

October 25, 2019

Allison Tucker
Department of Human Services
64 New York Avenue, N.E.
6th Floor
Washington, D.C. 20002

Submitted via electronic mail

Re: Notice of Proposed Rulemaking – Emergency Rental Assistance Program

Dear Ms. Tucker:

The undersigned organizations submit the following comments in response to the Department of Human Services's (DHS's) proposed rulemaking regarding the Emergency Rental Assistance Program. Historically, the policy goals of the Emergency Rental Assistance Program (ERAP) have been to help low-income DC residents obtain (via security deposit and first month's rent) and retain (via payment of back rent) housing. In particular, ERAP is the primary eviction prevention tool for families, seniors, and people with disabilities. More and more, social scientists and elected officials are recognizing what low-income tenants have been saying for years: eviction is traumatic and disproportionately impacts people of color, particularly women of color. At the "Evicted" exhibit at the National Building Museum, Matthew Desmond wrote:

Adults and children who have gone through an eviction are more likely to suffer from depression and other mental health challenges, and experience worse physical health than their counterparts with stable housing... Changing schools means that students cannot develop relationships with counselors or teachers. They may struggle to keep up with different curricula, and lose out on opportunities to sustain friendships. Even if evicted students somehow avoid changing schools, they face higher stress levels. Job performance problems and even job loss can be traced directly to extreme stress caused by eviction...

Eviction prevention programs such as ERAP play a critical and distinct role in preventing harm and furthering racial, gender and economic justice. According to the DC Fiscal Policy Institute, "In 2016, the most recent year for which data is available, 63 percent of DC's extremely low-income renters spent at least half of their income on housing. These 27,000 households are considered 'severely housing cost burdened'" by the US Department of Housing and Urban Development.¹ While certainly preventing evictions prevents homelessness for many low-income households, many of whom would end up entering shelter without this assistance, for others it plays an equally critical role in maintaining housing stability and preventing the trauma of eviction.

¹ Internal citations omitted. "Building the Foundation: A Blueprint for Creating Affordable Housing for DC's Lowest-Income Residents." Available <https://www.dcfpi.org/all/building-the-foundation-a-blueprint-for-creating-affordable-housing-for-dcs-lowest-income-residents/>.

Overall, we object to the extent that the new "Purpose" section limits the purpose of ERAP solely to the prevention of homelessness, and we object to specific reflections of that limited purpose within the regulations themselves. We recommend amending the first sentence of section 7500.1 to read as follows: "The Emergency Rental Assistance Program is designed to provide crisis intervention for District residents for the purposes of accessing permanent housing, preventing homelessness, and promoting housing stability for low-income residents." This better reflects the multiple roles ERAP plays for District families.

Relatedly – to the extent these regulations seek to make ERAP an effective anti-homelessness tool – that purpose is undermined by the strict limits for applicants who live in subsidized housing. ERAP is perhaps most effective as an anti-homelessness program when it allows residents to remain in subsidized housing units because, if they are evicted or are forced to vacate those units due to accrued back rent, it is unlikely they will be able to locate any other housing in the District that they can afford. Therefore, the proposed limitations on ERAP for tenants with subsidies are at odds with the stated purpose of the program, and are discriminatory against those individuals who reside in subsidized housing.

SUBSECTION 7501 – APPLICATION PROCESS – The Proposed Changes are Likely to Lead to Higher Rates of Denial, Without Providing a Meaningful Benefit to Program Administration

