

March 18, 2011

Ryan E. Jones
Housing Program Specialist
Management and Occupancy Division
Office of Public and Indian Housing
US Department of Housing and Urban Development
451 7th Street SW, Room 4208
Washington, D.C. 20410

Re: Implementation of the Violence Against Women Act (VAWA)

Dear Mr. Jones,

On behalf of the below-signed housing and anti-domestic violence advocacy organizations, we respectfully submit the following recommendations regarding implementation of the Violence Against Women Act (VAWA). During the past five years, our organizations have worked with advocates, owners, and public housing agencies (PHAs) nationwide to implement the housing provisions of VAWA. We appreciate HUD's recent efforts to promote housing protections for survivors of domestic violence, dating violence, and stalking, including the VAWA Final Rule published on October 27, 2010, and the Fair Housing Act memorandum issued on February 9, 2011.

It is our understanding that HUD plans to issue a PIH Notice regarding the VAWA Final Rule. We are pleased that HUD plans to issue a Notice and believe that it will be helpful in assisting public housing agencies (PHAs), owners, and management agents to understand their rights and obligations under the VAWA Final Rule. To further this effort, our recommendations seek to help PHAs, owners, and management agents to develop policies and procedures for implementing the VAWA Final Rule. Our recommendations focus on these areas: (1) actual and imminent threat; (2) documentation of domestic violence and conflicting certifications; (3) confidentiality; (4) family breakup, lease bifurcation, and removal of abusers from vouchers; (5) content of notices on VAWA rights and obligations; and (6) Administrative Plans and Admissions and Continued Occupancy Policies.

1. Actual and Imminent Threat

In §§ 5.2005(d)(2), (3) and 2.005(e) of the Final Rule, HUD elaborated on the meaning of "actual and imminent threat." We commend HUD for correcting the Interim Rule's use of the phrase "actual or imminent threat," for providing substantive guidance regarding the meaning of this phrase, and for emphasizing the high standard that must be met by PHAs and owners before it can be invoked to evict or terminate assistance. We believe any further guidance on "actual and imminent threat" should provide additional clarity regarding the limited scope of the exception and the burden that PHAs and owners must satisfy.

First, we note two issues in the drafting of the Final Rule's provisions that may cause confusion. The phrase "actual imminent threat" is used in § 5.2005(d)(2), even though that phrase does not

appear in the statute or anywhere else in the Rule, most likely due to an erroneous omission of the word “and”. Any further HUD guidance should consistently use the phrase “actual and imminent threat,” as stated in the statute, to make clear that the threat must be both actual and imminent. We also note that § 5.2005(d)(3) refers to itself in stating “[a]ny eviction or termination of assistance, as provided in paragraph (d)(3) of this section. . .” However, paragraph (d)(3) does not encompass all of the Rule’s sections that deal with evictions or terminations pursuant to the actual and imminent threat exception. HUD guidance should instruct PHAs and owners to consult all of the paragraphs – namely §§ 5.2005(d)(2), (3), and 2.005(e), as well as the accompanying statutory language – discussing “actual and imminent threat” before moving forward with any eviction or termination of assistance.

Section 5.2005(d)(3) of the Rule requires PHAs, owners, and management agents to pursue an eviction or termination of assistance based on an “actual and imminent threat” “only when there are no other actions that could be taken to reduce or eliminate the threat, including, but not limited to, transferring the victim to a different unit, barring the perpetrator from the property, contacting law enforcement to increase police presence or develop other plans to keep the property safe, or seeking other legal remedies to prevent the perpetrator from acting on a threat.” We commend HUD for explaining the obligations of PHAs and owners to explore all other options in order to preserve victims’ housing. We would ask that any further guidance on this issue also include the following options: providing the victim with a voucher so she can move to a new location; providing a lock change; allowing the victim a temporary absence from the subsidized unit while the victim waits for the abuser to be apprehended by law enforcement or develops plans to improve his or her safety; working with a victim service organization to develop a safety plan for the victim and identify other options; or contacting the local HUD office to discuss options.

