HOUSING JUSTICE
National Housing Law Project
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HUD Issues Notice on Admissions Preferences for the Homeless

On July 25, 2013, the Department of Housing and Urban Development (HUD) issued Notice H 2013-21, titled "Implementation and Approval of Owner-Adopted Admissions Preferences for Individuals or Families Experiencing Homelessness." The Notice provides guidance on how property owners of multifamily housing subsidized by HUD can adopt admissions preferences for homeless individuals and families. An "admissions preference" provides a housing applicant priority to receive housing before other applicants based on a particular applicant characteristic, such as being homeless. This Notice is particularly important for housing advocates of survivors of domestic violence, dating violence, sexual assault and stalking, as violence against women is a leading cause of homelessness. Importantly, the Notice allows multifamily housing owners to limit the preference to individuals and families referred by a partnering organization that services the homeless. Therefore, advocates, such as legal aid providers and staff of transitional housing programs, should use this opportunity to work with owners in adopting admissions preferences for homeless survivors.

Admissions Preference for Homeless Families

This Notice clarifies HUD's previous interpretation of a federal regulation outlining the kinds of admissions preferences that multifamily housing providers could adopt. Previously, HUD's Office of Multifamily Housing Programs limited admissions preferences to those categories of preferences listed in 24 C.F.R. § 5.655(c)(1)-(c)(5) – namely, residency preferences; preferences for working families; preferences for persons with disabilities; preferences for victims of domestic violence; and preferences for single persons who are elderly, displaced, homeless, or disabled over other single persons. Therefore, project-based Section 8 owners could not adopt admissions preferences specifically for homeless *families*, although preferences for homeless single individuals were allowed. With the Notice, HUD has broadened its interpretation of the regulation and now permits owners to adopt admissions preferences beyond those explicitly listed in the regulation. Therefore, a preference for homeless families is now allowed in multifamily housing assisted by HUD. Notably, the same regulation (24 C.F.R. § 5.655(c)(4)) already provides an admissions preference for "families that include victims of domestic violence." However, it is unclear whether this preference covers other survivors of abuse (such as sexual assault and dating violence) who are left homeless as a result of the violence committed against them.

Owners who adopt an admissions preference to include homeless families must receive HUD approval, since a preference for homeless families is not explicitly included in the regulation.

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HUD will approve such an owner-adopted preference if "it does not result in discrimination, violate civil rights or equal opportunity requirements, or conflict with statutory, regulatory, or program requirements."

Defining "Homeless"

In 2011, HUD issued a regulation implementing previous federal legislation that defines "homeless" persons as those falling into one of four categories: (1) persons or families "who lack a fixed, regular, and adequate nighttime residence," including individuals who have resided in a temporary emergency shelter; (2) persons and families "who will imminently lose their primary nighttime residence"; (3) "unaccompanied youth and families with children and youth" defined as homeless in other federal statutes but who do not fall under this definition; and (4) "individuals and families who are fleeing, or are attempting to flee domestic violence, dating violence, sexual assault, stalking or other dangerous or life-threatening conditions" related to violence against a person or family member. According to the Notice, owners may adopt this definition for purposes of an admissions preference for the homeless. However, owners are not bound by this definition and may establish an alternative definition based on local need. Therefore, owners may narrow or broaden their definition of "homeless" in administering an admissions preference. Owners must receive approval for owner-adopted definitions of "homeless" from the local HUD field office.

Considerations for Owner-Adopted Preference

In adopting an admissions preference, the Notice lists a series of issues that owners must take into consideration.

Resources

HUD, Notice H 2013-21, "Implementation and approval of owner-adopted admissions preferences for individuals or families experiencing homelessness" (July 25, 2013), available at portal.hud.gov/huddoc/13-21hsgn.pdf

HUD, Final Rule, "Homeless Emergency Assistance and Rapid Transition to Housing: Defining 'Homeless,'" 76 Fed. Reg. 75,994 (Dec. 5, 2011), available at www.gpo.gov/fdsys/pkg/FR-2011-12-05/pdf/2011-30942.pdf (includes four categories of "homeless" definition)

- An admissions preference does not make persons who would not be otherwise eligible for federally assisted housing eligible. Additionally, the Notice states that owners must tell every applicant about all admissions preferences used at the property, and permit each applicant to demonstrate that she qualifies for a preference. Owners must also alert persons on an admissions waitlist that such an admissions preference is available.

- The use of an admissions preference must be detailed in both the property's Tenant Selection Plan and any required Affirmative Fair Housing Marketing Plan.

