Shelter Issues in New York: The New Fair Housing Amendments and Western New York Public Housing

New York State Advisory Committee to the United States Commission on Civil Rights

A Summary Report

August 1992

This summary report of the New York State Advisory Committee to the United States Commission on Civil Rights was prepared for the information and consideration of the Commission. Statements and viewpoints in the report should not be attributed to the Commission or to the Advisory Committee, but only to individual participants in the community forum where the information was gathered or to the other sources cited.

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THE STATE ADVISORY COMMITTEES

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Letter of Transmittal

New York State Advisory Committee
to the
U.S. Commission on Civil Rights

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The Fair Housing Amendments Act of 1988 has been under implementation by the U.S. Department of Housing and Urban Development (HUD) for just over 3 years. Based on a 1990 forum, interviews in 1991, and fresh materials through May 1992, this report offers a glimpse of how implementation has fared in New York State. As learned by our Committee, HUD's role has been strengthened, and the caseload which HUD/Region II handles directly has soared from 6 cases in fiscal year 1988 to 341 cases in fiscal year 1991.

This dramatic increase is directly attributable to HUD's new jurisdictions of discrimination on the bases of disability and familial status, which the five HUD-funded State and local enforcement agencies in New York (as well as one in New Jersey) have not yet been authorized by HUD to investigate. Besides its investigations, the HUD/Region II office covering New York and New Jersey has also accounted for over 20 percent of the "reasonable cause" determinations made across the United States, while 4 of the 10 cases decided by administrative law judges (ALJs) nationwide through June 1991 were decided by Region II ALJs. Nevertheless, local forum participants faulted HUD for being tardy in its enforcement efforts and for confusing responses to segregation in public housing in western New York.

Several forum participants reported that housing discrimination continues in western New York, site of the forum. For example, recently listed as among the four most segregated cities in the United States, Buffalo contains 27 public housing developments managed by a housing authority deemed by HUD in 1989 to be out of compliance. Though HUD and the Buffalo Municipal Housing Authority (BMHA) reached an agreement last fall on "*race neutral admissions*," HUD spokespersons said that *desegregation* was not then a goal. Public housing tenants and their advocates subsequently decried the lack of HUD funding to desegregate Buffalo's public housing. More recently, in late April 1992, a Buffalo City Council member publicly called for New York's U.S. Senator Daniel P. Moynihan, who had held hearings on some of BMHA's problems in 1987 and 1990, to hold new hearings on the status of compliance.

At our forum, a BMHA spokesperson chronicled the steps that the BMHA had taken to overcome discrimination problems, and concluded that compliance was elusive or at least seemed to come down to "adherence to [a HUD-BMHA] agreement in the opinion of HUD," or—put more bluntly—"in essence, [the BMHA is] at the mercy of HUD." On the other hand, in Rochester, where the first lawsuit under the 1988 act of was filed, as part of the settlement the

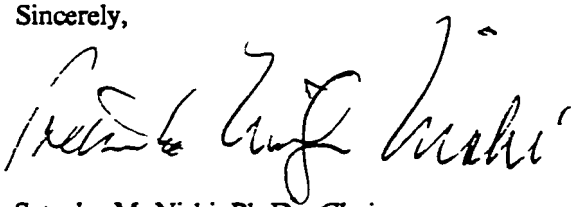
Rochester Housing Authority agreed to revise its admission and screening policies to conform to the 1988 act and to Section 504 of the Rehabilitation Act; HUD then clarified how housing managers are to meet their obligations.

Realtors at the forum emphasized the limited technical data available on fair housing requirements and the lack of information on the classes of persons to be protected under the 1988 act. One realtor pointed out that the use of housing testers has had a chilling effect on how realtors respond to questions from potential buyers. In any case, a realtors' association head said that, on the one hand, no allegations of discrimination had ever been brought to his association and that, on the other hand, some attorneys hired by the association to represent members have not been "fully conversant with the law." He added that brokers view their responsibilitiy as providing a "free and open choice in housing rather than being responsible for integration in housing."

Other speakers briefly discussed problems confronting the disabled. One housing specialist advises tenants with disabilities and disabled persons seeking housing; she asserted that her clients are largely unaware of the regulations intended to protect them. An attorney who works with a similar clientele described intrusive questions and screening devices and the litigation brought against the Rochester Housing Authority on behalf of her clients. A different forum participant noted that the building industry's lack of knowledge of the Americans With Disabilities Act continues to lead to significant problems. Several panelists voiced recommendations, many of them urging increased education and publicity about the 1988 Fair Housing Amendments Act.

Although the prospects for realizing fair housing appear mixed for western New York in the near term, we hope that the goals of fair housing will be realized before the close of the decade. In the meantime, we trust that this report which we unanimously approved will prove useful to you as you review the implementation of the 1988 Fair Housing Amendments Act and take note of the status of compliance in federally assisted housing in western New York.

Sincerely,



Setsuko M. Nishi, Ph.D., *Chairperson*
New York State Advisory Committee

New York State Advisory Committee to the U.S. Commission on Civil Rights

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*Member who moderated forum.
**Member who did not engage in project.
***Former chairperson and member who presided over day's activities.

Acknowledgments

The New York State Advisory Committee wishes to thank the staff of the Commission's Eastern Regional Office for its help in the preparation of this report. The forum and summary report were the principal assignments of Tino Calabia with support from Michèle D. Morgan, Linda Raufu, and Edna Y. Rogers. The project was carried out under the overall supervision of John I. Binkley, Director, Eastern Regional Office.

Contents

Background

> I just want to say to all of those people that have had so much to do both with the passage of the Civil Rights Act and with the passage of the Fair Housing Amendments in 1988 . . . I see this as Phase Two of the civil rights movement.
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> HUD Secretary Jack Kemp
> March 1989

> There are probably not many cities in America which can claim to have voted down fair housing in [1989] the last year of the last decade, but Buffalo, which calls itself the "City of Good Neighbors," can.
>
> Scott W. Gehl
> HOME Executive Director
> October 1990

In August 1991, a survey by Syracuse University and the Urban Institute found that "black and Hispanic Americans faced discrimination more than half the time they tried to rent or buy homes in 25 metropolitan areas of the country."[1] In mid-November 1991, the national daily, *USA Today*, published a 3-day series of articles on residential segregation in 219 major metropolises across the United States. Based on 1990 census data, the first day's articles indicated that segregation not only continues in many places but has also intensified in some cities such as Detroit, the most segregated. Buffalo ranks in the top four and is more segregated than Birmingham, Alabama, and Newark, New Jersey.[2] A companion article reported on the effects of the Fair Housing Act of 1968,[3] concluding that "the law hasn't worked."[4]

The same month, other dailies ran stories on efforts to build new public housing units and counterefforts to emphasize selling off units to the tenants presently occupying them. The *Washington Post* reported that, in a rebuff to U.S. Housing and Urban Development (HUD) Secretary Jack Kemp, "Congress appropriated more money for public housing than the Secretary wanted and barred him from implementing proposed regulations to cut operating funds."[5] Nonetheless, the following month, the *New York Times* reported that the New York City Housing Authority, the largest in the Nation, was formulating plans for Federal funds it is to receive which would allow for the construction of new units that could eventually be sold to their occupants, including middle income occupants.[6]

Even as the U.S. Bureau of the Census was tabulating the 1990 statistics that could be used in segregation studies, and while the Congress was debating whether to build new public housing or sell off existing units, the New York State Advisory Committee to the U.S. Commission on Civil Rights held two forums at the Federal building in Buffalo on October

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1 Ann Mariano, "HUD Study Finds Bias Nationwide; Blacks, Hispanics Blocked in Majority of Cases," Washington Post, Aug. 30, 1991, p. G-1.

2 "By the Numbers, Tracking Segregation in 219 Metro Areas," *USA Today*, Nov. 11, 1991, p. 3-A.

3 Pub. L. No. 90-284 (1968) (codified at 42 U.S.C. §§3601 et seq. (1988)).

4 "Housing Act Fails to Eliminate Bias Against Minorities," *USA Today*, Nov. 11, 1991, p. 2-A.

5 Ann Mariano, "Kemp's Initiatives for Public Housing Are the Big Loser," *Washington Post*, Nov. 8, 1991, p. A-23.

6 James C. McKinley, Jr., "New York to Let Public Buy Public Housing," *New York Times*, Dec. 3, 1991, p. B-1.

27, 1990. The first forum focused on the minority aging and their access to nursing homes and other long-term care facilities. The second forum examined the implementation of the Fair Housing Amendments Act of 1988[7] (1988 act) as well as fair housing issues affecting federally subsidized housing projects managed by housing authorities in Buffalo and Rochester. (This report serves in part as a companion to one issued by the neighboring Pennsylvania Advisory Committee which first reported on the 1988 act in April 1990.)

Because HUD was unable to be represented at the forum, interviews were held with a HUD/Region II spokesperson on October 15, 1991, in New York City regarding the 1988 act, and with HUD/Region II spokespersons on October 31, 1991, in Buffalo regarding the two housing authorities. Information from those more recent interviews is also incorporated below.

Greetings From Assembly, Executive Branch

New York State Assemblyman Arthur O. Eve, the deputy speaker of the New York State Assembly, welcomed the New York State Advisory Committee to western New York and thanked the Committee for providing western New Yorkers an opportunity to speak about their concerns.[8] Richard Clark, the director of the Buffalo office of the New York State Division of Human Rights and chairman of the Greater Buffalo Community Housing Resource Board, also welcomed the Committee and extended greetings on behalf of governor Mario Cuomo and the commissioner of the State Division of Human Rights, Margarita Rosa.

The deputy speaker then pointed out that he had just arrived from a meeting involving law enforcement officials from all levels of government, including the Buffalo police chief. Some statistics on violent crimes in Buffalo were circulated, and the deputy speaker pointed out that the precincts recording the greatest violence "are basically in my assembly district which is predominantly African American, and the numbers are astronomical."

The deputy speaker also observed that his district is troubled by drug abuse and poverty and that these afflictions exacerbate the problems of the minority aging, who had been the focus of the morning forum. He noted, too, that limited access to housing was among the serious problems adversely affecting the minority elderly, including older African Americans in Buffalo and elsewhere in western New York.

7 Pub. L. No. 100-430 (codified at 42 U.S.C. §§3601 et seq. (1988)).

8 This statement is taken from the transcript of the two Oct. 29, 1990, forums held in Buffalo. Unless otherwise noted, all quotes and statements in this report are from the transcript, which is on file in the Commission's Eastern Regional Office in Washington, D.C. Statements and viewpoints in this report should not be attributed to the Commission or to the Advisory Committee, but only to the participants in the forum or to the other individuals or sources cited in the appropriate footnotes.

Part I: Fair Housing Amendments Act of 1988

HUD's Enforcement of 1988 Amendments

Advisory Committee member Paula Ciprich, a practicing attorney and native of Buffalo, moderated the fair housing forum and convened the first panel which was to begin by offering a Federal perspective on the 1988 act. Tino Calabia, of the Commission's Eastern Regional Office staff, explained that Olga I. Diaz, Branch Chief for Fair Housing Enforcement in the Office of Fair Housing and Equal Opportunity of the U.S. Department of Housing and Urban Development (HUD), Region II, was unable to receive final authorization to travel from New York City to Buffalo due to uncertainties about a new Federal budget.

However, Diaz did provide some data by phone, indicating that HUD/Region II logged 914 cases by October 26, 1990, of which 255 were investigated by HUD/Region II, most of the latter relating to discrimination on the basis of "familial status," or, generally speaking, discrimination against families because of their children. Media accounts a month earlier had similarly reported that the majority of cases nationwide involved familial status, with the *Washington Post* stating that "[r]eports of housing discrimination against children have swamped Federal officials. . . ."[1]

Diaz was later interviewed by Ciprich and Calabia. During the October 15, 1991, interview, Diaz said that implementation of the 1988 act actually began on March 12, 1989,[2] and, thus, HUD had had 2 1/2 years of enforcement experience by the time of the interview.[3] She emphasized that the 1988 act made "some drastic changes in how complaints are received and how they are investigated." Processing them became a wholly new experience for her unit. Region II previously "was called 100 percent FHAP." She explained that the Fair Housing Assistance Program is often known as "FHAP," and that Region II contains five FHAP agencies: the New York State Division of Human Rights, the Albany Office of Equal Opportunity and Fair Housing, the New York City Commission on Human Rights, the Rockland County (NY) Commission on Human Rights, and the New Jersey Division on Civil Rights which has a statewide jurisdiction with 11 regional offices throughout New Jersey. "Any complaint that came into HUD would be dual filed . . . with one of the FHAP agencies. . . . It was indeed rare that [HUD] staff had to investigate complaints."

The 1988 act added two new categories of discrimination on the bases of disability and familial status. Since the FHAP agencies in Region II had not been certified to investigate cases based on both of the new jurisdictions, "it meant that all handicapped and familial status complaints had to be investigated by HUD," said Diaz, and her branch had to add nine investigators to the three it previously had.

In fiscal year 1988, prior to implementation of the 1988 act, 378 cases were filed in Region II, of which 372 cases were handled by the FHAP agencies and only 6 by HUD. However, by fiscal year 1990, there were 481 cases, of which 347 were processed by the FHAP agencies and 134 by HUD. In fiscal year 1991, ending September 30, 1991, there were 934 cases, of which 593 were processed by the FHAP agencies, and 341 by HUD. Thus, in the space of 4 years, the number of cases processed by HUD/Region II dramatically increased from 6 to 341.

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1 See app. A for HUD/Region II data on complaints from New Jersey and New York between Mar. 12, 1989, and Oct. 24, 1990. HUD's national data for approximately the same period were reported by various media, for example, Ann Mariano, "Reports of Bias Against Families on Rise; HUD: 12,800 Discrimination Cases Filed Since '89 Law Took Effect," *Washington Post*, Sept. 22, 1990, p. F-1. See app. B for HUD/Region II data between Mar. 12, 1989, and Sept. 30, 1991.

2 42 U.S.C. §3601 note. The statute provided that the 1988 act would take effect 180 days after its enactment (Sept. 13, 1988).

3 Olga Diaz, branch chief for Fair Housing Enforcement, U.S. Department of Housing and Urban Development (Region II), interview in New York City, Oct. 15, 1991 (hereafter cited as Diaz Interview). The audio tape and transcript of the interview is on file in the Commission's Eastern Regional Office in Washington, D.C.

No "Substantially Equivalent" Agencies in Region II

Diaz noted that none of the five FHAP agencies in Region II has been certified by HUD as being authorized by laws that would make an FHAP agency substantially equivalent to the new 1988 act. Only five FHAP agencies in the country have been so certified, she believed,[4] though she also believed that both the State of New York and the city of New York have submitted their enabling legislation to HUD headquarters for review.[5] The city of New York has already been authorized by its laws to investigate familial status complaints. State and local FHAP agencies were to have until January 13, 1992, to gain certification, but it was possible that an 8-month extension might be granted. She was uncertain as to what would happen in the event that an FHAP agency failed to become certified, but she said that "every case that comes to HUD will then be investigated by HUD, even cases involving racial allegations."

Regarding HUD's process, Diaz explained that she reviews every incoming case, presently sending complaints based on race, color, national origin, sex, or religion to an FHAP agency and assigning cases based on disability or familial status to a HUD investigator. By statute, the investigator has 10 days to serve notice on the respondent. The investigator must then try to conciliate the case by ascertaining what the complainant may desire as a remedy and what the position of the respondent may be regarding a possible conciliated agreement. If an agreement is reached, all the parties must sign including the complainant, the respondent, and the HUD Regional Director on behalf of the HUD Secretary.

