

Law & Policy of Integrated Supportive Housing

2016 Missouri Housing Summit

Mark Shelburne

Novogradac & Company LLP

mark.shelburne@novoco.com

919.889.2596

@housingMark

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The Next 90 Minutes....

- Who am I?
 - an attorney (sort of) and consultant
 - Novogradac & Company for 13 months
 - N.C. Housing Finance Agency for 13 years
- Learned supportive housing on the job
- Will discuss some of the concepts
- Also describe approach in N.C.
- First will start with multiple choice questions

Disclaimer





**Legal
Requirements**



**Policy
Considerations**



Direction of Federal Policy

- Three federal agencies each moving towards integrated housing for persons with disabilities

Justice:
enforcement of
ADA/Olmstead

**DHHS: Home
and Community
Based Services**

**HUD: disparate
impact, AFFH,
& Section 811**

- Clear, inexorable direction
- Research-based best practices



***Olmstead* Background**

- *Olmstead* is a 1999 Supreme Court decision interpreting Title II of the ADA
- Holding requires states to:
 - eliminate unnecessary segregation and
 - provide services in the most integrated setting
- Has become shorthand phrase for federal and private enforcement
- DoJ ramped up activity in 2009

Olmstead & Housing

- Focus is on overall housing and service systems
- More about gov'ts than individual projects
- Must enable PWD “to interact with non-disabled persons to the fullest extent possible”
- Do persons with disabilities:
 - Have a meaningful choice/opportunity to
 - live in the most integrated setting
 - appropriate to their needs?

Specifically...

- In many states the predominant housing option is not integrated (institutional)
- Living in a community setting is not a realistic possibility for persons with disabilities

Public entities must take affirmative steps to remedy this history of segregation and prejudice in order to ensure that individuals have an opportunity to make an informed choice.

- Similarity to language used for race is deliberate

Translation

- DoJ's perspective on "integrated" can be narrower than others'
- Not just group or adult care homes
- Includes 100% targeted supportive housing
- Projects do not further choice or integration
- Debatable in some contexts, not others
- Ultimately a legal, not policy question

Outcomes

- If PWD do not have adequate choice, state enters into a settlement agreement
- Alternative is litigation; state is likely to lose
- Resulting terms vary, but more community-based housing is a part of all
- Involves LIHTC and possibly market-rate projects, even if just tenant-based
- More 100% targeted projects don't help



What are HCBS & the Rule?

- Home and Community Based Services
- A form of Medicaid
- Serves over 3 million people nationwide
- Rule issued in 2014, largely unknown to housers
- Covers *all housing*, or “settings”, where people with disabilities receive services
- States put specifics in a plan last year

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All Settings (Housing)

In order to qualify for HCBS, the setting must:

- Be integrated and support full community access
- Be selected by individuals from different options
- Ensure rights of privacy, dignity and respect, and freedom from coercion and restraint
- Optimize autonomy and independence in life
- Facilitate choice regarding services and providers

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Provider-Owned Settings

Additional requirements:

- Have a lease or other enforceable agreement
- Ensure privacy, including lockable doors, choice of roommates, and freedom to furnish/decorate
- Allow control over schedule, including food
- Permit visitors at any time

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Presumed Institutional

Rule presumes the following are ineligible:

- Provides inpatient treatment (public or private)
- Located on the grounds of, or immediately adjacent to, a public institution
- Isolates individuals receiving HCBS from the broader community
- Any other setting discouraging integration

Will result in heightened scrutiny

What HCBS Really Means

- Many specifics and grey areas to work out
- Will apply “retroactively” (housing concept)
- Does not matter when built
- Some PWD may be faced with choice of
 - being ineligible for services, or
 - finding somewhere else to live
- Such a prospect is unacceptable



Fair Housing Act Components

Each apply at project and program level

Intentional Discrimination – most common

Disparate Impact – liability without proof of intent

Affirmatively Furthering – applicable when accept HUD funding

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Protected Classes



Race



Color



Religion



Sex



Handicap



Familial Status



National Origin

Texas DHCA v. Inclusive Communities Project

Majority Opinion



Justice Kennedy

- Agreed with lower courts that disparate impact can be the basis for a claim
- Intent not needed to violate fair housing
- Discussed other limitations and requirements for making a claim
- Remanded for rehearing based on HUD rule
- Although attention focuses on race, the holding applies to all protected classes

HUD's Disparate Impact Rule

“A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”

