



L E G A L

S E R V I C E S

I N C O R P O R A T E D

**TESTIMONY FOR AN OVERSIGHT HEARING ON:
EXAMINING HOW EXISTING AND NEW
RESIDENTIAL HOUSING CAN MEET THE NEEDS OF
OLDER NEW YORKERS**

PRESENTED BEFORE:

**THE NEW YORK CITY COUNCIL'S
COMMITTEE ON HOUSING AND BUILDINGS
AND
COMMITTEE ON AGING**

PRESENTED BY:

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I. Introduction

MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, MFY provides free legal assistance to residents of New York City on a wide range of civil legal issues. We prioritize services to vulnerable and under-served populations such as older New Yorkers, while simultaneously working to end the root causes of inequities through impact litigation, law reform, and policy advocacy.

Each year, MFY serves more than 2,000 New Yorkers who are at least 60 years old. When they turn to MFY for help, older New Yorkers are often facing eviction, foreclosure, or other housing-related problems. MFY's projects include the Manhattan Seniors Project, the Foreclosure Prevention Project, the Neighborhood Preservation Project, the Mental Health Law Project, and the Adult Home Advocacy Project. During 2012, MFY will also launch a Nursing Home Residents' Project.

MFY plays a key role in combating the lack of accessibility and discrimination that older New Yorkers and New Yorkers who have disabilities face on a daily basis. MFY's recommendations and testimony are based on our experience preserving existing, affordable housing for older New Yorkers and combating rights violations in institutional settings such as adult homes.

II. Key Recommendations

1. Expand outreach efforts to make sure that older New Yorkers know about the Senior Citizen Rent Increase Exemption (SCRIE) program and improve the accessibility of the application and recertification processes
2. Expand funding for legal services—including eviction prevention, public benefits claim advocacy, consumer debt defense, and long-term care planning—that help older New Yorkers to pay their rent and age in place
3. The City Council and the NYC Department for the Aging should seek leave to file an amicus brief in an upcoming Appellate Division case that will consider whether a housing court judge can consider factors such as a tenant's age or diminished capacity in enforcing the terms of settlement agreements that determine whether older New Yorkers can be evicted from their homes
4. Prioritize outreach about and enforcement of the reasonable accommodation and reasonable modification provisions of the Fair Housing Act, the New York State Human Rights Law, and the New York City Human Rights Law to improve the accessibility of existing housing for older New Yorkers
5. Prioritize enforcement of the accessible design and construction provisions of the Fair Housing Act, the New York State Human Rights Law, and other laws to improve the accessibility of new housing for older New Yorkers
6. Increase access to home care services that enable older New Yorkers to age in place with dignity in settings that are more integrated, less restrictive, and less expensive than institutional settings.

III. Preserve Existing Affordable Housing so that Older New Yorkers Can Age in Place

Older New Yorkers want to stay in their homes and communities. In one AARP survey, more than 80 percent of respondents who were at least 45 years old indicated that they would like to stay in their current residence for as long as possible.¹ Older New Yorkers are able to age in place only if their home is affordable and accessible.

A. Affordability is Essential to Allow Older New Yorkers to Age in Place

1. The Senior Citizen Rent Increase Exemption

Older New Yorkers can age in place only if they can continue to afford to continue to pay their rent. The Senior Citizen Rent Increase Exemption (SCRIE) plays an essential role in allowing older New Yorkers to age in place. SCRIE offers eligible tenants who are at least 62 years old an exemption from rent increases. Unfortunately, many older New Yorkers are not aware of the benefits that they may be eligible for through SCRIE. The SCRIE application and recertification processes are also too difficult for many older New Yorkers.

SCRIE's purpose is "to alleviate the severe impact of ever-increasing rental obligations upon low-income senior citizens by fixing their monthly rents at one third of their income. In this way, these senior citizens are protected against erosion of funds available for other necessities, such as food, clothing and medicine."² However, the burdens that are placed on SCRIE applicants and beneficiaries run counter to SCRIE's purpose. Delays in processing SCRIE applications and recertifications jeopardize the housing of older New Yorkers because they can result in rent arrears and eviction proceedings. Clients often come to MFY facing eviction based on problems involving SCRIE payments. These problems often stem from administrative delays and the Department of Finance placing burdens on tenants that are not consistent with the statute and regulations that govern the SCRIE program.

Based on our clients' experiences, a significant amount of advocacy is necessary to get SCRIE reinstated when an older New Yorker is unable to properly recertify and their benefit is terminated. It is particularly difficult for older New Yorkers to have their benefits reinstated retroactively. MFY recommends that New York City expand outreach efforts about SCRIE and continue to simplify and improve the accessibility of the SCRIE application and recertification processes.

