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October 18, 2019



**SUBMITTED VIA REGULATIONS.GOV**

Office of the General Counsel  
Rules Docket Clerk  
Department of Housing and Urban Development  
451 Seventh Street SW, Room 10276  
Washington, DC 20410-0001

**Re: Reconsideration of HUD's Implementation of the Fair Housing Act's  
Disparate Impact Standard, Docket No. FR-6111-P-02**

To whom it may concern,

We write to you on behalf of The Leadership Conference Education Fund (“The Education Fund”) as advocates for educational equity, in response to the U.S. Department of Housing and Urban Development’s (“HUD”) notice of proposed rulemaking (“Notice”) concerning its interpretation of the disparate impact standard.

We strongly oppose the proposed changes to HUD’s use of disparate impact. The existing disparate impact rule—which was instituted in 2013 and enshrines decades of jurisprudence—efficiently and successfully serves the American public as a tool for challenging the structural inequalities that persist in housing and financial markets. It is not only an effective mechanism for exposing forms of discrimination which are covert or unintentional, it also upholds a vital function of the Fair Housing Act and does not need to be changed.

The Education Fund was founded in 1969 as the education and research arm of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations working to build an America as good as its ideals. We build public will for federal policies that promote and protect the civil and human rights of all persons through public education campaigns, partnerships with local, state, and federal advocates, and information and research sharing.

Our nation has a vested interest in ensuring that housing opportunities are available to every person. Indeed, the very mission of HUD is not just to ensure housing opportunities, but to “build inclusive and sustainable communities free from discrimination.”<sup>1</sup> The passage of the Fair Housing Act of 1968 reinforced this central mission by codifying the agency’s mandate to end discrimination in housing. The Fair Housing Act protects people from discrimination on the basis of race, color, national origin, religion, sex, disability, or familial status. Importantly, the law not only prohibits intentionally discriminatory policies and practices, but also prohibits facially “neutral” policies and practices that have a discriminatory effect or limit housing opportunities for a particular group of people.

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<sup>1</sup> See HUD *Mission*, available at: <https://www.hud.gov/about/mission>.



The disparate impact rule is essential to achieving the goals and objectives of the Fair Housing Act. In accordance with the standard established in the 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,<sup>2</sup> it includes a burden-shifting framework to address discrimination while ensuring cases are not frivolously brought.

The proposed rule would deeply undermine individuals' ability to challenge disparate impact by placing the burden on plaintiffs to satisfy proof of wrongdoing prior to case discovery, which is nearly impossible to do under the given conditions. First, it would require a plaintiff "to plead that the challenged policy or practice is *arbitrary, artificial, and unnecessary* to achieve a valid interest or legitimate objective." Second, a plaintiff would be required "to allege a *robust causal link* between the challenged policy or practice and a disparate impact on members of a protected class." Third, a plaintiff would be required "to allege that the challenged policy or practice has an adverse effect *on members of a protected class*." Fourth, a plaintiff would be required "to allege that the disparity caused by the policy or practice is *significant*." Finally, a plaintiff would be required "to allege that the *complaining party's alleged injury* is directly caused by the challenged policy or practice." These new standards would make it nearly impossible to uncover evidence that a policy or practice is intentionally discriminatory.

**We believe in and are committed to eliminating discriminatory policies and practices, whether intentional or facially neutral, and we urge you to uphold HUD's current interpretation of the disparate impact rule.**

Disparate impact litigation under the Fair Housing Act and other civil rights laws has allowed victims of discrimination to challenge barriers that limit access to fair housing. Barriers have included "one-child-per-bedroom" policies that require families with more than one child to rent higher cost multibedroom apartments; "zero-tolerance" provisions in leases that grant landlords the ability to evict not just perpetrators, but also victims of domestic violence and other infractions; and predatory lending practices that drove tens of thousands of borrowers of color into high-risk subprime mortgages even though they were eligible for prime loans.

We are especially concerned about the impact of the proposed policy on educational equity. Housing policy has a significant effect on the opportunity students have to obtain a quality education. Disparate impact liability provides a remedy to address the long-standing discrimination in housing policies and practices that have created segregated neighborhoods and, by extension, segregated schools. Residential segregation persists through factors including the denial of mortgage loans on fair and equal terms to applicants of color, unfair zoning restrictions, and other policies that have a disparate impact on communities of color. The neighborhoods in which children live typically determine the schools they attend, and the more racially segregated our neighborhoods, the more racially segregated our schools. Segregated neighborhoods isolate communities of color in environments that are often poorly resourced and economically disadvantaged. These disparities are mirrored in our schools, resulting in disparate educational opportunity and outcomes for students of color.

In addition to school segregation, allowing for the continued concentration of poverty in communities limits the resources available to schools. Because of the decentralized nature of education funding, and

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<sup>2</sup> *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015).



the reliance on local property taxes, low-wealth communities are less able to provide sufficient funding for their schools, even when tax rates are high. Removing a critical tool for deconcentrating poverty would mean fewer schools have the resources they need.

We are also deeply concerned about the effort to undermine disparate impact more broadly. Achieving educational equity rests upon the ability to dismantle systems that create and maintain race-based barriers to achievement and wealth. Discrimination in education is powerful and leads to unequal access to fair school discipline, strong teaching, advanced courses, and other critical preparation for success in college, career, and life. Often this discrimination is advanced through facially neutral policies with disparate and unjustified effects. Without the tool of disparate impact liability, ostensibly neutral policies cannot effectively be challenged and barriers to opportunity, housing, education, and beyond will remain.

HUD should focus on robustly enforcing the Fair Housing Act within housing markets and ensure market actors comply with the standards established by the existing disparate impact rule. The existing disparate impact rule strengthens our communities and nation by allowing victims of all types of systemic discrimination to seek recourse and change policies and practices that limit their housing opportunities. This is imperative for ensuring that everyone has a good place to live and for ensuring that students have equal access to quality education.

Thank you for the opportunity to share our perspective. Please contact Liz King, Leadership Conference Education Fund Education Equity Program Director at [king@civilrights.org](mailto:king@civilrights.org) with any questions regarding these comments.

Sincerely,

The Leadership Conference Education Fund