Southwest Key Programs, Inc. v. City of Escondido
Challenge to Denial of Housing for Unaccompanied Immigrant Children
https://www.aclusandiego.org/southwest-key-programs-v-city-of-escondido/

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I. Legal Framework for Care of Unaccompanied Children

A. Congress has adopted statutes that complement *Flores* settlement governing care of unaccompanied children seeking the right to remain lawfully in the U.S. *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016) (discussing settlement); *D.B. v. Cardall*, 826 F.3d 721, 738 (4th Cir. 2016) (noting "Congress's unmistakable desire to protect" unaccompanied children).

1. An "unaccompanied alien child" is one for whom "there is no parent or legal guardian in the United States" or "no parent or legal guardian in the United States is available to provide care and physical custody." 6 U.S.C. § 279(g)(2).

2. Office of Refugee Resettlement ("ORR"), a component of HHS, cares for unaccompanied children. 6 U.S.C. § 279(a).

3. When taken into custody, unaccompanied children must be immediately transferred to ORR care and "placed in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(b)(3), (c)(2)(A).

4. Under *Flores* settlement:

   a. Unaccompanied children "shall be placed temporarily in a licensed program" until housed with a relative, guardian, or foster parent, or until they turn 18.

   b. The program must be "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children."

   c. The group home "shall be non-secure as required under state law" and comply with state welfare rules.

   d. Unaccompanied children may be confined in a "detention facility" only in narrow circumstances, for example when "no appropriate licensed program is immediately available" or the child "has been charged with, is chargeable, or has been convicted of a crime."

e. A "converted medium security prison" operated as a "detention facility" does not qualify as a "licensed program." *Bunikyte, ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at *4, 9 (W.D. Tex. Apr. 9, 2007); *cf. D.B.*, 826 F.3d at 732 (distinguishing "licensed program" from "secure facility"); *Walding v. United States*, 955 F. Supp. 2d 759, 764-65 (W.D. Tex. 2013) (contrasting "detention facilities" with "shelter care facilities").

II. Factual Background

A. Southwest Key Programs is a nonprofit that contracts with ORR for care of unaccompanied children. www.swkey.org.

B. During 2014, Southwest Key sought to increase capacity to house unaccompanied children in San Diego County.

C. Southwest Key sought conditional use permit to convert former skilled nursing facility to group home for unaccompanied children. The federal government pays all expenses of caring for the children. They do not attend local schools. The project would have brought approximately 90 new jobs and $6-7 million in new money to the community.

D. Planning Commission and City Council denied CUP after racially charged public opposition, asserting land use issues not raised by planning staff. City Council members also alluded to immigration issues, in some cases equating immigrants with Mexicans or Latinos.

III. Fair Housing Law Protects Unaccompanied Children

A. The Fair Housing Act protects "any person" from unlawful denial of housing based on race or national origin. 42 U.S.C. § 3604(a). Southwest Key had standing because it suffered "financial injury" due to deprivation of revenue. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017).

B. A law protecting "any person" protects everyone regardless of "status under the immigration laws." *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (Equal Protection Clause).

C. The Act "protects 'any person,' regardless of his immigration status," and it is no defense "to assert that those harmed by the [defendant's] actions are undocumented residents."[1] *Cent. Alabama Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1196 (M.D. Ala. 2011), *vacated as moot*, No. 11–16114–CC, 2013 WL 2372302 (11th Cir. May 17, 2013) (quoting *Plyler*, 457 U.S. at 210).

D. Unaccompanied children are authorized to reside in U.S. until their immigration proceedings are resolved. 6 U.S.C. § 279(b)(1); 8 U.S.C. § 1232(a)(5)(D)(i), (c)(2)(A).

[1] A decision vacated as moot remains persuasive authority. *Rosenbloom v. Pyott*, 765 F.3d 1137, 1154 n.14 (9th Cir. 2014).

IV. Immigration Status vs. Race or National Origin

A. A decision based on citizenship or immigration status does not discriminate based on race or national origin on its face. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

B. But such a decision may be challenged as a fair housing violation if one can show:

1. It is a "pretext to disguise what is in fact [race or] national-origin discrimination," under a disparate treatment theory. *Id.* at 92.

a. *Magee*, 835 F. Supp. 2d at 1192 (noting "court must be sensitive to the use … of illegal immigrant as a code for Latino or Hispanic, with the result that, while addressing illegal immigrants was the target, discriminating against Latinos was the target as well"); *Espinoza v. Hillwood Square Mut. Ass'n*, 522 F. Supp. 559, 568 (E.D. Va. 1981) (plaintiff stated claim that HOA's "citizenship policy was a pretext for national-origin discrimination").

b. *Cf., e.g., Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016); *Ave. 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016) (pretext cases involving coded language).

