

HOUSING JUSTICE

National Housing Law Project

Newsletter August-September 2013

HUD Issues Notice on Applying VAWA 2013 to Housing Programs

On August 6, 2013, the Department of Housing and Urban Development (HUD) published a notice in the Federal Register providing an overview of the applicability of the Violence Against Women Reauthorization Act of 2013's (VAWA 2013) housing provisions to HUD programs. Public comments are due October 7, 2013.

HUD indicates in the notice that while the housing protections were effective upon enactment on March 7, 2013, the agency does not interpret this to mean that these provisions are self-executing. Therefore, HUD guidance or rulemaking would be necessary for owners and managers to comply with the new provisions. Many housing and survivor advocates had assumed that except for a few significant safeguards requiring federal agencies to act before the protections could be implemented, owners and managers of the covered housing programs were bound by the statute's basic requirements once VAWA 2013 was signed into law. Subsequently, on August 30, 2013, HUD's Office of Special Needs Assistance Programs (SNAPS) sent a mass email over the OneCPD listserv explicitly stating that housing providers in HUD-covered programs should not wait on HUD guidance or regulations to extend the basic VAWA protections to tenants in HUD-assisted housing. The email further reminded stakeholders that housing providers who refused to rent or evict because of a person's status as a survivor of domestic violence may be violating the Fair Housing Act.

Advocates working with survivors to access and

maintain housing covered by VAWA 2013 should use HUD's email for advocacy purposes. In addition, advocates should know that HUD's regulations implementing VAWA 2005 are still in effect. Therefore, owners and managers of public housing, Section 8 vouchers, project-based Section 8, Section 202 housing for the elderly and Section 811 housing for the disabled are still bound by these rules that provide additional protections for survivors.

Members of the public are free to comment on HUD's notice or any issue related to HUD's implementation of VAWA 2013. In particular, HUD has highlighted four specific areas in which it would especially like feedback.

Rights of remaining tenants and "reasonable time." VAWA 2013 provides that if a lease bifurcation occurs because of domestic violence and the removed abuser was the tenant who was eligible to receive the housing subsidy, then any remaining tenant must have the opportunity to establish eligibility for the covered housing program. If that person cannot establish eligibility, then the housing provider must provide reasonable time for the tenant to find new housing or to establish eligibility under another covered housing program. VAWA 2013 requires that the federal agencies administering the covered programs determine what constitutes "reasonable time." HUD would like comments concerning what would be a "reasonable time" to find new housing or establish eligibility under another HUD-covered housing program.

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Self-certification forms. VAWA 2013 extended the documentation and confidentiality requirements found in VAWA 2005 to all programs covered by the new law. HUD will develop forms that are similar to forms HUD-50066 and HUD-91066 for the other programs. The agency requests comments on how these forms may be adapted for the newly covered programs.

HUD's notice of VAWA rights. The new law requires HUD to develop a notice of VAWA housing rights ("HUD notice"), which includes the right of confidentiality, for applicants and tenants. Specifically, PHAs, owners and managers must provide the HUD notice accompanied by the agency-approved, self-certification form to applicants and tenants: (1) at the time an applicant is denied residency; (2) at the time the individual is admitted; and (3) with any notification of eviction or termination of assistance. In addition, the HUD notice must be available in multiple languages and be consistent with HUD guidance concerning language access for individuals with limited-English proficiency. HUD solicits comments on the content of the notice of tenant's rights.

Model emergency transfer plan and tenant protection vouchers. VAWA mandates that each federal agency adopt a model emergency transfer plan to be used by PHAs and owners or managers of housing assisted under the covered housing programs. This transfer plan must allow survivor tenants to transfer to another available and safe dwelling unit assisted under a covered housing program if: (1) the tenant expressly requests the transfer and (2) either the tenant reasonably believes that the tenant is threatened with imminent harm from further violence if the tenant remains within the same assisted dwelling unit, or where the tenant is a victim of sexual assault and the sexual assault occurred on the premises within 90 days before the transfer request. In addition, the transfer plan must incorporate reasonable confidentiality measures to ensure that the PHA, owner or manager does not disclose the location of

