

June 21, 2010

The Honorable Mercedes Marquez
Assistant Secretary of Community Planning and Development
c/o Regulations Division
Office of the General Counsel
U.S. Department of Housing and Urban Development
Room 10276, 451 7th St NW
Washington DC 20410-0500

Re: Docket No. FR-5333-P-01 Title: Homeless Emergency Assistance and Rapid Transition to Housing: Defining “Homeless”

Dear Assistant Secretary Marquez:

The American Bar Association (ABA) offers the following comments to the U.S. Department of Housing and Urban Development (HUD) on its proposed rule (Docket No. FR-5333-P-01) to explain how HUD plans to implement the newly amended definition of homelessness contained in the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009.

I am Josephine A. McNeil, Chair of the ABA Commission on Homelessness and Poverty (Commission), and I am submitting these comments on behalf of the ABA. The Commission was created in 1991 by the ABA Board of Governors and tasked with: (1) educating members of the bar and the public about legal and other problems of poor and homeless people and ways in which lawyers can assist in solving or ameliorating them; (2) training lawyers in areas needed to provide pro bono legal assistance to homeless people and those at risk of becoming homeless; (3) working with all ABA entities on issues arising in their jurisdiction that affect poor and homeless people; and (4) engaging in such further activities as may be necessary and proper for the fulfillment of these responsibilities, including working with state and federal executive branches and legislative bodies concerning matters relating to the poor and homeless.

In August 2006, the ABA recognized the absence of a coordinated federal response due to the differing interpretations of “homeless individual” by various federal agencies, noting in particular the differing interpretations used by HUD and the U.S. Department of Education. At that time, the ABA adopted a policy that “urges federal agencies to include within the definition of “homeless person” individuals who lack a fixed, regular, and adequate nighttime residence, including those who, due to loss of housing, economic hardship, or similar reasons, are sharing

the housing of others or living in motels, hotels or camping grounds.” We are pleased that the definition of homelessness contained in the HEARTH Act will begin to cover some people in these categories. However, we have concerns that the proposed rule implementing that definition may prevent many homeless persons from receiving assistance unnecessarily.

1. The HEARTH Act permits HUD to consider anyone homeless who falls within one of several categories, including those who lack a “fixed, regular, and adequate nighttime residence.” The regulations should comport with the statute.

Since 1987, the following language in 42 U.S.C. § 11302(a) (2009) has been part of the McKinney-Vento Act.

(a) In General- For purposes of this Act, the terms “homeless”, “homeless individual”, and ‘homeless person’ means--

(1) an individual or family who lacks a fixed, regular, and adequate nighttime residence;

With minor modifications, the following additional categories defining homelessness, also found in 42 U.S.C. § 11302(a), have also been in place since original passage of the McKinney-Vento Act.

(2) an individual or family with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground;

(3) an individual or family living in a supervised publicly or privately operated shelter designated to provide temporary living arrangements (including hotels and motels paid for by Federal, State, or local government programs for low-income individuals or by charitable organizations, congregate shelters, and transitional housing);

(4) an individual who resided in a shelter or place not meant for human habitation and who is exiting an institution where he or she temporarily resided;

The statute provides for six categories of people who can be eligible for HUD homeless assistance, as well as an additional category relating to domestic violence and other dangerous or life-threatening conditions. In Section II of its preface to the proposed rule, HUD notes that it “has concluded that paragraphs (a)(2) through (a)(4) of section 103 define this first category of homeless (section 103(a)(1)) by providing three subsets of that category.” We question whether the proposed rule is consistent with the plain language of the statute and urge HUD to reconsider this interpretation. The impact of a new interpretation of this language could be profound. The U.S. Department of Education has defined a large segment of people living in shared housing or motels as homeless, because they do not have fixed, regular, and adequate housing; if HUD were to use a similar analysis, federal homelessness policy and complementary services would be significantly better aligned.

- 2. The HEARTH Act permits people losing their housing within 14 days to establish eligibility for homeless assistance through a credible oral statement to this effect. Regulations should not unduly interfere with this ability in a manner inconsistent with the legislative intent.**

Under the HEARTH Act, individuals and families may be found eligible for homeless assistance if they can demonstrate that they will lose their housing within 14 days. See Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009, Pub. L. 111-22, § 1003(a)(2), 123 Stat 1632, 1665 (to be codified at 42 U.S.C. § 11302(a)). To document eligibility, the law requires “credible evidence indicating that the owner or renter of the housing will not allow the individual or family to stay for more than 14 days.” To simplify eligibility determinations, the law specifies that “any oral statement from an individual or family seeking homeless assistance that is found to be credible shall be considered credible evidence for purposes of this clause.” *Id.*

We appreciate that certain verification obligations are being proposed to promote accountability and the wise expenditure of tax dollars. However, we are concerned that these obligations may undermine the very purpose of the HEARTH Act: to harmonize federal homeless assistance programs and ensure that appropriate housing and services are provided to those in need. For example, the proposal to require written verification of an oral statement may require project sponsors to divert time and attention away from service delivery and monitoring responsibilities in order to collect documents and conduct third-party interviews for each client. This may create unreasonable delay while persons or families in crisis go without the services Congress intended them to receive.

The verification procedure may also further jeopardize homeless individuals and their host families. A host family may not feel comfortable providing verification because allowing people to “double up” in their home may violate their lease. Caseworker efforts to verify an otherwise credible oral statement by attempting to interview a reluctant family may result in the homeless family being asked to leave sooner than anticipated, potentially putting that family on the street.

