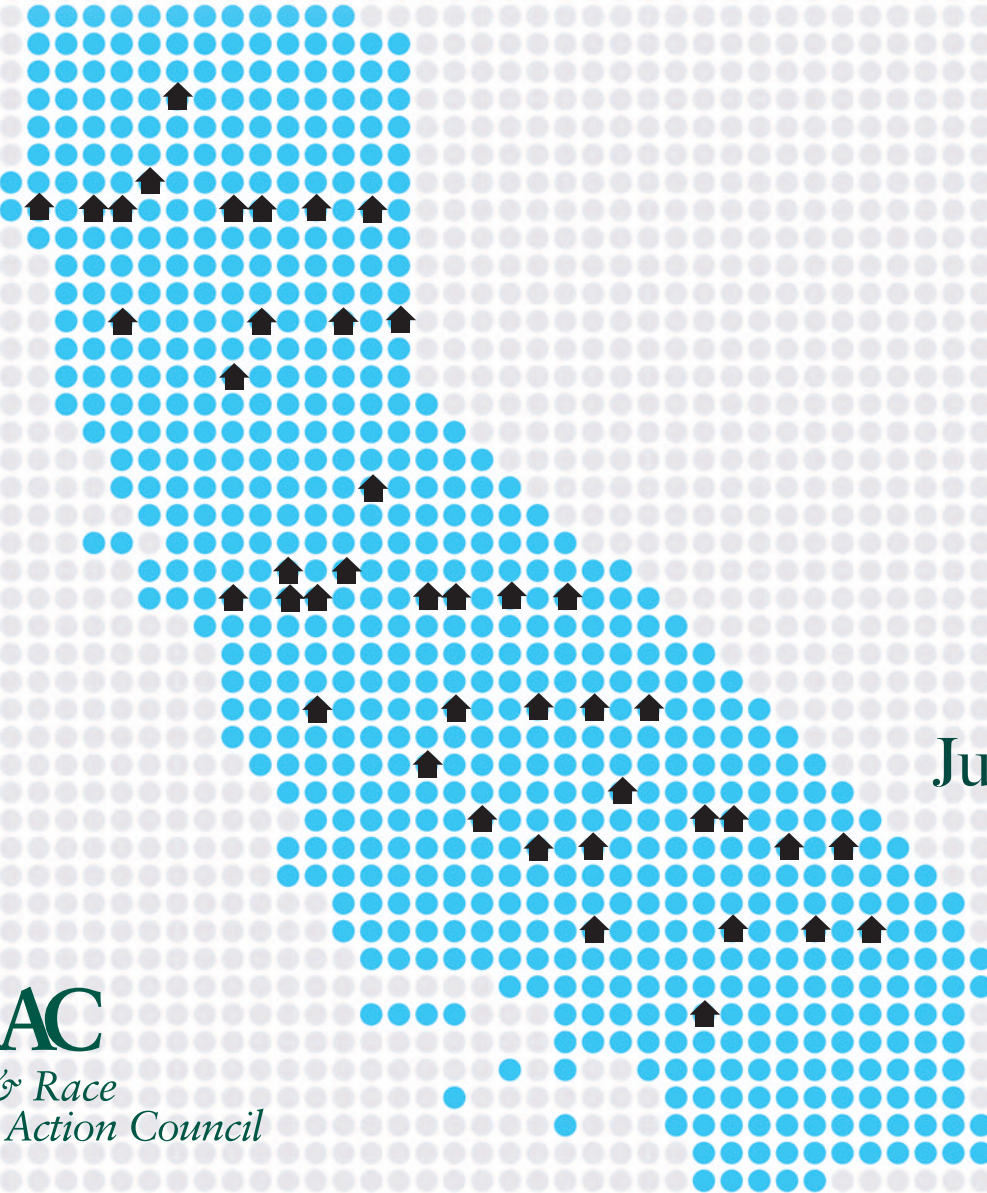


Working with PHAs to Adopt Policies that Affirmatively Further Fair Housing: An Advocacy Guide and Toolkit for Local Advocates



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Part I: Advocates' Guide

What is the Obligation to Affirmatively Further Fair Housing?

The obligation to affirmatively further fair housing (AFFH) is rooted in the original text of the federal Fair Housing Act (FHA). Specifically, the FHA states that the U.S. Department of Housing & Urban Development (HUD) Secretary shall “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies” of the FHA.¹ While the FHA text does not define the term “affirmatively further fair housing,” a mix of legislative history, case law, and HUD’s AFFH 2015 regulation have shaped what the understanding of this important obligation entails.

Members of Congress debating the FHA’s passage recognized the relationship between where a person lives and their ability to access opportunities. The legislation acknowledged that where “a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions.”² Given the nation’s history of residential segregation, exclusion, and discrimination, the FHA included an affirmative requirement that went beyond simply prohibiting housing discrimination – as such affirmative efforts were necessary to undo policies and practices that perpetuate racism and inequity. One court discussing the AFFH obligation described the federal mandate by stating that the FHA’s legislative history “reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”³

HUD’s 2015 AFFH regulation provided a definition for the term “affirmatively furthering fair housing,” defining it to mean “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.”⁴ The regulation goes on to state:

Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.⁵

1 42 U.S.C. § 3608(e)(5).

2 114 Cong. Rec. 2276–2707 (1968).

3 N.A.A.C.P. v. HUD, 817 F.2d 149, 155 (1st Cir. 1987).

4 Former 24 C.F.R. § 5.152 (definition of “affirmatively furthering fair housing”). While the HUD 2015 rule has been rescinded, it is relevant for analyzing the California AFFH state law obligation. The Biden Administration has reintroduced certain definitions (with not exactly the same numbering) related to the 2015 Rule via an interim final rule. *See* Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779 (June 10, 2021) (effective July 31, 2021).

5 Former 24 C.F.R. § 5.152.



In short, affirmatively furthering fair housing means taking affirmative steps to dismantle the legacy of segregation and unequal housing opportunities for groups historically denied housing opportunities, such as BIPOC communities and persons with disabilities. The federal obligation is broad, but generally applies to federal agencies, and recipients of federal funds (e.g., jurisdictions that receive federal community development funding; housing authorities that administer public housing).

While this section has focused on the federal AFFH obligation, advocates in California should know that a similar obligation exists under state law. Specifically, “public agencies” in California (which includes the state, cities, counties, government agencies, and housing authorities) must administer their “programs and activities relating to housing and community development in a manner to affirmatively further fair housing, and take no action that is materially inconsistent with [their] obligation to affirmatively further fair housing.”⁶

The definition of “affirmatively furthering fair housing” under California state law mirrors the 2015 federal regulation’s language. Note that the AFFH obligation in California is broader than the federal mandate in that the state obligation does not require the receipt of any type of state funding to apply. It is also worth noting that despite subsequent regulatory changes at the federal level, the California AFFH obligation is to be interpreted consistently with the 2015 regulation.⁷

How Does the AFFH Obligation Apply to PHAs?

The federal affirmatively furthering fair housing (AFFH) mandate not only applies to the actions of the HUD Secretary, but also applies within the context of HUD programs – including within the programs and activities of public housing agencies (PHAs).⁸ For example, in *Langlois v. Abington Housing Authority*, the court, while not providing the exact contours of a PHA’s AFFH obligation, concluded that the housing authorities should have at minimum investigated “the potential implications for fair housing of the proposed residency preferences and application processes.”⁹ The court added that a PHA’s “mere recital of racial neutrality is not enough.”¹⁰ In other words, PHAs have an obligation to take steps within its own policies to ensure that segregation is being affirmatively addressed and overcome. In *Langlois*, several PHAs in low-poverty majority-white communities had instituted a residency preference for the Section 8 Housing Choice Voucher program. Given the existing demographics of those jurisdictions, residency preferences would perpetuate existing patterns of segregation.¹¹

6 Cal. Gov. Code § 8899.50(b).

7 Cal. Gov. Code § 8899.50(c).

8 See 42 U.S.C. § 1437c-1(d)(16) (PHA must complete affirmatively further fair housing certification.); see also *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 73 (D. Mass. 2002) (“When viewed in the larger context of [the Fair Housing Act], the legislative history, and the case law, there is no way—at least, none that makes sense—to construe the boundary of the duty to affirmatively further fair housing as ending with the Secretary”); *Otero v. N. Y. City Hous. Auth.*, 484 F.2d 1122, 1133–34 (2d Cir. 1973) (PHA has an affirmatively further fair housing obligation.).

9 *Langlois*, 234 F. Supp. 2d at 78.

10 *Id.*

11 For more background on the *Langlois* case, see NHLP, “Recent Developments in Challenges to Residency Preferences,” 43 Hous. L. Bull. 129, 129-33 (July 2013).

Historically, PHAs did not have much practical direction on how to affirmatively further fair housing in their policies and practices.¹² Additionally, HUD's *Public Housing Occupancy Guidebook*, while recognizing the importance of affirmative marketing, also noted that it is a PHA's duty to conduct an analysis of impediments.¹³ However, the *Guidebook* does not elaborate on what this means, or how a PHA would go about analyzing impediments to fair housing choice. As of June 2021, the Biden Administration is beginning the process of updating HUD PHA regulations regarding affirmatively furthering fair housing.¹⁴

What policies work to overcome the history of segregation is specific to each PHA – as PHAs have different service populations and operate within different state and local contexts. However, determining the extent to which certain populations have been excluded from access to PHA programs can be a helpful starting point. As noted in the *Langlois* example above, perhaps a PHA has a residency preference that has the impact of excluding members of protected classes (e.g., BIPOC residents) from PHA programs such as the Section 8 Voucher program. Or, maybe a PHA does not have a meaningful language access policy that ensures that limited English proficient persons can apply for and participate in PHA programs. Further still, a PHA may open up its Section 8 Voucher waitlist on a first-come, first-served basis, which may limit the ability of persons with disabilities to secure a spot on the list. These scenarios are merely examples, but they also demonstrate the connection between a PHA's specific policy choices, and how those policies should be examined considering the PHA's AFFH obligation.

The HUD 2015 AFFH Rule, since withdrawn, identified PHA policies that may affirmatively further fair housing to include (but are not limited to):

- Marketing efforts
- Using “nondiscriminatory tenant selection and assignment policies that lead to desegregation”
- Additional applicant consultation
- Providing supportive services (e.g., “supportive services that enable an individual with a disability to transfer from an institutional setting into the community”).
- Coordinating with state and local disability agencies “to provide additional community-based housing opportunities for individuals with disabilities and to connect such individuals with supportive services to enable an individual with a disability to transfer from an institutional setting into the community”).¹⁵

12 See generally former 24 C.F.R. § 903.7(o). Note that 24 C.F.R. § 903.2(b) concerned deconcentrating poverty and income mixing within its portfolio.

13 HUD, *Public Housing Occupancy Guidebook*, at 21 (June 2003).

14 See generally Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779 (June 10, 2021).

15 Former 24 C.F.R. § 903.15(d)(2)(ii).



What Are California PHAs' AFFH Obligations Under State Law?

In 2018, California's governor signed into law Assembly Bill 686 (AB 686), which created a state obligation to affirmatively further fair housing. The state AFFH obligation requires "public agencies," including PHAs, to affirmatively further fair housing.¹⁶ This is a generalized obligation similar to the federal statutory obligation to affirmatively further fair housing; there is no explicit planning requirement for PHAs under the California state law. The California Department of Housing & Community Development (HCD) interprets AB 686 to "charge all public agencies with broadly examining their existing and future policies, plans, programs, rules, practices, and related activities and make proactive changes to promote more inclusive communities."¹⁷

Cities and counties conducting an Assessment of Fair Housing as required for their Housing Element under state law should consult with PHAs in order to have a more complete understanding of the fair housing issues and barriers in the jurisdiction. Guidance issued by HCD in 2021 lists public housing authorities as a key stakeholder for the purposes of the Housing Element.¹⁸

What is the PHA Plan?

Federal law generally requires PHAs to develop a PHA plan for HUD approval.¹⁹ The PHA Plan covers a PHA's policies regarding public housing and the Voucher program (both project-based and tenant-based Vouchers), among other programs. Most PHAs administering public housing and Voucher programs must submit a PHA plan to HUD.²⁰ There are two components of the PHA Plan: the Five-Year Plan and the Annual Plan.²¹

What is Required to be in the PHA Annual Plan and Five-Year Plan?²²

Annual Plan

The Annual Plan must contain information about the PHA's discretionary policies.²³ Importantly, the plan must be "consistent with the goals and objectives of the PHA's 5-Year Plan."²⁴ A PHA's

16 Cal. Gov. Code § 8899.50.

17 Cal. Dep't of Housing and Community Development, [Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements](#), at 9 (April 2021).

18 *Id.* at 21.

19 42 U.S.C. § 1437c-1.

20 Certain PHAs can submit a streamlined annual plan (24 C.F.R. § 903.11), while other PHAs are exempt from the Annual Plan requirement (42 U.S.C. § 1437c-1(b)(3)). PHAs exempt from the Annual Plan requirement must still submit a civil rights certification on a yearly basis. Moving to Work (MTW) PHAs are exempt from both the Annual Plan and the Five-Year Plan. However, MTW agencies must submit annual MTW plans and reports to HUD.

21 *See generally* 42 U.S.C. § 1437c-1.

22 This section has been adapted from Chapter 8 of NHP's *HUD Housing Programs: Tenants' Rights* (5th ed. 2018).

23 24 C.F.R. § 903.7.

24 *Id.*

Annual Plan contains information for the upcoming fiscal year concerning 19 different elements.²⁵ Select elements include the following²⁶:

- A statement of housing needs (including addressing the “housing needs of the low-income and very low-income families who reside in the jurisdiction served by the PHA, and other families who are on the public housing and Section 8 tenant-based assistance waiting lists”)
- A statement of the PHA’s “deconcentration and other policies that govern eligibility, selection, and admissions”
- A statement of the PHA’s policies for rent determination
- A statement of PHA grievance procedures
- A statement of any demolition/disposition of public housing
- A statement of properties that are designated to serve elderly populations and/or persons with disabilities
- A statement of the “conversion of public housing to tenant-based assistance”
- A statement of safety/crime prevention measures, including programs related to domestic violence, dating violence, sexual assault, and stalking prevention
- Civil rights certification, which includes a certification regarding the duty to affirmatively further fair housing
- A brief statement of progress made toward the Five-Year Plan goals, and criteria for determining “a significant amendment or modification” to the Annual Plan or Five-Year Plan

Changes to the Annual Plan from the prior year must be identified and be made publicly available.²⁷ Depending on the “type” of PHA completing the Annual Plan, HUD requires use of specific templates for PHAs to complete their plans for submission.²⁸

Five-Year Plan

The Five-Year Plan outlines a PHA’s “mission, goals and objectives.”²⁹ The Five-Year Plan must also include “goals and objectives that enable the PHA to serve the needs of the families identified in the PHA’s Annual Plan.”³⁰ Like with the Annual Plan, PHAs use a HUD template to complete the Five-Year Plan. The Five-Year Plan also includes various certifications, including a certification that the PHA will affirmatively further fair housing.

25 42 U.S.C. § 1437c-1(d).

26 24 C.F.R. § 903.7.

27 [Form HUD-50075-ST](#) (instructions).

28 HUD requires different templates for the following kinds of PHAs: Standard and Troubled, High Performer, Small, and Housing Choice Voucher-Only PHAs.

29 24 C.F.R. § 903.6.

30 *Id.*



What are Significant Amendments to the PHA Plan?

The PHA itself determines the “basic criteria” for what constitutes a “significant amendment” to the PHA Plan.³¹ Accordingly, advocates should consult their PHA’s Annual Plan to understand what the PHA considers to be a “significant amendment.” Significant amendments must go through a public hearing and comment process, among other requirements.³²

What is the Relationship Between the PHA Plan, the Admissions and Continued Occupancy Policy, and the Administrative Plan?

