



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

January 19, 2016

Regulations Division
Office of General Counsel
451 7th Street SW, Room 10276
Department of Housing and Urban Development
Washington DC 20410-0500
Submitted electronically through www.regulations.gov

Re: Docket No. FR 5597-P-02: "Instituting Smoke-Free Public Housing"

Dear Regulations Division, Office of General Counsel, Department of Housing and Urban Development (HUD):

The following comments are submitted on behalf of the Co-Chairs of the Consortium for Citizens with Disabilities (CCD) Housing Task Force and Rights Task Force regarding the proposed rule published on November 17, 2015, "Instituting Smoke-Free Public Housing."¹ CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the 57 million children and adults with disabilities and their families living in the United States. CCD advocates for national public policy that ensures full equality, self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We appreciate HUD's work in proposing a smoking ban in public housing that has the potential to impact residents' health. However, the proposed rule can be improved in a number of areas in order to address the public health needs of residents and their communities.

A. HUD's Proposed Rule Will Cause Significant Harm to Tenants

Homelessness and Housing Instability are Public Health Issues

CCD recognizes the negative health effects of tobacco smoking and exposure to second-hand smoke. HUD thoroughly explains in its preamble the deleterious health effects of smoking and second-hand smoke exposure, as illustrated by numerous studies that link exposure to a range of health issues. Reducing smoking would undoubtedly benefit public health. However, HUD has also recognized that homelessness and housing instability is a major public health crisis and one that it has a duty to address by providing safe and habitable housing to this nation's

¹ Instituting Smoke-Free Public Housing, 80 Fed. Reg. 71,762 (Nov. 17, 2015) (hereinafter Smoking Ban Rule)

neediest families including people with disabilities.² While HUD acknowledges in the proposed rule its own goal of ending homelessness and helping all Americans secure quality housing,³ the smoking ban, if implemented as proposed, will lead to countless evictions of public housing residents, especially those who have disabilities; the reasons for this disproportionate impact are discussed below. HUD's stated objective of ending homelessness will be frustrated by the creation of a fast track to eviction. As explained in more detail below, HUD must include in its rule additional procedural safeguards to protect residents from evictions.

The Rule Will Disproportionately Affect Tenants with Disabilities

HUD's smoking ban will have an especially harmful effect on residents with mental health and physical disabilities. People with disabilities are – unfortunately – disproportionately represented in the smoker population. According to the Centers for Disease Control (CDC), in 2011, 25.4% of U.S. adults with disabilities smoked compared to 17.3% without disabilities.⁴

The CDC reports a strong link between mental health and smoking. The CDC reports that nationally, 36% of adults with mental illness smoke cigarettes compared to 21% of adults without mental illness.⁵ Among low-income individuals with mental illness (who are most likely to live in HUD housing), the prevalence of smoking is even more stark: 48% of people with mental illness who live below the poverty level smoke, compared with 33% who live above the poverty line.⁶ Symptoms related to mental health issues can present unique challenges to smokers that attempt to quit. It is also common for people with mental health issues to use tobacco products as a means of alleviating stress related to their disabilities, increasing their reliance on nicotine. Residents with physical disabilities will have a hard time complying with a ban because of the challenges they will face if forced to physically leave the property to smoke. It would be ironic if these residents, for whom housing assistance is a critical part of the service package needed to address their disabilities, lost their housing due to an inability to comply with a smoking ban and became homeless. Just as traditional approaches that evicted individuals with disabilities from housing for failing to follow the rules had less success in keeping people housed and worse health and employment outcomes than "Housing First" programs, an approach of evicting people who cannot comply with a smoking ban can be expected to result in lower housing retention, poorer health outcomes, and lower employment rates, as well as increased public costs as people with disabilities become homeless and show up in emergency rooms, shelters, and jails.