7501.6 – Case Management Services Should Not Be a Prerequisite to Assistance

This section allows an ERAP provider to condition the receipt of ERAP on participation in case management “prior to receiving assistance” if the provider determines that “case management is necessary to ensure that the applicant addresses the circumstances which led to the need for emergency assistance.” This section is concerning for a number of reasons. First, there is no standard or guidance for how providers will make that determination. Second, case management can only be expected to “address the circumstances” that led to a rent arrearage in very limited situations. For the vast majority of applicants, an unexpected emergency, a reduction or loss of income or a rent increase led to them getting behind on rent. Applicants might need a referral to services, legal representation, employment or utility assistance, but ongoing case management is unlikely to be helpful to many applicants, and is therefore not a good use of limited resources except in a very limited number of cases. In addition, making such case management mandatory, as a prerequisite for an eligibility determination, is not in line with best practices, which suggest a voluntary services model, consistent with Housing First principles, is both more effective and less paternalistic. Finally, it is concerning that the case management would be required “prior to receiving assistance.” Most applicants are applying for assistance paying back rent with an active eviction case or even a writ of eviction in hand, meaning the time to apply for and receive assistance that effectively prevents eviction is incredibly limited. Requiring that an applicant participate in case management *first* before receiving emergency funds will render the assistance meaningless if the applicant gets evicted before receiving funds.

7501.10 – Verification of Applicants’ Documents Should Remain Discretionary Rather Than Mandatory

This section adds new language which *requires* providers to “verify documents submitted by the applicant in order to avoid misrepresentation.” We oppose this new requirement, which is likely to unnecessarily slow the process of determining eligibility and providing aid. The previous language permitted, but did not require, providers to verify an applicants’ information. Providers should retain this discretion such that where there is no reason to believe that a misrepresentation has been made, providers will not be required to use scarce program resources – and precious time – to obtain verification. This change is also significantly more likely to result in unfounded denials than the previous language, as applicants may be denied because the provider was unable to verify a required piece of information, regardless of whether there is any reason to doubt the veracity of that information. For example, where an applicant provided information regarding a termination of employment, and the provider is not able to verify that because the former employer fails to respond or does not keep adequate records to verify or contest the applicant’s representation, the inability to verify could lead to denial.

7501.15 – The Reduction of Days to Complete an Application from 60 to 45 Days Will Lead To Denials of Meritorious Applications

We oppose the change from an applicant having 60 days to provide required information before an application would be considered abandoned to having only 45 days. It often takes applicants close to the full 60 day period to be able to provide all the necessary information, particularly given the reliance on third-party documentation. This is exacerbated by the fact that providers often give applicants incomplete or incorrect information about what is still required, leading to several rounds of information-gathering. We believe that applicants will be motivated to complete the process as quickly as they can to avoid eviction without the need to reduce the allotted time for completion. This provision should explicitly give providers discretion to extend this period for good cause. Finally, this section should be clear that applicants are entitled to appeal a determination that the application has been “abandoned,” as this is a denial of eligibility.

SUBSECTION 7502 – APPLICANT UNIT – Determinations of Applicant Units Should Comply With and Be Consistent With District Law

7502.2 – The Definition of Family Should Be Consistent With the Homeless Services Reform Act

The definition of “applicant unit” should be consistent, or at least inclusive of, the definition of family in the HSRA. Family is defined as: “A group of individuals with at least one minor child or dependent child, regardless of blood relationship, age, or marriage, whose history and statements reasonably tend to demonstrate that they intend to remain together as a family unit.” D.C. Code §4-751.01(1)(A). We suggest that this section be revised to say “The applicant unit may include any combination of persons, regardless of blood relationship, age, or marriage, including but not limited to:”.

We suggest this to prevent any possible reading of the regulations that would risk impermissible discrimination based on marital status or family responsibilities under the D.C. Human Rights Act by seeming to require marriage, a formal domestic partnership, or a formalized stepchild/stepparent relationship, for example. It is also not clear that (a)-(d) would encompass unmarried partners who do not share a child in common, but who are co-parenting the child of one parent. We suggest that (c) be revised to state “persons related by marriage or domestic partnership, including stepchildren **and unmarried parents who live together and have a child in common or who are raising a child together either with or without formal custody order or legal adoption.**”

In addition, this section should be amended to consider adults who are temporarily away from home for education purposes as household members, provided that they meet the same requirements that apply to minor children who are away at school – namely, that “he or she returns to the home on occasional weekends, holidays, and during the summer vacations.” This will ensure that families are not denied assistance because a member who would otherwise be included in the household composition is attending college or other post-secondary school. Families with adult children in college are often financially responsible for those adult children in the same way they are for minor children. Additionally, there are legitimate public policy reasons for promoting college-access for low-income families, as well as supporting housing stability for these families, which is likely to increase success while in college.

