms. Bishof, and one other person whose name is unknown – interviewed Mr. Janniney. Plaintiffs maintain that the three MIL representatives questioned Mr. Janniney regarding the nature and severity of his disability. Plaintiffs assert that Mr. Janniney was also asked about his ability to use toilet facilities, cook, drive, and otherwise care for himself.

On or about March 23, 1999, Mr. Janniney received a letter from MIL signed by Ms. Bishof, stating that his application to live at MIL's apartment was denied because the committee felt that he was not ready to live independently.

Plaintiffs claim following the denial of housing by MIL, Mr. and Ms. Janniney moved to Warren, Ohio with Mr. Janniney's cousin. His cousin's dwelling is not wheelchair accessible. Plaintiffs contend, that while residing with Mr. Janniney's cousin, Ms. Janniney was terminated from her employment because of the lengthy commute and frequent absences caused by assisting

Mr. Janniney in meeting his daily needs.

Plaintiffs maintain in late 1999, Mr. and Ms. Janniney moved to Lakewood, Ohio to live with a relative until they could find affordable, accessible housing. The housing where they currently reside is not wheelchair accessible.

Plaintiffs allege in April 1999, Mr. and Ms. Janniney sought counseling from MSG. MSG has provided counseling and assistance to the Jannineys regarding their housing complaint.

Plaintiffs assert that MSG has been frustrated in its mission of working toward equal opportunities in housing due to MIL's failure to provide housing on a nondiscriminatory basis. Plaintiffs brought suit against Defendants on April 4, 2000. On September 18, 2000, the parties filed cross-motions for summary judgment in order to resolve two preliminary issues: (A) whether the Fair Housing Act (42 U.S.C. § 3601 *et seq.*) applies to subsidized housing for people with mobility disabilities so as to supersede § 202 of the National Housing Act of 1959 (12 U.S.C. § 1701 *et seq.*) and § 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. § 8013) and (B) whether the law deemed applicable or implementing HUD regulations allow "independent living" as an admission criteria to housing for persons with mobility disabilities, and, if so, allow the housing provider to evaluate whether the independent living standard is met by the applicant.

II. Stipulated Facts

The parties stipulated the following facts for the purposes of the cross motions for summary judgment. Maximum Independent Living operates five apartment houses for people with physical mobility disabilities by authority of § 811 of the Cranston-Gonzalez National Affordable Housing Act and § 202 of the National Housing Act, as authorized by 12 U.S.C. § 1701 *et seq.* and

42 U.S.C. § 8013. MIL applied for HUD approval and financing for each of the five Defendant apartment dwellings pursuant to either § 202 of the NHA or § 811 of the Cranston-Gonzalez Act.

MIL included the following description of the proposed occupants in its most recent HUD applications, including the Avon Lake project in which Jainniney expressed interest: "The tenants of the building will be people with mobility impairments who are able to either meet their needs or arrange to have somebody meet them." HUD approved those applications and provided the requested financing for each of the apartment dwellings.

MIL conducts a single, common application procedure for all of its apartment houses. MIL has an admissions committee approved by the Board to interview prospective residents. Members of that committee include one MIL staff member, several MIL board members, and two independent parties. Five of the eight members are persons with mobility disabilities. Any qualified applicant must have a long term physical mobility impairment. All the apartment houses operated by MIL are physically accessible to persons with mobility impairments. A preliminary determination as to whether the applicant is of qualifying age and income and has a qualifying long term disability is made prior to the applicant's interview. Whether or not an applicant has a long term mobility disability is confirmed during the applicant's interview process. During the applicant's interview, the members of the MIL Admission's Committee ask questions related to the long term nature of the mobility impairment, as well as general questions designed to elicit information as to whether the applicant can "live independently" and "access needed services."

"Independent living" or "live independently" is defined by MIL on the tenant application

as, "[t]aking control of and making the decisions that affect their lives. Individuals are not required to physically meet all of their needs, but must have the ability to see that these needs are met. This includes being responsible for securing their own meals, furnishings, attendants, cleaning their apartments, etc." "Ability to access needed services" is synonymous with "independent living."

Mr. Jainniney has a long term mobility impairment. Mr. Jainniney was interviewed by the admissions committee on March 17, 1999. Ms. Jainniney was not interviewed.

The members of the Admissions Committee who interviewed Mr. Jainniney were Frank Anderson, Stephen Hansler, and Margaret Meyer. Mr. Anderson has a mobility disability and is a member of MIL's Board of Trustees. Mr. Hansler does not have a mobility disability and is MIL's Executive Director. Ms. Meyer has a mobility disability and is not otherwise affiliated with MIL.

The MIL Admissions Committee did not ask Mr. Jainniney if he was "capable of living independently" or "capable of accessing needed services," using those words.