Regions Do Factfinding, Now Make Decisions Also

"Sometimes from the very beginning, it is obvious that there will be no conciliation," said Diaz, and the investigator proceeds with data collection. She stressed that the investigators "must be very neutral. Their role is one of factfinding. . . . They do not make any conclusions as to whether a respondent has violated the act." A final investigative report is written regarding all contacts made with the different parties and all the documents collected. Diaz serves as the first line of review, followed by the Compliance Director and the Regional Director. Until December 1991 the report would have then been forwarded to HUD headquarters where the determination would be made as to whether "reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur." If HUD headquarters believed that there had been no reasonable cause, then the HUD Assistant Secretary for Fair Housing and Equal Opportunity would issue the determination of no reasonable cause. Since December 1991 Regional Directors have been given the authority to make the no reasonable cause determinations in fair housing cases.[6]

However, if HUD headquarters decides that the facts point to reasonable cause, then the case is transferred to the HUD Office of the General Counsel because it is the General Counsel at headquarters, or a delegated regional counsel, who issues a finding of reasonable cause and who ensures that any cases for the courts are "litigation worthy." Diaz pointed out that her region's "complaint workload accounted for 4.5 percent of the national workload, yet 21.5 percent of all the reasonable cause determinations were from [Region II] during the first year of the act's implementation."

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4 See also, "Florida Fair Housing Act, Fifth Equivalent Law," Fair Housing Advocate (Louisville, Ky.), Nov.-Dec. 1991, p. 1. In addition to Florida, the States of Texas, South Carolina, North Carolina, and Indiana have been certified by HUD as having statutes equivalent to the 1988 act, according to this HUD-funded newsletter. More recently, Arizona, Nebraska, Ashville, N.C., and Dallas, Tex., became certified, as reported in Fair Housing-Fair Lending Bulletin, vol. 8, (Feb. 1, 1992) p. 3.

5 See app. C for a letter on the status of certification for the Pennsylvania Human Relations Commission. This State commission reported on the process of certification in the Pennsylvania Advisory Committee's report, *Implementing the 1988 Fair Housing Amendments Act*, issued in April 1990. The Pennsylvania report also contains details on the difficulties encountered by FHAP agencies seeking certification as being substantially equivalent.

6 Olga I. Diaz, letter to Tino Calabia, Mar. 16, 1992 (hereafter cited as Diaz Letter). See app. D.

Region II Handed Down First ALJ Decision in U.S.

The regional counsel is also called upon when investigators receive requests for temporary restraining orders. As to the administrative law judges (ALJs) newly provided by the act, HUD/Region II received the first ALJ decision in the Nation addressing the housing for older persons exemption to the 1988 act's prohibition of discrimination on the basis of familial status.[7] Of all 10 cases decided by administrative law judges nationwide from March 1989 through June 1991, 4 cases were decided in Region II.

Diaz also noted that relatively few cases handled in Region II have been remanded for additional investigation because of any perceived deficiencies; she estimated that perhaps only five were remanded over the last fiscal year. The act requires that complaints be investigated within 100 days of their receipt by HUD, and at the end of the last fiscal year, only one case exceeding the 100-day deadline remained in Region II's case inventory. She added that between March 12, 1989, when implementation of the 1988 act commenced, and September 30, 1991, HUD/Region II logged "a total of 98 determinations, of which 65, or 66 percent, were 'no reasonable cause' and 33, or 34 percent, were 'reasonable cause.'" Approximately 37 percent of the total number of cases were "resolved with relief for the complainants. [The cases] are either conciliated, or the complainant withdraws because he or she has obtained relief."

Jurisdiction of State Human Rights Division

During the October 1990 forum, Clark, director of the Buffalo office of the New York State Division of Human Rights and chairperson of the Greater Buffalo Community Housing Resource Board, then explained that in 1945, New York was the first State to enact a law prohibiting discrimination in employment. Since 1945, there have been 93 amendments involving the division in housing and commercial space, public accommodations, credit, education, and voluntary fire company membership cases on the bases of race, creed, color, national origin, age 18 years or older, sex, marital status, arrest and conviction records, and disability. With the 1974 passage of the Flynn Act, prohibiting discrimination based on disability, the major part of the division's experience has been gained in employment cases. The division operates 11 regional offices throughout the State, and the Buffalo regional office covers the four upstate counties of Erie, Niagara, Chatauqua, and Cattaraugus.

Though most of its cases have been in employment, a number are housing discrimination cases, many of which are processed in 90 days in accordance with the division's HUD contract, Clark said. A State bill to make the State's housing law substantially equivalent to the Federal Fair Housing Amendments Act of 1988 was drafted and, as of October 1990, was under review in the Governor's office. The State law already appears in part substantially equivalent, that is, in terms of disability but not in terms of familial status.[8]

Family Status and Disability Cases

Clark pointed out that on the morning of the forum, a new housing discrimination complaint on the basis of familial status was brought into his office. Because the complainant also alleged discrimination on the basis of race and color, his office would investigate it, but not with regard to the familial status charge. Since the forum, a HUD-funded newsletter reported in May 1991 that most complaints lodged with HUD involved charges of family status discrimination.[9]

Two rental housing cases on the basis of disability have also been filed, said Clark, but his office will not be making determinations in them, only investigating them as agents for HUD, and conciliating them. If conciliation fails, his office will forward the case files

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7 For a description and discussion of the case, see Michael J. Brudny, Esq., "Familial Status Discrimination: Recent Developments and Suggested Changes," *Trends in Housing* (Washington, D.C.), June-July 1990, pp. 1-6.

8 For earlier background on the issue of gaining substantially equivalent status, see Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights, *Implementing the 1988 Fair Housing Amendments Act*, April 1990.

9 See "Most HUD Cases on Family Status; Handicap Cases Show Most Increase," *Fair Housing Advocate* (Louisville, Ky.), May 1991, p. 1.

back to HUD. He noted that two different attorneys represented the respondents in the two cases and that both attorneys "were totally unfamiliar with the statute."

He said that racial minorities often bring complaints on multiple grounds of discrimination, adding sex or some other cause, but only seldom is disability added. This made him believe that, "There is a need for greater public awareness about this new statute." Complainants and others forget, he said, that people without a disability may only be temporarily without a disability, since a person could walk outside, fall, and become disabled. After recently checking with his New York City headquarters, Clark was able to report that only between 12 and 20 disability cases had been processed around the State by the time of the forum.

Since passage of the Fair Housing Amendments Act, Clark has participated in two HUD training sessions, one in the spring of 1989, the other in spring 1990. According to HUD statistics, there have been twice as many disability-related cases filed between January 1990 and June 1990, as were filed in 1989.[10] Thus, Clark was under the impression that in general, "the American public is fast becoming aware of what the statute is about." He also mentioned that in the week prior to the Advisory Committee's forum he participated in his division's conference called "EEO-2000." One panel dealt with the problems of the disabled, and a publication released by the New York City Bar Association called *The Rights of People with Disabilities* was available there. Clark noted that he can call HUD on a telephone tieline when he needs information and that he also may rely on Housing Opportunities Made Equal (HOME), a Buffalo agency partially funded by HUD.

Nevertheless, he called for "a better partnership with the Federal Government and local agencies in disseminating information." With the Fair Housing Amendments Act already here and the then impending arrival of the Americans with Disabilities Act, much new legislation needs to be explained to the public. It could be communicated through HUD or through the Community Housing Resource Board or the Fair Housing Coalition.

Access for Disabled Not Covered by State Law

During the question period, Clark acknowledged that the State's current legislation does not cover disability in terms of construction requirements and access or in terms of the accessibility requirements to be brought about by the Federal regulations then due in March 1991. As of October 1990, he had no instructions on how the enforcement of accessibility standards would be carried out, whether by his office or in conjunction with some other State agency. If called upon at this time, he would consult with the federally funded Eastern Paralyzed Veterans Association (EPVA) located in the Dulski Federal Building which has attorneys and architects available to it. For example, if a builder had a question about building a ramp to provide wheelchair accessibility, Clark would refer the builder to EPVA.

He said that he recently served on a panel and heard someone who was knowledgeable about the standards address builders and developers in the audience. According to Clark, there was "moaning in the audience" when the speaker told them of the changes that would have to be made. Some in the audience indicated that there "is going to have to be a radical change in the whole architectural/building industry."[11] The speaker also explained that only during the drafting of the regulations did their national organizations become aware of what was in the offing. Thus, among the local community of builders and developers "no one saw fit to raise these questions until now when the legislation is here," said the panel speaker.

State Division Is Not a Monitoring Agency

Clark also explained that the New York State attorney general looks into housing discrimination as well. The attorney general once had an office in the western part of the State, but it was disbanded. Clark said, "How much [the attorney general's office in

10 Ibid.

11 On a related development, see Ann Mariano, "Builders Seek Delay on Accessibility Rules; Law to Aid Disabled Takes Effect in March," *Washington Post*, Sept. 29, 1990, p. E-1.

New York City] functions on this side of the State is a question." The only cases he knew about have been handled by the attorney general in the eastern part, and, for example, newspaper accounts have reported on such cases.[12]

When asked about the Buffalo Municipal Housing Authority's noncompliance status, Clark replied that his office once handled cases related to the authority and that some believe that more recent cases also should be handled by his office. But Clark disagreed with them, saying "the jurisdiction is supposed to be with those agencies that are supposed to monitor, and we are not a monitoring agency. We are an enforcement agency. . . ." When asked which agencies are the monitoring agencies, if his is not a monitoring agency, Clark said, "I'm not sure which department. Let me ask Scott Gehl." The executive director of Housing Opportunities Made Equal (HOME), Gehl replied that in terms of the accessibility questions, "I do not believe that anyone is." On the other hand, Clark observed that it is possible to monitor certain aspects of new construction through the local agencies which issue housing permits.

Before concluding his remarks, Clark pointed out that the State division not only acts on complaints brought to it but the division can also initiate complaints. He may also observe a pattern of problems and make a recommendation to the division which could follow up on his recommendation. However, "more often than not, all of our complaints are from individuals."

Greater Buffalo Association of Realtors

Daniel Symoniak, executive vice president of the Greater Buffalo Association of Realtors, described the association as numbering approximately 4,500 real estate brokers, associates, and mortgage lenders. They are primarily from Erie and Niagara Counties, and they are involved almost exclusively in residential resale, though a very small percentage of the membership specializes in commercial real estate and another small percentage focuses on leasing.

Symoniak, who had been with the association for over 13 years, viewed the association's signing of the Voluntary Affirmative Marketing Agreement in 1979 as the most important juncture in its relationship to fair housing. The agreement was subscribed to with the local HUD office and involved the creation of the Greater Buffalo Community Housing Resources Board, which includes persons in the community, several of whom were attending the Advisory Committee's forum. The greatest benefit from creation of the board was "that it opened up channels of communication with the people in the community involved with fair housing enforcement. . . ," he said. It helped to sensitize real estate agents to fair housing problems in the two counties and provided fair housing expertise which real estate agents never had before. Now "there is an overwhelming moral commitment on the part of the members . . . to uphold the fair housing laws in this country" marking a major departure from before. Symoniak explained that when he began with the association in the late 1970s:

> a significant portion of the membership . . . had not made the moral commitment to uphold the fair housing laws in this country. Basically their attitude was I'm not going to break them, but I don't need to do anything to help uphold those laws. . . . [M]any of those people were brought up and had formed their values prior to the Civil Rights Act of 1968. . . . [T]here is a much different climate today than there was 13 years ago.

The most difficult problem which Symoniak encounters today is the "woeful lack of technical expertise," he said. The "overwhelming majority" of his membership perceives housing discrimination as simply being based on race, whereas in fact a number of members became guilty of infractions based on age and familial status. Thus, the association includes members who "thought they were complying with the law but did not have the technical expertise to make good on their good intentions." He saw the greatest single need as that of help "in identifying and defin-

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12 See, for example, "Abrams Files Lawsuit in Housing Bias Case," *New York Times*, Apr. 5, 1990, in which it is reported that "Attorney General Robert Abrams filed a suit in Federal court today, accusing a Westchester real estate office and four of its employees of concealing the availability of apartments from black applicants while showing them to white applicants." Also, Caren Halbfinger, "Real Estate Agent Was Accused of Bias Last April," *New Rochelle Standard-Star*, Oct. 4, 1991, in which it is reported that a New Rochelle real estate agent "was accused in April by Abrams of steering blacks away from available apartments in white neighborhoods."

ing the protected classes because we have had incidents recently where people with the best of intentions violated the law because they did not understand the protected classes."

Acknowledging his responsibility to inform his membership, Symoniak hoped for a renewed emphasis on education and assistance from the fair housing agencies. Several years ago, the Kiahoga Plan was developed, which was an education course made available to all his members. But it did not "go nearly into the depth that is required to help everybody understand all the protected classes." Even with help from Clark and Gehl, he still does not have a "definitive educational piece that covers everything."

Symoniak said the problem is compounded by the "confusion between the overlapping of State and Federal laws and perhaps the gaps therein," referring to the fact that the State housing discrimination law is not yet deemed by HUD as substantially equivalent to the 1988 act. Though one mission of the association is "to reduce the legal exposure" of its membership, "fair housing has been a particularly elusive educational objective for us" and even for the attorneys whom the association has hired to represent members, a number of whom were "not fully conversant with the law. . . ."

Allegations Never Brought to Realtors' Association

Asked whether clients or others bring allegations of housing discrimination to the attention of the association and what happens to such allegations, Symoniak stated that "[w]e have never had an allegation of discrimination brought to us. If we did, we would refer it to an agency such as [HOME]." Allegations of violations of law are referred to the appropriate legal authorities. Allegations of violations of ethics—if they have nothing to do with discrimination—have been brought to his association, and these allegations are dealt with according to the association's code of ethics. Members charged with ethical violations are called to a hearing with the complainant, after which a decision is rendered; if the decision involves a punishment, the punishment can range from a letter of warning to expulsion from the association. Expulsion is serious, said Symoniak, because the member would also be excluded from access to the multiple listing system which is overwhelmingly used by the industry in residential real estate sales.

The panelists were asked about resegregation in the area. Symoniak noted that "one of the hottest arguments in fair housing today is the controversy between providing free and open choice and providing integrated housing." In their dilemma, "brokers see their responsibility as providing a free and open choice in housing rather than being responsible for integration in housing." He pointed out that, if offering a free and open choice "does not result in integration, I don't think that is something that the real estate industry can be held liable for." However, having no statistics on the question of resegregation, Symoniak deferred to Gehl and Clark.

Resegregation and Violence Perceived as Increasing

Gehl also had no data on hand, but believed that there is a high degree of resegregation in Erie County, particularly in Buffalo and Lackawanna. Without statistics, there can be no explanations for the resegregation, but it is occurring, said Gehl. Clark concurred with Gehl, adding that the problem is also evident in the increase of violence and bigotry. Such incidents have especially increased against blacks moving into traditionally white neighborhoods. For example, in the summer following the forum, firebombings were widely reported against a real estate office in New York City that had sold homes to blacks in the predominantly white neighborhood of Canarsie.[13]

On the other hand, a rejuvenation is taking place in Buffalo, said Clark, particularly in black neighborhoods surrounding the downtown area on the east and west sides. Clark gave as an example the fact that his church is located very close to downtown. Several fellow churchgoers are whites who have lived in the suburbs. But after 60 new townhouses were built about two blocks away from the church, some of them left the suburbs to purchase new houses

13 See "Rights Panel Fights Canarsie Realty Bias," *New York Times*, Aug. 1, 1991; E.R. Shipp, "Canarsie's Long-Held Racial Anxieties Resurface," *New York Times*, Aug. 4, 1991, p. 1; and Laurie Goodstein, "In Canarsie, Change Cuts on Bias; Anger Attends Integration of Former White Enclave in Brooklyn," *Washington Post*, Aug. 9, 1991, p. A-12.

downtown in what has been a predominantly black neighborhood. Questions are being raised in the black community as to whether this type of phenomena represents a white "retakeover of the city," he added.

Association member Tom Hollander introduced himself as a broker and invited everyone to refer any financially qualified buyer to him. He stated that brokers in his market area do not contribute to resegregation and stressed that his office does not show "a house in a particular market to a particular kind of person or client. It is simply finding houses that fit and that are appropriate."

He pointed out, however, that brokers are "somewhat handicapped by the way the law is being enforced through the use of testers [such that] today you can no longer speak openly." Hollander said that a black woman able to buy a house in the $250,000 range came to his office recently and indicated that her family would avoid parts of some suburbs "because there was resistance they felt on behalf of their children going to school, and it was not something that I was able to discuss." He claimed that the industry believes that "you just don't talk about these subjects. Whether the person may or may not be a tester, you don't know." In the case of the black woman buyer, he said, "I didn't have the kind of dialogue that I felt was necessary to help me help her sell a house or find a house or buy a house. I'm very restricted today. . . . [T]he real estate industry today is taught that you are presumed guilty until proven innocent. . . ."

