

Housing Access for People with Criminal Records

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The United States is the world's largest jailer, imprisoning just under 2.3 million people in state and local jails and prisons, juvenile correctional facilities, immigrant detention facilities, and prisons and jails on tribal or territorial lands. The FBI estimates as many as one in three Americans has a criminal record, and Black and Latino people, people with a disability, and members of the LGBTQ community are disproportionately represented in the criminal justice system. After decades of imprisoning non-violent drug offenders with punitive and destructive mandatory minimum sentences, lawmakers and criminal justice reform advocates are making progress in the decarceration of prison inmates across the country. Since reaching its peak in 2009, the U.S. prison population has decreased 8%; however, as more former prisoners return to their communities, there is a growing concern about how they will fare upon reentry.

Formerly incarcerated people typically return to low-income communities where resources, particularly affordable, accessible housing, are scarce. Indeed, there is a national shortage of 7 million rental units affordable and available to extremely low-income households. A criminal record poses an additional barrier to accessing affordable, accessible housing for justice-involved individuals, placing them at risk of housing instability, homelessness, and ultimately recidivism. One study showed that returning inmates without stable housing were twice as 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 returning citizens from rejoining their families. Unless the Administration and Congress work to reduce these barriers by providing additional guidance and housing resources, large-scale decarceration

efforts will result in an even greater unmet demand for affordable, accessible housing.

LEGISLATIVE BACKGROUND

In past decades, Congress passed legislation that included increasingly stringent crime and drug enforcement policies in public housing. These policies increased penalties for certain drug-related activities and gave broad discretion to PHAs to evaluate potential and current residents. They also broadened resident accountability to include the behavior 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 (Pub. L. No. 100-690, 102 Stat. 4181, 4300, 1988). 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 discretion in determining whether an applicant was a potential safety risk to current residents (Pub. L. No. 105-276, 112 Stat. 2461, 2518, 1998). 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 (Pub. L. No. 101-625, 104 Stat. 4079, 4180, 1990), and gave PHAs the option to increase the ban 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 (Pub. L. No. 104-120, 110 Stat. 834, 836, 1996). HOPEA also granted PHAs the ability to reject applicants they believed were abusing drugs or alcohol or whose history of drug or alcohol use could pose a potential 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, 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 when a household includes a person who is required to register as a sex offender for life [42 U.S.C. § 13663(a) (2015); 24 C.F.R. §§ 960.204(a) (4), 982.553(a)(2), 2012]. Additionally, PHAs must impose a permanent admission ban or permanently terminate a household's tenancy when a household member has been convicted of manufacturing methamphetamine on federally assisted property [42 U.S.C. § 1437f(n) (2015); 24 C.F.R. §§ 960.204(a)(3), 982.553(a)(1)(ii)(C), 2012].

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 [42 U.S.C. § 13661(a) (2015); 24 C.F.R. §§ 960.204(a)(1), 982.553 (a)(1)(i), 2012]. 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 [42 U.S.C. § 13661(b) (2015); 24 C.F.R. §§ 960.204(a)(2)(i), 982.553 (a)(1)(ii)

(a), 2012]. PHAs and project owners must also prohibit admitting households where the PHA or property owner has reason to believe that a household member's historical or current abuse of illegal drugs or alcohol "may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents" [42 U.S.C § 13661(b)(1) (2015); 24 C.F.R. §§ 960.204(a)(2)(ii), 982.553(a)(1)(ii)(B) (2012)].

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 and grant housing providers broad discretion in screening out tenants with a criminal record. 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

Much of HUD's guidance on evaluating current and potential tenants is advisory and not mandatory so 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 to evaluate applicants' criminal records. Federal law instructs housing providers to look back in an applicant's history of criminal activity within a "reasonable time," but neither the statute nor HUD explicitly define what constitutes a reasonable time; instead, HUD has provided suggested time limits or best practices for establishing a reasonable lookback time. This lack of formal guidance has allowed a large number of housing providers to establish admissions policies that have no time limit on using a person's criminal history to evaluate

their application. Although HUD expects housing providers to define a “reasonable time,” some neglect to do so or leave it open ended and, as a result, discourage people with criminal records from applying. Others impose blanket lifetime bans or use overly long lookback periods for particular crimes.

