



**U.S. Department of Housing and Urban Development
Office of Public and Indian Housing**

SPECIAL ATTENTION OF:

Regional Managers; Office of Public Housing
Directors; Program Center Coordinators;
Public Housing Agencies; Resident
Management Corporations

NOTICE PIH 2014-20 (HA)

Issued: August 20, 2014
This notice remains in effect until
amended, superseded or rescinded.

SUBJECT: Program Eligibility Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD's Equal Access Rule

1. Purpose: On February 3, 2012, HUD published a final rule entitled Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity (77 FR 5662) ("Equal Access Rule" or "rule"). The final rule requires HUD's assisted and insured housing programs are open to all eligible individuals regardless of sexual orientation, gender identity or marital status. The rule revises HUD's general program requirements by adding the following provisions at 24 CFR 5.105(a)(2):
 - (a) A determination of eligibility for housing that is assisted by HUD or subject to a mortgage insured by the Federal Housing Administration shall continue to be made in accordance with the eligibility requirements provided for such program by HUD, and such housing shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status, and
 - (b) No owner or administrator of HUD-assisted or HUD-insured housing, approved lender in an FHA mortgage insurance program, or any other recipient or sub-recipient of HUD funds may inquire about the sexual orientation or gender identity of an applicant for, or occupant of, HUD-assisted or HUD-insured housing for purposes of determining eligibility or otherwise making such housing available. (See Permissible Inquiries in item 6 herein.)

Through this notice, the Office of Public and Indian Housing (PIH) provides guidance on how the Equal Access Rule applies to PIH-assisted housing programs administered by public housing agencies (PHAs). The rule does not create any additional protected classes under the Fair Housing Act or any other civil rights law. Although the Fair Housing Act does not include sexual orientation, gender identity, or marital status as protected classes, complaints involving LGBT persons may raise claims that are actionable under one or more of the Fair Housing Act's protected classes (See section 10 of this notice).

2. Applicability: The Equal Access Rule applies to all HUD-assisted and HUD-insured housing. This notice applies to all PIH programs administered by PHAs, affiliates,

instrumentalities and mixed-finance owner-entities, specifically the Public Housing, Section 8 Housing Choice Voucher (HCV), Project-Based Voucher (PBV), Project-Based Certificate (PBC) and Moderate Rehabilitation programs (collectively PIH-assisted housing programs). This notice also applies to PHAs under Moving to Work (MTW) and Rental Assistance Demonstration (RAD). This notice describes requirements and provides examples applicable to all PIH-assisted housing programs.

In addition, the Equal Access Rule applies to private owners that participate in housing programs funded under section 8 of the U.S. Housing Act of 1937, 42 U.S.C. § 1437, who must make housing available without regard to actual or perceived sexual orientation, gender identity, or marital status.

A private owner that participates in the HCV program becomes subject to the rule when the owner executes a housing assistance payments (HAP) contract with the PHA. It is at that point the owner becomes subject to the rule.

All housing providers are also subject to applicable state and local fair housing laws prohibiting discrimination because of sexual orientation, gender identity and/or marital status.

Individual offices within HUD are providing their own guidance on how the Equal Access Rule affects their programs and program participants. In addition, HUD's Native American programs will incorporate the requirements of making housing available regardless of sexual orientation, gender identity, or marital status and prohibiting inquiries on the basis of sexual orientation and gender identity after conducting tribal consultation.

3. **Terms and Definitions.** PHAs must use federal definitions and follow federal eligibility requirements in their administration of PIH-assisted housing programs. Accordingly, PHAs are required to update their admissions and continued occupancy policies (ACOP) and/or Administrative Plans consistent with the Equal Access Rule. The rule defines "sexual orientation" and "gender identity" at 24 CFR 5.100 and clarifies the term "family" at 24 CFR 5.403. *Sexual orientation* means homosexuality, heterosexuality or bisexuality. *Gender identity* means actual or perceived gender-related characteristics.