2. Eviction Prevention and Other Legal Services

Every year thousands of older New Yorkers are sued in NYC Housing Court by their landlords. Most of these seniors, like other tenants, are not represented by attorneys. MFY's Manhattan Seniors Project helps hundreds of seniors to age in place with dignity each year by preventing evictions. Older New Yorkers who have low incomes face daunting challenges in their efforts to live independently in their own homes. With one in five older New Yorkers living at or below the federal poverty level, a growing

¹ AARP, Fixing to Stay: A National Survey of Housing and Home Modification Issues 24 (2000).

² Coccaro v. Stupp, 635 N.Y.S.2d 924, 925, 166 Misc.2d 948, 949-50 (Sup. Ct. NY Cty. 1995).

numbers of older New Yorkers live one crisis away from homelessness as they try to make their fixed retirement or disability income cover the rising costs of housing, utilities, food, medicine, and transportation.

With support from the New York City Department for the Aging (DFTA), MFY's Manhattan Seniors Project provides a broad range of high-quality civil legal services for older New Yorkers. We prioritize the cases of clients who are at risk of losing their housing and independence. The Manhattan Seniors Project is also part of an assigned counsel program in partnership with DFTA social workers. Through this program, MFY defends seniors who are facing imminent eviction and who need both legal and social work assistance to resolve their housing problem. The overarching goal of the work of MFY's Manhattan Seniors Project is to preserve existing affordable housing for older New Yorkers so that they can age in place.

Unfortunately, the needs of older New Yorkers for these civil legal services are greater than MFY's capacity to provide them. MFY recommends the expansion of funding for legal services that have an impact on the ability of older New Yorkers to pay their rent and age in place. Such an expansion would be cost-effective, because programs like MFY's Manhattan Seniors Project preserve affordable housing and help older New Yorkers avoid institutionalization that is costly both in terms of dignity as well as dollars and cents. An increase in funding for civil legal services for older New Yorkers would allow programs like MFY's Manhattan Seniors Project to preserve more affordable housing units directly, by representing older New Yorkers in eviction proceedings, and indirectly, by helping older New Yorkers access essential public benefits, resolve consumer debt claims, and engage in long-term care planning.

3. *Judicial Discretion to Consider Age and Capacity*

When older New Yorkers are sued in NYC Housing Court, they are often surprised to learn that their age, with few exceptions, is not a defense to the case against them. One of the few places where a tenant's age may be considered is where a judge has some measure of discretion to consider the equities of a particular case. A court's power to exercise discretion is particularly important when a judge supervises the enforcement of a stipulation of settlement—like those which resolve the majority of cases brought against unrepresented senior tenants in NYC Housing Court. These settlements are often written by attorneys for landlords and usually contain terms that impose severe penalties on the tenant—such as forfeiture of their home—for technical or nominal breaches of the settlement agreement.

The New York Court of Appeals has affirmed the importance of judicial discretion in such situations. However, *Chelsea 19 v. James*, which is a recent decision by the Appellate Division, has had the effect of essentially stripping housing court judges of this discretion. Though it involved an almost entirely unique set of facts, the decision in *Chelsea 19* has been frequently cited by lower courts as holding that a housing court judge is strictly bound to enforce the terms of a settlement without consideration of the particular equities of a case. It follows from this decision that a housing court judge would be bound to evict an older New Yorker from his or her long-term, affordable home even for the most minor of defaults.

For the first time since *Chelsea 19*, the Appellate Division has granted leave to hear an appeal involving the extent of a housing court judge's discretion. This case will likely affect whether a judge can consider factors such as a tenant's age and diminished capacity in enforcing the terms of a settlement. MFY Legal Services is planning to seek leave to submit an amicus brief supporting the authority and responsibility of judges to consider such factors as they preside over litigation involving seniors and their homes. Given the potential impact that an adverse decision could have on older New Yorkers, MFY plans to invite the City Council and the Department for the Aging to consider seeking leave to file an amicus brief on this issue.

B. Accessibility is Essential to Allow Older New Yorkers to Age in Place

Older New Yorkers can age in place only if their homes are accessible. Accessibility is a major concern for older New Yorkers because approximately 40 percent of people who are at least 65 years old have a disability. Federal, state, and local statutes, rules, and regulations protect the rights of people with disabilities, including people with age-related disabilities. Antidiscrimination laws recognize that disabilities result from the interaction of a person's impairment with the barriers the person faces. The barriers that a person with a disability faces can be caused by the built environment, such as staircases, narrow doorways, and inaccessible bathrooms, or by attitudinal biases, such as misunderstanding, prejudice, and stigma. Disability-rights laws are designed to eliminate the physical and attitudinal barriers that people with disabilities often face.

