MEMORANDUM

To: National League of Cities

From: National Law Center on Homelessness and Poverty and its external pro bono counsel

Date: October 22, 2018

Re: Applicability of the federal Fair Housing Act to homeless veterans' preferences in rental housing and landlord incentive funds for veterans

Overview

The National Law Center on Homelessness and Poverty ("Law Center"), with the support of external pro bono counsel, has prepared the memorandum below to examine the potential applicability of the federal Fair Housing Act to preferences for homeless veterans in various types of programs of interest to the Law Center and its partners. In particular, the Law Center considered two questions: 1) whether, consistent with the federal Fair Housing Act, landlords and property managers may give priority to the tenancy applications of homeless veterans, and 2) whether, consistent with the federal Fair Housing Act, privately- or municipally-sponsored housing-related incentive funds may condition payments from the fund on the beneficiary's status as a homeless veteran.

The opinions offered herein are based on our understanding of certain factual information described throughout the memo that has not been independently verified – including general information about the types of programs of interest provided by the National League of Cities, as well as certain publicly available information regarding the demographics of the homeless veteran population in the United States – and certain legal authority. This memorandum does not constitute legal advice on any particular veterans' homelessness program or on the application of any state or local fair housing laws, the requirements of which may vary from and/or be more extensive than federal law. Providers of and participants in such programs should consult their own attorneys regarding the application of relevant laws to their specific programs.

As discussed in more detail below, we believe that housing providers and incentive funds may, consistent with the federal Fair Housing Act, implement homeless veteran preferences for tenancy and incentive funds for veterans experiencing homelessness in connection with housing, as long as such there is no underlying discriminatory intent. Housing providers/incentive funds should ensure that there are legitimate purposes for implementing homeless veteran preferences and document those purposes.

Background

The National Law Center on Homelessness and Poverty ("the Law Center") supports the efforts of partner organizations to address homelessness among military veterans. In particular, the Law Center partners with the National League of Cities ("NLC"), which in turn is the primary national partner with federal agencies on the Mayors Challenge to End Veteran Homelessness ("MCEVH"). In connection with its work on the MCEVH, NLC is pursuing two related initiatives in various communities throughout the United States:

1. NLC, in connection with local partners, conducts housing provider recruitment events seeking the commitment of property owners and managers to support efforts to end veteran homelessness in their communities by, among other things, prioritizing the tenancy applications of homeless veterans for vacant units. (These tenancies generally, though not necessarily, are supported by various public assistance programs for veterans, including HUD-VASH vouchers and the Supportive Services for Veteran Families program.)

2. NLC encourages the creation of incentive funds in communities – funded and managed privately and/or by municipalities – that can further support and subsidize efforts to place homeless veterans in stable rental housing. Among other potential uses, for example, these incentive funds may directly assist homeless veterans to become eligible tenants by clearing past outstanding utility debts; incentivize housing providers to participate in rental subsidy programs for homeless veterans; or compensate a housing provider for reserving a vacant unit while a potential homeless veteran tenant is being identified and/or conditions for use of a rental subsidy voucher (such as Housing Quality Inspections) are being cleared. To achieve their purpose, the funds would necessarily be limited to homeless veteran beneficiaries.

According to data reported by the U.S. Department of Veterans Affairs, approximately 91% of homeless veteran are male. In terms of race and national origin, the homeless veteran population is relatively diverse. Roughly 45% of all homeless veterans are African American or Hispanic, despite those racial/ethnic groups only accounting for 10.4% and 3.4% of the overall U.S. veteran population, respectively. Approximately 51% of individual homeless veterans have disabilities. http://nchv.org/index.php/news/media/background_and_statistics/ (last visited June 10, 2018).

Analysis

I. Consistent with the federal Fair Housing Act, private property owners and managers may give preference to the tenancy applications of homeless veterans.

a. Background on the Fair Housing Act

The federal Fair Housing Act, 42 U.S.C. §§ 3601, *et seq*. (the "FHA," or the "Act"), prohibits discrimination in housing on seven prohibited bases – race, color, national origin, sex, religion, familial status, and disability. Among other specific actions, the FHA prohibits any person from:

- Refusing to sell or rent, negotiate for the sale or rental, or otherwise make unavailable or deny a dwelling to any person because of a prohibited basis;
- Discriminating against any other person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of a prohibited basis; and,
- Making or publishing any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on a prohibited basis. 42 U.S.C. § 3604(a)-(c), (f).

The FHA's provisions apply broadly to public and private entities and their agents, such as property managers, who engage in the sale and rental (as well as other related activities) of all types of dwellings in the United States, with certain limited exceptions for owner-occupied

dwellings, small numbers of single family homes sold or rented by the owner, and religious organizations and private clubs, *see* 42 U.S.C. §§ 3603(b), 3607(a).

