

National Commission on Fair Housing and Equal Opportunity
Testimony of Marca Bristo¹
Chicago Hearing
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I. Introduction

My name is Marca Bristo. I have been the President and CEO of Access Living, Chicago's Center for Independent Living, since its founding 28 years ago. As former President of the National Council on Independent Living, I helped craft the Fair Housing Act's 1988 amendments covering people with disabilities and families, and I served on the Congressional Task Force on the Rights and Empowerment of People with Disabilities, which drafted the Americans with Disabilities Act. From 1994 to 2002, I chaired the National Council on Disability (NCD), a position for which I was appointed by the President and confirmed by the U.S. Senate. While chair of NCD, we issued a report entitled "Reconstructing Fair Housing"², which examined the performance of the U.S. Department of Housing and Urban Development (HUD) in enforcing the provisions of the Fair Housing Act that prohibit discrimination against people with disabilities. The report sharply critiqued HUD's performance and issued several recommendations to address identified shortcomings.³

II. Overview of Access Living and Its Fair Housing Work

Founded in 1980, Access Living is one of the nation's largest, most experienced and most prominent disability rights organizations governed and administered by people with disabilities. As a Center for Independent Living established under the federal Rehabilitation Act, our

¹Note that, for the most part, all materials referenced in this testimony are included under separate cover. In instances where a particular referenced report is voluminous, we included only the report's Executive Summary and the cited page(s).

² National Council on Disability, *Reconstructing Fair Housing*, (November 6, 2001), available at www.ncd.gov/newsroom/publications/2001/pdf/fairhousing.pdf.

³ A short biography of my background and experience is included under separate cover.

statutorily-mandated mission includes advocacy to ensure the independence, integration and full citizenship of people with disabilities.

Because the lack of housing is one of the key barriers to this mission, Access Living has historically worked to eradicate housing discrimination. We were the first program funded under the Fair Housing Initiatives Program to conduct disability-specific fair housing testing and, as such, developed the model for disability-based housing testing. For over 16 years, we have conducted a fair housing program focused on disability-based discrimination, which has included: complaint intake; complaint investigation; testing for fair housing violations; enforcement of meritorious claims through negotiation, litigation and other legal strategies; and education and outreach. During this time period, we have: a) handled over 4,500 complaints of housing discrimination; (b) opened over 800 intakes or cases; and (c) filed and/or litigated over 100 complaints with HUD and the local FHAP agency, over 20 lawsuits, and over 30 local administrative actions. These cases have resulted in hundreds of settlements and judgments that have made hundreds of housing units accessible to the disabled, generated hundreds of thousands of dollars in damages, and mandated fair housing training for hundreds of housing providers and their employees.

Access Living's leadership extends beyond litigation. Often, Access Living staff are asked to train architects, developers and landlords on the Fair Housing Act. In 2003, Access Living was the only fair housing organization selected by the City of Chicago to serve on a committee charged with incorporating the Act's new construction requirements into the City building code. The new code, which took effect in July 2004, is perhaps the nation's most ambitious attempt to expand accessibility in housing and achieve compliance with the Act. Access Living was also the only fair housing organization selected to administer testing for

HUD's first study of disability discrimination in housing, "Discrimination Against People with Disabilities: Barriers at Every Step."⁴

III. Historical Context for Housing Discrimination Against Persons with Disabilities

For most of our nation's history, persons with disabilities were viewed as unfit, dangerous, and a detriment to "normal" society. Literally and figuratively, persons with disabilities were treated as second class or even non-citizens. This viewpoint resulted in, condoned and rationalized government-imposed segregation of people with disabilities in every aspect of community life including education, transportation, employment, recreation and, of course, housing. Historically, and even to this day, government-imposed housing segregation has forced persons with disabilities into state-operated and private institutional settings. Because people with disabilities were considered "sick" and in need of treatment and cure, their housing options resembled (and still largely do resemble) medical centers. As Justice Thurgood Marshall noted in describing the history of discrimination against persons with cognitive impairments: "A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow."⁵

Shamefully, people with disabilities had very few housing options aside from institutional settings. Homes, apartment buildings, condominiums, and subsidized housing developments were typically inaccessible. In addition, government and private providers were free to deny housing to persons with disabilities; that is, there was no obligation to serve persons with disabilities or treat them equally. Simply put, if a landlord preferred not to rent an apartment to someone who used a wheelchair, had a visual or hearing disability, a development, cognitive or

⁴ U.S. Department of Housing and Urban Development, *Discrimination Against Persons With Disabilities: Barriers at Every Step*, (June 2005), available at <http://www.hud.gov/offices/fheo/library/dss-download.pdf>.

⁵ *City of Cleveland vs. Cleburne Living Center*, 473 U.S. 432, 462 (U.S. 1985).

psychiatric impairment, or any other disability, he/she was legally protected. Housing providers, with impunity, could slam the door on prospective residents with disabilities.

