June 10, 2024

U.S. Department of Housing & Urban Development
Office of General Counsel, Regulations Division
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: National Housing Law Project's Sign-on Comment on HUD Notice of Proposed Rulemaking "Reducing Barriers to HUD-Assisted Housing"

Thank you for the opportunity to provide feedback on the Department of Housing and Urban Development's Notice of Proposed Rulemaking "Reducing Barriers to HUD-Assisted Housing." The following comments are submitted on behalf of the National Housing Law Project (NHLP), members of the Housing Justice Network (HJN), and the undersigned organizations. The undersigned consist of 75 national, state, and local organizations representing a diverse set of perspectives, including legal aid, fair housing, criminal legal system reform, and disability rights.

We strongly support the proposed rule, which takes a much-needed step toward a more balanced and reasonable approach to the use of criminal history in admissions, subsidy terminations, and evictions in HUD-assisted housing. Once finalized, this rule will further fair housing by reducing criminal records barriers that disproportionately harms Black communities and other communities of color, people with disabilities, and survivors of gender-based violence.

NHLP's mission is to advance housing justice for people living in poverty and their communities. NHLP achieves this by strengthening and enforcing the rights of tenants and increasing housing opportunities for underserved communities. Our organization also provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. NHLP hosts the national Housing Justice Network (HJN), a vast field network of over 2,000 community-level housing advocates and resident leaders. HJN member organizations are committed to protecting affordable housing and residents' rights for low-income families across the country.

This comment provides recommendations on (i) definitions, (ii) evidence of disqualifying criminal activity, (iii) admissions, (iv) terminations and evictions, and (v) additional topics.

DEFINITIONS

HUD should adjust definitions in the proposed rule to eliminate potential loopholes that can harm applicants and tenants with criminal histories.

HUD should define "currently engaging in" in the 3-6 month range, not 12 months. Since federal law requires PHAs and owners to deny any applicant who "is illegally using a controlled substance,"[1] a person who used an illegal drug twelve months ago would automatically be denied housing under the proposed rule. It is a stretch of the imagination to characterize activity that took place twelve months ago as "current." A shorter timeframe aligns with the overall purpose of the proposed rules to reduce automatic denials from HUD-assisted housing on the basis of disqualifying criminal activity.

HUD should define "threatens the health, safety, and right to peaceful enjoyment" to preclude overly broad categories of disqualifying criminal activity. The definition should require that the threat is actual, substantial, and imminent. PHAs and owners should not be able to accept "[g]eneralized

[1] 42 U.S.C. § 13661(b)(1)(A).

assumption," "subjective fears," or "speculation" as conclusive evidence of disqualifying activity.[2] A definition that focuses on an actual, substantial, and imminent threat aligns with the Violence Against Women Act and the Fair Housing Act, under which PHAs and owners have existing obligations.

To increase precision and reduce confusion, HUD should define *criminal activity*; eliminate the definition and use of *criminal history*; and adjust the definition and limit the use of *criminal record*. Even though the term "criminal activity" is used throughout the relevant statutes and regulations, it is not defined. A definition, long overdue, would help focus PHAs and owners who might otherwise fixate on whether a criminal record exists as opposed to whether a person actually engaged in disqualifying criminal activity.[3] It is also consistent with the various HUD guidance and case law interpreting the term "criminal activity" used in statutes and regulations.[4]

By contrast, the term "criminal history" is not statutory and therefore should be eliminated in the final rule. Otherwise, its inclusion alongside the statutory term "criminal activity" in the proposed rules is confusing, and its elimination will result in little to no substantive changes.

References to the term "criminal record" should be reserved for the information that HUD-assisted housing providers obtain from law enforcement or other sources governed by Subpart J. Outside of this context, HUD should eliminate use of this term to avoid confusion, including references to "any finding of unsuitability that is based on a criminal record." Such language conflicts with the statutes that refer to findings of unsuitability based on criminal *activity*.

EVIDENCE OF DISQUALIFYING CRIMINAL ACTIVITY

HUD should adopt more prescriptive limitations on the evidence sufficient to prove criminal activity.

1. **Arrest records**

Although we support HUD's prohibition against arrest record screening, we strongly oppose allowing PHAs and owners to use an arrest record to trigger an inquiry into whether the underlying conduct occurred. This decision undermines the overall prohibition and opens a backdoor for records that are frequently inaccurate, unreliable, and discriminatory.

