When Discretion Means Denial:

The Use of Criminal Records to Deny Low-Income People Access to Federally Subsidized Housing in Illinois

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Introduction

Keith Landers first applied for public housing in February 1995. For the next thirteen years, he would wait patiently for the day when his name reached the top of the Chicago Housing Authority (CHA)'s wait list—a long, but not uncommon length of time for the low-income people who managed to beat the odds by getting their names on the list. In November 2008, Mr. Landers got the news he had been waiting for: his name had come up on the wait list, and the end of his homelessness was near.

But first, he had to pass a criminal background check.

Long stretches of homelessness had subjected Mr. Landers to frequent questioning by the police. Sometimes, he was arrested for offenses, such as public drinking, that arose simply from living out in the open and in close proximity to other people on the streets. Never, however, was he convicted of a crime. In fact, each and every one of his criminal arrests was dismissed.

Despite Mr. Landers' testimony that he never engaged in the criminal activity for which he was arrested, the CHA still cited the results of his criminal background check in rejecting his application. Only after Mr. Landers successfully challenged this rejection in the Illinois circuit and appellate courts did the CHA finally admit him into its public housing program. In the courts, the fate of Mr. Landers' housing turned on whether his arrests alone constituted a "history of criminal activity"—a standard the CHA and many public housing authorities use for rejecting applicants. The Landers court explained that given Mr. Landers' arrest record, "there was no evidence that [he] was a potential threat to the health, safety, and welfare of the public housing community."[1]

Mr. Landers' case is just one of many examples where a criminal records policy implemented to help achieve a laudable goal—protecting the health, safety, and welfare of the public housing community—proves to be overly broad, resulting in the exclusion of people who both pose no threat to the community and have the least access to housing. His story is particularly compelling because his criminal record consists of nothing more than mere dismissals.

People with criminal records, regardless of whether they pose little to no threat, face an increasing number of housing barriers. It is not surprising, then, that many people who have left the criminal justice system experience homelessness at some point in their lives. In Minnesota, for example, one out of every eight homeless adults in 2003 had been released from a correctional facility within the past two years.[2] Furthermore, this mostly male population was

[1] *Landers v. Chicago Housing Authority*, 936 N.E.2d 735 at 742 (Ill. App. Ct. 2010).

[2] WILDER RESEARCH, EX-OFFENDERS AMONG THE HOMELESS: HIGHLIGHTS FROM THE 2003 MINNESOTA SURVEY OF HOMELESSNESS 1 (June 2006).

twice as likely to be living unsheltered (and likely on the street) than the general homeless population. A prolonged lack of stable housing can only frustrate a person's efforts to avoid future contact with the criminal justice system. A study of people with criminal records in their first year after release found that those without adequate housing were more than twice as likely to commit another crime as those with adequate housing.[3]

To reverse this trend, public housing authorities (PHAs) and other housing providers need to start scaling back the onerous restrictions found in their written admissions policies. These restrictions are not limited to people who have been incarcerated and to people who a judge has deemed worthy of remaining in their communities, such as people on probation. In many jurisdictions, these restrictions also extend to people like Mr. Landers who have never been convicted of a crime. With approximately 65 million people with criminal records in the United States,[4] the reach of these restrictions is enormous.

To assess just how overly broad these policies often are, we reviewed the written admissions policies of public housing, Housing Choice Voucher, and project-based Section 8 programs in the state of Illinois. These admissions policies are contained in the written rules and regulations governing each subsidized housing program. PHAs develop admissions and continued occupancy policies (ACOPs) for their individual public housing programs and administrative plans for their individual Housing Choice Voucher programs. The counterpart to these policies in the project-based Section 8 program are tenant selection plans (TSPs), which are developed by project owners as opposed to PHAs. In addition to HUD requirements, these written policies also set forth the PHA's or project owner's policies in areas where HUD has given them discretion, which includes most policies governing people with criminal records.

From this review, we identified four areas where these policies tend to be overly broad with regard to people with criminal records:

1. The number of years that the housing provider can look back for past criminal activity;
2. The use of arrests without convictions as proof of past criminal activity;
3. The use of categories of criminal activity so vague that neither applicants nor administrators can fully understand how to apply them fairly; and

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[3] *See* Lornet Turnbull, *Few rentals for freed felons*, THE SEATTLE TIMES, November 29, 2010 http://o.seattletimes.nwsource.com/html/localnews/2013552561_housing30m.html (last visited July 5, 2011).

[4] MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, THE NATIONAL EMPLOYMENT LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT 27 n.2 (Mar. 2011), http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1 (last visited July 19, 2011).

4. The absence of mitigating circumstances as a means for overcoming criminal records barriers in written admissions policies.

PHAs and project owners should replace these overly broad provisions in their admissions policies with narrowly tailored criteria that properly balance the housing provider's interest in public safety with the applicant's need for safe, decent, and affordable housing.

HUD can and should play an important role here in guiding and limiting what criminal history information PHAs and project owners can use as part of their ACOPs, administrative plans, and tenant selection plans. HUD's verbal commitment earlier this year suggests a desire to take on this role. For example, in January 2011, HUD Secretary Shaun Donovan made clear that "this is an Administration that believes in the importance of second chances … [a]nd at HUD, part of that support means helping ex-offenders gain access to one of the most fundamental building blocks of a stable life – a place to live."[5] Secretary Donovan reaffirmed these commitments in a letter issued this past June to PHA executive directors encouraging them to use the wide discretion they have in a way that allows people with criminal records to rejoin their families in the public housing and Housing Choice Voucher programs when appropriate. In underscoring President Barack Obama's commitment to second chances, Secretary Donovan further stressed to PHA executive directors that other than two specific areas where the federal government imposes mandatory bans, there are no other areas where PHAs must reject an applicant.[6] In fact, the cabinet-level Interagency Reentry Council featured these two limited mandatory bans in its new "Myth Buster" series – a user-friendly guide intended to dispel the myth that the federal government bans anyone with a criminal record from subsidized housing.[7]

While HUD's commitments are a step in the right direction, still more must be done to make actual change in admissions and to actively facilitate successful reentry, such as creating guideposts for housing providers and monitoring the effects of their policies on people with criminal records.

Without further guideposts and monitoring, overly broad criminal records policies will continue to flourish. Housing providers, especially those who use outside screening services, appear to rely heavily on quick, bright-line rules of acceptable and not acceptable alleged

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[5] Federal Interagency Reentry Council, *Reentry Mythbuster on Public Housing* (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1089/Reentry_Council_Mythbuster_Housing.pdf.

[6] Letter from Shaun Donovan, Secretary, United States Department of Housing and Urban Development, to Public Housing Authority Executive Directors (Jun. 17, 2011), available at http://www.nationalreentryresourcecenter.org/documents/0000/1126/HUD_letter_6.23.11.pdf [hereinafter Donovan Letter].

[7] *Reentry Mythbuster on Public Housing*, *supra* note 5.

criminal activity.[8] This outlook, however, ignores HUD's admonition that "screening is the most demanding and, often, the most time consuming aspect of … housing admissions."[9] Much of the difficulty of this process comes from the fact that deciding whether to admit an applicant requires the use of judgment, something that cannot be neatly compartmentalized through bright-line rules. As HUD describes, "screening decisions are more difficult when, *as often happens*, an applicant's tenant and/or criminal history is mixed or marginal." In these cases, HUD expects "thoughtful decisions by trained staff and, sometimes, gathering additional information and intervention by outside agencies."[10] This type of thoughtful consideration, however, does not seem to be the norm among PHAs and project owners. Instead, housing providers consistently err on the side of denying assistance to individuals who have had even minimal contact with the criminal justice system.[11]

This report aims to show how PHAs and project owners abuse their discretion so that they, together with HUD, can take active steps to stop the abusive practices. This report starts with a background discussion of federally-imposed screening requirements on PHAs and project owners participating in these federal housing subsidy programs. Specifically, it distinguishes between areas where the federal government mandates certain screening criteria and where it gives PHAs and property owners discretion. Focusing on areas where denials on the basis of criminal activity are discretionary, the report then discusses the four most common areas where overly broad policies result in disproportionately burdensome restrictions on applicants with criminal records.

