

IMMIGRANTS' ACCESS TO PROGRAMS AND SERVICES NECESSARY TO PROTECT LIFE AND SAFETY AND POST ASSAULT HEALTH CARE

By: Kilpatrick Townsend & Stockton LLP, Laura Waters and Leslye E. Orloff

Collaboratively developed by RAKSHA, Pennsylvania Immigrant & Refugee Women's Network (PAIRWIN), VIDA Legal Assistance and Legal Momentum.

General

U.S. based domestic violence and homeless shelters, rape crises centers, crime victim services, transitional housing programs, food banks, emergency health care and other programs and facilities are designed to serve women and children of every class, race, ethnicity, religion and national origin and, as such, they will not deny access to help, support, protection and safety to victims of domestic violence, sexual assault, child abuse, elder abuse or human trafficking regardless of immigration status. Federal legislation, regulations, policy directives, and executive orders uniformly recognize and affirm the right of *any* person in the country to have protection from domestic violence, sexual assault, human trafficking and/or crime victimization and provide all persons with access to services necessary to protect their life and safety. Additionally, the Department of Homeland Security strongly encourages that enforcement officers use prosecutorial discretion when determining whether to pursue an enforcement action for violation of civil immigration laws against crime victims and advises that enforcement actions should not take place at sensitive locations such as domestic violence shelters, rape crisis centers, family justice centers, community based organizations, courthouses, visitation centers, schools, funerals, and religious institutions.

Basis for Access Under Federal Law

PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY ACT OF 1996

Under the Personal Responsibility and Work Opportunities Act of 1996 (PRWORA), if a publicly funded program or service is necessary for the protection of life and safety, it is exempt from restrictions on immigrant access to federal, state and local public benefits. These programs include but are not limited to police, fire, emergency medical technician and ambulatory services, emergency Medicaid, emergency shelter, transitional housing, soup kitchens, disaster relief, access to the courts and victim services. Under the supremacy clause of the United States Constitution, after the passage of PRWORA, federal preemption laws do not permit states to regulate in the field of public benefits provided to immigrants without obtaining affirmative federal authority to do so.

The PRWORA gives the U.S. Attorney General the authority to exempt certain programs from any restrictions on immigrant access to services and benefits, regardless of whether the programs offering these services are state, locally, privately or federally funded. On January 16, 2001, the U.S. Attorney General issued final regulations specifying what community programs were necessary for the protection of life and safety under PRWORA. The Attorney General's final regulations deem the following non-exhaustive list of programs that are as a matter of federal law required as a matter of

federal law to be open to all persons without regard to immigration status because they are necessary to protect the life and safety of all community members, including immigrants. Programs open to all persons including immigrants:

Are community-based,
Offer in-kind¹ services,
Offer services to all persons without regard to the applicant's economic means; and
Provide services or assistance that is necessary for the protection of life and safety.

Programs deemed under federal law to be necessary to protect life and safety include and are not limited to the following types of programs:

- ***Crisis counseling and intervention programs.*** Includes domestic violence, rape crisis, mental health counseling and treatment for domestic abuse and sexual assault survivors and child and elder abuse survivors.
- ***Services and assistance relating to child protection.*** Includes services to child abuse, incest and sexual assault victims.
- ***Adult protective services.*** Includes services to elder abuse victims, elder victims of human trafficking, and elder victims of crime. Elder abuse victims include victims of physical, sexual, and psychological abuse, neglect, abandonment, financial exploitation by another person or entity, and/or stalking.
- ***Violence and abuse prevention.*** Includes domestic violence, sexual assault, child abuse, incest, elder abuse, trafficking and crime victim related outreach, education and prevention activities.
- ***Services to victims of domestic violence or other criminal activity.*** Includes the full range of services, assistance and treatment for victims of domestic violence, sexual assault, incest, child and elder abuse, trafficking and crime victim services. This includes full access to protections offered by state and federal courts in civil, criminal, family and protection order matters.
- ***Treatment of mental illness or substance abuse.*** Immigrant victims of domestic violence, sexual assault, incest, trafficking and family violence can access mental health treatment programs that are necessary to protect life and safety.
- ***Programs to help individuals during periods of adverse weather conditions.*** Earthquakes, tornados, hurricanes, floods, wildfires, heat, dam failures, landslides, nuclear power plant emergencies, thunderstorms, tsunamis, volcanoes, and winter storms.
- ***Short-term shelter or housing assistance for the homeless, for victims of domestic violence, or for runaway, abused or abandoned children.*** U.S. Department of Housing and Urban Development defines short term shelter or housing assistance to include emergency shelter and transitional housing of up to two years duration. Victims of sexual assault may qualify for emergency shelter and transitional housing as child abuse, elder abuse or domestic violence

¹ "In-kind" services are those that involve the provision of goods or services, not cash payments, to persons. These services could include food, clothing, shelter, legal assistance, counseling, protection orders and victim services.

victims or because they are homeless.

