



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

March 26, 2014

By Electronic Mail to Grace.F.Robertson@irs.gov

Grace Robertson, C2-422
Internal Revenue Service
5000 Ellin Road
Lanham, MD 20706

Re: Draft Audit Technique Guide, IRC §42, Low-Income Housing Credit

Dear Ms. Robertson,

Please accept these comments submitted by the co-chairs of the Consortium for Citizens with Disabilities (CCD) Housing Task Force regarding the above referenced Draft Audit Guide for the federal Low Income Housing Tax Credit (LIHTC) program.

The CCD is a coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the 57 million children and adults with disabilities and their families living in the United States. CCD advocates for national public policy that ensures full equality, self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. The CCD Housing Task Force advocates on behalf of the housing needs of people with the full range of disabilities, and strongly supports the expansion of high quality community based permanent and affordable housing for extremely low income people with significant disabilities.

Permanent supportive housing (PSH) provides decent, safe, affordable, and accessible permanent housing along with the voluntary services and supports people with disabilities need and want to live successfully in the community. The housing component of the model is typically funded through a Department of Housing and Urban Development (HUD) rental or operating subsidy, such as the HUD McKinney-Vento/HEARTH homeless assistance programs, project-based Housing Choice Vouchers including HUD-VASH for homeless veterans, and HUD's new Section 811 Project Rental Assistance (PRA) option. The voluntary community-based services offered to PSH tenants are increasingly funded through the federal Medicaid program, including Medicaid Home and Community Based Service waivers and Medicaid optional services approved in the State Medicaid Plan.

The Draft Audit Technique Guide is highly relevant to efforts to expand PSH across the country in response to the U.S. Supreme Court's *Olmstead vs. L.C.* decision in 1999. Under *Olmstead*, the Supreme Court ruled that the unjustified segregation of people with disabilities in institutional settings constitutes discrimination in violation of Title II of the Americans with

Disabilities Act. The *Olmstead* decision imposes an obligation on states to offer long term care services in “the most integrated setting” for people with disabilities who are either in institutional settings or at-risk of institutionalization – a category which includes people with disabilities who are homeless.

The LIHTC program is an ideal mechanism to create new PSH opportunities called for by *Olmstead*, and many State Housing Agencies have modified their Qualified Allocation Plans to ensure that PSH units can be included in projects that receive an allocation of LIHTC. These state efforts have been stimulated by a number of important federal policies, including:

- The Frank Melville Supportive Housing Investment Act of 2010, which amended Section 811 of the Cranston-Gonzales National Affordable Housing Act (Pub L. 111-374). The Melville Act authorized HUD’s new Section 811 Project Rental Assistance (PRA) option to specifically leverage investments of LIHTC equity (among other sources of affordable housing capital) to create PSH units integrated within LIHTC properties. The Melville Act was modeled after successful efforts in states (North Carolina, Louisiana, and Pennsylvania) to create small set-asides of PSH units within properties financed through the LIHTC program;
- U.S. Department of Health and Human Services policies through the Centers for Medicare and Medicaid (CMS) to expand community-based long term care services through the Money Follows the Person Demonstration program authorized by Congress, and expanded Medicaid waiver and optional community-based services. Newly promulgated CMS regulations describe “the most integrated setting” to include permanent affordable housing units such as those created through the LIHTC and HUD subsidized housing programs; and
- U.S Department of Justice *Olmstead* enforcement activities including Settlement Agreements with numerous states that require the state to expand integrated PSH opportunities.

The Draft Audit Guide’s focus on the presence of long term care services as a potentially disqualifying factor in the context of LIHTC compliance has the potential for significantly undermining the progress being made the states to comply with *Olmstead* and the ADA. We understand and appreciate the importance of the General Public Use rule, and the need to ensure that LIHTC equity is not utilized to finance institutional or facility-based care. However, we are also concerned that without clearer guidance, auditors unfamiliar with the PSH housing approach, or who do not have a clear understanding regarding how PSH works, might err in their judgment.

In addition to our specific comments below, we urge you to consult with your federal colleagues at HUD and at the Department of Health and Human Services / Centers for Medicare and Medicaid Services (HHS/CMS) regarding these important improvements in the delivery of permanent housing and long-term community-bases services and supports for people with disabilities. Please let us know if you would like us to provide names and contact information.

