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# Mi Casa Es Su Casa: The Benefits of a HUD Mediation Program for Resolving Housing Accommodation or Modification Disputes Between Landlords and Tenants with Disabilities

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# Mi Casa Es Su Casa: The Benefits of a HUD Mediation Program for Resolving Housing Accommodation or Modification Disputes Between Landlords and Tenants with Disabilities

I.	INTRODUCTION .....	35
II.	BACKGROUND AND HISTORY .....	36
	A. <i>Fair Housing Amendments Act of 1988</i> .....	36
	B. <i>Current Dispute Resolution Options</i> .....	39
	1. File a Complaint with HUD .....	39
	2. Litigate .....	42
	C. <i>Mediation</i> .....	42
	D. <i>Equal Employment Opportunity Commission Mediation</i> <i>Program</i> .....	44
III.	ANALYSIS .....	46
	A. <i>Shortcomings of HUD Discrimination Complaint Process</i> .....	46
	B. <i>Shortcomings of Litigation</i> .....	49
IV.	PROPOSAL .....	53
V.	CONCLUSION .....	57

## I. INTRODUCTION

The famous eighteenth century German writer, artist, and politician Johann Wolfgang von Goethe once remarked that, “[h]e is happiest, be he king or peasant, who finds peace in his home.”<sup>1</sup> Indeed, one’s home can provide

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1. BRAINY QUOTE, <http://www.brainyquote.com/quotes/quotes/j/johannwolf101508.html> (last visited Feb. 24, 2013).

a welcome refuge from the fast-paced, high-stress lifestyle of the modern world. Unfortunately, without the necessary housing accommodation or modification, tenants with disabilities cannot enjoy the same sense of comfort and convenience that many of us associate with our homes. More and more, landlords are denying tenants with disabilities housing accommodations or modifications out of ignorance, apathy, or outright prejudice.<sup>2</sup> Often the tenant must bear the burden of locating alternate housing, while the landlord needlessly loses valuable rental income. Should the tenant decide to file a complaint with the Department of Housing and Urban Development (HUD), what ensues is a lengthy, bureaucratic investigative procedure. Should the tenant instead choose immediate litigation, the result is often the same. As an alternative to these forms of dispute resolution, this article suggests the use of a specialized mediator to resolve disability accommodation disputes in the landlord/tenant context.

After first providing a background on federal housing laws that prohibit discrimination based on disability, this article then proceeds to describe and analyze the remedies available to tenants who have experienced disability discrimination.<sup>3</sup> The article concludes that, not only are such remedies as filing a complaint or pursuing litigation difficult and time-consuming, they could also damage the long-term relationship between the parties and preclude the possibility of creative remedies that satisfy the needs of both parties.<sup>4</sup> The article finishes by proposing that HUD develop an agency-wide mediation program based on the model of the Equal Employment Opportunity Commission (EEOC) mediation program, with a mediator who specializes in federal housing laws and who has experience with mediating disability accommodation disputes.<sup>5</sup>

## II. BACKGROUND AND HISTORY

### A. *Fair Housing Amendments Act of 1988*

The Fair Housing Amendments Act of 1988 (FHAA) was enacted as a national mandate to prevent discriminatory exclusion of individuals with

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2. *See generally* MARGERY AUSTIN TURNER, ET AL., DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: BARRIERS AT EVERY STEP (The Urban Institute, Washington DC, June 2005).

3. *See infra* Parts II.A–B.

4. *See infra* Parts III.B.

5. *See infra* Part IV.

disabilities from housing opportunities.<sup>6</sup> To this end, the FHAA prohibits discrimination in the sale or rental of housing to handicapped individuals.<sup>7</sup> The Act defines “handicap”<sup>8</sup> as “a physical or mental impairment which substantially limits one or more of such person’s major life activities,<sup>9</sup> a record of having such an impairment, or being regarded as having such an impairment.”<sup>10</sup> Examples of such handicaps include, but are not limited to, cerebral palsy, multiple sclerosis, muscular dystrophy, diabetes, cancer, blindness, and mental retardation.<sup>11</sup>

The Act not only prohibits one from refusing to sell or lease to a handicapped individual on the basis of such handicap, but also requires landlords to provide a reasonable modification or accommodation requested by the

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6. H.R. REP. NO. 100-711, 18 (1988). The House Report notes that [p]rohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice. . . . [The FHAA] repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

*Id.*

7. 42 U.S.C. § 3604(f)(1)–(2) (2012). The provisions of the FHAA that apply to discrimination against individuals seeking to rent housing only apply if “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.” 42 U.S.C. § 3603(b)(2) (2012).

8. 42 U.S.C. § 3602(h)(1)–(3) (2012). As legal terms, “handicap” means the same thing as “disability”. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the Americans with Disabilities Act of 1990’s definition of disability is “drawn almost verbatim from . . . the definition of ‘handicap’ contained in the Fair Housing Amendments Act of 1988.”). Despite the access verbiage, this article will use the term “individual with a disability” rather than the term “disabled individual” in order to emphasize the point that a disability is just one of many traits of such an individual. See KATHIE SNOW, TO ENSURE INCLUSION, FREEDOM, AND RESPECT FOR ALL, IT’S TIME TO EMBRACE: PEOPLE FIRST LANGUAGE, <https://www.disabilityisnatural.com/images/PDF/pf109.pdf> (last visited Mar. 23, 2014).

9. Under the FHAA, “major life activities” include functions such as “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” 24 C.F.R. § 100.201(b) (2014).

10. 42 U.S.C. § 3602(h)(1)–(3) (2012). Under 24 C.F.R. § 100.201(a)(2)(d), a person is regarded as having an impairment if the person is treated by others as if he has a substantial impairment when in fact the impairment is not substantial, has an impairment that only substantially limits one or more major life activities because of the attitudes of others towards the impairment, or is treated by another person as if he has a substantial impairment when in fact the person has no impairment at all. Thus, one’s impairment does not always have to substantially impair one or more major life activities to be protected under the FHAA. 24 C.F.R. § 100.201(a)(2)(d) (2014).

