

October 16, 2019

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: Proposed Rule: "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard"
HUD Docket No. HUD-2019-0067

To Whom It May Concern:

Thank you for the opportunity to comment on the Department of Housing and Urban Development's (HUD) Notice of Public Rule Making (NPRM) for "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" published on August 19, 2019. On behalf of Children's HealthWatch, a network of pediatricians, public health researchers, and policy and child health experts, please accept these comments and our strong opposition to this rule change that will threaten the health and well-being of protected classes of people, many of whom we serve. In this comment, we detail the ways in which this rule will harm the health and financial prosperity of people of color, families with children, immigrants, people with disabilities, and LGBTQ people, by establishing new burden-shifting framework that benefits defendants and undermines the core intent of the Fair Housing Act and Disparate Impact Rule.

Children's HealthWatch is committed to improving children's health in America. Every day, in urban hospitals across the country, we collect data on children ages zero to four, many of whom are from families experiencing economic hardship. Over the past 20 years, we have surveyed more than 70,000 caregivers. We analyze our data and release our findings to researchers, legislators, and the public to inform public policies and practices that can give all children and their families equitable opportunities for healthy, successful lives.

The proposed changes to the Disparate Impact Rule would dismantle a key enforcement tool for combatting discrimination, further restricting access to housing for people of color, people with disabilities, immigrants, LGBTQ people, families with children, and others:

The proposed changes outlined in the NPRM would establish a new and complex burden-shifting framework, making it more difficult for a plaintiff to prove disparate impact. These changes would fundamentally weaken the Disparate Impact Rule as an enforcement tool, and would allow insurance companies, financial institutions, developers, and other major corporations to engage in discriminatory practices, intentionally or unintentionally, with near impunity. As a result, an increased number of protected people and groups would likely be disproportionately and negatively impacted by certain housing policies and practices, including possible exclusion from home ownership, a major source of wealth building and generational economic mobility.¹

One such group of people that may be affected by this rule change and housing discrimination is families with children. This effect could also be amplified, if/when a member(s) of the family is identified as a

member of another group likely to face discrimination (i.e. person of color, disabled, immigrant, LGBTQ, etc.).

Research has found that housing discrimination has led to concentrations of poor quality housing and housing instability which are associated with adverse population health outcomes, household hardships, and racial and ethnic inequities in child health.^{2,3} Furthermore, analyses from Children’s HealthWatch have found that experiences of discrimination in various settings, including accessing housing, are strongly linked to reports of household and child food insecurity.⁴ Informed by these findings, researchers recommended in the report that lawmakers strengthen the Fair Housing Act in order to reduce food insecurity through eliminating practices of discrimination. Aligned with this previous recommendation and research, it is imperative that HUD strengthens the Fair Housing Act in order to prevent household hardships. The proposed rule change would do the opposite, weakening the Act and its ability to reduce housing discrimination and thus reduce associated poor health and hardship outcomes.

We know that where children live, including the quality, affordability, and stability of their family’s housing, shapes health and future prosperity. For example, where children live influences where they go to school – the quality of which is often tied to the income of the neighborhood⁵ –, and dictates access to safe spaces to play and exercise (such as parks and green space), nutritious food, and other opportunities that impact health and well-being across the lifespan. Additionally, substandard housing is related to health risks including increased exposure to lead, vermin infestations, worse mental health, and allergens that exacerbate asthma.^{6,7}

A large body of research also documents the impact historical housing discrimination, such as redlining and investment in “white-only” enclaves, has had on restricting the amount of capital, resources, and opportunities available to communities, particularly communities of color, to build wealth.^{8,9} Current housing discrimination, even when unintentional, unfolds in this historic context of government-sanctioned discriminatory policies, and often reinforces racial and ethnic inequalities in neighborhoods. As a result, most American metropolitan areas remain moderately to highly segregated, and families of color, regardless of income or economic means, have a far greater likelihood of living in high-poverty and resource-limited neighborhoods.¹⁰ In an effort to eliminate these disparities and discrimination in housing, a goal that is aligned with the mission of HUD and the intent of the Fair Housing Act, it is the responsibility of HUD to support tools that adequately allow individuals/groups to prove, and therefore correct, instances of disparate impact. By changing the Rule as proposed, HUD would significantly limit the ability to prove disparate impact, and thus dismantle a key enforcement tool for combatting housing discrimination.

