UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY

The Secretary, United States Department of Housing and Urban Development, the Charging Party, on behalf of:

NEISHA POTTER, JASON POTTER, and their minor children,

Complainants,

v.

THEA MORGAN,

Respondent.

HUDALJ 11-F-090-FH-49

October 26, 2012

For the Complainants: Jeanine Worden, Associate General Counsel for Fair Housing, Kathleen Pennington, Assistant General Counsel for Fair Housing Enforcement, Onjil McEachin and James Wylie, Trial Attorneys, U.S. Department of Housing and Urban Development

For the Respondent: Thea Morgan, *pro se*, Cody, WY, and Kevin Dunn, Representative, Arvada, CO

ORDER ON SECRETARIAL REVIEW

On October 12, 2012, the Charging Party submitted a *Petition for Secretarial Review of Initial Decision and Order In Part* ("CP Petition"), appealing the September 28, 2012, *Initial Decision and Order* ("Decision") issued by Administrative Law Judge Alexander Fernández ("ALJ"). In the Decision, the ALJ found that Respondent had violated the Fair Housing Act, as amended, 42 U.S.C. §§ 2601 *et seq*. Specifically, the

ALJ found that Respondent made statements indicating an unwillingness to rent to Complainants based on familial status in violation of 42 U.S.C. § 3604(c) and made housing unavailable to Complainants by refusing to negotiate with them in violation of 42 U.S.C. § 3604(a). The ALJ ordered Respondent to pay $3,000 total damages for out-of-pocket losses and $750 total damages for emotional distress and inconvenience. See Decision at 15, 19. The ALJ assessed a civil penalty of $500. See id. at 21. The ALJ also ordered HUD to provide, within 180 days of the Decision date and at no cost to Respondent, training on Fair Housing issues in or around Cody, WY, where Respondent resides. See id. at 22. The CP Petition asks the Secretary to: (1) modify the ALJ's award of $750 to $27,500 for emotional distress and inconvenience damages; and (2) modify the injunctive relief provision on fair housing training because it is an undue burden to the Department. See CP Petition at 5, 11.

Respondent filed a response to the CP Petition on October 18, 2012 ("Respondent's Reply"). Respondent's Reply stated that: (1) she did not refuse the property to Complainants because of the familial status, but because of rudeness; (2) Respondent has withdrawn her participation in the rental of her properties; and (3) Respondent is willing to be flexible in executing the training requirement ordered in the Decision. See Respondent's Reply at 1.

Upon review of the entire record in this proceeding, including the trial hearing transcript, deposition transcript, and briefs filed with the ALJ and the Secretary, and based on an analysis of the applicable law, I hereby GRANT the CP Petition in part and MODIFY the ALJ's decision as described below.

BACKGROUND

On September 30, 2011, the Charging Party filed a *Charge of Discrimination* on behalf of Neisha Potter, Jason Potter, and their minor children ("Complainants") alleging that Thea Morgan ("Respondent") unlawfully discriminated against Complainants under the Fair Housing Act, as amended, 42 U.S.C. §§ 3601 *et seq.*, by making discriminatory statements and refusing to negotiate on the basis of familial status in violation of 42 U.S.C. §§ 3604(a) & (c). The Charging Party alleged the following facts: Complainants had been living in LaGrange, WY, but needed to relocate to Cody, WY, approximately 400 miles away, because Mr. Potter's new job started in July 2011. During the course of searching for housing, Complainants contacted Respondent on June 10, 2011, but were wrongly denied Respondent's property on Draw Street (Draw Street Property). Complainants failed to find other available housing in Cody before Mr. Potter's job began and were forced to move to Clark, which is 37 miles north of Cody. After six months of commuting from Clark to Cody for both work and amenities, Mr. Potter received a conditional job offer from the Cody Police Department and Complainants broke their lease and moved to a house in Cody, at Gabbi Lane, in December 2011.

