

LAW AND PUBLIC SAFETY

DIVISION ON CIVIL RIGHTS

Rules Pertaining to Disparate Impact Discrimination

Proposed New Rules: N.J.A.C. 13:16

Authorized By: Sundeeep Iyer, Director, Division on Civil Rights.

Authority: N.J.S.A. 10:5-8, 10:5-12, and 10:5-18.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2024-063.

Submit comments by August 2, 2024, to:

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The agency proposal follows:

Summary

The New Jersey Division on Civil Rights (the Division), in the Department of Law and Public Safety, enforces the Law Against Discrimination (“the Act” or “LAD”), N.J.S.A. 10:5-1 through 50. The Division proposes to adopt new rules, N.J.A.C. 13:16, Disparate Impact Discrimination, to clarify that the Act prohibits practices or policies that

result in a disproportionately negative effect on members of a protected class, even if these and are not intended to discriminate, unless it is shown that such practices or policies are necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is no less discriminatory, equally effective alternative that would achieve the same interest. This is known as “disparate impact” discrimination. The proposed new rules provide the standard for determining whether a practice or policy is unlawfully discriminatory and the burden-shifting framework applied to the standard for disparate impact claims arising in specific contexts.

The Act prohibits disparate treatment and disparate impact discrimination and bias-based harassment based on characteristics protected pursuant to the Act, including race, religion, national origin, ancestry, sex, sexual orientation, gender identity or expression, disability, and others, in employment, housing, places of public accommodation, credit, and contracting. Disparate treatment discrimination involves conduct that treats people differently based on their membership in a protected class, whereas, disparate impact discrimination involves policies and practices that disproportionately affect members of a protected class.

The proposed new rules set forth the disparate impact discrimination legal standard and the burdens of proof required in disparate impact discrimination claims, largely codifying existing State and Federal case law. The standards and burdens of proof mirror disparate impact discrimination analyses New Jersey and Federal courts, as well as the Division, have conducted when reviewing claims of disparate impact discrimination pursuant to the Act. The New Jersey Supreme Court acknowledged in *Gerety v. Atlantic City Hilton Casino Resort*, 184 N.J. 391 (2005), that disparate impact claims are cognizable

pursuant to the Act. Even before *Gerety*, courts and the Division had long interpreted the Act to prohibit disparate impact discrimination. In addition to *Gerety* and other employment cases, the New Jersey Appellate Division analyzed a claim of disparate impact discrimination in housing in *In re Adoption of 2003 Low Income Housing Tax Credit*, 369 *N.J. Super. 2* (App. Div. 2004), and the Division analyzed disparate impact discrimination in the housing context in *Ricardo Moran v. Tower Management Services, L.P.*, N.J. DCR DOCKET NO. HB52WR-61415 (2019).

The proposed new rules codify the general legal standard used in these cases by providing that an employment, housing, housing financial assistance, place of public accommodation, or contracting practice or policy that causes a disparate impact on members of a protected class pursuant to the Act is unlawful and a violation of the Act, unless it is shown that such practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. New Jersey courts have often referred to this interest as a “legitimate business necessity” in business cases. For example, the New Jersey Supreme Court explained in *Gerety* that disparate impact “involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on the group than another and cannot be justified by business necessity.” The proposed new rules require a respondent to demonstrate a practice or policy is necessary to achieve a “substantial, legitimate, nondiscriminatory interest,” rather than a “legitimate business necessity,” to account for claims of disparate impact against non-business entities, such as non-profit organizations and government agencies. The proposed new rules mirror New Jersey and Federal disparate impact cases by providing that even if the practice or policy at issue is necessary to achieve a substantial, legitimate, nondiscriminatory interest,

it may still be unlawful pursuant to the Act if there is a less discriminatory, equally effective alternative practice or policy that would achieve the same interest.

The proposed new rules provide the burden-shifting framework for disparate impact discrimination claims pursuant to the Act and detail what each party is required to show to establish or refute disparate impact liability. In all contexts, a complainant challenging a practice or policy of a covered entity must show that the practice or policy has a disparate impact on members of a protected class. A complainant must do so using empirical evidence, meaning evidence that is not hypothetical or speculative. If the complainant meets this burden, they have established a *prima facie* case.

In the employment, public accommodations, and contracting contexts, if the complainant meets the burden of showing that the practice or policy results in a disparate impact on members of a protected class, the respondent has the burden of showing that the challenged practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. To meet this burden, a respondent must establish that the practice or policy is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests, where “substantial interest” means a core interest of the entity that has a direct relationship to the function of that entity; “legitimate interest” means that a justification for a challenged practice or policy is genuine, not false or pretextual; and “nondiscriminatory interest” means that a justification for a challenged practice or policy does not itself discriminate based on a protected characteristic. A respondent must also show that the practice or policy effectively carries out the identified interest. A justification that is not supported by empirical evidence will not meet the burden. An interest in

achieving diversity or increasing access for underrepresented or underserved members of a protected class may constitute a substantial, legitimate, nondiscriminatory interest.

In the employment context, whether a practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest means whether the practice or policy is job related and consistent with a legitimate business necessity. Pursuant to the proposed new rules, a practice or policy is job related when it is appropriately tailored to bear a demonstrable relationship to successful performance of the job. The determination of whether a party has met these burdens requires a case-specific, fact-based inquiry.

In the employment, public accommodations, and contracting contexts, if the respondent meets the burden of showing that the challenged practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, the complainant has the burden of showing that there is a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest. This burden-shifting framework aligns with case law analyzing disparate impact liability pursuant to the Act in the employment context.

In the housing and housing financial assistance contexts, the Division proposes a similar burden-shifting framework but places the burden of showing that there is not a less discriminatory, equally effective alternative means of achieving the housing provider or lender's substantial, legitimate, nondiscriminatory interest on the respondent at the final stage of the burden-shifting test. If the complainant meets the burden of showing the practice or policy results in a disparate impact on members of a protected class, the respondent has the burden of showing that the challenged practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less

discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest. To meet its burden of showing that there is not a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest, the respondent may, but is not required to, identify what policy or practice options it considered and how and why it decided to select the policy or practice it chose.

The Division's rulemaking to implement a more protective burden-shifting framework in the housing and housing financial assistance contexts aligns with how New Jersey courts and the Division have applied disparate impact liability in this context. In *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan*, the Appellate Division held that “[o]nce plaintiff makes a prima facie case of adverse impact, ‘the defendant must prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect.’” 369 *N.J. Super.* 2, 30–31 (App. Div. 2004). The Appellate Division, therefore, placed the burden on the respondent to establish that there was not a less discriminatory, equally effective alternative. A 2019 Division Finding of Probable Cause similarly placed the burden to show that no less discriminatory alternative practice or policy would serve the housing provider's interest on the housing provider. In *Ricardo Moran v. Tower Management Services*, the Division concluded that “after a prima facie case is established, the burden shifts to the housing provider to demonstrate that the practice serves a legitimate non-discriminatory business interest, and that no alternative policy or practice could be adopted that would serve the housing provider's legitimate business interest with less of a discriminatory impact against members of a protected class.” *Ricardo*

Moran v. Tower Management Services, L.P., N.J. DCR DOCKET NO. HB52WR-61415 (2019).

Requiring the respondent in housing cases to bear the burden of proving there is not a less discriminatory alternative also draws strong support from several unique features of the housing context. The New Jersey Supreme Court has stated that it will “not hesitate[] to depart’ from federal precedent” in interpreting the LAD ““if a rigid application of its standards is inappropriate under the circumstances.”” *Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 600-01 (1993) (quoting *Grigoletti v. Ortho Pharm. Corp.*, 118 N.J. 89, 107 (1990)). Placing the burden on the respondent to prove there is not a less discriminatory alternative is appropriate in light of the particularly stark information asymmetry between housing providers and victims of housing discrimination, as housing providers are far more likely to have access to information about the challenged practice or policy, their interests, what potential alternative practices or policies are available, and whether an alternative could serve their interests while having less discriminatory effects. Victims of housing discrimination, by contrast, may not have meaningful access to information about potential alternatives, and the increasing use of tenant screening reports and online platforms in housing sale and rental markets has made it especially difficult for complainants to access information about specific housing providers’ practices and policies. Placing the burden on the respondent at this stage of the analysis in housing cases is also appropriate in light of the particularly significant imbalance in access to legal representation in housing cases: landlords have legal representation in 90 percent of housing cases involving eviction, for example, while renters have legal representation in less than 10 percent of cases. That stark imbalance means that housing providers are far better situated to identify possible

alternatives than claimants. Moreover, placing the burden on the respondent at this stage in housing cases is appropriate in light of the State Supreme Court's longstanding recognition that housing is among the "most basic" rights, *S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp.*, 67 N.J. 151, 178 (1975), and that equal access to housing is necessary for individuals to "be in a position to take an active and beneficial role in the cultural, social and economic life of the community." *Levitt & Sons, Inc. v. Div. Against Discrimination in State Dep't of Ed.*, 31 N.J. 514, 533 (1960). In light of these unique characteristics of the housing context, the Division has placed the burden of showing that there is not a less discriminatory, equally effective alternative on the respondent.

The proposed new rules provide examples of practices and policies in each context that may result in a disparate impact on members of a protected class pursuant to the Act.

The following is a summary of the proposed new rules:

Proposed new N.J.A.C. 13:16-1, Purpose, Construction, and Definitions, sets forth the general interpretive guidelines for the proposed new rules, including the purpose, construction, severability, and key definitions relating to the proposed new rules.

Proposed new N.J.A.C. 13:16-1.1 sets forth the purpose of the chapter.

Proposed new N.J.A.C. 13:16-1.2 sets forth the general requirement that the remedial provisions of the Act be broadly construed and that provisions of the chapter are severable.

Proposed new N.J.A.C. 13:16-1.3 sets forth the definitions for the chapter. The Division proposes defining the following terms as they are defined in the Act, for consistency: "Attorney General," "Director," "disability," "Division," "employee," "employer," "employer agency," "gender identity or expression," "labor organization,"

“person,” “place of public accommodation,” “publicly assisted housing accommodation,” “race,” “real estate broker,” “real estate salesperson,” “real property,” “unlawful discrimination,” and “unlawful employment practice.” The Division proposes defining several additional terms necessary for understanding the proposed new rules. The defined terms are as follows: automated employment decision tools, complainant, consumer credit history, county correctional facility, covered entity, criminal record, exclusionary discipline, housing financial assistance, housing provider, isolated confinement, law enforcement agency, lending institutions, legitimate interest, municipal jail, nondiscriminatory interest, protected characteristics, real estate, real estate-related transaction, respondent, restorative justice practices, source of lawful income, State correctional facility, and substantial interest.

