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Regulations Division
Office of General Council
U.S. Department of Housing and Urban Development
451 7th Street, SW, Room #10276
Washington, DC 20410-0500

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Re: Docket No. FR-5246-P-02, RIN 2506-AC30, Housing Trust Fund

To Whom It May Concern:

The Technical Assistance Collaborative Inc. (TAC) is a national non-profit organization that advances proven solutions to the housing and community support needs of vulnerable low income people with significant and long term disabilities. TAC strives to achieve sustainable public sector systems change through evidence-based and promising approaches in mental health, substance abuse, human services and affordable and permanent supportive housing.

Introduction to Comments

TAC deeply appreciates the efforts of U.S. Department of Housing and Urban Development (HUD) staff regarding the implementation of the National Housing Trust Fund (HTF). This program holds great promise for addressing the nation's most serious – and most hidden - housing crisis, which is the unmet need for affordable rental housing and permanent supportive housing for people with the most significant and long-term disabilities.

TAC and the Consortium for Citizens with Disabilities Housing Task Force (CCD) recently submitted updated data to HUD PD&R which illustrates the severity of the housing problems facing people with disabilities. This data shows that as many as half of the non-elderly households with HUD defined “worst case” needs include an adult with disabilities. HUD’s worst case needs estimates do not include people with disabilities who are chronically homeless or who are living in institutions or restrictive group quarters which may violate federal civil rights laws.. In the aggregate, housing needs among very low income non-elderly adult households with disabilities may be well above 2.5 million households.

TAC’s *Priced Out in 2008* study found that the average income of the 4.2 million non-elderly adults with disabilities that rely on federal Supplemental Security Income (SSI) payments is equal to only 18 percent of AMI – far below the 30 percent upper limit for ELI households.

We understand that a difficult tension exists between the ELI policy goals and financing challenges associated with the HTF program. This tension is symbolized by the tradeoffs between developing as many units as possible within a specific appropriation level vs. the need to provide more funding per unit to ensure affordability for the most vulnerable people – particularly households with incomes below 20 percent of AMI.

The HTF program was authorized primarily to expand the supply of rental housing for ELI households – not just the upper end of the ELI spectrum. The likely scarcity of new and existing rental subsidies which can be linked with HTF capital creates an imperative for HUD to deliver a clear and strong policy message to state and local housing agencies. That message has several components:

- HUD will hold housing agencies accountable for ensuring that the most vulnerable very lowest income households are prioritized for scarce federal housing assistance;
- Spending more federal funding per unit to ensure affordability for households at the lower end of the ELI spectrum is an appropriate and necessary policy decision;
- HUD will provide housing agencies with the necessary tools/financing mechanism in programs such as the HTF to achieve these objectives.
- The difficult tradeoffs associated with spending more federal funding per unit of to ensure affordability for the most vulnerable ELI households are more than offset when other federal policy objectives – such as helping to control costs in federal entitlement programs such as Medicaid – are achieved.

Overall Approach to TAC Comments

Because of the importance of the ELI issue to the disability community – and its relevance to the on-going collaboration between HUD and HHS – TAC's comments begin with core HTF issues specific to disability housing policy including:

- Rent levels, financing and operating cost assistance;
- Housing integration and tenant selection policies in Permanent Supportive Housing (PSH). PSH is an evidence based model of housing which combines permanent affordable housing with voluntary and flexible community-based supportive services appropriate for the tenants who will occupy the PSH units.

We conclude with additional comments that are also highly relevant to housing policy for disability with disabilities.

TAC comments on rent levels, financing and operating cost assistance relevant to 92.731(e), 92.740(a), 92.746(b)

TAC is concerned that the present proposed rent structure and limits on operating cost assistance will not only exclude people with the most significant and long-term disabilities with SSI level incomes from HFT units, but also will increase the already significant financing challenges associated with creating PSH units. Under the proposed regulatory structure, ELI households with incomes below 20-25 percent of AMI will

either be: (1) denied access to HTF units because of insufficient income; or (2) be rent burdened. Rent burdened ELI households adversely impact the sustainability of HFT-financed developments. Tenants paying a punishingly high percentage of their income for rent are likely to fall behind in payments resulting in more frequent unit turnover and less stable cash flow and operations for the project.

The housing barriers created by the proposed ELI threshold rents and the affordability needs of millions of people with disabilities with SSI-level incomes can only be address by project-based operating assistance, a project-based rent subsidy such as a project-based Housing Choice Voucher (PBV) or fully capitalized operating reserves. TAC is pleased note that last week – after three years of intensive advocacy by TAC and CCD – the 111th Congress passed the Frank Melville Supportive Housing Investment Act of 2010. This legislation modernizes and reinvigorates the moribund Section 811 Supportive Housing for Persons with Disabilities program and creates a new stand-alone Project Rental Assistance Contract component to ensure Brooke “rule” rents for future HTF projects with PSH units. We strongly urge HUD to make specific reference to this new Section 811 authority in the HTF Final Rule, including its 25 percent unit limitation. [NOTE: See comments below on housing integration.]