A one day hearing occurred on May 9, 2012, in Powell, Wyoming. On July 6, 2012 and July 9, 2012, Respondent and the Charging Party submitted post-hearing briefs, respectively. On August 3, 2012, the Charging Party filed its reply brief.

Respondent did not file a reply brief.

On September 28, 2012, the ALJ issued the Decision. The ALJ reviewed the applicable law for the Fair Housing Act's definition of familial status, the standard of proof for discriminatory statements under § 3604(c), and the law on direct and indirect evidence for establishing discriminatory intent in refusing to negotiate under § 3604(a). See Decision at 2-3. He then made 53 findings of fact, including that Mrs. Potter called Respondent about the Draw Street property, Respondent stated it was available and asked for Complainants number of family members and ages of their children, and Mrs. Potter refused to give the ages of children. See id. at 4-7 (facts #21-24). He recounted the disputed ending of this conversation, based upon his findings of fact:

> At the heart of this matter is a one and a half to three minute telephone conversation, some of the content of which is in dispute. The parties agree that Respondent spoke with Mrs. Potter on June 10, 2011... Based on its observation of the witnesses and their demeanors while testifying, the facts enumerated at paragraphs 21-31, *supra*, constitute the Court's findings with regard to the interactions between Mrs. Potter and Respondent...The salient statements are as follows: 1. Respondent told Complainants that the ages of Complainants' children were Respondent's "business" because Respondent was concerned with the children's safety, as the steps in the Draw Street Property could post a safety problem. 2. In response to Mrs. Potter's statement that Respondent could not discriminate against Complainants because of her children, Respondent replied, "yes I can and I will."[then hung up the telephone]. See id. at 9-11.

The ALJ decided "an ordinary listener could easily conclude that the statement was in violation of § 3604(c)." See id. at 11, nt. 8. The ALJ also held "that the statement 'I can and I will' constitutes direct evidence of discrimination...Respondent refused to negotiate in violation of § 3604(a) when she made the statement and hung up the phone, thereby making the property unavailable to Complainants." See id. at 13. The ALJ ordered Respondent to pay Complainants $3,750 total damages and assessed a civil penalty of $500. See id. at 22. The ALJ's Order also provides for injunctive relief, including mandatory training by HUD at no cost to Respondent in Cody. See id.

DISCUSSION

I. The ALJ's damage award is modified.

The ALJ awarded $3,000 in damages for tangible injuries, i.e. out-of-pocket losses. See Decision at 16. He arrived at this number by calculating the increased rent and gas expenditure Complainants incurred for six months after Respondent wrongfully denied housing to them. See id. at 15. The ALJ also awarded $750 for intangible injuries, i.e. emotional distress and inconvenience. See id. at 19. He found that Complainants' injuries "[we]re not severe enough to justify the substantial award sought by the Charging Party." Id. at 18.

After review, the Secretary modifies the total damage award for three reasons: first, the ALJ incorrectly cut off Respondent's liability when calculating the rent increase of the alternative housing; second, the ALJ erroneously relied upon Respondent's lack of malicious intent to lower the award for actual injuries incurred by Complainants; and third, the ALJ failed to adequately consider inconvenience damages.

a. The ALJ's award for alternative housing is modified.

When an aggrieved party is forced to seek alternative housing due to unlawful discrimination, "the proper measure of damages is a comparison between what would have been obtained but for the discrimination and a reasonably comparable dwelling." Morgan v. HUD, 985 F.2d 1451, 1458 (10th Cir. 1993). But for Respondent's violation of the Act, the housing that "would have been obtained" was a $750 per month, 3 bedroom townhouse on Draw Street in the center of Cody. See Hearing Exhibit 6. The ALJ found the Clark property a "reasonably comparable dwelling" and awarded the difference in rent, $1,500, for the six months that Complainants lived there. See Decision at 15. He cut off Respondent's liability entirely when Complainants moved to Cody at the Gabbi Lane property in December 2011, because the family moved for reasons unrelated to Respondent's discrimination. See id. at 16. Although moving into Cody effectively cut off Complainant's inconvenience injuries, it did not cut off the family's need of alternate housing in Cody. See CP Post-Hearing Reply at 8 ("[B]ut for Respondent's illegal discrimination, Complainants would have enjoyed a stable life in Respondent's townhouse.").