In the same section, HUD explains that “Restrictions predicated on public safety cannot be based on stereotypes, but must be tailored to particularized concerns about individual residents.” In order to explain how stereotypes about domestic violence cannot be used to inform housing actions, including evictions and terminations pursuant to the actual and imminent threat exception, HUD could draw from the recent FHEO memorandum on how to assess discrimination based on domestic violence under the Fair Housing Act, available at <http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf> (Feb. 9, 2011). For example, the memorandum states that an assumption by a landlord that a woman with a history of domestic violence will always go back to the man who abuses her is an example of stereotyping and direct evidence of discrimination based on sex. *Id.* at 4. Similarly, the memorandum notes that a landlord who treats victims of domestic violence differently from other victims of crime, or who treats female victims of domestic violence differently from male victims of domestic violence, is engaging in discriminatory unequal treatment. *Id.* PHAs and owners should be informed that before relying on the “actual and imminent threat” exception, they must explore all alternatives to help preserve housing for the victim and also examine whether unlawful stereotypes or unequal treatment are involved.

More generally, and outside of the “actual and imminent threat” context, any HUD guidance on implementation of VAWA should explain that violations of VAWA, particularly discrimination

in admissions or evictions based on domestic violence status, can also constitute violations of the Fair Housing Act and refer PHAs and owners to the FHEO memorandum.

Lastly, HUD guidance should make clear that a tenant is entitled to informal review or an informal hearing prior to eviction or termination of assistance based on a determination by the PHA, owner, or management agent that the tenant's continued presence presents an actual and imminent threat to other tenants or to those employed at or providing service to the property. While the preamble to the Final Rule clarified that such informal review should be provided before denial of VAWA protection to tenants who are unable to provide requested documentation of domestic violence status, any future HUD guidance should also explain that tenants are entitled to informal review when a PHA or owner plans to evict or terminate based on "actual and imminent threat."

2. Documentation of Domestic Violence, Dating Violence, or Stalking

We appreciate HUD's efforts to implement VAWA's documentation requirements as part of § 5.2007 of the Final Rule. Because this is an area in which housing providers, domestic violence agencies, and housing advocates often have questions, we suggest the following additional guidance.

§ 5.2007(a) Request for documentation.

The Final Rule states that any requests for documentation of domestic violence, dating violence, or stalking must be in writing. To protect victims' safety, we recommend that HUD provide additional guidance regarding delivery of the request for documentation as follows:

PHAs, owners, and management agents must deliver written requests for documentation, and any subsequent communications, in a manner that will not expose the tenant to danger of further violence and shall document how and when a written request was made. PHAs, owners, and management agents shall ask the victim to designate a method for safe communication, such having the victim designate an attorney, advocate, friend, or family member as his or her primary contact. If no method is designated, certified mail shall be used to deliver the written request for documentation.

We recommend that HUD also provide guidance to PHAs and owners on the need to promptly respond once the victim has provided documentation of domestic violence, dating violence, or stalking. Failure to act quickly on this documentation in cases where the abuser should be removed from the lease and/or voucher may force victims to remain in dangerous situations for prolonged periods of time. Failure to timely respond to the documentation also deprives victims of the opportunity to adequately prepare for eviction or termination proceedings. We therefore suggest the following:

Once a victim provides documentation of domestic violence, dating violence, or stalking, the PHA, owner, or management agent shall respond in writing within seven business days to acknowledge receipt of the documentation. In its response,

the PHA, owner, or management agent shall indicate whether it intends to provide VAWA relief based on the documentation, or whether it intends to proceed with any proposed eviction or termination despite the documentation. If the PHA, owner, or management agent intends to proceed with eviction or termination, its response must explain why it is not providing the victim VAWA relief. The response also must state that the tenant may request an informal hearing or review to challenge the denial of VAWA relief.

If the PHA, owner, or management agent declines to provide VAWA relief despite documentation of domestic violence, dating violence, or stalking, or fails to respond to the documentation within seven business days, the tenant may request an expedited grievance hearing, informal hearing, or informal review with the PHA, owner, or manager. Nothing shall preclude the tenant from using the certification form or other documentation in the expedited grievance hearing, informal hearing, informal review, or other proceedings. All hearing officers must receive training regarding domestic violence, dating violence, and stalking semi-annually and must have such training before hearing any cases. The PHA must coordinate such training with local or state domestic violence organizations.

