

May 1, 2023

Office of Public and Indian Housing  
Office of Fair Housing and Equal Opportunity  
Office of General Counsel  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street, SW, Room 10276  
Washington, DC 20410-0500

**RE: Housing Choice Voucher Program: Rescreening of Porting Participants**

Dear colleagues,

We are writing to express our continuing concern regarding elective rescreening of Housing Choice Voucher families that choose to port their voucher across Public Housing Authority (PHA) jurisdictional lines. This illegal and duplicative process creates significant barriers to the portability rights of recipients and restricts their movement to areas of higher opportunity. This practice violates the Housing Choice Voucher statute and is inconsistent with HUD’s obligation to Affirmatively Furthering Fair Housing. We hope HUD will reconsider its position as set forth in the final portability rule in 2015 and issue clarifying guidance or revise its regulations to comply with the law.<sup>1</sup>

**Rescreening Current Participants Violates the Section 8 Statute<sup>2</sup>**

Congress has not granted PHAs authority to rescreen existing participants for behavior and suitability of tenancy.<sup>3</sup> PHAs’ authority to adopt their own elective screening practices is limited to new applicants for the program.<sup>4</sup> The Secretary outlined such requirements in the “Applicant screening” clause of 24 CFR § 982.552. By section title alone, it is clear that only applicants not yet admitted to the program are subject to screening requirements. Previous clauses within the same section reference PHAs authority to “deny or terminate” assistance, distinguishing the processes appropriate for new applicants versus those already admitted into the program. The applicant screening clause differs in that it only references PHAs ability to *deny* applicants.

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<sup>1</sup> Housing Choice Voucher Program: Streamlining the Portability Process, 80 Fed. Reg. 50564 (August 20, 2015).

<sup>2</sup> Importantly, this legal argument was raised by both the National Housing Law Project and PRRAC in comments submitted on the proposed portability rule *but never addressed* in the preamble to the final rule. This oversight should compel HUD to amend its final rule.

<sup>3</sup> “Selection of tenants: Each housing assistance payment contract entered into by the public housing agency and the owner of a dwelling unit shall provide that the screening and selection of families for those units shall be the function of the owner. In addition, the public housing agency may elect to screen applicants for the program in accordance with such requirements as the Secretary may establish. That an applicant or participant is or has been a victim of domestic violence, dating violence, or stalking is not an appropriate basis for denial of program assistance or for denial of admission if the applicant otherwise qualifies for assistance or admission.” 42 USC § 1437f (o)(6)(B) (emphasis added)

<sup>4</sup> These screening practices can be quite extensive including criminal records screening more stringent than the statutory minimum and beyond regulatory authorization. See Housing Choice Voucher Guidebook, Eligibility Determination and Denial of Assistance (Nov. 2019).

Further, the regulation defines “applicant” as “[a] family that has applied for admission to the HCV program but is not yet a program participant.”<sup>5</sup> An applicant becomes a “participant” when they are admitted to the program.<sup>6</sup> There is no doubt that tenants with a voucher who choose to port are participants. The terms applicant and participant are not used interchangeably and are consistently tied to either the phrase “denial” or “termination” but never both. Once a person has met the regulatory definition of participant, they hold a federal public benefit that may only be terminated through due process.<sup>7</sup>

In the portability clause of the statute, Congress conferred a participant’s right to receive tenant-based voucher assistance anywhere in the United States with a participating PHA.<sup>8</sup> The only limitation offered in this clause is that porting tenants are subject to terminations that align with regulatory rules 24 CFR § 982.552 and § 982.553.<sup>9</sup> Inconsistently, when voucher-holders attempt to exercise their portability rights, PHAs improperly use elective *applicant* screening processes that threaten the security of a family’s voucher.

### **Rescreening Participants is Duplicative and Inconsistent with HUD and PHA AFFH Obligations**

All portability requests include a Certification Statement signed by the Initial PHA’s Certifying Official affirming that the voucher was issued in accordance with the program regulations.<sup>10</sup> This includes screening for all federally mandated criminal exclusions, income verification using the Receiving PHA’s guidelines, and providing copies of all related verification information to HUD and the Receiving PHA.<sup>11</sup> Additionally, participants’ income and family composition eligibility are verified annually upon recertification.

The imposition of new or additional screening requirements can have a discriminatory impact on families seeking to move to less segregated communities. Overall, 61% of voucher households are black or Latino, and the percentage is significantly higher in cities than in suburban or rural areas.<sup>12</sup> Thus, a barrier to porting from a city to a suburban or exurban PHA will have a predictable discriminatory impact and is inconsistent with HUD’s AFFH obligations. Access to opportunity isn’t just a civil rights issue: a conclusive body of research has also shown that families experience greater health, educational, and economic outcomes in areas of greater opportunity.<sup>13</sup>

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<sup>5</sup> 24 CFR § 982.4 (“Applicant”).

<sup>6</sup> 24 CFR § 982.4 (“Participant”).