Proposed new N.J.A.C. 13:16-2, Disparate Impact Discrimination, sets forth the standard for disparate impact liability pursuant to the Act; provides the burden-shifting framework for claims; reiterates the private right of action established pursuant to the Act for all forms of discrimination, including disparate impact discrimination; and lists examples of evidence that may be relevant in such claims.

Proposed new N.J.A.C. 13:16-2.1 clarifies that practices and policies with a disparate impact are violations of the Act, unless such practices or policies are necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is no less discriminatory, equally effective alternative that would achieve the same interest. A practice or policy has a disparate impact where it actually or predictably results in a disproportionately negative effect on members of a protected class. A practice or policy cannot be found to predictably have a disparate impact unless it is approved, announced,

or otherwise finalized and there is evidence that the practice or policy will have a disparate impact, even though it has not yet been implemented. The proposed new section clarifies that any person claiming to be aggrieved by disparate impact discrimination, or the Attorney General, the Director of the Division, the Commissioner of the Department of Labor and Workforce Development, or the Commissioner of the Department of Education may bring a complaint of discrimination based on disparate impact liability pursuant to the Act to the Division or initiate suit in Superior Court.

Proposed new N.J.A.C. 13:16-2.2 sets forth the burdens of proof and evidentiary standards used in disparate impact discrimination claims pursuant to the Act. The proposed new rule lists types of evidence, including national, State, and local statistical data; applicant, employee, or tenant or resident files or data; criminal justice system data and police and court records; demographic or census data; labor market data; correctional facility data and records; law enforcement records and data; and school disciplinary data, that may be relevant in disparate impact claims.

Proposed new N.J.A.C. 13:16-3, Employment, sets forth specific disparate impact liability provisions as they relate to the employment context.

Proposed new N.J.A.C. 13:16-3.1 sets forth the standard pursuant to which employment practices and policies, which include practices and policies of employers, labor organizations, and employment agencies, may be unlawful if they have a disparate impact on members of a protected class, unless a respondent shows that they are necessary to achieve a substantial, legitimate, nondiscriminatory interest. Whether an employment practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest is equivalent to whether the practice or policy is job related and consistent with a

legitimate business necessity. An employment practice or policy may still be prohibited if necessary to achieve a substantial, legitimate, nondiscriminatory interest if a complainant shows there is a less discriminatory, equally effective alternative that would achieve the same interest. The section does not preclude affirmative efforts to utilize recruitment practices to attract an individual who is a member of an underrepresented or underserved member of a protected class covered pursuant to the Act.

Proposed new N.J.A.C. 13:16-3.2 sets forth guidelines for covered entities in the employment context to conduct advertising and recruitment efforts in a way that does not cause a disparate impact and that ensures that all persons are given fair and adequate notice of job vacancies, membership opportunities, and employment referral opportunities. For example, an employer's practice of relying on word-of-mouth recruitment by a mostly homogenous work force may be a prohibited recruitment practice or policy if its use results in a disparate impact on potential applicants who are members of a protected class by limiting recruitment to the networks or communities of its current employees, unless the employer can show that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and the complainant cannot show that there is a less discriminatory alternative. The proposed new rule also provides examples of pre-employment screening and interview practices and policies that may result in a disparate impact on members of a protected class. Such practices and policies include the use of automated employment decision tools to make employment decisions.

Proposed new N.J.A.C. 13:16-3.3 establishes that employee selection procedures are subject to disparate impact analysis pursuant to the proposed new chapter and incorporates by reference, the Uniform Guidelines on Employee Selection Procedures, 29

CFR 1607, applying it to all protected characteristics pursuant to the Act. The Uniform Guidelines on Employee Selection Procedures were issued by the U.S. Equal Employment Opportunity Commission (EEOC), U.S. Department of Labor (DOL), U.S. Office of Personnel Management, U.S. Department of Justice, and the U.S. Department of the Treasury to establish a uniform position on employee selection for the agencies enforcing Federal equal employment opportunity laws. Where there is a conflict between such guidelines and the proposed rules, the proposed rules control. Upon request, the Division will make the guidelines available for public inspection and make available a printed copy of the guidelines.

Proposed new N.J.A.C. 13:16-3.4 identifies a number of employment practices that may have a disparate impact on protected classes and, if so, would be prohibited unless an employer or other covered entity shows they are necessary to achieve a substantial, legitimate, nondiscriminatory interest. Examples include practices that may disparately impact applicants or employees based on national origin or ancestry, including language restrictions in the workplace and citizenship requirements, with the exception of citizenship requirements that are required or expressly permitted by law or regulation. The proposed new rule also provides examples of other requirements, such as height and/or weight requirements, which may result in disparate impact on applicants and employees on the basis of gender, national origin, ancestry, or disability, and health or physical ability requirements, which may disproportionately impact applicants and employees based on gender, age, or disability. Specific dress or appearance requirements may have a disparate impact on members of a protected class based on religion. For example, a prohibition on hats or head coverings may have a disparate impact based on religion for those who wear

yarmulkes, hijabs, turbans, or other religious articles or articles of faith or maintain religiously mandated unshorn hair/beards. Additionally, dress requirements that do not allow employees to dress in a way that affirms their gender identity or allows them to express their gender identity may have a disparate impact based on gender identity and expression. Similarly, a requirement to possess a driver's license may have a disparate impact on applicants based on disability and national origin because many people with disabilities and those who are immigrants may not possess a driver's license. Additionally, certain employment practices or policies may have the effect of discriminating against applicants or employees on the basis of pregnancy, breastfeeding, or chestfeeding.

The proposed new rule provides that, with the exception of employment practices that are otherwise required pursuant to Federal or State law, rule, or regulation, an employment practice or policy of excluding from consideration, an applicant based on criminal history information may have a disparate impact based on race (particularly for Black applicants), national origin (particularly for Latinx/e applicants), or ancestry. Racial disparities in New Jersey's criminal justice system are well documented. At the end of 2021, 61 percent of the people incarcerated in New Jersey were Black and only 22 percent were white, even though Black people made up only 13 percent of the population of New Jersey at that time. Black people were incarcerated at a rate more than 12 times higher than the rate at which white people were incarcerated, and Latinx/e people were incarcerated at a rate of nearly twice that of white people. Therefore, any practice or policy of excluding job applicants based on criminal history information may have a disparate impact based on race or national origin.

An employer, labor organization, or employment agency that eliminates applicants

from consideration because of a criminal record has the burden to show that the practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, the practice or policy is still unlawful if the complainant can show that there is a less discriminatory, equally effective alternative that would achieve the same interest. A practice or policy that contains an individualized assessment of the facts and circumstances of the applicant's criminal record and other mitigating information is likely to be a less discriminatory alternative to a policy or practice that excludes individuals from employment or the application process based on criminal history information without conducting an individualized assessment. The proposed new rule provides a list of factors that may be relevant to such an assessment.

Proposed new N.J.A.C. 13:16-4, Housing, Real Estate, and Housing Financial Assistance, sets forth specific disparate impact liability provisions as they relate to housing, real estate, and housing financial assistance.

Proposed new N.J.A.C. 13:16-4.1 explains that practices or policies relating to housing and real estate transactions, which include practices and policies of housing providers and real estate brokers, agents, and salespeople, are unlawful pursuant to the Act if they have a disparate impact on members of a protected class, unless a respondent shows they are necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is not a less discriminatory, equally effective alternative that would achieve the same interest.

Proposed new N.J.A.C. 13:16-4.2 sets forth guidelines for covered entities in the housing context to conduct advertising and recruitment efforts in a way that does not cause a disparate impact and that gives fair and adequate notice of residential vacancies and

referral programs or opportunities. For example, a housing provider's practice of relying on word-of-mouth recruitment by a mostly homogenous resident population may be a prohibited practice or policy if its use results in a disparate impact on potential residents who are members of a protected class by limiting recruitment to the networks or communities of its current residents, unless the housing provider can show that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is not a less discriminatory, equally effective alternative that would achieve the same interest. The proposed new rule acknowledges that owners or operators of special needs and supportive housing, age-restricted housing, or affordable housing, including affordable housing developments that provide priority to veterans, may target advertising practices and policies to the specific populations served by that housing, but notes that any practices and policies that have a disparate impact on members of protected classes other than those the housing is intended to serve may still violate the Act.

Proposed new N.J.A.C. 13:16-4.3 identifies a number of sale and rental practices that may have a disparate impact on protected classes and, if so, would be unlawful unless a housing provider shows they are necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is not a less discriminatory, equally effective alternative that would achieve the same interest. Examples include minimum income requirements, financial standards, or income standards that may have a disparate impact on people who seek to pay rent with forms of government rental assistance that are available only to people with low incomes, including, but not limited to, Section 8 housing choice vouchers, and excluding from consideration applicants based on criminal history or credit history.

The proposed new rule provides that, with the exception of housing practices that are otherwise required by Federal or State law, rule, or regulation, a housing practice or policy of excluding from consideration an applicant based on criminal history information may have a disparate impact based on race (particularly for Black applicants), national origin (particularly for Latinx/e applicants), or ancestry. Racial disparities in New Jersey's criminal justice system are well-documented. At the end of 2021, 61 percent of the people incarcerated in New Jersey were Black and only 22 percent were white, even though Black people made up only 13 percent of the population of New Jersey at that time. Black people were incarcerated at a rate of more than 12 times higher than the rate at which white people were incarcerated, and Latinx/e people were incarcerated at a rate nearly twice that of white people. Therefore, any practice or policy excluding housing applicants based on criminal history information may have a disparate impact based on race or national origin. A housing provider that eliminates applicants from consideration because of a criminal record would then have the burden to show that the practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, for example, an interest in protecting other residents. The housing provider must also show there is not a less discriminatory, equally effective alternative that would achieve the same interest. A practice or policy that contains an individualized assessment of the facts and circumstances of the housing applicant's criminal record and other mitigating information is likely to be a less discriminatory alternative to a practice or policy that excludes individuals from housing based on criminal history information without conducting an individualized assessment.

