

HUD Reaches LEP Voluntary Compliance Agreement with Nebraska Agency

By Renee Williams, NHLP Staff Attorney

The State of Nebraska's Department of Economic Development (DED) has entered into an agreement with the Department of Housing and Urban Development (HUD) regarding access to DED housing programs for limited English proficient (LEP) persons. The Voluntary Compliance Agreement (VCA or Agreement)¹ became effective in March 2014 and remains in effect for three years.² Advocates engaged in work related to the housing rights of LEP individuals should review the VCA, taking special note of the elements HUD is requiring DED to include in its language assistance plan. The following article briefly summarizes the important provisions included in the VCA.

Background

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin.³ While the language of Title VI does not mention language access, the obligation to provide meaningful assistance to LEP persons stems from the U.S. Supreme Court case *Lau v. Nichols*, decided in 1974. The *Lau* opinion stands for the proposition that the denial of meaningful language access constitutes national origin discrimination under Title VI.⁴ More than two decades later, President Bill Clinton issued Executive Order 13,166, which called upon federal agencies to develop guidance for their funding recipients on how these recipients could provide meaningful language

assistance to the LEP communities they serve.⁵ In 2007, pursuant to the Executive Order, HUD issued its LEP guidance (HUD LEP Guidance), which directs recipients of HUD funding⁶ to: conduct a four-factor analysis to assess the need for language assistance; decide which language services are appropriate; develop a language assistance plan; and provide appropriate language assistance.⁷ Language assistance includes taking actions such as providing oral interpretation when needed and translating "vital" documents, which are those documents "that are critical for ensuring meaningful access by beneficiaries or potential beneficiaries generally and LEP persons specifically."⁸

Nebraska Department of Economic Development

Nebraska's DED receives over \$54 million in HUD funding through the State's participation in the Community Development Block Grant (CDBG) and HOME programs.⁹ Thus, as a recipient of federal financial assistance, Nebraska has an obligation under Title VI to provide meaningful language assistance to LEP individuals accessing federally assisted housing programs. In its press release announcing the VCA, HUD noted that Nebraska's Hispanic LEP population increased by 77% in the decade between 2000 and 2010, and that the state is also home to increasing numbers of individuals of Somali and Sudanese origin.¹⁰

HUD Compliance Review

In July 2011, HUD conducted a review of the DED's compliance with various civil rights laws, including Title VI and its implementing regulations (24 C.F.R. Part 1). In May 2013, HUD sent DED a Letter of Findings that outlined findings of noncompliance with Title VI.¹¹ According to the VCA's introductory section, the compliance review found that: (1) DED failed to take "reasonable steps to provide meaningful access to federally funded pro-

¹See generally Voluntary Compliance Agreement between HUD and State of Nebraska Department of Economic Development, Title VI Review No.: 07-11-R002-6; Section 504 Review Number: 07-11-R002-4 (Mar. 2014), available at: <http://portal.hud.gov/hudportal/documents/huddoc?id=VCA3-4-2014.pdf> [hereinafter Agreement or VCA]. It is worth noting that the VCA also addresses a single issue related to non-compliance with Section 504 of the Rehabilitation Act of 1973. That finding concerned the height of a DED office counter; however, this article focuses on the language access portion of the Agreement.

²Agreement at 6. Paragraph IV.A. of the VCA states that the Agreement became effective March 1. However, the same paragraph states, "This Agreement will only become effective on March 1, 2014, if it has been signed by the Recipient and the Office of Fair Housing and Equal Opportunity (FHEO) Director for Region VII, or her designee." *Id.* HUD FHEO signed the Agreement on March 5, 2014. See Agreement at 12.

³42 U.S.C. § 2000d.

⁴See generally 414 U.S. 563 (1974).

⁵See generally Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (2000). The Executive Order also calls upon each federal agency to "examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency." 65 Fed. Reg. at 50,121.

⁶HUD has created a list of its programs subject to Title VI. See List of Federally Assisted Programs; Notice, 69 Fed. Reg. 68,700 (Nov. 24, 2004). Note that this list is for informational purposes and does not purport to be comprehensive.

