

Overview of legal challenges supporting providers and individuals w/ IDD in Texas: Fair Housing Act, ADA, Rehab Act Issues Facing Persons with Disabilities in HCS Group Homes

Garth Corbett, Sr. Litigation Attorney
Chris McGreal, Attorney
Disability Rights Texas
October 18, 2023: PACSTX Conference



DISCLAIMER

The following presentation is not legal advice. You should consult your own attorney for your legal rights.

Mission of Disability Rights Texas

**To advocate for,
protect and advance
the legal, human and
service rights of
people with
disabilities.**

History of the P & A System

- The Protection and Advocacy concept was triggered by a series of local television news broadcasts by Geraldo Rivera.
- His investigative reporting exposed abuse, neglect and lack of programming at a state institution for people with developmental disabilities on Staten Island in New York.
 - <http://www.ndrn.org/about/26-our-history.html>

Housing discrimination regarding individuals with disabilities:

- Local opposition to permanent supportive housing (PSH) for individuals with disabilities is often driven by discriminatory prejudices and irrational fear about the residents.
- Pretextual: Reason for an discriminatory action which is false, and offered to cover up true motives or intentions
- Types of PSH targeted for discrimination: HCS Waiver Group Homes; Host Homes Sober Homes;

The Neighbors:



"Normally I'd be optimistic that we could work out a little problem like this."

NIMBYism:

- N - I - M - B - Y: “Not in my backyard.”
- Neighbors
- Home Owner’s Associations
- Local Municipalities

Main Issues Identified

- Discrimination by HOA's, Cities, the State, and LL's
 - Intentional Discrimination
 - Disparate Impact
 - Denial of Accommodation Requests
 - Denial of Modification Requests

Relevant Laws for Housing

- Federal Fair Housing Act Amendments
- Texas Fair Housing Act
- Section 504 of the Rehabilitation Act of 1973
- Title II of the Americans with Disabilities Act
- Title III of the Americans with Disabilities Act

Federal Fair Housing Act Amendments of 1988

- The Fair Housing Act, and its amendments, were enacted to prohibit discrimination in private and public real estate transactions.
- Law makes it unlawful to discriminate in the sale or rental of housing, or to discriminate in the terms, conditions, services or facilities provided because an individual is or was disabled (among other things)

Who is protected by the Federal Fair Housing Act?

- Persons:
 - With physical or mental impairment
 - that substantially limits a major life activity, and
 - who have a record of such an impairment; or
- who are regarded as having such an impairment.

Who is protected by the Federal Fair Housing Act?

- Includes individuals associated with a person who has a disability (ex: family members),
- an individual who has a history of a disability (ex: alcoholism, former drug user who successfully completed an addiction recovery program),
- individuals who are believed to have a disability but do not.

Who does the Federal Fair Housing Act Apply to?

- housing providers or other individuals who otherwise make housing unavailable.
- Includes: property owners, landlords, housing managers, housing subsidized by federal or state funds (i.e., low-income public housing or federally subsidized or Section 8 housing), neighborhood and condominium associations, real estate agents, brokerage service agencies, banks, insurance companies, neighbors, etc.

Discrimination in sale, rental, or otherwise make unavailable

- 3604(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of (A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter.

Discrimination in terms, conditions, or privileges

- 3604(f)(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of— (A) that person; or (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; (C) any person associated with that person.

Disparate Treatment

- A plaintiff “need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the FHA[] in a different manner than others.” *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995).
- *See Oxford House v. City of Baton Rouge*, 932 F. Supp. 2d 683, 695-96 (E.D. La. 2013) (ordinance that imposed burdens on homes for persons with disabilities was facially discriminatory and therefore caused disparate treatment under the FHA).

Disparate Impact

- *Tex. Dep't of Hous. & City. Affairs v. Inclusive Cmtys. Project*, ___ U.S. ___, 135 S. Ct. 2507, 192 L. Ed. 2d 514, 530 (2015) (“Unlike disparate treatment, which challenges laws, regulations, and rules that are discriminatory on their face, disparate impact claims target “practices that are fair in form, but discriminatory in operation.”) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)) *Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (quoting *Int’l Bhd. of Teamsters v. United States*, 421 U.S. 324, 325-26 n. 15 (1977)); *Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (Disparate impact claims are more appropriate when challenged policies or practices are “facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . .”) (quoting *Int’l Bhd. of Teamsters v. United States*, 421 U.S. 324, 325-26 n. 15 (1977)).

Requests for Accommodations

“Discrimination includes a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”

42 U.S.C. § 3604(f)(3)(B).

What is Reasonable?