Resources

HUD, The Violence Against Women Reauthorization Act of 2013: Overview of Applicability to HUD Programs, 78 Fed. Reg. 47,717 (Aug. 6, 2013). <http://www.gpo.gov/fdsys/pkg/FR-2013-08-06/pdf/2013-18920.pdf>

HUD CPD Email, Reauthorization of the Violence Against Women Act (VAWA) (Aug. 30, 2013). <http://us5.campaign-archive2.com/?u=87d7c8afc03ba69ee70d865b9&id=5c84a52df8&e=fbb488621b>

HUD, HUD Programs: Violence Against Women Act Conforming Amendments; Final Rule, 75 Fed. Reg. 66,246 (Oct. 27, 2010). <http://www.gpo.gov/fdsys/pkg/FR-2010-10-27/pdf/2010-26914.pdf>

NHLP, VAWA 2013 Continues Vital Housing Protections for Survivors and Provides New Safeguards, DOJ-OVW Newsletter (April-May 2013). <http://nhlp.org/files/April-May%202013%20Newsletter%205-15-13.pdf>

the new unit to the abuser. VAWA 2013 further mandates that HUD establish policies and procedures under which a victim requesting an emergency transfer may receive a tenant protection voucher. HUD requests comments on the content of the model emergency transfer plan and the implementation of the tenant protection vouchers provision. ■

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Housing Protections for Survivors with Limited English Proficiency

Many survivors of domestic violence are limited English proficient (LEP). The term “LEP” describes persons whose first language is not English and who experience difficulty in reading, writing, or speaking English. While many survivors face considerable hurdles in obtaining safe, affordable housing, LEP survivors also must contend with language barriers when trying to communicate with local housing authorities, the courts, or police officers responding to a domestic violence incident. Therefore, advocates should familiarize themselves with the legal protections for LEP survivors living in or seeking housing.

Protections under Title VI

The main source of protections for LEP individuals exists under Title VI of the Civil Rights Act of 1964. Title VI prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin. In 1974, the U.S. Supreme Court, in *Lau v. Nichols*, ruled that refusing to provide meaningful language access constituted national origin discrimination under Title VI. The *Lau* decision established a link between national origin discrimination and language discrimination. Decades later, the nexus between national origin discrimination and language access, as established in *Lau*, remains good law. For example, in 2012, in *United States v. Maricopa County*, a federal district court discussed and reaffirmed this link under Title VI in a case involving the jail conditions of Latino inmates.

Given this nexus, entities such as public housing authorities (PHAs), which receive federal financial assistance, have a legal obligation to ensure that appropriate translations or interpretations are provided to LEP individuals. In 2000, President Clinton signed Executive Order 13166, entitled “Improving Access to Services for Persons with Limited English Proficiency.” This Executive Order requires federal agencies to devise plans as well as administrative guidance to ensure that their fund-

ing recipients—as well as the agencies themselves—comply with Title VI. In 2007, HUD issued its final LEP Guidance (HUD LEP Guidance), which outlined a series of steps that recipients of HUD funding, including PHAs, should take to ensure Title VI compliance. USDA issued similar proposed guidance for its funding recipients in 2012. These requirements include conducting a four-factor analysis to assess the need for language assistance; creating a language assistance plan based on the findings of the four-factor analysis; translating all vital documents (i.e., those documents necessary to ensure meaningful access); and always offering oral interpretation, if needed.

In addition, in 2004, HUD published a list of housing programs administered by the agency that must comply with Title VI. This list includes public housing, Section 8 vouchers, project-based Section 8, Housing Opportunities for Persons with AIDS (HOPWA), Shelter Plus Care, programs receiving Community Development Block Grant (CDBG) funds, Emergency Shelter Grants, and HOME funds, among others.

