

NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY

Regulations Division
Office of General Counsel
451 7th Street SW., Room 10276
Department of Housing and Urban Development
Washington, DC 20410-0500

May 23, 2016

Re: Docket No.[FR -517-N-08]

Affirmatively Furthering Fair Housing Assessment Tools

The National Law Center on Homelessness & Poverty (“NLCHP”) and the undersigned allied organizations appreciate the opportunity to comment on specific issues related to the U.S. Department of Housing and Urban Development’s (“HUD”) Affirmatively Furthering Fair Housing Assessment Tool for Public Housing Agencies (the “Tool”).

The Tool uses the classifications of individuals protected from housing discrimination set forth in the Fair Housing Act (the “Act”), Title VIII of the Civil Rights Act of 1968. The Act was amended in 1988 to expand the list of protected classifications, which now include (1) race, (2) color, (3) national origin, (4) religion, (5) sex, (6) handicap, and (7) familial status. As HUD reviews comments and finalizes the Tool, NLCHP encourages HUD to supplement or clarify the Tool and the guidance to account for people without housing, a group that is often targeted as a proxy for one or more protected classes and suffers discrimination, exclusion, and segregation disproportionately. We believe that considering data and analyzing how local policies can serve to include or exclude this population is critical to a full fair housing analysis.

I. Homelessness and Protected Classifications

Individuals and families who are racially or ethnically non-white are more likely than the white population to experience homelessness.¹ This is true even when accounting for income disparities.² Persons with mental or physical disabilities are also disproportionately likely to

¹ U.S. Interagency Council on Homelessness, *Council Confronts Racial Disparities in Homelessness, Reducing Criminal Justice System Involvement*, available at <https://www.usich.gov/news/council-meeting-update-October-2015> (Nov. 5, 2015). U.S. Dep’t of Housing & Urban Dev. Off. of Community Planning & Dev., *The 2015 Annual Homeless Assessment Report (AHAR) to Congress*, available at <https://www.hudexchange.info/resources/documents/2015-AHAR-Part-1.pdf>. See also National Law Center on Homelessness & Poverty, *Homelessness in America: Overview of Data and Causes*, available at https://www.nlchp.org/documents/Homeless_Stats_Fact_Sheet (Jan. 2015) ; Joint Center for Housing Studies of Harvard University, *The State of the Nation’s Housing 22-26* (2014), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/sonhr14_txt_bw-full.pdf (Reporting that, in 2012, 27% of African-American households paid over 50% of their incomes in rent, along with 24% of Hispanic households and 21% of Asian households, while only 14% of white households paid over 50% of their incomes in rent.)

² National Law Center on Homelessness & Poverty, *Homelessness in America: Overview of Data and Causes*, available at https://www.nlchp.org/documents/Homeless_Stats_Fact_Sheet (Jan. 2015) (“When compared to the

experience homelessness.³ And animosity towards people experiencing homelessness is often based on racial, ethnic or disability stereotypes.⁴

Just as governmental policies that limit or exclude affordable housing serve to create or perpetuate segregation because of the disparate effect on racial and ethnic minorities, governmental policies that limit or exclude people experiencing homelessness from residing in a community serve to create and/or perpetuate segregation on the basis of race, ethnicity, and/or disability.

HUD's definition of "affirmatively furthering fair housing" includes "replacing segregated living patterns with truly integrated and balanced living patterns."⁵ In evaluating living patterns, HUD should recognize that many state and federal laws effectively treat the location where a person sleeps as their address or residence for purposes of voting, food stamps, and other purposes.⁶ Accordingly, the living patterns of homeless persons are an important factor to be accounted for in the fair housing analysis.

We urge HUD to require analysis of data and certain types of laws and policies that impact homeless and high-need populations as part of the factors that contribute to segregation/integration, racially or ethnically concentrated areas of poverty ("R/ECAPs"), disparities in access to opportunity, and disproportionate housing needs. Governmental laws and policies can have a particularly deleterious effect on people experiencing homelessness because they are often forced to live in public space or to rely on publicly funded or regulated shelters or food. Recent years have seen a dramatic growth in local and state laws criminalizing people for experiencing homelessness,⁷ even as the federal government has pushed hard to discourage the same.⁸ In fact, the Department of Justice recently filed a statement of interest in a federal lawsuit

total population and *those living in poverty*, those who are homeless are more likely to be [African American] and disabled.") (emphasis added).

³ The Substance Abuse and Mental Health Services Administration estimates that 20 to 25% of homeless Americans suffer from some form of severe mental illness. In comparison, only 6% of Americans are severely mentally ill. Nat'l Coal. for the Homeless, *Mental Illness & Homelessness* (2009), available at http://www.nationalhomeless.org/factsheets/Mental_Illness.pdf.

