



October 18, 2019

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

Re: Docket No. HUD-2019-0067, “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard”

Dear Assistant Secretary Farías:

The Bazelon Center for Mental Health Law submits these comments in response to the proposed rule, HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, Docket No. HUD-2019-0067. The Bazelon Center is a national non-profit legal advocacy organization that promotes equal opportunity for individuals with mental disabilities in all aspects of life, including health care, community living, housing, education, employment, voting, and other areas. This comment letter is in addition to our endorsement of the comments of the Consortium for Citizens with Disabilities.

The proposed rule flouts congressional intent by changing the standard for proving disparate impact to one that is far afield from the standard articulated by the Supreme Court in *Texas Dep’t of Hous. and Community Affairs v. Inclusive Communities Project, Inc.*, and reflected in the Court’s decisions concerning disparate impact liability under other civil rights statutes.

People with Disabilities Need Strong Fair Housing Protections

People with disabilities face particular barriers in securing housing. First, people with disabilities live in poverty at more than twice the rate of people without disabilities, making the scarcity of affordable housing an acute problem for them.¹ More than 65 percent of the 17.9 million working-age adults with disabilities participate in at least one safety net or income support program.² Further, for many years, people with disabilities have been employed at less than half the rates of people without disabilities. In 2017, the National Council on Disability reported that only 32 percent of working-age people with disabilities are employed compared with 73 percent of those without disabilities.³

¹ National Council on Disability, A Progress Report (Oct. 26, 2017), at 21, https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf.

² Id. at 22.

³ Id. at 32.

As described in *Priced Out: The Housing Crisis for People with Disabilities*:

- In 2016, millions of adults with disabilities living solely on Supplemental Security Income (SSI) found that renting even a modest unit in their community would require nearly all of their monthly income. In hundreds of higher-cost housing markets, the average rent for such basic units is actually much greater than the entirety of an SSI monthly payment.⁴
- As a result, “non-elderly adults with significant disabilities in our nation are often forced into homelessness or segregated, restrictive, and costly institutional settings such as psychiatric hospitals, adult care homes, nursing homes, or jails.”⁵
- Compounding this concern, people with many types of disabilities, including people with mobility impairments, people who are blind, and people who are deaf or hard of hearing, face additional barriers securing affordable housing that is also accessible.
- These concerns make it critical to ensure that protections against disability-based discrimination in housing are not weakened. As it is, complaints of disability discrimination have comprised the largest percentage of housing discrimination complaints received by both public and private fair housing enforcement organizations since the early 2000’s.⁶ The inability to preserve housing will not only put people with disabilities at risk of homelessness and institutionalization, but will likely increase costs to state and local governments, which will incur the costs of institutionalization, shelter placements, and emergency department visits.

The 2013 HUD Disparate Impact Rule Sets Forth the Proper Standards

In 2013, HUD issued a final rule implementing the disparate impact standard, which has helped ensure that people with disabilities have access to fair housing.⁷ The 2013 regulation requires the following burden-shifting analysis, consistent with caselaw interpreting the FHA’s disparate impact requirements:

“(1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

⁴ Technical Assistance Collaborative, *Priced Out in the United States* (Dec. 2017), <http://www.tacinc.org/knowledge-resources/priced-out-v2/>.

⁵ Technical Assistance Collaborative and Consortium for Citizens with Disabilities Housing Task Force, *Priced Out: The Housing Crisis for People with Disabilities* (Dec. 2017), at 8, <http://www.tacinc.org/media/59493/priced-out-in-2016.pdf>.

⁶ National Fair Housing Alliance, *The Case for Fair Housing, 2017 Fair Housing Trends Report* (Apr. 2017), at 27, <https://nationalfairhousing.org/wp-content/uploads/2017/04/TRENDS-REPORT-4-19-17-FINAL-2.pdf>.

⁷ 24 C.F.R. § 100.5

(2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”⁸

To satisfy the first step, plaintiffs must show that a “practice caused, causes, or predictably will cause a discriminatory effect” on a group of persons or a community “on the basis of race, color, religion, sex, disability, familial status, or national origin”⁹ and specifically, “(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant’s facially neutral acts or practices.”¹⁰ Furthermore, “[i]n establishing discriminatory impact, the plaintiff must demonstrate a causal connection between [a] facially neutral policy and the resultant proportion of minority group members in the population at issue.”¹¹

This rule closely tracks the Supreme Court’s opinion concerning disparate impact liability in *Texas Dep’t of Hous. and Community Affairs v. Inclusive Communities Project, Inc.* and mirrors the disparate impact burden shifting analysis from other civil rights statutes including Title VII and the Age Discrimination in Employment Act.¹² The Supreme Court described the factors to be considered in analyzing FHA disparate impact claims in *Inclusive Communities Project, Inc.*, and those factors were closely aligned with the burden-shifting

⁸ 24 C.F.R. § 100.5

⁹ *Id.*

¹⁰ *MHANY Mgmt. Inc. v. Inc. Vill. Of Garden City*, 985 F. Supp. 2d 390, 424 (E.D.N.Y. 2013), *aff’d* by *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) (holding that the district court analysis is still valid following *Inclusive Communities Project.*).