Federal Law and Tenant Screening for Federally-Subsidized Housing

Mandatory Policies

For some categories of criminal activity, federal law dictates a PHA's screening policy. For example, PHAs and project owners must permanently ban any applicant who has been convicted of manufacturing methamphetamine on federally-assisted property.[12] People who

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[8] *See* Pam Adams, *Ex-Inmates Struggling to Find New Homes*, PEORIA JOURNAL STAR (Oct. 2, 2010), http://www.pjstar.com/news/x399785995/Ex-inmates-struggling-to-find-new-homes (last visited July 19, 2011).

[9] HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 73 (June 2003), *available at* http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf.

[10] *Id.*, emphasis added.

[11] John W. Barbrey, *Measuring the Effectiveness of Crime Control Policies in Knoxville's Public Housing: Using Mapping Software to Filter Part I Crime Data*, 20 JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 6, 15 (2004) (describing how the public housing authority in Knoxville, Tennessee would deny admission to applicants even if they had never been convicted of a crime out of a desire to err on the side of caution).

[12] 42 U.S.C. § 1437n(f)(1) (2006).

must register as sex offenders for life are permanently ineligible as well.[13] For applicants who fall into either of these categories, there is no relief from these mandatory bans.

Some mandatory bans, however, are temporary rather than permanent. Federal law requires PHAs and project owners to exclude applicants with past evictions from federally-assisted housing for drug-related activity, but only if those evictions took place in the last three years.[14] An applicant matching this criteria, however, may still be admitted if he can show that either (1) he has successfully completed drug rehabilitation or (2) the circumstances that led to the prior eviction no longer exist (e.g., the death or incarceration of the person who committed the drug-related criminal activity).[15]

Applicants who use illegal drugs or abuse alcohol are also off limits.[16] PHAs and project owners must deny admission to any household where they have reasonable cause to believe that a member's (1) illegal use of a controlled substance, (2) abuse of alcohol, or (3) pattern of illegal use of controlled substance or abuse of alcohol may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.[17] HUD has suggested that conviction records and former landlord references are the types of evidence that PHAs and project owners should consider in assessing whether an applicant falls in these categories.[18]

There are two ways for a housing provider to keep out an applicant under this mandatory ban. First, the PHA or project owner could determine that the applicant is "currently engaged" in illegal drug use. According to HUD regulations, an applicant fits this description if he has illegally used drugs recently enough to justify a reasonable belief that the behavior is current.[19] HUD has advised PHAs to define "recently" in terms of a specific period of time, suggesting time frames such as the past month or six months.[20] Second, the PHA or project owner could deny admission if it has reasonable cause to believe that the household member's illegal use or pattern of illegal use of drugs may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.[21]

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[13] 42 U.S.C. § 13663(a) (2006).

[14] 42 U.S.C. § 13661(a) (2006).

[15] *Id.*

[16] 42 U.S.C. § 13661(b) (2006).

[17] *Id.*

[18] HUD, HUD NOTICE H 2002-22, SCREENING AND EVICTION FOR DRUG ABUSE AND OTHER CRIMINAL ACTIVITY – FINAL RULE 5 (2002).

[19] 24 C.F.R. 960.204(a)(2)(i).

[20] PUBLIC HOUSING OCCUPANCY GUIDEBOOK, *supra* note 9, at 53.

[21] 24 C.F.R. 960.204(a)(2)(ii).

The key for PHAs and project owners is to determine whether the drug use or alcohol abuse is *current*. If the applicant can demonstrate that he has successfully completed rehabilitation or is no longer using illegal drugs, the admissions ban is lifted.[22] Furthermore, HUD discourages housing providers from screening out former drug users and alcohol abusers, particularly if their rental histories show a propensity for complying with the lease.[23]

Overall, these mandatory bans provide a floor, not a ceiling, for PHA screening policies. For example, although federal law imposes a mandatory three-year lookback period for evictions arising from drug-related criminal activity, PHAs and project owners have the discretion to look back further.[24] Besides changing the lookback period, they also have the discretion to broaden the scope of a mandatory ban. Although federal law bans lifetime registered sex offenders from federally assisted housing, for instance, PHAs might extend that ban to anyone who has to register as a sex offender for a period less than life.[25]

Although PHAs and owners have the discretion to impose more than the federal standards, that discretion is curbed by the Fair Housing Act. HUD reinforces this limit on discretion by reminding PHAs and owners that they must apply policies and procedures "in a manner that is consistent with applicable fair housing and equal opportunity laws."[26]

Discretionary policies

In most cases, denial is not mandatory. Instead, HUD gives PHAs and project owners discretion in deciding whether to admit an applicant with a criminal record. PHAs and project owners may reject applicants who have engaged in any of the following during a reasonable time before being otherwise selected for admission:

1. ***Drug-related criminal activity***, defined as the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute, or use the drug;[27]

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[22] 42 U.S.C. § 13661(a) (2006).

[23] *See, e.g.*, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, *supra* note 9, at 92.

[24] *Id.* at 53-54; HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, at 4-17 (June 2007) [hereinafter HUD Handbook 4350.3].

[25] *See, e.g.*, CHICAGO HOUSING AUTHORITY, FY2010 ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 14 (approved Sept. 21, 2010) (denying admission to applicants who have "ever been convicted of a crime that requires them to be registered under a state sex offender registration program including the ten-year Illinois State Sex Offender Registration Act").

[26] *See, e.g.*, HUD NOTICE H 2002-22, *supra* note 18 at 3. For further discussion of the fair housing implications of criminal records policies, see text accompanying notes 57-65.

[27] 42 U.S.C. § 13663(a) (2006); 24 C.F.R. § 5.100.

2. ***Violent criminal activity***, defined as any criminal activity that has as one of its elements the use, attempted use or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage;[28]
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.[29]

This last category of criminal activity is not simply a catch-all provision. In advising PHAs how to implement their screening criteria, HUD has recognized 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."[30] For criminal activity that falls outside of this category, therefore, the ability to deny admission is limited.

Another limit on discretion is the passage of time. PHAs and project owners are only supposed to look at criminal activity that occurred during a "reasonable time" before the screening takes place.[31] This period of time is finite, as evidenced by the fact that HUD advises housing owners on how to admit applicants with a criminal history after this reasonable, yet undefined, period expires. Specifically, to admit such an applicant, PHAs and project owners should obtain the applicant's certification that he has not engaged in the prohibited criminal activity within the specific lookback period set by the PHA. In addition, the applicant must offer information that supports this certification from sources "such as a probation officer, a landlord, neighbors, social service agency workers, or criminal records that were verified by the owner."[32] Although this period of time is supposed to be finite, HUD has offered little guidance on what constitutes a "reasonable time." In the absence of such guidance, PHAs and project owners have enacted draconian lookback periods, which are highlighted in the next section.

Ultimately, where PHAs and project owners have discretion, HUD calls for an individualized (as opposed to bright-line) review of applicants that factor in a person's mitigating circumstances:

> PHAs should consider applicants for residence by persons with such criminal histories on a case-by-case basis, focusing on the concrete evidence of the seriousness and recentness of criminal activity as the best predictors of tenant suitability. PHAs also should take into account the extent of criminal activity and any additional factors that might suggest a

[28] 42 U.S.C. § 13663(a) (2006); 24 C.F.R. § 5.100.

[29] 42 U.S.C. § 13663(a) (2006).

[30] PUBLIC HOUSING OCCUPANCY GUIDEBOOK, *supra* note 9, at 96-97.

[31] 42 U.S.C. § 13663(a) (2006).

[32] HUD NOTICE H 2002-22, *supra* note 18, at 7.

likelihood of favorable conduct in the future, such as evidence of rehabilitation.[33]

Yet it is clear that in practice this individualized review by PHAs and project owners is the exception rather than the rule. A manager of federally-subsidized properties in Peoria, Illinois, recognized that "[t]here is some leeway in terms of how we interpret HUD guidelines," but admitted that "we're not going to vary that much."[34] Although this property manager might admit an applicant with a minor shoplifting conviction from the early 1980s, he draws the line at *any* drug conviction, no matter how old. "If it's a drug conviction," he said, "that's zero tolerance."[35] Despite his attempt to pin this policy on the HUD guidelines, a careful reading of these guidelines shows that HUD requires no such policy. Only by engaging in a proper individualized review will housing providers give applicants the judgment and care that tenant screening requires and federal law necessitates.

