

August 6, 2004

Secretary Alphonso Jackson
Michael Liu, Assistant Secretary for Public Housing
U.S. Department of Housing and Urban Development
451 Seventh Street, S.W.
Washington, DC 20410

Re: Ensuring Mobility and Portability in the Housing Choice Voucher Program

Dear Secretary Jackson and Assistant Secretary Liu:

We are writing to express our grave concerns about recent HUD actions authorizing local Public Housing Agencies (PHAs) to restrict housing mobility in the Housing Choice Voucher (HCV) program in response to the current Section 8 renewal funding crisis. Voucher mobility (including "portability" between jurisdictions) is one of the most important federal policy tools available to promote housing integration and deconcentration of poverty.¹ Authorizing PHAs to restrict housing mobility in the name of budget savings violates both the Section 8 statute and federal civil rights laws.

HUD began restricting choice last fall by cutting back on the use of exception payment standards which permit families to move to lower-poverty areas that have higher rents. HUD's decision to retroactively cut voucher funding in PIH Notice 2004-7 further increased incentives for PHAs to adopt policies that discourage or prohibit families from moving to higher-rent areas.² PHAs around the country are now denying thousands of families the right to move.³

¹ In this letter the terms "mobility" and "choice" refer to the ability to use a voucher to move to housing in areas selected by the HCV family. In many cases, the exercise of such choice allows families the opportunity to move from areas of concentrated poverty and racial segregation to areas that are less poor and more racially integrated. The statutory term "portability" refers to a specific type of mobility – moves across jurisdictional lines.

² While we also object to these other steps HUD has taken, this comment letter is limited in scope to the most recent HUD and PHA actions restricting tenants' right to move with their vouchers based on local budgeting concerns.

³ Results from a soon to be released survey by the National Association of Housing and Redevelopment Officials (NAHRO) reveal the extent of the restrictions resulting from HUD's renewal funding policies. NAHRO found that 288 PHAs in 46 states have implemented policies to cope with the shortfall. Fifty-one percent of those agencies, administering 20% of the country's vouchers, have developed policies to restrict portability. This means that, by December 31, 2004, 4,517 families will be denied their right to move. The same survey shows that 73% of the PHAs state that voucher holders will end up living in neighborhoods with higher concentrations of poverty.

In recent guidance to PHAs, HUD has affirmatively stated that portability of vouchers – a key feature of the Section 8 program since 1991 – may be disallowed by PHAs in order to protect local Section 8 budgets. We are writing to ask HUD to withdraw this advice and immediately notify PHAs that tenant mobility may not be restricted.

HUD is authorizing local PHAs to deny families the right to mobility and choice

In a recent webcast and followup guidance about how to respond to the renewal funding policy in PIH Notice 2004-7, HUD advises PHAs that, as a “last resort” if funding is “insufficient,” PHAs may deny permission to move to higher cost units within the PHA jurisdiction or deny portability moves to more expensive areas if the receiving PHA refuses to absorb the voucher.⁴ Consistent with this advice, many PHAs are now denying families the right to move with a Housing Choice Voucher.

We believe HUD’s instructions to PHAs that result in denials of choice and mobility violate federal fair housing laws, the U.S. Housing Act and HUD regulations. In order to comply with legal requirements, and to preserve the core concept of mobility in the HCV program, we ask HUD to instruct PHAs that they may not adopt policies restricting families’ right to move and that they must search all possible sources of funds to permit tenant mobility. In rare cases, where the PHA is able to document to HUD that it has no money available, HUD should bear the responsibility for paying the excess cost of a family’s move to a higher rent area.⁵

“Freedom of choice” is the defining characteristic of the HCV Program

A family’s right to choose where to rent a home is central to the aptly named Housing Choice Voucher program. Freedom of choice is what differentiates the tenant-based

On August 2, 2004, the Center on Budget and Policy Priorities posted updated data on actions taken by PHAs in response to HUD’s funding policies. That research shows that 26.7% of 176 agencies that have adopted or are considering changes in their policies to respond to HUD’s 2004 funding method are restricting or are considering restrictions on portability. These agencies administer 66,196 vouchers.