Specific sections of the Draft Audit Guide which we believe are most relevant to this concern include the following:

Chapter 8 Eligible Basis:

Page 8-13: Common areas and providing services. Under both Medicaid optional and Medicaid Home and Community Based Service waivers, certain PSH tenants may be receiving certain nursing, medical or psychiatric services on regular or frequent intervals in their home from mobile community-based service providers selected by the PSH tenant under Medicaid “choice of provider” requirements. The Audit guide should make it clear that these types of service arrangements are not a violation of IRS rules because they do not change the residential nature of the unit. For example, the occupant of Unit 2 could be an individual with an Intellectual or Developmental Disability (IDD) receiving frequent in-home voluntary services in his/her unit from a service provider based in the community, while the occupant of Unit 5 is receiving frequent mobile Assertive Community Treatment Team (ACT) voluntary services in his/her home from a community based mental health service provider.

Chapter 12 Applicable Fraction:

Page 12:16. Frequent Services. As noted above, when provided to PSH tenants with valid leases receiving voluntary community-based services, the provision of frequent nursing, medical, or psychiatric services should not trigger a presumption that the services are not optional and that the building is ineligible for the credit. These are the types of services increasingly being made available in conjunction with PSH units through CMS and State Medicaid programs for the expressed purpose of ensuring compliance with the community integration mandates within the ADA and the *Olmstead* decision.

Page 12-28. Vacant Unit and Vacancy Payments. The final Audit Guide should clarify that the definition of a vacant unit does not include a PSH unit which is receiving a vacancy payment under a HUD authorized program such as the new Section 811 PRA option or HUD’s Section 8 Project-Based Voucher program. These payments are authorized by the HUD program in order to hold units off the market for a short period of time (generally 2 months or less) to allow prospective PSH tenants (particularly those transitioning to PSH from institutional care) to make all arrangements for the delivery of appropriate community-based services in advance of occupying the PSH unit. We note that 26 C.F.R. §1.42-15(c) and Revenue Ruling 2004-82, Q&A #10 say that a unit “is not available” and is therefore not considered vacant “when the unit is no longer available for rent due to contractual arrangements that are binding under local law.” It is important that Audit Guide emphasize that these factors are among the “facts and circumstances” that are to be taken into account in assessing whether the presence of vacancy payments and vacant units comply with the vacant unit rule.

Page 12-32: General Public Use. The term “special needs” should be clarified through an example that includes people with disabilities receiving voluntary community-based long term care services in conjunction with a federal or state PSH housing or services program.

Page 12-33: Nursing, Medical or Psychiatric Care. See comments above at page 8-13 and page 12:16. Frequent nursing, medical or psychiatric services provided in housing through community-based service providers are now facilitated by Medicaid optional and waiver policies as a means of ensuring federal/state compliance with the ADA and Olmstead. The presence of these services facilitate the ability of people with significant disabilities to live in integrated, community-based settings and should not result in a violation of the General Public Use rule.

Page 12-34: Referrals by Third Party. The draft guide policy with respect to third party referrals directly contradicts other federal law, specifically the PSH referral policies of HUD's Section 811 PRA option authorized by the Frank Melville Supportive Housing Investment Act, and the centralized referral approach promoted by HUD for homeless Continuums of Care systems. It also contradicts the holding of Private Letter ruling 9209020, in which referrals of homeless families to PSH financed with tax exempt bond proceeds was determined to be consistent with the General Public Use rule. These policies ensure that only eligible populations are referred for units set-aside for that purpose. For example, under Section 811 PRA, states are utilizing centralized third party referral networks to refer Section 811 PRA-eligible applicants to owners with vacant PSH units in their LIHTC properties. HUD-financed Continuums of Care have created centralized third party referral systems so that the most vulnerable and high cost chronically homeless people have priority access to PSH projects. Prohibiting third party referrals for these special needs populations would disrupt efforts to end homelessness and state efforts to comply with the community integration requirements of the Americans with Disabilities Act.

Page 12-34: Special Adaptations. The audit guide should be modified to ensure that certain special adaptations which maintain the character of the housing —such as creating a pass-through door to adjoining PSH apartments for shared live-in or rotating care-givers permitted by Medicaid waiver policies, and structural adaptations to assure that a residential unit is usable by and accessible to a person with significant physical impairments – are permissible.

Page 12-35: Applicable Fraction. As previously explained, the people with significant disabilities who are protected by the ADA and the Supreme Court decision in Olmstead are individuals who typically qualify for occupancy in LIHTC units, but who also face significant barriers to renting those apartments because of their disabilities. They are people who “who are members of a specified group under a Federal program or State program or policy that supports housing for such a specified group” under the clarification of the General Public Use rule in Section 42. The use of preferences and eligibility criteria that target LIHTC housing to such people is an essential tool used to address barriers to equal access to housing and to effectuate the provisions Section 42(g)(9). The Audit Guide must clarify that such targeting should not result in a reduction in the applicable fraction.

Thank you for this opportunity to provide comments on the Draft Audit Technique Guide on behalf of the co-chairs of the CCD Housing Task Force.

Sincerely,

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