The proposed new rule provides that, with the exception of housing practices that are otherwise required by Federal or State law, rule, or regulation and any practice or policy

related to the sale of housing, a housing practice or policy that excludes housing rental applicants from housing because of information associated with their consumer credit history may have a disparate impact based on race or national origin, particularly against Black, Hispanic, and Latinx/e applicants. Disparities in consumer credit histories, including credit reports and credit scores, based on race and national origin are well documented. National studies, including studies conducted by Federal agencies like the Consumer Financial Protection Bureau and the Federal Reserve Board, have identified significant racial disparities in credit scores and concluded that Black and Hispanic individuals are significantly more likely than white individuals to not have credit scores at all. In 2017, the median credit score in predominantly white areas of Newark, New Jersey, was 615, while the median credit score in areas that were predominantly Black, Hispanic, and Latinx/e was 567. The stark racial wealth gap in New Jersey has also been widely reported. A 2020 report documented that the median net worth for white families in New Jersey is \$352,000 while the median net worth is \$6,100 for Black families and \$7,300 for Latinx/e families. This gap directly contributes to disparities in credit histories based on race and national origin.

If a rental housing applicant shows that a particular practice or policy related to consumer credit history results in a disparate impact based on race or national origin, a housing provider then has the burden to show that the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, for example, an interest in collecting rent on time, and that there is not a less discriminatory, equally effective alternative that would achieve the same interest. The proposed new rule lists examples of practices or policies for which a housing provider may not be able to satisfy its burden of showing that

the practice or policy achieves a substantial, legitimate, nondiscriminatory interest and that there are not less discriminatory, equally effective alternatives that would achieve the same interest, including a practice or policy of automatically refusing all rental housing applicants who have no credit score or a practice or policy of automatically refusing all rental housing applicants who have a credit score below a minimum threshold. A practice or policy that contains an individualized assessment of the facts and circumstances of the rental housing applicant's consumer credit history or credit score, along with other information bearing on the rental housing applicant's ability to reliably pay their rent, is likely to be a less discriminatory alternative to a blanket practice or policy that automatically excludes individuals from rental housing based on lack of credit history or a credit score below a minimum threshold without conducting an individualized assessment.

Proposed new N.J.A.C. 13:16-4.4 clarifies that real estate-related practices or policies of real estate brokers, agents, salespersons, and other covered entities, such as making available or unavailable a real estate-related transaction; establishing the price or other terms or conditions of a real estate-related transaction; and providing or refusing to provide information regarding a real estate-related transaction, are subject to the same disparate impact analysis as other housing practices.

Proposed new N.J.A.C. 13:16-4.5 clarifies that housing providers' residential property management practices and policies that have a disparate impact on members of a protected class are prohibited unless the respondent shows they are necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest. Residential property management practices or policies that

require a renter or buyer to violate or forgo a sincerely held religious practice or religious observance may have a disparate impact based on religion. For example, a residential community that does not provide a non-electronic means of entering or exiting the premises may result in a disparate impact for Jewish residents who do not use electricity while observing their Sabbath, who may not be able to enter or exit the premises on their Sabbath.

Proposed new N.J.A.C. 13:16-4.6 clarifies that lending institutions' housing financial assistance practices or policies, such as making available or unavailable the provision of housing financial assistance; establishing housing financial assistance terms or conditions; and the creation and application of criteria requirements, procedures, or standards for the review and approval of a real estate-related transaction, are subject to the same disparate impact analysis as housing practices, with the exception of evaluations of an applicant's consumer credit history where required for a Federal loan product or formula or practices or policies that enforce Federal guidelines.

Proposed new N.J.A.C. 13:16-5, Public Accommodations, sets forth specific disparate impact liability provisions as they relate to places of public accommodation, which include, generally, places open to the public.

Proposed new N.J.A.C. 13:16-5.1 provides that practices or policies of places of public accommodation are unlawful pursuant to the Act if they have a disparate impact on members of a protected class unless a respondent shows they are necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a practice or policy of a place of public accommodation may still be prohibited if a complainant shows there is a less discriminatory, equally effective alternative that would achieve the same interest.

Proposed new N.J.A.C. 13:16-5.2 clarifies that public accommodation practices or

policies related to an individual’s ability to wear religious garb or particular articles of faith may have a disparate impact on patrons or prospective patrons based on religion. For example, a policy prohibiting hats or head coverings may have a disparate impact based on religion for patrons or prospective patrons who wear yarmulkes, hijabs, turbans, or other religious garb or articles of faith. Those policies that include a requirement that all patrons wear particular clothing in order to participate in an activity may have a disparate impact based on religion for patrons or prospective patrons who cannot wear the required clothing for religious reasons. A prohibition on weapons may have a disparate impact based on religion for a Sikh patron or prospective patron who wears a kirpan. Such policies could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on religious beliefs.

Proposed new N.J.A.C. 13:16-5.3 clarifies that the policies and practices of educational institutions that operate as places of public accommodation are subject to a disparate impact analysis. The proposed new section provides that the use of zero tolerance policies or other disciplinary policies that exclusively or predominantly rely on exclusionary discipline for minor or subjective infractions, such as “insubordination,” “disrespect,” and “misbehavior,” may have a disparate impact based on race and other protected characteristics. Racial disparities in student discipline in New Jersey are well documented. Data from the New Jersey Department of Education (DOE) shows that in the 2019-2020 school year, 8.9 percent of all Black students in New Jersey public schools were suspended, compared to less than 2.7 percent of all white students. New Jersey DOE’s data for the 2017-2018 school year indicates that although only 17.8 percent of students with disabilities were Black, Black students accounted for 36 percent of suspensions amongst

students with disabilities. Research shows that educators tend to refer Black students for disciplinary action for more behaviors requiring subjective judgment than they do white students. A 2015 Stanford University study found that teachers were more likely to recommend more severe discipline, label students “troublemakers,” and anticipate greater future misbehavior from Black students than white students, despite the behavior being described in identical terms. A 2016 Yale University Child Study Center study found that teachers spent more time observing Black students when told to look for “challenging behavior,” and 42 percent of the teachers (68 percent more than expected by chance alone) said Black male students needed the most attention regarding such behavior. Therefore, a practice or policy of suspending students for minor or subjective infractions may have a disparate impact on students of color. The proposed new rule provides additional examples of educational practices or policies that may result in a disparate impact for students, such as a practice or policy that requires a student to violate or forgo a religious practice or religious observance as a term or condition of participating in the educational program or activity that may have a disparate impact based on religion and a practice or policy that limits or prohibits the use of any particular language or dialect by students, including, but not limited to, an English-only rule, that may have a disparate impact on students based on national origin or ancestry.

Proposed new N.J.A.C. 13:16-5.4 provides that law enforcement practices or policies of State and local law enforcement agencies are unlawful pursuant to the Act if they have a disparate impact on members of a protected class, unless a respondent shows they are necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a law enforcement practice or policy may still be prohibited if a complainant shows

there is a less discriminatory, equally effective alternative that would achieve the same interest. For example, a law enforcement agency's practices or policies to patrol or conduct checkpoints in specific geographic areas may have a disparate impact on members of a protected class who reside, work, or frequent those geographic areas. Similarly, a law enforcement practice or policy allowing an officer to use force against a person who does not comply with the officer's verbal directions without requiring consideration, when feasible, of whether the person's mental, physical, developmental, intellectual disability, or other conditions, such as the age of the person, affect the person's ability to communicate, or comply may have a disparate impact on people who have a disability. Additionally, a law enforcement practice or policy allowing an officer to use force against a person who does not comply with the officer's verbal directions without requiring the officer to consider, whenever feasible, whether a safe alternative to achieve law enforcement's objectives and gain voluntary compliance, like verbal commands, critical decision-making, tactical deployment, and de-escalation techniques can be used may have a disparate impact based on race.

Proposed new N.J.A.C. 13:16-5.5 provides that a State correctional facility, county correctional facility, and municipal jail practices or policies are unlawful pursuant to the Act if they have a disparate impact on members of a protected class, unless a respondent shows they are necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a State correctional facility, county correctional facility, or municipal jail practice or policy may still be prohibited if a complainant shows there is a less discriminatory, equally effective alternative that would achieve the same interest. For example, disciplinary practices or policies used by a State correctional facility, county

correctional facility, or municipal jail for disciplining incarcerated persons may have a disparate impact on members of a protected class. The practice or policy of using isolated confinement where not explicitly required by applicable statute, rule, or regulation may have a disparate impact based on race. Using isolated confinement has been shown to have a disparate impact based on race, with Black men and women overrepresented in solitary confinement. According to a 2018 study by the Association of State Correctional Administrators and the Liman Center for Public Interest Law at Yale Law School, there are racial disparities among women incarcerated persons placed in solitary confinement in New Jersey. While Black women make up 48.6 percent of the prison population in New Jersey, they make up 66.7 percent of those placed in solitary confinement. Accordingly, such practices and policies by State correctional facilities, county correctional facilities, or municipal jails that cause a disparate impact are unlawful, unless they are necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, they are still unlawful if the complainant can show that there is a less discriminatory, equally effective alternative that would achieve the same interest. Similarly, a State correctional facility, county correctional facility, or municipal jail's lack of a language assistance policy may have a disparate impact on incarcerated persons who do not speak English based on their national origin. For example, a State correctional facility's lack of a policy to ensure incarcerated persons who do not speak English have equal access to the facility's services may have a disparate impact on Latinx/e incarcerated persons who have limited English proficiency.

Proposed new N.J.A.C. 13:16-6, Contracting, sets forth specific disparate impact

liability provisions as they relate to contracting.

Proposed new N.J.A.C. 13:16-6.1 clarifies that contracting practices and policies of any person who is required to comply with N.J.S.A. 10:5-12 that have a disparate impact on members of a protected class are prohibited, unless a respondent shows they are necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a contracting practice or policy may still be prohibited if a complainant shows there is a less discriminatory, equally effective alternative that would achieve the same interest.

Proposed new N.J.A.C. 13:16-6.2 provides that contract bidding is subject to disparate impact analysis and identifies bid selection procedures or selection criteria that may have a disparate impact on members of a protected class, including word-of-mouth recruiting and the use of geographic location as selection criterion when that criterion leads to people of a protected class being screened out of consideration. The Division incorporates by reference the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607, applying it to all protected characteristics pursuant to the Act. The Uniform Guidelines on Employee Selection Procedures were issued by the U.S. Equal Employment Opportunity Commission (EEOC), U.S. Department of Labor (DOL), U.S. Office of Personnel Management, U.S. Department of Justice, and U.S. Department of the Treasury to establish a uniform position on employee selection for the agencies enforcing Federal equal employment opportunity laws. Where there is a conflict between such guidelines and the proposed rules, the proposed rules control. Upon request, the Division will make the guidelines available for public inspection and make available a printed copy of the guidelines.