The Admissions and Continued Occupancy Policy (ACOP) and Administrative Plan are supporting documents for the PHA Plan. Many (but not all) PHAs post their ACOPs and/or Administrative Plans for public comment during the PHA Plan process. Advocates should ensure that all of these documents are included on the PHA’s website and are easily accessible to the public.

To the extent that changes to the ACOP or Administrative Plan would constitute substantial changes to the policies outlined in either the Annual Plan or Five-Year Plan, the changes in the ACOP or Administrative Plan should be subject to the PHA Plan process, including public hearing and comment.³³ Advocates have also submitted global comments on the ACOP and/or Administrative Plan beyond those provisions being changed. The ACOP and Administrative Plans are particularly important for advocates and their clients because these documents outline the day-to-day policies of the PHA.

Many PHAs work off templates that they have purchased from a private company, leading to a fair amount of standardization in these planning documents. However, because of the standardization, these plans may not have policies that reflect the needs of local residents. Other times, these templates are old, and have not been updated to reflect newer HUD requirements. Therefore, it is important to review these planning documents regularly to ensure that they reflect the most recent legal authorities, including HUD guidance documents.

What is the Administrative Plan?

A PHA’s Administrative Plan outlines that PHA’s policies in the Section 8 Housing Choice Voucher program and the Project-Based Voucher program. HUD regulations require PHAs to “adopt a written administrative plan that establishes local policies for administration of the program in accordance with HUD requirements.”³⁴ Importantly for advocates, the Administrative Plan states PHA “policy on

31 24 C.F.R. § 903.7(r)(2)(ii).

32 24 C.F.R. § 903.21.

33 See NHLP’s *HUD Housing Programs: Tenants’ Rights*, § 8.3.

34 24 C.F.R. § 982.54(a).

matters for which the PHA has discretion to establish local policies.”³⁵ PHAs must follow their Administrative Plans.³⁶

HUD regulations consider the Administrative Plan to be a supporting document of the PHA Plan.³⁷ A PHA must make its Administrative Plan publicly available.³⁸

What Does the Administrative Plan Cover?

HUD regulations require that the Administrative Plan cover the following topics, among others³⁹:

- Applicant selection and admission off the PHA waitlist — including admissions preferences, taking applicant names off the waitlist, and closing and reopening the waitlist;
- Issuance or denial of Vouchers, including policies “governing the voucher term and any extensions of the voucher term”;
- Occupancy policies, including the definitions of “family,” and “continuously assisted,” as well as admissions or termination standards with respect to criminal activity or alcohol abuse;
- Encouraging owners “outside of areas of low income or minority concentration” to participate in the Voucher program;
- Assisting families who have experienced housing discrimination;
- Subsidy standards;
- Informal review procedures for applicants;
- Informal hearing procedures for Voucher participants;
- Revising payment standards;
- Determining rent reasonableness;
- Applicant screening;
- Policies regarding applying Small Area FMRs to project-based Voucher units; and
- Other provisions outlined in HUD regulations.

What is the Admissions and Continued Occupancy Policy (ACOP)?

A PHA’s Admissions and Continued Occupancy Policy (ACOP) outlines the PHA’s policies in its public housing program. The ACOP is a supporting document of the PHA Plan.

35 *Id.* § 982.54(a).

36 *Id.* § 982.54(c).

37 *Id.* § 982.54(b).

38 *Id.* § 982.54(b).

39 *Id.* § 982.54(d). Please consult the regulations for the full list of required policies the Administrative Plan must cover.



What Does the ACOP Cover?

HUD has issued a sample ACOP that outlines elements of a PHA's ACOP, including (but not limited to)⁴⁰:

- Nondiscrimination requirements
- Eligibility for admission, and applications – including affirmative marketing, waitlist management, preferences
- Tenant selection
- Transfer policy
- Eligibility for continued occupancy
- Lease terminations

That said, many ACOPs share many components (and are structured in a similar manner) to Administrative Plans, particularly when the PHA has purchased template ACOP and Administrative Plans.

Importantly, more recent updates and changes to HUD requirements are not reflected in the HUD sample ACOP, such as protections for tenants and applicants under the Violence Against Women Reauthorization Act, or HUD's Equal Access Rule. Additionally, if a PHA purchased an older template ACOP, more recent protections and requirements may not be included in the ACOP.

According to HUD's *Public Housing and Occupancy Guidebook*, it is the PHA's responsibility to have within its ACOP a written policy "that explains how one would request a reasonable accommodation, how it will be processed, and one's options if the request is denied, including use of the grievance procedure."⁴¹

What are the Public Participation Requirements for the PHA Plan?

Public Hearing

HUD regulations require PHAs to follow certain public participation requirements during the PHA Plan process.⁴² In fact, PHAs "shall conduct reasonable outreach activities to encourage broad public participation in the PHA plans."⁴³ For example, the PHA must hold a public hearing regarding the PHA Plan and invite public comment on the plan.⁴⁴ HUD requires that the hearing "be conducted at a location that is convenient to the residents served by the PHA."⁴⁵

40 See HUD, *Public Housing and Occupancy Guidebook*, Appendix III, "Sample Admissions and Continued Occupancy Policy" (June 2003).

41 *Public Housing and Occupancy Guidebook*, at 21.

42 See generally 24 C.F.R. §§ 903.13, 903.17, and 903.19 (2019).

43 24 C.F.R. § 903.17(c).

44 24 C.F.R. § 903.17(a).

45 24 C.F.R. § 903.17(a).

Advocates should use this language, taken with the broader requirement that the PHA must conduct outreach to encourage broad public input, to ensure that the PHA is holding its hearing on the PHA Plan at a location (and time) that will allow residents served by the PHA to attend and provide input on PHA policies. Advocates should also make it a point to attend these hearings and raise concerns about any problematic PHA policies and procedures. Examples may include the PHA's reasonable accommodation policies, language access issues, Voucher payment standards, transfers protocols for domestic violence survivors, or waitlist administration.

Importantly, the PHA is bound by Title VI of the Civil Rights Act of 1964 to provide meaningful language access to these hearings in accordance with the PHA's language access policy. Practically speaking, the PHA should provide a means for individuals to request interpretation assistance before the meeting but should also be prepared to provide interpretation. Furthermore, under Section 504 of the Rehabilitation Act of 1973, the PHA must ensure that the public hearing is accessible to persons with disabilities. Accordingly, the location of the hearing must be physically accessible, with the PHA making other reasonable accommodations as requested to ensure that residents with disabilities can fully participate.

Required 45-Day Comment Period

Before the public hearing, PHAs must allow the public to submit comments on the PHA Plan. The PHA must do the following at least 45 days *before* the public hearing:

- Make the PHA Plan, required attachments and documents (which, presumably, includes the ACOP and Administrative Plan), and “all information relevant to the public hearing” available for public inspection “at the principal office of the PHA during normal business hours”⁴⁶; and
- Publish a public hearing notice including the hearing date, time, and location, and informing the public that the PHA Plan is available for review.⁴⁷

Oftentimes, PHAs will include the PHA Plan, the ACOP, and the Administrative Plan on the PHA's website. Where the PHA does not do so, advocates should urge the PHA to include these documents online, with any changes denoted by track changes, or some other method. Advocates can point to the regulatory requirement that the PHA conduct “reasonable outreach activities to encourage broad public participation in the PHA plans”⁴⁸ to support the need for these planning documents to be available to the public in an online format (in addition to any other places in the community, such as the library, where residents may benefit from documents being available). Furthermore, advocates should urge the PHA to place dates its planning documents, and to provide documents in a searchable format.

⁴⁶ 24 C.F.R. § 903.17(b)(1).

⁴⁷ 24 C.F.R. § 903.17(b)(2).

⁴⁸ 24 C.F.R. § 903.17(c).



Similar to the public hearings, within the 45-day commenting period, PHAs must adhere to their obligations under Title VI with respect to providing meaningful language access for limited English proficient individuals, as well as their obligations under Section 504 to ensure accessibility for persons with disabilities. In the language access context, for example, this may mean that the PHA provides a translated summary of key changes in the ACOP or Administrative Plans in languages for which the PHA is required to translate vital documents.

Submission to HUD

PHAs can submit their PHA Plans to HUD only after conducting the public hearing, considering any comments received, and making “any changes to the plan, based on comments, after consultation with the Resident Advisory Board or other resident organization.”⁴⁹

Why is Participating in the PHA Plan Process Worth the Time?

Housing advocates oftentimes do not feel as though they can balance their ongoing case load with engaging in the PHA Plan process. However, the PHA Plan provides an opportunity to address policies and practices that impact your clients’ lives and ability to access affordable housing. In this sense, you can think of your time working on providing input to the PHA Plan as an investment towards resolving systemic issues that are creating barriers for your clients to either access or maintain housing. This process also provides an opportunity to approach your PHA from a place of collaboration and cooperation, as opposed to the adversarial context of challenging a problematic PHA policy while representing an individual client. For example, if a PHA’s policies regarding re-opening the Section 8 Voucher waitlist do not take adequate steps to ensure access to persons with disabilities, it may be advantageous to flag those issues through the PHA Plan process, as opposed to waiting until the waitlist opens.

Advocating for fair, inclusive PHA policies can work to advance fair housing objectives. Certainly, PHAs are subject to HUD statutory and regulatory requirements. However, PHAs also have considerable discretion on issues such as admissions criteria. And, of course, PHAs that participate in the Moving to Work (MTW) Demonstration have even more flexibility. Advocates should view this flexibility with an eye toward opportunities to establish and promote policies and best practices that expand fair housing choice and access to opportunity for the families served by the PHA.

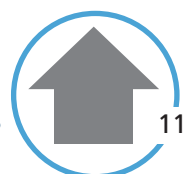
The resources in the Toolkit accompanying this Advocates’ Guide are designed to help advocates focus on key issues within a PHA’s ACOP and/or Administrative Plan. The Toolkit provides checklists for common advocate issues, and, where possible, cites to relevant legal authority that advocates can include in their comment letters. The Toolkit was developed to save housing advocates time by allowing them to focus on one or several issues for the purposes of submitting comments, and by providing relevant legal authority that can be used in commenting efforts.

⁴⁹ 24 C.F.R. § 903.19(c).

Practical Tips for Advocates Commenting on PHA Planning Documents

Getting involved with the PHA planning process can seem daunting at times; however, doing so provides an opportunity to influence a PHA's policies and practices in a way that can affirmatively further fair housing by increasing access to safe, decent, and affordable housing. Listed below are a few tips that advocates considering getting involved with the PHA planning process may wish to consider.

- **Plan ahead.** Advocates should ask their PHA when the PHA Plan, ACOP, and Administrative Plan will be updated next. If the commenting period is far off, consider assigning law clerks and legal fellows to review the entire ACOP and/or Administrative Plan and issue spot.
- **Avoid getting overwhelmed with issue areas.** Depending on how much time you have before the commenting deadline, decide on topics that are within and outside the scope of your review. Focus on providing comments only on those topics that are within the scope of your review. You do not need to comment on every aspect of the planning documents; it is very easy to get overwhelmed given the length of most ACOPs and Administrative Plans. For example, are you seeing a series of clients receiving overly burdensome requests for documentation in the context of reasonable accommodation requests? Is your PHA failing to implement VAWA requirements? Prioritize a handful of issues and focus on those. If you collaborate with other local organizations to submit comments, you may wish to divide up issue areas by areas of focus or expertise. At minimum, advocates should review updates to the planning documents to ensure no new problematic policies are being adopted.
- **Use prior comment letters.** Prior comment letters, particularly comment letters that are relatively recent, can be useful as a starting point. Many PHAs' ACOPs and Administrative Plans are based on the same template that PHAs can purchase. Therefore, comments that have been previously written, even if by another organization, may be useful in crafting new comments, or serving as a checklist for issue where you may wish to comment. Advocates should also consider asking colleagues at their own and other legal services organizations if they would be willing to share their prior PHA Plan comments. A PHA may not address an issue the first time someone comments on it, and so it may be worth raising again.
- **Reach out for technical assistance.** Organizations such as the National Housing Law Project and the Poverty and Race Research Action Council can provide technical assistance to advocates who are engaged in this commenting process or are otherwise engaged in advocacy with their PHAs. These organizations will also have insights into issue areas where applicable laws or regulations have been recently updated.
- **If possible, propose draft language.** Anecdotally, advocates who have engaged in the PHA planning process have experienced more success in getting requested changes when they have proposed draft language or redlines to the existing PHA Plan language. This contrasts with simply identifying a problem in a comment letter and then leaving it up to PHA staff to update or change the planning document. As you know, PHA staff are often



time- and resource-strapped. Therefore, it stands to reason that such staff would be more inclined to incorporate changes from comments if they are provided with alternative text or line edits. Use track changes or formatting tools such as strikethrough, bold, and underline to denote such changes or line edits. At the same time, be cautious when suggesting draft language – as, of course, this could be the language that could potentially bind future clients.

- **Join forces.** Issues that impact individuals and families who access PHA programs may be served by several local organizations. Reach out to legal aid agencies, domestic and sexual violence service providers, disability rights advocacy organizations, and fair housing organizations, among others, to identify core or systemic issues. Consider submitting a joint comment letter or coordinating attendance at the public hearing to share comments on the PHA planning documents.
- **Lift up best practices.** PHAs enjoy a great deal of discretion in establishing many of their policies. If you are focused on providing a PHA recommendations with improvements that can be made in a particular area, a PHA may be more likely to adopt best practices if they have been successfully implemented elsewhere. Contact NHLP, PRRAC, or post on the Housing Justice Network listserv to see if advocates in other jurisdictions have identified best practices that other PHAs have adopted on a particular issue. If possible, advocates should try to identify best practices in other PHAs that are similar in size and in resources to the PHA at issue.
- **Remember the program covered by the plan.** For PHAs that have both Voucher and public housing programs, certain issues may play out very similarly in the ACOP or Administrative Plans. However, to the extent advocates are using the same or similar language for commenting purposes, remember to stop and consider whether that language makes sense for the program or plan you are commenting upon. For example, your comments regarding the ACOP should not discuss reasonable accommodations for payment standards for Voucher families. Put another way, make sure you are correctly identifying the right planning document — particularly when providing very specific feedback, such as draft language. Furthermore, if you are working with a PHA that has both an ACOP and Administrative Plan, remember that if you divide the planning documents for review among staff, make sure that the edits and suggestions are consistent between the two documents (e.g., if one document expresses concerns about the PHA's general reasonable accommodation request policy, the concerns should be reflected in comments for both planning documents).
- **Set the stage for follow through.** In your comments, if possible, request a follow-up meeting with the PHA to discuss your comments. Hopefully, this will result in an ongoing dialogue between the PHA and your office about policies and practices that need to be addressed. This also makes sure that your hard work engaging in the commenting process is not simply confined to a written comment letter.
- **Do not forget new legal requirements that may apply.** PHAs often do not timely update their planning documents to reflect new legal requirements. For example, many PHAs did not timely update their planning documents to reflect the fact that survivors of

sexual assault were covered by housing protections within the Violence Against Women Reauthorization Act of 2013. The PHA planning process can thus be used as an educational tool to inform the PHA of new authorities that can be helpful in advocacy with the PHA.

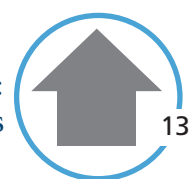
Implementation of California's Fair Housing Regulations

On January 1, 2020, state fair housing regulations went into effect.⁵⁰ These regulations cover several issues that are important from the perspective of evaluating PHA policies. The regulations cover areas such as harassment, disparate impact under California law, retaliation, reasonable accommodations, disability, and the use of criminal history in housing decisions.

California fair housing regulations cannot supersede federal requirements to the extent that they would make an otherwise ineligible person eligible for participation in a federally assisted housing program. For example, nothing in California's criminal history regulations supersede categorical exclusions from federally assisted housing that are in federal statute. Or, for instance, California's prohibition on discrimination based on immigration status would not override certain immigration status requirements for participation in federally assisted housing programs. That said, PHAs have wide discretion over many of their policies.

