

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

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### Seeking a Uniform Student Eligibility Rule for Tax Credit & HUD Properties

#### Background

The Low Income Housing Tax Credit (LIHTC) is increasingly important in providing and preserving affordable multifamily housing for low-income families. Tax credit funds are often combined with other federal affordable housing programs to create mixed-income properties with layered subsidies.

While combining these funds has numerous advantages, it also presents serious challenges when these different program regulations conflict. Of particular concern is the dilemma caused by the different rules the Internal Revenue Service and HUD have to determine whether full time student households are permitted to live in the properties funded by their programs. Generally, the IRS regulations prohibit full time student households from occupying a low-income unit (unless one of four exceptions is met), while HUD policies allow assistance to income-qualified full time students. The question often arises when a tenant assisted with a Section 8 Housing Choice Voucher lives in a tax credit unit—or a tax credit property in general.

There is currently no official policy guidance for housing providers to determine which rule prevails. The current industry practice is to follow the more restrictive LIHTC rules. Permitting occupancy by full time student households in a layered subsidy property puts the tax credits at risk of recapture by the IRS; denying housing to full time student households risks a fair housing judgment by HUD. NAHMA believes there should be a single occupancy rule for students in these properties.

#### Summary

It should be noted that the various student occupancy rules did not form in a vacuum. The prohibition on occupancy by full time student households in LIHTC properties is statutory. Congress did not wish to see LIHTC properties used as dormitories. Congress has been requiring HUD to tighten its student occupancy policies as well, particularly in the area of income verification and allowing denial of assistance for students receiving athletic scholarships.

NAHMA appreciates Congress' efforts to ensure affordable housing is available for low-income families who truly need the assistance. We look forward to engaging legislators and administration officials in constructive discussions about how policies for student occupancy can meet the housing needs of low-income families and allow them to improve their economic opportunities through education.

That said, there are three different student occupancy rules relevant to this discussion. The IRS regulations govern the tax credit program. HUD's Office of Public and Indian Housing (PIH) determines the policies affecting Public Housing, Housing Choice Voucher (HCV), Project-based Certificate, Project-based Voucher, and Section 8 Moderate Rehabilitation Programs. Finally, HUD's Office of Housing issues the rules for the Project-Based Section 8, Section 221(d)(3) BMIR, Section 236, Section 202, Section 811, Rental Assistance Payment, and Rent Supplement programs.

Laws governing the LIHTC program prohibit households made up entirely of full time students from living in tax credit units unless they meet one of four exceptions.<sup>1</sup> Full time student households may live in tax credit units if they are:

- Receiving Temporary Assistance to Needy Families (TANF)
- Enrolled in a federal, state or local job training program
- Single parents and their children and such parents and children are not dependents (as defined in section 152) of another individual, or
- Married full time students who file a joint return.<sup>2</sup>

PIH's policy for determining and verifying the eligibility of full-time college students of non-parental/guardian households is explained in Notice PIH 2005-16 (HA), Policy Guidance on College Student Admissions, issued June 15, 2005.<sup>3</sup> To be eligible for rental assistance under PIH programs—including Housing Choice Voucher assistance--“full-time” college students must be of legal age or be an emancipated minor under the state law and must be income eligible for assistance. The portion of any *athletic scholarship* assistance available for housing costs must be verified by the PHA with the third party income source and included in the determination of family adjusted income. PHAs may deny housing assistance to persons receiving athletic scholarship with a specified amount available for housing costs (must exceed \$5,000 annually) or one that allows for a portion of the scholarship to be used towards housing costs. Additionally, public housing agencies were encouraged to implement the following eligibility and verification policies for admitting “full-time” college students:

- Each college student within a household must provide a *written/signed certification* that the student does or does not anticipate receiving financial support from the student's parent(s) or guardian(s) and the amount of support;
- The college student must have established a household separate from his/her parents or legal guardians for at least *one year* prior to applying to public housing, voucher, or certificate programs; and

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<sup>1</sup> In the LIHTC program, a full-time student is defined as an individual who, during each of five calendar months during the calendar year, is a full-time student at an educational organization or is pursuing a full-time course of institutional or farm training under the supervision of an accredited agent of an educational organization or a state or political subdivision of a state. A full-time student is one who is enrolled for some part of five calendar months for the number of hours or courses, which is considered to be full-time attendance. The five calendar months need not be consecutive.

<sup>2</sup> See the Internal Revenue Code, Section 42(i)(D).

Additionally, these four exceptions are not universal. For example, the exemption regarding single parents is only applicable to properties where the credits were allocated credits after 6/30/92. Likewise, properties financed with tax exempt bonds may apply only some of the exemptions depending upon the state.

<sup>3</sup>See: [http://hudclips.org/sub\\_nonhud/cgi/nph-brs.cgi?d=PIHN&s1=05-16\\$\[NO\]&SECT5=PIHN&SECT1=TXTHLB&l=50&u=../cgi/newsdoc\\_run.cgi&p=1&r=1&f=G](http://hudclips.org/sub_nonhud/cgi/nph-brs.cgi?d=PIHN&s1=05-16$[NO]&SECT5=PIHN&SECT1=TXTHLB&l=50&u=../cgi/newsdoc_run.cgi&p=1&r=1&f=G).

- The college student *must not be claimed* as a dependent by parent(s) or legal guardian(s) on their Internal Revenue Services (IRS) tax return.