Courts have found that alternate housing must be comparable in location, amenities, and features. See Morgan, 985 F.2d at 1458 (Comparable home for sale in same mobile home park was correct measurement despite fact that complainants chose not to live there and instead purchased a cheaper townhome in a different area); see also Heifetz and Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications*, 26 J. Marshall L. Rev. 3, 9 (1992). ("Numerous factors determine comparability, such as cost, size, style, composition, structural integrity, location, and proximity to transportation, schools, and cultural facilities."). Although the record does not support the conclusion that the Clark property is a reasonably comparable dwelling to Respondent's property, the record also does not provide a better property to use as an alternative. The Clark property was not reasonably comparable in location, proximity to shopping, cultural facilities or schools. In particular, it was not in a school district with an adequate gifted program for the Potter's son. Nevertheless, the record does not provide a viable alternative and prior decisions have calculated increased rent based on the property a complainant actually found despite lack of comparability. See Decision at 6, fact #43; see also, Sams v. United States Dep't of Hous. & Urban Dev., 1996 U.S. App. LEXIS 449 at *12 (4th Cir. Jan. 16, 1996) (affirming ALJ decision when: "In considering the effects of the Petitioners' denial of housing on the Paul family, the ALJ compared Sams" house to the apartment the Paul's were forced to rent."). In Morgan, respondents argued against the comparable property used because it was larger and had more upgrades and was thus higher priced because it was more desirable. See Morgan, 985 F.2d at 1458 (holding that awards for

alternative housing are appropriate as long as the amount is reasonable and not a windfall). In contrast to Morgan, the Clark property in this case is not an ideal comparison because it is much less desirable than Respondent's property.

The cost of alternative housing is calculated using a period of twelve months, the length of the lease about which Respondent refused to negotiate, or thirteen months, as up to the date of the initial decision. See Trial Exhibit 6. In Sams, the ALJ extended the period of liability beyond twelve months because "[r]espondents did not prove that the lease would have only been for one year" and complainants had intended to stay long term. HUD v. Sams, HUDALJ No. 03-92-0245-1 at *13 (HUD ALJ Mar. 11, 1994); aff'd, 1996 U.S. App. LEXIS 449 (4th Cir. 1996); see also HUD v. Gruen, HUDALJ 05-09-1375-8, 2003 HUD ALJ LEXIS 40, *16 (HUD ALJ Feb. 27, 2003) (awarding $18,550 for increased alternative housing costs for a period of 2 years and 8 months until the date of decision). Here, Complainants moved to the Cody area with the intent of raising their children there and staying long term. See Transcript at 103, ln. 25. Using thirteen months of the increased rental cost for an alternative property is supported by the law and the record. The difference in rent of the Clark property as compared to the Draw Street property for thirteen months results in an award of $3,250. The Secretary finds this award reasonable, given the Complainants continued need for reasonably comparable dwelling in Cody. Therefore, the total tangible damage award is modified to $4,750.[1]

b. The ALJ's award for emotional distress and inconvenience damages is modified.

i. The Respondent's actions were intentional.

The Secretary finds the ALJ erroneously relied upon lack of an intentional act to lower the damage award for two reasons. First, such reliance misconstrues the law. Second, the ALJ ignores his own findings that Respondent did in fact intentionally discriminate against Complainants.

