To: Richard Cho, Senior Advisor for Housing and Services
Demetria McCain, FHEO
Cc: HUD Deputy Secretary Adrianne Todman
From: The National Housing Law Project and Housing Justice Network
Re: Recommendations on the Use of Criminal Records in HUD Housing
Date: September 13, 2022

The National Housing Law Project (NHLP) and the Housing Justice Network (HJN) submit the following recommendations to eliminate existing obstacles to HUD's housing programs for justice-involved families. Secretary Marcia Fudge, in her April 2022 directive to Principal HUD staff, recognized that the use of criminal records often creates enormous barriers to HUD housing programs. Secretary Fudge thereby directed HUD staff to review its policies related to the use of criminal records and make recommendations as to what regulations and subregulatory guidance can be revised to increase access to affordable housing, ensure housing stability among HUD residents, and keep communities safe. Our real-world experience representing HUD tenants and applicants who have come in contact with the criminal justice system means we can provide meaningful input into this process and help prioritize the changes that will have the highest impact.

NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income residents and homeowners; and increasing housing opportunities for underserved communities. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. NHLP hosts the national Housing Justice Network (HJN), a vast field network of over 2,000 community-level housing advocates and resident leaders. HJN member organizations are committed to protecting affordable housing and residents' rights for low-income families.

The memo is organized into three sections with recommendations related to (a) admissions (b) subsidy terminations and (c) evictions. Importantly, our recommendations focus on what HUD can do with existing statutory authority through regulation and subregulatory guidance. To the extent possible, we also provide case examples to show the harm of HUD's existing policies and the need for change.

ADMISSIONS

I. HUD should limit the types of criminal history information that PHAs and owners can consider in admissions decisions.

Present regulations allow PHAs and subsidized owners wide discretion in the types of criminal history information they may consider in screening. For example, in screening families for admission to public housing, a "PHA may consider all relevant information, which may include, but is not limited to: … (3) A history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants." 24 C.F.R. § 200.203(c). While the regulations for subsidized multifamily housing do not specify the kinds of information that may be considered in screening tenants, owners are specifically authorized to evict current tenants if they "determine that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying a criminal conviction standard of proof of the activity." 24 CFR § 5.861. Subsidized multifamily

owners are similarly authorized to deny admission based on such a "determination" that any household member "is currently engaging in, or has engaged in [certain criminal activity] during a reasonable time before the admission decision." 24 CFR § 5.855(a).

Given this ambiguity in the regulations around the types of criminal history information that may be used, some PHAs and subsidized owners continue to base criminal history denials on records other than criminal convictions.

As HUD previously recognized in subregulatory guidance, rental admission decisions based on criminal history require sufficient evidence to establish (by a preponderance of evidence) that the relevant individual actually committed the criminal activity.[1] In the admissions context, this means a criminal history denial should almost always be based upon criminal convictions—for an arrest record alone does not meet this evidentiary standard,[2] and a PHA or owner would rarely, if ever, be in a position to have other reliable evidence of criminal activity by an applicant (as opposed to a current tenant). Lesser information, such as the opinions or unexamined statements of police (often themselves based on hearsay statements), is even less reliable.

Many PHAs and subsidized owners obtain information from third-party sources for use in criminal history screening. Some such information sources, such as law enforcement agencies, may be especially inappropriate because even though the information they provide may be unreliable or impossible to verify, PHAs and subsidized housing owners may feel pressure or be otherwise inclined to reject applicants deemed undesirable by local police. Some third-party tenant-screening products render algorithmic "admit" or "deny" decisions that may not even contain or refer to the detailed records upon which those decisions were based; such unaccountable decision-making products have no place in the admission process for federally subsidized housing. HUD should prohibit PHAs and subsidized owners from soliciting or considering information from police departments, automated decisions, or other such compromised or unaccountable information in rental admission decisions. Any such information that PHAs or subsidized owners do receive should be disclosed to applicants.

> Recommendation: HUD should amend all relevant regulations, including 24 C.F.R. § 200.203 and 24 CFR § 5.855, to state that criminal history-based denials of admission to subsidized housing programs must be based on criminal convictions, with the specific conviction record(s) causing the denial identified. Other evidence of criminal activity (or of a suspected inclination toward criminal behavior) such as police commentary or algorithmic determinations of unsuitability, shall not be considered. HUD should amend 24 CFR § 5.861 to make clear that regulation does not pertain to the admissions context.

Present regulations provide no guidance as to the appropriate lookback period for criminal history screening. See, e.g., 24 CFR § 5.855(a) ("a reasonable time before the admission decision"). In subregulatory guidance, HUD previously recognized a PHA policy establishing "a twelve-month lookback period for drug-related criminal activity and a twenty-four-month lookback period for violent and other criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by

[1] See Notice PIH 2015-19 at 3-4 (Nov. 2, 2015); see 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 at p. 5 (Apr. 4, 2016).
[2] Id.

other residents" as a best practice.[3] However, the same guidance also recognized as a best practice pilot programs having two-to-three-year lookback periods coupled with "six months to one year of supportive services with nonprofit partners" for returning citizens joining existing tenant households.[4] And more recent guidance, in discussing the need for transparency in admissions policies, gave "three years from application date" as a presumptively appropriate example of a criminal screening lookback period.[5] Not only has HUD avoided establishing a maximum lookback period, HUD has not provided guidance as to the appropriate starting point for a criminal history lookback period, or the factors that should be considered in determining a lookback period. This has led to great variation and, indeed, arbitrariness in the establishment of such lookback periods. PHAs and subsidized owners commonly establish lookback periods that are exceedingly long, or run from arbitrary time points such as the date of an applicant's conviction or release from incarceration—a scheme under which applicants who commit the same exact crime on the same exact day could face radically different lookback periods depending on whether they pleaded guilty or were convicted after a trial, and the duration of the sentence imposed.

HUD's failure to prescribe either a maximum lookback period for criminal history screening or set forth relevant factors for consideration in establishing such lookback periods has hindered efforts to ensure access to housing for citizens returning from incarceration.[6]

To address these issues, HUD should make clear that an appropriate criminal history screening policy is one calibrated to exclude applicants who do not, at the time of admission, conform their conduct to relevant laws. PHA and property management staff are not equipped to meaningfully predict whether individuals with old criminal records will offend again, or if so, whether such offenses will pose hazards to others within the residential community. Rather, criminal history screening should be limited to discerning present conduct only. Criminal activity occurring within the year preceding the applicant's admission would appear most relevant to this purpose—with records more than two to three years old carrying little if any bearing upon the applicant's present conduct. Consistent with this view, appropriate lookback periods should run from the date of the criminal offense itself, not some subsequent event such as an arrest, conviction, or termination of sentence.

> Recommendation: HUD should amend all relevant regulations, including 24 C.F.R. § 200.203 and 24 CFR § 5.855, to impose a maximum lookback period for criminal history in admission screening other than for statutorily-disqualifying criminal offenses, with the lookback period running from the date of the offense. The period of time for that lookback period should be no more than three years, and it should be evidence-based. HUD should make clear that lookback periods should be designed to detect and exclude individuals found not to be conforming their conduct to law at the time of admission. If HUD will not impose a maximum lookback period for criminal history screening, HUD should at least require PHAs imposing longer lookback periods to present evidence justifying the use of such longer lookback periods (as to the specific type of criminal activity being screened for) and secure HUD approval for the longer lookback period before denying applicants under it.