TAC understands that the proposed HTF rule presumes that project-based subsidy assistance will be available and provides priority to those projects that seek such assistance. However, even with the new Section 811 PRAC option, near-term budget realities make it highly unlikely that on-going subsidy will be available for all HFT ELI units. Therefore, TAC recommends that the HTF regulations permit and provide for alternative methods to achieve income-based (Brooke-type) rents for persons with disabilities and other ELI households below 25 percent of AMI. After consultation with national experts in housing finance for ELI households, TAC is proposing several approaches to address this challenge:

- “Brooke Rents” and PBVs. While we understand the underwriting challenges of “Brooke rents”, we also understand the hardship that failure to tie rent affordably to actual income will create for ELI tenants below 25 percent of AMI. “Brooke rents” work best with predictable, sustained operating assistance and we urge HUD to continue efforts to provide new incremental PBVs for HFT. Failing that, we urge HUD to consider set-asides of existing PBVs for ELI persons in HFT housing.
- ‘Value vouchers’. The cost of providing Fair Market-Rent (FMR-based) Section 8 project-based vouchers for all HTF ELI units may be too high in this scarce resource environment. Creating a new type of shallow subsidy similar to the new Section 811 PRAC-only component (i.e. operating cost-based “value vouchers”, “skinny vouchers”, etc.) can address legitimate underwriting concerns by providing the difference between cost-based rents and an ELI tenant’s income. While this method will not leverage debt, a shallow project-based voucher can provide stable, affordable rents to ELI tenants while covering the costs of operating the development and allow predictable underwriting assumptions.
- Fixed Rent Income Band for PWDs at 15% AMI. For projects that are unable to obtain Section 811 or other project-based assistance, HUD should require all HTF financed properties to include at least a 10 percent set-aside of units with “Brook rule” rents for people with disabilities with SSI -level incomes. This policy is essential given the disproportionately high incidence of “worst case” housing needs among non-elderly renter with disabilities. This affordability band would set the threshold rent at 30 percent of SSI income which could be funded

through HTF operating subsidy reserves and adjusted periodically to reflect changes in SSI payments.

- Operating Subsidy Reserve. Allow projects that do not have project-based operating assistance to create an upfront development operating reserve to fund Brooke rents for the longest term possible. To be effective for underwriting purposes, project stability and sustainability of tenancies, the reserve should cover at least 15 years. TAC estimates that capitalizing an operating subsidy to make up the difference between operating costs and the income of ELI households with SSI over a period of 15 years could cost approximately \$80,000. We recommend that HUD allow: (1) higher maximum per unit development subsidy amounts {S 92.740 (a)}; and (2) a higher percentage of the annual HTF grant to be applied to operating cost assistance for those units serving ELI households with disabilities with SSI-level incomes {S 92.730}. At the end of the 15 year period covered by the operating subsidy reserve, the project should have priority for any program of operating subsidy assistance available at the time, and the developer should be required to seek and accept such assistance.
- Short-term operating cost assistance. 92.731 8 e (1). The two year period of allowed operating cost assistance allowed to be paid for within an annual HFT grant will not address underwriting concerns. However, under certain circumstances a short-term operating subsidy could be an important interim mechanism to allow ELI persons to be housed immediately, provided a longer term subsidy commitment is ensured. If a project or tenant expects to receive project or tenant-based assistance during this period, the ELI HFT tenants should retain their place on any waiting list for operating assistance. More flexibility for jurisdictions to provide longer than 2 years of operating assistance from any annual HFT grant in response to underwriting or project feasibility concerns should also be incorporated into the regulations.

With respect to “terms of affordability”, we recommend that HFT projects remain affordable for the longest term possible consistent with project sustainability and feasibility and create the strongest possible incentives for projects that agree to 50 year affordability terms.