IV. Disability Rights Movement Leads to Passage of Civil Rights Laws That Prohibit Discrimination, Including Housing Discrimination

In the 1960's, institutional living came to be viewed as isolating and controlling. This spurred a de-institutionalization movement, which resulted in the creation of smaller, yet still congregate facilities in the "community" as an alternative to institutional living. Then, in the 1970's, persons with disabilities began to develop a collective consciousness and to confront their history of segregation, discrimination, mistreatment, medicalization, and paternalism. The disability rights movement had taken root.

The movement's first major political success was the passage of Section 504 of the Rehabilitation Act. Section 504 made it illegal for federal agencies (e.g., the U.S. Department of Housing and Urban Development) and recipients of federal financial assistance (e.g., public housing authorities) to discriminate against persons with disabilities. However, the benefits and protections of Section 504 were not realized until four years later, when – after a major protest by persons with disabilities - regulations implementing the law were finally issued. Sadly, even after the regulations were issued, enforcement remained lax and the promise of the law remained largely unrealized.⁶

The 1980's and 1990's brought a further shift toward integration, inclusion and recognition that persons with disabilities have civil rights. As the disability rights movement strengthened its political muscle, civil rights laws were passed that prohibited discrimination in the areas of housing, transportation, education, recreation and public accommodations.

⁶ Timothy L. Cook, *The Americans with Disabilities Act of 1990: The Move to Integration*, Temple Law Review, Vol. 64:2, 1991, p. 394.

One critical success, in 1988, was the passage of the Fair Housing Amendments Act. In amending the Fair Housing Act, Congress extended its protections - which until then prohibited housing discrimination based on race, gender, national origin, and religion - to people with disabilities. The relevant House Committee Report called the Act's 1988 amendments "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with [disabilities] from the American mainstream."⁷ The Act made it illegal for housing providers to: (a) discriminate against people with disabilities in the rental or sale of housing; (b) refuse to make reasonable accommodations to rules, policies, practices, and services necessary for people with disabilities to equally enjoy the property; and (c) refuse to permit reasonable modifications (e.g., physical improvements to a unit or building), at the resident's expense, necessary to afford equal enjoyment of the property. In addition, the Act required that the design and construction of multi-family buildings (defined as buildings with four or more units) be accessible to people with mobility disabilities. The Act applied with equal force to private and public/government housing providers.

V. Housing Discrimination Against People with Disabilities

A. Disability Cuts Across All Protected Classes, Especially Minorities and the Elderly

People with disabilities are not a small, insular sub-set of our population. Rather, the disabled come from all walks of life and all social, economic, racial, ethnic, and religious backgrounds. Disability is the only protected class that each one of us has the potential to join. Whether disability is acquired from birth, illness or traumatic injury, it is part of the human

⁷ H.R. Rep. No. 100-711 (1988) at 18, reprinted at 1988 U.S.C.C.A.N. 2173, 2179.

condition. It is a condition that will impact virtually all of us or someone we love at some point in our lives.

In 2002, the U.S. Census found that 51.2 million Americans have a disability.⁸ Of these, 25 million people have ambulatory disabilities, 14.8 million have difficulty hearing, seeing or speaking, and 14.3 million have intellectual, mental or emotional disabilities.⁹

Although disability occurs among all ages, racial, ethnic and economic groups, it is more predominant among the elderly and minorities. For example, 36.8% of people over age 64 have a disability that limits their ability to care for themselves, compared with 9.7% aged 16-64. 26.4% of African-Americans and 24% of Latinos have a disability, compared with 16.8% of whites.¹⁰ In Cook County, over 300,000 African-Americans – one in four – have a disability, as do 17% of Latinos.¹¹ Thus, the disabled often belong to two or more protected classes and may encounter multiple forms of discrimination.

Available census data also shows that the residential segregation of people with disabilities in Cook County parallels that of African-Americans and Latinos. Census tracts show that the greatest percentages of the disabled are concentrated almost entirely to the south and west of downtown Chicago, in neighborhoods that are over 80% African-American, as well as northwest and southwest of downtown, in neighborhoods that are over 72% Latino.¹²

Notably, the disability community is growing due to two important phenomena. First, our senior population is expected to explode in the coming years. “By 2030, one in five people in the United States will be over the age of 65As the population of elders grows, it is likely

⁸ U.S.Census Bureau, *Disability Status: 2002*, available at www.census.gov/prod/2006pubs/p70-107.pdf

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Compare* U.S. Census Thematic Maps TM-P046, TM-P004H, & TM-P004B, available at: <http://factfinder.census.gov>.

that the number of people with disabilities also will grow ...”¹³ Second, due to the wars in Afghanistan and Iraq, substantial numbers of veterans have become disabled.

Because disability affects us all in direct, tangible ways, and the ranks of the disability community are increasing, discrimination against people with disabilities should be a matter of deep concern to everyone.