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[3] See Notice PIH 2015-19 at 6 (Nov. 2, 2015).

[4] See Id. at 6.

[5] See HUD, Office of Fair Housing and Equal Opportunity (FHEO) Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties at 7 (Apr. 21, 2022).

[6] Marie Claire Tran-Leung, When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing (Feb. 2015).

In the housing choice voucher program, the PHA provides only a rental subsidy and does not also own or manage the housing in which the tenant resides, hence the tenant's criminal history, if any, is even less relevant to the PHA than in site-based housing assistance programs. Also owners will conduct their own screening of rental applicants before admitting them as tenants—effectively requiring an applicant to pass not one but two criminal background checks before securing housing. HUD should lessen this redundant barrier to voucher utilization and to fulfilling the housing needs of returning citizens by restricting criminal history screening in voucher programs to only those statutorily-disqualifying offenses.

> Recommendation: HUD should amend 24 C.F.R. §§ 982.552 and 553 to end permissive denials of admission to tenant-based housing choice voucher program based on criminal history.

Applicants to subsidized housing programs are commonly asked to disclose their criminal history information on written application forms, with either the failure to make such disclosures or the failure to provide accurate information becoming an independent reason for denial of an application. Housing applicants often fail to disclose criminal history because they forget about it or misunderstand their obligations due to plea arrangements, expungements, or other legal circumstances. Others make errors in trying to disclose criminal history information. Yet an applicant's nondisclosure of criminal history seldom causes any actual prejudice to a housing provider, as PHAs and subsidized owners typically purchase criminal background checks from third-party tenant screening companies or other sources. In effect, the availability of these sources makes the written disclosure requirement an unnecessary burden and a "gotcha" trap for rental applicants. One example is a case in Seattle where an applicant didn't disclose an old marijuana conviction because she received a ticket and paid it. The housing authority accused her of fraud even though she didn't understand that she technically received a conviction for possession.

> Recommendation: HUD should amend appropriate regulations to state that a PHA or subsidized owner shall not inquire about an applicant's criminal history on an application and shall not deny admission because of an applicant's failure to disclose criminal history.

Even with the regulatory changes proposed above, advocates anticipate many PHAs and subsidized owners will remain resistant to admitting applicants with criminal history. HUD should further incentivize PHAs and subsidized owners to limit criminal history exclusions by collecting data on the number of applicants rejected for criminal history and setting benchmarks for PHAs and owners to reduce those numbers over time.

II. **HUD should set minimum standards for hearings/reviews of denials based on criminal history.**

PHAs and subsidized owners who deny applicants because of criminal history must allow for individualized review and reverse such rejections based on mitigating factors or changed circumstances, as well as new information revealing inaccuracies, incompleteness, or other errors in applicant background reports.[7] Yet the appropriate policies and standards by which such individualized reviews need be conducted remain largely undefined in HUD regulations. HUD should establish and codify a set of minimum hearing standards that assure applicants rejected for criminal history are consistently

[7] See 24 C.F.R. § 960.208(a); see 24 C.F.R. § 880.603(b)(1).

afforded an accessible and meaningful opportunity for individualized review.

An initial consideration is how the individual review process is initiated. A common procedure is for a rejected applicant to request the review—such as by stating an objection or request for the application to be considered, which is then followed by a meeting, hearing, or other procedure. This is appropriate because while some tenants may already have evidence and be able to present their objections on their own, others may need time to gather documents or other materials or may need an advocate to assist them. In some cases an applicant may need to pursue credit disputes (which can take up to 35 days[8]) or other ancillary procedures before appearing at the review hearing. Some review procedures, however, require an applicant to initiate the review by submitting additional evidence and materials to be considered from the outset. Review procedures designed in this manner may disadvantage applicants who do not already have access to such materials and may deter or intimidate tenants who lack the ability to prepare such review petitions on their own. PHAs and subsidized owners should accept review requests in any reasonable format and not insist upon superfluous form requirements.

A related question is the amount of time to allow a rejected applicant for initiating individualized review. Where the applicant may initiate a review simply by making a request, the amount of time needed to invoke the procedure may be shortest—and the short deadlines PHAs and subsidized owners commonly impose, often 10-14 days, may be sufficient in most cases. Certainly where initiating review requires an applicant to take more elaborate steps, more time should be given.

Yet another consideration relevant to this issue is whether the dwelling unit will be held open for the applicant during the review period. If so, then a shorter deadline for initiating review enables the PHA or owner to move on to the next applicant on the waiting list if a rejected applicant fails to invoke review by the deadline. But if the dwelling unit will not be held open, even a significantly delayed request for individualized review would appear unlikely to prejudice the PHA or owner in any material way.

For individualized review to truly be meaningful, the reversal of a denial decision must enable an applicant to access the housing without undue delay. Typically this will mean a dwelling unit should remain open while the review takes place, at least if the review can be conducted without undue delay. This may not be necessary in large public housing programs with ample turnover, as a new unit may reasonably be expected to come available soon even if a previous specific unit is not held open. But in smaller housing projects with low turnover or where there are other reasons to doubt that a different comparable unit would come available, PHAs and subsidized owners should hold a unit available for at least 30 days to allow the review process to take place. For waitlist admissions, screening & hearings should take place in anticipation of units coming available to minimize risk of unit being lost due to denial that is overturned, or units sitting unused during review process.

> Recommendation: HUD should amend appropriate regulations to state that a PHA or subsidized owner shall enable an application rejected for criminal history to initiate individualized review simply by presenting an objection to denial or request for review, and that no additional documents or evidentiary material need be submitted along with such request. A rejected

[8] See 15 U.S.C. § 1681i.

applicant should be given at least 14 days in which to initiate the review. A PHA or owner shall for at least 30 days hold open the unit applied for to allow the review process to be completed, unless another comparable dwelling unit will be available at or shortly after the time the review is completed.

The specific individual review procedures available to applicants denied for criminal history should be comparable to those procedures available in most other HUD administrative hearings and should track the minimum due process requirements required upon deprivation of the means to afford essential housing, as set forth in *Goldberg v. Kelly,* 397 U.S. 254, 267-71 (1970). Features of the review procedure should thus include:

- A right to review any records or evidence upon which the PHA or owner relied in making the admission decision;
- An impartial, adequately prepared decisionmaker who was not involved in the denial decision (or a subordinate of any such person);
- An opportunity to appear and present evidence and arguments to the decisionmaker orally;
- An opportunity to refute the evidence presented by the PHA or owner, including the right to confront and cross-examine witnesses and to present one's own witnesses and documents;
- The right to be represented by counsel (or other representative) at the applicant's expense;
- The burden of justifying the denial decision to be on the PHA or owner, with factual determinations decided by the preponderance of evidence;
- A written decision that states the evidence relied upon and delineates the evidence found credible from that found not credible; and
- The right to have a recording made of the hearing and all exhibits preserved.

These hearing rights for applicants rejected due to criminal history should be made applicable in all HUD programs. A best practice for individualized review hearings is to have them heard and decided by three-member panels that include a resident having lived experience with the criminal legal system, and at least one member with legal training. Decision templates that specify the steps to be taken in issuing a decision may also be helpful.

