

The National Commission on Fair Housing and Equal Opportunity

Los Angeles, September 9, 2008

Testimony of Bonnie Milstein

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Honorable Commission Members:

I have been invited to testify before you today because of my work in civil rights as a federal government employee and as an advocate for the rights of individuals with disabilities. I have served four Administrations in two federal agencies. From 1976 to 1982, I was Deputy Assistant General Counsel for the Office for Civil Rights in the U. S. Department of Health, Education and Welfare under Presidents Ford, Carter and Reagan. From 1994 to 1996, I was Director of FHEO's Office of Program Civil Rights Compliance in the U.S. Department of Housing and Urban Development under President Clinton. In 1996, I became Regional Director of FHEO's Office of Program Civil Rights Compliance in San Francisco.

As the Commissioners know, the money flowing from HUD to states, cities, businesses, institutions and housing providers throughout the country comes with civil rights responsibilities. My job was to enforce those responsibilities primarily through

- Title VI of the Civil Rights Act (42 U.S.C. Sec. 2000 et seq.),
- Age Discrimination Act of 1975 (42 U.S.C. Sec 6101, et seq.),
- Section 504 of the Rehabilitation Act (29 U.S.C. Sec. 794),
- Title II of the Americans with Disabilities Act (42 U.S.C. 12131, 12132, 24 CFR 35.190[b][4]),
- Architectural Barriers Act (42 U.S.C. 4151 et seq.),
- Executive Order 12892, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing (59 Fed. Reg. 2939, 1/20/1994),
- CDBG Civil Rights Certifications (42 U.S.C. 5304(b)(2), 24 CFR 91.225[a][1]), and
- Section 109 of the Housing and Community Development Act of 1974 (42 U.S.C. 5309).

The laws prohibit recipients of the funds from using them to establish or perpetuate discrimination. It is HUD's task, as it is of each federal agency, to ensure that its funding recipients understand and comply with this mandate. To fulfill this task, HUD, as grantor, must also be HUD, the civil rights enforcer. The Department must convey this message to its staff and to its recipients if it is serious about being effective. It is much easier to give money than it is to withhold it. Secretary Cisneros and Secretary Kemp, both of you forcefully and consistently reinforced HUD's civil rights role. You did so through enforcement of

the laws, but you also did by making FHEO an equal partner with the program offices that manage and distribute HUD funds.

One of the many examples of enforcement successes involved the country's second largest Housing agency, the New York City Housing Authority (NYCHA). A group of public interest organizations had sued NYCHA in 1995 for failing to provide the required numbers of accessible apartment to tenants with disabilities and for failing to comply with other Section 504 requirements. HUD was not a party to the suit, and could have waited for years of litigation to resolve the complaint. Instead, we formed a team consisting of the Offices of General Counsel (OGC), Public and Indian Housing (PIH), Policy, Development and Research (PD&R), and Office of Program Civil Rights Compliance, that I was directing. We travelled to New York together for several months, meeting with NYCHA officials.

NYCHA contended that the number of tenants, applicants, and members of the eligible population who had qualifying disabilities, did not justify Section 504's requirement that 5% of the units be accessible and 2% be useable by tenants with hearing and vision disabilities. They insisted that enough of their 181,000 apartments were accessible to meet the need and that the New York FHEO and PIH Offices had given them many waivers over the years, even though the Section 504 regulations make no mention of waivers. NYCHA also had an undisputed backlog of more than 13,000 requests for reasonable accommodations from current tenants.

Although PIH and FHEO had collaborated on several Section 504 guidance and enforcement matters, the Office of General Counsel had never taken as active a role, nor had statisticians from PD&R. HUD's statistician and NYCHA's conducted simultaneous analyses that convinced NYCHA that it needed a minimum of 9,000 fully accessible units. The age of the buildings and the size of the elevators led to more disputes that required a specific elevator accessibility study. That study's results led to NYCHA's agreement to expand the number of accessible units in nearby buildings when the original buildings were too old or too narrow to generate the required 5%.