As the Division has provided a 60-day comment period on this notice of proposal,

this notice is excepted from the rulemaking calendar requirement, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The Division believes the proposed new rules will have a positive social impact on the general public in the State of New Jersey, as well as employers and employees, housing providers and tenants and buyers, lending institutions and borrowers, places of public accommodations and patrons, and contractors and those with whom they contract. The proposed new rules set forth the disparate impact discrimination legal standard and the burdens of proof required in disparate impact discrimination claims, largely codifying existing State and Federal case law. Codifying disparate impact standards helps employers, housing providers, lending institutions, places of public accommodation, and contractors to clearly understand their legal obligations and may lead to a reduction in disparate impact discrimination in the State.

The Division believes there will be a positive social impact on people with a criminal record and those with no credit history or a low credit score because the proposed new rules clarify when employment and housing practices and policies regarding a person's criminal record, and housing practices regarding a person's credit history, may cause a disparate impact. This clarification may lead to employers and housing providers reconsidering how they rely on these factors when evaluating individuals for jobs or residences.

The proposed new rules would clarify the law for covered entities, as well, providing them with information on how to comply with the Act. The examples provided will enable them to better understand what practices or policies that result in a disparate

impact look like and how to avoid liability. The proposed new rules will enable covered entities to review current practices and policies that may unlawfully result in a disparate impact. The proposed new rules will have a positive effect on covered entities by educating them on their obligations pursuant to the Act and providing them with an opportunity to proactively curb disparate impact liability.

Economic Impact

The Division does not anticipate that the proposed new rules will have a significant economic impact. The proposed new rules may assist regulated entities in complying with existing legal obligations by clarifying policy implementation, existing practices, rights, obligations, and permissible and impermissible conduct, thereby reducing the need to retain legal or non-legal professional services to assist in complying with the Act. This may reduce the financial resources necessary for compliance. To the extent that a regulated entity has current practices or policies that result in disparate impact, they may need to devote resources to revise those practices or policies to comply with the Act. This should not be a new cost, however, because the proposed new rules do not establish new liability but simply clarify the existing disparate impact liability pursuant to the Act.

Federal Standards Analysis

The proposed new rules generally align with Federal laws, rules, regulations, and guidelines on disparate impact discrimination liability. The standard for disparate impact liability in the employment, public accommodation, and contracting contexts is the standard used by the U.S. Equal Employment Opportunity Commission (EEOC) in Title VII of the Civil Rights Act of 1964, at 42 U.S.C. § 2000e-2(k), and in the Uniform Guidelines for Employee Selection Procedures, at 29 CFR 1607. The standard for disparate

impact liability in the housing and housing financial assistance contexts is the standard used by the U.S. Department of Housing and Urban Development (HUD) as set forth in the Reinstatement of HUD's Discriminatory Effects Standard, 24 CFR 100 (2023). The standards regarding criminal history in housing are those set forth in the April 4, 2016 Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions.

The burden-shifting frameworks in the proposed new rules also generally align with the frameworks used at the Federal level, with the exception of the housing and housing financial assistance frameworks set forth in the proposed new rules. Pursuant to 42 U.S.C. § 2000e-2(k)(1), a Title VII disparate impact claim can be established if a complaining party meets its burden of proving that the employer's selection procedure causes a disparate impact, but the user fails to meet its burden of proving that its selection procedure is job related and consistent with business necessity; or even if the user meets its burden of proving that its selection procedure is job related and consistent with business necessity, the complaining party can still prevail by proving that there is an alternative procedure that will meet the user's needs with less of an adverse impact, but the user refuses to adopt it.

HUD's rule requires the complainant to prove that a challenged practice caused or predictably will cause a discriminatory effect. If the complainant makes this *prima facie* showing, the respondent must then prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant or respondent. If the respondent meets its burden, the complainant may still prevail by proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged policy or practice could be served by another practice that has a less

discriminatory effect. The rulemaking differs from HUD's rule by requiring the respondent to show that there is a no less discriminatory, equally effective alternative that would meet the interest, rather than requiring the complainant to show there is such an alternative. This aligns with the burden-shifting framework used by New Jersey courts and the Division to determine disparate impact liability pursuant to the LAD.

Jobs Impact

The Division does not anticipate that the proposed new rules will have any impact on the number of jobs in this State.

Agriculture Industry Impact

The Division does not anticipate that the proposed new rules will have any impact on the agriculture industry of this State.

Regulatory Flexibility Statement

The Division does not anticipate that the proposed new rules will impose any reporting or recordkeeping requirements on small businesses, as the term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Any compliance requirements are discussed in the Summary above; however, the proposed new rules do not impose any reporting, recordkeeping, or other compliance requirements beyond those imposed by existing State and Federal law, therefore, a regulatory flexibility analysis is not required.

Housing Affordability Impact Analysis

The Division does not anticipate that the proposed new rules would have any impact on the affordability of housing in New Jersey or would change the average costs associated with housing. The proposed new rules do not alter the requirements imposed by the Law Against Discrimination. Rather, they generally codify existing law or the Division's

existing interpretation or implementation of disparate impact liability pursuant to the Act.

Smart Growth Development Impact Analysis

The Division does not anticipate that the proposed new rules would have any impact on smart growth, or would change housing production in Planning Areas 1 or 2, or within designated centers, pursuant to the State Development and Redevelopment Plan in New Jersey. The proposed new rules do not alter the requirements imposed by the Law Against Discrimination. Rather, they generally codify existing law or the Division's existing interpretation or implementation of disparate impact liability pursuant to the Act.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Division has evaluated this rulemaking and determined that it would not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. The proposed new rules do not alter the requirements imposed by the Law Against Discrimination. Rather, they generally codify existing law or the Division's existing interpretation or implementation of disparate impact liability pursuant to the Act. Accordingly, no further analysis is required.

Full text of the proposed new rules follows:

CHAPTER 16

DISPARATE IMPACT DISCRIMINATION

SUBCHAPTER 1. PURPOSE, CONSTRUCTION, AND DEFINITIONS

13:16-1.1 Purpose

This chapter is designed to implement the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. (the Act), as it pertains specifically to disparate impact liability.

13:16-1.2 Construction

(a) Consistent with the public policy underlying the Act and with firmly established principles for the interpretation of such remedial legislation, the remedial provisions of the statute will be given a broad construction and its exceptions construed narrowly.

(b) The provisions of this chapter are severable. If any provision or the application of any provisions of this chapter to any person or circumstances is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

13:16-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Act” shall mean the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

“Attorney General” shall have the same meaning as in the Act.

“Automated employment decision tools” are any software, system, or process that aims to automate, aid, or replace human decision-making relevant to employment.

“Automated employment decision tools” include tools that analyze datasets to generate scores, rankings, predictions, classifications, or some recommended action(s) that are used by employers to make decisions regarding employees, contractors, and job candidates, or potential job candidates, including decisions related to advertising, recruiting, screening, interviewing, hiring, placement, promotion, and compensation, or any other term, condition, or privilege of employment.

“Complainant” means any person filing a verified complaint alleging discrimination pursuant to the Act.

“Consumer credit history” means an individual’s creditworthiness, credit standing, credit capacity, and borrowing or payment history, as indicated by, but not limited to:

1. A consumer credit report, including any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living;

2. A credit score; or

3. Information provided by an individual regarding:

- i. Credit accounts, including the individual’s number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limit, or prior credit report inquiries; or

- ii. Bankruptcies, judgments, or liens.

“County correctional facility” means any prison or other secure facility managed and operated by any county of this State in which adult offenders are incarcerated and includes, but is not limited to, a county prison, jail, penitentiary, or workhouse.

“Covered entity” means an employer; labor organization; employment agency; housing provider; real estate broker, agent, or salesperson; lending institution; place of public accommodation; or person who is required to comply with N.J.S.A. 10:5-12.

“Criminal record” shall have the same meaning as in the Fair Chance in Housing Act, P.L. 2021, c. 110.

“Director” shall have the same meaning as in the Act.

“Disability” shall have the same meaning as in the Act.

“Division” shall have the same meaning as in the Act.

“Employee” shall have the same meaning as in the Act.

“Employer” shall have the same meaning as in the Act.

“Employment agency” shall have the same meaning as in the Act.

“Exclusionary discipline” describes expulsion, out-of-school suspension, in-school suspension, or any other type of punitive school disciplinary action, whether or not labeled as such, that limits, removes, or excludes a student from their usual educational setting or usual educational programming. “Exclusionary discipline” does not include evidence-based restorative justice practices.

“Gender identity or expression” shall have the same meaning as in the Act.

“Housing financial assistance” means the process of making or purchasing loans, grants, securities, or other debts; the pooling or packaging of loans or other debts or securities, which are secured by residential real estate; or the provision of other financial assistance relating to the purchase, organization, development, construction, improvement, repair, maintenance, rental, leasing, occupancy, or insurance of dwellings, including:

1. Mortgages, reverse mortgages, home equity loans, and other loans secured by residential real estate;
2. Insurance and underwriting related to residential real estate, including construction insurance, property insurance, liability insurance, homeowner's insurance, and renter's insurance; and
3. Loan modifications, foreclosures, and the implementation of the foreclosure process.

“Housing provider” means any person who is required to comply with N.J.S.A. 10:5-12.g or h.

“Isolated confinement” means confinement of an incarcerated person in a State correctional facility, county correctional facility, or municipal jail pursuant to disciplinary, administrative, protective, investigative, medical, or other classification, in a cell or similarly confined holding or living space, alone or with other incarcerated persons, for approximately 20 hours or more per day in a State correctional facility or 22 hours or more per day in a county correctional facility or municipal jail, with severely restricted activity, movement, and social interaction. “Isolated confinement” shall not include confinement due to a facility-wide or unit-wide lockdown that is required to ensure the safety of incarcerated persons and staff.

“Labor organization” shall have the same meaning as in the Act.

“Law enforcement agency” means a department, division, bureau, commission, board, or other authority of the State or of any political subdivision thereof that has, by statute or ordinance, the responsibility of detecting and enforcing the general criminal laws of this State.

“Legitimate interest” means that a justification for a challenged practice or policy is genuine and not false or pretextual.

“Lending institutions” include banks, building and loan associations, insurance companies, and any other enterprise whose business consists in whole or in part in the making or purchasing of any loan or extension of credit, for whatever purpose, whether secured by residential real estate or not, including, but not limited to, financial assistance for the purchase, acquisition, construction, rehabilitation, repair, or maintenance of any real

property or part or portion thereof. The term includes, but is not limited to, affiliates, agents, officers, or employees of these enterprises.

“Municipal jail” means a municipal jail, lockup, police station, or other place maintained by a municipality for the detention of suspects or offenders.

“Nondiscriminatory interest” means that a justification for a challenged practice or policy does not itself discriminate based on a protected characteristic.

