

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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ANTHONY HUNTER, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:12-cv-01960-GK
)	
DISTRICT OF COLUMBIA, <i>et al.</i> ,)	
)	
Defendants)	
_____)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

I. INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517 to address arguments raised by Defendant District of Columbia in its Motion for Dismissal of Plaintiffs’ First Amended Complaint (the “Def.’s Mot. Dismiss” or “Motion”).¹ June 3, 2013, ECF No. 65-1. In this lawsuit, Plaintiffs allege that the District of Columbia (the “District”) failed to provide its homeless shelter services and programs in compliance with title II of the Americans with Disabilities Act, as amended (the “ADA” or “title II”), 42 U.S.C. §§ 12131-34; Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794; the Fair Housing Act (“FHA”), 42 U.S.C. §§ 3601-19; and D.C. law. First Amended Complaint (“First Am. Compl.”) ¶ 101, May 17, 2013, ECF No. 59. Plaintiffs allege a knowing and willful failure to accommodate and a failure to maintain appropriate and accessible shelter units for persons with immune system and mobility impairments. First Am. Compl. ¶ 4. Accordingly, the Plaintiffs, a

¹ Under 28 U.S.C. § 517, “[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”

father and his minor daughter, seek declaratory and compensatory relief, and punitive damages.

As the agency charged with enforcing title II, Section 504,² and the FHA, and issuing regulations implementing the ADA, 42 U.S.C. §§ 12133-34, the Department of Justice (the “Department”) has a strong interest in enforcement these statutes. In this case, Plaintiffs allege that the District, a public entity, is liable under title II, Section 504, and the FHA. The District argues that, through its contractual relationships with private entities, it is not liable under title II or Section 504. Def.’s Mot. Dismiss 5-8. It also argues that the FHA does not apply to its shelter program. *Id.* at 11-16. The Court’s decision on these issues will directly affect the United States’ enforcement authority.

The United States respectfully urges this Court to deny Defendant’s Motion to dismiss Plaintiffs’ title II, Section 504, and FHA claims to allow consideration of these claims on their merits.³

II. STATUTORY AND REGULATORY BACKGROUND

The ADA is a comprehensive civil rights law enacted, “to provide a clear and

² Section 504, like title II, prohibits disability-based discrimination. 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”). In all ways relevant to this discussion, title II and Section 504 are generally construed to impose similar requirements. *See, e.g., Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1261 n.2 (D.C. Cir. 2008); *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999). This principle follows from the similar language employed in the two acts. It also derives from the Congressional directive that implementation and interpretation of the two acts, “be coordinated to prevent[] imposition of inconsistent or conflicting standards for the same requirements under the two statutes.” *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-69 (4th Cir. 1999) (citing 42 U.S.C. § 12117(b)) (alteration in original) (internal quotation marks omitted).

³ The United States takes no position as to the Defendant’s Motion regarding claims under the District of Columbia Human Rights Act of 1977 (the “DCHRA”) or the District of Columbia Homeless Services Reform Act (the “HSRA”), or as to claims of negligence. *See* Def.’s Mot. Dismiss 16-27.

comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). Title II of the ADA, at issue in this case, provides that, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

Title II does not simply prohibit outright denial of services; it also prohibits unequal participation in such services. As defined by title II’s implementing regulation, a public entity may not deny a qualified individual with a disability, “an opportunity to participate that is not equal to that afforded others,” nor may it, “otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity” enjoyed by others receiving the services. 28 C.F.R. § 35.130(b)(1)(iii), (vii). If a requested modification is needed to ensure full and equal enjoyment by a person with a disability, then the modification is necessary to prevent discrimination on the basis of disability. 42 U.S.C. § 35.130(b)(7).

The Fair Housing Act, originally enacted in 1968, and substantially expanded by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, declares that: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601.

The 1988 amendments, among other things, added “handicap” as a prohibited basis for discrimination.⁴ In describing the need for protection for this class of persons, the House Judiciary Committee report on the legislation stated that:

The Committee understands that housing discrimination against handicapped persons is not limited to blatant, intentional acts of discrimination. Acts that have the effect of

⁴ Throughout this Statement of Interest, the United States uses the term “disability” instead of “handicap.” For purposes of the FHA, the terms have the same meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

causing discrimination can be just as devastating as intentional discrimination. . . . In *Alexander v. Choate*, 469 U.S. 287 (1985), the Supreme Court observed that discrimination on the basis of handicap is “most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect.”

H.R. Rep. No. 100-711, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186.

III. SUMMARY OF FACTS

A. The Plaintiffs

Plaintiff Anthony Hunter sued the District of Columbia on his own behalf and on behalf of A.H., his minor daughter. First Am. Compl. ¶ 6. Plaintiffs make the following allegations:

A.H. is an individual with several disabilities, including cri-du-chat syndrome, spina bifida, and related medical conditions.⁵ *Id.* These conditions significantly impair her in the major life activities of standing, walking, bathing, dressing, and eating. *Id.* A.H. is therefore dependent on her caregivers to meet her basic daily needs. *Id.* ¶ 35. In addition to the fact that A.H. requires the use of a wheelchair and accessible facilities, she is highly susceptible to infection due to her medical conditions and therefore requires a climate-controlled and lightly populated living environment. *Id.*

On December 7, 2011, Mr. Hunter applied at the Virginia Williams Family Resource Center (the “Center”), which is operated by the Coalition for the Homeless,⁶ for placement in a homeless shelter. *Id.* ¶¶ 12, 37. He explained his daughter’s disabilities and requested

⁵ Cri-du-chat syndrome, “is a chromosomal condition that results when a piece of chromosome 5 is missing.” *Cri-du-chat syndrome*, Genetics Home Reference (Jul. 8, 2013), <http://ghr.nlm.nih.gov/condition/cri-du-chat-syndrome>. It is, “characterized by intellectual disability and delayed development, small head size (microcephaly) . . . and weak muscle tone (hypotonia) in infancy.” *Id.* “Spina bifida is a condition in which the bones of the spinal column do not close completely around the . . . spinal cord.” *Spina bifida*, (Jul. 8, 2013), <http://ghr.nlm.nih.gov/condition/spina-bifida>. Spina bifida may result in “permanent nerve damage[,] . . . weakness or paralysis of the feet or legs, and problems with bladder and bowel control.” *Id.*

⁶ This Court entered the order granting the settlement between Plaintiffs and Defendant Coalition for the Homeless on May 31, 2013. ECF No. 58.

reasonable accommodations for those disabilities.⁷ *Id.* ¶ 37. Staff at the Center prepared a written reasonable accommodation request but failed to record Mr. Hunter’s request for a non-communal environment with a private bathroom. *Id.* ¶ 39.