⁴ Kaya Lurie, et al., *Discrimination at the Margins: The Intersectionality of Homelessness & Other Marginalized Groups* (May 6, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602532.

⁵ 24 CFR § 5.152.

⁶ See, e.g., 7 CFR 273.3 (protecting individuals who do not have a permanent address from being denied food stamps). The federal voter registration form provides an option to draw a map and denote a location where a person lives, in order to account for homeless persons who sleep outside. See Voter Registration Form, available at http://www.eac.gov/assets/1/Page/Federal%20Voter%20Registration_1-25-16_ENG.pdf.

⁷ Nat'l Law Ctr. on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* (2014), available at https://www.nlchp.org/documents/No_Safe_Place.

⁸ See, e.g., U.S. Department of Justice, *Justice Department Files Brief to Address the Criminalization of Homelessness*, <https://www.justice.gov/opa/pr/justice-department-files-brief-address-criminalization-homelessness>;

in Idaho arguing that criminalizing homelessness through anti-camping ordinances when a locality does not provide sufficient homeless shelters is cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution.⁹ Additionally, in September 2015, as part of its second Universal Periodic Review by the UN Human Rights Council, the U.S. government committed to “[i]nvest further efforts in addressing the root causes of recent racial incidents and expand its capacity in reducing poverty in neighborhoods experiencing sub/par public services, including access to adequate housing and public safety” and “[a]mend laws that criminalize homelessness and which are not in conformity with international human rights instruments.”¹⁰

The laws and policies that act to criminalize homelessness or push out people experiencing homelessness, such as anti-camping laws or police sweeps, also facilitate segregation by forcing homeless populations out of some neighborhoods and result in consolidation in other neighborhoods. While this takes on different forms, one pattern is to corral people experiencing homelessness to an area on the outskirts of town, far from jobs or opportunities, at times removed from public transportation or access to education.¹¹ This has an impact on segregation, R/ECAPs, and access to opportunity. Another common practice is to sweep encampments of people experiencing homelessness who lack any adequate alternatives.¹² Where the local practice is to remove people and their belongings repeatedly, the intent or effect may be to force people to leave the jurisdiction altogether or to push people experiencing homelessness into particular neighborhoods—generally those that are R/ECAPs and lack access to opportunity.

This issue, moreover, is not limited to criminal laws or policies. Zoning or other regulatory laws and policies may target organizations that provide services to homeless and high-need populations by imposing unrealistic or expensive requirements such as requiring security in order to obtain or maintain a business license or selective enforcement (or imposition) of building code requirements. These regulations have the effect of limiting services to homeless populations in an area, which results in homeless and high-need populations often being forced to relocate as they are being told explicitly or implicitly, “your kind is unwelcome here.”

It is important to note that these policies, which have a direct and long-term impact on the spatial living patterns of our most deeply impoverished neighbors, also have tremendous impacts on

U.S. Department of Justice Community Oriented Policing Services, *Community Policing Dispatch*, <http://cops.usdoj.gov/html/dispatch/12-2015/index.asp> (December 2015); National Law Center on Homelessness & Poverty, *The Cost of Criminalizing Homelessness Just Went Up by \$1.9 Billion*, https://www.nlchp.org/press_releases/2015.09.18_HUD_NOFA_criminalization.

⁹ See Statement of Interest of the United States, *Bell v. City of Boise*, No. 1:09-cv-540-REB (D. Idaho Aug. 6, 2015).

¹⁰ Report of the Working Group on the Universal Periodic Review, United States of America, A/HRC/30/12, ¶ 176.124, 310 (July 20, 2015).

¹¹ See, e.g., Arthur Delaney, How A Traveling Consultant Helps America Hide The Homeless, http://www.huffingtonpost.com/2015/03/09/robert-marbut_n_6738948.html (Mar. 17, 2015);

¹² Al Jazeera America, *ACLU files suit against Honolulu over homeless-camp sweeps*, (Sept. 16, 2015) <http://america.aljazeera.com/articles/2015/9/16/aclu-files-suit-against-honolulu-over-homeless-camp-sweeps.html>.

those individuals' immediate efforts to escape poverty and homelessness. With instability and dislocation comes the interruption of services. With exclusion from job-rich areas comes increased difficulty in finding or keeping a job or accessing related services. With removal of encampments often comes interruptions in basic services, including water, food, and sanitation. With citations or arrest come additional costs, loss of jobs or custody of children, and the burden of a criminal record.