11. 24 C.F.R. § 100.201(a)(2) (2014).

tenant with a disability that is necessary to allow the tenant equal use and enjoyment of the housing premises,<sup>12</sup> as long as such modification or accommodation does not constitute an undue financial or administrative burden; would not result in a fundamental alteration of the landlord's services<sup>13</sup>; and would not constitute a direct threat to the health or safety of others or cause substantial physical damage to others' property.<sup>14</sup>

Under the FHAA, a modification is considered a structural change made to the premises,<sup>15</sup> such as

widening doorways to make rooms more accessible for persons in wheelchairs; installing grab bars in bathrooms; lowering kitchen cabinets to a height suitable for persons in wheelchairs; adding a ramp to make a primary entrance accessible for persons in wheelchairs; or altering a walkway to provide access to a public or common use area.<sup>16</sup>

A reasonable accommodation, on the other hand, is a change to a rule, policy, practice, or service when such change is necessary to allow the individual with a disability equal use and enjoyment of the premises.<sup>17</sup> An example of such an accommodation would be a landlord allowing an exception to a "no-pets" policy in order to allow an individual with a vision disability to have a service animal.<sup>18</sup>

In general, a tenant must pay for the costs associated with a modification,<sup>19</sup> while the landlord must pay for any costs associated with an accom-

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12. 42 U.S.C. § 3604(3)(A),(B) (2012).

13. *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002).

14. 24 C.F.R. § 100.202(d) (2014).

15. THE DEP'T OF HOUS. & URBAN DEV. & THE DEP'T OF JUSTICE, REASONABLE MODIFICATIONS UNDER THE FAIR HOUSING ACT, at 6 (2008).

16. *Id.* at 3. Under the FHAA, a public use area, sometimes also called a "common use" area is considered "rooms, spaces, or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and passageways among and between buildings." 24 C.F.R. § 100.201 (2014).

17. 42 U.S.C. § 3604(f)(3)(B) (2012).

18. REASONABLE MODIFICATIONS UNDER THE FAIR HOUSING ACT, *supra* note 15, at 7.

19. 42 U.S.C. § 3604(f)(3)(A) (2012). However, under Section 504 of the Rehabilitation Act of 1973, housing providers receiving federal financial assistance must pay for any structural modifications. If the housing provider does not receive federal financial assistance, the housing provider may, if reasonable, condition allowance of a reasonable modification on the tenant's agreement to

modation,<sup>20</sup> as long as the accommodation does not constitute an undue financial or administrative burden on the landlord or fundamentally alter the nature of the landlord's services.<sup>21</sup>

### B. Current Dispute Resolution Options

If a tenant believes his landlord has denied him a reasonable modification or accommodation, he has several different dispute resolution options available to him. The two most commonly used are either filing a complaint with HUD, or choosing to litigate.<sup>22</sup>

#### 1. File a Complaint with HUD

HUD is the federal agency charged with enforcing the FHAA.<sup>23</sup> The Secretary of Housing and Urban Development ("HUD Secretary") has the authority and responsibility for administering the provisions of the FHA and FHAA, and may choose to delegate any part of his authority to other HUD employees.<sup>24</sup>

If a tenant with a disability believes a landlord has wrongfully denied him a reasonable accommodation or modification, a tenant may fill out and send a housing discrimination complaint form to HUD.<sup>25</sup> Once HUD has received the complaint, it must notify the individual with a disability if it

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pay to restore the premises to their original condition upon termination of the tenancy, "reasonable wear and tear excepted." 24 C.F.R. § 100.203(a) (2014). However, the landlord may not condition allowance of a reasonable modification on the tenant's agreement to pay for restoration if the modification will not interfere with a future tenant's use or enjoyment of the premises. *Id.* For example, a tenant who widens an existing doorway does not have to pay to restore it to its original condition because a wider doorway will not interfere with the use and enjoyment of future tenants. 24 C.F.R. § 100.203(c) (2014).

20. REASONABLE MODIFICATIONS UNDER THE FAIR HOUSING ACT, *supra* note 15, at 6. As an example, consider a rental policy that does not provide for assigned parking spaces. *Id.* at 7. If, as an exception to this policy, a tenant with a disability received an accommodation that allowed for an assigned parking space that is close to the housing premises, the landlord would have to pay for any associated costs. *Id.* Such costs might include "creating signage, repainting markings, redistributing spaces, or creating curb cuts." *Id.*

21. *Id.* at 6, 16.

22. See U.S. DEP'T OF HOUS. AND URBAN DEV., FAIR HOUSING—IT'S YOUR RIGHT, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/FHLaws/yourrights](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/yourrights) (last visited Apr. 1, 2014).

23. 42 U.S.C. § 3608(a) (2012).

24. 42 U.S.C. § 3608(a),(c) (2012).

25. U.S. DEP'T OF HOUS. AND URBAN DEV., FAIR HOUSING—IT'S YOUR RIGHT, *supra* note 22.

cannot complete an investigation within 100 days of receiving the complaint.<sup>26</sup> If it so chooses, HUD may refer the case to a state housing agency that has the same authority as HUD to enforce fair housing.<sup>27</sup> If the state housing agency does not begin work on the complaint within thirty days, HUD will take back the complaint and resume its attempt to resolve the dispute.<sup>28</sup>

If, upon reviewing the complaint, HUD believes that there is reasonable cause to believe that housing discrimination has occurred, the HUD Secretary will issue a charge on behalf of the complainant.<sup>29</sup> After the charge is issued, the case must be heard before an administrative law judge within 120 days of the date the charge was issued, unless impracticable to do so.<sup>30</sup> After the end of such administrative hearing, the judge has sixty days to render a decision, unless impracticable to do so.<sup>31</sup> The Secretary of HUD may review the judge's order, but must complete such review no later than thirty days after the order was issued.<sup>32</sup> If the Secretary's review of the order is not completed after the end of the thirty-day period, then the order becomes final.<sup>33</sup>

Throughout the HUD investigative process, between the period beginning when an aggrieved individual files a complaint of housing discrimination and either HUD issues a charge of housing discrimination or dismisses the complaint, HUD is under a statutory obligation to engage in conciliation between the complainant and respondent.<sup>34</sup> In Chapter Eleven of the *Title VIII Complaint Intake, Investigation, and Conciliation Handbook*, HUD defines conciliation as "the attempt to resolve issues raised in a complaint, or arising during the investigation of a complaint, through informal negotiations involving the aggrieved person(s) and the respondents."<sup>35</sup> Specific

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26. *Id.*

27. *Id.*

28. *Id.*

29. 42 U.S.C. § 3610(g)(2)(A) (2012).

30. 42 U.S.C. § 3612(g)(1) (2012). Possible remedies for the complainant upon a finding of housing discrimination include: compensation for humiliation and pain and suffering; injunctive relief (by, for example, ordering the landlord to create the reasonable accommodation or modification); and payment of attorney's fees and costs. U.S. DEP'T OF HOUS. AND URBAN DEV., *supra* note 22.