A summary of select provisions of California fair housing regulations is included in the Toolkit accompanying this guide. Advocates should use language in these regulations to seek fair and inclusive PHA policies within the PHA Plan process.

⁵⁰ 2 C.C.R. § 12005 *et seq.*



Part II: Advocating with Your Local PHA Toolkit

About This Toolkit

This Toolkit is designed for advocates who are reviewing their PHA policies, specifically in the context of the PHA Plan. The Toolkit includes a series of checklists created to mirror common issues that arise in the context of the public housing and Section 8 Housing Choice Voucher programs. These checklists are intended to help busy legal services attorneys and other local advocates quickly review planning documents and provide comments on select provisions.

For each checklist item is a question, followed by an explanation, legal authority, and, occasionally, model language or best practices. The creators of this Toolkit designed these checklists so that advocates could simply copy and paste the relevant sections, authorities, and explanations into their own comment letters. Of course, these checklists are merely a starting point for thinking about fair housing and access to opportunity for families served by local PHAs. While getting good written policies incorporated into PHA planning documents is an important milestone, it is not the end of your advocacy. Advocates must also continue ensuring that the PHA is training staff and implementing positive policies that promote fair housing choice. You should thus think of your PHA advocacy as an ongoing interaction with the housing authority – with gradual progress being made.

Also included in this Toolkit are summaries of select provisions of the California fair housing regulations that took effect in January 2020. These provisions are included to provide advocates a primer on the regulations; however, the regulations themselves contain helpful language and examples, and therefore advocates should carefully review any relevant provisions by reading the actual regulatory text.

If you have questions or want more in-depth technical assistance about commenting on PHA Plans, please reach out to the National Housing Law Project.

California's Fair Housing Regulations: A Primer on Select Provisions

On January 1, 2020, California's groundbreaking fair housing regulations went into effect. This primer serves as an introduction to key provisions that advocates should be aware of as they engage in advocacy on behalf of their clients.

While this is an introduction to key portions of the regulations, **advocates should review the regulations in their entirety, as several sections and provisions have been omitted here.** Furthermore, the following are summaries compiled for the convenience of the reader. Advocates should refer to the actual text of the regulations to ensure their full meaning and terms are understood in context.

Article 1 – General Matters

Article 1 includes two sections – § 12005, which includes a series of important definitions, and § 12010, which outlines liability standards for discriminatory housing practices.

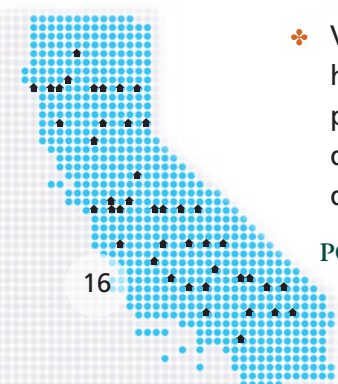
2 CCR § 12005. Definitions. Advocates should review this section with care, as many foundational definitions are included in this section. Terms that are defined in this section include (but are not limited to), the following:

- ❖ "Adverse action," which includes the failure to rent a property; changing terms, conditions, or privileges regarding a dwelling; filing an eviction action; filing false reports with tenant reporting agencies; taking actions that are prohibited related to one's criminal history; refusal to provide a reasonable accommodation; among other actions.
- ❖ "Assistance animals," which includes service animals and support animals.
- ❖ "Criminal conviction," defined as "a record from any jurisdiction that includes information indicating an individual has been convicted of a felony or misdemeanor."
- ❖ "Discriminatory housing practice," a term used to define an "act that is unlawful under federal or state fair housing law, including housing-related violations of":
 - ▲ the Fair Employment and Housing Act,
 - ▲ the federal Fair Housing Act,
 - ▲ the Unruh Civil Rights Act,
 - ▲ the Ralph Civil Rights Act,
 - ▲ the Disabled Persons Act, and
 - ▲ the Americans with Disabilities Act.
- ❖ "Housing accommodations" or "dwelling," includes (but is not limited to):
 - ▲ single- and multi-family homes,
 - ▲ apartments,
 - ▲ homeowner associations,
 - ▲ housing cooperatives,

- ▲ residential motels/hotels,
 - ▲ recreational vehicles used as residences,
 - ▲ shelters, and
 - ▲ vacant land offered for sale or lease for the building of such housing accommodations.
- ❖ “Owner”
 - Any “person having any legal or equitable right of ownership, possession or the right to rent or lease housing accommodations.”
 - ❖ “Person”
 - Meant to be interpreted broadly. The term includes owners; institutional third parties; homeowner associations; the state, political subdivisions, and state agencies; and those covered by the Fair Housing Act definition of “person.”
 - ❖ “Practice”
 - Includes policies, actions, decisions, and lack of action, written or unwritten; multiple policies, actions, or decisions are not required to establish a practice.
 - ❖ “Protected bases” or “protected classes”
 - All classes of individuals and those associated with them protected by fair housing laws and the Unruh Civil Rights Act, including:
 - “race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, age, medical condition, genetic information, citizenship, primary language, immigration status” [Editor’s note: Effective January 2020, veteran or military status has been added to the statute, but not yet added to revised finalized regulations.]
 - arbitrary characteristics as protected by the Unruh Civil Rights Act

2 CCR § 12010. Liability for Discriminatory Housing Practices. This section outlines both standards for direct and vicarious liability. A person can be held directly or vicariously liable for acts of housing discrimination. Note that the standard for direct liability would cover a housing provider’s failure to intervene in incidents of tenant-on-tenant harassment.

- ❖ Direct liability, defined in § 12010(a), applies to a person’s “own conduct that results in a discriminatory housing practice”; a person’s failure to “take prompt action...to correct and end a discriminatory housing practice by that person’s employee or agent”; or a person’s failure to “take prompt action...to correct and end a discriminatory housing practice by a third-party” where the person “had the power to correct it.” Liability attaches when the person “knew or should have known of the discriminatory conduct.”
- ❖ Vicarious liability, defined in § 12010(b), makes a person liable “for the discriminatory housing practice of a third party,” and that liability can attach “regardless of whether the person knew or should have known of the conduct by the third party that resulted in the discriminatory housing practice.” Vicarious liability applies to a person for the discriminatory practices by an agent or employee.



Article 7 – Discriminatory Effect

Article 7 outlines the standards for establishing discriminatory effects liability. California requirements for proving discriminatory effects liability are less burdensome on plaintiffs and complainants than federal fair housing requirements. Instead of a three-step burden-shifting framework, the regulations outline a two-step analysis.

In contrast the current federal standard for discriminatory effects claims, under FEHA, the burden of showing the absence of a less discriminatory alternative lies with the defendant or respondent.

2 CCR § 12060. Practices with a Discriminatory Effect.

- ❖ FEHA imposes liability for “practices that are not motivated by discriminatory intent when the practices have a discriminatory effect.” However, practices with a discriminatory effect “may still be lawful if supported by a legally sufficient justification.”
- ❖ The regulations, as outlined in § 12060(b), provide for both disparate impact and perpetuation of segregation methods of proof:
 - “A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of individuals, or creates, increases, reinforces, or perpetuates segregated housing patterns, based on membership in a protected class. A practice predictably results in a disparate impact when there is evidence that the practice will result in a disparate impact even though the practice has not yet been implemented. A single person may pursue a claim based upon a practice that has disparate impact on a group of individuals if that person has been injured by the practice. A practice that is proven ... to create, increase, reinforce, or perpetuate segregated housing patterns is a violation of the Act independently of the extent to which it produces a disparate effect on protected classes.”

2 CCR § 12061. Burdens of Proof in Discriminatory Effect Cases.

- ❖ First, the complainant “has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.”
- ❖ Then, the burden shifts, such that the respondent must “prove that the challenged practice meets all of the elements of a legally sufficient justification.”
- ❖ Either party may use various types of evidence to establish or rebut a discriminatory effect, including national, state, and local statistics; applicant files/data; tenant files/data; conviction statistics; Census data; local agency data/records; police records; court records; eviction data, survey data; other relevant data.

2 CCR § 12062. Legally Sufficient Justification.

- ❖ There are different elements to prove a legally sufficient justification for business establishments (i.e., housing providers) and non-business establishments (i.e., local governments):
 - Business establishments must establish:

- ▲ The challenged practice “is necessary to achieve one or more substantial, legitimate, nondiscriminatory business interests”;
- ▲ The challenged practice “effectively carries out the identified business interest”; and
- ▲ There is “no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect.”
- Non-business establishments must establish:
 - ▲ The challenged practice is “necessary to achieve one or more substantial, legitimate, nondiscriminatory purposes of the non-business establishment”;
 - ▲ The challenged practice “effectively carries out the identified purpose”;
 - ▲ The “identified purpose is sufficiently compelling to override the discriminatory effect”; and
 - ▲ There is no “no feasible alternative practice that would equally or better accomplish the identified purpose with a less discriminatory effect.”

2 CCR § 12063. No Legally Sufficient Justification for Intentional Discrimination.

- ❖ A demonstration “that a practice is supported by a legally sufficient justification...may not be used as a defense against a claim of intentional discrimination.”

Article 12 — Harassment and Retaliation

Article 12 includes two sections, one that outlines the elements of unlawful harassment (§ 12120) and retaliation (§ 12130).

2 CCR § 12120. Harassment.

- ❖ Outlines the standards for two types of harassment, “quid pro quo” and “hostile environment.”
- ❖ “Quid pro quo” harassment
 - Involves making a housing-related benefit conditional on complying with a request or demand, regardless of whether the victim complied with the request.
- ❖ “Hostile environment” harassment
 - Involves “unwelcome conduct that is sufficiently severe or pervasive as to interfere” with a person’s ability to access or maintain housing. Demonstrating that hostile environment harassment existed depends on analysis of the totality of circumstances.
 - Factors to be considered in the totality of circumstances inquiry include (but are not limited to) “the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved.”
- ❖ Examples
 - The Act includes a non-exhaustive list of conduct that may constitute harassment, such as:
 - ▲ verbal harassment
 - ▲ physical harassment

- ▲ written or otherwise visual forms of harassment (e.g., derogatory posters, cartoons)
- ▲ unwanted sexual conduct based on a protected category such as gender or sexual orientation
- ▲ intimidation or threats
- ▲ disclosing private information without consent
- ▲ discriminatory housing practices, such as making repairs based on tenants' English-speaking ability
- ❖ Number of incidents
 - A single instance of harassment can constitute a discriminatory housing practice.

2 CCR § 12130. Retaliation.

- ❖ FEHA prohibits retaliation against persons “who exercise their rights to be free from discriminatory or harassing housing practices,” by engaging in a variety of protected activities such as filing a housing discrimination complaint. FEHA prohibits taking an adverse action against someone “when a purpose for the adverse action is retaliation for engaging in protected activity.”
- ❖ Proving retaliation involves a three-step, burden-shifting process.
 - First, the complainant must establish a prima facie case. A prima facie case of retaliation consists of three elements: (1) engagement in a protected activity; (2) an adverse action by defendant/respondent; and (3) the existence of a causal link between the adverse action and the protected activity.
 - Then, the burden shifts to the respondent to provide “a legitimate non-retaliatory reason for the adverse action.”
 - The burden then shifts back to the complainant to show “that the proffered reason is pretextual or false.”
- ❖ The respondent does not need to have taken the adverse action only to retaliate, but it must be at least a nontrivial part of the basis for the action.
- ❖ Retaliation can also be used as an affirmative defense in unlawful detainer cases, and does not constitute a delay of such an action.

Article 18 - Disability

2 CCR § 12176. Reasonable Accommodations.

- ❖ Refusal to make “reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford an individual with a disability an equal opportunity to use and enjoy a dwelling unit and public and common use areas, or an equal opportunity to obtain, use, or enjoy a housing opportunity” is a discriminatory housing practice.
 - Exceptions:
 - ▲ the accommodation would excessively burden the program financially or administratively;

- ▲ the accommodation would fundamentally alter the program;
 - ▲ allowing the accommodation would create a direct threat to the health and safety of others; or
 - ▲ allowing the accommodation would “cause substantial physical damage” to others’ property
- ❖ Those directly involved in the interactive or decision-making process must keep the person’s information about their request and disability confidential.
 - Exceptions:
 - ▲ Disclosure is required for decision-making;
 - ▲ Disclosure is required for administering the accommodation;
 - ▲ Disclosure is required by law; or
 - ▲ The person with the disability authorizes the disclosure in writing.
 - ❖ Reasonable accommodations must be requested by the individual requiring them, a family member, or a person the individual has authorized to be a representative.
 - ❖ The request does not have to be made in a particular way or time, and the individual does not have to call it a “reasonable accommodation” to make the request. A reasonable accommodation request “may be made at any time, including during litigation, at or after trial.”
 - ❖ Accommodations can also be for financial circumstances and are allowed to impose a financial burden if the individual would not have equal access to the housing opportunity.
 - Examples may include “waiving guest fees or other fees; waiving fees or providing additional time to pay fees for city clean-up of a property; and allowing a prospective tenant to use a co-signer when their limited income, so limited because of a disability, does not qualify them for the unit.”.
 - ❖ Regarding unlawful detainer (eviction) actions, an individual can request an accommodation at any time during the process, and in certain circumstances after the eviction. Failure to provide an accommodation can be raised as an affirmative defense.

2 CCR § 12177. The Interactive Process.

- ❖ Housing providers must engage in an interactive process with the person requesting a reasonable accommodation that cannot be immediately provided. This process must be timely (determined on a case-by-case basis) and made in good faith, meaning the provider honestly considers the request.
- ❖ A provider cannot deny the request before requesting more information if the disability or link between the disability and the accommodation is not immediately clear. The individual then must be given a reasonable opportunity to provide the additional information. If the provider believes they could deny the accommodation under the Act unrelated to the lack of a disability or need for an accommodation, they must consider whether they could provide an alternate type of accommodation. This alternative must be as equally effective and provide the same amount of accessibility as the requested one. If there is such an alternative that cannot be denied, the provider must grant it. The

individual cannot be forced to accept an alternative accommodation if it will not meet their needs and the original accommodation requested could in fact not be denied. The individual's thoughts on their own needs should be strongly considered.

- ❖ The promptness of the consideration depends on the facts of an individual case, including the type of the accommodation, whether additional information is needed, whether the accommodation is needed urgently, and whether the provider must participate in an interactive process to resolve an issue. Undue delay from refusing to make a decision promptly can be considered a denial of a reasonable accommodation.
- ❖ An inability to come to an agreement on an accommodation amounts to a decision not to grant the requested accommodation. A provider can consider the individual's unreasonable refusal to offer additional information a basis to deny the request. If the request is denied, the individual can make the same or similar request at a later date, which must be considered independently and according to the same procedure.

2 CCR § 12178. Establishing that a Requested Accommodation is Necessary.

- ❖ Information establishing the existence of the disability can come from a variety of sources, including health care providers, peer support groups, and other reliable third parties. Third party reliability must be made on a case-by-case basis, though the provider is allowed to ask for further information regarding how the third party knows about the disability, their general knowledge of the individual's functional limitations, and means to contact them.
- ❖ The individual requesting the accommodation can also self-certify the existence of their disability, including, but not limited to, with documentation of disability benefits or a reliable statement.

2 CCR § 12179. Denial of Reasonable Accommodation.

- ❖ Any reasons for denial cannot be based on prejudices, a fear that other individuals would consider the accommodations unfair, or that the accommodation would pose an undue burden if provided to more individuals.

2 CCR § 12180. Other Requirements or Limitations in the Provision of Reasonable Accommodations.

- ❖ Housing providers cannot require an additional fee or other financial contribution as a condition relating to an accommodation.
- ❖ Housing providers cannot ask or force individuals to waive their right to additional accommodations.
- ❖ If the cost of the accommodation would not be an undue financial or administrative burden, a provider cannot deny the accommodation based on cost.