⁷See generally Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons; Notice, 72 Fed. Reg. 2,732 (Jan. 22, 2007) [hereinafter HUD LEP Guidance].

⁸HUD LEP Guidance at 2,736.

⁹Agreement at 2.

¹⁰Press Release, United States Department of Housing and Urban Development, No. 14-033, HUD, Nebraska Reach Agreement on Language Access to Housing Programs (Apr. 11, 2014), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2014/HUDNo.14-033.

¹¹Agreement at 2.

grams for LEP persons pursuant to the nondiscrimination requirements of Title VI at 24 C.F.R. § 1.4¹²; (2) DED did not monitor sub-recipients' Title VI compliance concerning language access; and (3) DED and its sub-recipients "have not implemented any of the actions recommended in HUD's LEP Guidance pursuant to Title VI."¹³ As a result of these findings, the State agreed to enter into a VCA with HUD.

Voluntary Compliance Agreement Terms

Four-Factor Analysis

The VCA mandates that DED engage in the four-factor analysis outlined in the HUD LEP Guidance within 60 days of the Agreement.¹³ This analysis involves a balancing test of four factors to assess the existing language need in a given jurisdiction while acknowledging a funding recipient's existing resources. The four factors include (1) number of LEP persons who are eligible for a particular program; (2) frequency of contact with the program; (3) the importance of the program involved; and (4) costs and available resources.¹⁴ DED must submit its four-factor analysis to HUD.¹⁵

Language Assistance Plan

The VCA also requires DED to develop a language assistance plan (LAP), subject to HUD review.¹⁶ Upon HUD approval, DED will have 30 days to implement the LAP. The LAP portion of the VCA is likely the most useful for advocates, as it provides insight into what elements HUD believes constitute an effective LAP. Under the VCA, Nebraska's DED must incorporate the following elements into its plan:

- steps for assessing language need, including how LEP individuals and populations will be identified;
- DED's potential "[p]oints and types of contact" with LEP individuals;
- the types of language assistance to be provided;
- a plan to reach out to LEP communities;
- an employee training plan, which will include training on the HUD LEP Guidance as well as the LAP, with specific provisions that will be used to train staffers who monitor DED's sub-recipients;
- a listing of vital documents to be translated, which languages these documents will be translated into, and a timeline for completing translation of vital documents;

¹²*Id.*

¹³*Id.* at 7.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.* at 7-8.

- a plan to translate informational materials;
- a plan to provide translated notices to LEP individuals;
- a plan to provide interpreters in several contexts, such as individual and larger group meetings;
- a plan for utilizing resources, such as community resources and partnerships, to assist in fulfilling language access obligations; and
- a plan for updating and monitoring the language access plan.¹⁷

Advocates working with state and local housing providers to create, update, or strengthen LAPs should consult the above list, as the elements listed build upon what is outlined in the HUD LEP Guidance. These items can form the basis of a preliminary checklist for evaluating language assistance needs in a given community or jurisdiction, or for assessing the strength of an existing LAP.

Notifying, Training, and Monitoring Funding Sub-Recipients

Another key part of the VCA requires DED to make sure that its sub-recipients comply with Title VI. As part of the Agreement, DED must distribute a notice to its funding sub-recipients that: (1) notifies the sub-recipients of their obligation to take "reasonable steps to provide meaningful access to eligible LEP persons"; (2) recommends that sub-recipients engage in the four-factor analysis and generally follow the HUD LEP Guidance; (3) recommends that, if needed, sub-recipients create a LAP based on the results of the four-factor analysis; and (4) mandates that sub-recipients keep records related to Title VI compliance efforts.¹⁸ HUD must receive a copy of this notice before distribution.

In addition to the notice, DED must train its sub-recipients on their language access obligations under Title VI. Such training will include topics such as the four-factor analysis, creating a LAP, and providing language assistance.¹⁹ DED must also add a Title VI language access component to its annual CDBG training and provide sub-recipients with any necessary technical assistance.²⁰

DED must also monitor its sub-recipients to ensure that they are complying with the Title VI obligations.²¹ Such monitoring efforts will be incorporated into DED's regular compliance monitoring of its sub-recipients.

