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Strong Enforcement is Required to Promote Integration on the Basis of Race and Disability

The Affirmatively Furthering Fair Housing Obligation is a Vital Toll Against Racial Segregation

> "Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph—even as [she] OK's public housing sites in the heart of the [African-American] slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which [African-Americans] will be barred….These and similar acts are committed daily by officials who say they are unalterably opposed to segregation, and have the memos to prove it….But when you ask one of these [HUD administrators] why, despite the [fair housing legislation] most public housing is still segregated, he invariably blames it on regional custom, local traditions, personal prejudices of municipal housing officials." --Senator Edward Brooke: 114 Cong. Rec. 2281 [1968]

Senator Brooke, one of the chief architects of the Fair Housing Act (FHA) made it clear that a primary purpose of Title VIII was to remedy the "weak intentions" that have led to the federal government's "sanctioning discrimination in housing throughout this Nation." As a consequence, §3608(e)(5) of the FHA explicitly requires HUD to "administer [housing] programs…in a manner affirmatively to further the policies of [the Fair Housing Act]," including the general policy to "provide, within constitutional limits, for fair housing throughout the United States."

Federal courts have repeatedly held that §3608 reflects a Congressional "desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases…." *NAACP v. Sec'y of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987). Or, as the Third Circuit previously put it, "[HUD cannot] remain blind to the very real effect that racial concentration has had in the development of urban blight…[and] must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts." *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970).

The obligation imposed by §3608 is an affirmative obligation, and calls on HUD to ensure that federal housing and community development funds are used to reduce racial segregation, not to perpetuate or exacerbate it. The Second Circuit made clear that "[t]he

affirmative duty placed on the Secretary of HUD by § 3608(e)(5)… requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Action must be taken to fulfill, as much as possible, the goal of open integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973).

"[E]very court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others)…This broader goal [of truly open housing] … reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." *NAACP v. Sec'y of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987).

The statute's mandatory provisions apply not only to HUD itself, but to its grantees. As one federal court has put it: "When viewed in the larger context of Title VIII, the legislative history, and the case law, there is no way—at least no way that makes sense—to construe the boundary of the duty to [AFFH] as ending with the Secretary…. [t]hese regulations unambiguously impose mandatory requirements on the [public housing authorities] not only to *certify* their compliance with fair housing laws, but actually *to comply*." *Langlois v. Abington Housing Authority*, 234 F.Supp.2d 33, 73, 75 (D.Mass. 2002). *See also Otero v. New York City Housing Authority*, 484 F.2d 1122, 1133 (2d Cir. 1973)(holding that the affirmative duty placed on the HUD Secretary by § 3608(d)(5) also applied to "other agencies administering federally-assisted housing programs.")

In fact, HUD itself can be liable for violation of §3608(d)(5) "when HUD is aware of a grantee's discriminatory practices and has made no effort to force it into compliance with the Fair Housing Act by cutting off existing federal financial assistance to the agency in question." *Anderson v. City of Alpharetta, Ga.*, 737 F.2d 1530, 1537 (11th Cir. 1984).

The AFFH obligation is imposed on grantees of all of HUD's housing and community development programs, including the Community Development Block grant program (24 C.F.R. §570.601 *et seq.*), the HOME program (24 C.F.R. §92.350, incorporating 24 C.F.R. §5.105), Public Housing (24 CFR §982.53(b)), the Section 8 Housing Choice Voucher Program (24 C.F.R. §982.53, incorporating 24 C.F.R. §903.7(o)), and all entities required to complete a Consolidated Plan (24 C.F.R. §§91.225, 91.425). All of these entities are required to conduct an analysis of impediments to fair housing (sometimes referred to as an "AI"), take appropriate actions to overcome those impediments, and maintain records reflecting the analysis and the actions taken.

Federal law makes clear that the AFFH certification is precondition to the receipt of federal funds. In other words, no AFFH certification, no federal funds. But while HUD's statutory and regulatory mandate concerning AFFH is clear and explicit, the agency has not developed the enforcement tools or the political will to take on the powerful constituent groups, like mayors, governors and county executives who are the primary recipients of CDBG and other related funds (totaling roughly $7 billion per year). HUD's office of Community Planning and

Development ("CPD") clearly sees those elected officials as its chief constituents, and HUD's office of Fair Housing and Equal Opportunity ("FHEO") is often seen as an obstacle to satisfying those constituents. Under those circumstances, and given the strong political influence that elected officials have had within CPD and with HUD Secretaries of both political parties, it is little wonder that HUD rarely, if ever, actually terminates or suspends CDBG and other HCD funding for failure to AFFH. In fact, at the April 2008 National Fair Housing Policy Conference in Atlanta, a long-time HUD employee said he could think of only three instances over 20 years in which HUD such action.

