



**Federally Assisted Housing
and Previously Incarcerated Individuals**

An Affordable Home on Re-entry

*Federally Assisted Housing
and Previously Incarcerated
Individuals*

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ACKNOWLEDGEMENTS

NHLP's Senior Staff Attorney, Catherine Bishop, first authored this guide in 2010, when the barriers facing people with criminal records began to attract overdue attention of housing and social justice advocates. While some communities are starting to address this issue, finding a decent and affordable home remains a significant problem. NHLP Supervising Attorney, Deborah Thrope, was the lead attorney and editor of this updated edition that captures the latest developments and policy changes aimed at increasing access to housing for people with criminal records and their families.

The new guide could not have been accomplished without support from fellow NHLP staff members Lisa Sitkin, Eric Dunn, Jessie Cassella, Bridgett Simmons, Kara Brodfuehrer and Wendy Mahoney. NHLP is also grateful for the assistance of Marie Claire Tran-Leung from the National Sargent Shriver Center on Poverty Law for her thoughtful contributions.

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Until this guide, there was no comprehensive resource available to assist advocates who are representing individuals with criminal records in their efforts to obtain housing. We hope that advocates use this as a tool to expand housing opportunities for people with a criminal record, as "home" is where so many positive beginnings start.

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INTRODUCTION

Since 1975, federal regulations have instructed Public Housing Authorities (PHAs) to consider the criminal history of applicants for public housing as it relates to physical violence to persons or property or other criminal acts that would affect the health, safety or welfare of other tenants.¹ As a result, most PHAs have adopted broad screening policies that call for the rejection of applicants with unfavorable criminal histories.

In 1996, HUD issued its “One Strike and You’re Out” policy.² As the title of the policy suggests, its primary focus was on evicting tenants who were linked to criminal activity. However, it also had an admissions component, which directed PHAs to screen applicants for criminal activity, including crimes of violence and activity that would lead one to conclude that the applicant could pose a threat to the life, health or safety of other residents or to their peaceful enjoyment of the property.³ The HUD directive also urged PHAs to evaluate each applicant on a case-by-case basis by weighing the seriousness of the criminal activity, its recentness and whether the applicant had been rehabilitated. Unfortunately, many PHAs did not focus on the individualized assessment aspect of the policy.

In addition, Congress began to extend laws regarding the impact of criminal activity on admission and eviction to other federally subsidized housing programs and to the tenant-based Section 8 program. HUD simultaneously pushed aggressively for implementation of policies that would deny admission of individuals with criminal records, despite the fact that the federal statutes are limited in scope and tailored to specific criminal activity. The Department of Agriculture also began to take steps that resulted in the exclusion of individuals with criminal records

from Rural Development rental housing.

The federal government supported one-strike and other policies that restrict housing opportunities for people exiting jails and prisons for many years, exacerbating homelessness and contributing to high recidivism rates. The Obama administration, however, shifted the executive branch’s position on housing and reentry to focus more on second chances. Under Obama, HUD began to emphasize the importance of housing providers’ use of their discretion to adopt policies that would allow formerly incarcerated individuals to obtain housing upon reentry. In 2011 letters to PHA Executive Directors and HUD Multifamily owners and agents, HUD encouraged PHAs to allow ex-offenders to rejoin their families in the Public Housing or Housing Choice Voucher programs and reminded PHAs of their broad discretion in devising admissions and termination policies.⁴

In 2015 and 2016, HUD issued two important notices about the use of criminal history records in housing-related decisions. The first notice reminds owners and PHAs that HUD does not require the adoption of “one-strike” policies and warns housing providers against the use of arrest records alone as the basis for an adverse decision.⁵ The second notice provides guidance from HUD’s Office of General Counsel and applies a fair housing analysis to the use of criminal records in housing decisions, concluding that overly restrictive bans on people with criminal histories may violate fair housing laws.⁶ The future of Obama-era directives and policies like these is uncertain at present, but whatever direction federal policies on reentry and housing take in coming years, advocacy in this arena will continue to be essential.

Accessing federally assisted housing is important because it is housing that is affordable to the lowest

¹40 Fed. Reg. 33,446 (Aug. 8, 1975), *codified at* 24 C.F.R. § 960.203(c)(2) and (3) (2003).

²“One Strike and You’re Out” Screening and Eviction Guidelines for Public Housing Authorities (PHAs), PIH 96-16 (HA) (Apr. 12, 1996); *see also* Occupancy Provisions of the Housing Opportunity Program Extension Act of 1996, PIH 96-27 (May 13, 1996), extended by PIH 97-27 (May 20, 1997); 62 Fed. Reg. 15,346-49 (Mar. 31, 1997) §§ 982.201 and 982.551-53 and 62 Fed. Reg. 25,728-38 (May 9, 1997), §§ 960.201-960.210 (all of which sought to implement 1996 statutory changes with respect to criminal activity).

³PIH 96-16, *supra* note 2, pp. 5-6.

⁴Letter from Shaun Donovan, HUD Secretary, to PHA Executive Directors (June 17, 2011); Letter from Shaun Donovan, HUD Secretary, and Carol J. Galante, Acting Asst. Sec. for Hous., to Owners and Agents (undated).

⁵Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, H 2015-10 and PIH 2015-19 (Nov. 2, 2015).

⁶HUD, 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 (Apr. 2016).

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income families. For many of the federal housing programs referenced in this Guide, tenants pay no more than 30 percent of income for rent. Many individuals who leave prison are low- or very low-income and are therefore income-eligible for this housing. Yet a number of reports about the growing population of individuals who have been released from incarceration find that they frequently do not have access to housing in general and federally assisted housing in particular.⁷ Studies have also shown that individuals released from prison who lack permanent housing are much more likely to commit crimes again and be reincarcerated. This destructive cycle destabilizes families and communities.

This Guide is designed for advocates working with or representing individuals with criminal records who are seeking access to federally assisted housing programs. The Guide describes the current state of the law with respect to the admission process in general and as it relates specifically to individuals with criminal records; the barriers these individuals face as they seek housing; and the process for challenging a denial. It also offers guidance on how advocates working with or representing individuals with criminal records can have an impact on local policies and practices.

⁷See, e.g., Marie Claire Tran-Leung, When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing (Feb 2015); Corinne Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545. (This report uses the term “public housing” to encompass both conventional public housing and the Section 8 voucher program. This Guide refers to each program separately.); CATERINA GOUVIS ROMAN & JEREMY TRAVIS, URBAN INSTITUTE, TAKING STOCK, HOUSING, HOMELESSNESS AND PRISONER RE-ENTRY (2004).

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What follows is a brief description of each chapter and the appendices.

Chapter One places the issues addressed in the Guide in context and provides a brief overview of the scope of the problem.

Chapter Two describes the federal statutes and regulations governing admission and continued occupancy for individuals with criminal records who have been incarcerated. New to this edition are sections that discuss the limitations on the authority to deny an applicant with a criminal record based on Fair Housing Laws and the Violence Against Women Act.

Chapter Three addresses housing providers' access to and use of an individual's criminal record and drug rehabilitation information. It also discusses the related issue of expungement of criminal records. New to this edition is a more in-depth discussion of consumer protections available to housing applicants and a detailed look at private criminal history reports.

Chapter Four describes mitigation and reasonable accommodation requirements and how an applicant with a criminal record can use these tools to gain admission to a housing program.

Chapter Five describes the process for an applicant with a criminal record who has been denied housing to challenge the denial.

Chapter Six provides a roadmap for advocates seeking to change or improve local PHA admission policies for public housing and the Section 8 voucher program in the context of the PHA plan process. It also discusses how to use other required planning processes, such as the Consolidated Plan, the Qualified Allocation Plan, the Continuum of Care plan, Olmstead plans, and the new Assessment of Fair Housing to change or improve admission policies or increase the number of units or housing subsidies available to individuals with criminal records and their families. This chapter also includes brief descriptions of local ordinances designed to prevent discrimination against individuals with criminal records.

Chapter Seven addresses the issues individuals with criminal records who are participants in the voucher program encounter when they seek to move to the jurisdiction of different public housing agency. This section has been updated to reflect the new portability rules and guidelines issued by HUD.

Chapter Eight addresses the issues that an individual with a criminal record may encounter when seeking to return to federally assisted housing after a brief incarceration or to rejoin family members who currently receive federal housing assistance.

Appendix One is a resource that describes the

characteristics of the various federally assisted housing programs, including tips on how to locate such housing in local communities.

Appendix Two describes the basic eligibility requirements for the federally assisted housing programs.

The National Housing Law Project (NHLPP) has published and regularly updates a comprehensive manual on the rights of applicants for and tenants in federally assisted housing. Information on purchasing the manual and its current supplements, titled *HUD Housing Programs: Tenants' Rights*, is available on NHLPP's website: www.nhlp.org.

AN AFFORDABLE HOME ON REENTRY

CHAPTER 1

THE PROBLEM: INCREASING INCARCERATION RATES AND A SERIOUS SHORTAGE OF AFFORDABLE HOUSING

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1.1 Characteristics of the United States Prison Population

The United States prison population has grown by 500% in the last 40 years⁸ and constitutes almost 25% of the world's prison population.⁹ Approximately 641,000 people leave prison each year.¹⁰ In 2014, 1 in 52 adults in the United States was on probation or parole.¹¹ Estimates of the number of people likely to be excluded from federally-subsidized housing due to an arrest or criminal record are staggering.¹²

Low-income people are overrepresented among those arrested or incarcerated. In 2002, 14% of people in jail reported being homeless or living in temporary shelter immediately before incarceration. A 1996 study found that a stunning 49% of homeless adults had spent five or more days in a city or county jail, while another 22% had spent time in military, state, or federal prisons.¹³ A 2002 study found that an

estimated 29% of people jailed were not employed in the month before their arrest, and only 57.4% were employed full-time.¹⁴

People of color and ethnic minorities are also incarcerated at disproportionate rates. These groups represent 60% of the prison population.¹⁵ At the end of 2015, the Bureau of Justice Statistics reported that out of all state and federal inmates with a sentence of more than one year, approximately 35% were African American, 21% were Latino, and 33% were white.¹⁶ In the 2016 Census, African Americans accounted for 13.3% of the total population, Latinos, 17.8%, and Whites, 76.9%.¹⁷

Women are the fastest growing segment of the prison population. Between 1980 and 2014, the number of women imprisoned increased by an astounding 700%.¹⁸ This increase coincided with the rapid increase in the number of inmates imprisoned for drug offenses, which rose from 40,900 in 1980 to

⁸The Sentencing Project, *Fact sheet: Trends in U.S. Corrections* (June 2017), available at:

<http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>

⁹Roy Walmsley, *World Prison Population List*, Institute for Criminal Policy Research (2016), available at:

http://prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf

¹⁰U.S. Department of Justice, Bureau of Justice Statistics, *Total Sentenced Prisoners Released From State or Federal Jurisdiction Admissions and Releases of Sentences Prisoners Under the Jurisdiction of State or Federal Correctional Authorities* (2015), available at: <https://www.bjs.gov/content/pub/pdf/p15.pdf>

¹¹U.S. Department of Justice, Bureau of Statistics, *Probation and Parole in the United States* (2014), available at:

<https://www.bjs.gov/content/pub/pdf/ppus14.pdf>

¹²U.S. Department of Justice, Bureau of Justice Statistics, *Prisoner Series 1980 to 2015*, available at:

<https://www.bjs.gov/index.cfm?ty=pbse&sid=40>

¹³Urban Institute, *Findings on the National Survey of Homeless Assistance Providers* (1999) available at:

<https://www.urban.org/sites/default/files/publication/66286/310291-Homelessness-Programs-and-the-People-They-Serve-Findings-of-the-National-Survey-of-Homeless-Assistance-Providers-and-Clients.PDF>

¹⁴U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates* (2004) available at:

<https://www.bjs.gov/content/pub/pdf/pji02.pdf>

¹⁵U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2013*, available at: <https://www.bjs.gov/content/pub/pdf/p13.pdf>

¹⁶U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2015*, available at: <https://www.bjs.gov/content/pub/pdf/p15.pdf>

¹⁷U.S. Census Bureau, *Quick Facts, Population Estimates*, (2016) available at:

<https://www.census.gov/quickfacts/fact/table/US/PST045216>

¹⁸U.S. Department of Justice, Bureau of Justice Statistics, *Prisoner Series 1980 to 2015*, available at:

<https://www.bjs.gov/index.cfm?ty=pbse&sid=40>

469,545 in 2015.¹⁹ In 2015, an estimated 48% of federal inmates and 15.7% of state inmates were serving sentences for drug offenses. That same year, 25% of all women in prison were incarcerated for drug related offenses.²⁰

1.2 The (Un)Availability of Affordable Housing

People released from incarceration face a monumental challenge when trying to find affordable housing. They are competing for housing with the 37 million other Americans who live at or below the federal poverty level.²¹ Very low-income households (those making 50% of area median income or less) already face extremely long odds, with only 65 affordable units available for every 100 very low-income renter households.²² The situation is even worse for extremely low-income households (those making 30% of area median income or less) for whom there are only 39 units available for every 100 households.²³ In 2015 alone, 7.72 million tenants had what HUD termed “worst case needs,” meaning they had very low incomes, lacked housing assistance, and had severe rent burdens, severely inadequate housing or both.²⁴

Federally subsidized affordable units are a subset of all affordable housing units. Currently, there are fewer than 1 million public housing units, and about 2.2 million families utilize Section 8 Housing Choice Vouchers. HUD assists approximately 1.4 million households in its other programs.²⁵ There are also about 2.3 million Low-Income Housing Tax Credit units, and the U.S. Department of Agriculture

administers rental assistance to 282,000 rural households.²⁶

Access to federally assisted housing is limited by overly strict admissions policies, many of which specifically target and reduce options for people with criminal records. Stable, affordable housing is an urgent need for people leaving prison and is an essential factor in reducing recidivism.²⁷ The remaining chapters of this Guide discuss policies regarding admission to federally assisted housing, how they may be changed, and advocacy strategies for advocates assisting formerly incarcerated people.

¹⁹The Sentencing Project, *Fact sheet: Trends in U.S. Corrections* (June 2017), available at: <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>

²⁰U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2015*, available at: <https://www.bjs.gov/content/pub/pdf/p15.pdf>

²¹U.S. Census Bureau, *Income and Poverty in the United States 2015*, available at: <https://www.census.gov/library/publications/2016/demo/p60-256.html>

²²*Id.* at 24

²³*Id.* at 24

²⁴HUD-Worst Case Housing Needs 2015: A Report to Congress available at: <https://www.huduser.gov/portal/Publications/pdf/WorstCaseNeeds2015.pdf>

²⁵Alicia Mazzara, *Federal Rental Assistance Provides Affordable Homes for Vulnerable People in All Types of Communities* at App. 3: State Data by Community Type, Center on Budget and Policy Priorities, available at: <https://www.cbpp.org/research/housing/federal-rental-assistance-provides-affordable-homes-for-vulnerable-people-in-all#appendix3>

²⁶Alicia Mazzara, *Federal Rental Assistance Provides Affordable Homes for Vulnerable People in All Types of Communities* at App. 3: State Data by Community Type, Center on Budget and Policy Priorities, available at:

<https://www.cbpp.org/research/housing/federal-rental-assistance-provides-affordable-homes-for-vulnerable-people-in-all#appendix3>

²⁷Urban Institute, *Examining Housing as a Pathway to a Successful Reentry*, available at:

<http://www.urban.org/sites/default/files/publication/24206/412957-Examining-Housing-as-a-Pathway-to-Successful-Reentry-A-Demonstration-Design-Process.PDF>; Faith E. Lutze, Jeffrey W. Rosky, Zachary K. Hamilton, Homelessness and Reentry-A Multisite Outcome Evaluation of Washington State’s Reentry Housing Program for High Risk Offenders (2013) available at: <http://journals.sagepub.com/doi/abs/10.1177/0093854813510164>

CHAPTER 2

ELIGIBILITY FOR FEDERALLY ASSISTED HOUSING FOR INDIVIDUALS WHO HAVE BEEN RELEASED FROM INCARCERATION

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2.1 Introduction

The following discussion focuses on the eligibility of individuals who have been released from incarceration or have past criminal convictions. It does not address the rights of residents and program participants who are threatened with eviction or termination from a federal housing program because of allegations of current criminal activity or criminal activity that occurred while they were residing or participating in a housing program.²⁸

²⁸For information about how to represent such individuals, see Lawrence R. McDonough & Mac McCreight, *Wait A Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REV. 55 (May/June 2007). See also National

The following rules generally apply to federally assisted housing.²⁹ They should be read carefully as

Housing Law Project, HUD HOUSING PROGRAMS TENANTS' RIGHTS Ch 13.

²⁹The term "federally assisted housing" is defined in the statute and regulations relating to criminal activity and access to criminal records to include public housing, the voucher program, project-based Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 514 and Section 515. See 42 U.S.C.A. § 13664 (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07) and 24 C.F.R. § 5.100 (2017). The regulations implementing the statute are codified in different sections of the Code of Federal Regulations (C.F.R.). For public housing the regulations are found in 24 C.F.R. part 960, for the voucher program they are found in 24 C.F.R. part 982 (see

the rules vary from program to program.

Federal law does not impose any program-specific rules for screening applicants for Low Income Housing Tax Credit (LIHTC) properties or for most of the smaller HUD programs, such as Housing Opportunities for People with AIDS (HOPWA), Shelter Plus Care (S+C) or Supportive Housing Program (SHP).³⁰

Exhibit 3 to this Chapter is a chart showing how particular types of criminal activity may affect admissions eligibility under the different federal programs.

2.2 Criminal History for Selected Crimes

Pursuant to federal statutes and regulations, public housing agencies (PHAs) and owners of some federally assisted housing must reject applicants in three specified categories: those with convictions for methamphetamine production, lifetime registered sex offenders, and those with previous evictions for drug-related criminal activity. In addition, PHAs and owners have broad discretion to deny or accept applicants who have engaged in other types of criminal activity, within some limits. Owners of Rural Development (RD) housing financed under Sections 515 and 514 or 516 or of LIHTC properties are not required to bar any applicant due to criminal history.³¹

2.2.1 Conviction for Methamphetamine Production

A PHA must permanently deny admission to public housing, the voucher program, and the Section 8 moderate rehabilitation program to a household if any

especially § 982.552 and 982.553), for Section 8 Moderate Rehabilitation they are found at 24 C.F.R. part 882 (12 especially § 882.518) and for all the other HUD-assisted housing they are found at 24 C.F.R. part 5, subpart I. The regulations for the Rural Development programs, Sections 515, 514 and 516, are found, respectively, at 7 C.F.R. §§ 3560.154(j), 3560.551, 3560.601. These regulations do not bar admission of any class of applicants due to criminal activity.

³⁰Although the rules for programs such as LIHTC and HOPWA do not address criminal records screening, other federal laws may limit a housing provider's ability to screen applicants with criminal records, such as the Fair Housing Act and the Violence Against Women Act, as explained in more detail at the end of this chapter. See Appendix 1 for a brief description of the various federally assisted housing programs.

³¹“[Owners] may deny admission for criminal activity or alcohol abuse by household members in accordance with the provisions of 24 C.F.R. § 5.854 [evicted from federally assisted housing for drug-related criminal activity within three years], § 5.855 [engaged in criminal activity within a reasonable time], § 5.856 [registered lifetime sex offenders], and § 5.857 [abuse of alcohol].” 7 C.F.R. § 3560.154(j) (2017) (emphasis added).

member of the applicant household has ever been convicted of criminal activity for the manufacture or production of methamphetamine on the premises of any “federally assisted housing.”³² This lifetime ban is serious for those individuals to whom it applies, but in practice the ban applies to a relatively small number of potential applicants since it is only triggered when a conviction for the manufacture or production of methamphetamine was based on activity that took place on the premises of “federally assisted housing.”

Moreover, this ban applies only to applicants to the three housing programs that PHAs administer. It is not applicable to other federally assisted housing. The exclusion of other federally assisted developments from the rule highlights the arbitrary and political nature of the ban.³³ On the practical side, it relieves owners other than PHAs from the responsibility of seeking out the information. It also gives applicants with such histories greater latitude to object to the imposition of a lifetime ban and present mitigating circumstances when applying for admission. If an owner who is not required by statute to impose a lifetime ban seeks to impose one, an applicant may object to the policy as contrary to congressional intent as it goes beyond the statutory limits.³⁴ If an owner rejects such an applicant, the applicant should challenge the lifetime ban and present information regarding mitigating circumstances or rehabilitation. Mitigating circumstances might include the fact that the applicant was on the premises but did not manufacture the drugs, or was involved in the manufacturing but was a victim of domestic violence.³⁵ It may also include the fact that there has been a significant lapse of time between the offense and the application for admission with no other intervening criminal activity.

2.2.2 Lifetime Registered Sex Offender

PHAs and owners of most federally assisted housing

³²42 U.S.C.A. § 1437n(f)(1) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07); 24 C.F.R. §§ 882.518(a)(1)(ii) (Section 8 moderate rehabilitation), 960.204(a)(3) (public housing), 982.553(a)(1)(ii)(c) (Section 8 voucher) (2017).

³³See Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. Tol. L. Rev. 545, 583-85 (2005) (noting that “in establishing the exclusionary policies . . . Congress was far more interested in sending a message of disapproval about specific crimes than in establishing reasonable protections for tenant safety”).

³⁴See footnote 10, *infra*, discussing federal preemption.

³⁵See § 2.3.5, *infra*, discussing protections for survivors of domestic violence.

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must deny admission to a family if any member of the household is subject to a lifetime registration requirement under a state sex offender registration program.³⁶ Owners of LIHTC and RD housing are not required to deny admission to a lifetime registered sex offender.³⁷ For those programs to which the lifetime ban applies, an applicant must meet all the elements of the definition to be permanently excluded. For example, because not all registered sex offenders are subject to a *lifetime* registration requirement, such individuals may not be subject to a permanent exclusion. Advocates should check state and local laws regarding lifetime registration requirements.

Some PHAs or owners either misinterpret this rule or apply their own criteria, effectively banning any convicted sex offender regardless of when convicted, the specific offense, or how long the person is required to be registered as an offender. Such practices should be challenged. Only those applicants who meet the statutory definition should be automatically denied for life.³⁸ For all other applicants with prior sex offenses, the PHA should analyze the time, nature and circumstances of the offense, as would be appropriate for any other criminal activity.³⁹ Applicants should

also be permitted to establish mitigating circumstances and/or rehabilitation. For example, non-lifetime registered sex offenders should be able to establish that the conduct was not violent, did not involve children, happened a long time ago, and that there have been no subsequent problems.⁴⁰

Many housing providers simply search the internet for evidence of prior sex offenses, which in many cases leads to the use of inaccurate records. The rules regarding access to lifetime sex offender registries and the opportunity to dispute the information are similar to those discussed in Chapter 3 regarding access to criminal conviction records.⁴¹

One applicant denied admission based on registered sex offender status unsuccessfully challenged the exclusion statute on several grounds. The federal district court found that sex offenders are not a suspect class for purposes of equal protection because the restriction is rationally related to a legitimate government purpose and that, in light of the regulatory and non-punitive nature of 42 U.S.C. § 13663, the restriction does not violate the Ex Post Facto Clause of the U.S. Constitution.⁴²

A registered lifetime sex offender who applies for public housing, the voucher program, project-based Section 8 or other federally assisted housing is faced with the choice of disclosing and being barred from the housing for life or not disclosing but being denied when discovered. An applicant who does not initially disclose the information may be evicted or terminated (or even prosecuted) for fraud for submitting false information.

Absent fraud, however, courts are split as to whether a PHA can terminate a lifetime registered sex offender who was previously admitted into the program. Whereas the federal statute clearly requires a lifetime ban on *admission* to federally assisted housing,⁴³ the

³⁶42 U.S.C.A. § 13663(a) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44), approved 7-5-07); 24 C.F.R. §§ 5.100 (definition of federally assisted housing), 5.856 (federally assisted housing in general), 882.518(a)(2) (Section 8 moderate rehabilitation), 960.204(a)(4) (public housing) and 982.553(a)(2)(i) (voucher) (2017); Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule, H 2002-22 (Oct. 29, 2002), ¶ VI.

³⁷7 C.F.R. § 3560.154(j) (2017) (RD housing). There are no regulations for LIHTC properties mandating the denial of admission of a registered sex offender.

³⁸Perhaps, a successful argument could be made that the federal statute barring lifetime registered sex offenders preempts an expansion of that bar to other sex offenders. There are three general types of situations in which preemption may be established. One of the situations is that preemption may be inferred where the scheme of the federal legislation is so comprehensive that it creates the inference that Congress “left no room” for local regulation in that area. *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 281 (1987). Applying that standard, the area in question is eligibility for federally assisted housing and Congress has fully defined eligibility for federally assisted housing. (See brief discussion of eligibility in Appendix 2). Imposing an absolute life time bar when none is required is determining eligibility in an area that Congress has not left any room for local regulation. Success on such a claim may be complicated as the party seeking preemption has the burden of proof and the presumption is against preemption. *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992).

³⁹See *Ouellette v. Housing Auth. of Old Town*, No. AP-03-17, 2004 WL 842412 (Me. Super. Ct. Mar. 11, 2004) (plaintiff challenging PHA policy denying housing to all applicants who had committed a violent crime admitted to being convicted as sex offender) and

the discussion in Chapter 4 regarding mitigating circumstances.

⁴⁰Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. REV. 545, 579 (2005) (article also lists reasons why an individual might be on a lifetime registration list, including consensual relationship with partners who are a few years younger, indecent exposure or lewd displays often related to substance abuse, mental health diagnosis, homelessness, and women who are convicted of conspiracy to commit sexual abuse for failing to protect a child from such abuse); See also HOUSING RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US (2007), available at: <http://hrw.org/reports/2007/us0907/>.

⁴¹24 C.F.R. §§ 5.903(f) (criminal records) and 5.905(b) and (d) (sex offender records) (2017).

⁴²*Cunningham v. Parkersburg Hous. Auth.*, Civil Action No. 6:05-cv-00940, 2007 WL 712392 (S.D.W. Va. Mar. 6, 2007).

⁴³42 U.S.C. § 13663(a), “An owner of federally assisted housing

law does not address the *termination* of program participants who are lifetime registered sex offenders (which could occur if a lifetime registered sex offender was a resident prior to the law's enactment, for example). While some courts follow a plain language interpretation of the statute and treat applicants and participants differently with respect to sex offender status, others interpret the statute as a strong statement of public policy that urges PHAs and owners to deny admission and terminate assistance for all lifetime registered sex offenders.⁴⁴ To complicate matters, HUD's guidance has changed through the years, although more recent notices take a "zero tolerance" approach to housing lifetime registered sex offenders, even when they were previously admitted by a housing provider.⁴⁵ Nonetheless, HUD recommends that federally assisted housing providers terminate and evict on grounds other than the federal statute that bars admission if a lifetime registered sex offender has been

shall prohibit admission to such housing for any . . . individual who is subject to a lifetime registration requirement under a State sex offender registration program."

⁴⁴Miller v. McCormick, 605 F. Supp. 2d 296 (D. Me 2009) (court compared several provisions of statute and determined that federal law and regulations prohibits termination because of sex offender status alone); Perkins-Bey v. Hous. Auth., No. 4:11CV310 JCH, 2011 U.S. Dist. LEXIS 25438 (E.D. Mo. Mar. 14, 2011) (tenant required to register after tenancy commenced so housing authority has no grounds to evict for status as a registrant); Spring Valley Hous. Auth. v. [redacted] (Justice Court County of Rockland N. Y.([Redacted])) (court declined to evict tenant of eight years who had truthfully responded in application process and who was a sex offender) (copy available in Exhibit 1 to this Chapter); Albany Hous. Auth. v. [redacted], No. AHA 06 [redacted] (Albany N.Y. City Court, Dec. 11, 2006) (court relied upon HUD Notice H 2002-22 and declined to evict the tenant) (copy available in Exhibit 2 to this chapter); Compare Zimbelman v. S. Nev. Reg'., Hous. Auth., 111 F Supp. 3d 1148, 1155 (D. Nev. 2015) (despite that PHA mistakenly admit sex offender applicant, PHA has grounds to terminate for status as a lifetime registered sex offender); Archdiocesan Hous. Auth. v. Demmings, 108 Wash. App. 1035, 2001 WL 1229809 (unpublished) (Wash. App. Oct. 15, 2001) (upholding eviction of tenant who reported felon status at admission because court found the PHA later properly adopted rule excluding registered sex offenders, that rule was reasonable, and tenant had opportunity to dispute the fact).

⁴⁵State Registered Lifetime Sex Offenders in Federally Assisted Housing, HUD Notice PIH 2012-28/H 2012-11; State Lifetime Sex Offender Registration, HUD Notice PIH 2009-35(HA)/H 2009-11 (both notices take the position that a PHA or owner must pursue eviction or termination of assistance for lifetime registered sex offender participants who were erroneously admitted); Compare Screening and Eviction for Drug Abuse and Other Criminal Activity – Final Rule, HUD Notice H 2002-22; Opinion Letter from HUD regarding the applicability of 42 U.S.C. Sec. 13663 to Program Participants (2007) (interpreting the statute to apply to applicants only).

admitted to the housing program.⁴⁶

The different treatment of registered sex offenders in the admissions as opposed to eviction context has in many cases been attributed to the language of the statute. However, other factors often play a role including the perceived property interest of a participant versus an applicant and that a tenant but not the applicant may demonstrate more definitely that he or she has been a good tenant for a substantial period of time.

2.2.3 Previously Evicted for Drug-Related Activity

For certain programs, there is a mandatory three-year ban on admission if any member of the applicant household has been evicted from "federally assisted housing" for drug-related criminal activity.⁴⁷ This ban relates to applicants for public housing, the voucher program, project-based Section 8, and other federally assisted housing, excluding LIHTC and RD housing.⁴⁸ The rule is not applicable to applicants with evictions for drug-related activity from non-federally assisted housing.

In creating the ban, Congress recognized that an individual should be given another chance and an opportunity to demonstrate rehabilitation or changed circumstances. Thus, the statute provides that a PHA or owner may admit the household if the previously evicted household member who engaged in drug-related activity successfully completed an approved, supervised drug rehabilitation program, or the circumstances have changed.⁴⁹ Changed circumstances include "for example, the criminal household member

⁴⁶Id.

⁴⁷42 U.S.C.A. § 13661(a) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07).

⁴⁸24 C.F.R. §§ 5.850(c) (excludes rural development housing), 5.854(a) (federally assisted housing in general), 882.518(a)(1)(I) (Section 8 moderate rehabilitation), 960.204(a)(1) (public housing), 982.553(a)(1)(i) (voucher) (2017); Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule, H 2002-22 (Oct. 29, 2002) ¶ VI (HUD Notice applicable to HUD-assisted project-based housing, excluding Section 8 moderate rehabilitation housing and project-based vouchers or certificates). The rule is also not applicable to housing assisted with S+C, SHP or HOPWA funding.

⁴⁹42 U.S.C.A. § 13661(a) (West, WESTLAW Current through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07); 24 C.F.R. § 5.854(a)(2) (2017). The rehabilitation should not be limited to supervised rehabilitation programs but also ought to recognize self-help programs such as Alcoholics Anonymous. See, e.g., Rules & Regulations, Dep't of Hous. & Urban Dev., 66 Fed. Reg. 28,776, 28,785 (May 24, 2001) (codified at 24 C.F.R. § 5.852(c)(1)).

has died or is imprisoned.”⁵⁰ Because the rule includes examples rather than an exhaustive list, there may be other situations that constitute changed circumstances, such as the fact that the applicant has had no recent contact with and does not know the whereabouts of the household member who engaged in the criminal activity.

Although Congress set the ban at three years, HUD regulations authorize PHAs and owners to extend the ban for a longer period of time.⁵¹ Allowing an extension of the three-year ban may not be an appropriate interpretation of the statute, but to date there are no reported cases on this issue. It can be argued that any extension is not authorized because of the statute’s specificity and Congress’ recognition that an applicant’s efforts at rehabilitation or changed circumstances could reduce the three-year period. An applicant who was involved in a less serious drug-related crime, such as mere possession, or who has been rehabilitated should not be denied admission due to an extended ban. Such an applicant may have good grounds to challenge any extension of the ban beyond the statutory three-year period.⁵²

2.3 Policies Relating to Other Criminal History

Even if a particular offense or event does not constitute a statutory trigger for a ban on admission, PHAs and owners do have discretion to screen applicants for other types of criminal history. Any policies regarding admission and screening must be in writing and available to applicants.⁵³

As noted above, for the major housing programs, federal laws require the rejection of an applicant with a criminal record in certain limited situations. For the vast majority of situations, the rejection of an applicant with a criminal record is within the discretion of the

PHA or owner. HUD has encouraged PHAs and other federally subsidized housing providers to exercise this discretion in favor of “allowing ex-offenders to rejoin their families in the Public Housing or Housing Choice Voucher programs, when appropriate” and “helping [them] gain access to one of the most fundamental building blocks of a stable life – a place to live.”⁵⁴

Importantly, Congress has placed some restrictions on the discretion to deny housing to an applicant based on criminal history.

2.3.1 Limitations on the Authority to Deny an Applicant with a Criminal Record

Congress determined that a PHA or owner may reject an applicant⁵⁵ for:

- drug-related criminal activity,⁵⁶
- violent criminal activity,⁵⁷
- other criminal activity that would threaten the health, safety or right to peaceful enjoyment of the premises by other residents, or
- other criminal activity that would threaten the health or safety of the owner or local housing agency staff or contractors.

HUD notes that there is “a wide variety of other crimes that cannot be claimed to adversely affect the health, safety, or welfare of the PHA’s residents.”⁵⁸ Advocates, therefore, should be prepared to push back against PHAs and project owners who attempt to justify the over-inclusion of criminal activity based on attenuated health and safety concerns. How “other criminal activity” has been interpreted by PHAs and the courts is discussed in more detail below.

⁵⁰*Id.*

⁵¹24 C.F.R. §§ 5.852(d) (federally assisted housing), 960.203(c)(3)(ii), 966.4(1)(5)(vii)(E) (public housing) (2017). HUD apparently believes that the statute sets a floor of three years, and that PHAs and owners are not violating the statute if they expand the time period. The HUD explanation in the regulations is that “[s]ince the intent of the statute was to strengthen protections against admitting persons whose presence in assisted housing might be deleterious, HUD does not interpret this new provision as a constraint on the screening authority that owners and PHAs already had.” Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule, 66 Fed. Reg. 28,776, 28,779 (May 24, 2001).

⁵²See footnote 10, *supra*, (discussion regarding preemption).

⁵³See Appendix 2 (discussion regarding written admission policies).

⁵⁴Letter from Shaun Donovan, HUD Secretary, to PHA Executive Directors, at 1-2 (June 17, 2011) (Companion Website) (also noting the specific restrictions on PHAs regarding admissions and occupancy); Letter from Shaun Donovan, HUD Secretary, and Carol J. Galante, Acting Asst. Sec. for Hous., to Owners and Agents (undated) (Companion Website).

⁵⁵42 U.S.C.A. § 13661(c) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07); 24 C.F.R. §§ 5.855(a), 882.518(b), 982.553(a)(2)(ii) (2017).

⁵⁶See 42 U.S.C.A. § 1437a(b)(9) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07) (definition of drug-related criminal activity); 24 C.F.R. § 5.100 (2017).

⁵⁷The regulations define “violent criminal activity” as “any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage.” 24 C.F.R. § 5.100 (2017).

⁵⁸HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, § 7.7, p. 96 (June 2003).

2.3.2 Limitation Regarding the Length of the Denial

In authorizing screening for criminal activity, Congress did not intend that the authorization to exclude individuals with criminal records be expanded unjustifiably. Thus, it limited the time frame that an applicant could be rejected for prior criminal activity. It provided that in order to reject the applicant, the PHA or owner must determine that the criminal activity is current or occurred within a “reasonable period” of time prior to the admission decision.⁵⁹ Congress also specifically noted that applicants who have been denied admission due to criminal activity may reapply and be found eligible if they can demonstrate that they have not engaged in the criminal activity for a “reasonable period” of time.⁶⁰

The term “reasonable period” of time is not defined in the statute or regulations, but Congress repeatedly emphasized its importance and established some guideposts to define it. It determined that only certain types of criminal activity (sex offenses that result in lifetime registration and certain criminal activities related to methamphetamine production) warrant a permanent bar from federally assisted housing.⁶¹ It also determined that, absent mitigating circumstances, a three-year prohibition is appropriate for certain drug-related criminal activity that resulted in an eviction.⁶²

Similarly, although HUD has not stated definitively what constitutes a “reasonable period” of time, its discussions on this topic indicate a policy preference for a shorter time period. HUD officials have suggested that it is not reasonable to permanently ban applicants for criminal activity other than activity covered by the HUD mandates.⁶³ Furthermore, in describing best practices for PHA screening policies, HUD highlights a policy that considers drug-related criminal activity in the last twelve months and violent

criminal activity in the last twenty-four months.⁶⁴ HUD guidance also suggests that “five years may be reasonable for serious offenses” and notes that PHAs and owners may want to differentiate what is a reasonable time period for different categories of criminal activity.⁶⁵ In addition, HUD provides the example that when an applicant has a prior eviction for manufacturing or dealing drugs, a PHA may consider a five-year ban as an adequate penalty.⁶⁶

Regardless of the length of time that a housing provider chooses, the “reasonable period” of time should be defined. Indeed, HUD expects owners of HUD-subsidized multifamily properties to specify the applicable “reasonable period” in their tenant selection plans.⁶⁷ For public housing and vouchers, the specific tenant screening criteria should appear in the Admissions and Continued Occupancy Plan (ACOP) and Administrative Plan, respectively.

In spite of these requirements, many PHA screening policies lack the required “reasonable period” of time definition. Some written admissions policies omit time restrictions altogether, thus authorizing open-ended inquiries that can penalize applicants for stale criminal records.⁶⁸ Other policies include time limits that are overly long and likely unreasonable.⁶⁹ Extreme examples of 99- and 200-year lookback periods are clear violations of the “reasonable period” requirement,⁷⁰ but it can be argued that even seven or ten years is unreasonable in light of HUD’s endorsement of a five-year lookback period for serious crimes. The argument will become stronger as more

⁵⁹42 U.S.C.A. § 13661(c) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07). The term “reasonable period” is repeated three times in this section.

⁶⁰42 U.S.C.A. § 13661(c)(2) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07); 24 C.F.R. §§ 5.855(c), 882.518(b)(3) and 982.553(a)(2)(ii)(C) (2017).

⁶¹See discussion of registered lifetime sex offender and denial of admission to individuals convicted of methamphetamine production, *supra*.

⁶²42 U.S.C.A. § 13661(a) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07).

⁶³See Memorandum from Thomas J. Coleman, HUD Region VII, at 5-6 (Feb. 4, 2010) (explaining that instead of denying admission to anyone “who has ever been determined guilty of a violent crime,” a federally subsidized property owner should define a specific “reasonable time” standard”) (emphasis in original).

⁶⁴Guidance for Public Housing Agencies (PHAs) and Owners of Federally assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, H 2015-10 (Nov. 2, 2015); Guidance for Public Housing Agencies (PHAs) and Owners of Federally assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, PIH 2015-19 (Nov. 2, 2015).

⁶⁵Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule, 66 Fed. Reg. 28,776, 28,779 (May 24, 2001).

⁶⁶HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, § 4.6, p. 53 (June 2003). See also 24 C.F.R. § 982.552(c)(1)(ii) (2017) (five-year ban on admission to voucher program for eviction from federally assisted housing).

⁶⁷HUD, Occupancy Requirements of Subsidized Multifamily Housing Programs, Handbook 4350.2 REV-1, 4-20 (June 2007).

⁶⁸MARIE CLAIRE TRAN-LEUNG, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING pp. 11-12 (2015). Policies that impose a minimum (rather than a maximum) number of years for criminal records screening also present the same problem of open-endedness and are likely to be considered unreasonable. *Id.* at 13.

⁶⁹*Id.* at 12-13.

⁷⁰MARIE CLAIRE TRAN-LEUNG, WHEN DISCRETION MEANS DENIAL: THE USE OF CRIMINAL RECORDS TO DENY LOW-INCOME PEOPLE ACCESS TO FEDERALLY SUBSIDIZED HOUSING IN ILLINOIS 12 (2011), <http://povertylaw.org/files/docs/when-discretion-means-denial.pdf>.

PHAs adopt lookback periods in the three to five year range.⁷¹

The term “currently engaged in” is also referenced in the statute in connection with the use of illegal drugs and is defined in the statute and regulations to mean the individual has engaged in “the behavior recently enough to justify a reasonable belief that the individual’s behavior is current.”⁷² HUD guidance instructs PHAs to “spell out what they consider to be ‘recent,’ e.g. past month, past six months, etc.”⁷³ The HUD guidebook for the voucher program provides that a PHA may exclude an individual for possession or use of an illegal drug only if such use or possession occurred within the prior year.⁷⁴ Cases interpreting similar language regarding “current use” brought under fair housing laws are also instructive.⁷⁵

Implicit in the statutory term “reasonable period” of time is the concept that at some point most applicants with aging criminal records should be eligible for the housing and should not be barred by screening criteria. This acknowledgment that most applicants with criminal records should at some point be given the opportunity to demonstrate eligibility through good behavior, rehabilitation or changed circumstances, is consistent with litigation challenging policies that rejected all applicants with any record of past criminal activity⁷⁶ and social science research.⁷⁷ In addition,

there may be equitable claims that the length of a ban is unconscionable, drastic beyond reasonable necessity, or shocks one’s sense of fairness.⁷⁸

2.3.3 Relationship of the Prior Criminal Activity to the Future Tenancy

conviction for sexual assault violated federal regulations). *But see* Talley v. Lane, 13 F.3d 1031 (7th Cir. 1994) (consideration of applicant’s criminal record is not forbidden under either Fair Housing Act or Rehabilitation Act); Collins v. AAA Homebuilders, Inc., 333 S.E.2d 792 (W. Va. 1985) (private landlord could exclude an applicant because of criminal conviction; dissent noted that landlord had a Section 8 New Construction contract and found that absolute bar violated the law) and Collins v. AAA Homebuilders, CA3 85-0767 (S.D.W. Va. Dec. 9, 1985) (Clearinghouse No. 49,351) (complaint filed after state court decision; federal court refused to dismiss after defendants sought removal because of, *inter alia*, due process violation in application process).

⁷¹HUD’s 2016 fair housing guidance on the use of criminal records cites a study that found that, after approximately 7 years, there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those without a criminal record. 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, p. 7 fn. 34 (Apr. 2016) (Companion Website) [hereinafter “HUD OGC Guidance”], (citing Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?*, *Criminology & Public Policy*, Volume 5 Issue 3, pp. 483-504 (August 2006)) available at: [http://www.reentry.net/search/item.100739-Scarlet Letters and Recidivism Does An Old Criminal Record Predict Future R.](http://www.reentry.net/search/item.100739-Scarlet%20Letters%20and%20Recidivism%20Does%20An%20Old%20Criminal%20Record%20Predict%20Future%20Offending%20R.)

This study is one of several criminological studies over the past decade to consider the degree to which past interaction with the criminal justice system increases a person’s likelihood of offending in the future. Although the timeframes in some studies differed from the seven years discussed in the Kurlychek study, the studies all support the proposition that “an offender’s risk of re-offending declines over time such that it approximates one in the general population or even individuals who have never committed a crime.” Peter Leasure & Tia Stevens Andersen, *Recognizing Redemption: Old Criminal Records and Employment Outcomes*, N.Y.U. Review of Law and Social Change, The Harbinger, Volume 41, pp. 276-278 (Mar. 21, 2017) available at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2938768 (providing a literature review of relevant criminological research).

⁷⁸Thomas v. Housing Auth. of Little Rock, 282 F. Supp. 575, 580 (E.D. Ark 1967) (unwed mother admission policy is drastic beyond reasonable necessity); *See also* United States v. Robinson, 721 F. Supp. 1541 1544-1545 (forfeiture of tenant’s apartment and her federal housing assistance payments, which were the only means by which the defendant could provide shelter for her children, was disproportionately severe to the offense of knowingly and intentionally distributing a mixture containing cocaine base); In the Matter of Elaine Sicardo v. Peter Smith, etc. No. 2007-03609, Index No. 219067/06 (N.Y. App. Div. Second Jud. Dept., March 18, 2008) (penalty in termination case so disproportionate to the offense as to be shocking to one’s sense of fairness) available at: http://www.nycourts.gov/reporter/3dseries/2008/2008_02603.htm.

⁷¹*Id.* at p. 51 app. I (showing a substantial number of PHAs with lookback periods of the three to five years).

⁷²42 U.S.C.A. § 1437d(t)(7) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07) (defining “currently engaging in the illegal use of a controlled substance which has the added emphasis that the activity must be a “real and ongoing problem”); 24 C.F.R. §§ 5.853(b) (federally assisted housing in general), 882.518(a)(1)(iii) (Section 8 moderate rehabilitation), 960.204(a)(2)(i) (public housing), 982.553(a)(2)(ii)(C)(2) (Section 8 voucher) (2017).

⁷³HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, § 4.6, p. 53 (June 2003).

⁷⁴HUD, VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE, 7420.10G, ¶ 5.7, p. 5-37 (Apr. 2001). *But see* Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule, 60 Fed. Reg. 34,660, 34,688 (July 3, 1995) (codified at 24 C.F.R. § 982.553(b)) (HUD regulations formerly stated that to deny admission, drug use or possession should have occurred within prior year).

⁷⁵For a discussion of those cases, *see* Chapter 4 regarding drug rehabilitation; *see also* MADISON, WIS. CODE OF ORDINANCES Ch. 39.03(1) and (4) (Renumbered by Ord. 12,039, Adopted 2-17-98) available at

<http://www.municode.com/resources/gateway.asp?pid=50000&sid=49> (ordinance prohibiting discrimination against individuals with a criminal record is applicable for most offenses two years after the individual has completed or complied with the penalty).

⁷⁶Ouelette v. Housing Auth. of Old Town No. AP-03-17, 204 WL 842412 (Me. Super. Ct. Mar. 11, 2004) (PHA’s “zero tolerance” denial of voucher application due to husband’s 15-year-old

AN AFFORDABLE HOME ON REENTRY

Significantly, Congress qualified denials of admission for “other criminal activity” (*i.e.*, criminal activity that is not drug-related or violent) to activities that would threaten the health, safety, or right to peaceful enjoyment of other residents or the PHA staff and contractors. Thus, not all criminal activity and subsequent convictions can properly be used as the basis for a denial. As HUD has noted:

[T]he PHA should be looking for history of crimes that would result in denial for eligibility or demonstrate lease violations if they were committed by a public housing resident. There are a variety of other crimes that cannot be claimed to adversely affect the health, safety or welfare of the PHA’s residents.⁷⁹

In addition, HUD has instructed federally assisted owners that any decision that they make based upon “reasonable belief” or other determination must be documented. The documentation should be not only of the behavior, but should also demonstrate that the behavior would interfere with the health, safety, or peaceful enjoyment by other residents.⁸⁰

Relying on these authorities, an advocate may argue that applicants with a record involving crimes such as shoplifting, writing bad checks, sale of unauthorized recordings, theft of cable television services, littering, or vehicular manslaughter should not be rejected unless it can be demonstrated that the activity would pose a threat to the health and safety of others or the development.⁸¹

2.3.4 Limitations Based on Fair Housing Laws

The federal Fair Housing Act also imposes a

significant limitation on criminal records screening policies.⁸² Because the FHA applies to most housing, both subsidized and private, it can be a particularly important source of protection for individuals whose housing subsidy is not subject to specific regulations governing the use of criminal records, such as subsidies from the Low Income Housing Tax Credit and Rural Development programs. In 2016, HUD’s Office of General Counsel issued guidance (Guidance) on the relationship between the use of criminal records in housing decisions and the FHA under the theories of disparate treatment and disparate impact.⁸³

Disparate Treatment. Intentional discrimination (disparate treatment) occurs when a housing provider “treats an applicant or renter differently” because of membership in a protected class, such that the housing provider is using one’s criminal history as pretext for discrimination.⁸⁴ For example, there would be disparate treatment if a housing provider rejects African-American applicants who have been convicted of distributing a controlled substance, but does not similarly reject White applicants convicted of the same conduct.⁸⁵ Fair housing audits have documented the prevalence of this type of discrimination in New Orleans and Washington, DC.⁸⁶ In assessing potential fair housing claims, advocates should consider evaluating their cases under a disparate treatment framework since these claims often require fewer resources and expenses than claims based on the more commonly-considered disparate impact theory.

Disparate Impact/Discriminatory Effects. Criminal records policies that are neutral on their face may nonetheless raise fair housing concerns under the

⁷⁹HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, § 7.7, p. 96 (June 2003).

⁸⁰Screening and Eviction for Drug Abuse and Other Criminal Activity-Final Rule, HUD Notice H 2002-22, ¶ X.

⁸¹*See, e.g., Williams v. New York City Hous. Auth.*, Nos. 94 Civ. 4160 (SHS) and 95 Civ. 1595 (SHS) (S.D.N.Y., Stipulation of Settlement, July 30, 1996) (list of convictions attached to Stipulation which NYCHA will not consider as the sole reason for denial of an application); *See also* Cabrini-Green Local Advisory Council v. Chicago Hous. Auth., No. 96 C 6949 (N.D. Ill., Jan. 29, 200), 2007 WL 294253 (N.D.Ill.) Slip Op. 5 (“With respect to those who have been released from our penal system, it provides no societal benefit to deny them a place to live where their presence does not create an identifiable threat against surrounding residents.”) *Cf. Carey, supra* note 6, at 567 (one PHA reported that most rejections were for shoplifting or not paying video rentals).

⁸²Fair Housing Act, 42 U.S.C. 3601, *et seq.*. HUD emphasizes that screening, termination, and eviction policies in public and multifamily housing must be applied in accordance with the FHA and other applicable civil rights laws. HUD Notice H 2015-10 at 4; HUD Notice PIH 2015-19 at 5.

⁸³HUD, 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 (Apr. 2016) (Companion Website) [hereinafter “HUD OGC Guidance”].

⁸⁴*Id.* at 8-10.

⁸⁵*Id.* at 10.

⁸⁶EQUAL RIGHTS CENTER, UNLOCKING DISCRIMINATION: ADC AREA TESTING INVESTIGATION ABOUT RACIAL DISCRIMINATION AND CRIMINAL RECORDS SCREENING IN HOUSING (2016), <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf>; GREATER NEW ORLEANS FAIR HOUS. ACTION CNTR., LOCKED OUT: CRIMINAL BACKGROUND CHECKS AS A TOOL FOR DISCRIMINATION (2015), http://www.gnofairhousing.org/wp-content/uploads/2015/09/Criminal_Background_Audit_FINAL.pdf.

disparate impact theory. As the Guidance explains, because members of protected classes such as African Americans, Latinos and Native Americans have disproportionately higher rates of arrest, conviction and incarceration than the general population, housing barriers based on criminal record are more likely to have a disparate racial impact and are thus suspect under the FHA.⁸⁷ Suspect policies may include blanket bans on admission for any person with a conviction or an arrest, or the application of “one strike” policies. Several lawsuits have challenged the use of blanket bans that exclude anyone with a conviction from housing, including one recent case that alleged race and color discrimination under the FHA, as well as under state and local law.⁸⁸

The Guidance describes the three-step, burden-shifting framework used to evaluate claims using a discriminatory effects theory under the FHA.⁸⁹ First, the plaintiff or charging party must show that the policy regarding criminal history “results in a disparate impact on a group of persons because of their race or national origin.”⁹⁰ (Despite the Guidance’s focus on race and national origin, this three-step analysis applies to all of the classes protected by the FHA, including sex and disability.) This first step in the analysis will likely require the use of statistics. The Guidance notes that while “state or local statistics should be presented where available and appropriate based on a housing provider’s market area or other facts particular to a given case,” national statistics regarding racial and ethnic disparities within the criminal justice system can be utilized where state or local statistics are unavailable and “there is no reason to believe they would differ markedly from the national statistics.”⁹¹

⁸⁷HUD OGC Guidance at 2.

⁸⁸First Amended Complaint, *The Fortune Soc’y v. Sandcastle Towers Hous. Dev. Fund Corp.*, et al., No. 1:14-cv-06410-VMS (E.D.N.Y. May 1, 2015). The suit alleges that the housing provider’s policy excludes “any person with a record of a criminal conviction from renting or living in an apartment” regardless “of the nature of the conviction, the amount of time that has lapsed since the conviction, evidence of rehabilitation, or any other factor related to whether a specific person poses any threat to safety.” *Id.* at 2. See Ch. 6 for more cases challenging screening policies under the Fair Housing Act.

⁸⁹Guidance footnote + DOJ Statement of Interest, 6-8.

⁹⁰HUD OGC Guidance at 3; United States of America’s Statement of Interest, at 8-14, *Fortune Society v. Sandcastle Towers Hou. Dev’t Fund Corp.* et al., No. 1:14-cv-6410 (E.D.N.Y. Oct. 18, 2016),

<https://www.justice.gov/crt/file/903801/download>

⁹¹HUD OGC Guidance at 3. The HUD OGC Guidance states that evidence including “applicant data, tenant files, census demographic data and localized criminal justice data, may be

The second step of the burden-shifting framework requires the housing provider to prove that the policy or practice at issue is justified – more specifically, that the policy or practice is “necessary to achieve a substantial, legitimate, nondiscriminatory interest” of the housing provider.⁹² Housing providers commonly assert that protecting residents and property justifies the criminal history policy at issue, but a mere assertion is not enough. The housing provider must “be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history *actually assists in protecting resident safety and/or property.*”⁹³ In other words, housing providers cannot satisfy their burden simply by relying on generalizations or stereotypes about persons with criminal backgrounds.⁹⁴

Arrest record screening will usually fail under this second step of the analysis. As the Guidance explains, the fact that someone was arrested (without a conviction) does not prove that he or she violated the law.⁹⁵ Thus, housing providers whose policies exclude individuals due solely to *arrests* “cannot prove that the exclusion actually assists in protecting resident safety and/or property” as required by the second prong of the disparate impact analysis.⁹⁶

HUD stresses that PHAs and owners of HUD-assisted properties may not take adverse actions based solely on a person’s record of past arrests.⁹⁷ The

relevant in determining whether local statistics are consistent with national statistics and whether there is reasonable cause to believe that the challenged policy or practice causes a disparate impact.” *Id.* at 4. Additionally, the HUD OGC Guidance notes that national statistics show that racial and ethnic minorities are arrested and incarcerated at disproportionate rates. *Id.* at 3-4. Therefore, national statistics on this issue “provide grounds for HUD to investigate complaints challenging criminal history policies.” *Id.* at 3.

⁹²*Id.* at 4.

⁹³*Id.* at 5 (emphasis added).

⁹⁴“Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden.” *Id.*; see also United States of America’s Statement of Interest, at 14-17, *Fortune Society v. Sandcastle Towers Hou. Dev’t Fund Corp.* et al., No. 1:14-cv-6410 (E.D.N.Y. Oct. 18, 2016), <https://www.justice.gov/crt/file/903801/download>.

⁹⁵*Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957); see also *Landers v. Chicago Housing Authority*, 404 Ill. App. 3d 568 (2010).

⁹⁶*Id.* at 5.

⁹⁷Guidance for Public Housing Agencies (PHAs) and Owners of Federally assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, H 2015-10 (Nov. 2, 2015); Guidance for Public Housing Agencies (PHAs) and Owners of Federally assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, PIH 2015-19 (Nov. 2, 2015).

underlying conduct that resulted in an arrest may, however, serve as the basis of an adverse housing decision if there exists “sufficient evidence” that someone engaged in the criminal activity at issue.⁹⁸ Such evidence might include witness statements, police reports, and “[r]eliable evidence of a conviction.”⁹⁹ HUD also advises that Admissions and Continued Occupancy Plans and Administrative Plans should not include the fact that someone was arrested as a permissible basis to deny admission, terminate assistance, or evict tenants.¹⁰⁰ HUD encourages PHAs to revise these documents to eliminate arrest-record discrimination and increase housing access for those with criminal histories who do not pose a risk to health or safety.¹⁰¹

Unlike arrest record screening, screening on the basis of convictions records may be considered justified under the second step of the three-step discriminatory effects analysis. However, while convictions are generally sufficient to show that a person engaged in unlawful conduct, policies that ban individuals with convictions across the board are unlikely to pass muster under this step. By ignoring factors such as the passage of time or the nature of the offense, housing providers risk falling short of their burden of providing sufficient justification for the blanket ban on convictions.¹⁰² This risk remains even for policies less sweeping than a blanket ban if they fail “to consider the nature, severity, and recency of criminal conduct.”¹⁰³ It follows, therefore, that housing providers who ban individuals on the basis of broad categories such as felonies or violent criminal activity must be prepared to demonstrate why such a ban is necessary to serve a substantial, legitimate, nondiscriminatory interest.

Assuming the housing provider satisfies the burden required by the second step of the analysis, the burden then shifts back to the plaintiff or complainant to show that there is a less discriminatory alternative to the challenged practice that serves the housing provider’s substantial, legitimate, nondiscriminatory interest. In discussing step three of the analysis, the Guidance notes that while identifying a less discriminatory alternative is done on a case-by-case basis, “individualized assessment of relevant mitigating

information beyond that contained in an individual’s criminal record is likely to have a less discriminatory effect than categorical exclusions.”¹⁰⁴

Under a significant statutory exemption, this discriminatory effects analysis does not apply to convictions for the illegal manufacture or distribution of a controlled substance.¹⁰⁵ In other words, applicants who are denied housing on the basis of a conviction for illegal drug manufacturing or distribution will not be able to seek relief for discrimination under the disparate impact theory of the FHA. (The same person, however, could instead seek relief if he or she instead alleges intentional discrimination.)¹⁰⁶ Because of the limited scope of the exemption, the discriminatory effects analysis is still available for arrests for the illegal manufacture or distribution of a controlled substance; and for convictions for drug-related crimes other than illegal manufacture or distribution, e.g., possession of illegal drugs.¹⁰⁷

2.3.5 Limitations Based on the Violence Against Women Act (VAWA)

Many survivors of domestic violence have a prior arrest or conviction that is related to the violence committed against them. For example, an abuser may have forced the survivor to commit a crime, the survivor may have been mistakenly arrested during an incident of abuse, or the survivor may have used drugs as a way to cope with the abuse. Under the Violence Against Women Act (VAWA), federally-assisted housing providers cannot take an adverse action against an applicant because the person is or has been a survivor of domestic violence, dating violence, sexual assault, or stalking.¹⁰⁸ This may include denying admission to an individual based on criminal history when the applicant’s record is related to violence committed against her. Advocates can argue that denying a survivor housing based on such negative history is prohibited under VAWA.

For more information on survivors’ rights in the application process under VAWA and the FHA, advocates can access the guide *Assisting Survivors of Domestic Violence in Applying for Housing* on NHP’s website.

⁹⁸HUD Notice H 2015-10 at 4; HUD Notice PIH 2015-19 at 5.

⁹⁹*Id.*

¹⁰⁰HUD, FAQs: EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS, at 4 (Undated) (Companion Website).

¹⁰¹*Id.*

¹⁰²HUD OGC Guidance, *supra* note at 6.

¹⁰³*Id.* at 7.

¹⁰⁴*Id.* at 7; see also United States of America’s Statement of Interest, at 18, *Fortune Society v. Sandcastle Towers Hou. Dev’t Fund Corp.* et al., No. 1:14-cv-6410 (E.D.N.Y. Oct. 18, 2016), <https://www.justice.gov/crt/file/903801/download>

¹⁰⁵HUD OGC Guidance, *supra* note at 8.

¹⁰⁶*Id.* at 10.

¹⁰⁷*Id.*

¹⁰⁸42 U.S.C. § 14043e-11.

JUSTICE COURT: VILLAGE OF SPRING VALLEY
COUNTY OF ROCKLAND: STATE OF NEW YORK

SPRING VALLEY HOUSING AUTHORITY,

Petitioner,

DECISION AND ORDER

- against -

[REDACTED] and [REDACTED]

Respondents.

This matter is a Landlord Tenant matter that has come before this Court for determination. It was agreed by both sides to submit the issues to the Court on what is an agreed statement of facts.

The papers before this Court are listed as follows:

1. Notice of Petition - Holdover dated [REDACTED] by Spring Valley Housing Authority.
2. Answer by Respondent dated [REDACTED].
3. Affirmation of Facts and Position submitted by Petitioner dated [REDACTED]
4. Respondent's Memorandum of Law.

THE CONTENTIONS OF THE PARTIES

THE PETITIONER:

1. Lease paragraph 16 c provides that landlord may terminate tenancy based on "furnishing false or misleading information during the application or review process..." Specifically, the provision in respondent's lease providing for termination for being a registered sex offender (par. 16q), although not present in respondents' initial lease when they took

occupancy in 1998, was added in respondents' most recent renewal lease dated December 1, [REDACTED], yet respondent did not reveal to landlord that he was a registered sex offender at the time.

2. Violation of lease paragraph 16 e ("failure to abide by necessary and reasonable rules made by the Landlord for the benefit and well being of the housing development and the residents") which provides that the landlord is not required to assist applicants who have a lifetime registration under a State sex offender registration program.

3. Violation of lease paragraph 16 q ("determination or discovery that a resident is a registered sex offender") is based on the landlord's discovery on or about [REDACTED], by way of a printed notice provided to the landlord by the Spring Valley Police Department of respondent [REDACTED] status as a registered sex offender, which status was not previously known to the landlord nor previously revealed to landlord by respondents either in respondents' initial application or respondents' subsequent re-certifications to the landlord.

4. Title 24 CFR 960.204 provides for those bases for denial of admission that are required for all housing authorities. Petitioner contends that it is allowed, by adopting appropriate policies and lease provisions, to provide for other causes for both denial of admission and termination of a tenancy, as long as such are not specifically prohibited by federal statute or regulation.

5. Title 24 CFR 966.4 ("Lease Requirements") further defines "other good cause" for termination of a lease as "discovery after admission of facts that made the tenant ineligible." Here, the lease provision paragraph 16 q does just that, by providing for the discovery of the registration of the tenant as a sex offender as the basis for termination.