The term "*family*" includes, but is not limited to the following, **regardless of actual or perceived sexual orientation, gender identity, or marital status:**

- (1) A single person, who may be an elderly person, displaced person, disabled person, near-elderly person or any other single person; or
- (2) A group of persons residing together and such group includes, but is not limited to:
 - (i) A family with or without children (a child who is temporarily away from the home because of placement in foster care is considered a member of the family);
 - (ii) An elderly family;
 - (iii) A near-elderly family;
 - (iv) A disabled family;
 - (v) A displaced family; and

(vi) The remaining member of a tenant family.

In addition, for categorizing family as defined above, the terms disabled family, elderly family and near-elderly family (per 24 CFR 5.403) are:

Disabled family means a family whose head (including co-head), spouse or sole member is a person with a disability.

Elderly family means a family whose head (including co-head), spouse or sole member is a person who is at least 62 years of age.

Near elderly family means a family whose head (including co-head), spouse or sole member is a person who is at least 50 years of age but below the age of 62; or two or more persons, who are at least 50 years of age but below the age of 62, living together; or one or more persons who are at least 50 years of age but below the age of 62.

4. Required Revisions to PHA Plans and Policies: PHAs are required to review and update, if necessary, their ACOP and/or Administrative Plans to ensure consistency with the Equal Access Rule.
 - a. Annual Plan: In accordance with 24 CFR 903.7(b), a PHA's Annual Plan includes a statement of the PHA's policies governing eligibility, selection and admissions. The PHA's definition of family as provided in the admissions and continued occupancy policies will have to be amended as a result of the rule and this notice. Thus, the next Annual Plan submitted by the PHA subsequent to the posting of this notice must include a statement in the section on eligibility, selection and admissions to reflect the change in the definition of family and the requirement to provide equal access regardless of sexual orientation, gender identity or marital status.
 - b. Section 8 Administrative Plan: In accordance with 24 CFR 982.54, PHAs must revise their Administrative Plans to reflect the definition of "family" at 24 CFR 982.4 and the definition of "family composition" at 24 CFR 982.201(c):
 - i. *Family*. A person or group of persons, as determined by the PHA consistent with 24 CFR 5.403, approved to reside in a unit with assistance under the program. See discussion of family composition at section 982.201(c).
 - ii. *Family Composition*. See definition of "family" in 24 CFR 5.403.
 - c. Public Housing Tenant Selection Policies: In accordance with 24 CFR 960.202, PHAs must revise their tenant selection policies to reflect the definition of "family" at 24 CFR 945.105:
 - i. *Family*. A person or group of persons, as determined by the PHA consistent with 24 CFR 5.403, approved to reside in a unit with assistance under the program.

5. Equal Access and Prohibited Inquiries: Housing assisted under the U.S. Housing Act of 1937 must be made available without regard to actual or perceived sexual orientation, gender identity or marital status. HUD clarified the term “family” at 24 CFR 5.403 to preclude the exclusion of otherwise qualified persons who may identify as LGBT individuals, who have an LGBT relationship or who may be perceived as such.

PHAs and owners are prohibited from inquiring about an applicant’s or participant’s sexual orientation or gender identity for the purpose of determining eligibility or otherwise making housing available. This does not prohibit an individual from voluntarily self-identifying sexual orientation or gender identity.

6. Permissible Inquiries: The Equal Access Rule does not prohibit all inquiries concerning an applicant’s or participant’s sex. For example, the rule permits a PHA to ask an applicant’s or participant’s sex in order to determine the number of bedrooms for which a household may be eligible based on the PHA’s written occupancy standards.

In addition, PHAs must collect and report on a program participant’s sex through form HUD-50058 and submit the data electronically to the Information Management System/PIH Information Center (IMS/PIC)

(http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/systems/pic/50058.) HUD does not require reporting on sexual orientation through form HUD-50058 or in any other form. As noted above, sexual orientation means homosexuality, heterosexuality or bisexuality.