Arrest records are highly prejudicial with limited to no probative value. Because of confirmation bias, PHAs and owners are likely to accept evidence that conforms to their theory that the person engaged in the underlying conduct, even if the evidence would not be considered reliable in the criminal legal system.

On a practical level, this exception will likely encourage PHAs and owners to use pretext to collect information about arrest. PHAs and owners can defend their practice from fair housing concerns by claiming that they are investigating the underlying conduct, despite their lack of proper investigatory skills.

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[2] *Cf.* H.R. REP. NO. 711, 100th Cong., 2d Sess. 18, 29, reprinted in 1988 U.S. CODE CONG. ADMIN. NEWS 2173 (regarding whether a person should be considered a direct threat to others under the FHAA).

[3] The NPRM notes that "[t]he conduct, not the arrest, is what is relevant for admissions and tenancy decisions." Reducing Barriers o HUD-Assisted Housing, 89 Fed.Reg. 25332, 25341 (Apr. 10, 2024).

[4] *See, e.g.,* HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 5 (Apr. 4, 2016) (discussing how "[i]n most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal *conduct*") (emphasis added) [hereinafter "2016 OGC Guidance"]; Memorandum from Demetria McCain, Principal Deputy Assistant Secretary for Fair Housing & Equal Opportunity, Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 10 (June 10, 2022) (describing relevant individualized evidence that revolves around the conduct at issue, such as "the facts and circumstances surrounding the criminal *conduct*" and "how long ago the *conduct* occurred") (emphasis added) [hereinafter "2022 FHEO Memorandum"]; *see also Landers v. Chicago Housing Authority*, 936 N.E.2d 735, 742 (Ill. App. Ct. 2010) (overturning denial on the basis of an arrest record because "there was no verifiable criminal conduct to support the rejection of petitioner's application") (emphasis added).

Another consequence of this policy is that applicants with arrest records will require legal representation, or at least an advocate like a caseworker, to help them navigate the application process and ensure that the PHA and owner are using their arrest record correctly and fairly. Because not all HUD applicants have access to an advocate, an arrest record may remain a practical barrier for many.

Should HUD choose not to eliminate the ability of PHAs and owners to re-investigate arrests that did not result in a conviction, HUD should, at a minimum, refine all provisions related to arrest records in the proposed rules to make this nuanced policy clearer. HUD should also issue detailed subregulatory guidance, preferably with multiple hypotheticals, to help PHAs, owners, applicants, and tenants understand what evidence independent of an arrest can prove engagement in criminal activity.

2. **Other evidence of criminal activity**

With respect to other types of evidence, to answer Question #7 for public comment, HUD should clarify what evidence may or may not be used to determine that criminal activity occurred for denials, terminations, and evictions in the final rule. Subsequent guidance can supplement, but should not replace, clarification in the final rule.

Police reports, witness statements, & dismissed charges: In the final rule, HUD should explain that police reports, witness statements, and dismissed charges should not be taken at face value as sufficient evidence of underlying criminal activity. In subregulatory materials, HUD should provide more detailed explanation, including hypotheticals, about such evidence may be sufficient. This explanation should be accessible to housing providers, tenants, and applicants to help ensure that all parties understand how to properly use this information.

Plea deals: We echo HUD's caution in the NPRM preamble that "even a guilty plea does not conclusively establish the underlying crime" and encourage HUD to explain in subregulatory guidance how best to treat plea arrangements.

Inclusion in a "gang database": So-called "gang databases" have long been criticized as being unreliable evidence of whether a person is a member of a gang, let alone whether they have engaged in criminal activity. Police can often include young people in a database for arbitrary reasons.[5] There is often little transparency into how or why a person is included on the database, and no way to challenge their inclusion. Such evidence often does not rise to the level of a reasonable suspicion of criminal activity, much less the preponderance of the evidence. HUD should advise PHAs and owners, therefore, against relying on a person's inclusion in a gang database as proof of criminal activity.

Expunged/sealed records & juvenile records: Because of state policy reasons justifying the confidentiality of expunged and sealed records as well as juvenile records, HUD should prohibit PHAs and owners from using them as evidence of disqualifying criminal activity.

ADMISSIONS

1. Admission denials based on failure to disclose record

We support the proposed limitation on when PHAs and owners may deny admission based on an applicant's failure to disclose their criminal record. To avoid loopholes, HUD should eliminate:

[5] *See, e.g., Unmasking the Boston Police Department's Gang Database: How an Arbitrary System Criminalizes Innocent Conduct*, 137 Harv. L. Rev. 1381 (Mar. 2024); *Targeted, Labeled, Criminalized: Early Findings on the District of Columbia's Gang Database* (Jan. 2024); City of Chicago Office of Inspector General, *Review of the Chicago Police Department's "Gang Database"* (Apr. 2019).