THE RESPONDENT'S CONTENTIONS ARE

1. The Spring Valley Housing Authority ("SVHA") may not now terminate the tenancy of the respondents who have lived, without incident, in the subject premises since 1998 solely on the basis that respondent [REDACTED] is a registered sex offender resulting from a conviction in [REDACTED]

2. 42 USC 13663 and 24 CFR §960.204 (a) (4) which prohibits admission to Public Housing of applicants who are subject to lifetime registration under a State sex offender registration program applies only to the screening of applicants for admission and are not retroactive to tenants, such as the [REDACTED] who were admitted prior to the enactment of the law under different admission standards. Neither the statute or the regulation authorizes or requires termination of current tenants admitted prior to its enactment.

3. Barring proof of fraud, subsequent acts of criminal conduct or discovery of information that would make the Respondents ineligible at the time of admission Respondents, once admitted cannot be evicted for conduct pre-dating the tenancy.

FINDING OF FACTS

1. The Landlord Petitioner is the owner of the apartment which is the subject of this proceeding.

2. The Tenant [REDACTED] [REDACTED] and their family occupy the apartment pursuant to a lease (written) originally issued on December 27, 1997.

3. The lease and tenancy and the Landlord's enforcement of same are subject to the rules and regulations of the Federal Public Housing Program regulations are set forth at 24CFR § 960 and 966.

4. In June of 2005 the Petitioner served upon the Respondent a thirty (30) day Notice to

Terminate the Tenancy.

5. The Notice was based upon the following reason:

The reason for the termination of your lease is as follows: Serious violation of Tenant's obligations pursuant to Lease paragraph 16, subparagraphs (c), (e) and (q): "The Landlord shall not terminate or refuse to renew the Lease other than for serious or repeated violation of material terms of the Lease, such as, but not limited to, the following ... (c) furnishing false or misleading information during the application or review process ..., (e) failure to abide by necessary and reasonable rules made by the Landlord for the benefit and well being of the housing development and the Residents" and "(q) determination or discovery that a resident is a registered sex offender."

Specifically, Landlord was notified by the Spring Valley Police Department on or about [REDACTED] that [REDACTED] has been designated as a [REDACTED] Sex Offender based on a conviction for rape in the [REDACTED] on [REDACTED]. Said conviction and designation were not previously revealed to the Landlord by the Tenant. Said designation is grounds for termination of the Tenant's lease under Paragraph 16 (c), under Landlord's policies section 8.4 (Q), as incorporated into Tenant's lease under Paragraph 16 (e), and under Paragraph 16 (q).

6. The Lease provisions cited were not in Respondents' initial lease and it appears did not become effective until some time in December [REDACTED].

7. Based upon the notice supplied by the Petitioner, Respondent requested a hearing.

8. A Grievance Hearing was held in August [REDACTED] before a Hearing Officer who in a decision dated [REDACTED] upheld the Petitioner's decision to terminate the tenancy. This gave rise to the Instant Proceeding.

9. On [REDACTED] [REDACTED] was convicted of rape in the [REDACTED].

10. Based upon the conviction [REDACTED] was imprisoned until some time in [REDACTED]

11. Also based upon the conviction [REDACTED] was adjudicated a [REDACTED] sex offender pursuant to the New York State Sex Offender Registration Act.

12. In about March 2003 the Landlord-Petitioner changed their policy and required prospective tenants to supply criminal history information.

13. That the Respondent cooperated with Petitioner in disclosing his record.

14. No allegation has been made that the Tenant committed any negative act while a Tenant - either payment of rent or conduct of a negative manner.

CONCLUSIONS OF LAW

1. This Court has the authority to determine De Novo the validity of the allegations in the Petition and it is not bound by the prior determination of a Hearing Officer in this matter.

2. That the Petitioner as a participant in the Public Housing process as administered by the Federal Government - HUD had a right to establish standards for tenants to meet to be eligible for public housing providing same are reasonable and non-discriminatory.

3. I specifically find that the rules banning sex offenders from public housing is a fair and proper standard to adopt and enforce in order to insure a quality of life in public housing.

4. I further find as a Conclusion of Law that the Petitioner must still prove the allegations on the Petition to sustain an eviction.

5. A Landlord Tenant action is both an action in law and in equity and therefore equitable principles of law are also applicable.

6. The Petition alleges breach of the lease in the Notice to Terminate.

7. In order to terminate the lease the Petitioner must show that the Notice to Terminate is justified.

8. The Petitioner contends that the Tenant [REDACTED] [REDACTED] violated the terms of the lease by the following acts:

(A) 16 (c) of lease provides that Landlord may terminate tenancy based upon Tenant furnishing false or misleading information.

No evidence or contention was raised as to any information that the Respondent actually supplied was false or misleading.

(B) 16 (e) of the lease- failure to abide by necessary and reasonable rules made by the Landlord. Relying on Policy 8.4 Q "Landlord is not required to assist applicants who have a lifetime registration under a State Sex Offender's Registration Program.

Does not apply to this Respondent because he is an existing tenant and not a new applicant and the term not required does not mean a right to deny an existing tenant who is living peacefully at the premises a right to renew the lease.

(C) 16 (q) The discovery that respondent is a sex offender does not appear to be adequate because at the time of the original lease no questions were asked and no evidence was submitted that the Respondent lied about this.

(D) 24 CFR 960.204 and 24 CFR 166.4 do not appear under the facts present in this case to apply so as to deny the Respondents continued occupancy.

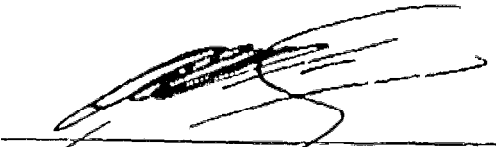
It is the ruling of this Court that absent any proof that the Respondent made any false representations and/or absent any proof that the Respondent's actions while a tenant caused any harm to the Petitioner or any other tenant and based upon the fact that the Tenant apparently pays rent timely, I find no legal justification to order the lease terminated and therefore this action to evict this Tenant is dismissed.

This shall constitute the ruling of the Court.

Dated:

[REDACTED]

SO ORDERED


ALAN M. SIMON, V.J.

[REDACTED]

STATE OF NEW YORK COUNTY OF ALBANY
CITY OF ALBANY CITY COURT, CIVIL PART

Albany Housing Authority,

Petitioner,

-against-

INDEX NO. AHA 06-
DECISION and ORDER


Respondents.

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HON. GARY F. STIGLMEIER

Respondent moves for an order dismissing this summary proceeding based upon his allegation that while the federal regulations prohibit a Public Housing Authority (hereinafter "PHA") from renting to a tenant who is subject to a lifetime registration requirement, those regulations do not allow for the eviction of a tenant on those grounds. This summary proceeding is based upon 24 CFR 5.856, which requires all PHAs to prohibit the admission of persons subject to a lifetime registration requirement under a state sex offender registration program. This regulation requires the PHA to perform the necessary criminal history background checks and to contact national and state sex offender registry agencies to determine an applicant's suitability for Federally-assisted housing. In accordance with this law, any individual who is a sex offender subject to a lifetime registration requirement under state law shall not be admitted to Federally-assisted housing.

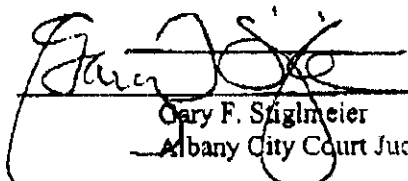
In New York State the law was recently amended, subjecting level 2 sex offenders to a lifetime registration requirement. Respondent admits that he has been adjudicated a level 2 sex offender and

is therefore subject to register. However, neither the statutory nor regulatory requirements specifically address the issue of sex offenders currently living in Federally-assisted housing. HUD, however, did address the issue in section IX of a Notice (# 2002-22) it issued on October 29, 2002, which stated that "households already living in Federally-assisted housing units are not subject to the provisions in the regulations at 24 CFR 5.856."

The Court defers to HUD's interpretation of the applicable federal regulation, and determines it to be dispositive of the issue. As such, respondent's motion to dismiss this summary proceeding is granted.

So ordered.

Dated at Albany, New York
December 11, 2006



Gary F. Stiglmeier
Albany City Court Judge

Chapter 2, Exhibit 3

Federally Assisted Housing Programs: Admissions for Applicants with Certain Criminal Backgrounds*

	Convicted of producing meth at federally-assisted housing [^]	Lifetime registered sex offender	Prior eviction from federally-assisted housing [^] for drug-related activity	History of drug-related criminal activity	History of violent criminal activity	History of crimes that threaten health, safety, or peaceful enjoyment	Current user of illegal substances
Public Housing	Permanent ban on admission. 42 U.S.C. § 1437n(f); 24 C.F.R. § 960.204(a)(3).	Permanent ban on admission. 42 U.S.C. §§ 13663 and 13664; 24 C.F.R. § 960.204(a)(4).	3-year ban on admission unless applicant is rehabilitated. 42 U.S.C. §§ 13661(a) and 13664; 24 C.F.R. § 960.204(a)(1).	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 960.203(d).	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 960.203(d).	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 960.203(d).	PHA must deny admission. 42 U.S.C. § 13661(b); 24 C.F.R. § 960.204(a)(2).
Voucher Program	Permanent ban on admission. 42 U.S.C. § 1437n(f); 24 C.F.R. § 982.553.	Permanent ban on admission. 42 U.S.C. §§ 13663 and 13664; 24 C.F.R. § 982.553.	3-year ban on admission unless applicant is rehabilitated. 42 U.S.C. §§ 13661 and 13664; 24 C.F.R. § 982.553.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 982.553.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 982.553.	PHA has discretion to admit applicant. 42 U.S.C.A. § 13661(c); 24 C.F.R. § 982.553.	PHA must deny admission. 42 U.S.C. § 13661(b); 24 C.F.R. § 982.553.
Section 8 Mod Rehab	Permanent ban on admission. 42 U.S.C. § 1437n(f); 24 C.F.R. § 882.518.	Permanent ban on admission. 42 U.S.C. §§ 13663 and 13664; 24 C.F.R. § 882.518.	3-year ban on admission unless applicant is rehabilitated. 42 U.S.C. §§ 13661 and 13664; 24 C.F.R. § 882.518.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 882.518.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 882.518.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 882.518.	PHA must deny admission. 42 U.S.C. § 13661(b); 24 C.F.R. § 882.518.

* There are no federal requirements regarding admission of individuals with criminal background to Low-Income Housing Tax Credit (LIHTC) housing, Shelter Plus Care (S+C) (see generally 24 C.F.R. §§ 582.325 and 582.330), Supportive Housing Program (SHP) (see generally 24 C.F.R. § 583.325) or Housing Opportunities for Persons with AIDS (HOPWA) (see generally 24 C.F.R. § 574.603).

[^] Federally-assisted housing is defined, in this context, to include, public housing, Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 515 and Section 514.

Appendix 2B: Federally Assisted Housing Programs: Admissions for Applicants with Certain Criminal Backgrounds*

	Convicted of producing meth at federally-assisted housing [^]	Lifetime registered sex offender	Prior eviction from federally-assisted housing [^] for drug-related activity	History of drug-related criminal activity	History of violent criminal activity	History of crimes that threaten health, safety, or peaceful enjoyment	Current user of illegal substances
Section 8 SRO Mod. Rehab. for homeless	Current funds are appropriated for homeless individuals. 42 U.S.C. §11401. Regulations may require a ban. 24 C.F.R. §§ 882.805(c) and 882.808(b)(2); <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	Current funds are appropriated for homeless individuals. 42 U.S.C. §11401. Regulations may require a ban. 24 C.F.R. §§ 882.805 (c) and 882.808(b)(2); <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	Current funds are appropriated for homeless individuals. 42 U.S.C. §11401. Regulations may require a ban. 24 C.F.R. §§ 882.805 (c); <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	PHA or owner has discretion to admit applicant. 24 C.F.R. §§ 882.805 (c) and 882.808(b)(2), <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	PHA or owner has discretion to admit applicant. 24 C.F.R. §§ 882.805 (c) and 882.808(b)(2), <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	PHA or owner has discretion to admit applicant. 24 C.F.R. §§ 882.805 (c) and 882.808(b)(2), <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	Current funds are appropriated for homeless individuals. 42 U.S.C. §11401. Regulations may deny admission. 24 C.F.R. §§ 882.805 (c) and 882.808(b)(2); <i>see also</i> provisions cited above under Section 8 Mod. Rehab.
Project-based Section 8	No requirement imposed by federal law. Owner has discretion to admit applicant. 42 U.S.C. § 1437n(f); 24 C.F.R. § 5.855.	Permanent ban on admission. 42 U.S.C. §§ 13663 and 13664; 24 C.F.R. § 5.856.	3-year ban on admission unless applicant is rehabilitated. 42 U.S.C. §§ 13661 and 13664; 24 C.F.R. § 5.854.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner must deny admission. 42 U.S.C. § 13661(b); 24 C.F.R. § 5.854

* There are no federal requirements regarding admission of individuals with criminal background to Low-Income Housing Tax Credit (LIHTC) housing, Shelter Plus Care (S+C) (see generally 24 C.F.R. §§ 582.325 and 582.330), Supportive Housing Program (SHP) (see generally 24 C.F.R. § 583.325) or Housing Opportunities for Persons with AIDS (HOPWA) (see generally 24 C.F.R. § 574.603).

[^] Federally-assisted housing is defined, in this context, to include, public housing, Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 515 and Section 514.

Appendix 2B: Federally Assisted Housing Programs: Admissions for Applicants with Certain Criminal Backgrounds*

	Convicted of producing meth at federally-assisted housing [^]	Lifetime registered sex offender	Prior eviction from federally-assisted housing [^] for drug-related activity	History of drug-related criminal activity	History of violent criminal activity	History of crimes that threaten health, safety, or peaceful enjoyment	Current user of illegal substances
Sections 202, 811, 221(d)(3), 236	No requirement imposed by federal law. Owner has discretion to admit applicant. 42 U.S.C. § 1437n(f); 24 C.F.R. § 5.855.	Permanent ban on admission. 42 U.S.C. §§ 13663 and 13664; 24 C.F.R. § 5.856.	3-year ban on admission unless applicant is rehabilitated. 42 U.S.C. §§ 13661 and 13664; 24 C.F.R. § 5.854.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner must deny admission. 42 U.S.C. § 13661(b); 24 C.F.R. § 5.854.
USDA Housing	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154; <i>but see</i> 42 U.S.C. §§ 13663 and 13664, which extend to Section 515 and 514 housing.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154; <i>but see</i> 42 U.S.C. §§ 13661 and 13664, which extend to Section 515 and 514 housing.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154; <i>see also</i> 42 U.S.C. § 13661(b) and 24 C.F.R. § 5.850(c).
HOME	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).

* There are no federal requirements regarding admission of individuals with criminal background to Low-Income Housing Tax Credit (LIHTC) housing, Shelter Plus Care (S+C) (see generally 24 C.F.R. §§ 582.325 and 582.330), Supportive Housing Program (SHP) (see generally 24 C.F.R. § 583.325) or Housing Opportunities for Persons with AIDS (HOPWA) (see generally 24 C.F.R. § 574.603).

[^] Federally-assisted housing is defined, in this context, to include, public housing, Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 515 and Section 514.

AN AFFORDABLE HOME ON REENTRY

CHAPTER 3

CRIMINAL HISTORY RECORDS: ACCESS, USE AND EXPUNGEMENT

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3.1 Introduction

Increasingly, criminal records are accessible to the public. Access rules vary significantly by jurisdiction. There is no one single source of an individual's criminal record; such information may be available from the state, courts, commercial vendors, correctional institutions, and law enforcement agencies.¹ Public Housing Authorities (PHAs) and subsidized owners can obtain information about an applicant's prior criminal activity, arrest and conviction record from many of these sources as well as from the applicant directly. It is important for an applicant for federally assisted housing who has a

criminal record to get a copy of the records these entities obtain.²

This chapter discusses the federal housing program rules governing access to an applicant's criminal record and how to leverage those rules in the event a PHA or owner negligently fails to follow them. In addition, this chapter discusses consumer protections that apply to private criminal history records and provides information about expunging or sealing a criminal record.

The access rules discussed in Section 3.2 are applicable only to public housing, the voucher program, and the project-based Section 8 program. Although owners of developments participating in other federally assisted housing programs--such as Section 236, Section 221(d)(3), Rural Development Section 514, 515 or 516, or Low Income Housing Tax

¹See Sharon M Dietrich, *When "Your Permanent Record" is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139 (July-Aug. 2007), for a basic and informative discussion of criminal records, access to criminal records, how legal aid programs can help clients to minimize or eliminate their criminal records, and systematic advocacy issues for assisting clients who have criminal records; MARGARET COLGATE LOVE, *RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE* (Hein, Rothman 2006)

²See Sharon M Dietrich, *When "Your Permanent Record" is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139, 141 (July-Aug. 2007), discussing what applicants can do to improve or challenge the criminal record; *See also* Chapter 5 on Challenging a Denial of Admission.

Credits (LIHTC)--may seek to obtain criminal record information from applicants or other sources, they are only subject to generally applicable fair housing and consumer protection laws in connection with access to criminal records; there are no other rules that apply.

3.2 Criminal History Records

PHAs may require adult public housing and voucher applicants to sign releases (consent forms) authorizing PHAs to obtain their criminal records from the Federal Bureau of Investigation (FBI), National Criminal Information Center (NCIC), police departments, and other law enforcement agencies, including a state's criminal history system boards.³ Owners of project-based Section 8, but not other federally assisted landlords, may also utilize these official records, but they are not permitted to access them directly. Congress was reluctant to allow private owners direct access to criminal records, so it set up a scheme under which the owner of project-based Section 8 housing may request that the PHA obtain the records and determine whether an applicant should be rejected or a tenant evicted.⁴ When making the determination, the PHA must apply the owner's tenant selection criteria, not the PHA's standards.⁵ The PHA may not turn criminal records over to the owner, but in an eviction case, the PHA is permitted to disclose the records to

the extent necessary.⁶ Despite having this option, most project-based Section 8 owners use private credit check and screening services instead.⁷

A PHA may not charge an applicant for any screening costs, including the cost the FBI charges for processing fingerprint cards.⁸ Federally assisted housing owners, including those receiving Section 8 project-based assistance, also may not charge applicants or tenants any fees for criminal background checks.⁹ However, a PHA may charge an owner reasonable fees for screening applicants or obtaining their criminal records.¹⁰

After a PHA submits the applicant's release to a law enforcement agency, it may receive preliminary information that there is a match based on the name, date of birth, and social security number of the applicant. However, the PHA may not deny admission based on this preliminary information; instead, it must obtain a verification of the match with a positive fingerprint comparison.¹¹

A PHA must notify the household of any proposed adverse action and provide a copy of the criminal record information to the subject of the record (and to the applicant, if different).¹² The subject of the

³42 U.S.C.A. § 1437d(q)(1)(A) (West, WESTLAW through P.L. 110-39 approved 06-21-07). The statute limits the release of juvenile records to a PHA to the extent allowed by state law and defines an "adult" as a person 18 years of age or older, or, an individual, regardless of age, if that individual was convicted of a crime as an adult under any Federal, State, or tribal law. *Id.* § 1437d(q)(1)(C) and (8)(A); 24 C.F.R. § 5.903(b) (2017); HUD OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1 CHG-4 (Nov. 2013) ¶ 4-27(E); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, (June 2003), App. VIII, p. 381 (PHA Police Record Verification form); Instructions for Obtaining Federal Bureau of Investigation Criminal History Information, PIH 2003-11(HA) (Apr. 11, 2003). There are a parallel statute and regulations regarding access to sex offender registration information. *See* 42 U.S.C.A. § 13,663(b) (West, WESTLAW through P.L. 110-39 approved 06-21-07) and 24 C.F.R. § 5.905 (2017).

⁴42 U.S.C.A. § 1437d(q)(1)(B) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 5.903(d) (2017); HUD OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1 CHG-4 (Nov. 2013) ¶ 4-27(E)(4); *see also* 42 U.S.C.A. § 13,663(b) (West, WESTLAW through P.L. 110-39 approved 06-21-07) and 24 C.F.R. § 5.905 (2007) (sex offender registration information).

⁵42 U.S.C.A. § 1437d(q)(1)(B) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 5.903(d) and (e) and 5.905(b)(2)(ii) (2017). *See also* Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule, H 2002-22 (HUD) (Oct. 29, 2002).

⁶24 C.F.R. §§ 5.903(e)(2)(i)(B) and 5.905(b)(4) (2017).

⁷*See* Section 3.3. HUD OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-4 (Nov. 2013) ¶ 4-27(E)(4)(b) (referencing other types of screening services or sources of information that an owner may use); Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule, H 2002-22 (HUD) (Oct. 29, 2002) (same).
⁸Instructions for Obtaining Federal Bureau of Investigation Criminal History Information, PIH 2003-11(HA) (Apr. 11, 2003) ¶ 4. HUD advises PHAs to use trained local law enforcement personnel to do the actual fingerprinting. *Id.* ¶ 7; 24 C.F.R. § 5.903(d)(4) and 5.905(b)(5) (2017).

⁹24 C.F.R. §§ 5.903(d)(4) and 5.905(b)(5); HUD OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2 (June 2007) ¶ 4-(B)(7); Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule, H 2002-22 (HUD) (Oct. 29, 2002) ¶ X, p. 9, ¶ XIII, p. 11; *see also* 24 C.F.R. § 5.100 (2007) (definition of federally-assisted housing).

¹⁰24 C.F.R. §§ 5.903(d)(4) and 5.905(b)(5) (2007).

¹¹Instructions for Obtaining Federal Bureau of Investigation Criminal History Information, PIH 2003-11(HA) (Apr. 11, 2003) ¶ 7.

¹²42 U.S.C.A. § 1437d(q)(2) (West, WESTLAW through P.L. 110-39 approved 06-21-07). There are conflicting interests involved in providing the criminal record to both the applicant and the member of the family subject to the criminal record. The FBI "commented that dissemination of criminal records is limited to those with authorization (such as the PHA) and the person who is the 'subject' of the record, not to other persons in the household." 66 Fed. Reg. 28,776, 28,789 (May 24, 2001). HUD disagreed, contending that under its statutory authority, it is required to provide the information to the applicant or tenant so that the applicant or tenant

information must be given an opportunity to dispute the proposed action.¹³ Generally, applicants must be given an opportunity to dispute an adverse decision via an informal review process. The type of dispute process varies based on the program. Chapter 5 discusses the due process rights of applicants in more detail.

PHAs must maintain a system to protect the confidentiality of criminal records, guard against their improper dissemination, and provide for their destruction after authorized use is complete. Civil and criminal penalties are available for improper disclosure of a criminal records obtained pursuant to the federal statute.¹⁴ Significantly, public housing, vouchers, or project-based Section 8 applicants also may bring an action for “any other negligent or knowing action that is inconsistent with” the statute or regulations pertaining to access to criminal records.¹⁵ Relief available in such an action includes reasonable attorney’s fees and other litigation costs.¹⁶ Thus, a PHA or owner may be liable for negligent actions relating to improper disclosure of a criminal record; improper use of a consent form; or for failing to notify an applicant or tenant about the information collected, provide the applicant or tenant with the information, or allow the applicant or tenant to dispute the information. The broad scope of a PHA’s or owner’s potential liability may provide leverage for an applicant harmed by the negligence.¹⁷ The threat of litigation costs and attorney’s fees may encourage a settlement that includes admission to the housing program.

may dispute the determination. *Id.* Also note that if the source of the criminal record is a private screening company, rather than the FBI, federal consumer protection law would govern disclosure of the report to third-persons. See 15 U.S.C. § 1681(b).

¹³42 U.S.C.A. § 1437d(q)(2) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 5.903(f) (2017); *see also Id.* §§ 960.204(c), 966.4(l)(5)(iv) (public housing) and 982.553(d) (voucher). The notice and opportunity to contest must also be provided in the case of an eviction or lease enforcement action.

¹⁴42 U.S.C.A. § 1437d(q)(4) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 5.903(h) (2017).

¹⁵42 U.S.C.A. § 1437d(q)(7) (West, WESTLAW through P.L. 110-39 approved 06-21-07).

¹⁶*Id.* § 1437d(q)(7); *see also* *Rivers v. Housing Auth. of Contra Costa County*, No. CO5-04291 PJH (N.D. Cal., complaint filed Oct. 21, 2005) (illegal release of juvenile record) (a copy is available in Exhibit 1 to this Chapter); There is no equivalent language regarding fees and costs regarding negligent actions with respect to registered sex offenders.

¹⁷*But see* *Spokeo, Inc. v. Robins*, 578 U.S. ____ (2016), (a mere technical violation of a statutory right is not enough to confer Article III standing without some actual injury flowing from that violation).

The statutory language evidences a concern that PHAs maintain the confidentiality of criminal records obtained through the federally authorized process. However, the regulation states that the confidentiality requirements are not applicable to public information or to criminal records or information obtained from law enforcement agencies if the information was not sought pursuant to the regulations.¹⁸ The meaning and full effect of this overbroad exemption and its consistency with the statute has not been tested, but there is a concern is that it could be used to permit a PHA that obtains information from a private consumer reporting agency, to disregard the confidentiality provisions of the statute.¹⁹ Additionally, the confidentiality provisions of the statute most likely do not cover information the PHA or owner obtains from other sources, such as police blotters and newspaper reports. Nevertheless, advocates should argue that any information obtained from law enforcement agencies that is not otherwise publicly available should be subject to the statutory protections.²⁰

3.3 Private criminal history reports

Most private owners and even many PHAs obtain and utilize criminal background reports from private consumer reporting agencies when screening applicants. These private agencies, along with their users (*i.e.*, landlords) and information sources (known as “furnishers”), are regulated by the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.), as well as (in many states) by state credit reporting laws.²¹ A full discussion of the FCRA and its applicability to criminal background check companies and tenant screening agencies is beyond the scope of this publication; this section will address key issues that arise in the use of private criminal background reports by PHAs and owners of HUD-subsidized housing.

¹⁸24 C.F.R. §§ 5.901(c) and 5.905(c)(2)(2017).

¹⁹The Fair Credit Reporting Act governs consumer reports. 15 U.S.C.A. §§ 1681-1681u (West, WESTLAW through P.L. 110-39 approved 06-21-07).

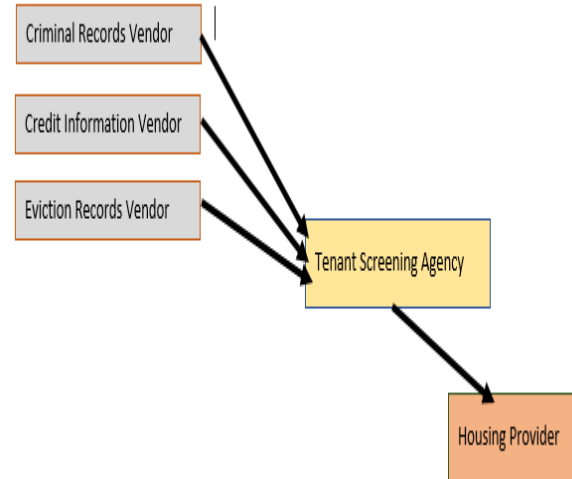
²⁰24 C.F.R. § 5.901(c) (2017). With respect to the management of the records, the statute references “any criminal records received,” whereas other provisions of the statute are limited to information received under the subsection. 42 U.S.C.A. § 1437d(q) (West, WESTLAW through P.L. 110-39 approved 06-21-07) and 42 U.S.C.A. § 13,663(f) (West, WESTLAW through P.L. 110-39 approved 06-21-07). *See also* 24 C.F.R. § 982.307(b)(2) (PHA may provide voucher landlords information in PHA files).

²¹*See, e.g.,* Rev. Code. Wash. § 19.182; *see* Cal. Civ. Code § 1785.1-36...

3.3.1 Sources of private criminal background checks

Housing providers may purchase criminal background reports from countless private consumer reporting agencies.²² By one (albeit dated) estimate, there are more than 600 companies offering consumer reports for residential tenant screening.²³ Criminal background reports are typically provided as one component in a package of information known as a “tenant screening report,” which usually also contains information about the applicant’s credit, residential history, civil litigation involvement, employment status and other characteristics.

Tenant screening companies obtain criminal records from a variety of sources. Some obtain the information directly from courts, law enforcement agencies, and other public records systems. Most, however, obtain this information from vendors, such as Lexis Nexis or HygenicsData, LLC, that maintain private databases of criminal records information. Although the criminal records in those private databases originate with public records systems, data transferred to a private database will not necessarily reflect updates, deletions, or other subsequent changes made to a record in the originating public system.



3.3.2 Criminal background reports – contents

To generate a private criminal background report, an operator at the tenant screening company searches the public records systems (and/or private criminal records databases to which the company has access) using the prospective tenant’s personal identifiers. The search retrieves criminal records belonging to persons who match those identifiers, at which point the screening company may or may not engage in additional filtering to ensure the records retrieved belong to the actual applicant before passing the records on to the housing provider.

Private criminal background reports generally contain very limited information about the offenses. A typical report will ordinarily list the name associated with the record, the jurisdiction from which the record originated, a date (which could be the date of arrest, date of disposition, date the record was created, or some other date), and a judicial case number or law enforcement number. Most background reports will also contain some description of the offense—often a one-word description (such as “assault”), which might be the initial charge or the crime for which the applicant was convicted (these are not always the same). The report will usually also list the date of birth associated with the record, though this is sometimes truncated (usually to month and year of birth). Other identifying information, such as height and weight, middle names or initials, and social security numbers, are less common but do sometimes appear. Dispositions may or may not be listed. Criminal background reports almost never contain detailed information about the crime, such as the facts of the offense or related circumstances.

²²See 15 U.S.C. § 1681a(f) (“The term ‘consumer reporting agency’ means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”).

²³See Kleystauber, Rudy, “Tenant Screening 30 Years Later: A Statutory Proposal to Protect Public Records,” 116 Yale L.J. 1344, 1346 (2007), citing Keat Foong, Automation Takes Subjectivity Out of Tenant Selection Process, Multi-Housing News, Sept. 2006, at 72, available at http://www.multi-housingnews.com/multihousing/reports_analysis/feature_display.jsp?vnu_content_id=1003087265.

In addition to—and sometimes in lieu of—providing the actual criminal records to the housing provider, most tenant screening companies will compare the contents of the retrieved records with the housing provider’s rental admission policy and determine whether the applicant meets the requirements for admission. Housing providers commonly defer to these screener determinations, which can take the form of scores, recommendations, “pass/fail” codes or green light/red light indicators, etc. If a screener determines and reports that an applicant “fails” under the housing provider’s criminal background policy, the applicant will typically be denied housing.

Increasingly, tenant screening companies have marketed reports that provide the housing provider with only the “pass/fail” determination and no information regarding the underlying criminal records (or other basis for denial). Screening companies market these products as a means of improving a housing provider’s fair housing compliance by ensuring consistent treatment of rental applicants and limiting the ability of leasing staff to engage in disparate treatment of prospective tenants; however, such products may actually increase a housing provider’s exposure to fair housing liability since a criminal history report that lacks the underlying information on which a denial is based does not allow a housing provider to meaningfully conduct an individualized assessment of an applicant’s criminal history.²⁴

3.3.3 Common problems with private criminal records searches

Unlike FBI criminal background checks, which use fingerprint matches to minimize the possibility of one person’s criminal record being confused for another’s, private criminal background checks tend to rely solely on personal identifiers such as name and birthdate, making mismatches quite common.²⁵ When criminal records searches are conducted across all fifty U.S. states, an applicant’s personal identifiers—especially when truncated—will frequently match records belonging to at least one other person.²⁶

²⁴See 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 6-7 (Apr. 4, 2016).

²⁵Several studies of error rates on “Big 3” financial credit reports have been conducted, which have revealed roughly 25%-30% of credit reports to contain errors. No study has been conducted to assess the error rate on criminal background checks—though this rate is likely far higher.

²⁶See, e.g., *Williams v. FirstAdvantage LNS Screening Solutions*,

In addition, criminal background check companies often conduct their searches using methods and algorithms designed to capture records that bear common nicknames, misspellings of an applicant’s name, transposed digits, or other discrepancies. These search algorithms can match records to applicants with the same *or similar* names, and the same *or similar* dates of birth or other identifies. For instance, a search for the first name “James” would typically match records belonging to people having “James” as their first or middle name, along with those of people with common nicknames such as “Jim”, “Jimmy” and “Jimmie.” For dates of birth, typically only the month and year are used—meaning an applicant could potentially be matched to records of any person with the same or similar name born in the same month. As a result, a criminal record belonging to a “Marshall Hendricks” born on November 3, 1942, could appear on a criminal history report for Jimi Marshall Hendrix, born November 27, 1942.

Another common problem with private criminal background reports is duplicative entries. Most—if not all—states have multiple public sources of criminal record information, such as law enforcement databases, judicial information systems and corrections records systems. A single crime may show up in numerous public records, including the arrest report created by police, the charging documents filed in court and corrections files when incarceration begins. Each of these records may or may not be updated or modified over time. Private criminal background searches often locate all of these records and can easily fail to recognize them as relating to the same offense. This dynamic can make it appear that a person with one offense has multiple offenses. In some cases, the duplicative entries even reflect more serious charges than the one for which the person was convicted.²⁷

3.3.4 Key rights of applicants screened with private criminal background checks

Private criminal background check companies are governed by the Fair Credit Reporting Act²⁸ as well as by state consumer protection statutes in many states.²⁹ The FCRA and some state credit reporting laws also

Inc., 155 F.Supp.3d 1233, 1238-39 (N.D.Fla. 2015).

²⁷See, e.g., *Smith v. HireRight Solutions, Inc.*, 711 F.Supp.2d 426, 430 (E.D.Pa. 2010).

²⁸15 U.S.C. § 1681 et seq.

²⁹See, e.g., Rev. Code. Wash. § 19.182; see Cal. Civ. Code § 1785.1-36...

impose duties on housing providers and others who receive and use background reports, as well as on the “furnishers” who supply information to the background check companies.³⁰ A number of FCRA rights and protections are especially germane to tenants denied admission to subsidized housing programs because of private criminal background reports. These include: (i) a screener’s duty to exclude outdated or otherwise improper information; (ii) a screener’s duty to ensure the maximum possible accuracy of its reports, including by correcting or deleting disputed information, and (iii) a consumer’s right to disclosures, including a copy of her report.

3.3.4.1 Exclusion of outdated or otherwise improper information

The FCRA imposes time limits on how long certain types of adverse information may be reported about consumers.³¹ While there is no such limit on the reporting of criminal *convictions*, other types of criminal records—such as those reflecting arrests or charges—may not be reported for longer than seven years.³² Some states and local governments have also imposed time limits on the reporting of criminal convictions.³³ When arrest records or other non-conviction data becomes too old to report under the FCRA, a screening company is not only barred from including the information in a background report, but may not even disclose the existence of the information or use it in determining an applicant’s suitability for admission to rental housing.³⁴

Private reports sometimes contain criminal records that are within the permissible FCRA reporting period, but outside the specific housing provider’s criminal history lookback period. If a PHA is providing an admission recommendation or other analytical information to a housing provider, records that pre-date the applicable lookback period should be excluded from the analysis. Advocates should not,

however, overlook the possibility that even if older criminal records are formally excluded from an admission decision, they may nonetheless tend to prejudice a housing official, hearing officer, or other decision maker called upon to exercise judgment or discretion in an admission decision. A consumer reporting agency may not furnish a background report for use in rental admission screening unless the agency reasonably believes the user “has a legitimate business need for the information.”³⁵ Since a housing provider has no legitimate business use for criminal records that predate its lookback period, private screeners should omit such records from their reports and delete them when they are disputed.

3.3.4.2 Accuracy & Disputes

The FCRA requires background check companies to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”³⁶ The “maximum possible accuracy” standard has long been interpreted to require more than mere technical truth—information must also be “complete,” *i.e.*, provided with enough context so as to not mislead the reader or put the consumer in a false light.³⁷ Thus, a screening report that lists an arrest record but omits the favorable disposition of that arrest such as a dismissal, for instance, would not meet the standard.

In order to increase completeness and accuracy in background reports, the FCRA gives consumers the right to dispute information that is incomplete or inaccurate.³⁸ When a consumer disputes information to a screener or other reporting agency, the company becomes obligated to “reinvestigate” the disputed item

³⁵ 15 U.S.C. § 1681b(a)(3)(F).

³⁶ 15 U.S.C. § 1681e(b). Whether an agency’s procedures for assuring maximum possible accuracy are reasonable is determined under a reasonably prudent person standard. See *Houston v. TRW Information Services, Inc.*, 707 F.Supp. 689, 693 (S.D.N.Y. 1989), quoting *Thompson v. San Antonio Retail Merchants Ass’n*, 682 F.2d 509, 513 (5th Cir.1982). “Evaluating the reasonableness of an agency’s procedures involves balancing the potential harm from inaccuracy against the burden on the agency of safeguarding against such inaccuracy.” *Houston v. TRW Information Services, Inc.*, 707 F.Supp. 689, 693 (S.D.N.Y. 1989), quoting *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C.Cir.1984).

³⁷ See, e.g., *Gorman v. Walpoff & Abramson, LP*, 584 F.3d 1147, 1163 (2009) (report that is technically true but presented in a misleading way is inaccurate for FCRA purposes); see also *Schoendorf v. U.D. Registry, Inc.*, 97 Cal.App.4th 227, 240; 118 Cal.Rptr.2d 313 (2002) (tenant screening report that contained true information about unlawful detainer action but omitted information suggesting the suit had been filed in retaliation for reporting health code violations was inaccurate).

³⁸ See 15 U.S.C. § 1681i(a)(1)(A).

³⁰ See, e.g., 15 U.S.C. § 1681m (duties of users); see 15 U.S.C. § 1681s-2 (responsibilities of information furnishers).

³¹ See 15 U.S.C. § 1681c(a).

³² See 15 U.S.C. § 1681c(a)(2).

³³ See, e.g., Rev. Code of Wash., § 19.182.040(1)(e) (prohibiting the inclusion of “[r]ecords of arrest, indictment, or conviction of an adult for a crime that, from date of disposition, release, or parole, antedate the report by more than seven years” in consumer reports). See also SEATTLE, WA, MUNICIPAL CODE ch. 14.09 (2017) (Fair Chance Housing).

³⁴ See *Serrano v. Sterling Testing Systems, Inc.*, 557 F.Supp.2d 688, 690-91 (E.D.Pa. 2008) (disclosing the existence of outdated arrest records violates FCRA, even if the arrest records themselves are not disclosed); see also *Haley v. TalentWise, Inc.*, 9 F.Supp.3d 1188, 1192 (W.D.Wash. 2014).

in a reasonable manner within 30 days.³⁹ Unless the agency verifies the accuracy and completeness of the disputed information, the agency must delete or correct it and report those changes to the consumer.⁴⁰ Importantly, if the agency makes changes to a consumer's report as a result of the reinvestigation, the applicant may (by request) also require the agency to report those changes to the PHA, owner, or other housing provider.⁴¹

A consumer who is not satisfied with the outcome of a reinvestigation may also “file a brief statement setting forth the nature of the dispute” with the background check agency.⁴² If the consumer submits such a statement, the agency must, “in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.”⁴³

3.3.4.3 Disclosures to consumers

The FCRA entitles a consumer to obtain disclosures—with few exceptions generally inapplicable to tenant screening—of whatever information a consumer reporting agency has on file about him or her at the time of the request.⁴⁴ The disclosure must be made for free if requested within 60 days of an adverse action, such as denial of admission by a PHA or private housing provider.⁴⁵

To enable consumers to obtain these disclosures, the FCRA also requires a person who denies housing or takes another adverse action against a consumer based on a background report to provide the name, address, and telephone number of the agency that provided the report, and to notify the consumer that she may obtain

a free copy of the report (from the screening or consumer reporting agency) within 60 days after the denial.⁴⁶ The notice requirement is not privately actionable under the FCRA,⁴⁷ but a PHA or subsidized owner's failure to provide the notice could have legal significance in an admission denial case, particularly if the violation delayed or prevented an applicant from accessing her report.

A public housing applicant's right to obtain a copy of his file from a private screening agency does not replace or diminish the applicant's right to receive a copy of the criminal record from the PHA.⁴⁸ The FCRA explicitly authorizes a housing provider to share a screening report with a consumer “if adverse action against the consumer has been taken by the user based in whole or in part on the report,”⁴⁹ so the applicant has an opportunity to challenge the denial at a hearing.⁵⁰ For similar reasons, a private subsidized owner (or a PHA screening an applicant for admission to the Housing Choice Voucher Program) who has a copy of an applicant's criminal history report on file should share that report with the applicant, even though the applicant has the right to obtain a copy from the screening company.⁵¹

3.3.5 Advocacy in cases involving denial of admission based on private criminal history reports

Advocates should of course challenge admission denials based on mismatched records or other inaccuracies common to private criminal background reports. Even when a private report accurately describes an applicant's criminal history, however, advocates should keep in mind that a denied applicant has the right to dispute the denial based on mitigating factors, evidence of rehabilitation or changed circumstances, and also to have an individualized determination made.⁵² In cases where a housing

³⁹See 15 U.S.C. § 1681i(a)(1)(A).

⁴⁰See 15 U.S.C. § 1681i(a)(5).

⁴¹See 15 U.S.C. § 1681i(d).

⁴²See 15 U.S.C. § 1681i(b).

⁴³See 15 U.S.C. § 1681i(c).

⁴⁴See 15 U.S.C. § 1681g(a). Notably, if a consumer requests particular information within a file, such as just the criminal background information, the screening company only needs to disclose the information requested—whereas a request for one's “report” or “file” without limitation must be treated as a request for disclosure of all the information the agency has on file about that consumer. See *Taylor v. Screening Reports, Inc.*, 294 F.R.D. 680, 686 (N.D.Ga. 2013) (consumer's request for his “report” without limitation entitled Plaintiff to his entire consumer file).

⁴⁵See 15 U.S.C. § 1681j (the disclosure must also be made without charge if the consumer “is a recipient of public welfare assistance,” is unemployed and certifies that he intends to apply for employment in the next 60 days, or has reason to believe that her file “contains inaccurate information due to fraud.”)

⁴⁶15 U.S.C. § 1681m(a)(3-4).

⁴⁷See 15 U.S.C. § 1681m(h)(8)(A).

⁴⁸See 24 C.F.R. § 960.204(c) (“Before a PHA denies admission to the PHAs public housing program on the basis of a criminal record, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record *and the applicant with a copy of the criminal record* and an opportunity to dispute the accuracy and relevance of that record.”) (italics added).

⁴⁹15 U.S.C. § 1681e(c).

⁵⁰See 24 C.F.R. § 960.204(c).

⁵¹See HUD Handbook 4350.3, Ch. 4-22(E) (“The applicant's or tenant's file should be available for review by the applicant or tenant upon request or by a third party who provides signed authorization for access from the applicant or tenant.”).

⁵²See HUD, Office of General Counsel Guidance on Application of

provider has received a recommendation or other admission determination from a third-party screener, advocates should ensure that such a determination is not accorded improper deference.⁵³

The applicant's right to challenge a denial includes the right to see (and receive a copy of) the criminal records at issue, obtain copies of their background reports, dispute inaccurate or incomplete contents, and have appropriate deletions or corrections made. Advocates should endeavor to make sure the structure and dynamics of private criminal checks do not impair these rights and protections.

In a typical case involving the denial of admission to subsidized housing based on a private criminal background check, an advocate's likely first step will be to preserve the client's appeal right by making a timely request for a hearing or reconsideration of the rental application. Next, the advocate should request from the housing provider the client's application file, the provider's admission policies, and the name of the tenant screening agency used to obtain the client's background report. The advocate should also obtain copies of the client's official criminal records from the

appropriate courts or law enforcement agencies, as well as any records or other evidence of rehabilitation or mitigating circumstances.

Denied applicants often have difficulty obtaining copies of their reports from screening companies. While the FCRA requires a consumer reporting agency to obtain "appropriate identification," before disclosing the contents of a consumer's file,⁵⁴ agencies differ broadly in terms of what identification they will require. Subsidized housing applicants, particularly those who are or have recently been homeless, often cannot produce multiple forms of government-issued photo ID, utility bills, or other materials that may be requested. Advocates should challenge excessive identification requirements that keep applicants from accessing their reports.⁵⁵

If a private background report contains errors or other improper contents, the advocate should assist the client in disputing those items and follow up on the dispute to ensure the disputed items are corrected or removed. Note that PHAs and subsidized housing owners often require denied applicants to appeal denials within as few as 10 to 14 days, sometimes even less, while the FCRA gives consumer reporting agencies 30- 45 days to reinvestigate disputed information,⁵⁶ plus an additional five business days to report the results of a reinvestigation to a consumer.⁵⁷ Thus, an advocate may need to request a continuance or other adjustment from the housing provider to ensure that the reporting dispute is resolved before the hearing.

If a disputed criminal record is ultimately changed or deleted, the advocate should ensure the screening agency reports the change to the housing provider by submitting an affirmative request for such a notification.⁵⁸

3.3.6. Opportunities for systemic advocacy

Hundreds of tenant screening firms operate in the

Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions at ____ (Apr. 4, 2016).

⁵³A housing provider who defers to a third-party screener's recommendations on which applicants to accept or reject should be liable if that screener makes those recommendations in an unlawfully discriminatory manner; the screening company is merely the agent of the housing provider, acting within the scope of its authority. An as-of-yet unanswered question is whether a screening company itself violates the Fair Housing Act for carrying out such a process. In *Goode v. LexisNexis Risk & Information Analytics Group, Inc.*, a consumer reporting agency was found to have made "quite literally, a decision for employment purposes" when it reviewed job applicants' criminal histories under an employer's hiring policy and reported those with disqualifying criminal records as "noncompetitive," resulting in their elimination from the candidate pool. *Goode v. LexisNexis Risk & Information Analytics Group, Inc.*, 848 F.Supp.2d 532, 539 (E.D.Pa. 2012). *Goode* established only that a screening company which effectively makes the hiring decision for an employer must comply with the same notice and disclosure duties the Fair Credit Reporting Act imposes on employers who deny applicants because of background checks. See 15 U.S.C. § 1681b(b) (Conditions for furnishing and using consumer reports for employment purposes). But if, as *Goode* implies, a screening company is effectively making an admission decision when a landlord always and without question defers to the screener's recommendation, then surely such a screener could be said to make unavailable or deny housing (for Fair Housing Act purposes) when it recommends denial. See 42 U.S.C. § 3604 ("it shall be unlawful—(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin) (*italics added*).

⁵⁴See 15 U.S.C. § 1681h(a)(1); see also Regulation V, 12 C.F.R. § 1022.123(a)(2) (requiring consumer reporting agencies to balance identification requirements against "an identifiable risk of harm arising from misidentifying the consumer.").

⁵⁵Nationwide tenant screening agencies must maintain a "streamlined process" for making disclosures that "[c]ollects only as much personal information as is reasonably necessary to properly identify the consumer[.]" 12 C.F.R. § 1022.137(a)(2)(ii).

⁵⁶See 15 U.S.C. §§ 1681i(a)(1)(A) (30-day reinvestigation period) and 1681i(a)(1)(B) (permitting 15-day extension under certain circumstances).

⁵⁷See 15 U.S.C. § 1681i(a)(6)(A).

⁵⁸See 15 U.S.C. § 1681i(d).

U.S., and these companies vary widely in terms of size, scope, types of reports and services provided, and overall quality. Housing providers who opt to utilize private screening companies therefore have many choices. Where possible, advocates should encourage housing providers to select screeners that employ tenant-friendly practices, such as omitting dismissed arrest records even if they are within the permissible FCRA reporting period, providing consumer disclosures electronically, and/or issuing “portable” screening reports that the screening company will re-issue to other landlords free of charge for a limited period.⁵⁹ At the very least, advocates should try to discourage housing providers from contracting with screening companies that routinely report outdated, mismatched, or otherwise inaccurate or improper criminal records, that do not give denied applicants fast and easy access to their reports, and that do not respond promptly and reasonably to disputes.

Although the FCRA provides rejected applicants an absolute right to see the contents of their screening reports, few applicants exercise this important right, and even when they do, many tenant screening companies frustrate applicants’ efforts through a variety of bureaucratic mechanisms.⁶⁰ Obtaining screening reports is a critical first step not only in detecting (and potentially disputing) errors, but also in understanding and evaluating a housing provider’s reason(s) for denying the applicant and using that information to formulate requests for individualized reconsideration. By encouraging more applicants to order copies of their screening reports, assisting them in overcoming procedural hurdles, and challenging egregious disclosure violations, advocates may bring more transparency to the private criminal background check industry and hopefully reduce or eliminate many of the barriers applicants face in challenging admission denials.

Advocates should also aggressively pursue fair

housing claims on behalf of applicants with old or irrelevant criminal records against owners who, by deferring to a screener’s admission recommendation in substantially all cases, effectively allow third-party background check companies to make the rental admission decisions for them. Challenging such practices is particularly important where a housing provider is relying solely on computer-generated recommendations and not conducting any kind of individualized review of the underlying criminal records. Enforcement actions of this kind present opportunities not only to assist individual clients in gaining access to housing, but to achieve systemic impacts by enjoining or reforming providers’ screening practices and admission policies. Advocates may also wish to explore whether a background check company may itself bear liability under the Fair Housing Act for a discriminatory housing denial when the screener effectively makes the rental decision for a housing provider.

3.4 Drug Treatment Program Records

PHAs are authorized to request and obtain information about public housing applicants from drug abuse treatment facilities,⁶¹ but their requests must be limited to the question of whether the drug abuse treatment facility “has reasonable cause to believe that the household member is currently engaging in illegal drug use.”⁶² PHAs are not permitted to seek additional information. Treatment facilities and applicants often have reasonable concerns that the sharing of any additional information could interfere with an individual’s treatment and recovery and present issues of confidentiality of medical records.

Prior to requesting the information, the PHA must obtain the applicant’s signed written consent.⁶³ The

⁵⁹See, e.g., Revised Code of Washington, RCW 59.18.030(3) (“‘Comprehensive reusable tenant screening report’ means a tenant screening report prepared by a consumer reporting agency at the direction of and paid for by the prospective tenant and made available directly to a prospective landlord at no charge, which contains all of the following: (a) A consumer credit report prepared by a consumer reporting agency within the past thirty days; (b) the prospective tenant’s criminal history; (c) the prospective tenant’s eviction history; (d) an employment verification; and (e) the prospective tenant’s address and rental history.”).

⁶⁰See, e.g., *Handlin v. On-Site Manager, Inc.*, 187 Wn. App. 841, 850-51 351 P.3d 226 (Wash.App. 2015) (tenant screening company’s failure to provide full and complete disclosures to rejected rental applicants was actionable violation of FCRA disclosure obligation).

⁶¹42 U.S.C.A. § 1437d(t) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 960.205 (2017). The statute does not address access to information regarding rehabilitation relating to alcohol abuse.

⁶²*Id.*, Cf. *Campbell v. Minneapolis Pub. Hous. Auth.*, 175 F.R.D. 531 (D. Minn. 1997), *vacated and remanded*, 168 F.3d 1069 (8th Cir. 1999). *Campbell* involved an interpretation of 42 U.S.C.A. §§ 1437n(e)(1) and (2), which have been repealed. The court allowed the PHA to seek information regarding drug use and rehabilitation efforts from drug treatment facility, but remanded the case to the PHA to determine eligibility because the administrative record was incomplete. The PHA conceded that it would have to change its policy based upon the repeal and amendments to the statute. For a discussion of the meaning of the phrase “currently engaging in illegal drug use,” see Chapter 2.

⁶³42 U.S.C.A. § 1437d(t)(2) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 960.205(c)(1) (2017). Cf. *Campbell v. Minneapolis Pub. Hous. Auth.*, 175 F.R.D. 531 (D.

consent form must expire automatically after the PHA has made a final decision to either approve or deny admission.⁶⁴ A PHA must also develop a system to maintain confidentiality of the information.⁶⁵ PHAs requesting information from drug treatment facilities must adopt and consistently follow a nondiscriminatory policy for all public housing applicants.⁶⁶ The policy adopted must be included in the PHA's plans, such as the Section 8 Administrative plan, the Admission and Continued Occupancy Plan (ACOP) and the PHA Annual Plan.⁶⁷

The statute and regulations authorizing PHAs to obtain information from drug abuse treatment facilities are limited to public housing. There are no companion provisions for the voucher or other federally assisted housing programs. It is not clear whether a PHA or a private owner could adopt a similar policy without statutory authorization for a voucher or other type of subsidized housing program. The argument against such adoption is that Congress intentionally limited the applicability of the statutory provision to public housing and did not extend it to other programs. If a PHA or private owner does adopt a policy of obtaining records from drug treatment facilities, advocates should argue, at a minimum, that the provider must incorporate the public housing statutory protections or their equivalent in order to avoid a violation of fair housing laws or discrimination based upon disability.⁶⁸

3.5 Expungement of Criminal Records⁶⁹

A criminal record can be a substantial barrier to qualifying for federally assisted housing. Expungement or sealing can sometimes help an applicant overcome this type of barrier⁷⁰ by preventing

disclosure and possibly relieving an applicant from the requirement of self-disclosure. Although definitions vary by state, "expungement" typically refers to the process of destroying or erasing all previously public records relating to a specific criminal incident. In some jurisdictions, "expunged" criminal records may remain open to public view but are effectively readjudicated as dismissals. These kinds of expungements may affect the length of time during which consumer reporting agencies may lawfully report the record⁷¹ or the circumstances under which a housing provider may deny admission because of the record,⁷² but they nonetheless leave applicants who deny or fail to disclose the existence of the records vulnerable to claims of misrepresentation. "Sealing" does not require destruction of records, but does prevent them from being accessed by others, including PHAs or private owners of federally assisted housing. Although expungement may be available to suppress convictions, admission or eviction problems may persist if the underlying conduct that led to the conviction and incarceration is revealed elsewhere.

Because of the benefits of expungement, some legal services offices and law school legal clinics have developed units that focus on expungement.⁷³ In addition, some legal services offices have recruited private attorneys to represent clients in expungement proceedings.

In many states, criminal records that have been expunged or sealed cannot legally or practically be used as grounds for denying federal housing benefits or taking other adverse action against recipients.

Minn. 1997), *vacated and remanded*, 168 F.3d 1069 (8th Cir. 1999).

⁶⁴42 U.S.C.A. § 1437d(t)(2)(C) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 960.205(c)(2) (2017).

⁶⁵42 U.S.C.A. § 1437d(t)(2)(B) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 960.205(f) (2017).

⁶⁶24 C.F.R. § 960.205(e) (2017).

⁶⁷*Id.* The regulations refer to the PHA Administrative Plan; presumably, this refers to the Admission and Continued Occupancy Plan (ACOP). For a brief discussion of the ACOP and the PHA plan see Chapter 6.

⁶⁸For a brief discussion of the Fair Housing Act and the Americans with Disabilities Act and a PHA's or owner's obligation not to discriminate against recovering drug abuser, see Chapter 4.

⁶⁹This section is adapted from Devon Knowles, *Expungement of Criminal Records and Federally Assisted Housing*, 36 Hous. L. Bull. 75 (2006).

⁷⁰Sharon M. Dietrich, *When "Your Permanent Record" is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139 (July-Aug. 2007)(Provides a basic and informative discussion of criminal

records, access to criminal records, how legal aid programs can help clients to minimize or eliminate their criminal records, and systematic advocacy issues for assisting clients who have criminal records); MARGARET COLGATE LOVE, *RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE* (William S. Hein & Co., Inc. 2006).

⁷¹The Fair Credit Reporting Act prohibits consumer reporting agencies from disclosing "records of arrest that, from date of entry, antedate the report by more than seven years." 15 U.S.C. § 1681c(a)(2). There is no such time limit on the reporting of adult criminal convictions. Hence the "expungement" that converts a criminal conviction into a non-conviction record renders the record subject to the seven-year limit.

⁷²See 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, pp. 5-6 (Apr. 4, 2016) (denial of admission based on mere arrest record likely violates Fair Housing Act).

⁷³For example, Neighborhood Legal Services of Los Angeles County and East Bay Community Law Center (EBCLC), Berkeley, CA, have developed such programs; *Cleaning Up Criminal Records*, 41 CLEARINGHOUSE REV. 148 (July-Aug. 2007) (discussing the EBCLC program).

Specifically, expungement may restore an individual's legal status and rights,⁷⁴ prevent PHAs and owners from accessing an individual's criminal record,⁷⁵ or authorize an individual to omit the expunged information from housing applications.⁷⁶

While expungement can be an extremely useful remedy in overcoming the consequences associated with an individual's criminal record, it is a difficult process⁷⁷ and has inherent limitations. First, the process varies from state to state,⁷⁸ and it may be difficult to determine what the process is and whether it is available. Second, each state typically defines the classes of individuals who qualify for expungement, making it a remedy that is not available to all. Only seven states and Puerto Rico have expungement laws that apply to most adult felony convictions.⁷⁹ Third, the process of petitioning for and successfully obtaining an expungement order requires individuals to maneuver through a complicated legal process which can be time-consuming and expensive.⁸⁰ If successful, the individual seeking expungement must monitor the results carefully to ensure that the

expungement order is provided to the FBI and NCIC; otherwise, the criminal record will continue to remain available to PHAs and owners. States typically use five classifications to define categories of individuals eligible to petition for expungement. These are:

Case Disposition: Generally, states have distinguished three classes of criminal records: (1) the individual was arrested, but the charges were never brought or were ultimately dropped, dismissed or resolved in favor of the individual; (2) the individual pled guilty to or was convicted of an offense where the judgment was withheld or suspended on the condition of completing a program or term of probation; and (3) the individual pled guilty to or was convicted of an offense where the judgment was imposed. Usually, expungement laws are more likely to provide relief for individuals in the first two categories.⁸¹

Criminal Offense: Many states allow expungement of criminal records for those who were convicted of or pled guilty to commission of relatively minor offenses, particularly those involving controlled substances.⁸²

Age and Criminal History of Individual: Some states have special expungement provisions that apply to offenses committed by juvenile offenders or individuals under the age of 21.⁸³

Time Limitations: Individuals will often be required to wait for a predetermined period of time after arrest or conviction before they are eligible to apply for expungement. How long an individual must wait usually depends on the state and on the type of offense committed. The waiting period may be an additional

⁷⁴E.g., IDAHO CODE § 19-2604 (2017).

⁷⁵E.g., GA. CODE ANN. § 35-3-37 (2017).

⁷⁶E.g., Mich. Comp. Laws § 780.622(1) (2015)

⁷⁷United States v. James, 2003 U.S. Dist. LEXIS 6494, *7 (E.D.N.Y. 2003)(describing the policy of record expungement as so difficult that it is "self-defeating" and "morally wanting").

⁷⁸MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 62-61 (William S. Hein & Co., Inc. 2006) available at: <http://www.wshein.com/media/catalog/2/334160.pdf>; a summary of the book and profiles of the law and practice in each U.S. jurisdiction is available at:

<http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>; See also 21A AM. JUR. 2d Criminal Law § 1309 (2007) (noting that in some jurisdictions courts gain their authority to expunge from statutes).

⁷⁹Sharon M Dietrich, *When "Your Permanent Record" is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139, 145 (July-Aug. 2007)

⁸⁰Typically, individuals must petition for expungement in the court where the criminal case was handled. The process also usually requires collecting all the relevant information about the case such as date of arrest, statute violated, and date of conviction. An individual will have to contact the law enforcement agency responsible for handling the case or refer to court records. Next, an individual will usually have to fill out a court form, pay a filing fee and, at times, attend a hearing to explain why he or she is seeking expungement or demonstrate qualification for expungement under the state statute. Applying for employment or housing may be a sufficient interest for seeking to expunge or seal a record. If successful, the court will then order the record expunged. Also, the statutes vary in that individuals may or may not be responsible for forwarding the expungement order to local and federal law enforcement agencies.

⁸¹For example, under the Colorado Code, most individuals who were arrested or taken into police custody but were not ultimately charged of a crime can have their record sealed. COLO. REV. STAT. § 24-72-702.

⁸²See Chapter 1, regarding the increase in drug-related convictions. Pennsylvania provides one example of this type of classification, it entitles most individuals charged under the Controlled Substances, Drug Device, and Cosmetic Act to expungement. 35 PA. STAT. ANN. § 780-119(a) and (c) (2007) (expungement available as a matter of right only once, for drug-related charges that are withdrawn, dismissed, or for which the individual is acquitted).

⁸³See, e.g., N.C. GEN. STAT. § 15A-145(b) (2017) (providing that individuals under the age of 21 who have not previously been convicted and who plead or are found guilty of misdemeanor possession of alcohol may petition to have the record expunged after two years and are thereafter not required to report that information for any purpose including federal housing applications; individuals under the age of 18 who have not previously been convicted of a crime and who are convicted of a misdemeanor other than a traffic violation are also eligible to have their records expunged); see also Rev. Code Wash., § 19.182.040(1)(f) (prohibiting consumer reporting agencies from disclosing "[j]uvenile records ... when the subject of the records is twenty-one years of age or older at the time of the report;")

burden on applicants for federally assisted housing if the state waiting period is longer than the lookback period used by the housing provider. laws.⁸⁶

Prior Expungement: Often, an individual is eligible to have only one offense expunged or sealed over his or her lifetime. As a result, those who have already availed themselves of this remedy in a state with a lifetime limit will be barred from expunging other criminal records.

Once a record has been expunged, absent error, it should be erased from the federal criminal database, and housing providers should not have access to it.⁸⁴ In addition, many individuals who have their records expunged may legally omit information regarding their criminal history from their housing applications and other forms requesting information for housing.⁸⁵ Unfortunately, mistakes do occur. Sometimes the final steps in the process are not completed and the record is not expunged or sealed. In other cases, individuals are mistakenly told (or mistakenly believe) that their records are cleared. Misinformed individuals then fail to disclose their records and are accused of lying on the application. It is therefore critical that applicants or their advocates obtain current copies of criminal records and verify that any expungements or sealings have been completed.