² U.S. Department of Housing and Urban Development Strategic Plan 2014-2018, April 2014 at p. 22. Ending Homelessness is one of HUD's strategic objectives. HUD seeks to "end homelessness for veterans, people experiencing chronic homelessness, families, youth, and children."

³ Preamble to Smoking Ban Rule at 71766.

⁴ U.S. Centers for Disease Control, "Current Cigarette Smoking Among Adults — United States, 2011". *Morbidity and Mortality Weekly*, November 9, 2012 / 61(44); pp. 889-894.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6144a2.htm?s_cid=mm6144a2_w.

⁵ U.S. Centers for Disease Control, "Smoking Among Adults With Mental Illness", February, 2013.
<http://www.cdc.gov/features/vitalsigns/smokingandmentalillness/>, accessed January 19, 2016.

⁶ Id.

In accordance with HUD's Fair Housing Act (FHA) rule concerning disparate impact, HUD should specify that for people with disabilities and any other group disparately affected by the rule, Public Housing Authorities (PHAs) must use practices that accomplish the goals of this rule but with a less discriminatory effect. HUD should provide examples of such less discriminatory practices, including those set forth below as proposed reasonable accommodations.

We applaud HUD for explicitly noting that civil rights laws apply to public housing residents with respect to the smoking ban, and particularly reasonable accommodations. We agree that HUD should publish additional guidance on this matter and provide, below, extensive comments on what types of accommodations PHAs should be required in order to provide equal opportunity to tenants with disabilities. HUD should follow the formal rulemaking process prior to publishing guidance, however. A formal notice and comment period would provide stakeholders- many of whom work with public housing residents to request accommodations on a daily basis- an opportunity to review and comment on the proposed guidance before it is finalized.

Implementation of any required smoking ban should not commence until both the final rule **and** the final HUD Office of Fair Housing and Equal Opportunity guidance are published.

B. There is a Need for Greater Tenant Protections in the Rule

Simply revising 24 C.F.R. Part 966 to include smoking in restricted areas will create a fast track to evictions. PHAs may consider a violation of the smoking ban a serious or material violation of the lease and therefore sufficient cause to terminate a tenancy. Further, where a PHA alleges other minor lease violations, in many jurisdictions a violation of the smoking ban could be grounds for eviction if it is considered one of several repeated violations of the lease, even if minor.

There are other, more effective ways to implement a smoking ban in public housing that balance the concerns around second-hand smoke along with the risk of homelessness. We propose two alternative options below and urge HUD to consider implementing one of them in lieu of what is proposed in the rule.

HUD Should Revise the Proposed Lease Requirement Language

The proposed language to amend 24 C.F.R. Part 966 is insufficient to protect tenants who smoke from evictions. It should be amended to require that the PHA give at least 3 warnings to a tenant *before* smoking is considered a lease violation. In fact, HUD's office of Healthy Homes states that working with tenants prior to an eviction, either through mediation or multiple in-person meetings, is a best practice.⁷ HUD should also explicitly include language in the regulation that a violation of the smoking ban will not be considered a serious or material

⁷ See Part IV of U.S. Department of Housing and Urban Development, Office of Lead Hazard Control and Healthy Homes, *Change is In the Air: An Action Guide for Establishing Smoke-Free Public Housing and Multifamily Properties*, October, 2014, <http://portal.hud.gov/hudportal/documents/huddoc?id=SMOKEFREEACTIONGUIDE.PDF>.

violation of the lease, unless and until the tenant has received the required warnings. 24 C.F.R. § 966.4(f)(12)(i)(B) and (ii)(B) could read:

Civil activity. For any units covered by 24 CFR part 965, subpart G, any smoking of lit tobacco products in restricted areas, as defined by 24 CFR 965.653(a), or in other outdoor areas that the PHA has designated as smoke free. A violation under this section will only be considered a lease violation after tenant has been provided with three (3) notices, in writing, of the alleged violation. Each notice will contain (1) an opportunity to cure the alleged violation, (2) information and resources about free cessation services offered in a language appropriate for the tenant, and (3) the right to request a reasonable accommodation. Under no circumstances will a violation of this section be considered a material or serious violation of the lease.