7502.6(b) – Eligibility for Assistance Should Not Be Contingent on the Landlord Changing the Lease

It is unclear why the agency would want the applicant and the landlord to “change the lease to reflect only the applicant’s name,” or if that would even be legal. Without understanding the intent of this section, it is difficult to suggest alternative language. The problem with this requirement, though, is twofold: 1) it could result in another person, who may also be a low-income tenant, being displaced and 2) landlords would likely be unwilling to comply with this section due to concerns of legal liability for violating a contract with the non-household member, or wrongful eviction. (Even if the language is meant to only include former household members who no longer live there, the landlord may still be required to go through a legal process to remove the individual from the lease.)

SUBSECTION 7503 – ELIGIBILITY CRITERIA – Eligibility Criteria Should Be Drafted To Avoid Unnecessarily Narrow Definitions and Burdensome Requirements on Applicants

7503.1 – Application of the HSRA Should Not Prevent Assistance to Previously Eligible Applicants Who Fail to Meet the Strict Definition of “At Risk of Homelessness”

While we do not object to the explicit acknowledgement that ERAP is a part of the Continuum of Care of homeless services, we do think it is important that this change in the regulatory language should not be understood to restrict eligibility for ERAP to exclude applicants who would have previously been found eligible. When considering amendments to the HSRA, the first Committee on Human Services Committee Report highlighted legislative intent that by defining “at risk of

homelessness” at D.C. Code §4-751.01(5b)(A)(i) as including a family that “[h]as an annual income below 40% of the median family income for the Washington DC Metropolitan Area, as determined by the U.S. Department of Housing and Urban Development” that this would actually increase the eligibility pool for the ERAP program.² The Department also specifically stated its understanding that the change in the definition of “at risk of homelessness” would not alter eligibility.³ While at that time the Department took the position that ERAP was not part of the Continuum of Care, we would ask that the Department reiterate the position expressed in the legislative history, including through clarification of this provision if needed.

7503.1(b) – Eligibility on the Basis of Disability Should Not Be Limited to Applicants Who Receive Federal Disability Benefits

We oppose the addition of language to Section (b)(3), which appears to require for the first time that a person with a disability receive federal Supplemental Security Income or Social Security Disability Insurance in order to qualify for ERAP, versus simply having those categories of assistance be sufficient evidence of disability. The definition of disability for purposes of federal monetary benefits is much narrower than the definition of disability used for provision of services or civil rights protections. *See* 42 U.S.C. § 12102. These federal benefits are difficult to obtain, and can take years to be approved—a temporary termination or withholding of those benefits might even be the very cause of the emergency for the applicant. Including this language will prevent many families with individuals with disabilities from receiving assistance through ERAP, cutting off a particularly vulnerable population. DHS should adopt, for ERAP, the broader definition: “a physical or mental impairment that substantially limits one or more major life activities.” Finally, this narrow understanding of disability is in conflict with the definition of “Household Member with a Disability”, which allows for disability to be “documented by medical evidence provided by a qualified professional or by participation in a program which conditions its eligibility on the documentation of disability.”

7503.1 (c) – The Burden Should Be On Providers to Determine Ineligibility Based on Other Available Resources

While this language is not a change from the previous regulations, we are concerned it can be difficult for applicants to prove a negative without further guidance. Here, an applicant is asked to “demonstrate that he or she has no other available resources for resolving the emergency...” It is incredibly difficult for applicants to prove a negative. It is our position that the requirement that applicants document income and assets, coupled with the comprehensive regulatory guidance regarding what income and assets should be considered when determining eligibility, is

² Committee Report on B22-0293 the “Homeless Services Reform Amendment Act of 2017” at 6-7. October 18, 2017. <http://lims.dccouncil.us/Download/38138/B22-0293-CommitteeReport1.pdf>

³ Government of the District of Columbia, Homeless Services Reform Act Modernization, Frequently Asked Questions, available at https://dhs.dc.gov/sites/default/files/dc/sites/dhs/publication/attachments/HSRA%20Modernization%20FAQ_9-25-17.pdf.

sufficient for a provider to determine whether an applicant has other available resources to resolve the emergency. We suggest that the regulations further explain how agencies should use the information provided by applicants to meet this standard in a way that appropriately places the burden on the agency to prove ineligibility.

