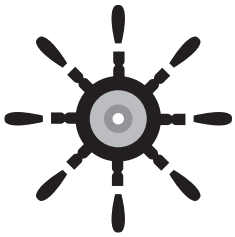
Housing Access for People with Criminal Records



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The United States incarcerates its citizens at a shockingly high rate and holds the title of world's largest jailer. The FBI estimates that as many as one in three Americans has a criminal record. But finally—after years of prisoners, mostly non-violent drug offenders, receiving overly harsh mandatory minimum sentences—lawmakers and criminal justice reform advocates are making progress in the decarceration of prison inmates across the country. In 2014, the U.S. prison population experienced a decrease—the second largest decline in the number of inmates in more than 35 years.[1] However, as more former prisoners return to their communities, there is a growing concern about how they will fare upon reentry.

Resources, especially affordable housing, are already scarce in the low income communities where formerly incarcerated persons typically return. Indeed, there is currently a shortage of 7.2 million affordable rental units that are available to extremely low income households. Because of their criminal records, former inmates face additional barriers in accessing affordable housing, potentially placing them at risk of housing instability, homelessness, and ultimately recidivism. One study, for example, has shown that returning inmates without stable housing were twice more likely to recidivate than those living in stable housing. Public housing authorities (PHAs) and owners of federally-assisted housing have broad discretion in screening out applicants with criminal records or precluding ex-offenders from rejoining their families, which studies have shown, most plan to do. Unless HUD and Congress work to reduce these barriers by providing additional guidance and housing resources, large-scale decarceration efforts are likely to result in an even greater unmet demand for housing.

LEGISLATIVE BACKGROUND

In the past few decades, Congress has passed legislation that included increasingly robust crime and drug enforcement policies in public housing. To reduce drug-related crime and promote the safety and well-being of public housing residents, Congress created policies that increased penalties related to certain activities and gave broad discretion to PHAs to evaluate potential and current residents. These policies also broadened resident accountability to include the behavior and actions of a wider range of individuals, including minors and social acquaintances, and increased the oversight and penalties for PHAs that failed to make progress in implementing strategies to lower crime and drug use.

The Anti-Drug Abuse Act of 1988 required PHAs to include a provision in their lease agreements that would allow them to evict tenants who used drugs or behaved in a way that threatened the safety of other tenants.[2] Ten years later, Congress passed the Quality Housing and Work Responsibility Act of 1998, which allowed PHAs to exclude applicants with criminal records and use their discretion in determining whether an applicant was a potential safety risk to current residents.[3] Additionally, the Cranston-Gonzalez National Affordable Housing Act of 1990 created a mandatory three-year ban on readmitting tenants who had previously been evicted for engaging in drug-related criminal activity.[4] PHAs were given the option to increase the ban's time length beyond the initial three years. The Housing Opportunity Program Extension Act of 1996 (HOPEA) increased PHA's ability to evict tenants and allowed them to request applicants' criminal records from the National Crime Information Center and local police departments.[5] Moreover, HOPEA gave PHAs the ability to reject applicants they believed to be abusing drugs or alcohol or who had a history of drug or alcohol use that could potentially pose a risk to the health and safety of current residents.

1 E. Ann Carson, U.S. Dep't of Justice, Prisoners in 2014, available at http://www.bjs.gov/content/pub/pdf/p14.pdf.

2 Pub. L. No. 100-690, 102 Stat. 4181, 4300 (1988).

3 Pub. L. No. 105-276, 112 Stat. 2461, 2518 (1998).

4 Pub. L. No. 101-625, 104 Stat. 4079, 4180 (1990).

5 Pub. L. No. 104-120, 110 Stat. 834, 836 (1996).

The U.S. Supreme Court has also weighed in on a PHA's ability to evict tenants. In U.S. Department of Housing and Urban Development v. Rucker, the Court unanimously ruled that PHAs could evict an entire household due to the criminal activity of a household member or guest even if there was no specific proof that the tenant whose name was on the lease knew about the activity[6].

MANDATORY SCREENING POLICIES

Although PHAs have broad discretion in evaluating current and prospective tenants, there are several federal admissions policies that all PHAs and project-owners are required to follow. However, these policies merely act as a floor that many PHAs supplement with additional screening policies. Under federal law and regulation, PHAs and project owners must impose a permanent admission ban in two situations: (1) when a household includes a person who is required to register as a sex offender for life,[7] or (2) when a household member has ever been convicted of manufacturing methamphetamine on federally assisted property.[8]

PHAs and project owners are also required to prohibit admitting a household for three years if a household member has been evicted from federally assisted housing for drug-related criminal activity. However, the PHA or project owner has discretion to admit the household if it is determined that the member successfully completed drug rehabilitation or the circumstances leading to the eviction no longer exist (e.g., the incarceration or death of the person who committed the drug-related criminal activity). Additionally, households must be denied admission if a member is currently engaged in illegal drug use or alcohol abuse. Moreover, PHAs and project owners must prohibit admitting households where the PHA or property owner has reason to believe that a household member's past history or current abuse of illegal drugs or alcohol "may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents."[9]

Those policies, along with whatever additional screening criteria a PHA or project owner may develop, are contained in the housing provider's written admissions policy. Depending on the program, these written policies are referred to as: admission and continued occupancy policies for public housing, administrative plans for the Housing Choice Voucher program, or tenant selection plans for project-based Section 8 developments.