PHAs may maintain voluntary and anonymous reporting of sexual orientation or gender identity for compliance with data collection requirements by state and local governments or other federal assistance programs so long as information obtained pursuant to such reporting has no bearing on eligibility for housing or program participation.

7. Program Compliance: A PHA’s or owner’s actions or policies that are inconsistent with the rule could result in HUD’s determination that the PHA or owner has failed to comply with program requirements. HUD may pursue any available remedy, including sanctions or corrective action plans that it deems appropriate to remedy the violation. HUD may review a PHA’s or owner’s policies and performance to determine if it is complying with the Equal Access Rule. This may include monitoring by PIH or HUD’s Office of Fair Housing and Equal Opportunity (FHEO). It may also include requests for information concerning allegations of noncompliance. The PHA or owner must cooperate with HUD and provide access to staff, records and beneficiaries as needed.

Typically, HUD seeks voluntary corrective action in the event a PHA or owner violates a requirement under the Equal Access Rule. Applicants and participants may request corrective action directly from the PHA if they believe they have been denied housing or subjected to improper inquiries in violation of the rule.

8. Complaints to PHAs: Upon receipt of a complaint from an applicant or participant alleging a violation of the Equal Access Rule, the PHA must determine if a program violation occurred and implement appropriate corrective action(s). The PHA may seek assistance from its local HUD Field Office of Public Housing in order to make this determination. In all cases, the PHA may advise the family to file a fair housing complaint if the family feels they have been discriminated against under the Fair Housing Act (see sections 10 and 11).

In addition, the PHA must follow its written policies for responding to complaints; policies must include that the PHA provide written notice of receipt of the complaint to those alleged to have violated the rule and that the complainant be informed that such notice was made. Following an investigation of the allegations, the PHA must provide the complainant and those alleged to have violated the rule with findings from the investigation and either a proposed corrective action to resolve any violation or an explanation as to why corrective action is not warranted. The PHA must keep records of all complaints, investigations, notices and corrective actions consistent with its current record-keeping obligations.

9. Examples of Program Violations under the Equal Access Rule:

- a. A PHA asks a woman who has applied for assistance under a PHA's HCV program to update her eligibility information prior to the PHA issuing a voucher. She brings another woman with her to the PHA office. While completing program verifications, her companion puts her arm around her. The PHA's occupancy specialist believes that the women are lesbians and denies the woman's application because of perceived sexual orientation. The actions taken by the PHA's occupancy specialist constitute a violation of 24 CFR 5.105(a)(2)(i) by the PHA because the denial of housing assistance was based on perceived sexual orientation.
- b. A gay man who currently receives rental assistance under the PBV program contacts the property owner and requests to add his male partner, who is also income-eligible, to the lease so they may live together. The owner seeks approval from the PHA. The PHA denies the request stating that the couple does not meet the PHA's definition of "family," which requires that family members be related either through blood or marriage. The owner informs the family of the denial. The PHA's restrictive definition of "family" violates the rule's prohibition on considering sexual orientation or marital status when determining who qualifies as a "family" and who may occupy HUD-assisted housing. A PHA must determine whether a family is eligible for assistance without regard to the sexual orientation, gender identity, or marital status of any of its members. *See* 24 CFR 983.8 ("The PBV program requires compliance with all equal opportunity requirements under federal law and regulation, including the authorities cited at 24 CFR 5.105(a)"). In addition, the denial is a violation of 24 CFR 5.105(a)(2)(i) because the denial was based on sexual orientation and/or marital status.
- c. A gay man who currently receives rental assistance under the PBV program contacts the property owner to request to add his male partner, who is also income-eligible, to the lease so they could live together. The owner asks "Are you gay?" and denies the request when the tenant confirms that he is gay. The actions taken by the owner constitute a

violation of 24 CFR 5.105(a)(2)(i) and (ii) because the owner inquired about sexual orientation for the purpose of determining eligibility and making housing available, and the denial was based on sexual orientation and/or marital status.

