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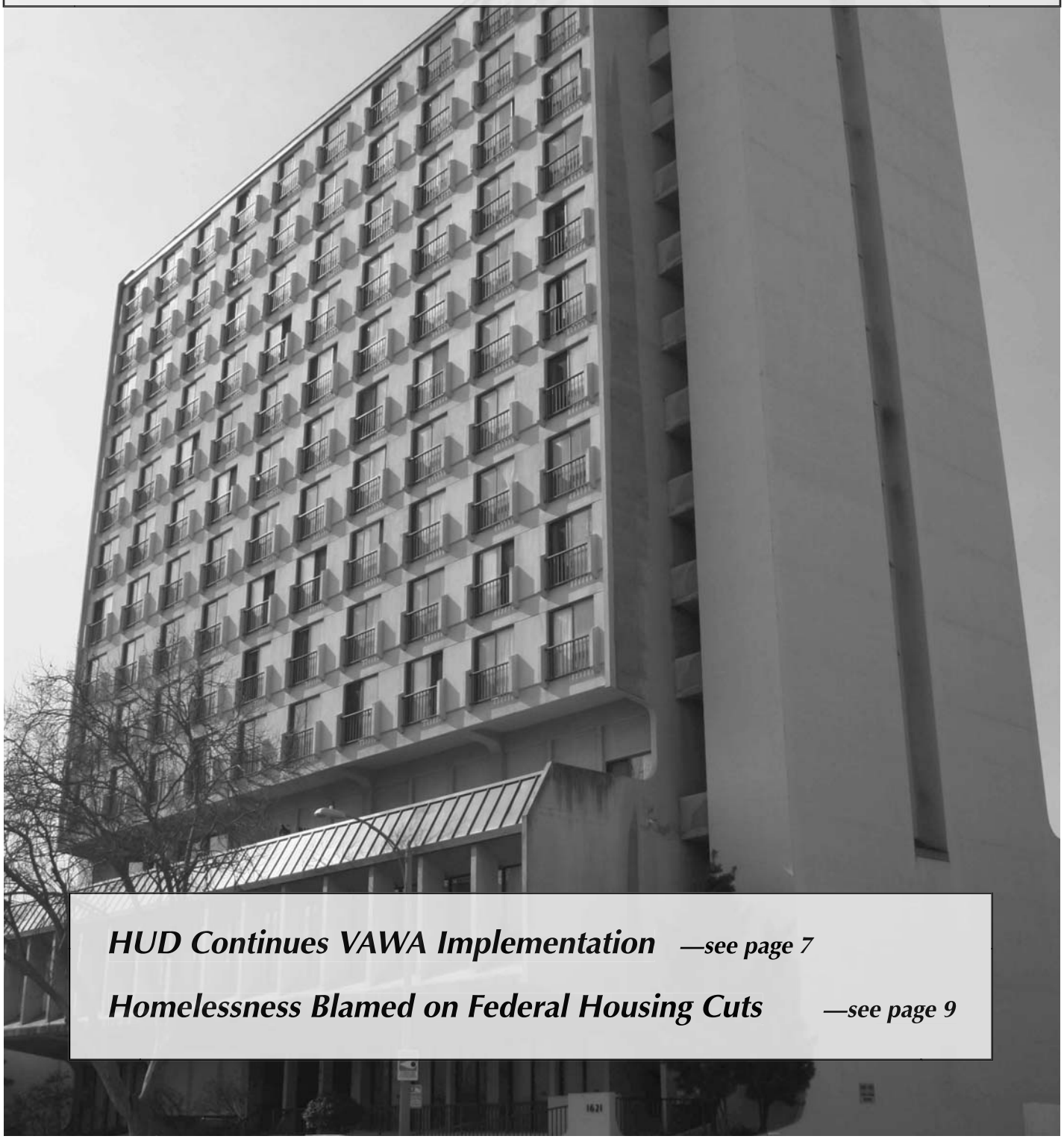

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614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300

727 Fifteenth Street, N.W., 6th Fl. • Washington, D.C. 20005

www.nhlp.org • nhlp@nhlp.org

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Inquiries or comments should be directed to Eva Guralnick, Editor, *Housing Law Bulletin*, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

Linking Eviction Defense to Education Rights

By Joy Moses*

The mainstay of legal services housing law practices involves defending low-income tenants in eviction proceedings. Usually, the objective of providing representation in such cases is to prevent homelessness by keeping a roof over the client's head, either indefinitely or for a period of time to enable the client's family to move to other housing. In those cases in which the client's family must move, legal services housing attorneys typically end their active involvement with the client once the moving date is established by court order or agreement, regardless of whether the client has secured a new permanent home.

This article urges legal services programs and their housing advocates to expand services to clients facing eviction, to ensure not only continuity of housing to prevent homelessness, but continuity of education for the children in households facing eviction. Housing advocates are very familiar with the consequences to clients when they suffer the loss of a permanent home, but are less familiar with the consequences on children's educational outcomes when their education is disrupted by moves. Such involuntary "mobility" is an accepted predictor of student success in school. Using a federal law known as the McKinney-Vento Act,[1] housing advocates and legal services programs can advocate for clients to prevent the interruption of schooling when families are evicted and lack permanent housing. This article briefly discusses the negative consequences of student mobility on student achievement and outlines the rights of homeless children, i.e., those children who live in households lacking permanent housing, under the McKinney-Vento Act. The article concludes by suggesting various steps legal services housing advocates and their programs can take to help prevent the negative consequences to children's education that can result from loss of housing due to eviction.

Background: Loss of Housing and Education

Families that experience evictions often encounter difficulties when trying to secure new permanent housing. For instance, they may temporarily live with friends or relatives, move in to shelters, or live in vehicles. Such

*Joy Moses is a Children & Youth Staff Attorney for the National Law Center on Homelessness and Poverty. The author thanks Steven Fischbach, Community Lawyer, Rhode Island Legal Services, for helping to frame this article for an audience of legal services housing attorneys.

[1]Codified at 42 U.S.C. § 11431 et seq.

housing instability allows them to be classified as "homeless" under federal education law. Once placed in that category, young people benefit from legal protections that are based on established research indicating that homeless students (i.e., those in temporary housing arrangements) exhibit more academic problems than their non-homeless peers. They have a 36% likelihood of repeating a grade, which is twice the rate of other children.[2] Further, their frequent residential moves have also been associated with lower standardized test scores and a higher likelihood of dropping out of school.[3]

Nearly 100% of homeless families move at least once during the course of a year and approximately one out of five live in three or more different homes during that time period.

Homeless children and youth face numerous barriers on the road to receiving a quality education. Such barriers include the following:

Residential Mobility

Nearly 100% of homeless families move at least once during the course of a year and approximately one out of five live in three or more different homes during that time period.[4] With each move, children must learn to adjust to new environments that include shelters and "doubling-up," or living with friends and relatives. Both shelters and doubled-up situations are often characterized as being overcrowded and uncomfortable with entire families sharing a single room, sharing bathroom facilities with multiple individuals, and/or sleeping on couches and floors. Importantly, children often live with the knowledge that these situations are temporary and must worry about whether they will soon be without a place to live. Homeless children bring these stresses to school with them each day as they prepare to learn.

School Mobility

Repeated residential moves often lead children to make frequent school transfers. More than half of all homeless students transfer schools at least once a year, more than 15% transfer three or more times each academic year.[5] Both homeless and non-homeless students who frequently transfer suffer academically, psychologically, and socially. Researchers estimate that it takes a child four to six months to recover academically from each school transfer.[6] Thus, children who make frequent school moves are increasingly disadvantaged with each and every new school they attend. According to the National Association of School Psychologists, children who change schools also need as few as six or as many as eighteen months to regain a sense of equilibrium, security, and control.[7] These young people often find it difficult to make new friends and are more likely to experience alienation, withdrawal, or discipline problems.[8]

Enrollment Delays

Homeless children often experience delays when enrolling in new schools. These delays typically stem from local requirements for records such as proof of residency, proof of immunization, birth certificates, and academic records. Doubled-up families are particularly unable to prove residency through items such as lease agreements and utility bills, which usually bear the name of the host family. Students can lose valuable days, and sometimes weeks, of school as parents and schools search for these records.

Poor Health and Nutrition

When compared to their non-homeless peers, homeless children are twice as likely to be in poor or only fair health.[9] They are more likely to suffer from illnesses such as asthma, ear infections, fevers, and stomach problems.[10] These conditions are likely caused by overcrowded and unhealthy living situations. Homeless children are in a state of hunger more than twice as often as other children.[11] Often forced to skip meals, homeless children suffer from poor nutrition, which is another contributing factor to poor health. Unfortunately, poor health (with potential links to hunger) often causes homeless children to miss valuable days of class.

Stress

Homeless students may have very real worries about where they are going to live, where they are going to sleep, and whether they will have food to eat. They may worry about their parents, who are similarly experiencing stress in relation to those issues while also trying to find employment and access necessary social services.

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[2]The Better Homes Fund, *Homeless Children: America's New Outcasts* 25 (1999).

[3]Texas Education Agency, *A Study of Student Mobility in Texas Public Schools: Statewide Texas Educational Progress Study Report No. 3.* (1997); Russell Rumberger, "Student Mobility and Academic Achievement," *ERIC Digest* (June 2002).