Legal Services, State DHR Can Help

David G. Jay introduced himself as a director of the New York Civil Liberties Union (NYCLU). Referring to Symoniak, he said that there are groups who are readily available to work with the association in terms of training, though perhaps providing a point of view that some association members may not agree with. He noted that Neighborhood Legal Services was being represented at the forum and guessed that Legal Services "spends probably 30 to 40 percent of their time doing that very thing for lawyers and students" and others. He thought that the State division on human rights and similar agencies would be willing to help as well. As for Hollander and Hollander's belief that he is unable to address certain topics despite his sincere concern, Jay speculated that such a situation "is a product of not having the information that he needs" from agencies and individuals who can help.

Clark noted that he chairs the Greater Buffalo Community Housing Resource Board which:

> over the last few years [has] given seminars to the fair housing market on an annual basis which has brought in a large number of the real estate industry in the western New York area. Surprisingly, it's sort of like the E.F. Hutton commercial; when we raise the question of testing everybody comes. . . . We have had, I think, two successive seminars where we have dealt with the question of the issue of testing, and we have had well over 300 Realtors, where at one time we used to get maybe 50 or 60.

Housing Opportunities Made Equal (HOME)

HOME executive director Gehl described his agency as a not-for-profit organization founded in 1963 to overcome barriers preventing fair and equal access to housing on the Niagara Frontier. Now, with nearly 700 dues-paying members from western New York, HOME has received more housing discrimination complaints in recent years than all other agencies, public or private, in western New York. For the last 16 years it has been under contract to the city of Buffalo to provide comprehensive fair housing services to city residents. HOME also is under contract to the town of Hamburg, the 33 municipalities of the Erie County Block Grant Consortium, and the New York State Division of Housing and Community Renewal.

In 1989 HOME became one of 32 fair housing agencies across the Nation to win first-year funding from HUD's Fair Housing Initiatives Program (FHIP). As part of that HUD contract, HOME sends out teams of testers in response to complaints by bona fide homeseekers. Most of the complaints involve the rental market. A component of the FHIP project will also examine residential lending by Buffalo area banks for compliance with the Community Reinvestment Act.[14]

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14 A succinct description of FHIP appears in Lisa Navarrete, "Final FHIP Regulations Issued by HUD," *Trends in Housing* (Washington, D.C.), February-March 1989, p. 1.

Despite the 27 years that have passed since enactment of the Metcalf-Baker Act—the State statute which first prohibited discrimination in privately owned housing—"housing discrimination is alive and well on the Niagara Frontier," Gehl declared. From 1984 to 1989, HOME recorded 2,054 reported incidents of housing bias. Of that number, 28 percent involved familial status, 27 percent, race; 1 percent, religion; 3 percent, national origin; 16 percent, sex or marital status; 5 percent, disability; and 8 percent, age. HOME has also verified incidents of discrimination due to source of income and sexual orientation, two classes not currently protected by Federal or State statute. He added that "housing bias is a crime which does not respect municipal boundaries." About 57 percent of the complaints come from the city of Buffalo, 35 percent from other Erie County communities, and 7 percent from the surrounding counties.

HOME's Experience with 1988 Federal Amendments Act

Gehl then commented on Federal legislation, noting that the Fair Housing Amendments Act of 1988 "was a very long time in coming." He said that the Mondale-Brook Fair Housing Bill of 1967 lost much of its potential strength when, on the advice of U.S. Senator Everett M. Dirksen, HUD's enforcement powers were compromised. Those compromises notwithstanding, the strategy was unsuccessful in getting the bill through the Congress. Final passage came only amid the wave of urban violence that followed the assassination of Dr. Martin Luther King, Jr. Then it took another 20 years for enforcement powers to be restored to HUD through the Fair Housing Amendments Act under review at the forum.

HOME's anecdotal data about enforcement of the 1988 act included the fact that from March 1989, when the act took effect, to the time of the forum, HOME had filed a total of 17 cases with HUD. All involved familial status or disability discrimination, since HOME continues to file other types of discrimination cases with HUD's contract agency in New York State, the division of human rights. Six of the 17 cases were filed with HUD in the 3 months prior to the forum, and consequently, HOME was unable to make an assessment of HUD's ability to complete the investigation within the 100 days stipulated in the statute. However, in 9 of the 11 other cases, the 100-day statutory limit for investigations was exceeded. He further noted that the only two cases which HUD resolved within the 100 days were cases that HUD dismissed on grounds that both supposedly fell into statutory exemptions. A year after the forum, a Federal agency issued similar findings.[15]

Of the 17 cases filed by HOME, 6 were resolved by the time of the forum, 4 by HUD's conciliation agreements. Gehl expressed the opinion that, while HUD's investigators understandably urge parties to settle complaints, in a few cases "the pressure seemed to have been placed on complainants to settle for sums inappropriately small in relation to the acts of discrimination which occurred." He also believed that "any victim of discrimination filing with a government agency understandably defers to the person handling his or her case, and some advice was given which from our standpoint was some very bad advice."[16]

Regarding the size of settlements, HUD/Region II fair housing enforcement Branch Chief Diaz later commented that fair housing organizations have an obligation to represent the complainant's best interest, but:

> What may be in the best interest of the complainant is not always in the best interest of the fair housing group. . . . At times, the fair housing groups may have a vested interest in the outcome of a case. Very often [a case] is a source of revenue for them because, if they are parties to their complaint, they can get a settlement.[17]

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15 In November 1991, the Fair Housing-Fair Lending Bulletin reported that at an Oct. 7, 1991, meeting of the Adjudication Committee of the Administrative Conference of the United States: "Topping the list of concerns was HUD's failure to investigate most complaints within the 100-day period required by law. . . .The administrative conference staff noted that HUD had exceeded its deadline in almost 75 percent of complaints filed in 1990." "Federal Advisory Committee Reviews HUD Administrative Enforcement Procedures," Fair Housing-Fair Lending Bulletin, Nov. 1, 1991, p. 10.

16 A year later, Gehl summarized several example cases for HUD/Washington. Gehl letter to Leonora Guarraia, Deputy Assistant Secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Sept. 30, 1991, 5 pp.

17 Diaz Interview.

Diaz said that a complainant may want to settle for a smaller amount or for placement in a unit but the fair housing agency may want more, and this is what has happened in some cases in Region II. She also observed that an advocacy group may believe that it represents a complainant with a strong case even though the case would not meet HUD's legal standards for a violation. Such a case may be pressed through the whole process, after which the "complainant gets zero. [HUD's] position is that it is better that the complainant be allowed to make the decision to get something rather than nothing at all. . . which has occurred in some cases," according to Diaz.

HUD's Understaffing, Inexperience, Pressure to Close Cases

According to Gehl, in one instance, a HUD investigator actually urged a HOME client to withdraw his complaint, reportedly saying that there was nothing that HUD could do about it. Gehl asserted that only through the diligence of HOME's assistant director and the intervention of HUD Area Director of Fair Housing Charles Martin, was the complaint reinstated and eventually resolved by a conciliation agreement. The experience caused HOME to "express concern that HUD understaffing, inexperience in processing cases, and the administrative pressure to close cases in a timely fashion might adversely affect a complainant's right to fair housing," said Gehl, at the same time expressing his appreciation for the receptivity of HUD/Region II Director Seidenfeld and his staff to HOME's concerns.

In another instance, HOME sought a temporary restraining order in connection with a complaint filed by HUD. During the subsequent 2 weeks, HOME received almost daily phone calls from HUD both in New York and in Washington, D.C., and an attorney with the U.S. Department of Justice. One day, the case generated five calls to HOME from three different Federal employees in two different cities. Nonetheless, "despite all the sound and fury, a temporary restraining order was never obtained," said Gehl. Fortunately, HUD staff did later negotiate an interim agreement allowing HOME's client to occupy the unit. However, at the time of the forum, 15 months later, HOME still did not have a signed conciliation agreement.

He added that one of HOME's first conciliation agreements involved the owner of a suburban apartment complex. According to the agreement and the language which HOME specified in it, the agreement also applied to other complexes owned or managed by the respondents to the complaint. But 3 months after that first agreement, HOME learned that the respondents were committing the same discriminatory practice at another complex in spite of the HUD agreement.

As a consequence, on June 18, 1990, HOME notified HUD of the violation of the conciliation agreement and, 1 week later, followed with a formal complaint. Aware of the U.S. Attorney General's role in pattern and practice cases and the Attorney General's reported eagerness for such cases, on June 25, 1990, HOME also directed a letter to the Department of Justice. Despite followup calls, HOME still had not elicited any response from them, Gehl stated.

He then pointed out the irony in the fact that HOME's first case, filed with HUD on July 5, 1989, was still pending. The case involved allegedly discriminatory steering by a real estate agent. Since HOME had no evidence of complicity by the landlords involved, the complaint was directed only against their agent. However, 7 months after filing, HUD insisted that the complaint be amended to include one of the two landlords, and HOME complied, though reluctantly. One month after that amendment, another level of review at HUD decided that the landlord should not have been included; accordingly, HUD required a second amendment, undoing the first. Gehl stressed that at the time of the forum, 16 months after the complaint was filed, the case had not been resolved.

HOME's Four Recommendations

In sharing these experiences with the Advisory Committee, Gehl said that he did "not intend to criticize the good intentions of our friends at HUD, who grapple with inadequate resources to implement an admittedly complex statute." However, having offered some background on HOME's experience with HUD and the Department of Justice in terms of the Fair Housing Amendments Act, he then suggested several recommendations. First, when obtaining a temporary restraining order or investigating violations of a conciliation agreement, there is need for better delineation of the roles of HUD and the Jus-

tice Department and for more effective communication between the two separate agencies.

Second, there is also a need for better training of investigators and for other measures to ensure quality control in the processing of cases. While it is desirable for HUD staff to promote conciliation agreements, it is not appropriate to advise complainants to withdraw complaints or to use influence to encourage acceptance of token settlements.

Third, although the Federal statute requires notification of parties when an investigation is not completed within 100 days, HOME has learned that months can later pass without any further word on the case. Thus, Gehl recommended that there be periodic status reports on the order of every 100 days thereafter until a determination as to reasonable cause can be made. Fourth, and last, HUD must be afforded sufficient staff to fulfill its respon-sibilities.

Steps Taken If Testers Meet Differential Treatment

Referring to HOME's testing project, then Advisory Committee Chairperson Walter Oi asked what steps are taken if the visit by testers indicates that a landlord or rental agent is in outright violation of any antidiscrimination laws. Gehl responded that it depends in large part on what the client, a bona fide homeseeker, wants, be it access to the particular dwelling as well as some compensation in return for the discrimination the homeseeker experienced, plus requiring an affirmative action remedy.

A different course that HOME might take would be to refer the complaint to the State division of human rights or, in exceptional cases, to file the complaint directly in Federal court. About a year after the forum, the Fair Housing Advocate reported that a Federal court settlement resulted in part in an award of $6,000 to HOME and three of its investigators who had pursued a race discrimination complaint against a 720-unit apartment complex. A biracial team of HOME testers had encountered differential treatment when seeking housing at the complex. In addition to the finding of discrimination, the court also decided that "a fair housing organization whose mission has been frustrated by discrimination and who has diverted resources to identify and counteract acts of housing bias also has standing. . . ."[18]

At the forum Gehl observed that, despite its imperfections, the 1988 act has refocused public attention on the continuing problem of housing discrimination in America. He emphasized that by working cooperatively with HUD's substantially equivalent agencies and nonprofit fair housing centers, HUD can do a great deal to help realize the still unkept promise of fair housing.

Michael Hanley, a Greater Upstate Law Project attorney, also commented on testing but specifically in regard to HUD-financed housing. On the one hand, HUD funds agencies such as HOME to carry out testing;[19] on the other hand, HUD is very reluctant to cooperate in having its own properties tested, that is, "properties where there are indirect subsidies under those programs that are supposed to be providing subsidies for low-income families." He asserted that most of the fair housing agencies have been hampered in trying to test a federally subsidized project because at the time of completing an application, an applicant must sign an affidavit giving data about the applicant's family status and income. Most people who appear in a role of a person other than themselves, such as testers, cannot sign such an affidavit. HUD has refused to change its policy with respect to allowing testers to submit applications to subsidized housing programs.

The solution, said Hanley, is simple: let HUD indicate that it will not prosecute anyone for perjury or fraud for falsely filing an application for subsidized housing. Testing would then go a long way in improving the availability of subsidized housing for minorities.

Testing Exerts a Chilling Effect?

Tino Calabia referred to real estate broker Hollander's earlier description of the predicament he faces when he considers that someone asking about a neighborhood might in fact be a tester and not a bona fide client. Calabia asked Gehl how he re-

18 "Buffalo Apartments Pay HOME $6,000 for Race Discrimination," Fair Housing Advocate (Louisville, Ky.), Oct. 1991, p. 6.

19 In November 1991 the U.S. Department of Justice announced that it, too, would begin utilizing testers to uncover housing discrimination. Sharon LaFraniere, "'Testers' to Probe for Bias by Landlords; Justice Department to Send Individuals Posing as Renters Into Field," Washington Post, Nov. 5, 1991, p. A-19.

sponds to Hollander's suggestion that the possibility of being "tested" exerts a chilling effect on the broker who would prefer to answer a client's questions honestly. While acknowledging that Hollander's reluctance was well founded, Gehl replied, "The problem does not occur when you say positive things; the problem occurs when you say negative things."

At the same time, Gehl pointed out that, "You find very often that housing providers wishing to discriminate today will use very subtle clues to discourage people." HOME has published a brochure that lists potentially discouraging and, therefore, discriminatory statements referring to children and whether the home dweller will feel safe on the block where the sought-after housing unit is located or statements about the high cost of heating in the winter.[20] Gehl explained that, "These facts may be objectively correct, but the issue is: are they said to everyone, or are they said to only certain people to discourage them?"

He added that HOME has been told of instances in which brokers have "essentially confided to minority clients that, well, in the past, minorities have attempted to live in this community, and there have been problems." Gehl said that any reasonable client will see such a statement as a red flag and be discouraged away. The issue for brokers and other housing providers is whether they are certain of the information they provide and whether they provide exactly the same information to everyone.

During an October 1991 interview, HUD/Region II fair housing enforcement Branch Chief Diaz commented that "there is a place for testing, and just as a realtor can be found to violate the law on the basis of testing evidence, he or she can be found to be in compliance as well." Furthermore, while real estate broker Hollander asserted that the real estate industry has been taught that its members are "presumed guilty until proven innocent," Diaz disagreed, noting that HUD does not operate that way and that American jurisprudence still prevails, "where you are innocent until determined guilty."[21]

First Suit Under 1988 Act Filed Against Rochester Authority

During the October 1990 forum, Susan A. Silverstein, an attorney with the Monroe County Legal Assistance Corporation, described her agency as a federally funded legal assistance office representing low-income clients in Monroe County. Her office has helped many clients affected by discrimination based on familial status, but she focused on the Fair Housing Amendments Act in terms of its protections for persons with disabilities.

She reported that a colleague and she filed what she believed to be the first case in the U.S. to be brought against a landlord under the 1988 act. The suit was against the Rochester Housing Authority (RHA) for discriminating in its application process primarily against individuals with disability, and it has received a favorable decision from the U.S. District Court for the Western District of New York in Rochester that holds favorable implications for other enforcement efforts against other types of landlords.

For background, Silverstein noted that people involved in housing "tend to throw around terms for various types of housing and expect everybody to know what this means. Public housing is housing that is directly subsidized through the government, and it is usually owned by the local housing authority." She further noted that there are two types of public housing: housing projects built for the classic configuration of a family of at least two people, although projects contain units with enough bedrooms to accommodate small to moderately large families, that is, units of one to three bedrooms; and projects funded for what is referred to as "elderly housing," primarily housing with studio apartments or with one bedroom.