Mr. Hunter and A.H. were placed in Building 12 of the D.C. General Shelter and were told that they would receive a private room. *Id.* ¶ 41. However, though it was wheelchair accessible, the most private bathroom available was a shared bathroom and did not meet Plaintiffs’ needs relating to A.H.’s immune system. *Id.* Additionally, the ramp leading to the front door of Building 12 was inaccessible; A.H. was unable to use it without assistance. *Id.* ¶¶ 45-46. Furthermore, all fifty families that resided in Building 12 ate meals in one room, which increased A.H.’s exposure to possible infections. *Id.* ¶ 50. On multiple occasions, the staff refused to allow Mr. Hunter and A.H. to eat in a separate room. *Id.*

Mr. Hunter immediately discovered that Building 12 did not meet his daughter’s disability-related needs and asked his case manager to move him and A.H. to an accessible and non-communal placement. *Id.* ¶ 51. His case manager demanded verification from A.H.’s doctors before processing this request. *Id.* On December 21, 2011, Mr. Hunter renewed his reasonable accommodation request and submitted medical verification. *Id.* ¶ 53. On December 29, 2011, he was informed that he and A.H. would be moved to the Girard Street Apartments, which are operated by Defendant Community of Hope. *Id.* ¶ 56, 62.

⁷ The requirement of title II is that public entities make, “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability...” 42 U.S.C. § 12132(2); 29 C.F.R. § 35.130(b)(7). The District has decided to refer to such requests as requests for “reasonable accommodations.” As this language has also been adopted by Plaintiffs, we use “reasonable accommodations” to mean “reasonable modifications” under title II. This practice has been accepted and embraced by other courts. *E.g., McGary v. City of Portland*, 386 F.3d 1259, 1266 n.3 (9th Cir. 2004) (citing *Wong v. Regents of Univ. of California*, 192 F.3d 807, 816 n.26 (9th Cir. 1999)) (“Although Title II of the ADA uses the term ‘reasonable modification,’ rather than ‘reasonable accommodation,’ these terms create identical standards.”).

During the time Mr. Hunter and A.H. lived there, the Girard Street Apartments building was inaccessible to wheelchair users. *Id.* ¶ 56. Neither the ramp leading to the entrance door nor the entrance door itself met accessibility guidelines. *Id.* ¶ 72. Upon entering, there were three stairs up to the lobby. *Id.* ¶ 73. Although there was a lift for wheelchair users, it was out of service for the duration of the three months that the Hunter family resided at the Girard Street Apartments. *Id.* Furthermore, the Hunters were assigned to the third floor (Unit 303), but the only access to the third floor was by way of two flights of stairs; there was no elevator. *Id.* ¶ 74. Finally, the hallways in Unit 303 were too narrow to accommodate A.H.'s wheelchair. *Id.* ¶ 75.

On January 3, 2012, Mr. Hunter filed with shelter staff another reasonable accommodation request for a wheelchair accessible room. *Id.* ¶ 76. This request was not responded to. *Id.* On February 10, 2012, Mr. Hunter and A.H. were transferred to the first floor (Unit 106). *Id.* ¶ 86. Although Unit 106 was more accessible, the staff at the Girard Street Apartments never provided a working wheelchair lift to access the first floor of the building. *Id.*

During the Plaintiffs' residence at the Girard Street Apartments, Mr. Hunter submitted a reasonable accommodation request that a nursing student be allowed to visit in order to assist him with the care of A.H. *Id.* ¶ 81. Though A.H.'s health conditions required occasional respite care and Mr. Hunter's case manager recommended that he request respite care, Community of Hope staff only allowed one visit. *Id.*

B. The District's Record of Discrimination

In 2007, the Department of Justice Civil Rights Division conducted an ADA compliance review of the accessibility of the D.C. homeless shelter system. First Am. Compl. ¶ 58. Fifteen shelters were inspected, including the D.C. General Shelter and Girard Street Apartments. *Id.* As a result of that review, the United States found that none of the fifteen shelters complied with the ADA and a settlement agreement was subsequently entered in December 2008, detailing

seventy-one pages of ADA violations at the fifteen shelters. Settlement Agreement Between the United States of America and the District of Columbia Under the Americans with Disabilities Act ¶ 20(a) (Dec. 10, 2008) (the “Settlement Agreement”) (Attachment # 1). The District was aware that the D.C. General Shelter and Girard Street Apartments did not meet the requirements of the ADA. *Id.* As part of the 2008 Settlement Agreement, the District was required to, “create and implement procedures for ensuring that any contractor or subcontractor of the District providing services in the Shelter Program is providing these services in compliance” with title II of the ADA. First Am. Compl. ¶ 59; Settlement Agreement ¶ 24(a). This provision expired on December 10, 2011. Settlement Agreement ¶ 39.