§ 5.2007(c) Failure to provide documentation.

The Final Rule states that PHAs, owners, and management agents have discretionary authority to extend VAWA's 14 business-day deadline for providing documentation of domestic violence, dating violence, or stalking. In recognition of the difficulties victims may experience in providing documentation of violence, we recommend that HUD provide examples of instances in which an extension of the 14 business-day deadline is warranted:

PHAs, Section 8 owners, or management agents shall grant extensions to the 14 business-day deadline liberally and take into account factors that may have contributed to the victim's inability to provide documentation in a timely manner. Such factors may include, but are not limited to, cognitive limitations, limited English proficiency, absence from the unit due to hospitalization or time in an emergency shelter, failure of the victim to receive actual notice of the request, administrative delays in obtaining police or court records, the danger of further violence, and the victim's need to address health or safety issues. Any extensions granted to the 14 business-day deadline should be documented in a confidential tenant file.

We have received reports that some PHAs have refused to allow victims to assert their VAWA rights at eviction or termination proceedings if the victim did not timely provide documentation of domestic violence, dating violence, or stalking. We recognize that VAWA does not limit a PHA's authority to proceed with eviction or termination in cases where a victim fails to provide documentation during the 14 business-day deadline. However, VAWA does not state that a tenant waives her right to raise VAWA at an eviction or termination proceeding if she fails to timely provide documentation. In these instances, hearing officers or other fact finders still should have discretion to weigh the tenant's testimony and any other evidence to determine

whether the proposed eviction or termination violates VAWA. Further, the preamble to the Final Rule states that if an individual does not provide documentation, the PHA, owner, or management agent must provide an opportunity for an informal review or hearing before denying the individual VAWA's protections. 75 Fed. Reg. 66,253. We therefore recommend the following guidance:

An individual's failure to timely provide documentation of domestic violence, dating violence, or stalking does not result in a waiver of the individual's right to challenge the denial of assistance or termination, nor does it result in a waiver of the individual's right to assert VAWA protections at eviction or termination proceedings. If an individual fails to timely provide documentation, the PHA, owner, or management agent must, in accordance with the procedures established in the applicable program regulations, provide an opportunity for an informal review or hearing before denying the individual VAWA's protections.

§ 5.2007(d) Discretion to provide relief.

The Final Rule provides that a PHA, owner, or management agent has discretion to provide VAWA protections to an individual based solely on the individual's verbal statement or other corroborating evidence. We recommend providing examples of instances in which it would be appropriate to exercise such discretion. Such examples could include, but are not limited to, instances in which an employee or social worker at the property witnessed an incident of domestic violence, dating violence or stalking; instances in which law enforcement has contacted the PHA, owner, or management agent regarding an incident of domestic violence, dating violence, or stalking at the property; and instances in which a tenant has visible injuries resulting from domestic violence, dating violence, or stalking, or photos of such injuries. A decision to provide VAWA protections based solely on a tenant's verbal statement or other corroborating evidence should be documented in a confidential tenant file.

§ 5.2007(e) Response to conflicting certification.

The Final Rule provides some guidance on cases where a PHA, owner, or management agent receives conflicting documentation from two members of a household, each claiming to be a victim and naming the other as the perpetrator. The issue of conflicting certifications raises the more general issue of whether and how a housing provider can challenge the validity of documentation of domestic violence, dating violence, or stalking. We recommend the following guidance on this issue:

PHAs, owners, management agents, and tenants must follow the following procedure in the event the validity of a victim's documentation is challenged, or two members of the same household provide contradictory certifications:

- (1) Where only one tenant has submitted documentation and an eviction or termination proceeding has been commenced by the PHA, owner, or management agent, any question about the validity of the documentation shall be submitted to

the court or hearing officer that will adjudicate the eviction or termination proceeding.

(2) Where certification has been submitted by two or more tenants in the same household, each claiming to be a victim of violence perpetrated by the other, the PHA, owner, or management agent must defer to any court order regarding possession of the residence. Specifically, if there is an order of protection in force or a criminal or civil court order that determines possession of the residence or makes a finding as to which party is the perpetrator, the PHA, owner, or management agent must follow the terms of such order and abide by such determination.

