

PIH Issues Guidance Regarding Equal Access Rule

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In August 2014, the Department of Housing and Urban Development (HUD) issued Notice PIH 2014-20 (HA), entitled “Program Eligibility Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD’s Equal Access Rule” (Notice). The Notice, which was issued by the Office of Public and Indian Housing (PIH), discusses how HUD regulations prohibiting LGBT discrimination apply to public housing authorities (PHAs). This article adopts a Q&A format to highlight important aspects of the Notice.

Q: What is the legal authority behind the Notice?

A: In 2012, HUD issued its final rule to address discrimination against LGBT individuals trying to access HUD housing programs.¹ The Rule, known as the “Equal Access Rule,” changed existing HUD regulations to include protections for LGBT individuals and families. The Equal Access Rule requires that HUD-assisted and HUD-insured housing providers make housing available without considering “actual or perceived sexual orientation, gender identity, or marital status.”² Additionally, the Rule prohibits HUD-assisted and HUD-insured housing providers, as well as HUD-funded recipients and sub-recipients, from asking about sexual orientation or gender identity for the purposes of determining an applicant or occupant’s housing eligibility, or for otherwise providing housing.³ The Rule also updated HUD’s definition of “family” so that LGBT families would be included.⁴ The Notice details how the Equal Access Rule applies to PHAs and the programs they administer.

Q: What HUD programs are covered by the Notice?

A: HUD PIH issued the Notice, so this particular Notice’s coverage is limited to PIH programs. The Notice applies to all PIH programs that are administered by PHAs and their affiliates.⁵ Programs covered by the Notice include public housing, the Section 8 voucher program, project-based vouchers, as well as the Project-Based

¹Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, Final Rule, 77 Fed. Reg. 5662 (Feb. 3, 2012) (codified at 24 C.F.R. Parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982) [hereinafter “Equal Access Rule”], available at <http://portal.hud.gov/hudportal/documents/huddoc?id=12lgbtfinalrule.pdf>.

²*Id.* at 5674 (codified at 24 C.F.R. § 5.105(a)(2)(i)).

³*Id.* (codified at 24 C.F.R. § 5.105(a)(2)(ii)).

⁴*Id.* at 5674 (codified at 24 C.F.R. §§ 5.100, 5.403).

⁵Program Eligibility Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD’s Equal Access Rule, Notice PIH 2014-20 (HA), 1 (Aug. 20, 2014), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2014-20.pdf> [hereinafter “Notice”].

Certificate and Moderate Rehabilitation programs.⁶ In addition, the Notice applies to PHAs operating under certain special agreements with HUD such as the Rental Assistance Demonstration (RAD) or Moving to Work (MTW).⁷ Note that the Equal Access Rule itself applies to a broader array of HUD programs not referenced in the Notice.

Q: Are private landlords covered by the Equal Access Rule?

A: Private landlords who participate in “programs funded under section 8 of the U.S. Housing Act of 1937” are covered by the Equal Access Rule, and, therefore, cannot discriminate against LGBT individuals and families.⁸ An owner who accepts a Section 8 Housing Choice Voucher becomes covered by the Rule “when the owner executes a housing assistance payments (HAP) contract with the PHA.”⁹ However, private landlords who do not participate in HUD programs are not covered by the Rule. As discussed below, other laws may provide protections for LGBT individuals seeking privately owned housing not affiliated with a HUD program.

Q: How does the Equal Access Rule define key terms such as “sexual orientation,” “gender identity,” and “family”?

A: The Equal Access Rule defines “sexual orientation” to mean “homosexuality, heterosexuality, or bisexuality.”¹⁰ The Rule defines “gender identity” to mean “actual or perceived gender-related characteristics.”¹¹ Additionally, the Rule defines “family” as including, but not limited to: (1) single persons, and (2) a group of individuals residing together (including both families with and without children), regardless “of actual or perceived sexual orientation, gender identity, or marital status.”¹²

Q: What does the Notice require housing authorities to do?

A: In addition to prohibiting PHAs from discriminating on the basis of sexual orientation, gender identity, or marital status, the Notice also directs PHAs to take certain actions. First, the Notice instructs PHAs to review and, as necessary, update planning documents and policies to

be consistent with the Equal Access Rule, including their Admissions and Continued Occupancy Policies (ACOPs), Administrative Plans, and public housing tenant selection policies.¹³ Such updates include changing the definition of “family” in planning documents and policies to reflect HUD regulations, as amended by the Equal Access Rule.¹⁴ The Notice also instructs PHAs to include a statement in their Annual Plans regarding “eligibility, selection and admissions to reflect the change in the definition of family and the requirement to provide equal access regardless of sexual orientation, gender identity or marital status.”¹⁵ PHAs’ Administrative Plans will also include changes to the existing definition of “family composition” as a result of the Rule.¹⁶

Q: Are there any times when a housing authority may ask about a person’s sexual orientation or gender identity?