Despite HUD’s suggested limit on lookback periods for certain crimes (for example, five years for serious crimes), housing providers routinely look further back into a person’s criminal history, sometimes as long as 20 years. HUD has also 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 a 2015 HUD guideline banned the use of arrest records in federally assisted housing decisions (Notice PIH 2015-19), a criminal arrest alone could trigger denial 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 criminal 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. As a result, housing providers create a de facto ban on individuals with a criminal record, even if they do not have a policy explicitly barring individuals with a criminal record from being admitted.

Housing providers are increasingly turning to private tenant screening companies to review applicants’ criminal records and make recommendations about whether to admit or deny. These companies usually pull criminal records data from public databases that are

often incomplete or inaccurate. For example, a jurisdiction might misreport a misdemeanor as a felony or vice-versa, fail to indicate when a record has been expunged or sealed, or mix up the criminal histories of two people with the same name. Tenant screening companies use the records they gather to make an “up or down” determination as to whether a prospective tenant should be approved for residency. Despite federal law guaranteeing tenants’ right to see a copy of their criminal background report, not all housing providers comply. This lack of transparency means applicants are typically left in the dark about the criminal record information 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 do not pose a risk to the community and will be good tenants. PHAs are required by federal law to consider mitigating circumstances during their admissions process, including the time, nature, and extent of the applicant’s conduct, as well as 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 inform 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 and puts them at risk of violating the FHA. 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. Housing providers' refusal to add returning citizens to a lease places 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 if they need to transfer their voucher to another jurisdiction. When a household moves from one jurisdiction to another, the receiving PHA might rescreen the household using a more stringent criteria than the one used by the initial PHA. If the receiving PHA determines that the household does not meet its criteria, it will try to terminate assistance. This practice of rescreening prevents 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."

Impact of COVID-19

The coronavirus pandemic poses a particular threat to people residing in congregate settings, including jails and prisons. In an effort to decrease congestion, some state and local incarceration facilities have released incarcerated individuals with underlying health conditions more vulnerable to COVID-19 complications and individuals determined not to pose a threat to the health and safety of others. HUD issued in PIH Notice 2020-05 in April 2020, providing PHAs broad authority to waive regulatory and statutory provisions in an effort to increase access to federally assisted housing. These

waivers could be adopted by PHAs to allow individuals with a criminal history to obtain residency in housing supported by the Housing Choice Voucher (HCV) or Project Based Voucher (PBV) program. However, adopting these waivers is not mandatory and is left up to the discretion of PHAs. HUD should mandate these waivers be adopted to increase access to housing for individuals exiting incarceration.

PHAs were given the option of waiving regulation HQS-10 § 982.401(d), which if adopted would allow current tenants of HCV- and PBV-assisted housing to add individuals to the household lease even if doing so would exceed HUD's minimum standard for adequate space. This waiver could allow people with a criminal record to be added to the lease of a family member residing in assisted housing. HUD also gave PHAs the option to waive 24 CFR § 960.202(c)(1) and 24 CFR § 982.54 (a), which would allow PHAs to amend and adopt changes to their Admission and Continued Occupancy Policy (ACOP) and Administrative Plans without formal board approval. If adopted, PHAs could use these waivers to change their tenant screening policies and reduce barriers to accessing housing for people with a criminal record. For example, PHAs could remove criminal record screening policies for individuals released from incarceration in response to COVID-19, as these individuals have already been determined not to pose a threat to the health or safety of others.

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.” Secretary Donovan further encouraged 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, Secretary Donovan sent a similar letter to owners and agents of HUD-assisted properties.

