

An Affordable Home on Re-entry

*Federally Assisted Housing
and Previously Incarcerated
Individuals*



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Corinne Carey identified the fact that there was no comprehensive information guide available to assist advocates who are representing individuals with criminal records in their efforts to obtain housing. She sought out and secured the original funding for this Guide.

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INTRODUCTION

Since 1975, federal regulations have instructed Public Housing Authorities (PHAs) to consider the criminal history of applicants for public housing as it relates to physical violence to persons or property or other criminal acts that would affect the health, safety or welfare of other tenants.¹ As a result, most PHAs have adopted broad screening policies that call for the rejection of applicants with unfavorable criminal histories.

In 1996, HUD issued its “One Strike and You’re Out” policy.² As the title of the policy suggests, its primary focus was on evicting tenants who were linked to criminal activity. However, it also had an admissions component, which directed PHAs to screen applicants for criminal activity, including crimes of violence and activity that would lead one to conclude that the applicant poses a threat to life, health, safety of other residents or their peaceful enjoyment of the property.³ The HUD directive also urged PHAs to evaluate each applicant on a case-by-case basis by weighing the seriousness of the criminal activity, its recentness and whether the applicant had been rehabilitated. Unfortunately, many PHAs have not focused on this aspect of the policy.

In addition, Congress began to extend aspects of the law regarding admission and certain criminal activity and eviction for criminal activity to other federally-subsidized housing programs and to the tenant-based Section 8 program. HUD simultaneously pushed aggressively for implementation of policies which would deny admission of individuals with criminal records, despite the fact that the federal statutes are limited in scope and tailored to specific criminal activity. More recently, the Department of Agriculture also began to take steps that have

resulted in the exclusion of individuals with criminal records from Rural Development rental housing.

There have been several recent reports that have identified and discussed the growing population of individuals who have been released from incarceration and their lack of access to housing in general and federally assisted housing in particular.⁴ Each report contains recommendations, highlights opportunities for improvement, or provides examples of successful reintegration.

This Guide is designed for advocates working with or representing individuals with a criminal record who are seeking access to federally assisted housing programs. The Guide describes the current state of the law with respect to the admission process in general and, more specifically, as it relates to individuals with criminal records who have also been incarcerated; the barriers these individuals face as they seek housing; the process by which to challenge a denial; and suggestions as to how local advocates who are working with or representing individuals with criminal records may begin to change local policies and practices.

Accessing federally assisted housing is important because it is housing that is affordable to the lowest income families. For many of the federal housing programs referenced in this Guide, tenants pay no more than 30 percent of income for rent. Many individuals who leave prison are low- and very low-income and are therefore income-eligible for this housing. Studies have shown that individuals who have been released from prison but who have no permanent housing are much more likely to commit crimes again and to be reincarcerated. This cycle is self-defeating and is a factor in destabilizing families and communities. The purpose of this Guide is to emphasize that policies

¹40 Fed. Reg. 33,446 (Aug. 8, 1975), *codified at* 24 C.F.R. § 960.203(c)(2) and (3) (2003).

²“One Strike and You’re Out” Screening and Eviction Guidelines for Public Housing Authorities (PHAs), PIH 96-16 (HA) (Apr. 12, 1996); *see also* Occupancy Provisions of the Housing Opportunity Program Extension Act of 1996, PIH 96-27 (May 13, 1996), extended by PIH 97-27 (May 20, 1997); 62 Fed. Reg. 15,346-49 (Mar. 31, 1997) §§ 982.201 and 982.551-53 and 62 Fed. Reg. 25,728-38 (May 9, 1997), §§ 960.201-960.210 (all of which sought to implement 1996 statutory changes with respect to criminal activity).

³PIH 96-16, *supra* note 2, pp. 5-6.

⁴*See, e.g.,* Corinne Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. Tol. L. Rev. 545. (This report uses the term “public housing” to encompass both conventional public housing and the Section 8 voucher program. This Guide refers to each program separately.); CATERINA GOUVIS ROMAN & JEREMY TRAVIS, URBAN INSTITUTE, *TAKING STOCK, HOUSING, HOMELESSNESS AND PRISONER RE-ENTRY* (2004); *Every Door Closed: Barriers Facing Parents With Criminal Records*, CLASP and CLS Report (Chapter 3, “Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter”).

that indiscriminately exclude all individuals with a criminal record from federally assisted housing are wrong and are self-defeating. Advocates can help to change these and other restrictive policies through individual representation and policy advocacy. The objective of policy advocacy should be to dispel the myth that public housing agencies (PHA) and owners of federally assisted housing are required to exclude individuals with criminal records. Lifetime bans of persons with criminal records are generally not required by federal law and are inconsistent with studies regarding recidivism. Reasonable admission policies should require that each applicant be individually measured and that evidence of mitigating factors and rehabilitation should always be considered. In addition, PHAs and nonprofits should be encouraged to set aside units or housing subsidies to assist individuals obtain housing after release from incarceration.

To assist advocates in using this Guide, what follows is a brief description of each chapter and the appendices.

Chapter One: places the issues addressed in the Guide in context and provides a brief overview of the scope of the problem.

Chapter Two: describes the federal statutes and regulations as they pertain to admission and continued occupancy for individuals with a criminal record and have been incarcerated.

Chapter Three: describes the manner by which a local public housing agency may access an individual's criminal record and information regarding his or her drug rehabilitation. It also discusses the related issue of expungement of criminal records.

Chapter Four: describes mitigation and reasonable accommodation requirements, which may be used by an applicant with a criminal record to gain admission.

Chapter Five: describes the process by which an applicant with a criminal record who has been denied housing may challenge that denial.

Chapter Six: describes how advocates may seek to change or improve the admission policies of a local public housing agency, which administers public housing and the Section 8 voucher program, in the context of the PHA plan process. Other plans, such as

the Consolidated Plan, the Qualified Allocation Plan, the Continuum of Care and Olmstead plans may also be influenced for the purpose of obtaining better admission policies for the applicable federal housing programs or increase the number of units that may be available or provide a set aside of units for individuals with criminal records. This chapter also has a brief description of local codes that prevent discrimination against individuals with a criminal record.

Chapter Seven: addresses the issues that individuals with a criminal record may encounter if they are participants in the voucher program and are seeking to move to the jurisdiction of another public housing agency.

Chapter Eight: addresses the issues that an individual with a criminal record may encounter if he or she seeks to return to his or her unit after a brief incarceration or to rejoin family members who currently receive federal housing assistance.

Appendix One: is a resource that describes the characteristics of the various federally assisted housing programs, including tips on how to locate such housing within local communities.

Appendix Two: describes the basic eligibility requirements for the federally assisted housing programs.

The National Housing Law Project (NHLP) has published and regularly updates a comprehensive manual on the rights of applicants for and tenants in federally assisted housing. The manual and its current supplements, titled *HUD Housing Programs: Tenants' Rights*, may be purchased by submitting an order form that is available on the NHLP website: www.nhlp.org.

CHAPTER 1

The Problem: The Number of Individuals Who Have Been Incarcerated Is Increasing and Many Need Affordable Housing

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1.1 What Is Known About Individuals Who Have Been Incarcerated?

Estimates regarding the number of people likely to be excluded from federally-subsidized housing due to an arrest or criminal record are staggering. Approximately 600,000 people leave prison each year.¹ As of 2001, approximately 4,299,000 individuals had a record of incarceration.² In 2005, it is estimated that 14.1 million individuals were arrested for criminal infractions.³ All of these individuals may encounter barriers to accessing federally assisted housing.

Among the individuals arrested or incarcerated, low-income people are over-represented. In 2002, 14% of people in jail reported being homeless or living in temporary shelter immediately before incarceration. A 1996 study found that a stunning 49% of homeless adults had reportedly spent five or more days in a city or county jail while another 22% had spent time in military, state, or federal prisons.⁴ An estimated 29% of people jailed were not employed in the month

before their arrest.⁵

People of color and ethnic minorities are also disproportionately represented in this population. At the end of 2005, the Bureau of Justice Statistics reported that African Americans accounted for approximately 40% of all state or federal inmates with a sentence of more than one year, that Latinos accounted for 20% and that whites accounted for 35%.⁶ As the report notes, the racial breakdown of state or federal prisoners has largely remained unchanged between 1995 and 2005.⁷ Correspondingly, in the 2000 Census, African Americans accounted for 12.3% of the total population, Latinos, 12.5%, and Caucasians, 75.1%.⁸

Women are a fast growing segment of the jail population. In 1983, women accounted for 7.1% of inmates. By 1996, incarcerated women constituted 10.2% of the inmate population—a 31% increase.⁹ This increase coincided with the “rapid increase in the percentage of jail inmates held for a drug offense during the 1980s . . . [when] the percentage charged with a drug

¹U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, TOTAL SENTENCED PRISONERS RELEASED FROM STATE OR FEDERAL JURISDICTION (2000), available at: <http://www.ojp.usdoj.gov/bjs/data/corpop22.wk1>.

²U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/plusp01.pdf>.

³U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIMES IN THE UNITED STATES, 2005, table 29, available at http://www.fbi.gov/ucr/05cius/data/table_29.html That figure is not an anomaly. 13.6 million such arrests were made in 2003, see U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIMES IN THE UNITED STATES, 2003, 270, table 29, available at: http://www.fbi.gov/ucr/cius_03/pdf/03sec4.pdf (These figures do not include traffic violations).

⁴U.S. CENSUS BUREAU, NATIONAL SURVEY OF HOMELESS ASSISTANCE PROVIDERS AND CLIENTS (1996).

⁵U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES, 2002 (2004) available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf>.

⁶U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2005, 8 (2006) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>.

⁷*Id.*

⁸CENSUS BUREAU, 2000 CENSUS, available at: http://www.factfinder.census.gov/servlet/SAFFacts?_event=&geo_id=01000US&_geoContext=01000US&_street=&_county=&_cityTown=&_state=&_zip=&_lang=en&_sse=on&ActiveGeoDiv=&_useEV=&pctxt=fp&pgsl=010&_submenuId=factsheet_1&ds_name=ACS_2006_SAFF&_ci_nbr=null&q_r_name=null®=&_keyword=&_industry=

⁹U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, PROFILE OF JAIL INMATES 1996, 3 (1998) available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji96.pdf>.

offense rose from 9 percent in 1983 to 23 percent in 1989.”¹⁰ By 2002, the number of incarcerated women rose another 2% to 12% of the jail population.¹¹ Moreover, the rate of incarceration of women continues to increase faster than the rate for men. In 2005, the number of women in state or federal prison increased by 2.6%, versus a 1.9% increase in the number of men incarcerated.¹²

Drug-related incarceration increased in the late 1990s. The number of people in jail for a drug offense grew by 37% from 1996 to 2002—the largest source of jail population growth during that time period.¹³ “In 2000, an estimated 57% of Federal inmates and 21% of State inmates were serving a sentence for a drug offense.”¹⁴

People who are released from incarceration face a monumental challenge in finding affordable housing. Most are competing for housing with the 37 million other Americans who live at or below the federal poverty level.

The likelihood of an American having some form of criminal or arrest record has grown over the past thirty years. One in every 136 United States residents was in prison or jail at the end of 2005.¹⁵ To provide some perspective, the number of prisoners released

in 2004 was four times the number released in 1980.¹⁶ Significantly, the increase in the number of individuals incarcerated does not correlate to an increase in crime. Studies have shown that the tripling of the prison population between 1980 and 1996 is due primarily to changes in sentencing, not an increase in crime.¹⁷ The increase in arrests and incarceration has been generated by changes in sentencing policies that have focused on punishing even non-serious, non-violent crime in a highly punitive fashion. For example, there are 5,500 individuals behind bars in Texas for drunken driving and some of those were not even involved in an accident.¹⁸

1.2 Availability of Affordable Housing

People who are released from incarceration face a monumental challenge in finding affordable housing. Most are competing for housing with the 37 million other Americans who live at or below the federal poverty level.¹⁹ Very low-income households, with 50% of area median income or less, are also competing for fewer available affordable units. In 2005, 77 units were affordable and available for every 100 very low-income households whereas in 2003, 81 affordable units were available for every 100 very low-income households.²⁰ The situation is even worse for extremely low-income households, with 30% of area median income or less. The ratio of affordable units in 2005 was 40 per 100 households, down from 43 per 100 in 2003.²¹ Federally-subsidized affordable units are a subset of all affordable housing units. Currently,

¹⁰*Id.* at 4.

¹¹U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2004 (2004) available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

¹²U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2005 (2006) available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>.

¹³U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS (2004) available at: <http://www.ojp.usdoj.gov/bjs/crimoff.htm#inmates>.

¹⁴U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#feds>.

¹⁵*Id.*; The Pew Center on the States issued a report finding that one in 100 adults are behind bars. See One in 100: Behind Bars in America (Feb. 2008) available at http://www.pewcenteronthestates.org/topic_category.aspx?category=528; Adam Liptak, *U.S. Imprisons One in 100 Adults, Report Finds* (New York Times, Feb. 29, 2008).

¹⁶CATERINA GOUVIS ROMAN & JEREMY TRAVIS, THE URBAN INSTITUTE, TAKING STOCK, HOUSING, HOMELESSNESS AND PRISONER RE-ENTRY, 9 (2004) available at: http://www.urban.org/UploadedPDF/411096_taking_stock.pdf.

¹⁷See Alfred Blunstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 PRISONS: CRIME AND JUSTICE—A REVIEW OF RESEARCH 16-61 (Michael Tonry & Joan Petersilia eds., 1999); James Bell, *Mapping the Criminal Justice System's Impact in Your Community*, 41 CLEARINGHOUSE REV. 134, 135 (July-Aug. 2007) (Changes in crime statistics explained only 12% of the prison population increase while changes in sentencing policy accounted for 88%).

¹⁸Adam Liptak, *U.S. Imprisons One in 100 Adults, Report Finds* (New York Times, Feb. 29, 2008).

¹⁹U.S. CENSUS BUREAU, POVERTY: 2005 HIGHLIGHTS (2006) available at: <http://www.census.gov/hhes/www/poverty/poverty05/pov05hi.html>.

²⁰HUD, AFFORDABLE HOUSING NEEDS 2005: REPORT TO CONGRESS, 4 (MAY 2007), available at: <http://www.huduser.org/Publications/pdf/AffHsgNeeds.pdf>.

²¹*Id.*

there are about 1.2 million public housing units,²² 2 million tenant-based voucher units,²³ more than 1.3 million project-based Section 8 units, about 1 million HUD and Rural Housing Service subsidized units²⁴ and 2 million tax credit units. Access to federally assisted housing may be restricted because of overly restrictive policies.

Stable, affordable housing is an urgent need for people leaving prison.²⁵ Not surprisingly, individuals who leave prison and are homeless face an increased likelihood of recidivism.²⁶ The remaining chapters of this Guide discuss policies regarding admission to federally assisted housing, how they may be changed, and admission strategies for advocates who are assisting formerly incarcerated applicants.

²²HUD, RESIDENT CHARACTERISTICS REPORT, PUBLIC HOUSING UNITS (ACC UNITS) (2/1/06-5/31/07) available at: <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>.

²³HUD, RESIDENT CHARACTERISTICS REPORT, TENANT BASED VOUCHERS (FORM 50058 RECEIVED) (2/1/06-5/31/07) available at: <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>.

²⁴HUD, MULTIFAMILY PROPERTIES: OPTING IN, OPTING OUT AND REMAINING AFFORDABLE 14 (Jan. 2006); See also, HUD, PICTURE OF SUBSIDIZED HOUSING, SECTION 236 (440,329) AND ALL OTHER MULTIFAMILY UNITS ASSISTED WITH FHA OR HUD SUBSIDY (352,337) (2000), available at: http://www.huduser.org/Publications/pdf/opting_in.pdf—and HUD, PICTURE OF SUBSIDIZED HOUSING, SECTION 8 NEW CONSTRUCTION/SUBSTANTIAL REHABILITATION AND SECTION 8 MODERATE REHABILITATION UNITS (2000) available at: http://www.huduser.org/picture2000/form_1S.odt. These authorities do not provide information on the number Section 202 or Section 811 units.

²⁵THE URBAN INSTITUTE, NATIONAL PORTRAIT OF SERIOUS AND VIOLENT OFFENDER REENTRY INITIATIVE, 7 (2004) available at: https://www.svori-evaluation.org/%5Cdocuments%5Cnationalportrait%5CSVORI_NationalPortrait.pdf.

²⁶NINO RODRIQUEZ AND BRENNER BROWN, PREVENTING HOMELESSNESS AMONG PEOPLE LEAVING PRISON 4 (Vera Institute of Justice, Dec. 2003); see also THE URBAN INSTITUTE, NATIONAL PORTRAIT OF SERIOUS AND VIOLENT OFFENDER REENTRY INITIATIVE, 7 (2004) available at: https://www.svori-evaluation.org/%5Cdocuments%5Cnationalportrait%5CSVORI_NationalPortrait.pdf.

CHAPTER 2

Eligibility for Federally Assisted Housing for Individuals Who Have Been Released from Incarceration

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2.1 Introduction

The following discussion focuses on the eligibility of individuals who have been released from incarceration or who in the past have been convicted of criminal acts. It does not address the rights of residents and program participants who are threatened with eviction or termination from a federal housing program because of allegations that they are currently engaging in criminal activity or engaged in such activity while residing or participating in a housing program.¹

The following rules generally apply to federally assisted housing.² They should be read carefully as

the rules vary from program to program.

There are no federal rules for screening applicants to Low Income Housing Tax Credit (LIHTC) properties or for most of the smaller HUD programs, such as Housing Opportunities for People with AIDS (HOPWA), Shelter Plus Care (S+C) or Supportive Housing Program (SHP).³

Exhibit 3 to this Chapter is a chart which identifies the federal program, a selected type of criminal activ-

¹For information about how to represent such individuals, see Lawrence R. McDonough & Mac McCreight, *Wait A Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, available at: <http://povertylaw.homestead.com/waitaminute.html>. An abridged version is available at 41 CLEARINGHOUSE REV. 55 (May/June 2007). See also National Housing Law Project, HUD HOUSING PROGRAMS TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Suppl.) Ch 14.

²The term "federally assisted housing" is defined in the statute and regulations relating to criminal activity and access to criminal records to include public housing, the voucher program,

project-based Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 514 and Section 515. See 42 U.S.C.A. § 13664 (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07) and 24 C.F.R. § 5.100 (2007). The regulations implementing the statute are codified in different sections of the Code of Federal Regulations (C.F.R.). For public housing the regulations are found in 24 C.F.R. part 960, for the voucher program they are found in 24 C.F.R. part 982 (see especially § 982.552 and 982.553), for Section 8 Moderate Rehabilitation they are found at 24 C.F.R. part 882 (12 especially § 882.518) and for all the other HUD-assisted housing they are found at 24 C.F.R. part 5, subpart I. The regulations for the Rural Development programs, Sections 515, 514 and 516, are found, respectively, at 7 C.F.R. §§ 3560.154(j), 3560.551, 3560.601. These regulations do not bar admission of any class of applicants due to criminal activity.

³See Appendix 1 for a brief description of the various federally assisted housing programs.

ity and whether denial of admission is mandatory or permissive.

2.2 Criminal History for Selected Crimes

Pursuant to federal statutes and regulations, public housing agencies (PHAs) and owners of some federally assisted housing must reject applicants with certain very specific criminal backgrounds. In addition, PHAs and owners have broad discretion to deny or accept applicants who have engaged in any other types of criminal activity. Owners of Rural Development (RD) housing financed under Sections 515 and 514 or 516 or LIHTC properties are not required to bar any applicant due to criminal history.⁴

2.2.1 Conviction of Methamphetamine Production

A PHA must permanently deny admission to public housing, the voucher program, and the Section 8 moderate rehabilitation program to a household if any member of the applicant household has ever been convicted of criminal activity for the manufacture or production of methamphetamine on the premises of any “federally assisted housing.”⁵ This lifetime ban is serious for those individuals to whom it applies. However, the ban applies to a relatively small number of potential applicants: those who have been 1) convicted, 2) of the manufacture or production of methamphetamine and 3) the activity took place on the premises of “federally assisted housing.” Moreover, the ban applies only to applicants to the three housing programs that PHAs administer. It is not applicable to other federally assisted housing. The exclusion of other federally assisted developments from the rule highlights the arbitrary and political nature of the

ban.⁶ On the practical side, it relieves owners, other than PHAs, from the responsibility of seeking out the information. It also gives applicants with such histories greater latitude in objecting to the imposition of a lifetime ban and to present mitigating circumstances when applying for admission. If an owner, who is not required by statute to impose a lifetime ban, seeks to impose one, an applicant may object to the policy as contrary to congressional intent as it goes beyond the statutory limits.⁷ If an owner rejects such an applicant the applicant should challenge the lifetime ban and present information regarding mitigating circumstances or rehabilitation. Mitigating circumstances might include the fact that the applicant was on the premises but did not manufacture the drugs, or was involved in the manufacturing but was a victim of domestic violence. It may also include the fact that there has been a significant lapse of time between the offense and the application for admission with no other intervening criminal activity.

2.2.2 Lifetime Registered Sex Offender

PHAs and owners of most “federally assisted” housing must deny admission to a family if any member of the household is subject to a lifetime registration requirement under a state sex offender registration program.⁸ Owners of LIHTC or RD housing are not required to deny admission to a lifetime registered sex offender.⁹ For those programs to which the lifetime ban applies, an applicant must meet all the elements of the definition to be permanently excluded. For example, because not all registered sex offenders

⁴ “[Owners] may deny admission for criminal activity or alcohol abuse by household members in accordance with the provisions of 24 C.F.R. § 5.854 [evicted from federally assisted housing for drug-related criminal activity within three years], § 5.855 [engaged in criminal activity within a reasonable time], § 5.856 [registered lifetime sex offenders], and § 5.857 [abuse of alcohol].” 7 C.F.R. § 3560.154(j) (2007) (emphasis added).

⁵ 42 U.S.C.A. § 1437n(f)(1) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07); 24 C.F.R. §§ 882.518(a)(1)(ii) (Section 8 moderate rehabilitation), 960.204(a)(3) (public housing), 982.553(a)(1)(ii)(c) (Section 8 voucher) (2007).

⁶ See Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. Tol. L. Rev. 545, 583-85 (2005) (noting that “in establishing the exclusionary policies . . . Congress was far more interested in sending a message of disapproval about specific crimes than in establishing reasonable protections for tenant safety”).

⁷ See footnote 10, *infra*, discussing federal preemption.

⁸ 42 U.S.C.A. § 13663(a) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44), approved 7-5-07); 24 C.F.R. §§ 5.100 (definition of federally assisted housing), 5.856 (federally assisted housing in general), 882.518(a)(2) (Section 8 moderate rehabilitation), 960.204(a)(4) (public housing) and 982.553(a)(2)(I) (voucher) (2007); Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule, H 2002-22 (Oct. 29, 2002), ¶ VI.

⁹ 7 C.F.R. § 3560.154(j) (2007) (RD housing). There are no regulations for LIHTC properties mandating the denial of admission of a registered sex offender.

are subject to a *lifetime* registration requirement, such individuals may not be subject to a permanent exclusion. Advocates should check state and local laws regarding lifetime registration requirements.

Some PHAs or owners either misinterpret the rule or apply their own criteria, which in effect means that any convicted sex offender is banned regardless of when convicted, the offense for which the offender was convicted, or for how long the person is required to be registered as an offender. Such action could be challenged. Only those applicants who meet the statutory definition should be automatically denied for life.¹⁰ For all other applicants with a prior sex offense, the PHA should analyze the time, nature and circumstances of the offense, as would be appropriate for any other criminal activity.¹¹ Applicants should also be permitted to establish mitigating circumstances and/or rehabilitation. For example, non-lifetime registered sex offenders should be able to establish that the conduct was not violent, did not involve children, happened a long time ago, and there have been no subsequent problems.¹²

¹⁰Perhaps, a successful argument could be made that the federal statute barring lifetime registered sex offenders preempts an expansion of that bar to other sex offenders. There are three general types of situations in which preemption may be established. One of the situations is that preemption may be inferred where the scheme of the federal legislation is so comprehensive that it creates the inference that Congress “left no room” for local regulation in that area. *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 281 (1987). Applying that standard, the area in question is eligibility for federally assisted housing and Congress has fully defined eligibility for federally assisted housing. (See brief discussion of eligibility in Appendix 2). Imposing an absolute life time bar when none is required is determining eligibility in an area that Congress has not left any room for local regulation. Success on such a claim may be complicated as the party seeking preemption has the burden of proof and the presumption is against preemption. *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992).

¹¹See *Ouellette v. Housing Auth. of Old Town*, No. AP-03-17, 2004 WL 842412 (Me. Super. Ct. Mar. 11, 2004) (plaintiff challenging PHA policy denying housing to all applicants who had committed a violent crime admitted to being convicted as sex offender) and the discussion in Chapter 4 regarding mitigating circumstances.

¹²Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. Tol. Rev. 545, 579 (2005) (article also lists reasons why an individual might be on a lifetime registration list, including consensual relationship with partners who are a few years younger, indecent exposure or lewd displays often related to substance abuse, mental health diagnosis, homelessness, and women who are convicted of conspiracy to commit sexual abuse for failing to protect a child from such abuse); See also HOUSING RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US* (2007), available at: <http://hrw.org/reports/2007/us0907/>.

The rules regarding access to lifetime sex offender registers and the opportunity to dispute the information are similar to those discussed in Chapter 3 regarding access to criminal conviction records.¹³

A registered lifetime sex offender who applies for public housing, the voucher program, project-based Section 8 or other federally assisted housing is faced with the choice of disclosing and being barred from the housing for life, not disclosing but being denied when discovered, or being subject to eviction or termination of benefits or possible prosecution for fraud for submitting false information when discovered.

Applicants should also be permitted to establish mitigating circumstances and/or rehabilitation.

One applicant denied admission because he or she was a registered sex offender unsuccessfully challenged the exclusion statute on several grounds. One federal district court found that sex offenders are not a suspect class for purposes of equal protection because the restriction is rationally related to a legitimate government purpose and that, in light of the regulatory and non-punitive nature of 42 U.S.C. § 13663, the restriction does not violate the Ex Post Facto Clause of the U.S. Constitution.¹⁴ In contrast, in the eviction context, courts have either rejected efforts to evict a lifetime registered sex offender who was a long-term resident prior to the law’s enactment, or have permitted the eviction after finding the change in the rules to be reasonable.¹⁵ The different

¹³24 C.F.R. §§ 5.903(f) (criminal records) and 5.905(b) and (d) (sex offender records) (2007).

¹⁴*Cunningham v. Parkersburg Hous. Auth.*, Civil Action No. 6:05-cv-00940, 2007 WL 712392 (S.D.W. Va. Mar. 6, 2007).

¹⁵*Spring Valley Hous. Auth. v. [redacted]* (Justice Court County of Rockland N. Y. ([Redacted])) (court declined to evict tenant of eight years who had truthfully responded in application process and who was a sex offender) (copy available in Exhibit 1 to this Chapter); *Albany Hous. Auth. v. [redacted]*, No. AHA 06 [redacted] (Albany N.Y. City Court, Dec. 11, 2006) (court relied upon HUD Notice H 2002-22 and declined to evict the tenant) (copy available in Exhibit 2 to this chapter); *Compare Archdiocesan Hous. Auth. v. Demmings*, 108 Wash. App. 1035, 2001 WL 1229809 (unpublished) (Wash. App. Oct. 15, 2001) (upholding eviction of tenant who reported felon status at admission because court found the PHA

treatment of registered sex offenders in the admission as opposed to the eviction context may be attributed to several factors including that the statute addresses only admissions, the difference in the property interest involved, and that the tenant but not the applicant may demonstrate more definitively that he or she has been a good tenant for a substantial period of time.

The statute provides that a PHA or owner may admit the household if the previously evicted household member who engaged in drug-related activity successfully completed an approved, supervised drug rehabilitation program, or the circumstances have changed.

2.2.3 Previously Evicted for Drug-Related Activity

For certain programs, there is a mandatory three-year ban on admission for families if any member of the applicant household has been evicted from “federally assisted housing” for drug-related criminal activity.¹⁶ This ban is applicable to applicants for public housing, the voucher program, project-based Section 8, and other federally assisted housing, excluding LIHTC and RD housing.¹⁷ The rule is also not applicable to applicants with evictions for drug-related activity from non-federally assisted housing.

In creating the ban, Congress recognized that an individual should be given another chance and an opportunity to demonstrate rehabilitation or changed circumstances. Thus, the statute provides that a PHA or owner may admit the household if the previously

evicted household member who engaged in drug-related activity successfully completed an approved, supervised drug rehabilitation program, or the circumstances have changed.¹⁸ Changed circumstances include “for example, the criminal household member has died or is imprisoned.”¹⁹ Because the rule cites examples, there may be other situations that constitute changed circumstances, such as the fact that the applicant, for a relevant period of time, has had no contact and does not know the whereabouts of the household member who engaged in the criminal activity.

Although Congress set the ban at three years, HUD regulations authorize PHAs and owners to extend the ban for a longer period of time.²⁰ An extension of the three-year ban may not be an appropriate interpretation of the statute, but to date there are no reported cases on this issue. It can be argued that any extension is not authorized because of the statute’s specificity and Congress’ recognition that an applicant’s efforts at rehabilitation or changed circumstances could reduce the three-year period. Thus, an applicant, especially one who was involved in a less serious drug-related crime, such as mere possession, or who has been rehabilitated, should not be denied admission due to an extended ban. Such an applicant may have good grounds to challenge any extension of the ban beyond the statutorily established three-year period.²¹

later properly adopted rule excluding registered sex offenders, that rule was reasonable, and tenant had opportunity to dispute the fact).

¹⁶42 U.S.C.A. § 13661(a) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07).

¹⁷24 C.F.R. §§ 5.850(a) (excludes rural development housing), 5.854(a) (federally assisted housing in general), 882.518(a)(1)(I) (Section 8 moderate rehabilitation), 960.204(a)(1) (public housing), 982.553(a)(1)(I) (voucher) (2007); Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule, H 2002-22 (Oct. 29, 2002) ¶ VI (HUD Notice applicable to HUD-assisted project-based housing, excluding Section 8 moderate rehabilitation housing and project-based vouchers or certificates). The rule is also not applicable to housing assisted with S+C, SHP or HOPWA funding.

¹⁸42 U.S.C.A. § 13661(a) (West, WESTLAW Current through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07); 24 C.F.R. § 5.854(a)(2) (2007). The rehabilitation should not be limited to supervised rehabilitation programs but also ought to recognize self-help programs such as Alcoholics Anonymous. *See, e.g.*, Rules & Regulations, Dep’t of Hous. & Urban Dev., 66 Fed. Reg. 28,776, 28,785 (May 24, 2001) (codified at 24 C.F.R. § 5.852(c)(1)).

¹⁹*Id.*

²⁰24 C.F.R. §§ 5.852(d) (federally assisted housing), 960.203(c)(3)(ii), 966.4(1)(5)(vii)(E) (public housing) (2007). HUD apparently believes that the statute sets a floor of three years, and that PHAs and owners are not violating the statute if they expand the time period. The HUD explanation in the regulations is that “[s]ince the intent of the statute was to strengthen protections against admitting persons whose presence in assisted housing might be deleterious, HUD does not interpret this new provision as a constraint on the screening authority that owners and PHAs already had.” Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule, 66 Fed. Reg. 28,776, 28,779 (May 24, 2001).

²¹*See* footnote 10, *supra*, (discussion regarding preemption).

2.3 Policies Relating to Other Criminal History

Even if rejection is not required by statute, PHAs and owners may screen applicants for other types of criminal history. Any policies regarding admission and screening must be in writing and available to applicants.²²

As noted above, for the major housing programs, federal laws require the rejection of an applicant with a criminal record in certain very limited situations. For the vast majority of situations, the rejection of an applicant with a criminal record is within the discretion of the PHA or owner. Importantly, Congress has placed some restrictions on that discretion.

2.3.1 Limitations on the Authority to Deny an Applicant with a Criminal Record

Congress determined that a PHA or owner may reject an applicant²³ for:

- drug-related criminal activity,²⁴
- violent criminal activity,²⁵
- other criminal activity that would threaten the health, safety or right to peaceful enjoyment of the premises by other residents, or
- other criminal activity that would threaten the health or safety of the owner or local housing agency staff or contractors.

2.3.2 Limitation Regarding the Length of the Denial

In authorizing screening for criminal activity, Congress did not intend that the authorization to exclude individuals with a criminal record be expanded

unjustifiably. Thus, it limited the time frame that an applicant could be rejected for prior criminal activity. It provided that in order to reject the applicant, the PHA or owner must determine that the criminal activity is current or occurred within a “reasonable period” of time prior to the admission decision.²⁶ Congress also specifically noted that applicants who have been denied admission due to criminal activity may reapply and, as a condition of readmission, may demonstrate that they have not engaged in the criminal activity for a “reasonable period” of time.²⁷

The term “reasonable period” of time is not defined in the statute or regulations, but Congress repeatedly emphasized its importance and established some guideposts to define it. It determined that only certain types of criminal activity (sex offenses that result in lifetime registration and certain criminal activities related to methamphetamine production) warrant a permanent bar from federally assisted housing.²⁸ It also determined that, absent mitigating circumstances, a three-year prohibition is appropriate for drug-related criminal activity that resulted in an eviction.²⁹

HUD guidance suggests that “five years may be reasonable for serious offenses” and notes that PHAs and owners may want to differentiate what is a reasonable time period for different categories of criminal activity.³⁰ HUD provides the example that when there is “an eviction where the applicant was manufacturing or dealing drugs,” a PHA may consider a five-year ban as an adequate penalty.³¹

The term “currently engaged in” is also referenced in the statute in connection with the use of illegal

²²See Appendix 2 (discussion regarding written admission policies).

²³42 U.S.C.A. § 13661(c) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07); 24 C.F.R. §§ 5.855(a), 882.518(b), 982.553(a)(2)(ii) (2007).

²⁴See 42 U.S.C.A. § 1437a(b)(9) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07) (definition of drug-related criminal activity); 24 C.F.R. § 5.100 (2007).

²⁵The regulations define “violent criminal activity” 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.” 24 C.F.R. § 5.100 (2007).

²⁶42 U.S.C.A. § 13661(c) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07). The term “reasonable period” is repeated three times in this section.

²⁷42 U.S.C.A. § 13661(c)(2) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07); 24 C.F.R. §§ 5.855(c), 882.518(b)(3) and 982.553(a)(2)(ii)(c) (2007).

²⁸See discussion of registered lifetime sex offender and denial of admission to individuals convicted of methamphetamine production, *supra*.

²⁹42 U.S.C.A. § 13661(a) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07).

³⁰Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule, 66 Fed. Reg. 28,776, 28,779 (May 24, 2001).

³¹HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, § 4.6, p. 53 (June 2003). See also 24 C.F.R. § 982.552(c)(1)(ii) (2007) (five-year ban on admission to voucher program for eviction from federally assisted housing).

drugs and is defined in the statute and regulations to mean the individual has engaged in “the behavior recently enough to justify a reasonable belief that the individual’s behavior is current.”³² HUD guidance instructs PHAs to “spell out what they consider to be ‘recent,’ e.g. past month, past six months, etc.”³³ The HUD guidebook for the voucher program provides that a PHA may exclude an individual for possession or use of an illegal drug only if such use or possession occurred within the prior year.³⁴ The cases interpreting similar language regarding current use in the fair housing laws are also instructive.³⁵

Implicit in the statutory term “reasonable period” of time is the concept that at some point most applicants with an aging criminal record should be eligible for the housing and should not be barred by screening criteria.

Thus, implicit in the statutory term “reasonable period” of time is the concept that at some point most applicants with an aging criminal record should be eligible for the housing and should not be barred by screening criteria. This acknowledgment, that over time most applicants should be given the opportunity to demonstrate eligibility through good behavior,

³²42 U.S.C.A. § 1437d(t)(7) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 7-5-07) (defining “currently engaging in the illegal use of a controlled substance which has the added emphasis that the activity must be a “real and ongoing problem”); 24 C.F.R. §§ 5.853(b) (federally assisted housing in general), 882.518(a)(1)(iii) (Section 8 moderate rehabilitation), 960.204(a)(2)(I) (public housing), 982.553(a)(2)(ii)(C)(2) (Section 8 voucher) (2007).

³³HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, § 4.6, p. 53 (June 2003).

³⁴HUD, VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE, 7420.10G, ¶ 5.7, p. 5–37 (Apr. 2001). *But see* Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule, 60 Fed. Reg. 34,660, 34,688 (July 3, 1995) (codified at 24 C.F.R. § 982.553(b)) (HUD regulations formerly stated that to deny admission, drug use or possession should have occurred within prior year).

³⁵For a discussion of those cases, see Chapter 4 regarding drug rehabilitation; see also MADISON, WIS. CODE OF ORDINANCES Ch. 39.03(1) and (4) ((Renumbered by Ord. 12,039, Adopted 2-17-98) available at <http://www.municode.com/resources/gateway.asp?pid=50000&sid=49>) (ordinance prohibiting discrimination against individuals with a criminal record is applicable for most offenses two years after the individual has completed or complied with the penalty).

rehabilitation or changed circumstances, is consistent with litigation challenging policies that rejected all applicants with any record of any past criminal activity³⁶ and social science research.³⁷ In addition, there are equitable claims that may be made that the length of the ban is unconscionable, drastic beyond reasonable necessity, or shocks one’s sense of fairness.³⁸

2.3.3 Relationship of the Prior Criminal Activity to the Future Tenancy

Significantly, Congress qualified denials of admission for “other criminal activity” (*i.e.*, criminal activity that is not drug-related or violent) to activities that would threaten the health, safety, or right to peaceful enjoyment of other residents or the PHA staff and contractors. Thus, not all criminal activity and sub-

³⁶Omelette v. Housing Auth. of Old Town No. AP-03-17, 204 WL 842412 (Me. Super. Ct. Mar. 11, 2004) (PHA’s “zero tolerance” denial of voucher application due to husband’s 15-year-old conviction for sexual assault violated federal regulations). *But see* Talley v. Lane, 13 F.3d 1031 (7th Cir. 1994) (consideration of applicant’s criminal record is not forbidden under either Fair Housing Act or Rehabilitation Act); Collins v. AAA Homebuilders, Inc., 333 S.E.2d 792 (W. Va. 1985) (private landlord could exclude an applicant because of criminal conviction; dissent noted that landlord had a Section 8 New Construction contract and found that absolute bar violated the law) and Collins v. AAA Homebuilders, CA3 85-0767 (S.D.W. Va. Dec. 9, 1985) (Clearinghouse No. 49,351) (complaint filed after state court decision; federal court refused to dismiss after defendants sought removal because of, *inter alia*, due process violation in application process).

³⁷Study found that after approximately 7 years there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those without a criminal record. See Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, ENDURING RISK? OLD CRIMINAL RECORDS AND SHORT-TERM PREDICTIONS OF CRIMINAL INVOLVEMENT, Crime & Delinquency (March 2006) available at: http://www.reentry.net/library/item.100735_Enduring_Risk_Old_Criminal_Records_and_ShortTerm_Predictions_of_Criminal_In; Kurlychek, Brame, Bushway, *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?*, Criminology & Public Policy, Volume 5 Issue 3, pp. 483-504 (August 2006) available at: http://www.reentry.net/search/item.100739-Scarlet_Letters_and_Recidivism_Does_An_Old_Criminal_Record_Predict_Future_R.

³⁸Thomas v. Housing Auth. of Little Rock, 282 F. Supp. 575, 580 (E.D. Ark 1967) (unwed mother admission policy is drastic beyond reasonable necessity); See also United States v. Robinson, 721 F. Supp. 1541 1544-1545 (forfeiture of tenant’s apartment and her federal housing assistance payments, which were the only means by which the defendant could provide shelter for her children, was disproportionately severe to the offense of knowingly and intentionally distributing a mixture containing cocaine base); In the Matter of Elaine Sicardo v. Peter Smith, etc. No. 2007-03609, Index No. 219067/06 (N.Y. App. Div. Second Jud. Dept., March 18, 2008) (penalty in termination case so disproportionate to the offense as to be shocking to one’s sense of fairness) available at: http://www.nycourts.gov/reporter/3dseries/2008/2008_02603.htm.

sequent convictions should be the basis for a denial. As HUD has noted: “[T]he PHA should be looking for history of crimes that would result in denial for eligibility or demonstrate lease violations if they were committed by a public housing resident. There are a variety of other crimes that cannot be claimed to adversely affect the health, safety or welfare of the PHA’s residents.”³⁹

In addition, HUD has instructed federally assisted owners that any decision that they make based upon “reasonable belief” or other determination must be documented. The documentation should be not only of the behavior, but should also show that the behavior would interfere with the health, safety, or peaceful enjoyment by other residents.⁴⁰

From these authorities, an advocate may argue that applicants with a record involving crimes, such as shoplifting, writing bad checks, sale of unauthorized recordings, theft of cable television services, littering or vehicular manslaughter, should not be rejected unless it can be demonstrated that the activity would pose a threat to the health and safety of others or the development.⁴¹

³⁹HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, § 7.7, p. 96 (June 2003).

⁴⁰Screening and Eviction for Drug Abuse and Other Criminal Activity-Final Rule, HUD Notice H 2002-22, ¶ X.

⁴¹*See, e.g., Williams v. New York City Hous. Auth.*, Nos. 94 Civ. 4160 (SHS) and 95 Civ. 1595 (SHS) (S.D.N.Y., Stipulation of Settlement, July 30, 1996) (list of convictions attached to Stipulation which NYCHA will not consider as the sole reason for denial of an application); *See also Cabrini-Green Local Advisory Council v. Chicago Hous. Auth.*, No. 96 C 6949 (N.D. Ill, Jan. 29, 200), 2007 WL 294253 (N.D.Ill.) Slip Op. 5 (“With respect to those who have been released from our penal system, it provides no societal benefit to deny them a place to live where their presence does not create an identifiable threat against surrounding residents.”) *Cf. Carey, supra* note 6, at 567 (one PHA reported that most rejections were for shoplifting or not paying video rentals).

Chapter 2: Exhibit 1

JUSTICE COURT: VILLAGE OF SPRING VALLEY
COUNTY OF ROCKLAND: STATE OF NEW YORK

_____x

SPRING VALLEY HOUSING AUTHORITY,

Petitioner,

DECISION AND ORDER

- against -

_____ and _____

Respondents.

_____x

This matter is a Landlord Tenant matter that has come before this Court for determination. It was agreed by both sides to submit the issues to the Court on what is an agreed statement of facts.

The papers before this Court are listed as follows:

1. Notice of Petition - Holdover dated _____ by Spring Valley Housing Authority.
2. Answer by Respondent dated _____.
3. Affirmation of Facts and Position submitted by Petitioner dated _____
4. Respondent's Memorandum of Law.

THE CONTENTIONS OF THE PARTIES

THE PETITIONER:

1. Lease paragraph 16 c provides that landlord may terminate tenancy based on "furnishing false or misleading information during the application or review process..." Specifically, the provision in respondent's lease providing for termination for being a registered sex offender (par. 16q), although not present in respondents' initial lease when they took

Chapter 2: Exhibit 1

occupancy in 1998, was added in respondents' most recent renewal lease dated December 1, [REDACTED], yet respondent did not reveal to landlord that he was a registered sex offender at the time.

2. Violation of lease paragraph 16 e ("failure to abide by necessary and reasonable rules made by the Landlord for the benefit and well being of the housing development and the residents") which provides that the landlord is not required to assist applicants who have a lifetime registration under a State sex offender registration program.

3. Violation of lease paragraph 16 q ("determination or discovery that a resident is a registered sex offender") is based on the landlord's discovery on or about [REDACTED], by way of a printed notice provided to the landlord by the Spring Valley Police Department of respondent [REDACTED] status as a registered sex offender, which status was not previously known to the landlord nor previously revealed to landlord by respondents either in respondents' initial application or respondents' subsequent re-certifications to the landlord.

4. Title 24 CFR 960.204 provides for those bases for denial of admission that are required for all housing authorities. Petitioner contends that it is allowed, by adopting appropriate policies and lease provisions, to provide for other causes for both denial of admission and termination of a tenancy, as long as such are not specifically prohibited by federal statute or regulation.

5. Title 24 CFR 966.4 ("Lease Requirements") further defines "other good cause" for termination of a lease as "discovery after admission of facts that made the tenant ineligible." Here, the lease provision paragraph 16 q does just that, by providing for the discovery of the registration of the tenant as a sex offender as the basis for termination.

Chapter 2: Exhibit 1**THE RESPONDENT'S CONTENTIONS ARE**

1. The Spring Valley Housing Authority ("SVHA") may not now terminate the tenancy of the respondents who have lived, without incident, in the subject premises since 1998 solely on the basis that respondent [REDACTED] is a registered sex offender resulting from a conviction in [REDACTED]

2. 42 USC 13663 and 24 CFR §960.204 (a) (4) which prohibits admission to Public Housing of applicants who are subject to lifetime registration under a State sex offender registration program applies only to the screening of applicants for admission and are not retroactive to tenants, such as the [REDACTED] who were admitted prior to the enactment of the law under different admission standards. Neither the statute or the regulation authorizes or requires termination of current tenants admitted prior to its enactment.

3. Barring proof of fraud, subsequent acts of criminal conduct or discovery of information that would make the Respondents ineligible at the time of admission Respondents, once admitted cannot be evicted for conduct pre-dating the tenancy.

FINDING OF FACTS

1. The Landlord Petitioner is the owner of the apartment which is the subject of this proceeding.

2. The Tenant [REDACTED] [REDACTED] and their family occupy the apartment pursuant to a lease (written) originally issued on December 27, 1997.

3. The lease and tenancy and the Landlord's enforcement of same are subject to the rules and regulations of the Federal Public Housing Program regulations are set forth at 24CFR § 960 and 966.

4. In June of 2005 the Petitioner served upon the Respondent a thirty (30) day Notice to

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Terminate the Tenancy.

5. The Notice was based upon the following reason:

The reason for the termination of your lease is as follows: Serious violation of Tenant's obligations pursuant to Lease paragraph 16, subparagraphs (c), (e) and (q): "The Landlord shall not terminate or refuse to renew the Lease other than for serious or repeated violation of material terms of the Lease, such as, but not limited to, the following ... (c) furnishing false or misleading information during the application or review process ..., (e) failure to abide by necessary and reasonable rules made by the Landlord for the benefit and well being of the housing development and the Residents" and "(q) determination or discovery that a resident is a registered sex offender."

Specifically, Landlord was notified by the Spring Valley Police Department on or about [REDACTED] that [REDACTED] has been designated as a [REDACTED] Sex Offender based on a conviction for rape in the [REDACTED] or [REDACTED]. Said conviction and designation were not previously revealed to the Landlord by the Tenant. Said designation is grounds for termination of the Tenant's lease under Paragraph 16 (c), under Landlord's policies section 8.4 (Q), as incorporated into Tenant's lease under Paragraph 16 (e), and under Paragraph 16 (q).

6. The Lease provisions cited were not in Respondents; initial lease and it appears did not become effective until some time in December [REDACTED]

7. Based upon the notice supplied by the Petitioner, Respondent requested a hearing.

8. A Grievance Hearing was held in August [REDACTED] before a Hearing Officer who in a decision dated [REDACTED] upheld the Petitioner's decision to terminate the tenancy. This gave rise to the Instant Proceeding.

9. On [REDACTED] [REDACTED] was convicted of rape in the [REDACTED].

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10. Based upon the conviction [REDACTED] was imprisoned until some time in [REDACTED]

11. Also based upon the conviction [REDACTED] was adjudicated a [REDACTED] sex offender pursuant to the New York State Sex Offender Registration Act.

12. In about March 2003 the Landlord-Petitioner changed their policy and required prospective tenants to supply criminal history information.

13. That the Respondent cooperated with Petitioner in disclosing his record.

14. No allegation has been made that the Tenant committed any negative act while a Tenant - either payment of rent or conduct of a negative manner.

CONCLUSIONS OF LAW

1. This Court has the authority to determine De Novo the validity of the allegations in the Petition and it is not bound by the prior determination of a Hearing Officer in this matter.

2. That the Petitioner as a participant in the Public Housing process as administered by the Federal Government - HUD had a right to establish standards for tenants to meet to be eligible for public housing providing same are reasonable and non-discriminatory.

3. I specifically find that the rules banning sex offenders from public housing is a fair and proper standard to adopt and enforce in order to insure a quality of life in public housing.

4. I further find as a Conclusion of Law that the Petitioner must still prove the allegations on the Petition to sustain an eviction.

5. A Landlord Tenant action is both an action in law and in equity and therefore equitable principles of law are also applicable.

6. The Petition alleges breach of the lease in the Notice to Terminate.

7. In order to terminate the lease the Petitioner must show that the Notice to Terminate is justified.

Chapter 2: Exhibit 1

(A) 16 (c) of lease provides that Landlord may terminate tenancy based upon Tenant furnishing false or misleading information.

No evidence or contention was raised as to any information that the Respondent actually supplied was false or misleading.

(B) 16 (e) of the lease- failure to abide by necessary and reasonable rules made by the Landlord. Relying on Policy 8.4 Q “Landlord is not required to assist applicants who have a lifetime registration under a State Sex Offender’s Registration Program.

Does not apply to this Respondent because he is an existing tenant and not a new applicant and the term not required does not mean a right to deny an existing tenant who is living peacefully at the premises a right to renew the lease.

(C) 16 (q) The discovery that respondent is a sex offender does not appear to be adequate because at the time of the original lease no questions were asked and no evidence was submitted that the Respondent lied about this.

(D) 24 CFR 960.204 and 24 CFR 166.4 do not appear under the facts present in this case to apply so as to deny the Respondents continued occupancy.

It is the ruling of this Court that absent any proof that the Respondent made any false representations and/or absent any proof that the Respondent’s actions while a tenant caused any harm to the Petitioner or any other tenant and based upon the fact that the Tenant apparently pays rent timely, I find no legal justification to order the lease terminated and therefore this action to evict this Tenant is dismissed.

Chapter 2: Exhibit 2

STATE OF NEW YORK COUNTY OF ALBANY
CITY OF ALBANY CITY COURT, CIVIL PART

Albany Housing Authority,
Petitioner,

-against-

[REDACTED],
Respondents.

INDEX NO. AHA 06- [REDACTED]
DECISION and ORDER

Joseph Brennan, Esq.
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200 S. Pearl Street
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Attorney for Respondent
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HON. GARY F. STIGLMEIER

Respondent moves for an order dismissing this summary proceeding based upon his allegation that while the federal regulations prohibit a Public Housing Authority (hereinafter "PHA") from renting to a tenant who is subject to a lifetime registration requirement, those regulations do not allow for the eviction of a tenant on those grounds. This summary proceeding is based upon 24 CFR 5.856, which requires all PHAs to prohibit the admission of persons subject to a lifetime registration requirement under a state sex offender registration program. This regulation requires the PHA to perform the necessary criminal history background checks and to contact national and state sex offender registry agencies to determine an applicant's suitability for Federally-assisted housing. In accordance with this law, any individual who is a sex offender subject to a lifetime registration requirement under state law shall not be admitted to Federally-assisted housing.

In New York State the law was recently amended, subjecting level 2 sex offenders to a lifetime registration requirement. Respondent admits that he has been adjudicated a level 2 sex offender and

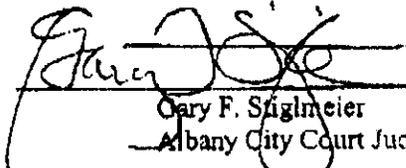
Chapter 2: Exhibit 2

is therefore subject to register. However, neither the statutory nor regulatory requirements specifically address the issue of sex offenders currently living in Federally-assisted housing. HUD, however, did address the issue in section IX of a Notice (# 2002-22) it issued on October 29, 2002, which stated that "households already living in Federally-assisted housing units are not subject to the provisions in the regulations at 24 CFR 5.856."

The Court defers to HUD's interpretation of the applicable federal regulation, and determines it to be dispositive of the issue. As such, respondent's motion to dismiss this summary proceeding is granted.

So ordered.

Dated at Albany, New York
December 11, 2006



Gary F. Stiglmeier
Albany City Court Judge

Chapter 2: Exhibit 3

Federally-Assisted Housing Programs: Admissions for Applicants with Certain Criminal Backgrounds¹

	Convicted of producing methamphetamine at federally-assisted housing	Lifetime registered sex offender	Prior eviction from federally-assisted housing for drug-related activity	History of drug-related criminal activity	History of violent criminal activity	History of crimes that threaten health, safety, or peaceful enjoyment	Current user of illegal substances
Public Housing	Permanent ban on admission. 42 U.S.C. § 1437n(f); 24 C.F.R. § 960.204(a)(3).	Permanent ban on admission. 42 U.S.C. §§ 13663 and 13664; 24 C.F.R. § 960.204(a)(4).	3-year ban on admission unless applicant is rehabilitated. 42 U.S.C. §§ 13661(a) and 13664; 24 C.F.R. § 960.204(a)(1).	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 960.203(d).	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 960.203(d).	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 960.203(d).	PHA must deny admission. 42 U.S.C. § 13661(b); 24 C.F.R. § 960.204(a)(2).
Voucher Program	Permanent ban on admission. 42 U.S.C. § 1437n(f); 24 C.F.R. § 982.553.	Permanent ban on admission. 42 U.S.C. §§ 13663 and 13664; 24 C.F.R. § 982.553.	3-year ban on admission unless applicant is rehabilitated. 42 U.S.C. §§ 13661 and 13664; 24 C.F.R. § 982.553.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 982.553.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 982.553.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 982.553.	PHA must deny admission. 42 U.S.C. § 13661(b); 24 C.F.R. § 982.553.
Section 8 Mod Rehab	Permanent ban on admission. 42 U.S.C. § 1437n(f); 24 C.F.R. § 882.518.	Permanent ban on admission. 42 U.S.C. §§ 13663 and 13664; 24 C.F.R. § 882.518.	3-year ban on admission unless applicant is rehabilitated. 42 U.S.C. §§ 13661 and 13664; 24 C.F.R. § 882.518.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 882.518.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 882.518.	PHA has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 882.518.	PHA must deny admission. 42 U.S.C. § 13661(b); 24 C.F.R. § 882.518.