HUD should additionally make clear that the key issue for decision in an individualized review of an application denied for criminal history should always be whether reliable evidence shows that the applicant does not, at the time of admission, conform their conduct to relevant laws having a nexus with housing and the safety of other residents and neighbors. Too often PHAs and subsidized owners fixate on irrelevant details of crimes or treat review of a denied application as an evaluation of arbitrary questions, such as whether the applicant "deserves" the housing opportunity. This is not a helpful approach to individualized review. Rather, examination of past criminal conduct should focus on relevant aspects—such as the reasons an applicant engaged in the past criminal activity (which tend to show what changed circumstances might reflect a cessation of that activity) or how the criminal activity related to housing.

Focusing individualized review on the key question of whether the application remains engaged in criminal activity posing threats to the health and safety of other residents also rationalizes and makes more consistent the consideration of mitigating circumstances or rehabilitation. As HUD has

acknowledged in subregulatory guidance and should further institutionalize through formal regulations, the types of mitigating circumstances and rehabilitation evidence an applicant might present are virtually unlimited but will often include such examples as:

- Evidence of good tenant history (before or after the past criminal activity);
- Letters of support, such as from employers, social service agencies, faith-based institutions, relatives, or other community members willing to assist the applicant in living successfully in the prospective housing;
- Education, job training, or employment;
- Age/maturity level
- Treatment or interventions such as drug or alcohol rehabilitation, batterers' intervention, sex offender treatment, anger management treatment, cognitive behavioral therapy, etc.;
- Any history of and trauma related to domestic violence, dating violence, sexual assault, stalking, and human trafficking.
- Other factors: time since most recent criminal activity or since release from prison/jail, the number of convictions, the nature of the conviction(s), circumstances surrounding the conviction(s), risk assessment scores if applicable, any connection between the conviction and a disability.

PHAs or subsidized owners conducting individualized reviews can make the best use of information such as this by viewing it through the lens of whether the applicant remains engaged in criminal activity (dangerous to the project environment) at the time of admission. Naturally, PHA and owner admission policies should always reflect that disability-related criminal activity will be overlooked where the risk of subsequent criminal activity has been reduced by treatment, accommodations, or other changed circumstances. Additionally, criminal activity that a survivor of domestic violence and/or sexual assault was part of that they connect to the violence shall be presumed irrelevant to admission decisions.

Here, it is especially critical that HUD do more to educate PHAs and other assisted housing providers on the impact of intersectionality on women of color, especially Black women. Black women face discrimination because of both their race and their gender, and the two identities should not be conflated. In this context, Black women face further harm because frequently, they are neither believed as survivors nor are they able to access the help they need because of discrimination. As a result, they are more likely to be criminalized for behaviors related to trauma or strategic conduct deployed to mitigate the abuse.[9] Current HUD guidance touching upon criminal conduct should more affirmatively address the intersectional discrimination Black women experience or the paralyzing effects of trauma on survivors.

III. **HUD must ensure transparency in the application process**

For individualized review procedures to be truly meaningful, PHAs and subsidized owners must provide full and timely access to all of the information necessary by which to understand why their

[9] For the seminal discussion of intersectionality in the context of gender-based violence, see Kimberly Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stanford L. Rev. 1241 (1991), https://blogs.law.columbia.edu/critique1313/files/2020/02/1229039.pdf

application was rejected and identify any possible challenges to that denial. This includes access to both the specific policy under which the application was rejected, as well as the factual information that led to the rejection.

As HUD recently advised multifamily owners in connection with marketing housing opportunities, criminal history screening policies "should be available to prospective applicants and contain enough detail for an applicant to tell whether they are likely to qualify. For example, a criminal records screening policy should specify the types of records being considered (e.g., convictions) [and] which specific types of crimes are disqualifying, the lookback period (e.g., three years from application date)[.]"[10]

Access to complete criminal history screening policies is essential for rejected applicants to determine whether the policy was applied correctly to their specific cases. Criminal history screening policies often sort criminal convictions into various different categories and may apply different rules to those categories—such as longer lookback periods for crimes of violence or requiring multiple misdemeanor convictions (compared with a single felony conviction) for denial. Hence an improper categorization could result in the denial of a qualified applicant.

To determine whether a mistake may have been made in such categorization, the applicant need not only to be provided with a copy of the specific criminal record(s) that led to the denial and be informed of any specific ways in which that criminal record was sorted, aged, or categorized, but also have access to the policy showing the range of other possible categories to which those criminal records *might* have been assigned (and the rules applicable to the other categories). Only complete access to the full criminal screening policy fulfills this need. Ideally, PHAs and subsidized owners should post their complete criminal history screening policies on-line so that any applicant, rejected applicant, advocates, or other person with a need for the information may access it at any time. Applicants should not be denied access to this information simply because the sorting, categorization, or evaluation of criminal history information is contracted to a third-party, such as a tenant-screening company.

> Recommendation: HUD should amend appropriate regulations to state that applicants denied admission to housing operated by PHAs or subsidized owners shall be provided with a copy of the specific criminal record(s) that led to the denial and be informed any specific ways in which that criminal record was sorted, aged, or categorized. Such regulations should further provide that criminal history screening policies should be fully accessible to applicants and posted on-line. Any such information held by third-parties that participate in the screening of tenants, such as tenant-screening companies, shall be made available to applicants.

Pertinent regulations already obligate PHAs and subsidized owners to inform denied applicants of the reason(s) for denial. See, e.g., 24 C.F.R. § 960.208(a) ("PHA must promptly notify any applicant determined to be ineligible for admission to a project of the basis for such determination"); § 880.603(b)(2) ("the owner will promptly notify the applicant in writing of the determination and its reasons"). For some applicants rejected because of criminal history, however, even more detail is required. Applicants with criminal history sometimes have multiple criminal records, some which

[10] See HUD, Office of Fair Housing and Equal Opportunity (FHEO) Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties at 7 (Apr. 21, 2022).

contributed to the adverse decision and others that did not. Simply disclosing in connection with such denials that the basis was "disqualifying criminal history," without specifying precisely which criminal record(s) prompted the denial, may prevent an applicant from understanding the basis of the decision or formulating an effective response to it. Applicants denied admission to public housing are already entitled to receive a copy of the criminal record upon which the denial was based. See 24 C.F.R. § 960.204(c).

Recommendation: HUD should further clarify its admissions regulations to state that when the basis for denial is criminal history, the PHA or subsidized owner must specify the precise criminal records that contributed to the denial decision. This shall be done in a way so as to easily distinguish any other criminal records that did not contribute to the denial.

SUBSIDY TERMINATIONS

I. HUD should limit the legal grounds for voucher terminations due to criminal activity.

HUD regulations on voucher terminations do not flow from any statutory directive. The regulations requiring pre-deprivation notice and an opportunity for a hearing were originally promulgated by HUD at the direction of the court in *Nichols v. Landrieu*, No. 79-3094, (D.D.C. Sept. 12, 1980). See 47 Fed. Reg. 32169 (July 26, 1982) (proposed rule) (introductory comments); 49 Fed. Reg. 12215 (March 29, 1984) (final rule) (introductory comment). Since Congress has not mandated any grounds for termination of voucher assistance, HUD has the legal authority to change the procedure and the grounds for termination without concern about statutory parameters. Thus, it is possible for HUD to propose regulatory changes to substantive and procedural grounds for voucher subsidy terminations.

a. HUD should refine the definition of "criminal activity that threatens the health and safety" to preclude overly broad categories of criminal activity.

