

June 10, 2024

Regulations Division Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500
Sent electronically via the *Federal Register*

RE: Proposed Rule “Reducing Barriers to HUD-Assisted Housing” 89 Fed. Reg. 25332

Dear colleagues,

The Poverty & Race Research Action Council (PRRAC) commends HUD for addressing the significant barriers in the existing screening process that limit low-income families' access to federally assisted housing, including their right to freely move across jurisdictional lines using Housing Choice Vouchers.

PRRAC is a civil rights policy organization dedicated to the cause of fair housing, and the urgent need to address the continuing segregation of many low-income families of color in high poverty, low opportunity neighborhoods, a condition that is perpetuated by housing, land use, transportation, and education policies at every level of government. As we will discuss below, the disproportionate racial impact of strict criminal records screening is a function of over-policing in racially and economically segregated communities, and in the context of the voucher program, inappropriate screening practices can serve to intensify segregation. HUD's duty to Affirmatively Further Fair Housing should guide its implementation of this proposed rule.

Portability and rescreening

The right to move with your voucher across public housing authority jurisdictional lines was guaranteed by Congress in the late 1980s. HUD subsequently developed “portability” rules in the early 1990s.¹ Despite this, voucher families have always faced untenable obstacles to utilize their portability rights. Some improvements were adopted in 2015 through HUDs revised portability rule²; however, this new rule was extremely limited in scope, and its most important proposed features were removed from the final rule in response to public housing authority opposition.

PRRAC has repeatedly criticized the illegal, duplicative, and discriminatory practice of rescreening porting voucher holders by a receiving PHA. The voucher statute only grants PHAs' authority to adopt elective screening practices to assess new applicants to the program, not existing participants utilizing

¹ HUD implementation guide, HUD Notice PIH 2016-09, <https://www.hud.gov/sites/documents/PIH2016-09.PDF>.

² “Housing Choice Voucher Program: Streamlining the Portability Process,” 80 Fed. Reg. 50564 (August 20, 2015).

their portability rights.³ Other sections throughout the statute reference PHAs authority to “deny or terminate” assistance. However, the applicant screening clause differs in that it only references PHAs ability to *deny* applicants.⁴ This is further supported by the statutory definition of “applicant” versus “participant.”

In the portability clause of the statute, Congress conferred a participant’s right to receive tenant-based voucher assistance anywhere in the United States with a participating PHA.⁵ The only limitation offered in this clause is that porting tenants are subject to terminations that align with regulatory rules 24 CFR § 982.552 and § 982.553.⁶ Inconsistently, when voucher holders attempt to exercise their portability rights, PHAs improperly use elective *applicant* screening processes that threaten the security of a family’s voucher not only upon porting but throughout their tenancy in the receiving PHA.

Additionally, rescreening porting tenants is inconsistent with HUD’s obligation to Affirmatively Further Fair Housing. As HUD has acknowledged, higher incarceration rates of Black and Latinx Americans are attributed to biases in the criminal justice system, rather than disparities in propensity to commit crimes.⁷ Rescreening participants based on their criminal records above the statutory minimum will have predictable discriminatory impact based on race and is not necessary to protect health or safety.⁸ In some cases, rescreening may block families’ access to better resourced, lower poverty areas. Further, rescreening gives a great deal of discretion to PHA staff to make case-by-case portability determinations,

³ “Selection of tenants: Each housing assistance payment contract entered into by the public housing agency and the owner of a dwelling unit shall provide that the screening and selection of families for those units shall be the function of the owner. In addition, **the public housing agency may elect to screen applicants for the program** in accordance with such requirements as the Secretary may establish. That an applicant or participant is or has been a victim of domestic violence, dating violence, or stalking is not an appropriate basis for denial of program assistance or for denial of admission if the applicant otherwise qualifies for assistance or admission.” 42 USC § 1437f (o)(6)(B) (emphasis added)

⁴ 24 CFR § 982.4 “Applicant”; 24 CFR § 982.4 “Participant”

