



THE RIGHTS OF PEOPLE WITH DISABILITIES IN INCLUSIVE NEIGHBORHOODS

under the Americans with Disabilities Act,
Fair Housing Act, and
Section 504 of the Rehabilitation Act.

The Ability Center of Greater Toledo

Inclusive Neighborhoods for People with Disabilities.

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This booklet was made possible in part by a grant from the Ohio State Bar Foundation. The views expressed herein do not necessarily represent those of the Ohio State Bar Foundation.

This booklet is also funded under grant CFDA 93.791 from the U. S. Department of Health and Human Services, Centers for Medicare and Medicaid Services. However, the contents of this booklet do not necessarily represent policy of the U. S. Department of Health and Human Services, and you should not assume endorsement by the Federal Government.

The Ability Center of Greater Toledo is a Center for Independent Living, established in 1920, serving seven counties in northwest Ohio. Our mission is to assist people with disabilities to live, work, and socialize within a fully accessible community. We exercise our core values of consumer control and community inclusion; advocacy; establishing high expectations for success among people with disabilities; and forming partnerships and positive public relations to deliver best practice programs that assist people with disabilities in achieving community integration.

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The Ability Center of Greater Toledo

The Ability Center of Greater Toledo has always been a non-profit agency serving people with disabilities in north-west Ohio, but we have evolved alongside shifting disability policy in the United States. Since our founding, U.S. policy has shifted, mostly at the urging of people with disabilities, from a policy of segregation and seclusion to one prioritizing community inclusion and self-determination.

The Ability Center shifted its focus from a hospital for children with disabilities in 1920, to a school for children with disabilities in the 1960s, and finally, to a Center for Independent Living in 1989, an organization led and directed by people with disabilities. The passage of federal laws protecting people with disabilities from discrimination shifted our goals from seeking to establish policies of support and community inclusion to seeking to enforce those policies.

For many years, disability advocacy focused on trying to give people living in institutional settings the choice to live independently in community-based settings. That focus is evolving to offering people with disabilities, who are now in the community, the choice of where they want to live, work, and spend their days. Looking to the future, people with disabilities will need the tools available under the ADA, FHA, and state and local housing laws to create neighborhoods that are inclusive. We hope this booklet helps local governments and advocates plan and create those inclusive neighborhoods.

Introduction: The Right to Inclusive Neighborhoods

In the U.S., people with disabilities have a civil right to be free from discrimination in a neighborhood of their choosing.

The passage of the Americans with Disabilities Act (ADA) was in response to the historic exclusion and unequal treatment of people with disabilities from their communities.¹ The ADA sets out the goals of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.² In short, in passing the ADA, Congress found that, if we seek to create a country where every person has a chance of equal opportunity, people with disabilities must be given additional legal protections to counteract the historic tendency for our country to exclude and isolate such people.

The lack of access to neighborhoods often meant a lack of access to jobs, property ownership, and generally, a lack of community inclusion as a whole.

For many years, federal and state laws encouraged people with disabilities to live in isolated, institutional settings outside local communities. Federal health care laws provided care in institutions that was not available in the community. Some local laws, like zoning restrictions, intentionally sought to keep people with disabilities out of certain neighborhoods. Inaccessible housing kept people with disabilities from choosing where they want to live or restricted access to neighborhood homes. The lack of access to neighborhoods often meant a lack of access to jobs, property ownership, and generally, a lack of community inclusion as a whole.

Because of that, lawmakers passed federal laws such as the Americans with Disabilities Act (ADA) and Fair Housing Amendments Act (FHA) to provide people with disabilities

the right to choose inclusive neighborhoods. State and local governments passed civil rights and visitability laws to ensure neighborhood access. These laws have done much to move people with disabilities into communities, but there is much work to be done.

Inclusive neighborhoods exist where people with disabilities have the right to choose to live, and visit, in neighborhoods of their choice.³ This booklet aims to help people with disabilities, state and local governments, and housing providers recognize the laws that protect people with disabilities and provide tools for community planning of inclusive single-family neighborhoods.

Laws used in this booklet:

In the U.S., people with disabilities are protected from discrimination under federal, and some state and local, laws. This booklet addresses the following laws as they relate to community planning and single- family neighborhood accessibility:

- **Title II of the Americans with Disabilities Act;**⁴
- **The Fair Housing Amendments Act;**⁵
- **Section 504 of the Rehabilitation Act;**⁶
- **State or Local Visitability laws.**

This booklet discusses the obligations of state and local governments in protecting the rights of people with disabilities to choose to live in a particular neighborhood through community planning and neighborhood accessibility. This booklet also seeks to provide governments and advocates with tools to create local ordinances that further the goal of community inclusion.

Who is protected?

People with disabilities and those who create housing for people with disabilities are protected from discrimination. Under federal law,⁷ a person with a disability is, “a) an individual with a physical or mental impairment that substantially limits one or more major life activities of such individual; b) a record of such impairment; or c) being regarded as having such an impairment.”⁸ The EEOC and Department of Justice have identified epilepsy, paralysis, HIV infection, AIDS, a hearing or visual impairment, mental retardation, or a specific learning disability as examples of disabilities that are protected under federal law.⁹

Local governments must comply with the ADA and FHA. This includes compliance with the *Olmstead* decision and ADA inclusion mandate; refraining from enforcing discriminatory ordinances; and granting reasonable accommodations in zoning. Local governments also have the power to enact local ordinances that further the goals of community inclusion including reasonable accommodation ordinances and local visitability laws. By complying with federal laws and creating enacting local ordinances, communities can encourage inclusive neighborhoods for people with disabilities.