IV. ARGUMENT

A. Legal Standard for a Rule 12(b)(6) Motion to Dismiss

A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint; it is not a mechanism to decide the merits. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Indeed, the purpose of the complaint is merely to, “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). Accordingly, to survive a Rule 12(b)(6) motion to dismiss, the complaint need not include, “detailed factual allegations,” but it must provide, “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible when the pleaded facts allow a, “reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* A court considering a Rule 12(b)(6) motion must construe all inferences in the light most favorable to the plaintiff, including accepting as true all reasonable factual inferences that can be derived from the facts alleged in the complaint. *Stewart v. Nat’l*

Educ. Ass'n, 471 F.3d 169, 173 (D.C. Cir. 2006); *In re Navy Chaplaincy*, 850 F. Supp. 2d 86, 101 (D.D.C. 2012); *Tressler v. AMTRAK*, 819 F. Supp. 2d 1, 4 (D.D.C. 2011).

When viewed in that light, the Hunters' complaint sufficiently sets forth plausible violations of title II of the ADA and its implementing regulations, Section 504, and the FHA. Thus, the Court should deny the District's Motion on the title II, Section 504, and FHA grounds.

B. Deference is Due to Department of Justice Interpretations of Title II

Congress explicitly delegated to the Department of Justice the authority to promulgate regulations under title II. 42 U.S.C. § 12134(a); 28 C.F.R. Part 35. Accordingly, the Department's regulations and interpretation thereof are entitled to substantial deference. *See, e.g., City of Arlington v. FCC*, 133 S.Ct. 1863, 1868 (2013) ("Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (concluding that an agency's interpretation of its regulations is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted).

C. Alleged Violations of Title II of the Americans with Disabilities Act

1. The District is Liable under Title II of the ADA for the Actions of Private Entities with which it has Contracted

a. The District has previously agreed that it has responsibility for ensuring that contractors provide services in compliance with title II.

The District entered into a comprehensive Settlement Agreement with the United States in December 2008 to resolve the Department's concerns regarding allegations of discrimination (similar to those alleged here) in the D.C. homeless shelter program. *See Settlement Agreement*

(Attachment # 1). In this Settlement Agreement, the District agreed that it would create and implement procedures for ensuring that any contractor of the District providing shelter services would provide those services in compliance with title II of the ADA. Settlement Agreement ¶ 24(a).

The Department is currently reviewing its enforcement options under this Settlement Agreement, separate from this Statement of Interest.

b. The ADA and accompanying Regulations expressly prohibit title II entities from escaping liability through contract.

The District of Columbia is liable for the discriminatory actions of the private entities with which it contracted to provide homeless shelter services. Title II of the ADA prohibits public entities (*i.e.*, “any State [or] local government,” or any “instrumentality of a State or . . . local government”) from discriminating against persons with disabilities. 42 U.S.C. §§ 12131(1)(A)-(B), 12132. The ADA Regulations explicitly state that, “[a] public entity, in providing any . . . service, may not, directly *or through contractual . . . arrangements*, [discriminate] on the basis of disability” 28 C.F.R. § 35.130(b)(1) (emphasis added). Furthermore, Appendices A and B which provide guidance on the Regulations (the “Guidance”) and the Department’s Title II Technical Assistance Manual (“TA Manual”), clearly state that a public entity is obligated to ensure compliance with its title II obligations, even if a private entity provides services on behalf of the state. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 286 (2d Cir. 2003) (explaining the Department’s interpretation of Section 504 that public entities remain liable for the actions of private entities with which they contract); *Kerr v. Heather Gardens Ass’n*, Civ. A. No. 09-cv-00409-MSK-MJW, 2010 WL 3791484, at *9 (D. Colo. Sept. 22, 2010) (“Both the Regulations and the [TA] Manual suggest that even if a public entity allows others to provide services, programs and activities, the public entity remains obligated to ensure

compliance with Title II.”); Appendix A to Part 35—Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. Pt. 35, App. A, at 634 (2012) (“[A]ll governmental activities of public entities are covered, even if they are carried out by contractors.”) (internal quotation marks omitted); Appendix B to Part 35—Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services Originally Published July 26, 1991, 28 C.F.R. Pt. 35, App. B, at 661 (2012) (“All governmental activities of public entities are covered, even if they are carried out by contractors.”); TA Manual, 42 U.S.C. § 12206(c)(3), Part II—1.3000 (explaining that private entities may be subject to title II if they, “have a close relationship,” with a public entity).

For example, a TA Manual illustration explains that when a private corporation operates group homes for individuals with mental disabilities under contract with a State agency, the State must ensure that its contracts are carried out in accordance with title II. *Id.* at Illustration Four. Another illustration explains that the State is, “obligated to ensure by contract,” that a privately owned restaurant operating in a State park meets the State’s title II obligations, “even though the restaurant is not directly subject to title II.” *See id.* at Illustration One.

In sum, the Department of Justice interprets the ADA and its Regulations to prohibit title II entities, such as the District of Columbia, from escaping liability for discrimination in services for which it is responsible by contracting away the provision of those services.

c. Case law supports a finding that the District is liable for the discriminatory actions of its contractors.

In addition to the clear statements in the Regulations, the Guidance, and the TA Manual, several courts have confirmed that a title II entity is liable for the unlawful actions of private entities with which it has contracted.

In *Armstrong v. Schwarzenegger*, state prison inmates with disabilities were denied accommodations under the ADA and sued the State. 622 F.3d 1058, 1062 (9th Cir. 2010). The State unsuccessfully argued that the Regulations were unreasonable and, since it had contracted away all incarceration services to the prison, that it should have no responsibility to ensure that prisoners with disabilities receive accommodations. *See id.* (“That argument, and defendants’ other arguments contesting their obligations to their prisoners and parolees housed in county jails, are without merit.”). The Ninth Circuit ruled that the Regulations “reflect the fairest reading of the statute,” and that they explicitly prohibit public entities from avoiding title II obligations through contractual relationships. *Id.* at 1062, 1067.