B. Disability-Based Housing Discrimination is Prevalent and Multi-Faceted

Disability discrimination is prevalent. A 2005 HUD study, “Discrimination Against People with Disabilities: Barriers at Every Step,”¹⁴ assessed discrimination against those who are deaf and those who use wheelchairs. The study confirmed widespread discrimination in the Chicago housing market against people with disabilities.¹⁵ Notably, the study compared its findings to those from HUD’s 2002 study of housing discrimination based on race, which also included the Chicago area. Quite notably, it found that:

[P]ersons with disabilities face more frequent adverse treatment in the Chicago area rental market than African Americans or Hispanics ... Not only were testers with disabilities more likely to experience *unfavorable* treatment ... than blacks or Hispanics, they were much less likely to be favored. As a consequence, the net measures of systematic discrimination against persons with disabilities are generally higher than the net measures of discrimination on the basis of race and ethnicity.¹⁶

For people who are deaf and use TTY phones to make rental inquiries, the study found that such prospective renters were turned down or hung up on 25% of the time.¹⁷ Additionally, callers who reached rental agents frequently received less information than non-disabled

¹³ National Council on Disability, *Issues in Creating Livable Communities for People with Disabilities: Proceedings of the Panel*, pg. 5 (October 1, 2007), available at www.ncd.gov/newsroom/publications/2007/pdf/livable_communities_10-01-07.pdf.

¹⁴ U.S. Department of Housing and Urban Development, *Discrimination Against Persons With Disabilities: Barriers at Every Step*, (June 2005), available at <http://www.hud.gov/offices/fheo/library/dss-download.pdf>.

¹⁵ *Id.* at pp. 2-3.

¹⁶ *Id.* at pp. 54 (emphasis in original)

¹⁷ *Id.* at p. 2.

callers.¹⁸ Overall, deaf persons “experienced *consistently* adverse treatment relative to their hearing partners in almost half of all tests.”¹⁹ Similarly, in 25% of all tests, wheelchair users were often falsely told no units were available or that certain units were unavailable, were not invited to inspect units, and were given less information on the application process than non-disabled persons – and this took place in those few units that were, or could be made, wheelchair-accessible.²⁰ They were also refused needed reasonable accommodations and modifications in about one of every six cases.²¹ In general, people who use wheelchairs are frequently “treated as less serious rental customers” and/or denied necessary, reasonable accommodations and modifications.²²

The findings of the HUD study are borne out by the percentage of disability-based housing complaints filed with HUD. Quite tellingly, disability-based fair housing complaints are the most common type of complaint filed with HUD. In FY 2006, 45% of the fair housing complaints received by HUD concerned allegations of disability-based discrimination.²³ In FY 2005, the percentage was 49%.²⁴

The many fair housing cases we have litigated reflect the discrimination found in the HUD study and suffered by persons with disabilities. For example, our fair housing project has confronted the following incidents of discriminatory treatment:

- a condominium association’s refusal to permit a young boy with disabilities to use the accessible front entrance to his condo building, for fear that the boy’s wheelchair would damage the front entrance. The association insisted he use the back entrance, next to the garbage dumpster. When the family refused, the association threatened to fine the family each time the boy used the front entrance;

¹⁸ *Id.* at p. 39.

¹⁹ *Id.* at p. 41 (emphasis in original).

²⁰ *Id.* at pp. 42-47.

²¹ *Id.* at pp. 49-50.

²² *Id.* at p. 42.

²³ U.S. Department of Housing and Urban Development, *The State of Fair Housing, FY 2006 Annual Report on Fair Housing*, p. 23.

²⁴ *Id.*

- a landlord's refusal to modify a "no pets" policy for a prospective renter who was blind and relied on the services of a support dog. The landlord insisted he had no problem renting to someone who was blind, but he would not permit the dog;
- a cooperative's refusal to provide a sign language interpreter for a resident who was deaf during Board meetings. Without the interpreter, the resident would not be able to understand or participate in the meetings;
- a landlord's failure to accommodate a tenant who used a wheelchair when the building elevator was shut down for major repairs. As a result, the tenant was trapped in his unit for nine days. When he was finally relocated, the tenant was forced to sleep on the floor for four days while he waited for the landlord to deliver the tenant's box spring and mattress;
- a retirement community's policy that seniors who use wheelchairs eat in separate dining areas. Our client received a letter prohibiting her from using the "independent living" dining room; and
- a transitional housing program's denial of housing to a homeless man because of his psychiatric disability, his use of psychiatric medications and his failure to respond to illegal and offensive questions by the housing provider about his psychiatric condition.

In addition, we have handled countless cases concerning newly constructed multi-family housing that violates the Fair Housing Amendments Act, which itself is a form of discrimination. Some twenty years after passage of the Act, architects and developers continue to design and construct multi-family housing that is not accessible to people with disabilities. Doing so is tantamount to placing a sign at a housing development stating: "No disabled allowed."²⁵

The new construction cases we have litigated have involved private and subsidized, HUD-funded developments, and have targeted apartment complexes and condominium buildings. For example, several years ago, when the Chicago Housing Authority (CHA) redeveloped Henry Horner Homes, the new development was not accessible to persons with disabilities. Among other violations, entrances were not accessible and bathrooms and kitchens were not usable. As a result of our advocacy, we forced the CHA to remedy the violations.

²⁵ Note that it costs architects and developers virtually nothing extra to make residential housing accessible to people with disabilities.

