



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

June 14, 2017

Electronic submission to www.regulations.gov

Regulations Division
Office of General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: Docket No. FR-6030-N-01: Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777

To Whom It May Concern:

Thank you for the opportunity to comment on “**Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777**” Docket No. FR-6030-N-01, published on May 15, 2017. Please accept this letter as the comments of the Co-Chairs of the Consortium for Citizens with Disabilities (CCD) Housing Task Force. CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the over 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.

A. HUD Regulations Provide People with Disabilities Equal Access to Community Living

While streamlining certain Department of Housing and Urban Development (HUD) regulations may well move HUD forward on its mission to “create strong, sustainable, inclusive communities and quality affordable homes for all”¹, many regulations exist to provide critical protections for vulnerable populations such as low-income people with disabilities. HUD’s enforcement of the Federal Fair Housing Amendments Act (FHA) and Section 504 of the Rehabilitation Act (Section 504) has been a critical ingredient in helping people with disabilities move into the community.

¹ HUD Strategic Plan.

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court held that title II prohibits the unjustified segregation of individuals with disabilities. The Supreme Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. The Supreme Court explained that this holding “reflects two evident judgments.” First, “*institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life*.”² Second, “*confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment*.”³ ⁴

For many years, HUD and the U.S. Department of Health and Human Services (HHS) have collaborated on programs that provide both the affordable housing and the voluntary support services needed to help people with disabilities move from institutions into the community, i.e., to ensure the “integration mandates” of the Americans with Disabilities Act (ADA) and Section 504. These collaborations include Nonelderly Disabled vouchers, Mainstream vouchers, nondiscriminatory preferences in HUD housing programs and the Section 811 Project Rental Assistance program. These programs are also highly cost-efficient for federal and state Medicaid and other health care programs, as the cost of serving people with disabilities in community settings is typically far lower than the cost of institutionalization.

HUD’s enforcement of the FHA and Section 504 are also critical to assisting low-income people with disabilities to move into and remain in the community. HUD has used the FHA to ensure that design and construction of new or substantially rehabilitated housing is accessible to people with physical and sensory disabilities. Enforcement of Section 504 ensures eligible people with disabilities access to HUD programs such as HUD-Assisted housing, Public Housing, the Housing Choice Voucher program and other affordable housing programs. For example, Section 504 requires HUD-assisted programs to provide reasonable accommodations. A person with a visual disability who uses a service animal is entitled to an accommodation when a property has a “no-pets” policy.

The following section identifies some areas of regulations where streamlining would benefit people with disabilities. That said, from the perspective of the over 57 million children and adults with disabilities and their families living in the United States represented by the CCD Housing Task Force, enforcement and protection of the civil rights of people with disabilities through the existing regulations cited above is far more important.

² Emphasis added.

³ Emphasis added.

⁴ Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* https://www.ada.gov/olmstead/q&a_olmstead.htm.

B. Some Areas for Regulatory Reform to Enhance Access to HUD Programs for People with Disabilities

1. HUD Permanent Supportive Housing (PSH) Policy Barriers

PSH is an evidence-based practice critical to providing community-based housing for vulnerable populations including people with disabilities and people experiencing homelessness.⁵ PSH programs bring together affordable housing programs – such as those funded by HUD – with support services available on a voluntary basis – such as those available from HHS. HUD policies related to PSH in the National Housing Trust Fund (NHTF) and the Housing Choice Voucher (HCV) programs are confusing at best and are in conflict with key policies in other federal agencies including HHS. HUD PSH policies for the HCV and NHTF programs permit and incentivize the creation of single-site PSH units but appear to prohibit more integrated models many states are developing to comply with Title II of the ADA, the U.S. Supreme Court’s 1999 *Olmstead* decision and to meet expressed preferences of many people with disabilities. This confusion has impacted some state and local housing agencies’ willingness to create PSH opportunities. The CCD Housing Task Force **urges** HUD to provide clarification that integrated housing for people with disabilities, including disability specific PSH, is allowable under all HUD affordable housing programs.

2. Affirmatively Furthering Fair Housing (AFFH)

Although the CCD Housing Task Force has previously submitted comments to HUD regarding the need to improve the AFFH data collection at the local and state level regarding the housing needs of people with disabilities, we want to affirm the critical importance of affirmatively meeting the affordable housing needs of **all** low-income people covered by the civil rights statutes including but not limited to people with disabilities. The CCD Housing Task Force concurs with the comments submitted by the Lawyers’ Committee for Civil Rights Under the Law.

3. “Housing Opportunity through Modernization Act of 2016 (HOTMA) Notice - January 18, 2017.