A PHA or owner may become aware of a criminal record or criminal conduct on which the record was based and deny an applicant housing because of the conduct. The PHA or owner may argue that its action was based on the underlying facts, not the conviction. In response, applicants should consider using expungement laws as a basis for claiming mitigating or changed circumstances. Generally, expungement laws are intended to give an individual a second chance, so many jurisdictions treat criminal history that has been expunged as though it never existed. Advocates may want to argue that by considering an expunged record or the underlying facts, a housing provider frustrates the purpose of the expungement

⁸⁴See, e.g., *Hartford Hous. Auth. v. Reyes*, No. SPH 87435, 1997 WL 30989, at *2 (Conn. Super. Jan. 21, 1997) (“Erasure means, at a minimum, that information contained in the record is not to be disclosed to anyone.”).

⁸⁵Many of the expungement statutes explicitly provide that individuals cannot be held liable for omitting the expunged information in the future. See, e.g., FLA. STAT. § 943.0585(b)(4)(a)(7)(b) (2017) (“[A] person who has been granted an expunction under this section, former s. 893.14, former s. 901.33, or former s. 943.058 may not be held under any provision of law of this state to commit perjury or to be otherwise liable for giving a false statement by reason of such person’s failure to recite or acknowledge an expunged criminal history record.”).

⁸⁶Some PHAs or owners may argue that their obligations regarding admission to federally assisted housing preempt state laws governing expungement. For a discussion of how to respond to these arguments in a related area of state protections, namely evictions and federal law, see Lawrence R. McDonough and Mac McCreight, *Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REV. 55, 76 (May-June 2007).

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No.

Plaintiff,

vs.

COMPLAINT FOR INJUNCTIVE
 RELIEF AND DAMAGES, AND
 JURY DEMAND

(Violation of Federal Housing and
 Federal Civil Rights Laws)

HOUSING AUTHORITY OF THE
 COUNTY OF CONTRA COSTA,
 ELIZABETH CAMPBELL, in her official
 capacity as Acting Director of Housing
 Assistance Programs for the Housing
 Authority of Contra Costa County,
 TERRI LOCKETT, in her official capacity
 as Housing Assistance Manager for the
 Housing Authority of Contra Costa County,
 and DOES 1-10,

Defendants.

1 Plaintiff [REDACTED] for her Complaint, alleges as follows:

2
3 **INTRODUCTORY STATEMENT**

4 Plaintiff, a former recipient of a Section 8 housing subsidy, sues Defendants
5 Housing Authority of the County of Contra Costa ("HACCC"); Elizabeth Campbell,
6 Acting Director of Housing Assistance Programs for HACCC, in her official capacity;
7 Terri Lockett, Housing Assistance Manager for HACCC, in her official capacity; and Does
8 1-10. Defendants terminated Plaintiff's Section 8 housing subsidy by using the release of
9 information purportedly relating to her son's juvenile criminal record, but this use of his
10 juvenile file was not authorized under federal or California law. Defendants also denied
11 Plaintiff's right of due process, adequate notice, and a meaningful opportunity to be heard.

12 Plaintiff requests that this Court issue an order directing defendants to reinstate her
13 Section 8 housing subsidy, compensate her for damages suffered as a result of the
14 improper denial of housing assistance payments, cease the improper use of juvenile
15 records, and that this Court award her any and all relief that it deems proper and just.

16 **JURISDICTION AND VENUE**

17 1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331
18 because it arises under 42 U.S.C. § 1437d and 42 U.S.C. § 1983, and for redress of
19 violations of Plaintiff's rights under Federal Housing and Federal Civil Rights Laws.

20 2. Venue is proper in this Court under 28 U.S.C. § 1391 because the events at
21 issue occurred in this judicial district.

22 3. A number of claims asserted herein allege violations of state law, and arise
23 out of the same transaction or series of transactions on which the federal claims are based,
24 and therefore this Court has supplemental jurisdiction over these state law claims.

25 **PARTIES**

26 4. Plaintiff [REDACTED] at all times relevant herein, resided in [REDACTED]
27 County.
28

1 14. Until April 2005, [REDACTED] son lived with [REDACTED] at
2 their apartment in [REDACTED] County. The [REDACTED] paid \$439 in rent per month, and
3 Defendant HACCC paid \$611 per month to the landlord (total rent was \$1050 per month).

4 15. [REDACTED] son, who is [REDACTED] years old, has been charged with involvement
5 in a capital crime that occurred on April 23, 2005 in a neighboring city in [REDACTED]
6 County. The Contra Costa County District Attorney's Office has stated that to its
7 knowledge [REDACTED] had no involvement in the April 23 incident.

8 16. On or about May 9, 2005, and purportedly based on the April 23 Incident,
9 HACCC notified [REDACTED] that it would seek to terminate her Section 8 rental subsidy.

10 17. On May 12, 2005, [REDACTED] requested in writing that HACCC provide
11 her with an administrative hearing to determine whether HACCC properly proposed
12 termination of her Section 8 rental subsidy.

13 18. On June 14, 2005, HACCC conducted an administrative hearing before
14 Hearing Officer Laurel Weil. At this hearing, Defendant Terri Lockett introduced a
15 newspaper article as evidence of the April 23 Incident. At this hearing, Ms. Lockett also
16 introduced a letter from Deputy District Attorney Hal Jewett dated June 9, 2005. Counsel
17 for [REDACTED] objected to both the newspaper article and the letter as hearsay. The Deputy
18 District Attorney's letter stated that, to his knowledge, [REDACTED] had no
19 involvement in the April 23 Incident. The Deputy District Attorney's letter also made two
20 specific allegations regarding the juvenile record of [REDACTED] son.

21 19. Defendants at no time provided [REDACTED] with access to any portion of
22 the juvenile records of her son.

23 20. Defendants at no time before the administrative hearing on June 14, 2005
24 provided [REDACTED] with notice that any aspect of her son's juvenile record would be at
25 issue or potentially become a basis for termination of her housing subsidy.

26 21. The Hearing Officer ruled in favor of HACCC, relying on and specifically
27 citing the juvenile allegations against [REDACTED] son as they were detailed in the Deputy
28 District Attorney's letter dated June 9, 2005, and upheld the termination of [REDACTED]

1 Section 8 rental subsidy because the alleged juvenile offenses described in the Deputy
2 District Attorney's letter had not been reported to HACCC.

3 22. By letter dated July 28, 2005, Defendant Elizabeth Campbell provided [REDACTED]
4 [REDACTED] with a copy of the administrative hearing decision upholding the termination of
5 Section 8 housing assistance payments.

6 23. [REDACTED] moved to a less expensive apartment, but their
7 housing costs have increased due to the loss of Section 8 housing assistance payments.

8 **FIRST CAUSE OF ACTION**

9 **(Violation of Federal Housing Law: Unauthorized Release of Juvenile Records)**

10 24. Plaintiff realleges and incorporates by reference paragraphs 1 through 23 of
11 her Complaint as though fully set forth herein.

12 25. This Cause of Action is brought pursuant to 42 U.S.C. §§ 1437d(q)(1)(c)
13 and 1437(q)(7).

14 26. The above-described acts and omissions of defendants, and each of them,
15 violated Plaintiff's rights pursuant to 42 U.S.C. § 1437d(q)(1)(c) because defendants
16 terminated [REDACTED] housing subsidy by using the release of information purportedly
17 relating to a juvenile's criminal conviction that was not authorized under California law.

18 27. As a direct and proximate result of the acts, omissions, and violations
19 alleged above, Plaintiff suffered damages in an amount to be proven at trial.

20 28. Plaintiff also seeks injunctive and declaratory relief to remedy her loss of a
21 housing subsidy that was wrongfully terminated as a result of defendants' unlawful acts.

22 **SECOND CAUSE OF ACTION**

23 **(Violation of Federal Housing Law: Failure to Provide Juvenile Records)**

24 29. Plaintiff realleges and incorporates by reference paragraphs 1 through 28 of
25 her Complaint as though fully set forth herein.

26 30. This Cause of Action is brought pursuant to 42 U.S.C. §§ 1437d(q)(2) and
27 1437d(q)(7).

1 31. The above-described acts and omissions of defendants, and each of them,
2 violated Plaintiff's rights pursuant to 42 U.S.C. § 1437d(q)(2) because defendants did not
3 provide Plaintiff with a copy of the criminal record at issue before taking an adverse
4 action against Plaintiff by terminating her rental subsidy.

5 32. As a direct and proximate result of the acts, omissions, and violations
6 alleged above, Plaintiff suffered damages in an amount to be proven at trial.

7 33. Plaintiff also seeks injunctive and declaratory relief to remedy her loss of a
8 housing subsidy that was wrongfully terminated as a result of defendants' unlawful acts.

9 **THIRD CAUSE OF ACTION**

10 **(Violation of Federal Housing Law: Failure to Provide Notice and Fair Hearing)**

11 34. Plaintiff realleges and incorporates by reference paragraphs 1 through 33 of
12 her Complaint as though fully set forth herein.

13 35. This Cause of Action is brought pursuant to 42 U.S.C. § 1983, and 42
14 U.S.C. §§ 1437d(k)(1) and 1437d(k)(3).

15 36. The above-described acts and omissions of defendants, and each of them,
16 violated Plaintiff's rights pursuant to 42 U.S.C. §§ 1437d(k)(1) and 1437d(k)(3) because
17 defendants terminated Plaintiff's housing assistance payments without first advising her of
18 the specific grounds allegedly supporting this action, and defendants did not provide
19 Plaintiff with an opportunity to examine any documents or records related to the juvenile
20 records at issue.

21 37. As a direct and proximate result of the acts, omissions, and violations
22 alleged above, Plaintiff suffered damages in an amount to be proven at trial.

23 38. Plaintiff also seeks injunctive and declaratory relief to remedy her loss of a
24 housing subsidy that was wrongfully terminated as a result of defendants' unlawful acts.

25 **FOURTH CAUSE OF ACTION**

26 **(Violation of Federal Civil Rights: Denial of Due Process)**

27 39. Plaintiff realleges and incorporates by reference paragraphs 1 through 38 of
28 her Complaint as though fully set forth herein.

1 40. This Cause of Action is brought pursuant to 42 U.S.C. § 1983 and the
2 United States Constitution, in particular but not limited to, the Fifth and Fourteenth
3 Amendment thereto.

4 41. The above-described acts and omissions of defendants, and each of them,
5 violated Plaintiff's rights pursuant to 42 U.S.C. § 1983 because defendants terminated
6 Plaintiff's housing assistance payments without providing her with due process, and denied
7 her adequate notice or a meaningful opportunity to be heard.

8 42. As a direct and proximate result of the acts, omissions, and violations
9 alleged above, Plaintiff suffered damages in an amount to be proven at trial.

10 43. Plaintiff also seeks injunctive and declaratory relief to remedy her loss of a
11 housing subsidy that was wrongfully terminated as a result of defendants' unlawful acts.

12 **FIFTH CAUSE OF ACTION**

13 **(Supplemental Claim: Appeal From Administrative Hearing Decision**
14 **Pursuant to California Code of Civil Procedure Sections 1094.5 and 1094.6)**

15 44. Plaintiff realleges and incorporates by reference paragraphs 1 through 43 of
16 her Complaint as though fully set forth herein.

17 45. California Code of Civil Procedure §§ 1094.5 and 1094.6 provide a
18 procedure for setting aside administrative decisions issued in proceedings where by law an
19 administrative hearing is required to be held, evidence taken, and discretion in the
20 determination of facts is vested in the agency holding the hearing.

21 46. Plaintiff has a clear, present, and beneficial interest in, and right to,
22 defendants' performance of the duties mandated by the due process clause of the fifth and
23 fourteenth amendments to the United States Constitution, the United States Housing Act of
24 1937, the Housing and Community Development Act of 1974, and the federal regulations
25 and handbooks promulgated pursuant thereto with respect to defendants' operation of the
26 Section 8 program.

27 47. Notwithstanding the plain duties imposed upon them by law, defendants
28 have failed and refused, and continue to fail and refuse, to carry out their obligations in the
manner required by law. Specifically, by terminating Plaintiff's Section 8 housing subsidy

1 based on the release of information purportedly relating to her son's juvenile criminal
 2 record that was not authorized under federal or California law, and by denying Plaintiff her
 3 rights to due process, adequate notice, and a meaningful opportunity to be heard,
 4 defendants abused their discretion.

5 48. Plaintiff has exhausted all available administrative remedies, and has no
 6 plain, speedy, or adequate remedy at law.

7 PRAYER

8
 9 WHEREFORE, Plaintiff prays for judgment as follows:

10 1. That Plaintiff be awarded damages according to proof, under Plaintiff's first
 11 cause of action caused by defendants' violation of Plaintiff's federal housing rights
 12 pursuant to 42 U.S.C. §§ 1437d(q)(1)(c) and 1437(q)(7);

13 2. That Plaintiff be awarded damages according to proof, under Plaintiff's
 14 second cause of action caused by defendants' violation of Plaintiff's federal housing rights
 15 pursuant to 42 U.S.C. §§ 1437d(q)(2) and 1437d(q)(7);

16 3. That Plaintiff be awarded damages according to proof, under Plaintiff's
 17 third cause of action caused by defendants' violation of Plaintiff's federal housing rights
 18 pursuant to 42 U.S.C. § 1983, and 42 U.S.C. §§ 1437d(k)(1) and 1437d(k)(3);

19 4. That Plaintiff be awarded damages according to proof, under Plaintiff's
 20 fourth cause of action caused by defendants' violation of Plaintiff's federal civil rights
 21 pursuant to 42 U.S.C. § 1983, and the United States Constitution, in particular but not
 22 limited to, the Fifth and Fourteenth Amendment thereto;

23 5. That Plaintiff be awarded damages according to proof, under Plaintiff's fifth
 24 cause of action pursuant to California Code of Civil Procedure §§ 1094.5 and 1094.6;

25 6. That the Court order defendants to reinstate Plaintiff's housing choice
 26 voucher payments under the program known as "Section 8";

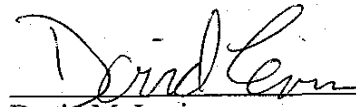
27 7. That the Court permanently enjoin defendants from using juvenile records
 28 in violation of 42 U.S.C. § 1437d;

1 8. That Plaintiff be awarded her costs of suit, including attorneys' fees for co-
2 counsel Youth Law Center incurred in bringing, prosecuting and maintaining this action
3 under federal law, including pursuant to 42 U.S.C. §1437d and 42 U.S.C. §1983; and

4 9. That Plaintiff be awarded such other and further relief as the Court deems
5 just and proper.

6 10. In accordance with Fed. R. Civ. P. Rule 38(b), and Northern District Local
7 Rule 3-6, Plaintiff hereby demands a jury trial on all issues triable by jury.

8
9 Dated: October 20, 2005



David M. Levin
Bay Area Legal Aid
For [REDACTED]

10
11
12
13
14
15 **VERIFICATION**

16 1. I have read the foregoing Complaint.

17 2. I am a party to this action.

18 3. The matters stated in the foregoing document are true of my own
19 knowledge except as to those matters which are stated on information and belief, and as to
20 those matters I believe them to be true.

21 4. I declare under penalty of perjury under the laws of the State of California
22 that the foregoing is true and correct.

23 5. Executed on October 20, 2005, at Pittsburg in Contra Costa County,
24 California.

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

AN AFFORDABLE HOME ON REENTRY

CHAPTER 4

MITIGATING CIRCUMSTANCES, REHABILITATION AND REASONABLE ACCOMMODATIONS

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4.1 Introduction

In many cases, being able to demonstrate mitigating circumstances and/or rehabilitation allows individuals with criminal records to gain admission to federally assisted housing. Evidence of mitigating circumstances and rehabilitation may include documentation of a disability related to the criminal activity, the nature and context of the conviction and/or verification of completion of a rehabilitation program. Mitigating circumstances and rehabilitation evidence may be presented at any time during the application process. This Chapter discusses how these factors are treated under the applicable laws and regulations and offers strategies advocates can use to demonstrate and utilize mitigation and rehabilitation effectively.

4.2 Mitigating Circumstances

The rules regarding consideration of mitigating circumstances vary among the federally assisted programs. In the public housing program, PHAs are required by regulation to consider mitigating factors. Owners of other HUD-assisted housing are permitted, but not required, to consider such factors.

Public Housing. In considering an applicant's criminal history prior to admission in public housing, a PHA must consider the time, nature and extent of the applicant's conduct, including the seriousness of the offense.¹ HUD has emphasized that PHAs should

consider applications for residence by persons with criminal histories on a case-by-case basis, focusing on the concrete evidence of the seriousness and recentness of criminal activity as the best predictors of tenant suitability. HUD guidance also advises PHAs to take into account the extent of the individual's criminal activity and any additional factors, such as evidence of rehabilitation, that signal the likelihood of favorable conduct in the future.²

The prohibition on automatic rejection of all applicants with criminal histories is important since it requires PHAs to provide applicants with an opportunity to explain the situation and present the facts in context. However, the right to present additional information or rebut adverse information does not mean that the applicant will definitely be accepted once an individualized assessment is complete. These rules regulate the process rather than the outcome.

Voucher Program and HUD-Assisted Housing. When reviewing a voucher application, PHAs are urged, but not required, to consider mitigating factors. The same rule applies to HUD-assisted owners. While HUD regulations do not require that such factors be considered, many applicants present mitigation evidence at the time of application or during the informal hearing/review. Moreover, there is nothing

¹24 C.F.R. § 960.203(d) (2017); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶¶ 4.6, 4.8 and 4.10 (June 2003) available at:

<http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>; see also *Lancaster v. Scranton Hous. Auth.*, 479 F. Supp. 134, 138 (M.D. Pa. 1979), *aff'd mem.*, 620 F.2d 288 (3d Cir. 1980) (applicant has burden of putting forth such evidence).

²Guidance for Public Housing Agencies (PHAs) and Owners of Federally assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, HUD Notice PIH 2015-19 (Nov. 2, 2015); "One Strike and You're Out" Screening and Eviction Guidelines for Public Housing Authorities (HAs), PIH 96-16 (HA) (Apr. 12, 1996) 5-6; see also Letter from Mel Martinez, Secretary of HUD, to Public Housing Directors (Apr. 16, 2002), and letter from Michael Liu, Assistant Secretary of HUD to Public Housing Directors (June 9, 2002), (in the eviction context HUD has urged PHAs to be guided by "compassion and common sense").

that bars a PHA or owner from adopting a policy or practice of requiring consideration of mitigating factors. Pointing out that a PHA must consider the additional information in the public housing setting may help convince a PHA administering vouchers or a private owner that they should also be considering such information. Advocates should also cite to eviction and termination of benefits cases where courts have reversed and remanded because of a voucher administrator or landlord's failure to consider mitigating circumstances.³

The HUD regulations set forth the following factors that should be considered in admission to its programs, which include:⁴

- the seriousness of the offense,
- the effect the denial of admission would have on the rest of the family,
- the effect the denial of admission would have on the community,⁵
- the extent to which the applicant has taken responsibility and taken steps to prevent or mitigate,
- evidence of rehabilitation,
- mitigating circumstances relating to the disability of a family member, and
- evidence of the family's participation in or willingness to participate in social service or counseling programs.⁶

Advocates should note that the federal regulations also list other factors that may weigh against admitting an individual with a criminal record, such as the individual's degree of participation in an offense. In addition, as discussed in Section 2.3.5, housing providers in all programs are obligated to consider

whether the criminal activity was related to an applicant's status as a survivor of domestic violence (*see* Section 2.3.5).

4.3 Drug Rehabilitation

There are a number of ways PHAs and owners may take into consideration whether an applicant is participating in or has completed a rehabilitation program. For example, an applicant may have to submit evidence of rehabilitation in order to avoid or reduce the three-year ban on admission for individuals evicted from federally assisted housing due to a drug-related crime.⁷ For public housing, a PHA with questions about an applicant's current use of illegal drugs may seek documentation that the applicant is not currently using.⁸

PHAs are instructed that they should not engage in screening that excludes former users of illegal drugs (*i.e.*, individuals who are in recovery).⁹ If a PHA or owner denies housing to an individual in recovery because of the applicant's status as a recovering substance abuser, the denial may constitute a violation of the Fair Housing Act ("FHA"). Courts have held that persons in recovery may be entitled to protection under the FHA and the Americans with Disabilities Act ("ADA").¹⁰ The FHA makes it unlawful "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter

⁷*See* discussion in Chapter 2 regarding exclusion of applicants for certain prior criminal behavior.

⁸*See* discussion in Chapter 3 regarding the limitations and protections that a PHA or owner must provide when seeking information from a drug abuse treatment center.

⁹HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶¶ 4.6 and 7.6 (June 2003) available at:

<http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>. Owners of HUD-assisted housing are also instructed that they may not screen applicants by using or requiring a medical exam. *See* HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶ 4-8B (June 2007). Typically this provision is used to prohibit owners from inquiring into an applicant's medical/physical condition, such as pregnancy, AIDS or TB. But it also could be used to argue that an owner may not request drug testing.

¹⁰*See, e.g.*, *MX Group, Inc. v. Covington*, 293 F.3d 326, 328 (6th Cir. 2002) (finding that city zoning ordinance excluding methadone clinics discriminated against recovering substance abusers in violation of the ADA); *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 916 (4th Cir. 1992) (finding that corporation that refused to lease apartments to a community drug- and alcohol-abuse rehabilitation program violated the FHA); *Hispanic Counseling Ctr., Inc. v. Hempstead*, 237 F. Supp. 2d 284, 287, 293 (E.D.N.Y. 2002) (finding that a zoning amendment preventing a substance abuse treatment center from relocating to a new building constituted discrimination against the center's clients in violation of the ADA).

³*E.g.*, *Hicks v. Dakota Cnty. Comm. Dev. Agency*, No. A06-1302, 2007 WL2416872 (Minn. App., Aug. 28, 2007) ("The permissive nature of the [voucher] regulation does not preclude a determination that mitigating circumstances are an important factor that must be considered in a particular case."); *Oakwood Plaza Apartments v. Smith*, 352 N.J. Super. 467, 800 A.2d 265 (2002) (remanding project-based Section 8 eviction case to trial court for a determination of whether landlord properly exercised discretion and considered relevant factors prior to deciding to evict).

⁴The list is culled from the following sources: 24 C.F.R. §§ 982.552(c)(2), 5.852 (2007); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶ 4-7C4 (June 2007).

⁵This factor opens the door to the argument that providing housing to an individual with a criminal record substantially increases the potential that the individual will not be a repeat offender and therefore may be a benefit to the community.

⁶24 C.F.R. § 960.203(d)(ii) (2007). This factor is listed in the context of public housing but could be considered with respect to applications for other federally assisted housing.

because of a handicap of ... a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available.”¹¹ HUD regulations define ‘handicap’ to include drug addiction.¹² Similarly, the ADA, which is often used by courts to interpret the FHA’s definition of ‘handicap,’ provides that an individual with a disability can include “someone who has successfully completed a drug rehabilitation program, is currently in such a program, or is mistakenly regarded as engaging in illegal drug use.”¹³ In contrast, “current, illegal use of, or addiction to, a controlled substance” cannot constitute a “handicap.”¹⁴ To raise an FHA claim, the applicant must show that his or her status as an individual with a history of abusing drugs was a motivating factor in the owner’s or PHA’s decision to deny admission.¹⁵

There are few published cases in which an applicant has argued that he was unlawfully denied access to housing because of his status as an individual in recovery in violation of the FHA. In *United States v. Southern Management Corporation*, a corporation that managed a private apartment complex refused to rent its units to a community drug- and alcohol-abuse rehabilitation board.¹⁶ The board had planned to rent the units to its clients who had remained drug-free for one year and were in the “reentry” phase of a treatment program.¹⁷ A jury later determined that the corporation refused to rent to the board because its clients were former substance abusers.¹⁸ The United States Court of Appeals for the Fourth Circuit held that the clients qualified as having a “handicap” under the FHA because their status as former substance abusers limited a major life activity—their ability to obtain housing—as a result of others’ attitudes toward that status.¹⁹ The court reasoned that “an individual who makes the effort to recover should not be subject to housing discrimination based on society’s accumulated fears and prejudices associated with drug addiction.”²⁰ Accordingly, it held that the corporation’s refusal to rent to the board constituted a violation of the FHA

and upheld an injunction requiring the corporation to rent apartments to the board.²¹

A case decided in the Eighth Circuit illustrates the importance of submitting documentation clearly establishing that an applicant is no longer using illegal drugs. In *Campbell v. Minneapolis Public Housing Authority*, the applicant claimed that the PHA improperly determined that he was ineligible for public housing.²² The PHA denied the housing because the applicant had “recently used illicit drugs.”²³ The record contained an affidavit in which the applicant stated that he no longer used illegal drugs.²⁴ The record also contained a declaration in which the applicant stated that he had used illegal drugs less than fourteen months before he applied for public housing and had not completed a chemical-dependency treatment program since his most recent illegal drug use.²⁵ Neither party submitted the applicant’s treatment records to the court.²⁶ The court held that there was insufficient evidence to determine whether the PHA’s decision was proper, and the court remanded the matter to the PHA for redetermination of the applicant’s eligibility.²⁷

As *Campbell* illustrates, an applicant’s ability to establish that he or she is no longer a current user of illegal substances is crucial to establishing that he or she is eligible for subsidized housing and entitled to the protections of the FHA. However, it is unclear how long an individual in recovery must be off drugs in order to avoid being deemed a current user. Congress has not clearly defined what constitutes ‘current, illegal use’ of a substance under the FHA or ADA. The regulations accompanying the ADA provide that current use is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the discriminatory action in question.²⁸ Rather, “the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.”²⁹ Courts have found ‘current’ use of illegal substances when presented with periods of

¹¹42 U.S.C.A. § 3604(f)(1)(B) (West, WESTLAW through P.L. 110-111 approved 11-5-07).

¹²24 C.F.R. § 100.201(a)(2) (2007).

¹³42 U.S.C.A. § 12210(b) (West, WESTLAW through P.L. 110-111 approved 11-5-07).

¹⁴42 U.S.C.A. 3602(h) (West, WESTLAW through P.L. 110-106 approved 10-25-07); 24 C.F.R. § 100.201(a)(2) (2007).

¹⁵See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

¹⁶955 F.2d 914, 916 (4th Cir. 1992).

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.* at 919.

²⁰*Id.*

²¹*Id.* at 923.

²²168 F.3d 1069, 1076 (8th Cir. 1999).

²³*Id.* at 1075.

²⁴*Id.*

²⁵*Id.* at 1076.

²⁶*Id.*

²⁷*Id.*

²⁸29 C.F.R. § 1630.3 App. (2008); see also *Shafer v. Preston Mem’l Hosp. Corp.*, 107 F.3d 274, 278 (4th Cir. 1997) (The plain meaning of “current” is “a periodic or ongoing activity in which a person engages ... that has not yet permanently ended.”).

²⁹29 C.F.R. § 1630.3 App. (2008).

abstinence lasting only a few weeks.³⁰ In contrast, courts have found that a sustained period of abstinence from drug use lasting several months may demonstrate that someone is not ‘currently’ using illegal substances.³¹

In sum, if a PHA or owner denies a former substance abuser housing because the applicant previously used illegal drugs, the applicant can challenge the denial under the FHA and Section 504. The applicant should argue that addiction is a recognized disability under the HUD regulations implementing the FHA and Section 504, and that a denial of housing based on this disability violates either or both statutes. The applicant should be prepared to respond to arguments that he or she is a current user of illegal substances and therefore does not have a protected disability. Treatment records establishing a substantial period of abstinence and evidence of participation in or completion of a drug abuse program will be particularly useful in countering a housing provider’s ‘current user’ argument.

4.4 Reasonable Accommodation

If an applicant’s criminal conviction arose because of a disability such as substance abuse or mental illness, and the applicant has been rehabilitated or treated, the applicant should seek an exception from a policy that bars admission based upon a prior conviction. An applicant may argue that granting such an exception constitutes a reasonable accommodation under the FHA.³²

A reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary to afford an applicant with a disability an equal opportunity to use and enjoy a dwelling. The Supreme Court has held that an accommodation may be required even if it results in a preference for disabled individuals over otherwise similarly situated non-disabled individuals.³³ In addition, HUD has acknowledged that because rules and policies may have a different effect on persons with disabilities than on other persons, “treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling.”³⁴

To be eligible for a reasonable accommodation, the applicant must first demonstrate that he or she has a disability. Federal fair housing law defines disability as “(1) a physical or mental impairment which substantially limits one or more of a person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.”³⁵ As noted above, HUD regulations define physical or mental impairment to include drug addiction, but current use of illegal substances does not constitute a disability under the FHA.³⁶ Unless the disability is readily apparent, the housing provider is permitted to ask for verification of the disability, only to the extent necessary to confirm the disability.³⁷ The verification can come from a doctor or other medical professional, a peer support group, a non-medical service agency, or any reliable third party who is in a position to know about the individual’s disability.³⁸

³⁰See *Zenor v. El Paso Healthcare Sys.*, 176 F.3d 847, 857 (5th Cir. 1999) (finding five-week period of abstinence insufficient); *Shafer v. Preston Memorial Hosp. Corp.*, 107 F.3d 274, 278 (4th Cir. 1997) (finding periodic use of drugs during weeks and months prior to termination from employment as current use); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 833 (9th Cir. 1995) (same); *Baustian v. Louisiana*, 910 F. Supp. 274, 276 (E.D. La. 1996) (finding seven-week period of abstinence insufficient); *McDaniel v. Mississippi Baptist Medical Center*, 877 F. Supp. 321, 328 (S.D. Miss. 1995) (finding six-week period of abstinence insufficient); see also discussion in Chapter 2 regarding reasonable time period.

³¹*United States v. Southern Mgmt. Corp.*, 955 F.2d 914 (4th Cir. 1992) (holding that one-year period of abstinence could not constitute current use); *Herman v. City of Allentown*, 985 F. Supp. 569, 578-79 (E.D. Pa. 1997) (holding that nine-month period of abstinence could not constitute current use).

³²Housing providers that receive federal financial assistance, such as PHAs and owners of federally assisted housing, are also subject to Section 504 of the Rehabilitation Act of 1973. 29 U.S.C.A. § 794 (West, WESTLAW through P.L. 110-106 approved 10-25-07). Section 504 and its implementing regulations, 24 C.F.R. Part 8, require recipients of federal financial assistance to provide reasonable accommodations to applicants and residents with disabilities. Private owners who are participating in the voucher program are not considered to be recipients of federal financial assistance and are not directly covered under Section 504. See

preamble to 53 Fed. Reg. 20,227 (June 2, 1988); Accessibility Notice: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; the Architectural Barriers Act of 1968 and the Fair Housing Act of 1988, PIH 2002-01 (Jan. 22, 2002) ¶ I.A.7; 24 C.F.R. § 8.28(b) (2007); see also Compliance with Section 504 of the Rehabilitation Act of 1973 and the Disability/Accessibility Provisions of the Fair Housing Act of 1988, H 2001-02 (HUD) (Feb. 6, 2001).

³³See *U.S. Airways v. Barnett*, 535 U.S. 391, 397 (2002).

³⁴Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act, 6 (May 17, 2004) available at:

www.usdoj.gov/crt/housing/jointstatement_ra.htm.

³⁵42 U.S.C.A. § 3602(h)(1)-(3) (West, WESTLAW through P.L. 110-106 approved 10-25-07).

³⁶24 C.F.R. § 100.201(a)(2) (2007).

³⁷Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act, May 17, 2004, available at:

www.usdoj.gov/crt/housing/jointstatement_ra.htm.

³⁸*Id.* at 37; *Powers v. Kalamazoo Breakthrough Consumer Hous.*

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To invoke the protection, an individual must also show an identifiable relationship, or nexus, between the requested accommodation and the individual's disability³⁹ and that the request is reasonable. Accommodations that impose an undue financial or administrative burden on a PHA or owner or fundamentally alter the nature of a housing provider's operations are generally considered unreasonable.⁴⁰ However, the Supreme Court has held that an accommodation cannot automatically be deemed unreasonable simply because it requires an entity to give a 'preference' – in the sense of different treatment – to individuals with disabilities.⁴¹

There is an exception as to when a housing provider is obligated to provide a reasonable accommodation. The FHA does not protect an individual with a disability whose tenancy would constitute a 'direct threat' to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by a reasonable accommodation.⁴² To determine a direct threat, the housing provider must engage in an individualized assessment that is based upon "reliable objective evidence" of current or recent post-rehabilitation conduct that poses a direct threat to safety of others.⁴³ Housing providers must meet a high bar in order to show that an applicant or tenant is a direct threat. A housing provider is required to show that no reasonable accommodation would eliminate or acceptably minimize any risk the plaintiff posed to other residents.⁴⁴

To request a reasonable accommodation from an admissions policy that bars applicants with convictions, an applicant should submit a written request that (1) states that the applicant has a disability; (2) establishes that the applicant's prior criminal conduct occurred during and/or was a result of the applicant's disability (for example, mental illness) or former substance abuse; (3) clearly

describes the requested accommodation and the reason the accommodation is being requested; and (4) states that an exception from the applicable policy is necessary to afford the applicant an equal opportunity to access housing.

Only a few cases have analyzed whether an applicant's request to be admitted to a housing unit despite a criminal record related to disability can be granted as a reasonable accommodation. In *Evans v. UDR, Inc.*,⁴⁵ a housing applicant was denied admission due to criminal history. She subsequently requested a reasonable accommodation for an exception to the tenant screening requirements because the criminal conduct, a misdemeanor conviction for criminal assault, was a result of her mental health disability. The court concluded that the causal connection between the disability and criminal conduct was inadequate to require the landlord to make an accommodation under the FHA.⁴⁶ The Court further ruled that requiring that the applicant be admitted in spite of her criminal record was too far outside the scope of the type of discrimination Congress intended to eliminate with the passage of the FHA.⁴⁷ The Court came to a similar result in *Stoick v. McCorvey*.⁴⁸

On the other hand, in *Simmons v. T.M. Associates Management, Inc.*⁴⁹ the court rejected the reasoning in *Evans* and determined that a residential landlord must consider, as a reasonable accommodation, an exception to its admission policy when an applicant's criminal history is related to his disability. In *Simmons*, a woman was denied permission to add her adult disabled son to her lease based on the son's prior criminal record. The son's criminal activity occurred while he was off of his psychiatric medication and was directly related to his mental health symptoms. After his arrest, he received in-patient mental health services while in custody and continued with treatment after his release. The court found the reasoning in *Evans* unpersuasive and relied on the statutory construction of the FHA to support a ruling in the applicant's favor.

Coop., 2009 wl 2922309 (w.d. Mich. Sept. 9, 2009).

³⁹*Id.*

⁴⁰*Id.*, question 7; 24 C.F.R. § 8.33 (2007); *See* *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 410, 412 (1979).

⁴¹*See Barnett*, 535 U.S. at 397.

⁴²Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act*, May 17, 2004, available at:

www.usdoj.gov/crt/housing/jointstatement_ra.htm.

⁴³*Id.*

⁴⁴*Roe v. Housing Authority of City of Boulder*, 909 F. Supp. 814, 822-23 (D. Colo. 1995); *Roe v. Sugar River Mills Assoc.*, 820 F.Supp. 636 (D.N.H.1993).

⁴⁵644 F. Supp.2d 675 (E.D.N.C. 2009)

⁴⁶*Id.* at 685

⁴⁷*Id.* at 684

⁴⁸2011 WL 3419939 (D. Minn. July 29, 2011) (after the Minneapolis Public Housing Authority excluded an applicant from public housing on the basis of a criminal record, the Court upheld a denial of the applicant's request for an accommodation because the criminal activity was related to the applicant's disability).

⁴⁹287 F.Supp.3d 600 (W.D. Va. 2018).

In the eviction and employment contexts, courts have been more willing to find that anti-discrimination laws provide protection to people who engage in criminal activity as a result of a disability. In *Boston Hous. Auth. v. Bridgewaters*, the plaintiff, a tenant in a federally assisted housing project for the elderly and disabled, experienced mental illness.⁵⁰ The plaintiff assaulted his twin brother, who also lived in the complex. After the assault, the housing authority moved to terminate the plaintiff's tenancy.⁵¹ The court found that the FHA, HUD regulations, and the housing authority's own policies all required an individualized assessment of the alleged criminal activity and related disability before the PHA could evict a tenant for posing a threat to the health or safety of others.⁵²

In addition, at least two courts have held that employers can be required to reasonably accommodate rehabilitated employees by disregarding workplace violations that resulted from pre-rehabilitation substance abuse. In *Callicotte v. Carlucci*, the plaintiff accrued a number of work violations because of her alcoholism.⁵³ After rehabilitation, her employer still counted these violations against the plaintiff's overall employment record and terminated her employment.⁵⁴ A federal district court held that the goal of rehabilitating individuals with disabilities dictated that the employer disregard the plaintiff's record of pre-rehabilitation violations when making employment decisions.⁵⁵ The court ordered the employer to reasonably accommodate the plaintiff by expunging her pre-rehabilitation disciplinary records.⁵⁶ Similarly, in *Walker v. Weinberger*, a federal district court held that "'reasonable accommodation' of an alcoholic employee requires forgiveness of his past alcohol-induced misconduct in proportion to his willingness to undergo a favorable response to treatment."⁵⁷ The court reasoned that "[u]se of pre-treatment records conceded to be attributable to alcohol abuse for disciplinary purposes is inconsistent with the legislative perception of alcoholism as a disease."⁵⁸ In the context of access to public housing, advocates can use these employment cases to argue that PHAs should disregard an applicant's pre-rehabilitation convictions where the convictions arose from the applicant's

addiction.

A PHA or owner may argue that it is not required to provide an exception to a policy denying housing to all applicants with drug-related convictions because such a policy treats disabled and nondisabled applicants equally. However, in *U.S. Airways v. Barnett*,⁵⁹ the Supreme Court held that an actor may be obligated to provide an accommodation even though it would provide a preference to an individual with a disability.⁶⁰ According to *Barnett*, an accommodation may be required even if it would permit an individual with a disability "to violate a rule that others must obey."⁶¹ However, to demonstrate that such an accommodation is warranted, the plaintiff must show that 'special circumstances' warrant a finding that the requested accommodation is reasonable on the particular facts.⁶²

Barnett supports the proposition that a PHA or owner may be required to make an exception to a policy barring all applicants with drug-related convictions where 'special circumstances' indicate that the requested accommodation is reasonable on the facts. Although there is no published authority supporting such a claim, under *Barnett*, advocates could argue that certain facts—including that an applicant's pre-rehabilitation convictions directly resulted from addiction, that all criminal activity ceased once the applicant entered rehabilitation, that there has been no use of illegal substances for a substantial period of time, that the applicant is

⁵⁰*Boston Hous. Auth. v. Bridgewaters*, 452 Mass. 833, 836 (2009).

⁵¹*Id.* at 836 and 837.

⁵²*Id.* at 841.

⁵³731 F. Supp. 1119, 1120 (D.D.C. 1990).

⁵⁴*Id.* at 1120-21.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷600 F. Supp. 757, 762 (D.D.C. 1985).

⁵⁸*Id.*

⁵⁹535 U.S. 391 (2002). Several of the cases denying employees' requests to expunge disciplinary records were decided prior to the Supreme Court's decision in *Barnett*. These cases did not adopt the reasoning advanced in *Callicotte* and *Walker*. See, e.g., *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1107-08 (Fed. Cir. 1996); *Green v. George L. Smith II Ga. World Congress Ctr. Auth.*, 987 F. Supp. 1481, 1484-85 (N.D. Ga. 1997). The Federal Circuit Court rejected *Callicotte's* and *Walker's* reasoning on the basis that expunging workplace violations arising from an employee's disability would constitute preferential treatment for persons with disabilities. *Sergeant*, 95 F.3d at 1107. The *Sergeant* court found that the employer was not required to disregard the plaintiff's previous disability-related misconduct, stating that employers are permitted to hold employees with disabilities to the same standards as other employees "if they choose." *Id.* It should also be noted that the cases holding that employers need not disregard addiction-related misconduct are often distinguishable due to the plaintiff's failure to timely notify the employer that he or she had a disability and that the misconduct resulted from this disability. In contrast, a housing applicant would likely disclose his or her disability to a PHA at the beginning of the parties' relationship in order to seek a reasonable accommodation from the PHA's admissions policies.

⁶⁰See *id.* at 397.

⁶¹*Id.* at 398.

⁶²*Id.* at 405.

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currently receiving supportive services—and/or other facts indicating that future criminal activity or use of illegal substances is unlikely – all constitute ‘special circumstances’ warranting an exception from such an admissions policy.

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CHAPTER 5

CHALLENGING A DENIAL OF ADMISSION

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5.1 Introduction

If an applicant with a reported criminal record or background is denied admission to a federally assisted housing project or program, it is important to evaluate whether to contest the rejection. If the individual applied without the assistance of an advocate, it is very likely that the rejection was based primarily upon the applicant's reported criminal background or record without regard to whether the information was accurate or whether there is evidence of mitigating circumstances or rehabilitation.¹ Disputing the rejection will involve challenging any erroneous information and presenting evidence of mitigating circumstances or rehabilitation. In addition, challenging the rejection may provide the necessary time to improve or gather information to clarify the applicant's criminal history. If an applicant has not already done so, he or she should request a copy of the record relied upon by the decision-maker so any inaccuracies or discrepancies can be addressed and corrected.

This Chapter sets forth the basic elements of an

applicant's procedural rights to contest a denial.² The purpose of this discussion is to advise applicants of their rights so that they know what to expect during the application process and to alert them to when there may be a basis for a challenge. However, it is important to remember that a procedural challenge, even if successful, will not necessarily result in admission to a federally assisted housing program or unit. At best, a successful procedural challenge may result in a review of the facts or another hearing. Nevertheless, it may be that the procedural failings are so substantial or repeated that the hearing officer or reviewing court becomes exasperated with the PHA or owner and orders admission.

All applicants for public housing, the voucher program, HUD-assisted housing and USDA Rural Development housing are entitled to a review of a denial of admission. No hearing or meeting is required by federal law for programs such as Low Income Housing Tax Credit, HOME, Shelter Plus Care, Supportive Housing or Housing Opportunities for People with AIDS. However, applicants for these programs should request an informal meeting to review the negative admissions decision. A review will be especially beneficial if the information that the

¹Corinne A. Carey, No Second Chance: People with Criminal Records Denied Access to Public Housing, 36 U. Tol. L. Rev. 545, 572 (2005) ("PHAs typically automatically exclude anyone with a criminal record that falls into one of their designated categories and exclusionary periods without any individualized assessment"). Because PHAs initially automatically deny admission to anyone with a criminal record, there is an increased likelihood that a hearing officer may reinstate the application upon presentation of favorable relevant information.

²This Chapter also cites, when relevant, cases involving the denial or termination from federally assisted housing. Advocates and applicants should be aware that there may be cases from other social welfare programs that also may be used to build an applicant's case. Such cases are not included in this discussion, as they are beyond the scope of this handbook.

applicant believes may be available to the PHA or owner relied upon is incorrect or the applicant has been rehabilitated or there are mitigating circumstances.

5.2 Notice of the Denial

Any applicant denied admission to public housing, the voucher program, other HUD-assisted housing or USDA Rural Development housing must be given written notice of the denial.³ The notice must state the reasons for the rejection in advance of any hearing.⁴ Courts have found fault with rejection notices that, without more detail, conclude that the applicant does “not meet the standards for admission”⁵ or that informs the applicant that “previous housing records and habits indicate a detrimental effect on tenants and project environment.”⁶ Thus, a conclusory statement that the PHA or owner has information that the applicant has a criminal record may be insufficient to support the denial. The criminal record in question, or the facts relied upon, should be provided as part of the denial letter.⁷ Advocates should check state and local

law to determine if there are additional protections regarding the use of criminal records and what must be included in any notice.⁸

A clear and detailed notice will benefit the applicant because it will help frame the issue for review or appeal. For example, a specific notice can help the applicant determine whether the rejection is based upon an old or recent conviction and incarceration, now refuted and changed information, or a crime of violence against others or a victimless crime.

The rejection notice should set forth the procedure and a reasonable time frame⁹ for contesting the adverse determination.¹⁰ Some courts have concluded

USDA Rural Development housing programs be attached to Notices of Ineligibility or Rejection in accordance with the Fair Reporting Credit Act); Hud, Public Housing Occupancy Guidebook, ¶ 4.9 (June 2003); see also *Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312 (D. Conn. 1993) (termination of subsidy); *Driver v. Hous. Auth. of Racine*, 713 N.W.2d 670 (Wis. Ct. App. 2006) (sustaining tenants’ § 1983 claim challenging adequacy of notice and hearing decision in a termination case as a matter of both due process, per *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Edgecomb*, and public policy.

⁸In Massachusetts, there is a provision, uncodified, as part of the budget (but in regulation and a memorandum) that if any entity denies an individual a benefit based upon a criminal record, the entity must tell the person which part of the criminal record appears to make the individual ineligible. See also San Francisco Police Code Art. 49 (Fair Chance Act), This local ordinance limits what a landlord can consider in the housing admissions process and mandates that housing providers make an individualized assessment of the applicant’s eligibility. In addition, a housing provider must provide the applicant a copy of the tenant screening report and notify the applicant of the items forming the basis for a prospective adverse action.

⁹See, e.g., 24 C.F.R. § 5.514(e)(1) (2016) (applicants for federally assisted housing rejected because of rules regarding immigration statutes have 30 days from notice to request grievance hearing); 7 C.F.R. § 3560.154(h) (2016) (Rural Development housing notice must be delivered by certified mail return receipt requested or hand-delivered letter with signed receipt by applicant and inform denied applicant of the right to respond within ten calendar days after date of notice and right to hearing available upon request), whereas, 7 C.F.R. 3560.160(h) states notice must be given of the right to respond within ten days after receipt of notice (emphasis added); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, REV-1, CHG-4, ¶ 4-9(C)(2)(b) (Nov. 2013) (notice must inform applicant of right to respond in writing and to request a meeting within fourteen days); Hud, Public Housing Occupancy Guidebook, App. VIII (Applicant Notice of Rejection) (June 2003) (request informal hearing within ten days); see also *Samuels v. District of Columbia*, 669 F. Supp. 1133, 1140 (D.D.C. 1987) (ten-day period for a tenant to seek grievance hearing is unreasonably short).

¹⁰E.g., 24 C.F.R. §§ 880.603(b)(2) (Section 8 new construction), 960.208(a) (public housing) and 982.201(f)(1), 982.552(d) and (e) and 982.554(a) (voucher) (2016); Hud, Occupancy Requirements of Subsidized Multifamily Housing Programs, REV-1, CHG-42, ¶ 4-9(C)(2)(b) (Nov. 2013) (notice must inform applicant of right

³42 U.S.C.A. § 1437d(c)(3) (West, WESTLAW through P.L. 110-113 approved 11-8-07) (public housing); 24 C.F.R. §§ 880.603(b)(2) (Section 8 new construction), 882.514(f) (Section 8 moderate rehabilitation), 960.208(a) (public housing), 982.201(f)(1) and 982.554(a) (voucher) (2016); Hud, Occupancy Requirements of Subsidized Multifamily Housing Programs, Handbook 4350.3, REV-1, CHG-4 (Nov. 2013)); HUD, Public Housing Occupancy Guidebook, ¶ 4.9 and App. III (June 2003) (sample ACOP) (the ACOP and Notices are models; nevertheless, they should be persuasive); Hud, voucher Program Guidebook, Housing Choice, 7420.10G, ¶ 5.7 (Apr. 2001) (voucher); *Holmes v. N.Y. City Hous. Auth.*, 398 F.2d 262 (2d Cir. 1968) (PHA’s failure to inform applicants of denial or reasons violated due process); 7 C.F.R. §§ 3560.160(e), 3560.154(h) (RD Section 515 Rental Housing) (applied to Section 514 and 516 farmworker housing through §§ 3560.551, 3560.601), 3560.255(b) (2016) (comparable notice requirements in the USDA Rural Development housing program).

⁴*Id.*; *Holmes*, 398 F.2d at 262, 264; *Billington v. Underwood*, 613 F.2d 91 (5th Cir. 1980), and subsequent opinion, *Billington v. Underwood*, No. 81-7978, 707 F.2d 522 (11th Cir. May 23, 1983) (unreported slip opinion available as Exhibit 1 to this Chapter); see also *Vance v. Housing Opportunities Comm’n*, 332 F. Supp. 2d 832 (D. Md. 2004) (mentally disabled tenant challenged a termination from Supportive Housing program and denial of reinstatement based on various procedural deficiencies; court preliminarily ordered reconsideration of reinstatement request and new hearing on termination with other procedural protections).

⁵*McNair v. N.Y. City Hous. Auth.*, 613 F. Supp. 910 (S.D.N.Y. 1985).

⁶*Billington*, 613 F.2d at 92; see also *Singleton v. Drew*, 485 F. Supp. 1020, 1024 (E.D. Wis. 1980) (reasons for denial must be set forth “with reasonable specificity”).

⁷See, e.g., 7 C.F.R. § 3560.154(h) (2016) (requiring that the credit report relied upon to deny admission to an applicant under the

that the notice should inform the applicant of the nearest legal services office.¹¹ The notice must also state that an applicant with a disability has the right to request a reasonable accommodation to participate in the informal hearing.¹² For public housing, a rejection notice should inform the applicant that, at the hearing, the hearing officer will give consideration to the time, nature and extent of the conduct and to factors that might indicate a reasonable probability of favorable future conduct.¹³ In the event that the denial is based upon a copy of a criminal record (including registered lifetime sex-offender) obtained by a PHA, there are separate but similar rules that apply regarding the notice, the opportunity to dispute, and the timing of such opportunity.¹⁴ In addition, depending upon the number of non-English speakers served by the PHA or owner, the notice may have to be written in the language used by the applicant.¹⁵

to respond in writing and to request a meeting within fourteen days); *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180, 185 (6th Cir. 1984) (“Written notice to the [Section 8] applicant must set forth the allegations on which the denial was based and the method for requesting a hearing.”); see also *McNair*, 613 F. Supp. at 915 (inadequate and misleading information regarding remedial procedures made notice of rejection inadequate).

¹¹*Ressler v. Pierce*, 692 F.2d 1212, 1220 (9th Cir. 1982). See also *Vance v. Hous. Opportunities Comm’n*, 332 F. Supp. 2d 832, 843 (D. Md. 2004) (disabled “re-applicant” who challenged a prior termination was entitled to notice of how to obtain free legal services).

¹²E.g., Compliance with Section 504 of the Rehabilitation Act of 1973 and the Disability/Accessibility Provisions of the Fair Housing Act of 1988, H 2001-02, ¶ II.B.5 (Feb. 6, 2001); Accessibility Notice: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; the Architectural Barriers Act of 1968 and the Fair Housing Act of 1988, PIH 2002-01, ¶ II.C.1 (Jan. 22, 2002); see also *Price v. Rochester Housing Authority*, 2006 WL 2827165 (W.D.N.Y. Sept. 26, 2006) (due process requires that notices of termination in Shelter Plus Care program include notice of the right to request a reasonable accommodation).

¹³24 C.F.R. § 960.203(d) (2016). See also [Redacted] v. Housing Auth. of the City of Austin, CA No. A-96-CA-330-SC (W.D. Tex., Complaint filed July 1, 1996) (complaint challenging PHA policy of rejecting all applicants with arrest records and raising statutory, regulatory, constitutional and fair housing claims; settled), copy available in Exhibit 2 to this Chapter.

¹⁴42 U.S.C.A. § 1437d(q)(2) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. §§ 5.903(f), 960.204(c), 982.553(d) (2016); see also discussion in Chapter 3 regarding Access to Criminal Records.

¹⁵42 U.S.C.A. § 2000d (Title VI, § 601 of the Civil Rights Act of 1964) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 7 C.F.R. § 3560.160(e) (2016) (Rural Development housing); and Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (Jan. 22, 2007).

5.3 Preparing for the Review

Applicants denied admission to public housing, the voucher program, HUD-assisted, and USDA properties are entitled to a review of the denial. Prior to the informal hearing/review, the applicant should request and obtain all documents and information from the PHA or owner regarding the denial.¹⁶ In addition, the applicant should independently obtain a copy of his or her criminal record. That record should be compared with the information upon which the PHA or owner has relied. Critical errors and mistakes in the information relied upon should be identified and corrected. “Both public and commercially prepared criminal records are incorrect more often than generally known.”¹⁷ As part of the preparation if relevant, the applicant should be prepared to explain differences between information originally submitted and that secured by the PHA or owner. For example, the applicant should be prepared to explain why he or she omitted information about specific prior criminal activity.

Mitigating information is critical. Therefore, letters of support are very important.¹⁸ To the extent possible or relevant, the applicant should obtain letters from a current employer, teacher, probation officer, social worker, neighbors, current or prior landlords, community leaders or anyone who can vouch for the applicant. Information from correctional institutions regarding work or other activities may also be relevant. The key points that the letters should emphasize are that

- circumstances have changed since the arrest and conviction,

¹⁶For the USDA rural housing programs, applicants who have been denied housing and choose to file grievances are entitled to examine the records that a borrower plans to rely upon to defend the admission decision. 7 C.F.R. § 3560.160(g)(4) (2016) (Rural Development housing). See also, *Hud, Public Housing Occupancy Guidebook*, App. VIII (sample Applicant Notice of Rejection) (June 2003) (offers applicant the opportunity to review applicant file); See Chapter 3 for a discussion of special federal rules regarding access to criminal records by PHAs and owners. In the event that the denial is based upon criminal record information obtained by a PHA (including lifetime sex offender registration) in accordance with the federal statute, the PHA has an obligation to provide the applicant a copy of that record.

¹⁷Sharon M. Dietrich, When “Your Permanent Record” Is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records, 41 *Clearinghouse Rev.* 139 (July-Aug 2007).

¹⁸New York City Housing Authority, Division of Applicant Appeals, Public Housing Hearing, Report of Informal Hearing, August 7, 2007, No. 113-52-7732, copy available in Exhibit 3 to this Chapter.

- the applicant is a good person who gets along well with others, and
- the applicant is motivated to improve his or her life.

If the individual is working or in school, the letters should highlight that he or she has a good performance and attendance record. If there are individuals who would be willing to accompany the applicant to the hearing and who will testify to the changed circumstances and support the application, their attendance may have a substantial beneficial impact. If there is information demonstrating that the applicant has participated in counseling and social service programs, it should also be submitted.¹⁹ Finally, the applicant should consider submitting a certification that he or she has not engaged in criminal activity during a specified period of time.²⁰ Depending upon local practice, the letters and information provided should be notarized.

Information about the applicant's need for housing is important, but it is not key or relevant to the issue of whether the applicant can overcome the prior criminal record and demonstrate that he or she will be a good tenant and not threaten other tenants, the development or PHA or the owner's staff. Moreover, the hearing officer and the PHA's or owner's staff are likely to be aware that there is a critical shortage of housing and that most applicants can demonstrate a similar need for the housing.

When relevant, such as in a tight housing market or if the unit has unique characteristics that the applicant needs, an applicant who seeks a review of a rejection should consider requesting that the unit applied for remain available while the denial is contested²¹. For those developments with little turnover or few vacancies, failure to obtain such an agreement may result in the applicant winning the right to occupancy but losing the unit. A PHA or owner will balance such a request with the need to rent vacant units.

¹⁹See discussion in Chapter 4 regarding mitigating circumstances and rehabilitation.

²⁰See, e.g., 24 C.F.R. § 5.855(c) (2016) (for federally assisted housing, a certification by an applicant who was previously denied housing that he or she has not engaged in criminal activity during a specified period of time is sufficient evidence that the applicant is not currently engaged in criminal activity).

²¹Local law may also require that the unit remain open while the applicant seeks review of the adverse decision. See Richmond Municipal Code Ch. 7.110.050(f)(4) ("Fair Chance Access to Affordable Housing") "The Housing Provider shall delay any Adverse Action and shall hold the unit open during the time of the appeals process."

5.4 The Review Process

All applicants for public housing, the voucher program, HUD-assisted housing and USDA Rural Development housing are entitled by statute and regulation²² and/or due process principles²³ to a review of the admission decision if they are rejected. Depending upon the program, the review is called a grievance, an informal hearing, an informal review, or a meeting.²⁴ The process is generally very informal. The nature of the review varies for each program. In general, it includes the right to be heard and to present evidence.²⁵ At the review, the standard of proof is, at

²²See, e.g., 42 U.S.C.A. § 1437d(c)(4) (West, WESTLAW through P.L. 110-113 approved 11-8-07) (public housing); 24 C.F.R. §§ 882.514(f) (Section 8 moderate rehabilitation), 960.208(a) (public housing), 982.554 (voucher) 880.603(b)(2) (Section 8 new construction) (2016); 7 C.F.R. § 3560.160(f)-(g) (2016) (rural development program); Hud, Public Housing Occupancy Guidebook, ¶ 4-9) (June 2003) (informal hearing is distinct from a public housing grievance hearing).

²³See Ressler, 692 F.2d at 1215 (applicants for project-based Section 8 had a sufficient property interest to give rise to due process procedural safeguards); Holmes, 398 F.2d at 265 (due process requires ascertainable standards for admission); Daubner v. Harris, 514 F. Supp. 856, 869 (S.D.N.Y. 1981) (admission to Section 8 housing is subject to due process), aff'd, 688 F.2d 815 (2d Cir. 1982); Singleton, 485 F. Supp. at 1022-23 (due process discussed, but court concluded that regulations obviated need to decide due process issue). But see Overton v. John Knox Ret. Tower, Inc., 720 F. Supp. 934 (N.D. Ala. 1989) (rejecting Section 202 applicant's substantive due process challenge by finding no property interest and no governmental action); Hill v. Group Three Hous. Dev. Corp., 620 F. Supp. 355 (E.D. Mo. 1986), aff'd, 799 F.2d 385 (8th Cir. 1986) (applicants for Section 8 new construction projects lack sufficient property interest for due process protections); Germain v. Recht-Goldin-Siegel Props., 567 F. Supp. 384 (E.D. Wis. 1983), aff'd sub nom. Eidson v. Pierce, 745 F.2d 453 (7th Cir. 1984) (applicants for Section 8 new construction projects lack sufficient property interest for due process protections).

²⁴For Rural Development housing, the review process is called the grievance procedure. For public housing, it is called an informal hearing. For the voucher program, it is called an informal review. For HUD-assisted housing, it is called a meeting. For convenience here, the process is generally referred to as the review.

²⁵See, e.g., 24 C.F.R. § 982.554(b)(2) (2016) (voucher); 7 C.F.R. § 3560.160(h) (2016) (rural development housing); Hud, Voucher Program Guidebook, Housing Choice, 7420.10G, ¶ 16.5 (Apr. 2001) (voucher program); Hud, Occupancy Requirements of Subsidized Multifamily Housing Programs, Handbook 4350.3, REV-1, CHG-4 (Nov. 2013); see also Baldwin v. Hous. Auth. of Camden, 278 F. Supp. 2d 365, (D.N.J. 2003). The court in Baldwin considered whether the presence of the PHA director at the informal review and his instruction to the hearing officer not to accept an applicant's evidence may have prevented meaningful review and a denial of due process. Id. at 389. The court found that a question of fact existed as to whether a reasonable officer in the PHA director's position would have recognized that his

least, substantial evidence or preponderance of the evidence.²⁶ Substantial evidence includes both the quality of the evidence as well as the quantity of the evidence. Preponderance of the evidence means that there is more quality evidence than is presented by the other side. The PHA or owner bears the burden of persuasion and the applicant the burden of production.²⁷ For example, the PHA has the burden of showing that the applicant has a criminal record that is sufficient to deny admission and the applicant has the burden to show that the record is inaccurate or that there are mitigating circumstances.

5.4.1 Review Process for Public Housing, Voucher, and HUD-Assisted Tenants

Several courts have discussed the elements of an admission hearing for applicants of public housing, voucher, and HUD-assisted housing.²⁸ These courts have determined that at the hearing the applicant must have a reasonable opportunity to prepare a rebuttal and

to contest the basis for the unfavorable decision.²⁹ No stenographic record is required, however, an applicant should request a recording and provide the equipment, if not otherwise available.³⁰ Witnesses are not required to testify under oath, but the better practice is to require an oath.³¹ The applicant may appear with counsel or an advocate.³² In addition, for public housing and the voucher program, the subject of the hearing is confined to the issues presented in the notice.³³ Thus, information should not be presented at the hearing if it was not the basis for the denial because the applicant has no opportunity to investigate and effectively rebut the information.

Formal rules of evidence do not typically apply in an informal hearing/review. Thus, hearsay is often introduced and considered. The PHA or owner may seek to introduce or rely upon newspaper reports, police blotters, declarations or criminal records, with no one available to authenticate them or to testify about the information or records. Each type of evidence will carry a different weight and may be objected to on various grounds. However, the decision of the hearing officer should not be based only upon uncorroborated hearsay.³⁴

conduct violated the applicant's clearly established constitutional right to due process. *Id.*

²⁶24 C.F.R. § 882.514(f) (2016) (Section 8 moderate rehabilitation); see also *Billington*, No. 81-7978, 707 F.2d 522 (11th Cir. May 23, 1983) (discussion of the burden of proof in hearing for denial of admission); see also 66 Fed. Reg. 28776, 28785 (May 24, 2001) (stating that for termination of a voucher, the preponderance of the evidence standard is retained because there is no expectation of a court proceeding, and HUD wants to ensure that the action is not taken lightly). In the eviction context, HUD regulations provide that the standard for determining whether an individual has engaged in criminal activity is not the standard of proof used in criminal cases. 24 C.F.R. §§ 5.861 (federally assisted housing in general), 966.4(l)(5)(iii) (public housing), 982.310(c)(3) (voucher) (2016).

²⁷See *Basco v. Machin*, 514 F.3d 1177 (11th Cir. 2008) (the PHA bears the burden of persuasion in an informal hearing to determine whether to terminate a voucher).

²⁸See *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086 (6th Cir. 1985); *Billington*, 613 F.2d at 93; *Neddo v. Hous. Auth. of Milwaukee*, 335 F. Supp. 1397 (E.D. Wis. 1971); cf. *Spady v. Mount Vernon Hous. Auth.*, 341 N.Y.S.2d 552 (N.Y. App. Div. 1973), *aff'd mem.*, 310 N.E.2d 542 (N.Y. 1974), cert. denied, 419 U.S. 983 (1974) (Douglas, J., dissenting); *Sumpter v. White Plains Hous. Auth.*, 278 N.E.2d 892 (N.Y. 1972), cert. denied, 406 U.S. 928 (1972) (distinguishing evidentiary hearing required before termination of benefits from procedures required before denials of eligibility). These cases distinguish between those who are denied admission and those who are evicted. Although the property interest is different, the ultimate injury or loss is identical in that both are likely to be relegated to living in housing that is not decent, safe, or sanitary, and both suffer a sense of frustration and alienation when rightful benefits are withheld. See also S. K. Morris, Note, *The New Leased Housing Program: How Tenants Can a Proposition?* 26 *Hastings L.J.* 1145, 1201 (1975).

