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Pro Bono
Course Handbook Series

Subsidized Housing 2.0—Advanced Topics in Subsidized Housing 2023

Chair
Deborah Thrope

Subsidized Housing 2.0—Advanced Topics in Subsidized Housing 2023

Chair
Deborah Thrope

Practising Law Institute
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Program
San Francisco and Live Webcast, November 13, 2023

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Senior Pro Bono Program Attorney: Christina Thompson

Program Schedule

Subsidized Housing 2.0—Advanced Topics in Subsidized Housing 2023
November 13, 2023
San Francisco and Live Webcast, www.pli.edu

AGENDA

9:00
Opening Remarks
Deborah Thrope

9:15
Admissions and Tenant Screening in Federally Assisted Housing
This session will cover the substantive eligibility criteria for admission to the major subsidized housing programs. After completing this session participants will be able to:

- Understand common "suitability" criteria under which subsidized landlords often discretionarily deny admission.
- Implement procedures for appealing admission denials.
- Recognize possible means of judicial review or litigation-based challenges to denial.

Eric Dunn, Lila Gitesatani, Abby Khodayari

10:15
Tenant Protections in Admissions Cases
This session will address the various legal protections available to housing applicants. After completing this session, participants will be able to:

- Explore individual rights under the Fair Housing Act.
- Understand housing applicant rights under the Violence Against Women Act.
- Recognize how these laws protect applicants from unfair and illegal application denials.

Ugochi Anaebere-Nicholson, Sarah Brandon, Tiffany Hickey

11:15
Networking Break

11:30

Consumer Protections in Admissions Cases

This session will provide an overview of consumer protections that housing applicants and their advocates should be aware of. After completing this session, participants will be able to:

- Understand fair credit reporting laws.
- Interpret screening and application fee regulations.
- Understand developments regarding portable screening reports.

Ariel Nelson, Lisa Sitkin, Stacey Tutt

12:30

Adjourn

Faculty:

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Faculty Bios

Deborah Thrope
National Housing Law Project

Deborah Thrope is the Deputy Director of the National Housing Law Project. Deborah's work focuses on federal, state, and local policy advocacy to preserve affordable housing and tenants' rights. She provides training and technical assistance to advocates working with low-income tenants and serves as an advisor and editor of NHLP's seminal publication, *HUD Housing Programs: Tenants Rights*. Deborah has testified before Congress about increasing economic mobility in the Housing Choice Voucher program and improving living conditions for public housing residents. Before joining NHLP, Deborah was a senior attorney at the Law Foundation of Silicon Valley and represented clients with disabilities facing eviction and civil commitment.

Ugochi Anaebere-Nicholson
Public Interest Law Project

Ugochi joined PILP in July 2022 and focuses her work on homelessness prevention and protecting the rights of unhoused people. Ugochi brings expertise in several substantive practice areas, including housing and consumer rights, housing rights for veterans, immigration rights, and landlord/tenant law.

Prior to joining PILP, Ugochi served as Directing Attorney for the Housing and Homelessness Prevention Unit of the Public Law Center. She brings over 17 years' experience practicing public interest law, including protecting the rights of tenants and those in need of affordable housing using litigation, administrative and policy advocacy, and coalition building strategies. She has served as a staff attorney with Neighborhood Legal Services of Los Angeles County, as acting director of Disability Rights Legal Center's Options Counseling and Lawyer Referral Service, as director of pro bono legal services in the Central Valley at Central California Legal Services, and as a managing attorney with Inland Counties Legal Services.

Ugochi earned her Bachelor of Arts Degree in Political Science from UCLA, and her Juris Doctor Degree from Southwestern Law School. She currently serves as a member of the California State Bar's Judicial Nominees Evaluation (JNE) Commission, and of the Rural Task Force Committee of the Access to Justice Commission.

Sarah Brandon
National Housing Law Project

Sarah Brandon is a Berkeley Law Public Interest Fellow at NHLP. Sarah focuses on federal, state, and local advocacy to prevent evictions, expand tenants' rights, and break down barriers to housing access. She is a graduate of Brown University and received a concurrent law and Master of Public Policy degree from UC Berkeley. While in graduate school, she researched best practices for equitable engagement with administrative agencies and was a member of the Policy Advocacy Clinic, where she worked with community-driven coalitions to abolish fees and fines in the juvenile legal system. Sarah also participated in and co-coordinated the Tenants' Rights Workshop at East Bay Community Law Center, supporting Bay Area tenants in understanding and asserting their right to safe and secure housing.

Eric Dunn
National Housing Law Project

Eric Dunn is a national expert on tenants' rights and consumer law issues, including subsidized housing and criminal and eviction records. Prior to NHLP, Eric was an attorney with the Virginia Poverty Law Center, the Northwest Justice Project in Seattle, and the Legal Aid & Defender Association of Detroit. He has been involved in a number of significant cases. *Hendrix v. Seattle Housing Authority* and *Shepherd v. Weldon Mediation Services, Inc*. led to significant improvements in the administrative hearing protections for termination from federally subsidized housing. Resident Action Council v. Seattle Housing Authority vindicated the free speech rights of public housing tenants to post signs on their doors and windows. *Downtowner Tenants Association v. Seelig* stopped the owner of a HUD-subsidized building from raising rents or displacing tenants after the Rent Supplement contract expired, forcing a sale to a new owner who maintained the building as affordable housing. *Simmons v. T.M. Associates Management, Inc*. found that a landlord may have a duty to overlook a rental applicant's disability-related criminal conviction as a reasonable accommodation under the Fair Housing Act, and *Arroyo v. Corelogic Rental Property Solutions, LLC* established that consumer reporting agencies are subject to the Fair Housing Act when they engage in tenant-screening activities. In *Handlin v. On-Site Manager, Inc.*, the court upheld a rental applicant's right to obtain a full and complete disclosure of a tenant-screening report that a landlord obtained about the applicant. *Indigo Real Estate Services v. Rousey* established a right for a domestic violence survivor to have an eviction case record sealed. Eric also was a lead counsel in *Smith v. Wasatch Property Management, Inc.*, which challenged a landlord's policy of categorically denying admission to applicants with eviction records, by alleging an unlawful discriminatory effect on African-American women. Smith, which settled in 2017, is believed to be the first fair housing case ever filed based on the discriminatory impact of eviction records.

Lila Gitesatani
National Housing Law Project

Lila Gitesatani is a Staff Attorney at NHLP. Lila focuses on NHLP's California policy work, fair housing, and preservation of affordable housing. Before joining NHLP, Lila was a lead attorney with the housing team at Legal Aid Society of San Diego, Inc where she represented tenants facing evictions, advocated for the rights of low-income tenants, and engaged in community outreach and education. Lila holds a bachelor's degree from UC San Diego and a law degree from UCLA.

Tiffany Hickey
Disability Rights California

Tiffany Hickey is a Staff Attorney with Disability Rights California (DRC). Tiffany currently advises tenants with disabilities on a variety of issues including fair housing, eviction, rent increases, subsidized housing, and substandard living conditions. Prior to joining DRC, Tiffany defended low-income tenants in unlawful detainer litigation, represented participants in voucher termination hearings and other housing-related administrative hearings, and housing discrimination complaints at HUD and CRD (formerly DFEH). Tiffany received her J.D. from the University of San Francisco School of Law in 2013.

Abby Khodayari
Bay Area Legal Aid

Abby Khodayari is a Senior Staff Attorney at Bay Area Legal Aid's Contra Costa County Office, providing free wrap-around civil legal assistance to low-income Bay Area residents through a Medical-Legal Partnership with Contra Costa County Health Services. She joined Bay Area Legal Aid in 2016 and became the Regional Medical-Legal Partnership Coordinator in 2021.

As part of providing wrap-around civil legal services, Abigail has represented low-income tenants in voucher termination hearings and other housing-related administrative hearings in Contra Costa. She has also represented clients in administrative hearings appealing General Assistance denials and SSI denials. She is a graduate of the University of San Francisco School of Law.

Ariel Nelson

National Consumer Law Center

Ariel Nelson is a staff attorney at the National Consumer Law Center (NCLC) focusing on credit reporting; tenant, employment, and background screening; and issues at the intersection of criminal and consumer law. She is a co-author of NCLC's *Fair Credit Reporting* treatise and a contributing author of *Collection Actions*. Previously, Ariel litigated administrative and environmental law cases as a staff attorney/clinical teaching fellow at Georgetown University Law Center. She also served as a law clerk to the Honorable Judge David O. Carter of the U.S. District Court for the Central District of California and to the Honorable Judge Dorothy W. Nelson of the U.S. Court of Appeals for the Ninth Circuit. She holds a B.A. from the University of California, Berkeley and a J.D. from Harvard Law School.

Lisa Sitkin
National Housing Law Project

Lisa Sitkin is a Supervising Attorney at the National Housing Law Project. She provides technical assistance, training, and practice resources to attorneys representing homeowners in connection with mortgages and foreclosure. Before joining NHLP, Lisa was managing attorney at Housing and Economic Rights Advocates in Oakland, CA. Lisa has counseled and represented individual clients, participated in policy advocacy regarding mortgage servicing and foreclosure, and assisted with mortgage servicing, predatory and unfair lending litigation. She has conducted numerous workshops and trainings regarding mortgages, foreclosures, loan modification and foreclosure rescue scams, including programs produced by the Practicing Law Institute and the National Consumer Law Center, and has testified before the California State Legislature and other governmental bodies regarding mortgage servicing and foreclosure issues. She is one of the original drafters of the bill that ultimately became the California Homeowner Bill of Rights.

Stacey Tutt
National Housing Law Project

Stacey Tutt is the Homeowner Assistance Fund Coordinator and a Senior Staff Attorney at NHLP. Her work focuses on the national implementation of the Homeowner's Assistance Fund, predatory lending, mortgage servicing, and energy efficiency housing finance. She also serves as the Consumer Claims Trustee in the Ditech Holding Corporation Bankruptcy. Prior to joining NHLP, Stacey designed and directed the Consumer Law Clinic at the University of California, Irvine School of Law. The Consumer Law Clinic focused on keeping low-income consumers in their homes after experiencing home improvement fraud, and advocating on behalf of vulnerable populations with government-imposed debt. She also developed and directed the Community Preservation Clinic at the University of Illinois College of Law which provided foreclosure defense to vulnerable homeowners, developed foreclosure mediation programs throughout the state, and designed neighborhood revitalization efforts following the foreclosure crisis.

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National Housing Law Project, Tenant Screening & Admissions in Federally Assisted Housing: Advocacy Outline (November 2023)

Submitted by:
Eric Dunn
Lila Gitesatani

National Housing Law Project

Tenant Screening & Admissions in Federally Assisted Housing: Advocacy Outline

The National Housing Law Project has created this outline to provide reference materials for advocates serving clients in finding and maintaining safe, decent, and affordable housing. This outline provides an overview of the admissions criteria for some federally assisted housing. (November 2023)

Public Housing

A) Admissions via waiting list:
   1) Tenant selection and assignment plan (TSAP) incorporates written tenant selection polices and procedures developed by the PHA.
   2) PHAs may consider the use of a lottery or other random choice technique to select which applicants will be placed on the waiting list. (Notice PIH -2012-34)
   3) But, some applicants may be entitled to waitlist "preference" (24 CFR § 960.206(a)(1))
      i) Applicants with preferences are placed ahead of others on list. Preferences do not take the place of eligibility requirements, applicant must still be eligible for the program.
      ii) Find preferences for the PHA in the Admission & Continued Occupancy Plan.
      iii) Examples Types of Preferences: residency preference; working families; veterans; homeless; DV survivors; individuals with disabilities.
   4) Method by which PHA can select from Waiting list among tenants with same priority/preferences for admission: (1) date and time of application; or (2) a drawing or other random choice technique. (24 C.F.R. § 982.207(c); 24 C.F.R. § 960.206(e))

B) Eligibility criteria (24 CFR § 960.201)
   1) Low-income family (below 80% of AMI); at least 40% of new admissions must be "extremally low-income" (below 30% of AMI). HUD publishes income limits by family size for the area.
      i) Some exceptions in small PHAs (under 250 units). (24 C.F.R. § 960.503)
      ii) Police officers, allowed for the purpose of increasing security for the residents. (42 U.S.C. § 1437a(a)(4))
   2) U.S. citizen or eligible non-citizen (24 CFR § 5.506.)
      i) Tenant's must disclose and document the Social Security Numbers (SSNs) of all family members, except ineligible noncitizens, as a condition of admission and continued assistance. (24 CFR § 5.216)
   3) Not an ineligible student (24 C.F.R. § 5.612)
   4) Criminal activity bans:
      i) Absolute statutory bans
         (a) Conviction for manufacture/distribution of methamphetamine in federally-assisted housing premises (42 U.S.C. § 1437n(f); 24 C.F.R. § 960.204(a)(3))
         (b) Subject to lifetime sex offender registration (42 U.S.C. §13663; 24 C.F.R. § 960.204(a)(4))
      ii) Mandatory bans subject to exceptions

(a) Evicted from federally-assisted housing for drug-related criminal activity within three years (42 U.S.C. § 13661(a))
(b) Current illegal drug use or pattern of drug use that poses health/safety threat to other tenants (42 U.S.C. § 13661(b))
(c) Current alcohol abuse that threatens health/safety
(d) History of drug related criminal activity, violent criminal activity, crimes that threaten health, safety or peaceful enjoyment (42 U.S.C. § 13661(c))

5) Suitability criteria: not mandatory but may be grounds for denial (4 CFR § 960.203)
   i) Other criminal history
   ii) Credit history
   iii) Rental history/evictions
   iv) Housekeeping practices
   v) Debts to PHAs

C) Procedural requirements
   1) Written admission policy open to public in ACOP
   2) No application fees
   3) Notice of denial that states "the basis for such determination" (24 CFR § 960.208(a))
   4) "Informal hearing" to contest denial

D) Resources for more information:
   1) HUD, Public Housing Occupancy Guidebook (available at https://www.hud.gov/program_offices/public_indian_housing/programs/ph/mod/guidebook)

Project-based Section 8 (subsidized multifamily) housing

A) Admissions via waiting list
   1) Applicants added chronologically based on application date
   2) But, some applicants may be entitled to waitlist "preference"
      i) Applicants with preferences placed ahead of others on list. Preferences do not take the place of eligibility requirements, applicant must still be eligible for the program.
      ii) Find preferences in owner tenant selection plan

B) Eligibility criteria
   1) Low-income family (below 80% of AMI) (24 C.F.R. § 5.653(b)(2))
      i) Income-targeting rules favor families below 50% AMI (42 U.S.C. § 1437n(c); 24 C.F.R. § 5.653(d))
   2) Exception for police or security personnel (42 U.S.C. § 1437f(cc))
   3) U.S. citizen or eligible non-citizen (24 C.F.R. § 5.216)
   4) Not an ineligible student (24 C.F.R. § 5.612)
   5) Criminal activity bans:
      i) Absolute statutory bans
         (a) Conviction for manufacture/distribution of methamphetamine in federally-assisted housing premises (42 U.S.C. § 1437n(f); 24 C.F.R. § 960.204(a)(3))
         (b) Subject to lifetime sex offender registration (42 U.S.C. §§ 13663; 24 C.F.R § 5.856).
      ii) Mandatory bans subject to exceptions

(a) Evicted from federally-assisted housing for drug-related criminal activity within three years (24 C.F.R § 5.854(a))
(b) Current illegal drug use or pattern of drug use that poses health/safety threat to other tenants (24 C.F.R § 5.854(b))

C) Suitability criteria: not mandatory but may be grounds for denial (24 C.F.R. § 5.655)
1) Other criminal history
2) Credit history
3) Rental history/evictions
4) Housekeeping practices
5) Debts to PHAs

D) Procedural requirements
1) Written admission policy open to public in affirmative marketing plan
2) No application fees
3) Notice of denial that states "the reasons"
4) Right to "meeting" with owner/managing agent to dispute denial
i) If owner is PHA, right to informal hearing

E) Resources for more information:
1) HUD, HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs (available at https://www.hud.gov/sites/documents/43503HSGH.PDF)

Housing Choice Vouchers

A) Admissions via waiting list
1) Waitlists typically closed, applying to waitlist can only apply when open. (24 C.F.R. §§ 982.204(a); 982.206).
i) When opening the waiting list, the PHA must issue a public notice stating where and when to apply and list any limitations on who may apply.
ii) PHA will conduct lottery to award waitlist positions
2) Some applicants may be entitled to waitlist "preference." (24 C.F.R. § 982.207)
i) Applicants with preferences placed ahead of others on list. Preferences do not take the place of eligibility requirements, applicant must still be eligible for the program.
ii) Find preferences in PHA administrative plan

B) Eligibility criteria
1) Very low-income family (below 50% of AMI) (24 CFR § 982.201(b)(1))
i) Some exceptions for low-income (80% > families > 50% AMI)
ii) PHA administrative plan will specify income criteria
2) U.S. citizen or eligible non-citizen (24 CFR § 5.506(b))
i) Tenant's must disclose and document the Social Security Numbers (SSNs) of all family members, except ineligible noncitizens, as a condition of admission and continued assistance. (24 CFR § 5.216)
3) Not an ineligible student (24 C.F.R. § 5.612)
4) Criminal activity bans:
i) Mandatory bans
(a) Conviction for manufacture/distribution of methamphetamine in federally-assisted housing premises (42 U.S.C. § 1437n(f); 24 C.F.R. § 982.553(a)(1)(ii)(C)).

(b) Subject to lifetime sex offender registration (24 CFR § 5.856; § 5.905; 24 C.F.R. § 982.553(a)(2))
(c) Evicted from federally-assisted housing for drug-related criminal activity within three years (24 C.F.R. § 982.553(a)(1)(i)).
ii) Permissive bans subject to exceptions
(a) Currently engaged in, or has engaged in during reasonable time before admission: (24 C.F.R. § 982.553(a)(2)(ii))
(a) Drug-related criminal activity
(b) violent criminal activity
(c) other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents
(d) other criminal activity which may threaten the health or safety of the owner, property management staff or PHA employee or contractor or agent.
(b) Current alcohol abuse that threatens health/safety (24 C.F.R. § 982.553(a)(3))
5) Suitability criteria: not mandatory but may be grounds for denial
i) Tends to be less rigorous than for site-based subsidized housing because the PHA is only providing the subsidy, not actual housing.
(a) Landlord will conduct its own separate screening.
ii) Grounds listed in (24 C.F.R. §§ 982.552, 553)
(a) Past eviction from federally-assisted housing (5 years)
(b) Debt to PHA
(c) Certain criminal/quasi-criminal acts
C) Procedural requirements
1) Written admission policy open to public in PHA administrative plan
2) Notice of denial that contains a "brief statement of the reasons" (24 CFR § 982.201(f))
3) "Informal review" to contest denial
D) Resources for more information:
1) HUD, The Housing Choice Voucher Program Guidebook (available at https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/guidebook)

USDA Section 515 housing

A) Waiting list admissions:
1) Tiered by income level (very low > low > moderate).
i) How compiled and maintained. 7 C.F.R. § 3560.154(f) and RD Asset Mgmt. Handbook, HB-2-3560, ¶ 6.18.
B) Eligibility:
1) Income Eligibility Requirements: Income less than 80% of AMI + $5500. 7 C.F.R. §§ 3560.152 and 3560.11; RD Asset Mgmt. Handbook, HB-2-3560, ¶ 6.3.
2) Not required to be a U.S. citizen or qualified alien.
i) 7 C.F.R. § 3560.152 note, 70 Fed. Reg 8503 (Feb. 22, 2005) in § 3560.152(a)(1), implementation of the words ''Be a United States citizen or qualified alien, and'' delayed indefinitely.
3) Application fee discouraged, but not prohibited. RD Asset Mgmt. Handbook, HB-2-3560, ¶ 6.18 B.

4) Management plan must specify admission criteria, 7 C.F.R. § 3560.154 (d)(1); RD Asset Mgmt. Handbook, HB-2-3560, Ch. 3, Attachment 3-A
   i) "may not contain arbitrary or discriminatory rejection criteria"
   ii) rental and credit history and "relations with other tenants" allowed

C) Suitability:
   1) Screening: Owner has discretion not to reject for certain criminal history but may consider criminal activity or alcohol abuse, poor tenant history, poor rent paying history or bad credit. 7 C.F.R. § 3560.154 (d) & (j); RD Asset Mgmt. Handbook, HB-2-3560, Ch. 6, § 4.

D) Procedural requirements:
   1) For grievance procedure, in general see 7 C.F.R. § 3560.160; RD Asset Mgmt. Handbook, HB 2-3560 Chp. 6, Sec. 8
   2) Notice of denial that "must give specific reasons"
      i) If consumer reporting agency used, must be identified
      ii) Must advise of procedural rights
   3) Right to respond to denial within 10 days
   4) Right to grievance hearing to dispute denial

IRS Low-Income Tax Credit housing program

A) No waiting list requirements.

B) Eligibility:
   1) Eligibility is based on the income limitation required under the minimum set-aside test applicable to the subject building (26 U.S.C. §42(g)(1)). Review your states Qualified Allocation Plan (QAP) because some states use their authority to set lower AMI limits. (26 U.S.C. §42(h)(6)(B)(vi))
   2) Some restrictions on full-time students. (26 U.S.C. §42(i)(3)(D))
   3) No citizenship requirement.

C) Suitability:
   1) Owners prohibited from discriminating against voucher holders (26 U.S.C. §42(h)(6)(B)(iv))
   2) Owners may have accepted contractual limitations on screening criteria. Some state "qualified allocation plans" reward less-restrictive screening.

D) Procedural requirements:
   1) No express federal notice requirement beyond FCRA. (15 U.S.C. § 1681m)
   2) Though not required by statute, appeal procedures common in LIHTC properties.

E) Resources for more information: NHLP, An Advocate's Guide to Tenants' Rights in the Low-Income Housing Tax Credit Program (available at https://www.nhlp.org/wp-content/uploads/LIHTC-2021.pdf)

NOTES

2

Tenant Screening & Admissions in Federally Assisted Housing (PowerPoint slides)

Eric Dunn
Lila Gitesatani

National Housing Law Project

Abby Khodayari

Bay Area Legal Aid

Tenant Screening & Admissions in Federally Assisted Housing

Abby Khodayari, Bay Area Legal Aid
Eric Dunn, NHLP
Lila Gitesatani, NHLP
November 13, 2023

NATIONAL
HOUSING LAW
PROJECT

Public Housing

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HOUSING LAW
PROJECT

Waiting List

NATIONAL HOUSING LAW PROJECT

- Tenants are selected from a waiting list
  - Lists can be site-based or agency-wide
- To place on a waiting list, PHA can use a lottery or other random choice technique
- PHA can create local preferences
  - Find preferences in PHA administrative plan & tenant selection and assignment plan (TSAP)
  - Examples:
    - Residency
    - Working families
    - Person with disabilities
    - Survivors of DV
    - Homeless
- Selecting among tenants with same priority admission:
  - (1) date and time of application; or
  - (2) a drawing or other random choice technique

Notice PIH -2012-34; 24 CFR § 960.206

Eligibility Factors

NATIONAL HOUSING LAW PROJECT

4 factors PHA considers when determining eligibility, the household:

1. Meet HUD's definition of a "family" (24 CFR § 5.403)
2. Annual income cannot exceed the income limit (24 CFR §§ 960.201; 960.202)
   - Est. by HUD for the area
   - Generally, must be low income (80% AMI)
3. Citizen or eligible immigration status with supporting documentation (24 CFR § 5.508)
   - Must disclose SSN

Tenant Screening

NATIONAL HOUSING LAW PROJECT

- PHA is responsible for screening for suitability for tenancy
- PHA may consider all relevant information, including:
  - Past performance meeting financial obligations (rent)
  - Record that may affect health, safety or welfare of other tenants
    - Disturbance of neighbors
    - Destruction of property
    - Housekeeping habits
  - Criminal history
- PHA's ACOP sets forth its applicant selection policies

24 CFR § 960.203

Criminal History

NATIONAL HOUSING LAW PROJECT

- Absolute ban, if any household member:
  - Subject to a lifetime sex offender registration requirement
  - Convicted of the manufacture of methamphetamine on the premises of federally assisted housing
- Mandatory ban subject to exceptions, if any household member:
  - Evicted from federally assisted housing within the last three years for drug-related criminal activity
  - Currently illegally using a controlled substance
  - Currently uses controlled substance or alcohol, that interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents

24 CFR §§ 960.204, 960.204

Procedural Requirements

NATIONAL HOUSING LAW PROJECT

- If PHA denies assistance, must provide
  - Prompt notification
  - Basis for the determination
  - Opportunity for an informal hearing
  - VAWA Notice of Occupancy Rights & form HUD-5382
  - Notice that person with disability can request a RA
- Denial due to criminal history, PHA must provide
  - Opportunity to dispute accuracy and relevance
  - Copy of the criminal record

24 CFR §§ 960.204(c), 960.208(a); Notice PIH-2017-08

Poll #1!

NATIONAL HOUSING LAW PROJECT

Tammy applied for public housing, but was denied for prior criminal history. Tammy received notice of her denial, but did not receive a copy of the record. Is the PHA required to provide a copy of the criminal record to Tammy?

A. YES! The PHA must provide a copy of the criminal record if it is the basis for the denial.

B. NO! The PHA is only required to provide an opportunity to dispute the record.

Poll #1 Answer!

NATIONAL HOUSING LAW PROJECT

Best Answer is A- Yes

HUD regulations at 24 CFR §§ 960.204(c) require that before a PHA denies admission on the basis of a criminal record, the PHA must notify the household of the proposed action, provide a copy of the criminal record and an opportunity to dispute the accuracy and relevance of that record.

Housing Choice Voucher

NATIONAL
HOUSING LAW
PROJECT

Waiting List

NATIONAL HOUSING LAW PROJECT

- Tenants are selected from waiting list
- When a waiting list is opened, PHA needs to give public notice
- PHA can create local preferences
  - Find preferences in PHA administrative plan
  - Examples:
    - Residency
    - Working families
    - Person with disabilities
    - Survivors of DV
    - Homeless
- Selecting among tenants with same preferences for admission:
  - (1) date and time of application; or
  - (2) a drawing or other random choice technique

24 CFR §§ 982.204, 982.206, 982.207

Eligibility Factors

NATIONAL HOUSING LAW PROJECT

4 factors PHA considers when determining eligibility, the household:

1. Meet HUD's definition of a "family" (24 CFR § 5.403)
2. Annual income cannot exceed the income limit (24 CFR § 982.201)
   - Est. by HUD for the area
   - Generally, must be very low income (50% AMI)
3. Citizen or eligible immigration status with supporting documentation (24 CFR § 982.201)
   - Must disclose SSN
4. Restrictions on student eligibility (24 CFR § 5.612)

Criminal History

NATIONAL HOUSING LAW PROJECT

- PHA's are required to conduct criminal background screening
- Absolute ban, if any household member:
  - Subject to a lifetime sex offender registration requirement
  - Convicted of the manufacture of methamphetamine on the premises of federally assisted housing
- Mandatory ban subject to exceptions, if any household member:
  - Evicted from federally assisted housing within the last three years for drug-related criminal activity
  - Currently illegally using a controlled substance
  - Currently uses controlled substance or alcohol, that interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents

24 CFR § § 982.552, 982.553

Suitability Criteria

NATIONAL HOUSING LAW PROJECT

Permissive reasons for a denial, PHA discretion

- Examples:
  - Violation of family program obligations
  - Eviction from federally-assisted housing in last 5 years
  - Prior termination by PHA
  - Debt to PHA
  - Certain criminal/quasi-criminal acts
- PHA should consider the circumstances in making their determination to deny assistance
- Review the PHA admin plan for more information

24 CFR §§ 982.552, 982.553

Procedural Requirements

NATIONAL HOUSING LAW PROJECT

If PHA denies assistance, must provide

- Prompt, written notice of decision, which includes:
  - "brief statement of the reasons"
  - Right to request an informal review & how to arrange for it
  - Grounds for denial of assistance

24 CFR §982.201(f)(1)

Low-Income Housing Tax Credit

NATIONAL
HOUSING LAW
PROJECT

Eligibility

NATIONAL HOUSING LAW PROJECT

- Program is primarily administered by state tax credit agencies. Review your states Qualified Allocation Plan (QAP)
- Eligibility determined by Area Median Gross Income (AMI), based on the income limitation required under the minimum set-aside test applicable to the subject building (26 U.S.C. §42(g)(1))
  - Income cannot exceed 50% of the AMI (under the 20-50 test),
  - Income cannot exceed 60% of AMI (under the 40-60 test)
- Some restrictions on full-time students. (26 U.S.C. §42(i)(3)(D))
  - Applies when unit occupied exclusively by full-time student
- No citizenship requirement
- Cannot discriminate against voucher holders (26 U.S.C. §42(h)(6)(B)(iv)

Suitability Criteria

NATIONAL HOUSING LAW PROJECT

Owners are not prohibited from using criteria that are common in private, market-rate housing

- Examples:
  - Credit scores
  - Income minimums
  - Prior history
- Some state "qualified allocation plans" reward less-restrictive screening

Procedural Requirements

NATIONAL HOUSING LAW PROJECT

- No express federal notice requirement beyond FCRA (15 U.S.C. § 1681m)
- Though not required by statute, appeal procedures common in LIHTC properties

Additional Resources

NATIONAL HOUSING LAW PROJECT

- NHLP, HUD Housing Programs: Tenants' Rights (Green Book)
- HUD, Public Housing Occupancy Guidebook
- HUD, Occupancy Requirements of Subsidized Multifamily Housing Programs (4350.3)
- HUD, Housing Choice Voucher Program Guidebook
- NHLP, An Advocate's Guide to Tenants' Rights in the LIHTC Program

Fighting Denials
Practical Tips

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Questions?

NATIONAL HOUSING LAW PROJECT

Contact Info

NATIONAL HOUSING LAW PROJECT

- Abby Khodayari, Bay Area Legal Aid- akhodayari@baylegal.org
- Eric Dunn, NHLP- edunn@nhlp.org
- Lila Gitesatani, NHLP- lgitesatani@nhlp.org

NOTES

3

Group Letter to U.S. Department of Housing and Urban Development (HUD), Re: Removing Credit Reports and Credit Scores as a Barrier to Public and Subsidized Housing; Request for Meeting (November 3, 2021)

Submitted by:
Sarah Brandon

National Housing Law Project

November 3, 2021

Secretary Marcia L. Fudge
U.S. Department of Housing and Urban Development (HUD)
451 7th Street, S.W.
Washington, DC 20410

Via email

Re: Removing credit reports and credit scores as a barrier to public and subsidized housing; request for meeting

Dear Secretary Fudge:

The undersigned organizations urge you to take action to ensure that individuals who qualify for public or subsidized housing can successfully secure a home. In particular, we urge you to prohibit public housing authorities (PHAs) and multifamily subsidized housing providers, including providers managing developments undergoing Rental Assistance Demonstration (RAD) conversions and developments receiving Project Based Vouchers (PBV) or Project Based Rental Assistance (PBRA), from considering credit reports and credit scores. We also urge you to strongly discourage landlords reviewing applicants with housing choice vouchers (HCV) from considering this information.

Even after qualifying for public or subsidized housing, many renters still will struggle to find housing due to their credit reports and scores. As one woman who was granted an HCV but was repeatedly rejected from housing explained, "Everything is credit . . . . Oftentimes, they don't even let you see a property until you tell them your credit score."[1] One housing provider refused to allow the sister and primary caregiver of a severely mentally handicapped woman with an HCV to move into her sister's apartment because of her "poor credit and rental history."[2] The housing provider maintained its position even though, under the HCV program, it would continue to receive the same rent regardless of whether the primary caregiver moved in. The primary caregiver also had paid monthly rent on time and without incident until the housing provider refused to accept further payments.[3]

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[1] Ashley Balcerzak, *Credit scores affect affordable housing eligibility. NJ lawmakers consider bill to help renters*, NorthJersey.com (Apr. 16, 2021).
[2] Martinez by Martinez v. Lexington Gardens Assocs., 336 F. Supp. 3d 270, 275, 280 (S.D.N.Y. 2018).
[3] *Id.* at 280.

Housing providers' reliance on credit reports and scores also can lock survivors of domestic violence out of affordable housing. Domestic violence includes economic abuse,[4] which often results in significant amounts of coerced debt. Coerced debt includes abusive partners fraudulently opening accounts in a survivor's name, lying about paying bills in a survivor's name, overcharging credit accounts, or coercing survivors into signing for loans, credit lines, or other expenses.[5] Coerced debt therefore destroys credit reports and scores and can cripple a survivor's ability to secure housing. The inability to access housing can lead survivors to stay in abusive relationships.[6]

Requiring a credit score or report creates an unnecessary hurdle to securing housing because rental assistance programs are designed to make sure that the tenant can pay rent. As HUD has stated, benefits for landlords who participate in the HCV program include full rental payments and financial protection because, if a tenant's income decreases, the public housing authority will pay a larger portion of the rent.[7] HUD also has busted the myth that HCV tenants are problem tenants, emphasizing that they are "typically long-term tenants" and that there are "no documented statistics showing that HCV participants are any more likely to . . . not pay rent than are non-HCV tenants."[8]

Moreover, credit reports and scores are not intended to gauge whether someone will be a good tenant. As the Consumer Financial Protection Bureau (CFPB) has explained,[9] credit scores are specifically designed to predict the likelihood that a borrower will become 90 days late on a *credit obligation*—not rent, which is not credit. What's more, credit reports tell a story about *past* ability to pay in particular instances, not *current* ability to pay rent, and rent is a high-priority bill that families will pay before all others.[10]

Credit scores and credit reports are an especially poor predictor of tenant performance in subsidized housing. Due to the severe lack of affordable housing throughout the U.S., over 18 million renter households are rent-burdened and about 10.4 million are severely

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[4] Researchers estimate that between 94 and 99% of women seeking services for intimate partner violence have experienced economic abuse, which involves behaviors that control a person's ability to acquire, use, or maintain economic resources, therefore undermining that person's financial security. Adrienne E. Adams et al., *Development of the Scale of Economic Abuse*, 14 Violence Against Women 563, 564, 580 (2008); Judy L. Postmus et al., *Understanding Economic Abuse in the Lives of Survivors*, 27 J. of Interpersonal Violence 411, 424 (2011).
[5] *See* Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 Calif. L. Rev. 951, 953–54 (2012).
[6] *See id.* at 955.
[7] U.S. Dept. of Hous. & Urban Dev., Housing Choice Voucher (HCV) Myth-Busting and Benefits Fact Sheet.
[8] *Id.*
[9] Consumer Fin. Prot. Bureau Office of Research, Data Point: Credit Invisibles 7 (2015).
[10] Matthew Desmond, The Rent Eats First, Even During a Pandemic, NY Times (Aug. 29, 2020); *see also* Andrew Aurand & Daniel Threet, Nat'l Low Income Hous. Coal., The Road Ahead for Low Income Renters 2 (2021).

rent-burdened (spending more than 50% of income on housing).[11] In most cases, access to affordable housing will enable these households to keep their rent at about 30% of their income—in many cases for the first time in many years, or ever. Credit reports and scores that reflect the difficulty these renters faced in paying their consumer accounts while rent-burdened has little value in assessing their fitness for housing and simply penalizes these households for their poverty.

Further, credit reports are riddled with errors, which makes them an unreliable tool whether for housing providers or others. As found in a Federal Trade Commission study, 20% of consumers had verified errors in their reports, with 5% having an error so serious that it would cause them to be denied credit or pay more for credit.[12] In 2020, complaints about credit reporting to the CFPB more than doubled from 2019, to almost 320,000, with the majority of those complaints having to do with "incorrect information on your report."[13]

Finally, reliance on credit reports and scores perpetuates historic racial inequities and injustices. The economic consequences of the nation's long history of racial discrimination—including in housing (redlining)[14] and debt collection (debt collection lawsuits are far more common in Black communities than white ones)[15]—are the foundation of the data in credit reports. As a result, Black consumers have lower credit scores as a group than white consumers.[16] Allowing housing providers to use credit data to determine whether to accept an applicant amplifies these inequities and discriminatory outcomes.[17]

Congress is currently considering a landmark bill that would provide robust funding for rental assistance and public housing.[18] However, this initiative and others like it will only be effective solutions to our ongoing affordable housing crisis if people who qualify for public or subsidized housing are actually able to secure housing. HUD has the tools to

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[11] Nat'l Low Income Hous. Coal., The Gap: A shortage of affordable rental homes 7 (Mar. 2021).
[12] Fed. Trade Comm'n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (2012).
[13] Consumer Fin. Prot. Bureau, Consumer Response Annual Report 20–21 (2021).
[14] *See generally* Richard Rothstein, The Color of Law (2017).
[15] Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, ProPublica (Oct. 8, 2015).
[16] *See* Nat'l Consumer Law Ctr., Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination (2016).
[17] Natalie Campisi, *From Inherent Racial Bias to Incorrect Data--The Problems With Current Credit Scoring Models*, Forbes (Feb. 26, 2021); *see also* Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 Suffolk U. L. Rev. 935 (2013) (discussing how credit scoring has a discriminatory impact and is also not the best measure of risk).
[18] Build Back Better Act, H.R. 5376, 117th Cong. (2021).

ensure that credit checks do not bar these qualified candidates from access to safe and affordable housing.

We urge you to prohibit the consideration of credit reports and scores for those who qualify for public housing and multifamily subsidized housing. At a minimum, HUD should prohibit PHAs and multifamily subsidized housing providers from denying applicants solely due to poor credit history or low credit scores and also strongly discourage the use of credit reports and scores by landlords reviewing applicants with HCVs.

We thank you for your consideration and respectfully request a meeting to discuss these issues. Please contact Ariel Nelson at anelson@nclc.org or 805-432-3993 to schedule the meeting.

Sincerely,

National Consumer Law Center (on behalf of its low-income clients)
National Housing Law Project
National Low Income Housing Coalition
Center for Survivor Agency and Justice (in support of domestic violence survivors across the nation)

CC:
Lopa Kolluri
Principal Deputy Assistant Secretary for the Office of Housing and the Federal Housing Administration

Ethan D. Handelman
Deputy Assistant Secretary for Multifamily Housing

Dominique Blom
General Deputy Assistant Secretary for Public and Indian Housing

NOTES

NOTES

4

U.S. Department of Housing and Urban Development, FAQs for Notice PIH 2015-19 / H 2015-10, FAQs: Excluding the Use of Arrest Records in Housing Decisions

Submitted by:
Ugochi Anaebere-Nicholson

Public Interest Law Project

Sarah Brandon

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Tiffany Hickey

Disability Rights California

FAQs: Excluding the Use of Arrest Records in Housing Decisions

These FAQs are issued by HUD's Office of Public and Indian Housing ("PIH"), Office of Housing, and Office of General Counsel to address questions raised by *Notice PIH 2015-19 / H 2015-10,* which was issued on November 2, 2015, and is entitled *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*.

These FAQs are intended as a supplemental resource to *Notice PIH 2015-19 / H 2015-10*.

Q1: What does *Notice PIH 2015-19 / H 2015-10* do?

A1: The *Notice* clarifies that the fact that someone has been arrested does not itself prove that the person has engaged in criminal activity. As a result, the fact of an arrest is not itself an acceptable reason for denying that person admission, terminating their assistance, or evicting tenants in public or federally-assisted housing.

The *Notice* also reminds PHAs and owners of HUD-assisted multifamily properties ("owners") that HUD does not require the adoption of "one-strike" policies and that PHAs and owners have an obligation to safeguard the due process and civil rights of applicants and tenants.

In addition, the *Notice* provides some best practices for PHAs and owners interested in revising their admissions and occupancy policies to improve housing opportunities for persons who, despite past criminal activity, do not pose a threat to the health or safety of residents or staff.

Q2: Why is the fact of an arrest not itself a permissible basis for making a housing decision?

A2: The fact that someone was arrested means only that the person was suspected of having committed an offense. Further investigation may have shown that no criminal activity actually occurred, or that the arrested individual did not in fact commit an offense.

Consequently, the fact of the arrest itself does not prove that a person engaged in disqualifying criminal activity, poses a threat, or has otherwise violated admission standards or lease terms relating to criminal activity.

Q3: Does *Notice PIH 2015-19 / H 2015-10* completely exclude the review of arrest records in housing decisions?

A3: No. Although the fact that an individual was arrested is not grounds to deny a housing opportunity, a record of an arrest might properly trigger an inquiry by a PHA or owner into whether a person actually engaged in disqualifying criminal activity. As part of such an inquiry, a PHA or owner may continue to obtain and review the police report, record of disposition of any criminal charges, and other evidence associated with the arrest to inform its eligibility determination.

Q4: If an individual has an arrest history, what kind of evidence of criminal activity is needed before disqualifying that person from housing assistance?

A4: In determining whether a person who was arrested for disqualifying criminal activity actually engaged in such activity, PHAs and owners may consider, among other things: police reports that detail the circumstances of the arrest; statements made by witnesses or by the applicant or tenant that are not part of the police report; whether formal criminal charges were filed; whether any charges were ultimately withdrawn, abandoned, dismissed, or resulted in an acquittal; and any other evidence relevant to whether the applicant or tenant engaged in the disqualifying criminal activity. The best evidence of a person's involvement in criminal activity is an official record of the person's conviction in a court of law for disqualifying criminal activity.

Q5: In considering evidence of a person's criminal activity, what is the threshold that must be met before a PHA or owner *may* disqualify that person from housing assistance?

A5: Public housing and Section 8 applicants may not be denied admission or assistance based on the mere suspicion that they or a household member engaged in disqualifying criminal activity. There must be enough evidence to be able to reasonably conclude that the applicant engaged in criminal activity. Thus, the fact that an individual was arrested is not an adequate basis for disqualifying an applicant for admission or assistance.

When terminating assistance for participants of Section 8 tenant-based and moderate rehabilitation programs due to disqualifying criminal activity, HUD regulations specifically provide that disqualifying criminal activity by a tenant, other household member, or guest must be demonstrated by a "preponderance of the evidence." In other words, when taking all the evidence together and considering its reliability or unreliability, it must be more likely than not that the person in question engaged in the disqualifying criminal activity. The same preponderance of the evidence standard applies to public housing evictions as well.

As a reminder, only in limited and specific cases of criminal activity do HUD statutes and regulations *require* denial of admission or termination of assistance (and in only two cases—where someone has been convicted of producing methamphetamine in federally-assisted housing or must register as a lifetime sex offender—is someone permanently barred). In all other cases, PHAs and owners have discretion to consider any mitigating circumstances in making admission and eviction decisions.

Q6: What is an example of an admissions policy that complies with Section 4 of *Notice PIH 2015-19 / H 2015-10*?

A6: An admissions policy that complies with Section 4 of the *Notice* and recognizes the interests of applicants who need access to affordable housing while guarding the safety interests of current residents might include the following statement:

"The fact that an applicant or tenant was arrested for a disqualifying offense shall not be treated or regarded as proof that the applicant or tenant engaged in disqualifying criminal activity. The arrest may, however, trigger an investigation to determine whether the applicant or tenant actually engaged in disqualifying criminal activity. As part of its investigation, [the PHA or owner] may obtain the police report associated with the arrest and consider the reported circumstances of the arrest. The PHA may also consider any statements made by witnesses or the applicant or tenant not included in the police report; whether criminal charges were filed; whether, if filed, criminal charges were abandoned, dismissed, not prosecuted, or ultimately resulted in an acquittal; and any other evidence relevant to determining whether or not the applicant or tenant engaged in disqualifying activity."

Q7: Does *Notice PIH 2015-19* require a PHA to rewrite its (1) Admissions and Continued Occupancy Policies (ACOP), or (2) Section 8 Administrative Plan (Admin Plan) if the ACOP or Admin Plan does not include the same language used in the previous answer's example?

A7: Maybe. All PHAs must comply with *Notice PIH 2015-19*. PHAs should therefore review their ACOPs and Admin Plans and revise them where a policy treats the fact that someone was arrested as a reason to deny admission, terminate assistance, or evict tenants in public or federally-assisted housing.

At the same time, a PHA is not required to use the same language used in the previous example to comply with the *Notice*. Where a PHA's ACOP and Admin Plan are completely consistent with the example policy set forth in the previous answer and do not permit relying on the fact of an arrest (or arrests) to prove disqualifying criminal activity, it may be that no revisions are required.

HUD encourages PHAs to revise their ACOP and Admin Plans as they relate to criminal records in order to better facilitate access to HUD-assisted housing for applicants who, despite their criminal history, do not pose a threat to the health or safety of residents or staff.

Q8: If, during an applicant's admissions screening process, the applicant is arrested for violent or other disqualifying criminal activity, must a PHA or owner wait until the arrest disposition to determine the applicant's eligibility for housing?

A8: No. While it may be advisable to wait until the arrest disposition—especially if the disposition is imminent—PHAs and owners have discretion to go ahead and use the available evidence to make an eligibility determination according to the standards in the applicable written admissions policies of the PHA or owner.

Q9: Must a PHA or owner provide an applicant with notice and the opportunity to dispute the accuracy or relevance of a criminal record *before* denying admission on the basis of that record?

A9: Yes. Before a PHA denies admission to the public housing or Section 8 program on the basis of a criminal record, the PHA must notify the applicant of the proposed decision and provide the applicant and the subject of the record with a copy of the criminal record and an opportunity to dispute the accuracy and relevance of that record. In addition, public housing and Section 8 applicants have the right to request an informal review of the decision after their application has been denied. For further guidance, please consult 24 C.F.R. §§ 960.204(c), 960.208(a), 982.553(d), 982.554.

Similarly, when owners make the decision to reject an applicant on the basis of a criminal record, the owner must provide the applicant with a written rejection notice. This notice must state the reason for the rejection, advise of the applicant's right to respond to the owner in writing or to request a meeting within 14 days to dispute the rejection, and advise that persons with disabilities have the right to request reasonable accommodations to participate in the informal hearing process. For further guidance, please consult HUD Handbook 4350.3, REV-1, paragraphs 4–9.

Q10: May PHAs or owners contact HUD if they have questions about *Notice PIH 2015-19 / H 2015-10*?

A10: Yes. If assistance is needed, PHAs and owners can contact their local field office, which can put them in touch with HUD regional counsel to answer any questions about the *Notice*.

NOTES

5

U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2015-19, Re: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions (November 2, 2015)

Submitted by:
Ugochi Anaebere-Nicholson

Public Interest Law Project

Sarah Brandon

National Housing Law Project

Tiffany Hickey

Disability Rights California

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

Public and Indian Housing

Special Attention of: Public Housing Agency Directors Public Housing Hub Offices Directors Public Housing Field Office Directors Resident Management Corporations All Multifamily Hub Directors All Multifamily Program Center Directors	**Notice PIH 2015-19** Issued: November 2, 2015 Expires: This notice remains in effect until amended, superseded, or rescinded.