¹ There are no federal requirements regarding admission of individuals with criminal background to Low Income Housing Tax Credit (LIHTC) housing, Shelter Plus Care (S+C) (see generally 24 C.F.R. §§ 582.325 and 582.330), Supportive Housing Program (SHP) (see generally 24 C.F.R. § 583.325) or Housing Opportunities or People with Aids (HOPWA) (see generally 24 C.F.R. § 574.603).

² Federally-assisted housing is defined, in this context, to include, public housing, Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 515 and Section 514.

Chapter 2: Exhibit 3

	Convicted of producing methamphetamine at federally-assisted housing	Lifetime registered sex offender	Prior eviction from federally-assisted ³ housing for drug-related activity	History of drug-related criminal activity	History of violent criminal activity	History of crimes that threaten health, safety, or peaceful enjoyment	Current user of illegal substances
Section 8 SRO Mod. Rehab. for homeless	Current funds are appropriated for homeless individuals. 42 U.S.C. § 11401. Regulations may require a ban. 24 C.F.R. §§ 882.805(c) and 882.808(b)(2); <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	Current funds are appropriated for homeless individuals. 42 U.S.C. § 11401. Regulations may require a ban. 24 C.F.R. §§ 882.805(c) and 882.808(b)(2); <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	Current funds are appropriated for homeless individuals. 42 U.S.C. § 11401. Regulations may require a ban. 24 C.F.R. §§ 882.805(c); <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	PHA or owner has discretion to admit applicant. 24 C.F.R. §§ 882.805(c) and 882.808(b)(2), <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	PHA or owner has discretion to admit applicant. 24 C.F.R. §§ 882.805(c) and 882.808(b)(2), <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	PHA or owner has discretion to admit applicant. 24 C.F.R. §§ 882.805(c) and 882.808(b)(2), <i>see also</i> provisions cited above under Section 8 Mod. Rehab.	Current funds are appropriated for homeless individuals. 42 U.S.C. § 11401. Regulations may deny admission. 24 C.F.R. §§ 882.805(c) and 882.808(b)(2); <i>see also</i> provisions cited above under Section 8 Mod. Rehab.
Project-based Section 8	No requirement imposed by federal law. Owner has discretion to admit applicant. 42 U.S.C. § 1437n(f); 24 C.F.R. § 5.855.	Permanent ban on admission. 42 U.S.C. §§ 13663 and 13664; 24 C.F.R. § 5.856.	3-year ban on admission unless applicant is rehabilitated. 42 U.S.C. §§ 13661 and 13664; 24 C.F.R. § 5.854.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner must deny admission. 42 U.S.C. § 13661(b); 24 C.F.R. § 5.854

³ Federally-assisted housing is defined, in this context, to include, public housing, Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 515 and Section 514.

Chapter 2: Exhibit 3

	Convicted of producing methamphetamine at federally-assisted housing	Lifetime registered sex offender	Prior eviction from federally-assisted⁴ housing for drug-related activity	History of drug-related criminal activity	History of violent criminal activity	History of crimes that threaten health, safety, or peaceful enjoyment	Current user of illegal substances
Sections 202, 811, 221(d)(3), 236	No requirement imposed by federal law. Owner has discretion to admit applicant. 42 U.S.C. § 1437n(f); 24 C.F.R. § 5.855.	Permanent ban on admission. 42 U.S.C. §§ 13663 and 13664; 24 C.F.R. § 5.856.	3-year ban on admission unless applicant is rehabilitated. 42 U.S.C. §§ 13661 and 13664; 24 C.F.R. § 5.854.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner has discretion to admit applicant. 42 U.S.C. § 13661(c); 24 C.F.R. § 5.855.	Owner must deny admission. 42 U.S.C. § 13661(b); 24 C.F.R. § 5.854.
USDA Housing	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154; <i>but see</i> 42 U.S.C. §§ 13663 and 13664, which extend to Section 515 and 514 housing.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154; <i>but see</i> 42 U.S.C. §§ 13661 and 13664, which extend to Section 515 and 514 housing.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154.	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154. <i>see also</i> 42 U.S.C. § 13661(b) and 24 C.F.R. § 5.850(c).	Owner has discretion to admit applicant. 7 C.F.R. § 3560.154; <i>see also</i> 42 U.S.C. § 13661(b) and 24 C.F.R. § 5.850(c).

⁴ Federally-assisted housing is defined, in this context, to include, public housing, Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 515 and Section 514.

Chapter 2: Exhibit 3

	Convicted of producing methamphetamine at federally-assisted housing	Lifetime registered sex offender	Prior eviction from federally-assisted ⁵ housing for drug-related activity	History of drug-related criminal activity	History of violent criminal activity	History of crimes that threaten health, safety, or peaceful enjoyment	Current user of illegal substances
HOME	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).	No requirements imposed by federal law; Owner has discretion to admit applicant. 24 C.F.R. § 92.253(d).

⁵ Federally-assisted housing is defined, in this context, to include, public housing, Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 515 and Section 514.

CHAPTER 3

Access to Criminal History Records, Drug Rehabilitation Information and Expungement of Criminal Records

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3.1 Introduction

Increasingly criminal records are accessible to the public. The rules regarding access vary significantly by jurisdiction. There is no one single source of an individual’s criminal record. Information may be available from the state, courts, commercial vendors, correctional institutions, and the police.¹ Public Housing Authorities (PHAs) and subsidized owners may obtain information about an applicant’s prior criminal activity, arrest and conviction record from many of these sources as well as from the applicant directly. It is important for an applicant for federally assisted housing, who has a criminal record, to get a copy of that record.²

This chapter discusses the federal housing program rules governing access to an applicant’s criminal record and notes the leverage that the rules may

provide in the event that a PHA or owner negligently fails to follow them. In addition, this chapter discusses the opportunities and benefits of expungement or sealing of a criminal record.

The access to criminal record rules discussed are applicable only to public housing, the voucher program, and the project-based Section 8 program. There are no rules applicable to other programs, such as Section 236, Section 221(d)(3), the Rural Development Section 514, 515, or 516, or the Low Income Housing Tax Credit (LIHTC) programs. Nevertheless, owners of these developments may seek to obtain criminal record information from applicants or other sources.

3.2 Criminal History Records

PHAs may require adult public housing and voucher applicants to sign releases (consent forms) in order to obtain their criminal records from the Federal Bureau of Investigation (FBI), National Criminal Information Center (NCIC), police departments, and other law enforcement agencies, including a state’s criminal history system boards.³ In addition, own-

¹See Sharon M Dietrich, *When “Your Permanent Record” is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139 (July-Aug. 2007), for a basic and informative discussion of criminal records, access to criminal records, how legal aid programs can help clients to minimize or eliminate their criminal records, and systematic advocacy issues for assisting clients who have criminal records; MARGARET COLGATE LOVE, *RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE* (Hein, Rothman 2006) available at <http://www.nicic.org/Library/020693>; a summary of the book and profiles of the law and practice in each U.S. jurisdiction is available at: <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>.

²See Sharon M Dietrich, *When “Your Permanent Record” is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139, 141 (July-Aug. 2007), discussing what applicants can do to improve or challenge the criminal record; See also Chapter 5 on Challenging a Denial of Admission.

³42 U.S.C.A. § 1437d(q)(1)(A) (West, WESTLAW through P.L. 110-39 approved 06-21-07). The statute limits the release of juvenile records to a PHA to the extent allowed by state law and defines an “adult” as a person 18 years of age or older, or, an individual, regardless of age, if that individual was convicted of a crime as an adult under any Federal, State, or tribal law. *Id.* § 1437d(q)(1)(C) and (8)(A); 24 C.F.R. § 5.903(b) (2007); HUD OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1 CHG-2 (June 2007) ¶ 4-27(E); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, (June 2003), App. VIII, p. 381 (PHA Police Record Verification form); Instructions for Obtaining Federal Bureau of

ers of project-based Section 8, but not other federally assisted landlords, may obtain these records, but not directly. Because Congress was reluctant to allow private owners direct access to criminal records, it set up a scheme under which owners of project-based Section 8 housing may ask PHAs to obtain the records and determine whether an applicant should be rejected or a tenant evicted.⁴ When making the determination, the PHA must apply the owner's tenant selection criteria, not the PHA's standards.⁵ The PHA may not turn criminal records over to the owner, but in an eviction case, the PHA may disclose the records to the extent necessary.⁶ Despite this authorization, most project-based Section 8 owners are not using PHAs to obtain information. They are using private credit check and screening services instead.⁷

A PHA may not charge an applicant for any screening costs, including the cost the FBI charges for processing fingerprint cards.⁸ Federally assisted housing owners, including those receiving Section 8 project-based assistance, also may not charge applicants or tenants any fees for criminal background checks.⁹

Investigation Criminal History Information, PIH 2003-11(HA) (Apr. 11, 2003). There are a parallel statute and regulations regarding access to sex offender registration information. *See* 42 U.S.C.A. § 13,663(b) (West, WESTLAW through P.L. 110-39 approved 06-21-07) and 24 C.F.R. § 5.905 (2007).

⁴42 U.S.C.A. § 1437d(q)(1)(B) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 5.903(d) (2007); HUD OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1 CHG-2 (June 2007) ¶ 4-27(E)(4); *see also* 42 U.S.C.A. § 13,663(b) (West, WESTLAW through P.L. 110-39 approved 06-21-07) and 24 C.F.R. § 5.905 (2007) (sex offender registration information).

⁵42 U.S.C.A. § 1437d(q)(1)(B) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 5.903(d) and (e) and 5.905(b)(2)(ii) (2007). *See also* Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule, H 2002-22 (HUD) (Oct. 29, 2002).

⁶24 C.F.R. §§ 5.903(e)(2)(i)(b) and 5.905(b)(4) (2007).

⁷HUD OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2 (June 2007) ¶ 4-27(E)(4)(b) (referencing other types of screening services or sources of information that an owner may use); Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule, H 2002-22 (HUD) (Oct. 29, 2002) (same).

⁸Instructions for Obtaining Federal Bureau of Investigation Criminal History Information, PIH 2003-11(HA) (Apr. 11, 2003) ¶ 4. HUD advises PHAs to use trained local law enforcement personnel to do the actual fingerprinting. *Id.* ¶ 7; 24 C.F.R. § 5.903(d)(4) and 5.905(b)(5) (2007).

⁹24 C.F.R. §§ 5.903(d)(4) and 5.905(b)(5); HUD OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2 (June 2007) ¶ 4-(B)(7); Screening and Eviction for Drug Abuse and Other Criminal Activity—Final Rule, H 2002-22 (HUD) (Oct. 29, 2002) ¶ X, p. 9, ¶ XIII, p. 11; *see also* 24 C.F.R. § 5.100 (2007) (definition of federally assisted housing).

However, a PHA may charge an owner reasonable fees for screening applicants or obtaining their criminal records.¹⁰

After a PHA submits the release to a law enforcement agency, it may receive preliminary information that there is a match based on the name, date of birth, and social security number of the applicant. However, the PHA may not deny admission based on this information and must obtain a verification of the match with a positive fingerprint comparison.¹¹

A PHA must notify the household of any proposed adverse action and provide a copy of the criminal record information to the subject of the record (and to the applicant, if different).¹² The subject of the information must be given an opportunity to dispute the proposed action.¹³ In the public housing and voucher programs, the dispute process may be the PHA informal hearing or informal review process.¹⁴ Applicants for project-based Section 8, including the Section 8 moderate-rehabilitation program, are also entitled to dispute the PHA determination. Access to the PHA dispute process for most of these project-based applicants is unusual because, typically, they do not have rights before a PHA.¹⁵ Because most Section 8 owners do not rely upon PHAs to obtain criminal records,

¹⁰24 C.F.R. §§ 5.903(d)(4) and 5.905(b)(5) (2007).

¹¹Instructions for Obtaining Federal Bureau of Investigation Criminal History Information, PIH 2003-11(HA) (Apr. 11, 2003) ¶ 7.

¹²42 U.S.C.A. § 1437d(q)(2) (West, WESTLAW through P.L. 110-39 approved 06-21-07). There are conflicting interests involved in providing the criminal record to both the applicant and the member of the family subject to the criminal record. The FBI "commented that dissemination of criminal records is limited to those with authorization (such as the PHA) and the person who is the 'subject' of the record, not to other persons in the household." 66 Fed. Reg. 28,776, 28,789 (May 24, 2001). HUD disagreed, contending that under its statutory authority, it is required to provide the information to the applicant or tenant so that the applicant or tenant may dispute the determination. *Id.*

¹³42 U.S.C.A. § 1437d(q)(2) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 5.903(f) (2007); *see also Id.* §§ 960.204(c), 966.4(l)(5)(iv) (public housing) and 982.553(d) (voucher). The notice and opportunity to contest must also be provided in the case of an eviction or lease enforcement action.

¹⁴24 C.F.R. §§ 960.208(a) (public housing), 982.553(d) (voucher) (2007). The details of the process used to dispute the adverse action could be addressed in the context of the PHA plan process for applicants for public housing and the voucher program. For a discussion of the PHA plan process, *see* Chapter 6; for a discussion of the informal hearing/review process, *see* Chapter 5.

¹⁵24 C.F.R. § 5.903(f); 66 Fed. Reg. 28776, 28787 (May 27, 2001) ("Tenants of project-based Section 8 should have the opportunity to dispute a record . . . The PHA that obtains the records should be the entity that provides the right to dispute the accuracy or relevance of the record.")

there is no reported experience regarding access to PHA dispute processes by Section 8 applicants.

PHAs must maintain a system to protect the confidentiality of criminal records, guard against their improper dissemination and provide for their destruction once their purpose has been achieved. The statute and regulations provide for civil and criminal penalties for improper disclosure of a criminal record obtained¹⁶ pursuant to the federal statute.¹⁷ Significantly, public housing, vouchers, or project-based Section 8 applicants also may bring an action for “any other negligent or knowing action that is inconsistent with” the statute or regulations pertaining to access to criminal records.¹⁸ The statute and regulations provide that the relief in such action includes reasonable attorney’s fees and other litigation costs.¹⁹ Thus, a PHA or owner may be liable for negligent actions relating to improper disclosure of a criminal record, improper use of a consent form, failing to notify an applicant of the information collected, failing to provide the information collected to the applicant or tenant, or failing to allow the applicant the right to dispute the information. The broad scope of the PHA’s or owner’s liability may provide leverage for an applicant harmed by the negligence. The threat of litigation costs and attorney’s fees may encourage settlement and the admission of the applicant.

The statutory language evidences a concern that PHAs maintain the confidentiality of criminal records obtained through the federally authorized process. However, the regulation states that it is not applicable to public information or to criminal records information obtained from law enforcement agencies if the information was not sought pursuant to the regulations.²⁰ This exemption may be too broad. The meaning and full effect of the exclusion and its consistency

with the statute has not been tested. The concern is that it may mean that if a PHA obtains information from a private consumer reports agency, it may not have to abide by the confidentiality provisions of the statute.²¹ Additionally, the confidentiality provisions of the statute most likely do not cover information the PHA or owner obtains from other sources, such as police blotters and newspaper reports. Nevertheless, advocates should argue that any information obtained from law enforcement agencies that is not otherwise publicly available should be subject to the statutory protections.²²

3.3 Drug Treatment Program Records

PHAs are also authorized to request and obtain information about public housing applicants from drug abuse treatment facilities.²³ The information that they may request is limited to a question of the applicant’s eligibility for the housing—whether the drug abuse treatment facility “has reasonable cause to believe that the household member is currently engaging in illegal drug use.”²⁴ The PHA should not be permitted to seek additional information. Treatment facilities and applicants may have concerns that any additional information could interfere with an individual’s treatment and recovery and present issues of confidentiality of medical records.

²¹The Fair Credit Reporting Act governs consumer reports. 15 U.S.C.A. §§ 1681-1681u (West, WESTLAW through P.L. 110-39 approved 06-21-07).

²²24 C.F.R. § 5.901(c) (2007). With respect to the management of the records, the statute references “any criminal records received,” whereas other provisions of the statute are limited to information received under the subsection. 42 U.S.C.A. § 1437d(q) (West, WESTLAW through P.L. 110-39 approved 06-21-07) and 42 U.S.C.A. § 13,663(f) (West, WESTLAW through P.L. 110-39 approved 06-21-07). See also 24 C.F.R. § 982.307(b)(2) (PHA may provide voucher landlords information in PHA files).

²³42 U.S.C.A. § 1437d(t) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 960.205 (2007). The statute does not address access to information regarding rehabilitation relating to alcohol abuse.

²⁴*Id.*, Cf. *Campbell v. Minneapolis Pub. Hous. Auth.*, 175 F.R.D. 531 (D. Minn. 1997), *vacated and remanded*, 168 F.3d 1069 (8th Cir. 1999). *Campbell* involved an interpretation of 42 U.S.C.A. §§ 1437n(e)(1) and (2), which have been repealed. The court allowed the PHA to seek information regarding drug use and rehabilitation efforts from drug treatment facility, but remanded the case to the PHA to determine eligibility because the administrative record was incomplete. The PHA conceded that it would have to change its policy based upon the repeal and amendments to the statute. For a discussion of the meaning of the phrase “currently engaging in illegal drug use,” see Chapter 2.

¹⁶42 U.S.C.A. § 1437d(q)(4) and (6) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 5.903(h) (2007).

¹⁷42 U.S.C.A. § 1437d(q)(4) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 5.903(h) (2007).

¹⁸42 U.S.C.A. § 1437d(q)(7) (West, WESTLAW through P.L. 110-39 approved 06-21-07).

¹⁹*Id.* § 1437d(q)(7); see also *Rivers v. Housing Auth. of Contra Costa County*, No. CO5-04291 PJH (N.D. Cal., complaint filed Oct. 21, 2005) (illegal release of juvenile record) (a copy is available in Exhibit 1 to this Chapter); There is no equivalent language regarding fees and costs regarding negligent actions with respect to registered sex offenders.

²⁰24 C.F.R. §§ 5.901(c) and 5.905(c)(2) (2007).

Prior to requesting the information, the PHA must obtain the applicant's signed written consent.²⁵ The consent form must expire automatically after the PHA has made a final decision to either approve or deny admission.²⁶ A PHA must also develop a system to maintain tenant or applicant confidentiality.²⁷ PHAs requesting information from drug treatment facilities must adopt and consistently follow a nondiscriminatory policy for all public housing applicants.²⁸ The policy adopted must be included in the PHA's plans, such as the Section 8 Administrative plan, the Admission and Continued Occupancy Plan (ACOP) and the PHA Annual Plan.²⁹

PHAs requesting information from drug treatment facilities must adopt and consistently follow a nondiscriminatory policy for all public housing applicants.

The statute and regulations authorizing PHAs to obtain information from drug abuse treatment facilities are limited to public housing. There are no companion provisions for the voucher or other federally assisted housing programs. It is not clear whether, for the voucher program, a PHA or an owner, under any other program, could adopt a similar policy without statutory authorization. The argument against such adoption is that Congress intentionally limited the applicability of the statutory provision to public housing and did not extend it to the other programs. However, if a PHA, for the voucher program, or an

owner, for other programs, adopts a policy that seeks to obtain records from drug treatment facilities, it should also be argued that the public housing statutory protections or their equivalent must be incorporated, as the statute is designed to avoid a violation of fair housing laws and claims of discrimination based upon disability.³⁰

3.4 Expungement of Criminal Records³¹

A criminal record can be a substantial barrier to qualifying for federally assisted housing. Expungement, or the sealing of the records, can sometimes be used to overcome these barriers³² because either process may prevent disclosure and relieve an applicant from the requirement of self-disclosure. Although expungement may be available to suppress convictions, admission or eviction problems may persist if the underlying conduct that led to the conviction and incarceration is revealed.

Because of the benefits of expungement, some legal services offices and law school legal clinics have developed units that focus on expungement.³³ In addition, some legal services offices have recruited private attorneys to represent clients in expungement proceedings.

Although definitions vary by state, "expungement" typically refers to the process of destroying or erasing all previously public records relating to a

²⁵42 U.S.C.A. § 1437d(t)(2) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 960.205(c)(1) (2007). Cf. *Campbell v. Minneapolis Pub. Hous. Auth.*, 175 F.R.D. 531 (D. Minn. 1997), *vacated and remanded*, 168 F.3d 1069 (8th Cir. 1999).

²⁶42 U.S.C.A. § 1437d(t)(2)(C) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 960.205(c)(2) (2007).

²⁷42 U.S.C.A. § 1437d(t)(2)(B) (West, WESTLAW through P.L. 110-39 approved 06-21-07); 24 C.F.R. § 960.205(f) (2007).

²⁸24 C.F.R. § 960.205(e) (2007).

²⁹*Id.* The regulations refer to the PHA Administrative Plan; presumably, this refers to the Admission and Continued Occupancy Plan (ACOP). For a brief discussion of the ACOP and the PHA plan see Chapter 6.

³⁰For a brief discussion of the Fair Housing Act and the Americans with Disabilities Act and a PHA's or owner's obligation not to discriminate against recovering drug abuser, see Chapter 4.

³¹This section is adapted from Devon Knowles, *Expungement of Criminal Records and Federally Assisted Housing*, 36 Hous. L. Bull. 75 (2006).

³²Sharon M. Dietrich, *When "Your Permanent Record" is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139 (July-Aug. 2007) (Provides a basic and informative discussion of criminal records, access to criminal records, how legal aid programs can help clients to minimize or eliminate their criminal records, and systematic advocacy issues for assisting clients who have criminal records); MARGARET COLGATE LOVE, *RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE* (William S. Hein & Co., Inc. 2006) available at: <http://www.wshein.com/media/catalog/2/334160.pdf>; a summary of the book and profiles of the law and practice in each U.S. jurisdiction is available at: <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>.

³³For example, Neighborhood Legal Services of Los Angeles County and East Bay Community Law Center (EBCLC), Berkeley, CA, have developed such programs; *Cleaning Up Criminal Records*, 41 CLEARINGHOUSE REV. 148 (July-Aug. 2007) (discussing the EBCLC program).

specific criminal incident. “Sealing” does not require destruction of the record, but does prevent it from being accessed by others, including PHAs or private owners of federally assisted housing.

In many states, criminal records that have been expunged or sealed cannot legally or practically be used as grounds for denying federal housing benefits or taking other adverse action against recipients. Specifically, expungement may restore an individual’s legal status and rights,³⁴ prevent PHAs and owners from accessing an individual’s criminal record,³⁵ or authorize an individual to omit the expunged information from housing applications.³⁶

While expungement can be an extremely useful remedy in overcoming the consequences associated with an individual’s criminal record, it is often a difficult process³⁷ and has inherent limitations. First, the process varies from state to state³⁸ and it may be difficult to determine what the process is and whether it is available. Second, each state typically defines the classes of individuals who qualify for expungement, making it a remedy that is not available to all. Only seven states and Puerto Rico have expungement laws that apply to most adult felony convictions.³⁹ Third, the process of petitioning for and successfully obtaining an expungement order is difficult. It requires individuals to maneuver through a complicated legal process, which can be time-consuming and

expensive.⁴⁰ If successful, the individual seeking expungement must monitor the results carefully to ensure that the expungement order is provided to the FBI and NCIC; otherwise, the criminal record will continue to remain available to PHAs and owners. States typically use five classifications to define categories of individuals eligible to petition for expungement. These are:

Case Disposition: Generally, states have distinguished three classes of criminal records: (1) the individual was arrested, but the charges were never brought or were ultimately dropped, dismissed or resolved in favor of the individual; (2) the individual pled guilty to or was convicted of an offense where the judgment was withheld or suspended on the condition of completing a program or term of probation; and (3) the individual pled guilty to or was convicted of an offense where the judgment was imposed. Usually, expungement laws are more likely to provide relief for individuals in the first two categories.⁴¹

Criminal Offense: Many states allow expungement of criminal records for those who are convicted or pled guilty to commission of relatively minor offenses, particularly those involving controlled substances.⁴²

³⁴E.g., IDAHO CODE § 19-2604 (2007).

³⁵E.g., GA. CODE ANN. § 35-3-37 (2007).

³⁶E.g., FLA. STAT. §§ 943.0585 and 943.0509 (2007).

³⁷United States v. James, 2003 U.S. Dist. LEXIS 6494, *7 (E.D.N.Y. 2003)(describing the policy of record expungement as so difficult that it is “self-defeating” and “morally wanting”).

³⁸MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 62-61 (William S. Hein & Co., Inc. 2006) available at: <http://www.wshein.com/media/catalog/2/334160.pdf>; a summary of the book and profiles of the law and practice in each U.S. jurisdiction is available at: <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>; See also 21A AM. JUR. 2d *Criminal Law* § 1309 (2007) (noting that in some jurisdictions courts gain their authority to expunge from statutes).

³⁹Sharon M Dietrich, *When “Your Permanent Record” is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139, 145 (July-Aug. 2007).

⁴⁰Typically, individuals must petition for expungement in the court where the criminal case was handled. The process also usually requires collecting all the relevant information about the case such as date of arrest, statute violated, and date of conviction. An individual will have to contact the law enforcement agency responsible for handling the case or refer to court records. Next, an individual will usually have to fill out a court form, pay a filing fee and, at times, attend a hearing to explain why he or she is seeking expungement or demonstrate qualification for expungement under the state statute. Applying for employment or housing may be a sufficient interest for seeking to expunge or seal a record. If successful, the court will then order the record expunged. Also, the statutes vary in that individuals may or may not be responsible for forwarding the expungement order to local and federal law enforcement agencies.

⁴¹For example, under the Colorado Code, most individuals who were arrested or taken into police custody but were not ultimately charged of a crime can have their record sealed. COLO. REV. STAT. § 24-72-308 (2007).

⁴²See Chapter 1, regarding the increase in drug-related convictions. Pennsylvania provides one example of this type of classification, it entitles most individuals charged under the Controlled Substances, Drug Device, and Cosmetic Act to expungement. 35 PA. STAT. ANN. § 780-119(a) and (c) (2007) (expungement available as a matter of right only once, for drug-related charges that are withdrawn, dismissed, or for which the individual is acquitted).

Age and Criminal History of Individual: Some states have special expungement provisions that apply to offenses committed by juvenile offenders or individuals under the age of 21.⁴³

Time Limitations: Individuals will often be required to wait for a predetermined period of time after arrest or conviction before they are eligible to apply for expungement. How long an individual must wait depends on the state and on the type of offense committed. The waiting period may be an additional burden on applicants for federally assisted housing if the state waiting period is longer than the period that the PHA or owner has established for considering prior criminal history relevant for admission.

Prior Expungement: Often, an individual is eligible to get only one offense expunged or sealed over his or her lifetime. As a result, those who have already availed themselves of this remedy in a state with a lifetime limit will be barred from expunging other criminal records.

Once a record has been expunged, absent error, it should be erased from the federal criminal database, and PHAs or owners should not have access to it.⁴⁴ In addition, many individuals who have their records expunged may legally omit information regarding their criminal history from their housing applications and other forms requesting information for housing.⁴⁵ Unfortunately, mistakes occur and applicants are misinformed about the status of their records. Sometimes the final steps in the process are not completed and

the record is not expunged or sealed. In other cases, individuals are misinformed and are mistakenly told or mistakenly believe that their records are cleared. Misinformed individuals then fail to disclose their record and are accused of lying on the application. Therefore, applicants or their advocate should obtain copies of criminal record and verify that the expungement or sealing has been completed.

A PHA or owner may become aware of a criminal record or criminal conduct on which the record was based and deny an applicant housing because of the conduct. The PHA or owner may argue that it is considering the underlying facts, not the conviction. In response, applicants should consider using expungement laws to provide the basis for claiming mitigating or changed circumstances. Because the law treats criminal history that has been expunged as though it never existed, it can be argued that considering the record or the underlying facts is a violation of the letter or spirit of the expungement law, which is intended to give individuals a second chance. A PHA or owner that denies housing based on criminal history that has been expunged frustrates that purpose.⁴⁶

⁴³See, e.g., N.C. GEN. STAT. § 15A-145(b) (2007) (providing that individuals under the age of 21 who have not previously been convicted and who plead or are found guilty of misdemeanor possession of alcohol may petition to have the record expunged after two years and are thereafter not required to report that information for any purpose including federal housing applications; individuals under the age of 18 who have not previously been convicted of a crime and who are convicted of a misdemeanor other than a traffic violation are also eligible to have their records expunged).

⁴⁴See, e.g., *Hartford Hous. Auth. v. Reyes*, No. SPH 87435, 1997 WL 30989, at *2 (Conn. Super. Jan. 21, 1997) (“Erasure means, at a minimum, that information contained in the record is not to be disclosed to anyone.”).

⁴⁵Many of the expungement statutes explicitly provide that individuals cannot be held liable for omitting the expunged information in the future. See, e.g., FLA. STAT. § 943.0585(b)(4)(a)(7)(b) (2007) (“[A] person who has been granted an expunction under this section, former s. 893.14, former s. 901.33, or former s. 943.058 may not be held under any provision of law of this state to commit perjury or to be otherwise liable for giving a false statement by reason of such person’s failure to recite or acknowledge an expunged criminal history record.”).

⁴⁶Some PHAs or owners may argue that their obligations regarding admission to federally assisted housing preempt state laws governing expungement. For a discussion of how to respond to these arguments in a related area of state protections, namely evictions and federal law, see Lawrence R. McDonough and Mac McCreight, *Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REV. 55, 76 (May-June 007).

Chapter 3: Exhibit 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

19 [Redacted]
 20 Plaintiff,
 21 vs.
 22 HOUSING AUTHORITY OF THE
 23 COUNTY OF CONTRA COSTA,
 24 ELIZABETH CAMPBELL, in her official
 25 capacity as Acting Director of Housing
 26 Assistance Programs for the Housing
 27 Authority of Contra Costa County,
 28 TERRI LOCKETT, in her official capacity
 as Housing Assistance Manager for the
 Housing Authority of Contra Costa County,
 and DOES 1-10,
 Defendants.

) Case No.
)
) COMPLAINT FOR INJUNCTIVE
) RELIEF AND DAMAGES, AND
) JURY DEMAND
)
) (Violation of Federal Housing and
) Federal Civil Rights Laws)
)
)
)
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Chapter 3: Exhibit 1

1 Plaintiff [REDACTED] for her Complaint, alleges as follows:

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INTRODUCTORY STATEMENT

Plaintiff, a former recipient of a Section 8 housing subsidy, sues Defendants Housing Authority of the County of Contra Costa (“HACCC”); Elizabeth Campbell, Acting Director of Housing Assistance Programs for HACCC, in her official capacity; Terri Lockett, Housing Assistance Manager for HACCC, in her official capacity; and Does 1-10. Defendants terminated Plaintiff’s Section 8 housing subsidy by using the release of information purportedly relating to her son’s juvenile criminal record, but this use of his juvenile file was not authorized under federal or California law. Defendants also denied Plaintiff’s right of due process, adequate notice, and a meaningful opportunity to be heard.

Plaintiff requests that this Court issue an order directing defendants to reinstate her Section 8 housing subsidy, compensate her for damages suffered as a result of the improper denial of housing assistance payments, cease the improper use of juvenile records, and that this Court award her any and all relief that it deems proper and just.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because it arises under 42 U.S.C. § 1437d and 42 U.S.C. § 1983, and for redress of violations of Plaintiff’s rights under Federal Housing and Federal Civil Rights Laws.

2. Venue is proper in this Court under 28 U.S.C. § 1391 because the events at issue occurred in this judicial district.

3. A number of claims asserted herein allege violations of state law, and arise out of the same transaction or series of transactions on which the federal claims are based, and therefore this Court has supplemental jurisdiction over these state law claims.

PARTIES

4. Plaintiff [REDACTED] at all times relevant herein, resided in [REDACTED] County.

Chapter 3: Exhibit 1

1 14. Until April 2005, [REDACTED] son lived with [REDACTED] at
2 their apartment in [REDACTED] County. The [REDACTED] paid \$439 in rent per month, and
3 Defendant HACCC paid \$611 per month to the landlord (total rent was \$1050 per month).

4 15. [REDACTED] [REDACTED] son, who is [REDACTED] years old, has been charged with involvement
5 in a capital crime that occurred on April 23, 2005 in a neighboring city in [REDACTED]
6 County. The Contra Costa County District Attorney's Office has stated that to its
7 knowledge [REDACTED] had no involvement in the April 23 incident.

8 16. On or about May 9, 2005, and purportedly based on the April 23 Incident,
9 HACCC notified [REDACTED] that it would seek to terminate her Section 8 rental subsidy.

10 17. On May 12, 2005, [REDACTED] requested in writing that HACCC provide
11 her with an administrative hearing to determine whether HACCC properly proposed
12 termination of her Section 8 rental subsidy.

13 18. On June 14, 2005, HACCC conducted an administrative hearing before
14 Hearing Officer Laurel Weil. At this hearing, Defendant Terri Lockett introduced a
15 newspaper article as evidence of the April 23 Incident. At this hearing, Ms. Lockett also
16 introduced a letter from Deputy District Attorney Hal Jewett dated June 9, 2005. Counsel
17 for [REDACTED] objected to both the newspaper article and the letter as hearsay. The Deputy
18 District Attorney's letter stated that, to his knowledge, [REDACTED] had no
19 involvement in the April 23 Incident. The Deputy District Attorney's letter also made two
20 specific allegations regarding the juvenile record of [REDACTED] son.

21 19. Defendants at no time provided [REDACTED] with access to any portion of
22 the juvenile records of her son.

23 20. Defendants at no time before the administrative hearing on June 14, 2005
24 provided [REDACTED] with notice that any aspect of her son's juvenile record would be at
25 issue or potentially become a basis for termination of her housing subsidy.

26 21. The Hearing Officer ruled in favor of HACCC, relying on and specifically
27 citing the juvenile allegations against [REDACTED] son as they were detailed in the Deputy
28 District Attorney's letter dated June 9, 2005, and upheld the termination of [REDACTED]

Chapter 3: Exhibit 1

1 Section 8 rental subsidy because the alleged juvenile offenses described in the Deputy
2 District Attorney's letter had not been reported to HACCC.

3 22. By letter dated July 28, 2005, Defendant Elizabeth Campbell provided [REDACTED]
4 [REDACTED] with a copy of the administrative hearing decision upholding the termination of
5 Section 8 housing assistance payments.

6 23. [REDACTED] moved to a less expensive apartment, but their
7 housing costs have increased due to the loss of Section 8 housing assistance payments.

8 **FIRST CAUSE OF ACTION**

9 **(Violation of Federal Housing Law: Unauthorized Release of Juvenile Records)**

10 24. Plaintiff realleges and incorporates by reference paragraphs 1 through 23 of
11 her Complaint as though fully set forth herein.

12 25. This Cause of Action is brought pursuant to 42 U.S.C. §§ 1437d(q)(1)(c)
13 and 1437(q)(7).

14 26. The above-described acts and omissions of defendants, and each of them,
15 violated Plaintiff's rights pursuant to 42 U.S.C. § 1437d(q)(1)(c) because defendants
16 terminated [REDACTED] housing subsidy by using the release of information purportedly
17 relating to a juvenile's criminal conviction that was not authorized under California law.

18 27. As a direct and proximate result of the acts, omissions, and violations
19 alleged above, Plaintiff suffered damages in an amount to be proven at trial.

20 28. Plaintiff also seeks injunctive and declaratory relief to remedy her loss of a
21 housing subsidy that was wrongfully terminated as a result of defendants' unlawful acts.

22 **SECOND CAUSE OF ACTION**

23 **(Violation of Federal Housing Law: Failure to Provide Juvenile Records)**

24 29. Plaintiff realleges and incorporates by reference paragraphs 1 through 28 of
25 her Complaint as though fully set forth herein.

26 30. This Cause of Action is brought pursuant to 42 U.S.C. §§ 1437d(q)(2) and
27 1437d(q)(7).

28

Chapter 3: Exhibit 1

1 31. The above-described acts and omissions of defendants, and each of them,
2 violated Plaintiff's rights pursuant to 42 U.S.C. § 1437d(q)(2) because defendants did not
3 provide Plaintiff with a copy of the criminal record at issue before taking an adverse
4 action against Plaintiff by terminating her rental subsidy.

5 32. As a direct and proximate result of the acts, omissions, and violations
6 alleged above, Plaintiff suffered damages in an amount to be proven at trial.

7 33. Plaintiff also seeks injunctive and declaratory relief to remedy her loss of a
8 housing subsidy that was wrongfully terminated as a result of defendants' unlawful acts.

THIRD CAUSE OF ACTION**(Violation of Federal Housing Law: Failure to Provide Notice and Fair Hearing)**

11 34. Plaintiff realleges and incorporates by reference paragraphs 1 through 33 of
12 her Complaint as though fully set forth herein.

13 35. This Cause of Action is brought pursuant to 42 U.S.C. § 1983, and 42
14 U.S.C. §§ 1437d(k)(1) and 1437d(k)(3).

15 36. The above-described acts and omissions of defendants, and each of them,
16 violated Plaintiff's rights pursuant to 42 U.S.C. §§ 1437d(k)(1) and 1437d(k)(3) because
17 defendants terminated Plaintiff's housing assistance payments without first advising her of
18 the specific grounds allegedly supporting this action, and defendants did not provide
19 Plaintiff with an opportunity to examine any documents or records related to the juvenile
20 records at issue.

21 37. As a direct and proximate result of the acts, omissions, and violations
22 alleged above, Plaintiff suffered damages in an amount to be proven at trial.

23 38. Plaintiff also seeks injunctive and declaratory relief to remedy her loss of a
24 housing subsidy that was wrongfully terminated as a result of defendants' unlawful acts.

FOURTH CAUSE OF ACTION**(Violation of Federal Civil Rights: Denial of Due Process)**

26 39. Plaintiff realleges and incorporates by reference paragraphs 1 through 38 of
27 her Complaint as though fully set forth herein.
28

Chapter 3: Exhibit 1

1 40. This Cause of Action is brought pursuant to 42 U.S.C. § 1983 and the
2 United States Constitution, in particular but not limited to, the Fifth and Fourteenth
3 Amendment thereto.

4 41. The above-described acts and omissions of defendants, and each of them,
5 violated Plaintiff's rights pursuant to 42 U.S.C. § 1983 because defendants terminated
6 Plaintiff's housing assistance payments without providing her with due process, and denied
7 her adequate notice or a meaningful opportunity to be heard.

8 42. As a direct and proximate result of the acts, omissions, and violations
9 alleged above, Plaintiff suffered damages in an amount to be proven at trial.

10 43. Plaintiff also seeks injunctive and declaratory relief to remedy her loss of a
11 housing subsidy that was wrongfully terminated as a result of defendants' unlawful acts.

12 **FIFTH CAUSE OF ACTION**

13 **(Supplemental Claim: Appeal From Administrative Hearing Decision**
14 **Pursuant to California Code of Civil Procedure Sections 1094.5 and 1094.6)**

15 44. Plaintiff realleges and incorporates by reference paragraphs 1 through 43 of
16 her Complaint as though fully set forth herein.

17 45. California Code of Civil Procedure §§ 1094.5 and 1094.6 provide a
18 procedure for setting aside administrative decisions issued in proceedings where by law an
19 administrative hearing is required to be held, evidence taken, and discretion in the
20 determination of facts is vested in the agency holding the hearing.

21 46. Plaintiff has a clear, present, and beneficial interest in, and right to,
22 defendants' performance of the duties mandated by the due process clause of the fifth and
23 fourteenth amendments to the United States Constitution, the United States Housing Act of
24 1937, the Housing and Community Development Act of 1974, and the federal regulations
25 and handbooks promulgated pursuant thereto with respect to defendants' operation of the
26 Section 8 program.

27 47. Notwithstanding the plain duties imposed upon them by law, defendants
28 have failed and refused, and continue to fail and refuse, to carry out their obligations in the
manner required by law. Specifically, by terminating Plaintiff's Section 8 housing subsidy

Chapter 3: Exhibit 1

1 based on the release of information purportedly relating to her son's juvenile criminal
2 record that was not authorized under federal or California law, and by denying Plaintiff her
3 rights to due process, adequate notice, and a meaningful opportunity to be heard,
4 defendants abused their discretion.

5 48. Plaintiff has exhausted all available administrative remedies, and has no
6 plain, speedy, or adequate remedy at law.

7
8 **PRAYER**

9 WHEREFORE, Plaintiff prays for judgment as follows:

10 1. That Plaintiff be awarded damages according to proof, under Plaintiff's first
11 cause of action caused by defendants' violation of Plaintiff's federal housing rights
12 pursuant to 42 U.S.C. §§ 1437d(q)(1)(c) and 1437(q)(7);

13 2. That Plaintiff be awarded damages according to proof, under Plaintiff's
14 second cause of action caused by defendants' violation of Plaintiff's federal housing rights
15 pursuant to 42 U.S.C. §§ 1437d(q)(2) and 1437d(q)(7);

16 3. That Plaintiff be awarded damages according to proof, under Plaintiff's
17 third cause of action caused by defendants' violation of Plaintiff's federal housing rights
18 pursuant to 42 U.S.C. § 1983, and 42 U.S.C. §§ 1437d(k)(1) and 1437d(k)(3);

19 4. That Plaintiff be awarded damages according to proof, under Plaintiff's
20 fourth cause of action caused by defendants' violation of Plaintiff's federal civil rights
21 pursuant to 42 U.S.C. § 1983, and the United States Constitution, in particular but not
22 limited to, the Fifth and Fourteenth Amendment thereto;

23 5. That Plaintiff be awarded damages according to proof, under Plaintiff's fifth
24 cause of action pursuant to California Code of Civil Procedure §§ 1094.5 and 1094.6;

25 6. That the Court order defendants to reinstate Plaintiff's housing choice
26 voucher payments under the program known as "Section 8";

27 7. That the Court permanently enjoin defendants from using juvenile records
28 in violation of 42 U.S.C. § 1437d;

Chapter 3: Exhibit 1

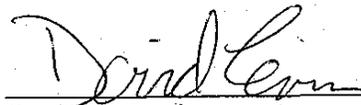
1 8. That Plaintiff be awarded her costs of suit, including attorneys' fees for co-
2 counsel Youth Law Center incurred in bringing, prosecuting and maintaining this action
3 under federal law, including pursuant to 42 U.S.C. §1437d and 42 U.S.C. §1983; and

4 9. That Plaintiff be awarded such other and further relief as the Court deems
5 just and proper.

6 10. In accordance with Fed. R. Civ. P. Rule 38(b), and Northern District Local
7 Rule 3-6, Plaintiff hereby demands a jury trial on all issues triable by jury.

8

9 Dated: October 20, 2005



10 _____
11 David M. Levin
12 Bay Area Legal Aid
13 For 

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VERIFICATION

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- 1. I have read the foregoing Complaint.
- 2. I am a party to this action.
- 3. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

4. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5. Executed on October 20, 2005, at Pittsburg in Contra Costa County, California.



CHAPTER 4

Mitigating Circumstances and Rehabilitation

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4.1 Introduction

Individuals with a criminal record who are seeking admission to federally assisted housing have been successful in gaining admission when they have established mitigating circumstances and/or rehabilitation. Mitigating circumstances and rehabilitation evidence may be presented at anytime during the application process. This Chapter discusses examples of strategies advocates can use to demonstrate mitigation and rehabilitation.

4.2 Mitigating Circumstances

The rules regarding the consideration of mitigating circumstances vary among the federally assisted programs. In the public housing program, PHAs are required by regulation to consider mitigating factors. Owners of other HUD-assisted housing may, but are not required to, consider mitigating circumstances.

Public Housing. If adverse information is obtained, a PHA must consider the time, nature and extent of the applicant’s conduct, including the seriousness of the offense.¹ HUD has emphasized that PHAs should consider applications for residence by persons with 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 likelihood of favorable conduct in the future, such as evidence of rehabilitation.²

The fact that PHAs may not automatically reject applicants is important, as it provides an opportunity to explain the situation and present the facts in the most favorable manner. However, the right to present additional information or rebut adverse information does not mean that the applicant will be accepted.

Voucher Program and HUD-Assisted Housing. When reviewing a voucher application, PHAs are urged, but not required, to consider mitigating factors. The same rule applies to HUD-assisted owners. The fact that a PHA must consider the additional/rebuttal information for public housing tenants may be of some assistance in convincing a PHA, or an owner, that such information should be examined for the voucher program or other HUD assisted housing. It is also helpful that courts, in the eviction or termination of benefits context, have reversed and remanded cases involving voucher and project-based Section 8 tenants because of the voucher administrator or landlord’s failure to consider mitigating circumstances.³

¹24 C.F.R. § 960.203(d) (2007); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶¶ 4.6, 4.8 and 4.10 (June 2003) available at: <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>; see also *Lancaster v. Scranton Hous. Auth.*, 479 F. Supp. 134, 138 (M.D. Pa. 1979), *aff’d mem.*, 620 F.2d 288 (3d Cir. 1980) (applicant has burden of putting forth such evidence).

²“One Strike and You’re Out” Screening and Eviction Guidelines for Public Housing Authorities (HAs), PIH 96-16 (HA) (Apr. 12, 1996) 5-6; see also Letter from Mel Martinez, Secretary of HUD, to Public Housing Directors (Apr. 16, 2002), and letter from Michael Liu, Assistant Secretary of HUD to Public Housing Directors (June 9, 2002), both letters are available at: <http://www.nhlp.org/html/new/index.htm> (in the eviction context HUD has urged PHAs to be guided by “compassion and common sense”).

³*Hicks v. Dakota Cnty. Comm. Dev. Agency*, No. A06-1302, 2007 WL2416872 (Minn. App., Aug. 28, 2007) (“The permissive nature of the [voucher] regulation does not preclude a determination

The HUD regulations set forth the factors that should be considered, which include:⁴

- the seriousness of the offense,
- the effect the denial of admission would have on the rest of the family,
- the effect the denial of admission would have on the community,⁵
- the extent to which the applicant has taken responsibility and taken steps to prevent or mitigate,
- evidence of rehabilitation,
- mitigating circumstances relating to the disability of a family member, and
- evidence of the family's participation in or willingness to participate in social service or counseling programs.⁶

Advocates should note that the federal regulations list other factors that may weigh against admitting an individual with a criminal record, such as the individual's degree of participation in an offense. Although there is no requirement that the factors weighing in favor must be considered, many applicants present such evidence at the time of application or during the informal hearing/review. Moreover, while HUD regulations do not require that the factors be considered, there is nothing that prohibits a PHA or owner from adopting a policy or practice of requiring consideration of such mitigating factors.

that mitigating circumstances are an important factor that must be considered in a particular case."); *Oakwood Plaza Apartments v. Smith*, 352 N.J. Super. 467, 800 A.2d 265 (2002) (remanding project-based Section 8 eviction case to trial court for a determination of whether landlord properly exercised discretion and considered relevant factors prior to deciding to evict).

⁴The list is culled from the following sources: 24 C.F.R. §§ 982.552(c)(2), 5.852 (2007); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶ 4-7C4 (June 2007).

⁵This factor may support an argument that providing housing to an individual with a criminal record substantially increases the potential that the individual will not be a repeat offender and hence is a benefit to the community.

⁶24 C.F.R. § 960.203(d)(ii) (2007). This factor is listed in the context of public housing but could be considered with respect to applications for other federally assisted housing.

4.3 Drug Rehabilitation

In general, PHAs and owners may take into consideration whether an applicant is participating in or has completed a rehabilitation program. For example, an applicant may have to submit evidence of rehabilitation if he or she wants to avoid or reduce the three-year ban on admission for individuals evicted from certain federally assisted housing due to a drug-related crime.⁷ For public housing, if a PHA has questions about an applicant's current use of illegal drugs, the PHA may seek documentation that the applicant is not currently using.⁸

PHAs are instructed that they should not engage in screening that excludes former users of illegal drugs (*i.e.*, individuals who are in recovery).⁹ If a PHA or owner denies housing to an individual in recovery because of the applicant's status as a recovering substance abuser, the denial may constitute a violation of the Fair Housing Act ("FHA"). Courts have held that individuals who are in recovery may be entitled to protection under the FHA and the Americans with Disabilities Act ("ADA").¹⁰ The FHA makes it unlawful "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of ... a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available."¹¹ HUD regulations

⁷See discussion in Chapter 2 regarding exclusion of applicants for certain prior criminal behavior.

⁸See discussion in Chapter 3 regarding the limitations and protections that a PHA or owner must provide when seeking information from a drug abuse treatment center.

⁹HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶¶ 4.6 and 7.6 (June 2003) available at: <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>. Owners of HUD-assisted housing are also instructed that they may not screen applicants by using or requiring a medical exam. See HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶ 4-8B (June 2007). Typically this provision is used to prohibit owners from inquiring into an applicant's medical/physical condition, such as pregnancy, AIDS or TB. But it also could be used to argue that an owner may not request drug testing.

¹⁰See, *e.g.*, *MX Group, Inc. v. Covington*, 293 F.3d 326, 328 (6th Cir. 2002) (finding that city zoning ordinance excluding methadone clinics discriminated against recovering substance abusers in violation of the ADA); *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 916 (4th Cir. 1992) (finding that corporation that refused to lease apartments to a community drug- and alcohol-abuse rehabilitation program violated the FHA); *Hispanic Counseling Ctr., Inc. v. Hempstead*, 237 F. Supp. 2d 284, 287, 293 (E.D.N.Y. 2002) (finding that a zoning amendment preventing a substance abuse treatment center from relocating to a new building constituted discrimination against the center's clients in violation of the ADA).

¹¹42 U.S.C.A. § 3604(f)(1)(B) (West, WESTLAW through P.L. 110-111

define “handicap” to include drug addiction.¹² Similarly, the ADA, which is often used by courts to interpret the FHA’s definition of ‘handicap,’ provides that an individual with a disability can include “someone who has successfully completed a drug rehabilitation program, is currently in such a program, or is mistakenly regarded as engaging in illegal drug use.”¹³ In contrast, “current, illegal use of, or addiction to, a controlled substance” cannot constitute a “handicap.”¹⁴ To raise an FHA claim, the applicant must show that his or her status as an individual with a history of abusing drugs was a motivating factor in the owner’s or PHA’s decision to deny admission.¹⁵

An applicant’s ability to establish that he or she is no longer a current user of illegal substances is crucial to establishing that he or she is eligible for subsidized housing and that he or she is entitled to the protections of the FHA.

There are few published cases in which an applicant has argued that he was unlawfully denied access to housing under the FHA because of his status as an individual in recovery. In *United States v. Southern Management Corporation*, a corporation that managed a private apartment complex refused to rent its units to a community drug- and alcohol-abuse rehabilitation board.¹⁶ The board had planned to rent the units to its clients who had remained drug-free for one year and were in the “reentry” phase of a treatment program.¹⁷ A jury later determined that the corporation refused to rent to the board because its clients were former substance abusers.¹⁸ The United States Court of Appeals for the Fourth Circuit held that the clients qualified as having a “handicap” under the

FHA because their former substance abuse limited a major life activity—their ability to obtain housing.¹⁹ The court reasoned that “an individual who makes the effort to recover should not be subject to housing discrimination based on society’s accumulated fears and prejudices associated with drug addiction.”²⁰ Accordingly, it held that the corporation’s refusal to rent to the board constituted a violation of the FHA and upheld an injunction requiring the corporation to rent apartments to the board.²¹

A case decided in the Eighth Circuit illustrates the importance of submitting documentation establishing that an applicant is no longer using illegal drugs. In *Campbell v. Minneapolis Public Housing Authority*, the applicant claimed that the PHA improperly determined that he was ineligible for public housing.²² The PHA denied the housing because the applicant had “recently used illicit drugs.”²³ The record contained an affidavit in which the applicant stated that he no longer used illegal drugs.²⁴ The record also contained a declaration in which the applicant stated that he had used illegal drugs less than fourteen months before he applied for public housing and that he did not complete a chemical-dependency treatment program since his most recent illegal drug use.²⁵ Neither party submitted the applicant’s treatment records to the court.²⁶ As a result, the court held that there was insufficient evidence to establish that the PHA’s decision was proper, and the court remanded the matter to the PHA for redetermination of the applicant’s eligibility.²⁷

As *Campbell* illustrates, an applicant’s ability to establish that he or she is no longer a current user of illegal substances is crucial to establishing that he or she is eligible for subsidized housing and that he or she is entitled to the protections of the FHA. However, it is unclear how long an individual in recovery must be off drugs before not being considered a current user. Congress has not clearly defined what con-

approved 11-5-07).

¹²24 C.F.R. § 100.201(a)(2) (2007).

¹³42 U.S.C.A. § 12210(b) (West, WESTLAW through P.L. 110-111 approved 11-5-07).