A: The Equal Access Rule prohibits housing authorities (and other HUD housing providers) from asking about an individual’s sexual orientation or gender identity for the purposes of establishing housing eligibility or otherwise providing housing.¹⁷ A person is still free to self-identify as LGBT.¹⁸ Additionally, the Notice states that PHAs may also collect anonymous, voluntary information about program participants’ gender identity and/or sexual orientation for reporting purposes, as long as the information does not impact one’s ability to access HUD housing.¹⁹

Q: Are there any times when a housing authority may ask a person to identify his or her sex?

A: Yes. The Equal Access Rule permits a PHA (or other HUD housing provider) to ask an applicant to identify his or her sex for the purposes of calculating how many bedrooms a household is eligible for.²⁰ Furthermore, the Notice states that PHAs *must* collect information about participants’ sex for certain reporting purposes.²¹ However, there is no reporting requirement for participants’ sexual orientation.

While outside the scope of the PIH Notice, the Rule also permits a housing provider to ask about an individual’s sex “where the housing provided or to be provided to the individual is temporary, emergency shelter that involves the sharing of sleeping areas or bathrooms.”²²

⁶*Id.* at 2.

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰Equal Access Rule, *supra* note 1, at 5674 (codified at 24 C.F.R. § 5.100); *see also* Notice, *supra* note 5, at 2.

¹¹*Id.* (codified at 24 C.F.R. § 5.100); *see also* Notice, *supra* note 5, at 2.

¹²*Id.* (codified at 24 C.F.R. §§ 5.100, 5.403); *see also* Notice, *supra* note 5, at 2-3. The complete definition of “family” in the regulation is as follows: “Family includes, but is not limited to, the following, regardless of actual or perceived sexual orientation, gender identity, or marital status: (1) A single person, who may be an elderly person, displaced person, disabled person, near-elderly person, or any other single person; or (2) A group of persons residing together, and such group includes, but is not limited to: (i) A family with or without children (a child who is temporarily away from the home because of placement in foster care is considered a member of the family); (ii) An elderly family; (iii) A near-elderly family; (iv) A disabled family; (v) A displaced family; and (vi) The remaining member of a tenant family.” *Id.* (codified at 24 C.F.R. § 5.403).

¹³Notice, *supra* note 5, at 3.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷Equal Access Rule, *supra* note 1, at 5674 (codified at 24 C.F.R. § 5.105(a)(2)(ii)); *see also* Notice, *supra* note 5, at 4.

¹⁸*Id.* (codified at 24 C.F.R. § 5.105(a)(2)(ii)); *see also* Notice, *supra* note 5, at 4.

¹⁹*See* Notice, *supra* note 5, at 4.

²⁰Equal Access Rule, *supra* note 1, at 5674 (codified at 24 C.F.R. § 5.105(a)(2)(ii)); *see also* Notice, *supra* note 5, at 4.

²¹*See* Notice, *supra* note 5, at 4.

²²Equal Access Rule, *supra* note 1, at 5674 (codified at 24 C.F.R. § 5.105(a)(2)(ii)).

Q: I know the Equal Access Rule only applies to HUD programs. What additional protections exist for LGBT individuals and families trying to access housing?

A: The federal Fair Housing Act (FHA) provides protections against discrimination in both federally assisted and private housing. Although LGBT individuals are not explicitly protected by the FHA—since sexual orientation, gender identity, and marital status are not protected categories—an LGBT individual may still be able to pursue FHA claims to the extent that the person also falls within a protected category.²³ The Notice provides an example of how this intersection occurs: a PHA denies housing to a public housing applicant who is gay based on the assumption that because the applicant is gay, the applicant is also HIV-positive and will pose a health threat to other tenants.²⁴ Such a denial would violate the Equal Access Rule because the PHA has discriminated on the basis of the individual's sexual orientation.²⁵ Additionally, the PHA has also violated the FHA because it is discriminating on the basis of the applicant's perceived disability of having HIV/AIDS.²⁶

State and local laws may offer additional protections for LGBT persons, even those residing in private housing that is not funded by HUD. For example, state or local law may prohibit private, non-HUD-assisted landlords from discriminating on the basis of sexual orientation, gender identity, or marital status.

Q: What should someone do upon experiencing housing discrimination on the basis of sexual orientation, gender identity, or marital status in housing covered by the Rule?

A: Individuals who believe they have been discriminated against due to sexual orientation, gender identity, or marital status can file a complaint with their local PHA.²⁷ According to the Notice, the PHA must then follow its written procedures to investigate the complaint and take corrective action, if necessary, or provide an explanation of why corrective action will not be taken.²⁸ Furthermore, a person can also file a complaint with HUD's Office of Fair Housing and Equal Opportunity (FHEO). In either instance, the party alleged to have engaged in discrimination will be alerted as to the filing of the complaint.²⁹ ■

²³See Notice, *supra* note 5, at 6.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

²⁷*Id.* at 4-5.

²⁸*Id.* at 5.

²⁹*Id.* (PHA complaints); see also 42 U.S.C.A. § 3610(a)(1)(B)(ii) (West 2014) (HUD complaints).