HUD Definition of Elderly

According to Silverstein, HUD defines elderly as people over the age of 62 as well as people with a handicap or disability. The definition has created problems in that single people with disabilities and people who are elderly, or over 62, are housed together in the same projects. Whether the problem is

20 See app. E. for "The Language of Discrimination," published by HOME.

21 Diaz Interview.

perceived or actual has been a matter of debate, she said.

The three plaintiffs in her agency's suit included a young Hispanic client with a mental disability. This client was paying about 68 percent of her income for rent, so she applied for an apartment with the RHA. The second client was an older Hispanic woman who applied to the RHA and would have been eligible just on the basis of her age. She did not inform the RHA of her disability, for it did not appear immediately relevant. However, in the course of investigating her application, the RHA found documentation that she also had physical disabilities related to age, such as high blood pressure, and that she had a history of mental disability as well. The third client was black and had been living in a nursing home. According to the RHA, it had never received an application from anyone living in a nursing home, said Silverstein, and "They apparently felt many people go into nursing homes and never come out, and they just hadn't a clue as to how to process the application."

In all three instances, the plaintiffs had histories of being tenants, either renting somewhere at the time of applying or having rented somewhere earlier. Their rental references proved to be "perfectly adequate," according to Silverstein, and housekeeping inspections were carried out regarding the two plaintiffs living in the community, which also proved adequate. However, the authority, "believing it was operating under HUD sanctioned procedures, did what they call an investigation into their ability to live independently."

Silverstein said that an RHA employee whose job was to visit people at home or in nursing homes subjected the clients:

> to a list of questions that were designed to determine whether they could live independently. The questions included things like: how frequently do you bathe? How frequently do you shampoo your hair? What television programs do you watch? List all the medications that you are on. This questionnaire was used just for applicants who are elderly or handicapped. People who are applying for family units were not subjected to those questions.

Finding those inquiries offensive, Silverstein stated that the RHA tried to rationalize them, arguing that the authority could not have tenants living in apartments who could not take care of themselves. Another question was: how deeply do you sleep at night? It was rationalized on the assumption that, if there was a fire, a person with a disability who slept too deeply might not be able to get to safety. The authority also stated that a HUD handbook indicated that such questions were to be asked.

Judge Those with Disability the Same Way as Those Without

Silverstein said that the suit was brought against the RHA on the basic principle that:

> under the Fair Housing Amendments Act, you do not judge people that are handicapped any differently than people who are not handicapped, and what you are to look at is whether or not the applicant is able to be a good tenant. The words used in the regulations are: "capable of fulfilling their obligations of tenancy."

Although the principle seemed obvious to her and her colleagues, Silverstein said that after working with other housing managers and landlords, she realized that the principle would represent a "pretty dramatic shift from the way these housing providers are thinking about handicapped people." The authority's additional eligibility requirement—expecting a person with a disability to demonstrate that he or she is able to live independently but not expecting the same of persons without disabilities—is prohibited. And yet, for example, the authority told the judge in court that applicants with disabilities have social problems, while applicant families who have no disabilities enjoy "all kinds of community resources." The judge, however, differed with the RHA, and indicated a belief that low-income families may also have difficult social problems, too.

Silverstein further noted that the suit was also brought under the regulatory provision prohibiting "intrusive inquiries," which, like inquiries in sex discrimination cases, render the inquiries as per se discrimination. One need not show that such questions have a negative effect. Simply asking a woman if she is pregnant can be an act of discrimination, and in the same way, asking what medications a person with disabilities is taking, or requiring a doctor's statement from that person can be viewed by a judge as illegal discrimination. She added that "every HUD-subsidized project that I am aware of in Monroe County is currently using an illegal screening device at the initial stage and is asking intrusive questions."

The RHA also required that all people with disabilities submit upon admission to what the RHA called a "comprehensive care plan." Silverstein and the third plaintiff in the suit attended one meeting at which 12 service providers were present. Each of the latter had to sign a contract agreeing to continue to provide services to the plaintiff after she was housed by the authority. Silverstein found it ironic that none of the housing managers was present for the meeting, not even the person identified in the contract as the central contact person. "So we felt that those contracts were being used to keep people out of housing . . . to be another hurdle that people had to jump over, rather than in fact to provide services."

Reasons for Denials by RHA

In depositions that were part of the litigation process, RHA managers flatly stated that one plaintiff was denied housing because of her high blood pressure and her mental disability. They also asserted that the RHA believed that she would not make a good tenant because she did not admit that she had a mental disability. The fact that this plaintiff had lived for 32 years in another HUD-subsidized project in New York City apparently did not count for much.

A second plaintiff was not explicitly denied approval because of her disability but because she allegedly made too many phone calls to the RHA applications staff person, did not always understand what she was told, and requested information in writing even though it was not the policy to give information in writing. The real issue was that the plaintiff was considered to be a potential problem tenant, surmised Silverstein.

One issue that was not resolved by the court and was still pending at the time of the forum was a steering issue.[22] The RHA was making an "eyeball determination" of what services an applicant needed and then referred the applicant for special housing, or what the authority called "enriched housing" or "extended shared aid program housing." The authority would place an applicant with a disability on a special floor segregated from the other floors or in specific buildings where these services were provided and not inform the applicant about the referral.

HUD Offices Lack Unified Voice

At any rate, the court eventually made it clear that "living independently as a criterion for housing is dead in the water, that this was absolutely prohibited under the Fair Housing Amendments Act," and what the authority should be considering is whether a tenant can fulfill the obligations of tenancy. Silverstein added that after the court reached its decision, HUD sponsored a conference in Washington, D.C., where it brought together its FHEO staff and staff from its Public Housing Program Office:

> trying to get them to actually sit down in the same room and discuss these issues, and it was really striking the lack of a unified voice that HUD spoke with. . . . The FHEO office, which I believe actually drafted the regulations, understood what their own regulations said, but the programming office was totally reluctant to embrace those regulations in any wholehearted way, although they kind of had to acknowledge that they had to abide by them.

As to the standard of being able to live independently, HUD's handbook at the time of the Advisory Committee's forum still required that public housing authorities carry out the kind of investigation sketched by Silverstein, giving them "permission to do the mechanical inquiries, and I think that HUD really needs to quickly revise its handbook." At its conference, HUD indicated that it would revise it, but Silverstein was unsure about how quickly that would be done. At any rate, while making it clear that the regulations were to be followed by all the housing authorities, HUD hesitated to comment on the provisions in the HUD handbook even though, according to Silverstein, the handbook provisions conflict with the law.[23]

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22 In August 1991 Silverstein wrote that pursuant to a settlement in Cason v. Rochester Housing Authority, the latter "has completely revised its tenant admission and screening policies to conform to the requirements of the Fair Housing Amendments Act and Section 504 of the Rehabilitation Act." See Susan Ann Silverstein letter to Tino Calabia, Aug. 13, 1991, (hereafter cited as Silverstein Letter). See app. F.

23 Silverstein subsequently wrote that, although HUD had yet to change its public housing manual as of Aug. 13, 1991, it "responded to the Cason decision by issuing a HUD field memorandum to its regional offices" and a letter to "recipients of HUD funding that clarifies the guidelines housing managers are to use to meet their obligations . . . ." Ibid.

In the meanwhile, the housing authorities "were begging for direction on this from HUD . . . . But HUD really has not come down with that kind of leadership to say 'Here's how we are going to help you screen people. Here's the screening device to be used.'" Silverstein stated that she and her colleagues are not opposed to screening applicants in general. She also believed that most housing authorities do not wish to violate the law and be sued. However, she thought that housing authorities "don't seem to understand the difference between screening as applied to everybody versus the screening of people based on this illegal criteria."

Silverstein added that one reason why her agency brought suit against the Rochester Housing Authority was that it appeared "particularly offensive that a property that was owned and managed by an agency directly supervised by HUD should not be following HUD's own fair housing regulations." She also thought more community education was called for, because there were well-intentioned landlords in the community who neither know that a law exists nor what they are supposed to do. People:

> have not had experience with the law, and do not know that what they are doing is illegal, and I think, if they knew, they would be open to changing their policies. The management company that I trained [which included managers from five projects] were very open to discussion on this issue. They have had very many illegal practices, but, when they found out, when I told them I was willing to meet with them, they were willing to meet with us, and I think that would be the case with other companies as well.

Silverstein reported that on the day that the court decision came down, HUD Secretary Kemp was in Rochester. At the airport, he was asked whether he would support the court's decision. He had not read the decision, but upon being told that it upheld the Fair Housing Amendments Act, he said that he, of course, supported the decision and that the housing authority should not be allowed to hide behind "'obscure housing manuals.' This comment alienated the entire public housing community because for them these manuals are far from obscure; they are their daily operating manual."

The final point Silverstein made dealt with reasonable accommodations in housing. She did not believe that landlords have thought through what a reasonable accommodation is, and her clients have lost access to housing or housing itself due to a mental health problem or a physical disability for which a reasonable accommodation could have been made.

Landlords of HUD-subsidized dwellings have evicted people without reasonably accommodating them by affording them an opportunity to receive mental health treatment before the eviction, said Silverstein. Also, a physically disabled applicant for HUD-subsidized housing lived on the third floor of a walkup building, even though she used a wheelchair. Her apartment lacked a working door buzzer, but the policy of the HUD-subsidized project was to have unannounced housekeeping inspections. After trying to reach her all day and failing to perform their inspection, the project rejected her application.

Broaden Understanding of Accessibility

Maggie Lee, the housing advocate with the Western New York Independent Living Center, works with the disabled on a daily basis. She said that every single day numerous requests for housing arrive at the center which she described as "a not-for-profit advocacy organization [whose] main purpose is to assist and educate persons with disabilities to take control of the events that influence their daily lives." Examples of requests include: a call from a hospital social worker in search of an accessible, affordable apartment for a person with a spinal cord injury but who is ready for discharge; a mother of two who has a seizure disorder and is living with friends because she cannot find a place to live; a middle-aged man suffering from a mental disorder in need of an apartment upon release.

Since Lee regularly takes such calls from persons either physically or mentally impaired, her task is frustrating because, "Our community provides limited housing options and choices for those persons with handicapping conditions." Finding "housing options reflecting the personal taste, economic status, and physical needs of all persons with disabilities is difficult." Moreover, said Lee, despite many social advances, many negative attitudes and stereotypes persist. She explained that the concept of accessibility goes beyond accommodating a person who uses a wheelchair; the concept ought to extend to everyone with a disability, including the person who can get around on crutches or a walker but may need changes in narrow doorways and steps, and the visually impaired, who may not require any architectural modifications but may need access to direct bus routes near employment and shopping.

Upon becoming the center's housing advocate, Lee "was amazed at just how few accessible emergency shelters there are in the city of Buffalo. There are only two wheelchair accessible emergency shelters . . . one is for women and children, and the other one is for families, but it is quite a ways out."

Still, with implementation of the 1988 act, Lee anticipated that the spinal cord-injured patient will have a ramp at his residence. The woman with seizure disorders will find housing for herself and her children without fear of being evicted due to a seizure, and the mentally impaired man will enjoy the freedom of choosing his own apartment. At present, however, "the Fair Housing Amendments Act is unknown to the majority, if not all, of the individuals with whom I work, and have worked," she said. Therefore, a change in the thinking of both landlords and tenants is extremely important. She said:

> Rarely have I been informed by anyone that they have run into any discriminatory troubles. I believe that many are intimidated, and they feel that they have no rights to advocate for themselves. Hopefully, with further education, we can better aid our clients, so that they will no longer need our assistance.

Eastern Paralyzed Veterans Association

Brian Black, associate advocate and code enforcement specialist for the Eastern Paralyzed Veterans Association (EPVA), explained that EPVA was chartered by the U.S. Congress to serve the spinal cord-injured veteran but in the process has served many people with disabilities. He specifically addressed the 1988 act as it relates to the requirements for new construction. Since its creation, EPVA's parent body, Paralyzed Veterans of America, has submitted detailed recommendations for the implementation of the 1988 act. EPVA has been working with code enforcement agencies in the private sector since 1989 to "try to dovetail the requirements for accessibility of fair housing into the existing building code requirements not only in New York State and New York City but throughout the country."

Within days after the Advisory Committee's forum, Black was to meet with the New York State advocate for the disabled and a member of the Uniform Code Council to try to hammer out language to help State and municipal code enforcement authorities to enforce the requirements of the 1988 act in terms of new construction. There is a question as to whether the design requirements for the 1988 act can be translated into building code language, but, if it can be done, the goal is to get the States and municipalities to adopt the language.[24]

Black also pointed out that there were no State or local enforcement mechanisms in place to ensure compliance with the new construction requirements, a lack affecting New York State, New Jersey, and Pennsylvania, each covered by EPVA. The same problem exists in "virtually 95 percent of the municipalities in [the U.S.] who adopt modern building codes, such as the Uniform Building Code or the Standard Building Code, for the code" used in those jurisdictions.

Architects, Engineers Not Trained in Civil Rights

Moreover, in Black's judgment:

> most, if not all, of the construction that is currently being undertaken and the design that is on the drawing board now will by March 13, 1991, be in violation of the requirements of the Fair Housing Amendments Act. The problem is in a nutshell that the [1988] act is essentially a civil rights act, and unfortunately, we have yet to train our architects, engineers, and code enforcement professionals to look to Federal and civil rights and antidiscrimination statutes before they look to the building codes, [though they do] look to the standards such as the ANSI [Architectural National Standards Institute] standard for handicapped design.

His experience even included speaking the previous week to a chapter of the American Institute of Architects, and based on such experience he believed that "most of the professionals in the design industry have never even heard of the Fair Housing Amendments Act, much less had a copy of the design guidelines." As a consequence, the industry will continue to practice "the discrimination of benign neglect,"

24 With regard to public accommodations in commercial space, it was recently reported that compliance has not been as burdensome as had been expected. See Udayan Gupta, "Disabilities Act Isn't as Burdensome as Many Feared; Some Small Businesses Are Finding That Compliance Is Worth the Cost," Wall Street Journal, Apr. 20, 1992.

discriminating against people with disabilities not intentionally but "because they just don't know any better." Professionals will design buildings, and code enforcement officials will allow them to carry out their designs, and see the buildings constructed. However, 2 or 3 years later, a complainant will point out that a ramp is missing, "and then the reactive complaint process takes effect."

Black lamented the fact that buildings—especially multifamily dwellings—are often designed such that it is structurally impossible to go back and retrofit them to meet the requirements of the 1988 act, and those buildings will continue to discriminate "for their lifetime, 30 or 40 or 50 years." He also stated that some of the requirements for adaptable housing—both in model building codes and the Fair Housing Amendments Act—appear in violation of other provisions of building codes; thus, it will be that much more difficult to convince code enforcement officials to adopt the desired changes carte blanche.

Lastly, Black wondered how day-to-day enforcement will work out. The issues are becoming complicated because there will exist New York State adaptability in addition to HUD adaptability, and so the more restrictive requirements may have to be simplified or perhaps reduced in order to emerge in a package of requirements that would be manageable by local code enforcement officials. Black voiced concern that the simplification and reduction of requirements may not please the disability community. In short, he has been reminding those with whom he works and those whom he addresses that "the enforcement of those standards is not going to occur as readily as we like."

Architectural Standards Training, Region II Recommendation

In October 1991, HUD/Region II fair housing enforcement Branch Chief Diaz observed that HUD has held training sessions with architects and developers regarding the standards for access which HUD issued on March 6, 1991. The standards are basically those promulgated by the Architectural National Standards Institute (ANSI). In addition, she stated that occasional inquiries from architects come to her unit, and what cannot be answered by her unit can be referred to the HUD/Region II office which employs architects and engineers.

