

Ensuring NAHMA Members Receive the Latest News and Analysis of Breaking Issues in Affordable Housing

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A Business Case for a Single Student Occupancy Rule for All Affordable Housing Programs

I. Background

A. Overview: There is currently no single policy to determine whether an adult student is eligible to live in an apartment that is financed or subsidized through a federal multifamily housing program. This NAHMAanalysis will discuss a number of these different rules, but it will focus on the policy conflict between the Section 8 and LIHTC programs, which is the one most frequently encountered by our members.¹

The discrepancies in the student occupancy rules for HUD's Section 8 programs and the IRS' Low Income Housing Tax Credit (LIHTC) program can cause serious complications for multifamily owners and management agents. The Section 8 restrictions apply to the programs administered by HUD's Office of Housing and the Office of Public and Indian Housing, and they are applicable to both part-time and full time students. These policies allow students to receive housing assistance if they are independent adults who are income-qualified and meet the program requirements. In the case of students who are not independent adult students, both the students and their parents must be income-qualified to receive Section 8 assistance. On the other hand, LIHTC restrictions prohibit full time student households from occupying a low-income unit unless certain exceptions are satisfied. The conflict in the student occupancy policies is statutory, and resolving their differences would require Congressional action rather than a simple regulatory fix.

The LIHTC restrictions are found in the Internal Revenue Code,² which states:

“A unit shall not fail to be treated as a low-income unit merely because it is occupied—

- (i) by an individual who is—
 - (I) a student and receiving assistance under title IV of the Social Security Act [TANF];

¹ The student policies noted in this discussion may not be exhaustive. This document is intended only for informational purposes; it does not constitute legal or compliance advice.

² See §42(i)(3)(D) Certain students not to disqualify unit.

- (II) a student who was previously under the care and placement responsibility of the State agency responsible for administering a plan under part B or part E of title IV of the Social Security Act [foster care]; or
- (III) enrolled in a job training program receiving assistance under the Job Training Partnership Act or under other similar Federal, State, or local laws; or
- (ii) entirely by full-time students if such students are—
 - (I) single parents and their children and such parents are not dependents of another individual and such children are not dependents (as so defined)³ of another individual other than a parent of such children, or
 - (II) married and file a joint return.”

For multifamily properties assisted through HUD’s Section 8 programs, the following occupancy restrictions apply⁴:

- “(a) No assistance shall be provided under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) to any individual who--
 - (1) is enrolled as a student at an institution of higher education (as defined under section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002));
 - (2) is under 24 years of age;
 - (3) is not a veteran;
 - (4) is unmarried;
 - (5) does not have a dependent child⁵;
 - (6) is not a person with disabilities, as such term is defined in section 3(b)(3)(E) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)(3)(E)) and was not receiving assistance under such section 8 as of November 30, 2005; and
 - (7) is not otherwise individually eligible, or has parents who, individually or jointly, are not eligible, to receive assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).
- (b) For purposes of determining the eligibility of a person to receive assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), any financial assistance (in excess of amounts received for tuition and any other required fees and charges) that an individual receives under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), from private sources, or an institution of higher education (as defined under the Higher Education Act of

³ LIHTC uses a different definition of a dependent child than Section 8. For tax credit properties, §152 of the Internal Revenue Code, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B), is used for the definition of a dependent child.

⁴ This language was most recently included in the Consolidated Appropriations Act, 2014 (P.L. 113-76) in Division L: Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2014, Title II, Section 215. It has been included in each annual HUD appropriations legislation since the FY 2006 Transportation, Treasury, HUD Appropriations bill (P.L. 109-115). HUD’s Section 8 student occupancy regulations are found at 24 CFR 5.612 Restrictions on assistance to students enrolled at an institution of higher education.

⁵ “Dependent child” is defined in HUD’s income eligibility regulations at 24 CFR 5.603 as a member of the family (except foster children and foster adults) other than the family head or spouse, who is under 18 years of age, or a person with a disability, or is a full-time student.