31. 42 U.S.C. § 3612(g)(2) (2012).

32. 42 U.S.C. § 3612(h)(1) (2012).

33. *Id.*

34. 24 C.F.R. § 103.300(a) (2014).

35. U.S. DEP'T OF HOUS. & URBAN DEV., 8024.01, TITLE VIII COMPLAINT INTAKE,

tasks include educating the parties about the relative strengths or weaknesses of their case in an effort to promote settlement, soliciting and conveying offers, rejecting offers and counter-offers, and soliciting “impasse-breaking” offers in an effort to sustain negotiations.<sup>36</sup>

Although the applicable Code of Federal Regulations states a preference not to have the investigator also acting as a conciliator,<sup>37</sup> separating the tasks of investigation and conciliation may not be practical in certain circumstances.<sup>38</sup> It is preferable to have one HUD employee investigate and a separate person conciliate to ensure the confidentiality of information disclosed during conciliation, because information discovered during conciliation should not be publicly disclosed without the written permission of both parties.<sup>39</sup> Thus, an investigator doubling as a conciliator must make a concerted effort not to include information obtained during conciliation in the investigative report.<sup>40</sup> To obtain this objective, the HUD handbook suggests:

1. Concluding any investigation (i.e. interview, etc.) that is taking place prior to engaging in conciliation; 2. Taking a break prior to beginning conciliation; 3. Initiating a separate telephone call in which only conciliation is discussed; 4. Verbally announcing to the parties the transition to conciliation and fully explaining the difference in roles and functions of the investigator and conciliator (i.e. that anything said or done during conciliation cannot be used in the investigation); and 5. Taking steps to avoid commingling notes related to investigation and conciliation.<sup>41</sup>

Remedies available during conciliation do not have to be limited to the remedies available in a process of adjudication on the merits of the complaint, but rather may include “any terms that are not offensive to the public interest or fair housing and that are acceptable to all parties and to HUD.”<sup>42</sup> Once a conciliation agreement has been created and approved by HUD, such an

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INVESTIGATION, AND CONCILIATION HANDBOOK, CHAPTER 11: CONCILIATION 55 (2005), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/fheh/80241/80241c11FHEH.pdf>.

36. *Id.* at 3.

37. 24 C.F.R. § 103.300(c) (2014).

38. U.S. DEP’T OF HOUS. & URBAN DEV., 8024.01, *supra* note 35, at 2.

39. *Id.* at 3–4.

40. *Id.*

41. *Id.* at 2.

42. *Id.* at 14.



agreement is binding on the parties.<sup>43</sup>

Finally, although in the past administrative law judges have agreed to mediate some complaints,<sup>44</sup> HUD currently only has two administrative law judges.<sup>45</sup> These two judges also have suspended review of all cases pending their lawsuit against David Anderson, former director of the department's Office of Hearing and Appeals, in an attempt to avoid a conflict of interest.<sup>46</sup> Therefore, currently, mediation of disputes by HUD administrative law judges is largely non-existent.<sup>47</sup>

## 2. Litigate

If the individual with a disability chooses to litigate, there are basically two options available. One option is to bring the case in federal district court and have the Attorney General file suit and litigate on behalf of the plaintiff.<sup>48</sup> The second option is for the plaintiff, at his own expense, to retain private counsel to file suit in either federal district court or state court.<sup>49</sup> Remedies available in litigation are identical to those that can be granted by an administrative law judge.<sup>50</sup>

### C. Mediation

Mediation is a form of alternative dispute resolution in which a neutral third party helps disputants negotiate a voluntary settlement.<sup>51</sup> Unlike a traditional arbitrator or judge, the mediator does not issue a decision that binds the two parties.<sup>52</sup> Rather, the mediator's role is to help the parties come to

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43. *Id.* at 34–35.

44. *Id.* at 43.

45. *Justice Delayed*, GOVERNMENT EXECUTIVE (August 1, 2011), <http://www.govexec.com/magazine/features/2011/08/justice-delayed/34525/>.

46. *Id.*

47. *Id.*

48. U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING—IT'S YOUR RIGHT, *supra* note 22.

49. *Id.* Even after filing a housing discrimination complaint with HUD, one may bring suit as long as complainant has not signed a conciliation agreement and an administrative law judge has not commenced a hearing. *Id.*

50. *Id.*

51. NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY AND PRACTICE* § 1:1 (2013).

52. H. WARREN KNIGHT, ET AL., *CAL. PRAC. GUIDE ALT. DISP. RES.* Ch. 3-A (West 2004).

an agreement on how to resolve the disputed issue.<sup>53</sup> Only when both parties voluntarily decide on an agreement does the agreement become a binding contract.<sup>54</sup>

Parties value mediation not just for its efficiency in resolving disputes, but also because it allows more participation in the decision-making process itself.<sup>55</sup> Parties to a dispute tend to experience more satisfaction with mediation than with formal court hearings because mediation allows the parties to participate in deciding how the dispute will be resolved.<sup>56</sup> In contrast, during litigation, the decision-making process is largely in the hands of lawyers and judges, rather than the parties themselves.<sup>57</sup> It would seem that allowing parties to participate in determining the solution to the dispute makes it more likely that they will comply with the settlement, as opposed to when a decision is forced upon them by an authority figure such as a judge or arbitrator.<sup>58</sup>

Parties also express high satisfaction with the mediation process because it allows them to express their feelings and communicate their views about the dispute.<sup>59</sup> Mediation can serve as an environment in which parties have the opportunity to vent emotions and express their side of the story more freely than would be possible in a formal court proceeding.<sup>60</sup> Getting to tell one's story and feeling heard out by a neutral person can have a powerful impact on a party's willingness to settle.<sup>61</sup>

Furthermore, mediation helps to overcome certain barriers inherent in negotiating settlements.<sup>62</sup> One such barrier between the parties, known as reactive devaluation, is the cognitive phenomenon whereby one party deval-

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53. ROGERS & MCEWEN, *supra* note 51, § 1:2.

54. *See id.* § 7:2.

55. Robert A. Baruch Bush, "What Do We Need A Mediator for?": Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 18-19 (1996).

56. *Id.* at 16, 18.

57. *Id.* at 19 n.32.

58. *Id.* at 16.

59. *Id.* at 19; *see also* DWIGHT GOLAN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 92 (2d ed. 2011) (stating that part of the value of mediation is that it "allows the parties to talk about many things that will never be considered relevant by a court. When they are allowed to speak freely, often in private to a mediator offering a sympathetic ear, material just spills out, and afterward people are much more willing to compromise.").

