



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

March 16, 2020

Submitted via Regulations.gov

The Honorable Benjamin S. Carson, Sr.
Secretary of Housing and Urban Development
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, D.C. 20410

Re: HUD's Affirmatively Furthering Fair Housing Notice of Proposed Rulemaking, HUD-2020-0011, RIN 2577-AA97

Dear Secretary Carson,

Thank you for the opportunity to comment on the “Affirmatively Furthering Fair Housing” Notice of Proposed Rulemaking (NPRM) from the U.S. Department of Housing and Urban Development (HUD). The Consortium for Citizens with Disabilities (CCD) is the largest coalition of national organizations working together to advocate for Federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. On behalf of the undersigned organizations of CCD, we submit the following response for your consideration.

People with disabilities and their families 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 too frequently, encounter discrimination when seeking housing.³ As HUD reports, from 2013-2017, disability discrimination complaints were the most common complaint filed with HUD and the fair

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>.

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.”); and see U.S. Dept. of Housing and Urban Development, “Rental Housing Discrimination on the Basis of Mental Disabilities: Results of Pilot Testing,” (2017)(finding “significant levels of adverse differential treatment toward individuals with MI and I/DD when compared with individuals who did not have MD.”)

housing agencies.⁴ In 2018, disability was again the basis for the majority of complaints filed with HUD and fair housing agencies.⁵ 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.⁶ 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. Given the ongoing lack of affordable, and accessible housing, the history and ongoing risk of institutionalization, and the prevalence of housing discrimination against people with disabilities, we strongly oppose the proposed AFFH rule due to its significantly diminished protections and we urge HUD to withdraw this NPRM and reinstate the 2015 AFFH Rule.

I. General Comments

The proposed rule is inconsistent with the Fair Housing Act's mandate to affirmatively further fair housing, as it would fail to do so, including for people with disabilities. The proposed rule would eliminate important obligations that were put in place after years of ineffective efforts to implement the mandate and replace them with obligations that would be even less effective than those that existed previously. Moreover, the proposed rule would eliminate a key requirement that fair housing planning address one of the most significant forms of discrimination--the needless institutionalization of people with disabilities.

The "Affirmatively Furthering Fair Housing" mandate requires recipients of federal housing and community development dollars to work toward eliminating discriminatory practices and dismantling segregation.⁷ As HUD has stated, "From its inception, the Fair Housing Act (and subsequent laws reaffirming its principles) has not only prohibited discrimination in housing related activities and transactions but has also provided, through the duty to affirmatively further fair housing (AFFH), for meaningful actions to be taken to overcome the legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing."⁸ The Congressional

⁴ U.S. Dep't of Housing and Urban Development, "Office of Fair Housing and Equal Opportunity Annual Report to Congress FY 2017" at 15 at https://www.hud.gov/sites/dfiles/FHEO/images/FHEO_Annual_Report_2017-508c.pdf.

⁵ National Fair Housing Alliance, "Defending Against Unprecedented Attacks on Fair Housing. 2019 Fair Housing Trends Report," at 15 (2019) at <https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf> ("Disability is again the basis for the majority of complaints filed with FHOs, HUD, and FHAP agencies... This has been the trend for the past several years.")

⁶ See, e.g., U.S. Dep't of Housing and Urban Development, "2019 Annual Homeless Assessment Report" (2020) at [https://affordablehousingonline.com/blog/annual-hud-report-shows-rise-in-homelessness-for-third-year/\(growth in the number of persons who are chronically homeless, who, by definition, are people with disabilities\)](https://affordablehousingonline.com/blog/annual-hud-report-shows-rise-in-homelessness-for-third-year/(growth%20in%20the%20number%20of%20persons%20who%20are%20chronically%20homeless,%20who,%20by%20definition,%20are%20people%20with%20disabilities)).

⁷ The Fair Housing Act (title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619) declares that it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. The Fair Housing Act prohibits, among other things, discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions because of "race, color, religion, sex, familial status, national origin, or [disability]." See 42 U.S.C. 3604 and 3605. Section 808(d) of the Fair Housing Act requires all executive branch departments and agencies administering housing and urban development programs and activities to administer these programs in a manner that affirmatively furthers fair housing. See 42 U.S.C. 3608. Section 808(e)(5) of the Fair Housing Act (42 U.S.C. 3608(e)(5)) requires that HUD programs and activities be administered in a manner affirmatively furthering the policies of the Fair Housing Act.

