

Advocacy Strategies for Protecting the Fair Housing Rights of People with Criminal Records

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Deborah Thrope, Staff Attorney, National Housing Law Project

Marie Claire Tran-Leung, Staff Attorney, Housing Justice, Sargent Shriver National Center on Poverty Law



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About Sargent Shriver National Center on Poverty Law

The Sargent Shriver National Center on Poverty Law provides national leadership in advancing laws and policies that secure justice to improve the lives and opportunities of people living in poverty.

We specialize in practical solutions. We advocate and serve clients directly, while also building the capacity of the nation's legal aid providers to advance justice and opportunity for their clients.



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About the National Housing Law Project

The National Housing Law Project (NHLP) is a nonprofit national housing and legal advocacy center established in 1968. Our mission is to advance housing justice for poor people by:

- Increasing and preserving the supply of decent, affordable housing
- Improving existing housing conditions, including physical conditions and management practices
- Expanding and enforcing low-income tenants' and homeowners' rights, and
- Increasing housing opportunities for racial and ethnic minorities.



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#ReentryHousing

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Deborah Thrope
Staff Attorney



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Marie Claire Tran-Leung
Staff Attorney
Housing Justice



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Webinar Overview

Summary of HUD Policies on Use of Criminal Records
Overview of HUD Guidance
Advocacy Strategies
Question & Answer



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Why now?



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Summary of HUD Policies on the Use of Criminal Records



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Mandatory Bans

PHAs and project owners **MUST** deny admission to:

1. Anyone who has been convicted of **manufacturing methamphetamine on federally assisted property**;
2. Anyone subject to **lifetime registration for a sex offense**;
3. **Current users** of illegal drugs, abusers of alcohol, or pattern interfering with health, safety, peaceful enjoyment;
or
4. Anyone who, **within the last 3 years**, has been **evicted from federal housing for drug-related criminal activity** *unless* (1) drug rehabilitation or (2) circumstances leading to eviction no longer exist.



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Discretionary Bans

PHAs and project owners MAY consider denying admission, evicting or terminating for:

1. **Drug-related criminal activity** – manufacture, sale, distribution, use, or possession;
2. **Violent criminal activity** – use of or threatened use of physical force that will cause serious bodily injury or property damage;
3. Other criminal activity that would **adversely affect the health, safety, or right to peaceful enjoyment** of the premises by other residents, the owner, or public housing employees.



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Discretionary Bans

HUD notes that there are “**a wide variety of other crimes that cannot be claimed to adversely affect the health, safety, or welfare** of the PHA’s residents.”



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Limits on Discretion

PHAs and project owners' discretion subject to two additional, important limits:

1. **Civil Rights Laws**, including federal ***Fair Housing Act***
2. **Time** – Criminal activity must have occurred during a “***reasonable time***” before the screening takes place. 42 U.S.C. § 13661(c)(2012).



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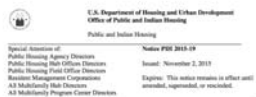
Overview of HUD Guidance



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PIH/Housing Arrest Record Guidance



Special Attention of: Public Housing Agency Directors, Public Housing OH Office Directors, Public Housing OH Office Directors, Resident Management Organizations, All Multifamily HOA Directors, All Multifamily Program Center Directors

HUD Notices PIH 2015-19/H 2015-10 applies to public housing, vouchers, and multifamily housing.

<https://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>

<https://portal.hud.gov/hudportal/documents/huddoc?id=15-10hsgn.pdf>

HUD also released a subsequent FAQ.

<http://portal.hud.gov/hudportal/documents/huddoc?id=faqexclud earrestrec33116.pdf>



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Fair Housing Guidance



Office of General Counsel Guidance on Application of Fair Housing Act Standards in the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions

I. Introduction
The Fair Housing Act (the Act) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin. HUD's Office of General Counsel issues this guidance concerning how the Fair Housing Act applies to the use of criminal history for purposes of housing and real estate transactions. Specifically, the guidance addresses how the most common criminal offenses and judgments should be used to apply the Fair Housing Act cases in which a housing provider justifies an adverse housing action - such as a refusal to rent or lease a home - based on an individual's criminal history.