In addition, HUD should clarify in the rule that residents should not be punished for the smoking of their guests.

HUD Should Use the Enforcement Mechanism that already exists for the Community Service Requirement

Another option is to structure enforcement of the rule much like the community service requirement in public housing.⁸ An obligation to comply with the requirement is not in the lease itself; rather, the PHA will not renew the tenant's lease if a family does not comply with the requirement after notice and an extended opportunity to cure the alleged violation. The language reads,

*"The lease shall specify that it shall be renewed automatically for all purposes, unless the family fails to comply with the service requirement. Violation of the service requirement is grounds for nonrenewal of the lease at the end of the twelve month lease term, but not for termination of tenancy during the course of the twelve month lease term."*⁹

HUD also allows requires that PHAs allow tenants to (1) enter into a written agreement with the PHA to comply and complete the community service requirements within the following year and (2) exclude the noncompliant household member during the second year if he refuses to comply.¹⁰ HUD could easily structure the smoking ban like the community service requirements. HUD could also, like the community service requirements, include an exemption provision related to reasonable accommodations.

⁸ The regulations governing the community service requirements in public housing can be found at 24 C.F.R. §§ 960.600-609.

⁹ 24 C.F.R. 960.603 (emphasis added).

¹⁰ 24 C.F.R. 960.607.

Tenants Must Receive Sufficient Notice of the Ban

It is important that residents receive sufficient notice of the ban in order to best prepare them for success. HUD could do this in two steps. First, HUD should require PHAs to incorporate the ban into the lease at least one year before the ban goes into effect. In this way, tenants will be informed of the ban far in advance of its implementation and be given ample time to take advantage of cessation services, request a reasonable accommodation, and/or prepare for any changes to their daily routines that the ban will require. Second, the initial six months of the ban should be treated as provisional. In this way, residents will be given more time to adjust to the enforcement of the ban without putting their subsidized housing tenancy at risk.

C. PHAs Should be Obligated to Provide a Range of Reasonable Accommodations

Most importantly, as HUD explicitly states in the preamble, PHAs must consider requests for reasonable accommodations related to a smoking ban and that the PHA must grant the requests in appropriate circumstances.¹¹ We urge HUD to include this statement in the text of the final rule, and to publish additional guidance in this area to ensure that PHAs have clarity concerning what types of accommodations are required, and sufficient examples of reasonable accommodations.

Different disabilities will make compliance with a smoking ban particularly challenging for many tenants, for a variety of reasons. Each request must be considered on a case-by-case basis, taking into account the individual needs based on a tenant's disability. The smoking ban will affect people with a range of disabilities such as:

- Those with mobility impairments who are unable to walk to a designated (accessible) smoking area. This includes frail seniors and in some cases people with endurance disabilities.
- Those with mental health, cognitive, or learning disabilities that have a hard time understanding and/or complying with traditional cessation services.
- Those who are homebound who oftentimes experience multiple disabilities.
- Those with compromised immune systems who cannot stand outside during cold winter months without serious risks to their health.

PHAs are mandated by fair housing laws to provide reasonable accommodations and this must be reflected in HUD's regulations. It is important to remind PHAs that although banning smoking in public housing is in part a cost-saving measure, a housing provider may bear some cost for providing a reasonable accommodation.¹² There are a range of accommodations that could be made at a smoke-free property that would not pose an undue financial or administrative burden on a PHA. For example:

¹¹ Preamble to Smoking Ban Rule at 71766.

¹² Fair Housing Act, Section 804 (f)(3)(B).

