

Former Federal Preferences

Some of the former federal preferences are discussed below to help guide those who are considering the range of local preferences that may be adopted, to assist with targeting federal housing to those most in need, and to help PHAs that are implementing local preferences that are identical or similar to the former federal preferences. Where appropriate, the discussion is updated to include current federal policies, such as providing a preference for victims of domestic violence. When Congress enacted the former federal preferences, HUD delayed implementation and numerous cases were brought to require implementation.¹

Preferences for Persons Involuntarily Displaced

Under the former federal preferences, the term involuntary displacement was broadly defined to include displacement due to disaster, government action, action of the housing owner (excluding rent increases), and domestic violence. It also extended to displacement caused by efforts to avoid reprisals and hate crimes, by inaccessibility of the unit, and HUD disposition of multifamily developments.²

An applicant was considered to be involuntarily displaced if, after initial displacement she was not living in standard permanent replacement housing or if she would be involuntarily displaced within the next six months.³ Standard permanent replacement housing was defined as decent, safe and sanitary housing that was large enough for the entire household. Because of this requirement, families that had secured housing that was not large enough to enable them to reunify with family members temporarily placed elsewhere could still claim preference. This provision was very important to families who, for example, were “doubled up” and not technically homeless (in the sense of being on the street or in a shelter). It was also important for victims of domestic violence who experienced abuse.

Displacement Because of Domestic Violence. Displacement due to domestic violence was considered a form of involuntary displacement. The prior regulations defined domestic violence as “actual or threatened physical violence directed against one or more members of the applicant family by a spouse or other member of the applicant’s household.”⁴ While this definition has deficiencies that are noted below, the regulations provided that the preference applied until the victim obtained standard, permanent

¹ There was a long delay between when the federal preferences were initially enacted, 1979, and the final 1988 regulations. During that period, numerous lawsuits were brought seeking to implement the preference regulations on an individual or a class basis. *See, e.g., Drake v. Pierce*, 691 F. Supp. 264 (W.D. Wash. 1988), 22 CLEARINGHOUSE REV. 401 (No. 43,528, Aug./Sept. 1988), *subsequent opinion*, 698 F. Supp. 1523 (W.D. Wash. 1988), 22 CLEARINGHOUSE REV. 800 (No. 43,528, Dec. 1988) (HUD ordered to implement preference statute immediately); *Pruticka v. Posner*, 714 F. Supp. 119 (D.N.J. 1989) (applicant may litigate § 1983 claim of wrongful denial of preference before regulations are issued); *Limehouse v. Chicago Hous. Auth.*, No. 89-C-3599 (N.D. Ill. June 28, 1989), 23 CLEARINGHOUSE REV. 745 (No. 44,797, Oct. 1989) (PHA implements federal preferences); *Owens v. Housing Auth. of Bowling Green*, No. C86-0208 BG(M) (W.D. Ky. Feb. 10, 1987), 21 CLEARINGHOUSE REV. 48 (No. 42,029, May 1987) (case settled when applicant offered next available unit); *Solomon v. New York City Hous. Auth.*, No. 79 Civ. Act. No. 3591 (L.B.S.) (S.D.N.Y. July 6, 1981), 15 CLEARINGHOUSE REV. 681 (No. 27,871, Dec. 1981) (priorities implemented for Section 8 Certificate program); *City of Vallejo v. Haber*, No. V14681 (Cal. Super. Ct., Solano Cnty., preliminary injunction, Jan. 4, 1986), 19 CLEARINGHOUSE REV. 1342 (No. 40,300, Mar. 1986), *aff’d sub nom. Seamon v. City of Vallejo*, No. A-035427 (Cal. Ct. App. Sept. 18, 1987), 21 CLEARINGHOUSE REV. 765 (No. 40,300, Dec. 1987) (affirming preliminary injunction granting Certificates to plaintiffs who were displacees and residents of substandard housing); *Moya v. Board of Comm’rs of Hous. Auth. of Jersey City*, No. 86-1994 (D.N.J. Feb. 24, 1987) (Clearinghouse No. 42,588) (Section 8 applicant entitled to priority because displaced; statute self-executing). *Compare Gholston v. Housing Auth. of Montgomery*, 818 F.2d 776 (11th Cir. 1987) (Clearinghouse No. 41,099) (PHA need not give statutory preference until regulations published because statute not self-executing).