Changes to the Disparate Impact Rule would undermine legislative intent of the Rule, the Fair Housing Act, and the mission of HUD:

Enacted in 1968, the Fair Housing Act (FHA) gives HUD the authority and responsibility of combatting and preventing segregation and discrimination in housing, with the reiterated goal “to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States”.¹¹ In accordance with this goal and purpose of the FHA (as administered and enforced by HUD), HUD has the power and duty to conduct formal adjudications of FHA complaints (i.e. complaints of discrimination in housing practices or policies). Since the enactment of the FHA, HUD and the courts have interpreted the FHA to prohibit practices that have an unjustified discriminatory effect, regardless of intent – an

interpretation codified in 2013 as the Disparate Impact Rule.¹² However, despite this longstanding interpretation by both the Department and the courts, the proposed changes to the Rule would change the Disparate Impact framework by adding unnecessary and complex steps, and shifting the burden of proof in these cases from the defendant to the plaintiff. By making discrimination much more burdensome and difficult to prove, disparate impact is essentially no longer available as a legal defense against facially neutral or unintentionally discriminatory policies. Therefore, the proposed changes undermine the legislative intent of the Rule and the department's purpose and ability to meet its obligation to achieve the FHA's central purpose "to eradicate discriminatory practices within a sector of our Nation's economy."¹³ Furthermore, by limiting the ability of individuals/groups to challenge and prove disparate impact, and thus making it easier for groups to implement policies and practices with discriminatory impacts, the proposed rule undermines HUD's mission "to...build inclusive and sustainable communities free from discrimination."¹⁴

The current Disparate Impact regulation is consistent with the *Inclusive Communities* ruling, and therefore does not need to be revised:

Experts in the housing and legal community, such as the National Low Income Housing Coalition, have established that the Disparate Impact Rule is in accordance with decades of established judicial precedent, including the 2015 Supreme Court decisions, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*. Despite HUD's interpretation that the current Disparate Impact Rule is misaligned with the 2015 Supreme Court decisions, numerous fair housing experts and levels of courts have affirmed that the decision implicitly adopted the Disparate Impact rule's burden-shifting framework. For example, in *MHANY Management v. County of Nassau*, the Second Circuit court concluded that in *Inclusive Communities*, "[the Supreme Court] implicitly adopted HUD's approach."¹⁵ Additionally, in *Property Casualty Insurers Association of America v Carson*, the US district court for the Northern District of Illinois analyzed the relationship between the Rule and the Supreme Court decision in an issued decision that concluded, "[i]n short, the Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that requires correction."¹⁶ Although *Inclusive Communities* was not resolved based upon deference to the Disparate Impact rule, its decision is not in conflict with Disparate Impact, as is supported in these various post-*Inclusive Communities* court decisions and expert analyses.

Added complexities to the Disparate Impact Rule burden-shifting framework would likely add administrative cost and burden in court cases, in addition to cost burdens associated with poor health and housing:

As described previously, housing discrimination, even when unintentional, has serious health and economic implications on individuals, families, communities, and society as a whole. This is largely due to resulting housing instability, and/or continued segregation that limits ability to access resources and opportunities. Compared to white households living in lower-income neighborhoods, studies have found that black families living in upper-income neighborhoods are twice as likely to be victims of subprime loans, and during the recession were nearly 50 percent more likely to face foreclosure than their white counterparts across all income levels.¹⁷ Additionally, it's been documented that people of color are routinely denied conventional mortgage loans at far higher rates than whites, even when controlling for applicants' income, loan amount, and neighborhood.¹⁸ When discrimination in housing such as this occurs, it limits people of color's ability to afford homes and build wealth, and therefore may contribute

to instances of housing instability such as behind on rent, multiple moves, and even homelessness. Furthermore, research investigating characteristics of individuals vulnerable to housing instability identified social capital and discrimination as significant predictors of housing instability.¹⁹ The proposed rule change could lead to further housing instability, as it would prevent instances of housing discrimination from being challenged, addressed, and further prevented.

Our recent research found that unstable housing among all families with children will conservatively cost the US \$111 billion in avoidable health and education expenditures over the next ten years.²⁰ This estimate assumes that the current number of families living in unstable homes persists. The proposed rule changes would add to this already huge cost, by potentially increasing the number of families with children experiencing housing instability which, as described previously, is linked to experiences of discrimination. Given the large and robust body of research demonstrating the adverse health, educational, and loss of work productivity outcomes associated with housing instability and other economic hardships, it is imperative that HUD maintains the current disparate impact framework which allows those most likely to experience housing instability to challenge violations of the Fair Housing Act.

The Fair Housing Act and practices codified in the Disparate Impact Rule have received bipartisan support for nearly 50 years. Over that time, courts and administrations have relied on the framework outlined in the current Rule to address widespread discrimination in housing, and rectify unjust instances that have undermined the intent of the FHA and the Department. The Rule, as is, is essential to protecting the civil rights of communities historically and currently affected by inequitable policies and eliminating discrimination that persists decades after the Fair Housing Act was passed. Our future national prosperity depends on our ability to acknowledge and remedy unfair or discriminatory policies or practices that affect the well-being, health, and wealth of our nation's vulnerable populations. Given HUD's recent move to delay the Affirmatively Furthering Fair Housing (AFFH) rule, it is essential that the Department maintains this safeguard as is currently written to protect populations that have historically faced discrimination in housing.

As those who care for the health and future of America's children and families, we strongly oppose the proposed changes to the Disparate Impact Rule, and urge HUD to withdraw this proposal in full immediately.

Sincerely,



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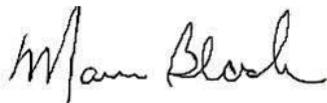
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