Under federal law,⁷ a person with a disability is, “a) an individual with a physical or mental impairment that substantially limits one or more major life activities of such individual; b) a record of such impairment; or c) being regarded as having such an impairment.”⁸

Part I: Government Services in the Community rather than an Institution: Olmstead and the ADA Integration Mandate

Many people with physical, mental, and intellectual disabilities need public services and supports in order to manage health conditions and/or cognitive impairments. Historically, one barrier to inclusive neighborhoods for people with disabilities has been a lack of access to government services and supports, especially long-term care, in community settings. To receive long-term care, people with disabilities had to live in institutional settings, such as nursing homes and intermediate care facilities, with little independence and access to the community.¹⁰ However, the Title II of the ADA and the Supreme Court decision of *Olmstead v. L.C.* changed the landscape for people who must rely on government subsidized health care to manage a disability.¹¹

The ADA affirmed that people with disabilities have the same rights as all citizens: to live with family and friends in local neighborhoods and towns; to be employed at competitive wages; and to participate in community affairs.¹²

Under Title II of the ADA, governments have an obligation to provide services to people with disabilities in the, “most integrated setting appropriate,”¹³ and under *Olmstead v. L.C.*, governments must refrain from programs that cause, “unjustified isolation.”¹⁴ Based on the ADA and *Olmstead* decision, where governments provide health care, they must offer health care in integrated, community-based settings.¹⁵

An overview of the *Olmstead* decision and the integration mandate.

In 1999, the U.S. Supreme Court held in the case of *Olmstead v. L.C.* that “unjustified isolation” of persons with disabilities constitutes discrimination under Title II of the ADA, which states that public entities must, “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified people with disabilities.”¹⁶

Olmstead involved the state of Georgia’s failure to transition two people with developmental disabilities and mental illness from state psychiatric hospitals to the community because of a lack of state sponsored community services.¹⁷



While the two plaintiffs had both been deemed able to leave the hospital by their doctors, and wished to leave, they were unable to move into the community due to a lack of available services.¹⁸

The Court held that public entities must provide community-based services to people with disabilities when the services are appropriate; the person does not oppose community-based treatment; and community services can be reasonably accommodated.¹⁹ The Court also held that, where states provide a range of services to people with disabilities, they have a duty to do so equitably.²⁰

The holding of *Olmstead* applies to all public entities. Under the ADA, a public entity is, “any state or local government,” and, “any department, agency, [or] special purpose district.”²¹ A “qualified individual with a disability,” is a person with a disability who, “with or without reasonable modifications... meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity.”²² Practically, where a state government program, like Medicaid, provides care that forces people with disabilities

to live in institutions rather than community-based settings in order to receive services, that program violates the ADA.

Olmstead's Application to Neighborhood Inclusion

The *Olmstead* decision has helped move people with disabilities out of institutions and into neighborhoods. Because of the *Olmstead* decision, states have adopted programs that have moved thousands of people with disabilities out of institutions into community settings. The decision has also placed more emphasis on the ADA mandate to provide services in integrated settings. For example, since the *Olmstead* decision, states have worked to transition people with disabilities from nursing homes, psychiatric hospitals, and developmental centers, into home and community based settings, such as individual homes, apartments, and small group homes.²³ **As of 2015, states had transitioned over 52,000 people out of institutions into the community using the federal Money Follows the Person (MFP) program.**²⁴ Twenty-one states expected the rate of enrollment to increase as of 2016.²⁵ The *Olmstead* decision has made neighborhoods the default setting where people with disabilities will live. Along with that reality, public entities that serve neighborhoods have an increasing obligation to follow the ADA integration mandate and *Olmstead* decision.

The *Olmstead* decision has emphasized public entities' duty under the ADA to have inclusive policies and individuals with disabilities' right to challenge programs offered only, or mostly, in institutional or segregated settings. Where a public entity administers its programs in a manner that results in unjustified segregation of people with disabilities, it violates the ADA and the *Olmstead* decision.²⁶ More specifically, where a public entity 1) operates facilities or programs that segregate people with disabilities; 2) finances the segregation of people with disabilities in private facilities; or 3) promotes or relies on the segregation of people with disabilities in facilities or programs through its planning, service system design, funding choices, or service implementation practices, it may have violated the *Olmstead* decision and the ADA.²⁷

Thus, individuals with disabilities can challenge the setting in which they receive public services. While most *Olmstead* lawsuits have been brought to change policy on a systemic level, individuals with disabilities have also challenged inappropriate institutional placements under the ADA.²⁸ Under the ADA and *Olmstead* decision, people with disabilities have the right to have services provided in the most integrated setting appropriate to their needs.²⁹ If a person is served in a segregated setting, she has the right to ask that services be provided in the community.³⁰

People with disabilities can rely on the following evidence that they should be served in a more integrated setting:

- ✓ An assessment by a public entity's treating professional;
- ✓ An independent assessment by a different professional;
- ✓ Evidence that people with similar needs are living, working, and receiving services in an integrated setting;
- ✓ Evidence from a community group;
- ✓ Any other evidence that is relevant.³¹

While the *Olmstead* case involved long-term care services, the holding of *Olmstead* has already been expanded to apply to employment and educational settings.³² It is essential for public entities to consider the holding of *Olmstead* as part of their program and community planning.

Federal Government Implementation of Olmstead

Despite a recent focus on *Olmstead* enforcement, many state and local governments have needed pressure in order to take *Olmstead* into account in their health care, employment, and housing planning. Because of federal enforcement of *Olmstead*, advocates have guidance from federal agencies to use in influencing state and local health care, employment, and housing planning.

The past two U.S. Presidents have issued executive orders in support of the *Olmstead* decision to deinstitutionalize people with disabilities and support their move into the community. In 2001, President George W. Bush issued an executive order supporting swift implementation of *Olmstead*.³³ In 2009, President Barack Obama launched the “Year of Community Living,” directing all relevant federal agencies to work together to make the promise of *Olmstead* a reality.³⁴

With the support of two U.S. Presidents, the Federal Centers for Medicare and Medicaid Services (CMS), Federal Department of Housing and Urban Development (HUD), and Federal Department of Justice (DOJ) have all taken actions to implement the requirement that people with disabilities be offered public services in the “most integrated environment.”