HUD's tenant-based assistance program regulations do not define "criminal activity" that is a "threat to health and safety." Therefore, HUD housing providers have significant discretion to set policies related to subsidy terminations. This can lead to overly restrictive termination policies as well as wildly inconsistent ones that vary greatly from PHA to PHA. For example, Some PHAs terminate assistance for crimes that involve disturbing the peace or for conviction records that indicate the participant may be a negative influence on other residents. These are overbroad categories and more expansive than HUD regulations should allow.

Recommendation: Define and narrow all references *to criminal activity that threaten the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or PHA employees* in HUD regulations, including at 24 C.F.R. §§ 982.551 - 982.553. Revised regulations or new guidance should narrowly define the terms in the current regulations including "threat to health and safety." The threat should be actual, substantial, and imminent, and not based on stereotypes, past activity that does not present a current threat, speculation of the activity, or an individual's protected status.

In addition, 24 C.F.R. § 982.551 sets forth participant family obligations including not engaging in drug-related criminal activity, with a link to 24 C.F.R. § 982.310 that discusses the lease requirement: "The lease must provide that drug-related criminal activity engaged in, on or near the premises ..." with

"near the premises" not defined. "On or near the premises" is too broad. In many cases, PHAs are terminating family's subsidies due to criminal activity that occurred far from the home. Terminations and evictions should not result from activity well away from the property.

Recommendation: HUD should further narrow the definition of criminal activity that is "on or near the premises." New guidance should define "near the premises" as "immediate vicinity" or "on or directly adjacent to the premises."

Further, tenants should not be terminated (or evicted) from the voucher program for actions outside their control. In *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 130 (2002), the Court held that the public housing eviction statute did not include an innocent tenant defense but it did not preclude HUD from creating one.

Recommendation: New regulations or guidance should provide for an innocent tenant defense and further define criminal activity as not including activity that the tenant did not do, did not know or have reason to know would occur, could not prevent, and has taken action to prevent in the future.

In 2016, HUD issued guidance to PHAs related to the use of overly broad categories of criminal activity that may be illegal under the fair housing act. HUD should follow up with PHAs and provide additional guidance pursuant to that notice.

Recommendation: Provide notice to PHAs of their duty to affirmatively further fair housing and more closely monitor and enforce its 2016 fair housing guidance.

b. **HUD should revise all of its regulations and guidance related to subsidy terminations for drug-related criminal activity.**

HUD regulations currently allow subsidy terminations for drug-related criminal activity that threatens the health, safety, or right of peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises. See 24 C.F.R. § 982.551(l) (2021). The regulations have been broadly interpreted by many PHAs to include most drug-related activity by any household member, even when there is no clear threat to other residents on the property. Narrowing the regulations to prohibit termination for possession or use of a drug would help prevent terminations for which no purpose is served. The criminal legal system is the venue to determine a potential punishment for the use or possession of drugs. No sensible reason exists to allow termination of the assistance for the entire family, which can lead to eviction and homelessness.

The voucher statute does not pose a barrier to revising the regulations related to drug use. 42 U.S.C. § 1437f(o) does not mandate specific grounds for termination. The statutory provisions on screening for drug use and alcohol abuse in federally assisted housing apply only to screening for admission. See 42 U.S.C. § 13661.

Recommendation: Revise HUD regulations to eliminate voucher terminations for possession or use of illegal drugs (or at least possession or use of marijuana). This would also require an update to the Housing Choice Voucher Program Guidebook 7420.10G.

HUD currently gives PHAs full discretion to terminate a family's voucher due to drug-related criminal activity and does not require the consideration of mitigating circumstances. See 24 C.F.R. § 982.552(c)(2(i) (2021) ("The PHA *may* consider all relevant circumstances…") Therefore, a PHA can be as hard as they choose on a family. Many PHAs, for example, choose to terminate a subsidy because of the drug possession by one family member or a guest. HUD should change its regulation to provide a standard by which a PHA will evaluate a termination related to drug activity.

Recommendation: Change the language in § 982.552(c)(2(i) from "may consider" to "must consider all relevant circumstances." This will help eliminate voucher terminations for personal drug use in compelling circumstances. See below for a list of mitigating circumstances that PHAs should be required to consider prior to terminating a family's subsidy.

Moreover, many states and localities have decriminalized drug-related activities that are criminal under Federal law, including marijuana. The definitions in 24 C.F.R. § 5.100 provide*, "*Drug means a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)" and "Drug-related criminal activity means the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug." HUD regulations related to drug-related criminal activity have simply not kept up to reflect the legalization and decriminalization efforts in states throughout the country.

Recommendation: New guidance should define "illegal" as being illegal under both Federal and state or local law so that if one is more lenient than the other, the most lenient would apply.

Recommendation: In the alternative, HUD should at least provide that a PHA may not terminate the voucher subsidy of a person who has been approved for use of marijuana for medicinal purposes. The need for this rule is illustrated by *Forest City Residential Management, Inc. v. Beasley*, No. 13-14547, 2014 WL 6861439 (E.D. Mich. Dec. 3, 2014) (holding that tenant not entitled to reasonable accommodation under the Fair Housing Act or Rehabilitation Act of 1973 to use medical marijuana in rental unit).

Here is an example from one advocate in the Housing Justice Network (HJN):

We have seen a number of voucher termination actions over the years based solely on the possession or use of marijuana by a child or grandchild. PHAs never seem to use criminal records correctly. They either do not provide a copy or include records with arrests.

c. **HUD should require PHAs to consider a defined set of mitigating circumstances with respect to the consideration of criminal history**

HUD provides PHAs significant discretion to terminate a subsidy for criminal activity, alcohol abuse, or violations of any family obligations. HUD regulations allow, but do not require, PHAs to consider relevant circumstances in deciding whether to terminate assistance.

Recommendation: The regulations should require PHAs and owners to consider a clear set of mitigating circumstances with respect to the consideration of criminal history and activity for

subsidy terminations, similar to evictions. Mitigating circumstances include:

- Whether the tenant is innocent in that the tenant did not know or have reason to know of the activity of others
- Completion of substance abuse treatment, therapeutic treatment, counseling, or other health-related services
- Ongoing negative drug tests
- Statements from reliable third parties citing commitment to recovery or rehabilitation
- Recommendations on behalf of participant by probation officer, case worker, counselor, family member, clergy, employer, community leader or other involved individuals
- Existence of a support network and community ties
- Length of time passed from criminal activity or history
- Participant's or family member's disability
- Participant or family member's status as a survivor of domestic violence, dating violence, sexual assault, stalking, or human trafficking.
- Evidence, including testimony, of likely negative consequences of termination on participant or family members
- Any other information relevant to the current lifestyle of the individual
- Any other mitigating circumstances

Specifically, HUD should revise 24 C.F.R. § 982.552 - PHA denial or termination of assistance for family, amend as follows:

(2) Consideration of circumstances. In determining whether to deny or terminate assistance because of action or failure to act by members of the family:

(i) The PHA may **must** consider all relevant circumstances such as [include list].

....

(iii) In determining whether to deny admission or terminate assistance for illegal use of drugs or alcohol abuse by a household member who is no longer engaged in such behavior, the PHA may **must** consider [see list above for mitigating circumstances].

