



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

OFFICE OF GENERAL COUNSEL

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MEMORANDUM FOR: Ann M. Oliva, Deputy Assistant Secretary for Special Needs, Office of Community Planning and Development, DN

FROM: *Althea M. Forrester*
Althea M. Forrester, Associate General Counsel for Assisted Housing and Community Development, CAHB

SUBJECT: Applicability of Section 8 Requirements to Rental Assistance Funded through the Housing Opportunities for Persons with AIDS Program

This memorandum responds to your request for legal advice concerning a provision in the authorizing statute of the Housing Opportunities for Persons with AIDS (HOPWA) program that requires HOPWA-funded rental assistance to be provided to the extent practicable in the manner provided for under section 8 of the United States Housing Act of 1937. Specifically, you asked which statutory and regulatory requirements that govern the provision of section 8 rental assistance (hereafter, "section 8 program requirements") also govern rental assistance activities under HOPWA. Additionally, you asked whether a HOPWA grantee may voluntarily follow section 8 program requirements not expressly required by the HOPWA statute and regulations in the administration of the grantee's HOPWA rental assistance program.

We conclude that grantees are only subject to the section 8 program requirements that HUD has incorporated into HOPWA program regulations. Additionally, grantees administering HOPWA rental assistance may voluntarily follow other section 8 program requirements not expressly incorporated into the HOPWA program regulations, except where those section 8 program requirements directly conflict with HOPWA statutory or regulatory requirements.

Background

The HOPWA program is authorized under the AIDS Housing Opportunity Act, Pub. L. No. 101-625, Title VIII, Subtitle D (Nov. 28, 1990), as amended, *codified at* 42 U.S.C. §§ 12901-12912 (hereafter, the "Act"). The Act permits HUD to make grants to states, units of general local government, and nonprofit organizations for eligible activities aimed at preventing homelessness among persons with AIDS and their families. One of the eligible activities under the Act is providing project-based and tenant-based rental assistance to low-income persons with AIDS and their families. When these activities are carried out, the Act requires that the rental assistance "shall be provided to the extent practicable in the manner provided for under section 8 of the United States Housing Act of 1937." § 859(a)(1) of the Act, *as amended*, 42 U.S.C. § 12908(a)(1).

HUD first issued regulations governing the HOPWA program through an interim rule in July 1992. The interim rule established a basic framework for the HOPWA program consistent with the Act, including standards governing the use of HOPWA grant funds to carry out rental assistance activities. In the preamble to the interim rule, HUD explained that its regulatory standards for HOPWA rental assistance were consistent with similar standards in other HUD programs, including section 8. 57 Fed. Reg. 32,106 (July 20, 1992). The HOPWA program regulations have been further amended multiple times since then and are codified at 24 C.F.R. part 574.

Over the years, CPD's Office of HIV/AIDS Housing has received many questions from field office staff and grantees seeking clarification on which section 8 program requirements apply to HOPWA rental assistance.

Analysis

Based on our review of the Act and HOPWA program regulations, we provide the following:

- (1) Grantees must provide HOPWA rental assistance in accordance with the Section 8 program requirements that have been expressly incorporated into the HOPWA program regulations.**

Congress did not mandate that HUD subject HOPWA rental assistance to all statutory and regulatory requirements that apply to section 8 rental assistance. The Act, as originally passed into law in 1990, authorized "short-term rental assistance" and specified that it "shall be provided to the extent practicable in the manner provided for under section 8 of the United States Housing Act of 1937." The short-term limitation on rental assistance authorized under section 859 of the Act was eliminated by section 606(h) of the Housing and Community Development Act of 1992, Pub. L. No. 102-550 (Oct. 28, 1992).

As Congress was considering the bill that ultimately became the Act, the House of Representatives proposed language that would have mandated the reservation of certain section 8 certificates for persons with AIDS. This proposal was later replaced with language to allow tenant-based and project-based rental assistance as one of several eligible activities that grantees could carry out with HOPWA grant funds. The conference committee that agreed to this change explained:

"[T]he conference report does not contain the reservation of assistance for individuals with AIDS as provided in the House bill, however, the conferees believe that the Department of Housing and Urban Development (HUD) should permit public housing authorities to reserve Section 8 and public housing assistance for persons with AIDS and this deletion is not intended to preclude persons with AIDS from receiving such vitally-needed housing assistance."

Joint Explanatory Statement of the Committee of Conference, reprinted in 136 Cong. Rec. H11,518 (Oct. 22, 1990)(accompanying H.R. Rep. No. 101-922 (1990)(Conf. Rep.)).