⁵ 42 USC § 1437f (r)(1)(A)

⁶ 42 USC § 1437f (r)(5); 24 CFR § 982.353 (b)

⁷ Office of Fair Hous. & Equal Opportunity, U.S. Dep’t of Hous. and Urban Dev., FHEO Memorandum 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 1, 2 (June 10, 2022) citing Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 *Nature Human Behaviour*, 736-745 (July 2020) (analyzing data showing that police search Black and Hispanic drivers more often than White drivers, but are less likely to turn up contraband during searches of Black and Hispanic drivers compared to searches of White drivers); id (showing that black drivers are less likely to be pulled over at night (when their race is obscured)); Nembhard, Susan and Lily Robin, *Racial and Ethnic Disparities throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*, Urban Institute (August 2021); A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform, American Civil Liberties Union (April 2020) (citing data showing that Black residents are 3.6 times as likely to get arrested for marijuana possession than their White counterparts, despite similar usage rates), available at https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf.

⁸ FHEO Memorandum, *supra* note 15 at 2; Office of General Counsel, U.S. Dep’t of Hous. and Urban Dev., OGC Memorandum, Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016); See also, Carnemolla, Phillippa and Vivienne Skinner, Outcomes Associated with Providing Secure, Stable, and Permanent Housing for People Who Have Been Homeless: An International Scoping Review, 36 *Journal of Planning Literature* 508-525(2021); Fontaine, Jocelyn and Jennifer Beiss, Housing as a Platform for Formerly Incarcerated Persons, The Urban Institute (April 2012) <https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF>.

thus increasing the role of unconscious bias in the decision-making process. This is inconsistent with the shifting legal landscape concerning the use of criminal records in the screening process.⁹

PRRAC also opposes general rescreening of HUD-assisted tenants as it relates to transfers and continuing assistance. Existing program participants who have already been screened through their PHA should not face additional rescreening when transferring from one HUD-assisted program to another. This is especially true for tenants whose housing is undergoing RAD conversion. Rescreening should not jeopardize the stability and future of their housing, and their right to obtain a portable voucher under the choice-mobility provisions of the RAD program.

PRRAC commends HUD's efforts to bring its portability rule into alignment with the statutory right created by Congress. We were pleased to finally see the inclusion of explicit language prohibiting this practice in §§ 982.301 and 982.355 and voice our strongest support for its inclusion in the final rule.¹⁰

Disqualifying criminal activity

Race is deeply implicated in HUD's criminal records screening policies. Sixty-nine percent of voucher holders and seventy-one percent of public housing households are racial minorities.¹¹ Communities of color disproportionately face aggressive policing strategies and excessive surveillance, particularly in neighborhoods with higher concentrations of poverty. This over-policing results in more frequent stops and interactions with law enforcement causing higher arrest rates. Despite ongoing reforms and heightened awareness following high-profile incidents of police violence, data consistently shows that Black residents living in high poverty areas are more likely to be subjected to aggressive policing compared to their white counterparts. The impact of these frequent police interactions and higher arrest rates is profound and perpetuates a cycle of poverty and disenfranchisement.

A. Mandatory denials of admission for "currently engaging in" disqualifying criminal activity

Since its creation, this section of the regulation has been subject to ambiguity and incongruent application. Clarity is needed to ensure that families are not subjected to outdated and immaterial exclusions. PRRAC generally supports the need to define what it means to be "currently engaging in" disqualifying criminal activity. However, HUD's proposed definition is far too broad. Twelve months cannot reasonably be considered "current" for the purposes of this section.

Many housing authorities have limited the definition of "currently engaging in" to be much more contemporaneous. For example, the Kansas City Housing Authority, the Authority of San Angelo, and Montana Housing considers activities that have occurred within six months to be "current." The Saint

⁹ FHEO Memorandum (2022); OGC Memorandum (2016); See also, Daniel K. Malone, 2009. "Assessing criminal history as a predictor of future housing success for homeless adults with behavioral health disorders," *Psychiatric Services* 60:2, 224–30 (concluding that criminal history is not a good predictor of a housing success).