ISSUES

Because much of HUD's guidance on evaluating current and potential tenants is advisory and not mandatory, PHAs and project owners across the country have developed their own criteria, creating additional barriers for ex-offenders and raising fair housing concerns.

The Fair Housing Act of 1968 (FHA) prohibits housing discrimination on the basis of race, color, religion, sex, familial status, national origin or disabilitythe "protected classes" of people. In addition to banning intentional discrimination, the FHA bars policies and practices that have a disparate impact (i.e., that do not have a stated intent to discriminate but that have the effect of discriminating against the FHA's protected classes. Because people of color disproportionately make up the U.S. prison population, admissions policies that automatically exclude people with criminal records, rather than being narrowly-tailored, would have a disparate impact. Furthermore, such blanket exclusions or unreasonable screening criteria interferes with PHAs and project owners' duty to affirmatively further fair housing.

One issue that continues to prevent ex-offenders from accessing affordable housing arises from PHAs and project-owners using unreasonable lookback periods into applicants' criminal records. Federal law instructs housing providers to look back in an applicant's history of criminal activity that occurred during a "reasonable time." However, neither the statute nor HUD has explicitly defined what constitutes a reasonable time; instead, HUD has provided suggested time limits and best practices on this issue. Because of this lack of formal guidance, a large number of housing providers have established admissions policies that have no time limits on using a person's criminal history in evaluating their application for admission. Although HUD expects housing providers to define a

6 535 U.S. 125 (2002).

7 42 U.S.C. § 1437(f)(1) (2015); 24 C.F.R. §§ 960.204, 982.553(a)(2) (2012).

8 42 U.S.C. § 13663(a) (2015); 24 C.F.R. §§ 960.204, 982.553(a)(1)(ii)(C) (2012).

9 42 U.S.C § 13661(b)(1) (2015); 24 C.F.R. §§ 960.204, 982.553(a)(ii)(B) (2012).

"reasonable time" in their admissions, some neglect to do so or leave it open ended, and, as a result, discourage ex-offenders from applying. Others impose lifetime bans or use overly long lookback periods for particular crimes. Even though HUD has suggested reasonable look back periods for certain crimes (e.g., five years for serious crimes), housing providers routinely look further back into a person's criminal history, sometimes as long as 20 years. Meanwhile, HUD has long held that permanent bans contradict federal policy and in 2010, advised project owners to modify their admissions policies that prohibited certain ex-offenders. Moreover, housing providers often neglect to include what events in a lookback period trigger denial (e.g., the criminal activity itself, a conviction, or release from incarceration), again making it difficult for ex-offenders to determine their eligibility. Until recently, just a criminal arrest could be the triggering event, even if it didn't lead to a subsequent conviction.

In addition, many housing providers utilize overly broad categories of criminal activity that reach beyond HUD's three general categories: drug-related criminal activity; violent crime activity; and other criminal activity that may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or anyone residing in the immediate vicinity. By casting such a wide net over almost any felony, which can include shoplifting and jaywalking, housing providers screen out potential tenants to the point that anyone with a criminal record need not apply. Housing providers are increasingly turning to private tenant screening companies to review applicants' criminal records and make recommendations whether to admit or deny. However, these recommendations are usually based on a crude check list and prevents applicants from knowing what criminal record was used to deny their admission.

Another issue that arises during the screening process is that too often PHAs and project owners ignore or don't provide mechanisms for applicants to present mitigating circumstances to show they pose no risk to the community and will be good tenants. Currently, PHAs are required by federal law to consider mitigating circumstances during their admissions process, in particular, the time, nature and extent of the applicant's conduct, including the seriousness of the offense. PHAs can also take into consideration actions that indicate future good conduct, such as whether an applicant has successfully completed a drug rehabilitation program. However, PHAs often fail to educate applicants of their right to present evidence, or choose to ignore mitigating circumstances when considering an application. For the Housing Choice Voucher Program and Section 8 project based properties, HUD merely encourages housing providers to consider mitigating circumstances, rather than requiring them to do so. Some housing providers are reluctant to adopt such a policy, arguing that its subjective nature makes it too hard to apply uniformly, putting them at risk of violating the FHA. In actuality, adopting a one-size-fits-all policy that is not narrowly tailored and fails to consider mitigating circumstances may violate the FHA if it has a disparate impact on a protected class of people, including racial minorities.