¹⁴42 U.S.C.A. 3602(h) (West, WESTLAW through P.L. 110-106 approved 10-25-07); 24 C.F.R. § 100.201(a)(2) (2007).

¹⁵See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

¹⁶955 F.2d 914, 916 (4th Cir. 1992).

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.* at 919.

²⁰*Id.*

²¹*Id.* at 923.

²²168 F.3d 1069, 1076 (8th Cir. 1999).

²³*Id.* at 1075.

²⁴*Id.*

²⁵*Id.* at 1076.

²⁶*Id.*

²⁷*Id.*

stitutes “current, illegal use” of a substance under the FHA or ADA. The regulations accompanying the ADA provide that current use is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the discriminatory action in question.²⁸ Rather, “the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.”²⁹ Courts have found ‘current’ use of illegal substances when presented with periods of abstinence lasting only a few weeks.³⁰ In contrast, courts have found that a sustained period of abstinence from drug use lasting several months does not constitute ‘current’ use of illegal substances.³¹

In sum, if a PHA or owner denies a reformed substance abuser housing because the applicant previously used illegal drugs, the applicant can challenge the denial under the FHA and Section 504. The applicant should argue that addiction is a recognized disability under the HUD regulations implementing the FHA and Section 504, and denials of housing based on this disability violates either or both statutes. The applicant should be prepared for arguments that he or she does not have a protected disability because he or she is a current user of illegal substances. The applicant should counteract these arguments by providing treatment records establishing that he or she has not used illegal substances for the relevant period of time. The applicant can bolster the argument by providing evidence of participation in or completion of a drug abuse program.

²⁸29 C.F.R. § 1630.3 App. (2008); *see also* *Shafer v. Preston Mem’l Hosp. Corp.*, 107 F.3d 274, 278 (4th Cir. 1997) (The plain meaning of “current” is “a periodic or ongoing activity in which a person engages...that has not yet permanently ended.”).

²⁹29 C.F.R. § 1630.3 App. (2008).

³⁰*See* *Zenor v. El Paso Healthcare Sys.*, 176 F.3d 847, 857 (5th Cir. 1999) (finding five-week period of abstinence insufficient); *Shafer v. Preston Memorial Hosp. Corp.*, 107 F.3d 274, 278 (4th Cir.1997) (finding periodic use of drugs during weeks and months prior to termination from employment as current use); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 833 (9th Cir. 1995) (same); *Baustian v. Louisiana*, 910 F. Supp. 274, 276 (E.D. La. 1996) (finding seven-week period of abstinence insufficient); *McDaniel v. Mississippi Baptist Medical Center*, 877 F. Supp. 321, 328 (S.D. Miss. 1995) (finding six-week period of abstinence insufficient); *see also* discussion in Chapter 2 regarding reasonable time period.

³¹*United States v. Southern Mgmt. Corp.*, 955 F.2d 914 (4th Cir. 1992) (holding that one-year period of abstinence could not constitute current use); *Herman v. City of Allentown*, 985 F. Supp. 569, 578-79 (E.D. Pa. 1997) (holding that nine-month period of abstinence could not constitute current use).

4.4 Reasonable Accommodation

If an applicant’s criminal convictions arose because of a disability, such as substance abuse or mental illness, and the applicant has been rehabilitated or circumstances have changed, the applicant should seek an exception from PHA policies that bar admission based upon a prior conviction. As discussed in detail below, an applicant may argue that granting such an exception constitutes a reasonable accommodation under the Fair Housing Act.³²

To be eligible for a reasonable accommodation, the applicant must first demonstrate that he or she has a disability. Federal fair housing law defines disability as “(1) a physical or mental impairment which substantially limits one or more of a person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.”³³ As noted above, HUD regulations define physical or mental impairment to include drug addiction, but current use of illegal substances cannot constitute a disability under the FHA.³⁴ Individuals suffering from drug addiction who have successfully completed some form of rehabilitation program are considered disabled on the basis of their recorded history of addiction, or the fact that other individuals consider them to have been addicts.³⁵ The act does not protect an individual with a disability whose tenancy would constitute a ‘direct threat’ to the health or safety of other individuals or

³²Housing providers that receive federal financial assistance, such as PHAs and owners of federally assisted housing, are also subject to Section 504 of the Rehabilitation Act of 1973. 29 U.S.C.A. § 794 (West, WESTLAW through P.L. 110-106 approved 10-25-07). Section 504 and its implementing regulations, 24 C.F.R. Part 8, require recipients of federal financial assistance to provide reasonable accommodations to applicants and residents with disabilities. Private owners who are participating in the voucher program are not considered to be recipients of federal financial assistance and are not directly covered under Section 504. *See* preamble to 53 Fed. Reg. 20,227 (June 2, 1988); Accessibility Notice: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; the Architectural Barriers Act of 1968 and the Fair Housing Act of 1988, PIH 2002-01 (Jan. 22, 2002) ¶ I.A.7; 24 C.F.R. § 8.28(b) (2007); *see also* Compliance with Section 504 of the Rehabilitation Act of 1973 and the Disability/Accessibility Provisions of the Fair Housing Act of 1988, H 2001-02 (HUD) (Feb. 6, 2001).

³³42 U.S.C.A. § 3602(h)(1)-(3) (West, WESTLAW through P.L. 110-106 approved 10-25-07).

³⁴24 C.F.R. § 100.201(a)(2) (2007).

³⁵*See* 42 U.S.C.A. § 3602(h)(2)-(3) (West, WESTLAW through P.L. 110-107 approved 10-26-07); 29 U.S.C.A. § 705(2)(C) (West, WESTLAW through P.L. 110-107 approved 10-26-07); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 (2003).

result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.³⁶ To determine a direct threat, the housing provider must engage in an individualized assessment that is based upon “reliable objective evidence” of current or recent post rehabilitation conduct that poses a direct threat to safety of others.³⁷

A “reasonable accommodation” is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary to afford an applicant with a disability an equal opportunity to use and enjoy a dwelling.³⁸ Under the Fair Housing Act, it is unlawful for a PHA or owner to refuse to make reasonable accommodations to rules, policies, practices, or services when such accommodations may be necessary to provide applicants with disabilities an equal opportunity to use and enjoy a dwelling.³⁹ The Supreme Court has held that an accommodation may be required even if it results in a preference for disabled individuals over otherwise similarly situated non-disabled individuals.⁴⁰ In addition, HUD has acknowledged that because rules and policies may have a different effect on persons with disabilities than on other persons, “treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling.”⁴¹

To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual’s disability.⁴² At the same time, a request for a reasonable accommodation may be denied if providing the accommodation is not reasonable. An accommodation is considered unreasonable

if it would impose an undue financial and administrative burden on a PHA or if it would fundamentally alter the nature of a PHA’s operations.⁴³ However, the Supreme Court has held that an accommodation cannot automatically be deemed unreasonable simply because it requires an entity to give a “preference”—in the sense of different treatment—to individuals with disabilities.⁴⁴

In seeking a reasonable accommodation from a PHA or an owner’s admissions policy that bars applicants with convictions resulting from mental illness or drug addiction, the applicant should submit a written request that clearly describes the requested accommodation, the reason the accommodation is being requested, and the manner in which the accommodation is related to the applicant’s disability. The request should first explain that the applicant has a disability. To establish disability, the applicant may be asked to provide documentation, such as letters from service providers, showing that he or she has a mental illness and/or drug addiction, successfully completed some form of rehabilitation program or is being successfully treated for mental illness, and no longer uses substances or is receiving appropriate treatment to control the effects of the mental illness. The request should state that an exception from the PHA’s criminal history policy is necessary to afford the applicant an equal opportunity to access housing. The request should explain that there is a link between the requested accommodation—a waiver of the PHA’s requirement that, for example, the applicant not have any drug-related convictions—and the applicant’s former substance abuse. Accordingly, the request should establish that the applicant’s criminal conduct occurred during and was a result of the applicant’s mental illness or former substance abuse.

The Fair Housing Act and Section 504 may require a housing provider to alter its rules or practices regarding criminal conduct that would otherwise exclude the individual with disabilities from housing.⁴⁵ There

³⁶Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act, May 17, 2004, available at: www.usdoj.gov/crt/housing/jointstatement_ra.htm.

³⁷*Id.*

³⁸42 U.S.C.A. § 3604(f)(3)(B) (West, WESTLAW through P.L. 110-107 approved 10-26-07).

³⁹*See id.*

⁴⁰*See* U.S. Airways v. Barnett, 535 U.S. 391, 397 (2002).

⁴¹Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act, 6 (May 17, 2004) available at: www.usdoj.gov/crt/housing/jointstatement_ra.htm.

⁴²*Id.*

⁴³*Id.*, question 7; 24 C.F.R. § 8.33 (2007); *See* Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 410, 412 (1979).

⁴⁴*See* Barnett, 535 U.S. at 397.

⁴⁵*See* Roe v. Sugar River Mills Assoc., 820 F. Supp. 636 (D.N.H. 1993) (mentally ill tenant engaged in abusive behavior toward other residents and management which resulted in a criminal conviction and eviction action; the court held that Fair Housing Act required

are no reported cases where a rehabilitated applicant with a history of substance abuse or an applicant with mental impairment with a history of criminal acts arising from the mental illness has been granted a reasonable accommodation from a PHA's criminal activity restrictions.⁴⁶ The most closely analogous cases have arisen in the employment context. At least two courts have held that employers can be required to reasonably accommodate rehabilitated employees by disregarding workplace violations that resulted from pre-rehabilitation substance abuse. In *Callicotte v. Carlucci*, the plaintiff had accrued a number of work violations because of her alcoholism.⁴⁷ After rehabilitation, her employer still counted these violations against the plaintiff's overall employment record and terminated her employment.⁴⁸ A federal district court held that the goal of rehabilitating individuals with disabilities dictated that the employer disregard the plaintiff's record of pre-rehabilitation violations during future employment decisions.⁴⁹ The court, therefore, ordered the employer to reasonably accommodate the plaintiff by expunging her pre-rehabilitation disciplinary records.⁵⁰ Similarly, in *Walker v. Weinberger*, a federal district court held that "'reasonable accommodation' of an alcoholic employee requires forgiveness of his past alcohol-induced misconduct in proportion to his willingness to undergo and favorable response to treatment."⁵¹ The court reasoned that "[u]se of pre-treatment records conceded to be attributable to alcohol abuse for disciplinary purposes is inconsistent with the legislative perception of alcoholism as a disease."⁵²

a showing that no reasonable accommodation would minimize the risk to others before tenant could be denied housing); *Roe v. Housing Auth. of Boulder*, 909 F. Supp. 814 (D. Colo. 1995) (a mentally disabled tenant assaulted and injured another resident; court ruled that tenant must be afforded reasonable accommodation before being denied federally assisted housing).

⁴⁶Compare *Williams v. Rochester Hous. Auth.*, CA No. 03 CV 6005 (W.D.N.Y., Apr. 7, 2005) (Consent Order) (plaintiffs recovering drug abusers with criminal records settled reasonable accommodation claim for damages and an agreement to change PHA policies).

⁴⁷731 F. Supp. 1119, 1120 (D.D.C. 1990).

⁴⁸*Id.* at 1120-21.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹600 F. Supp. 757, 762 (D.D.C. 1985).

⁵²*Id.*

The employment cases can be used to support the premise that the concept of 'reasonable accommodation' requires a PHA to disregard an applicant's pre-rehabilitation convictions where the convictions arose from the applicant's addiction. The cases can be cited for the proposition that in determining whether such an accommodation would be appropriate, the PHA should consider the applicant's success in undergoing treatment. The cases also support the argument that denying an applicant housing based on pre-rehabilitation convictions that resulted from addiction is inconsistent with regulations recognizing that drug addiction constitutes a disability.

In *U.S. Airways v. Barnett*,⁵³ the Supreme Court held that an actor may be obligated to provide an accommodation even though it would provide a preference to an individual with a disability.⁵⁴ According to *Barnett*, an accommodation may be required even if it would permit an individual with a disability "to violate a rule that others must obey."⁵⁵ However, to demonstrate that such an accommodation is warranted, the plaintiff must show that 'special circumstances' warrant a finding that the requested accommodation is reasonable on the particular facts.⁵⁶

A PHA or owner may argue that it is not required to provide an exception to a policy denying housing to all applicants with drug-related convictions

⁵³35 U.S. 391 (2002). Several of the cases denying employees' requests to expunge disciplinary records were decided prior to the Supreme Court's decision in *Barnett*. These cases did not adopt the reasoning advanced in *Callicotte* and *Walker*. See, e.g., *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1107-08 (Fed. Cir. 1996); *Green v. George L. Smith II Ga. World Congress Ctr. Auth.*, 987 F. Supp. 1481, 1484-85 (N.D. Ga. 1997). The Federal Circuit Court rejected *Callicotte's* and *Walker's* reasoning on the basis that expunging workplace violations arising from an employee's disability would constitute preferential treatment for persons with disabilities. *Sergeant*, 95 F.3d at 1107. The *Sergeant* court found that the employer was not required to disregard the plaintiff's previous disability-related misconduct, stating that employers are permitted to hold employees with disabilities to the same standards as other employees "if they choose." *Id.* It should also be noted that the cases holding that employers need not disregard addiction-related misconduct are often distinguishable due to the plaintiff's failure to timely notify the employer that he or she had a disability and that the misconduct resulted from this disability. In contrast, a housing applicant would likely disclose his or her disability to a PHA at the beginning of the parties' relationship in order to seek a reasonable accommodation from the PHA's admissions policies.

⁵⁴See *id.* at 397.

⁵⁵*Id.* at 398.

⁵⁶*Id.* at 405.

because such a policy treats disabled and nondisabled applicants equally. However, *Barnett* indicates that a PHA or owner may be required to make an exception to such a policy where 'special circumstances' indicate that the requested accommodation is reasonable on the facts. The fact that an applicant's pre-rehabilitation convictions directly resulted from mental illness or addiction could constitute 'special circumstances' warranting an exception from a PHA's or owner's admissions policy. Although there is no published authority supporting such a claim, *Barnett* indicates that the assessment of whether the accommodation is reasonable is heavily fact-based. Thus, for example, an applicant may be successful if it can be demonstrated that he or she has not used substances for a substantial period of time, all criminal activity ceased once he or she entered rehabilitation, the use of controlled substances (or the failure to maintain an appropriate treatment plan to control the mental illness) is unlikely to recur. Other special circumstances may include that the applicant is currently receiving supportive services and the applicant's conviction is dated.

CHAPTER 5

Challenging a Denial of Admission

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5.1 Introduction

If an applicant with a reported criminal record or background is rejected, it is important to evaluate whether to contest the rejection. If the individual was not assisted by an advocate in the application process, it is highly likely that the rejection was based primarily upon the applicant’s reported criminal background/record without regard to whether the information was accurate or whether there is mitigating circumstances or rehabilitation.¹ Disputing the rejection requires a challenge of any erroneous information, the presentation of mitigating circumstances and/or rehabilitation. In addition, challenging the rejection may provide the necessary time to improve or gather information to clarify the applicant’s criminal history. If an applicant has not already done so, he or she should request a copy of his or her criminal

record and seek to correct any discrepancies.

This Chapter sets forth the basic elements of an applicant’s procedural rights to contest a denial.² The purpose of this discussion is to advise applicants of their rights so that they know what to expect during the application process and to alert them to when there may be a basis for a challenge. However, it is important to remember that a procedural challenge, even if successful, will not necessarily result in admission to a federally assisted housing program or unit. At best, a successful procedural challenge may result in a review of the facts or another hearing. Nevertheless, it may be that the procedural failings are so substantial or repeated that the hearing officer or reviewing court becomes exasperated with the PHA or owner and orders admission.

5.2 Notice of the Denial

Any applicant denied admission to public housing, the voucher program, other HUD-assisted housing, or USDA Rural Development housing must be given written notice of the denial.³ The notice must state

¹Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. Tol. L. Rev. 545, 572 (2005) (“PHAs typically automatically exclude anyone with a criminal record that falls into one of their designated categories and exclusionary periods without any individualized assessment”). Because PHAs initially automatically deny admission to anyone with a criminal record, there is an increased likelihood that a hearing officer may reinstate the application upon presentation of favorable relevant information. See Legal Action Center, *How to Get Section 8 or Public Housing Even with a Criminal Record: A Guide for New York City Housing Authority Applicants and their Advocates*, ii (no date), available at <http://www.lac.org/index.php/lac/130> (suggesting that if applicants follow the procedures detailed in the guide, their likelihood of being admitted to Section 8 or public housing operated by NYCHA will increase).

²This Chapter also cites, when relevant, cases involving the denial or termination from federally assisted housing. Advocates and applicants should be aware that there may be cases from other social welfare programs that also may be used to build an applicant’s case. Such cases are not included in this discussion, as they are beyond the scope of this handbook.

³42 U.S.C.A. § 1437d(c)(4) (West, WESTLAW through P.L. 110-113 approved 11-8-07) (public housing); 24 C.F.R. §§ 880.603(b)(2)

the reasons for the rejection in advance of any hearing.⁴ Courts have found fault with rejection notices that, without more detail, conclude that the applicant does “not meet the standards for admission”⁵ or that informs the applicant that “previous housing records and habits indicate a detrimental effect on tenants and project environment.”⁶ Thus, a conclusory statement that the PHA or owner has information that the applicant has a criminal record may be insufficient to support the denial. The criminal record in question, or the facts relied upon, should be provided as part of the denial letter.⁷ Advocates should check state law to determine if there are additional protections regarding the use of criminal records and what must be included in any notice.⁸

(Section 8 new construction), 882.514(f) (Section 8 moderate rehabilitation), 960.208(a) (public housing), 982.201(f)(1) and 982.554(a) (voucher) (2007); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶ 4-9C (June 2007); HUD, Public Housing Occupancy Guidebook, ¶ 4.9 and App. III (June 2003) (sample ACOP) (the ACOP and Notices are models; nevertheless, they should be persuasive); HUD, VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE, 7420.10G, ¶ 5.7 (Apr. 2001) (voucher); *Holmes v. N.Y. City Hous. Auth.*, 398 F.2d 262 (2d Cir. 1968) (PHA’s failure to inform applicants of denial or reasons violated due process); 7 C.F.R. §§ 3560.160(e), 3560.154(h) (RD Section 515 Rental Housing) (applied to Section 514 and 516 farmworker housing through §§ 3560.551, 3560.601), 3560.255(b) (2007) (comparable notice requirements in the USDA Rural Development housing program).

⁴*Id.*; *Holmes*, 398 F.2d at 262, 264; *Billington v. Underwood*, 613 F.2d 91 (5th Cir. 1980), and *subsequent opinion*, *Billington v. Underwood*, No. 81-7978, 707 F.2d 522 (11th Cir. May 23, 1983) (unreported slip opinion available as Exhibit 1 to this Chapter); *see also Vance v. Housing Opportunities Comm’n*, 332 F. Supp. 2d 832 (D. Md. 2004) (mentally disabled tenant challenged a termination from Supportive Housing program and denial of reinstatement based on various procedural deficiencies; court preliminarily ordered reconsideration of reinstatement request and new hearing on termination with other procedural protections).

⁵*McNair v. N.Y. City Hous. Auth.*, 613 F. Supp. 910 (S.D.N.Y. 1985).

⁶*Billington*, 613 F.2d at 92; *see also Singleton v. Drew*, 485 F. Supp. 1020, 1024 (E.D. Wis. 1980) (reasons for denial must be set forth “with reasonable specificity”).

⁷*See, e.g.*, 7 C.F.R. § 3560.154(h) (2007) (requiring that the credit report relied upon to deny admission to an applicant under the USDA Rural Development housing programs be attached to Notices of Ineligibility or Rejection in accordance with the Fair Reporting Credit Act); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 4.9 (June 2003); *see also Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312 (D. Conn. 1993) (termination of subsidy); *Driver v. Hous. Auth. of Racine*, 713 N.W.2d 670 (Wis. Ct. App. 2006) (sustaining tenants’ § 1983 claim challenging adequacy of notice and hearing decision in a termination case as a matter of both due process, per *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Edgecomb*, and public policy).

⁸For example, in Massachusetts, there is a provision, uncodified, as part of the budget (but in regulation and a memorandum) that if any entity denies an individual a benefit based upon a criminal

record, the entity must tell the person which part of the criminal record appears to make the individual ineligible.

A clear and detailed notice will benefit the applicant because it will help frame the issue for review or appeal. For example, a specific notice can help the applicant determine whether the rejection is based upon an old or recent conviction and incarceration, now refuted and changed information, or a crime of violence against others or a victimless crime.

The rejection notice should set forth the procedure and a reasonable time frame⁹ for contesting the adverse determination.¹⁰ Some courts have concluded that the notice should also inform the applicant of the nearest legal services office.¹¹ The notice must also state that an applicant with a disability has the right to request a reasonable accommodation to participate in the informal hearing.¹² For public housing, a rejec-

record, the entity must tell the person which part of the criminal record appears to make the individual ineligible.

⁹*See, e.g.*, 24 C.F.R. § 5.514(e)(1) (2007) (applicants for federally assisted housing rejected because of rules regarding immigration statutes have 30 days from notice to request grievance hearing); 7 C.F.R. § 3560.154(e) (2007) (Rural Development housing notice must be delivered by certified mail return receipt requested or hand-delivered letter with signed receipt by applicant and inform denied applicant of the right to respond within ten calendar days after date of notice and right to hearing available upon request), whereas, 7 C.F.R. 3560.160(h) states notice must be given of the right to respond within ten days *after receipt* of notice (emphasis added); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, REV-1, CHG-2, ¶ 4-9(C)(2)(b) (June 2007) (notice must inform applicant of right to respond in writing and to request a meeting within fourteen days); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, App. VIII (Applicant Notice of Rejection) (June 2003) (request informal hearing within ten days); *see also Samuels v. District of Columbia*, 669 F. Supp. 1133, 1140 (D.D.C. 1987) (ten-day period for a tenant to seek grievance hearing is unreasonably short).

¹⁰*E.g.*, 24 C.F.R. §§ 880.603(b)(2) (Section 8 new construction), 960.208(a) (public housing) and 982.201(f)(1), 982.552(d) and (e) and 982.554(a) (voucher) (2007); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, REV-1, CHG-2, ¶ 4-9(C)(2)(b) (June 2007) (notice must inform applicant of right to respond in writing and to request a meeting within fourteen days); *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180, 185 (6th Cir. 1984) (“Written notice to the [Section 8] applicant must set forth the allegations on which the denial was based and the method for requesting a hearing.”); *see also McNair*, 613 F. Supp. at 915 (inadequate and misleading information regarding remedial procedures made notice of rejection inadequate).

¹¹*Ressler v. Pierce*, 692 F.2d 1212, 1220 (9th Cir. 1982). *See also Vance v. Hous. Opportunities Comm’n*, 332 F. Supp. 2d 832, 843 (D. Md. 2004) (disabled “re-applicant” who challenged a prior termination was entitled to notice of how to obtain free legal services).

¹²*E.g.*, Compliance with Section 504 of the Rehabilitation Act of 1973 and the Disability/Accessibility Provisions of the Fair Housing Act of 1988, H 2001-02, ¶ II.B.5 (Feb. 6, 2001); Accessibility Notice: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; the Architectural Barriers Act of 1968 and the Fair Housing Act of 1988, PIH 2002-01, ¶ II.C.1 (Jan. 22, 2002); *see also Price v. Rochester Housing Authority*, 2006

tion notice should inform the applicant that, at the hearing, the hearing officer will give consideration to the time, nature and extent of the conduct and to factors that might indicate a reasonable probability of favorable future conduct.¹³ In the event that the denial is based upon a copy of a criminal record (including registered lifetime sex-offender) obtained by a PHA, there are separate but similar rules that apply regarding the notice, the opportunity to dispute, and the timing of such opportunity.¹⁴ In addition, depending upon the number of non-English speakers served by the PHA or owner, the notice may have to be written in the language used by the applicant.¹⁵

5.3 Preparation for the Informal Hearing/Review

Applicants denied admission to the federal housing programs are entitled to a review of the denial. Prior to the informal hearing/review, the applicant should request and obtain all documents and information from the PHA or owner regarding the denial.¹⁶ In addition, the applicant should indepen-

dently obtain a copy of his or her criminal record. That record should be compared with the information upon which the PHA or owner has relied. Critical errors and mistakes in the information relied upon should be identified and corrected. “Both public and commercially prepared criminal records are incorrect more often than generally known.”¹⁷ As part of the preparation if relevant, the applicant should be prepared to explain differences between information originally submitted and that secured by the PHA or owner. For example, the applicant should be prepared, if necessary, to explain why he or she omitted information about specific prior criminal activity.

Mitigating information is critical. Therefore, letters of support are very important.¹⁸ To the extent possible or relevant, the applicant should obtain letters from a current employer, teacher, probation officer, social worker, neighbors, current or prior landlords, community leaders, or anyone who can vouch for the applicant. Information from correctional institutions regarding work or other activities may also be relevant. The key points the letters should emphasize are that:

- circumstances have changed since the arrest and conviction,
- the applicant is a good person who gets along well with others, and
- the applicant is motivated to improve his or her life.

If the individual is working or in school, the letters should highlight that he or she has a good performance and attendance record. If there are individuals who would be willing to accompany the applicant to the hearing and who will testify to the changed circumstances and support the application, their attendance may have a substantial beneficial impact.

WL 2827165 (W.D.N.Y. Sept 26, 2006) (due process requires that notices of termination in Shelter Plus Care program include notice of the right to request a reasonable accommodation).

¹³24 C.F.R. § 960.203(d) (2007). *See also* [Redacted] v. Housing Auth. of the City of Austin, CA No. A-96-CA-330-SC (W.D. Tex., Complaint filed July 1, 1996) (complaint challenging PHA policy of rejecting all applicants with arrest records and raising statutory, regulatory, constitutional and fair housing claims; settled), copy available in Exhibit 2 to this Chapter.

¹⁴42 U.S.C.A. § 1437d(q)(2) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. §§ 5.903(f), 960.204(c), 982.553(d) (2007); *see also* discussion in Chapter 3 regarding Access to Criminal Records.

¹⁵42 U.S.C.A. §2000d (Title VI, § 601 of the Civil Rights Act of 1964) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 7 C.F.R. § 3560.160(e) (2007) (Rural Development housing); and Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (Jan. 22, 2007).

¹⁶For the USDA rural housing programs, applicants who have been denied housing and choose to file grievances are entitled to examine the records that a borrower plans to rely upon to defend the admission decision. 7 C.F.R. § 3560.160(g)(4) (2007) (Rural Development housing). *See also*, HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, App. VIII (sample Applicant Notice of Rejection) (June 2003) (offers applicant the opportunity to review applicant file); *See* Chapter 3 for a discussion of special federal rules regarding access to criminal records by PHAs and owners. In the event that the denial is based upon criminal record information obtained by a PHA (including lifetime sex offender registration) in accordance with the federal statute, the PHA has an obligation to provide the applicant a copy of that record.

¹⁷Sharon M. Dietrich, *When “Your Permanent Record” Is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139 (July-Aug 2007).

¹⁸*See* Legal Action Center, *How to Get Section 8 or Public Housing Even with a Criminal Record: A Guide for New York City Housing Authority Applicants and their Advocates*, App. H (no date), available at <http://lac.org/index.php/lac/130> (provides examples of letters of recommendation); New York City Housing Authority, Division of Applicant Appeals, Public Housing Hearing, Report of Informal Hearing, August 7, 2007, No. 113-52-7732, copy available in Exhibit 3 to this Chapter.

If there is information demonstrating that the applicant has participated in counseling and social service programs, it should also be submitted.¹⁹ Finally, the applicant should consider submitting a certification that he or she has not engaged in criminal activity during a specified period of time.²⁰ Depending upon local practice, the letters and information provided should be notarized.

An applicant who seeks a review of a rejection should consider requesting that the unit applied for remain available while the denial is contested.

Information about the applicant's need for housing is important, but it is not key or relevant to the issue of whether the applicant can overcome the prior criminal record and demonstrate that he or she will be a good tenant and not threaten other tenants, the development or PHA or the owner's staff. Moreover, the hearing officer and the PHA's or owner's staff are likely to be aware that there is a critical shortage of housing and that most applicants can demonstrate a similar need for the housing.

When relevant, such as in a tight housing market or if the unit has unique characteristics that the applicant needs, an applicant who seeks a review of a rejection should consider requesting that the unit applied for remain available while the denial is contested. For those developments with little turnover or few vacancies, failure to obtain such an agreement may result in the applicant winning the right to occupancy but losing the unit. A PHA or owner will balance such a request with the need to rent vacant units.

5.4 The Informal Hearing/Review

All applicants for public housing, the voucher program, HUD-assisted housing and USDA Rural

Development housing are entitled by statute and regulation²¹ and/or due process²² to a review of the admission decision if they are rejected. Depending upon the program, the review is called a grievance, an informal hearing, an informal review, or a meeting.²³ The process is generally very informal. The nature of the review varies for each program. In general, it includes the right to be heard and to present evidence.²⁴ At the hearing/review, the standard of proof is, at least, substantial evidence or preponderance of the evidence.²⁵ Substantial evidence includes

²¹See, e.g., 42 U.S.C.A. § 1437d(c)(4) (West, WESTLAW through P.L. 110-113 approved 11-8-07) (public housing); 24 C.F.R. §§ 882.514(f) (Section 8 moderate rehabilitation), 960.208(a) (public housing), 982.554 (voucher) 880.603(b)(2) (Section 8 new construction) (2007); 7 C.F.R. § 3560.160(f)-(g) (2007) (rural development program); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 4-9 (June 2003) (informal hearing is distinct from a public housing grievance hearing).

²²See *Ressler*, 692 F.2d at 1215 (applicants for project-based Section 8 had a sufficient property interest to give rise to due process procedural safeguards); *Holmes*, 398 F.2d at 265 (due process requires ascertainable standards for admission); *Daubner v. Harris*, 514 F. Supp. 856, 869 (S.D.N.Y. 1981) (admission to Section 8 housing is subject to due process), *aff'd*, 688 F.2d 815 (2d Cir. 1982); *Singleton*, 485 F. Supp. at 1022-23 (due process discussed, but court concluded that regulations obviated need to decide due process issue). *But see Overton v. John Knox Ret. Tower, Inc.*, 720 F. Supp. 934 (N.D. Ala. 1989) (rejecting Section 202 applicant's substantive due process challenge by finding no property interest and no governmental action); *Hill v. Group Three Hous. Dev. Corp.*, 620 F. Supp. 355 (E.D. Mo. 1986), *aff'd*, 799 F.2d 385 (8th Cir. 1986) (applicants for Section 8 new construction projects lack sufficient property interest for due process protections); *Germain v. Recht-Goldin-Siegel Props.*, 567 F. Supp. 384 (E.D. Wis. 1983), *aff'd sub nom. Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1984) (applicants for Section 8 new construction projects lack sufficient property interest for due process protections).

²³For Rural Development housing, the review process is called the grievance procedure. For public housing, it is called an informal hearing. For the voucher program, it is called an informal review. For HUD-assisted housing, it is called a meeting. For convenience here, the process is generally referred to as the informal hearing/review.

²⁴See, e.g., 24 C.F.R. § 982.554(b)(2) (2007) (voucher); 7 C.F.R. § 3560.160(h) (2007) (rural development housing); HUD, VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE, 7420.10G, ¶ 16.5 (Apr. 2001) (voucher program); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2 (June 2007); see also *Baldwin v. Hous. Auth. of Camden*, 278 F. Supp. 2d 365, (D.N.J. 2003). The court in *Baldwin* considered whether the presence of the PHA director at the informal review and his instruction to the hearing officer not to accept an applicant's evidence may have prevented meaningful review and a denial of due process. *Id.* at 389. The court found that a question of fact existed as to whether a reasonable officer in the PHA director's position would have recognized that his conduct violated the applicant's clearly established constitutional right to due process. *Id.*

²⁵24 C.F.R. § 882.514(f) (2007) (Section 8 moderate rehabilitation); see also *Billington*, No. 81-7978, 707 F.2d 522 (11th Cir. May 23, 1983) (discussion of the burden of proof in hearing for denial of admis-

¹⁹See discussion in Chapter 4 regarding mitigating circumstances and rehabilitation.

²⁰See, e.g., 24 C.F.R. § 5.855(c) (2007) (for federally assisted housing, a certification by an applicant who was previously denied housing that he or she has not engaged in criminal activity during a specified period of time is sufficient evidence that the applicant is not currently engaged in criminal activity).

both the quality of the evidence as well as the quantity of the evidence. Preponderance of the evidence means that there is more quality evidence than is presented by the other side. The PHA or owner bears the burden of persuasion and the applicant the burden of production.²⁶ For example, the PHA has the burden of showing that the applicant has a criminal record that is sufficient to deny admission and the applicant has the burden to show that the record is inaccurate or that there are mitigating circumstances.

Several courts have discussed the elements of an admission hearing.²⁷ These courts have determined that at the hearing the applicant must have a reasonable opportunity to prepare a rebuttal and to contest the basis for the unfavorable decision.²⁸ No stenographic record is required, however, an applicant should request a recording and provide the equipment, if not otherwise available.²⁹ Witnesses are not required to testify under oath, but the better practice

is to require an oath.³⁰ The applicant may appear with counsel or an advocate.³¹ In addition, for public housing and the voucher program, the subject of the hearing is confined to the issues presented in the notice.³² Thus, information should not be presented at the hearing if it was not the basis for the denial because the applicant has no opportunity to investigate and effectively rebut the information.

Courts that have discussed the elements of an admission hearing have determined that at the hearing the applicant must have a reasonable opportunity to prepare a rebuttal and to contest the basis for the unfavorable decision.

The USDA Rural Development housing grievance procedures have some unique features. When a grievance is filed, the regulations require the borrower (owner of the multifamily property), or a representative of the borrower, to offer to meet informally with the denied applicant within ten calendar days to resolve the grievance.³³ If the informal meeting fails to yield a resolution, the owner must file a report summarizing the problem to USDA and the applicant.³⁴ The applicant may also submit a summary of the problem to USDA. Upon receipt of the summary, if a grievance hearing is desired, an applicant must file a written request for a hearing within ten calendar days of receipt of the informal meeting summary.³⁵ The hearing is then scheduled within fifteen days of the selection of a hearing panel.³⁶

sion); *see also* 66 Fed. Reg. 28776, 28785 (May 24, 2001) (stating that for termination of a voucher, the preponderance of the evidence standard is retained because there is no expectation of a court proceeding, and HUD wants to ensure that the action is not taken lightly). In the eviction context, HUD regulations provide that the standard for determining whether an individual has engaged in criminal activity is not the standard of proof used in criminal cases. 24 C.F.R. §§ 5.861 (federally assisted housing in general), 966.4(l)(5)(iii) (public housing), 982.310(c)(3) (voucher) (2007).

²⁶*See* Basco v. Machin, 514 F.3d 1177 (11th Cir. 2008) (the PHA bears the burden of persuasion in an informal hearing to determine whether to terminate a voucher).

²⁷*See* Jaimes v. Toledo Metro. Hous. Auth., 758 F.2d 1086 (6th Cir. 1985); *Billington*, 613 F.2d at 93; *Neddo v. Hous. Auth. of Milwaukee*, 335 F. Supp. 1397 (E.D. Wis. 1971); *cf.* Spady v. Mount Vernon Hous. Auth., 341 N.Y.S.2d 552 (N.Y. App. Div. 1973), *aff'd mem.*, 310 N.E.2d 542 (N.Y. 1974), *cert. denied*, 419 U.S. 983 (1974) (Douglas, J., dissenting); *Sumpter v. White Plains Hous. Auth.*, 278 N.E.2d 892 (N.Y. 1972), *cert. denied*, 406 U.S. 928 (1972) (distinguishing evidentiary hearing required before termination of benefits from procedures required before denials of eligibility). These cases distinguish between those who are denied admission and those who are evicted. Although the property interest is different, the ultimate injury or loss is identical in that both are likely to be relegated to living in housing that is not decent, safe, or sanitary, and both suffer a sense of frustration and alienation when rightful benefits are withheld. *See also* S. K. Morris, Note, *The New Leased Housing Program: How Tenatable a Proposition?* 26 HASTINGS L.J. 1145, 1201 (1975).

²⁸*Billington*, 613 F.2d at 95; *see also* *Edgecomb*, 824 F. Supp. at 314-16 (D. Conn. 1993) (in a termination of benefits case, the hearing decision could not be based wholly on hearsay; hearing decision inadequate because no reasons given; participant was entitled to cross-examine witness); *Kurdi v. Du Page County Hous. Auth.*, 514 N.E.2d 802, 806 (Ill. App. Ct. 1987) (setting aside a termination decision based wholly on hearsay); *see also* 7 C.F.R. § 3560.160(h) (2007) (rural development housing).

²⁹*Neddo*, 335 F. Supp. at 1400.

³⁰*Id.*; *see also* 7 C.F.R. § 3560.160(h) (2007) (Rural Development housing).

³¹*Id.*; *Vance v. Hous. Opportunities Comm'n*, 332 F. Supp. 2d 832, 843 (D. Md. 2004) (disabled 'reapplicant's' due process rights violated for failure to allow representation); *see also* HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, App. VIII (Applicant Notice of Rejection) (June 2003).

³²*See* *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974); *Billington*, 613 F.2d at 93-95; *Singleton*, 485 F. Supp. at 1024; *McNair*, 613 F. Supp. at 914-15.

³³7 C.F.R. § 3560.160(f)(2) (2007) (rural development housing).

³⁴*Id.* § 3560.160(f)(3).

³⁵*Id.* § 3560.160(g)(1) (2007). If a request for a hearing is not submitted within the ten calendar days, the initial decision of the borrower becomes final. *Id.* § 3560.160(g)(7).

³⁶When a standing panel, *supra*, is chosen, a hearing is scheduled within fifteen days of the standing panel's receipt of a request for a grievance hearing. *Id.* § 3560.160(g)(5).

Although an informal meeting, such as is required by Rural Development housing, is not required for the other federal programs and no hearing or meeting is required by federal law for programs such as Low Income Housing Tax Credit, HOME, Shelter Plus Care, Supportive Housing or Housing Opportunities for People with AIDS, applicants for these programs should request an informal meeting (a prior meeting if relevant). A prior meeting will be especially beneficial if the information that the applicant believes maybe available to the PHA or owner relied upon is incorrect, the applicant has been rehabilitated, or if there are mitigating circumstances.

Formal rules of evidence do not typically apply in an informal hearing / review. Thus, hearsay may often be introduced and considered. As a result, the PHA or owner may seek to introduce or rely upon newspaper reports, police blotters, declarations or criminal records, with no one available to authenticate them or to testify about the information or records. Each type of evidence will carry a different weight and may be objected to on various grounds. However, the decision of the hearing officer should not be based only upon uncorroborated hearsay.³⁷

At the hearing or prior to, an applicant who has plead guilty should be permitted to explain the plea. A guilty plea in most states is evidence in a subsequent civil proceeding, not conclusive proof.³⁸ In any case, there may be relevant reasons why the applicant pled guilty, which may be considered significant by the decision maker.

³⁷See *Billington*, No. 81-7978, 707 F.2d 522 (11th Cir. May 23, 1983) (discussion of the burden of proof and use of hearsay in hearing for denial of admission). The following cases set aside hearing decisions based solely on hearsay in the context of subsidy terminations or proposed evictions: *Basco v. Machin*, 2008 WL 182249 (11th Cir.); *Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312 (D. Conn. 1993) (in decision involving termination of tenant-based assistance, court held that conclusory statement was insufficient); *Kurdi v. Du Page County Hous. Auth.*, 161 Ill. App. 3d 988, 514 N.E.2d 802 (1987); *Carter v. Olmsted County Hous. & Redev. Auth.*, 574 N.W.2d 725 (Minn. Ct. App. 1998); *Chase v. Binghamton Hous. Auth.*, 91 A.D.2d 1147, 1147-48, 458 N.Y.S.2d 960 (N.Y. App. Div. 1983); Hearsay rules, if used, will likely apply to all parties. Therefore, an applicant should be prepared to have whatever hearsay rules are adopted apply to the evidence that he or she presents. *Broughton v. Hous. Auth. of Pittsburgh*, 755 A.2d 105 (Pa. Commw. Ct. 2000) (tenant's hearsay evidence excluded in judicial setting).

³⁸*Costa v. Fall River Hous. Auth.*, 71 Mass.App.Ct. 269, 283, 881 N.E.2d 800, 811 (2008).

The applicant is entitled to a hearing before an impartial hearing officer.³⁹ The regulations for public housing, the voucher program and HUD-assisted developments state that the hearing officer may not be the person who was the original decision-maker.⁴⁰ For public housing and the voucher program, the rules further provide that the hearing officer cannot be a subordinate of the original decision-maker.⁴¹ Courts have enjoined PHAs' use of hearing officers who were the original decision-makers or their subordinates as violating the United States Housing Act, the regulations, and due process.⁴²

For the USDA rural housing programs, the applicant and the borrower (owner of the multifamily development) may agree on a single hearing officer. Alternatively, the applicant and the borrower may each appoint one member of a three-person panel, and the two hearing officers selected then choose the third officer. In the event the applicant and borrower cannot agree within 30 days on the two hearing officers, after notice, USDA will appoint a person to act as the sole hearing officer.⁴³ The regulations also provide for a 'Standing Hearing Panel' approved by USDA to hear all grievances related to a particular development.⁴⁴ At least one member of the standing hearing panel must be selected by the residents at a formal resident meeting called to select hearing panel members.⁴⁵

5.5 Statement and Review of Decision

For most of the programs, including public housing, the voucher program and HUD-assisted housing, the

³⁹*Billington*, 613 F.2d at 95; see also *Piretti v. Hyman*, No. 79-622-K, slip op. (D. Mass. July 23, 1979), *vacated as moot without opinion*, 618 F.2d 94 (1st Cir. 1980), 13 CLEARINGHOUSE REV. 399 (No. 27,377, Sept. 1979) (in a case regarding termination of tenant-based assistance, decision-maker not impartial when the attorney presenting the PHA's case also advised the hearing officer).

⁴⁰24 C.F.R. § 982.554(b)(1) (2007); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, § 4.9 and App. VIII (Applicant Notice of Rejection) (June 2003); HUD, VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE, 7420.10G, ¶ 16.5 (Apr. 2001) (voucher program); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ch. 4-9D (June 2007); see also *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180, 185 (6th Cir. 1984).

⁴¹*Id.*

⁴²See *Singleton*, 485 F. Supp. at 1024; see also *Billington*, 613 F.2d at 95; *Piretti*, No. 79-622-K (slip op.).

⁴³7 C.F.R. § 3560.160(g)(2) (2007) (rural development housing).

⁴⁴*Id.* § 3560.160(g)(3).

⁴⁵RD, MFH Asset Management Handbook, 2-3560, § 6.37(c) (2007), available at: <http://www.rurdev.usda.gov/regs/hblist.html>.

applicant must be given a written decision after the hearing.⁴⁶ The decision must be provided within a reasonable period of time, state the reasons for the determination and indicate the evidence relied upon.⁴⁷

For Rural Development housing, the decision is binding unless parties to the hearing are notified within ten days by USDA that the decision is not in compliance with the program regulations.⁴⁸ However, neither party is precluded from challenging the decision in court. Therefore the decision is binding, unless one party challenges the determination in court.

PHA hearing decisions can be challenged in court, and the reviewing court may defer to the PHA's or hearing officer's fact-finding, or may engage in a more exacting review.⁴⁹ Actions may be filed in state

or federal court seeking plenary (complete) review of the PHA's decision for compliance with federal requirements governing substantive grounds or procedural protections (subject to any applicable Section 1983 limitations). Review also may be sought under state statutes providing for judicial review of administrative decisions.⁵⁰

Due to the difficulty of establishing a cognizable cause of action, including issues related to whether an applicant has a property interest that is protected by due process, it is unclear as to what kind of court review an applicant for HUD-assisted housing (as contrasted with an applicant for public housing or the voucher program) may be entitled.⁵¹

In certain compelling situations, an applicant should consider appealing a hearing decision to the PHA Board of Commissioners or, for HUD-assisted

⁴⁶See, e.g., New York City Housing Authority, Division of Applicant Appeals, Public Housing Hearings, Report of Informal Hearing, August 6, 2007, No. 113-52-7732 copy available as Exhibit 3 of this Chapter (applicant with felony convictions found to have made significant positive changes and improved since the offenses).

⁴⁷24 C.F.R. §§ 882.514(f) (Section 8 Moderate Rehabilitation) and 982.552(b)(3) (voucher program) (2007); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 4.9 (public housing); HUD Handbook 4350.3, REV-1, CHG-2, ch. 4-9D (June 2007) (final decision must be given to applicant within five business days of meeting); *Jaimies*, 758 F.2d at 1086; *Neddo*, 335 F. Supp. at 1397; see also *Edgecomb*, 824 F. Supp. at 312 (in a termination of benefits case, hearing decision could not be based wholly on hearsay; hearing officer decision inadequate because no reasons given; participant entitled to cross-examine witness); *Powell v. D.C. Hous. Auth.*, 818 A.2d 188 (D.C. 2003) (reversing PHA's termination decision for alleged fraudulent underreporting of income because hearing officer failed to make findings with respect to each contested material allegation of fact as required by due process and applicable local Administrative Procedure Act (APA); see also *Hicks v. Dakota County Community Development Agency*, No. A06-1302, 2007 WL2416872 (Minn. App., Aug. 28, 2007) (the record must be sufficient to facilitate meaningful review and where there are no findings or credibility determinations, the court could not conduct a meaningful review); see, e.g., New York City Housing Authority, Division of Applicant Appeals, Public Housing Hearing, Report of Informal Hearing, August 6, 2007, No. 113-52-7732 (copy available as Exhibit 3 to this Chapter). For Rural Development housing, the notice must be served within ten days of the hearing. 7 C.F.R. § 3560.160(i)(2) (2007). As noted above, the decision also should not be based wholly upon uncorroborated hearsay.

⁴⁸7 C.F.R. § 3560.160(i)(5) (2007) (Rural Development housing).

⁴⁹*Campbell v. Minneapolis Pub. Hous. Auth.*, 168 F.3d 1069, 1076 (8th Cir. 1999) (reminding PHA that a determination in a denial case must be supported by appropriate findings based upon evidence in administrative record); *Billington v. Underwood*, No. 81-7978, 707 F.2d 522 (11th Cir. May 23, 1983) (reversing hearing officer decision as there was no reliable evidence produced to substantiate allegations); *Carter v. Olmsted County Hous. & Redev. Auth.*, 574 N.W.2d 725 (Minn. Ct. App. 1998) (invalidating hearing officer's decision regarding a termination due to insufficient findings and lack of substantial evidence for decision); cf. *Clark v. Alexander*, 85 F.3d 146 (4th Cir. 1996) (refusing to overturn factual findings of PHA in a termination case).

⁵⁰See, e.g., *Blatch v. Hernandez*, 360 F. Supp. 2d 595 (S.D.N.Y. 2005) (PHA's failure to inform hearing officers in termination proceedings and housing court in eviction proceedings of mental disabilities of unrepresented residents and to provide appropriate training regarding mental disabilities to hearing officers violated due process); *Sackett v. Hansen*, No. 04-682, 2005 WL 425307 (S.D. Iowa Feb. 10, 2005) (pursuant to 28 U.S.C.A. § 1447(c), remanding case to state court due to lack of federal jurisdiction over challenge to PHA's termination decision or possible ADA discrimination claim); *Vance*, 332 F. Supp. 2d at 832 (mentally disabled tenant challenged termination from Supportive Housing program based on procedural deficiencies; court preliminarily ordered reconsideration of reinstatement request and new hearing on termination); *Powell*, 818 A.2d at 196 (reversing PHA's termination decision for alleged fraudulent under reporting of income because hearing officer failed to make findings with respect to each contested material allegation of fact as required by due process and applicable local APA); *Cole v. Metro. Council HRA*, 686 N.W. 2d 334 (Minn. App. 2004) (although decision to terminate tenant upheld, court interpreted 24 C.F.R. § 982.555(e)(6) to require explanation of the evidence and its connection to conclusion).

⁵¹*Ressler v. Pierce*, 692 F.2d 1212, 1220 (9th Cir. 1982) (applicants for project-based Section 8 had a sufficient property interest to give rise to due process procedural safeguards); *Daubner v. Harris*, 514 F. Supp. 856, 869 (S.D.N.Y. 1981) (admission to Section 8 housing is subject to due process); cf. *Overton v. John Knox Ret. Tower, Inc.*, 720 F. Supp. 934 (N.D. Ala. 1989) (rejecting Section 202 applicant's substantive due process challenge by finding no property interest and no governmental action); *Hill v. Group Three Hous. Dev. Corp.*, 620 F. Supp. 355 (E.D. Mo. 1986), *aff'd*, 799 F.2d 385 (8th Cir. 1986) (applicants for Section 8 New Construction projects lack sufficient property interest for due process protections); *Germain v. Recht-Goldin-Siegel Props.*, 567 F. Supp. 384 (E.D. Wis. 1983), *aff'd sub nom. Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1984) (applicants for Section 8 New Construction projects lack sufficient property interest for due process protections). Cause of action includes the right/ability to state a claim and the right to bring the claim. It is not always possible, in every situation in which an individual is wronged, to state a claim that a court will recognize and to bring that claim in court with the court sustaining the right to bring the claim.

and Rural Development properties, to the owners of the development. For the respective programs, these are the entities or individuals who are ultimately responsible for the housing. The situation raised and relief sought should be compelling or involve a particularly arbitrary action, because these individuals or entities are generally not inclined to overturn a decision of their managers. An advocate could contact individuals on the PHA Board of Commissioners or address the complaint to the full Board. An advocate can find out the name of the Commissioners from the PHA, the internet, or possibly from HUD. Most Boards meet regularly and announce meeting times and agendas. Contacting the owners of federally assisted housing will be more difficult, but a title search may turn up contact information. In the case of Shelter Plus Care, Supportive Housing Program, Housing Opportunities for People with AIDS and Section 8 Single Room Occupancy housing, the owner is required to have one or more homeless or formerly homeless individuals on the board of directors or other similar policy making entity of the recipient or otherwise make arrangements to consult with such homeless or formerly homeless individuals.⁵² In individual cases, it may be helpful to contact these individuals for assistance.

Because the housing involved is federal housing, intervention by a congressional representative may also bring some pressure to obtain the relief sought. Congressional representatives have local offices that respond to constituent complaints. Bringing the facts of the case to the attention of the press may also create pressure for change in policy or an exception to a current policy. In each of these cases, any letter outlining the problem should also set forth the remedy sought.

⁵²See, e.g., 24 C.F.R. §§ 882.808q (Section 8 SRO) and 582.300(a) (S+C) (2007).

Chapter 5: Exhibit 1

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7978

JOHNNIE LEE BILLINGTON,

Plaintiff-Appellant,

versus

LEWIS C. UNDERWOOD, Individually
and as Executive Director of the
Housing Authority of the City of
Tifton, Ga., et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

(May 23, 1983)

Before FAY and CLARK, Circuit Judges, and MORGAN,
Senior Circuit Judge.

PER CURIAM:

This case is before our court for the second time. Because we find that the Housing Authority of the City of Tifton, Georgia (THA) produced no evidence substantiating its declaration of Billington's ineligibility, we reverse and remand.

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In April 1978, appellant Billington applied to THA for admission to federally subsidized low-rent public housing.¹ He was subsequently informed of his eligibility² and placement on the waiting list. Appellant alleges that he then made plans to relocate his residence. On June 1, 1978, however, THA informed appellant that he was no longer eligible for said housing. Billington, through his attorney, requested a hearing on his denial of eligibility, and on June 14, 1978 a meeting was held at the offices of THA's attorney. Upon being told that his denial of eligibility was final and receiving only general accusations of the reasons therefor, appellant filed suit in district court challenging, among other things, the housing authority's procedures for determining eligibility.

On June 12, 1979, the district court granted the housing authority's motion for judgment on the pleadings. This court reversed and remanded for a hearing pursuant to federal law and regulations. Billington v. Underwood, 613 F.2d 91 (5th Cir. 1980).³ An informal hearing was held at which plaintiff presented testimony, affidavits, and

¹The Housing Authority of the City of Tifton, Georgia is a federally subsidized, state chartered, locally administered corporate body established pursuant to Off. Code Ga. Ann. sec. 8-3-1 et seq. (1982).

²Record Vol. 2, p. 79.

³The court specifically declined to address the constitutional issues, finding the hearing to be required under Federal Regulation 24 C.F.R. sec. 860.207(a) (1979) and 42 U.S.C. sec. 1401 et seq. (1970). Billington v. Underwood, 613 F.2d at 93.

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documents rebutting the bases listed as reasons for his ineligibility. The housing authority presented only one witness and two pieces of documentary evidence.

The hearing officer denied appellant relief. Mr. Billington then filed an amended complaint in the district court seeking legal and equitable relief under the Civil Rights Act of 1871, 42 U.S.C. sec. 1983, and the due process clause of the fourteenth amendment. On November 10, 1981, the district court denied relief to appellant and granted summary judgment to defendants based on a finding of deference to the housing authority in determining eligibility requirements. This timely appeal followed.