²⁹*Billington*, 613 F.2d at 95; see also *Edgecomb*, 824 F. Supp. at 314-16 (D. Conn. 1993) (in a termination of benefits case, the hearing decision could not be based wholly on hearsay; hearing decision inadequate because no reasons given; participant was entitled to cross-examine witness); *Kurdi v. Du Page County Hous. Auth.*, 514 N.E.2d 802, 806 (Ill. App. Ct. 1987) (setting aside a termination decision based wholly on hearsay); see also 7 C.F.R. § 3560.160(h) (2016) (rural development housing).

³⁰*Neddo*, 335 F. Supp. at 1400.

³¹*Id.*; see also 7 C.F.R. § 3560.160(h) (2016) (Rural Development housing).

³²*Id.*; *Vance v. Hous. Opportunities Comm'n*, 332 F. Supp. 2d 832, 843 (D. Md. 2004) (disabled 'reapplicant's' due process rights violated for failure to allow representation); see also *Hud, Public Housing Occupancy Guidebook*, App. VIII (Applicant Notice of Rejection) (June 2003).

³³See *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974); *Billington*, 613 F.2d at 93-95; *Singleton*, 485 F. Supp. at 1024; *McNair*, 613 F. Supp. at 914-15.

³⁴See *Billington*, No. 81-7978, 707 F.2d 522 (11th Cir. May 23, 1983) (discussion of the burden of proof and use of hearsay in hearing for denial of admission). The following cases set aside hearing decisions based solely on hearsay in the context of subsidy terminations or proposed evictions: *Basco v. Machin*, 2008 WL 182249 (11th Cir.); *Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312 (D. Conn. 1993) (in decision involving termination of tenant-based assistance, court held that conclusory statement was insufficient); *Kurdi v. Du Page County Hous. Auth.*, 161 Ill. App. 3d 988, 514 N.E.2d 802 (1987); *Carter v. Olmsted County Hous. & Redev. Auth.*, 574 N.W.2d 725 (Minn. Ct. App. 1998); *Chase v. Binghamton Hous. Auth.*, 91 A.D.2d 1147, 1147-48, 458 N.Y.S.2d 960 (N.Y. App. Div. 1983); Hearsay rules, if used, will likely apply to all parties. Therefore, an applicant should be prepared to have

In addition, hearing officers should not rely on evidence of arrests alone to uphold an adverse action. In November of 2015, HUD released guidance and a subsequent FAQ regarding the exclusion of arrest records in housing decisions.³⁵ HUD's guidance states that an arrest alone (i.e., arrest records without a resulting conviction) cannot be the basis for denying admission to a housing applicant because an arrest shows only a suspicion that the person apprehended committed an offense. In fact, many arrests do not result in criminal charges, many charges are later dismissed, and many arrest records are incomplete and inaccurate. Therefore, an arrest does not provide sufficient evidence that an individual engaged in criminal behavior. HUD's notice, however, goes on to explain that the underlying conduct for an arrest can be the basis of an adverse housing action if there is additional, sufficient evidence that the applicant engaged in criminal activity. Thus, a housing provider would need more than an arrest record, such as a detailed police report, statements by witnesses, or under the best case scenario—an official record of the person's conviction. The arrest record can prompt further inquiry into an individual's conduct.

At the hearing or prior to, an applicant who has plead guilty should be permitted to explain the plea. A guilty plea in most states is evidence in a subsequent civil proceeding, not conclusive proof.³⁶ In any case, there may be relevant reasons why the applicant plead guilty which may be considered significant by the decision maker.

The applicant is entitled to a hearing before an impartial hearing officer.³⁷ The regulations for public housing, the voucher program and HUD-assisted developments state that the hearing officer may not be

the person who was the original decision-maker.³⁸ For public housing and the voucher program, the rules further provide that the hearing officer cannot be a subordinate of the original decision-maker.³⁹ Courts have enjoined PHAs' use of hearing officers who were the original decision-makers or their subordinates as violating the United States Housing Act, the regulations, and due process.⁴⁰

5.4.2 Review Process for USDA Tenants

The USDA Rural Development housing grievance procedures have some unique features. When a grievance is filed, the regulations require the borrower (owner of the multifamily property), or a representative of the borrower, to offer to meet informally with the denied applicant within ten calendar days to resolve the grievance.⁴¹ If the informal meeting fails to yield a resolution, the owner must file a report summarizing the problem to USDA and the applicant.⁴² The applicant may also submit a summary of the problem to USDA. Upon receipt of the summary, if a grievance hearing is desired, an applicant must file a written request for a hearing within ten calendar days of receipt of the informal meeting summary.⁴³ The hearing is then scheduled within fifteen days of the selection of a hearing panel.⁴⁴

The applicant and the borrower (owner of the multifamily development) may agree on a single hearing officer. Alternatively, the applicant and the borrower may each appoint one member of a three-person panel, and the two hearing officers selected then choose the third officer. In the event the applicant and borrower cannot agree within 30 days on the two hearing officers, after notice, USDA will appoint a

whatever hearsay rules are adopted apply to the evidence that he or she presents. *Broughton v. Hous. Auth. of Pittsburgh*, 755 A.2d 105 (Pa. Commw. Ct. 2000) (tenant's hearsay evidence excluded in judicial setting).

³⁵Guidance for Public Housing Agencies (PHAs) and Owners of Federally assisted Housing on Excluding the use of arrest Records in Housing Decisions, HUD Notice PIH 2015-19/H 2015-10 (Nov. 2, 2015); FAQs for Notice PIH 2015-19/H 2015-10

³⁶*Costa v. Fall River Hous. Auth.*, 71 Mass.App.Ct. 269, 283, 881 N.E.2d 800, 811 (2008).

³⁷*Billington*, 613 F.2d at 95; see also *Piretti v. Hyman*, No. 79-622-K, slip op. (D. Mass. July 23, 1979), vacated as moot without opinion, 618 F.2d 94 (1st Cir. 1980), 13 CLEARINGHOUSE REV. 399 (No. 27,377, Sept. 1979) (in a case regarding termination of tenant-based assistance, decision-maker not impartial when the attorney presenting the PHA's case also advised the hearing officer).

³⁸24 C.F.R. § 982.554(b)(1) (2016); Hud, Public Housing Occupancy Guidebook, § 4.9 and App. VIII (Applicant Notice of Rejection) (June 2003); Hud, Voucher Program Guidebook, Housing Choice, 7420.10G, ¶ 16.5 (Apr. 2001) (voucher program); Hud, Occupancy Requirements of Subsidized Multifamily Housing Programs, Handbook 4350.3, REV-1, CHG-4, ch. 4-9D (November 2013); see also *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180, 185 (6th Cir. 1984).

³⁹*Id.*

⁴⁰See *Singleton*, 485 F. Supp. at 1024; see also *Billington*, 613 F.2d at 95; *Piretti*, No. 79-622-K (slip op.).

⁴¹7 C.F.R. § 3560.160(f)(2) (2016) (rural development housing).

⁴²*Id.* § 3560.160(f)(3).

⁴³*Id.* § 3560.160(g)(1) (2016). If a request for a hearing is not submitted within the ten calendar days, the initial decision of the borrower becomes final. *Id.* § 3560.160(g)(7).

⁴⁴When a standing panel, *supra*, is chosen, a hearing is scheduled within fifteen days of the standing panel's receipt of a request for a grievance hearing. *Id.* § 3560.160(g)(5).

person to act as the sole hearing officer.⁴⁵ The regulations also provide for a ‘Standing Hearing Panel’ approved by USDA to hear all grievances related to a particular development.⁴⁶ At least one member of the standing hearing panel must be selected by the residents at a formal resident meeting called to select hearing panel members.⁴⁷

5.5 Statement and Review of Decision

For public housing, the voucher program and HUD-assisted housing, the applicant must be given a written decision after the hearing.⁴⁸ The decision must be provided within a reasonable period of time, state the reasons for the determination and indicate the evidence relied upon.⁴⁹

For Rural Development housing, the decision is binding unless parties to the hearing are notified within ten days by USDA that the decision is not in compliance with the program regulations.⁵⁰ However,

neither party is precluded from challenging the decision in court. Therefore the decision is binding, unless one party challenges the determination in court.

PHA hearing decisions can be challenged in court, and the reviewing court may defer to the PHA’s or hearing officer’s fact-finding, or may engage in a more exacting review.⁵¹ Actions may be filed in state or federal court seeking plenary (complete) review of the PHA’s decision for compliance with federal requirements governing substantive grounds or procedural protections (subject to any applicable Section 1983 limitations). Review also may be sought under state statutes providing for judicial review of administrative decisions.⁵²

Due to the difficulty of establishing a cognizable cause of action, including issues related to whether an applicant has a property interest that is protected by due process, it is unclear as to what kind of court review an applicant for HUD-assisted housing (as contrasted with an applicant for public housing or the voucher program) may be entitled.⁵³

⁴⁵7 C.F.R. § 3560.160(g)(2) (2007) (rural development housing).

⁴⁶Id. § 3560.160(g)(3).

⁴⁷RD, MFH Asset Management Handbook, 2-3560, § 6.37(c) (2007).

⁴⁸See, e.g., New York City Housing Authority, Division of Applicant Appeals, Public Housing Hearings, Report of Informal Hearing, August 6, 2007, No. 113-52-7732 copy available as Exhibit 3 of this Chapter (applicant with felony convictions found to have made significant positive changes and improved since the offenses).

⁴⁹24 C.F.R. §§ 882.514(f) (Section 8 Moderate Rehabilitation) and 982.554(a) (voucher program) (2017); Hud, Public Housing Occupancy Guidebook, ¶ 4.9 (public housing); HUD Handbook 4350.3, REV-1, CHG-2, ch. 4-9D (June 2007) (final decision must be given to applicant within five business days of meeting); Jaimes, 758 F.2d at 1086; Neddo, 335 F. Supp. at 1397; see also Edgecomb, 824 F. Supp. at 312 (in a termination of benefits case, hearing decision could not be based wholly on hearsay; hearing officer decision inadequate because no reasons given; participant entitled to cross-examine witness); Powell v. D.C. Hous. Auth., 818 A.2d 188 (D.C. 2003) (reversing PHA’s termination decision for alleged fraudulent underreporting of income because hearing officer failed to make findings with respect to each contested material allegation of fact as required by due process and applicable local Administrative Procedure Act (APA); see also Hicks v. Dakota County Community Development Agency, No. A06-1302, 2007 WL2416872 (Minn. App., Aug. 28, 2007) (the record must be sufficient to facilitate meaningful review and where there are no findings or credibility determinations, the court could not conduct a meaningful review); see, e.g., New York City Housing Authority, Division of Applicant Appeals, Public Housing Hearing, Report of Informal Hearing, August 6, 2007, No. 113-52-7732 (copy available as Exhibit 3 to this Chapter). For Rural Development housing, the notice must be served within ten days of the hearing. 7 C.F.R. § 3560.160(i)(2) (2017). As noted above, the decision also should not be based wholly upon uncorroborated hearsay.

⁵⁰7 C.F.R. § 3560.160(i)(4) (2017) (Rural Development housing).

⁵¹Campbell v. Minneapolis Pub. Hous. Auth., 168 F.3d 1069, 1076 (8th Cir. 1999) (reminding PHA that a determination in a denial case must be supported by appropriate findings based upon evidence in administrative record); Billington v. Underwood, No. 81-7978, 707 F.2d 522 (11th Cir. May 23, 1983) (reversing hearing officer decision as there was no reliable evidence produced to substantiate allegations); Carter v. Olmsted County Hous. & Redev. Auth., 574 N.W.2d 725 (Minn. Ct. App. 1998) (invalidating hearing officer’s decision regarding a termination due to insufficient findings and lack of substantial evidence for decision); cf. Clark v. Alexander, 85 F.3d 146 (4th Cir. 1996) (refusing to overturn factual findings of PHA in a termination case).

⁵²See, e.g., Blatch v. Hernandez, 360 F. Supp. 2d 595 (S.D.N.Y. 2005) (PHA’s failure to inform hearing officers in termination proceedings and housing court in eviction proceedings of mental disabilities of unrepresented residents and to provide appropriate training regarding mental disabilities to hearing officers violated due process); Sackett v. Hansen, No. 04-682, 2005 WL 425307 (S.D. Iowa Feb. 10, 2005) (pursuant to 28 U.S.C.A. § 1447(c), remanding case to state court due to lack of federal question jurisdiction over challenge to PHA’s termination decision or possible ADA discrimination claim); Vance, 332 F. Supp. 2d at 832 (mentally disabled tenant challenged termination from Supportive Housing program based on procedural deficiencies; court preliminarily ordered reconsideration of reinstatement request and new hearing on termination); Powell, 818 A.2d at 196 (reversing PHA’s termination decision for alleged fraudulent under reporting of income because hearing officer failed to make findings with respect to each contested material allegation of fact as required by due process and applicable local APA); Cole v. Metro. Council HRA, 686 N.W. 2d 334 (Minn. App. 2004) (although decision to terminate tenant upheld, court interpreted 24 C.F.R. § 982.555(e)(6) to require explanation of the evidence and its connection to conclusion).

⁵³Ressler v. Pierce, 692 F.2d 1212, 1220 (9th Cir. 1982) (applicants for project-based Section 8 had a sufficient property interest to give rise to due process procedural safeguards); Daubner v. Harris,

AN AFFORDABLE HOME ON REENTRY

In certain compelling situations, an applicant should consider appealing a hearing decision to the PHA Board of Commissioners or, for HUD-assisted and Rural Development properties, to the owners of the development. For the respective programs, these are the entities or individuals who are ultimately responsible for the housing. The situation raised and relief sought should be compelling or involve a particularly arbitrary action, because these individuals or entities are generally not inclined to overturn a decision of their managers. An advocate could contact individuals on the PHA Board of Commissioners or address the complaint to the full Board. An advocate can find out the name of the Commissioners from the PHA, the internet, or possibly from HUD. Most Boards meet regularly and announce meeting times and agendas. Contacting the owners of federally assisted housing will be more difficult, but a title search may turn up contact information. In the case of Shelter Plus Care, Supportive Housing Program, Housing Opportunities for People with AIDS and Section 8 Single Room Occupancy housing, the owner is required to have one or more homeless or formerly homeless individuals on the board of directors or other similar policy making entity of the recipient or otherwise make arrangements to consult with such homeless or formerly homeless individuals.⁵⁴ Because the housing involved is federal housing, intervention by a congressional representative may also bring some pressure to obtain the relief sought. Congressional representatives have local offices that respond to constituent complaints. Bringing the facts of the case to the attention of the press may also create pressure for change in policy or an exception to a current policy. In each of these cases, any letter outlining the

problem should also set forth the remedy sought.

514 F. Supp. 856, 869 (S.D.N.Y. 1981) (admission to Section 8 housing is subject to due process); cf. *Overton v. John Knox Ret. Tower, Inc.*, 720 F. Supp. 934 (N.D. Ala. 1989) (rejecting Section 202 applicant's substantive due process challenge by finding no property interest and no governmental action); *Hill v. Group Three Hous. Dev. Corp.*, 620 F. Supp. 355 (E.D. Mo. 1986), *aff'd*, 799 F.2d 385 (8th Cir. 1986) (applicants for Section 8 New Construction projects lack sufficient property interest for due process protections); *Germain v. Recht-Goldin-Siegel Props.*, 567 F. Supp. 384 (E.D. Wis. 1983), *aff'd sub nom. Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1984) (applicants for Section 8 New Construction projects lack sufficient property interest for due process protections). Cause of action includes the right/ability to state a claim and the right to bring the claim. It is not always possible, in every situation in which an individual is wronged, to state a claim that a court will recognize and to bring that claim in court with the court sustaining the right to bring the claim.

⁵⁴See, e.g., 24 C.F.R. §§ 882.808(q) (Section 8 SRO) and 582.300(a) (2016).

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7978

JOHNNIE LEE BILLINGTON,

Plaintiff-Appellant,

versus

LEWIS C. UNDERWOOD, Individually
and as Executive Director of the
Housing Authority of the City of
Tifton, Ga., et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

(May 23, 1983)

Before FAY and CLARK, Circuit Judges, and MORGAN,
Senior Circuit Judge.

PER CURIAM:

This case is before our court for the second time. Because we find that the Housing Authority of the City of Tifton, Georgia (THA) produced no evidence substantiating its declaration of Billington's ineligibility, we reverse and remand.

In April 1978, appellant Billington applied to THA for admission to federally subsidized low-rent public housing.¹ He was subsequently informed of his eligibility² and placement on the waiting list. Appellant alleges that he then made plans to relocate his residence. On June 1, 1978, however, THA informed appellant that he was no longer eligible for said housing. Billington, through his attorney, requested a hearing on his denial of eligibility, and on June 14, 1978 a meeting was held at the offices of THA's attorney. Upon being told that his denial of eligibility was final and receiving only general accusations of the reasons therefor, appellant filed suit in district court challenging, among other things, the housing authority's procedures for determining eligibility.

On June 12, 1979, the district court granted the housing authority's motion for judgment on the pleadings. This court reversed and remanded for a hearing pursuant to federal law and regulations. Billington v. Underwood, 613 F.2d 91 (5th Cir. 1980).³ An informal hearing was held at which plaintiff presented testimony, affidavits, and

¹The Housing Authority of the City of Tifton, Georgia is a federally subsidized, state chartered, locally administered corporate body established pursuant to Off. Code Ga. Ann. sec. 8-3-1 et seq. (1982).

²Record Vol. 2, p. 79.

³The court specifically declined to address the constitutional issues, finding the hearing to be required under Federal Regulation 24 C.F.R. sec. 860.207(a) (1979) and 42 U.S.C. sec. 1401 et seq. (1970). Billington v. Underwood, 613 F.2d at 93.

documents rebutting the bases listed as reasons for his ineligibility. The housing authority presented only one witness and two pieces of documentary evidence.

The hearing officer denied appellant relief. Mr. Billington then filed an amended complaint in the district court seeking legal and equitable relief under the Civil Rights Act of 1871, 42 U.S.C. sec. 1983, and the due process clause of the fourteenth amendment. On November 10, 1981, the district court denied relief to appellant and granted summary judgment to defendants based on a finding of deference to the housing authority in determining eligibility requirements. This timely appeal followed.

The hearing mandated by this court in Billington v. Underwood, 613 F.2d 91 (5th Cir. 1980), although informal in that it need not conform to the strictures of a trial, was a prescription to conduct a meaningful proceeding. Id. at 95. Appellant concedes that the hearing in the instant case complied in form with the required proceeding⁴ but maintains that the hearing was not meaningful in that the decision rendered was not supported by the evidence. He asserts that "substantial" evidence is

⁴In remanding the case for informal hearing, we advised that the proceeding "need not conform to the rigors of formal evidentiary rules, need not afford cross examination, need not be transcribed, and need not issue in a formal written decision of the hearing officer's findings of fact and conclusions of law." Billington v. Underwood, 613 F.2d at 95. Mr. Billington was, in fact, represented at the hearing by an attorney and allowed to cross-examine witnesses. The hearing was transcribed and the hearing officer rendered a written decision.

the yardstick to be used by a reviewing court. Appellees maintain, and the district court found, that substantial evidence existed to support the hearing officer's finding. Appellees also argue that, assuming the evidence is not substantial, only some evidence is required to sustain an agency finding pursuant to an informal hearing. The issue in this case, thus, concerns the standard of review to be used by a court in reviewing an administrative agency decision.

Courts and commentators have written extensively on the subject of judicial review of informal action by agencies. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Dunlop v. Bachowski, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975); K. Davis, Administrative Law Treatise sec. 29.01-6 (Supp. 1982). The controversy has traditionally centered around whether a reviewing court must defer to the agency whenever there is "some" evidence to support the latter's finding or only when "substantial" evidence exists on the record.⁵ Frequently, however, the various standards of review are merged into a single standard. In South Georgia Natural Gas Company v. Federal Energy Regulatory Commission, 699 F.2d 1088 (11th Cir. 1983), this court reviewed an agency interpretation of its regulation to determine whether the interpretation was reasonable,

⁵Informal hearings often do not have what is commonly thought of as a record. However, in this case, a record in the traditional sense is available.

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Id. at 1090. Likewise, in Home Health Services of the United States v. Schweiker, 683 F.2d 353 (11th Cir. 1982), we stated, "The scope of review of agency actions is limited to a determination of whether the Board's findings are arbitrary, capricious, an abuse of discretion, not in accordance with the law or unsupported by substantial evidence in the record as a whole." Id. at 356. See K. Davis, Administrative Law Treatise sec. 29.01-6 (Supp. 1982).

Upon reviewing the record in this case, we find no evidence to support the decision reached. As noted above, the housing authority presented only one witness, the Assistant Executive Director of THA. The witness testified that Mr. Billington had been found eligible for public housing and so informed. Record Vol. 2, pp. 78-79. The witness testified further that although Mr. Billington visited the office approximately once per week for over six weeks, he was never asked to submit further information regarding his application. Record Vol. 2, pp. 78-79. She also stated that she possessed no knowledge of a regulation requiring that she keep a file on applicants verifying their status with the housing authority. Record Vol. 2, pp. 81-82. Thus, the only documentary evidence presented by THA consisted of two statements dated after the decision of ineligibility, both of which were later repudiated by the authors.

The purpose of an informal hearing is accurate fact-finding. Billington v. Underwood, 613 F.2d at 95. While acknowledging the discretion necessarily granted administrative agencies and their directors, we equate the mandate calling for a "meaningful" hearing with one requiring a "fair" proceeding. We conclude that such adjectives are conspicuously absent from a hearing at which supporting evidence is altogether lacking.⁶ The agency action in this case thus fails under each and every standard of review. The case is remanded for entry of judgment for the plaintiff.

REVERSED AND REMANDED.

⁶We note also the results of an investigation by the Chief Administrative Law Judge of the Department of Housing and Urban Development into the Housing Authority of the City of Tifton, Georgia. The decision, issued August 17, 1981, stated that THA was in noncompliance with both its own and HUD's regulations and in violation of Title VII. The evidence set out in the report indicates an arbitrary and discriminatory selection of tenants. In the Matter of: the Housing Authority of the City of Tifton, Georgia, Department of Housing and Urban Development Administrative Decision, Docket No. 80-1981.

RECEIVED

U. S. DISTRICT COURT
CLERK'S OFFICE
By: [Redacted] Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

By: [Redacted]
Plaintiffs

v.

HOUSING AUTHORITY OF THE CITY
OF AUSTIN, and HYACINTH ONYEKANNE
in his official capacity as
Director of Housing Management and
Admissions for the Housing
Authority of the City of Austin,
Defendants

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§

CIVIL ACTION NO.

[Redacted]

PLAINTIFFS' FIRST AMENDED COMPLAINT

PRELIMINARY STATEMENT

1.

Plaintiffs were each denied a public housing apartment by the Housing Authority of the City of Austin ("the Housing Authority") in accordance with its policy of automatically denying the application of every person whose criminal history record shows any incident -- even if only an arrest -- within ten years of their application. Plaintiffs [Redacted] were denied on the basis of a single arrest on which no criminal charges were filed. Plaintiff [Redacted] was denied on the basis of a single non-violent, non drug-related incident for which she received deferred adjudication.

CHAPTER 5, EXHIBIT 2

2.

The Housing Authority failed to comply with the Constitution of the United States, federal law and the Texas Constitution (1) in denying Plaintiffs [REDACTED] housing solely on the basis of their arrests; (2) in denying Plaintiff [REDACTED] on the basis of one isolated deferred adjudication for filing a false police report; (3) in failing to consider the time, nature and extent of Plaintiffs' conduct and Plaintiffs' rehabilitative and other favorable evidence; and (4) in failing to give notice to Plaintiffs of their right to present evidence of rehabilitation and other favorable evidence at their appeal hearing.

JURISDICTION

3.

This court has jurisdiction under 28 U.S.C. Section 1331 because this case raises issues under federal law and the United States Constitution. The court has supplemental jurisdiction of the Texas Constitution claims under 28 U.S.C. Section 1367.

PLAINTIFFS

4.

Plaintiffs are all adult residents of Travis County, Texas. They each meet the income eligibility standards for admission to the conventional public housing program.

DEFENDANTS

5.

Defendant Housing Authority of the City of Austin is a federally subsidized, state-chartered, locally established and

CHAPTER 5, EXHIBIT 2

administered public body situated in Austin, Texas. Its actions and those of its employees are under color of law.

6.

Defendant Hyacinth Onyekanne is sued in his official capacity as Director of Housing Management and Admissions for the Housing Authority of the City of Austin. His actions complained of here were taken under color of law.

FACTUAL BACKGROUND

7.

The United States Housing Act of 1937 established the low rent public housing program for the purpose of remedying the acute shortage of decent, safe, and sanitary dwellings for families of low income. Pursuant to this program, the Housing Authority of the City of Austin was established to construct and administer low rent public housing in Austin. To ensure the program is administered in a fair and even-handed manner, Congress has required that the Secretary of the United States Department of Housing and Urban Development promulgate regulations governing the admissions policies of public housing bodies. These regulations set out binding criteria that housing authorities are to follow in selecting and rejecting applicants for public housing.

8.

The Housing Authority follows an "arrest-only" denial policy in the selection of its tenants. Pursuant to its written policies, the Housing Authority will deny an applicant admission

CHAPTER 5, EXHIBIT 2

into the Housing Authority's housing program on the sole basis that the applicant has been arrested, without considering whether the applicant did indeed commit any crime, or the time, nature and extent of the conduct. Moreover, in the event unfavorable information is received on an applicant, the Housing Authority does not consider the time, nature and extent of the applicant's conduct or other factors which might indicate a reasonable probability of favorable future conduct unless the applicant's alleged unfavorable conduct occurred more than ten years prior to the date of the application.

Facts as to Plaintiff [REDACTED]

9.

In January 1995, Plaintiff [REDACTED] applied for public housing with the Housing Authority of the City of Austin. Pursuant to the Housing Authority's admissions requirements, Plaintiff [REDACTED] later submitted a criminal history report issued by the Texas Department of Public Safety. Plaintiff [REDACTED] criminal report with the Texas Department of Public Safety states that he was arrested for burglary of a habitation in 1991. The report also states that no charges were filed for this incident. There are no other criminal incidents listed in Plaintiff [REDACTED] report. Plaintiff [REDACTED] denies having ever been involved in a burglary of a habitation.

10.

Pursuant to the Housing Authority's policy to deny housing to any applicant who has been arrested within the past ten years

for certain types of criminal activity, the Housing Authority rejected Plaintiff [REDACTED] application for public housing. On January 9, 1996, the Housing Authority sent Plaintiff [REDACTED] a notice of rejection stating that his application had been rejected. The sole stated reason for denial was for a "burglary of habitation." In the notice, the Housing Authority stated that Plaintiff [REDACTED] had a right within ten calendar days from the date of the letter to request an informal review of the Housing Authority's denial of his application.

11.

Plaintiff [REDACTED] requested an informal review with the Housing Authority. On January 29, 1996, the Housing Authority sent Plaintiff [REDACTED] notice of the informal review hearing. The notice stated that at the hearing he had the following rights:

Please be advised that at this hearing you shall have the right to be represented by counsel and present evidence and arguments in support of your defense or rebutting the grounds for rejection. You have a right, upon written request to review your application file in advance of the hearing.

Plaintiff [REDACTED] was not given notice of his right to present evidence at the hearing relating to the time, nature, and extent of his conduct. Plaintiff [REDACTED] was not given notice of his right to present evidence which might indicate a reasonable probability of favorable future conduct, including rehabilitation evidence.

12.

On February 13, 1996, Plaintiff [REDACTED] attended an

CHAPTER 5, EXHIBIT 2

informal hearing at the Housing Authority. The hearing officer for this hearing was Hyacinth Onyekanne, Director of Housing Management and Admissions for the Housing Authority. Plaintiff [REDACTED] was not represented by counsel. The only evidence relied upon by the Housing Authority for evidence of burglary of habitation was Plaintiff [REDACTED] Texas Department of Public Safety criminal history report, which stated that he had been arrested for burglary of habitation but that no charges were filed. Plaintiff [REDACTED] explained to the hearing officer that he had not been involved in a burglary and that burglary charges were not filed against him. Defendant Onyekanne did not consider the time, nature and extent of the conduct, rehabilitation evidence, or other evidence which might indicate a reasonable probability of favorable future conduct. Defendant Onyekanne acted in accordance with the Housing Authority's policy of considering such evidence only when the denial of an application is for an incident occurring more than ten years prior to the date of the application.

13.

On February 19, 1996, Defendant Onyekanne wrote Plaintiff [REDACTED] notifying him that he had decided to uphold the decision of the Housing Authority. Defendant Onyekanne stated that his decision was based on the fact that "DPS records show that you were involved in Burglary of a Habitation."

CHAPTER 5, EXHIBIT 2

Facts as to Plaintiff [REDACTED]

14.

In August 1994, Plaintiff [REDACTED] applied for public housing with the Housing Authority of the City of Austin. When the Housing Authority reached Plaintiff [REDACTED] on the waiting list, it requested, and Plaintiff [REDACTED] submitted, a criminal history report issued by the Texas Department of Public Safety. Plaintiff [REDACTED] criminal report with the Texas Department of Public Safety states that Plaintiff [REDACTED] was arrested for unlawfully carrying a weapon in 1989. The report also shows that no charges were filed for this incident. There are no other criminal incidents listed in Plaintiff [REDACTED] report. Plaintiff [REDACTED] denies having ever carried a weapon unlawfully.

15.

Pursuant to the Housing Authority's policy to deny housing to any applicant who has been arrested within the past ten years for certain types of alleged criminal activity, the Housing Authority rejected Plaintiff [REDACTED] application for public housing. On February 20, 1996, the Housing Authority sent Plaintiff [REDACTED] a notice of rejection stating that her application had been rejected. The sole stated reason for denial was "Carrying Prohibited: unlawful carrying weapon Arrest Date 4-9-89." In the notice, the Housing Authority stated that Plaintiff [REDACTED] had the right, within ten calendar days from the date of the letter, to request an informal review of the Housing Authority's denial of her application.

15.

Plaintiff [REDACTED] requested an informal review with the Housing Authority. On February 29, 1996, the Housing Authority sent Plaintiff [REDACTED] notice of the informal review hearing. The notice stated that at the hearing she had the following rights:

Please be advised that at this hearing you shall have the right to be represented by counsel and present evidence and arguments in support of your defense or rebutting the grounds for rejection. You have a right, upon written request to review your application file in advance of the hearing.

Plaintiff [REDACTED] was not given notice regarding her right to present evidence at the hearing relating to the time, nature, and extent of her conduct and to other factors which might indicate a reasonable probability of favorable future conduct, including rehabilitation evidence.

17.

On March 12, 1996, Plaintiff [REDACTED] attended an informal hearing at the Housing Authority. The hearing officer for this hearing was Hyacinth Onyekanne, Director of Housing Management and Admissions for the Housing Authority. Plaintiff [REDACTED] was not represented by counsel. The only evidence relied upon by the Housing Authority for evidence of unlawfully carrying a weapon was Plaintiff [REDACTED] Texas Department of Public Safety criminal history report, which stated that she had been arrested for unlawfully carrying a weapon but showed that no charges were filed. Plaintiff [REDACTED] explained to the hearing officer that she had been arrested with several others when a gun was found in her father's car, but that the gun neither belonged to her nor

did she know to whom it belonged. She was taken to jail -- apparently for having no driver's license and no insurance. She was subsequently released. Charges were not filed against her for unlawfully carrying a weapon.

18.

Defendant Onyekanne gave no consideration to the fact that this was a single isolated incident occurring seven years ago or any other favorable information. He also did not consider rehabilitation evidence or other evidence which might indicate a reasonable probability of favorable future conduct because of the Housing Authority's policy of considering such evidence only when the denial of an application is for an incident occurring more than ten years prior to the date of the application.

19.

On March 18, 1996, Defendant Onyekanne wrote Plaintiff [REDACTED] notifying her that he had decided to uphold the decision of the Housing Authority. Defendant Onyekanne wrote that his decision was based on the fact that "DPS records show that you were involved in Unlawful Carrying Weapon in 1989."

Facts as to Plaintiff [REDACTED]

20.

In December 1994, Plaintiff [REDACTED] applied for public housing with the Housing Authority of the City of Austin. Pursuant to the Housing Authority's admissions requirements, Plaintiff [REDACTED] later submitted a criminal history report issued by the Texas Department of Public Safety. Plaintiff [REDACTED] criminal report

with the Texas Department of Public Safety states that Plaintiff [REDACTED] was arrested for resisting an officer by giving a false report to a police officer in 1991 and that she was convicted in 1993. But for an administrative error, the criminal report would have reflected that adjudication of Plaintiff [REDACTED] guilt was deferred by a judge and then charges were dismissed after a period of probation. Plaintiff [REDACTED] was in fact never convicted of the misdemeanor, but rather pled "nolo contendere" upon the advice of a court-appointed attorney who advised her that contesting the charge would cost her \$500 and that if she pleaded no contest and completed probation, no charge would appear in her record. There are no other criminal incidents listed in Plaintiff [REDACTED] report. Plaintiff [REDACTED] denies having ever given a false report to a police officer.

21.

Pursuant to the Housing Authority's practice of denying housing to any applicant who has any criminal record, the Housing Authority rejected Plaintiff [REDACTED] application for public housing. On February 23, 1996, the Housing Authority sent Plaintiff [REDACTED] a notice of rejection stating that her application had been rejected. The sole stated reason for denial was for "resisting officer." In the notice, the Housing Authority stated that Plaintiff [REDACTED] had a right within ten calendar days from the date of the letter to request an informal review of the Housing Authority's denial of her application.

22.

Plaintiff [REDACTED] requested an informal review with the Housing Authority. On March 14, 1996, the Housing Authority sent Plaintiff [REDACTED] notice of the informal review hearing. The notice stated that at the hearing she had the following rights:

Please be advised that at this hearing you shall have the right to be represented by counsel and present evidence and arguments in support of your defense or rebutting the grounds for rejection. You have a right, upon written request to review your application file in advance of the hearing.

Plaintiff [REDACTED] was not given notice regarding her right to present evidence at the hearing relating to the time, nature, and extent of her conduct and evidence on other factors which might indicate a reasonable probability of favorable future conduct, including rehabilitation evidence.

23.

On March 25, 1996, Plaintiff [REDACTED] attended an informal hearing at the Housing Authority. The hearing officer for this hearing was Hyacinth Onyekanne, Director of Housing Management and Admissions for the Housing Authority. Plaintiff [REDACTED] was represented by a paralegal from Legal Aid. The only evidence relied upon by the Housing Authority for "resisting an officer by giving a false report to a police officer" was Plaintiff [REDACTED]'s Texas Department of Public Safety criminal history report, which stated that she had been arrested for resisting an officer. The report also erroneously stated that she had been convicted.

24.

At the hearing Plaintiff [REDACTED] explained to Defendant Onyekanne that she had never resisted an officer by filing a false report. She explained that she filed a police report when a missing child support payment had become over twenty days late. Ms. [REDACTED] told Defendant Onyekanne how she then followed the instructions of the Domestic Relations Office and the Austin Police Department as to how she should proceed when several child support checks arrived at once. She further explained that she had been certain that there was some mix-up when she was informed that a warrant had been issued for her arrest because she had cashed the missing check. She told Defendant Onyekanne that she had gone to the police station where she was arrested and charged with filing a false police report. Ms. [REDACTED] explained that upon the advice of a court-appointed attorney, she pled "nolo contendere" to the charge, received a deferred adjudication, and completed probation with the expectation that the charge would be dismissed and not appear on her record.

25.

Although Ms. [REDACTED] and her Legal Aid advocate presented Defendant Onyekanne with court documents, he did not consider the fact that a court had released Ms. [REDACTED] from all penalties and disabilities as a result of the misdemeanor charge. Defendant Onyekanne did not consider the type of crime that Ms. [REDACTED] allegedly committed or the relevance of the crime to her potential as a good tenant. Finally, Defendant Onyekanne did not

consider any rehabilitation evidence or other evidence which might indicate a reasonable probability of favorable future conduct because of the Housing Authority's policy of considering such evidence only when the denial of an application is for an incident occurring more than ten years prior to the date of the application.

26.

On April 4, 1996, Defendant Onyekanne wrote Plaintiff [REDACTED] notifying her that he had decided to uphold the decision of the Housing Authority. He stated that his decision was based on the fact that "the evidence establishes that you were involved in resisting an officer in 1991 and convicted in 1993."

FIRST CAUSE OF ACTION: ARREST-ONLY DENIAL POLICY
VIOLATES HUD'S REGULATIONS GOVERNING
ADMISSIONS CRITERIA

27.

The Department of Housing and Urban Development regulation governing the criteria to be used in selecting and rejecting applicants for public housing states, in pertinent part:

- (a) The tenant selection criteria to be established and information to be considered shall be reasonably related to individual attributes and behavior of an applicant
- (b) The criteria to be established in relation to avoiding concentration of families with serious social problems in PHA projects and information to be considered shall be reasonably related to whether the conduct of the applicant in present or prior housing has been such as would not be likely to interfere with other tenants in such a manner as to diminish their enjoyment of the premises by adversely affecting their health, safety or welfare or to affect adversely the physical environment or the financial stability of the project if the applicant were admitted to the project.

24 C.F.R. § 960.205 (1995). The Housing Authority's "arrest-only" denial policy--its policy of rejecting applicants solely on the basis of a prior arrest--is in violation of this regulation because it is not reasonably related to the above criteria and because it fails to consider the individual attributes and behavior of applicants. Defendants' actions in denying Plaintiffs under this policy give rise to a cause of action directly under the regulation and under 42 U.S.C. § 1983 for declaratory and injunctive relief, damages, and attorney's fees.

SECOND CAUSE OF ACTION: FAILURE TO GIVE NOTICE
OF THE RIGHT TO PRESENT REHABILITATIVE AND OTHER
FAVORABLE EVIDENCE DENIED PLAINTIFFS THEIR
RIGHT TO PROCEDURAL DUE PROCESS OF LAW

28.

Plaintiffs are entitled under the Fourteenth Amendment of the United State Constitution to procedural due process of law. Defendants violated Plaintiffs' due process rights in denying Plaintiffs' applications for public housing without giving them written notice of their right to present evidence in an informal hearing relating to the time, nature, and extent of the conduct, in addition to other factors which might indicate a reasonable probability of favorable future conduct -- including the right to present evidence of rehabilitation. The Housing Authority's actions give rise to a cause of action under 42 U.S.C. § 1983 for declaratory and injunctive relief, damages, and attorney's fees.

THIRD CAUSE OF ACTION: ARREST-ONLY DENIAL POLICY DENIED
PLAINTIFFS THEIR RIGHT TO SUBSTANTIVE DUE
PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

29.

Plaintiffs are entitled under the Fourteenth Amendment of the United States Constitution to substantive due process of law and equal protection of the laws. Defendants' decisions to deny the applications of Plaintiffs [REDACTED] and [REDACTED] solely on the basis that their Texas Department of Public Safety reports show they were once arrested and to deny the application of Plaintiff [REDACTED] solely on the basis that she received deferred adjudication for a non-violent, non-drug-related offense is arbitrary and capricious, shocks judicial notions of fairness, and is not rationally related to the right to protect the health, safety, and welfare of other tenants. Defendants' actions give rise to a cause of action under 42 U.S.C. § 1983 for declaratory and injunctive relief, damages, and attorney's fees.

FOURTH CAUSE OF ACTION: VIOLATION OF HUD'S
REGULATIONS GOVERNING ADMISSIONS CRITERIA
BY FAILING TO CONSIDER REHABILITATION
EVIDENCE AND OTHER FAVORABLE EVIDENCE

30.

The pertinent HUD regulations governing the admissions process for public housing state, in pertinent part:

In the event of the receipt of unfavorable information with respect to an applicant, consideration shall be given to the time, nature, and extent of the applicant's conduct and to factors which might indicate a reasonable probability of favorable future conduct or financial prospects. For example:

- (1) Evidence of rehabilitation;

(2) Evidence of the applicant family's participation in or willingness to participate in social service or other appropriate counseling service programs and the availability of such programs;

(3) Evidence of the applicant family's willingness to attempt to increase family income and the availability of training or employment programs in the locality.

24 C.F.R. § 960.205(d) (1995). The Housing Authority considers the above favorable information only when an applicant's alleged unfavorable conduct occurred more than ten years prior to the date of application. The Housing Authority's policy of refusing to consider favorable information in the original consideration of Plaintiffs' applications and at the informal review hearing is in violation of the above regulation. Defendants' actions give rise to a cause of action directly under the regulation and under 42 U.S.C. § 1983 for declaratory and injunctive relief, damages, and attorney's fees.

FIFTH CAUSE OF ACTION: ARREST ONLY DENIAL POLICY VIOLATES THE FAIR HOUSING ACT

31.

The Housing Authority's "arrest only" denial policy--its policy of denying housing solely on the basis that an applicant has been arrested within the past ten years--has a discriminatory impact on classes of minority applicants, of which all three Plaintiffs are members, and is not reasonably related to the Housing Authority's legitimate mission of providing safe and affordable housing. Defendants' actions give rise to a cause of action under 42 U.S.C. §§ 3604 and 3613 and 42 U.S.C. §1983 for

declaratory and injunctive relief, damages, and attorney's fees.

SIXTH CAUSE OF ACTION: ARREST-ONLY DENIAL POLICY AND
FAILURE TO GIVE NOTICE OF THE RIGHT TO PRESENT
FAVORABLE EVIDENCE VIOLATED PLAINTIFF'S DUE
PROCESS AND EQUAL PROTECTION RIGHTS UNDER
THE TEXAS CONSTITUTION

32.

Plaintiffs are entitled under Article 1, § 19 of the Texas Constitution to procedural and substantive due course of law. Plaintiffs are entitled under Article I, §3 of the Texas Constitution to equal protection of the laws. Defendants' "arrest-only" denial policy violated Plaintiffs' right to due course of the law and equal protection of the law. Defendants also violated Plaintiffs' due process rights in denying their applications for public housing without giving them written notice of their right to present evidence at the informal hearing relating to the time, nature, and extent of their conduct, in addition to other factors which might indicate a reasonable probability of favorable future conduct -- including the right to present evidence of rehabilitation. The Housing Authority's actions give rise under Sections 65.011, 37.003, and 37.009 of the Texas Civil Practices & Remedies Code to a cause of action for declaratory and injunctive relief and attorney's fees.

DAMAGES

33.

Plaintiffs seek to recover their actual damages resulting from the illegal denial of their applications for public housing.

REQUEST FOR RELIEF

34.

Plaintiffs request that this court:

- (a) Enter a declaratory judgment that Defendants violated Plaintiffs' rights under federal law, the United States Constitution, and the Texas Constitution;
- (b) Enter a declaratory judgment that Defendants' tenant selection policies on their face and as applied, violate the United States Constitution, federal law and the Texas Constitution;
- (c) Grant appropriate injunctive relief ordering Defendants to revise their tenant selection policies and procedures so as to bring them into compliance with the United States Constitution, the Texas Constitution and federal law;
- (d) Grant Plaintiffs an injunction ordering Defendants to reinstate Plaintiffs' applications effective the date they originally applied; to process Plaintiffs' applications in accordance with the law; and to offer Plaintiffs the next available appropriate apartment;
- (e) Award Plaintiffs their actual damages, including damages for emotional distress;
- (f) Award Plaintiffs their reasonable attorneys' fees, to the extent allowed by law, pursuant to 42 U.S.C. §1988, 42 U.S.C. § 3613(c)(2), and Texas Civil Practices & Remedies Code §37.009.


CHAPTER 5, EXHIBIT 2

- (g) Assess costs against Defendants; and
- (h) Grant Plaintiffs such other and further relief as the court deems proper and just.

Respectfully submitted,

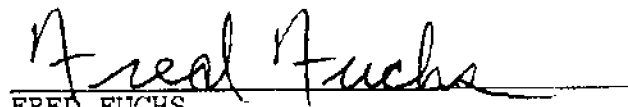
LEGAL AID OF CENTRAL TEXAS
205 W. 9th Street, Suite 200
Austin, Texas 78701
Phone: 512/476-7244, ext. 311
Telefax: 512/476-3940

BY:


FRED FUCHS
State Bar No. 07498000
ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' First Amended Complaint has been hand delivered to Ms. Iris J. Jones, 2610 Nations Bank Tower, 515 Congress Avenue, Austin, Texas 78701, and to Ms. Brenda Jo Cox, 1640 E. 2nd Street, Austin, Texas 78702, attorneys for Defendants, on this 1st day of July, 1996.


FRED FUCHS



NEW YORK CITY
HOUSING
AUTHORITY

NEW YORK CITY HOUSING AUTHORITY

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SECRETARY
DOUGLAS APPLE
GENERAL MANAGER

Attn: Jacques David
Received 9/1/07

DIVISION OF APPLICANT APPEALS

PUBLIC HOUSING HEARINGS

Report of Informal Hearing Held August 6, 2007

The Application Of:

[REDACTED]
1415 St. John's Place #4
Brooklyn, NY 11213

Application # [REDACTED]

Present At The Hearing:

Barry Carey - Hearing Officer
Michael Sills - Housing Authority Presenting Official
Thaddeus Kwasnick - Housing Authority Attorney
[REDACTED] - Applicant / Appellant
Jacques David - Applicant's / Appellant's Attorney

Housing Authority Presentation:

The Housing Authority Presenter reported the appellant was found ineligible for Public Housing on 10/27/06 for Failure to Meet the Standards for Admission.

The Basis for Ineligibility indicates the following:

The Authority has adopted Standards to exclude persons who have been convicted of Violent Felonies, Possession, Use or Sale of Controlled Substances, or Alcohol Related Offenses.

Our investigation reveals that Mr. [REDACTED] (applicant) was convicted of the following offenses:

1. Code 125.25 A Felony, Murder in the 2nd degree, sentenced 5/4/78, sentence imposed = imprisonment 15 years - life.
2. Code 110-220.39 C Felony, Attempted Criminal Sale of a Controlled Substance in the 3rd degree, sentenced 3/6/95, sentence imposed = imprisonment 4 years - 8 years.

Based on the above information, you do not meet the New York City Housing Authority's Standards for Admission. You are ineligible until 5/4/2009.

Mr. Sills reported that the applicant was interviewed on 8/09/06. Mr. Sills reported that the applicant was asked the Standards for Admissions Question; "Has Applicant or family member been convicted of any offense?" The applicant responded, "Yes." Mr. Sills reported that the case entry indicates [REDACTED] born 10/17/60, was convicted 12/76 and released in 1991. He was placed on parole for life. Because of good behavior he was released from parole after 3 years. Applicant was arrested in 1994 for attempted sale of a controlled substance. He was convicted in 1995, and he was released in 2000. Mr. Sills reported that the applicant was asked the Standards for Admissions Question; "Is applicant or family member currently facing prosecution for any offense?" The applicant answered, "No."

Mr. Sills reported that Housing did a criminal background check on 9/15/06 obtaining the information indicated in the Basis of Ineligibility. [REDACTED] was arrested 12/22/76 and 5/20/94.

Mr. Sills reported the applicant submitted the following:

1. An employer's form dated 8/1/06 from Little Lads Café Bakery. It indicates [REDACTED] began employment on 3/22/06. He works as a chef.
2. Pay stubs for [REDACTED] for various check dates from 5/20/06 to 7/07/06.
3. A State of New York Executive Department Division of Parole Final Discharge dated November 20, 2003. It certifies that [REDACTED]

has been discharged from further jurisdiction of the Board of Parole in accordance with the provisions of law.

4. A certificate from Universal Life Church. It certifies that [REDACTED] [REDACTED] has been awarded a Doctor of Metaphysics Degree on November 3, 1997 by Universal Life Church for meritorious recognition upon completion of a course of instruction in the principles of the Universal Life Church.
5. A Minister License presented to [REDACTED] on October 9, 2005 by the Church of God In Christ.
6. A certificate from Universal Life Church. It certifies that [REDACTED] [REDACTED] has been ordained minister on November 7, 1995 by Universal Life Church.
7. A Certificate of Completion. It certifies that [REDACTED] [REDACTED] [REDACTED] has successfully completed Family Dynamics a division of SCO Family of Service 20 Weeks Parents' Support Workshop Series granted the 25th of May 2005.
8. A letter dated January 23, 2007 from Jacques L. David, Esq., The Legal Aid Society. The letter states in parts, "In support of his application, Mr. [REDACTED] presented documentary proof of his good character and adduced other evidence of his rehabilitation since the offense which served as the basis for NYCHA's determination. At the interview, Mr. [REDACTED] noted that he had enrolled in the University of the State of New York Restaurant School from June 2000 to February 2001. As a student he pursued courses in culinary arts and restaurant management and graduated with a certificate in Pastry Arts. Since that time, Mr. [REDACTED] has worked as a pastry chef at Little Lad's Basket, a Seventh-Day Adventist cafe' and bakery in lower Manhattan. Mr. [REDACTED] matriculation in culinary school and his present employment attest to the fact that he has become productive member of his community. In addition to the support of his immediate family, Mr. [REDACTED] has also been embraced by his church community. Mr. [REDACTED] is an active member of the Open Door Church of God in Christ, where he serves as a minister."

Mr. Sills reported that an entry in the case on 01/26/07 indicates the applicant was in the Applications Information Office. The Basis of Ineligibility was explained to him. The entry indicates the applicant submitted a fair hearing form.

Mr. Sills reported that an entry in the case on 02/02/07 indicates the case was approved for a hearing by a supervisor.

Hearing Presentation:

Appellant indicated he resides at 1415 St. John's Place #4 Brooklyn, NY 11213. This is his mailing address. Appellant stated he is applying for Public Housing for himself and his 6 year old daughter, [REDACTED]. Appellant indicated he is

employed. Appellant indicated he works full-time at Little Lad's Cafe' as a manager and head chef. Appellant indicated there is no other income in the household.

Appellant indicated he was arrested 12/22/76 when a man was robbed. The man fell down and fractured his hip. Appellant indicated the man died as he was signing out of the hospital. Appellant indicated he was a witness. Appellant indicated he refused to testify. Appellant indicated he was charged as an accessory to murder, and he was convicted at trial. Appellant indicated he was released in 1991. Appellant indicated he got married, and his wife started to use drugs. Appellant indicated she sold narcotics to the police. Appellant indicated they found out he was her husband and on parole. Appellant indicated he took a plea bargain. Appellant indicated he was released in May of 2000. Appellant indicated he was discharged from parole on 11/20/2003.

Appellant indicated he attended New York Restaurant School from 6/2000 to 2/2001, when he graduated. Appellant indicated he attended the Help Desk Specialist Program and graduated April 02, 2004. Appellant indicated it was a 6 months to a year program. Appellant indicated he has worked with children and as a head cook at Ft. Greene Senior Center since his release from prison. Appellant indicated he takes his daughter to church, and his whole focus is living right. Appellant indicated he taught children music at the daycare center. Appellant did not verify his work at Ft. Greene Sr. Center.

Appellant indicated he has not had any other arrests, pending charges or convictions since his offense of 1994.

Blanche M. Centeno, Program Director of General Prevention Services Family Dynamics, spoke on appellant's behalf. She indicated she has been working with [REDACTED] since 2004. Ms. Centeno stated appellant is an exceptional father. He insures that his daughter is in school, and he participates in family counseling. Ms. Centeno indicated appellant has rehabilitated himself, and he is an exemplary client. Ms. Centeno indicated [REDACTED] is a voluntary case.

Vincent Haynes, from State Senator Eric L. Adams' office, spoke on [REDACTED] behalf. Mr. Haynes indicated he was a counselor for Family Dynamics, and he serviced [REDACTED] and his daughter beginning in 2004. Mr. Haynes indicated [REDACTED] was cooperative and reserved, and he looked for ways to improve himself. Mr. Haynes indicated appellant pursued training in the culinary arts, and appellant was a volunteer at a daycare center for a year before he was brought on payroll. Mr. Haynes indicated [REDACTED] is a minister at Church of God in Christ, and Mr. [REDACTED] poses no threat to anyone or anything.

The case is left open until August 15, 2007. Appellant will submit additional documentation.

Appellant submitted the following:

1. A letter dated August 14, 2007 from Little Lad's. The letter states in parts, "[REDACTED] has been employed by Little Lad's at the 120 Broadway New York, NY location since March 20th, 2006. His hourly rate of pay is \$12.00 per hour. Normally he works 40 hours each week and receives \$480.00 gross pay. He is still employed as of this date." The letter is signed by Maria Fleming, co-owner.
2. A pay stub for [REDACTED] dated 08/03/07. It indicates gross pay of \$480.00.
3. A Certificate of Graduation granted to [REDACTED] on March 23, 2002 by University of the State of New York, New York Restaurant School.
4. [REDACTED] Official Transcript the New York Restaurant School. It indicates [REDACTED] attended from the Summer Session 2000 through the fall 2001.
5. A letter dated October 23, 2003 from computer Career Center. It indicates [REDACTED] enrolled in Help Desk specialist on 05/30/03.
6. A diploma issued to [REDACTED] on April 02, 2004 by Computer Career Center for completing the requirements for graduation from the Help Desk specialist Program.
7. [REDACTED] Official Transcript the Computer Career Center. It indicates [REDACTED] attended from 7/07/03 to 3/20/04.
8. A letter dated August 6, 2007 from Reach For The Stars Child Development Inc. It states in parts, "[REDACTED] has been a parent at Reach For The Stars Child Development Inc. since August 2001. He is a supportive parent as well as an active participant in the development of the children at RFTS. Mr. [REDACTED] has taught our after school children to read and play music. This has helped the children a lot as this is a talent that most children in this day no longer have access to. He worked with the after school children for about a year as a volunteer and as a staff member starting March of 2004. Due to financial obligations Mr. [REDACTED] resigned from RFTS because of a higher paying job." The letter is signed by Jacqueline Europe, Director.
9. A Security Guard Training Certificate presented to [REDACTED] on November 1, 2000. [REDACTED] has successfully completed the Eight Hour Pre-Assignment Course For Security Guards conducted by Security Works Inc.
10. A Security Guard Training Certificate presented to [REDACTED] on November 30, 2000. [REDACTED] has successfully completed the Sixteen Hour On The Job Training Course For Security Guards conducted by Quikstart Training & Placement Centers.
11. A Certificate of Completion presented to [REDACTED] on November 30, 2000 by Quikstart Placement Center, Inc. [REDACTED] has successfully completed the New York City Fire Guard Preparation Course.
12. A Certificate issued to [REDACTED] by NYC Fire Dept 04/19/2005.
13. A Petition for Custody filed by [REDACTED] January 22, 2001. [REDACTED] files for custody of [REDACTED]

14. A report dated February 20, 2001 from Administration For Children's Services regarding [REDACTED] Petitioner For Custody in Brooklyn Family Court. It states in part, "Petitioner impresses as truly having the welfare of the child and her mother at heart, and the relationship between the parties appears to be one of love and respect. Worker inquired as to whether there was a history of drug, alcohol, child abuse, domestic violence or mental illness, and Mr. [REDACTED] responded in the negative."
15. A certificate issued by New York State Office of Children and Family Services. It certifies that [REDACTED] participated in Discovering the Scientist Within on Thursday, May 27, 2004 presented by SUNY Early Childhood Education and Training Program.
16. A letter from The City of New York ACS Family Child Care Conference sponsored by ACS Division of Child Care & Head Start Saturday, June 5, 2004 Hostos Community College. The letter awards two hours of instructional credits in safety and security procedures for attending the workshop "The First Responder - First Aid and CPR" to [REDACTED]
17. A letter from The City of New York ACS Family Child Care Conference sponsored by ACS Division of Child Care & Head Start Saturday, June 5, 2004 Hostos Community College. The letter awards two hours of instructional credits in principles of early childhood development for attending the workshop "Fostering Language Development in the Infant/Toddler Program" to [REDACTED]
18. A certificate issued by New York State Office of Children and Family Services. It certifies that [REDACTED] participated in Can I Get That Super Sized? Early Beginnings to a Healthy Lifestyle on Wednesday, June 09, 2004 presented by SUNY Early Childhood Education and Training Program.
19. A certificate issued by New York State Office of Children and Family Services. It certifies that [REDACTED] participated in Math: What's Play Got To Do With It? on Thursday, June 24, 2004 presented by SUNY Early Childhood Education and Training Program.
20. A letter dated August 13, 2007 from Open Door Church of God in Christ. The letter states in parts, "This is a letter of recommendations for public housing for our church member [REDACTED] [REDACTED] who is a Minister of our congregation. He is also a single parent of a daughter and is in need of affordable public housing. Minister [REDACTED] [REDACTED] is in good standards with this church and this community." The letter is signed by Katherine Bryant for Elder Curtis Bryant, Pastor.
21. A letter dated August 15, 2007 from Family Dynamics. The letter states in parts, "Mr. [REDACTED] has demonstrated that he is a responsible, respectful, mature father that has created a loving, nurturing home environment for himself and his daughter. He is a full time employee and has maintained his employment for a significant period of time. He is well integrated into his church. He is fully participatory in the education and well being of his daughter and he continues to receive individual and family counseling from

his family counselor from Family Dynamics." The letter is signed by Ms. Blanche M. Centeno, LMSW General Prevention Supervisor.

Findings:

I find the Authority made an appropriate determination based on Federal Housing Guidelines.

I find that appellant has now presented sufficient objective evidence to show that he meets the Standards for Admission for Public Housing. The appellant was found to be ineligible for Public Housing based upon his criminal record. [REDACTED] was convicted of an A Felony, Murder in the 2nd degree, and a C Felony, Attempted Criminal Sale of a Controlled Substance in the 3rd degree. At the hearing, appellant presented documentation to show that he has been employed for seventeen months by Little Lad's since his last offense. He attended and graduated from New York Restaurant School, and he received his diploma for completing the requirements for graduation from the Help Desk Specialist Program. Appellant worked with after school children for about a year as a volunteer, and he worked as a staff member beginning March, 2004. Since his last offense, appellant has completed various training courses, and he has obtained his Minister License. Appellant is currently a minister at his church. Appellant submitted a reference letter from Family Dynamics that states in parts, "Mr. [REDACTED] has demonstrated that he is a responsible, respectful, mature father that has created a loving, nurturing home environment for himself and his daughter. He is a full time employee and has maintained his employment for a significant period of time. He is well integrated into his church." In addition, appellant has not had any other arrests, pending charges, or convictions since his second offense.

Based on the above, I believe [REDACTED] has made significant positive changes in his behavior and improved since the offenses.

Determination:

I am reversing the original determination of ineligibility for Public Housing.

The Department of Housing Applications will determine when you will be contacted and what further information will be necessary to continue the processing of your application.



Barry Carey
Hearing Officer
August 28, 2007

CHAPTER 6

Advocating for Policies that Respond to the Housing Needs of Individuals with Criminal Records

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6.1 Introduction

To increase the likelihood that individuals with criminal records and/or who have been incarcerated obtain federally-assisted housing, advocates may want to participate in one or more of the local planning processes that establish low-income housing policies and/or have an impact on admission policies for individuals with criminal records. These planning processes include:

- The Public Housing Agency (PHA) plans the PHAs must adopt for public housing and voucher programs,
- The Consolidated Plan (ConPlan), which state or local jurisdictions must adopt for housing in conjunction with the receipt of Community Development Block Grant (CDBG), HOME, Emergency Support Grants (ESG) and Housing Opportunities for People with AIDS (HOPWA) funds,
- The Assessment of Fair Housing (AFH), a new fair housing planning framework required by HUD,
- The Qualified Allocation Plan (QAP), which statewide agencies administering the Low Income Housing Tax Credit (LIHTC) program must adopt,
- The Continuum of Care planning process, including any Ten Year Plan to End Homelessness, which primarily impacts the allocation of funds for the Shelter Plus Care (S+C) program, the Supportive Housing Program (SHP), and the Section 8 Single Room Occupancy (SRO) housing program, and
- The Olmstead Plan, which affects individuals with disabilities, including those who are seeking housing in the community, avoiding institutionalization, and/or leaving institutions

Each of these plans serves a different purpose, so advocacy strategies will differ. The emphasis of the advocacy should be on reasonable admission policies

for the particular housing program¹ and/or a set aside of units or admission priority for individuals with criminal records and their families. Another key component of successful advocacy will be dispelling the myth that PHAs and owners of federally-assisted housing are required to restrict the access of individuals with criminal records. In all but a few limited situations,² PHAs and owners of federally-assisted housing have substantial discretion regarding admissions and should be encouraged to exercise that discretion in favor of admitting individuals with criminal records.

The advocacy strategies selected may vary depending upon the type of housing and the character of the entity or agency involved. For example, PHAs are public bodies that have one or more residents or program participants on their boards, and some housing developments must either have program participants on the governing board or consult with current or prior homeless residents.³ These participants' involvement in governance and planning will likely affect the advocacy in those contexts. The fact that a housing development may be owned by a nonprofit may also affect the chosen strategy because such owners may be more responsive than private for-profit owners. For all the programs, there is a federal oversight agency, such as HUD, the Department of Agriculture (for RD housing) or Department of Treasury (for LIHTC units), and for some of the programs a state or local oversight or administrative agency will be involved. In addition, for all the federal programs, federal legislators may be interested and willing to play a role in the effective administration of the program.

There is no required public process for influencing the policies for project-based Section 8 housing, HUD-insured multi-family housing, or Rural Development

¹For more information about the different federal housing programs, see Appendix 1 to this Guidebook.

²See Chapter 2 for a discussion of the two situations in which PHAs and some owners have no discretion and must reject applicants with certain criminal backgrounds.

³See Appendix 1 for a brief descriptions of the composition of PHA boards and of advisory groups for Shelter Plus Care (S+C), Supportive Housing Program (SHP) and Section 8 Single Room Occupancy (SRO) housing.

rental housing. In these cases an advocate may need to negotiate directly with the owner or manager of the complex, or work with the appropriate federal entity, such as HUD, RD or Congress. It may also be possible to achieve changes to admission policies through local ordinances governing all private housing.