- In a multifamily building, a PHA could allow a tenant to smoke in their room as an accommodation but move the tenant to an end room so that second-hand smoke does not infiltrate adjacent units.
- The PHA could move the tenant to a room with a balcony or porch.
- A PHA could provide vouchers to tenants who smoke and give priority to those tenants on the voucher waitlist.
- The PHA could allow tenants to smoke e-cigarettes.
- The tenant could be allowed to smoke in an area outside but on the property and close to their unit.
- A PHA could grant a tenant additional time to comply with the smoking ban.
- Housing managers may be required to work with tenants in special circumstances to help them comply with the smoking ban.

As HUD explains in its preamble, the rule is not meant to punish smokers, rather, to improve public health by eliminating smoking. All of these accommodations would help HUD meet those goals.

Housing providers routinely make the argument that smoking is not a qualifying disability; therefore a housing provider is not obligated to accommodate a tenant for his or her smoking. However, this opinion is misguided and displays a shallow understanding of fair housing laws. The tenant is not requesting an accommodation to her smoking habit, rather, it is the symptoms of the tenant's disability that frustrate the tenant's ability to comply with the no-smoking policy. Just as in all accommodation requests, the tenant is asking for an exception to a PHA policy, rule, or practice, *due to the tenant's disability*.

Indeed, at least one court found that a PHA was obligated to accommodate a tenant by not proceeding with an eviction and allowing a tenant more time to comply with a smoking ban because it was both necessary and reasonable.¹³ In that case, the tenant experienced schizophrenia, which presented barriers to her compliance with a no-smoking policy. After the PHA sent a termination notice due to the noncompliance, the tenant requested that she be allowed more time to modify her behavior with the help of a mental health counselor, in order to comply with the ban. The PHA denied the request and moved forward with the eviction. The court, however, found that the tenant was entitled to a reasonable accommodation under fair housing laws and allowed the tenant to remain in her residence.

D. HUD Should Remove the Rigid 25-Foot Rule and Require, Not Make Optional, a Smoking Area on the Property

The rule, as proposed, is unnecessarily rigid in its 25-foot rule. HUD should not require that smoke-free policies extend to all outdoor areas up to 25-feet from the housing and administrative buildings. Instead, it should permit housing authorities to make adjustments based on layouts of particular properties. This will allow PHAs flexibility in implementing the rule by taking into consideration local conditions.

¹³ Housing Authority of the City of Bangor v. Jacobsen, July 27 2009, Bangor District Court, No. BAN-SA-09-279.

In addition, in the proposed rule, HUD makes it optional for PHAs to create a designated smoking area on its property, but outside a 25-foot boundary. HUD should require PHAs to designate a safe smoking area on PHA property. A designated outdoor smoking area – that includes shade and seating - will help tenants succeed with the no-smoking policy while alleviating the safety concerns involved in having to leave the property to smoke, a problem faced by all tenants but seniors and people with disabilities in particular.

At least one federally subsidized building has evicted tenants after management refused to allow smoking in a designated area, despite the resident association showing support for it. In this case, the complex was located in a rural area in Vermont, making it impossible for frail seniors to walk off of the property to smoke during the cold winter months. The resident association, which consisted of smokers and non-smokers alike, requested that management allow a smoking area to avoid evictions but the request was refused. The building began eviction proceedings shortly after the policy was implemented.

E. There is a Need for Robust Resident Engagement Before Implementation of the Ban

Given the impact that such a policy will have on public housing residents, tenants should be given an opportunity to participate in a robust resident engagement process prior to implementation of a smoking ban. A community participation process would allow for tenant input and also help put tenants on notice of the smoke-free policy.

In order to guarantee resident engagement, HUD should require PHAs to treat the smoking ban as a significant amendment to the PHA plan. Requiring the smoking ban to be treated as a significant amendment would allow residents to play an active role in the crafting of the specific rules and procedures for implementing the smoking ban in their jurisdiction. A significant amendment to a PHA Plan would require that the PHA consult with the Resident Advisory Board about the provisions of the smoking ban and create a 45 day public review period of the smoking ban, including the release of all relevant information to the public and a public hearing for tenants and the general public to register comments, among other regulatory requirements. Mandating opportunities for community participation will lead to greater awareness about the ban amongst residents and as a result of tenant “buy-in,” will encourage resident compliance. It will also enable PHAs to incorporate residents’ jurisdiction-specific concerns and suggestions prior to implementation of the ban.