(3) Where certifications have been submitted by two or more tenants in the same household, each claiming to be a victim of violence perpetrated by the other, and there is no court determination or order of protection in force, the PHA, owner, or management agent may grant relief to both of the parties, including, if necessary, bifurcation of the lease, provision of an additional unit or Section 8 voucher, or other relief, until or unless there is a court decision regarding possession or there is a finding by a criminal or civil court that one party is the perpetrator of the violence. If the PHA, owner, or management agent is unable to provide relief to both parties due to unavailability of an additional unit or Section 8 voucher, the PHA may issue a written request requiring the parties to provide third-party documentation of domestic violence, dating violence, or stalking, as set forth in 24 C.F.R. § 5.2007(b)(2)-(3). If there are questions regarding the validity of the third-party documentation, the PHA, owner, or management agent may contact the person or entity that issued or signed the documentation. Before doing so, the PHA, owner, or management agency must obtain a written release from the applicant or tenant who provided the documentation. The release must be limited to the sole purpose of verifying that the person or entity issued or signed the documentation.

3. Confidentiality for Victims of Domestic Violence, Dating Violence and Stalking when Invoking VAWA Protections

We appreciate HUD's efforts to implement VAWA's confidentiality requirements as part of § 5.2007 of the Final Rule. Confidentiality is paramount to victims' ongoing safety and privacy. The implementation of confidentiality provisions is an integral part of VAWA housing protections. We suggest the following additional guidance to help ensure victim confidentiality. Additionally, it may be helpful to analogize VAWA's confidentiality requirements to the confidentiality requirements regarding criminal records that are set forth at 42 U.S.C. § 1437d(q)(4) and Section 7.11 of the Public Housing Occupancy Guidebook, as many PHAs have developed confidential record-keeping systems in order to comply with those provisions.

Confidential information

As stated in the VAWA final rule, employees of the PHA, owner or management agent or those within their employ shall not have access to documentation that identifies the

applicant or tenant as a victim of domestic violence, stalking or dating violence unless explicitly authorized by the PHA, owner or management agent for reasons that specifically call for these employees to have access to the information. In order to ensure the minimum access to such files, the PHA, owner or management agent should not grant authorization without significant justification and direct reasons for permitting access.

Information regarding domestic violence, dating violence, or stalking must not be filed in an applicant or tenant's general file. Such information should be retained separately from the applicant or tenant's general file. Files containing information regarding domestic violence, dating violence, or stalking should be maintained in a place that assures confidentiality and that can be accessed only by authorized employees. The information should be destroyed once the purpose for which the documentation was requested has been accomplished.

In addition to ensuring that the written documentation and information is kept confidential, PHAs, owners and management agents should develop policies and procedures that ensure that verbal communication about tenants' victim status is appropriate and directly related to assisting the victim find safety. Information about the victim known by one or more of the employees of the PHA or project should not be discussed in conversations that are not directly related to obtaining safety for the tenant. PHAs should make clear to employees that they are bound by confidentiality rules, explain the policies and procedures and have staff sign to certify their understanding and compliance with the policy.

To reduce the collection and storage of unnecessary information, PHAs should develop policies and procedures that instruct employees to document (date, time, type of documentation) the certification of domestic violence, dating violence or stalking without placing the actual documentation into the client's file.

Disclosure of confidential information

PHAs must not include a tenant's victim status in general releases of information, and releases regarding victim status must be limited in time and purpose. PHAs shall not disclose victim status to prospective owners or management companies, nor shall the tenant's status as a victim of domestic violence, dating violence, or stalking in any way damage the rental history of the victim as maintained by the PHA, Section 8 owner, or management agent.

Confidentiality after tenant relocation

In connection with any tenant relocation due to domestic violence, dating violence, or stalking, the PHA, or Section 8 owner must ensure that all information regarding the new location of the household is kept confidential unless that disclosure is requested or consented to by the tenant in writing or otherwise required by applicable law. Only PHAs or Section 8 owners who need access to such information to perform the relocation shall have access to this information. The PHA, Section 8 owner, or management agent of the property where the tenant originally resided must redact all information about the tenant's new location upon release of the tenant's file, unless otherwise required by

applicable law, and no information about the new location must be entered into any shared computer system.