Several housing advocacy organizations have developed guidebooks to assist persons with criminal records with their admission applications.⁴ The guidebooks created for New York City and Massachusetts applicants serve as models for the development of similar guidebooks for other jurisdictions. In addition, for those advocates who are seeking to expand housing opportunities for individuals with criminal records through the creation of new housing opportunities, the guidebook created by AIDS Housing of Washington (now called Building Change) is instructive.⁵

The following sections of this chapter (6.2-6.7) provide brief introductions to each of the planning processes listed above. The subsequent section (6.8) highlights advocacy pertaining to the PHA planning process. The strategies and issues discussed in that section will generally be applicable in the context of other planning processes as well.

The final sections review successful litigation aimed at making housing available for individuals with criminal records or changing restrictive admission policies for a class of such individuals (6.9) and discuss local laws that prohibit discrimination against individuals with criminal records (6.10).

6.2 The Public Housing Agency (PHA) Five Year and Annual Plans

PHAs, which administer public housing, the voucher program and Section 8 moderate rehabilitation housing, are required to develop and submit to HUD Five Year and Annual Plans (PHA Plans). The PHA Annual Plans must include information regarding policies for admission to these programs. The policies

include preferences for admission, site-based waiting lists (for public housing) and screening, which should provide information about whether the PHA makes requests to law enforcement agencies to determine if an applicant has a criminal record.⁶ More detailed rules regarding a PHA's admission policies should be set out in supporting documents to the PHA Plans. For the Public Housing program, this supporting document is called the Admission and Continued Occupancy Plan (ACOP). For the voucher program, it is the Administrative Plan.⁷ The PHA Plans and Administrative Plan should also contain information on the number and placement of project-based vouchers, a portion of which could be targeted to families that include individuals with criminal records.⁸ The PHA Plans must conform to the overall Comprehensive Affordable Housing Strategy contained in a jurisdiction's Consolidated Plan (ConPlan).⁹ In addition, as discussed below in Section 6.4, federal regulations may require that a given PHA submit and receive acceptance from HUD an Assessment of Fair Housing (AFH) before it can submit its PHA Plans.¹⁰

When developing the PHA Plans, a PHA is required to form a Resident Advisory Board (RAB) composed of public housing and voucher tenants, provide the RAB draft copies of the plans and seek and respond to comments from the RAB about the plans.¹¹ PHAs must annually notice and hold at least one public hearing on the PHA Plan before the PHA's Board of Commissioners.¹² After approval by the Board of

⁴See, e.g., https://www.reentry.net/ny/help/item.2912-Housing_and_Reentry; LEGAL TACTICS: FINDING PUBLIC AND SUBSIDIZED HOUSING (2d ed., 2006 Public Housing), available at <http://www.masslegalhelp.org/housing/finding-housing-booklets> (see especially Booklet 6, Tenant Screening).

⁵KRISTINA HALS, AIDS HOUSING OF WASHINGTON, FROM LOCKED UP TO LOCKED OUT: CREATING AND IMPLEMENTING POST-RELEASE HOUSING FOR EX-PRISONERS (2005); see also DOJ, OFFICE OF JUSTICE PROGRAMS, No. NCJ 203374, DEVELOPING HOUSING FOR EX-OFFENDERS (May 2004), available at: <https://www.ncjrs.gov/pdffiles1/203374.pdf>.

⁶42 U.S.C.A. § 1437c-1(c) and (d) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07); 24 C.F.R. § 903.7 (2017). HUD provides form templates for PHAs to use for their PHA Plans. The Template prompts the PHA to provide certain information. See HUD, Public Housing Agency Annual Plan Templates, available at <http://www.hud.gov/offices/pih/pha/templates/>; see also PUBLIC HOUSING AGENCY [PHA] PLAN DESK GUIDE (Sept. 20, 2001), available at

<http://www.hud.gov/offices/pih/pha/policy/pha-plan-guide.pdf>.

⁷See PUBLIC HOUSING AGENCY [PHA] PLAN DESK GUIDE 84 and 98 (Sept. 20, 2001), available at

<http://www.hud.gov/offices/pih/pha/policy/pha-plan-guide.pdf>.

⁸24 C.F.R. § 983.51(a) (2014).

⁹See Section 6.3 for a discussion of the ConPlan.

¹⁰To determine whether a given PHA is currently subject to the AFFH framework, go to

<https://www.hudexchange.info/programs/affh/affh-field-point-of-contacts/>.

¹¹42 U.S.C.A. § 1437c-1(e) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07); 24 C.F.R. § 903.13 (2007); PUBLIC HOUSING AGENCY [PHA] PLAN DESK GUIDE, Section 4 (Sept. 20, 2001), available at

<http://www.hud.gov/offices/pih/pha/policy/pha-plan-guide.pdf>.

¹²42 U.S.C.A. § 1437c-1(f) (West, Westlaw through Pub. L. No.

Commissioners and HUD, the PHA must be available locally for review.¹³

As discussed below in Section 6.8, advocates in a number of jurisdictions have had success influencing public housing and voucher program admission policies as they relate to people reentering.

6.3 The Consolidated Plan (ConPlan)

The ConPlan is both a planning document and an application for four HUD block grant programs: the Community Development Block Grant (CDBG) program, the HOME program, the Housing Opportunities for Persons with AIDS (HOPWA) program, and the Emergency Shelter Grants (ESG) program.¹⁴ The entity tasked with crafting the ConPlan will vary by jurisdiction, but it is generally a department within a city, county or state government dealing with community development and housing.¹⁵ The process for completing a ConPlan includes a

115-30, approved 11-8-07); 24 C.F.R. § 903.17 (2017); PUBLIC HOUSING AGENCY [PHA] PLAN DESK GUIDE, Section 4 (Sept. 20, 2001), *available at*

<http://www.hud.gov/offices/pih/pha/policy/pha-plan-guide.pdf>.

¹³The annual plan and the Administrative Plan and ACOP for each PHA must be available locally. 24 C.F.R. §§ 903.23(e) 960.202(c)(1) and 982.54(b) (2017).

¹⁴See Appendix 1, for more information about HOME and HOPWA. *See also* information about the amount of such funds allocated yearly to each jurisdiction, *available at*

https://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/about/budget. For more information regarding CDBG,

see 42 U.S.C.A. § 5301-5320 (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07) and 24 C.F.R. Part 570 (2017). For more information regarding the ConPlan, *see* the HUD ConPlan web page, at:

https://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/about/conplan and the HUD, GUIDELINES FOR PREPARING A CONSOLIDATED PLAN FOR LOCAL AND STATE JURISDICTIONS, available at the same site. *See also*, ED GRAMLICH,

CENTER FOR COMMUNITY CHANGE, HOUSING AND COMMUNITY DEVELOPMENT HANDBOOK, HUD'S CONSOLIDATED PLAN: AN ACTION GUIDE FOR INVOLVING LOW INCOME COMMUNITIES (1998) (the Action Guide is dated but continues to have useful information).

¹⁵All large cities and urban counties receiving these funds directly from the federal government are required to develop a ConPlan. 24 C.F.R. § 91.2(a) (2017). For small cities and rural counties receiving CDBG or HOME monies from the state government, a State Consolidated Plan is formulated and governs each small city and rural county receiving funds. *Id.* § 91.2(b). Small cities and rural counties applying to the state for funds are required to submit applications and certify that the activities funded comport with the State ConPlan. *Id.* § 91.2(b). For localities that do not receive CDBG money directly, but apply directly to the federal government for a range of other HUD Community Planning and Development (CPD) programs, such as the Shelter Plus Care (S+C) program, the locality is required to submit an abbreviated ConPlan. *Id.*, § 91.235.

Proposed and Final Consolidated Plan (including the Long-term Strategic Plan and an Annual Action Plan),¹⁶ a Citizen Participation Plan,¹⁷ a Consolidated Annual Performance and Evaluation Report (CAPER)¹⁸ and, where still required,¹⁹ an Analysis of Impediments to fair housing (AI).²⁰ The ConPlan identifies needs, creates a long-term strategy to meet those needs, and sets priorities.²¹

The ConPlan must include an identification of the needs of homeless individuals and individuals with other special needs who require supportive housing, such as persons with disabilities, persons with alcohol or other drug addictions, and persons with HIV/AIDS and their families.²² The housing and supportive housing needs of individuals with criminal records are not specifically referenced in the federal statute or regulations governing the ConPlan process, but there is nothing to prevent those needs from being identified and addressed locally in the ConPlan. The ConPlan must also highlight the programs and resources that will be used in order to meet the identified needs. The

¹⁶42 U.S.C.A. §§ 5304(a)(2)(B), 5304(a)(2)(E), 12705(a)(1)-(2) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07); 24 C.F.R. §§ 91.215 (localities), 91.315 (states), 91.220 (localities), 91.320 (states) (2017).

¹⁷42 U.S.C.A. § 5304(a)(3) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07); 24 C.F.R. §§ 91.105 (localities) 91.115 (states) (2017).

¹⁸42 U.S.C.A. §§ 5304(e), 5304(a)(2)(B) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07); 24 C.F.R. § 91.520 (2017).

¹⁹Under the newer AFH framework discussed below in Section 6.4, implementation of AFH submission requirements are staggered over several years, so a particular jurisdiction may or may not be required to prepare an AI depending on whether it is currently required to provide an AFH plan as a prerequisite to submission of its ConPlan. *See* 24 C.F.R. §§ 5.151, 5.160(a)(3) (2016).

²⁰24 C.F.R. § 91.225(a)(1) (2017); *see also* HUD FAIR HOUSING PLANNING GUIDE, Feb. 14, 2000, *available at*

<http://www.hud.gov/offices/fheo/images/fhpg.pdf>, reissued in accordance with HUD Memorandum from Nelson R. Bregón, General Deputy Assistant Secretary for Community Planning and Development to All CPD Field Office Directors, etc. regarding Analysis of Impediments to Fair Housing Choice Reissuance, *available at*

<http://www.hud.gov/offices/fheo/library/finaljointletter.pdf>.

²¹42 U.S.C.A. 12705(b) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07); 24 C.F.R. §§ 91.205, 91.215 (localities), 91.305, 91.315 (2007). The proposed plan should be drafted in consultation with social service providers (both governmental and non-governmental), the local PHA and local governments (in the case of the development of state ConPlans). *Id.* §§ 91.100 (localities), 91.110 (states).

²²24 C.F.R. §§ 91.215(d) and 91.315(d) (2017). As noted by several commentators, some post-release individuals are homeless. In addition, others may have HIV/AIDS, be disabled, or be in a treatment plan or have been rehabilitated due to an addiction to drugs.

AN AFFORDABLE HOME ON REENTRY

Annual Action Plan allocates a specific amount of money to projects or programs in accordance with the needs and priorities set forth in the Long-Term Strategic Plan.²³ The Citizen Participation Plan details a strategy to “provide for and encourage” public involvement in the entire ConPlan process.²⁴ The CAPER is an annual evaluation of whether the objectives of the ConPlan have been met. The AI is an analysis of the housing opportunities and levels of segregation and the local plan to eliminate impediments to fair housing.²⁵

A certification must be filed annually with the ConPlan. Significantly, jurisdictions that receive Emergency Shelter Grants must certify that:

The jurisdiction [or state] has established a policy for the discharge of persons from publicly funded institutions . . . such as . . . youth facilities, or correction programs and institutions in order to prevent such discharge from immediately resulting in homelessness for such persons.²⁶

There has not been any litigation regarding these certifications. However, there has been litigation regarding false or improper certifications in the context of allegations of violations of fair housing obligations.²⁷

For a local jurisdiction, at least two public hearings must be held at two different stages of the program year.²⁸ One of those hearings must be held prior to the publication of the proposed ConPlan for comment. The second may be held at any other time in the year, such as in conjunction with the development of

proposed activities pursuant to the plan or a review of program performance.²⁹ The hearings must be noticed to allow for a 30-day review and comment period.³⁰ Elected officials approve the ConPlan,³¹ and the final ConPlan is submitted to HUD for review at least 45 days before the beginning of the jurisdiction’s fiscal year.³² HUD reviews the ConPlan to ensure that all required elements are included, that the plan was developed with public participation and social service consultation, and that the ConPlan includes the locality’s chief executive’s compliance certification.³³

Advocates seeking to address the problems of individuals with criminal records in obtaining housing can participate in the development of the ConPlan by identifying the needs of those individuals and providing, if available, documentation of those needs. It is not sufficient to identify a particular need; advocates should also be prepared to provide grounds for a determination that an identified need is significant in order to increase the likelihood that CDBG, HOME, ESG and/or HOPWA funds, will be allocated to address such needs.

Copies of ConPlans may be available on the relevant local jurisdiction’s website. There is no central posting of all such plans. Therefore, there are limited readily available examples of communities using CDBG, HOPWA, HOME or ESG funds to assist individuals with criminal records gain access to federally assisted housing. The few identified examples include communities with jail or prison facilities, permitting minimum security inmates to work on the construction of low-income housing. Such an idea has been pursued in at least two jurisdictions and a suggestion made that such a program could be modified to expand the opportunity for the creation of post-release housing.³⁴ In addition, ESG funds have been used by legal services programs to assist low-income individuals who have

²³*Id.* §§ 91.220 (localities), 91.320 (states).

²⁴*Id.* §§ 91.105(a)(2)(i) (localities), 91.115(a)(2) (states).

²⁵As discussed below in Section 6.4, under HUD’s Affirmatively Furthering Fair Housing Rule, the AI is currently being phased out and replaced with the more robust Assessment of Fair Housing (AFH), *see* 24 C.F.R. §§ 5.151, 5.160(a)(3), and the AFH process creates additional opportunities for advocacy regarding the obstacles to fair housing posed by overly restrictive tenant selection policies that bar or limit access for individuals with criminal records.

²⁶*Id.* §§ 91.255(c)(10) (localities), 91.325(c)(10)(states).

²⁷*See* *United States ex rel. Anti-Discrimination Center of Metro New York v. Westchester Cty.*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007); *Thompson v. United States Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d (D. Md. 2005).

²⁸42 U.S.C.A. §§ 12705(b)(1), 5304(a)(3)(D), 5304(a)(2)(C) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07); 24 C.F.R. §§ 91.105(e)(1) (localities), 91.115(b)(3) (states) (2007) (States are required to have at least one hearing at the needs determination stage. Localities are required to have two hearings at two different stages).

²⁹The hearings “must address housing and community development needs, development of proposed activities, and review of program performance.” 24 C.F.R. § 91.105(e)(1) (2017).

³⁰42 U.S.C.A. § 5304(a)(3)(D) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07); 24 C.F.R. §§ 91.105(b)(4) (localities), 91.115(b)(4) (states) and 91.105(e) (citizen participation) (2017).

³¹24 C.F.R. §§ 91.225(a)(6) (localities), 91.325(a)(6) (states) (2017).

³²*Id.* § 91.15(a).

³³42 U.S.C.A. § 12705(c) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07); 24 C.F.R. § 91.500(b) (2017).

³⁴KRISTINA HALS, AIDS HOUSING OF WASHINGTON, FROM LOCKED UP TO LOCKED OUT: CREATING AND IMPLEMENTING POST RELEASE HOUSING FOR EX PRISONERS 139 (2005).

been denied admission to public housing, with investigating the circumstances of the alleged crime and obtaining evidence of mitigating circumstances and rehabilitation so that they may find appropriate housing.³⁵ Despite the lack of reported examples, nothing prevents a local community from requiring recipients of CDBG, HOPWA or HOME funding to set aside units for individuals who are recently released from incarceration or to require such recipients to amend or establish admission policies that provide for individualized consideration of each application and consideration of mitigating circumstances, rehabilitation and, if applicable, any need for a reasonable accommodation.³⁶ In fact, the provisions of the ESG certification appear to require action along these lines.

6.4 The Assessment of Fair Housing (AFH)

Under the Affirmatively Furthering Fair Housing (AFFH) rule issued by HUD in 2015,³⁷ the AI process that has been a required part of the ConPlan³⁸ is currently being replaced by a new planning framework called the Assessment of Fair Housing (AFH). HUD has described the AFH as a way for HUD funding recipients to “more effectively and efficiently incorporate into their planning processes the duty to affirmatively further the purposes and policies of the Fair Housing Act.”³⁹ PHAs that receive funds under Sections 8 or 9 of the U.S. Housing Act of 1937 and jurisdictions that complete ConPlans are subject to the AFFH Rule.⁴⁰ These funding recipients must complete and submit an AFH to HUD according to an implementation schedule set forth in the rule.⁴¹

An AFH must contain several required sections, including a summary of fair housing issues in the jurisdiction and an analysis of HUD-provided data, local data, and local knowledge regarding segregation

and integration, racially and ethnically concentrated areas of poverty, significant disparities in access to opportunity and disproportionate housing needs based on membership in a protected class.⁴² The AFH must also identify and prioritize contributing factors that create, contribute to, perpetuate, or increase the severity of “segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs” and set goals to overcome the effects of those contributing factors.⁴³ Funding recipients must also include a summary of their community participation process.⁴⁴

Community participation is a cornerstone of the AFH process. The AFFH Rule requires a series of community participation requirements for both PHAs and jurisdictions,⁴⁵ and more specific requirements that apply either to particular types of jurisdictions participating in ConPlan programs⁴⁶ or to PHAs.⁴⁷ HUD has issued two fact sheets about the community participation process for jurisdictions and PHAs, respectively, that provide a useful overview of the requirements.⁴⁸ Advocates participating in the AFH process should familiarize themselves with these materials in order to identify and utilize opportunities for providing input and influencing priorities and goals.

As participants in the AFH process, advocates may consider asserting that the practice of using criminal records in housing decisions are “contributing factors” that create, contribute to, perpetuate, or increase the severity of one or more fair housing issues for the purposes of the AFH analysis.⁴⁹ In other words,

⁴²See generally 24 C.F.R. § 5.154(d) (2016).

⁴³24 C.F.R. § 5.154(d)(3).

⁴⁴24 C.F.R. § 5.154(d)(4).

⁴⁵24 C.F.R. § 5.158 (2016).

⁴⁶24 C.F.R. §§ 91.105 (local governments), 91.115 (states) (2016).

⁴⁷24 C.F.R. §§ 903.13, 903.15, 903.17, and 903.19 (2016).

⁴⁸HUD, AFFH FACT SHEET: COMMUNITY PARTICIPATION AND AFFIRMATIVELY FURTHERING FAIR HOUSING: GUIDANCE FOR PUBLIC HOUSING AGENCIES (Nov. 2015) (Companion Website); HUD, AFFH FACT SHEET: COMMUNITY PARTICIPATION AND AFFIRMATIVELY FURTHERING FAIR HOUSING: GUIDANCE FOR CONSOLIDATED PLAN PROGRAM PARTICIPANTS (Nov. 2015) (Companion Website).

⁴⁹See e.g., HUD, Assessment of Fair Housing Assessment Tool for Local Governments (Jan. 2017), Appendix C, at 2 (including reference to criminal records policies under “Admissions and occupancy policies and procedures, including preferences in publicly supported housing”) available at

<https://www.hudexchange.info/resource/5216/assessment-of-fair-housing-tool-for-local-governments/>; HUD, Assessment of Fair Housing Assessment Tool for Public Housing Agencies (Jan. 2017), Appendix D, at 66 (same) available at <https://www.hudexchange.info/resource/5217/assessment-of-fair-housing-tool-for-public-housing-agencies/>

³⁵See HUD, HOMELESS PREVENTION IN THE EMERGENCY SHELTER GRANTS PROGRAM 10 (March 2001), available at <https://www.hudexchange.info/resources/documents/HomelessPreventionESG.pdf>.

³⁶KRISTINA HALS, AIDS HOUSING OF WASHINGTON, FROM LOCKED UP TO LOCKED OUT: CREATING AND IMPLEMENTING POST RELEASE HOUSING FOR EX PRISONERS 52 (2005); see also discussion in Chapter 3 of mitigation and reasonable accommodation.

³⁷80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903); See also NHLP, HUD Housing Programs Tenants Rights, 2016 Supplement at § 13.14.2.4.3.1.

³⁸See Section 6.3 for a description of the AI.

³⁹80 Fed. Reg. at 42,272.

⁴⁰24 C.F.R. § 5.154(b) (2016).

⁴¹24 C.F.R. §§ 5.151, 5.160(a)(3) (2016).

advocates can use the AFH process to connect the existence of local exclusionary housing policies based on one's criminal history (e.g., refusing to rent to anyone with a criminal record regardless of circumstances) with fair housing issues such as segregation, racial or ethnic concentrations of poverty, disparities in access to opportunity, and disproportionate housing needs such as cost burden. To the extent that members of protected classes are being disproportionately denied housing choice by restrictive criminal records policies in both federally assisted and private housing, advocates can use the AFH process to push jurisdictions and PHAs to set goals that recognize and address these disparities. For example, advocates may use the AFH process to urge a jurisdiction to set a goal in the AFH of adopting a "fair chance" or similar local ordinance⁵⁰ to address fair housing disparities created by criminal records-based housing policies.

6.5 Qualified Allocation Plan

The Internal Revenue Service (IRS), a bureau of the Department of the Treasury, distributes tax credits to each state for construction or rehabilitation of housing under the Low-Income Housing Tax Credit program (LIHTC). Each state then allocates the tax credits to sponsors of LIHTC housing in accordance with a state-adopted Qualified Allocation Plan (QAP). The QAP sets forth the state's LIHTC allocation plan and project selection criteria.⁵¹ The IRS requires that state LIHTC agencies update their QAP plans annually and that they do so after a public hearing that has been reasonably noticed.⁵² A copy of each state's QAP is available online.⁵³

State LIHTC awards are generally made in accordance with preferences or set-asides. Eight non-exclusive selection criteria must be considered in the QAP: location of the housing, housing needs characteristics, use of existing housing as part of a community revitalization plan, sponsor characteristics, tenant populations with special needs, public housing waiting lists, tenants with children, and the potential

for tenant ownership of the development.⁵⁴ Preferences in awarding the tax credits must be given to developments that serve the lowest income tenants for the longest period of time and are situated in qualified census tracts.⁵⁵

Advocates can take advantage of the QAP planning and public hearing process to advocate for housing for individuals with criminal records. To gain support for such a proposal, advocates would need to show that there is a need for such housing, that the need is significant and not being met, and that there is sufficient community support to establish a set-aside or preference for developments that serve individuals with criminal records. The QAP process could also be used to advocate for reasonable admission policies for all LIHTC-financed developments that would address issues such as individualized review of applicants, mitigation, rehabilitation and reasonable accommodation. Alternatively, advocates could work with a local community and a nonprofit or other type of developer to submit an application for tax credits for a project that would serve individuals with criminal records or families with such members. To make such a development affordable, LIHTC financing would have to be combined with additional subsidies from programs such as project-based vouchers, Shelter Plus Care (S+C), Supportive Housing program (SHP), Housing for People With AIDS (HOPWA), Section 8 Moderate Rehabilitation (SRO), HOME and/or CDBG.⁵⁶

6.6 Continuum of Care

Continuum of Care (CoC) is a HUD-created policy providing for a local planning process to assess the needs of homeless individuals and develop a plan for providing housing and services to this population. The CoC model is based on the premise that homelessness is not caused simply by a lack of shelter, but involves a

[housing-tool-for-public-housing-agencies/](http://www.housing-tool-for-public-housing-agencies/).

⁵⁰For a discussion of local ordinances addressing use of criminal history as a tenant screening tool, *see* Section 6.10.

⁵¹26 U.S.C.A. § 42(m)(1)(A)(i) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07).

⁵²*Id.*

⁵³Copies of the 2017 QAPs are available at <https://www.novoco.com/resource-centers/affordable-housing-tax-credits/application-allocation/qaps-and-applications/2017-qaps-and-applications>. QAPs for other years are available at the same site.

⁵⁴26 U.S.C.A. § 42(m)(1)(B) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07); JEREMY GUSTAFON, URBAN INSTITUTE, ANALYSIS OF STATE QUALIFIED ALLOCATION PLANS FOR THE LOW-INCOME HOUSING TAX CREDIT PROGRAM (May 2002); *see, e.g.*, The 2008 Low-Income Housing Tax Credit Qualified Allocation Plan for the State of North Carolina, *available at*

<http://www.nchfa.com/Rental/RD2008qap.aspx>; Massachusetts Department of Housing and Community Development, Low-Income Housing Tax Credit Program: Revised 2007 Qualified Allocation Plan (Oct. 2007), *available at*: https://www.novoco.com/sites/default/files/atoms/files/mass_final_07.pdf.

⁵⁵26 U.S.C.A. § 42(m)(1)(B) (West, Westlaw through Pub. L. No. 115-30, approved 11-8-07).

⁵⁶For a brief discussion of these programs and a definition of homelessness as applied to CoC planning, *see* Appendix 1.

variety of underlying needs, and that the best approach for alleviating homelessness is, therefore, through a community-based process that provides a comprehensive response to the diverse needs of homeless persons.

There are five components to the CoC: a system for determining the need, emergency shelters, transitional housing, permanent housing, and preventive strategies. The CoC may cover whatever jurisdiction (*e.g.*, a city, county or state) the local participants determine is reasonable. The rules governing the CoC are contained in the HUD Guidance to Continuum of Care Planning and Implementation⁵⁷ and in the yearly Notice of Fund Availability (NOFA) for the three McKinney-Vento homeless programs: Shelter Plus Care (S+C), Supportive Housing Program (SHP) and Section 8 Moderate Rehabilitation Single Room Occupancy (SRO).⁵⁸

The CoC should be developed by a range of interested parties including nonprofits, government agencies, PHAs, community and faith-based organizations, homeless providers, housing developers, homeless persons, law enforcement, correctional institutions and agencies, veteran service agencies and others.⁵⁹ Applications for housing under the three McKinney-Vento housing programs are very competitive and most applications have as an exhibit the local CoC. An application submitted outside of the CoC process is not likely to be funded.⁶⁰ In addition, any application for S+C or SHP must be consistent with the ConPlan.⁶¹

The Bush Administration created the Interagency Council on Homelessness,⁶² which developed a policy of encouraging a “Ten Year Plan to End Chronic

Homelessness.” The Administration wants the 10-Year plans integrated into the CoC plans.⁶³ In addition, applicants for the three competitive McKinney-Vento housing programs, receive points based upon compliance with the 10-year plans and strategies for ending chronic homelessness.⁶⁴

Advocates could use the CoC process to identify the needs of individuals with criminal records who are returning to the community after incarceration and seeking housing. The CoC plan could be used to set forth admission guidelines for local recipients of McKinney-Vento funding requiring that owners of the housing have reasonable admission policies, provide for individualized determinations, and require consideration of mitigation, rehabilitation and reasonable accommodation to overcome unfavorable information. The guidelines could also require that a certain number of units be set aside for individuals recently released from incarceration for whom no residence has been identified.

6.7 Olmstead Plans

Olmstead plans arise out of litigation concerning Title II of the Americans with Disabilities Act of 1990 (ADA).⁶⁵ The litigation sought enforcement of the anti-discrimination provisions in Title II (also known as the “integration mandate”) by requiring that, under certain conditions, persons with mental disabilities be placed in community facilities rather than in institutions.⁶⁶ On January 14, 2000, HHS issued a

⁵⁷HUD, GUIDE TO CONTINUUM OF CARE PLANNING AND IMPLEMENTATION, available at:

<https://www.hudexchange.info/resources/documents/CoCGuide.pdf> (content updated Oct. 16, 2006); see also Miller, Emily, Ann O’Hara, and Maria Herb. “Permanent Housing and HUD’s Continuum of Care.” Opening Doors (Technical Assistance Collaborative, Inc., and the Consortium for Citizens with Disabilities Housing Task Force), issue 13, March 2001.

⁵⁸See, *e.g.*, Continuum of Care Homeless Assistance Programs, Notice of Funding Availability, 72 Fed. Reg. 11,742 (Mar. 13, 2007).

⁵⁹*Id.* 11,743.

⁶⁰Projects developed exclusive of participation in a CoC process will receive few, if any, points under the CoC rating factors and are very unlikely to be funded. *Id.* 11,750.

⁶¹See, *e.g.*, 24 C.F.R. §§ 582.120 (S+C), 583.155 (SHP) (2017).

⁶²<http://www.ich.gov>. Three hundred twenty-five jurisdictions have adopted 10 Year Plans to End Chronic Homelessness. See Appendix 1 of this Guidebook for a definition of chronic homelessness; see also 72 Fed. Reg. 11,742, 11,744 (Mar. 13, 2007) for a definition of chronically homeless person.

⁶³Continuum of Care Homeless Assistance Programs, Notice of Funding Availability, 72 Fed. Reg. 11,742, 11,743 (Mar. 13, 2017).

⁶⁴*Id.*

⁶⁵42 U.S.C.A. §12132 (Westlaw through Pub. L. No. 115-30, 2007).

⁶⁶The Supreme Court, in *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999), found that the ADA requires that persons with mental disabilities be placed in community settings if a treatment professional has recommended it, the affected individual does not oppose it, and the placement can be reasonably accommodated. The Court also suggested that state plans on placing people in community-based centers might help compliance. For more information on *Olmstead*, see Home and Community-Based Services: Introduction to Olmstead Lawsuits and Plans, https://www.americanbar.org/content/dam/aba/events/homelessness_poverty/2013_Annual_Meeting_Medicare/intro_to_olmstead_lawsuits_and_plans.authcheckdam.pdf. The White House, as part of its “New Freedom Initiative,” issued Executive Order 13217, (June 18, 2001) available at:

<https://www.federalregister.gov/documents/2001/06/21/01-15758/community-based-alternatives-for-individuals-with-disabilities>, directing the federal government, specifically the

Attorney General, the Secretaries of Health and Human Services (HHS), Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration, to aid states in swiftly implementing the requirements of the *Olmstead*

letter and guidance to all State Medicaid Directors on how to implement the *Olmstead* decision.⁶⁷ In an enclosure, HHS strongly encouraged states to create Olmstead plans. HHS stated that it is extremely important that

the State involves people with disabilities (and their representatives, where appropriate) in the plan development and implementation process. . . . considers what methods could be employed to ensure constructive, on-going involvement and dialogue. . . .[and] assesses what partnerships are needed to ensure that any plan is comprehensive and works effectively.⁶⁸

Olmstead plans are focused on increasing community integration for people with disabilities and include strategies to ensure housing. Although there is limited federal funding or technical support for the Olmstead planning process, as of October 2006, twenty-nine states had adopted Olmstead plans.⁶⁹ States that have adopted the plans generally provided opportunity for public/consumer comment through forums and written submissions.⁷⁰ In some states, the plans include working groups and/or goals and objectives related to assisting disabled individuals in correctional facilities transition to community facilities.⁷¹ In those states and in others where the

decision, including the provision of technical assistance to the states.

⁶⁷HHS letter to All State Medicaid Directors, Jan. 14, 2000, available at

<https://www.medicaid.gov/Federal-Policy-Guidance/downloads/SMD011400C.pdf>.

⁶⁸*Id.*

⁶⁹MARTIN KITCHENER, MARSHALL ALAMEIDA, ALICE WONG AND CHARLENE HARRINGTON, STATE OLMSTEAD PLANS AND ALTERNATIVE STRATEGIES, UCSF National Center for Personal Assistance Services, 4th Revision (Oct. 2006); For more information on individual state plans see Home and Community-Based Services: Introduction to Olmstead Lawsuits and Plans, available at https://www.americanbar.org/content/dam/aba/events/homelessness_poverty/2013_Annual_Meeting_Medicaid/intro_to_olmstead_lawsuits_and_plans.authcheckdam.pdf.

⁷⁰See Cynthia Zubritsky, *et al.*, *The State of the Olmstead Decision and the Impact of Consumer Participation in Planning*, 9 AMER. J. OF PSYCH. REHAB. 131-143 (May-Aug. 2006) ("The recommendations made by both the stakeholders and the consumers underscore the need for more funding, more housing, more community support services, such as employment, and more meaningful consumer involvement in the development and delivery of services.").

⁷¹For example, The July 1, 2001 IOWA PLAN FOR COMMUNITY DEVELOPMENT A WORKING PLAN FOR SYSTEMS CHANGE AND

plans do not yet address this issue, advocates could raise the post-incarceration housing needs of disabled inmates in the context of the Olmstead planning process or as part of the implementation of the Olmstead plan.

6.8 Strategies to Address the Housing Needs of Individuals with Criminal Records

In general, policy strategies vary based on the particular federal housing program. For example, a PHA may be willing to conduct less screening for a voucher applicant than for a public housing applicant so as to avoid duplicating the screening that may be conducted by the private landlord or because it perceives that it has less exposure to liability under the voucher program than in the public housing program. Sections 6.8-6.10 focus on advocacy with PHAs, but the strategies discussed may be used to advocate with other housing providers as well.

6.8.1 Identify the Housing Needs of Individuals with Criminal Records

Advocates should identify and, if feasible, quantify the problems individuals who have been incarcerated face when trying to obtain decent and safe affordable housing in the community.⁷² Determining the number and housing needs of individuals who live within and/or are being released to the jurisdiction will be an important foundation for the advocacy. Local jurisdictions' law enforcement or correctional staff may have relevant data or information.⁷³ Agencies that serve a subset of those who have a criminal

IOWA'S RESPONSE TO THE SUPREME COURT DECISION IN *OLMSTEAD, ET AL. V. L.C. AND E.W.* proposed to identify the incarcerated disabled population and assess its needs relating to leaving correctional facilities.

⁷²In 2002, HUD reported to Human Rights Watch that 46,657 applicants were denied admission to public housing because of arrest or criminal records. HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 31-32 (2004), available at

<http://hrw.org/reports/2004/usa1104/usa1104.pdf>. An individual who is leaving a correctional institution will also seek housing on the private market and with family, who may live in private or federally-assisted housing.

⁷³NANCY V. LA VIGNE, PH.D. ET. AL., URBAN INSTITUTE, MAPPING PRISONER RE-ENTRY: AN ACTION RESEARCH GUIDEBOOK 14 (2d ed. 2006) (recommends useful resources to identify local prisoner reentry data, most notably a state's Department of Corrections), available at http://www.urban.org/UploadedPDF/411383_reentry_guidebook.pdf.

record, such as the homeless,⁷⁴ disabled or individuals with HIV/AIDS may also have useful information.

Advocates should also request information about policies and practices from their local PHAs to determine – and later demonstrate – the extent to which the PHAs’ policies or practices exclude individuals with criminal records. PHAs may have such information as part of their compliance with HUD’s reporting requirements.⁷⁵ Relevant information could include, for example, the number of people excluded annually due to screening relating to prior criminal activity and the characteristics of those families. Alternatively, residents and advocates could conduct a blind survey (to encourage honest answers and avoid concerns about reprisal) to determine the number of current residents of federally assisted housing who have family members with criminal records or who expect to have a formerly incarcerated family member return to the family unit.⁷⁶ If possible, advocates should also determine through discussions with residents, homeless shelter providers, the PHA, law enforcement and correctional staff, the extent to which individuals with criminal records are dissuaded from even applying to public housing or the voucher program due to the PHAs’ restrictive admission

policies. It will also be useful to ascertain the number of families with household members who have criminal records admitted into the relevant housing programs. This information, if obtainable, will be helpful in quantifying the impact of a PHA’s admission policies upon such families and individuals.

The need for affordable housing should then be compared with the number of potentially available units, including both federally-assisted and private housing. Such information may form the basis for the development of policies and/or programs to address the identified need and serve as a back drop for discussions of alternatives and the potential effects on public safety and recidivism if individuals are unable to find housing.

6.8.2 Cultivate Community Partners and Build Coalitions

To be effective, advocates must reach out to existing groups whose members are directly impacted by mass incarceration and groups already addressing the problems faced by individuals with criminal records. In addition, local housing and social service providers, law enforcement and correctional staff, public defenders and others who work with individuals with criminal records, residents of public housing, participants in the voucher program and community philanthropic organizations can also be invaluable in producing responsive admission policies for federally-assisted housing.

It can also be helpful to address the problem regionally. In Vermont, for example, the Burlington Housing Authority convened a Regional Advisory Group to develop a response to the housing needs of post-release individuals returning to the county.⁷⁷

The gatekeepers and creators of local PHA admission policies—the PHA staff and the PHA Board—are best situated to immediately institute positive change.⁷⁸ Advocates will likely need to address those parties’ concerns about balancing new, less exclusionary policies with their responsibility to provide safe housing for all program participants. Current tenants and other community leaders will often be in the best position to address such concerns.

⁷⁴CATERINA GOUVIS ROMAN & JEREMY TRAVIS, THE URBAN INSTITUTE, TAKING STOCK, HOUSING, HOMELESSNESS AND PRISONER RE-ENTRY 8 (2004), *available at* http://www.urban.org/UploadedPDF/411096_taking_stock.pdf (One-tenth of the population entering prisons are homeless and about one-tenth leaving prisons are homeless after release). Other reports state that the figures of homelessness prior to incarceration are higher, *see* Chapter 1.

⁷⁵Some PHAs may have some documentation because they are evaluated by HUD on their management practices. For public housing, this evaluation includes information regarding security. PHAs must annually submit to HUD a Public Housing Asset Management Operation System Certification, HUD Form 50072 (5/2005) showing compliance with the requirement to screen for applicants’ criminal backgrounds. 24 C.F.R. § 902.43(a)(5) (2017); HUD, PUBLIC HOUSING ASSESSMENT MANAGEMENT OPERATIONS SYSTEM CERTIFICATION GUIDEBOOK, *available at* http://www.hud.gov/offices/reac/pdf/guide_book/appendix_1.pdf. The certification form contains under Sub-indicator #5: Security, Component #2: Screening of Applicants a field titled, “The total number of applicants denied who met the applicable criteria.” The HUD guidebook instructions for completing the certification form suggest that PHAs include “[d]ocumentation including applicant ineligibility letters.” *See* http://www.hud.gov/offices/reac/pdf/guide_book/sub-indicator_5_security.pdf. For the voucher program, there is no similar form for a PHA to compile data related to screening applicants for criminal backgrounds.

⁷⁶*See* ROMAN & TRAVIS, *supra* Note 58 at 25 (four out of ten families in one public housing development expected a family member to be released from prison and return to live with them within two years); *see also* discussion in Chapter 1.

⁷⁷COUNCIL OF STATE GOVERNMENTS, PUBLIC HOUSING AUTHORITIES (PHAS) AND PRISONER RE-ENTRY (2005), *available at* http://www.endhomelessness.org/page/-/files/1081_file_RPC_PHAs_one_page_v7.pdf.

⁷⁸*Id.* National Association of Housing and Redevelopment Officials (NAHRO) has acknowledged the role that PHAs may play in addressing the housing needs of individuals with criminal records who are no longer incarcerated.

6.8.3 Pilot Programs

Advocates may successfully advocate for limited-scope or pilot programs in which a PHA implements new policies and procedures for a prescribed trial period or only applies them to one waiting list or development before applying them to all PHA programs or developments.⁷⁹ PHAs may also be able to create special programs in partnership with other organizations in the community that are working to successfully reintegrate individuals with criminal records.⁸⁰ Section 6.9.1 describes several examples of such programs.

6.8.4 Policies of Other PHAs

In order to convince a PHA to adopt a new policy, it is often helpful to provide information about other PHAs that have adopted similar policies. Several examples are referenced in this Guide. In addition, it may be helpful to review policies of neighboring PHAs. Human Rights Watch found that the Salt Lake County PHA undertakes individualized applicant reviews, while the Salt Lake City PHA, located in the same county, automatically excludes applicants with minor offenses. Both PHAs claim that their policies increase safety.⁸¹ It is possible that neighboring PHAs

may be convinced, by example, to adopt better policies. Even anecdotal information may be persuasive. PHAs that undertake individualized applicant reviews may have information demonstrating that despite a more inclusive admissions policy, a proportionate increase in crime did not occur. Although no data is currently available addressing the issue of whether individuals with criminal records admitted into public housing or the voucher program contribute to higher crime rates, a Portland State University study about the issue is underway.⁸²

6.8.5 Success Stories

Stories detailing the successful reintegration of individuals with criminal records and a period of incarceration may also help persuade PHAs to adopt more progressive policies. Residents may be a good source of information. In the employment context one study found that after a certain amount of time, there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those without a criminal record.⁸³ Moreover, some employers have reported that new hires recently released from prison make some of the best workers because they are eager for the chance to work and motivated to succeed.⁸⁴

6.9 Examples of Local Advocacy Efforts

The following are examples of local advocacy efforts that resulted in collaboration between PHAs and social service providers to expand housing opportunities for people reentering. Section 6.9.1 focuses on creative partnerships between PHAs and other organizations to expand housing opportunities. Section 6.9.2 focuses on coalitions that resulted in

⁷⁹HUD is implementing a system whereby individual PHAs will manage public housing as part of an asset management system where funding and waitlist management will be crafted for specific developments. The new system may be more conducive to allowing experimentation with admissions policies at individual developments. See 24 C.F.R. § 990.270 (2007); see also 42 U.S.C.A. § 1437d(r) (West, WESTLAW through P.L. 110-113 approved 11-8-07) and 24 C.F.R. § 903.7(b)(2) (2007) (authorization for site-based waiting list). In addition, some PHAs are designated as Moving to Work agencies, which provides them with more flexibility in designing innovative programs. See, <http://www.hud.gov/offices/pih/programs/ph/mtw/> for a list of MTW public housing agencies.

⁸⁰KRISTINA HALS, AIDS HOUSING OF WASHINGTON, FROM LOCKED UP TO LOCKED OUT: CREATING AND IMPLEMENTING POST RELEASE HOUSING FOR EX PRISONERS 90-92 (2005) (describes a number of examples of post-release housing, provides guidance on how to apply for federal housing funds such as Supportive Housing Program (SHP), Shelter Plus Care (S+C) and Section 8 Single Room Occupancy (SRO) housing); CATERINA GOUVIS ROMAN AND JEREMY TRAVIS, URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY Ch. 4 (2004) (provides numerous examples of post-release housing, with a general description of the sources of funding); Janelle Nanos, *Lots of Privacy – and No Bars: Eight Ex-Convict Mothers Get a Fresh Start in a Subsidized Apartment Complex Especially for Them*, Newsday (June 20, 2005). This article highlights a community-based organization harnessing local and state resources to address the housing needs of individuals post release.

⁸¹HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 38 (2004), available at <http://hrw.org/reports/2004/usa1104/usa1104.pdf>.

⁸²*Id.* 36-37. The study will track individuals with a criminal record living in Portland public housing for four to five years.

⁸³Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, CRIME & DELINQUENCY (Mar. 2006) (available at:

http://www.reentry.net/library/item.100735-Enduring_Risk_Old_Criminal_Records_and_ShortTerm_Predictions_of_Criminal_In); Kurlychek, Brame, Bushway, *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUBLIC POLICY 483-504 (Aug. 2006) (available at http://www.reentry.net/search/item.100739-Scarlet_Letters_and_Recidivism_Does_An_Old_Criminal_Record_Predict_Future_R).

⁸⁴Jennifer Fahey, Cheryl Roberts & Len Engel, *Employment of Ex-Offenders: Employer Perspectives*, (Crime and Justice Institute, Sponsored by the Massachusetts Executive Office of Public Safety, Oct. 31, 2006), available at: http://www.crjjustice.org/cji/ex_offenders_employers_12-15-06.pdf.

more inclusive screening policies at PHAs within the context of the PHA planning process. For additional examples and further analysis of how PHAs are creating opportunities for housing at reentry, see a recent publication from the VERA Institute, *Opening Doors: How to develop reentry programs using examples from public housing authorities*.⁸⁵

6.9.1 Partnerships between PHAs and Service Providers to Create Housing Opportunity

The following policies provide examples of innovative partnerships between PHAs and service providers to improve housing options for people upon reentry.

6.9.1.1 Baltimore, Maryland

The Homeless Representation Project, a Baltimore community-based organization, successfully advocated for changes to the Housing Authority of Baltimore City (HABC) REENTRY policies to secure more favorable treatment for individuals with criminal records.⁸⁶ The changes clarified language about “involvement” with criminal activity, limited disqualification periods for applicants who had committed felonies to three years from conviction and, for applicants who had committed misdemeanors, to 18 months from conviction.

In addition, HABC has set aside between 200 and 250 vouchers for chronically homeless families and individuals with an ex-offender in the family.⁸⁷ In 2017, 50 of these vouchers are to be set aside for individuals who are ex-offenders and chronically homeless. All voucher holders in the program must be referred by the Mayor’s Office of Criminal Justice and Homeless Services and be participating in the City’s Ex-Offender Program.

6.9.1.2 Oakland, California

The Volunteers of America, the Alameda County Sheriff’s Office and the Oakland Housing Authority (OHA) partnered to create a program for women with children who are transitioning out of Santa Rita jail called Maximizing Opportunities for Mothers to

Succeed (MOMS).⁸⁸ Santa Rita is the fifth largest jail in the country with more than four thousand inmates. The Sheriff’s Office provides an in-custody educational program, OHA provides 19 units of “transitional” public housing, and Volunteers of America and other non-profits provide supportive services. Women and their children may live in one of the 19 units for up to 18 months. The women who successfully complete the program are then offered other public housing upon graduation. According to OHA, two major benefits of the program are the supportive services and the track record the family establishes as lease-compliant, which facilitates entry into other public housing units.

6.9.1.3 Philadelphia, Pennsylvania

In late 2013, in collaboration with the Mayor’s Office of Re-integration Services (RISE) and the Eastern District Federal Court, the Philadelphia Housing Authority (PHA) announced the formation of a 10-voucher pilot program for recently incarcerated individuals.⁸⁹ Access to the program is limited to individuals who are participating in the Eastern District’s Supervision to Aid Reentry (STAR) program, which is a voluntary reentry court for recently incarcerated people living in Philadelphia County who are likely to re-offend. In other words, participants must either have a history of violent crime or receive a moderate to high risk score on the Risk Prediction Index. Participants in the STAR program receive a variety of support services intended to aid reentry, and the PHA’s participation is intended to complement other efforts to reduce burdens related to housing.⁹⁰ The program is scheduled to be evaluated for expansion in 2018.⁹¹

6.9.1.4 Los Angeles, CA

The Housing Authority of the City of Los Angeles (HACLA), in collaboration with local community organizations and other public agencies, began a pilot

⁸⁵John Bae, Kate Finley, Margaret diZerega, and Sharon Kim, September 2017, *available at*:

<https://www.vera.org/publications/opening-doors-public-housing-reentry-guide>

⁸⁶HABC FY 2017 Admissions and Continued Occupancy Policy, pp. 4-15—4-17, *available at*

<http://static.baltimorehousing.org/pdf/HABCACOPFY2017.pdf>.

⁸⁷HABC FY 2017 MTW Annual Plan, p. 9, *available at*

<http://static.baltimorehousing.org/pdf/fy2017hudapprovedap.pdf>.

⁸⁸For more details about the MOMS program, see FY2018 MTW Approved MTW Annual Plan, *available at* <http://www.oakha.org/AboutUs/ReportsPolicies/Pages/default.aspx>

. Oakland is also considering developing a similar program for fathers exiting incarceration called DADS. *Id.*

⁸⁹Philadelphia Housing Authority, November 7, 2013. “PHA Establishes Second Chance Program for Returning Citizens,”

<http://www.pha.phila.gov/pha-news/pha-news/2013/pha-establishes-second-chance-program-for-returning-citizens.aspx>

⁹⁰United States Probation Office, Eastern District of PA. “Re-Entry Court,” <http://www.paep.uscourts.gov/re-entry-court> [accessed October 1, 2016]

⁹¹Philadelphia Housing Authority. 2016 at 58. “FY2016 Moving to Work Annual Plan,” pg. 5

<http://portal.hud.gov/hudportal/documents/huddoc?id=phillyfy16plan.pdf>

reentry program for recently incarcerated individuals to join or re-join a household with a voucher.⁹² The program has two qualifications: first, participants must not have committed an offense that is included HUD's mandatory exclusions, and second, individuals must be a participant in a reentry program offered by one of HACLA's community-based partners. For individuals and families adding a recently incarcerated person to the lease, the program presents a mild risk, since HACLA does not guarantee that a household's voucher won't be terminated in the event of a re-offense by a program participant.

6.9.1.5 New York City, New York

In 2014, the New York City Housing Authority, in collaboration with the Vera Institute of Justice and a wide array of community agencies, began the Family Reentry Pilot Program.⁹³ The two-year program is open to a small group of people who have been out of jail or prison for less than 3 years and "who are motivated not to repeat their past mistakes, and want to rejoin their families so they can help their loved ones."⁹⁴ Participants are allowed to move into public housing units without being subject to a criminal background check, and are provided with intensive case management and support services for 6 months, with an additional 18 months of support available as needed. Program participants are considered "temporary occupants" and are not eligible for succession rights, but the goal of the program is to eventually have program participants join the lease, avoid re-arrest, and remain reunited with their families.⁹⁵

6.9.1.6 Chicago, Illinois

In November 2014, the Chicago Housing Authority (CHA) approved the Reentry Pilot Program after working in collaboration with the Chicago Coalition for the Homeless.⁹⁶ The program is open to 50 individuals who have completed one year of reentry

programming with one of three qualified service organizations: the Safer Foundation, Lutheran Social Services, or St. Leonard's Ministries.⁹⁷ In addition to those barred by HUD's mandatory exclusions, people convicted of murder, attempted murder and terrorism are also ineligible to participate. Approved participants may be added, without any additional preferences, to the CHA's HCV or public housing waitlist, either on an individual basis or as part of an existing waitlist application. Participants with family members already living in public housing or in an HCV-subsidized private market unit may be added to existing leases as temporary occupants. In either case, participants are expected to be drug free, with those moving into public housing or HCV-subsidized units subject to random drug testing, to meet the CHA's work requirements, and to continue to maintain contact with service organizations through regular check-ins and home visits. After move-in, the program lasts for four years, after which participants are released from pilot-specific requirements and eligible to be added to the lease.

6.9.1.7 Alaska

Since 2009, the Alaska Housing Finance Corporation, in collaboration with the Alaska Department of Corrections, has used HOME Tenant-Based Rental Assistance (TBRA) funding and state matching to provide up to \$700 a month in housing subsidy for 24 months for parolees and probationers who make under 60% of Area Median Income.⁹⁸ The program currently serves fewer than 100 individuals and costs, on average, \$9,482 per household per year, including administrative costs. Participants in the program have a 30% lower recidivism rate than the typical offender and, in the first 3 years of the program, only 4% of participating households received a Notice to Vacate.⁹⁹ A study comparing expected with

⁹²Housing Authority of the County of Los Angeles. "About Section 8: Section 8 Pilot Re-Entry Program," <http://www.hacla.org/abouts8>.

⁹³Vera Institute of Justice, "NYCHA Family Reentry Pilot: Reuniting Families in New York City Public Housing," <https://www.vera.org/projects/nycha-family-reentry-pilot-reuniting-families-in-new-york-city-public-housing/learn-more>

⁹⁴New York City Housing Authority. December 12, 2014. "Family Re-entry Pilot Program FAQ,"

<https://www1.nyc.gov/assets/nycha/downloads/pdf/family-reentry-pilot-faqs-revised-english-12-12-14.pdf>

⁹⁵*Id.*

⁹⁶Chicago Housing Authority. January 2016 "Chicago Housing Authority Demonstration Program and Special Initiatives Overview," http://www.thecha.org/assets/1/6/Demonstration_Overview.YTD_update_Jan_2016.pdf.

⁹⁷Chicago Coalition for the Homeless. November 3 2015 "HUD Praises Reentry Pilots Like Those Advocated By CCH's Reentry Project," <http://www.chicagohomeless.org/hud-praises-reentry-housing-pilot-advocated-by-cchs-reentry-project/> [accessed October 1, 2016]

⁹⁸AK State Recidivism Reduction Work Group. January 2016. "2016 Recidivism Reduction Implementation Plan," pg. 13, <http://mhtrust.org/mhtawp/wp-content/uploads/2014/12/2016-RRIP-FINAL.pdf>; Alaska Housing Finance Corporation. "Low-Income Alaskans on Parole or Probation & Youth Aging out of Foster Care," <https://www.ahfc.us/publichousing/rental-programs/low-income-alaskans-parole-or-probation-youth-aging-out-foster-care/>

⁹⁹Alaska Housing Finance Corporation. "Tenant-Based Rental Assistance (TBRA) for Former Prisoners," pg. 2 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0OahUKEwieoISdgvTPAhXrxFOKHQmCDSYQFgqeMAA&url=https%3A%2F%2Fwww.ncsha.org%2Fsystem%2Ffiles%2FAlaska_Combating_Homelessness.pdf&usq=AFOjCNE6nvkyzkUpHmOwMOhRUGgamV98Sg&sig2=zBOJoLhqKsgrQyEjCx52jQ&cad=rja.

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actual rates of re-incarceration for the first 210 participants found that the state saved approximately \$386,000 through the program.¹⁰⁰

6.9.1.8 New Haven, Connecticut

Since 2010, the Housing Authority of New Haven (HANH) has set aside 16 public housing units for recently incarcerated individuals referred to it by the City of New Haven.¹⁰¹ Individuals who are approved after an initial interview with HANH sign a one-year lease and commit to an action plan that requires them to complete 14 hours per week of employment, conditional on ability, a job training program, and/or a treatment program. To facilitate meeting these requirements, program participants are provided with intensive case management and on-site employment training. After one year, participants are evaluated based upon reentry goals established in consultation with a case manager at move-in: those residents who have met their goals and achieved stable employment leave the program and those who have not are considered for extensions. As of 2016, 75% of participants were disabled and thus unable to achieve the employment goals required for move-out, resulting in a slow-moving wait list for entry into the program.¹⁰²

6.9.1.9 King County, Washington

Since 2013, the King County Housing Authority (KCHA), in collaboration with the YWCA, has used 46 project-based vouchers at a development specifically designated for individuals exiting incarceration who are re-uniting with children.¹⁰³ Passage Point program participants are selected by the YWCA via outreach to local prisons and jails and then provided with wraparound services once they move into the development, including parenting classes, employment training and other supports. Importantly, the program has no time limit. Instead, participants are expected to exit the program once they have demonstrated an ability to succeed, via stable employment and successful family reunification. After leaving Passage Point, former participants are eligible

to apply to KCHA-owned public housing and receive priority on the waitlist. In 2016, there were 69 households participating in the program, and 12 of those were able to graduate to permanent housing.¹⁰⁴

Additionally, since 2007, the KCHA has run a sponsor-based housing program for chronically homeless individuals, including those with criminal records.¹⁰⁵ Under the sponsor-based housing program, KCHA provides subsidy dollars for partner organizations, usually mental health providers, to rent private market apartments and sublease them to program participants. In 2016, the program provided housing options for 121 individuals (out of 814 chronically homeless people in the County).¹⁰⁶

6.9.1.10 Minneapolis, Minnesota

The Minneapolis Public Housing Authority (MPHA) is working on a project with two service organizations, Beacon and Better Futures, to start the Prison to Home program.¹⁰⁷ The program, which is still awaiting a final determination from HUD and funding for development of the chosen site, is designed to provide support for men exiting prison over three phases of reentry. First, potential program participants will either be identified by the Department of Correction 30 days prior to release and referred to Better Futures or selected after walk-ins to one of the two participating service organizations. Second, as many as 32 participants will move into the Better Futures guest house using HCVs. There, they will work in a Better Futures-run warehouse and, after the first month, contribute \$25 a week to rent. They will also receive intensive case management, job training, and other support services. Third, participants will move into market rate units operated by a community partner of Better Futures. In these units, participants will only pay 30% of their income to rent, with the remaining amount covered by a sponsor-based voucher provided by MPHA. Participants will be able to convert these vouchers into project-based vouchers with the permission from Beacon and Better Futures.

6.9.1.11 Lawrence-Douglas County, Kansas

¹⁰⁰AK State Recidivism Reduction Workgroup. February 2015. "2015 Recidivism Reduction Plan," pg. 26.

¹⁰¹<http://www.correct.state.ak.us/commish/docs/hb266.pdf>

¹⁰²See Housing Authority of New Haven Annual Reports at <http://www.elmcitycommunities.org/AnnualReport.aspx>

¹⁰³Housing Authority of New Haven. April 2016. "FY2017 DRAFT MTW Annual Plan" pg. 87,

<http://www.elmcitycommunities.com/Data/AnnualReports/New%20Haven%20FY17%20Plan%20Draft%20April%202016.pdf>

¹⁰⁴King County Housing Authority. "FY2017 MTW Annual Plan," p. 23 https://www.kcha.org/Portals/0/PDF/MTW/2018_MTW_Plan.pdf

¹⁰⁴King County Housing Authority. "FY2016 MTW Annual Report," p. 35 https://www.kcha.org/Portals/0/PDF/MTW/2016_MTW_Report.pdf

¹⁰⁵*Id.*

¹⁰⁶King County Housing Authority. "FY2016 MTW Annual Report," p. 46 https://www.kcha.org/Portals/0/PDF/MTW/2015_MTW_Report.pdf

¹⁰⁷Minneapolis Public Housing Authority. "FY2017 MTW Annual Plan," pg. 46, <https://www.hud.gov/sites/documents/MINNEAPOLIS17PLAN.PDF>

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Since 2010, the Lawrence-Douglas Housing Authority (LDCHA) has worked in collaboration with the Douglas County Sheriff's Office to provide vouchers for individuals exiting jail.¹⁰⁸ In order to qualify for the program, individuals must have served at least 30 days in the County Jail.¹⁰⁹ After release, participants in the Jail Reentry program are eligible to receive up to 180 days of intensive case management through the County Sheriff's office, as well as vouchers provided by the LDCHA. Currently, the housing portion of the program is extremely small, with only 5 vouchers set aside per year.¹¹⁰ The program is funded by the National Institute of Correction's Transition from Jail to Community Program, the Bureau of Justice Assistance, and the LDCHA.

6.9.2 PHA Policies that Expand Housing Opportunity

The PHA planning process provides an opportunity for advocates to engage their local PHAs on issues related to housing and reentry. PHAs are required to allow for public comment prior to finalizing and submitting their local plans to HUD. The local plan process therefore creates a great opportunity for advocates to work with PHAs to revise admissions policies and screening criteria to expand housing opportunities for people with a criminal record. The key elements of a reasonable admission policy are listed below. The policies discussed in the following sections contain some or all of these elements:

- Individualized review of each applicant.¹¹¹

¹⁰⁸Lawrence-Douglas Housing Authority. "FY2017 MTW Annual Plan," pg. 26

<http://www.ldcha.org/news/documents/LDCHA2017MTWAnnualPlanApproved.pdf>

¹⁰⁹Douglas County Sheriff's Office. "Jail Reentry Program Description." http://www.dgso.org/web/index.php?option=com_content&view=article&id=50

¹¹⁰Lawrence-Douglas Housing Authority. "FY2015 MTW Annual Report," pg. 41 <http://portal.hud.gov/hudportal/documents/huddoc?id=LAWRENCEFY2015.pdf>

¹¹¹Consideration of mitigating circumstances is suggested but not required for most of the federally-assisted housing programs. Regulations for public housing currently mandate consideration of time, nature, and extent of applicant's conduct (including seriousness of the offense), *see* 24 C.F.R. § 960.203(d) (2007); *see also* discussion in Chapter 3 of this Guide. In the event that a PHA ignores the mandate for public housing applicants for consideration of extenuating circumstances, advocates could use the PHA plan process to seek stricter enforcement or information on compliance with the rule. *See* LEGAL ACTION CENTER, IMPROVING HOUSING OPPORTUNITIES FOR INDIVIDUALS WITH CONVICTION RECORDS, available at:

- Required consideration of mitigating circumstances and/or rehabilitation.
- Limit review of an applicant's criminal history to certain convictions and no arrests.
- Restrict inquiry into criminal history to a fixed period of time such as one or three years prior to the time of admission and/or make distinctions as to the time period depending upon the seriousness of the prior criminal activity. and
- Exclude any categorical bans aside from what is required by federal law.¹¹²

6.9.2.1 New Orleans, LA

After identifying the need to house people reentering the community from jails and prisons, advocates worked with formerly incarcerated individuals and representatives of law enforcement for several years to improve the admissions policy at the Housing Authority of New Orleans (HANO). The result is an innovative approach to tenant screening and one that rules out certain criminal activity as a factor in admission decisions, clearly defines look-back periods, and includes a hearing process that allows the applicant to submit mitigating circumstances surrounding the conviction and rehabilitation. The hearing process is unique in that an applicant appears before a three-person panel to present the mitigating evidence. For PHA-managed programs (public housing and vouchers), panel members consist of two senior HANO officials and one resident representative that reflect the residents assisted by HANO. Currently, the resident panel member is a formerly incarcerated individual.

6.9.2.2 Cleveland, Ohio

In Cleveland, Ohio, advocates worked with a wide array of community groups, including government entities and service agencies, to address a variety of issues affecting individuals with criminal records. Access to affordable housing was a key issue. In 2007, these groups approached the Cuyahoga Metropolitan Housing Authority (CMHA) as a partner and sought to amend CMHA's admission rules, both substantively and procedurally, as they related to individuals with prior criminal records. First, they

<http://www.lac.org/toolkits/housing/housing.htm>; compare Corinne Carey, Human Rights Watch, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 572 (2005) (reports that many PHAs deny an applicant without consideration of any factors other than the conviction).

¹¹²*See* Chapter 2 for a discussion of mandatory bans in the federally subsidized housing programs.

developed and presented to CMHA a model admissions procedure¹¹³ that creates fair and appropriate substantive, procedural and evidentiary rules regarding the treatment of an individual with a prior criminal record. The model rule sought to be consistent with HUD regulations and, where feasible, CMHA's then-existing rules.

The discussions with CMHA focused on three substantive provisions of CMHA's existing rules. The then-existing rules effectively barred admission of previously incarcerated persons for at least one year after release from incarceration (and three years if the offense was for one of several specified felonies). The rules also included criteria that denied admission to a person with "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."¹¹⁴

As a result of the discussions, CMHA revised its admission rules so as to:¹¹⁵

- eliminate completely the three-year bar or waiting period,
- retain a one-year bar or waiting period for a discrete list of felonies (which is a significantly reduced list of the felonies that CMHA previously used for the now-rescinded three-year waiting period), and
- limit the "history of criminal activity" review to a three-year period preceding the admission decision.