II. Background
As many as 100 million U.S. adults - or nearly one-third of the population - have a criminal record of some sort.¹ The United States prison population of 2.2 million adults is by far the largest in the world.² And of 2012, the United States accounted for only about five percent of the world's population, yet almost one-quarter of the world's prisoners were held in American prisons.³ Thus, an average of one 100,000 individuals have been released annually from state and federal prisons, and over 10 percent of released inmates will be released in some form. When individuals are released from prisons and jails, their ability to secure safe, secure and affordable housing is critical to their successful reentry to society.⁴ For many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encountering significant barriers to securing housing, including public and other federally-subsidized housing,

This legal opinion from HUD OGC applies to all housing covered by the Fair Housing Act.

https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASStandCR.pdf

HUD has said that an FAQ is forthcoming.



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Blanket Bans Under the Fair Housing Act

Criminal records status is *not* a protected class.

But adverse housing decisions based on a person's criminal record screening may violate the Fair Housing Act, which prohibits discrimination on the basis of race.

1. ***Discriminatory treatment*** – criminal record as pretext for race
2. ***Disparate impact*** – facially neutral policies that have an unjustified disparate impact on racial minorities



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Disparate Impact: Step 1

Q1: Is there a disparate impact on race or other protected class?

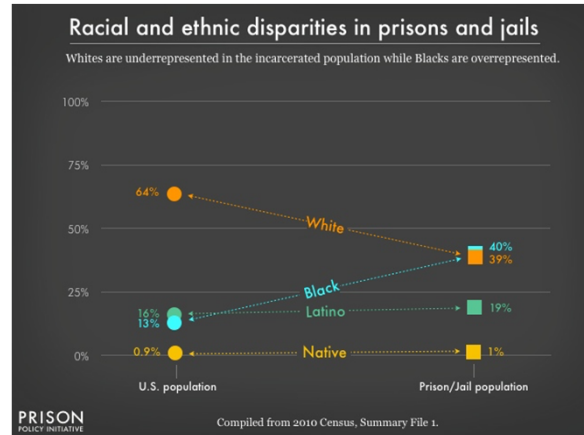
- Plaintiff's burden
- Local and state statistics preferred, but HUD says that national statistics may work



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Disparate Impact: Step 1



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Disparate Impact: Step 2

Q2: Is the disparate impact justified? In other words, is it necessary to achieve a substantial, legitimate, and necessary interest?

- Defendant's burden.
- Proof required; speculation is not enough.
- Defendant will have to show that the prohibited criminal activity "indicates ***a demonstrable risk to resident safety and/or property.***"



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Disparate Impact: Step 2

General Principles:

- No arrests without convictions because no proof of criminal activity
- No blanket bans on convictions because not all indicate risk to resident safety and/or property
- Even if only some convictions, defendant must show demonstrable risk to resident safety and/or property, usually by showing that it considers (1) nature, (2) severity, and (3) recency of criminal activity



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Disparate Impact: Step 3

Q3: Is there a less discriminatory alternative?

- Burden back on plaintiff.
- **Individualized assessment of relevant mitigating factors** will usually be a less discriminatory alternative to a blanket ban.



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Disparate Impact: Big Exception

No disparate impact claims for convictions for manufacturing and distribution of drugs. 42 U.S.C. 3607(b)(4).



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No Mere Arrests

Arrests alone cannot be the basis of a denial, eviction, or termination.

So what is proof of criminal activity?

- Arrests as a starting point.
- Other evidence like police reports.
- Must be based on a preponderance of evidence.

Best practice: Only use conviction records



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Mitigating Circumstances

Required for PH admissions, but may be considered for other decisions.

Note that before an adverse decision, an applicant or resident must have the right to dispute the relevance of a criminal record. 24 CFR 982.553(d)(1)-(2).

Use FH guidance to argue that it is always required to some degree.

Examples of mitigating evidence from HUD notices.



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Mitigating Circumstances: Disabilities

HUD guidance did not address fair housing implications of denials/terminations based on criminal history for people with disabilities.

Always request a reasonable accommodation when the criminal activity was related to an individual's disability.



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Mitigating Circumstances: VAWA

Where survivor's criminal record arises from abuser's conduct, argue that consideration of mitigating circumstances is required under VAWA.



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Mitigating Circumstances: Best Practices

Best practice: Opportunity to present mitigating circumstances *before* an adverse action.

But what about “ban the box” in housing?



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Due Process: Rights

Admissions

- Right to Notice + Opportunity to dispute accuracy and relevancy of criminal record before denial.
- Right to request information review after denial

Termination/Eviction

- Right to notice + opportunity to dispute accuracy and relevancy of criminal record before denial
- Right to administrative grievance hearing before impartial hearing officer



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Due Process: Evidence

Housing provider's decision must be based on a preponderance of the evidence.