- ***Soup kitchens and community food banks.*** Soup kitchens are defined as established feeding operations that provide food for the needy homeless. Food banks are public or charitable institutions that provide food or edible commodities to food pantries, soup kitchens, hunger relief centers, or other food center that provide food to needy persons.²
- ***Senior nutrition programs and other nutritional programs for persons requiring special assistance.*** Examples include the Women Infants Children Program, public education and school meals program, summer meals and medial assistance for people with AIDS.
- ***Medical and public health services and mental health disability or substance abuse assistance necessary to protect life and safety.*** This provision assures access to Emergency Medicaid and other services for the treatment and prevention of diseases and injuries.³
- ***Activities designed to protect the life and safety of workers, children and youths or community residents.*** Includes police, fire department, emergency medical personnel, and access to courts and to federal and state agencies responsible for enforcing labor laws. In the health care context, services include immunizations for children and adolescents, AIDS and HIV services and treatment, tuberculosis services and treatment for sexually transmitted diseases.

THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT

The Emergency Medical Treatment and Active Labor Act (EMTALA)⁴ is also often referred to as the federal “antidumping” statute. This law protects persons without health insurance from being denied life-saving medical treatment. EMTALA applies to any hospital with an emergency room participating in Medicare. It requires that any time a person comes to the emergency room for help, the hospital makes a determination of whether that person has an emergency medical condition or is in active labor. If so, the hospital must provide treatment sufficient to stabilize the condition. In addition, the law requires that patients whose emergency medical condition has stabilized not be transferred without the written certification of the physician on duty that the medical benefits of transfer outweigh the increased health risks to the individual due to lack of availability of medical treatment. These protections can be very important for victims of sexual assault and domestic violence who have low- income, lack health insurance, or are immigrants who do not otherwise qualify for Medicaid-funded health care. EMTALA also provides for penalties including loss of the right to participate in Medicare, and fines up to \$50,000, against hospitals and doctors who do not comply with EMTALA’s requirements.

COMMUNITY HEALTH CENTERS

Pursuant to the Omnibus Budget Reconciliation Act of 1990 the federal government provides grants to Federally Qualified Health Centers⁵ (FQHCs), otherwise known as Community Health Centers.

² 7 U.S.C. § 7501.

³ In addition to the benefits guaranteed by PRWORA, immigrant victims are guaranteed a range of health services under federal and state law regardless of immigration status. Further information about these medical and public health services, some of which are discussed later in the article, can be obtained in the Breaking Barriers Manual. ORLOFF, LESLYE & AMANDA BARON, *Access to Health Care for Immigrant Victims of Sexual Assault*, in BREAKING BARRIERS ch. 17.

⁴ 42 U.S.C. §1395dd (2007).

⁵ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 § 4161 (1990). For more information on FQHCs, see Claudia Schlosberg, *Immigrant*

Community health centers and migrant health centers fill the gap for many sexual assault and domestic violence victims who cannot otherwise access health care services. Community health centers are local, non-profit, community-owned health care providers serving low income and medically underserved communities. The national network of health centers provides high-quality, affordable primary care and preventive services, and often provide on-site dental, pharmaceutical, mental health, and substance abuse services. More importantly, the FQHCs improve access to care for millions of persons living in the United States regardless of their insurance status, immigration status or ability to pay. It is through community health centers that victims who do not qualify for Medicaid can receive health care.

Health Centers who receive FQHC grants must provide basic health services and services that help ensure access to basic health and social services. Such services include:

Primary care;

Diagnostic, laboratory, and radiological services;

Prenatal care;

Post-assault health care;

Cancer and other disease screening;

Well child services;

Immunizations against vaccine-preventable diseases;

Screening for elevated blood lead levels, communicable diseases and cholesterol;

Eye, ear and dental screenings for children;

Family planning services;

Preventive dental services;

Emergency medical and dental services; and

Pharmaceutical services.

FAIR HOUSING ACT

Domestic violence shelters and homeless are covered by the Fair Housing Act, which prohibits discrimination on the basis of race, national origin, color, religion, sex, familial status or disability. Discrimination in access to shelter services or other failures to comply with the Fair Housing Act could put a shelter at risk of becoming subject to lawsuits or government enforcement actions. To protect against this, it is advisable that shelters develop protocols for screening potential residents that are not

based on any discriminatory factors prohibited under the Act such as race, national origin, language capabilities or immigration status.