Asked what recommendations she would make after more than 2 years of experience enforcing the 1988 act, Diaz said that she would hope that HUD headquarters would consolidate all the decisions rendered by the administrative law judges and then formulate appropriate policy decisions based on the consolidation. Work has somewhat begun along these lines with the issuance of technical guidance memoranda. As to staffing needs, Diaz acknowledged an initial apprehension about the level of staffing but said she was currently satisfied. However, a related concern has to do with the status of the so-called substantially equivalent agencies. "If no agency in our region becomes substantially equivalent, then we'll really be swamped. Then the staffing we have now will not be sufficient. But, if at least two or three of the agencies become substantially equivalent, I think we'll be able to handle it," Diaz speculated.[25]

25 Diaz Interview.

Part II: Compliance Status of Publicly Subsidized Housing

Status of Fair Housing: Buffalo Housing Authority Example

During the forum, Gehl offered another example illustrating the status of fair housing in the metropolitan area. It involved western New York's biggest landlord, the Buffalo Municipal Housing Authority, which, Gehl stressed, involved "extreme segregation in 27 public housing developments, 9 of which, when we began this, were 90 percent, or more, white, while 9 others were 90 percent, or more, minority." In addition, there were glaring inequalities in conditions at white and minority developments, few minorities on the BMHA's payroll, and "an appalling vacancy rate of 28 percent." The vacancy rate was flourishing at the same time that more than 3,000 families, mostly minority, were on the authority's waiting list.[1]

He stated that attempts to remedy the situation had continued for years. While hopeful that a legal services suit and the appointment of a then-new top BMHA administrator would make a difference, Gehl noted the tragedy "that visible problems were allowed to fester for years at the BMHA, that millions of dollars were squandered in the interim, and that thousands of area families were forced to go without decent and affordable housing."

About 6 months after the forum, the Buffalo News reported that Gehl completed a proposal to build new public housing, provide greater choice through cross-listing the Buffalo and suburban section 8 programs, create magnet incentives in BMHA developments aimed at integration, afford tenants more influence in how public housing is managed, and establish a partnership broader than that between only the Federal Government and the BMHA.[2] Requested by HUD Assistant Secretary Gordon H. Mansfield, the proposal was submitted by Gehl to Mansfield on May 4, 1991.[3] Less than 6 months later, the Buffalo News reported that the proposal, by then supported by local officials including the BMHA head, had been rejected by HUD.[4] On October 24, 1991, Gehl was described as feeling "profoundly disappointed' by [an October 23, 1991, HUD-BMHA] agreement, stating it fails to prescribe the programs and provide the money necessary to dismantle segregation."[5]

By January 1992, Gehl wrote to HUD Secretary Kemp, urging the Secretary to devote his personal attention to the issue.[6] Last month, on May 1, 1992, the Buffalo News reported that Senator Moynihan has written to the U.S. Department of Justice asking for further details on its investigation of a separate issue, the BMHA's equal opportunity employment practices.[7]

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1 Of the 27 developments, 23 are federally assisted, and four are State assisted; of the latter, two were completely vacant as of March 1991, according to a report by the U.S. Government Accounting Office, Public Housing: Management Issues Pertaining to the Buffalo Municipal Housing Authority, March 1991 (hereafter cited as GAO Report), p. 16. Moreover, as of June 1990, 26 percent of the federally assisted public housing units were vacant, exceeding the 2,800 households on the BMHA's August 1990 waiting list. The GAO Report also noted that the vacancy rate was the highest among the 51 housing authorities under the jurisdiction of HUD's Buffalo Area Office and "greatly exceeds the 1989 national average of 7.5 percent, p. 7.

2 James Heaney, "Integration Plan Would Draft Bills to Boost Public Housing's Appeal," Buffalo News, May 12, 1991, p. B-1 and B-7.

3 Scott W. Gehl, memorandum to HUD Assistant Secretary Gordon H. Mansfield, May 4, 1991.

4 James Heaney, "HUD Rejection of City Plan Criticized: Federal Proposal for Desegregating Public Housing Called 'Cruel Hoax,'" Buffalo News, Oct. 23, 1991, p. B-5.

5 James Heaney, "Accord Is Reached on Public Housing: but Critics Say Pact With HUD Falls Short of Steps Needed to End Segregation," *Buffalo News*, Oct. 24, 1991, pp. C-1, C-11 (hereafter cited as "Accord Is Reached . . . ").

6 Gehl letter to HUD Secretary Jack F. Kemp, Jan. 15, 1992. See app. G, and HUD Assistant Secretary Mansfield's response to Gehl, Feb. 10, 1992, app. H.

7 James Heaney, "Moynihan Requests Details on Housing Authority Probe," Buffalo News, May 1, 1992, p. B-11.

Buffalo Municipal Housing Authority in Noncompliance

At the forum Daniel T. Quider, assistant executive director of the BMHA, helped to give background and a historical perspective on the issue. He noted that the authority administers 5,047 federally assisted and 973 State assisted low-income housing units for a total of 6,020 units at 27 developments in Buffalo with an average rental rate of $175. He said that 8,194 low-income persons live in over 4,118 occupied units. Of these occupied units, 1,203 are nonminority, with 31 being Native Americans and 2,878 or over two-thirds being blacks. At the same time, he acknowledged that the BMHA has undergone a degree of scrutiny and criticism over the previous 2 years that exceeds the scrutiny and criticism of any other municipal agency in Buffalo.

In 1983 HUD conducted a compliance review under Title VI of the Civil Rights Act of 1964 and examined the BMHA's project-based waiting list. Under the project-based waiting list approach, an applicant wanting to reside in a particular area of Buffalo or in a specific project could apply at the desired project and be placed on its waiting list. HUD found this approach to be in noncompliance and, therefore, called for the authority to establish a central or unitwide waiting list, Quider reported.

The BMHA responded by introducing a concept known as Location Preference into its preliminary application process. This concept provided applicants an opportunity of choice, that is, they could indicate three developments that they would prefer to live in, had they been given an opportunity, according to Quider. The BMHA used this process to place 87 percent of all applicants during that period, "and it was not until 1987 that HUD came through and did another compliance review and found this practice to be in noncompliance with Title VI . . . despite the fact that HUD had approved the previous policy."

Nevertheless, on August 18, 1987, the BMHA approved an action plan calling for the elimination of Location Preferences, and on September 24, 1987, that concept was formally eliminated, and the authority "began administering what is known as Plan B under Title VI." Under Plan B, an applicant would be offered as a first choice the development with the greatest number of vacancies, and, if the applicant declined that, he or she would be given a second choice from the development with the next greatest number of vacancies, then a third choice from the development with the third greatest number of vacancies. Plan B was not a new process, Quider said; in fact, it was in 1967 that HUD introduced the concept, then known as the "1, 2, 3 Plan." This plan was subject to a great deal of criticism and controversy at that time, and, Quider pointed out, is still subject to the same criticism and controversy today.

In November 1987, as findings came to light that the authority was in noncompliance, Senator Moynihan held his first hearings on the subject in Buffalo. Around the same time, said Quider, the HUD/Region II office informed the BMHA that there would be another Title VI compliance review, and, in April 1989, HUD informed the authority that the new review yielded a finding of noncompliance, "in particular as it related to the use of location of preference in its very early years and that this resulted in a racially segregated program here . . . where 22 of 27 of the Federally aided developments were racially identifiable or segregated, as we know it."

HUD Offers Three Options

The BMHA was then given three options to remedy the situation: first, present evidence that the findings were incorrect; second, present evidence that there was a legitimate reason for the actions of the authority; or, third, request commencement of discussions for voluntary compliance. Quider said that the authority selected the third option and on April 27, 1989, commenced negotiations with the local and regional HUD offices with the goal of developing a Title VI voluntary compliance agreement. In September 1989, HUD sent a draft voluntary compliance agreement to the authority, which went back and forth between HUD and the authority until a final agreement was approved by HUD on April 24, 1990, with an implementation date of May 1, 1990.

Quider noted that there are about 300 housing authorities in the U.S. that are developing voluntary compliance agreements similar to Buffalo's but that Buffalo's agreement is unique "in that it incorporates incentives that would result in voluntary compliance not only by the authority but [also] by people moving into developments where their race or ethnicity is not concentrated." He called the BMHA's agreement "a very bold experiment" insofar as it uses the concept of magnets. The magnet program in the Buffalo school system has been very successful, and it is the same concept that is incorporated into the BMHA's

agreement, though many believe that the incentives offered to individual applicants and to those already residing in public housing are not going to result in desegregating Buffalo's public housing, he said.

The incentives would amount to $1,000 per applicant or per transferee, and an applicant or transferee may divide the $1,000 in any way--between what are referred to as "software" and "hardware." "Software" encompasses vouchers for child daycare, adult daycare, adult domestic services, student tutoring, college credits, and educational and other opportunities. "Hardware" involves rehabilitation of the unit, including a replacement and upgrading of wiring to accommodate various appliances, new stoves, refrigerators, washers, dehumidifiers, humidifiers, ceiling fans with light fixtures, and so on.

Quider acknowledged that many have criticized such incentives, believing that to relocate into a development where one's race or ethnicity is not concentrated would take far more than some physical appliance or a voucher. During a January 1991 meeting of BMHA tenants and other interested parties, tenants were reportedly "insulted by a government plan offering tenants $1,000 in additional appliances if they would transfer to another apartment. . . ." They also reportedly "felt tricked" after being told that "the $1,000 in appliances actually wasn't being offered to the tenant but to the apartment. If a tenant took the incentives and later moved, the appliances would remain in the apartment. . . ."[8]

Software Incentives Considered Illegal by GAO

Quider said during the forum that a concept is also offered that involves family service centers providing a comprehensive package of services. In these ways, the authority's program represents a bold experiment. In July 1991, however, Quider notified the Advisory Committee's staff that a U.S. General Accounting Office report[9] considered what Quider had called the "software" incentives to be illegal. According to a newsclipping which he forwarded to Advisory Committee staff, "Refrigerators, microwave ovens and toasters are fine . . . because such incentives are related directly to housing. But offering job training or vouchers for education and child care are not because they lack a direct link to housing. . . ."[10]

Quider added that the authority has gone beyond its traditional role of administrator of a Federal program as a landlord. In trying to encourage residents to take advantage of the incentives available to them, the authority has embarked upon a new process in its application procedure that involves cross-listing with Buffalo's section 8 program. According to Quider, though the authority does not administer the section 8 program as many other authorities do, the Buffalo authority has begun the cross-listing at the encouragement of HUD Secretary Kemp. The authority has also started a comprehensive needs assessment of its properties in compliance with section 504 of the Rehabilitation Act of 1973 which in turn is in accordance with the authority's plan to adapt its properties to accommodate those with physical and mental disabilities.

Despite these plans, Quider admitted that there are many other tasks that need to be completed. However, the BMHA "is but an agent, if you will, of the Federal Government. It can go only as far as the Federal dollars available to it," he said, noting that the authority was recently informed that its modernization funds will be cut from about $13 million to only $330,000.

In the previous 2 months the authority had undergone "very dramatic changes in its administration," Quider pointed out. Some of the criticism of the past was fair, he added, but in many other instances it was unfair. At this juncture, the authority has a new executive director, new leadership on its governing board, and is moving in a new direction. Under subsequent questioning, however, Quider acknowledged that, "We do not pretend to sit here and say that, as a result of this plan, we are going to have a racially balanced program, and, in fact, it is the feeling of the professional staff of the Buffalo Municipal Housing

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8 Susan Schulman, "Tenants Assail Plan for Desegregation; HUD Wants to Relocate Families to Integrate City Projects," *Buffalo News*, Jan. 6, 1991, p. B-1 (hereafter cited as "Tenants Assail Plan for Desegregation").

9 See GAO Report, p. 4 and p. 24.

10 James Heaney, "Key Part of Plan to Integrate Housing Is Illegal, U.S. Says; Report Questions Some Incentives, Levels of Staffing, Vacancies Here," *Buffalo News*, Mar. 27, 1991, an attachment to a letter from Daniel T. Quider, assistant executive director, Buffalo Municipal Housing Authority, to Tino Calabia, July 18, 1991.

Authority that you will not get a program that is balanced, if one were to define balance as equal numbers of minority and nonminority people."

Then-Advisory Committee Chairperson Oi asked, "What, if that is so, constitutes compliance?" Quider responded that compliance is "adherence to the agreement in the opinion of HUD." Having asked HUD on many occasions the same question, Quider indicated that:

> the response that we have is that compliance is adherence to [tasks within] the agreement, and we cannot take a statistical profile or a racial snapshot, if you will, 6 months into the plan to measure our compliance or our success with the agreement. In essence, we are at the mercy of HUD.

He explained that the voluntary compliance agreement will remain in effect for a 3-year period, and it may continue beyond that if HUD deems it necessary. The agreement is in effect, but according to the timetables built into the agreement, the BMHA would be allowed to submit a new tenant selection in the assignment plan for HUD to review, and the BMHA expected that tenant selection under a new set of rules would begin in mid-December.

How Segregation Came About

Advisory Committee member Setsuko M. Nishi, currently the Committee's Chairperson, asked how it happened that the units and developments under the BMHA became so segregated.[11] Quider replied that the biggest impact was the Housing Act of 1949 which transferred surplus wartime housing to the authority. Two developments, LaSalle Courts and Langfield, were given to the authority under the 1949 program, neither of which were located in industrial areas and both of which were predominantly white at one time. Langfield is now predominantly black.

Regarding the current situation, a number of theories exists. The project-based waiting list system that permitted applicants to specify and wait for their first choice may have reinforced the prevailing ethnic patterns already existing in Buffalo. Under the subsequent Location Preference system, which allowed applicants to indicate three preferences, one might have found "a continuation of the desire of Polish Americans to live in the Polish community, Hispanics in the Hispanic community, black Americans in the black area in the city of Buffalo, etc., and I would say in large part this is the reason." Indeed, during a BMHA tenants meeting in January 1991, several tenants expressed the belief that any relocation plan devised to foster integration should allow those moved a choice of location.

Quider also pointed out that "some 80 or 85 percent of the applicants on the waiting list tend to be minorities in our family program, and there is an enormous need for outreach within the white community to get whites to apply . . . , one of the greatest challenges in our efforts to succeed in this program."

HUD's Fair Housing Act Obligations

Greater Upstate Law Project attorney Hanley explained that his Rochester-based agency works with local legal services offices representing low-income families and individuals on a variety of poverty law issues, including low-income housing programs, Hanley's own specialty. He said he would discuss violations not in terms of the Fair Housing Amendments Act of 1988 but violations of Title VIII of the Fair Housing Act as it has existed since its initial passage in 1968. He explained that the Fair Housing Act prohibited different types of discrimination but also imposed specific legal duties on HUD, one such being to implement its programs in a manner that does not result in discrimination.

In civil rights litigation, many distinctions are made between when a particular type of conduct or activity has a discriminatory effect and when purposeful or intentional discrimination must be shown, said Hanley. With respect to HUD, however, the act is specific that, if it is administering its programs in a manner that does not affirmatively further fair housing, then HUD is not complying with its fair housing obligations. He pointed to the problem created by residency preferences, charging that such preferences often have the effect of excluding persons based on minority status. In a community that only has a very low minority concentration, if the housing programs there include residency preferences, the practical effect of such preferences will be the total shutout of minorities.

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11 For a discussion by HUD/Buffalo Office spokespersons of this same question, see pp. 29-30 below.

Hanley was not opposed to the concept of residency preference as such. He postulated that, if a residency preference is applied to an area in which there is an equitable racial distribution and an equitable ethnic distribution, then a problem would probably not arise. A problem arises when there has been disproportionate segregation resulting from a history of racial discrimination.

In a 1975 school desegregation case brought by attorney Jay of the NYCLU, who had spoken earlier, and other lawyers, the court determined that the residential patterns in the city of Buffalo and its suburbs did not occur by accident but were the product of years of real estate industry discrimination, multiple-listing agents refusing to show listings to black families, and financing discrimination through unfair mortgage loan practices. Those residential patterns created a situation that led to disproportionately low minority concentrations not just in Erie County but in other parts of the State as well. In this context, Hanley submitted that HUD violated its specific obligations under Title VIII by approving a local residency preference for its suburban housing subsidy programs.