[4]Homes for the Homeless and The Institute for Children and Poverty, *Homeless in America: A Children's Story—Part One* (New York, NY, 1999).

[5]*Id.* at 12.

[6]*Id.*

[7]Linda Jacobson, "Moving Targets," *Education Week* (April 4, 2001).

[8]Russell Rumberger, et al., "The Educational Consequences of Mobility for California Students and Schools," *Pace Policy Brief* (January 1999).

[9]The Better Homes Fund, *supra* note 1, at 3.

[10]*Id.* at 4.

[11]*Id.* at 7.

Addressing Barriers Through the McKinney-Vento Act

The McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 et seq. (1987), is the primary federal legislation focused on homelessness in America. It includes education provisions that are designed to improve the life outcomes of homeless children and youth through increasing school stability, ensuring immediate school enrollments, targeting funds towards specialized programming, and designating personnel to focus on the needs of homeless students.

Defining Homelessnes

The definition of homelessnes under federal education law is more expansive than those which exist for other federal programs. McKinney-Vento defines homelessness as "lacking a fixed, regular, and adequate nighttime residence."[12] The law also provides some examples of living situations that qualify as being "homeless." Some of the examples include the following:

- Sharing the housing of others due to a loss of housing, economic hardship, or similar reason;
- Living in motels, hotels, or trailer parks due to the lack of alternative adequate accomodations; and
- Living in emergency or transitional shelters.[13]

McKinney-Vento does not include an express time limit on homelessness. Thus, families are "homeless" and protected by the Act for however long they fit the definition of "lacking a fixed, regular, and adequate nighttime residence." However, it is important to note that schools and districts sometimes seek periodic updates from families to ensure that they are still homeless and eligible for services.

Reevaluations of homeless status can be particularly challenging for doubled-up families who have remained in the same home for a long period of time. For such students it is helpful if advocates can demonstrate that current housing truly is temporary. For instance, the family may be actively searching for an apartment or employment and expect to move soon. Alternatively, they may be awaiting the upcoming receipt of a Section 8 voucher or placement in transitional or public housing. Finally, they may be expecting their host family to ask them to leave sometime soon. It often proves helpful for advocates to share any of the above family circumstances (or related issues) with school officials.

Personnel Dedicated to Student Needs

McKinney-Vento requires state departments of education and school districts to designate personnel to be responsible for the education of homeless students.[14] State Coordinators of Homeless Education train school district employees on legal requirements and best practices for serving this special population. School district homeless liaisons train school personnel, ensure that students are able to enroll in school or remain in their school of origin, oversee the provision of transportation, develop and maintain special programs, and help resolve disputes between schools and families.

Increasing School Stability

McKinney-Vento aims to improve school stability by allowing for schools of origin. A "school of origin" is the school a student attended when permanently housed ***or*** the school in which the student was last enrolled.[15] The McKinney-Vento Act provides that homeless children and youth can attend a school of origin until the end of the academic year in which they become permanently housed.[16]

The ability to continue in a school of origin may be limited by the best interests of the child, feasibility, or the preference of a parent or guardian. McKinney-Vento requires school placement decisions (school of origin versus new local school) to be made according to the child or youth's best interests.[17] The law assumes that attending the school of origin is in the best interests of the child. However, other factors may lead to a decision that the child's best interests are served by attending a new school. The only available standards for best interest determinations are contained in a 2004 guidance produced by the U.S. Department of Education,[18] which lists the following examples of factors that may be considered:

- Age of the child or youth;
- Distance of any commute and the impact it may have on the student's education;
- Personal safety issues;
- Student's need for special instruction (e.g., special education and related services);
- Length of anticipated stay in a temporary shelter or other temporary location; and
- Time remaining in the school year.

School of origin may also be limited by feasibility, i.e. whether it's actually possible for the student to stay in the same school.[19] For instance, it wouldn't be feasible for a child living in a shelter in Florida to attend a school in Louisiana or to attend a school that no longer exists.

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[12] 42 U.S.C. § 11434a(2).
[13] *Id.* § 11434a(2)(B).
[14] *Id.* §§ 11432(d)(3) and 11432(g)(1)(J)(ii).
[15] *Id.* § 11432(g)(3)(G).
[16] *Id.* § 11432(g)(3)(A)(i)(II).
[17] *Id.* § 11432(g)(3)(A).
[18] U.S. Department of Education, Education for Homeless Children and Youth Non-Regulatory Guidance (July 2004).
[19] 42 U.S.C. § 11432(g)(3)(B)(i).

Finally, a student may not attend a school of origin if parents or guardians decide they want to enroll their children in a new school.

The Role of Transportation

McKinney-Vento includes special provisions related to the transportation of homeless children and youth. Specifically, it requires the following:

- *School of origin transportation.* School districts must provide transportation to and from schools of origin.[20] This rule applies even when students must cross attendance zones or school district lines.
- *Comparable transportation services.* Homeless students must also receive transportation services that are comparable to those offered to non-homeless students in the schools they attend.[21] Thus, homeless students must have equal access to commonly offered transportation services.

The law does not require specific types of transportation. School districts tend to use a variety of methods including school buses, passes for public transportation, shuttle services, taxis, or gas and mileage reimbursements for shelters and families.

Arranging transportation services can present some significant challenges and concerns. For instance, depending on the community and the individual student circumstances, school of origin transportation can be costly. Funds provided through the federal McKinney-Vento program may not meet the needs of school districts and states. Expenses for these services are especially high in urban districts serving large numbers of homeless students with unstable housing. Thus, concerns about cost may negatively affect a school district's motivation to properly implement school of origin and transportation requirements.

Another common challenge is obtaining transportation services in a timely manner. The transportation systems that school districts have in place may result in delays while paperwork is completed and bus routes are altered. For students who live in one school district, but attend a school of origin in another school district, unnecessary delays may also occur while the two districts follow McKinney-Vento's requirement[22] of reaching an agreement about who will pay for transportation.

Immediate School Enrollments

Sometimes homeless families enroll their children in new schools due to their own preferences or feasibility concerns that prevent attendance at a school of origin (*e.g.*, the school is out of state or was closed following a hurricane). To alleviate enrollment delays, McKinney-Vento requires schools to immediately enroll homeless children even if they lack typically required documents such as proof of residency, birth certificates, and immunization records.[23] To "enroll" in school means to attend classes and participate fully in school activities.[24] The enrolling school is responsible for obtaining academic records and homeless liaisons must assist families and youth with obtaining immunizations or immunization/medical records.[25]

In practice, many schools are more familiar with local policies than they are with McKinney-Vento requirements. They may hesitate to enroll children without the academic records that are typically deemed necessary to make appropriate placement decisions. Sometimes advocacy focused on providing basic information about the law is necessary.

Another common difficulty is posed by schools and districts that require students to produce immunization records at the time of enrollment. Families that face eviction and subsequently live in a series of temporary housing situations often leave their homes suddenly and may not have their immunization records available to produce to new school officials. Ideally, these documents will be included within academic records maintained by school districts. They may also be available electronically via state health agencies. However, students should not miss school while such records are located.

School administrators sometimes apply state and local immunization policies without considering the requirements of McKinney-Vento. They may have concerns about the potential health consequences of enrolling children for whom they do not have official immunization records. Under such circumstances, advocates can present information that may alleviate health concerns, such as:

- Expert opinions indicating that it is safe to presume that students have been immunized even if they don't have the records immediately available. For instance, following Hurricane Katrina, the Centers for Disease Control released a memo that stated the following: "States affected by Hurricane Katrina had immunization requirements for school and daycare and it is likely that children enrolled prior to the disaster would be vaccinated appropriately. It is not necessary to repeat vaccinations for children displaced by the disaster, unless the provider has reason to believe the child was not in compliance with applicable state

[20] *Id.* § 11432(g)(1)(J)(iii).
[21] *Id.* § 11432(g)(4)(A).
[22] *Id.* § 11432(g)(1)(J)(iii)(II).
[23] *Id.* § 11432(g)(3)(C)(i).
[24] *Id.* § 11434a(1).
[25] *Id.* § 11432(g)(3)(C).

requirements."[26] Importantly, all fifty states and the District of Columbia do require students to be immunized.

- Most states have exceptions to the immunization requirements, allowing some students to attend school without being immunized and without fear of a major health risk. Typical exceptions include religious objections and grace periods for students who still need to be immunized.
- Most students in the school building have been immunized, which reduces the risk of an epidemic spreading throughout the school building should one child become ill.

Accessing Beneficial Services

Young people who have recently been evicted and who subsequently experience homelessness may be eligible for special services that promote educational development and provide for basic needs.

McKinney-Vento Services

Some school districts receive McKinney-Vento grants that allow them to provide a broad range of services. Examples include tutoring programs, before and after school programs, summer school, free school supplies, expedited assessments to determine appropriate placements, and counseling services. Advocates should inquire about the availability of such programs and services within the student's school district.

School Meals

Homeless students are automatically eligible for free school meals.[27] According to the Child Nutrition Act, homeless families and unaccompanied youth do not have to complete the typically required forms or present proof of income eligibility. Rather, U.S. Department of Agriculture guidance allows service providers and school district homeless liaisons to simply provide a list of eligible students to school nutrition programs.[28] Once signed up for services, children can receive lunches for the remainder of the school year. They may continue to qualify for up to thirty days of the next school year.[29]

Advocates may have to inform relevant school personnel of these legal provisions.