Congress clearly did not direct that HOPWA rental assistance must mimic section 8 in every respect. Rather, Congress provided that rental assistance was an eligible activity under the HOPWA program, and required that the assistance be provided "to the extent practicable in the manner provided for" under section 8. We construe this provision as requiring rental assistance funded with HOPWA grant amounts to be administered and delivered to eligible persons in the same "manner" as section 8 rental assistance is administered and delivered, to the extent practicable. Further, we interpret "to the extent practicable" to authorize HUD to determine which section 8 program requirements regarding delivery and administration of rental assistance are "practicable" when applied to the HOPWA program by adopting them as HOPWA program requirements through rulemaking.

HUD exercised this authority when it issued HOPWA program regulations. At the inception of the HOPWA program, HUD identified a number of features that are fundamental to the delivery and administration of section 8 rental assistance. HUD determined that the following section 8 program requirements are practicable and adopted them, with some modification, to govern HOPWA rental assistance:

- (a) Resident rent payment [24 C.F.R. 574.310(d)];
- (b) Maximum subsidy amount [24 C.F.R. 574.320(a)(1)];
- (c) Rent standard, including exception rent [24 C.F.R. 574.320(a)(2)]; and
- (d) Rent reasonableness [24 C.F.R. 574.320(a)(3)].

The section 8 program requirements that apply to HOPWA rental assistance are those that HUD adopted in the HOPWA program regulations. Grantees providing HOPWA rental assistance are not required to comply with other section 8 program requirements that are not expressly incorporated into the HOPWA regulations (except when such requirements also independently apply to HOPWA).

In the future, HUD could revisit its initial determination and adopt additional section 8 program requirements regarding delivery and administration of rental assistance that it determines to be practicable by incorporating them into the HOPWA regulations. Those other requirements would, then, become binding upon HOPWA grantees. We are available to advise you on the authority to incorporate additional section 8 program requirements that you may wish to extend by regulation to the HOPWA program.

Also, we note that the Office of HIV/AIDS Housing has received several requests for clarification on whether HOPWA grantees carrying out rental assistance activities are subject to the admissibility and termination provisions in subtitle F ("Safety and Security in Public and Assisted Housing") of the Quality Housing and Work Responsibility Act of 1998 (QHWRA), Pub. L. No. 105-276, Title V (Oct. 21, 1998). Subtitle F of QHWRA limits the section 8 participation of persons who use controlled substances and persons subject to a lifetime registration requirement under a state sex offender registration program. These restrictions do not apply to the HOPWA program and, therefore, HOPWA grantees are not required to comply with them in providing HOPWA rental assistance.

- (2) HOPWA grantees may follow section 8 program requirements not expressly incorporated into the HOPWA regulations in providing HOPWA rental assistance except in the event of a direct conflict with HOPWA statutory or regulatory requirements.**

Even though HOPWA grantees are not bound by section 8 program requirements that are not expressly incorporated into the HOPWA regulations, grantees may generally choose to follow section 8 program requirements in providing HOPWA rental assistance. However, grantees may not follow section 8 program requirements that directly conflict with HOPWA statutory or regulatory requirements.

Based on our past review, we have found that grantees regularly design their HOPWA rental assistance programs to mirror their local section 8 programs. Often times, in administering both HOPWA and section 8 rental assistance, grantees use the same standard forms and leases, and follow the same procedures when terminating assistance to a program participant. HOPWA grantees frequently choose to align their HOPWA rental assistance program with their section 8 program for the following reasons: (1) ease of administration in providing assistance under both programs and/or (2) satisfaction of the HOPWA program confidentiality requirement at section 856(e) of the Act [42 U.S.C. § 12905(e)] by removing HOPWA-specific references in occupancy-related documents. We find no statutory or regulatory prohibition against HOPWA grantees following this approach. However, grantees should ensure that all of their policies and program rules remain consistent with the Act and HOPWA program regulations. If a direct conflict arises between a HOPWA statutory or regulatory requirement and a section 8 program requirement, the HOPWA requirement must prevail.

Conclusion

The Act requires HOPWA rental assistance to be provided in the same manner as section 8 rental assistance, to the extent practicable. HUD has incorporated into HOPWA program regulations a number of requirements that are fundamental to the manner in which section 8 rental assistance is delivered and administered. Other requirements may be determined practicable and incorporated through rulemaking in the future. However, until such future rulemaking occurs, those additional section 8 program requirements do not apply to HOPWA rental assistance unless otherwise stated. Grantees, however, may voluntarily follow other section 8 program requirements in providing HOPWA rental assistance except when those other requirements directly conflict with statutory and regulatory requirements that apply to HOPWA.

If you have any further questions or concerns, please contact Brian Stecker (ext. 3270) or Jad Atallah (ext. 5378), of my office. Thank you.