Additionally, several cases clarify that public entities are required to ensure that their contractors comply with title II requirements. In *Henrietta D.*, the Second Circuit points out that the basic common law of contracts supports this view. 331 F.3d at 286. The court quotes Farnsworth on Contracts: “An ‘obligor . . . cannot rid itself of a duty merely by making an effective delegation.” *Id.* (quoting E. Allan Farnsworth, III Farnsworth on Contracts § 11.10 p. 126 (1998)). “Thus, once a party has made a promise, it is responsible to the obligee to ensure that performance will be satisfactory, even if the promising party obtains some third party to carry out its promise.” *Id.* The court goes on to acknowledge that the “Justice Department’s interpretation . . . strongly supports this view,” and quotes the Guidance to the ADA Regulations: “All governmental activities of public entities are covered, even if they are carried out by contractors.”⁸ *Id.* (quoting the Guidance, 28 C.F.R. pt. 35, App. A, at 517 (2002)); *see also Kerr*, 2010 WL 3791484, at *8 (quoting the same).

⁸ The Guidance note that public entities contract for countless other social services to be run by private entities, “all of which must be operated in accordance with title II requirements.” 28 C.F.R. pt 35, App. A, at 634 (2012). They go on to list some examples, “medical and mental

Similarly, in *Hahn ex rel. Barta v. Linn County*, the court explained that a public entity must, “ensure that the private entities with which it contracts comply with the public entity’s Title II obligations.” 191 F. Supp. 2d 1051, 1054 n.2 (N.D. Iowa 2002). The court in *James v. Peter Pan Transit Management* also held that public entities must ensure that private entities comply with title II, even if the private entity is an independent contractor. *See* No. 5:97-CV-747, 1999 WL 735173, at *9-10 (E.D.N.C. Jan. 20, 1999).

Here, the District contracted its homeless shelter services and programs to the other Defendants that are private entities, such as Community of Hope. First Am. Compl. ¶ 100. Since a public entity may not escape liability by signing a contract, it is the District’s responsibility to ensure that its contractors follow title II when providing the services. In sum, the District cannot escape liability and is ultimately responsible under title II for any service that it contracts away to a private entity.

2. Plaintiffs Properly State a Cause of Action Under Title II of the ADA

a. Defendants conflate the standard for compensatory damages with required elements for liability.

The District argues that to state a claim under title II or Section 504, Plaintiffs must show that the District was deliberately indifferent to such discrimination. Def.’s Mot. Dismiss 5. This assertion is unsupported by law. Defendants have conflated the elements necessary to state a cause of action under title II with the legal standard used to determine awards of compensatory damages. To state a claim under title II of the ADA, a plaintiff must prove three elements: (1) that he is a qualified individual with a disability, (2) that he was discriminated against by being excluded from or denied the benefits of a public entity’s services, and (3) that he was discriminated against because of his disability. *Am. Council of the Blind v. Paulson*, 525 F.3d

health services, food services, laundry, prison industries, vocational programs, and drug treatment and substance abuse programs.” *Id.*

1256, 1266 (D.C. Cir. 2008) (setting forth these elements in the analogous Section 504 context); *Equal Rights Ctr. v. District of Columbia*, 741 F. Supp. 2d 273, 283 (D.D.C. 2010); *see also Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2012); *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007); *Kiman v. New Hampshire Dep't of Corr.*, 451 F.3d 274, 283 (1st Cir. 2006). Once liability is established under this framework, then a plaintiff must prove that a defendant acted with discriminatory intent to succeed on a claim for compensatory damages.⁹ *See Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 342 (11th Cir. 2012) (“To recover compensatory damages under § 504, the [Plaintiffs] must show that . . . [the Defendant] violated their rights . . . with discriminatory intent.”); *Delano-Pyle v. Victoria Cnty.*, 302 F.3d 567, 575 (5th Cir. 2002) (“However, in order to receive compensatory damages for violations of the [ADA], a plaintiff must show intentional discrimination.”); *Duwall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001) (“To recover monetary damages under Title II of the ADA . . . a plaintiff must prove intentional discrimination”); *Wilkins-Jones v. Cnty. of Alameda*, 859 F. Supp. 2d 1039, 1044 (N.D. Cal. 2012) (“In a disability action seeking monetary relief, a plaintiff must additionally prove intentional discrimination”). Proving knowledge of intentional discrimination, however, is irrelevant to the principal question in this Motion: whether, under

⁹ There are two competing standards for intentional discrimination, “deliberate indifference” or the stricter “discriminatory animus” standard. *See Liese*, 701 F.3d at 344. Most jurisdictions have applied the “deliberate indifference” standard. *See id.* at 345. Though the District confusingly urges the court to apply the “intentional discrimination” standard (presumably intending “discriminatory animus”), it is the position of the United States that the “deliberate indifference” standard is applicable in this case. The United States takes no position here on whether deliberate indifference is the appropriate standard for compensatory damages in all cases brought under title II. This Statement of Interest does not address the standards that the Department of Justice and other federal agencies use in resolving administrative complaints or the regulations each agency enforces, or the standards applicable in any other cause of action subject to a deliberate indifference standard outside of the facts of this case.

title II, the Plaintiffs have alleged sufficient facts to survive a motion to dismiss by the District, which denies liability for the discriminatory actions of its contractors.

b. Homeless shelter service contractors are agents of the District.

The District concedes that a public entity can be liable for compensatory damages, “based on the deliberate indifference of others,” and that this applies at least to employees and agents. Def.’s Mot. Dismiss 6, n.5. Their argument, advanced in a footnote and relying heavily on Federal Tort Claims Act (the “FTCA”) cases instead of ADA and Section 504 cases, is that the District’s contractors are independent contractors and therefore unable to give rise to the indirect liability of the District.¹⁰ *See id.* This argument disregards basic agency law and the clear guidance of the Regulations.¹¹

A basic principle of agency law is that principals are responsible for the actions of their agents. *See* Restatement (Third) Of Agency § 1.01 (2006). Generally, an employer is not liable for physical harm caused by its independent contractor. *Cooper v. United States Gov’t & Gen. Servs. Admin.*, 225 F. Supp. 2d 1, 5 (D.D.C. 2002). However, the mere fact that the District ascribes the independent contractor label to the homeless shelter service providers “does not end the inquiry.” *Schwieger v. Farm Bureau Ins. Co. of Nebraska*, 207 F.3d 480, 483 (8th Cir. 2000) (performing independent contractor analysis in the analogous Title VII context).