In 2013, the U.S. Interagency Council on Homelessness (USICH) published a guidebook for PHAs that includes best practices and policies 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.” Like Secretary Donovan, USICH encourages 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, including a new \$8.7 million demonstration program to address homelessness and reduce recidivism rates. President Obama also announced that HUD would provide \$1.75 million to aid eligible public housing residents under the age of 25 in expunging or sealing their criminal records under the new Juvenile Reentry Assistance Program.

In conjunction with the announcement, HUD released PIH 2015-19, recognizing the responsibility PHAs and project owners have in ensuring people with a criminal record are not automatically barred from federally subsidized housing. The guidance clarifies the use of arrest records to determine who can live in federally subsidized properties and notes an individual’s arrest record cannot be used as evidence that

they have committed a crime, stating “[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 stating that housing providers, both in the public and private housing market, likely violate the “Fair Housing Act of 1968” when employing blanket policies 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 while coining these as “protected classes” of people and noting, “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, known as the “disparate impact rule,” states that when a housing provider’s seemingly neutral policy or practice has a discriminatory effect, such as restricting access to housing on the basis of criminal history, which 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. HUD's 2016 disparate impact 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 assist in protecting residents and property.

The guidance also states that a housing provider with a policy that excludes people because of a prior arrest without conviction cannot satisfy its burden of showing the policy is necessary to achieve a "substantial, legitimate, nondiscriminatory interest," since an arrest is not a reliable basis upon which to assess an applicant's potential risk to residents or property. 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."

In August 2019, the Trump Administration proposed changes to HUD's disparate impact rule that would make it more difficult to challenge a housing provider's discriminatory policies. Under the rule's 2016 guidelines, bringing a disparate impact claim requires a three-part "burden-shifting" standard that begins with a plaintiff, usually the target of a discriminatory policy, showing a policy or practice causes (or will likely cause) a discriminatory effect. Next, the burden shifts to the defendant, usually a housing provider, to prove that the policy or practice is necessary to achieve a legitimate, nondiscriminatory interest. Finally, if the defendant can prove the policy is necessary, the burden shifts back to the plaintiff who must then prove that the defendant's interest can be achieved through another policy or practice that has a less discriminatory effect.

Under the Trump Administration's revisions, the burden of proof shifts entirely to the plaintiff, who would be required to show that the policy or practice under question is "arbitrary, artificial, and unnecessary" to achieve a valid interest. They must then establish a "robust causal link" between the policy or practice and its disparate impact on members of a protected class and show that the disparate impact has a significant negative impact. Finally, plaintiffs must show that the disparate impact is directly linked to adverse outcomes for members of a protected class. The rule also allows defendants to cite financial gain as a valid reason for imposing a discriminatory policy or practice. HUD issued its final Disparate Impact Rule in September 2020.

Efforts in Congress

In December 2018, Congress passed, and President Trump signed into law, the bipartisan "First Step Act" (P.L. 115-391), which rolls back mandatory minimum sentences in certain circumstances and expands on "good time credits" for well-behaved prisoners looking to shorten their sentences. While advocates acknowledged the bill was not perfect, they agreed it was a modest step forward for

comprehensive criminal justice reform. The bill also included the “Second Chance Reauthorization Act” that supports state, local, and tribal governments and nonprofit organizations in their work to reduce recidivism and improve outcomes for people returning from incarceration. Second Chance grants support a variety of reentry services, including housing, job training, education, mentoring, and mental health treatment. The “Second Chance Reauthorization Act” expands opportunities for community-based nonprofits to apply for grants to develop support programs, such as housing, and drug treatment programs. It also requires coordination among multiple federal agencies (including HUD), state and local governments, and service providers on federal programs and policies related to reentry.

While the “First Step Act” authorizes \$75 million per year over five years to carry out the reforms, grants, and programs the bill establishes, the Trump Administration’s budget request for fiscal year (FY) 2020 appropriated only \$14 million for “First Step Act” implementation. The President’s budget request is just that—a request—and has no bearing on how much programs are ultimately appropriated. However, it does signal the Administration’s priorities, and significantly underfunding the “First Step Act” has led criminal justice reform advocates to question the Trump Administration’s sincerity in implementing meaningful criminal justice reform measures. Both the House and Senate FY20 appropriations bills would fully fund “First Step Act” implementation at the authorized amount.