Mr. Jainniney received a letter in response to his application, stating the following:

Following review of your application and interview to live at MIL's Apartments for people with physical disabilities, your application has been placed in Class C - NOT READY. The committee felt that you are not yet ready to live independently. Maximum Independent Living suggests that you gain more experience in meeting your own needs or in finding someone to help you meet your needs. One good step would be to take the "Orientation to Independent Living" classes offered by Services for Independent Living. ***

When you feel you have gained experience and are ready to live independently, please contact us to get a new application. You may not reapply before October 2, 1999. We will then reconsider your application. Good luck and thank you for your

interest in MIL.

(ECF No. 28, Exhibit A). Mr. Janniney has not subsequently obtained housing at MIL or reapplied to MIL after having received the letter.

II. Analysis

A. Does the Fair Housing Act (42 U.S.C. § 3601 *et seq.*) apply to subsidized housing for people with mobility disabilities so as to supersede § 202 of the National Housing Act of 1959 (12 U.S.C. § 1701 *et seq.*) and § 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. § 8013)?

1. Fair Housing Act and Amendments

On April 11, 1968, Congress enacted the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, which prohibits discrimination with regard to renting and selling dwellings on the basis of race, color, religion, sex, and national origin. In 1988, Congress amended this Act under the Fair Housing Amendments Act of 1988 ("FHAA"), P.L. 100-430, which extends the protections afforded by the original Act to the handicapped. Section 3604 of the FHAA provides the following:

[I]t shall be unlawful . . .

(f)(1) 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.

(f)(2) to discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of –

(A) that person; or

(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 person.

2. National Housing Act

On June 27, 1934, Congress enacted the National Housing Act. On September 23, 1959, Congress amended this Act by including § 202, 12 U.S.C. § 1701. As originally enacted, the stated purpose of § 202 was to “. . . assist private non-profit corporations, limited profit sponsors, consumer cooperatives or public bodies or agencies to provide housing and related facilities for elderly or handicapped families.” 12 U.S.C. § 1701q(a)(1). As enacted in 1959, 12 U.S.C. § 1701l(k)(2) provided, “[t]he Secretary shall encourage the provision of small and scattered site group homes and independent living facilities for non elderly handicapped persons and families.”

On November 28, 1990, Congress enacted amendments to § 202, which provide:

Supportive Housing for the Elderly

(a) Purpose

The purpose of this section is to enable elderly persons to live with dignity and independence by expanding the supply of supporting housing services that—

- (1) are designed to accommodate the special needs of elderly persons and;
- (2) provide a range of services tailored to the needs of elderly persons occupying such housing.

The 1990 amendments to the National Housing Act of 1959 eliminated references to “persons with disabilities” and “handicapped persons” and solely regulates housing for the elderly.

3. Cranston-Gonzalez National Affordable Housing Act

On the same date that § 202 was amended, November 28, 1990, Congress enacted Cranston-Gonzalez National Affordable Housing Act § 811 to address the housing needs of persons with disabilities. This legislation is codified at 42 U.S.C. § 8013 *et seq.* (hereinafter “§ 811”). Section 811

provides:

Supportive Housing for Persons with Disabilities

(A) Purpose

The purpose of this section is to enable persons with disabilities to live with dignity and independence within their communities by expanding the supply of supportive housing that –

- (1) is designed to accommodate the special needs of such persons; and
- (2) provide supportive services that address the individual health, mental health, and other needs of such persons.

42 U.S.C. § 8013(a).

Section 811 further provides that:

The Secretary shall take such actions as may be necessary to ensure that-

- (1) Assistance made available under this section will be used to meet the special needs of persons with disabilities by providing a variety of housing options, ranging from group homes and independent living facilities¹ to dwelling units in multi family housing developments, condominium housing, and cooperative housing; and
- (2) Supportive housing for all persons with disabilities assisted under this section shall—
 - (A) Provide persons with disabilities occupying such housing with supportive services that address their individual needs;
 - (B) Provide such persons with opportunities for optimal independent living and participation in normal daily activities, and
 - (C) Facilitate access by such persons to the community at large and to suitable employment opportunities within the community.

42 U.S.C. § 8013(c).

Section 811 became effective October 1, 1991 and applies “with respect to projects

¹ “The term ‘independent living facility’ means a project designed for occupancy by not more than 24 persons with disabilities (or such higher number of persons as permitted under criteria that the Secretary shall prescribe subject to the limitation under subsection (h)(6)) in separate dwelling units where each dwelling includes a kitchen and bath.” 42 U.S.C. § 8013(k)(4).

approved on or after that date.” 42 U.S.C. § 8013(m)(1). MIL is subject to § 811’s provisions.