Rules for HUD programs administered by the Office of Housing are spelled out in the 4350.3 Occupancy Handbook. This handbook is currently being updated, and will likely include substantial changes to its student occupancy policies. At this time, the 4350.3 handbook maintains that for a student to be eligible for occupancy in the HUD Multifamily Housing programs:

- The individual must be of legal contract age under state law;
- The individual must have established a household separate from parents or legal guardians for at least one year prior to application for occupancy or the individual meets the U. S. Department of Education’s definition of an independent student;
- The individual must not be claimed as a dependent by parents or legal guardians pursuant to IRS regulations; and
- The individual must obtain a certification of the amount of financial assistance that will be provided by parents, guardians or others signed by the individual providing the support. This certification is required even if no assistance will be provided. The financial assistance provided by persons not living in the unit is part of annual income that must be verified to determine eligibility and at annual recertification to determine rent.<sup>4</sup>

As noted earlier, the LIHTC program is often combined with other federal programs. Benefits of the layered subsidies include creating mixed income communities, providing much needed money for rehabilitation of the property and preserving it as affordable housing, and occasionally, allowing larger developments to be built. The LIHTC is often combined with HOME, Project-based Section 8, Section 236, and Section 515 rural housing. Legislation enacted in late 2000 allows the LIHTC to be paired with Section 202 and Section 811 (housing for the elderly and disabled, respectively). The Internal Revenue Code prohibits tax credit properties from denying housing to an applicant solely because he or she has a Section 8 Voucher. HUD estimates that about one-third of tax credit properties are housing tenants with Section 8 Housing Choice Vouchers. Because the LIHTC is the largest federal program for production of affordable housing, is considered a “go-to” program for preservation, and prohibits discrimination against Section 8 Voucher holders, there is every reason to believe the layered subsidy trend will continue. Therefore, it is most important to resolve the conflicting occupancy policies for full-time student households.

### **Issues of Concern to NAHMA**

We believe it is unfair to and contrary to sound public policy to deny occupancy to an applicant or to require a tenant to move just because they are going to school. In many cases, it is only through education that the tenant can improve their economic circumstances so that they can eventually move to a conventional apartment or buy a home. Until the LIHTC statutes are changed, however, owners and agents must obey the rules or risk recapture of the tax credits.

Consider a common situation which requires a family to move out. A single parent living in a tax credit property has two children that each attends school. She also enrolls in night classes with enough credits to be considered a full time student. The family is now considered a full time student household. The single parent received child support from the father of her children, and the father has claimed the children as dependents on his tax return. Because the children were claimed as dependents by another individual

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<sup>4</sup> Handbook 4350.3 REV-1, “Occupancy Requirements of Subsidized Multifamily Housing Programs,” Chapter 3, paragraph 3-16, Determining the Eligibility of Students Who are Head or Co-Head of a Household.

(besides the single parent living in the LIHTC property), this household is NOT eligible for the full-time student household exemption and must move out of the property.

Another example of why this policy should be revisited is a true story offered by a NAHMA member:

“...we were recently sued (and she lost) by a single woman who graduated from college in May and then in July of the same year, applied to and was denied occupancy at our 100 percent tax credit property. Since she had been a full time student during each of five calendar months, she was not eligible--although she was no longer a student and had taken a job that would have easily qualified her for our LIHTC property. What an awful case to have to fight!”

In some unfortunate cases, LIHTC operators must evict full time student households who will not move out voluntarily. While owners and agents often win these cases, other members report that judges will not always approve the eviction. In these latter cases, the property is in noncompliance with the federal regulations, and investors may be subject to recapture of the credits and fines from the IRS.

Another concern is the lack of official policy guidance for properties where the LIHTC is combined with other federal programs that permit occupancy by eligible income-qualified students. The situation is even more complicated when a family lives in a tax credit unit and receives a Section 8 Housing Choice Voucher. In the absence of definitive policy guidance from the federal agencies, LIHTC operators defer to the LIHTC rules which deny occupancy to full time student households (unless they meet one of the four exceptions), even though HUD’s rules are more favorable to the tenant.

The conflicting occupancy rules present affordable housing operators with a variety of undesirable choices. By using the LIHTC for acquisition and rehab of a Project-based Section 8 property which has “a very small percentage of residents who are otherwise income-qualified but are full-time students trying to get an education,” a NAHMA member identified the options as follows:

- “Make these folks move out;”
- “Risk an 8823 issuance for non-compliance on LIHTC;”
- “Claim fewer LIHTC units which means less equity which means less rehab;”
- “Appeal for a Private Letter Ruling (expensive and unpredictable of success);” or
- “Avoid preservation of Section 8 properties because rules are incompatible and folks that try to preserve get caught!”

### **Positive Aspects of This Policy/Proposal**

We believe adopting a single student occupancy policy presents opportunities to create uniformity in the regulations, provide clear policy guidance to management agents and owners, encourage economic self-sufficiency for the tenants and allow residents to reach their full potential.

### **NAHMA’s position**

We firmly believe that tenants in tax credit properties should not be penalized for trying to improve their circumstances and create a better life for their families through education. Requiring families to move for pursuing an education is contrary to the goal of resident self-sufficiency.

Clear policy guidance on student occupancy is required when both LIHTC and HUD programs are combined. We respectfully suggest that eligible income-qualified students should be permitted to live in

mixed subsidy properties—and in LIHTC units even when HUD subsidies are not present. We welcome a constructive dialogue with the Administration and Congress on this issue.