- *United States v. City of Jackson, Miss.*, 318 F. Supp. 2d 395, 412 (S.D. Miss. 2002) (“An accommodation is ‘reasonable’ under the FHA unless it imposes an undue financial and administrative burden on the defendant or requires a fundamental alteration in the nature of the program at issue. . . .”), *aff’d by United States v. City of Jackson, Miss.*, 359 F.3d 727 (5th Cir. 2004).

Examples of accommodation requests to LL

- Classic example: Pet Policy (no pet deposit)
- To cure and prevent evictions
- Move to a lower floor apartment (no transfer fee)
- Move to a bigger apartment (no transfer fee)
- Modifications to apartment itself
- Application process
- Bad rental history or poor credit
- Translator – “effective communication”
- Prepaid rent
- Mail

Reasonable Modifications

- Reasonable Modifications – a structural change made to the existing premises, occupied or to be occupied by a person with a disability, in order to afford the person with full enjoyment and use of the premises
- Includes structural changes to interiors and exteriors of dwellings and to common and public use areas

Local Government and Land Use Restrictions:



Why the Egyptians Stopped Building
the Pyramids

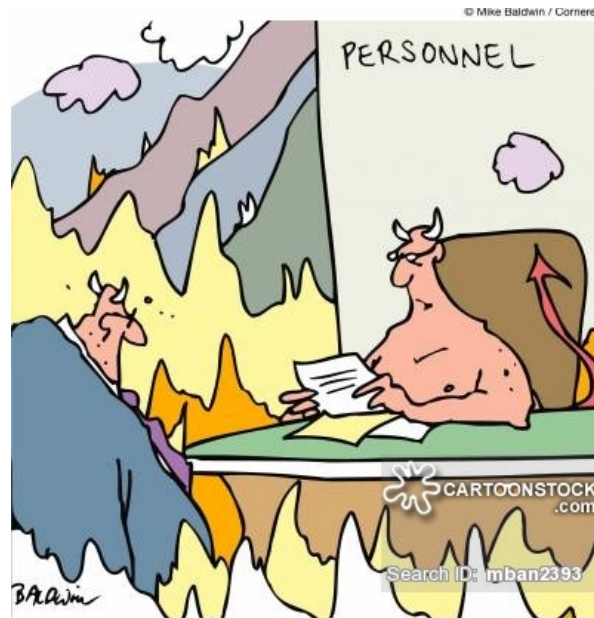
Specific Issue: Land Use Discrimination

- Talking about ordinances, code enforcement, restrictive covenants or deeds restrictions
- Typical codes: International Fire and Building Codes
- Ordinances: Occupancy Limits and zoning areas as residential
- Restrictive covenants: definition of a single family and operating as a business

Duties of local governments:

- Local governments must comply with the Fair Housing Act when making decisions impacting the development of permanent supportive housing.
- This includes funding, zoning and other land use decisions.
- Government decisions pertaining to the funding, location and operation of housing must not have a discriminatory intent or impact on persons with disabilities.
- If a recipient of HUD money (CDBG, HOME, etc...) the government must Affirmatively Further Fair Housing

Paternalism?



"You had good intentions. Let's find you a nice job paving roads."

Paternalism

- Claims of health and safety considerations
- Real or Pretextual?
- It is a violation of the Fair Housing Act to discriminate even if the motive was benign or paternalistic. Thus, motive is not necessarily relevant; if a statute is discriminatory against a protected class on its face, it violates the FHA, even if the statute was intended to have a positive effect on the protected class.

Zoning and other local policies:

- Zoning and land use policies must have a relationship to legitimate zoning and cannot exclude or otherwise discriminate against individuals with disabilities.
- Local governments cannot make unfounded assumptions or speculations about the problems posed by housing persons with disabilities.
- Local governments cannot allow neighbors' objections to influence the decision making process when such objections are based on discriminatory concerns about tenants with disabilities.

Intentional Discrimination versus Disparate Impact

- Discriminatory zoning practices are among the types of conduct prohibited by the FHA.
- A plaintiff may establish a violation of the FHA by showing either:
 1. that a defendant was motivated by an intent to discriminate (also referred to as “discriminatory intent” or “disparate treatment”) or
 2. that a defendant’s otherwise neutral action has an improper discriminatory effect (commonly referred to as “disparate impact”).

Disparate Treatment and Land Use

- Show that “discriminatory purpose was a motivating factor” denying a change in land use. Can show disparate treatment by proving that the City would have approved the change but for discriminatory animus toward people with disabilities. *Smith & Lee Assocs., Inc. v. City of Taylor, Mich.*, 102 F.3d 781, 790 (6th Cir. 1996)
- Example: ordinance prohibiting housing for persons with disabilities or a specific type of disability, such as mental illness, from locating in a particular area because the community has a preconceived idea that people with disabilities are dangerous, while allowing other groups of unrelated individuals to live together in that area.