MCKINNEY HOMELESS ACT

In the eyes of the law, domestic violence shelters are considered homeless shelters because they assist battered women who would otherwise be homeless. Some domestic violence programs receive McKinney Homeless Act funds as programs which facilitate movement of homeless individuals and families to more permanent housing within two years. This Act places no alienage restrictions on who can access emergency shelter and short-term transitional housing facilities, nor does it require operators to inquire into the immigration status of its residents.

LEGAL SERVICES

LSC funded programs are allowed to provide legal counsel to undocumented immigrants if they have been battered or subjected to extreme cruelty by a spouse or parent, or a family member of their spouse or parent living in the same household.⁶ The Violence Against Women Act (VAWA) expanded the scope of services that Legal Services Corporation (LSC) grantees can provide to victims of domestic violence, sexual assault, trafficking and certain other crimes, regardless of their immigration status. First, grantees are now permitted to use both LSC and non-LSC funds to provide services to an undocumented immigrant that are "directly related" to the prevention of, or obtaining relief from, the battery or cruelty, sexual assault or trafficking, or the crimes such as those listed in section IOI(a)(15)(U)(iii) of the Immigration and Nationality Act or whose.⁷ Previously, such legal assistance by grantees was allowed only if supported wholly with non-LSC funds. Second, recipients are permitted to provide "related legal assistance" to otherwise ineligible immigrants who are victims of domestic abuse even if they are not married to (or the child of) their abusers. Previously, such assistance was allowed only if the domestic abuse was perpetrated by the spouse (or parent) of the victim. Third, grantees may provide related legal assistance, supported with LSC funds, to immigrant victims in addition to those who have been battered or subject to extreme cruelty.⁸ This includes victims of sexual assault or trafficking, immigrants who qualify for a U-visa or T-visa, and any immigrant whose child has been battered or subjected to extreme cruelty, sexual assault, or trafficking.

Federal Preemption of State Laws

The United States Constitution's supremacy clause requires that federal legislation in the field of public benefits preempt any state legislation that restricts access to these benefits provided under federal law. PRWORA fully controls and occupies the field determining as a matter of federal law what publically funded benefits and services are to be open to immigrants. PRWORA requires that programs necessary to protect life and safety be open to all persons without regard to immigration status. Laws passed by state and local governments, whatever their terms, do not have the legal effect of denying non-citizens access to federal public benefits and to access the federally guaranteed programs necessary to protect life and safety and the federally guaranteed access to health care, housing and legal services discussed above.⁹ Federal law only provides one area in which states are authorized to enact state laws limiting immigrant access and discriminating among immigrants with

⁶ Leslye E. Orloff et al., *Opening a Door to Help Legal Services Programs*, 37 J.L. POVERTY & POL'Y, 36, 36-45 (May-June 2003).

⁷ 8 USC 1101(a)(15)(U)(iii).

⁸ Letter from Helaine M. Barnett, President, Legal Services Corporation, to all Legal Services Corporation Program Directors (Feb. 21, 2006), available at <http://iwp.legalmomentum.org/cultural-competency/access-to-legal-services>.

⁹ See *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997).

regard to “programs of general cash public assistance.”¹⁰ Congress does not provide state and local governments with the authority to limit state and local government non-cash benefits.

DHS Prosecutorial Discretion and Enforcement Recommendations

Through a series of memos,¹¹ the Department of Homeland Security has strongly indicated that undocumented immigrants should continue to have access to federally guaranteed life saving programs and should be encouraged to report crimes and assist law enforcement in the detection, investigation and prosecution of criminal activity perpetrated against them. Law enforcement officials are strongly discouraged from pursuing immigration enforcement against immigrant crime victims and witnesses and from undertaking enforcement actions at sensitive locations (schools, religious institutions, funerals) and must comply with federal Violence Against Women Act confidentiality laws that prohibit enforcement actions at domestic violence shelters, rape crisis centers, victim services, community based organizations, courthouses, family justice centers and visitation centers. If immigration enforcement officials rely on perpetrator provided information to initiate or pursue enforcement actions against crime victims the immigration case can be dismissed by DHS or an immigration judge. Additionally, DHS has indicated that enforcement officers should take special care to exercise prosecutorial discretion when deciding whether to pursue actions against pregnant or nursing women, minors and elderly individuals, victims of domestic violence, trafficking, or other serious crimes, individuals who suffer from a serious mental or physical disability, and individuals with serious health conditions. DHS maintains that absent special circumstances, enforcement actions should not be taken against victims or witnesses to a crime.