The Tool provides communities a unique opportunity to look both at specific, individual laws and how systems and structures of laws interact in the region to discriminate, exclude, deny, or segregate. Any analysis and planning that does not take into account laws that exclude individuals experiencing homelessness from our neighborhoods and public spaces risks permanently excluding the most vulnerable amongst us, even as it purports to open access to all.

II. Laws that Impact Victims of Domestic Violence

Victims of domestic violence face discrimination in housing as “towns and cities across the country are increasingly passing local laws that punish landlords and tenants when crimes occur on a property.”¹³ New “nuisance ordinances” label a property a nuisance when it is the site of particular conduct, including calls for police, or nuisance conduct (such as assault, harassment, stalking, or disorderly conduct). These laws often apply regardless of whether the resident was the victim or perpetrator and landlords often respond by punishing the tenant, who may be an innocent victim.¹⁴ As a result, “[w]omen and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence.”¹⁵

¹³ ACLU, *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, <https://www.aclu.org/i-am-not-nuisance-local-ordinances-punish-victims-crime>; Nava Kantor and Molly W. Metzger, *Evicting Victims: Reforming St. Louis's Nuisance Ordinance for Survivors of Domestic Violence*, at 2 (Sept. 2015), <http://csd.wustl.edu/Publications/Documents/PB15-47.pdf> (“city governments nationwide have promoted chronic nuisance laws that are overly tough on both property owners and tenants; moreover, such laws allow cities to fine property owners deemed to require ‘excessive’ police attention to recoup the cost of providing these police services”); see also U.S. Department of Housing and Urban Development, Notice (Feb. 9, 2011), <http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf> (chronicling various ways in which victims of domestic violence may face housing discrimination); Press Release, *HUD and City of Berlin, New Hampshire, Settle Allegations of Housing Discrimination Against Victims of Domestic Violence* (Feb. 19, 2015), U.S. Department of Housing and Urban Development, Notice (Feb. 9, 2011), <http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf> (discussing Conciliation Agreement between the city of Berlin, New Hampshire, and HUD following allegations that the municipality violated the Fair Housing Act when it enacted an ordinance requiring landlords to evict tenants cited three or more times for “disorderly action,” including domestic violence incidents); Press Release, *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 (discussing HUD Conciliation Agreement with Norristown, Pennsylvania, settling allegations that the municipality violated the Fair Housing Act when it enacted ordinances that held landlords responsible for evicting tenants cited for “disorderly behavior,” including domestic violence incidents, or risk being fined or losing their rental license).

¹⁴ *Id.*; see also *Abused Women: Your Fair Housing Rights*, <http://ptla.org/abused-women-your-fair-housing-rights>.

¹⁵ 42 U.S.C. § 14043e(3) (findings published in the Violence Against Women Act); see also Lenora M. Lapidés, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 J. GENDER, SOC. POL’Y & L.

Discrimination against victims of domestic violence overwhelmingly impacts classes protected by the Fair Housing Act. Indeed, “discrimination against victims of domestic violence is almost always discrimination against women”¹⁶ and “certain other protected classes experience disproportionately high rates of domestic violence.”¹⁷ Such discrimination violates the Fair Housing Act, which makes it unlawful to evict an individual because of race, color, national origin, religion, sex, disability, or familial status and the Violence Against Women Act, which makes it unlawful to evict an individual from federally funded housing because of their status as a victim of domestic violence or sexual assault.¹⁸

The Tool provides a unique opportunity for communities to examine whether they have laws that reduce housing opportunities for victims of gender based crime (particularly victims of domestic violence or sexual assault), and we urge HUD to consider specifically addressing this consideration in the Tool.

III. Eviction Records

Subsidized housing providers, such as Public Housing Authorities, generally screen tenants for criminal, credit, and eviction history to make sure that applicants will be good tenants.¹⁹ The

(2003) (“Battered women are discriminated against by landlords and housing authorities, employers, child protective service agencies and others. Discrimination against victims of domestic violence means that battered women are more likely to hide the abuse they suffer rather than seek help resulting in the availability of far fewer resources to protect themselves and change their lives.”) (internal footnotes omitted).

¹⁶ U.S. Department of Housing and Urban Development, Notice (Feb. 9, 2011), <http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf>.

¹⁷ *Id.* (explaining that African-American and Native American women experience disproportionately higher rates of domestic violence than white women); Emily J. Martin, Deborah A. Widiss, *Using Federal and State Laws to Promote Secure Housing for Survivors of Domestic Violence*, ABA Commission on Domestic Violence, Quarterly eNewsletter Volume 6, at 3 (Winter 2007), http://www.americanbar.org/content/dam/aba/publishing/cdv_enevletter/fairhousingforvictimsstateandfederallaws.authcheckdam.pdf (“women of color, poor women, women who are not married to their intimate partners or who have non-monogamous relationships or same-sex relationships, and women who openly express anger are all more likely to be blamed for the violence against them”).