10. Fair Housing Act Implications: The Fair Housing Act does not include sexual orientation, gender identity or marital status as protected classes. However, complaints involving LGBT persons may raise claims that are covered by one or more of the Fair Housing Act's protected classes. For example, courts have recognized that the Fair Housing Act's prohibition against discrimination because of sex includes discrimination based on non-conformance with sex stereotypes. Therefore, under certain circumstances, complaints involving sexual orientation or gender identity may be investigated under the Fair Housing Act.

When reviewing alleged violations of the Equal Access Rule, FHEO determines whether the Fair Housing Act is implicated. If HUD lacks jurisdiction to investigate a complaint from an LGBT person, an applicant or beneficiary may still be protected under state and local laws that include sexual orientation, gender identity and/or marital status as protected classes. Many states and local jurisdictions prohibit housing discrimination on the basis of sexual orientation, gender identity and/or marital status, and HUD may refer complaints or other information concerning these protected classes to appropriate state and local fair housing enforcement agencies.

Below are examples of actions that may violate both the Fair Housing Act and the Equal Access Rule:

- a. A gay man applies for public housing, but the PHA denies his application because he is gay and it presumes that, because he is gay, he is HIV-positive and may infect other tenants. This action violates 24 CFR 5.105(a)(2)(i) because the man is denied HUD-assisted housing based on sexual orientation. This action also violates the Fair Housing Act because the man is regarded as having a disability, HIV/AIDS. Disability, which includes a record of having a disability, or being regarded as having a disability, is a protected class under the Fair Housing Act.
- b. A lesbian tenant who dresses in masculine clothes alleges the PHA's property manager at the public housing complex where she resides refuses to make necessary repairs to her apartment. She alleges the property manager tells her that he "only does repairs for real ladies." An investigation confirms that the property manager refused to make the repairs because the tenant is a lesbian and did not conform to gender stereotypes. This action violates 24 CFR 5.105(a)(2)(i) because the action of the PHA's representative is based on sexual orientation and/or gender identity and is affecting the habitability of the tenant's housing. The rule requires that housing be made available regardless of the actual or perceived sexual orientation, gender identity, or marital status of a resident. This complaint may also raise a claim under the Fair Housing Act as discrimination based on sex, because the property manager's actions are based on the tenant's nonconformance with gender stereotypes.

- c. A gay man alleges he was harassed by the PHA's maintenance worker at the public housing complex where he resides. The maintenance worker routinely told the tenant "you walk like a girl" and "you should man up," whistled at him and made sexual gestures. The tenant reported the harassment to the PHA, but the PHA made no effort to stop it. Therefore, as a result of inaction by the PHA, the tenant moved out. Due to the continued harassment, the PHA violated the requirement at 24 CFR 5.105(a)(2)(i) to make housing available without regard to actual or perceived sexual orientation, gender identity, or marital status. The rule prohibits consideration of a person's sexual orientation throughout the tenancy, not just at the time of application. This conduct may also be considered sex discrimination under the Fair Housing Act because the actions of the maintenance worker may constitute discrimination based on gender non-conformity and/or sexual harassment.

In the example above, the tenant moved out of the assisted housing unit as a result of the harassment by the PHA maintenance work. Please note; a program participant is not required to leave the assisted housing unit, or terminate participation in the HCV program, for the purpose of filing a complaint for violation under the Equal Access Rule.

11. Further information: For further information about this Notice, contact your local HUD Office of Public Housing. Contact information is available through the PIH Customer Service Center, 1-800-955-2232 (toll free), and is available on HUD's website at http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/about/field_office. Fair Housing questions may be directed to appropriate Fair Housing Field Offices. Complaints may be filed electronically at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/online-complaint. Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at (800) 877-8339.

/s/

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