

Earned Income Disregards: Practical Steps for Advocates

Last month's *Bulletin* featured a comprehensive article that outlined how the earned income disregards (EIDs) work for public housing and some Section 8 residents and described the results of negotiations with and litigation against some public housing authorities (PHAs).¹ This follow-up article discusses some of the practical steps advocates can take to identify whether their local PHA has implemented and correctly applied the EID as well as the methods they can use to help assure compliance.²

In short, the EID permits tenants with increased income from work to avoid rent increases based on that higher income for a period of time. The EID removes a possible disincentive to improve one's income and also provides tenants the time they need to "settle in" after getting a new job, considering all the changes and expenses that accompany new employment. Implementation of the EID is crucial because ignoring it will lead to tenants overpaying their rent and even being evicted for non-payment of rent that they should not have had to pay in the first place.

Advocates initially must identify whether improper or complete lack of implementation is a problem in their jurisdiction. Then they must address the problem on a number of fronts, including in their own offices, with the tenants and with the PHA. They must assure that any solutions that are proposed address the issue of tenants who have not received proper disregards in the past and are therefore owed money, without losing sight of those who should be getting the disregard presently and in the future.

Identifying the Problem³

Before attorneys and advocates can attempt to correct an EID implementation problem, they must first identify it. There are a few methods that can be used to do this. First, advocates should call their PHA to determine if it believes that it has implemented the EID and if so when. In 1998, when NHLP surveyed PHAs about their knowledge and imple-

¹See *PHAs Are Slow to Heed Earned Income Disregard Program*, 33 HOUS. L. BULL. 37 (Feb. 2002).

²Much of the information contained in this article was derived from conversations with the following people who have worked with the EID issue in their jurisdiction: Nick DiNardo of Legal Aid of Greater Cincinnati; Eric Angel and Julie Becker of the Legal Aid Society of Washington, D.C.; Claire Curry of Charlottesville, Virginia Legal Aid; Richard Tennenbaum of Connecticut Legal Services; J. Mark Finnegan, associated with the Equal Justice Foundation in Ohio; and George Gould of Community Legal Services, Inc. in Philadelphia. NHLP wishes to extend our thanks to all of them for taking the time to discuss this issue.

³This article addresses issues surrounding the mandatory earned income disregard provisions. See 42 U.S.C. § 1437a(d)(West Supp. 2001) and 24 C.F.R. § 960.255 (2001). Advocates should be aware that PHAs may also implement additional earned income disregards that can have different qualifying criteria. Because PHAs are not required to offer these additional disregards, they are considered "discretionary" EIDs. See 42 U.S.C. § 1437a(b)(5)(B)(West Supp 2001); see also 24 C.F.R. § 5.611 (2001). Many of the techniques discussed herein will apply with equal force to EIDs that PHAs have adopted locally.

mentation of the EID, a surprisingly large number of PHAs admitted outright that they had either not heard of the EID or had not implemented it.⁴ In Connecticut, conversations with PHA directors and the HUD Field office revealed that they were not even aware of the EID and legal services attorneys quickly realized that there would be thousands of people overpaying their rent. As a result, they changed their intake procedures to better screen for possible EID clients. The Legal Aid Society of the District of Columbia learned of the EID through the 1999 LALSHAC (now Housing Justice Network (HJN)) conference and questioned the D.C. Housing Authority's landlord/tenant attorney on her knowledge of the program. When that attorney failed to demonstrate awareness of the EID issue, they began to screen their own applicants for possible EID problems.

Second, advocates should review their PHA plans. PHAs are required to address the question of whether they will exercise the local option to provide additional deductions from income to support tenants' efforts to work in their PHA plans. In the context of making that decision, it is relevant to consider the implementation of the mandatory EID and to question the PHA on the effectiveness of that program. Moreover, the mandatory EID should be set forth in the PHA's Admission and Occupancy Plan, which is a supporting document to the PHA Plan and is available for review. Advocates should check the Admission and Occupancy Plan for a discussion of the mandatory EID.

Third, legal services providers can question their clients to determine if the EID is being implemented locally. This can be done in a number of ways, including talking to public housing residents or altering intake forms to capture information regarding the possible applicability of the EID in eviction actions due to non-payment of rent. It also can be done by simply alerting intake workers to the issues involved so they are better equipped to identify possible problems when dealing with public housing and some Section 8-assisted residents. Legal services providers from Charlottesville, Virginia, were unable to attend the 1999 LALSHAC conference, so they sent resident leaders. Those leaders heard about the old EID at the conference, questioned whether their rent had been calculated correctly and brought the issue back to legal services. In Cincinnati, legal service attorneys were first alerted to the problem after becoming aware of the existence of the new EID regulations. They then started to notice possible EID problems among applicants for their services by looking at their source of income and length-in-job more closely. Thus, once legal services providers suspect an EID problem in their jurisdiction, adjustments to their intake procedures may serve to focus those concerns.