¹⁰ The cases cited by the District holding that the United States cannot be held indirectly liable under the FTCA for the actions of foreign independent contractors are wholly irrelevant to the instant inquiry: whether a city can be held indirectly liable for the actions of private entities with which it collaborates to provide social care services under the ADA.

¹¹ The case the District most heavily relies on explicitly contradicts their argument. *See Wood v. Barwood Cab Co.*, 648 A.2d 670, 671 (D.C. 1994), holding that even when a taxi driver is an independent contractor, if a passenger is injured due the driver’s negligence, the “taxi company is estopped from denying liability . . . on the ground that it did not own the vehicle” *Id.*

An independent contractor is defined as “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” Restatement (Second) of Agency § 2(3) (1958).¹² In other words, the essential element of an agency relationship is the right of the principal to control the performance of the agent. *See Miller v. D.F. Zee’s, Inc.*, 31 F. Supp. 2d 792, 806 (D. Or. 1998). A leading case in the District characterizes the right to control as, “the *right* to control an employee in the performance of a task and in its result, and not the actual exercise of control or supervision.” *Safeway Stores Inc. v. Kelly*, 448 A.2d 856, 860 (1982) (citing *Dovell v. Arundel Supply Corp.*, 361 F.2d 543, 545 (1966)) (emphasis added); *see also Giles v. Shell Oil Corp.*, 487 A.2d 610, 611 (1985) (“[T]he right of control . . . [is] the right to direct the manner in which the work shall be done.”). However, “[i]t does not matter whether the putative principal actually exercises control; what is important is that it has the *right* to do so.” *D.F. Zee’s, Inc.*, 31 F. Supp. 2d at 806 (emphasis added).

Federal law, federal regulations, D.C. law, the contract between the District and the homeless shelter service providers, and the previous Settlement Agreement with the United States all require that homeless shelter service contractors in the District of Columbia fulfill the District’s title II requirements under the ADA. 42 U.S.C. § 12131(1)(A)-(B); 28 C.F.R. § 35.130(b)(1); D.C. Code § 4-754.11(2); Settlement Agreement ¶ 24(a); First Am. Compl. ¶¶ 8, 10, 29, 59. Similarly, the District was required to monitor the activities of its contractors to ensure that they comply with all applicable laws. Settlement Agreement ¶ 24(a). The District,

¹²The current Restatement (Third) of Agency abandons the term, “independent contractor,” but retains the inherent concept of this particular principal-agent relationship. Restatement (Third) of Agency § 1.01, cmt. c (2006); *see id.* at § 7.07.

therefore, has the right and the obligation to make certain that its contractors provide their services in compliance with title II. This establishes for the purposes of this Motion, an agency relationship, based on the right to control, between the District and its contractors, regardless of the presence of the “independent contractor” label.

c. Deliberate indifference does not require a showing of actual knowledge of the discriminatory acts.

The District argues that, “[w]hether the District is deliberately indifferent depends on the District’s knowledge, not what the other Defendants knew or should have known.” Def.’s Mot. Dismiss 6. Proving deliberate indifference requires, “both knowledge that a harm to a federally protected right is substantially likely and a failure to act upon that likelihood.” *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) (applying deliberate indifference standard from *City of Canton v. Harris*, 489 U.S. 378, 389 (1988), a § 1983 case, to a title II claim).

However, a finding on whether the District was deliberately indifferent, at this stage, is premature. As explained above, a deliberate indifference inquiry should only be employed to determine the availability of compensatory damages. *See supra* Part IV.C.2.a. Additionally, deliberate indifference is a question of fact, and thus best submitted to a jury. *See, e.g., Barnes v. District of Columbia*, 793 F. Supp. 2d 260, 284 (D.D.C. 2011) (“[O]rdinarily the question of whether a municipality has a deliberately indifferent policy or custom is for the jury . . .”). Here Plaintiffs not only seek compensatory damages, but also declaratory and injunctive relief, the availability of which does not rely on a finding of deliberate indifference. First Am. Compl. ¶ 38. While a finding on deliberate indifference, therefore, is not only premature, it would only address compensatory damages and not other relief sought by the Plaintiffs.

Further, contrary to the District’s assertion, the deliberate indifference inquiry does not require proof of actual knowledge by the District, only, “some form of notice . . . and the

opportunity to conform to statutory dictates” *Harris*, 489 U.S. at 395 (O’Connor, J., concurring) (emphasis added). In fact, as little as “benign neglect” of a city’s statutory duty to monitor private contractors is sufficient to state an ADA claim. *Deck v. City of Toledo*, 56 F. Supp. 2d 886, 895 (N.D. Ohio 1999). “When the plaintiff has alerted the . . . entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the . . . entity is on notice that an accommodation is required.”). *Duvall*, 260 F.3d at 1139. The District was on notice that harm to a federally protected right was likely because of the District’s previous Settlement Agreement with the United States resolving similar complaints, the Hunters had filed multiple accommodation requests with staff of the homeless shelter operators, the need for accommodation was obvious based on A.H.’s disabilities, and the accommodation was required by statute and regulation. *See* 42 U.S.C. § 12131(1)(A)-(B); 28 C.F.R. § 35.130(b)(1); D.C. Code § 4-754.11(2); *Duvall*, 260 F.3d at 1139; Settlement Agreement ¶ 7; First Am. Compl. ¶ 3.

d. Even though not required, Plaintiffs have alleged actual knowledge by the District.

Even though it is not necessary to prove actual knowledge, the Hunters do allege actual knowledge by the District. In this case, the homeless shelter operators had actual knowledge and authority to address the alleged discrimination. Therefore, as agents of the District, their knowledge is imputed to the District. *See BCCI Holdings (Luxembourg), S.A. v. Clifford*, 964 F. Supp. 468, 480 n.7 (D.D.C. 1997) (“A principal cannot be allowed to ‘avoid, by acting vicariously, burdens to which he would become subject if he were acting for himself. The so-called presumption that the principal knows what the agent knows is irrebuttable’”); *see supra* Part IV.C.2.b.