Special Education

Homeless students with special education needs greatly benefit from the rights guaranteed under the Individuals with Disabilities Education Act (IDEA). This legislation includes requirements for students who transfer to new school districts. For instance, it requires a continuation of previously received services.[30] IDEA also encourages the efficient completion of evaluations for services that were interrupted by a school transfer.[31] To learn more about IDEA and its relation to homeless students, please refer to "Connecting Homeless Students to Special Education Services: A Guide to Rights and Resources," which is available on NLCHP's website (www.nlchp.org).

Challenges for homeless students may include the timely transfer of special education records. Without these documents, new schools may be unsure about placement decisions and appropriate services. Advocates can:

- Ask parents and students to recall as much as possible about previous placements and services. They could then encourage schools to use that informal information to make interim placement decisions while documents are being gathered or students are being re-evaluated for service needs.
- If necessary, encourage schools to complete new assessments as expeditiously as possible.

Advocacy Tips: Suggested Steps for Enforcing Rights

If you are representing a student who has been denied rights guaranteed under the law, it is important to know that McKinney-Vento requires states and school districts to have dispute resolution processes in place.[32] When a dispute arises over school selection or enrollment, the student must 1) be immediately admitted to the school in which enrollment is sought and 2) be provided with a written explanation of the school's decision that includes information about the right to appeal.[33] The student can remain at the desired school at least until the dispute is resolved.[34]

The following are some suggested advocacy steps for resolving disputes.

Step 1: Call or Visit the School

Explain the situation, your request for services, and the section of McKinney-Vento that applies to the situation.

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[26]Centers for Disease Control, *Disaster Recovery Information: Interim Immunization Recommendations for Individuals Displaced By A Disaster* (December 28, 2006), available at http://www.bt.cdc.gov/disasters/hurricanes/katrina/pdf/vaccrecdisplaced.pdf.

[27]42 U.S.C. § 1758(b)(5)(A)(ii).

[28]U.S. Department of Agriculture, *Updated Guidance for Homeless Children In the School Nutrition Programs* (April 4, 2002), available at http://www.fns.usda.gov/cnd/Governance/Policy-Memos/2002-04-04.pdf.

[29]U.S. Department of Agriculture, *Duration of Households' Free and Reduced Price Meal Eligibility Determination – Reauthorization 2004: Implementation Memo – SP 3* (July 7, 2004), available at http://www.fns.usda.gov/cnd/governance/Reauthorization_Policy_04/Reauthorization_04/2004-07-07.pdf.

[30]20 U.S.C. § 1414(d)(2)(C)(i).

[31]*Id.* § 1414(a)(1)(C).

[32]42 U.S.C. §§ 11432(g)(1)(C) and 11432(g)(3)(E).

[33]*Id.* § 11432(g)(3)(E).

[34]*Id.* § 11432(g)(3)(E)(i).

If meeting in person, you may want to bring a copy of the law with you so that you can physically point out relevant sections. Be understanding if the school wants to call an administrator at the district or state level to confirm your reading of the law. However, be vigilant in ensuring that this doesn't delay the required immediate enrollment, even in situations where there is a dispute. You can ask the school administrator to call necessary officials while you wait or check back with the school no later than the morning of the next school day. The student should be ready to attend school immediately.

Note: Many people, including school staff and administrators, are simply unaware of McKinney-Vento and its requirements. Many problems can be quickly resolved by politely informing schools about the law and how it should apply to homeless students.

Step 2: Call the School District's Homeless Liaison or Homeless Coordinator

By law, every school district in the country must appoint a local homeless liaison to ensure that homeless children have access to an education and appropriate related services.[35] If you are unable to come to an agreement with the school, the school is non-responsive, or the school is taking too long to act, it may help to talk to the homeless liaison/coordinator for the school district. The liaison/coordinator can inform the school of its legal obligations, including the requirement to enroll pending resolution of any dispute. The liaison/coordinator is also responsible for carrying out the district's dispute resolution process.[36] Processes vary from district to district, but they often simply require the liaison/coordinator or superintendent to hear any relevant information and make a decision either in favor of the student or the school. To reach the liaison/coordinator, you can call the main number for the school district. The operator should be able to refer you to the correct person.

Note: Although the law requires the appointment of a homeless liaison/coordinator, a minority of school districts do not have one in place. Sometimes there is a gap between when one person exits the job and another person is appointed. At other times, the district is simply failing to live up to its responsibilities. You may also encounter liaisons/coordinators who aren't very familiar with McKinney-Vento because they are new to the job or juggling several different responsibilities on behalf of the school district. Bottom line, if you are unable to find a satisfactory resolution by contacting the liaison/coordinator, you should proceed to step 3.

Step 3: Contact the State Coordinator for Homeless Education

By law, each state is required to appoint a state-level administrator to be responsible for the education of homeless children and youth.[37] An updated listing of state coordinators can be found on the website of the National Center for Homeless Education (NCHE).[38] The duties of the state coordinator include ensuring that school districts comply with the law. Finally, the state coordinator should be able to provide you with information about how to file a state-level appeal of any decision made by the school or school district.

Note: Every state does have an identified coordinator. Many of these professionals have significant experience working on homeless education issues and can be extremely helpful with settling disagreements between families and school districts.

Step 4: Pursue Administrative Appeals

As noted above, each state must have a dispute resolution process in place and such processes vary by region. Appeals policies are often informal, but they can also be extremely detailed and legalistic. Under such circumstances, families definitely benefit from the assistance of an attorney. It may often be necessary to appeal cases up to the state level in order to find a satisfactory resolution.

Step 5: Litigation

In situations where advocates believe that the student's rights are clearly being violated and despite their efforts, neither the school district nor the state has appropriately intervened, a lawsuit may be the appropriate next step. A temporary restraining order (TRO) can prevent the student from being removed from the desired school even after the state's dispute resolution process is completed. A TRO can also help students immediately gain access to schools they have been unable to attend.

Very few cases have been brought to enforce homeless student rights. Only two have resulted in written decisions: *Lampkin v. District of Columbia*, 27 F.3d 605 (D.C. Cir. 1994) and *NLCHP v. State of New York*, 224 F.R.D. 314 (E.D.N.Y 2004). These cases largely relied on McKinney-Vento (enforced via Section 1983) and the Equal Protection Clause. In each, the major point of contention was whether McKinney-Vento is enforceable via Section 1983. Both courts concluded that it was enforceable and plaintiffs' claims could be heard in court.[39] Only the New York district court found that homeless children had a valid claim under the Equal Protection Clause. In doing so, it applied a heightened scrutiny standard outlined in *Plyler v. Doe*, 457 U.S. 202 (1982), which, in other education cases,

[35] *Id.* § 11432(g)(1)(J)(ii).
[36] *Id.* § 11432(g)(3)(E)(iii).
[37] *Id.* § 11432(d)(3).
[38] http://www.serve.org/nche/downloads/sccontact.pdf.
[39] *Lampkin v. District of Columbia,* 27 F.3d 605, 612 (D.C.Cir. 1994); *NLCHP v. State of New York*, 224 F.R.D. 314, 321 (E.D.N.Y. 2004).

allows a state to survive an equal protection clause challenge only if the denial of education is justified by a "substantial goal" of the state.[40]

Despite this history, attorneys should also research potential state law claims. Many states have laws that either govern the education of homeless students or that relate to other relevant topics (*e.g.*, constitutional right to education, compulsory attendance, flexible enrollment procedures, or immunization requirements).

In general, it is important to gather as much relevant information as possible, as early as possible. If there is a dispute, it may be helpful to present school administrators, school district liaisons/coordinators, and state coordinators with any available evidence of such factors as homeless status (*e.g.*, a letter from a shelter or other service provider), immunizations, and previous academic placements (special education, advanced courses, gifted and talented). However, it is important to note that students should be enrolled in school while these documents are collected and disputes are pending.

Concluding Thoughts

An eviction is a traumatizing event for each member of a family, including school-aged children. Such negative experiences can be compounded by forced departures from familiar schools, routines, teachers, and friends. Advocates who work to prevent evictions would do a great service to their clients if they could also assist with the basic educational needs of children they serve. Such assistance could take varying forms, including direct assistance, appropriate referrals, and/or the distribution of know-your-rights materials.[41] These efforts to assist young people from families who have been evicted will likely produce short-term benefits such as an enhanced sense of well-being and long-term benefits such as improved educational outcomes.

Perhaps the importance of this work is best encapsulated in the words of a student who experienced homelessness: "Through it all, school is probably the only thing that has kept me going. I know that every day that I walk in those doors, I can stop thinking about my problems for the next six hours and concentrate on what is most important to me. Without the support of my school system, I would not be as well off as I am today. School keeps me motivated to move on, and encourages me to find a better life for myself." ■

[40]224 F.R.D. 314, 321-322 (E.D.N.Y. 2004).