¹⁸ See 42 U.S.C. § 3604; see also Emily J. Martin, Deborah A. Widiss, *Using Federal and State Laws to Promote Secure Housing for Survivors of Domestic Violence*, ABA Commission on Domestic Violence, Quarterly eNewsletter Volume 6, at 3 (Winter 2007), http://www.americanbar.org/content/dam/aba/publishing/cdv_enevletter/fairhousingforvictimsstateandfederallaws.authcheckdam.pdf (“The FHA prohibits both intentional sex discrimination and policies and practices that have a discriminatory effect on women. Both kinds of discrimination may be at work when a victim is threatened with eviction or denied housing.”).

¹⁹ See, e.g., MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 297 (Crown Publishers, 1st ed. 2016) (“Housing Authorities count evictions and unpaid debt as strikes when reviewing applications.”); MassLegalHelp, *Reasons for Denial* (Dec. 2009) <http://www.masslegalhelp.org/housing/reasons-for-denial> (federal public housing authority has wide discretion to deny public housing to applicants, in general “this means a housing authority will consider your rent-paying history” among other things); *HUD’s Public Housing Program*,

purported reasoning for eviction history screening is that a tenant with an eviction history will make a less desirable tenant in public housing as well. A tenant could have an eviction history because of: (1) non-payment of rent, (2) no cause (the eviction was illegal or unsubstantiated), or (3) breaking the lease (other than non-payment of rent). However, for purposes of eligibility for public housing, two of these three reasons for eviction shed no light on whether an applicant will be a good tenant. Indeed, non-payment of rent only reflects the existence of an inability to pay for market rate housing—which is itself a prerequisite for public housing eligibility.²⁰ When a family is denied public housing on the basis of an underlying eviction that resulted from non-payment of rent, denial of public housing arises from the very reason that made the family in need of public housing in the first place.

Furthermore, an individual or family may have an eviction record because they were victims of domestic violence or other gender based crime and evicted due to a nuisance law, because the property they were renting was foreclosed and they were evicted during the foreclosure process despite paying rent, or for another reason unrelated to their tenancy.

Such exclusions from public housing are not only paradoxical, they may also disproportionately exclude families and people of color from public housing in violation of the Fair Housing Act. Families and people of color are evicted at higher rates than other populations.²¹ As a result, public housing authorities may be turning families and people of color away from public housing for reasons irrelevant to their ability to be an acceptable tenant in public housing. NLCHP encourages HUD to use the Tool for further examination of how eviction records are used as admissions criteria for public housing and other subsidized housing and how this may be excluding protected classes without reason.

Specific Recommendation

1. Add “Access to public space for people experiencing homelessness” as a contributing factor throughout the assessment. The repeal or modification of such laws and policies should be

http://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog (describing eligibility for HUD’s public housing program); Subsidized Housing & Section 8 FAQ, <http://www.tenantsunion.org/en/rights/faq/subsidized-housing-section-8#can-low-income-housing-providers-not-rent-to-me-because-i-have-an-eviction> (discussing Washington state); *A Guide to Public Housing in Minnesota* (2013) (public housing authority can ask about and check records of eviction histories when evaluating an application for public housing).

²⁰ HUD’s *Public Housing Program*, http://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog (“Public housing was established to provide decent and safe rental housing for eligible low-income families,” among other groups.)

²¹ See e.g., Matthew Desmond, et al., *Evicting Children*, *Social Forces* 303-327 (Sept. 2013), available at http://scholar.harvard.edu/files/mdesmond/files/social_forces-2013-desmond-303-27.pdf; University of Wisconsin Institute for Research on Policy, Matthew Desmond, *Unaffordable America: Poverty, housing, and eviction*, *Fast Focus* (Mar. 2015), <http://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf>; Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MacArthur Foundation, *How Housing Matters* (Mar. 2014), available at https://www.macfound.org/media/files/HHM_Research_Brief_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf.