Chicago Housing Authority Precedent and Section 8 Program

Then came the section 8 Existing Housing Program[12] that provided subsidies to low-income families on a finders-keepers basis so that they could go looking for housing. If allocations of section 8 certificates are made to areas in a manner that takes into account residency preferences, minority families would never be able to obtain subsidies, Hanley stated. Again, the problem is not just in Erie County. The most studied case is the Chicago Housing Authority case, *Hills v. Gautreaux*.[13] It was filed over 20 years ago, and one important result was the U.S. Supreme Court's recognition that to effect a remedy for public housing discrimination, one must look at the vitality of the housing programs available in an area; in the Chicago Housing Authority case, it meant looking at the section 8 programs in combination with the public housing programs, and that is the issue being raised in the BMHA case.

According to Hanley, one thing that worked in *Gautreaux* was an experiment tried after 1974 when the section 8 program was created. In the experiment, families in Chicago Housing Authority units were afforded an opportunity to use section 8 subsidies in areas beyond the city line. The point was that, once segregated, public housing cannot be desegregated.[14] For example, if a development is 80 percent minority and the waiting list is 80 percent minority and the number of vacant units cannot contribute to racial balance, then the only way to help the people who have been living there for years is to give those people additional subsidies and let them move elsewhere, even beyond the city. Their move also creates an opportunity for nonminority persons to move into public housing.

Metropolitanwide Remedy Works

Several studies of *Gautreaux* have been reported in the *New York Times* and in professional journals, said Hanley. A study comparing the control families who stayed in Chicago with the families who moved out of Chicago indicated that the minority mothers using finders-keepers subsidies were able to "locate adequate housing in the suburbs, housing where they fit into the community," plus employment and educational opportunities which the families did not have in the city. Some families have been in their new communities long enough for there to be documentation that the children went on to higher education to a greater degree than the control group which remained in authority housing in Chicago.

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12 42 U.S.C. 1437f.

13 425 US. 284, 299 (1976). "A district court may order HUD to effectuate 'metropolitan area' relief to remedy HUD's own unconstitutional actions (intentional discrimination)," according to Michael Hanley, "UN-Fair Housing: the Unrealized Promise of Section 8," New York Legal Services Journal, January 1990, p. 2 (hereafter cited as "UN-Fair Housing").

14 A U.S. Census Bureau racial statistics expert recently stated that "Residential segregation, once established, is a very persistent phenomenon." See Barbara Vobejda, "Neighborhood Racial Patterns Little Changed; Black Segregation Off Slightly in '80s," Washington Post, Mar. 18, 1992, p. A-7.

Hanley noted that the metropolitan area relief attempted in the *Gautreaux* case has since been used in Boston and Dallas.[15] He also said that HUD's Office of Fair Housing and Equal Opportunity (FHEO) includes "good people [who] try to do good things." However, from his review of HUD programs and from his interaction with the program people in other parts of HUD, it appeared to him that FHEO is the stepchild of the HUD family. "They don't seem to have the clout that they should, and I'm not even sure that they are in a position to be as aggressive as they need to be."

FHEO Declines to Examine Residency Preference

Hanley added that FHEO has not addressed the residency preference issue. He has had "numerous conversations" with Washington officials about whether they believe that a residency preference has the effect of excluding minorities in violation of Title VI and Title VIII. But "they don't want to get involved in that issue. In fact, it was almost the exact words I was given by a senior official of Fair Housing and Equal Opportunity: 'We don't want to get into that.'"

Hanley also said that the coordination between FHEO and the program offices needs to improve. "Program people don't worry about fair housing considerations," and in many cases there is only a nominal review of HUD programs by FHEO. To program staff, "Residency preference is something that programs allow for, and they don't look beyond that to see what the effect of the residency preference is." Meanwhile, FHEO is responsible for reviewing the overall housing assistance plan of a city, but from his experience with Buffalo and other cities, Hanley judged that FHEO defers too much to the program staff.

One example of such deference, according to Hanley, can be seen in the Community Development Block Grant (CDBG) Program. Buffalo has been receiving CDBG funds, which created the section 8 program, since 1974. But the city of Buffalo administered the section 8 program in such a way that it was not used effectively to promote fair housing. Even though a pattern of segregation in the BMHA has been documented by HUD and the Department of Justice, HUD has never used its leverage through the regulations governing the CDBG program to push for corrections.

Comer v. Kemp and Separate Section 8 Programs

Dennis McGrath, an attorney with the housing unit of Neighborhood Legal Services, Inc., in Buffalo, continued the review of HUD's conduct in Buffalo. He explained that his agency is currently in litigation in *Comer v. Kemp*. The case involves 7 plaintiffs and 10 defendants. Cocounsel includes the Greater Upstate Law Project in Rochester and the NAACP Legal Defense and Education Fund in New York City. The suit was filed in December 1989 in Buffalo, in the U.S. District Court for the Western District of New York. Among other things, it challenges the establishment of two separate Section 8 programs in Erie County. One serves the city of Buffalo and is primarily minority; the other serves a consortium of 41 towns and villages in the suburbs surrounding Buffalo and is "overwhelmingly white."

His office is similarly focusing on questions of racial steering in Buffalo's public housing program, the racially disparate conditions and services provided in the Buffalo public housing program, and the failure of the city of Buffalo to comply with fair housing laws in the administration of its CDBG program. The office is also looking at what it considers the failure of the city of Buffalo and HUD to administer housing programs in Erie County and Buffalo in a manner that will affirmatively advance fair housing and on the conversion of State-financed public housing in Buffalo to private ownership of housing units.

In Erie County, as in other counties in the State, there are two separate section 8 programs, one for the city and the other for the suburbs. Buffalo's program administers approximately 2,500 section 8 certificates and vouchers. About 80 percent of Buffalo's participants are minority. Just a few blocks away from the city's section 8 program office is another section 8 program office for the county and 41 towns and villages outside of Buffalo. The suburban pro-

15 For further background on the argument, see "The Evolution of Metropolitan Area Relief," a sidebar in "UN-Fair Housing," p. 2, also appearing in app. I.

gram has its own allocation of approximately 2,800 additional section 8 certificates and vouchers, and only 4 percent of the suburban participants are minority. While the city has 30 percent minorities in the general population, the suburbs are about 3 percent black or other minority.

Minorities Excluded From Section 8 Program

One of the basic tenets in the legal services case is that minorities are excluded from the section 8 programs by the way that these programs are operated, said McGrath. The exclusion arises from two factors: first, the administrative plan that the city of Buffalo submits to HUD provides that section 8 certificates may only be used within the city limits. There is some indication that this policy may have been changed, but, as far as Legal Services knows, the provision is still in the administrative plan of the Rental Assistance Corporation, which administers the section 8 program for the city of Buffalo.

Second, the administrative plan submitted to HUD for the suburban section 8 program, operated by the Belmont Shelter Corporation, provides for a local residency preference for families residing in one of the 41 towns or villages of the suburban consortium. For example, a family residing in the town of Amherst, one of the largest suburban towns and a main agency in the consortium, would be given preference over a family residing in Buffalo and could use its suburban subsidy anywhere in the county. Even though over 20 percent of the suburban section 8 waiting list is minority, because of the local residency preference, the percentage of minority families actually given subsidies in the suburbs is only 3 to 4 percent.

Combining the Rental Assistance Corporation's restriction limiting city residents to Buffalo with the local preference in the suburban program results in a section 8 residency pattern that look like a doughnut around Buffalo.[16] Nonminorities live in the suburbs surrounding Buffalo, and Buffalo contains the minorities. The city participants in the section 8 program are effectively denied access to the newer, higher quality housing available in the suburbs, and so they are also denied educational, employment, social, and other benefits and services, said McGrath.

The Section 8 program incorporates provisions throughout its regulations and directives that require it to be administered in a manner promoting the widest possible geographic choice of rental units; it was never intended to restrict mobility. In fact, the HUD regulations specifically require that section 8 administrators make affirmative efforts to find apartments outside of areas of high minority concentration. Nevertheless, even the administrator of the Buffalo section 8 program conceded in a 1982 report that "[a]lmost no blacks moved into predominantly white, nonimpacted areas of the city as a result of section 8 participation," according to McGrath.

Plaintiffs Ask That Section 8 Programs Be Combined

In the legal services suit, the plaintiffs have asked that the waiting list for the two section 8 programs—the city program and the suburban program—be combined, that the geographic restrictions be lifted from the city program, and that the local residency preference of the suburban program be removed. Though the local residency preferences are not illegal per se, they violate fair housing laws when the effect of the preference is to exclude minorities, as the suit alleges. McGrath added that HUD regulations require that, when residency preferences are included in a section 8 program, the preferences must be extended to residents of any area in which the housing agency is authorized to enter contracts. In New York State, that would preclude limiting the preference to a particular municipality or even to a group of municipalities, as is the case with Amherst and the consortium.

Moreover, the plaintiffs have asked the court to reorder the waiting list to give an "equal opportunity preference" to families who have been adversely impacted or affected by racially discriminatory practices in the past. More specifically, the plaintiffs are asking that a section 8 "equal opportunity preference" be extended to families living in Buffalo's heav-

16 See also Hanley's "Doughnut analysis" in "UN-Fair Housing," p. 3. Hanley writes: "The city of Buffalo operates a program which administers about 2,500 section 8 certificates and vouchers. Approximately 80 percent of its participants are minority. . . . [The section 8 program in the suburbs] has its own allocation of about 2,800 certificates and vouchers. Only 4 percent of the suburban program's participants are minority."

ily segregated housing projects and, because of the outreach requirements that were meant to apply to public housing residents but which have not been complied with for years, the plaintiffs are asking that HUD allocate an additional number of section 8 program subsidies to promote desegregation. In short, said McGrath, a metropolitan remedy is being sought as one of the ways to desegregate public housing in Buffalo and Erie County, similar to the East Texas and Chicago housing desegregation cases.

He noted that the litigation was almost a year old at the time of the forum. Legal Services has had various motions and other arguments before the court, and in December 1990, a motion for class certification was to be heard. He pointed out that one of the most important concepts underlying *Comer v. Kemp* is that people who were injured because of housing discrimination are entitled to a remedy. One objective sought by the lawsuit is:

> an infusion of housing subsidies so that families will have an opportunity, not just to stay in Buffalo public housing projects, which by anyone's measure will stay segregated or will stay disproportionately minority, but will have the opportunity that they should have been given between 1976 and 1990, to take other types of housing subsidies that do not restrict them to a particular project and that do not restrict them to a particular geographic area.

HUD Secretary's Section 8 Program Discretionary Fund

Hanley explained that the section 8 program includes an allocation of 5 percent of the HUD Secretary's discretionary fund that can be used to resolve fair housing litigation. He hoped that the Buffalo Municipal Housing Authority, the New York State Division of Housing, and many other concerned organizations and individuals would support a request of HUD that allocations be made from that national pool for the Buffalo area. Although the pool is small, a few thousand subsidies nationally, Hanley believed that HUD "over a period of years on an annual incremental basis would be able to provide an infusion of. . . .about 1,000 subsidies a year." That number would be very small compared to the need, but "we are trying to be pragmatic. . .[and] know that there is not a prospect of giving fair housing subsidy opportunities to everyone discriminated against."

Hanley added that many families may desire to remain in public housing where they have friends, are familiar with local businesses, are in their own neighborhood, and do not want to move. He also said that people should not have to move as part of the public housing litigation remedy. Thus, if the subsidies were made available to those others who do want subsidies, annual allocations over a period of years, even though small, would be a desirable starting point.

The other part of the suit recognizes that there would not be sufficient subsidies to help people move into public housing. Indeed, there is a proposal to the State of New York that Ellicott Mall be privatized, and Ellicott Mall contains about 500 State-financed public housing units which are under the Buffalo Municipal Housing Authority, said Hanley. He voiced concern that, if those units are turned over to private ownership, the 2,000 families already on the authority's waiting list would suffer by no longer having that pool of apartments potentially available.

In any event, the goal in the second part of the suit would be to have HUD allocate sufficient funds to bring the authority's housing projects up to a level of equalization, that is, the projects that are disproportionately minority would enjoy the same types of services and amenities and quality of housing as do the projects that are predominantly nonminority. The request is simple, but the problem is two-fold: the restrictions of cost and the scheduling of the repairs and improvements which need to be done. Moreover, according to Hanley, the authority appeared reluctant to admit the degree of disparity and services that has been confirmed by the U.S. Department of Justice.

July 1991 HUD Review

On July 10, 1991, the HUD Assistant Secretary for Public and Indian Housing, Joseph G. Schiff, wrote that a HUD performance review of the Buffalo Municipal Housing Authority rated the authority "as 'poor' or 'failing' in approximately 70 percent of the areas examined [by HUD]."[17] Schiff also informed

17 Joseph G. Schiff, HUD Assistant Secretary for Public and Indian Housing, letter to Michael K. Clarke, executive director, Buffalo Municipal Housing Authority, July 10, 1991, p. 1.

the authority that the authority must submit an "Action Plan" to HUD designed to overcome deficiencies.[18] During an October 31, 1991, interview, Joseph B. Lynch, HUD's Buffalo Office manager, and Harry Reese, the office's division director for public housing, elaborated on the compliance status of the authority.

Lynch noted that the HUD review was conducted in accordance with a stipulation in the Cranston-Gonzalez Affordable Housing Act of 1990. Though the review indicated widespread problems, it also identified some areas of improvement; and HUD Secretary Kemp ultimately did not recommend that the authority be put into receivership or lose its operating subsidies from the Federal Government. Lynch also said that his office was assisting the authority in the authority's efforts to develop the "Action Plan."[19]

One aspect of that plan dealt with the authority's admissions policy which had called for transferring residents from developments they were living in to other developments with available units. For example, explained Lynch, if a woman residing in a north Buffalo development for the elderly suffered the loss of her husband, she might have been required to move to a one-bedroom unit in south Buffalo. However, the tenant leadership in the developments objected very strongly to such moves, arguing that a resident's friends, church, and support groups remain in the original neighborhood where many such residents, like the new widow, may have lived all of their lives.

Another problem related to the incentives described earlier by Quider.[20] Instead of the controversial hardware incentives, more types of social services—police protection and security, drug elimination, and self-sufficiency programs—are expected to be built into the plan by the authority in consultation with tenant leaders, housing advocates, and others organized into an advisory panel by Lynch. Some of the services might be funded by Federal resources different from HUD's housing monies. Although GAO attorneys consider some so-called "software" incentives to be illegal, HUD attorneys have differed on the matter, said Lynch.

Since one goal of the concept of incentives is to mitigate the problem of escalating concentrations of one race at many developments and a different race at a few developments, Lynch spoke of the status of such concentrations in various parts of Buffalo and the composition of the lists of applicants waiting to move into the developments. He estimated that the waiting list for family units was predominantly minority, that is, about 80 percent, while most of the developments with family units were already predominantly minority, "up over 80 percent, most of them about 100 percent." He also acknowledged that, since the developments for families were already highly concentrated with minorities as were the waiting lists for family units, it would most likely be another minority family that would move into a vacant family unit. On the other hand, both the waiting lists of elderly applicants and the developments for the elderly have been predominantly white.

Combatting Violations, Not Reducing Segregation

When asked what measures were being taken to reduce any existing segregation, Lynch replied that "We are not reducing segregation." Indeed, just days before the interview with Lynch and Reese, the HUD Assistant Secretary for Fair Housing and Equal Opportunity, Gordon Mansfield, had been reported as saying that, "All HUD can do at this point . . . is deal with the regulatory violations. The larger issues of segregation that relate to quality of life are separate . . . and best handled in a different forum some other time."[21]

About 2 weeks after the interview, the *Buffalo News* reported that:

> The tenant leaders are taking issue with the Federal government's refusal to invest money in the projects to make them better places to live. Without improved living

18 Ibid.

19 Joseph B. Lynch, Office Manager, Buffalo Office, U.S. Housing and Urban Development (Region II), interview in Buffalo, Oct. 31, 1991. Harry Reese, Division Director for Public Housing of the Buffalo Office, also engaged in the interview. The audio tape and transcript of the interview are on file in the Commission's Eastern Regional Office in Washington, D.C.

20 See Quider discussion, pp. 20-21 above.

21 "Accord Is Reached . . . .," p. C-11.

conditions, the tenant leaders maintain that little change is likely to come from the plan in the 27 projects managed by the Buffalo Municipal Housing Authority.