Ex-offenders attempting to reunite with their families living in federally subsidized housing are sometimes barred from doing so or are not permitted to be added to the household's lease. Although HUD has no prohibition on adding ex-offenders to a lease, it is widely believed that PHAs and project owners are not permitted to do so. By refusing to add ex-offenders to the lease, housing providers place these individuals at risk of losing their housing if something were to happen to the head of household.

Finally, people with criminal records who have managed to secure a Housing Choice Voucher can run into trouble when needing to port their voucher to another jurisdiction. When a household moves from one jurisdiction to another, the receiving PHA can rescreen the household utilizing a more stringent criteria than the one used by the initial PHA. If the receiving PHA determines the household does not meet its criteria, it will try to terminate its assistance. This practice of rescreening prevent ex-offenders and their families from being able to move to new areas that offer greater opportunities. In 2015, HUD published a final rule on voucher portability that reiterated PHAs ability to rescreen families, stating, "[R]eceiving PHAs should be allowed to apply their own screening standards consistently among families in their program and for families moving into their jurisdiction under portability. However, it is important that moving families be informed that they are subject to screening based on the

receiving PHA's criteria, and that the receiving PHA's screening criteria may be different than that of the initial PHA."[10]

ADMINISTRATION EFFORTS TO ADDRESS CRIMINAL RECORDS AND HOUSING

The Obama Administration first demonstrated its new position on helping ex-offenders have access to housing in 2011, when then HUD Secretary Shaun Donovan issued a letter to PHA executive directors stating, "As President Obama recently made clear, this is an Administration that believes in the importance of second chances–the people who have paid their debt to society deserve the opportunity to become productive citizens and caring parents, to set the past aside and embrace the future. Part of that support means helping ex-offenders gain access to one of the most fundamental building blocks of a stable life–a place to live."[11] Secretary Donovan further encouraged the PHAs to allow former inmates, when appropriate, to live with their families in public housing or the Housing Choice Voucher program, and asked that when PHAs screened for criminal records, they "consider all relevant information, including factors which indicate a reasonable probability of favorable future conduct." A year later, Secretary Donovan sent a similar letter to owners and agents of HUD-assisted properties.[12]

In 2013, the U.S. Interagency Council on Homelessness (USICH) published a guidebook for PHAs that includes best practices and policies that can be used to increase access to housing. In the guidebook, USICH notes the relationship between incarceration and homelessness, "as difficulties in reintegrating into the community increase the risk of homelessness for released prisoners, and homelessness increased the risk of re-incarceration."[13] Like Secretary Donovan, USICH encourage PHAS to consider individual factors when screening potential tenants with criminal records in order to remove barriers to housing assistance.

In November 2015, President Barack Obama announced new actions to promote the rehabilitation and reintegration for formerly-incarcerated inmates. The administration's criminal justice reform efforts will include new pilot efforts dedicated to housing people coming out of prison.

President Obama announced a new $8.7 million demonstration program to address homelessness and reduce recidivism rates. According to the White House, "The Pay for Success (PFS) Permanent Supportive Housing Demonstration will test cost-effective ways to help persons cycling between the criminal justice and homeless service systems, while making new Permanent Supportive housing available for the reentry population."

The president also announced that HUD would provide $1.75 million to aid eligible public housing residents under the age of 25 to expunge or seal their criminal records under the new Juvenile Reentry Assistance Program. The National Bar Association has committed 4,000 hours of pro bono legal services to support the program.

In conjunction with the president's announcement, HUD released new guidance to PHAs and owners of HUD-assisted housing that officially recognizes the responsibility of PHAs and project-owners to make sure that having a criminal record does not automatically disqualify a person from living in federally subsidized housing.[14] The guidance clarifies the use of arrest records to determine who can live in their properties. According to the guidance, an individual's arrest record cannot be used as evidence that he or she has committed a crime. The guidance states, "[T]he fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity warranting denial of admission, termination of assistance or eviction."

10 Housing Choice Voucher Program: Streamlining the Portability Process, 80 Fed. Reg. 50,564, 50,568 (Aug. 20, 2015), available at http://portal.hud.gov/hudportal/documents/huddoc?id=PortabilityRule.pdf.

11 Letter from Shaun Donovan, Sec'y of Housing and Urban Dev., & Sandra B. Henriquez, Assistant Sec'y for Public Housing and Indian Housing, to PHA Executive Director (June 17, 2011), https://www.usich.gov/resources/uploads/asset_library/Rentry_letter_from_Donovan_to_PHAs_6-17-11.pdf.