- Judicial rules of evidence don't apply in hearings.
- Advocates should still consider whether housing provider's evidence should be used to support the decision.
- Beware of hearsay issues- consider reliability and probative value of police reports, witness statements, and other evidence.



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Open Questions

What is a reasonable lookback period?

- Shriver Center Report: Most PHAs fall within 3-5 year range.
- **Best practice:** 12 months for drug-related criminal activity, 24 months for violent criminal activity

How do fair housing laws protect people with disabilities who have come in contact with the criminal justice system?



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Advocacy Strategies



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Comment on local PHA Plan and other plans

Common issues to look out for

- Use of arrests?
- Lookback/exclusionary period?
- Blanket bans?
- Overbroad categories of criminal activity?
- Due process rights?

Call NHLP and Shriver Center for technical assistance.



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How would you comment on this policy?

8. Staff will determine if the applicant has a history of disturbance to neighbors, destruction of property, or living or housekeeping habits at prior or present residences which may adversely affect the health, safety, or welfare of other tenants or neighbors; or a history of criminal activity on the part of any applicant family member involving crimes of physical violence to persons or property or other criminal acts which may affect the health, safety, or welfare of other persons. Other criminal acts may include, but are not limited to:

- a pattern or arrests or conviction for drug-related offenses;
or
- organized gambling activities; or
- gang-related criminal activities.
- violent criminal activities



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How would you comment on this policy?

No time limit

8. Staff will determine if the applicant has a history of disturbance to neighbors, destruction of property, or living or housekeeping habits at prior or present residences which may adversely affect the health, safety, or welfare of other tenants or neighbors; or a history of criminal activity on the part of any applicant family member involving crimes of physical violence to persons or property or other criminal acts which may affect the health, safety, or welfare of other persons. Other criminal acts may include, but are not limited to:

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- violent criminal activities

Use of arrests to prove criminal activity



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How would you comment on this policy?

An authorized representative of HAKC will document any pertinent information relative to the following:

1. **Criminal Activity** – including the activities further defined herein as of a criminal nature.
2. **Pattern of Violent Behavior** – includes evidence of repeated acts of violence on the part of an individual, or a pattern of conduct constituting a danger to neighbors' peaceful enjoyment of their premises. HUD defines violent criminal activity as any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force against a person or property, and the activity was/is being engaged in by any family member.
3. A pattern of conduct reflected by several violations of Federal, State or local law indicative of disregard for the law and the rights of others. Examples include, but are not limited to, violations for trespassing, disturbing the peace, disorderly conduct, prostitution or public drunkenness on or near Public Housing property.
4. Was convicted of prostitution within the past five (5) years in accordance with Chapter 99 Section 99.103



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How would you comment on this policy?

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Blanket ban?

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Overbroad categories of criminal activity

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How would you comment on this policy?

If on probation or parole for any conviction, assistance will be denied until the member has been discharged from probation or parole.




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How would you comment on this policy?

Overbroad category of criminal activity


If on probation or parole for any conviction, assistance will be denied until the member has been discharged from probation or parole.

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**A Model Policy from
the Housing Authority of New Orleans**

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Type	#	Crime Category	Subcategory	Further Review
Crimes Against Persons	1	Assault and Battery	Felony only	Further Review if within 3 years of conviction or 1 year of release from date of screening
	2	Misdemeanor Domestic Violence	All	Further Review 3 years of conviction or 1 year of release from date of screening
	3	Use of firearm against a person	All	Further Review
	4	Armed Robbery offenses	All	Further Review
	5	Robbery offenses, no weapon involved	All	Further Review if within 3 years of conviction or 1 year of release from date of screening
	6	Intentional Homicides	All	Further Review
	7	Manslaughter	All	Further Review
	8	Kidnapping and Abduction	All	Further Review
	9	Sex offenses - forcible	All	Further Review
Crimes Against Property	10	Sex offenses - non-forcible	Felony only and peeping tom misdemeanor	Further Review if within 3 years of conviction or 1 year of release from date of screening
	11	Stalking	All	Further Review if within 3 years of conviction or 1 year of release from date of screening
	12	Arson-related offenses	All	Further Review
	13	Burglary/Breaking and Entering-related offenses	Felony only	Further Review if within 3 years of conviction or 1 year of release from date of screening
	14	Theft, Stolen Property, Fraud-related offenses	If two or more convictions	Further Review if within 3 years of latest conviction or 1 year of release from date of screening
	15	Destruction/Damage/Vandalism of Property offenses	Felony only	Further Review if within 3 years of conviction or 1 year of release from date of screening
Crimes Against Society	16	Drug offenses -- Possession	If two or more felony convictions	Further Review if within 1 year of latest conviction or release from date of screening
	17	Drug offenses - Manufacture, Distribution, or Possession with Intent to Distribute	All	Further Review if within 3 years of conviction or 1 year of release from date of screening
	18	Driving under the influence-related offenses	If two or more convictions	Further Review if within 1 year of latest conviction or release from date of screening
	19	Weapons offenses (other than use of a firearm against a person)	All	Further Review if within 3 years of conviction or 1 year of release from date of screening
In addition:				
Multiple offenses	20	# 1, 2, 4, 5, 7, 10, 11, or 17.	If two or more convictions	Further Review if two convictions are within previous 10 years from date of screening