60. GOLAN & FOLBERG, *supra* note 59, at 118.

61. *Id.* at 118-19.

62. ROGERS & MCEWEN, *supra* note 51, § 3:5.

ues an offer made by the other party.<sup>63</sup> Each party's lack of trust in the other side causes them to devalue an offer made by the other side during a negotiation because they believe that the opposing party's self-interest prevents them from offering a fair deal.<sup>64</sup> A mediator can eliminate reactive devaluation by presenting the idea contained within the offer as the mediator's own.<sup>65</sup> When a party perceives the proposal as coming from a neutral, disinterested mediator, they are less likely to engage in reactive devaluation, and hence more likely to agree to the proposal.<sup>66</sup>

In addition to cognitive barriers, mediators can also help overcome strategic barriers to settlement that often exist in negotiations.<sup>67</sup> Parties may be reluctant to disclose certain weaknesses in their case for fear that the other side will use it to their detriment.<sup>68</sup> Such a desire to maintain a bargaining advantage inhibits a free exchange of information that might otherwise lead to an optimal settlement.<sup>69</sup> Mediators can help break down such strategic barriers by building trust with each party, thereby encouraging them to reveal underlying interests during private caucuses.<sup>70</sup> Parties will most likely feel more comfortable revealing sensitive information during private caucuses because such communications are confidential, and therefore can only be revealed to the other side with that party's permission.<sup>71</sup> After caucusing with both parties, the mediator has gained valuable information about underlying interests and priorities that can then be used to suggest possible solutions that benefit both parties.<sup>72</sup>

#### *D. Equal Employment Opportunity Commission Mediation Program*

Similar to the way the FHAA prohibits housing discrimination, Title I of the Americans With Disabilities Act ("ADA") outlaws discrimination in

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63. GOLAN & FOLBERG, *supra* note 59, at 192; *see also* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 475 (2008).

64. GOLAN & FOLBERG, *supra* note 59, at 192.

65. *Id.* at 192-93.

66. *Id.* at 193.

67. ROGERS & MCEWEN, *supra* note 51, § 3:10.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

employment based on disability,<sup>73</sup> including failure to provide a reasonable accommodation within the employment setting.<sup>74</sup> The EEOC is the federal agency charged with enforcing the provisions of federal laws that outlaw discrimination against a job applicant or employee because of the person's "race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information."<sup>75</sup> Analogous to HUD, the EEOC allows individuals who feel they have experienced employment discrimination, including failure to provide a requested reasonable accommodation, the opportunity to file a complaint with the EEOC.<sup>76</sup>

However, unlike HUD, the EEOC offers a voluntary mediation program for cases of alleged employment discrimination.<sup>77</sup> Prior to commencing an investigation/conciliation, the EEOC offers the parties the option to mediate their dispute before a trained mediator.<sup>78</sup> Only when either or both parties reject mediation or the dispute fails to be resolved by mediation does the complaint investigation process begin.<sup>79</sup>

EEOC mediators, unlike their HUD investigator/conciliator counterparts, are knowledgeable and experienced in matters of federal employment discrimination law and specialize in resolving employment discrimination disputes.<sup>80</sup> Such specialization among EEOC mediators helps explain why, in the fiscal year 2008, mediations were resolved within an average of nine-

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73. 42 U.S.C § 12112(a) (2012).

74. 42 U.S.C § 12112(b)(5)(A) (2012). Different accommodations in the employment setting might include:

[j]ob restructuring (reallocating or redistributing marginal job functions or altering how or when essential or marginal functions are performed) . . . [p]hysical modifications to facilities (e.g., rearranging furniture to create uncluttered path for an employee in a wheelchair or a blind employee) . . . [and] [m]odifying a workplace policy (e.g., permit eating or drinking at workstation for diabetic, or modification of break schedule to permit employee to take medication).

*Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/mediation/ada-mediators.cfm> (last visited Mar. 25, 2014).

75. *About EEOC: Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Mar. 25, 2014).

76. *How To File A Charge of Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/howtofile.cfm>, (last visited Mar. 25, 2014).

77. *Questions and Answers about Mediation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/mediation/qanda.cfm> (last visited Mar. 25, 2014).

78. *Id.*

79. *Id.*

80. *Id.*

ty-seven days, while it took an average of 200 days to go through the traditional complaint investigation procedure.<sup>81</sup> In addition, studies report high satisfaction among participants of the mediation program.<sup>82</sup> One study of the EEOC mediation program found that “96% of respondents and 91% of charging parties indicated they would use the mediation process again if the opportunity arose, even where the results of the mediation were different than they had anticipated.”<sup>83</sup>

### III. ANALYSIS

#### A. Shortcomings of the HUD Discrimination Complaint Process

Ideally, any dispute resolution process should be cheap, efficient, produce consistent results, and provide justice to those who have been wronged. Studies show that HUD has fallen far short of the latter three ideals when it comes to enforcing the provisions of the FHAA.<sup>84</sup> Almost twenty years after the passage of the FHAA, housing discrimination against individuals with disabilities remains rampant.<sup>85</sup> Despite such continued discrimination, “[a]

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81. *Id.*

82. See, e.g., *Studies of the Mediation Program*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/mediation/studies.cfm> (last visited Mar. 25, 2014).

83. *Id.* (citing Dr. E. Patrick McDermott, *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, EEOC Order No. 9/0900/7632/2 (September 20, 2000)).

84. See generally, THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY (December 2008), available at [http://www.civilrights.org/publications/reports/fairhousing/future\\_of\\_fair\\_housing\\_report.pdf](http://www.civilrights.org/publications/reports/fairhousing/future_of_fair_housing_report.pdf) [hereinafter FUTURE OF FAIR HOUSING].

85. For example, a 2005 study in the Chicago Metropolitan Area revealed that [a]lmost one of every six housing providers who indicated that units were available refused to allow reasonable unit modification needed by wheelchair users. Similarly, one of every five of those with on-site parking refused to make the reasonable accommodation of providing a designated accessible parking space for a wheelchair user.

TURNER, ET AL., *supra* note 2, at 3; see also Tim Iglesias & Susan Saylor, *Fair Housing at 30: Where We are, Where We are Going*, 30 CAL. REAL. PROP. J. 16, 17 (2012) (stating that “[p]eople with disabilities experience discrimination in 30 to 50 percent of all inquiries for rental housing.”)