2 CCR § 12185 Assistance Animals.

- ❖ The provider cannot demand extra charges or insurance on condition of accommodating an assistance animal. However, they may require the individual to pay for damage caused by the animal that is unrelated to normal wear and tear.

- ❖ The provider is allowed to consider the cumulative effect multiple animals would create an undue burden or alteration when considering the accommodation request. The regulations forbid size, weight, and breed limitations on assistance animals (except for restrictions related to miniature horse service animals under the Americans with Disabilities Act).
- ❖ Housing providers are allowed to impose reasonable restrictions on the use of assistance animals, which are no more restrictive as those imposed on other animals in the property, as long as they do not interfere with the animal's duties.

Article 24 — Consideration of Criminal History Information in Housing

This Article outlines new regulations related to how criminal history can be considered in housing decisions. Advocates should review carefully; many of the principles here are derived from federal guidance related to the consideration of criminal history in housing.

2 CCR § 12264. Definitions.

- ❖ "Criminal history information" is defined as "any record that contains individually identifiable information and describes any aspect of an individual's criminal history or contacts with any law enforcement agency." This includes "information describing an individual's arrests and subsequent dispositions; information that an individual has been charged with or indicted for a felony, misdemeanor, or other criminal offense; and information indicating that an individual has been questioned, apprehended, taken into custody or detained, or held for investigation by a law enforcement, police, military, or prosecutorial agency, whether or not the contact with law enforcement led to a criminal conviction." It also includes investigative consumer reports.

2 CCR § 12265. Prohibited Uses of Criminal History Information.

- ❖ Any practice that involves seeking, considering, or using an individual's criminal history information is prohibited if it has a discriminatory effect and has no legally sufficient justification, is intentional discrimination, is a discriminatory statement, or is specifically prohibited in the regulations.

2 CCR § 12269. Specific Practices Related to Criminal History Information.

- ❖ The regulations specifically prohibit a number of practices related to looking for, using, and taking adverse actions based on criminal history information. A provider can consider this information, however, if the individual volunteers the information as mitigating circumstances. A provider cannot otherwise consider:
 - Arrests, questioning, and other apprehensions that did not result in a conviction.
 - Participation or referral to pre- or post-trial diversion or deferred entry of judgment programs.
 - Any convictions that are invalidated by a court or statute, such as being expunged or pardoned.

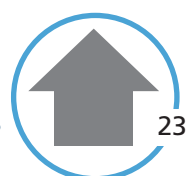
- Any adjudication or matter processed in juvenile court, unless the consideration is required by a court order.
- Enacting any blanket bans taking adverse actions against all individuals with a criminal record “regardless of whether the criminal conviction is directly related to a demonstrable risk to the identified substantial, legitimate, nondiscriminatory interest or purpose.”
- ❖ Consumer reports or criminal history information obtained by third parties are subject to federal and state laws governing such records.

2 CCR § 12270. Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History.

- ❖ Complying with federal or state laws that require considering or taking adverse actions based on criminal history information is considered an affirmative defense. FEHA may be violated if the provider does not comply with specific requirements of such laws, including to consider mitigating circumstances.

2 CCR § 12271. Local Laws or Ordinances.

- ❖ As long as local laws or ordinances regarding criminal history information do not violate FEHA, the Act does not keep providers from complying with such laws if they are more protective for protected classes.



Commenting Checklists

Violence Against Women Act

Survivors of domestic violence, dating violence, sexual assault, and stalking oftentimes face negative housing consequences because of the violence committed against them. However, the Violence Against Women Act (VAWA), last reauthorized in 2013, provides a host of protections for survivors, including notification requirements, anti-discrimination protections, and the ability to sign a self-certification form to document abuse. Importantly, these protections did not expire even though VAWA was not reauthorized by Congress; the VAWA housing protections do not sunset.⁵¹ These protections apply in both the Section 8 Voucher program and in public housing. For more information and advocacy resources regarding VAWA, please visit NHLP's website. Because most domestic violence survivors are women, fair housing law may also provide additional protections for survivors. You can also find more detailed information in NHLP's Green Book, § 13.2 (VAWA) and, § 13.5.3.3 (Fair Housing).

Nondiscrimination

- **Is VAWA included among the legal authorities cited by the PHA in the section describing nondiscrimination requirements?**

ACOP

- ❖ VAWA 2013 contains anti-discrimination language stating that survivors cannot be denied admission to or evicted from covered housing programs (defined to include public housing⁵²) on the basis that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking:

An applicant for or tenant of housing assisted under a covered housing program may not be denied admission to, denied assistance under, terminated from participation in, or evicted from the housing on the basis that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, if the applicant or tenant otherwise qualifies for admission, assistance, participation, or occupancy. 34 U.S.C.A. § 12491(b)(1). See also 24 C.F.R. § 5.2005(b); PIH 2017-08 (HA) at 6.

Administrative Plan

- ❖ VAWA 2013 contains anti-discrimination language stating that survivors cannot be denied admission to or evicted from covered housing programs (defined to include the Section 8 HCV program⁵³) on the basis that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking:

An applicant for or tenant of housing assisted under a covered housing program may not be denied admission to, denied assistance under, terminated from participation in, or evicted from the housing on the basis that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, if the applicant

or tenant otherwise qualifies for admission, assistance, participation, or occupancy. 34 U.S.C.A. § 12491(b)(1). See *also* 24 C.F.R. § 5.2005(b); PIH 2017-08 (HA) at 6.

Eligibility and Admissions

- Does the plan include language requiring that applicants receive a notice of VAWA rights?

ACOP and Administrative Plan

- ❖ VAWA 2013 requires that the PHA⁵⁴ provide Form HUD-5380 (Notice of Occupancy Rights Under the Violence Against Women Act) and Form HUD-5382 (Self-Certification Form) to applicants upon granting or denial of assistance or admission, and with any notification of termination of assistance. 34 U.S.C.A. § 12491(d). See *also* 24 C.F.R. § 5.2005(a); PIH 2017-08 (HA) at 10, 18-19.
- ❖ Both forms must be distributed in accordance with language access requirements, including Executive Order 13166 and HUD's 2007 LEP Guidance. 34 U.S.C.A. § 12491(d)(2)(D). See *also* 24 C.F.R. § 5.2005(a)(3); PIH 2017-08 (HA) at 11, 19

VAWA Adverse Factors

- Does the plan include language explaining the factors that a PHA cannot use as a basis to deny assistance to or evict a survivor?

ACOP and Administrative Plan

- ❖ HUD regulations at 24 C.F.R. § 5.2005(b)(1) prohibit PHAs from denying or terminating an applicant's assistance, or owners denying admission or evicting a survivor, "on the basis or as a direct result of the fact that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, if the applicant or tenant otherwise qualifies for admission, assistance, participation, or occupancy."
- ❖ Prohibition of admission denial or termination of assistance "as a direct result of the fact" means that the PHA or owner cannot deny admission to the applicant or terminate their assistance on the basis of an adverse factor, if the applicant otherwise qualifies for assistance or admission, and the adverse factor is a direct result of the fact that the applicant is or has been a victim of domestic violence, dating violence, sexual assault or stalking. PIH 2017-08 (HA) at 6.

Verification - Documentation

- Does the plan include language on the types of documentation a survivor can use to prove eligibility to invoke VAWA rights?

51 Advocates can use language in this template letter to notify a PHA that VAWA housing protections remain in effect.

52 34 U.S.C.A. § 12491(a)(3)(H).

53 34 U.S.C.A. § 12491(a)(3)(H).

- **Does the plan include the fact that the survivor gets to choose what type of documentation to provide (with limitations in cases of conflicting information)?**

ACOP and Administrative Plan

- ❖ PHAs and owners may elect to take a tenant or applicants word that they are a survivor of domestic violence, dating violence, sexual assault, or stalking, and are not required to ask for a survivor to provide documentation of abuse. See 24 C.F.R. § 5.2007(b)(3); PIH 2017-08 (HA), at 11.
- ❖ If a PHA or owner elects to require documentation, upon written request by the PHA or Owner, the applicant is required to submit documentation. See 24 C.F.R. § 5.2007(a); PIH 2017-08 (HA), at 11-12.
 - To satisfy this documentation request, the tenant or applicant must submit, at the discretion of the tenant or applicant, any one of the following:
 - ▲ The certification form HUD-5382 completed by the victim that states the applicant is a victim of domestic violence, dating violence, sexual assault, or stalking, that the incident of domestic violence, dating violence, sexual assault, or stalking meets the applicable definition for such incident, and the name of the perpetrator if known and safe to provide.
 - ▲ A Federal, State, tribal, territorial or local law enforcement agency, court, or administrative record documenting the domestic violence, dating violence, sexual assault, or stalking.
 - ▲ A document signed by the applicant and a person who has assisted the victim in addressing domestic violence, dating violence, sexual assault, or stalking, or the effects of such abuse. This person may be an employee, agent, or volunteer of a victim service provider, an attorney, mental health professional, or a medical or other knowledgeable professional. The person signing the documentation must attest under penalty of perjury to the person's belief that the incident in question meets the applicable definition of domestic violence, dating violence, sexual assault or stalking.

Family Break-Up

- **Does the plan include a statement acknowledging that — in instances of family break-ups that are a result of domestic violence, dating violence, sexual assault, or stalking — the PHA must ensure that the victim retains assistance?**

ACOP and Administrative Plan

- ❖ If the family break-up results from an occurrence of domestic violence, dating violence, sexual assault, or stalking, the housing provider must ensure that the victim retains

54 The PHA can provide Form HUD-5380 and Form HUD-5382 to owners to distribute in the Section 8 Moderate Rehabilitation program. 24 C.F.R. § 882.102.

assistance. See 24 C.F.R. § 983.315 (HCV); [PIH 2017-08](#) (HA), at 31-32.

Emergency Transfers

- Does the plan list VAWA Emergency Transfers as a type of transfer?
- Does the plan include the list of requirements to request an emergency transfer (listed in 24 C.F.R. § 5.2005(e))?

ACOP and Administrative Plan

- ❖ A resident or household member qualifies for an emergency transfer if: they (1) request a VAWA emergency transfer, (2) reasonably believe that they are threatened with imminent physical or emotional harm due to their being a victim of domestic violence, dating violence, sexual assault, or stalking, OR if a sexual assault occurred on the premises during the 90-calendar day period preceding the request for transfer.
- ❖ Although PHAs and owners are not required to ask for documentation when a resident or household member requests an emergency transfer, they are permitted to do so.
- ❖ If a PHA or owner elects to require documentation, upon written request by the PHA or owner, the applicant is required to submit documentation. To satisfy this documentation request, the tenant or applicant must submit, at the discretion of the tenant or applicant, any one of the following:
 - The certification form HUD-5382 completed by the victim that states the applicant is a victim of domestic violence, dating violence, sexual assault, or stalking, that the incident of domestic violence, dating violence, sexual assault, or stalking meets the applicable definition for such incident, and the name of the perpetrator if known and safe to provide.
 - A Federal, State, tribal, territorial or local law enforcement agency, court, or administrative record documenting the domestic violence, dating violence, sexual assault, or stalking.
 - A document signed by the applicant and a person who has assisted the victim in addressing domestic violence, dating violence, sexual assault, or stalking, or the effects of such abuse. This person may be an employee, agent, or volunteer of a victim service provider, an attorney, mental health professional, or a medical or other knowledgeable professional. The person signing the documentation must attest under penalty of perjury to the person's belief that the incident in question meets the applicable definition of domestic violence, dating violence, sexual assault or stalking.

- Is there a copy of the PHA's VAWA Emergency Transfer Plan?

ACOP and Administrative Plan

- ❖ VAWA requires PHAs and owners to adopt an emergency transfer plan that outlines the PHA or owner's policy for providing emergency transfers in accordance with the requirements set forth in 24 C.F.R. § 5.005(e).
- ❖ HUD has created a Model Emergency Transfer Plan that can be found in form [HUD-5381](#).

VAWA Self-Petitioners

- Does the plan include language clarifying that VAWA self-petitioners are eligible for the public housing and/or Section 8 HCV programs?

ACOP and Administrative Plan

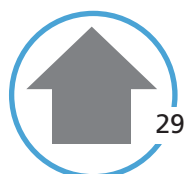
- ❖ In 2016, HUD issued guidance that clarified the ability of VAWA self-petitioners to access HUD programs that are otherwise have immigration restrictions under Section 214 of the Housing and Community Development Act of 1980. See Memorandum from Tonya Robinson, HUD Acting General Counsel, to Julián Castro, HUD Secretary re: Eligibility of Battered Noncitizen Self-Petitioners for Financial Assistance Under Section 214 of the Housing and Community Development Act of 1980 (Dec. 15, 2016).

Confidentiality

- Does the plan include language on VAWA's confidentiality requirements?

ACOP and Administrative Plan

- ❖ Per 24 C.F.R. § 5.2007(c), all information provided to PHAs and owners regarding domestic violence, dating violence, sexual assault, or stalking, including the fact that an individual is a victim of such abuse, must be retained in strict confidence and may neither be entered into any shared database nor provided to any related entity, except to the extent that the disclosure: is requested or consented to by the individual in a written, time-limited release; is required for use in an eviction proceeding; or is otherwise required by applicable law.



Consideration of Criminal History in Tenant Screening Decisions

Inequities in the criminal legal system – particularly with respect to people of color and persons experiencing disabilities – have resulted in criminal records having outsized impacts on applicants from these populations who seek affordable housing, including housing administered by PHAs. HUD has issued prior guidance documents explaining how overly restrictive criminal records policies have fair housing implications, as well as how to factor in circumstances such as arrests into tenant screening decisions. For more in-depth information on this topic, please refer to [NHLP’s manual “An Affordable Home on Reentry” \(2018\)](#). You can also find a brief discussion about fair housing protections for persons with criminal histories in [NHLP’s Green Book](#), § 13.5.3.8.

Specific Criminal History

- **Does the plan include restrictions on specific criminal history, beyond the federal mandatory categorical bans?**

ACOP and Administrative Plan

- PHAs must permanently prohibit admission to applicants in two specified categories:
 - ▲ Those with convictions for methamphetamine production (42 U.S.C. § 1437n(f); 24 C.F.R. §§ 960.204(a)(3) and 982.553(a)(1)(ii)(c)); and
 - ▲ Lifetime registered sex offenders (42 U.S.C. § 13663(a); 24 C.F.R. §§ 960.204(a)(4) and 982.553(a)(2)(1)).
- Additionally, PHAs must prohibit admission for three years to applicants with previous evictions for drug-related criminal activity, absent mitigating circumstances such as evidence of rehabilitation (42 U.S.C. § 13661(a); 24 C.F.R. §§ 960.204(a)(1) and 982.553(a)(1)(i)).
- Other than the mandatory bans, PHAs have broad discretion to deny or accept applicants who have engaged in other types of criminal activity, with some limitations (42 U.S.C. § 13661(c)). PHAs may only reject an applicant for: drug-related criminal activity (42 U.S.C. § 1437a(b)(9); 24 C.F.R. § 5.100), violent criminal activity (24 C.F.R. § 5.100), or other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or PHA staff.
- HUD states there is a “wide variety of other crimes that cannot be claimed to adversely affect the health, safety, or welfare of the PHA’s residents.” HUD, [Public Housing Occupancy Guidebook](#), § 7.7, p. 96 (June 2003).
- Blanket bans on certain criminal history (for example, “no felonies” or “no misdemeanors”) are probably illegal under fair housing law. HUD, [Office of General](#)

Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, at 6 (Apr. 2016).

- California law bans the use of criminal history records if their use has a discriminatory effect without a legally sufficient justification. 2 Cal. Code Reg. § 12265.