Limitations of Title VI Protections

While Title VI protects LEP individuals by prohibiting discrimination on the basis of national origin, there are limits to this safeguard. In situations where there has been a general failure to provide language assistance to several language groups, a few courts have held that this did not constitute national origin discrimination because one nationality was not being singled out. For example, in 2012, in *Partida v. Page*, a federal district court in California found that the LEP plaintiff did not sufficiently allege national origin discrimination under Title VI, concluding that she failed to show that the defendants refused her medical treatment because she was LEP or born in Mexico. The court added that the plaintiff did not demonstrate that the defendants treated her differently from U.S.-born or English-speaking patients.

Furthermore, in 2001, the U.S. Supreme Court decided *Alexander v. Sandoval*, a case about the failure of a state to offer driver’s license exams in

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languages other than English. In this case, the Supreme Court decided that private plaintiffs could only bring a lawsuit under Title VI by alleging intentional discrimination. Previously, private plaintiffs also could sue under Title VI by using a legal doctrine known as “disparate impact,” in which a policy that does not explicitly discriminate could still be unlawful if it disproportionately discriminates against individuals based on race, color or national origin.

Therefore, after the *Sandoval* decision, if private plaintiffs wish to make a Title VI claim in court, they must allege that the defendant intentionally discriminated against them. Showing intentional discrimination can be difficult, as evidence demonstrating this intent is often hard to obtain. However, any person who believes that she has been subject to Title VI violations in the context of a HUD housing program can still file an administrative complaint with her regional HUD Office of Fair Housing and Equal Opportunity alleging either intentional discrimination or disparate impact under Title VI. As a federal agency, HUD retains the authority to bring Title VI claims based on a disparate impact theory. HUD’s LEP Guidance confirms that federal regulations prohibiting conduct that creates a disparate impact in violation of Title VI remain valid post-*Sandoval*.

Finally, there are limitations to the types of housing covered by Title VI, and, therefore, obligations for providing language access for LEP persons under this statute. Title VI only applies to housing that receives any sort of federal financial assistance. Thus, private landlords who do not receive federal financial assistance do not have obligations under Title VI. Additionally, according to HUD’s LEP Frequently Asked Questions, landlords who accept Section 8 Housing Choice Program Vouchers are not bound by Title VI unless they receive additional federal funding from a program covered by the statute.

Furthermore, it is unclear whether Low Income Housing Tax Credit (LIHTC) units that do not receive Project-based Section 8, funds from the American Recovery and Reinvestment Act of 2009, or any other federal financial assistance, are sub-

Resources

HUD, Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (Jan. 22, 2007). [http://www.justice.gov/crt/lep/guidance/ HUD_guidance_Jan07.pdf](http://www.justice.gov/crt/lep/guidance/HUD_guidance_Jan07.pdf)

HUD, Questions and Answers from February 28, 2007 Limited English Proficiency Meeting. http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14791.pdf

HUD, Limited English Proficiency (LEP) Frequently Asked Questions. http://portal.hud.gov/hudportal/ HUD?src=/program_offices/fair_housing_equal_opp/promotingfh/lep-mfh-faq

HUD, List of Federally Assisted Programs, 69 Fed. Reg. 68700 (Nov. 24, 2004). [http://www.hud.gov/offices/fheo/library/ title6_hudprograms.pdf](http://www.hud.gov/offices/fheo/library/title6_hudprograms.pdf)

Conciliation Agreement between HUD and Virginia Realty Company of Tidewater, FHEO Case No. 03-11-0424-8 (Jan. 3, 2013). <http://portal.hud.gov/hudportal/documents/huddoc?id=OPADOC.PDF>

NHLP, DOJ-OVW Newsletter, VAWA 2013 Continues Vital Housing Protections for Survivors and Provides New Safeguards (April-May 2013). <http://nhlp.org/files/April-May%202013%20Newsletter%205-15-13.pdf>

ject to Title VI, since it is uncertain whether Tax Credits constitute “federal financial assistance.” The Department of Treasury, which administers the LIHTC program, has not issued guidance on this question.

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The Fair Housing Act

Title VIII of the Civil Rights Act of 1964, commonly known as the Fair Housing Act (FHA), also prohibits national origin discrimination. Unlike Title VI, which has a scope beyond housing, the FHA specifically prohibits discrimination in the rental or sale, or in the terms, conditions, or privileges of the rental or sale of dwellings.