- The owner must consider whether the property will, as discussed above, adopt the HUD definition of "homeless" or create an owner-adopted definition. This definition cannot violate fair housing or civil rights laws.

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- The owner should consider whether any homeless admissions preference will give priority to referrals from a partnering agency (such as a temporary housing program), and how eligibility for the preference will be verified.

- Owners should consider whether they will use "alternating selection" when implementing the admissions preference. For example, if an owner has three units available, the owner could provide 1 unit to a homeless applicant and 2 units to non-homeless applicants off of the waitlist. How an alternating selection scheme is applied must be included in the property's Tenant Selection Plan.

- Owners must be mindful of the fact that adopting an admissions preference cannot change the designation of the property or of specific units. For example, a property designated as elderly housing cannot begin admitting nonelderly persons simply because of an admissions preference for the homeless.

- Any owner adopting a homeless admissions preference must ensure that the adoption would comply with all fair housing and civil rights obligations. For instance, the admissions preference could not exclude persons of a particular race or religion. Owners "should analyze demographic data of the waiting list population and of the population in the community and compare this to the demographic characteristics of those who would qualify for the preference to ensure that the preference does not" disadvantage particular classes protected by the Fair Housing Act.

Additional Admissions Policies

While an owner may adopt an admissions preference, the Notice reminds owners that they must deny admission to households with certain persons, including: individuals who have been evicted from federally assisted housing within three years due to drug-related criminal activity (although the owner may consider certain exceptions); persons using illegal drugs, or if there is reasonable cause to suspect that a household member's drug or alcohol abuse might interfere with the health, safety, or right to peaceful enjoyment of other tenants; and individuals required to register as state lifetime sex offenders.

Although owners may devise additional screening criteria, the Notice encourages owners who wish to serve more homeless persons to "consider reviewing his/her discretionary admission policies to determine if any changes can be made to remove barriers." Furthermore, the Notice reminds owners that they cannot establish different admission or termination policies for those tenants admitted under any homeless admissions preference. ■

HUD Clarifies Definition of Assistance Animals under Civil Rights Laws

Individuals with disabilities are particularly vulnerable to violence. According to one report, women with disabilities have a 40% greater risk of experiencing violence from their male partners than women without disabilities. A physical, mental health, or intellectual disability can increase the barriers that survivors face when seeking decent, safe, and affordable housing. For example, a survivor who has an emotional support animal might be wrongfully denied access to housing as a result of a no-pets policy. With few housing options available to survivors, it is crucial that domestic violence agencies that operate shelters and transitional housing programs are aware of the fair housing protections that apply to individuals with disabilities. Further, advocates for survivors experiencing disabilities should be familiar with the right to reasonable accommodations in housing.

On April 25, 2013, the Department of Housing and Urban Development (HUD) issued a Notice concerning the obligation of housing providers to accommodate people with disabilities who rely on assistance animals under three civil rights statutes: the Fair Housing Act (FHA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Americans with Disabilities Act (ADA). HUD issued the Notice in part to clarify confusion over the definitions of "service animal" (provided by the Department of Justice (DOJ) in amendments made in 2010 to the ADA regulations) and "assistance animal" under the FHA and Section 504. DOJ limited the definition of "service animal" under the ADA, creating a contradiction in how the ADA dealt with reasonable accommodation requests concerning assistance animals, versus the approaches taken by the FHA and Section 504. These differing approaches have been problematic for housing advocates in deciding what definition to apply when requesting a reasonable accommodation for an assistance animal because courts usually interpreted all three civil rights laws as interchangeable. This article will discuss key points raised by the HUD Notice and will guide advocates and housing providers on dealing with assistance animals.

Resources

HUD FHEO-2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs (April 25, 2013), available at http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf

Memorandum from Sara K. Pratt, Deputy Assistant Sec'y for Enforcement & Programs, HUD, to FHEO Reg'l Dirs., Re *New ADA Regulations and Assistance Animals as Reasonable Accommodations under the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973* (Feb. 17, 2011).

When do the FHA, Section 504, and ADA apply?

The FHA, Section 504, and ADA are civil rights laws intended to prevent discrimination against individuals with disabilities. The FHA applies to most housing providers, both public and private, and prohibits discrimination on the basis of "handicap" or disability with limited exceptions. Section 504 covers housing providers that receive financial assistance from any federal department or agency, such as public housing authorities (PHAs), owners of project-based Section 8 buildings, and transitional housing providers. Title II of the ADA prohibits discrimination by state and local governments in its programs, activities , or services. This provision covers local

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public housing authorities, components of state-funded affordable housing programs, and some government-funded transitional housing facilities. Title III of the ADA covers public and common use areas of housing developments when these public areas are, by their nature, open to the general public. Title III also applies to non-government entities, both non-profit and for-profit, that provide goods and services to the public, such as agencies that provide social services to domestic violence survivors.

