

# **National Low Income Housing Coalition National Housing Voucher Summit 2005**

## **Briefing Paper: Portability**

The term “portability” refers both to the right of voucher holding families to move outside the jurisdiction of the public housing agency (PHA) that issues the housing choice voucher, and to the administrative system that HUD has developed to deal with these transfers.

Voucher “portability” is related to, but not the same as voucher “mobility.” The latter term generally refers to a move from a higher poverty (or racially concentrated) neighborhood to a lower poverty (or non-racially concentrated) neighborhood. Mobility moves, if they cross jurisdictional lines, may often involve portability. However, not all portability moves are to lower poverty neighborhoods or jurisdictions. The important role of the portability system in enabling housing mobility is the reason that restrictions on portability are a civil rights issue.

The right to portability is found in statute; the implementing regulations state that, subject to certain conditions, “a voucher-holder or participant family has the right to receive tenant-based voucher assistance in accordance with requirements of this part to lease a unit outside the initial PHA jurisdiction, anywhere in the United States, in the jurisdiction of a PHA with a tenant-based program under this part.”<sup>1</sup>

In contrast, HUD Notice PIH 2005-1, adopted in response to the fiscal constraints imposed by the recent HUD budget, provides that “a PHA has the authority to deny a family’s request to move under the portability procedures to a unit in another jurisdiction that would require the PHA to pay a higher subsidy cost for the same family’s assistance if the PHA determines it does not have sufficient funding available under their calendar year 2005 budget...and the receiving PHA will not absorb the family into its own program.”

Advocates contend that portability is an enforceable right, and that the portability statute and regulations (as well as the Fair Housing Act) bar the blanket restrictions that HUD has recently sought to impose on higher-rent portability moves. HUD relies on its regulation 24 CFR 982.314(e)(1) which provides that “[t]he PHA may deny permission to move if the PHA does not have sufficient funding for continued assistance.” But another part of the regulation (24 CFR §982.355(e)(6) provides that “a PHA must manage the PHA tenant-based program in a manner that ensures that the PHA has the financial ability to provide assistance for families that move out of the PHA program under the portability procedures.” This issue has not yet been litigated, in part because some PHAs have permitted portability when an attorney makes the request on behalf of an individual client.

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<sup>1</sup> The current portability statute is set out at 42 USC § 1437f(r) and the regulations are found at 24 CFR § 982.353. Current HUD guidance on portability includes HUD Notice PIH 2004-12 and the more recent HUD Notice PIH 2005-1.

## Portability: A Brief History

Although housing choice and mobility were part of the original concept of the Section 8 program,<sup>2</sup> during the first 13 years of the program, certificate tenants did not have an unlimited statutory right to move outside the city where their certificate was issued. In the 1970s, HUD and some local PHAs experimented with programs that helped families move across jurisdictional lines,<sup>3</sup> and HUD officially directed PHAs to permit broader use of certificates throughout metropolitan areas.<sup>4</sup> These efforts were followed, in 1983, by the creation of a small demonstration program of "vouchers" that later gained greater portability rights than certificates.<sup>5</sup> But it was not until 1987 that Congress amended the Section 8 statute to permit certificate holders to use their subsidies throughout their metropolitan area.<sup>6</sup> In 1990, HUD began to enforce the portability rights of voucher and certificate tenants,<sup>7</sup> and later that year, the Section 8 statute was again amended to permit statewide portability for certificate holders.<sup>8</sup> In 1998-99, the program was again expanded to allow nationwide portability.<sup>9</sup> After 1990, and until HUD's latest notices, the only restriction on portability was a provision passed in 1992 that required new voucher holders who had not previously resided in a jurisdiction to use their subsidies within the jurisdiction for at least 12 months before being allowed to take them elsewhere.<sup>10</sup> This provision was replaced in 1999 by a provision that permits, but does not require, the 12-month waiting period as part of the PHA Plan.<sup>11</sup>

## Data on Portability

There are currently more than 44,000 portable vouchers in use (about 2.4% of the 1.86 million vouchers in use nationally).<sup>12</sup> This figure includes all vouchers retained by one PHA but administered by another. It does not include any counting of families who have moved through

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<sup>2</sup> See Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 101(a)(1), (c)(6), 88 Stat. 633, 633-34 (codified as amended at 42 U.S.C. § 5301 (1988)).