The hearing mandated by this court in Billington v. Underwood, 613 F.2d 91 (5th Cir. 1980), although informal in that it need not conform to the strictures of a trial, was a prescription to conduct a meaningful proceeding. Id. at 95. Appellant concedes that the hearing in the instant case complied in form with the required proceeding⁴ but maintains that the hearing was not meaningful in that the decision rendered was not supported by the evidence. He asserts that "substantial" evidence is

⁴In remanding the case for informal hearing, we advised that the proceeding "need not conform to the rigors of formal evidentiary rules, need not afford cross examination, need not be transcribed, and need not issue in a formal written decision of the hearing officer's findings of fact and conclusions of law." Billington v. Underwood, 613 F.2d at 95. Mr. Billington was, in fact, represented at the hearing by an attorney and allowed to cross-examine witnesses. The hearing was transcribed and the hearing officer rendered a written decision.

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the yardstick to be used by a reviewing court. Appellees maintain, and the district court found, that substantial evidence existed to support the hearing officer's finding. Appellees also argue that, assuming the evidence is not substantial, only some evidence is required to sustain an agency finding pursuant to an informal hearing. The issue in this case, thus, concerns the standard of review to be used by a court in reviewing an administrative agency decision.

Courts and commentators have written extensively on the subject of judicial review of informal action by agencies. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Dunlop v. Bachowski, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975); K. Davis, Administrative Law Treatise sec. 29.01-6 (Supp. 1982). The controversy has traditionally centered around whether a reviewing court must defer to the agency whenever there is "some" evidence to support the latter's finding or only when "substantial" evidence exists on the record.⁵ Frequently, however, the various standards of review are merged into a single standard. In South Georgia Natural Gas Company v. Federal Energy Regulatory Commission, 699 F.2d 1088 (11th Cir. 1983), this court reviewed an agency interpretation of its regulation to determine whether the interpretation was reasonable,

⁵Informal hearings often do not have what is commonly thought of as a record. However, in this case, a record in the traditional sense is available.

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arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Id. at 1090. Likewise, in Home Health Services of the United States v. Schweiker, 683 F.2d 353 (11th Cir. 1982), we stated, "The scope of review of agency actions is limited to a determination of whether the Board's findings are arbitrary, capricious, an abuse of discretion, not in accordance with the law or unsupported by substantial evidence in the record as a whole." Id. at 356. See K. Davis, Administrative Law Treatise sec. 29.01-6 (Supp. 1982).

Upon reviewing the record in this case, we find no evidence to support the decision reached. As noted above, the housing authority presented only one witness, the Assistant Executive Director of THA. The witness testified that Mr. Billington had been found eligible for public housing and so informed. Record Vol. 2, pp. 78-79. The witness testified further that although Mr. Billington visited the office approximately once per week for over six weeks, he was never asked to submit further information regarding his application. Record Vol. 2, pp. 78-79. She also stated that she possessed no knowledge of a regulation requiring that she keep a file on applicants verifying their status with the housing authority. Record Vol. 2, pp. 81-82. Thus, the only documentary evidence presented by THA consisted of two statements dated after the decision of ineligibility, both of which were later repudiated by the authors.

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The purpose of an informal hearing is accurate fact-finding. Billington v. Underwood, 613 F.2d at 95. While acknowledging the discretion necessarily granted administrative agencies and their directors, we equate the mandate calling for a "meaningful" hearing with one requiring a "fair" proceeding. We conclude that such adjectives are conspicuously absent from a hearing at which supporting evidence is altogether lacking.⁶ The agency action in this case thus fails under each and every standard of review. The case is remanded for entry of judgment for the plaintiff.

REVERSED AND REMANDED.

⁶We note also the results of an investigation by the Chief Administrative Law Judge of the Department of Housing and Urban Development into the Housing Authority of the City of Tifton, Georgia. The decision, issued August 17, 1981, stated that THA was in noncompliance with both its own and HUD's regulations and in violation of Title VII. The evidence set out in the report indicates an arbitrary and discriminatory selection of tenants. In the Matter of: the Housing Authority of the City of Tifton, Georgia, Department of Housing and Urban Development Administrative Decision, Docket No. 80-1981.

Chapter 5: Exhibit 2

RECEIVED

U. S. DISTRICT COURT
CLERK'S OFFICE
BY [Redacted] Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

By [Redacted]

Plaintiffs

v.

HOUSING AUTHORITY OF THE CITY
OF AUSTIN, and HYACINTH ONYEKANNE
in his official capacity as
Director of Housing Management and
Admissions for the Housing
Authority of the City of Austin,
Defendants

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CIVIL ACTION NO.

[Redacted]

PLAINTIFFS' FIRST AMENDED COMPLAINT

PRELIMINARY STATEMENT

1.

Plaintiffs were each denied a public housing apartment by the Housing Authority of the City of Austin ("the Housing Authority") in accordance with its policy of automatically denying the application of every person whose criminal history record shows any incident -- even if only an arrest -- within ten years of their application. Plaintiffs [Redacted] were denied on the basis of a single arrest on which no criminal charges were filed. Plaintiff [Redacted] was denied on the basis of a single non-violent, non drug-related incident for which she received deferred adjudication.

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2.

The Housing Authority failed to comply with the Constitution of the United States, federal law and the Texas Constitution (1) in denying Plaintiffs [REDACTED] housing solely on the basis of their arrests; (2) in denying Plaintiff [REDACTED] on the basis of one isolated deferred adjudication for filing a false police report; (3) in failing to consider the time, nature and extent of Plaintiffs' conduct and Plaintiffs' rehabilitative and other favorable evidence; and (4) in failing to give notice to Plaintiffs of their right to present evidence of rehabilitation and other favorable evidence at their appeal hearing.

JURISDICTION

3.

This court has jurisdiction under 28 U.S.C. Section 1331 because this case raises issues under federal law and the United States Constitution. The court has supplemental jurisdiction of the Texas Constitution claims under 28 U.S.C. Section 1367.

PLAINTIFFS

4.

Plaintiffs are all adult residents of Travis County, Texas. They each meet the income eligibility standards for admission to the conventional public housing program.

DEFENDANTS

5.

Defendant Housing Authority of the City of Austin is a federally subsidized, state-chartered, locally established and

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administered public body situated in Austin, Texas. Its actions and those of its employees are under color of law.

6.

Defendant Hyacinth Onyekanne is sued in his official capacity as Director of Housing Management and Admissions for the Housing Authority of the City of Austin. His actions complained of here were taken under color of law.

FACTUAL BACKGROUND

7.

The United States Housing Act of 1937 established the low rent public housing program for the purpose of remedying the acute shortage of decent, safe, and sanitary dwellings for families of low income. Pursuant to this program, the Housing Authority of the City of Austin was established to construct and administer low rent public housing in Austin. To ensure the program is administered in a fair and even-handed manner, Congress has required that the Secretary of the United States Department of Housing and Urban Development promulgate regulations governing the admissions policies of public housing bodies. These regulations set out binding criteria that housing authorities are to follow in selecting and rejecting applicants for public housing.

8.

The Housing Authority follows an "arrest-only" denial policy in the selection of its tenants. Pursuant to its written policies, the Housing Authority will deny an applicant admission

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into the Housing Authority's housing program on the sole basis that the applicant has been arrested, without considering whether the applicant did indeed commit any crime, or the time, nature and extent of the conduct. Moreover, in the event unfavorable information is received on an applicant, the Housing Authority does not consider the time, nature and extent of the applicant's conduct or other factors which might indicate a reasonable probability of favorable future conduct unless the applicant's alleged unfavorable conduct occurred more than ten years prior to the date of the application.

Facts as to Plaintiff [REDACTED]

9.

In January 1995, Plaintiff [REDACTED] applied for public housing with the Housing Authority of the City of Austin. Pursuant to the Housing Authority's admissions requirements, Plaintiff [REDACTED] later submitted a criminal history report issued by the Texas Department of Public Safety. Plaintiff [REDACTED] criminal report with the Texas Department of Public Safety states that he was arrested for burglary of a habitation in 1991. The report also states that no charges were filed for this incident. There are no other criminal incidents listed in Plaintiff [REDACTED] report. Plaintiff [REDACTED] denies having ever been involved in a burglary of a habitation.

10.

Pursuant to the Housing Authority's policy to deny housing to any applicant who has been arrested within the past ten years

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for certain types of criminal activity, the Housing Authority rejected Plaintiff [REDACTED] application for public housing. On January 9, 1996, the Housing Authority sent Plaintiff [REDACTED] a notice of rejection stating that his application had been rejected. The sole stated reason for denial was for a "burglary of habitation." In the notice, the Housing Authority stated that Plaintiff [REDACTED] had a right within ten calendar days from the date of the letter to request an informal review of the Housing Authority's denial of his application.

11.

Plaintiff [REDACTED] requested an informal review with the Housing Authority. On January 29, 1996, the Housing Authority sent Plaintiff [REDACTED] notice of the informal review hearing. The notice stated that at the hearing he had the following rights:

Please be advised that at this hearing you shall have the right to be represented by counsel and present evidence and arguments in support of your defense or rebutting the grounds for rejection. You have a right, upon written request to review your application file in advance of the hearing.

Plaintiff [REDACTED] was not given notice of his right to present evidence at the hearing relating to the time, nature, and extent of his conduct. Plaintiff [REDACTED] was not given notice of his right to present evidence which might indicate a reasonable probability of favorable future conduct, including rehabilitation evidence.

12.

On February 13, 1996, Plaintiff [REDACTED] attended an

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informal hearing at the Housing Authority. The hearing officer for this hearing was Hyacinth Onyekanne, Director of Housing Management and Admissions for the Housing Authority. Plaintiff [REDACTED] was not represented by counsel. The only evidence relied upon by the Housing Authority for evidence of burglary of habitation was Plaintiff [REDACTED] Texas Department of Public Safety criminal history report, which stated that he had been arrested for burglary of habitation but that no charges were filed. Plaintiff [REDACTED] explained to the hearing officer that he had not been involved in a burglary and that burglary charges were not filed against him. Defendant Onyekanne did not consider the time, nature and extent of the conduct, rehabilitation evidence, or other evidence which might indicate a reasonable probability of favorable future conduct. Defendant Onyekanne acted in accordance with the Housing Authority's policy of considering such evidence only when the denial of an application is for an incident occurring more than ten years prior to the date of the application.

13.

On February 19, 1996, Defendant Onyekanne wrote Plaintiff [REDACTED] notifying him that he had decided to uphold the decision of the Housing Authority. Defendant Onyekanne stated that his decision was based on the fact that "DPS records show that you were involved in Burglary of a Habitation."

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Facts as to Plaintiff [REDACTED]

14.

In August 1994, Plaintiff [REDACTED] applied for public housing with the Housing Authority of the City of Austin. When the Housing Authority reached Plaintiff [REDACTED] on the waiting list, it requested, and Plaintiff [REDACTED] submitted, a criminal history report issued by the Texas Department of Public Safety. Plaintiff [REDACTED] criminal report with the Texas Department of Public Safety states that Plaintiff [REDACTED] was arrested for unlawfully carrying a weapon in 1989. The report also shows that no charges were filed for this incident. There are no other criminal incidents listed in Plaintiff [REDACTED] report. Plaintiff [REDACTED] denies having ever carried a weapon unlawfully.

15.

Pursuant to the Housing Authority's policy to deny housing to any applicant who has been arrested within the past ten years for certain types of alleged criminal activity, the Housing Authority rejected Plaintiff [REDACTED] application for public housing. On February 20, 1996, the Housing Authority sent Plaintiff [REDACTED] a notice of rejection stating that her application had been rejected. The sole stated reason for denial was "Carrying Prohibited: unlawful carrying weapon Arrest Date 4-9-89." In the notice, the Housing Authority stated that Plaintiff [REDACTED] had the right, within ten calendar days from the date of the letter, to request an informal review of the Housing Authority's denial of her application.

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15.

Plaintiff [REDACTED] requested an informal review with the Housing Authority. On February 29, 1996, the Housing Authority sent Plaintiff [REDACTED] notice of the informal review hearing. The notice stated that at the hearing she had the following rights:

Please be advised that at this hearing you shall have the right to be represented by counsel and present evidence and arguments in support of your defense or rebutting the grounds for rejection. You have a right, upon written request to review your application file in advance of the hearing.

Plaintiff [REDACTED] was not given notice regarding her right to present evidence at the hearing relating to the time, nature, and extent of her conduct and to other factors which might indicate a reasonable probability of favorable future conduct, including rehabilitation evidence.

17.

On March 12, 1996, Plaintiff [REDACTED] attended an informal hearing at the Housing Authority. The hearing officer for this hearing was Hyacinth Onyekanne, Director of Housing Management and Admissions for the Housing Authority. Plaintiff [REDACTED] was not represented by counsel. The only evidence relied upon by the Housing Authority for evidence of unlawfully carrying a weapon was Plaintiff [REDACTED] Texas Department of Public Safety criminal history report, which stated that she had been arrested for unlawfully carrying a weapon but showed that no charges were filed. Plaintiff [REDACTED] explained to the hearing officer that she had been arrested with several others when a gun was found in her father's car, but that the gun neither belonged to her nor

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did she know to whom it belonged. She was taken to jail -- apparently for having no driver's license and no insurance. She was subsequently released. Charges were not filed against her for unlawfully carrying a weapon.

18.

Defendant Onyekanne gave no consideration to the fact that this was a single isolated incident occurring seven years ago or any other favorable information. He also did not consider rehabilitation evidence or other evidence which might indicate a reasonable probability of favorable future conduct because of the Housing Authority's policy of considering such evidence only when the denial of an application is for an incident occurring more than ten years prior to the date of the application.

19.

On March 18, 1996, Defendant Onyekanne wrote Plaintiff [REDACTED] notifying her that he had decided to uphold the decision of the Housing Authority. Defendant Onyekanne wrote that his decision was based on the fact that "DPS records show that you were involved in Unlawful Carrying Weapon in 1989."

Facts as to Plaintiff [REDACTED]

20.

In December 1994, Plaintiff [REDACTED] applied for public housing with the Housing Authority of the City of Austin. Pursuant to the Housing Authority's admissions requirements, Plaintiff [REDACTED] later submitted a criminal history report issued by the Texas Department of Public Safety. Plaintiff [REDACTED] criminal report

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with the Texas Department of Public Safety states that Plaintiff [REDACTED] was arrested for resisting an officer by giving a false report to a police officer in 1991 and that she was convicted in 1993. But for an administrative error, the criminal report would have reflected that adjudication of Plaintiff [REDACTED] guilt was deferred by a judge and then charges were dismissed after a period of probation. Plaintiff [REDACTED] was in fact never convicted of the misdemeanor, but rather pled "nolo contendere" upon the advice of a court-appointed attorney who advised her that contesting the charge would cost her \$500 and that if she pleaded no contest and completed probation, no charge would appear in her record. There are no other criminal incidents listed in Plaintiff [REDACTED] report. Plaintiff [REDACTED] denies having ever given a false report to a police officer.

21.

Pursuant to the Housing Authority's practice of denying housing to any applicant who has any criminal record, the Housing Authority rejected Plaintiff [REDACTED] application for public housing. On February 23, 1996, the Housing Authority sent Plaintiff [REDACTED] a notice of rejection stating that her application had been rejected. The sole stated reason for denial was for "resisting officer." In the notice, the Housing Authority stated that Plaintiff [REDACTED] had a right within ten calendar days from the date of the letter to request an informal review of the Housing Authority's denial of her application.

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22.

Plaintiff ██████ requested an informal review with the Housing Authority. On March 14, 1996, the Housing Authority sent Plaintiff ██████ notice of the informal review hearing. The notice stated that at the hearing she had the following rights:

Please be advised that at this hearing you shall have the right to be represented by counsel and present evidence and arguments in support of your defense or rebutting the grounds for rejection. You have a right, upon written request to review your application file in advance of the hearing.

Plaintiff ██████ was not given notice regarding her right to present evidence at the hearing relating to the time, nature, and extent of her conduct and evidence on other factors which might indicate a reasonable probability of favorable future conduct, including rehabilitation evidence.

23.

On March 25, 1996, Plaintiff ██████ attended an informal hearing at the Housing Authority. The hearing officer for this hearing was Hyacinth Onyekanne, Director of Housing Management and Admissions for the Housing Authority. Plaintiff ██████ was represented by a paralegal from Legal Aid. The only evidence relied upon by the Housing Authority for "resisting an officer by giving a false report to a police officer" was Plaintiff ██████'s Texas Department of Public Safety criminal history report, which stated that she had been arrested for resisting an officer. The report also erroneously stated that she had been convicted.

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24.

At the hearing Plaintiff █████ explained to Defendant Onyekanne that she had never resisted an officer by filing a false report. She explained that she filed a police report when a missing child support payment had become over twenty days late. Ms. █████ told Defendant Onyekanne how she then followed the instructions of the Domestic Relations Office and the Austin Police Department as to how she should proceed when several child support checks arrived at once. She further explained that she had been certain that there was some mix-up when she was informed that a warrant had been issued for her arrest because she had cashed the missing check. She told Defendant Onyekanne that she had gone to the police station where she was arrested and charged with filing a false police report. Ms. █████ explained that upon the advice of a court-appointed attorney, she pled "nolo contendere" to the charge, received a deferred adjudication, and completed probation with the expectation that the charge would be dismissed and not appear on her record.

25.

Although Ms. █████ and her Legal Aid advocate presented Defendant Onyekanne with court documents, he did not consider the fact that a court had released Ms. █████ from all penalties and disabilities as a result of the misdemeanor charge. Defendant Onyekanne did not consider the type of crime that Ms. █████ allegedly committed or the relevance of the crime to her potential as a good tenant. Finally, Defendant Onyekanne did not

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consider any rehabilitation evidence or other evidence which might indicate a reasonable probability of favorable future conduct because of the Housing Authority's policy of considering such evidence only when the denial of an application is for an incident occurring more than ten years prior to the date of the application.

26.

On April 4, 1996, Defendant Onyekanne wrote Plaintiff [REDACTED] notifying her that he had decided to uphold the decision of the Housing Authority. He stated that his decision was based on the fact that "the evidence establishes that you were involved in resisting an officer in 1991 and convicted in 1993."

FIRST CAUSE OF ACTION: ARREST-ONLY DENIAL POLICY
VIOLATES HUD'S REGULATIONS GOVERNING
ADMISSIONS CRITERIA

27.

The Department of Housing and Urban Development regulation governing the criteria to be used in selecting and rejecting applicants for public housing states, in pertinent part:

- (a) The tenant selection criteria to be established and information to be considered shall be reasonably related to individual attributes and behavior of an applicant
- (b) The criteria to be established in relation to avoiding concentration of families with serious social problems in PHA projects and information to be considered shall be reasonably related to whether the conduct of the applicant in present or prior housing has been such as would not be likely to interfere with other tenants in such a manner as to diminish their enjoyment of the premises by adversely affecting their health, safety or welfare or to affect adversely the physical environment or the financial stability of the project if the applicant were admitted to the project.

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24 C.F.R. § 960.205 (1995). The Housing Authority's "arrest-only" denial policy--its policy of rejecting applicants solely on the basis of a prior arrest--is in violation of this regulation because it is not reasonably related to the above criteria and because it fails to consider the individual attributes and behavior of applicants. Defendants' actions in denying Plaintiffs under this policy give rise to a cause of action directly under the regulation and under 42 U.S.C. § 1983 for declaratory and injunctive relief, damages, and attorney's fees.

SECOND CAUSE OF ACTION: FAILURE TO GIVE NOTICE
OF THE RIGHT TO PRESENT REHABILITATIVE AND OTHER
FAVORABLE EVIDENCE DENIED PLAINTIFFS THEIR
RIGHT TO PROCEDURAL DUE PROCESS OF LAW

28.

Plaintiffs are entitled under the Fourteenth Amendment of the United State Constitution to procedural due process of law. Defendants violated Plaintiffs' due process rights in denying Plaintiffs' applications for public housing without giving them written notice of their right to present evidence in an informal hearing relating to the time, nature, and extent of the conduct, in addition to other factors which might indicate a reasonable probability of favorable future conduct -- including the right to present evidence of rehabilitation. The Housing Authority's actions give rise to a cause of action under 42 U.S.C. § 1983 for declaratory and injunctive relief, damages, and attorney's fees.

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THIRD CAUSE OF ACTION: ARREST-ONLY DENIAL POLICY DENIED
PLAINTIFFS THEIR RIGHT TO SUBSTANTIVE DUE
PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

29.

Plaintiffs are entitled under the Fourteenth Amendment of the United States Constitution to substantive due process of law and equal protection of the laws. Defendants' decisions to deny the applications of Plaintiffs [REDACTED] and [REDACTED] solely on the basis that their Texas Department of Public Safety reports show they were once arrested and to deny the application of Plaintiff [REDACTED] solely on the basis that she received deferred adjudication for a non-violent, non-drug-related offense is arbitrary and capricious, shocks judicial notions of fairness, and is not rationally related to the right to protect the health, safety, and welfare of other tenants. Defendants' actions give rise to a cause of action under 42 U.S.C. § 1983 for declaratory and injunctive relief, damages, and attorney's fees.

FOURTH CAUSE OF ACTION: VIOLATION OF HUD'S
REGULATIONS GOVERNING ADMISSIONS CRITERIA
BY FAILING TO CONSIDER REHABILITATION
EVIDENCE AND OTHER FAVORABLE EVIDENCE

30.

The pertinent HUD regulations governing the admissions process for public housing state, in pertinent part:

In the event of the receipt of unfavorable information with respect to an applicant, consideration shall be given 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. For example:

- (1) Evidence of rehabilitation;

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(2) 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;

(3) Evidence of the applicant family's willingness to attempt to increase family income and the availability of training or employment programs in the locality.

24 C.F.R. § 960.205(d) (1995). The Housing Authority considers the above favorable information only when an applicant's alleged unfavorable conduct occurred more than ten years prior to the date of application. The Housing Authority's policy of refusing to consider favorable information in the original consideration of Plaintiffs' applications and at the informal review hearing is in violation of the above regulation. Defendants' actions give rise to a cause of action directly under the regulation and under 42 U.S.C. § 1983 for declaratory and injunctive relief, damages, and attorney's fees.

FIFTH CAUSE OF ACTION: ARREST ONLY DENIAL POLICY VIOLATES THE FAIR HOUSING ACT

31.

The Housing Authority's "arrest only" denial policy--its policy of denying housing solely on the basis that an applicant has been arrested within the past ten years--has a discriminatory impact on classes of minority applicants, of which all three Plaintiffs are members, and is not reasonably related to the Housing Authority's legitimate mission of providing safe and affordable housing. Defendants' actions give rise to a cause of action under 42 U.S.C. §§ 3604 and 3613 and 42 U.S.C. §1983 for

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declaratory and injunctive relief, damages, and attorney's fees.

SIXTH CAUSE OF ACTION: ARREST-ONLY DENIAL POLICY AND FAILURE TO GIVE NOTICE OF THE RIGHT TO PRESENT FAVORABLE EVIDENCE VIOLATED PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE TEXAS CONSTITUTION

32.

Plaintiffs are entitled under Article 1, § 19 of the Texas Constitution to procedural and substantive due course of law. Plaintiffs are entitled under Article I, §3 of the Texas Constitution to equal protection of the laws. Defendants' "arrest-only" denial policy violated Plaintiffs' right to due course of the law and equal protection of the law. Defendants also violated Plaintiffs' due process rights in denying their applications for public housing without giving them written notice of their right to present evidence at the informal hearing relating to the time, nature, and extent of their conduct, in addition to other factors which might indicate a reasonable probability of favorable future conduct -- including the right to present evidence of rehabilitation. The Housing Authority's actions give rise under Sections 65.011, 37.003, and 37.009 of the Texas Civil Practices & Remedies Code to a cause of action for declaratory and injunctive relief and attorney's fees.

DAMAGES

33.

Plaintiffs seek to recover their actual damages resulting from the illegal denial of their applications for public housing.

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REQUEST FOR RELIEF

34.

Plaintiffs request that this court:

- (a) Enter a declaratory judgment that Defendants violated Plaintiffs' rights under federal law, the United States Constitution, and the Texas Constitution;
- (b) Enter a declaratory judgment that Defendants' tenant selection policies on their face and as applied, violate the United States Constitution, federal law and the Texas Constitution;
- (c) Grant appropriate injunctive relief ordering Defendants to revise their tenant selection policies and procedures so as to bring them into compliance with the United States Constitution, the Texas Constitution and federal law;
- (d) Grant Plaintiffs an injunction ordering Defendants to reinstate Plaintiffs' applications effective the date they originally applied; to process Plaintiffs' applications in accordance with the law; and to offer Plaintiffs the next available appropriate apartment;
- (e) Award Plaintiffs their actual damages, including damages for emotional distress;
- (f) Award Plaintiffs their reasonable attorneys' fees, to the extent allowed by law, pursuant to 42 U.S.C. §1988, 42 U.S.C. § 3613(c)(2), and Texas Civil Practices & Remedies Code §37.009.

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- (g) Assess costs against Defendants; and
- (h) Grant Plaintiffs such other and further relief as the court deems proper and just.

Respectfully submitted,

LEGAL AID OF CENTRAL TEXAS
 205 W. 9th Street, Suite 200
 Austin, Texas 78701
 Phone: 512/476-7244, ext. 311
 Telefax: 512/476-3940

BY: Fred Fuchs
 FRED FUCHS
 State Bar No. 07498000
 ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' First Amended Complaint has been hand delivered to Ms. Iris J. Jones, 2610 Nations Bank Tower, 515 Congress Avenue, Austin, Texas 78701, and to Ms. Brenda Jo Cox, 1640 E. 2nd Street, Austin, Texas 78702, attorneys for Defendants, on this 1st day of July, 1996.

Fred Fuchs
 FRED FUCHS

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NEW YORK CITY
HOUSING
AUTHORITY

TINO HERNANDEZ
CHAIRMAN
EARL ANDREWS, JR.
VICE-CHAIRMAN
MARGARITA LOPEZ
MEMBER
VILMA HUERTAS
SECRETARY
DOUGLAS APPLE
GENERAL MANAGER

NEW YORK CITY HOUSING AUTHORITY
250 BROADWAY • NEW YORK, NY 10007

TEL: (212) 306-3000 • <http://nyc.gov/nycha>

Attn: Jacques David
Received 9/1/07

DIVISION OF APPLICANT APPEALS

PUBLIC HOUSING HEARINGS

Report of Informal Hearing Held August 6, 2007

The Application Of:

[REDACTED]
1415 St. John's Place #4
Brooklyn, NY 11213

Application # [REDACTED]

Present At The Hearing:

Barry Carey - Hearing Officer
Michael Sills - Housing Authority Presenting Official
Thaddeus Kwasnick - Housing Authority Attorney
[REDACTED] - Applicant / Appellant
Jacques David - Applicant's / Appellant's Attorney

Chapter 5: Exhibit 3Housing Authority Presentation:

The Housing Authority Presenter reported the appellant was found ineligible for Public Housing on 10/27/06 for Failure to Meet the Standards for Admission.

The Basis for Ineligibility indicates the following:

The Authority has adopted Standards to exclude persons who have been convicted of Violent Felonies, Possession, Use or Sale of Controlled Substances, or Alcohol Related Offenses.

Our investigation reveals that Mr. [REDACTED] (applicant) was convicted of the following offenses:

1. Code 125.25 A Felony, Murder in the 2nd degree, sentenced 5/4/78, sentence imposed = imprisonment 15 years - life.
2. Code 110-220.39 C Felony, Attempted Criminal Sale of a Controlled Substance in the 3rd degree, sentenced 3/6/95, sentence imposed = imprisonment 4 years - 8 years.

Based on the above information, you do not meet the New York City Housing Authority's Standards for Admission. You are ineligible until 5/4/2009.

Mr. Sills reported that the applicant was interviewed on 8/09/06. Mr. Sills reported that the applicant was asked the Standards for Admissions Question; "Has Applicant or family member been convicted of any offense?" The applicant responded, "Yes." Mr. Sills reported that the case entry indicates [REDACTED] born 10/17/60, was convicted 12/76 and released in 1991. He was placed on parole for life. Because of good behavior he was released from parole after 3 years. Applicant was arrested in 1994 for attempted sale of a controlled substance. He was convicted in 1995, and he was released in 2000. Mr. Sills reported that the applicant was asked the Standards for Admissions Question; "Is applicant or family member currently facing prosecution for any offense?" The applicant answered, "No."

Mr. Sills reported that Housing did a criminal background check on 9/15/06 obtaining the information indicated in the Basis of Ineligibility. [REDACTED] was arrested 12/22/76 and 5/20/94.

Mr. Sills reported the applicant submitted the following:

1. An employer's form dated 8/1/06 from Little Lads Café Bakery. It indicates [REDACTED] began employment on 3/22/06. He works as a chef.
2. Pay stubs for [REDACTED] for various check dates from 5/20/06 to 7/07/06.
3. A State of New York Executive Department Division of Parole Final Discharge dated November 20, 2003. It certifies that [REDACTED]

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has been discharged from further jurisdiction of the Board of Parole in accordance with the provisions of law.

4. A certificate from Universal Life Church. It certifies that [REDACTED] [REDACTED] has been awarded a Doctor of Metaphysics Degree on November 3, 1997 by Universal Life Church for meritorious recognition upon completion of a course of instruction in the principles of the Universal Life Church.
5. A Minister License presented to [REDACTED] on October 9, 2005 by the Church of God In Christ.
6. A certificate from Universal Life Church. It certifies that [REDACTED] [REDACTED] has been ordained minister on November 7, 1995 by Universal Life Church.
7. A Certificate of Completion. It certifies that [REDACTED] [REDACTED] [REDACTED] has successfully completed Family Dynamics a division of SCO Family of Service 20 Weeks Parents' Support Workshop Series granted the 25th of May 2005.
8. A letter dated January 23, 2007 from Jacques L. David, Esq., The Legal Aid Society. The letter states in parts, "In support of his application, Mr. [REDACTED] presented documentary proof of his good character and adduced other evidence of his rehabilitation since the offense which served as the basis for NYCHA's determination. At the interview, Mr. [REDACTED] noted that he had enrolled in the University of the State of New York Restaurant School from June 2000 to February 2001. As a student he pursued courses in culinary arts and restaurant management and graduated with a certificate in Pastry Arts. Since that time, Mr. [REDACTED] has worked as a pastry chef at Little Lad's Basket, a Seventh-Day Adventist cafe' and bakery in lower Manhattan. Mr. [REDACTED] matriculation in culinary school and his present employment attest to the fact that he has become productive member of his community. In addition to the support of his immediate family, Mr. [REDACTED] has also been embraced by his church community. Mr. [REDACTED] is an active member of the Open Door Church of God in Christ, were he serves as a minister."

Mr. Sills reported that an entry in the case on 01/26/07 indicates the applicant was in the Applications Information Office. The Basis of Ineligibility was explained to him. The entry indicates the applicant submitted a fair hearing form.

Mr. Sills reported that an entry in the case on 02/02/07 indicates the case was approved for a hearing by a supervisor.

Hearing Presentation:

Appellant indicated he resides at 1415 St. John's Place #4 Brooklyn, NY 11213. This is his mailing address. Appellant stated he is applying for Public Housing for himself and his 6 year old daughter, [REDACTED] Appellant indicated he is

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employed. Appellant indicated he works full-time at Little Lad's Cafe' as a manager and head chef. Appellant indicated there is no other income in the household.

Appellant indicated he was arrested 12/22/76 when a man was robbed. The man fell down and fractured his hip. Appellant indicated the man died as he was signing out of the hospital. Appellant indicated he was a witness. Appellant indicated he refused to testify. Appellant indicated he was charged as an accessory to murder, and he was convicted at trial. Appellant indicated he was released in 1991. Appellant indicated he got married, and his wife started to use drugs. Appellant indicated she sold narcotics to the police. Appellant indicated they found out he was her husband and on parole. Appellant indicated he took a plea bargain. Appellant indicated he was released in May of 2000. Appellant indicated he was discharged from parole on 11/20/2003.

Appellant indicated he attended New York Restaurant School from 6/2000 to 2/2001, when he graduated. Appellant indicated he attended the Help Desk Specialist Program and graduated April 02, 2004. Appellant indicated it was a 6 months to a year program. Appellant indicated he has worked with children and as a head cook at Ft. Greene Senior Center since his release from prison. Appellant indicated he takes his daughter to church, and his whole focus is living right. Appellant indicated he taught children music at the daycare center. Appellant did not verify his work at Ft. Greene Sr. Center.

Appellant indicated he has not had any other arrests, pending charges or convictions since his offense of 1994.

Blanche M. Centeno, Program Director of General Prevention Services Family Dynamics, spoke on appellant's behalf. She indicated she has been working with [REDACTED] since 2004. Ms. Centeno stated appellant is an exceptional father. He insures that his daughter is in school, and he participates in family counseling. Ms. Centeno indicated appellant has rehabilitated himself, and he is an exemplary client. Ms. Centeno indicated [REDACTED] is a voluntary case.

Vincent Haynes, from State Senator Eric L. Adams' office, spoke on [REDACTED] behalf. Mr. Haynes indicated he was a counselor for Family Dynamics, and he serviced [REDACTED] and his daughter beginning in 2004. Mr. Haynes indicated [REDACTED] was cooperative and reserved, and he looked for ways to improve himself. Mr. Haynes indicated appellant pursued training in the culinary arts, and appellant was a volunteer at a daycare center for a year before he was brought on payroll. Mr. Haynes indicated [REDACTED] is a minister at Church of God in Christ, and Mr. [REDACTED] poses no threat to anyone or anything.

The case is left open until August 15, 2007. Appellant will submit additional documentation.

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Appellant submitted the following:

1. A letter dated August 14, 2007 from Little Lad's. The letter states in parts, "[REDACTED] has been employed by Little Lad's at the 120 Broadway New York, NY location since March 20th, 2006. His hourly rate of pay is \$12.00 per hour. Normally he works 40 hours each week and receives \$480.00 gross pay. He is still employed as of this date." The letter is signed by Maria Fleming, co-owner.
2. A pay stub for [REDACTED] dated 08/03/07. It indicates gross pay of \$480.00.
3. A Certificate of Graduation granted to [REDACTED] on March 23, 2002 by University of the State of New York, New York Restaurant School.
4. [REDACTED] Official Transcript the New York Restaurant School. It indicates [REDACTED] attended from the Summer Session 2000 through the fall 2001.
5. A letter dated October 23, 2003 from computer Career Center. It indicates [REDACTED] enrolled in Help Desk specialist on 05/30/03.
6. A diploma issued to [REDACTED] on April 02, 2004 by Computer Career Center for completing the requirements for graduation from the Help Desk specialist Program.
7. [REDACTED] Official Transcript the Computer Career Center. It indicates [REDACTED] attended from 7/07/03 to 3/20/04.
8. A letter dated August 6, 2007 from Reach For The Stars Child Development Inc. It states in parts, "[REDACTED] has been a parent at Reach For The Stars Child Development Inc. since August 2001. He is a supportive parent as well as an active participant in the development of the children at RFTS. Mr. [REDACTED] has taught our after school children to read and play music. This has helped the children a lot as this is a talent that most children in this day no longer have access to. He worked with the after school children for about a year as a volunteer and as a staff member starting March of 2004. Due to financial obligations Mr. [REDACTED] resigned from RFTS because of a higher paying job." The letter is signed by Jacqueline Europe, Director.
9. A Security Guard Training Certificate presented to [REDACTED] on November 1, 2000. [REDACTED] has successfully completed the Eight Hour Pre-Assignment Course For Security Guards conducted by Security Works Inc.
10. A Security Guard Training Certificate presented to [REDACTED] on November 30, 2000. [REDACTED] has successfully completed the Sixteen Hour On The Job Training Course For Security Guards conducted by Quikstart Training & Placement Centers.
11. A Certificate of Completion presented to [REDACTED] on November 30, 2000 by Quikstart Placement Center, Inc. [REDACTED] has successfully completed the New York City Fire Guard Preparation Course.
12. A Certificate issued to [REDACTED] by NYC Fire Dept 04/19/2005.
13. A Petition for Custody filed by [REDACTED] January 22, 2001. [REDACTED] files for custody of [REDACTED]

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14. A report dated February 20, 2001 from Administration For Children's Services regarding [REDACTED] Petitioner For Custody in Brooklyn Family Court. It states in part, "Petitioner impresses as truly having the welfare of the child and her mother at heart, and the relationship between the parties appears to be one of love and respect. Worker inquired as to whether there was a history of drug, alcohol, child abuse, domestic violence or mental illness, and Mr. [REDACTED] responded in the negative."
15. A certificate issued by New York State Office of Children and Family Services. It certifies that [REDACTED] participated in Discovering the Scientist Within on Thursday, May 27, 2004 presented by SUNY Early Childhood Education and Training Program.
16. A letter from The City of New York ACS Family Child Care Conference sponsored by ACS Division of Child Care & Head Start Saturday, June 5, 2004 Hostos Community College. The letter awards two hours of instructional credits in safety and security procedures for attending the workshop "The First Responder - First Aid and CPR" to [REDACTED]
17. A letter from The City of New York ACS Family Child Care Conference sponsored by ACS Division of Child Care & Head Start Saturday, June 5, 2004 Hostos Community College. The letter awards two hours of instructional credits in principles of early childhood development for attending the workshop "Fostering Language Development in the Infant/Toddler Program" to [REDACTED]
18. A certificate issued by New York State Office of Children and Family Services. It certifies that [REDACTED] participated in Can I Get That Super Sized? Early Beginnings to a Healthy Lifestyle on Wednesday, June 09, 2004 presented by SUNY Early Childhood Education and Training Program.
19. A certificate issued by New York State Office of Children and Family Services. It certifies that [REDACTED] participated in Math: What's Play Got To Do With It? on Thursday, June 24, 2004 presented by SUNY Early Childhood Education and Training Program.
20. A letter dated August 13, 2007 from Open Door Church of God in Christ. The letter states in parts, "This is a letter of recommendations for public housing for our church member [REDACTED] [REDACTED] who is a Minister of our congregation. He is also a single parent of a daughter and is in need of affordable public housing. Minister [REDACTED] [REDACTED] is in good standards with this church and this community." The letter is signed by Katherine Bryant for Elder Curtis Bryant, Pastor.
21. A letter dated August 15, 2007 from Family Dynamics. The letter states in parts, "Mr. [REDACTED] has demonstrated that he is a responsible, respectful, mature father that has created a loving, nurturing home environment for himself and his daughter. He is a full time employee and has maintained his employment for a significant period of time. He is well integrated into his church. He is fully participatory in the education and well being of his daughter and he continues to receive individual and family counseling from

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Findings:

I find the Authority made an appropriate determination based on Federal Housing Guidelines.

I find that appellant has now presented sufficient objective evidence to show that he meets the Standards for Admission for Public Housing. The appellant was found to be ineligible for Public Housing based upon his criminal record. [REDACTED] was convicted of an A Felony, Murder in the 2nd degree, and a C Felony, Attempted Criminal Sale of a Controlled Substance in the 3rd degree. At the hearing, appellant presented documentation to show that he has been employed for seventeen months by Little Lad's since his last offense. He attended and graduated from New York Restaurant School, and he received his diploma for completing the requirements for graduation from the Help Desk Specialist Program. Appellant worked with after school children for about a year as a volunteer, and he worked as a staff member beginning March, 2004. Since his last offense, appellant has completed various training courses, and he has obtained his Minister License. Appellant is currently a minister at his church. Appellant submitted a reference letter from Family Dynamics that states in parts, "Mr. [REDACTED] has demonstrated that he is a responsible, respectful, mature father that has created a loving, nurturing home environment for himself and his daughter. He is a full time employee and has maintained his employment for a significant period of time. He is well integrated into his church." In addition, appellant has not had any other arrests, pending charges, or convictions since his second offense.

Based on the above, I believe [REDACTED] has made significant positive changes in his behavior and improved since the offenses.

Determination:

I am reversing the original determination of ineligibility for Public Housing.

The Department of Housing Applications will determine when you will be contacted and what further information will be necessary to continue the processing of your application.



Barry Carey
Hearing Officer
August 28, 2007

CHAPTER 6

Advocating for Policies that Respond to the Housing Needs of Individuals with a Criminal Record

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6.1 Introduction

To increase the likelihood that individuals with criminal records and who have been incarcerated obtain federally assisted housing, advocates may want to influence one or more local planning processes that establish low-income housing policies and/or have an impact on admission policies for individuals with criminal records. These planning processes include:

- the Public Housing Agency (PHA) plans that the PHAs must adopt for public housing and voucher programs,
- the Consolidated Plan (ConPlan), which state or local jurisdictions must adopt for housing in conjunction with the receipt of Community Development Block Grant (CDBG), HOME, Emergency Support Grants (ESG) and Housing Opportunities for People with AIDS (HOPWA) funds,
- the Qualified Allocation Plan (QAP), which statewide agencies administering the Low Income Housing Tax Credit (LIHTC) program must adopt,
- the Continuum of Care planning process, including any Ten Year Plan to End Homelessness, which primarily impacts the allocation of funds for the Shelter Plus Care (S+C) program, the Supportive Housing Program (SHP), and the Section 8 Single Room Occupancy (SRO) housing program, and
- the Olmstead Plan, which affects individuals with disabilities, including those who are seeking housing in the community, avoiding institutionalization, and/or leaving institutions.

Each of these plans serves a different purpose. Therefore, the details of the objectives of the advocacy will be different.¹The particulars of the advocacy should be on reasonable admission policies for the particular housing program and/or a set aside of units, or an admission priority to certain units or programs, for individuals with a criminal record, and their families. Another key component for success-

¹For more information about each of these housing programs, see Appendix 1 to this Guidebook.

ful advocacy will be to dispel the myth that PHAs and owners of federally assisted housing are required to restrict the access of individuals with a criminal record to federally assisted housing. In all but a few limited situations,² PHAs and owners of federally assisted housing have substantial discretion regarding admissions and should be encouraged to exercise that discretion in favor of admitting individuals with a criminal record who can demonstrate that it is not likely that they will pose a threat to other tenants, the development, or staff.

The advocacy strategies selected may vary depending upon the type of housing. For example, the fact that a PHA is a public body that has one or more residents or program participants on its board may impact the strategy. Similarly, strategies would vary with respect to housing developments that must either have program participants on the governing board or be required to consult with current or prior homeless residents.³ The fact that a housing development may be owned by a nonprofit may also affect the chosen strategy because such owners may be more responsive than private for-profit owners. For all the programs, there is a federal oversight agency, such as HUD, the Department of Agriculture for RD housing or Department of the Treasury for LIHTC units and for some of the programs, a state or local oversight or administrative agency. In addition, for all the federal programs federal legislators may be interested and willing to play a role in the effective administration of the program.

There is no required public process for influencing the policies for project-based Section 8 housing, HUD-insured multifamily housing, or Rural Development rental housing. In these cases an advocate may need to negotiate directly with the owner or manager of the complex or work with the appropriate federal agency

²See Chapter 2 for a discussion of the two situations in which PHAs and some owners have no discretion and must reject applicants with certain criminal backgrounds.

³See Appendix 1 for a brief descriptions of the composition of PHA boards, and advisory groups for Shelter Plus Care (S+C), Supportive Housing Program (SHP), and Section 8 Single Room Occupancy (SRO) housing.

such as HUD, RD or Congress. It might also be possible to achieve changes to admission policy through local ordinances governing all private housing.

Several housing advocacy organizations have developed guidebooks to assist persons with criminal records with their admission applications.⁴ The guidebooks created for New York City and Massachusetts applicants serve as models for the development of similar guidebooks for other jurisdictions. In addition, for those advocates who are seeking to expand housing opportunities for individuals with a criminal record through the creation of new housing opportunities, the guidebook created by AIDS of Washington is instructive.⁵

In the following sections of this chapter, there is a brief introduction to each of the above-listed planning processes. The subsequent discussion highlights advocacy pertaining to the PHA planning process. The strategies and issues discussed in those sections are similar and applicable to each of the other planning processes.

This chapter also references successful litigation involving PHAs and owners of federally assisted housing to either make available housing for an individual with a criminal record or to change restrictive admission policies for a class of such individuals. The end of this chapter briefly discusses local laws that prohibit discrimination against individuals with criminal records.

6.2 The Public Housing Agency (PHA) Five Year and Annual Plans

PHAs, which administer public housing, the voucher program and Section 8 moderate rehabilitation housing, are required to develop and submit to

HUD Five Year and Annual Plans (PHA Plans). The PHA Annual Plans must include information regarding policies for admission to these programs. The policies include preferences for admission, site based waiting lists (for public housing) and screening, which should provide information as to whether the PHA makes requests to law enforcement agencies to determine if an applicant has a criminal record.⁶ More detailed rules regarding a PHA's admission policies should be set out in supporting documents to the PHA Plans, which, for the Public Housing program, is the Admission and Continued Occupancy Plan (ACOP) and, for the voucher program, is the Administrative Plan.⁷ The PHA Plans and Administrative Plan should also contain information on the number and placement of project-based vouchers, a portion of which could be targeted to families with individuals with a criminal record and could also provide necessary services to such families.⁸ The PHA Plans must conform to the overall Comprehensive Affordable Housing Strategy contained in a jurisdiction's Consolidated Plan (ConPlan).⁹

When developing the PHA Plans, a PHA is required to form a Resident Advisory Board (RAB), composed of public housing and voucher tenants, to provide the RAB draft copies of the plans and to seek from the RAB comments about the plans, to which the PHA must respond.¹⁰ PHAs must annually notice and hold at least one public hearing on the PHA Plan, before the PHA Board of Commissioners.¹¹ After approval

⁴LEGAL ACTION CENTER, HOW TO GET SECTION 8 OR PUBLIC HOUSING EVEN WITH A CRIMINAL RECORD: A GUIDE FOR NEW YORK CITY HOUSING AUTHORITY APPLICANTS AND THEIR ADVOCATES, App H (no date), available at: <http://www.lac.org/pubs/gratis.html>; LEGAL TACTICS: FINDING PUBLIC AND SUBSIDIZED HOUSING (2d ed., 2006 Public Housing), available at: <http://www.masslegalhelp.org/housing/finding-housing-booklets> (see especially Booklet 6, Tenant Screening).

⁵KRISTINA HALS, AIDS HOUSING OF WASHINGTON, FROM LOCKED UP TO LOCKED OUT: CREATING AND IMPLEMENTING POST-RELEASE HOUSING FOR EX-PRISONERS (2003), available at: http://www.aidshousing.org/ahw_library2275/ahw_library_show.htm?doc_id=182133; see also, DOJ, OFFICE OF JUSTICE PROGRAMS, No. NCJ 203374, DEVELOPING HOUSING FOR EX-OFFENDERS (May 2004), available at: <http://www.ojp.usdoj.gov/ccdo/pub/pdf/NCJ203374.pdf>.

⁶42 U.S.C.A. § 1437c-1(c) and (d) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. § 903.7 (2007). HUD provides form Templates for PHAs to use for their PHA Plans. The Template prompts the PHA to provide certain information. See HUD, Public Housing Agency Annual Plan Templates, available at: <http://www.hud.gov/offices/pih/pha/templates/>; See also PUBLIC HOUSING AGENCY [PHA] PLAN DESK GUIDE (Sept. 20, 2001), available at: <http://www.hud.gov/offices/pih/pha/policy/pha-plan-guide.pdf>.

⁷See PUBLIC HOUSING AGENCY [PHA] PLAN DESK GUIDE 84 and 98 (Sept. 20, 2001), available at: <http://www.hud.gov/offices/pih/pha/policy/pha-plan-guide.pdf>.

⁸24 C.F.R. § 983.51(a) (2007).

⁹See Section 6.3 for a discussion on ConPlan.

¹⁰42 U.S.C.A. § 1437c-1(e) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. § 903.13 (2007); PUBLIC HOUSING AGENCY [PHA] PLAN DESK GUIDE, Section 4 (Sept. 20, 2001), available at: <http://www.hud.gov/offices/pih/pha/policy/pha-plan-guide.pdf>.

¹¹42 U.S.C.A. § 1437c-1(f) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. § 903.17 (2007); PUBLIC HOUSING AGENCY [PHA] PLAN DESK GUIDE, Section 4 (Sept. 20, 2001), available at: <http://www.hud.gov/offices/pih/pha/policy/pha-plan-guide.pdf>.

of the plan by the Board of Commissioners and HUD, the PHA Plans are posted on the HUD website and must be available locally for review.¹²

As discussed below with respect to individuals with criminal records, advocates have had success in influencing public housing and voucher program admission policies.

6.3 The Consolidated Plan (CONPLAN)

The ConPlan is both a planning document and an application for four HUD block grant programs: the Community Development Block Grant (CDBG) program, the HOME program, the Housing Opportunities for Persons with AIDS (HOPWA) program, and the Emergency Shelter Grants (ESG) program.¹³ The entity tasked with crafting the ConPlan will vary by jurisdiction, but generally, it is a department within a city, county, or state government dealing with community development and housing.¹⁴ The process for completing a ConPlan includes a Proposed and Final Consolidated Plan (including the Long-term Strategic

Plan and an Annual Action Plan),¹⁵ a Citizen Participation Plan,¹⁶ and a Consolidated Annual Performance and Evaluation Report (CAPER)¹⁷ and the Analysis of Impediments (AI) to fair housing.¹⁸ The ConPlan identifies needs, creates a long-term strategy to meet those needs, and sets priorities.¹⁹

The ConPlan must include an identification of the needs of homeless individuals and individuals with other special needs that need supportive housing, such as persons with disabilities, persons with alcohol or other drug addictions, and persons with HIV/AIDS and their families.²⁰ The housing and supportive housing needs of individuals with a criminal record are not specifically referenced in the federal statute or regulations governing the ConPlan process but their needs could be highlighted and identified locally in the ConPlan. The plan must also highlight the programs and resources that will be used in order to meet the identified needs. The Annual Action Plan allocates a specific amount of money to projects or programs in accordance with the needs and priorities set forth in the Long-Term Strategic Plan.²¹ The Citizen Participation Plan details a strategy to “provide for and encourage” public involvement in the entire

¹²The HUD website for approved PHA Plans is <http://www.hud.gov/offices/pih/pha/approved/>. The annual plan and the Administrative Plan and ACOF for each PHA must be available locally. 24 C.F.R. §§ 903.23(e) 960.202(c)(1) and 982.54(b) (2007).

¹³See Appendix 1, for more information about HOME and HOPWA. See also information about the amount of such funds allocated yearly to each jurisdiction, available at <http://www.hud.gov/offices/cpd/about/budget/budget07/>. For more information regarding CDBG, see 42 U.S.C.A. § 5301-5320 (West, WESTLAW through P.L. 110-113 approved 11-8-07) and 24 C.F.R. Part 570 (2007). For more information regarding the ConPlan, see the HUD ConPlan web page, at: <http://www.hud.gov/offices/cpd/about/conplan/> and the HUD, GUIDELINES FOR PREPARING A CONSOLIDATED PLAN FOR LOCAL AND STATE JURISDICTIONS, available at the same site. See also, ED GRAMLICH, CENTER FOR COMMUNITY CHANGE, HOUSING AND COMMUNITY DEVELOPMENT HANDBOOK, HUD'S CONSOLIDATED PLAN: AN ACTION GUIDE FOR INVOLVING LOW INCOME COMMUNITIES (1998) (the Action Guide is dated but continues to have useful information).

¹⁴All large cities and urban counties receiving these funds directly from the federal government are required to develop a ConPlan. 24 C.F.R. § 91.2(a) (2007). For small cities and rural counties receiving CDBG or HOME monies from the state government, a State Consolidated Plan is formulated and governs each small city and rural county receiving funds. *Id.* § 91.2(b). Small cities and rural counties applying to the state for funds are required to submit applications and certify that the activities funded comport with the State ConPlan. *Id.* § 91.2(b). For localities that do not receive CDBG money directly, but apply directly to the federal government for a range of other HUD Community Planning and Development (CPD) programs, such as the Shelter Plus Care (S+C) program, the locality is required to submit an abbreviated ConPlan. *Id.* § 91.235.

¹⁵42 U.S.C.A. §§ 5304(a)(2)(B), 5304(a)(2)(E), 12705(a)(1)-(2) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. §§ 91.215 (localities), 91.315 (states), 91.220 (localities), 91.320 (states) (2007).

¹⁶42 U.S.C.A. § 5304(a)(3) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. §§ 91.105 (localities) 91.115 (states) (2007).

¹⁷42 U.S.C.A. §§ 5304(e), 5304(a)(2)(B) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. § 91.520 (2007).

¹⁸24 C.F.R. § 91.225(a)(1) (2007); see also HUD FAIR HOUSING PLANNING GUIDE, Feb. 14, 2000, available at <http://www.hud.gov/offices/fheo/images/fhpg.pdf>, reissued in accordance with HUD Memorandum from Nelson R. Bregón, General Deputy Assistant Secretary for Community Planning and Development to All CPD Field Office Directors, etc. regarding Analysis of Impediments to Fair Housing Choice Reissuance, available at <http://www.hud.gov/offices/fheo/library/finaljointletter.pdf>.

¹⁹42 U.S.C.A. 12705(b) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. §§ 91.205, 91.215 (localities), 91.305, 91.315 (2007). The proposed plan should be drafted in consultation with social service providers (both governmental and non-governmental), the local PHA and local governments (in the case of the development of state ConPlans). *Id.* §§ 91.100 (localities), 91.110 (states).

²⁰24 C.F.R. §§ 91.215(d) and 91.315(d) (2007). As noted by several commentators, some post-release individuals are homeless. In addition, others may have HIV/AIDS, be disabled, or be in a treatment plan or have been rehabilitated due to an addiction to drugs.

²¹*Id.* §§ 91.220 (localities), 91.320 (states).