What do we see?

- Zoning Ordinances and restrictive covenants used against Group Homes.
- Group Homes are not “businesses”
 - for-profit versus non-profit
- Pretext of protecting health and safety;
 - Certificates of Occupancy;
 - Fire Inspections and fire safety equipment;
 - Onerous Fees;
- Spacing Rules

Business Restrictions on Group Homes

- The Fifth Circuit has recognized the importance of commercial for-profit (residents pay to live at the home) and non-profit group home providers for persons with intellectual and developmental disabilities in that many persons with similar disabilities are “not able to live safely and independently without organized, and sometimes, commercial, group homes....” *Groome Resources v. Parish of Jefferson, LA*, 234 F.3d 192, 202 (5th Cir. 2000); see also *Avalon Residential Care Homes, Inc. v. City of Dallas*, 130 F.Supp.2d 833, 841 (N.D. Tex. 2000) (holding that, under the FHA, both for-profit and not-for-profit commercial activities are authorized for group home protections)

Business Restrictions on Group Homes (cont'd)

“Group homes currently are the principal community living alternatives for persons who [have intellectual or developmental disabilities]. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who [have intellectual or developmental disabilities], and each factor that makes such group homes harder to establish operates to exclude persons from the community.” *Cleburne*, 473 U.S. at 439 n. 6 (quoting *Cleburne Living Ctr., Inc., v. City of Cleburne, Texas*, 726 F.2d 191, 193 (5th Cir. 1984)).

Health and Safety

- Where the City claims to pass ordinances in the guise of health and safety powers
- Fire sprinklers
- Spacing rules
- Parking
- Other nuisance laws

Healthy and Safety (Cont'd)

- In *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43, 47 (6th Cir. 1992), the Sixth Circuit recognized that the City of Stow was “correct in its contention that the FHAA does not prohibit the city from imposing *any* special safety standards for the protection of persons with disabilities [and that the City] may impose standards which are different from those to which it subjects the general population, so long as that protection is demonstrated to be warranted by the unique and specific needs and abilities of those [] persons [with disabilities].” The Sixth Circuit ultimately struck down a city zoning ordinance that required a four-person house for persons with intellectual disabilities to have fire safety features that “are more rigorous than the state department’s safety rules” for group homes “and are far more extensive than those required of single-family dwellings.” 974 F.2d at 45.

Fire Inspections

- Chapter 9 of the Texas Admin Code, Section 9.178(e):
- (e)(1) Before providing residential support in a four-person residence, the program provider must: (A) ensure that the four-person residence meets one of the following:
 - (i) is certified by:
 - **(I) the local fire safety authority having jurisdiction in the location of the residence as being in compliance with the applicable portions of the National Fire Protection Association 101: Life Safety Code (Life Safety Code) as determined by the local fire safety authority;**
 - **(II) the local fire safety authority having jurisdiction in the location of the residence as being in compliance with the applicable portions of the International Fire Code (IFC) as determined by the local fire safety authority; or**

Fire Inspections (cont'd)

3 bedroom HCS v.

4 bedroom HCS

Distancing Requirements and the 1/2 mile rule



"It's disgraceful the way they build houses
so close together!"

Specific Land Use Case Examples

- United States v. Beaumont
- City of Harlingen
- City of Pearland
- City of Dallas

United States v. Beaumont

- HCS group homes certified through DADS (mostly 3 and under)
- Host Companion Care Homes (foster care)
- Individuals with ID and DD
- City of Beaumont characterized these homes as “community homes” under its zoning ordinance
- “Community homes” meant homes with six and under with persons with disabilities, no more than 2 care takers, and meet the requirements of Chapter 123 of the Texas Human Resources Code

United States v. Beaumont

- Beaumont enforced a half-mile rule and cited HCS homes for violations if they were within half-mile of another community home
- Beaumont characterized the HCS homes as “businesses” and therefore needed to obtain a certificate of occupancy for being in a residential zoned area
- Beaumont also characterized the HCS homes as I-2 institution under the 2009 IBC and IFC. This characterization required automatic fire sprinklers, commercial vented-hoods, and other requirements

United States v. Beaumont

- DRTx requested an appeal with the Beaumont Zoning Bd. of Adjustment and the Board of Construction to fight these characterizations
- DRTx first argued that the characterizations of the HCS homes were improper and discriminatory
- Alternatively, DRTx requested accommodations under the FHA and ADA to waive any requirements under the zoning, building, and fire ordinances
- The Zoning Bd. denied the appeal without ruling on the accommodation requests, while the Board of Construction failed to issue a decision

United States v. Beaumont

- DRTx filed housing discrimination HUD complaints against the City of Beaumont
- DOJ and HUD investigated the complaints
- On May 26, 2015, the DOJ, on behalf of the United States, filed a complaint in federal court against the City of Beaumont, alleging violations of the FHA and ADA
- On November 25, 2015, DRTx intervened in the lawsuit on behalf of its clients
- The case has settled and a Consent Decree was signed by The Court on June 16, 2016.