Look-Back Periods

- **Does the policy include a reasonable look-back period? Or, does the policy include a limitless look-back period?**

ACOP and Administrative Plan

- To reject an applicant, the criminal activity must have occurred within a “reasonable period” of time prior to the admission (42 U.S.C. § 13661(c)).
- HUD does not define “reasonable time” but provides some guidance. In describing best practices for PHA screening policies, HUD highlights a policy that considers drug-related criminal activity in the last twelve months and violent criminal activity in the last twenty-four months. Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, Notice PIH 2015-19, at 6 (Nov. 2, 2015). Older guidance suggests that five years may be reasonable for serious offenses but that different categories of crimes may warrant different look-back periods. Screening for Eviction for Drug Abuse and Other Criminal Activity, Final Rule, 66 Fed. Reg. 28,776 (May 24, 2001); HUD, Public Housing Occupancy Guidebook, § 4.6, p. 53 (June 2003).
- In 2015, the Shriver Center on Poverty Law published, “When Discretion Means Denial” which reviewed more than 300 written admissions policies of PHAs and project-based Section 8 owners. The results showed that many PHAs use their discretion to implement overly restrictive criminal records policies and encourages HUD and PHAs to review their policies in light of fair housing and civil rights laws.
- California fair housing regulations state, “Look-back periods are intended to ensure that the criminal history information considered is relevant to the decision being made.” 2 Cal. Code Reg. § 12269(b).

Mitigating Circumstances

- **Is the PHA required to consider mitigating circumstances?**

ACOP and Administrative Plan

- For all programs, PHAs must consider whether the criminal activity is related to an applicant’s status as a survivor of domestic violence, dating violence, sexual assault, or stalking. 34 U.S.C. § 12491.
 - *For more information about protections under the Violence Against Women Act, please refer to the “Violence Against Women Reauthorization Act” Checklist in this Toolkit.*



- For all programs, PHAs must consider whether the criminal activity is related to the individual's disability (Fair Housing Act (42 U.S.C. 3601 *et seq.*), Section 504 of the Rehabilitation Act (29 U.S.C. § 701 *et seq.*)).
 - ▲ See also *Simmons v. T.M. Associates Management, Inc.*, 287 F. Supp. 3d (W.D. Va. 2018) (Landlord refused to allow tenant to add her son to the lease, citing a misdemeanor conviction for indecent exposure and rejecting son's reasonable accommodation request. The conviction resulted from an incident where the son removed his clothing in public when he was not taking medication for his schizoaffective disorder. He then received mental health treatment and had no further incidents. The district court denied the landlord's motion to dismiss, finding that the Fair Housing Act required an accommodation. The landlord should have made an exception to its criminal record policy where the criminal conduct resulted from the disability and the son did not present a direct threat.)
- California's fair housing regulations provide helpful language about what constitutes "mitigating information" related to a person's criminal history. See *generally* 2 Cal. Code Reg. § 12266(e).

ACOP

- The PHA is required to consider the time, nature, and extent of the applicant's conduct, including the seriousness of the offense (24 C.F.R. § 960.203(d); HUD, Public Housing Occupancy Guidebook, §§ 4.6, 4.8, and 4.10 (June 2003)).
- PHAs should take into account the extent of the individual's criminal activity and any additional factors, such as evidence of rehabilitation, that signal the likelihood of favorable conduct in the future. Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, Notice PIH 2015-19, at 3 (Nov. 2, 2015).

Administrative Plan

- The PHA may consider mitigating circumstances.
- PHAs should take into account the extent of the individual's criminal activity and any additional factors, such as evidence of rehabilitation, that signal the likelihood of favorable conduct in the future. Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, Notice PIH 2015-19 (Nov. 2, 2015).

Use of Arrests in Admissions

- Does the plan include language prohibiting the use of arrests in the admission decision?

ACOP and Administrative Plan

- Arrest records may not be used as the basis of an adverse housing decision. Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on

Excluding the Use of Arrest Records in Housing Decisions, PIH 2015-19 (Nov. 2, 2015); see *also* Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real-Estate-Related Transactions, at 5 (Apr. 2016) (“A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.”).

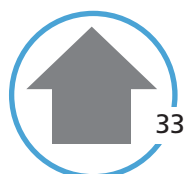
- HUD “does not require their adoption of ‘One Strike’ policies,” and housing providers have an “obligation to safeguard the due process rights of applicants and tenants.” Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, Notice PIH 2015-19, at 2 (Nov. 2, 2015).

Blanket Bans

■ Does the plan include a blanket ban for criminal activity?

ACOP and Administrative Plan

- Blanket bans (such as “no felonies”) may be illegal under the Fair Housing Act. See Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real-Estate-Related Transactions, at 6 (Apr. 2016).
- California’s fair housing regulations prohibit the imposition of blanket bans that take “adverse action against all individuals with a criminal record regardless of whether the criminal conviction is directly related to a demonstrable risk to the identified substantial, legitimate, nondiscriminatory interest or purpose.” 2 Cal. Code Reg. § 12269(a)(5). Note, however, that this provision would not supersede any federally mandated exclusions from federally assisted housing.



Reasonable Accommodations

Persons with disabilities often face challenges locating and maintaining housing that is both accessible and affordable. A PHA's approach to reviewing and granting reasonable accommodation requests can significantly impact a family's access to housing stability, as families may require changes to policies such as Voucher search times or unit size. For more in-depth information regarding reasonable accommodations in HUD programs, please refer to [NHLP's Green Book](#), § 13.3.

Right to Request a Reasonable Accommodation

- Does the plan have procedures to inform applicants, participants, and tenants of their right to request a reasonable accommodation?

ACOP and Administrative Plan

- PHAs are mandated to provide reasonable accommodations for people with disabilities if they are necessary to allow them equal access to housing. This includes the policies and procedures pertaining to admissions, income certification, and terminations. See 42 U.S.C. § 3604 (f)(3)(B).
 - *Sample Language:* “The PHA will inform all applicants, participants, and tenants, in writing, that they may request a reasonable accommodation during the admissions process, annual reexamination process, and as part of any adverse action proposed by the PHA.”
- California fair housing regulations state that a reasonable accommodation request “may be made at any time.” 2 Cal. Code Reg. § 12176(c)(3).

Verifying Need for Reasonable Accommodation

- Does the plan have language regarding the information that can and cannot be requested to verify the need for a reasonable accommodation?

ACOP & Administrative Plan

- A PHA can request only information that is necessary to verify that someone has a disability-related need for the requested accommodation. A person's diagnosis, medical records, or detailed information about the extent of a person's disability should not be necessary as part of this inquiry. If a disability-related need for the request is readily apparent, the PHA cannot request additional information. See [Joint Statement of the Department of Housing and Urban Development and the Department of Justice \[on\] Reasonable Accommodations under the Fair Housing Act](#), p. 7 (May 17, 2004).
 - *Sample Language:* “The PHA may not inquire about a person's diagnosis or details of treatment for a disability or medical condition. If the PHA

receives a verification document that provides such information, the PHA will not place this information in the tenant file. Under no circumstances will the PHA request medical records.”

- California fair housing regulations state that a person evaluating a reasonable accommodation request cannot seek information such as one’s “particular diagnosis or medical condition, the severity of the disability, medical records, medical history, other disability or medical issues unrelated to the request, or other disability or health related information beyond the information identified in [the regulations].” 2 Cal. Code Reg. § 12178.

■ **Does the plan clarify who can provide a verification of the disability and need for a reasonable accommodation?**

ACOP & Administrative Plan

- In addition to doctors and other medical professionals, other persons may verify a disability and the need for an accommodation:

“Depending on the individual’s circumstances, information verifying that the person meets the Act’s definition of disability can usually be provided by the individual ... (e.g., proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits or a credible statement by the individual). A doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual’s disability may also provide verification of a disability.” See Joint Statement of the Department of Housing and Urban Development and the Department of Justice [on] Reasonable Accommodations under the Fair Housing Act, p. 7 (May 17, 2004); Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 797 (1999).
- California fair housing regulations note that “[a]ny other reliable third party who is in a position to know about the individual’s disability or disability-related need for the accommodation” may provide information confirming a person’s disability or need for an accommodation. Such a reliable third party could include “a relative caring for a child with a disability, a relative caring for an elderly family member with dementia, or others in a caregiving relationship with a person with a disability.” The California regulations state that determining reliability is done on a case-by-case basis. 2 Cal. Code Reg. § 12178(g)-(h).

Reasonable Accommodations in the Housing Choice Voucher Program

- **Does the plan have guidance regarding extensions for voucher holders to locate a unit as a reasonable accommodation?**

Administrative Plan

- It is often much more difficult for people with disabilities to locate a unit that will accept a Section 8 Voucher. This is due to many factors that can include mobility difficulties, a lack of accessible units, cognitive difficulties, or the symptoms of mental health disabilities making the search difficult. PHAs are required to grant extensions of the time to search for a unit if it is necessary as a reasonable accommodation:

“If the family needs and requests an extension of the initial voucher term as a reasonable accommodation...the PHA must extend the voucher term up to the term reasonably required for that purpose.” 24 C.F.R. § 982.303(b)(2).

- **Does the plan have guidance regarding exceptions to the payment standard as a reasonable accommodation?**

Administrative Plan

- It can be very difficult for people with disabilities to locate accessible units. As a result, PHAs can grant an exception to the payment standard to raise the payment standard to allow a person with a disability to access a unit that meets their needs:

“If the family includes a person with disabilities and requires a payment standard above the basic range, as a reasonable accommodation for such person...the PHA may establish a payment standard for the family of not more than 120 percent of the FMR[Fair Market Rent]. A PHA may establish a payment standard greater than 120 percent of the FMR by submitting a request to HUD.” 24 C.F.R. § 982.505(d); see also Revision for Requests for Exception Payment Standards for Persons with Disabilities as a Reasonable Accommodation, PIH 2013-18 (HA) (Aug. 1, 2013).

Live-in Aides

- **Does the plan address the addition of a live-in aide as a reasonable accommodation?**

ACOP & Administrative Plan

- A person with a disability can have a live-in aide reside with them as a reasonable accommodation.
 - ▲ A live-in aide is a person who: “resides with one or more elderly persons, or near-elderly persons, or persons with disabilities, and who: (1) Is determined to be essential to the care and well-being of the persons; (2) Is not obligated for the support of the persons; and (3) Would not be living in the unit except to provide the necessary supportive services.” 24 C.F.R. § 5.403.
 - ▲ A live-in aide is not a tenant and does not have to meet eligibility requirements, including income requirements. See 24 C.F.R. § 5.609(c)(5) (income of live-in aide is

not included in family income for purposes of determining eligibility or rent).

- ▲ The live-in aide should be assigned their own bedroom. HUD, Public Housing Occupancy Guidebook, § 5.4, p. 64 (June 2003).

Administrative Plan Only

- The voucher size should be changed to allow the live-in aide to have their own bedroom. See Over Subsidization in the Housing Choice Voucher Program, PIH 2014-25 (HA) (Oct. 16, 2014).

Portability Requirements

- **Does the plan have guidance regarding exceptions to portability requirements as a reasonable accommodation of a disability?**

Administrative Plan

- Generally, Section 8 Voucher participants have the right to “portability,” which allows them to move out of the PHA’s jurisdiction with continued assistance. However, a PHA may deny a move for certain reasons including not residing in the original jurisdiction for 12 months, frequent moves, program violations, or leaving a tenancy during the lease term. See 24 C.F.R. § 982.353; 24 C.F.R. § 982.354; 24 C.F.R. § 982.54(d)(19).
- However, participants with disabilities may need a change in these rules as a reasonable accommodation.



Vouchers

A PHA's administration of its Housing Choice Voucher and Project Based Voucher programs can be a key means of affirmatively furthering fair housing. Housing Choice Vouchers offer families the opportunity to obtain housing on the private rental market. A PHA can adopt policies such as Small Area Fair Market Rents (SAFMRs) to further promote housing opportunities for Voucher families. Furthermore, Project Based Vouchers provide a means to preserve affordable housing access, particularly in areas with rising housing costs. PHAs should ensure that their policies governing the Voucher program allow families to live in the neighborhoods of their choice.

Voucher Portability and Mobility

- **Does the plan describe how the PHA will manage the search period for families, including how the PHA will manage extension requests?**

Administrative Plan

- PHAs must grant an initial term of at least 60 days, but they have discretion to increase the initial search time beyond 60 days and may allow for any number of extensions. 24 C.F.R. § 982.303(a)-(b).
- For porting families, the search time should be 90 days. For most families, porting takes extra time.
- The policy to set and extend Voucher search time should consider market conditions for variously sized units, including the fact that the market may change rapidly.
- If a family requests additional search time as a reasonable accommodation for a family member who is a person with a disability, the PHA must extend the time for a reasonable period. 24 C.F.R. § 982.303(b).
- The search time is suspended (tolled) during the time that the family has submitted a request to the PHA for approval of a tenancy until the date the PHA notifies the family in writing whether the request has been approved or denied. 24 C.F.R. § 982.303(c).?
- PHA should include a search period exception for victims of domestic violence, dating violence, sexual assault, and stalking and as a reasonable accommodation.

- **Does the plan describe how the PHA will manage families who requested a move, but funding shortfalls impede the PHA's ability to issue the voucher?**

Administrative Plan

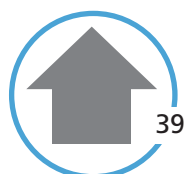
- A PHA can only deny a request to move due to insufficient funding if all of the following apply (Notice PIH 2016-09 (HA) (June 6, 2016) § (7)(a)):
 - ▲ The move is to a higher cost unit (for moves within the PHA's jurisdiction) or to a higher cost area (for portability moves).

- ▲ The receiving PHA is not absorbing the voucher (applicable only to portability moves).
- ▲ The PHA would be unable to avoid termination of current participants during the calendar year in order to remain within its budgetary allocation (including any available HAP reserves) for housing assistance payments.
- When the Initial Request is Denied, but funds subsequently become available:
 - ▲ PHAs must establish a process for addressing these requests. Notice PIH 2016-09 (HA) (June 6, 2016) § (7)(d).
 - ▲ The process must include:
 - How the PHA will inform families of its process for addressing these requests;
 - How long the request to move will remain open for consideration;
 - How the PHA will notify families with open requests when the funds become available.
 - ▲ Before the family's request to move is closed, the PHA should notify the family in writing of such at least 30 days prior.
- When the Initial Request was Approved, but subsequent shortfalls require Retraction of Voucher:
 - ▲ Voucher may only be retracted if the family would be allowed to remain in their current unit. Notice PIH 2016-09 (HA) (June 6, 2016) § (7).
 - ▲ If the family is unable to remain in its current unit, the PHA "must not" rescind the Voucher and allow the family to lease a new unit (porting and mobility). Notice PIH 2016-09 (HA) (June 6, 2016) § (7).
 - ▲ Retraction should not be permitted if the porting is necessary for a reasonable accommodation or due to domestic violence.
- The PHA should not issue any Vouchers until it has issued the Voucher to the family requesting to move.

■ **Does the plan require families requesting to move undergo a re-examination?**

Administrative Plan

- Re-examination period should not exceed 30 days. Re-examination may severely limit a family's right to move, especially if prolonged. 24 C.F.R § 982.355(c)(11); HUD, Housing Choice Voucher Program Guidebook, at 5.7 (2019).
- Families should be allowed to move without re-examination at any time within 120 days after the annual recertification process has been completed. Typically, HUD considers information verified by a PHA within 120 days to be current.



- **Are families allowed to choose the receiving PHA when there are several PHAs servicing the receiving jurisdiction?**

Administrative Plan

- Porting families should choose the PHA it would like to administer their Voucher. 24 C.F.R. § 982.355(b); Notice PIH 2016-09 (HA) (June 6, 2019) § (9)(c).

- **Does the plan describe the process for terminating a Voucher ported to another jurisdiction?**

Administrative Plan

- PHA should not terminate a family that has moved out of the jurisdiction and cannot easily return to defend itself in an informal hearing.