My firm is currently engaged in a lawsuit called *U.S. ex rel. Anti-Discrimination Center v. Westchester County, New York*, filed under the federal False Claims Act, and pending in the U.S. District Court for the Southern District of New York. My client chose this particular enforcement mechanism, in part, because HUD's own enforcement of the AFFH obligation has been so minimal and ineffective, and many observers have lost faith in HUD's ability to enforce the AFFH obligation. When recipients of federal funds know that HUD will not be looking closely at their AFFH certifications, many will be tempted to just sign whatever certification they need to sign to get the money from HUD.

Westchester has historically received between $7 million and $10 million per year in federal housing and community development funds, most notably from the CDBG program. Like the other 1100 CDBG recipients around the country, Westchester is required to submit a certification that it will affirmatively further fair housing. 24 C.F.R. § 570.601(a)(2), 24 CFR § 91.225(a). In the face of strong evidence of residential racial segregation (while comprising just over 15% of the County's population, African-Americans are highly concentrated in Yonkers, New Rochelle, Mount Vernon, White Plains, Peekskill, Ossining and Greenburgh, and nearly half of Consortium Municipalities have African-American populations of 1% or less), Westchester repeatedly certified, over many years, that it was AFFH.

But Westchester's Analyses of Impediments (AIs) from 1996, 2000 and 2004 do not identify any impediments on the basis of race, color, national origin or any other protected class, even though County is part of one of the most segregated regions in the country. There is no mention in any of them of race discrimination or racial segregation, and no analysis of whether these might operate to diminish fair housing choice. Westchester refused to identify or analyze community resistance to integration on the basis of race and national origin as an impediment.

The complaint alleges that, as a matter of policy, the County refused to monitor the efforts of participating municipalities to further fair housing and did not inform them that Westchester might withhold federal funds if the municipality did not take steps to further fair housing, and that from April 2000 to April 2006 (the so-called "false claims period"), Westchester never required a participating municipality to take any steps to increase the availability of affordable housing or otherwise affirmatively further fair housing.

In its court filings, the County has defended its failure to identify race-based impediments in its AIs by suggesting that "income is arguably a better proxy for determining need than race when distributing housing funds," and that race is "not among the most challenging impediments" to fair housing in Westchester.

In July 2007, the Court denied the County's motion to dismiss the lawsuit holding, in part: "In the face of the clear legislative purpose of the Fair Housing Act, enacted pursuant to Congress's power under the Thirteenth Amendment as Title VIII of the Civil Rights Act of 1968, to combat racial segregation and discrimination in housing, an interpretation of 'affirmatively further fair housing' that excludes consideration of race would be an absurd result." *Westchester,* 495 F.Supp.2d at 387-88. Cross-motions for summary judgment will be filed September 30, 2008.

Policy Recommendations

Bringing any private civil rights litigation can be complicated and expensive, and that is particularly true in litigation under the False Claims Act. But there are a number of concrete steps that could be taken immediately to strengthen the federal government's enforcement of the AFFH obligation:

- Remove federal oversight and enforcement of the AFFH obligation from HUD as a means of overcoming the political influence of recipients with CPD and the Secretary's office. Invest that authority in an independent agency whose director is a career employee and not a political appointee, and empower the agency to investigate and resolve complaints involving recipients' failure to AFFH in any program receiving federal housing and community development funding.

- Make the AFFH obligation enforceable by private parties (including fair housing and other community groups) who are knowledgeable about impediments to fair housing and about appropriate actions to overcome those impediments. This could be accomplished by amending the definition of "discriminatory housing practice" provided in 42 U.S.C. §3602 to include "a failure to comply with the obligations of section 3608(e)(5)."

- Promulgate AFFH regulations that contain performance standards, and that require municipalities to obtain the concurrence of local fair housing enforcement groups that the Analysis of Impediments has actually identified and analyzed fair housing impediments in the jurisdiction, implemented appropriate actions to overcome those impediments and that the AI otherwise complies with those performance standards.

- Require that recipients of federal funds submit their AIs to the new independent agency, and fund an organization with the capacity to collect and analyze all AIs for their compliance with the federal statutory and regulatory requirements. Such an organization would also work with fair housing and community groups around the country to enhance their capacity to review and analyze AIs and to participate in the process of identifying fair housing impediments and appropriate actions to overcome them. Such an organization would also be charged with identifying exemplary AIs and promoting them as models for other communities.

Strong Enforcement of the FHA's Disability Provisions Required for True Community Integration

When Congress passed the Fair Housing Amendments Act of 1988, it said the new law was:

> [A] clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

H.Rpt. 100-711, at p. 18, reprinted at 1988 U.S.C.C.A.N 2173, 2179.

