

The court also rejected the owner's claim that this interpretation would ensnare owners in an "endless lease," stating that owners may terminate tenancies on any ground permitted by local law, concluding that "One thing that BSA may not do, however, is refuse to accept payment by voucher and then contend that eviction is warranted for nonpayment of rent."²⁰

The Local Source of Income Claim

The District of Columbia Human Rights Act makes it unlawful to refuse to "conduct any transaction in real property," to "require different terms for such transaction," or to "include in the terms or conditions of a transaction in real property" any condition or restriction "wholly or partially for a discriminatory reason based on" any one of a list of specified factors, including an individual's "source of income."²¹ The Act expressly recognizes Section 8 assistance as a source of income, and that those harmed may sue for damages and other remedies.²²

BSA did not dispute that it demanded that the tenants pay rent from their own funds and not through the Section 8 voucher program. However, the owner claimed that this was not "source of income" discrimination, because it was not motivated by anti-voucher animus but rather by the desire to vacate the units for sale. In dismissing the local law claim, the district court had accepted BSA's argument that motive was dispositive. The D.C. Circuit rejected this analysis because it has generally looked to Title VII cases in interpreting the Act, and "under Title VII, when a policy is "discriminatory on its face," the defendant's motive is irrelevant."²³ When BSA expressly refused to accept the tenants' vouchers, it committed a facial violation of the local law. At oral argument, BSA had suggested that the voucher program's requirements are burdensome, particularly the requirement that the landlord execute an initial lease with the tenant, to which the court responded:

Were we to accept that excuse, however, we would render the Human Rights Act's definition of "source of income" nugatory. The Act expressly defines "source of income" as encompassing the Section 8 program; indeed, Section 8 vouchers are the source-of-income provision's paradigm case...Permitting BSA to refuse to accept Section 8 vouchers on the ground that it does not wish to comply with Section 8's requirements would vitiate that definition and the legal safeguard it was intended to provide.

548 F.3d at 1070-71.²⁴

²⁰*Feemster* at 1069.

²¹D.C. Code § 2-1402.21(a)(1) and (2).

²²*Id.*, §§ 2-1402.21(e) and 2-1403.16.

²³548 F.3d at 1070 (citing several U.S. Supreme Court cases).

²⁴See also NHLP, *Courts Consider Landlord Defenses to Source of Income Laws*, 38 HOUS. L. BULL. 239 (Nov.-Dec. 2008).

Conclusion

Feemster marks another important victory in protecting the federal right of HUD-assisted tenants facing housing conversion actions to remain in their homes, despite the various creative attempts of owners to avoid its coverage. The D.C. Circuit's resounding decision also reinforces the utility of local laws establishing source of income protections. This strong precedent can help advocates ensure that such protections can and will be upheld in the future. ■

HUD Publishes Violence Against Women Act Interim Rule

In late November, the Department of Housing and Urban Development (HUD) took its first step toward adopting regulations to implement the housing provisions of the Violence Against Women Act of 2005 (VAWA).¹ HUD published an interim rule² that would amend existing subsidized housing regulations, including those governing the public housing and Section 8 programs, to incorporate VAWA's protections for survivors of domestic violence, dating violence, and stalking. For the most part, the interim rule parrots VAWA's statutory language, frustrating advocates, public housing agencies (PHAs), and owners who had hoped that the regulations would clarify some of VAWA's ambiguities. However, some provisions differ from the statute and, in fact, could be problematic for advocates representing survivors. Although the interim rule became effective December 29, 2008, HUD considered comments on the interim rule until January 27, 2008. It has not indicated when it plans to publish a final rule.

The Interim Rule's Structure

The interim rule would place the bulk of the regulatory language implementing VAWA in 24 C.F.R Part 5, the regulations that currently set forth HUD's general program requirements. The interim rule adds a new Subpart L titled "Protection for Victims of Domestic Violence in Public and Section 8 Housing" to 24 C.F.R Part 5.³

¹Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006). For more information on VAWA and HUD's implementation, see NHLP, *HUD Continues VAWA Implementation*, 37 HOUS. L. BULL. 7 (Jan. 2007); NHLP, *PHAs and Advocates Begin Early Efforts to Implement VAWA*, 37 HOUS. L. BULL. 193 (Dec. 2007); NHLP, *HUD Issues VAWA Guidance for Project-Based Section 8 Owners*, 38 HOUS. L. BULL. 220 (Oct. 2008).

²HUD Programs: Violence Against Women Act Conforming Amendments, 73 Fed. Reg. 72,336 (Nov. 28, 2008) [hereinafter "VAWA Interim Rule"].

³*Id.* at 72,340.

