

Disparate Impact

By Ed Gramlich, Senior Advisor, NLIHC

Title VIII of the “Civil Rights Act of 1968,” also known as the “Fair Housing Act,” prohibits discrimination on the basis of race, color, sex, disability, national origin, familial status, or religion (the “protected classes”) in the sale, rental, or financing of dwellings and in other housing-related activities. Section 804(a) of the Fair Housing Act makes it unlawful “[t]o refuse to sell or rent..., **or otherwise make unavailable or deny**, any dwelling to any person because of race, color, national origin, religion, sex, familial status, or handicap.” (emphasis added).

In simple terms, “disparate impact” refers to a method of proving housing discrimination without having to show that discrimination is intentional.

Some common examples of disparate impact include:

- Nuisance ordinances that endanger women experiencing domestic violence
- Occupancy limit policies that adversely affect families with children
- Policies that restrict access to housing for people who have arrest records or criminal convictions
- Restrictive zoning laws and building codes that harm people with disabilities
- Restrictive zoning laws and building codes that disproportionately impact people of color
- Restrictive zoning laws and building codes that prevent the development of affordable housing, disproportionately harming people of color and perpetuate segregation
- Policies and practices that harm those relying on vouchers who are disproportionately people of color
- Redevelopment policies and practices that result in greatly increased rents and/or

displacement disproportionately harming people of color

- Disaster recovery policies and programs that disproportionately harm or underserve people of color.

The 2013 Disparate Impact Rule

For more than 45 years, HUD interpreted the Fair Housing Act to prohibit housing policies or practices that have a discriminatory effect, even if there was no apparent intent to discriminate. There are 13 U.S. Courts of Appeals, 11 of which had disparate impact cases before them and all of which upheld disparate impact and applied a “burden shifting standard” (described below). Because minor variations existed in how the courts and HUD applied the concept of discriminatory effects over the years, HUD published a proposed rule for public comment in 2011.

The preamble to the proposed rule provided a number of examples of “disparate impact” and “perpetuating segregation,” each based on court decisions. Examples included: zoning ordinances that restrict construction of multifamily housing to predominantly minority areas; public housing agency use of a local residency preference for distributing Housing Choice Vouchers where most residents are White; and, demolition of public housing principally occupied by African Americans.

A final a final Disparate Impact rule was published on February 15, 2013. It defined the term “discriminatory effect” as a practice that actually or predictably results in a “disparate impact” on a group of people or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, sex, handicap, familial status, national origin, or religion. Importantly, the 2013 rule established a uniform standard for determining when a housing policy or practice with a discriminatory effect violates the Fair Housing Act.

The three-step burden shifting standard in the 2013 rule was very simple:

1. The plaintiff (the party alleging disparate impact) has the burden of proving that a policy or practice caused or predictably will cause a discriminatory effect.
2. If the plaintiff satisfies that burden of proof, the burden shifts to the defendant (the housing provider, business, government, or other entity) to prove that the challenged policy or practice is necessary to achieve one or more of the defendant's substantial, legitimate, nondiscriminatory interests.
3. If the defendant satisfies the above burden of proof, then the burden shifts again to the plaintiff to prove that the defendant's substantial, legitimate, nondiscriminatory interests could be served by another policy or practice that has a less discriminatory effect.

The U.S. Supreme Court Upholds Disparate Impact Theory

On June 25, 2015, Justice Anthony Kennedy announced the 5-4 decision of the Supreme Court of the United States upholding the disparate impact theory in housing discrimination cases that was challenged by the State of Texas in *Texas Department of Housing and Community Affairs v The Inclusive Communities Project*.

At issue was whether the Fair Housing Act of 1968 bars not only intentional discrimination, but also policies and practices that have a disparate impact – that do not have a stated intent to discriminate but that have the effect of discriminating against the Fair Housing Act's protected classes.

The Inclusive Communities Project (ICP) sued the Texas Department of Housing and Community Development over the siting of most Low Income Housing Tax Credit properties in predominately Black communities in Texas. ICP won in District Court. Texas appealed to the U.S. Supreme Court.

ICP is a Dallas-based nonprofit that assists low-income people in finding affordable housing and

that seeks racial and socioeconomic integration in Dallas housing. ICP assists voucher holders who want to move into non-minority areas obtain apartments in non-minority suburban neighborhoods by offering counseling, assisting in negotiations with landlords, and by helping with security deposits.

NLIHC prepared a [summary](#) of the Supreme Court decision.

Disparate Impact During the Trump Administration

HUD during the Trump Administration issued an [advance notice of proposed rulemaking](#) (ANPR) in the *Federal Register* on June 20, 2018. HUD acknowledged that the Supreme Court upheld the use of disparate impact theory, but HUD asserted that the Court “did not directly rule upon it [the disparate impact rule].” Advocates and attorneys asserted that the Court implicitly endorsed the rule by not questioning it or challenging it. Since the *Inclusive Communities* Supreme Court decision, courts found that the rule is consistent with the Supreme Court's decision.

