

The Fair Housing Act: 2015 Update for Campus Housing

Eric D. Luskin, CPM®

“Disparate Impact” Survives Supreme Court Challenge

In a case closely watched by many in the housing and civil rights arenas, on June 25, 2015 the U.S. Supreme Court validated a tool that the federal government and fair-housing advocates have used for the past 40 years in an effort to combat perceived housing discrimination. In a 5-4 decision that surprised many, the Court concluded that “disparate impact” claims are allowable, even though the words “disparate impact” do not appear anywhere in the relevant statutes.

This Supreme Court decision clarifies that the federal Fair Housing Act (FHA) permits individuals to challenge housing practices that have the *effect* of impacting protected classes, even if there is no proof that anyone intended to discriminate. The successful argument made by fair housing advocates was that the FHA encompasses challenges to purportedly race-neutral policies that have negative effects on protected groups. In upholding this tactic, the justices let stand a legal strategy that has been used for decades to challenge discrimination in housing, zoning, occupancy standards and other housing-related areas.

Because this is the third time the Supreme Court agreed to consider a FHA disparate impact claim in recent years (the first two were settled before adjudication by the Court), many thought the decision might be to reverse the prior practice. That possibility may have tempered use of disparate impact by enforcement agencies such as the Department of Justice (DOJ), the Department of Housing and Urban Development (HUD) and others. Any such restraints will now fall away.

Impact on Campus Housing

The Supreme Court’s decision could potentially have a meaningful impact on student housing. To date, all reported major fair housing-based legal challenges in student housing involved students with disabilities and assistance animals. Perhaps that has been the “low hanging fruit,” but the FHA has now been applied repeatedly to student housing both on and off campus, and that means disparate impact applies too. Applying this theory to student housing could specifically affect students with disabilities gaining access to unique housing programs, services and rates, as well as students with children — even though no discrimination is intended by, for example, simply requiring all residents in a student housing facility to be students.

Regarding equal access to all programs by students with disabilities, the concept should be nothing new for campuses, as the Americans with Disabilities Act (ADA) already considers colleges and universities as places of public accommodation and “housing at a place of education” was specifically added in 2011 to clarify that campus housing is also covered by the ADA.¹ Most campus housing options, especially if related to an educational component, should already be accessible to students with disabilities. Disparate impact within the FHA, however, now provides an additional response tool to those who feel excluded from housing options due to a disability.

In the case of students with children, the possible impact on campus housing operations might appear to be larger and more complicated. If an institution

¹ The DOJ added a definition to §36.104 of the ADA to clarify the types of educational housing programs that are covered. This section defines “housing at a place of education” as “housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence.” Housing that is subject to this section must comply with the provisions of the 2010 Standards applicable to “transient lodging,” including but not limited to the requirements for transient-lodging guest rooms.

requires all residents to be enrolled, and since virtually no minor children of students would also be university students themselves then, by virtue of that policy alone, students with children are effectively ineligible to live on most campuses. Some campuses expressly state students with children need not even apply for housing, as they are ineligible for consideration. This could certainly be argued to create disparate impact (unintentional harm based on familial status). Simply looking at the logistics, however, wouldn't a minor child in a traditional residence hall setting be disruptive to other residents and maybe the child as well?

It is possible for schools to respond affirmatively in full compliance with the intent of the law, without major disruptions to how campus housing operates today. First, however, some FHA background may be helpful.

Background

The FHA prohibits discrimination by providers of housing whose practices make housing unavailable to persons because of race, color, religion, national origin, sex, handicap and familial status. Familial status, incidentally, has nothing to do with marital status; it is defined as having custody, even part-time custody, of a minor. All of these are federally-protected classes throughout the country, although many states and cities have also added additional protected classes. (The Scion Group, for example, operates student housing communities where as many as 22 protected classes are in place.)

The purpose of the Act is to allow anyone in America to live wherever they choose and are otherwise eligible, regardless of their protected class standing. Two additional major components of the FHA are as follows:

- Design and construction – there are seven requirements that obligate designers, developers and builders for certain living units in buildings with more than four units and first occupied since 1991
- Steering – not allowing (or even discouraging) people to live in certain sections or areas based on one or more protected classes is prohibited

Steering is specifically called out by the FHA as being unlawful. This provision eliminates the right of a housing operator to make adult decisions (or suggestions) for other adults, and our understanding is that it is involved in a majority of all FHA cases that are litigated.

Options to Respond

We have heard from some schools that they do not discriminate against students with children per se, but since all residents must be enrolled and the minor children are not enrolled, the child cannot live in campus housing and therefore a student who desires to live with their child becomes automatically ineligible. With the Supreme Court's ruling in June, such a stance may invite a disparate impact claim.

A different approach is to embrace the law of the land through compliance, and to continue the educational process with students regarding what they are likely to encounter after graduation. This is more likely to be beneficial to higher education institutions as well as to students themselves. Students with pet allergies, as an example, could wind up in a future rental community with a neighbor who lives with an animal, even in a pet-free community, because of laws that allow assistance animals to help disabled individuals access housing on a more equal basis.

Instead of a policy that results in automatic denial of student applicants with custody

of a child, schools might continue to offer campus inventory in most areas on a per-person/per-bed basis, but also designate other areas as housing accommodations offered by the unit. Once this is in place, it should be relatively easy to allow students to live wherever they qualify (based on class-standing, enrollment in specific programs, availability, etc.) regardless of familial status or other protected classes.

Given these options, few if any students with children would select what is likely to be more expensive accommodations in a by-the-bed environment. But giving them the option can make the difference in legal compliance, as opposed to essentially communicating that they should not even bother applying. In the rare occasion where a student freely chooses to rent one or more extra spaces for their children in a per-person area of campus housing, communication and accountability are essential. Lifestyle differences can generally be accommodated, just as that occurs now in off-campus student housing and other multi-family housing operations nationwide.

Conclusion

The FHA has been in effect since 1968, but it does not appear to have been enforced on campuses in any significant manner until around 2005. Since then, however, there have been at least a half-dozen cases where schools have either settled or been found to be in violation. This is not likely to go away and now, with the affirmation of disparate impact to support claims of discrimination, further enforcement activity on campuses would not be surprising.

We recommend schools become more proactive regarding compliance with the FHA, especially in regards to accessibility issues for the disabled and for students with a child. Annual training for everyone

involved with housing and residence life, as well as others on campus who are responsible for compliance with fair housing issues, is also recommended. This should be an on-going process due to turnover of team members, the desire to avert claims through proper education, and because the legal landscape continues to evolve.

About the Author

Eric D. Luskin, Senior Vice President and a Principal with Scion, has over 30 years' experience in campus housing administration, and has been a resource on Fair Housing and regulatory compliance to many professionals. He currently serves as the chair of the ACUHO-I Certificate in Occupancy Management committee and also serves on the Board of Advisors to the monthly publication *Fair Housing Coach* published by Vendome Group, LLC. He has consulted with dozens of clients and is a Certified Property Manager® through the Institute of Real Estate Management. Mr. Luskin is not an attorney and readers should rely on their own counsel for legal advice.

About Scion

The Scion Group LLC is a real estate services partner to higher education and not-for-profit institutions, as well as to third-party student housing providers. Scion provides planning and feasibility consulting, implementation services, and management consulting for student housing facilities and operations. Scion has been engaged to perform advisory services on over 160 campus markets in the United States, Canada, Mexico and the U.K. For more information, contact The Scion Group at 312-704-5100 or info@thesciongroup.com.