⁴ See PowerPoint slide 53 from HUD’s Webcast on Housing Choice Voucher Appropriations Implementation, June 21, 2004. HUD acknowledges that denying mobility is a “last resort” for the PHA in Slide 54 of the same presentation, which advises PHAs that “these steps should not be taken prior to a HUD analysis of PHA finances and PHA development of a plan to reduce costs via other means.” In its July 13, 2004 follow up to its June 14 and 21 webcasts, HUD elaborates on its advice concerning denial of portability. In its answer to Question # 15, HUD says the following (excerpts quoted here):

A PHA may in certain circumstances deny a family the right to exercise a portability move on the basis of 24 CFR 982.314(e)(1), keeping the following caveats in mind: 1. There must, in fact be insufficient funding for continued assistance. That is to say, the PHA must be able to demonstrate, through a detailed cost reduction plan supported by reasonable assumptions, that it will actually lack the funding to cover the housing assistance payments (HAP) for the family should the family move to a higher cost area. The PHA cannot simply deny a move to a higher cost area on the basis that it will cost more money, unless there actually is insufficient funding for continued assistance to the family

⁵ Alternatively, as suggested by HUD Notice PIH 2004-12 (posted on August 4, 2004), HUD may transfer the voucher to the receiving agency.

voucher program from all of HUD’s other programs. Congress defines “tenant-based assistance” as “rental assistance under subsection (o) that is not project-based assistance and that *provides for the eligible family to select suitable housing and to move to other suitable housing*” (emphasis supplied). 42 USC § 1437f(f)(7). Choice of where to live has been a hallmark of the program since its inception; the certificate program was known from 1975 on as the “finders-keepers” program. HUD’s HCV regulations emphasize that it is the family, not the PHA, that selects units, and that the family may receive continued assistance to move to a new unit so long as program requirements are met and the PHA has “sufficient” funding.⁶

We understand that some PHAs are denying all “portability” moves between jurisdictions, denying portability moves to more expensive jurisdictions, or terminating participants with portable vouchers. These actions violate the special status that Congress accorded to “portability” moves between PHA jurisdictions.⁷ Congress required portability to be allowed as a matter of right after the first 12 months of a tenancy.

Proposed restrictions on voucher mobility must be assessed in light of the PHA’s and HUD’s Fair Housing obligations.

Although the first objective of the HCV program is to provide tenant-based housing assistance to needy families, the program also seeks to promote racial and economic integration. HUD is required to “use its grant programs to assist in ending discrimination and segregation.” *N.A.A.C.P., Boston Chapter v. Secretary of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987). “All aspects of [HCV] program administration must be consistent with the HA’s obligation to operate the program in

⁶ The Housing Act at 42 USC § 1437f (r), addresses a family’s right to move under portability procedures. The HCV regulations are replete with provisions giving families the right to select units and to move either inside or outside of the PHA’s jurisdiction so long as program requirements are met. For example: 24 CFR § 982.1(a)(2) and (b)(1) provide that families may select units anywhere in the country so long as program requirements are met; § 982.301(a)(2) provides that a PHA may not discourage family from choosing to live anywhere in or out of PHA jurisdiction; § 982.353(f) provides that a family has “freedom of choice.” “The PHA may not directly or indirectly reduce the family’s opportunity to select among available units except as provided in (program rules);” § 982.301(a)(3) provides that a PHA must explain advantages of moving to an area with a low concentration of poor families; § 982.314(b) provides that a family may move with continued assistance if certain program requirements met (e.g., lease terminated, notice to vacate, tenant notice to terminate); § 982.353(a) provides that a family can receive assistance to rent anywhere in the jurisdiction unless restrictions are necessary to achieve desegregation or comply with court order; § 982.314(c) provides that a PHA may prohibit moving during the initial lease term and may prohibit more than one move per year; § 982.314(e)(2) provides that a PHA may deny permission to move in accordance with § 982.552(grounds for denial or termination); § 982.353(b) provides that subject to certain restrictions, a voucher holder or participant has the RIGHT to lease under portability. Finally, § 982.355 is explicit about the duties of PHAs where families seek to cross jurisdictional lines – the regulations provide that the receiving PHA “must administer assistance for the family,” and “must issue a voucher to the family,” § 982.355(a). Similarly, the regulations provide that “[t]he initial PHA must promptly reimburse the receiving PHA,” and the “PHA must manage the PHA tenant-based program in a manner that ensures that the PHA has the financial ability to provide assistance for families that move out of the PHA program under the portability procedures.” § 982.355(e).