The Trump Administration [proposed](#) a drastic revision of the 2013 rule in August 2019 and issued a [final rule on September 24, 2020](#) that would make it far more difficult for people experiencing various forms of discrimination to challenge the practices of housing providers, governments, businesses, and other large entities. The 2013 rule's three-part “burden shifting” standard to show disparate impact would be radically changed to a five-component set of tests placing virtually all of the burden on people who are in protected classes. The changes were designed to make it much more difficult, if not impossible, for people in protected classes to challenge and overcome discriminatory effects in housing policies or practices.

The proposed rule would tip the scale in favor of defendants (housing providers, governments, and business) that are accused of discrimination. It would shift the burden of proof entirely to the plaintiffs; victims of discrimination would be asked to try to guess what justifications a defendant might invoke, and plaintiffs would

have to preemptively counter those justifications. HUD further proposed making a profitable policy or practice immune from challenge of disparate impact unless the victims of discrimination could prove that a company could make at least as much money without discriminating. In other words, according to HUD, profit justifies discrimination.

NLIHC prepared a [summary of key features](#) of the proposed rule and an [analysis of the final 2020 rule](#).

U.S. District Court Issues Preliminary Injunction on Trump Final Disparate Impact Rule

The National Fair Housing Alliance (NFHA), the NAACP Legal Defense and Educational Fund, Inc. (LDF), Fair Housing Advocates of Northern California, and BLDS, LLC filed a lawsuit against HUD with the U.S. District Court for the Northern District of California. In addition, the Open Communities Alliance (OCA) and SouthCoast Fair Housing of Massachusetts and Rhode Island filed a lawsuit with the United States District Court for the District of Connecticut.

The U.S. District Court for the District of Massachusetts issued a preliminary nationwide injunction on October 25, 2020 to halt implementation of HUD's final disparate impact rule, thanks to the efforts of Lawyers for Civil Rights and Anderson & Kreiger, with the Massachusetts Fair Housing Center and Housing Works, Inc. serving as plaintiffs on the case.

The plaintiffs claimed the new final disparate impact rule violated the Administrative Procedure Act (APA). In order to obtain preliminary injunctive relief, the plaintiffs demonstrated: a substantial likelihood of success on the merits; a significant risk of irreparable harm if an injunction is withheld; a favorable balance of hardships; and a fit between the injunction and the public interest.

The court wrote that there can be [no] doubt that the 2020 disparate impact rule weakens, for housing discrimination victims and fair housing organizations, disparate impact liability under the Fair Housing Act. It does so by introducing new, onerous pleading requirements on plaintiffs,

and significantly altering the burden-shifting framework by easing the burden on defendants of justifying a policy with discriminatory effect while at the same time rendering it more difficult for plaintiffs to rebut that justification. In addition, the 2020 rule arms defendants with broad new defenses that appear to make it easier for offending defendants to dodge liability and more difficult for plaintiffs to succeed. In short, these changes constitute a massive overhaul of HUD's disparate impact standards, to the benefit of putative defendants, and to the detriment of putative plaintiffs (and, by extension, fair housing organizations, such as MFHC).

An NLIHC [summary](#) provides more detail.

Disparate Impact in the First Year of the Biden Administration

President Biden issued "[Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies](#)" to the HUD Secretary on January 26, 2021, instructing HUD to examine the effect of the previous administration's September 24, 2020 final disparate impact rule replacing the 2013 disparate impact rule.

The memorandum further instructed the HUD Secretary to take the necessary steps to prevent practices that have a disparate impact. The memorandum stated, "Based on these examinations, the Secretary shall take any necessary steps, as appropriate and consistent with applicable law, to administer the Fair Housing Act including by preventing practices with an unjustified discriminatory effect."

In addition, the U.S. Department of Justice withdrew the previous Trump-era HUD appeal of the case postponing implementation of the disparate impact rule. By withdrawing the appeal, the preliminary injunction described above continued to delay implementation of the Trump disparate impact rule.

HUD published a [proposed rule](#) in the *Federal Register* on June 25, 2021 to reinstate the 2013 disparate impact rule. The proposed rule would recodify the 2013 rule's discriminatory effects three-step burden shifting standard. The

proposed rule would also return the definition of “discriminatory effect” eliminated from the 2020 rule, which also erased “perpetuation of segregation” as a recognized type of discriminatory effect distinct from disparate impact. As of the date this article was drafted, a final rule was not published, but one is expected in 2022.

FOR MORE INFORMATION

NLIHC, 202-662-1530,

- Fair Housing: Disparate Impact, <https://nlihc.org/racial-equity-and-fair-housing-disparate-impact>
- HUD Updates and Links, <https://nlihc.org/hud-updates-and-links-0>
- NLIHC Resources, <https://nlihc.org/nlihc-resource-disparate-impact>

National Fair Housing Alliance, 202-898-1661, <https://nationalfairhousing.org/?s=Disparate+Impact>

NAACP Legal Defense and Educational Fund, Inc. (LDF), 202-682-1300, https://www.naacpldf.org/search-results/?_sf_s=Disparate+Impact