¹⁰ 8 U.S.C. § 1101(a)(3)

¹¹ ¹¹ DHS Broadcast Message on New 384 Class of Admission Code (December, 2010); Available at: <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message%20to%20DHS%20384%20COA%20Final%2012.21.10.pdf/view> (This DHS memo directs DHS officials to identify victims with pending or approved VAWA confidentiality protected cases and to not initiate enforcement, detention or removal actions against these victims); *Memorandum of John P. Torres, Director of the Office of Detention and Removal Operations, Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005*, (Jan. 22, 2007). (VAWA confidentiality provisions prohibit the government from relying on information given by the abuser, from disclosing information relating to any immigrant that has filed for a VAWA self-petition, U-Visa, or T-visa, and from enforcing actions at shelters, rape crisis centers, victim services programs, community based organizations, courthouses, supervised visitation centers, or family justice centers without certification under oath that the other provisions have not been violated.) Available at: http://iwp.legalmomentum.org/vawa-confidentiality/government-memoranda-and-factsheets/VAWA%20CONF_Torres%20ICE%20VAWA%20Confidentiality%20Memo_1.22.07.pdf *Memorandum of John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, (June 17, 2011). Available at: <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf/view>; *Memorandum of John Morton, Director, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, (June 17, 2011). Available at: <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton%206.17.11prosecutorial-discretion-memo.pdf/view>; *Memorandum of John Morton, Assistant Secretary, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions*, (Aug. 20, 2010). Available at: <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/aliens-pending-applications.pdf/view>; U.S. Citizenship and Immigration Services, *Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11-16 (PM-602-0029)* (February 4, 2011), available at: <http://www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/coordination-adjud-removal-proceedings.pdf>. John Morton, Director, *Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens* (March 2, 2011) <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-Civil%20Immigration%20Enforcement%20Memo%2003-02-2011.pdf> *Memorandum from Peter S. Vincent, Principal Legal Advisor, Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sept. 25, 2009) <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Vincent%20Memo%20Guidance%20Regarding%20U%20Nonimmigrant%20Status.pdf>; *Memorandum from Julie L. Myers, Assistant Secretary of ICE, Prosecutorial and Custody Discretion* (Nov. 7, 2007) <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Myers%20Memo%20Custody%20Discretion%2011-7-07.pdf>; *Memorandum from William I. Howard, Principal Legal Advisor, VA WA 2005 Amendments to Immigration and Nationality Act and 8 U.S.C. § 1367* (Feb. 1, 2007); *Director John P. Torres and Director Marcy M. Forman, Interim Guidance Related to Officer Procedure Following Enactment of VAWA 2005* (January 22, 2007). http://iwp.legalmomentum.org/vawa-confidentiality/government-memoranda-and-factsheets/VAWA%20CONF_Torres%20ICE%20VAWA%20Confidentiality%20Memo_1.22.07.pdf

Non-Profit Charitable Organizations

Victim assistance and victim services programs are required, as a matter of law, to offer their services equally to all victims, without regard to the victim's immigration status. Non-profit charitable organizations are specifically exempted from Department of Homeland Security verification and reporting requirements. Congress explicitly confirmed that nonprofit charitable organizations have no legal obligation to inquire about or report the immigration status of persons who seek their services.

What Does This Mean? The Risk of Prosecution for Discrimination and Loss of Federal Funding

All programs that provide services necessary to protect life and safety, HHS funded health programs that federal law requires be open to all persons, legal services for victims, and housing programs for the homeless or subject to fair housing laws must serve all persons regardless of immigration status. State laws cutting immigrants off from programs and services guaranteed under federal law are constitutionally preempted. Although some undocumented immigrants will remain ineligible for certain federal benefits and state cash benefits programs, agencies that deny federally guaranteed programs and services to immigrants risk being in violation of Title VI for national origin discrimination. Title VI of the Civil Rights Act of 1964 "prohibits discrimination on the basis of race, color, or national origin in any program or activity, whether operated by state, local, or private entity, that receives federal funds or other federal financial assistance."¹² Programs that deny undocumented immigrants federally guaranteed access to services and assistance that the applicant is otherwise eligible to receive based on the applicant's race, color, national origin, immigration status or ethnic surname programs violate Title IV. Programs that violate Title IV can lose federal funding. Programs can also violate Title IV if they act "upon the assumption that applicants with these characteristics are illegal aliens," or if they impose "additional eligibility requirements on ethnic or racial minorities because of their ethnicity or race."¹³ Domestic violence shelters, sexual assault crisis centers, and similar programs should continue to provide services and benefits to immigrant victims regardless of immigration status in order to ensure federal funding and compliance with federal law.

¹² Nondiscrimination Advisory, 62 Fed. Reg. 61,360 attachment 2 (Nov. 17, 1997)

¹³ *Id.*