One tenant leader was quoted as saying, "The bottom line is money. If you don't have the money to make those developments desirable, you're not going to be able to desegregate."[22] On the other hand, less than 6 months earlier, HUD had been reported as "unveil[ing] an initiative to help public housing agencies combat segregation, which government officials say persists in many projects around the nation."[23] Accordingly, blacks in public housing were to be encouraged to move into predominantly white developments, and white residents were to be urged to transfer to predominantly black developments.[24]

Meanwhile, during the interview, Reese explained that as part of its voluntary compliance agreement:

> What HUD established . . . was an admissions plan that was race neutral and also contained what was referred to as a desegregation option—not really an option—but it was required of the plan to encourage a better mix. But the primary focus or intention was a race neutral plan.

The desegregation option involved the incentives concept meant to encourage members of one race to move to a development where members of a different race were concentrated, said Reese.

Tenants Were "Self-Segregating"

However, doing something such as simply taking someone lower down on a waiting list and moving that person up the list in order to fill a particular vacant unit and thereby lessen any racial concentration in a development would also present a problem, indicated the HUD spokespersons. For example, if a unit became available in a predominantly white development, HUD could not allow a minority applicant to be moved up over a white applicant at the top of the waiting list. "That would be discrimination," stated Lynch, acknowledging at the same time that "because of the makeup of the waiting list, it is a self-fulfilling prophecy that all of these units will eventually be all minority unless there is some court-ordered integration plan. . . ."

Reese pointed out that an earlier admissions policy of the authority had allowed applicants to designate three preferences when applying for a unit. Under that system, when a unit became available in one of the applicant's preferred developments, the applicant often received his or her preference. The resultant pattern of segregation was recognized; however, it was considered the result of "self-segregation. The housing authority itself was not accused of segregation, but, by virtue of this preference that they allowed the applicant, the applicants were self-segregating themselves in the development," according to a Title VI compliance review by HUD, said Reese. The practice was halted by the voluntary compliance agreement calling for the race neutral admissions plan described above.

Rental Certificates, Rental Vouchers

As to a metropolitan solution, or a program permitting Buffalo public housing applicants to seek federally subsidized housing in the environs beyond the city limits, Reese stated that the plaintiffs in a current suit have been suggesting that a rental certificate or rental voucher might be given to a Buffalo resident who could then look for a unit in the suburbs. For example, Section 8 program vouchers come out of the Housing and Community Development Act of 1974. With a voucher, the rental assistance would be tenant based, that is, "the tenant selects his or her own unit and, as long as that unit qualifies according to the program criteria, the individual can stay at the unit they found. And, if they decide to move, they take their rental assistance to the next place which also has to meet the same requirements."

He added that certificates, though not identical to vouchers, are also tenant based and would allow a Buffalo applicant to move to one of the suburban towns.

Reese pointed out that a practical advantage to such an approach is that the applicant might more easily move to where he or she chooses, based on the location of jobs, families, or other personal consider-

22 James Heaney, "Tenants Now Fault Plan to Desegregate Projects," *Buffalo News*, Nov. 12, 1991, p. B-1.

23 Ann Mariano, "Public Housing in Black and White: HUD Unveils Voluntary Program to Help Agencies Eliminate Bias," *Washington Post*, May 21, 1991, p. A-19.

24 Ibid.

ations. He noted that, nevertheless, "most of the people who participate in the voucher and certificate programs in the city of Buffalo . . . are minority, and a good percentage opt to stay not only in the same location but in the same units in which they are residing. . . ."

Asked by Ciprich for an explanation of how two separate section 8 programs were set up in the same county, Erie County, Reese answered that in New York, only villages, towns, cities, and municipalities may participate in providing public housing assistance, but counties are excluded from doing so under State law. When section 8 began to be implemented, various units of local government—except counties—applied individually. They set up separate programs out of a belief that they had a responsibility to start by assisting their own constituents within their own jurisdictions. What some plaintiffs have been arguing is that these units of government should not have limited themselves in that way but should have provided assistance beyond their borders.

Situation in Texas Differs From Buffalo's Situation

Moreover, the compliance plan being developed was not taking into consideration the possibility of a metropolitanwide program. What occurred in Texas, where such relief has been implemented, said Reese, occurred under different circumstances.[25] In Texas, "Development A was all black, and it was steered that way. Development B was all white, and it was steered that way. . . . They also had another issue: basically the authority maintained the white [development, but] did not maintain the black [development]. So you had disparate treatment in terms of how the developments were being maintained. That was a very clear, clear case of discrimination in the way the process was handled."

In contrast, continued Reese:

> [I]n Buffalo, you did not have the same kind of situation . . . . What happened here was essentially through self-segregation where people who were on the list said "I would like to go here," and the bureaucrats in the authority were saying "We are going to keep our customers happy," because in their minds it was easier for them to have an applicant say where they wanted to go, put them in that particular development . . . than to put them elsewhere and have them transfer . . . which a lot of people did to beat the system. They would say "I will take this unit," and within 3 months they were getting on a transfer list to move back to the development they had wanted to go to.

He further explained that an applicant can repeatedly reject the offer of a vacant unit, but would then fall to the bottom of the waiting list each time. Still:

> [W]hen people understand the system and they are looking for a specific project, that is what they tend to do. They ride on the list for years, and all the authority has been doing is recycling people coming up. . . . Specifically with the elderly you would get that, where they have a development in mind, and that's the only place they want to go, and they'll ride that list for years until they luck out.

Secretary's Discretionary Funds and Segregation's Start

Regarding the discretionary funds available to HUD through the section 8 program,[26] Lynch agreed that "there is a percentage of section 8 assistance that can be used for desegregation purposes at the discretion of the Assistant Secretary for Fair Housing." However, he and Reese believed that the amount was small and in some instances involved rental certificates. Reese also observed that, since certificates operate on the finders-keepers principle, an applicant may take a certificate, leave a BMHA development, find housing elsewhere than in a development, and thereby increase the already large percentage of vacant units in the developments and further add to the financial burden of the authority.

As to the history of how the developments became segregated, Reese estimated that in the northeastern part of Buffalo in the 1960s, the Kenfield and Langfield developments were "probably predominantly white. By the time the 'sixties were finished, they were predominantly black. Currently they are both more than 95 percentage black. So, that whole part of the city has become minority." Going back even earlier, Reese noted that one of the larger family developments, A.D. Price, was built around 1941:

25 See discussion by Hanley, p. 23 above.

26 See discussion by Hanley, p. 26 above.

specifically for Negroes. At that point in time, there were developments that were built all over specifically for—you can read it in the board minutes and everything else—that we had to "do something for our Negro families." And so that is what they did. . . . So you are starting with 100 percent basic population in a development like A.D. Price which was African American at that point in time.

Asked by Calabia whether such decisions might represent the seeds for an act of discrimination that could be used for a court finding of discrimination, Reese replied, "No," that this situation began in the 1940s when there was no relevant law.[27] Moreover, in "that historical context, that was the responsible thing to do because there was nothing else for those families, and communities felt that they were doing something positive for those folks. Now, obviously, we have a totally different outlook."

Calabia reminded the forum participants that HUD/Region II spokesperson Diaz had intended to be involved in the forum to speak on the Fair Housing Amendments Act, but, because of continuing uncertainty surrounding a budget for the fiscal year, was unable to make the normal travel arrangements. Commission staff will be communicating with Diaz again on the 1988 act, but Calabia asked whom should staff address at HUD regarding the issues involving the Buffalo Municipal Housing Authority?

Hanley responded, "Well, that is part of my dilemma. I never know. . . . If you talk to the Office of Fair Housing and Equal Opportunity, they tend to refer you to the program people. They say, well, this fits the regulations of public housing, or this fits the regulations of section 8." He also said that he has little contact with regional HUD and very little interaction with the heads of the housing program in Washington, D.C., but, regarding the section 8 program, he named Gerald Benoit and Madelin Hayes in Washington. James S. Cunningham, the Commission's Assistant Staff Director for civil rights evaluation, suggested consulting Larry Pearl, the head of FHEO's program development office in Washington, D.C., who could suggest a contact at HUD/ Region II in New York.

Failure to Enact Fair Housing Law

As a closing example illustrating the status of fair housing in the metropolitan area, during the forum HOME's Gehl cited the situation that occurred in 1989 when the Buffalo Common Council debated a municipal fair housing ordinance prepared by HOME. The bill went slightly beyond current Federal and State law by adding sexual orientation and lawful source of income to the protected classes. The bill also proposed narrowing exemptions for owner-occupied dwellings. It was endorsed by 20 community organizations and enjoyed strong editorial support from the *Buffalo News*.[28]

However, said Gehl:

[T]he proposed ordinance generated a firestorm of controversy, which, in the assessment of veteran city hall reporters, exceeded that of any other legislation in the previous 10 years. Investor landlords lobbied against the bill, claiming it would be unfair to prohibit them from automatically rejecting "people on welfare." A few council members made the bill's defeat a personal crusade, shipping busloads of angry senior citizens to public hearings.

Gehl continued that despite strong opposition, the common council passed Buffalo's first fair housing bill on February 7, 1989—something that New York City, Philadelphia, and other cities had accomplished 30 years earlier. However, 10 days later, Buffalo's mayor vetoed the ordinance, and the council voted to sustain that veto.[29] Gehl observed, "There are probably not many cities in America which can claim to have voted down fair housing in the last year of the last decade, but Buffalo, which calls itself the 'City of Good Neighbors,' can."

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27 But see also Hanley discussion, p. 22 above.

28 See the editorials, "Fair Housing Law Would Be Step Forward for Buffalo," Buffalo News, Jan. 25, 1989, p. B-2, and "Setback on Fair Housing," Buffalo News, Feb. 25, 1989, p. C-2.

29 See also James Heaney, "Fair Housing Proposal Killed by Griffin Veto, Council Vote," Buffalo News, Feb. 22, 1989, p. B-1.

Asked what particular provisions were considered objectionable by the mayor, Gehl responded that "It's so hard to choose." But there was a concern about provisions related to two-family, owner-occupied homes which are exempt from most Federal and State laws except for one enacted in the 19th century. Opponents also expressed reservations about the purpose of fair housing laws in general.[30]

30 The bill also proposed going beyond Federal and State housing laws by making it "illegal not to rent housing to someone simply because of sexual orientation or source of income. In short, while the landlord could consider factors such as the ability to pay or track record as a tenant elsewhere, he could not refuse to rent simply because the applicant was homosexual or on welfare." Ibid.

Conclusion

Federal, State, and Local Officials, Realtors, and Advocates

In October 1990 the Advisory Committee invited several Federal and State officials and other experts in housing to a forum in Buffalo focusing on the Fair Housing Amendments Act of 1988 as well as on the status of compliance in the developments administered by the Buffalo Municipal Housing Authority and the Rochester Housing Authority. Because budget restrictions prevented the HUD/Region II office in New York City from being represented, that office and HUD's Buffalo area office agreed to followup interviews in October 1991. Thus, among the sources of information were HUD officials, the deputy speaker of the New York State Assembly, the head of the Buffalo office of the New York State Division of Human Rights, several housing advocates including four attorneys, two advocates for persons with disabilities, the head of a regional Realtors' association, and others. Spokespersons for two local organizations serving blacks and Hispanics were also invited, but they excused themselves on the day of the forum.

The Advisory Committee learned about the extent to which HUD's caseload increased over 3 years and how HUD's role in investigating and enforcing fair housing has been strengthened under the new legislation through the addition of administrative law judges and more investigators. Much of the caseload increase has been due to the fact that none of the HUD-funded fair housing agencies at the State and local levels within New York has been certified by HUD as having fair housing legislation deemed "substantially equivalent" to the new Federal act, leaving it to HUD to carry out more enforcement itself. However, while HUD has aggressively been working on the new jurisdictions of discrimination on the bases of familial status and disabilities, those representing nonprofit agencies perceived problems in how HUD has handled some discrimination complaints and especially how HUD has responded to the issue of segregation in Buffalo's public housing units and admissions at the Rochester Housing Authority.

Housing Discrimination Persists

Indeed, several forum participants reported that housing discrimination continues in western New York. For example, recently listed as among the four most segregated cities in the U.S., Buffalo contains 27 developments managed by a housing authority deemed by HUD in 1989 to be out of compliance. Two legal services attorneys explained the necessity for an areawide remedy involving HUD-funded programs on both sides of the line dividing Buffalo from its suburbs. While HUD and the BMHA came to an agreement last fall on a way of achieving race neutral admissions, HUD spokespersons stated that desegregation is not necessarily a goal.

A BMHA official who had engaged in earlier negotiations with HUD on how to achieve compliance indicated to the Advisory Committee that he remained unsure what constituted compliance and that "in essence [the authority is] at the mercy of HUD." After the followup interview with HUD in Buffalo last fall, public housing tenants and their advocates reportedly decried the lack of HUD funding to desegregate Buffalo's developments. In January 1992 a prominent Buffalo housing advocate wrote to HUD Secretary Kemp, asking that the Secretary devote personal attention to the problems. In April 1992 a Buffalo city council member called upon Senator Moynihan to launch new hearings focusing on compliance at the BMHA, and that same month Senator Moynihan asked HUD for fresh information.

Education on 1988 Act and ADA Needed

Realtors also addressed the forum, emphasizing the limited technical data available on fair housing requirements and the lack of information on the classes of persons supposedly protected under the new 1988 act. One real estate agent noted that the use of housing testers has had a chilling effect on how real estate agents respond to questions from potential buyers. In any case, a Realtors' association head said that, on the one hand, no allegations of discrimination had ever been brought to his association and that, on the other hand, some attorneys hired by the association to represent members were unfamiliar

with the law. He added that brokers view their responsibility as providing a "free and open choice in housing rather than being responsible for integration in housing."

Other speakers briefly discussed problems confronting the disabled. One housing specialist asserted that her clients with disabilities are largely unaware of the regulations intended to protect them. An attorney who works with those wanting public housing or already residing in public housing in Rochester described intrusive questions and screening devices adversely affecting persons with disabilities and litigation brought against the Rochester Housing Authority; she later reported that one suit had a positive outcome. Another forum participant observed that the building industry's lack of knowledge of the Americans with Disabilities Act continues to lead to significant problems. Several panelists voiced recommendations, many of them urging increased education and publicity about that new law as well.

From: Olga Dias, Regional HUD
212/264-5071
Date: October 26, 1990

MARCH 12, 1989 thru OCTOBER 24, 1990

1. 914 cases -- Total for New York and New Jersey

2. 255 investigations by HUD, mostly familial status and disability

3. 659 investigations by Fair Housing Assistance Program ('FHAP') agencies

4. 737 closures, that is, 204 by HUD and 533 by FHAPs

5. Of 204 closures by HUD:

64 administrative closures
66 conciliated
37 determinations made
38 pending determinations at OGC/Washington

Of 35 (!) determinations made,

13 were for cause or violations
22 were for no cause or no violation

3 administrative law hearings in Region II including 2 admininistrative law judge decisions, both supporting HUD.

6. New York State - March 12, 1989 thru October 24, 1990

149 cases investigated by HUD

20 for race
2 for religion
16 for gender
2 national origin
68 for handicap
69 for familial status

7. Major issues in New York State

3 refusal to sell
69 refusal to rent
1 discriminatory advertising
5 false representation
2 discriminatory financing
79 differential treatment in term of conditions of tenancy
3 coercion, intimidation, harrassment, retaliation, etc.
1 zoning

[Exceeds 149 because some cases were for 2 or more causes]

8. FHAP cases - March 12, 1989 thru October 24, 1990

426 total

307 for race
20 for religion
68 for gender
113 for national origin
79 for color
9 refusal to sell
226 refusal to rent
-0- discriminatory advertising
5 false representation
3 discriminatory financing
176 differential treatment in terms of conditions of tenancy

Appendix B

U.S. Department of Housing and Urban Development
New York Regional Office, Region II
Jacob K. Javits Federal Building
26 Federal Plaza
New York, New York 10278-0068

Region 2 Complaint Data:

FISCAL YEAR	TOTAL # OF CASES	#FHAP CASES	# HUD CASES
1988	378	372	6
1989	462	357	105
1990	481	347	134
1991	934	593	341

The most frequent basis for FHAP cases is race.