In 24 C.F.R. § 982.553 - Denial of admission and termination of assistance for criminals and alcohol abusers, amend as follows:

(e) In determining whether to deny or terminate assistance, the PHA **must** consider all relevant circumstances such as [see list above for mitigating circumstances].

(f) The requirements in 24 CFR part 5, subpart L (Protection for Victims of Domestic Violence, Dating Violence, Sexual Assault, or Stalking) apply to this section.

The following stories from HJN members illustrate why HUD should limit the legal grounds to terminate

subsidies and require PHAs to consider mitigating circumstances related to criminal activity

My client was a 56-year-old woman with mental health disabilities. She was terminated from the Section 8 program after she destroyed her neighbor's unit and got evicted from her apartment. The client's mental health was unstable due to the client being on the wrong medication. She was arrested but never convicted of any crime. The charges were dropped after the client successfully completed mental health treatment. The client did not have representation at her eviction or administrative hearing and came to our office, post-termination. The hearing decision rendered in the case was awful. It contained no factual or legal analysis to bridge the analytical gap between the evidence and the ultimate decision rendered to terminate the participant from the Section 8 program. Even more galling and troubling, at the hearing, the Hearing Officer refused to receive any evidence from the participant's physician that explained the client's mental health condition and impact of her mental health conditions on her involvement with the criminal legal system. The hearing officer also refused to consider any mitigating circumstances in favor of allowing the participant to retain her voucher. The client sued the PHA for violations of her due process rights and abuse of discretion regarding the decision to terminate. In this case, the PHA stipulated and entered into a settlement agreement to reinstate the participant to the Section 8 program. But the failure to consider mitigating circumstances is a situation we see often, and it results in participants being summarily terminated from the Section 8 program, making it extremely difficult, if not next to impossible for them to locate adequate and safe housing.

In another case, a voucher applicant was denied admission after a PHA determined that a single arrest and charge of theft was a violent felony that warranted her denial of her admission to the Section 8 program. The applicant had been charged with the misdemeanor crime of theft of a shopping cart, a status non-violent crime related to her being homeless. In my experience, PHAs have grossly mischaracterized minor infractions or criminal acts charged and disposed of as misdemeanors as serious and violent felonies that they have then relied upon to deny admission to their Section 8 Program, or in the case of a participant, to terminate from the Section 8 program. This abuse of discretion has prevented people in need of housing post-release from being able to access housing.

II. **HUD should improve due process for voucher terminations due to criminal activity.**

Tenants, attorneys, and other advocates regularly complain of inadequate due process for Section 8 Voucher program terminations. Specific complaints include hearing officers who are not impartial, weak evidentiary requirements to prove criminal activity including the reliance on hearsay alone (including police records) to prove criminal activity, and the failure of the PHA to provide essential documents before the hearing. Due process issues are especially pronounced in criminal activity cases because of the stigma associated with committing a crime. Tenants are necessarily denied a fair hearing without standardized rules. The below recommendations ensure a voucher family's right to due process and a fair hearing.

Recommendations: 24 C.F.R. § 982.555 governs hearings. It should be amended as follows:

(e) Hearing procedures -

(1) Administrative plan. The administrative plan must state the PHA procedures for conducting informal hearings for participants.

(2) Discovery -

(i) By family. The family must be given the opportunity to examine before the PHA hearing any PHA documents that are directly relevant to the hearing or that the PHA will use at the hearing. The family must be allowed to copy any such document at the family's expense. If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing.

(ii) By PHA. The PHA hearing procedures may provide that the PHA must be given the opportunity to examine at PHA offices before the PHA hearing any family documents that are directly relevant to the hearing. The PHA must be allowed to copy any such document at the PHA's expense. If the family does not make the document available for examination on request of the PHA, the family may not rely on the document at the hearing.

(iii) Documents. The term “documents” includes records and regulations.

(3) Representation of family. At its own expense, the family may be represented by a lawyer or other representative.

(4) Hearing officer: Appointment and authority.

(i) The hearing should be conducted by any person or persons not employed or affiliated with the PHA, and under no circumstances by a person who made or approved the decision under review or a subordinate of this person. The PHA and family must select a hearing officer or hearing panel. If the PHA and family cannot agree on a hearing officer, then they must each appoint a member to a hearing panel and the members selected must appoint a third member.

[Comment: This is taken from the Rural Housing Service regulation 7 C.F.R. § 3560.160.]

(ii) The person who conducts the hearing may regulate the conduct of the hearing in accordance with the PHA hearing procedures.

(5) Evidence. The PHA and the family must be given the opportunity to present evidence, and may question any witnesses. Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings. The PHA must make available by the family for cross examination any person on whose information the PHA relies. Termination of assistance may not be based on hearsay.

(6) Issuance of decision. The person who conducts the hearing must issue a written decision, stating briefly the reasons for the decision. Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing. A copy of the hearing decision shall be furnished promptly to the family.

In addition, to ensure a fair hearing, HUD should clarify what types of criminal records can be used as the basis to terminate a family from a HUD program. Consistent with prior HUD guidance, arrest reports without further corroborating evidence do not provide sufficient grounds for terminating

assistance. In many cases, conviction records provide stronger evidence for termination. At the same time, HUD should take measures to ensure that, where termination is due to a family break-up related to gender-based violence, survivors should not be required to provide criminal conviction records as a basis for termination for several reasons. First, survivors cannot be forced to participate in the criminal legal system as a condition of receiving relief under VAWA. Furthermore, many survivors are not seeking the conviction or incarceration of the person accused of gender-based violence; they simply want that person to leave. In this context, direct testimony from the survivor should be properly weighed against other testimony or evidence provided by the person accused of gender-based violence. This balanced approach helps to ensure that both sides receive the due process they are entitled to.[11]

> Recommendation: Revise the regulations or emphasize in a HUD Notice that police officer arrest reports are not, by themselves, sufficient evidence to terminate assistance. In some cases, a conviction record may be sufficient. For terminations because of family break-ups due to gender-based violence, HUD should advise PHAs not to require conviction records and instead educate PHAs on how best to provide due process for all parties.

Finally, due to the overwhelming evidence that criminal records and tenant screening reports contain many errors, it is imperative that HUD require PHAs to send tenants a copy of the report that is the basis of a proposed adverse action *prior to initiating the termination process.* This will give families the chance to correct a false or misleading report and also prepare mitigating circumstances to present to the PHA.

> Recommendation: Strengthen and clarify 24 C.F.R. § 982.553(d) (2021). Mandate that a PHA provide a copy of any criminal record to the participant family prior to initiating steps to terminate assistance. See 42 U.S.C. § 1437d(q) ((2) ("Before an adverse action is taken… on the basis of a criminal record, the … [PHA] *shall* provide the tenant…with a copy…") (emphasis added). As the regulation now reads, the PHA sends the family a notice of proposed termination and includes a copy, or often merely references the record. PHAs should be required to send the notice prior to initiating the termination.

III. HUD should amend project-based section 8 sub regulatory guidance related to subsidy terminations for criminal activity.