Health Care:

Centers for Medicaid and Medicare Services (CMS)

Home and Community Based Services Waivers

In order to implement *Olmstead*, the Centers for Medicare and Medicaid Services made it easier for states to offer Home and Community Based Services Waivers as part of their state Medicaid services.³⁵ Home and Community Based Services (HCBS) Waivers allow states to use Medicaid funding to cover in-home medical and non-medical long-term care services such as transportation and personal care services.³⁶ Over the years, CMS has modified federal policy on HCBS Waivers to

make it easier for states to offer them as part of their Medicaid system.³⁷ CMS has also implemented “Money Follows the Person Rebalancing Demonstration” Grants (MFP) to assist states in “re-balancing” their Medicaid programs by increasing the number of HCBS Waivers available and creating programs that assist people to transition out of institutional settings into the community.³⁸

Guidance for State Departments of Medicaid

CMS also asked state Departments of Medicaid to follow its guidance on *Olmstead* by issuing four letters.³⁹

In the first letter, CMS told state Medicaid departments that **“reasonable steps should be taken if the treating professional determines that a person living in a facility could live in the community with the right mix of support services to enable them to do so.”**⁴⁰ It also required states to conduct a self-evaluation to ensure that their policies, practices, and procedures promote, rather than hinder, integration.⁴¹

In the second letter, CMS offers **assistance on creating state Medicaid policies of deinstitutionalization** and reminds states that the HHS Office of Civil Rights has the power to enforce *Olmstead*.⁴²

In the third letter, CMS **explains modifications made to federal regulations in order to make it easier for states to provide home and community based services.**⁴³

Finally, the fourth letter **addresses frequent questions regarding HCBS Waivers.**⁴⁴ These letters were meant to guide the development of state Medicaid programs focused on HCBS Waivers and transition from institutional settings to community based settings.

Advocates wishing to influence their state HCBS Waiver programs can also contact their state Departments of Medicaid to receive notice of opportunities for comment on applications and rule changes. Prior to an application for a rule change or CMS program, states are required to seek public feedback on their programs.

Housing:

The Department of Housing and Urban Development (HUD)

Guidance for HUD Grantees including Local Governments and Public Housing Authorities

Many local governments and Public Housing Authorities receive HUD funding, and HUD has issued guidance making it clear that the receipt of HUD funding comes with *Olmstead* obligations.⁴⁵ In that guidance, HUD stated that it is, “committed to providing individuals with disabilities a meaningful choice in housing and the delivery of long-term health care and support services.”⁴⁶

First, HUD encourages Public Housing Authorities and other housing providers to partner with state and local governments to increase the number of community-based, integrated housing opportunities for individuals with disabilities transitioning out of, or at serious risk of entering, institutions or other segregated settings.⁴⁷

Second, HUD encourages local governments to take *Olmstead* into account in their programs. The guidance points out that HUD’s Section 504 regulations require that HUD and entities that receive money from HUD administer their programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.⁴⁸ It identifies a lack of “accessible, affordable housing” and “integrated housing options scattered throughout the community where individuals with disabilities can receive the support services they need

from the provider of their choosing,” as a barrier to CMS’s efforts under the Money Follows the Person program.⁴⁹ In the statement, HUD offers to assist state and local governments with *Olmstead* related work.⁵⁰

Finally, HUD encourages Public Housing Authorities and other housing providers that receive money from HUD to implement *Olmstead* preferences and provide, “integrated, affordable, and accessible housing options for individuals with disabilities who are transitioning from, or at serious risk of entering, institutions or other segregated settings.”⁵¹

HUD Programs that assist with *Olmstead* Implementation

HUD has created programs to aid people with disabilities transitioning out of institutions.⁵² HUD allocated a portion of its funding of Housing Choice Vouchers for people with disabilities who are 1) not elderly (below the age of 62) and 2) who are transitioning from an institution to the community.⁵³ These are called NED II Vouchers. NED II vouchers are often issued by Public Housing Authorities with the aid of organizations who are assisting people in transitioning out of institutions. Other Housing Choice Voucher programs involve Designated Housing Vouchers; Certain Developments Vouchers; One-Year Mainstreaming Vouchers; and the Project Access Pilot Program.⁵⁴

HUD’s Section 811 Supportive Housing for People with Disabilities Program, which is meant to create new integrated, affordable permanent supportive housing units, is also meant to assist with transition.⁵⁵

HUD *Olmstead* Enforcement

Finally, HUD issued a memorandum to its Fair Housing Enforcement Offices directing them to conduct compliance reviews and periodic limited monitoring reviews to ensure that Public Housing Authorities are assessing the housing needs of persons with disabilities transitioning out of institutions in their

service area and are assuring that notice of their programs reach people transitioning out of institutions.⁵⁶ The memo suggests a six-factor review and suggests that reviews can be based on complaints filed with HUD regarding the Public Housing Authority.⁵⁷

Enforcement: The Federal Department of Justice (DOJ)

Guidance and Compliance Documents

The Department of Justice is the legal department of the United States government.⁵⁸ The DOJ also promulgates ADA Title II regulations⁵⁹ and has been charged with enforcement of Title II of the ADA. It will investigate complaints of non-compliance, including non-compliance with *Olmstead*.⁶⁰

The DOJ offers information and guidance on compliance with *Olmstead*, including an ADA technical assistance hotline and several guidance letters. For example, the DOJ issued the Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act.⁶¹

Investigations, Lawsuits, and Statements of Interest

Since 2009, the DOJ has brought lawsuits based on *Olmstead* against over 25 states who failed to offer services and supports in the most integrated setting appropriate for people with disabilities.⁶² The DOJ has brought lawsuits against states that over-relied on nursing facilities⁶³, intermediate care facilities⁶⁴, mental health facilities⁶⁵, and sheltered workshops⁶⁶ to the exclusion of providing services for people with disabilities in their homes or in integrated, community settings. Most of those lawsuits and investigations resulted in settlements or court orders requiring states to create plans to offer people services and supports in integrated, community based environments.⁶⁷ People with disabilities who believe their rights have been violated by a state and local government or place of public accommodation can file a complaint with the Department of Justice through mail or online.⁶⁸

Local Advocacy

In addition to reaching out to the state department of Medicaid, public housing providers, and other recipients of HUD funding, advocates can reach out to local governments regarding administrative compliance under Title II of the ADA. Every public entity is required to maintain an ADA transition plan that evaluates all of its programs, services, and activities for ADA compliance and sets out steps to make areas of non-compliance accessible.⁶⁹ Any public entity with over 50 employees is required to designate an ADA coordinator, or a responsible employee, to coordinate ADA compliance.⁷⁰ Advocates can approach ADA coordinators regarding *Olmstead* implementation or a lack of community integration in programs, services, and activities of the entity.

What is happening in my state?

The *Olmstead* decision is being implemented all over the United States. If you are interested in what is happening in your state, you can look at the U.S. Department of Justice's webpage, http://www.ada.gov/olmstead/olmstead_enforcement.htm.⁷¹

The National Association of States United for Aging and Disability also maintains a State Medicaid Integration Tracker at <http://nasuad.org/initiatives/tracking-state-activity/state-medicaid-integration-tracker/ohio>.