Selection Preference for Families Who Qualify for Voluntary Services

The January 18, 2017 HOTMA Notice requires that HUD Headquarters Office of Fair Housing and Equal Opportunity (FHEO) and the Office of General Counsel (OGC) review every PHA proposed preference.

“As part of the PHA Plan review process, the Office of Fair Housing and Equal Opportunity, in consultation with the Office of General Counsel, will review each proposed preference for consistency with fair housing and civil rights requirements. As part of this process, HUD may request the PHA or owner provide any additional documentation necessary to determine consistency with the PHA plan”.

Given the volume of requests that HUD could receive, we believe that the requirement for HUD Headquarters to review each proposed PHA preference is infeasible. An estimated 2,300 Public Housing Authorities (PHAs) administer Housing Choice Voucher (HCV) programs for 2.1 million households. A

⁵ See for example <https://store.samhsa.gov/shin/content//SMA10-4510/SMA10-4510-07-TheEvidence-PSH.pdf> and <http://www.cbpp.org/research/housing/supportive-housing-helps-vulnerable-people-live-and-thrive-in-the-community>.

preference-by-preference FHEO/OGC review requirement (as implied by the Notice) is equally infeasible. For example, a single PHA plan from a large PHA could have 5-10 or more different supportive housing PBV proposals, each with a different preference structure. With limited staff capacity, a Headquarters' review is likely to be a slow process, in direct contravention to Congress's goals in passing HOTMA. For example, we have observed Headquarters' review of housing plans from the RAD Program to projects with disability-specific preferences in states covered by *Olmstead* settlement agreements. Despite the urgency of moving these projects forward, FHEO/OGC limited staff capacity has meant projects cannot always be approved in a timely manner.

Given this history, current and anticipated staffing levels at Headquarters, and the "open-ended" process envisioned by the Notice, the CCD Housing Task Force believes that it will be extremely difficult, if not impossible, for HUD Headquarters to approve disability-specific preferences – authorized in statute – within the PBV timelines of PHAs. This will result in the loss of many opportunities across the country to develop supportive housing for extremely low-income people with disabilities including those who are homeless.

The CCD Housing Task Force understands and appreciates that HUD is concerned about segregation and discrimination when reviewing such preferences. In order to both ensure PHAs can move forward with the development of supportive housing using PBVs, and that disability preferences are consistent with fair housing and civil rights laws, we recommend that HUD use the local Field Office review required for implementation of other components of this Notice. PHAs desiring to implement the Selection Preference for Families Who Qualify for Voluntary Services, should comply with the following:

- A. A requirement that the PHA Plan specifically describe the PBV supportive housing activities it plans to undertake, including the specific target populations it plans to assist and the voluntary supportive services that will be offered in conjunction with the offer of a PBV unit.
- B. In addition to the Civil Rights Certification (HUD-50077-CR) already required as a component of the PHA Plan, require an assurance or certification within the PHA Plan that the PHAs PBV supportive housing preferences are:
 - (1) consistent with their obligations to HUD under the applicable Fair Housing and Section 504 rules and policies;
 - (2) consistent with the PBV program requirements which grant full rights of tenancy and require voluntary services;
 - (3) consistent with applicable federal and state Medicaid policies as well as their state's related disability policies that promote and facilitate community integration for people with disabilities; and
 - (4) consistent with state efforts to comply with applicable U.S. Department of Justice policies related to the ADA and the U.S. Supreme Court's *Olmstead* decision.
- C. Oversight and monitoring by the HUD Field/Regional Office. Information under A and B above can be submitted to the local Field Office for approval in the same manner that other PBV information is submitted.

HUD would want to provide training and on-going guidance to the Field Offices to ensure consistent review across the country.

Should HUD determine that the process of approving disability-specific preferences will remain at FHEO/OGC, the CCD Housing Task Force strongly urges HUD to implement a seventy-five (75) day deadline for preference review consistent with the PHA Plan review process. A Plan and the PBV preferences would be automatically approved if HUD does not disapprove it within the 75-day period. Once developed, supportive housing projects would of course continue to be subject to fair housing and civil rights laws, as would any other PBV project.

Section II.C.2 of Notice: Changing the Maximum Amount of PBVs permitted in the PHA HCV Program

This provision allows PHAs to project-base an additional 10 percent of its units above the 20 percent program limit, provided those additional units fall into one of three categories. The first and second categories of units that are exempt from the 20 percent program limit are those that assist households that meet the definition of homeless under the McKinney-Vento Homeless Assistance Act and households that include a veteran, respectively. The third category is units that provide supportive housing to persons with disabilities or to elderly persons, and the Notice provides that “Supportive housing means that the project makes supportive services available to all of the assisted families in the project.”

