November 20, 2015

Lourdes Castro Ramirez
Principal Deputy Assistant Secretary for Public and Indian Housing
451 Seventh Street, SW
Washington, DC 20410

Dear Deputy Assistant Secretary Lourdes Castro Ramirez,

The National Association of Housing and Redevelopment Officials (NAHRO) represents more than 3,100 agencies and over 20,000 individual members and associates. Collectively, our membership manages over 970,000 public housing units, or approximately 83 percent of the entire inventory. Given the extent of this portfolio, the Department of Housing and Urban Development’s (HUD) Notice PIH 2015-19, Guidance for Public Housing Agencies and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, is of particular importance to the organization.

On November 2, HUD released Notice PIH 2015-19 (the Notice) which provided guidance for public housing agencies (PHAs) and owners of federally-assisted housing on the exclusion of arrest records in housing decisions. The Notice informed PHAs and owners that arrest records alone may not be the basis for denying admission, terminating assistance, or evicting tenants in public or federally-assisted housing. The Notice also reminded PHAs and owners that HUD does not require the adoption of “one-strike” policies and reminded them of their obligation to safeguard the due process rights of applicants and tenants. This letter focuses specifically on the provision in the Notice excluding the use of arrest records in housing decisions.

NAHRO understands the need to ensure that those who have been impacted by the criminal justice system are able to access a place to live. Accurate background checks are critical so that public housing applicants are not harmed on the basis of inaccurate, incomplete, or otherwise unreliable evidence. However, it is also critical that admission and eviction decisions do not impact the safety and security of public housing residents. Admission and eviction procedures help PHAs find a balance between these two important, yet sometimes conflicting goals. These procedures can greatly impact the safety and security of public housing residents while still ensuring policies adhere to the Fair Housing Act. Due to the importance and the significant policy implications of this notice, PHAs should be allowed to help guide any federal policy relating to resident admissions and evictions. As such, NAHRO strongly disagrees with HUD’s decision to release a Notice that directly impacts PHAs’ admission and eviction procedures as opposed to a proposed rule drafted through the regulatory process.

It is unclear why PHAs and other owners of federally-assisted housing were not given the opportunity to express their concerns or questions regarding the guidance provided within the Notice. HUD states that the guidance within the Notice resulted from reviews of relevant case law, however that should not give HUD free reign to establish significant policy outside of the regulatory process. HUD has previously
utilized the regulatory review process in other instances where policy changes were pursued as a result of existing case law. For example, on October 21, 2015, HUD published the Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Practices under the Fair Housing Act Proposed Rule (Quid Pro Quo Proposed Rule). Both Notice PIH 2015-19 and the Quid Pro Quo Proposed Rule resulted from reviews of prior case law. However, one is undergoing regulatory review whereas the other is not. This seems rather incongruous. PHAs and owners of federally-assisted housing should have the ability to seek clarification and voice concerns over changes to HUD policies that directly affect them whether or not the changes are related to HUD’s interpretation of case law. It appears that HUD agrees with this in the case of the Quid Pro Quo Proposed Rule, but does not in the exclusion of arrest records in housing decisions. NAHRO fails to understand the rationale behind this dichotomy.

Our members have contacted us with numerous questions and concerns regarding the Notice that should have been addressed through regulatory review. Members have expressed concerns in regard to potential conflicts with federal code, confusion over the amount of evidence required to evict tenants or deny admission, situations in which the use of an arrest record is appropriate and allowable, and diminished safety standards for residents of public housing. A proposed rule drafted through the regulatory process would have ensured that HUD and PHAs had an opportunity to work through these matters before implementation of the new guidance began. The use of guidance documents to circumvent the informal rulemaking process not only denies stakeholders the opportunity to comment and preemptively address substantive weaknesses in a policy, but also denies stakeholders the ability to comment on the clarity of documents in order to avoid future misunderstandings.

PHAs understand their populations and the communities they serve in a way that allows them to provide invaluable input and feedback to HUD during the regulatory process. It is unfortunate that HUD saw no reason to consider this perspective in regard to drafting Notice PIH 2015-19. In light of this oversight, NAHRO respectfully requests that HUD PIH rescind the guidance issued in Notice PIH 2015-19 and instead pursue these policy changes through the regulatory process allowing PHAs to voice their concerns and perspectives before implementing any policy changes.

Please feel free to contact me at 202-580-7213 if you have any questions or would like to discuss this further. Thank you for your time and consideration on this important matter.

Sincerely,

Eric Oberdorfer
Policy Advisor, Public and Affordable Housing
National Association of Housing and Redevelopment Officials