Informing the Public/Finding Potential Clients

Once the beginnings of a problem are recognized, legal service providers and advocates need to determine the extent of the problem and identify as many tenants as possible to whom the PHA did not appropriately apply the EID. As

⁴*PHAs, Rents and the Working Poor*, 28 HOUS. L. BULL. 89, 90 (June 1998).

noted earlier, legal service providers can identify an EID client through their intake process. Only a few basic red flag questions need be answered to find potential EID problems. First, the potential clients are virtually all going to be public housing residents and the cases will be primarily eviction cases for non-payment of rent, although a client at risk of eviction for other reasons may still have an EID issue. There also may be similarly situated disabled-voucher recipients who may take advantage of the EID. The intake worker must then assess if the tenant or member of her family is or was employed, either in a traditional job or through a job training program. If so, the interviewer should ascertain how long the person has had the new income (or any increase in income) and what the person's status was before the new job, job training program, or increase in earned income. If the new or increased income has come within the last few years and the earner had been on welfare or was unemployed for a year or more, the EID specter is raised. The interviewer should then try to determine whether the tenant reported that increase in income and whether the tenant's rent was adjusted due to that increase in income. Of course, any determination of whether the tenant did or did not receive the benefit of the EID will require careful review of the tenant's rent recertification forms.

After they suspected a problem, advocates in Virginia, D.C., Cincinnati, and Connecticut all started asking EID-relevant questions of their clients and all identified some tenants who were eligible for a disregard but had not received one. Legal Aid in D.C. created an EID questionnaire to augment their intake process and sent a memo to all their attorneys. They also shared their knowledge with other legal services providers in the city.

Searching for potential clients can and should be extended beyond the intake process. In Charlottesville, the housing authority cooperated with legal services in trying to reach clients. Because of the authority's relatively small size (376 units, with about 100 units renting to disabled or elderly people whose income was likely to be fixed), attorneys strove for personal contact with as many tenants as possible. One attorney set up a table for half a day in various community centers in PHA developments and informed tenants of the EID and their rights.

Several jurisdictions, including Charlottesville, created and distributed fliers and posters about the EID with phone numbers of whom to call with questions, thereby giving clients knowledge about the program and the means to act on that knowledge. In Charlottesville, the phone number on the fliers led directly to the attorney dealing with the EID issue, so any possible attrition due to the normal legal services intake process was minimized. Advocates in D.C., Cincinnati, Charlotte, and Connecticut also conducted outreach to tenants by attending resident meetings and enlisting the help of citywide and development-wide resident groups to spread the word.

It is worth noting that the EID issue actually served as an organizing tool in some jurisdictions. The possibility of tenants receiving refunds or credits on their rent was a strong motivating factor for those tenants to get involved in their

statewide or development-wide tenant organization. An example of the substantial benefit that enforcement of EID may produce is highlighted by the Charlottesville experience where 33 families received more than \$57,000 in credits and refunds.⁵

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With welfare reform, it is also possible that local welfare agencies may assist housing advocates in identifying welfare recipients who are residents of public housing and may be eligible for the EID.⁶ These agencies have an independent interest in the EID because it assists families who may be in the process of moving from welfare to work. Likewise, contacting the local welfare department and informing it of the benefits of the EID is another good way to get information about the program to tenants.

Another strategy employed at least in D.C., Charlottesville, and Connecticut was to contact job training organizations working with the housing authority. Since tenants who attended those trainings are likely to be eligible for the EID, this method of outreach proved quite fruitful in finding people who were being overcharged due to the improper implementation of the program. Lastly and unfortunately, homeless providers may also be a source of clients because some potential EID recipients who did not get the EID may have been evicted. Homeless providers may also be an avenue to educating tenants who may be eligible for the EID.

Confronting and Working with the PHA

Once an EID implementation problem is discovered, advocates should approach the PHA directly to ascertain if it is aware of the problem and what steps it is taking, or willing to take, to address the issue. Some attorneys have started with demand letters to their PHA, identifying the problem and noting that they have a potentially major class action law suit at hand. In Connecticut, legal aid attorneys sent a letter to the directors of every PHA in the state. These letters almost invariably lead to meetings with PHA officials. Issues to address at these meetings include the following: how the PHA will screen for the EID during the recertification

⁵See *Enforcement of Income Disregard Provisions Yields \$58,000 in Benefits for Charlottesville Public Housing Residents*, 29 HOUS. L. BULL. 72 (Apr. 1999).