The CCD Housing Task Force has two recommendations regarding this section of the Notice.

First, we have a long-standing interest in promoting the development of integrated housing models such as the Section 811 Project Rental Assistance (PRA) Program, which caps the percentage of units for people with disabilities qualified for services at 25% in any single project. Because HUD proposes to define “supportive housing” as a project that makes supportive services available to all of the assisted families in the project, it has the potential effect of prohibiting non-supportive housing PBVs from being used in projects that have supportive housing PBVs.

To ensure that PBVs used for supportive housing can be combined with other, non-targeted PBVs in a single project, the CCD Housing Task Force recommends that HUD use the following wording: “Supportive housing means that supportive services are made available to assisted families living in the project’s supportive housing units”.

Second, we recommend that HUD Headquarters advise Field Office staff clearly that “mixed” PBV projects – meaning projects that include some PBV units within the three exempt categories as well as PBV units that do not qualify for one of the three exemptions – are permitted under HOTMA.

Supportive Services Standards

The CCD Housing Task Force believes that HUD’s proposed definition of supportive housing is overly broad and not consistent with the supportive housing movement as it has evolved over the past 30 years. HUD’s proposed definition as stated in the Notice is as follows:

Supportive housing means that the project makes supportive services available for all the assisted families in the project and provides a range of services tailored to the needs of the residents occupying such housing.

Such services may include (but are not limited to):

(A) Meal service adequate to meet nutritional need;

- (B) Housekeeping aid;*
- (C) Personal assistance;*
- (D) Transportation services;*
- (E) Health related services;*
- (F) Educational and employment services; or*
- (G) Other services designed to help the recipient live in the community as independently as possible.*

HUD's proposed definition requires that all of the assisted units in a project be deemed supportive housing. To promote more integrated housing, HUD should make it clear that PHAs can "mix" PBV supportive housing units with PBV non-supportive housing units in the same project. To accomplish this goal, CCD recommends the identical change as recommended in #2 above.

Second, under HUD's definition, any project offering any of these services – even if they are sporadic or offered on a very limited basis (for example, transportation to shop once a week, health related services such as podiatry which can be offered only once-per-month, etc.) – could qualify as supportive housing. The substantial body of supportive housing literature makes it clear that supportive housing offers comprehensive voluntary services needed by a specific vulnerable target population(s) and that, without those services, the target population would be unlikely to gain access to and/or maintain permanent housing. Because of the extraordinary array of supportive services that can be offered to multiple sub-population groups, we believe it is less important for HUD to provide a "laundry list" of possible services and more important to emphasize that supportive housing is a model that serves vulnerable populations with comprehensive service needs, and that those comprehensive services are committed by service provider partner(s) to people living in supportive housing units, rather than a supportive housing project.

4. Rental Assistance Demonstration (RAD) Notice Regarding Fair Housing and Civil Rights Requirements and Relocation Requirements Applicable to RAD First Component

The RAD Notice indicates that "RAD conversions that result in the implementation of an admissions preference (e.g., residency preferences or restrictions) at the Covered Project that would alter the occupancy of the property (e.g., family units converting to elderly units, elderly/disabled units converting to elderly only units) are subject to a front-end civil rights review by HUD pursuant to the RAD Notice and Section 5.3(A)." Further the Notice states that "A PHA must demonstrate that the proposed change in occupancy type is consistent with the demand for affordable housing in its jurisdiction as demonstrated by factors such as the demographics of its current occupancy, the demographics of its waiting list or a market study."

The CCD Housing Task Force is concerned that this standard is significantly lower than the PHA would be required to demonstrate if the PHA were to request to convert elderly/disabled housing project to an elderly-only project outside of the RAD process. That standard was included in PIH Notices from 2005 to 2011⁶ and we believe is the standard HUD continues to use to review designated plans, some of which continue to be submitted for HUD's approval every year (see

⁶ See http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_8096.pdf and http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11413.pdf.

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/dhp/designated). The standard in these Notices includes:

- **Justification for Designation.** A PHA must establish that the designation of the project is **necessary to achieve the housing goals for the jurisdiction under the Comprehensive Housing Affordability Strategy, part of a jurisdiction’s Consolidated Plan** [emphasis added], and to meet the housing needs of the low-income population of the jurisdiction.
- **Alternative Resource.** A Plan must include a description of any plans to secure additional resources or housing assistance to provide assistance to families that may have been housed if occupancy in the project were not restricted pursuant to this section.
- **No Eviction or Lease Termination Due to Designation.** A PHA may not evict or terminate the lease of any tenant lawfully residing in a dwelling unit in public housing because of the designation.
- **Voluntary Relocation Because of the Designation.** A PHA must provide the following to persons and families who agree to be relocated in connection with a designation:
 - A notice of the designation and an explanation of available relocation benefits, as soon as is practicable for the agency and the person or family.
 - Access to comparable housing (including appropriate services and design features), which may include tenant-based rental assistance under the Housing Choice Voucher Program, at a rental rate paid by the tenant that is comparable to that applicable to the unit from which the person or family has vacated.
 - Payment of actual, reasonable moving expenses.

