March 26, 2012

Via electronic and first-class mail

Hans Froelicher
General Counsel
D.C. Housing Authority
1133 North Capitol Street NE
Washington, D.C. 20002

Re: Notice of Proposed Rulemaking: Chapters 49, 51-56, 58-59, and 61, Title 14, D.C. Municipal Regulations (D.C. Register publication February 17, 2012)

Dear Mr. Froelicher:

Thank you for the opportunity to comment on the proposed regulatory changes to the Housing Choice Voucher Program (HCVP). As advocates for applicants and participants in the HCVP, we appreciate the chance to work with you and the agency's staff to improve the rules and functioning of the voucher program.

In particular, we are very grateful for the hard work that everyone, on both sides of the table, has invested over the last year on this project. We have made a great deal of progress on issues large and small, and we think everyone can agree that the current version of the regulations is a vast improvement over the initial draft.

Despite these efforts, several items of great concern remain. A few of these are simply policy differences that we have already discussed with you and HCVP Director Ronald McCoy. Many, however, are late-breaking changes to the draft that were never discussed in any of our meetings and which we never had a meaningful opportunity to address with program staff.

This letter will first address these major areas of concern, and then will cover more detailed items that relate to the language of the regulations.

Overlap between current and proposed regulations

There is a continuing conflict between these proposed regulations and the regulations that are already on the books, including on issues such as Waiting Lists, Local Preferences, and Applicant Selection (14 DCMR Chapter 76); Housing Quality Standards (14 DCMR Chapter 81); Recertifications (14 DCMR Chapter 84); and Transfers (14 DCMR Chapter 85). We raised this concern as the first general comment in our March 23, 2011 letter to you, and again in our October 26, 2011 letter.

Although the proposed regulations contain, at Section 4903.7, a blanket preemption of those existing regulations to the extent that they conflict with the newly proposed HCVP

regulations, we do not believe that "solution" is either sensible or adequate. There is no reason that a reader coming fresh to the regulations at Title 14 would necessarily understand which regulations are applicable and which are not, or why there are multiple, often conflicting chapters addressing the same subject. A person wondering what the rules are about moving, for example, would quite logically go to the Title 14 chapter entitled "Participant Moves"; there is no reason he or she would think to look anyplace else, much less for the tiny regulation, dozens of chapters earlier, that sets out the conflict rule. By publishing the new conflicting regulations, DCHA will certainly confuse D.C. Superior Court judges, OFH hearing officers, HCVP clients, HCVP applicants, and HCVP staff. As a result, we can anticipate inconsistent decisions from hearing officers, D.C. Superior Court judges, and others. This confusion will lead to inefficiencies and needless litigation.

Rather than simply rely on the preemption language in Section 4903.7, we strongly suggest that HCVP go through the already-existing chapters and repeal them to the extent that they include material covered in these new regulations, or otherwise take steps to reconcile the conflicting provisions.

The proposed policy for transfer vouchers

Sections 5333.3 through 5333.7 include a new and drastically restrictive policy regarding when a family can obtain a voucher to relocate. The ability to move with the voucher is one of the fundamental elements of participation in this program; it is what distinguishes the voucher program from virtually any other type of subsidized housing. There are any number of reasons that a family may need to relocate: poor housing conditions, conflict with the landlord, the need to accommodate medical and educational circumstances, the need to escape abuse or exploitation, and changes in family size or circumstances are some of the most common.

Under the current regulations, at 14 DCMR Chapter 85, a family may obtain a transfer voucher in most circumstances, so long as the family is in good standing in the program and with the landlord. The proposed regulation, however, would impose severe limitations on a family's ability to move. Problems with the proposed regulations include, but are not limited to:

- <u>The proposal includes unnecessary and onerous timing restrictions.</u> Under the proposed rule, a family can transfer only if it has been recertified for at least 15 months, on the one hand, but is more than 90 days from the next recertification, on the other hand. Assuming recertification happens every 24 months, as is standard, that leaves a family exactly and only six months in any given two-year period in which it can move.