Another study indicates that “the share of complaints alleging failure to make reasonable accommodation or modification rose significantly, from less than 1 percent in 1996 to 16.5 percent in 2003.” UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, FAIR HOUSING: OPPORTUNITIES TO IMPROVE HUD’S OVERSIGHT AND MANAGEMENT OF THE ENFORCEMENT PROCESS 29 (Apr. 2004), available at <http://www.gao.gov/new.items/d04463.pdf> [hereinafter REPORT TO CONGRESSIONAL REQUESTERS, FAIR HOUSING]; see also *Davis v. Lane Mgmt., LLC*, 524 F. Supp. 2d 1375, 1376 (S.D. Fla. 2007)

review of all of HUD's cases in which a charge was issued between January 2004 and October 21, 2008, indicates that the average age of cases in which a determination of reasonable cause [of housing discrimination] was made and a charge issued was 502 days."<sup>86</sup> Such delays have served as a reason for dismissal of cases by courts and administrative law judges,<sup>87</sup> and confirm the oft-quoted maxim that "justice delayed is justice denied."

Furthermore, a September 2008 study conducted by the HUD's Office of the Inspector General revealed several instances in which complainant and respondent were not notified when the investigation could not be completed in the required 100-day period.<sup>88</sup> Specifically, the study revealed that in a sample size of "39 cases open for more than 100 days, 74 percent (29) of the files did not include the 100-day notification letters to the complainants and respondents."<sup>89</sup> The study further found that files lacked the required closure notices required by 24 C.F.R. § 103.400(a)(1) and (2)(i) and (ii), which are supposed to be sent to complainants and respondents when an investigation is closed.<sup>90</sup> Specifically, one sample found that "[for] closure types other than reasonable cause, 16 percent of the files (7) did not include copies of closure letters addressed to the complainants and 42 percent of the files (18) did not include copies of closure letters addressed to the respondents."<sup>91</sup> Finally, the study found a consistent failure to document conciliation attempts: "63 percent (17) of the case files with a closure type of no cause did not document conciliation attempts."<sup>92</sup>

In addition, inconsistencies among HUD's various regional offices in

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(When landlord refused to repair broken elevators in multi-story complex, fifty-nine-year old quadriplegic tenant living on second floor was forced to crawl up and down stairs "filthied by spit, urine, and dog feces tracked in by people's shoes.").

86. FUTURE OF FAIR HOUSING *supra* note 84, at 15. "The shortest time period between the filing of a complaint and the issuance of a charge [of housing discrimination] was 143 days, while the longest was 1254 days." *Id.*; see also U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT: OFFICE OF INSPECTOR GENERAL, EVALUATION OF FHEO HOUSING DISCRIMINATION COMPLAINT PROCESSING AND COMPLIANCE 3 (September 2008), available at <http://www.hudoint.gov/pdf/IEReports/IED-07-001.pdf> (noting that in a sample size of seventy-eight cases with closure types other than reasonable cause, "50 percent (39 cases) exceeded the 100-day completion requirement.").

87. Secretary v. Sparks, HUDALJ 05-92-1274-8, 19-21 (2003) (citing cases).

88. See EVALUATION OF FHEO HOUSING DISCRIMINATION COMPLAINT PROCESSING AND COMPLIANCE, *supra* note 87, at 3.

89. See *id.*

90. *Id.* at 5.

91. *Id.*

92. *Id.* at 7.

investigative procedures and interpretations of law have resulted in different complainants with identical cases receiving “different treatment, different outcomes, and different levels of access to justice depending upon the region in which they filed a complaint.”<sup>93</sup> Such inconsistencies and delays in FHAA enforcement come as little surprise when one considers that HUD investigators often possess low skill levels and lack the appropriate training and guidance.<sup>94</sup> Such low skill level resulting from a lack of appropriate training also helps explain low levels of successful conciliation during the investigative process.<sup>95</sup>

Finally, given the maze-like complexities of the HUD complaint process, it comes as little surprise that potential claimants often forgo filing a claim. HUD’s “How Much Do We Know” studies revealed that

[o]f respondents who believed they had suffered discrimination and whose claims would be plausibly actionable, only 20% had asserted their fair housing rights. The rest reported that they didn’t act for many reasons, including not knowing how to complain, fears about the cost and time demands of trying to vindicate their rights, being too busy, and being fearful of retaliation. Perhaps most disturbingly, a substantial portion didn’t act because they didn’t expect that filing a complaint would accomplish any beneficial result.<sup>96</sup>

Thus, of those affected by housing discrimination, a substantial portion have lost faith in the HUD complaint process as a method of vindicating their rights and resolving their disputes.

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93. FUTURE OF FAIR HOUSING *supra* note 84, at 16 (citing testimony of Cathy Cloud (Houston)). Ms. Cloud reports that “HUD investigators do not have consistent training on the Fair Housing Act, investigation strategies and techniques, legal standards and case law, testing and more.” *Id.*

94. REPORT TO CONGRESSIONAL REQUESTERS, FAIR HOUSING, *supra* note 85, at 42

95. A 2005 United States Government Accountability Office (GAO) survey indicated that HUD investigators only offered assistance with conciliation in 42% of complaints, and “21 percent of complainants in cases with no-cause outcomes were contacted only once” in attempts by investigators to offer conciliation. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, FAIR HOUSING: HUD NEEDS BETTER ASSURANCE THAT INTAKE AND INVESTIGATION PROCESSES ARE CONSISTENTLY THOROUGH 48, 50 (Oct. 2005) [hereinafter FAIR HOUSING: HUD NEEDS BETTER ASSURANCE]. Such poor efforts to promote conciliation are lamentable, given that the survey also indicated that complainants accepted conciliation 90% of the time when investigators proposed HUD assist with conciliation. *Id.* at 49. Finally, the 2005 GAO survey indicated that investigators often failed to document conciliation attempts, leading to frequent backtracking that resulted in wasted valuable time. *See id.* at 50–52.