Malicious intent or an egregious act may serve as a factor to evaluate the victim's reaction to the discrimination and in turn increase a damage award for emotional distress injuries. See HUD v. Parker, 2011 HUDALJ LEXIS 15, *19 (HUD ALJ Oct. 27, 2011) (An intentional, particularly outrageous or public act of discrimination generally justifies a higher emotional award, because such an act will "affect the plaintiff's sense of outrage and distress."). However, the lack of such a finding does not minimize or lower the damage award for injuries *actually suffered* by Complainants. See, e.g., HUD v. Godlewski, 2007 HUD ALJ LEXIS 67, *11, 16 (HUD ALJ Dec. 21, 2007) (rejecting argument that damages be reduced because Respondent only refused to rent after complainant "cursed out" respondent for discriminating and instead holding that "[t]he key to the claim for damages is that the distress or loss must be caused by the act of discrimination"); See also, Sams, HUDALJ No. 03-92-0245-1 at *11 (specifically

[1] The Secretary upholds the ALJ's award of $1,500 for out-of-pocket losses as pertains to gas expenditure. See Decision at 15. However, that award does not compensate for the intangible elements of the inconvenience.

rejected this kind of punitive theory argument). Instead, damages for fair housing violations are calculated under a compensatory theory that looks to the victim's reaction to the conduct as opposed to a punitive theory focused on the discriminator's conduct. See Heifetz, 26 J. Marshall L. Rev. at 6 (1992).

Here, the ALJ misconstrued the law and focused on how Respondent's intent did not warrant a substantial award, and failed to award sufficient compensatory damages for Complainants' actual injuries. See Decision at 17, nt. 13 ("a higher award requires an intentional act." citing Parker, 2011 HUDALJ LEXIS at *7).

In addition, the ALJ did hold Respondent intentionally discriminated against Complainants based on familial status. He stated:

> Respondent was motivated by her intent to impermissibly discriminate against families with young children. Indeed, Respondent testified that it would have been 'very hard' for Respondent to rent the Draw Street Property to a family with a young child. The purpose of Respondent's questions to Mrs. Potter during the June 10th conversation was to ascertain whether Mrs. Potter had young children. Had Mrs. Potter told Respondent she had a baby, Respondent would have been hesitant to rent to her and would have told her that. Respondent's discriminatory intent was integral in her refusal to negotiate with Complainants. Decision at 13.

Once the ALJ found Respondent intentionally violated the Act, he cannot then minimize the damages awarded because of her lack of intent. See HUD v. Corey, HUDALJ 10-M-207-FH-27, 2012 HUD ALJ LEXIS 26, *10-12 (HUD Sec'y Aug. 15, 2012) (The ALJ decision on damages was overturned because, inter alia, it was inconsistent in finding evidence of intentional discrimination as to liability while minimizing damage award because conduct did not reflect 'malicious intent.').

ii. Complainants inconvenience and emotional distress resulting from the discrimination warrants a higher award for intangible injuries.

After review, the Secretary modifies the ALJ's award for emotional distress and inconvenience damages because the ALJ failed to compensate for injuries actually incurred by Complainants. The court in Morgan recognized that inconvenience damages can be awarded if adequately specified in the record. See Morgan, 985 F.2d at 1459. Damages for emotional distress may be based on an inference drawn from the circumstances of the case, as well as on testimonial proof. See Johnson v. Hale, 13 F.3d 1351, 1352 (9th Cir. 1994) (concluding that "compensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms").

The ALJ appears to have awarded $750 to Complainants based solely on Mrs. Potter's "tears" on June 10, 2011. See Decision at 17. The ALJ incorrectly emphasized factors not relevant to the emotional distress suffered by Mrs. Potter, stating a larger

damage award was not justified because "there are no allegations (and no proof) of difficulty sleeping, weight loss, excessive noise, lawless neighbors, need for medical assistance, etc." See id. However, these conditions need not be present for a non-trivial award for intangible injuries when familial status discrimination has occurred. See HUD v. Gruen, HUDALJ 05-09-1375-8 at *19-20 (awarding a complainant who "appeared to be a person of strong constitution" $10,000 for becoming "very upset," "angry," and "insulted" after he was denied rental because of his four year old child even though he had no signs of difficulty sleeping, weight loss, excessive noise, lawless neighbors, need for medical assistance); see also HUD v. Wooten, HUDALJ 05-99-0045-8, 2007 HUD ALJ LEXIS 68 (HUD ALJ 2007) (awarding $10,000 in emotional distress damages for complainant becoming "very upset," "angry," and "insulted" when landlord ended the phone inquiry upon learning she had children, but with no additional proof of difficulty sleeping, weight loss, excessive noise, lawless neighbors, need for medical assistance, etc.).