  This is entirely unrealistic. The reasons giving rise to a need for transfer do not confine themselves to a six-month timetable, and this rule would effectively prohibit a vast number of families from exercising their basic right to move from one home to another. Nor is there any evident reason for imposing this restriction.

- <u>The proposal fails to account for families who need additional time to search for housing.</u> By restricting families to one transfer voucher in a two-year period (Section 5333.5), the proposed rule would tie the hands of families who have been unable to use their transfer

voucher within its timeframe. For some families, particularly those who need large units or who have credit or other barriers, finding a new place can be quite difficult. Often these families need more than the initial voucher time – either by getting a new voucher once the first one expires, or by starting over again after some months. There is no reason not to accommodate families who, through no fault of their own, need (and otherwise still qualify for) more than one voucher between recertifications.

- <u>The proposal unduly restricts families who have been recommended for termination.</u> The proposed rule (5333.4(c)) provides that a family may not transfer if it is "currently being recommended for termination." While we understand DCHA's reluctance to process relocation for a family facing possible termination, the reality is that at present – because DCHA's informal hearing process is dysfunctional – this rule has the effect of unlawfully denying families the right to move at all.

  The proposed regulation would prohibit transfers not merely for families who *have been* terminated, but for those who are anywhere in the termination process – including those families against whom DCHA has not yet proven any wrongdoing or who have won their informal hearings. As the hearing process currently stands, a family who timely requests an informal hearing to challenge a recommendation for termination will likely wait up to six months or more for a hearing. During that entire time, the proposed rule would prohibit the family from transferring. Once an informal hearing decision is made, the next step is the right for either party to appeal to the Executive Director, including an appeal by DCHA if the family wins. The Executive Director appeal may take a year or more. Again, during that entire time, the family cannot relocate because it would continue to be DCHA's position that the family is "being recommended for termination."

  If DCHA had a timely and well-functioning hearing process, then denying families the ability to transfer during the pre-hearing termination period might be less problematic. In the current circumstances, however, the rule is both practically unworkable and, as a legal matter, poses significant due process concerns.

- <u>The proposed section on emergency transfers 5333.6 (c) should replace "the family has been evicted from their assisted unit" with "eviction proceedings have been initiated against the family."</u> As written, the family would be entitled to an emergency transfer voucher only after actually being evicted from its home. The Housing Authority should hope to help families avoid eviction, which is traumatic and extremely disruptive to families and to children and elders in particular. During an eviction, a family may lose all of its personal belongings because the items are left on the street for anyone to take. The stress of eviction can exacerbate any existing health problems that a participant may have. Furthermore, once a family is evicted, it will likely be without a reliable mailing address, thereby creating difficulty in communicating with DCHA regarding briefing dates and lease-up packets.

  Rather than require that families go through the humiliating experience of being evicted, a better approach is to offer participants an opportunity to transfer when eviction proceedings have begun. Doing so will not only benefit the family greatly but also

minimize the administrative costs and resources DCHA will have to spend on trying to reconnect with participants who are displaced from their homes.

- The proposed section on emergency transfers is incomplete. While the enumerated conditions in Section 5333.6 cover many of the common emergencies HCVP families face, it is impossible to anticipate every scenario that might require an emergency transfer. For this reason, the current version of the regulations authorizes issuance of an emergency transfer voucher if "[o]ther emergency factors acceptable to DCHA have been identified by the Participant Household." 14 DCMR § 8500.1(b)(3). We suggest that this provision be added to the proposed regulation as well.

  In addition, the current transfer regulations provide as follows: "If a Participant Household makes a written request for [an emergency transfer voucher], DCHA shall respond in writing within five business days." *Id.* § 8500.1(c). This provision is critical to ensuring that emergencies are, in fact, treated like emergencies, such that HCVP responds promptly to families' requests. This provision should also be added to the new regulations.