96. Iglesias & Saylor, *supra* note 85, at 16, 19 (citations omitted).

*B. Shortcomings of Litigation*

One might think that choosing litigation in lieu of filing a complaint would avert the aforementioned parade of horrors. However, choosing litigation to resolve a complaint of housing discrimination by either having the Attorney General file suit in federal district court or pursuing private counsel can be just as time-consuming. In federal district courts, the median length of a trial during the twelve-month period ending March 31, 2011, was 23.2 months—almost two years.<sup>97</sup> For this same time period, the average age of cases resolved during or after pre-trial was 15.4 months.<sup>98</sup> Finally, the average age of cases settled before pre-trial is 7.7 months.<sup>99</sup> As these statistics demonstrate, choosing not to settle before trial and entering the pre-trial phase adds an average of 7.7 months if the case should settle during or after the pre-trial phase.<sup>100</sup> In addition, choosing to litigate adds an average of another 7.8 months to the time period.<sup>101</sup>

In addition to the time-consuming aspect of litigation, litigating reasonable accommodation disputes tends to produce highly unpredictable outcomes. One reason for this is that in deciding the threshold question of what constitutes a disability, judges persist in using the medical model of disability.<sup>102</sup> Under the medical model of disability, a disability is an individual, medical problem.<sup>103</sup> In order to overcome the limitations posed by the disability, the medical model suggests that individuals seek medical treatment and rehabilitation.<sup>104</sup> Thus, under the medical model, “the focus is on the individual and how she can overcome her condition. . . . [a] person’s disability

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97. *U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2011*, UNITED STATES COURTS, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C05Mar11.pdf> (last visited Mar. 26, 2014).

98. *Id.*

99. *Id.*

100. *See supra* notes 98–100 and accompanying text. 15.4 months minus 7.7 months equals 7.7 months. *Id.*

101. *See supra* notes 98–100 and accompanying text. 23.3 months minus 15.4 months equals 7.8 months. *Id.*

102. Paul Steven Miller, *A Just Alternative or Just an Alternative? Mediation and the Americans with Disabilities Act*, 62 OHIO ST. L.J. 11, 12 (2001).

103. Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 185–86 (2008).

104. *Id.* at 186.



is her own personal misfortune—devoid of social cause or responsibility.”<sup>105</sup>

In contrast to the medical model of disability, the social model of disability posits that part of what creates the disability is not the medical condition itself, but rather the “barriers erected by society—physical, institutional, and attitudinal—that inhibit full participation in mainstream life.”<sup>106</sup> Thus, while the medical model promotes individual responsibility for the person with a disability to obtain medical solutions in an attempt to fit into mainstream society, the social model focuses on social responsibility to adjust the social environment to fit the individual.<sup>107</sup>

The unfortunate result of the predominance of the medical model of disability in federal jurisprudence is that many disability reasonable accommodation cases get dismissed at the summary judgment phase because many plaintiffs are “not disabled enough” to be considered “substantially limit[ed]” in performing a major life activity.<sup>108</sup> Without considering whether the requested accommodation was reasonable or posed an undue burden upon the defendant—whether the defendant engaged in discrimination by refusing to grant a reasonable accommodation—federal courts have become overly preoccupied with making sure that individuals are “disabled enough” to be deserving of legal protection.<sup>109</sup>

*Holt v. Grand Lake Mental Health Center, Inc.*, aptly demonstrates how a judge’s narrow definition of disability under the medical model precludes examination of whether a requested accommodation was reasonable.<sup>110</sup> In this case, the plaintiff, Dawn Opala Holt, who suffered from a “mild” form of cerebral palsy, began experiencing difficulties keeping up with the writing requirements of her employment position.<sup>111</sup> After Holt’s employer fired her, Holt sued, claiming that she was fired because of her cerebral palsy.<sup>112</sup> In determining whether Holt’s cerebral palsy substantially limited a major life activity, the court noted that Holt’s cerebral palsy

adversely affects . . . her ability to perform certain activities which

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105. *Id.*

106. *Id.* at 188.

107. *Id.* at 189.

108. *Id.* at 217.

109. *Id.* at 210–11.

110. *See generally* 443 F.3d 762 (10th Cir. 2006).

111. *Id.* at 763–64.

112. *Id.* at 765.

require fine motor coordination. Holt requires assistance when chopping, peeling, and slicing food. She sometimes has difficulty eating and must chew her food thoroughly or it will become lodged in her throat. She cannot cut her own fingernails or toenails. Holt can dress herself, but sometimes must ask for help when buttoning her clothes.<sup>113</sup>

Despite difficulty in accomplishing a broad array of everyday manual tasks, the court held that Holt's cerebral palsy did not rise to the level of a substantial limitation.<sup>114</sup> The court specifically reasoned that

[w]hile Holt needs help when chopping, cutting, and slicing food, the evidence is insufficient to allow a factfinder to conclude she is severely restricted in her ability to cook. . . . [while] Holt occasionally must ask others for assistance when buttoning her clothing . . . Holt has introduced no evidence . . . that would permit a factfinder to conclude she is severely restricted in dressing herself. In short, based on the evidence presented, a rational jury could not find Holt is substantially limited in her ability to perform manual tasks.<sup>115</sup>

As we see, consistent with the medical model, the court fixated exclusively on the physical aspects of Holt's disability to determine if they substantially limited her life activities, rather than considering whether the defendant's responses to Holt's disability exacerbated her difficulties with manual tasks in the work environment. In its analysis, the court omitted any consideration of whether the defendant discriminated against Holt by refusing to consider a reasonable accommodation, but instead chose to uphold the district court's summary judgment ruling because, apparently, no reasonable jury could conclude that a person who could not cut food or button their clothes on their own was substantially limited in performing a major life activity.<sup>116</sup> Apparently, the court in *Holt* did not think much of the Supreme Court's statement in *Bragdon v. Abbott* that the ADA "addresses substantial limitations on major life activities, not utter inabilities."<sup>117</sup>

Lest prospective defendants believe that a judge's narrow view of disa-

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113. *Id.* at 763.

114. *Id.* at 767.

115. *Id.* (footnote omitted).

116. *See id.*

117. 524 U.S. 624, 641 (1998).

bility based on the medical model assures summary judgment in their favor, consider two cases involving plaintiffs with diabetes. In *Lawson v. CSX Transportation, Inc.*, after CSX Transportation refused to hire John Lawson, Sr., Lawson sued under the ADA, claiming that CSX discriminated against him by refusing to hire him because of his Type I insulin-dependent diabetes.<sup>118</sup> In response, CSX filed a motion for summary judgment, claiming that Lawson's diabetes did not qualify as a disability under the ADA.<sup>119</sup> The district court granted the motion for summary judgment, after which Lawson appealed to the Seventh Circuit.<sup>120</sup>

In overturning the district court's summary judgment ruling, the Seventh Circuit described in great detail how Lawson's diabetes substantially limited his ability to eat, which the court considered a major life activity.<sup>121</sup> The court specifically stated that, even when in compliance with the strict restrictions of his treatment regimen, his "ability to regulate his blood sugar and metabolize food is difficult, erratic, and substantially limited." . . . [Lawson] 'must always concern himself with the availability of food, the timing of when he eats, and the type and quantity of food he eats.'"<sup>122</sup> The court took pains to note that even the multiple daily insulin injections that Lawson takes to mitigate his symptoms can cause hypoglycemia, leading to side-effects such as "dizziness, weakness, loss of mentation and concentration, and a deterioration of bodily functions' if Mr. Lawson does not eat immediately."<sup>123</sup> So, it would seem, based on *Lawson*, that Type I insulin-dependent diabetes substantially limits a major life activity.