Subpart L contains five subsections: applicability; definitions; protection of victims of domestic violence, dating violence, and stalking in public and Section 8 housing; certification of status and confidentiality; and effect on other laws.⁴ The regulations that govern the individual HUD programs would then cross-reference the VAWA amendments in 24 C.F.R. Part 5. Specifically, Subpart L would apply to the housing choice voucher program; project-based voucher and certificate programs; public housing program; and renewed funding or leases under 24 C.F.R. parts 880, 882, 883, 884, 886, and 891 (which govern the various project-based Section 8 programs and the supportive housing program for the elderly and persons with disabilities).

Areas in Which VAWA Is Incorporated Without Change

In the interim rule's preamble, HUD states that it is "simply conforming its existing regulations to statutory provisions [of VAWA]," and that it "is not exercising agency discretion."⁵ This statement holds true for much of the interim rule's content, as it replicates VAWA's language stating that:

- An incident of violence will not be construed as a serious or repeated lease violation by the victim or as good cause to terminate the victim's tenancy or assistance.⁶
- Admission shall not be denied on the basis that an applicant is or has been a victim of domestic violence, dating violence, or stalking.⁷
- Criminal activity related to domestic violence, dating violence, or stalking shall not be cause for termination of the victim's tenancy or assistance.⁸
- A PHA or owner may bifurcate a lease to evict, remove, terminate occupancy rights, or terminate assistance to a tenant who engages in criminal acts of violence without evicting or terminating assistance to the victim of the violence.⁹
- VAWA does not limit the authority of a PHA or owner to honor court orders addressing rights of access to or control of property issued to protect the victim and to address distribution of property in a case where a family breaks up.¹⁰

⁴*Id.*

⁵*Id.* at 72,339.

⁶24 C.F.R. § 5.2005(a), 73 Fed. Reg. 72,341 (Nov. 28, 2008). For purposes of brevity, further citations to the Code of Federal Regulations refer to the revisions set forth in 73 Fed. Reg. 72,341.

⁷*Id.*

⁸§ 5.2005(b).

⁹§ 5.2005(c).

¹⁰§ 5.2005(a).

- Certification of domestic violence, dating violence, or stalking shall be kept confidential by the PHA or owner.¹¹
- Consolidated plans must estimate the housing needs of victims of domestic violence, dating violence, sexual assault, and stalking.¹²
- The 5-year plan must include a statement about goals, activities, objectives, policies, or programs that will enable a PHA to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking.¹³
- The annual plan must include a description of any activities, services, or programs offered by a PHA that help victims of domestic violence, dating violence, sexual assault, or stalking to obtain or maintain housing, to prevent violence, or to enhance victim safety.¹⁴
- A PHA may allow portability for a family that moves out of the assisted unit in violation of the lease in order to protect the health or safety of a victim of domestic violence, dating violence, or stalking.¹⁵

Areas of Concern

Although the interim rule states that it incorporates VAWA "without change,"¹⁶ this statement is belied by several provisions that substantially alter the statute's language. Two of the areas of greatest concern are the interim rule's provisions regarding "actual and imminent threat" and certification of domestic violence, dating violence, and stalking.

Actual and Imminent Threat

VAWA does not limit a PHA or owner's authority to evict or terminate assistance to any tenant, including a survivor, if the PHA or owner can demonstrate an "actual and imminent threat" to other tenants or employees at the property.¹⁷ In contrast, the interim rule states that a PHA or owner need only demonstrate an "actual or imminent threat."¹⁸ While this may seem to be a small change, it is concerning because VAWA makes clear that the threat must be both genuine and impending. Also troubling is HUD's attempt to define the phrase "imminent threat."

¹¹§ 5.2007(a)(1)(v).

¹²§ 91.205(b)(1).

¹³§ 903.6.

¹⁴§ 903.7.

¹⁵§ 982.353.

¹⁶VAWA Interim Rule, 73 Fed. Reg. 72,339.

¹⁷42 U.S.C.A. § 1437d(l)(6)(E) (West, WESTLAW through P.L. 110-460 approved 12-23-08) (emphasis added); 42 U.S.C.A. §§ 1437f(d)(1)(B)(iii)(V), 1437f(o)(20)(D)(iv) (West, WESTLAW through P.L. 110-460 approved 12-23-08) (emphasis added).

¹⁸24 C.F.R. § 5.2005(e).

VAWA does not define the term, and HUD's decision to do so undermines its statement that it has incorporated VAWA's statutory language without change. The interim rule states that "words, gestures, actions, or other indicators will be considered an 'imminent threat' if a reasonable person, considering all of the relevant circumstances, would have a well-grounded fear of death or bodily harm as a result."¹⁹ This definition is problematic because it contains no requirement of immediacy. For example, if an abuser made threats to other tenants or employees in the past, but is now incarcerated, or has not engaged in threatening activity in several months, HUD's definition of "imminent threat" could still apply, putting a survivor of domestic violence at risk of eviction or termination of assistance. By failing to include a requirement of immediacy or urgency in its definition of "imminent threat," HUD has ignored VAWA's plain language.