⁸ Affirmatively Furthering Fair Housing Final Rule (2015) <https://www.regulations.gov/document?D=HUD-2013-0066-0889>.

mandate for HUD and other federal agencies with housing and urban development programs to administer those programs in a manner that would AFFH were part of the original statutory language in the Fair Housing Act. However, for many years, HUD took no steps to fulfill this obligation.⁹ In 1994, HUD adopted the first AFFH regulations. The requirements of that rule were abbreviated and were later found lacking by the General Accountability Office (GAO)¹⁰ and HUD itself.¹¹ Even under those circumstances, municipalities submitting an Analysis of Impediments (AI) often left out, or mentioned only in passing, the needs of people with disabilities.

The 2015 Rule, which HUD now proposes gutting, was developed precisely because GAO found that HUD's Analysis of Impediments (AI) process was ineffective.¹² Specifically, GAO found that "HUD's limited regulatory requirements and oversight" contributed to many HUD program participants placing a "low priority on ensuring that their AIs serve as effective planning tools." In its recommendations, GAO emphasized that HUD could assist program participants by providing more effective guidance and technical assistance and the data necessary to prepare fair housing plans. The subsequent 2015 regulations were developed to address the deficiencies GAO had identified and in response to requests from jurisdictions for greater clarity and guidance about what steps they should take to fulfill their AFFH obligations. Implementation of the new regulation began in 2016, and was to be phased in over the next several years. Unfortunately, between publication of the final AFFH rule in 2015 and today, HUD effectively suspended implementation of the rule, and directed recipients of federal funds to return to the process that GAO had already found insufficient. The proposed rule not only undoes the 2015 Rule's progress in ensuring the development of meaningful fair housing plans, but provides for even less guidance and oversight than under the previous ineffective AI process. This proposed rule represents a huge step back in fair housing compliance.

Creating and sustaining safe, accessible, affordable, and integrated housing for people with disabilities and other covered classes, free from discrimination,¹³ involves putting systems in place to address barriers that arise from the interaction of poverty, inaccessibility, funding rules related to acquiring supportive services, and a disability policy system rooted in the outmoded model of segregating people with disabilities from the community mainstream.¹⁴ In the NPRM, HUD talks about "significant burden" in implementing the 2015 rule, but instead of proposing improvements to existing tools, it resets the entire process, using deficient standards that would

⁹ See, e.g., Nikole Hannah-Jones, "Living Apart: How the Government Betrayed a Landmark Civil Rights Law," *ProPublica* (2015) at: <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

¹⁰ U.S. Government Accountability Office (GAO) "HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," GAO-10-905, Sept. 14, 2010.

¹¹ See, e.g., U.S. Dep't of Housing and Urban Development, Proposed Regulatory Impact Analysis, *Affirmatively Furthering Fair Housing*, Docket No. FR-6123-P-02, 4 (Jan 15, 2020) at [file:///C:/Users/mburgdorf/Downloads/HUD-2020-0011-0004%20\(6\).pdf](file:///C:/Users/mburgdorf/Downloads/HUD-2020-0011-0004%20(6).pdf).

¹² U.S. Government Accountability Office (GAO) "HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," GAO-10-905, Sept. 14, 2010.

¹³ The Fair Housing Act prohibits discrimination in housing based on race, color, national origin, religion, sex, familial status and disability. 42 U.S.C. §3601 et seq.

¹⁴ National Council on Disability, "The State of Housing in America in the 21st Century: A Disability Perspective," at 13 (2010) at https://ncd.gov/system/files_force/Documents/NCD_Housing_Report508.pdf?download=1.

do little to ensure that housing discrimination is addressed and that people with disabilities and others will meaningfully benefit from AFFH efforts.