But, in *Orr v. Wal-Mart Stores, Inc.*, an Eighth Circuit case decided just one year after *Lawson*, the court held that plaintiff's Type I insulin-dependent diabetes did not substantially limit a major life activity and, hence, was not a disability under the ADA.<sup>124</sup> In *Orr*, the plaintiff, a Walmart pharmacist, was fired when he insisted on closing the pharmacy to take a mid-day half-hour lunch break that was essential to controlling his diabetes.<sup>125</sup> Even though, when the plaintiff's diabetes was not well-

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118. 245 F.3d 916, 922 (7th Cir. 2001).

119. *Id.*

120. *Id.*

121. *Id.* at 923–29.

122. *Id.* at 924 (citations omitted).

123. *Id.* at 925.

124. 297 F.3d 720, 724–25 (8th Cir. 2002).

125. *Id.* at 722–23.

controlled, he suffered from “vision impairment, low energy, lack of concentration and mental awareness, lack of physical strength and coordination, slurred speech, difficulties typing and reading, and slowed performance,”<sup>126</sup> the court nonetheless stated that the plaintiff’s diabetic condition “[did] not place substantial limitations on his ability to work.”<sup>127</sup>

As we see, even though Orr’s symptoms were substantially similar to the plaintiff’s in *Lawson*, the court in *Orr* nonetheless held that Orr did not have a disability that substantially limited a major life activity. Thus, the court’s decision in *Holt* that cerebral palsy did not substantially limit a major life activity, coupled with the disparate treatment of Type I insulin-dependent diabetes in *Lawson* and *Orr*, indicates that judicial decisions in disability discrimination cases are anything but predictable. Unlike in mediation, where the parties control the decision making process, once disputants submit their dispute to litigation, they lose control over the litigation process,<sup>128</sup> and their dispute may ultimately turn on how narrowly or broadly a judge chooses to construe the two words “substantial limitation.”

Furthermore, a tenant with a disability seeking an injunction ordering a landlord to provide a reasonable accommodation or modification might encounter difficulties preserving the long-term relationship. For example, a landlord who has been dragged through costly, time-consuming litigation might be less flexible regarding late rent payments or exceptions to other housing policies. In a twist of irony, a landlord who is later asked by this same tenant for a different accommodation or modification may know of a different accommodation or modification that would increase the tenant’s use and enjoyment of the housing premises more than the one being requested, but may withhold this information in an attempt to exact passive-aggressive revenge upon his tenant.

#### IV. PROPOSAL

HUD should develop an agency-wide mediation program based on the EEOC model.<sup>129</sup> Like the EEOC model, the mediation would be voluntary

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126. *Id.* at 722.

127. *Id.* at 725 n.6.

128. The author is indebted to Professor Linda Bulmash for discussing this aspect of mediation during her Mediation Advocacy course at Pepperdine University’s Straus Institute for Dispute Resolution.

129. In the fiscal year 2008, the EEOC’s mediation program achieved a 72.1% settlement rate. *Questions and Answers About Mediation*, *supra* note 78.

and would include professional mediators who specialize in federal fair housing laws and disability accommodation/modification disputes. In addition, parties would be given the option to mediate before the complaint investigative procedure. This process would allow the parties the possibility of resolving their dispute in a more efficient, amicable fashion. In resolving a majority of disputes at the mediation stage before beginning the traditional complaint investigation procedure,<sup>130</sup> HUD would save the time and resources that traditionally are involved in the complaint investigation process.<sup>131</sup> Given the similarities between employment and housing situations, a HUD mediation program based on the EEOC model would most likely lead to a dispute resolution process that is peaceful, consistent, and efficient.<sup>132</sup>

In describing the EEOC mediation program, Seth D. Harris notes that

experienced mediators may have task-specific knowledge acquired during prior negotiations which benefits the participants. The me-

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130. One FHAP agency within HUD, experimenting with a separate mediation track involving professional private-sector mediators, found using mediation in their region reduced complaints by about one-third. FAIR HOUSING: HUD NEEDS BETTER ASSURANCE, *supra* note 98, at 50.

131. HUD officials feel that for cases with complex issues, it [is] often difficult to meet the 100-day investigative requirement and also conduct a thorough investigation. . . . Many cases are open for more than 100 days because of difficulty tracking down witnesses and locating complainants, waiting 30-45 days for responses from issued subpoenas, and requests from the respondents for more time to respond to the complaint.

KENNETH M. DONAHUE, EVALUATION OF FHEO HOUSING DISCRIMINATION COMPLAINT PROCESSING AND COMPLIANCE 2-3(2008), *available at* <http://www.docstoc.com/docs/7477155/Evaluation-of-FHEO-Housing-Discrimination-Complaint-Processing-and-Compliance>. A specialized mediator would be especially helpful for overworked investigators and would allow them to conduct more thorough investigations where mediation is not desired by one or both of the parties. *See* Miller, *supra* note 102, at 11-12.

132. In *We Can Work It Out: Reasonable Accommodation and the Interactive Process Under the Fair Housing Amendments Act*, Gretchen M. Widmer notes that

[w]hile significant differences exist between the two relationships [i.e. employer/employee and landlord/tenant], in both situations the individual with a disability often has less power and limited information with respect to possible accommodations. Furthermore, stability in employment and housing are frequently among an individual's greatest concerns, thus placing an individual with a disability (either in the capacity of employee or tenant) in a respective position of undue vulnerability.