Subject: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions

1. Background

For the past five years HUD has been an active member of the Federal Interagency Reentry Council. This Council, made up of more than 23 Federal Agencies, meets on a regular basis to act on issues that affect the lives of those released from incarceration. An important aspect of the Reentry Council's work has been to have each Federal Agency identify and address "collateral consequences" that individuals and their families may face because they or a family member has been incarcerated or has had any involvement with the criminal justice system.[1]

In 2011, former HUD Secretary Shaun Donovan issued a letter to public housing authorities (PHAs) across the country emphasizing the importance of providing "second chances" for formerly incarcerated individuals.[2] Secretary Donovan urged PHAs to adopt admission policies that achieve a sensible and effective balance between allowing individuals with a criminal record to access HUD-subsidized housing and ensuring the safety of all residents of such housing. A year later, Secretary Donovan encouraged owners of HUD-assisted multifamily properties ("owners") to do the same and reiterated HUD's goal of "helping ex-offenders gain access to one of the most fundamental building blocks of a stable life – a place to live." HUD has also previously stressed the troubling relationship between housing barriers for individuals with criminal records and homelessness, stating that "the difficulties in reintegrating into the community increase the risk of homelessness for released prisoners, and homelessness in turn

[1] For more information on the initiatives of the Council members, see https://csgjusticecenter.org/nrrc/projects/firc/snapshots/.
[2] Letter from Shaun Donovan, Secretary, United States Department of Housing and Urban Development, to Public Housing Authority Executive Directors (June 17, 2011), available at http://usich.gov/resources/uploads/asset_library/Rentry_letter_from_Donovan_to_PHAs_6-17-11.pdf.

increases the risk of subsequent re-incarceration."[3]

At a time when an estimated 100 million (or nearly one in three) Americans have some type of criminal record,[4] HUD remains committed to the goal of providing second chances to formerly incarcerated individuals where appropriate and to ensuring that individuals are not denied access to HUD-subsidized housing on the basis of inaccurate, incomplete, or otherwise unreliable evidence of past criminal conduct. With those aims, and in response to requests from housing providers and prospective tenants for guidance from HUD regarding the proper use of criminal records in housing decisions, HUD is issuing this notice.

2. Purpose

The purpose of this Notice is to inform PHAs and owners of other federally-assisted housing that arrest records may not be the basis for denying admission, terminating assistance or evicting tenants, to remind PHAs and owners that HUD does not require their adoption of "One Strike" policies, and to remind them of their obligation to safeguard the due process rights of applicants and tenants.

The Notice also reminds PHAs and owners of their obligation to ensure that any admissions and occupancy requirements they impose comply with applicable civil rights requirements contained in the Fair Housing Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, and Titles II and III of the Americans with Disabilities Act of 1990, and the other equal opportunity provisions listed in 24 CFR 5.105.

Finally, the Notice provides best practices and peer examples for PHAs and owners to review.

3. HUD Does Not Require PHAs and Owners to Adopt "One Strike" Policies

HUD does not require that PHAs and owners adopt or enforce so-called "one-strike" rules that deny admission to anyone with a criminal record or that require automatic eviction any time a household member engages in criminal activity in violation of their lease. Instead, in most cases, PHAs and owners have discretion to decide whether or not to deny admission to an applicant with certain types of criminal history, or terminate assistance or evict a household if a tenant, household member, or guest engages in certain drug-related or certain other criminal activity on or off the premises (in the case of public housing) or on or near the premises (in the case of Section 8 programs).[5]

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[3] Guidance on Housing Individuals and Families Experiencing Homelessness Though the Public Housing and Housing Choice Voucher Programs, HUD PIH Notice 2013-15 (HA), 8 (June 10, 2013), available at http://1.usa.gov/1afx3VY.

[4] Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of State Criminal History Information Systems*, 2012, 3 (Jan. 2014), available at https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf.

[5] HUD regulations outline the limited instances where denial of admission or termination of assistance is required in the public housing, Housing Choice Voucher and Section 8 multifamily programs. See 24 CFR Part 5, subpart I; Part 960, subpart B; Part 966, subpart A; Part 982, subpart L.

In deciding whether to exercise their discretion to admit or retain an individual or household that has engaged in criminal activity, PHAs and owners may consider all of the circumstances relevant to the particular admission or eviction decision, including but not limited to: the seriousness of the offending action; the effect that eviction of the entire household would have on family members not involved in the criminal activity; and the extent to which the leaseholder has taken all reasonable steps to prevent or mitigate the criminal activity. Additionally, when specifically considering whether to deny admission or terminate assistance or tenancy for illegal drug use by a household member who is no longer engaged in such activity, a PHA or owner may consider whether the household member is participating in or has successfully completed a drug rehabilitation program, or has otherwise been rehabilitated successfully.[6]

4. An Arrest is Not Evidence of Criminal Activity that Can Support an Adverse Admission, Termination, or Eviction Decision

Subject to limitations imposed by the Fair Housing Act and other civil rights requirements,[7] PHAs and owners generally retain broad discretion in setting admission, termination of assistance, and eviction policies for their programs and properties. Even so, such policies must ensure that adverse housing decisions based upon criminal activity are supported by sufficient evidence that the individual engaged in such activity. Specifically, before a PHA or owner denies admission to, terminates the assistance of, or evicts an individual or household on the basis of criminal activity by a household member or guest, the PHA or owner must determine that the relevant individual engaged in such activity.

HUD has reviewed relevant case law and determined that the fact that an individual was arrested is not evidence that he or she has engaged in criminal activity. Accordingly, the fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity warranting denial of admission, termination of assistance, or eviction.

An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. In many cases, arrests do not result in criminal charges, and even where they do, such charges can be and often are dismissed or the person is not convicted of the crime alleged. In fact, in the 75 largest counties in the country, approximately one-third of felony arrests did not result in conviction, with about one-quarter of all cases ending in dismissal.[8]

Moreover, arrest records are often inaccurate or incomplete (e.g., by failing to indicate whether

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[6] See 24 CFR 5.852, 960.203(d), 966.4(l)(5)(vii), 982.310(h) (describing PHA and owner discretion in screening and evictions actions related to criminal activity).

[7] See 24 CFR 5.852(e) ("admission and eviction decisions must be consistent with fair housing and equal opportunity provisions of [24 CFR 5.105]"); see also 24 CFR 960.202(c)(3), 966.6(l)(vii)(F), 982.310(h)(4), 982.552(c)(2)(v).

[8] Brian A. Reaves, Bureau of Justice Statistics, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2009, at 22, Table 21 (2013), http://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

the individual was prosecuted, convicted, or acquitted), such that reliance on arrests not resulting in conviction as the basis for denying applicants or terminating the assistance or tenancy of a household or household member may result in unwarranted denials of admission to or eviction from federally subsidized housing.[9]

With respect to the Section 8 tenant-based and moderate rehabilitation programs, HUD regulations specifically provide that termination of assistance for criminal activity must be based on a "preponderance of the evidence" that the tenant, or other household member, or guest engaged in such activity. For public housing as well, applicants or tenants may not be denied admission or evicted based on mere suspicion that they, a household member, or guest has engaged in criminal activity. Where PHAs or owners seek eviction, they should be prepared to persuade a court that the eviction is justified based on sufficient evidence of criminal activity in violation of the lease.

For these reasons, a PHA or owner may not base a determination that an applicant or household engaged in criminal activity warranting denial of admission, termination of assistance, or eviction on a record of arrest(s).

Although a record of arrest(s) may not be used to deny a housing opportunity, PHAs and owners may make an adverse housing decision based on the conduct underlying an arrest if the conduct indicates that the individual is not suitable for tenancy and the PHA or owner has sufficient evidence other than the fact of arrest that the individual engaged in the conduct. The conduct, not the arrest, is what is relevant for admissions and tenancy decisions.

An arrest record can trigger an inquiry into whether there is sufficient evidence for a PHA or owner to determine that a person engaged in disqualifying criminal activity, but is not itself evidence on which to base a determination. PHAs and owners can utilize other evidence, such as police reports detailing the circumstances of the arrest, witness statements, and other relevant documentation to assist them in making a determination that disqualifying conduct occurred. Reliable evidence of a conviction for criminal conduct that would disqualify an individual for tenancy may also be the basis for determining that the disqualifying conduct in fact occurred.

5. Protecting the Due Process Rights of Applicants and Tenants

Federal law requires that PHAs provide public housing, project-based Section 8, and Section 8 HCV applicants with notification and the opportunity to dispute the accuracy and relevance of a criminal record *before* admission or assistance is denied on the basis of such record. Public housing and Section 8 applicants also must be afforded the right to request an informal hearing

[9] See, e.g., U.S. Dep't of Justice, *The Attorney General's Report on Criminal History Background Checks* at 3, 17 (June 2006), http://www.justice.gov/olp/ag_bgchecks_report.pdf (reporting that the FBI's Interstate Identification Index system, which is the national system designed to provide automated criminal history record information and "the most comprehensive single source of criminal history information in the United States," is "still missing final disposition information for approximately 50 percent of its records").

or review *after* an application for housing assistance is denied.

As with admissions decisions, federal law requires that PHAs provide public housing, project-based Section 8, and Section 8 HCV tenants with notice and the opportunity to dispute the accuracy and relevance of a criminal record before they evict or terminate the tenant's assistance on the basis of such record. Moreover, PHAs and owners may only terminate the tenancy or assistance of a public housing or project-based Section 8 tenant through either a judicial action in state or local court, or, in the case of a Section 8 HCV participant, through an administrative grievance hearing before an impartial hearing officer appointed by the PHA. In either case, the tenant must be afforded the basic elements of due process, including the right to be represented by counsel, to question witnesses, and to refute any evidence presented by the PHA or owner.

6. Civil Rights Requirements and Consistent Application of Procedures and Standards

PHAs and owners must ensure that any screening, eviction, or termination of assistance policies and procedures comply with all applicable civil rights requirements contained in in the Fair Housing Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, and Titles II and III of the Americans with Disabilities Act of 1990, and the other equal opportunity provisions listed in 24 CFR 5.105. To that end, a PHA or owner should institute protocols that assure that its procedures and standards are consistently applied and that decisions are made based on accurate information. Inconsistent application of standards or decisions based on partial or inaccurate information may result in liability under federal civil rights laws. See, e.g., Allen v. Muriello, 217 F. 3rd 517 (7th Cir. 2000) (allegation that African American applicant for federal housing assistance was given less opportunity to contest erroneous record of criminal activity than two similarly situated white applicants established a prima facie case of discrimination under the Fair Housing Act).

7. Best Practices and Peer Examples

PHAs and owners are encouraged to adopt admissions and continuing occupancy policies based on the best practices highlighted below to guard against unwarranted denial of assistance, termination from program participation, or eviction from federally assisted housing. These best practices incorporate clear standards for using information about criminal history in an admission or continuing participation decision. PHAs and owners are also encouraged to read the Shriver Report entitled "When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing."

Examples of PHA Best Practices on the Use of Criminal Records

A. Many PHAs have adopted written admission policies that limit their criminal record screening to assessments of conviction records.

Examples of PHA Best Practices on Screening for Criminal Activity

A. Some PHAs allow public housing and Housing Choice Voucher applicants to address and present mitigating circumstances regarding criminal backgrounds prior to admission decisions. In some cases, doing so has produced cost savings due to fewer decision appeals.

B. Some PHAs have adopted lookback periods that limit what criminal conduct is considered during the screening process based on when the conduct occurred and/or the type of conduct. For example, when screening HCV applicants, one PHA has adopted a twelve-month lookback period for drug-related criminal activity and a twenty-four month lookback period for violent and other criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents.

C. Some PHAs have adopted admission policies that enumerate the specific factors that will be considered when the PHA evaluates an individual's criminal record, including:

a. Whether the applicant's offense bears a relationship to the safety and security of other residents;
b. The level of violence, if any, of the offense for which the applicant was convicted;
c. Length of time since the conviction;
d. The number of convictions that appear on the applicant's criminal history;
e. If the applicant is now in recovery for an addiction, whether the applicant was under the influence of alcohol or illegal drugs at the time of the offense; and
f. Any rehabilitation efforts that the applicant has undertaken since the time of conviction.

D. Some PHAs have implemented pilot programs that allow formerly incarcerated persons who have been released from prison within the past two or three years to be added to an existing voucher of a family member if all involved agree to participate and the formerly incarcerated individual agrees to six months to one year of supportive services with nonprofit partners.

E. One PHA has hired an offender reentry housing specialist who collaborates with a formerly incarcerated individual's parole officer, landlord, and treatment provider to ensure successful reentry into the community.

Example of PHA Best Practices on Evicting and Terminating Assistance for Criminal Activity

A. Some PHAs have adopted policies that list the circumstances that will be considered prior to a termination of the lease on the basis of criminal activity, including:

a. The seriousness of the offending action, especially with respect to how it would affect other residents;
b. The extent of participation or culpability of the leaseholder, or other household members, in the offending action, including whether the culpable member is a minor, a person with disabilities, or a victim of domestic violence, dating violence, sexual assault, or stalking;
c. The effects that the eviction will have on other family members who were not involved in the action or failure to act;

d. The effect on the community of the termination, or of the PHA's failure to terminate the tenancy;
e. The effect of the PHA's decision on the integrity of the public housing program;
f. The demand for housing by eligible families who will adhere to lease responsibilities;
g. The extent to which the leaseholder has shown personal responsibility and whether they have taken all reasonable steps to prevent or mitigate the offending action; and
h. The length of time since the violation occurred, the family's recent history, and the likelihood of favorable conduct in the future.

8. Paperwork Reduction Act

The information collection requirements contained in this Notice were approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C 3501-3520). Compliance and Enforcement are covered by OMB controls numbers 2502-0205, 2577-0232, 2577-0220, 2577-0230, and 2577 - 0169. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

9. Contact Information

If you have questions regarding this Notice, please contact your local HUD Field Office.

/s/
Lourdes Castro Ramirez
Principal Deputy Assistant Secretary for
Public and Indian Housing

/s/
Edward Golding
Principal Deputy Assistant Secretary for
Housing

NOTES

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U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2023-13, CPD 2023-05, Re: Guidance on Housing Individuals and Families Experiencing Homelessness through the Public Housing and Housing Choice Voucher Programs (June 8, 2023)

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Disability Rights California

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-5000

OFFICE OF PUBLIC AND INDIAN HOUSING

Special Attention of:

Public Housing Agencies administering the Housing Choice Voucher and/or Public Housing Programs; Public Housing Field Office Directors; CPD Directors; Continuums of Care

NOTICE PIH 2023-13, CPD 2023-05

Issued: June 8, 2023

Expires: Effective until amended, superseded, or rescinded

Supersedes: PIH Notice 2013-15

Cross References: PIH Notice 2015-19, PIH Notice 2017-21 (HA), CPD Notice 2017-01

Subject: Guidance on housing individuals and families experiencing homelessness through the Public Housing and Housing Choice Voucher Programs

1. **Applicability**: This Notice applies to public housing agencies (PHAs) administering Public Housing and/or Housing Choice Voucher (HCV) programs and Continuums of Care (CoCs).

2. **Purpose:** This Notice supersedes previous guidance found in PIH Notice 2013-15 and identifies strategies that PHAs can pursue to expand housing opportunities for individuals and families experiencing homelessness through the Public Housing and HCV programs. Specifically, this Notice:

   - Revises the definition of homelessness for the purpose of reporting in the Inventory Management System/Public Housing Information Center (IMS/PIC) or its successor system,
   - Outlines new guidance on how PHAs and CoCs can share data derived from IMS/PIC or its successor system and the Homeless Management Information System (HMIS),
   - Provides updated guidance on:
     - waiting list management and preferences,
     - screening policies regarding criminal activity, substance use, and rental history,
     - program termination and eviction policies, and
     - information regarding pairing project-based vouchers with CoC Supportive Services[1] to create Permanent Supportive Housing

   As authorized by the Consolidated Appropriations Act, 2022 (P.L. 117-103), HUD

[1] CoC Eligible Activities – Supportive Services – HUD Exchange (This resource was developed by a HUD funded technical assistance provider).

published PIH Notice 2022-29, awarding more than 19,000 new HCVs to PHAs that may be used as an additional resource to combat homelessness in local communities. The Fiscal Year 22 Appropriations provides that "the Secretary may specify additional terms and conditions to ensure that public housing agencies provide vouchers for use by survivors of domestic violence, or individuals and families who are homeless, as defined in section 103(a) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302(a)), or at risk of homelessness as defined in section 401(1) of such Act (42 U.S.C. 11360(1))." This Notice describes how PHAs can use these new vouchers strategically by collaborating with their local CoC to establish preferences to assist individuals and families who are experiencing or at-risk of experiencing homelessness (See Section 11 of the Notice for additional information on preferences for admission). In addition to information on preferences, this Notice addresses multiple ways in which PHAs can most effectively target and serve families experiencing homelessness through updated occupancy policies.

3. **Background:** CoCs and PHAs play a critical role in the efforts to end homelessness. Across the country, PHAs administer approximately 850,000 units of public housing and 2.6 million HCV subsidies, providing safe, stable, and affordable housing for low- and extremely low-income households. Many households entering public housing or the HCV program transition from CoC-funded projects. HUD encourages PHAs to become familiar with their local CoC's projects and coordinated entry systems to strengthen collaborations that can make each organization's efforts more effective.

   In partnership with the United States Interagency Council on Homelessness (USICH), HUD created a new initiative called House America. Through this initiative, HUD invited mayors, city and county leaders, Tribal nation leaders, and governors to leverage American Rescue Plan funds as well as other Federal, Tribal, State, and local resources to nationally re-house 100,000 households experiencing homelessness through a Housing First approach and to bring 20,000 new units of affordable housing into development by December 31, 2022. Local collaboration is essential to House America's success, requiring coordinated efforts by PHAs and CoCs to match available resources to unstably housed families. As of January 2023, 105 communities across 31 states and territories housed more than 100,00 households experiencing homelessness and added over 40,000 affordable housing units into development.

   While coordinating with HUD on House America, USICH released its strategic plan, "The Federal Strategic Plan to Prevent and End Homelessness" in December 2022. To help meet the Administration's goal of reducing homelessness by 25% by January 2025, the plan focuses on ways to provide housing and supports, homelessness response, and homeless prevention, by effectively using equity, data, and collaboration. The plan's emphasis on equity reflects a priority of both HUD and USICH. Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color experience homelessness at significantly higher and disproportionate rates than White people, and eliminating these racial disparities is not only a focus of HUD and USICH but also The White House, as evidenced in the Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. The Administration has committed to advancing

equity, civil rights, racial justice, and equal opportunity by redressing inequities in policies and programs that serve as barriers to equal opportunity across the Federal Government.

HUD is expanding its guidance related to how PHAs can leverage their public housing and HCV resources to assist individuals and families who are experiencing homelessness, including how PHAs can work with their local CoC to accept referrals from a Coordinated Entry System (CES). This Notice also updates the definition of homeless for Form HUD-50058 reporting to include Categories 2 and 3 of the definition under 24 CFR 578.3.

PHAs play an integral role in offering safe, stable, and affordable housing solutions within their communities, particularly to households with the lowest incomes and greatest barriers to housing. PHAs have taken varied approaches to assist individuals and families experiencing homelessness, both through relationships with partnering organizations and by implementing thoughtful policies and procedures aimed at removing barriers to housing homeless individuals and families. This Notice also provides information on these strategies.

4. **Definitions:**
   - Homeless[2] – The CoC program definition of homeless at 24 CFR 578.3 includes the following four "homeless" categories. Categories 1 through 3 are based on section 103(a) of the McKinney-Vento Homeless Assistance Act, whereas Category 4 is based on section 103(b) of that Act. PHAs should keep this distinction in mind when determining whether an individual or family is homeless as defined by section 103(a) of the McKinney-Vento Homeless Assistance Act.
     1. Category 1: Individual or family who lacks a fixed, regular, and adequate nighttime residence, meaning:
        i. Has a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for

[2] For purposes of programs such as the Emergency Solutions Grants and Continuum of Care Programs, section 605 of the Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022) amended section 103(b) of the McKinney-Vento Homeless Assistance Act to require HUD to consider as homeless "any individual or family who— (1) is experiencing trauma or a lack of safety related to, or fleeing or attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous, traumatic, or life-threatening conditions related to the violence against the individual or a family member in the individual's or family's current housing situation, including where the health and safety of children are jeopardized; (2) has no other safe residence; and (3) lacks the resources to obtain other safe permanent housing." Rulemaking will be needed to require Emergency Solutions Grants (ESG) recipients and subrecipients, Continuums of Care (CoCs), and CoC Program recipients and subrecipients to make corresponding changes to the applicable written standards, coordinated entry policies, and documentation policies used to qualify individual and families as homeless under the CoC Program. That said, because HUD must recognize as "homeless" families and individuals who meet the new statutory criteria in section 103(b) of the McKinney-Vento Homeless Assistance Act as of October 1, 2022, ESG and CoC recipients may implement the new definition prior to HUD rulemaking, provided that ESG recipients and CoCs update the relevant written standards and policies as needed to reflect the new statutory criteria. For further information, please see "The Violence Against Women Act Reauthorization Act of 2022: Overview of Applicability to HUD Programs," which HUD published in the Federal Register on January 4, 2023."

human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground;
    ii. Is living in a publicly or privately operated shelter designated to provide temporary living arrangements (including congregate shelters, transitional housing, and hotels and motels paid for by charitable organizations or by federal, state, and local government programs); or
    iii. Is exiting an institution where the individual or family resided for 90 days or less and who resided in an emergency shelter or place not meant for human habitation immediately before entering that institution.
2. Category 2: Individual or family who will imminently lose their primary nighttime residence, provided that:
    i. Residence will be lost within 14 days of the date of application for homeless assistance;
    ii. No subsequent residence has been identified; and
    iii. The individual or family lacks the resources or support networks needed to obtain other permanent housing.
3. Category 3: Unaccompanied youth under 25 years of age, or families with children and youth, who do not otherwise qualify as homeless under this definition, but who:
    i. Are defined as homeless under the other listed federal statutes;
    ii. Have not had a lease, ownership interest, or occupancy agreement in permanent housing during the 60 days prior to the homeless assistance application;
    iii. Have experienced persistent instability as measured by two moves or more during the 60-day period immediately preceding the date of applying for homeless assistance; and
    iv. Can be expected to continue in such status for an extended period of time due to certain special needs or barriers.
4. Category 4: Any individual or family who:
    i. Is fleeing, or is attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions that relate to violence against the individual or a family member, including a child, that has either taken place within the individual's or family's primary nighttime residence or has made the individual or family afraid to return to their primary nighttime residence;
    ii. Has no other residence; and
    iii. Lacks the resources or support networks to obtain other permanent housing.

- Chronic Homelessness –
    1. A homeless individual with a disability, as defined in section 401(9) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11360(9)), is an individual who:
        i. Lives in a place not meant for human habitation, a safe haven, or in an emergency shelter; and

ii. Has been homeless continuously for at least 12 months or on at least 4 separate occasions in the last 3 years, as long as the combined occasions equal at least 12 months and each break in homelessness separating the occasions included at least 7 consecutive nights of not living as described in paragraph 1(i).

2. An individual who has been residing in an institutional care facility, including a jail, substance abuse or mental health treatment facility, hospital, or other similar facility, for fewer than 90 days and met all of the criteria in the preceding bullets of this definition before entering that facility; or
3. A family with an adult head of household (or if there is no adult in the family, a minor head of household[3]) who meets all of the criteria in paragraphs 1 and 2 including a family whose composition has fluctuated while the head of household has been homeless.

- Centralized or Coordinated Assessment System (CE system) – The definition of Centralized or Coordinated Assessment is found at 24 CFR 578.3, 24 CFR 578.7(a)(8) details the responsibilities of the CoC to establish and operate this required system. In addition to the definition and responsibilities established in the Rule, HUD posted on its website, CPD-17-01: *Notice Establishing Additional Requirements for a Continuum of Care Centralized or Coordinated Assessment System*, establishing additional requirements related to the development and use of a centralized or coordinated entry assessment system. These systems help communities assess the needs of program participants and effectively match individuals and families experiencing homelessness with the most appropriate resources available to address their supportive service and housing needs. CoCs may use planning costs to design and plan for the implementation of a centralized or coordinated assessment system; however, once the system is established and operating, the costs of operating it are not eligible planning costs. CoCs must operate the system with CoC Program funds, other funds, or a combination of the two.
- Continuum of Care (CoC) (24 CFR 578.3) – The group organized to carry out the responsibilities required under this part and that is composed of representatives of organizations, including nonprofit homeless providers, victim service providers, faith-based organizations, governments, businesses, advocates, public housing agencies, school districts, social service providers, mental health agencies, hospitals, universities, affordable housing developers, law enforcement, organizations that serve homeless and formerly homeless veterans, and homeless and formerly homeless persons to the extent these groups are represented within the geographic area and are available to participate.
- Continuum of Care Program (24 CFR part 578) – Promotes a community-wide commitment toward the goal of ending homelessness; to provide funding for efforts by nonprofit providers, states, Indian Tribes or tribally designated housing entities (as defined in section 4 of the Native American Housing Assistance and Self Determination Act of 1996 (25 U.S.C. 4103) (TDHEs)), and local governments to

[3] An individual who is a minor under the age of 18 who has been emancipated to act on his/her own behalf, including the ability to execute a contract or lease under state law. See 24 CFR § 5.504(b).

quickly rehouse homeless individuals, families, persons fleeing domestic violence, dating violence, sexual assault, and stalking, and youth while minimizing the trauma and dislocation caused by homelessness; to promote access to and effective utilization of mainstream programs by homeless individuals and families, and to optimize self-sufficiency among those experiencing homelessness.

- Disability – The inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or in the case of an individual who has attained the age of 55 and is blind, the inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which they have previously engaged with some regularity and over a substantial period of time.[4]
- Emergency Solutions Grant (ESG) (24 CFR part 576)– A formula grant program that provides funding to cities, urban counties, territories, and states for street outreach, emergency shelter, homelessness prevention, and rapid-rehousing.
- Family – A person or group of persons, as determined by the PHA consistent with 24 CFR 5.403, approved to reside in a unit with assistance under the program. The term "family" used in EHV/HCV context always includes a family that is comprised of a single individual as well as a group of persons under the HCV program regulations at 24 CFR 982.4.
- Homeless Management Information System (HMIS) – means the information system designated by the Continuum of Care to comply with the HUD's data collection, management, and reporting standards and used to collect client-level data and data on the provision of housing and services to homeless individuals and families and persons at-risk of homelessness.
- Housing for Persons with HIV/AIDS (HOPWA)- The only federal program dedicated to the housing needs of people living with HIV/AIDS. Under the HOPWA Program, HUD makes grants to local communities, States and nonprofit organizations for projects that benefit low-income persons living with HIV/AIDS and their families.
- House America – A partnership between HUD and The U.S. Interagency Council on Homelessness (USICH) with mayors, local government leaders, tribal nation leaders, and governors that utilize the American Rescue Plan (ARP) to address homelessness.
- Household – Includes everyone who lives in the unit, including foster children/adults and live-in aides. Household members are included when determining unit size, but are not considered family members, and have no rights to the public housing unit or Housing Choice Voucher if there are no remaining family members.
- Housing First – A model of housing assistance that prioritizes rapid placement and stability in permanent housing in which admission does not have preconditions (such as sobriety or a minimum income threshold) and in which housing assistance is not conditioned upon participation in services.

[4] 42 USC § 423(d)(1)(A). For consistency with fair housing requirements, see The Fair Housing Act, 42 U.S.C. 3602(h) (defining a person with a disability as an individual who has "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21)."

- Moving On – A strategy that enables individuals and families who are able and want to move on from Permanent Supportive Housing (PSH) to do so by providing them with sustainable, affordable housing options through mainstream systems, as well as the services and resources necessary to maintain housing stability.
- Permanent Supportive Housing (PSH) – As it relates to project-based vouchers, permanent housing in which supportive services are provided to assist homeless persons or families, in which at least one person has a disability, to live independently.

5. **Definition of Homeless for the Purpose of Completing Line 4c on Form HUD-50058:** For all new admissions, PHAs must determine whether an individual or family was homeless at admission, and this information must be reported on line 4c on Form HUD-50058. Note that while a PHA may adopt its own definition of the term *homeless* for purposes of a PHA-adopted waiting list preference, PHAs must use the definition provided in Section 4 above for purposes of reporting whether a new admission is homeless on the Form HUD-50058. The Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (HEARTH Act) amended the McKinney Vento Act definition of homeless for HUD's homeless assistance programs, and on December 5, 2011, HUD published its Final Rule implementing this definition.

   HUD previously adopted only a portion of this definition for the purpose of reporting on Form HUD-50058 (categories 1 and 4). This Notice supersedes the definition of homeless family found in the Form HUD-50058 guide. As of this Notice, "Homeless at admission" in Section 4 is to be filled out as follows.

   When using Form HUD-50058 for either the Emergency Housing Vouchers (PIH Notice 2021-15) or Stability Vouchers (PIH Notice 2022-24), PHAs should mark yes only if the applicant meets criteria in category 1, 2, or 3 of the homeless definition in 24 CFR 578.3. For any other Housing Choice Voucher, PHAs should mark yes only if the applicant meets the criteria in category 1, 2, 3, or 4 of the homeless definition in 24 CFR 578.3 or the criteria in section 103(b) of the McKinney Vento Homeless Assistance Act, as amended 42 U.S.C §11302(b).

   For additional information on the Form HUD-50058, please see the Form HUD-50058 Instruction Booklet.

6. **Reporting Homelessness on the Form 50058:** The Form HUD-50058 and Form HUD-50058 MTW modules allow HUD to obtain information about participants in the Public Housing and HCV programs, including the homeless status of persons entering the program. The accuracy and reliability of this information is critical to tracking the homelessness system's collective progress towards ending homelessness. However, based on a HUD review of PIC reporting on line 4c, some PHAs are not reporting this field accurately, or are reporting "no" for all applicants, whether they are homeless or not. It is of particular importance for PHAs to record the homeless status of individuals receiving Veterans Affairs Supportive Housing (HUD-VASH), Family Unification Program (FUP), Foster Youth to Independence Initiative (FYI), EHV, Mainstream, and Non-elderly Disabled (NED), as these special purpose vouchers serve a high percentage

of people meeting the updated homeless definition (and in the case of HUD-VASH, is statutorily required to meet the definition of homeless and for FUP-Youth and FYI, must meet the definition of homeless or at-risk of homelessness). For all new admissions to Public Housing, HCV program, and all special purpose vouchers, PHAs must determine whether an individual or family was homeless at admission using the definition detailed in Section 4 above, and this information must be reported on line 4c on Form HUD-50058. HUD does not require PHAs to collect documentation or third-party verification of any kind to verify an applicant's homelessness status for the purpose of reporting on line 4c. Verbal self-verification by the applicant that any of the above criteria are true is sufficient.

To aid PHAs in accurately reporting a new admission's homelessness status on line 4c of Form HUD-50058, the PHA may find the following list of questions helpful. If the answer to any of the following questions is *yes* regarding the family's current living situation, the PHA would mark "Y" on line 4c of the Form HUD-50058 (homeless at admission).

1. Are you currently living in a car, on the street, or another place not meant for human habitation?
2. Are you currently living in an emergency shelter, transitional housing, Safe Haven[5], or a hotel/motel paid for by a charitable organization or by federal, state, or local government programs for low-income individuals?
3. Are you exiting an institution, including a hospital, substance abuse or mental health treatment facility, or jail/prison, where you stayed for 90 days or less? If so, were you living in an emergency shelter or place not meant for human habitation immediately before entering that institution?
4. Will you be losing your primary nighttime residence within the next 14 days, with no subsequent residence identified and no resources or support networks to obtain other permanent housing?
5. Are you an unaccompanied youth under 25 years of age, who does not otherwise qualify as homeless under the HUD definition, but who is considered to be experiencing homelessness under the definition of another federal statute[6], have not had a lease, ownership interest or occupancy agreement in permanent housing in the past 60 days, have experienced persistent instability (2 or more moves in the past 60 days), and can be expected to continue the above instability because of various barriers, including chronic disabilities, chronic physical or behavioral issues, histories of domestic violence or child abuse and neglect, or two or more barriers to employment?
6. Are you experiencing trauma or a lack of safety related to, or fleeing or attempting to flee, domestic violence, dating violence, sexual assault, stalking, human trafficking or other dangerous, traumatic, or life-threatening conditions related to the violence against you or a family member in your current housing situation?

[5] A Safe Haven is a form of supportive housing that serves hard-to-reach homeless persons with severe mental illness who are on the street and have been unable or unwilling to participate in housing or supportive services.
[6] Other federal definitions of homelessness include those used by the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11434(a)(2)) and the Runaway and Homeless Youth Act (42 U.S.C. § 5732a)).

Example 1: A family that lost their home because the family was no longer able to make the mortgage payments and is living in their car **would** qualify as homeless.
Example 2: An individual that had previously lived in an emergency shelter and was admitted to the hospital for a 5-day stay **would** qualify as homeless.
Example 3: An individual being released from prison after a 3-year incarceration **would not** qualify as homeless based on the length of incarceration.
Example 4: An individual that is residing in a home with their abuser, both of whom are on the lease, and does not have sufficient resources to leave the home and obtain housing independently **would** qualify as homeless.

PHAs are encouraged to partner with a CoC or other homeless services organization to assist with documenting the homelessness status of applicants. In particular, partnerships may be valuable for determining whether individuals and families qualify under categories 2 and 3 of the homeless definition, since the documentation requirements for these categories are time-sensitive (e.g., losing housing within the next 14 days). This partnership between the PHA and other organization could be simply to verify the family's homelessness status or could be more robust in which the PHA accepts referrals from the CoC's CE System. This more robust partnership is discussed further in Section 7 of this Notice.

PHAs must follow the verification requirements established in their written policies to verify homelessness status for a preference, which may include reliance on verification from partnering organizations such as CoCs.

7. **Partnering and Working Collaboratively with CoCs:** As demonstrated by the implementation of the Emergency Housing Voucher program, a partnership between the CoC and the PHA is a critical part of a community-wide effort to end homelessness. CoCs manage federal resources to assist individuals and families experiencing homelessness, while PHAs provide stable, long-term housing and housing subsidies which can help end the cycle of homelessness. HUD strongly encourages PHAs and CoCs to proactively engage in partnerships, since the communities that have been most successful in working toward ending homelessness are those where PHAs form direct partnerships with the local CoC, homeless service providers, and other agencies.

   Partnerships between PHAs and CoCs allow the organizations to leverage their resources to better serve individuals and families experiencing homelessness. For example, a PHA and CoC may partner to create a PSH project in which the PHA provides a tenant-based or project-based voucher, while the CoC may be able to provide or coordinate the accompanying supportive services in accordance with program requirements. Other examples involve the creation of a Rapid Rehousing (RRH) project where supportive services are provided through the CoC program or ESG funds, while housing subsidies are supplied through an HCV or a Public Housing unit. Note that when funds are provided by both the CoC and PHA, there is a prohibition on duplication of subsidies.[7]

[7] 24 CFR § 982.352(c)

In any partnership, CoCs and PHAs must follow the rules of the respective program that is being supported, including rules regarding admission to the program such as waiting list requirements and existing PHA preferences. CPD Notice 2017-01 generally provides for all admissions to CoC and ESG programs to go through the CoC's CE system, while PHAs, with the exception of special admissions, are required to select participants from their waiting lists. For these resources to be leveraged, a PHA could establish a waiting list preference for referrals from the CoC, which would, in turn, refer clients from the CE system for the PHA resource. PHAs may choose to prioritize certain categories of homelessness, in accordance with the PHA's Admission and Continued Occupancy Plan (ACOP) or PHA Administrative plan when accepting referrals from the CoC for the PHA's waiting list, depending on identified local needs and racial equity considerations.[8]

Relationships between CoCs and PHAs can benefit both organizations. By working together, the organizations can help each other in a multitude of ways including by:

- Sharing best practices
- Identifying and prioritizing people experiencing homelessness for assistance
- Aiding in locating a unit, accessing additional services, etc.
- Providing documentation for verification purposes
- Sharing information on the physical location of people experiencing homelessness to ensure services can be provided
- Providing case management assistance to households when applying to PHA programs, including assistance with securing vital documents, and understanding relevant program requirements
    - Providing housing search assistance
    - Serving as a liaison between the PHA, family, and owner
    - Identifying and recruiting of landlords for HCV programs

PHAs and CoCs are encouraged to establish strong partnerships, as this enables PHAs to access larger networks of different homeless service providers throughout their community. A larger PHA provider network ensures that vulnerable individuals and families admitted to Public Housing or HCV programs are offered the supportive services necessary to remain stably housed and compliant with the family obligations and other requirements of the program. PHAs and CoCs can use both formal and informal approaches to build relationships, including:

- Participating in a Moving On Program strategy (see Section 13 of this Notice)
- Establishing Memorandums of Understanding (MOU) to detail specific roles and responsibilities of the partnership and leverage combined resources to create PSH and RRH (building off existing EHV MOUs as appropriate)
- Becoming members of the CoC, including PHA leadership holding a seat on the CoC Board and participation from CoC leadership on the PHA board
- PHAs participating in the CoC's HMIS and in the CoC's regular meetings, including ongoing case conference and prioritization meetings

[8] 24 CFR § 960.206 for Public Housing, 24 CFR § 982.207 for the HCV program, and 24 CFR § 983.251(c)(3) for the PBV program.

- Providing training to PHA staff on the local strategic plan to end homelessness and the various supportive programs that may be available to Public Housing residents and HCV participants
- Providing training to CoC staff to ensure they understand how to best support the clients/participants navigating the HCV and Public Housing application process
- Engaging with other organizations that serve underserved communities (including individuals who belong to communities of color, such as Black and African American, Hispanic and Latino, Native American, Alaska Native and Indigenous, Asian American, Native Hawaiian and Pacific Islander, Middle Eastern, and North African persons; individuals who belong to communities that face discrimination based on sex, sexual orientation, and gender identity; and individuals with disabilities) to exchange ideas about outreach and assessment processes that improve equitable outcomes
- Identifying which other systems interact with the homelessness system. Start a committee with those community partners to address cross-system disparities
- Expanding opportunities for people of different races/ethnicities who have lived experience of homelessness to provide expert advice and opinions on policy, procedures, and services delivery. Consider mechanisms to compensate community partners

8. **Characteristics of an Effective CE Process:** The July 31, 2012, CoC Program interim rule requires CoCs to establish and operate "a centralized or coordinated assessment system that provides an initial, comprehensive assessment of the needs of individuals and families for housing and services with the intention of matching the homeless individual or family with the most appropriate resources." Prior to coordinated entry (CE), limited housing resources were distributed separately by each housing provider and the most vulnerable households were not always prioritized for subsidies or PSH units.

   A CE system is a centralized approach to assessing the needs, vulnerability level, and program eligibility of people experiencing homelessness and linking them to available housing programs in the community using a standardized access, assessment, prioritization, and referral process. With the exception of ESG-funded victim service providers, HUD requires all communities funded through its ESG or CoC program to implement a centralized or coordinated intake and assessment system. In many communities, Veterans Administration (VA) and Health and Human Services (HHS) funded programs partner with the CE to provide access to their units or subsidies. Each CE system is unique, giving CoCs flexibility to design processes and priorities that fit their local needs. HUD strongly encourages PHAs to participate in the CE system in their area by establishing a mechanism for referrals once an assessment has been made by the CoC.

   As one of the largest providers of affordable housing in their communities, PHAs can play a critical role in the CE process. HUD encourages PHAs to connect with their local CoCs to understand their local CE design and operation (processes, tools, policies, and procedures). A typical process would likely include the following steps:

- Outreach – CoCs must conduct outreach in a variety of ways to homeless providers, shelters, and community partners, including human trafficking, domestic violence, and sexual assault providers, to ensure equal access to housing based on need and eligibility of homeless households. CoCs must also affirmatively market their housing and supportive services to eligible persons regardless of race, color, religion, sex (including gender identity and sexual orientation), disability, familial status (children under age 18, including pregnancy or seeking legal custody), or national origin who are least likely to apply in the absence of special outreach (see 24 CFR 578.93(c)(1));
- Access - A household experiencing homelessness requests help at one or multiple designated access points (e.g., emergency shelter(s), call line, or intake center(s));
- Assessment – A CoC staff member completes a standardized assessment and identifies which services and housing programs may be the best fit for a program participant;
- Prioritization – Policies documenting the prioritization process must align with existing CoC Program and ESG Program written standards established under HUD regulations 24 CFR 578(a)(9) and 24 CFR 576.400(e). The CoC's coordinated entry policies and procedures must describe the factors and assessment information with which prioritization decisions are made for all homeless assistance in the CoC. Based on a local prioritization process, if the household meets program criteria and is a good candidate to receive long-term housing assistance, CoC staff prioritize the household for that type of assistance. Communities are always encouraged to evaluate and adjust their prioritization policies based on evolving information and circumstances, including new or improved data (to include potential disparate impacts by race/ethnicity), changing needs and priorities, and available resources;
- Referral/Placement - CoC staff refer eligible households to the PHA or other housing provider intake staff for documentation review and placement.

The structure and operations of a CE system will vary depending on many factors, including the size of the community it serves and the length of its history in building a CE process. HUD does not identify a specific assessment tool or process that CoCs should use for CE, and CoCs can choose to use different assessment tools for specific sub-populations. According to CPD Notice 2017-01, "the coordinated entry process may, but is not required to include separate access points and variations in assessment processes to the extent necessary to meet the needs of the following five populations: (1) adults without children; (2) adults accompanied by children; (3) unaccompanied youth; (4) households fleeing domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions (including human trafficking); and (5) persons at-risk of homelessness."

A PHA can participate in their local CoC's CE system by accepting CE system referrals of people experiencing homelessness who are eligible for and in need of the housing programs they offer, including HCV, PBVs, Public Housing, Mainstream Vouchers, NED Vouchers, FUP, FYI, Housing for Persons with HIV/AIDS (HOPWA), or PSH-funded through the CoC and supported by HCV. PHAs can also provide housing support

through EHVs; however, EHVs require a direct referral from the CoC.[9] PHAs can also use the CoC's CE system to identify households that may be eligible for any limited preference they have for people experiencing homelessness in their community. While all referrals for HUD-VASH must come directly from the PHA's partnering VA facility or designated service provider (DSP), VA facilities are encouraged to become connected with their local CE system.[10]

A PHA may establish a preference for families referred from the CE process in the community.[11] This may be a general preference or the PHA may choose to limit the number of vouchers/public housing units available under this preference.[12] Please note that this preference is somewhat different from a homeless preference since applicants would need to be referred from the CE rather than applying directly to the PHA. See section 11 of this Notice for further information on establishing a waiting list preference for referrals from a CE system.

For more information on additional CE best practices, see the following resource developed by a HUD funded TA provider: PHA Strategies to Assist People Experiencing Homelessness Guidebook: Using Coordinated Entry to Identify People Experiencing Homelessness for Housing Assistance.

9. **Pairing Data from the Form 50058 with HMIS Data:** The Homeless Management Information System (HMIS) is a local information technology system used by CoCs to comply with the data collection and reporting requirements of the CoC Program interim rule found at 24 CFR 578. It is a locally administered system used to record and analyze data on program participants on the provision of housing and services for individuals and families who are homeless or at-risk of homelessness.[13] Further, HUD and other federal partners use aggregate data from HMIS to better inform homeless policy and decision making. Note that client-level data in HMIS is only visible at the local level and must be aggregated when reported to HUD.

   HMIS can be used to generate reports, assess programs, and process intake and referral information in some CE systems. The system is a valuable tool and can be used by CoCs to make data-driven decisions, increase access to housing resources for families experiencing homelessness, and evaluate efforts at advancing racial equity. To further enhance the analytical capabilities of both PHAs and CoCs, these organizations can implement data sharing agreements to share disaggregated data, facilitated in part through joint Releases of Information (ROIs). These agreements allow PHAs to link their Form 50058 data with the CoC's HMIS systems, and vice versa, enabling both organizations to understand and analyze the individual paths taken by homeless families through the

[9] Per PIH Notice 2021-15, Congress provided HUD with broad waiver authority through the American Rescue Plan Act that permitted HUD to establish this alternative requirement for EHV. In the absence of that authority, this alternative requirement would be impermissible.
[10] VA Participation in Coordinated Entry Guidance (hudexchange.info)
[11] See 24 CFR § 960.206 for Public Housing, 24 CFR § 982.207 for the HCV program, and 24 CFR § 983.251(c)(3) for the PBV program.
[12] *Id.*
[13] HUD Exchange HMIS Data Standards - This resource was developed by a HUD funded TA provider.

system of homelessness.

CoCs often have no visibility into the outcomes of families they refer to PHAs, including application approval, voucher issuance, leasing up, their time in the program, or when they exit the program. However, CoCs, PHAs, and their partners can establish data sharing agreements[14] to better understand family outcomes in order to create and coordinate strategies that support equitable access to programs and improved outcomes for the families they serve.

For example, if a large number of families are receiving vouchers, but only a small number of those families successfully lease up, it may indicate a need for support in finding units, completing landlord applications, or getting paperwork returned to the PHA. Or, if families do successfully lease up but are frequently terminated within 1-2 years, it may indicate a need for increased support throughout their time within the program. Both examples highlight instances where access to data can lead to a greater understanding of the path through homelessness, enabling PHAs and CoCs to coordinate the application of additional resources most needed by the people experiencing homelessness in their communities. Viewing these disaggregated data can also help determine disparities in lease-up by race/ethnicity to examine any racial equity concerns.

CoCs and PHAs are required to create policies and procedures regarding how data is collected, used, stored, and disclosed across the homeless services system. These policies must comply with the requirement to protect clients' personally identifying information (PII) and should follow the guiding principle to only share the minimum amount of data necessary to achieve the purpose. CoCs and PHAs must be transparent in the data collection process and articulate the policies to clients in a way that they understand, and clients must be protected from denial of services they would otherwise qualify for if they do not consent to data collection or sharing. In instances where information collection is required by law, CoCs and PHAs are not required to seek consent.

10. **Waiting List Management:** PHA waiting lists can be a barrier to individuals and families experiencing homelessness trying to access the Public Housing and HCV programs.[15] When waiting lists are long or closed, an individual or family who lacks stable housing and reliable contact information may not be able to be contacted when they come to the top of the waiting list or when waiting lists are purged, especially if it has been months or years since the application was submitted. Additionally, when PHAs reopen waiting lists for short periods of time, people experiencing homelessness may be excluded from the application process due to a lack of information about the eligibility to apply.

    PHAs may establish strong outreach and intake strategies through partnerships with key CoC leadership and service providers within the CoC such as emergency shelter staff, CE staff, and housing navigators. PHAs may also alter policies and procedures to:

[14] This resource was developed by a HUD funded TA provider.

[15] While HUD-VASH is included in this guidance among other special purpose voucher programs, there are several HUD-VASH policies, including waiting list management, that are unique to HUD-VASH. HUD-VASH operating requirements (86 FR 53207) supersede all guidance in this notice.