One way disability-rights laws eliminate barriers is by giving people with disabilities the right to reasonable accommodations and modifications of policies, practices, and the built environment. During the twenty years since Congress enacted the Americans with Disabilities Act, requests for reasonable accommodations have become more and more prevalent in various contexts, including housing. Finding and keeping adequate housing is often a struggle for people with disabilities. This is particularly true in a city like New York, where the housing stock overwhelmingly pre-dates the accessible design and construction requirements of the Fair Housing Act Amendments and the vacancy rate for accessible and affordable housing is low.

Requests for reasonable accommodations and modifications by older New Yorkers who have disabilities can be governed by the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Fair Housing Act (FHA), the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL). Fair Housing laws require individuals and entities owning, managing, selling, or renting housing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling. The individual or entity that owns, manages, sells, or rents the relevant property is generally responsible for paying the costs, if any, associated with a reasonable accommodation.

Fair Housing laws also require individuals and entities owning, managing, selling, or renting covered dwellings to permit reasonable modifications of existing premises if

modifications may be necessary to allow a person with a disability full enjoyment of the premises. The term “reasonable modification” refers to a change to a physical or structural element of a covered dwelling or common area. According to the Department of Justice and the Department of Housing and Urban Development, “[e]xamples of modifications that typically are reasonable include 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.”³ If modifications to the housing unit will not suffice, a person with a disability may request a reasonable accommodation to be transferred to a more accessible unit. Under the FHA, the requester is responsible for paying for a reasonable modification. However, under the recently-modified NYSHRL, the landlord is responsible for paying for a reasonable modification to the common areas. Landlords have also been required to pay for modifications such as adding ramps to public and common areas under the NYCHRL.

Unfortunately, many older New Yorkers who have disabilities are not aware of their rights under the ADA, the Rehabilitation Act, the FHA, the NYSHRL, and the NYCHRL. In order to improve the accessibility of existing housing for older New Yorkers, MFY recommends that the City Council prioritize outreach to older New Yorkers about the reasonable accommodation and reasonable modification provisions of these laws. MFY also recommends that the City Council prioritize funding enforcement of these laws by the New York City Commission on Human Rights and not-for-profits organizations such as MFY.

IV. Prioritize Integration by Creating Accessible New Housing in the Community for Older New Yorkers

Older New Yorkers want to live in integrated housing that is located in and is part of the community. New York City must make sure that new housing for older New Yorkers is accessible, integrated, and community-based.

A. New Housing Must be Accessible for Older New Yorkers

Various laws, including the Fair Housing Act (FHA) and the New York State Human Rights Law (NYSHRL), require new construction to be accessible to people who have disabilities. The FHA’s design and construction provisions, for example, apply to all housing facilities with four or more units that have been built since 1991. The FHA requires, among other things, that new residential buildings have: an accessible building entrance on an accessible route; accessible public and common use areas; usable doors; accessible routes into and through units; light switches, electrical outlets, and environmental controls in accessible locations; reinforced walls in bathrooms so that grab

³ Joint Statement of the Dep’t of Housing and Urban Dev. & the Dep’t of Justice, Reasonable Modifications Under the Fair Housing Act 3 (Mar. 5, 2008), *available at* http://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf (last visited Nov. 29, 2011).

bars can be installed; and usable kitchens and bathrooms. Unfortunately, based on our clients' experiences, it is clear that compliance with the FHA's requirements and other applicable laws is, at best, inconsistent.

When new housing is not accessible, it excludes older New Yorkers and other people who have disabilities. New York City should not allow any residential building to receive a certificate of occupancy unless it complies with the FHA and other applicable laws. By prioritizing the enforcement of the accessible design and construction provisions of the FHA, the NYSHRL, and other applicable laws, New York City would greatly improve the accessibility of new housing for older New Yorkers.

B. New Housing for Older New Yorkers Must be Community-based and Integrated

As DFTA's Annual Plan Summary recognizes, "the housing preferences of older adults are to age in place and to maximize autonomy, choice, familiarity, flexibility and privacy"⁴ These attributes cannot be found in institutional settings such as adult homes and nursing homes.

