JUSTICE IN AGING
FIGHTING SENIOR POVERTY THROUGH LAW

September 13, 2023

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Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, D.C. 20410-0500

RE: Docket No. FR-6381-N-01; Improving Access to Public Benefit Programs; Request for Comment

Justice in Aging appreciates the opportunity to provide comments on improving access to HUD's public benefit programs. Justice in Aging is a national legal advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable housing, health care, economic security, and the courts for older adults with limited resources. We focus on the needs of low-income populations who have traditionally lacked legal protections, such as women, people of color, LGBTQI+ individuals, and people with limited English proficiency.

We strongly support HUD's efforts to reduce administrative barriers and paperwork burdens that disproportionately affect marginalized groups, including older adults. We offer the following responses to the questions posed in the Request for Comment.

Questions 1a-d: Eligibility Questions and Requirements, Completion of Forms

One major problem with many subsidized housing applications (both initial and recertification applications) is the inclusion of overbroad questions about criminal history. For example, some public housing authority (PHA) applications ask about any criminal activity an individual may have been involved in regardless of the circumstances and when it occurred, including arrests that did not result in convictions. Arrests and other criminal justice contact that did not result in convictions should generally be immaterial to PHA and owners' admissions decisions.

HUD guidance on the Fair Housing Act (FHA) and criminal records explains that a policy or practice of excluding individuals because of one or more prior arrests (without any convictions) violates the FHA because it 1) has a disparate impact on protected classes who are arrested at disproportionate rates; and 2) is not necessary to achieve a substantial, legitimate, nondiscriminatory interest.[1] PHA practices of asking about arrests (or other criminal justice system involvement) without convictions therefore likely contravene HUD guidance.

The following is an example of overbroad questions about criminal history from a PHA in Delaware:

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[1] HUD, "Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions" (April 2016), available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

- Multiple application questions asking whether any member of the household has "ever engaged in, been arrested for, been convicted for, had charges dropped or nolle prossed, or been placed on probation for" a variety of criminal activities, such as misdemeanors and felony charges.[2]

These types of needlessly overbroad questions about criminal history impose time and psychological costs on people with criminal records, who often struggle with navigating housing application processes and worry about stigma and discrimination based on their criminal history. In addition, these overbroad questions increase the risk that people will accidentally provide erroneous or incomplete information. Applicants may not remember every potentially relevant criminal incident or case that may have occurred years ago for every household member. Questions about criminal history can also be confusing because people – particularly those with intellectual or cognitive disabilities – do not always understand the details and dispositions of criminal cases. People are also sometimes unsure about how to answer questions when they believe their criminal records have been expunged or sealed. When people unknowingly make mistakes in answering questions about criminal history, they can be accused by PHAs and owners of intentional misrepresentation. PHAs and owners will then deny admission or terminate assistance based on the alleged misrepresentation even if it is not material to substantive eligibility.

We urge HUD to create model application questions about criminal history that only ask for the minimum information necessary for PHAs and owners to make eligibility determinations. HUD should encourage PHAs and owners to use these questions in lieu of broader questions that impose burdens on people with criminal records. PHAs and owners should also consider removing certain questions about criminal history altogether if they plan to conduct and rely on criminal background checks to verify information.

Further, PHA and owner applications and processes should inform people at the front end about policies on criminal records, as well as the opportunity to submit evidence of mitigating factors regarding criminal history. HUD fair housing guidance emphasizes the importance of individualized reviews of mitigating information, such as the circumstances surrounding the criminal conduct and evidence of rehabilitation.[3] Applicants and tenants are often unaware of the option to provide such documentation until they are already facing denial or termination based on their criminal history, at which point they have limited time to gather evidence for an appeal. This problem adds to people's confusion and frustration, particularly for applicants who spend years on waiting lists before their applications are considered for openings. If these applicants had sufficient advance notice about how a PHA will evaluate their criminal history and the option to provide mitigating evidence, they could secure relevant documentation before their applications reach the top of waiting lists.

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[2] The PHA only agreed to modify its criminal history questions after Delaware's Fair Housing Initiatives Program – which was representing a client with cognitive disabilities accused of providing fraudulent answers to these questions – filed a fair housing complaint against the PHA.

[3] HUD, "Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions" (June 2022), available at https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf.