- Simplify the application process for Public Housing or HCVs, including steps such as:
    - Develop a universal application with partner PHAs in the region
    - Minimize the length and number of questions used to accurately determine program eligibility and to meet regulatory requirements, providing a balance between collecting all necessary information and ensuring that the application process is clear and accessible
    - Provide multiple ways to access and submit an application as appropriate, including to ensure a PHA meets its statutory obligation to make information accessible to people with disabilities and people with limited English proficiency (LEP). For example, PHAs must take appropriate steps to ensure effective communication with individuals with disabilities through the use of auxiliary aids and services whether the application is electronic or in hard copy. PHAs must be able to process applications to accommodate individuals who are unable to access an electronic form. Otherwise, they must offer a reasonable accommodation, or alternative application processes for those populations. They must also take appropriate steps to ensure that applications are meaningful access by individuals with Limited English Proficiency (LEP) populations by translating such materials into languages other than English.
- Engage with partner organizations to help homeless households gather necessary information and documents, and ensure that requirements are explained in clear, plain language and available in multiple languages as needed
- Strengthen the process for contacting applicants on their waiting list, providing multiple forms of communication to reduce barriers for applicants without a permanent address (e.g., contacting applicants via email, text, or phone)
- Implement liberal reinstatement policies when applicants are removed from the waiting list because of non-responsiveness
- Allow updates to address information via multiple methods, including by mail, email, and online forms
- Establish flexible intake and briefing schedules
    - Provide a window of time for appointments
    - Allow for remote briefing opportunities[16]
- Establish nondiscriminatory preferences in admissions policies for persons experiencing homelessness, or a subset of such persons (e.g., chronically homeless, homeless veterans, homeless identified as most vulnerable through community-based assessment strategies, etc.). See Section 11 of this Notice.
- Establish admissions preferences for victims of domestic violence, dating violence, sexual assault, stalking, and human trafficking.
- Revise criminal record and substance use policies to ensure that they are not overly restrictive and that they do not discriminate in violation of the Fair Housing Act or other civil rights authorities, based on the requirements of the individual program (e.g., HCV vs. EHV). Additional best practices can be found in HUD's Implementation of the Office of General Counsel's Guidance on Application of

[16] PIH Notice 2020-32

Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions Memo (2022 Criminal Records Memo)

- Implement flexible policies for rental history for those individuals and families without a consistent or steady rental history
- Amend the HCV Administrative Plan to provide longer initial search terms if required by rental market conditions, and simplify processes for requesting search extensions consistent with the terms of the administrative plan.

For more guidance on waiting list and applications management, please see the following resource developed by a HUD funded TA Provider: PHA Strategies to Assist People Experiencing Homelessness Guidebook. As a reminder to PHAs, all actions taken in association with the application and intake process must comply with all applicable fair housing and civil rights laws, including the Violence Against Women Act. See 24 CFR 5.105(a) and 24 CFR Part 5, subpart L.

11. **Homeless Admissions Preference:** A PHA's greatest tool for increasing program access for individuals and families experiencing homelessness is establishing a preference in the Admission and Continued Occupancy Plan (ACOP) for public housing and the Administrative Plan for HCV. The adoption of preferences is at the discretion of the PHA. HUD regulations[17] authorize PHAs to establish certain local preferences in PHA policies. The PHA has the discretion to establish other preferences not addressed in program regulations provided they are based on local housing needs and priorities, including preferences for families who are homeless or living in substandard housing. If adopting the preference constitutes a significant amendment to the PHA Plan as defined by the PHA, the PHA must comply with the amendment provisions of 24 CFR 903.21, including soliciting public comment and consulting with the resident advisory board.

    This Section describes the criteria that may be considered when establishing preferences for homeless individuals or families. For a detailed discussion of best practices for operating waiting lists and establishing preferences for people experiencing homelessness, please also see the following resource developed by a HUD funded TA Provider: PHA Strategies to Assist People Experiencing Homelessness Guidebook.

    a) Assessing local housing needs. PHAs should understand the unique circumstances impacting people experiencing homelessness in their communities. A PHA's system of local preferences must be based on local housing needs and priorities by using generally accepted data sources and information obtained through the PHA Plan public comment process.[18] HUD encourages PHAs to work collaboratively with CoCs, health care providers, social service providers, homeless services providers, disability organizations, organizations serving victims of domestic violence, dating violence, stalking, sexual assault, or human trafficking, and local offices of government and community organizations to establish a system of preferences based on local housing

[17] 24 CFR § 960.206 for Public Housing, 24 CFR § 982.207 for HCV, and 24 CFR § 983.251(c)(3) for PBV.
[18] 24 CFR § 960.206(a)(1) for Public Housing and 24 CFR §982.207(a)(2) for HCV

needs collectively identified by the community. For example, PHAs may look to their Community Plan to End Homelessness, Consolidated Plans, HIV/AIDS Housing Plan and/or data from their jurisdiction's CoC HMIS to identify whether and to what extent there is need for a homeless preference. For more information on these products, visit the following resources developed by HUD funded TA Providers: Coordinated Community Plan, Consolidated Plans, Housing Opportunities for Persons with AIDS (HOPWA) Housing Plan, and HMIS Community Examples.

b) Identifying and addressing racial equity in the PHA's preference system. It is important that PHAs use the resources highlighted in sub-section a) above to identify, understand, and take the necessary action to address racial disparities in their communities, particularly when establishing and applying homeless admissions preferences. Black, Hispanic, and American Indian and Alaskan Natives represent 29% of the total U.S. population but accounted for over 60% of the homeless population in 2020.[19] These trends highlight the disproportionate impact on Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color and the need for PHAs to understand the demographics and particular circumstances faced by the people they serve in their communities. PHAs may utilize the following (developed by a HUD funded TA provider) CoC Analysis Tool to examine racial disparities in the numbers of individuals or families experiencing homelessness in the local community or those who obtain and maintain permanent housing. Using this information, PHAs may want to consult with their CoC and other community partners to determine changes to current preference policies that target needs, vulnerabilities, and barriers disproportionately faced by Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color, which may help address racial equity concerns. Notably, any such policy changes must not target race, national origin, or any other characteristic protected under fair housing and civil rights laws.

c) Applying and Limiting Preferences. HCV, PBV, and Public Housing regulations allow PHAs to establish waiting list preferences.[20] The PHA may establish a general preference for people experiencing homelessness or may create a more narrowly defined or limited preference. PHAs may also limit the number of applicants that may qualify for a particular preference.[21]

PHAs may create a preference or limited preference specifically for people who are referred by a partnering homeless service organization or consortium of organizations such as the CE System established by the CoC. Establishing a preference for clients referred by the CE system helps ensure that the housing options for families experiencing homelessness are prioritized for those who most need long-term housing support. When a PHA establishes a preference for clients referred from a CE system, the PHA should work closely with the organization in charge of the CE system to ensure that any referral agencies understand the criteria for admissions set by the PHA

[19] 2020 Annual Homeless Assessment Report (AHAR) to Congress
[20] 24 CFR § 982.206 for Public Housing, 24 CFR § 982.207 for HCV, and 24 CFR § 983.251 for PBV
[21] 24 CFR § 982.206(a)(2) for Public Housing and 24 CFR § 982.207(a)(3) for HCV

during the initiation of the partnership. This will minimize the number of ineligible families that are referred, leading to time and resource savings, as well as reducing potential delays faced by eligible families awaiting referral.

PHAs may also choose to create a general or limited preference for families experiencing homelessness, including preferences limited to families with children, veterans, or other particular subgroups of families experiencing homelessness, provided that the preference reflects local housing needs and is compliant with Fair Housing rules. A PHA may also create a preference for individuals and families participating in a Moving On strategy, discussed in Section 13 of this Notice. These individuals and families are people that were previously homeless prior to entry into the PSH program but who no longer need that level of supportive services and are now transitioning from PSH units. While these persons would not be considered homeless for reporting purposes on the Form HUD-50058, creating such as a "Moving On" preference can contribute significantly to the community's overall efforts to end homelessness by freeing up units for currently homeless families and individuals with disabilities who need housing combined with services.

d) Opening waiting lists and public notice. If a PHA does not have enough applicants on its waiting list who qualify for a specific preference, the PHA may open its waiting list strictly to people to whom the preference applies. The notification process, as well as the preferences themselves, must comply with HUD fair housing and civil rights requirements, such as adopting suitable means to assure that the notice reaches eligible individuals with disabilities and those with limited English proficiency (LEP). HCV program regulations require the public notice to appear in a local newspaper of general circulation, minority media, and other suitable means.[22] These public notice practices are strongly encouraged in the Public Housing Program.

Once an adequate number of persons experiencing homelessness meeting the preference have been placed on the waiting list, the PHA may choose to keep the waiting list open only for the population qualified for the preference (i.e., continue to accept applications only from applicants that qualify for the preference), while keeping it closed for all other applicants. This can be particularly helpful if the PHA preference is for referrals from partner agencies since it will allow the agencies to continue sending referrals when more resources are available through the PHA. HUD encourages PHAs to keep their websites up to date regarding whether the waiting list is open or closed, who may currently apply for assistance, and specific information regarding the application process. PHAs may also want to share waiting list news with CoC and other community partners.

e) Verifying preference eligibility. As described in Section 6 above, while HUD does not require PHAs to collect documentation or third-party verification to verify an applicant's homelessness status for the purpose of reporting on line 4c, PHAs must follow the verification requirements established in their written policies to verify homelessness status for a preference. If a PHA adopts a preference or limited

[22] 24 CFR § 982.206

preference for people experiencing homelessness, or for a particular subset of this population, the PHA may require the individual or family to provide documentation indicating that they qualify for the preference. Alternatively, when a PHA establishes a partnership for referrals from a homeless service organization, they may allow the partnering organization to verify the individual's or family's preference qualification by providing supporting documentation before the individual or family is referred to the PHA.

f) Public Housing property designations pertaining to preference. For Public Housing developments with an active designation by HUD for a specific population, this designation remains in effect despite the adoption of the new preference. For example, if the property is a designated elderly property, then the homeless preference would not supersede this designation. Any qualified applicant benefiting from the homeless preference would need to meet both criteria, i.e., experiencing homelessness and be part of a HUD-defined elderly family by 24 CFR 5.403. PHAs are reminded that PBV projects are not designated for specific populations, and therefore this paragraph is inapplicable to PBV.

g) Ensuring Fair Housing compliance. PHAs must ensure that any waiting list preference would not have the purpose or effect of excluding other eligible families from the program because of any characteristic protected by federal fair housing and civil rights laws, including, for example, the Fair Housing Act (42 U.S.C. 3601 *et seq.*). Protected characteristics under the Fair Housing Act include: race, color, national origin, religion, sex (including sexual orientation and gender identity), disability, or familial status (children under age 18, including pregnancy or seeking legal custody). The PHA must also ensure that the preference would not have the purpose or effect of creating, increasing, or perpetuating segregation. PHAs must ensure that the adoption of a homeless preference and the opening of the waiting list, including site-based waiting lists open only to homeless families and individuals that qualify for the preference, is done in a manner that is consistent with all fair housing and civil rights laws and affirmatively furthers fair housing.

h) Residency preference. PHAs that have a residency preference as allowed under the regulations[23] are encouraged to include in their definition of the term "residence" shelters, other dwelling places, and unsheltered locations where homeless people may be living or sleeping. PHAs may also consider the circumstances leading to a family's current dwelling place when defining residency for homeless applicants. For example, in some communities, there may be a lack of suitable shelters in the community covered by the PHA's residency preference forcing the family or individual to seek shelter in another community. If an applicant family or individual resides in a shelter located outside of the area covered by the PHA's residency preference, the PHA may establish policies considering the applicant's previous residency and circumstances. PHAs with a residency preference may need to change their definition of residency in their policies for the purpose of allowing such flexibility. The preference cannot have an unjustified discriminatory effect on a group of persons with certain characteristics

[23] 24 CFR § 960.206(b) and 24 CFR § 982.207(b)(1)

protected under fair housing and civil rights laws, including race, color, national origin, sex (including sexual orientation and gender identity), religion, disability, or familial status (children under age 18, including pregnancy or seeking legal custody). See (g) above.

12. **Admission and Termination of Assistance Policies Regarding Criminal Activity, and Substance Use:** Incarceration and homelessness are highly interrelated, as the difficulties of reintegrating into the community increase the risk of homelessness for returning citizens, and homelessness in turn increases the risk for subsequent re-incarceration. On June 23, 2021, HUD issued a letter to PHAs, CoCs, Multifamily Owners, and HUD Grantees, outlining steps HUD has taken to meet the housing needs of returning citizens and to reduce barriers to housing among people with criminal records, and noting that addressing reentry housing needs also further advances equity and reverses systemic racism, given the racial disparities evident in the criminal justice system. This letter strongly encouraged PHAs to work with their Continuum of Care (CoC) partners to ensure that the housing needs of individuals who are at-risk of homelessness after leaving prisons or jails were met. On April 12, 2022, HUD issued a directive to its principal staff, directing all relevant HUD program offices to identify all existing HUD regulations, guidance documents, and other policies and sub-regulatory documents (including model leases and other agreements) that may pose barriers to housing for persons with criminal histories or their families and propose updates and amendments to make HUD's programs as inclusive as possible. PHAs wishing to serve more people experiencing homelessness may consider amending their discretionary admissions policies where possible. However, PHAs must adhere to policies mandating prohibition of admission and termination of assistance regarding certain criminal activities and illegal drug use, described further in this section. PHAs are also reminded that the Violence Against Women Act (VAWA, 34 U.S.C. § 12471 *et seq.*) and HUD's VAWA rule establish specific protections in regard to criminal activity related to domestic violence, dating violence, sexual assault, or stalking. For example, an applicant for assistance or tenant assisted under a covered housing program may not be denied admission to, denied assistance under, terminated from participation in, or evicted from the housing on the basis or as a direct result of the fact that the applicant or tenant is or has been a survivor of domestic violence, dating violence, sexual assault, or stalking, if the applicant or tenant otherwise qualifies for admission, assistance, participation, or occupancy.[24]

    In June 2015, HUD published PIH Notice 2015-19 to inform PHAs and owners of federally assisted housing that arrest records may not be the sole basis for denying admission, terminating assistance, or evicting tenants, to remind PHAs and owners that HUD does not require the adoption of "one-strike" policies, and to remind them of their obligation to safeguard the due process rights of applicants and tenants. In April 2016,

[24] See PIH Notice 2017-08 - Section 7, which provides guidance on HUD's 2016 VAWA rule implementing VAWA's housing protections. In 2022, VAWA was further amended to provide additional housing protections, including a new prohibition against penalizing homeowners, housing applicants, or housing landlords, tenants, residents, occupants, or guests based on their requests for assistance or based on criminal activity of which they are a victim or otherwise not at fault.

HUD's Office of General Counsel (OGC) published 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 (2016 Guidance) to remind housing providers that while having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if the housing provider intentionally discriminates in using criminal history information, or, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability). As described above, since 2021, HUD has issued further guidance and an internal directive to address how HUD and its program participants can meet the housing needs of returning citizens and reduce barriers to housing among people with criminal records. In June 2022, HUD supplemented the 2016 Guidance with a memorandum to its Office of Fair Housing and Equal Opportunity (FHEO) and its grantees (2022 Criminal Records Memo). In the 2022 Criminal Records Memo, HUD reviewed the principles outlined in the 2016 Guidance and provided tips and best practices related to the use of criminal background screening for fair housing investigators and housing providers.

a) Admissions Policies: Under federal law and HUD regulations for both the HCV and Public Housing programs, PHAs are required to adopt screening policies that absolutely prohibit admission for certain types of conduct. For other types of conduct, PHAs have discretion to allow admission (or prohibit admission) and may consider all relevant circumstances. This discretion is limited by, and must be exercised consistent with, fair housing and nondiscrimination requirements.

- **Mandatory Prohibition of Admission**: If an applicant household includes a member subject to the following two absolute prohibitions,[25] that household must be prohibited from admission:
  - Applicants with a household member that has ever been convicted for manufacture or production of methamphetamine on the premises of federally assisted housing
  - Applicants with a household member that is subject to a lifetime registration requirement under a State sex offender registration program

- **Potentially Mandatory Prohibition of Admission**: Under certain circumstances, it may be mandatory to prohibit admissions to certain applicant households.[26] For example, a PHA must prohibit admission to an applicant for three years from the date of eviction if a household member has been evicted from federally assisted housing for drug-related criminal activity *unless* the PHA determines that the evicted household member who engaged in such activity has successfully completed a supervised drug rehabilitation program approved by the PHA or the

[25] 24 CFR § 982.553(a)(2)(i) and 24 CFR § 982.553(a)(1)(ii)(C) for HCV, and 24 CFR § 960.204(a)(4) and 24 CFR § 960.204(a)(3) for Public Housing

[26] 24 CFR § 982.553(a)(1)(i), 24 CFR § 982.553(a)(1)(ii)(A), 24 CFR § 982.553(a)(1)(ii)(B), and 24 CFR § 982.553(a)(3) for HCV, and 24 CFR § 960.204(a)(1), 24 CFR § 960.204(a)(2)(i), 24 CFR § 960.204(a)(2)(ii), and 24 CFR § 960.204(b) for Public Housing

circumstances leading to the eviction no longer exist (e.g., the household member that engaged in drug-related criminal activity is no longer part of the household).[27]

Additionally, PHAs are required to establish standards that prohibit admission for any household with a member who is currently engaged in the illegal use of a controlled substance or where the PHA determines it has reasonable cause to believe that the household member's pattern of illegal use of a controlled substance or pattern of abuse of alcohol may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.[28]

- **Discretion to Prohibit Admission**: Where the HCV or Public Housing applicants' conduct or activities falls outside the scope of the statutorily mandated prohibitions, PHAs may have discretion whether to admit or deny admissions to these individuals. PHAs must balance the safety of the families they serve with potential barriers to vulnerable populations. PHAs also must ensure that they use their discretion in a manner that is consistent with regulations for the specific program, as well as fair housing and civil rights laws. For example, in a manner consistent with the PHA's policies, procedures and practices under the regulations for the public housing program at 24 CFR 960.203(d), consideration shall be given to the time, nature, and extent of the applicant's conduct (including the seriousness of the offense), and consideration may also be given to other factors which might indicate a reasonable probability of favorable future conduct.

  It is important for PHAs to understand the damage that denial of admission can have on a family and that discretionary admissions policies can be a barrier for vulnerable populations, including people experiencing homelessness, and can result in discrimination against protected classes. PHAs wishing to serve more people experiencing homelessness may consider reviewing their discretionary policies to determine what changes can be made to remove barriers. For example, to increase access for vulnerable populations and to avoid potential fair housing liability, PHAs should, in a manner consistent with the PHA's policies, procedures and practices under 24 CFR 960.203(b):
    - Conduct an individualized assessment of each applicant's case that considers relevant mitigating information instead of automatically denying them based on conviction history
    - Eliminate policies that deny assistance to all individuals with past evictions for any type of criminal activity
    - Eliminate policies that deny assistance to all individuals on probation or parole
    - For drug-related criminal activity, consider whether the household member is participating in or has successfully completed a drug rehabilitation program, or has otherwise been rehabilitated successfully

[27] 24 CFR § 982.553(a)(1)(i), 24 CFR § 982.553(a)(1)(ii)(A), 24 CFR § 982.553(a)(1)(ii)(B), and 24 CFR § 982.553(a)(3) for HCV, and 24 CFR § 960.204(a)(1), 24 CFR § 960.204(a)(2)(i), 24 CFR § 960.204(a)(2)(ii), and 24 CFR § 960.204(b) for Public Housing

[28] 42 USC 13661(b), 24 CFR § 960.204(a)(2) (public housing), and 24 CFR § 982.553(a)(1)(ii) (HCV).

- Ensure applicants are notified that in accordance with Section 504 of the Rehabilitation Act (24 CFR Part 8), the Fair Housing Act (24 CFR Part 100) and the Americans with Disabilities Act (28 CFR Part 35), people with disabilities may be eligible for reasonable accommodations.

The following best practices are also recommended to PHAs that seek to avoid fair housing liability when screening applicants or tenants:

- Reduce the look-back period for criminal convictions considered during the screening process based on when the conduct occurred and/or the type of conduct
- Screen only for the mandatory requirements (described above)
- Eliminate "one-strike" policies for individuals with a criminal record
- Limit denials related to current illegal drug use by redefining "current use" to mean no more than the previous three months prior to the application date.
- Have a written criminal background screening policy that is compliant with federal, state, and local nondiscrimination laws and made available to all applicants
- Avoid the use of third-party screening companies that utilize algorithms that may contain racial or other prohibited bias in their design, have not been shown to reliably predict risk, may produce inaccurate information about the applicant, or make the decision for the housing provider (rather than providing information to the housing provider to make its own determination).
- Before making an adverse decision related to an applicant's or tenant's criminal involvement, provide the applicant or tenant with the criminal record, indicate which specific part of the record may form the basis of an adverse decision, and give the applicant or tenant the opportunity to dispute the information, correct inaccurate information, the relevancy of the record, and/ or explain extenuating circumstances related to that record.[29]

b) Program Termination and Eviction Policies: A PHA's discretionary termination policies play an important role in ensuring that once homeless families are housed, they remain housed and can help break the cycle of homelessness that many families experience. Careful consideration is required while developing and enforcing termination policies, as termination of assistance and eviction may imminently or immediately lead to future episodes of homelessness and should be avoided if possible. PHAs may also want to look to their CoC partners and other partnering organizations to determine what role other service providers can play in eviction prevention, particularly in providing supportive services that may help prevent or address specific issues that may put a family at risk of termination.

[29] PHAs are required to undertake these actions when proposing denial or termination per 24 CFR § 982.553(d) and 24 CFR § 960.204(c).

A key consideration for PHAs when establishing and revising termination policies is to understand that federal law and HUD regulations provide specific instances where a PHA must terminate assistance or evict a family and provide the PHA with broad discretion to consider individual family circumstances. The termination standards for both the Public Housing and HCV Programs are different from the prescribed admissions standards in that they allow, but do not require termination for certain activities.[30] In certain instances, PHAs have discretion when determining whether or not to terminate program assistance and are allowed to consider relevant circumstances surrounding the activities.[31] Further, HUD does not require PHAs to adopt rules that require automatic termination any time a household member engages in criminal activity, and having such rules may violate laws such as the Fair Housing Act, Title VI of the Civil Rights Act of 1964, and VAWA.[32]

All discretionary admission and program termination policies must be applied to all applicants and participants broadly. In other words, a PHA may not have a certain set of admission/termination policies that apply specifically to a certain population, such as the homeless population, which are different than the admission/termination policies for all other applicants and participants, unless there is express legal authority to do so (e.g., HUD-VASH program).

PHAs must also comply with the protections for victims/ survivors of domestic violence, dating violence, sexual assault, or stalking under VAWA and HUD's VAWA rule. For example, 24 CFR 5.2005(c) states 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/survivor or threatened victim of the domestic violence, dating violence, sexual assault, or stalking, or as good cause to terminate the assistance, tenancy or occupancy rights of the victim or threatened victim. Additionally, 24 CFR 5.2005(b) prohibits a tenant from being denied admission, evicted, or have their assistance terminated solely because of criminal activity relating to domestic violence, dating violence, sexual assault, or stalking, if they are the victim and a household member or guest engaged in the criminal activity.

c) Consideration of Circumstances Regarding Admissions and Terminations/Evictions: PHAs should carefully consider the circumstances in which any conduct has occurred. For instance, defining criminal activity to focus on activities that pose threats to the safety and security of other residents can help ensure compliance with fair housing and civil rights requirements. The Public Housing regulations at 24 CFR 960.203(a) and 24 CFR 966.4(l)(5)(vii)(B) and the HCV program regulation at 24 CFR 982.552(c)(2) indicate that individual consideration of factors may be a basis for a PHA's decision to admit or refrain from terminating assistance. For example, a PHA

[30] Sept. 24, 1999, Memorandum from Gail W. Laster, General Counsel, to William C. Apgar, Assistant Secretary of Housing/Federal Housing Commissioner, and Harold Lucas, Assistant Secretary for Public and Indian Housing, on "Medical use of marijuana in public housing" [Laster Memorandum]

[31] HUD regulations outline the limited instances where denial of admission or termination of assistance is required in the public housing, Housing Choice Voucher programs. See 24 CFR Part 5, subpart I; Part 960, subpart B; Part 966, subpart A; Part 982, subpart L.

[32] 24 CFR § 966.4(l) for Public Housing and 24 CFR § 982.55 for HCV.

may establish a policy for the HCV program to consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action before denying admission or terminating assistance to a family.[33]

In public housing, in the event of receipt of unfavorable information about an applicant, consideration must be given to the time, nature, and extent of the applicant's conduct (including the seriousness of the offense).[34] Consideration should be given to factors which might indicate a reasonable probability of favorable future conduct, including evidence of rehabilitation, and the applicant's willingness to participate in social services.[35]

The PHA may impose, as a condition of admittance or continued assistance for other family members, a requirement that family members who participated in or were culpable for the action will not reside in the unit. The PHA may permit the other members of a participant family to receive or continue receiving assistance, once the conditions have been met.[36] PHAs are prohibited from denying admission or terminating assistance based on the fact that a family has experienced homelessness in the past or at the time of admission.

In both the HCV and Public Housing Programs, in determining whether to deny admission or terminate assistance for illegal use of drugs or alcohol abuse by a household member who is no longer engaged in such behavior, the PHA should consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program or has otherwise been rehabilitated successfully.[37]

Further, for both the HCV and Public Housing Programs, PIH Notice 2015-19 states that PHAs may consider all circumstances relevant to the admission or eviction decision, including but not limited to:

- The seriousness of the offending action
- The effect that eviction of the entire household would have on family members not involved in the criminal activity
- The extent to which the leaseholder has taken all steps to prevent or mitigate the criminal activity.

Before a PHA denies admission to an applicant or terminates the assistance of a participant based on the criminal conviction of a household member or guest, consistent with their policies, PHAs should conduct an individualized assessment to determine whether denial of admission or termination is mandatory under the circumstances, or in

[33] 24 CFR § 982.552(c)(2)(i) for HCV
[34] 24 CFR § 960.203(d)
[35] 24 CFR § 960.203(d)
[36] 24 CFR § 982.552(c)(2)(ii) for HCV and § 960.203(c)(3)(i) for Public Housing
[37] 24 CFR § 960.203(d)

cases where it is permissive, whether the criminal activity will threaten others' health, safety, or right to peaceful enjoyment of the premises. A record of an arrest alone may not be the basis for a denial of admission or termination of assistance, though PHAs may make an adverse decision based on the conduct underlying the arrest if the conduct indicates that the individual is not suitable for tenancy and the PHA has sufficient evidence other than the arrest itself that the individual engaged in the conduct. Although conviction records are more reliable evidence that an individual engaged in certain criminal conduct, PHAs must still make a determination that a specific individual's criminal conviction record will threaten the health, safety, or right to peaceful enjoyment of the premises using the criteria above. Additionally, a PHA may not deny admission or terminate assistance for this criminal activity if it directly relates to VAWA violence/ abuse and the tenant or certain affiliated individuals of the tenant is the victim/ survivor or threatened victim.[38] Except in cases in which an informal hearing is not required[39], PHAs must give applicants or participants a hearing or review of the circumstances prior to any determination being made.[40]

For both the HCV and Public Housing Programs, the PHA decision regarding denial of admission or termination of assistance is subject to reasonable accommodation requirements in accordance with Section 504 of the Rehabilitation Act of 1973, the Fair Housing Act, Title II of the Americans with Disabilities Act, and their implementing regulations at 24 CFR Part 8, 24 CFR Part 100, and 28 CFR Part 35, respectively. Because the PHA may not necessarily be aware of a person's disability, all denial of admission and termination correspondence should include information about the right to request a reasonable accommodation and how to request a reasonable accommodation. The PHA must also provide a Notice of Occupancy Rights Under the Violence Against Women Act with each denial and termination.[41]

HUD encourages PHAs to review their termination and eviction policies considering their discretionary authority. PHAs should review these policies in light of the guidance provided in PIH Notice 2015-19 on the use of arrest records and protections for the due process rights of applicants and participants as well as HUD OGC's 2016 guidance. HUD recommends that PHAs work with homeless service providers to establish discretionary termination and eviction policies best suited to the community and to develop partnerships that can implement effective eviction prevention strategies. HUD encourages PHAs to review the 2022 Criminal Records Memo for tips and best practices for establishing policies that comply with fair housing and civil rights laws.

13. **Moving On Strategies:** Moving On (sometimes called Moving Up, Move Up, Move On, or FLOW) enables individuals and families who are able and want to move on from PSH. PSH generally targets the most vulnerable individuals and families and combines affordable housing with intensive supportive services. PSH is not time-limited, but over time, some program participants reach a point where they no longer need or want

[38] 24 CFR § 5.2005(b)(2)
[39] 24 CFR § 982.555(b)
[40] 24 CFR § 982.555(a)
[41] 24 CFR § 5.2005(a)(2)

intensive services. However, in most cases the need for financial housing assistance remains a prohibitive barrier to leaving PSH. Moving On helps tenants overcome these barriers by providing an affordable housing option and short-term services and resources that support program participants during and shortly after their move to a greater level of independence.

PHAs play a fundamental role in Moving On, providing access to affordable housing through PHA programs that enable program participants to move on as tenants, which allows more individuals and families to access the housing options best suited for their situations. Moving On efforts include a broad range of options based on local context, needs, and resources. This frees up units and intensive services that can then be offered to the most vulnerable people experiencing homelessness. Moving On provides optimal outcomes for current PSH program participants, as well as the entire homeless system, as it supports growth, independence, and choice for current program participants. For more information, see the following resource, developed by a HUD funded TA Provider: PHA Moving On How-To Guide.

14. **Service Providers as a Resource in Continued Occupancy:** Social service providers, homeless service providers, and other community programs are important resources in ensuring housing stability, including compliance with program and family obligations and other program requirements, for homeless individuals and families newly admitted to the program.

    Many PHAs develop either formal or informal relationships with local community organizations, including public and nonprofit homeless service providers as well as city or county departments of health and human services and mental health, to help provide services to people experiencing homelessness. These agencies can help families to retain their assistance by offering supportive services (see Section 15 of this Notice for a discussion of PBV and supportive services), food assistance, basic education, employment and vocational training, transportation assistance, financial planning, life skills classes, substance abuse services, mental and physical health care, and parenting and childcare services. PHAs may establish working relationships or consider entering into service agreements with the service providers to provide greater access to services for tenants. The PHA may consider making available an empty office space or community space for the service provider to offer voluntary services to the residents.

15. **Project-Based Vouchers:** The PBV program offers a flexible tool PHAs can use to meet the affordable housing needs of their local community, including providing the opportunity to partner with homeless service providers and other program partners to offer permanent affordable housing and access to supportive services to individuals and families who are experiencing homelessness. In particular, PHAs may use PBVs in units specifically made available to house individuals and families experiencing homelessness, pair PBV units with voluntary supportive services and establish waiting list preferences in the PHA Administrative Plan to ensure families experiencing homelessness are assisted as quickly as possible in PBV units. A PHA's use of PBVs is subject to the PBV

program rules,[42] which include certain flexibilities that may facilitate PBV use for individuals and families experiencing homelessness.

•**Program Cap:** PBV program requirements generally limit the number of units that PHAs may project-base to up to 20 percent of their Consolidated Annual Contributions Contract (ACC) authorized units. However, PHAs may project-base an additional 10 percent of their ACC authorized units above this program limit, provided these units fall into one of the eligible exception categories outlined in PIH Notice 2017-21, Attachment D.

a) **Units Made Available to House Individuals and Families Experiencing Homelessness:** An exception is made for units specifically made available to house individuals and families who meet the definition of homeless under Section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302) and contained in the Continuum of Care Interim Rule at 24 CFR 578.3. While all PBVs may house homeless individuals and families, units contracted pursuant to this program cap exception category are specifically for homeless individuals and families.

b) **Units Made Available to House Veterans:** An exception is made for units specifically made available to house veterans, which could include veterans experiencing homelessness.

c) **Units Providing Supportive Services:** An exception is made for units specifically made available to persons with disabilities or elderly, which could include persons with disabilities or elderly that were experiencing homelessness.

d) **Units Located in a Census Tract with a Poverty Rate of 20 percent or less:** An exception is made for unit located in a census tract with a poverty rate of 20 percent or less. In addition to increasing the number of units a PHA may project-base, this exception may use to increase family choice for individuals and families experiencing homelessness.

e) **Units Made Available to Foster Youth Utilizing FUP FYI Awards:** An exception is made for units specifically made available to foster youth eligible for a FUP or FYI voucher award, which could include foster youth experiencing homelessness.

• **Project Cap:** The project cap for the PBV program generally provides that PHAs may not provide project-based assistance to more than the greater of 25 units or 25 percent of the of units in a project as outlined in PIH Notice 2017-21, Attachment E. However, certain units are excepted or not subject to the cap as explained in Notice PIH 2017-21 Attachment E and F. These exceptions may increase access to PBVs for individuals and families experiencing homelessness:

[42] 24 CFR Part 983 and provisions implemented at 82 FR 5458 (Jan. 18, 2017), 82 FR 32461 (Jul. 14, 2017)

a) **Units exclusively serving elderly families:** A PHA is not limited with respect to the number of units in a project it can make available to elderly families. While it is not necessary that an entire project or building within the project be made available for the exclusive use of elderly families, a PHA may project-base 100 percent of the units in such project. This may increase opportunities for elderly families experiencing homelessness.

b) **Units housing households eligible for supportive services:** Dwelling units that are exclusively made available to "households eligible for supportive services" that are made available to the assisted residents of the project are excepted from the project cap.

To implement the exception, the PHA must include in its Administrative Plan the type of services offered to families and the extent to which such services will be provided. For the exception to apply to a unit, the project must make supportive services available to all assisted families in the project, and the family must be eligible for one or more of the services. A PHA may not require supportive services as a condition of living in an excepted unit.[43] While the supportive services do not need to be provided by the owner or onsite, services must be reasonably available to the families receiving PBV assistance in the project and designed to help the families in the project achieve self-sufficiency or live in the community as independently as possible.

PBV projects that offer supportive services, including supportive services offered as part of a project cap exception, are an important form of PSH that combines affordable housing assistance with voluntary supportive services. PHAs and owners are encouraged to offer supportive services in connection with all PBV units, even where no project cap exception is used. The PHA or owner may enter into an MOU or other such agreement with a homeless services provider or other program partner to provide these supportive services, which may be designed to assist individuals and families with building independent living and tenancy skills, connect to community-based and culturally specific health care, treatment, or job service, and address chronic health problems, mental illness, or trauma.

HUD encourages PHAs to consider how the structure of their supportive services package may best support individuals and families that experienced homelessness maintain their PBV tenancy. In the case of a family that chooses to participate in the supportive services, as described by the PHA in the Administrative Plan, and successfully completes the supportive services objective, as defined by the PHA in its Administrative Plan, the unit will continue to be an excepted unit under this category for as long as the family resides in the unit.

[43] There are two exceptions to this. First, certain projects with HAP contract effective dates prior to April 18, 2017, are subject to rules on PBVs housing families participating in supportive services. See Notice PIH 2017-21 Att. E § 6 for information. Second, PBV units using HUD-VASH vouchers are subject to requirements on participation in case management. See 86 FR 53207 (Sept. 27, 2021) for information.

c) **Units in a census tract with a poverty rate of 20 percent or less:** Another strategy for increasing the number of units available to individuals and families experiencing homelessness is to locate units in a project within a census tract with a poverty rate of 20 percent. Such units are subject to a higher (40%) cap. This strategy also increases family choice.

16. **PBV Waiting List Administration and Preferences:** The PHA may use a separate waiting list for admission to PBV units in individual projects or buildings (or for sets of such units), use a single waiting list for the PHA's entire PBV program, merge the PBV waiting list with a waiting list for another tenant-based or project-based housing program, or may use the same waiting list for both tenant-based and PBV assistance.[44] If the PHA chooses to use a separate waiting list for admission to PBV units, the PHA must offer to place applicants who are listed on the waiting list for tenant-based assistance on the waiting list for PBV in accordance with 24 CFR 983.251(c)(2). The PHA must select families from the waiting list in accordance with the PHA's Administrative Plan.

    The PHA may also adopt a different set of admissions preferences for each separate waiting list and may do so in consultation with the CoC and other community partners. The preferences offered by a PHA depend on local housing needs and may include a preference for housing that is intended for a particular population or for families who qualify for voluntary services, including disability-specific services, offered in conjunction with the housing. In the case of PBV units under a project cap exception, PHAs must give preference to families qualifying for the units. Assisted families who receive housing because of a preference for families who qualify for services can receive voluntary services from a service provider of their choosing or choose not to participate in services at all.[45]

    A PHA that wishes to partner with a homeless service provider to project-base vouchers may consider creating a separate waiting list for the project and may offer a preference for individuals or families who are homeless, individuals or families who qualify for voluntary services, including disability-related services, offered in conjunction with assisted units at the project, or individuals or families referred through the local CE System. Any such preference must be consistent with the PHA plan and all applicable Federal nondiscrimination and civil rights statutes and requirements.

17. **Paperwork Reduction Act:** The information collection requirements contained in this document have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB control number 2577-0083. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

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[44] 24 CFR § 983.251(c)(2)-(4)

[45] See 82 FR 5458, 5469-5471 (Jan. 18, 2017) for information on preferences for families who qualify for voluntary services and PIH Notice 2017-21 Appx. II for information on PBV preferences generally.

18. <u>Information Contact</u>: Inquiries about this Notice should be directed to publichousingpolicyquestions@hud.gov for Public Housing, vouchernotice@hud.gov for Housing Choice Vouchers, and SNAPSinfo@hud.gov for CPD.

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For Public and Indian Housing

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For Community Planning and Development

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Disability Rights California, Press Release, California Supreme Court Win for People with Developmental Disabilities and Their Families (August 31, 2020)

Submitted by:
Tiffany Hickey

Disability Rights California

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Press Release

California Supreme Court Win for People with Developmental Disabilities and their Families

Court holds that regulation prohibits public housing authorities from counting IHSS payments toward a family's income

August 31, 2020

(San Francisco, CA) - Today, the California Supreme Court ruled in favor of people with developmental disabilities and their families who live in federally-subsidized housing. The Court held that a federal regulation prohibits public housing authorities from counting In-Home Supportive Services (IHSS) payments towards a family's income.

These families provide services needed to keep their family member with a developmental disability at home. They provide them with assistance such as bathing, feeding, dressing, etc., and may receive IHSS payments from the State of California to offset a portion of the time they spend caring for their loved ones.

"Including IHSS payments in the determination of annual income essentially penalized families who had made the laudable decision to provide the services needed to keep their family member at home," said Autumn Elliott, senior counsel at Disability Rights California. "Now families do not have to choose between preserving their housing subsidy and having their family member with a developmental disability live at home with them."

Disability Rights California originally brought this case to the California Supreme Court on behalf of Kerrie Reilly, who receives IHSS payments for a portion of the 24-hour-per-day protective supervision that she provides for her adult daughter living with her who has a developmental disability.

Ms. Reilly challenged the Marin Housing Authority's practice of including IHSS payments in its calculation of her annual income. The California Supreme Court agreed with Ms. Reilly that in doing so Marin Housing Authority acted in violation of a federal regulation, which excludes such State payments from the definition of "annual income."

Public housing authorities use a family's annual income to calculate a family's share of rent and also determine whether the family is eligible to participate in a subsidized housing program in the first place. Under Marin Housing Authority's practice, families that provided services for a family member with a developmental disability would see their rent increase as a result, and could even lose eligibility for housing.

Without the IHSS program, many Californians with developmental disabilities would be forced to live in an institution rather than in their family homes. The California Supreme Court's decision today helps this critical program be fulfilled for families who rely on federal housing subsidies in a state with increasing unaffordable housing costs.

Significant Court Documents

- Opinion of the Court (docx)

News Coverage

- State payments for care of disabled child don't count as income for poor family, California high court rules - San Francisco Chronicle 08/31/2020

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Disability Rights California (DRC) is the agency designated under federal law to protect and advocate for the rights of Californians with disabilities. The mission of DRC is to advance the rights, dignity, equal opportunities, and choices for all people with disabilities. For more information visit: https://www.disabilityrightsca.org.

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Disability Rights California (DRC) is a nonprofit organization founded in 1978 that defends, advances, and strengthens the rights and opportunities of people with disabilities.

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U.S. Department of Justice, U.S. Department of Housing and Urban Development, Joint Statement, Re: Reasonable Accommodations under the Fair Housing Act (May 17, 2004)

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CIVIL RIGHTS DIVISION

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

Washington, D.C.
May 17, 2004

JOINT STATEMENT OF
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
AND THE DEPARTMENT OF JUSTICE

REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT

Introduction

The Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") are jointly responsible for enforcing the federal Fair Housing Act[1] (the "Act"), which prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability.[2] One type of disability discrimination prohibited by the Act is the refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.[3] HUD and DOJ frequently respond to complaints alleging that housing providers have violated the Act by refusing reasonable accommodations to persons with disabilities. This Statement provides technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the Act relating to

[1] The Fair Housing Act is codified at 42 U.S.C. §§ 3601 - 3619.

[2] The Act uses the term "handicap" instead of the term "disability." Both terms have the same legal meaning. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (noting that definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This document uses the term "disability," which is more generally accepted.

[3] 42 U.S.C. § 3604(f)(3)(B).

reasonable accommodations.[4]

Questions and Answers

1. What types of discrimination against persons with disabilities does the Act prohibit?

The Act prohibits housing providers from discriminating against applicants or residents because of their disability or the disability of anyone associated with them[5] and from treating persons with disabilities less favorably than others because of their disability. The Act also makes it unlawful for any person to refuse "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling."[6] The Act also prohibits housing providers from refusing residency to persons with disabilities, or placing conditions on their residency, because those persons may require reasonable accommodations. In addition, in certain circumstances, the Act requires that housing providers allow residents to

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[4] Housing providers that receive federal financial assistance are also subject to the requirements of Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794. Section 504, and its implementing regulations at 24 C.F.R. Part 8, prohibit discrimination based on disability and require recipients of federal financial assistance to provide reasonable accommodations to applicants and residents with disabilities. Although Section 504 imposes greater obligations than the Fair Housing Act, (*e.g.*, providing and paying for reasonable accommodations that involve structural modifications to units or public and common areas), the principles discussed in this Statement regarding reasonable accommodation under the Fair Housing Act generally apply to requests for reasonable accommodations to rules, policies, practices, and services under Section 504. *See* U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2002-01(HA) (www.hud.gov/offices/fheo/disabilities/PIH02-01.pdf) and "Section 504: Frequently Asked Questions," (www.hud.gov/offices/fheo/disabilities/sect504faq.cfm#anchor272118).

[5] The Fair Housing Act's protection against disability discrimination covers not only home seekers with disabilities but also buyers and renters without disabilities who live or are associated with individuals with disabilities 42 U.S.C. § 3604(f)(1)(B), 42 U.S.C. § 3604(f)(1)(C), 42 U.S.C. § 3604(f)(2)(B), 42 U.S.C. § (f)(2)(C). *See also* H.R. Rep. 100-711 – 24 (reprinted in 1988 U.S.C.A.N. 2173, 2184-85) ("The Committee intends these provisions to prohibit not only discrimination against the primary purchaser or named lessee, but also to prohibit denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities."). *Accord*: Preamble to Proposed HUD Rules Implementing the Fair Housing Act, 53 Fed. Reg. 45001 (Nov. 7, 1988) (citing House Report).

[6] 42 U.S.C. § 3604(f)(3)(B). HUD regulations pertaining to reasonable accommodations may be found at 24 C.F.R. § 100.204.

make reasonable structural modifications to units and public/common areas in a dwelling when those modifications may be necessary for a person with a disability to have full enjoyment of a dwelling.[7] With certain limited exceptions (*see* response to question 2 below), the Act applies to privately and publicly owned housing, including housing subsidized by the federal government or rented through the use of Section 8 voucher assistance.

2. Who must comply with the Fair Housing Act's reasonable accommodation requirements?

Any person or entity engaging in prohibited conduct – *i.e.*, refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling – may be held liable unless they fall within an exception to the Act's coverage. Courts have applied the Act to individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services. Courts have also applied the Act to state and local governments, most often in the context of exclusionary zoning or other land-use decisions. *See e.g.*, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 729 (1995); Project Life v. Glendening, 139 F. Supp. 703, 710 (D. Md. 2001), aff'd 2002 WL 2012545 (4th Cir. 2002). Under specific exceptions to the Fair Housing Act, the reasonable accommodation requirements of the Act do not apply to a private individual owner who sells his own home so long as he (1) does not own more than three single-family homes; (2) does not use a real estate agent and does not employ any discriminatory advertising or notices; (3) has not engaged in a similar sale of a home within a 24-month period; and (4) is not in the business of selling or renting dwellings. The reasonable accommodation requirements of the Fair Housing Act also do not apply to owner-occupied buildings that have four or fewer dwelling units.

3. Who qualifies as a person with a disability under the Act?

The Act defines a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

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[7] This Statement does not address the principles relating to reasonable modifications. For further information see the HUD regulations at 24 C.F.R. § 100.203. This statement also does not address the additional requirements imposed on recipients of Federal financial assistance pursuant to Section 504, as explained in the Introduction.

The term "substantially limits" suggests that the limitation is "significant" or "to a large degree."

The term "major life activity" means those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, and speaking.[8] This list of major life activities is not exhaustive. *See e.g.*, Bragdon v. Abbott, 524 U.S. 624, 691-92 (1998)(holding that for certain individuals reproduction is a major life activity).

4. Does the Act protect juvenile offenders, sex offenders, persons who illegally use controlled substances, and persons with disabilities who pose a significant danger to others?

No, juvenile offenders and sex offenders, by virtue of that status, are not persons with disabilities protected by the Act. Similarly, while the Act does protect persons who are recovering from substance abuse, it does not protect persons who are currently engaging in the current illegal use of controlled substances.[9] Additionally, the Act does not protect an individual with a disability whose tenancy would constitute a "direct threat" to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.

5. How can a housing provider determine if an individual poses a direct threat?

The Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (*e.g.*, current conduct, or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat. Consequently, in evaluating a recent history of overt acts, a provider must take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat (*i.e.*, a significant risk of substantial harm). In such a situation, the provider may request that the individual document

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[8] The Supreme Court has questioned but has not yet ruled on whether "working" is to be considered a major life activity. See Toyota Motor Mfg, Kentucky, Inc. v. Williams, 122 S. Ct. 681, 692, 693 (2002). If it is a major activity, the Court has noted that a claimant would be required to show an inability to work in a "broad range of jobs" rather than a specific job. *See* Sutton v. United Airlines, Inc., 527 U.S. 470, 492 (1999).

[9] *See*, *e.g.*, United States v. Southern Management Corp., 955 F.2d 914, 919 (4th Cir. 1992) (discussing exclusion in 42 U.S.C. § 3602(h) for "current, illegal use of or addiction to a controlled substance").

how the circumstances have changed so that he no longer poses a direct threat. A provider may also obtain satisfactory assurances that the individual will not pose a direct threat during the tenancy. The housing provider must have reliable, objective evidence that a person with a disability poses a direct threat before excluding him from housing on that basis.