To promote fairness in housing, the FHA prohibits: (1) "disparate treatment," or intentional discrimination, where the defendant violates some provision of the FHA with a discriminatory intent or motive, and (2) "disparate impact," where a defendant's action, despite no discriminatory intent, results in a disproportionately adverse effect on a prohibited basis group and is otherwise unjustified by a legitimate rationale. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2513, 192 L. Ed. 2d 514 (2015).

b. Disparate Treatment

Veteran status is not a prohibited basis under the FHA, so a tenancy preference for homeless veterans would not facially violate the Act.

Nor would a homeless veteran preference otherwise constitute disparate treatment, or intentional discrimination, under the FHA, absent some evidence that the housing provider actually intended to disfavor members of some prohibited basis group. If the housing provider enacted the tenancy preference entirely for nondiscriminatory purposes, and there were no evidence and/or persuasive arguments that the stated preference was actually a pretext for discrimination on a prohibited basis, then the provider is unlikely to be liable under any disparate treatment theory under the FHA.

Moreover, because the homeless veteran population is relatively diverse in terms of each of the characteristics protected by the FHA (e.g., race, sex, etc.), a tenancy preference favoring homeless veterans could not reasonably be considered discrimination-by-proxy against a particular prohibited basis group. A discrimination-by-proxy theory imposes liability where a technically neutral classification is used as a proxy to evade the prohibition on intentional discrimination, but such a theory is only possible where a very close correlation, or "fit," exists between a prohibited basis group and the characteristic alleged to serve as a proxy for that group. *See McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir.1992) (citing examples of grey hair as a proxy for age, or service dogs or wheelchairs as proxies for disabilities); *see also* *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 177–78 (3d Cir. 2005) (reviewing cases imposing liability where the proxy characteristic "follow[s] ineluctably" from the prohibited basis characteristic, as distinguishable from cases where the two characteristics may generally correlate but are not necessarily connected). Although the homeless veteran population is disproportionately male, nearly one in ten homeless veterans is a woman, making veteran status a relatively weak proxy for gender.

c. Disparate Impact

Notwithstanding that a housing provider might enact a homeless veteran preference with entirely nondiscriminatory (and, in fact, altruistic) motives, such a policy could still violate the FHA if it caused an unlawful disparate impact. Given that the homeless veteran population is so disproportionately male – approximately 91% -- it is at least theoretically possible that a homeless veteran tenancy preference could be challenged as causing a disparate impact on the basis of sex. For the reasons below, however, it is unlikely that a homeless veteran preference would be found to cause disparate impact on the basis of sex.

To make a prima facie showing of disparate impact in violation of the FHA, a plaintiff must: (1) show "statistically-imbalanced" tenancy patterns that "adversely impact a [protected] group"; (2) identify a facially-neutral policy used by the defendant; (3) allege that the policy was "artificial, arbitrary, and unnecessary"; and (4) "provide factual allegations that meet the

'robust causality requirement' linking the challenged neutral policy to a specific adverse [] disparity." *See City of Miami v. Bank of America Corp.*, 171 F. Supp. 3d 1314, 1320 (S.D. Fla. 2016) (quoting *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 125 S. Ct. 2507, 2522-24 (2015).

To successfully lodge a disparate impact challenge to a homeless veteran tenancy preference, a plaintiff would first have to establish that the housing provider's facially neutral preference policy has actually caused a "statistically-imbalanced" tenancy pattern. Most housing providers who accept homeless-veterans under such a program would only do so for a portion of their units, thus not causing a statistically significant impact. In the unlikely event that a particular housing provider's policy was applied so uniformly over such a period of time as to cause a statistically significant imbalance in the sexes of that provider's tenant population, the plaintiff would still have to establish that the preference was "artificial, arbitrary, and unnecessary."

Although it could be argued that it is not the housing provider, but the program itself that could generate statistically significant disparities in beneficiaries, there is still reason to believe such preferences are allowed. In 2013, the U.S. Department of Housing and Urban Development (which also has regulatory and enforcement authority under the Fair Housing Act) issued guidance to public housing agencies ("PHAs") on issues related to addressing homelessness through the Public Housing and Housing Choice Voucher programs. U.S. Dept. of Housing & Urban Dev. Notice PIH 2013-15 (HA), June 10, 2013 (available at https://www.hud.gov/sites/documents/PIH2013-15.PDF). According to HUD's guidance, "[a] PHA's greatest tool for increasing program access for individuals and families experiencing homelessness is establishing a preference in their admissions policies" for homeless persons "or a subset of such persons (e.g., . . . homeless veterans . . .)," subject to compliance with all applicable fair housing and civil rights laws. *Id.*, at 4.