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Question 1f: Barriers for People with Limited English Proficiency

Despite PHAs' and owners' obligations to provide language assistance services under Title VI, people with limited English proficiency (LEP) face numerous barriers accessing HUD's rental assistance programs due to a lack of translated written materials and oral interpretation. Notices about waiting lists, applications, eviction and termination notices, etc. are all often in English only, and PHAs and owners also frequently fail to provide oral interpretation services. These problems result in applicants and tenants having to rely on family members, friends, or community-based organizations (CBOs) to assist them with navigating HUD's programs. Those who are unable to secure help from third parties can find themselves facing a range of adverse consequences, from being shut out of HUD's programs entirely to losing their housing assistance. Advocates in Chicago and New York City, for example, have published reports about problems that older adults with LEP experience in trying to access services from PHAs.[4] And in some communities, certain groups like Latinos and Asians are significantly underrepresented in federally subsidized housing programs, with language barriers being one likely reason for these disparities.[5]

We urge HUD to require PHAs and owners to collect more language data and track the language needs of people with LEP. Applications and other significant materials should include multilingual notices about the availability of free language assistance services.[6] PHAs and owners should have a process for identifying and recording whether an individual needs an interpreter for oral communications, translated documents, or both, as well as preferred language. This information will help PHAs and owners provide more consistent language assistance services, determine language resource needs, identify underserved and emerging populations, and inform the development of language access plans and Affirmatively Furthering Fair Housing (AFFH) Equity Plans.[7] HUD has already acknowledged the value of tracking data about clients' language needs in the homeless service system – HUD recently introduced a new Homeless Management Information System (HMIS) data element that captures a client's preferred language and need for "translation assistance."[8] This data is equally important in the context of permanent housing, and HUD should therefore implement similar data collection requirements for PHAs and owners.

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[4] The Center for Urban Research and Learning at Loyola University Chicago, "Falling Flat: The Chicago Housing Authority's Inadequate Implementation of Their Language Access Plan" (September 2019), available at https://www.seniorcaucus.org/language-access-report; CAAV, et al., "No Access: The Need for Improved Language Assistance Services for Limited English Proficient Asian Tenants of New York City Housing Authority" (2015), available at https://caaav.org/wp-content/uploads/2015/09/CAAAV-full-housing-report-v11-HIGH-RES.pdf.
[5] Vincent Reina and Claudia Aiken, "Fair Housing: Asian and Latino/a Experiences, Perceptions, and Strategies" (April 2021), available at https://muse.jhu.edu/article/794152.
[6] As discussed in Justice in Aging's comments on HUD's Section 504 ANPRM, we recommend that HUD require this notice in the 15 most common languages spoken by people with LEP in the state and in alternate formats for people with disabilities who request auxiliary aids and services. HUD could provide sample multilingual notices.
[7] For more information about the importance of data collection for language access, see Department of Justice, "Language Access in Digital Portals and Data Collection Systems" (August 2023), available at https://www.lep.gov/sites/lep/files/media/document/2023-08/Language-Access-in-Digital-Portals.pdf.
[8] See HUD, Fiscal Year 2024 HMIS Data Standards Manual (August 2023), available at https://files.hudexchange.info/resources/documents/HMIS-Data-Standards-Manual-2024.pdf. It should be noted that the new data element about "translation assistance needed" seems to erroneously conflate oral interpretation and written translation.

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HUD should also encourage PHAs and owners to partner with trusted CBOs to conduct culturally and linguistically appropriate outreach to potential applicants with LEP. Certain immigrant communities are likely underserved and may lack knowledge about HUD's programs and how to access them. However, PHAs and owners should not expect these CBOs to divert resources towards providing language assistance services that these housing providers should be offering themselves under Title VI.

Another critical step is improving access to websites and online applications and portals for people with LEP. Many PHAs and owners rely on automated translation services, such as Google Translate, to translate online content into other languages (if they do so at all) without assessing translation quality. PHAs and owners should have a qualified human translator check translated content for accuracy and comprehensibility.

Lastly, some PHAs accept applications completed over the phone. Voice menus should offer audio prompts in frequently encountered non-English languages and route people with LEP to staff who are trained to obtain an interpreter.