[33] HUD, HUD NOTICE PIH 96-16, "ONE STRIKE AND YOU'RE OUT": SCREENING & EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES (HAS) 6 (1996), www.hud.gov/offices/adm/hudclips/notices/pih/files/96-16PIHN.doc.

[34] *See* Adams, *supra* note 8.

[35] *Id.*

Issue Area #1: Lookback Periods

One major area where PHAs and project owners, through their ACOPs, administrative plans, and TSPs, fall short is in setting reasonable time limits for how far back they look into a person's criminal history. With the exception of two areas of criminal conduct,[36] housing providers are not required to use a person's criminal history against them indefinitely. Federal law requires them to narrow their inquiries to criminal activity that occurred during a "reasonable time" before screening takes place,[37] and HUD directs PHAs and project owners to define "reasonable time" in their written admissions policies.[38] Although HUD has suggested a five-year lookback period is appropriate for serious criminal activity, it has declined to define an appropriate time period that would apply across the board.[39] Furthermore, federal law recognizes that this "reasonable time" will expire and even guides the PHA in admitting applicants with a criminal history after this time period does expire.[40]

No Time Limits On Criminal History Review

Some of the admissions policies we reviewed had one glaring problem: they had ***no time limits*** on how far back a PHA or project owner could look at a person's criminal history, even if that history consisted only of arrests and no convictions. More than 20% of the ACOPs and 10% of the administrative plans and TSPs failed to provide a time limit, thus depriving applicants of any notice of how long a person's criminal history will remain relevant in the admissions process.[41] Consequently, many people with criminal records will not bother to apply, and for

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[36] *See supra* text accompanying notes 12–13.

[37] 42 U.S.C. § 13663(a) (2006).

[38] *See, e.g.*, HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, at 4-17 (June 2007) ("For those behaviors that would result in denial for a 'reasonable time,' the owner must define a reasonable period in the tenant selection plan.").

[39] Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28776, 28779 (May 24, 2001).

[40] *See supra* text accompanying notes 31-32.

[41] ACOPs from the following housing authorities provide no time limit: Aurora Housing Authority, Clay County Housing Authority, Franklin County Housing Authority, Housing Authority of Greene County, Jersey County Housing Authority, Knox County Housing Authority, Housing Authority of the County of Lawrence, Livingston County Housing Authority, Housing Authority of the City of Marion, Mason County Housing Authority, Housing Authority of McDonough County, Morgan County Housing Authority, Oak Park Housing Authority, Pekin Housing Authority, Perry County Housing Authority, Housing Authority of Pulaski County, Randolph County Housing Authority, Shelby County Housing Authority, St. Clair County Housing Authority, Vermillion County Housing Authority, Wayne County Housing Authority, and White County Housing Authority.

those that do apply, they will not know when a housing provider has overstepped its bounds by denying someone on the basis of a criminal record that is otherwise too old to be relevant.

The flip side of this problem is the use of ***permanent bans*** on people with certain criminal activity. For example, Brown County Housing Authority permanently bans applicants with prior convictions for any drug-related criminal activity other than possession for personal use, such as manufacturing and sales.[42] Although PHAs and project owners have a strong interest in keeping this type of activity off their properties, they do not necessarily need to keep out everyone who has ever been convicted of this activity, especially if the activity took place a long time ago and there is no indication that the person has engaged in that activity since. Given that the federal government has chosen to impose permanent bans in only two limited instances (convictions for methamphetamine production on federally assisted property and lifetime registered sex offenders),[43] the use of permanent bans in federally assisted housing should be sparsely used in only the most compelling circumstances.

Equally problematic are ***excessively long lookback periods*** that essentially function as permanent bans. This problem arose most frequently in tenant selection plans. We reviewed over 100 tenant selection plans, and seventy-seven of them adopted this boilerplate language:

> Applicants who fall into the following categories may be rejected. In addition, if other persons that will be living in the unit fall into these categories, the applicant may be rejected.
>
> a) Criminal convictions that involved physical violence to persons or property, or endangered the health and safety of other persons within the last ___ years;

Administrative plans in the following counties have no time limit: Aurora Housing Authority, Housing Authority of Christian County, Ford County Housing Authority, Knox County Housing Authority, Lake County Housing Authority, Livingston County Housing Authority, Mason County Housing Authority, Morgan County Housing Authority, Randolph County Housing Authority, Shelby County Housing Authority, Vermillion County Housing Authority, and Wayne County Housing Authority.

TSPs of the following properties have no time limit: Asbury Plaza (ML-135) (Chicago); Burnham Manor (ML-118) (Elgin); Burnham Oaks Apartments (ML-40) (University Park); Green Farms Townhouses (ML-129) (Belvidere); Hedgehill Apartments (ML-175) (Peoria); Pebbleshire Phase II (Vernon Hills); Skyline Towers Apartments (ML-85) (Alton); Southern Hills Apartments (Decatur); Town & Country Apartments (ML-159) (Marion); and Valleyview Heights (ML-114) (Danville).

[42] BROWN COUNTY HOUSING AUTHORITY, ADMISSIONS AND OCCUPANCY PLANS AND PROCEDURES, 5 (revised Dec. 2008).

[43] 42 U.S.C. § 1437n(f)(1) (methamphetamine manufacture); 42 U.S.C. § 13663(a) (lifetime registered sex offenders).

or

b) Criminal convictions in connection with the manufacture or distribution of a controlled substance within the last ___ years; or

The majority of project owners opted to fill in the blank with lengthy waiting periods. Over half of these waiting periods dip into the double-digits, and twenty properties use waiting periods that stretch across decades. In one particularly egregious case, the TSP imposes a ninety-nine-year waiting period, and in yet another case, an applicant must wait 200 years.[44] Given how absurdly long these waiting periods are, the message to applicants is loud and clear: people with criminal records are not welcome here.[45]

Unreasonable Time Limits

The remainder of ACOPs, administrative plans, and TSPs do limit how far back certain criminal activity will be considered in admissions. Most plans apply one lookback period for the three main categories of criminal activity: drug-related criminal activity, violent criminal activity, and criminal activity that threatens the health, safety, and welfare of residents and PHA employees. These one-size-fits-all lookback periods do not distinguish between misdemeanors or felony offenses.

Public housing: Most ACOPs tend to look back either three or five years. Joliet Housing Authority looks for criminal activity in the past seven years,[46] while PHAs in the following counties look back a full decade for criminal activity: Edgar, Massac, Dekalb, Moline, Rock Island.[47]

Housing Choice Vouchers: Likewise, administrative plans tend to look back three or five years. Madison County has the longest lookback period at seven years.[48]

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[44] TOWNSHIP VILLAGE (ML-146), MODEL TENANT SELECTION PLAN, 16 (approved Aug. 31, 2005) (200-year lookback period); LAKESIDE/GRANT MANOR (ML-188), TENANT SELECTION PLAN, 16 (approved Mar. 7, 2006) (ninety-nine-year lookback period).

[45] *See* Appendix A, *infra*.

[46] JOLIET HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 2-10 (Apr. 2010).

[47] HOUSING AUTHORITY OF EDGAR COUNTY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 17 (updated Jan. 18, 2008); MASSAC COUNTY HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 15 (2010); HOUSING AUTHORITY OF THE COUNTY OF DEKALB, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 3-15 (Oct. 2007)(felonies only); MOLINE HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 3-14 (Apr. 2010)(felonies only); ROCK ISLAND HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 3-14 (Jun. 2009)(felonies only).

[48] MADISON COUNTY HOUSING AUTHORITY, ADMINISTRATIVE PLAN, 3-16 (Oct. 2007).