Also, we recently settled a complaint filed against a developer and architect who designed and constructed a condominium building without an accessible entrance. There were stairs to the front entrance and stairs to the back entrance. In this case, however, because we learned of the violations after all the units had been sold, it was too late to compel retrofits. Hence, the case settled for monetary damages, attorneys' fees, and mandatory fair housing training for the developer and architect.²⁶

In summary, disability discrimination persists, notwithstanding hard-earned civil rights protections.

C. Housing Discrimination Against People with Disabilities is Particularly Devastating

Although housing discrimination is devastating to all protected classes, it hits with additional force against people with disabilities because their housing options are so limited. Two entrenched factors combine to choke their housing opportunities: (a) the dearth of affordable housing; and (b) the lack of accessible housing. This one-two punch presents a daunting challenge to persons with disabilities who seek housing.

1. Affordability

The lack of affordable housing across the country has been well-documented. The affordable housing crisis is particularly problematic for the disability community, which is largely poor and unemployed. The unemployment rate among the disabled in Cook County is over 60% – even excluding thousands institutionalized in nursing homes and other facilities – and 25% of working-age disabled people live in poverty.²⁷ In

²⁶ Note that in cases involving condominium buildings where the violations are discovered after the units have been sold, a common remedy is the establishment of a retrofit fund that individual unit owners can draw from to make accessibility-related improvements, if they so desire.

²⁷ *Cook County, IL Disability Characteristics*, *supra* note 4.

Chicago, it is “estimate[d] that 37% of all households with mobility limitations are also with income levels below \$20,000.”²⁸

Nationally, “working-age adults with disabilities are half as likely as working-age adults without disabilities to be employed (35% versus 78%) even though a large majority of persons with disabilities report they would want to work.”²⁹ Many of these individuals rely on Supplemental Security Income (SSI), yet in a September 2005 study, Senator Jack Reed wrote that rents for a one-bedroom apartment averaged 105% of SSI, and even rents for studios and efficiencies averaged 96% of SSI.³⁰ In the Chicago area, these figures were 142.4% and 122.9%, respectively.³¹ Not surprisingly, then, most accessible units are “above fair market rates,” beyond what many disabled people can afford.³²

2. Accessibility

The lack of accessible housing is the second major challenge. HUD’s 2005 Disability Discrimination Study demonstrated that many median-income units in Chicago are off-limits to people with physical disabilities because they are not accessible:

It is far more difficult for a person using a wheelchair to find rental housing in the Chicago area than for a non-disabled person. More than a third of rental homes and apartments that are advertised in the City of Chicago and surrounding Cook County are in buildings that are inaccessible for wheelchair users even to visit ... In other words, at best, a person who uses a wheelchair is limited to only about two-thirds of the Chicago area rental housing market from the outset.³³

²⁸ *Id.* p. 32.

²⁹ National Council on Disability, *Issues in Creating Livable Communities for People with Disabilities: Proceedings of the Panel*, p. 16 (October 1, 2007), available at www.ncd.gov/newsroom/publications/2007/pdf/livable_communities_10-01-07.pdf.

³⁰ Technical Assistance Collaborative, *Priced Out in 2004: The Housing Crisis for People with Disabilities*, p. i., available at: http://www.c-c-d.org/press_room/pricedout04.pdf

³¹ *Id.* at p. 29.

³² *Id.*

³³ U.S. Department of Housing and Urban Development, *Discrimination Against Persons With Disabilities: Barriers at Every Step*, (June 2005), at p. 42, available at <http://www.hud.gov/offices/fheo/library/dss-download.pdf>.

Simply put, the absence of accessible housing further squeezes housing opportunities for people with disabilities.

Discriminatory treatment, combined with the lack of affordable housing and the gloomy prospect of finding accessible housing, presents a potent barrier for persons with disabilities in need of housing. Because the housing market for people with disabilities is extraordinarily tight, there is virtually no margin for prejudice. Discrimination against people with disabilities can and will lead to homelessness and/or institutionalization.

VI. The Barriers of Discrimination, Affordability and Accessibility Force People with Disabilities into Institutions

As a result of their constricted housing options, people with disabilities, at alarming rates, are segregated into institutions and nursing homes. Approximately 78,000 people in Illinois live in nursing homes, of whom 20% are under age 65, and over 21% – over 16,000 people – state they would rather live in their own home and receive in-home care.³⁴ These numbers are starkly higher in Cook County, where over 30% of those over 65, and over 60% of those under 65, have stated they do not want to be institutionalized.³⁵ The National Council on Disability has cited the lack of housing as one of the most significant barriers to leaving institutions.³⁶

The dearth of viable housing options is of particular importance due to the decision of the U.S. Supreme Court in *Olmstead v. L.C.*³⁷ In *Olmstead*, the Supreme Court held that institutionalization without medical justification is itself discrimination. The Court noted that “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational

³⁴ U.S. Department of Health & Human Services, Centers for Medicare and Medicaid Services (CMS), Minimum Data Set Active Resident Count Report (3d Quarter 2006), available at www.cms.hhs.gov.

³⁵ CMS Minimum Data Set Q1a Report (3d Quarter 2006), available at www.cms.hhs.gov.