ConPlan process.²² The CAPER is an annual evaluation of whether the objectives of the ConPlan have been met. The AI is an analysis of the housing opportunities and levels of segregation and the local plan to eliminate impediments to fair housing. It is possible that concerns about housing individuals with criminal records could be addressed in the AI as it impacts the ability of individuals in certain protected classes to access integrated housing. An AI should be updated, especially at the beginning of the five-year ConPlan program cycle.

A certification must be filed annually with the ConPlan. Significantly, for jurisdictions which receive Emergency Shelter Grants, they must certify that: "The jurisdiction [or state] has established a policy for the discharge of persons from publicly funded institutions . . . (such as . . . youth facilities, or correction programs and institutions) in order to prevent such discharge from immediately resulting in homelessness for such persons."²³

There has not been any litigation regarding these certifications. However, there has been litigation regarding false or improper certifications in the context of allegations of violations of fair housing obligations.²⁴

For a local jurisdiction, at least two public hearings must be held at two different stages of the program year.²⁵ One of those hearings must be held prior to the publication of the proposed ConPlan for comment. The second hearing may be held at any other time in the year, such as in conjunction with the development of proposed activities pursuant to the plan or to review program performance.²⁶ The hearings must be noticed to allow for a 30-day review and comment

period.²⁷ Elected officials approve the ConPlan²⁸ and the final ConPlan is submitted to HUD for review at least 45 days before the beginning of the jurisdiction's fiscal year.²⁹ HUD reviews the ConPlan to ensure that all required elements are included, that the plan was developed with public participation and social service consultation, and that the ConPlan includes the locality's chief executive's compliance certification.³⁰

For jurisdictions which receive Emergency Shelter Grants, they must certify that the jurisdiction has established a policy for the discharge of persons from publicly funded institutions in order to prevent such discharge from immediately resulting in homelessness.

Advocates seeking to address the problems of individuals with criminal records in obtaining housing could assist in the development of the ConPlan by identifying the need and providing, if available, documentation of that need. It is not, however, sufficient to identify the need, it must also be determined that the need is significant. This will increase the likelihood that funds, such as CDBG, HOME, ESG, and HOPWA, will be allocated to address the identified housing needs of low and very-low income individuals with criminal records.

Copies of ConPlans may be available on the relevant local jurisdiction's website. There is no central posting of all such plans. Therefore, there are limited readily available examples of communities using CDBG, HOPWA, HOME or ESG funds to assist individuals with criminal records gain access to federally assisted housing. The few identified examples include communities with jail or prison facilities, permitting minimum security inmates to work on the construction of low-income housing. Such an idea has been pursued in at least two jurisdictions and a suggestion made

²²*Id.* §§ 91.105(a)(2)(i) (localities), 91.115(a)(2) (states).

²³*Id.* §§ 91.225(c)(10) (localities), 91.325(c)(10)(states).

²⁴*See* United States ex rel. Anti-Discrimination Center of Metro New York v. Westchester County, 495 F. Supp. 2d 375 (S.D.N.Y. 2007); Thompson v. United States Dep't of Hous. and Urb. Dev., 348 F. Supp. 2d (D. Md 2005).

²⁵42 U.S.C.A. § 12705(b)(1), 5304(a)(3)(D), 5304(a)(2)(C) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. §§ 91.105(e)(1) (localities), 91.115(b)(3) (states) (2007) (States are required to have at least one hearing at the needs determination stage. Localities are required to have two hearings at two different stages).

²⁶The hearings "must address housing and community development needs, development of proposed activities, and review of program performance." 24 C.F.R. § 91.105(e)(1) (2007).

²⁷42 U.S.C.A. § 5304(a)(3)(D) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. §§ 91.105(b)(4) (localities), 91.115(b)(4) (states) and 91.105(e) (citizen participation) (2007).

²⁸24 C.F.R. §§ 91.225(a)(6) (localities), 91.325(a)(6) (states) (2007).

²⁹*Id.* § 91.15(a).

³⁰42 U.S.C.A. § 12705(c) (West, WESTLAW through P.L. 110-113 approved 11-8-07); 24 C.F.R. § 91.500(b) (2007).

that such a program could be modified to expand the opportunity for the creation of post-release housing.³¹ In addition, ESG funds have been used by legal services programs to assist low-income individuals, who have been denied admission to public housing, with investigating the circumstances of the alleged crime and obtaining evidence of mitigating circumstances and rehabilitation so that they may find appropriate housing.³² Despite the lack of reported examples, nothing prevents a local community from requiring recipients of CDBG, HOPWA or HOME funding to set aside units for individuals who are recently released from incarceration or to require such recipients to amend or establish admission policies that provide for individualized consideration of each application and in the event of the receipt of unfavorable information, consideration of mitigating circumstances, rehabilitation and, if applicable, reasonable accommodation.³³ In fact, the provisions of the ESG certification appear to require such or similar action.

6.4 Qualified Allocation Plan

The Department of Treasury, Internal Revenue Service (IRS) distributes tax credits to each state for construction or rehabilitation of housing under the Low-Income Housing Tax Credit Program (LIHTC). Each state then allocates the tax credits to sponsors of LIHTC housing in accordance with a state adopted Qualified Allocation Plan (QAP). The QAP sets forth the state's LIHTC allocation plan and project selection criteria.³⁴ IRS requires that state LIHTC agencies update their QAP plans annually and that they do so after a public hearing that has been reasonably noticed.³⁵ A copy of each state's QAP is available on line.³⁶

State LIHTC awards are generally made in accordance with preferences or set asides. Eight selection criteria must be considered in the QAP including: the location of the housing, the housing needs characteristics, use of existing housing as part of a community revitalization plan, sponsor characteristics, tenant populations with special needs, public housing waiting lists, tenants with children, and the potential for tenant ownership of the development.³⁷ Preferences in awarding the tax credits must be given to developments that serve the lowest income tenants for the longest period of time and are situated in qualified census tracts.³⁸

Advocates can take advantage of the QAP planning and public hearing process to advocate for housing for individuals with a criminal record. To gain support for such a proposal, advocates would need to show that there is a need for such housing, that the need is significant and not being met, and that there is sufficient support to establish a set-aside or preference for developments that serve individuals with a criminal record. The QAP process could also be used to advocate for reasonable admission policies for all developments that address issues such as individualized review of applicants, and mitigation, rehabilitation and reasonable accommodation in the event that unfavorable information is received. Alternatively, advocates could work with a local community and a nonprofit or other type of developer to submit an application for tax credits for housing that serves individuals with a criminal record or families with such members. To make such a LIHTC development affordable, it would have to be combined with additional subsidies from programs such as project-based vouchers, Shelter Plus Care (S+C), Supportive Housing program (SHP), Housing for People With AIDS (HOPWA), Section 8 Moderate Rehabilitation (SRO), HOME and/or CDBG.³⁹

³¹KRISTINA HALS, AIDS HOUSING OF WASHINGTON, FROM LOCKED UP TO LOCKED OUT: CREATING AND IMPLEMENTING POST RELEASE HOUSING FOR EX PRISONERS 139 (2003).

³²See HUD, HOMELESS PREVENTION IN THE EMERGENCY SHELTER GRANTS PROGRAM 10 (March 2001).

³³KRISTINA HALS, AIDS HOUSING OF WASHINGTON, FROM LOCKED UP TO LOCKED OUT: CREATING AND IMPLEMENTING POST RELEASE HOUSING FOR EX PRISONERS 52 (2003); see also discussion in Chapter 3 of mitigation and reasonable accommodation.

³⁴26 U.S.C.A. § 42(m)(1)(A)(i) (West, WESTLAW through P.L. 110-113 approved 11-8-07).

³⁵*Id.*

³⁶For copies of the 2008 QAPs go to: http://www.novoco.com/low_income_housing/lihtc/qap_2008.php. QAPs for other years are available at the same site.

³⁷26 U.S.C.A. § 42(m)(1)(B) (West, WESTLAW through P.L. 110-113 approved 11-8-07); JEREMY GUSTAFON, URBAN INSTITUTE, ANALYSIS OF STATE QUALIFIED ALLOCATION PLANS FOR THE LOW-INCOME HOUSING TAX CREDIT PROGRAM (May 2002); see, e.g., The 2008 Low-Income Housing Tax Credit Qualified Allocation Plan for the State of North Carolina, available at: <http://www.nchfa.com/Rental/RD2008qap.aspx>; Massachusetts Department of Housing and Community Development, Low-Income Housing Tax Credit Program: Revised 2007 Qualified Allocation Plan (Oct. 2007), available at: <http://www.mass.gov/Ehed/docs/dhcd/hd/qap/qap.pdf>.

³⁸26 U.S.C.A. § 42(m)(1)(B) (West, WESTLAW through P.L. 110-113 approved 11-8-07).

³⁹For a brief discussion of these programs and a definition of

6.5 Continuum of Care

Continuum of Care (CoC) is a HUD created policy for a local planning process for assessing the needs of homeless individuals and developing a plan for providing housing and services to this population.⁴⁰ The CoC model is based on the premise that homelessness is not caused by simply a lack of shelter, but involves a variety of underlying needs. HUD believes the best approach for alleviating homelessness is through a community-based process that provides a comprehensive response to the diverse needs of homeless persons.

There are five components to the CoC: a system for determining the need, emergency shelters, transitional housing, permanent housing, and preventive strategies. The CoC may cover whatever jurisdiction (*e.g.*, a city, county or state) the local participants determine is reasonable. The rules governing the CoC are contained in a HUD Guidance to Continuum of Care Planning and Implementation⁴¹ and the yearly Notice of Fund Availability (NOFA) for the three McKinney-Vento homeless programs: Shelter Plus Care (S+C), Supportive Housing Program (SHP) and Section 8 Moderate Rehabilitation Single Room Occupancy (SRO).⁴²

The CoC should be developed by a range of interested parties including nonprofits, government agencies, PHAs, community and faith-based organizations, homeless providers, housing developers, homeless persons, law enforcement and correctional institutions and agencies, veteran service agencies and others.⁴³ Applications for housing under the three McKinney-Vento housing programs are very competitive and most applications have as an exhibit the local CoC. An application submitted outside of the CoC process is not likely to be funded.⁴⁴ In addition,

any application for S + C or SHP must be consistent with the ConPlan.⁴⁵

The Bush Administration, created the Interagency Council on Homelessness,⁴⁶ which developed a policy of encouraging a “Ten Year Plan to End Chronic Homelessness.” The Administration wants the 10-Year plans integrated into the CoC plans.⁴⁷ In addition, applicants for the three competitive McKinney-Vento housing programs, receive points based upon compliance with the 10-year plans and strategies for ending chronic homelessness.⁴⁸

Advocates could use the CoC process to identify the needs of individuals with criminal records who are returning to the community after incarceration and seeking housing. The CoC plan could be used to set forth admission guidelines for local recipients of McKinney-Vento funding. Those guidelines could require that owners of the housing have reasonable admission policies, provide for individualized determinations, and require consideration of mitigation, rehabilitation and reasonable accommodation to overcome unfavorable information. They could also require that a certain number of units be set aside for individuals who have been recently released from incarceration for whom no residence has been identified.

6.6 Olmstead Plans

Olmstead plans arise out of litigation concerning Title II of the Americans with Disabilities Act of 1990 (ADA).⁴⁹ The litigation sought enforcement of the anti-discrimination provisions in Title II (also known as the “integration mandate”) by requiring that persons with mental disabilities, under certain conditions, be placed in community facilities rather than in institutions.⁵⁰ On January 14, 2000, the Department

homelessness as applied to CoC planning, *see* Appendix 1.

⁴⁰HUD, GUIDE TO CONTINUUM OF CARE PLANNING AND IMPLEMENTATION, available at: <http://www.hud.gov/offices/cpd/homeless/library/coc/>; *see also* PERMANENT HOUSING AND HUD’S CONTINUUM OF CARE, OPENING DOORS ISSUE 13 (Mar. 2001) available at: <http://www.tacinc.org/Pubs/ODpubs.htm>.

⁴¹Available at: <http://www.hud.gov/offices/cpd/homeless/library/coc/> (Content updated October 16, 2006).

⁴²*See, e.g.*, Continuum of Care Homeless Assistance Programs, Notice of Funding Availability, 72 Fed. Reg. 11,742 (Mar. 13, 2007).

⁴³*Id.* 11,743.

⁴⁴Projects developed exclusive of participation in a CoC process

will receive few, if any, points under the CoC rating factors and are very unlikely to be funded. *Id.* 11,750.

⁴⁵*See, e.g.*, 24 C.F.R. §§ 582.120 (S+C), 583.155 (SHP) (2007).

⁴⁶<http://www.ich.gov/>. Three hundred twenty-five jurisdictions have adopted 10 Year Plans to End Chronic Homelessness. *See* Appendix 1 of this Guidebook for a definition of chronic homelessness; *see also* 72 Fed. Reg. 11,742, 11,744 (Mar. 13, 2007) for a definition of chronically homeless person.

⁴⁷Continuum of Care Homeless Assistance Programs, Notice of Funding Availability, 72 Fed. Reg. 11,742, 11,743 (Mar. 13, 2007).

⁴⁸*Id.*

⁴⁹42 U.S.C.A. §12132 (West 2007).

⁵⁰The Supreme Court, in *Olmstead v. Linn*, 527 U.S. 581, 587 (1999), found that the ADA requires that persons with mental disabilities be placed in community settings if a treatment pro-

of Health and Human Services issued a letter and guidance to all State Medicaid Directors on how to implement the *Olmstead* decision.⁵¹ In an enclosure, HHS strongly encouraged states to create *Olmstead* plans. For the plan development, HHS stated that it is extremely important that,

the State involves people with disabilities (and their representatives, where appropriate) in the plan development and implementation process. . . . [The state] considers what methods could be employed to ensure constructive, on-going involvement and dialogue. . . . The State assesses what partnerships are needed to ensure that any plan is comprehensive and works effectively.⁵²

Olmstead plans are focused on increasing community integration for people with disabilities and include strategies to ensure housing. Although there is limited federal funding or technical support for the *Olmstead* planning process, as of October 2006, twenty-nine states had adopted *Olmstead* plans.⁵³ States that have adopted the plans generally provided opportunity for public/consumer comment through forums and written submissions.⁵⁴ In some

professional has recommended it, the affected individual does not oppose it, and the placement can be reasonably accommodated. The Court also suggested that state plans on placing people in community-based centers might help compliance. For more information on *Olmstead* see Home and Community Services: Introduction to *Olmstead* Law Suits and Plans, <http://www.pascenter.org/olmstead/>. The White House, as part of its "New Freedom Initiative," issued Executive Order 13217, (June 18, 2001) available at: www.whitehouse.gov/news/releases/2001/06/20010619.html, directing the federal government, specifically the Attorney General, the Secretaries of Health and Human Services (HHS), Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration, to aid states in swiftly implementing the requirements of the *Olmstead* decision, including the provision of technical assistance to the states.

⁵¹HHS letter to All State Medicaid Directors, Jan. 14, 2000, last revised Jan. 18, 2000, available at <http://www.hhs.gov/ocr/olms0114.htm>.

⁵²*Id.*

⁵³MARTIN KITCHENER, MARSHALL ALAMEIDA, ALICE WONG AND CHARLENE HARRINGTON, STATE *OLMSTEAD* PLANS AND ALTERNATIVE STRATEGIES, UCSF National Center for Personal Assistance Services, 4th Revision (Oct. 2006); For more information on individual state plans see Home and Community Services: Introduction to *Olmstead* Law Suits and Plans, <http://www.pascenter.org/olmstead/>.

⁵⁴See Cynthia Zubritsky, et al., *The State of the Olmstead Decision and the Impact of Consumer Participation in Planning*, 9 AMER. J. OF PSYCH. REHAB. 131-143 (May-Aug. 2006) ("The recommendations made by both the stakeholders and the consumers underscore the need for more funding, more housing, more community support services, such as employment, and more meaningful consumer involvement in the development and delivery of services.")

states, the plans contain working groups and/or goals and objectives related to assisting disabled individuals in correctional facilities transition to community facilities.⁵⁵

6.7 Strategies to Create Plans that Address the Housing Needs of Individuals with Criminal Records

This section focuses on advocacy with the PHA Plan process. Nevertheless, the strategies discussed may be applied to the other identified planning processes.

6.7.1 Identify the Housing Needs of Individuals Who Have a Criminal Record

Advocates should identify and, if feasible, quantify the problem facing individuals who have been incarcerated in obtaining decent and safe affordable housing in the community.⁵⁶ For example, they should determine, the number and housing needs of individuals who live within and/or are being released to the jurisdiction. Local jurisdictions' law enforcement or correctional staff may have relevant data or information.⁵⁷ Agencies that serve a subset of those who have a criminal record, such as the homeless,⁵⁸ disabled, and individuals with HIV/AIDS

⁵⁵See IOWA'S *OLMSTEAD* REAL CHOICES CONSUMER TASK FORCE, COMMUNITY OPPORTUNITY PROSPERITY. . . IOWA'S *OLMSTEAD* POLICY SUMMIT REPORT ON CROSS-CUTTING STATE POLICY ISSUES AFFECTING OLDER IOWANS AND IOWANS WITH DISABILITIES 23 (Aug. 24, 2007) available at: <http://www.olmsteadrealchoicesia.org/Taskforce/TFReports.htm>. The July 1, 2001 IOWA PLAN FOR COMMUNITY DEVELOPMENT A WORKING PLAN FOR SYSTEMS CHANGE AND IOWA'S RESPONSE TO THE SUPREME COURT DECISION IN *OLMSTEAD, ET AL. V. L.C. AND E.W* proposed to identify the incarcerated disabled population and assess its needs relating to leaving correctional facilities.

⁵⁶In 2002, HUD reported to Human Rights Watch that 46,657 applicants were denied admission to public housing because of arrest or criminal records. HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 31-32 (2004), available at: <http://hrw.org/reports/2004/usa1104/usa1104.pdf>. Individuals who are leaving a correctional institution will also seek housing on the private market and with family, who may live in private or federally assisted housing.

⁵⁷NANCY V. LA VIGNE, PH.D. ET. AL., URBAN INSTITUTE, MAPPING PRISONER RE-ENTRY: AN ACTION RESEARCH GUIDEBOOK 14 (2d ed. 2006) (recommends useful resources to identify local prisoner reentry data, most notably a state's Department of Corrections), available at: www.urban.org/UploadedPDF/411383_reentry_guidebook.pdf.

⁵⁸CATERINA GOUVIS ROMAN & JEREMY TRAVIS, THE URBAN INSTITUTE, TAKING STOCK, HOUSING, HOMELESSNESS AND PRISONER RE-ENTRY 8 (2004), available at: http://www.urban.org/UploadedPDF/411096_taking_stock.pdf (One-tenth of the population entering prisons are homeless and about one-tenth leaving prisons are homeless after release); other reports state that the figures of homelessness

may also have helpful information.

Advocates should request information from their local PHAs that may demonstrate the extent to which the PHAs' policies or practices exclude individuals with a criminal record. PHAs may have that information because of HUD's reporting requirements.⁵⁹ Relevant information could include, for example, the number of people excluded annually due to screening relating to prior criminal activity and the characteristics of those families. Alternatively, residents and advocates could conduct a blind survey (to encourage honest answers and to avoid concerns about reprisal) to determine the number of current residents of federally assisted housing who have family members with criminal records or who expect to have a formerly incarcerated family member return to the family unit.⁶⁰ If possible, advocates should determine, through discussions with residents, homeless shelter providers, the PHA, law enforcement and correctional staff, the extent to which individuals with criminal records are dissuaded from even applying to public housing or the voucher program due to the PHAs' restrictive admission policies. In addition, it is useful to know the number of families that have household members who have a criminal record who have been successfully admitted into the housing programs. This information, if obtainable, will be

prior to incarceration are higher, *see* Chapter 1.

⁵⁹Some PHAs may have some documentation because they are evaluated by HUD on their management practices. For public housing, this evaluation includes information regarding security. PHAs must annually submit to HUD a Public Housing Asset Management Operation System Certification, HUD Form 50072 (5/2005) showing compliance with the requirement to screen for applicants' criminal backgrounds. 24 C.F.R. § 902.43(a)(5) (2007); HUD, PUBLIC HOUSING ASSESSMENT MANAGEMENT OPERATIONS SYSTEM CERTIFICATION GUIDEBOOK, *available at*: http://www.hud.gov/offices/react/pdf/guide_book/appendix_1.pdf. The certification form contains under Sub-indicator #5: Security, Component #2: Screening of Applicants a field titled, "The total number of applicants denied who met the applicable criteria." The HUD guidebook instructions for completing the certification form suggest that PHAs include "[d]ocumentation including applicant ineligibility letters." *See*: http://www.hud.gov/offices/react/pdf/guide_book/sub-indicator_5_security.pdf. For the voucher program, there is no similar form for a PHA to compile data related to screening applicants for criminal backgrounds.

⁶⁰*See* CATERINA GOUVIS ROMAN & JEREMY TRAVIS, THE URBAN INSTITUTE, TAKING STOCK, HOUSING, HOMELESSNESS AND PRISONER RE-ENTRY 25 (2004), *available at*: http://www.urban.org/UploadedPDF/411096_taking_stock.pdf (Four out of ten families in one public housing development expected a family member to be released from prison and return to live with them within two years); *see also* discussion in Chapter 1.

helpful in quantifying the impact of a PHA's admission policy upon such families and individuals.

The need for affordable housing should then be compared with the number of potentially available units, including both federally assisted and private housing. Such information may form the basis for the development of policies and/or programs to address the identified need and serve as a back drop for discussions of alternatives and the potential effects on public safety and recidivism if individuals are unable to find housing.

6.7.2 Cultivate Community Partners and Build Coalitions

To be effective, advocates must reach out to local housing and social service providers, law enforcement and correctional staff, public defenders and others who work with individuals with criminal records, residents of public housing, participants in the voucher program, and community philanthropic organizations. Working with existing groups or building coalitions with groups who are addressing problems faced by individuals with a criminal record can be invaluable in producing responsive admission policies for federally assisted housing.

It may be helpful to address the problem regionally. In Vermont, for example, the Burlington Housing Authority convened a Regional Advisory Group to develop a response to the housing needs of post-release individuals returning to the county.⁶¹

The gatekeepers and creators of local PHA admission policies—the PHA staff and the PHA Board—are best situated to immediately institute positive change.⁶² Advocates may have to address concerns they may have to balance any new policy with their responsibility of providing safe housing for all program participants. Such concerns may be addressed by tenants and other community leaders.

The following are examples of local advocacy efforts aimed at improving admission policies.

⁶¹COUNCIL OF STATE GOVERNMENTS, PUBLIC HOUSING AUTHORITIES (PHAs) AND PRISONER RE-ENTRY (2005), *available at*: <http://www.reentrypolicy.org/publications?states=&keyword=public+housing+>.

⁶²*Id.* National Association of Housing and Redevelopment Officials (NAHRO) has acknowledged the role that PHAs may play in addressing the housing needs of individuals with criminal records who are no longer incarcerated.

6.7.2.1 Cleveland, OH

In Cleveland, Ohio, advocates worked with a wide array of community groups, which included government entities and service agencies to address a variety of issues affecting individuals with a criminal record. Access to affordable housing was a key issue. In 2007, these groups approached the Cuyahoga Metropolitan Housing Authority (CMHA) as a partner and sought to amend CMHA's admission rules, both substantively and procedurally, as they related to individuals with prior criminal records. First, they developed and presented to CMHA a model admissions procedure,⁶³ that creates fair and appropriate substantive, procedural and evidentiary rules regarding the treatment of an individual with a prior criminal record. The model rule sought to be consistent with HUD regulations and, where feasible, CMHA's then-existing rules.

The discussions with CMHA focused on three substantive provisions of CMHA's existing rules. The then existing rules effectively barred admission of previously incarcerated persons for at least one year after release from incarceration (and three years if the offense was for one of several specified felonies). The rules also included criterion that denied admission to a person with "a history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety, or welfare of other tenants."⁶⁴

As a result of those discussions, CMHA revised its admission rules⁶⁵ so as to:

- eliminate completely the three-year bar or waiting period,
- retain a one-year bar or waiting period for a discrete list of felonies (which is a significantly reduced list of the felonies that CMHA previously used for the now-rescinded three-year waiting period), and

⁶³See Public Housing—Model Admission Rules on Criminal Activity and Summary of the Model PHA Admission Rule on Criminal Activity, prepared for CMHA, a copy of which is available in Exhibit 1 to this Chapter.

⁶⁴24 C.F.R. § 960.203(c)(3) (2007).

⁶⁵CMHA Admission and Continued Occupancy Plan, revised Oct. 3, 2007 § 2.16, available at: <http://www.cmha.net/information/docs/acop.pdf>. It is anticipated that the group and CMHA will continue to seek improvements in the admission policy.

- limit the "history of criminal activity" review to a three-year period preceding the admission decision.

6.7.2.2 Baltimore, Maryland

A Baltimore community-based organization, the Homeless Representation Project, successfully advocated for changes to the Housing Authority of Baltimore City (HABC) re-entry policies to secure more favorable treatment for individuals with criminal records. The changes clarified language about "involvement" with criminal activity, set disqualification periods for applicants who had committed felonies at three years from conviction, and, for applicants who had committed misdemeanors, at 18 months from conviction. It also secured HABC's agreement not to continue to consider arrests when there were no convictions.⁶⁶ HABC also agreed to require the consideration of mitigating circumstances.⁶⁷ In support of the new policies, Jean Booker-Bradey, a HABC board member and resident of Somerset Homes in East Baltimore, said "I'm very much for it because I believe everybody deserves a chance, even murderers."⁶⁸

6.7.2.3 Dayton, Ohio

The Dayton Metropolitan Housing Authority (DMHA) proposed amending its ACOP and Section 8 Administrative Plan to increase from three years to five years the period for denial of admission for drug-related, violent or criminal activity that may threaten the health or safety of other residents. Advocates for

⁶⁶See Housing Authority of Baltimore, Admission and Continued Occupancy Plan, Chapter 2, p. 2-9 and email from Carolyn Johnson, Managing Attorney, Homeless Persons Representation Project (Sept. 9, 2007). The new policy was adopted pursuant to a threat of litigation. See also Housing Authority of Baltimore City, Annual Plan for HABC MTW program for FY 2007 and FY 2008, Section 8 Administrative Plan 240 (contains an eligibility key based on felonies and misdemeanors that tracks the policy proposal from 2003), and the Admissions and Continued Occupancy Policy 2 (contains a similar policy for public housing), available at: http://www.baltimorehousing.org/index/ps_plans.asp.

⁶⁷Information provided by Theda Saffo, Maryland Legal Aid Bureau, Inc., July 2007.

⁶⁸KAY RANDOLPH-BACK, COMMUNITY VOICES SERIES, PUBLIC HOUSING POLICIES THAT EXCLUDE EX-OFFENDERS: A HOUSE DIVIDED 12 (2007), available at: http://www.communityvoices.org/Uploads/Public_Housing_Policies_Exclude_Ex-offenders_00108_00167.pdf (citing Laura Vozzella, HUD Needs to OK Rule Allowing Ex-Convicts to Live in Public Units, The Baltimore Sun (Nov. 17, 2003), available at: <http://www.prisontalk.com/forums/showthread.php?p=325956>).

Basic Legal Equality (ABLE) objected to the change because DMHA did not consult with residents. After DMHA postponed the implementation and consulted with residents, the DMHA Board of Commissioners voted down the change based on the residents' comments.⁶⁹ Residents' experiences did not support a policy to increase the period for denial.

6.7.2.4 Somerville, Massachusetts

During the annual PHA plan process, the Somerville, Resident Advisory Board (RAB) negotiated with the Somerville Housing Authority (SHA) to include amendments to the housing authority's new ACOP. The amendments included, that the SHA must consider mitigating factors and rehabilitation for any applicant for admissions to any housing programs administered by SHA. In addition, if an applicant has an arrest but no final disposition, the applicant has the option of deferring a decision on the application until there has been an adjudication of the criminal case and the applicant does not lose his or her place on waitlist.⁷⁰

6.7.2.5 Miami-Dade County, Florida

The Miami-Dade Housing Authority (MDHA) sought to terminate approximately 550 voucher families because of a member's alleged past criminal activity. Advocates met with MDHA's legal counsel and management and eventually convinced them to individually review all proposed terminations. Ultimately, MDHA agreed to reinstate all families with *nolle prosequere* (no action or acquittal). Subsequently, MDHA amended its admission policies for both public housing and the Section 8 voucher program. The policies that it adopted provide that in situations where the family has no pattern of repeated engagement with criminal activity and the disposition of the criminal case is that it is either "dropped, dismissed or not prosecuted . . . the family will not be denied

assistance if otherwise qualified."⁷¹ In addition, for both housing programs, the policy stated that the agency shall consider mitigating circumstances. It is likely that the earlier discussions between the residents and advocates and MDHA played a role in the revised admission policies.⁷²

6.7.2.6 Oakland, California

The Volunteers of America, the Alameda County Sheriff's Office and the Oakland Housing Authority (OHA) have partnered to create a program, Maximizing Opportunities for Mothers to Succeed (MOMS), for women with children who are transitioning out of Santa Rita jail, which is described as a mega-jail—fifth largest in the country with more than four thousand inmates.⁷³ The Sheriff's office provides an in-custody educational program, OHA provides 11 units of "transitional" public housing and Volunteers of America and other non profits provide supportive services. Women and their children may live in one of the 11 units for up to 12 months. The women who successfully complete the "transition" program are offered other public housing upon graduation. According to OHA, a major benefit of the program is the supportive services and the track record that the family establishes as lease compliant so that entry into other public housing units is facilitated.

6.7.3 Policy Recommendations

In general, policy suggestions may vary based on the particular federal housing program. For example, a PHA may be willing to conduct less screening for a voucher applicant than for a public housing applicant so as to avoid duplicating the screening that may be conducted by the private landlord or because it perceives that it has less exposure to liability under

⁶⁹E-mail from Matt Currie, ABLE, Dayton, OH, Jan. 30, 2007.

⁷⁰SHA Admissions and Continued Occupancy Policy for Federally Subsidized Family, Elderly/Disabled Public Housing, adopted Mar. 9, 2005, amended Oct. 2005 and Section 8 Administrative Plan, adopted Dec. 13, 2006, and information from Susan Hegel, Cambridge and Somerville Legal Services.

⁷¹Miami-Dade Housing Agency, Private Rental Housing, Section 8 Administrative Plan, ¶¶ 2.7 and 2.8 (revised May 31, 2007) and Miami-Dade Housing Agency, Admissions and Continued Occupancy Plan, Chapter II, ¶¶ J and K (revised May 25, 2007) (both documents are available at <http://www.miamidade.gov/housing/policy-links.asp>).

⁷²E-mail from Jeffrey Hearne, Legal Services of Greater Miami, Sept. 2007.

⁷³MOMS Program Offers Parolees a Second Chance, CARE AND SHARE, VOLUNTEERS OF AMERICA, INC, BAY AREA (2006); Alameda County Sheriff's Office Testimony, Little Hoover Commission, Public Hearing on Women & Parole (Apr. 22, 2004).

the voucher program than in the public housing program.

Advocates may also successfully advocate that PHAs implement new policies and procedures for a prescribed trial period or limit their application to one waiting list or development before applying them to all PHA programs or developments.⁷⁴ PHAs may also be able to create special programs in partnership with other organizations in the community that are working to successfully reintegrate into the community individuals with criminal records.⁷⁵

The following subsections highlight examples of policies that may assist applicants with a criminal record.

6.7.3.1 Reasonable Admission Standards

The key elements of a reasonable admission policy include:

- Individualized review of each applicant.⁷⁶

⁷⁴HUD is implementing a system whereby individual PHAs will manage public housing as part of an asset management system where funding and waitlist management will be crafted for specific developments. The new system may be more conducive to allowing experimentation with admissions policies at individual developments. See 24 C.F.R. § 990.270 (2007); see also 42 U.S.C.A. § 1437d(r) (West, WESTLAW through P.L. 110-113 approved 11-8-07) and 24 C.F.R. § 903.7(b)(2) (2007) (authorization for site-based waiting list). In addition, some PHAs are designated as Moving to Work agencies, which provides them with more flexibility in designing innovative programs. See, www.hud.gov/offices/pih/programs/ph/mtw/ for a list of MTW public housing agencies.

⁷⁵KRISTINA HALS, AIDS HOUSING OF WASHINGTON, FROM LOCKED UP TO LOCKED OUT: CREATING AND IMPLEMENTING POST RELEASE HOUSING FOR EX PRISONERS 90-92 (2003) (describes a number of examples of post-release housing, provides guidance on how to apply for federal housing funds such as Supportive Housing Program (SHP), Shelter Plus Care (S+C) and Section 8 Single Room Occupancy (SRO) housing); CATERINA GOUVIS ROMAN AND JEREMY TRAVIS, URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY Ch. 4 (2004) (provides numerous examples of post-release housing, with a general description of the sources of funding); Janelle Nanos, *Lots of Privacy – and No Bars: Eight Ex-Convict Mothers Get a Fresh Start in a Subsidized Apartment Complex Especially for Them*, *Newsday* (June 20, 2005). This article highlights a community-based organization harnessing local and state resources to address the housing needs of individuals post release.

⁷⁶Consideration of mitigating circumstances is suggested but not required for most of the federally assisted housing programs. Regulations for public housing currently mandate consideration of time, nature, and extent of applicant's conduct (including seriousness of the offense), see 24 C.F.R. § 960.203(d) (2007); see also discussion in Chapter 3 of this Guide. In the event that a PHA ignores the mandate for public housing applicants for consideration of extenuating circumstances, advocates could use the PHA plan process to seek stricter enforcement or information on compliance with the rule. See LEGAL ACTION CENTER, IMPROVING HOUSING

(Somerville, Massachusetts, New York City and Miami-Dade County policies).⁷⁷

- Required consideration of mitigating circumstances and/or rehabilitation. (Somerville, Massachusetts, New York City, Atlanta and Miami-Dade County policies).
- Limit review of an applicant's criminal history to convictions, not arrests. (Miami/Dade and Somerville policies).
- Restrict inquiry into criminal history to a fixed period of time such as one or three years prior to the time of admission and/or make distinctions as to the time period depending upon the seriousness of the prior criminal activity. (Atlanta, Baltimore, Cleveland and New York City policies).⁷⁸ and
- Limit the period of time and the type of crime for which an applicant is banned from admission. (Cleveland and Baltimore).

6.7.3.2 PHAs May Expand Housing Opportunities in Other Ways

There are many ways in which a PHA may expand housing opportunities, including the following:

- refer those who are denied admission to a local legal services office and/or other advocacy organizations for assistance,⁷⁹

OPPORTUNITIES FOR INDIVIDUALS WITH CONVICTION RECORDS, available at: <http://www.lac.org/toolkits/housing/housing.htm>; compare Corinne Carey, Human Rights Watch, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. Tol. L. Rev. 545, 572 (2005) (reports that many PHAs deny an applicant without consideration of any factors other than the conviction).

⁷⁷The policies referenced by jurisdiction are discussed elsewhere in this Chapter.

⁷⁸See also LEGAL ACTION CENTER, IMPROVING HOUSING OPPORTUNITIES FOR INDIVIDUALS WITH CONVICTION RECORDS, <http://www.lac.org/toolkits/housing/housing.htm> (provides examples from the Housing Authority of Portland, OR, which ranks criminal activity, considers the amount of time and number of subsequent convictions, and from the Saint Paul Public Housing Agency, which considers the pattern of convictions over a period of time).

⁷⁹See *Ressler v. Pierce*, 692 F.2d 1212, 1220 (9th Cir. 1982) (policy includes a referral to a legal services office). In letters denying assistance, the Housing Authority of the City of Atlanta suggests that applicants should contact Legal Aid or Lawyer's Referral Service. See also HUD, HOMELESS PREVENTION IN THE EMERGENCY SHELTER GRANTS PROGRAM 10 (March 2001).

- directly or through referrals to other agencies, offer assistance to individuals who have a criminal record,⁸⁰
- secure outside funding or assistance to enable individuals with a criminal record to access and remain in public housing,⁸¹
- work with the community and landlords to increase the probability that voucher landlords will accept applicants with a criminal background,⁸²
- provide training for hearing/informal review staff on the need to consider mitigating factors and rehabilitation for applicants who have a criminal record,
- develop a project-based voucher program that targets individuals with a criminal record and provides services to enable them to remain in the housing and/or set aside a number of vouchers for individuals who are recently released from incarceration,⁸³ and
- apply for other federally assisted housing, such as Section 8 Moderate Rehab (SRO) housing, or Shelter Plus Care, that may be used for housing individuals with a criminal record who have been recently released and for whom no housing has been identified.⁸⁴

6.7.4 Policies of Other PHAs

In order to convince a PHA to adopt a new policy, it is often helpful to identify other PHAs that have adopted similar policies. Several examples are referenced in this Guide. In addition, it may be helpful to review policies of neighboring PHAs. Human Rights Watch found that the Salt Lake County PHA undertakes individualized applicant reviews, while the Salt Lake City PHA, located in the same county, automatically excludes applicants with minor offenses. Both PHAs claim that their policies increase safety.⁸⁵ It is possible that neighboring PHAs may be convinced, by example, to adopt better policies. Even anecdotal information may be persuasive. PHAs that undertake individualized applicant reviews may have information demonstrating that despite a more inclusive admissions policy, a proportionate increase in crime did not occur. Although no data is currently available addressing the issue of whether individuals with a criminal record admitted into public housing or the voucher program contribute to higher crime rates, a Portland State University study is researching the issue.⁸⁶

⁸⁰See, e.g., LEGAL ACTION CENTER, IMPROVING HOUSING OPPORTUNITIES FOR INDIVIDUALS WITH CONVICTION RECORDS, <http://www.lac.org/toolkits/housing/housing.htm> (provides examples of counseling provided by Oakland Housing Authority and the Portland Housing Center); See, e.g., California Welfare and Institutions Code §§ 5814(b) and 5814.5(b) (West 2007) (CA Department of Mental Health authorized to provide services to severely mentally ill individuals who are recently released from incarceration); see also CATERINA GOUVIS ROMAN AND JEREMY TRAVIS, URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 20 (2004) (funds for housing for homeless individuals with mental illness who are involved with the criminal justice system may be used for security deposits, rent, and repairs pending receipt of a Section 8 voucher).

⁸¹See, e.g., Department of Justice Weed and Seed program, http://www.ojp.usdoj.gov/ccdo/programs/public_housing.html; see also CATERINA GOUVIS ROMAN AND JEREMY TRAVIS, URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 25 (2004) (Weed and Seed operates in some jurisdictions in conjunction with local PHAs. Some PHAs have used the program to link returning prisoners, parolees, and probationers to social services and to assist these ex-offenders remain in public housing); *id.* at 87-88 (describing a family-centered program that works with public housing residents to break cycles of criminal justice involvement).

⁸²COUNCIL OF STATE GOVERNMENTS, PUBLIC HOUSING AUTHORITIES (PHAS) AND PRISONER RE-ENTRY (2005) available at: <http://www.reentry-policy.org/publications?states=&keyword=public+housing+> (Salt Lake County (Utah) Housing Authority partners with the county government to place individuals who have been released from jail directly into housing).

⁸³24 C.F.R. Part 983 (2007). A PHA may project-base up to twenty percent of its Housing Choice Vouchers *Id.* § 983.6. For any building that serves other than elderly or disabled, in general, no more than 25 percent of the units may have project-based voucher assis-

tance. *Id.* § 983.56. To exceed 25 percent, the housing must have supportive services. *Id.* § 983.56. Such housing could be developed for individuals, or families with members, who have a criminal record. For such housing, the PHA refers families who qualify for the services to the owner. *Id.* §§ 983.57(b)(3) and 983.261(b). Burlington, Vermont's housing authority has such a set aside. See COUNCIL OF STATE GOVERNMENTS, PUBLIC HOUSING AUTHORITIES (PHAS) AND PRISONER RE-ENTRY (2005), available at: <http://www.reentrypolicy.org/publications?states=&keyword=public+housing+>.

⁸⁴See CATERINA GOUVIS ROMAN AND JEREMY TRAVIS, URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 72-73 (2004); COUNCIL OF STATE GOVERNMENTS, PUBLIC HOUSING AUTHORITIES (PHAS) AND PRISONER RE-ENTRY (2005), available at: <http://www.reentrypolicy.org/publications?states=&keyword=public+housing+> (The Housing Authority of Portland, OR., provides 89 units of Shelter Plus Care (S+C), some of which are targeted to post-release individuals); see also programs administered by local YMCA or YWCA, which in some jurisdictions assist individuals with criminal records who were recently released from incarceration.

⁸⁵HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 38 (2004), available at: <http://hrw.org/reports/2004/usa1104/usa1104.pdf>.

⁸⁶*Id.* 36-37. The study will track individuals with a criminal record living in Portland public housing for four to five years.

6.7.5 Success Stories

Stories detailing the successful reintegration of individuals with a criminal record and a period of incarceration may also help persuade PHAs to adopt more progressive policies. Residents may be a good source of information. In the employment context, one study found that after approximately seven years there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those without a criminal record.⁸⁷ Moreover, some employers have reported that new hires recently released from prison make some of the best workers because they are eager for the chance to work and motivated to succeed.⁸⁸

6.8 Change Through Litigation

When admission policies are overly restrictive and efforts for administrative change are unsuccessful, litigation on behalf of clients may be advisable. Individual plaintiffs and groups or classes of plaintiffs have been successful.

6.8.1 Atlanta, Georgia

In *Bonner v. Housing Authority of the City of Atlanta*,⁸⁹ applicants successfully challenged the Housing Authority of the City of Atlanta's (HACA) admissions policy. Prior to the filing of *Bonner*, HACA automatically denied applicants who had any criminal history within the prior three years. The plaintiffs alleged that HACA summarily denied applicants with arrest records, individuals who had been acquitted or rehabilitated through probation or parole, as

well as those charged with very minor offenses.⁹⁰ In an unpublished consent decree, HACA agreed to limit the review of criminal convictions to those obtained within five years of the housing application, and to criminal offenses involving violence against persons or illegal drugs. HACA also agreed to take into consideration evidence of rehabilitation and to provide training to its staff regarding the new policies. The decree has served as a model for advocating on behalf of individuals with a criminal record across the state of Georgia.⁹¹

6.8.2 New York City, New York

In the early 1990s, applicants sued the New York City Housing Authority (NYCHA) because they had been denied housing solely on the ground that they had been convicted of misdemeanors or non-criminal violations of the law.⁹² The parties reached a settlement agreement under which NYCHA agreed to: reconsider certain ineligibility determinations, adopt an admissions policy that would consider whether an applicant would or would not be likely to interfere with other tenants so as to diminish their enjoyment of the premises by adversely affecting their health, safety, or welfare, the physical environment, or the financial stability of the project, consider relevant factors, including the time, seriousness and frequency of the criminal activity, and consider mitigating circumstances, rehabilitation and other factors that may indicate a reasonable probability of favorable future conduct. Evidence of the offender's rehabilitation included documentation of a positive six-month record of enrollment in school, job training, a job, or a letter from the prosecutor's office or the sentencing judge that the offender has been rehabilitated.⁹³

⁸⁷Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, CRIME & DELINQUENCY (Mar. 2006) (available at: http://www.reentry.net/library/item.100735-Enduring_Risk_Old_Criminal_Records_and_ShortTerm_Predictions_of_Criminal_In); Kurlychek, Brame, Bushway, *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUBLIC POLICY 483-504 (Aug. 2006) (available at http://www.reentry.net/search/item.100739-Scarlet_Letters_and_Recidivism_Does_An_Old_Criminal_Record_Predict_Future_R).

⁸⁸Jennifer Fahey, Cheryl Roberts & Len Engel, *Employment of Ex-Offenders: Employer Perspectives*, (Crime and Justice Institute, Sponsored by the Massachusetts Executive Office of Public Safety, Oct. 31, 2006), available at: http://www.crjustice.org/cji/ex_offenders_employers_12-15-06.pdf.

⁸⁹*Bonner v. Housing Auth. of Atlanta*, No. 94-376 (N.D. Ga. Nov. 8, 1995) (unpublished consent decree) available as Exhibit 2 to this Chapter.

⁹⁰*Bonner v. Housing Auth. of Atlanta*, Shriver Center, Poverty Law Library, Clearinghouse No. 49,726, available at: <http://www.povertylaw.org/poverty-law-library/case/49700/49726>.

⁹¹KAY RANDOLPH-BACK, COMMUNITY VOICES SERIES, PUBLIC HOUSING POLICIES THAT EXCLUDE EX-OFFENDERS: A HOUSE DIVIDED 10-11 (2007), available at: http://www.communityvoices.org/Uploads/Public_Housing_Policies_Exclude_Ex-offenders_00108_00167.pdf (citing HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING, 59-60 (2004), available at: <http://hrw.org/reports/2004/usa1104/usa1104.pdf>).

⁹²*Williams v. N.Y. City Hous. Auth.*, Nos. 94-4160 and 96-1595 (S.D.N.Y. July 30, 1996) (stipulation of settlement), available at: <http://www.probono.net/>.

⁹³NYCHA's current policy is discussed more fully in LEGAL ACTION CENTER, HOW TO GET SECTION 8 OR PUBLIC HOUSING EVEN WITH A

6.8.3 Old Town, Maine

In *Ouellette v. Housing Authority of Old Town*, the plaintiff obtained a voucher from one PHA and then sought to transfer to the jurisdiction of another PHA. During the application/transfer process, he admitted to having a fifteen-year old conviction for aggravated sexual assault. When, as a result, the voucher was denied, the applicant requested a hearing at which he was told that if he produced three documents, he could be considered eligible. When he was unable to produce one of the three documents because it was unavailable, his rejection was affirmed. The applicant then filed suit challenging the PHA's policy of rejecting all applicants who have committed a violent crime regardless of when the crime occurred. The court agreed with the plaintiff that the PHA violated the federal regulations because it failed to consider whether a reasonable time had passed since the date of the criminal acts. The court, therefore, remanded the case to the PHA for further proceedings consistent with its ruling.⁹⁴ The favorable decision resulted in reconsideration and admission of the plaintiff, but no corollary change to the PHA's admission policy.⁹⁵

6.8.4 Other Cases

Other advocates have reported that they have successfully negotiated settlements that changed a policy or forced the acceptance of an applicant when a PHA's or owner's policy was unreasonable or unfair. In Texas, advocates settled a case with a Section 8 project-based owner who had a policy of rejecting all applicants with any prior drug-related criminal record.⁹⁶

The claims that may be alleged in admission or eligibility cases include violation of federal statutes and regulations. The enforcement of such claims will vary

depending upon the strength of the plaintiff's case and the characteristics of the defendant. If it is a PHA, enforcement is pursuant to 42 U.S.C.A. § 1983; if the defendant is a private owner, enforcement is predicated on the existence of a private right of action.⁹⁷ Principles of federal preemption may also apply.⁹⁸ There may also be state law claims under general recourse (under the theory that where there is a right, there is a remedy), declaratory relief, or consumer protection or unfair business practices statutes. If a PHA and a hearing are at issue, the claim may include a state-law review of agency action, administrative mandamus, and, depending upon the facts, a possible constitutional due process claim.

Advocates have reported that they have successfully negotiated settlements that changed a policy or forced the acceptance of an applicant when a PHA's or owner's policy was unreasonable or unfair.

In most cases, advocates have been able to negotiate agreements prior to filing formal cases in court by using administrative hearings when they are available, or pre-hearing meetings at which they have presented mitigating or more favorable information. For example, in Denver, Colorado, advocates convinced a PHA not to evict a tenant who was a registered sex offender by informing the PHA that the tenant was eligible for an expungement of the criminal record and that an attorney had been engaged to assist with the expungement.⁹⁹ Other examples of successful resolution of claims include situations in which there is documentation of other mitigating factors, such as successful completion of drug rehabilitation

CRIMINAL RECORD: A GUIDE FOR NEW YORK CITY HOUSING AUTHORITY APPLICANTS AND THEIR ADVOCATES (no date), available at: http://lac.org/doc_library/lac/publications/How_to_Get_Section_8_or_Public_Housing.pdf.

⁹⁴*Ouellette v. Housing Auth. of Old Town*, No. Ap.-03-17, 2004 WL 842412 (Me. Super. Ct., Penobscot County, Mar. 11, 2004). See also Chapter 2 for a discussion of reasonable time period.

⁹⁵Although no change occurred with respect to the substantive admission policy, the PHA did alter its procedure with respect to appealing a denial of admission. Information provided by Amy Keck, Pine Tree Legal Assistance, July 2007.

⁹⁶See _____ v. _____, (Travis County, Tex.) (draft complaint), included as Exhibit 3 of this Chapter.

⁹⁷See NHLP, HUD HOUSING PROGRAMS: TENANT'S RIGHTS, Ch. 16 (2004 and Supp. 2006-2007) (more information about legal theories regarding enforcement).

⁹⁸Lauren K. Saunders, *Preemption as an Alternative to Section 1983*, 30 CLEARINGHOUSE. REV. 703, 705 (Mar./Apr. 2005).

⁹⁹Colo. Rev. Statutes Anno. (C. R. S. A.) § 16-22-103, CO ST § 16-22-103 (West 2007) and email from Julianne Middleton, Colorado Legal Services (August and Sept 2007).

programs, engagement in work and volunteer activities in a correctional facility, and favorable letters from treating physicians.¹⁰⁰

6.9 Local Ordinance Preventing Discrimination Against Individuals with Criminal Records

Two jurisdictions have included individuals with criminal records in their anti-discrimination ordinances, thereby providing more comprehensive protections than federal or state civil rights laws. The City of Madison, Wisconsin enacted an ordinance preventing discrimination against an individual based upon an arrest or conviction record. However the ordinance does not prohibit refusal to rent “if the circumstances of the offense bear a substantial relationship to tenancy.”¹⁰¹ Also an owner or PHA may be exempt from compliance with the ordinance, if they demonstrate a “justifiable fear for the safety of landlord or tenant property or for the safety of other residents or employees” which may include acts of “violence to persons such as murder, child abuse, sexual assault, battery, aggravated assault, assault with a deadly weapon arson, vandalism, theft, burglary, [or] criminal trespass to a dwelling.”¹⁰² Significantly, in most cases, the exemptions do not apply if two years have elapsed since the applicant or member of the tenant’s or applicant’s household was placed on probation, paroled, released from incarceration or paid a fine for offenses.

The City of Urbana, Illinois’ Code of Ordinances also prohibits discrimination by reason of “prior arrest or conviction record” without limitation regarding the criminal activity.¹⁰³ The ordinance exempts state and local governments and agencies from coverage therefore the ordinance is not applicable to public

housing.¹⁰⁴ Nevertheless, the ordinance should apply to other federally assisted housing and to owners of housing assisted by the voucher program. There is no reported case law interpreting either the Illinois or Wisconsin ordinances.

¹⁰⁰See, e.g., New York City Hous. Auth., Div. of Applicant Appeals, Public Housing Hearing, Report of Informal Hearing, Aug. 7, 2007, No. 113-52-7732, copy available in Exhibit 3 to Chapter 5.

¹⁰¹MADISON, WIS. CODE OF ORDINANCES Ch. 39.03(1) and (4) ((Renumbered by Ord. 12,039, Adopted 2-17-98) available at: <http://www.municode.com/resources/gateway.asp?pid=50000&sid=49>.

¹⁰²*Id.*

¹⁰³Urbana, Ill, Code of Ordinances, Ch. 12 Art. III. Div. 1, §§ 12-37 and 12-64, (Ord. No. 7879-92, § 1(29), 4-24-79; Ord. No. 9798-49, § 1, 10-6-97) available at: <http://genderadvocates.org/links/urbana.html> or http://www.city.urbana.il.us/urbana/city_code/11500000.HTM.

¹⁰⁴*Id.* 12-105(d).

Chapter 6: Exhibit 1**Public Housing – Model Admission Rules on Criminal Activity**

1. The Public Housing Authority (PHA) shall prohibit admission of a household for three years from the date of the eviction, if any household member has been evicted from federally assisted housing for drug-related criminal activity.

However, the PHA shall admit the household if the PHA determines:

- (i) The evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program approved by the PHA; or
 - (ii) The circumstances leading to the eviction no longer exist (for example, the criminal household member has died, is imprisoned, or is no longer a member of the household).
2. The PHA shall prohibit admission of a household if the PHA determines that any household member is currently engaging in illegal use of a drug.
3. The PHA shall prohibit admission of a household if the PHA determines that any household member has engaged in the illegal use of a drug recently enough to justify a reasonable belief that the behavior is current, which means that any household member has engaged in the illegal use of a drug within one month before the admission decision.
4. The PHA shall prohibit admission of a household if the PHA determines that it has reasonable cause to believe that a household member's illegal use or pattern of illegal use of a drug, during the one month period before the admission decision, may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents. The PHA shall not prohibit admission of a household under this criterion if, at the time of the admission decision, the household member, who engaged in the illegal use or pattern of illegal use of a drug, is a participant in good standing in a supervised drug rehabilitation program approved by the PHA.
5. The PHA shall prohibit admission of a household if any household member has ever been convicted of drug-related criminal activity for the manufacture or production of methamphetamine on the premises of federally assisted housing.
6. The PHA shall prohibit admission of a household if any member of the household is subject to a lifetime registration requirement under a state sex offender registration program. In the screening of households, the PHA shall perform necessary criminal history background checks in the state where the housing is located and in other states where household members are known to have resided.