Family obligations and grounds for termination

There are several items in the proposed Chapter 58 that remain problematic:

- Proposed Section 5808.1(e) is overbroad. This section, which requires families to give DCHA "a copy of any written action an Owner takes to remove the family from the unit," goes far beyond the family obligations set forth in the federal regulations. 24 CFR 982.551(g) requires families to provide a copy of the "owner eviction notice." The rationale for this regulation is to ensure that HCVP does not continue paying on a unit if the family has been evicted.

  To accomplish this purpose, DCHA's rule should require a family to provide a copy of the *writ of restitution* – the document from the courts that authorizes the U.S. Marshals to perform an eviction. By contrast, the proposed language, "any written action an Owner takes," covers much more: a complaint for possession, a 30-day notice to correct or vacate, or simply a letter saying the owner would like the family to leave. None of these other documents gives DCHA any information about whether the family will actually continue to reside in the premises. Only the writ of restitution does that, and it is the only document that should be required. Indeed, if participants are required to bring in any eviction-related document, HCVP will inevitably spend significant additional (and needless) staff time collecting and analyzing the documents and determining what if any action is appropriate.

- Proposed Section 5808.4(e) is not a lawful ground for termination. This provision requires termination if a family "is not in a contracted unit and the Family is eligible, but has not come into DCHA to receive a new voucher for more than 180 days." This ground for termination is not authorized by the federal regulations. DCHA has no legal authority to create its own grounds for termination, beyond what is set forth in federal law.

Moreover, this rule purports not only to allow termination under these circumstances, but to *require* it – leaving DCHA no discretion to retain such families in the program even under compelling circumstances. For example, a family may be homeless and may not have a reliable mailing address. Or the head of household may be hospitalized or in an assisted living facility. Or the mailbox may be broken, so that the family is unable to receive mail. Or DCHA may fail to send notice to the family informing the family of the need to come and pick up a new voucher, leaving the family in the dark as to its circumstances until more than 180 days have passed. Under this proposed regulation, DCHA would be required to terminate these families even if the families could prove that the failure to receive a voucher was due to no fault of their own.

- Section 5806.10 should be discretionary and not mandatory. This rule should provide that a Family *may* (not *shall*) "be held liable for overpayments of HAP" where the family moves without notice to the owner. While DCHA certainly would be entitled to hold the family liable in many circumstances, it also has the discretion not to do so – a discretion that would be warranted where, for example, the family had to move suddenly for safety or health-related reasons. "May" is also consistent with many other places in the local and federal regulations where DCHA and HUD have elected to use discretionary rather than mandatory language.

- All of Proposed Section 5812.1 should be removed. Parts of this section are duplicative of family obligations (e.g. sections (b), (g), (h)); and the remainder are impermissible additions to the list of family obligations. DCHA has no authority to impose family obligations – i.e., obligations whose violation gives rise to termination – beyond those that are contained in the federal regulations.

  To the extent that DCHA is concerned about fraud and misrepresentation – which is what this section really seems to be targeting – that issue is fully covered by 24 C.F.R. § 982.551(a)(4), which requires that "[a]ny information supplied by the family must be true and complete"; and by proposed Section 5803.1, which authorizes termination of "Families who are found guilty of program abuse or fraud, bribery or other criminal act in conjunction any federal or local housing assistance program." These are family obligations, and violation of either is grounds for termination. Of the items listed in 5812.1, the only one that arguably does not fall within these categories is (c), side payments. Side payments, which typically involve an owner exploiting a vulnerable family, should not generally be grounds for termination in any event.

Tenant responsibility for rent after termination of the HAP Contract

The proposed regulations at Section 5329 misstate the law as to what a tenant must pay after the HAP Contract is terminated. Section 5329.6 should be removed entirely. When DCHA terminates a HAP Contract for HQS violations, it typically leaves the tenant in a very difficult position. Having just received a transfer voucher, the tenant will be looking for a new place – but meanwhile, she has no choice but to remain in the home where the contract was terminated, with no HAP being paid on her behalf. Invariably, because rent is unpaid, the landlord sues the tenant for eviction.