Furthermore, the court in *Liese* clarifies the holding in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), by explaining that, “the purpose of the ‘official’ requirement is to ensure that an entity is only liable for the deliberate indifference of someone whose actions can fairly be said to represent the actions of the organization.” *Liese*, 701 F.3d at 350. As explained above, the homeless shelter operators, as agents of the District, “can fairly be said to represent” the District in their provision of shelter services. *Id.*; see *supra* Part IV.C.2.b.

The District’s argument that actual knowledge of intentional discrimination is necessary to state a claim against the District is incorrect. Regardless, their argument fails because the plaintiffs have alleged sufficient facts in their complaint that the District was deliberately indifferent. In conclusion, the service providers with which the District contracts are agents of the District, are obligated to provide their services in compliance with title II requirements, and give rise to indirect liability by the District when they violate title II.

D. The Court Should Not Dismiss Alleged Violations of the Fair Housing Act

Plaintiffs allege that the District’s actions violated the FHA. 42 U.S.C. § 3604(f)(1)-(f)(3); First Am. Compl. ¶ 108.

Section 3604(f) provides that it is unlawful:

- (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, dwelling to any buyer or renter because of a handicap of—
 - (A) that buyer or renter
 - (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
 - (C) any person associated with that buyer or renter.
- (2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—
 - (A) that person; or
 - (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
 - (C) any person associated with that person.
- (3) For purposes of this subsection, discrimination includes—

...

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . .

42 U.S.C. § 3604(f)(1)-(3).

The District argues that Plaintiffs' FHA claims should be dismissed because: (1) shelters are not "dwellings" under the FHA; and (2) shelter residents are not protected by the FHA because they are not "buyers" or "renters" of dwellings.¹³ Def.'s Mot. Dismiss 11-16. As explained below, these arguments are without merit.

1. Shelters are "Dwellings" Under the Fair Housing Act

The FHA defines the term "dwelling" to include, "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." 42 U.S.C. § 3602(b). This definition is broadly construed to effectuate the purposes of the FHA. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216 (11th Cir. 2008) ("[T]he Supreme Court has repeatedly instructed us to give the Fair Housing Act a broad and inclusive interpretation . . .") (internal quotation marks omitted).

The Department of Housing and Urban Development ("HUD"), which shares enforcement authority for the FHA with the Department of Justice, has issued an implementing regulation that expressly states that the term "dwelling" includes accommodations in homeless shelters, defining the term "dwelling unit" to include, "dormitory rooms and sleeping

¹³The District makes a third argument that Plaintiffs fail to allege specific facts on the element of "intent" to survive a motion to dismiss. However, it is well-settled that plaintiffs need not plead facts on each element of a "prima facie case" to survive a motion to dismiss a discrimination claim. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002) ("[W]e hold that an employment discrimination complaint need not include [] facts [showing elements of a prima facie case.]"). In any event, as explained in Plaintiffs' Memorandum of Law in Opposition to District of Columbia's Motion to Dismiss ("Opp. D.C. Mot. Dismiss"), plaintiffs allege a reasonable accommodation claim, which does not require proof of intent. Opp. D.C. Mot. Dismiss 25-26, Jul. 3, 2013, ECF No. 74.

accommodations *in shelters intended for occupancy as a residence for homeless persons.*” 24 C.F.R. § 100.201 (emphasis added). HUD’s regulation is its reasonable interpretation of the Act and is therefore entitled to deference. *See Meyer v. Holley*, 537 U.S. 280, 287-88 (2003) (explaining that because HUD was, “the federal agency primarily charged with the implementation and administration of the [FHA],” courts, “ordinarily defer to [its] reasonable interpretation of [the] statute.”); *see supra* Part IV.B. That HUD has spoken on the meaning of “dwelling” in the FHA alone disposes of the District’s argument.

The District argues that shelters cannot be “dwellings” because the “length of stay” at shelters is temporary.¹⁴ Def.’s Mot. Dismiss 13-14. HUD has stated expressly that the “length of stay” is only one factor to be considered in determining whether a particular building is a “dwelling” covered by the Act:

Other factors to be considered include: (1) Whether the rental rate for the unit will be calculated based on a daily, weekly, monthly or yearly basis; (2) Whether the terms and length of occupancy will be established through a lease or other written agreement; (3) What amenities will be included inside the unit, including kitchen facilities;(4) How the purpose of the property will be marketed to the public; (5) Whether the resident possesses the right to return to the property; and (6) Whether the resident has anywhere else to which to return.

Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. 15,740, 15,746 (March 23, 2000).

¹⁴The District relies primarily on inapposite cases against commercial entities involving one or two-day stays, such as motels, or on cases involving correctional facilities. *See* Def.’s Mot. Dismiss 13 (citing *Garcia v. Condarco*, 114 F. Supp. 2d 1158 (D.N.M. 2000) (detention center); *Patel v. Holley House Motels*, 483 F. Supp. 374, 381 (S.D. Ala. 1979) (motel)). One court has expressly rejected this comparison. *See United States v. Univ. of Nebraska at Kearney*, --- F. Supp. 2d ---, No. 4:11-CV-3209, 2013 WL 1694603, at *4-5 (D. Neb. Apr. 19, 2013) (explaining that the comparison of a university dorm to a jail is not “apt”). Defendant’s reliance on the district court’s decision in *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101 (D. Idaho 2010), is also misplaced. On appeal, the Ninth Circuit expressly declined to affirm the district court’s decision that a shelter did not meet the definition of a “dwelling,” and affirmed instead on a separate ground that the shelter at issue qualified under the “religious exemption” in the FHA. *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 657 F.3d 988, 995 (9th Cir. 2011).