There is no question that people with disabilities will be harmed by HUD’s retreat on AFFH. Implementation of the 2015 Rule – through tools that HUD withdrew in May 2018 – required local jurisdictions to consider thoughtful, reasonable questions regarding community integration as required by the Americans with Disabilities Act and the Supreme Court’s *Olmstead* decision, and whether people with disabilities were able to “live in apartments and houses instead of institutions and other segregated settings.”¹⁵

By contrast, the proposed rule centers on the Consolidated Plan process and HUD’s template to be completed by covered jurisdictions. While there are extensive sections in the HUD template regarding people experiencing homelessness or who have HIV, the specific disability-related questions are limited to template NA-45 Non-Homeless Special Needs Assessment in which “The plan should describe, to the extent practicable, the housing needs of persons who are not homeless but require supportive housing.”¹⁶ The template provides a crowded list of target populations including but not limited to: “elderly, frail elderly, persons with mental, physical, and/or developmental disabilities, persons with alcohol or other drug addiction, persons with HIV/AIDS and their families, victims of domestic violence, dating violence, sexual assault, and stalking.”¹⁷ Further, the screen for the jurisdiction’s Strategic Plan’s Priority Needs does not even include an option for “non-homeless special needs populations.”¹⁸ The only non-homeless disability-specific component of the strategic plan is whether there is a “need to increase the number of accessible units where required by Section 504.”¹⁹ The proposed rule, which reverts back to the limited scope of the Consolidated Plan, does not adequately evaluate or address whether the jurisdictions are affirmatively furthering fair housing for people with disabilities.

Every day a person with a disability lives in an institutional setting instead of the community is a lost opportunity, lost human potential, and needless cost to public systems. Most importantly, it is a lost opportunity for those people with disabilities who will remain institutionalized rather than active members of their community of choice. It is a lost opportunity for the state and local governments that would benefit from the cost-savings achieved when people with disabilities

¹⁵ See, e.g., U.S. Dep’t of Housing and Urban Development, “Fair Housing Assessment Tool,” at 11-12 (2014), <https://www.huduser.gov/portal/publications/pdf/AFFH-Assessment-Tool-2014.pdf>. Relevant Questions include:

- To what extent do persons with disabilities in or from the Jurisdiction or Region reside in segregated settings (e.g., psychiatric hospitals, developmental centers, other institutions, board and care homes, large group homes, nursing homes, personal care homes) instead of integrated settings (apartments, family homes, other integrated, community-based housing)?
- To what extent do state or local programs, laws, policies, or practices encourage or discourage placement of persons with disabilities in apartments, family homes, and other integrated settings)?
- What are range of options for and access to affordable housing and supportive services for persons with disabilities in the Jurisdiction and Region? (e.g., integrated settings versus segregated settings, housing linked with services versus choice of service provider, housing with required supportive services versus housing with voluntary supportive services, ability to remain in own home and receive services).

¹⁶ U.S. Dep’t of Housing and Urban Development, “Using IDIS to Prepare the Consolidated Plan, Annual Action Plan and CAPER/PER” at 130 (2018) at <https://files.hudexchange.info/resources/documents/eCon-Planning-Suite-Desk-Guide-IDIS-Conplan-Action-Plan-Caper-Per.pdf>.

¹⁷ *Id.* at 130.

¹⁸ *Id.* at 180.

¹⁹ *Id.* at 199.

move from expensive nursing facilities, psychiatric hospitals, and other institutions into the community. It may also increase the exposure of state and local governments to liability for failing to comply with the Supreme Court’s *Olmstead* decision, which requires public entities to administer services to people with disabilities in the most integrated setting appropriate.

We are concerned that this proposed rule—particularly following HUD’s actions suspending implementation of the 2015 rule—risks further enshrining patterns of residential segregation (including institutionalization) and concentrated poverty in America, impede AFFH and undermine the stated policy of the Fair Housing Act “to provide, within constitutional limitations, for fair housing throughout the United States.”²⁰

II. Key issues

A. The Proposed Rule Undermines the Obligation to Affirmatively Further Fair Housing

The proposed rule dismantles the current regulatory definition of affirmatively furthering fair housing and substitutes a definition that is inconsistent with Congress’s AFFH mandate. Under the proposed rule, AFFH is defined as “advancing fair housing choice within the program participant’s control or influence.” The section below details some of our key concerns. Overall, the approach in the new §5.150, including three prongs of “fair housing choice” in proposed §5.5150(a)(2), is a significant and troubling step back from the 2015 rule.