¹¹ *Id.* (internal quotations omitted).

¹² *See Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2518 (2015) (“The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court... A comparison to the antidiscrimination statutes examined in *Griggs* and *Smith* is useful. Title VII’s and the ADEA’s “otherwise adversely affect” language is equivalent in function and purpose to the FHA’s “otherwise make unavailable” language... The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court’s interpretation of similar language in Title VII and the ADEA, Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.”); *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016) (relying on Title VII and ADEA cases for disparate impact analysis); *Kyle v. J.K. Guardian Sec. Serv. Inc.*, 222 F.3d 289, 295 (7th Cir. 2000) (“Courts have recognized that Title VIII is the functional equivalent of Title VII and so the provisions of these two statutes are given like construction and application.”) (internal citations omitted); *Grimm v. Gloucester Cnty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va 2018) (“Courts may look to case law interpreting Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (2018)—which prohibits employment discrimination on the basis of, among other qualities, sex—for guidance in evaluating a claim brought under Title IX.”) (internal quotations omitted); *Prop. Casualty Insurers Ass’n of American v. Donovan*, 66 F. Supp. 3d 1018 (N.D. Ill. 2014) (“HUD explained in the Notice of Proposed Rulemaking [in 2013] that it had adopted this framework because it is consistent with the discriminatory effects standard Congress adopted for Title VII cases and it prevents either party from having to prove a negative.”)

analysis contained in the 2013 regulation.¹³ Indeed, the Court never suggested that HUD’s disparate impact rule was in any way inconsistent with its analysis. The Supreme Court’s decision has been consistently interpreted to adopt the analysis of the 2013 disparate impact regulation.¹⁴ By contrast, the new proposed rule would require additional steps and make it extraordinarily difficult for plaintiffs to prove disparate impact liability.

The 2019 Proposed Rule Would Impede Plaintiff’s Ability To Utilize this Important Tool and Would Hinder State and Local Governments from Enforcing the ADA’s Integration Mandate

The proposed rule seeks to make it more difficult for plaintiffs to prove their case, laying out a different burden-shifting framework that is not in line with *Texas Dep’t of Hous. and Community Affairs v. Inclusive Communities Project, Inc.*

Under the proposed rule, plaintiffs must prove 5 elements to make a prima facie case: (1) “that the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective,” (2) that there is a “robust causal link,” (3) “that the challenged policy or practice has an adverse effect on members of a protected class,” (4) “that the disparity caused by the policy or practice is significant,” and (5) that the complaining party’s alleged injury is directly caused by the challenge (sic) policy or practice.”¹⁵

The proposed rule also dramatically expands the defenses to disparate impact claims. Among other things, it would authorize a defense that a defendant’s “discretion is materially limited by a third party—such as through a Federal law or a State or local law—or a binding or

¹³ See, e.g., *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2522, 2523 (“ . . . so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest;” “An important and appropriate means of ensuring that disparate impact is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability.”).

¹⁴ *Fair Housing Ctr. Of Washington v. Brier-Scheetz Properties, LLC*, 743 Fed.Appx. 116 (9th Cir. 2018) (utilizing the 2013 HUD regulation and citing *Inclusive Communities Project* in its burden shifting analysis without noting differences in the standards); *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) (“The Supreme Court implicitly adopted HUD’s approach.”); *Avenue 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 513 (9th Cir. 2016) (citing both *Inclusive Communities Project* and the 2013 rule to establish the burden-shifting framework); *Inclusive Communities Project, Inc. v. Texas Dep’t of Hous. and Cmty. Affairs*, 747 F.3d 275, 282 (5th Cir. 2014) (adopting HUD’s interpretation), *aff’d and remanded* 135 S.Ct. at 2507; *Nat’l Fair Hous. Alliance v. Travelers Indemnity Co.*, 261 F.Supp.3d 20, 28-29 (D.D.C. 2017) (“But the Supreme Court carefully explained that ‘disparate-impact liability has always been properly limited. Disparate-impact liability under the FHA can be proven under a burden-shifting framework analogous to that used in employment discrimination cases: the plaintiff must plead a prima facie case of discrimination, the defendant may rebut by presenting non-discriminatory reasons for the challenged policy, and the plaintiff bears the ultimate burden of persuasion.”) (internal citations and quotations omitted); *Oviedo Town Ctr. II, LLLP v. City of Oviedo*, Case No. 6:16-cv-1005-Orl-37GJK, 2017 WL 3621940, (M.D. Fla. Aug. 23, 2017) (explaining the burden-shifting framework and citing to both the 2013 HUD regulation and *Inclusive Communities Project*); *Alms Residents Assoc. v. U.S. Dep’t of Hous. and Urban Dev.*, Case No. 1:17-cv-605, 2017 WL 4553401, at *12 (S.D. Oh. Oct. 12, 2017) (utilizing the 2013 HUD regulation).