Chapter 6: Exhibit 1

7. The PHA shall prohibit admission of a household if the PHA determines that it has reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol, during the one month period before the admission decision, may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.
8. The PHA may prohibit admission of a household if it determines that any household member is currently engaging in:
 - (a) Drug-related criminal activity, as defined in 24 C.F.R. § 5.100; or
 - (b) Violent criminal activity, as defined in 24 C.F.R. § 5.100.

With respect to these categories of criminal activity, currently engaging in means that the individual has engaged in the behavior recently enough to justify a reasonable belief that the individual's behavior is current, which means that the individual has engaged in the criminal activity within three months before the admission decision.

The PHA shall not prohibit admission of a household under this criterion if, at the time of the admission decision, the household member, who engaged in the drug-related criminal activity, is a participant in good standing in a supervised drug rehabilitation program approved by the PHA.

Where applicable, the PHA may determine that an individual is not currently engaging in these categories of criminal activity based on the individual's certification and/or supporting information from such sources as a probation officer, landlord, neighbor, social service agency worker, or criminal records.

9. The PHA may prohibit admission of a household for three years from the date of conviction, if any household member has been convicted for any of the felony crimes listed below.
 - (i) Homicide;
 - (ii) Rape, sexual assault, sexual battery, gross sexual imposition, and, insofar as they are felonies committed against a minor, child pornography, corruption of a minor, child endangerment, and child enticement;
 - (iii) Arson;
 - (iv) Kidnapping, abduction.
10. In determining whether to deny admission for illegal drug use or a pattern of illegal drug use by a household member who is no longer engaging in such use, or for abuse or a pattern of abuse of alcohol by a household member who is no longer engaging in such abuse, the PHA shall consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program,

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or has otherwise been rehabilitated successfully. For this purpose, the PHA may require the applicant to submit evidence of the household member's current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.

11. In the event that the PHA receives unfavorable information with respect to a household member, and the information may cause the PHA to deny admission under a criterion (or criteria) contained in paragraphs 1 through 10, above, the PHA shall give consideration to the time, nature, and extent of the household member's conduct (including the seriousness of the offense).

The PHA shall give consideration to factors that might indicate a reasonable probability of favorable future conduct. For example, it shall give consideration to:

- (i) Evidence of rehabilitation; and
- (ii) Evidence of the household member's (or household's) participation in, or willingness to participate in, social service or other appropriate counseling service programs and the availability of such programs.

The PHA shall also give consideration to:

- (a) The adverse effect of denial of admission on the community; and
- (b) The adverse effect of denial of admission on household members not involved in the offending action.

12. The unfavorable information that the PHA may consider, in determining whether to prohibit admission of a household under a criterion (or criteria) contained in paragraphs 1 through 11, above, shall be limited to the reliable, credible, and verified information that the PHA has received. The PHA shall not rely upon unfavorable information that it receives from an anonymous or unknown source. The PHA shall not rely upon unfavorable information that it receives from a second-hand source, unless the information is furnished by an agency or entity that maintains such information in the normal course of its business and the information is based on an original source who had first-hand knowledge, is reliable, and is credible. The PHA shall not rely upon unfavorable information that it receives from an individual, in the form of an individual's statement (oral or written), unless the household has an opportunity to confront and cross-examine the individual during an informal hearing, before the PHA makes a final decision on the admission of the household.

13. The PHA shall make its decision, with respect to the criteria that are contained in paragraphs 1 through 12, above, based on a preponderance of the evidence, with the burden of proof on the PHA to establish any grounds for denial of admission.

Chapter 6: Exhibit 1

14. With respect to any household that otherwise would be denied admission under a criterion (or criteria) contained in paragraphs 1 through 13, above, the PHA shall provide the household with an opportunity (and notice of the opportunity) to exclude the household member who has participated in, or been culpable for, the action on which the denial would be based. If the household then excludes that household member, the PHA shall not deny admission to the household under that criterion (or those criteria).

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Chapter 6: Exhibit 2

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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF GEORGIA
 ATLANTA DIVISION

'QUENTELLA P. BONNER and)
 JAMES CHARLES RAPLEY JR.,)
 individually and on behalf of)
 all others similarly situated,)
)
 Plaintiffs,)
)
 v.)
)
 THE HOUSING AUTHORITY)
 OF THE CITY OF ATLANTA,)
 GEORGIA, and RENEE LEWIS)
 GLOVER, in her official)
 capacity as the Executive)
 Director of the Housing)
 Authority of the City of)
 Atlanta, Georgia,)
)
 Defendants.)

CIVIL ACTION

FILE NO.: 1:94-CV-376-MHS

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**NATIONAL CLEARING HOUSE
FOR LEGAL SERVICES, INC.**

CONSENT ORDER

Presently pending are the Plaintiff's Motion to Compel Discovery, and the Motion to Intervene James Charles Rapley Jr. as a named plaintiff. The Plaintiff, the Defendants, and the proposed Intervenor having come to a resolution of the issues in this case, IT IS HEREBY ORDERED AND ADJUDGED as follows:

I. MOTION TO INTERVENE

1. The Motion to Intervene James Charles Rapley Jr. as a named plaintiff in this action is hereby GRANTED. The Clerk is directed to enter James Charles Rapley Jr.'s name upon the docket as of this date, and to note that the style of this case will be as shown above until further order of the Court.

Chapter 6: Exhibit 2

2. The original motion of September 29, 1994, moved to intervene Rapley as well as Richard Blalock Jr. However, on November 16, 1994, Blalock's death was suggested on the record. Accordingly, as regards Richard Blalock Jr., this motion is **DENIED**.

II. MOTION TO COMPEL DISCOVERY

There being no further unresolved substantive issues in this action, the Plaintiffs' Motion to Compel Discovery is moot and accordingly is hereby **DENIED** without prejudice.

III. CRIMINAL HISTORY SCREENING

To the extent that Defendant Housing Authority of the City of Atlanta, Georgia ("HACA"), screens applicants for admission to its conventional public housing program for their criminal records, the Plaintiffs and Defendants agree as follows:

A. DEFINITIONS

1. As used in this Order, the terms "criminal history" and "criminal record" shall be synonymous, and shall mean the fact of having committed a criminal offense under the laws of the United States or any foreign country, any state of the United States, or any city, county, or other municipal authority, or having been convicted, suspected, or otherwise accused of having committed a criminal offense, or being regarded as having such a criminal history or criminal record.

2. As used in this Order, the terms "hearing" and "informal review" are synonymous and refer to administrative proceedings held by HACA.

Chapter 6: Exhibit 2**B. APPLICATIONS FOR PUBLIC HOUSING**

1. In its Application for Admission to the conventional public housing program, HACA will use the language in Exhibit "A" of this Consent Order to question applicants regarding their criminal histories and warn them of the consequences of providing false information in this regard. For a period of eighteen months, there shall be no variation in this language unless the Plaintiffs' counsel agrees in writing to such changes. This paragraph shall not apply to changes required by future statutes or federal regulations, or changes to other parts of the application thought desirable by HACA, provided that Plaintiffs' counsel have an opportunity to review and comment on any such changes made within one year of the entry of this Order.

2. HACA shall amend, subject to its Board of Commissioners' and the U.S. Department of Housing and Urban Development's ("HUD") approval, its Admissions and Continued Occupancy Policy regarding the taking of applications for admission to public housing as provided in Exhibit "B" to this Consent Order.

3. All persons who apply for admission to HACA's public housing program shall, if any so request, be counselled as to their rights and obligations under this Consent Order. Applicants shall also be orally advised to complete that portion of their applications regarding their criminal histories with the utmost candor, and to disclose all information whose relevance they question.

Chapter 6: Exhibit 2**C. TRAINING OF HACA EMPLOYEES**

Within thirty (30) days of the entry of this Consent Order, HACA shall conduct a training program for all of its employees who accept applications for public housing or who are involved in the screening of public housing applicants' criminal records, regarding their obligations under this Consent Order. Thereafter, all employees new to such positions shall likewise be trained before beginning their duties, and all such employees shall annually be re-trained regarding their obligations under this Consent Order.

D. CRIMINAL HISTORY SCREENING OF PUBLIC HOUSING APPLICANTS

1. HACA may only screen its applicants for criminal offenses which have occurred within five years preceding the date of an application for housing, and for any criminal offenses involving violence against persons or illegal drugs without regard to a time limitation.

2. Whenever HACA, in processing a public housing application, reasonably determines that an applicant or a proposed household member of an applicant has a criminal record which may indicate a threat to the health, safety, or welfare of other residents of HACA, and HACA proposes to deny this application on this basis, HACA shall send to the applicant the Suitability Denial Notice annexed- hereto as Exhibit "C". For a period of one year from the entry of this Consent Order, HACA shall not make any changes to this form without the written consent of the Plaintiffs' counsel. Under the section labeled "past criminal history," HACA

Chapter 6: Exhibit 2

shall provide, for each charge which is the proposed basis for denial of the application, the name of the charge, the date of the arrest, the county and state of the charge, and, if known, the court, disposition, and date of disposition of the charge, attaching additional paper to the form as necessary. In lieu of completing this section of the form, HACA may complete the section with the words "see attached" or their equivalent, and attach to the form a photocopy of the printout from the Georgia Crime Information Center or whatever other authority has provided the criminal record information to HACA, so long as HACA provides written notice to the applicant of the specific charges listed on the attached form that HACA is relying upon to deny the application.

3. HACA shall enclose with this suitability denial notice the Hearing Request Form annexed hereto as Exhibit "D", for the applicant to request an informal review on the denial of the application. For a period of one year from the entry of this Consent Order, HACA shall not make any changes to this form without the written consent of the Plaintiffs' counsel.

4. The applicant shall have no fewer than ten (10) days to request an informal review or hearing on this issue. The applicant may do so with the form provided or by any other writing sufficient to notify HACA of the applicant's identity and desire for an informal review or hearing. If the deadline for requesting an informal review or hearing falls upon a Saturday, Sunday, or **legal**

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holiday, a request received by HACA on the next working day shall be considered timely. If the applicant presents himself or herself in person to HACA within the prescribed period and requests an informal review or hearing on the issue, HACA shall assist the applicant in completing a hearing request form, or otherwise memorializing in writing the applicant's oral request for a hearing; however, no request shall be considered timely unless it is in writing. No timely written request for an informal review or hearing shall be denied by HACA because of a minor or technical deficiency; however, the written request must clearly request a hearing or informal review.

5. Upon the applicant's request for a hearing or review, HACA shall, within a reasonable time, schedule an informal review or hearing and notify the applicant of the date, time, and location of the hearing *or* review by means of the Hearing Notification Form annexed hereto as Exhibit "E". For a period of one year from the entry of this Consent Order, HACA shall not make any changes to this form without the written consent of the Plaintiffs' counsel. The applicant shall be given no less than seven (7) days advance notice of the date, time, and place of the informal review or hearing.

6. An applicant who has requested an informal review or hearing shall have the right to examine his or her application file in the possession of HACA and to copy any relevant documents. HACA may charge a reasonable cost for copying, not to exceed the rates

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prescribed by the Georgia Open Records Act, O.C.G.A. § 50-18-71.

E. INFORMAL REVIEWS OR HEARINGS

1. All informal reviews or hearings shall be heard by an impartial hearing officer who has not had any prior role in processing the applicant's application.

2. All informal reviews, at the option of HACA, may be tape recorded.

3. At informal reviews or hearings, the applicant shall have the right to be represented by counsel, to cross-examine any witnesses, and to present any relevant evidence.

4. If the information obtained by HACA regarding the applicant's criminal record includes the disposition of the criminal case(s), the issues at the informal review relating to the applicant's criminal record shall be limited to the circumstances of the criminal case(s); the severity of the applicant's conduct; the presence of mitigating or aggravating circumstances; whether the criminal conduct indicates that the applicant would, if admitted to public housing, pose a danger to the health, safety, or welfare of other residents of HACA; whether the applicant has, since the criminal case, been rehabilitated so as not to pose such a danger; whether there are other facts which would prevent the applicant from posing such a danger, as, for instance, physical incapacity; and any other factors which may be required by HUD regulations.

5. If the information so found by HACA regarding the

Chapter 6: Exhibit 2

applicant's criminal history reveals that the applicant has in the past been arrested, but does not reveal the disposition of the criminal case, and the applicant, at the informal review, admits that this arrest resulted in a conviction or guilty plea for the charged offense, the hearing officer may only consider the issues outlined in Section III(E), Paragraph 4, supra, and shall not, without reasonable cause, require the applicant to provide additional information regarding that criminal conviction or guilty plea.

6. If the information obtained by HACA regarding the applicant's criminal history reveals that the applicant has in the past been arrested, but does not reveal the disposition of the criminal case, the hearing officer in his or her discretion may, in addition to considering the issues outlined in Section III(E), Paragraph 4, supra, request in writing that the applicant produce documentation showing the disposition of the criminal case at issue. A noncertified copy of the verdict, judgment, dismissal, order of *nolle prosequi*, or other final disposition from the appropriate court shall be sufficient for this purpose, as shall a letter from any attorney who represented the applicant or who is employed by the law firm which represented the applicant in this criminal proceeding explaining the disposition of the case. The applicant shall have no fewer than thirty (30) days to do this, and that period shall be extended upon the applicant's showing of good cause. If this documentation is not provided to the hearing

Chapter 6: Exhibit 2

officer within the specified time, the hearing officer shall not automatically deny the application but shall issue a decision based upon the evidence presented and considering whether it demonstrates the applicant's suitability for admission, even in the absence of the requested documentation. In no event shall the applicant be required to provide records when this is impossible, for instance, if the court records have been destroyed.

7. In cases where the information regarding the applicant's criminal history provided to HACA reveals, or the applicant admits, that there is presently pending a criminal case against the applicant, the hearing officer shall consider the issues outlined in Section III(E), Paragraph 4, *supra*. If the hearing officer decides that, notwithstanding the **pendency** of the criminal case, the applicant does not pose a threat to the health, safety, or welfare of other residents of HACA, the application shall be approved and the applicant admitted. An application may be denied if a criminal case is pending, provided that the hearing officer determines that the applicant would pose a threat to the health, safety or welfare of other residents of HACA.

8. In cases where HACA requires the applicant to produce additional documentation of the disposition of his or her criminal case, the applicant shall be given information on how to do this and shall also be provided the names of agencies in metropolitan Atlanta capable of assisting in this process. This shall include, but not be limited to, the Atlanta Legal Aid Society, Inc.

Chapter 6: Exhibit 2**F. FALSIFICATION OF APPLICATION INFORMATION**

1. It shall be a ground for denial of an application for admission to public housing with HACA if an applicant provides false information regarding his or her criminal record on his or her application for admission or at his or her informal review or hearing, provided that no application shall be denied for this reason unless the falsification was intentional. Falsification is "intentional" if the information contained on the application is inaccurate and the applicant does not provide an acceptable excuse for the misinformation.

2. HACA may deny an application on this ground; however, the applicant has the right to an informal review or hearing of this issue, pursuant to Section III(E), Paragraphs 1 through 3, *supra*.

3. At the informal review or hearing on this issue, the hearing officer shall consider, in deciding whether the falsification of information was intentional, whether the applicant understood the questions asked of him or her in his or her application for public housing; whether the applicant understood or should have understood the precise legal disposition of the criminal cases against him or her; whether the applicant remembered or should have remembered his or her criminal record at the time of his or her application; whether the applicant was properly assisted in completing his or her application form by HACA staff; and all other relevant issues. The hearing officer shall also consider the applicant's literacy, mental capacity, and proficiency in the

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English language, and any other mitigating circumstances.

G. INFORMAL REVIEW OR HEARING DECISIONS

1. The applicant shall be provided a written decision within ten (10) days of the informal review. If the hearing officer requested the applicant to submit additional information pursuant to Section III(E), Paragraph 6, supra, the decision shall be provided within ten (10) days of the date the additional information was submitted, or was due if not submitted, whichever comes first.

2. If the hearing officer's decision is to deny the application, the hearing decision shall set forth the reasons in detail.

3. If an applicant fails to attend his or her informal review and the hearing officer denies the application on this basis, the applicant shall be notified of this in writing within ten (10) days of the scheduled hearing date. HACA shall reopen the matter and schedule a new informal review upon the applicant's showing of good cause for failure to attend the previous informal review, provided that the request is made within thirty (30) days after the date of the decision. For purposes of this paragraph, "good cause" shall be narrowly construed.

H. RELIEF FOR CLASS MEMBERS

1. Within fifteen (15) days of the entry of this Consent Order, HACA shall mail ("Initial Mailing") to each class member who has not been admitted to HACA public housing, at his or her last

Chapter 6: Exhibit 2

known address, the form annexed hereto as Exhibit "F", along with a Hearing Request Form (Exhibit "D").

a. If, within thirty (30) days of the Initial Mailing, any notices are returned to HACA as undelivered, or HACA otherwise learns that a class member did not receive notice of the settlement, HACA shall, within forty-five (45) days of such receipt or notice, attempt to locate each unnotified class member by using each of the following methods as necessary:

- 1) Telephoning any and all telephone numbers on file for that applicant;
- 2) Contacting the Metro Atlanta Task Force for the Homeless, and all Fulton and DeKalb County offices of the Division of Family and Children Services, the Social Security Administration, and the Child Support Recovery Unit;
- 3) Contacting all municipal, state, and federal correctional facilities in Fulton and DeKalb counties, including but not limited to prisons, jails and pretrial detention facilities, probation and parole offices, halfway houses, detention centers, and diversion centers;
- 4) Contacting the facilities holding federal prisoners in Douglas and Paulding counties; and
- 5) Hiring a skip tracer to locate all remaining class members using whatever reasonable methods are usually employed in the skip tracing industry. In any event, the

Chapter 6: Exhibit 2

NHLP does not have page 13 of this opinion and has not been successful in securing a copy.

Chapter 6: Exhibit 2

admitted to HACA's public housing program, will be so admitted and placed on HACA's active waiting list based upon the date of their original application for admission.

J. MONITORING

1. HACA will provide Plaintiffs' attorneys the following information within 120 days after the entry of this Consent Order:

a. The number of notices sent pursuant to Section III(H), Paragraph 1, supra;

b. The number of applicants who, in response to the mailed notices, or other efforts undertaken by HACA, requested informal reviews of their criminal history denials;

c. The number of applicants who failed to attend informal reviews requested in response to the aforementioned notices;

d. The number of applicants whose applications were approved or denied pursuant to an informal review requested in response to the aforementioned notices; and

e. Copies of all denial notices sent to class members who requested an informal review.

2. For one year after the entry of this Consent Order, HACA shall provide Plaintiffs' attorneys with monthly reports regarding the processing of applications for all persons denied housing based on an alleged criminal history. These reports shall include:

a. The total number of public housing applications received that month;

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b. The number of applicants denied admission that month due to an alleged criminal history;

c. The number of those applicants who requested informal reviews of their denials;

d. Of the applicants who requested informal reviews of their denials, the number who failed to appear at their informal review;

e. The number of persons who, at their informal review, were requested to submit additional information pursuant to Section III(E), Paragraph 6 of this Consent Order;

f. The number of persons who were admitted to public housing after an informal review of this issue; and

g. The number of persons who were denied admission to public housing after an informal review of this issue.

This information shall account for applications carried over from one month to the next.

3. For one year after the entry of this Consent Order, HACA shall provide to the Plaintiffs' counsel copies of all denial notices sent to persons whose applications are denied based upon an alleged criminal history. Said notices shall be provided on a monthly basis.

4. For one year after the entry of this Consent Order, HACA shall allow Plaintiffs' counsel to have access, subject to agreement among counsel as to reasonable times, places, and manners of access, to all files and records maintained by HACA for every

Chapter 6: Exhibit 2

person whose application is denied based upon an alleged criminal history.

K. ATTORNEY FEES

Defendants will pay to Plaintiffs' counsel attorney fees of \$12,000.

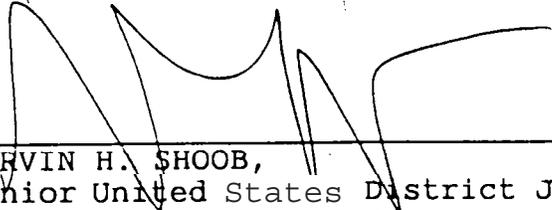
L. COSTS

Each party shall bear its own costs.

M. EFFECT OF CONSENT ORDER

This Consent Order shall terminate further proceedings in this matter other than proceedings in the nature of the enforcement or interpretation of provisions of this Consent Order.

IT IS SO ORDERED this 10 day of Oct 9 5 .



MARVIN H. SHOOB,
Senior United States District Judge
Northern District of Georgia

[SIGNATURES CONTINUED ON NEXT PAGE]

Chapter 6: Exhibit 2

CONSENTED TO:



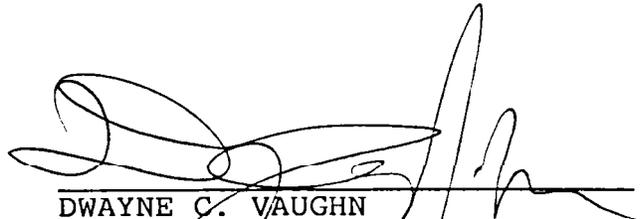
PAUL OWENS
Georgia Bar No. 632130

Steven D. Caley by P.O. w/ express delivery

STEVEN D. CALEY
Georgia Bar No. 102866

DENNIS GOLDSTEIN
Georgia Bar No. 300250
Attorneys for Plaintiffs

ATLANTA LEGAL AID SOCIETY, INC.
151 Spring Street, N.W.
Atlanta, Georgia 30303-2097
(404) 614-3903
Fax (404) 614-3997



DWAYNE C. VAUGHN
Georgia Bar No. 726265

ANDREA E. ALLEN
Georgia Bar No. 236926
Attorneys for Defendants

Office of General Counsel
HOUSING AUTHORITY OF THE CITY OF ATLANTA, GEORGIA
739 West Peachtree Street, N.E.
Atlanta, Georgia 30365
(404) 817-7217

Chapter 6: Exhibit 2

APPLICATION FOR HOUSING INCENTIONS

IV. CRIMINAL ACTIVITY:

- A. Have you or any family member(s) listed on this Application been involved in any criminal activity/conduct that might adversely affect the health safety or welfare of HOUSING AUTHORITY, OF THE CITY OF ATLANTA RESIDENTS.
 - Yes
 - No

EXAMPLES OF CRIMINAL ACTIVITY/CONDUCT INCLUDE BUT ARE NOT LIMITED TO: (Please Check All Which Apply)

- 1. Homicide/Murder
- 2. Rape or child molesting
- 3. Burglary/Robbery/Larceny
- 4. Threats or harassment
- 5. Destruction of property or vandalism
- 6. Assault or fighting
- 7. Drug trafficking/use/possession
- 8. Child abuse/domestic violence
- 9. Public intoxication/drunk & disorderly
- 10. Receiving stolen goods
- 11. Fraud
- 12. Prostitution
- 13. Disorderly conduct
- 14. Other (Specify) _____

IF YOU HAVE BEEN INVOLVED IN ANY OF THE ABOVE CRIMINAL ACTIVITIES GIVE ITEM NUMBERED () AND EXPLAIN BELOW. If additional space is needed please write on the back of this page or attach additional sheets.

- B. Have you or has anyone listed on your application been accused of, convicted or pled guilty to any of the crimes listed above?
 - Yes
 - No
- C. Have you or has anyone listed on your application been convicted within the last five (5) years of a felony?
 - Yes
 - No

A FELONY IS ANY CRIME WHOSE MAXIMUM PUNISHMENT IS MORE THAN ONE YEAR IN JAIL OR A FINE OF MORE THAN \$1,000.

Chapter 6: Exhibit 2

-2-

D. Have you or has anyone listed on your application ever been convicted of murder, rape, armed robbery, child abuse/molestation, and drug-related felony, or any other violent crime?

- Yes No

E. Are you or is anyone listed on your application currently facing any criminal charges?

- Yes No

F. Are you or is anyone listed on your application currently facing any felony charges?

- Yes No

G. If you answered "Yes" to any of the above questions, then answer the following:

1. List the criminal charges or activity, the date, and the court disposition (waiting for court date, dismissed, continued, probation, sentence served, etc.) If additional space is needed please write on the back of this page or attach additional sheets.

Four horizontal lines for writing.

2. List who (which family member(s)) was/were involved in each case. If additional space is needed please write on the back of this page or attach additional sheets.

Four horizontal lines for writing.

3. Explain why this does not show that you are a threat to the health, safety, or welfare of other residents. You may explain the circumstances of the case. that the case is so old or is not serious enough to show that you are a threat. that you have been rehabilitated. or any other favorable information. If additional space is needed please write on the back of this page or attach additional sheets.

One horizontal line for writing.

Chapter 6: Exhibit 2

-3-

I/WE REALIZE THAT THE HOUSING AUTHORITY OF THE CITY OF ATLANTA WILL VERIFY ANY INFORMATION PROVIDED BY ME/US IN THIS APPLICATION. I/WE HEREBY WAIVE AND RELEASE ANY RIGHTS I/WE MAY HAVE OR ASSERT AGAINST THE HOUSING AUTHORITY OF THE CITY OF ATLANTA BY VIRTUE OF ITS RELIANCE ON INFORMATION PROVIDED BY OUTSIDE INVESTIGATORY OR INFORMATIONAL AGENCIES, INCLUDING, BUT NOT LIMITED TO, CREDIT REPORTING AGENCIES AND GEORGIA CRIME INFORMATION CENTER, FORMER LANDLORDS, AND STATE WAGE INFORMATION AGENCY OR BY VIRTUE OF THE DISSEMINATION OF INFORMATION TO ME VIA CORRESPONDENCE DIRECTED TOWARD ME/US AT THE ADDRESS LISTED ON PAGE ONE OF THIS APPLICATION.

I/WE CERTIFY THAT IF SELECTED TO RECEIVE ASSISTANCE, THE UNIT I/WE OCCUPY WILL BE MY/OUR ONLY RESIDENCE. I/WE UNDERSTAND THAT THE ABOVE INFORMATION IS COLLECTED TO DETERMINE MY/OUR ELIGIBILITY AND SUITABILITY FOR HOUSING ASSISTANCE. I/WE AUTHORIZE THE ATLANTA HOUSING TO VERIFY ALL INFORMATION PROVIDED ON THIS APPLICATION AND TO CONTACT PREVIOUS OR CURRENT LANDLORDS OR OTHER SOURCES FOR CREDIT AND VERIFICATION INFORMATION RELEASED TO APPROPRIATE FEDERAL, STATE OR LOCAL AGENCIES. I/WE CERTIFY THAT THE STATEMENTS MADE IN THIS APPLICATION ARE TRUE AND COMPLETE TO THE BEST OF OUR KNOWLEDGE AND BELIEF. I/WE UNDERSTAND THAT FALSE STATEMENTS OF INFORMATION ARE PUNISHABLE UNDER FEDERAL LAW. AND THAT I/WE MAY BE DENIED HOUSING FOR ANY FALSE STATEMENTS OR FAILURE TO ATTEND PRE-OCCUPANCY TRAINING. IF DENIED, I/WE HAVE A RIGHT TO AN INFORMAL REVIEW AND THE RIGHT TO BE REPRESENTED BY LEGAL COUNSEL OF MY/OUR CHOOSING.

SIGNATURE OF HEAD OF HOUSEHOLD: _____ DATE: _____

SIGNATURE OF SPOUSE: _____ DATE: _____

HACA REPRESENTATIVE: _____ DATE: _____

Chapter 6: Exhibit 2

3-4. SUITABILITY FOR TENANCY.

HACA will evaluate each applicant to determine whether the applicant would be reasonably expected to have a detrimental effect on the other residents or on the development site. HACA will deny admission to any applicant whose habits and practices may be expected to have a detrimental effect on other residents or on the development site.

Screening for suitability.

A. Applicants will be appropriately screened by the Department of Resident Selection and Assignment. Applicants who fall into one of the following categories may (on an individual basis) be declared unsuitable for occupancy. Before such determination is made, consideration shall be given to favorable changes in the behavior pattern of the applicant, length of time since the latest offense and other extenuating circumstances that indicate the applicant would or could be a responsible resident.

1. History of serious or consistent criminal activity.

An Applicant may be denied on the basis of a criminal history if the applicant has a criminal record which indicates future behavior which poses a threat to the health, safety, peaceful environment, or welfare of other residents and/or employee(s) of the HACA. An application may not be denied for a case more than five years old unless that case involved murder, rape, armed robbery, child abuse/molestation, violence (e.g., aggravated assault), and/or drugs.

2. Drug or alcohol abuse.

3. Pattern of violent behavior.

4. History of chronic delinquency in rent payments.

5. Records of serious disturbances of neighbors, destruction of property, or other disruptive or dangerous behavior.

6. Excessively unsanitary or hazardous housekeeping.

B. Notification of Applicant.

1. The HACA shall promptly notify any applicant determined as having failed suitability, the basis for such a determination, and shall provide the applicant upon request, (within a reasonable time after the determination

Chapter 6: Exhibit 2

is made) with an opportunity for an informal hearing on such determination.

2. When a determination has been made that an applicant is eligible and satisfies all requirements for admission, including the resident screening and selection criteria, the applicant shall be notified of the approximate date of occupancy in so far as that date can be reasonably determined.
3. If the applicant fails to request a hearing within the specified time of ten (10) days, the applicant will be removed ~~from~~ the Active Waiting List and the record will be placed in the Denied File.

Chapter 6: Exhibit 2



Housing Authority of the City of Atlanta

"Helping People *Help* Themselves"

(404) 892-4700

DATE _____

COMMISSIONERS

SUITABILITY DENIAL

JOHN SWEET
Chair

SS# _____

JANIS WARE
Vice Chair

Dear _____ Bedroom Size _____

BEVERLY ADAMS
MURIEL FRANKLIN
CECIL PHILLIPS
FRANK SKINNER
DR. CHARLES E. WELLS

We regret to inform you that your request to participate in the Conventional Public Housing Program has been denied for suitability, for the reason(s) listed below:

RENEE LEWIS GLOVER
Executive Director

- () Previous Tenancy (Rent Paying History) Code _____
- 0 Previous Tenancy (Conduct) Code _____
- 0 Past Criminal History
- 0 Previous Credit History
- 0 Misrepresentation and/or Fraudulent Information
- 0 Failed Pre-Occupancy
- 0 Other, specify _____

You have the right to an informal review, if you disagree with this decision. Reviews are held by appointment only. You have ten (10) days from the date of this letter to request a review in writing (form attached) or you may make your request in person at our office. If we have not heard from you within ten (10) days, your application will be deleted from the Active Waiting List.

At the Hearing you have the following rights:

1. To have the case heard by an impartial hearing officer.
2. To present evidence showing mitigating circumstances, that the crime is not serious enough to keep you out of public housing, or that you have been rehabilitated.
3. To present evidence in your behalf, challenge the evidence presented against you, and cross-examine any witnesses. You should therefore bring any witnesses or documents in your favor to your hearing.
4. To be represented by the counsel of your choice.

sdenial/ck

Rev. 4195

EXHIBIT C

Suitability Denial
Page -2-

Chapter 6: Exhibit 2

Request for informal reviews should be addressed to:

Office of Resident Selection and Assignment
Housing Authority of the City of Atlanta
739 West Peachtree Street, NE - 1st Floor
Atlanta, Georgia 30365
ATTN: Ed Aaron

Upon receipt of your request, you will receive a letter informing you of your hearing date and time.

Please bring to the hearing any explanations for your position including the disposition of your case, dismissal(s), non-conviction(s) and letters of support (from Probation Officers, Social Workers, Rehabilitation Center(s), Physician(s), etc.). If you would like a lawyer but cannot afford one, you may contact Legal Aid. If you would like a lawyer but do not know of one, you may contact the Lawyer's Referral Service.

If you have any questions please contact Deborah Potier at 8 17-7280.

Sincerely,

Housing Occupancy Specialist
Office of Resident Selection and Assignment

EXPLANATION OF SUITABILITY DENIAL

<u>DATE</u>	<u>Description (e.g. incidents/charges/disposition, etc.)</u>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Attachment: Hearing Request Form

xc: Applicant File

Chapter 6: Exhibit 2

HEARING REQUEST FORM

DATE

NAME ON APPLICATION
HEAD OF HOUSEHOLD

NAME OF PERSON REQUESTING
HEARING

SOCIAL, SECURITY #

ADDRESS

APPLICATION DATE

CITY STATE/ZIP

TELEPHONE #

I, _____, hereby request an informal review pertaining to the denial for Admission, dated _____. Please check the reason(s) for the denial:

PUBLIC HOUSING ELIGIBILITY

- Annual Income Exceeds Income Limit
Failure to meet minimum age requirement
Failure to report income
Failure to provide Social Security Number or certification.

PUBLIC HOUSNG SUITABILITY

- Previous Tenancy (Rent Paying History) Code
Previous Tenancy (Conduct) Code
Past Criminal History
Previous Credit History
Misrepresentation and/or Fraudulent Information
Other, specify:

SECTION 8 ELIGIBILITY

- Previous Tenancy (Public Housing) Code
Previous Tenancy (Public Housing) Outstanding Balance

OTHER

Sincerely,

Applicant's Signature

Rev.4195

Chapter 6: Exhibit 2



"Helping People Help Themselves"

Housing Authority of the City of Atlanta

(404) 892-4700

DATE: _____

TO: _____

DEAR _____

**APPLICANT
HEARING NOTIFICATION**

SS#: _____

BEDROOM SIZE: _____

COMMISSIONERS

JOHN SWEET
Chair

JANIS WARE
Vice Chair

BEVERLY ADAMS
MURIEL FRANKLIN
CECIL PHILLIPS
FRANK SKINNER
DR. CHARLES E. WELLS

RENEE LEWIS GLOVER
Executive Director

Your letter requesting an informal hearing has been received. The hearing has been scheduled as follows:

Date: _____ Time: _____

Location: 739 West Peachtree Street, Atlanta, GA 30365
1 st Floor - Office of Resident Selection & Assignment

Please notify me upon receipt of this letter if this time is inconvenient for you. Failure to attend within fifteen (15) minutes of your appointed time will result in a denial of your right to a hearing.

Prior to this hearing, you have the right to examine your application file with the Housing Authority of the City of Atlanta. At your expense, you may copy any relevant document from the file. To do so, please call Deborah Potier at 8 17-7280.

At the Hearing you have the following rights:

1. To have the case heard by an impartial hearing officer.
2. To present evidence showing mitigating circumstances, that the crime is not serious enough to keep you out of public housing, or that you have been rehabilitated.
3. To present evidence in your behalf, challenge the evidence presented against you, and cross-examine any witnesses. You should therefore bring any witnesses or documents in your favor to your hearing.
4. To be represented by the counsel of your choice.

EXHIBIT E

739 West Peachtree Street, N.E. Atlanta, GA 30365

Chapter 6: Exhibit 2

Dear Sir or Madam:

According to our records, you applied for admission to the Atlanta Housing Authority's Public Housing program since January 1, 1993, and your application was denied due to an alleged criminal history.

Due to the settlement of a federal class action lawsuit filed on your behalf (Bonner v. Housing Authority of the City of Atlanta et al., U.S. District Court, N. Dist. of Ga., Civil Action File No. 1:94-CV-376-MHS), HACA will, if you request it, make a new decision on your application.

If you ask for a new decision, you will have the right to a new hearing on your application. At your hearing, you will have the following rights:

1. To have your case heard by an impartial hearing officer;
2. To present evidence showing mitigating circumstances, that your alleged criminal history is not serious enough to keep you out of public housing, or that you have been rehabilitated;
3. To present evidence in your behalf, challenge the evidence presented against you, and cross-examine any witnesses; and
4. To be represented by the counsel of your choice.

You have these rights even if you have already had a hearing, did not ask for a hearing, or did not attend your own hearing. You do not have these rights if you requested and received a hearing pursuant to the Bonner class action case.

If you ask for a new decision on your application, you will be provided a detailed notice of the charges being considered before your new hearing. If your application is approved, you will be admitted to the Housing Authority of the City of Atlanta or placed on a waiting list based on the date and time of your original application.

If you wish to have a new decision on your application, you may request a new hearing at this time. To do so, complete the enclosed Hearing Request Form and mail or hand deliver it to:

Office of Resident Selection and Assignment
Housing Authority of the City of Atlanta
739 West Peachtree Street, N.E. - 1st Floor
Atlanta, Georgia 30365
Attn: Deborah Potier

The deadline for requesting a new decision is thirty (30) days from the date you received this notice, or _____ whichever is earlier.
Sincerely,

DEBORAH POTIER
Housing Occupancy Specialist

adenied.wpd/ck

Chapter 6: Exhibit 2

APPLICANT HEARING NOTIFICATION

Page 2

Please bring to the hearing the disposition of your case, dismissal(s), non-convictions(s) and letters of support (from Probation Officers, Social Workers, Rehabilitation Center(s), Physician(s), etc.).

If you have any questions, please feel free to call Deborah Potier at 817-7280.

Sincerely,

DEBORAH POTIER
Housing Occupancy Specialist

xc: District Manager (Previous Tenancy Only)
Resident Manager (Previous Tenancy Only)
Applicant's Representative (If Applicable)
Applicant File

applnoti/ck

Rev. 4/95

Chapter 6: Exhibit 3

NO. _____

_____ and _____
Plaintiffs

v.

Defendants

§
§
§
§
§
§
§
§
§
§

IN THE COUNTY COURT

AT LAW NUMBER _____

TRAVIS COUNTY, TEXAS

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiffs, _____ and _____, complain of _____
_____ and _____ and respectfully show the court as follows:

DISCOVERY PLAN

1.

Discovery is intended to be conducted under Texas Rule of Civil Procedure 190.3 (Level 2).

PRELIMINARY STATEMENT

2.

_____ is a 130-unit federally subsidized multifamily apartment complex with rents subsidized by the United States Department of Housing and Urban Development. Defendants illegally denied Plaintiff _____ application to move into the apartment occupied by his fiancée, Plaintiff _____. Plaintiffs seek (1) damages for wrongful denial; (2) a declaratory judgment that Defendants' tenant selection

Chapter 6: Exhibit 3

policies violate governing federal regulations and handbooks; (3) an injunction directing Defendants to revise their tenant selection policies to conform to the requirements of the applicable federal regulations; and (4) an injunction directing Defendants to permit Plaintiff [REDACTED] to move into Plaintiff [REDACTED] apartment at [REDACTED].

PARTIES

3.

Plaintiffs, [REDACTED] and [REDACTED] are both adult residents of Travis County.

4.

Defendant [REDACTED], L.P. is a Texas limited liability partnership doing business as [REDACTED] in Austin, Travis County, Texas. It may be served by serving its agent, [REDACTED], at 1054 Springdale Road, Austin, Texas 78721.

5.

Defendant [REDACTED] is the on-site property manager at [REDACTED] [REDACTED] and an employee of [REDACTED]. She acted within the scope of her employment in her actions complained of in this petition. She may be served at the property management office at [REDACTED] [REDACTED]. The office telephone number is [REDACTED].

Chapter 6: Exhibit 3

VENUE

6.

Venue is proper pursuant to Section 15.002 of the Texas Civil Practice & Remedies Code because the facts on which Plaintiff's claims are premised occurred in Travis County, Texas.

FACTUAL BACKGROUND

7.

Defendant [REDACTED] was originally constructed under the section 221(d)(3) of the Housing Act of 1961. [REDACTED] has signed a Section 8 Housing Assistance Payments Contract with the United States Department of Housing and Urban Development (hereafter "HUD"). Under the Section 8 Program HUD subsidizes the tenant rents so that a family pays no more than thirty percent of its adjusted monthly income for rent and utilities, subject to a minimum rent requirement of \$25.00.

8.

Under the Section 8 Set-Aside Program, the owner must comply with numerous federal regulations. Such owners must rent only to financially eligible families; must comply with certain limitations in selecting tenants; must notify rejected applicants of the grounds for denial; must afford rejected applicants an opportunity for an informal hearing when denying admission; must calculate tenant rent in accordance with federal guidelines; must give tenants an opportunity for an informal meeting prior to filing an eviction action or terminating a tenant's rental subsidy; may evict during the lease term or at the end of the lease term

Chapter 6: Exhibit 3

only for cause; must utilize HUD-approved leases; and must adopt reasonable lease terms and rules.

9.

██████████ has lived at ██████████ for over five years. In September 2006 she and her fiancée, ██████████, completed an application asking that ██████████ add ██████████ to the lease household. ██████████ denied ██████████ application claiming ██████████ did not meet its tenant selection criteria and that ██████████ had provided false information on the application. It claimed ██████████ did not meet its tenant selection criteria because it had obtained information from a Texas criminal search showing that ██████████ had been involved in prior drug-related activity in December 1986 and May 1987. See Exhibit 1, Notice of Rejection. The notice gave no other information. It did not specify how Plaintiff ██████████ allegedly provided false information on the application and gave no detailed information about the alleged drug-related activity.

10.

██████████ tenant selection policies provide in pertinent part as follows:

Rental applications will be rejected/denied if any of the applicant(s) and/or prospective household members do not meet the screening criteria. Reasons to reject/deny an application include, but are not limited to, the following reasons:

. . . .

If, in the sole judgment of Owner, the Owner determines and/or is of the belief that, based upon the information contained from such sources as the interview, landlord references, credit report, court records, or other documents, the applicant, co-applicant or any prospective household member have engaged in, facilitated, been involved in, or associated with criminal activity (neither an arrest or conviction is necessary) including but not limited to,:

Chapter 6: Exhibit 3

any drug-related criminal activity regardless of date committed including, without limitation, the manufacture, sale, distribution, possession, use or possession with the intent to manufacture, sell, distribute, possess, or use controlled substances and/or drug paraphernalia.

[REDACTED], Resident Selection Criteria, at ¶ E-2-(d). See Exhibit 2 (Excerpt of [REDACTED] Resident Selection Criteria). The criteria are written in such a way to prohibit the admission of any individual with previous drug-related activity, regardless of the date it occurred. This violates governing HUD regulations and handbook provisions. Defendants have refused to reconsider their decision rejecting Plaintiff [REDACTED] application.

FIRST CAUSE OF ACTION: VIOLATION OF GOVERNING FEDERAL REGULATIONS ON TENANT SELECTION

11.

The regulations governing [REDACTED] restrict its discretion in selecting tenants. They state:

(a) You may prohibit admission of a household to federally assisted housing under your standards if you determine that any household member is currently engaging in, or has engaged in during a reasonable time before the admission decision:

(1) Drug-related criminal activity;

. . . .

(b) You may establish a period before the admission decision during which an applicant must not have engaged in the activities specified in paragraph (a) of this section (*reasonable time*).

24 C.F.R. §5.855 (2006) (emphasis in original). [REDACTED] policies violate this regulation as well as HUD Handbook 4350.3 that is binding on owners such as [REDACTED] and implements the regulation. Plaintiffs seek declaratory relief, injunctive relief, and damages for Defendants' violation of the law.

Chapter 6: Exhibit 3SECOND CAUSE OF ACTION: VIOLATION OF FEDERAL HANDBOOK REQUIREMENT
TO EXPLAIN THE REASONS FOR THE REJECTION

12.

HUD Handbook 4350.3 provides the following mandatory guidelines for rejecting applicants:

1. Rejection notices must be in writing.
2. The written rejection notice must include:
 - a. The specifically stated reason(s) for the rejection; and
 - b. The applicant's right to respond to the owner in writing or request a meeting within 14 days to dispute the rejection.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Handbook 4350.3, REV-1, Occupancy Requirements of Subsidized Multifamily Housing Programs*, at §4-9-C (May 1993) ("Handbook 4350.3") (emphasis in original). Defendants' notice of rejection is conclusory and does not "specifically" state the reasons for the rejection. Plaintiffs were deprived of their right to be informed of the grounds for the rejection such that they could respond in a meaningful manner. By their actions, Defendants violated Handbook 4350.3, for which violation Plaintiffs seeks damages, declaratory relief and injunctive relief.

VI. THIRD CAUSE OF ACTION: VIOLATION OF SECTION 17.46 OF THE TEXAS
DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION ACT

13.

Section 17.46 of the Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA") provides in part as follows:

- (a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . .

Chapter 6: Exhibit 3

TEX. BUS. & COM. CODE ANN. §17.46 (Vernon Supp. 2006). Violation of this section gives rise to a claim for relief under Section 17.50 of the DTPA. Plaintiffs were consumers seeking housing and thus fell under the protections of the DTPA. Defendants' actions in denying Plaintiff [REDACTED] application for admission were not only false, misleading, and deceptive, they were also unconscionable. Defendants' actions constituted a producing cause of Plaintiffs' economic damages and damages for mental anguish. Plaintiffs seek declaratory relief, injunctive relief, and damages as permitted under Section 17.50 of the DTPA.

DAMAGES

14.

Plaintiffs seek actual damages resulting from Defendants' wrongful rejection of Plaintiff [REDACTED] application for tenancy at [REDACTED]. Plaintiffs' damages are therefore within the jurisdictional limits of this court.

REQUEST FOR RELIEF

15.

Plaintiffs ask that Defendants be cited to appear and answer this lawsuit and that this court:

1. Issue a declaratory judgment that (a) Defendants' tenant selection policies violate applicable federal regulations and handbooks in that they do not limit admission rejections for drug-related criminal activity to such activity that occurred a

Chapter 6: Exhibit 3

reasonable time before the admission decision; and

(b) Defendants failed to comply with the requirement of HUD Handbook 4350.3 that notices of rejection give "specifically stated reasons" for rejection in denying Plaintiffs' application for admission of Plaintiff [REDACTED];

2. Enter a permanent injunction enjoining Defendants to revise their tenant selection policies to comply with federal law requirement that rejections for drug-related criminal activity relate to activity that occurred a reasonable time before the admission decision;
3. Enter a permanent injunction enjoining Defendants to revise their tenant rejection notice to ensure that rejected applicants are given specifically stated reasons for the rejection;
4. Enter a permanent injunction enjoining Defendants to approve Plaintiff [REDACTED] application for admission to Elm Ridge as a member of Plaintiff [REDACTED] household;
5. Award Plaintiffs actual damages resulting from Defendants' denial of the application of Plaintiff [REDACTED];
6. Award Plaintiffs costs of litigation and court costs; and

Chapter 6: Exhibit 3

7. Grant Plaintiffs such other and further relief, general and special, legal and equitable, to which they may be entitled.

Respectfully submitted,

TEXAS RIOGRANDE LEGAL AID
4920 North IH-35
Austin, Texas 78751
Phone: 512-374-2720
Fax: 512-447-3940

By: _____
Fred Fuchs
State Bar No. 07498000
Attorneys for Plaintiffs

CHAPTER 7

Vouchers, Portability and Individuals with a Criminal Record

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7.1 Individuals Porting with a Criminal Record.....	149
<i>Exhibit 1 - Avanesova v. Housing Auth. of Los Angeles, No. CV-04-5588-GAF (C.D. Cal. Dec. 20, 2004)</i>	151

7.1 Individuals Porting with a Criminal Record

A key feature of the voucher program is that a tenant with a voucher may move from one PHA's jurisdiction to another PHA's jurisdiction. This feature of the program is called portability.¹ Unique issues may arise if a voucher holder has a criminal background and seeks to take advantage of the portability feature. The portability rules are different depending upon whether the tenant leased a unit with a voucher in the issuing PHA's jurisdiction. If the voucher holder previously leased a unit under the program but is without housing in the issuing PHA's jurisdiction, other problems may arise.

In general, the regulations provide that the issuing PHA must allow a family to move and the receiving PHA must provide assistance to the moving family. If the family participated in the voucher program with the issuing PHA by leasing a unit in its jurisdiction, the receiving PHA cannot delay the issuance of the voucher or approving the unit.² If the moving family finds a unit in the receiving PHA's jurisdiction that

PHA must process the Request for Tenancy Approval and not delay in assisting the tenant while awaiting the results of a criminal background check.³ However, after issuing the voucher, the receiving PHA may seek to terminate the voucher because of criminal history or criminal activity.⁴ In contrast, if the family did not lease up with the voucher in the initial PHA's jurisdiction, the receiving PHA may immediately redetermine eligibility, possibly delay entering into a contract on behalf of the incoming tenant, and seek to deny the voucher based upon a criminal background check.⁵

The initial PHA is encouraged but not required to send criminal background check information regarding the voucher recipient to the receiving PHA.⁶ If

¹42 U.S.C.A. § 1437f(r) (West Supp. 2007). Moving within the PHA's jurisdiction is sometimes distinguished and referred to as mobility or simply housing choice.

²42 U.S.C.A. § 1437f(r)(2) (West Supp. 2007) (receiving PHA has duty to carry out portability provisions); 24 C.F.R. § 982.355(a) (receiving PHA duty to administer assistance), 982.355(c)(1) (receiving PHA does not redetermine eligibility), 982.355(c)(4) (receiving PHA may not delay) (2007); *see also Avanesova v. Housing Auth. of Los Angeles, No. CV-04-5588-GAF (C.D.Cal. Dec. 20, 2004)* (granting summary judgment to Section 8 recipient—s' 1983 claims that PHA violated portability provisions of voucher statute and its regulations as well as procedural due process in denying portability rights with no hearing (available in Exhibit 1 to this Chapter)).

³*See* 24 C.F.R. § 982.355(c)(10) (2007); Memorandum from Anthony F. Britto, HUD, Massachusetts State Office, to All Public Housing Authorities, State of Massachusetts, Subject: Delay in Approval of Units in Violation of 24 C.F.R. § 982.355(c)(4) (Apr. 13, 1998) (available in Exhibit 2 to this Chapter). It is possible for the receiving PHA to delay leasing activities only to receive income verification information, which the initial PHA must provide. 24 C.F.R. § 982.355(c)(4) (2007); HUD, VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE, Handbook 7420.10G, ¶ 13.5 (Apr. 2001); A family's total tenant payment (TTP) must be less than the payment standard of the receiving PHA to lease in the jurisdiction of the receiving PHA. *Id.* at ¶ 13.5.

⁴24 C.F.R. § 982.355(c)(9) and (10) (2007); *Lawrence v. Brookhaven Dep't of Hous. Community Dev. & Intergovernmental Affairs, 2007 WL 4591845 (E.D.N.Y. Dec. 26, 2007)* (Receiving PHA was acting within its authority to reexamine the voucher holder's eligibility); *see also id.* §§ 982.552 and 982.553 (2007) for rules regarding the termination of voucher participant that are beyond the scope of this Guide. For more information regarding the procedures and defenses to a termination, *see* NHLP, HUD HOUSING PROGRAMS TENANTS' RIGHTS (2004 and 2006-2007 Supplement) § 14.4.

⁵24 C.F.R. § 982.355(c)(4) (2007).

⁶HUD, VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE, HUD Handbook 7420.10G, ¶ 13.4 (Apr. 2001).

the initial PHA intends to send the information, it must disclose that fact to the voucher holder.⁷ Some state laws may limit what information is shared. In addition, depending upon how the PHA obtained the information, additional federal protections may apply.⁸

Despite the regulatory scheme which anticipates a smooth (no delay) transition from one PHA to another, for tenants who have leased a unit with a voucher, additional problems have arisen. For example, problems arise when the voucher tenant voluntarily or involuntarily terminates his or her lease in the initial PHA's jurisdiction. An involuntary termination may come about when the PHA terminates the landlord from the voucher program or the landlord decides to terminate participation in the voucher program at the end of the lease term. If the tenant has not leased a new unit and the initial PHA seeks to terminate the voucher during that period, the PHA may claim that the tenant is not entitled to a pre-termination hearing because the tenant is not a program participant.⁹ The response to this argument is that the voucher holder has had his or her property taken without due process.¹⁰ The PHA should not be able to terminate the voucher without a prior hearing.

Because of potential problems, whenever possible, a voucher holder, especially one with a criminal record, who seeks to move to the jurisdiction of another PHA, should inquire as to the policy of the receiving PHA and seek a determination of eligibility prior to moving into the new jurisdiction. In the alternative, such a voucher holder should seek to move to the jurisdiction of a PHA with less ridged eligibility requirements.¹¹

⁷*Id.*

⁸See discussion in Chapter 3 Access to Criminal Records.

⁹24 C.F.R. § 982.555(a)(2) (2007).

¹⁰See *Simmons v. Drew*, 716 F.2d. 1160, 1164 (7th Cir. 1983); See also *Munford v. Newark Hous. Auth.*, 2000 WL 546078 (Del. Ch. 2000) (participant who had leased up should not be treated as if she were an applicant who had never leased up).

¹¹Although a tenant ought to investigate the policy of the PHA in the receiving jurisdiction, a very strict policy on criminal background checks may be suspect as it may be premised upon an illegal policy or practice of keeping protected classes out of the jurisdiction.

Chapter 7: Exhibit 1

ORIGINAL
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

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Case No. CV 04-5588-GAF

Date: December 20, 2004

Title: Avanesova v. Housing Authority of the City of Los Angeles, et al.

The Honorable Gary Allen Feess, Judge

Debra L. O'Neill for
Marilynn Morris
Courtroom Deputy Clerk

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: (In Chambers)

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RULING ON MOTION FOR SUMMARY JUDGMENT

Plaintiff moves for summary judgment on multiple claims against the two defendants – City of Glendale and the Housing Authority of the City of Los Angeles (HACLA). Because Plaintiff properly moved her residence to the City of Glendale, and because she has been denied benefits established under 42 U.S.C. §1437f, the Court **GRANTS** the motion for summary judgment against Glendale on the First and Seventh Claims for Relief. The remainder of the motion is **DENIED**.