In July 2019, Representative Alexandria Ocasio-Cortez (D-NY) and Senator Kamala Harris (D-CA) introduced legislation to ensure that people with criminal records have access to federally assisted housing. The “Fair Chance at Housing Act” would ban “one-strike” and “no-fault” eviction policies, demand higher standards of evidence to reject an applicant on the basis of their criminal record, and mandate an individualized review processes that takes into account both the totality of circumstances surrounding a criminal offense and any mitigating evidence provided by a

prospective tenant. These measures would allow families to reunify when a household member returns home after serving time in prison or jail and help end the cycle of homelessness and recidivism too often experienced by justice-involved individuals.

In March 2020, the “Coronavirus Aid, Relief, and Economic Security Act (CARES Act)” was signed into law. The CARES Act provided states and communities with much-needed resources to respond to the coronavirus pandemic, including additional funding for housing and homelessness assistance. While the CARES Act failed to provide resources to specifically address the housing needs of people exiting incarceration, there is nothing in the bill prohibiting funds being used to assist people with a criminal record in finding or maintaining safe, stable, affordable housing.

FORECAST FOR 2021

With a new Congress and new Administration, 2021 presents a new opportunity to enact legislation that will increase access to safe, stable, accessible, affordable housing for people with a criminal history. Congress and the White House must work together to immediately pass a comprehensive coronavirus relief bill that includes funding for housing and homelessness services that can be used to help people exiting incarceration and those with a criminal history find stable housing.

During his campaign, President Biden set a goal of “ensuring 100% of formerly incarcerated individuals have housing upon reentry” by directing HUD to only contract with housing providers willing to rent to formerly incarcerated people, and by investing federal funding into the construction of transitional housing. While important, in order to maximize federal investments and ensure longer-term housing stability funding should also be dedicated to the construction of permanent housing with supportive services where needed. Further, passing a federal source of income discrimination ban would help ensure that more people using a HCV to find housing – including individuals with a criminal history – are able to fully utilize their

voucher.

Additionally, the “First Step Act” was passed well into FY19, delaying funding and implementation of many of the law’s reforms. The House Appropriations committee allocated \$165 million for First Step Act Implementation in its FY21 bill. It is crucial that the “First Step Act” receive full funding in the new fiscal year to fully implement the reforms established by the law. Criminal justice advocates will also continue pushing for new reforms and remind lawmakers that as its title suggests, the “First Step Act” is just that: a first step and one of many steps toward comprehensive criminal justice reform. Advocates can press for legislation, including the “Fair Chance at Housing Act,” that helps people returning from incarceration get back on their feet and reconnect with their communities.

HOW ADVOCATES CAN TAKE ACTION

Urge legislators to:

- Enact a federal ban on source-of-income discrimination.
- Pass comprehensive spending bills that include full funding for implementation of the “First Step Act.”
- Ensure that criminal justice reform efforts include a comprehensive plan addressing the housing needs of people with criminal records.
- Support legislation that reduces housing barriers for people with criminal records, including the “Fair Chance at Housing Act.”

Urge HUD to:

- Rescind its changes to the Disparate Impact Rule.
- Mandate PHAs adopt regulatory waivers to increase access to federally assisted housing for people with a criminal history.
- Ensure compliance with and build upon HUD guidance that would expand access to federally assisted housing for people with a criminal record.

- Require all federally subsidized housing providers to consider mitigating circumstances.
- Provide 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 that can be used by PHAs and federally assisted housing providers to make housing decisions.
- Work with the Consumer Financial Protection Bureau to identify comprehensive, interagency solutions to tenant screening problems.
- Increase data collection on applicant screening practices.

FOR MORE INFORMATION

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