Similar issues arose during the course of nearly a year of negotiation, study, surveys, and policy clearance within HUD. The effort resulted in a 1996 Voluntary Compliance Agreement that put NYCHA on firm management reform and construction/rehabilitation schedules, and that included modification and accommodation tenant request forms that other housing authorities have since adopted. Our HUD team hoped that we would be able to replicate our successful team approach that included FHEO, OGC, PD&R, and the appropriate program office. Unfortunately, the Administrations changed, HUD's budgets and staff were downsized, and the Department chose not to adopt the strategy. See, National Council on Disability, *Reconstructing Fair Housing*, November 2001.

In the past 8 years, HUD's failure to address its civil rights responsibilities as meaningfully as its funding responsibilities has generated civil rights conflicts in HUD programs and among its recipients. It has increased FHEO's workload. It has undermined FHEO's credibility and strength within the agency and in public. The following are some examples.

Accessible Public Housing Units

For the populations of extremely low income, very low income and low income homeseekers, housing developed through HUD programs is often the best source of housing. For those who require accessible housing, HUD subsidized housing is often the only source of housing. *See, "Accessible Homes? Not Really, Say Disabled Residents," New York Times, 8/27/08.* Yet, the Department and the Administration have not only requested inadequate budgets but have stymied the production of adequate supplies of affordable and accessible housing by failing to enforce civil rights mandates and by issuing guidance that was misleading and harmful.

Under HOPE VI and other HUD programs, thousands of accessible and adaptable public housing units have been razed. The buildings were often blighted beyond recovery, and should have been replaced. But HUD failed to adopt the former "one-for-one" requirement of earlier Administrations or to prioritize the replacement of accessible housing. Many new units have been built as townhomes, simply adding to the housing crisis faced by disabled individuals and families, and particularly distressing in light of the elderly population bulge.

Even those who are public housing tenant continue to face continuing discrimination from Housing Authority staff unfamiliar with the civil rights requirements. PIH issued an excellent Occupancy Guidebook in 2003, and, more recently, Accessibility Notices. Unfortunately, the Department chose not to support the publication with adequate and on-going notification and training for both HUD and Housing Agency staff. Too often, tenant advocates have been the first to bring the Guidebook and other HUD Notices to Housing Agency staff attention during affirmative litigation and eviction actions.

Homeownership and Section 504

The Section 504 regulations unambiguously apply to the homeownership programs that were funded the year that the regulations were published, 1988. Until this Administration, HUD applied its program related civil rights requirements to the current version of the program. Instead, HUD has promoted ambiguity about 504's continuing applicability to the newer Homeownership regulations and has published advice that is inconsistent with the un-amended 504 regulations and misleading. Because of this, HUD is responsible for the construction of inaccessible homes that were required to meet Section 504 accessibility mandates.

The 504 regulations require a percentage of newly constructed housing to be built as accessible to individuals with mobility and sensory impairments. "New multifamily housing projects . . . shall be designed and constructed to be readily accessible to and usable by individuals with handicaps." 24 C.F.R. 8.22(a). A minimum of five percent of the total dwelling units or at least one unit in a multifamily housing project, whichever is greater, shall be made accessible for person with mobility impairments. An additional two percent of the units (but not less than one unit) in such project shall be accessible for persons with hearing or visual impairments. 24 C.F.R. 8.22(b)

Similarly, 24 C.F.R. 8.23 imposes similar minimum unit requirements when existing housing undergoes substantial renovation. In both new construction and substantial alteration, the Department may prescribe a higher percentage based on local needs. A "multifamily housing project" is defined as a project containing five or more dwelling units. 24 C.F.R. 8.3. Thus, HUD funded single family homes that are built as part of a single project and that produce more than 5 homes, must include 5%, or at least one

home, that is accessible to wheelchair users and 2%, or at least one home that meets the needs of occupants with hearing or vision disabilities.

Notice CPD-00-9 (12/26/2000), issued by HUD's Office of Community Planning and Development (CPD), advised HOME and CDBG recipients that "with respect to Section 504, this Notice does not address the applicability of Section 504's physical accessibility requirements to homeownership programs financed with HOME/CDBG assistance." CPD's more recent 2005 Homeownership Accessibility Notice -05-09 repeats the same Note and mischaracterizes Section 504's applicability to homeownership programs by stating, "For purposes of this Notice, the references to multifamily housing projects covered by Section 504 only apply to multifamily *rental* housing projects" (emphasis added). In effect, the current HUD Administration is telling recipients that Section 504 does not apply to Homeownership programs. The Administration is well aware of the firestorm that would ensue if they opened the Section 504 regulations to change through the Administrative Procedures Act. Instead, HUD has chosen to accomplish its goal of limiting the applicability of Section 504 by using Departmental Notices as its back door route.