- **The first exception for PHAs and owners who only rely on self-disclosure.** Given the wide availability of criminal background checks, HUD-assisted housing providers rarely screen solely on the basis of self-disclosed records. Self-disclosure is also an unreliable method of collecting criminal history information not because people lie, but rather because people often misinterpret or misremember the details of their interactions with the bureaucracy of the criminal legal system.

- **The second exception for PHAs and owners to bar admission for failure to disclose a criminal record that would have been material to the decision.** If a person's criminal record provides sufficient evidence of disqualifying criminal activity, then the PHA or owner has grounds to deny admission based on the criminal activity. If retained, this exception would simply provide a work-around for a PHA or owner to bypass the individualized assessment requirement when denying applicants.

2. **Reasonable time & lookback period**

We support the proposed rule providing that a lookback period longer than 3 years is presumptively unreasonable. Congress considered three years to be a reasonable time period for barring applicants who had previously been evicted for drug-related criminal activity on federally assisted property,[6] which has a much stronger nexus to being a good applicant for HUD-assisted housing than generalized concerns about criminal activity. Adopting a similar lookback period also creates consistency for housing providers and tenants applying to HUD housing. A number of PHAs and housing providers have either adopted lookback periods that comport with HUD's proposed regulations or operate in jurisdictions that have restricted lookbacks for them.[7]

HUD should not establish different lookback periods for different types of criminal activity. Although such a system may arguably work within a given jurisdiction, HUD would be hard-pressed to create a user-friendly grid that accounts for the variations in classifications of offenses in federal law and the laws of the fifty states. Furthermore, such a system in HUD-assisted housing would add a complexity to the admissions process that would hike the administrative costs of housing providers and make the process less accessible and predictable for applicants attempting to gauge their eligibility for housing.

HUD should clarify the event that triggers the lookback period. The proposed rule refers to "prohibiting admission for a period of time longer than three years following any particular *criminal activity*," suggesting that the conduct that the applicant engaged in triggers the lookback period. This straightforward interpretation, however, is undermined by the following phrase: "including prior terminations from HUD-assisted housing for drug-related criminal activity." Terminations are a consequence, not a category, of criminal activity. To make sure that PHAs and owners administer their lookback periods consistently, HUD should clarify the triggering event in the final rule.

Finally, while we support the requirement that housing providers present empirical evidence before they can establish a longer lookback period, HUD should clarify the process for requesting and approving a longer lookback period. Without such clarification, PHAs and owners may mistakenly believe that they can adopt a longer lookback period on a case-by-case basis as long as they can point to empirical evidence. The NPRM, however, seems to contemplate a more rigorous approval system for adopting and justifying a longer lookback period. In multifamily housing, one solution is to incorporate such an approval process into the proposed notice-and-comment process for proposed changes to tenant

[6] 42 U.S.C. § 13661(a).

[7] *See, e.g.,* Housing Authority of Cook County (3 years); Housing Authority of Prince George's County (3 years); *see also* Just Housing Amendment to the Cook County Human Rights Act.

selection plans.[8] HUD could require PHAs to incorporate a similar process during the annual plan process. Whatever process is used, it is critical to have a mechanism in place for PHAs and owners to secure HUD's affirmative approval before denying applicants under the longer lookback period.

3. **Individualized assessment**

We support HUD requiring PHAs and owners to conduct an individualized assessment and consider mitigating circumstances before denial of admission. Currently, some PHAs and owners require applicants to submit additional mitigating evidence and materials before they can request what is essentially an individualized assessment. This timeline often disadvantages applicants who do not have ready access to these materials and may deter or intimidate tenants who lack the ability to prepare such review petitions on their own. A "deny first, appeal later" model commonly prevents people from accessing the housing they need. In mandating an individualized assessment before denial of admission, HUD will help catch applicants who might otherwise fall through the cracks.

HUD should generalize its proposed definition of "individualized assessment" so that the definition can also apply to eviction history and credit history, in addition to criminal history. Furthermore, HUD should remove references to "risk" – a task better left to the criminal legal system – and instead make clear that, in the criminal history context, the key issue for decision in an individualized assessment is whether reliable evidence shows that the applicant does not, at the time of admission, conform their conduct to relevant laws having a nexus with housing and the health and safety of other residents and neighbors.