HUD permits federally assisted landlords covered by Handbook 4350.3 to terminate the subsidy of tenants in certain limited circumstances. See HUD Handbook 4350.3 chapter 8 (Termination), pp. 8-3 – 8-4 at para. 8-5 ("When Assistance Must Be Terminated"). Paragraph 8-5 lists the limited circumstances when the owner must terminate assistance. Although section 8-5 seems clear, some owners have used it to terminate the subsidy and increase the rent to the fair market rent when the tenant is unable to rebut a criminal conviction or arrest that appears on the background check at the annual recertification review. Because the tenant is unable to pay the fair market rent, the tenant is evicted for nonpayment.

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[11] For additional recommendations specific to family break-up terminations in situations of domestic violence and sexual assault, please see Letter from NHLP to Rosie Hidalgo, Senior Advisor on Gender-Based Violence and Special Assistant to the President, White House Gender Policy Council & Karlo Ng, Dir. on Gender-based Violence Prevention, U.S. Dep't of Hous. & Urban Dev. (May 9, 2022), (on file with author).

The trial courts do not look behind the allegations in the pleadings that the tenant has failed to pay the rent, and tenants are thus evicted for nonpayment of a rent amount far beyond their financial ability to pay. But the conviction on their record may be something that occurred away from the property or that was nonviolent, such as shoplifting. Had the landlord pleaded the true reason for the eviction, the tenant would have kept their home.

Recommendations: Handbook 4350.3 should be revised. HUD should add language in chapter 8 of Handbook 4350.3 clearly and emphatically stating that owners may not terminate a tenant's subsidy and increase rent to the fair market rent for any actions related to alleged criminal activity. Rather, the owner must use the court eviction process if the owner chooses to evict for the conduct. This will allow the tenant to defend the court eviction on the merits and not allow for back-door evictions based on nonpayment of the fair market rent.

Recommendation: Additionally, paragraphs 15 and 17 of the HUD Model Lease should be revised to specifically state that owners may not evict by increasing rent to fair market rent for alleged criminal conduct but must base the eviction on the alleged conduct.

Here are case examples from HJN members:

In one case, a project-based section 8 landlord increased the tenant's rent to the fair market rent after she failed to pass the annual tenant screening criteria. She had been arrested and charged with possession of an illegal drug over nine miles from the apartment complex. We fought the eviction for nonpayment of the fair market rent in court and eventually the landlord's law firm non-suited the eviction shortly before trial in the county court at law.

Although these cases were not cases in which the landlord increased the rent to the fair market rent because of alleged criminal record, they illustrate the problem. See Jessie v. Jerusalem Apartments, No. 12-06-00113-CV, 2006 WL 3020368 (Tex. App. – Tyler Oct. 25, 2006, no pet.) (mem. op.); Palisades Manor Estates v. Chapman, No. LT-13-000225, 2013 WL 10301136 (Pa. Ct. Common Pleas June 4, 2013); cf. DiVetro v. Housing Authority of Myrtle Beach, No. 4:13-cv-01878- RBH, 2014 WL 3385163 (D. S.C. July 10, 2014) (finding due process violation when Housing Authority terminated tenant's rental assistance for alleged lease violations and evicted tenant for failing to pay full market rent without giving her hearing on underlying lease violations).

In Jessie v. Jerusalem Apartments, No. 12-06-00113-CV, 2006 WL 3020368 (Tex. App. – Tyler Oct. 25, 2006, no pet.) (mem. op.), the landlord claimed Ms. Jessie had violated the terms of her lease and demanded that she vacate the premises. When she refused to vacate, the landlord increased the rent to the fair market rent and sought to evict for nonpayment of the rent. The appellate court saw through this ruse and reversed the county court judgment in favor of the landlord.

IV. HUD should eliminate or limit the criminal activity exclusion of public housing residents' right to a grievance procedure.

A PHA is not required to provide a grievance procedure prior to termination in limited

circumstances related to criminal activity. See 24 CFR Sec. 966.51(a)(2). The PHA may argue it has an interest in an expedited process to evict a tenant, particularly if the PHA believed they present a threat to health and safety. However, the grievance process potentially enables a PHA to resolve a matter more expediently and at less expense, and also best allows a PHA to fulfill HUD's directive to consider all circumstances and to determine whether all other options have been exhausted before proceeding with an eviction.

No statute, regulation, or case law requires a PHA to exclude evictions involving these criminal activities from the grievance process. HUD could therefore amend its regulations to eliminate this exception. This is especially important because the right to a grievance hearing is a right retained by tenants in RAD buildings.

> Recommendation: HUD should consider eliminating the exception (remove 24 CFR Sec. 955.51(2)(i)). Short of that, PHAs should only be able to exclude cases based on felonious, serious, or violent criminal activity, or terminations brought after a criminal conviction. Other distinctions could also be made on the basis of where the activity takes place (e.g., on or off the premises), or whether the person accused of perpetrating the criminal activity was an adult tenant or a child, guest, or visitor of the resident. Another option for PHAs is to use an expedited grievance procedure for evictions based on alleged criminal activity, rather than eliminate the grievance altogether. HUD should also make clear that if the person asserts that they are covered by VAWA, then then the exclusion does not apply.

V. HUD should provide guidance and training to PHA staff on the intersection of the criminal legal system and gender-based violence.

As HUD is aware, persons experiencing domestic violence, dating violence, sexual assault, or stalking, particularly women and children with limited economic resources, are at increased vulnerability of homelessness. Black women are also more likely to face discrimination as a survivor of the violence, such as not being believed, or turned away from shelter or support services, and heightened criminalization for behaviors related to the violence and trauma. These vulnerabilities are compounded when the survivor is dealing with the trauma caused by the violence and facing a voucher termination or public housing eviction.

Advocates report working with clients who are dealing with uneducated and unsympathetic PHA staff who try to exclude Black survivors in particular from protections they should receive under VAWA, including for criminal activity. For instance, in a voucher terminatin case, a survivor's participation in drug-related criminal activity was explained by her and her advocate as part of the cycle of violence. The perpetrator compelled her to participate in drug sales under threat of loss of her home and children. PHA staff claimed the domestic violence and criminal activity were completely unrelated, even though they had no evidence to back that up or training. Staff should not be allowed to make such uninformed decisions.

PHAs, their counsel, and all contractors (i.e. hearing officers) need training on how to interact with survivors of gender-based violence in a way that acknowledges the pain and trauma they have endured without retraumatizing them and that considers the connections between violence, trauma, and contact with the criminal legal system, especially for survivors of color. PHAs and their staff should

be required to demonstrate an understanding of fair housing protections for survivors of violence, as well as those protections provided for by VAWA. PHAs should be required to employ VAWA dedicated staff within their agencies, and have those staff ensure that all PHA employees and contractors understand gender-based violence, trauma, VAWA, the criminalization of survivors, and intersectional harms often faced by Black women. The training and technical assistance dollars authorized in the VAWA 2022 reauthorization should provide funding for training and technical assistance on many of these topics, but guidance from HUD could also address the commonality of criminalizing survivors, particularly Black women.

> Recommendation: HUD should issue new training resources and guidance related to the specific issues faced by survivors of gender violence, and the commonality of criminalizing survivors, particularly Black women.