6.9.2.3 Somerville, Massachusetts

During the annual PHA plan process, Somerville's Resident Advisory Board (RAB) negotiated with the Somerville Housing Authority (SHA) to amend the housing authority's local plans. The amendments require the SHA to consider mitigating factors and rehabilitation for any applicant for admissions to any housing programs administered by SHA.¹¹⁶ In addition, if an applicant has an arrest but no final disposition, the applicant has the option of deferring a

decision on the application until there has been an adjudication of the criminal case without losing his or her place on the waitlist.¹¹⁷

6.10 Other Ways PHAs Can Expand Housing Opportunities for Individuals with Criminal Records

- Refer those who are denied admission to a local legal services office and/or other advocacy organizations for assistance,¹¹⁸
- Offer assistance to individuals who have a criminal record, either directly or through referrals to other agencies,¹¹⁹
- Secure outside funding or assistance to enable individuals with criminal records to access and remain in public housing,¹²⁰
- Work with the community and landlords to increase the probability that voucher landlords will accept applicants with criminal backgrounds,¹²¹

¹¹⁷*Id.* at 12. See also SHA Admissions and Continued Occupancy Policy for Federally Subsidized Family, Elderly/Disabled Public Housing, adopted Mar. 9, 2005, amended Oct. 2005 and Section 8 Administrative Plan, adopted Dec. 13, 2006, and information from Susan Hegel, Cambridge and Somerville Legal Services.

¹¹⁸See *Ressler v. Pierce*, 692 F.2d 1212, 1220 (9th Cir. 1982) (policy includes a referral to a legal services office). In letters denying assistance, the Housing Authority of the City of Atlanta suggests that applicants should contact Legal Aid or Lawyer's Referral Service. See also HUD, HOMELESS PREVENTION IN THE EMERGENCY SHELTER GRANTS PROGRAM 10 (March 2001).

¹¹⁹See, e.g., LEGAL ACTION CENTER, IMPROVING HOUSING OPPORTUNITIES FOR INDIVIDUALS WITH CONVICTION RECORDS, <http://www.lac.org/toolkits/housing/housing.htm> (provides examples of counseling provided by Oakland Housing Authority and the Portland Housing Center); See, e.g., California Welfare and Institutions Code §§ 5814(b) and 5814.5(b) (West 2007) (CA Department of Mental Health authorized to provide services to severely mentally ill individuals who are recently released from incarceration); see also CATERINA GOUVIS ROMAN AND JEREMY TRAVIS, URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 20 (2004) (funds for housing for homeless individuals with mental illness who are involved with the criminal justice system may be used for security deposits, rent, and repairs pending receipt of a Section 8 voucher).

¹²⁰See, e.g., Department of Justice Weed and Seed program, http://www.ojp.usdoj.gov/ccdo/programs/public_housing.html; see also CATERINA GOUVIS ROMAN AND JEREMY TRAVIS, URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 25 (2004) (Weed and Seed operates in some jurisdictions in conjunction with local PHAs. Some PHAs have used the program to link returning prisoners, parolees, and probationers to social services and to assist these ex-offenders remain in public housing); *id.* at 87-88 (describing a family-centered program that works with public housing residents to break cycles of criminal justice involvement).

¹²¹COUNCIL OF STATE GOVERNMENTS, PUBLIC HOUSING AUTHORITIES (PHAS) AND PRISONER RE-ENTRY (2005) available at:

¹¹³See Public Housing—Model Admission Rules on Criminal Activity and Summary of the Model PHA Admission Rule on Criminal Activity, prepared for CMHA, a copy of which is available in Exhibit 1 to this Chapter.

¹¹⁴24 C.F.R. § 960.203(c)(3) (2017).

¹¹⁵CMHA Admission and Continued Occupancy Plan, revised Oct. 3, 2007 § 2.16, available at

<http://www.nhlp.org/files/CMHA%20ACOP%2010-2007.pdf>. As reflected in CMHA's more recent ACOPs, it has retained these changes to its admissions policies. See <https://www.cmha.net/aboutus/phaplan.aspx>.

¹¹⁶See <http://sha-web.org/documents/policies/ACOP.pdf> at p. 22.

- Provide training for hearing/informal review staff on the need to consider mitigating factors and rehabilitation for applicants who have criminal records,
- Develop a project-based voucher program that targets individuals with criminal records and provides services to enable them to remain in the housing and/or set aside a number of vouchers for individuals who are recently released from incarceration,¹²² and
- Apply for other federally-assisted housing, such as Section 8 Moderate Rehab (SRO) housing or Shelter Plus Care, that may be used for housing individuals with criminal records who have been recently released and for whom no housing has been identified.¹²³

6.11 Change Through Litigation

When admission policies are overly restrictive and efforts to bring about administrative change are unsuccessful, litigation on behalf of clients may be advisable. Individual plaintiffs and groups or classes of plaintiffs have been successful.

<http://www.reentrypolicy.org/publications?states=&keyword=public+housing+> (Salt Lake County (Utah) Housing Authority partners with the county government to place individuals who have been released from jail directly into housing).

¹²²24 C.F.R. Part 983 (2007). A PHA may project-base up to twenty percent of its Housing Choice Vouchers *Id.* § 983.6. For any building that serves other than elderly or disabled, in general, no more than 25 percent of the units may have project-based voucher assistance. *Id.* § 983.56. To exceed 25 percent, the housing must have supportive services. *Id.* § 983.56. Such housing could be developed for individuals, or families with members, who have a criminal record. For such housing, the PHA refers families who qualify for the services to the owner. *Id.* §§ 983.57(b)(3) and 983.261(b). Burlington, Vermont's housing authority has such a set aside. See COUNCIL OF STATE GOVERNMENTS, PUBLIC HOUSING AUTHORITIES (PHAs) AND PRISONER RE-ENTRY (2005), available at:

<http://www.reentrypolicy.org/publications?states=&keyword=public+housing+>.

¹²³See CATERINA GOUVIS ROMAN AND JEREMY TRAVIS, URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 72-73 (2004); COUNCIL OF STATE GOVERNMENTS, PUBLIC HOUSING AUTHORITIES (PHAs) AND PRISONER RE-ENTRY (2005), available at:

<http://www.reentrypolicy.org/publications?states=&keyword=public+housing+> (The Housing Authority of Portland, OR., provides 89 units of Shelter Plus Care (S+C), some of which are targeted to post-release individuals); see also programs administered by local YMCA or YWCA, which in some jurisdictions assist individuals with criminal records who were recently released from incarceration.

6.11.1 Atlanta

In *Bonner v. Housing Authority of the City of Atlanta*,¹²⁴ applicants successfully challenged the Housing Authority of the City of Atlanta's (HACA) admissions policy. Prior to *Bonner*, HACA automatically denied applicants who had any criminal history within the prior three years. The plaintiffs alleged that HACA summarily denied applicants with arrest records or who had been acquitted or rehabilitated through probation or parole, as well as those charged with very minor offenses.¹²⁵ In an unpublished consent decree, HACA agreed to limit the review of criminal convictions to those obtained within five years of the housing application, and to criminal offenses involving violence against persons or illegal drugs. HACA also agreed to take into consideration evidence of rehabilitation and to provide training to its staff regarding the new policies. The decree has served as a model for advocating on behalf of individuals with criminal records across the state of Georgia.¹²⁶

6.11.2 New York City

In the mid-1990s, applicants sued the New York City Housing Authority (NYCHA) because they had been denied housing solely on the ground that they had been convicted of misdemeanors or non-criminal violations of the law.¹²⁷ The parties reached a settlement agreement under which NYCHA agreed to: reconsider certain ineligibility determinations; adopt an admissions policy that would consider whether an applicant would or would not be likely to adversely affect the health, safety, or welfare of other tenants, the physical environment, or the financial stability of the project; consider relevant factors, including the time, seriousness and frequency of the criminal activity; and consider mitigating circumstances, rehabilitation and other factors that might indicate a reasonable probability of favorable future conduct. Evidence of

¹²⁴*Bonner v. Housing Auth. of Atlanta*, No. 94-376 (N.D. Ga. Nov. 8, 1995) (unpublished consent decree) available as Exhibit 2 to this Chapter.

¹²⁵*Id.*

¹²⁶KAY RANDOLPH-BACK, COMMUNITY VOICES SERIES, PUBLIC HOUSING POLICIES THAT EXCLUDE EX-OFFENDERS: A HOUSE DIVIDED 10-11 (2007), available at

http://www.communityvoices.org/Uploads/Public_Housing_Policies_Exclude_Ex-offenders_00108_00167.pdf (citing HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING, 59-60 (2004), available at <http://hrw.org/reports/2004/usa1104/usa1104.pdf>).

¹²⁷*Williams v. N.Y. City Hous. Auth.*, Nos. 94-4160 and 96-1595 (S.D.N.Y. July 30, 1996) (stipulation of settlement).

the offender's rehabilitation included documentation of a positive six-month record of enrollment in school or job training, a job, or a letter from the prosecutor's office or the sentencing judge confirming the person's rehabilitation.¹²⁸

6.11.3 Old Town, Maine

In *Ouellette v. Housing Authority of Old Town*, the plaintiff obtained a voucher from one PHA and then sought to transfer to the jurisdiction of another PHA. During the application/transfer process, he admitted to having a fifteen-year old conviction for aggravated sexual assault, and the transferee PHA denied the voucher. When the applicant requested a hearing, he was told that if he produced three documents he could be considered eligible. He was unable to produce one of the three documents because it was unavailable, and the PHA affirmed the voucher denial. The applicant then filed suit challenging the PHA's policy of rejecting all applicants who have committed a violent crime regardless of when the crime occurred. The court agreed with the plaintiff that the PHA violated the federal regulations because it failed to consider whether a reasonable amount of time had passed since the date of the criminal acts. The court remanded the case to the PHA for further proceedings consistent with its ruling.¹²⁹ The favorable decision resulted in reconsideration and admission of the plaintiff, but no corollary change to the PHA's admission policy.¹³⁰

6.11.4 FHA Cases

Advocates have also been bringing claims under the Fair Housing Act for discriminatory rental practices relating to the use of criminal history to exclude applicants for federally-assisted housing. The complaints in such cases are often instructive for administrative advocacy as well since they lay out the relevant legal framework, offer examples of misguided tenant selection policies and outline alternative screening procedures designed to strike a reasonable balance between safety concerns and the critical need

to provide individuals access to affordable housing after incarceration.

6.11.4.1 New York City, New York

In a 2014 lawsuit, The Fortune Society, a non-profit organization in New York City that works to reintegrate formerly incarcerated individuals into the community, sued the owners and managers of a four-building apartment complex in Queens over a policy that automatically denies housing at the complex to any person with a criminal record.¹³¹ In an amended complaint filed in 2015,¹³² the Fortune Society alleged that the defendants' blanket ban on persons with a criminal record has a disparate impact on African Americans and Latinos based on their disproportionate representation in the criminal justice system. The group argued that the defendants' failure to undertake an individualized assessment of an applicant's criminal record violates the Fair Housing Act and that federal and state laws require housing providers to consider factors that are actually relevant to qualification for a tenancy, such as the nature of the conviction, the time elapsed since conviction, evidence of rehabilitation and post-conviction and post-release conduct. In 2016, the United States Justice Department filed a Statement of Interest in the case in support of the plaintiff's position.¹³³

6.11.4.2 District of Columbia

In 2015, Washington DC resident Maurice Alexander sued the owners and operators of federally subsidized housing projects where he had applied to live.¹³⁴ Mr. Alexander was denied housing based on a seven-year-old, non-violent, non-drug-related offense and challenged the defendants' tenant selection policies regarding use of criminal history as racially discriminatory.¹³⁵ He asserted claims under the Fair Housing Act based on a disparate impact theory and under the D.C. Human Rights Act. He also brought a contract claim as a third-party beneficiary of the contracts between the defendants and the D.C. Housing Authority because the defendants' policies did not comply with HUD regulations and guidance. The tenant selection policies at issue in the case include

¹²⁸NYCHA's current policy is discussed more fully in Opening Doors: How to develop reentry programs using examples from public housing authorities (September 2017), available at: <https://www.vera.org/publications/opening-doors-public-housing-reentry-guide>

¹²⁹*Ouellette v. Housing Auth. of Old Town*, No. Ap.-03-17, 2004 WL 842412 (Me. Super. Ct., Penobscot County, Mar. 11, 2004). See also Chapter 2 for a discussion of reasonable time period.

¹³⁰Although no change occurred with respect to the substantive admission policy, the PHA did alter its procedure with respect to appealing a denial of admission. Information provided by Amy Keck, Pine Tree Legal Assistance, July 2007.

¹³¹*Fortune Society Inc. v. Sandcastle Towers Housing Development Fund Corp. et al.* (Case No. 14-cv-06410-VMS, E.D.N.Y.).

¹³²*Id.*, Docket No. 30.

¹³³*Id.*, Docket No. 102.

¹³⁴*Alexander v. Edgewood Housing Corp. et al.* (Case No 15-cv-01140-RCL, D. D.C.).

¹³⁵*Id.*

exclusion of any applicant with any felony or misdemeanor conviction from the previous three years and an exclusion of any applicant with a conviction for a sex offense, drug offense or felony crime from the previous ten years.

6.11.5 Other Cases

Other advocates have reported that they have successfully negotiated settlements that changed a policy or forced the acceptance of an applicant when a PHA's or owner's policy was unreasonable or unfair. In Texas, advocates settled a case with a Section 8 project-based owner who had a policy of rejecting all applicants with any prior drug-related criminal record.¹³⁶

Claims in admission or eligibility cases will likely include violation of federal statutes and regulations. The enforcement mechanism for such claims will depend on the strength of the plaintiff's case and the characteristics of the defendant. Claims against a PHA will be brought pursuant to 42 U.S.C.A. § 1983. If the defendant is a private owner, enforcement will be predicated on a private right of action, if available. Principles of federal preemption may also apply.¹³⁷ There may also be state law claims of general recourse (under the theory of where there is a right there is a remedy) and/or claims for declaratory relief, or claims under consumer protection or unfair business practices statutes. If a hearing involving a PHA is at issue, claims may include a state law review of agency action, administrative mandamus, and/or a possible constitutional due process claim, depending on the facts.

In many cases, advocates have been able to negotiate agreements prior to filing formal cases in court by using administrative hearings when they are available or pre-hearing meetings at which they have presented mitigating or other favorable information. For example, in Denver, Colorado, advocates convinced a PHA not to evict a tenant who was a registered sex offender by informing the PHA that the tenant was eligible for an expungement of the criminal record and that an attorney had been engaged to assist with the expungement.¹³⁸ Other examples of successful resolution of claims include situations in which there

is documentation of other mitigating factors, such as successful completion of drug rehabilitation programs, engagement in work and volunteer activities in a correctional facility, and favorable letters from treating physicians.¹³⁹

6.12 Local Ordinances Preventing Discrimination Against Individuals with Criminal Records

Seven jurisdictions currently have local ordinances that expand the housing rights of people with criminal records in the admission process.¹⁴⁰ The ordinances, called "Fair Chance" laws, take several forms but generally limit the types of information that a landlord can consider in the tenant screening process.

Two jurisdictions in Illinois have included individuals with criminal records in their anti-discrimination ordinances, thereby providing more comprehensive protections than federal or state civil rights laws. The City of Urbana's Code of Ordinances, for example, prohibits discrimination by reason of "prior arrest or conviction record" without limitation regarding the criminal activity.¹⁴¹ The ordinance exempts state and local governments and agencies from coverage therefore the ordinance is not applicable to public housing.¹⁴² Nevertheless, the ordinance should apply to other federally assisted housing and to owners of housing assisted by the voucher program. A non-discrimination ordinance would broadly prohibit a housing provider from taking an adverse action based on an applicant's criminal history.

The basic elements of reasonable admissions standards found in Section 6.8.3.1 can be found in several local Fair Chance ordinances. Several policies restrict the landlord's ability to screen for arrests that do not lead to a conviction, juvenile adjudications, and criminal activity that occurred many years prior to the housing application. Others employ an appeals process if an applicant is denied and require the landlord to

¹³⁶See Exhibit 3 of this Chapter (Redacted draft complaint from Travis County, Texas).

¹³⁷Lauren K. Saunders, *Preemption as an Alternative to Section 1983*, 30 CLEARINGHOUSE REV. 703, 705 (Mar./Apr. 2005).

¹³⁸Colo. Rev. Statutes Anno. (C. R. S. A.) § 16-22-103, CO ST § 16-22-103 (West 2007) and email from Julianne Middleton, Colorado Legal Services (August and Sept 2007).

¹³⁹See, e.g., New York City Hous. Auth., Div. of Applicant Appeals, Public Housing Hearing, Report of Informal Hearing, Aug. 7, 2007, No. 113-52-7732, copy available in Exhibit 3 to Chapter 5.

¹⁴⁰The jurisdictions are: Seattle, WA; Richmond, CA; San Francisco, CA; Newark, NJ; Washington, D.C.; Urbana, IL, and Champaign, IL.

¹⁴¹Urbana, Ill, Code of Ordinances, Ch. 12 Art. III. Div. 1, §§ 12-37 and 12-64, (Ord. No. 7879-92, § 1(29), 4-24-79; Ord. No. 9798-49, § 1, 10-6-97) available at:

<http://genderadvocates.org/links/urbana.html> or http://www.city.urbana.il.us/urbana/city_code/11500000.HTM.

¹⁴²*Id.* 12-105(d).

AN AFFORDABLE HOME ON REENTRY

consider mitigating circumstances and/or rehabilitation.

For example, in late 2016, the Richmond, CA City Council passed the Fair Chance Access to Affordable Housing Ordinance.¹⁴³ The ordinance applies to all federal, state, and locally assisted affordable housing properties in Richmond, including Richmond Housing Authority and Low Income Housing Tax Credit developments. Under the ordinance, a landlord must first determine if an individual is otherwise qualified to live in the unit before reviewing his or her criminal record. Upon review of the record, the provider is barred from considering criminal history that does not relate to health and safety concerns. In addition, the ordinance requires an individualized assessment of each applicant's criminal history, including mitigating circumstances such as disability or domestic violence.

The most recent and perhaps the most inclusive Fair Chance Ordinance came out of Seattle, WA.¹⁴⁴ The ordinance was a product of a coalition of people directly impacted by incarceration, housing advocates, criminal justice advocates, and others seeking to tackle issues around housing and reentry. The result is a progressive policy that applies to all rental housing in Seattle and bars landlords from taking any adverse action based on criminal history, unless the adverse action is based on a legitimate business reason. For more information and links to the local ordinances, see NHLP's website: www.nhlp.org.

¹⁴³RICHMOND, CAL. MUNICIPAL CODE, art. 7.110 (2016)

¹⁴⁴Seattle, Wa. Ordinance 125393 (Aug. 23, 2017).

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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THOMAS, Clerk
Deputy Clerk

'QUENTELLA P. BONNER and
JAMES CHARLES RAPLEY JR.,
individually and on behalf of
all others similarly situated,

Plaintiffs,

v.

THE HOUSING AUTHORITY
OF THE CITY OF ATLANTA,
GEORGIA, and RENEE LEWIS
GLOVER, in her official
capacity as the Executive
Director of the Housing
Authority of the City of
Atlanta, Georgia,

Defendants.

CIVIL ACTION

FILE NO.: 1:94-CV-376-MHS

RECEIVED

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NATIONAL CLEARING HOUSE
FOR LEGAL SERVICES, INC.

CONSENT ORDER

Presently pending are the Plaintiff's Motion to Compel Discovery, and the Motion to Intervene James Charles Rapley Jr. as a named plaintiff. The Plaintiff, the Defendants, and the proposed Intervenor having come to a resolution of the issues in this case, IT IS HEREBY **ORDERED AND ADJUDGED** as follows:

I. MOTION TO INTERVENE

1. The Motion to Intervene James Charles Rapley Jr. as a named plaintiff in this action is hereby GRANTED. The Clerk is directed to enter James Charles Rapley Jr.'s name upon the docket as of this date, and to note that the style of this case will be as shown above until further order of the Court.

2. The original motion of September 29, 1994, moved to intervene Rapley as well as Richard Blalock Jr. However, on November 16, 1994, Blalock's death was suggested on the record. Accordingly, as regards Richard Blalock Jr., this motion is **DENIED**.

II. MOTION TO COMPEL DISCOVERY

There being no further unresolved substantive issues in this action, the Plaintiffs' Motion to Compel Discovery is moot and accordingly is hereby **DENIED** without prejudice.

III. CRIMINAL HISTORY SCREENING

To the extent that Defendant Housing Authority of the City of Atlanta, Georgia ("HACA"), screens applicants for admission to its conventional public housing program for their criminal records, the Plaintiffs and Defendants agree as follows:

A. DEFINITIONS

1. As used in this Order, the terms "criminal history" and "criminal record" shall be synonymous, and shall mean the fact of having committed a criminal offense under the laws of the United States or any foreign country, any state of the United States, or any city, county, or other municipal authority, or having been convicted, suspected, or otherwise accused of having committed a criminal offense, or being regarded as having such a criminal history or criminal record.

2. As used in this Order, the terms "hearing" and "informal review" are synonymous and refer to administrative proceedings held by HACA.

B. APPLICATIONS FOR PUBLIC HOUSING

1. In its Application for Admission to the conventional public housing program, HACA will use the language in Exhibit "A" of this Consent Order to question applicants regarding their criminal histories and warn them of the consequences of providing false information in this regard. For a period of eighteen months, there shall be no variation in this language unless the Plaintiffs' counsel agrees in writing to such changes. This paragraph shall not apply to changes required by future statutes or federal regulations, or changes to other parts of the application thought desirable by HACA, provided that Plaintiffs' counsel have an opportunity to review and comment on any such changes made within one year of the entry of this Order.

2. HACA shall amend, subject to its Board of Commissioners' and the U.S. Department of Housing and Urban Development's ("HUD") approval, its Admissions and Continued Occupancy Policy regarding the taking of applications for admission to public housing as provided in Exhibit "B" to this Consent Order.

3. All persons who apply for admission to **HACA's** public housing program shall, if any so request, be counselled as to their rights and obligations under this Consent Order. Applicants shall also be orally advised to complete that portion of their applications regarding their criminal histories with the utmost candor, and to disclose all information whose relevance they question.

C. TRAINING OF HACA EMPLOYEES

Within thirty (30) days of the entry of this Consent Order, HACA shall conduct a training program for all of its employees who accept applications for public housing or who are involved in the screening of public housing applicants' criminal records, regarding their obligations under this Consent Order. Thereafter, all employees new to such positions shall likewise be trained before beginning their duties, and all such employees shall annually be re-trained regarding their obligations under this Consent Order.

D. CRIMINAL HISTORY SCREENING OF PUBLIC HOUSING APPLICANTS

1. HACA may only screen its applicants for criminal offenses which have occurred within five years preceding the date of an application for housing, and for any criminal offenses involving violence against persons or illegal drugs without regard to a time limitation.

2. Whenever HACA, in processing a public housing application, reasonably determines that an applicant or a proposed household member of an applicant has a criminal record which may indicate a threat to the health, safety, or welfare of other residents of HACA, and HACA proposes to deny this application on this basis, HACA shall send to the applicant the Suitability Denial Notice annexed- hereto as Exhibit "C". For a period of one year from the entry of this Consent Order, HACA shall not make any changes to this form without the written consent of the Plaintiffs' counsel. Under the section labeled "past criminal history," HACA

shall provide, for each charge which is the proposed basis for denial of the application, the name of the charge, the date of the arrest, the county and state of the charge, and, if known, the court, disposition, and date of disposition of the charge, attaching additional paper to the form as necessary. In lieu of completing this section of the form, HACA may complete the section with the words "see attached" or their equivalent, and attach to the form a photocopy of the printout from the Georgia Crime Information Center or whatever other authority has provided the criminal record information to HACA, so long as HACA provides written notice to the applicant of the specific charges listed **on** the attached form that HACA is relying upon to deny the application.

3. HACA shall enclose with this suitability denial notice the Hearing Request Form annexed hereto as Exhibit "D", for the applicant to request an informal review on the denial of the application. For a period of one year from the entry of this Consent Order, HACA shall not make any changes to this form without the written consent of the Plaintiffs' counsel.

4. The applicant shall have no fewer than ten (10) days to request an informal review or hearing on this issue. The applicant may do so with the form provided or by any other writing sufficient to notify HACA of the applicant's identity and desire for an informal review or hearing. If the deadline for requesting an informal review or hearing falls upon a Saturday, Sunday, or **legal**

CHAPTER 6, EXHIBIT 1

holiday, a request received by HACA on the next working day shall be considered timely. If the applicant presents himself or herself in person to HACA within the prescribed period and requests an informal review or hearing on the issue, HACA shall assist the applicant in completing a hearing request form, or otherwise memorializing in writing the applicant's oral request for a hearing; however, no request shall be considered timely unless it is in writing. No timely written request for an informal review or hearing shall be denied by HACA because of a minor or technical deficiency; however, the written request must clearly request a hearing or informal review.

5. Upon the applicant's request for a hearing or review, HACA shall, within a reasonable time, schedule an informal review or hearing and notify the applicant of the date, time, and location of the hearing **or** review by means of the Hearing Notification Form annexed hereto as Exhibit "E". For a period of one year from the entry of this Consent Order, HACA shall not make any changes to this form without the written consent of the Plaintiffs' counsel. The applicant shall be given no less than seven (7) days advance notice of the date, time, and place of the informal review or hearing.

6. An applicant who has requested an informal review or hearing shall have the right to examine his or her application file in the possession of HACA and to copy any relevant documents. HACA may charge a reasonable cost for copying, not to exceed the rates

prescribed by the Georgia Open Records Act, O.C.G.A. § 50-18-71.

E. INFORMAL REVIEWS OR HEARINGS

1. All informal reviews or hearings shall be heard by an impartial hearing officer who has not had any prior role in processing the applicant's application.

2. All informal reviews, at the option of HACA, may be tape recorded.

3. At informal reviews or hearings, the applicant shall have the right to be represented by counsel, to cross-examine any witnesses, and to present any relevant evidence.

4. If the information obtained by HACA regarding the applicant's criminal record includes the disposition of the criminal case(s), the issues at the informal review relating to the applicant's criminal record shall be limited to the circumstances of the criminal case(s); the severity of the applicant's conduct; the presence of mitigating or aggravating circumstances; whether the criminal conduct indicates that the applicant would, if admitted to public housing, pose a danger to the health, safety, or welfare of other residents of HACA; whether the applicant has, since the criminal case, been rehabilitated so as not to pose such a danger; whether there are other facts which would prevent the applicant from posing such a danger, as, for instance, physical incapacity; and any other factors which may be required by HUD regulations.

5. If the information so found by HACA regarding the

applicant's criminal history reveals that the applicant has in the past been arrested, but does not reveal the disposition of the criminal case, and the applicant, at the informal review, admits that this arrest resulted in a conviction or guilty plea for the charged offense, the hearing officer may only consider the issues outlined in Section III(E), Paragraph 4, supra, and shall not, without reasonable cause, require the applicant to provide additional information regarding that criminal conviction or guilty plea.

6. If the information obtained by HACA regarding the applicant's criminal history reveals that the applicant has in the past been arrested, but does not reveal the disposition of the criminal case, the hearing officer in his or her discretion may, in addition to considering the issues outlined in Section III(E), Paragraph 4, supra, request in writing that the applicant produce documentation showing the disposition of the criminal case at issue. A noncertified copy of the verdict, judgment, dismissal, order of *nolle prosequi*, or other final disposition from the appropriate court shall be sufficient for this purpose, as shall a letter from any attorney who represented the applicant or who is employed by the law firm which represented the applicant in this criminal proceeding explaining the disposition of the case. The applicant shall have no fewer than thirty (30) days to do this, and that period shall be extended upon the applicant's showing of good cause. If this documentation is not provided to the hearing

officer within the specified time, the hearing officer shall not automatically deny the application but shall issue a decision based upon the evidence presented and considering whether it demonstrates the applicant's suitability for admission, even in the absence of the requested documentation. In no event shall the applicant be required to provide records when this is impossible, for instance, if the court records have been destroyed.

7. In cases where the information regarding the applicant's criminal history provided to HACA reveals, or the applicant admits, that there is presently pending a criminal case against the applicant, the hearing officer shall consider the issues outlined in Section III(E), Paragraph 4, *supra*. If the hearing officer decides that, notwithstanding the **pendency** of the criminal case, the applicant does not pose a threat to the health, safety, or welfare of other residents of HACA, the application shall be approved and the applicant admitted. An application may be denied if a criminal case is pending, provided that the hearing officer determines that the applicant would pose a threat to the health, safety or welfare of other residents of HACA.

8. In cases where HACA requires the applicant to produce additional documentation of the disposition of his or her criminal case, the applicant shall be given information on how to do this and shall also be provided the names of agencies in metropolitan Atlanta capable of assisting in this process. This shall include, but not be limited to, the Atlanta Legal Aid Society, Inc.

F. FALSIFICATION OF APPLICATION INFORMATION

1. It shall be a ground for denial of an application for admission to public housing with HACA if an applicant provides false information regarding his or her criminal record on his or her application for admission or at his or her informal review or hearing, provided that no application shall be denied for this reason unless the falsification was intentional. Falsification is "intentional" if the information contained on the application is inaccurate and the applicant does not provide an acceptable excuse for the misinformation.

2. HACA may deny an application on this ground; however, the applicant has the right to an informal review or hearing of this issue, pursuant to Section III(E), Paragraphs 1 through 3, **supra**.

3. At the informal review or hearing on this issue, the hearing officer shall consider, in deciding whether the falsification of information was intentional, whether the applicant understood the questions asked of him or her in his or her application for public housing; whether the applicant understood or should have understood the precise legal disposition of the criminal cases against him or her; whether the applicant remembered or should have remembered his or her criminal record at the time of his or her application; whether the applicant was properly assisted in completing his or her application form by HACA staff; and all other relevant issues. The hearing officer shall also consider the applicant's literacy, mental capacity, and proficiency in the

English language, and any other mitigating circumstances.

G. INFORMAL REVIEW OR HEARING DECISIONS

1. The applicant shall be provided a written decision within ten (10) days of the informal review. If the hearing officer requested the applicant to submit additional information pursuant to Section III(E), Paragraph 6, supra, the decision shall be provided within ten (10) days of the date the additional information was submitted, or was due if not submitted, whichever comes first.

2. If the hearing officer's decision is to deny the application, the hearing decision shall set forth the reasons in detail.

3. If an applicant fails to attend his or her informal review and the hearing officer denies the application on this basis, the applicant shall be notified of this in writing within ten (10) days of the scheduled hearing date. HACA shall reopen the matter and schedule a new informal review upon the applicant's showing of good cause for failure to attend the previous informal review, provided that the request is made within thirty (30) days after the date of the decision. For purposes of this paragraph, "good cause" shall be narrowly construed.

H. RELIEF FOR CLASS MEMBERS

1. Within fifteen (15) days of the entry of this Consent Order, HACA shall mail ("Initial Mailing") to each class member who has not been admitted to HACA public housing, at his or her last

known address, the form annexed hereto as Exhibit "F", along with a Hearing Request Form (Exhibit "D").

a. If, within thirty (30) days of the Initial Mailing, any notices are returned to HACA as undelivered, or HACA otherwise learns that a class member did not receive notice of the settlement, HACA shall, within forty-five (45) days of such receipt or notice, attempt to locate each unnotified class member by using each of the following methods as necessary:

- 1) Telephoning any and all telephone numbers on file for that applicant;
- 2) Contacting the Metro Atlanta Task Force for the Homeless, and all Fulton and **DeKalb** County offices of the Division of Family and Children Services, the Social Security Administration, and the Child Support Recovery Unit;
- 3) Contacting all municipal, state, and federal correctional facilities in Fulton and **DeKalb** counties, including but not limited to prisons, jails and pretrial detention facilities, probation and parole offices, halfway houses, detention centers, and diversion centers;
- 4) Contacting the facilities holding federal prisoners in Douglas and **Paulding** counties; and
- 5) Hiring a skip tracer to locate all remaining class members using whatever reasonable methods are usually employed in the skip tracing industry. In any event, the

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NHLP does not have page 13 of this opinion and has not been successful in securing a copy.

admitted to **HACA's** public housing program, will be so admitted and placed on **HACA's** active waiting list based upon the date of their original application for admission.

J. MONITORING

1. **HACA** will provide Plaintiffs' attorneys the following information within 120 days after the entry of this Consent Order:

a. The number of notices sent pursuant to Section **III(H)**, Paragraph 1, supra;

b. The number of applicants who, in response to the mailed notices, or other efforts undertaken by HACA, requested informal reviews of their criminal history denials;

c. The number of applicants who failed to attend informal reviews requested in response to the aforementioned notices;

d. The number of applicants whose applications were approved or denied pursuant to an informal review requested in response to the aforementioned notices; and

e. Copies of all denial notices sent to class members who requested an informal review.

2. For one year after the entry of this Consent Order, HACA shall provide Plaintiffs' attorneys with monthly reports regarding the processing of applications for all persons denied housing based on an alleged criminal history. These reports shall include:

a. The total number of public housing applications received that month;

CHAPTER 6, EXHIBIT 1

b. The number of applicants denied admission that month due to an alleged criminal history;

c. The number of those applicants who requested informal reviews of their denials;

d. Of the applicants who requested informal reviews of their denials, the number who failed to appear at their informal review;

e. The number of persons who, at their informal review, were requested to submit additional information pursuant to Section III(E), Paragraph 6 of this Consent Order;

f. The number of persons who were admitted to public housing after an informal review of this issue; and

g. The number of persons who were denied admission to public housing after an informal review of this issue.

This information shall account for applications carried over from one month to the next.

3. For one year after the entry of this Consent Order, HACA shall provide to the Plaintiffs' counsel copies of all denial notices sent to persons whose applications are denied based upon an alleged criminal history. Said notices shall be provided on a monthly basis.

4. For one year after the entry of this Consent Order, HACA shall allow Plaintiffs' counsel to have access, subject to agreement among counsel as to reasonable times, places, and manners of access, to all files and records maintained by HACA for every

person whose application is denied based upon an alleged criminal history.

K. ATTORNEY FEES

Defendants will pay to Plaintiffs' counsel attorney fees of \$12,000.

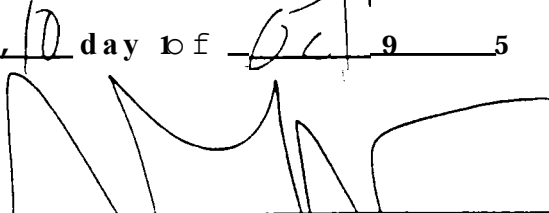
L. COSTS

Each party shall bear its own costs.

M. EFFECT OF CONSENT ORDER

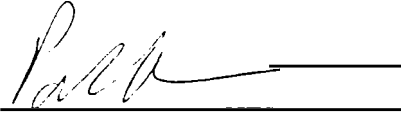
This Consent Order shall terminate further proceedings in this matter other than proceedings in the nature of the enforcement or interpretation of provisions of this Consent Order.

IT IS SO ORDERED this 10 day of Oct 95.

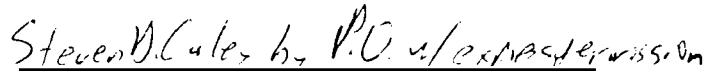

MARVIN H. SHOOB,
Senior United States District Judge
Northern District of Georgia

[SIGNATURES CONTINUED ON NEXT PAGE]

CONSENTED TO:



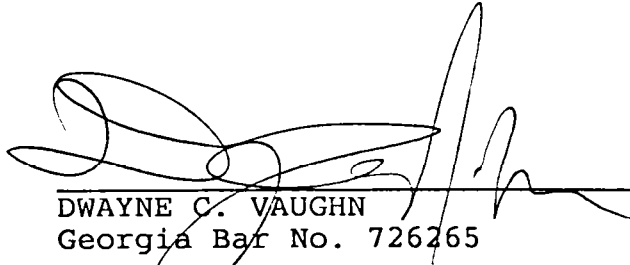
PAUL OWENS
Georgia Bar No. 632130



STEVEN D. CALEY
Georgia Bar No. 102866

DENNIS GOLDSTEIN
Georgia Bar No. 300250
Attorneys for Plaintiffs

ATLANTA LEGAL AID SOCIETY, INC.
151 Spring Street, N.W.
Atlanta, Georgia 30303-2097
(404) 614-3903
Fax (404) 614-3997



DWAYNE C. VAUGHN
Georgia Bar No. 726265

ANDREA E. ALLEN
Georgia Bar No. 236926
Attorneys for Defendants

Office of General Counsel
HOUSING AUTHORITY OF THE CITY OF ATLANTA, GEORGIA
739 West Peachtree Street, N.E.
Atlanta, Georgia 30365
(404) 817-7217

APPLICATION FOR HOUSING INCLUSIONS

IV. CRIMINAL ACTIVITY:

A. Have you or any family member(s) listed on this Application been involved in any criminal activity/conduct that might adversely affect the health safety or welfare of HOUSING AUTHORITY, OF THE CITY OF ATLANTA RESIDENTS.

☐ Yes

☐ No

**EXAMPLES OF CRIMINAL ACTIVITY/CONDUCT INCLUDE BUT ARE NOT LIMITED TO:
(Please Check All Which Apply)**

- | | | |
|-------------------------------------|-----|--|
| <input type="checkbox"/> | 1. | Homicide/Murder |
| <input type="checkbox"/> | 2. | Rape or child molesting |
| <input type="checkbox"/> | 3. | Burglary/Robbery/Larceny |
| <input checked="" type="checkbox"/> | 4. | Threats or harassment |
| <input type="checkbox"/> | 5. | Destruction of property or vandalism |
| <input type="checkbox"/> | 6. | Assault or fighting |
| <input checked="" type="checkbox"/> | 7. | Drug trafficking/use/possession |
| <input type="checkbox"/> | 8. | Child abuse/domestic violence |
| <input type="checkbox"/> | 9. | Public intoxication/drunk & disorderly |
| <input type="checkbox"/> | 10. | Receiving stolen goods |
| <input type="checkbox"/> | 11. | Fraud |
| <input type="checkbox"/> | 12. | Prostitution |
| <input checked="" type="checkbox"/> | 13. | Disorderly conduct |
| <input checked="" type="checkbox"/> | 14. | Other (Specify)_____ |

IF YOU HAVE BEEN INVOLVED IN ANY OF THE ABOVE CRIMINAL ACTIVITIES GIVE ITEM NUMBERED () AND EXPLAIN BELOW. If additional space is needed please write on the back of this page or attach additional sheets.

B. Have you or has anyone listed on your application been accused of, convicted or pled guilty to any of the crimes listed above? ☐ Yes ☒ No

C. Have you or has anyone listed on your application been convicted within the last five (5) years of a felony? ☐ Yes ☒ No

<u>A FELONY IS ANY CRIME WHOSE MAXIMUM PUNISHMENT IS MORE THAN ONE YEAR IN JAIL OR A FINE OF MORE THAN \$1,000.</u>
--

EXHIBIT A

D. Have you or has anyone listed on your application ever been convicted of murder, rape, armed robbery, child abuse/molestation, and drug-related felony, or any other violent crime?

☒ Yes

☐ No

E. Are you or is anyone listed on your application currently facing any criminal charges?

☐ Yes

☐ No

F. Are you or is anyone listed on your application currently facing any felony charges?

☐ Yes

☐ No

G. If you answered "Yes" to any of the above questions, then answer the following:

1. List the criminal charges or activity, the date, and the court disposition (waiting for court date, dismissed, continued, probation, sentence served, etc.) If additional space is needed please write on the back of this page or attach additional sheets.

2. List who (which family member(s)) was/were involved in each case. If additional space is needed please write on the back of this page or attach additional sheets.

3. Explain why this does not show that you are a threat to the health, safety, or welfare of other residents. You may explain the circumstances of the case, that the case is so old or is not serious enough to show that you are a threat, that you have been rehabilitated, or any other favorable information. If additional space is needed please write on the back of this page or attach additional sheets.

I/WE REALIZE THAT THE HOUSING AUTHORITY OF THE CITY OF ATLANTA WILL VERIFY ANY INFORMATION PROVIDED BY ME/US IN THIS APPLICATION. I/WE HEREBY WAIVE AND RELEASE ANY RIGHTS I/WE MAY HAVE OR ASSERT AGAINST THE HOUSING AUTHORITY OF THE CITY OF ATLANTA BY VIRTUE OF ITS RELIANCE ON INFORMATION PROVIDED BY OUTSIDE INVESTIGATORY OR INFORMATIONAL AGENCIES, INCLUDING, BUT NOT LIMITED TO, CREDIT REPORTING AGENCIES AND GEORGIA CRIME INFORMATION CENTER, FORMER LANDLORDS, AND STATE WAGE INFORMATION AGENCY OR BY VIRTUE OF THE DISSEMINATION OF INFORMATION TO ME VIA CORRESPONDENCE DIRECTED TOWARD ME/US AT THE ADDRESS LISTED ON PAGE ONE OF THIS APPLICATION.

I/WE CERTIFY THAT IF SELECTED TO RECEIVE ASSISTANCE, THE UNIT I/WE OCCUPY WILL BE MY/OUR ONLY RESIDENCE. I/WE UNDERSTAND THAT THE ABOVE INFORMATION IS COLLECTED TO DETERMINE MY/OUR ELIGIBILITY AND SUITABILITY FOR HOUSING ASSISTANCE. I/WE AUTHORIZE THE ATLANTA HOUSING TO VERIFY ALL INFORMATION PROVIDED ON THIS APPLICATION AND TO CONTACT PREVIOUS OR CURRENT LANDLORDS OR OTHER SOURCES FOR CREDIT AND VERIFICATION INFORMATION RELEASED TO APPROPRIATE FEDERAL, STATE OR LOCAL AGENCIES. I/WE CERTIFY THAT THE STATEMENTS MADE IN THIS APPLICATION ARE TRUE AND COMPLETE TO THE BEST OF OUR KNOWLEDGE AND BELIEF. I/WE UNDERSTAND THAT FALSE STATEMENTS OF INFORMATION ARE PUNISHABLE UNDER FEDERAL LAW. AND THAT I/WE MAY BE DENIED HOUSING FOR ANY FALSE STATEMENTS OR FAILURE TO ATTEND PRE-OCCUPANCY TRAINING. IF DENIED, I/WE HAVE A RIGHT TO AN INFORMAL REVIEW AND THE RIGHT TO BE REPRESENTED BY LEGAL COUNSEL OF MY/OUR CHOOSING.

SIGNATURE OF HEAD OF HOUSEHOLD: _____ DATE: _____

SIGNATURE OF SPOUSE: _____ DATE: _____

HACA REPRESENTATIVE: _____ DATE: _____

3-4. **SUITABILITY FOR TENANCY.**

HACA will evaluate each applicant to determine whether the applicant would be reasonably expected to have a detrimental effect on the other residents or on the development site. HACA will deny admission to any applicant whose habits and practices may be expected to have a detrimental effect on other residents or on the development site.

Screening for suitability.

A. Applicants will be appropriately screened by the Department of Resident Selection and Assignment. Applicants who fall into one of the following categories may (on an individual basis) be declared unsuitable for occupancy. Before such determination is made, consideration shall be given to favorable changes in the behavior pattern of the applicant, length of time since the latest offense and other extenuating circumstances that indicate the applicant would or could be a responsible resident.

1. **History of serious or consistent criminal activity.**

An Applicant may be denied on the basis of a criminal history if the applicant has a criminal record which indicates future behavior which poses a threat to the health, safety, peaceful environment, or welfare of other residents and/or employee(s) of the HACA. An application may not be denied for a case more than five years old unless that case involved murder, rape, armed robbery, child abuse/molestation, violence (e.g., aggravated assault), and/or drugs.

2. **Drug-or alcohol abuse.**

3. **Pattern of violent behavior.**

4. **History of chronic delinquency in rent payments.**

5. **Records of serious disturbances of neighbors, destruction of property, or other disruptive or dangerous behavior.**

6. **Excessively unsanitary or hazardous housekeeping.**

B. **Notification of Applicant.**

1. The HACA shall promptly notify any applicant determined as having failed suitability, the basis for such a determination, and shall provide the applicant upon request, (within a reasonable time after the determination

is made) with an opportunity for an informal hearing on such determination.

2. When a determination has been made that an applicant is eligible and satisfies all requirements for admission, including the resident screening and selection criteria, the applicant shall be notified of the approximate date of occupancy in so far as that date can be reasonably determined.
3. If the applicant fails to request a hearing within the specified time of ten (10) days, the applicant will be removed ~~from~~ the Active Waiting List and the record will be placed in the Denied File.



"Helping People *Help* Themselves"

Housing Authority of the City of Atlanta

(404) 892-4700

COMMISSIONERS

JOHN SWEET
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JANIS WARE
Vice Chair

BEVERLY ADAMS
MURIEL FRANKLIN
CECIL PHILLIPS
FRANK SKINNER
DR. CHARLES E. WELLS

RENEE LEWIS GLOVER
Executive Director

DATE _____

SUITABILITY DENIAL

SS# _____

Dear _____ Bedroom Size _____

We regret to inform you that your request to participate in the Conventional Public Housing Program has been denied for suitability, for the reason(s) listed below:

- () Previous Tenancy (Rent Paying History) Code _____
- 0 Previous Tenancy (Conduct) Code _____
- 0 Past Criminal History
- 0 Previous Credit History
- 0 Misrepresentation and/or Fraudulent Information
- 0 Failed Pre-Occupancy
- 0 Other, specify _____

You have the right to an informal review, if you disagree with this decision. Reviews are held by appointment only. You have ten (10) days from the date of this letter to request a review in writing (form attached) or you may make your request in person at our office. If we have not heard from you within ten (10) days, your application will be deleted from the Active Waiting List.

At the Hearing you have the following rights:

1. To have the case heard by an impartial hearing officer.
2. To present evidence showing mitigating circumstances, that the crime is not serious enough to keep you out of public housing, or that you have been rehabilitated.
3. To present evidence in your behalf, challenge the evidence presented against you, and cross-examine any witnesses. You should therefore bring any witnesses or documents in your favor to your hearing.
4. To be represented by the counsel of your choice.

sdenial/ck

Rev. 4195

EXHIBIT C

Suitability Denial

Page -2-

Request for informal reviews should be addressed to:

Office of Resident Selection and Assignment
Housing Authority of the City of Atlanta
739 West Peachtree Street, NE - 1st Floor
Atlanta, Georgia 30365
ATTN: Ed Aaron

Upon receipt of your request, you will receive a letter informing you of your hearing date and time.

Please bring to the hearing any explanations for your position including the disposition of your case, dismissal(s), non-conviction(s) and letters of support (from Probation Officers, Social Workers, Rehabilitation Center(s), Physician(s), etc.). If you would like a lawyer but cannot afford one, you may contact Legal Aid. If you would like a lawyer but do not know of one, you may contact the Lawyer's Referral Service.

If you have any questions please contact Deborah Potier at 8 17-7280.

Sincerely,

Housing Occupancy Specialist
Office of Resident Selection and Assignment

EXPLANATION OF SUITABILITY DENIAL

<u>DATE</u>	<u>Description (e.g. incidents/charges/disposition, etc.)</u>
--------------------	--

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Attachment: Hearing Request Form

xc: Applicant File

HEARING REQUEST FORM

DATE

NAME ON APPLICATION
HEAD OF HOUSEHOLD

NAME OF PERSON REQUESTING
HEARING

SOCIAL, SECURITY #

ADDRESS

APPLICATION DATE

CITY

STATE/ZIP

TELEPHONE #

I, _____, hereby request an informal review pertaining to the denial
for Admission, dated _____. Please check the reason(s) for the denial:

PUBLIC HOUSING ELIGIBILITY

- _____ Annual Income Exceeds Income Limit
- _____ Failure to meet minimum age requirement
- _____ Failure to report income
- _____ Failure to provide Social Security Number or certification.

PUBLIC HOUSING SUITABILITY

- _____ Previous Tenancy (Rent Paying History) Code _____
- _____ Previous Tenancy (Conduct) Code _____
- _____ Past Criminal History
- _____ Previous Credit History
- _____ Misrepresentation and/or Fraudulent Information
- _____ Other, specify: _____

SECTION 8 ELIGIBILITY

- _____ Previous Tenancy (Public Housing) Code _____
- _____ Previous Tenancy (Public Housing) Outstanding Balance

OTHER _____

Sincerely,

Applicant's Signature

Rev.4195

xc: Applicant file

Hearform/cv



"Helping People *Help* Themselves"

Housing Authority of the City of Atlanta

(404) 892-4700

COMMISSIONERS

JOHN SWEET
Chair

JANIS WARE
Vice Chair

BEVERLY ADAMS
MURIEL FRANKLIN
CECIL PHILLIPS
FRANK SKINNER
DR. CHARLES E. WELLS

RENEE LEWIS GLOVER
Executive Director

DATE: _____

TO: _____

APPLICANT HEARING NOTIFICATION

SS#: _____

BEDROOM SIZE: _____

DEAR _____

Your letter requesting an informal hearing has been received. The hearing has been scheduled as follows:

Date: _____

Time: _____

Location: 739 West Peachtree Street, Atlanta, GA 30365
1 st Floor - Office of Resident Selection & Assignment

Please notify me upon receipt of this letter if this time is inconvenient for you. Failure to attend within fifteen (15) minutes of your appointed time will result in a denial of your right to a hearing.

Prior to this hearing, you have the right to examine your application file with the Housing Authority of the City of Atlanta. At your expense, you may copy any relevant document from the file. To do so, please call Deborah Potier at 817-7280.

At the Hearing you have the following rights:

1. To have the case heard by an impartial hearing officer.
2. To present evidence showing mitigating circumstances, that the crime is not serious enough to keep you out of public housing, or that you have been rehabilitated.
3. To present evidence in your behalf, challenge the evidence presented against you, and cross-examine any witnesses. You should therefore bring any witnesses or documents in your favor to your hearing.
4. To be represented by the counsel of your choice.

EXHIBIT E

Dear Sir or Madam:

According to our records, you applied for admission to the Atlanta Housing Authority's Public Housing program since January 1, 1993, and your application was denied due to an alleged criminal history.

Due to the settlement of a federal class action lawsuit filed on your behalf (Bonner v. Housing Authority of the City of Atlanta et al., U.S. District Court, N. Dist. of Ga., Civil Action File No. 1:94-CV-376-MHS), HACA will, if you request it, make a new decision on your application.

If you ask for a new decision, you will have the right to a new hearing on your application. At your hearing, you will have the following rights:

1. To have your case heard by an impartial hearing officer;
2. To present evidence showing mitigating circumstances, that your alleged criminal history is not serious enough to keep you out of public housing, or that you have been rehabilitated;
3. To present evidence in your behalf, challenge the evidence presented against you, and cross-examine any witnesses; and
4. To be represented by the counsel of your choice.

You have these rights even if you have already had a hearing, did not ask for a hearing, or did not attend your own hearing. You do not have these rights if you requested and received a hearing pursuant to the Bonner class action case.

If you ask for a new decision on your application, you will be provided a detailed notice of the charges being considered before your new hearing. If your application is approved, you will be admitted to the Housing Authority of the City of Atlanta or placed on a waiting list based on the date and time of your original application.

If you wish to have a new decision on your application, you may request a new hearing at this time. To do so, complete the enclosed Hearing Request Form and mail or hand deliver it to:

Office of Resident Selection and Assignment
Housing Authority of the City of Atlanta
739 West Peachtree Street, N.E. - 1st Floor
Atlanta, Georgia 30365
Attn: Deborah Potier

The deadline for requesting a new decision is thirty (30) days from the date you received this notice, or _____ whichever is earlier.
Sincerely,

DEBORAH POTIER
Housing Occupancy Specialist

adenied.wpd/ck

EXHIBIT F

APPLICANT HEARING NOTIFICATION

Page 2

Please bring to the hearing the disposition of your case, dismissal(s), non-convictions(s) and letters of support (from Probation Officers, Social Workers, Rehabilitation Center(s), Physician(s), etc.).

If you have any questions, please feel free to call Deborah Potier at 817-7280.

Sincerely,

DEBORAH POTIER

Housing Occupancy Specialist

xc: District Manager (Previous Tenancy Only)
Resident Manager (Previous Tenancy Only)
Applicant's Representative (If Applicable)
Applicant File

applnoti/ck

Rev. 4/95

NO. _____

_____ and _____	§	IN THE COUNTY COURT
Plaintiffs	§	
	§	
v.	§	AT LAW NUMBER _____
	§	
_____	§	
_____	§	
_____	§	
Defendants	§	TRAVIS COUNTY, TEXAS
	§	

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiffs, _____ and _____, complain of _____
_____ and _____ and respectfully show the court as
follows:

DISCOVERY PLAN

1.

Discovery is intended to be conducted under Texas Rule of Civil
Procedure 190.3 (Level 2).

PRELIMINARY STATEMENT

2.

_____ is a 130-unit federally subsidized multifamily
apartment complex with rents subsidized by the United States Department
of Housing and Urban Development. Defendants illegally denied Plaintiff
_____ application to move into the apartment occupied by his
fiancee, Plaintiff _____. Plaintiffs seek (1) damages for wrongful
denial; (2) a declaratory judgment that Defendants' tenant selection

CHAPTER 6, EXHIBIT 2

policies violate governing federal regulations and handbooks; (3) an injunction directing Defendants to revise their tenant selection policies to conform to the requirements of the applicable federal regulations; and (4) an injunction directing Defendants to permit Plaintiff [REDACTED] to move into Plaintiff [REDACTED] apartment at [REDACTED].

PARTIES

3.

Plaintiffs, [REDACTED] and [REDACTED] are both adult residents of Travis County.

4.

Defendant [REDACTED], L.P. is a Texas limited liability partnership doing business as [REDACTED] in Austin, Travis County, Texas. It may be served by serving its agent, [REDACTED], at 1054 Springdale Road, Austin, Texas 78721.

5.

Defendant [REDACTED] is the on-site property manager at [REDACTED] [REDACTED] and an employee of [REDACTED]. She acted within the scope of her employment in her actions complained of in this petition. She may be served at the property management office at [REDACTED] [REDACTED]. The office telephone number is [REDACTED].

VENUE

6.

Venue is proper pursuant to Section 15.002 of the Texas Civil Practice & Remedies Code because the facts on which Plaintiff's claims are premised occurred in Travis County, Texas.

FACTUAL BACKGROUND

7.

Defendant [REDACTED] was originally constructed under the section 221(d)(3) of the Housing Act of 1961. [REDACTED] has signed a Section 8 Housing Assistance Payments Contract with the United States Department of Housing and Urban Development (hereafter "HUD"). Under the Section 8 Program HUD subsidizes the tenant rents so that a family pays no more than thirty percent of its adjusted monthly income for rent and utilities, subject to a minimum rent requirement of \$25.00.

8.

Under the Section 8 Set-Aside Program, the owner must comply with numerous federal regulations. Such owners must rent only to financially eligible families; must comply with certain limitations in selecting tenants; must notify rejected applicants of the grounds for denial; must afford rejected applicants an opportunity for an informal hearing when denying admission; must calculate tenant rent in accordance with federal guidelines; must give tenants an opportunity for an informal meeting prior to filing an eviction action or terminating a tenant's rental subsidy; may evict during the lease term or at the end of the lease term

only for cause; must utilize HUD-approved leases; and must adopt reasonable lease terms and rules.

9.

██████████ has lived at ██████████ for over five years. In September 2006 she and her fiancée, ██████████, completed an application asking that ██████████ add ██████████ to the lease household. ██████████ denied ██████████ application claiming ██████████ did not meet its tenant selection criteria and that ██████████ had provided false information on the application. It claimed ██████████ did not meet its tenant selection criteria because it had obtained information from a Texas criminal search showing that ██████████ had been involved in prior drug-related activity in December 1986 and May 1987. See Exhibit 1, Notice of Rejection. The notice gave no other information. It did not specify how Plaintiff ██████████ allegedly provided false information on the application and gave no detailed information about the alleged drug-related activity.

10.

██████████ tenant selection policies provide in pertinent part as follows:

Rental applications will be rejected/denied if any of the applicant(s) and/or prospective household members do not meet the screening criteria. Reasons to reject/deny an application include, but are not limited to, the following reasons:

. . . .
If, in the sole judgment of Owner, the Owner determines and/or is of the belief that, based upon the information contained from such sources as the interview, landlord references, credit report, court records, or other documents, the applicant, co-applicant or any prospective household member have engaged in, facilitated, been involved in, or associated with criminal activity (neither an arrest or conviction is necessary) including but not limited to,:

any drug-related criminal activity regardless of date committed including, without limitation, the manufacture, sale, distribution, possession, use or possession with the intent to manufacture, sell, distribute, possess, or use controlled substances and/or drug paraphernalia.

██████████, Resident Selection Criteria, at ¶ E-2-(d). See Exhibit 2 (Excerpt of ██████████ Resident Selection Criteria). The criteria are written in such a way to prohibit the admission of any individual with previous drug-related activity, regardless of the date it occurred. This violates governing HUD regulations and handbook provisions. Defendants have refused to reconsider their decision rejecting Plaintiff ██████████ application.

FIRST CAUSE OF ACTION: VIOLATION OF GOVERNING FEDERAL REGULATIONS ON
TENANT SELECTION

11.

The regulations governing ██████████ restrict its discretion in selecting tenants. They state:

(a) You may prohibit admission of a household to federally assisted housing under your standards if you determine that any household member is currently engaging in, or has engaged in during a reasonable time before the admission decision:

(1) Drug-related criminal activity;

. . . .

(b) You may establish a period before the admission decision during which an applicant must not have engaged in the activities specified in paragraph (a) of this section (*reasonable time*).

24 C.F.R. §5.855 (2006) (emphasis in original). ██████████ policies violate this regulation as well as HUD Handbook 4350.3 that is binding on owners such as ██████████ and implements the regulation. Plaintiffs seek declaratory relief, injunctive relief, and damages for Defendants' violation of the law.

SECOND CAUSE OF ACTION: VIOLATION OF FEDERAL HANDBOOK REQUIREMENT
TO EXPLAIN THE REASONS FOR THE REJECTION

12.

HUD Handbook 4350.3 provides the following mandatory guidelines for rejecting applicants:

1. Rejection notices must be in writing.
2. The written rejection notice must include:
 - a. The specifically stated reason(s) for the rejection;
and
 - b. The applicant's right to respond to the owner in writing or request a meeting within 14 days to dispute the rejection.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Handbook 4350.3, REV-1, Occupancy Requirements of Subsidized Multifamily Housing Programs*, at §4-9-C (May 1993) ("Handbook 4350.3") (emphasis in original). Defendants' notice of rejection is conclusory and does not "specifically" state the reasons for the rejection. Plaintiffs were deprived of their right to be informed of the grounds for the rejection such that they could respond in a meaningful manner. By their actions, Defendants violated Handbook 4350.3, for which violation Plaintiffs seeks damages, declaratory relief and injunctive relief.

VI. THIRD CAUSE OF ACTION: VIOLATION OF SECTION 17.46 OF THE TEXAS
DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION ACT

13.

Section 17.46 of the Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA") provides in part as follows:

- (a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . .

TEX. BUS. & COM. CODE ANN. §17.46 (Vernon Supp. 2006). Violation of this section gives rise to a claim for relief under Section 17.50 of the DTPA. Plaintiffs were consumers seeking housing and thus fell under the protections of the DTPA. Defendants' actions in denying Plaintiff [REDACTED] application for admission were not only false, misleading, and deceptive, they were also unconscionable. Defendants' actions constituted a producing cause of Plaintiffs' economic damages and damages for mental anguish. Plaintiffs seek declaratory relief, injunctive relief, and damages as permitted under Section 17.50 of the DTPA.

DAMAGES

14.

Plaintiffs seek actual damages resulting from Defendants' wrongful rejection of Plaintiff [REDACTED] application for tenancy at [REDACTED]. Plaintiffs' damages are therefore within the jurisdictional limits of this court.

REQUEST FOR RELIEF

15.

Plaintiffs ask that Defendants be cited to appear and answer this lawsuit and that this court:

1. Issue a declaratory judgment that (a) Defendants' tenant selection policies violate applicable federal regulations and handbooks in that they do not limit admission rejections for drug-related criminal activity to such activity that occurred a

CHAPTER 6, EXHIBIT 2

reasonable time before the admission decision; and

(b) Defendants failed to comply with the requirement of HUD Handbook 4350.3 that notices of rejection give "specifically stated reasons" for rejection in denying Plaintiffs' application for admission of Plaintiff [REDACTED];

2. Enter a permanent injunction enjoining Defendants to revise their tenant selection policies to comply with federal law requirement that rejections for drug-related criminal activity relate to activity that occurred a reasonable time before the admission decision;
3. Enter a permanent injunction enjoining Defendants to revise their tenant rejection notice to ensure that rejected applicants are given specifically stated reasons for the rejection;
4. Enter a permanent injunction enjoining Defendants to approve Plaintiff [REDACTED] application for admission to Elm Ridge as a member of Plaintiff [REDACTED] household;
5. Award Plaintiffs actual damages resulting from Defendants' denial of the application of Plaintiff [REDACTED];
6. Award Plaintiffs costs of litigation and court costs; and

CHAPTER 6, EXHIBIT 2

7. Grant Plaintiffs such other and further relief, general and special, legal and equitable, to which they may be entitled.

Respectfully submitted,

TEXAS RIOGRANDE LEGAL AID
4920 North IH-35
Austin, Texas 78751
Phone: 512-374-2720
Fax: 512-447-3940

By: _____
Fred Fuchs
State Bar No. 07498000
Attorneys for Plaintiffs

AN AFFORDABLE HOME ON REENTRY

CHAPTER 7

VOUCHERS, PORTABILITY AND INDIVIDUALS WITH A
CRIMINAL RECORD

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7.1 Individuals Porting with a Criminal Record

The key features of the voucher program are housing choice and mobility: the ability of families to move from one unit to another and not forfeit the rental assistance. HUD generally refers to the process of relocating with a voucher as a “move with continued assistance.”¹ Moves with continued assistance can occur both within and outside the jurisdiction of the public housing agency (PHA) that issued the family’s voucher. A family may use its voucher to lease a unit anywhere in the United States where there is a PHA operating a voucher program.² The term “portability” refers to moves with a voucher outside of the jurisdiction of the issuing PHA. The PHA that issued the voucher to the family is known as the “initial PHA.”³ The PHA in the jurisdiction where the family will be moving is called the “receiving PHA.”⁴ Unique issues may arise if a voucher holder has a criminal background and seeks to take advantage of the portability feature of the voucher program (or, “port” to another jurisdiction).