¹⁵ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 160 (Proposed Aug. 19, 2019) (to be codified at 24 C.F.R. Part 100).

controlling court, arbitral, regulatory, administrative order, or administrative requirement.”¹⁶ Additionally, “where a plaintiff identifies an offending policy or practice that relies on an algorithmic model, a defending party may defeat the claim by: (i) identifying the inputs used in the model and showing that these inputs are not substitutes for a protected characteristic and that the model is predictive of risk or other valid objective; (ii) showing that a recognized third party, not the defendant, is responsible for creating or maintaining the model; or (iii) showing that a neutral third party has analyzed the model in question and determined it was empirically derived, its inputs are not substitutes for a protected characteristic, the model is predictive of risk or other valid objective, and is a demonstrably and statistically sound algorithm.”¹⁷

The proposed rule goes far beyond the Supreme Court’s articulation of the FHA’s disparate impact liability, and essentially eviscerates the burden-shifting paradigm. While the proposed rule calls this new framework the “new-burden shifting framework,” in reality, the defenses are so broad as to swallow the entire rule. The new rule would mean no real burden shift at all in most cases, effectively placing all of the burden on plaintiffs.

For example, a rule or policy that produces a profit would be immune from challenge for its discriminatory impact under the proposed rule unless there is an alternative approach that produces almost just as much money, even if the business could use alternate business approaches that are less discriminatory while still being significantly profitable.

Similarly, the proposed rule would allow entities covered by the FHA to rely on algorithmic tools without disparate impact liability, as long as the inputs are not “substitutes or close proxies for protected classes under the FHA and that the model is predictive of credit risk or other similar valid objective.” Yet even if a factor is not directly a “substitute or close proxy” for a protected class, or appears facially neutral, it can still create a disparate impact. For example, an algorithmic input of criminal justice involvement could have a disparate impact on people with disabilities,¹⁸ but criminal justice involvement may not necessarily be considered a “substitute or close proxy” for disability under this proposed rule. Further, the proposed rule would permit discrimination under disparate impact theory so long as the algorithm was “predictive” of risk, even if a less discriminatory alternative would perform just as well, contrary to the intent of *Texas Dep’t of Hous. and Community Affairs v. Inclusive Communities Project, Inc.*¹⁹

The proposed rule would also provide a safe harbor from disparate impact liability if a defendant is using an industry-standard algorithm from a third party. However, a model or methodology may be “standard in the industry” and still serve to perpetuate discrimination in its outcome or application; the fact that other housing providers are using the same discriminatory

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *supra* note 8.

¹⁹ Michelle Arnowitz and Edward Golding, “HUD’s Proposal to Revise the Disparate Impact Standard Will Impede Efforts to Close the Homeownership Gap” 4 (2019) at: https://www.urban.org/sites/default/files/publication/101015/huds_proposal_to_revise_the_disparate_impact_standard_0.pdf.

method should not eliminate disparate impact liability. This safe harbor is sweeping in its scope: for example, almost all mortgages are underwritten using third-party models.²⁰ In effect, this proposal permits entities covered by the FHA to discriminate without any disparate impact liability, just so long as they contract that discrimination out to a third party.

The proposed rule would also protect a covered entity from disparate impact liability for using an algorithmic model as long as the model was “validated by an objective and unbiased neutral third party,” who finds the algorithm is accurately predictive and that the factors used are not “substitutes or close proxies” for protected classes. This provision sets no standard for “validation” nor who can qualify as an “unbiased neutral third party,” leaving significant questions as to how this would be operationalized—and essentially eliminating judicial review of these determinations that affect core civil rights.

The disparate impact theory of liability is an important tool for people with disabilities to fight against discrimination in housing. People with disabilities largest percentage of housing discrimination complaints and already face a shortage of accessible housing.²¹ For example, without this tool, people with disabilities would have more difficulty challenging policies that require people to prove that they can live independently²², require people to have a full time job to rent in certain places even if they can afford the apartment²³, zoning laws that are designed to keep people with disabilities from moving out into integrated communities²⁴, policies where landlords refuse to accept rental subsidies²⁵, a policy of refusing to accept papers from a conservator²⁶, or policies that impose additional fees for people with service animals or assistance animals.²⁷

Additionally, access to fair housing is integral to the enforcement and implementation of the Supreme Court’s 1999 decision in *Olmstead v. L.C.*, which held that unjustified isolation was a form of unlawful discrimination under the Americans with Disabilities Act and sought to provide opportunities for people living in institutions to live in community-based settings and receive community-based supports and services.²⁸ As a part of many *Olmstead* lawsuits and settlements, states and healthcare systems must allow for people with disabilities to live in

²⁰ *Id.* at 3.