We support the further guidance HUD plans to provide on the confidentiality afforded under the Privacy Act (5 U.S.C. 522a). All client confidentiality protections should be provided in the initial notice of protections and explained in plain language. Further, we recommend that all employees receive confidentiality training.

4. Family Breakup, Lease Bifurcation, and Removal of Abusers from Vouchers

We appreciate HUD's effort to specifically address domestic violence, dating violence, and stalking as part of any family break-up policy in § 982.315 of the Final Rule. § 982.315 now states that if the family breakup results from domestic violence, dating violence, or stalking, the PHA must ensure that the victim retains assistance and lists the some of the factors to be considered in making this decision under the PHA policy, including whether the assistance should remain with the family members remaining in the original unit, the interest of minor children, ill, elderly, or disabled family members, whether family members are forced to leave the unit as a result of the violence, whether any of the family members are receiving VAWA protection, whether the abuser is still in the household, and other factors as specified by the PHA.

As evidenced by some of the comments noted in the Final Rule, lease bifurcation and the termination of assistance or eviction solely of the abuser has been one of the more complicated and challenging parts of VAWA implementation. The Final Rule notes that it is the PHA's responsibility to advise state courts on its obligations under VAWA 2005 and the HUD regulations, but agreed that lease bifurcation should work the same way in the public housing and voucher programs. Finally, the Final Rule states that it is committed to developing guidance on the many issues that arise from PHAs moving to terminate the assistance of abusers, while protecting victims.

For that guidance, we suggest the following:

- a. Pursuant to 24 C.F.R. § 982.54(d)(11) a PHA must address the issue of family break-up in their Administrative Plan and set forth a policy in conformance with 24 C.F.R. parts 966, 982, and 5, subpart L.
- b. As noted in the Final Rule, an individual who qualifies for protection as a victim of domestic violence, dating violence, or stalking cannot have their housing assistance terminated as a result of any decision based upon the PHA's family break-up policy. That individual continues to receive the assistance of the PHA in accordance with VAWA. It should be made clear that PHAs must ensure that the victim retains assistance even in those circumstances when the victim is not on the voucher and/or the lease. Victims should be directed to immediately request PHA approval for housing assistance.
- c. It should also be made clear that the immigration status of a household member or family member will not be used against him or her in determining allocation of the housing,

unless otherwise required by law. As long as the household member or family member is eligible for assisted housing under Section 214 of the Housing and Community Development Act of 1980, their status should be irrelevant to the determination of who will receive continued assistance.

- d. If the state and/or local unlawful entry and detainer laws of the PHA's jurisdiction provide for single tenant or partial lease terminations and evictions, the PHA or owner may expeditiously move to bifurcate or remove the abusive household member from a lease and home in order to evict, remove, or terminate occupancy rights or assistance. In those jurisdictions where partial or single tenant evictions are not permitted, the PHA may still expeditiously move to bifurcate the lease and separate the abusive household member from the victim. In these jurisdictions without partial evictions, the PHA may have to initially provide assistance to both households post-bifurcation, until it can move to evict or terminate the assistance of the abuser on the basis of the commission of criminal acts of physical violence against family members or others in accordance with local, state and federal law. In the voucher program, the PHA would issue a new voucher to the victim and may terminate the original voucher of the perpetrator.
- e. PHAs must ensure that all decisions made concerning family break-ups and continued assistance must be handled on an expeditious basis, particularly in those circumstances where the victim and the abuser are in the same household. Thus, any family break-up policy should be coordinated with an emergency public housing transfer policy or the issuance of emergency moving papers under the Housing Choice Voucher program.
- f. PHAs must give notice to all tenants regarding the family break-up policy.
- g. If a household's composition has changed due to domestic violence, dating violence, or stalking, the PHA must, if appropriate, adjust the tenant's rent based on the family unit size. If the apartment is too large for the new composition of the family, the tenants must be allowed to stay in their current residence until appropriate and safe housing is available. Appropriate and safe housing must be suitable for the family size and composition, as required by law, and located in an area in which the victim and, where applicable, family can reasonably expect to be safe from continued danger by the abuser. Where no such appropriate and safe assisted housing is immediately available, the tenant shall be permitted a brief absence of not less than 60 days without forfeiting the voucher or lease. The portion of the rent paid by the household must be adjusted based upon the date of notification by the victim to the PHA that the abuser is no longer residing on the property.

