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March 16, 2020

VIA ELECTRONIC SUBMISSION

The Honorable Benjamin S. Carson, Sr.
Secretary of Housing and Urban Development
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, D.C. 20410

Re: HUD's Affirmatively Furthering Fair Housing Notice of Proposed Rulemaking, HUD-2020-0011, RIN 2577-AA97

Dear Secretary Carson,

Thank you for the opportunity to comment on the “Affirmatively Furthering Fair Housing” Notice of Proposed Rulemaking (the “proposed rule”) from the U.S. Department of Housing and Urban Development (HUD), published in the Federal Register on January 14, 2020. On behalf of the National Center for Law and Economic Justice (NCLEJ), we submit the following response for your consideration. While we strongly oppose all of the proposed changes, we have focused these comments on the provisions pertaining to discrimination against people with disabilities.

Our organization advances economic justice and preserves fundamental rights for low-income families, individuals, communities, and organizations nationwide through impact litigation, policy advocacy, and support for grassroots organizing. We work to ensure that public benefits programs, such as Medicaid and the Supplemental Nutrition Assistance Program (“SNAP,” more commonly known as Food Stamps), and HUD’s federal housing programs serve those who are eligible and in need of help. NCLEJ also protects the rights of persons with disabilities by ensuring that federal, state, and local social services agencies afford them an opportunity to participate meaningfully in benefits programs and receive accommodations for their disabilities.

The proposed rule would harm many of the constituencies NCLEJ represents. The proposed rule purports to “establish a uniform reporting process that respects the unique needs and difficulties faced by individual jurisdictions” by “revis[ing] the definition of AFFH [, or “affirmatively further fair housing”], develop[ing] metrics to allow comparison of jurisdictions, and requir[ing] jurisdictions to certify that they will AFFH by identifying concrete steps the jurisdiction will take over the next 5 years.”¹ By implementing the rule, HUD claims that it will be satisfying its statutory obligation to affirmatively further fair housing. But the proposed rule will do the exact

¹ 85 Fed. Reg. 2041.

opposite; if implemented, HUD will contravene federal anti-discrimination law and disproportionately harm persons with disabilities who rely on federal housing assistance for shelter.

The current rule, passed in 2015 (“2015 Final Rule”), came into being after the General Accounting Office (GAO) found that HUD’s prior process to implement the “affirmatively furthering fair housing” requirement, which relied on an Analysis of Impediments (AI), was ineffective.² Specifically, the GAO found that “HUD’s limited regulatory requirements and oversight” contributed to many HUD program participants placing a “low priority on ensuring that their AIs serve as effective planning tools.” In its recommendations, GAO emphasized that HUD could assist program participants by providing more effective guidance and technical assistance and the data necessary to prepare fair housing plans.

The proposed rule not only undoes progress in the development of fair housing plans achieved by the 2015 Rule, but provides for even less guidance and oversight than under the AI process. This proposed rule represents a huge step back in fair housing compliance.

The Proposed Rule Contravenes Federal Anti-Discrimination Law that Requires HUD to Affirmatively Further Fair Housing

The proposed rule directly violates HUD’s statutory obligation to affirmatively further fair housing. The federal Fair Housing Act (“FHA”) mandates that the HUD Secretary shall “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of” the FHA.³

In its own 2015 regulations, HUD defined “affirmatively further fair housing” to mean “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.”⁴ This obligation to affirmatively further fair housing also includes “fostering and maintaining compliance with civil rights and fair housing laws.”⁵

The proposed rule does nothing to advance fair housing aims and does not comply with other civil rights laws. Instead, it seeks to do the exact opposite by discriminating against eligible individuals with disabilities.

First, the proposed rule removes both definitions of “integration” and “segregation” for people with disabilities from the current rule. As stated in the 2015 Final Rule:

For individuals with disabilities, integration also means that such individuals are able to access housing and services in the most integrated setting appropriate to the individual’s needs. The most integrated setting is one that enables individuals with disabilities to

² U.S. Government Accountability Office (GAO) “HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans,” GAO–10–905, Sept. 14, 2010.

³ 42 U.S.C.A. § 3608(e)(5) (West 2019).

⁴ 24 C.F.R. § 5.152 (definition of “Affirmatively furthering fair housing”).

⁵ *Id.*

interact with persons without disabilities to the fullest extent possible, consistent with the requirements of the Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973 (emphasis added, citation omitted).

Further:

For persons with disabilities, segregation includes a condition in which the housing or services are not in the most integrated setting appropriate to an individual's needs in accordance with the requirements of the Americans with Disabilities Act and section 504 of the Rehabilitation Act (emphasis added, citation omitted).