4. **Mitigating Circumstances in Admissions**

We support HUD's actions to improve provisions regarding mitigating circumstances, including the removal of factors that reflected outdated attitudes toward low-income people and were largely irrelevant to whether a person with criminal history would be a successful tenant.[9] HUD should also:

- Add the factor of whether the conduct in question is part of a pattern of criminal activity to help PHAs and owners differentiate between isolated incidents and a continuing pattern;
- Remove references to the word "risk," which is more appropriate in the criminal legal system;
- Replace "adversely affect" with "would threaten" to be consistent with other proposed changes in the NPRM;
- Clarify whether the term "medical condition" refers to a person's disability status or rather a medical condition that does not rise to the level of disability under federal law;
- Clarify how different mitigating factors that refer to treatment, recovery, and rehabilitation interact with one another in the individualized assessment process;
- Remind PHAs and owners that the duty to consider mitigating circumstances under the proposed rule is distinct from reasonable accommodations;
- Re-insert the factor of "the effect of denial of admission on household members not involved in the conduct," which is part of the original regulations but is omitted in the proposed rule;

[8] 89 Fed.Reg. at 25351.
[9] Factors like "the demand for assisted housing by families who will adhere to lease responsibilities" and "the extent to which [a person] has taken personal responsibility" for example, play into the trope of "deserving versus non-deserving poor."

- Amend the list to ensure that PHAs and owners consider whether a person's criminal activity is related to their status as survivors as required by Violence Against Women Act.

5. Procedural Protections

We support HUD specifying a minimum time period to dispute the accuracy or relevance of the record before denial. HUD should provide further guidance on when PHAs and owners should extend the opportunity to dispute beyond the minimum 15 days provided in the proposed rule. To address inaccurate records, for example, an applicant may need up to 35 days to pursue credit disputes.[10]

In addition, HUD should ensure that applicants have the information necessary to determine their chances of satisfying the PHA or owner's tenant screening criteria. This information includes: (i) sources of criminal record information, including their rights under the Fair Credit Report Act,[11] (ii) a written copy of the tenant screening criteria in sufficient detail that an applicant can ascertain whether they are likely to qualify; and (iii) information about how to submit evidence of mitigating circumstances, how such evidence will be treated, how to request a reasonable accommodation for a disability, and how to contest an inaccurate, incomplete, or irrelevant record."[12]

HUD should also clarify the sequence of each process that a justice-involved individual goes through when applying for housing. The proposed rule describes two pre-denial processes that are related, but are never directly connected to one another: (1) the opportunity to dispute the accuracy or relevance of the record, and (2) the individualized assessment. If the applicant is denied, they are also entitled to a post-denial informal hearing, pursuant to existing HUD regulations. The purpose of the informal hearing is "to permit the applicant to hear the details of the reason for denial, present evidence to the contrary if available, and claim mitigating circumstances when possible."[13] A straightforward timeline from HUD is necessary to ensure that PHAs and owners implement these processes correctly and that applicants, especially those without advocates, do not get lost in a maze of procedures.

To ensure that applicants receive a meaningful chance to present their mitigating circumstances and receive full consideration by the PHA or owner, **HUD should require that PHAs and owners provide the following procedural safeguards to applicants during the individualized assessment:**

- The PHA or owner should provide the applicant with a pre-denial notice that includes the reasons for the proposed denial in as much detail as possible, including the specific standard(s) that the applicant does not meet and how.[14]

- Although applicants are already entitled to a pre-denial copy of the criminal record,[15] HUD should also make explicit that PHAs and owners must provide a copy of the criminal record before the individualized assessment takes place. The PHA or owner should also include an accessible explanation about how it will conduct the individualized assessment; instructions on how to

[10] *See* 15 U.S.C. § 1681i.

[11] U.S. Dep't of Housing & Urban Development, Office of Fair Housing and Equal Opportunity, Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing 13 (Apr. 29, 2024) [hereinafter "2024 OGC Tenant Screening Guidance"].

[12] *Id.*

[13] 24 CFR § 966.51(a)(1). The informal hearing is separate from the grievance hearing available to public housing residents. U.S. Dep't of Housing & Urban Development, Public Housing Occupancy Guidebook, *Eligibility Determination and Denial of Assistance* (June 2022) [hereinafter HUD Public Housing Occupancy Guidebook].

[14] 2024 OGC Tenant Screening Guidance at 13 ("Denial letters should contain as much detail as possible as to all reasons for the denial, including the specific standard(s) that the applicant did not meet and how they fell short.") If an applicant fails multiple screening criteria, the housing provider should disclose all such criteria. Furthermore, if an applicant has multiple criminal records, the PHA or owner must specify the precise criminal records that contribute to the proposed denial and which records did not.