In some cases, a family will choose to port before leasing up with a voucher in the jurisdiction of the initial PHA. In other words, as soon as a family is approved for the program, the family will inform the initial PHA that they plan to use the voucher somewhere else. In other cases, families are already renting a unit with their voucher in the jurisdiction of the initial PHA but wish to move to a new area under the jurisdiction of a different PHA. Families choose to

move for a variety of reasons and PHAs are prohibited from discouraging a family from choosing to take advantage of the voucher program’s mobility feature. In limited circumstances, however, the PHA may deny a request to port, as explained in more detail below.

In general, the regulations provide that the issuing PHA must allow a family to move and the receiving PHA must provide assistance to the moving family. The receiving PHA does not re-determine income eligibility for a participant family.⁵ The receiving PHA may, however, choose to conduct a new reexamination of the porting family, in which case the receiving PHA may not delay in issuing the family a voucher or otherwise delay the approval of a unit in order to complete the recertification.⁶ For new participants that were not already receiving assistance under the voucher program, the initial PHA determines eligibility for the receiving PHA’s program using the receiving PHA’s income limits.⁷

Although the receiving PHA may not delay in issuing a voucher to a porting family, it may take subsequent action. For example, the receiving PHA may seek to terminate the family after it has ported for program violations committed during the family’s tenure in the receiving jurisdiction.⁸ Some receiving PHAs may go even further, by screening families for past criminal activity.⁹ If the receiving PHA has more

¹42 U.S.C.A. § 1437f(r) (West 2016) (portability); 24 C.F.R. § 982.354 (2016).

²24 C.F.R. § 982.1 (2016).

³*Id.* § 982.4.

⁴*Id.*

⁵24 C.F.R. § 982.355(c)(9)).

⁶24 C.F.R. § 982.355(c)(11)).

⁷24 C.F.R. § 982.355(c)(9)).

⁸*Id.* § 982.355(c)(10).

⁹PIH 2016-09 (HA), Housing Choice Voucher (HCV) Family Moves with Continued Assistance, Family Briefing, and Voucher Term’s Suspension (June 6, 2016) at 24 (stating that a receiving PHA may take subsequent action against a porting family based on their criminal background). *Lawrence v. Brookhaven Dep’t of Hous. Community Dev. & Intergovernmental Affairs*, 2007 WL

stringent criteria than the initial PHA, it may terminate the family's assistance due to criminal history involving acts prior to the porting.¹⁰ This practice arguably violates the voucher statute, which limits PHAs' authority to conduct elective screening to "applicants" for the voucher program.¹¹ When HUD updated its portability rule in 2015, however, it explicitly allowed PHAs to re-screen porting families for criminal history. Families wishing to port should therefore become familiar with the screening policies of the receiving PHA, especially if a member of the family has a criminal background.

In addition, the initial PHA is encouraged but not required to send criminal background check information regarding the voucher recipient to the receiving PHA.¹² If the initial PHA intends to send the information, it must disclose that fact to the voucher holder.¹³ Some state laws may limit what information is shared. In addition, depending upon how the PHA obtained the information, additional federal protections may apply.¹⁴

Where criminal activity is related to one's status as a survivor of domestic violence, VAWA protections can provide significant rights to participants. An incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking may not be construed as a serious or repeated lease violation by the survivor and therefore cannot be grounds to deny a

request to port.¹⁵ In the case of crimes by household members or guests, any offending activity directly related to domestic violence, dating violence, sexual assault, or stalking likewise cannot be cause to deny a survivor's request to port.¹⁶

HUD regulations state that a PHA's refusal to process or provide assistance under portability procedures constitutes termination of assistance for an applicant as well as a participant.¹⁷ As a result, in any case where an initial or receiving PHA refuses to process or provide assistance under portability procedures, the family must be given the opportunity for an informal review or hearing.¹⁸

Despite the regulatory scheme which anticipates a smooth transition from one PHA to another, a range of issues can arise for tenants that cause delay in the moving process or even a denial of porting rights. Whenever possible, advocates should assist voucher families, especially individuals with a criminal record, to seek a determination of eligibility prior to porting into a new jurisdiction. In the alternative, such a voucher holder should seek to move to the jurisdiction of a PHA with less ridged eligibility requirements.¹⁹

4591845 (E.D.N.Y. Dec. 26, 2007) (Receiving PHA was acting within its authority to reexamine the voucher holder's eligibility); see also *id.* §§ 982.552 and 982.553 (2007) for rules regarding the termination of voucher participant that are beyond the scope of this Guide. For more information regarding the procedures and defenses to a termination, see NHLP, HUD HOUSING PROGRAMS TENANTS' RIGHTS (2012 and 2016 Supplement) Ch. 13.

¹⁰24 C.F.R. § 982.355(c)(10) (2017); See *Binns v. City of Marietta Hous. Assist. Program*, 2010 WL 1138453 (N.D. Ga. Mar. 22, 2010) (challenging receiving PHA's refusal to issue voucher to porting family, allegedly due to disabled family member's criminal record); *Lawrence v. Brookhaven Dep't of Hous., Cmty. Dev. & Intergovernmental Affairs*, 2007 WL 4591845

(E.D.N.Y. Dec. 26, 2007) (holding that the receiving PHA was acting within its authority to reexamine the voucher holder's eligibility when she moved into its jurisdiction, and that it was also within its authority to terminate her assistance after discovering a prior drug conviction). Housing Choice Voucher Program: Streamlining the Portability Process, 80 Fed. Reg. 50,564, 50,568 (August 20, 2015) (HUD rejected multiple comments to the proposed portability rule that stated receiving PHAs should be restricted from rescreening porting families in order to minimize hardship on voucher families that relocate).

¹¹See 42 U.S.C.A. § 1437f(o)(6)(B) (West 2016).

¹²HUD, VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE, HUD Handbook 7420.10G, ¶ 13.4 (Apr. 2001).

¹³*Id.*

¹⁴See discussion in Chapter 3 Access to Criminal Records.

¹⁵42 U.S.C.A. § 14043e-11(b)(1), (b)(2) (West 2016); 24 C.F.R. § 982.551(e) (2016); see NHLP, DV Manual, *supra* note 2, at § 6.8, discussing VAWA's Protections Against Evictions and Subsidy Terminations.

¹⁶42 U.S.C.A. § 14043e-11(b)(3)(A) (West 2016); 24 C.F.R. § 982.551(l) (2016); see also NHLP, DV Manual, *supra* note 2, at § 6.8, discussing VAWA's Protections Against Evictions and Subsidy Terminations.

¹⁷24 C.F.R. § 982.552(a)(2), (3) (2017).

¹⁸PIH 2016-09(HA), *supra* note 12, at 25 (receiving PHA must provide a hearing); See also *Orullian v. Hous. Auth. of Salt Lake City*, 2011 WL 6935039 (D. Utah Dec. 30, 2011) (tenant required to move because of an eviction notice should have been given a moving packet or the right to a hearing); *Avanesova*, 2004 WL 5913378 (porting tenant was denied due process when receiving PHA refused to enter into a contract with the landlord); but see *Koroma v. Richmond Redev. & Hous. Agency*, 2010 WL 1704745 (E.D. Va. Apr. 27, 2010) (porting tenant was not entitled to a hearing from receiving PHA that refused to process his portability request; note however that the ruling was prior to PIH 2012-42, *supra* note, 11, which states a contrary policy position).

¹⁹Although a tenant ought to investigate the policy of the PHA in the receiving jurisdiction, a very strict policy on criminal background checks may be suspect as it may be premised upon an illegal policy or practice of keeping protected classes out of the jurisdiction.

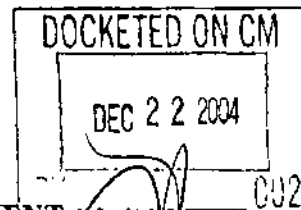
ORIGINAL
**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES - GENERAL**Case No.** CV 04-5588-GAF**Date:** December 20, 2004**Title:** Avanesova v. Housing Authority of the City of Los Angeles, et al.**The Honorable Gary Allen Feess, Judge**Debra L. O'Neill forMarilynn MorrisCourtroom Deputy ClerkNone PresentCourt Reporter**ATTORNEYS PRESENT FOR PLAINTIFFS:**

None Present

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

PROCEEDINGS: (In Chambers)**RULING ON MOTION FOR SUMMARY JUDGMENT**

Plaintiff moves for summary judgment on multiple claims against the two defendants – City of Glendale and the Housing Authority of the City of Los Angeles (HACLA). Because Plaintiff properly moved her residence to the City of Glendale, and because she has been denied benefits established under 42 U.S.C. §1437f, the Court **GRANTS** the motion for summary judgment against Glendale on the First and Seventh Claims for Relief. The remainder of the motion is **DENIED**.

A. BACKGROUND FACTS

The following facts are undisputed or without substantial controversy.

In late 2002 or early 2003, Plaintiff applied to the Housing Authority of the City of Los Angeles (HACLA) for benefits under federal law administered by and funded to local public housing authorities (PHA) through the United States Department of Housing and Urban Development. In February 2003, she was approved for the program and received a voucher to give to a prospective landlord as proof of her eligibility. Three months later she sought, under applicable federal regulations, to transfer her voucher to the Glendale PHA. Glendale received her request, re-certified her eligibility, approved her proposed residence and negotiated a final contract with the landlord for the housing assistance payments (HAP). However, before Glendale signed the contract, a dispute arose between the Glendale and HACLA regarding which agency would be responsible for the payment of Plaintiff's rent.

Under federal law, when a tenant transfers the voucher to a new PHA, the receiving PHA (Glendale) has the option of billing the original PHA (HACLA) for the rent and costs of administration, or of absorbing the voucher holder into its own program and bearing the costs out of its HUD allotment. Under that program, ¹⁴ Glendale had received a number of transfers from Los Angeles residents and had been billing the costs of these transfers to HACLA. At the time Glendale was about to sign the contract with Plaintiff's landlord, HACLA¹ rejected approximately 99 billing requests submitted by Glendale for payment on transferred vouchers. Because Glendale assumed that HACLA would reject any bills submitted for Plaintiff's rent payments, it refused to sign the contract and complete processing of her voucher. Thus, Plaintiff has an apartment but no means of paying the rent. Glendale won't pay because it believes it won't be reimbursed; HACLA won't pay because Plaintiff lives in Glendale.

Caught in the middle of this battle of bureaucrats, Plaintiff now sues to enforce her rights under federal law by bringing suit under 42 U.S.C. § 1983. The First Claim for relief alleges a violation of 42 U.S.C. § 1437, 28 C.F.R. § 982.355 and various guidebooks and Administrative Plans. The Court concludes that the undisputed facts establish that Plaintiff is entitled to relief on this claim, as to which the motion is **GRANTED**. The remainder of the motion is **DENIED**.

B. DISCUSSION

42 U.S.C. § 1437f is the general statute authorizing low-income housing assistance. Subsection (r) of that statute authorizes portability and places the responsibility for the program participant on the receiving PHA stating in relevant part that "[t]he public housing agency having authority with respect to the dwelling unit to which a family moves under this subsection **shall have the responsibility** of carrying out the provisions of this subsection with respect to the family." 42 U.S.C. § 1437f(r)(2) (emphasis added). Under HUD's portability regulations, the receiving PHA is required either to bill the initial PHA for the rent and costs of administering the voucher or to absorb/accept the voucher holder into its own program for which it would bear the costs out of its own HUD allotment. 24 C.F.R. § 982.355(c)(5). The receiving PHA is required to "**promptly** inform the initial PHA" of its choice. 24 C.F.R. § 982.355(c)(5) (emphasis added).¹ Further, the regulations provide that "the receiving PHA **must** provide assistance for the family. Receiving PHA procedures and preferences for selection among eligible applicants do not apply, and the receiving PHA waiting list is not used." 24 C.F.R. § 982.355(c)(10) (emphasis added).

Here Plaintiff had met every request of the Glendale PHA and fulfilled all requirements of the program. Plaintiff requested and was allowed to port her HACLA voucher to Glendale on May 27, 2003. (Avanesova Decl. ¶ 3). That same day, May 27, 2003, she also submitted her Request for Tenancy Approval on the Glendale residence. (*Id.* ¶ 6). On June 4, 2003, Plaintiff's file was received by Glendale. (Glendale Statement of Genuine Issues ("SGI") ¶ 6). Glendale then re-certified Plaintiff's program eligibility and performed two housing inspections on Plaintiff's proposed residence, before it ultimately passed on August 21, 2003. (Siegler Decl. ¶ 8). On or about October 28, 2003, Glendale negotiated the final rent with the landlord and prepared to execute the HAP contract. (*Id.*). It is undisputed that Glendale never executed this contract nor has it paid any section 8 assistance payments on behalf of Plaintiff to date. (Avanesova Decl. ¶ 21). Therefore, it is clear that Glendale did not bill or absorb Plaintiff, not because of any action by Plaintiff but because of its dispute with HACLA. Whatever the merits of that dispute, Glendale's obligation to Plaintiff is clear. Glendale bore primary

¹ The full text of the subsection reads, "[w]hen the portable family requests assistance from the receiving PHA, the receiving PHA must promptly inform the initial PHA whether the receiving PHA will bill the initial PHA for assistance on behalf of the portable family, or will absorb the family into its own program." 24 C.F.R. § 982.355(c)(5).

responsibility for carrying out the provisions of the Act applicable with respect to Plaintiff. 42 U.S.C. § 1437f(r)(2). Accordingly, the motion for summary judgment is **GRANTED**. Glendale is **ORDERED** to execute the HAP and to take financial responsibility for Plaintiff's tenancy. Glendale's compliance with this Court's order is without prejudice to Glendale's right to pursue its claim that HACLA should reimburse Glendale under applicable regulations.

The foregoing disposes of the Seventh Claim for Relief as well. In that claim, Plaintiff contends that she was deprived of her rights under federal law without procedural due process. Glendale contends that, since it never made a decision to deny assistance to Plaintiff (because its obligation was extinguished by HACLA's termination of her voucher), it had no obligation to conduct a hearing. However, the Court has concluded that she did have substantial rights under the statute, that Glendale was obligated to provide her with benefits under the statute and that Glendale refused to do so without conducting an appropriate hearing. Accordingly, the motion is **GRANTED** as to this claim.

The motion is **DENIED** as to the remaining claim against Glendale. As to the additional claims against Glendale, Plaintiff alleges in her Third Claim for Relief that Glendale failed to follow its administrative plan. However, no federal statute or regulation mandates the creation of a plan that purportedly contains the requirements identified by Plaintiff (a 6-month billing requirement), and therefore no evidence has been presented to show that Glendale violated its own plan.

The motion is **DENIED** as to HACLA since the Court has determined that Avensova's claim is against Glendale.

IT IS SO ORDERED.

AN AFFORDABLE HOME ON REENTRY

CHAPTER 8

Adding an Individual with a Criminal Record to the Assisted Household and Rechecking Current Residents

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8.1 Introduction

This chapter addresses issues related to an individual with a criminal record who seeks to join a household that is participating in one of the federally-assisted housing programs. Such an individual may be joining an assisted household for the first time or may be rejoining an assisted household after an absence. This Chapter includes a discussion of (1) the process for adding a household member and important considerations, (2) the issues that arise for guests and live-in aides, and (3) the rights of current residents who are re-checked for eligibility including post-subsidy-conversion.

8.2 Adding an Individual with a Criminal Record to the Family

An individual with a criminal record may seek to join or rejoin a federally-assisted family.¹ The policies governing the process are complex because

¹Studies have shown that a substantial number of public housing residents have family members or significant others with recent criminal history. See CATRINA GOUVIS ROMAN, URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISON REENTRY 24 (2004). The circumstances of residents of other federally-assisted housing are no doubt similar.

they involve questions of what must be reported and when. Guest policies and other practices addressing whether the individual is considered to be a member of the tenant family may also come into play. In addition, the interests of other family members who are living in federally-assisted housing may conflict with the interests of the individual with the criminal record.

8.2.1 Reporting Changes in Family Composition and Rechecking Current Residents

Public housing agencies (PHAs) and owners have an interest in knowing who is residing in a unit. As with new admissions, they may want to review current information to assess how the individual will act in the future and whether the individual will comply with the lease or pose a threat to other residents, the development, or the staff. The PHA or owner may also need to know who is residing in the unit for purposes of determining the tenant rent and for determining the appropriate unit size for the family.

Federal regulations and policies address the steps that must be taken when the composition of a family living in federally-assisted housing changes. In

general, if a family is adding an adult member to the household, the tenant or voucher participant must notify the PHA or owner of the new member and, in most cases, obtain approval.² Typically, the PHA or owner will screen the new member for criminal activity.³ As with applicants seeking admission, in certain limited situations, the PHA or owner must reject the new family member.⁴ As with other admission decisions, for the vast majority of the situations in which the individual is seeking to join the family, the PHA or owner has broad discretion to accept or reject the new family member. Accordingly, an individual with a criminal record seeking to join the family should be prepared, if asked, to disclose the criminal record and demonstrate mitigating circumstances and rehabilitation. The individual should consider including information regarding the benefit of having him or her join the family and how that may positively affect the stability of the development. These benefits will vary depending upon the facts, but could include information regarding the relationship between the new family member and his or her children, the supportive relationship between the new family member and his or her spouse, and the potential for increasing the income of the tenant family and, therefore, rent for the PHA or owner.

The timing for reporting a change in family composition is critical. It is important to know and comply with the notice provisions, so as to avoid a potential threat of a termination of subsidy or eviction of the family seeking to add the individual. For most programs, family composition is determined annually and interim reporting may be required. At the annual and interim recertification, most owners and PHAs

will check the criminal background of the new family members. For more information regarding the rules for each program *see* Exhibit 1 to this Chapter.

Owners and PHAs may also recheck the background of current residents, but this is typically not done unless the building is undergoing a conversion from one form of a subsidy to another, explained in more detail below.⁵ If the owner does require a background check on current tenants at recertification, the HUD rules for project-based HUD-assisted housing state that the owner must conduct the background check on all tenants.⁶ Such a rule ought to be applicable for all the programs to avoid arbitrary or discriminatory action. The criminal background check for a current tenant may reveal information that may threaten the family's tenancy. Such eviction threats may be substantial, but if they are not accompanied by current threatening behavior, they may be defeated.⁷

The rules affecting the addition of family members to an assisted household for each program are determined locally and should be set forth in the PHA Annual Plan, the Admission and Occupancy Plan (ACOP) and lease for public housing, in the Administrative Plan for the Section 8 voucher program, and in the lease and/or house rules for the HUD-assisted or RD project based programs as well as the Low Income Housing Tax Credit (LIHTC) program. Section 8 voucher tenants are in a unique position because the obligation to report changes in family composition is not included in the lease. In addition, most Section 8 voucher participants are not aware of the requirements of the Section 8 Administrative Plan. Therefore, HUD separately requires that the PHA give written notice to participants of their obligations under the program,

²24 C.F.R. §§ 966.4(a)(1)(v), 982.516(c) and 982.551(h)(2) (2017); *See* HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, HUD Handbook 4350.3, REV-1, CHG-4, ¶ 7-10A.2 (Nov. 2013), *compare with id.* at App. 4-A the model lease, ¶ 16a, which does not require interim reporting of changes in family composition. Because tenants generally are not aware of the rules set forth in HUD Handbooks and the lease does not require interim reporting, tenants without notice of the obligation to report should not be penalized for failing to report interim changes in family composition.

³*See, e.g.,* HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-4, ¶ 7-11C (Nov. 2013) (owner must screen the proposed additional person for drug abuse and other criminal activity); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 12.2 (June 2003) (PHA should not add adults to a lease unless the PHA has screened them, using standard applicant selection criteria). For the voucher program, there are no separate federal guidelines for screening persons who are added to an assisted family.

⁴*See* Chapter 2 for a discussion of the screening criteria relating to individuals with criminal histories.

⁵HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 12.2 (June 2003) (PHA may conduct criminal background check of current residents at the annual review "although this is not a HUD requirement"); *cf.* HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-4, ¶¶ 7-4A.5 and 7-12 (Nov. 2013) (owners may conduct criminal background checks at annual recertification); *see also* Exhibit 1 to this Chapter.

⁶HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-4, ¶ 7-4A.5 (Nov. 2013); *cf.* HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 12.2 (June 2003) (PHA may conduct criminal background check at the annual review "although this is not a HUD requirement").

⁷Defending a family from eviction is beyond the scope of this Guide. For more information regarding defending such evictions, *see* NHLP, HUD HOUSING PROGRAMS TENANTS' RIGHTS, Chapter 14 (3d ed., 2004 and 2006-2007 Supp.); Lawrence R. McDonough & Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REV. 55 (May-June 2007).

including a written description of the grounds on which the PHA may deny or terminate assistance because of a family's action or failure to act.⁸ Such notice, as well as notice of the timeframes within which participants must act to provide information to the PHA, may also be required as a matter of due process.⁹ Failure of the PHA to provide notice of the specific interim reporting requirements should render them unenforceable.

8.2.2 Re-checking Current Residents Post-Conversion

In some situations, a public housing or HUD-subsidized building will convert to either market rate or a new type of assisted housing. The owner's right to re-check tenants will depend on the type of conversion and what type of subsidy remains on the property, if any. Where a new owner adopts more stringent screening policies with respect to criminal history, advocates should always argue that only *applicants* can be re-screened and that ongoing participants should remain eligible for the housing. Some conversions, such as through the Rental Assistance Demonstration (RAD) Program provide additional rights to tenants regarding re-screening.

8.2.2.1. Special Rules for a RAD Conversion

The Rental Assistance Demonstration Program (RAD) allows Public Housing Authorities (PHAs) to convert public housing to the Section 8 housing program. For tenants in RAD-converting properties, there are special protections that apply at the time of the conversion to ensure that the tenants are able to continue living at the property. Specifically, federal law¹⁰ prohibits rescreening or evicting

these tenants because of RAD conversions.” In other words, tenants who lived at the public housing property before the RAD conversion cannot be denied the right to return or relocation housing based on any rescreening, income eligibility, or income targeting criteria.¹¹ Existing tenants must be grandfathered in for any eligibility conditions that occurred prior to the RAD conversion, including standards for screening for criminal history.¹²

Some public housing authorities that are undergoing a RAD conversion may engage in an “add-a-household-member” campaign prior to the official RAD conversion in order to ensure that all existing and desired occupants are on the lease. The local public housing authority Admissions and Continued Occupancy Plan (ACOP) should describe the screening process and criteria that the housing authority will apply for these “add-a-household-member” campaigns until the property officially changes from public housing to Section 8. The ACOP screening criteria will likely be different from, and potentially less stringent than, the criteria that apply to applicants of Section 8 housing. Advocates should work with tenants to make sure the appropriate screening criteria are used and that families are not illegally screened out during this process.

8.3 Individual Returns to Unit After Brief Absence due to Imprisonment

There may be situations in which the individual is the sole member of the household and be returning to his or her former unit after a brief imprisonment. For the voucher program, the PHA is required to have a policy in the Administrative Plan regarding family absence from the unit.¹³ The temporary absence policy must state whether or when the family may be absent, including for imprisonment, the amount of time for which absence is permitted and any provision for resumption of assistance.¹⁴ There are no federal rules regarding temporary absences for the other

⁸See 24 C.F.R. § 982.552(d)(1)-(2) (2017).

⁹See *Aikens v. D.C. Dep't. of Hous. & Cmty. Dev.*, 515 A.2d 712 (D.C. Ct. App. 1986) (PHA violated due process by not giving written notice to Section 8 participants of timeframes for reporting recertification information).

¹⁰Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55 (Nov. 18, 2011) as amended by the Consolidated Appropriations Act, 2014 (Public Law 113-76, approved January 17, 2014) and the Consolidated and Further Continuing Appropriations Act, 2015 (Public Law 113-235, approved December 6, 2014).

¹¹Section 1.7(B)(1), HUD Notice 2012-32 (REV-3) (2017); Section 1.6(C)(1), HUD Notice 2012-32 (REV-3).

¹²Section 1.7(B)(1), HUD Notice 2012-32 (REV-3) (2017); Section 1.6(C)(1), HUD Notice 2012-32 (REV-3).

¹³24 C.F.R. § 982.54(d)(10) (2017).

¹⁴*Id.* § 982.312(e).

federally-assisted programs. However, the PHA or owner may develop rules and policies regarding temporary absences and many have such policies.

In the RD programs, the owner must include a number of policies in the lease that is executed with a tenant, which must be approved by the agency. RD regulations require that the lease include information regarding the tenant's duty to notify the borrower of an extended absence.¹⁵

If the returning individual was previously a member of an assisted household, it is important to determine whether the returning family member continues to be listed on the lease or on the rent recertification forms, which may be incorporated by reference in the lease. Prior listing on the lease may obviate the need to provide prompt notice to the PHA, or owner, when the family member returns. It may also eliminate the need to seek the PHA's or owner's approval of the family member upon return. However, as noted above, the criminal record of the individual may be reviewed at the annual recertification. In addition, PHAs and owners generally have policies that require family members to report when a family member moves out.¹⁶ The issue of whether the family had a duty to report the fact that a family member was absent due to imprisonment should turn on the question of the family member's intent. In other words, the family arguably does not have a duty to report if the absence is temporary and the individual intends to continue to reside in the unit.

As a cautionary note, the returning family member may jeopardize the tenancy of the entire family. Therefore, the family should be made aware of the risks. In addition, it may be prudent to discuss the issues with the owner or PHA before the family member returns. If that is not possible, there are defenses to an eviction action if it is brought against the entire family.¹⁷

¹⁵ 7 C.F.R. § 3560.156(c)(18)(xiii) (2017).

¹⁶ 24 C.F.R. §§ 966.4(c)(2), 982.516(c) and 982.551(h)(3) (2007). See also HUD form 50075, PHA Plans (exp. 04/04/2011), ¶ 4A1f (PHA Annual Plan requires, for public housing, PHAs to state how frequently a tenant must report changes in family composition).

¹⁷ Defending a family from eviction is beyond the scope of this Guidebook. For more information regarding defending such evictions, see NHLP, HUD HOUSING PROGRAMS TENANTS' RIGHTS, Chapter 14 (3d ed., 2004 and 2006-2007 Supp.); Lawrence R. McDonough & Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REVIEW 55 (May-June 2007).

8.4 Individual with Criminal Record and Guest Policies

Questions may arise whether an individual with a criminal record may, on a temporary basis, stay overnight in a federally-assisted unit as a guest. The key issues include whether the guest must be approved by the owner or PHA and the length of time that a guest may stay in the unit before the guest is considered a household member. For the resident family, there are also issues of whether the guest may jeopardize their tenancy.

Assisted tenants are permitted to have overnight guests.¹⁸ The federal regulations for HUD federally-assisted housing define the term guest as "a person temporarily staying in the unit with the consent of a tenant."¹⁹ An assisted tenant should not be required to register and seek prior approval for an overnight guest. Many PHAs and owners have policies placing a time limit on the number of consecutive or total days in a year that a guest may stay in a unit.

For public housing, the courts have invalidated prior registration requirements that are coupled with management approval of the overnight guest. One court stated that a rule requiring registration and PHA approval for overnight guests violated the tenants' constitutional rights of privacy and association.²⁰ Another court held that a PHA lease provision requiring written approval for overnight guests violated applicable HUD regulations.²¹ The court specifically found that the PHA's prior-approval requirement for every overnight guest – which permitted management unfettered discretion – was neither necessary nor reasonable and did not provide for reasonable accommodation of guests and visitors

¹⁸ 24 C.F.R. § 966.4(d)(1) (2017) (public housing reasonable accommodation of guests). The model leases for the other HUD-assisted programs reference guests but do not specifically mention a reasonable accommodation of guests. See, e.g., HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, 4350.3, REV-1, CHG-4, App. 4 (Nov. 2017); see also 42 U.S.C.A. § 1437d(l)(2) (West, Westlaw through Pub. L. No. 115-30 approved 11-8-07) (public housing lease must have reasonable lease terms); 12 U.S.C.A. § 1715z—1b(b)(3) (West, Westlaw through Pub. L. No. 115-30 approved 11-8-07) (reasonable lease terms for federally-assisted housing).

¹⁹ 24 C.F.R. § 5.100 (2017).

²⁰ McKenna v. Peekskill Hous. Auth., 647 F.2d 332 (2d Cir. 1981) (reversing lower court decision that had upheld the rule and remanding claim for damages for constitutional violation, while dismissing declaratory and injunctive relief claims as moot when PHA rescinded policy).

²¹ Lancor v. Lebanon Hous. Auth., 760 F.2d 361 (1st Cir. 1985); see also 42 U.S.C.A. § 1437d(l)(2) (West, Westlaw through Pub. L. No. 115-30 approved 11-8-07) (PHAs "must utilize leases that do not contain unreasonable terms and conditions").

as required by the regulations. The court noted that most PHAs require permission only for guest stays of longer than two weeks.²² Owners of other federally-assisted housing should not be allowed to impose undue restrictions on guests because federal statute and regulations contain a similar “reasonableness” requirement.²³ State courts have also invalidated unreasonable guest policies imposed by subsidized owners.²⁴

For RD programs, the regulations require that all leases “include provisions that establish when a guest will be considered a member of the household and be required to be added to the tenant certification.”²⁵ Also, a borrower must post this same information in its occupancy rules.²⁶ Thus, there is no standard amount of time, but instead the owner must include its policies in the agency approved lease that it executes with tenants. As with the other programs, preapproval and registration of guests should not be allowed and the amount of time that a tenant may have a guest should be a reasonable period. However, if the guest was a former tenant who committed and was evicted for a drug violation, then the owner may require that the tenant obtain approval before the guest may visit.²⁷

Some PHAs have established “guest” policies for Section 8 voucher participants, limiting the time period that persons not listed as household members can stay with a tenant.²⁸ PHAs should also inform

participants of these policies and give them an opportunity to request that persons in occupancy for a longer period be added to the household.

The family and the individual with the criminal record should be careful with respect to the issue of whether the individual is a guest or has joined the family.²⁹ To avoid claims that the guest is residing in the unit, the assisted tenant should not only abide by the legitimate guest rules but also ensure that a record is kept of the places that the individual is staying or sleeping to avoid jeopardizing the assisted family’s right to remain in the housing or to request that the guest be added to the lease. For example, the guest should keep copies of bills and mail addressed to him or her at the alternative residence, a copy of a lease or receipts for residency at a residential hotel or for overnights in a shelter, or copies of statements of friends that the individual resided with for specified periods of time. In the event that the family is seeking to add the individual to the lease, advocates have negotiated policies that state that if the screening process exceeds the time specified for allowing a guest, due to no fault of the applicant, the housing provider may extend the period during which the guest may stay in the household.³⁰ Such a policy helps avoid the problem of guests who want to become members of the family overextending the guest time limits and thereby jeopardizing their application.

8.5 Review of a Determination to Not Allow the Individual with the Criminal Record to Join the Assisted Family

For public housing, if the PHA declines to add the individual with a criminal record to the family, the tenant who is seeking to add the new member has the right to grieve the decision.³¹ For the rules governing the grievance hearing, see Chapter 5. If the PHA declines to add the individual to the voucher household, the voucher participant or the rejected

²²See, e.g., *Ritter v. Cecil County Office of Hous. & Comm. Dev.*, 33 F.3d 323 (4th Cir. 1994) (upholding, against First Amendment association and privacy claims, PHA’s two-week visitation rule for Section 8 tenant-based recipients as reasonable under HUD regulations prohibiting residency by nonfamily members).

²³42 U.S.C.A. § 1715z—1b(b)(3) (West, Westlaw through Pub. L. No. 115-30 approved 11-8-07). These provisions may be enforced via the tenant’s lease or as a private right of action. To the extent that a constitutional claim is involved, a tenant may be required to prove some form of governmental action in order to state a claim.

²⁴See *Messiah Baptist Hous. Dev. Fund Co. v. Rosser*, 92 Misc. 2d 383, 400 N.Y.S.2d 306 (1977) (occasional overnight visitor does not violate subsidized housing lease provisions requiring reporting of changes in income and family composition and prohibiting accommodations for boarders); *Ashley Ct. Enters. v. Whittaker*, 249 N.J. Super. 552, 592 A.2d 1228 (App. Div. 1991) (refusing eviction of tenant-based Section 8 recipient because lease provision barring recurring visits was unreasonable and so vague as to be unenforceable); cf. *New Boston Kiwanis Hous. Dev. Corp. v. Sparks*, No. 1957, 1992 WL 79561 (Ohio Ct. App. Apr. 14, 1992) (lease provision requiring tenant to report changes in family composition does not constitute unlawful attempt to legislate morality; if guest stays long enough to become household member, tenant can be evicted for failing to report).

²⁵7 C.F.R. § 3560.156(c)(8) (2017).

²⁶*Id.* § 3560.157(b)(10).

²⁷*Id.* § 3560.156(c)(15).

²⁸See, e.g., *Ritter v. Cecil County Office of Hous. & Cmty. Dev.*,

33 F.3d 323 (4th Cir. 1994) (Section 8 tenant-based recipient violated two-week guest rule and had notice that violation could result in termination); *Zajac v. Altoona Hous. Auth.*, 156 Pa. Commw. 209, 626 A.2d 1271 (1993), *appeal denied*, 537 Pa. 627, 641 A.2d 591 (PHA policy provided that no one other than a resident could reside in the unit other than on a temporary basis not to exceed 30 days).

²⁹See *Sparks*, 1992 WL 79561 at *2.

³⁰Somerville (Massachusetts) Housing Authority policy.

³¹24 C.F.R. Part 966, Subpart B (2017); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 9.3 (June 2003); *Saxton v. Hous. Auth. of Tacoma*, 1 F.3d 881 (9th Cir. 1993) (“[A] public housing tenant whose request to add a returning family member to the lease is denied is entitled to a grievance hearing under the procedures specified in 24 C.F.R. § 966.50 *et seq.* (1992).”).

individual could request an informal review or an informal hearing by referring to the rights of public housing tenants.³² It is also possible that the family may have a constitutional due process claim for violation of individual liberties and for failure to provide a hearing.³³

8.6 Individual with Criminal Record as Live-in Aide

An individual with a criminal record may also be asked to live in federally-assisted housing as a live-in-aide because a disabled resident of public housing, project-based Section 8, or a voucher participant may need a live-in-aide. A live-in-aide is defined as a person who resides with one or more elderly, near elderly, or persons with disabilities, and who is essential to the care and well-being of that individual. The live-in-aide is not obligated to support the person and would not be living in the unit except to provide the required services.³⁴ A live-in-aide has no right to continued occupancy if the tenant needing the assistance vacates the unit.

Most PHAs and owners screen live-in-aides for criminal background using the same or similar criteria as for admission.³⁵ However, it is possible that the criminal background checks for a live-in-aid may not be as strict as with admission of a tenant. In addition, there may be situations in which the individual needing the care has substantial difficulty finding a live-in-aide, or the individual with the criminal record meets some unique need of the disabled individual. In such situations, the disabled individual needing the live-in-aide may request a reasonable accommodation in the form of a waiver of the strict screening criteria. Whether the request for reasonable accommodation is successful will depend upon the facts and an interpretation of reasonable accommodation provisions, which are discussed in Chapter 4.

³²24 C.F.R. § 982.555 (2017).

³³See *Saxton*, 1 F.3d at 884 (recognizing that a tenant may have a constitutional due process right concerning family living arrangements, but expressly declining to consider whether tenant had a constitutional right to have her husband live with her).

³⁴24 C.F.R. § 5.403 (2017).

³⁵HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-4, ¶¶ 4-7B5 and 7-10 (Nov. 2013) (stating that owner must apply screening criteria for criminal activity to persons added to the lease, including a live-in-aide).

Rules On Reporting of Family Composition and Criminal Background Checks of New Family Members, Current Tenants, and Live-In-Aides In
Federal Housing Programs

	Column 1	Column 2	Column 3	Column 4	Column 5
Type of Housing Program	Annual determination of family composition	Approval to add members to family	Interim reporting of family composition	Criminal background check at annual recertification	Criminal background check at interim recertification
Public Housing	Required Annually. 42 U.S.C. §§1437a(a)(1), 1437d(c) (2); 24 C.F.R. § 960.257(a).	PHA must approve additional family members, except when child is added to household by birth, adoption, or court awarded custody. 24 C.F.R. § 966.4(a)(v); HUD PHOG, ¶ 12-2.*	PHA must adopt policy and include it in ACOP.** Policy must be consistent with the PHA's Annual plan. 24 C.F.R. § 960.258(b) and (c); HUD Form 50075 Standard Template, ¶¶ 3.A.(5)b. and 4.A.(1)f; Lease must provide basis of interim redetermination. 24 C.F.R. § 966.4(c)(1), HUD PHOG, ¶ 12.2.	If required, should be set out in ACOP** and lease. HUD PHOG, ¶ 12.2* (PHA should screen adults added to lease and may conduct criminal background check of current tenants at annual recertification, but it is not a federal requirement).	Same as annual recertification. See Column 4.
Voucher	Required Annually. 42 U.S.C. §§1437f(c)(3)(A) and 1437f(o)(5); 24 C.F.R. § 982.516(a).	PHA must approve additional family members, except when child is added by birth, adoption, or court awarded custody. 24 C.F.R. § 982.551(h)(2) and HUD Form 52646, ¶ 4.B.9.	PHA must adopt policy. 24 C.F.R. § 982.517(c) It must be in the PHA's Administrative Plan. 24 C.F.R. § 982.54(d)(18).	Policy, if adopted, should be set forth in PHA's Administrative Plan.	If adopted, should be set forth in PHA's Administrative Plan.
Moderate Rehabilitation Section 8	Required Annually. 42 U.S.C. §1437f(c)(3)(A); 24 C.F.R. § 882.515(a).	There are no federal rules addressing this issue. If PHA adopts a policy, it should be in the PHA's Administrative Plan.	There are no federal rules addressing this issue; Policy, if adopted, should be in the PHA's Administrative Plan.	There are no federal rules on this issue. Policy, if adopted, should be in the PHA's Administrative Plan.	There are no federal rules on this issue. Policy, if adopted, should be in the PHA's Administrative Plan.

* HUD PHOG is the Public Housing Occupancy Guidebook available at <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>.

** ACOP is the Admission and Occupancy Plan for public housing.

	Column 1	Column 2	Column 3	Column 4	Column 5
Type of Housing Program	Annual determination of family composition	Approval to add members to family	Interim reporting of family composition	Criminal background check at annual recertification	Criminal background check at interim recertification
Moderate Rehabilitation SRO	Required Annually. 42 U.S.C. §1437f(c)(3)(A); 24 C.F.R. § 882.808(i).	The program is designed to assist single individuals. It does not contemplate adding other members to family. 24 C.F.R. §§ 882.802, 882.808(i).	The program is designed to assist single individuals. See Column 2.	There are no federal rules on this issue.	There are no federal rules on this issue.
Project-based Section 8	Required Annually. 42 U.S.C. §1437f(c)(3)(A); 24 C.F.R. § 5.657(b); HUD Handbook 4350.3, REV-1, CHG-2 ¶ 7-4A.5.	See discussion in Column 4.	Household must report when it proposes to move in a new member. HUD Handbook 4350.3, REV-1, CHG-2 ¶ 7-10.A.2. But lease does not require such reporting. HUD Handbook, 4350.3, REV-1, CHG-2, App 4-A, the model lease, ¶ 16a.	Owner required to screen new family additions and live-in-aides. HUD Handbook 4350.3, REV-1, CHG-2 ¶¶ 7-10.A.2, 7-11.C.1 and 4-7.B.5. If owner conducts criminal background check on current tenants, it must do it for all tenants. <i>Id.</i>	See discussion in Column 4.
Section 236	Required Annually. 24 C.F.R. § 236.80 (1995) saved by 24 C.F.R. § 236.1(c)(2007); It is not required for families paying market rent. HUD Handbook, 4350.3, REV-1, CHG-2, ¶¶ 7-4.A.6 and B.	Same as Project-based Section 8 (above).	Same as Project-based Section 8.	Same as Project-based Section 8.	Same as Project-based Section 8.
Section 221(d)(3)	Required Annually; Not required for families paying 110% of economic rent. HUD Handbook, 4350.3, REV-1, CHG-2, ¶¶ 7-4.A.6 and B.	Same as Project-based Section 8 (above).	Same as Project-based Section 8.	Same as Project-based Section 8.	Same as Project-based Section 8.

	Column 1	Column 2	Column 3	Column 4	Column 5
Type of Housing Program	Annual determination of family composition	Approval to add members to family	Interim reporting of family composition	Criminal background check at annual recertification	Criminal background check at interim recertification
Section 202	Required Annually. 24 C.F.R. § 891.610(g); 24 C.F.R. § 891.410(g).	Same as Project-based Section 8 (above).	Same as Project-based Section 8; Section 202 model lease; <i>see</i> HUD Handbook, 4350.3, REV-1, CHG-2, App 4-B and C, the model lease, ¶ 24; 24 C.F.R. § 891.610(g); 24 C.F.R. § 891.410(g) (if owner receives income information between annual recertification it must consult with family and make any appropriate adjustments).	Same as Project-based Section 8.	Same as Project-based Section 8.
Section 811	Required Annually. 24 C.F.R. § 891.410(g).	Same as Project-based Section 8 (above).	Same as Project-based Section 8 and Section 202. <i>See</i> HUD Handbook, 4350.3, REV-1, CHG-2, App 4-D the model lease, ¶ 24.	Same as Project-based Section 8.	Same as Project-based Section 8.
Rent Supplement	Required Annually. 12 U.S.C. § 1701s(e)(2).	Same as Project-based Section 8 (above).	Same as Project-based Section 8.	Same as Project-based Section 8.	Same as Project-based Section 8.
Rural Development	Required Annually. 7 C.F.R. § 3560.152(e).	There are no federal rules on this issue.	No interim reporting required. However, tenant required to report changes in status which may affect eligibility. 7 C.F.R. § 3560.152(e)(1).	There are no federal rules on this issue.	There are no federal rules on this issue.
LIHTC	Required Annually. 26 C.F.R. § 1.42-5(b)(vi).	Not required by federal law.	Not required by federal law.	Not required by federal law.	Not required by federal law.
HOME	Required Annually 24 C.F.R. §§ 92.203, 92.252(h).	There are no federal rules addressing this issue.	Income of all family members must be determined annually.	There are no federal rules on this issue.	There are no federal rules on this issue.
Shelter + Care	Required Annually. 24 C.F.R. § 582.310(b)(2).	There are no federal rules on this issue.	There are no federal rules addressing this issue.	There are no federal rules on this issue.	There are no federal rules on this issue.

	Column 1	Column 2	Column 3	Column 4	Column 5
Type of Housing Program	Annual determination of family composition	Approval to add members to family	Interim reporting of family composition	Criminal background check at annual recertification	Criminal background check at interim recertification
Supportive Housing	Required Annually. HUD Notice CPD 1996-03, ¶ 6; note that grantees are not required to charge rent when policy, if adopted, may affect policies regarding family composition.	There are no federal rules on this issue.	There are no federal rules on this issue.	There are no federal rules on this issue.	There are no federal rules on this issue.
HOPWA	No federal requirement, <i>but see</i> 24 C.F.R. § 574.310(d) rents are set in accordance with 24 C.F.R. 5.609 taking into account annual income.	There are no federal rules on this issue.	There are no federal rules on this issue.	There are no federal rules on this issue.	There are no federal rules on this issue.

APPENDIX 1

DESCRIPTION OF FEDERALLY ASSISTED HOUSING PROGRAMS FOR LOWER INCOME FAMILIES

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1.1 Introduction

Three of the largest federally-assisted housing programs that serve the lowest-income families are the Section 8 voucher program, the public housing program, and the project-based Section 8 program. Another large and growing program is the Low-Income Housing Tax Credit (LIHTC) program. In rural and some suburban areas, federally-subsidized Rural Development (RD) properties also provide affordable rental housing. In addition, many smaller programs that provide affordable housing receive federal support. This Appendix briefly reviews the key features of these programs. The main chapters in this Guide explain, to the extent that they exist, the specific rules or guidelines for each program as they affect admission and occupancy by individuals with a criminal record who are no longer incarcerated.

Occupancy in the federal housing programs is usually limited to tenants in particular income ranges, which are typically defined as a percentage of “Area Median Income” (AMI). As described below, the various programs may have different income limitations.¹ They will usually vary depending on the depth of subsidy that is made available to program participants. Certain income ranges have been given common labels that are applicable to most programs: 51 to 80 percent of AMI is “low-income,” 31 to 50 percent of AMI is “very low-income,” and 30 percent of AMI and below or the federal poverty level is “extremely low-income.”

1.2 Section 8 Housing Choice Voucher Program

The Department of Housing and Urban Development (HUD) allocates money for the Voucher program to public housing agencies (PHAs) so that they may provide low-income families with assistance for renting units in the private market. A voucher family finds a prospective unit, which the PHA inspects to ensure it meets quality standards and then determines whether the requested rent is reasonable. If the PHA approves the unit, the PHA and landlord enter into an assistance contract, under which the PHA makes monthly payments, for part or all of the rent, on behalf of the family. The family pays that portion of the rent that the PHA does not pay. All types of rental housing are eligible for the program. In some cases,

PHAs also permit the use of some vouchers for homeownership. A key feature of the program is portability: subject to certain limitations, a family can take the voucher and move to another unit in any jurisdiction in the United States where another PHA operates a voucher program.

The PHA determines which applicants receive voucher assistance. Eligibility is generally restricted to families whose income does not exceed 50 percent of the AMI. Applicants with incomes at or below 30 percent of AMI are targeted to receive three out of every four vouchers issued in any year by each PHA. Low-income families, with incomes between 51 percent and 80 percent of AMI, are eligible for the program if they also meet additional criteria such as being continuously assisted by a federally-assisted housing program or are displaced.

As explained in the main chapters of this Guide, PHAs screen otherwise eligible applicants under standards and procedures established by federal law and locally developed policies. Landlords who participate in the voucher program may have their own criteria for selecting tenants. Criminal activity of a household member can present grounds for rejection by either the PHA or the landlord.

Tenant contribution toward rent is generally set at 30 percent of the family’s adjusted income. However, each PHA establishes a “payment standard” (generally between 90 percent and 110 percent of the HUD-published Fair Market Rent (FMR) for the area in which the PHA operates) that serves as a limit on the subsidy that may be paid for participating families. If the approved rent for the unit exceeds the PHA’s payment standard, the family will pay the excess in addition to their 30 percent of income contribution. For families with little income, PHAs may also establish a minimum monthly rent contribution of up to \$50. For more information on how rents are set for this program, *see*:

<http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on program name).

Each PHA is governed by a board of commissioners, which in all but a very few cases must include a voucher program participant or public housing tenant. PHAs must develop annual and five-year plans that detail how they will address the housing needs of low-income tenants in the voucher program, as well as in the public housing program. These plans and supporting documents also set forth certain policies for admission, occupancy and termination that may affect participation by individuals with a criminal record. All

¹For information on the current income limits and median income for a particular area, *see*:
<http://www.huduser.org/datasets/il.html>.

approved PHA annual plans should be available on HUD's website,² and the supporting documents (e.g., the Section 8 Administrative Plan) may also be posted. Nationwide, there are 24 PHAs that participate in the Moving to Work (MTW) Demonstration program, which allows those PHAs to waive many requirements of federal law, including admission standards.

Good cause is required for evictions during the lease term. There is no federal statutory or regulatory good cause requirement when a tenant has reached the end of the lease term. However, some leases or local laws may impose additional good cause requirements on the landlord. As explained in the main chapters of this Guide, good cause for eviction can include criminal activity of a household member or guest.

PHAs may terminate a voucher under standards and procedures established by federal law and locally developed policies. As explained in the main chapters of this Guide, good cause for voucher termination by the PHA can include criminal activity of a household member or serious violations of the lease. In some situations, federal law requires the PHA to seek the termination of a voucher.

How to find Vouchers. To find where PHAs are located in a particular community *see* <http://www.hud.gov/offices/pih/systems/pic/haprofiles/>. For the number of voucher units authorized for the PHA *see*: <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>.

Basic References:

42 U.S.C. § 1437f(o)

24 C.F.R. pt. 982

24 C.F.R. pt. 5

HUD, HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, 7420.10G (April 2001), available at www.hudclips.org (click on Guidebooks) and <http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm>

HUD General Reference for Housing Choice Voucher Program:

<http://www.hud.gov/offices/pih/programs/hcv/>

For more extensive discussion of this program, the Moving to Work Program, and applicants' and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.). The HUD Moving to Work website is:

<http://www.hud.gov/offices/pih/programs/ph/mtw/>

²<http://www.hud.gov/offices/pih/pa/approval/>.

1.3 Section 8 Project-Based Vouchers

The project-based voucher program is a small subset of the Housing Choice Voucher program. PHAs choose to use some of their voucher funds for assistance to landlords who commit a certain number of units in their buildings to voucher tenants. The PHA contracts with landlords for up to 10 years and may provide for extension of the agreement in 5 year increments. PHAs may spend up to 20% of their annual voucher funding for project-based vouchers. A unique feature of this program is that a tenant participant who wants to move from the project-based voucher property can obtain a new voucher from the PHA that allows the tenant to relocate into the private rental market and continue to receive rental assistance. The landlord can then re-rent the unit to another voucher tenant using the project-based voucher assistance. No more than 25% of the units in a particular development may be rented under the project-based voucher program, unless the development serves the elderly or disabled or provides supportive services.

The PHA determines family eligibility and selects participants in accordance with the standards and procedures described above for the Housing Choice Voucher program. As in the regular voucher program, a project-based voucher landlord may use its own tenant selection criteria to screen applicants, although it can only rent to families referred by the PHA from its waiting list. Certain criminal activity of a household member presents potential grounds for rejection by either the PHA or the landlord.

Tenant contributions toward rents are set at 30 percent of the family's adjusted income, since the payment standard for units under the project-based voucher program equals the PHA-approved rent. For families with little income, PHAs may also establish a minimum monthly rent contribution of up to \$50.

Evictions and terminations are governed by the same standards and procedures as described above for the Housing Choice Voucher program.

HUD's Resident Characteristics Reports provides the number of project-based vouchers for each PHA, *see*:

<http://www.hud.gov/offices/pih/systems/pic/50058/rcr/>.

Basic References:

42 U.S.C. § 1437f(o)(13)

24 C.F.R. pt. 983

24 C.F.R. pt. 5

HUD, HOUSING CHOICE VOUCHER PROGRAM

AN AFFORDABLE HOME ON REENTRY

GUIDEBOOK, 7420.10G (April 2001), available at www.hudclips.org (click on Guidebooks) and <http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm>

HUD General Reference for Project-Based Vouchers: <http://www.hud.gov/offices/pih/programs/hcv/project.cfm>

For more extensive discussion of this program and applicants and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.4 Public Housing

HUD provides money to PHAs that own and operate public housing facilities, usually rental units. Some PHAs contract with private companies to manage their developments. A few public housing units are homeownership units.

Each PHA is governed by a board of commissioners, which in all but a very few cases must include a voucher program participant or a public housing tenant. PHAs must develop annual and five-year plans that detail how they will address the housing needs of low-income tenants in public housing, as well as in the voucher program. These plans and supporting documents also prescribe certain policies for admission, occupancy, and termination that affect participation by individuals with a criminal record. All approved PHA annual plans should be available on HUD's website:

(<http://www.hud.gov/offices/pih/pha/approved/>).

The supporting documents (the public housing Admission and Continued Occupancy Plan (ACOP)) may also be posted. Nationwide, there are 24 PHAs that participate in the Moving to Work (MTW) Demonstration program, which allows those PHAs to waive many requirements of federal law, including admission requirements.

The PHA determines which applicants will be admitted to public housing. To be eligible for public housing, applicants must have incomes at or below 80 percent of the AMI. At least half of the current public housing tenants nationwide, however, have incomes that do not exceed 30 percent of AMI. Applicants with incomes lower than 30 percent of AMI are targeted to receive two out of every five units that become available in any year by each PHA.

As explained in the main chapters of this Guide, PHAs screen otherwise eligible applicants under standards and procedures established by federal law and locally developed policies. Certain criminal activity of a household member presents potential

grounds for rejection.

A public housing tenant's rent is typically set at 30 percent of adjusted income, although the rent may be higher for some welfare recipients and families with unusually large deductions. PHAs may charge a minimum monthly rent of up to \$50 for those tenants with little or no income.

Good cause is required for evicting tenants whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find public housing. To find where PHAs are located in a particular community *see*:

<http://www.hud.gov/offices/pih/systems/pic/haprofiles/>. For the number of public housing units managed by the PHA *see*:

<https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>.

Basic References:

42 U.S.C. §§ 1437 to 1437e

24 C.F.R. pt. 5 and pts. 900-972

24 C.F.R. pt. 966 (lease and grievance)

24 C.F.R. pt. 960 (admission and occupancy)

HUD, Public Housing Occupancy Guide-book (June 2003), available at:

<http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>

HUD General Reference for Public Housing: <http://www.hud.gov/offices/pih/programs/ph/index.cfm>

For a more extensive discussion of this program, the Moving to Work program and applicants and tenants' rights, *see* National Housing Law Project, Hud Housing Programs: Tenants' Rights (3d ed. 2004 and 2006-2007 Supp.).

1.5 Federally-Assisted Multifamily Rental Housing Programs

Multifamily housing assisted or subsidized by the federal government is usually privately owned by a nonprofit organization, a for-profit entity, or occasionally by a public agency. Various subsidy programs fall under the jurisdictions of HUD, the Department of Agriculture (USDA, Rural Development/Rural Housing Service), the Treasury Department's Internal Revenue Service, or designated agencies or contractors working under their regulatory supervision.

In these developments, rents charged to tenants will depend upon the type of subsidy made available through the owner. Some developments receive a "shallow" subsidy, typically in the form of a reduced

interest rate on the mortgage loan, or a capital contribution towards the cost of construction through the low income housing tax credit or another program. Rents in these development are usually below-market, reflecting the reduced interest rate or capital subsidy. These units are typically not affordable to the lowest-income families. For other developments, or sometimes some units in the same development, the subsidy is more substantial, taking the form of rental assistance to bridge the gap between the rent for the unit and a tenant contribution set at 30 percent of adjusted income. Most prominent among these “deep subsidies” is the HUD project-based Section 8 program, which may be used in either HUD or RD multifamily properties, or the RD Rental Assistance program, which is only available in RD properties.

Each program has its own eligibility and tenant selection rules, although private owners make these decisions pursuant to standards and procedures largely governed by federal law or policy guidelines. Furthermore, admission to some of these developments may be restricted to certain classes of individuals and their families. Thus, a development might be restricted to the elderly, people with disabilities, both elderly and people with disabilities, individuals with AIDS or related diseases, or to persons who are homeless. Subsidized developments may have units with one set of bedroom sizes or a range of bedroom sizes. Generally units are assigned on the basis of two persons per bedroom.

1.5.1 How to Find Federally Assisted Multi-family Rental Housing

If an applicant is looking for the name and address of a federally-subsidized multifamily development within a particular area, that information is available on the HUD website for most properties and most housing programs. *See:*

<http://www.hud.gov/renting/local.cfm>.³ From this HUD web page, there is information for each state about both the location and contact information for project-based Section 8 developments (in addition to contact information for PHAs administering either public housing or vouchers). There are also links on the state pages to the USDA web site for the location and contact information for RD multifamily units, another HUD web page for the location of Low-Income Housing Tax Credit (LIHTC) properties, the

state housing finance agency, independent living centers, housing counseling agencies and other resources for renters and applicants.

For a list of developments serving the elderly and people with disabilities, including project-based Section 8 and other properties with HUD-insured mortgages, check HUD’s Multi-family Inventory of Units for the Elderly and Persons with Disabilities, available at:

<http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>. The non-Section 8 units listed may not be as affordable as the Section 8 units, but the rents will generally be below market. Another HUD website lists Section 202 properties serving these populations:

<http://www.hud.gov/offices/hsg/mfh/map/actloan/activesec202loans.cfm>.

When using the HUD website to locate developments, elderly and disabled families should check both the “local renting information” or “low rent apartment search” and the Multifamily Inventory of Units for the Elderly and Persons with Disabilities. This is because the latter inventory does not list public housing, LIHTC or RD units.

The Multifamily Inventory of Units for the Elderly and Persons with Disabilities also lists units for families. These family units may not have Section 8 project-based assistance, but the rents may still be below market. For this reason, a family that does not qualify as elderly or disabled should also check both the Multifamily Inventory of Units for the Elderly and Persons with Disabilities and the “local renting information.”

Other HUD websites listing participating properties for the programs described in the remainder of this Appendix, are included at the end of each program description. Some HUD-assisted units, such as those under the HOME or Shelter Plus Care programs, are not listed on any of these websites. Information on how to find these units is provided below after each program description.

The following sections provide basic information regarding the different types of privately owned, federally-assisted multifamily housing (other than public housing), for which the subsidy is project-based (*i.e.*, the subsidy is tied to the unit and tenants cannot take the subsidy with them if they move). These programs are often referred to by a number (*e.g.*, Section 8, Section 236, etc.), which usually refers to a section of the relevant housing act (*e.g.*, Section 8 of the United States Housing Act of 1937 or Section 236 of the National Housing Act).

Throughout this Guide, we have used the term

³This site can be reached from the HUD home page by clicking on “information for tenants” and then clicking on “local renting information.”

“federally-assisted” housing as that term is defined and used with respect to many of the statutory provisions relating to criminal acts and admission policies.⁴ There are times, however, when, for ease of reference to multiple programs, we have used the generic terms “HUD-assisted,” “HUD-subsidized” or “federally-subsidized” housing to refer to categories of the federally-assisted programs, including housing assisted by USDA and the LIHTC programs. Because of discrete variations in the rules as well as their coverage, advocates should look carefully at the discussion to determine which housing is covered.

1.6 Section 221(D)(3) Below-Market Interest Rate (BMIR) Program

Created in 1961, this program is the oldest federally assisted low- and moderate income family housing program of the Federal Housing Administration’s (FHA). Developments financed under the program, now regulated by HUD, were subsidized by the provision of a below-market interest rate (BMIR) on the original mortgage loan for the purpose of constructing or substantially rehabilitating a multifamily rental or cooperative developments. The purpose of the BMIR subsidy mechanism was to reduce the overall cost of operating the development, and thus permit lower rents. Over time, the primary factor maintaining the affordability of these developments has been HUD’s limiting rent increases to costs required to cover only demonstrated operating cost increases. As a result, rents in these developments may now be considerably lower than market rents. Since about 1970, no additional developments were developed under this program and older units are now being lost because loans have fully matured or owners are prepaying their mortgage loans.

There are also Section 221 market interest rate developments, where HUD insures the loan but provides no additional mortgage subsidy. The rents for these developments may have some degree of affordability because, over the years, rents may have been restricted by a regulatory agreement.

In Section 221(d)(3) BMIR developments without subsidies other than the reduced interest rate, eligible applicants must have income at or below 95 percent of

AMI. Admission decisions are made by the owner or manager pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for the denial of admissions.

The rent in Section 221(d)(3) developments is approved by HUD based upon the number of bedrooms in the unit and the cost of operating the unit with the loan subsidy. Rents are flat rents, *i.e.*, they are the same for equal sized units and, unless some other subsidies are available, are not based upon a percentage of the family’s income. Some higher-income tenants pay a slightly higher rent, 110 percent of the BMIR rent. The rents in these developments can only be increased upon HUD’s approval of demonstrated operating cost increases. For more information about the rents in a Section 221(d)(3) BMIR development, *see* <http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on the program name).

In any Section 221(d)(3) BMIR or market-rate development, some or all units may also receive additional “deep subsidy” rental assistance, such as project-based Section 8 or rent supplement, which makes the units affordable to the lowest-income families by reducing tenant rent contributions to 30 percent of the family’s adjusted income. These additional subsidy programs are discussed below.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find Section 221(d)(3) BMIR properties. HUD maintains a list of these developments at: <http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>.

Basic References:

- 12 U.S.C. §§ 1715l(d)(3) and (d)(5).
- 24 C.F.R. pt. 221 Low Cost and Moderate Income Mortgage Insurance.
- 24 C.F.R. pt. 247 (Evictions).
- HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.
- HUD website with more information about this program: <http://www.hud.gov/offices/hsg/mfh/progdesc/rentcophsg221d3n4.cfm>.
- For more extensive discussion of this program and

⁴42 U.S.C.A. § 13664(a)(2) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 07-05-07); 24 C.F.R. § 5.100 (2007) (reciting a long list of programs covered by part 5); 24 C.F.R. § 5.850 (2007) (establishing exceptions from rules concerning admission and eviction for alleged criminal activity from public housing, vouchers and RD properties, which have their own program-specific rules).

applicants' and tenants' rights, *see* National Housing Law Project, *Hud Housing Programs: Tenants' Rights* (3d ed. 2004 and 2006-2007 Supp.).

1.7 Section 236 Rental Program

This program was created in 1968. These developments, financed by private institutions and regulated by HUD, were subsidized by interest reduction payments that reduced the original loan interest rate for the purpose of constructing or substantially rehabilitating multifamily rental or cooperative developments. The interest subsidy mechanism reduced overall costs, and thus permitted lower rents. Over time, the primary factor maintaining affordability has been HUD's limiting rent increases to demonstrated increased operating costs. Thus, rents in these developments may now be considerably lower than market rents. No new development have been constructed under the program since about 1980 and older developments are now being lost because the loan term has matured or owners are prepaying their loans.

Eligible applicants must have incomes that do not exceed 80 percent of AMI. Admission decisions are made by the owner or manager pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Under the Section 236 program, there is a minimum "basic" rent for each unit, which is the amount needed to operate the development with an interest rate of one percent. This flat basic rent is approved by HUD and can only be increased as operating costs increase. Relatively higher-income families may pay more than the basic rent up to the so-called "Section 236 market rent," which is the rent without the interest subsidy (usually about \$50-\$70 per unit higher than the basic rent). For more information on how rents are set, *see*:

<http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on program name).