Once that case comes to court, the question whether the tenant is, in fact, liable for the entire contract rent is very much open to determination by the judge. First, the court may refuse to allow the landlord – whose own inaction caused the contract termination in the first place – to hold the tenant legally responsible for the money DCHA used to pay. Second, if there are HQS violations, the value of the premises may be significantly less than the contract rent. These are considerations and determinations to be made by a neutral fact-finder, which better ensures that a tenant is accountable for rent only when such payment is justified by the specific facts of the situation.

If Section 5329.6 is not removed in its entirety, then, alternatively, it should use "may" rather than shall, i.e., "If the tenant remains in the unit after the cancellation of the HAP contract, the tenant ~~shall~~ may be liable for payment of DCHA's portion of the contract rent."

Definitions for drug and other criminal activity

The proposed regulations include, for the first time, definitions of "drug," "drug-related criminal activity," "threatened use of physical force," and "violent criminal activity." The wording of these definitions is inextricably tied to the regulations regarding criminal activity, which, while discussed somewhat, have never come to any closure and have not been included in these proposed regulations.

We strongly suggest that DCHA eliminate these definitions from the proposed regulations, and hold them until all of the criminal activity rules are finalized. If the agency does insist on including them, then attached please find an excerpt from the comments we submitted on August 23, 2010, regarding this issue.

Other items

Chapter 53 should be titled Recertifications, HQS Inspections, and Family Moves. Currently, the Chapter is titled "Standards for Initial, Biennial, and Interim Recertifications." However, the chapter actually covers much more than just recertifications. It also addresses HQS inspections, termination of HAP contracts due to failed HQS inspections, and transfer vouchers.

Section 4904.4: As proposed, Section 4904.4 states that "[p]ursuant to the guidance issued by HUD" DCHA "may" consult with the case manager of a veteran participant who receives a VASH voucher prior to any termination recommendation for that participant. This provision fails to capture accurately HUD's explicit recommendation that PHAs "should" consult with the case managers and attempt to work together to find solutions and try to avoid termination. Therefore, to comply with both the spirit and the letter of HUD's guidance on VASH, the language in Section 4904.4 should be changed from "may" to "shall," or at the very least, "should."

Section 4906.2: This section should include "victim of an intrafamily offense." *See* D.C. Code § 2-1402.21.

Section 5104.1(b): This section should be limited to *adult* family members. Minors are not required to sign consent forms.

Section 5202.2: The published version of this proposed regulation does not reflect the changes that advocates made and that were accepted in the full draft version of the regulations sent to us on February 17, 2012. The regulation should read:

> If the notice is returned by the U.S. Postal Service with no forwarding address, the applicant Family *shall be placed in an "inactive" status on the waiting list in accordance with § 6103* unless the applicant Family can show that the mail was not received due to error by the Postal Service or DCHA. DCHA shall document when a briefing notice is mailed to the address on record, and keep the information in the applicant Family's file.

The published version of this section provides that if notice is returned, families shall be removed from the waitlist, *not* that they shall be placed in inactive status.

Section 5202.3: Similarly here, the published version does not reflect advocate-suggested changes that appeared to have been previously accepted. The regulation should read:

> Applicants who fail to attend a scheduled briefing shall automatically be scheduled for another briefing in a letter via first class mail. Applicants who fail to attend two scheduled briefings, without DCHA approval, *shall be placed in an "inactive" status on the waiting list in accordance with §6103.*

The published version of this section provides that if a family fails to attend two briefings, it shall be removed from the waitlist, *not* that it shall be placed in inactive status.

Section 5207.10: The references to "applicants" and "informal review" should be removed, as this entire section (5207) is for live-in aide guidelines *for participants.* Participants are not applicants, and they have informal hearings, not informal reviews.

Section 5211.1: "Local" should not be capitalized. We do not believe HUD uses the term "Local Fair Market Rent."