4. ***Beckert v. Our Lady of Angels Apartments, Inc.***

In *Beckert v. Our Lady of Angels Apartments, Inc.*, 192 F.3d 601 (6th Cir. 1999), the Sixth Circuit held that § 3604 of the FHAA did not repeal § 202 of the National Housing Act of 1959, 12 U.S.C. 17019q(1)(a). The plaintiff in this case, who had been diagnosed with chronic undifferentiated schizophrenia, had applied for housing at the defendant’s apartments. The defendant was a non-profit organization providing housing and related services to elderly and physically handicapped person pursuant to § 202. The plaintiff indicated on her application that she was “mental-schizo” and was taking two medications. The defendant denied the application because the plaintiff was neither elderly nor physically handicapped.

The plaintiff argued that defendant violated the FHAA in denying her application. She asserted further that although § 202 may have allowed housing sponsors to serve some but not all groups of persons with disabilities, the FHAA superceded and effectively repealed § 202. However, the Sixth Circuit determined that the U.S. Department of Housing and Urban Development (“HUD”) reasonably interpreted § 202 to permit a facility to serve eligible groups while denying other eligible groups. Further, nothing in the FHAA indicated that Congress intended to repeal any aspect of § 202. As such, the defendant’s refusal of the plaintiff’s application was not unlawful discrimination under the FHAA.

Beckert’s holding logically should be extended to § 811. Section 811 is the amended version of the original § 202. Its purposes and functions remain the same with regard to persons with disabilities. Further, § 811 was enacted after the FHAA. Under the doctrine of *in pari materia*, a

"later act can . . . be regarded as a legislative interpretation of the earlier act in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting. It is therefore entitled to great weight in resolving any ambiguities and doubts." *Beckert*, 192 F.2d at 606 (quoting *United States v. Stewart*, 311 U.S. 60, 64-65 (1940)). Section 811 requires that owners certify that they will comply with the Fair Housing Act. *See* 42 U.S.C. § 8013(j)(2). This clearly demonstrates Congress's intent not to repeal either § 811 or the FHAA. As such, this Court must determine the impact of the FHAA upon § 811 and *vice versa*.

B. Does the law deemed applicable or implementing HUD regulations allow "independent living" as an admission criteria to housing for persons with mobility disabilities, and, if so, allow the housing provider to evaluate whether the independent living standard is met by the applicant?

Implicit in § 811 is permission for owners to serve only some disabled people while declining to serve others. Section 811 provides with regard to tenant selection:

Notwithstanding any other provision of law, an owner may, with the approval of the Secretary, limit occupancy within housing developed under this section to person with disabilities who have similar disabilities and require a similar set of supportive services in a supportive housing environment.

42 U.S.C. § 8013(i)(2). Although § 811 has a provision that owners comply with the Fair Housing Act, 42 U.S.C. § 8013(j)(2), this provision must be read in conjunction with 42 U.S.C. § 8013(i)(2). It is well settled that specific statutory language prevails over general statutory language. *See FDIC v. Bates*, 42 F.3d 369 (6th Cir. 1995). With regard to the language at odds in § 811, it is evident that § 8013(i)(2) which allows an owner to limit occupancy is the more specific language that prevails.

Plaintiffs urge this Court to adopt an interpretation of § 811 by which owners may only choose among four categories of disabilities when determining what population to serve: (1) elderly; (2) mobility

impaired; (3) developmentally disabled; and/or (4) chronically mentally ill.² Essentially, Plaintiffs maintain if an owner chooses to serve a particular category of disabled people – such as the chronically mentally ill – he cannot refuse to serve a particular subset of that population – such as those who suffer from schizophrenia.

However, the language of § 811 does not limit owners to four categories of disabilities. Rather, owners can limit occupancy to “persons with disabilities who have similar disabilities and require a similar set of supportive services in a supporting housing environment.”

Further, this language has been interpreted by HUD in the HUD Handbook 45271.2, ¶ 1-5³ to mean “sub-categories of the three major disability categories.”⁴ The use of the term “sub-categories” clearly indicates that HUD envisions owners may serve populations of people with particular types of physical disabilities, while excluding others with different types of physical disabilities. However, this Court does not read this provision as a tool for owners to exclude people with physical disabilities who may also suffer from additional disabilities or to discriminate on the basis of the ability to live independently.

In *Niederhauser v. Independence Square Housing*, Fair Housing-Fair Lending Rptr. ¶ 16,305.1 (No. C 95-20504n RMW, (N.D. Cal. 8-27-98)), the defendant housing provider was a §

²These were the categories devised under the original § 202. HUD has set forth three major disability groups in HUD Handbook 4571.2, ¶ 1-5: (1) physical disability; (2) developmental disability; and (3) chronic mental disability.

³HUD’s reasonable interpretation of housing law is entitled to deference. *See Beckert*, 192 F.3d at 606.

⁴These categories are listed in footnote 2 *supra*.