The new definition emphasizes affordable housing, which, while a laudable goal, does not by itself address historic patterns of segregation, including the needless segregation of people with disabilities in institutional settings. And even within affordable housing, the rule does not address housing needs of low-income or extremely low-income people, where the legacy of harmful discrimination and segregation are concentrated.

Removal of obligations concerning integrated settings

The proposed §5.5150 “fair housing choice” removes important *Olmstead* language without any explanation or justification for this change. As stated in the 2015 Final Rule,

For individuals with disabilities, *integration* also means that such individuals are able to access housing and services in the most integrated setting appropriate to the individual’s needs. The most integrated setting is one that enables individuals with disabilities to interact with persons without disabilities to the fullest extent possible, consistent with the requirements of the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)(emphasis added).

Further,

For persons with disabilities, *segregation* includes a condition in which the housing or services are not in the most integrated setting appropriate to an individual’s needs in accordance with the requirements of the Americans with

²⁰ 42 U.S.C. §3601.

Disabilities Act (42 U.S.C. 12101, et seq.), and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (emphasis added).

By contrast, the proposed rule eliminates “housing in the most integrated setting appropriate to an individual’s needs as required under Federal civil rights law” from the definition of “fair housing choice,” and removes the definitions of integration and segregation for people with disabilities. These concepts are integral to achieving the goals of *Olmstead*, and are an essential part of affirmatively furthering fair housing, promoting fair housing choice, and fostering inclusive communities that are free from discrimination. As Congress identified in the Americans with Disabilities Act, “historically, society has tended to isolate and segregate individuals with disabilities.”²¹ Discrimination against individuals with disabilities continue to be a serious and pervasive social problem, and, specifically, discrimination against individuals with disabilities persists in housing. It is inconsistent with the Fair Housing Act to strip this key element from HUD’s definition of Affirmatively Furthering Fair Housing.

Limitation of individuals’ fair housing choice to options “within their means”

The proposed language in § 5.150 (a)(2) that fair housing choice means “that individuals and families have the opportunity and options to live where they choose, *within their means...*” (emphasis added) also creates specific concerns for disability rights advocates. People with disabilities live in poverty at more than twice the rate of people without disabilities,²² and a large proportion of people with disabilities—about 8 in 10—were not in the labor force in 2018, compared with about 3 in 10 of those with no disability.²³

Even more starkly, 4.7 million adults with disabilities who are between the ages of 18 and 64 receive income from the Supplemental Security Income (SSI) program.²⁴ SSI is the federal income maintenance program that assists people with significant and long-term disabilities who have virtually no assets and, in most instances, no other source of income. Adults under 62 with disabilities living on SSI confront a housing affordability gap across all 50 states and the District of Columbia.²⁵ No state has an average-priced one-bedroom or studio apartment that would be affordable to someone on SSI. In fact, the average rental payment in the United States for a studio would require spending 100 percent of the monthly SSI payment and renting the average one-bedroom unit would require 112 percent of a monthly SSI payment. As a result, most of the 4.2 million people receiving SSI cannot afford housing in their community unless they receive some form of housing subsidy.²⁶ People in these circumstances, extremely low-income people with disabilities, face an unrelenting rental housing crisis in every single one of the nation’s housing market areas.²⁷

²¹ 42 U.S.C. §12101(a)(2).

²² National Council on Disability, “2017 Progress Report,” 11 (2017) at https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_Interior.docx.

²³ U.S. Dept of Labor, “Persons with a Disability: Labor Force Characteristics – 2018,” (2019) at <https://www.bls.gov/news.release/pdf/disabl.pdf>.

²⁴ U.S. Social Security Administration, “SSI Recipients by State and County, 2018” (2020) at https://www.ssa.gov/policy/docs/statcomps/ssi_sc/2018/ssi_sc18.pdf

²⁵ See *Priced Out supra* note 2 at 8.

²⁶ National Council on Disability, “The State of Housing in America in the 21st Century: A Disability Perspective) at 31 (2010) at https://ncd.gov/system/files/force/Documents/NCD_Housing_Report508.pdf?download=1

²⁷ See *Priced Out supra* note 2.

