

# NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY

Regulations Division  
Office of General Counsel  
451 7th Street SW., Room 10276  
Department of Housing and Urban Development  
Washington, DC 20410-0500

May 10, 2016

**Re: Docket No.FR -517-N-08**

Affirmatively Furthering Fair Housing Assessment Tools

The National Law Center on Homelessness & Poverty (“NLCHP”) appreciates the opportunity to comment on specific issues related to the U.S. Department of Housing and Urban Development’s (“HUD”) Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas (the “Tool”).

The Tool uses the classifications of individuals protected from housing discrimination set forth in the Fair Housing Act (the “Act”), Title VIII of the Civil Rights Act of 1968. The Act was amended in 1988 to expand the list of protected classifications, which now include (1) race, (2) color, (3) national origin, (4) religion, (5) sex, (6) handicap and (7) familial status. As HUD reviews comments and finalizes the Tool, NLCHP encourages HUD to supplement or clarify the Tool and guidance to account for people experiencing homelessness, a group often targeted as a proxy for one or more protected classes and which suffers discrimination, exclusion, and segregation disproportionately. We believe that considering data and analyzing how local policies can serve to include or exclude this populations is critical to a full fair housing analysis.

Individuals and families who are racially or ethnically non-white are more likely than the white population to experience homelessness.<sup>1</sup> This is true even when accounting for income disparities. Persons with mental or physical disabilities are also disproportionately likely to

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<sup>1</sup> U.S. Interagency Council on Homelessness, *Council Confronts Racial Disparities in Homelessness, Reducing Criminal Justice System Involvement*, available at <https://www.usich.gov/news/council-meeting-update-October-2015> (Nov. 5, 2015). U.S. Dep’t of Housing & Urban Dev. Off. of Community Planning & Dev., *The 2015 Annual Homeless Assessment Report (AHAR) to Congress*, available at <https://www.hudexchange.info/resources/documents/2015-AHAR-Part-1.pdf>.

experience homelessness.<sup>2</sup> And animosity towards people experiencing homelessness is often based on racial, ethnic or disability stereotypes.<sup>3</sup>

Just as governmental policies that limit or exclude affordable housing serve to create or perpetuate segregation because of the disparate effect on racial and ethnic minorities, governmental policies that limit or exclude people experiencing homelessness from residing in a community serve to create and/or perpetuate segregation on the basis of race, ethnicity, and/or disability.

We urge HUD to require analysis of data and certain types of laws and policies that impact homeless and high-need populations as part of the factors that contribute to segregation/integration, racially or ethnically concentrated areas of poverty (R/ECAPs), disparities in access to opportunity and disproportionate housing needs. Governmental laws and policies can have a particularly deleterious effect on people experiencing homelessness because they are often forced to live in public space or to rely on publicly funded or regulated shelters or food. Recent years have seen a dramatic growth in local and state laws criminalizing people for experiencing homelessness,<sup>4</sup> even as the federal government has pushed hard to discourage the same.<sup>5</sup> In fact, the Department of Justice recently filed a statement of interest in a federal lawsuit in Idaho that criminalizing homelessness through anti-camping ordinances when a locality does not provide sufficient homeless shelters is cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution.<sup>6</sup> Additionally, in September 2015, as part of its second Universal Periodic Review by the UN Human Rights Council, the U.S. government committed to “[i]nvest further efforts in addressing the root causes of recent racial incidents and expand its capacity in reducing poverty in neighborhoods experiencing sub/par public services, including access to adequate housing and public safety” and “[a]mend laws that criminalize homelessness and which are not in conformity with international human rights instruments.”<sup>7</sup>

The laws and policies that act to criminalize homelessness or push out people experiencing homelessness, such as anti-camping laws or police sweeps, also facilitate segregation by forcing homeless populations out of some neighborhoods and result in consolidation in other neighborhoods. While this takes on different forms, one pattern is to corral people

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<sup>2</sup> The Substance Abuse and Mental Health Services Administration estimates that 20 to 25% of homeless Americans suffer from some form of severe mental illness. In comparison, only 6% of Americans are severely mentally ill. NAT'L COAL. FOR THE HOMELESS, MENTAL ILLNESS AND HOMELESSNESS (2009), available at [http://www.nationalhomeless.org/factsheets/Mental\\_Illness.pdf](http://www.nationalhomeless.org/factsheets/Mental_Illness.pdf).

<sup>3</sup> Kaya Lurie, et al., *Discrimination at the Margins: The Intersectionality of Homelessness & Other Marginalized Groups* (May 6, 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2602532](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602532).

<sup>4</sup> Nat'l Law Ctr. on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* (2014), available at [https://www.nlchp.org/documents/No\\_Safe\\_Place](https://www.nlchp.org/documents/No_Safe_Place).

<sup>5</sup> See, e.g., U.S. Department of Justice, *Justice Department Files Brief to Address the Criminalization of Homelessness*, <https://www.justice.gov/opa/pr/justice-department-files-brief-address-criminalization-homelessness>; U.S. Department of Justice Community Oriented Policing Services, *Community Policing Dispatch*, <http://cops.usdoj.gov/html/dispatch/12-2015/index.asp> (December 2015); National Law Center on Homelessness & Poverty, *The Cost of Criminalizing Homelessness Just Went Up by \$1.9 Billion*, [https://www.nlchp.org/press\\_releases/2015.09.18\\_HUD\\_NOFA\\_criminalization](https://www.nlchp.org/press_releases/2015.09.18_HUD_NOFA_criminalization).