Example 1: A housing provider requires all persons applying to rent an apartment to complete an application that includes information on the applicant's current place of residence. On her application to rent an apartment, a woman notes that she currently resides in Cambridge House. The manager of the apartment complex knows that Cambridge House is a group home for women receiving treatment for alcoholism. Based solely on that information and his personal belief that alcoholics are likely to cause disturbances and damage property, the manager rejects the applicant. The rejection is unlawful because it is based on a generalized stereotype related to a disability rather than an individualized assessment of any threat to other persons or the property of others based on reliable, objective evidence about the applicant's recent past conduct. The housing provider may not treat this applicant differently than other applicants based on his subjective perceptions of the potential problems posed by her alcoholism by requiring additional documents, imposing different lease terms, or requiring a higher security deposit. However, the manager could have checked this applicant's references to the same extent and in the same manner as he would have checked any other applicant's references. If such a reference check revealed objective evidence showing that this applicant had posed a direct threat to persons or property in the recent past and the direct threat had not been eliminated, the manager could then have rejected the applicant based on direct threat.

Example 2: James X, a tenant at the Shady Oaks apartment complex, is arrested for threatening his neighbor while brandishing a baseball bat. The Shady Oaks' lease agreement contains a term prohibiting tenants from threatening violence against other residents. Shady Oaks' rental manager investigates the incident and learns that James X threatened the other resident with physical violence and had to be physically restrained by other neighbors to keep him from acting on his threat. Following Shady Oaks' standard practice of strictly enforcing its "no threats" policy, the Shady Oaks rental manager issues James X a 30-day notice to quit, which is the first step in the eviction process. James X's attorney contacts Shady Oaks' rental manager and explains that James X has a psychiatric disability that causes him to be physically violent when he stops taking his prescribed medication. Suggesting that his client will not pose a direct threat to others if proper safeguards are taken, the attorney requests that the rental manager grant James X an exception to the "no threats" policy as a reasonable accommodation based on James X's disability. The Shady Oaks rental manager need only grant the reasonable accommodation if James X's attorney can provide satisfactory assurance that James X will receive appropriate counseling and

periodic medication monitoring so that he will no longer pose a direct threat during his tenancy. After consulting with James X, the attorney responds that James X is unwilling to receive counseling or submit to any type of periodic monitoring to ensure that he takes his prescribed medication. The rental manager may go forward with the eviction proceeding, since James X continues to pose a direct threat to the health or safety of other residents.

6. What is a "reasonable accommodation" for purposes of the Act?

A "reasonable accommodation" is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling. The Act makes it unlawful to refuse to make reasonable accommodations to rules, policies, practices, or services when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling.

To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability.

Example 1: A housing provider has a policy of providing unassigned parking spaces to residents. A resident with a mobility impairment, who is substantially limited in her ability to walk, requests an assigned accessible parking space close to the entrance to her unit as a reasonable accommodation. There are available parking spaces near the entrance to her unit that are accessible, but those spaces are available to all residents on a first come, first served basis. The provider must make an exception to its policy of not providing assigned parking spaces to accommodate this resident.

Example 2: A housing provider has a policy of requiring tenants to come to the rental office in person to pay their rent. A tenant has a mental disability that makes her afraid to leave her unit. Because of her disability, she requests that she be permitted to have a friend mail her rent payment to the rental office as a reasonable accommodation. The provider must make an exception to its payment policy to accommodate this tenant.

Example 3: A housing provider has a "no pets" policy. A tenant who is deaf requests that the provider allow him to keep a dog in his unit as a reasonable accommodation. The tenant explains that the dog is an assistance animal that will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. The housing

provider must make an exception to its "no pets" policy to accommodate this tenant.

7. Are there any instances when a provider can deny a request for a reasonable accommodation without violating the Act?

Yes. A housing provider can deny a request for a reasonable accommodation if the request was not made by or on behalf of a person with a disability or if there is no disability-related need for the accommodation. In addition, a request for a reasonable accommodation may be denied if providing the accommodation is not reasonable – *i.e.*, if it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations. The determination of undue financial and administrative burden must be made on a case-by-case basis involving various factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs.

When a housing provider refuses a requested accommodation because it is not reasonable, the provider should discuss with the requester whether there is an alternative accommodation that would effectively address the requester's disability-related needs without a fundamental alteration to the provider's operations and without imposing an undue financial and administrative burden. If an alternative accommodation would effectively meet the requester's disability-related needs and is reasonable, the provider must grant it. An interactive process in which the housing provider and the requester discuss the requester's disability-related need for the requested accommodation and possible alternative accommodations is helpful to all concerned because it often results in an effective accommodation for the requester that does not pose an undue financial and administrative burden for the provider.

Example: As a result of a disability, a tenant is physically unable to open the dumpster placed in the parking lot by his housing provider for trash collection. The tenant requests that the housing provider send a maintenance staff person to his apartment on a daily basis to collect his trash and take it to the dumpster. Because the housing development is a small operation with limited financial resources and the maintenance staff are on site only twice per week, it may be an undue financial and administrative burden for the housing provider to grant the requested daily trash pick-up service. Accordingly, the requested accommodation may not be reasonable. If the housing provider denies the requested accommodation as unreasonable, the housing provider should discuss with the tenant whether reasonable accommodations could be provided to meet the tenant's disability-related needs – for instance, placing an open trash collection can in a location that is readily accessible to the tenant so the tenant can dispose of his own trash and the provider's maintenance staff can then transfer the trash to the dumpster when they are on site. Such an accommodation would not involve a

fundamental alteration of the provider's operations and would involve little financial and administrative burden for the provider while accommodating the tenant's disability-related needs.

There may be instances where a provider believes that, while the accommodation requested by an individual is reasonable, there is an alternative accommodation that would be equally effective in meeting the individual's disability-related needs. In such a circumstance, the provider should discuss with the individual if she is willing to accept the alternative accommodation. However, providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable.

8. What is a "fundamental alteration"?

A "fundamental alteration" is a modification that alters the essential nature of a provider's operations.

Example: A tenant has a severe mobility impairment that substantially limits his ability to walk. He asks his housing provider to transport him to the grocery store and assist him with his grocery shopping as a reasonable accommodation to his disability. The provider does not provide any transportation or shopping services for its tenants, so granting this request would require a fundamental alteration in the nature of the provider's operations. The request can be denied, but the provider should discuss with the requester whether there is any alternative accommodation that would effectively meet the requester's disability-related needs without fundamentally altering the nature of its operations, such as reducing the tenant's need to walk long distances by altering its parking policy to allow a volunteer from a local community service organization to park her car close to the tenant's unit so she can transport the tenant to the grocery store and assist him with his shopping.

9. What happens if providing a requested accommodation involves some costs on the part of the housing provider?

Courts have ruled that the Act may require a housing provider to grant a reasonable accommodation that involves costs, so long as the reasonable accommodation does not pose an undue financial and administrative burden and the requested accommodation does not constitute a fundamental alteration of the provider's operations. The financial resources of the provider, the cost of the reasonable accommodation, the benefits to the requester of the requested accommodation, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant or resident's disability-related needs must be considered in determining whether a requested accommodation poses an undue financial and administrative

burden.

10. What happens if no agreement can be reached through the interactive process?

A failure to reach an agreement on an accommodation request is in effect a decision by the provider not to grant the requested accommodation. If the individual who was denied an accommodation files a Fair Housing Act complaint to challenge that decision, then the agency or court receiving the complaint will review the evidence in light of applicable law- and decide if the housing provider violated that law. For more information about the complaint process, see question 19 below.

11. May a housing provider charge an extra fee or require an additional deposit from applicants or residents with disabilities as a condition of granting a reasonable accommodation?

No. Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation.

> **Example 1**: A man who is substantially limited in his ability to walk uses a motorized scooter for mobility purposes. He applies to live in an assisted living facility that has a policy prohibiting the use of motorized vehicles in buildings and elsewhere on the premises. It would be a reasonable accommodation for the facility to make an exception to this policy to permit the man to use his motorized scooter on the premises for mobility purposes. Since allowing the man to use his scooter in the buildings and elsewhere on the premises is a reasonable accommodation, the facility may not condition his use of the scooter on payment of a fee or deposit or on a requirement that he obtain liability insurance relating to the use of the scooter. However, since the Fair Housing Act does not protect any person with a disability who poses a direct threat to the person or property of others, the man must operate his motorized scooter in a responsible manner that does not pose a significant risk to the safety of other persons and does not cause damage to other persons' property. If the individual's use of the scooter causes damage to his unit or the common areas, the housing provider may charge him for the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

> **Example 2:** Because of his disability, an applicant with a hearing impairment needs to keep an assistance animal in his unit as a reasonable accommodation. The housing provider may not require the applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep the assistance animal. However, if a tenant's assistance animal causes damage to the applicant's unit or the common areas of the dwelling, the housing provider may charge the tenant for

the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

12. When and how should an individual request an accommodation?

Under the Act, a resident or an applicant for housing makes a reasonable accommodation request whenever she makes clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of her disability. She should explain what type of accommodation she is requesting and, if the need for the accommodation is not readily apparent or not known to the provider, explain the relationship between the requested accommodation and her disability.

An applicant or resident is not entitled to receive a reasonable accommodation unless she requests one. However, the Fair Housing Act does not require that a request be made in a particular manner or at a particular time. A person with a disability need not personally make the reasonable accommodation request; the request can be made by a family member or someone else who is acting on her behalf. An individual making a reasonable accommodation request does not need to mention the Act or use the words "reasonable accommodation." However, the requester must make the request in a manner that a reasonable person would understand to be a request for an exception, change, or adjustment to a rule, policy, practice, or service because of a disability.

Although a reasonable accommodation request can be made orally or in writing, it is usually helpful for both the resident and the housing provider if the request is made in writing. This will help prevent misunderstandings regarding what is being requested, or whether the request was made. To facilitate the processing and consideration of the request, residents or prospective residents may wish to check with a housing provider in advance to determine if the provider has a preference regarding the manner in which the request is made. However, housing providers must give appropriate consideration to reasonable accommodation requests even if the requester makes the request orally or does not use the provider's preferred forms or procedures for making such requests.

Example: A tenant in a large apartment building makes an oral request that she be assigned a mailbox in a location that she can easily access because of a physical disability that limits her ability to reach and bend. The provider would prefer that the tenant make the accommodation request on a pre-printed form, but the tenant fails to complete the form. The provider must consider the reasonable accommodation request even though the tenant would not use the provider's designated form.

13. Must a housing provider adopt formal procedures for processing requests for a reasonable accommodation?

No. The Act does not require that a housing provider adopt any formal procedures for reasonable accommodation requests. However, having formal procedures may aid individuals with disabilities in making requests for reasonable accommodations and may aid housing providers in assessing those requests so that there are no misunderstandings as to the nature of the request, and, in the event of later disputes, provide records to show that the requests received proper consideration.

A provider may not refuse a request, however, because the individual making the request did not follow any formal procedures that the provider has adopted. If a provider adopts formal procedures for processing reasonable accommodation requests, the provider should ensure that the procedures, including any forms used, do not seek information that is not necessary to evaluate if a reasonable accommodation may be needed to afford a person with a disability equal opportunity to use and enjoy a dwelling. See Questions 16 - 18, which discuss the disability-related information that a provider may and may not request for the purposes of evaluating a reasonable accommodation request.

14. Is a housing provider obligated to provide a reasonable accommodation to a resident or applicant if an accommodation has not been requested?

No. A housing provider is only obligated to provide a reasonable accommodation to a resident or applicant if a request for the accommodation has been made. A provider has notice that a reasonable accommodation request has been made if a person, her family member, or someone acting on her behalf requests a change, exception, or adjustment to a rule, policy, practice, or service because of a disability, even if the words "reasonable accommodation" are not used as part of the request.

15. What if a housing provider fails to act promptly on a reasonable accommodation request?

A provider has an obligation to provide prompt responses to reasonable accommodation requests. An undue delay in responding to a reasonable accommodation request may be deemed to be a failure to provide a reasonable accommodation.

16. What inquiries, if any, may a housing provider make of current or potential residents regarding the existence of a disability when they have not asked for an accommodation?

Under the Fair Housing Act, it is usually unlawful for a housing provider to (1) ask if an applicant for a dwelling has a disability or if a person intending to reside in a dwelling or anyone associated with an applicant or resident has a disability, or (2) ask about the nature or severity of such persons' disabilities. Housing providers may, however, make the following inquiries, provided these inquiries are made of all applicants, including those with and without disabilities:

- An inquiry into an applicant's ability to meet the requirements of tenancy;

- An inquiry to determine if an applicant is a current illegal abuser or addict of a controlled substance;

- An inquiry to determine if an applicant qualifies for a dwelling legally available only to persons with a disability or to persons with a particular type of disability; and

- An inquiry to determine if an applicant qualifies for housing that is legally available on a priority basis to persons with disabilities or to persons with a particular disability.

Example 1: A housing provider offers accessible units to persons with disabilities needing the features of these units on a priority basis. The provider may ask applicants if they have a disability and if, in light of their disability, they will benefit from the features of the units. However, the provider may not ask applicants if they have other types of physical or mental impairments. If the applicant's disability and the need for the accessible features are not readily apparent, the provider may request reliable information/documentation of the disability-related need for an accessible unit.

Example 2: A housing provider operates housing that is legally limited to persons with chronic mental illness. The provider may ask applicants for information needed to determine if they have a mental disability that would qualify them for the housing. However, in this circumstance, the provider may not ask applicants if they have other types of physical or mental impairments. If it is not readily apparent that an applicant has a chronic mental disability, the provider may request reliable information/documentation of the mental disability needed to qualify for the housing.

In some instances, a provider may also request certain information about an applicant's or a resident's disability if the applicant or resident requests a reasonable accommodation. See Questions 17 and 18 below.

17. What kinds of information, if any, may a housing provider request from a person with an obvious or known disability who is requesting a reasonable accommodation?

A provider is entitled to obtain information that is necessary to evaluate if a requested reasonable accommodation may be necessary because of a disability. If a person's disability is obvious, or otherwise known to the provider, and if the need for the requested accommodation is also readily apparent or known, then the provider may not request any additional information

about the requester's disability or the disability-related need for the accommodation.

If the requester's disability is known or readily apparent to the provider, but the need for the accommodation is not readily apparent or known, the provider may request only information that is necessary to evaluate the disability-related need for the accommodation.

> **Example 1:** An applicant with an obvious mobility impairment who regularly uses a walker to move around asks her housing provider to assign her a parking space near the entrance to the building instead of a space located in another part of the parking lot. Since the physical disability (*i.e.*, difficulty walking) and the disability-related need for the requested accommodation are both readily apparent, the provider may not require the applicant to provide any additional information about her disability or the need for the requested accommodation.

> **Example 2:** A rental applicant who uses a wheelchair advises a housing provider that he wishes to keep an assistance dog in his unit even though the provider has a "no pets" policy. The applicant's disability is readily apparent but the need for an assistance animal is not obvious to the provider. The housing provider may ask the applicant to provide information about the disability-related need for the dog.

> **Example 3:** An applicant with an obvious vision impairment requests that the leasing agent provide assistance to her in filling out the rental application form as a reasonable accommodation because of her disability. The housing provider may not require the applicant to document the existence of her vision impairment.

18. If a disability is not obvious, what kinds of information may a housing provider request from the person with a disability in support of a requested accommodation?

A housing provider may not ordinarily inquire as to the nature and severity of an individual's disability (*see* Answer 16, above). However, in response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (*i.e.*, has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. Depending on the individual's circumstances, information verifying that the person meets the Act's definition of disability can usually be provided by the individual himself or herself (*e.g.*, proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits[10] or a credible statement by the individual). A doctor or other

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[10] Persons who meet the definition of disability for purposes of receiving Supplemental Security Income ("SSI") or Social Security Disability Insurance ("SSDI") benefits in most cases meet the definition of disability under the Fair Housing Act, although the converse may not be true. *See e.g.*, Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 797 (1999)

medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.

Once a housing provider has established that a person meets the Act's definition of disability, the provider's request for documentation should seek only the information that is necessary to evaluate if the reasonable accommodation is needed because of a disability. Such information must be kept confidential and must not be shared with other persons unless they need the information to make or assess a decision to grant or deny a reasonable accommodation request or unless disclosure is required by law (*e.g.*, a court-issued subpoena requiring disclosure).

19. If a person believes she has been unlawfully denied a reasonable accommodation, what should that person do if she wishes to challenge that denial under the Act?

When a person with a disability believes that she has been subjected to a discriminatory housing practice, including a provider's wrongful denial of a request for reasonable accommodation, she may file a complaint with HUD within one year after the alleged denial or may file a lawsuit in federal district court within two years of the alleged denial. If a complaint is filed with HUD, HUD will investigate the complaint at no cost to the person with a disability.

There are several ways that a person may file a complaint with HUD:

- By placing a toll-free call to 1-800-669-9777 or TTY 1-800-927-9275;

- By completing the "on-line" complaint form available on the HUD internet site: http://www.hud.gov; or

- By mailing a completed complaint form or letter to:

Office of Fair Housing and Equal Opportunity
Department of Housing & Urban Development
451 Seventh Street, S.W., Room 5204
Washington, DC 20410-2000

(noting that SSDI provides benefits to a person with a disability so severe that she is unable to do her previous work and cannot engage in any other kind of substantial gainful work whereas a person pursuing an action for disability discrimination under the Americans with Disabilities Act may state a claim that "with a reasonable accommodation" she could perform the essential functions of the job).

Upon request, HUD will provide printed materials in alternate formats (large print, audio tapes, or Braille) and provide complainants with assistance in reading and completing forms.

The Civil Rights Division of the Justice Department brings lawsuits in federal courts across the country to end discriminatory practices and to seek monetary and other relief for individuals whose rights under the Fair Housing Act have been violated. The Civil Rights Division initiates lawsuits when it has reason to believe that a person or entity is involved in a "pattern or practice" of discrimination or when there has been a denial of rights to a group of persons that raises an issue of general public importance. The Division also participates as *amicus curiae* in federal court cases that raise important legal questions involving the application and/or interpretation of the Act. To alert the Justice Department to matters involving a pattern or practice of discrimination, matters involving the denial of rights to groups of persons, or lawsuits raising issues that may be appropriate for *amicus* participation, contact:

U.S. Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section – G St.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

For more information on the types of housing discrimination cases handled by the Civil Rights Division, please refer to the Housing and Civil Enforcement Section's website at http://www.usdoj.gov/crt/housing/hcehome.html.

A HUD or Department of Justice decision not to proceed with a Fair Housing Act matter does not foreclose private plaintiffs from pursuing a private lawsuit. However, litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and the Department of Justice encourage parties to Fair Housing Act disputes to explore all reasonable alternatives to litigation, including alternative dispute resolution procedures, such as mediation. HUD attempts to conciliate all Fair Housing Act complaints. In addition, it is the Department of Justice's policy to offer prospective defendants the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.

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Disability Rights California, Fact Sheet: Disability Discrimination and HUD Section 8 Vouchers (March 1, 2019)

Submitted by:
Tiffany Hickey

Disability Rights California

Disability Rights California

Fact Sheet: Disability Discrimination and HUD Section 8 Vouchers

Mar 1, 2019 | #7141.01

Introduction

The Section 8 voucher program (now called the Housing Choice Voucher Program) is a federal housing program that helps low-income families and people with disabilities afford safe, decent housing in the private housing market. The program works by giving participant families a voucher that pays for part of their monthly rent. Participant families are then free to use this voucher to rent from a housing provider of their choice, as long as the rent is within the amounts set by the public housing authority (often referred to as PHAs) and the housing authority approves the tenancy.

The Section 8 Program is funded through the U.S. Department of Housing and Urban Development (HUD) and is administered locally by a network of housing authorities. The program is subject to various state and federal laws that protect people with disabilities from discrimination by private landlords and public housing agencies. Federal laws include Section 504 of the Rehabilitation Act (29 U.S.C. Section 794), the Fair Housing Amendments Act (42 U.S.C. Sections 3601-3631), and Title II of the Americans with Disabilities Act (42 U.S.C. Sections 12131-12165). California state laws include the Fair Employment and Housing Act (Gov't Code Sections 12955-12956.2), the Unruh Civil Rights Act (Civ. Code Section 51), the Disabled Persons Act (Civil Code Sections 54.1 and 54.2), and Government Code Section 11135.

Disability-based housing discrimination can take many forms. It includes unequal treatment, refusing to rent to someone because of a disability, physical or communication access barriers, harassment, retaliation, and discriminatory statements. It also includes the failure to provide reasonable accommodations and reasonable modifications.

Reasonable Accommodations and Modifications

In the context of housing, an accommodation is an exception or change to a landlord's rules, policies, or practices. A modification is a physical change to a building, rental unit, or common area.

Under disability discrimination laws, landlords must provide reasonable accommodations and reasonable modifications when necessary to provide someone with a disability an equal opportunity to use and enjoy housing. Accommodations and modifications must be necessary due to a disability, and they must be reasonable. Accommodations and modifications are reasonable if they do not fundamentally alter the nature of the services provided and do not impose an undue burden on the landlord. In private housing, landlords must pay for the cost of any reasonable accommodation, while tenants must pay for the cost of any reasonable modification.

Like landlords, housing authorities are also required to provide reasonable accommodations when necessary to provide someone with a disability equal access to the Section 8 Program. Examples include:

- **Higher Payment Standards** – Payment standards represent the most a housing authority can pay to help a family with rent. A housing authority will set payment standards for each unit size, and they are generally somewhere between 90% and 110% of the area's fair market rate (FMR) for each unit size. A housing authority can approve a higher payment standard as a reasonable accommodation, but only up to 120% of the FMR. A housing authority may establish payment standards higher than 120% of the FMR as a reasonable accommodation, but only after approval from HUD.
- **Higher Subsidy Standards and Live-in Aides** – A subsidy standard is a standard established by a housing authority to determine the appropriate number of bedrooms for families of different sizes and compositions. A housing authority

must approve a higher subsidy standard if necessary as a reasonable accommodation. This could be to accommodate a live-in aide, to provide extra room for necessary medical equipment, or for some other disability-related reason.

- **Higher Utility Allowances** – In cases where tenants pay for their own utilities, a housing authority may provide a utility allowance to account for the cost of reasonable utility consumption. A housing authority must approve a higher utility allowance if necessary as a reasonable accommodation for a tenant who uses disability-related equipment that results in higher utility bills.
- **Longer Search Times** – The initial term of a Section 8 Voucher is at least sixty (60) calendar days. This means that a person must generally find a rental unit within 60 days of receiving their voucher. A housing authority must extend the term of the voucher if necessary as a reasonable accommodation.
- **Reinstatement on Waiting List** - A housing authority may remove a voucher applicant from the waiting list if they do not respond to requests for information and updates. However, if an applicant did not respond to such a request because of a disability, the housing authority must reinstate the applicant in the family's former position on the waiting list.
- **Renting From a Relative** – Federal regulations generally prohibit housing authorities from approving a tenancy if the owner of the unit is a relative of the tenant. However, a housing authority may approve such an owner if necessary as a reasonable accommodation for the tenant so long as the owner does not also live in the unit.
- **Assistance with Finding Accessible Unit** - When a housing authority issues a voucher to a family that includes a person with a disability, it must provide a current listing of available accessible units known to the housing authority and, if necessary, otherwise assist the family in locating an accessible unit.

Obtaining Reasonable Accommodations and Modifications

These are the steps to take to obtain a reasonable accommodation or reasonable modification from a housing authority or housing provider:

1. Write a request for reasonable accommodations / modifications. Your request should explain the following:

- that you are a person with a disability (you do not need to disclose the type of your disability);
- the ways in which your disability affects your ability to use and enjoy your home / access the housing authority's services;
- the specific accommodations / modifications you need; and
- the date by which you expect a response.

2. Unless your disability and need for accommodations / modifications is apparent, obtain a support letter from your doctor or other treating professional. This letter should explain why you need the requested accommodation / modification because of your disability.

3. Send your written request and support letter. Be sure to keep copies for your records.

A sample letter requesting reasonable accommodations / modifications and a sample support letter are at the end of this fact sheet.

Informal Hearings

If a housing authority denies your request for reasonable accommodations, you should ask the housing authority for an informal hearing. Although federal regulations do not guarantee the right to an informal hearing for reasonable accommodation requests, many housing authorities include the right to an informal hearing in their administrative plans. Please know that the procedures for requesting an informal hearing will vary for each housing authority. However, most housing authorities have a deadline for requesting an informal hearing. Be sure to check your denial letter and the housing authority's administrative plan to make sure you request a hearing before the deadline.

Administrative Complaints

If you believe your landlord or a housing authority has refused to provide you with a reasonable accommodation or has otherwise discriminated against you because of your disability or the disability of someone you live with, you can file an administrative complaint with the California Department of Fair Employment and Housing (DFEH) or with HUD.

You can file an administrative complaint with DFEH within one year of the most recent date of discrimination. Information on how to file a complaint with DFEH can be found at https://www.dfeh.ca.gov/complaintprocess/, or by calling (800) 884-1684 (voice) or (800) 700-2320 (TTY). You can appeal a DFEH decision to the DFEH Director within 10 days of the decision.

You can also file an administrative complaint with HUD. If you are filing a complaint against a private landlord, you must file with HUD within one year. If you are filing against a housing authority, you must file with HUD within 180 days. Information on how to file a HUD complaint can be found at 1-800-669-9777 or: https://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination.

Civil Litigation

You also have the option of enforcing your rights through a private civil lawsuit. Please be aware that statutes of limitations restrict the timeframe for filing litigation and you could potentially lose claims if you do not act within that timeframe. These deadlines can be as short as two years from the date of discrimination.

If you intend to sue the housing authority, be aware of the Government Tort Claims Act which requires that a government tort claim be filed within six months of a discriminatory incident before bringing a lawsuit for money damages against a state or local governmental entity. More information about tort claims can be found at: Tort Claims--Filing Claims Against Public Entities Under the California Tort Claims Act. Please note that this website links to the form for claims against the state or a state agency or employee, which may not apply in your case.

If you are seeking less than $10,000 in money damages, you may file a discrimination case in Small Claims Court. The statutes of limitations discussed above will apply. You cannot use a lawyer if you go to small claims court. For more information, see Disability Rights California, A Guide to Small Claims Court: How to Sue if a Business or Landlord

Discriminates Against You Because of Your Disability, at: https://www.disabilityrightsca.org/publications/a-guide-to-small-claims-court-how-to-sue-if-a-business-or-landlord-discriminates.

Other Resources

For more information about disability-based housing discrimination, the Housing Choice Voucher Program, and your right to request reasonable accommodations and modifications, please see the following publications and sample letters:

- Disability Rights California has published a series of fact sheets on the rights of people with disabilities in housing, which can be found here: https://www.disabilityrightsca.org/publications/housing
- Technical Assistance Collaborative, Section 8 Made Simple, available at: http://www.tacinc.org/knowledge-resources/publications/e-books/section-8-made-simple/
- Bazelon Center for Mental Health Law, What Fair Housing Means for People with Disabilities, available at: http://www.bazelon.org/wp-content/uploads/2018/05/Fair-Housing-Guide_2018-Update.pdf
- Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act, available at: https://www.hud.gov/sites/documents/DOC_7771.pdf
- Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Modifications Under the Fair Housing Act, available at: https://www.hud.gov/sites/documents/DOC_7502.PDF
- Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings Under the Fair Housing Act, available at: https://www.ada.gov/doj_hud_statement.pdf

Sample Letter to Housing Provider Requesting Reasonable Accommodation or Modification

[Date]

Dear [Landlord, Housing Authority, Homeowners Association]

I am writing to request reasonable accommodations/modifications for my disability/disabilities.

I live at/am applying to rent your property at [address]. Because of my disability, I need the following accommodations: [list accommodations/modifications].

My physician/psychiatrist/psychologist/therapist/social worker/occupational therapist /other individual [describe] has deemed these accommodations/modifications necessary in light of my disability. Please see the attached letter from [doctor or professional's name].

Federal and state law require that a housing provider reasonably accommodate tenants/occupants and applicants who have disabilities. Please respond to this request by [date]. Feel free to contact me at [your phone number and/or e-mail address] if you have any questions. Thank you.

Sincerely,

[Your name]

[Your address]

Sample Verification Letter

[Date]

To [Landlord, Housing Authority, and Homeowners Association]:

I am the physician/psychiatrist/psychologist/therapist/social worker/occupational therapist for [Your name], and am familiar with his/her condition. (S)he has a disability that causes certain functional limitations. These limitations include [list functional limitations that require the requested accommodation].

[The requested accommodation] is necessary for [Name] to live in the community and use and enjoy his/her dwelling by [describe how the accommodation will assist or support the individual].

Thank you for providing this reasonable accommodation for [Name].

Sincerely,

[Name and Title]

Disclaimer: *This publication is legal information only and is not legal advice about your individual situation. It is current as of the date posted. We try to update our materials regularly. However, laws are regularly changing. If you want to make sure the law has not changed, contact DRC or another legal office.*

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Disability Rights California, Fact Sheet: Disability-Based Housing Discrimination (July 10, 2023)

Submitted by:
Tiffany Hickey

Disability Rights California

Fact Sheet: Disability-Based Housing Discrimination

Jul 10, 2023 | #F108.01

This fact sheet discusses the rights of people with disabilities to be free from disability-based discrimination in housing under federal and California law.

Introduction

Housing discrimination against persons who have disabilities is illegal. Different things can be considered housing discrimination. Some examples of what housing discrimination looks like can be:

- Being treated differently because of a disability
- Physical barriers that block or hinder access
- Harassment
- Retaliation
- Discriminatory statements
- Failure to provide needed exceptions or changes (“reasonable accommodations and modifications”).

Difference Between Accommodations and Modifications

Reasonable accommodations are exceptions to rules, procedures, services, or policies. Reasonable modifications are physical changes to buildings, units, or

grounds. Accommodations and modifications are reasonable if they:

1. Are necessary to provide someone with a disability an equal opportunity to use and enjoy housing;
2. Do not fundamentally alter the nature of the housing or other services provided; AND
3. Do not impose an undue burden on the housing provider.

For further information click the following link: https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications

To receive a reasonable accommodation or a reasonable modification, you will need to ask for it. Even though you don't need to ask for it in writing, and you don't need to use the words "reasonable accommodation" or "reasonable modification," it is a good idea to do both. This is because it will help make what you are asking for clearer, and you may need to use the document later to prove that you asked for the change. Submitting your request by email is an easy way to have documentation for later, but if you prefer to send it via snail mail be sure to keep a copy of your request for yourself.

Below is a sample for making these requests to housing providers. To make a reasonable accommodation or modification request, the connection between the change needed and the person's disability must be stated. For example, you cannot simply make a reasonable accommodation by stating, "I am a person with a disability, and I want to pay my rent on the 7th instead of the 1st of the month." You need to provide a little more information than that. Instead, it will be more helpful and clear to state that, "because I don't receive my disability-related income until the 6th of the month, I cannot pay rent on the 1st of the month, so I am asking for an exception to this rule to pay on the 7th."

Sample Letter to a Housing Provider Requesting Reasonable Accommodation(s) or Modification(s)

[Date]

[Full name of the Landlord and/or Property Manager]
[Email address or physical address of the Landlord and/or Property Manager]

Dear [name of the Landlord and/or Property Manager]

I live at/am applying to rent your property at [address]. I am writing to request the following reasonable accommodations/modifications for my disability:

_____

This request is related to my disability because:

_____

My [physician/psychiatrist/psychologist/therapist/social worker/occupational therapist /other individual] has deemed these accommodations/modifications necessary due to my disability. I can provide this verification if you need it.

Federal and state law require that a housing provider reasonably accommodate tenants/occupants and applicants who have disabilities.

Please respond to this request, in writing, by [date]. Please understand that failure to respond to a reasonable accommodation, undue delay in responding, or unlawfully denying a reasonable accommodation request constitutes disability discrimination. See Cal. Code Regs. tit. 2, § 12177(e). Feel free to contact me at [your e-mail address/phone number]. Thank you for your attention to this request.

Sincerely,

[Your name]

[Your address]

Housing providers can request a verification letter from their residents when the resident requests a reasonable accommodation or reasonable modification and the need for the accommodation or modification is not obvious. A verification letter confirms that a person with a disability has a disability-related need for the change that they are requesting to their housing policies, procedures, services, or physical structures. Below is a sample for medical verification letters.

Sample Verification Letter from a Medical Professional

[Date]

To [Landlord, Housing Authority, and Homeowners Association]:

I am the [physician/psychiatrist/psychologist/therapist/social worker/occupational therapist] for [patient/client name] and I am familiar with [his/her/their] condition. [Patient's name] has a disability that causes certain functional limitations. These limitations include [list functional limitations that require the requested accommodation]:

_____

[The requested accommodation] is necessary for [patient/client name] to live in the community and use and enjoy [his/her/their] dwelling by [describe how the accommodation will assist or support the individual [list the limitations that require the requested accommodation]:

_____

Thank you for providing this reasonable accommodation for [patient/client name].

Sincerely,

[Name and Title]

Enforcing Your Rights: Complaints and Lawsuits

If a landlord, homeowners association, or other housing provider refuses to provide a reasonable accommodation or modification, or otherwise discriminates against you, you will need to file an administrative complaint or a lawsuit to enforce your rights. These options can take a long time.

Administrative Complaints

You can file an administrative complaint with California's Civil Rights Department (CRD), formerly the Department of Fair Employment and Housing (DFEH), within one year of the most recent date of discrimination. An overview of the complaint process

with CRD, and information on how to file the complaint, can be found here: https://calcivilrights.ca.gov/complaintprocess/#:~:text=800%2D884%2D1684,-contact.center%40dfeh and you can look at CRD's complaint flowchart here: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/09/CRD-Non-Employment-Flowchart_ENG.pdf. You can also start the complaint process by calling (800) 884-1684 (voice) or (800) 700-2320 (TTY).

If CRD does not make a finding in your favor, CRD's decision can be appealed to the CRD Director within 10 days of the decision.[1]

You can also file an administrative complaint with the U.S. Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity (HUD-FHEO)[2] within one year of the discrimination. Information on how to file a HUD-FHEO complaint can be found by calling 1-800-669-9777 or on HUD's website: https://www.hud.gov/program_offices/fair_housing_equal_opp/online-complaint Information on what the complaint process will look like can be found here: https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process

Private Lawsuits

You can enforce your rights through civil lawsuits filed in federal or state court. You do not need to have a lawyer and you have the right to file for yourself if you are unable to get help or representation from a lawyer. Please be aware that there are time limits ("statutes of limitations") that restrict how much time you have for filing claims in court, and you may automatically lose if you fail to file the lawsuit within that timeframe. These deadlines can be as short as two years from the date of discrimination. If interested in filing a lawsuit, you should consult with an attorney as soon as possible to get advice, explore your options, and potentially for representation. You will be responsible for paying filing fees to file your lawsuit, but you may be eligible for a fee waiver if you cannot afford to pay the filing fees.

Small Claims

If you are seeking less than $10,000 in money damages, you can file a discrimination case in Small Claims Court. Small claims court cases must be filed before the time limits ("statutes of limitations") expire, and there is a filing fee unless you are eligible for a fee waiver. You can consult with a lawyer about Small Claims Court cases, but a

lawyer cannot represent you in Small Claims Court. For more information, see Disability Rights California, A Guide to Small Claims Court: How to Sue if a Business or Landlord Discriminates Against You Because of Your Disability, at https://www.disabilityrightsca.org/system/files?file=file-attachments/520601_0.pdf

Legal Citations and More Information

Housing discrimination against tenants and applicants who have disabilities is prohibited under federal law in the Fair Housing Amendments Act[3] and Section 504 of the federal Rehabilitation Act of 1973.[4] Additionally, it is prohibited under California law in the Fair Employment and Housing Act[5] and the Disabled Persons Act.[6] These laws cover housing providers including landlords, homeowners' associations, realtors, housing lenders, and owners and property managers of long-term housing including board and care homes, group homes, independent living homes, homeless shelters and, in some cases, nursing facilities.

For detailed information about disability-based housing discrimination, and how to request reasonable accommodations and modifications as a tenant or applicant for housing, see:

Tenants Together is a statewide coalition of local tenant organizations. Tenants Together has a publication on Reasonable Accommodations and Reasonable Modifications here: https://www.tenantstogether.org/resources/discrimination-and-reasonable-accommodations and you can find their sample reasonable accommodation letter here: https://actionnetwork.org/user_files/user_files/000/025/581/original/Reasonable_Accommodations_Instructions.pdf

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act https://www.justice.gov/crt/us-department-housing-and-urban-development

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Modifications Under the Fair Housing Act https://www.hud.gov/sites/documents/DOC_7502.PDF

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings Under the Fair Housing Act https://www.hud.gov/sites/documents/JOINTSTATEMENT.PDF

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1. See 2 C.C.R. Section 10065
2. The Fair Housing Amendments Act allows for this.
3. 42 U.S.C. Sections 3601-3631
4. For housing that receives funding from the U.S. Department of Housing and Urban Development or other federal financial assistance
5. Government Code Sections 12955-12956.2
6. Civil Code Sections 54.1 and 54.2

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Opinion, *Reilly v. Marin Housing Authority*, S249593 (Cal. 2020)

Submitted by:
Ugochi Anaebere-Nicholson

Public Interest Law Project

Sarah Brandon

National Housing Law Project

Tiffany Hickey

Disability Rights California

IN THE SUPREME COURT OF CALIFORNIA

KERRIE REILLY,
Plaintiff and Appellant,
v.
MARIN HOUSING AUTHORITY,
Defendant and Respondent.

S249593

First Appellate District, Division Two
A149918

Marin County Superior Court
CIV 1503896

August 31, 2020

Justice Chin authored the opinion of the Court, in which Justices Liu, Cuéllar, and Groban concurred.

Chief Justice Cantil-Sakauye filed a dissenting opinion, in which Justices Corrigan and Kruger concurred.

REILLY v. MARIN HOUSING AUTHORITY

S249593

Opinion of the Court by Chin, J.

The federal Housing Choice Voucher program is a key program in section 8 of the United States Housing Act of 1937. (42 U.S.C. § 1437 et seq., as amended by § 201(a) of the Housing and Community Development Act of 1974.) Commonly referred to as "Section 8," the program provides low-income families a monthly subsidy to pay for a portion of their rent. The amount of the subsidy depends, in part, on the income Section 8 families receive. The program, which is funded and regulated by the United States Department of Housing and Urban Development (HUD), is administered locally by public housing authorities (PHAs). In this case, we address whether a Section 8 beneficiary's compensation for providing in-home care for a severely disabled adult daughter should be excluded from income in calculating the rental subsidy. For reasons that follow, we conclude that it should be excluded and reverse the Court of Appeal's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, plaintiff Kerrie Reilly and her two daughters moved into a three-bedroom apartment in Novato and began receiving Section 8 housing assistance payments to subsidize their monthly rent. Reilly has an adult daughter, K.R., who is severely disabled and requires constant supervision. Reilly receives compensation to provide in-home supportive care for

K.R. through the state and federally funded In-Home Supportive Services (IHSS) program.

In 2004, Reilly's other daughter, R.R., moved out of their subsidized apartment, but Reilly did not inform the Marin Housing Authority (MHA), which is responsible for administering Reilly's Section 8 voucher. Five years later, when Reilly told MHA that R.R. no longer lived with her, MHA advised her that her failure to report her daughter's leaving constituted a violation of the program rules. Reilly could only stay in the government-subsidized apartment if she paid approximately $16,000 in damages to MHA.

Reilly agreed to pay MHA in monthly installments, initially starting at $486 and eventually lowered to $150 per month at Reilly's request. In 2010, after Reilly missed an installment payment, MHA warned her that future missed payments would result in termination of her housing assistance. Reilly missed multiple payments in 2012, 2014, and 2015.

In 2015, Reilly requested that MHA recalculate her rent and exclude her IHSS compensation from "income" under the relevant federal regulation. (See 24 C.F.R. § 5.609(c)(16) (2020).) MHA did not respond to this request, but instead served Reilly a notice of termination of her Section 8 voucher. After a hearing on MHA's decision to terminate Reilly's housing voucher, the hearing officer upheld the agency's decision, noting that Reilly's failure to pay amounts under the settlement agreement constituted grounds for terminating her housing assistance. The hearing officer did not address whether the IHSS compensation counted as income, however.

On October 26, 2015, Reilly filed a petition for writ of mandate seeking an order requiring MHA to terminate her

repayment plan and reinstitute her Section 8 voucher; she also sought an administrative writ ordering MHA to terminate the repayment plan and exclude Reilly's IHSS payments in calculating her income going forward. The trial court rejected Reilly's assertion that IHSS payments were excepted from the meaning of "annual income" (24 C.F.R. § 5.609(c)(16) (2020)). It sustained MHA's demurrer without leave to amend, and the CA affirmed the judgment. (*Reilly v. Marin Housing Authority* (2018) 23 Cal.App.5th 425.) Both lower courts ordered "a stay in the enforcement of the administrative order terminating Reilly's Section 8 benefits." MHA later agreed to an extension of this stay pending review in this court.

We granted review, limited to the issue whether IHSS payments should be excluded from "annual income" for purposes of calculating a Section 8 beneficiary's home assistance payment.

DISCUSSION

A. Overview of Section 8 voucher program

In 1974, Congress added the Section 8 housing program to the United States Housing Act of 1937 "[f]or the purpose of aiding low-income families in obtaining a decent place to live." (42 U.S.C. § 1437f(a); see generally Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2019) ¶ 12.) The program gives eligible families either "tenant-based" or "project-based" rent subsidies administered locally through PHAs. (See *Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust* (9th Cir. 2011) 636 F.3d 1150, 1152–1153 [overview of Section 8 housing assistance].) " '[T]enant-based assistance' " is a rent subsidy that is tied to a specific family even if the family moves to other suitable housing. (42 U.S.C.

§ 1437f(f)(7).) " '[P]roject-based assistance,' " on the other hand, is tied to a specific housing development or unit. (42 U.S.C. § 1437f(f)(6).) We focus on tenant-based assistance, which is at issue in this case.

Under the tenant-based assistance program, at least 75% of all admitted families must be "[e]xtremely low[] income," i.e., their income may not exceed 30% of the median income calculated by HUD for the relevant area (24 C.F.R. § 5.603(b) (2020)); and all remaining admitted families must be "[l]ow income," i.e., their income may not exceed 50% of the median income. (*Ibid.*; *id.*, § 982.201(b)(1), (2)(i) (2020) [eligibility and targeting].)

After a Section 8 family selects an eligible rental unit approved by the applicable PHA, the PHA enters into a contract with the rental property owner. That owner "functions as a landlord in the private rental market. The owner signs a lease with the Section 8 tenant (which includes a HUD Lease/Tenancy Addendum) and also signs a Housing Assistance Payments (HAP) contract with the Housing Authority." (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 123.) The PHA gives the subsidy payments directly to the property owner. (24 C.F.R. § 982.311(a) (2020).)

As we explain below (see *post*, at p. 8), the amount of the housing subsidy depends in large part on the "annual income" the Section 8 family receives or expects to receive. (See 24 C.F.R. § 5.609(a) (2020); *id.* § 982.201(a), (b) (2020).) The issue is whether the IHSS payments Reilly receives to provide services to keep her developmentally disabled daughter at home are excluded from income under 24 Code of Federal Regulations part 5.609(c)(16) (2020).

B. IHSS

IHSS is a state social welfare program implemented under The Burton-Moscone-Bagley Citizens' Income Security Act for Aged, Blind and Disabled Californians, enacted in 1973. (Welf. & Inst. Code,[1] § 12000 et seq., added by Stats. 1973, ch. 1216, § 37, p. 2904; see *County of Sacramento v. State of California* (1982) 134 Cal.App.3d 428, 430–431.) The purpose of the legislation is to give the aged, blind and disabled the "assistance and services which will encourage them to make greater efforts to achieve self-care and self-maintenance, whenever feasible, and to enlarge their opportunities for independence." (§ 12002.) IHSS is specifically "designed to avoid institutionalization of incapacitated persons." (*Basden v. Wagner* (2010) 181 Cal.App.4th 929, 931.) Providers perform nonmedical supportive services for IHSS recipients, such as domestic services, personal care services, protective supervision, and accompaniment to health-related appointments. (§ 12300; see *Miller v. Woods* (1983) 148 Cal.App.3d 862, 867, disapproved on other grounds by *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 986, fn. 15.)

"IHSS is actually provided under three programs: the original IHSS program (the residual program) (§ 12300 et seq.); the Medi-Cal personal care services program (PCSP) (§ 14132.95); and the IHSS Plus waiver program (§ 14132.951).[2]

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[1] All further statutory references are to Welfare and Institutions Code unless otherwise noted.

[2] Section 14132.951, subdivision (a) provides: "It is the intent of the Legislature that the State Department of Health Services seek approval of a Medicaid waiver under the federal

The latter two programs tap into federal funds, and IHSS recipients will receive services under the residual program only if they do not qualify under the other two programs. (§§ 12300, subd. (g); 14132.95, subd. (b); 14132.951, subd. (d).)" (*Basden v. Wagner*, *supra*, 181 Cal.App.4th at p. 933, fn. 4; see 2 Dayton et al., Advising the Elderly Client (2019) § 22:40 (Advising the Elderly Client); *Calderon v. Anderson* (1996) 45 Cal.App.4th 607, 609–610.)

The State Department of Social Services (Department) administers the IHSS program in compliance with state and federal law. The Department promulgates regulations to implement the relevant statutes, which are set out in its Manual of Policies and Procedures: Social Services Standards (July 2019) (MPP). (MPP, §§ 30-700 to 30-785; see *Norasingh v. Lightbourne* (2014) 229 Cal.App.4th 740, 744–745.) County welfare departments administer the IHSS program with the Department's supervision, and determine an applicant's individual needs to authorize necessary services. (*Norasingh v. Lightbourne,* at pp. 744–745; see MPP, § 30-761 [needs assessment standards].)

A county welfare department may either obtain and pay directly a provider of the supportive services, or pay the recipient who hires one. (*Basden v. Wagner*, *supra*, 181 Cal.App.4th at p. 940 [when state pays provider or recipient directly, it assumes certain " 'employer' duties"]; MPP, § 30-

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Social Security Act in order that the services available under Article 7 (commencing with Section 12300) of Chapter 3, known as the In-Home Supportive Services program, may be provided as a Medi-Cal benefit under this chapter to the extent federal financial participation is available. The waiver shall be known as the 'IHSS Plus waiver.' "

763.44.) Or, as in this case, it may compensate the parent who provides in-home care to her disabled child. (See § 12300, subd. (e); MPP, § 30-763.45 et seq.; see also Fam. Code, § 3910, subd. (a) [parent's responsibility extends to a "child of whatever age who is incapacitated from earning a living and without sufficient means"].) It bears noting that "[t]he vast majority of home care is provided by family and friends." (Advising the Elderly Client, *supra*, § 22:17.)