Project-based Section 8: The majority of TSPs had lookback periods in the double-digits. Seventeen properties looked back no more than five years, and ten properties looked back seven years. The shorter waiting periods are in the two- to three-year range.[49]

Other PHAs and project owners impose different waiting periods for different types of criminal activity. Some housing providers, such as the Housing Authority of Christian County, disclaim these waiting periods as mere guidelines, again leaving applicants in the dark about how much time they need to put between them and their past criminal activity.[50] Without a precise and reasonable time limit, these policies will chill the efforts of people with criminal records to secure affordable, federally-subsidized housing.

Even where the time limits are clear, their reasonableness can be questionable, such as the limits imposed by the Lake County and Saline County Housing Authorities. For these housing authorities, in addition to waiting a set number of years, applicants must complete their sentence and go through at least six months of unsupervised living without any problems with the law. Although these time periods are spelled out, they still may be unreasonable. For example, if a person had been convicted of misdemeanor battery, he would have to complete his sentence, wait a decade, and live unsupervised without incident for six months. This lengthy period seems unreasonable given that this crime carries a maximum penalty of one year imprisonment and is usually an offense where probation is available, particularly for first offenders.[51]

Saline County Housing Authority has an even more unreasonable policy because it considers ten years the minimum, not maximum, number of years that it will look back for criminal history. Similarly, the Housing Authority of the City of Bloomington looks back a minimum (rather than a maximum) of ten years for drug trafficking offenses.[52] Setting a minimum number of years is unreasonable because it fails to provide people with notice or any measurable standards for judging abuse by PHAs and property owners.

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[49] *See* Appendix A, *infra*.

[50] *See, e.g.*, Housing AUTHORITY OF CHRISTIAN COUNTY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 14 (Aug. 2010).

[51] 720 ILCS 5/12-3.

[52] HOUSING AUTHORITY OF THE CITY OF BLOOMINGTON, ADMISSIONS AND OCCUPANCY POLICY, 10-11 (2010).

Criminal Activity	Lookback Periods	
	Lake County Housing Authority[53]	**Saline County Housing Authority**[54]
Drug-related activity for personal use or possession for personal use	**3** years from activity	***a minimum of*** **3** years from activity + completion of a court-ordered or voluntary rehabilitation program + 6 months of unsupervised living without repeat incident
• Crimes against property • Crimes that impose a financial cost • Crimes that involve disturbing the peace • Crimes that affect the health, safety or right to peaceful enjoyment of the premises by other residents or other people residing in the vicinity of the property	**5** years + completion of sentence for any conviction, parole, probation served as result of the crime or offense + 6 months thereafter of unsupervised living without repeat incident	***a minimum of*** **5** years + completion of sentence for any conviction, parole, probation served as result of the crime or offense + 6 months thereafter of unsupervised living without repeat incident
Crimes of violence against people	**10** years + completion of sentence for any conviction, parole, probation served as result of the crime or offense + 6 months thereafter of unsupervised living without repeat incident	***a minimum of*** **10** years + completion of sentence for any conviction, parole, probation served as result of the crime or offense + 6 months thereafter of unsupervised living without repeat incident
Drug-related criminal activity for illegal manufacture, sale, distribution or possession with intent to manufacture, sell or distribute	**10** years + completion of sentence for any conviction, parole, probation served as result of the crime or offense + 6 months thereafter of unsupervised living without repeat incident	***a minimum of*** **5** years + completion of sentence for any conviction, parole, probation served as result of the crime or offense + 6 months thereafter of unsupervised living without repeat incident
Convictions of acts that would constitute fraud in connection with any Saline County program or *any* other fraud	n/a	***a minimum of*** **10** years + completion of sentence for any conviction, parole, probation served as result of the crime or offense + 6 months thereafter of unsupervised living without repeat incident

[53] LAKE COUNTY HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 19–20 (Oct. 2009).

[54] SALINE COUNTY HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 2.F.

<u>Recommendation</u>: Reign in unreasonable lookback periods.

PHAs, project owners, and HUD must reign in lookback periods whose unreasonable lengths are deterring people with criminal records from applying for federally-subsidized housing. For reasonable time limits to be the norm, HUD must also provide guidance to PHAs and property owners on what is reasonable. Without this guidance, housing providers will continue to err on the side of caution, thus excluding many applicants with criminal records who may pose no greater risk than applicants without criminal records.

Additionally, HUD should weigh in on what triggers the lookback period. While most written admissions policies refer to "criminal activity" generally, others require a person to serve his sentence first. Inconsistency in this area has made it difficult for applicants to know when they can qualify for housing and contributes to excessively long waiting periods.

In general, housing policies should include reasonable time period limits on the use of a person's criminal history as a factor in the admissions process. These time limits should not be unreasonably long, nor should they extend indefinitely. Finally, they should provide the maximum, not minimum, number of years that the housing provider will look back on a person's criminal history so as to provide proper notice.

When reviewing admissions policies, therefore, HUD should carefully scrutinize policies that include: (a) no time limits on criminal history review; (b) permanent bans; (c) excessively long lookback periods; or (d) unreasonable time limits. Where any of these problematic time periods exist, HUD should demand that PHAs justify these bans with evidence showing why the desired result cannot be achieved with a more narrowly tailored time limit. Otherwise, these policies will proliferate, leaving large numbers of people without a place to live.

Issue Area #2: Use of Arrests to Prove Criminal Activity

Another problem is the use of arrests as proof of criminal activity. Federal statutes and regulations authorize PHAs and project owners to deny admission to applicants who have engaged in criminal activity, and many PHAs in Illinois equate a criminal *arrest* with criminal *activity*, even if the arrest did not result in a conviction. As there has been no finding of guilt, however, arrests provide a crude metric for measuring past criminal activity.[55] In fact, arrests by themselves are not sufficient proof of criminal activity to satisfy the preponderance of the evidence standard that many PHAs and project owners adopt. As the U.S. Supreme Court has recognized, "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense."[56]

Yet instead of trying to determine whether the applicant actually engaged in criminal activity and may be a threat to the housing program, PHAs often confine themselves to the four corners of a criminal background check for their assessment of applicants.

An overreliance on arrests raises serious problems under the Fair Housing Act (FHA). In addition to policies intended to discriminate, FHA also bars facially neutral policies that have an unjustified disparate impact on racial minorities.[57] When a housing provider screens applicants on the basis of arrests, this screening policy will disparately impact racial minorities because this population is arrested at a disproportionate rate compared to the general population.[58] Most

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[55] *See, e.g.*, HOUSING AUTHORITY OF COOK COUNTY, PUBLIC HOUSING PROGRAM ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 3-22 (2010).

[56] *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957); see also *Landers*, 936 N.E.2d at 742 (finding "no evidence whatsoever that [the public housing applicant] engaged in criminal activity where the outcome of his arrests was the consistent dismissal of the charges").

[57] *Langlois v. Abington Housing Authority*, 207 F.3d 43, 49 (1st Cir. 2000); *Pfaff v. HUD*, 88 F.3d 739, 745–46 (9th Cir. 1996); *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250–51 (10th Cir. 1995); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–35 (2d Cir. 1988); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 986 (4th Cir. 1984); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977); *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974).

[58] *See generally* Merf Ehman, Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies (Jan. 2011).; *cf.* EEOC Policy Guidance on Arrests on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964 (1982) (citing *Gregory v. Litton Systems*, 316 F. Supp. 401 (C.D. Cal 1970), http://www.eeoc.gov/policy/docs/arrest_records.html).

housing providers will try to justify this adverse racial impact by arguing that it improves public safety in housing, but this is more assumption rather than proven fact. In fact, in *Landers v. Chicago Housing Authority*, the Illinois Appellate Court held that where a public housing applicant had a history of arrests, none of which resulted in criminal convictions, the PHA had no evidence of criminal activity and therefore no basis for denying his application.[59] The limited value of arrests as evidence of criminal activity is demonstrated by the fact that the PHAs of Los Angeles and New York City no longer screen applicants for arrests, and their crime-fighting efforts have not suffered.[60] Similarly, the Housing Authority of Baltimore City no longer looks at arrests in its Admissions and Continued Occupancy Plan.[61] Consequently, the racial impact of arrest record screening is unjustified, making it highly suspect under FHA.