Comments on Proposed 92.747(d)(3)(ii), (iii), and (iv): Tenant Selection

Sections 92.747(d)(3)(ii), (iii), and (iv) of the proposed rule attempt to address highly complex and interrelated issues pertaining to developing affordable housing units and PSH units for people with disabilities. We urge HUD to give the strongest possible consideration to TAC’s comments with respect to these issues, as well as comments submitted separately by CCD and CCD member organizations including the National Alliance on Mental Illness (NAMI). Because several disability policy issues are covered within the Tenant Selection section of the proposed rule, we have organized our comments as follows:

- Comments on segregated housing projects entirely reserved for people with disabilities;
- Comments regarding tenant selection policies for PSH units, including PSH units integrated within multi-family developments as well as “single purpose” PSH projects. These policies must ensure the effective coordination of both PSH units with PSH community-based supportive services for the most vulnerable households with disabilities.
- Other comments relevant to certain provisions of 92.747(d)(3)

Density, Segregated Housing and PSH

Section 92.747(d)(3) does not differentiate between segregated HTF projects intended to be occupied solely by non-elderly people with disabilities and “single purpose” PSH projects. TAC strongly opposes the creation of any segregated or “single purpose” rental housing developments proposed for occupancy solely by non-elderly people with disabilities unless that housing is PSH as defined above. The final HTF regulation must also reflect that integrated PSH units are increasingly being created through set-asides within affordable rental housing developments. This integrated PSH approach emerged during recent years in response to the U.S. Supreme Court *Olmstead* decision and to meet community integration goals included in Section 504 and the Americans with Disabilities Act (ADA). Thus, TAC strongly believes any PSH project financed with HTF resources must satisfy the community integration mandates in Section 504 and Americans with Disabilities Act (ADA) noted below.

Under Section 504 and ADA, it is permissible to create segregated housing for people with disabilities and to adopt eligibility limitations and preferences within a category of disability only when “such action is necessary to provide qualified individuals with disabilities with housing, aid, benefits or services that are as effective as those provided to others” 24 C.F.R. §8.4(b)(1)(iv) and 28 D.F.R. 35.130(b)(1)(iv). In all cases, including in general occupancy housing and in situations where separate housing is otherwise justified by civil rights requirements, housing and services must be provided in the “most integrated setting appropriate to the needs of the individual with disabilities.” 24 D.F.R. 8.4(d) and 28 C.F.R. 35.130(d).

This policy direction is consistent with the new provisions of the Melville Section 811 legislation passed last week as well as HHS’s Money Follows the Person housing guidelines. Both articulate emerging federal policy which strongly emphasizes integrated PSH models for people with the most significant and long term disabilities.

Consequently, TAC recommends revising the proposed 92.747(d)(3) in order to prohibit segregated housing for people with disabilities in general, and clearly articulate the limited situations when segregated PSH housing is permitted consistent with these federal civil rights requirements.

Tenant Selection in PSH

TAC and CCD have urged HUD to adopt a single and comprehensive tenant selection policy for all of its subsidized housing programs that is based on federal fair housing laws. Such a policy must also be feasible and effective for PSH units serving people with significant disabilities who are leaving institutions or are at risk of institutionalization, or who are chronically homeless or at-risk of chronic homelessness. Our recommendations below are largely consistent with the approach adopted in the current rules in the PBV program promulgated in 2005. However, as we have discussed with senior HUD officials, three improvements in this approach are needed in order to align HUD’s tenant selection policies with HHS supportive services financing – particularly Medicaid.¹

First, HTF housing should adopt tenant selection preferences in general occupancy developments for people with disabilities without regard to category of disability. Such a policy is consistent with selection preference rules for public housing, the HCV program, and for subsidized multifamily housing. The rule should correspondingly forbid the

¹ Medicaid is now by far the largest single source of community-based supportive services financing for ELI households with significant and long term disabilities. This trend will continue as the Obama Administration begins the implementation of the health care and long-term care reforms contained in the Patient Protection and Affordable Care Act (ACA).

segregation of people with disabilities in separate buildings or on separate floors or in parts of buildings within a general occupancy development.

Second, accessible units must be offered on a preferential basis to households with family members who need the features of the units. For the comparable PBV rule, *see*, 24 C.F.R. §983.251(c)(7).

Third, with respect to tenant selection in PSH, TAC recommends that tenant selection preferences be permitted to target households *who are eligible for and can obtain access to the supportive services offered in connection with the housing*. This italicized phrase differs from the current PBV rule which states that households must “need” the services and be able to “benefit from them”. Although well-intended, these terms within the PBV rule are not responsive to key operational features in Medicaid optional and waiver programs for people with disabilities that fund supportive services for people leaving institutions or at risk of institutionalization or people who are chronically homeless or at risk of chronic homelessness.

HUD tenant selection policy for HTF-financed PSH units (as well as other HUD programs) must acknowledge the reality that Medicaid and state financed supportive services are typically targeted at a sub-set of people within a category of disability. Medicaid optional/waiver funded supportive services are not available to all people with mental illness, or all people with developmental or physical disabilities, but only those individuals whose impairment is severe enough to warrant eligibility for these scarce Medicaid resources. Medicaid optional/waiver service targeting is also essential for state and local service providers to comply with the integration mandates of Section 504 and the ADA as explained in judicial decisions like *Olmstead v. L.C.*, and to address chronic homelessness.