Section 5212.9: Again, the published version does not reflect changes that appeared to have been accepted in the latest round of comments. The regulation should read:

> Once the RTA and proposed lease are approved, DCHA shall schedule an HQS inspection within thirty (30) days.

The published version omits the 30-day language, which should be restored in the final version. As advocates and staff agreed, prompt inspections are critical to participants' ability to move with their vouchers, and to landlords' willingness to lease to HCVP participants.

Section 5214.1(a): For the benefit of both participants and owners, the regulation should spell out what makes a unit "eligible."

Section 5306.2 and 5306.3: The amount of these deductions should be included in the regulation, as with any changes to DCHA policy that must and should take place through the regulatory process. This type of policy change is not appropriate for simple Board action without a notice and comment period. In addition, if the amount does not appear in the regulations, it is not clear how it would be made public.

If the amount of the deduction is not included in these regulations, then both should include the following language: "Prior to final adoption, the Board of Commissioners shall publish in the D.C. Register and make available for public comment in accordance with the D.C. Administrative Procedure Act, any amount of the proposed deduction and any proposed changes to such amount."

Section 5306.3 and 5306.4: It is unclear whether these provisions refer to separate deductions or to the same one (as was our assumption from prior versions, which had all these subsections as part of 5306.3). If they are the same deduction, then the regulations should use the same terminology – either "additional dependent deduction" or "child care deduction," but not both. In addition, if these provisions refer to the same deduction, they should appear in the same subsection and not separate ones.

Section 5308.6: This section should be deleted. It appears verbatim in 5311.1.

Section 5317.4: There is no reason for requiring two forms of verification that an individual is residing elsewhere, particularly because for many families, it may be hard enough – and take long enough – to obtain just one form of verification. We also are not clear why DCHA would require two verifications in the HCVP context, but only one in the public housing arena. *See* 14 DCMR § 6119(c).

Section 5317.6: This section is incomplete as to the procedures that will be employed to ensure due process in the context of family break-up. In particular, we are concerned about the potential termination of assistance to a participant, using the factors set forth in this section, without giving that person notice or the opportunity to be heard on the matter.

During our extensive conversations about these regulations, and at DCHA's request, we made the following proposal for additional language:

5317.7 *Prior to making any determination pursuant to 5319.6, DCHA shall notify both adults (the current Head of Household and the other adult Family member requesting to become the Head of Household) that only one part of the family shall receive continued assistance. The notice shall be in writing and shall inform both adults how DCHA will determine who retains assistance, including the factors set forth in 5319.6, and shall give both adults an opportunity to present any relevant information in support of his or her claim to continued assistance.*

5317.8 *After making its determination pursuant to 5319.6, DCHA shall notify both adults in writing (the current Head of Household and the other adult Family member requesting to become the Head of Household) of its determination and the reasons for the determination.*

5317.9 *The adult whom DCHA has determined will not receive continued assistance shall be entitled to an informal hearing pursuant to 14 D.C.M.R. Chapter 89, even if that person is not the current Head of Household. The notice to both adults of DCHA's determination shall include information about the adult's right to such informal hearing.*

5317.10 *If the adult whom DCHA has determined will not receive continued assistance challenges the determination, then DCHA shall hold an informal hearing for both adults. The hearings shall be at different times but shall be heard by the same hearing officer. If either party fails to appear for the hearing, the hearing officer shall make a determination based on all available information, including information provided to DCHA for purposes of making the original determination. The hearing officer shall decide which adult retains assistance in accordance with Chapter 89.*

5317.11 *This section does not limit any protections for victims of a violent crime, domestic violence, dating violence, or stalking that may be available under federal or local law.*

DCHA has not adopted any of this language, or any similar language. Without some protections of this sort, we believe that DCHA is leaving itself open to legal challenges should it apply the presently proposed family break-up rules to remove a participant from the eligible household.

Section 5317.9: The proposed section discusses what happens when a Head of Household becomes permanently absent. In limiting who may become Head of Household in this situation, the proposal is in conflict with HUD's regulations allowing remaining family members to retain the subsidy. Specifically, 24 CFR § 5.403 includes "remaining family member" in the definition of family.