2. It has an unjustified "effect of discriminating on the basis of [race or] national origin," under a disparate impact theory. *Espinoza*, 414 U.S. at 92.

a. Any "assertion that the [defendant] was primarily discriminating against some other, non-protected group (in this case non-citizens) does not undermine [the] showing of a prima-facie case of disparate impact against Latinos." *Magee*, 835 F. Supp. 2d at 1196.

b. *Cf., e.g., Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2521-22 (2015); *Mhany*, 819 F.3d at 617-20; *Ave. 6E*, 818 F.3d at 503; *Sisemore v. Master Fin., Inc.*, 151 Cal. App. 4th 1386, 1418 (2007) (cases on disparate impact framework); 24 CFR § 100.500 (HUD disparate impact regulation).

c. Is denial of single permit subject to federal disparate impact claim as a "practice"? *See Inclusive Communities Project, Inc.*, 135 S. Ct. at 2523; *Mhany*, 819 F.3d at 619. California FEHA disparate impact claim can be based on any "act or failure to act." Govt. Code § 12955.8(b).

C. "A requirement involving citizenship or immigration status will violate the Act when it has the purpose or [unjustified] effect of discriminating on the basis of national origin" or race. *HUD Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency*, at 3 (Sept. 15, 2016) (LEP Guidance) (brackets in original, citation and quotation marks omitted).[2]

[2] http://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf.

D. HUD's guidance commands "considerable and substantial deference." *Castellano v. Access Premier Realty, Inc.*, No. 1:15-CV-0407-MCE-KJS, 2016 WL 1588430, at *5 (E.D. Cal. Apr. 20, 2016); *see also Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1214 (9th Cir. 2009).

E. *But see Keller v. City of Fremont*, 719 F.3d 931, 949 (8th Cir. 2013) (Loken, J.); *De Reyes v. Waples Mobile Home Park Ltd. P'ship*, 205 F. Supp. 3d 782 (E.D. Va. 2016) (plaintiffs did not state disparate impact claims against immigration status classifications).

V. Is a Group Home for Unaccompanied Children a Dwelling?

A. FHA covers "dwellings," broadly defined. *Lakeside Resort Enters., L.P. v. Bd. of Supervisors of Palmyra Twp.,* 455 F.3d 154, 156 (3d Cir. 2006).

1. Dwelling: "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence." 42 U.S.C. § 3602(b).

2. "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." *United States v. Hughes Mem'l Home*, 396 F. Supp. 544, 549 (W.D. Va. 1975) (children's group home was dwelling).

3. The issue is "whether the facility is intended or designed for occupants who intend to remain in the facility for any significant period of time" and "whether those occupants would view the facility as a place to return to during that period." *Lakeside*, 455 F.3d at 158.

B. City argued group home was not a dwelling because unaccompanied children are in custody of ORR and do not choose to live there. According to City, based on legislative history, FHA only protects "freedom of choice" in housing.

1. City's position adds language to statute that Congress did not include and violates purpose of FHA.

2. All unemancipated children are in custody of parent or guardian and no child chooses residence. Many adults also do not choose their residence, e.g., individuals under conservatorship. It would be inconsistent with FHA to exclude entire classes of people who do not choose their residence.

3. City relied on *Garcia v. Condarco*, 114 F. Supp. 2d 1158 (D.N.M. 2000) (jail is not dwelling), but unlike in *Garcia*, a group home is not "designed and intended to be a penal facility." *Id.* at 1161.

4. District court denied summary judgment to City, finding "a triable issue of material fact on whether the facility is a dwelling." *Southwest Key Programs, Inc. v. City of Escondido*, No. 3:15-CV-01115-H-BLM, 2017 WL 1094001, at *5 (S.D. Cal. Mar. 23, 2017)

VI. Did the City Make a Dwelling Unavailable?

A. City argued it did not make dwelling "unavailable" because when it denied permit, Southwest Key had excess capacity resulting from expansion to meet surge in demand, which then dropped temporarily but later resumed growing.

B. A dwelling may be "intended for occupancy" in the future, even if unoccupied at present. 42 U.S.C. § 3602(b); *see also United States v. Gilbert*, 813 F.2d 1523, 1528 (9th Cir. 1987) (holding "it is unnecessary for a dwelling to be in existence or occupied. A prospective dwelling is sufficient.").

C. City focused on moment when it denied permit. Unlike "refuse to sell or rent," which occurs at a single point in time, the term "otherwise make unavailable or deny," 42 U.S.C. § 3604(a), should cover anticipated lifetime of project. *See Ave. 6E*, 818 F.3d at 511 (rejecting claim that "glut in the market … foreclosed the possibility of any adverse impact," because contrary result "would threaten the very purpose of the FHA"); *Bloch v. Frischholz*, 587 F.3d 771, 776 (7th Cir. 2009) ("[T]he 'otherwise make unavailable or deny' part" of § 3604(a) "is not tethered to the words 'sale or rental.'"); *Gilbert*, 813 F.2d at 1528 (rule against making dwelling unavailable is "as broad a prohibition as Congress could have made").

D. District court denied summary judgment to City without addressing these issues. *Southwest Key*, 2017 WL 1094001 at *6.