The courts have not firmly established the link between national origin discrimination and language access under the FHA. For example, in *Vialez v. New York Housing Authority*, a federal district court in New York reasoned that the housing authority's failure to provide Spanish translation was not discrimination on the basis of national origin because "[a]ll non-English speaking people are equally affected by English-only forms," and, therefore, there is "no distinct impact on those of Hispanic origin." The court also found that in claiming language discrimination, the plaintiff did not allege discrimination against a category of persons protected by the FHA. According to the court, discrimination on the basis of language did not violate the FHA.

However, HUD is willing to recognize the relationship between national origin discrimination and language access under the FHA through administrative enforcement. In January 2013, HUD settled a complaint with a private realty company in Virginia based on allegations of discrimination against an LEP prospective tenant. During its investigation of the allegations, HUD found that the realty company had a written policy requiring potential renters to communicate in English without any outside assistance. In its complaint, HUD alleged that the realty company, by having such a policy in place, violated the FHA by discriminating on the basis of national origin. The conciliation agreement required the realty company to adopt an LEP plan under which the company must provide interpretation and translation services for both current tenants and rental applicants. The agreement also directed the company to pay over \$80,000 to settle the claims and to adopt a non-discrimination policy.

Protections under VAWA 2013

Congress recently took a step to address language barriers faced by domestic violence survivors by including a new language access provision in the 2013 reauthorization of the Violence Against Women Act (VAWA 2013). VAWA 2013's housing provisions require that public housing agencies (PHAs) and owners and managers of programs covered by the statute provide a notice, developed by HUD, to applicants and tenants regarding VAWA housing rights (1) when an applicant is denied residency; (2) when an applicant is admitted; and (3) with any notification of eviction or termination of assistance. This notice must be accompanied by an agency-approved self-certification form, available in multiple languages and be consistent with HUD's LEP Guidance.

Conclusion

The information in this article provides a starting point for advocates working with LEP survivors experiencing difficulties with language access and housing rights. Advocates looking to enforce language access rights in the HUD housing context should consider the possibility of doing so administratively through HUD. This mechanism can be a particularly useful tool for challenging violations under VAWA, Title VI and the FHA. ■

Available Online in English and Spanish

Q and A for Survivors with Criminal Records: What You Should Know When Applying for Federally Subsidized Housing

The Q and A, available in English and Spanish, has basic information for survivors who have a criminal record and are applying for federally subsidized housing. Issues covered include improving your chances of being admitted; bars from certain housing programs; and housing denials due to criminal convictions and arrests.

The Q and A is at: <http://nhlp.org/node/2631/>

Technical Assistance Question of the Month: Eviction or Subsidy Termination Due to Damage to Unit Caused by Abuser

Q. Can a survivor be evicted or terminated from a federal housing subsidy program as a result of the damage that an abuser caused to her unit?

A. A domestic violence survivor may be threatened with an eviction or subsidy termination when her abuser causes damage to a federally subsidized housing unit. Advocates can make a number of strong arguments in favor of protecting the rights of survivors to maintain their federally subsidized housing.

Argument 1: The damage is a result of the abuser's acts of violence and, therefore, the survivor's assistance cannot be terminated under the Violence Against Women Act (VAWA). VAWA provides that an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking will not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and will not be good cause for terminating the victim's tenancy or rental assistance. In other words, a tenant cannot be evicted for reasons related to the violence committed against her. When an abuser causes physical destruction to the property, advocates should argue that the damage is directly related to the abuse and, therefore, no negative action may be taken against the survivor as a result. It is important to show a correlation between the property damage and the domestic violence because the law only protects victims when the damage is related to the domestic violence. In the case where the property damage was a direct result of a physical altercation between the abuser and survivor, advocates may have an easier time relating the property damage to the acts of violence. In other circumstances, advocates can argue there is a correlation by providing a statement from a domestic violence expert explaining the risk of harm the

survivor would have faced if she reported the abuser's activity, or a statement from the survivor documenting the threats of retaliation she experienced when she tried to stop the abuser from damaging the property.