[41]Sample flyers that can be distributed to clients seeking assistance in eviction matters can be found in the materials of the 2006 Housing Justice Network Meeting. National Housing Law Project, Housing Justice Network National Meeting, 435-38 (2006), available at http://www.nhlp.org/hjn2006/hjn2006/Meeting%20Handbook2.pdf. Such flyers should list the names of State and Local Homeless Education Coordinators. A list of all fifty state coordinators can be found in the same materials. *Id.*, at 439-44. Names of local coordinators can be obtained from state coordinators.

HUD Continues VAWA Implementation

The Violence Against Women and Justice Department Reauthorization Act of 2005[1] protects tenants and family members of tenants who are victims of domestic violence, dating violence or stalking from being evicted or terminated from housing assistance based on acts of such violence against them. The law provides that criminal activity directly relating to domestic violence, dating violence or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of assistance, tenancy, or occupancy rights if the tenant or an immediate member of the tenant's family is the victim or threatened victim of that abuse. The law also provides that an incident or incidents of actual or threatened domestic violence, dating violence or stalking will not be construed as serious or repeated violations of the lease by the victim or threatened victim of that violence and will not be good cause for termination of the assistance, tenancy, or occupancy rights of a victim of such violence.

On December 27, 2006, the Department of Housing and Urban Development (HUD) published a notice implementing these provisions of the Violence Against Women Act (VAWA).[2] The notice is accompanied by a form that victims of domestic violence, dating violence or stalking may be requested to sign in order to certify to their landlord that an incident, or set of incidents, which could form the basis for a lease termination, were *bona fide* incidents of abuse.[3] The HUD notice and accompanying certification form, previously published in proposed form, incorporate several changes recommended by legal services advocates when the notice and form were first published for comment.[4]

[1]Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006). For more information on the amendments and HUD's implementation, *see* NHLP, *Reauthorized Violence Against Women Act Protects Housing Rights of Domestic Violence Survivors*, 36 Hous. L. Bull. 53 (March 2006), NHLP, *HUD Begins VAWA Implementation*, 36 Hous. L. Bull. 181 (Sept. 2006).

[2]Notice PIH 2006-42, Violence Against Women and Justice Department Reauthorization Act 2005 Form HUD—50066 Certification of Domestic Violence, Dating Violence, or Stalking (Dec. 27, 2006), hereinafter "PIH 2006-42".

[3]Form HUD—50066 Certification of Domestic Violence, Dating Violence, or Stalking (11/2006), hereinafter "Form HUD 50066".

[4]*See* comments submitted by Barbara Zimble and Linda Garcia, Greater Boston Legal Services, August 2, 2006; Naomi Stern, National Law Center on Homelessness & Poverty, August 2, 2006, and comments submitted by a group that included national housing advocacy groups for tenants and applicants of assisted housing as well as national groups representing apartment associations and owners, August 2, 2006, all of which are on file at the National Housing Law Project.

Applicability

The notice and certification form are applicable to programs administered by the Office of Public and Indian Housing. Thus, it is applicable to public housing, the voucher program (including project-based vouchers), the Section 8 Project-based Certificate program, and the Section 8 Moderate Rehabilitation program (excluding the McKinney Act Mod Rehab Single Room Occupancy program). It is anticipated that the HUD Office of Housing will issue separate guidance for the other project-based Section 8 programs.[5]

Terms of the Certificate

The notice and certification form provide that in the event of an eviction or termination of housing subsidy, the owner or manager of the applicable housing programs may request that the victim of domestic violence, dating violence or stalking complete the certification form or submit other information within fourteen days after receiving written notification of the request for such certification or other information.

As urged by legal services advocates, the notice and certification form are clear that the certification form is only requested in the event of an eviction or termination of housing subsidy and that the victim may submit other information in lieu of, or in addition to, the certification. This may include federal, state, tribal, local police or court records, or documentation signed

> by an employee, agent or volunteer of a victim service provider, an attorney or medical professional, from whom the victim has sought assistance in addressing domestic violence, dating violence or stalking, or the effects of abuse, in which the professional attests under penalty of perjury that the incident or incidents in question are bona fide incidents of abuse.[6]

The victim of domestic violence or stalking, must also sign or attest to the documentation.

The HUD notice states that

> [a]n owner or PHA is not required to demand that an individual produce official documentation or physical proof of an individuals [sic] status as a victim of domestic violence, dating violence, sexual assault, or stalking in order to receive the protections of VAWA. Note that, a PHA, owner or manager, at their [sic] discretion, may provide assistance to an individual based solely upon the individuals [sic] statement or other corroborating evidence.[7]

The HUD notice sets forth the definitions of domestic violence, dating violence, stalking and immediate family member. They are not included in the certification form. Legal services advocates had urged that they be included in the form because they would be helpful to individuals completing or reviewing the form. Unfortunately, HUD chose not to include them, not to cross reference the notice in the form, or to require that the notice be attached to the form.[8] This is unfortunate because the HUD notice tracks the statute and is very helpful in explaining the purposes of the VAWA amendment and the certification form. Over time, this may be a critical omission because owners and managers may only rely on the certification form and not refer to the HUD notice which contains substantial useful information.

The notice and certification form are clear that the certification form is only requested in the event of an eviction or termination of housing subsidy and that the victim may submit other information.

The notice contains some very practical guidance to owners and managers regarding the consequences of notifying the victim by mail, which may place the victim in danger, as the abuser may monitor the mail. It encourages owners and managers to make "delivery arrangements that do not place the tenant at risk."[9]

The notice also states that if the requested information is not provided by the resident within the fourteen-day period, or any extension period, the owner or manager may evict or terminate the subsidy "without regard to the [2005 VAWA] amendments."[10] Unfortunately, it is easy to envision a situation in which a victim of domestic violence does not respond within the fourteen days and has a reasonable explanation for the failure, which may be related to the domestic violence, a disability, or other circumstances. Such explanations should provide an adequate basis for an extension of the fourteen-day requirement and forestall any attempt to avoid the new VAWA requirements. The failure of a housing owner or manager to extend the fourteen-day period in these situations may be an abuse of discretion and the HUD notice should have addressed the issue to avoid future problems. Regrettably, it did not.

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[5]PIH 2006-42, p 1.
[6]Form HUD 50066 (citation omitted); *see also* 42 U.S.C. §§ 1437f(ee)(1)(C), 1437d(u)(1)(C).
[7]PIH 2006-42, p. 2.

[8]Often, a HUD form will cross reference to an applicable handbook or guidance. *See e,g,* Form HUD-52641 (HAP Contract, which references HUD Handbook 7420.8 in the lower right hand corner), or Form HUD-52723 (Operating Fund, Calculation of Operating Subsidy, which references the attached instructions and the applicable C.F.R. regulations).
[9]*Id*. p. 2-3.
[10]PIH 2006-42, p. 3; *see also* 42 U.S.C. § 1437f(ee)(1)(B) and 1437d(u)(1)(B).

Certification Information

The certification form asks for the name of the victim, the names of other individuals on the lease, the name of the abuser and the relationship of the abuser to the victim, and the date and location of the domestic violence. There is also space for the victim to provide a narrative of the incident. The form requires a signature, certifying that the information is correct, that the victim believes that she/he is a victim of domestic violence, dating violence or stalking, and that the events described are incidents of such abuse. The signature is also an acknowledgment that the submission of false information is a basis for eviction or termination of assistance.[11] Legal services advocates objected to the certification, because it asks the victim to sign the certification form under penalty of perjury. This goes beyond the mere signature requirement that is required by the VAWA amendment.[12]

If a child or an incompetent individual has to sign the certification form, the signature and certification form would have to be modified to allow someone other than the victim to sign.

At the end of the certification form there is a paragraph reminding the PHA, owners and managers that any information collected must remain confidential, may not be placed into any shared database, and may not be released to any entity, except as specifically provided. This provision was inserted at the suggestions of legal services advocates who commented on the proposed form.

Conclusion

It appears that the comments of the legal services advocacy community were taken into account by HUD and adopted in many instances. As a result, the final certification form is better than the proposed form. But it is also apparent that work remains to be done. The effectiveness of the policies set out in the HUD notice and the certification form will depend on how owners and managers comply with the notice and how they go about implementing it.

It is possible to currently address deficiencies in the notice or certification form. Even though the HUD notice does not expire until December 31, 2007, the certification form has an Office of Management and Budget (OMB) expiration date of May 31, 2007. This is significant because the certification form states that an agency may not collect the information and that an individual is not required to complete the information "unless [the form] displays a currently valid OMB control number." To address this expiration date, HUD has published a new notice seeking comments on the form.[13] This presents advocates with an opportunity to ask for some additional changes to the form. One of the small but helpful changes would be to get OMB to approve a form that cross references to the notice. Another, more significant, change would require that the certification form be made available in other languages such as Spanish, Cantonese and Vietnamese.[14] Comments, which mush be submitted by March 12, 2007, should support those aspects of the certificate that are beneficial to victims of domestic violence. ■

[11]The obligation to submit correct information is contained in other regulations. *See e.g.*, 24 C.F.R. § 982.551(a) (voucher rules provide that "any information supplied by the family must be true and complete"); 24 C.F.R. § 960.259(a)(4) (same for public housing).

[12]42 U.S.C § 1437f(ee) ("the victim of domestic violence, dating violence or stalking has signed or attested to the documentation").

[13]72 Fed. Reg. 1233 (Jan. 10, 2007)(Notice of Submission of Proposed Information Collection to OMB; Implementation of the Violence Against Women (VAWA) and Justice Department Reauthorization Act of 2005).