In addition, courts have considered the inconvenience or loss of housing opportunity resulting from inferior alternative housing apart from and in addition to purely emotional injuries, even when awarding one total intangible damage amount. See HUD v. Sams, HUDALJ No. 03-92-0245-1 at *13 (HUD ALJ Mar. 11, 1994); aff'd, 1996 U.S. App. LEXIS 449 (4th Cir. 1996) (the emotional impact of the discrimination is "entirely separate from the intangible difference in values between the subject [respondent's] property and the alternative housing.") For example, the ALJ in Sams first compared the respondent's property to the alternative housing and found: "Both [c]omplainant parents and [c]omplainant children lost the opportunity to live in, what was for them, an ideal environment, and they must be compensated for that lost opportunity." Id. at 12-13 (noting the alternative housing did not meet complainants' goal of a secluded neighborhood with a safe yard and with a design amenable to home schooling). The ALJ then turned to discuss the emotional impact of being denied such housing and awarded a total amount for both the lost housing opportunity and the distress. See id. at 13-14 (awarding $7,500 per parent, $2,000 for each of the four older children and $1,000 for the infant).

Similar to Sams, where the alternative housing did not provide space for home schooling, other courts have recognized that lost education benefit is a significant element to consider when evaluating the intangible differences of alternative housing. See Gore, 563 F.2d 159, 164 (5th Cir. 1977) (instructing district court to consider inability to enroll child in desired school district when assessing emotional distress damages); see also, HUD v. French, HUDALJ 09-93-1710-8, 1995 HUD ALJ LEXIS 38, *41-42 (HUD All Sept. 12, 1995) (noting that "[c]omplainant testified that she looked forward to eventually putting her daughter into a preschool program in a school in the Lincoln Unified School District, the best in Stockton" and concluding that familial status discrimination is more injurious where features, such as location, school district, and shopping, are particular to a property). The ALJ here acknowledged the Complainants desired to be in the Cody school district, but found it an injury "not severe enough" to merit an award. Decision at 19.

In contrast, courts have overturned inconvenience claims not because inconvenience cannot be considered as part of the total intangible injuries, but because the inconvenience was not sufficiently demonstrated. See Baumgardner v. HUD *ex rel.* Holley, 960 F.2d 572, 581 (6th Cir. 1992) (overturning a separate award for inconvenience apart from emotional distress because no financial loss for inconvenience was shown and complainant only testified he made 20 additional calls about rentals over the course of one year); see also Morgan, 985 F.2d at 1459 (inconvenience and emotional distress not adequately specified when mobile home park changed discriminatory property after ten days and complainant's chose not to live in the alternative housing for independent reasons). Unlike the cases cited above, Complainants experienced significant inconvenience injuries, and the record demonstrates injuries beyond the typical aggravations of relocating.

The nominal award of $750 does not compensate Complainants for the actual intangible injuries caused by Respondent's intentional discrimination. After the June 10th call, Mrs. Potter became "so disappointed" and "upset." CP Reply Br. at 6, Transcript at 43, ln. 24-25. The ALJ found that she cried and had "hurt feelings" but also that factors unrelated to Respondent's violation caused her to "jump to the worst conclusion" by assuming that Respondent meant she could deny housing to Complainant *and her children* instead of just herself when Respondent ended the call with "I can and I will [click]." See Decision at 10-11. However, the ALJ himself agreed with Mrs. Potter's "worst conclusion" and found, specifically in regards to the "I can and I will" statement, that an ordinary listener "could easily conclude" it was indicating a preference, limitation, or discrimination based on familial status. Id. at 11, nt. 8. Mrs. Potter was correct to understand that Respondent intended not to rent to her family because she had a toddler. Id. at 13. Her tears and resulting distress are directly caused by Respondent wrongfully denying housing during an especially vulnerable time. The rental market in Cody is scarce[2] and Complainants needed housing before Mr. Potter started his job in Cody in July, 2011. Id. at 5, facts #18-20, and 10. Mrs. Potter's emotional distress was more than just tears.

