



CONSORTIUM FOR CITIZENS  
WITH DISABILITIES

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Submitted via Regulations.gov

Kathleen Pennington  
Acting Associate General Counsel for Fair Housing  
Office of the General Counsel  
451 7<sup>th</sup> Street SW  
Washington DC 20410

**Re: *Proposed Rule, Reinstatement of HUD's Discriminatory Effects Standard*, Docket No. FR-6231-P-01, RIN 2529-AB02**

Dear Acting Associate General Counsel Pennington:

The co-chairs of the Consortium for Citizens with Disabilities (CCD) Rights and Housing Task Forces submit these comments in response to the above-captioned proposed rule. CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, integration, and inclusion of children and adults with disabilities in all aspects of society.

We strongly support HUD's proposal to withdraw its 2020 rule implementing the Fair Housing Act's application to disparate impact discrimination and reinstate its 2013 rule. The 2013 rule accurately reflected decades of legal precedent from federal courts and HUD interpreting the FHA, and was consistent with the Supreme Court's decision in *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project*.<sup>1</sup> The 2020 rule, by contrast, diverged significantly from the requirements of *Inclusive Communities*. As HUD notes, the only court that has ruled on a challenge to the 2020 rule preliminarily enjoined it and "concluded that the 2020 Rule did not appear to bring clarity to the discriminatory effects framework, but rather introduced new concepts that had never been part of disparate-impact caselaw without fully explaining their meaning."<sup>2</sup> Among other things, that court found that certain provisions "ran the

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<sup>1</sup> 576 U.S. 519 (2015).

<sup>2</sup> Notice of Proposed Rulemaking, 86 Fed. Reg. 33590, 33593 (June 25, 2021) (citing *Mass. Fair Hous. Ctr. v. HUD*, No. 20-11765-MGM, 2020 U.S. Dist. LEXIS 205633, at \*20-21 (D. Mass. Oct. 25, 2020)).

risk of ‘effectively neutering’ discriminatory effects liability under the Act, and were likely unsupported by *Inclusive Communities* or other judicial decisions.”<sup>3</sup>

The 2020 rule created overwhelming obstacles for people who experience discrimination and seek to enforce their rights based on a disparate impact claim. That rule weighted the analysis of “discriminatory effects” claims unfairly against individuals alleging discrimination, obstructing accountability, making it prohibitively difficult for people facing discrimination to access an appropriate and timely remedy, and dismantling a key tool for addressing systemic discrimination under the FHA.

For example, the 2020 rule replaced the longstanding burden-shifting framework with a new framework placing nearly all of the burden on people the FHA was intended to protect. Among other things, disparate impact plaintiffs have the burden of identifying and addressing justifications the defendant may raise, and of proving that “a less discriminatory policy or practice would serve the interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.” The proposed rule not only sets a much higher bar for plaintiffs but one requiring information that only the entity with the discriminatory policy or practice may have.

People with disabilities and their families already face a national shortage of accessible and affordable housing,<sup>4</sup> particularly the lowest-income people with disabilities.<sup>5</sup> They often have few financial resources and remain among the country’s poorest, and far too frequently, encounter discrimination when seeking housing.<sup>6</sup> The availability of housing that is both accessible and affordable is critically important to make the rights afforded by the Americans with Disabilities Act’s “integration mandate” and the Supreme Court’s *Olmstead* decision a reality for so many people with disabilities. Far too many remain needlessly segregated in institutions, homeless, or with unstable housing and at risk of needless institutionalization. Creating new barriers for these individuals to access needed housing is an ill-conceived approach. HUD should restore the disparate impact protections afforded by Congress to

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<sup>3</sup> *Id.* at 33593.

<sup>4</sup> See, e.g., U.S. Dept. Of Housing and Urban Development, *Worst Case Housing Needs 2017 Report to Congress* (2017), <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).

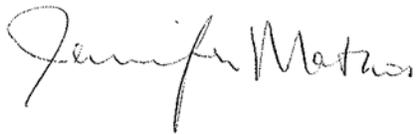
<sup>5</sup> Technical Assistance Collaborative, Inc., et al., *Priced Out: The Housing Crisis for People with Disabilities* (2017), <http://www.tacinc.org/media/59493/priced-out-in-2016.pdf>.

<sup>6</sup> National Fair Housing Alliance, 2018 Fair Housing Trends Report, at 52 (2018), <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.”).

challenge practices that have a discriminatory effect on people with disabilities, such as overbroad criminal background screening requirements.

For these reasons, we strongly support HUD's proposal to rescind the 2020 rule and reinstate the appropriate protections put in place by the 2013 rule.

Sincerely,



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Jennifer Mathis  
Bazelon Center for Mental Health Law



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Allison Nichol  
Epilepsy Foundation



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Stephen Lieberman  
United Spinal Association



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Samantha Crane  
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