If the rule is implemented, integration and segregation would no longer be required considerations in fair housing planning. These concepts are integral to achieving the goals of *Olmstead*, and are an essential part of affirmatively furthering fair housing, promoting fair housing choice, and fostering inclusive communities that are free from discrimination. Without them, people with disabilities who are stuck in institutions due to a lack of housing would be left out of fair housing plans.

Second, under the proposed rule, none of the agencies or communities that receive HUD funding would be required to take any action to address discrimination faced by people with disabilities.

Disability discrimination complaints are the most common type of complaint filed with HUD and the fair housing agencies, and the number of complaints of discrimination against people with disabilities has continued to rise in recent years. But jurisdictions would now be required to pick a minimum of three "goals" towards fair housing choice or obstacles to fair housing choice, and the proposed rule does not require covered entities to address all of the groups who are protected under the Fair Housing Act, or even to address the most significant barriers to fair housing. A jurisdiction could fully comply with the new certification requirements of the proposed rule without addressing fair housing for people with disabilities at all – ever.

The Proposed Rule Disproportionately Harms Individuals with Disabilities Who Rely on Federal Housing Assistance for Shelter

People with disabilities and their families face a national shortage of accessible and affordable housing, particularly the lowest-income people with disabilities. People with disabilities comprise a large percentage of the individuals served by HUD programs, including programs covered under the proposed rule. For example, about 1 in 3 households using Section 8 housing vouchers are headed by a non-elderly person with a disability and about 1 in 5 households living in public housing are headed by a non-elderly person with a disability.

People with disabilities often have few financial resources and remain among the country's poorest.⁶ Far too often, they encounter discrimination when seeking housing.⁷ The lack of

⁶ See, e.g., L. Kraus et al., "2018 Disability Statistics Annual Report," 9 (2019) at https://disabilitycompendium.org/sites/default/files/user-uploads/Annual_Report_2018_Accessible_AdobeReaderFriendly.pdf ("In 2017, the poverty rate of individuals with disabilities (ages 18-64) was 29.6 percent. In contrast, in 2017 the poverty rate of individuals without disabilities was estimated at 13.2 percent.")

sufficient safe, accessible, and affordable housing is a continuing and significant barrier to integrated community living, making it difficult for people with disabilities to move from segregated facilities into the community, and putting many people with disabilities at risk of unnecessary institutionalization or homelessness, with tremendous cost to their health, earning potential, well-being, and other significant harms. It remains extremely important to expand opportunities for people with disabilities to live in accessible and inclusive housing in the community, and to protect the rights guaranteed under the Fair Housing Act.

HUD Should Focus on Providing Greater Access to Safe, Inclusive, and Affordable Housing to Families in Need

Access to stable and affordable housing is a basic platform for family and community health, well-being, and dignity, and our communities thrive when everyone has access to a high-quality home. Having safe and stable housing is crucial to a person's good health, sustaining employment, and overall self-sufficiency.

Public housing provides one crucial source of homes affordable to over 2 million low-income people in America,⁸ and the evidence is clear that affordable housing supports health.⁹ When families have to put too much of their income towards rent, they cannot afford to pay for other basic needs like food and health care, which is why problems like food insecurity increase along with housing costs,¹⁰ and many renters delay needed medical care because they cannot afford it.¹¹

People who are evicted from their homes, or even threatened with eviction, are more likely to experience health problems like depression, anxiety, and high blood pressure than people with stable housing.¹² They are also more likely to become homeless, contend with long-term housing instability, and to visit an emergency room.¹³ Studies have also shown that unstable housing situations can cause individuals to experience loss of employment and can dramatically increase

⁷ See, e.g., National Fair Housing Alliance, "Making Every Neighborhood A Place of Opportunity: 2018 Fair Housing Trends Report," 52 (2018) at https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf ("As has been the case in past years, the majority of complaints from 2017 involved housing discrimination against people with disabilities.")

⁸ CENTER ON BUDGET & POLICY PRIORITIES, *Policy Basics: Public Housing* (Nov. 15, 2017), <https://www.cbpp.org/research/policy-basics-public-housing>.

⁹ Nabihah Maqbool, Janet Viveiros, & Mindy Ault, CENTER FOR HOUSING POLICY, *The Impacts of Affordable Housing on Health: A Research Summary* (Apr. 2015), <https://www.rupco.org/wp-content/uploads/pdfs/The-Impacts-of-Affordable-Housing-on-Health-CenterforHousingPolicy-Maqbool.etal.pdf>.

¹⁰ Jason M. Fletcher, Tatiana Andreyeva, & Susan H. Busch, *Assessing the Effect of Increasing Housing Costs on Food Insecurity* (Nov. 12, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503043.