[14]*See* 72 Fed. Reg. 2732 (Jan 22, 2007)(Final Guidance to Federal Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficiency Persons).

Homelessness Blamed on Federal Housing Cuts

Funding cutbacks and the near elimination of the federal government's commitment to building, maintaining, and subsidizing affordable housing are the most important causes of homelessness in the United States. That is the conclusion of *Without Housing: Decades of Federal Housing Cutbacks, Massive Homelessness and Policy Failures*,[1] a report recently published by the Western Regional Advocacy Project.[2]

The report documents[3] the massive funding cuts in the housing and community development programs of the United States Departments of Housing and Urban Development (HUD) and Agriculture (USDA) that began in the late 1970s, and correlates them to the emergence and continued prevalence of mass homelessness. It criticizes the federal government's policy responses to homelessness, which focus on individual rather than systemic needs, and argues that the de-funding of federal housing programs, coupled with the loss of public and private-sector affordable housing units, should be central to any discussion of the cause of homelessness. It contends that funding housing through homeless assistance programs is an insufficient, inadequate, and costly substitute for

[1]A copy of the report is available at http://wraphome.org.

[2]Western Regional Advocacy Project is a coalition of West Coast social justice-based homelessness organizations.

[3]This summary quotes and paraphrases *Without Housing* liberally. Quotation marks and footnote references have been omitted.

restoring affordable housing funding. It argues that priorities for federal housing assistance are askew and unfair in light of the fact that the federal government foregoes collection of disproportionally large sums of money on homeownership-related tax deductions that primarily benefit well-to-do households while only a fraction of that amount is spent on housing assistance for low-income households. The study concludes that until "we recognize and commit ourselves to the principle that housing is a human right, we will not end homelessness in the United States."

The federal government responded, and continues to respond, to the rise in homelessness by instituting temporary and local programs and policies that have either failed or proved inadequate.

The Rise of Homelessness in the Early 1980s

Without Housing states that episodes of mass homelessness have occurred throughout U.S. history. In the middle of the twentieth century, however, New Deal policies and post-World War II social welfare programs effectively reduced U.S. homelessness until the early 1980s. At that time, the Reagan Administration slashed funding of social programs, including affordable housing programs, initiated massive tax breaks for individuals and corporations, and increased military spending that pushed the nation into unprecedented peacetime deficits. These events occurred at the same time that the cumulative effects of de-industrialization, global out-sourcing of jobs, decreasing real wages, urban renewal, and gentrification were driving down income and driving up housing costs. Together, these events left millions of people without economic security, unable to afford housing, and, eventually, homeless.

According to *Without Housing*, the federal government responded, and continues to respond, to the rise in homelessness by instituting temporary and local programs and policies that have either failed or proved inadequate. Homelessness programs and federal homelessness policies focus on the individual and fail to examine or respond to systemic causes of homelessness, the primary cause of which is the de-funding of federal production and subsidization of affordable housing.

Reduction in Federal Housing Production and Subsidization

Charts and data in the report show that the peak in the subsidization and production of new housing under the HUD and USDA programs was reached in 1976. In that year, the federal government funded the construction and new subsidization of nearly 447,000 units of housing. While the number dropped to 386,000 by 1979, it dropped precipitously to 76,000 units by 1982 and, with one exception, has been declining ever since. In 2002, the last year that the report covers, the new units constructed and subsidized by the federal government dropped to 34,000.

Unfortunately, the loss of federal housing assistance from the 1980s to today has been accompanied by the demolition, abandonment, and conversion of private and unsubsidized affordable housing that was previously available to low-income renter households. *Without Housing* states that several hundred thousand units of such housing were lost in the 1990s alone. Combined with the effects of de-industrialization, which led to high unemployment, and the loss of well-paid jobs within many urban centers, the need for affordable housing increased dramatically. As a result, millions of single adults, families, and youths found themselves out on the streets and homeless for the first time in decades. The human consequences are severe.

Funding Other Priorities

Without Housing points to the fact that federal budget outlays have doubled in the last twenty-five years while federal affordable housing expenditures are only a fraction of the amount that they used to be. This is not to say that housing is excluded altogether. Over $120 billion is being expended for interest and other homeownership-related tax deductions for upper-income homeowners. In absolute dollars, this is a three-fold increase over the amounts spent for these purposes thirty years ago. Unfortunately, more than 55% of these benefits go to the 12% of taxpayers with incomes greater than $100,000, often to finance luxury or second homes. Every year since 1981, the cost of these tax benefits has been greater than the entire HUD budget and has dwarfed direct expenditures for programs that benefit low-income renters. According to *Housing First*, 61% of all federal housing expenditures go to persons with incomes over $54,000, while only 20% go to households with incomes under $18,465.

In short, *Without Housing* contends that the federal government has not stopped spending, not even for housing, but that it has chosen to spend massively on militarization and corporate welfare rather than housing. Of the amounts that do go to housing, much of the spending goes to those least in need of federal assistance.

Conclusion

Without Housing concludes that ending homelessness will require a massive recommitment by the federal government to create, subsidize and maintain affordable housing. ■

HUD's Proposed Hurricane Reoccupancy Policies Raise Concerns

Nearly fifteen months after Hurricanes Katrina, Rita, and Wilma swept through the Gulf Coast and ravaged the lives of countless families, the Department of Housing and Urban Development (HUD) briefly introduced and then pulled back a set of reoccupancy policies for pre-disaster HUD assisted and special needs families.[1] The reoccupancy policies are critical to the Gulf Coast recovery process because many regional public housing programs were devastated by the unprecedented loss of rental units and the massive displacement of individuals and families from their homes and communities.

The proposed reoccupancy policies vary somewhat by program. For project-based assistance programs, the policies stated that displaced families must be notified in writing at least sixty days prior to the expected date the unit would be ready for reoccupancy, and that families should be given a reasonable amount of time to return to their units, but not less than sixty days from the date the unit is actually ready for reoccupancy. In the event a family chooses not to return to its pre-disaster unit, the family would relinquish the unit with no guarantee that it would receive housing assistance or be given an admission preference at a later time. In contrast, residents assisted by the tenant-based voucher programs would receive considerably more flexibility because of the program's portability feature, which allows families to continue to receive voucher assistance even if they choose not to return to their pre-disaster community.

Although HUD's publication of the reoccupancy policies was generally welcomed, the long-awaited policies drew some scrutiny. In particular, housing advocates who became aware of the policies and submitted comments to HUD expressed a number of concerns with regard to communication with displaced families, obstacles to relocation, and program eligibility and unit availability.[2]

Communication with Displaced Families

In the wake of the hurricanes, thousands of HUD-assisted families were separated and forced to seek refuge in communities scattered throughout the United States, often leaving families thousands of miles away from home in communities to which they had little or no connection. Even now, many of these families have been unable to return to their homes for various financial and logistical reasons. HUD's proposed reoccupancy policies are critically important to thousands of families who want to return home. Accordingly, advocates have urged HUD to incorporate the following amendments into the proposed reoccupancy policies:

- The Contact During the Disaster Voucher Program (DVP) Tenancy section of the proposed policy stated that, "The PHA or Special Needs housing provider *should* keep families apprised of the availability of their pre-disaster housing unit." Under the circumstances, HUD was urged to amend this language to state that the PHA or Special Needs housing provider *must* keep families apprised of the availability of their pre-disaster housing unit. Moreover, the contact should be made on a fairly regular schedule and no less than once every three months.
- The "Resources for finding displaced families" section of the proposed policy stated that several recommended methods of contacting displaced families had been effective in the past (i.e. letters to any known post-disaster address, postings at public areas, and public announcements). Under the circumstances, advocates urged HUD to include several alternative outreach strategies that likely will improve and/or extend communication into non-traditional households (i.e. working with Resident Council leaders). In addition, HUD was encouraged to instruct PHAs to utilize the FEMA database to find families who are not currently receiving public housing assistance and that this search should be conducted before FEMA aid for Katrina victims expires in February 2007. The advocates urged that Continuum of Care organizations

[1]HUD Office of Public and Indian Housing, Reoccupancy Policies for Pre-Disaster HUD Assisted and Special Needs Families Displaced by Hurricanes Katrina and Rita (2006) (on file with NHLP). A draft of HUD's proposed reoccupancy policies were temporarily made available for public comment in November 2006 with comments due to David Vargas, Director, Office of Housing Voucher Programs, on December 8, 2006. However, shortly after the draft policies were first published on the HUD website, they were removed with no direction as to when and/or if these policies would be reintroduced. After this article was written, HUD posted the final reoccupancy policies on its website. PIH Notice 2007-3. http://www.hud.gov/offices/pih/publications/hurricane.cfm. These new policies are different in several respects from the draft policies discussed here. NHLP plans to publish another article on the final policies in the next issue of the *Housing Law Bulletin*.

[2]A diverse group of local and national housing advocates collaborated and submitted comments to HUD's proposed hurricane reoccupancy policies. The list of collaborating organizations includes: New Orleans Legal Assistance Corporation; Greater New Orleans Fair Housing Action Center; Loyola Law Clinic; Everywhere and Now Public Housing Residents Organizing Nationally Together (ENPHRONT); Lawyers' Committee for Civil Rights Under Law; National Housing Trust; National Low Income Housing Coalition; Technical Assistance Collaborative; The Partnership for Working Families; and National Housing Law Project.

also be provided timely access to family contact information with respect to pre-disaster homeless persons.