Having spent most of the past 20 years immersed in housing issues affecting people with disabilities, I have come to the conclusion that HUD's enforcement of disability provisions of the Fair Housing Act does not evidence any such "national commitment." Rather, enforcement has grown stodgy and bureaucratic. Even though disability claims comprise the largest category of complaints in many regions, many complaints languish on the desks of investigators who do not understand some of the basic elements of a disability discrimination claim. Processing times are still too slow, particularly for cases in which the refusal to grant an accommodation or modification means that a person with a disability loses the opportunity to live in a house or apartment that meets her other needs.

I have heard countless stories from victims of disability discrimination and their advocates that investigators from HUD and its partner state and local enforcement agencies require that disability discrimination complaints be fully supported with evidence before they are accepted as complaints. Rather than follow its own 1999 guidance on the reasonable cause standard. In that guidance, HUD explained why using more stringent tests (like the summary judgment standard in litigation, or the "more likely than not" or Rule 11 standards) was inappropriate. That memo concludes that

> [Reasonable cause] exists when FHEO can conclude based on all relevant evidence, viewed not as an advocate for either complainant or respondent but rather objectively in light of the Act's prohibitory language and case law, that a violation may have occurred. In the event of conflicting yet reasonable believed evidence after a full investigation, the evidence may be construed in favor of complainant. If the evidence appears to support complainant and respondent equally, a reasonable cause finding also may be made.

When victims of disability discrimination feel like they have been given the "third degree" in order to get their FHA complaints processed, it is no wonder that they feel that the HUD administrative system will not give them justice.

As a co-author of the report *Reconstructing Fair Housing*, published in 2001 by the National Council on Disability, I know that there is wide variability between HUD regions concerning the quality of investigations and the thoroughness and speed with which cases are

resolved. None of those variables has changed appreciably in the past seven years since the report was released. And while HUD has upgraded the training for its own employees and the staffs of state and local government fair housing enforcement agencies, I still consult regularly with complainants or their advocates who have encountered investigators who don't understand the basic elements of disability case and so make determinations that are plainly wrong.

When NCD issued its report in 2001, we were appalled to report that HUD had found cause in only 96 cases in FY 2000. That number now looks very robust as compared to 31 cases that HUD charged in FY 2007. Further, the fact that HUD administrative law judges heard only two cases in the three-year period ending with FY 2007 suggests that the responsive, inexpensive and prompt administrative enforcement option envisioned by Congress in the 1988 Amendments Act has proven to be anything but. These days, a victim of discrimination who cannot find or afford a lawyer to litigate her claim is left with little more than the empty shell of an administrative process at HUD.

NCD's report concluded in 2001 that "ineffective enforcement has led to a loss of public trust that the protections of the Fair Housing Act [and related laws] will be enforced." *Reconstructing Fair Housing,* p. 4. The dysfunction, or disappearance, of HUD's administrative complaint system sends a message to housing providers around the country: Fair housing enforcement is not a national priority, and most acts of discrimination will not be detected and punished.

Beyond complaint processing and ALJ hearings, HUD has other means of articulating its enforcement position in a way that can improve compliance with the FHA. The enormously helpful joint HUD-DOJ statements on reasonable accommodation and reasonable modification are the two most obvious examples. These plain-English guides have been used by thousands of advocates and people with disabilities to secure the rights protected under the FHA, without the need to hire a lawyer or file a complaint. That makes it all the more puzzling that HUD has not taken a similar approach in other areas, most significantly on the issues of the statute of limitations and continuing violations theory in new construction, and the application of the FHA's disability provisions to assisted living and continuing care retirement communities.

Policy Recommendations

For people with disabilities, "integration" means being part of the "American mainstream," and not being treated unfavorably because of a housing provider's biases or stereotypes about disability. Vigorous and timely enforcement of the FHA is especially important in the context of disability because a single discriminatory act (being it disparate treatment, the refusal to accommodate or inaccessible design and construction) can be the difference between someone being housed in an integrated setting and being relegated to some more institutional setting like a group home or assisted living or other housing set aside for people with disabilities.

- Congress should establish an independent agency, headed by a career employee, to investigate Title VIII complaints and to take enforcement action.

- Congress should fund that agency in a manner that will permit investigation of claims and determinations of cause within 100 days so that people with disabilities are not left wondering whether their rights will be enforced

- HUD should issue guidance providing that the continuing violations doctrine applies in the context of the design and construction of "covered multifamily units."

- HUD should guidance, either by itself or jointly with DOJ, on the applicability of the FHA to seniors with disabilities living in assisted living or continuing care retirement communities.

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