² Former 24 C.F.R. § 5.420(b)(1)-(8) (1997).

³ *Id.* § 5.420(a).

⁴ *See* former 24 C.F.R. § 5.420(b)(4)(ii) (1997). The violence or threats of violence could be directed against any member of the household and perpetrated by any member of the household. The regulation stated that an applicant was involuntarily displaced by domestic violence if she vacated a housing unit because of domestic violence, or was living in a housing unit with a person who engages in domestic violence; if the applicant was still in the housing unit, the PHA would have to determine that the domestic violence occurred recently or was of a continuing nature. *See* former 24 C.F.R. § 5.420(b)(4)(i), (iii)(A) (1997). The applicant would also have to certify that the person who engaged in such violence would not reside with the applicant family unless the PHA had given advance written approval for this. *See* former 24 C.F.R. § 5.420(b)(4)(iii)(B) (1997).

replacement housing. In addition, the definition recognized that the abuse could be directed at any family member. Both of these concepts should be incorporated into any preference for victims of domestic violence that are being considered locally.

Although the federal preferences have been eliminated, Congress continues to recognize the critical situation of victims of domestic violence. It has urged PHAs to consider a preference for such victims and to protect them from discrimination based upon their victimization.⁵ Current federal regulations urge PHAs administering Public Housing and Vouchers and project-based Section 8 owners to adopt such a preference.⁶ Advocates can urge PHAs to adopt such a preference in the PHA plan process.⁷

While HUD regulations no longer define the term domestic violence, other federal agency regulations define it to include physical and psychological violence and an overall pattern of violence.⁸ The abuse may be perpetrated by non-family members and upon any member of the family.⁹

State laws have also defined domestic violence.¹⁰ These definitions should be referred to and used when appropriate to avoid confusion and to assure that remedies for a victim are not hampered by inconsistent definitions.¹¹

PHAs should also be encouraged to accept a broad range of evidence as proof of domestic violence. The dynamics of domestic violence often make it difficult for victims to provide specific forms of proof. A declaration by the victim may be the only, as well as the most reliable, form of documentation. At a minimum, what was formerly required by the federal preference regulations should suffice.¹²

The failure of PHAs and owners to address the ramifications of domestic violence may subject them

⁵ Pub. L. No. 105-276, 112 Stat 2461, 2548 (1998), § 514(e), *codified at* 42 U.S.C.A. § 1437f note (West 2003). *See also* H.R. Conf. Rpt. 272, 107 Cong. 1st Sess. 120 (Nov. 6, 2001) (instructs HUD to work with PHA to protect victims of domestic violence from being discriminated against in receiving public housing). These congressional declarations should thwart a PHA's refusal to admit a victim of domestic violence because of claims that it was concerned about her safety. *See also* 42 U.S.C.A. § 1437f(o)(6) (West 2003) (Voucher program may provide preferences for public housing residents who are victims of a violent crime). *See also Responding to Congressional Directive to Protect Victims of Domestic Violence*, 33 HOUS. L. BULL. 43 (Feb. 2002); *In re Relocation Assistance to Domestic Violence Victims*, (Clearinghouse No. 47,670) (four PHAs in Washington State entered into agreements to allow speedy relocation of domestic violence victims).

⁶ 24 C.F.R. §§ 5.655(c)(4) (project-based Section 8), 982.207(b)(4) (Voucher) and 960.206(b)(4) (Public Housing) (2003). *See also* discussion of other victims of violence *infra* in this section.

⁷ *See* HUD Form 50075, PHA Plans, *supra* note **Error! Bookmark not defined.**, ¶ 3A(4) (domestic violence is listed as a possible preference category).

⁸ *See* 42 U.S.C.A. § 3796gg-2, subsec. (1) (West, WESTLAW Current through P.L. 108-182 (excluding P.L. 108-136, 108-159, 108-173, 108-176 to 108-178) (12-15-03)) (Violence Against Women Act (VAWA)). VAWA's domestic violence definition covers acts or threats of violence committed by: a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction... or by any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction... . In addition in 2000, VAWA was amended to add a definition of "dating violence." *See id.* § 3796gg-2, subsec. (9).

