

family is absent from its assisted unit for longer than the maximum permitted absence. The term of the HAP contract and assisted lease also terminate. (§ 982.312(b)) Before terminating payments under the HAP contract, the HA must give the family the opportunity for an informal hearing. (§ 982.555(a)(1)(vi); § 982.555(a)(2)) The owner must reimburse the HA for any housing assistance payment for the period after the termination. (§ 982.312(b))

Under the final rule, the HA has great flexibility to establish local policies on tenant absence, including different rules on the length of allowable absence in different circumstances. The family may be absent for "brief" periods. However, a family may not be away from the unit for more than 180 consecutive days in any circumstances. The HA has broad discretion to set policy for absences of less than 180 days.

As suggested by some comments, the 180 maximum absence interval is the same as the interval for termination of the assistance contract because no assistance is paid (termination because family contribution equals the maximum HUD subsidy). (§ 982.455(a)) In the case of family absence, assistance payments are terminated so that the HA does not waste subsidy by continuing to pay for an empty unit. In the case where no assistance has been paid for 180 days, the assistance contract is terminated so that the program slot can be freed-up and used for another family (even though the unit is occupied and the HA is not making any payment for the unit).

As suggested by comments, HAs must distinguish between cases of prolonged absence from a unit, and cases where the family simply moves out of the unit. If the family moves out, the HA may not continue assistance after the month when the family moves out. If the family has not moved out, but is absent from the unit, the HA may elect to continue assistance payments for a maximum of 180 days, as determined in accordance with the HA policy.

In practice, of course, HAs will be confronted with difficult problems in determining whether a family is actually living in, has moved out, or is otherwise absent from the unit; and in determining the length or reason for family absences. Under this rule, a family is obligated to notify the HA before the family moves out. (§ 982.309(f)) However, the family may fail to give this notice. The HA may be uncertain whether the family moved out or intends to return after an absence.

The final rule specifies that the family is obligated to give the HA information on family absence from the unit, and to

cooperate with the HA for this purpose. (§ 982.312(d)(1); § 982.551(i)) The HA may adopt appropriate techniques to verify family occupancy or absence, including letters to the unit, phone calls, visits, or questions to the landlord or neighbors. (§ 982.312(d)(2))

#### *K. Family Break-up*

The proposed and final rule provide that the HA administrative plan must describe the HA's discretionary policies on how to determine who remains in the program if an assisted family breaks up. (final rule § 982.315) Resolution of these issues is left to HA discretion in accordance with the HA policy. Comments generally agree that HUD should leave resolution of such issues to the HA, and that the rule should confirm that the HA's decision is final, and not subject to appeal. Some comments request more guidance on how the HA should exercise its discretion.

Other comments assert that HUD should establish a national policy on who keeps the Section 8 subsidy after a family break-up. These comments object to granting discretion for local HAs to decide these issues, and object to the lack of regulatory guidance for exercise of this discretion. These comments state that the absence of guidance may lead to arbitrary and inequitable results, or violations of the Fair Housing laws.

Comments suggest various factors or interests that could be considered in deciding who receives assistance after a breakup:

- Whether assistance should stay with the family members who remain in the unit (during or after the initial lease term).
- The interest of children.
- Spousal abuse.
- Medical condition.
- Special needs of a disabled family member for accessibility features.

The final rule confirms that the HA has authority to determine which family members continue to receive assistance after a family breaks up. The HA policy must describe how the HA determines what family members will remain in the program if the family breaks up. (§ 982.315(a); § 982.54(d)(11)) The final rule makes clear that the HA has broad discretion to decide these issues. The rule does not require the HA to use any particular procedure for making such decisions, and does not require the HA to consider any particular factors. The rule confirms, as suggested by public comments, that the factors to be considered by the HA in making this decision may include:

- Whether the assistance should remain with family members remaining in the original assisted unit.
- The interest of minor children or of ill, elderly or disabled family members.
- Whether family members are forced to leave the unit as a result of actual or threatened physical violence against family members by a spouse or other member of the household.
- Other factors specified by the HA. (§ 982.315(b))

The HA is not required to devise a complete set of rules for disposing of the issues posed because of family break-up. The HA is free to leave room for case by case decision, based on the circumstances of individual cases. The HA is merely required to adopt a procedure for handling these issues, and to state the procedure in the administrative plan. Under this rule, the HA is not required to routinely submit the administrative plan, including the HA family break-up policy, for HUD review or approval.

The final rule provides that when a court determines the disposition of property between members of the assisted family in a divorce or separation under a settlement or judicial decree, the HA is bound by the court's determination of which family members continue to receive assistance in the program. (§ 982.315(c))

### **V. Where Family Can Live and Move**

#### *A. Eligible Housing*

The rule provides that Section 8 tenant-based subsidy may not be used for certain types of housing, and may not be combined with certain other types of housing subsidy. (§ 982.352) The final rule revises several provisions on this subject.

##### **1. HUD-Owned Unit**

When the proposed rule was published, the law provided that a Section 8 "owner" must be either a "private" person or entity, or a public housing agency. (42 U.S.C. 1437f(f)(1)) HUD is neither a private entity nor a public housing agency. For this reason, the proposed rule would have prohibited assistance for a unit that is owned by HUD. However, the law was amended in 1994 to provide that an owner may be "an agency of the Federal Government". (Pub. L. 103-233, April 11, 1994, section 101(d), 108 Stat. 357, amending the Section 8 "owner" definition) This amendment was intended to permit HUD to receive Section 8 housing assistance payments as a Section 8 owner when HUD takes title to units covered by a Section 8 HAP