[15] 24 C.F.R. § 960.204(c); *see also* 2024 OGC Tenant Screening Guidance at 13 ("All records relied upon should be attached, including any screening reports")

submit evidence of mitigating circumstances, including the time frame for submission; and instructions on how to make a request for reasonable accommodation for a disability if needed.[16]

- Finally, if the PHA or owner ultimately decides to deny after conducting the individualized assessment, the applicant should receive a written decision that states the evidence relied upon and delineates the evidence found credible from that found not credible.[17] The PHA must also notify the family that it may request an informal hearing.[18]

TERMINATIONS & EVICTIONS

1. Notice of rights regarding mitigating circumstances

While we applaud HUD's proposal to require PHAs and owners to consider mitigating circumstances before termination and eviction, the absence of a mechanism to hold them accountable is concerning, especially since PHAs and owners vary significantly in terms of whether and when they consider a person's mitigating circumstances before terminations or evictions.

To help ensure that residents understand and can enforce their rights, HUD should require PHAs and owners to provide a written notice of their right to present mitigating circumstances. This notice should include instructions on how to submit evidence of mitigating circumstances and a description of the PHA or owner's duty to consider those circumstances before taking an adverse action. HUD should require PHAs and owners to provide this notice at the same time that they provide the resident with a copy of their criminal record, *i.e.*, at least 15 days before the eviction or lease termination action under the proposed rule.[19] Ideally, residents should receive this notice before they receive a termination or eviction notice so that they can have enough time to gather the evidence needed to persuade the PHA or owner not to take the adverse action. At minimum, the PHA or owner should provide this notice concurrently with the termination or eviction notice, though this timing would not be as conducive to fully effectuating the resident's right to full consideration of their mitigating circumstances.[20]

In addition, HUD should engage in affirmative compliance monitoring to ensure that PHAs and owners are providing residents with the proper notices and fulfilling their duties to consider mitigating circumstances.

2. 15-day period for opportunity to dispute

While we generally support the proposed rule's requirement of a minimum 15-day period to dispute the accuracy or relevance of the criminal record, **HUD should require that this 15-day period take place *prior to* the PHA or owner initiating the termination or eviction process.** Given the overwhelming evidence that criminal records and tenant screening reports contain many errors,[21]a 15-day period will give families the chance to correct a false or misleading report, to prepare mitigating circumstances to

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[16] 2024 OGC Tenant Screening Guidance at 13-14. The PHA or owner should also include a detailed description of how they will conduct individualized assessments in the relevant ACOP, administrative plan, or tenant selection plan.
[17] *See, e.g.*, 24 C.F.R. § 960.208(a) ("PHA must promptly notify any applicant determined to be ineligible for admission to a project of the basis for such determination"); § 880.603(b)(2) ("the owner will promptly notify the applicant in writing of the determination and its reasons").
[18] 24 C.F.R. § 882.514(f). According to HUD: "The purpose of the hearing is to permit the applicant to hear the details of the reason for denial, present evidence to the contrary if available, and claim mitigating circumstances when possible. The person who made the original decision to deny, or a subordinate of that person may not conduct the hearing. A written record of the hearing decision should be mailed to the applicant and placed in the applicant's file. If the hearing decision overturns the denial, processing for admission should resume." *See* HUD Public Housing Occupancy Guidebook at 22.
[19] 89 Fed. Reg. at 25363 (proposing changes to 24 CFR 5.903(f)).
[20] See 34 U.S. Code § 12491(d).
[21] *See, e.g.*, Consumer Financial Protection Bureau, Consumer Snapshots: Tenant Background Checks (2022) (noting that between January 2019 to September 2022, the agency received "more than 17,200 [consumer complaints] related to incorrect information appearing on a prospective renter's report")

present to the PHA, and to obtain an advocate to assist them. As the regulation currently reads, the PHA or owner may send the family a termination notice and include a copy of the criminal record at the same time or simply reference the record in the notice, leaving tenants with little to no time to prepare. HUD should also provide guidance on when it is appropriate for PHAs and owners to extend the opportunity to dispute beyond the minimum 15 days, such as when additional time is needed to pursue credit disputes.

3. Copy of criminal records anytime they are pulled

HUD should require that PHAs and owners provide tenants with a copy of their criminal record *anytime* it is pulled, rather than only when it is the basis of a proposed denial, termination, or eviction action. This requirement would help uncover housing providers who use nonpayment evictions as a pretext for criminal activity evictions.