Enumerated, limited list of criminal activity

Uses "Further Review" rather than denial

Most lookback periods are within 3 years of conviction or 1 year of release.

PHA Plan: Best Practice

2. Rules to Apply the Screening Criteria Grid


The look-back periods in the Screening Criteria Grid apply from the date of conviction or date of release from detention or incarceration—whichever is more recent—to the date of the screening. The post-release look-back periods only apply to release from serving a sentence for the crime identified in the Grid. Incarceration for any other reason is not relevant to the post-release look-back periods in the Grid.

The Screening Criteria Grid generally applies to convictions. Arrests alone shall not be considered, unless charges are pending. In the case of pending charges listed on the Grid, a decision on admission is deferred until adjudication of the case. If an expunged conviction appears on a criminal background report, it will not be considered in the screening process.

The misdemeanors specified in the Grid are those that may reasonably impact community safety, such as a domestic violence or concealed weapon offense.


Will not be considered:

- Incarceration alone
- Arrests alone
- Expunged records



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PHA Plan: Best Practice

The Panel will then conduct an individualized assessment based on the totality of the circumstances to determine whether the applicant should be admitted or denied admission. The Panel will follow the procedures in this document.



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PHA Plan: Best Practice

2.6 Applicant Documents for Panel Consideration. The applicant bears no burden of proof. However, the applicant is invited to submit the following, if relevant:

- Letter or comments from a probation/parole officer;
- Letter or comments from a case worker, counselor, or therapist;
- Certificates of treatment completion as relevant to the conduct underlying the conviction(s) (e.g., batterers' intervention, sex offender treatment, drug or alcohol treatment, cognitive behavioral therapy);
- Letter or comments from family members or others who know the applicant well;
- Document from a community organization with which the applicant has been engaged;
- Letter or comments from employers or teachers;
- Certificate of completion of a training program;
- Proof of employment;
- Other relevant documents;
- Statement from the applicant (see 2.3).

Lists examples of mitigating evidence



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PHA Plan: Best Practice


Requires consideration of mitigating factors and lists those factors

Requires panel to explain any factors they considered that was not listed.


The Panel will, at a minimum, take into account the following factors in its decision-making:

- a. Criminal History
 - Time since most recent conviction;
 - Time since release from prison/jail, if applicable;
 - Number of convictions;
 - Nature of the conviction;
 - Risk and/or needs scores, if applicable, such as Louisiana Risk Needs Assessment (LARNA) used by Probation and Parole.
- b. Rehabilitation
 - History of drug/alcohol abuse;
 - Treatment participation (while incarcerated or not);
 - Treatment completion;
 - Success or failure during community supervision, if any.
- c. Community Ties/Support
 - Household composition;
 - Support networks (both who supports the applicant and who the applicant supports);
 - Involvement in community groups (e.g., volunteer work, AA/NA).
- d. Employment History
 - Current employment;
 - Employment stability;
 - Current educational or training program.

The Panel may consider any factors other than the above, that they consider relevant. If the Panel considers any factors other than the above, they will specify those factors and explain why they were relevant. For any denial based on a household member's criminal record, the Panel may permit the remaining household members to be admitted, after excluding the denied family member.




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Other Advocacy Strategies

- Work with clients to appeal denials
- Coalition Building
- Get local HUD office involved
- Litigation
- Support local, state, and federal policy initiatives to improve housing choice for people with criminal records



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Question & Answer



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For further information

Deborah Thrope
(415) 546-7000 ext 3124
dthrope@nhlp.org



www.nhlp.org
[@nhlp](https://www.facebook.com/nhlp)
www.facebook.com/nhlp

Marie Claire Tran-Leung
(312) 754-9450
marieclairetran@povertylaw.org



www.povertylaw.org
[@shrivercenter](https://www.facebook.com/shrivercenter)
www.facebook.com/shrivercenter

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