HUD's interpretation is consistent with that of courts. The statute defines "dwelling" to include, "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a *residence* by one or more families," but does not define the key term "residence." 42 U.S.C. § 3602(b). As multiple courts have noted, the ordinary meaning of "residence" is: "a *temporary* or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit." (emphasis added). *United States v. Hughes Mem. Home*, 396 F. Supp. 544, 549 (W.D. Va. 1975) (quoting Webster's Third International Dictionary (1931)); *see also United States v. Columbus Country Club*, 915 F.2d 877, 881 (3d Cir. 1990) (on denial of rehearing *en banc*), *cert. denied*, 501 U.S. 1205 (1991); *Schwarz*, 544 F.3d at 1214; *Lakeside Resort Enters., L.P. v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154, 157 (3d Cir. 2006), *cert. denied*, 549 U.S. 1180 (2007); *United States v. Univ. of Nebraska at Kearney*, --- F. Supp. 2d ---, No. 4:11-CV-3209, 2013 WL 1694603, at *3 (D. Neb. Apr. 19, 2013); *Woods v. Foster*, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995).

Therefore, contrary to the District's contention, numerous courts have held that "dwellings" encompass a range of temporary residences, including a children's home, *Hughes*, 396 F. Supp. at 548-49; a hospice for terminally ill patients, *Baxter v. City of Belleville*, 720 F. Supp. 720, 731 (S.D. Ill. 1989); seasonal housing, *Columbus Country Club*, 915 F.2d at 881; a nursing home, *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996); group homes for individuals recovering from drug and alcohol addictions, *e.g.*, *Lakeside*, 455 F.3d at 154-60; *Connecticut Hosp. v. City of New London*, 129 F. Supp. 2d 123, 131-35 (D. Conn. 2001); *Schwarz*, 544 F.3d at 1213-16; dormitories, *Univ. of Nebraska at Kearney*, 2013 WL 1694603, at *8; and seasonal housing for migrant workers, *e.g.*, *Lauer Farms, Inc. v. Waushara Cnty. Bd. of*

Adjustment, 986 F. Supp. 544, 557-59 (E.D. Wis. 1997); *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1327-28 (D. Or. 1996).

The “length of stay” was not the decisive factor in these cases. In *Schwarz*, the average stay was six to ten weeks, 544 F.3d at 1207, and in *Lakeside Resort Enterprises*, the average stay was 14.8 days, 455 F.3d at 158-59. See also *Connecticut Hosp.*, 129 F. Supp. 2d at 132 (one to three months); *Project Life Inc. v. Glendening*, No. WMN-98-2163, 1998 WL 1119864, at *2 n.4 (D. Md. Nov. 30, 1998) (one month). In addition to “length of stay,” these courts considered whether: (1) the occupants intend to return to (or remain in) the building, and (2) whether the occupants, “treat [the] building like their home,” albeit a temporary one, by “cook[ing] their own meals, clean[ing] their own rooms and maintain[ing] the premises, do[ing] their own laundry, and spend[ing] free time together in common areas.” *Schwarz*, 544 F.3d at 1215; accord *Lakeside*, 455 F.3d at 159-60.

For example, in *Woods v. Foster*, the court found the term “dwelling” applicable to a homeless shelter. The court explained that the homeless “are not visitors or those on a temporary sojourn in the sense of motel guests. Although the Shelter is not designed to be a place of permanent residence, it cannot be said that the people who live there do not intend to return – they have nowhere else to go.” *Woods*, 884 F. Supp. at 1173. The court rejected defendants’ contention that the shelter was not a dwelling because occupants’ stays were limited to 120 days, ruling that the length of stay was not the determining factor. “Because the people who live in the Shelter have nowhere else to ‘return to,’ the Shelter is their residence in the sense that they live there and not in any other place.” *Id.* at 1173-74; see also *Jenkins v. New York City Dep’t of Homeless Servs.*, 643 F. Supp. 2d 507, 518 (S.D.N.Y. 2009) (concluding, on motion to dismiss,

that homeless shelters, “could well fall within the definition of dwelling,” where the plaintiff, “intends to stay at the shelter as long as he can, . . . and has no other home to go to.”).

So too here. Plaintiffs allege sufficient facts to show that D.C. General Building 12 and the Girard Street Apartments provide temporary housing for those who, “have nowhere else to ‘return to,’” *Woods*, 884 F. Supp. at 1173, and who treat the shelter “like their home.” *Schwarz*, 544 F.3d at 1215. With respect to D.C. General Building 12, the First Amended Complaint alleges that there is no, “time limit on how long residents can remain;” that each family has, “their own room,” where “they return...each day, [and] where they keep their belongings;” and that residents are responsible for “cleaning their own rooms.” First Am. Compl. ¶ 43.

Similarly, Plaintiffs allege that Girard Street Apartments is a “traditional apartment building, with approximately 20 separate keyed apartment units for residents containing kitchens, bedrooms, living areas and bathrooms;” that residents, “decorate their units and place personal items in them;” that residents are responsible for, “cleaning [their] apartments;” that all residents are provided a “Resident Handbook” and “receive[] a key to their apartment;” that residents must pay, “30% of their income into an escrow account;” and that residents have the right to make “maintenance requests” and “receive notice” before staff enter their apartments. *See* First Am. Compl. ¶¶ 63-68. Accordingly, Plaintiffs have alleged sufficient facts to show that Building 12 and the Girard Street Apartments are “dwellings” under the FHA.

2. The FHA Applies to Discriminatory Conduct Against Shelter Residents

The District also argues that Plaintiffs cannot bring an FHA claim because they do not pay and therefore are not “renters” under 42 U.S.C. § 3604(f)(1)-(3) of the FHA. Def.’s Mot. Dismiss 10-11. This argument fails for several reasons.