What Are the Differences in Defining "Assistance Animal"?

There are several important distinctions as to what qualifies as an assistance animal under the FHA, Section 504, and the ADA. HUD's Notice intentionally uses the inclusive term "assistance animal" with respect to the FHA and Section 504 to help distinguish it from the ADA's narrower term "service animal." An "assistance animal" under the FHA and Section 504 can be a certified service animal, an emotional support animal , or any other animal that "works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability." Not only dogs, but other animals may qualify as assistance animals. In fact, there appears to be no limit as to the type of animal that may provide assistance to a disabled individual, so long as the animal lessens the symptoms of the person's disability and does not pose a threat to public health and safety. This broad definition is aligned with how most housing advocates interpret "assistance animal" for purposes of a reasonable accommodation request in the housing context. Courts have not further restricted this interpretation. The HUD Notice clarifies that under the FHA and Section 504, a housing provider cannot apply breed, size, or weight restrictions to assistance animals. To deny an accommodation request to have an assistance animal, the housing provider must show that the specific animal will cause a threat to the health and safety of others or damage the housing provider's property.

In contrast, DOJ's definition of "service animal" under the ADA includes only animals that are "*individually trained* to do work or perform tasks for the benefit of an individual with a disability, including physical, sensory, psychiatric, intellectual, or other mental disability" (emphasis added). Emotional support animals are specifically excluded from the definition. Further, only dogs and, in some rare instances, miniature horses may qualify as service animals under the ADA. An entity may deny access to a qualifying service animal only if it poses a direct threat to health and safety, the animal is out of control, or the animal is not housebroken.

Which Definitions Should Be Used When?

According to the HUD Notice, it is "the housing provider's responsibility to know the applicable laws" when deciding whether to modify its practices to permit the use of an assistance animal. In a facility where only the ADA applies, the animal must meet the "service animal" definition and not fall into any of the exceptions. However, "an entity that is subject to both the ADA and the FHA or Section 504 must permit access to ADA-covered 'service animals' and, additionally, apply the more expansive assistance animal standard when considering reasonable accommodations for persons with disabilities who need assistance animals that fall outside the ADA's 'service animal' definition." For example, a transitional housing facility that provides social services to survivors and receives federal funding is obligated to accommodate a client's assistance animal under both Section 504 and the ADA. Section 504 applies because the housing provider receives federal

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funds. The provider is also covered by Title III of the ADA because it is considered a social service establishment.

Tips for Advocates

When drafting a request for an assistance animal accommodation, housing advocates should be sure to apply the proper federal anti-discrimination law and corresponding definition of "service animal" or "assistance animal." For FHA and Section 504-covered facilities, advocates must also satisfy all the elements of a reasonable accommodation claim by providing facts about the client's disability or symptoms of the disability and the nexus between the disability and the need for an assistance animal.

In addition, housing advocates should argue that the FHA and Section 504 apply whenever possible, to invoke the broadest definition of "assistance animal" under federal law. Housing providers may argue that they are only covered by the ADA, and, therefore, the narrower definition of service animal applies. When appropriate, advocates should cite to the FHA and Section 504 as well as the recent HUD Notice when negotiating with such entities because all housing providers, whether public or private, are covered by the FHA, with limited exceptions. In addition, if advocates are dealing with federally subsidized housing providers, then the law is clear that they are covered by the FHA or Section 504 and must allow assistance animals, emotional support animals, and therapy animals in the home.

One gray area for advocates is often the application of federal fair housing laws to domestic violence emergency shelters. Owners and managers of these entities often argue that the program is not covered by the FHA because it does not meet the definition of "dwelling" and, therefore, they need not accommodate a survivor's emotional support animal, such as an untrained dog. This presents a problem for survivors with disabilities who access emergency shelters accompanied by an emotional support animal. The law in this area is unsettled. Nonetheless, advocates should argue that based on the facts of the case, shelters are covered entities and the FHA applies. Further, if the shelter receives federal funding, advocates should cite to Section 504 to access HUD's broad interpretation of the term "assistance animal." In addition, domestic violence shelters operated by local or state governments must comply with Title II of the ADA and, therefore, are obligated to allow service animals into their establishments. Title III of the ADA imposes nondiscrimination requirements on social service agencies open to the public and specifically includes homeless shelters. ■

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