³⁶ National Council on Disability, *Olmstead: Reclaiming Institutionalized Lives* p. 18 (2003), available at www.ncd.gov/newsroom/publications/2003/reclaimlives.htm.

³⁷ 527 U.S. 581 (1999).

advancement, and cultural enrichment.”³⁸ *Olmstead* harbors the promise of reversing the institutional bias that finds the lion’s share of long-term care funding under Medicaid allocated to institutional, rather than community-based, settings. Because of this bias, 60.6% of Medicaid’s combined long-term care funding for persons with physical disabilities and cognitive disabilities goes to institutional placements, compared to 39.4% for community-based options.³⁹

Olmstead required States to develop a “comprehensive, effectively working plan” to move people with disabilities out of institutions and into the community.⁴⁰ Unfortunately, because many states, including Illinois, have not reformed their long-term care systems, state officials and departments have been sued to compel compliance. Still, as the principles of *Olmstead* are implemented (with or without the need for litigation), greater numbers of persons with disabilities will be searching for community-based housing. As Illinois’ Consolidated Plan recognizes, “[w]ith the movement away from institutionalization of persons with disabilities toward more integrated, community-based settings, there is a need for more housing that is integrated in and typical of affordable housing projects located in communities.”⁴¹

Addressing this need and protecting the fair housing rights of people with disabilities will be necessary to effectuate the *Olmstead* directive against unnecessary institutionalization. HUD has an important role to play in this regard. On this front, HUD has asked public housing authorities to develop plans to house persons with disabilities who are leaving institutions. We commend HUD for doing so, but this is hardly enough. A more aggressive strategy will be necessary if the promise of *Olmstead* is to be realized.

³⁸ *Id.* at 600.

³⁹ Steve Gold, *FY 2006: Medicaid Expenditures for Institutions versus Community-Based Services*, Article # 222, August 17, 2007, available at www.stevegoldada.com/stevegoldada/archive.php?mode=A&id=222;&sort=D.

⁴⁰ 527 U.S. at 605-06.

⁴¹ *State of Illinois Consolidated Plan* pt II, p. 7, available at: www.ihda.org.

VII. The U.S. Department of Housing and Urban Development (HUD), Through Its Programs and Policies, Lack of Oversight, and Lack of Enforcement, Perpetuates and/or Enables Discrimination

Because the housing market is so compressed for people with disabilities, the disability community needs HUD to proactively and aggressively address its housing needs. However, the sad truth is that HUD, the very agency whose mission is to combat housing discrimination, itself perpetuates and enables discrimination. It does this through its programs and policies, lack of oversight and lax enforcement.

A. Programs and Policies

1. Housing Silos

Despite Section 504's and the Fair Housing Act's proscription against disability-based discrimination, HUD's own programs segregate people with disabilities into congregate settings, which we characterize as "housing silos." First, there are 811 (Supportive Housing for People with Disabilities) properties, which are specifically and exclusively for persons with disabilities. By definition, these are segregated developments. Another congregate housing program is the 202 program. 202 properties are often structured as senior-specific housing that permits younger people with disabilities (under age 62) as residents. As so designed, these 202 developments are congregate housing silos for seniors and persons with disabilities. Also, while some silos house a variety of disabled residents, others are specific to a particular kind of disability, such as a mobility disability, developmental disability, or psychiatric disability. In any way, shape or form, these congregate settings are segregated vestiges of the past.

Relatedly, some 811 and 202 properties link mandatory services with residency. Residents are forced to eat meals on-site and at particular times, to use in-house personal attendants, attend certain counseling/training programs, and accept other forms of mandatory

services. This linking reflects an archaic and patronizing attitude about people with disabilities and compromises their control and independence.

HUD must eliminate its housing silos.

2. New Construction

HUD has never issued meaningful policy guidance on how courts should interpret the two-year statute of limitations period with respect to complaints of new construction violations. Namely, HUD has not indicated when – in its view – the two-year period begins to run. Several theories abound, including the following: (a) the limitations period begins to run when the occupancy permit is issued; (b) the limitations period begins to run when the last unit is sold or rented; (c) the limitations period begins to run when a person with a disability encounters or is injured/harmed by the violation; or (d) the limitations period begins to run after the violation has been corrected. At least in part because of HUD's failed leadership on this issue, courts around the country have issued differing opinions about this question, some friendly to civil rights claimants and some not.

This issue has immeasurable importance because if the limitations period is construed too narrowly, as in examples (a) and (b), above, in many instances the claims of a person with a disability, a fair housing organization, or a disability rights organization will be snuffed out, the developer and architect will be insulated from liability for their discriminatory design and construction, and the building will likely forever remain inaccessible. On the other hand, if the limitations period is construed in a manner consistent with the broad remedial purpose of the FHA to open the housing market to persons with disabilities and prevent their continued isolation, then people with disabilities will have the opportunity to challenge and correct new construction violations.

The promise of the new construction provisions hangs in the balance. Given that very few housing units built before passage of the Act were accessible, newly-constructed housing provides a critical housing option for people with disabilities. If this option is compromised due to a narrow reading of the limitations period, so too will the promise of the new construction requirements. HUD needs to issue an interpretation that upholds and respects that promise.