Reilly's daughter suffers from a severe developmental disorder and obtained authorization for protective supervision, i.e., 24-hours-a-day supervision that allows her to remain at home safely. (§ 12301.21; MPP, § 30-757.173.) Protective supervision involves "observing recipient behavior and intervening as appropriate in order to safeguard the recipient against injury, hazard, or accident." (MPP, § 30-757.17; see *Marshall v. McMahon* (1993) 17 Cal.App.4th 1841, 1847 [" 'Protective supervision' appears to be similar to care given small children, that is, anticipating everyday hazards and intervening to avert harm"].) Such supervision is available for "nonself-directing, confused, mentally impaired, or mentally ill persons only." (MPP, § 30.757.171; see *Marshall v. McMahon*, at p. 1847; *Calderon v. Anderson*, *supra*, 45 Cal.App.4th at p. 616.) There is no dispute that Reilly's adult daughter was entitled to IHSS services, or that Reilly was authorized to receive IHSS compensation for providing those services to her.

C. HUD regulation on "Annual Income" and its exclusions

The applicable federal regulation defines "annual income" broadly, as "all amounts, monetary or not." (24 C.F.R. § 5.609(a) (2020).) For example, income includes "compensation for personal services" (*id.*, § 5.609(b)(1) (2020)) and "[p]ayments in

lieu of earnings, such as unemployment and disability compensation, worker's compensation, and severance pay" (*id.*, § 5.609(b)(5) (2020)). However, income does not include such amounts as "specifically excluded" under the regulation. (*Id.*, § 5.609(a)(3) (2020).) There are 16 such exclusions. (*Id.*, § 5.609(c)(1)–(17) (2020).)

"An extensive set of statutory provisions and regulations governs the calculations of the subsidy that must be paid on behalf of each tenant." (*Nozzi v. Housing Authority of City of Los Angeles* (9th Cir. 2015) 806 F.3d 1178, 1184.) In general, Section 8 tenants must contribute 30% of their monthly adjusted income or 10% of their gross monthly income, whichever is greater, towards each month's rent. (42 U.S.C. § 1437f(*o*)(2)(A).) The housing assistance payment covers the balance of the rent, up to a statutorily capped amount. (*Nozzi v. Housing Authority of City of Los Angeles*, at pp. 1184–1185.)

We do not examine the underlying method used to calculate the rental subsidy, however, but focus on whether Reilly's IHSS compensation for care of her disabled daughter is "specifically excluded" (24 C.F.R. § 5.609(a)(3) (2020)) from income as "[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home *to offset the cost of services* and equipment needed to keep the developmentally disabled family member at home" (*id.*, § 5.609(c)(16) (2020), italics added). The parties do not dispute that if Reilly's daughter received IHSS care from a *third party* rather than a family member, such amounts paid would qualify under the exclusion. MHA argues that for the exclusion to apply, however, a family must incur costs for hiring someone because only then would the "[a]mounts paid" by the state to a family truly "offset" those "cost[s]." (24 C.F.R. § 5.609(c)(16)

(2020); see *In re Ali* (Minn. 2020) 938 N.W.2d 835, 840 (*Ali*) ["Cost means an actual monetary expense . . . incurred by the family to keep the disabled family member living at home"].) Because the state pays Reilly to provide care for her own daughter and not to hire a third party provider, MHA maintains there is no actual "cost" to Reilly for such services, and consequently, there is nothing to "offset."

1. Meaning of "Offset" & "Cost"

MHA's interpretation is based in part on the dictionary definition of "offset," which generally means to counterbalance or compensate for something. (See *Steinmeyer v. Warner Cons. Corp.* (1974) 42 Cal.App.3d 515, 518.) Echoing the Court of Appeal, MHA asserts that payments by the state must offset costs the family itself incurs to keep a developmentally disabled member at home; "[o]therwise the payment does not counterbalance or compensate for the costs of services." As MHA puts it, "the payment must go to the same entity that incurs the cost of those services." MHA further insists that "cost" is a monetary term that does not encompass *emotional* costs Reilly bears in caring for her daughter, nor any *lost opportunity* costs when Reilly forgoes outside employment to be her daughter's IHSS provider.

We disagree with MHA's interpretation. Unlike the word "reimburse," which means to "*pay back* or compensate (another party) for *money spent* or losses incurred" (American Heritage Dict. (5th ed. 2020) p. 1214, italics added), "offset" is not similarly restrictive. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117 ["Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a

different meaning"].) For example, the term "reimbursement" is used in two other exclusions. (24 C.F.R. § 5.609(c)(4), (8)(iii) (2020).) Consistent with the meaning of "reimburse," those exclusions refer to compensation of specific, discrete amounts, e.g., "the cost of medical expenses" (*id.*, § 5.609(c)(4) (2020)) and "out-of-pocket expenses" to participate in a publicly assisted program (*id.*, § 5.609(c)(8)(iii)).

While the term "reimburse" suggests there may be full recompense for any out-of-pocket expenses a family incurs under those exclusions, "offset" as used here does not necessarily reflect that same meaning. (See *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1117.) Here, what is "offset" is the "cost of services and equipment needed to keep the developmentally disabled family member at home." (24 C.F.R. § 5.609(c)(16) (2020).) "[C]ost," in turn, is defined to include both "an amount paid or required in payment for a purchase; a price" and "the expenditure of something, such as time or labor, necessary for the attainment of a goal." (American Heritage Dict., *supra*, at p. 454.) Whether a family uses homecare payments to support itself so that it may care for a developmentally disabled member at home, or instead uses the funds to pay a third party to provide care for some of the time, these payments do no more than "offset" the "cost" of services and equipment needed to avoid institutionalization, costs that are not otherwise specified or limited. (24 C.F.R. § 5.609(c)(16) (2020).)

Further, contrary to MHA's suggestion, "cost" in this exclusion (24 C.F.R. § 5.609(c)(16) (2020)) does not have the same meaning as "cost" used in other provisions of the regulation. For instance, "actual cost of shelter and utilities" (24 C.F.R. § 5.609(b)(6)(ii) (2020)) and "cost of medical expenses for

any family member" (*id.*, § 5.609(c)(4) (2020)) both refer to discrete, monetary amounts. "[T]he presumption that 'identical words used in different parts of the same act are intended to have the same meaning . . . readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.' " (*Roberts v. Sea-Land Services, Inc.* (2012) 566 U.S. 93, 108.)

2. Rulemaking history of 24 Code of Federal Regulations par 5.609(c)(16) (2020)

This interpretation of the terms "offset" and "cost" is also consistent with the rulemaking history of 24 Code of Federal Regulations part 5.609(c)(16) (2020). (See 60 Fed.Reg. 17388–17395 (Apr. 5, 1995) ["Combined Income and Rent"; interim rule as precursor to 24 C.F.R. § 5.609(c)(16) (2020)]; 61 Fed.Reg. 54492–54504 (Oct. 18, 1996) [final rule]). Though the Court of Appeal found this history to be unhelpful and not illuminating, we do not share that view. (See *Thomas Jefferson Univ. v. Shalala* (1994) 512 U.S. 504, 512 [relevance of agency's " 'intent at the time of the regulation's promulgation' "].)

In 1995, HUD published an interim rule proposing eight new income exclusions — among them the homecare payments exclusion — to the definition of annual income under Section 8 and other assisted housing programs. (See 60 Fed.Reg. 17388–17395 (Apr. 5, 1995); 24 C.F.R. § 5.609(c) (2020).) It determined that the new exclusions "are essential for achieving its goals of ensuring economic opportunity, empowering the poor and expanding affordable housing opportunities. Moreover, HUD believes that the *costs* of additional exclusions will be *offset* by long-term future savings because the exclusions will increase

the number of economically self-sufficient families residing in assisted housing." (60 Fed.Reg. 17388, italics added.)

Regarding the "homecare payments" exclusion in particular, HUD explained that the "exclusion exempts amounts paid by a State agency to families that have developmentally disabled children or adult family members living at home. *States that provide families with homecare payments do so to offset the cost of services and equipment needed to keep a developmentally disabled family member at home, rather than placing the family member in an institution.* Since families that strive to avoid institutionalization should be encouraged, and not punished, the Department is adding this additional exclusion to income. The Department wishes to point out that today's interim rule does not define 'developmentally disabled' since *whether a family member qualifies as developmentally disabled, and is therefore eligible for homecare assistance, is determined by each individual State.*" (60 Fed.Reg. 17388, 17389 (Apr. 5, 1995), italics added.)

In finalizing the rule and responding to public comment that " 'developmentally disabled children' " and " 'adult family members' " should be expressly defined, HUD rejected the suggestion as unnecessary: "There is no need for HUD to define these terms, as they are defined by the State program providing the payments. *If the family is receiving such a payment from the State because a family meets the criteria of the definition, the [public housing authority] should consider the family eligible for the exclusion.*" (61 Fed.Reg. 54492, 54497 (Oct. 18, 1996), italics added.)

We find several points from this rulemaking history to be significant. As to the meaning of "offset," HUD recognized that

states that make payments for in-home services "do so to offset the cost" to the family keeping the developmentally disabled member at home "rather than placing the family member in an institution." (60 Fed.Reg. 17388, 17389 (Apr. 5, 1995).) Significantly, HUD here did not use "cost" and "offset" in terms of a specific monetary expense or amount a Section 8 family incurs, but in a broad sense with respect to describing the overall objective of the exclusion. HUD regarded homecare payments as reducing or offsetting costs to families caring for developmentally disabled individuals, costs that would be borne by state and federal governments if the family member were institutionalized. (See Perkins & Boyle, *Addressing Long Waits for Home and Community-Based Care Through Medicaid and the ADA* (2001) 45 St. Louis U. L.J. 117, 119 ["Most states have reduced costly institutional care by shifting some public funding to home and community settings"].)

This background clearly informs the interpretation of 24 Code of Federal Regulations part 5.609(c)(16) (2020). The language of the regulation ("amounts paid by a State agency . . . *to offset the costs of services and equipment needed to keep the developmentally disabled family member at home*" [italics added]) closely tracks this rulemaking language ("States that provide families with homecare payments do so *to offset the costs of services and equipment needed to keep a developmentally disabled family member at home*, rather than placing the family member in an institution") (60 Fed.Reg. 17388, 17389, italics added), and the italicized phrases at issue here are identical.

The only express limitation HUD has placed on this exclusion is that the in-home care payments must be for services and equipment needed to keep the "developmentally disabled" family member at home. (See *post*, at pp. 15–16.) Even then,

HUD found "no need" to define what "developmentally disabled" meant, and instead left this up to the states to decide. (61 Fed.Reg. 54492, 54497 (Oct. 18, 1996; see 60 Fed.Reg. 17389 (Apr. 5, 1995) ["whether a family member qualifies as developmentally disabled, and is therefore eligible for homecare assistance, is determined by each individual State"].) From HUD's perspective, "If the family is receiving such a payment from the State because a family member meets the criteria of the definition, the [public housing authority] *should consider the family eligible for the exclusion*." (61 Fed.Reg. 54492, 54497, italics added.)

Notwithstanding the general rule that exclusions from income should be construed narrowly (see *Commissioner v. Schleier* (1995) 515 U.S. 323, 328), we find no indication that HUD intended a narrow construction of the homecare payments exclusion. We perceive no reasoned basis — including any basis informed by the regulation's language — why HUD would single out a parent provider's compensation as unworthy for income exclusion. Rather, we find HUD's stated goals of encouraging families to avoid the institutionalization of developmentally disabled individuals through the addition of this exclusion (60 Fed.Reg. 17388, 17389 (April 5, 1995)), and more globally of "ensuring economic opportunity, empowering the poor and expanding affordable housing opportunities" (60 Fed.Reg. 17388), would be furthered by permitting *all* homecare payments for services to keep developmentally disabled family members at home — whether the provider is a family member or third party — to be excluded from the meaning of "annual income." (24 C.F.R. § 5.609(c)(16) (2020).) By allowing these families to realize the full benefit of the homecare payments without facing a corresponding increase in rent, the exclusion

would operate as intended by not penalizing families who take on the onus of caring for a developmentally disabled family member at home.

To that end, it is helpful to remember that "[t]he United States Housing Act is a program of 'cooperative federalism.' " (*James v. New York City Housing Authority* (S.D.N.Y. 1985) 622 F.Supp. 1356, 1359; see 42 U.S.C. § 1437; see also *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264, 289.) "HUD's delegation of eligibility requirements to local public housing authorities is intended to effectuate the underlying policy of the United States Housing Act by promoting efficient management of the programs . . . ." (*James v. New York City Housing Authority*, at pp. 1361–1362.) With respect to the exclusion for homecare payments specifically (24 C.F.R. § 5.609(c)(16)) (2020)), HUD expressly left it to the states to define "developmentally disabled," which in part determines a family's eligibility for the income exclusion. (See *ante*, at p. 12.)

Along these lines, HUD did not limit the income exclusion based on whether a state allows a family to use a family member or a third party to provide the necessary care; the exclusion covers "[a]mounts paid by a State agency to a family" with a developmentally disabled member (24 C.F.R. § 5.609(c)(16) (2020)). Indeed, acknowledging such a distinction would do little to advance the complementary purposes of the federal and state statutes. Congress established Section 8 with "the purpose of aiding low-income families in obtaining a decent place to live." (42 U.S.C § 1437f(a).) And our Legislature created IHSS with the goal of providing "supportive services . . . to aged, blind, or disabled persons . . . who are unable to perform the services themselves and who cannot safely remain in their

homes or abodes of their own choosing unless these services are provided." (§ 12300, subd. (a).) Like the purpose of the federal exclusion (see *ante*, at pp. 12–13), the IHSS program's purpose is to enable " 'disabled poor persons to avoid institutionalization by *remaining in their homes* with proper supportive services.' " (*Basden v. Wagner*, *supra*, 181 Cal.App.4th at p. 939.) Nevertheless, MHA would have us read in the words "from third parties" after the phrase "cost of services" (24 C.F.R. § 5.609(c)(16) (2020)) thereby making it correspondingly harder for certain families to provide necessary in-home care. Given this cooperative federalism regime, we ought to be reticent to interpret the HUD regulation in a way that would foreclose or hinder the objectives of the state IHSS program.

The dissent overstates the import of the authority it cites (see dis. opn., *post*, at pp. 1–2, 16–19). (See *Anthony v. Poteet Housing Authority* (5th Cir. 2009) 306 Fed. Appx. 98, 101 (*Anthony*) ["One must incur costs before they can be offset"]; *Ali*, *supra*, 931 N.W.2d 835.) In *Anthony*, an unpublished Fifth Circuit decision that first addressed the issue, plaintiff Brenda Anthony provided in-home care for her severely disabled son in their Section 8 subsidized apartment. Unlike California, the State of Texas does not pay families directly for in-home care; such care is provided by third party intermediaries, who in turn employ in-home attendants and pay them wages partially funded by the state. Through her employment as a personal care attendant with two private for-profit companies, Anthony provided care not only for her son but also for other clients under the terms of her employment.

In determining Anthony's annual income for purposes of calculating her subsidized rent, the PHA refused to exclude Anthony's wages under 24 Code of Federal Regulations part

5.609(c)(16) (2020)). The Fifth Circuit agreed with the PHA's decision: "[T]he fact that Anthony's employment income coincides with state funds that are set aside for her son's care does not make that income a form of reimbursement." (*Anthony*, *supra*, 306 Fed. Appx. at pp. 101–102.) The court further rejected Anthony's claim that the services she provided her son were at a cost and were not free: "[F]or Anthony, they are free. She has no out-of-pocket expenses — 'costs' — that must be reimbursed or 'offset' by the state." (*Id*. at p. 102.)

We are not persuaded by *Anthony*'s reasoning on several grounds. Fundamentally, Texas's program is distinct from the IHSS scheme in that "all state-funded in-home attendant-care services in Texas are provided by private intermediaries, and Texas does not provide any amounts directly to families to offset costs incurred to keep a disabled family member at home." (*Anthony*, *supra*, 306 Fed. Appx. at p. 101.) Next, although Anthony's private employers paid her to provide in-home care to her son "with money partially provided by the state" (*id*. at p. 101), it is unclear what portion of her wages truly constituted "pass-through" state funds. Her employers paid Anthony not just to care for her disabled son, but also to care for other clients. (*Id*. at p. 100.) Thus, Anthony's compensation as an in-home attendant was arguably indistinguishable from wages a parent earns from outside employment, and therefore properly not excluded from income under 24 Code of Federal Regulations part 5.609(c)(16) (2020)). Finally, we do not agree with the Fifth Circuit's narrow interpretation of the exclusion as limited to out-of-pocket expenses that a state directly reimburses. (See *Anthony*, *supra*, 306 Fed. Appx. at pp. 101–102; see *ante*, at pp. 9–11.)

Nor are we persuaded by the Minnesota Supreme Court's recent decision in *Ali*, *supra*, 938 N.W.2d 835, which relied in part on both *Anthony* and the Court of Appeal opinion below to reach a similar conclusion. (See *Reilly v. Marin Housing Authority*, *supra*, 23 Cal.App.5th 425.) Under Minnesota's Consumer Directed Community Support option for home and community-based services, a family receives a budget for specific services and equipment needed to keep a developmentally disabled member at home. (*Ali*, *supra*, 938 N.W.2d at p. 837.) The plaintiff, whose autistic son was eligible for the program, "chose to allocate a portion of the budget to herself as a paid parent to provide to her son some of the necessary services." (*Ibid.*) Following *Anthony* and *Reilly*, the *Ali* court adopted a narrow view of "cost" to mean out-of-pocket expenses, and concluded that the mother incurred no actual monetary expenses to "offset." (*Id.* at p. 840.)

As with the Texas program, the Minnesota program — which allowed the mother to "allocate her budget as she saw fit to keep her son living at home" — is structured differently from the IHSS program in a way that makes *Ali* distinguishable. (*Ali*, *supra*, 938 N.W.2d at p. 837.) Moreover, as with *Anthony*, we disagree with the *Ali* court's narrow interpretation of "cost" and "offset."

D. MHA's policy arguments

Notwithstanding this reading of the HUD regulation, MHA asserts that including a parent's IHSS compensation as income is necessary to achieve a measure of parity between families in similar circumstances. An expansive reading of the exclusion (24 C.F.R. § 5.609(c)(16) (2020)), MHA argues, would unfairly advantage families who provide in-home care to a

developmentally disabled member because their compensation is not counted as income for purposes of calculating their rent subsidy, whereas no comparable income exclusion is available for a family with a medically disabled member or for a family who hires a third party provider.

In advancing this argument, MHA asserts the state pays Reilly "wages" under the IHSS program. Describing an employment relationship between Reilly and the State of California, MHA relies in part on the Court of Appeal's reasoning that "IHSS payments substitute in the family's budget for the money the parent would have earned outside the home." Such wages, MHA continues, should be considered part of her annual income just like the outside income of a parent who instead hires an in-home provider. We address these points in turn.

1. Disparity based on individuals' different disabilities

First, we reject MHA's and the dissent's assertion that excluding Reilly's IHSS payments from annual income under 24 Code of Federal Regulations part 5.609(c)(16) (2020) would create an unfair disparity by extending the exclusion to families with a *developmentally* disabled member but not to families with a *medically* disabled member. To the extent there is any disparity, it is inherent in the federal regulation itself, which specifically limits the exclusion to payments made to families caring for a "developmentally disabled family member." (24 C.F.R. § 5.609(c)(16) (2020).) Put another way, even assuming MHA's position is correct that the exclusion is limited to payments made to third party providers, it would still treat developmental disabilities more favorably than physical disabilities because whatever its scope, the exclusion by its

terms applies only to "[a]mounts paid by a State agency to a *family with a member who has a developmental disability*." (*Ibid.*, italics added.)

The regulation, moreover, does not require that an individual meet a particular definition of "developmentally disabled" for the income exclusion to apply. As previously discussed (see *ante*, at p. 15), HUD has not defined "developmental disability" in the regulation, but instead left it up to states to determine its meaning. Specifically, if a state program authorizes a family to receive in-home care for a family member, in HUD's view that family member "meets the criteria of the definition" of developmentally disabled, and the PHA "should consider the family eligible for the exclusion." (61 Fed.Reg. 54492, 54497 (Oct. 18, 1996), italics added.) This expansive view in favor of applying the exclusion is consistent with HUD's expressed concern that families of developmentally disabled members in particular would receive unfair treatment if this income exclusion were *not* made available to them. HUD added the relevant exclusion for families with a developmentally disabled member "[s]ince families that strive to avoid institutionalization should be *encouraged, and not punished*." (60 Fed.Reg. 17388, 17389 (Apr. 5, 1995), italics added.)

The dissent, however, asserts that precluding Reilly from utilizing this income exclusion would not amount to punishment because no other group, besides foster parents, enjoys the benefit of the income exclusion. (See dis. opn., *post*, at p. 34, fn. 18.) This critically misapprehends the nature of the penalty involved. The punishment here is not merely withholding a benefit to a family that is not otherwise given to similarly situated families; in other words, the dilemma a family faces is not choosing between enjoying or forgoing a "preferential

benefit," as the dissent seems to suggest. (Dis. opn., *post*, at p. 23.) Rather, if a family cannot utilize the income exclusion to exclude compensation for a parent's in-home care, this may cause the family to lose its Section 8 housing altogether because it is unable to pay an increased portion of rent. Without such housing, a family may face having to institutionalize a developmentally disabled member, a result the exclusion seeks to prevent in the first place.

Further, despite no expressed preference for family providers per se, "[r]ecipients needing 24-hour protective supervision — and other services — are more likely to receive better *continuous care* from relatives living with them whose care is more than contractual." (*Miller v. Woods*, *supra*, 148 Cal.App.3d at p. 870.) This continuity of care is particularly salient here because of the nature of need-based tasks under the IHSS program. Because an IHSS recipient may only receive specific services based on an assessed need — i.e., where "[p]erformance of the service by the recipient would constitute such a threat to his/her health/safety that he/she would be unable to remain in his/her own home" (MPP, § 30.761.14) — not all time that a provider spends with a recipient would be compensable. (See § 12300, subd. (a); MPP, § 30.761.12.) Many tasks are discrete and not clustered together throughout the day (such as feeding, dressing, bowel and bladder care), and a provider may not be compensated for time spent waiting in between those tasks. It would no doubt prove challenging to find many providers — other than family members — willing to work that intermittently during the day.

Family members may also make particularly good providers because IHSS services "involve a most intimate and personal aspect of an individual's life" and family providers

often "insure the least intrusion upon the recipient's privacy." (*Miller v. Woods*, *supra*, 148 Cal.App.3d at p. 878; see § 12304.1 ["preference shall be given to any qualified individual provider who is chosen by any recipient"].) Also recognizing that family-provided care is often the best type of care for individuals with disabilities, Congress has included it as one of the "goals of the Nation" to provide families of children with disabilities the services necessary to "enable families of children with disabilities to nurture and enjoy their children at home"; and "support family caregivers of adults with disabilities." (42 U.S.C. § 15091(a)(6)(B), (D) [congressional findings of Families of Children with Disabilities Support Act of 2000]; *id.*, § 15091(a)(1) ["It is in the best interest of our Nation to preserve, strengthen, and maintain the family"].) Congress further emphasized the important cost savings when family members are themselves providers for their disabled children: "Families of children with disabilities provide support, care, and training to their children that can save States millions of dollars. Without the efforts of family caregivers, many persons with disabilities would receive care through State-supported out-of-home placements." (*Id.*, § 15091(a)(2); see 60 Fed.Reg. 17388, 17389 (Apr. 5, 1995).) These expressed goals fully align with HUD's objective to have developmentally disabled individuals avoid institutionalization and instead live with their families at home.[3]

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[3] Contrary to the dissent's suggestion, nothing in our opinion should be construed as implying that third party caregivers as a whole will provide "substandard" care compared to family members. (Dis. opn., *post*, at p. 31.) We merely confirm what Congress has expressly recognized about the benefits of having family caregivers.

This leads us to the inescapable conclusion that parents who keep their disabled child at home instead of in an institution — while also providing care as their child's IHSS provider — *are* different from other caregivers. That difference, however, cuts *in favor* of allowing a parent's IHSS compensation under the exclusion. Unlike third party caregivers whose job it is to take care of someone on an hourly basis, for these parent providers, caring for their child "is not a day job; it is their life." (*In re Hite* (Bankr. W.D.Va. 2016) 557 B.R. 451, 458 [holding parents' in-home care payments excluded from monthly income and consequently not deemed disposable income subject to creditors].) If in-home care payments are not excluded from her income, the benefits Reilly receives — the in-home care for her disabled daughter K.R. and the Section 8 housing assistance — would be at cross-purposes. A family should not be forced to make an impossible choice between these two critical benefits. We perceive no plausible reason why Reilly should not realize the full benefit of what each program has to offer her family.[4]

2. IHSS payments as wages

Next, we reject MHA's underlying assumption that a parent provider's compensation under the IHSS program seeks to replicate the wages and hours of a parent who is employed outside the home. A parent's employment is relevant only to the extent it relates to the parent's suitability or availability to provide IHSS services to a child. (MPP, § 30-763.451; Dept. All-County Letter No. 19-02 (January 9, 2019) (All-County Letter

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[4] This conclusion focuses on Reilly's general entitlement to benefits under the Section 8 voucher and IHSS programs, and does not consider any other basis for terminating these benefits such as the failure to comply with any program requirements.

19-02).) As section 12300, subdivision (e) explains, the predicate for a paid parent provider is that "no other suitable provider is available." (§ 12300, subd. (e); see MPP, § 30-763.451.) In providing the necessary in-home care to a disabled child, a parent forgoes any outside employment — not to displace otherwise competent professional caregivers — but to prevent a third party caregiver's "inappropriate placement or inadequate care" for their child. (§ 12300, subd. (e).)

For instance, in its 2019 All-County Letter 19-02, the Department clarified the paid parent provider requirements: "The paid parent IHSS provider requirements, set forth in MPP Section 30-763.451, do not require or imply that a parent must have marketable job skills or a work history to be their child's paid IHSS provider, *as long as it is the recipient child's needs which prevent the parent from maintaining or obtaining full-time employment*." (All-County Letter 19-02, *supra*, at p. 4, italics added.) Likewise, parents who retire or are laid off may also serve as their child's provider only if their retirement or layoff is due to the child's need for IHSS services. (*Id.* at p. 6.) In short, "if a parent is not employed full-time for a reason other than the recipient child's IHSS needs . . . that parent would not qualify as a paid parent IHSS provider." (*Id.* at p. 4.)

Second, even assuming Reilly's IHSS compensation represents her wages, this does not mean that providing in-home care to her child is "an employment for all purposes." (*Basden v. Wagner*, *supra*, 181 Cal.App.4th at p. 940.) In *Basden v. Wagner*, the Court of Appeal recognized certain duties — such as the state being responsible for the provider's unemployment compensation, workers' compensation, federal and state income tax and the like — that would suggest providing IHSS full-time could be considered an employment. The court, however,

pointed out that "the Legislature defined IHSS providers as employees for limited circumstances, but undisputedly not for all circumstances. More significantly, nothing in the statutes even remotely suggests the Legislature defined the provision of in-home, full-time, IHSS funded care by a parent to a child as full-time employment . . . ." (*Ibid.*, italics omitted.) The question here is whether a parent's compensation for providing in-home care is "specifically excluded" from the definition of annual income for purposes of the HUD regulation. (24 C.F.R. § 5.609(a)(3), (c)(16) (2020).) As explained above, we conclude that IHSS compensation to a parent provider is excluded from income. (See *ante*, at pp. 14–15.)

Nevertheless, the dissent maintains that "[u]nlike funds that reimburse a family's expenditures, funds provided by the state to compensate for the family's caregiving activities are available to meet the family's daily needs. *That is their purpose*." (Dis. opn., *post*, at p. 25, italics added.) This characterization gravely misconstrues the nature and scope of IHSS services.

Under the IHSS program, the main focus is on assessing the disabled individual's "service needs and authorizing service hours to meet those needs." (§ 12301.2, subd. (a)(1).) A caregiver will be compensated only for those authorized service hours and nothing more. As previously explained (see *ante*, at p. 21), because many tasks are discrete and completed throughout the day, a provider might not be compensated for time spent waiting in between those tasks. Contrary to the dissent's suggestion, excluding a parent's IHSS compensation from income would not artificially reduce a family's income and thereby increase any resulting rent subsidy. At best, a parent's IHSS compensation will offset a portion of the costs of keeping

a developmentally disabled family member at home, and would not go far in meeting the family's daily needs.

The dissent's related assertion — i.e., family providers "are effectively selling their labor to the state, and the resulting income is indistinguishable, in its impact on the family's standard of living, from money earned working outside the home" (dis. opn., *post*, at p. 25) — is likewise long on conclusion but short on facts. (See *ibid.* ["to receive funds from IHSS a parent must accept their disabled child's care as, in effect, their *job*"].) In the case of Reilly's daughter, K.R., for example, she required protective supervision that is "only available" if "a need exists for twenty-four-hours-a-day of supervision in order for the recipient to remain at home safely." (MPP, § 30-757.173(a).) A person needing 24-hour supervision would require a provider's services for 720 hours in a 30-day month. However, an IHSS provider is limited to a statutory cap of 283 hours of compensation. (§§ 12303.4, 14132.95, subd. (g).) The discrepancy between a parent provider's actual hours of service and compensation belies any assertion that IHSS payments, at least with respect to protective supervision, are intended to represent wages the parent would have earned outside the home, where compensation would be based on every hour worked.

Finally, we find it significant that the IRS also treats in-home care payments — *whether the provider is related or unrelated to the disabled individual* — as excludable from a provider's income under Internal Revenue Code section 131. (26 U.S.C. § 131; see Rev. Proc. 2014-7, 2014-4 I.R.B. 445.) In 2014, the IRS explained that Medicaid waiver payments to states, which are used to fund IHSS payments through the state Medi-Cal program (see *ante*, at pp. 5–6 & fn. 2), should be *excluded*

from a provider's gross income. (Rev. Proc. 2014-7, 2014-4 I.R.B. 445.) It equated these payments to foster care payments, which are considered "difficulty of care" payments excludable from a provider's income under Internal Revenue Code section 131. (26 U.S.C. § 131(a) ["Gross income shall not include amounts received by a foster care provider . . . as qualified foster care payments"].) "The programs share the objective of enabling individuals who otherwise would be institutionalized to live in a family home setting rather than in an institution, and both difficulty of care payments and Medicaid waiver payments compensate for the additional care required." (Rev. Proc. 2014-7, 2014-4 I.R.B. 445 [these foster parents " 'are saving the taxpayers' money by preventing institutionalization of these children' "].) As relevant here, the IRS makes no distinction between care provided by a parent or by a third party — the exclusion for Medicaid waiver payments "*will apply whether the care provider is related or unrelated to the eligible individual*." (*Ibid.*, italics added.)

Seeking to downplay any impact an IRS interpretation has on a HUD regulation, MHA notes that HUD has indicated that the "tax rules are different from the HUD program rules." (HUD, HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs (Nov. 2013) ¶ 5-1.) Be that as it may, we do not conclude that the IRS's interpretation is dispositive or compels the outcome in this case. We do, however, acknowledge that it provides persuasive insight, one that is consistent with the rulemaking record of the HUD regulation (24 C.F.R. § 5.609(c)(16) (2020)). (See *ante*, at pp. 11–13)

For example, though payments to foster parents and in-home care payments are both considered "difficulty of care"

payments excludable from a provider's taxable income, these payments would receive unequal treatment under MHA's interpretation of the regulation. Under 24 Code of Federal Regulations part 5.609(c)(2) (2020), "[p]ayments received for the care of foster children or foster adults (usually persons with disabilities, unrelated to the tenant family, who are unable to live alone)" are excluded from income for purposes of Section 8 housing. If a family takes into their home an unrelated disabled adult who is unable to live alone, and receives payment from the State for providing care to that adult, such payments are excluded from the family's income. However, if that same family receives payment for providing the same care but to a developmentally disabled family member, those payments would not be excluded from income. To ascribe this interpretation to HUD, which would impose a financial penalty on a family simply because the care is given to a disabled family member rather than a disabled stranger, would not only be inconsistent with the IRS's treatment of both payments, there is no evidence in the regulation's rulemaking record that HUD intended different treatment.

E. HUD's position

At our request, HUD filed an amicus brief in this matter. We first note that at oral argument HUD's counsel indicated that the agency did not request we give deference to its interpretation of the regulation because it believed the plain language controlled. (See *Kisor v. Wilkie* (2019) 588 U.S. ___ [139 S. Ct. 2400, 2415] ["If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means — and the court must give it effect"].) Urging us to affirm the Court of Appeal's judgment, HUD opines that the IHSS payments Reilly receives must be treated as

income under the regulation because that "compensation substitutes for income Reilly would otherwise earn for working outside the home." HUD essentially echoes the reasoning of the Court of Appeal below.

Though deference is generally accorded an agency's interpretation of its own regulation in the face of ambiguity (see *Auer v. Robbins* (1997) 519 U.S. 452; *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140), we conclude that such deference is not compelled here. (See *United States v. Mead Corp.* (2001) 533 U.S. 218, 228 ["[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances"].) Courts should defer to an agency's interpretation unless an " 'alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent *at the time of the regulation's promulgation*.' " (*Thomas Jefferson Univ. v. Shalala*, *supra*, 512 U.S. at p. 512, italics added.)

As explained above (see *ante*, at pp. 12–13), we conclude that HUD's clearly expressed intent at the time it added the exclusion for homecare payments (24 C.F.R. § 5.609(c)(16) (2020)) was to encourage families to provide in-home care to, and avoid institutionalization of, developmentally disabled family members. This contemporaneous intent is fully realized only when in-home payments for services needed to keep the developmentally disabled member at home — are excluded from income for purposes of the Section 8 program, i.e., whether those payments are ultimately made to a family member or to a third party provider. This interpretation is consistent with exclusion's language, which places no restrictions on *who* the provider of services can be. (24 C.F.R. § 5.609(c)(16) (2020).)

Contrary to MHA's suggestion, we do not perceive any intent by HUD to treat families with a developmentally disabled member and families with a medically disabled member the same, or to consider a parent's outside income the same as a parent's IHSS compensation. We will not pursue parity for parity's sake, especially if such pursuit runs counter to the language and purpose of the exclusion. Including a parent's in-home care payments as income to determine a family's Section 8 eligibility will have the perverse effect of making it *harder* for a family to maintain a home in which to care for the child.

In the end, we refuse to adopt a crabbed interpretation that does little to advance the tandem goals of offering affordable housing to low income families and of supporting families who themselves provide in-home care for developmentally disabled members. We cannot endorse a construction that yields a result antithetical to our nation's "goal of providing families of children with disabilities with the support they need to raise their children at home." (42 U.S.C. § 15091(c).) We conclude a parent's IHSS compensation to provide care to keep a developmentally disabled child at home is excluded from income under 24 Code of Federal Regulations part 5.609(c)(16) (2020).

CONCLUSION

We reverse the Court of Appeal's judgment and remand the matter for further proceedings consistent with this opinion.

CHIN, J.

We Concur:

LIU, J.
CUÉLLAR, J.
GROBAN, J.

REILLY v. MARIN HOUSING AUTHORITY

S249593

Dissenting Opinion by Chief Justice Cantil-Sakauye

The federal Housing Choice Voucher program, 42 U.S.C. section 1437f (hereafter Section 8), provides housing assistance to low-income families, with the amount of the assistance determined by the family's annual income. Under 24 Code of Federal Regulations part 5.609(c) (2020),[1] certain funds are excluded from the calculation of annual income. Among the funds excluded from that calculation are state payments to a family providing at-home care to a developmentally disabled family member *if* those payments "offset the cost of services and equipment needed to keep the developmentally disabled family member at home." (§ 5.609(c)(16).) The majority adopts an expansive interpretation of part 5.609(c)(16), holding that, in addition to excluding the state's reimbursement of out-of-pocket expenses, the regulation also covers the compensation paid to parents who are hired by the state to provide full-time care to their developmentally disabled children. Every other appellate court to consider part 5.609(c)(16) — the United

[1] Hereafter part 5.609(c) — and, when referred to in a citation parenthetical, § 5.609(c). (See California Style Manual (2000) § 2:44.)

States Court of Appeals for the Fifth Circuit, the Minnesota Supreme Court, and our Court of Appeal — has adopted a narrower construction, limiting the exclusion to those state payments that reimburse a family's expenditures. In contrast, these courts have held that compensation to parents for their labor in caring for a developmentally disabled child, which constitutes genuine income to the family, is outside the scope of the exclusion.

The conclusion reached by these other appellate courts is the most straightforward reading of the relevant regulatory language, which is restricted to payments made "to offset the cost of services and equipment." (§ 5.609(c)(16).) And this interpretation fully serves my understanding of the purpose underlying the regulation, which is to ensure that families caring for a developmentally disabled family member are not disadvantaged in their receipt of Section 8 housing assistance by their acceptance of state help in keeping the family member at home. Significantly, the narrower interpretation is the one urged on us by the United States Department of Housing and Urban Development (HUD), the federal agency that drafted the regulation.

The majority's more expansive construction of the regulation relies on a strained reading that disregards the actual language, and it will have unfortunate and selective public policy consequences. First, the majority's ruling will introduce unintended and unwarranted inequities into the

administration of Section 8. Second, the majority's misreading will siphon scarce housing assistance from California's other low-income families, inevitably reducing the number of families who will benefit from the Section 8 program. In light of the misguided, if well-intentioned, nature of the majority's analysis, I respectfully dissent.

I. BACKGROUND

A. Plaintiff's Circumstances

Plaintiff Kerrie Reilly and her adult daughter, K.R., live together in a three-bedroom apartment in Marin County. Due to a severe developmental disability, K.R. requires around-the-clock supervision. Under the In-Home Supportive Services program (IHSS; Welf. & Inst. Code, § 12300 et seq.), the state pays plaintiff to provide full-time home care and supervision to her daughter. Without such care, K.R. would likely be placed in an institution. At the time of the trial court proceedings, the family's annual income exceeded $52,000, comprised of K.R.'s social security benefits of $11,000 and more than $41,000 in IHSS compensation to plaintiff.

Plaintiff is a long-time participant in Section 8. In 2004, plaintiff's second daughter, R.R., moved from the family's apartment to attend college. For the next five years, plaintiff falsely represented in annual, sworn certifications to the Marin Housing Authority (Authority), the agency responsible for administering her Section 8 benefits, that

R.R. continued to live with her.[2] After the Authority learned the truth, plaintiff admitted that she made the misrepresentations because she was concerned that she and K.R. would be required to move from their three-bedroom apartment if she disclosed R.R.'s move. Plaintiff's false representations also caused her to be granted, the Authority concluded, a larger Section 8 housing voucher than she would have received had the Authority known the true circumstances. When the Authority confronted plaintiff, she agreed to repay more than $16,000 in excess subsidies under a payment schedule. Unfortunately, plaintiff was often unable to make the scheduled payments. The Authority's patience ran out in 2015, when it terminated her participation in the Section 8 program.

As the Authority informed the trial court in explaining its decision to terminate plaintiff, its implementation of Section 8 is severely constrained by limited funding. In 2015, more than 5,000 families in Marin County eligible for Section 8 housing assistance were on a waiting list because the Authority was unable to help them. At the time, the Authority was authorized to grant vouchers to only 2,153 families; in practice, it provided rent vouchers only to 1,957

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[2] The majority's statement that plaintiff "did not inform" the Authority of R.R.'s departure (maj. opn., *ante*, at p. 2) is a charitable but misleading characterization of plaintiff's repeated and knowing falsehoods.

families due to insufficient funding. The Authority decided to terminate plaintiff because, it explained, although it "has been grappling with the possibility of terminating hundreds of compliant families from the Section 8 Program, [plaintiff] has made it a practice to violate rules of the Section 8 Program and her contractual obligations." Contrary to majority's claim (maj. opn., *ante*, at p. 2), the termination did not require plaintiff's eviction from her apartment, although she would become responsible for paying the entire rent.

In this mandate action challenging her termination, plaintiff argued that the Authority had improperly included her IHSS payments when calculating her annual income under Section 8, causing the Authority to understate the housing subsidy due her. The trial court disagreed, sustaining the Authority's demurrer without leave to amend upon concluding that the IHSS payments were properly included in plaintiff's income calculation. The Court of Appeal affirmed in a published decision. (*Reilly v. Marin Housing Authority* (2018) 23 Cal.App.5th 425, 439 (*Reilly*).) The Supreme Court now reverses the Court of Appeal.

B. Governing Law

1. Section 8

The Section 8 voucher program "is funded by HUD and administered by state and local public housing authorities . . . in accordance with regulations promulgated by HUD.

When a rent payment exceeds a specified percentage of a family's monthly income, the federal program pays the balance." (*Inclusive Communities Project, Inc. v. Lincoln Property Co.* (5th Cir. 2019) 920 F.3d 890, 900.) As HUD characterizes the program in an amicus curiae brief, "Section 8 is not an entitlement program; Congress appropriates only a fixed sum for vouchers . . . each year, and not every otherwise qualified family receives a voucher."[3] Each administering agency is assigned a maximum number of annual vouchers and has a fixed budget.[4] Yet Congress has underfunded the program in recent years, requiring

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[3] If the Authority's experience is any guide, HUD's concession that "not every otherwise qualified family receives a voucher" is a gross understatement. More than 7,000 families in Marin County are eligible for assistance under Section 8, but fewer than 2,000 are actually provided vouchers.

[4] See Congressional Research Service, An Overview of the Section 8 Housing Programs: Housing Choice Vouchers and Project-Based Rental Assistance, No. RL32284 (Feb. 7, 2014). A copy of the report can be found at <https://www.everycrsreport.com/reports/RL32284.html#:~:text=The%20voucher%20program%20is%20funded,an%20annual%20budget%20from%20HUD.> (as of Aug. 28, 2020). All Internet citations in this opinion are archived by year, docket number, and case name at <http://www.courts.ca.gov/38324.htm>.

these agencies to operate at only 85 percent of their assigned budgets.[5]

Each subsidized family is required to contribute to its rent payment an amount equal to "thirty percent of the tenant family's monthly 'adjusted income' or ten percent of its monthly gross income, whichever is greater." (*Hayes v. Harvey* (3d Cir. 2018) 903 F.3d 32, 36, citing 42 U.S.C. § 1437f(*o*).) "Adjusted income" for this purpose is a family's "annual income," minus certain expenses and allowances. (24 C.F.R. § 5.611 (2020); *DeCambre v. Brookline Housing Authority* (1st Cir. 2016) 826 F.3d 1, 9 (*DeCambre*).) The calculation of annual income therefore determines the proportion of its monthly rent that a family participating in Section 8 must pay.

For purposes of Section 8, "annual income" constitutes "all amounts, monetary or not" that "[g]o to, or on behalf of, the family head or spouse . . . or to any other family member." (24 C.F.R. § 5.609(a)(1), (3) (2020); *DeCambre*, *supra*, 826 F.3d at p. 9.) Among other things, this includes "[t]he full amount, before any payroll deductions, of wages and salaries, . . . and other compensation for personal services." (24 C.F.R. § 5.609(b)(1) (2020).) Subpart (c) of part 5.609 lists

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[5] Eligibility Team, *How the Housing Choice (Section 8) Voucher Program is Funded* (Jan. 22, 2016) <https://eligibility.com/section-8/how-the-housing-choice-section-8-voucher-program-is-funded#> (as of Aug. 28, 2020).

16 exclusions from annual income. In addition to the exclusion on which plaintiff relies, part 5.609(c)(16), which excludes certain payments to a family providing at-home care to a developmentally disabled family member, these include payments received "for the care of foster children" (§ 5.609(c)(2)), payments "for, or in reimbursement of, the cost" of medical expenses (§ 5.609(c)(4)), students' financial aid (§ 5.609(c)(6)), certain nonrecurring payments (§ 5.609(c)(3), (9)), and student earnings and adoption assistance payments "in excess of $480" (§ 5.609(c)(11), (12)).

2. IHSS

The purpose of the IHSS program is "to avoid institutionalization of incapacitated persons. It provides supportive services to aged, blind, or disabled persons who cannot perform the services themselves and who cannot safely remain in their homes unless the services are provided to them. The program compensates persons who provide the services to a qualifying incapacitated person." (*Basden v. Wagner* (2010) 181 Cal.App.4th 929, 931 (*Basden*).) IHSS is administered by the state's counties (*Skidgel v. California Unemployment Ins. Appeals Bd.* (2018) 24 Cal.App.5th 574, 578–579), which either hire a caregiver for the recipient or pay the recipient directly to cover the costs of a caregiver. (*Basden*, at p. 934; Welf. & Inst. Code, §§ 12302, 12304, subd. (a).) Counties are required to give preference to a care provider selected by the recipient, and some IHSS care

recipients are entitled to select and hire their own provider. (Welf. & Inst. Code, §§ 12303.4, subd. (b); 12304, subd. (a), 12304.1; *Skidgel*, *supra*, 24 Cal.App.5th at p. 579.)

The state may hire parents to care for their children under IHSS, but only "when the [parent] leaves full-time employment or is prevented from obtaining full-time employment because no other suitable provider is available." (Welf. & Inst. Code, § 12300, subd. (e); see generally, *Basden*, *supra*, 181 Cal.App.4th at pp. 939–940.) Of the 535,000 IHSS care providers in California, about 70 percent are a relative or spouse of the recipient, and about one-quarter of those are a parent. Slightly less than half of IHSS providers — 250,000 persons — are, like plaintiff, relatives of the person for whom they provide care and live in the same home.[6]

Plaintiff's claim that her IHSS payments should be excluded from the calculation of her Section 8 annual income is premised on part 5.609(c)(16), which excludes "[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the

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[6] The State Department of Social Services reports a wide range of monthly data regarding participation in the IHSS program. The information cited in this paragraph is from a table of data for June 2020, maintained at IHSS Program Data <https://www.cdss.ca.gov/inforesources/ihss/program-data> (as of Aug. 28, 2020). The cited data is available under a tab labeled "Provider Details," which does not appear to be accessible through a separate URL.

developmentally disabled family member at home." The Authority and HUD interpret the phrase "[a]mounts paid . . . to offset the cost of services and equipment" to cover only payments by the state to compensate for a family's actual expenditures on services or equipment. (§ 5.609(c)(16.) Because plaintiff's IHSS compensation was not used to pay for the costs of services or equipment purchased by the family to care for K.R., the Authority explains, it did not exclude plaintiff's IHSS payments when calculating her annual income. Plaintiff contends, however, and the majority holds, that the phrase "[a]mounts paid . . . to offset the cost of services and equipment" (*ibid.*) should be construed to cover any payment made to a family by the state in connection with the in-home care of a developmentally disabled family member, regardless of whether the payment offset an expenditure by the family or compensated a family member hired by the state to care for the disabled person.

II. DISCUSSION

A. The Language of Part 5.609(c)(16) Precludes the Majority's Interpretation

We review questions of statutory interpretation de novo. (*Christensen v. Lightbourne* (2019) 7 Cal.5th 761, 771.) Under "our familiar principles of statutory construction," " '[w]e start with the statute's words, which are the most reliable indicator of legislative intent.' [Citation.] ' "We interpret relevant terms in light of their ordinary meaning,

while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose." ' [Citations.] 'If we find the statutory language ambiguous or subject to more than one interpretation, we may look to extrinsic aids, including legislative history or purpose to inform our views.' " (*In re A.N.* (2020) 9 Cal.5th 343, 351–352 (*A.N.*).) We take the same approach when interpreting administrative regulations. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1011.) Based on the ordinary meaning of its language, we should conclude that the part 5.609(c)(16) exclusion is limited to state payments that compensate a family's actual expenditures for services and equipment to keep a developmentally disabled family member in their home.