As a matter of practice, however, these federal policy objectives and judicial mandates can be effectively carried out only when a vulnerable individual with disabilities is able to simultaneously secure access to both the supportive services and community-based housing. For example, Medicaid waiver “slots” used by people leaving institutions are typically “capped” at a specific number of participants by states as a means to control costs. Therefore, a person might very well be eligible for the services linked to a HUD financed PSH unit but be unable to access them because they are on a Medicaid waiver waiting list.

Other TAC Comments Related to 92.747(d)(3)

The prohibition on mandatory supportive services expressed in the proposed §92.747(b)(9) must be extended to any supportive housing for people with disabilities (including any transitional housing if transitional housing is retained in the final rule). People with disabilities must also retain the right to choose their own service provider, and select and direct supportive services. This approach is consistent with changes in systems that provide supportive services. It is also consistent with practices in HUD’s Section 811 program. In this regard, the final rule should also state that a refusal to accept supportive services cannot be a basis for termination of an HTF tenancy.

Limits on eligibility and preferences for a particular segment of the population should be consistent not only with the priorities expressed in a jurisdiction’s consolidated plan. They must not perpetuate impediments to fair housing choice identified in the jurisdiction’s Analysis of Impediments (AI) and they must act in furtherance of the fair housing actions expressed in the AI.

We agree that eligibility limitations and preferences must not violate the affirmative fair housing marketing requirements of proposed §92.760(b) and the existing 24 C.F.R. §92.351. However, the rule’s reference through the proposed §92.760(a) to all of the

cross-cutting federal requirements of 24 C.F.R. part 5, subpart A is too vague. TAC urges you to incorporate by direct reference the nondiscrimination requirements of 24 C.F.R. §5.105(a).

Comments on Proposed §91.220(l)(4)(i) and §91.320(k)(5)(i): Allocation Plans and Affirmatively Furthering Fair Housing.

TAC supports the concept of integrating HTF allocation plans with jurisdictional Consolidated Plans, as described in the proposed changes to Part 91 rules. TAC recommends that priority factors for funding in local and state action plans include activities intended to address impediments to fair housing identified in a jurisdiction's AI. We also urge you to add universal design, visitability, and other efforts that increase the supply of accessible housing for people with disabilities as funding priorities to the proposed §91.220(l)(4)(i) and §91.320(k)(5)(i).

Comments on Proposed §92.730(a)(1): Eligible Activities: Transitional Housing

TAC is opposed to using HTF funds to create transitional housing. The statute does not specifically mention transitional housing but it does declare that the purpose of the program is to increase and preserve the supply of rental and homeownership housing. This strongly implies that permanent housing is the goal of the HTF program. Transitional housing includes an array of approaches/models that may not meet the legal test of rental housing and have not proven to be effective. [NOTE: One notable example is the “licensed residential facility” model that does not collect rent from residents.] HUD and HHS are currently collaborating on activities to better understand whether transitional housing can be deemed an effective model for certain target populations. Given this lack of evidence, TAC believes transitional housing should not be included as an eligible HTF activity.

Comments on Proposed §92.742(b)(5): Property Standards and Architectural Access

TAC is pleased that the proposed rule for property standards specifically addresses the architectural access requirements imposed by Section 504 of the 1973 Rehabilitation Act and the Fair Housing Act. We support the reference in proposed §92.742(b)(5)(ii) to the obligation to construct additions to existing dwellings in a manner compliant with Title VIII design and construction standards, as this responsibility is often overlooked. TAC is also pleased that the rule encourages rehabilitation that exceeds minimum code requirements. However, we urge you to strengthen this provision by changing it to read, “Rehabilitation *should* include improvements that *further fair housing for people with disabilities with design features that are not otherwise* required by regulation or statute, *including improvements that promote visitability and universal design.*”

TAC also asks that the final rule correct two oversights with respect to architectural access. First, we request the addition of a provision that reinforces the duty expressed in HUD's Section 504 rules to make site selection decisions in a manner that will not exclude people with disabilities. *See*, 24 C.F.R. §8.4(b)(5). We are particularly concerned about the absence of accessibility features in existing housing that will not undergo alteration, and the lack of accessibility due to site infeasibility. TAC also asks that the rule specifically require homeownership activities funded through HTF to comply with the architectural access standards imposed by Section 504 for existing, altered, and new construction housing.

TAC looks forward to working with HUD to finalize HTF regulations which reflect the needs of the most vulnerable ELI households. Please feel free to contact me at 617-266-5657 Ext #114 or at ahara@tacinc.org if you have any questions or require additional information.

Sincerely

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