Mr. Potter also experienced emotional distress. He was discouraged about the family's rental prospects in Cody and Respondent's action contributed to his negative feelings about renting from private owners. See Transcript at 94, ln. 18-19, and 101, ln. 23-25; see also Parker, 2011 HUD ALJ LEXIS at *23 (finding that "distrust" can be part of "damaging emotional toll" and awarding tester complainant $5,000 for emotional distress after race discrimination). As is made clear by Mr. Potter's testimony, Cody was the ideal environment for his family, not only because of the amenities and the schools, but also because he served the Cody community as a deputy sheriff. See Transcript at 100, ln. 21-25; 101 ln. 1-3. ("Clark, there isn't much of a community. It's a bunch of houses that they call a town. There's nothing there. Being involved in Cody, it's nice because it's actually a community that I serve, and I get to see a lot of people that I can help and stuff and just be around. And it's a beautiful town. If we need groceries, five minutes out and get them. It's so much more. It's better.") Not only did Complainants

[2] Respondent herself was aware of the scarcity of the Cody rental market, and understood that she could "pick and chose a good renter." See Deposition Transcript at 37, ln. 10.

"los[e] the opportunity to live in, what was for them, an ideal environment," but that environment was made less ideal because of the worry, stress, and distrust once the family eventually was able to move to Cody. See CP Petition at 8 (quoting Sams, HUDALJ No. 03-92-0245-1 at *13). Respondent's discrimination denied Complainants the chance of "being settled in one place." Transcript at 103, ln. 7. Instead, Respondent's actions have contributed to Mr. Potter's feelings of doubt: "are we supposed to be here or not?...I think it's beautiful here and I want to raise my kids, [but] it seemed like you're just not wanted here." Trans. 102, ln 24-25. Therefore, the record provides substantial evidence that Complainants experienced "distress which exceeds the normal transient and trivial aggravation attendant to securing suitable housing." See Morgan, 985 F.2d at 1459 (citing Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973)). Here, Mr. and Mrs. Potter experienced the stress of being discriminated against at a particularly vulnerable time.

We find Wooten instructive here as it also involved a refusal to negotiate after landlord learned of complainant's two children. The ALJ awarded $10,000 for complainant and $2,000 for each of the two children for emotional distress suffered despite the fact that "the nature of the discriminatory statement in Wooten was ambiguous enough, as the Government states, that it was only interpreted to be discriminatory after appeal to the 7th Circuit." Godlewski, 2007 ALJ LEXIS at 14 (citing Wooten, *decision on remand*, HUDALJ 05-99-0045-8 (HUDALJ Aug. 1, 2007). Even though the ALJ had, before remand, found the landlord's statements to not violate the Fair Housing Act, upon remand he found the following:

> [Complainant] testified that she was "very upset," "angry," and "insulted." (Tr. 56-7, 59, 61.) She stated that she had to take some time after the first phone conversation to calm down, needing her co-workers' help. (Tr. 57.) She also testified that she lost hope of finding an apartment thereafter, based in part upon her fears that having children would cause others to refuse to rent to her. (Tr. 60.) And she testified that she was further hurt and dismayed when she saw the apartment advertised again later, especially when she called, changed the composition of her family during the call, and was then accepted. (Tr. [*12] 61, 67.) Wooten, 2007 HUD ALJ LEXIS at *11-12 (HUD ALJ 2007).

Similar to Wooten, Mrs. Potter experienced the emotional impact of calling a second time to learn that property was still available for rent. See Decision at 6, fact #36. That fact, along with the others cited above, demonstrates that a higher award is supported by the record.