5. Content of Notices on VAWA Rights and Obligations

§ 5.2005(a) Notice of VAWA protections

VAWA requires that PHAs and landlords notify tenants of their rights under the statute. In light of this obligation, HUD should issue general guidelines concerning the contents of notices and the timing and process for issuing them. These notices should describe all housing protections

under VAWA, outline procedures for exercising such rights, and furnish contact information for appropriate domestic violence, legal, and social service providers. HUD should direct all PHAs, Housing Choice Voucher Program landlords, and project-based Section 8 owners to post the notices in public areas and to establish guidelines for making them accessible to tenants with disabilities and limited English proficiency.

Ideally, HUD should issue its own designated notice form for PHAs, Housing Choice Voucher Program landlords, and project-based Section 8 owners to use in informing tenants of their rights under VAWA. The agency should also instruct housing providers to supplement this form with referrals to local service providers as well as information about relevant state laws.

For applicants to and tenants of Public Housing or the Housing Choice Voucher Program, PHAs should provide the Notice to applicants for housing and tenants with all leases, denial letters, notices of proposed or actual eviction, notices of proposed or actual termination, and in connection with annual recertifications; they should also post the Notice in the common space of public housing buildings. PHAs should take reasonable steps to ensure that the Notice is provided in a format that is understandable to the tenant, particularly with respect to individuals who have limited English proficiency or are disabled. At the initial lease signing and at each recertification meeting, the PHA should receive acknowledgment, in writing, of each adult tenant's receipt of the Notice.

For project-Based Section 8, where the PHA administers the housing, the requirements outlined above should apply. Where the PHA does not administer the housing, the administering entity should be responsible for providing notice to all applicants and tenants with all leases, denial letters, eviction notices, notices of termination, and in connection with annual recertifications. The administering entity should take reasonable steps to ensure that the Notice is provided in a format that is understandable to the tenant, particularly with respect to individuals who have limited English proficiency or are disabled. At the initial lease signing and at each recertification meeting, the administering entity should receive acknowledgment, in writing, of each adult tenant's receipt of the Notice. PHAs should post the Notice in the common space of the project-based Section 8 building where such space exists.

Finally, PHAs should supply all landlords participating in the Housing Choice Voucher Program and all participating project-based Section 8 owners with notices of their obligations under VAWA, both in the Housing Assistance Payment contract and as a separate notification, on an annual basis.

6. Administrative Plans and Admissions and Continued Occupancy Policies

As noted in the Final Rule, the November 2008 interim rule, and previous notices concerning VAWA 2005, housing providers were to immediately implement the protections provided by VAWA 2005, including updating policies pertaining to VAWA . Unfortunately, advocates continue to discover housing authority Administrative Plans and/or Admissions and Continued Occupancy Policies that make no reference to VAWA or limit, alter, or ignore certain VAWA statutory provisions. PIH guidance should provide specific instructions to housing authorities on how these critical documents must accurately incorporate VAWA.

For that guidance, we suggest the following:

PHAs should continue to update and evaluate their Administrative Plans and Admissions and Continued Occupancy Policies to ensure they comply with VAWA and accurately reflect its statutory and regulatory requirements. PHAs should pay particular attention to policies regarding admissions, occupancy, family break-up and lease bifurcation, portability, documentation for verification purposes, certifications, terminations, the actual and imminent threat exception to the bar on VAWA-protected terminations, confidentiality, and the required VAWA notices to program participants.

Thank you for the opportunity to provide recommendations regarding further implementation of VAWA's housing protections. We appreciate HUD's continued efforts to improve the housing security of survivors of domestic violence, dating violence, and stalking. If you have any questions, please contact Meliah Schultzman of the National Housing Law Project at 415-546-7000 x. 3116 or mschultzman@nhlp.org.

Sincerely,

National Housing Law Project
American Civil Liberties Union
National Network to End Domestic Violence
Sargent Shriver National Center on Poverty Law

Cc:

Fred Karnas, Senior Advisor to the Secretary
Diane Yentel, Acting Director, Public Housing Management and Occupancy Division