The CCD Housing Task Force is particularly concerned that alterations to the property’s occupancy type be linked to the objective state or local Consolidated Plan rather than a market survey conducted by a PHA or a developer. The CCD Housing Task Force understands that many communities have unmet demand for elderly housing but there is also significant unmet housing need among extremely low-income people with disabilities. HUD’s most recent Worst Case Housing Needs Report⁷, found the rate of worst case needs among very low-income nonfamily renters was higher than of the three other housing types: elders, families with children and other family households.

5. National Housing Trust Fund: Interim Rule

Definition of Operating Cost Assistance

The HTF statute allows HTF funds to be used to operate, as well as build, rehabilitate, and preserve, HTF-assisted rental units. However, HUD’s interim rule inhibits states from utilizing their HTF dollars for operating cost assistance by too narrowly defining “operating cost.” The HTF statute requires at least 75% of a state’s HTF funds to be used for rental housing targeted to ELI households. In order to achieve such deep targeting without having to charge assisted households with rents that would exceed 30% of their income, several states sought to use up to 30% of their HTF allocation for operating cost assistance.

⁷ https://www.huduser.gov/portal/Publications/pdf/WorstCaseNeeds_2015.pdf.

Unfortunately, the interim HTF rule at 24 CFR Part 93.201(e)(1) defines operating cost too narrowly as the cost of insurance, utilities, real property taxes, maintenance, and scheduled payments to a reserve for replacement of major systems. Consequently, several states have had to cancel plans to use HTF for operating cost assistance and might have to charge rents to ELI households that are greater than 30% of their income.

In order to enable states to fully utilize HTF resources effectively so that assisted ELI households are not cost-burdened, HUD should modify the HTF rule so that the definition of operating cost comports with industry standards (such as including maintenance and security arrangements that include personnel, paying for a front desk person at a project serving people with special needs, and management personnel).

Maximum Rents That May Be Charged to Tenants

HUD's interim rule implementing the HTF should be modified because it is ineffective at meeting the goal of ensuring rents charged to ELI households at HTF-assisted units are affordable. The interim rule inappropriately established maximum rents that developers of HTF-assisted rental units could charge ELI households at 30% of 30% AMI or 30% of the federal poverty guideline, whichever is greater [24 CFR Part 93.302(b)(1)]. There is no basis in the statute for setting rents at 30% of the federal poverty guideline. In addition, the interim rule defines "extremely low income families" as those with income less than 30% AMI, and the preamble to the interim rule as well as HUD's HTF summary only refer to 30% of 30% AMI.

By using the "greater of" 30% of 30% AMI or 30% of the federal poverty guideline, the interim rule will cause many HTF-assisted ELI households to be rent cost-burdened (pay more than 30% of their income for rent and utilities) and even severely rent cost-burdened (pay more than 50% of their income for rent and utilities). NLIHC's analysis indicates that, with the exception for efficiency apartments, HTF maximum rents in the vast majority of counties are set at the higher rent based on 30% of the federal poverty guideline (92% of all counties for two-bedroom apartments and 61% of all counties for one-bedroom apartments).

The interim rule results in pervasive rent cost burden for households the statute requires to be the principal beneficiaries of the HTF – households with income less than 30% AMI. A primary objective of affordable housing programs, including the HTF, is housing stability. However, an affordable housing program that allows beneficiaries to suffer rent cost burden, and in some cases severe rent cost burden, is at odds with this objective.

In order for the HTF program to be more effective at achieving its purpose, NLIHC urges HUD to modify the interim HTF rule at 24 CFR Part 93.302(b)(1) to be the "lesser of" 30% of 30% AMI or 30% of the federal poverty guideline.

6. Lead-Based Paint in Federally Owned Residential Property and Housing Receiving Federal Assistance

The CCD Housing Task Force concurs with the comments regarding Lead Paint submitted by the National Low Income Housing Coalition (NLIHC).

Conclusion

Thank you again for the opportunity to comment on **Docket No. FR-6030-N-01: Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777.**

Sincerely,

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Co-Chair, CCD Housing Task Force

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Co-Chair, CCD Housing Task Force