A second concern regarding new construction compliance is that HUD has identified several “safe harbors” for new construction. That is, HUD has indicated that compliance with the new construction requirements of any of these design and construction standards will satisfy the FHA. The existence of these many “safe harbor” guidelines has generated some confusion in the building industry. HUD has granted the status of “safe harbor” to standards that in some cases contradict the technical guidance issued by HUD. Hence, a single standard is needed to provide “clarity and certainty” to architects and developers concerning the requirements of the FHA. HUD needs to provide leadership to establish a single standard.

B. Lack of Oversight of Public Housing Authorities

Across the nation, HUD does not provide sufficient oversight of public housing authorities. As a result, these authorities are not sufficiently trained on disability issues, are not forced to address internal practices that discriminate against persons with disabilities and violate Section 504, and are not forced to work and coalesce with disability stakeholders. In short, the radar screens for public housing authorities too often ignore the rights and housing needs of people with disabilities. HUD must resolve this critical deficiency.

HUD’s lack of oversight was exemplified when the Chicago Housing Authority (CHA) unveiled its “plan for transformation,” intended to place thousands of people with disabilities into the private housing market by eliminating traditional housing developments in favor of

mixed-income developments. 56.1% of CHA households have one or more persons with a disability.⁴² Under the plan, many of these residents, and most future CHA residents, will be provided, either temporarily or permanently, with housing choice vouchers instead of traditional public housing units.⁴³

However, what the CHA failed to consider was that the private housing market is, generally, inaccessible to people with disabilities. It is simply not enough to provide a voucher to a person with a disability and direct them to search for housing in the private market. Rather, for a voucher to have any utility for a person with a disability, he/she often must secure reasonable accommodations from a prospective landlord and/or permission from a landlord to make reasonable modifications. When the “plan for transformation” was introduced, the CHA had not developed a strategy to address this extra challenge.⁴⁴

In addition, the demolition of public housing in Chicago, under the plan for transformation, has given way to inaccessible, walk-up townhouses that are not covered by the new construction requirements of the FHA and, hence, are mostly inaccessible to persons with disabilities.⁴⁵ With respect to this phenomenon in Chicago, as well as other locales across the nation, HUD has not done enough to insist or encourage that: (a) new townhome units be built “piggy-back” style, which would involve multi-story townhome units on top of single story, accessible ground floor units, the latter of which would be accessible to people with disabilities;

⁴² *Chicago Housing Authority Comprehensive Annual Financial Report* p. 129 (Dec. 31, 2005), available at: www.thecha.org/aboutus/files/cafr_2005.pdf.

⁴³ Thirteen percent of Chicago voucher holders are former public housing residents displaced under the CHA transformation plan. John Bebow *et al.*, “CHA moves tenants out – but not up; ex-residents still live in struggling, segregated areas,” *Chicago Tribune*, Feb. 27, 2005, at p. C1.

⁴⁴ To its credit, due largely to advocacy by people with disabilities, the CHA now funds modification improvements for participants in the housing choice voucher program.

⁴⁵ Although not covered by the FHA, the townhouse developments must comply with Section 504.

and/or (b) new townhomes, if not built “piggy-back” style, at least be “visitable” by persons with mobility disabilities.⁴⁶

A second example of why HUD needs to more actively monitor public housing authorities concerns their “senior housing designation” plans. These plans are intended to move future public housing recipients with disabilities into the open housing market. Under this designation, non-elderly persons with disabilities no longer qualify to live in senior buildings. As these designation plans are implemented around the country, vouchers will increasingly become the only available form of housing assistance for people with disabilities. According to CHAC, the agency that runs Chicago’s voucher program, one in four voucher holders, and persons waiting for vouchers, have disabilities.⁴⁷ Unfortunately, when public housing authorities have developed senior designation plans, they have failed to consider the unique challenges faced by people with disabilities in the private housing market, including the lack of accessibility and the need for accommodations and/or modifications.

A third example of the need for greater HUD oversight of public housing authorities is illustrated by the CHA’s entering into a Voluntary Compliance Agreement (VCA) with HUD to resolve the CHA’s long-standing failure to comply with disability rights laws, including Section 504. The execution of this VCA was an important step forward for HUD and the CHA, for which credit is due. However, had HUD and the CHA been doing their jobs in the first place, a VCA would not have been needed.

Finally, in instances when housing choice vouchers, through various HUD programs, have been targeted for use by persons with disabilities, HUD has not ensured that: (a) when

⁴⁶ When Henry Cisneros was Secretary of HUD, he encouraged the CHA to construct “piggy-back” buildings and ensure new townhouses were “visitable.” HUD currently lacks this type of leadership.

⁴⁷ Similarly, the Housing Authority of Cook County reported that 1,980 of 11,945 families on the waiting list for vouchers contain a person with a disability. *Cook County, Illinois Consolidated Community Development Plan 2005-2009*, *supra* note 17, at p. 129.

released for use, these vouchers are, in fact, used only by persons with disabilities; (b) when these vouchers turn-over (e.g., are no longer needed by the person with a disability, for whatever reason), the new users are also persons with a disabilities; and (c) a modification fund has been established to fund accessibility-related improvements in the private housing market.