From 3/12/89 through 9/30/91: Disposition of Cases (HUD investigations)

- Approximately 37% of cases were resolved with relief for the complainants.
- We had a total of 98 determinations, of which 65 (or 66%) were No Reasonable Cause, and 33 (or 34%) were Reasonable Cause.

Citation for Havens case:

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)

In this case, the Supreme Court recognized that fair housing organizations and testers have standing to sue under Title VIII.

Appendix C

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION
101 South Second Street, Suite 300
P.O. Box 3145
Harrisburg, Pennsylvania 17105-3145
(717) 787-4410 (Voice)
(717) 783-9308 (TDD)

August 16, 1991 [APPENDIX C]

Mr. Tino Calabia
U.S. Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, DC 20425

Dear Mr. Calabia:

As requested in your telephone conversation with Raymond W. Cartwright, our Housing Director, this is an update on Pennsylvania's efforts to secure substantial equivalency with the Fair Housing Amendments of 1988.

The Pennsylvania Human Relations Commission (PHRC) is hopeful of securing legislation which will make us substantially equivalent by the January, 1992 deadline. Pennsylvania has a Sunset Law, requiring that various agencies be re-established by statute or they will got out of existence. The PHRC is slated for abolishment unless re-enacted by December 31, 1991.

Legislation to re-establish the PHRC has been introduced and unanimously approved by the State House of Representatives committee which has the lead responsibility for PHRC's Sunset Review. This bill, House Bill 1827, Printer's No. 2388 (enclosed), contains language to achieve substantial equivalency, as well as other amendments.

It still needs approval by the full House of Representatives, plus Senate action and the Governor's signature.

While we are optimistic about having the legislation enacted by the deadline, it is not clear whether it will be approved by HUD by the January, 1992 deadline. We have recently (July, 1991) submitted the bill to HUD for review. There has not yet been time for a HUD response.

We are also concerned about the equivalency status of local commissions in Pennsylvania, most of which derive their authority through enabling language contained in the Pennsylvania Human Relations Act. In several cases, city solicitors are advising that the local ordinances cannot be amended until the state law is amended. Therefore, even if state amendments are enacted by December 31, 1991, it is unlikely that most local ordinances can be enacted by January, 1992.

HUD staff have, through presentations at conferences and through informal discussions, provided some guidance as to the elements necessary to secure substantial equivalency. HUD has also indicated its intent to be flexible on technical issues. We hope, as the January, 1992 deadline approaches, that HUD will expedite its formal certification process in order to avoid the administrative problems which would result from losing all but a handful of its deferral relationships. We would also hope that HUD will be willing to extend the deadlines for current deferral agencies which, for various significant reasons, are unable to meet the January, 1992 deadline. The inability of local commissions to have their local ordinances amended until the state law is amended would, we believe, constitute a justified reason for extending the deadline.

Please feel free to contact either Ray Cartwright or me if you have any further questions.

Very truly yours,

Homer C. Floyd

Homer C. Floyd
Executive Director

cf

Enclosure

Appendix D

U.S. Department of Housing and Urban Development
New York Regional Office, Region II
Jacob K. Javits Federal Building
26 Federal Plaza
New York, New York 10278-0068
2E

MAR 16 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Tino Calabia
New York State Advisory Committee
United States Commission on Civil Rights
Eastern Regional Division
1121 Vermont Avenue, N.W. - Room 710
Washington, D.C. 20425

[APPENDIX D]

Dear Mr. Calabia:

Thank you for sending me the sections of the Commission's draft report pertaining to our meeting of October 15, 1991.

There are two issues we discussed in October which need updating. First, please refer to the last two sentences of the first paragraph on page 5 relating to the issuance of compliance determinations. In December 1991, the Assistant Secretary for Fair Housing and Equal Opportunity signed a Redelegation of Authority giving the Regional Directors authority to make no reasonable cause determinations in Fair Housing Act cases. This redelegation does not affect the authority of the General Counsel, or the authority redelegated to the ten Regional Counsel, to make determinations of reasonable cause and no reasonable cause under 24 C.F.R. § 103.400.

Second, we had discussed Mr. Scott Gehl's criticism of FHEO investigators. Subsequent to our October meeting, he expressed those same concerns to our Assistant Secretary who investigated the matter and completed a review of all HOME and HOME-related case files. The Assistant Secretary concluded that the Regional investigators' conduct was clearly within the prescribed procedures governing Title VIII complaint processing.

I very much appreciated the opportunity to participate in this project. Our Office remains committed to the full and fair enforcement of the Fair Housing Act.

Sincerely,

Olga I. Diaz
Branch Chief
Fair Housing Enforcement
Office of Fair Housing
and Equal Opportunity

Appendix E

THE LANGUAGE OF DISCRIMINATION

[APPENDIX E]

In the old days, it was not uncommon for landlords and real estate agents to slam doors in your face.

Today, discriminators are usually much more clever - and you might not even realize that you are a victim of discrimination.

To protect your rights, it's important to recognize the *language of discrimination*. Here are some examples:

"Sorry, that apartment was just rented. You can call again, but I doubt we'll have anything."

■

"I don't think you'd be happy in this neighborhood."

■

"We don't have any listings for you now."

■

"Do you think your kids would be safe on a street this busy?"

■

"This place costs a fortune to heat."

■

"I'd be happy to show you the apartment, but I don't have a key."

■

"Sure we advertised, but there's a waiting list for those apartments."

Anytime a landlord, rental manager, or real estate agent doesn't try to "sell you" on a house or apartment, you may be the victim of discrimination. To protect yourself, call HOME at 854-1400.

[Reproduced with permission of HOME.]

VIVIENDA JUSTA ES LA LEY!

Vivienda justa significa darle a cada posible inquilino o comprador de vivienda *igual oportunidad* para que pruebe que él o ella califica para rentar o para comprar vivienda.

Las leyes federales y estatales prohiben negarle vivienda a cualquier residente de los Estados Unidos - ya sea o no ciudadano - por razón de su raza, color, religión, origen nacional, sexo, estado civil, incapacidad, edad o la presencia de niños en su familia.

Esas mismas leyes también prohiben:

- Discriminar en los términos o condiciones de venta y renta (por ejemplo, cobrar diferentes rentas o depósitos de seguridad)
- Hacer preguntas o anotar información acerca de la raza, origen nacional, estado civil, edad, etc. de los aplicantes.
- Colocar (o publicar) anuncios de vivienda que indiquen, preferencias o limitaciones (tales como "Sólo para adultos" o "Se prefieren parejas").
- Rechazar a una persona incapacitada por motivo de su perro guía o rehusarle el derecho de que por su propia cuenta y gastos, haga modificaciones razonables para mejor accesibilidad.

Desafortunadamente, estas leyes no son a menudo ejecutadas. Como resultado, algunos dueños de casa y agentes de bienes raíces discriminan - y se salen con la suya.

EL LENGUAGE DE DISCRIMINACION

No hace mucho, los dueños de casa y agentes de bienes raíces que querian discriminar tiraban la puerta en su cara. Los discriminadores de hoy en día son usualmente mucho más ingeniosos - y a lo mejor ni se de cuenta de que ha sido la victima de discriminación.

Para proteger sus derechos de vivienda justa, es importante reconocer el *lenguage de discriminación*. He aquí algunos ejemplos:

"Disculpe, ese apartamento se acabo de rentar. Puede llamar de nuevo, pero dudo que tenga algo disponible."

■

"No creo que sea felíz en este vecindario."

■

"Cree que sus hijos estarian a salvo en una calle tan transitada como esta?"

■

"La calefacción de esta casa cuesta una fortuna."

■

"Claro que anunciamos, pero todavia tengo que poner su nombre en nuestra lista de espera."

Cada que un dueño de casa, administrador o agente de bienes raíces no trata de persuadirle para que tome la casa o el apartamento en el que esta interesado, usted puede ser una victima de discriminación.

Para protegerse, llame a HOME al

854-1400

MONROE COUNTY LEGAL ASSISTANCE CORPORATION

Appendix F

SUITE 200
87 N. CLINTON AVENUE
ROCHESTER, NEW YORK 14604-1479
TEL: 716 - 325-2520
VOICE & TTY

LEGAL ASSISTANCE
OF THE FINGER LAKES
1 FRANKLIN SQUARE
GENEVA, NEW YORK 14456
315-781-1465

GREATER UPSTATE
LAW PROJECT
SUITE 202
87 N. CLINTON AVENUE
ROCHESTER, NEW YORK 14604-1478

August 13, 1991

Tino Calabia
United States Commission on Civil Rights
Eastern Regional Division
1121 Vermont Avenue, N.W., Room 710
Washington, D.C. 20425

[APPENDIX F]

Dear Mr. Calabia:

I appreciated the opportunity to testify before you and the New York State Advisory Committee of the United States Commission on Civil Rights. I am pleased to let you know that a final settlement has been reached in Cason v. Rochester Housing Authority.

A partial consent judgment was signed by the Court on June 18, 1991. Pursuant to the settlement, the Rochester Housing Authority has completely revised its tenant admission and screening policies to conform to the requirements of the Fair Housing Amendments Act and Section 504 of the Rehabilitation Act. In order to insure that these somewhat experimental procedures will in fact benefit applicants with disabilities, their use will be monitored for at least one year. The settlement also resolves all additional, substantive claims that the plaintiffs raised, including inappropriate steering of applicants with disabilities and the provision of adequate notice to rejected applicants.

Although HUD has yet to change its public housing manual, it has responded to the Cason decision by issuing a HUD field memorandum to its regional offices. In addition, HUD has also issued a "Dear Recipient" letter directed to recipients of HUD funding that clarifies the guidelines housing managers are to use to meet their obligations under the Fair Housing Amendment Act and Section 504 of the rehabilitation act. I have enclosed a copy of these two HUD documents for your convenience.

People interested in obtaining a copy of the settlement in Cason v. Rochester Housing Authority may do so by contacting:

National Clearinghouse Legal Services, Inc.
407 South Dearbone Street, Suite 400
Chicago, Illinois 60605 - 1-800-621-3256

and requesting a copy of the "Stipulation to Entry of Partial Consent Judgment" in Cason v. Rochester Housing Authority, Clearinghouse No.45,739. (For agencies not funded by the Legal Services Corporation there is a nominal fee).

If I can be of any further assistance, please feel free to contact me.

Sincerely yours,

Susan Ann Silverstein, Esq.

Appendix G

HOUSING OPPORTUNITIES MADE EQUAL, INC.
700 MAIN STREET BUFFALO, NEW YORK 14202
(716) 854-1400

January 15th, 1992

Hon. Jack F. Kemp, Secretary
U.S. Department of Housing
and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

[APPENDIX G]

Dear Secretary Kemp:

As you know, Housing Opportunities Made Equal is a not-for-profit organization founded in 1963 to combat housing discrimination on the Niagara Frontier. Today HOME provides fair housing services under contract with HUD, New York State, and 36 municipalities in Erie County.

HOME believes strongly that the situation at the Buffalo Municipal Housing Authority requires your personal attention.

Ever since HUD's April 1989 finding that the Authority had discriminated against minority tenants, the Office of Fair Housing and Equal Opportunity has searched for measures which would remedy past discrimination and ensure future compliance. HOME--which has consulted with Senator Moynihan on this issue since 1988--has twice been asked to propose remedies and did so in letters dated 9/21/89 to Mr. Stanley Seidenfeld and 5/4/91 to Assistant Secretary Gordon Mansfield. (A copy of the latter is appended.)

We have been convinced from the beginning that the key to resolving the problems of BMHA--racial segregation, unequal conditions at predominantly white and minority developments, and a 28 percent vacancy rate--lies in improving the condition of housing at older predominantly minority projects through the creation of one or more "magnet developments". While Mr. Mansfield has been forthright in his dealings with this agency, he has taken the position that to provide federal support for improved facilities and services would be to reward BMHA for Title VI non-compliance.

While we understand Mr. Mansfield's position, the fact remains that without the benefit of additional federal resources the HUD-BMHA compliance agreement will inevitably fail--affecting not only the Authority but, more importantly, poor and minority families already victimized by past discrimination and mismanagement.

HOME is not alone in this belief, which is shared by tenant leaders, the Buffalo Common Council, and the editorial board

of the Buffalo News. Only last week Michael Clarke, the reform-oriented executive director of BMHA, wrote to Mr. Mansfield adding his voice to the chorus of opposition. (Enclosed are clippings dated 11/12/91, 11/26/91, 12/9/91 and 1/9/92.)

Given the consensus which has emerged, HOME joins the Common Council in asking you to become personally involved in resolving the problems of the Buffalo Municipal Housing Authority. By declaring BMHA a federal demonstration project, you have the power to make Buffalo a national example of the federal government's commitment to provide shelter to our most vulnerable citizens.

As a member of Congress, your work repeatedly benefited the the Buffalo metropolitan area--just as, a decade before, your work brought honors to this city through two AFL championships. In this matter we must again rely on your commitment of the people of Buffalo.

May we ask to learn your thoughts on this matter? Thanking you for your consideration, I remain

Sincerely,

Scott W. Gehl
Executive Director

cc: Hon. Daniel Patrick Moynihan
Hon. Henry J. Nowak

Appendix H

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-2000

OFFICE OF THE ASSISTANT SECRETARY
FOR FAIR HOUSING AND EQUAL OPPORTUNITY

February 10, 1992

FEB 27 1992

Mr. Scott W. Gehl
Executive Director
Housing Opportunities Made Equal, Inc.
700 Main Street
Buffalo, New York 14202

Dear Mr. Gehl:

On behalf of Secretary Kemp, thank you for your letter of January 15, 1992 regarding the Buffalo Municipal Housing Authority (BMHA).

As you know, the Department is actively pursuing solutions to the problems identified as a result of a compliance review conducted by the New York Regional Office of the BMHA. Secretary Kemp has personally asked me to attempt resolution of issues delaying implementation of the Voluntary Compliance Agreement between the Department of Housing and Urban Development (HUD) and the BMHA. I am in continual contact with him regarding the progress of this matter. You probably are aware that the Executive Director of the BMHA and HUD policy makers met during the week of February 3, 1992 to continue negotiations. The negotiations were fruitful.

In addition, I have been involved, personally, in attempts to address the concerns that you raise in your letter. You and I have discussed these concerns on more than one occasion. Discussions are continuing within the Department.

I appreciate your interest in this matter.

Very sincerely yours,

Gordon H. Mansfield
Assistant Secretary

Appendix I

New York
Legal Services Journal
Greater Upstate Law Project January, 1990

UN-Fair Housing: The Unrealized Promise of Section 8

by Michael Hanley

Systemic Fair Housing Litigation:

The Evolution of Metropolitan Area Relief

Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973).
The statutory obligation imposed under the Fair Housing Act "affirmatively to further" fair housing extends to municipalities as well as HUD.

Hills v. Gautreaux, 425 U.S. 284, 299 (1976).
A district court may order HUD to effectuate "metropolitan area" relief to remedy HUD's own unconstitutional actions. (intentional discrimination).

U.S. v. Yonkers, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 2821 (1988).
A municipality may be ordered to construct low income housing to remedy intentional race discrimination, and may be ordered to use CDBG funds to further low income housing.

Walker v. HUD, (District Court Texas; consent order 1/20/87, subsequent orders 8/89).
Suburban communities may be required to accept Section 8 certificates; public housing and Section 8 programs may be consolidated to effectuate desegregation (intentional discrimination).

NAACP v. Secretary of HUD, 817 F.2d 149, 155 (1st Cir. 1987).
HUD may be sued under the Administrative Procedure Act to review its failures to meet its statutory obligation under the Fair Housing Act to "affirmatively to further fair housing," 42 U.S.C. §3608(e)(5), *even in the absence of intentional discrimination.*

NAACP, Boston Chapter v. Kemp, 721 F. Supp. 361 (D.Mass., 1989)
"Metropolitan Area Relief" ordered requiring HUD to impose restrictions on all publicly assisted housing programs in the Boston metropolitan area to assure availability of subsidies to minorities, ad creating a "Boston Housing Opportunity Clearing Center", to assist in affirmative remedial efforts.