



OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

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MEMORANDUM FOR: Fair Housing Assistance Program Participants

FROM: Joseph A. Pelletier, Director, Fair Housing Assistance Program

SUBJECT: Fair Housing Assistance Program Requirements Related to Conciliation
and Conciliation Agreements

The purpose of this memorandum is to remind Fair Housing Assistance Program (FHAP) participants of the specific statutory, regulatory, and contractual requirements related to conciliation, as well as to reinforce FHAP participants' understanding of their proper role with respect to conciliation. With limited exceptions, the technical aspects of conciliation (*e.g.*, transmittal of offers, recording of conciliation attempts, termination) are not addressed herein; FHAP participants should refer to the relevant sections of the *Title VIII Complaint Intake, Investigation, and Conciliation Handbook*, 8024.0 (the '*Handbook*').

The FHAP Division is concerned that some FHAP participants do not appear to understand their role in the conciliation process, with the result that conciliation agreements approved by such agencies fail to provide meaningful and substantive relief. FHAP agencies must understand and fulfill their role in helping the parties craft provisions in conciliation agreements that provide appropriate levels of compensation to individuals as well as meaningful public interest relief.

The Role of the FHAP Agency Conciliator

The Fair Housing Act and its implementing regulations require that conciliation be attempted from the time of the filing of a complaint until the issuance of a charge or dismissal.¹ Section VII(E) (1) and (2) of the Memorandum of Understanding (MOU) between HUD and each FHAP participant extends this affirmative obligation contractually to FHAP agencies.² Thus, FHAP participants must engage in meaningful attempts to conciliate the complaint throughout the course of an investigation, but not before a complaint is actually filed.

As articulated in § 11-3 of the Handbook, the role of the conciliator is to facilitate a conversation around trying to have the parties reach agreement. Aside from early-stage conciliation,³ before attempting conciliation the conciliator should have a realistic understanding of the strengths and weaknesses of the case, and should be familiar with the parties' positions and resources in addition to the types of public interest relief that would be appropriate. The conciliator should provide all parties with a realistic context by describing the remedies available under the Act, as well as the types and amounts of relief that have been awarded to complainants

¹ 42 U.S.C § 3610(b)(1); 24 C.F.R. § 103.300.

² See also the discussion of conciliation at 24 C.F.R. § 115.206(c); (e)(3) (discussing Performance Standard #3).

³ Early-stage conciliation *may* be appropriate in some situations. See, § 11-13(A) of the *Handbook*.

who have prevailed on the merits of complaints based upon similar allegations. While a conciliator should refrain from behaving in a manner that suggests partiality or that they have an emotional or professional stake in the outcome, they should nonetheless actively assist in crafting the terms of the agreement.

The FHAP Agency's Role in Approving a Conciliation Agreement

As the FHAP program's implementing regulations make clear, FHAP agencies are a party to a conciliation agreement and are responsible for approving such agreements: a conciliation agreement "shall be an agreement between the respondent, the complainant, and the agency and shall require the approval of the agency."⁴ Section VII(E)(2) of the MOU explicitly states "the Agency will attempt to get a just resolution of the complaint and to obtain assurances that the respondent will satisfactorily remedy any violations... and take such action as will assure the elimination of the discriminatory housing practices, or the prevention of their occurrence in the future." The FHAP agency is thus an active participant in the conciliation process, and is not a disinterested third-party simply accepting and approving whatever agreement the parties reach on their own.

As a signatory to the agreement, the FHAP agency has an obligation to ensure that the terms of the agreement adequately address the allegations of the complaint by providing both appropriate, substantive individual relief and relief designed to vindicate the public interest. This affirmative obligation means that the agency should not sign an agreement simply because the other parties agree to it if the conciliator or responsible agency officials believe that the relief provided is inadequate to either address the alleged harm or to prevent the conduct from reoccurring in the future.⁵ With respect especially to public interest relief, the FHAP agency must take the lead on identifying and seeking a respondent's agreement to include provisions that will address and/or prevent harm to others beyond the immediate complainant.

Nature of Conciliation Agreements

A conciliation agreement is a single agreement between all parties, including the FHAP agency, and is subject to approval by the FHAP agency. A conciliation agreement cannot include separate side agreements, or agreements only between a complainant and a respondent (*i.e.*, without the approval of the agency). FHAP participants must also remember that conciliation agreements are public documents and should indicate their public nature, unless: (i) both complainant and respondent request nondisclosure in writing, and (ii) the head of the agency determines that disclosure is not required to further the purposes of the law.⁶ Examples of circumstances that may result in partial or complete nondisclosure of a conciliation agreement, include: "sexual harassment claims; a complainant's physical or mental condition or medical

⁴ 24 C.F.R. § 115.204(a)(2)(iv)

⁵ Substantive individual relief includes both monetary relief (which should be appropriate to the facts of the case) and other affirmative relief required to make the complainant(s) whole (*e.g.*, approval or restoration of a housing opportunity, approval of a reasonable accommodation or reasonable modification request).

⁶ 24 C.F.R. § 115.204(a)(2)(iv).

diagnoses; or the fact that a complainant is a resident in a domestic violence shelter or other protected residence which complainant believes may, if disclosed, be a safety risk.”⁷

Monitoring and Enforcement of Conciliation Agreements

Finally, FHAP agencies are reminded that Performance Standard #4, 24 C.F.R § 115.206(e)(4), requires the conduct of compliance reviews of conciliation agreements. Compliance with the performance standard requires that the agency have in place and follow procedures for conducting such reviews, and that the conciliation agreements themselves include explicit monitoring provisions. This requirement is repeated at § V(A)(9) of the annual Criteria for Processing, which stipulates that conciliation agreements must contain “provisions that allow the FHAP agency to effectively monitor compliance with the Agreement.”

Section VII(E) of the MOU between HUD and each FHAP participant further requires that the agency “obtain assurances that the respondent will satisfactorily remedy any violations... and take such action as will assure the elimination of the discriminatory housing practices, or the prevention of their occurrence in the future.” Therefore, when an agency finds either through its monitoring or otherwise that there has been a breach of the terms in the conciliation agreement, the agency must take action to enforce, or seek enforcement of, the agreement on behalf of the complainant.

Questions regarding this guidance should be directed to the FHAP GTR or GTM assigned to your agency.

⁷ 2017 Criteria for Processing, § V(A)(8).