⁹ It may be that neither the former federal preference definition nor VAWA is broad enough to include all of the types of child or elder abuse that a jurisdiction may want to cover. Therefore, HUD and PHAs should consider appropriate revisions to help protect these individuals. *See, e.g.*, 42 U.S.C.A. § 13031(c) (child abuse or exploitation definitions); 42 U.S.C.A. § 10408 (definition of family violence); 42 U.S.C.A. § 3002 (definitions related to elder abuse or exploitation) (West, WESTLAW Current through P.L. 108-182 (excluding P.L. 108-136, 108-159, 108-173, 108-176 to 108-178) (12-15-03)).

¹⁰ *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993). *See, e.g.*, "abuse" defined to include "causing another to engage involuntarily in sexual relations by force, threat, or duress," and includes the persons protected to be those with a child in common (regardless of whether they ever were married or lived together) or those in a substantive dating or engagement relationship. Mass. Gen. Laws. Ann. ch. 209A, § 1 (2003 Electronic Pocket Part Update).

¹¹ *See, e.g.*, 63 Fed. Reg. 41,662 (Aug. 4, 1998) ("Verification of Eligibility for Public Benefits, AG Order No. 2170-98); 62 Fed. Reg. 61,344, 61369 (Nov. 17, 1997) (Interim Guidance AG Order No. 2129-97); 62 Fed. Reg. 65,285 (Dec. 11, 1997) (Guidance on Standard and Methods for Determining Whether a Substantial Connection Exists Between Battering or Extreme Cruelty and Need for Specific Public Benefits); 8 C.F.R. § 204.2(c)(1)(vi) and (e)(1)(vi) (2002) (Immigration and Naturalization Service). *But see* 61 Fed. Reg. 9,044 (Mar. 6, 1996), § 5.420(b)(4) (prior HUD definition of domestic violence was not as expansive) and *Ullom v. Housing Auth. of Wheeling*, No. 82-0085-W (N.D. W.Va. June 21, 1983) (Clearinghouse No. 42,362) (PHA's rejection of battered spouse not arbitrary or capricious).

¹² Former 24 C.F.R. § 5.420(c)(4) (1997) (certification from the police, social services agency, court, clergyman, physician or public or private facility that provides shelter or counseling to victims of domestic violence).

to liability under the Fair Housing Act.¹³

Victims of violence, reprisals or hate crimes. There continues to be federal statutory support for a local preference for persons who are witnesses to crimes and facing retaliation, victims of hate crimes and victims of violent crimes.¹⁴ While the statutory language is limited to providing Public Housing residents who are victims of violence a preference for the Voucher Program, such a preference, if adopted locally, does not need to be so limited. For both Public Housing and the Voucher program, HUD recognizes the possible breadth of the preference by listing it as a possible local preference for both programs in the PHA Plans template.¹⁵

Displacement by inaccessibility. The former regulations defined involuntary displacement to include applicants residing in inaccessible units. A family qualified for this preference if a member of the family had a mobility or other impairment that made the person unable to use critical elements of the unit and the owner was not legally obligated to make the changes. This preference was used very successfully to give an admission priority to persons with disabilities who needed accessible units. Clearly, that need continues to exist today and PHAs and owners should be urged to adopt a preference to accommodate it.

Substandard Housing (Including Homelessness)

Applicants for Public Housing and all types of Section 8 assistance were also entitled to a federal preference if they resided in substandard housing.¹⁶ HUD defined “substandard” to mean housing which was dilapidated, without operable indoor plumbing or a usable flush toilet or bathtub inside the unit for the family’s exclusive use, without electricity or with inadequate or unsafe electrical service, without a safe or adequate source of heat, and should but does not have a kitchen, or has otherwise been declared unfit for habitation by the government.¹⁷

The former regulations defined an applicant who is homeless to include a person living in substandard housing.¹⁸ When adopting a local preference for homeless persons, consideration should be given to the McKinney Homeless Assistance Act definition of a “homeless” person.¹⁹ It recognizes that an individual may be homeless if he or she lacks a fixed residence, an adequate residence, *or* has a primary residence in a shelter or other private or public temporary accommodation not ordinarily used for human habitation. Any definition of “homeless” should also recognize that residents of transitional housing are also considered as homeless.²⁰ In addition, the term should include those families who are threatened with or likely to become homeless.²¹

Advocates should remember that PHA plans are required to be consistent with the local Consolidated Plan (ConPlan). The local jurisdiction is required to include in the ConPlan a description of the homeless problem and the local plan to assist homeless families make the transition to permanent housing.²²

¹³ See, e.g., *Alvera v. The C.B.M. Group, Inc.*, No. 01-857-PA (D. Or., Oct. 2001) (press release about case and links to complaint and consent decree (approved Nov. 6, 2001) are available at <http://www.nowldef.org/html/issues/vio/housing.htm>). See also *Domestic Abuse Victim Settles Discriminatory Eviction Claim Favorably*, 31 HOUS. L. BULL. 265 (Nov./Dec. 2001).