The *Olmstead* decision is moving people with disabilities out of institutions and into neighborhoods. In one example, the number of people with II/DD living in state-run institutions has declined from a peak of 194,650 in 1967 to 32,909 in 2009.⁷² This shift is changing the landscape of neighborhoods within the United States.

Part II: Home Accessibility and Availability: Discriminatory Zoning Ordinances and Reasonable Accommodations

Imagine a situation where a person who uses a wheelchair moves to a city that does not allow ramps to be built on housing without the ramp meeting expensive design standards. Or where a person who uses a miniature horse as a service animal moves to a city where it is unlawful to own farm animals. Some land use and zoning laws specifically exclude people with disabilities; some set a standard that people with disabilities are unable to match; and some prevent people with disabilities from modifying housing to make it accessible.⁷³

People with disabilities are protected by the Fair Housing Amendments Act (FHA) and the ADA from being shut out of particular neighborhoods due to discriminatory land use and zoning laws. Local governments must plan non-discriminatory land use and zoning laws to further neighborhood inclusion for people with disabilities.

Courts have recognized restrictive land use and zoning laws as discrimination under the FHA and ADA.⁷⁴ This means that cities, counties, and states must allow changes to their building and zoning codes where necessary to accommodate a person's disability.⁷⁵ They must, too, refrain from enacting ordinances and policies that discriminate against people with disabilities.

The FHA and ADA's Application to Single-Family Neighborhood Inclusion

The Fair Housing Amendments Act

The FHA was enacted, in part, "to end the unnecessary exclusion of persons with handicaps from the American mainstream."⁷⁶ It gives people with disabilities the "right to

choose to live in single-family neighborhoods,”⁷⁷ and “prohibits local governments from applying land use regulations in a manner that will exclude people with disabilities entirely from zoning neighborhoods, particularly residential neighborhoods.”⁷⁸

The FHA prohibits discrimination on the basis of disability in the rental or sale of a dwelling.⁷⁹ Discrimination includes a refusal to permit reasonable modifications of the premises if they are necessary to afford a person full enjoyment of the premises; a refusal to make reasonable accommodations in rules, policies, practices, or services when they are necessary to use and enjoy a dwelling; and the failure to design new apartment buildings according to the specifications of the FHA.⁸⁰

The Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

While the ADA does not focus on housing to the extent of the FHA, it was enacted to counter discrimination, in, “architecture, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other activities.”⁸¹ Two circumstances where the ADA overlaps with the FHA are where housing is operated by a public entity or where there are places of public accommodation within housing developments.⁸²

This booklet focuses on Title II of the ADA, which prohibits public entities, including local and state governments, from discriminating against people with disabilities on the basis of their disability.⁸³ Specifically, the ADA prohibits public entities from excluding qualified people with disabilities from participation in or denying them the benefits of their services, programs, and activities or subjecting them to discrimination.⁸⁴ Discrimination includes refusing to make reasonable modifications in policies, practices, or procedures

when necessary to avoid discrimination on the basis of disability.⁸⁵ Where local and state laws, such as building and zoning laws, govern neighborhoods, they must refrain from enacting discriminatory laws and must make accommodations in those laws where it is necessary to accommodate a person's disability.⁸⁶

Section 504 of the Rehabilitation Act also prohibits any program receiving federal funding from discriminating on the basis of disability.⁸⁷ Where a local government receives federal funding, it is subject to Section 504.⁸⁸ While Section 504 contains different requirements than the FHA and ADA, generally, discrimination under Section 504 is interpreted alongside the FHA and ADA.⁸⁹ We will not address Section 504 in this booklet.

Discriminatory Zoning and Land Use Laws

Historically, land use and zoning ordinances have been used to keep people with disabilities out of particular neighborhoods, especially when there is neighborhood opposition to housing. Before the passage of the FHA and ADA, these ordinances were challenged as unconstitutional. With the passage of the FHA and ADA, discriminatory ordinances also violate federal statute.

In one pre-FHA and ADA case, *City of Cleburne v. Cleburne Living Center*,⁹⁰ the U.S. Supreme Court found that the City of Cleburne violated the Equal Protection clause of the Fourteenth Amendment by preventing a group home from locating in a residential neighborhood.⁹¹ City law required that hospitals for the, "insane or feeble-minded," get a special use permit, and the City of Cleburne denied a permit to a person wishing to open a group home in a residential neighborhood because locating a group home in that neighborhood was unpopular.⁹² In its decision, the Supreme Court noted that, "'a bare desire to harm a politically unpopular group,'" is not a legitimate state interest that would support a discriminatory ordinance."⁹³

Other types of land use and zoning restrictions have acted to keep people with disabilities out of particular neighborhoods. Local governments have enacted zoning ordinances aimed at preventing housing for people with disabilities from being built in particular neighborhoods.⁹⁴ Yet, group home spacing requirements, fire and safety requirements, and other land use restrictions also limit where housing can be built for people with disabilities.⁹⁵ Zoning laws that prevent people with disabilities from modifying their home, such as setback restrictions, can force people with disabilities to avoid or move from neighborhoods of their choice.⁹⁶

The FHA and ADA were designed, in part, to prohibit land use and zoning discrimination. Governments are not allowed to enforce laws for the purpose of keeping people with disabilities out of particular neighborhoods.⁹⁷

Where an ordinance is passed to prevent people with disabilities from moving into particular neighborhoods, it is unlawful under the FHA and ADA.⁹⁸

Governments are also prohibited from enforcing ordinances that have the effect of making housing unavailable to people with disabilities.⁹⁹ Where the enforcement of an ordinance has the effect of denying housing or making housing unavailable to people with disabilities, it is unlawful under the FHA and ADA if it is not necessary to achieve a valid purpose.¹⁰⁰ The FHA and ADA invalidate any local zoning ordinance, law or decision that constitutes discrimination.¹⁰¹

Non-discriminatory reasons for ordinances or reasonable accommodation denials

Local governments are not always prohibited from enacting ordinances that have the effect of restricting housing for people with disabilities. If a local government or association has valid,

non-discriminatory reasons for enacting such an ordinance or denying a reasonable accommodation, it may be lawful for them to do so.¹⁰² For example, one court found that a 500-ft. spacing requirement between group homes was legitimate because the city had an interest in limiting the concentration of group homes and the ordinance did not have a discriminatory effect on people with disabilities.¹⁰³

Reasonable Accommodations in Zoning and Land Use Laws

If enforcement of a land use or zoning law against a person with a disability prevents him from having access to housing, local governments are required to grant reasonable accommodations, or exceptions to the law, to the extent necessary to accommodate his disability.¹⁰⁴ For example, a city may be required to allow a person who uses a miniature horse as a service animal to keep his horse even if there is a law prohibiting farm animals in the city. The refusal to grant reasonable accommodations is discrimination under the FHA and ADA.