EVICTIONS

Evictions cause harm to families and communities and should be treated as a last resort rather than a normal business practice, especially given the limited resources that subsidized tenants have to find alternative housing on the private rental market. Consequently, HUD should focus more attention to the intersection between evictions and criminal activity. Although prior HUD guidance have focused on admissions, terminations, and evictions, screening issues have received a higher degree of attention from HUD than either terminations or evictions. HUD's one-strike policy was created in the 1990s, when being "tough on crime" animated public policy aimed at addressing criminal activity. It also helped to spawn harmful crime-free programs and nuisance property ordinances all over the country. Decades later, it is clear that "one-strike" is now a relic of the failed, deeply racist War on Drugs. It is time for HUD to take bold regulatory and sub-regulatory action to end the use of "one strike" by PHAs and other HUD-assisted owners and to give residents more procedural and substantive protections from arbitrary evictions based on criminal activity.

I. **HUD should require PHAs and other HUD-assisted housing providers to consider mitigating evidence and use their discretion in considering whether to evict.**

Evictions cause significant harms to the health and well-being of residents and families and should therefore only be used as a last resort.[12] This is especially true for federally subsidized housing

[12] Note that there is no statute for either the public housing or various HUD-assisted programs that specifically mandates the eviction of tenants by PHAs or owners. For public housing, USHA sec. 6 requires the ACC to establish "...satisfactory procedures designed to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of nonpayment of rent." 42 USC 1437d(c)(4)(B). Section 6(l) also requires public housing leases to permit (but not mandate) evictions for certain specified "good causes." 42 USC 1437d(l)(5) to (9). For HUD-assisted multifamily properties (and enhanced vouchers), Congress has mandated that HUD "assure that ... leases approved by the Secretary provide that tenants may not be evicted without good cause." 12 USC 1715z-1b(b)(3). For Housing choice Vouchers, Congress has required that the HAP contracts "provide that during the term of the lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause." 42 USC 1437f(o)(7)(C). These statutes create no mandate nor any right to evict.

residents, whose lack of financial resources puts them at a high risk of homelessness without federal subsidies. To help ensure that evictions are a last resort, HUD should require PHAs and other HUD-assisted housing providers to consider mitigating evidence and to use their discretion when deciding whether to evict a household for specific criminal activity across all HUD-assisted programs. Currently, HUD should also remind housing providers that they should use their discretion in a way that comports with their duties to affirmatively further fair housing under the Fair Housing Act.

Recommendation: HUD should amend 24 C.F.R. §§ 5.852 and 24 C.F.R. §§ 966.4(l)(5)(vii)(B-D) (2018) by changing "may consider" to "must consider" to ensure that PHAs and other HUD-assisted housing providers consider mitigating evidence when deciding whether to pursue an eviction. HUD should also amend its Public Housing Occupancy Guidebook to reflect these regulatory changes.

II. **HUD should add regulatory definitions to ensure that the authority of PHAs and HUD-assisted owners to evict is narrowly tailored and not overly broad.**

The prior sections on subsidy terminations makes recommendations on refining the definitions of "threats" and "on or near the premises." These recommendations apply to the eviction context as well.

HUD should further amend its regulations to clarify that arrests alone are insufficient evidence of criminal activity and cannot be used to justify an eviction without further corroborating evidence. HUD guidance has advised its assisted housing providers of this position, and codifying it in HUD regulations will provide further authority to ensure that residents are not unfairly evicted for arrests without further evidence that they engaged in criminal activity.

Recommendation: HUD should include a definition of "criminal activity" that clarifies that arrests alone are not sufficient proof of criminal activity.

In addition, HUD should further clarify the types of criminal activity that threatens the "health, safety, or right to peaceful enjoyment of the premises." In the Public Housing Occupancy Handbook of June 2003, HUD noted that "there are a wide variety of other crimes that cannot be claimed to adversely affect the health, safety or welfare of the PHA's residents." And yet, a number of housing authorities and other housing providers use crimes with only an attenuated relationship to health, safety, and welfare to evict tenants. Through other subregulatory documents in HUD-assisted housing, HUD should ensure that housing providers do not wrongly use this language as a catch-all provision justifying evictions for activity unrelated to a person's ability to carry out their responsibilities as a tenant.

Recommendation: HUD should issue guidance advising PHAs and HUD-assisted owners that they should not use the category of "criminal activity that threatens the health, safety, or right to peaceful enjoyment" as a catch-all to evict tenants for criminal activity.

III. **HUD should issue guidance advising PHAs and HUD-assisted owners that they cannot comply with local crime-free programs and/or nuisance property ordinances if they run contrary to their obligations under federal law.**

Since the 1990s, there has been a proliferation of local jurisdictions adopting crime-free housing programs and nuisance property ordinances targeted at rental property owners and prospective and actual renters. These programs and ordinances threaten the housing of the most vulnerable tenants, particularly low-income tenants of color, survivors of gender-based violence, and tenants with

disabilities. While they vary slightly by jurisdiction, crime-free programs typically require or encourage property owners to: (1) utilize a "crime free lease addendum," which require the eviction of the entire household if one tenant is accused of violating the lease addendum (typically by having any contact with the police – convictions and often even arrests are not required); (2) conduct criminal background checks of applicants, as well as ongoing screening for new criminal activity by current tenants; and (3) participate in mandatory training on operating "crime-free housing," which encourage landlords to police their property in potentially discriminatory ways. The programs are typically operated by local law enforcement agencies. Nuisance ordinances, which often go hand-in-hand with crime-free programs, single out properties where alleged "nuisance" activity—such as calls for emergency services, alleged misdemeanor or felony criminal activity, or local ordinance violations such as noise disturbances—has occurred. Such ordinances and programs aim to hold a tenant and/or owner responsible for this alleged conduct by demanding the eviction of all of the tenants in a home and fining or otherwise penalizing landlords who do not comply with that demand.

In 2016, HUD took an important first step to address the growth of these laws and programs and the civil rights impediments created by them. HUD's Guidance on the Application of Fair Housing Act Standards on the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services focused on how these laws and programs harm victims of domestic violence, as acts of violence against survivors can easily be identified as "nuisance" conduct.[13] HUD's guidance also briefly noted that many ordinances and crime-free programs negatively impact communities of color, persons with criminal records, and persons experiencing disabilities, but did not provide a detailed outline of the legal and practical implications for these protected groups. The guidance also failed to note the intersectional discrimination experienced by survivors of color, survivors with disabilities, and people of color with disabilities, all of whom are particularly vulnerable to be targeted under these laws and programs.[14] Despite this guidance and HUD's guidance on criminal records screening, aggressive criminal records screening remains a key aspect of many crime-free housing programs and nuisance ordinances, often done by the local government or at their direction, as well as the aggressive efforts by local governments to force the eviction of tenants if there is any contact with the police.

Race may be the central driver for the origination of these laws and programs. As has been well-documented by Professor Deborah Archer and others, these programs and ordinances have been used to maintain residential segregation and racial boundaries within a community.[15] They validate discriminatory policing and permit white neighbors to influence the racial make-up of the neighborhood, by using the ordinance or program to oust Black and Latinx neighbors.

HUD's federally subsidized housing program owners and tenants are not beyond the reach of these laws and programs. Indeed, in some communities, due to anti-Black racism and opposition to

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[13] Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), *available at* https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF.

[14] *Id.* at 13.