An award of $750 to compensate Complainants for the six months of inconvenience experienced at the Clark property is also inadequate based on the record. The basic test for inconvenience damages is not to put the complainants back in the same position they were in before beginning to search for rental housing; rather it is to put them in as nearly the same position as they would have been had they not been wrongly denied rental housing. See Godlewski, 2007 HUD ALJ LEXIS 69, at *5. Rather than follow such precedent, the ALJ discounted his own inconvenience findings by

erroneously comparing Mr. Potter's commute time from Clark to Cody to the 30 mile commute he had previously when the family lived in LaGrange. See Decision at 18, nt. 14. Rather, the correct test is comparing the Clark experience with the experience they would have had had they rented Respondent's property. With respect to the inconvenience between these two living situations, the ALJ found the following:

> Clark is a very small town that does not offer many of the amenities the family required. To attend church, go to the doctor, or buy groceries, Complainants had to travel to Cody. Mr. Potter also had a longer commute for work because the Park County Sherriff's Department was in Cody. The longer commute took some of Mr. Potter's time away from spending time with his family. Decision at 17-18.

Complainants were all affected by the inconvenience of living for six months at the Clark property. They all had to travel an increased 72 miles per round trip each time they needed to go to work, shopping, church, or a doctor's appointment. See Transcript at 59, 7-17; 62, 12-23. Using the exact address for Respondent's property provided in the record and Mr. Potter's work location, his commute would have been 1.1 miles each way. See Hearing Exhibit 6; Transcript at 61, 17-18. Thus, Mr. Potter alone experienced a daily work commute that added up to approximately 8,640 additional miles over the course of six months, which would have equaled approximately 148 hours if traveling at normal speeds. He testified, however, that weather often slowed his travel time as winter months approached. See id. at 61, 18-23. This inconvenience injury caused additional stress to both Mr. Potter and to the family due to his increased absence. See id. at 102, 11-14. These facts of inconvenience were completely discounted by the ALJ when awarding the $750 for Mrs. Potter's emotional distress. See Decision at 17.

Finally, the award of $750 fails to compensate for the lost educational opportunity, despite the ALJ's finding:

> Additionally, Complainant's nine year-old son also lost the benefit of attending a school with a program for gifted children for a period of four months. Complainants testified that their son was gifted and eligible for a program catering to advanced children. However, the Clark Property was not located in a school district that offered such a program. Decision at 17-18.

Complainants had learned of this gifted program while living in LaGrange, and that it was offered at only certain schools throughout the state; this program was a main reason why Complainants wanted to raise their children in Cody. See Transcript at 59, 23-24; 60, 4-25; see also id. at 97, ln. 14-15 ("The reason we moved to Cody was, one of the reasons, was for the special program for my son."). The Clark property did not have a local elementary school and instead bussed children across the state line to Montana. See id. at 60, ln. 1-3. Mr. Potter testified that the Montana school teachers "said they never had a kid of his intelligence there and they had nothing they could offer him." Id. at 97, ln. 16-18. The gifted Potter child also experienced trouble adjusting due to starting a new school in Cody during the middle of fourth grade. See id. at 100, ln. 16-18 ("[h]e has kind of been the outcast because he had to start the school in the middle of the school year.").

Mr. Potter was also denied the opportunity to participate in coaching wrestling and other extracurricular events at the Cody school, which he began doing as soon as the family moved into Cody. Id. at 100, ln. 2-10. Here, Complainant's eldest child lost half of a school year in an inferior school when, but for Respondent's discrimination, he would have been in the gifted program in Cody. The ALJ also ignored this intangible injury of lost educational opportunity when assessing the $750 award.