“Person” shall have the same meaning as in the Act.

“Place of accommodation” shall have the same meaning as in the Act.

“Protected characteristics” include race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy (including childbirth, breastfeeding or chestfeeding, and pregnancy-related medical conditions), sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces, and any other characteristics protected pursuant to the Act.

“Publicly assisted housing accommodation” shall have the same meaning as in the Act.

“Race” shall have the same meaning as in the Act.

“Real estate” means an identified parcel or tract of land, including improvements thereon, if any.

“Real estate broker” shall have the same meaning as in the Act.

“Real estate salesperson” shall have the same meaning as in the Act.

“Real property” shall have the same meaning as in the Act.

“Real estate-related transaction” includes:

1. Providing financial assistance;
2. Buying, selling, brokering, or appraising of real estate; or
3. The use of territorial underwriting requirements, for the purpose of requiring a borrower in a specific geographic area to obtain flood insurance, required by an institutional third party on a loan secured by real property.

“Respondent” means any party charged with unlawful discrimination pursuant to the Act.

“Restorative justice practices” means practices based on a system of dispute resolution tools that allow all parties to a dispute to be involved in defining the harm and devising remedies while giving the necessary attention to community safety, victims’ needs, and the need for accountability for harm. “Restorative justice practices” include, but need not be limited to, student or community court, restorative circles, mediation, and conferencing.

“Source of lawful income” means any source of income lawfully obtained or any source of rental or mortgage payment lawfully obtained, including, but not limited to, any Federal, State, or local public assistance or housing assistance voucher or funds, including Section 8 housing choice vouchers, temporary rental assistance programs, or State rental assistance programs; rental assistance funds provided by a nonprofit organization; Federal, State, or local benefits, including disability benefits, unemployment benefits, and veterans’ benefits; court-ordered payments, including, but not limited to, child support, alimony, or damages; and any form of lawful currency tendered, without regard to whether such

currency is tendered in the form of cash, check, money order, or other lawful means.

“State correctional facility” means a State prison or other penal institution or a State-contracted half-way house.

“Substantial interest” means a core interest of the entity that has a direct relationship to the function of that entity.

“Unlawful discrimination” shall have the same meaning as in the Act.

“Unlawful employment practice” shall have the same meaning as in the Act.

SUBCHAPTER 2. DISPARATE IMPACT DISCRIMINATION

13:16-2.1 Disparate impact liability pursuant to the Act

(a) Practices and policies that have a disparate impact, as defined at (b) below, on members of a protected class, even if these practices and policies are not discriminatory on their face (that is, facially neutral) and are not motivated by discriminatory intent, will be considered discriminatory and a violation of the Act, unless it is shown that such practices and policies are necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is no less discriminatory, equally effective alternative that would achieve the same interest.

(b) A practice or policy has a disparate impact where it actually or predictably results in a disproportionately negative effect on members of a protected class. A practice or policy predictably can have a disparate impact when there is evidence that the practice or policy will have a disparate impact even though the practice or policy has not yet been implemented, if the practice or policy has been approved, announced, or otherwise finalized. However, a practice or policy that is simply being debated or deliberated internally by a covered entity cannot be challenged pursuant to this chapter before it is

implemented, approved, announced, or otherwise finalized.

(c) Any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination, the Attorney General, the Director of the Division, the Commissioner of the Department of Labor and Workforce Development, or the Commissioner of the Department of Education may bring a complaint of discrimination based on disparate impact liability pursuant to the Act to the Division or initiate suit in Superior Court.

(d) The practices and policies, as well as the specific protected characteristics discussed in relation to them in this chapter are only examples and are not meant to limit the application of the chapter to those practices and policies or the specific protected characteristics discussed in relation to them.

13:16-2.2 Burdens of proof and evidence for disparate impact discrimination claims

(a) A complainant challenging a practice or policy of a covered entity must show the practice or policy challenged has a disparate impact on members of a protected class.

(b) In the employment, public accommodations, and contracting contexts, if the complainant meets the burden of proof at (a) above, the respondent has the burden of showing that the challenged practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. In the employment context, whether a practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest is equivalent to whether the practice or policy is job related and consistent with a legitimate business necessity. A practice or policy is job related when it bears a demonstrable relationship to successful performance of the job and measures the person's fitness for the

specific job.

(c) In the employment, public accommodations, and contracting contexts, if the respondent meets the burden at (b) above, the complainant has the burden of showing that there is a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(d) In the housing and housing financial assistance contexts, if the complainant meets the burden at (a) above, the respondent has the burden of showing that the challenged practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest. To meet its burden of showing that there is not a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest, the respondent can identify what policy or practice options it considered and how and why it decided to select the policy or practice it chose.

(e) To meet its burden of proof at (a), (b), (c), or (d) above, a party must provide empirical evidence, meaning evidence that is not hypothetical or speculative, to support its allegations. For example, a complainant would not meet its burden to show an employment policy has a disparate impact on job applicants based on gender by speculating that the policy harms women more than men, but could meet its burden by providing empirical evidence, which could include applicant files or data or applicant selection rates by gender. Anecdotal evidence, while not sufficient on its own, may be introduced along with empirical evidence. For example, a complainant would not meet its burden to show an employment policy has a disparate impact on job applicants based on gender by solely providing that they know women who applied and did not receive a position but men who

did. However, a complainant could introduce anecdotal evidence along with empirical evidence, such as applicant selection rates by gender.

(f) The opposing party may rebut whether the party with the burden of proof at (a), (b), (c), or (d) above has met its burden. For example, a complainant challenging a housing practice may rebut whether the respondent met its burden at (d) above by showing there is not a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(g) Additional proof may be required when challenging or defending particular practices or policies. Such requirements are noted in this chapter, where relevant.

(h) Types of evidence that, depending on the facts of the case, may be relevant to establish or to rebut the existence of disparate impact include, but are not limited to:

1. National, State, and local statistics;
2. Applicant or employee files or data;
3. Applicant or employee selection, suspension, pay setting, and termination rates by race, gender, and other protected characteristics;
4. Tenant/resident files or data;
5. Criminal justice system data, including:
 - i. Incarcerated person and correctional staff incident reports created by a correctional facility;
 - ii. Records regarding correctional disciplinary referrals;
 - iii. Correctional decisions and actions, including placing an incarcerated person in solitary confinement;
 - iv. Records regarding placement in a correctional facility;

v. Requests for accommodation in a correctional facility;
vi. Law enforcement officer incident reports;
vii. Citations by law enforcement officers; and
viii. Complaints made by the public about the conduct of law enforcement officers;

6. Demographic or census data;
7. Local agency data or records;
8. Police records and court records, including eviction data;
9. Survey data;
10. Labor market data;
11. School disciplinary data;
12. School referrals to law enforcement and school-based arrests;
13. School attendance data;
14. Home school instruction data;
15. Demographic data regarding classification and placement for special education services;

16. Demographic data regarding academic placement, including placement in remedial courses, honors courses, advanced placement (AP) courses, and gifted and talented programs; and

17. Other relevant data.

(i) To establish that a challenged practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, a respondent must establish that:

1. The practice or policy is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests, where “substantial interest” means a core interest of the entity that has a direct relationship to the function of that entity, “legitimate” means that a justification is genuine and not false or pretextual, and “nondiscriminatory” means that the justification for a challenged practice or policy does not itself discriminate based on a protected characteristic; and

2. The practice or policy effectively carries out the identified interest.

(j) The determination of whether an interest is substantial, legitimate, and nondiscriminatory requires a case-specific, fact-based inquiry. An interest in achieving diversity or increasing access for underrepresented or underserved members of a protected class may constitute a substantial, legitimate, nondiscriminatory interest.

(k) The determination of whether there is a less discriminatory, equally effective alternative means of achieving a substantial, legitimate, nondiscriminatory interest requires a case-specific, fact-based inquiry.

(l) If a respondent’s practice or policy that results in a disparate impact based on a protected characteristic relies on conduct, standards, products, procedures, or systems of an outside person or vendor, the respondent must take reasonable steps to ensure that the outside person or vendor’s conduct, standards, products, procedures, or systems are consistent with the Act and this chapter. For example, if an employer uses an employee selection algorithm that results in a disparate impact based on gender or race, the fact that the employer did not create the algorithm itself, but instead used an algorithm created by a technology company will not shield the employer from liability, unless the employer took reasonable steps to

ensure that the algorithm would not result in a disparate impact based on a protected characteristic and was otherwise consistent with the Act and this chapter before using it.

SUBCHAPTER 3. EMPLOYMENT

13:16-3.1 Disparate impact discrimination in employment

(a) Employment practices and policies may be unlawful if they have a disparate impact on members of a protected class. An employment practice or policy that has a disparate impact is prohibited unless, in accordance with N.J.A.C. 13:16-2.2, a respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Whether an employment practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest is equivalent to whether the practice or policy is job related and consistent with a legitimate business necessity. An employment practice or policy may still be prohibited if necessary to achieve a substantial, legitimate, nondiscriminatory interest if a complainant shows there is a less discriminatory, equally effective alternative that would achieve the same interest.

(b) Nothing in this subchapter shall preclude affirmative efforts to utilize recruitment practices to attract an individual who is a member of an underrepresented or underserved member of a protected class covered by the Act.

(c) This subchapter applies to the practices and policies of employers, labor organizations, employment agencies, and other covered entities.

13:16-3.2 Pre-employment practices

(a) Job recruitment, advertising, and solicitation practices are as follows:

1. All employers, labor organizations, and employment agencies should conduct advertising and recruitment efforts, including job vacancy, membership recruitment, and employment referral programs, in such a manner as to ensure that all persons, including members of protected classes, are given fair, adequate, and equivalent notice of job vacancies, membership opportunities, and employment referral opportunities; that those advertising and recruitment efforts should guard against perpetuating any historical patterns of segregation or discrimination in their respective industry; and that those advertising and recruitment efforts do not rely on the use of stereotypes regarding members of a protected class:

i. Employers and labor organizations are encouraged to post notices or advertisements relating to employment, or to membership in a labor organization, in a way that will maximize visibility in the relevant labor market; and

ii. Employers should encourage their referral sources to seek and refer all qualified individuals, without regard to individuals' identities or protected characteristics; and

2. An employer's reliance on word-of-mouth recruitment may be a prohibited recruitment practice or policy if its use actually or predictably results in a disproportionately negative effect on potential applicants who are members of a protected class unless the employer can satisfy its burden of showing that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and the complaining party cannot show that there is a less discriminatory, equally effective alternative.

i. For example, an employer's practice or policy of relying on word-of-mouth recruitment by its mostly Hispanic work force may violate the Act if the result is that almost all new hires are Hispanic. This is because the employer's reliance on word-of-mouth recruitment may have resulted in limiting recruitment to the networks or communities of current employees, resulting in a disparate impact on members of one or more protected classes, including people who do not identify as Hispanic.