7503.2 – Case Management Services Should Be Voluntary and Reserved For Appropriate Cases

In order to reserve case management services for those for whom it would be most helpful, we recommend adding language to this section requiring providers to also make a determination that the “circumstances leading to the emergency” are likely to be resolved with the receipt of services before assigning an applicant case management. As we said above, some circumstances, such as severe rent burden, are unlikely to be resolved with case management services, so a provider should make an explicit determination that these services are actually relevant to an applicant’s unresolved circumstances before placing the “expectation” on the applicant to participate.

This section should also clarify that, while a provider may refer an applicant to the Homeless Prevention Program, the applicant is not required to accept this referral to a different and distinct program⁴ as part of participating in case management or as an eligibility requirement to receive financial assistance from ERAP they would otherwise qualify for. This would make it clear that this referral is voluntary, in line with the voluntary service model, as referenced above in our comment regarding Section 7501.6. We suggest the following language be added: “An applicant referred under this provision is not required to participate in the Homeless Prevention Program.”

7503.8 – We Support Proposed Changes Clarifying Eligibility for Applicants with Income Up to 40% of AMI

We support the change in regulations making clear that families and individuals with income up to 40% of Area Median Income are eligible for assistance. We recommend publishing this income cut-off annually in a table with household size either in regulations or on the DHS website to facilitate provider implementation and applicant’s knowledge of their potential eligibility.

⁴ It is important to note that there are no regulations governing the Homeless Prevention Program, meaning that it is also unclear how a caseworker would determine a referral to HPP is appropriate at all, or more appropriate than ERAP assistance. The agency is in violation of the Administrative Procedure Act each time it determines whether a client is or is not eligible for or prioritized for a referral to HPP without properly promulgated rules subject to notice and comment (The only regulations ever promulgated were for the federal “HPRP” program, which is not the same as HPP.). Similarly, rules must be published concerning the amount and type of assistance provided by HPP and any grounds for ending such assistance. There are also no rules regarding case management standards, timeline, or duration in either these proposed ERAP regulations, or for HPP.

7503.11(f) – Federal or State Tax Refunds Should Be Included As Assets Only If Still Available to the Applicant

If DHS is going to amend this section to include “federal or state tax refunds received during any period before or during the budget month,” it should mirror section (c), which addresses sporadic or lump-sum income “if it has been received in the budget month or has been received in an earlier month *and is still available to the applicant.*” (emphasis added). There is no reason to treat tax refunds differently than other lump sum income applicants may receive during the year, and, most importantly, a family should not be considered to have access to funds if that money is no longer available.

SUBSECTION 7506 – EMERGENCY ASSISTANCE – RENT ARREARAGES – Computations for Rent Arrearages Should Be Drafted to Most Effectively Resolve Emergencies and Prevent Eviction

7506.1 – ERAP Assistance Should Not Cover Late Fee Payments That Are Not Required to Avoid Eviction

We believe that this section should be amended to remove late fees, because pursuant to the Late Fee Amendment Act at DC Code § 42–3505.31, the redemption amount required to avoid eviction can no longer include late fees. In the interest of conserving ERAP resources to help as many families and individuals as possible avoid eviction and displacement, removing late fees from the calculation will still prevent eviction, without unnecessarily providing payment to landlords that is not required to keep the tenant in their home.