- In order to facilitate the relocation decision-making process, the Family Certification of Intent letter, which is sent to families who previously received Project-Based Voucher (PBV) assistance, should expressly inform families that if they occupied the PBV unit for twelve months or more before hurricanes Katrina or Rita, the family may choose between returning to the PBV project or receiving a tenant-based voucher or comparable tenant-based assistance from the pre-disaster PHA.
- Disaster-displaced families are going to need adequate time to determine if they want to return. In making this determination, families will need to consider whether the move is practical given the countless employment and family relocation issues they are sure to face. Therefore, given the time-sensitive nature of the Family Certification of Intent letter (twenty-one days as currently proposed) and the significant consequences that accompany this letter (i.e. the failure to respond within the proposed twenty-one days may result in the family relinquishing their housing assistance), HUD was urged to amend its proposed policies and extend the deadline to forty-five days.
- Given the significance of the Family Certification of Intent letter (i.e. the failure to respond by the deadline may result in the family relinquishing their housing assistance), HUD was urged to amend the reoccupancy policies to include a follow-up notice that would be sent to all displaced families approximately twenty-one days after the original notice. The follow-up notice would either: (1) confirm the PHA's receipt of the family's certification of intent letter; or (2) notify the family that the PHA has not received its response and re-inform the family of the significance of this notice and its need to reply in a timely manner. Moreover, given the significant consequences that accompany a family's decision not to reoccupy the pre-disaster public housing or project-based unit, the Family Certification of Intent letter should draw special attention to these consequences/provisions.

Obstacles to Relocation

The proposed reoccupancy policies stated that the opportunity to return to the pre-disaster assisted housing or to resume tenant-based voucher assistance in the pre-disaster PHA's jurisdiction would be afforded to all families. However, the proposed policies also stated that a family's right to return would not be held in perpetuity; thus if a family failed to comply with the procedural deadlines it would relinquish the reoccupancy rights so that program benefits could be made available to other eligible families.

While the rationales behind HUD's reoccupancy policies are conceptually logical, under the circumstances there are a number of family relocation considerations that warrant amendments to the proposed reoccupancy policies:

- Even before Hurricanes Katrina and Rita swept across the Gulf Coast, the poorest families in New Orleans relied on the public transit system for their travel needs. According to the 2000 U.S. Census, an astonishing 27% of households did not own a vehicle. Not surprisingly, 27% of households in New Orleans were also below the poverty line. This translates to approximately 120,000 residents who had little choice in their travel plans outside of walking, cycling, or using public transport. Consequently, during the evacuation process many of these same families were not afforded a meaningful choice with regard to their relocation destination, stranding countless low-income families in communities thousands of miles from home with no means of returning. Nevertheless, HUD's proposed reoccupancy policies only give families twenty-one days to decide whether they plan to return and sixty days to complete their move once their pre-disaster unit is ready for reoccupancy. Under the circumstances, the proposed deadlines are overly burdensome to low-income families because of the financial and logistical roadblocks that will surely confront them in the decision-making process (e.g. the cost of relocating one's family will likely translate into thousands of dollars in up-front expenses for transportation, temporary storage, security deposits, utility service deposits, etc). Therefore, HUD was urged to amend its proposed policies and include provisions that would provide funding to assist families with relocation expenses and extend the above-noted deadlines to forty-five and 120 days respectively.
- Many housing developments are charging families rent from the date of the first notification that their pre-disaster unit is ready for occupancy. Thus upon returning home, many families soon discover that they owe over one thousand dollars in back rent. HUD was urged to amend its proposed policies and expressly direct PHAs that rent should not be charged until the date the family returns and reoccupies the unit or the date the family otherwise accepts responsibility for the unit. Under either scenario, the family's rental obligations must be clearly set forth in writing.
- It has been widely recognized that Hurricanes Katrina and Rita caused an unprecedented amount of property damage, significant loss of life, and massive displacement of individuals and families from their homes and communities. Hurricane survivors have experienced high levels of prolonged stress and are faced with a dizzying array of complicated decisions regarding their futures and well-being. Every

displaced family is in need of professional assistance to help it make the best possible choices under these highly stressful circumstances. HUD was urged to amend the proposed policies to include provisions that would assure funding for case management assistance for all displaced families and individuals.

- In the first few months following the hurricanes, many families were unfairly confronted with the monumental decision of staying in their current evacuation location or returning home to a community still reeling from the hurricanes. Under these conditions, many public housing residents, under conditions of extreme stress, made hasty decisions that were often based on inadequate or faulty information. Consequently, many families rushed home, only to find that they lost their assistance entirely through a failure to properly terminate their lease for the relocation housing. Others unknowingly relinquished their only opportunity to return home to their pre-disaster public housing unit. Those who returned home with no guidance or counseling should not be penalized for not having a clear understanding of the applicable rules. HUD was urged to amend the policies and direct PHAs that families that inadvertently relinquished or otherwise surrendered their housing assistance prior to the release of the reoccupancy policies notice should be granted amnesty and be allowed to return to their pre-disaster units if they are available; and, in the event the family's pre-disaster unit is unavailable (i.e. it was leased to another family), the family should become eligible for either another comparable unit, when one becomes available, or for a voucher.

Program Eligibility and Unit Availability

The proposed reoccupancy policies stated that program eligibility for a particular family would vary depending on factors that raised a number of issues. Specifically, advocates expressed concerns with the proposed eligibility standards and unit availability:

- The "Background" section of the proposed reoccupancy policies stated that Disaster Voucher Program (DVP) assistance is time-limited and expected to end on September 30, 2007. This implies that families will no longer be able to receive DVP assistance after September 30, 2007. The imposition of this deadline is not consistent with the supplemental appropriations act,[3] which states that funding must be committed by, rather than ending on, September 30, 2007. Funds become "committed" when HUD grants them to PHAs. HUD was urged to amend the reoccupancy policies and clearly articulate that a PHA's DVP assistance shall continue until committed DVP funds are no longer available.
- The "Purpose" section of the proposed reoccupancy policies stated that the proposed reoccupancy policies were not applicable to the multifamily and Section 202 housing programs. Instead, those seeking guidance for these programs were referred to a dated 2004 HUD notice. The multifamily and Section 202 housing programs desperately need revised guidance, especially considering the disturbingly low number of DVP vouchers that have been issued to former program participants (less than 1,000 DVP vouchers have been issued to families that previously received assistance under the multifamily or Section 202 housing program). According to HUD's website,[4] before the hurricanes there were 3,719 families that were housed in these programs in Orleans Parish alone. Without adequate guidance there is a great danger that PHAs will lose all contact with these families. Accordingly, HUD was urged to issue revised reoccupancy policies for the multifamily and Section 202 programs.
- The proposed reoccupancy policies stated that the pre-disaster PHAs may need to conduct a reexamination of the returning disaster-displaced families' income and composition to assess their ongoing program eligibility. However, the proposed reoccupancy policies failed to expressly recognize the fact that returning families' household income and/or composition is likely to have been impacted by a loss of life, employment, and property loss caused by the hurricanes. In particular, some families have increased in size because of hurricane-related fatalities and subsequent household realignments. Therefore, under the circumstances, HUD was urged to direct PHAs to generously construe these standards, especially as they relate to family composition and unit size. Such an expansive interpretation should ensure that the maximum number of families are encouraged to return.
- Under the proposed reoccupancy policies, the definition of a "Special Needs Family" is overly restrictive. For example, if an otherwise homeless family was temporarily staying with a friend or relative the week prior to the hurricanes it would not be eligible for assistance. Because this surely was not the intent of the reoccupancy policy, HUD was urged to amend the policy and liberally define a special needs family as one that meets the proposed reoccupancy requirements or "otherwise qualified as a special needs and/or homeless family under the PHA's pre-disaster definition."

[3]Pub. L. No. 109-234, 120 Stat. 418 (2006).

[4]www.HUDuser.org.

- The proposed reoccupancy polices for families previously residing in public housing stated that the pre-disaster PHA must determine that "an adequate community infrastructure (e.g. hospitals, schools, and dependable utilities) exists" before families will be allowed to return to their pre-disaster unit. This policy is overly restrictive and should be amended. If a family's public housing unit is available and otherwise decent, safe, sanitary, and in good repair the family should be given the opportunity to determine whether it wants to return (e.g. a family with no school-aged children would be unaffected by a lack of schools and would probably want to return). Moreover, this would be consistent with the proposed policies relating to tenant-based vouchers.
- The proposed reoccupancy policies did not clearly articulate a plan for families who were previously receiving assistance under the public housing or project-based voucher program and whose units would not be available until after the date when committed DVP funds are no longer available, or would never be available (i.e. the development is set for demolition). HUD was urged to amend the policies and clearly articulate that in the event a family's unit will not be available until after the date when committed DVP funds are no longer available, the family will be given a voucher.
- The proposed reoccupancy policies stated that if a family decides not to reoccupy its pre-disaster public housing or project-based unit it would relinquish the unit with no guarantee that it would be provided housing assistance in the future. The proposed policy is too limited because there are a number of justifiable reasons why a family might not be able to return (e.g., children are enrolled in new schools, households have settled into new employment and have no guarantee of employment back in their previous communities, etc). HUD was urged to amend the policy and work with the Appropriations Committees in Congress to secure funding for additional Section 8 vouchers for these families. If HUD receives adequate appropriations for additional vouchers, these vouchers should be offered to families in such circumstances.