1965 (20 U.S.C. 1002)), shall be considered income to that individual, except for a person over the age of 23 with dependent children.”

Through a *Federal Register*⁶ notice, HUD explained the policy in plain language:

“For a student under the age of 24 who is not a veteran, is unmarried, does not have a dependent child and who is seeking section 8 assistance, section 327(a) of the Act sets up a two-part income eligibility test. Both parts of this test must be affirmatively met. That is, both the student and the student’s parents (the parents individually or jointly) must be income eligible for the student to receive section 8 assistance. If it is determined that the parents are not income eligible, the student is ineligible to receive section 8 assistance.”

Separate student occupancy rules apply to other HUD programs, including the Rent Supplement, Rental Assistance Program (RAP), Section 221(d)(3) Below Market Interest Rate, Section 236, Section 202 PAC, Section 202 PRAC or Section 811 PRAC programs. For these programs, owners must determine a student’s eligibility for assistance at move-in, initial or annual recertification, and at the time of an interim recertification if one of the changes reported is that a household member is enrolled as a student, at an institution of higher education. According to the HUD 4350.3 Occupancy Handbook:

“The student must meet **all** of the following criteria to be eligible for residency in one of the programs listed above. The student must:

- a) Be of legal contract age under state law;
- b) Have established a household separate from parents or legal guardians for at least one year prior to application for occupancy, **or**
- c) Meet the U.S. Department of Education’s definition of an independent student.
- d) Not be claimed as a dependent by parents or legal guardians pursuant to IRS regulations; and
- e) Obtain a certification of the amount of financial assistance that will be provided by parents, signed by the individual providing the support. This certification is required even if no assistance will be provided.

The full amount of financial assistance paid directly to the student or to the educational institution and amounts of scholarships funded under title IV of the Higher Education Act of 1965, including awards under federal work study programs or under the Bureau of Indian Affairs student assistance programs, is excluded from annual income [for the programs listed above].”⁷

⁶ HUD Notice, “[Eligibility of Students for Assisted Housing Under Section 8 of the U.S. Housing Act of 1937; Supplementary Guidance](#),” *Federal Register* [Docket No. FR-5036-N-02]: Monday, April 10, 2006.

⁷ HUD Handbook 4350.3 REV-1 “Occupancy Requirements of Subsidized Multifamily Housing Programs,” Chapter 3: Eligibility for Assistance and Occupancy, paragraph 3-13.B.

The HOME Investment Partnerships program recently submitted a regulation change that cross references the student occupancy rules of Section 8. In a *Federal Register* notice⁸, HUD outlines that this HOME regulation also follows the definition of low-income and very low-income families for student eligibility purposes.

USDA's Rural Development has student occupancy rules which are similar to HUD's for Rent Supplement, RAP, etc. These rules apply to Section 515 Multifamily Housing and to Section 514/516 Farm Labor Housing. RD's handbook states:

"A student or other seemingly temporary resident of the community who may be considered an eligible tenant when all of the following conditions are met:

- The student is of legal age in accordance with the applicable state law or is otherwise legally able to enter into a binding contract under state law;
- The person seeking occupancy has established a household separate and distinct from the person's parents or legal guardians;
- The person seeking occupancy is no longer claimed as a dependent by the person's parents or legal guardians pursuant to Internal Revenue Service regulations, and evidence is provided to this effect; and
- The person seeking occupancy signs a written statement indicating whether or not the person's parents, legal guardians, or others provide any financial assistance and this financial assistance is considered as part of current annual income and is verified in writing by the borrower."⁹

According to Attachment 6-A of the Rural Development HB-2-3560 "Asset Management Handbook", the following items are excluded from annual income when determining a student's eligibility:

- "Earnings in excess of \$480 for each full-time student 18 years old or older (excluding the head of household and spouse)"¹⁰; and
- ONLY for Section 515/8 properties, "Amounts of scholarships funded under Title IV of the Higher Education Act of 1965, including awards under Federal work-study programs or under the Bureau of Indian Affairs student assistance programs (20 U.S.C. 1087uu). The exception found in § 237 of Public Law 109-249 applies and requires that the amount of financial assistance in excess of tuition shall be considered income in accordance with the provisions codified at 24 CFR 5.609(b)(9), except for those persons with disabilities as defined by 42 U.S.C. 1437a(b)(3)(E) (Pub. L. 109-247). This applies to Section 515 with project based Section 8 only;"¹¹

These policies are all intended to reserve housing for those most at need, while barring students who may still receive parental financial assistance from acquiring available units.

⁸ HUD Notice, "[HOME Investment Partnerships Program: Improving Performance and Accountability; Updating Property Standards](#)", *Federal Register* [Docket No. FR-5563-F-02]: Wednesday, July 24, 2013.

⁹ Rural Development HB-2-3560 "Asset Management Handbook", Chapter 6: Project Occupancy, paragraph 6.5.B.

¹⁰ See Attachment 6-A paragraph (c)(11).

¹¹ See Attachment 6-A paragraph (c)(16)(viii).

B. Reason for Change:

As the LIHTC program is used more frequently to preserve older HUD and RD properties (including Section 515/8 communities), harmonizing the conflicting student occupancy requirements would help ensure that mixed finance properties:

- Can claim the LIHTCs which provide the equity to preserve the property and maintain affordability without running afoul of IRS requirements or their state agencies' directives;
- Satisfy HUD or RD compliance requirements; and
- Serve the broadest pool of otherwise-eligible applicants and residents.

Despite the now long-standing inconsistencies, the agencies have not issued *official joint* policy guidance for housing providers to determine which student occupancy rule prevails.

This issue over differing student occupancy rules resurfaced in March of 2014 as HUD issued draft chapters for inclusion in the revised 4350.1 Asset Management Handbook. The draft "Chapter 12.10, Tax Credits and Subsidy Layering" noted that while the Section 8 student restrictions are different from LIHTC, "Owners and Management Agents should be advised to adhere to the Section 8 student rule policy if there is a Housing Assistance Payment (HAP) contract in place." While the draft chapter is currently not in effect,¹² NAHMA is still concerned that violating the LIHTC student rule jeopardizes the very tax credits necessary to preserve and recapitalize HUD-assisted properties. NAHMA believes this example underscores the need for a legislative solution to reconcile the conflicting student occupancy laws.

II. Legislation to Permit LIHTC Occupancy for Certain Students

A. Enacted Laws

Although the student occupancy rules for LIHTC are designed to prevent full-time college students who are not yet financially independent from their parents from reducing the affordable housing stock, they could bar an individual from achieving their educational goals.

In recent years, Congress has enacted important but incremental changes to address the LIHTC student occupancy rule. The Mortgage Forgiveness Debt Relief Act of 2007 (P.L. 110-142) provided clarification of the "dependent" status of a child in a single-parent household. Before this bill was passed, a single parent who has returned to school full-time and whose child (in grades K-12) was claimed as a dependent on the non-custodial parent's tax return would not qualify for the single parent exemption. Later in 2008, lawmakers provided relief for students through the Housing and Economic Recovery Act (HERA). This bill extended eligibility under the student qualifying exceptions to children who once received foster care assistance, and were now exiting the system.

Although the Mortgage Forgiveness Debt Relief Act and HERA provided some clarifications for housing students, lawmakers have yet to fully address the remaining discrepancies between the HUD and IRS rules.

¹² Although the draft chapter is not in effect, some NAHMA members have reported that their local HUD field office staff expressed similar instructions when the Section 8 and LIHTC student rules conflict.