Although HUD's guidance does not apply directly to private housing providers, it is persuasive in two regards. First, HUD affirmed that homeless tenancy preferences, including specifically for homeless veterans, may be a critical tool in addressing homelessness in communities – hardly an "artificial, arbitrary, [or] unnecessary" policy that should give rise to disparate impact liability. Second, HUD's guidance specifically cautioned PHAs that any preferences must be enacted and administered consistent with fair housing laws. Had HUD been concerned that a homeless veteran preference would necessarily create an unlawful disparate impact under the FHA, surely HUD would not have explicitly suggested that such a preference might be an option for PHAs, which are required by law and regulation to comply with the FHA.

Finally, we note that private entities have, in the employment context, been held liable for disparate impact sex discrimination for applying veteran preferences in hiring. *See* e.g., *Bailey v. Se. Area Joint Apprenticeship Comm.*, 561 F. Supp. 895, 912 (N.D.W. Va. 1983); EEOC Notice N.915-056, "Policy Guidance on Veterans' Preference Under Title VII," Aug. 10, 1990 (stating that veterans preferences in hiring that are not specifically authorized by law are presumed to have a disparate impact against women under federal equal employment law); *but see Brown v. Puget Sound Elec. Apprenticeship and Training Trust*, 732 F.2d 726 (9th Cir. 1984) (upholding a program granting veterans a credit for their years of military service when calculating their qualifying age for an apprenticeship program).

There are several reasons, however, that this authority from the employment context is not persuasive as it would relate to tenancy preferences in housing for homeless veterans. First, HUD presumably was aware of the precedent in the employment context when it issued its 2013 PHA guidance on veterans' preferences, and had such disparate impact liability been contemplated in the housing context, it is unlikely that HUD would have suggested that PHAs could implement homeless veteran preferences consistent with the FHA. Second, we have

found no authority applying such disparate impact theories, or any FHA theories, to veteran preferences in the housing context. Third, the EEOC's 1990 Policy Guidance bases its conclusions on national statistics from a VA report in 1989 stating that only 4.4% of veterans at that time were women. But according to a 2017 VA study, women comprised 9.4 percent of the total veteran population in the United States in 2015 and are projected to make up 16.3 percent of all living veterans by 2043. Women Veterans Report, Department of Veterans Affairs, February 2017 (available at https://www.va.gov/vetdata/docs/SpecialReports/Women_Veterans_2015_Final. pdf) (last accessed Sept. 29, 2018). With the passage of time, the increased proportion of women among veterans generally (and homeless veterans specifically) will further attenuate any putative disparate impact that a plaintiff might allege.

II. Privately- and/or municipally-sponsored incentive funds may condition payments on the beneficiary's status as a homeless veteran without violating the federal Fair Housing Act.

The potential application of the federal Fair Housing Act to veterans' preferences in incentive funds follows essentially the same analysis as for tenancy preferences described above.

There is a potential threshold question whether, or to what extent, an incentive fund would be covered by the prohibitions of the FHA. That question would likely turn on specific facts about how each fund is structured and administered and for what purposes payments from the fund are used in connection with housing. But it is at least possible, if not likely, that such a fund would be subject to the FHA under one of two provisions. The Act prohibits discrimination in the "provision of services and facilities in connection" with the sale or rental of a dwelling, 42 U.S.C. § 3604(b), and also in "residential real estate-related transactions," which are defined to include financial assistance for "improving, repairing, or maintaining a dwelling," among other things. 42 U.S.C. § 3605. Because the FHA is generally interpreted broadly to give effect to its purpose, this memo assumes that the Act applies to prohibit discrimination in incentive funds of the type being encouraged by the Law Center and its partners.

For the same reasons as described above, however, it is unlikely that a homeless veterans' preference, or conditioning payments from the funds on the beneficiary's status as a homeless veteran, would violate the FHA. Because veteran status is not itself a prohibited basis or a proxy for one, and assuming there is no evidence that an incentive fund administrator has discriminatory intent in enacting a homeless veteran preference, such a preference would not constitute disparate treatment. In addition, the remedial aims of the fund to assist a vulnerable population (homeless veterans) would likely constitute a sufficient legitimate justification to establish that it is not "artificial, arbitrary, and unnecessary," and thus violation of the Act.

Conclusion

Although there appears to be scant authority on veterans' preferences in housing, HUD's 2013 PHA guidance suggests what a legal analysis under the federal Fair Housing Act would appear to confirm – the implementation of homeless veteran preferences for tenancy or in the creation and administration of incentive funds would not violate the Act absent some evidence of discriminatory intent.

However, because a disparate impact challenge to such preferences on the basis of sex is at least theoretically possible, though unlikely, housing providers and the creators and administrators of incentive funds would be well advised to ensure that they have legitimate purposes when implementing such preferences – including, but not limited to, assisting in community efforts to reduce homelessness among a vulnerable population. Such legitimate purposes, especially

if contemporaneously documented, would help establish a lack of discriminatory intent. By making clear the legitimate justification for the policy, it would also help support an argument that the veterans' preference does not constitute disparate impact.