As noted above, part 5.609(c)(16), excludes from a Section 8 family's annual income "[a]mounts paid by a State agency to a family . . . to offset the cost of services and equipment needed to keep the developmentally disabled family member at home." According to Merriam-Webster, the verb "offset" means "to serve as a counterbalance for : COMPENSATE." (Merriam-Webster Dict. Online (2020) <https://www.merriam-webster.com/dictionary/offset> [as of Aug. 28, 2020]; see, e.g., *Steinmeyer v. Warner Cons. Corp.* (1974) 42 Cal.App.3d 515, 518 ["An 'offset' may be defined as

a claim that serves to counterbalance or to compensate for another claim"].) Part 5.609(c)(16) therefore excludes payments by the state to a family that are made to "counterbalance" the cost of services and equipment needed to keep the developmentally disabled family member at home. Necessarily, this language anticipates that an equivalent cost has been or will be paid by the family for those services or equipment, since there would be nothing to counterbalance in the absence of such an expenditure.

If HUD, the agency that drafted part 5.609(c)(16), had intended the regulation to bear the broader meaning imposed by the majority, it could have used a more inclusive phrase, such as amounts paid by the state "*for* services and equipment," instead of requiring the excluded payments to "offset the cost" of services and equipment. This is the approach taken by HUD in drafting the only part 5.609(c) exclusion that undoubtedly bears the breadth bestowed on subpart (c)(16) by the majority. Part 5.609(c)(2) excludes "[p]ayments received *for the care* of foster children or foster adults (usually persons with disabilities, unrelated to the tenant family, who are unable to live alone)," leaving no uncertainty about its meaning.[7] (Italics added.) By imposing

[7] The parenthetical presumably explains the reason for the breadth of the exclusion: To provide a benefit to low-income families that care for unrelated persons who are in

a similar breadth on part 5.609(c)(16), the majority's reading renders pointless the use of the term "offset" because its reading is not restricted to the exclusion of payments that "offset the cost" of services and equipment. It is an elementary principle of statutory interpretation that " '[a]n interpretation that renders statutory language a nullity is obviously to be avoided.' " (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1039.) The majority's expansive approach also defies the general interpretive principle that exceptions to a statute are to be construed narrowly. (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 771; *Simpson Strong-Tie Co. v. Gore* (2010) 49 Cal.4th 12, 22.)

HUD has confirmed this understanding in an amicus curiae brief, arguing that it intended the regulation to reach only state payments that reimburse a family's expenditures. As HUD reasons, this narrower reading "accords with the basic policy objectives of the regulation. [Citation.] As HUD

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distressed circumstances. The majority contends that interpreting subpart (c)(2) differently from subpart (c)(16) "would be unreasonable" because both families are providing "the same care." (Maj. opn., *ante*, at p. 28.) The different approaches, however, are readily explained. HUD could reasonably have concluded that the familial connection required by part 5.609(c)(16) makes it unnecessary to bestow this type of benefit on families covered by that exclusion. In any event, the distinctly different language in the two exclusions suggests that they should be interpreted differently.

has explained, in promulgating [part] 5.609(c)(16), the exclusion exists because 'families that strive to avoid institutionalization should be encouraged, and not punished.' [Citation.] The regulation pursues this goal in part by ensuring that families that choose different means of keeping the developmentally disabled family member at home are treated evenhandedly."[8]

Plaintiff argues that the term "cost" could cover more than a monetary expenditure. In ordinary parlance, "cost," admittedly, can refer not simply to the price paid for something, but more broadly to "the outlay or expenditure (as of effort or sacrifice) made to achieve an object" or the "loss or penalty incurred especially in gaining something." (Merriam-Webster Dict. Online (2020) <https://www.merriam-webster.com/dictionary/cost> [as of Aug. 28, 2020].) In this connection, plaintiff invokes the economic concept of an "opportunity cost," that is, the opportunities foregone when a person makes a particular economic choice. Here, the argument goes, "cost" refers to the

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[8] Leaving aside debate about the precise degree of deference to be accorded HUD's interpretation under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8, the administrative agency's interpretation undoubtedly deserves serious consideration. Although the majority does address HUD's views, its explanation for rejecting them amounts to little more than a disagreement with HUD over which interpretation best serves HUD's goals. (Maj. opn., *ante*, at pp. 28–30.)

employment opportunities that plaintiff has foregone in order to provide care under IHSS. The payments therefore "offset" the cost to plaintiff of not having other employment. This is hardly the "ordinary meaning" of the language HUD chose to use. (*A.N.*, *supra*, 9 Cal.5th at p. 351.) We typically refer to a payment for services as "compensation" or, more simply, "payment" for the work performed. We do not refer to compensation for providing a service as "offsetting the cost" of the service provider's own effort, much less the service provider's decision to take this job, rather than a different hypothetical job.

The majority takes a different tack in justifying its interpretation, suggesting that because much of the IHSS compensation paid to plaintiff will ultimately be spent on costs associated with supporting K.R. in the family home, that compensation is paid to "offset the cost of services and equipment needed to keep [K.R.] at home." (§ 5.609(c)(16); see Maj. opn., *ante*, at p. 10 ["Whether a family uses homecare payments to support itself so that it may care for a developmentally disabled member at home, or instead uses the funds to pay a third party to provide care for some of the time, these payments do no more than 'offset' the 'cost' of services and equipment needed to avoid institutionalization"].) This rationale fails for two independent reasons. First, while it finds a role for the term "offset," it disregards other aspects of the regulatory

language. Part 5.609(c)(16) excludes only state payments that offset expenditures for "services and equipment." As rationalized above, the majority's reading necessarily stretches the exclusion to cover *any* cost related to K.R.'s presence in the home, including food, clothing, and rent. These are not normally viewed as "services and equipment."[9] By restricting the exclusion to the costs of "services and equipment," HUD signaled its intent to exclude only costs related to the family member's disability, rather than the ordinary, if necessary, expenses of daily life. Second, the regulation excludes "[a]mounts paid by a state agency . . . to offset the costs of services and equipment." (§ 5.609(c)(16).) As discussed above, the IHSS compensation is paid by the state to compensate plaintiff for her labor in caring for her daughter. While it may be *used* by plaintiff to cover the costs of supporting her daughter, it is not paid by the state to offset those costs.

The restrictive view of part 5.609(c)(16) has been adopted by all other appellate courts that have considered the issue. The plaintiff in *Anthony v. Poteet Housing Authority* (5th Cir. 2009) 306 Fed. Appx. 98, the first decision to address

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[9] Indeed, because the majority reads the regulation to exclude the entirety of plaintiff's IHSS compensation on this basis, it construes "the costs of services and equipment" to cover the cost of anything plaintiff chooses to spend her compensation on.

this issue, lived with her developmentally disabled adult child. Under a state-funded program in Texas, she was employed by a private entity to care for the child and, like plaintiff, contended that the income she earned in this role should be excluded from her Section 8 income under part 5.609(c)(16). The court was willing to accept that her payments, despite being provided by a private employer, constituted payments by the state. It rejected her argument that the payments should be excluded from the calculation of her Section 8 income under part 5.609(c)(16), however, upon concluding that the exclusion applies only to reimbursements for costs paid for care by third-party providers. As the court explained, "One must incur costs before they can be offset." (*Anthony*, at p. 101.)

The Court of Appeal below reached a similar conclusion after a more extensive analysis. It declined to equate "offset" with "reimburse," but the distinction it found between the two terms was quite narrow and is inconsequential in these circumstances. As the court explained, part 5.609(c)(16) "appears to reach money paid to a family so that the family can go out and hire services or purchase equipment necessary for the developmentally disabled family member. Such payments 'offset the cost of services and equipment' that would otherwise fall on the family. But they are not reimbursement for out-of-pocket expenses if the family receives payment before, rather than after, incurring the

expense."[10] (*Reilly*, *supra*, 23 Cal.App.4th at p. 434.) The appellate court below also rejected plaintiff's argument that the IHSS payments should be excluded because "the services she provides are necessary for her daughter to live at home, and the IHSS payments offset the costs of those services." (*Id.* at p. 432.) The court rightly accepted plaintiff's contention that her services were necessary to keep K.R. at home, but it found the language of the regulation inconsistent with plaintiff's argument that it excludes any payment for necessary services. As the court explained, part 5.609(c)(16) refers to payments " 'to a family . . . to offset the cost of services . . . .' " (*Reilly*, at p. 434.) "If a payment is to 'offset the cost of services,' the payment must go to the same entity that incurs the cost of those services. Otherwise the payment does not counterbalance or compensate for the cost of services. . . . This means that the costs these payments offset must be costs that the family itself incurs." (*Ibid.*)

Most recently, the Minnesota Supreme Court reached the same conclusion in *In re Ali* (Minn. 2020) 938 N.W.2d 835 (*Ali*). In that case the plaintiff lived at home with her developmentally disabled son. Under a Minnesota state program, she was provided with a budget for the services and

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[10] The majority contends that " 'offset' as used here does not necessarily reflect th[e] same meaning" as "reimburse" (maj. opn., *ante*, at p. 10), but it does not clearly articulate what the difference might be.

equipment needed to keep him in the home, some of which she allocated to herself as compensation for her services as a caregiver. (*Id.* at p. 837.) In concluding that the sums allocated to plaintiff were not excluded from her Section 8 income under part 5.609(c)(16), the court held that the word "cost" should be interpreted as "price." (*Ali*, at p. 839.) It rejected the argument that the word should be given a broader definition for three independent reasons. First, referring to the entirety of the phrase "to offset the cost of services and equipment," the court reasoned that "[t]he 'and' between the words services and equipment suggests that the same measurement is used for each. Typically, the cost of equipment is calculated in monetary terms — such as the cost to buy or lease." (*Ibid.*) Second, like the appellate court below, *Ali* cited the use of the word "cost" elsewhere in part 5.609, where it clearly refers to "a monetary expense." (*Ali*, at p. 839.) Finally, the court noted that "when the regulators wanted to exclude amounts paid to family members for their own services, they knew how to do so — and did so unambiguously." (*Ibid.*) *Ali* cited in support two other subparts of part 5.609(c), in both of which the regulatory language, unlike part 5.609(c)(16), unambiguously excludes

state payments made to the Section 8 family.[11] (*Ali*, at p. 839.)

B. Extrinsic Aids to Interpretation Weigh Against the Majority's Approach

I do not agree with the majority that the interpretation it has imposed on the language of part 5.609(c)(16) is sufficiently reasonable to create a statutory ambiguity, but there is no need to debate the issue. The available extrinsic aids to interpretation also weigh against the majority's reading. Its interpretation assigns an unfounded purpose to the part 5.609(c)(16) exclusion that will seriously distort the intended operation of the annual income calculation for families receiving caregiving income under IHSS. In turn, this distortion will not only introduce unintended inequities among Section 8 families, but it is also likely to materially reduce the funds available to support housing subsidies for other low-income families in California. These unfortunate consequences weigh strongly against the majority's ruling.

1. The rulemaking history does not support the majority's reading

The majority finds support for its interpretation in commentary on part 5.609(c)(16) published by HUD around

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[11] In addition to addressing part 5.609(c)(2), discussed above, which excludes payments to foster families, *Ali* cited part 5.609(c)(12), which excludes from annual income "[a]doption assistance payments in excess of $480 per adopted child." (*Ali*, *supra*, 938 N.W.2d at p. 839.)

the time of its adoption. (Maj. opn., *ante*, at pp. 11–16.) Reviewing the same materials, the Court of Appeal found them "unhelpful in resolving the interpretive issue before us," and I agree. (*Reilly*, *supra*, 23 Cal.App.5th at p. 436.) As quoted by the majority (maj. opn., *ante*, at p. 12), the commentary never expressly addresses the issue before us — the distinction between state payments made to reimburse a family's expenditures for services and those made to compensate the family's own provision of services — and does little more than parrot the language of the regulation. The commentary does use the term "homecare payments," but it characterizes those payments in the language of the exclusion itself. That is, "homecare payments," as the term is used by HUD, are payments made "to offset the cost of services and equipment needed to keep a developmentally disabled family member at home, rather than placing the family member in an institution." (60 Fed.Reg. 17388, 17389 (Apr. 5, 1995).) HUD's use of the term is therefore of no help in resolving the question before us.

The majority's contrary conclusion is based on circular reasoning. Beginning with its assumption that "homecare payments" means any payment made by the state in connection with the care in the home of a developmentally disabled person, the majority concludes that by joining that term with the regulatory language HUD signaled its agreement with the majority's broad interpretation. The

conclusion that "homecare payments" refers to any payment by the state, however, rather than only those intended to offset family expenditures, is unsupported by anything in the commentary. In fact, the commentary clearly uses "homecare payments" merely as a synonym for the type of payments that are excluded by part 5.609(c)(16). Its use therefore confirms the majority's interpretation only if one assumes that the regulation should be interpreted in the manner adopted by the majority. In reality, the HUD commentary simply does not address the question before us.

The policy argument advanced by the majority in connection with HUD's commentary is, in essence, that because payments made by the state to compensate a family for caregiving services may be critical in keeping a developmentally disabled family member in the home, they must be included within the part 5.609(c)(16) exclusion. The flaw in this logic, as the Court of Appeal noted in rejecting the same argument below (*Reilly*, *supra*, 23 Cal.App.4th at p. 434), is that it ignores the language of the regulation. Merely because these payments are important in keeping a developmentally disabled family member in the home does not alone mean that they "offset the costs of service and equipment" necessary to that task. As explained above, to reach the majority's conclusion it is necessary to read the phrase "offset the costs" as synonymous with "for," a different and broader term. Because it is the regulation's language

that must guide our interpretation, we are required to respect HUD's word choice.

2. The majority's interpretation misunderstands the limited function of the part 5.609(c)(16) exclusion

The impetus underlying the majority's interpretation of part 5.609(c)(16) seems to be to maximize the Section 8 subsidy for persons in plaintiff's situation, given the difficulties of their circumstances. In other words, if some subsidy is good, more is better. Because the purpose of the exclusion is to help burdened, low income families, it is difficult to argue with the sentiment. Yet our interpretation must be guided not by our own view of proper public policy, but by the views of Congress and HUD, the agency tasked with administering the Section 8 program. In implementing the congressional plan, HUD is required to balance a wide variety of pertinent policy and equity considerations, not the least of which is the allocation of very limited public resources among many needy families. Its policy choice is reflected in the language of part 5.609(c)(16), which limits the exclusion to out-of-pocket expenses. As discussed below, HUD's choice is consistent with the foundational concerns of Section 8. The majority's more expansive view upsets the balance struck by Section 8, will create unintended inequities in its implementation, and will ultimately lead to a

diminution in the housing assistance available to other low-income Californians.

The purpose of the part 5.609(c)(16) exclusion is to ensure that the acceptance of state financial help by families who keep a developmentally disabled family member at home does not place the families at a disadvantage in receiving Section 8 housing assistance; they are to be " 'encouraged, and not punished.' " (Maj. opn., *ante*, at p. 12 [quoting HUD explanation].) To accomplish this, part 5.609(c)(16) excludes from the families' annual income funds provided by the state that the family spends on services and equipment to support at-home care of the disabled family member. By excluding this type of payment, the regulation ensures that the acceptance of state aid by families maintaining a developmentally disabled family member does not inflate their annual income and result in a diminished Section 8 subsidy. Instead, the family receives the same housing subsidy as other Section 8 families having a similar disposable income.

There is no indication in the language of the regulation itself or the limited regulatory history that, in adopting part 5.609(c)(16), HUD intended to go further and provide affirmative *advantages* to families with a developmentally disabled member at home. HUD did not say such families should be *preferentially benefitted*, and not punished. Yet such a preferential benefit is the consequence of the

majority's interpretation of part 5.609(c)(16), since it affords families who are paid to provide at-home care of a developmentally disabled family member substantially greater Section 8 housing subsidies than to other low-income families with the same family income.

Section 8 housing subsidies are determined by a participating family's income — that is, the funds available to the family to pay for rent and other daily needs.[12] The part 5.609(c)(16) exclusion is necessary because the regulations defining "annual income" for purposes of Section 8 are very broad, including "all amounts, monetary or not" that "[g]o to, or on behalf of, the family head or spouse . . . or to any other family member." (24 C.F.R. § 5.609(a)(1) (2020).) Given this comprehensive definition, any payments made by the state to a family for the care of a developmentally disabled family member are included in annual income under part 5.609(a), even if the payments are not available to the family to pay for rent and other daily needs because they merely offset family expenditures for at-home care. Properly understood, part 5.609(c)(16) prevents a family's annual income from being inflated by payments covering such out-of-

[12] Literally, it is not the subsidy that is determined by a family's income. Rather, annual income determines the amount the family is required to contribute to its rent payment. The subsidy is then the difference between this contribution and the family's actual rent. For purposes of this analysis, the difference is immaterial.

pocket expenses, recognizing that those payments should not be treated as income because they do not increase the resources available to the family for daily expenses. In the absence of the exclusion, the acceptance of such aid would reduce the family's Section 8 subsidy without improving its standard of living — in the words of HUD, such families would be "punished."

This highlights the fundamental difference, for purposes of Section 8, between IHSS funds that are given to reimburse expenditures by a family and funds that compensate a family for the care of the disabled family member. Unlike funds that reimburse a family's expenditures, funds provided by the state to compensate for the family's caregiving activities *are* available to meet the family's daily needs. That is their purpose. In accepting compensation for their caregiving activities, IHSS participants are effectively selling their labor to the state, and the resulting income is indistinguishable, in its impact on the family's standard of living, from money earned working outside the home. For that reason, HUD has determined that this compensation is properly characterized as income under Section 8.

This is particularly true of parents who are hired to provide caregiving responsibilities under IHSS. As noted above, the state precludes a parent's acceptance of full-time work outside the home if the parent is receiving IHSS

compensation; such funding is available to parents only if "the [parent] leaves full-time employment or is prevented from obtaining full-time employment because no other suitable provider is available." (Welf. & Inst. Code, § 12300, subd. (e).) In other words, to receive funds from IHSS a parent must accept their disabled child's care as, in effect, their *job*. Plaintiff is an example. So far as the appellate record reveals, caring for her daughter is her full-time activity, and IHSS compensation is her only income.

The majority argues that the acceptance of compensation from IHSS is not " 'an employment for all purposes.' " (Maj. opn., *ante*, at p. 24.) The issue here, however, is not whether IHSS "employs" caregivers for all purposes. As defined by part 5.609, "annual income" includes any "compensation for personal services," not just income from formal employment. (24 C.F.R. § 5.609(b)(1) (2020).) The issue is therefore whether the compensation received from IHSS by persons like plaintiff should be treated the same as income received by Section 8 participants from other types of compensable labor. By limiting the exclusion of part 5.609(c)(16) to offsetting payments, HUD has declared that it should. The majority may disagree with HUD's policy

choice, but it is HUD's choice, not that of the majority, that must govern our interpretation.[13]

Excluding IHSS compensation from a Section 8 family's annual income, as the majority requires, artificially reduces the family's income and, consequently, increases the family's housing subsidy above the level justified by its actual income. The effect can be substantial. Take, as an example, plaintiff. As noted above, a Section 8 family is ordinarily required to contribute 30 percent of its annual income toward rent. The remainder of its rent is paid by the program. Plaintiff's family income in the latest year for which we have information was more than $52,000, consisting primarily of plaintiff's $41,000 income from IHSS; the remainder was $11,000 in disability payments to K.R. If plaintiff's IHSS compensation is included in her annual income for purposes of Section 8, the family would be expected to contribute $1,300 toward its monthly rent. Here, the majority would exclude plaintiff's $41,000 in IHSS compensation from the family's annual income. Plaintiff's family will therefore be

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[13] The majority also finds support in the exclusion of in-home care payments from "income" under the Internal Revenue Code. (Maj. opn., *ante*, at pp. 26–27.) Because Section 8 and the Internal Revenue Code are quite different statutes with very different aims, there is no reason why the exclusion of IHSS payments from federal taxable income should weigh in favor of their exclusion from "annual income" under Section 8.

treated as though it had an annual income of $11,000, although it was living on an actual income of $52,000 per year. As a result, the family's expected rent contribution will be reduced to $275.[14] The remaining $1,005 of the family's monthly rent payment, an annual gap of more than $12,000, must be made up from the Authority's Section 8 funds. It is noteworthy that the majority nowhere acknowledges, let alone attempts to explain or justify, that its interpretation will treat a family with an annual income exceeding $52,000, more than three times the federal poverty level for a family of two, as though it were living far below the poverty line.[15] Yet that is the clear and unavoidable import of its decision.

Low-income families caring for a developmentally disabled family member at home face daily challenges unknown to the rest of us. Few would begrudge such families

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[14] This assumes the resulting subsidy does not exceed the maximum permitted. Section 8 housing subsidies are capped by a "payment standard," which is determined by local rental conditions. (See *Nozzi v. Housing Authority* (9th Cir. 2015) 806 F.3d 1178, 1184–1185; 24 C.F.R. § 982.503(b) (2020); 42 U.S.C. § 1437f(*o*)(2).) The appellate record does not contain sufficient information from which we may determine whether plaintiff's subsidy, as re-jiggered by the majority, would be capped.

[15] The 2020 federal poverty level for a family of two is an annual income of $17,240. (See U.S. Dept. Health & Human Services, Poverty Guidelines (Jan. 2020) <https://aspe.hhs.gov/poverty-guidelines> [as of Aug. 28, 2020].)

a generous housing subsidy, above and beyond that provided to other low-income families with a similar income — *if* there was evidence that Congress or HUD intended to provide them such assistance. But as noted above, the part 5.609(c)(16) exclusion was intended to ensure that families receiving aid from IHSS are simply treated the same as, not better than, other families — to ensure that they were not punished, rather than to preferentially benefit them.

3. The majority's interpretation will introduce unintended inequities into Section 8 implementation and reduce the availability of Section 8 housing assistance in California

As discussed above, the majority's reading of the part 5.609(c)(16) exclusion is contrary to its language and achieves the result, unintended by HUD, of granting IHSS participants like plaintiff substantially greater Section 8 subsidies than are justified by their actual income. That alone, of course, would be sufficient to reject the reading. But we should be particularly wary of imposing a rule HUD did not write, given the serious public policy consequences that will follow.

As explained below, these consequences are of two types. First, the interpretation adopted by the majority will create inequities among families participating in the IHSS and Section 8 programs. Families that are paid through IHSS to care at home for a developmentally disabled person will receive a far larger housing subsidy than families of

similar income that (1) IHSS funds to hire a third party to care for a developmentally disabled family member in their home or (2) receive IHSS funds to care for a *medically* disabled family member.

Second, and just as important, the majority's interpretation will reduce, by an unknown but potentially sizable amount, the number of families that can obtain Section 8 housing assistance in California. The majority's decision will not increase by a single dollar the Section 8 funds reaching California. Yet it will require the state's counties to steer a significantly larger portion of their Section 8 housing funds to families that receive IHSS compensation for caring for a disabled member in the home. These increased subsidies can come from only one place: The funds available to other low-income families who are, or would have been, receiving housing assistance under Section 8. The majority's expansive interpretation will come at the cost of assistance to other families in need.

First the inequities. IHSS provides families with the funds necessary to maintain a developmentally disabled family member in their home. The Authority or the family can use these funds to hire a third-party caregiver or, alternatively, a member of the family for the same role. Both approaches serve the purposes of IHSS and the part 5.609(c)(16) exclusion by (1) keeping the developmentally disabled family member out of an

institution and (2) ensuring that the family is not disadvantaged in the receipt of Section 8 funds by doing so. So far as appears, neither HUD nor IHSS favors one option over the other; certainly there is no language in either Section 8 or IHSS reflecting a preference, as the majority acknowledges. (Maj. opn., *ante*, at p. 21 ["despite no expressed preference for family providers per se"].) Yet under the majority's reading a family that provides its own compensated care will receive a far larger Section 8 housing voucher than the family that uses IHSS funds to hire a nonfamily member to provide the same care, even if both families have identical incomes. This occurs because, under the majority's interpretation, some or all of the income of the first family, consisting of compensation received from IHSS, is excluded from the annual income, while the income of the second family, earned outside the home, is fully included. Assuming both families end up with similar disposable income, the first family will receive a far larger subsidy under Section 8 due to the exclusion of a significant portion of its disposable income. (See *Reilly*, *supra*, 23 Cal.App.5th at pp. 437–438.) There is no indication in the language of part 5.609(c)(16) or the regulatory history to suggest that HUD intended this result; in its amicus curiae brief, HUD expressly disavows such an intent.

The majority seeks to explain away this disparity by claiming that persons needing 24-hour care " 'are more likely

to receive better continuous care from relatives living with them whose care is more than contractual.' " (Maj. opn., *ante*, at pp. 21, quoting *Miller v. Woods* (1983) 148 Cal.App.3d 862, 870.) Neither *Miller* nor our appellate record contains evidence to support the proposition that third-party caregivers provide substandard care, compared to family members.[16] But more to the point, the majority cites no evidence that HUD believed this to be true or that it crafted part 5.609(c)(16) based on any assumptions about the relative competence of family members versus third-party caregivers.

Much of the majority's policy justification for its interpretation is a recognition of the importance and difficulty of the work done by persons who care for a developmentally disabled family member at home. And I agree, there is no doubt that this work is difficult and important. If preferentially benefitting families who care for developmentally disabled members themselves, rather than retain a third-party caregiver, were actually a motive underlying part 5.609(c)(16), however, one would expect some express indication that HUD intended to favor family

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[16] The majority notes that IHSS does not pay for 24-hour care. (Maj. opn., *ante*, at p. 26.) Although true, that is of no policy consequence here. Families that hire a third-party to provide care for a developmentally disabled family member in their home must provide the same type of uncompensated off-hours care for the dependent as families that receive IHSS compensation.

care over care by third-party providers. As noted above, there is no such indication. In fact, the regulation is entirely silent, and therefore presumably neutral, on that issue.[17]

The majority's interpretation will create a similar inequity between families that receive IHSS compensation to care for a developmentally disabled family member and families that receive IHSS funds to care for a *medically* disabled family member. (See *Reilly*, *supra*, 23 Cal.App.5th at p. 438.) Like families maintaining a developmentally disabled member in the home, families that maintain a medically disabled family member in the home can receive IHSS reimbursement for expenditures necessary to keep that person at home as well as compensation for caregiving by a family member. The Section 8 exclusion covering families with a medically disabled member, however, allows the exclusion from annual income only of "[a]mounts . . . that are specifically for, or in reimbursement of, the cost of medical expenses . . . ." (§ 5.609(c)(4).) Although families caring for a

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[17] The majority also claims that if IHSS compensation is not excludable under part 5.609(c)(16), the two programs, IHSS and Section 8, will be at "cross-purposes," presumably because accepting IHSS compensation will reduce a family's Section 8 subsidy. (Maj. opn., *ante*, at p. 23.) Accepting IHSS compensation, however, is no more at cross-purposes with Section 8 than is employment generally, since all income reduces a family's Section 8 subsidy to the same degree. In any event, there are no cross-purposes. The supplement to a family's income from accepting IHSS compensation far exceeds any corresponding decline in its Section 8 subsidy.

medically disabled family member face challenges similar to those of families caring for a developmentally disabled family member, the enhanced Section 8 subsidy made available by the majority's interpretation of part 5.609(c)(16) is unavailable to families with a medically disabled member. Such families will also receive a materially reduced Section 8 subsidy compared to families that benefit from the majority's interpretation of part 5.609(c)(16).

The majority responds that this disparity "is inherent in the federal regulation itself" because part 5.609(c)(4) permits recovery only of payments to third-party providers. (Maj. opn., *ante*, at p. 19.) The argument misses the point. Part 5.609(c)(16) has a materially wider scope than part 5.609(c)(4) only because the majority has interpreted it that way. If "offset the cost of services and equipment" is interpreted to cover only the reimbursement of out-of-pocket expenditures, the two exclusions have a similar scope. It is not "the federal regulation itself," but the majority's interpretation of it, that creates an inequity. The majority otherwise fails to explain what possible public policy supports giving families with a developmentally disabled member far

more advantageous treatment under Section 8 than families with a medically disabled family member.[18]

The second unfortunate policy consequence of the majority's interpretation of part 5.609(c)(16) is its inevitable diminution of the funds available to other low-income participants in the Section 8 program. In an ideal world, the majority's award of greater Section 8 housing subsidies to low-income families receiving state compensation to care for disabled family members at home would be financed by additional congressional appropriations for the Section 8 program. In our real world, it does not work that way. Already, Section 8 housing subsidies are available only to a relatively small subset of all eligible families. The Authority, for example, is authorized to serve less than one-third of the families that qualify for its help. Yet even that does not fully capture the inadequacy of the program. Presumably because

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[18] The majority's claim that HUD believes that families with a developmentally disabled member would "receive unfair treatment" if they were not allowed to exclude income (maj. opn., *ante*, at p. 20) is based entirely on HUD's comment that such families should be " 'encouraged, and not punished' " (*ibid.*, italics omitted). Because no other class of Section 8 participants, besides foster parents, is able to exclude such income, restricting the exclusion to reimbursement of expenditures hardly constitutes punishment. The majority argues that such families will be punished if their income is not excluded because they might not qualify for Section 8 subsidy. (*Ibid.*) Again, the same is true of all other families who have too much income to qualify for Section 8; it is not a punishment.

of congressional underfunding, the Authority actually provides vouchers to only 1,957 families, rather than the 2,153 it is authorized to help.

The majority's generosity toward plaintiff and similar IHSS participants does not come without cost, and that cost will likely be borne by other low-income families in California. The funding available to the Authority will not be increased by $12,000 per year merely because the majority has decreed that plaintiff must receive an additional annual subsidy of $12,000. Instead, given the fixed and inadequate budgets available under Section 8, it is likely that every additional dollar of subsidy provided to families with a developmentally disabled member at home will come directly from the funds available to subsidize the housing of other low-income families that are, or could have been, served by the Authority. By skewing the allocation of Section 8 housing subsidies to families receiving IHSS compensation, contrary to HUD's express intent, the majority's misinterpretation of the regulation will likely lead to a reduction in the housing subsidies available to other low-income families in California, and these will likely be reduced in an amount equal to the

enhanced subsidies given by the majority to IHSS participants.[19]

If the language of part 5.609(c)(16) required this result, we would be duty-bound to implement it. In fact, the result is eminently avoidable. To bring it about, the majority stretches the language of the regulation and fails to account for the serious public policy implications weighing against its decision. Further, the dubious end result is to require the Authority to treat a family with an income of more than $50,000 as though it were living on $11,000. In the process, the majority will divert the Authority's all-too-scarce low-income housing assistance away from other needy families. Every other court to consider the issue has avoided this result, and this court should as well.

CANTIL-SAKAUYE, C. J.

We Concur:

CORRIGAN, J.
KRUGER, J.

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[19] We lack the evidence necessary to estimate the financial impact of the majority's interpretation, but the limited information available suggests that it could be substantial. According to the state data cited above (see *ante*, fn. 6), there are currently 250,000 "live-in relative providers" caring for a disabled family member under IHSS. If just a tiny proportion of those live-in relatives care for a developmentally disabled person, participate in the Section 8 program, and receive IHSS compensation similar to that of plaintiff, the majority's ruling will divert millions of dollars in Section 8 housing subsidies from other low income families state-wide.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion Reilly v. Marin Housing Authority

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U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (September 13, 2016)

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Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services

I. Introduction

The Fair Housing Act (or the Act) prohibits discrimination in the sale, rental or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.[1] The Department of Housing and Urban Development's (HUD's) Office of General Counsel issues this guidance to explain how the Fair Housing Act applies to ensure that the growing number of local nuisance ordinances and crime-free housing ordinances do not lead to discrimination in violation of the Act.[2]

This guidance primarily focuses on the impact these ordinances may have on domestic violence victims, but the Act and the standards described herein apply equally to victims of domestic violence and other crimes and to those in need of emergency services who may be subjected to discrimination prohibited by the Act due to the operation of these ordinances. This guidance therefore addresses both the discriminatory effects and disparate treatment methods of proof under the Act, and briefly describes the obligation of HUD fund recipients to consider the impacts of these ordinances in assessing how they will fulfill their affirmative obligation to further fair housing.[3] HUD will issue subsequent guidance addressing more specifically how the Fair Housing Act applies to ensure that local nuisance or crime-free housing ordinances do not lead to housing discrimination because of disability.[4]

[1] 42 U.S.C. §§ 3601-19.
[2] State and local governments use a variety of terms, including "nuisance," "chronic nuisance," "crime-free," or "disorderly behavior" to describe the types of ordinances addressed by this guidance.
[3] Local governments and landlords who receive federal funding may also violate the Violence Against Women Act, which, among other things, prohibits them from denying "assistance, tenancy, or occupancy" to any person because of domestic violence-related activity committed by a household member, guest or "other person in control" of the tenant if the tenant or an "affiliated individual" is the victim. 42 U.S.C. § 14043e-11(b)(3)(A).
[4] Discrimination prohibited by the Fair Housing Act includes "a refusal to make a reasonable accommodation in rules, policies, practices, and services, when such accommodation may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

II. Background

A. Nuisance Ordinances

A growing number of local governments are enacting a variety of nuisance ordinances that can affect housing in potentially discriminatory ways. For example, in Illinois alone, more than 100 such ordinances have been adopted.[5] These ordinances often label various types of conduct associated with a property—whether the conduct is by a resident, guest or other person—a "nuisance" and require the landlord or homeowner to abate the nuisance under the threat of a variety of penalties.[6] The conduct defined as a nuisance varies by ordinance and has ranged from conduct affecting the appearance of the property – such as littering,[7] failing to tend to one's lawn[8] or abandoning a vehicle,[9] to general prohibitions related to the conduct of a tenant or guest – such as disorderly or disruptive conduct,[10] disrupting the quiet use and enjoyment of neighboring properties,[11] or any criminal conduct occurring on or near the property.[12] Nuisance conduct often

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[5] The Sargent Shriver National Center on Poverty Law noted that in August 2013, "more than 100 municipalities in the state of Illinois alone ha[d] adopted some kind of [nuisance or crime-free] ordinance," with the number continuing to increase. Emily Werth, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances* 1 (2013), http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf. Other research has identified 37 nuisance ordinances in Pennsylvania. News Release, Pennsylvania Coalition Against Domestic Violence, *Executive Director Dierkers Praises Legislators for Shielding Domestic Violence Victims from Eviction* (Oct. 16, 2014) [hereinafter News Release], http://www.pcadv.org/Resources/HB1796_PR_10162014.pdf. Additionally, 59 nuisance ordinances have been identified across every region of the country, including in large metropolitan cities and small towns, 39 of which define domestic violence, assault, sexual abuse, or battery as nuisance activities. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women* (online supplement), 78 AM. SOCIOLOGICAL REV. 2–3, 4–18 (2013) [hereinafter Desmond & Valdez (online supplement)], http://scholar.harvard.edu/files/mdesmond/files/unpolicing.asr2013.online.supplement_0.pdf.

[6] Although nuisance ordinances have been enacted that apply to both owner-occupied and rental housing, this guidance focuses on the application of the Fair Housing Act to a local government's enactment and enforcement of nuisance and crime-free ordinances against persons who reside in rental housing. Much of the legal analysis in this guidance applies equally to owner-occupied housing as well.

[7] *See, e.g.*, PORTLAND, OR., CODE § 14.B.60.010(D)(9) (2013), https://www.portlandoregon.gov/citycode/?c=28531; CARSON CITY, NEV., CODE § 8.08.70 (2005), https://www.municode.com/library/nv/carson_city/codes/code_of_ordinances?nodeId=TIT8PUPESAMO_CH8.08NU_8.08.110JUABUNVE#!.

[8] *See, e.g.*, JEFFERSON, WIS., CODE § 197-6(F) (2002), http://ecode360.com/9781229.

[9] *See, e.g.*, ADAIR VILLAGE, OR. CODE § 40.610(5) (2012), http://www.adairvillage.org/wordpress/wp-content/uploads/2012/06/Chapter-40-Public-Nuisance-2012.pdf; CARSON CITY, NEV., CODE § 8.08.110 (2005), https://www.municode.com/library/nv/carson_city/codes/code_of_ordinances?nodeId=TIT8PUPESAMO_CH8.08NU_8.08.110JUABUNVE#!; *see also* Werth, *supra* note 5, at 17.

[10] *See, e.g.*, WATERTOWN, WIS. CODE § 12.08(d)(ii) (2014), http://www.ci.watertown.wi.us/document_center/Chapter_12.pdf; WEST CHICAGO, ILL., CODE § 10-53 (2008), https://www.municode.com/library/il/west_chicago/codes/code_of_ordinances?nodeId=COOR_CH10NU_ARTVIICHNUPRAB_S10-52VI.

[11] *See, e.g.*, ARIZ. REV. STAT. § 13-2917 (2006).

[12] *See* SPOKANE, WASH., CODE § 10.08A.20(H) (2016), https://my.spokanecity.org/smc/?Section=10.08A.020; *see also* ACLU WOMEN'S RIGHTS PROJECT & THE SOC. SCI. RESEARCH COUNCIL, *Silenced: How Nuisance Ordinances Punish Crime Victims in New York* 8 (2015) [hereinafter *Silenced*], https://www.aclu.org/report/silenced-how-nuisance-ordinances-punish-crime-victims-new-york (citing as examples of harmful nuisance ordinances PATTERSON, N.Y., CODE § 72-2(K) (2009),

includes what is characterized by the ordinance as an "excessive" number of calls for emergency police or ambulance services, typically defined as just a few calls within a specified period of time by a tenant, neighbor, or other third party, whether or not directly associated with the property.[13]

In some jurisdictions, an incident of domestic violence is defined as a nuisance without regard to whether the resident is the victim or the perpetrator of the domestic violence.[14] In other jurisdictions, incidents of domestic violence are not specifically defined as nuisances, but may still be categorized as such because the ordinance broadly defines nuisance activity as the violation of any federal, state or local law, or includes conduct such as disturbing the peace, excessive noise, disorderly conduct, or calls for emergency services that exceed a specified number within a given timeframe.[15] Some ordinances specifically define "excessive" calls for police or emergency services as nuisances, even when the person in need of services is a victim of domestic violence or another crime or otherwise in need of police, medical or other emergency assistance.[16] Even where ordinances expressly exclude victims of domestic violence or other crimes, victims are still frequently deemed to have committed nuisance conduct because police and other emergency service providers may not log the call as domestic violence, instead categorizing it incorrectly as property damage, disturbing the peace or another type of nuisance conduct.[17] Some victims also are hesitant or afraid to identify themselves as victims of abuse.[18]

The ordinances generally require housing providers either to abate the alleged nuisance or risk penalties, such as fines, loss of their rental permits, condemnation of their properties and, in some extreme instances, incarceration.[19] Some ordinances may require the housing provider to evict the resident and his or her household after a specified number of alleged nuisance

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http://www.pattersonny.org/PDFs/Codes/Chapter72-Chronic_Public_Nuisance_Abatement.pdf; SCOTIA, N.Y., CODE § 196-12 (2009), http://ecode360.com/13862484; GLENS FALLS, N.Y., CODE § 146-2(C)(7) (2000), http://ecode360.com/14410432; AUBURN, N.Y., CODE § 213-3(D)(1) (1997), http://ecode360.com/8969396; ROCHESTER, N.Y., CHARTER § 3-15(B)(1)(W) (1984), http://ecode360.com/28971339); News Release, *supra* note 5.

[13] *See* Werth, *supra* note 5, at 4, 18 n.70.

[14] *See, e.g.*, SPOKANE, WASH., CODE § 10.08A.20(H)(2)(q) (2016), *https://my.spokanecity.org/smc/?Section=10.08A.020*; *see also Silenced*, *supra* note 12, at 12; Anna Kastner, *The Other War at Home: Chronic Nuisance Laws and the Revictimization of Survivors of Domestic Violence*, 103 CALIF. L. REV. 1047, 1058 (2015); News Release, *supra* note 5.

[15] *See* Kastner, *supra* note 14, at 1058 ("Similarly, the ordinance could cause survivors to be evicted either because the 911 call was not coded as 'domestic violence' or because the landlord was not aware that domestic violence was occurring and could not create a plan to remediate the issue properly.").

[16] *See* Gretchen Arnold & Megan Slusser, *Silencing Women's Voices: Nuisance Property Laws and Battered Women*, L. & SOC. INQ. 15-17 (2015), http://nhlp.org/files/001.%20Silencing%20Women's%20Voices-%20Nuisance%20Property%20Laws%20and%20Battered%20Women%20-%20G%20Arnold%20and%20M%20Slusser.pdf.

[17] *See, e.g.*, BEACON, N.Y., CODE § 159-3(A)(20) (2011) (exempting domestic violence victims from being penalized under nuisance ordinance where a police officer properly "observes evidence that a domestic dispute occurred").

[18] *See, e.g.*, Arnold & Slusser, *supra* note 16, at 15–16.

[19] *See, e.g.*, Desmond & Valdez (online supplement), *supra* note 5, at 4-18; Cari Fais, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1189 (2008).

violations—often quite low—within a specific timeframe.[20] For example, in at least one jurisdiction, three calls for emergency police or medical help within a 30-day period is considered to be a nuisance,[21] and in another jurisdiction, two calls for such services within one year qualify as a nuisance.[22] Even when nuisance ordinances do not explicitly require evictions, a number of landlords resort to evicting the household to avoid penalties.[23]

In many jurisdictions, domestic-violence-related calls are the largest category of calls received by police.[24] "Intimate partner violence, sexual violence, and stalking are widespread" and impact millions of Americans each year.[25] "On average, 24 people per minute are victims of rape, physical violence, or stalking by an intimate partner in the United States" – more than 12 million individuals over the course of a year.[26] From 1994 to 2010, approximately 80 percent of the victims of intimate partner violence in the nation were women.[27] Women with disabilities are more likely to be subjected to domestic violence than women without disabilities.[28]

Studies have found that victims of domestic violence often do not report their initial incident of domestic violence and instead suffer multiple assaults before contacting the police or seeking a protective order or other assistance.[29] Victims of domestic violence often are reluctant to

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[20] *See* Werth, *supra* note 5 at 4 n.9.
[21] *See, e.g.*, CINCINNATI, OH. CODE § 761-3(a) (2013), http://www.municode.com/resources/gateway.asp?pid=19996&sid=35.
[22] *See* ST. LOUIS, MO., CODE § 15.42.020(G) (2014), https://www.municode.com/library/mo/st._louis/codes/code_of_ordinances?nodeId=TIT15PUPEMOWE_DIVIVOFAGPUPE_CH15.42PUNU#!.
[23] *See* Arnold & Slusser, *supra* note 16, at 13–15 (2015), http://nhlp.org/files/001.%20Silencing%20Women's%20Voices-%20Nuisance%20Property%20Laws%20and%20Battered%20Women%20-%20G%20Arnold%20and%20M%20Slusser.pdf. While local governments might not explicitly require eviction as the primary nuisance abatement method in their ordinances, in practice, governments may indicate to landlords that eviction is the only acceptable nuisance abatement method. *See, e.g.*, Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 135 (2013), http://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr__0.pdf ("[T]he [Milwaukee Police Department] cleared landlords who evicted domestic violence victims—'Plan Accepted!'—but pressured those who refused to do so.").
[24] Andrew R. Klein, NATIONAL INST. OF JUSTICE, U.S. DEP'T. OF JUSTICE, *Practical Implications of Current Domestic Violence Research* 1 (2009), https://www.ncjrs.gov/pdffiles1/nij/225722.pdf.
[25] CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T. OF HEALTH & HUMAN SERV., *Injury Prevention & Control* (last updated Sep. 8, 2014), http://www.cdc.gov/violenceprevention/nisvs/infographic.html.
[26] CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T. OF HEALTH & HUMAN SERV., UNDERSTANDING INTIMATE PARTNER VIOLENCE (2014), https://www.cdc.gov/violenceprevention/pdf/ipv-factsheet.pdf.
[27] *See* SUSAN CASTALANO, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, *Intimate Partner Violence, 1993–2010* 1 (2015), http://www.bjs.gov/content/pub/pdf/ipv9310.pdf. *See also* NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, *There's No Place Like Home: State Laws that Protect Housing Rights for Survivors of Domestic and Sexual Violence* 5 (2012) [hereinafter *No Place Like Home*], https://www.nlchp.org/Theres_No_Place_Like_Home ("In some areas of the country 1 in 4 homeless adults reported that domestic violence was a cause of their homelessness, and between 50% and 100% of homeless women have experienced domestic or sexual violence at some point in their lives.").
[28] OFFICE ON WOMEN'S HEALTH, U.S. DEP'T. OF HEALTH AND HUMAN SERV., *Violence Against Women With Disabilities* (last updated Sep. 4, 2015) [hereinafter WOMEN'S HEALTH], http://www.womenshealth.gov/violence-against-women/types-of-violence/violence-against-women-with-disabilities.html.
[29] KLEIN, *supra* note 24, at 6.

seek assistance because of, among other things, fear of reprisal from their attackers.[30] Nuisance ordinances (and crime-free housing ordinances) are becoming an additional factor that operates to discourage victims from reporting domestic violence and obtaining the emergency police and medical assistance they need.[31]

For example, a woman in Norristown, Pennsylvania who had been subjected to domestic violence by her ex-boyfriend was warned by police that if she made one more 911 call, she and her young daughter would be evicted from their home pursuant to the local nuisance ordinance.[32] The ordinance operated under a "three strike" policy, allowing her no more than two calls to 911 for help. As a result, the woman was too afraid to call the police when her ex-boyfriend returned to her home and stabbed her. Rather than call for an ambulance, she ran out of her house in the hope she would not lose her housing.[33] A neighbor called the police and, due to the serious nature of her injuries, the woman was airlifted to the hospital. A few days after she returned home from the hospital, she was served with eviction papers pursuant to the local nuisance ordinance.[34]

B. Crime-Free Lease Ordinances and Crime-Free Housing Programs

A number of local governments enforce crime-free lease ordinances or promote crime-free housing programs that incorporate the use of crime-free lease addenda.[35] Some of these ordinances operate like nuisance ordinances and penalize housing providers who fail to evict tenants when a tenant, resident or other person has allegedly engaged in a violation of a federal, state and/or local law, regardless of whether the tenant or resident was the victim of the crime at issue.[36] Others mandate or strongly encourage housing providers to include lease provisions that require or permit housing providers to evict tenants where a tenant or resident has allegedly engaged in a single incident of criminal activity, regardless of whether the activity occurred on or off the property.[37]

These provisions often allow housing providers to evict tenants when a guest or other person allowed onto the property by the tenant or resident allegedly engages in criminal activity on

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[30] *See* Arnold & Slusser, *supra* note 16, at 15.
[31] *Id.* at 22; Fais, *supra* note 19, at 1202; Werth, *supra* note 5, at 8.
[32] Complaint at 9–17, *Briggs v. Borough of Norristown et al.*, No. 2013 C 2191 (E.D. Pa. Apr. 24, 2013) [hereinafter Complaint], http://www.aclu.org/files/assets/norristown_complaint.pdf.
[33] *Id.*; Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911*, GUARDIAN, (Sep. 11, 2015), https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911.
[34] *Id.* *See also* Press Release, U.S. Department of Housing and Urban Development, HUD and Philadelphia Area Borough Settle Allegations of Housing Discrimination Against Victims of Domestic Violence (Oct. 2, 2014), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2014/HUDNo_14-121.
[35] *See, e.g.*, HESPERIA, CAL., HEALTH AND SAFETY CODE § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR.
[36] *See* Werth, *supra* note 5, at 3 n.8.
[37] *See, e.g.*, SAN BERNARDINO, CAL., HEALTH AND SAFETY CODE § 15.27.050 (2011), https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=19233; City of San Bernardino Crime Free Multi-Housing Program Crime-Free Lease Addendum, https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=11259 ("A single violation of any of the provisions of this added addendum shall be deemed a serious violation and a material and irreparable non-compliance. It is understood that a single violation shall be good cause for termination of the lease.").

or near the property, regardless of whether the resident was a victim of the criminal activity or a party to it.[38] The criminal activity that constitutes a lease violation is frequently broadly and ambiguously defined and may include any violation of federal, state or local laws, however minor.[39] Thus, disorderly conduct, excessive noise and similar activity may constitute a crime resulting in eviction.[40] Crime-free lease addenda often do not provide exceptions for cases where a resident or tenant is the victim of domestic violence or another crime.[41] And, as previously noted, even where exceptions do exist, victims of domestic violence and other crimes may be mistakenly categorized and face eviction despite the exception.[42] For example, police often arrest both the victim and the perpetrator under "dual arrest" policies when a victim has defended herself or himself from the perpetrator.[43]

Furthermore, some crime-free housing ordinances mandate or strongly encourage housing providers to implement lease provisions that require eviction based on an arrest alone, or do not require an arrest or conviction to evict a tenant, but rather allow housing providers to rely on a preponderance of the evidence standard while remaining silent on who is responsible for determining that this standard has been met.[44] The principles discussed in HUD's "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"[45] are instructive in

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[38] *See, e.g.*, HESPERIA, CAL., HEALTH AND SAFETY CODE § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR (mandating that all landlords include the Hesperia Crime-Free Lease Addendum, which requires that a single violation of the addendum, whether committed by resident, guest, or other person, provides good cause for termination of tenancy); Hesperia Crime-Free Lease Addendum, http://www.cityofhesperia.us/DocumentCenter/View/13394.