⁷ 42 USC § 1437f(r): “Portability (1) In general. (A) Any family receiving tenant-based assistance under subsection (r) of this section may receive such assistance to rent an eligible dwelling unit if the dwelling unit to which the family moves is within any area in which a program is being administered under this section.”

accordance with civil rights requirements.” Fed.Reg. Vol 60, No. 127, 34661, July 3, 1995 (preamble to Section 8 Certificate and Voucher Conforming Rule).

Much of the available research suggests that the HCV program is a major, if not fully realized, resource for housing mobility and desegregation,⁸ and HUD has integrated fair housing goals into virtually every stage of the program. Statements of Section 8 program purposes incorporate civil rights objectives and prominently incorporate the goals of equal opportunity and affirmatively furthering fair housing. See 24 C.F.R. § 982.53. In addition to being prohibited from discriminating, PHAs have a separate and distinct legal duty “affirmatively to further fair housing,” which imposes “an obligation to do more than simply not discriminate itself.” *N.A.A.C.P., Boston Chapter v. Secretary of Housing and Urban Development*, 817 F.2d 149, 154 (1st Cir. 1987); *Langlois v. Abington Housing Authority*, 234 F.Supp 2d 33, 78-93 (D.Mass.,2002). The “affirmatively furthering” duty is especially implicated when a PHA seeks to limit the ability of participants to live in certain communities. Many of the moves that PHAs are denying are precisely those that are protected by fair housing laws – moves to better-integrated communities or to neighborhoods that may meet the needs of a person with disabilities.

To comply with the affirmative obligation, HUD requires PHAs to, at a minimum, “examine their programs or proposed programs, identify any impediments to fair housing choice within those programs, address those impediments in a reasonable fashion in view of the resources available . . . and maintain records reflecting these analyses and actions.” 24 C.F.R. § 903.7(o)(2). To our knowledge, no PHA attempting to restrict the right to move has undertaken the required fair housing analysis. Although HUD has instructed PHAs that they have the option to deny moves, it has failed to even mention the civil rights implications of such action and has undertaken no such analysis of its own guidance to PHAs.

When does a PHA have “insufficient funding”?

Relying on HUD’s guidance, PHAs are prohibiting moves to more expensive areas or units claiming that they lack “sufficient funding” for continued assistance.⁹ However, what HUD should be advising PHAs is that there is “sufficient funding” to maintain legally required choice and mobility if either the PHA *or HUD* has resources to make Housing Assistance Payments for a family that wishes to move. HUD could provide the additional funding needed to the initial agency or transfer the family’s voucher to what would be the receiving PHA, paying the higher per unit cost due to the receiving agency.

⁸ See John Goering et al., *Promoting Housing Choice in HUD’s Rental Assistance Programs - A Report to Congress*, U.S. Department of Housing and Urban Development, Office of Policy Development and Research (1995).