⁶Fourteen percent of public housing residents receive some form of welfare, while 28 percent receive some form of wages. See <http://pic.hud.gov/pic/RCRPublic/rcrmain.asp>.

process; will the PHA suspend non-payment evictions until the EID is properly implemented; how the PHA will deal with refunds for those who have overpaid their rent; and how they will redress tenants who may have been improperly evicted for non-payment of rent that they would not have owed if the EID had been properly implemented.⁷

To address many of these concerns, some attorneys offered to provide EID training to the PHAs' staffs. This offer was generally declined, but HUD and legal services providers in Connecticut did conduct joint training of PHA officials in that state, although not of the staff that may have needed it the most—the rent recertification specialists.

Most jurisdictions report that the PHAs have been cooperative at the meeting stage. In Connecticut, advocates were fortunate to have HUD's backing, and it was HUD that helped to convene the meetings that eventually led to a negotiated plan without litigation. Meetings proved productive in D.C. and Charlottesville, where the PHAs realized they needed to take action to better implement the EID and eventually developed acceptable plans to do so without litigation. In Cincinnati, the PHA also addressed the issue without the threat of litigation.

Some PHAs, of course, were not cooperative. In Philadelphia, for example, the PHA resisted vigorously deep into the litigation process, but now may be closer to settling since a judge certified the class of tenants.⁸ In Columbus, Ohio, litigation was also necessary before there was a settlement.⁹

The PHA Plan process is also an excellent avenue for tenants to raise the issue of the EID, both the mandatory EID and the local option to implement a discretionary one. Residents and Resident Advisory Board (RAB) members should raise the issue in hearings about the PHA Plan and in any plan discussions with the PHA. If the EID is not addressed, they should demand that it be included in the plan. In the more likely event that the EID is addressed but inadequately implemented, residents should ask the PHA to provide them with their strategy for assuring that those who qualify for the EID receive it, including better screening processes and training for PHA staff. Tenants and RABs should request that the PHA provide the number of individuals who are claiming the EID and explain its mechanism for tracking the number of EID recipients. Form 50058, the Family Report,¹⁰ used by PHAs to report to HUD tenant characteristics and rent calculations, includes a line for the amount of "income exclusions," which includes EIDs. However, the form does not specifically ask whether a given tenant receives an EID,¹¹ or include questions that might prompt a rent recertification specialist to ascertain whether a tenant might qualify for the EID. A recertification form that would help to identify potential EID recipients would have to be developed locally and some advocates have created such questionnaires.

⁷See *PHAs Are Slow to Heed Earned Income Disregard Program*, 33 HOUS. L. BULL. 37 (Feb. 2002), *supra* note 1, for a discussion of possible outcomes of these discussions.

⁸See *id.* at 42.

⁹See *id.* at 41.

¹⁰Available online through www.hudclips.org/sub_nonhud/html/forms.htm.

¹¹See Form 50058, line 7e, *supra* note 8.

In sum, this negotiation process has proven crucial in getting PHAs to properly implement the EIDs. With good tenant organizing, and perhaps HUD support, advocates can persuade or force PHAs to fix any problems they might have in assuring that tenants who qualify for EIDs get them, and skilled negotiation and persistent inquiry can obviate the need for litigation.

Follow-Up

Following up on EID implementation once the PHA has agreed to address the problem is more difficult and time-consuming and therefore more "ad hoc." Some PHAs have allowed attorneys to conduct a random sampling of rent calculations to see if tenants who qualify for the EID are receiving it. Attorneys in D.C. have scheduled follow-up meetings with the PHA on the issue, but their intake system still reveals clients who are not benefitting from the EID. At the very least, advocates should continue to closely monitor the situation through their own intake process and through meetings with the PHA and active engagement in the PHA Plan process. They should continue to educate tenant groups about the program and work closely with those groups to learn if they believe the EID is being implemented and to assure that the PHA Plan adequately addresses the issue. Advocates should also make sure that any training that the PHA promised to conduct actually takes place and that new PHA employees are informed about EID issues. They should confirm that PHAs are using locally developed questionnaires to prompt recertification specialists to the applicability of the EID.

If a PHA does not seem to have done as it has promised, advocates should consider approaching the PHA board directly. Litigation also continues to be a viable, and so far successful option.

Conclusion

The EIDs—both the old and the new—create important benefits for tenants and fit perfectly within the framework of congressionally and presidentially supported welfare-to-work programs. If tenants are expected to get jobs and increase their income, the EID should alleviate any fears they may have that their rents will rise substantially as soon as they report the income. Implemented correctly, EIDs could relieve PHAs of part of the administrative burden of resetting tenant rents whenever they improve their earned income level. In the long run, an effectively implemented EID may increase a PHA's rent collection, because it supports public housing residents' work efforts. If a PHA experiences an increase in the amount of rent collected, HUD regulations permit it to retain 50 percent of any increase and not be subject to a reduction in operating subsidy.¹² In short, EIDs have the potential to benefit everyone involved. Advocates should therefore make sure that their PHA is properly implementing those benefits and take strong measures when it is not. ■

¹²24 C.F.R. §§ 990.109(b)(iii) and 990.116(a)(2001).