AFFH requires a process to help ensure that people without the current means can still exercise “fair housing choice,” but the posed rule provides for less consideration of housing subsidies and assistance that are key for people with disabilities to access housing. Moreover, ensuring fair housing choice for people with disabilities “within their means” is inconsistent with the cuts to HUD programs, such as rental assistance, in the President’s proposed budget,²⁸ which would significantly reduce housing programs that would increase the supports and supply of options for people with disabilities and their families to have choices “within their means.”

Limitation of AFFH to actions within participants’ “sphere of influence”

The proposed § 5.150 (a)(1) states that “[e]very recipient of HUD funding must affirmatively further fair housing by acting in a manner consistent with reducing obstacles within the participant’s sphere of influence to providing fair housing choice,” and § 5.150 (a)(2) proposes that “Fair housing choice means, within a HUD program participant’s sphere of influence...”

We are concerned that this language may be interpreted in ways insufficient to advance the purposes of AFFH. Jurisdictions should use the policy tools available to exert influence on housing and community development, including zoning, public policy initiatives, funding protocols, and others, and these tools should be used to dismantle segregation and discrimination and remediate its effects. While *Olmstead* planning is primarily a state government activity, local governments are also public entities with *Olmstead* obligations. Moreover, state government 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, which largely control local disability services, and local housing agencies. Collaboration between state and local agencies and across local agencies is critical to helping people move from nursing facilities into affordable housing in the community. Yet the “sphere of influence” limitation could be interpreted by some to exclude these important local government activities.

The proposed rule may be interpreted by some to remove the obligation of program participants to engage the community to assess its own barriers to housing choice, to gather data and assess trends, and to consider how HUD and other funds and resources are used in ways that influence these patterns. This anemic interpretation of the AFFH obligation is not consistent with the law. States, localities and regional collaboratives must work together to meet fair housing needs and this proposed language does not promote the kind of cross-jurisdictional work necessary to create affordable housing and remove fair housing barriers for people with disabilities and other people. Instead of the clear expectation that program participants “ensure that they are taking meaningful actions within their control and that their actions do not contribute to or perpetuate discrimination, segregation, and limitation of housing choice, including against persons with disabilities”²⁹ the language of the proposed rule adopts a weaker and more limited standard with a lower level of accountability.

²⁸ U.S. Office of Management and Budget, “A Budget for America’s Future – President’s Budget FY 2021” at https://www.whitehouse.gov/wp-content/uploads/2020/02/budget_fy21.pdf.

²⁹ HUD, Affirmatively Furthering Fair Housing Final Rule, F.R. 4229. (Vol. 80, No. 136 / Thursday, July 16, 2015).

B. The Proposed Certification Process Eliminates the Obligation to Address Important Priorities

In the preamble, the proposed rule raises the organizational management maxim that “if everything is a priority, nothing is a priority.”³⁰ However, the certification process defined in the proposed rule sets a bar so low that it does not address the purpose of the statutory mandate to AFFH. In the proposed rule, each covered jurisdiction is required to submit a certification that it will AFFH by addressing at least three goals towards fair housing choice or obstacles to fair housing choice, identified by the jurisdiction, that the jurisdiction intends to achieve or ameliorate, respectively. There is no requirement to address all of the covered classes, or even to address what the objective data might evidence as the most significant barriers to fair housing. A jurisdiction could fully comply with the certification requirements of the proposed rule without addressing fair housing for people with disabilities at all – ever.

To assist jurisdictions in selecting the minimum three goals or obstacles, HUD includes a nonexhaustive list of obstacles which the agency considers to be “inherent barriers to fair housing choice.” While we appreciate that the list includes “Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable and accessible to people with disabilities,”³¹ many of the listed items have no bearing on fair housing for members of a protected class. Instead, the goals are characterized as “inherent” obstacles to fair housing choice without any explanation or justification. These include such items as design standards and building and rehabilitation codes and review procedures, rent control, “arbitrary or excessive” energy and water efficiency mandates, wetland or environmental regulations, tax policies that “discourage” investment or reinvestment, and arbitrary labor requirements. These terms are subject to widely varying interpretations and, with no requirements for jurisdictions to meaningfully explain why they chose particular goals or how the removal of “obstacles” would increase nondiscriminatory access to housing and neighborhood opportunity, jurisdictions will be able to spend federal dollars in ways that may further perpetuate segregation or known fair housing issues. Should a jurisdiction choose goals not enumerated in the proposed regulation, they would only be required to include a brief narrative of how those goals would affirmatively further fair housing. No fair housing analysis would be required.