- **Does the Plan list the reason for a denial for a request to move?**

Administrative Plan

- Plan should indicate the listed reasons are the only reasons for which the PHA may deny a family's request to move.
- Mandatory Reasons (24 CFR § 982.353(d)(1); Notice PIH 2016-09 (HA) (June 6, 2016) § (6)(a))
 - ▲ Not income-eligible in receiving PHA's jurisdiction (mandatory denial to port)
 - ▲ Vacating previous unit in violation of the lease, except in cases of VAWA protections, as reasonable accommodation, or to flee harassment.
- Discretionary Reasons
 - ▲ Family has violated program requirements (24 C.F.R. §§ 982.354(e)(2), 982.552, 982.553)
 - ▲ Residence Requirements—Nonresident applicants should only be required to live in the jurisdiction for a period of 12 months, except if the request to move is a reasonable accommodation or for survivors of violence, dating violence, sexual assault, or stalking (24 C.F.R. § 982.354(c)(2); Notice PIH 2016-09 (HA) (June 6, 2016) § (6)(b)); and
 - ▲ Family has moved more times than the local policy allows (24 C.F.R. §§ 982.354(c)(2), 982.54(d)(19))
 - ▲ Insufficient funding for continued assistance (24 C.F.R. § 982.354(e)(1)).

Project-Based Vouchers

- **Will the PHA use Small Area FMR to set their payment standards for the PBV program?**

Administrative Plan

- Small Area Fair Market Rents (SAFMRs) are the Department of Housing and Urban Development's (HUD) calculation of fair market rents for zip codes. In 24 mandatory

jurisdictions, PHAs are required to use SAFMRs to set their payment standards. PHAs in other jurisdictions can elect to use SAFMR to set their payment standards. See generally [Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in the Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs](#), 81 Fed. Reg. 80,567 (Nov. 16, 2016).

- PHAs in both mandatory and non-mandatory jurisdictions can elect to use SAFMRs to set the payment standards for their PBV program. PHAs should strongly consider using SAFMRs to set their payment standard. SAFMRs are intended to capture more granular discrepancies in rent across neighborhoods and therefore more accurately reflect market rents.

■ **Will the PHA use the same waiting list for the PBV program as the HCV program?**

Administrative Plan

- PHAs can elect to use a separate waiting list for its PBV and tenant-based rental assistance programs; however, if the PHA elects to use separate waiting list, the PHA must offer to place tenant-based assistance applicants on the waiting list for the PBVs. 24 C.F.R. § 983.251(c)(2).
- Additionally, PHAs can elect to use separate waiting lists for a specific subsidized project or for the PHA's entire PBV program. 24 C.F.R. § 983.251(c)(3).
- Does the Administrative Plan describe if and how the PHA will include families referred from property owners on its waiting lists? 24 C.F.R. § 983.251(c)(5).

■ **Does the Administrative Plan describe the briefing procedures once a family has been accepted into the PBV program?**

Administrative Plan

- Once a family is accepted into the PBV program, the PHA must orally brief the family about how the program operates, including the family's and owner's responsibilities. 24 C.F.R. § 983.252(a).
- PHAs should include in the PBV information packet information about available legal aid services in the community.
- PHAs should include in the PBV information packet their Administrative Plan, highlighting the process for receiving tenant-based rental assistance after terminating the lease for the PBV unit. 24 C.F.R. § 983.252(b).
- Does the information packet include a template for informing the owner and PHA of the tenants' intent to terminate the PBV lease? See 24 C.F.R. § 983.261(a).

■ **Does the Administrative Plan describe the PHA's process for addressing request to move with continued assistance?**

Administrative Plan

- Families must provide the owner and PHA written notice of its intent to terminate the PBV lease. The Administrative Plan should describe the process for families to provide notice to the PHA about its desire to terminate the lease for the PBV unit and include a template for families to use. 24 C.F.R. § 983.261(a).
- The Administrative Plan should describe the PHA's process for offering families who are terminating their PBV lease continued tenant-based rental assistance. 24 C.F.R. § 983.261(b).
- If comparable tenant-based rental assistance is not immediately available at the end of the family's lease, the PHA must give the family priority to receive the next available opportunity for continued tenant-based rental assistance. 24 C.F.R. § 983.261(c).

Enhanced Vouchers

- **Does the Administrative Plan require the landlord to include an enhanced voucher lease addendum?**

Administrative Plan

- An enhanced voucher lease addendum stating the right to remain is also necessary to protect the rights of thousands of current enhanced voucher families. Only a lease addendum can inform tenants, owners, and judges of the unique rights and requirements for enhanced voucher families and permit effective enforcement of the tenants' right to remain. Without an enhanced voucher lease addendum, it is extremely difficult to hold owners accountable for compliance with the statutory requirements for enhanced voucher families. A lease addendum should be required both at the time of the eligibility event (for new enhanced voucher families) and at the time of recertification or lease renewal (for current enhanced voucher families).
- Model Language: The owner's lease must include [PHA's NAME]'s prescribed tenancy addendum.

- **Does the PHA rescreen tenants for considerations outside of income eligibility?**

Administrative Plan

- PHAs administering Enhanced Vouchers will usually try to screen tenants under the criteria they use for their ordinary Voucher program, as HUD (but not the statute) allows. One argument is that, for former project-based Section 8 tenants facing conversion, re-screening by PHAs would violate the Enhanced Voucher statute. Section 524(d) of the Multifamily Assisted Housing Reform and Affordability Act (MAHRAA), as amended by Pub. L. No. 106-74, § 531(a), 113 Stat. 1113 (Oct. 20, 1999), states that:

to the extent that amounts for assistance under this subsection are provided in advance in appropriation Acts, upon the date of the expiration of such contract the Secretary shall make enhanced voucher

assistance under section 8(t) of the United States Housing Act of 1937 (42 U.S.C. 1437f(t)) available on behalf of each low-income family who, upon the date of such expiration, is residing in an assisted dwelling unit in the covered project.

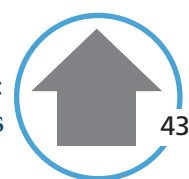
- HUD thus has a clear statutory duty to provide enhanced voucher assistance to each family residing at contract expiration or termination. Permitting any re-screening by PHAs for issues other than low-income status directly violates this duty. See *also* 12 U.S.C. § 4113(a).
- Re-screening potential enhanced voucher recipients as if they were new Section 8 voucher applicants, under different criteria than those used to determine continued occupancy under their project-based lease, is also fundamentally unfair. This re-screening could deny enhanced vouchers to tenants in good standing under their prior lease.

Emergency Housing Vouchers

As of June 2021, HUD was in the process of administering Emergency Housing Vouchers (EHVs), created as part of the American Rescue Plan package passed in response to COVID-19. These EHVs are targeted to serve individuals and families who are experiencing homelessness, at risk of homelessness, recently homeless, or fleeing domestic violence, dating violence, sexual assault, stalking, or human trafficking. For more information about EHVs, see [HUD's operations notice](#), as well as NHLP's [FAQs regarding EHVs](#).

Below are a few considerations for advocates to consider as PHAs begin issuing EHVs, and whether the PHA is using the considerable flexibility they have in administering EHVs to affirmatively further fair housing:

- ❖ How are PHAs using the additional EHV-related fees the PHA has received?
- ❖ How is the PHA approaching the required housing search assistance?
- ❖ Is the PHA using EHVs to assist survivors of domestic violence, dating violence, sexual assault, or stalking on the PHA's emergency transfer waitlist?
- ❖ Is the PHA denying admission to the EHV program on impermissible grounds (e.g., prior eviction from federally assisted housing, alcohol abuse)? Has the PHA established EHV admissions criteria that allow individuals with criminal history or negative rental history to access EHVs?
- ❖ Is the PHA conducting individualized assessments for denials based on non-mandatory grounds (i.e., where the PHA has discretion to not adopt a particular requirement)?
- ❖ Has the PHA adopted higher payment standards for EHVs?



Persons With Limited English Proficiency

Persons with limited English proficiency often face difficulties accessing vital information and documents in their primary language. This can place individuals and households at risk of eviction for not fulfilling programmatic requirements or prevent LEP persons from accessing housing at all. LEP individuals participating in or applying to PHA programs are protected by Title VI of the Civil Rights Act of 1964 and the federal Fair Housing Act. Both laws prohibit discrimination based on national origin, which includes discrimination against limited English proficient persons. For more information regarding the rights of LEP individuals, please refer to [NHLP's Green Book](#), §§ 13.4 and 13.5.3.4.

Nondiscrimination protections for Limited English Proficient (LEP) persons

- Does the plan list Title VI of the Civil Rights of 1964, HUD's 2007 LEP Guidance, and Executive Order 13166 as sources of authority prohibiting discrimination against persons with limited English proficiency?

ACOP & Administrative Plan

- As recipients of federal financial assistance, PHAs must ensure meaningful language access for persons with limited English proficiency. Failure to do so constitutes a violation of a PHA's obligations under Title VI of the Civil Rights Act of 1964 and may also constitute national origin discrimination under the Fair Housing Act.
- ▲ See 42 U.S.C. § 2000d; see *also* *Lau v. Nichols*, 414 U.S. 563 (1974) (failure to provide meaningful language access denied individuals ability to participate in federally assisted program on the basis of national origin); Executive Order 13166, [Improving Access to Services for Persons with Limited English Proficiency](#), 65 Fed. Reg. 50,121 (Aug. 16, 2000); Dep't of Hous. & Urban Dev., [Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons](#), 72 Fed. Reg. 2,732 (Jan. 22, 2007) [hereinafter *HUD 2007 LEP Guidance*]; Dep't of Hous. & Urban Dev., [Office of General Counsel Guidance on Fair Housing Act Protections For Persons With Limited English Proficiency](#), at 6 (Sept. 2016) (noting that failure to provide language assistance otherwise required by law may constitute intentional discrimination under the Fair Housing Act).

Four-Factor Analysis and Determination of Language Assistance Needs

- **Does the plan reference a separate language access plan, or are the language access policies included within or attachments to the ACOP or Administrative Plan?**
 - ★ *Practice Tip:* If this is not clear, advocates should ask specifically to see the language access plan, along with the four-factor analysis outlined in the HUD 2007 LEP Guidance.
- **Has the PHA completed a four-factor analysis as HUD outlined in its 2007 LEP Guidance?**
 - ★ *Practice Tip:* The four-factor analysis is important to understanding the PHA's thinking about what languages need to be served through PHA language assistance services such as translated documents. The four-factor analysis will rely on data (e.g., Census data). Advocates may wish to review the four-factor analysis and offer other sources of data or information to justify language assistance services such as translated vital documents being offered in additional languages. If the four-factor analysis is not publicly available, advocates should request it. Furthermore, if it has been a while since the four-factor analysis has been updated, demographic shifts within the service population may require different languages to be served by the PHA.

Translation of Vital Documents⁵⁵

- **Does the plan have a list of vital documents that the PHA has translated, and into which languages have these documents been translated?**
 - ★ *Practice Tip:* While not required, this is a useful best practice. Asking the PHA to provide a list of currently translated documents, the languages they are available in, and for those documents that have not been translated yet, a timetable for those documents acknowledges a PHA's resource limitations while also providing a roadmap by which the PHA can be held accountable to advocates.
 - ★ *Practice Tip:* HUD has translated a number of commonly used HUD forms. Those forms can be accessed on HUD Clips, http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hud_clips/forms/
 - ★ *Practice Tip:* Use of machine translation (e.g., Google Translate) is not sufficient for ensuring meaningful language access. According to a 2014 newsletter from the U.S. Department of Justice:

Automatic or machine translation software or applications cannot provide the level of translation required for meaningful access. It may be used limitedly to establish the general concept or essence of written text, or used by a qualified translator to check materials before a formal translation, or in extremely time sensitive or emergency situations where no other alternative is available.

Machine translation should not be used alone, absent human quality control, when materials are vital to an individual's rights or benefits, or when the source materials contain non-literal language (e.g., slang, metaphor), lack clear grammar or structure, contain abbreviations or acronyms, or are overly complex, technical, or wordy.

ACOP & Administrative Plan

- ▲ In its LEP Guidance, HUD provides guidelines for translation of vital documents. While there is not an exhaustive list of vital documents or “generic widely used documents” that may warrant translation, HUD names examples such as: consent and complaint forms; intake forms; written notices concerning “rights, denial, loss, or decreases in benefits or services, and other hearings”; eviction notices; notices detailing availability of free language assistance; hearing notices; leases; tenant rules; and applications. See HUD 2007 LEP Guidance at 2,744; see also NHLP Green Book, § 13.4.
- ▲ HUD’s LEP Guidance includes numerical guidelines for the translation of vital documents. Per HUD guidance, PHAs should translate written vital documents for language populations that comprise more than either 5 percent or 1,000 persons (whichever is less) of the eligible service population. The HUD Guidance characterizes these guidelines as a “safe harbor,” meaning that following these guidelines will indicate “strong evidence of compliance” with the PHA’s written translation obligations under Title VI. See generally HUD 2007 LEP Guidance at 2,745. For language groups that reach 5 percent, “but compose fewer than 50 people, the Final LEP Guidance states that the recipient does not need to translate vital documents,” but instead can provide “written notice, in the primary language of the LEP group, regarding the right to receive competent oral interpretation of the written material free of cost.” NHLP Green Book, § 13.4, citing HUD 2007 LEP Guidance at 2,744-45.

Oral Interpretation

■ Does the plan outline how oral interpretation will be provided?

- ★ *Practice Tip:* Many PHAs use a language line as a means of providing interpretation services, particularly for less frequently encountered languages. Other ways to increase language capacity include the PHA including salary incentives to hire bilingual staff.

55 Vital documents are documents “that are critical for ensuring meaningful access by beneficiaries or potential beneficiaries generally and LEP persons specifically.” HUD 2007 LEP Guidance, 72 Fed. Reg. at 2,736.

- **Does the plan cite to language group size thresholds for providing oral interpretation?**
 - ▲ PHAs have an obligation to take reasonable steps to make oral interpretation assistance available, regardless of the population size.
 - ▲ The HUD LEP Guidance is clear, unlike with written translation, there are no safe harbors for providing oral interpretation. HUD 2007 LEP Guidance, 72 Fed. Reg. at 2,736 (noting that there is not a “safe harbor” for oral interpretation, and that no “matter how few LEP persons the [PHA] is serving, oral interpretation services should be made available in some form”).

Role of Minors and Informal Interpreters

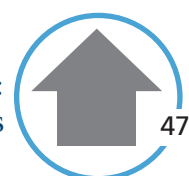
- **Does the plan prohibit the PHA’s use of minors to provide language assistance for LEP individuals, including translation of documents or for interpretation?**
- **Does the plan discourage the use of friends and informal interpreters?**

ACOP & Administrative Plan

- Except in emergency circumstances, minors should not be used for the provision of language assistance. The plan should include a provision specifically barring the PHA from requiring minors to serve as interpreters or otherwise provide language assistance to LEP individuals, including family members. See *generally* HUD 2007 LEP Guidance, 72 Fed. Reg. at 2,743. PHAs “should take special care to ensure that family, legal guardians, caretakers, and other informal interpreters are appropriate in light of the circumstances.” HUD 2007 LEP Guidance, 72 Fed. Reg. at 2,743. In HUD’s view, in many cases, “family members (especially children) or friends are not competent to provide quality and accurate interpretations.” HUD 2007 LEP Guidance, 72 Fed. Reg. at 2,743.
- If a person who is LEP ultimately decides to use a family member or informal interpreter, the PHA should have ways to document this decision by the LEP individual, and a way to document that free interpretation was offered to the LEP person. See *generally* HUD 2007 LEP Guidance, 72 Fed. Reg. at 2,743.

English-Only Policies

- **Does the plan have any language adopting an English-only policy, or requiring tenants to speak English?**
 - ▲ HUD has stated that “bans on tenants speaking non-English languages on the property or statements disparaging tenants for speaking non-English languages have no cognizable justification under” the Fair Housing Act. See *generally* HUD, Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency, at 4 (Sept. 15, 2016). Any such language included in a PHA planning document should be removed as inconsistent with fair housing law.
 - ▲ In California, the Unruh Civil Rights Act prohibits discrimination in housing based on one’s primary language. See Cal. Civ. Code § 51(b).