[15] *See, e.g.*, Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 Mich. L. Rev. 173 (2019); Deborah N. Archer, *'Crime-Free' Housing Ordinances, Explained*, The Appeal (Feb. 17, 2021), https://theappeal.org/the-lab/explainers/crime-free-housing-ordinances-explained/.

affordable housing, federally subsidized housing is directly targeted for enforcement.[16] These ordinances and programs frequently require the attachment of lease addendum, which have the effect of subjecting tenants to eviction for a broad range of offenses and presents several conflicts with the "good cause" eviction protections to which tenants living in federally assisted housing programs are entitled.[17] These ordinances and lease addenda also create conflicts with the Violence Against Women Act (VAWA), which was enacted to protect survivors of domestic violence, dating violence, sexual assault and stalking who live in federally assisted housing from facing eviction based on the violence against them. In these situations, federally subsidized owners and PHAs are caught between trying to meet the obligations imposed by the local government and meeting their obligations under federal law. In some cases, PHAs are also pressured to share the identifying information of tenants (such as their names and addresses) participating in the Housing Choice Voucher program, in violation of the Privacy Act. HUD should make clear that federally subsidized housing providers cannot abide by the terms of a program or ordinance or deploy the crime-free lease addendum if it conflicts with federal good cause requirements, requirements under VAWA, or civil rights laws. For additional discussion of the actions that HUD can take to curb crime free programs and nuisance property ordinances, see the attached June 28, 2022 letter to Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity Demetria McCain from the ACLU Women's Right Project and other organizations.

IV. **HUD should strengthen notice provisions for evictions based on criminal activity.**

Tenants need more notice of evictions, especially where evictions are based on criminal activity.

HUD should re-affirm the obligation of HUD-assisted housing providers to comply with existing notice requirements. The Coronavirus Aid, Relief, and Economic Security (CARES) Act requires federally subsidized housing providers to give residents a 30-day notice. 15 U.S.C. § 9058(c). New guidance should state that the notice requirement applies to all HUD programs, is still in effect for all cases, and cases without the notice must be dismissed. Furthermore, the Violence Against Women Reauthorization Act of 2013 requires landlords for all programs to include with the complaint the VAWA Notice of Occupancy Rights under the Violence Against Women Act (VAWA) and a certification form (Form HUD 5383). 34 U.S.C. Sec. 12491(d)(2)(c); 24 C.F.R. §§ 5.2005 (notice and form), 5.2003 (covered programs), 966.4. New guidance should state that eviction cases without them must be dismissed.

> Recommendation: HUD should issue guidance reminding HUD-assisted housing providers of their obligations to comply with the CARES Act 30-day notice requirement and to provide residents with the VAWA Notice of Occupancy Rights and a certification form under the Violence Against Women Act.

In addition to existing notice requirements, HUD should add notice requirements to ensure consistency across HUD-assisted programs in two ways.

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[16] https://www.cltampa.com/news/tampas-crime-free-housing-program-is-under-federal-investigation-but-the-city-is-still-defending-it-13334899

[17] See 24 C.F.R. 247; 24 C.F.R. 966.4(l); 24 C.F.R. 891.770(b); 24 C.F.R. 982.310, 24 C.F.R. 983.257; and 42 U.S.C. 1437d(l)(5).

First, the Section 8 Voucher Program is the only HUD-assisted program that does not require notice beyond what is required by local law. HUD should amend 24 C.F.R. § 982.310(e)(2)(i) to reflect the following language:

> Owner eviction notice means a notice to vacate of [number] days before filing a court, or a complaint or other initial pleading used under State or local law to commence an eviction action.

Second, HUD should amend its regulations to give HUD-assisted tenants notice of the lease violation and the opportunity to avoid eviction. This amendment can be modeled on the Rural Housing Service Program, which includes a notice of violation and right to cure before issuing a termination notice. 7 C.F.R. § 3560.159(a) provides that:

> Prior to terminating a lease, the borrower must give the tenant written notice of the violation and give the tenant an opportunity to correct the violation. Subsequently, termination may only occur when the incidences related to the termination are documented and there is documentation that the tenant was given notice prior to the initiation of the termination action that their activities would result in occupancy termination.

This notice of violation and opportunity to cure would give residents an important opportunity to avoid eviction for criminal activity.

V. HUD should issue guidance to assist tenants who are facing evictions or subsidy terminations while a parallel criminal case is pending.

Tenants who are facing subsidy terminations and evictions on the basis of criminal activity face unique challenges while a parallel criminal case is pending. When a tenant is facing eviction or termination of assistance for criminal activity and the criminal case is still pending, the tenant must decide whether to claim the Fifth Amendment privilege against self-incrimination or to testify at the trial in the eviction action. If the tenant chooses to invoke the privilege, she runs the risk that this will be used as a basis for an adverse inference against her in the civil case. If she chooses to testify, she runs the risk that the prosecutor will use her responses against her in the pending criminal case.

In the termination context, HUD should issue guidance advising PHAs to use their discretion to stay Section 8 termination hearings when criminal proceedings are still pending. In doing so, HUD would be recognizing that proceeding promptly while the criminal matter is pending creates a great risk of compromising important rights. While a PHA or owner may proceed if there are exigent circumstances (such as active ongoing harm), in most instances it should be presumed that there is no harm in waiting.

Indeed, our HJN members made similar observations that a stay is appropriate in most circumstances. In Massachusetts, for example, police reports can generally be used without any testifying witnesses with personal knowledge at Section 8 termination hearings, even though this seemingly contradicts the 2016 criminal records guidance against using mere arrests in the absence of corroborating evidence. By working with PHAs to stay termination proceedings while a criminal trial is pending, HUD would help ensure that termination is taking place only where the evidence supports a finding of criminal activity by the preponderance of the evidence and not merely a police officer's summation of various reports which often can include unsubstantiated or uncorroborated information.

In the evictions context, housing courts may choose to grant continuances/stays pending resolution of the criminal case, though many choose not to. Although HUD does not have jurisdiction over such housing courts, HUD may issue guidance to PHAs and owners to encourage them to exercise their discretion in a way that pauses the eviction proceeding pending the final disposition of the criminal case and in a manner that is consistent with their duty to AFFH. Such guidance may affect how courts choose to approach this since they will see that HUD is open to this approach and is not pushing for a "rush to judgment."

> Recommendation: In the termination context, HUD should issue guidance advising PHAs to use their discretion to stay Section 8 termination hearings when criminal proceedings are still pending. In the eviction context, although HUD does not have jurisdiction over such housing courts, HUD may issue guidance to PHAs and owners to encourage them to exercise their discretion in a way that pauses the eviction proceeding pending the final disposition of the criminal case and in a manner that is consistent with their duty to AFFH.

VI. HUD should address the problem of third-party property managers that apply rules inconsistent with PHA rules, which frustrates progress on policies at the intersection of housing and the criminal legal system.

A persistent problem that cuts across the admissions, termination, and evictions context is the inconsistent application of PHA policy by third-party property management companies. This inconsistency can seriously undercut progress that HUD makes in reforming its criminal records policies. The Housing Authority of New Orleans, for example, has long been a shining example of a reasonable criminal records screening policy that prioritizes housing families. The third-party property management companies that manage HANO housing, however, do not adopt HANO's policies, depriving people of the benefit of HANO's inclusive screening policies and undercutting hard-fought wins from New Orleans' low-income tenants. A tenant's right should not fluctuate so dramatically depending on which entity manages the property, especially within the same jurisdiction. To achieve consistency in tenants' rights, HUD should take steps to ensure that third-party management companies adopt the same policies as the public housing authorities whose properties are being managed.