Question 1g: Barriers for Other Sub-Populations and Strategies/Tools to Reduce Burdens

Immigrant Families

Immigrant families, particularly those that are "mixed-status" and consist of people with different citizenship or immigration statuses, may avoid HUD programs due to fears that receipt of benefits may negatively affect immigration status. These fears were exacerbated by efforts during the Trump Administration to expand the "public charge" rule to consider use of housing assistance in applications for green cards, as well as by a withdrawn proposed HUD rule that would have prevented mixed-status immigrant families from living together in public and other subsidized housing. Research shows that in 2022, about 25% of adults in mixed-status families reported avoiding applying for or participating in public benefit programs (including housing subsidies) due to concerns about immigration consequences.[9]

HUD should ensure its programs reach and serve immigrant families. In addition to improving language access and increasing outreach, we recommend that HUD issue guidance on how subsidized housing applications can be structured in a way that does not deter immigrant families from seeking assistance. The U.S. Departments of Agriculture (USDA) and Health and Human Services (HHS) released joint guidance on this issue in 2000, and in 2011 USDA issued a memo on how to apply this guidance to online applications for the Supplemental Nutrition Assistance Program (SNAP).[10] The USDA memo identifies ways to improve applications, such as by offering explanations on how Social Security numbers (SSNs) will be used; providing a clear process that allows applicants to identify which household members are seeking SNAP benefits and which are not ("opting-out"); and improving the sequencing of information so that immigrant families do not abandon applications. USDA also developed a sample notice to applicants about the mandatory or voluntary nature of questions about immigration status/SSNs and how families may still be eligible for benefits even if they decline to provide information

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[9] Urban Institute, "One in Four Adults in Mixed-Status Families Did Not Participate in Safety Net Programs in 2022 Because of Green Card Concerns" (August 2023), available at https://www.urban.org/research/publication/one-four-adults-mixed-status-families-did-not-participate-safety-net-programs.

[10] USDA, "SNAP-Conforming to the Tri-Agency Guidance Through Online Applications" (February 2011), available at https://www.fns.usda.gov/snap/admin/conforming-tri-agency-guidance-through-online-applications.

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for certain family members.[11] Subsidized housing applications should provide similar notices as well as make it clear that 1) receipt of benefits/services under HUD's programs will not be considered by immigration officials as part of a public charge determination; and 2) HUD programs will only report someone's unlawful immigration status under very limited circumstances.

Standardized Deduction for Health and Medical Care Expenses

HUD's health and medical care expense deduction is confusing for many older adults and people with disabilities. In determining their adjusted annual income, elderly and disabled families in HUD's rental assistance programs can deduct unreimbursed medical expenses that exceed three percent of annual income.[12] However, some barriers to claiming the deduction include the burden of providing verifications for each medical expense and confusion about which expenses qualify as allowable medical costs.

We recommend that HUD consider demonstration projects that implement a standardized medical deduction (SMD) similar to SMDs that are available in the SNAP program. Federal SNAP rules permit households with elderly and/or disabled members to deduct allowable medical costs over $35 per month from their gross income. States can request demonstration waivers to develop an SMD (representing average medical expenses) to allow households to claim the state's SMD rather than documenting each medical expense. Households must still verify the first $35 in medical expenses, and they still have the option to claim a deduction higher than the SMD by verifying each out-of-pocket medical cost.[13] However, the availability of an SMD simplifies the process of claiming the medical deduction in the SNAP program for older and disabled households and also improves administrative efficiencies. An SMD for HUD rental assistance programs could provide similar benefits.

Simplified Applications for Older Adults and People with Disabilities

We also encourage HUD to build on current flexibilities for families with fixed incomes and consider further streamlining of application and recertification processes for these households, particularly for older adults and people with disabilities. This population often faces hurdles in applying for and staying enrolled in benefit programs due to issues such as cognitive and mobility impairments. These impairments and other challenges can make it more difficult to comply with program requirements. At the same time, this group often receives Supplemental Security Income (SSI) or Social Security benefits, and thus eligibility and subsidy amounts for this group are less likely to significantly change from year to year given their fixed incomes.

The SNAP program has recognized these issues and includes the option for states to implement Elderly Simplified Application Project (ESAP) demonstration projects for older adults and people with disabilities with no earned income.[14] An ESAP typically waives several requirements of the SNAP

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[11] USDA, "Sample – Important Notice to Applicants," available at https://fns-prod.azureedge.us/sites/default/files/a-SampleInterimNotice.pdf.