We urge you to consider an alternative mechanism for establishing a person’s oral statement as credible that respects the reason for which oral statements were expressly authorized as sufficient.

- 3. The HEARTH Act states that unaccompanied youth or families with children and youth defined as homeless under other federal statutes will be considered homeless if they meet a certain set of conditions. The final rule should define these conditions more inclusively, to protect rather than restrict the rights of vulnerable children, youth, and families.**

Under section 1003(a)(2) of the HEARTH Act, unaccompanied youth or families with children and youth defined as homeless under other federal statutes will be considered homeless if they:

- (A) have experienced a long-term period without living independently in permanent housing; and
- (B) have experienced persistent instability as measured by frequent moves over such period; and
- (C) can be expected to continue in such status for an extended period of time because of chronic disabilities, chronic physical health or mental health conditions, substance addiction, histories of domestic violence or childhood abuse, the presence of a child or youth with a disability, or multiple barriers to employment. *Id.*

The statute leaves several critical terms undefined, including “long-term period” and “persistent instability as measured by frequent moves.” HUD proposes in the draft regulation that “long-term period” be defined as 90 days, with “frequent moves” being defined as 3 or more moves within that 90 day period.

In defining these terms, the ABA urges consideration of shorter time frames, as any period in which children and youth are without housing is damaging to their health, development, and ability to attend and succeed in school. The ABA recognized the serious effects of homelessness in its August 2006 policy and did not qualify its suggested definition by including any restrictions with regard to time periods or frequent moves. The policy simply urges federal agencies to include within the definition of “homeless person” individuals who lack a fixed, regular, and adequate nighttime residence. Consider, for example, that the definitions proposed by HUD would require a child or youth to move three times over the course of a single school semester in order to receive HUD homeless assistance. We urge consideration of alternate definitions that do not restrict access to services.

4. The HEARTH Act defines as homeless individuals and families who are fleeing dangerous or life-threatening conditions, including where the health and safety of children are jeopardized. The rule should not seek to limit the statute's application to dangerous or life-threatening conditions related to violence.

To protect vulnerable people, the HEARTH Act includes language explicitly stating that individuals or families facing domestic violence and other dangerous or life-threatening conditions will be considered homeless. *Id.* at 1665. Specifically, the statute states that “the Secretary shall consider to be homeless any individual or family who is fleeing, or is attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions in the individual’s or family’s current housing situation, including where the health and safety of children are jeopardized, and who have no other residence and lack the resources or support networks to obtain other permanent housing.” As written, the proposed rule appears to limit the applicability of this provision by requiring that the dangerous or life-threatening conditions relate to violence “that has either taken place within the individual’s or family’s primary nighttime residence or has made the individual or family afraid to return to their primary nighttime residence.” We urge the consideration of language that more closely tracks the statute.

In addition, the HEARTH Act uses “where the health and safety of children are jeopardized” as an example of a situation where a “dangerous or life threatening condition” is present. *Id.* at 1666. But the proposed rule does not reference this portion of the statute. We urge HUD to place this specific statutory language in the final rule, thereby providing the best possible guidance to people making eligibility determinations for homeless assistance.

Without these changes, we are concerned that families living in dangerous conditions not related to violence, who are intended to be covered by the law, would be denied eligibility for homeless assistance. This might include families living in dangerously overcrowded homes or living in spaces with a high risk of fire due to faulty wiring or improper use of space heaters and other devices. We are particularly concerned about the impact of dangerous or life-threatening conditions on children and youth.

5. The HEARTH Act definition of homelessness encompasses homeless youth, but the proposed rule does not offer service providers sufficient guidance on how to determine the eligibility of youth for homeless assistance through HUD. The final rule should add language addressing the specific needs of homeless youth.

The ABA has long focused on strategies for meeting the needs of homeless youth, particularly those who are unaccompanied. In February 2010, the ABA House of Delegates adopted policy in support of the Runaway and Homeless Youth Act and other laws in order to more effectively intervene and end homelessness for youth ages 12 through 24. The HEARTH Act definition of homelessness found in section 1103(a)(2) covers these youth, but the final rule should explicitly ensure that homeless youth are eligible for HUD homeless assistance. Improvements should be made in the following areas.

- In § 577.2(3), the proposed rule does not provide an age range to define an “unaccompanied youth.” We recommend that an individual up to the age of 24 be considered under this category.
- In § 577.2(3)(iii), the proposed rule lists “a history of incarceration” as an example of a barrier to employment that would make it more likely for an unaccompanied youth to remain homeless. We recommend that the language be changed to “a history of incarceration or detention,” as in all but the most serious cases youth are typically “detained” not “incarcerated.”
- We also believe that all unaccompanied youth who have left their housing and are living on their own should be considered eligible under the definition of homelessness as individuals fleeing “dangerous or life threatening conditions.” Unaccompanied youth are extraordinarily vulnerable to sexual and other abuse and exploitation. For example, many homeless youth often trade sex for food or shelter. Until they have found stable housing, these youth can never be considered safe.

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Thank you for considering these comments. We look forward to working with you to ensure that the implementing regulations of the HEARTH Act balance HUD's administrative needs while still ensuring that federal supportive housing and services reach those whom the Act intends.

Sincerely,

A handwritten signature in black ink that reads "Josephine A. McNeil". The signature is written in a cursive style with a large initial "J" and "M".

Josephine A. McNeil

Chair, ABA Commission on Homelessness and Poverty