Use of Arrests/Convictions

Example of disparate impact's importance

- Statistically, interaction with justice system varies based on protected class status
- HUD guidance: basing adverse housing decisions on criminal records may have a disparate impact
- Specifically, owners cannot
 - consider arrests, or
 - have blanket prohibitions on convictions
- Other decisions or practices also may be illegal

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Affirmatively Furthering

- AFFH has been in place for >40 years
- Means **more than not** discriminating
- A purpose of federal funding is to eliminate barriers, desegregate, and expand choice/opportunity
- HUD changed its approach with 2015 rule
- Does not mandate specific outcomes
- States and localities must undertake “meaningful actions” as a condition of accepting federal resources
- Applies to all protected classes, including disability

AFFH Process

- Will be part of the **Consolidated Plan** or **PHA Plan** adopted by Participating Jurisdictions and housing authorities
- HUD will provide data, as supplemented by local info
- Used to prepare an “Assessment of Fair Housing”:



Patterns of integration and segregation;



Racially and ethnically concentrated areas of poverty;



Disparities in access to opportunity; and



Disproportionate housing needs

AFFH Process

- PJ/PHA uses the assessment to set goals to overcome issues identified
- Goals must inform later funding decisions
- Will include “meaningful actions” to:
 - overcome patterns of segregation and foster inclusive communities free from barriers to opportunity
 - address disparities in housing needs and opportunities
 - replace segregation with integrated, balanced living
- Include input from public participation process
- Varying deadlines based on current Con/PHA Plan

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	Fair Housing In General	Affirmatively Furthering
Applicable...	regardless of any subsidy.	when using certain federal subsidies (e.g., HOME).
Meaning for owners and managers:	Cannot intentionally discriminate, or use policies/practices which have a disparate impact.	Must actively market housing to those in protected classes who are the least likely to apply for occupancy.
Example:	screening criteria	marketing plan
Meaning for agencies / authorities:	Same as for owners and managers, just on a different level.	Jurisdictions receiving HUD funding must use all program resources to advance desegregation.
Example:	Texas case	a unit set-aside for PWD
How enforced:	Either through HUD administrative complaints or in federal court.	Same as the other column, plus HUD review of agencies' compliance.

HUD 811 Demonstration

- Collaboration between state housing and HHS/Medicaid agencies
- Only operating assistance for qualified units
- Capital from other affordable housing programs
- No more than 25% of units targeted to PWD
- Participation in supportive services is voluntary, cannot be required as condition of tenancy
- 25 states, \$150 million

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Federal Mandates Together

- Not as ominous as it sounds
- Will involve adapting some:
 - state priorities/practices,
 - business models, and
 - project operations
- Policy considerations:
 - what kind of projects and programs to fund
 - “first rule of holes” (stop digging)



Supportive Housing in N.C.

- LIHTC program advances integration for PWD
- Partnership at two levels
 - NCHFA (allocator) and HHS (services)
 - owners/managers and local providers
- All LIHTC properties must set-aside 10% of units for persons with disabilities
- Local human service agencies make referrals

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Why does it work?

- Each partner focuses on what it does best:
 - NCHFA requires developers' participation
 - DHHS works with local providers
 - owners and property managers build and operate
 - human service agencies support tenants
- State funds project-based operating assistance
 - providing adequate revenue and
 - making units affordable

What happens?

- Management treats referrals the same as any other applicant
- Apply normal screening criteria, including reasonable accommodations
- Keep unit open for 30 days after vacancy if <10%
- Treat the same as other tenants once under lease
- Request operating assistance monthly

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What does *not* happen?

Owners and property management

- Have no knowledge of medical circumstances
- Do not provide services, treatment, etc.
- Are not responsible if the lead agency doesn't send referrals (no compliance issue)
- No expectation to avoid remedies, including eviction, subject to reasonable accommodations

Results

Required since 2004

- 500 properties participating
- 80 of 100 counties, including very rural
- 3,000 units currently targeted
- ~250 added annually
- Households are integrated
- Similar policies in eight other states (CSH)

Reasonable Accommodations

- Some on-site staff understandably want to treat everyone the same
- Doing so may violate federal law for PWD requesting accommodations/modifications
- Have to consider each one
- Can be very complex
- A continuing challenge
- Need constant training



Policy Considerations

The following are considered best practices (TAC):

- Choice of housing options and living arrangements
- Housing management and service provision are functionally separate, performed by different staff
- Housing units are typical for the community
- Leases have all tenancy rights under state law; occupancy not contingent on program compliance
- No requirement to accept services

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