<sup>6</sup> See Statement of Interest of the United States, *Bell v. City of Boise*, No. 1:09-cv-540-REB (D. Idaho Aug. 6, 2015).

<sup>7</sup> Report of the Working Group on the Universal Periodic Review, United States of America, A/HRC/30/12, ¶ 176.124, 310 (July 20, 2015).

experiencing homelessness to an area on the outskirts of town, far from jobs or opportunity, at times removed from public transportation or access to education. This has impact on segregation, R/ECAPs and access to opportunity. Another common practice is to sweep encampments of people experiencing homelessness who lack any adequate alternatives. Where the local practice is to repeatedly remove people and their belongings, the intent of effect may be to force people to leave the jurisdiction altogether- or to push people experiencing homelessness into particular neighborhoods, generally those that are R/ECAPs and lack access to opportunity.

This issue, however, is not limited to criminal laws or policies. Zoning or other regulatory laws and policies may target organizations that provide services to homeless and high-need populations by imposing unrealistic or expensive requirements. These regulations have the effect of limiting services to homeless populations in that area, such as requiring security in order to obtain or maintain a business license or selective enforcement (or imposition) of building code requirements. The result is that homeless and high-need populations are often forced to relocate after being told explicitly, “your kind is unwelcome here.”

It is important to note that these policies, which have a direct and long term impact on the spatial living patterns of our most deeply impoverished neighbors, also have tremendous impacts on their immediate efforts to escape poverty and homelessness. With instability and dislocation come the interruption of services. With exclusion from job rich areas comes increased difficulty in finding or keeping a job or accessing services. With removal of encampments often comes interruptions in basic services, including water, food, and sanitation.

### *Specific Recommendation*

1. Add “Access to public space for people experiencing homelessness” as a contributing factor throughout the assessment. Laws that criminalize homelessness or otherwise burden the use of, or access to, public space for those without shelter or housing have a deleterious and segregative impact on living patterns and fair housing opportunity that is not captured in any of the other contributing factors. In particular, this factor needs to include threats or civil or criminal sanctions for sitting, resting, lying, sleeping, eating, sharing food, or conducting other life sustaining activities on public property or in a legally parked vehicle while no other decent and accessible alternatives are available. Program participants must analyze whether such policies and practices that forcibly move people or otherwise cause people to dislocate have a segregative effect in the state and whether they increase concentrations of R/ECAPs. Program participants should also consider whether displacement or exclusion that results from these laws leads to a reduction in access to water, sanitation, transportation, jobs, schools, services or other infrastructure or indicators of opportunity. Where such policies lead to worse living conditions that should be discussed in disparate housing needs and where such policies or practices lead to a loss of services for persons with disabilities, that should be discussed in the section on persons with disabilities. In discussions of public expenditures, it would be helpful to analyze how much the program participant spends on criminalization policies, to include cost of police, hospital, jail/prison/detention, court costs, and the cost of moving people and moving or destroying property.
2. Specifically reference laws that have the effect of restricting or allowing provision of services to persons experiencing homelessness (including transitional shelters, day shelters, soup kitchens, or other provision of services) in the definitions of “land use and zoning laws” as well as “occupancy codes and restrictions.” In the alternative, HUD

could create a factor that mirrors “regulatory barriers to providing housing and supportive services for persons with disabilities,” which appears to serve the same purpose with respect to the fair housing analysis for persons with disabilities.

3. When discussing affordability of housing units in the definitions section and throughout, it is important to clarify that it is not enough to have units that are affordable at 80% AMI or other moderate incomes. Whether looking at inclusionary zoning or other policies that support affordable housing, it is important to consider what income levels are included and which are excluded. The availability of housing at different affordability levels needs to be included in the definitions of “location and type of affordable housing” and “availability of affordable units in a range of sizes.” It also should be part of the analysis of restrictions placed on affordable housing through other contributing factors, including but not limited to land use, zoning laws, and occupancy codes and restrictions.
4. The section on disproportionate housing needs should include data and analysis on the population of people experiencing homelessness that are currently unhoused. The most extreme form of disproportionate housing need is homelessness and this is an important factor. To fully analyze the fair housing situation, program participants need to understand better the demographics of the population experiencing homelessness in the jurisdiction/region.
5. Specifically reference the commitments the U.S. made during the Universal Periodic Review to “[i]nvest further efforts in addressing the root causes of recent racial incidents and expand its capacity in reducing poverty in neighborhoods experiencing sub/par public services, including access to adequate housing and public safety” and “[a]mend laws that criminalize homelessness and which are not in conformity with international human rights instruments” among other reasons for implementing the Tool.

NLCHP thanks HUD for the opportunity to comment on the Affirmatively Furthering Fair Housing Assessment Tool. If you have any questions or would like any additional information in connection with any of our comments, please contact me at [jhostetler@nlchp.org](mailto:jhostetler@nlchp.org) or 202-638-2535.

Sincerely,

Janet M. Hostetler

Deputy Director

The National Law Center on Homelessness & Poverty

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