¹⁰ Question for comment #8: Rescreening of tenants for criminal activity.

¹¹ "In the District, Source of Income Discrimination is Race Discrimination Too," Uprety, Aastha and Kate Scott (Equal Rights Center, Oct. 12, 2018); "Public housing households with family head belonging to a racial minority U.S. 2022," Statista Research Department (Oct 18, 2023) <https://www.statista.com/statistics/1416793/public-housing-households-with-minority-family-head-us/#statisticContainer>

Joseph Housing Authority, the Maricopa Housing Authority, and the Allegheny Housing Authority define the mandatory denials' "current" requirement as having occurred within three months. HUD should define "currently engaging in" as activity that has occurred within the prior three months. Any alternative timeframe should not exceed six months.

When looking to bring clarity to this section of the regulation HUD should strive to bring both unity *and* fairness to the definition. Due to the mandatory nature of such exclusions and denials, HUD should exercise caution to ensure that tenants do not face undue penalization based on outdated or isolated incidents. Material incidents that occur within six to twelve months prior may still be considered under the discretionary denials but including such activity under the definition of mandatory "currently engaging in" denials would create unreasonable additional barriers for low-income families. By focusing on only recent activity, HUD can ensure that tenants are being fairly and accurately assessed for future risk.

B. Discretionary denials of admission for disqualifying criminal activity

PRRAC is generally supportive of the proposed prohibition against PHAs and owners denying admission on criminal activity beyond the required categories of drug-related criminal activity, violent criminal activity, and criminal activity that threatens the health, safety, and right to peaceful enjoyment of residents and others. However, it is important to also provide guidance on the application of this section. The final rule should define "health, safety, and right to peaceful enjoyment" as behavior or conditions that pose a risk of harm to the physical well-being or security of residents, staff, or visitors. We support HUD's utilization of its statutory authority to limit PHAs' discretionary denials of admission to only material criminal activity as described in this section.

Similarly, the definitions for "criminal history" and "criminal record" are too encompassing and confusing. HUD should include a single definition of "criminal activity." Further, HUD should not allow PHAs to use evidence of law enforcement interactions that did not result in conviction for discretionary denials. To ensure that applicants are given due process, housing authorities must only rely on concrete evidence, not mere allegations. This approach is necessary to protect applicants from bias, errors, or misinterpretations of their behavior and to uphold the principle that individuals are innocent until proven guilty.

C. Lookback period

We support the proposed rule's provision that a lookback period longer than three years is presumptively unreasonable. Three years provides sufficient information for the PHA to assess risk of future activity while also upholding principles of fairness and equity. It is also supported by the abundance of evidence that recidivism is highest within the first year following completion of a sentence and continues to decline as years pass. The three-year recidivism rate is the most commonly measured marker by researchers and is often used as a marker of decreased likelihood of reoffending by interest groups.¹² This rule not only brings the rule in alignment with interest groups and Congressional language around eviction for drug-

¹² Recidivism Rates: What You Need to Know, Council on Criminal Justice, (Sept. 1, 2021) https://counciloncj.org/recidivism_report/

related criminal activity on federally assisted property, but it also brings much needed consistency across PHA jurisdictions.

Mitigating circumstances

A. Admission

We strongly support requiring PHAs and owners to conduct an individualized assessment and consider mitigating circumstances before denial of admission, rather than leaving this process to their discretion. HUD should strengthen this process by requiring PHAs and owners allow applicants a right to review any records or evidence that the PHA and/or owner relies on in making the decision to admit or deny. A fair individualized assessment would allow applicants to dispute both the validity and relevance of any records or evidence. HUD should also require individualized assessments to be reviewed by an impartial decision maker. We also express concern that fifteen days is too short of a timeframe to adequately engage in the process and present mitigating factors to consider. We recommend that HUD extend this timeline to thirty days. These changes would bring the process into alignment with generally accepted due process principles.