HUD, PHAs, and project owners should be especially concerned about the fair housing implications of screening applicants for arrests. In addition to a duty not to discriminate, FHA imposes on HUD a duty to administer its housing programs in a manner that will affirmatively further fair housing (AFFH).[62] This duty to AFFH encompasses more than passively refraining from discrimination; it requires HUD to take active steps toward promoting fair housing choice by identifying and then eliminating barriers that would otherwise hinder that choice.[63] The duty to AFFH also applies to PHAs and project owners that administer these housing programs.[64] As a practical matter, therefore, HUD, PHAs, and project owners should be scrutinizing arrest record screening policies to determine the extent to which they impede fair housing choice and how best to eliminate those impediments. Such increased scrutiny would be in line with HUD's current strategic plan, which promises to prevent discrimination through enforcement actions, compliance measures, public awareness campaigns, and education, all to ensure open, diverse,

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[59] *Landers*, 936 N.E.2d at 742.

[60] HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 37 (2004), http:// www.hrw.org/en/reports/2004/11/17/no-second-chance.

[61] HOUSING AUTHORITY OF BALTIMORE CITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY (FY2011).

[62] 42 U.S.C. § 3608(e)(5).

[63] *See Langlois* 234 F. Supp. 2d at 71–72 (noting a "substantial difference between a statute that merely exhorts officials not to discriminate in effect (a negative obligation) and one that exhorts them to take steps to promote fair housing (an affirmative obligation)"). For project owners, the duty to affirmatively further fair housing arises from the housing assistance payments (HAP) contract they enter with PHAs as well as the annual contributions contract (ACC) they enter with HUD. *See* HUD, OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY, FAIR HOUSING PLANNING GUIDE VOL. 1, at 1-3 (Mar. 1996) (noting that "the grantee's AFFH obligation arises in connection with the receipt of Federal funding"), http://www.hud.gov/offices/fheo/images/fhpg.pdf.

[64] 42 U.S.C. § 3608(e)(5).

and equitable communities.[65]

The prevalence of admissions policies that explicitly or implicitly allow PHAs to use arrests strongly suggests that this type of civil rights scrutiny is severely lacking. About one out of every ten ACOPs in Illinois, for example, define "criminal activity" simply by the number of arrests on a person's criminal record, even if none of those arrests resulted in a conviction. These policies provide:

> For the purpose of this Policy, if any member of the applicant family has been *arrested* at least __ times within the prior __ year period for this purpose, they will be determined to have engaged in criminal activity, drug-related criminal activity or violent criminal activity.

As the chart below shows, the threshold for meeting this definition is quite low.

"Criminal Activity"	**Housing Authority**
3 arrests in 3 years	Cumberland County Housing Authority
2 arrests in 3 years	Fulton County Housing Authority
1 arrest in 3 years	Effingham County Housing Authority
3 arrests in 5 years	GMAHA (Rock Island County), Jo Daviess County Housing Authority, Ogle County Housing Authority[66]
3 arrests in 5 years or 2 arrests in 1 year, whichever is most restrictive	Richland County Housing Authority
2 arrests in 5 years	Grundy County Housing Authority
1 arrest in 5 years	Calhoun County Housing Authority, Clark County Housing Authority, Hardin County Housing Authority, Johnson County Housing Authority, Ford County Housing Authority, Lee County Housing Authority
1 arrest in 10 years	Housing Authority of Edgar County, Massac County Housing Authority

When coupled with long lookback periods, these arrest policies have a particularly draconian effect. The housing authorities of Edgar County and Jackson County, for example, deny applications submitted by anyone with a history of criminal activity involving physical

[65] HUD, HUD STRATEGIC PLAN FY 2010-2015, at 36 (May 2010), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4436.pdf.

[66] Note, the Ogle County Housing Authority ACOP states, "if any member of the applicant family has been arrested at least **three (1)** time within the prior five (5) year period," emphasis added.

violence against persons or property; criminal activity that would adversely affect the health, safety, or well-being of others; or criminal activity that causes damage to the property. At both housing authorities, a single arrest for any of these offenses within the past ten years will send a public housing applicant into the "reject" pile.[67]

Even barring applicants who have been arrested once in the past three or five years creates significant barriers to public housing with questionable benefit. Like several of the PHAs in the chart above, Peoria Housing Authority explicitly adopts the view that a single arrest for drug possession within the past five years is sufficient proof of drug-related criminal activity to deny admission.[68] Similarly, the Housing Authority of Piatt County denies admission to applicants who have been arrested *once* in the past seven years for specific felonies, such as possession of a controlled substance, domestic battery, theft of benefits from any State or Federal Agency, and criminal damage to property.[69] So one arrest, even if the person was fully exonerated, bars them from accessing public housing for years.

More common are PHAs that consider arrests as evidence of criminal activity rather than explicitly equate one with the other. Usually, their ACOPs and administrative plans will deny admission to households if any member has engaged in certain types of criminal activity within the lookback period, and provide that:[70]

> Evidence of such criminal activity includes, but is not limited to any record of convictions, arrests, or evictions for drug-related or violent criminal activity of household members within the past ___ years.

About half of these admissions policies add that "a conviction for drug-related or violent criminal activity will be given more weight than an arrest for such activity."[71] Nevertheless, the authority to deny admission on the basis of mere arrests remains.

Other PHAs define "criminal activity" as:

> any act within the past ___ years by applicants or participants, household members or

[67] HOUSING AUTHORITY OF EDGAR COUNTY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 17 (updated Jan. 18, 2008); JACKSON COUNTY HOUSING AUTHORITY, ADMINISTRATIVE PLAN, 2-8 (Sept. 2004).

[68] PEORIA HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 23 (updated FY2001).

[69] HOUSING AUTHORITY OF PIATT COUNTY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 17–19.

[70] *See, e.g.*, MADISON COUNTY HOUSING AUTHORITY, ADMINISTRATIVE PLAN, 3-16 (Oct. 2007).

[71] *See, e.g.*, HENDERSON COUNTY HOUSING AUTHORITY, ADMINISTRATIVE PLAN, 3-22 (Oct. 2009).

> guests which involved criminal activity …, which did or did not result in the arrest and/or conviction of the applicant or participant, household members, or guests.

Since these PHAs will use something less than an arrest, it seems very likely that arrests factor into their eligibility determinations. Where, as in Joliet, the housing authority looks back seven years for criminal activity on the basis of arrest information or something less than that, this policy will yield some harsh results.[72]

Among the ACOPs and administrative plans we reviewed, it was rare to find an admission policy that limited its inquiry to criminal convictions. McHenry County Housing Authority comes closest by imposing a four-year ban on applicants with *convictions* for drug-related criminal activity, violent criminal activity, and multiple felony offenses in its ACOP and a four-year ban on applicants found guilty of similar offenses in its administrative plan.[73] At the same time, however, both policies also bar applicants who have committed other "activity that threatened the health, safety, or right to peaceful enjoyment of other person residing in the immediate vicinity." Although at least one Illinois appellate court has held that arrests by themselves do not establish criminal activity,[74] neither policy expressly supports this position. As for the remainder, thirty PHAs expressly equated criminal arrests with criminal activity, while twenty-nine PHAs allowed arrests to serve as evidence of past criminal activity.

The tenant selection plans for project-based Section 8 properties we reviewed, however, took a different trajectory. Most owners adopted the following language, which seems to come from a model tenant screening policy from the Illinois Housing Development Authority (IHDA):

> Applicants who fall into the following categories may be rejected. In addition, if other persons that will be living in the unit fall into these categories, the applicant may be rejected.
>
> a) Criminal convictions that involved physical violence to persons or property, or endangered the health and safety of other persons within the last ___ years; or
> b) Criminal convictions in connection with the manufacture or distribution of a controlled substance within the last ___ years; or

Since this policy refers only to criminal convictions, not arrests or criminal activity, the problem of an undue reliance on arrest may be less severe in the project-based Section 8 program, at least

[72] HOUSING AUTHORITY OF JOLIET, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 2-9, -10 (Apr. 2010).

[73] MCHENRY COUNTY HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 12 (Jan. 2009); MCHENRY COUNTY HOUSING AUTHORITY, ADMINISTRATIVE POLICY, 10 (Mar. 2010).

[74] *Landers v. Chicago Housing Authority*, 936 N.E.2d 735, 742 (1st Dist. 2010).

among those projects where IHDA is the contract administrator.