Further, by not allowing the subsidy to pass to all remaining family members, DCHA is creating a situation in which the remaining family member will likely be evicted, become homeless, and ultimately end up back on the DCHA waiting list. From a public policy perspective, this limitation on who can inherit the subsidy is shortsighted.

Additionally, as a matter of drafting, the regulation is confusing. As written, it suggests that in order to retain the subsidy, the family must be "comprised of" *solely* minor children, elderly persons, or persons with disabilities. If DCHA does intend to retain these limitations on who may inherit the subsidy, then the regulation should be altered as follows: " . . . DCHA may permit a remaining adult family member to become Head of Household if the remaining Family ~~is comprised of~~ *includes* one or more of the following persons . . ."

Section 5323.4: This language is repeated at 5325.4.

Section 5406.1: This section remains confusing as to the documentation necessary to verify wages, tips, commissions, and bonuses. In addition, to the extent that it limits documentation of wages to three consecutive paycheck stubs, the regulation will make it impossible for participants with uneven or sporadic income to document their earnings.

We previously suggested the following slight tweaks to this section:

(a) Wages may be documented by any one of the following:
- (1) Three (3) consecutive paycheck stubs.
- (2) Previous two (2) year official Federal and Local tax returns;
- (3) Certified Statement from participants of anticipated wages, based on previous twenty-four (24) months; or
- (4) New Hire, statement from employer on anticipated amount for the next twelve (12) months.

(b) Tips, commissions, and bonuses, if not included in paycheck stubs, may be documented by:
- (1) Previous two (2) year official Federal and Local tax returns;
- (2) Certified Statement from participants of anticipated tips, commissions, or bonuses, based on previous twenty-four (24) months; or
- (3) New Hire, statement from employer on anticipated amount for the next twelve (12) months.

DCHA did not appear to respond to this suggestion. If left as is, this section will lead not only to a waste of DCHA's resources in participant appeals of incorrect rent determinations, but a waste of District of Columbia Superior Court resources as participants are unable to pay the incorrectly determined, higher rent level.

Section 5603.4: This should read "if there is a decrease ~~of~~ OR increase . . ." It should also provide that this language will be in the repayment agreement itself. *See* HUD PIH Notice 2010-19 ("At a minimum, repayment agreements must contain the following provisions . . . The terms of the agreement may be renegotiated if there is a decrease or increase in the family's income.").

Section 5802.5: Everything after the first sentence of this comment should be deleted; or, alternatively, the regulation must explain what factors will be "considered" in a request to terminate the lease and why DCHA would or would not "decide that termination is necessary."

Section 6125.8: The language and documentation relating to intrafamily violence and the proof thereof are incomplete. To be consistent with VAWA and with D.C. law regarding intrafamily offenses, this section should read as follows:

DCHA shall give placement priority to an applicant Family who is involuntarily displaced due to domestic violence, sexual violence, dating violence, or stalking**.** The applicant Family shall provide documentation as follows regarding incident or incidences of violence and current housing arrangements for the applicant Family:

(a) the HUD-approved certification HUD Form-50066;
(b) Federal, state, tribal, territorial or local police record;
(c) Documentation signed by an employee, agent, or volunteer of a victim service provider, an attorney or medical provider from whom the victim has sought assistance in the situation; or
(d) Other acceptable documentation in order to verify the Family's claim of domestic violence, sexual violence, dating violence, or stalking.

* * *

We look forward to discussing these comments further with you and with the Board of Commissioners. If you have any questions, please do not hesitate to contact any of us.

Sincerely,

Julie Becker
Shirley Horng
Legal Aid Society of D.C.

Jennifer Berger
AARP Legal Counsel for the Elderly

Misty Thomas
Washington Legal Clinic for the Homeless

Vytas Vergeer
Rebecca Lindhurst
Bread for the City Legal Clinic

Enclosure

cc: Members of the DCHA Board of Commissioners