B. Pending Legislation

On July 31, 2014, Senators Al Franken (D-MN) and Rob Portman (R-OH) introduced S. 2723, The Housing for Homeless Students Act of 2014¹³. This bill would exempt certain individuals from the LIHTC student occupancy rule if they have experienced homelessness at any point in the five years prior to moving into a LIHTC property. This exemption will include homeless individuals covered by the definition of “homeless children and youth” in the McKinney-Vento Homeless Assistance Act and an explicit rule exemption for homeless veterans. NAHMA supports this bill. In a letter to Senator Franken dated April 18, 2014, Executive Director Kris Cook explained:

“These changes to the LIHTC student rule will allow full-time students who experience homelessness or have recently experienced homelessness to become eligible (or retain eligibility) for LIHTC housing units. NAHMA believes that formerly homeless youth or veteran residents should not be displaced from affordable housing when they pursue educational opportunities that are necessary to improve their economic circumstances. We look forward to continuing to work with you on this and other affordable rental housing issues.”

Although S. 2723 is a strong bill with bipartisan support, Congress’ tight legislative schedule for the remainder of this year will make its prospects for enactment challenging.

There are currently no active bills that are specifically intended to reconcile the student rules for all federal multifamily housing programs. Still, NAHMA is urging lawmakers to work with HUD, the Treasury Department, IRS, USDA-Rural Development and multifamily industry stakeholders to develop a uniform student occupancy policy for all federally-assisted properties which will permit residents to pursue educational opportunities and to climb the economic ladder. The residents who rely on affordable housing should not be dissuaded from pursuing higher education because of housing loss. Additionally, NAHMA believes the most efficient way for Congress to unify the student occupancy rules would be through comprehensive legislation. Until such comprehensive legislation is introduced, NAHMA will consider support for bills that make incremental fixes.

III. The Business Case

A. The Benefits to the Federal Government: NAHMA believes that a single student rule is an example of a good government policy that will make compliance more straightforward. Eliminating the current nuances between program requirements, especially the Section 8 and LIHTC rules, will decrease the likelihood of program violations that jeopardize the very tax credits necessary to preserve and recapitalize HUD-assisted properties. With a clearly defined occupancy statute, the federal government can provide better management guidance for O/As and ensure that properties are following the appropriate protocol which satisfies all agencies’ compliance requirements.

B. The Benefits to Owners/Agents: A single student occupancy rule would save property owners and managers numerous hours of compliance-related administrative time. This issue is especially apparent for O/As of mixed portfolios that have both LIHTC properties

¹³ A different version of the Housing for Homeless Students Act was previously submitted by Senator Franken in 2012, but it did not advance past the committee level.

and HUD-assisted housing. The uncertainty these O/As face when working with student applicants, or existing Section 8 residents who would not qualify for an exemption under the LIHTC student occupancy restrictions, could be eliminated with a unified student rule.

Furthermore, under a consistent rule, O/As may be more inclined to pursue tax credits for project rehabilitations. Currently, certain student residents who qualify under HUD rules may not qualify if the project was to receive tax credits. A single statute for all affordable housing programs will then eliminate this risk, increase compliance, protect essential tax credits, and will help O/As better serve their residents.

- C. The Benefits to Tenants:** A unified student occupancy rule across all federal housing programs would increase housing opportunities for qualified individuals. Residents living in federally-assisted properties with clear guidelines for student qualifications may pursue higher education and will later have access to better employment opportunities. Additionally, these changes may persuade individuals currently living in LIHTC properties to pursue higher education if it does not require them to sacrifice their housing.

IV. Next Steps

NAHMA will work with its Tax Credit Committee and Federal Affairs Committee members to outline what a single student rule should look like for all multifamily housing programs. This rule should permit independent adult residents to pursue higher education that will lead to better jobs with higher incomes. By earning more income, residents would reduce their need for subsidies and maybe even transition to market-rate housing.

Additionally, NAHMA will reach out to other stakeholder groups in the hopes of building an industry-wide coalition to harmonize the student occupancy rules for affordable multifamily housing programs. With members of different housing groups aligned on this issue, we can present a stronger, more unified message to lawmakers.