<sup>7</sup> Amanda R. Engel, Constitutional Concerns in Section 8 Housing: Transfer Voucher Terminations and the Impact on Participant Families, 94 Wash. U.L. Rev. 485 (2016)

<sup>8</sup> 42 USC § 1437f (r)(1)(A)

<sup>9</sup> 42 USC § 1437f (r)(5); 24 CFR § 982.353 (b)

<sup>10</sup> Form HUD-52665

<sup>11</sup> *Id.*

<sup>12</sup> Nat’l Low Income Hous. Coal., *Who Lives in Federally Assisted Housing?*, 2 Hous. Spotlight Issue 2 (Nov. 2012) <https://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf>

<sup>13</sup> See Chetty, Raj et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, Opportunity Insights (May 2015); Sard, Barbara and Douglas Rice, *Realizing the Housing Choice Voucher Program’s Potential to Enable Families to Move to Better Neighborhoods*, Center on Budget and Policy Priorities (Jan 2016).

Rescreening participants based on their criminal records above the statutory minimum will have a predictable discriminatory impact based on race and is not necessary to protect health or safety.<sup>14</sup> As HUD has acknowledged, higher incarceration rates of Black and Latinx Americans are attributable to biases in the criminal justice system, rather than disparities in propensity to commit crimes.<sup>15</sup>

Rescreening also gives a great deal of discretion to PHA staff to make case-by-case portability determinations, thus increasing the role of unconscious bias in the decision-making process. This is inconsistent with the shifting legal landscape concerning the use of criminal records in the screening process and liability.<sup>16</sup>

For example, the Housing Authority of Baltimore City screens only for the federally mandated eligibility requirements and allows individual landlords to screen with their own suitability of tenancy criteria.<sup>17</sup> If a voucher-holding family from Baltimore City wishes to move to nearby Baltimore County, Maryland their eligibility will be considered as though they are a new applicant coming off the waiting list, instead of a participant in good standing.<sup>18</sup> This additional barrier to portability is especially concerning with the knowledge that the population of Baltimore City is 62% Black compared to just 31% of the population of the surrounding Baltimore County.<sup>19</sup>

### **Most families are not aware that a receiving PHA will rescreen**

Rescreening puts families in an impossible situation. Most tenants do not know to ask about the screening criteria of a receiving PHA. In some cases, a family will move to a new jurisdiction, only to find that they are ineligible for a voucher with the new PHA. At that point, the initial PHA will typically not accept the family back into their program. Moreover, even if the PHAs have the same policy regarding rescreening (for example, a similar policy on criminal history), PHAs may interpret the same rules differently (i.e. what is considered a threat to the health and safety), so tenants can never fully have informed notice of screening criteria.

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<sup>14</sup> Office of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. and Urban Dev., FHEO Memorandum, Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 1, 2 (June 10, 2022); Office of General Counsel, U.S. Dep't of Hous. and Urban Dev., OGC Memorandum, Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016); See also, Daniel K. Malone, 2009. "Assessing criminal history as a predictor of future housing success for homeless adults with behavioral health disorders," *Psychiatric Services* 60:2, 224–30 (concluding that criminal history is not a good predictor of a housing success).

<sup>15</sup> FHEO Memorandum, *supra* note 14 (citing *inter alia* Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 *Nature Human Behaviour*, 736-745 (July 2020) (showing that black drivers are less likely to be pulled over at night when)); See also Nembhard, Susan and Lily Robin, *Racial and Ethnic Disparities throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*, Urban Institute (August 2021)).

<sup>16</sup> FHEO Memorandum (2022); OGC Memorandum (2016).

<sup>17</sup> The FY 2018 Housing Choice Voucher Administrative Plan, Housing Authority of Baltimore City.

<sup>18</sup> Baltimore County Housing Choice Voucher Program Participant Guide 2018.

<sup>19</sup> U.S. Census Bureau, QuickFacts: Baltimore City, Maryland (July 1, 2022); U.S. Census Bureau, QuickFacts: Baltimore County, Maryland (July 1, 2022).

In conclusion, it is clear from the statutory and regulatory authority that PHAs' permission to apply elective screening ceases the moment an applicant reaches participant status yet PHAs persist in rescreening applicants who port. To allow this illegal and discriminatory practice to continue will delay the goals of affirmative furthering fair housing and inevitably result in wrongful limitation and termination of benefits of families in good standing. Furthermore, we believe that HUD can accomplish this goal without the need for a regulatory amendment. The portability regulation does not explicitly grant permission to receiving PHAs to rescreen porting families, contrary to the language in the preamble of the final rule.<sup>20</sup> Because the regulation itself does not authorize rescreening, HUD can issue guidance that conforms the regulation to the statute and bar this illegal practice.

Sincerely,

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<sup>20</sup> Housing Choice Voucher Program: Streamlining the Portability Process, 80 Fed. Reg. 50564 (August 20, 2015).