[39] *See* Werth, *supra* note 5, at 17.

[40] *See, e.g.*, WATERTOWN, WIS. CODE § 12.08(d)(ii) (2014), http://www.ci.watertown.wi.us/document_center/Chapter_12.pdf.

[41] *See* Werth, *supra* note 5, at 8.

[42] *See, e.g.*, OPEN COMMUNITIES & SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, *Reducing the Cost of Being Crime Free: Alternative Strategies to Crime Free/Nuisance Property Ordinances in Illinois* 3 (2015) http://povertylaw.org/sites/default/files/images/advocacy/housing/reducing-the-cost-of-crime-free.pdf.

[43] *See, e.g.*, Kastner, *supra* note 14, at 1065; *see* Werth, *supra* note 5, at 21.

[44] *See, e.g.*, Werth, *supra* note 5, at 12 (noting that some ordinances allow evictions based on arrests or citations alone); LAS VEGAS, NEV., CODE § 6.09.20 (2012) (requiring landlords to complete training encouraging use of Crime-Free Addendum, which permits eviction based on single alleged violation, as shown by preponderance of evidence, rather than criminal conviction; Las Vegas Crime Free Multi-Housing Program Crime-Free Addendum (2014), http://www.lvmpd.com/Portals/0/pdf/prevention/English_CFAddendum01_2014.pdf); SAN BERNARDINO, CAL., HEALTH AND SAFETY CODE § 15.27.050 (2011), https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=19233 (requiring landlords to use Crime-Free Lease Addendum, which permits eviction based on single alleged violation of addendum as shown by preponderance of evidence, rather than criminal conviction); City of San Bernardino Crime Free Multi-Housing Program Crime-Free Lease Addendum, https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=11259); Hesperia, Cal., Health and Safety Code § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR (providing chief of police discretion as to whether or not to notify the landlord of the evidence or documents, if any, used to determine that a resident engaged in criminal activity); *see also* Werth, *supra* note 5, at 4.

[45] *See* HELEN R. KANOVSKY, GENERAL COUNSEL, U.S. DEP'T OF HOUS. & URBAN DEV., *Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (2016), https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf.

evaluating the fair housing implications of crime-free lease ordinances and crime-free lease addenda mandated or encouraged by localities and enforced by housing providers.[46]

III. Discriminatory Effects Liability and Enforcement of Nuisance Ordinances and Crime-Free Housing Ordinances

A local government's policies and practices to address nuisances, including enactment or enforcement of a nuisance or crime-free housing ordinance, violate the Fair Housing Act when they have an unjustified discriminatory effect, even when the local government had no intent to discriminate.[47] Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification.[48] Thus, where a policy or practice that restricts the availability of housing on the basis of nuisance conduct has a disparate impact on individuals of a particular protected class, the policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the local government, or if such interest could be served by another practice that has a less discriminatory effect.[49]

Discriminatory effects liability is assessed under a three-step, burden-shifting standard requiring a fact-specific analysis.[50] The following sections discuss the three steps used to analyze whether a local government's enforcement of a nuisance or crime-free housing ordinance results in a discriminatory effect in violation of the Act. As explained in Section IV, below, a different analytical framework is used to evaluate claims of intentional discrimination.

A. Evaluating Whether the Challenged Nuisance Ordinance or Crime-Free Housing Ordinance Policy or Practice Has a Discriminatory Effect

In the first step of the analysis, a plaintiff (or HUD in an administrative enforcement action) has the burden to prove that a local government's enforcement of its nuisance or crime-free housing ordinance has a discriminatory effect, that is, that the local government's nuisance or crime-free housing ordinance policy or practice results or predictably will result in a disparate impact on a group of persons because of a protected characteristic.[51] This is also true for a local

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[46] In addition to being liable for their own discriminatory conduct, housing providers may have a cause of action under the Fair Housing Act against a locality if a locality's ordinance requires housing providers to discriminate based on a protected characteristic. *See, e.g.*, *Waterhouse v. City of Am. Canyon*, 2011 U.S. Dist. LEXIS 60065, *1, 13–15 (N.D. Cal. 2011) (concluding that "forcing the owners of a mobile-home park to discriminate on the basis of familial status through a series of city ordinances . . . violates the federal Fair Housing Act.").

[47] 24 C.F.R. § 100.500; *accord Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, *Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 2511 (2015).

[48] For purposes of this guidance, the term "policy or practice" encompasses governments' nuisance and crime-free ordinances as well as their enforcement of the ordinances. It also includes government activities related to crime-free housing programs that may not be specified by ordinance.

[49] 24 C.F.R. § 100.500; *see also Inclusive Cmtys. Project*, 135 S. Ct. at 2514–15 (summarizing HUD's Discriminatory Effects Standard in 24 C.F.R. § 100.500).

[50] *See* 24 C.F.R. § 100.500.

[51] 24 C.F.R. § 100.500(c)(1). A discriminatory effect can also be proven with evidence that the policy or practice creates, increases, reinforces, or perpetuates segregated housing patterns. *See* 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing disparate impact claims, which in HUD's experience are more commonly asserted in this context.

government's policy or practice encouraging or incentivizing housing providers to adopt crime-free lease addenda (and the discussion throughout the guidance applies equally to such actions). This burden is satisfied by presenting evidence proving that the challenged policy or practice actually or predictably results in a disparate impact.

Different data sources may be available and useful to demonstrate that a government's ordinance actually or predictably results in a disparate impact, which is ultimately a fact-specific and case-specific inquiry. While state or local statistics typically are presented where available and appropriate based on the local government's jurisdiction or other facts particular to a given case, national statistics may be relevant and appropriate, depending on the specific case and the nature of the claim.

Local statistics are likely to be available for use in establishing whether a local government's enforcement of its nuisance or crime-free ordinance has a disparate impact. Other evidence – for example, resident data and files, demographic data, city and police records including data on enforcement of nuisance or crime-free ordinances, citations and correspondence between housing providers and city officials and court records regarding nuisance abatement – may also be relevant in determining whether a challenged nuisance or crime-free housing ordinance policy or practice causes a disparate impact.

Evidence of nationwide disparities in the enforcement of nuisance or crime-free ordinances based on protected characteristics may be relevant to consider, depending on the specific case and the nature of the claim.[52] Also, in some cases, national statistics may provide grounds for HUD to investigate complaints challenging the enforcement of nuisance ordinances. For example, nationally, women comprise approximately 80 percent of all individuals subjected to domestic violence each year,[53] which may provide grounds for HUD to investigate under the Fair Housing Act allegations that the adverse effects of a nuisance ordinance fall more heavily on victims of domestic violence.

Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a local government will have the opportunity to offer evidence to refute the claim that its nuisance ordinance causes a disparate impact on one or more protected classes.

B. Evaluating Whether the Challenged Nuisance Ordinance or Crime-Free Housing Ordinance is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the local government to prove that the challenged nuisance or crime-free housing ordinance is necessary

[52] *Compare Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population."), *with Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995) ("In some cases national statistics may be the appropriate comparable population. However, those cases are the rare exception and this case is not such an exception.") (citation omitted).
[53] *See* CASTALANO, *supra* note 27, at 1.

to achieve a substantial, legitimate, nondiscriminatory interest of the local government.[54] The interest of the local government may not be hypothetical or speculative, meaning the local government must be able to prove with evidence what the government interest is, that its interest is legitimate, substantial and nondiscriminatory, and that the challenged practice is necessary to achieve that interest.[55] Assertions based on generalizations or stereotypes about persons deemed to engage in nuisance or criminal conduct are not sufficient to prove that an ordinance or its enforcement is necessary to achieve the local government's substantial, legitimate, nondiscriminatory interest.

As explained in the preamble to HUD's 2013 Discriminatory Effects Final Rule, a "substantial" interest is a core interest of the organization that has a direct relationship to the function of that organization.[56] The requirement that an interest be "legitimate" means that the local government's justification must be genuine and not false or fabricated.[57] A number of local governments have nuisance or crime-free ordinances that encourage, require or are likely to result in housing providers evicting or taking other adverse housing actions against residents, including victims of domestic violence and other crimes, because the residents requested police, medical or other emergency assistance, without regard to whether the calls were reasonable under the circumstances.[58] Where such a practice is challenged and proven to have a disparate impact, the local government would have the difficult burden to prove that cutting off access to emergency services for those in grave need of such services, including victims of domestic violence or other crimes, thereby potentially endangering their lives, safety and security,[59] in fact achieves a core interest of the local government and was not undertaken for discriminatory reasons or in a discriminatory manner. Similarly, if the local government's policy or practice requires or encourages housing providers to evict victims of domestic violence or other crimes or others in need of emergency services, the local government would have the burden to prove that such a policy or practice in fact is necessary to achieve the local government's substantial, legitimate, nondiscriminatory interest.

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a local government successfully proves that its nuisance or crime-free housing ordinance, policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. If the analysis reaches the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another policy or practice that has a less discriminatory effect.[60]

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[54] 24 C.F.R. § 100.500(c)(2).
[55] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013) (preamble to final rule codified at 24 C.F.R. pt. 100).
[56] 78 Fed. Reg. at 11470.
[57] *Id.*
[58] *See* Werth, *supra* note 5, at 8.
[59] When domestic violence victims are evicted on the basis of a nuisance citation, they may often lack alternative housing and experience homelessness. *See, e.g.*, Amanda Gavin, *Chronic Nuisance Ordinances: Turning Victims of Domestic Violence into "Nuisances" in the Eyes of Municipalities*, 119 PENN ST. L. REV. 257, 260 ("on any given day, over 3000 people face homelessness because they are unable to find shelter away from their abusers . . . making domestic violence a leading cause of homelessness in the United States").
[60] 24 C.F.R. § 100.500(c)(3); *accord Inclusive Cmtys. Project*, 135 S. Ct. at 2515.

The identification of a less discriminatory alternative will depend on the particulars of the policy or practice at issue, as well as the specific nature of the underlying problem the ordinance seeks to address.

IV. Intentional Discrimination and Enforcement of Nuisance Ordinances or Crime-Free Housing Ordinances

A local government may also violate the Fair Housing Act if it intentionally discriminates in its adoption or enforcement of a nuisance or crime-free housing ordinance. This occurs when the local government treats a resident differently because of sex, race or another protected characteristic. The analysis is the same as is used to analyze whether any housing ordinance was enacted or enforced for intentionally discriminatory reasons.

Generally, two types of claims of intentional discrimination may arise. One type of intentional discrimination claim arises where a local government enacts a nuisance ordinance or crime-free housing ordinance for discriminatory reasons. Another type is where a government selectively enforces a nuisance or crime-free housing ordinance in a discriminatory manner. For the first type of claim, in determining whether a facially neutral ordinance was enacted for discriminatory reasons, courts generally look to certain factors. The factors, all of which need not be satisfied, include, but are not limited to: (1) the *impact* of the ordinance at issue, such as whether the ordinance disproportionately impacts women compared to men, minority residents compared to white residents, or residents with disabilities or a certain type of disability compared to residents without disabilities; (2) the *historical background* of the ordinance, such as whether there is a history of discriminatory conduct by the local government; (3) the *specific sequence of events*, such as whether the locality adopted the ordinance only after significant community opposition motivated by race or another protected characteristic; (4) *departures from the normal procedural sequence*, such as whether the locality deviated from normal procedures for enacting a nuisance ordinance; (5) *substantive departures*, such as whether the factors usually considered important suggest that a local government should have reached a different result; and (6) the *legislative or administrative record*, such as any statements by members of the local decision-making body.[61]

For the second type of intentional discrimination claim, selective enforcement, where there is no "smoking gun" proving that a local government is selectively enforcing a nuisance or crime-free housing ordinance in a discriminatory way, courts look for evidence from which such an inference can be drawn. The evidence might be direct or circumstantial. For example, courts have noted that an inference of intentional sex discrimination could arise directly from evidence

[61] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). *See also Hidden Vill., LLC v. City of Lakewood*, 867 F. Supp. 2d 920, 942 (N.D. Ohio 2012) (utilizing *Arlington Heights* factors to analyze whether municipal action was motivated by discriminatory intent); *see, e.g.*, *Valdez v. Town of Brookhaven*, 2005 U.S. Dist. LEXIS 36713, *47 (E.D.N.Y 2005) (explaining factors probative of discriminatory intent in case involving town's alleged disproportionate enforcement of zoning and housing codes against Latinos).

that a housing providers seeks to evict female residents shortly after incidents of domestic violence.[62]

A common method of establishing intentional discrimination indirectly, through circumstantial evidence, is through the familiar burden-shifting method of proving intentional discrimination originally established by the Supreme Court in the employment context.[63] In the standard complaint alleging selective enforcement of a nuisance or crime-free ordinance for discriminatory reasons, the plaintiff first must produce evidence to establish a prima facie case of disparate treatment. This may be shown, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) a local government official (or housing provider, depending on the circumstances) took action to enforce the nuisance or crime-free ordinance or lease addendum against the plaintiff or complainant because the plaintiff or complainant allegedly engaged in nuisance or criminal conduct; (3) the local government official or housing provider did not take action to enforce the nuisance or crime-free ordinance or lease addendum against a similarly-situated resident not of the plaintiff or complainant's protected class who engaged in comparable conduct; and (4) the local government or housing provider subjected the plaintiff or complainant to an adverse housing action as a result of the enforcement of the nuisance or crime-free ordinance or lease addendum. It is then the burden of the local government and/or housing provider, depending on the circumstances, to offer evidence of a legitimate, nondiscriminatory reason for the adverse housing action.[64] The proffered nondiscriminatory reason for the challenged decision must be clear, reasonably specific and supported by admissible evidence.[65] Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.[66]

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[62] *See Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 678 (D. Vt. 2005) (explaining that landlord's attempt to evict victim 72 hours after domestic violence incident could give rise to inference of discrimination on the basis of gender). *See, e.g.*, *Dickinson v Zanesville Metro. Hous. Auth.*, 975 F. Supp. 2d 863, 872 (S.D. Ohio 2013) (articulating that a housing provider's failure to comply with the Violence Against Women Act and assignment of blame to the victim for the results of domestic violence could give rise to an inference of sex discrimination); *Meister v. Kansas City*, 2011 U.S. Dist. LEXIS 19166, *19–20 (D. Kan. 2011) ("[E]vidence that defendant knew that domestic violence caused damage to plaintiff's housing unit would help support a claim that she was evicted under circumstances giving rise to an inference of sex discrimination.").

[63] *See, generally*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (articulating burden-shifting standard of proving intentional discrimination under Title VII).

[64] *See, e.g.*, *Lindsay v. Yates*, 578 F.3d at 415 (articulating that if plaintiff presents evidence from which a reasonable jury could conclude that there exists a prima facie case of housing discrimination, then the burden shifts to the defendant to offer evidence of a legitimate, nondiscriminatory reason for the adverse housing decision); *Bouley*, 394 F. Supp. 2d at 678 (explaining that once a plaintiff has established a prima facie case of discrimination, the burden then shifts to the defendant to assert a legitimate, nondiscriminatory rationale for the challenged decision).

[65] *See, e.g.*, *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1040 (2d Cir. 1979) ("A prima facie case having been established, a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection.").

[66] *See, e.g.*, *Soules v. U.S. Dep't of Hous. and Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) ("In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members or protected groups. Our reasoning, in part, is that 'clever men may easily conceal their [discriminatory] motivations.'" (*quoting United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974))).

If the defendant (or respondent in a HUD administrative enforcement action) establishes a legitimate, nondiscriminatory reason for the adverse housing action, a plaintiff or HUD may still prevail by showing that the proffered reason was not the true reason for the adverse housing decision, and was instead a mere pretext for unlawful discrimination.[67] For example, the fact that the defendant (or respondent) acted upon comparable nuisance or criminal conduct differently for one or more individuals of a different protected class than the plaintiff or complainant is strong evidence that the defendant (or respondent) was not considering such conduct uniformly. Additionally, shifting or inconsistent explanations offered by the defendant (or respondent) for the adverse housing action may provide evidence of pretext. Similarly, a local government's claim that its nuisance citations would not cause tenant evictions because the citations were issued to the housing provider and not the residents could be evidence of pretext.[68] Ultimately, the evidence that may be offered to show that defendant's or respondent's stated justification is pretext for intentional discrimination will depend on the facts of a particular case.

V. Assessment of Nuisance Ordinances and Crime-Free Housing Ordinances as Part of the Duty to Affirmatively Further Fair Housing

In addition to prohibiting discrimination, the Fair Housing Act requires HUD to administer programs and activities relating to housing and urban development in a manner that affirmatively furthers the policies of the Act.[69] The purpose of the Act's affirmatively furthering fair housing (AFFH) mandate is to ensure that recipients of Federal housing and urban development funds do more than simply not discriminate: recipients also must take meaningful action to overcome fair housing issues and related barriers to fair housing choice and disparities in access to opportunity based on sex, race, national origin, disability, and other characteristics protected by the Act. Congress has repeatedly reaffirmed the AFFH mandate by requiring HUD program participants to certify that they will affirmatively further fair housing as a condition of receiving Federal funds.[70]

In 2015, HUD issued a rule on affirmatively furthering fair housing which requires grantees who receive Community Development Block Grant, HOME, Housing Opportunities for Persons with AIDS, or Emergency Solutions Grant funding to conduct an assessment of fair housing for purposes of setting goals to affirmatively further fair housing. In conducting their assessments of fair housing, state and local governments should assess their nuisance ordinances, crime-free housing ordinances and related policies or practices, including the processes by which nuisance ordinance and crime-free housing ordinances are enforced, and consider how these ordinances, policies or practices may affect access to housing and access to police, medical and other governmental services based on sex, race, national origin, disability, and other characteristics protected by the Act. One step a local government may take toward meeting its duty to affirmatively further fair housing is to eliminate disparities by repealing a nuisance or

[67] *See, e.g.*, *Bouley*, 394 F. Supp. 2d at 678.
[68] *See Hidden Vill.*, 867 F. Supp. 2d at 952 (noting that "[d]efendants appear blind to the possibility that repeatedly issuing citations to a landlord, based upon the actions of its tenants, would logically create an incentive for the landlord to evict his problem tenant . . . produc[ing] the same result—the eviction of [predominantly African American youth] but by different means.").
[69] 42 U.S.C. § 3608(d), (e)(5).
[70] 42 U.S.C. §§ 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16).

crime-free ordinance that requires or encourages evictions for use of emergency services, including 911 calls, by domestic violence or other crime victims.

VI. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing ordinances, policies or practices that have an unjustified discriminatory effect because of protected characteristics. While the Act does not prohibit local governments from appropriately considering nuisance or criminal conduct when enacting laws related to housing, governments should ensure that such ordinances and related policies or practices do not discriminate in violation of the Fair Housing Act.

Eighty percent of domestic violence victims are women, and in some communities, racial or ethnic minorities are disproportionately victimized by crime. Where the enforcement of a nuisance or crime-free ordinance penalizes individuals for use of emergency services or for being a victim of domestic violence or other crime, a local government bears the burden of proving that any discriminatory effect caused by such policy or practice is supported by a legally sufficient justification. Such a determination cannot be based on generalizations or stereotypes.

Selective use of nuisance or criminal conduct as a pretext for unequal treatment of individuals based on protected characteristics violates the Act. Repealing ordinances that deny access to housing by requiring or encouraging evictions or that create disparities in access to emergency services because of a protected characteristic is one step local governments can take to avoid Fair Housing Act violations and as part of a strategy to affirmatively further fair housing.

Helen R. Kanovsky, General Counsel

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Sample Notice of Occupancy Rights under the Violence Against Women Act, OMB Approval No. 2577-0286, Form HUD-5380 (December 2016)

Submitted by:
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Public Interest Law Project

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Disability Rights California

U.S. Department of Housing and Urban Development
OMB Approval No. 2577-0286
Expires 06/30/2017

[Insert Name of Housing Provider[1]]

Notice of Occupancy Rights under the Violence Against Women Act[2]

To all Tenants and Applicants

The Violence Against Women Act (VAWA) provides protections for victims of domestic violence, dating violence, sexual assault, or stalking. VAWA protections are not only available to women, but are available equally to all individuals regardless of sex, gender identity, or sexual orientation.[3] The U.S. Department of Housing and Urban Development (HUD) is the Federal agency that oversees that **[insert name of program or rental assistance]** is in compliance with VAWA. This notice explains your rights under VAWA. A HUD-approved certification form is attached to this notice. You can fill out this form to show that you are or have been a victim of domestic violence, dating violence, sexual assault, or stalking, and that you wish to use your rights under VAWA."

Protections for Applicants

If you otherwise qualify for assistance under **[insert name of program or rental assistance],** you cannot be denied admission or denied assistance because you are or have been a victim of domestic violence, dating violence, sexual assault, or stalking.

Protections for Tenants

[1] The notice uses HP for housing provider but the housing provider should insert its name where HP is used. HUD's program-specific regulations identify the individual or entity responsible for providing the notice of occupancy rights.
[2] Despite the name of this law, VAWA protection is available regardless of sex, gender identity, or sexual orientation.
[3] Housing providers cannot discriminate on the basis of any protected characteristic, including race, color, national origin, religion, sex, familial status, disability, or age. HUD-assisted and HUD-insured housing must be made available to all otherwise eligible individuals regardless of actual or perceived sexual orientation, gender identity, or marital status.

If you are receiving assistance under **[insert name of program or rental assistance],** you may not be denied assistance, terminated from participation, or be evicted from your rental housing because you are or have been a victim of domestic violence, dating violence, sexual assault, or stalking.

Also, if you or an affiliated individual of yours is or has been the victim of domestic violence, dating violence, sexual assault, or stalking by a member of your household or any guest, you may not be denied rental assistance or occupancy rights under **[insert name of program or rental assistance]** solely on the basis of criminal activity directly relating to that domestic violence, dating violence, sexual assault, or stalking.

Affiliated individual means your spouse, parent, brother, sister, or child, or a person to whom you stand in the place of a parent or guardian (for example, the affiliated individual is in your care, custody, or control); or any individual, tenant, or lawful occupant living in your household.

Removing the Abuser or Perpetrator from the Household

HP may divide (bifurcate) your lease in order to evict the individual or terminate the assistance of the individual who has engaged in criminal activity (the abuser or perpetrator) directly relating to domestic violence, dating violence, sexual assault, or stalking.

If HP chooses to remove the abuser or perpetrator, HP may not take away the rights of eligible tenants to the unit or otherwise punish the remaining tenants. If the evicted abuser or perpetrator was the sole tenant to have established eligibility for assistance under the program, HP must allow the tenant who is or has been a victim and other household members to remain in the unit for a period of time, in order to establish eligibility under the program or under another HUD housing program covered by VAWA, or, find alternative housing.

In removing the abuser or perpetrator from the household, HP must follow Federal, State, and local eviction procedures. In order to divide a lease, HP may, but is not required to, ask you for documentation or certification of the incidences of domestic violence, dating violence, sexual assault, or stalking.

Moving to Another Unit

Upon your request, HP may permit you to move to another unit, subject to the availability of other units, and still keep your assistance. In order to approve a request, HP may ask you to provide documentation that you are requesting to move because of an incidence of domestic violence, dating violence, sexual assault, or stalking. If the request is a request for emergency transfer, the housing provider may ask you to submit a written request or fill out a form where you certify that you meet the criteria for an emergency transfer under VAWA. The criteria are:

(1) You are a victim of domestic violence, dating violence, sexual assault, or stalking. If your housing provider does not already have documentation that you are a victim of domestic violence, dating violence, sexual assault, or stalking, your housing provider may ask you for such documentation, as described in the documentation section below.

(2) You expressly request the emergency transfer. Your housing provider may choose to require that you submit a form, or may accept another written or oral request.

(3) You reasonably believe you are threatened with imminent harm from further violence if you remain in your current unit. This means you have a reason to fear that if you do not receive a transfer you would suffer violence in the very near future.

OR

You are a victim of sexual assault and the assault occurred on the premises during the 90-calendar-day period before you request a transfer. If you are a victim of sexual assault, then in addition to qualifying for an emergency transfer because you reasonably believe you are threatened with imminent harm from further violence if you remain in your unit, you may qualify for an emergency transfer if the sexual assault occurred on the premises of the property from which you are seeking your transfer, and that assault happened within the 90-calendar-day period before you expressly request the transfer.

HP will keep confidential requests for emergency transfers by victims of domestic violence, dating violence, sexual assault, or stalking, and the location of any move by such victims and their families.

HP's emergency transfer plan provides further information on emergency transfers, and HP must make a copy of its emergency transfer plan available to you if you ask to see it.

Documenting You Are or Have Been a Victim of Domestic Violence, Dating Violence, Sexual Assault or Stalking

HP can, but is not required to, ask you to provide documentation to "certify" that you are or have been a victim of domestic violence, dating violence, sexual assault, or stalking. Such request from HP must be in writing, and HP must give you at least 14 business days (Saturdays, Sundays, and Federal holidays do not count) from the day you receive the request to provide the documentation. HP may, but does not have to, extend the deadline for the submission of documentation upon your request.

You can provide one of the following to HP as documentation. It is your choice which of the following to submit if HP asks you to provide documentation that you are or have been a victim of domestic violence, dating violence, sexual assault, or stalking.

- A complete HUD-approved certification form given to you by HP with this notice, that documents an incident of domestic violence, dating violence, sexual assault, or stalking. The form will ask for your name, the date, time, and location of the incident of domestic violence, dating violence, sexual assault, or stalking, and a description of the incident. The certification form provides for including the name of the abuser or perpetrator if the name of the abuser or perpetrator is known and is safe to provide.
- A record of a Federal, State, tribal, territorial, or local law enforcement agency, court, or administrative agency that documents the incident of domestic violence, dating violence, sexual assault, or stalking. Examples of such records include police reports, protective orders, and restraining orders, among others.
- A statement, which you must sign, along with the signature of an employee, agent, or volunteer of a victim service provider, an attorney, a medical professional or a mental health professional (collectively, "professional") from whom you sought assistance in addressing domestic violence, dating violence, sexual assault, or stalking, or the effects of abuse, and with the professional selected by you attesting under penalty of perjury that he or she believes that the incident or incidents of domestic violence, dating violence, sexual assault, or stalking are grounds for protection.
- Any other statement or evidence that HP has agreed to accept.

If you fail or refuse to provide one of these documents within the 14 business days, HP does not have to provide you with the protections contained in this notice.

If HP receives conflicting evidence that an incident of domestic violence, dating violence, sexual assault, or stalking has been committed (such as certification forms from two or more members of a household each claiming to be a victim and naming one or more of the other petitioning household members as the abuser or perpetrator), HP has the right to request that you provide third-party documentation within thirty 30 calendar days in order to resolve the conflict. If you fail or refuse to provide third-party documentation where there is conflicting evidence, HP does not have to provide you with the protections contained in this notice.

Confidentiality

HP must keep confidential any information you provide related to the exercise of your rights under VAWA, including the fact that you are exercising your rights under VAWA.

HP must not allow any individual administering assistance or other services on behalf of HP (for example, employees and contractors) to have access to confidential information unless for reasons that specifically call for these individuals to have access to this information under applicable Federal, State, or local law.

HP must not enter your information into any shared database or disclose your information to any other entity or individual. HP, however, may disclose the information provided if:

- You give written permission to HP to release the information on a time limited basis.
- HP needs to use the information in an eviction or termination proceeding, such as to evict your abuser or perpetrator or terminate your abuser or perpetrator from assistance under this program.
- A law requires HP or your landlord to release the information.

VAWA does not limit HP's duty to honor court orders about access to or control of the property. This includes orders issued to protect a victim and orders dividing property among household members in cases where a family breaks up.

Reasons a Tenant Eligible for Occupancy Rights under VAWA May Be Evicted or Assistance May Be Terminated

You can be evicted and your assistance can be terminated for serious or repeated lease violations that are not related to domestic violence, dating violence, sexual assault, or stalking committed against you. However, HP cannot hold tenants who have been victims of domestic violence, dating violence, sexual assault, or stalking to a more demanding set of rules than it applies to tenants who have not been victims of domestic violence, dating violence, sexual assault, or stalking.

The protections described in this notice might not apply, and you could be evicted and your assistance terminated, if HP can demonstrate that not evicting you or terminating your assistance would present a real physical danger that:

1) Would occur within an immediate time frame, and

2) Could result in death or serious bodily harm to other tenants or those who work on the property.

If HP can demonstrate the above, HP should only terminate your assistance or evict you if there are no other actions that could be taken to reduce or eliminate the threat.

Other Laws

VAWA does not replace any Federal, State, or local law that provides greater protection for victims of domestic violence, dating violence, sexual assault, or stalking. You may be entitled to

additional housing protections for victims of domestic violence, dating violence, sexual assault, or stalking under other Federal laws, as well as under State and local laws.

Non-Compliance with The Requirements of This Notice
You may report a covered housing provider's violations of these rights and seek additional assistance, if needed, by contacting or filing a complaint with **[insert contact information for any intermediary, if applicable]** or **[insert HUD field office]**.

For Additional Information

You may view a copy of HUD's final VAWA rule at **[insert Federal Register link]**.

Additionally, HP must make a copy of HUD's VAWA regulations available to you if you ask to see them.

For questions regarding VAWA, please contact **[insert name of program or rental assistance contact information able to answer questions on VAWA].**

For help regarding an abusive relationship, you may call the National Domestic Violence Hotline at 1-800-799-7233 or, for persons with hearing impairments, 1-800-787-3224 (TTY). You may also contact **[Insert contact information for relevant local organizations]**.

For tenants who are or have been victims of stalking seeking help may visit the National Center for Victims of Crime's Stalking Resource Center at https://www.victimsofcrime.org/our-programs/stalking-resource-center.

For help regarding sexual assault, you may contact **[Insert contact information for relevant organizations]**

Victims of stalking seeking help may contact **[Insert contact information for relevant organizations]**.

Attachment: Certification form HUD-5382 **[form approved for this program to be included]**

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Sample Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking, and Alternative Documentation Form, OMB Approval No. 2577-0286, Form HUD-5382 (December 2016)

Submitted by:
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Disability Rights California

CERTIFICATION OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, OR STALKING, AND ALTERNATE DOCUMENTATION

U.S. Department of Housing and Urban Development

OMB Approval No. 2577-0286
Exp. 06/30/2017

Purpose of Form: The Violence Against Women Act ("VAWA") protects applicants, tenants, and program participants in certain HUD programs from being evicted, denied housing assistance, or terminated from housing assistance based on acts of domestic violence, dating violence, sexual assault, or stalking against them. Despite the name of this law, VAWA protection is available to victims of domestic violence, dating violence, sexual assault, and stalking, regardless of sex, gender identity, or sexual orientation.

Use of This Optional Form: If you are seeking VAWA protections from your housing provider, your housing provider may give you a written request that asks you to submit documentation about the incident or incidents of domestic violence, dating violence, sexual assault, or stalking.

In response to this request, you or someone on your behalf may complete this optional form and submit it to your housing provider, or you may submit one of the following types of third-party documentation:

(1) A document signed by you and an employee, agent, or volunteer of a victim service provider, an attorney, or medical professional, or a mental health professional (collectively, "professional") from whom you have sought assistance relating to domestic violence, dating violence, sexual assault, or stalking, or the effects of abuse. The document must specify, under penalty of perjury, that the professional believes the incident or incidents of domestic violence, dating violence, sexual assault, or stalking occurred and meet the definition of "domestic violence," "dating violence," "sexual assault," or "stalking" in HUD's regulations at 24 CFR 5.2003.

(2) A record of a Federal, State, tribal, territorial or local law enforcement agency, court, or administrative agency; or

(3) At the discretion of the housing provider, a statement or other evidence provided by the applicant or tenant.

Submission of Documentation: The time period to submit documentation is 14 business days from the date that you receive a written request from your housing provider asking that you provide documentation of the occurrence of domestic violence, dating violence, sexual assault, or stalking. Your housing provider may, but is not required to, extend the time period to submit the documentation, if you request an extension of the time period. If the requested information is not received within 14 business days of when you received the request for the documentation, or any extension of the date provided by your housing provider, your housing provider does not need to grant you any of the VAWA protections. Distribution or issuance of this form does not serve as a written request for certification.

Confidentiality: All information provided to your housing provider concerning the incident(s) of domestic violence, dating violence, sexual assault, or stalking shall be kept confidential and such details shall not be entered into any shared database. Employees of your housing provider are not to have access to these details unless to grant or deny VAWA protections to you, and such employees may not disclose this information to any other entity or individual, except to the extent that disclosure is: (i) consented to by you in writing in a time-limited release; (ii) required for use in an eviction proceeding or hearing regarding termination of assistance; or (iii) otherwise required by applicable law.

TO BE COMPLETED BY OR ON BEHALF OF THE VICTIM OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, OR STALKING

1. Date the written request is received by victim: _____

2. Name of victim: _____

3. Your name (if different from victim's):_____

4. Name(s) of other family member(s) listed on the lease:_____

_____

5. Residence of victim: _____

6. Name of the accused perpetrator (if known and can be safely disclosed):_____

_____

7. Relationship of the accused perpetrator to the victim:_____

8. Date(s) and times(s) of incident(s) (if known):_____

_____

10. Location of incident(s):_____

In your own words, briefly describe the incident(s):

_____

_____

_____

_____

This is to certify that the information provided on this form is true and correct to the best of my knowledge and recollection, and that the individual named above in Item 2 is or has been a victim of domestic violence, dating violence, sexual assault, or stalking. I acknowledge that submission of false information could jeopardize program eligibility and could be the basis for denial of admission, termination of assistance, or eviction.

Signature _____Signed on (Date) _____

Public Reporting Burden: The public reporting burden for this collection of information is estimated to average 1 hour per response. This includes the time for collecting, reviewing, and reporting the data. The information provided is to be used by the housing provider to request certification that the applicant or tenant is a victim of domestic violence, dating violence, sexual assault, or stalking. The information is subject to the confidentiality requirements of VAWA. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid Office of Management and Budget control number.

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15

National Housing Law Project, National Network to End Domestic Violence, National Alliance to End Sexual Violence, How to File a VAWA Complaint: Information on the NEW Violence Against Women Act (VAWA) 2022 Complaint Process

Submitted by:
Sarah Brandon

National Housing Law Project

National Alliance to
End Sexual Violence

HOW TO FILE A VAWA COMPLAINT:

Information on the NEW Violence Against Women Act (VAWA) 2022 COMPLAINT PROCESS

VAWA is a federal law that helps all survivors of domestic violence, dating violence, sexual assault, and stalking. In 2022, VAWA expanded protections for survivors eligible for or participating in federally assisted housing programs. A federally assisted housing program is any housing program that receives federal funding. There is a list here. VAWA 2022 created for the first time a path for survivors to get help when their VAWA rights are violated.

Effective October 1, 2022, Housing and Urban Development's (HUD) Office of Fair Housing and Equal Opportunity (FHEO) will investigate complaints for VAWA violations. FHEO Notice 2023-01 explains that these complaints will be investigated using HUD's existing Fair Housing Act complaint process. Here are some common questions regarding the new complaint process.

1. **How can filing a VAWA 2022 complaint help?**
    - It could potentially stop an eviction.
    - It could help you to secure housing.
    - It could force the housing provider to change their policies.
    - It could require the housing provider to receive education and training on VAWA 2022.

2. **What are some examples of VAWA violations?**
    - My property owner threatens me with eviction after I am sexually assaulted on the premises.
    - The property manager shares information with other residents about my

request for VAWA help.

- A transitional housing provider denies me housing because I was evicted for being a survivor of domestic violence.
- My property owner denies my request for an emergency transfer, claiming that "we don't do transfers here."
- A housing provider rejects my application for housing due to a low credit score, even after explaining that it was due to domestic violence.
- I ask to transfer to a safer home because I was sexually assaulted on the premises. The property manager says I can only transfer if I have a police report and court order.
- I ask to remove my partner from the lease because they assaulted me. The property manager says I have to first get a divorce.
- I call the police for help. The landlord tells me that the local government is ordering him to evict me because I called the police.

For more information on VAWA housing rights, please check out HUD's new resource page.

3. **When do I need to file the VAWA complaint by?**
   - You can file a VAWA complaint for actions that occurred on or after October 1, 2022.
   - File the complaint within **one year** of the VAWA violation.
   - If there is a violation that began prior to one year and the violation is continuing, FHEO will also accept the complaint.
   - If a complaint is filed more than one year after the violation occurred (and the violation is not continuing), FHEO may, but is not required to, investigate.

4. **Who can file the complaint?**
   - A survivor could file the complaint.
   - Organizations who have invested time and resources to investigate the VAWA violations may file a complaint.
   - A group trying to protect its members or clients from VAWA violations may file a complaint. This could include a local domestic violence or sexual assault program whose clients and/or housing programs are harmed by the VAWA violations.

5. **How can I file a complaint?**
   - Online using FHEO's complaint form (available in English and Spanish)
   - Email to your local FHEO office (forms available in English, Arabic, Cambodian, Chinese, Korean, Russian, Somali, Spanish, and Vietnamese)
   - Phone 1-800-669-9777 or TTY: 1-800-877-8339 or call your HUD regional office and someone can help you fill out the complaint

- Mail to regional FHEO office (forms available in English, Arabic, Cambodian, Chinese, Korean, Russian, Somali, Spanish, and Vietnamese)

6. **The complaint form is confusing. Can others help me complete the form?**
   - HUD is in the process of updating the complaint form to include VAWA specific information. The current complaint form may be confusing for a survivor attempting to fill it out.
   - Survivor advocates can help you fill out the complaint form.
   - A lawyer does not need to complete or submit the form, but could also help you answer the questions.

7. **On the complaint form, how do I answer the questions:**

"Why do you believe someone discriminated against you, someone you live with, or someone you sought to live with?" and asks what unlawful reason there is for the discrimination.	• You can select "Other" and simply note "VAWA violation" or "discrimination due to domestic violence, dating violence, sexual assault, and stalking." • If there are also other forms of discrimination, such as race, color, religion, national origin, family status, disability, or sex (including gender identity or sexual orientation) discrimination, you can also select those reasons.
"Who discriminated against you?"	You can name, if you know, • the covered housing provider OR • landlord, OR • the name of their housing development or project. HUD may be able to help you determine who actually owns or manages a VAWA covered property.
"Where did the discrimination happen?"	You can report where the violation occurred to the best of your knowledge. If for example, the covered housing provider denied your housing application due to the violence, provide the covered housing provider's address. If an eviction was filed against you, provide the address of property management or your address.

"When did the discrimination happen" and provide the most recent date?	• Examples of a most recent date would be **the day you received notice of the filing of an eviction** case in violation of VAWA. • You should also check the box if the discrimination is **ongoing**. ○ An example of ongoing discrimination would be when the provider is not maintaining your confidentiality under VAWA. The provider continues to share your information with others.
"What happened?"	This is a chance to explain how your VAWA rights (and other civil rights) were violated. **Briefly describe** the incident that led to the violations. For example, the property manager threatened to evict you unless you provided them with a police report. Note if there are **any witnesses**. Witnesses could be, for example, a survivor advocate who spoke with the covered housing provider. The survivor advocate may have confirmed that the covered housing provider would only accept a police report. Let FHEO know if there is **any documentation**. Documentation could include emails, a termination notice, eviction court papers, or denial of an emergency transfer request. You can give them copies of documents later.

8. **What will FHEO do with this complaint?**
    - FHEO will first determine if it can accept the complaint.
    - FHEO may schedule a time to interview you or others about the complaint.
    - If there is reason to believe VAWA has been violated, FHEO will assess whether prompt action is needed. Prompt action could mean preventing your eviction. Prompt action may mean filing a case in federal court,

with help from the Department of Justice.

- Make clear on the complaint intake form if you are being denied housing or being threatened with eviction or the loss of your voucher.
- Ask who you can follow up with at FHEO for additional information and updates.
- FHEO can investigate your complaint and potentially other VAWA (and civil rights) violations by the housing provider. For example, you may claim that the housing provider evicted you for being a survivor. FHEO could investigate your case and evaluate if the housing provider is not complying with other VAWA protections.
- FHEO has certain time frames for review of your complaint. It often seeks more time to investigate.

9. **Where can I find more information?** You can visit **new landing page on HUD's website**, which centralizes information on VAWA and the housing rights of survivors. You can also review FHEO Notice 2023-01.

For additional questions, please contact Kate Walz, National Housing Law Project, kwalz@nhlp.org, Debbie Fox, National Network to End Domestic Violence, dfox@nnedv.org, or Laela Kashan, National Alliance to End Sexual Violence, laela@endsexualviolence.org.

If you are currently experience domestic or sexual violence please reach out to the following 24/7 hotlines for support:

1-800-799-SAFE National Domestic Violence Hotline

1-800-656-4673 National Sexual Assault Hotline

***

This project was supported by Grant No. 15JOVW22GK03996MUMU, 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.

NOTES

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Tenant Protections in HUD Housing Admissions (PowerPoint slides)

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Public Interest Law Project

Sarah Brandon

National Housing Law Project

Tiffany Hickey

Disability Rights California

Tenant Protections in HUD Housing Admissions

Ugochi Anaebere-Nicholson | Public Interest Law Project
Sarah Brandon | National Housing Law Project
Tiffany Hickey | Disability Rights California

November 13, 2023

NATIONAL
HOUSING LAW
PROJECT

Who are we?

NATIONAL
HOUSING LAW
PROJECT

Who's in the room?

- Organization
  - Nonprofit
  - Government
  - Private practice
  - Firm
  - Other

NATIONAL HOUSING LAW PROJECT

Who's in the room?

- Organization
  - Nonprofit
  - Government
  - Private practice
  - Firm
  - Other
- Practice
  - 0-5 years
  - 10-15 years
  - 20 years+

NATIONAL HOUSING LAW PROJECT

Who's in the room?

- Organization
  - Nonprofit
  - Government
  - Private practice
  - Firm
  - Other
- Practice
  - 0-5 years
  - 10-15 years
  - 20 years+
- Experience with tenant admissions issues
  - Yes
  - No

NATIONAL
HOUSING LAW
PROJECT

Key tenant protections

- Fair Housing Act (FHA)
- Reasonable Accommodations (RA)
- Violence Against Women Act (VAWA)

NATIONAL
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PROJECT

Key tenant protections

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- Reasonable Accommodations (RA)
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Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Protected Classes

- Race
- Color
- National Origin
- Religion
- Sex
- Disability
- Familial Status (*including families with minor children, pregnant people*)

Covered Housing

- "Dwellings"
  - Examples include: houses, apartments, university student housing, farmworker housing, AIDS hospice, nursing homes
  - Excluded: motels, jails, bed & breakfasts

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Exemptions

- Owner-occupied buildings with four or fewer units
- Single-family housing sold or rented without advertisement
- Housing operated by organizations and private clubs that limit occupancy to members (i.e. sorority houses/ golf clubs)
- Religious organizations (non-commercial property) - *religious discrimination exemption only*
- 55+ and 62+ communities (restrictions apply) - *familial status discrimination exemption only*

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Prohibited Discriminatory Practices

Refusal to:

- sell, rent or lease (including loans & mortgages), or otherwise make housing unavailable
- negotiate for a sale, rental or lease
- permit, at a disabled person's expense, reasonable modification of the premises
- make reasonable accommodations

Additionally:

- representation that housing is not available for inspection, sale or rental when it is in fact so available
- provision of inferior housing terms, conditions, privileges, facilities or services
- harassment in connection with housing accommodations
- cancellation or termination of a sale or rental agreement
- provision of segregated or separated housing accommodations

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Prohibited Discriminatory Practices – admissions-specific

Refusal to:

- sell, rent or lease (including loans & mortgages), or otherwise make housing unavailable
- negotiate for a sale, rental or lease
- permit, at a disabled person's expense, reasonable modification of the premises
- make reasonable accommodations

Additionally:

- representation that housing is not available for inspection, sale or rental when it is in fact so available
- provision of inferior housing terms, conditions, privileges, facilities or services
- harassment in connection with housing accommodations
- cancellation or termination of a sale or rental agreement
- provision of segregated or separated housing accommodations

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Theories of Liability

- Disparate Treatment
- Discriminatory Effects
  - Disparate Impact
  - Perpetuation of Segregation

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Theories of Liability

- Disparate Treatment
  - Treating someone differently because they are a member of a protected class
- Discriminatory Effects
  - Disparate Impact
  - Perpetuation of Segregation

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Disparate Treatment

- May provide evidence of discriminatory intent by
  - Providing direct evidence of discrimination or
  - Demonstrating a prima facie case of discrimination
    - If the plaintiff shows a prima facie case, then defendant must provide legitimate, nondiscriminatory reason for the action. If defendant does so, plaintiff must then show that defendant's reason was pretextual.