In summary, without effective oversight from HUD, people with disabilities will continue to be pinched by public housing authorities that do not (a) comply with disability rights laws and/or (b) provide housing opportunities to the disability community. HUD needs to forcefully address this problem.

C. Enforcement Deficiencies

Notwithstanding the predominance of disability-based complaints, HUD has not made enforcement of disability rights a priority and, likewise, its funding has not been equitably distributed to combat disability-based discrimination. Current funding levels are simply inadequate to meet the challenge of efficiently and effectively processing, investigating and enforcing these complaints. The pointed conclusion reached in 2001 by the National Council on Disability in *Reconstructing Fair Housing* continues to ring true: “[T]he lack of sustained, consistent resource support has seriously and adversely affected HUD’s ability to enforce civil rights laws.”⁴⁸

A related problem is HUD’s lack of enforcement of the rights of persons with disabilities under Section 504. To date, HUD has not made Section 504 enforcement a core focus. This is particularly problematic given that government-subsidized housing is often the only viable housing option for persons with disabilities. Again, the finding reached in *Reconstructing Fair Housing* applies with equal force today: “HUD’s enforcement of Section 504 has been even

⁴⁸ National Council on Disability, *Reconstructing Fair Housing*, (November 6, 2002), p. 11, available at www.ncd.gov/newsroom/publications/2001/pdf/fairhousing.pdf.

more troubled ... data that are available [] show that both enforcement and compliance efforts have been marked by long delays resulting from diversion of limited resources to other activities.”⁴⁹

Also, overall, the private sector, rather than the public sector, has led efforts to enforce the FHA and Section 504. While private sector work is a critical component of effective enforcement and needs substantial funding, we know that when the government puts its legal muscle behind enforcement, its actions resonate profoundly across the fair housing spectrum and cause the public, especially the housing industry, to take notice. When the government acts, it produces a loud and clear message that discrimination against the disabled will be punished by federal officials. Unfortunately, because HUD too infrequently conducts enforcement work of its own, this message is missing.

Moreover, HUD has for too long been focused on numerical achievements rather than systemic accomplishments. That is, HUD is more concerned about the numbers of cases it processes, the numbers of cases handled by FHIPs, and related numerical benchmarks. It has not made systemic work (i.e., broad-based advocacy or litigation aimed at addressing major fair housing problems) a hallmark of its enforcement strategy. This emphasis on numbers is short-sighted. A more strategic vision is needed.

Furthermore, under the Fair Housing Initiative Program (FHIP) and the Fair Housing Assistance Program (FHAP), private housing organizations (FHIPs) and state/local enforcement agencies (FHAPs) around the nation have inconsistent levels of understanding about, and commitments to, disability rights issues. HUD has not done enough to ensure FHIPs and FHAPs are on the same page regarding the investigation, processing and enforcement of disability rights complaints, especially regarding Section 504 claims.

⁴⁹ *Id.* at p. 6.

VIII. Recommendations

HUD needs to do more and to do things differently. To assist the Commission in addressing the concerns raised in this testimony, I offer the following recommendations.

A. Program/Policy Recommendations

- Because “housing silos” are congregate, segregated settings, HUD should eliminate all “housing silos” and instead foster the development of “housing for all.”
- Because of the challenges attendant to persons with disabilities securing housing, a higher percentage of affordable housing constructed with HUD support should be reserved for people with disabilities, and HUD should ensure that units so reserved are actually occupied by people that need accessible features.
- Because HUD is increasingly relying on housing choice vouchers and the use of these vouchers by persons with disabilities presents special challenges, HUD should establish a well-funded national modification fund to pay for reasonable modifications that are necessary to make private units accessible (or at least usable by people with disabilities).
- In accord with the Supreme Court’s *Olmstead* decision:
 - (a) HUD should require public housing authorities to set local preferences for public housing units and designate vouchers for people with disabilities who are leaving institutions;
 - (b) HUD should issue a policy requiring that a portion of HOME funds be designated as rental assistance for use by people with disabilities who are leaving institutions; and
 - (c) Over the next several years, HUD should dramatically increase the number of vouchers it issues for the exclusive use of persons with disabilities and a portion of such vouchers should be designated for those leaving institutions.
- Because HUD does not effectively monitor the provision of housing choice vouchers to people with disabilities, HUD must ensure that vouchers that are supposed to be used by people with disabilities are, in fact, only used by people with disabilities, and that when such vouchers turn-over the new user is a person with a disability.
- Because FHIPs and FHAPs and the various HUD enforcement offices have varying levels of expertise and commitment to disability rights issues, there

should be a greater level of training that educates the groups consistently about the interpretation of the law and new developments, encourages coordination with disability rights organizations/groups, and rewards FHIPs and FHAPs that develop partnerships with the disability community. Such a consistent strategy could also support more systemic investigations of discrimination based on disability.