The Americans with Disabilities Act (ADA) requires that states and cities provide services to a person who has a disability—including a person who has an age-related disability—in the most integrated setting that is appropriate to his or her need. The ADA regulations explain that the "most integrated setting" for an individual is a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible. The meaning of this regulation, which is generally referred to as the ADA's "integration mandate," is at the heart of the Supreme Court's landmark *Olmstead* decision.⁵

In *Olmstead*, the Supreme Court emphasized that the Department of Justice has "consistently advocated" that "undue institutionalization qualifies as discrimination 'by reason of . . . disability.'"⁶ The Supreme Court explained why "unjustified segregation" is discrimination:

First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . . Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.⁷

When governmental entities fund or provide services in restrictive settings such as adult homes and nursing homes to people with disabilities who could live in the community, they are violating the ADA. Adult homes are congregate residential facilities that were

⁴ NYC Department for the Aging, Annual Plan Summary, April 1, 2012 – March 31, 2013, p. 16, available at http://www.nyc.gov/html/dfta/downloads/pdf/aps_2012_13.pdf (last visited Nov. 29, 2011).

⁵ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

⁶ *Id.* at 597.

⁷ *Id.* at 600-01 (citations omitted).

originally created to provide housing, meals and basic care for the elderly who do not need a nursing care. MFY's advocacy and litigation helped bring widespread public attention to the plight of adult home residents and the lack of viable community-based housing and supports for people exiting New York State's psychiatric hospitals. In 2002, MFY worked closely with a New York Times reporter to bring public attention to suspicious deaths and inhumane conditions in adult homes. The resulting series, *Broken Homes*, earned the Pulitzer Prize for investigative journalism and fueled an avalanche of demands to end the abuses and reform practices in adult homes. MFY's work in adult homes culminated with the groundbreaking decision in *Disability Advocates v. Paterson*, in which the court ruled that New York State violated the Americans with Disabilities Act by segregating adults with psychiatric disabilities in large adult homes. New York State has appealed the court's order, so MFY, its partner organizations, and thousands of adult home residents are awaiting a decision from the Court of Appeals for the Second Circuit.

Numerous reports have raised questions about overbilling, unnecessary medical services, and Medicaid abuse in adult homes.⁸ However, an adult home can apply to be certified as an Assisted Living Residence (ALR) or an Enhanced Assisted Living Residence (EALR), and these certifications allow adult homes to admit residents who need even higher levels of care. MFY is deeply concerned that ALR and EALR certification will enable adult homes to place thousands of vulnerable older New Yorkers at risk of abuse, neglect, and other rights violations.

Like adult homes, nursing homes are also often a more restrictive setting than is appropriate for older New Yorkers. In response to an increasing number of calls for assistance from nursing home residents and their family members, MFY will soon launch a Nursing Home Residents' Project (NHRP). NHRP will include a telephone helpline for nursing home residents and their families and caregivers. The goal of this helpline is to provide information, advice and, advocacy services in the areas of: resident rights; discharge planning; improper discharges and transfers; unfair consumer practices; and abuse and neglect. MFY will also provide training and educational sessions to residents and family councils at nursing homes.

Despite the Supreme Court's decision in *Olmstead*, the provision of long-term care services in the United States remains unduly slanted toward institutionalization. New York State's Medicaid expenditures reflect the national bias toward institutionalization. In New York City, however, reliance on nursing home care is significantly less than it is in the rest of the state. The United Hospital Fund recently reported that "[p]ersonal care is a particularly substantial and important component of Medicaid long-term care service delivery and spending; 84 percent of Medicaid personal care spending statewide takes place in the city."⁹ Home care services allow older New Yorkers to age in place with

⁸ See, e.g., *Disability Advocates, Inc. v. Paterson*, 653 F.Supp.2d 184 (E.D.N.Y. 2009); New York State Commission on Quality of Care and Advocacy for Persons with Mental Disabilities (CQC), *A Review of Assisted Living Programs in "Impacted" Adult Homes* (2007); CQC, *Health Care in Impacted Adult Homes: A Survey* (2006); CQC, *Adult Homes Serving Residents with Mental Illness: A Study on Layering of Services* (2002); The New York Times, *Broken Homes* (April 28-30, 2002).

⁹ Sarah Samis, Michael Birnbaum, United Hospital Fund, *Medicaid Personal Care in New York City: Service Use and Spending Patterns* (2010), p. 1, available at <http://www.uhfny.org/publications/880720>.

dignity in settings that are more integrated, less restrictive, and ultimately less expensive than institutional settings such as adult homes or nursing homes. MFY recommends that new residential housing for older New Yorkers should be integrated and part of community life. MFY also recommends that the City Council increase access to vital home care services that allow older New Yorkers to remain in the integrated, community-based settings that they prefer and which are less costly to taxpayers.

V. Conclusion

MFY Legal Services thanks the Committee on Housing and Buildings and the Committee on Aging for holding this oversight hearing on an issue that is of critical importance to older New Yorkers. MFY is committed to working with the City Council to preserve existing affordable housing for older New Yorkers so that they can age in place and to prioritize integration and accessibility in any new residential housing that is created for older New Yorkers.