In particular, discrimination under the FHA includes, “a refusal to make reasonable accommodations in rules, practices, or services where they are necessary to use and enjoy a dwelling.”¹⁰⁵ Under the ADA, a public entity must make, “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.”¹⁰⁶

Reasonable accommodations often come into play where local laws prevent people from modifying their homes to make them accessible. Setback or design limitations can prevent people with mobility impairments from building ramps or prevent the families of people with developmental disabilities, such as autism, from building fences.¹⁰⁷ The Ability Center has encountered a person who was cited for keeping an accessible van where local laws restricted “commercial vehicles.” Under the FHA and ADA, local governments are required to grant

exceptions to such laws, and as such exceptions are necessary to inclusive neighborhood planning, governments should anticipate such exceptions in their own laws, procedures, and employee training.¹⁰⁸

Reasonable Accommodation Requirements

There are a number of legal requirements that must be met for a person to qualify for a reasonable accommodation. The requested exception must be both “reasonable” and “necessary” to be legally protected.¹⁰⁹

More specifically, a person with a disability must show that: 1) they are a person with a disability or making a request on behalf of a person with a disability as defined by the FHA and ADA; 2) the local government knows or should reasonably know of the person’s disability; and 3) the accommodation is reasonable and necessary to allow the person an equal opportunity to use and enjoy the housing in question.¹¹⁰

What constitutes a reasonable accommodation is a case-by-case determination.¹¹¹ If a requested modification imposes an undue financial or administrative burden on a local government or if it constitutes a fundamental alteration of their land use and zoning scheme, it is not reasonable.¹¹²

Examples of Reasonable Accommodations

Since the passage of the FHA, courts have required local governments and associations to allow people with disabilities reasonable accommodations in many different situations. Some examples are:

- ➡ A local ordinance in Pennsylvania required residential homes to have a rear yard. The developer of a group home for people with mental illness requested an exemption from the rear yard requirement. Despite local opposition, a federal court found that they were entitled to the exemption as a reasonable accommodation.¹¹³
-

- ➡ A local ordinance in Michigan permitted adult foster care homes for six people to move into a neighborhood, and an adult foster care home for nine people applied to locate in that neighborhood. The Sixth Circuit ruled that the city in Michigan was required to allow a foster care home for nine people.¹¹⁴
 - ➡ A local ordinance banned farm animals from being kept at residences within the city, and a city resident kept a miniature horse as a therapy animal for her daughter with autism. The Sixth Circuit found that the resident's request to keep the miniature horse could constitute a reasonable accommodation on the basis of her daughter's disability and reversed and remanded the District Court's finding of summary judgment.¹¹⁵
 - ➡ A city refused to grant a homeowner with a physical disability access to the alley behind her house in order to use it to build a parking pad. While steps led to her front entrance, the alley behind her house was level with the back exit. The District Court found that access to the alley was a reasonable accommodation that the City was required to provide.¹¹⁶
 - ➡ An Arizona Appeals Court concluded that a homeowners' association's refusal to reasonably accommodate an adult with a disability by modifying the community's age restrictions so that he could live with his parents violated the FHA and the Arizona FHA.¹¹⁷
 - ➡ A District Court in Tennessee found that a homeowners' association may be required to allow parents to build a sunroom on their home in order to accommodate the disabilities of their children.¹¹⁸
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Common Questions

Neighborhood Opposition

There are times that local governments enforce discriminatory ordinances because of neighborhood opposition to housing for people with disabilities. Sometimes, neighbors object to the placement of housing for people with disabilities in their neighborhood or the waiver of aesthetic zoning requirements to accommodate a disability.¹¹⁹ However, neighborhood opposition does not alter the duties of local governments and can be evidence of discrimination.¹²⁰

In fact, where a discriminatory ordinance is enforced or a request for a reasonable modification is denied because of stereotypical fears or prejudices about people with disabilities, evidence of neighborhood objections have been used as evidence of government discrimination.¹²¹

FHA and ADA Conflict with Local Laws

Sometimes local governments argue that following the ADA or FHA violate local laws, but entities are bound not to enforce a statute if doing so would perpetuate unlawful discrimination.¹²² To the extent that enforcing a local ordinance or state statute would violate the FHA or ADA, the ordinance or statute is unenforceable.¹²³

Group Homes

Local governments have an obligation to not discriminate against developers of group homes because people with disabilities live in group homes.¹²⁴ Local governments cannot prevent group homes from locating in single-family home neighborhoods without a non-discriminatory reason and must allow reasonable accommodations in laws that have the effect of restricting the location of group homes.¹²⁵

Addressing Land Use Discrimination

Too often, local governments, and people with disabilities, are not aware of their obligations or rights under the FHA and ADA regarding land use and zoning.¹²⁶ However, local governments can incorporate those rights into their community planning process. The following are a few steps that other communities have taken to further the goal of community integration for people with disabilities.

Develop a Local Ordinance to Process Reasonable Accommodations in Zoning

Local governments can adopt procedures to process reasonable accommodations separately from ordinary variances in the zoning code in order to protect the rights of people with disabilities under federal law.¹²⁷ Advocates can approach local governments about adopting an ordinance to create those procedures.