Pacific Shores v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013).

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Theories

- Disparate Treatment
- Discriminatory Effects
  - Disparate Impact
    - Neutral practice or policy that disproportionately impacts a protected class
  - Perpetuation of Segregation
    - A decision or action – often by a governmental entity – that reinforces segregation

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Disparate Impact

- Three step test
  - Step 1: Is there a disparate impact on a protected class?

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Step 1: Is there a disparate impact on a protected class?

Plaintiffs have alleged significant statistical disparities in the credit histories of Black and Hispanic consumers as compared to White consumers and of voucher holders as compared to individuals who do not use vouchers.

. . . if a lower credit score makes it more likely that a rental applicant will be denied, and Black and Hispanic individuals and voucher holders are disproportionately likely to have lower credit scores, it follows that any policy that relies on credit scores to evaluate rental applications will have a disproportionate impact on Black and Hispanic applicants and voucher holders who apply. This risk is heightened if the policy does not account for the impact a voucher has on a tenant's ability to pay rent each month.

Combined, these allegations are sufficient at the pleading stage to raise an inference of disparate impact, that is, that the "challenged practice caused or predictably will cause a discriminatory effect."

Louis v. Saferent Sols., Civil Action 22-CV-10800-AK 24-5 (D. Mass. Jul. 26, 2023).

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

Disparate Impact

- Three step test
  - Step 1: Is there a disparate impact on a protected class?
  - Step 2: Is the policy justified? Is the housing decision necessary to achieve a substantial, legitimate, and necessary interest?

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT

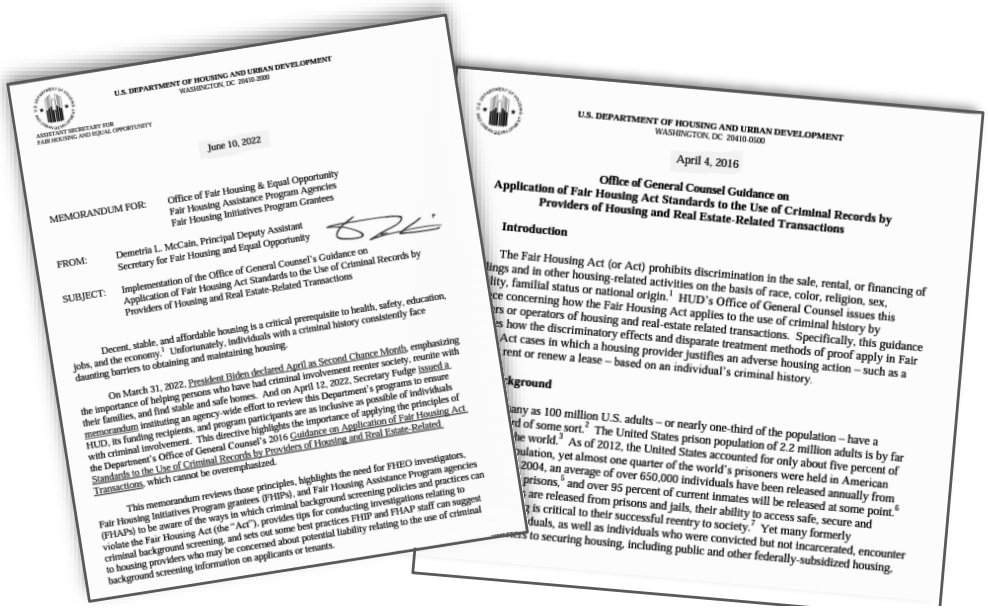
Disparate Impact

- Three step test
  - Step 1: Is there a disparate impact on a protected class?
  - Step 2: Is the policy justified? Is the housing decision necessary to achieve a substantial, legitimate, and necessary interest?
  - Step 3: Is there a less discriminatory alternative?

Fair Housing Act

42 U.S.C. § 3601 et seq.

NATIONAL HOUSING LAW PROJECT



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

ASSISTANT SECRETARY FOR
FAIR HOUSING AND EQUAL OPPORTUNITY

June 10, 2022

MEMORANDUM FOR: Office of Fair Housing & Equal Opportunity
Fair Housing Assistance Program Agencies
Fair Housing Initiatives Program Grantees

FROM: Demetria L. McCain, Principal Deputy Assistant
Secretary for Fair Housing and Equal Opportunity

SUBJECT: Implementation of the Office of General Counsel's Guidance on
Application of Fair Housing Act Standards to the Use of Criminal Records by
Providers of Housing and Real Estate-Related Transactions

Decent, stable, and affordable housing is a critical prerequisite to health, safety, education, jobs, and the economy.[1] Unfortunately, individuals with a criminal history consistently face daunting barriers to obtaining and maintaining housing.

On March 31, 2022, President Biden declared April as Second Chance Month, emphasizing the importance of helping persons who have had criminal involvement reenter society, reunite with their families, and find stable and safe homes. And on April 12, 2022, Secretary Fudge issued a memorandum instituting an agency-wide effort to review this Department's programs to ensure HUD, its funding recipients, and program participants are as inclusive as possible of individuals with criminal involvement. This directive highlights the importance of applying the principles of the Department's Office of General Counsel's 2016 Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, which cannot be overemphasized.

This memorandum reviews those principles, highlights the need for FHEO investigators, Fair Housing Initiatives Program grantees (FHIPs), and Fair Housing Assistance Program agencies (FHAPs) to be aware of the ways in which criminal background screening policies and practices can violate the Fair Housing Act (the "Act"), provides tips for conducting investigations relating to criminal background screening, and sets out some best practices FHIP and FHAP staff can suggest to housing providers who may be concerned about potential liability relating to the use of criminal background screening information on applicants or tenants.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

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

Introduction

The Fair Housing Act (or Act) prohibits discrimination in the sale, rental, or financing of
lings and in other housing-related activities on the basis of race, color, religion, sex,
lity, familial status or national origin.[1] HUD's Office of General Counsel issues this
ce concerning how the Fair Housing Act applies to the use of criminal history by
rs or operators of housing and real-estate related transactions. Specifically, this guidance
es how the discriminatory effects and disparate treatment methods of proof apply in Fair
Act cases in which a housing provider justifies an adverse housing action – such as a
rent or renew a lease – based on an individual's criminal history.

ckground

any as 100 million U.S. adults – or nearly one-third of the population – have a
d of some sort.[2] The United States prison population of 2.2 million adults is by far
he world.[3] As of 2012, the United States accounted for only about five percent of
pulation, yet almost one quarter of the world's prisoners were held in American
2004, an average of over 650,000 individuals have been released annually from
prisons,[6] and over 95 percent of current inmates will be released at some point.[6]
are released from prisons and jails, their ability to access safe, secure and
is critical to their successful reentry to society.[7] Yet many formerly
duals, as well as individuals who were convicted but not incarcerated, encounter
to securing housing, including public and other federally-subsidized housing,

NATIONAL
HOUSING LAW
PROJECT

Key tenant protections

- Fair Housing Act (FHA)
- Reasonable Accommodations (RA)
- Violence Against Women Act (VAWA)

Reasonable Accommodations

42 U.S.C.A. §§ 3601 et seq.; 29 U.S.C.A. § 794; 42 U.S.C.A. §§ 12131 et seq.

NATIONAL HOUSING LAW PROJECT

Overview

- Change to a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy the dwelling and public and common use areas or an equal opportunity to obtain, use, or enjoy a housing opportunity.

Reasonable Accommodations

42 U.S.C.A. §§ 3601 et seq.; 29 U.S.C.A. § 794; 42 U.S.C.A. §§ 12131 et seq.

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- Change to a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy the dwelling and public and common use areas or an equal opportunity to obtain, use, or enjoy a housing opportunity.

Disability includes people recovering from addiction – successfully completed or currently undergoing substance abuse treatment

Reasonable Accommodations

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Disability includes people recovering from addiction – successfully completed or currently undergoing substance abuse treatment

But not if:

- current users of illegal substances
- direct threat to health and safety of others
- tenancy would result in substantial physical damage to the property of others

Reasonable Accommodations

42 U.S.C.A. §§ 3601 et seq.; 29 U.S.C.A. § 794; 42 U.S.C.A. §§ 12131 et seq.

NATIONAL HOUSING LAW PROJECT

Overview

- Must be reasonable and necessary.
- Must show nexus between disabling condition and requested accommodation.
- If disability is not obvious or readily apparent, housing provider may ask for documentation to support the requested accommodation.**
- Can be requested at any time, even for the first time in an eviction.***
- Can be made in any format, though writing is suggested to keep a record of the request.

Reasonable Accommodations

42 U.S.C.A. §§ 3601 et seq.; 29 U.S.C.A. § 794; 42 U.S.C.A. §§ 12131 et seq.

NATIONAL HOUSING LAW PROJECT

Covered housing

- Federally assisted housing providers must provide a reasonable accommodation that would allow an applicant to meet the eligibility requirements of the program.
- Housing providers must also consider mitigating circumstances

Reasonable Accommodations

42 U.S.C.A. §§ 3601 et seq.; 29 U.S.C.A. § 794; 42 U.S.C.A. §§ 12131 et seq.

NATIONAL HOUSING LAW PROJECT

NATIONAL
HOUSING LAW
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Key tenant protections

- Fair Housing Act (FHA)
- Reasonable Accommodations (RA)
- Violence Against Women Act (VAWA)

Violence Against Women Act

VAWA 2022

NATIONAL HOUSING LAW PROJECT

Overview

- VAWA provides housing protections for survivors of domestic violence, sexual assault, dating violence, and stalking who are applying for or living in federally assisted housing.

Violence Against Women Act

VAWA 2022

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- survivors (actual or perceived)
- regardless of sex, gender identity, sexual orientation, disability or age, who are

Violence Against Women Act

VAWA 2022

NATIONAL HOUSING LAW PROJECT

Overview

- VAWA provides housing protections for survivors of domestic violence, sexual assault, dating violence, and stalking who are applying for or living in federally assisted housing

- **survivors (actual or perceived)**
- **regardless of sex, gender identity, sexual orientation, disability or age, who are**

- **victims of actual or threatened domestic violence, dating violence, sexual assault, or stalking, or an "affiliated individual" of the victim; AND**
- **living in, or seeking admission to, a federally assisted housing unit covered by VAWA.**

34 U.S.C.A. § 12491

Violence Against Women Act

VAWA 2022

NATIONAL HOUSING LAW PROJECT

Covered housing – *added in 2022 reauthorization

U.S. Department of Housing and Urban Development

- Public housing
- Section 8 Housing Choice Voucher program
- Project-based Section 8 housing
- Section 202 supportive housing for the elderly
- Section 202 Direct Loan program*
- Section 811 supportive housing for persons with disabilities
- Section 236 multifamily rental housing
- Section 221(d)(3) Below Market Interest Rate housing (BMIR)
- HOME
- Housing Opportunities for Persons with AIDS (HOPWA)
- McKinney-Vento Act programs
- Transitional Housing Assistance for Homeless Veterans*
- Grant programs for homeless veterans with special needs*
- Supportive Services for Veteran Families (SSVF)*
- Veterans Affairs Supportive Housing (VASH)*
- National Housing Trust Fund*
- Transitional Housing Assistance Grants for victims of domestic violence, dating violence, sexual assault, and stalking*

U.S. Department of Agriculture

- Rural Development (RD) multifamily housing programs, including the Rural Development Voucher program (514, 515, 516, 533, 538, and 542 of the Housing Act of 1949 (42 U.S.C. 1484, 1485, 1486, 1490m, 1490p–2, 1490r)*

U.S. Department of the Treasury

- Low-Income Housing Tax Credit program (LIHTC)

And "any other Federal housing programs providing affordable housing to low- and moderate-income persons…"

Violence Against Women Act

VAWA 2022

NATIONAL HOUSING LAW PROJECT

Covered housing – *added in 2022 reauthorization

U.S. Department of Housing and Urban Development

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U.S. Department of the Treasury

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And "any other Federal housing programs providing affordable housing to low- and moderate-income persons…"

VAWA does not apply to market-rate rental housing that is not subsidized.

Violence Against Women Act

VAWA 2022

NATIONAL HOUSING LAW PROJECT

Survivors' rights at admission

- PHAs, landlords, and owners may not deny an applicant housing on the basis or as a direct result of an applicant having been a survivor of domestic violence, dating violence, sexual assault, or stalking
- This includes adverse factors resulting from the abuse

Violence Against Women Act

VAWA 2022

NATIONAL HOUSING LAW PROJECT

Survivors' rights at admission

- PHAs, landlords, and owners may not deny an applicant housing on the basis or as a direct result of an applicant having been a survivor of domestic violence, dating violence, sexual assault, or stalking
- This includes adverse factors resulting from the abuse

Cross-reference with FHA

although survivors are not explicitly named as a protected class, because the vast majority of survivors are female, discrimination against survivors can constitute sex discrimination

Violence Against Women Act

VAWA 2022

NATIONAL HOUSING LAW PROJECT

Survivors with disabilities

- Section 504 of the Rehabilitation Act of 1973 is a federal law, codified at 29 U.S.C. § 794, that prohibits discrimination on the basis of disability in federally-assisted programs or activities.
- This means, for instance, that housing providers may not deny persons with disabilities the opportunity to participate in a program or activity because of their disability; or accept a different kind or lesser program or service than what the housing provider provides to others without disabilities, even if separate programs exist.

Violence Against Women Act

VAWA 2022

NATIONAL HOUSING LAW PROJECT

Juana is a survivor of domestic violence and she has a temporary domestic violence restraining order against her partner, which requires her to remain at least 100 yards away from her. She found an apartment near her job and applied online for it. When she went to go and sign the lease, she took a copy of her restraining order and gave it to the landlord. The landlord told Juana that she doesn't want cops around the apartment complex and denied the apartment to Juana.

NATIONAL
HOUSING LAW
PROJECT

State & Local Law

- When local or state laws conflict with federal fair housing protections, providers must first comply with federal
- However, state fair housing laws may be more protective than what's allowed under federal law

NATIONAL HOUSING LAW PROJECT

State & Local Law

- When local or state laws conflict with federal fair housing protections, providers must first comply with federal
- However, state fair housing laws may be more protective than what's allowed under federal law

e.g.
Crime-Free Programs / Nuisance Ordinances (CFNOS)

NATIONAL HOUSING LAW PROJECT

State & Local Law

- When local or state laws conflict with federal fair housing protections, providers must first comply with federal
- However, state fair housing laws may be more protective than what's allowed under federal law

e.g.
Crime-Free Programs / Nuisance Ordinances (CFNOS)

e.g.
Fair Chance Ordinances / Regulations

Thank you!

Questions? Reach out!

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Sarah Brandon | sbrandon@nhlp.org
Tiffany Hickey | tiffany.hickey@disabilityrightsca.org

NOTES

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Senate Judiciary Committee Analysis of Reusable Tenant Screening Reports Bill, AB 2559 (Ward) (May 4, 2022)

Submitted by:
Ariel Nelson

National Consumer Law Center

Lisa Sitkin
Stacey Tutt

National Housing Law Project

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2559 (Ward)
Version: May 4, 2022
Hearing Date: June 21, 2022
Fiscal: No
Urgency: No
TSG

SUBJECT

Reusable tenant screening reports

DIGEST

This bill introduces the concept of reusable tenant screening reports into law, specifies what content must be included, and sets forth the conditions under which landlords may voluntarily elect to accept them in lieu of individual applications.

EXECUTIVE SUMMARY

The cumulative expense of rental housing application fees is an often overlooked barrier to obtaining housing. Justified – accurately or not – by the need to cover the cost of screening prospective tenants, many landlords charge each applicant a fee of around $50 just to be considered for a vacancy. In a tight rental housing market where tenants may need to apply to many different openings before being accepted, these application fees quickly add up. As the starting point for one promising solution to this problem, this bill introduces the concept of a reusable tenant screening report, a document that tenants would pay for once and could then potentially utilize with multiple landlords to whom they submit an application. In this way, the bill seeks to lays the legal groundwork for the future use of reusable tenant screening reports, which could one day significantly reduce the transactional costs associated with seeking out rental housing.

The bill is author-sponsored. There is no known support. Opposition comes from a coalition of advocacy groups representing tenants and formerly incarcerated individuals who collectively contend that the bill will not promote acceptance of reusable tenant screening reports and will make it more difficult for people with a criminal history to secure housing. The bill passed off of the Assembly Floor by a vote of 54-8. If the bill passes out of this Committee, it will next be heard on the Senate Floor.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Defines "landlord" as an owner of residential rental property. (Civ. Code § 1950.6(g).)

2) Defines "applicant" as any entity or individual who makes a request to a landlord or their agent to rent a residential housing unit, or an entity or individual who agrees to act as a guarantor or cosignor on a rental agreement. (Civ. Code § 1950.6(i).)

3) Defines "application screening fee" as any nonrefundable payment charged by a landlord or their agent to an applicant in order to purchase a consumer credit report and to validate, review, or otherwise process an application for the rent or lease of residential rental property. (Civ. Code § 1950.6(h).)

4) Provides that a landlord or their agent may, but is not required to, accept and rely upon a consumer credit report presented by an applicant. (Civ. Code § 1950.6(a).)

5) Specifies that when a landlord or their agent receives a request to rent a residential property from an applicant, they may charge that applicant an application screening fee to cover the costs of obtaining information about the applicant which may include, but is not limited to, personal reference checks and consumer credit reports. (Civ. Code § 1950.6(a).)

6) Provides that rental application screening fees cannot be greater than the actual out-of-pocket costs of gathering information concerning the applicant including the cost of using a tenant screening service or a consumer credit reporting service, and the reasonable value of time spent in obtaining information on the applicant. Specifies that in no case can the amount of the application screening fee be greater than thirty dollars ($30) per applicant which may be adjusted annually, beginning on January 1, 1998, to correspond to increases in the Consumer Price Index. (Civ. Code § 1950.6(b).)

7) Requires a landlord or their agent to provide an applicant with a receipt for the fee paid by the applicant, itemizing the out-of-pocket expenses and time spent to obtain and process the information about the applicant. (Civ. Code § 1950.6(d).)

8) Provides that, if a landlord or their agent does not perform a personal reference check or does not obtain a consumer credit report, they must return any amount of the screening fee that is not used for the purposes authorized by this section to the applicant. (Civ. Code § 1950.6(e).)

9) Provides that, if an application screening fee has been paid by the applicant, and the applicant so requests, then the landlord or their agent must provide a copy of the consumer credit report to the applicant. (Civ. Code § 1950.6(f).)

10) Defines a "consumer credit report" as any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part, for the purpose of determining eligibility for specified uses including hiring of a dwelling unit. (Civ. Code § 1785.3(c).)

11) Defines "criminal history information" under FEHA as any record that contains individually identifiable information and describes an individual's criminal history or contacts with a law enforcement agency. Includes information describing an individual's arrests; information that an individual has been charged; information that an individual has been questioned, apprehended, taken into custody or detained, or held for investigation by a law enforcement, police, military, or prosecutorial agency; records from any jurisdiction; and records that are not prepared strictly for law enforcement purposes, such as investigative consumer reports. (2 C.C.R. § 12264.)

12) Defines "consumer report" as 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 which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used for personal, family or household purposes; employment; a legitimate business interest, or other specified purposes. (15 U.S.C. § 1681a(d).)

This bill:

1) Defines "reusable tenant screening report" as a consumer report that satisfies all of the following criteria:
   a) it was prepared within the previous 30 days by a consumer reporting agency at the request and expense of an applicant;
   b) it is made directly available to a landlord for use in the rental application process or is provided through a third-party website that regularly engages in the business of providing a reusable tenant screening report and complies with all state and federal laws pertaining to use and disclosure of information contained in a consumer report by a consumer reporting agency; and
   c) it is available to the landlord at no cost to access or use.

2) Requires a reusable tenant screening report to include all of the following information regarding an applicant:

a) the results of a criminal history check for the seven years preceding the date on which the consumer reporting agency received the request for the reusable screening report;
b) the results of an eviction history check for the seven years preceding the date on which the consumer reporting agency received the request for the reusable screening report;
c) verification of employment; and
d) the applicant's last known address.

3) Provides that a landlord may elect to accept reusable tenant screening reports and may require an applicant to state that there has not been a material change to the information in the reusable screening report.

4) Requires a landlord who elects to accept reusable tenant screening reports to provide an applicant with notice in a manner reasonably calculated to inform applicants that the landlord accepts reusable tenant screening reports. Notice must be provided, at a minimum through the following:
   a) a clear and conspicuous statement on each listing or advertisement for residential rental property on the internet;
   b) a clear and conspicuous statement on each internet website maintained by the landlord;
   c) a clear and conspicuous statement on each application; and
   d) a clear and conspicuous statement posted at each physical location where applicants may submit applications for residential rental property.

5) Provides that, despite existing law allowing a landlord to charge an applicant screening fee under specified conditions, if an applicant provides a reusable tenant screening report to a landlord that accepts reusable tenant screening reports, the landlord must not charge the applicant either a fee for the landlord to access the report or an application screening fee.

6) Declares that this bill does not affect any other applicable law related to the consideration of criminal history information in housing.

7) Provides that an ordinance, resolution, regulation, administrative action, initiative, or other policy adopted by a city, county, or city and county that conflicts with this section shall apply if it provides greater protections to applicants.

8) Clarifies that this bill does not require a landlord to accept reusable tenant screening reports.

COMMENTS

1. Background on the high cost of securing rental housing

California is in the midst of a housing affordability crisis and a related epidemic of homelessness. An often overlooked barrier to rehousing is the cost of securing a rental home in the first place. There are the common and obvious big ticket items like first and last month's rent as well as a security deposit. But searching for a new place to live uses up other resources as well: gas or public transit money to visit each potential rental; time taken off of work; childcare; and myriad small charges like stamps, envelopes, access to a printer, and making copies of application documents. There is also the opportunity cost of the time and energy that the prospective tenant has to pour into the endeavor.

On top of this, there are application fees. There do not appear to be any studies on what percentage of California landlords charge a fee to apply for a rental, but it is a common practice, particularly in the case of apartment complexes where the application process tends to be more regimented and management companies place a premium on cost recovery.

These application fees add up. Although California law currently caps those fees at just over $50, that limitation on rental application fees only applies to each individual landlord. (Civ. Code § 1950.6(b).) When tenants must apply to multiple locations in order to secure housing, the fees can quickly add up into the hundreds of dollars. The dynamic is especially punishing in a tight rental market, of course. The author points out that the dynamic is also particularly punitive for would-be tenants who are struggling to obtain housing, since they will usually have to submit a larger volume of applications in their quest to find a place that will accept them. In other words, the ones paying the greatest amount in application fees will often be those least able to afford it.

2. Enter the reusable tenant screening report

Against this backdrop, this bill introduces the concept of reusable tenant screening reports into California law. As the name implies, reusable tenant screening reports are documents containing key information about the tenant that a tenant can order from a credit reporting agency. The tenant can then submit the document to each prospective landlord or give the landlord the means with which to access it.

The general concept is not totally new. Washington State and Maryland already have laws on the books facilitating and regulating the use of reusable tenant screening reports. (*See* Wash. Rev. Code Section 58.19.257; Md. Code Ann., Real Property Section 8-218.) It also appears that a few companies in the tenant screening business have begun to embrace the idea. For example, the website Zillow offers an online product through which tenants pay a one-time $29 fee for a screening report which they can then use to

apply to an unlimited number of participating rentals for 30 days. Accessing the report is free for landlords.[1] Similarly, the online company MyScreeningReport.Com sells tenants a report valid for 30 days for between $31.95 and $49.95, depending on the level of detail included.[2] Absent state laws defining what constitutes a reusable tenant screening report and requiring or incentivizing landlord's acceptance of them, however, the adoption of reusable tenant screening reports is unlikely to take off in California on its own.

3. Potential unintended consequences

While the concept of a reusable tenant screening report shows tremendous promise for reducing the transactional costs of finding a new place to live, the specific legal framework that this bill proposes probably would not result in their widespread adoption. In fact, in some ways, enactment of the bill in print might inadvertently discourage the acceptance of reusable tenant screening reports.

As the law stands now, landlords are perfectly free to accept reusable tenant screening reports if they wish. Were this bill to be enacted in its present form, that would no longer be true. Pursuant to the bill in print, even if landlords wanted to accept reusable tenant screening reports, they would have to comply with a series of notice requirements in order to do so. Thus, a landlord who might be perfectly willing to accept reusable tenant screening reports now might actually be dissuaded from doing so if this bill became law because of the additional bureaucratic steps that would then be involved.

At the same time, the bill can be criticized on the basis of the content it says a reusable tenant screening report must contain. In particular, the bill requires every reusable tenant screening report to include the prospective tenant's criminal history for the prior seven years. A coalition of tenant and reentry advocacy groups objects to the bill on this basis. The coalition argues that such a lengthy lookback period is in tension with efforts to ensure that formerly incarcerated individuals have a genuine opportunity to secure housing. The bill may even be in conflict with recently promulgated fair housing regulations on the subject. (2 C.C.R. § 12264 *et seq*.) The coalition writes:

> [T]he bill undermines the important work that state and local advocates are doing to increase housing opportunities for justice-involved families. The definition of "reusable tenant screening report" includes extremely long look-back periods for both criminal and eviction history, outside of the standard practice for many landlords and certainly longer than reasonable to determine an

[1] *See Online Rental Applications FAQ*. Zillow https://www.zillow.com/z/rental-manager/rental-applications-faq/ (as of June 4, 2022).
[2] *See MyScreeningReport.com Services*. MyScreeningReport.com https://www.myscreeningreport.com/services/ (as of June 4, 2022).

> individual's qualifications for tenancy. The bill risks codifying harmful and discriminatory look back periods into law.

In spite of these concerns, the author believes it is important to push forward on the concept of reusable tenant screening reports. As already stated, the policy concept shows great potential for reducing the transactional costs of finding new housing generally, and lowering the barrier to re-housing for formerly homeless individuals in particular.

4. Proposed amendments

While unlikely to remove opposition from the bill, amendments could address some of the concerns raised. The revised approach still introduces the key concept of a reusable tenant screening report into California law, but it does so in a more generalized way and without imposing any additional burdens on landlords that elect to accept reusable tenant screening reports. This approach should enable landlords, credit reporting agencies, and tenant organizers to begin to prepare for the more widespread adoption of reusable tenant screening reports in the future, while leaving room and flexibility for further development of optimal content and procedures.

In summary, the proposed amendments would:

- make eviction history information available in a reusable screening report in a format and for a period of time consistent with applicable law;
- eliminate criminal history information from the reusable screening report; and
- eliminate the requirement that landlords provide notice in multiple places in order to be able to accept reusable tenant screening reports.

A mock-up of the amendments in context is attached to this analysis.

5. Arguments in support of the bill

According to the author:

> In the current rental market, renters often have to apply to multiple rental properties before their application is accepted. If a renter applies to several properties, the various background screening report fees can quickly add up to several hundred dollars. AB 2559 sets a standard for reusable screening reports to be used during the rental application process. By using a reusable screening report, renters only have to pay one time for the report that can be used many times over 30 days, thereby saving the renter many hundreds of dollars, and will allow landlords to expeditiously review verified applicant information.

6. Arguments in opposition to the bill

In opposition to the bill, California Rural Legal Assistance Foundation, ECHO Housing, Fair Housing Napa Valley, Inner City Law Center, Law Foundation of Silicon Valley, Legal Aid Society of San Diego, National Housing Law Project, and Western Center on Law and Poverty collectively write:

> The undersigned social justice organizations share the author's mission to eliminate tenant screening fees and shift consumer power into the hands of rental housing applicants. We are worried, however, that AB 2559, as written, runs a risk of doing more harm than good. […] First, the bill does not require or incentivize landlords to accept portable screening reports. In fact, the bill may discourage landlords from using portable screening reports because it requires only landlords that accept portable screening reports to disclose that they do and then prohibits only those landlords from charging application fees. […] Second, the bill undermines the important work that state and local advocates are doing to increase housing opportunities for justice-involved families.

In further opposition to the bill, Just Cities, Legal Services for Prisoners with Children, and Root and Rebound collectively repeat the concerns from the excerpt, above, and add:

> [T]he bill contradicts recently-enacted fair housing regulations pursuant to California's state fair housing laws. Article 24 of the regulations governs the consideration of criminal history information in housing and the type of criminal history that may be considered in housing admissions decisions. The regulations note that while some consumer credit reports contain information up to seven years from the date of disposition, shorter lookback periods may be required in order to comply with fair housing laws. Codifying a seven year look back period in AB 2559 will undermine the regulations because in most cases, landlords would have access to, via portable tenant screening reports, more information than they are allowed to consider in admissions decisions. A much better practice is to not require the usage of criminal background checks at all in tenant screening reports thereby letting landlords decide which information is relevant to their practices and in their particular local jurisdictions.

SUPPORT

None known

OPPOSITION

California Rural Legal Assistance Foundation
ECHO Housing
Fair Housing Napa Valley
Inner City Law Center
Just Cities
Law Foundation of Silicon Valley
Legal Aid Society of San Diego
Legal Services for Prisoners with Children
National Housing Law Project
Root and Rebound
Western Center on Law and Poverty

RELATED LEGISLATION

Pending Legislation: SB 1335 (Eggman, 2022) prohibits a landlord from using a person's credit history as part of the application process for a rental accommodation in instances involving a government rent subsidy unless the landlord offers the applicant the option to provide alternative evidence of financial responsibility and ability to pay. SB 1335 is currently pending consideration before the Assembly Housing and Community Development Committee.

Prior Legislation:

AB 2203 (L. Rivas, 2022) would have prohibited a property owner from requiring a consumer credit report as part of the application process for rental housing in which the housing unit or the applicant receives a government rent subsidy. AB 2203 is on the Assembly inactive file.

AB 2527 (Quirk-Silva, 2022) would have prohibited landlords from relying on a consumer credit report in deciding whether to rent to a prospective tenant, as well as from asking applicants to answer questions about the contents of their credit reports. AB 2527 was never set for a hearing in the Assembly Housing and Community Development Committee.

PRIOR VOTES:

Assembly Floor (Ayes 54, Noes 8)
Assembly Privacy and Consumer Protection Committee (Ayes 9, Noes 0)
Assembly Judiciary Committee (Ayes 8, Noes 0)

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Amended Mock-up for 2021-2022 AB-2559 (Ward (A))

Mock-up based on Version Number 96 - Amended Assembly 5/4/22

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1950.1 is added to the Civil Code, to read:

1950.1. (a) A reusable tenant screening report shall include all of the following information regarding an applicant:

(1) Name. ~~The results of a criminal history check for the seven years preceding the date on which the consumer reporting agency received the request for the reusable tenant screening report.~~

(2) Contact information. ~~The results of an eviction history check for the seven years preceding the date on which the consumer reporting agency received the request for the reusable tenant screening report.~~

(3) Verification of employment.

(4) Last known address.

(5) Results of an eviction history check in a manner and for a period of time consistent with applicable law related to the consideration of eviction history in housing.

(b) A reusable tenant screening report shall also prominently state the date through which the information contained in the report is current.

(c~~b~~) A landlord may elect to accept reusable tenant screening reports and may require an applicant to state that there has not been a material change to the information in the reusable tenant screening report.

~~(c) A landlord who elects to accept reusable tenant screening reports shall provide an applicant with notice in a manner reasonably calculated to inform applicants that the landlord accepts such reports. That notice shall be provided, at minimum, by the following means:~~

~~(1) A clear and conspicuous statement on each listing or advertisement for residential rental property on the internet.~~

~~(2) A clear and conspicuous statement on each internet website maintained by the landlord.~~

~~(3) A clear and conspicuous statement on each application for residential rental property.~~

~~(4) A clear and conspicuous statement posted at each physical location where applicants may submit applications for residential rental property.~~

(d) Notwithstanding Section 1950.6, if an applicant provides a reusable tenant screening report to a landlord that accepts reusable tenant screening reports, the landlord shall not charge the applicant either of the following:

(1) A fee for the landlord to access the report.

(2) An application screening fee.

(e) As used in this section:

(1) “Applicant” has the same meaning as defined in Section 1950.6.

(2) “Application screening fee” has the same meaning as defined in Section 1950.6.

(3) “Consumer report” has the same meaning as defined in Section 1681a of Title 15 of the United States Code.

(4) “Consumer reporting agency” means a person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties and that uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(5) “Landlord” means an owner of residential rental property or the owner’s agent.

(6) “Reusable tenant screening report” means a consumer report that meets all of the following criteria:

(A) Was prepared within the previous 30 days by a consumer reporting agency at the request and expense of an applicant.

(B) Is made directly available to a landlord for use in the rental application process or is provided through a third-party website that regularly engages in the business of providing a reusable tenant screening report and complies with all state and federal laws pertaining to use and disclosure of information contained in a consumer report by a consumer reporting agency.

(C) Is available to the landlord at no cost to access or use.

(f) This section does not affect any other applicable law related to the consideration of criminal history information in housing, including, but not limited to, Article 24 (commencing with Section 12264) of Subchapter 7 of Chapter 5 of Division 4.1 of Title 2 of the California Code of Regulations and local ordinances governing the information that landlords may review and consider when determining to whom they will rent.

(g) If an ordinance, resolution, regulation, administrative action, initiative, or other policy adopted by a city, county, or city and county conflicts with this section, the policy that provides greater protections to applicants shall apply.

(h) This section does not require a landlord to accept reusable tenant screening reports.

NOTES

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U.S. Department of Housing and Urban Development, Office of Policy Development and Research, Transparency in Rental Fees (July 2023)

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Policy&Practice

Innovative solutions to help local policymakers and practitioners address today's housing and community development challenges.

July 2023

U.S. Department of Housing and Urban Development | Office of Policy Development and Research

Transparency in Rental Fees

As part of the housing search, prospective renters often pay application fees to be considered for available rental units. Application fees can limit options for renters and strain household budgets, particularly for renters with low and modest incomes who already face high rental cost burdens. These fees may be particularly burdensome in tight markets where renters often submit multiple applications as they compete for scarce units. In addition, the monthly rent included in a listing may not reflect the full cost if a landlord later requires the tenant to pay undisclosed or hidden fees. This issue of *Policy & Practice* provides an overview of the research on rental fees and highlights strategies to encourage transparency and fairness in the rental market.

Research Insights

Most prospective renters contact several owners or property managers and visit multiple units during their housing search, even if they ultimately apply to fewer units. Typically, each application is accompanied by a rental application fee, which can range from $50 to several hundred dollars and is meant to cover the cost of background and credit checks.[1] A tighter rental market nationally has led to an increase in the percentage of renters applying to two or more properties.[2]

Application fees are pervasive within the rental market[3] and contribute to a prerental application process that disproportionately burdens Black and Hispanic renters and low-income households with housing vouchers.[4] Black and Hispanic renters, on average, apply to more units than White renters.[5] In addition to applying to more units, 73 percent of Black and Hispanic renters and 84 percent of Asian renters pay an application fee, compared with 56 percent of White renters.[6]

Even if prospective renters are charged modest rental application fees, the fact that most prospective renters apply to at least one unit means these costs can add up quickly. Because tenant screening reports may include inaccurate information, prospective renters may pay multiple application fees only to be repeatedly rejected because of those inaccuracies.[7]

Furthermore, after securing housing, renters may end up paying a monthly amount for their housing that exceeds the listed price of the unit due to hidden or junk fees.[8] Tenants are sometimes evicted when they don't pay these fees—even if they have paid their rent. These fees make it harder for renters to find housing in the future if they are saddled with debt, an eviction on their record, or diminished credit scores.[9]

Innovative Policies and Practices

Across the country, state and local governments have placed limits on the amount and types of fees that can be charged to tenants and now require increased upfront disclosure of fees that tenants will be charged. Leasing platforms and housing providers have also taken action to limit or better disclose fees. These actions aim to increase transparency for renters and ensure that fees reflect the actual costs to housing providers. Although

state and local governments play an important role in regulating fees and promoting fairness, housing search platforms and housing providers can voluntarily take proactive steps to increase transparency in rental transactions. This section highlights actions that governments and housing providers can take to increase transparency or limit rental fees.

Cap or eliminate rental application fees.

Recognizing that application fees often exceed the costs of screening services, some states have limited the application fees that landlords can charge. Several states, such as Virginia, cap rental application fees at a specific dollar figure, with caps typically ranging from $20 to $50.[10] Other states, such as Washington, set the cap to equal the exact cost of the tenant screening service.[11] Vermont has banned rental application fees altogether.[12]

Allow prospective renters to provide their own screening reports. Instead of renters paying landlords to screen on their behalf, some states are enabling renters to purchase and provide their own screening reports. New York State prohibits landlords from collecting application fees from prospective renters with portable screening reports.[13] State laws in California, Maryland, and Washington define reusable tenant screening reports, including the contents of those reports (e.g., income, rental history, credit history, and criminal history) and the length of time they are valid.[14] Maryland and Washington require landlords to disclose whether they accept reusable screening reports.[15] Those two states prohibit landlords from charging a fee to an applicant with a portable report unless the landlord has properly disclosed that portable reports are not accepted. Similarly, California prohibits landlords from charging a fee to an applicant with a portable report unless the landlord does not generally accept such reports.[16]

Allow a single application fee to cover multiple applications. Similarly, some rental leasing and property management websites allow renters to reuse applications and screening reports when applying to multiple listings on the platform. The online rental platform Avail, which serves mom-and-pop landlords, allows the 1.3 million renters on its platform to access their application information and submit it to multiple property owners at no additional cost.[17] Zillow offers a universal rental application that allows renters to apply to unlimited units for 30 days and includes their credit and background reports.[18] Like the Common App for college applications, these policies enable prospective renters to apply to more units at no additional charge.

Limit allowable fees and deposits at the time of move-in or lease signing. When tenants sign a lease to move into a unit, they can be charged a mixture of nonrefundable fees and fully refundable deposits. State and local governments can set limits on these fees. For example, the city of Seattle allows only nonrefundable fees to be charged for cleaning and screening.[19] Generally, those fees are limited to less than 10 percent of one month's rent.[20] In addition, Seattle's regulations stipulate that landlords cannot charge cleaning fees at both the beginning and end of rental periods,[21] and it forbids landlords from charging security deposits and fees in excess of one month's rent.[22] Several states also specify that the lease agreement must include the amount, timeframe, and conditions for late fees.[23]

Clearly identify bottom-line amounts that tenants will pay for move-in and monthly rent.

Advertisements and lease documents can include language that makes it tough for prospective renters to identify additional fees that increase their total monthly costs. These lease document features should be one page or less in length, in a readable format, and provided in the languages spoken in the local area and should clearly identify costs to renters and the purposes of those costs. The Texas Apartment Association provides a Summary of Key Information in their model lease document that succinctly highlights the total monthly costs and any additional fees to which renters may be subjected.[24]

Connecting to the U.S. Department of Housing and Urban Development's Efforts

In January 2023, the Biden-Harris Administration released a Blueprint for a Renter Bill of Rights, which

includes five principles that create a shared baseline for fairness for renters in the housing market. One of the principles focuses on clear and fair leases, highlighting the need for transparency around fees and security deposits, among other best practices.[25] This brief expands upon a letter that Secretary Fudge published urging all housing providers, as well as state and local governments, to take action to limit and better disclose fees charged to renters in advance of and during tenancy.[26]

Policy & Practice

HUD's Office of Policy Development and Research

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Discuss this issue on the *Policy & Practice* Forum at www.huduser.gov/forums. You can subscribe to receive updates from PD&R at https://www.huduser.gov/portal/subscribe/subscribe.html.

Endnotes

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National Housing Law Project, Additional Resources: Consumer Protections and Tenant Admissions

Submitted by:
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National Housing Law Project

Consumer Protections and Tenant Admissions

Using Consumer Reports: What Landlords Need to Know (FTC, 2023)

Tenant Background Checks Market (CFPB, 2021)

Transparency in Rental Fees (HUD, 2023)

Analysis of AB 2559 (CA Senate Judiciary Committee, 2022)

Consumer Reform Priorities to Protect Tenants (NCLC, 2023)

The Rental Crisis Will Not Be Televised: The Case for Protecting Tenants Under Consumer Protection Regimes (Sirota, E., 2021)

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Consumer Protections in Admissions Cases (PowerPoint slides)

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National Housing Law Project

Consumer Protections in Admissions Cases

Ariel Nelson (NCLC)
Lisa Sitkin and Stacey Tutt (NHLP)

November 13, 2023

Rental application denial statistics

NATIONAL HOUSING LAW PROJECT

FIGURE 2: TENANT SCREENING COMPLAINTS BY ISSUES, JAN. 2019 TO SEPT. 2022

Source: CFPB

Fair Credit Reporting Act

NATIONAL HOUSING LAW PROJECT

FCRA consumer disclosure:

- Consumer reporting agencies must make disclosure on request (15 U.S.C. § 1681g)
- Includes credit accounts, criminal records, LL-T court records, etc.
- Reports provided to consumers typically do not contain scores or analytical information

Obtaining consumer disclosures is often difficult:

- Screening companies commonly insist on cumbersome identification requirements
- Companies often reluctant/unwilling to send paper disclosures to P.O. Box, relative, or friend
- Applicants often steered to oral, telephonic disclosures in lieu of written disclosures
- Some resellers still fail to disclose consumer data stored in third-party databases
  - Contrary to *Cortez v. Trans Union,* 617 F.3d 688 (3d Cir. 2010)
- Availability of screening report prior to rental application unclear

Screening report shows records that aren't mine

NATIONAL HOUSING LAW PROJECT

"Mixed files"

- Data belonging to different person(s) matched to applicant
- Most common with common names, fewer identifiers
- "Possible matches" (record may or may not relate to applicant)
- Especially common with criminal records

Incomplete records

- Information that appears in report is true, but misleading because other critical information is not included
- Most common with dismissed arrests, evictions, references
- Also common with outdated records

Duplicates/repeated entries

- Same negative item reported multiple times
- Common with criminal records (arrest, charge, conviction, sentence)

Disputing Credit Report

NATIONAL HOUSING LAW PROJECT

FCRA Dispute & Reinvestigation Scheme

- Obtain written denial notice from landlord
- Request copy report from screening service
- Transmit dispute to screening service
- Receive response to dispute (from screener)
- (If favorable), direct screener to notify LL of change

POLL

NATIONAL HOUSING LAW PROJECT

Have you ever disputed information on a credit report? Yes/No

If Yes:

Have you disputed information on a prospective tenant's tenant screening report? Yes/No

How long did it take to resolve the dispute?

- 30 days or less
- 31-60 days
- More than 61 days

Tenant Screening Report Dispute Procedures

NATIONAL HOUSING LAW PROJECT

- **Erroneous information on tenant-screening report**
  - **Dispute & reinvestigation procedure under FCRA (15 U.S.C. § 1681i)**
  - **Must lodge dispute with consumer reporting agency (not "furnisher")**
  - **CRA must "reinvestigate" disputed item, verify or delete/correct (30 days)**
  - **After CRA reports results of reinvestigation, consumer may request that CRA update "users"**
- **"Reseller" disputes (most tenant-screening companies resell some or all data)**
  - **Resellers must comply with 15 U.S.C. § 1681i(f)**
    - **Within 5 days, determine whether inaccuracy resulted from reseller's own act or omission; and**
    - **If so, correct information within 20 days; if not, forward dispute to source & relay source's response to consumer**
  - **Resellers generally exempt from balance of § 1681i**

Utilizing the FCRA

NATIONAL HOUSING LAW PROJECT

- **Practical uses for FCRA disputes:**
  - **Remove mismatched records**
  - **Clear sealed records**
  - **Compel updates/corrections to incomplete or inaccurate records**
- **Limitations on FCRA disputes:**
  - **No duty to reinvestigate legal disputes**
  - **Inaccuracies (basically) don't matter unless material to decision**
  - **Statute authorizes only damages, not injunctive relief (private)**

FCRA limitations (partial list)

- Injunctive relief not available
- No strict liability
  - Plaintiff must show inaccuracy resulted from failure to follow reasonable procedures
  - Procedures that produce inaccuracies often inscrutable, require discovery
- Damages only (no private injunctive relief available)
- 30 days to reinvestigate + 5 days to report results (vs. availability of unit)
- Unfavorable legal interpretations:
  - CRA has no duty to resolve "legal" disputes (only "factual" errors)
  - *Safeco Insurance v. Burr*: willful violation requires unreasonable misreading of FCRA duties
  - *Spokeo, Inc. v. Robins:* violation of consumer's statutory rights insufficient for standing
  - *Ramirez v. TransUnion*: even if violation is willful (thus authorizing statutory damages)
  - Only "material errors" actionable

Application Fees

NATIONAL HOUSING LAW PROJECT

- National average = $50 (per Zillow.com)
- Fees not refunded if application denied
- Significant racial disparities:
  - White & Asian renters average 2 applications, Black & Latinx average 3
  - 38% of Black and Latinx renters submit 5+ applications, vs. 21% of white renters
- Deterrent effect of rental application fees
  - Clients often reluctant to apply, especially to higher-quality rentals
  - Often try to suss-out likelihood of acceptance before formal application
- Probably contribute to residential segregation
  - Key impediments to housing admission more common among Black & Latinx renters
  - Likely steers Black & Latinx renters to lower-quality housing in areas of concentrated poverty

Portable Tenant Screening Reports

NATIONAL HOUSING LAW PROJECT

State Laws Vary

Example: Washington State
A comprehensive reusable report is "a report prepared within the previous 30 days by a consumer reporting agency at the request and expense of a prospective tenant and made directly available to a prospective landlord at no charge for use in the rental application process."

Each report must contain the following:

- A credit report
- A criminal history check in all jurisdictions indicated as prior residence over the past 7 years
- An eviction history over the previous 7 years
- Income and employment verification
- Current address and rental history

Applicants can use this report as many times as they want within 30 days. After that, the report is no longer valid, and the applicants have to request a new one.

Portable Tenant Screening Reports

NATIONAL HOUSING LAW PROJECT

Notification Requirements:
Property owners must notify applicants whether they accept comprehensive reusable tenant screening reports. Several notification options, including:

- A statement on the listing
- A notice on the property manager's website
- On the rental application page
- Any other calculated manner to notify the renter

If a property owner operates a website, they must include a notification statement on the homepage.

Portable Tenant Screening Reports

NATIONAL HOUSING LAW PROJECT

Charging Applicants for Application Fees

If a rental owner accepts reusable reports, they can't charge the applicant for:

- Application fees
- Fees to access the report
- Fees for additional background checks

However, if the report is not comprehensive or valid it will not be eligible for protection. In that case, the property owner can charge the applicant for additional screening.

Portable Tenant Screening Reports

NATIONAL HOUSING LAW PROJECT

Certifying the Comprehensive Reusable Tenant Screening Report

A property owner may require a prospective renter to certify the reusable tenant screening report. This is to ensure that there have not been any changes to the applicant's name, address, bankruptcy status, criminal history, or eviction history to hide unfavorable reports.

Doing so allows the property owner to use the document in any case proceedings in the event of discovering an alteration of information.

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