Certification of Domestic Violence, Dating Violence, or Stalking

The interim rule's language regarding certification of domestic violence, dating violence, or stalking also differs significantly from VAWA. VAWA states that a PHA or owner "may request that an individual certify via a HUD-approved certification form that the individual is a victim of domestic violence, dating violence, or stalking."²⁰ VAWA goes on to state that "[a]n individual may satisfy the certification requirement of subparagraph (A)" by providing (1) documentation signed by an employee, agent, or volunteer of a victim service provider, an attorney, or a medical professional; or (2) a police or court record.²¹ HUD has previously interpreted these provisions to mean that "[i]n lieu of a certification form," a police or court record or documentation signed by a professional may be provided.²² In other words, both VAWA's statutory language and HUD's prior guidance provide that an applicant or tenant may satisfy the certification requirement by supplying one of any of the following three documents: (1) HUD's certification form; (2) documentation signed by a qualified third party; or (3) a police or court record.

In contrast, the interim rule indicates that an individual must always provide the HUD form in response to an owner or PHA's request for certification. The interim rule states that a PHA or owner

may request that the tenant . . . certify in a form approved by HUD that the tenant is a victim of domestic violence, dating violence, or stalking, within 14 business days after the date that the tenant receives the request or such longer time as the PHA, owner, or management agent may at its discretion allow. The certification:

(i) May be based solely on the personal signed attestation of the victim . . . ; or

(ii) May be based on or supported by a federal, state, tribal, territorial, or local police or court record; or

(iii) May be based on or supported by documentation signed by an employee, agent, volunteer of a victim service provider, an attorney, or medical professional . . .²³

The interim rule makes clear that a PHA or owner may request that an individual provide the HUD form as proof of domestic violence, dating violence, or stalking. However, the interim rule never specifies that the tenant can provide a police or court record or qualified third-party documentation instead of the certification form. Rather, its certification provisions, read together as a whole, seem to suggest that the tenant must complete the HUD-approved form, if requested, and the information provided in this form "may be based on or supported by" a police or court record or qualified third-party documentation.

To add to this confusion, the interim rule's preamble states that "It is not mandatory that the victim provide the HUD form, and the PHA, owner, or management agent may not require the victim to provide the form."²⁴ However, this language is nowhere in the interim rule itself. Also missing from the interim rule is VAWA's statutory language providing that a PHA or owner's request for certification of domestic violence, dating violence, or stalking be in writing.²⁵ Additionally, the interim rule omits the statute's language stating that a PHA or owner is not required to demand official documentation or physical proof, and may provide VAWA's protections based solely on the individual's statement or other evidence.²⁶ Finally, the interim rule discusses certification only in the context of "continued tenancy."²⁷ It does not discuss certification in the context of voucher terminations or denials of housing to applicants.

Ironically, VAWA's certification provisions have been among the most difficult to implement. Several advocates have reported that PHAs and owners often require victims to provide multiple forms of documentation, which can be problematic in cases where the victim is in hiding or cannot access police, courts, or services due to fear of retaliation. The interim rule, as currently worded, does little to alleviate the confusion surrounding VAWA's certification procedures.

¹⁹*Id.*

²⁰§ 1437d(u)(1)(A); § 1437f(ee)(1)(A).

²¹§ 1437d(u)(1)(C); § 1437f(ee)(1)(C).

²²See Notice PIH 2006-42 (Dec. 27, 2006); Form HUD-50066.

²³24 C.F.R. § 5.2007(a).

²⁴VAWA Interim Rule, 73 Fed. Reg. 72,338.

²⁵§ 1437d(u)(1)(B); § 1437f(ee)(1)(B).

²⁶§ 1437d(u)(1)(D); § 1437f(ee)(1)(D).

²⁷§ 5.2007(a)(1).

Omissions in the Interim Rule

The interim rule fails to address several areas that are crucial to meaningful implementation of VAWA. For example, the interim rule does not include any amendments to 24 C.F.R. Part 966, which sets forth the requirements for public housing leases and the grievance procedure. VAWA requires that public housing leases include the statute's eviction and confidentiality protections,²⁸ yet this requirement is absent from the interim rule. Further, the interim rule fails to address what effect, if any, VAWA has on 24 C.F.R. § 966.51, which presently states that a PHA may exclude from the grievance procedure a termination of tenancy that involves violent criminal activity. Accordingly, 24 C.F.R. § 966.51 currently could be interpreted to exclude from the grievance procedure terminations of victims that are related to acts of domestic violence committed against them.