2007 U. Ill. L. Rev. 761, 773 (2007).

Widmer's article urges for an interactive process between a landlord and a tenant with a disability who is seeking a reasonable accommodation or modification. *See generally id.* While negotiating a dispute is a positive first step in the resolution of any dispute, in the event negotiations break down, mediation serves as an alternative to immediate litigation or a bureaucratic complaint-investigation procedure.

diator may have participated in negotiations over a similar disability . . . or been exposed to a menu of alternative solutions to accommodations problems in prior negotiations . . . The mediator is substantively knowledgeable and may have experience solving similar accommodations problems that would inform the parties' negotiations.<sup>133</sup>

Similarly, a mediator who has experience mediating housing accommodation disputes between a landlord and a tenant with a disability may be able to offer a number of specific accommodations or modifications that both allow the tenant to use and enjoy the premises and save the landlord money, administrative inconvenience, or both.<sup>134</sup>

A specialized mediator could also fashion an accommodation that would avoid a threat to the health or safety of other tenants. Consider an example given by the Department of Justice in one of its publications on reasonable accommodations.<sup>135</sup> In the example, a tenant suffers from a disability that makes it difficult for him to open a dumpster to put his trash in.<sup>136</sup> The tenant requests the landlord provide daily trash pickup service as an accommodation.<sup>137</sup> The landlord denies this specific accommodation as unreasonable in that it would constitute both an undue administrative and financial burden and would represent a fundamental alteration of the nature of the landlord's services.<sup>138</sup> While denying the accommodation for a trash pickup service, as an alternative accommodation the landlord offers to provide an open, easily accessible trash disposal site that the landlord's maintenance staff will dispose of when they are on-site.<sup>139</sup> While this negotiation between tenant and landlord is commendable in that it allows the tenant to use and enjoy the housing premises and avoids multiple burdens upon the landlord, this open trash site may constitute a nuisance and health hazard to nearby tenants. A specialized mediator would most likely be able to quickly come up with a

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133. Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC's mediation Program*, 13 HARV. NEGOT. L. REV. 1, 28–29 (2008).

134. See generally *id.*

135. JOINT STATEMENT OF THE DEP'T OF HOUS. & URBAN DEV. & THE DEP'T OF JUSTICE, REASONABLE MODIFICATIONS UNDER THE FAIR HOUSING ACT 7–8 (2004), available at <http://hud.gov/offices/fheo/library/huddojstatement.pdf>.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

solution that simultaneously allows the tenant to use and enjoy the premises, constitutes a minor burden upon the landlord, and does not interfere with *other* tenants' use and enjoyment of the premises. Rather than having a "winner" and a "loser"—as would be the case with litigation and the complaint investigation procedure—the mediator's expertise in various forms of disability accommodations has the potential to produce creative remedies that make winners out of both parties.

In addition, bringing the parties together in a peaceful mediation environment could help ease tension that exists between the two parties and can provide them with skills for working out any similar future disputes.<sup>140</sup> If a mediator prefers not to suggest possible reasonable accommodations, but rather to have the parties come up with the accommodation themselves, the mediator could help establish trust between the parties in an effort to encourage the parties to disclose information to the other side that they might find helpful when brainstorming possible accommodations.<sup>141</sup>

Furthermore, a knowledgeable mediator could help address stereotypes against individuals with disabilities and any biases a landlord might have against the concept of a reasonable accommodation, which the landlord may assume would result in a "net economic loss—in essence . . . a kind of targeted tax" to finance social goals.<sup>142</sup> A mediator who is knowledgeable about various types of disabilities may help to educate a landlord about the tenants' specific disability, helping the landlord understand exactly why the tenant needs the accommodation or modification, thereby making the landlord more likely to grant an accommodation or modification. For example, consider a tenant claiming to have multiple sclerosis who requests an assigned parking space because it is both painful and difficult for the tenant to walk long distances.<sup>143</sup> Assume also that the tenant has a type of multiple sclerosis known as relapsing/remitting multiple sclerosis, meaning that the symptoms that lead to painful and difficult walking are more active at cer-

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140. "For most cases, alternative dispute resolution probably represents the optimal outcome by empowering parties to address intangible harms through interpersonal contact and controlling the process by fashioning their own remedies." Iglesias & Saylor, *supra* note 85, at 16, 18.

141. See Harris, *supra* note 133, at 9 (observing that "[i]nformation asymmetries can . . . exacerbate the risk of stereotyping and biases which, in turn, make it more difficult for parties to consider new information that will adjust their expectations.").

142. *Id.* at 8.

143. This hypothetical is based loosely on the facts of *Jankowski Lee & Associates v. Cisneros*, 91 F.3d 891, 893–94 (7th Cir. 1996).

tain times than at others.<sup>144</sup> A landlord who has seen the tenant at certain times walking with little to no difficulty may assume that the tenant is lying about having multiple sclerosis and deny the request for an assigned parking space.<sup>145</sup> A mediator with knowledge of relapsing/remitting multiple sclerosis may serve as a trustworthy authority figure who could validate the symptomology and the tenant's corresponding need for an assigned parking space.

Thus, by employing a specialized mediator, HUD would simultaneously create an efficient dispute resolution mechanism that preserves the long-term economic relationship between landlord and tenant while also educating landlords about the needs of individuals with disabilities,<sup>146</sup> so that such individuals may obtain use and enjoyment from the housing premises equivalent to that of non-disabled individuals.

#### V. CONCLUSION

In the landlord-tenant context, there are often several different options for a reasonable accommodation or modification for a tenant with a disability that allows the tenant the same use and enjoyment of the premises as other tenants, while not creating an undue financial or administrative burden upon the landlord or creating a fundamental alteration of his services. A mediator who specializes in federal housing laws and disability accommodation disputes is well-positioned to create such potential solutions that satisfy the interests of both parties in an efficient and amicable manner, while also educating landlords who hold stereotypical beliefs about individuals with disabilities. When such barriers between the parties are broken down, the landlord keeps a tenant, and the tenant keeps a home.

Adam Knobler\*

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144. *Relapsing-Remitting Multiple Sclerosis*, WEBMD, <http://www.webmd.com/multiple-sclerosis/guide/relapsing-remitting-multiple-sclerosis> (last visited Mar. 23, 2014).

145. *Jankowski*, 91 F.3d at 893–94.

146. 42 U.S.C. § 3601 (2012) (“Declaration of policy”) states that the policy of the FHA is to promote fair housing throughout the United States. In an effort to further this policy, 42 U.S.C. § 3616a(d)(1) mandates that the HUD Secretary establish a national education and outreach program to promote fair housing. 42 U.S.C. § 3616a(d)(1) (2012). When the specialized mediator educates the landlord about the needs and limitations of the tenant with a disability, the mediator is indirectly furthering such a national education and outreach program by making it more likely that the landlord will grant a housing opportunity to an individual with a disability on equal terms with other non-disabled individuals.

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