

HOUSING JUSTICE

National Housing Law Project

November-December 2015

An Overview of Recent HUD Developments

Survivors of domestic violence, dating violence, sexual assault, and stalking face significant barriers when attempting to access safe, decent, and affordable housing. Since housing stability is so critical for survivors, changes in housing policy can potentially impact survivors' abilities to obtain and maintain housing in an environment that is free from violence. Recently, the U.S. Department of Housing and Urban Development (HUD) has taken action on several housing issues—including homelessness, harassment and liability under the Fair Housing Act (FHA), shelter access consistent with individuals' gender identity, and the use of arrest records in housing decisions. Specifically, HUD has: (1) issued a final regulation that defines "chronically homeless"; (2) proposed a regulation concerning harassment in housing and liability under the Fair Housing Act (FHA); (3) proposed a regulation concerning access to shelters and other facilities funded by HUD's Community Planning and Development (CPD) programs consistent with individuals' gender identity; and (4) issued guidance stating that arrest records alone cannot be the basis for housing decisions in federally subsidized housing. The following article briefly summarizes each of these recent developments.

HUD Issues Final Rule Defining "Chronically Homeless"

Domestic violence, dating violence, sexual assault, and stalking often result in survivors and their families experiencing homelessness. On December 4, 2015, HUD issued [a final rule that provided a definition of "chronically homeless"](#) that will be used in the agency's Continuum of Care program (CoC) and in the Consolidated Submis-

sions for CPD programs. HUD intentionally narrowed the statutory definition of "chronically homeless" found in Section 401 of the McKinney-Vento Act to ensure that the funds are targeted to provide permanent supportive housing solutions for individuals with the longest histories of homelessness and highest need. A "chronically homeless" person is defined as a homeless individual with a disability who lives either in a place not meant for human habitation, a safe haven, or in an emergency shelter, or in an institutional care facility if the individual has been living in the facility for fewer than 90 days and had been living in a place not meant for human habitation, a safe haven, or in an emergency shelter immediately before entering the institutional care facility. To meet the "chronically homeless" definition, the individual also must have been living as described above continuously for at least 12 months, or on at least 4 separate occasions in the last 3 years, where the combined occasions total at least 12 months. Each period separating the occasions must include at least 7 nights of living in a situation other than a place not meant for human habitation, in an emergency shelter, or in a safe haven.

Chronically homeless families are families with adult heads of household who meet the definition of a chronically homeless individual. If there is no adult in the family, the family would still be considered chronically homeless if a minor head of household meets all the criteria of a chronically homeless individual. A chronically homeless family includes those whose composition has fluctuated while the head of household has been homeless.

The rule further established the necessary recordkeeping requirements that correspond to the definition of "chronically homeless" for the CoC program. Recipients and subrecipients of the CoC program are required to follow written intake

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procedures to ensure compliance with the “chronically homeless” definition. The procedures must establish the order of priority for obtaining evidence as third-party documentation first, intake worker documentation second, and certification from the individual seeking assistance third.

The rule is effective January 4, 2016. HUD expects all providers operating permanent supportive housing dedicated to or prioritized for individuals and families experiencing chronic homelessness to use this definition for all new individuals admitted to the program after January 15, 2016. HUD is further providing a [webinar](#) in January 2016 for CoC leadership, CoC program participants, and other stakeholders to learn about the new definition and recordkeeping requirements.

HUD Issues Proposed Regulation Concerning Harassment and Liability Under the Fair Housing Act

Note to OVW Grantees: The Office of Violence Against Women, U.S. Department of Justice, does not handle issues regarding sexual harassment.

Harassment in the home is an issue that impacts survivors. A housing provider or neighbor’s conduct may begin as harassment, but, over time, may escalate to stalking or even sexual assault. Additionally, survivors—who are overwhelmingly female—are also often subject to housing discrimination in violation of the FHA. In October 2015, HUD issued a proposed regulation that would address both harassment in housing and liability under the FHA for acts of housing discrimination.