The list of obstacles that HUD considers “inherent” barriers to fair housing choice, even in its most generous reading, could arguably have links to construction obstacles, but increasing the number of housing units doesn’t necessarily increase affordable housing, and even increasing the supply of affordable housing, while a laudable goal, does not by itself address historic patterns of segregation. Affordable housing can still be segregated. The proposed rule is premised on the false notion that if jurisdictions remove the “barriers” to affordable housing development and let the market operate without constraints, it will solve their affordable housing problems and that, in turn, will solve our fair housing problems. Affordable housing, however, does not guarantee fair housing.

Finally, with respect to “High rates of housing-related lead poisoning in housing,”³² any language should address lead *hazards*, not lead poisoning. Congress, HUD, and local

³⁰ HUD, Affirmatively Furthering Fair Housing Proposed Rule F.R. 2044 (Vol 85, No. 9/ January 14, 2020).

³¹ The proposed § 91.325(a)(1)(i)(B) & § 91.425(a)(1)(i)(A)(2).

³² § 91.225 (a)(1)(i)(H) “High rates of housing-related lead poisoning in housing,” & § 91.425(a)(1)(i)(A)(8), with similar implications for § 5.155(c)(1)(v) Rates of lead-based paint poisoning.

jurisdictions must do much more to identify and mitigate or eradicate lead hazards before children become poisoned as a result of these hazards. If this element is included, it should focus on avoiding preventable harms, and HUD should require covered entities to identify and prevent health disparities caused by lead exposure and the development of secondary conditions in people with disabilities.

C. The Proposed Rule Eliminates the AFFH Obligation from the Jurisdictional Risk Analysis

This section of the proposed rule removes a duty to AFFH in favor of arbitrary categories to generate rewards, and even if this was an effective approach, the proposed rule doesn't incentivize the right things. Significantly, the comparison metrics in the analysis "would not reflect the determination that the jurisdiction had complied with FHA." The ranking score as defined in the proposed rule is based on information external to AFFH considerations. The examples of the types of data for each jurisdiction described in proposed §5.155(c) include some important housing considerations, but are not sufficient to for drawing conclusions necessary to further fair housing. The categories do not to break out the data out by disability, race, ethnicity, or any other protected characteristic. With respect to the impacts on people with disabilities and their families, central considerations for AFFH are not limited to accessible housing.

Further, ranking jurisdictions may create incentives (though even these are described vaguely in the proposed rule as eligibility for "potential benefits"), but not accountability. Providing incentives as points in a Notice of Funding Availability (NOFA) process (and penalizing some jurisdictions in the application process) also means that struggling jurisdictions most in need of an infusion of resources could be harmfully disadvantaged. And based on the proposed system, larger cities may be disproportionately ranked lower than smaller cities that don't face the same types of housing market conditions.

The proposed rule also states that "[o]ne of the key ways HUD would confirm that program participants fulfill their AFFH responsibilities would be to reward only jurisdictions that are free of material civil rights violations." A jurisdiction cannot be ranked as "outstanding" if "the jurisdiction or, for a local government, any PHA operating within the jurisdiction, has in the past five years been found by a court or administrative law judge in a case brought by or on behalf of HUD or by the U.S. Department of Justice to be in violation of civil rights law unless, at the time of the submission of the AFFH certification, the finding has been successfully appealed or otherwise set aside."³³ Whether a jurisdiction is free of adjudicated fair housing claims as described in the rule is not, alone, an appropriate measure, as the majority of reported fair housing complaints are investigated by private, nonprofit, fair housing organizations tasked with providing fair housing services in local housing markets.³⁴ And public and private fair housing enforcement often results in settlements that are short of an adverse ruling against the jurisdictions.

D. The Proposed Rule Eliminates Key Obligations of Public Housing Agencies to AFFH

³³ Proposed §5.155(d)(3)(i).

³⁴ See National Fair Housing Alliance, *supra* note 5 at 9.