¹⁷*Id.* at 8.

¹⁸*Id.* at 8-9.

¹⁹*Id.* at 9.

²⁰*Id.*

²¹*Id.*

Conclusion

Advocates should review the recent VCA, with particular focus on the elements HUD is requiring Nebraska DED to include in its LAP, as these elements may serve as a starting point for advocacy to create new or strengthen existing LAPs. Furthermore, this VCA should serve as a reminder to state agencies of their ongoing obligation to monitor their sub-recipients for Title VI compliance regarding serving persons with limited English proficiency. ■

GAO Report: LEP Borrowers Facing Foreclosure Still Experience Barriers

By Renee Williams, NHLP Staff Attorney

The Making Home Affordable (MHA) program was established in 2009 as a response to the foreclosure crisis that impacted millions of borrowers nationwide.¹ The MHA program itself encapsulates a series of sub-programs,² the most significant of which is the Home Affordable Modification Program (HAMP).³ The Department of the Treasury (Treasury Department or Treasury) administers the MHA programs, including HAMP. The idea behind HAMP is relatively simple: the federal government provides financial incentives to lending institutions, encouraging them to modify certain existing mortgages to lower a homeowner's monthly payment. The overarching goal of the MHA programs is to provide families with options other than foreclosure.

Nearly five years later, limited English proficient (LEP) borrowers still face barriers to meaningful access to MHA programs, according to a recent Government Accountability Office (GAO) report released in February 2014.⁴ This article provides a brief overview of the GAO

¹See generally GOVERNMENT ACCOUNTABILITY OFFICE, TROUBLED ASSET RELIEF PROGRAM: MORE EFFORTS NEEDED ON FAIR LENDING CONTROLS AND ACCESS FOR NON-ENGLISH SPEAKERS IN HOUSING PROGRAMS, GAO-14-117, 1 (2014) [hereinafter GAO Report], available at <http://www.gao.gov/assets/670/660712.pdf> (providing background on MHA program).

²See generally GAO Report at 4-7 (listing MHA programs, and noting that the Treasury's Office of Homeownership Preservation oversees these programs).

³The *Housing Law Bulletin* has included extensive coverage of HAMP in prior issues. For a more detailed examination of HAMP and relevant case law, see Brittany McCormick, *HAMP Litigation Update 2013: The Year of the Trial Period Plan*, 43 HOUS. L. BULL. 203, 203-208 (Oct. 2013); Kent Qian and Lindsay Frank, *Home Affordable Modification Program (HAMP) Litigation: Three Years Later*, 43 HOUS. L. BULL. 1, 1-6 (Jan. 2013); Rachel Baum, *Advocates Using Several Claims to Challenge Violations of the Home Affordable Modification Program*, 41 HOUS. L. BULL. 199, 199-203 (Sept. 2011); Rebekah Cook-Mack & Sarah Parady, *Home Affordable Modification Program Enforcement Through the Courts*, 40 HOUS. L. BULL. 131, 136-142 (June 2010); Holly E. Snow, *Hope for HAMP: One Step Back, But Two Steps Forward?*, 40 HOUS. L. BULL. 1, 12-14 (Jan. 2010); and Jane Bowman & Mark Ireland, *Home Affordable Modification Program: Help for Homeowners or Another Dead End?*, 39 HOUS. L. BULL. 223, 230-233 (Sept. 2009).

⁴See generally GAO Report at 25-29. This is not the first report that references the difficulties experienced by LEP borrowers facing foreclosure. See, e.g., California Reinvestment Coalition, *Chasm Between Words and Deeds IX: Bank Violations Hurt Hardest Hit Communities*, 12-13 (Apr. 2013) (noting, for example, that advocates report that the majority of their LEP clients are "sometimes" or "never" able to communicate with a servicer in their native language); National Housing Resource Center, *National Mortgage Settlement Servicing Standards and Noncompliance: Results of a National Housing Counselor Survey*, 7 (June 2013) (outlining similar findings, and noting that survey participants reported their LEP clients had worse outcomes than English-speakers). Both studies are referenced on pages 27- 28 of the GAO Report.