Hardship Policies and Minimum Rents

A PHA's hardship policies with respect to minimum rents are important for ensuring that families can maintain their housing. PHAs should ensure that tenants understand that hardship exemptions are available, and how to request such an exemption. For more information about minimum rents and hardship exemptions, see [NHLP's Green Book](#), § 4.4.2.2.4.

■ Does the PHA have a minimum rent policy?

- sPHAs must establish minimum rents ranging from \$0-\$50 per month. 42 U.S.C. § 1437a(a)(3); 24 C.F.R. § 5.630.

■ Does the PHA have a hardship policy for minimum rents?

- PHAs must grant exemptions to their minimum rent policies to families unable to pay the minimum rent because of financial hardship. 42 U.S.C. § 1437a(a)(3)(B)(i).

Hardship exemptions must be provided for:

- ▲ families who have lost or are waiting for benefits;
- ▲ families who would be evicted as a result of the imposition of the minimum rent;
- ▲ families whose circumstances change for reasons such as the loss of employment or a death in the family, and other situations as determined by the PHA.

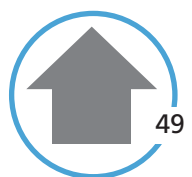
■ Does the PHA's policy require that the PHA suspend the minimum rent charges beginning the next month after a hardship request is received until such time that a PHA has determined whether to grant the request?

- A PHA is required to do this for both public housing and voucher tenants. 24 C.F.R. § 5.630(b)(2).

■ How is the tenant informed about the hardship policy?

- PHAs must notify tenants of the hardship exemption. HUD, [Public Housing Occupancy Guidebook](#), § 13.1; [Quality Housing and Work Responsibility Act of 1998](#); [Initial Guidance](#), 64 Fed. Reg. 8192, 8197 (Feb. 18, 1999).
 - ▲ HUD has not specified the form and timing of that notice and the burden is on the tenant to request the hardship exemption. As a result, many families are not aware of the hardship exemption.
- Section 102(b) of the Housing Opportunity Through Modernization Act of 2016 (HOTMA) required HUD to submit to Congress a report on the number of families that were granted an exemption to minimum rents. It found that .4% of public housing families had been granted a minimum rent exception nationwide and .7% of voucher families (excluding Moving to Work agencies). Letter to The Hon. Maxine Waters from HUD (Feb. 15, 2019) (on file with NHLP).

- ▲ A hardship policy should clarify how and when tenants are informed of the policy. At least, PHAs should provide notice of the hardship policy to every adult in the household: (1) during intake, both orally and in writing and (2) in all termination notices.
- ▲ Policies should also elaborate on what might qualify a family for a hardship exemption and inform tenants that applications will be considered on a case-by-case basis.



PHA Hearing Procedures

A PHA's hearing procedures are crucial to ensuring that tenants can participate in fair proceedings that could have great impact on their ability to maintain their access to housing. Considerations include procedures for ensuring that tenants with disabilities are granted reasonable accommodation requests, and that limited English proficient tenants have meaningful language access to hearings. For more discussion, please see *NHLP's Green Book Chapters 10 (Administrative Procedures) and 11 (Evictions and Subsidy Terminations)*.

■ Does the plan have rules and procedures to allow for participants or tenants to examine relevant documents prior to the hearing?

ACOP

- Tenants have a right to examine all evidence and relevant documents, prior to the hearing. If they are not made available upon the tenant's request, the PHA cannot rely on such a document at the hearing. See 24 C.F.R. § 966.56(b)(1); 42 U.S.C. § 1437d(k)(3).
- To ensure that tenants receive the documents with enough time to prepare a defense, advocates should push for discrete timelines for the disclosure of such information.
 - ★ *Recommended Language:* "The PHA will provide tenants with all relevant documents and evidence that will be relied upon in the hearing, no later than 10 days prior to the hearing. The PHA may not rely upon any documents not made available to the tenant 10 or more days prior to the hearing."

Administrative Plan

- For voucher terminations, participants have a right to examine all evidence and relevant documents, prior to the hearing. If they are not made available upon the tenant's request, the PHA cannot rely on such a document at the hearing. See 24 C.F.R. § 982.555(e)(2). To ensure that tenants receive the documents with enough time to prepare a defense, advocates should push for discrete timelines for the disclosure of such information.
- Although the legal mandate is only as to voucher terminations, PHAs can and should provide the right to this level of due process for all hearings in their Administrative Plan.
 - ★ *Recommended Language:* "The PHA will provide the participant with all relevant documents and evidence that will be relied upon in the hearing, no later than 10 days prior to the hearing. The PHA may not rely upon any documents not made available to the participant 10 or more days prior to the hearing."

- **Does the plan have rules and procedures to allow for participants or tenants to bring an advocate of their choosing to the hearing?**

ACOP

- A resident has the right to bring an advocate of their choosing. 42 U.S.C.A. §1437d(k)(4); 24 C.F.R. § 966.56(b)(2).
 - ★ *Recommended Language:* “A resident may bring an advocate of their choosing to the hearing. A hearing officer should allow a reasonable amount of time for a continuance in the event a resident would like to obtain a lawyer. The PHA will refer residents with mental health or cognitive disabilities to organizations that provide legal representation, at least 10 days prior to the hearing.”

Administrative Plan

- For Voucher terminations, participants have a right to bring an advocate of their choosing. See 24 C.F.R. § 982.555(e)(3).
- Upon request, the PHA should allow the Voucher holder a reasonable continuance to obtain an attorney. *In re Smith v. HPD*, No. 403147/11 (N.Y. Sup. Ct. Oct. 11, 2013) (finding abuse of discretion to deny adjournment to allow legal aid office to make decision on representation).
- PHAs or hearing officers should direct tenants with intellectual disabilities to legal assistance. *Blatch v. Hernandez*, 360 F. Supp. 2d 595 (S.D.N.Y. 2005) (PHA’s failure to inform hearing officers in termination proceedings and housing court in eviction proceedings of mental disabilities of unrepresented residents and to provide appropriate training regarding mental disabilities to hearing officers violated due process; providing individual assistance or modification of policies for all mentally disabled residents exceeded reasonable accommodation duties of federal statutes).
- ▲ Although the legal mandate is only as to Voucher terminations, PHA’s can and should provide the right to this level of due process for all hearings in their Administrative Plan.
 - ★ *Recommended Language:* “A participant may bring an advocate of their choosing to the hearing. A hearing officer should allow a reasonable amount of time for a continuance in the event a participant would like to obtain a lawyer. The PHA will refer participants with mental health or cognitive disabilities to organizations that provide legal representation, at least 10 days prior to the hearing.”

- **Does the plan have procedures to allow for participants or tenants to reschedule a hearing for good cause?**

ACOP

- The PHA must schedule the hearing promptly and at a time and place reasonably convenient to both the tenant and the PHA. 24 C.F.R. § 966.56.



- The PHA should also allow for a hearing to be rescheduled for good cause, including as a reasonable accommodation for a person with a disability.
 - ★ *Recommended Language:* “The PHA will schedule the hearing promptly and at a time reasonably convenient to the PHA and tenant. A hearing may be rescheduled to give a tenant time in which to retain counsel, as an accommodation for a person with disabilities, or an unavoidable conflict which seriously affects the health, safety or welfare of the party.”

Administrative Plan

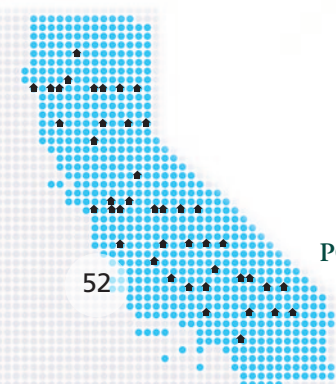
- PHA’s should allow participants to reschedule a hearing for good cause. This includes a continuance to allow a participant to obtain an attorney. *In re Smith v. HPD*, No. 403147/11 (N.Y. Sup. Ct. Oct. 11, 2013) (finding abuse of discretion to deny adjournment to allow legal aid office to make decision on representation)
 - ★ *Recommended Language:* “A hearing may be rescheduled to give a participant time in which to retain counsel, as an accommodation for a person with disabilities, or an unavoidable conflict which seriously affects the health, safety or welfare of the party.”
- **Does the plan have procedures to allow for participants or tenants to get access to an interpreter and other translation services to allow for meaningful access to the hearing process?**

ACOP

- If a resident has limited English proficiency, the PHA must take affirmative steps to ensure that resident has meaningful access to the grievance procedure. This means providing an appropriate interpreter, both for the informal conference and the grievance hearing, at no cost. The PHA should also translate or interpret all vital documents, including notices, forms, summaries, and decisions into the resident’s primary language. 24 C.F.R. § 966.56(g); Executive Order 13166 (Aug. 11, 2000); Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (Jan. 22, 2007)

Administrative Plan

- If a participant has limited English proficiency, the PHA must take affirmative steps to ensure that resident has meaningful access to the grievance procedure. This means providing an appropriate interpreter, both for the informal conference and the grievance hearing, at no cost. Executive Order 13166 (Aug. 11, 2000); Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (Jan. 22, 2007).



Rental Assistance Demonstration⁵⁶

The Rental Assistance Demonstration (RAD) process requires a significant amendment to the annual plan, five-year plan, or moving to work plan. Advocates are encouraged to get involved in this process as it is a great way to engage with the PHA to ensure the rights of tenants in converting properties are protected. For more information, please refer to NHLP's "[Advocate's Guide to Public Housing Conversions Under Component 1 of the Rental Assistance Demonstration](#)." The following checklist is designed for Administrative Plan comments for RAD Properties that are Converting to Project-Based Vouchers (PBVs).

- **Does the plan ensure that tenants will not be rescreened when the property is converted to project-based vouchers?**
 - The RAD statute mandates that tenants will “at a minimum” retain all the public housing rights provided under sections 6 and 9 of the United States Housing Act of 1937. Consolidated and Further Continuing Appropriations Act, 2012, Pub. Law 112-55, 125 Stat. 673 (Nov. 18, 2011).
 - At conversion, current tenants are not subject to rescreening, income eligibility, or income targeting. See HUD, [Rental Assistance Demonstration – Final Implementation, Notice PIH-2019-23 \(HA\) \(REV-4\)](#), at 60 (Sept. 5, 2019) (“RAD Notice”).

- **Does the plan ensure tenants will retain the same grievance procedures that apply to public housing tenants?**
 - The RAD statute mandates that tenants will “at a minimum” retain all the public housing rights provided under sections 6 and 9 of the United States Housing Act of 1937, including a grievance procedure similar to that of the public housing grievance procedure. Consolidated and Further Continuing Appropriations Act, 2012, Pub. Law 112-55, 125 Stat. 673 (Nov. 18, 2011).
 - In RAD PBV conversions, the RAD Notice establishes certain procedural rights for grievances, which largely mirrors the public housing grievance procedure. See [RAD Notice \(REV-4\)](#), at 65.

- **Does the plan guarantee that tenants have the right to return?**
 - RAD program rules prohibit the permanent involuntary relocation of residents as a result of conversion. Residents who are temporarily relocated retain the right to return to the project once it has been completed and is in a decent, safe, and sanitary condition. See HUD, [Rental Assistance Demonstration \(RAD\) Notice Regarding Fair Housing and Civil Rights Requirements and Relocation Requirements Applicable to RAD First Component – Public Housing Conversions](#), H 2016-17; PIH 2016-17 (HA), at § 5 (Nov. 10, 2016).



■ Does the plan address the relocation process?

- RAD tenants may need to temporarily move after RAD conversion to allow for any planned repair or rebuilding of their unit and/or property. If there is a possibility that residents will be relocated because of RAD, PHAs must participate in a planning process that conforms with the Uniform Relocation Act (“URA”) to minimize the adverse impact of relocation on tenants. 49 C.F.R. § 24.205(a).
- “While a written relocation plan is not required for temporary relocation lasting one year or less, HUD strongly encourages PHAs, in consultation with any applicable Project Owners, to prepare a written relocation plan for all RAD conversions to establish their relocation process clearly and in sufficient detail to permit consistent implementation of the relocation process and accurate communication to the residents. Appendix II [of the notice] contains recommended elements of a relocation plan.” See HUD, Rental Assistance Demonstration (RAD) Notice Regarding Fair Housing and Civil Rights Requirements and Relocation Requirements Applicable to RAD First Component – Public Housing Conversions, H 2016-17; PIH 2016-17 (HA), at § 6.1 (Nov. 10, 2016).

■ Does the plan require rent increases to be phased in?

- Generally, almost all tenants’ rents will not change after a RAD conversion because the tenant’s rent contribution is already 30% of their monthly adjusted income. However, some tenants may have been paying a flat rent or minimum rent in their public housing unit that is less than 30% of their income. These tenants may see an increase in their rent because of the RAD conversion. If a tenant’s monthly rent increases by more than the greater of 10% or \$25 purely because of the RAD conversion, the rent increase must be phased in over three or five years. See RAD Notice (REV-4), at 61. A PHA must create a policy setting the length of the phase-in period at three years, five years, or a combination depending on circumstances.

■ Does the plan discuss the tenant’s right to organize?

- PBV residents have the right to establish and operate a resident organization for the purpose of addressing issues related to their living environment. These residents are eligible for resident participation funding. See RAD Notice (REV-4), at 64. RAD developers must provide \$25 per occupied unit annually for resident participation, of which at least \$15 per occupied unit shall be provided to the “legitimate resident organization” at the covered property. RAD Notice (REV-4), at 135. These funds must be used for resident education, organizing around tenancy issues, and training activities.

56 Please note that during COVID-19, HUD issued Notice PIH-2020-26 (Supplemental COVID Guidance).

Additional Nondiscrimination Requirements

The following checklist outlines issue areas that PHAs may have otherwise failed to include in their PHA planning documents. Note that ACOPs and Administrative Plans generally have a section devoted to non-discrimination requirements, and that section usually appears early in the plans. For more information about federal fair housing and equal access requirements in HUD programs, see *NHLP's Green Book*, § 13.5.

- **Have the plans been updated to reflect the nondiscrimination requirements of the Equal Access Rule, which prohibits discrimination based on sexual orientation, gender identity, or marital status in HUD programs?**

ACOP & Administrative Plan

- ❖ HUD's Equal Access Rule prohibits the denial of housing opportunities from HUD programs based upon actual or perceived sexual orientation, gender identity, or marital status. See generally "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity," 77 Fed. Reg. 5662 (Feb. 3, 2012). Note that the 2012 prohibition on inquiries regarding one's sexual orientation or gender identity was removed in 2016. See generally Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763 (Sept. 21, 2016) (codified at 24 C.F.R. pt. 5). Note, however, that inquiries can only be made for legitimate, nondiscriminatory purposes (e.g., determining bedroom size for a household), and not as the basis to discriminate. (Note: *This change in the 2016 regulation applied to the Equal Access Rule generally, not just within the HUD CPD programs.*)
- ❖ HUD has instructed that PHAs update ACOPs and Administrative Plans to reflect the Equal Access Rule's definitions of "family," "sexual orientation," and "gender identity." See generally Program Eligibility Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD's Equal Access Rule, Notice PIH 2014-20 (HA), at 2-3 (Aug. 20, 2014).
- ❖ PHAs also should have updated tenant selection policies to include the Equal Access Rule definition of "family." Program Eligibility Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD's Equal Access Rule, Notice PIH 2014-20 (HA), at 3 (Aug. 20, 2014).