(b) Pre-employment screening and interviews. Pre-employment screening and interviews may have a disparate impact on members of a protected class. Notwithstanding any internal safeguards taken to secure a discrimination-free atmosphere in interviews, the entire screening and interview process is subject to review for disparate impact on individuals of a protected class. By way of example, but not limitation, a practice of only interviewing on Saturdays or only on Sundays may result in a disparate impact for people whose religions prohibit them from engaging in work on those days of the week.

(c) Automated employment decision technology practices are as follows:

1. The use of automated employment decision tools to make employment decisions, including, but not limited to, decisions related to advertising, recruiting, screening, interviewing, hiring, and compensation, or any other terms, conditions, or privileges of employment, may have a disparate impact on applicants and employees based on their race, national origin, gender, disability, religion, and other protected characteristics. By way of example, but not limitation, an automated employment decision tool that uses data on a company's current employees to inform a search for candidates may have a disparate impact on members of protected classes that are not well represented in that company or industry. If most current employees at a computer science company are white, cisgender

men, an automated employment decision tool that assesses applicants based on that pool may score women applicants lower because their resumes list “women’s field hockey” rather than “football,” or score Black applicants lower because their resumes list “Black Student Alliance,” an organization in which the company’s current employees are less likely to have been involved;

2. The use of online application technology that limits or screens out applicants based on their schedule may have a disparate impact on applicants based on their religion, disability, or medical condition and must include a mechanism for applicants to request a reasonable accommodation. By way of example, but not limitation, an application asking if an applicant is available to work a proposed schedule of Monday through Saturday may screen out applicants who answer the question in the negative due to religious practices they engage in on Saturdays; and

3. An employer’s use of an automated employment decision tool that has not been adequately tested and shown to not adversely affect people in a protected class before its use may have a disparate impact on members of that protected class. By way of example, but not limitation, an employer’s use of facial analysis technology to detect personality traits during virtual interviews is likely to result in lower scores for interviewees whose facial expressions the tools have not been tested on and designed to read. If the technology was tested exclusively or predominantly on white people with no disabilities, then use of the technology may disproportionately impact interviewees with darker skin or interviewees with disabilities because the technology cannot match their facial expressions to those programmed into the tool and may not account for interviewees who cannot make certain facial expressions.

i. The use of facial analysis technology may disproportionately impact interviewees wearing religious headwear or maintaining religiously mandated facial hair if the technology has not been tested on people with similar religious practices.

13:16-3.3 Employee selection procedures

The guidelines set forth in the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607 (1978), which are incorporated herein by reference, are applied to all protected characteristics listed in the Act. Where there is a conflict between such guidelines and this chapter, the rules in this chapter shall control. Upon request, the Division will make the guidelines available for public inspection and make available a printed copy of the guidelines.

13:16-3.4 Employment practices

(a) The following employment practices and policies may have a disparate impact on members of a protected class and, if so, would be prohibited, unless a respondent shows a specific practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even with a showing of a substantial, legitimate, nondiscriminatory interest, it is still unlawful if the complainant can show that there is a less discriminatory, equally effective alternative that would achieve the same interest.

1. Language restrictions. The adoption or enforcement of a policy that limits or prohibits the use of any language in the workplace, including, but not limited to, an English-only rule, may have a disparate impact on employees based on national origin or ancestry.

i. To prove the language restriction is necessary to achieve a substantial, legitimate, nondiscriminatory interest, it is not sufficient to demonstrate that it promotes business convenience or is due to customer or co-worker preference. Instead, the restriction must be necessary for the employee to be able to effectively perform the job duties in question. In addition, if the employer is able to show the language restriction is necessary to achieve a substantial, legitimate, nondiscriminatory interest, it must effectively notify its employees of the circumstances and time when the language restriction must be observed and of the consequence for violating the language restriction. Applying language restrictions, including English-only rules, during conversations that are not essential to the performance of a job, such as co-worker small-talk, or during an employee's non-work time, including breaks, lunch, and unpaid employer sponsored events, is generally not necessary to achieve a substantial, legitimate, nondiscriminatory interest.

ii. The adoption or enforcement of a policy regarding English proficiency may have a disparate impact based on national origin or ancestry. In order to show that such a requirement is necessary to achieve a substantial, legitimate, nondiscriminatory interest, the employer would be required to show that the level of proficiency required is necessary to effectively fulfill the job duties of the position. In determining necessity in this context, relevant factors include, but are not limited to, the type of proficiency required (for example, spoken, written, aural, and/or reading comprehension), the degree of proficiency required, and the nature and job duties of the position.

iii. It is not unlawful for an employer to request from an applicant or employee, information regarding their ability to speak, read, write, or understand any language, including languages other than English.

2. Citizenship requirements. Citizenship requirements may have a disparate impact on applicants or employees based on national origin or ancestry. Citizenship requirements that are required or expressly permitted by Federal or State law, rule, or regulation are not unlawful employment practices pursuant to this paragraph.

3. Height and/or weight requirements. Height and/or weight requirements may have a disparate impact on applicants or employees based on gender, national origin, ancestry, or disability.

4. Health or physical ability requirements. Health or physical ability requirements may have a disparate impact on applicants or employees based on gender, age, or disability. By way of example, but not limitation, a requirement that an applicant have the ability to lift 20 pounds that has a disparate impact on members of a protected class would be unlawful, unless the employer can show that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest, meaning that it must be job related and consistent with a legitimate business necessity. The employer would have to show that lifting 20 pounds is necessary to the successful performance of the job. Even then, it would still be unlawful if the complainant can show that there is a less discriminatory, equally effective alternative that would achieve the same interest.

5. Dress and/or appearance requirements. Dress and/or appearance requirements may have a disparate impact based on religion. By way of example, but not limitation, a prohibition on hats or head coverings may have a disparate impact based on religion for those who wear yarmulkes, hijabs, turbans, or other religious articles or articles of faith or maintain religiously mandated unshorn hair/beards. Such a policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on religious

beliefs and either granting the request or engaging in an interactive process with the employee.

i. A policy prohibiting employees who are men from having hair past “ear length” or requiring employees who are men to have “clean groomed” hair may have a disparate impact based on religion for those who maintain natural or longer hair in conformance with their religious mandates. Such a policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on religious beliefs and either granting the request or engaging in an interactive process with the employee.

6. Dress requirements that do not allow employees to dress in a way that affirms their gender identity or allows them to express their gender identity may have a disparate impact based on gender identity or expression. For example, a dress code that allows employees to wear a tie with a pantsuit but not with a skirt suit may have a disparate impact on an employee based on gender expression if they would like to express their gender identity by wearing a tie with a skirt suit.

7. Driver’s license requirements. A requirement to possess a driver’s license may have a disparate impact on applicants or employees based on disability or national origin. In order to show that such a requirement is necessary to achieve a substantial, legitimate, nondiscriminatory interest, the employer would be required to show it is job related and consistent with a legitimate business necessity, such as where the employee driving is necessary for successful performance of the job.

8. Pregnancy (including childbirth, breastfeeding or chestfeeding, and pregnancy-related medical conditions). Certain employment practices or policies may have a disparate impact based on pregnancy, including childbirth, breastfeeding or chestfeeding, and

pregnancy-related medical conditions. By way of example, but not limitation, a policy requiring employees to wear high heels may have a disparate impact on employees or applicants based on pregnancy. Such a policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on pregnancy and either granting the request or engaging in an interactive process with the employee.

i. A practice of not allowing employees to take breaks during work hours or a policy prohibiting employees from plugging in personal refrigerators in their work area may have a disparate impact on employees who are breastfeeding or chestfeeding. Such a policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on breastfeeding or chestfeeding and either granting the request or engaging in an interactive process with the employee.

(b) Criminal history. An employment practice or policy of excluding from consideration an applicant based on criminal history information may have a disparate impact based on race (particularly for Black applicants), national origin (particularly for Latinx/e applicants), or ancestry. Such a practice or policy that results in a disparate impact would, therefore, be unlawful unless it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, the practice or policy would still be unlawful if the complainant can show that there is a less discriminatory, equally effective alternative that would achieve the same interest.

1. A practice or policy that contains an individualized assessment of the facts and circumstances of the applicant's criminal record and other mitigating information is likely to be a less discriminatory alternative to a practice or policy that excludes individuals from employment or the application process based on criminal history information without

conducting an individualized assessment. The following factors, among others, may be relevant to such an assessment, although the lack of information relating to any one of these factors shall not be considered a negative factor when conducting an individualized assessment:

i. The nature and severity of the offense and the facts and circumstances of the conduct underlying it;

ii. The specific duties and responsibilities of the position sought or held by the person;

iii. The bearing, if any, that the criminal offense has on the person's fitness or ability to perform one or more such duties or responsibilities;

iv. The time that has passed since the criminal offense;

v. The age of the individual at the time of the occurrence of the offense;

vi. Whether an offer or continuation of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public; and

vii. Any evidence of rehabilitation that the applicant or others may choose to provide, including good conduct in a correctional or detention facility or in the community, counseling or psychiatric treatment received, academic or vocational schooling, successful participation in work-release programs, or the recommendation of persons who know the applicant's character.

2. Nothing in this subsection shall be construed to prohibit any practice that is otherwise required by Federal or State law, rule, or regulation.

3. Nothing in this subsection shall be construed in such a way as to interfere with the protections afforded job applicants pursuant to the Opportunity to Compete Act, N.J.S.A. 34:6B-11 et seq., or the rules promulgated by the New Jersey Department of Labor and Workforce Development to implement the Opportunity to Compete Act.

SUBCHAPTER 4. HOUSING, REAL ESTATE, AND HOUSING FINANCIAL ASSISTANCE

13:16-4.1 Disparate impact discrimination in the sale or rental of real property

(a) Housing and real estate practices and policies may be unlawful if they have a disparate impact on members of a protected class. A housing or real estate practice or policy that has a disparate impact is prohibited unless, in accordance with N.J.A.C. 13:16-2.2, a respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory, equally effective alternative that would achieve the same interest.

(b) This subchapter applies to the practices and policies of housing providers and real estate brokers, agents, salespersons, and other covered entities.