The Office of Public and Indian Housing similarly denies that Section 504 applies to its homeownership program. In guidance to Housing Agencies for homeownership projects funded through HOPE VI, HUD states, "The HOPE VI Program *encourages* PHAs to include 5% of for-sale units accessible for people with mobility impairments and 2% for people with hearing and vision impairments." Notice PIH 2002-01 (1/22/2002), "Program Specific Compliance/Activities, Section B(2) HOPE VI. In fact, the 504 regulations require, rather than encourage Housing Agencies using HOPE VI for new construction to ensure that five percent of the units are accessible for people with mobility impairments and two percent are accessible for people with hearing and vision impairments. 24 C.F.R. 8.3, 8.22(b).

The result of HUD's incorrect interpretation of the civil rights law is serious. Given the growing numbers of elderly Americans, and housing crisis that has faced elderly and younger home seekers with disabilities for years, HUD is funding the construction of more *inaccessible* housing. HUD is not fulfilling its Section 504 federally conducted responsibility to prevent the use of our tax dollars to perpetuate the type of disability discrimination addressed by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581.

In 1999, the Supreme Court decided that the unnecessary institutionalization of individuals with disabilities, when home and community-based care would meet their needs, violated the Americans with Disabilities Act (ADA) and constituted discrimination based on disability. The Court rejected the State of Georgia's defense that it didn't have enough housing in the community to be able to release patients who were ready for release. Disability and civil rights advocates demanded that the Federal government address barriers that Federal agencies posed to the creation of adequate numbers of affordable, accessible housing. The President responded with the "New Freedom Initiative," Executive Order, E.O. 13217. It directed six federal agencies, the Departments of Justice, Health and Human Services, Education, Labor and Housing and Urban Development and the Social Security Administration to "evaluate the policies, programs, statutes and regulations of their respective agencies to determine whether any should be revised or modified to improve the availability of community-based services for qualified individuals with disabilities" and to report back to the President with their findings.

In a less than candid response to the White House "New Freedom Initiative" request for information on how the agency was assisting individuals with disabilities secure housing in their communities. HUD

listed, as an “[e]xample of how its CDBG Program address the needs of persons with disabilities... [a]ssistance to support homeownership for persons with disabilities and promote full access to community life.” Notice CPD-05-03, 6/3/2005, and, www.hud.gov/offices/fheo/disabilities/eorder13217.cfm. Of course, the opposite is true. HUD has clearly communicated to recipients of all of its Homeownership funds that they need not worry about complying with Section 504’s accessibility requirements. (The Fair Housing Act does not require single family homes to include the Act’s universal design requirements for new construction.)

Designated Housing

In the “Designated Housing” program, HUD’s guidance to Public Housing Agencies also reduced housing resources for individuals with disabilities. Since 1992, federal law has permitted public and private HUD assisted housing providers to restrict or exclude people with disabilities under age 62 from residing in “elderly” public housing and in Section 8 project –based apartments “for the elderly.” 42 U.S.C. 13,611. Prior to the 1992 law, these units were available on an equal basis to both elderly and disabled applicants. In 1996, Congress amended the law to require less documentation from housing providers that the allocation plans designating housing as elderly-only would not disproportionately and negatively affect non-elderly individuals with disabilities.

HUD altered its mandated review of the allocation plans first by removing their review from Headquarters to the Strategic Applications Center in Chicago. When HUD transferred review authority to Regional Offices, the Department’s website also eliminated data showing the number of designated units, applications, replacement subsidies and other nation-wide information. Finding designated projects now requires a Housing Agency by Housing Agency review. See, Notice PIH 2005-2 (1/5/2005). At the same time, HUD published new procedures that ignored HUD’s own public participation regulations in, “Review of Designated Housing Plans: A HUD Processing Guidebook for Public Housing Headquarters and Field Staff (undated).” The regulations required that Housing Agencies notify the public of their draft Allocation Plan, provide a 30 day comment period, hold a public hearing, and make available free and accessible copies of the Plan. The final Plan must identify the groups consulted and comments submitted. 24 CFR 945.203(b), (c). The Guidebook contains none of these requirements.