7506.1(d) – Regulations Should Not Limit Assistance for Applicants Living In Subsidized Housing to the Tenant Portion

We oppose the inclusion of new language limiting the receipt of assistance for applicants with housing subsidies to five months of the tenant portion of the rent. Many of the same issues that make a family likely to experience an emergency or create eligibility for assistance (such as disability, large family size, or elderly status) also make it difficult for tenants in subsidized housing to recertify so that their tenant portion is the appropriate amount. We routinely see families who do everything they can to recertify, but still cannot do so because employers refuse to fill out necessary paperwork or because landlords refuse to work with them. We also see tenants who, due to a lengthy nursing home stay and lack of supports, were unable to recertify and accrued several months of market rent.

Additionally, it is possible that a tenant applying for ERAP assistance fell behind on rent when their tenant portion was higher than at the time of application. For these reasons, families in subsidized housing facing emergencies often owe more than their tenant portion. The general limitations on amount and frequency of assistance payments and other requirements for eligibility are sufficient to guard against system abuse without disadvantaging applicants in subsidized housing who are most likely to be evicted without ERAP.

7506.4(c) – Applicants Living In Subsidized Housing Should Be Eligible for Discretionary Awards of Higher than Five Months’ Rent

We oppose the inclusion of this language limiting assistance to applicant households in subsidized tenancies on the same grounds as our objection to the new language in Section 7506.1(d). Additionally, there is no reason to permit discretionary awards higher than five months’ rent for those in unsubsidized tenancies but not for those in subsidized tenancies. This is source of income discrimination, which is illegal under D.C. law. The monetary assistance provided to an owner of a housing accommodation under section 8 of the United States Housing Act of 1937, either directly or through a tenant, shall be considered income and a source of income according to DC Code § 2-1402.21. The requirement that certain mitigating circumstances are present is sufficient to ensure that the funds are being awarded in the cases of greatest need and vulnerability to eviction.

SUBSECTION 7507 – EMERGENCY ASSISTANCE – SECURITY OR DAMAGE DEPOSIT - Awards for Security or Damage Deposits Should Be Adjusted to Reflect the District Rental Market.

7507.2

While we support the increase in the possible award for security or damage deposits to \$1,200, which more accurately reflects the District rental market than the previous limit of \$900, we note that this *maximum* amount of assistance is still far below the *average* rent. For example, a 2019 study found that the average rent for a two-bedroom unit in DC was \$3100/month,⁵ whereas the HUD Fair Market Rent (FMR) for a two-bedroom unit in the DC-VA-MD Metro area is \$1665 per month.⁶ (HUD FMR is much lower than average DC rent due to the addition of the MD and VA suburbs.) We recommend increasing the cap and tying the maximum amount to a percentage of the FMR or the DCHA payment standards so that the standard can increase as rents increase. We also recommend publishing the cap along with the income guidelines on the DHS website.

SUBSECTION 7508 – EMERGENCY ASSISTANCE – FIRST MONTH’S RENT - Awards for First Month’s Rent Should Be Adjusted to Reflect the District Rental Market.

7508.2

Our concern regarding the gap between the maximum possible award for security deposits and the average rent in the District and region also apply to first month’s rent awards. As with Section 7507.2, the Department should increase the cap for this type of award, tying the maximum amount to a percentage of the FMR or the DCHA payment standards, and publish the cap on the DHS website.

⁵ See <https://dc.curbed.com/2019/7/30/20747273/dc-apartment-prices-two-bedrooms-renting-income>.

⁶ See https://reports.nlihc.org/sites/default/files/oor/OOR_2019.pdf.

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Thank you for the opportunity to submit comments in response to the Department's proposed rulemaking. Please do not hesitate to contact either Damon King at (202) 661-5956 or dking@legalaiddc.org or Samantha Koshgarian at (202) 661-5960 or skoshgarian@legalaiddc.org with any questions or concerns.

Sincerely,
Legal Aid Society of the District of Columbia
Bread for the City
Children's Law Center
Legal Counsel for the Elderly
Neighborhood Legal Services Program
Washington Legal Clinic for the Homeless