4. Mitigating circumstances in subsidy terminations and evictions

We support the addition of a list of mitigating circumstances in terminations and evictions separate from the list for admissions. HUD should also:

- Add the factor of "the length of time that has passed since the conduct," which was in the original regulation but was omitted from the proposed rule;
- Add the factor of whether the conduct in question is part of a pattern of criminal activity to help PHAs and owners differentiate between isolated incidents and a continuing pattern;
- Amend the list to ensure that PHAs and owners consider whether a person's criminal activity is related to their status as survivors as required by Violence Against Women Act; and
- Amend the list to ensure that PHAs and owners consider whether there is an alternative to eviction available to PHAs and owners that would allow the tenant to maintain their assistance and housing. This factor is consistent with the position that evictions should be the last resort in HUD-assisted housing.[22] The factor is also consistent with fair housing laws, which requires housing providers to consider whether its substantial, legitimate, nondiscriminatory interest could be served by an alternative practice that has a less discriminatory effect.[23]

5. Staying termination and eviction proceedings while the criminal case is pending

We support HUD's decision to give PHAs the discretion to stay the termination hearing while the criminal court case for the underlying activity is pending. In the evictions context, **HUD should issue guidance to PHAs and owners to encourage them to pause eviction proceedings pending the final disposition of the criminal case consistent with their duty to affirmatively further fair housing.**

6. Address termination due to a family break-up related to gender-based violence

When a family in federally assisted housing breaks up because of gender-based violence (GBV), the termination process can raise complicated issues that require a thoughtful balance between the survivor's rights under VAWA and the rights of the person accused of doing harm under the proposed rule. VAWA has specific requirements around proof, confidentiality, evictions, and admissions, and PHAs and owners

[22] *See, e.g.*, HUD PIH Notice 2023-06, Notice of Remedies PHAs have for Poor Performing Owners in the Housing Choice Voucher and Project-Based Voucher Programs 4 (2023) (reminding PHAs "that owners can adopt and implement alternative strategies to eviction to address tenant actions that are in breach of the lease agreement and use eviction as a last resort option to remedy noncompliance").
[23] *See* 2016 OGC Guidance, supra note 4, at 7.

must comply when GBV is alleged. Similarly, the proposed rule discusses types of evidence of criminal activity, the relevant standard of proof, and mitigating circumstances that PHAs and owners must consider before taking an adverse action based on the criminal activity. PHAs and owners must balance these requirements while at the same time carrying out the termination process in a way that considers and protects the survivor's ongoing safety.

To this end, HUD should convene listening sessions to hear from GBV experts and others to understand how family break-ups happen on the ground and what reforms are needed to protect the due process rights of both the survivor and the harm-doer. The findings from these sessions should inform robust guidance from HUD to PHAs and owners on a balanced approach to subsidy terminations due to a GBV-related family break-up that works for both parties involved. Because a balanced approach may mean that both parties should receive a subsidy, the HUD guidance should also re-affirm that PHAs and owners have the discretion to issue two subsidies, particularly where there is evidence in mitigation, such as rehabilitation, disability, children, or other factors

7. Additional regulatory changes to reduce "one strike" evictions

To reduce "one strike" evictions, HUD should also consider making the following regulatory changes:

- Define "on or near the premises" as "immediate vicinity" or "on or directly adjacent to the premises"
- Establish an innocent tenant defense to prevent evictions for criminal activity that the tenant did not do, did not know or have reason to know would occur, could not prevent, and has taken action to prevent in the future.
- Ensure a voucher family's right to due process and a fair hearing by amending 24 C.F.R. § 982.555 to ensure the household's right to an impartial decisionmaker[24] and right to cross examine[25]
- Eliminate or limit the criminal activity exclusion of public housing residents' right to a grievance procedure
- Address the use of drug-related activity that has been decriminalized under state law

ADDITIONAL TOPICS

1. Housing Choice Vouchers (HCV) & Project-Based Vouchers

HUD should extend the proposed rule to HCV landlords so that voucher holders may benefit from increased access for justice-involved individuals. HUD should apply the same protections against a voucher landlord's overbroad and unreasonable use of criminal history, including the duty to consider mitigating circumstances and to conduct an individualized assessment, among other protections. From the perspective of the voucher holder, it does not make sense to go through an individualized assessment that includes consideration of all mitigating circumstances by the PHA, only to be rejected on the basis of the exact same criminal history by a voucher landlord. Yet, the proposed rule maintains this two-tiered

[24] Consider the following language from rural housing (7 C.F.R. § 3560.160). "The hearing should be conducted by any person or persons not employed or affiliated with the PHA, and under no circumstances by a person who made or approved the decision under review or a subordinate of this person. The PHA and family must select a hearing officer or hearing panel. If the PHA and family cannot agree on a hearing officer, then they must each appoint a member to a hearing panel and the members selected must appoint a third member.