In valuing Complainants' injuries, a comparison of the damage awards in Wooten, French, and Sams is informative. All three cases involved familial status discriminatory statements and a refusal to negotiate. The intangible award in Wooten was only for emotional distress, not additional inconvenience or loss of educational opportunity. See, Wooten, HUDALJ 05-99-0045-8, 2007 HUD ALJ LEXIS 68 (awarding $10,000 in 2007). The award in Sams was for emotional distress and significant inconvenience where the complainants continued to live in inferior alternative housing up to the date of decision, over two years later. See, Sams, HUDALJ No. 03-92-0245-1 (awarding $24,000 in 1994). The award in French was for loss of educational opportunity and inconvenience, where the inconvenience portion involved only an additional five to ten minute commute. See, French, HUDALJ 09-93-1710-8, 1995 HUD ALJ LEXIS 38 (awarding $5,000 in 1995). Here, Complainants lost a preferred school district, like in French, suffered significant inconvenience like in Sams, but only until moving again into Cody, and had nearly identical emotional reactions as in Wooten. Accordingly, the total intangible damage award is modified to $15,000.

II. The ALJ's order for injunctive relief is modified.

Upon a finding that a respondent has engaged in a discriminatory housing practice, the ALJ may order injunctive or other equitable relief. 42 U.S.C. § 3612(g)(3). The ALJ ordered HUD to provide, at no cost to Respondent, training on Fair Housing issues to any of Respondent's agents and tenants at a suitable location for attendees, in or around Cody, WY, within 180 days of the date on which his Order becomes final. See Decision at 22.

The Charging Party argues that providing fair housing training in Cody, WY, is contrary to law and will impose significant costs on and use substantial resources of HUD's Denver office. See CP Petition at 12; Decl. of Amy Frisk, *Director of the Fair Housing Enforcement of Oversight* for Region VIII. Respondent indicates that she has turned all management of her rental properties over to her son and agent, Kevin Dunn, who maintains a residence in Denver. See Resp. Reply to Petition.

After review, the Secretary agrees with the Charging Party that the ALJ's injunctive relief is both contrary to law and unduly burdensome to the Department. Injunctive relief relating to the ultimate outcome of a lawsuit may be issued only against a respondent or defendant found to have violated the law. See Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 822 (10th Cir. 2007) ("injunction requires showing actual success on the merits"); see, e.g., Parker, 2011 HUD ALJ LEXIS 15, at *29

("Upon finding that a respondent has engage in a discriminatory housing practice, the presiding ALJ may order injunctive or other equitable relief as necessary to make the complainant whole or to protect the public interest in fair housing"); Godlewski, 2007 HUD ALJ LEXIS 67 at *28 ("The [ALJ] may order injunctive or other equitable relief to make the complainant whole and to protect the public interest in fair housing"). In this case, the ALJ erroneously issued injunctive relief against the Charging Party by requiring them to conduct training in Cody, WY.

Additionally, requiring HUD to travel to Cody, WY, to conduct this training is unduly burdensome. Travel to Cody, WY, from Denver, CO, requires substantial staff time as well as HUD resources. See CP Petition at 12; Decl. of Amy Frisk. Thus, the Secretary modifies Part 6 of the Order to read:

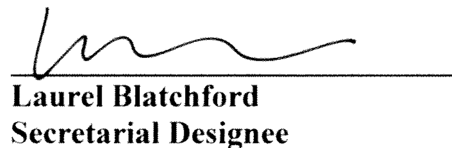
> Within 90 days of the date this Order becomes final, Respondent and Respondent's agent shall obtain fair housing training pertaining to a landlord's obligations under the Fair Housing Act and applicable state non-discrimination law. Respondent and Respondent's agent shall obtain HUD's Denver FHEO Regional Director's approval of the source of training at least thirty (30) calendar days before the date scheduled for such training. Respondent and Respondent's agent shall provide proof of such training to the FHEO Regional Director within one-hundred twenty (120) days of the effective date of this Order.

CONCLUSION

Upon review of the record in this proceeding, and based on analysis of the applicable law, the Charging Party's *Petition for Review* is hereby GRANTED in part and the ALJ's Initial Decision is MODIFIED as described.

IT IS SO ORDERED.

Dated this 26th day of October, 2012



Laurel Blatchford
Secretarial Designee