Proposed changes to PHA requirements are also inconsistent with the AFFH mandate. These requirements are critical, as people with disabilities, especially those between ages 18 and 61, depend on PHAs for affordable housing through the Public Housing and Housing Choice Voucher programs. These programs create opportunities for extremely low-income people – such as persons with disabilities whose sole source of income is SSI – to live in integrated housing in the community. HUD’s Resident Characteristics Report³⁵ indicated that as of January 30, 2020, over 705,000 nonelderly people with disabilities participated in these programs.

The 2015 AFFH Rule required PHAs to examine their programs, identify fair housing issues, and specify actions or strategies to address these issues “in a reasonable manner in view of the resources available.” By contrast, the proposed rule would have PHAs certify that they will affirmatively further fair housing in their programs and in areas under their direct control – but how can PHAs do this effectively if they have not examined where their current operations or activities might be lacking? It is important to note that in HUD’s Consolidated Plan’s Needs Assessment template, significant PHA data is gathered, but that in the Plan’s Strategic Plan template, the only issues required to be addressed are:

- The need to increase the number of accessible units where required by Section 504,
- Strategies to encourage public housing residents to become more involved in management and to participate in homeownership, and
- If HUD designates the public housing agency as "troubled," strategies to provide financial or other assistance to improve its operations and remove such a designation.

This suggests that neither the Consolidated Planning process nor the PHA certification process in the proposed rule will result in identifying or addressing fair housing issues in PHA programs, and therefore, creates little confidence that families covered by the Fair Housing Act, including people with disabilities, will have equal access to these critical resources.

E. Proposed Rule Abandons A Broader Analysis

Community participation for people with disabilities includes issues of accessibility, inclusion and social capital, such as being able to go out and about in the community; access to private, public and alternative transportation systems and information resources; affordable and integrated housing; education; and other neighborhood features such as crime and poverty rates.³⁶ People with disabilities have a right to full participation in all aspects of society, and should have an opportunity to become independent, taxpaying citizens. People with and without disabilities want to be part of a safe, integrated, and inclusive community, with reasonable access to educational institutions, jobs, and services. To ensure fair housing opportunity, communities need to promote investments in infrastructure and developments that include diverse yet integrated housing and transportation that promote economic opportunity for all residents.³⁷

³⁵ U.S. Dept. Of Housing and Urban Development, “Resident Characteristics Report” (2020) at https://www.hud.gov/program_offices/public_indian_housing/systems/pic/50058/rcr_

³⁶ See, e.g., ADA Participatory Action Research Consortium (ADA-PARC), “Community Participation Indicators,” at http://centerondisability.org/ada_parc/community_participation/index.php.

³⁷ NCD Progress Report *supra* note 22 at 69.

HUD's 2015 AFFH rule was based in part on recognition that the neighborhood in which a person lives has an enormous impact on that person's life: educational and employment opportunities, access to healthy food and safe, reliable transportation, the air and water quality to which they are exposed, their opportunities to build wealth, and many others.³⁸ The 2015 rule encouraged the coordination of different planning processes and leveraging multiple funding streams, for the most efficient use of limited resources and maximizing positive impacts. The much narrower perspective embodied in the proposed rule will impede the ability to ensure fair housing choice and derail accomplishment of the goals of the Fair Housing Act.

Finally, people with disabilities, like all people, have intersectional identities, and any weakening of AFFH requirements that hurts people in any of the protected classes under the FHA is an attack on the rights of all. We stand in solidarity with other people and groups facing a history of discrimination and segregation in objecting to this NPRM.

F. Conclusion

For all of the reasons discussed, we urge HUD to withdraw this proposed rule, to reinstate the 2015 AFFH Rule and leave existing protections intact, to uphold its commitment to Affirmatively Furthering Fair Housing. Thank you for the opportunity to comment.

Sincerely,

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
Disability Rights Education and Defense Fund
Epilepsy Foundation
National Alliance on Mental Illness
National Association of Councils on Developmental Disabilities
National Council on Independent Living
Paralyzed Veterans of America
Technical Assistance Collaborative
The Arc of the United States

³⁸ See, e.g., U.S. Cong. House. Committee on Oversight and Reform. Hearing "A Threat to America's Children: The Trump Administration's Proposal to Gut Fair Housing Accountability" February 5, 2020. 116th Cong. 2nd sess. (statement of Jorge Andres Soto, Director of Public Policy, National Fair Housing Alliance).