This proposed regulation puts forth standards for analyzing claims of harassment under the FHA. Importantly, the proposed regulation does not just cover sexual harassment, but would extend to harassment based on membership in all categories protected by the FHA, which include race, color, sex, religion, disability, national origin,

and familial status. HUD also proposes to create a new section within HUD regulations that would provide definitions for terms that describe the two prevailing theories of harassment—namely, “quid pro quo” harassment and “hostile environment” harassment. Specifically, HUD proposes to define “quid pro quo” harassment as referring to “an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to” the availability, sale, or rental of the dwelling, or the exercising of other rights under the FHA. As noted in the text that explains the proposed regulation, an example of quid pro quo harassment would be a housing provider conditioning a tenant’s ability to stay in a unit upon the tenant’s submission to unwanted sexual advances. HUD proposes to define “hostile environment” harassment as “unwelcome conduct that is sufficiently severe or pervasive as to interfere with” the availability, rental, sale, or “use or enjoyment” of the dwelling, or the exercising of other FHA rights. The proposed regulation also outlines some of the factors to be used to assess whether hostile environment harassment is present.

Furthermore, the proposed regulation outlines when housing providers and other entities covered by the FHA would be held liable for *all* FHA violations, including, but not limited to, harassment. The proposed regulation describes when a housing provider or other entity would be liable for an individual’s own discriminatory conduct (*i.e.*, a housing provider that harasses or otherwise discriminates against a tenant), or the discriminatory conduct of an agent or employee. Importantly, the proposed regulation assigns what is known as “direct liability” under the FHA to those persons with an existing duty to take “prompt action” to address housing discrimination by a third party but do not, assuming that the person with the duty “knew or should have known” about the discriminatory conduct. This existing duty may be the result of state, federal, or local law, or a lease or contract. Under the proposed regulation, FHA liability could arise for a landlord who does noth-

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ing to stop housing discrimination committed by one tenant against another tenant even though the landlord was aware (or should have been aware) of such discrimination.

HUD's final regulation is forthcoming.

HUD Issues Proposed Regulation Regarding Equal Access to HUD CPD Programs Regardless of Gender Identity

Survivors often turn to programs that provide shelter and other services when escaping domestic violence, dating violence, sexual assault, and stalking. Lesbian, gay, bisexual, and transgender (LGBT) survivors still face considerable discrimination when trying to access these services. In November 2015, HUD issued a proposed rule that would add to and amend the existing Equal Access Rule on the issue of ensuring equal access to HUD's Community Planning and Development (CPD) programs consistent with an individual's gender identity. Due to persistent housing discrimination against LGBT individuals, HUD previously tried to address LGBT discrimination in HUD programs generally by issuing the Equal Access Rule in 2012. At that time, the Equal Access Rule amended HUD regulations to require equal access to HUD-funded and HUD-insured programs regardless of sexual orientation, gender identity, or marital status. Now, HUD seeks to engage in more specific rulemaking that focuses on ensuring equal access within the CPD programs consistent with a person's gender identity.

First, the proposed rule seeks to amend the existing definition of "gender identity" within HUD regulations, in order to differentiate the concepts of actual gender identity and perceived gender identity.

Second, the proposed rule seeks to create a new section within HUD regulations (24 C.F.R. § 5.106) that specifically requires CPD programs to provide equal access to individuals regardless of gender identity. This proposed new section would supplement the existing general equal access provision included in current HUD regulations. The