[12] 24 C.F.R. § 5.611(a)(3)(i). Recent HOTMA rule updates will increase the threshold for medical expense deductions to 10% of annual family income, a change that will be phased in over two years. See HUD, "HOTMA Talking Points and Q&A for Multifamily Programs" (2023), available at https://www.hud.gov/sites/dfiles/Housing/documents/HOTMA_Talking_Points_Multifamily_Programs.pdf.

[13] 7 U.S.C. § 2014(e)(5); 7 C.F.R. § 273.9(d)(3).

[14] Although ESAPs target older adults with no income, they can also include disabled households with no income.

program, resulting in extended, three-year certification periods; elimination of recertification interviews; and simplified verification processes that rely on electronic verification sources (especially through the Social Security Administration (SSA)) to the maximum extent possible. ESAPs in some states have also included several practice changes, such as shorter applications and centralized case management for ESAP cases.[15]

HUD should consider implementing demonstration projects similar to ESAP for its rental assistance programs. PHAs and owners already have discretion to conduct full reexaminations of fixed-income families every three years instead of annually, similar to ESAP's three-year certification periods.[16] By expanding on this option and reducing other requirements for households with fixed incomes, HUD could help minimize administrative burdens for older adults and people with disabilities.

Notarization

Many PHAs require or encourage people to submit notarized statements for applications, recertifications, or when reporting various changes (such as changes in household composition). Notarization poses a barrier for low-income individuals and people with disabilities. To notarize documents, people must spend time and money to find and travel to a notary and pay a notarization fee, all of which can be a hardship for older adults who have limited incomes and/or have various disabilities. In addition, studies show disparities in geographic access to notaries, with high-poverty areas generally having fewer notaries than wealthier neighborhoods.[17] Remote notarization is also often not an option for low-income older adults, who may lack access to the internet and may not be able to navigate an online notarization process due to disabilities or limited digital literacy.

HUD should allow for self-attestation in place of notarized statements and affidavits. Under 28 U.S.C. § 1746, unsworn declarations subject to penalty of perjury have the same legal effect as sworn declarations. Requiring notarized documents is unnecessary and only adds to administrative burdens.

Prepopulated Forms and Plain Language

We recommend that HUD promote the use of prepopulated forms to reduce burdens, particularly for older adults and people with disabilities who often have a harder time completing paperwork. PHAs and owners should only request information that is not available through prior applications or other means. Prepopulated forms would be especially helpful for annual recertifications, when residents are asked to provide much of the same information (such as date of birth, race, and address) that PHAs and owners already have on file.

Additionally, plain language materials are crucial for increasing equitable access to HUD's programs. Many people who apply for or participate in HUD's programs struggle to understand various notices, forms, leases, websites, and other documents because of overly complicated or technical language. Further, complex language is more difficult to orally interpret and translate into different languages and alternative formats for people with limited English proficiency and/or disabilities. We

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[15] U.S. Department of Agriculture, "Elderly Simplified Application Project Guidance, FY2015-FY2016" (November 2015), available at fns-prod.azureedge.us/sites/default/files/snap/ESAP_Guidance.pdf.
[16] See 85 FR 27133.
[17] Urban Institute, "The Geography of Notaries Public" (May 2023), available at https://www.urban.org/sites/default/files/2023-05/The%20Geography%20of%20Notaries%20Public.pdf.

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urge HUD to revise its model leases, sample notices, and other public-facing templates to use plain language, and we encourage HUD to offer resources and trainings on plain language for homeless services and housing providers.

Question 2: Data Sharing Between HUD and Other Agency Programs

HUD could potentially support SSA's efforts to flag the cases of SSI and Social Security Disability (SSD) claimants experiencing homelessness. "Homeless cases" are subject to priority handling and special case development requirements to promote expedited processing by SSA.[18] Data sharing between Continuums of Care and SSA may help SSA more readily identify claimants who are experiencing homelessness and being served by HUD's shelter system, and it could help these individuals obtain the income supports they need to exit homelessness.