<u>Recommendation</u>: End the use of arrests as conclusive proof of criminal activity.

PHAs and project owners should follow IHDA's example and stop using arrests as evidence of criminal activity or as a basis to deny admission. By not relying on arrests, PHAs and project owners will avoid violating their duty not to discriminate and their duty to affirmatively further fair housing under the Fair Housing Act. HUD should also actively monitor ACOPs, administrative plans, and TSPs to ensure that housing providers stop equating criminal arrests with criminal activity.

Issue Area #3: Suspect Categories of Criminal Activity

As we discussed in the last section, many admissions policies refer to three types of criminal activity: drug-related, violent, and a threat to the health, safety, and welfare of other residents. Some policies, however, go into more detail. For example, a number of admission policies deny admission to applicants who have engaged in "criminal sexual conduct, including but not limited to sexual assault, incest, open and gross lewdness, or child abuse."[75] In addition, the ACOP of the Housing Authority of Piatt County supplements its broad categories of criminal activity with detailed (though not exclusive) lists of specific offenses, such as home invasion, armed violence, and vehicular hijacking.[76]

The most suspect categories are the ones that provide the least protection against abusive application. For example, Peoria Housing Authority stands alone as the only housing authority that denies admission to applicants for crimes of "***moral turpitude***."[77] Its ACOP provides that the housing authority:

> may deny admission, regardless of the time period prior to consideration, for persons who have been convicted of crimes involving moral turpitude such as crimes involving dishonesty fraud or deception such as theft, burglary or shoplifting.

(emphasis in original). The Illinois Criminal Code does not define "moral turpitude;" therefore, the question of what crimes involve moral turpitude is subject to great interpretation and therefore great abuse. As moral turpitude is such an imprecise concept, this policy fails to give applicants notice of the prohibited activity. Furthermore, it gives the PHA unfettered discretion to deny applicants and is consequently vulnerable to abuse. Exacerbating the problem is the absence of a time limit for these so-called crimes of moral turpitude, which seems unduly extreme and subject to challenge. In light of the vagueness of "moral turpitude" and the disproportionate lookback period, these policies should be stricken.

Similarly suspect are the ten ACOPs and three administrative plans that impose a five-year ban on applicants that may "***negatively influence***" other residents.[78] These admissions policies use the following language:

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[75] HOUSING AUTHORITY OF CHAMPAIGN COUNTY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 3-20 (Nov. 2008).

[76] HOUSING AUTHORITY OF PIATT COUNTY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 17–19.

[77] PEORIA HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 23 (2001), emphasis added.

[78] *See, e.g.*, Housing AUTHORITY OF CHRISTIAN COUNTY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 13 (Aug. 2010); WAUKEGAN HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICIES, 30 (Apr. 2007).

> Denied admission for five (5) years for the following:
>
> > An arrest or conviction record that indicates that the applicant may be a threat and/or negative influence on other residents. The five years shall begin on the date of the last reported act, completion of sentence and/or probation period.

This amorphous category of criminal activity does not mirror any of the language found in any federal statutes or regulations. Consequently, this provision is vulnerable to abusive application, especially because it allows a PHA to rely solely on an applicant's arrest record.

Finally, a handful of properties in the project-based Section 8 program also bar applicants who have a history of criminal activity that will adversely affect the property's reputation.[79] Specifically, their TSPs state:

> A household in which there is reasonable cause to believe that a member has engaged in criminal activity or has been convicted of criminal activity that will adversely affect the *reputation of the Development* or the health, safety or welfare of other residents within the Development, will be denied admission.

Yet nothing in federal law permits PHAs or owners to bar people for criminal activity that would have an ***adverse affect on the reputation of the property***. Such a standard strays from a property owner's legitimate interest in resident safety and seeps into an area where abuse could run rampant.

Recommendation: Enact clear standards for reviewing criminal history that have a basis in federal law.

HUD should ensure that admissions policies do not include vague standards that have no authority under or no basis in federal law, such as policies that bar applicants who have been convicted of crimes of "moral turpitude," applicants whose arrest records indicate that they will "negatively influence" others, and applicants whose past criminal activity will adversely affect the reputation of the property. Otherwise, applicants will be vulnerable to abusive application of those standards.

[79] *See, e.g.*,GARDEN HOUSE OF RIVER OAKS I, TENANT SELECTION PLAN 9 (2006); GARDEN HOUSE OF RIVER OAKS II, TENANT SELECTION PLAN 9 (2006); GARDEN HOUSE OF MAYWOOD, TENANT SELECTION PLAN 16 (1996); MERRILL COURT APARTMENTS, TENANT SELECTION PLAN 9 (2006).

Issue Area #4: Mitigating Circumstances

The final area of concern involves the use (or lack thereof) of mitigating circumstances to overcome criminal records-based housing barriers. To prevent a person's criminal record from becoming an automatic bar against housing, PHAs and project owners should consider evidence that shows that the applicant is not a risk to the housing program where he or she is seeking housing. Moreover, their written admissions policies should offer applicants some guidance on what type of mitigating evidence will be accepted.

Public Housing

In the public housing program, this consideration of mitigation circumstances is mandatory. HUD regulations require PHAs to consider the time, nature, and extent of the applicant's conduct, including the seriousness of the offense.[80] In addition, PHAs may consider factors that might indicate a reasonable probability of favorable future conduct, such as evidence of rehabilitation as well as evidence of the applicant family's participation in or willingness to participate in social service or other appropriate counseling service programs and the availability of such programs.[81]

Less than half of the ACOPs included some combination of these factors. For example, the Housing Authority of Champaign County and fifteen other housing authorities have adopted the regulatory language and enumerated the following additional factors to consider:

- The seriousness of the case, especially with respect to how it would affect other residents
- The effects that denial of admission would have on other members of the family who were not involved in the action or failure
- The extent of participation or culpability of individual family members, including whether the culpable family member is a minor or a person with disabilities
- The length of time since the violation occurred, the family's recent history, and the likelihood of favorable conduct in the future
- In the case of drug or alcohol abuse, whether the culpable household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program or has otherwise been rehabilitated successfully[82]

Similarly, some PHAs, such as the Oak Park Housing Authority and the Quincy Housing Authority, provide examples of mitigating circumstances, such as "evidence of successful and

[80] 24. C.F.R. § 960.203(d).

[81] 24. C.F.R. § 960.203(d)(1); *see also* Donovan Letter *supra* note 6.

[82] *See, e.g.*, HOUSING AUTHORITY OF CHAMPAIGN COUNTY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 3-27–3-28 (Nov. 2008).

sustained modification of previous disqualifying behavior."[83] In a separate addendum to the ACOP, Pekin Housing Authority provides that it will weigh the following factors in deciding whether to admit an applicant with a criminal record:

1. The nature and facts pertaining to the crime;
2. The number and frequency of crimes;
3. The length and time since the commission of the crime;
4. Activities and rehabilitation of the applicant since the commission of the crime;
5. Risk to other residents as a result of the crime; and
6. Any other factor that bears consideration as a result of the criminal history.[84]

By notifying applicants of these opportunities to mitigate the effects of their criminal records, these PHAs send the message that a criminal record will not function as a complete bar.

Over half of the ACOPs, on the other hand, gloss over the fact that applicants could – and in some cases, have the right to – present mitigating circumstances upon being denied for criminal history. Although these policies mentioned generally that applicants were entitled to an informal hearing to challenge admission denials, they did not specify that PHAs must consider the time, nature, and extent of the applicant's conduct or that applicants could introduce evidence of rehabilitation.[85] Without this information, applicants might come to believe that there is no way to challenge a denial based on a criminal record and thus self-select themselves out of the admissions process.

Housing Choice Vouchers

Although PHAs are not required to consider mitigating circumstances under the Housing Choice Voucher or project-based Section 8 programs, HUD has nevertheless urged them to do so.[86] HUD regulations permit PHAs and project owners to consider all relevant circumstances, such as (1) the seriousness of the case; (2) the extent of participation or culpability of individual family members; (3) mitigating circumstances related to the disability of a family member; and

[83] *See, e.g.,* OAK PARK HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 2-8–2-9 (2010); QUINCY HOUSING AUTHORITY, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 23 (2009).