13:16-4.2 Sale or rental advertising

(a) All housing providers and real estate brokers, agents, and salespersons are encouraged to make efforts to ensure that their advertising does not perpetuate historical patterns of housing segregation or discrimination in their respective localities, is not based solely on the characteristics of current or former residents, and does not rely on stereotypes about the characteristics predominantly found among residents of specific localities.

(b) All housing providers and real estate brokers, agents, and salespersons are encouraged, in a manner consistent with other requirements of State or Federal law, to conduct all sale and rental searches, listings, and advertisements, including referral programs, in such a manner as to ensure that all persons, including members of protected classes, are given fair, adequate, and equivalent notice of residential vacancies and referral programs and opportunities.

1. Housing providers and real estate brokers, agents, and salespersons are encouraged to advertise and provide notice of vacancies in a way that will ensure equal or equivalent visibility across the relevant housing market.

2. Housing providers should encourage their referral sources to seek and refer all qualified individuals, without regard to individuals' identities or membership in a protected class.

3. A housing provider's reliance on word-of-mouth referrals may be a prohibited housing practice or policy, based on actual or potential disparate impact, if its use discriminates against potential residents based on a protected characteristic. By way of example, but not limitation, a housing provider's practice or policy of relying on word-of-mouth referrals by its mostly white residents may violate the Act if the result is that almost all new applicants or residents are white. This is because the housing provider's reliance on word-of-mouth referrals may have resulted in limiting referrals to the networks or communities of current residents, resulting in a disparate impact on members of one or more protected classes, including people who do not identify as white.

(c) Nothing in this section shall preclude owners or operators of special needs and supportive housing, age-restricted housing, or affordable housing, including affordable

housing developments that provide priority to veterans, from targeting advertising practices to the specific populations served; however, any practices and policies that have a disparate impact on members of protected classes other than those the housing is intended to serve may still violate this section. For example, a housing provider's practice or policy of advertising veteran housing by posting flyers in a veterans' organization's facilities only in majority white communities may violate the Act if the result is that almost all new applicants or residents are white. This is because the housing provider's advertisement may have resulted in limiting applicants to the communities the flyers were posted within, resulting in a disparate impact on members of one or more protected classes, including veterans who are not white.

13:16-4.3 Sale or rental practices

(a) Minimum income, financial standard, or income standard. A housing provider's minimum income requirement, financial standard, or income standard may have a disparate impact based on source of lawful income, including, but not limited to, for people who seek to pay rent with forms of government rental assistance that are available only to people with low incomes. Such governmental rental assistance includes, but is not limited to, Section 8 housing choice vouchers, COVID-19 Emergency Rental Assistance Program (CVERAP), State Rental Assistance Program (SRAP), and temporary rental assistance (TRA). If such a policy has a disparate impact, it would only be necessary to achieve a substantial, legitimate, nondiscriminatory interest if the housing provider applied the minimum income requirement, financial standard, or income standard proportionally only to the portion of the rent to be paid by the tenant, rather than the entire rental amount.

(b) Criminal history. A housing provider's practice or policy of excluding from consideration, housing applicants based on criminal history information may have a disparate impact based on race (particularly for Black applicants), national origin (particularly for Latinx/e applicants), or ancestry. Such a practice or policy that results in a disparate impact would, therefore, be unlawful, unless the housing provider could show it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is not a less discriminatory, equally effective alternative that would achieve the same interest.

1. Whether a particular housing practice or policy has a disparate impact pursuant to the Act is not the same as whether a particular housing practice or policy is consistent with the Fair Chance in Housing Act, P.L. 2021, c. 110.

2. Examples of practices or policies that are likely not necessary to achieve a substantial, legitimate, nondiscriminatory interest in protecting other residents or property include:

i. A practice or policy of excluding individuals from housing because of one or more prior arrests or charges that have not resulted in conviction;

ii. A practice or policy of excluding individuals from housing based on conviction records that have been erased through executive pardon, vacated, and otherwise legally nullified, expunged, or sealed;

iii. A practice or policy of excluding individuals from housing based on juvenile adjudications of delinquency; or

iv. A blanket practice or policy of excluding from housing all persons with any prior conviction record, without regard to when the conviction occurred, what the underlying conduct entailed, or any evidence of rehabilitation.

3. A practice or policy that contains an individualized assessment of the facts and circumstances of the housing applicant's criminal record and other mitigating information is likely to be a less discriminatory alternative to a practice or policy that excludes individuals from housing based on criminal history information without conducting an individualized assessment. The following factors, among others, may be relevant to such an assessment, although the lack of information relating to any one of these factors shall not be considered a negative factor when conducting an individualized assessment:

i. The nature and severity of the offense, and the facts and circumstances of the conduct underlying it;

ii. The time that has passed since the offense;

iii. The age of the individual at the time of the occurrence of the offense;

iv. The degree to which the criminal offense, if it reoccurred, would negatively impact the safety of the housing provider's other tenants or property;

v. Whether the criminal offense occurred on, or was connected to, property that was rented or leased by the applicant; and

vi. Any evidence of rehabilitation that the applicant or others may choose to provide, including good conduct in a correctional or detention facility or in the community, counseling or psychiatric treatment received, academic or vocational schooling, successful participation in work-release programs, or the recommendation of persons who know the applicant's character.

4. Nothing in this subsection shall be construed to prohibit any practice that is otherwise required by Federal or State law, rule, or regulation.

(c) Credit score. Due to widespread historical disparities in credit and wealth, a practice or policy that excludes housing rental applicants from housing because of information associated with their consumer credit history may have a disparate impact based on race or national origin, particularly against Black, Hispanic, and Latinx/e applicants.

1. If a rental housing applicant shows that a particular practice or policy related to consumer credit history results in a disparate impact based on race or national origin, a housing provider would then have the burden to show that the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, for example, an interest in collecting rent on time, and that there is not a less discriminatory, equally effective alternative that would achieve the same interest. For purposes of this subsection, a housing practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest when it is required by Federal or State law, rule, or regulation.

i. Examples of practices or policies for which a housing provider may not be able to satisfy its burden of showing that the practice or policy achieves a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory, equally effective alternative that would achieve the same interest include, but are not limited to, a practice or policy of automatically refusing all rental housing applicants who have:

(1) No credit score; or

(2) A credit score below a minimum threshold.

ii. A practice or policy that contains an individualized assessment of the facts and circumstances of the rental housing applicant's consumer credit history or credit score, along with other information bearing on the rental housing applicant's ability to reliably pay their rent, is likely to be a less discriminatory alternative to a blanket practice

or policy that automatically excludes individuals from rental housing based on a lack of credit history or a credit score below a minimum threshold without conducting an individualized assessment. The following factors, among others, may be relevant to such an assessment, although the lack of information relating to any one of these factors shall not be considered a negative factor when conducting an individualized assessment:

(1) The nature of the items identified in a credit report, and whether those items actually bear on the rental housing applicant's ability to provide timely payment of rent;

(2) The time that has elapsed since the items were identified in a credit report;

(3) Evidence presented by the rental housing applicant challenging the credibility or accuracy of the items identified in a credit report;

(4) In cases where an applicant is relying on government or other assistance to pay rent, the portion of the rent that will be paid by the rental housing applicant, versus the portion that will be paid by the government or other entity;

(5) Whether the rental housing applicant has taken any measures to improve their credit score or credit history since incurring any debts or obligations; and

(6) Whether the rental housing applicant has presented any other evidence tending to show ability to pay rent, such as evidence of income or evidence of on-time, complete rental payments over the course of the preceding 12 months.

2. Nothing in this subsection shall be construed to prohibit any practice that is otherwise required by Federal or State law, rule, or regulation.

3. Nothing in this subsection shall be construed to prohibit any practice or policy

related to the sale of housing.

(d) Refusal to rent or sell to a person who requests a reasonable religious accommodation.

A housing provider's practice or policy of refusing to rent or sell housing to a person because the person requests a religious accommodation pursuant to N.J.A.C. 13:16-4.5 is a violation of the Act.

13:16-4.4 Real estate-related practices or policies

(a) Real estate-related practices or policies may have a disparate impact on members of a protected class. A residential real estate-related practice or policy that has a disparate impact on members of a protected class is prohibited, unless the respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest. The practice or policy may involve: making available, or unavailable, a real estate-related transaction; establishing the price or other terms or conditions of a real estate-related transaction; providing, or refusing to provide, information regarding a real estate-related transaction; and the creation, dissemination, or application of criteria, requirements, procedures, or standards for the review and approval of a real estate-related transaction.

(b) This section applies to the practices and policies of real estate brokers, agents, salespersons, and other covered entities.

13:16-4.5 Residential property management practices

(a) Housing providers' residential property management practices and policies may have a

disparate impact on members of a protected class. A housing provider's residential property management practice or policy that has a disparate impact on members of a protected class is prohibited, unless the respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(b) A housing provider's residential property management practice or policy may have a disparate impact on prospective or current residents based on religion, if it requires the person to violate or forgo a sincerely held religious practice or religious observance as a term or condition of obtaining or retaining residence.

1. By way of example, but not limitation:

i. A residential community that does not provide a non-electronic means of entering or exiting the premises may result in a disparate impact for Jewish residents who do not use electricity while observing their Sabbath, who may not be able to enter or exit the premises on their Sabbath. Such terms and conditions may interfere with the rights and privileges associated with the property for an owner or tenant who needs a reasonable accommodation for religious observances, practices, or beliefs. Such a practice or policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on religious observances, practices, or beliefs and either granting the request or engaging in the interactive process with residents who request reasonable accommodations; and

ii. An apartment building policy that prohibits residents from affixing items to the outside of their doors or doorframes may have a disparate impact based on religion

for residents whose religious beliefs require them to affix certain religious items, such as crucifixes, mezuzahs, or deity idols, to the outside of their doors or doorframes. Such terms and conditions may interfere with the rights and privileges associated with the property for an owner or tenant who needs a reasonable accommodation for religious observances, practices, or beliefs. Such a policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on religious observances, practices, or beliefs and either granting the request or engaging in an interactive process with the resident.

13:16-4.6 Housing financial assistance practices

(a) Housing financial assistance practices and policies may have a disparate impact on members of a protected class. A housing financial assistance practice or policy that has a disparate impact on members of a protected class is prohibited, unless the respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest. The practice or policy may involve: making available, making unavailable, or discouraging the provision of housing financial assistance; establishing the terms or conditions of housing financial assistance; providing, or refusing to provide, information regarding housing financial assistance; determining the type of housing financial assistance to be provided; servicing of housing financial assistance; and the creation and application of criteria requirements, procedures, or standards for the review and approval of a real estate-related transaction.