First, the text of the FHA is not limited only to sale or rental transactions involving owners or paying tenants.¹⁵ For example, 42 U.S.C. § 3604(f)(2) states that it is unlawful to discriminate against:

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

42 U.S.C. § 3604(f)(2).

Section 3604(f)(2) protects “any person” from discrimination, and the phrases, “terms, conditions, or privileges of sale or rental,” and, “provision of services or facilities,” encompass activities that extend beyond the sale or rental transaction, including benefits that are ongoing in nature, such as the use of common areas, maintenance, access to facilities, and rules of enforcement. Indeed, HUD regulations provide that unlawful conduct under this section includes, “[l]imiting the use of privileges, services or facilities associated with a dwelling because of . . . handicap . . . of an owner, tenant *or a person associated with him or her.*” 24 C.F.R. § 100.65(b)(4) (emphasis added).

Second, courts have applied the FHA to encompass a wide variety of conduct that does not involve a refusal to sell or rent housing to owners or tenants.¹⁶ *See, e.g., Comm. Concerning*

¹⁵The District’s reliance on *Jenkins v. New York City Dep’t of Homeless Servs.*, 643 F. Supp. 2d 507 (S.D.N.Y.) – a *pro se* case challenging plaintiffs’ placement in a mental health shelter – is misplaced. On appeal, the Second Circuit ruled that the, “[d]istrict court erred in reaching the question of whether (1) the shelter is a ‘dwelling’ and (2) Jenkins is a ‘renter’ under § 3604(f).” *See* 391 F. App’x. 81, 83 (2d Cir. 2010). The court of appeals affirmed on a separate ground; that plaintiff’s, “tenancy would constitute a direct threat to the health or safety of other individuals.” *Id.*

¹⁶These cases were brought under 42 U.S.C. § 3604(a). Section 3604(a) makes it unlawful, “[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” In the 1988 Amendments to the FHA, Congress added “disability” as a protected class. 42 U.S.C. § 3604(f)(1)-(3). In promulgating implementing regulations after the amendments, HUD made clear that persons with disabilities should be afforded the same protections available to persons of other protected classes: “[t]he Department believes that the legislative history of the Fair

Cnty. Improvement (CCCI) v. City of Modesto, 583 F.3d 690, 711-15 (9th Cir. 2009) (holding that CCCI and residents of predominantly Latino neighborhoods stated valid FHA claim against the City when they alleged that the City had denied them adequate municipal services); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297-301 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993) (homeowners insurance); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 941 (2d Cir. 1988) (holding that residents and NAACP established FHA claim against the City when evidence showed that City restricted multi-family housing construction to an “urban renewal” area); *United States v. City of Black Jack*, 508 F.2d 1179, 1188 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (municipal zoning ordinance prohibiting construction of multi-family housing).

For example, in *Woods v. Foster*, the court rejected the contention that defendants assert here, namely that the FHA does not apply to a homeless shelter that provides housing without charge to the occupants. 884 F. Supp. at 1175. The court explained:

The FHA was passed in order to ‘provide, within constitutional limitations, for fair housing throughout the United States’ . . . As such, there is no reason to conclude that the scope of the FHA should be limited to those who pay for their own housing, rather than extended to all victims of the types of discrimination prohibited by the Act.

Id. (internal citation omitted).

Third, shelter occupants are “renters” under the FHA. The FHA defines the term “to rent” to include, “to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.” 42 U.S.C. § 3602(e). Notably, under this definition, the term “to rent” is an act performed by the owner, not the occupant of the dwelling.

Housing Act and the development of fair housing law after the protections of that law . . . support the position that persons with handicaps . . . must be provided the same protections as other classes of persons.” Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3236 (Jan. 23, 1989).

Nothing in the definition requires that the “consideration” be paid by the occupant. *See Woods*, 884 F. Supp. at 1175 (holding that the defendants’ receipt of funds from HUD was, “undoubtedly ‘consideration’ granted for the right to occupy the premises of the Shelter.”). Nor does the statutory definition of “to rent” require the exchange of money, as long as “consideration” is exchanged for the right of occupancy.¹⁷ In the shelter context, courts and HUD have construed the requirement of “consideration” to include, among other things, receipt of funds by a shelter or chores and other responsibilities performed by shelter occupants. *See, e.g., id.* at 1175 (\$125,000 federal HUD grant to shelter sufficient consideration); *Anonymous v. Goddard Riverside Cmty. Ctr., Inc.*, No. 96 CIV. 9198 (SAS), 1997 WL 475165 at *5, n.4 (S.D.N.Y. July 18, 1997) (receipt of federal funds sufficient consideration); Brief of the Secretary of the United States Department of Housing and Urban Development as Amicus Curiae in *Intermountain Fair Hous. Council v. Boise Rescue Mission*, No. 10-35519 (9th Cir. Apr. 29, 2011) (requiring shelter residents to abide by rules of conduct and perform daily chores may be “consideration”).

Finally, limiting the protections of the FHA to tenants who pay their own rent would create a large gap in coverage, permitting landlords to discriminate against anyone whose rent is paid by family members or others. *Cf. Giebler v. M. & B. Assocs.*, 343 F.3d 1143, 1157 (9th Cir. 2003) (applying reasonable accommodation requirement of Fair Housing Act to claim of disabled plaintiff whose rent would be paid by his mother, and noting that “[r]entals by parents for children are not unusual in most rental markets”); *United States v. S. Mgmt. Corp.*, 955 F.2d 914 (4th Cir. 1992) (applying Fair Housing Act to landlord’s refusal to rent apartments to community services board for use by individuals in drug and alcohol rehabilitation program).

¹⁷“Consideration” means, “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act.” Black’s Law Dictionary 347 (9th ed. 2009).

Accordingly, for the foregoing reasons, this Court should reject the District's argument that the FHA does not protect shelter residents.

V. CONCLUSION

For the reasons stated above, the Court should deny Defendant's Motion on the title II, Section 504, and FHA grounds. With permission from the Court, counsel for the United States will be present and prepared to argue the present Statement of Interest at any upcoming hearings regarding this Motion, should such argument be helpful to the Court.

DATED: July 26, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2013, a copy of the foregoing was served on all counsel of record via the Court's electronic filing system.

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