[84] HOUSING AUTHORITY OF THE CITY OF PEKIN, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 104 (2010).

[85] *See, e.g.,* HOUSING AUTHORITY FOR THE COUNTY OF CUMBERLAND, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 14-15 (2010) (mentioning an applicant's right to informal review but not the right to present mitigating circumstances); HOUSING AUTHORITY FOR THE COUNTY OF HARDIN, ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 18-19 (2009) (same).

[86] *See, e.g.,* Donovan Letter *supra* note 6.

(4) the effects of denial or termination of assistance on other family members who were not involved in the action or failure.[87]

Unlike the ACOPs, the administrative plans we reviewed were much more likely to list specific factors that could mitigate the effect of a person's criminal record. Only three PHAs (McHenry, North Chicago, and Waukegan) failed to recognize in their administrative plans that applicants could present mitigating circumstances.[88]

Project-Based Section 8

Out of all the tenant selection plans we reviewed, only two provided examples of the type of mitigating evidence that the project owners would consider. Using language that mirrors HUD regulations governing public housing, Oak Woods and Blackhawk Hills Apartments provide applicants with significant guidance with the following:

> In the event of unfavorable information regarding the applicant is received, [the project owner] will give consideration to the time, nature and extent of the applicant's conduct and to factors which might indicate a reasonable probability of favorable future conduct or financial prospects in determining the suitability of the applicant. This will occur on a case-by-case basis. Factors to be considered in such a case will include the following:
>
> 1. Evidence of rehabilitation
> 2. Evidence of applicant's participation in or willingness to participate in social service or other appropriate counseling programs and the availability of such programs[89]

Unlike these properties, many TSPs state in broad terms that applicants can offer evidence of mitigating circumstances. About half of them, for example, provide that:

> Extenuating circumstances will be considered in cases where applicants would normally be rejected, but the applicants will have to indicate that he or she will be an acceptable resident in the future.[90]

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[87] 24 C.F.R. § 982.552(c)(2)(i).

[88] HOUSING AUTHORITY OF THE CITY OF DANVILLE, ADMINISTRATIVE PLAN FOR THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM (2009); MCHENRY COUNTY HOUSING AUTHORITY, SECTION 8 ADMINISTRATIVE PLAN (2010); NORTH CHICAGO HOUSING AUTHORITY, SECTION 8 ADMINISTRATIVE PLANS; WAUKEGAN HOUSING AUTHORITY, HOUSING CHOICE VOUCHER ADMINISTRATIVE PLAN (2007).

[89] OAK WOODS APARTMENTS, TENANT SELECTION PLAN 19-20 (2010); BLACKHAWK HILLS APARTMENTS, TENANT SELECTION PLAN 19 (2010).

[90] *See, e.g.*, COURT PLACE APARTMENTS, TENANT SELECTION PLAN 15 (2005).

Although this provision lacks the detail and guidance of the policies of Oak Woods and Blackhawk Hills Apartments, it at least notifies applicants of the possibility of mitigating the housing effects of their criminal records.

A number of TSPs, however, will not even give this much to applicants. One-fourth of the TSPs explicitly state that the project owners will not consider an applicant's mitigating circumstances,[91] and six TSPs do not even mention the possibility of presenting mitigating circumstances at all.[92] In these project-based Section 8 properties, the odds of admissions are stacked against any applicant with a criminal record.

In a recent letter to PHAs, HUD Secretary Shaun Donovan stressed the need to exercise discretion *in favor of* people with criminal records in federally-assisted housing programs to allow them "to become productive citizens and caring parents, to set the past aside and embrace the future."[93] In essence, what HUD is calling for is an individualized, case-by-case determination of whether an applicant is suitable for federally-assisted housing in spite of his or her criminal record.[94] Yet, based on our review of admissions policies, not all PHAs or project owners acknowledge that applicants are entitled to this type of individualized assessment, much less set forth the factors that would be relevant in such an analysis.

Recommendation: Ensure that applicants can overcome criminal records barriers by presenting evidence of mitigating circumstances

To follow the spirit of Secretary Donovan's letter, PHAs and project owners should individually assess applicants with criminal records, which must include weighing a person's mitigating evidence against the risk – if any – posed by past criminal activity. For this reason, HUD should ensure that PHAs and project owners include mitigating circumstances in their written admissions policies. Moreover, HUD should ensure that PHAs and project owners actually consider these circumstances in their admissions decisions.

[91] *See, e.g.*, NEW VISTAS II, TENANT SELECTION PLAN 15 (2007) (specifically stating that "extenuating circumstances will not be considered").

[92] *See, e.g.*, BURNHAM OAKS APARTMENTS, TENANT SELECTION PLAN (2001).

[93] *See* Donovan Letter *supra* note 6.

[94] *See* HUD NOTICE PIH 96-16 *supra* note 33 ("PHAs should consider applicants for residence by persons with such criminal histories on a case-by-case basis…").

Conclusion & Final Recommendations

Together, HUD, PHAs, and project owners need to ensure that tenant screening criteria respects the applicant's right to be free from unwarranted discrimination. Indeed, HUD has stressed that "it is critical to the credibility and success of one-strike programs that PHAs will comply with all civil rights, fair housing, and privacy laws, at both the screening and eviction stages."[95] Proper screening, therefore, requires more than simply pulling a person's criminal history. It requires thoughtful consideration and proper balancing of various factors, such as the nature and severity of the offense, the time elapsed since the commission of the offense, and its relationship to a person's tenancy. In the quest for bright-line rules, however, policies in Illinois today do not always call for this type of careful consideration, leading PHAs and project owners to abuse the discretion given to them by HUD. Proper screening will only happen when HUD makes it clear that housing providers have to look beyond the criminal history or face potential consequences.

To help ensure that people with criminal records are not unnecessarily barred from federally-subsidized housing, we make the following recommendations:

1. Reign in unreasonable lookback periods

For reasonable time limits to be the norm, HUD must provide guidance to PHAs and property owners on what is reasonable. Additionally, HUD should weigh in on what triggers the lookback period. While most written admissions policies refer to "criminal activity" generally, others require a person to serve his sentence first. Inconsistency in this area has made it difficult for applicants to know when they can qualify for housing and contributes to excessively long waiting periods.

In general, PHAs and project owners should enact housing policies that include reasonable time period limits on the use of a person's criminal history as a factor in the admissions process. These time limits should not be unreasonably long, nor should they extend indefinitely. Finally, they should provide the maximum, not minimum, number of years that the housing provider will look back on a person's criminal history so as to provide proper notice.

When reviewing admissions policies, HUD should carefully scrutinize policies that include: (a) no time limits on criminal history review; (b) permanent bans; (c) excessively long lookback periods; or (d) unreasonable time limits. Where any of these problematic time periods exist, HUD should demand that PHAs justify these bans with evidence showing why the desired result cannot be achieved with a more narrowly tailored time limit.

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[95] *See id.* at 4; *see also* HUD NOTICE H 2002-22, *supra* note 18 (stressing that criminal record screening policies in subsidized multifamily housing "must be adopted and implemented in a manner that is consistent with Fair Housing and Equal Opportunity regulations").

2. End the use of arrests as conclusive proof of criminal activity

PHAs and project owners should stop using arrests as evidence of criminal activity or as a basis to deny admission. By not relying on arrests, PHAs and project owners will avoid violating their duty not to discriminate and work toward their duty to affirmatively further fair housing under the Fair Housing Act. HUD should also actively monitor ACOPs, administrative plans, and TSPs to ensure that housing providers stop equating criminal arrests with criminal activity.

3. Enact clear standards for reviewing criminal history that have a basis in federal law

To protect applicants from abusive application of criminal history standards, HUD should ensure that admissions policies do not include vague standards that have no authority under or basis in federal law. Examples include policies that bar applicants who have been convicted of crimes of "moral turpitude," applicants whose arrest record indicates that they will "negatively influence" others, and applicants whose past criminal activity will adversely affect the reputation of the property.

