

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. After decades of imprisoning non-violent drug offenders with punitive 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. 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 7.4 million affordable rental units that are available to extremely low income households. Because of their criminal records, justice-involved individuals 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 as likely to recidivate as 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 returning citizens from rejoining their families—which, studies have shown, most plan to do. Unless the Administration 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.¹ 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.² 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.³ 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 PHAs' ability to evict tenants and allowed them to request applicants' criminal records from the National Crime Information Center and local police departments.⁴ 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.

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,

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

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

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

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

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,⁵ or (2) when a household member has ever been convicted of manufacturing methamphetamine on federally assisted property.⁶

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."⁷

These 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 people with criminal records and raising fair housing concerns.

One issue that continues to prevent justice-involved people 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 nor 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 "reasonable time" in their admissions, some neglect to do so or leave it open ended, and, as a result, discourage people with criminal records from applying. Others impose lifetime bans or use overly long lookback periods for particular crimes. Even though HUD has suggested reasonable lookback 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. 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 people with criminal records to determine their eligibility. Until recently, just a criminal arrest could be the triggering event, even if it did not lead to a subsequent conviction.

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

5 42 U.S.C. § 1437(f)(1) (2015); 24 C.F.R. §§ 960.204, 982.553(a)(2) (2012).

6 42 U.S.C. § 13663(a) (2015); 24 C.F.R. §§ 960.204, 982.553(a)(1)(ii)(C) (2012).

7 42 U.S.C. § 13661(b)(1) (2015); 24 C.F.R. §§ 960.204, 982.553(a)(ii)(B) (2012).

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.

Too often PHAs and project owners ignore or do not 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 an applicant successfully completing 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.

Returning citizens 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 returning citizens to a lease, it is widely believed that PHAs and project owners are not permitted to do so. By refusing to add returning citizens to the lease, housing providers place these individuals and their families at risk of losing their housing if something happens 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 justice-involved individuals 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.”

RECENT EFFORTS TO ADDRESS CRIMINAL RECORDS AND HOUSING

Administrative Efforts

The Obama Administration first took action in helping returning citizens gain access to housing in 2011, when then HUD Secretary Shaun Donovan issued a letter to PHA executive directors stating, “[T]his 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 justice-involved individuals gain access to one of the most fundamental building blocks of a stable life—a place to live.”⁸ Former HUD Secretary Donovan further encouraged the PHAs to allow justice-involved people, 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, Former HUD Secretary Donovan sent a similar letter to owners and agents of HUD-assisted

8 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_PHA_s_6-17-11.pdf.

properties.⁹

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.”

¹⁰ Like then-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 people. The administration’s criminal justice reform efforts included new pilot programs 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.”

Mr. Obama 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 Mr. Obama’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.¹¹ 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.”

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.

In April 2016, HUD issued legal guidance from the Office of General Counsel (OGC) that states housing providers, both in the public and private housing market, likely violate the Fair Housing Act of 1968 when employing blanket policies in refusing to rent or renew a lease based on an individual’s criminal history since such policies may have a disparate impact on racial minorities. The Fair Housing Act prohibits housing discrimination on the basis of race, color, religion, sex, familial status, national origin or disability, the “protected classes” of people. The guidance says, “Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African-Americans and Hispanics.”

The guidance states that when a housing provider’s seemingly neutral policy or practice has a

9 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>.

10 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.

11 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>.

discriminatory effect—such as restricting access to housing on the basis of criminal history, and has a disparate impact on individuals of a particular race, national origin, or other protected class—the policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if the interest could be served by another practice that has a less discriminatory effect.

Some landlords and property managers assert that the reason they have blanket criminal history policies is to protect other residents and the property. The guidance declares that “bald assertions based on generalization or stereotype that any individual with an arrest or conviction record poses a greater risk than those without such records are not sufficient.” Landlords and property managers must be able to prove through reliable evidence that blanket policies actually assist in protecting residents and property.

The guidance also states that a housing provider with policies of excluding people because of a prior arrest without conviction cannot satisfy its burden of showing such a policy is necessary to achieve a “substantial, legitimate, nondiscriminatory interest,” since an arrest is not a reliable basis upon which to assess the potential risk to residents or property. In instances when a person has been convicted, the policy must be applied on a case-by-case basis considering the nature and severity of the conviction, what the individual has done since conviction, and how long ago the conviction took place.

In addition, the guidance discusses how a housing provider may violate the Fair Housing Act if the provider intentionally discriminates when using criminal history information in evaluating applicants and tenants, “which occurs when the provider treats an applicant or renter differently because of race, national origin or another protected characteristic. In these cases, the housing provider’s use of criminal records or other criminal history information as a pretext for unequal treatment of individuals because of race, national origin or other protected characteristics is no different from the discriminatory application of any other rental or purchase criteria.”

Efforts in Congress

In April 2016, Representative Maxine Waters (D-CA) introduced legislation to ensure people with criminal

records have access to federally assisted housing. The Fair Chance at Housing Act of 2016 would ban “one-strike” and “no-fault” policies, demand higher standards of evidence and individualized review processes, and extend support to providers actively seeking to house and rehabilitate justice-involved individuals. These measures will allow families to reunify when a household member returns home after serving their time in prison or jail. The bill proposes a means to help end the cycle of homelessness and recidivism too often experienced by justice-involved individuals.

FORECAST FOR 2017

In the 114th Congress, there was a large bipartisan push in both the House and Senate to pass criminal justice reform legislation, and House Speaker Paul Ryan (R-WI) indicated it was a top priority for him. Unfortunately those efforts fell short and neither chamber of Congress voted on legislation to overhaul the criminal justice system.

Some lawmakers have already indicated that they will again try to pass legislation in the 115th Congress. However, it remains unclear whether the Trump administration will support these renewed efforts given the President’s earlier rhetoric on the issue and his selection of Senator Jeff Sessions, an opponent of past reform proposals, to serve as U.S. attorney general.

Some advocates believe that the Trump administration may be less interested in working on more controversial reforms, such as reducing prison sentences, and might instead focus its efforts on reentry issues, which could include housing access for people with criminal records.

HOW YOU CAN TAKE ACTION

Urge your legislators to:

- Ensure criminal justice reform efforts include a comprehensive plan that addresses the housing needs of people with criminal records.
- Support legislation that reduces housing barriers for people with criminal records.

Urge HUD to:

- Ensure compliance with and build upon recent HUD guidance.
- Require all federally subsidized housing providers to consider mitigating circumstances.

- Provide more concrete guidance on reasonable lookback periods.
- Place limitations on what criminal activity housing providers may consider when reviewing applications.
- Set minimum standards for the quality and nature of criminal background information.
- Increase data collection on applicant screening practices.

FOR MORE INFORMATION

Reentry and Housing Working Group, <http://www.reentryandhousing.org>