Conclusion

New Orleans and many other Gulf Coast communities are currently struggling through the worst affordable housing crisis since the Civil War. And although the proposed reoccupancy policies symbolize a positive step toward bringing thousands of families back home, HUD and the Housing Authority of New Orleans (HANO) continue to send conflicting messages regarding their true desire to bring everyone back home. For example, despite the housing crisis, HUD and HANO still plan to demolish 4,534 public housing garden-style apartments. These apartments could be cost-effectively refurbished and made available to thousands of former tenants. Even after the reoccupancy policies are finalized, advocates still will be confronted with a considerable number of logistical, financial, judicial, and political hurdles to be negotiated and resolved before all families can start returning home. ■

Recent Cases

The following are brief summaries of recently reported federal and state cases that should be of interest to housing advocates. Copies of the opinions can be obtained from a number of sources including the cited reporter, Westlaw,[1] Lexis,[2] or, in some instances, the court's website.[3] Copies of the cases are *not* available from NHLP.

Payment Standard—Voucher Program; Appropriate Unit Size; Fair Hearing

Bursey V. San Diego Hous. Comm., 2006 WL 3791262 (Cal. App. 4 Dist., Dec. 27, 2006) (Unreported). Court of appeals upheld superior court judgment that housing authority could reduce Section 8 voucher assistance level from a three-bedroom payment standard to a two-bedroom payment standard for a three-person household with two teenage children of the opposite sex in order to save funds when HUD reduced program funding. Under the PHA plan, a living room could be considered as a sleeping room, thus allowing the children to sleep in separate rooms. The court also affirmed the lower court finding that the hearing accorded to the voucher holder was fair.

De facto Demolition—Public Housing

Givens v. Butler Metropolitan Hous. Auth., 2006 WL 3759702, (S.D.Ohio, Dec. 19, 2006). Public housing residents who were relocated from one public housing development operated by the Cincinnati Housing Authority into another development operated by the authority in anticipation of the first development's demolition sought summary judgment against the housing authority on the ground that its actions constituted a *de facto* demolition without

[1]http://www.westlaw.com.
[2]http://www.lexis.com.
[3]For a list of courts that are accessible through the World Wide Web, see http://www.uscourts.gov/links.html (federal courts) and http://www.ncsc.dni.us/COURT/SITES/courts.htm#state (for state courts). *See also* http://www.courts.net.

HUD approval and thus violated the United States Housing Act. The residents also sought summary judgment on their claim that they were not given adequate relocation benefits and denied the right to select other "comparable housing" as required by the Housing Act. The defendant housing authority argued that a 1995 amendment to the Housing Act, allowing housing authorities to consolidate developments eliminated all possible claims for *de facto* demolition, that HUD's ultimate approval of the demolition mooted the residents' claim, and that the housing authority's actions actually constituted a consolidation of developments in order to provide better housing to the residents. The court rejected the housing authority's first two arguments, disagreeing about the reach of the 1995 amendment and finding that HUD's ultimate approval of the demolition does not moot the claim of *de facto* demolition. The court, however, denied the plaintiffs' summary judgment motion on the ground that the housing authority disputed the facts as to whether the residents' relocation constituted a permissible consolidation. As a consequence, the court held that the issue would have to be decided at a jury trial. As for the plaintiffs' relocation claims, the court found that the residents were given all the relocation benefits that they sought and, on the representation of the housing authority that it would consider other requests for reimbursement, it dismissed the plaintiffs' claims. Lastly, the court also deferred to trial the residents' claim that they were not relocated to "comparable housing" on the basis that the comparability of the two housing developments is a factual issue that must be decided by a jury.

Federal Courts—Jurisdiction; Rooker-Feldman Doctrine; Foreclosure and Demolition of Subsidized Housing

Farmer v. City of Cincinnati, 2006 WL 3762131 (S.D. Ohio, Dec. 21, 2006). In a suit arising from the closure and demolition of Huntington Meadows, formerly the City of Cincinnati's largest affordable housing complex, the court granted, in part, and denied, in part, the City's motion to dismiss ten separate claims made by a resident association and individual former residents of the development. In response to the City's motion to dismiss the claims under the Rooker-Feldman doctrine, the court concluded that all but one of the plaintiffs were not parties to, nor in privity with parties to, the "losers" in the prior state court proceeding. It, therefore, refused to dismiss the case under the Rooker-Feldman doctrine or under a claims preclusion or *res judicata* defense. However, the court did dismiss several of the plaintiffs' claims on grounds of mootness or failure to state a cause of action.

Rent Increase; Section 236 Program

HUD Tenants Coalition v. U.S. Dept. of Housing and Urban Development, (D.N.J. Dec. 15, 2006) District court refused to set aside several rent increases approved by HUD for a Section 236 development. It rejected the residents' claim that the applicant's status as a nonprofit organization was relevant to the approval of the rent increase requests. It also refused to question the sufficiency of the rent increase notices provided to the residents on the grounds that the residents responded to several of the rent increase notices and that HUD found the notices sufficient.

Eviction—Good Cause; Section 202 Program; Preemption

Ross v. Broadway Towers, 2006 WL 3681148 (Tenn.Ct.App., Dec. 14, 2006). The court upheld lower court decision to evict resident of Section 202 development on the ground that resident's caretaker, now spouse, committed a crime before their admission to the development that was not discovered from a background check because caretaker gave owner a different name. The court rejected the resident's contention that the commission of the crime did not constitute good cause because it did not occur while the caretaker was residing in the development. It held that the caretaker's crime—felony forgery as part of an effort to withdraw $30,000 from her mother's account—was of the nature that threatened the health and safety of other senior residents in the development. The fact that the caretaker was convicted of the crime only nine months before she authorized the owner to conduct a criminal background check was sufficiently proximate to constitute good cause. Moreover, the court found that the owner's inadvertent acceptance of rent after issuing the eviction notice without reserving the right to evict did not constitute a waiver of the owner's right to evict. It held that federal regulations and policies that intend to provide crime-free housing to all residents preempt Tennessee landlord tenant law that gives rise to the waiver argument.

Bankruptcy—VA Single Family Guarantee Program; Anti-discrimination Provision of Bankruptcy Code

Ayes v. U.S. Dept. of Veterans Affairs, 2006 WL 3788795 (4th Cir. 2006). On a *de novo* review, the court affirmed the lower court's decision that the Veterans Administration did not violate the anti-discrimination provision of the Bankruptcy Code by refusing to restore the plaintiffs' home-loan guaranty entitlements solely because they had

previously filed for bankruptcy. The court found that the veterans' home-loan guarantee entitlement was not the type of benefit that fell within the protection of the anti-discrimination provisions of the Bankruptcy Code.

Bankruptcy—Rural Development (RD/RHS) Single Family Direct Loan; Right of Redemption

In re Bartlett, 2006 WL 3114469 (Bankr. D.Vt., Nov. 1, 2006). Acting on a complaint filed by the Rural Housing Service (RHS), the court denied RHS' motion that sought to revoke an earlier bankruptcy confirmation order that reinstated the Bartletts' interest in their home on the ground that at the time of filing for bankruptcy the Bartletts did not have an interest in their home that could become part of the bankruptcy estate. The court agreed that the Bartletts' right of redemption, under Vermont title law, was extinguished when a second mortgage holder foreclosed on its loan. However, it found that their right of redemption was reinstated when RHS subsequently foreclosed on its first mortgage and the court that handled the foreclosure proceedings, through an order drafted by RHS, specifically granted the Bartletts a right to redeem their interest in the property. Since that redemption right had not expired when the Bartletts filed their Chapter 13 proceeding, the Bartletts had an interest in their property that was part of the bankruptcy estate. The court also denied RHS' effort to set aside the confirmation order on the ground that RHS had participated in the confirmation proceedings and that it could have challenged the Bartletts' property interest in the confirmation proceedings. Having participated in the proceedings and having failed to raise the Bartletts' property interest, the earlier bankruptcy court confirmation order has a *res judicata* effect that precludes RHS from challenging the confirmation order in a subsequent proceeding.

Bankruptcy—Public Housing; Eviction; Curing Pre-petition Defaults

In re Kelly, 2006 WL 3704690 (Bankr. S.D.Fla., Dec. 1, 2006). In what appears to be a case of first impression under the Bankruptcy Code since its amendment in 2005, bankruptcy court held that public housing tenant, against whom an eviction judgment was entered prior to the filing of the bankruptcy petition, need not cure pre-petition defaults under § 362(l) of the Bankruptcy Code in order to stop an eviction. Section 525(a) of the Bankruptcy Code allows a Chapter 7 debtor to stay in his or her public housing unit even though pre-petition rent arrearages are being discharged. The court held that the 2005 addition of § 362(b)(22) of the Bankruptcy Code, which provides an exception to the automatic stay and allows a landlord to complete eviction proceedings on residential property leased to a debtor if the landlord obtained a judgment of eviction prior to the filing of the bankruptcy petition, does not override Section 525(a). ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture (USDA—Rural Development (RD)) issued in December of 2006. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's website,[1] (2) bound volumes of the Federal Register, (3) HUD Clips,[2] (4) HUD,[3] and (5) USDA's Rural Development website.[4] Citations are included with each document to help you secure copies.