¹¹ ENTERPRISE, *Renters Report Housing Costs Significantly Impact Their Health Care* (Apr. 3, 2019), https://www.enterprisecommunity.org/news-and-events/news-releases/2019-04_renters-report-housing-costs-significantly-impact-their-health-care.

¹² Alison Bovell & Megan Sandel, *The Hidden Health Crisis of Eviction*, CHILDREN'S HEALTH WATCH BLOG (Oct. 5, 2018), <http://childrenshealthwatch.org/the-hidden-health-crisis-of-eviction/>.

¹³ Robert Collinson & Davin Reed, *The Effects of Evictions on Low-Income Households*, NYU LAW (Dec. 2018), https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf.

the risk of an acute episode of a behavioral health condition, including relapse of addiction in adults.¹⁴

Eviction and other forms of housing instability, such as having to move frequently, are particularly harmful for children. Research has shown that economic and housing instability impedes children's cognitive development, leading to poorer life outcomes as adults.¹⁵ Unstable housing means that kids are more likely to have behavioral problems and to struggle in school¹⁶—and in classrooms where the student population changes quickly and frequently, all students can fall behind.¹⁷

Housing instability is directly correlated to decreases in student retention rates and contributes to homeless students' high suspension rates, school turnover, truancy, and expulsions, limiting students' opportunity to obtain the education they need to succeed later in life.¹⁸ Education itself is linked to positive health outcomes and longer lives.¹⁹ Thus, creating housing instability in children's lives can have immediate and negative health impacts, and can also lead to poorer health across the lives of affected people and their communities by disrupting education.

¹⁴ See Will Fischer, *Research Shows Housing Vouchers Reduce Hardship and Provide Platform for Long-Term Gains Among Children*, CENTER ON BUDGET AND POLICY PRIORITIES (October 7, 2015), <https://www.cbpp.org/research/research-shows-housing-vouchers-reduce-hardship-and-provide-platform-for-longterm-gains>; see also Linda Giannarelli et al., *Reducing Child Poverty in the US: Costs and Impacts of Policies Proposed by the Children's Defense Fund* (Jan. 2015), <http://www.childrensdefense.org/library/PovertyReport/assets/ReducingChildPovertyintheUSCostsandImpactsofPoliciesProposedbytheChildrensDefenseFund.pdf>.

¹⁵ HEATHER SANDSTROM & SANDRA HUERTA, *THE NEGATIVE EFFECTS OF INSTABILITY ON CHILD DEVELOPMENT: A RESEARCH SYNTHESIS* (2013), <https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF>.

¹⁶ *Housing Instability is Linked to Adverse Childhood Behavior*, HOW HOUSING MATTERS (May 9, 2019), <https://howhousingmatters.org/articles/housing-instability-linked-adverse-childhood-behavior/>.

¹⁷ Mary Cunningham & Graham MacDonald, *Housing as a Platform for Improving Education Outcomes among Low-Income Children*, URBAN INSTITUTE (May 2012), https://www.researchgate.net/profile/Heather_Schwartz/publication/267687704_Housing_as_a_Platform_for_Improving_Education_Outcomes_among_Low-Income_Children/links/546621100cf25b85d17f58d7/Housing-as-a-Platform-for-Improving-Education-Outcomes-among-Low-Income-Children.pdf.

¹⁸ See Mai Abdul Rahman, *The Demographic Profile of Black Homeless High School Students Residing in the District of Columbia Shelters and the Factors that Influence their Education 55* (Mar. 2014) (Ph.D. dissertation, Howard University), available at <http://gradworks.umi.com/3639463.pdf> (citations omitted).

¹⁹ S. Egerter, P. Braveman, T. Sadegh-Nobari, R. Grossman-Kahn, and M. Dekker, *An Examination of the Many Ways in Which Education can Influence Health, Including How Educational Attainment Affects Health Across Generations and the Social and Economic Advantages it Represents*, ROBERT WOOD JOHNSON FOUNDATION (Apr. 1, 2011), <https://www.rwjf.org/en/library/research/2011/05/education-matters-for-health.html>.

We urge HUD to uphold its commitment to Affirmatively Furthering Fair Housing for people with disabilities and other covered classes, and to withdraw this proposed rule and reinstate the 2015 AFFH Rule.

NCLEJ's comment includes citations to supporting research, including direct links to relevant studies and other data. We direct HUD to each of these cited studies and the links that we have provided, and we request that the full text of each of the documents, data, research, or studies cited, along with the text of this comment, be considered part of the formal administrative record on the proposed rule for the purposes of the Administrative Procedure Act.

If you have any questions you may contact Director of Litigation Claudia Wilner (wilner@nclej.org) and Equal Justice Works Fellow Jen Rasay (rasay@nclej.org).

National Center for Law and Economic Justice