HUD’s Budget and Discrimination

HUD, research institutions and non-profit housing and disability organizations all agree that individuals with disabilities are among the worst housed people in our country. HUD’s Worst Case Housing Need studies consistently highlight elderly households, families with children and non-elderly disabled households without children as having the most difficulty finding and retaining adequate housing. HUD estimates that 542,000 of the 6 million renters with worst case housing needs are individuals who have disabilities, are not elderly and have no children.

The Technical Assistance Collaborative (www.tacinc.org) reports that the more accurate number of this population numbers 1.3 – 1.4 million households. The Consortium of Citizens with Disabilities (www.ccd.org) estimates that the number rises to 2.3 - 2.4 million households when disabled families with children are added. In other words, 50% of all non-elderly households with worst case housing needs include adults with disabilities. See, Ann O’Hara, et al, *Priced Out in 2006: People with Disabilities Left Behind and Left Out of National Housing Policy*, www.tacinc.org. Given these statistics,

HUD's failure to include accessibility considerations into all of its construction and demolition policies, especially in public housing, makes the Department complicit in this housing and civil rights crisis.

Finally, the saddest housing issue has been the country's lack of commitment to decent, safe, affordable housing. Cushing Dolbeare and Sheila Crowley graphically demonstrate how "1976 was the high watermark of subsidized housing assistance, a level never previously achieved and never duplicated." *Changing Priorities: The Federal Budget and Housing Assistance, 1976-2007*, National Low Income Coalition, August 2002, p.9. We now have more families in "worst case housing" situations than in subsidized housing. HUD and the Administration have contributed to this tragedy. Each year, the Department has submitted budget requests for less funding than the year before. Even as it touts its support for accessible housing, the Department has requested Congress to reduce funding for rental subsidies. It has repeatedly proposed to eliminate the development of new units under the Section 811 Supportive Housing for Persons with Disabilities program – the federal program specifically created to house tenants with disabilities who lost their housing when it was designated for elderly only and which is also intended to enable thousands of people to move from institutions into their communities. See, Ann O'Hara, et al, "Opening Doors: Priced Out in 2006: People with Disabilities Left Behind and Left Out of national Housing Policy," www.tacinc.org, July 2007.

For Fair Housing and civil rights purposes, the loss of funding for HUD programs and the decreasing supply of housing means that Housing Agencies struggle with meeting the accessibility needs of their ageing populations when, year after year, they receive less than 100% of their approved budgets. HUD's response has been to tell Housing Agencies across the country that they haven't operated efficiently. As an example of how the agencies can save money, HUD has told them to review all of the reasonable accommodations that the Housing Agencies provided to their tenants, often only after protracted litigation. Tenants have had to try to prove, once again, that they need a second bedroom to house their medical equipment or their personal care attendant. These tenants are often the least likely to have private health care professionals whom they can call for the written confirmation that the requested accommodation is necessary.

HUD's message has not been lost on Public Housing directors. When I recently presented Fair Housing and Section 504 training to public housing staff at the request of their director, she thanked me, saying that her staff needed to know the law. Then she added, "But you know, all these so-called disabled tenants are just trying to get one over on us."

Public housing providers are not the only ones struggling to provide affordable housing. Private developers compete for the low income housing tax credits that are now, by default, the largest source of affordable housing. LIHTC housing rarely if ever creates housing affordable to extremely and very low income home seekers. The fact that the Department of the Treasury refuses to define the credits as federal assistance, and therefore not required to meet Title VI or Section 504 mandates is a separate scandal.

The scramble for affordable housing and rental subsidies becomes real when thousands stand in line for a chance to win the lottery for one of 50 new apartments. Policy makers pit one protected group against another for scarce housing resources, resulting in non-elderly individuals with disabilities fighting elders for too few, accessible and affordable apartments. Nursing homes and jails were never meant to

substitute for affordable housing, and administrators continue to hold thousands of people who are ready to move back to their communities because of the absence of affordable housing.

Thank you for the opportunity to appear before this Commission.