In any Section 236 development, some or all units may also receive additional "deep subsidy" assistance, such as project-based Section 8, Section 236 Rental Assistance, or rent supplements, which make the units affordable to the lowest-income families by reducing tenant rent contributions to about 30 percent of the family's adjusted income. These additional subsidy programs are discussed below.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for

eviction can include criminal activity of a household member or guest.

How to find Section 236 properties. HUD maintains a list, *see*:

<http://www.hud.gov/offices/hsg/mfh/map/actloan/activesec236proj.cfm> and

<http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>.

Basic References:

12 U.S.C. § 1715z-1.

24 C.F.R. pt. 236 Mortgage Insurance and Interest Reduction Payment for Rental Projects.

24 C.F.R. pt. 247 (Evictions).

HUD Handbook 4350.3, OCCUPANCY

REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.

For more extensive discussion of this program and applicants' and tenants' rights, *see* National Housing Law Project, *Hud Housing Programs: Tenants' Rights* (3d ed. 2004 and 2006-2007 Supp.).

1.8 Section 202 Program for the Elderly and People with Disabilities

These developments are subsidized and regulated by HUD. There are two types of Section 202 housing, depending on the date of the original loan (roughly pre- and post-1991). Under the original Section 202 program (prior to 1991), HUD made direct low-interest loans to nonprofits to develop housing for low-income elderly and disabled families. These developments are subject to rules and regulations similar to those applicable to the Section 221(d)(3) BMIR and Section 236 programs.

Because the Section 202 low-interest loan was insufficient to make the units affordable to the lowest-income families, some of these Section 202 developments also received rent supplement or project-based Section 8 assistance (Section 8 new construction or Section 8 additional assistance (Loan Management Set Aside program)). These Section 202/8 developments remain subject to both the Section 202 and the relevant Section 8 regulations.

Eligibility for initial occupancy in older Section 202 developments is limited to families with a head of household or a spouse who is elderly (defined as a person who is at least 62 years of age) or has a disability. Families are eligible if their income is not greater than 80 percent of AMI, although units in older Section 202 developments that are also receiving Section 8 assistance are further restricted to very low-income and extremely low-income families under

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additional targeting rules, discussed below under project-based Section 8.

Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the body of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Rents for older Section 202 developments that have no additional subsidies are budget-based flat rents (*i.e.* not adjusted in accordance with tenant income) and can increase only upon HUD approval for demonstrated operating cost increases. Tenant rent contributions for developments that also have Section 8 subsidy (Section 202/8) are set at 30 percent of adjusted household income. Some older Section 202 developments, which were developed in the late 1980s for persons with disabilities, have a Project Assistance Contract (PAC, also called Section 162), which also reduces the tenant's rent contribution to 30 percent of adjusted income.

The second type of Section 202 housing was developed in 1990 under Section 202 Supportive Housing for the Elderly. (The Section 811 program--Supportive Housing for People with Disabilities--which was created at the same time is discussed below.) The financing mechanism for this new Section 202 program changed from a loan to a capital advance, and the program also added special rental assistance for tenants, called the Project Rental Assistance Contract (PRAC).

Families are eligible for Section 202 Supportive Housing if their income is not greater than 50 percent of AMI. At initial occupancy, eligibility is limited to families with one or more elderly individuals.

Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

From the tenant's perspective, the Section 202 PRAC works just like project-based Section 8. Tenants pay rent contributions of 30 percent of adjusted family income. Limited funding continues to be available for building additional developments under the new Section 202 program.

For more information on how rents are set for the Section 202/162 Project Assistance Contract (PAC) and Section 202/811 Project Rental Assistance Contract (PRAC) units, *see*

<http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on the program name).

Good cause is required for evicting tenants from any Section 202 property, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find Section 202 properties. HUD maintains a list in a particular community, *see*:

<http://www.hud.gov/offices/hsg/mfh/map/actloan/activsec202loans.cfm> and

<http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>.

Basic References:

For the pre-1990 Section 202 program:

Section 202 of the Housing Act of 1959, Pub L. No. 86-372, § 202, 73 Stat. 667 (1959).

24 C.F.R. pt. 891 subpt. E.

24 C.F.R. pt. 247 Evictions (also made applicable by 24 C.F.R. §§ 891.630 and 891.770).

HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.

For the post-1990 Section 202 program

12 U.S.C. § 1701q.

24 C.F.R. pt. 891 Subparts A, B and D.

24 C.F.R. pt. 247 Evictions (also made applicable by 24 C.F.R. § 891.430).

HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.

HUD website with basic information about Section 202 program, *see*:

<http://www.hud.gov/offices/hsg/mfh/progdesc/eld202.cfm>.

For more extensive discussion of these programs and applicants' and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.9 Section 811 Program for Supportive Housing for Persons with Disabilities

Section 811 developments are subsidized and regulated by HUD, which provides interest-free capital advances to nonprofit sponsors to develop supportive housing for persons with disabilities. These properties also receive a Project Rental Assistance Contract (PRAC), which is identical to that provided with the new Section 202 program (above).

Eligibility for Section 811 Supportive Housing is limited to very low-income households, with incomes no greater than 50 percent of AMI. An eligible family must have one adult with a disability, such as a physical disability, developmental disability or chronic mental illness. With HUD approval, an owner can limit occupancy to persons with similar disabilities. However, the owner must permit occupancy by any qualified person with a disability who could benefit from the housing and/or services regardless of the type of disability. Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

From the tenant's perspective, the PRACs for the Section 811 program work just like project-based Section 8. Tenants pay rent contributions of 30 percent of adjusted family income. Limited funding continues to be available for building additional developments under the Section 811 program.

For more information on how rents are set for this program, *see:*

<http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm>

(Click on program name).

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find Section 811 housing. HUD maintains a list of developments by state with information about whether the development is elderly, disabled or both, *see:*

<http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>.

Basic References:

42 U.S.C. § 8013.

24 C.F.R. pt. 891 subpt. D.

24 C.F.R. pt. 247 Evictions (made applicable by 24 C.F.R. § 891.430).

HUD Handbook 4571.2, Section 811 Supportive Housing for Persons With Disabilities.

HUD website with basic information about

Section 811 program, *see:*

<http://www.hud.gov/offices/hsg/mfh/progdesc/disab811.cfm>.

1.10 Project-Based Rental Assistance Programs

Some privately owned properties with HUD-insured or subsidized mortgages or direct HUD loans also have additional rental assistance that makes some or all of the units more affordable to very low-income tenants. The most common rental assistance program is the project-based Section 8 program. Some HUD units still have Section 236 Rental Assistance Program (RAP) or rent supplement, and some Rural Development units have either project-based Section 8 or RD Rental Assistance. The following briefly explains these rental assistance programs. The Project-Based Section 8 program may also be a stand-alone program. It does not have to be used with a federal insured or guaranteed mortgage.

1.10.1 Project-Based Section 8 Programs

The project-based Section 8 rental assistance programs provide rent subsidies for some or all units in a development for a specific period of time. The assistance covers the difference between the approved unit rents and tenants' income-based rent contributions. These subsidies were provided in exchange for the owners' commitment to rent only to eligible low-income tenants and charge only HUD-approved rents for the term of the Section 8 contract.

Historically there have been many project-based Section 8 programs, including the New Construction program, the Substantial Rehabilitation program, the Additional Assistance for Projects with HUD-insured and HUD-Held Mortgages (Loan Management Set-Aside) program, and Additional Assistance for the Disposition of HUD-Owned Projects. There were also specific set-asides for project-based Section 8 funding to be used in conjunction with state-financed properties, Section 202 properties, and properties developed with Rural Development Section 515 loans. All of these programs are generally referred to as project-based Section 8 housing.

As its name implies, project-based Section 8 is a rental subsidy that is attached to a specific building and the tenant cannot move with the subsidy. In general, for most project-based Section 8 developments, HUD initially entered into a contract with the owner for a period of five to 40 years. In some cases, the contract is between a state housing agency or another public housing agency and the owner. HUD is not entering into any new project-based Section 8 contracts but is renewing existing contracts at the request of owners, usually for a year at

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a time or for a longer period, but subject to annual appropriations.

Under current rules, absent certain exceptions, families are eligible for project-based Section 8 if their income at initial occupancy is less than 50 percent of AMI, although owners must also provide two out of every five units that become available in any year to extremely low-income families (less than 30 percent of AMI).

Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Tenant contribution toward rent is generally set at 30 percent of the family's adjusted income. For families with little income, HUD has set a minimum monthly rent contribution of \$50. For more information on how rents are set for this program, *see*:

<http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm>
(click on program name).

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find a project-based Section 8 development. HUD maintains a list by state, city, county or zip code or by name of the development, *see*

<http://www.hud.gov/apps/section8/index.cfm>.

Section 8 project-based developments are now primarily administered by a Performance-Based Contract Administrator (PB-CA) under contract with HUD. The list of developments covered by a PB-CA is found at:

http://www.hud.gov/offices/hsg/mfh/rfp/ca_assigned.cfm.

Basic References:

- 42 U.S.C. § 1437f.
- 24 C.F.R. pt. 880 New Construction.
- 24 C.F.R. pt. 881 Substantial Rehabilitation.
- 24 C.F.R. pt. 883 Section 8 Housing Assistance Payments Program—State Housing Agency.
- 24 C.F.R. pt. 884 Section 8 Housing Assistance Payments Program, Section 515 Rural Rental Housing Projects.
- 24 C.F.R. pt. 886 Section 8 Housing Assistance Payments Program—Special Allocations.
- 24 C.F.R. pt. 247 Evictions.
- HUD Handbook 4350.3, Occupancy Requirements for

Subsidized Multifamily Housing Programs.

For more extensive discussion of this program and applicants and tenants' rights, *see* National Housing Law Project, HUD Housing Programs: Tenants' Rights (3d ed. 2004 and 2006-2007 Supp.).

1.10.2 Section 236 Rental Assistance Program (RAP)

Some Section 236 developments have a Section 236 RAP contract for up to 20% of the units. Eligibility and tenant selection are the same as for the Section 236 program, above.

The purpose of the Section 236 RAP contract is to reduce the rent paid by the family to 30 percent of adjusted family income. For more information on how rents are set for this program, *see*:

<http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm>
(click on program name).

Since the 1980s, almost all Section 236 RAP contracts have been converted to project-based Section 8, and HUD is not entering into any new Section 236 RAP contracts.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

Basic References:

- 12 U.S.C. § 1715z-1(f)(2).
- 24 C.F.R. pt. 236, Subpt. D, Rental Assistance Payments.
- 24 C.F.R. pt. 247 Evictions.
- HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.

For more extensive discussion of this program and applicants and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Suppl.).

1.10.3 Rent Supplement Program

Some HUD properties (especially Section 221(d)(3), Section 236, and old Section 202) have rent supplement contracts to make the units more affordable to very low-income tenants.

Families are eligible for rent supplement if their income at initial occupancy is less than 80 percent of AMI. Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a

household member presents potential grounds for rejection.

The purpose of the rent supplement contract is to reduce the rent paid by the family to about 30 percent of adjusted family income. For more information on how rents are set for this program, *see*:

<http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on program name).

Most rent supplement contracts have been converted to project-based Section 8, and HUD is not entering into any new rent supplement contracts.

Good cause is required for evicting tenants, whether during Some HUD properties (especially Section 221(d)(3), Section 236, and old Section 202) have rent supplement contracts to make the units more affordable to very low-income tenants.

Families are eligible for rent supplement if their income at initial occupancy is less than 80 percent of AMI. Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

The purpose of the rent supplement contract is to reduce the rent paid by the family to about 30 percent of adjusted family income. For more information on how rents are set for this program, *see*:

<http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on program name).

Most rent supplement contracts have been converted to project-based Section 8, and HUD is not entering into any new rent supplement contracts.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

Basic References:

12 U.S.C. § 1701s.

24 C.F.R. § 200.1302 (savings clause referencing the applicable rent supplement regulations).

24 C.F.R. pt. 247 Evictions.

HUD Handbook 4350.3, Occupancy Requirements for Subsidized Multifamily Housing Programs.

For more extensive discussion of this program and applicants and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.11 Section 8 Moderate Rehabilitation Program

Historically, PHAs administered the Section 8 Moderate Rehabilitation (Mod Rehab) program to provide rental assistance to tenants in privately-owned developments. The purpose of the program was to provide assistance sufficient to repair substandard housing in local communities for low- and very low-income

families. The subsidy is rental assistance, not a loan interest or capital subsidy.

These units were initially under 15-year contract terms that have now expired and are now eligible for annual renewal contracts.

Under current rules, absent certain exceptions, families are eligible for Section 8 Mod Rehab if their income at initial occupancy is less than 80 percent of AMI.

After an initial determination of eligibility by the public housing authority, families are referred to the owner, who then makes the actual admission decision, pursuant to a written tenant selection policy and procedures, hopefully, developed by the owner. As explained in the main chapters of this Guide, certain criminal activity of a household member may make the applicant ineligible and presents potential grounds for rejection.

Like other forms of Section 8, tenant rent contributions are set at 30 percent of adjusted family income. For families with little income, the PHA may set a minimum monthly rent contribution of up to \$50.

HUD reports state that there are currently approximately 29,000 non-single room occupancy moderate rehabilitation units nationwide.⁵

Starting in 1990, Congress limited funding for this program to rental assistance for single room occupancy (SRO) developments rehabilitated for homeless individuals.⁶ Typically, but not always, an SRO unit does not have either a bathroom and/or a kitchen in the individual unit. Public housing authorities and private nonprofit organizations may apply for funding for the Mod Rehab SRO program. Funding for the program continues to be available for new developments.

Homeless individuals must be provided first priority for this housing. Applicant screening is dependent upon the mission of the SRO project owner and allows discretion to managers to offer housing assistance in

⁵See HUD Resident Characteristics Report available at <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>

⁶There are approximately 6,000 nationwide. *Id.*

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the case of prior convictions and when housing might not typically be offered under the other Section 8 programs.

Recipients of Moderate Rehabilitation SRO funding, other than PHAs, must have one or more homeless or formerly homeless individuals on the board of directors or other similar policy making entity of the recipient or otherwise make arrangements to consult with such homeless or formerly homeless individuals.

Another HUD program, the Shelter Plus Care (S+C) program, although not technically a Section 8 Mod Rehab program, also contains a SRO moderate rehabilitation program for adults who are homeless and have a disability. The S+C program is discussed in detail below. Funding continues to be available for the S+C SRO program.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find Section 8 Moderate Rehabilitation housing. The local housing authority should have a list or know where the housing that it administers is located.⁷ The list may be an attachment to the approved local public housing authority (PHA) plan, available on HUD's website:

(<http://www.hud.gov/offices/pih/pha/approved/>). In addition, the state or local government entity that received these funds, if different from a PHA, should have a list of or know where these properties are located.

For units that are available for the homeless, such as Section 8 Mod Rehab SRO and S+C SRO housing, the location of the units should be available from local social services agencies, homeless service groups, and continuum of care coordinators. For more information about how to find these groups, *see* the discussion below under housing for the homeless and S+C.

Basic References:

- 42 U.S.C. § 1437f(e)(2) (authority for Section 8 Moderate Rehabilitation that was repealed in 1990).
- 42 U.S.C. § 1437f(n) (authority for Section 8 SRO housing that was repealed in 1998).
- 42 U.S.C. § 11401 (SRO housing for the homeless).
- 24 C.F.R. pt. 882 Section 8 Moderate Rehabilitation Programs.
- 24 C.F.R. § 882.514 (PHA and owner roles in tenant selection).

⁷HUD's website provides information on the number, but not the location, of Section 8 Moderate Rehabilitation units by PHA.

24 C.F.R. pt. 247 and § 882.511 Evictions.

Current funding for the Section 8 SRO program and the S+C SRO program is competitive by Notice of Funding Availability (NOFA), *see, e.g.*, 70 Fed. Reg. 14,273 (Mar. 21, 2005). The NOFAs may have additional information regarding eligibility or tenant screening.

HUD website with basic information about the SRO program, *see*:
<http://www.hud.gov/offices/cpd/homeless/programs/sro/index.cfm>.

Housing Homeless Individuals Through HUD's Section 8 Moderate Rehabilitation Single Room Occupancy (SRO) Program (March 2001), available at:
<http://www.hud.gov/offices/cpd/homeless/library/sro/finalguidepdf.pdf>.

1.12 Home Investment Partnership Program

HUD provides HOME funds to state and local governments to develop multifamily rental housing or homeownership units, or to provide tenant-based rental assistance. State or local government units contract with nonprofit or for-profit entities to develop the housing.

Eligibility for rental properties and rental assistance is restricted to families whose income at move-in does not exceed 80 percent of AMI and 90 percent of the tenants must have incomes no more than 60 percent of AMI at initial occupancy. For rental developments with five or more units, 20 percent of the units are reserved for families with incomes at or below 50 percent of AMI. Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Rents for HOME rental units are set by formula. The maximum rent is the lesser of 30 percent of 65 percent of AMI or the HUD-published Fair Market Rents for the area. Rents for any units required to be set aside for very low-income families are set at either of 30 percent of income or 30 percent of 50 percent of AMI. Without an additional rent subsidy, rents for most HOME rental units are not affordable to the lowest income families. Additional rent subsidies could come from HOME funds or Section 8 vouchers. Owners of HOME-funded rental properties cannot discriminate against Section 8 voucher applicants.

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HOME funds may also be combined with tax credits or project-based vouchers.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

HOME funding and restrictions on the development generally run from five to 20 years, depending upon the amount of funding. HOME funds used for rental assistance are initially limited to two years, but may be extended. Congress is still providing new funds for the development of units under the HOME program.

How to find HOME-funded developments. The state or local government agency that received these funds should have a list of developments or know where these properties are located.

Basic References:

42 U.S.C. §§ 12,741-12,756.

24 C.F.R. pt. 92.

24 C.F.R. §§ 92.203 (income determinations), 92.253(c) (good cause eviction protections), 92.253(d) (tenant selection), 92.351 (affirmative marketing; minority outreach).

Building HOME: A HOME Program Primer, a booklet produced by HUD, available at:

<http://www.hud.gov/offices/cpd/affordablehousing/library/building/index.cfm>.

HUD website with basic information about this program:

<http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm>.

For more extensive discussion of this program and applicants and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.13 Section 17 Rental Rehabilitation Program

Between 1983 and 1990, HUD provided grants to state and local governments to allow for the moderate rehabilitation of multifamily developments primarily in low-income neighborhoods. A condition of the grants was that for at least ten years, between 50 percent and 100 percent of the units were to be occupied by low-income families. Local governments may have added additional conditions and extended the term of any obligations.

Eligibility for these properties is restricted to families whose income at move-in does not exceed 80 percent of AMI. Admission decisions are made by the owner or manager, although there is no federal

requirement for a written tenant selection policy or procedures. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Rent for these units is considered affordable if it does not exceed the HUD-published Fair Market Rent (FMR) for the area. In general, the rent for these units is not affordable to the lowest income families. Tenants may use vouchers to reside in these units. This program no longer receives new funding for additional units. There is no federal effort to preserve or extend the contracts on these units.

How to find Rental Rehabilitation units: State and local government agencies that received these funds should be able to identify the location of these developments.

Basic References:

42 U.S.C.A. § 1437o note.

24 C.F.R. pt. 511.

1.14 Section 17 Housing Development Program (HODAG)

Between 1983 and 1990 HUD provided grants to state and local governments to make 20-year grants, loans and interest reduction payments for the construction or rehabilitation of multifamily units. Twenty percent of the units in each development had to be set aside for low-income families. Local governments may have added additional conditions and extended the term of any obligations.

Eligibility for these units is restricted to families whose income at move-in does not exceed 80 percent of AMI. Admission decisions are made by the owner or manager, although there is no federal requirement for a written tenant selection policy or procedures. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Rents for the low-income units may not exceed 30 percent of the income for a family at or below 50 percent of AMI. In general, the rent for these units is not affordable to the lowest income families. Tenants may use vouchers to reside in these units. This program no longer receives funding for additional units. There is no federal effort to preserve or extend the contracts on these units.

How to find HoDAG units. The state and local government agencies that received these funds should be able to identify the location of these developments.

Basic References:

42 U.S.C. § 1437o note.
24 C.F.R. pt. 850.

1.15 Low-Income Housing Tax Credit Program (LIHTC)

The Low-Income Housing Tax Credit (LIHTC) program is currently the primary production program for affordable housing for low-income people. Tax credits are divided among the states based upon population. Owners of LIHTC developments are usually limited partnerships with large corporate investors, who gain the benefits of the tax credits, acting as limited partners. General partners may include nonprofits.

The LIHTC program is administered by the Internal Revenue Service (IRS) of the Department of Treasury and state housing agencies, often called state housing finance or tax credit agencies. The state housing agencies develop a Qualified Allocation Plan (QAP), which describes priorities and standards for awarding tax credits within the state. Some state agencies also adopt rules or guidelines to govern operation of the properties, including tenant and applicant rights.

In exchange for the tax credits, the owner must agree to rent a certain number of units to income-eligible tenants for a fixed rent. The owner has two choices. At least 20 percent of the units must be initially occupied by tenants with incomes no higher than 50 percent of AMI or at least 40 percent of the units must be occupied by tenants with incomes no higher than 60 percent of AMI. Developments may also have a higher percentage of restricted units. Eligibility for the restricted units in these properties is limited to families whose income at move-in does not exceed the designated percentage of AMI. Admission decisions are made by the owner or manager. Although there is no federal requirement for a written tenant selection policy, such basic fairness protections could be required by the state tax credit allocation agency. As explained in the main chapters of this Guide, certain criminal activity

of a household member presents potential grounds for rejection.

Under federal law, rents for restricted units are set at no more than 30 percent of either 50 percent or 60 percent of AMI, depending upon the occupancy restriction selected. States may also impose requirements for occupancy and rents targeted to even lower-income people (e.g., 40 percent of AMI, and rents at 30 percent of that amount) as a condition of receiving tax credits. The applicable rent and

occupancy restrictions are set forth in a recorded regulatory agreement.

The rents for LIHTC-restricted units can increase as the AMI increases. Generally these units retain these rent restrictions for at least 30 years, or such longer term established under the regulatory agreement. Without additional subsidies, these rents are not affordable to the lowest income families. The LIHTC program can be used with HOME or CDBG funds, project-based vouchers or project-based Section 8. Moreover, the owner cannot discriminate against an applicant with a Section 8 voucher.

Tenants may be evicted from LIHTC units only for good cause. There is little case law defining good cause in the LIHTC context. Nevertheless, good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction most likely can include criminal activity of a household member or guest.

How to find LIHTC properties. HUD maintains a list of LIHTC properties by state at <http://lihtc.huduser.org/> (if needed, make sure to check the appropriate boxes to get bedroom size and owner contact information). Some state housing tax credit agencies also have website lists with the names and addresses of LIHTC properties within the state.

Basic References:

26 C.F.R. § 1.42.
26 U.S.C. § 42(h)(6)(B)(iv) (good cause eviction).
For general information about the LIHTC program, see <http://lihtc.huduser.org/>. In some states, the tax credit allocation agency has a website with information about the program.

1.16 Rural Development Housing

1.16.1 Section 515 Rural Rental Housing Program

Rural Development (RD), an agency within the United States Department of Agriculture (USDA), makes or guarantees market-rate loans for up to 50 years to public, private and nonprofit groups or individuals to provide rental or cooperative housing for low- and moderate-income families. Loan funds may be used to construct or rehabilitate housing. Housing constructed for elderly or disabled persons or families may include congregate or group homes.

Families are eligible for these properties if their income, at initial occupancy, is less than 80 percent of AMI, although families with slightly higher “moderate” incomes (no more than \$5,500 above the

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low-income limit) may also be eligible. Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under RD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Two forms of additional subsidy make rents in Section 515 developments affordable. The first, interest credit, is a shallow subsidy, available to limited-profit or non-profit owners. The interest credit reduces the interest rate for the loan to 3 percent or 1 percent. These interest credit subsidies are similar to the HUD Section 221(d)(3) BMIR and Section 236 programs.

The rents in 3 percent interest credit developments are approved by RD, based upon bedroom size, and do not vary with tenant income. The rent structure for 1 percent interest credit developments is slightly more complicated, like the HUD Section 236 program. The owner first sets the basic rent and market rent. The basic rent is based on the cost of operating the project with a loan amortized at a 1 percent interest rate, and the market rent is based upon the same operating expenses with the mortgage loan amortized at the RD market-rate in effect at the time the loan was made. Tenants pay the greater of the basic rent or 30 percent of income, up to the market rent. As with the HUD interest subsidy programs, the RD interest credit is not sufficient to make the units affordable to the lowest income families. Some Section 515 developments receive a second subsidy, RD Rental Assistance, which subsidizes the difference between the basic rent and 30 percent of tenant income, for some or all of the units. The Rental Assistance contracts initially were for five or 20 years; they have since been reduced to five-, four- and two-year terms and most recently to one-year terms. Some Section 515 developments also have project-based Section 8 contracts. Section 515 loans with RD Rental Assistance are still available for new developments. As owners prepay or retire their loans, the former Section 515 developments become unaffordable to low- and very low-income families because all the subsidies are terminated. Residents are, however, eligible for RD vouchers.

Good cause is required for evicting tenants from RD Section 515 units, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find RD Section 515 housing. The USDA website contains a list of multi-family developments assisted by the RD program. The list can be searched

by state and county. *See:*

http://rdmfhrentals.sc.egov.usda.gov/RDMFHRentals/select_state.jsp.

Basic References:

42 U.S.C. § 1485.

42 U.S.C. § 1490a(a)(2) (Rental Assistance authorization).

7 C.F.R. pt. 3560 (Section 515 regulations).

7 C.F.R. pt. 3560 Subpt. F (Rental Assistance).

24 C.F.R. § 884 (Section 8 for Rural Rental Housing Projects).

RD, MFH Asset Management Handbook, 2-3560, § 6.37(c) (2007), available at <http://www.rurdev.usda.gov/regs/hblist.html>.

USDA website with basic information about Rural Rental Housing program, the Guaranteed Rental Housing Program and the Rental Assistance program:

http://www.rurdev.usda.gov/rhs/common/program_info.htm#MFH

1.16.2 Farm Labor Housing: Section 514 and Section 516

The Rural Development agency has two housing programs to assist in the construction of rental housing for migrant, seasonal, and year-round farm laborers: Section 514, a 1 percent loan program, and Section 516, a grant program.⁸

Farmworker families are eligible for these properties if their income at initial occupancy is no more than \$5,500 above the low-income limit, although eligibility for projects receiving a Section 516 grant is restricted to low-income tenants (less than 80 percent of AMI). Eligibility is further restricted to households where the income of the lease holder is primarily from farm labor.

Although RD Farm Labor Housing must be used for farmworkers during the working season, it may also be used to house homeless individuals and their families on an emergency temporary basis during the off-season. Moreover, with RD permission, it can be used to house non-farm labor households if there

⁸Most farm labor housing is owned and operated by farmers for the benefit of their own farmworkers. Farmers are only eligible for Section 514 loans (on-farm labor housing) and are generally prohibited from charging rent in their housing, which typically consists of developments with less than 10 units. Nonprofit and public agencies are eligible for Section 514 loans and Section 516 grants (off-farm labor housing). These developments are typically larger and residents have to pay rent to live in the development. The discussion in this section is limited to housing financed under both sections 514 and 516.

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are persistent vacancies in the farmworker housing.

Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under RD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

From the tenant's perspective, the rents in developments financed under Sections 514 and 516 are typically lower than Section 515 rental housing without additional subsidies because part of the development was financed with a Section 516 grant and the Section 514 loan is amortized at 1 percent. All rents in developments financed under Sections 514 and 516 are based on the cost of operating the project and amortizing the 1 percent loan. Except for households assisted by Rental Assistance, all tenants pay the same rent for a similar sized unit regardless of income.

Because farmworker households generally have extremely low incomes, rents in farm labor housing are frequently too high to be affordable by farmworker households. As a result, Rental Assistance is available to some or all the families residing in farm labor housing. Households receiving Rental Assistance pay 30 percent of their adjusted income for rent.

Good cause is required for evicting tenants from RD Farm Labor Housing units, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find RD Farm Labor housing. The State USDA, Rural Development staff should be able to provide information regarding the location of Section 514 or Section 516 developments.

Basic References:

42 U.S.C. § 1484 (Section 514).

42 U.S.C. § 1486 (Section 516).

42 U.S.C. § 1490a(a)(2) (Rental Assistance authorization).

7 C.F.R. pt. 3560 (Section 514 and Section 516 regulations).

7 C.F.R. pt. 3560 Subpt. F (RD Rental Assistance).

USDA website with basic information about Farm Labor Housing Loans and Grants and the Rental Assistance program:

http://www.rurdev.usda.gov/rhs/common/program_info.htm#MFH.

1.17 Programs for the Homeless

The federal government supports a variety of

programs for homeless individuals and families that may be important resources for individuals with a criminal record seeking affordable housing. The definition of who is considered "homeless" is vital for determining whether these resources can help.

For certain federal programs, a person is considered "homeless" if (s)he or "lacks a fixed, regular, and adequate nighttime residence;" or in imminent danger of losing his or her primary nighttime residence; or those under the age of 25 or families with a youth who meet other definitions of homeless; or individuals or families fleeing, or attempting to flee, domestic violence.⁹ This definition of "homeless" applies to Supportive Housing program (SHP), Shelter Plus Care (S+C) and Section 8 Moderate Rehabilitation SRO housing. These programs are authorized in the McKinney-Vento Home Assistance Act¹⁰ and consolidated by the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009.¹¹ An incarcerated person is not considered to be homeless.¹² Upon discharge from incarceration, a person may be considered homeless if no residence has been identified and the person lacks the resources and support networks needed to obtain housing. For these programs HUD has also established a definition for a "chronically homeless person." A "chronically homeless" individual has a disability and has lived homeless for at least 12 months, or on at least four occasions in the past 3 years has lived homeless for an amount of time totaling 12 months.¹³ An individual re-entering into the community may meet the definition of chronically homeless if the individual received treatment for substance abuse or mental health while incarcerated.

Although the term "homeless" may be used in other housing programs (*e.g.*, public housing, the voucher program, and the older Section 8 Moderate Rehabilitation program), there is no federal definition for these programs. A local jurisdiction may define the term "homeless." Thus, it is possible for a local jurisdiction to define "homeless" to include individuals who are incarcerated or recently released individuals who do not have housing resources.

⁹42 U.S.C.A. 11302; 24 C.F.R. §§91.5, 582.5, 583.5

¹⁰The Section 8 Moderate Rehabilitation (SRO) program is discussed in the section on Section 8 Moderate Rehabilitation program.

¹¹Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009; Pub. L. No. 111-22, §§1001-1505, 123 Stat. 1632, 1663-1703 (2009). The program is codified at 42 U.S.C. 11381-11389 (2012).

¹²42 U.S.C.A. 11302(d).

¹³24 C.F.R. §91.5.

Basic References:

42 U.S.C.A. § 11302; 24 C.F.R. §§91.5, 582.5, 583.5 (Definition of “homeless”).

HUD website defining homelessness:

<https://www.hudexchange.info/resource/1928/hearth-defining-homeless-final-rule/>

1.17.1 Continuum of Care Program

The Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009 consolidated three homelessness assistance programs—Supportive Housing, Shelter Plus Care and Section 8 Moderate Rehabilitation SRO—into a single program called the Continuum of Care Program.¹⁴ This is not to be confused with the current “Continuum of Care” process by which local government agencies, community-based organizations, service providers, and advocates assess the needs of homeless individuals and families, develop a plan for providing housing and services to this population and review applications on a competitive basis to receive funding from HUD’s homelessness assistance programs.¹⁵

Because grants are still being administered under Supportive Housing, Shelter Plus Care and Section 8 Moderate Rehabilitation SRO, the existing regulations for these programs will remain in the Code of Federal Regulations. HUD states that when very few grants remain under the programs, HUD will remove the regulations by a separate rule, or will replace them with a savings clause.

HUD issued interim regulations to implement the Continuum of Care program.¹⁶ The Continuum of Care Program maintains for tenants and applicants the key tenant protections of the prior three programs.

Continuum of Care Program funds are to be used to promote community-wide commitments to ending homelessness by helping to re-house homeless individuals and families to minimize trauma and dislocation; promote access to and effective utilization

of mainstream programs; and optimize self-sufficiency among individuals and families experiencing homelessness. About \$1.9 billion for homeless assistance grants, which includes the Continuum of Care Program, was allocated for FY 2012.¹⁷

1.17.1.1 Shelter Plus Care (S+C) Program

The Shelter Plus Care program is a rental assistance program for people who are homeless and disabled. The S+C program specifically targets adults with disabilities including serious mental illnesses, those with chronic substance abuse problems, and those with AIDS and related diseases and their families. Rental assistance is linked to supportive services funded through other programs that tenants may be required to use. The funds are provided to states, local governmental units and public housing authorities. Funding for S+C continues to be available for additional developments.

S+C assistance may be provided in any of the following four ways:

Tenant rental assistance (TRA), a subsidy that moves with the tenant. The grant period for the administering agency is five years. Participants may be required to live in a particular building for the first year and a specific area thereafter or in a particular area for the entire period of participation so as to make the coordination and provision of services easier.

Sponsor-based rental assistance (SRA), a subsidy to a sponsor, which may be a private, nonprofit or community mental health agency. Participants reside in the units owned or leased by the sponsor. The grant period is five years.

Project-based rental assistance (PRA), a subsidy to an owner for five to ten years. To qualify for a ten-year subsidy, the owner must perform at least \$3,000 of rehabilitation on the units.

S+C Moderate Rehabilitation for Single Room Occupancy (SRO) dwellings program. Under this program, similar to the Section 8 Moderate Rehabilitation SRO program, units must comply with the regulations for Section 8 Moderate Rehabilitation units. From the applicant or tenant’s perspective, the major differences between this S+C program and the ordinary Section 8 Moderate Rehabilitation program are the definition of who is eligible and the supportive services. The S+C SRO Moderate Rehabilitation

¹⁴Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009, Pub. L. No. 111-22, §§ 1001-1505, 123 Stat. 1632, 1663-1703 (2009). The program is codified at 42 U.S.C. 11381-11389 (2012).

¹⁵Through the Continuum of Care application process, communities submit an application for funding from HUD’s homelessness assistance programs. The funds are awarded competitively to nonprofits, states and local governments, which in turn may contract with subrecipients to carry out program activities.

¹⁶Homeless Emergency Assistance and Rapid Transition to Housing: Continuum of Care Program, 77 Fed. Reg. 45,422 (July 31, 2012); NHLP, New HUD Rules will Impact Implementation of Homelessness Programs, 42 HOUS. LAW BULL. 159 (Aug. 2012).

¹⁷Pub. L. No. 112-55, div. C, tit II, 125 Stat. 552, 685 (2011).

funds are often combined with HOME funds. A participant may only be terminated from S+C programs for good cause. Owners of S+C housing are urged to be as lenient as possible and only evict for the most serious violations.

Recipients of S+C funding are required to have one or more homeless or formerly homeless individuals on the board of directors or other similar policy making entity of the recipient or otherwise make arrangements to consult with such homeless or formerly homeless individuals.

How to find S+C units. Community social service agencies should know where this housing is located. The HUD website contains contact information for each state identifying homeless service groups and continuum of care coordinators for homeless assistance providers within a county, city or region that receive HUD funding:

<http://www.hud.gov/homeless/hmlsagen.cfm>. These coordinators should be able to help locate the S+C housing, Supportive Housing program, and Section 8 Moderate Rehabilitation SRO housing. As part of the Continuum of Care Plan, which is part of the application for funding for the S+C, Supportive Housing program and Moderate Rehabilitation SRO housing, there is an inventory chart, which lists details about current new beds and any targeting to certain individuals.

Basic References:

42 U.S.C. §§ 11403-11407b.

24 C.F.R. pt. 582.

24 C.F.R. § 582.310(b) (calculating income), §§ 582.335 (outreach activities), 582.330 (non-discrimination and equal opportunity requirements), 582.320 (termination of assistance; *see also* 42 U.S.C. § 11403f(b)).

Current funding for the S+C program is competitive by Notice of Funding Availability, *see, e.g.*, 72 Fed. Reg. 11,743 (Mar. 13, 2007). The NOFA may contain information about eligibility and screening.

HUD's S+C Resource Manual, available at:

<http://www.hudhre.info/index.cfm?do=viewspcresourceman>.

HUD's website contains general information about the S+C programs:

<http://www.hud.gov/offices/cpd/homeless/programs/splusc/index.cfm>.

1.17.1.2 The Supportive Housing Program (SHP)

The Supportive Housing Program (SHP) provides funds for housing and/or supportive services. Eligible applicants for funding include states, local governmental units, public housing authorities, private nonprofits and community mental health centers. Funding for the SHP program continues to be available for the development of additional units. Populations who are given special consideration include homeless persons with disabilities and homeless families with children. Beyond supportive services, funds can be used for the following housing purposes:

Transitional Housing. Funds may be used for new construction, rehabilitation, leasing or purchase of transitional housing, defined as housing facilitating the move of homeless individuals and families from homelessness to permanent housing. It is available to homeless persons for up to 24 months, which may be extended. Supportive services are also provided. In general, the rent is set at 30 percent of adjusted family income in a manner similar to the Housing Choice Voucher program.

Permanent Housing for Persons with Disabilities. The Permanent Housing for Persons with Disabilities component is another type of Supportive Housing. It is long-term, community-based housing, with supportive services for homeless persons with disabilities. In general, the rent is set at 30 percent of adjusted family income in a manner similar to the Housing Choice Voucher program.

Innovative Projects. Supportive Housing (SHP) funds may also be used for housing demonstrating innovative or alternative methods for meeting immediate and long-term needs of homeless people. Recipients of SHP funding must have one or more homeless or formerly homeless individuals on the board of directors or other similar policy making entity of the recipient or otherwise make arrangements to consult with such homeless or formerly homeless individuals.

A tenant in SHP housing may only be terminated for good cause. Owners of SHP housing are urged to be as lenient as possible and only terminate assistance in the most severe cases.

How to find SHP housing. Community social service agencies should know where this housing is located. The HUD website contains contact information for each state identifying homeless service groups and continuum of care coordinators for homeless assistance providers within a county, city or region that receive HUD funding:

<http://www.hud.gov/homeless/hmlsagen.cfm>. These coordinators should be able to help locate S+C housing, Supportive Housing program (SHP), and Section 8 Moderate Rehabilitation SRO housing. As part of the Continuum of Care Plan which is part of the application for funding for the S+C, SHP and Moderate Rehabilitation SRO housing, there is an inventory chart, which lists details about current new beds and any targeting to certain individuals.

Basic References:

42 U.S.C. §§ 11381–11389.

24 C.F.R. pt. 583.

42 U.S.C. § 11386 and 24 C.F.R. § 583.300(I) (termination of assistance).

Current funding for the Supportive Housing Program is competitive by Notice of Funding Availability (NOFA), *see, e.g.*, 72 Fed. Reg. 11,743 (Mar. 13, 2007). The NOFA may contain information about eligibility and screening.

Supportive Housing Program Desk Guide, available on the HUD website at:

<http://www.hudhre.info/index.cfm?do=viewShpDeskGuide>.

HUD's website provides information about the Supportive Housing Program:

<http://www.hud.gov/offices/cpd/homeless/programs/shp/index.cfm>.

1.18 Housing Opportunities for Persons with Aids (HOPWA) Program

The HOPWA Program addresses the specific needs of low-income persons living with HIV/AIDS and their families. Eligibility for HOPWA-funded housing is restricted to families with incomes no more than 80 percent of AMI.

HOPWA grants may be made to local communities, states, and nonprofit organizations for projects benefitting low-income persons medically diagnosed with HIV/AIDS and their families. HOPWA funds may be used for acquisition, rehabilitation, or new construction of housing units; costs for facility operations; rental assistance; and short-term payments to prevent homelessness. HOPWA funds also may be used for supportive services.

HUD continues to provide funding for the HOPWA program by a formula based upon the incidence of AIDS by jurisdiction and by competitive grants. States and qualifying cities are eligible for the formula-funded grants upon submission and HUD approval of a Consolidated Plan. Eligible grantees (jurisdictions that have an approved housing strategy)

receive a grant each fiscal year. States, units of local government, and nonprofits are eligible for the competitive grants announced by Notice of Funding Availability (NOFA).

Tenant rent contributions for the HOPWA units are set similar to the Housing Choice Voucher Program, except for persons in short-term supportive housing.

A participant may only be terminated for good cause. Owners of HOPWA housing are urged to be as lenient as possible and only terminate assistance only in the most severe cases.

How to find HOPWA housing. HUD provides information about HOPWA grantees by state:

<http://www.hud.gov/offices/cpd/aidshousing/local/index.cfm>. These grantees should be contacted to find the location of HOPWA housing.

Basic References:

42 U.S.C. §§ 12901–12912.

24 C.F.R. pt. 574 and § 574.310(e) (termination of assistance).

Current funding for the HOPWA program is by formula and competitive by Notice of Funding Availability, *see, for example*, 72 Fed. Reg. 11,662 (Mar. 13, 2007). The NOFA may contain information about eligibility and screening.

HUD website with additional information:

<http://www.hud.gov/offices/cpd/aidshousing/programs/index.cfm>.

1.19 Index of Federal Programs Available to Specific Populations

The following is a quick guide listing which federal programs described above are available for specific populations with special characteristics. In some cases, the program has wide eligibility that includes individuals with the specified characteristic; in others, the program or the development might be restricted to people with the specified characteristic.

1.19.1 Housing Programs available to the Elderly

People who are elderly with qualifying incomes are eligible for all of the federal programs discussed above. In addition, there are programs, such as the HUD Section 202 program, which is generally restricted to the elderly. Finally, particular developments under some programs may have occupancy that is specifically restricted to elderly people or for elderly and people with disabilities (*e.g.*, Public Housing, HUD project-based Section 8, HUD Section 236, RD Section 515, Low-Income Housing

Tax Credit, and possibly others).

1.19.2 Housing Programs Available to People with Disabilities

People with disabilities with qualifying incomes are eligible for all of the federal programs discussed above. In addition, the old HUD Section 202 program provides units serving this population, as well as does the Section 811, Supportive Housing for People with Disabilities program, the HOPWA program (for people with HIV/AIDS) and some of the other housing programs such as S+C, and SHP. Finally, particular developments under some programs may have occupancy that is specifically restricted to people with disabilities, or to this population and the elderly (*e.g.*, Public Housing, HUD project-based Section 8, HUD Section 236, RD Section 515, Low-Income Housing Tax Credit, and possibly others). Finally, some PHAs have an allocation of vouchers specifically designated for people with disabilities.

1.19.3 Housing Programs Available to People with AIDS and Related Diseases

Persons with AIDS or related diseases are considered disabled and may be eligible for any of the units available for the disabled. If they meet the eligibility requirements, they may reside in any federally-funded low-income housing development. The HOPWA program is restricted to people with AIDS and related diseases and their families.

1.19.4 Housing Programs for Families

Almost all of the federal programs reviewed above provide housing for families, subject to unit size and any income and other categorical eligibility restrictions (*i.e.*, restricted to elderly, disabled or individuals with AIDS or related diseases) for the program or the particular development. The one exception is Moderate Rehabilitation SRO housing, which is

limited to single individuals.

1.19.5 Housing Programs for Homeless Families

For a discussion of programs targeted for homeless families, *see* Section 1.17 above. A homeless person may also be eligible for a preference to reside in most of the federally-assisted developments Preferences are determined locally.

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APPENDIX 2

Nuisance Ordinances and Crime-Free Programs

Municipalities nationwide have enacted nuisance property ordinances or “crime-free housing” programs that penalize tenants and landlords based on occurrences such as calls to 911, instances of alleged criminal activity, or noise.¹ Such laws and programs often impose penalties – such as fines, fees, threatened condemnation, or even loss of a rental property license —on owners whose properties are deemed to be “nuisance.”² Oftentimes, owners are directed by the municipality to “abate the nuisance” – which explicitly or impliedly directs the owner to evict all of the tenants at a nuisance property in order to avoid these penalties. Crime-free programs generally require owners to use a crime-free lease addendum, participate in training concerning the crime-free programs, and conduct a criminal background check of rental housing applicants and of tenants at the time of lease renewal. Any violation of the crime-free lease addendum, even if the contact with the police does not result in a conviction, often also requires the owners to evict everyone in the home.

Nuisance ordinances and crime free programs have been used to target particular conduct or populations. Civil rights issues thus arise when such policies or practices discriminatorily impact members of protected classes under the Fair Housing Act (“FHA”), Section 109 of the Housing and Community Development Act of 1974, or Title VI of the Civil Rights Act of 1964, including on the basis of race, national origin, sex, and disability. Additionally, depending on the specific policies or laws at issue, nuisance ordinance or crime-free programs may

violate the U.S. Constitution, state laws or state constitutional provisions, or the Violence Against Women Act (VAWA).

Some jurisdictions have been accused of enacting a nuisance ordinance or crime-free program in response to a perceived or actual change in the racial demographics of a community. During a HUD compliance review of Hemet, CA, a recipient of Community Development Block Grant funding, California, HUD found that the locality had enacted a Rental Registration and Crime-Free Rental Housing Program and Chronic Nuisance Abatement Program in response to an increase of racial and ethnic minorities who were renting their homes.³ Hemet officials made a series of discriminatory statements leading up to the enactments of the programs, including stating that they need to “take back Hemet.” HUD and Hemet subsequently entered into a Voluntary Compliance Agreement, where Hemet agreed to repeal the ordinances establishing the programs and to set up a \$200,000 remediation fund to improve housing conditions and for low and moderate income household, by proactively addressing code violations.⁴ Similarly, in *Jones et al. v. City of Faribault*, after an influx of Somali residents to the community,⁵ Faribault passed a Rental Licensing Ordinance, which required owners to obtain a license to rent property and agree that they would not allow their property to become a nuisance.⁶ The ordinance also included a Crime Free Rental Multi-Housing Program, which required owners to participate in the program in order to retain their rental property license, undergo training on crime-

¹ See generally, ACLU, *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, <http://www.aclu.org/notanuisance>; see also Emily Werth, *The Cost of Being “Crime-Free”: Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances*, <https://www.povertylaw.org/wp-content/uploads/2019/09/cost-of-being-crime-free.pdf>.

² See generally HUD, 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 (Sep. 13, 2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORD>

GDNCE.PDF [hereinafter “HUD Nuisance Guidance”].

³ Voluntary Compliance Agreement between Off. Of Fair Hous. And Equal Opportunity, U.S. Dep’t of Hous. And Urb. Dev. and the City of Hemet, CA, HUD Case NO. 09-20-0002-6 (Dec. 10, 2020), <https://www.hud.gov/sites/dfiles/FHEO/images/Hemet%20-%20HUD%20Voluntary%20Compliance%20Agreement%20-%20FINAL%20but%20not%20signed.pdf>.

⁴ *Id.*

⁵ There was also an increase in the Latinx population.

⁶ *Jones et al. v. City of Faribault*, 2021 WL 1192466, at *2-5 (D. Minn. Feb. 18, 2021)

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free housing, conduct criminal background checks, use a crime-free lease addendum, and evict any tenants accused of violating the crime-free lease addendum.⁷ As part of the mandatory training, owners were instructed that criminals “are like weeds” because they “grow roots” and “choke out healthy plants” and when “a criminal has an opportunity to act ... they take over an entire rental community!”⁸ The program also included strict occupancy limits on rental properties.⁹ Like Hemet, Faribault’s white residents and public officials made a series of racist statements, including that the town could “flip like Detroit” and that the crime-free program would get rid of “undesirables.”¹⁰ In a decision denying in part the city’s motion for summary judgment, the district court found that “...the confluence of racialized complaints leading up to the Ordinance’s enactment, the City’s knowledge that the Ordinance would have negative effects on the Somali community, and the City’s desire to eliminate low-rent housing downtown, create an inference that the City implemented the Ordinance because of its potential displacement of Black residents, not merely in spite of such effect...”¹¹ After a district court denied in part the city’s motion for summary judgment, a settlement was entered where Faribault’s crime-free, rental registration, and nuisance programs were overhauled and the City agreed to pay \$685,000.¹² As a part of this overhaul, the city agreed that criminal background checks are optional and if owners do conduct them, they can only consider recent, serious felony convictions.¹³ The police can no longer order the eviction of the entire household based upon the suspected criminal activity of a

household member or guest.¹⁴ The list of actionable criminal conduct is also limited to a set of more serious offenses that occurred at the rental property and cannot include calls to the police.¹⁵ Similar litigation has been brought against the cities of Hesperia, California, Peoria, Illinois, and Bedford, Ohio. In all three cases, it was alleged that the jurisdictions enacted and/or aggressively enforced their laws and programs with the purpose to exclude or segregate Black or Latinx residents.¹⁶

Nuisance ordinances and crime-free programs can also implicate civil rights laws arise in instances where nuisance ordinance or crime-free program are enforced against survivors of domestic violence, who are overwhelmingly women.¹⁷ Survivors often need to call for police or emergency assistance due to the actions of their abusers; however, such calls can also run afoul of nuisance ordinances or crime free programs – placing their housing in jeopardy. Local governments also often take a strict liability view of crime allegedly committed by the tenants or their guests, and mandate the eviction of everyone in the home, even when tenants are the crime victims, not culpable, or have not been convicted of a crime. In *Briggs v. Borough of Norristown*, a survivor and Section 8 Voucher participant survived repeated incidents of violence committed by her abuser. In spite of serious injuries that would lead to her hospitalization, the survivor did not want to call for help out of fear of being evicted. Local officials tried to force her landlord to evict her under the local nuisance ordinance due to the number of times she called police. The survivor filed suit challenging the jurisdiction’s nuisance law under the FHA and other

⁷ *Id.* at *11-12.

⁸ ACLU, ACLU Wins Settlement to End Housing Discrimination Case, <https://www.aclu.org/press-releases/aclu-wins-settlement-end-housing-discrimination-case#:~:text=Faribault%2C%20Minn.,opportunities%20for%20people%20of%20color>, (June 15, 2022).

⁹ *Jones*, *supra* at *4.

¹⁰ ACLU, *supra* note 8.

¹¹ *Jones*, *supra* at *14.

¹² *Jones et al. v. City of Faribault*, No. 18-CV-01643, Settlement Agreement and Release of All Claims (D. Minn. Jun. 29, 2018), <https://www.aclu.org/legal-document/jones-v-faribault-settlement>.

¹³ *Id.* at 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Somai v. City of Bedford*, No. 1:19-cv-373, Second Am. Comp. (N.D. Ohio Jan. 30, 2020), https://www.aclu.org/sites/default/files/field_document/2020.01.30_ecf_40-1_second_amended_complaint.pdf; *HOPE Fair Housing Center v. City of Peoria, IL*, No. 17-cv-01360, Compl.

(C.D. Ill. Aug. 10, 2017), https://www.reلمانlaw.com/media/cases/723_Complaint.pdf;

United States v. City of Hesperia et al., First Am. Compl. And Demand for Jury Trial, No. 5:19-cv-02298 (C.D. Cal. Sep. 10, 2020), <https://www.justice.gov/crt/case-document/file/1223276/download>;

See also *Hidden Vill., LLC v. City of Lakewood*, 867 F.Supp.2d 920 (N.D. Ohio 2012) (denying the city’s motion for summary judgment a 3617 Fair Housing Act claim and noting attempts by the city to use the jurisdiction’s nuisance laws to designate a youth-reentry program with primarily Black participants as a criminal nuisance), *rev’d in part and aff’d in part*, 734 F.3d 519 (6th Cir. 2013) (affirming district court in denial of summary judgment on FHA claim against the city, but reversing court denial of summary judgment on FHA claims regarding individual officials on qualified immunity grounds); Joseph Mead, et al., Cleveland State University, and Elizabeth Bonham, ACLU of Ohio, *Who Is a Nuisance? Criminal Activity Nuisance Ordinances in Ohio* (Nov. 8, 2017) at 8, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3067028.

¹⁷ *Id.*

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laws.¹⁸ After the court case was filed, HUD also filed a Secretary-initiated complaint in this case. Both the court case and administrative complaint resulted in settlement agreements.¹⁹ Other survivors have also sued or filed administrative complaints against municipalities under civil rights laws and other laws challenging local crime free programs or nuisance ordinances that penalize survivors and their landlords when too many calls to the police are made within a specific timeframe from a particular property.²⁰ Additionally, in New Hampshire, a survivor of domestic violence filed HUD discrimination complaints under the FHA against two New Hampshire landlords, alleging that the first landlord refused to renew her lease because she had placed 911 calls related to the abuse, and alleging that the second landlord refused to rent to her because of the domestic violence incidents at her former residence.²¹ HUD entered into conciliation agreements with both landlords.²²

Survivors of color may be at increased risk of being targeted under crime-free programs and nuisance ordinances, experiencing both race or national origin discrimination and sex discrimination due to their status as a survivor of gender-based violence. A two-year study of Milwaukee, Wisconsin's nuisance ordinance found that the nuisance citations for "noise," "domestic violence" and "911 abuse" were the second, third and fourth most common violations.²³ Importantly, the study also found that a property located in a majority Black neighborhood and from which at least one 911 call reporting domestic violence was placed was over 3.5 times more likely to be targeted under the city's nuisance ordinance than a majority white neighborhood.²⁴ Survivors of color often face intersectional discrimination as a result of these laws and programs and are denied the critical community

¹⁸ *Briggs v. Borough of Norristown et al.*, No. 2:13-cv-02191, Compl. (E.D. Pa. Apr. 24, 2013) (outlining additional claims under the U.S. Constitution and the Violence Against Women Act), <https://www.nhlp.org/wp-content/uploads/Complaint-Briggs-v.-Norristown-Apr.-29-2013.pdf>; NHLP, *Domestic Violence Survivor Challenges Nuisance Ordinances*, 43 Hous. L. Bull. 129, 142-44 (Jul. 2013) (providing background and summarizing claims in suit), <https://www.nhlp.org/wp-content/uploads/Domestic-Violence-Survivor-Challenges-Nuisance-Ordinances-43-Hous.-L.-Bull.-129-142-44-July-2013.pdf>.

¹⁹ *Briggs v. Borough of Norristown et al.*, No. 2:13-cv-02191, Release and Settlement Agreement (E.D. Pa. Apr. 24, 2013), <https://www.aclu.org/legal-document/briggs-v-borough-norristown-et-al-release-and-settlement-agreement>. See also Title VIII and Section 109 Conciliation Agreement between Off. of Fair Hous. and Equal Opportunity, U.S. Dep't of Hous. and Urb. Dev. and Municipality of Norristown, Nos. 03-13-0277-8 and 03-13-0277-9 (Sep. 18, 2014) (settlement of HUD Secretary-initiated complaint), <https://www.nhlp.org/wp-content/uploads/Title-VIII-and-Section-109-Conciliation-Agreement-between-HUD-and-Municipality-of-Norristown-Sept.-18-2014.pdf>.

²⁰ See, e.g., *Metro. St. Louis Equal Hous. and Opportunity Council v. City of Maplewood*, 2017 WL 6278882 (E.D. Mo. Dec. 8, 2017) (dismissing FHA disparate treatment and disparate impact claims, finding on the disparate impact claim that plaintiff had failed to show a causal connection between the ordinance and the discriminatory impact). Note, however, that certain non-FHA claims in a separate lawsuit against the City of Maplewood brought on behalf of a survivor (who actually lost her ability to rent in the city due to the nuisance ordinance) were allowed to proceed. See *Watson v. City of Maplewood*, 2017 WL 4758960 (E.D. Mo. Oct. 20, 2017) (denying motion to dismiss on survivor's First Amendment and Fourteenth Amendment due process claims, while dismissing other constitutional claims and VAWA claim). See also *Markham v. City of Surprise*, Compl. (D. Ariz. 2015), <https://www.aclu.org/legal-document/nancy-markham-v-city-surprise-complaint>. The parties in this case

entered into a Settlement Agreement, <https://www.aclu.org/legal-document/nancy-markham-v-city-surprise-settlement-agreement-mar-21-2016>; see also Title VIII Conciliation Agreement between HUD and City of Berlin, New Hampshire, Case No. 01-15-0017-8 (Jan. 2015) (requiring City of Berlin to amend nuisance ordinance, which mandated landlords to evict tenants cited three or more times for "disorderly behavior", to exempt incidents where the resident is domestic violence survivor), <https://nhlp.org/files/City-of-Berlin.pdf>; but see *TBS Group, LLC v. City of Zion*, 2017 WL 5129008 (N.D. Ill. Nov. 6, 2017) (dismissing racial discrimination lawsuit under FHA where nuisance ordinance penalized properties with residents who called for police assistance).

²¹ Press Release No. 14-089, U.S. Dep't of Hous. and Urb. Dev., *HUD and New Hampshire Landlords Settle Allegations of Discrimination Against Domestic Violence Victim* (Jul. 23, 2014), <https://archives.hud.gov/news/2014/pr14-089.cfm>.

²² Title VIII Conciliation Agreement between Complainant and New England Family Housing Management Organization, LLC, et al., FHEO Case No. 01-14-0073-8 (May 19, 2014), <https://www.nhlp.org/wp-content/uploads/Title-VIII-Conciliation-Agreement-Between-Complainant-and-New-England-Family-Hous.-Mgmt-Org-May-19-2014.pdf>; Title VIII Conciliation Agreement between Complainant and Michael Warren, FHEO Case No. 01-14-0074-8 (May 19, 2014), <https://nhlp.org/files/14vawarrenconcil.pdf>; NHLP, *Domestic Violence Survivor Settles Discrimination Claims Against New Hampshire Landlords*, Domestic Violence and Housing Newsletter (Jul.-Aug. 2014), <https://www.nhlp.org/wp-content/uploads/2018/06/8.-DV-Survivor-Settles-Discrimination-Claims-Against-NH-Landlords-2014.pdf>.

²³ Matthew Desmond and Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 Am. Socio. Rev. 117, 130 (2012), https://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr_0.pdf.

²⁴ *Id.* at 132-33.

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support necessary to end the abuse.²⁵

Persons with disabilities are also at heightened risk of eviction as a result of a crime-free program or nuisance ordinance, especially where the jurisdiction is relying upon calls to the police, where they may criminalize someone experiencing a mental health crisis, or otherwise failing to accommodate.²⁶ In *McGary v. City of Portland*, the Ninth Circuit concluded that a person experiencing a disability had adequately stated a failure to accommodate claim under the FHA, where the city did not reasonably accommodate the person's disability regarding property upkeep so that the individual could comply with the local nuisance ordinance.²⁷

In 2016, HUD issued guidance that outlined the relationship between nuisance and crime-free ordinances and policies and the FHA.²⁸ The guidance analyzes such ordinances and policies using both disparate treatment and discriminatory effects methods of proof. The guidance suggests that jurisdictions receiving HUD funds can take a step towards complying with their obligation to affirmatively further fair housing by, for example, repealing nuisance and crime-free ordinances that penalize survivors for calling 911.²⁹ The guidance also notes that housing providers subject to crime-free programs or ordinances that “mandate or strongly encourage housing providers to implement lease provisions that require eviction based on an arrest alone, or do not require an arrest or conviction to evict a tenant, but rather allow housing providers to rely on a preponderance of the evidence standard” should review HUD’s 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 to “evaluate the fair housing implications of those provisions.”³⁰ The

guidance also notes that housing providers may be able to bring suit under the FHA if a local government’s program or ordinance requires the housing provider to discriminate against protected classes.³¹

In 2022, HUD issued a supplemental memorandum to its 2016 guidance on the application of the FHA to the use of criminal records screening by housing providers.³² This memorandum reminded housing providers that “[evicting] individuals based on criminal activity that has no bearing on their tenancy, [evicting] entire families because of criminal activity of one person that has nothing to do with the rest of the household, or [evicting] because a household member was a *victim* of a crime that occurred at or near their home” frequently “result in discrimination against protected class groups...”³³ The memorandum notes that “[a] locality [applying] a crime-free ordinance requiring the eviction of criminally involved residents in a neighborhood with a significant Black or Hispanic population but ... not [applying] the ordinance in neighborhoods that are predominantly populated by White households” could be evidence of disparate treatment discrimination.³⁴

Finally, Section 603 of 2022 Reauthorization of VAWA protects the right of tenants, owners, and others to report crime and seek emergency assistance, and to otherwise not be subject to penalties due to their status as a crime victim or otherwise not a fault under policies or ordinances enacted or enforced by jurisdictions receiving Community Development Block Grant (“CDBG”) funding.³⁵ Prohibited penalties include actual or threatened evictions, fines, fees, refusals to rent or lease non-renewals, refusal to

²⁵ Sara K. Pratt, Off. Of Fair Hous. And Equal Opportunity, U.S. Dep’t of Hous. And Urb. Dev., *Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act* (Feb. 9, 2011) at 2, <https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF>; see also Kimberle Crenshaw, *Mapping The Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. Law Rev. 1241 (1991).

²⁶ Alisha Jarwala and Sejal Singh, *When Disability is a “Nuisance”: How Chronic Nuisance Ordinances Push Residents with Disabilities Out of their Homes*, 54 Harv. C.R.-C.L. L. Rev. 875 (2019).

²⁷ *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004) (reversing and remanding lower court opinion).

²⁸ HUD Nuisance Guidance, *supra* note 2.

²⁹ *Id.* at 12-13.

³⁰ *Id.* at 6-7, citing Helen R. Kanovsky, U.S. Dep’t of Hous. And

Urb. Dev., *Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (Apr. 4, 2016), https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASStandCR.pdf.

³¹ *Id.* at 7 n.46.

³² Demetria L. McCain, Off. Of Fair Hous. And Equal Opportunity, U.S. Dep’t of Hous. And Urb. Dev., *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* (Jun. 10, 2022).

³³ *Id.* at 2-3.

³⁴ *Id.* at 4.

³⁵ Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. W, sec. 603, 136 Stat. 49 (to be codified at 34 U.S.C. §41415).

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issue occupancy or landlord permits, actual or threatened closure of a property, or designation of the property as a nuisance, some of the very penalties often deployed by local governments with crime-free programs or nuisance property ordinances.³⁶ State and local governments receiving CDBG dollars (either directly or indirectly) must report any laws or policies that involve prohibited penalties and certify compliance or describe compliance efforts as part of their annual planning requirements to HUD.³⁷

³⁶ *Id.*

³⁷ *Id.*