A. BACKGROUND FACTS

The following facts are undisputed or without substantial controversy.

In late 2002 or early 2003, Plaintiff applied to the Housing Authority of the City of Los Angeles (HACLA) for benefits under federal law administered by and funded to local public housing authorities (PHA) through the United States Department of Housing and Urban Development. In February 2003, she was approved for the program and received a voucher to give to a prospective landlord as proof of her eligibility. Three months later she sought, under applicable federal regulations, to transfer her voucher to the Glendale PHA. Glendale received her request, re-certified her eligibility, approved her proposed residence and negotiated a final contract with the landlord for the housing assistance payments (HAP). However, before Glendale signed the contract, a dispute arose between the Glendale and HACLA regarding which agency would be responsible for the payment of Plaintiff's rent.

[Handwritten signature]

Chapter 7: Exhibit 1

Under federal law, when a tenant transfers the voucher to a new PHA, the receiving PHA (Glendale) has the option of billing the original PHA (HACLA) for the rent and costs of administration, or of absorbing the voucher holder into its own program and bearing the costs out of its HUD allotment. Under that program, ¹⁴ Glendale had received a number of transfers from Los Angeles residents and had been billing the costs of these transfers to HACLA. At the time Glendale was about to sign the contract with Plaintiff's landlord, HACLA¹⁵ rejected approximately 99 billing requests submitted by Glendale for payment on transferred vouchers. Because Glendale assumed that HACLA would reject any bills submitted for Plaintiff's rent payments, it refused to sign the contract and complete processing of her voucher. Thus, Plaintiff has an apartment but no means of paying the rent. Glendale won't pay because it believes it won't be reimbursed; HACLA won't pay because Plaintiff lives in Glendale.

Caught in the middle of this battle of bureaucrats, Plaintiff now sues to enforce her rights under federal law by bringing suit under 42 U.S.C. § 1983. The First Claim for relief alleges a violation of 42 U.S.C. § 1437, 28 C.F.R. § 982.355 and various guidebooks and Administrative Plans. The Court concludes that the undisputed facts establish that Plaintiff is entitled to relief on this claim, as to which the motion is **GRANTED**. The remainder of the motion is **DENIED**.

B. DISCUSSION

42 U.S.C. § 1437f is the general statute authorizing low-income housing assistance. Subsection (r) of that statute authorizes portability and places the responsibility for the program participant on the receiving PHA stating in relevant part that "[t]he public housing agency having authority with respect to the dwelling unit to which a family moves under this subsection shall have the responsibility of carrying out the provisions of this subsection with respect to the family." 42 U.S.C. § 1437f(r)(2) (emphasis added). Under HUD's portability regulations, the receiving PHA is required either to bill the initial PHA for the rent and costs of administering the voucher or to absorb/accept the voucher holder into its own program for which it would bear the costs out of its own HUD allotment. 24 C.F.R. § 982.355(c)(5). The receiving PHA is required to "promptly inform the initial PHA" of its choice. 24 C.F.R. § 982.355(c)(5) (emphasis added).¹ Further, the regulations provide that "the receiving PHA must provide assistance for the family. Receiving PHA procedures and preferences for selection among eligible applicants do not apply, and the receiving PHA waiting list is not used." 24 C.F.R. § 982.355(c)(10) (emphasis added).

Here Plaintiff had met every request of the Glendale PHA and fulfilled all requirements of the program. Plaintiff requested and was allowed to port her HACLA voucher to Glendale on May 27, 2003. (Avanesova Decl. ¶ 3). That same day, May 27, 2003, she also submitted her Request for Tenancy Approval on the Glendale residence. (*Id.* ¶ 6). On June 4, 2003, Plaintiff's file was received by Glendale. (Glendale Statement of Genuine Issues ("SGI") ¶ 6). Glendale then re-certified Plaintiff's program eligibility and performed two housing inspections on Plaintiff's proposed residence, before it ultimately passed on August 21, 2003. (Siegler Decl. ¶ 8). On or about October 28, 2003, Glendale negotiated the final rent with the landlord and prepared to execute the HAP contract. (*Id.*). It is undisputed that Glendale never executed this contract nor has it paid any section 8 assistance payments on behalf of Plaintiff to date. (Avanesova Decl. ¶ 21). Therefore, it is clear that Glendale did not bill or absorb Plaintiff, not because of any action by Plaintiff but because of its dispute with HACLA. Whatever the merits of that dispute, Glendale's obligation to Plaintiff is clear. Glendale bore primary

¹ The full text of the subsection reads, "[w]hen the portable family requests assistance from the receiving PHA, the receiving PHA must promptly inform the initial PHA whether the receiving PHA will bill the initial PHA for assistance on behalf of the portable family, or will absorb the family into its own program." 24 C.F.R. § 982.355(c)(5).

Chapter 7: Exhibit 1

responsibility for carrying out the provisions of the Act applicable with respect to Plaintiff. 42 U.S.C. § 1437f(r)(2). Accordingly, the motion for summary judgment is **GRANTED**. Glendale is **ORDERED** to execute the HAP and to take financial responsibility for Plaintiff's tenancy. Glendale's compliance with this Court's order is without prejudice to Glendale's right to pursue its claim that HACLA should reimburse Glendale under applicable regulations.

The foregoing disposes of the Seventh Claim for Relief as well. In that claim, Plaintiff contends that she was deprived of her rights under federal law without procedural due process. Glendale contends that, since it never made a decision to deny assistance to Plaintiff (because its obligation was extinguished by HACLA's termination of her voucher), it had no obligation to conduct a hearing. However, the Court has concluded that she did have substantial rights under the statute, that Glendale was obligated to provide her with benefits under the statute and that Glendale refused to do so without conducting an appropriate hearing. Accordingly, the motion is **GRANTED** as to this claim.

The motion is **DENIED** as to the remaining claim against Glendale. As to the additional claims against Glendale, Plaintiff alleges in her Third Claim for Relief that Glendale failed to follow its administrative plan. However, no federal statute or regulation mandates the creation of a plan that purportedly contains the requirements identified by Plaintiff (a 6-month billing requirement), and therefore no evidence has been presented to show that Glendale violated its own plan.

The motion is **DENIED** as to HACLA since the Court has determined that Avensova's claim is against Glendale.

IT IS SO ORDERED.

CHAPTER 8

Adding an Individual with a Criminal Record to the Assisted Household and Rechecking Current Residents

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8.1 Introduction

This chapter addresses issues related to an individual with a criminal record who seeks to join a household that is participating in one of the federally assisted housing programs. Such an individual may be joining an assisted household for the first time or may be rejoining an assisted household after an absence. Typically, the addition of a household member gives rise to the following issues: (1) when must the family notify the PHA or owner that the individual will be joining the household; (2) who has the right to object if the request for approval is rejected; and (3) whether there are added protections if the individual with the criminal record is rejoining the federally assisted unit. This Chapter also discusses briefly the issues that arise when an individual with the record is a guest of or a live-in aide for a federally assisted housing resident.

8.2 Adding an Individual with a Criminal Record to the Family

An individual with a criminal record may seek to join or rejoin a federally assisted family.¹ The policies governing the process are complex because they involve questions of what must be reported and when. Guest policies and other practices addressing whether the individual is considered to be a member of the tenant family may also come into play. In addition, the interests of other family members who are living in federally assisted housing may conflict with the interests of the individual with the criminal record.

8.2.1 Reporting Changes in Family Composition and Rechecking Current Residents

Public housing agencies (PHAs) and owners have an interest in knowing who is residing in a unit. As

¹Studies have shown that a substantial number of public housing residents have family members or significant others with recent criminal history. See CATRINA GOUVIS ROMAN, URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISON REENTRY 24 (2004). The circumstances of residents of other federally assisted housing are no doubt similar.

with new admissions, they may want to review current information to assess how the individual will act in the future and whether the individual will comply with the lease or pose a threat to other residents, the development, or the staff. The PHA or owner may also need to know who is residing in the unit for purposes of determining the tenant rent and for determining the appropriate unit size for the family.

*The timing for reporting
a change in family
composition is critical.*

Federal regulations and policies address the steps that must be taken when the composition of a family living in federally assisted housing changes. In general, if a family is adding an adult member to the household, the tenant or voucher participant must notify the PHA or owner of the new member and, in most cases, obtain approval.² Typically, the PHA or owner will screen the new member for criminal activity.³ As with applicants seeking admission, in certain limited situations, the PHA or owner must reject the new family member.⁴ As with other admission decisions, for the vast majority of the situations in which the individual is seeking to join the family, the PHA or owner has broad discretion to accept or reject the

²24 C.F.R. §§ 966.4(a)(1)(v), 982.516(c) and 982.551(h)(2) (2007); *See* HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, HUD Handbook 4350.3, REV-1, CHG-2, ¶ 7-10A.2 (June 2007), *compare with id.* at App. 4-A the model lease, ¶ 16a, which does not require interim reporting of changes in family composition. Because tenants generally are not aware of the rules set forth in HUD Handbooks and the lease does not require interim reporting, tenants without notice of the obligation to report should not be penalized for failing to report interim changes in family composition.

³*See, e.g.*, HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶ 7-11C (June 2007) (owner must screen the proposed additional person for drug abuse and other criminal activity); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 12.2 (June 2003) (PHA should not add adults to a lease unless the PHA has screened them, using standard applicant selection criteria). For the voucher program, there are no separate federal guidelines for screening persons who are added to an assisted family.

⁴*See* Chapter 2 for a discussion of the screening criteria relating to individuals with criminal histories.

new family member. Accordingly, an individual with a criminal record seeking to join the family should be prepared, if asked, to disclose the criminal record and demonstrate mitigating circumstances and rehabilitation. The individual should consider including information regarding the benefit of having him or her join the family and how that may positively affect the stability of the development. These benefits will vary depending upon the facts, but could include information regarding the relationship between the new family member and his or her children, the supportive relationship between the new family member and his or her spouse, and the potential for increasing the income of the tenant family and, therefore, rent for the PHA or owner.

The timing for reporting a change in family composition is critical. It is important to know and comply with the notice provisions, so as to avoid a potential threat of a termination of subsidy or eviction of the family seeking to add the individual. For most programs, family composition is determined annually and interim reporting may be required. At the annual and interim recertifications most owners and PHAs will check the criminal background of the new family members. For more information regarding the rules for each program *see* Exhibit 1 to this Chapter.

Owners and PHAs may also recheck the background of current residents, but this is typically not done.⁵ If the owner does require a background check on current tenants at recertification, the HUD rules for project-based HUD-assisted housing state that the owner must conduct the background check on all tenants.⁶ Such a rule ought to be applicable for all the programs to avoid arbitrary or discriminatory action. The criminal background check for a current tenant may reveal information that may threaten the

⁵HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 12.2 (June 2003) (PHA may conduct criminal background check of current residents at the annual review “although this is not a HUD requirement”); *cf.* HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶¶ 7-4A.5 and 7-12 (June 2007) (owners may conduct criminal background checks at annual recertification); *see also* Exhibit 1 to this Chapter.

⁶HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶ 7-4A.5 (June 2007); *cf.* HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 12.2 (June 2003) (PHA may conduct criminal background check at the annual review “although this is not a HUD requirement”).

family's tenancy. Such eviction threats may be substantial, but if they are not accompanied by current threatening behavior, they may be defeated.⁷

The rules affecting the addition of family members to an assisted household for each program are determined locally and should be set forth in the PHA Annual Plan, the Admission and Occupancy Plan (ACOP) and lease for public housing, in the Administrative Plan for the Section 8 voucher program, and in the lease and/or house rules for the HUD-assisted or RD project based programs as well as the Low Income Housing Tax Credit (LIHTC) program. Section 8 voucher tenants are in a unique position because the obligation to report changes in family composition is not included in the lease. In addition, most Section 8 voucher participants are not aware of the requirements of the Section 8 Administrative Plan. Therefore, HUD separately requires that the PHA give written notice to participants of their obligations under the program, including a written description of the grounds on which the PHA may deny or terminate assistance because of a family's action or failure to act.⁸ Such notice, as well as notice of the timeframes within which participants must act to provide information to the PHA, may also be required as a matter of due process.⁹ Failure of the PHA to provide notice of the specific interim reporting requirements should render them unenforceable.

8.3 Individual Returns to Unit after Brief Absence Due to Imprisonment

There may be situations in which the individual is the sole member of the household and may be returning to his or her former unit after a brief imprisonment. For the voucher program, the PHA is required to have a policy in the Administrative Plan regarding family absence from the unit.¹⁰ The temporary

absence policy must state whether or when the family may be absent, including for imprisonment, the amount of time for which absence is permitted and any provision for resumption of assistance.¹¹ There are no federal rules regarding temporary absences for the other federally assisted programs. However, the PHA or owner may develop rules and policies regarding temporary absences and many have such policies.

In the RD programs, the owner must include a number of policies in the lease that is executed with a tenant, which must be approved by the agency. RD regulations require that the lease include information regarding the tenant's duty to notify the borrower of an extended absence.¹²

If the returning individual was previously a member of an assisted household, it is important to determine whether the returning family member continues to be listed on the lease or on the rent recertification forms, which may be incorporated by reference in the lease. Prior listing on the lease may obviate the need to provide prompt notice to the PHA, or owner, when the family member returns. It may also eliminate the need to seek the PHA's or owner's approval of the family member upon return. However, as noted above, the criminal background of the individual with the criminal record may be reviewed at the annual recertification. In addition, PHAs and owners generally have policies that require family members to report when a family member moves out.¹³ The issue of whether the family had a duty to report the fact that a family member was absent due to imprisonment should turn on the question of the family member's intent. In other words, the family arguably does not have a duty to report if the absence is temporary and the individual intends to continue to reside in the unit.

As a cautionary note, the returning family member may jeopardize the tenancy of the entire family. Therefore, the family should be made aware of the risks. In addition, it may be prudent to discuss the issues with

⁷Defending a family from eviction is beyond the scope of this Guide. For more information regarding defending such evictions, see NHLP, HUD HOUSING PROGRAMS TENANTS' RIGHTS, Chapter 14 (3d ed., 2004 and 2006-2007 Supp.); Lawrence R. McDonough & Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REV. 55 (May-June 2007).

⁸See 24 C.F.R. § 982.552(d)(1)-(2) (2007).

⁹See *Aikens v. D.C. Dep't. of Hous. & Cmty. Dev.*, 515 A.2d 712 (D.C. Ct. App. 1986) (PHA violated due process by not giving written notice to Section 8 participants of timeframes for reporting recertification information).

¹⁰24 C.F.R. § 982.54(d)(10) (2007).

¹¹*Id.* § 982.312(e).

¹²7 C.F.R. § 3560.156(c)(18)(xiii) (2007).

¹³24 C.F.R. §§ 966.4(c)(2), 982.516(c) and 982.551(h)(3) (2007). See also HUD form 50075, PHA Plans (exp. 08/31/2009), ¶ 4A1f (PHA Annual Plan requires, for public housing, PHAs to state how frequently a tenant must report changes in family composition).

the owner or PHA before the family member returns. If that is not possible, there are defenses to an eviction action if it is brought against the entire family.¹⁴

8.4 Individual with Criminal Record and Guest Policies

Questions may arise whether an individual with a criminal record may, on a temporary basis, stay overnight in a federally assisted unit as a guest. The key issues include whether the guest must be approved by the owner or PHA and the length of time that a guest may stay in the unit before the guest is considered a household member. For the resident family, there are also issues of whether the guest may jeopardize its tenancy.

Assisted tenants are permitted to have overnight guests.¹⁵ The federal regulations for HUD federally assisted housing define the term guest as “a person temporarily staying in the unit with the consent of a tenant.”¹⁶ An assisted tenant should not be required to register and seek prior approval for an overnight guest. Many PHAs and owners have policies placing a time limit on the number of consecutive or total days in a year that a guest may stay in a unit.

For public housing, the courts have invalidated prior registration requirements that are coupled with management approval of the overnight guest. One court stated that a rule requiring registration and PHA approval for overnight guests violated the tenants’ constitutional rights of privacy and

association.¹⁷ Another court held that a PHA lease provision requiring written approval for overnight guests violated applicable HUD regulations.¹⁸ The court specifically found that the PHA’s prior-approval requirement for every overnight guest—which permitted management unfettered discretion—was neither necessary nor reasonable and did not provide for reasonable accommodation of guests and visitors as required by the regulations. The court noted that most PHAs require permission only for guest stays of longer than two weeks.¹⁹ Owners of other federally assisted housing should not be allowed to impose undue restrictions on guests because federal statute and regulations contain a similar “reasonableness” requirement.²⁰ State courts have also invalidated unreasonable guest policies imposed by subsidized owners.²¹

For RD programs, the regulations require that all leases “include provisions that establish when a guest will be considered a member of the household and be required to be added to the tenant certification.”²² Also, a borrower must post this same infor-

¹⁴Defending a family from eviction is beyond the scope of this Guidebook. For more information regarding defending such evictions, see NHLP, HUD HOUSING PROGRAMS TENANTS’ RIGHTS, Chapter 14 (3d ed., 2004 and 2006-2007 Supp.); Lawrence R. McDonough & Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REVIEW 55 (May-June 2007).

¹⁵24 C.F.R. § 966.4(d)(1) (public housing reasonable accommodation of guests). The model leases for the other HUD-assisted programs reference guests but do not specifically mention a reasonable accommodation of guests. See, e.g., HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, 4350.3, REV-1, CHG-2, App. 4 (June 2007); see also 42 U.S.C.A. § 1437d(l)(2) (West, WESTLAW through P.L. 110-113 approved 11-8-07) (public housing lease must have reasonable lease terms); 12 U.S.C.A. § 1715z—1b(b)(3) (West, WESTLAW through P.L. 110-113 approved 11-8-07) (reasonable lease terms for federally assisted housing).

¹⁶24 C.F.R. § 5.100 (2007).

¹⁷McKenna v. Peekskill Hous. Auth., 647 F.2d 332 (2d Cir. 1981) (reversing lower court decision that had upheld the rule and remanding claim for damages for constitutional violation, while dismissing declaratory and injunctive relief claims as moot when PHA rescinded policy).

¹⁸Lancor v. Lebanon Hous. Auth., 760 F.2d 361 (1st Cir. 1985); see also 42 U.S.C.A. § 1437d(l)(2) (West, WESTLAW through P.L. 110-113 approved 11-8-07) (PHAs “must utilize leases that do not contain unreasonable terms and conditions”).

¹⁹See, e.g., Ritter v. Cecil County Office of Hous. & Comm. Dev., 33 F.3d 323 (4th Cir. 1994) (upholding, against First Amendment association and privacy claims, PHA’s two-week visitation rule for Section 8 tenant-based recipients as reasonable under HUD regulations prohibiting residency by nonfamily members).

²⁰42 U.S.C.A. § 1715z—1b(b)(3) (West, WESTLAW through P.L. 110-113 approved 11-8-07). These provisions may be enforced via the tenant’s lease or as a private right of action. To the extent that a constitutional claim is involved, a tenant may be required to prove some form of governmental action in order to state a claim.

²¹See Messiah Baptist Hous. Dev. Fund Co. v. Rosser, 92 Misc. 2d 383, 400 N.Y.S.2d 306 (1977) (occasional overnight visitor does not violate subsidized housing lease provisions requiring reporting of changes in income and family composition and prohibiting accommodations for boarders); Ashley Ct. Enters. v. Whittaker, 249 N.J. Super. 552, 592 A.2d 1228 (App. Div. 1991) (refusing eviction of tenant-based Section 8 recipient because lease provision barring recurring visits was unreasonable and so vague as to be unenforceable); cf. New Boston Kiwanis Hous. Dev. Corp. v. Sparks, No. 1957, 1992 WL 79561 (Ohio Ct. App. Apr. 14, 1992) (lease provision requiring tenant to report changes in family composition does not constitute unlawful attempt to legislate morality; if guest stays long enough to become household member, tenant can be evicted for failing to report).

²²7 C.F.R. § 3560.156(c)(8) (2007).

mation in its occupancy rules.²³ Thus, there is no standard amount of time, but instead the owner must include its policies in the agency approved lease that it executes with tenants. As with the other programs, preapproval and registration of guests should not be allowed and the amount of time that a tenant may have a guest should be a reasonable period. However, if the guest was a former tenant who committed and was evicted for a drug violation, then the owner may require that the tenant obtain approval before the guest may visit.²⁴

Some PHAs have established guest policies for Section 8 voucher participants, limiting the time period that persons not listed as household members can stay with a tenant.²⁵ PHAs should also inform participants of these policies and give them an opportunity to request that persons in occupancy for a longer period be added to the household.

The family and the individual with the criminal record should be careful with respect to the issue of whether the individual is a guest or has joined the family.²⁶ To avoid claims that the guest is residing in the unit, the assisted tenant should not only abide by the legitimate guest rules but also ensure that a record is kept of the places that the individual is staying or sleeping to avoid jeopardizing the assisted family's right to remain in the housing or to request that the guest be added to the lease. For example, the guest should keep copies of bills and mail addressed to him or her at the alternative residence, a copy of a lease or receipts for residency at a residential hotel or for overnights in a shelter, or copies of statements of friends that the individual resided with for specified periods of time. In the event that the family is seeking to add the individual to the lease, advocates have negotiated policies that state that if the screening process exceeds the time specified for allowing a guest, due to no fault of the applicant, the housing provider

may extend the period during which the guest may stay in the household.²⁷ Such a policy helps avoid the problem of guests who want to become members of the family overextending the guest time limits and thereby jeopardizing their application.

8.5 Review of a Determination to Not Allow the Individual with the Criminal Record to Join the Assisted Family

For public housing, if the PHA declines to add the individual with a criminal record to the family, the tenant who is seeking to add the new member has the right to grieve the decision.²⁸ For the rules governing the grievance hearing, see Chapter 5. If the PHA declines to add the individual to the voucher household, the voucher participant or the rejected individual could request an informal review or an informal hearing by referring to the rights of public housing tenants.²⁹ It is also possible that the family may have a constitutional due process claim for violation of individual liberties and for failure to provide a hearing.³⁰

8.6 Individual with Criminal Record as Live-in Aide

An individual with a criminal record may also be asked to live in federally assisted housing as a live-in aide because a disabled resident of public housing, project-based Section 8, or a voucher participant may need a live-in aide. A live-in aide is defined as a person who resides with one or more elderly, near elderly, or persons with disabilities, and who is essential to the care and well-being of that individual. The live-in aide is not obligated to support the person and would not be living in the unit except to provide the required services.³¹ A live-in aide has no right to con-

²³*Id.* § 3560.157(b)(10).

²⁴*Id.* § 3560.156(c)(15).

²⁵*See, e.g., Ritter v. Cecil County Office of Hous. & Cmty. Dev.*, 33 F.3d 323 (4th Cir. 1994) (Section 8 tenant-based recipient violated two-week guest rule and had notice that violation could result in termination); *Zajac v. Altoona Hous. Auth.*, 156 Pa. Commw. 209, 626 A.2d 1271 (1993), *appeal denied*, 537 Pa. 627, 641 A.2d 591 (PHA policy provided that no one other than a resident could reside in the unit other than on a temporary basis not to exceed 30 days).

²⁶*See Sparks*, 1992 WL 79561 at *2.

²⁷Somerville (Massachusetts) Housing Authority policy.

²⁸24 C.F.R. Part 966, Subpart B (2007); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 9.3 (June 2003); *Saxton v. Hous. Auth. of Tacoma*, 1 F.3d 881 (9th Cir. 1993) (“[A] public housing tenant whose request to add a returning family member to the lease is denied is entitled to a grievance hearing under the procedures specified in 24 C.F.R. § 966.50 *et seq.* (1992).”).

²⁹24 C.F.R. § 982.555 (2007).

³⁰*See Saxton*, 1 F.3d at 884 (recognizing that a tenant may have a constitutional due process right concerning family living arrangements, but expressly declining to consider whether tenant had a constitutional right to have her husband live with her).

³¹24 C.F.R. § 5.403 (2007).

tinued occupancy if the tenant needing the assistance vacates the unit.

Most PHAs and owners screen live-in aides for criminal background using the same or similar criteria as for admission.³² However, it is possible that the criminal background checks for a live-in-aid may not be as strict as with admission of a tenant. In addition, there may be situations in which the individual needing the care has substantial difficulty finding a live-in aide, or the individual with the criminal record meets some unique need of the disabled individual. In such situations, the disabled individual needing the live-in aide may request a reasonable accommodation in the form of a waiver of the strict screening criteria. Whether the request for reasonable accommodation is successful will depend upon the facts and an interpretation of reasonable accommodation provisions, which are discussed in Chapter 4.

³²HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶¶ 4-7B5 and 7-10 (June 2007) (stating that owner must apply screening criteria for criminal activity to persons added to the lease, including a live-in aide).

Chapter 8: Exhibit 1

Rules On Reporting of Family Composition and Criminal Background Checks of New Family Members, Current Tenants, and Live-In-Aides In Federal Housing Programs					
Type of Housing Program	Column 1 Annual determination of family composition	Column 2 Approval to add members to family	Column 3 Interim reporting of family composition	Column 4 Criminal background check at annual recertification	Column 5 Criminal background check at interim recertification
Public Housing	Required Annually. 42 U.S.C. §§1437a(1), 1437d(c)(2); 24 C.F.R. § 960.257(a).	PHA must approve additional family members, except when child is added to household by birth, adoption, or court awarded custody. 24 C.F.R. § 966.4(a)(v); HUD PHOG, ¶ 12-2.	PHA must adopt policy and include it in ACOP.** Policy must be consistent with the PHA's Annual plan. 24 C.F.R. § 960.258(b) and (c); HUD Form 50075 Standard Template, ¶ 3.A.(5)b. and 4.A.(1)f; Lease must provide basis of interim redetermination. 24 C.F.R. § 966.4(c)(1), HUD PHOG, ¶ 12.2.	If required, should be set out in ACOP** and lease. HUD PHOG, ¶ 12.2* (PHA should screen adults added to lease and may conduct criminal background check of current tenants at annual recertification, but it is not a federal requirement).	Same as annual recertification. See Column 4.
Voucher	Required Annually. 42 U.S.C. §§1437f(c)(3)(A) and 1437f(o)(5); 24 C.F.R. § 982.516(a).	PHA must approve additional family members, except when child is added by birth, adoption, or court awarded custody. 24 C.F.R. § 982.551(h)(2) and HUD Form 52646, ¶ 4.B.9.	PHA must adopt policy. 24 C.F.R. § 982.517(c) It must be in the PHA's Administrative Plan. 24 C.F.R. § 982.54(d)(18).	Policy, if adopted, should be set forth in PHA's Administrative Plan.	If adopted, should be set forth in PHA's Administrative Plan.
Moderate Rehabilitation Section 8	Required Annually. 42 U.S.C. §1437f(c)(3)(A); 24 C.F.R. § 882.515(a).	There are no federal rules addressing this issue. If PHA adopts a policy, it should be in the PHA's Administrative Plan.	There are no federal rules addressing this issue; Policy, if adopted, should be in the PHA's Administrative Plan.	There are no federal rules on this issue. Policy, if adopted, should be in the PHA's Administrative Plan.	There are no federal rules on this issue. Policy, if adopted, should be in the PHA's Administrative Plan.

* HUD PHOG is the Public Housing Occupancy Guidebook available at <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>.

** ACOP is the Admission and Occupancy Plan for public housing.

Chapter 8: Exhibit 1

	Column 1	Column 2	Column 3	Column 4	Column 5
Type of Housing Program	Annual determination of family composition	Approval to add members to family	Interim reporting of family composition	Criminal background check at annual recertification	Criminal background check at interim recertification
Moderate Rehabilitation SRO	Required Annually. 42 U.S.C. §1437f(c)(3)(A); 24 C.F.R. § 882.808(i).	The program is designed to assist single individuals. It does not contemplate adding other members to family. 24 C.F.R. §§ 882.802, 882.808(i).	The program is designed to assist single individuals. See Column 2.	There are no federal rules on this issue.	There are no federal rules on this issue.
Project-based Section 8	Required Annually. 42 U.S.C. §1437f(c)(3)(A); 24 C.F.R. § 5.657(b); HUD Handbook 4350.3, REV-1, CHG-2 ¶ 7-4A.5.	See discussion in Column 4.	Household must report when it proposes to move in a new member. HUD Handbook 4350.3, REV-1, CHG-2 ¶ 7-10.A.2. But lease does not require such reporting. HUD Handbook, 4350.3, REV-1, CHG-2, App 4-A, the model lease, ¶ 16a.	Owner required to screen new family additions and live-in-aides. HUD Handbook 4350.3, REV-1, CHG-2 ¶ 7-10.A.2, 7-11.C.1 and 4-7.B.5. If owner conducts criminal background check on current tenants, it must do it for all tenants. <i>Id.</i>	See discussion in Column 4.
Section 236	Required Annually. 24 C.F.R. § 236.80 (1995) saved by 24 C.F.R. § 236.1(c)(2007); It is not required for families paying market rent. HUD Handbook, 4350.3, REV-1, CHG-2, ¶¶ 7-4.A.6 and B.	Same as Project-based Section 8 (above).	Same as Project-based Section 8.	Same as Project-based Section 8.	Same as Project-based Section 8.
Section 221(d)(3)	Required Annually; Not required for families paying 110% of economic rent. HUD Handbook, 4350.3, REV-1, CHG-2, ¶¶ 7-4.A.6 and B.	Same as Project-based Section 8 (above).	Same as Project-based Section 8.	Same as Project-based Section 8.	Same as Project-based Section 8.

Chapter 8: Exhibit 1

	Column 1	Column 2	Column 3	Column 4	Column 5
Type of Housing Program	Annual determination of family composition	Approval to add members to family	Interim reporting of family composition	Criminal background check at annual recertification	Criminal background check at interim recertification
Section 202	Required Annually. 24 C.F.R. § 891.610(g); 24 C.F.R. § 891.410(g).	Same as Project-based Section 8 (above).	Same as Project-based Section 8; Section 202 model lease; <i>see</i> HUD Handbook, 4350.3, REV-1, CHG-2, App 4-B and C, the model lease, ¶ 24; 24 C.F.R. § 891.610(g); 24 C.F.R. § 891.410(g) (if owner receives income information between annual recertification it must consult with family and make any appropriate adjustments).	Same as Project-based Section 8.	Same as Project-based Section 8.
Section 811	Required Annually. 24 C.F.R. § 891.410(g).	Same as Project-based Section 8 (above).	Same as Project-based Section 8 and Section 202. <i>See</i> HUD Handbook, 4350.3, REV-1, CHG-2, App 4-D the model lease, ¶ 24.	Same as Project-based Section 8.	Same as Project-based Section 8.
Rent Supplement	Required Annually. 12 U.S.C. § 1701s(e)(2).	Same as Project-based Section 8 (above).	Same as Project-based Section 8.	Same as Project-based Section 8.	Same as Project-based Section 8.
Rural Development	Required Annually. 7 C.F.R. § 3560.152(e).	There are no federal rules on this issue.	No interim reporting required. However, tenant required to report changes in status which may affect eligibility. 7 C.F.R. § 3560.152(e)(1).	There are no federal rules on this issue.	There are no federal rules on this issue.
LIHTC	Required Annually. 26 C.F.R. § 1.42-5(b)(vi).	Not required by federal law.	Not required by federal law.	Not required by federal law.	Not required by federal law.
HOME	Required Annually 24 C.F.R. §§ 92.203, 92.252(h).	There are no federal rules addressing this issue.	Income of all family members must be determined annually.	There are no federal rules on this issue.	There are no federal rules on this issue.
Shelter + Care	Required Annually. 24 C.F.R. § 582.310(b)(2).	There are no federal rules on this issue.	There are no federal rules addressing this issue.	There are no federal rules on this issue.	There are no federal rules on this issue.

Chapter 8: Exhibit 1

	Column 1	Column 2	Column 3	Column 4	Column 5
Type of Housing Program	Annual determination of family composition	Approval to add members to family	Interim reporting of family composition	Criminal background check at annual recertification	Criminal background check at interim recertification
Supportive Housing	Required Annually. HUD Notice CPD 1996-03, ¶ 6; note that grantees are not required to charge rent when policy, if adopted, may affect policies regarding family composition.	There are no federal rules on this issue.	There are no federal rules on this issue.	There are no federal rules on this issue.	There are no federal rules on this issue.
HOPWA	No federal requirement, <i>but see</i> 24 C.F.R. § 574.310(d) rents are set in accordance with 24 C.F.R. 5.609 taking into account annual income.	There are no federal rules on this issue.	There are no federal rules on this issue.	There are no federal rules on this issue.	There are no federal rules on this issue.

APPENDIX 1

Description of Federally Assisted Housing Programs for Lower Income Families

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1.1 Introduction

Three of the largest federally assisted housing programs that serve the lowest-income families are the Section 8 voucher program, the public housing program, and the project-based Section 8 program. Another large and growing program is the Low-Income Housing Tax Credit (LIHTC) program. In rural and some suburban areas, federally-subsidized Rural Development (RD) properties also provide affordable rental housing. In addition, many smaller programs that provide affordable housing receive federal support. This Appendix briefly reviews the key features of these programs. The main chapters in this Guide explain, to the extent that they exist, the specific rules or guidelines for each program as they affect admission and occupancy by individuals with a criminal record who are no longer incarcerated.

Occupancy in the federal housing programs is usually limited to tenants in particular income ranges, which are typically defined as a percentage of “Area Median Income” (AMI). As described below, the various programs may have different income limitations.¹ They will usually vary depending on the depth of subsidy that is made available to program participants. Certain income ranges have been given common labels that are applicable to most programs: 51 to 80 percent of AMI is “low-income,” 31 to 50 percent of AMI is “very low-income,” and 30 percent of AMI and below is “extremely low-income.”

1.2 Section 8 Housing Choice Voucher Program

The Department of Housing and Urban Development (HUD) allocates money for the voucher program to public housing agencies (PHAs) so that they may provide low-income families with assistance for renting units in the private market. A voucher family finds a prospective unit, which the PHA inspects to ensure it meets quality standards and then determines whether the requested rent is reasonable. If the PHA approves the unit, the PHA and landlord enter into an assistance contract, under which the PHA makes monthly payments, for part or all of the rent,

on behalf of the family. The family pays that portion of the rent that the PHA does not pay. All types of rental housing are eligible for the program. In some cases, PHAs also permit the use of some vouchers for homeownership. A key feature of the program is portability: subject to certain limitations, a family can take the voucher and move to another unit in any jurisdiction in the United States where another PHA operates a voucher program.

The PHA determines which applicants receive voucher assistance. Eligibility is generally restricted to families whose income does not exceed 50 percent of the AMI. Applicants with incomes at or below 30 percent of AMI are targeted to receive three out of every four vouchers issued in any year by each PHA. Low-income families, with incomes between 51 percent and 80 percent of AMI, are eligible for the program if they also meet additional criteria such as being continuously assisted by a federally assisted housing program or are displaced.

As explained in the main chapters of this Guide, PHAs screen otherwise eligible applicants under standards and procedures established by federal law and locally developed policies. Landlords who participate in the voucher program may have their own criteria for selecting tenants. Criminal activity of a household member can present grounds for rejection by either the PHA or the landlord.

Tenant contribution toward rent is generally set at 30 percent of the family’s adjusted income. However, each PHA establishes a “payment standard” (generally between 90 percent and 110 percent of the HUD-published Fair Market Rent (FMR) for the area in which the PHA operates) that serves as a limit on the subsidy that may be paid for participating families. If the approved rent for the unit exceeds the PHA’s payment standard, the family will pay the excess in addition to their 30 percent of income contribution. For families with little income, PHAs may also establish a minimum monthly rent contribution of up to \$50. For more information on how rents are set for this program, see: <http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on program name).

Each PHA is governed by a board of commissioners, which in all but a very few cases must include a voucher program participant or public housing ten-

¹For information on the current income limits and median income for a particular area, see: <http://www.huduser.org/datasets/il.html>.

ant. PHAs must develop annual and five-year plans that detail how they will address the housing needs of low-income tenants in the voucher program, as well as in the public housing program. These plans and supporting documents also set forth certain policies for admission, occupancy and termination that may affect participation by individuals with a criminal record. All approved PHA annual plans should be available on HUD's website,² and the supporting documents (e.g., the Section 8 Administrative Plan) may also be posted. Nationwide, there are 24 PHAs that participate in the Moving to Work (MTW) Demonstration program, which allows those PHAs to waive many requirements of federal law, including admission standards.

Good cause is required for evictions during the lease term. There is no federal statutory or regulatory good cause requirement when a tenant has reached the end of the lease term. However, some leases or local laws may impose additional good cause requirements on the landlord. As explained in the main chapters of this Guide, good cause for eviction can include criminal activity of a household member or guest.

PHAs may terminate a voucher under standards and procedures established by federal law and locally developed policies. As explained in the main chapters of this Guide, good cause for voucher termination by the PHA can include criminal activity of a household member or serious violations of the lease. In some situations, federal law requires the PHA to seek the termination of a voucher.

How to find Vouchers. To find where PHAs are located in a particular community see <http://www.hud.gov/offices/pih/systems/pic/haprofiles/>. For the number of voucher units authorized for the PHA see: <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>.

Basic References:

42 U.S.C. § 1437f(o).

24 C.F.R. pt. 982.

24 C.F.R. pt. 5.

HUD, HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, 7420.10G (April 2001), available at www.hudclips.org (click on Guidebooks) and <http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm>.

<http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm>.

HUD General Reference for Housing Choice Voucher Program: <http://www.hud.gov/offices/pih/programs/hcv/>.

For more extensive discussion of this program, the Moving to Work Program, and applicants' and tenants' rights, see National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.). The HUD Moving to Work website is: <http://www.hud.gov/offices/pih/programs/ph/mtw/>.

1.3 Section 8 Project-Based Vouchers

The project-based voucher program is a small subset of the Housing Choice Voucher program. PHAs choose to use some of their voucher funds for assistance to landlords who commit a certain number of units in their buildings to voucher tenants. The PHA contracts with landlords for up to 10 years and may provide for extension of the agreement in 5 year increments. PHAs may spend up to 20% of their annual voucher funding for project-based vouchers. A unique feature of this program is that a tenant participant who wants to move from the project-based voucher property can obtain a new voucher from the PHA that allows the tenant to relocate into the private rental market and continue to receive rental assistance. The landlord can then re-rent the unit to another voucher tenant using the project-based voucher assistance. No more than 25% of the units in a particular development may be rented under the project-based voucher program, unless the development serves the elderly or disabled or provides supportive services.

The PHA determines family eligibility and selects participants in accordance with the standards and procedures described above for the Housing Choice Voucher program. As in the regular voucher program, a project-based voucher landlord may use its own tenant selection criteria to screen applicants, although it can only rent to families referred by the PHA from its waiting list. Certain criminal activity of a household member presents potential grounds for rejection by either the PHA or the landlord.

Tenant contributions toward rents are set at 30 percent of the family's adjusted income, since the

²<http://www.hud.gov/offices/pih/pha/approval/>.

payment standard for units under the project-based voucher program equals the PHA-approved rent. For families with little income, PHAs may also establish a minimum monthly rent contribution of up to \$50.

Evictions and terminations are governed by the same standards and procedures as described above for the Housing Choice Voucher program.

HUD's Resident Characteristics Reports provides the number of project-based vouchers for each PHA, see: <http://www.hud.gov/offices/pih/systems/pic/50058/rcr/>.

Basic References:

42 U.S.C. § 1437f(o)(13).

24 C.F.R. pt. 983.

24 C.F.R. pt. 5.

HUD, HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, 7420.10G (April 2001), available at www.hudclips.org (click on Guidebooks) and <http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm>.

HUD General Reference for Project-Based Vouchers: <http://www.hud.gov/offices/pih/programs/hcv/project.cfm>.

For more extensive discussion of this program and applicants and tenants' rights, see National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.4 Public Housing

HUD provides money to PHAs that own and operate public housing facilities, usually rental units. Some PHAs contract with private companies to manage their developments. A few public housing units are homeownership units.

Each PHA is governed by a board of commissioners, which in all but a very few cases must include a voucher program participant or a public housing tenant. PHAs must develop annual and five-year plans that detail how they will address the housing needs of low-income tenants in public housing, as well as in the voucher program. These plans and supporting documents also prescribe certain policies for admission, occupancy, and termination that affect participation by individuals with a criminal record. All approved PHA annual plans should be available

on HUD's website: (<http://www.hud.gov/offices/pih/pha/approved/>). The supporting documents (the public housing Admission and Continued Occupancy Plan (ACOP)) may also be posted. Nationwide, there are 24 PHAs that participate in the Moving to Work (MTW) Demonstration program, which allows those PHAs to waive many requirements of federal law, including admission requirements. The PHA determines which applicants will be admitted to public housing. To be eligible for public housing, applicants must have incomes at or below 80 percent of the AMI. At least half of the current public housing tenants nationwide, however, have incomes that do not exceed 30 percent of AMI. Applicants with incomes lower than 30 percent of AMI are targeted to receive two out of every five units that become available in any year by each PHA.

As explained in the main chapters of this Guide, PHAs screen otherwise eligible applicants under standards and procedures established by federal law and locally developed policies. Certain criminal activity of a household member presents potential grounds for rejection.

A public housing tenant's rent is typically set at 30 percent of adjusted income, although the rent may be higher for some welfare recipients and families with unusually large deductions. PHAs may charge a minimum monthly rent of up to \$50 for those tenants with little or no income.

Good cause is required for evicting tenants whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find public housing. To find where PHAs are located in a particular community see: <http://www.hud.gov/offices/pih/systems/pic/haprofiles/>. For the number of public housing units managed by the PHA see: <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>.

Basic References:

42 U.S.C. §§ 1437 to 1437e.

24 C.F.R. pt. 5 and pts. 900-972.

24 C.F.R. pt. 966 (lease and grievance).

24 C.F.R. pt. 960 (admission and occupancy).

HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK (June

2003), available at: <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>.

HUD General Reference for Public Housing: <http://www.hud.gov/offices/pih/programs/ph/index.cfm>.

For a more extensive discussion of this program, the Moving to Work program and applicants and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.5 Federally Assisted Multifamily Rental Housing Programs

Multifamily housing assisted or subsidized by the federal government is usually privately owned by a nonprofit organization, a for-profit entity, or occasionally by a public agency. Various subsidy programs fall under the jurisdictions of HUD, the Department of Agriculture (USDA, Rural Development/Rural Housing Service), the Treasury Department's Internal Revenue Service, or designated agencies or contractors working under their regulatory supervision.

In these developments, rents charged to tenants will depend upon the type of subsidy made available through the owner. Some developments receive a "shallow" subsidy, typically in the form of a reduced interest rate on the mortgage loan, or a capital contribution towards the cost of construction through the low income housing tax credit or another program. Rents in these development are usually below-market, reflecting the reduced interest rate or capital subsidy. These units are typically not affordable to the lowest-income families. For other developments, or sometimes some units in the same development, the subsidy is more substantial, taking the form of rental assistance to bridge the gap between the rent for the unit and a tenant contribution set at 30 percent of adjusted income. Most prominent among these "deep subsidies" is the HUD project-based Section 8 program, which may be used in either HUD or RD multifamily properties, or the RD Rental Assistance program, which is only available in RD properties.

Each program has its own eligibility and tenant selection rules, although private owners make these decisions pursuant to standards and procedures largely governed by federal law or policy guidelines.

Furthermore, admission to some of these developments may be restricted to certain classes of individuals and their families. Thus, a development might be restricted to the elderly, people with disabilities, both elderly and people with disabilities, individuals with AIDS or related diseases, or to persons who are homeless. Subsidized developments may have units with one set of bedroom sizes or a range of bedroom sizes. Generally units are assigned on the basis of two persons per bedroom.

1.5.1 How to Find Federally Assisted Multifamily Rental Housing

If an applicant is looking for the name and address of a federally-subsidized multifamily development within a particular area, that information is available on the HUD website for most properties and most housing programs. *See*: <http://www.hud.gov/renting/local.cfm>.³ From this HUD web page, there is information for each state about both the location and contact information for project-based Section 8 developments (in addition to contact information for PHAs administering either public housing or vouchers). There are also links on the state pages to the USDA web site for the location and contact information for RD multifamily units, another HUD web page for the location of Low-Income Housing Tax Credit (LIHTC) properties, the state housing finance agency, independent living centers, housing counseling agencies and other resources for renters and applicants.

For a list of developments serving the elderly and people with disabilities, including project-based Section 8 and other properties with HUD-insured mortgages, check HUD's Multifamily Inventory of Units for the Elderly and Persons with Disabilities, available at: <http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>. The non-Section 8 units listed may not be as affordable as the Section 8 units, but the rents will generally be below market. Another HUD website lists Section 202 properties serving these populations: <http://www.hud.gov/offices/hsg/mfh/map/actloan/activesec202loans.cfm>.

³This site can be reached from the HUD home page by clicking on "information for tenants" and then clicking on "local renting information."

When using the HUD website to locate developments, elderly and disabled families should check both the “local renting information” or “low rent apartment search” and the Multifamily Inventory of Units for the Elderly and Persons with Disabilities. This is because the latter inventory does not list public housing, LIHTC or RD units.

The Multifamily Inventory of Units for the Elderly and Persons with Disabilities also lists units for families. These family units may not have Section 8 project-based assistance, but the rents may still be below market. For this reason, a family that does not qualify as elderly or disabled should also check both the Multifamily Inventory of Units for the Elderly and Persons with Disabilities and the “local renting information.”

Other HUD websites listing participating properties for the programs described in the remainder of this Appendix, are included at the end of each program description. Some HUD-assisted units, such as those under the HOME or Shelter Plus Care programs, are not listed on any of these websites. Information on how to find these units is provided below after each program description.

The following sections provide basic information regarding the different types of privately owned, federally assisted multifamily housing (other than public housing), for which the subsidy is project-based (*i.e.*, the subsidy is tied to the unit and tenants cannot take the subsidy with them if they move). These programs are often referred to by a number (*e.g.*, Section 8, Section 236, etc.), which usually refers to a section of the relevant housing act (*e.g.*, Section 8 of the United States Housing Act of 1937 or Section 236 of the National Housing Act).

Throughout this Guide, we have used the term “federally assisted” housing as that term is defined and used with respect to many of the statutory provisions relating to criminal acts and admission policies.⁴ There are times, however, when, for ease of reference to multiple programs, we have used the generic terms

“HUD-assisted,” “HUD-subsidized” or “federally-subsidized” housing to refer to categories of the federally assisted programs, including housing assisted by USDA and the LIHTC programs. Because of discrete variations in the rules as well as their coverage, advocates should look carefully at the discussion to determine which housing is covered.

1.6 Section 221(D)(3) Below-Market Interest Rate (BMIR) Program

Created in 1961, this program is the oldest federally assisted low- and moderate income family housing program of the Federal Housing Administration’s (FHA). Developments financed under the program, now regulated by HUD, were subsidized by the provision of a below-market interest rate (BMIR) on the original mortgage loan for the purpose of constructing or substantially rehabilitating a multifamily rental or cooperative developments. The purpose of the BMIR subsidy mechanism was to reduce the overall cost of operating the development, and thus permit lower rents. Over time, the primary factor maintaining the affordability of these developments has been HUD’s limiting rent increases to costs required to cover only demonstrated operating cost increases. As a result, rents in these developments may now be considerably lower than market rents. Since about 1970, no additional developments were developed under this program and older units are now being lost because loans have fully matured or owners are prepaying their mortgage loans.

There are also Section 221 market interest rate developments, where HUD insures the loan but provides no additional mortgage subsidy. The rents for these developments may have some degree of affordability because, over the years, rents may have been restricted by a regulatory agreement.

In Section 221(d)(3) BMIR developments without subsidies other than the reduced interest rate, eligible applicants must have income at or below 95 percent of AMI. Admission decisions are made by the owner or manager pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for the denial of admissions.

⁴2 U.S.C.A. § 13664(a)(2) (West, WESTLAW through P.L. 110-46 (excluding P.L. 110-42 & 110-44) approved 07-05-07); 24 C.F.R. § 5.100 (2007) (reciting a long list of programs covered by part 5); 24 C.F.R. § 5.850 (2007) (establishing exceptions from rules concerning admission and eviction for alleged criminal activity from public housing, vouchers and RD properties, which have their own program-specific rules).

The rent in Section 221(d)(3) developments is approved by HUD based upon the number of bedrooms in the unit and the cost of operating the unit with the loan subsidy. Rents are flat rents, *i.e.*, they are the same for equal sized units and, unless some other subsidies are available, are not based upon a percentage of the family's income. Some higher-income tenants pay a slightly higher rent, 110 percent of the BMIR rent. The rents in these developments can only be increased upon HUD's approval of demonstrated operating cost increases. For more information about the rents in a Section 221(d)(3) BMIR development, see <http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on the program name).

In any Section 221(d)(3) BMIR or market-rate development, some or all units may also receive additional "deep subsidy" rental assistance, such as project-based Section 8 or rent supplement, which makes the units affordable to the lowest-income families by reducing tenant rent contributions to 30 percent of the family's adjusted income. These additional subsidy programs are discussed below.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find Section 221(d)(3) BMIR properties. HUD maintains a list of these developments at: <http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>.

Basic References:

12 U.S.C. §§ 1715l(d)(3) and (d)(5).

24 C.F.R. pt. 221 Low Cost and Moderate Income Mortgage Insurance.

24 C.F.R. pt. 247 (Evictions).

HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.

HUD website with more information about this program: <http://www.hud.gov/offices/hsg/mfh/progdesc/rentcoop/hsg221d3n4.cfm>. For more extensive discussion of this program and applicants' and tenants' rights, see National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.7 Section 236 Rental Program

This program was created in 1968. These developments, financed by private institutions and regulated by HUD, were subsidized by interest reduction payments that reduced the original loan interest rate for the purpose of constructing or substantially rehabilitating multifamily rental or cooperative developments. The interest subsidy mechanism reduced overall costs, and thus permitted lower rents. Over time, the primary factor maintaining affordability has been HUD's limiting rent increases to demonstrated increased operating costs. Thus, rents in these developments may now be considerably lower than market rents. No new development have been constructed under the program since about 1980 and older developments are now being lost because the loan term has matured or owners are prepaying their loans.

Eligible applicants must have incomes that do not exceed 80 percent of AMI. Admission decisions are made by the owner or manager pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Under the Section 236 program, there is a minimum "basic" rent for each unit, which is the amount needed to operate the development with an interest rate of one percent. This flat basic rent is approved by HUD and can only be increased as operating costs increase. Relatively higher-income families may pay more than the basic rent up to the so-called "Section 236 market rent," which is the rent without the interest subsidy (usually about \$50-\$70 per unit higher than the basic rent). For more information on how rents are set, see: <http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on program name).

In any Section 236 development, some or all units may also receive additional "deep subsidy" assistance, such as project-based Section 8, Section 236 Rental Assistance, or rent supplements, which make the units affordable to the lowest-income families by reducing tenant rent contributions to about 30 percent of the family's adjusted income. These additional subsidy programs are discussed below.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for

eviction can include criminal activity of a household member or guest.

How to find Section 236 properties. HUD maintains a list, see: <http://www.hud.gov/offices/hsg/mfh/map/actloan/activesec236proj.cfm> and <http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>.

Basic References:

12 U.S.C. § 1715z-1.

24 C.F.R. pt. 236 Mortgage Insurance and Interest Reduction Payment for Rental Projects.

24 C.F.R. pt. 247 (Evictions).

HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.

For more extensive discussion of this program and applicants' and tenants' rights, see National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.8 Section 202 Program for the Elderly and People with Disabilities

These developments are subsidized and regulated by HUD. There are two types of Section 202 housing, depending on the date of the original loan (roughly pre- and post-1991). Under the original Section 202 program (prior to 1991), HUD made direct low-interest loans to nonprofits to develop housing for low-income elderly and disabled families. These developments are subject to rules and regulations similar to those applicable to the Section 221(d)(3) BMIR and Section 236 programs.

Because the Section 202 low-interest loan was insufficient to make the units affordable to the lowest-income families, some of these Section 202 developments also received rent supplement or project-based Section 8 assistance (Section 8 new construction or Section 8 additional assistance through the Loan Management Set Aside program). These Section 202/8 developments remain subject to both the Section 202 and the relevant Section 8 regulations.

Eligibility for initial occupancy in older Section 202 developments is limited to families with a head of household or a spouse who is elderly (defined as a person who is at least 62 years of age) or has a disability. Families are eligible if their income is not greater than 80 percent of AMI, although units in older Sec-

tion 202 developments that are also receiving Section 8 assistance are further restricted to very low-income and extremely low-income families under additional targeting rules, discussed below under project-based Section 8. Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the body of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Rents for older Section 202 developments that have no additional subsidies are budget-based flat rents (*i.e.* not adjusted in accordance with tenant income) and can increase only upon HUD approval for demonstrated operating cost increases. Tenant rent contributions for developments that also have Section 8 subsidy (Section 202/8) are set at 30 percent of adjusted household income. Some older Section 202 developments, which were developed in the late 1980s for persons with disabilities, have a Project Assistance Contract (PAC, also called Section 162), which also reduces the tenant's rent contribution to 30 percent of adjusted income.

The second type of Section 202 housing was developed in 1990 under Section 202 Supportive Housing for the Elderly. (The Section 811 program--Supportive Housing for People with Disabilities--which was created at the same time is discussed below.) The financing mechanism for this new Section 202 program changed from a loan to a capital advance, and the program also added special rental assistance for tenants, called the Project Rental Assistance Contract (PRAC).