included as part of the Goals and Priorities. Laws that criminalize homelessness or otherwise burden the use or access to public space for those without shelter or housing have a deleterious and segregative impact on living patterns and fair housing opportunity that is not captured in any of the other contributing factors. In particular, this factor needs to include threats, civil, or criminal sanctions for sitting, resting, laying, sleeping, eating, sharing food, or conducting other life sustaining activities on public property or in a legally parked vehicle while no other decent and accessible alternatives are available. Program participants must analyze whether such policies and practices that forcibly move people, or otherwise cause people to dislocate, have a segregative effect in the region and whether they increase concentrations of R/ECAPs. Program participants should also consider whether displacement or exclusion that results from these laws reduces access to water, sanitation, transportation, jobs, schools, services, infrastructure, or other indicators of opportunity. Where such policies lead to worse living conditions, it should be discussed in disparate housing needs and where such policies or practices lead to a loss of services for persons with disabilities, it should be discussed in the section on persons with disabilities. In discussions of public expenditures, it would be helpful to analyze how much the program participant spends on criminalization policies, including the cost of police, hospital, jail/prison/detention, court costs, and the expense of moving people and moving, storing, or destroying property.

2. Specifically reference laws that have the effect of restricting or allowing provision of services to persons experiencing homelessness (including transitional shelters, day shelters, soup kitchens, or other provision of services) in the definitions of “land use and zoning laws” as well as “occupancy codes and restrictions.” Alternatively, HUD could create a factor that mirrors “regulatory barriers to providing housing and supportive services for persons with disabilities,” which appears to serve the same purpose with respect to the fair housing analysis for persons with disabilities.
3. When discussing affordability of housing units in the definitions section and throughout, it is important to clarify that it is not enough to have units that are affordable at 80% Area Median Income or other moderate incomes. Whether looking at inclusionary zoning or other policies that support affordable housing, it is important to consider what income levels are included and which are excluded. The availability of housing at different affordability levels needs to be included in the definitions of “location and type of affordable housing” and “availability of affordable units in a range of sizes.” It also should be part of the analysis of restrictions placed on affordable housing through other contributing factors, including but not limited to land use, zoning laws, and occupancy codes and restrictions.
4. The section on disproportionate housing needs should include data and analysis on the population of people experiencing homelessness that are currently unhoused. The most extreme form of disproportionate housing need is homelessness, and this is an important factor. To fully analyze the fair housing situation, program participants need to better understand the demographics of the population experiencing homelessness in the jurisdiction/region.
5. Specifically reference the commitments the United States made during the Universal Periodic Review to “[i]nvest further efforts in addressing the root causes of recent racial incidents and

expand its capacity in reducing poverty in neighborhoods experiencing sub/par public services, including access to adequate housing and public safety” and “[a]mend laws that criminalize homelessness and which are not in conformity with international human rights instruments” among other reasons for implementing the Tool.

6. Add “Nuisance Laws” as a possible contributing factor throughout the assessment. Ask program participants to identify nuisance laws within the region and examine whether the laws are used to evict victims of crime, whether those evicted are disproportionately women or disproportionately victims of gender-based crime such as domestic violence or sexual assault. In other words, are such laws exclusionary or discriminatory? The repeal or modification of such laws and policies should be a component of the Fair Housing Goals and Priorities.
7. Under “Disproportionate Housing Needs” within the “General Issues” of the “Fair Housing Analysis,” ask for a description about laws that may impact victims of domestic violence and an analysis of whether they constrict housing opportunities for women.
8. Under Fair Housing Compliance and Infrastructure, include questions on enforcement of discrimination against victims of domestic violence under VAWA and the Fair Housing Act, as well as enforcement of HUD guidance on harassment under the Fair Housing Act.
9. Under “Publicly Supported Housing Analysis” within the “Fair Housing Analysis,” ask how many individuals are turned away from public housing because of prior evictions and how many of these prior evictions are due to non-payment of rent or other factors that are not indicative of relevant qualifications. Ask also whether there is a higher or lower proportion of members of protected classes rejected on the basis of prior evictions.
10. Add “Reliance on eviction history to make acceptance decisions” to the list of considerations in “Contributing Factors of Public Supported Housing Location and Occupancy” and “Contributing Factors of Disproportionate Housing Needs.”

We thank HUD for the opportunity to comment on the Affirmatively Furthering Fair Housing Assessment Tool. Please contact Janet Hostetler, Deputy Director of the National Law Center on Homelessness & Poverty at jhostetler@nlchp.org or 202-638-2535, if you have any questions or would like any additional information in connection with any of our comments.

Sincerely,
 National Law Center on Homelessness & Poverty
 Sargent Shriver National Center on Poverty Law
 National Health Care for the Homeless Council
 Coalition for Juvenile Justice
 National Resource Center on Domestic Violence
 National Network to End Domestic Violence
 Homeless Persons Representation Project, Inc.
 Sacramento Regional Coalition to End Homelessness
 Metropolitan Interfaith Council on Affordable Housing, Inc. (MICAH)

Integrated Community Solutions, Inc.
HerStory Ensemble