¹⁴ 42 U.S.C.A. § 1437f(o)(6) (West 2003) (preferences may be provided for Public Housing residents who are victims of a violent crime); 24 C.F.R. § 982.207(a)(4) (2003) (same). See also 42 U.S.C.A. § 1437f(o)(16) (West 2003) (funding for relocation of witnesses and victims of crime); HUD Notice, Rental Vouchers for the Relocation of Witnesses Cooperating With Law Enforcement Agencies in Efforts to Combat Crime in Public, Indian, and Assisted Housing, PIH 96-83 (Oct. 11, 1996).

¹⁵ See HUD Form 50075, PHA Plans, *supra* note **Error! Bookmark not defined.**, ¶ 3A(4) and 3B(4).

¹⁶ See also *Lambert v. Waynesboro Properties, Ltd.*, No. CV 181-71 (S.D. Ga. June 29, 1984), 18 CLEARINGHOUSE REV. 557 (No. 31,150, Oct. 1984) (consent order granting preference to Section 8 applicants living in substandard housing).

¹⁷ Former 24 C.F.R. § 5.425 (1997).

¹⁸ *Id.* § 5.425(b)(2).

¹⁹ 42 U.S.C.A. § 11,302(a) (West Supp. 2003) (general definition of homeless individual).

²⁰ See, e.g., former 24 C.F.R. § 5.425(b)(2) (1997).

²¹ See Letter from David P. Forsberg, Regional Administrator, HUD, to Amy Anthony, Executive Office of Communities and Development, EOCD, Massachusetts, Re *Preferences in Selecting Applicants for Section 8 Certificates* (May 21, 1990) (copy on enclosed CD) (PHA may define homelessness to include people who are not necessarily homeless but are likely to become homeless). It is important to provide housing prior to a person becoming homeless because there are social and psychological problems that are created or exacerbated by actual homelessness that could be avoided or minimized.

²² 42 U.S.C.A. § 12705 (b)(2) (West, WESTLAW Current through Pub. L. No. 107-203, approved 7-24-02).

Advocates and PHAs should work with local jurisdictions to develop a meaningful ConPlan that effectively lays the groundwork for or compliments the PHA plan.²³

There are certain housing programs, such as the Shelter Plus Care and McKinney Act Section 8 Moderate Rehabilitation Single Room Occupancy (SRO), for which homeless is not merely a preference, but a mandatory eligibility criterion.²⁴

Rent Overburden

Formerly, an applicant was entitled to a federal preference if he or she paid more than 50 percent of family income for rent.²⁵ Rent was defined to include utilities that were purchased from the utility provider by the tenant. Family income was defined as adjusted family income in accordance with the applicable federal regulations. To qualify for the preference, the applicant was required to show that she was obligated to pay the rent for at least 90 days but did not have to demonstrate that the rent was in fact paid.

²³ PHAs and owners have access to information and can determine whether their admission practices have an impact upon the local homeless problem. The HUD family report, HUD form 50058, collects information on each new admission and asks if the family was formerly homeless. HUD Form 50058, *supra* note **Error! Bookmark not defined.**, ¶ 4c. (question asks if applicant was homeless at admission, but since instructions do not define the term, the data generated may not be uniform). This information in the aggregate should be available locally from the PHA or owner (form 50059) or from HUD through a Freedom of Information Act (FOIA) request. Advocates should seek to have this information from the form 50058 or other relevant information on admission of formerly homeless families reported locally. The information may be used to support a preference for homeless families.

²⁴ 24 C.F.R. §§ 882.801–882.810 (Section 8 Mod. Rehab) and 582.1–582.401 (Shelter Plus Care) (2003). See §§ 1.3.5.4 and 1.3.13, *supra*.

²⁵ Former 24 C.F.R. § 5.430 (1997).