4. Ensure that applicants can overcome criminal records barriers by presenting evidence of mitigating circumstances

To guarantee the case-by-case review of applicants with criminal records that HUD calls for, PHAs and project owners must consider an applicant's mitigating circumstances, such as the seriousness of the criminal activity, the time lapsed, and the relationship to successful tenancy. PHAs and project owners should also include in their written admissions policies examples of the type of evidence applicants should introduce. Finally, for the Housing Choice Voucher and project-based Section 8 programs, HUD should do more than encourage the consideration of mitigating circumstances – HUD should mandate it.

APPENDIX A

Project-Based Section 8 Properties Using the Illinois Housing Development Authority's Model Tenant Screening Policy

The table in this appendix lists the project-based Section 8 properties whose tenant selection plans include the following language from a model tenant screening policy from the Illinois Housing Development Authority:

> Applicants who fall into the following categories may be rejected. In addition, if other persons that will be living in the unit fall into these categories, the applicant may be rejected.
>
> a) Criminal convictions that involved physical violence to persons or property, or endangered the health and safety of other persons within the last ___ years; or
> b) Criminal convictions in connection with the manufacture or distribution of a controlled substance within the last ___ years; or

All of these TSPs state the applicants "may be rejected," with the exception of two properties: Maple Pointe Apartments (HTF-240) and Pines of Edgewater, Phase II (ML-172).[96] Their TSPs state that applicants "*will* be rejected," thereby taking away discretion.

The table also lists the lookback period that each tenant selection plan authorizes for the two major categories of criminal activity.

Property	**City**	**Lookback Periods**	
		Physical Violence, Endangers Health and Safety	Manufacture or Distribution of Controlled Substances
Township Village (ML-146)	East Alton	200	200
Lakeside/Grant Manor (ML-188)	Chicago	99	99
Arrowhead Apartments (ML-66)	Palatine	40	40
Countryside Villages (ML-97)	Plano	40	40
Lake Shore Plaza (ML-181)	Chicago	25	25
New Vistas II (ML-101)	Chicago	25	25

[96] MAPLE POINTE APARTMENTS, TENANT SELECTION PLAN 14; PINES OF EDGEWATER II, TENANT SELECTION PLAN 12 (Dec. 2006).

Property	City	Lookback Periods	
		Physical Violence, Endangers Health and Safety	Manufacture or Distribution of Controlled Substances
Court Place Apartments (ML-158)	Pekin	20	20
Charles Court Apartments (ML-180)	Naperville	20	20
Heritage House (ML-111)	Oak Park	20	20
Jenkins Hall (ML-109)	Chicago	20	20
Plaza Verde Apartments (ML-107)	Centralia	20	20
Linden Place (ML-154)	Arlington Heights	20	20
Morningside North Apartments (ML-132)	Chicago	20	20
Morningside Court Apartments (ML-155)	Chicago	20	20
Sangamon Towers (ML-81)	Springfield	20	20
Sunrise Courts (ML-110)	Roselle	20	20
Buena Vista Apartments (ML-79)	Elgin	15	20
Inwood Tower Apartments (ML-90)	Joliet	15	20
Frank B. Peers (TEB-2269)	Highland Park	15	20
Walnut Place Apartments (TEB-2263)	Highland Park	15	20
Webster House Apartments (ML-112)	Chicago	20	15
The Terrace Apartments (ML-133)	Rockford	15	20
Amanda Brooke Associates (ML-143)	Normal	20	10
Englewood Garden Apartments (F-1392)	Chicago	15	15
Lilac Ledge Apartments (ML-91)	Waukegan	15	15
Kenwood Apartments (ML-186)	Chicago	15	15
Abbey Drive Apartments at Four Lakes (ML-78)	Lisle	10	10
Coatsworth Apartments (ML-136)	Galena	10	10

Property	City	Lookback Periods	
		Physical Violence, Endangers Health and Safety	Manufacture or Distribution of Controlled Substances
The Coventry (ML-122)	Rock Island	10	10
Elm Street Plaza (ML-59)	Chicago	10	10
The Fields Apartments (TEB-2113; ML-137)	Carbondale	10	10
Hillcrest Apartments (IL06H121192)	McHenry	10	10
Landmark Apartments (ML-126)	Peoria	10	10
Lincoln/Douglas-Cardinal (ML-142)	Quincy	10	10
Lincoln Towers Apartments (ML-117)	Bloomington	10	10
Oak Tree Towers (ML-87)	Downers Grove	10	10
Park Glen Apartments (ML-157)	Taylorville	10	10
Pines of Edgewater, Phase II (ML-172)	Chicago	10	10
Pioneer Village Apartments (IDHA-2649; F-540)	Chicago	10	10
Wilshire Towers Apartments (ML-62)	Bloomingdale	10	10
Diversey Square I (ML-149)	Chicago	5	10
Glen Oak Towers (ML-185)	Peoria	3	10
Jorge Hernandez Apartments (ML-189)	Chicago	5	10
Boulevard Commons II (F-1288)	Chicago	7	7
The Brookhaven Apartments (CDT-3002)	Gurnee	7	7
Hawthorne Ridge Apartments (ML-77)	Woodridge	7	7
Lake Vista Apartments (ML-165)	Chicago	7	7
Olympic Village Apartments (ML-47)	Chicago Heights	7	7
Pierson Hills II Associates (IL06H121168)	Peoria	7	7
Riverwoods Apartments (ML-173)	Kankakee	no # entered	7

Property	City	Lookback Periods	
		Physical Violence, Endangers Health and Safety	Manufacture or Distribution of Controlled Substances
65th Street Apartment (IHDA 2270; RS-260)	Chicago	5	7
West Point Plaza (ML-106)	Chicago	5	7
Northpoint Apartments (ML-290)	Chicago	7	0
Campbell Terrace Apartments (ML-178; TEB-2000)	Chicago	5	5
Countrybrook Apartments (ML-152; TEB-2002)	Champaign	5	5
Countryside Village Apartments (ML-128)	Rochelle & Yorkville	5	5
Florida House Apartments (IHDA-2314)	Urbana	5	5
Greenleaf Apartments (IL06H121180; ML-74)	Bolingbrook	5	5
Hickory Manor (ML-169)	Waukegan	5	5
Lakewood Villages (ML-168)	Island Lake	5	5
Luther Center (ML-108)	Rockford	5	5
Maple Pointe Apartments (HTF-240)	Chicago	5	5
Oakridge Village (TEB-2007; ML-171)	Antioch	5	5
Prairie View Apartments (PID-2285)	North Chicago	5	5
Rockton Village Green (ML-95)	Rockton	5	5
Shadley Apartments (ML-83)	Belvidere	5	5
Sunrise Apartments (TEB-2313)	Mattoon	5	5
Walsh Park Apartments (ML-176)	Chicago	5	5
Whiting Hall Senior Apartments (ML-150)	Galesburg	5	5
Wolford Apartments (ML-147)	Danville	5	5
Harold Washington Apartments (SRO-001)	Chicago	3	3
Village Center (ML-88)	Skokie	3	3

Property	City	Lookback Periods	
		Physical Violence, Endangers Health and Safety	Manufacture or Distribution of Controlled Substances
Carriage House of Decatur II (TEB-2277; ML-102)	Decatur	3	0
Sandburg Village Apartments (ML-115)	Galesburg	2	2
Carroll Tower Apartments (ML-167)	St. Charles	no # entered	no # entered
Cedar Village (ML-121)	Lake Villa	no # entered	no # entered
Paul G. Stewart, Phase IV (ML-174)	Chicago	no # entered	no # entered

APPENDIX B

Methodology

Freedom of Information Act (FOIA) requests were sent to the 109 PHAs listed in the "PHA Contact Information - IL" directory on the website of the U.S. Department of Housing and Urban Development, located at http://www.hud.gov/offices/pih/pha/contacts/states/il.cfm. The request sought both the Admissions and Continued Occupancy Policy (ACOP) and the Administrative Plan from the PHA. Either no response or an incomplete response was received from nine PHAs.

An additional FOIA request was made to the Illinois Housing Development Authority (IHDA), requesting the tenant selection plans (TSPs) for all Section 8 properties whose TSPs must be approved by the Authority. 104 tenant selection plans were received.