(b) Nothing in this section shall preclude a housing provider from evaluating the consumer

credit history of an applicant where such evaluation is required for a Federal loan product or formula or enforces Federal guidelines, including those requiring minimum credit scores for Federal Housing Administration loans.

(c) This section applies to the practices and policies of lending institutions and other covered entities that provide housing financial assistance.

SUBCHAPTER 5. PUBLIC ACCOMMODATIONS

13:16-5.1 Disparate impact discrimination in public accommodations

Practices and policies of places of public accommodation may have a disparate impact on members of a protected class. A practice or policy of a place of public accommodation that has a disparate impact on members of a protected class is prohibited unless, in accordance with N.J.A.C. 13:16-2.2, a respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a practice or policy of a place of public accommodation may still be prohibited if a complainant shows there is a less discriminatory, equally effective alternative that would achieve the same interest.

13:16-5.2 Practices of policies related to religious garb or articles of faith

(a) A place of public accommodation's entrance policy may have a disparate impact on patrons or prospective patrons based on religion, if such a practice or policy requires a patron or prospective patron to violate or forgo a sincerely held religious practice or religious observance as a term or condition of obtaining the accommodation. By way of example, but not limitation, a restaurant, bar, theater, or sporting facility policy prohibiting hats or head coverings may have a disparate impact based on religion for patrons or

prospective patrons who wear yarmulkes, hijabs, turbans, or other religious articles or articles of faith. Such a policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on religious beliefs and either granting the request or engaging in an interactive process with the patron or prospective patron.

(b) A requirement that all patrons wear particular clothing in order to participate in an activity may have a disparate impact based on religion for patrons or prospective patrons who cannot wear the required clothing for religious reasons. By way of example, but not limitation, a community sports team's requirement that all players wear shorts while participating in an athletic competition may have a disparate impact based on religion for a person who could not wear shorts for religious reasons. Such a policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on religious beliefs and either granting the request or engaging in an interactive process with the player or prospective player.

(c) A prohibition on weapons may have a disparate impact based on religion for a Sikh patron or prospective patron who wears a kirpan. Such a policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on religious beliefs, for example, allowing a kirpan, but imposing a size restriction and ensuring that the kirpan was dull and sewn inside a sheath so it could not be removed, and either granting the request or engaging in an interactive process with the patron or prospective patron.

13:16-5.3 Educational practices or policies

(a) Educational practices or policies may have a disparate impact on members of a protected class. An educational practice or policy that has a disparate impact on members

of a protected class is prohibited, unless it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, an educational practice or policy may still be prohibited if a complainant shows there is a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(b) This section applies to the practices and policies of any educational institution that operates as a place of public accommodation and other covered entities.

(c) Student discipline. An educational institution's disciplinary practice or policy may have a disparate impact on members of a protected class. If a complainant shows that a particular practice or policy related to student discipline results in a disparate impact based on membership in a protected class, a school would then have the burden to show that the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, for example, in creating a safe learning environment for all students or teachers. A complainant would then have the opportunity to show that a less discriminatory, equally effective alternative exists that would achieve the same interest, for example, non-exclusionary disciplinary measures that have been shown to be equally or more effective at addressing minor or subjective infractions.

1. By way of example, but not limitation:

i. The use of zero tolerance policies or other disciplinary policies that exclusively or predominantly rely on exclusionary discipline for minor or subjective infractions, such as "insubordination," "disrespect," "misbehavior," etc., may have a disparate impact based on race and other protected characteristics.

ii. Except where other provisions of State law require immediate suspension, expulsion, or removal of a student, an educational institution's practice or

policy of imposing suspensions, expulsions, or removals to an alternative school or alternative educational program without first meeting with the student's parent or guardian to review all relevant information about the incident to determine whether the conduct in question or the school's decision to impose exclusionary discipline for it was influenced by the student's protected characteristic may have a disparate impact based on disability, race, national origin, or other protected characteristics.

(d) Religious garb, religious diet, or articles of faith. A practice or policy of an educational institution may have a disparate impact on students based on religion if such a practice or policy requires a student to violate or forgo a religious practice or religious observance as a term or condition of participating in the educational program or activity. By way of example, but not limitation:

1. A prohibition on hats or head coverings may have a disparate impact based on religion for students who wear yarmulkes, hijabs, turbans, or other religious articles or articles of faith. Similarly, a grooming requirement may have a disparate impact based on religion for students who wear religiously mandated unshorn hair/beards. A requirement that all student athletes wear shorts while participating in an athletic competition may have a disparate impact on a student who could not wear shorts for religious reasons. In all such examples, a policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on religious beliefs and either granting the request or engaging in an interactive process with the student;

2. A prohibition on bringing outside food into the school building may have a disparate impact on a student who must bring in food required for a religious diet. Such a policy could avoid a disparate impact by explicitly allowing requests for reasonable

accommodations based on religious beliefs and either granting the request or engaging in an interactive process with the student; and

3. A prohibition on weapons may have a disparate impact based on religion for a Sikh student who wears a kirpan. Such a policy could avoid a disparate impact by explicitly allowing requests for reasonable accommodations based on religious beliefs, for example, a policy allowing a kirpan but imposing a size restriction and ensuring that the kirpan was dull and sewn inside a sheath so it could not be removed, and either granting the request or engaging in an interactive process with the student.

(e) Language use and restrictions. A practice or policy of an educational institution that limits or prohibits the use of any particular language or dialect by students, parents, or others who are not employees, including, but not limited to, an English-only rule, may have a disparate impact on students, parents, and others based on national origin or ancestry. Similarly, a practice or policy of providing notices to students or parents only in English without making available the notices in any other languages spoken by students or parents may have a disparate impact on students and their parents based on national origin or ancestry.

13:16-5.4 Law enforcement practices and policies

(a) Law enforcement practices or policies may have a disparate impact on members of a protected class. A law enforcement practice or policy that has a disparate impact on members of a protected class is prohibited, unless it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a law enforcement practice or policy may

still be prohibited if a complainant shows there is a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(b) This section applies to the practices and policies of State and local law enforcement agencies.

(c) Practices and policies based on location. A law enforcement agency's practices or policies to patrol or conduct checkpoints in specific geographic areas may have a disparate impact on members of a protected class who reside, work, or frequent those geographic areas.

(d) Practices and policies regarding the use of force. A law enforcement practice or policy that is out of compliance with the Office of the Attorney General's Use of Force Policy regarding the use of force against a person who does not comply with a law enforcement officer's verbal directions may also have a disparate impact on members of a protected class.

13:16-5.5 State and county correctional facility and municipal jail practices and policies

(a) State correctional facility, county correctional facility, and municipal jail practices or policies may have a disparate impact on members of a protected class. A State or county correctional facility or municipal jail practice or policy that has a disparate impact on members of a protected class is prohibited, unless it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a State or county correctional facility or municipal jail practice or policy may still be prohibited if a complainant shows there is a

less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(b) This section applies to the practices and policies of State correctional facilities, county correctional facilities, and municipal jails.

(c) Incarcerated person disciplinary practices and policies. Disciplinary practices and policies used by a State correctional facility, county correctional facility, or municipal jail for disciplining incarcerated persons may have a disparate impact on members of a protected class. By way of example, but not limitation, the practice or policy of using isolated confinement where not explicitly required by applicable statute, rule, or regulation may have a disparate impact based on race.

(d) Language assistance practices or policies. A State correctional facility, county correctional facility, or municipal jail's language assistance practices or policies may have a disparate impact on incarcerated persons based on national origin. By way of example, but not limitation, a State correctional facility, county correctional facility, or municipal jail's lack of a language assistance policy may have a disparate impact on incarcerated persons who do not speak English based on their national origin. For example, a State correctional facility's lack of a policy to ensure incarcerated persons who do not speak English have equal access to the facility's services may have a disparate impact on Hispanic or Latinx/e incarcerated persons who have limited English proficiency.

SUBCHAPTER 6. CONTRACTING

13:16-6.1 Disparate impact discrimination in contracting

(a) Contracting practices and policies may have a disparate impact on members of a

protected class. A contracting practice or policy that has a disparate impact on members of a protected class is prohibited, unless, in accordance with N.J.A.C. 13:16-2.2, a respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a contracting practice or policy may still be prohibited if a complainant shows there is a less discriminatory, equally effective alternative that would achieve the same interest.

(b) This section applies to the practices and policies of any person who is required to comply with N.J.S.A. 10:5-12 and other covered entities.

13:16-6.2 Contract bid selection and recruitment

(a) A contractor's use of bid selection procedures or selection criteria may have a disparate impact on members of a protected class. It is an unlawful contracting practice for any contractor to make use of any bid selection procedure or selection criteria that has the effect of screening out members of a protected class, unless the contractor shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Whether a practice or policy of using a bid selection procedure or selection criteria is necessary to achieve a substantial, legitimate, nondiscriminatory interest is equivalent to whether the practice or policy is job related and consistent with a legitimate business necessity. A bid selection procedure or selection criteria may still be prohibited if necessary to achieve a substantial, legitimate, nondiscriminatory interest if a complainant shows there is a less discriminatory, equally effective alternative that would achieve the same interest. An alternative selection procedure is less discriminatory where it does not screen out, or screens out fewer, members of the protected class. For example, a contractor's practice of refusing bids from people who live in a city or geographic area where the majority of residents are people of

color may have a disparate impact by screening out people of color with whom they could contract, and therefore, having the effect of excluding people on the basis of race or national origin. The use of geographic location as selection criterion that resulted in a disparate impact would be unlawful unless necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even if the contractor could show it was necessary to achieve a substantial, legitimate, nondiscriminatory interest, the bid selection criterion may still be prohibited if a complainant could show that alternative job-related tests or criteria that do not screen out, or screen out fewer, members of the protected class are available. The guidelines set forth in the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607 (1978), are incorporated herein by reference, and applied to all protected characteristics listed in the Act. Where there is a conflict between such guidelines and this chapter, the rules in this chapter shall control. Upon request, the Division will make the guidelines available for public inspection and make available a printed copy of the guidelines.

(b) A contractor's reliance on word-of-mouth recruitment for bids during a bidding process may be a prohibited recruitment practice or policy if its use actually or predictably results in a disproportionately negative effect on persons placing bids who are members of a protected class. For example, a contractor's practice or policy of relying on word-of-mouth recruitment for bids by the mostly white subcontractors it works with may violate the Act if the result is that almost all new subcontractors are white. This is because the contractor's reliance on word-of-mouth recruitment for bids may have resulted in limiting recruitment to the networks or communities of current subcontractors, resulting in a disparate impact on members of one or more protected classes, including

people who do not identify as white.