October 18, 2019

Dear Secretary Carson,,

We write on behalf of The Ability Center of Greater Toledo (The Ability Center), a consumer-controlled, cross- disability Center for Independent Living serving seven counties in northwest Ohio.[1] On behalf of The Ability Center, we strongly oppose the proposed changes to HUD's Implementation of the Fair Housing Act's Disparate Impact Standard and ask that HUD refrain from implementing the new rule as written. Much housing discrimination against people with disabilities, which the Fair Housing Amendments Act was designed to counter-act, is based on outmoded attitudes towards people with disabilities that are not always recognized as discrimination by those creating policy. However, policies created by those attitudes often have a significant disparate impact against people with disabilities that prevent access to jobs, education, transportation, and community inclusion.

As of 2010, recent federal research estimates that there are 54.4 million people with disabilities in the civilian population living in the United States, representing approximately 18.7% of the non-institutionalized population.[2] Survey estimates suggest that there are about 35,085,550 households with one or more people with a disability; this figure constitutes approximately 31.7 percent of the 110.6 million households in the United States in 2007[3] and will only increase as our country ages.

While many people with disabilities of any age are able to live independently, current research shows that a growing number are unable to find housing that meets their needs.[4] Reasons include location, quality, physical accessibility, and affordability.[5] Consolidated plan data showed that nearly 13 million homeowners in the United States with mobility impairments have a housing problem.[6] One important area where we see this issue is in local zoning laws, an area that is regulated by the Fair Housing Act. Regulatory barriers, including zoning, local politics, and planning practices greatly affect where and if affordable, integrated, and accessible housing is built.[7] Local zoning and planning also greatly affect whether a person with a disability is able to modify their home in order to remain, and live independently, for the long term.

Historically, land use and zoning ordinances have been used to keep people with disabilities out of particular neighborhoods, especially where there is neighborhood opposition to housing. Pre-Fair Housing Amendments Act, these actions were challenged as unconstitutional under the Equal Protection Clause, such as in *Cleburn v Cleburn Living Center*,[8] where the City

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[1] See The Ability Center website, https://www.abilitycenter.org/we-can-help/programs/.
[2] National Council on Disability, The State of Housing in the 21st Century: A Disability Perspective (Jan. 19, 2010), available at https://www.ncd.gov/publications/2010/Jan192010#_edn586R.
[3] Id.
[4] Id.
[5] Id.
[6] Id.
[7] Id.
[8] 473 US 432 (1985).

of Cleburn had an ordinance that required a "special use permit" for hospitals for the "insane or feeble-minded" and then denied a permit to a group home that wanted to locate in a residential neighborhood because it was unpopular. Post-Fair Housing Amendments Act, people with disabilities have a stronger tool to challenge local government or housing provider actions that either seek to keep them out of certain areas or do so unintentionally because of their disability. Both types of problems can be tackled with a disparate impact analysis, as there is not always evidence of clear intent. Some examples are unnecessary regulations that prohibit group homes from being established within certain distances from each other; denials of special use permits when a group home wants to be established; moratoriums on the establishment of group homes; and ordinances or policies that prohibit fences, locks, pets, or certain home modifications. Locally, we have seen restrictions on building ramps (for people with mobility impairments); fences (for people whose children have autism or service animals); an inability, based on a local ordinance) to exit from an accessible home entrance because it exited into an alleyway; and group home restrictions that benefit from a disparate impact analysis and outreach without even the use of litigation.

These actions and policies that deny housing, and especially inclusive, integrated housing, to people with disabilities, also, in effect, threaten the ability of people with disabilities to live lives like anyone else, in areas of their choice, and their access to jobs, education, transportation, and, generally, self-sufficiency and community inclusion.

The Department of Housing and Urban Developments (HUD) proposed changes to the disparate impact rule go against the purpose of the Fair Housing Act (FHA). While our Center can understand reasonable regulations, the proposed changes place an undue burden on Plaintiffs seeking to counter-act years of people with disabilities being placed in institutions rather then allowed to be part of the greater community. The intention of the FHA is to make sure that profit and prejudiced opinions do not outweigh the importance of providing fair and balanced service to all people regardless of age, race, disability, social class, gender identity, or faith.

If the proposed rules go into effect, then there will be an undue burden on people who have been discriminated against to not only prove that they were discriminated against intentionally, but also to provide an alternative policy.A five element test including two causal elements, one of which is the new standard of , "robust cause," is an almost impossible standard to meet even if it is clear that actual disparate impact discrimination is occurring. Additionally, the standard of, "arbitrary, artificial, and unnecessary," is too strong to accomplish the mission of the Fair Housing Act. While the rule consistently cites *Housing and Community Affairs v. Inclusive Communities Project, Inc.* as the reason for the new rule, Justice Kennedy notes in his opinion that the disparate impact analysis has worked both for advocates and policymakers. In *Inclusive Communities Project*, "several of our Nation's largest cities – entities that are potential defendants in disparate-impact suits – have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA."[9] Likewise, the Supreme Court has consistently respected the legal tools available to people with disabilities to ensure that they have access to

[9] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015).

community-based housing, even going back to *Cleburn* where Justice White finds that, "irrational fears of neighboring property owners," is not a rational basis on which to deny a special use permit.[10]

Integrity is a word that means doing the right thing even when no one else is around or even if it is not convenient. HUD should show integrity by throwing out these proposed rules and stand by the people that society often forgets to take care of. Stopping discrimination should not only be a priority of HUD's, it is a necessity to guarantee that protected classes have a place to call home.. For these reasons, we ask that HUD refrain from revising the current disparate-impact rule.

Sincerely,

Jimmy Russell

Disability Rights Advocate

Katie Hunt Thomas

Disability Rights Attorney

[10] 473 US 432, 455 (1985).