<sup>3</sup> See generally METROPOLITAN ACTION INSTITUTE, MORE PLACES TO LIVE: A STUDY OF INTERJURISDICTIONAL HOUSING MOBILITY PROGRAMS (1982).

<sup>4</sup> See HUD SECTION 8 HANDBOOK (1979) at ch. 7.

<sup>5</sup> The "original" Section 8 voucher program included only 11,063 subsidies in its first year. See U.S. GEN. ACCT. OFF., GAO/RCED-87-20FS, RENTAL HOUSING: POTENTIAL REDUCTION IN THE SECTION 8 EXISTING AND VOUCHER INVENTORY 14. tbl. 2.1 (1986). Regulations governing portability in the voucher program did not appear until 1988. See Section 8 Housing Vouchers, 53 Fed. Reg. 34,372, 34,409-11 (1988) (codified as amended at 24 C.F.R. §§ 887.551-.567 (1994)). Those regulations require PHAs to permit up to 15% of their voucher holders to move outside of the PHA's primary service area to anywhere in the United States. See 24 C.F.R. § 887.563 (1994). The voucher program was made permanent in the Housing and Community Development Act of 1987, and merged with the Section 8 certificate program in 1998.

<sup>6</sup> Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 145, 101 Stat. 1815, 1852 (codified as amended at 42 U.S.C. § 1437f(r) (Supp. V 1993)) (providing that Section 8 recipients may move to eligible units within the same state or contiguous "metropolitan statistical area" as the PHA issuing the certificate).

<sup>7</sup> See HUD Notice H 90-43 (July 2, 1990), replaced by HUD Notice 91-19 (Mar. 4, 1991).

<sup>8</sup> Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, § 551, 104 Stat. 4079, 4224 (codified as amended at 42 U.S.C. § 1437f(r)(1)).

<sup>9</sup> Quality Housing & Work Responsibility Act of 1998; implemented in Interim Statutory Merger Rule, 64 Fed. Reg. 26632 (May 14, 1999); Final Rule, 64 Fed. Reg. 56894 (October 21, 1999)

<sup>10</sup> Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 147, 106 Stat. 3672, 3715 (codified as amended at 42 U.S.C. § 1437f(r)(1))

<sup>11</sup> 64 Fed. Reg. 26632, 26646 (May 14, 1999); see 24 CFR § 982.353 (c)(2)(iii).

<sup>12</sup> See <http://pic.hud.gov/pic/RCRPublic/rcrmain.asp>

portability and then been “absorbed” into a receiving PHA’s program in prior years (thus, the cumulative total for portability may be significantly higher over time).

At this time, beyond these total figures, there is little demographic data available on the nature and cost of portability moves. Although HUD collects detailed information on billing, and family and neighborhood characteristics of families who move under portability, there is no published national data on how many voucher holders are using portability to move from lower to higher cost jurisdictions, or from higher to lower poverty neighborhoods. There are some indications that, within metropolitan areas, the number of families using portability to move from city to suburb is roughly equal to the number of families moving from suburb to city.

### **Portability Administration**

The current portability procedure permits a “receiving” PHA to bill the “initial” or sending PHA for both the cost of the voucher and a portion of the Section 8 Administrative Fee. Often PHAs view this billing system as administratively cumbersome and choose to “absorb” new families into their program directly.<sup>13</sup> The reimbursement rate has been set at 80% of the Section 8 Administrative Fee, but since Administrative Fees are now being distributed to PHAs on a pro rata basis and are no longer based directly on the number of vouchers in use (see HUD Notice PIH 2005-1), it is unclear how this aspect of portability billing will be handled.

The administration of this portability system has proved cumbersome for PHAs and in many cases interfered with the ability of tenants to easily move from one jurisdiction to another.<sup>14</sup> Problems for families included duplicative paperwork, delays in approval of units, differing certification requirements, new PHA staff to meet and learn to work with, and uncertainties created by variations in program requirements. Frequently cited problems for PHAs included delays in notification of a porting-out family by sending agencies, delays in reporting of leaseups by receiving agencies, delays in payment by sending agencies and resulting cash flow difficulties for receiving agencies, unexpected loss of 80% of the administrative fee for families moving out, and difficulties in planning for new families who may show up at a PHA Section 8 office without prior notice, needing immediate assisting and processing. Last year’s HUD Notice PIH 2004-12 on “Portability Procedures” attempts to address some of these issues by clarifying procedures and deadlines, but problems are likely to continue.