Additionally, PRRAC supports the deletion of mitigating circumstances that refer to “the demand for assisted housing by families who will adhere to lease responsibilities.” This language unfairly evokes competition between applicants and perpetuates the harmful stereotyping of the deserving v. non-deserving poor. For the same reasons, we also support removing the focus on “personal responsibility” and “integrity of the program.” In addition, we support replacing “successfully completed an approved supervised drug-rehabilitation program” with “participating in or has successfully completed substance abuse treatment services.”

B. Procedural protections

PRRAC commends HUD on its efforts to increase transparency and consistency in the tenant screening process. We strongly support this shift toward a more comprehensive review process that we believe will reduce barriers and further fair housing. HUD could prevent future confusion on the administration of this procedure by adding the following additional guidance from the FHEO’s “Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing:”

- “Tenant screening policies should be in writing, made public, and readily available to potential applicants.”¹³
- “Prior to applying, potential applicants should be given a copy of the screening policies or told where they can find them (e.g., the link to the website).”¹⁴
- “Screening policies should contain enough detail for applicants to tell whether they are likely to qualify (e.g., what records will be considered, what incidents will be disqualifying, and how far back the screening will look).”¹⁵

¹³ 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).

¹⁴ *Id.*

¹⁵ *Id.*

- “Applicants should also be given information about how evidence of mitigating circumstances can be submitted and will be treated, how to request a reasonable accommodation for a disability, and how to contest an inaccurate, incomplete, or irrelevant record.”¹⁶

Applicants should also be given information about which screening sources the PHA utilizes, including criminal record screenings conducted through private third party servicers. Applicants should also be informed of any Fair Credit Reporting Act rights that may be triggered during the screening process.

Upon completion of the initial screening, applicants should be given copies of the specific criminal record(s) uncovered and disclosure of all specific ways in which that criminal record was sorted, aged, or categorized under any admission policies or procedures. If an applicant is denied, in accordance with the FHEO screening guidance, “[d]enial 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.”¹⁷ Further, “All records relied upon should be attached, including any screening reports”¹⁸ including any information from law enforcement agencies or private screening companies. If the applicant has multiple criminal records, PHA/owner must specify the precise criminal record that contributed to the denial decision and which did not. “If an applicant fails multiple screening criteria, all of those criteria should be included in the denial letter.”¹⁹

Finally, “[d]enial notifications should also instruct applicants how to submit an appeal if a record is inaccurate, incomplete, or irrelevant; mitigating circumstance exist; or a reasonable accommodation for a disability is needed.”²⁰ The additions of these provisions in the final rule will provide the most clarity for PHAs and owners to apply the regulatory rule and guidance.

C. Terminations & Evictions

PRRAC commends the rule's efforts to make tenant screening more comprehensive and nuanced; however concerns about "one strike" evictions remain. The final rule could make additional adjustments to consider the totality of the circumstances before termination or eviction.

HUD should define “on or near the premises” as “immediate vicinity” or “on or directly adjacent to the premises” to prevent broad application of consequences for unrelated incidents. It should also establish an innocent tenant defense to protect tenants unaware of, or unable to prevent, criminal activity.

It is also essential for PHAs and owners to provide tenants with the report forming the basis of any proposed adverse action *before* initiating termination. Furthermore, the rule should eliminate or limit the exclusion of criminal activity from public housing residents' right to a grievance procedure and address the use of drug-related activity decriminalized under state law.

In conclusion, PRRAC urges HUD to adopt the final rule with the preceding refinements. With these adjustments, the final rule will better address the needs of low-income families, affirmatively further fair

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 13-14.

housing, and enhance transparency in the tenant screening process. By reducing barriers and considering the landscape in which low-income tenants of color must navigate, HUD can strengthen the long-term stability of families. PRRAC greatly appreciates HUD's ongoing efforts, and we look forward to continued collaboration to advance these critical issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Audrey Lynn Martin". The signature is fluid and cursive, with a large initial "A" and "M".

Audrey Lynn Martin, Esq.
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