Typically, state law designates land use and zoning powers to local governments, which will create a Plan Commission that creates zoning laws; a Department of Code Enforcement to enforce zoning laws; a Department of Building Inspection to grant building permits; and a Board of Zoning Appeals to process variances in the zoning code.¹²⁸ Often these local bodies are unfamiliar with the rights of people with disabilities under the FHA and ADA and may even lack a procedure to review and process reasonable accommodations. To resolve these issues, local governments can adopt ordinances that set a separate procedure for people with disabilities to request reasonable accommodations.¹²⁹

Sample Local Ordinances

Any procedure that sets up a method for requesting reasonable accommodations must be accessible to people with disabilities and is subject to people with disabilities' right to reasonable accommodations and modifications under the FHA and ADA

that are outlined above. The process itself cannot act as a barrier to a person's request for a reasonable accommodation through cost or difficulty in the request.¹³⁰

Jurisdictions around the country have adopted procedures to request reasonable accommodations through local ordinances. Included are Marin County, CA; Sacramento, CA; New Orleans, LA; Durham, NC;¹³¹ San Anselmo, CA,¹³² and Fort Worth, TX.¹³³

A sample local ordinance can be found at http://www.hcd.ca.gov/housing-policy-development/housing-element/documents/model_reasonable_accommodation_ordinance.pdf.

The sample ordinance can also be found on the Ability Center website.¹³⁴

Review Land Use and Zoning Laws During the Assessment of Fair Housing and Consolidated Plan process

Advocates and local governments have the ability to address land use and zoning discrimination during the Assessment of Fair Housing (AFH) review process. Local governments, states, and public housing authorities (PHAs) have a duty under the FHA and HUD regulations to Affirmatively Further Fair Housing (AFFH).¹³⁵ This means that, under HUD regulations, they must, "take meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination."¹³⁶

As part of that obligation, every three to five years, local governments and public housing authorities accepting HUD funds must conduct an AFH review¹³⁷ to identify fair housing issues in their community and create action steps to address those issues in a consolidated plan.¹³⁸

As part of the AFH process, local governments, states, and PHAs are required to seek community input in developing a plan of action to address fair housing concerns.¹³⁹ Their assessment, in part, on local data and knowledge and use that knowledge to form a plan to address fair housing issues in their region.¹⁴⁰ Thus, advocates and government representatives

should have a chance during the process to submit stories and data regarding local discrimination.¹⁴¹ Contributing to the process could require local governments, states, or PHAs to take action on zoning and land use discrimination such as reforming local statutes or creating a procedure for requesting reasonable accommodations.

At the end of the process, the consolidated plan is submitted to HUD as an outline of how HUD funds will be used and is subject to HUD enforcement.¹⁴² Advocates can monitor compliance with their plan and bring non-compliance to HUD's attention. More information on this process can be found on the HUD Affirmatively Furthering Fair Housing website.¹⁴³

Enforcement through the Department of Housing and Urban Development and the Department of Justice

If a person, or agency, whose rights have been violated does not wish to file a private lawsuit, he or she has the right to file a complaint with a federal agency:

Department of Housing and Urban Development (HUD): http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination.

Department of Justice (DOJ): https://www.ada.gov/fact_on_complaint.htm.

The Department of Housing and Urban Development (HUD) is responsible for enforcing the FHA and will enforce Section 504 and the ADA if they overlap with the FHA.¹⁴⁴ The Department of Justice (DOJ) has been charged with enforcement of Title II of the ADA and will enforce the FHA and Section 504 if they overlap with Title II or if there is a finding of widespread discrimination.¹⁴⁵ For zoning and land use matters, HUD refers cases that it evaluates as meritorious to the DOJ for enforcement action.¹⁴⁶

HUD and the DOJ updated a Joint Statement on Group Homes, Local Land Use, and the Fair Housing Act in 2016.¹⁴⁷ The

statement describes what constitutes discrimination in zoning and land use under the act, definitions, and the roles of the HUD and the DOJ in enforcing the act.¹⁴⁸ The DOJ has also issued guidance to state and local governments on enforcement of the ADA that includes discussion of zoning and land use requirements.¹⁴⁹ Both the DOJ and HUD have opened investigations or filed lawsuits based on discriminatory zoning ordinances and the denial of reasonable accommodations in zoning.¹⁵⁰

The role of the FHA and ADA in community planning, zoning, and land use are essential to creating inclusive neighborhoods for people with disabilities. The final section of this booklet addresses state and local ordinances that can create physical housing accessibility within single-family residential neighborhoods.

Part III:

Basic Physical Access to Single-Family Neighborhood Housing: State and Local Visitability Ordinances

Once people with disabilities move into a neighborhood, the neighborhood is often inaccessible to them. Past and current standard designs for housing have not taken into account the needs of people with disabilities. Often, people who use mobility aids have difficulty entering, getting through doorways, and using the bathrooms in homes that have been built with a standard design. One clever video on visitability shows a Lego child in a wheelchair run into entry-way steps while trying to get to a birthday party in a non-visitable home.¹⁵¹

Because they cannot get into others' homes, standard home design can result in isolation for people with disabilities.

While federal law doesn't currently require single family housing to be visitable for people with disabilities, many state and local governments have enacted visitability ordinances to prioritize neighborhoods where every home is, if not accessible, visitable for people with disabilities.

An Overview of Visitability

State and local visitability ordinances allow disability access to any neighborhood home. Visitability, sometimes called "Basic Home Access" or "Inclusive Home Design" is an affordable, sustainable, and accessible design approach targeting single-family homes.¹⁵²

Most visitability ordinances incorporate the following elements:

- One zero-step entrance;
- Interior doors, including bathrooms, with 32 inches or more of clear passage space; and
- At least one half bath (preferably a full bath) on the first floor.¹⁵³

In the United States, visitability was initiated in 1986 by disability rights advocate Eleanor Smith, and her group Concrete Change.¹⁵⁴ The group hopes to make all housing not covered by other regulations (the FHA, the ADA, etc.) accessible enough for visitors, those with disabilities seeking a single family home, and those who wish to age in place.¹⁵⁵

The Standard ICC Model of Visitability

The standard model of one visitable unit is found in the International Building Code, which is the American standard model building code. The organization which drafts the code, the ICC, has created a standard building code model for visitability features, which they have termed, “Type C” visitable for new single-family houses, duplexes, and triplexes.¹⁵⁶

A type C visitable unit requires:

- An accessible entrance on an accessible route with a slope no more than 1:20 leading from the sidewalk or street;
- A toilet room or bathroom on the entrance level with, at minimum, a lavatory or water closet and reinforced walls to allow the retro-active installation of grab bars;
- One habitable space on the entrance level with an area of 70 square ft. minimum;
- Doorways with a clear opening of 31¾ inches minimum;
- Outlets and light switches that are 15 inches minimum and 48 inches maximum above the floor;

Several additional standards and exceptions apply to kitchens on the entrance level; standards governing ramps, etc..¹⁵⁷

Existing Visitability Ordinances

Visitability is being recognized across the country as a necessary option for improving housing design. As of June 2008, there were 57 visitability programs across the U.S.¹⁵⁸ Visitability ordinances vary from jurisdiction, mostly by the region covered; features included; ways that they are implemented and enforced; and the scope of the housing covered.¹⁵⁹ Between 1992-2008, fifty-seven local and state visitability laws passed in the United States.¹⁶⁰ This resulted in over 30,000 visitable houses built for the open market.¹⁶¹

Cities including Naperville, IL; Pima County, AZ; Tucson, AZ; and Bolingbrook, IL, and states including Florida and Vermont have adopted visitability ordinances that require all new housing developments to be visitable.¹⁶²

Cities including Austin, TX; Urbana, IL; San Antonio, TX; Birmingham, AL; Pine Lake, GA; Scranton, PA; and Toledo, OH, and states including Georgia, Texas, and Kansas require all publicly-funded new housing developments to be visitable.¹⁶³

Cities including Austin, TX and San Antonio, TX have also created effective incentive-based visitability standards that tie visitability requirements to existing perks for builders.¹⁶⁴

Mandatory visitability programs are more effective than voluntary ones. For programs that track results, local government officials report that about 30,000 visitable homes have been built as the result of mandatory ordinances, while fewer than 1,300 visitable houses have been built with voluntary programs.¹⁶⁵

Objections to Visitability

Some people object that visitability ordinances interfere with the free market, but building design is already highly regulated with few objections. State and local governments already regulate home design through building codes that address public policy concerns such as aesthetics and safety.¹⁶⁶ For example, all buildings need to comply with fire safety design specifications in order to reduce house fires and ensure exits in case of a fire. Visitability requirements only add three additional housing features to building codes with large numbers of design specifications. Many private homeowners want a home with visitable features but are unaware that they are available.¹⁶⁷

People with disabilities are not the only ones that benefit from a visitability ordinance. Visitability ordinances provide a base level of accessibility in housing so that, if people acquire a disability after purchasing a home or wish to age in place, they do not need to retrofit their homes.¹⁶⁸ Often, when homebuyers need visitable features, such as after an accident or as they get older, they are not in a position to influence the new construction market.¹⁶⁹

Why adopt a Visitability Ordinance? Visitability's Application to Inclusive Single-Family Neighborhoods

As our population ages and people with disabilities are supported with long-term care in community-based, rather than institutional settings, there is a growing need for community-based housing that can accommodate them. Currently, the majority of housing stock is inaccessible single family housing, and people with disabilities have difficulty finding housing where they can get in and out the front door and use the bathroom. Visitability ordinances get ahead of this problem by requiring that housing be built with basic access features. While visitability features are invisible to people who do not need them, those same features become essential when a person, or someone close to them, acquires a disability.

Increased need for Visitability

Jurisdictions adopt visitability ordinances for many reasons. Municipalities anticipate that the need for visitable housing will increase as our population ages and wish to stay in their homes. Since 1900, the percentage of Americans 65 years and older has tripled,¹⁷⁰ and as of 2001, approximately 70% of people in the United States lived in single-family housing.¹⁷¹ 25% to 60% of all new houses will have a resident with a long-term severe mobility impairment.¹⁷² At the same time, 95% of new houses are built with steps at all entries and/or narrow bathroom doors.¹⁷³

Creating a more Inclusive Community

Municipalities also want to create a more welcoming community for people with disabilities. In one survey, 46% of people with disabilities reported feeling isolated from their communities compared with just 23% of people without disabilities.¹⁷⁴ Data from the 2002 NHIS indicated that building design problems are the most frequently cited barriers to community participation for adults, whether with or without disabilities.¹⁷⁵ States such as Florida and Arizona, which attract the aging population, have adopted visitability ordinances to adapt to their changing population.

Cost Savings for the Community

According to advocates, the cost of following a visitability ordinance in new construction is minimal. The organization Concrete Change has received letters from two jurisdictions that have adopted visitability ordinances that apply to all newly built single family houses, Bolingbrook, IL¹⁷⁶ and Pima County, AZ.¹⁷⁷ The letters attested that, with proper planning, visitability adds no extra cost to building a home. Other studies have estimated the cost to be between \$0 and \$200.00.¹⁷⁸ Visitability costs very little, if anything at all.

Advocates point out that it is much cheaper to build visitable houses than to retrofit houses when people become disabled and wish to stay in their homes.¹⁷⁹ The typical cost of retrofitting to create an entrance without steps is \$3300.¹⁸⁰ The typical cost of widening doorways that have already been built is \$700.¹⁸¹

Visitability and Universal Design

Universal design is a broader concept than visitability. Universal design involves making the entire built and urban¹⁸² environment usable by everyone regardless of age, ability, or status in life, including streets, commercial buildings, homes, and even cars.

The Center for Universal Design at North Carolina State University created the following seven principals of universal design:

- 1) equitable use¹⁸³
- 2) flexibility in use¹⁸⁴
- 3) simple and intuitive use¹⁸⁵
- 4) perceptible information¹⁸⁶
- 5) tolerance for error¹⁸⁷
- 6) low physical effort¹⁸⁸
- 7) size and shape for approach and use.¹⁸⁹

More information on Universal Design can be found on the website of the North Carolina State University Center for Universal Design, https://www.ncsu.edu/ncsu/design/cud/pubs_p/pubs_p.htm.

Visitability, on the other hand, is a set of simple design changes applied to the construction of single-family homes in order to make them more accessible for visitors and owners with disabilities.¹⁹⁰ While Universal Design takes into account changing the structure of a whole society, visitability is focused on single-family housing.¹⁹¹

Federal Visitability Laws

The Eleanor Smith Inclusive Home Design Act has been introduced to the U.S. House of Representatives by Representative Jan Schakowsky.