Argument 2: The damage is a result of criminal activity and, therefore, the survivor's assistance cannot be terminated under VAWA: VAWA explicitly prohibits survivors of domestic violence from being evicted or having their rental subsidies terminated as a result of criminal activity directly relating to the domestic violence. If the survivor is being evicted or her subsidy is being terminated essentially because of her abuser's criminal acts of vandalism, then VAWA could provide a strong defense. Applying a similar analysis as above, any damages that incurred as a result of the domestic violence would not be cause for eviction or termination.

Argument 3: Housing providers cannot hold survivors to a more demanding standard than other tenants. Under VAWA, housing providers cannot subject survivors to a more demanding standard than other tenants when determining whether to evict or terminate assistance. If, for example, there is information that other tenants have not been billed for similar damages, then there could be an argument that the housing provider is subjecting the survivor to a higher standard.

Argument 4: Fair housing laws prohibit an eviction/termination based on property damage resulting from domestic violence. The Fair Housing Act (FHA) does not explicitly prohibit housing providers from evicting tenants based on their status as survivors of domestic violence. However, since the majority of survivors are women, survivors may be able to use fair housing laws under a gender discrimination theory to challenge evictions or subsidy terminations that are related to acts of domestic violence committed against them. In 2011, HUD published a memorandum

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concerning the Fair Housing Act and domestic violence in which the agency suggested that evicting survivors for property damage caused by abusers could be illegal. Further, state and local fair housing laws may provide broader and more comprehensive coverage than the FHA and even include domestic violence survivors as a protected class.

Advocates may bring an FHA claim or defense under two major theories. First, a disparate treatment claim arises when a housing provider treats similarly situated men and women differently. An example would be a situation in which a landlord evicts a female tenant after she is involved in a loud argument with a cotenant, but does not evict a male tenant who has been involved in similar noisy disturbances. To succeed on a disparate treatment claim, a plaintiff must prove that the housing provider had a discriminatory intent or motive. This intent can be inferred from the fact that the housing provider treated male tenants differently from similarly situated female tenants. In *Meister v. Kansas City, Kansas Housing Authority*, 2011 WL 765887, slip op. (D. Kan. Feb. 25, 2011), the survivor alleged disparate treatment under the FHA when the housing authority terminated plaintiff's housing choice voucher because of damage to her unit, which the plaintiff argued was a result of domestic violence. A federal court ruled that the plaintiff survivor could proceed with her FHA claim for sex discrimination to challenge the Housing Authority's termination of her voucher and denied the housing authority's motion for summary judgment.

In addition, advocates may employ a disparate impact theory when challenging an eviction or voucher termination that resulted from an act related to domestic violence. Advocates can argue that housing policies that have a negative impact on domestic violence survivors in turn have a disparate impact on women. For example, where an apartment building has a policy that allows for eviction in the face of criminal activity, a survivor might bring a disparate impact claim or defense if survivors have been evicted as a result of domestic violence committed against them.

Resource

Memo from HUD, Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the VAWA (Feb. 9, 2011). <http://portal.hud.gov/hudportal/documents/huddoc?id=FHEODomesticViolGuidEng.pdf>

Argument 5: The abuser is an intruder, not a guest, and, therefore, the survivor is not responsible for the property damage and cannot be evicted or terminated because of it. Substantial property damage may be grounds for an eviction or subsidy termination, including when the damage is caused by a guest. Guests are typically defined as a person staying in the unit with the tenant's consent. Advocates should argue that abusers are not guests where the victim did not give consent to enter the unit. Moreover, even if the abuser was a guest at the time of entry, the abuser ceases to be a guest the moment the violence begins. Advocates can further contend that tenants are not responsible for the damage done to their property by illegal trespassers. In addition, advocates should check the administrative rules for their jurisdiction to see if the PHA has a specific rule that states crime victims cannot have their voucher terminated when there is damage done to their home by an intruder. ■

This project was supported by Grant No. 2008-TA-AX-K030 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.