- **Have the plans include policies that ensure PHAs are not discriminating against survivors of domestic violence?**

ACOP & Administrative Plan

- ❖ In addition to VAWA protections for survivors of domestic violence, dating violence, sexual assault, and stalking, fair housing protections for women survivors of domestic

violence may also apply. Domestic violence survivors should not be penalized for the abuse committed against them, including for damage to the unit caused by the abuser, or calls to the police because of the actions of the abuser. See generally Memorandum from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, HUD Office of Fair Housing and Equal Opportunity (FHEO), to FHEO Office Directors and Regional Directors (Feb. 9, 2011).

- **Do the plans have a statement prohibiting harassment based on protected class membership?**

ACOP & Administrative Plan

- ❖ Harassment, either in the form of quid pro quo harassment or hostile environment harassment, is prohibited based on a person's membership in a protected class. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (codified at 24 C.F.R. pt. 100). "Harassment" is a term that includes, but is not limited to, sexual harassment.

- **Does the Administrative Plan outline a process where existing public housing tenants can report tenant-on-tenant harassment?**

Administrative Plan

- ❖ The PHA is directly liable for failing to "take prompt action to correct and end" housing discrimination by a third party (including other PHA tenants engaged in discriminatory conduct) where the PHA "knew or should have known of the discriminatory conduct and had the power to correct it." 24 C.F.R. § 100.7(a)(1)(iii). Power "to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the person's control or any other legal responsibility the person may have with respect to the conduct of such third-party." *Id.* The PHA would exercise such control over a PHA tenant who was engaged in harassing conduct against another tenant due to membership in a protected class.

- **Do the plans reflect the additional protected classes under California law?**

ACOP & Administrative Plan

- ❖ See Cal. Gov't Code § 12955. (*Note, however, that state protections would not supersede federal program requirements.*)

Terminations

A PHA's policies regarding terminations, particularly where policies are discretionary, can make the difference between a family maintaining housing and facing homelessness. PHAs should adopt policies that consider families' mitigating circumstances when there is a lease or program violation where the PHA has discretion to do so under federal law. PHAs must also ensure that their policies do not have a disparate impact on groups protected by the Fair Housing Act. For more information about tenants' rights in terminations, see [NHLP's Green Book, Chapter 11](#).

■ Does the plan list reasons why a PHA would have to terminate the assistance?

- ❖ The PHA should note where decision to terminate is *discretionary*. See 24 C.F.R. §§ 966.4(l)(2), 966.4(l)(5) (Public Housing), 982.552(b)-(c) (Vouchers), 982.553(b) (Vouchers).
 - PHA may terminate assistance for serious or repeated violations of material terms of the lease). 24 C.F.R. § 966.4(l)(2)(i) (Public Housing)
 - ▲ Failure to make payments due under the lease
 - ▲ Failure to fulfill household obligations—24 C.F.R. §§ 966.4(l)(2)(i)(B) (Public Housing)
 - ▲ Being over-income
 - ▲ Other good cause
 - ★ Includes criminal activity or alcohol abuse (note, however that certain criminal activity requires mandatory termination); discovery after admission that tenant is ineligible; tenant false statements or fraud; failure to comply with service requirements; failure to accept PHA lease revision
 - PHA may terminate assistance to Voucher household on the following grounds (see 24 C.F.R. §§ 982.552(c)(1)(i)), such as (not exhaustive):
 - ▲ Violation of family obligation
 - ★ There may be times when a family does not promptly report changes in family composition or provide information related to family member absence. These failures and other similar ones should not be considered substantial and should not be grounds for termination.
 - ▲ Eviction from federally assisted housing in the last five years
 - ▲ Previous termination of household member's subsidy by PHA
 - ▲ Fraud or criminal act in connection with a federal housing program
 - ▲ Owes rent to the PHA
 - ▲ Threatening or abusive behavior to PHA staff
 - ▲ Criminal activity or alcohol abuse
 - ▲ Failure to comply with other programmatic requirements

- **Does the plan include language about tenant’s ability to seek assistance with local legal service organizations?**

ACOP & Administrative Plan

- ❖ PHA should include information about local legal service resources in the community.

- **Does the plan make clear the PHA has the burden, by a preponderance of credible evidence, that the household member committed the program violation?**

- ❖ Where good cause is required for termination, the landlord or PHA also has the burden of pleading and proving good cause by a preponderance of the evidence. Importantly, courts have not been willing to impose a higher evidentiary burden, such as clear and convincing evidence, for evictions involving alleged criminal activity. HUD concurs with this approach. 24 C.F.R. §§ 982.553(c) (Vouchers), *Spence v. Gormley*, 439 N.E.2d 741 (Mass. 1982).

- **Does the plan describe the notice provided to tenants when the PHAs plans to terminate the subsidy?**

- ❖ 24 C.F.R. §§ 982.522(d) (Voucher), 982.555 (Voucher), 966.4(l)(3) (Public Housing).

- **Does the PHA use arrest records as evidence of illegal activity?**

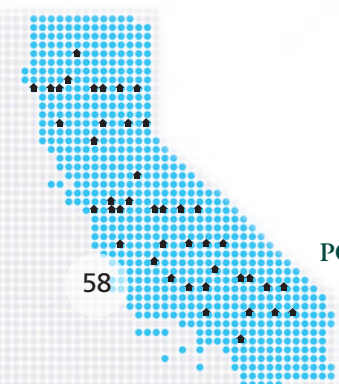
ACOP & Administrative Plan

- ❖ Arrest records should never be the sole evidence of the illegal activity. See 24 C.F.R. §§ 982.553(c) (Vouchers), *Spence v. Gormley*, 439 N.E.2d 741 (Mass. 1982); see also Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, Notice PIH-2015-19 (Nov. 2, 2015).

- **Does the plan include a statement about how the PHA will consider mitigating circumstances?**

ACOP & Administrative Plan

- ❖ HUD encourages PHAs to consider the totality of circumstances before terminating a family’s assistance.
 - Factors such as the seriousness of the offense and the impact of termination on other family members can significantly affect a decision to terminate. Failure to consider relevant circumstances may constitute an abuse of discretion. 24 C.F.R. §§ 982.552(c)(2) (Vouchers), 966.4(l)(5)(vii)(B) (Public Housing).



Waitlist Administration and Outreach

One of the most effective ways that a PHA can ensure that it is providing equal access to its programs is to approach waitlist administration and outreach through a fair housing lens. For example, is the opening of the waitlist being done in a manner that ensures equal access to persons with disabilities and persons with limited English proficiency? Is the PHA conducting affirmative marketing to reach wider portions of the eligible service populations. PHAs should consider these questions when evaluating their planning documents.

■ Does the plan address how the PHA notifies the public upon opening the waitlist?

Administrative Plan

- ❖ HUD regulations require that the PHA provide public notice when the Housing Choice Voucher waitlist opens. 24 C.F.R. § 982.206(a). The PHA “must give the public notice by publication in a local newspaper of general circulation, and also by minority media and other suitable means.” *Id.* This public notice must state limitations regarding who can apply for waitlist spots.

ACOP & Administrative Plan

- ❖ HUD guidance states that any public notice “announcing a waiting list opening and application procedure should be simple, direct, and clear but with sufficient detail to inform applicants of the time and place to apply, any limitations on who may apply, and any other information the applicant may need to successfully submit the application.” Waiting List Administration, Notice PIH 2012-34 (HA), at 2 (Aug. 13, 2012). Notifying the public must comply with language access requirements and accessibility requirements for persons with disabilities. *Id.*
- ❖ “PHAs should consider issuing notifications of waiting list openings to local welfare offices, homeless shelters, domestic violence shelters, and minority organizations, among others. PHAs should also think creatively when developing outreach efforts and consider using tools like social media sites, other websites, newsletters, and on-site visits.” *Id.* at 4.
- ❖ The PHA “must also reach out to persons with disabilities, including disabled individuals in institutions transitioning to community-based settings and those with limited-English proficiency.” *Id.* at 5.

■ Does the plan allow applicants a variety of approaches to apply for positions on the waitlist?

ACOP & Administrative Plan

- ❖ HUD guidance discourages “opening the waiting list and accepting applications for limited periods, such as a single day.” Waiting List Administration, Notice PIH 2012-34 (HA), at 2 (Aug. 13, 2012).
 - ❖ PHAs “should also consider offering several locations and methods by which applicants may submit their applications, especially if the PHA chooses to place applicants on the waiting list by date and time of application,” such as offering “applicants the opportunity to submit applications by mail, fax, telephone, e-mail, or other electronic formats.” *Id.* at 3.
- **Is the PHA’s method of selection from the waitlist consistent with ensuring equal access for persons with disabilities?**
- ❖ HUD guidance states that PHAs should understand the impacts of the selected method of choosing applicants off of the waitlist;

PHAs should also be aware of the implications each selection method may have. For instance, ordering a waiting list by the date and time of application may result in an adverse effect to applicants with disabilities, especially when the PHA opens its waiting list periodically. Therefore, the PHA must be prepared to make necessary modifications in its process to mitigate this effect, such as mailing applications to people with disabilities well in advance of this “first-come, first-served” opening and allowing submission of applications by mail or electronically. Further, when considering access to applicants with disabilities PHAs should consider using a lottery or other random choice technique because these techniques significantly minimize the need for special procedures or other administrative steps to mitigate adverse effects that may be costly and time consuming even when not considered an undue burden under Section 504 of the Rehabilitation Act of 1973.

Waiting List Administration, Notice PIH 2012-34 (HA), at 4 (Aug. 13, 2012).

Admissions⁵⁷

A PHA's policies regarding admissions can either promote or hamper efforts to affirmatively further fair housing. For more information on admissions in public housing or the Voucher program, see NHLP's *Green Book*, Chapter 2. Advocates should also cross-reference the VAWA checklist, as survivors have protections from discrimination in admissions.

■ Does the plan include preferences for admission?

ACOP & Administrative Plan

- ❖ PHAs should ensure that any preferences adopted do not have a discriminatory effect on members of protected classes. For example, residency preferences, under certain circumstances, can have a disparate impact by having the effect of excluding applicants from communities of color. See e.g., NHLP, *Recent Developments in Challenges to Residency Preferences*, 43 HOUS. L. BULL. 129, 129-33 (July 2013).

■ Does the plan explain how the PHA considers adverse information about applicants?

- ❖ Aside from federally mandated exclusions, see generally 24 C.F.R. §§ 960.204 (Public Housing), 982.553 (Vouchers), PHAs have a great deal of discretion over their admissions policies. Advocates should ensure that PHAs are considering mitigating information, and that the PHA's screening criteria is narrowly tailored to an applicant's ability to be a good tenant.

ACOP

- ❖ Tenant selection criteria "shall be reasonably related to individual attributes and behavior of an applicant and shall not be related to those which may be imputed to a particular group or category of persons of which an applicant may be a member." 24 C.F.R. § 960.203(a).
- ❖ PHAs must consider the "the time, nature, and extent of the applicant's conduct (including the seriousness of the offense)." 24 C.F.R. § 960.203(d).
 - The PHA may consider "factors which might indicate a reasonable probability of favorable future conduct," such as evidence of rehabilitation. 24 C.F.R. § 960.203(d)(1).

Administrative Plan

- ❖ In determining whether to deny assistance "because of action or failure to act by members of the family" the PHA may consider "all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure." 24 C.F.R. § 982.552(c)(2)(i).

Links to Additional Resources

[AB 686 Fact Sheet](#)

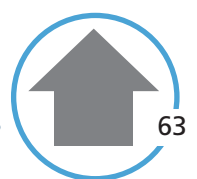
[California HCD AFFH Webpage](#)

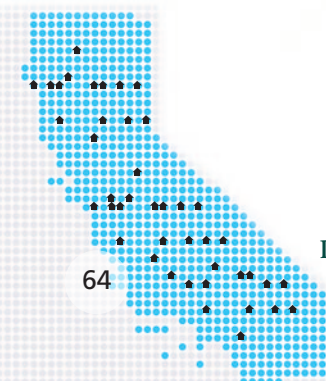
[Comment Letter Example #1](#)

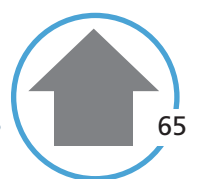
[Comment Letter Example #2](#)

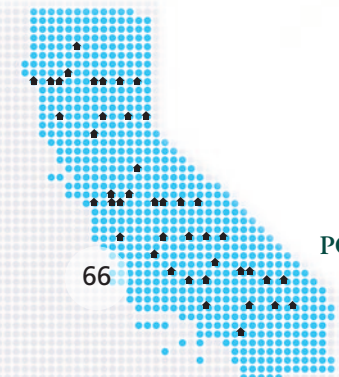
[HUD List of PHAs](#)

57 Note that Emergency Housing Vouchers issued in response to COVID-19 have different admissions requirements. Please refer to the “Voucher” checklist in this toolkit for more information.

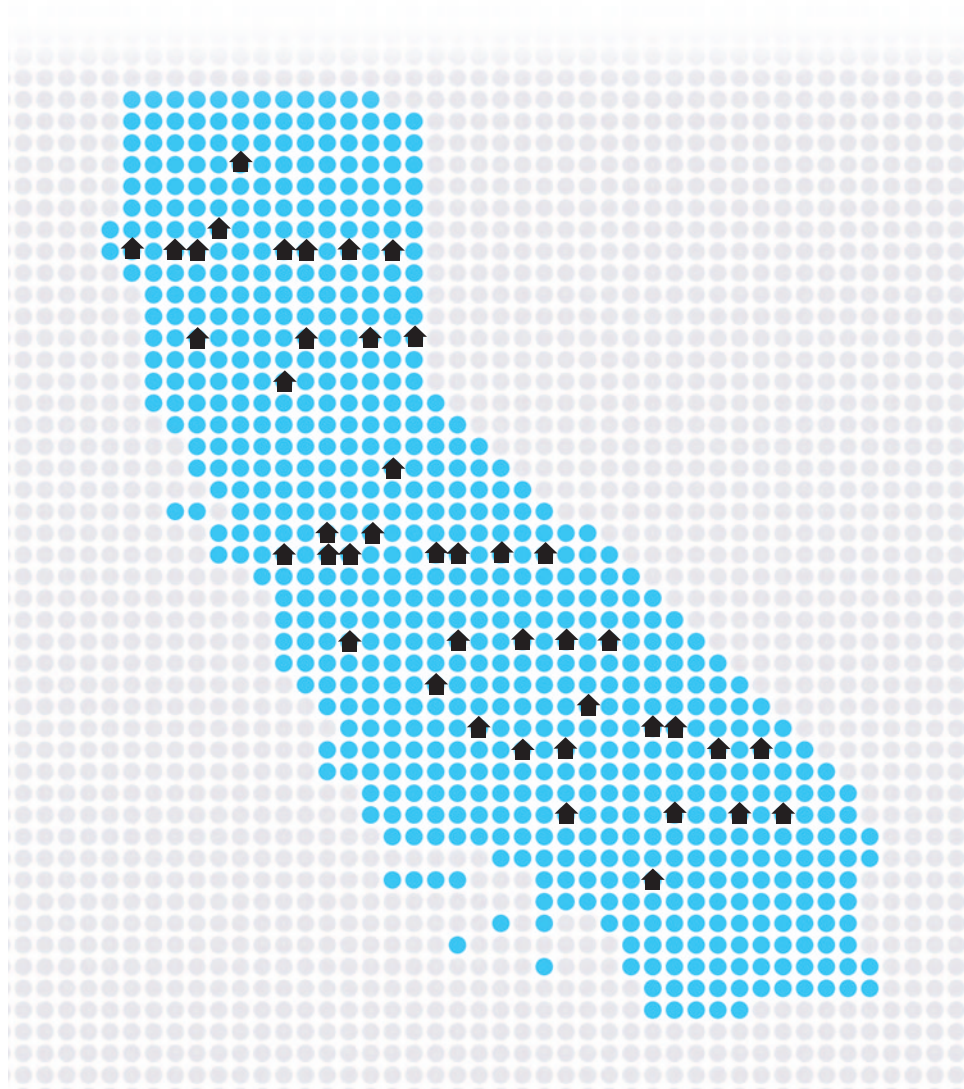








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