[25] Consider the following language: "The PHA must make available by the family for cross examination any person on whose information the PHA relies. Termination of assistance may not be based on hearsay."

system that tenants will have difficulty navigating and that undermines the balanced approach to housing access for people with criminal histories that the proposed rule strives for.

The final rule should clarify that the revised regulations apply to project-based voucher owners. HUD's concerns about retaining HCV landlords does not apply in the PBV setting because the subsidy is tied to the unit.

2. Portability & rescreening generally

We support the proposed rule's prohibition against the receiving PHA rescreening voucher holders. To prevent PHAs from interpreting this prohibition as applying only to income screening or to participants – a common practice – HUD should take one step further and expressly state that *the receiving PHA cannot rescreen for any criteria, including criminal history, eviction history, and credit for both participants or incoming families issued a voucher.*

3. Exclusion of culpable members

To prevent unreasonably long and sometimes indefinite exclusions,[26] we support the proposal to limit the duration of the exclusion to the time a person would be denied admission for similar conduct. We also support the requirement that the exclusion be reasonable in light of the age of the excluded household member, their relationship to other household members, and all other relevant circumstances.

HUD should make additional improvements to the final rule. First, HUD should explicitly state that the exclusion of minors from their families should be a last resort and that PHAs and owners should not be routinely offering exclusion as the only means of preserving tenancy. Second, since these exclusions will be time-limited, HUD should address both family separation *and* family reunification by discussing the circumstances under which excluded family members can later re-join the household.[27]

4. Tenant selection plans (TSPs)

We support requiring multifamily owners to amend their TSP within a specific time after the effective date of the final rule and believe that 6 months is reasonable. We support requiring owners to post a copy of their TSPs in each office that receives applications and to make free copies available to applicants and tenants who request them. **HUD should also consider online availability of these policies a requirement, as opposed to simply an alternative to hard copies in the office.**

Finally, we support the tenant's right to notice of proposed substantive changes, a 30-day period to inspect and copy these changes, and the right to submit written comments to the PHA/owner and the local HUD office. **HUD should amend the rule further by requiring the owner and the local HUD office to respond to tenant comments and HUD to engage in compliance reviews to ensure that TSPs reflect the final criminal history regulations.**

5. Interaction with local laws

We also support the proposed clarification that these regulations are not "intended to pre-empt operation of State and local laws that provide additional protections to those with criminal records" since some PHAs have pushed back against fair chance housing ordinances in some jurisdictions.

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[26] *See, e.g.*, Note, Maia M. Long, *Permanently Excluded*, 95 N.Y.U. L. Rev. 1062 (2020) (describing New York City Housing Authority's practice of exclusions for 10 years and sometimes indefinitely); Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. Times (Oct. 1, 2007).

[27] HUD should also amend the language to align with our recommendations on the use of arrest records earlier in the comment.

In addition, HUD should state explicitly that these regulations create a policy "floor," which covered housing providers must not undermine by complying with more aggressive state and local laws that mandate evictions and admissions denials without sufficient evidence of disqualifying criminal activity. Crime-free programs and nuisance property ordinances (CFNO) are a classic example of such a law. CFNOs interfere with important federal good cause requirements, the proposed goals of the NPRM, and federal civil rights laws. Covered housing providers need clear guidance from HUD as a counterpoint to often direct and intense pressure from local governments to evict or deny admission to tenants as a result of any contact with the criminal legal system.

6. Tenant screening companies

We support expanding the scope of Subpart J from records from law enforcement to records from "another source." In addition to third-party tenant screening companies, HUD should also note that "another source" includes public court databases. HJN members report that some PHAs send a person to the courthouse to review the court records at a public database without differentiating between case outcomes. A PHA may see, for example, that an applicant is a defendant in a criminal case, but not factor into its admission decision that the case was subsequently dismissed. HUD should provide guidance on how PHAs and owners use such records as well as the information that they must provide to applicants and tenants so that they can understand what evidence is being used against them.