proposed section lists the programs to which the CPD equal access provisions would apply—specifically, the HOME Investment Partnerships (HOME) program, the Community Development Block Grant (CDBG) program, Housing Opportunities for Persons with AIDS (HOPWA) program, the Emergency Solutions Grants (ESG) program, and the Continuum of Care (CoC) program. The proposed section would require CPD funding recipients, subrecipients, and providers to create policies and procedures to ensure equal access regardless of gender identity, including policies and procedures that would safeguard individuals' security and privacy. Additionally, this proposed section would require that an individual's placement and accommodation in shelters and facilities with shared sleeping areas and bathrooms be made in accordance with the person's gender identity. However, the proposed rule includes an exception to this requirement by permitting a CPD funding recipient to, on a case-by-case basis, make a written determination that an alternative placement is required to "ensure health and safety." Such determinations can only be made when less burdensome alternatives are unavailable; the proposed rule would also require that comparable alternative placement be provided. These case-by-case decisions cannot be made on the basis of complaints due to the shelter seeker's perceived or actual gender identity. CPD funding recipients must keep records of such case-by-case determinations. The proposed rule states that decisions "to provide accommodations based on concern for the health and safety of the individual seeking accommodations should be based on the individual's own request to be otherwise accommodated."

Third, the proposed rule would eliminate the provision of the Equal Access Rule prohibiting HUD-assisted and -insured housing programs from inquiring about an individual's gender identity or sexual orientation. HUD now feels that such a ban interferes with the ability of shelters and other facilities to place individuals in shelters/facilities consistent with their gender identity. HUD also explains that removal of this prohibition would

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permit inquiries about an individual's gender identity or sexual orientation such that the housing provider could determine the number of bedrooms a household is entitled to receive. HUD is retaining the Equal Access Rule's prohibition against determining housing eligibility based upon gender identity, sexual orientation, or marital status.

HUD's final regulation is forthcoming.

HUD Issues Guidance Regarding Use of Arrest Records in Housing Decisions

An abuser's actions can often lead to a survivor facing arrest. For example, if the police are called to respond to an abuser's attack on a survivor, the police may arrest both individuals if the responding officers are unable to ascertain which person is the perpetrator. In November 2015, HUD issued new guidance regarding the use of arrests in housing decisions within the federally subsidized housing programs.

HUD has issued two notices with the same content—one addressed to housing authorities and Section 8 Housing Choice Voucher landlords (Notice PIH 2015-19) and the other notice addressed to owners of multifamily properties subsidized through HUD programs (Notice H 2015-10). These notices inform HUD housing providers that arrest records alone cannot serve as the basis for an eviction, termination, or denial of admission for HUD's public housing and subsidized housing programs. In HUD's view, an arrest is insufficient to demonstrate involvement in criminal activity. However, the notices explain that the underlying conduct for an arrest can be the basis of an adverse housing decision if there exists "sufficient evidence" that someone engaged in the criminal activity at issue. Therefore, an arrest record can prompt further inquiry into an individual's conduct, but cannot serve as the sole basis for an adverse housing action. Thus, housing providers can use witness statements, police reports, and "[r]eliable evidence of a conviction" to demonstrate that criminal activity has taken place. The

Resources

Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Chronically Homeless," Final Rule, 80 Fed. Reg. 75,791-806 (Dec. 4, 2015), available at: <https://www.hudexchange.info/resources/documents/Defining-Chronically-Homeless-Final-Rule.pdf>

Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, Proposed Rule, 80 Fed. Reg. 63,720-731 (Oct. 21, 2015), available at: <https://www.gpo.gov/fdsys/pkg/FR-2015-10-21/pdf/2015-26587.pdf>

Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs, Proposed Rule, 80 Fed. Reg. 72,642-649 (Nov. 20, 2015), available at: <https://www.gpo.gov/fdsys/pkg/FR-2015-11-20/pdf/2015-29342.pdf>

Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, HUD Notice H 2015-10; HUD Notice PIH 2015-19 (Nov. 2, 2015), available at: <http://portal.hud.gov/hudportal/documents/huddoc?id=15-10hsgn.pdf> (Notice H 2015-10); <http://portal.hud.gov/hudportal/documents/huddoc?id=15-19pihn.pdf> (Notice PIH 2015-19)

guidance notes that screening, termination, and eviction policies must comply with the FHA and civil rights laws. Additionally, the guidance discusses best practices. ■

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