HUD Federal Register Proposed Regulations

71 Fed. Reg. 78,013 (Dec. 27, 2006)
Streamlined Application Process in Public/Private Partnerships For the Mixed-Finance Development of Public Housing Units

Summary: This proposed rule would revise the current application process for participation in mixed-finance public housing development programs, including HOPE VI, to simplify and streamline the application, review, and approval processes. Currently, a public housing agency (PHA) is required to submit a variety of closing documents to HUD, both before closing and after recordation. Under this proposed rule, this two-step process would be retained, but rather than submitting all documents related to the closing, a PHA would be required to complete and retain for inspection or audit all of the closing documents, and to submit to HUD only a portion of the closing documents, along with all necessary certifications of the fulfillment of the closing requirements. This change would significantly reduce the document submission burdens on PHAs while still enabling HUD to ensure that the PHAs meet the program requirements.

Comments Due Date: February 26, 2007.

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[1]http://www.access.gpo.gov/su_docs.
[2]http://www.hudclips.org/cgi/index.cgi.
[3]To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.
[4]http://www.rdinit.usda.gov/regs.

HUD Federal Register Notices and Announcements

71 Fed. Reg. 74,747 (Dec. 12, 2006)
Indian Housing Block Grant Program; Census Data Use

Summary: Senate Report 109-109, which accompanied HUD's Fiscal Year 2006 appropriations act, provides for HUD to reassess through notice and comment rulemaking its use of multi-race data in the computation of the Need component of the Indian Housing Block Grant (IHBG) program allocation formula. Through the IHBG program, HUD provides federal housing assistance to Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-government. Consistent with the language of Senate Report 109-109, this notice solicits public comment on HUD's use of multi-race data in the computation of the IHBG program allocation formula. Following HUD's review and consideration of the comments received, HUD may proceed with additional rulemaking as necessary.

***Comment Due Date*:** February 12, 2007.

71 Fed. Reg. 75,571 (Dec. 15, 2006)
Youthbuild Program

Summary: The department is soliciting public comments on the subject proposal. The Youthbuild Program provides disadvantaged youth, predominately high school dropouts, with educational opportunities and job skills training. Beginning with Fiscal Year (FY) 2007, this program transfers to the Department of Labor. The Youthbuild Transfer Act provides authority to HUD to administer grants for FY 2006 and earlier until closeout.

Comments Due Date: January 16, 2007.

71 Fed. Reg. 75,572 (Dec. 15, 2006)
Notice of Submission of Proposed Information Collection to OMB; Section 901 Notice of Intent and Fungibility Plan for Combining Public Housing Capital or Operating Funds, or Housing Choice Voucher Funds To Assist Displaced Families and Address Damages Related to Hurricanes Katrina and Rita

Summary: The department is soliciting public comments on the subject proposal. Eligible PHAs in areas most heavily impacted by Hurricanes Katrina and Rita will submit a Notice of Intent and Section 901 Fungibility Plan notifying HUD they intend to exercise funding flexibility and describing how program funds will be reallocated and spent to meet hurricane-related needs.

Comments Due Date: January 16, 2007.

71 Fed. Reg. 75,972 (Dec. 19, 2006)
Housing Counseling Training Program

Summary: The department is soliciting public comments on the subject proposal. Nonprofit organizations submit information to HUD through Grants.gov to apply for funding to develop and implement an ongoing training program for housing counselors. HUD will use the information to evaluate applicants competitively and then select one or more organizations to receive funding to develop and implement the ongoing training program for housing counselors.

Comments Due Date: January 18, 2007.

71 Fed. Reg. 75,973 (Dec. 19, 2006)
New Approach to the Anti-Drug Program

Summary: The department is soliciting public comments on the subject proposal. The New Approach to the Anti-Drug Program (formerly known as the Safe Neighborhood Action Grant Program) was authorized through yearly appropriations. Owners were eligible to apply for grants to fund security and crime elimination activity in federally assisted low-income housing projects. Funding for this program has not been appropriated since Fiscal Year 2001, but quarterly and semi-annually reporting is still required until all grant funds are expended.

Comments Due Date: January 18, 2007.

71 Fed. Reg. 75,973 (Dec. 19, 2006)
Eligibility of a Nonprofit Corporation/Housing Consultant Certification

Summary: The department is soliciting public comments on the subject proposal. Nonprofit organizations provide financial and other information so that HUD can determine that the sponsor and/or mortgagor is truly a nonprofit and demonstrates probable success in project development and continuing operation. A Housing Consultant hired by the nonprofit certifies to HUD that he/she has no other financial interest in the project and has no conflict of interest. The general contractor, subcontractors, equipment lessees, material and other suppliers, and management of the project certify to any direct or indirect contractual relationship they have with the sponsor or the mortgagor. HUD uses this information to assure compliance with regulations.

Comments Due Date: January 18, 2007.

71 Fed. Reg. 76,678 (Dec. 21, 2006)
Public Housing Inventory Removal Application on Reporting

Summary: The department is soliciting public comments on the subject proposal. Public housing agencies are required to submit information to HUD to request permission to remove from inventory all or a portion of a public housing development (i.e. dwelling unit(s), nondwelling property or vacant land) owned by a public housing authority (PHA). The information requested in this application is based on requirements of Sections 18, 22, 32, and 33 of the United States housing Act of 1937 as amended ("Act"), 24 CFR Parts 906, 970, and 972 (HUD Regulations), and HUD's interest in property of PHAs under Annual Contribution Contracts and Declarations of Trust. The department will use this information to

determine whether, and under what circumstances, to permit PHAs to remove from their inventories all or a portion of a public housing development, as well as to track removals for other record keeping requirements. Responses to this collection of information are statutory and regulatory to obtain a benefit. The department has automated the application process by instituting an inventory removal module in the Public and Indian Housing Information Center (PIC) System.

Comments Due Date: February 20, 2007.

71 Fed. Reg. 77,040 (Dec. 22, 2006)
Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2006

Summary: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly Federal Register notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous Federal Register notice. The purpose of this notice is to comply with the requirements of Section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on July 1, 2006, and ending on September 30, 2006.

71 Fed. Reg. 77,772 (Dec. 27, 2006)
Telephone Survey of Multifamily Assisted Housing Properties That Are Eligible for HUD's Service Coordination Program

Summary: The proposed information collection requirement described below has been submitted to the Office of Management and Budget for review, as required by the Paperwork Reduction Act. The department is soliciting public comments on the subject proposal. This project is a survey of HUD's Multifamily Assisted Housing properties that are eligible for the Service Coordinator Program. The study will be administered to a statistical sample of properties. This study involves a telephone survey of multifamily property managers. The survey will assess the level of satisfaction with the provision of service coordination that links residents of Multifamily Assisted Housing to the needed supportive services.

Comments Due Date: January 26, 2007.

71 Fed. Reg. 77,773 (Dec. 27, 2006)
Survey of Local Regulatory Practices and Manufactured Homes

Summary: The proposed information collection requirement described herein has been submitted to the Office of Management and Budget for review, as required by the Paperwork Reduction Act. The department is soliciting public comments on the subject proposal. How local regulatory barriers impact incidence of manufactured homes (MH) in metro communities is unknown. Information collected from local planning directors will help determine to what extent regulations limit MH as an affordable housing option.

Comments Due Date: January 26, 2007.

71 Fed. Reg. 77,778 (Dec. 27, 2006)
Announcement of Funding Awards for the Housing Choice Voucher Program; Fiscal Year 2006

Summary: This document notifies the public of funding awards for Fiscal Year 2006 to housing agencies (HAs) under the Section 8 housing choice voucher program. The purpose of this notice is to publish the names, addresses, and the amount of the awards to HAs for non-competitive funding awards for housing conversion actions, public housing relocations and replacements, moderate rehabilitation replacements, and HOPE VI voucher awards.

71 Fed. Reg. 78,021 (Dec. 27, 2006)
Hurricanes Katrina, Rita, and Wilma Disaster Areas; Extension of Regulatory and Administrative Waivers Granted for Public and Indian Housing Programs To Assist With Recovery and Relief in Hurricanes Katrina, Rita, and Wilma Disaster Areas

Summary: This notice advises the public of HUD's decision to extend for an additional period ending December 31, 2007, or for such other period as specified in this notice (e.g., Uniform Financial Reporting Standards and Public Housing Assessment System waivers) certain HUD regulations and other administrative requirements governing HUD's Office of Public and Indian Housing programs that were identified and waived or deferred under notices of Regulatory and Administrative Waivers Granted for Public and Indian Housing Programs to Assist with Recovery and Relief in Hurricanes Katrina, Rita, and Wilma Disaster Areas, published October 3, 2005, November 1, 2005, and March 13, 2006. The requirements in these three notices were waived or deferred in order to facilitate the delivery of safe and decent housing under these programs to families and individuals who were displaced from their housing by Hurricanes Katrina, Rita, and Wilma.

Effective Date: December 28, 2006. ■

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