It would require all federally assisted single family houses and townhouses to have:

- At least one zero step entrance;
- Thirty-two inches of clear passage space for all interior passage doors on the main floor; and
- An accessible bathroom with at least a toilet and sink on the main level.

Currently, there are federal laws requiring accessibility for multi-family housing, but there are no standards for single-family housing. Thus, a large amount of housing stock remains unaffected by current federal legislation. New, multifamily housing built after the implementation date of the FHA is required to be built to the standards laid out in that act.¹⁹² Any part of an apartment building that is open to the public, for example, the rental office, must comply with the standards of the ADA.¹⁹³ There are additional design standards in place where the owners of housing developments receive federal funding.¹⁹⁴ Finally, the Department of Housing and Urban Development has awarded an additional point for visitability in applications for Hope VI program funding.¹⁹⁵

There is currently no federal law requiring that new single-family housing be visitable.

International Standards

Internationally, many countries have adopted nation-wide versions of visitability. In March 1998, the British Parliament passed a mandate requiring sufficiently wide halls and interior doorways; a downstairs bathroom; one accessible entrance except where impossible; and several other accessibility features for all new homes in England.¹⁹⁶ Northern Ireland, Scotland, and Wales have adopted similar regulations.¹⁹⁷ Visitability or universal design standards have also been encouraged in the Netherlands and Australia, and adopted in Sweden.¹⁹⁸ It is estimated that 68% of all new builds in England, 44% of new housing in Amsterdam, and 60% of new housing in the Hague incorporate accessible design standards or are adaptable.¹⁹⁹

Enforcement of Visitability Ordinances

Only one visitability ordinance has been challenged in court.²⁰⁰ In 2003, the Southern Arizona Home Builders' Association (SAHBA) and Washburn Company, Inc. challenged the visitability ordinance passed in Pima County, Arizona.²⁰¹ The suit was initially filed in federal court but was dismissed for lack of standing and was re-filed as a state court action.²⁰²

The Pima County visitability ordinance adopted visitable construction standards found in the international model building code, the ANSI/ICC for all new housing built in Pima County.²⁰³ In their complaint, SAHBA and the Washburn Company, Inc. argued that Pima County did not have the statutory and constitutional authority to adopt parts of the ANSI into their building code.²⁰⁴

SAHBA and the Washburn Company lost their case on summary judgment and appealed their loss to the Second Division Court of Appeals in Arizona.²⁰⁵ On appeal, the parties argued again that Pima County lacked statutory authority to pass the visitability ordinance and that it violated the Arizona state constitution.²⁰⁶ The Arizona Court of Appeals, Division Two affirmed the judgment of the trial court that Pima County had the authority to enact its visitability ordinance.²⁰⁷

In its opinion, the Court of Appeals found that the state statute giving power to Pima County to adopt building code standards did not prohibit their visitability ordinance.²⁰⁸ It also rejected the arguments that the ordinance violated homeowners' right to privacy; fundamental right to design their homes; and impermissibly burdened only those people constructing new homes under the Arizona Constitution.²⁰⁹ As part of its decision, it found that building codes are a proper exercise of state police power and that the county, "addressed a legitimate governmental interest when it adopted a building code designed to increase the number of homes accessible to those in wheelchairs."²¹⁰

Each visitability ordinance is different, but most are adopted as part of state and local building codes. State and local building codes are enforced by local building inspectors and state building enforcement agencies. Unlike civil rights laws, like the FHA and ADA, most building codes cannot be enforced by private citizens or federal civil rights agencies.

Visitability Ordinances Help Create Inclusive Neighborhoods

Visitability laws and incentives work to keep people with disabilities from being isolated within their own homes. While *Olmstead* requires access to the community and non-discrimination in zoning allows people with disabilities to overcome land use barriers to access housing; visitability gives people with disabilities access to social integration in a community.

Visitability laws and incentives work to keep people with disabilities from being isolated within their own homes.

The Future of Inclusive Neighborhoods

Justin Dart said in a speech that, “the clear promise of the ADA is that all people with disabilities will be fully equal, fully productive, fully prosperous, and fully welcome participants in the mainstream.”²¹¹ Increasing ADA and *Olmstead* enforcement have given many people with disabilities a choice over institutional and community-based settings. As more and more people choose to live in inclusive environments, communities have an obligation to ensure that they are fully welcome participants. Knowledge of rights and options under the ADA, FHA, and visitability laws can help create these inclusive neighborhoods for people with disabilities.

More Information

If you need additional information, you can contact:

Your Regional ADA Center

Regional ADA Centers offer technical assistance on ADA requirements.

Phone: **1-800-949-4232**

Website: <https://adata.org/find-your-region>

Your Local HUD Office

Phone: **1-800-CALL-FHA**

Website: http://portal.hud.gov/hudportal/HUD?src=/program_offices/field_policy_mgt/localoffices

Email: answers@hud.gov

The DOJ Disability Rights Section

Phone: **1-800-514-0301**

Website: www.ada.gov

Concrete Change

Concrete Change is an international network whose goal is making all new homes visitable.²¹²

More information can be found at visitability.org.

For local assistance try:

Your local Center for Independent Living through contacting the ILRU:

Phone: **713-520-0232**

Website: <http://www.ilru.org/projects/cil-net/cil-center-and-association-directory>

Email: ilru@ilru.org

Your local Legal Aid organization through contacting LSC:

Phone: **202-295-1500**

Website: <http://www.lsc.gov/what-legal-aid/find-legal-aid>.

Your state Protection and Advocacy Organization by contacting the National Disability Rights Network:

Phone: **202-408-9514**

Website: <http://www.ndrn.org/en/ndrn-member-agencies.html> Email: info@ndrn.org

Your local Fair Housing Agency, through contacting the National Fair Housing Alliance:

Phone: **202-898-1661**

Website: <http://www.nationalfairhousing.org/FindLocalHelp/tabid/2574/Default.aspxnfha@nationalfairhousing.org>.

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 83. 42 U.S.C. § 12132.
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 85. 28 C.F.R. § 35.130.
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103. Harding v. City of Toledo, 433 F.Supp. 2d 867, 873 (N. D. Ohio 2006).
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107. Sackman v. Balfour Beatty Cmtys., LLC, 2014 U.S. Dist.LEXIS 125389(S.D.GA 2014).
108. 42 U.S.C. 3604; 28 C.F.R. 35.130(b)(7).
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