

M E M O R A N D U M

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TO: James N. Arbury
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FROM: Andrew L. Sandler
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RE: National Multi-Housing Council v. Jackson

In a March 28, 2008 Order, Judge Robertson, United States District Court Judge for the District of Columbia, dismissed the Complaint filed by the NMHC and NAA against HUD challenging the Limited English Proficiency (“LEP”) Final Guidance issued by HUD on March 7, 2007. In a Memorandum Opinion (“Opinion”) accompanying the Order, Judge Robertson held that the NMHC and the NAA do not have legal standing to bring two of the claims, and that the third claim is not yet ripe for review. While ultimately favorable to HUD, Judge Robertson’s Opinion stresses that the Final Guidance imposes no requirements on the NMHC’s and the NAA’s members (“Members”), and that any enforcement action by HUD relating to language services may not rely on the Final Guidance. A copy of the Opinion is attached.

Summary of Opinion

With respect to standing, Judge Robertson ruled that the NMHC and the NAA may not pursue their claims regarding the distinction between national origin and language discrimination and the availability of a disparate impact theory under Title VI because (1) the Final Guidance is a non-binding, malleable standard that imposes no requirements on the housing groups; and (2) the legal injuries asserted by the housing groups do not arise from the Final Guidance itself. (Opinion at pp. 6-12). With respect to the NMHC’s and the NAA’s third claim – that the Final Guidance is unlawfully vague and overly burdensome – Judge Robertson ruled that it is not yet ripe for review because HUD has not applied the Final Guidance to any of the Members, and the benefits of waiting for any such action before ruling on the

merits outweighs the harms to the Members. Essentially, Judge Robertson indicated that a court could consider the arguments set forth in the Complaint only in the context of a specific action by HUD against a recipient.

Impact on Members

Despite Judge Robertson’s ruling dismissing the Complaint, several statements in his Opinion, as well as statements made during oral argument preceding the issuance of his Order, undercut any attempt by HUD to pursue enforcement actions based solely on the Final Guidance. First, Judge Robertson stresses in the Opinion that the Final Guidance sets forth a “malleable,” “flexible” and “fact-dependent” standard that ultimately “does not create any new obligations.” (Opinion at pp. 12-13). More importantly, and as a corollary to this finding, Judge Robertson explains that HUD may not terminate funding to any of the Members without first “prov[ing]”, regardless of the Final Guidance, that a specific failure to provide language services to LEP persons had the effect of “defeating or substantially impairing accomplishment of the [funding] program as respects individuals of a particular . . . national origin.” (Opinion at p. 13).

Furthermore, at oral argument before Judge Robertson, counsel for HUD stated definitively that the Final Guidance “imposes no obligation on the recipients to do anything whatever” and that “if [the Members] choose to ignore it, they’re safe in doing so.” While we do not recommend that Members ignore the Final Guidance, these statements strongly suggest that, from HUD’s perspective, the Final Guidance does not articulate new policy or establish a new avenue for enforcement.

Next Steps

The NMHC and the NAA are entitled to appeal Judge Robertson’s ruling to the Circuit Court of Appeals within sixty days of the ruling. Reversal of Judge Robertson’s ruling is unlikely, however, as the Court of Appeals typically gives great weight to the District Court’s decisions. Even without an appeal, however, HUD is now on record as stating that the Final Guidance imposes no requirements on Members to provide language services. Furthermore, the industry continues to work with HUD and Congress to clarify the impact of Title VI regulations with respect to language services and to ensure that translations of critical documents are provided by HUD. Finally, should HUD attempt to cut off funding to any Member based on a failure to provide language services, the Final Guidance will not be a dispositive factor in any ruling.