⁹ HUD appears to be erroneously interpreting § 982.314(e)(1), which provides that “the PHA may deny permission to move if the PHA does not have sufficient funding for continued assistance.” This provision must be interpreted narrowly, consistent with fair housing requirements, and must be read in conjunction with § 982.355(e), which requires that the “PHA must manage the PHA tenant-based program in a manner that ensures that the PHA has the financial ability to provide assistance for families that move out,” and instructs that “HUD may provide additional funding” to both sending and receiving PHAs for portability purposes.

Although there is no additional guidance as to what constitutes “sufficient funding,” a number of PHAs assert that they lack sufficient funding because they are running a current or projected deficit as a result of PIH Notice 2004-7. For many PHAs, the judgment that they lack “sufficient” funds is made without regard to their Section 8 reserves. Such an understanding of “insufficient funding” is wrong. Given the requirement of freedom of choice and mobility under HUD’s statutory, regulatory, and fair housing mandates, there is likely no scenario in which the PHA and HUD could claim insufficient funding for otherwise allowable moves. But if after completing HUD’s suggested financial and programmatic analysis, the PHA and HUD conclude that the PHA lacks sufficient resources, then HUD must supply payment for the HAP contract.

Suggested Approach to Preserve Mobility and Choice

Guidance to PHAs: We urge HUD to immediately rescind its previous advice and issue guidance instructing PHAs that the right to move with continued assistance may not be denied because of funding problems. We recognize that there may be circumstances where, because of the recent HUD cutbacks, a PHA may legitimately lack funds to assist a family seeking to move to a higher rent location. In these rare cases, HUD must pay the initial agency the additional cost to permit a family to make a mobility move. However, before demanding such funding from HUD, a PHA must undertake a thorough analysis of its Section 8 reserves, voucher turnover, and cashflow, to find additional funds. The PHA must also analyze and address the effect of its policy on fair housing opportunities for the family and demonstrate that there is no less discriminatory way to meet the financial shortfall. In short, the PHA must show to HUD that it has taken all other lawful cost-saving steps to avoid denying choice to that family.¹⁰

HUD’s Responsibility: HUD has the duty to implement fair housing laws and to further the goals of fair housing. The mobility aspect of the Housing Choice Voucher Program is a key civil rights opportunity, and HUD must do all it can to maintain the right to mobility and choice. HUD must promptly review a PHA’s request for funds to support a family’s move. If HUD concludes that the PHA has taken all appropriate steps to reduce costs and still comes up short, then HUD must pay the initial agency for the additional cost of the higher rent move. HUD must respond in this manner regardless of appeal deadlines for adjustment of inflation factors. Alternatively, HUD could transfer the voucher to the receiving agency and pay the increased per unit cost for which that agency is eligible.

Conclusion

Unless HUD does everything that it can to ensure the continued existence of “choice” in the Housing Choice Voucher program, families will be consigned only to those neighborhoods where landlords are still willing to participate in the program. As a direct result of HUD’s recent funding decisions, the number of such landlords is rapidly

¹⁰ Anecdotal evidence suggests that some PHAs are targeting moves to save costs, while at the same time issuing new vouchers, granting rent increases to current owners for participants who remain in their units, allowing new participants to rent at prices similar to that requested by the mover, and, at least in Massachusetts, failing to directly administer its vouchers in other jurisdictions, which would permit them to retain the entire administrative fee. Those families requesting their right to move are thus being singled out over others on whom the PHA may be expending additional funds.

shrinking as the program loses stability and credibility around the country. In many areas, denying the option to move will mean that families will be steered to the poorest, most segregated and most disadvantaged communities, thwarting the basic goals of the program and fair housing laws. Unless HUD acts quickly, this could mean the end of the voucher program's provision of access to areas of better opportunity for poor and minority families. Thus, we urge HUD to take all steps, including those suggested in this letter, to preserve the right to choice and mobility in the HCV program.

If it would be helpful, we would be available to meet with you as soon as possible to discuss this issue, to learn how HUD plans to address this problem, and to assist you in the effort to preserve choice and mobility in the Housing Choice Voucher program.

Sincerely,

/s/

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