We support the explicit reminder to PHAs and owners that "HUD standards for nondiscrimination requirements extend to third-party screening services or companies" they contract with. HUD should remind PHAs, owners, and tenant screening companies that automated decisions are unlikely to satisfy the requirement that PHAs and owners consider an applicant's or tenant's mitigating circumstances.

7. Additional recommendations related to enforcement

Many of the policy changes in the NPRM are welcome, but there are concerns that HUD does not provide strong enforcement mechanisms beyond the pre-existing enforcement tools against PHAs and owners. In subregulatory guidance implementing the final rule, HUD should specify the avenues that applicants and tenants have to challenge PHA and owner actions that are inconsistent with the final rule, such as if the PHA or owner continues to adopt blanket bans or routinely fails to consider a person's mitigating circumstances.

At the very least, HUD must collect more data about the use of criminal history by HUD-assisted housing providers. Given the known impact of criminal records screening and criminal activity evictions, such data collection is necessary for HUD to carry out its duty to affirmatively further fair housing (AFFH). HUD could take similar steps to Illinois's Public Housing Access bill, which requires all Illinois PHAs to collect information about applications received and denied on the basis of criminal history and disaggregate that information by the race, ethnicity, and sex of housing applicants. This information is then reported to a central state agency.[28] Similar data collection by HUD would increase transparency and bolster enforcement of the final rule.

Thank you for taking this action to strengthen protections for justice-involved individuals in HUD-assisted housing. For your reference, the National Housing Law Project is also submitting an extended version of this comment that elaborates on the recommendations set out above and is entitled "National Housing Law Project's Extended Comment on HUD Notice of Proposed Rulemaking 'Reducing Barriers to HUD-Assisted Housing.'" For questions about either comment, please contact Marie Claire Tran-Leung, Evictions Initiative Project Director, National Housing Law Project, mctranleung@nhlp.org.

[28] 310 ILCS 10/8.10a.

Sincerely,

National Housing Law Project

Alliance for Safety and Justice
Alliance for the Betterment of Citizens with Disabilities (New Jersey)
Americans for Financial Reform Education Fund
ArchCity Defenders, Inc.
Bay Area Legal Aid
Blue Ridge Legal Services, Inc. (Virginia)
Chicago Lawyers' Committee for Civil Rights
Collaborative Support Programs of New Jersey
Colorado Poverty Law Project
Community Justice Project
Community Legal Aid Society, Inc. (Delaware)
Community Legal Services of Philadelphia
Community Planning and Advisory Council (New Jersey)
Connecticut Legal Services, Inc.
Disability Rights California
Disability Rights Education and Defense Fund
Drug Policy Alliance
Fair Share Housing Center
Faith in New Jersey
Florida Housing Umbrella Group
Greater Boston Legal Services
Greater Napa Valley Fair Housing Center
Greater Syracuse Tenants Network
Habitat for Humanity South Central New Jersey
Homeless Persons Representation Project
Housing Action Illinois
Housing and Economic Rights Advocates
Housing Assistance Council
Housing Opportunities Made Equal of Virginia
Illustra Impact
Indiana Legal Services
Jacksonville Area Legal Aid
Justice & Accountability Center of Louisiana
Justice in Aging
Land of Lincoln Legal Aid
Lawyer Committee for Better Housing
Legal Aid Society of Roanoke Valley
Legal Aid Society of San Diego
Legal Services of Greater Miami
Legal Services of Northern California
Legal Services of Northern Virginia
Mental Health Advocacy Services, Inc.
Mephibosheth, Inc.
Michigan Poverty Law Program
Mid Minnesota Legal Aid

Minnesota Second Chance Coalition
Mobilization for Justice, Inc.
National Consumer Law Center (on behalf of its low-income clients)
National Disability Rights Network
National Low Income Housing Coalition
Nebraska Appleseed
New Disabled South
New Hampshire Legal Assistance
New Jersey Citizen Action
New Jersey Institute for Social Justice
PolicyLink
Prosperity Indiana
Public Counsel
Public Justice Center
Regional Housing Legal Services
San Diego Volunteer Lawyer Program
Shriver Center on Poverty Law
Southern Poverty Law Center
Texas RioGrande Legal Aid
The Coalition of Mental Health Consumer Organizations of New Jersey
The Fortune Society
The Legal Aid Society
The Los Angeles Regional Reentry Partnership
The Public Interest Law Project
Three Rivers Legal Services, Inc.
Vera Institute of Justice
Vermont Legal Aid, Inc.
Virginia Poverty Law Center
Western Center on Law and Poverty
William E. Morris Institute for Justice