B. Enforcement, Compliance and Education Recommendations

- Because public housing authorities have not complied with their Section 504 obligations, HUD, over the next five years, should evaluate all public housing authorities for compliance with Section 504 and, as appropriate, enter Voluntary Compliance Agreements with them, and, if necessary, take enforcement action for non-compliance with those requirements. In addition, HUD should take further steps to ensure that public housing authorities know about and comply with the Fair Housing Act's provisions, including the accessibility requirements of the Act.
- Because Section 504 enforcement and educational efforts have been lacking, HUD should evaluate the programs, services and activities of its Regional Offices regarding their respective records on Section 504 and, as appropriate, demand improvements.
- Because Section 504 enforcement and education has never been a priority, future NOFAs should focus on Section 504 enforcement and education, and applicants for such funding should receive "extra points" for establishing specific Section 504 goals (e.g., agreeing to handle a certain number of Section 504 complaints).
- Because disability-based complaints make-up the largest percentage of the complaints filed with HUD, and because HUD's Disability Discrimination Study recommended "heightened public education and enforcement"⁵⁰ to protect the rights of persons with disabilities, HUD should:
 - (a) substantially increase funding to educate the public, especially the design and construction industry and housing providers, about disability-based fair housing rights;⁵¹
 - (b) dramatically ramp up its enforcement efforts in the area of disability.;
 - (c) require fair housing organizations to develop contractual partnerships with disability-based organizations on testing, education and enforcement strategies;

⁵⁰ U.S. Department of Housing and Urban Development, *Discrimination Against Persons With Disabilities: Barriers at Every Step*, (June 2005), at p. 57, available at <http://www.hud.gov/offices/fheo/library/dss-download.pdf>.

⁵¹ HUD has developed a good model - Fair Housing Accessibility First - for training architects and developers. The problem is that funding for this initiative is limited.

- (d) encourage fair housing organizations to do systemic legal work/advocacy. Where systemic work is contemplated, HUD should offer longer grant periods, because systemic work, especially systemic litigation, can last for several years;
 - (e) HUD should ask Congress to loosen the “two year rule” that requires FHIP recipients to have conducted two years worth of enforcement activities to be eligible for a FHIP grant, which in many respects effectively disqualifies consumer-directed disability rights organizations from eligibility;
 - (f) HUD should encourage consumer-directed organizations (e.g., Centers for Independent Living) to apply for education and outreach grants;
 - (g) HUD should permit organizations that receive FHIP enforcement funding to also receive FHIP education and outreach funding, and should seek increased funding to raise the current caps on each type of funding; and
 - (h) HUD should follow-up on HUD’s Disability Discrimination Study as a means to encourage additional, comprehensive disability-based testing and as a lever to support future disability-related enforcement and education.
- To assist in idea-sharing, HUD should proactively disseminate information about “best practices” with regard to disability-related enforcement activities, testing campaigns, compliance and educational activities.

C. Legislative/Regulatory/Legal Recommendations

- To address the issue of 811 “housing silos,” HUD should support HR 5772, which would cap at 25% the percentage of units in 811 developments that can house people with disabilities.⁵²
- Because the application of the Fair Housing Act’s statute of limitations in new construction cases is critical to appropriate enforcement, HUD should issue public written binding guidance that interprets the limitations period broadly and states that a failure to design and construct accessible housing is a violation of the Act that continues until the violations are corrected.
- HUD should convene a small working group, including design and construction professionals and people with disabilities, to:

⁵² Even though this bill does not require the full integration of people with disabilities, the bill is an important step forward.

- (a) consider the propriety of HUD and the Department of Justice charging the U.S. Access Board with the task of developing a single design standard for new construction under the FHA. The new standard would be harmonized with the ADA/ABA Accessibility Guidelines and model building codes to eliminate conflicts with other federal standards and minimize differences with state and local accessibility codes;
 - (b) adopt governmental strategies to identify, stop and modify the design and construction of multi-family residential housing that will not comply with the new construction requirements of the FHA; and
 - (c) implement a plan to modify the Internal Revenue Code so that tax credit properties are considered recipients of federal funding and hence are obliged to comply with Section 504.
- HUD should support the Inclusive Home Design Act that will ensure a basic level of accessibility (i.e., visitability) in all housing built with federal funds but not covered by the Fair Housing Act.

D. Commission-Specific Recommendations

- Because of the predominance of disability-based fair housing complaints, and because the issues addressed in this testimony merit a great deal more time and attention, the Commission should, going-forward: (a) ensure a more global, comprehensive analysis of these issues by encouraging and planning for more disability-related testimony during future Commission hearings; and (b) consider adding an extra day of testimony dedicated to disability-related concerns, which would promote more in-depth coverage of the matters raised in this testimony.
- Likewise, the Commission should revisit the report of the National Council on Disability, issued in 2001, entitled “Reconstructing Fair Housing” and (a) update the findings, (b) assess the extent to which the recommendations have or have not been undertaken by HUD, and (c) use that assessment when drafting the Commission’s final recommendations.

IX. Conclusion

Thank you for the opportunity to present this testimony. For people with disabilities, the preservation and advancement of our fair housing rights, as well as the promotion of our integration into the community, are critical causes. I commend the Commission for re-

energizing the public discourse about fair housing and I wish you the best of luck as your deliberations move forward.