12 Letter from Shaun Donovan, Sec'y of Housing and Urban Dev., & Carol J. Galante, Acting Assistant Sec'y for Housing to Owners and Agents (Mar. 14, 2012), http://nhlp.org/files/HUD%20Letter%203.14.12.pdf.

13 U.S. Interagency Council on Homelessness, PHA Guidebook to Ending Homelessness 23 (2013) https://www.usich.gov/resources/uploads/asset_library/PHA_Guidebook_Final.pdf.

14 U.S. Dep't of Hous. & Urban Dev, Notice PIH 2015-19 (Nov. 2, 2015), available at http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf.

The guidance also makes clear that HUD does not require PHAs and project owners to adopt or enforce "one strike" policies that deny admission to anyone with a criminal record or that require families to be automatically evicted any time a household member engages in criminal activity in violation of the lease. However it does not preclude PHAs and owners from utilizing such a policy. Instead, the guidance urges PHAs and owners to exercise discretion before making such a decision and to consider all relevant circumstances, including the seriousness of the crime and the effect an eviction of an entire household would have on family members not involved in the criminal activity.

Additionally, the guidance reminds PHAs and property owners of the due process rights of tenants and applicants applying for housing assistance. Federal law requires that PHAs provide public housing and Section 8 applicants with notification about, and the opportunity to dispute the accuracy and relevance of, any criminal record before the PHA or owner denies admission or assistance. Public housing and Section 8 applicants also have the right to request informal review hearings after their applications have been denied. PHAs and property owners may terminate a person's assistance only through judicial action, or in the case of voucher holders, through an administrative grievance hearing. PHAs and owners must ensure that their policies and procedures for screening, evicting, or terminating assistance comply with all applicable civil rights laws.

Even though the guidance is a step in the right direction, it does not directly address several critical issues including the Fair Housing Act's requirements on housing providers who screen on the basis of criminal records, and the need for specific guidance on how far back housing providers can inquire into an applicant's criminal history.

FORECAST

Criminal justice reform has become an increasingly bipartisan issue in recent years, and Congress could agree on legislation in 2016. Both President Barack Obama and Senate Majority Leader Mitch McConnell have highlighted criminal justice reform as a priority for this year. However, Leader McConnell has not committed to bringing legislation to the floor that could pose election-year risks. Meanwhile, several Republican senators have expressed opposition to the bill, which could influence Leader McConnell's decision. Senator John Cornyn (R-Texas), the Senate Majority Whip and member of the Judiciary Committee, expressed optimism that Republicans in Congress would be able to work with the president on the issue, but believes senators have "more work to do" before legislation is ready for a floor vote. In the House, Speaker Ryan said GOP members will craft a criminal justice reform plan in the first half of 2016. Goals include reducing mandatory-minimum sentences for drug offenders and helping prisoners integrate successfully into their communities to reduce recidivism rates.

Both the House and Senate have introduced criminal justice reform bills, but none have received a vote on the floor of either chamber. Last October, the Senate Judiciary Committee passed a comprehensive criminal justice reform package, known as the Sentencing Reform and Corrections Act of 2015 (S. 2123), while the House Judiciary Committee took a different approach by considering several bills that each touch on different issues within criminal justice reform. The committee has already approved a few of these bills, including the Second Chance Reauthorization Act of 2015 (H.R. 3406), aimed at reducing recidivism rates. Both S. 2123 and H.R. 3406 include some language around housing; yet, neither includes a comprehensive plan to meet the housing needs or reduce barriers for returning prisoners, which Congress must address to ensure ex-offenders do not become homeless or recidivate.

HOW YOU CAN TAKE ACTION

Urge your legislators:

Ensure criminal justice reform efforts include a comprehensive plan that addresses the housing needs of ex-offenders.

Support legislation that reduces housing barriers for ex-offenders.

Support legislation that increases housing resources for extremely low income households, including the Common Sense Housing Investment Act (H.R. 1662), which would raise almost $200 billion to produce new affordable rental units, and thus ease competition for housing.

Urge HUD to:

Provide additional guidance to PHAs and project owners that is more prescriptive in establishing reasonable lookback periods and the consideration of mitigating circumstances.

Issue guidance explaining how PHAs and property owners can violate the Fair Housing Act through overly broad screening policies and the failure to consider mitigating circumstances.

Enforce policies that ensure applicants are not subject to unreasonable lookback periods.

Take a more affirmative stance against "one strike" policies and other policies that deny housing to people with criminal records.

FOR MORE INFORMATION

Sargent Shriver National Center on Poverty Law, http://www.povertylaw.org/ ■