City of Harlingen

- City of Harlingen classifies all HCS homes as “assisted living facilities” under their zoning ordinance
- However, definition of a single-family dwelling is three or less unrelated individuals who share a common household unit
- If a home is classified as an assisted living facility, it needs to obtain a SUP to reside in a residential area with other single-family dwellings

City of Harlingen

- City of Harlingen noticed a 3-person HCS group home for operating as assisted living facility in a residential, single-family zoned area
- DRTx wrote to the City attorney for Harlingen on behalf of the individuals residing in the home and argued that the home is a single-family dwelling, and in the alternative, requested an accommodation under the FHA and ADA that the home be permitted in the residential zoned area
- The city backed off and the home was able to expand to a 4-person HCS home

City of Pearland

- Similar to Beaumont, required fire sprinklers and other specifications under the 2009 IFC and IBC for 3- and 4-bedroom HCS homes
- Additionally, required that the HCS group home place a disability parking placard outside the home, indicating to the neighborhood that persons with disabilities resided in the home
- If a home is classified as an assisted living facility, it needs to obtain a SUP to reside in a residential area with other single-family dwellings

City of Pearland (cont'd)

- After sending an accommodation to the City, which was then ignored, DRTx filed a HUD complaint on behalf of a resident of the HCS group home
- DRTx settled the case with the City of Pearland, securing that HCS group homes would be specifically exempted from any ordinance requiring fire sprinklers
- Additionally, the City adopted procedures to entertain future accommodation requests under the FHA and ADA, as well as agreed to undergo FHA training and pay the resident damages

City of Dallas

- Similar to Beaumont, city was requiring fire sprinklers for 3- and 4-bedroom HCS homes
- DRTx sent a letter to the city of Dallas that discussed the Beaumont Case and its outcome and invited the city to discuss the issue with us.
- Dallas retrained its entire Fire Department after speaking with us such that Group Homes are not required to have fire sprinklers.

HOAs

- Often characterize an HCS group home as a business in violation of a restrictive covenant
- In Dallas, one HOA is trying to enforce a covenant that states only group homes that comply with Chapter 123 of the Texas Human Resource Code can reside in the area (i.e., ½ spacing, non-profit, etc.)
- In Leander, Texas, we filed suit in the W.D. of Texas, Austin Division against HOA trying to enforce business and family construction covenants against two persons HCS group home. This has been successfully resolved.

HOAs

- HOA in Houston claiming the group home is operating as a business and not a single-family home.
- HOA has used a provision in the Tex. Gov't Code to ask a City to enforce its restrictive covenant against the group home (raising 1st Amendment issues).
- HOA mischaracterized a Group Home as a Business and claimed it is violation of the restrictive covenants.

City Enforcement of HOA Restrictive Covenants

- City of Pasadena wrote to a group home provider to enforce restrictive covenants of a HOA. City seemed to have backed down once DRTx wrote to the city and discussed the issue with attorneys at its City Attorney's office.
- In a situation like this, the HOA is subject to the FHAA as well as the City.

HOA's use cities to Discriminate

- City of Manfield investigated group home provider for operating a business at the behest of a HOA. HOA used the city to intimidate the HCS Provider
- City of McKinney used as a tool by HOA to intimidate the group home provider.

We are curious about what issues you are seeing?

- Spacing requirements?
- Certificate of occupancy/being called a business?
- Expensive fire protection requirements?
- NIMBYism?
- Other issues?

How DRTx can help

- We represent individuals with disabilities
- We need the provider to be committed to staying at the home or willing to fight
- We can help find providers attorneys, whether they be private pay or pro bono
- We also file HUD complaints and lawsuits on behalf of our clients (Beaumont and Pearland mode

DRTX Contact Info

- **INTAKE PHONE NUMBERS (Hours are Mon - Fri, 9 am - 4 pm)**
- **Toll-Free Intake Line for New Callers:**
- 1 (800) 252-9108
- **For People Who Use Sign Language:**
- VP Sorenson (Toll Free): 1 (866) 362-2851
- VP Purple 3: 1 (512) 271-9391
- **Toll-Free Phone Line for Current Clients Only:**
- 1 (800) 315-3876
- **Website:** www.drtx.org

Code for Survey

Overview of Legal Challenges