202 project providing housing to the elderly and to the disabled. The defendant required that residents:

(1) "be capable of tending to their needs independently and be able to transfer, bathe, cook and feed themselves;" (2) "be able to be self-sufficient mentally and emotionally and be able to conduct their own affairs, such as paying their own rent, hiring and terminating, if necessary, and supervising their own chore worker;" and (3) "demonstrate and have a successful history of living independently on their own, without an attendant or "relative care."

The Niederhausers, two elderly residents with cerebral palsy resulting in mobility and speech impairments, began living there in 1979. Over twenty years later, Mr. Niederhauser required hospitalization for surgery, and he temporarily required attendant care services. Because the defendant required all of its tenants to be able to live independently, it did not permit Mr. Niederhauser to return to his apartment. After Mr. Niederhauser secretly moved back into the apartment, the defendant harassed the Niederhausers and continued to threaten their tenancy, including taking Mr. Niederhauser's building key.

The court found that the defendant's policies violated federal and state housing laws. The court issued a permanent injunction, finding that the defendant's policies unlawfully discriminated against applicants and tenants by (1) calling for inquiries into the nature and extent of the severity of the disabilities of prospective tenants, which were unrelated to the eligibility requirements for tenancy at the housing project and (2) requiring the disclosure of confidential personal and medical information.

The court ruled the defendant may ask questions to: determine if prospective tenants fell within one or more groups that the defendant was designed to serve – tenants who were elderly or people with physical disabilities; inform applicants within these two groups that defendant did not provide

personal care services to meet the needs of people with severe physical disabilities or people with developmental and psychiatric disabilities; inquire to determine the extent of a disability of an applicant seeking a reasonable accommodation because of the disability; and give priority for accessible units at the housing project to people with mobility impairments. The defendant may also ask questions limited to determining whether a prospective tenant would pose a direct threat to the health or safety of other individuals or would result in substantial physical damage to the property of others. However, the defendant may not inquire into the nature and severity of an applicant's disabilities to determine if he/she needed services. Nor may the defendant prohibit tenants from arranging for and receiving services in their apartments, or deny tenancy to people in need of such services as long as they are elderly or have a physical disability.

The facts of *Niederhauser* are similar to the instant action. The law in that case is persuasive. Like the defendant in *Niederhuaser*, MIL has made independent living a prerequisite to residency. Specifically, MIL restricts its services to "persons with mobility impairment who are capable of independent living." Although MIL's application was approved by HUD, this Court finds that such approval goes against HUD's own handbook.

In describing residents eligible for § 811 housing, HUD Handbook 4571.2, ¶ 1-5 provides that § 811 housing is designed for those people who have "a physical, mental, or emotional impairment which . . . substantially impedes a person's ability to live independently." MIL's requirement of independent living seems to be at odds with this provision and violates the FHAA.

In addition, while the Handbook permits restrictions of occupancy of § 811 to one of the sub-categories of the three major disability categories, the Handbook qualifies this statement by requiring

that owners may restrict only "if they can justify that the proposed applicants share a need for a similar set of supportive services that are unique to their disability." In the instant action, MIL fails to cite any set of supportive services which are unique to people with mobility disabilities who are capable of independent living.⁵

Further, MIL fails to cite any legitimate reason for excluding those people who have mobility disabilities by are not able to live independently. Rather, MIL asserts that its "supportive service plans, as approved by HUD, are designed only to serve tenants who can live independently. Maximum Independent Living does not provide a full range of services, such as resident or visiting nurses, exercise therapists or food service personnel who may be needed by persons not capable of independent living." However, MIL fails to assert that people with mobility disabilities who are not capable of independent living cannot benefit from the services it does provide. In addition, it has not been alleged that Mr. Janniney requested that MIL accommodate him by providing services it does not typically provide to its residents.

The exclusion of Mr. Janniney and other people with mobility disabilities who have been deemed by MIL to be incapable of independent living can be viewed at best as a paternalistic attempt to direct these individuals to more suitable housing and at worst, as prejudicial discrimination. Either way, the exclusion of those who do in fact suffer from a mobility disability but who are not able to live

⁵In fact, MIL fails to cite *any* services it provides. As best as this Court can decipher from the evidence presented, MIL's primary "service" is providing a building which is accessible to people with mobility disabilities. An accessible building would benefit those who have mobility handicaps but are not able to live independently. As such, there appears no reason to exclude such individuals from MIL housing.

independently is violative of the FHAA and is not condoned by § 811. As such, "independent living" is not a proper admissions criteria for § 811 housing.

III. Conclusion

For the foregoing reasons, partial summary judgment is granted in favor of Plaintiffs.

IT IS SO ORDERED.

/s/ Nancy A. Vecchiarelli

Nancy A. Vecchiarelli

U.S. Magistrate Judge

Date: February 9, 2001