Question 3: Public Sharing of Data Collected by HUD

Finally, we urge HUD to publish more data about older adults experiencing homelessness. Older adults are likely the fastest growing group among people experiencing homelessness, and researchers estimate that the number of older adults who are unhoused will triple over the next decade.[19] The recently released California Statewide Study of People Experiencing Homelessness, the largest representative study of homelessness in the U.S. since the mid-1990s, found that nearly half of the single adult homeless population in the state was age 50 and older.[20] Meanwhile, Part 2 of HUD's 2021 Annual Homelessness Assessment Report (AHAR) showed that nearly 10,000 more people aged 65 and over experienced sheltered homelessness in 2021 than in 2019. The number of older adults who were chronically homeless also increased by 73% over the same two-year period.[21]

Although rates of homelessness are increasing rapidly among older adults, current HUD practices on collecting and reporting data about this population limit our understanding of the full scope of the problem. As noted in the most recent federal strategic plan on homelessness, older adults experiencing homelessness have historically been undercounted.[22] We support the plan's goal of identifying more effective ways of generating data on older adults and other marginalized groups, and we urge HUD to consider as part of that effort the importance of reporting more data disaggregated by race, ethnicity, sexual orientation, disability, language, and other characteristics. While Part 2 of the AHAR includes some information about older adults using age data from HMIS, the AHAR generally provides aggregate data, which does not always allow for analysis based on intersecting identities. HUD should publish more disaggregated data (or at least publish datasets that will allow researchers to customize and disaggregate data) and prioritize intersectional analysis, as people with multiple

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[18] See SSA Program Operations Manual System (POMS) DI 23020.001 and POMS DI 11005.004.

[19] Dennis Culhane et al., AISP, "The Emerging Crisis of Aged Homelessness: Could Housing Solutions be Funded by Avoidance of Excess Shelter, Emergency Room and Nursing Home Costs?" (2019), available at https://www.aisp.upenn.edu/aginghomelessness/.

[20] Benioff Homelessness and Housing Initiative, "Toward a New Understanding: The California Statewide Study of People Experiencing Homelessness" (June 2023), available at https://homelessness.ucsf.edu/sites/default/files/2023-06/CASPEH_Report_62023.pdf.

[21] HUD, "Part 2: Estimates of Homelessness in the United States, 2021 Annual Homelessness Assessment Report (AHAR) to Congress" (July 2023), available at https://www.huduser.gov/portal/sites/default/files/pdf/2021-AHAR-Part-2.pdf.

[22] United States Interagency Council on Homelessness, "All In: The Federal Strategic Plan to Prevent and End Homelessness" (December 2022), available at https://www.usich.gov/fsp.

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marginalized identities often experience compounded barriers to accessing services and securing housing. For example, older adults are more likely to experience homelessness upon release from incarceration than younger individuals, with Black and Hispanic individuals facing a higher risk of homelessness than their White counterparts.[23] Homelessness in this context also places older adults of color at higher risks of reincarceration, creates additional obstacles in accessing other social and income supports, and puts older adults with complex health needs in peril.[24]

Finally, we look forward to HUD reporting more granular data about older adults through the AHAR Part 1, which will be possible now that HUD has expanded age-related data collection and reporting requirements for the Point-in-Time (PIT) Count.[25] Historically, the limited age categories (under 18, 18-24, and over 24) that have been reported in the AHAR Part 1 and accompanying datasets have not distinguished older adults from much younger individuals, which has obscured the actual extent of older adult homelessness. We encourage HUD to develop specific sections on older adults in the AHAR (similar to the sections on youth experiencing homelessness) to help highlight data and trends that are essential for improving service delivery and informing policy solutions for this population. As homelessness systems increasingly serve seniors, the urgency of needing data about older adults will only grow.

Conclusion

Thank you for your consideration of Justice in Aging's comments and your commitment to improving access to HUD's public benefit programs. If you have any questions about this submission, please contact Jennifer Kye, Senior Attorney, at jkye@justiceinaging.org.

Sincerely,

Tracey Gronniger
Managing Director, Housing and Economic Security

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[23] Prison Policy Initiative, "Nowhere to Go: Homelessness Among Formerly Incarcerated People" (August 2018), https://www.prisonpolicy.org/reports/housing.html.
[24] Justice in Aging, "Reducing Barriers to Reentry for Older Adults Leaving Incarceration" (May 2022), https://justiceinaging.org/wp-content/uploads/2022/05/Reducing-Barriers-to-Reentry-for-Older-Adults-Leaving-Incarceration.pdf.
[25] HUD, Notice CPD-22-12 (October 2022), available at https://www.hud.gov/sites/dfiles/OCHCO/documents/2022-12cpdn.pdf.

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