F. PHAs Should Be Required to Provide Cessation Services

Without adequate and accessible cessation services, the proposed rule becomes an ineffective tool and one that could be aimed solely at evicting tenants who smoke. Achieving the goals of this proposed rule relies on tenants’ access to effective and affordable smoking cessation services in their community. Many studies have reiterated the importance of accessible

smoking cessation services and that smokers who use smoking cessation assistance typically have greater rates of success compared to smokers who don't utilize this assistance.¹⁴

While we applaud HUD's efforts to partner with the CDC, HUD should take more affirmative steps to collaborate with the CDC and other organizations to provide tenant cessation services to PHAs. Public housing complexes sited in underserved communities often simply do not have cessation services. PHAs may not yet be aware of smoking cessation resources in their community, or free resources may not yet exist on a local level. It is also important to note that cessation services and materials will be needed in languages other than English for residents with limited English proficiency.

PHAs should be obligated to provide cessation resources to tenants who have violated the smoking policy and/or demonstrated difficulties with compliance. As we propose in Section B above, public housing leases could be amended to include language requiring a PHA to provide these services.

In order to make a smoking ban effective, HUD should require, and at the least encourage, PHAs to begin to offer resources about cessation services now. HUD should require PHAs to have a plan in place to provide these services, at the latest, when the final rule goes into effect. Some PHAs may be unwilling to spend the resources compiling and organizing meaningful cessation services for its residents. However, the cost can be off-set by money PHAs will save in implementing the ban. HUD should be clear that PHAs may bear some expense in providing cessation services to its residents.

PHAs should ensure access to all FDA approved smoking cessation therapies including nicotine replacement and medication therapies. Peer-to-peer cessation services have been shown to be successful among low-income populations. HUD should explore this option as it creates an opportunity for cross-sector partnerships between public health and housing organizations.

G. HUD Should Collect Data from PHAs to Determine Impact of Smoking Bans

As part of HUD's smoke-free policy, we recommend that HUD collect data from PHAs annually on evictions (how many households are evicted, the demographics of these households). Such information will help HUD and other advocates understand whether policies like graduated enforcement protocols protect people from being evicted. Such data could also be included in the PHA Plan, where it would be publicly available.

Thank you for your consideration of our comments and recommendations. We look forward to working with HUD and are happy to further discuss our comments and proposal regarding additional streamlining measures. Please contact Andrew Sperling at andrew@nami.org should you wish to talk with CCD members to clarify our position on these important issues.

¹⁴ See, e.g., Shu-Hong, et al., Smoking cessation with and without assistance: A population-based analysis, 18 American Journal of Preventive Medicine 4, 305–311 (May 2000).

Sincerely,

T.J. Sutcliffe
The Arc of the United States
sutcliffe@thearc.org
202-783-2229

Andrew Sperling
National Alliance on Mental Illness
andrew@nami.org
703-516-7222

CCD Housing Task Force Co-Chairs

Dara Baldwin
National Disability Rights Network (NDRN)
dara.baldwin@ndrn.org
202-408-9514

Mark Richert
American Foundation for the Blind (AFB)
mrichert@afb.net
202-822-0833

Samantha Crane
Autistic Self Advocacy Network
sscrane@autisticadvocacy.org
202-596-1055

Sandy Finucane
Epilepsy Foundation
afinucane@efa.org
301-459-3700

Jennifer Mathis
Bazelon Center for Mental Health Law
jenniferm@bazelon.org
202-467-5730

CCD Rights Task Force Co-Chairs