With the advent of new funding rules in 2004 that generally limit PHAs to a fixed sum of funds for the year, with no right to receive extra funds when costs increase, the cost of tenant moves from lower cost to higher cost jurisdictions are no longer automatically reimbursed by HUD, thus creating a further disincentive to mobility under the current portability system. This problem was somewhat ameliorated where HUD awarded extra funds to agencies that

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<sup>13</sup> The details of portability administration are set out in HUD regulation 24 CFR § 982.355, as supplemented by HUD Notice PIH 2004-12. All portability moves are reported on form HUD-52665, “Family Portability Information Form.”

<sup>14</sup> See generally, Tegeler, Hanley & Liben, “Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation,” 30 Harvard Civil Rights-Civil Liberties Law Review 451 (1995); Bruce Katz & Margery Austin Turner, “Who Should Run the Housing Voucher Program? A Reform Proposal,” 12 Housing Policy Debate 239 (2001); Judith Feins et al, “State and Metropolitan Administration of Section 8: Current Models and Potential Resources (Final Report)” (Abt Associates 1996).

demonstrated, as part of the “inflation factor” appeals, that their voucher costs had increased due to “portability” moves. However, in 2005, this flexibility was removed entirely, since the inflation factors HUD uses (called “annual adjustment factors” or AAFs) are now intended only to measure *changes* in rent and utility costs in a *particular* area. If families move to a *different* area with much higher rents, for example, from a lower cost rural or inner city area to a suburban area with more jobs or better schools but higher rents, the cost of their voucher subsidies is likely to increase.

The 2005 funding system puts PHAs in the position of potentially having to reduce the number of vouchers available to people who want to stay in their community in order to assist a smaller number of families who wish to move to more expensive communities. When a family with a voucher moves to an area served by another agency, the “receiving” agency has the option to accept the family into its own voucher program if it is not already serving the maximum number of families HUD permits. If families moving to higher cost areas are “absorbed” in this manner, the cost burden on the original agency is eliminated and the family’s voucher is returned for the agency to reissue to the next family on the waiting list. Due to the 2005 funding cuts, however, few agencies are likely to have the financial ability to absorb families wanting to move into their communities, because their funding is fixed at 4% below the mid-2004 level (plus the AAF).

If voucher funding moved with families, or if HUD had a central pool of funds to be used for this purpose, this predicament could be avoided.<sup>15</sup>

### **The Future of Portability and Housing Mobility**

Even before the current voucher budgeting rules went into effect, in many parts of the country the system of portability administration did not adequately support the housing choice and deconcentration goals of the voucher program. Starting in 2004, these problems were exacerbated by a system that did not compensate PHAs for the cost of family moves to lower poverty areas. In 2005, this disincentive was heightened by elimination of the ability to appeal for higher reimbursements based on portability costs. Moving to a pure dollar-based budgeting approach in 2006 may eliminate portability as a means to achieve housing mobility. If these policies continue, new administrative approaches to portability or other methods of sharing and transfer of vouchers among PHAs will need to be worked out to preserve this important right.

Options might include direct reimbursement to PHAs from a special voucher fund for the extra cost of vouchers used in lower poverty, higher rent areas. Such a proposal would permit families to retain full portability rights without financial harm to sending PHAs. Costs to HUD of such a system could be offset by more realistic rent-setting in higher poverty neighborhoods. Similarly, it may be advantageous to resolve portability administration issues by simply specifying that the voucher travels with the family, so that receiving jurisdiction responsible for administration and receives all related funds directly from HUD until time of voucher turnover, at which point the voucher reverts to the sending PHA for use by another family.

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<sup>15</sup> The report accompanying the final appropriations bill includes a directive to HUD to “provide agencies with flexibility to adjust ...portability policies as necessary to manage within their 2005 budgets.” House Report 108-792, Joint Explanatory Statement, p. 1475. This statement does not have the force of law and does not alter existing legal requirements. It is unclear at this point whether HUD will attempt to revise its portability regulations, and if so, how much the rules could change in light of statutory requirements. See 42 U.S.C. § 1437f(r).