The interim rule replicates VAWA's provisions permitting a PHA or owner to bifurcate a lease to evict a tenant who engages in criminal acts of violence without evicting the victim of the violence. However, it does not incorporate VAWA's language stating that a PHA may terminate assistance to a household member who commits criminal acts of violence without terminating the victim's assistance.²⁹ In fact, there are several places in the interim rule that fail to incorporate VAWA's protections against voucher terminations.³⁰ In the preamble to the interim rule, HUD states that PHAs may be able to use their existing authority under 24 C.F.R. § 982.552(c)(2)(ii) to terminate voucher assistance for certain family members for criminal activity while permitting other family members to continue receiving assistance. However, even if it would be redundant to include VAWA's language regarding bifurcation of vouchers in the final rule, this would seem to be an important reminder for PHAs that they have this authority in cases involving domestic violence, dating violence, or stalking.

Conclusion

Housing and domestic violence advocates across the country submitted comments identifying the VAWA interim rule's deficiencies. Hopefully HUD will consider these comments and amend the interim rule accordingly before it issues the final rule. Even if the final rule does little more than reiterate VAWA's language, advocates can still work locally with PHAs to amend their Section 8 Administrative Plans and public housing Admissions and Continued Occupancy Policies to address the needs of survivors of domestic violence, dating violence, and stalking.³¹ ■

²⁸§ 1437d(l)(5)-(6).

²⁹§ 1437f(o)(7)(D).

³⁰See, e.g., §§ 5.2005(b), 5.2007.

³¹For sample PHA plan language and domestic violence policies, please contact Meliah Schultzman, attorney and Equal Justice Works fellow, at mschultzman@nhlp.org.

Fair Housing Tax Credit Case Survives Motion to Dismiss

The United States District Court for the Northern District of Texas recently denied a Motion to Dismiss by the Texas Department of Housing and Community Affairs (TDHCA) in a fair housing case brought by the Inclusive Communities Project (ICP),¹ which sought to increase the number of affordable housing units in more racially and economically integrated neighborhoods. TDHCA argued that ICP had no standing to bring the suit and that the case could not go forward because of ICP's failure to join the IRS and the City of Dallas. However, the court found in favor of ICP on all issues presented, permitting the case to proceed.

Background

Federal law imposes on the Department of Treasury and state housing finance agencies (HFAs) an obligation to promote racial and ethnic desegregation.² Both the Treasury and state HFAs are required "affirmatively to further" fair housing.³ In the context of other programs, several courts of appeal have held that the "affirmatively to further" duty prohibits an agency from funding housing developments that will exacerbate racial concentration.⁴ Pursuant to these holdings, Treasury and state HFAs arguably should be obligated to reject tax credit applications that would worsen racial concentration.⁵

The ICP filed an initial complaint on March 28, 2008, alleging that TDHCA had violated the Fair Housing Act (FHA), the Equal Protection Clause of the Fourteenth Amendment, and 42 U.S.C. § 1982 by (1) using race as a consideration in siting Low-Income Housing Tax Credit (LIHTC) properties and (2) disproportionately allocating tax credits in areas primarily comprised of people of color while denying credits in predominantly white

¹Inclusive Communities Project v. Texas Dep't. of Hous. and Cmty. Affairs, No. 3:08-CV-0546-D, 2008 WL 5191935 (N.D. Tex.) (hereafter *ICP v. TDHCA*). For background, see NHLP, *Texas Group Files Suit Alleging LIHTC Program Perpetuates Segregation*, 38 HOUS. L. BULL. 146 (July 2008).

²See 42 U.S.C.A. § 3608(d) (West, WESTLAW through P.L. 110-231 approved 5-18-08); 42 U.S.C.A. § 5304(b)(2) (West, WESTLAW through P.L. 110-231 approved 5-18-08); see also Poverty & Race Research Action Council, *Civil Rights Mandates in the Low Income Housing Tax Credit (LIHTC) Program* 2 (2004), <http://www.prrac.org/pdf/crmandates.pdf>; Florence Wagman Roisman, *Poverty, Discrimination, and the Low Income Housing Tax Credit Program* 20 (2000), <http://www.nhlp.org/lalshac/roisman.pdf>.

³42 U.S.C.A. § 3608(d) (West, WESTLAW through P.L. 110-231 approved 5-18-08); 42 U.S.C.A. § 5304(b)(2) (West, WESTLAW through P.L. 110-231 approved 5-18-08); Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994).

⁴Roisman, *supra* note 2, at 22 (citing *Shannon v. HUD*, 436 F.2d 809, 814 (3d Cir. 1970); *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982); *Otero v. N.Y. Hous. Auth.*, 484 F.2d 1122, 1333-34 (2d Cir. 1973); *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1535 (11th Cir. 1984)).

⁵*Id.*