²¹ U.S. Department of Housing and Urban Development “FY 2017 Annual Report on Fair Housing” 17 (2017) at: https://www.hud.gov/sites/dfiles/FHEO/images/FHEO_Annual_Report_2017-508c.pdf (Disability discrimination constitutes 59.4% of complaints)

²² *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990)

²³ *Connecticut Fair Housing Ctr., Inc. v Rosow*, No. 3:10-cv-01987 (D. Conn. Dec. 17, 2010) (settled May 7, 2013); According to the Bureau of Labor Statistics, in 2018, the proportion of the population with a disability that was employed is 19.1% compared to 65.9% of people without disabilities. BUREAU OF LABOR STATISTICS, *Persons with a Disability: Labor Force Characteristics Summary*, <https://www.bls.gov/news.release/disabl.nr0.htm> (Feb. 26, 2019).

²⁴ *Sharpvisions, Inc. v Borough of Plum*, 475 F. Supp2d 514 (W.D. Pa. 2007)

²⁵ See *Crossroads Residents Organized for Stable and Secure ResidencieS (CROSSRDS) v. MSP Crossroads Apartments, LLC.*, Civil No. 16–233 ADM/KMM, 2016 WL 3661146 (D. Minn. July 5, 2016) (challenging multiple rental policies including raising the rent, no longer accepting rental subsidies, requiring a certain credit score, and requiring that tenants make three times the rent in income)

²⁶ *Connecticut Fair Housing Ctr. v Corelogic Rental Property Solutions LLC*, 369 F. Supp3d 362 (D. Conn. 2019).

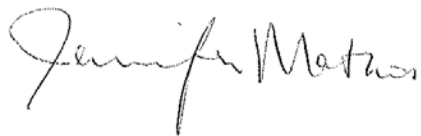
²⁷ *Fair Housing of the Dakotas v. Goldmark*, 778 F. Supp. 2d 1028 (D.N.D. 2011).

²⁸ *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999).

integrated community-based settings, which necessarily requires access to housing.²⁹ Virtually all *Olmstead* cases rely on housing subsidies to ensure that people being discharged from hospitals and psychiatric institutions have an accessible and affordable place to live.³⁰ Changing the standard for proving disparate impact liability could undermine the ability of plaintiffs in *Olmstead* cases to obtain housing, thus prolonging their unjustified and discriminatory institutionalization.

Adoption of the proposed rule will hinder people with disabilities' ability to utilize an important tool to fight for their rights, create confusion around the disparate impact standard, and flout congressional intent to permit disparate impact claims under the FHA. Furthermore, it would undermine HUD's mission to "create strong, sustainable, inclusive communities and quality affordable homes for all"³¹ and its work to "build inclusive and sustainable communities free from discrimination..."³² The Bazelon Center urges HUD to withdraw this PR and leave intact the 2013 Final Rule regarding disparate impact enforcement.

Respectfully submitted,



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²⁹ See Settlement Agreement, *Williams v. Quinn*, No. 05 C 4673, (2010), <http://www.bazelon.org/wp-content/uploads/2017/03/Modified-Proposed-Consent-decree-pursuant-to-5-27-10-order.pdf>; Settlement Agreement, *O'Toole v. Cuomo*, Civil Action No. CV-13-4165 (2013), <http://www.bazelon.org/wp-content/uploads/2017/03/7.23.13DAI-settlement-1.pdf>.

³⁰ See U.S. DEP'T OF JUSTICE, *Agreement to Resolve Department of Justice Investigation*, <https://www.justice.gov/crt/case-document/file/1072816/download>, U.S. DEP'T OF JUSTICE, *Settlement Agreement*, https://www.justice.gov/sites/default/files/crt/legacy/2013/03/26/maple_settlement_3-26-13.pdf, U.S. DEP'T OF JUSTICE, *Settlement Agreement*, https://www.justice.gov/sites/default/files/crt/legacy/2011/07/06/DE_settlement_7-6-11.pdf; Settlement Agreement, *U.S. v. Georgia*, CIVIL ACTION NO. 1:10-CV-249-CAP (2010), https://www.justice.gov/sites/default/files/crt/legacy/2011/01/10/US_v_Georgia_ADAsettle_10-19-10.pdf

³¹ U.S. Dep't. of Housing and Urban Development, "Mission," at: <https://www.hud.gov/about/mission> (last visited Sept. 9, 2019).

³² *Id.*