Families are eligible for Section 202 Supportive Housing if their income is not greater than 50 percent of AMI. At initial occupancy, eligibility is limited to families with one or more elderly individuals.

Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

From the tenant's perspective, the Section 202 PRAC works just like project-based Section 8. Tenants

pay rent contributions of 30 percent of adjusted family income. Limited funding continues to be available for building additional developments under the new Section 202 program.

For more information on how rents are set for the Section 202/162 Project Assistance Contract (PAC) and Section 202/811 Project Rental Assistance Contract (PRAC) units, see <http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on the program name).

Good cause is required for evicting tenants from any Section 202 property, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find Section 202 properties. HUD maintains a list in a particular community, see: <http://www.hud.gov/offices/hsg/mfh/map/actloan/activesec202loans.cfm> and <http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>.

Basic References:

For the pre-1990 Section 202 program:

Section 202 of the Housing Act of 1959, Pub L. No. 86-372, § 202, 73 Stat. 667 (1959).

24 C.F.R. pt. 891 subpt. E.

24 C.F.R. pt. 247 Evictions (also made applicable by 24 C.F.R. §§ 891.630 and 891.770).

HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.

For the post-1990 Section 202 program

12 U.S.C. § 1701q.

24 C.F.R. pt. 891 Subparts A, B and D.

24 C.F.R. pt. 247 Evictions (also made applicable by 24 C.F.R. § 891.430).

HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.

HUD website with basic information about Section 202 program, see: <http://www.hud.gov/offices/hsg/mfh/progdesc/eld202.cfm>.

For more extensive discussion of these programs and applicants' and tenants' rights, see National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.9 Section 811 Program for Supportive Housing for Persons with Disabilities

Section 811 developments are subsidized and regulated by HUD, which provides interest-free capital

advances to nonprofit sponsors to develop supportive housing for persons with disabilities. These properties also receive a Project Rental Assistance Contract (PRAC), which is identical to that provided with the new Section 202 program (above).

Eligibility for Section 811 Supportive Housing is limited to very low-income households, with incomes no greater than 50 percent of AMI. An eligible family must have one adult with a disability, such as a physical disability, developmental disability or chronic mental illness. With HUD approval, an owner can limit occupancy to persons with similar disabilities. However, the owner must permit occupancy by any qualified person with a disability who could benefit from the housing and/or services regardless of the type of disability. Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

From the tenant's perspective, the PRACs for the Section 811 program work just like project-based Section 8. Tenants pay rent contributions of 30 percent of adjusted family income. Limited funding continues to be available for building additional developments under the Section 811 program.

For more information on how rents are set for this program, see: <http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (Click on program name).

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find Section 811 housing. HUD maintains a list of developments by state with information about whether the development is elderly, disabled or both, see: <http://www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm>.

Basic References:

42 U.S.C. § 8013.

24 C.F.R. pt. 891 subpt. D.

24 C.F.R. pt. 247 Evictions (made applicable by 24 C.F.R. § 891.430).

HUD Handbook 4571.2, Section 811 Supportive

Housing for Persons With Disabilities. HUD website with basic information about Section 811 program, *see*: <http://www.hud.gov/offices/hsg/mfh/progdesc/disab811.cfm>.

1.10 Project-Based Rental Assistance Programs

Some privately owned properties with HUD-insured or subsidized mortgages or direct HUD loans also have additional rental assistance that makes some or all of the units more affordable to very low-income tenants. The most common rental assistance program is the project-based Section 8 program. Some HUD units still have Section 236 Rental Assistance Program (RAP) or rent supplement, and some Rural Development units have either project-based Section 8 or RD Rental Assistance. The following briefly explains these rental assistance programs. The Project-Based Section 8 program may also be a stand-alone program. It does not have to be used with a federal insured or guaranteed mortgage.

1.10.1 Project-Based Section 8 Programs

The project-based Section 8 rental assistance programs provide rent subsidies for some or all units in a development for a specific period of time. The assistance covers the difference between the approved unit rents and tenants' income-based rent contributions. These subsidies were provided in exchange for the owners' commitment to rent only to eligible low-income tenants and charge only HUD-approved rents for the term of the Section 8 contract.

Historically there have been many project-based Section 8 programs, including the New Construction program, the Substantial Rehabilitation program, the Additional Assistance for Projects with HUD-insured and HUD-Held Mortgages (Loan Management Set-Aside) program, and Additional Assistance for the Disposition of HUD-Owned Projects. There were also specific set-asides for project-based Section 8 funding to be used in conjunction with state-financed properties, Section 202 properties, and properties developed with Rural Development Section 515 loans. All of these programs are generally referred to as project-based Section 8 housing.

As its name implies, project-based Section 8 is a

rental subsidy that is attached to a specific building and the tenant cannot move with the subsidy. In general, for most project-based Section 8 developments, HUD initially entered into a contract with the owner for a period of five to 40 years. In some cases, the contract is between a state housing agency or another public housing agency and the owner. HUD is not entering into any new project-based Section 8 contracts but is renewing existing contracts at the request of owners, usually for a year at a time or for a longer period, but subject to annual appropriations.

Under current rules, absent certain exceptions, families are eligible for project-based Section 8 if their income at initial occupancy is less than 50 percent of AMI, although owners must also provide two out of every five units that become available in any year to extremely low-income families (less than 30 percent of AMI).

Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Tenant contribution toward rent is generally set at 30 percent of the family's adjusted income. For families with little income, HUD has set a minimum monthly rent contribution of \$50. For more information on how rents are set for this program, *see*: <http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on program name).

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find a project-based Section 8 development. HUD maintains a list by state, city, county or zip code or by name of the development, *see* <http://www.hud.gov/apps/section8/index.cfm>.

Section 8 project-based developments are now primarily administered by a Performance-Based Contract Administrator (PB-CA) under contract with HUD. The list of developments covered by a PB-CA is found at: http://www.hud.gov/offices/hsg/mfh/rfp/ca_assigned.cfm.

Basic References:

- 42 U.S.C. § 1437f.
 24 C.F.R. pt. 880 New Construction.
 24 C.F.R. pt. 881 Substantial Rehabilitation.
 24 C.F.R. pt. 883 Section 8 Housing Assistance Payments Program—State Housing Agency.
 24 C.F.R. pt. 884 Section 8 Housing Assistance Payments Program, Section 515 Rural Rental Housing Projects.
 24 C.F.R. pt. 886 Section 8 Housing Assistance Payments Program—Special Allocations.
 24 C.F.R. pt. 247 Evictions.
 HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.

For more extensive discussion of this program and applicants and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.10.2 Section 236 Rental Assistance Program (RAP)

Some Section 236 developments have a Section 236 RAP contract for up to 20% of the units. Eligibility and tenant selection are the same as for the Section 236 program, above.

The purpose of the Section 236 RAP contract is to reduce the rent paid by the family to 30 percent of adjusted family income. For more information on how rents are set for this program, *see*: <http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on program name).

Since the 1980s, almost all Section 236 RAP contracts have been converted to project-based Section 8, and HUD is not entering into any new Section 236 RAP contracts.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

Basic References:

- 12 U.S.C. § 1715z-1(f)(2).
 24 C.F.R. pt. 236, Subpt. D, Rental Assistance Payments.
 24 C.F.R. pt. 247 Evictions.
 HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.

For more extensive discussion of this program and applicants and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.10.3 Rent Supplement Program

Some HUD properties (especially Section 221(d)(3), Section 236, and old Section 202) have rent supplement contracts to make the units more affordable to very low-income tenants.

Families are eligible for rent supplement if their income at initial occupancy is less than 80 percent of AMI. Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

The purpose of the rent supplement contract is to reduce the rent paid by the family to about 30 percent of adjusted family income. For more information on how rents are set for this program, *see*: <http://www.hud.gov/offices/hsg/mfh/hsgrent.cfm> (click on program name).

Most rent supplement contracts have been converted to project-based Section 8, and HUD is not entering into any new rent supplement contracts.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

Basic References:

- 12 U.S.C. § 1701s.
 24 C.F.R. § 200.1302 (savings clause referencing the applicable rent supplement regulations).
 24 C.F.R. pt. 247 Evictions.
 HUD Handbook 4350.3, OCCUPANCY REQUIREMENTS FOR SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS.
 For more extensive discussion of this program and applicants and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.11 Section 8 Moderate Rehabilitation Program

Historically, PHAs administered the Section 8 Moderate Rehabilitation (Mod Rehab) program to provide rental assistance to tenants in privately-owned developments. The purpose of the program was to provide assistance sufficient to repair substandard housing in local communities for low- and very low-income families. The subsidy is rental assistance, not a loan interest or capital subsidy.

These units were initially under 15-year contract terms that have now expired and are now eligible for annual renewal contracts.

Under current rules, absent certain exceptions, families are eligible for Section 8 Mod Rehab if their income at initial occupancy is less than 80 percent of AMI.

After an initial determination of eligibility by the public housing authority, families are referred to the owner, who then makes the actual admission decision, pursuant to a written tenant selection policy and procedures, hopefully, developed by the owner. As explained in the main chapters of this Guide, certain criminal activity of a household member may make the applicant ineligible and presents potential grounds for rejection.

Like other forms of Section 8, tenant rent contributions are set at 30 percent of adjusted family income. For families with little income, the PHA may set a minimum monthly rent contribution of up to \$50.

HUD reports state that there are currently approximately 29,000 non-single room occupancy moderate rehabilitation units nationwide.⁵

Starting in 1990, Congress limited funding for this program to rental assistance for single room occupancy (SRO) developments rehabilitated for homeless individuals.⁶ Typically, but not always, an SRO unit does not have either a bathroom and/or a kitchen in the individual unit. Public housing authorities and private nonprofit organizations may apply for funding for the Mod Rehab SRO program. Funding for the program continues to be available for new developments.

Homeless individuals must be provided first priority for this housing. Applicant screening is dependent upon the mission of the SRO project owner and allows discretion to managers to offer housing assistance in the case of prior convictions and when housing might not typically be offered under the other Section 8 programs.

Recipients of Moderate Rehabilitation SRO funding, other than PHAs, must have one or more homeless or formerly homeless individuals on the board of directors or other similar policy making entity of the recipient or otherwise make arrangements to consult with such homeless or formerly homeless individuals.

Another HUD program, the Shelter Plus Care (S+C) program, although not technically a Section 8 Mod Rehab program, also contains a SRO moderate rehabilitation program for adults who are homeless and have a disability. The S+C program is discussed in detail below. Funding continues to be available for the S+C SRO program.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find Section 8 Moderate Rehabilitation housing. The local housing authority should have a list or know where the housing that it administers is located.⁷ The list may be an attachment to the approved local public housing authority (PHA) plan, available on HUD's website: (<http://www.hud.gov/offices/pih/pha/approved/>). In addition, the state or local government entity that received these funds, if different from a PHA, should have a list of or know where these properties are located.

For units that are available for the homeless, such as Section 8 Mod Rehab SRO and S+C SRO housing, the location of the units should be available from local social services agencies, homeless service groups, and continuum of care coordinators. For more information about how to find these groups, see the discussion below under housing for the homeless and S+C.

⁵See HUD Resident Characteristics Report available at <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>

⁶There are approximately 6,000 nationwide. *Id.*

⁷HUD's website provides information on the number, but not the location, of Section 8 Moderate Rehabilitation units by PHA.

Basic References:

42 U.S.C. § 1437f(e)(2) (authority for Section 8 Moderate Rehabilitation that was repealed in 1990).

42 U.S.C. § 1437f(n) (authority for Section 8 SRO housing that was repealed in 1998).

42 U.S.C. § 11401 (SRO housing for the homeless).

24 C.F.R. pt. 882 Section 8 Moderate Rehabilitation Programs.

24 C.F.R. § 882.514 (PHA and owner roles in tenant selection).

24 C.F.R. pt. 247 and § 882.511 Evictions.

Current funding for the Section 8 SRO program and the S+C SRO program is competitive by Notice of Funding Availability (NOFA), *see, e.g.*, 70 Fed. Reg. 14,273 (Mar. 21, 2005). The NOFAs may have additional information regarding eligibility or tenant screening.

HUD website with basic information about the SRO program, *see*: <http://www.hud.gov/offices/cpd/homeless/programs/sro/index.cfm>.

Housing Homeless Individuals Through HUD's Section 8 Moderate Rehabilitation Single Room Occupancy (SRO) Program (March 2001), available at: <http://www.hud.gov/offices/cpd/homeless/library/sro/finalguidepdf.pdf>.

1.12 Home Investment Partnership Program

HUD provides HOME funds to state and local governments to develop multifamily rental housing or homeownership units, or to provide tenant-based rental assistance. State or local government units contract with nonprofit or for-profit entities to develop the housing.

Eligibility for rental properties and rental assistance is restricted to families whose income at move-in does not exceed 80 percent of AMI and 90 percent of the tenants must have incomes no more than 60 percent of AMI at initial occupancy. For rental developments with five or more units, 20 percent of the units are reserved for families with incomes at or below 50 percent of AMI. Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under HUD regulations. As explained in the main chapters of this Guide, certain criminal

activity of a household member presents potential grounds for rejection.

Rents for HOME rental units are set by formula. The maximum rent is the lesser of 30 percent of 65 percent of AMI or the HUD-published Fair Market Rents for the area. Rents for any units required to be set aside for very low-income families are set at either of 30 percent of income or 30 percent of 50 percent of AMI. Without an additional rent subsidy, rents for most HOME rental units are not affordable to the lowest income families. Additional rent subsidies could come from HOME funds or Section 8 vouchers. Owners of HOME-funded rental properties cannot discriminate against Section 8 voucher applicants. HOME funds may also be combined with tax credits or project-based vouchers.

Good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

HOME funding and restrictions on the development generally run from five to 20 years, depending upon the amount of funding. HOME funds used for rental assistance are initially limited to two years, but may be extended. Congress is still providing new funds for the development of units under the HOME program.

How to find HOME-funded developments. The state or local government agency that received these funds should have a list of developments or know where these properties are located.

Basic References:

42 U.S.C. §§ 12,741-12,756.

24 C.F.R. pt. 92.

24 C.F.R. §§ 92.203 (income determinations), 92.253(c) (good cause eviction protections), 92.253(d) (tenant selection), 92.351 (affirmative marketing; minority outreach).

Building HOME: A HOME Program Primer, a booklet produced by HUD, available at <http://www.hud.gov/offices/cpd/affordablehousing/library/building/index.cfm>.

HUD website with basic information about this program: <http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm>.

For more extensive discussion of this program and applicants and tenants' rights, *see* National Housing Law Project, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed. 2004 and 2006-2007 Supp.).

1.13 Section 17 Rental Rehabilitation Program

Between 1983 and 1990, HUD provided grants to state and local governments to allow for the moderate rehabilitation of multifamily developments primarily in low-income neighborhoods. A condition of the grants was that for at least ten years, between 50 percent and 100 percent of the units were to be occupied by low-income families. Local governments may have added additional conditions and extended the term of any obligations.

Eligibility for these properties is restricted to families whose income at move-in does not exceed 80 percent of AMI. Admission decisions are made by the owner or manager, although there is no federal requirement for a written tenant selection policy or procedures. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Rent for these units is considered affordable if it does not exceed the HUD-published Fair Market Rent (FMR) for the area. In general, the rent for these units is not affordable to the lowest income families. Tenants may use vouchers to reside in these units. This program no longer receives new funding for additional units. There is no federal effort to preserve or extend the contracts on these units.

How to find Rental Rehabilitation units: State and local government agencies that received these funds should be able to identify the location of these developments.

Basic References:

42 U.S.C.A. § 1437o note.
24 C.F.R. pt. 511.

1.14 Section 17 Housing Development Program

Between 1983 and 1990 HUD provided grants to state and local governments to make 20-year grants, loans and interest reduction payments for the construction or rehabilitation of multifamily units.

Twenty percent of the units in each development had to be set aside for low-income families. Local governments may have added additional conditions and extended the term of any obligations.

Eligibility for these units is restricted to families whose income at move-in does not exceed 80 percent of AMI. Admission decisions are made by the owner or manager, although there is no federal requirement for a written tenant selection policy or procedures. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Rents for the low-income units may not exceed 30 percent of the income for a family at or below 50 percent of AMI. In general, the rent for these units is not affordable to the lowest income families. Tenants may use vouchers to reside in these units. This program no longer receives funding for additional units. There is no federal effort to preserve or extend the contracts on these units.

How to find Section 17 units. The state and local government agencies that received these funds should be able to identify the location of these developments.

Basic References:

42 U.S.C. § 1437o note.
24 C.F.R. pt. 850.

1.15 Low-Income Housing Tax Credit Program (LIHTC)

The Low-Income Housing Tax Credit (LIHTC) program is currently the primary production program for affordable housing for low-income people. Tax credits are divided among the states based upon population. Owners of LIHTC developments are usually limited partnerships with large corporate investors, who gain the benefits of the tax credits, acting as limited partners. General partners may include nonprofits.

The LIHTC program is administered by the Internal Revenue Service (IRS) of the Department of Treasury and state housing agencies, often called state housing finance or tax credit agencies. The state housing agencies develop a Qualified Allocation Plan (QAP), which describes priorities and standards for awarding tax credits within the state. Some state agencies also adopt rules or guidelines to govern operation of the properties, including tenant and applicant rights.

In exchange for the tax credits, the owner must agree to rent a certain number of units to income-eligible tenants for a fixed rent. The owner has two choices. At least 20 percent of the units must be initially occupied by tenants with incomes no higher than 50 percent of AMI or at least 40 percent of the units must be occupied by tenants with incomes no higher than 60 percent of AMI. Developments may also have a higher percentage of restricted units. Eligibility for the restricted units in these properties is limited to families whose income at move-in does not exceed the designated percentage of AMI. Admission decisions are made by the owner or manager. Although there is no federal requirement for a written tenant selection policy, such basic fairness protections could be required by the state tax credit allocation agency. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Under federal law, rents for restricted units are set at no more than 30 percent of either 50 percent or 60 percent of AMI, depending upon the occupancy restriction selected. States may also impose requirements for occupancy and rents targeted to even lower-income people (e.g., 40 percent of AMI, and rents at 30 percent of that amount) as a condition of receiving tax credits. The applicable rent and occupancy restrictions are set forth in a recorded regulatory agreement.

The rents for LIHTC-restricted units can increase as the AMI increases. Generally these units retain these rent restrictions for at least 30 years, or such longer term established under the regulatory agreement. Without additional subsidies, these rents are not affordable to the lowest income families. The LIHTC program can be used with HOME or CDBG funds, project-based vouchers or project-based Section 8. Moreover, the owner cannot discriminate against an applicant with a Section 8 voucher.

Tenants may be evicted from LIHTC units only for good cause. There is little case law defining good cause in the LIHTC context. Nevertheless, good cause is required for evicting tenants, whether during or at the end of the lease term. Good cause for eviction most likely can include criminal activity of a household member or guest.

How to find LIHTC properties. HUD maintains a list of LIHTC properties by state at <http://lihtc.huduser.org/> (if needed, make sure to check the appropriate boxes to get bedroom size and owner contact information). Some state housing tax credit agencies also have website lists with the names and addresses of LIHTC properties within the state.

Basic References:

26 C.F.R. § 1.42.

26 U.S.C. § 42(h)(6)(B)(iv) (good cause eviction). For additional information about good cause for eviction, see: <http://www.nhlp.org/html/lihtc/index.htm>.

For general information about the LIHTC program, see <http://lihtc.huduser.org/>. In some states, the tax credit allocation agency has a website with information about the program.

1.16 Rural Development Housing

1.16.1 Section 515 Rural Rental Housing Program

Rural Development (RD), an agency within the United States Department of Agriculture (USDA), makes or guarantees market-rate loans for up to 50 years to public, private and nonprofit groups or individuals to provide rental or cooperative housing for low- and moderate-income families. Loan funds may be used to construct or rehabilitate housing. Housing constructed for elderly or disabled persons or families may include congregate or group homes. Families are eligible for these properties if their income, at initial occupancy, is less than 80 percent of AMI, although families with slightly higher “moderate” incomes (no more than \$5,500 above the low-income limit) may also be eligible. Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under RD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

Two forms of additional subsidy make rents in Section 515 developments affordable. The first, interest credit, is a shallow subsidy, available to limited-profit or non-profit owners. The interest credit reduces the

interest rate for the loan to 3 percent or 1 percent. These interest credit subsidies are similar to the HUD Section 221(d)(3) BMIR and Section 236 programs.

The rents in 3 percent interest credit developments are approved by RD, based upon bedroom size, and do not vary with tenant income. The rent structure for 1 percent interest credit developments is slightly more complicated, like the HUD Section 236 program. The owner first sets the basic rent and market rent. The basic rent is based on the cost of operating the project with a loan amortized at a 1 percent interest rate, and the market rent is based upon the same operating expenses with the mortgage loan amortized at the RD market-rate in effect at the time the loan was made. Tenants pay the greater of the basic rent or 30 percent of income, up to the market rent. As with the HUD interest subsidy programs, the RD interest credit is not sufficient to make the units affordable to the lowest income families. Some Section 515 developments receive a second subsidy, RD Rental Assistance, which subsidizes the difference between the basic rent and 30 percent of tenant income, for some or all of the units. The Rental Assistance contracts initially were for five or 20 years; they have since been reduced to five-, four- and two-year terms and most recently to one-year terms. Some Section 515 developments also have project-based Section 8 contracts. Section 515 loans with RD Rental Assistance are still available for new developments. As owners prepay or retire their loans, the former Section 515 developments become unaffordable to low- and very low-income families because all the subsidies are terminated. Residents are, however, eligible for RD vouchers.

Good cause is required for evicting tenants from RD Section 515 units, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find RD Section 515 housing. The USDA website contains a list of multifamily developments assisted by the RD program. The list can be searched by state and county. See: http://rdmfhrentals.sc.egov.usda.gov/RDMFHRentals/select_state.jsp.

Basic References:

42 U.S.C. § 1485.

42 U.S.C. § 1490a(a)(2) (Rental Assistance authorization).

7 C.F.R. pt. 3560 (Section 515 regulations).

7 C.F.R. pt. 3560 Subpt. F (Rental Assistance).

24 C.F.R. § 884 (Section 8 for Rural Rental Housing Projects).

RD, MFH Asset Management Handbook, 2-3560, § 6.37(c) (2007), available at <http://www.rurdev.usda.gov/regs/hblist.html>.

USDA website with basic information about Rural Rental Housing program, the Guaranteed Rental Housing Program and the Rental Assistance program: http://www.rurdev.usda.gov/rhs/common/program_info.htm#MFH.

1.16.2 Farm Labor Housing: Section 514 and Section 516

The Rural Development agency has two housing programs to assist in the construction of rental housing for migrant, seasonal, and year-round farm laborers: Section 514, a 1 percent loan program, and Section 516, a grant program.⁸

Farmworker families are eligible for these properties if their income at initial occupancy is no more than \$5,500 above the low-income limit, although eligibility for projects receiving a Section 516 grant is restricted to low-income tenants (less than 80 percent of AMI). Eligibility is further restricted to households where the income of the lease holder is primarily from farm labor.

Although RD Farm Labor Housing must be used for farmworkers during the working season, it may also be used to house homeless individuals and their families on an emergency temporary basis during the off-season. Moreover, with RD permission, it can be used to house non-farm labor households if there are persistent vacancies in the farmworker housing.

Admission decisions are made by the owner or manager, pursuant to a written tenant selection policy and procedures developed by the owner under

⁸Most farm labor housing is owned and operated by farmers for the benefit of their own farmworkers. Farmers are only eligible for Section 514 loans (on-farm labor housing) and are generally prohibited from charging rent in their housing, which typically consists of developments with less than 10 units. Nonprofit and public agencies are eligible for Section 514 loans and Section 516 grants (off-farm labor housing). These developments are typically larger and residents have to pay rent to live in the development. The discussion in this section is limited to housing financed under both sections 514 and 516.

RD regulations and guidelines. As explained in the main chapters of this Guide, certain criminal activity of a household member presents potential grounds for rejection.

From the tenant's perspective, the rents in developments financed under Sections 514 and 516 are typically lower than Section 515 rental housing without additional subsidies because part of the development was financed with a Section 516 grant and the Section 514 loan is amortized at 1 percent. All rents in developments financed under Sections 514 and 516 are based on the cost of operating the project and amortizing the 1 percent loan. Except for households assisted by Rental Assistance, all tenants pay the same rent for a similar sized unit regardless of income.

Because farmworker households generally have extremely low incomes, rents in farm labor housing are frequently too high to be affordable by farmworker households. As a result, Rental Assistance is available to some or all the families residing in farm labor housing. Households receiving Rental Assistance pay 30 percent of their adjusted income for rent.

Good cause is required for evicting tenants from RD Farm Labor Housing units, whether during or at the end of the lease term. Good cause for eviction can include criminal activity of a household member or guest.

How to find RD Farm Labor housing. The State USDA, Rural Development staff should be able to provide information regarding the location of Section 514 or Section 516 developments.

Basic References:

42 U.S.C. § 1484 (Section 514).

42 U.S.C. § 1486 (Section 516).

42 U.S.C. § 1490a(a)(2) (Rental Assistance authorization).

7 C.F.R. pt. 3560 (Section 514 and Section 516 regulations).

7 C.F.R. pt. 3560 Subpt. F (RD Rental Assistance).

USDA website with basic information about Farm Labor Housing Loans and Grants and the Rental Assistance program: http://www.rurdev.usda.gov/rhs/common/program_info.htm#MFH.

1.17 Programs for the Homeless

The federal government supports a variety of programs for homeless individuals and families that may be important resources for individuals with a criminal record seeking affordable housing. The definition of who is considered "homeless" is vital for determining whether these resources can help.

For certain federal programs, a person is considered "homeless" if he or she is living in a place not meant for human habitation for example living on the street, in an emergency shelter, or transitional housing and is income-eligible. An incarcerated person is not considered to be homeless.⁹ Upon discharge from incarceration, a person may be considered homeless if no residence has been identified and the person lacks the resources and support networks needed to obtain housing. This definition applies to the following federal programs: Supportive Housing program (SHP), Shelter Plus Care (S+C) and Section 8 Moderate Rehabilitation SRO housing. These programs are authorized in the McKinney-Vento Home Assistance Act.¹⁰ For these programs, the relevant Notice of Funding Availability (NOFA) also may have a definition of "chronically homeless person." In the 2007 NOFA such a person is an "unaccompanied homeless individual with a disabling condition who has either been continuously homeless for a year or more or has had at least four (4) episodes of homelessness in the past three (3) years." Under this definition, S+C, Supportive Housing and Moderate Rehabilitation (SRO) housing is not for populations who are at risk of becoming homeless.

Although the term "homeless" may be used in other housing programs (e.g., public housing, the voucher program, and the older Section 8 Moderate Rehabilitation program), there is no federal definition for these programs. A local jurisdiction may define the term "homeless." Thus, it is possible for a local jurisdiction to define "homeless" to include individuals who are incarcerated or recently released individuals who do not have housing resources.

⁹42 U.S.C.A. 11302(c) (West, WESTLAW through P.L. 110-113 (End) approved 11-8-07).

¹⁰The Section 8 Moderate Rehabilitation (SRO) program is discussed in the section on Section 8 Moderate Rehabilitation program.

Basic References:

42 U.S.C. § 11,302 (Definition of “homeless”).

HUD website defining homelessness: <http://www.hud.gov/offices/cpd/homeless/library/sro/understandingsro/eligibleparticipants.cfm>.

Letter from James H. Barnes, HUD Director Community Planning and Development to Ms. Soni Gupta, AIDS Housing Corporation, Feb. 24, 2000 (discussing eligibility of individuals released from institutions) included as Exhibit 1 to this Appendix; and Question and Answers: A Supplement to the 2007 Continuum of Care Homeless Assistance NOFA and Application available at: <http://www.hud.gov/library/bookshelf12/supernofa/nofa07/grpcoc.cfm>.

1.17.1 Shelter Plus Care (S+C) Program

The Shelter Plus Care program is a rental assistance program for people who are homeless and disabled. The S+C program specifically targets adults with disabilities including serious mental illnesses, those with chronic substance abuse problems, and those with AIDS and related diseases and their families. Rental assistance is linked to supportive services funded through other programs that tenants may be required to use. The funds are provided to states, local governmental units and public housing authorities. Funding for S+C continues to be available for additional developments. S+C assistance may be provided in any of the following four ways:

Tenant rental assistance (TRA), a subsidy that moves with the tenant. The grant period for the administering agency is five years. Participants may be required to live in a particular building for the first year and a specific area thereafter or in a particular area for the entire period of participation so as to make the coordination and provision of services easier.

Sponsor-based rental assistance (SRA), a subsidy to a sponsor, which may be a private, nonprofit or community mental health agency. Participants reside in the units owned or leased by the sponsor. The grant period is five years.

Project-based rental assistance (PRA), a subsidy to an owner for five to ten years. To qualify for a ten-year subsidy, the owner must perform at least \$3,000 of rehabilitation on the units.

S+C Moderate Rehabilitation for Single Room Occupancy (SRO) dwellings program. Under this program, similar to the Section 8 Moderate Rehabilitation SRO program, units must comply with the regulations for Section 8 Moderate Rehabilitation units. From the applicant or tenant’s perspective, the major differences between this S+C program and the ordinary Section 8 Moderate Rehabilitation program are the definition of who is eligible and the supportive services. The S+C SRO Moderate Rehabilitation funds are often combined with HOME funds.

A participant may only be terminated from S+C programs for good cause. Recipients of S+C funds are urged to examine all extenuating circumstances and only terminate for the most serious violations.

Recipients of S+C funding are required to have one or more homeless or formerly homeless individuals on the board of directors or other similar policy making entity of the recipient or otherwise make arrangements to consult with such homeless or formerly homeless individuals.

How to find S+C units. Community social service agencies should know where this housing is located. The HUD website contains contact information for each state identifying homeless service groups and continuum of care coordinators for homeless assistance providers within a county, city or region that receive HUD funding: <http://www.hud.gov/homeless/hmlsagen.cfm>. These coordinators should be able to help locate the S+C housing, Supportive Housing program, and Section 8 Moderate Rehabilitation SRO housing. As part of the Continuum of Care Plan, which is part of the application for funding for the S+C, Supportive Housing program and Moderate Rehabilitation SRO housing, there is an inventory chart, which lists details about current new beds and any targeting to certain individuals.

Basic References:

42 U.S.C. §§ 11403-11407b.

24 C.F.R. pt. 582.

24 C.F.R. § 582.310(b) (calculating income), § 582.335 (outreach activities), 582.330 (non-discrimination and equal opportunity requirements), 582.320 (termination of assistance; *see also* 42 U.S.C. § 11403f(b)).

Current funding for the S+C program is competitive by Notice of Funding Availability, *see, e.g.*, 72 Fed. Reg. 11,743 (Mar. 13, 2007). The NOFA may contain information about eligibility and screening. HUD's S+C Resource Manual, available at: <http://www.hudhre.info/index.cfm?do=viewspresourceman>.

HUD's website contains general information about the S+C programs: <http://www.hud.gov/offices/cpd/homeless/programs/splusc/index.cfm>.

1.17.2 The Supportive Housing Program (SHP)

The Supportive Housing Program (SHP) provides funds for housing and/or supportive services. Eligible applicants for funding include states, local governmental units, public housing authorities, private nonprofits and community mental health centers. Funding for the SHP program continues to be available for the development of additional units. Populations who are given special consideration include homeless persons with disabilities and homeless families with children. Beyond supportive services, funds can be used for the following housing purposes:

Transitional Housing. Funds may be used for new construction, rehabilitation, leasing or purchase of transitional housing, defined as housing facilitating the move of homeless individuals and families from homelessness to permanent housing. It is available to homeless persons for up to 24 months, which may be extended. Supportive services are also provided. In general, the rent is set at 30 percent of adjusted family income in a manner similar to the Housing Choice Voucher program.

Permanent Housing for Persons with Disabilities. The Permanent Housing for Persons with Disabilities component is another type of Supportive Housing. It is long-term, community-based housing, with supportive services for homeless persons with disabilities. In general, the rent is set at 30 percent of adjusted family income in a manner similar to the Housing Choice Voucher program.

Innovative Projects. Supportive Housing (SHP) funds may also be used for housing demonstrating innovative or alternative methods for meeting immediate and long-term needs of homeless people.

Recipients of SHP funding must have one or more homeless or formerly homeless individuals on the board of directors or other similar policy making entity of the recipient or otherwise make arrangements to consult with such homeless or formerly homeless individuals.

A tenant in SHP housing may only be terminated for good cause. Recipients of SHP funds are urged to terminate assistance only in the most severe cases.

How to find SHP housing. Community social service agencies should know where this housing is located. The HUD website contains contact information for each state identifying homeless service groups and continuum of care coordinators for homeless assistance providers within a county, city or region that receive HUD funding: <http://www.hud.gov/homeless/hmlsagen.cfm>. These coordinators should be able to help locate S+C housing, Supportive Housing program (SHP), and Section 8 Moderate Rehabilitation SRO housing. As part of the Continuum of Care Plan which is part of the application for funding for the S+C, SHP and Moderate Rehabilitation SRO housing, there is an inventory chart, which lists details about current new beds and any targeting to certain individuals.

Basic References:

42 U.S.C. §§ 11381–11389.

24 C.F.R. pt. 583.

42 U.S.C. § 11386 and 24 C.F.R. § 583.300(I) (termination of assistance).

Current funding for the Supportive Housing Program is competitive by Notice of Funding Availability (NOFA), *see, e.g.*, 72 Fed. Reg. 11,743 (Mar. 13, 2007). The NOFA may contain information about eligibility and screening.

Supportive Housing Program Desk Guide, available on the HUD website at: <http://www.hudhre.info/index.cfm?do=viewShpDeskguide>.

HUD's website provides information about the Supportive Housing Program: <http://www.hud.gov/offices/cpd/homeless/programs/shp/index.cfm>.

1.18 Housing Opportunities for Persons with AIDS (HOPWA) Program

The HOPWA Program addresses the specific needs of low-income persons living with HIV/AIDS and their families. Eligibility for HOPWA-funded housing is restricted to families with incomes no more than 80 percent of AMI.

HOPWA grants may be made to local communities, states, and nonprofit organizations for projects benefitting low-income persons medically diagnosed with HIV/AIDS and their families. HOPWA funds may be used for acquisition, rehabilitation, or new construction of housing units; costs for facility operations; rental assistance; and short-term payments to prevent homelessness. HOPWA funds also may be used for supportive services.

HUD continues to provide funding for the HOPWA program by a formula based upon the incidence of AIDS by jurisdiction and by competitive grants. States and qualifying cities are eligible for the formula-funded grants upon submission and HUD approval of a Consolidated Plan. Eligible grantees (jurisdictions that have an approved housing strategy) receive a grant each fiscal year. States, units of local government, and nonprofits are eligible for the competitive grants announced by Notice of Funding Availability (NOFA).

Tenant rent contributions for the HOPWA units are set similar to the Housing Choice Voucher Program, except for persons in short-term supportive housing.

A participant may only be terminated for good cause. Owners of HOPWA housing are urged to terminate assistance only in the most severe cases.

How to find HOPWA housing. HUD provides information about HOPWA grantees by state: <http://www.hud.gov/offices/cpd/aidshousing/local/index.cfm>. These grantees should be contacted to find the location of HOPWA housing.

Basic References:

42 U.S.C. §§ 12901–12912.

24 C.F.R. pt. 574 and § 574.310(e) (termination of assistance).

Current funding for the HOPWA program is by formula and competitive by Notice of Funding

Availability, *see*, for example, 72 Fed. Reg. 11,662 (Mar. 13, 2007). The NOFA may contain information about eligibility and screening.

HUD website with additional information: <http://www.hud.gov/offices/cpd/aidshousing/programs/index.cfm>.

1.19 Index of Federal Programs Available to Specific Populations

The following is a quick guide listing which federal programs described above are available for specific populations with special characteristics. In some cases, the program has wide eligibility that includes individuals with the specified characteristic; in others, the program or the development might be restricted to people with the specified characteristic.

1.19.1 Housing Programs Available to the Elderly

People who are elderly with qualifying incomes are eligible for all of the federal programs discussed above. In addition, there are programs, such as the HUD Section 202 program, which is generally restricted to the elderly. Finally, particular developments under some programs may have occupancy that is specifically restricted to elderly people or for elderly and people with disabilities (*e.g.*, Public Housing, HUD project-based Section 8, HUD Section 236, RD Section 515, Low-Income Housing Tax Credit, and possibly others).

1.19.2 Housing Programs Available to People with Disabilities

People with disabilities with qualifying incomes are eligible for all of the federal programs discussed above. In addition, the old HUD Section 202 program provides units serving this population, as well as does the Section 811, Supportive Housing for People with Disabilities program, the HOPWA program (for people with HIV/AIDS) and some of the other housing programs such as S+C, and SHP. Finally, particular developments under some programs may have occupancy that is specifically restricted to people with disabilities, or to this population and the elderly (*e.g.*, Public Housing, HUD project-based Section 8, HUD Section 236, RD Section 515, Low-Income Housing Tax Credit, and possibly others). Finally, some PHAs

have an allocation of vouchers specifically designated for people with disabilities.

1.19.3 Housing Programs for People with AIDS and Related Diseases

Persons with AIDS or related diseases are considered disabled and may be eligible for any of the units available for the disabled. If they meet the eligibility requirements, they may reside in any federally-funded low-income housing development.

The HOPWA program is restricted to people with AIDS and related diseases and their families.

1.19.4 Housing Programs for Families

Almost all of the federal programs reviewed above provide housing for families, subject to unit size and any income and other categorical eligibility restrictions (*i.e.*, restricted to elderly, disabled or individuals with AIDS or related diseases) for the program or the particular development. The one exception is Moderate Rehabilitation SRO housing, which is limited to single individuals.

1.19.5 Housing Programs for Homeless Families

For a discussion of programs targeted for homeless families, see Section 1.17 above. A homeless person may also be eligible for a preference to reside in most of the federally assisted developments Preferences are determined locally.

Appendix 1: Exhibit 1

U.S. Department of Housing and Urban Development

MASSACHUSETTS STATE OFFICE, NEW ENGLAND AREA
 Office of Community Planning and Development
 Thomas P. O'Neill, Jr. Federal Building
 10 Causeway Street - Fifth Floor
 Boston, Massachusetts 02222-1092

Fax (617) 565-5442

Visit our website at <http://www.hud.gov/local/bos/boscpd.html>

COPY

FEB 24 2000

Ms. Soni Gupta
 AIDS Housing Corporation
 29 Stanhope Street
 Boston, MA 02116

COPY

Dear Ms. Gupta:

Subject: McKinney Eligibility for Persons Leaving Prison

This will reply to the letter of December 4, 1999, from Marie Herb, then Executive Director of AIDS Housing Corporation, and also respond to the questions on the subject raised during our meeting of January 27, 2000.

You were seeking clarification as to whether prisoners or more specifically ex-offenders being released are considered homeless. The answer is yes if they meet the stipulations articulated below. In general, these rules apply to any institutionalized person being considered for assistance under McKinney funded programs.

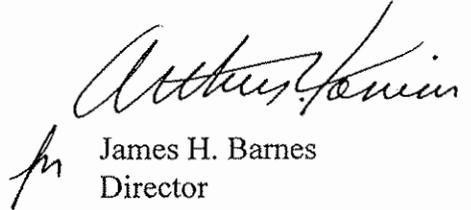
If persons are living in institutions and are at risk of homelessness because they are about to be released from the institution with no subsequent residence identified and no resources or support network necessary to obtain housing they are considered homeless. [This policy has been articulated by HUD in the Questions and Answers booklet that accompanied the SuperNOFAs the past two years]. The intake file prepared by the grantee/project sponsor should contain evidence regarding income, as well as documentation of attempts made by the individual and or institution to identify other housing and or support network such as family, friends, religious and social groups, and similar organizations. If this documentation is not available from the referring institution then it is incumbent upon the grantee that wishes to accept the person into their program to conduct and document that type of search themselves and incorporate the information into the person's intake file.

As discussed at our meeting, while we recognize some persons just released from institutions may be homeless, we are of course concerned if weaknesses in the support systems for these persons inappropriately impact on existing resources within a local continuum of care. The unique needs of this specialized homeless population should be

Appendix 1: Exhibit 1

considered as part of the continuum of care process of strategic planning, gaps analysis, and the identification of all resources available to meet homeless needs.

If you have any questions, please do not hesitate to contact Arthur Tonini at 565-5356, or myself at 565-5345.



James H. Barnes
Director
Community Planning and Development

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Appendix 1: Exhibit 1

**Determining Eligibility for Homeless Persons Leaving Jail/Prison
Due Diligence for McKinney Recipients**

To remain rigorously in compliance with the McKinney regulations pertaining to eligible homeless persons, an applicant to such housing programs from within a correctional facility will be considered homeless only if and when all of the following criteria can be demonstrated:

1. Proof that the inmate has been **incarcerated for over 30 days** and will be **released within the week** as evidenced by:
 - A dated release report or letter signed by an official jail/prison discharge planner, infectious disease nurse, or correctional official verifying inmate's length of stay in the correctional facility and release date

2. Proof that, ultimately, **all attempts to secure housing have failed** and that the inmate does not have a housing option or support network to provide housing and keep them from the streets after he/she leaves jail or prison as evidenced by:
 - Copies of signed, dated Discharge Plan from the correctional facility indicating that no housing has been secured for the inmate upon release,
 - A cover letter from discharge planner, correctional case manager, or reintegration manager summarizing the individual's housing search process and successive failures to secure post-release housing,
 - And one or more of the following supplementary documents:
 - a) Dated, signed letters from at least 3 housing resources indicating that the inmate will not receive housing assistance after leaving jail/prison due to ineligibility, no vacancy, placement on waiting list, or other reasons

or

 - b) Dated, signed letters from family members indicating that the inmate will not be accepted into the homes of family members upon release.



APPENDIX 2

General Eligibility Requirements for Federally Assisted Low-Income Housing

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2.1 Introduction

This Appendix provides a brief overview of the general requirements for admission to federally assisted housing, including eligibility, preferences, waiting lists and screening. In general, eligibility depends upon the applicant’s status, including the applicant family’s income, the type of housing (*i.e.*, who it is designed to serve) and the size of the unit as compared with the size of the applicant family. Other factors such as citizenship or immigration status and provision of a social security number are also important. Some PHAs and owners of federally assisted housing develop preferences to determine, of those eligible, who is admitted first. Most PHAs and owners have waiting lists. Most also screen applicants to determine suitability, which means that applicants are screened to determine if they are likely to be able to comply with the lease and other applicable landlord-tenant requirements. Screening for criminal history is discussed in Chapter 2. A housing provider’s admission and eligibility policies covering these issues should be set forth in writing.

2.2 Written Admission Policies

PHAs and owners of developments participating in the major federally assisted housing programs are required to have written admission policies.¹ These policies should include the provisions set forth in this Appendix, the provisions in Chapter 2 regarding eligibility of applicants with a criminal record, Chapter 3 regarding access to criminal records, and Chapter 5 regarding the process of appealing an adverse determination.

¹24 C.F.R. §§ 960.202(a) (public housing) 982.54(d) (voucher program), and 5.655(b)(2)(Section 8 project-based assistance programs) (2007); *Id.* §§ 108.1–108.50 and 200.600–200.640 (applicable to all subsidized and unsubsidized housing programs administered by HUD); 7 C.F.R. § 3560.102(b) (2007) (management plan must include admission policy); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK (June 2003) contains a chapter on the Tenant Selection and Assignment Plan, as well as a sample ACOP, *see* Ch. 8 and App. III (sample ACOP, including Tenant Selection and Assignment Plan); HUD, VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE, 7420.10G, Ch. 4; HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶ 4-4A. (5/03) (June 2007).

For public housing, the admission policies of any PHA are contained in the Admission and Continued Occupancy Plan (ACOP), which may also be known as the Admission and Occupancy Plan (A & O). For the voucher program, the admission policies are contained in the PHA's Administrative Plan.² For both public housing and the voucher program there are also some admission policies set forth in the PHA Annual Plan.³ For other HUD-assisted housing, owners have a tenant selection plan and may also have a separate Affirmative Fair Housing Marketing Plan.⁴ For RD multifamily developments the admission policies are contained in the management plan.⁵ Applicants should be able to review and obtain a copy of these plans.⁶ PHAs and owners may, but are not required to, provide to the applicant a free copy of the admission policies. However, applicants should at least be able to look at the plans in the PHA's or owner's office.

A PHA may have different admission policies for each individual public housing development, as the development may be owned or managed by a separate entity, such as is often the case with a development that received HOPE VI funding,⁷ or that is a mixed finance development.⁸ In addition, a PHA may have decided to have a separate site-based waiting list for some or all of its developments.⁹ In the event that there are site-based waiting lists for any of the public housing developments, the PHA central office

performs the criminal background check.¹⁰ Also, if the PHA administers other federally assisted housing programs, it may have different admission policies for those developments or programs. Also, the PHA may have distinct admission policies for public housing, the voucher program, and any project-based Section 8 development or Section 8 moderate rehabilitation development it manages or administers.

Owners of federally assisted developments may also have separate admission policies for each development. But the policies may be similar or identical if the developments are owned or managed by the same entity.

It is important for applicants, especially applicants with criminal records, to obtain a copy of or review admission policies so that they know the standards and can tailor their applications to address the criteria listed in the admission policies.

2.3 Eligibility

For most federally assisted housing, single individuals are eligible, as are families with children, and families with a head or spouse who is elderly or has a disability.¹¹ For all the federal housing programs, an elderly individual is defined as being 62 years of age or older.¹² A disabled family is one whose head or spouse has a disability.¹³ Some public housing agencies admit "near elderly" individuals to developments serving the elderly.¹⁴ A near elderly individual

²24 C.F.R. § 982.54(b) (2007).

³42 U.S.C.A. § 1437c-1 (West, WESTLAW through P.L. 110-48 approved 07-18-07); 24 C.F.R. Part 903. Annual plans for PHAs are posted on the HUD web site, <http://www.hud.gov/offices/pih/pha/> (Content updated November 7, 2007).

⁴24 C.F.R. § 5.655(b)(2) (2007) (Section 8 project-based assistance programs); *Id.* §§ 108.1-108.50 and 200.600-200.640 (2007) (applicable to all subsidized and unsubsidized housing programs administered by HUD); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, HANDBOOK 4350.3, REV-1, CHG-2, ¶ 4-4A. (5/03) (JUNE 2007).

⁵7 C.F.R. § 3560.102(b) (2007); RD, MFH ASSET MANAGEMENT HANDBOOK, 2-3560, § 3.3 (2007), available at <http://www.rurdev.usda.gov/regs/hblist.html>.

⁶24 C.F.R. § 960.202(c)(2)(public housing) (2007); *Id.* § 982.54(b) (Administrative Plan for voucher program must be available for review); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, HANDBOOK 4350.3, REV-1, CHG-2, ¶ 4-4D (JUNE 2007).

⁷42 U.S.C.A. § 1437v (West, WESTLAW through P.L. 110-48 approved 07-18-07).

⁸See 24 C.F.R. part 941 subpart F (2007) (discussing mixed finance public housing development).

⁹42 U.S.C.A. § 1437d(s); 24 C.F.R. § 9037(b)(2) (2007).

¹⁰24 C.F.R. § 5.903(g) (2007); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 8.3, p. 104 (June 2003).

¹¹See, e.g., 42 U.S.C.A. § 1437a(b)(3) (West, WESTLAW through P.L. 110-48 approved 07-18-07); see also HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, App. II, Definition of Terms, (June 2003); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, Glossary (June 2007).

¹²See, e.g., 42 U.S.C.A. § 1437a(b)(3)(D) and 12 U.S.C.A. § 1701q(k)(1) (West, WESTLAW through P.L. 110-48 approved 07-18-07); 24 C.F.R. § 5.403 (2007).

¹³A member of a family other than the head of household or spouse may have a disability. But that fact does not mean that the family is defined as a disabled family for purposes of eligibility for certain types of federally assisted housing, which may be specifically designated for elderly or disabled families. However, any person with a disability, head of household, or other member of the family may request a reasonable accommodation based upon disability. See, e.g., 24 C.F.R. part 8, subpart C and § 100.204 (2007).

¹⁴*Id.* § 945.105; HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 2.2 (June 2003) (definition of near elderly and eligibility for buildings designated for the elderly).

is 50 years of age or older.¹⁵ Owners of project-based Section 8 developments and other federally assisted developments must reserve a certain number of units in an elderly development for non-elderly disabled families and may provide a preference for near elderly disabled families.¹⁶ These owners and other federally assisted owners may also define elderly as 55 years of age or older.¹⁷

For the federally assisted programs, a person with a disability is one who receives Supplemental Security Income (SSI) or Supplemental Security Disability Insurance (SSDI).¹⁸ An individual who does not receive SSI or SSDI may also be considered disabled, but that person would have to provide proof of disability, such as a doctor's letter.¹⁹

2.3.1 Financial Criteria

For all of the federally assisted programs, applicants must be income eligible. The income standards for eligibility vary from program to program and are set forth in the program descriptions in Appendix 1. For example, to be eligible for public housing, family income cannot exceed 80 percent of area median income (AMI). To be eligible for the voucher program, most applicants must have income that does not exceed 50 percent of AMI. To be eligible for the income limited units of a Low-Income Housing Tax Credit (LIHTC) development, a tenant's income must be no higher than 50 or 60 percent of AMI depending on the income limits that the owner agreed to serve when applying for the tax credits.

¹⁵42 U.S.C.A. § 1437a(b)(3)(G) (West, WESTLAW through P.L. 110-48 approved 07-18-07); 24 C.F.R. § 5.403 (2007).

¹⁶See, e.g., 42 U.S.C.A. § 13641 Title VI, Subtitle D of Housing & Community Development Act of 1992 (West, WESTLAW through P.L. 110-48 approved 07-18-07) (certain HUD-subsidized multifamily properties can choose to serve elderly families only or reserve a portion of the units for elderly families); 24 C.F.R. §§ 880.612a, 881.601, 883.701, 884.223a, 886.329a (section 8) (2007).

¹⁷24 C.F.R. § 100.304 (2007) (the familial status provisions (*i.e.*, non discrimination against children) do not apply to housing intended and operated for persons 55 years of age or older).

¹⁸42 U.S.C.A. § 1437a(b)(3)(E) (West, WESTLAW through P.L. 110-48 approved 07-18-07); 24 C.F.R. § 5.403 (2007); see also HUD, Occupancy Requirements of Subsidized Multifamily Housing Programs, Handbook 4350.3, REV-1, CHG-2, Figure 3-6 D-I (June 2007).

¹⁹24 C.F.R. § 5.403 (2007); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 7.6 & App. VIII (June 2003); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, App. 3, Acceptable forms of verification (June 2007).

A low-income family is defined as a family whose income does not exceed 80 percent of AMI, a very low-income family is defined as a family whose income does not exceed 50 percent of AMI and an extremely low-income family is defined as a family whose income does not exceed 30 percent of AMI. The income levels for each of these categories vary by jurisdiction and family size, are annually adjusted by HUD, and are posted on the HUD web site.²⁰ For all of the federally-subsidized housing programs except the RD housing programs, the income level is based upon gross income, generally defined as pre-tax income from all sources, prior to any payroll deductions or deductions allowable under income tax laws or housing regulations.²¹ In the RD programs the income level is based on adjusted income.

There is no asset limitation, which means that the assets of an applicant will not disqualify the applicant. However, any income from the assets, including imputed income, will be included in the applicant's income to determine eligibility.²²

2.3.2 Size and Other Characteristics of the Unit

Most developments are either restricted to families with a head, spouse, or single individual who is elderly or disabled, or are available to the general population of eligible families including all families, single individuals of any age, and elderly or disabled families.

The size of the unit is also a relevant factor for determining applicant eligibility. For example, a single individual is eligible for a unit no larger than a one bedroom unit; the permissible unit size for a family with several members is generally determined on the basis of two persons per bedroom, but may vary under the PHA or owner's policy.²³

²⁰HUD User Data Sets, Income Limits, <http://www.huduser.org/datasets/il.html> (last visited July 23, 2007).

²¹24 C.F.R. § 5.609 (2007).

²²*Id.* § 5.609(a)(4) & (b)(3).

²³42 U.S.C.A. § 1437a(b)(3) (West, WESTLAW through P.L. 110-48 approved 07-18-07) (single person may not be provided with a unit with two or more bedrooms); HUD, Public Housing Occupancy Guidebook, App. III, ¶ G (June 2003) (model ACOP suggests two persons per bedroom); HUD, Occupancy Requirements of Subsidized Multifamily Housing Programs, Handbook 4350.3, REV-1, CHG-2, ¶ 3-23(E)(2) (June 2007) (two people per bedroom). There may be exceptions to the two persons per bedroom stan-

As noted in Appendix 1, some programs require that the applicant or member of the applicant family also have other characteristics to be eligible for the housing, such as living with AIDS/HIV or related diseases or being homeless at the time of application.

2.3.3 Immigration and Citizen Status

To be eligible for HUD-assisted housing, a family generally must have at least one member who is a citizen or who has eligible immigration status.²⁴ Eligible immigration status, as defined by the statute and regulations for public housing, Section 8 (including the voucher program) and other HUD-assisted programs does not include all individuals who are legally eligible to reside in the United States. Therefore, it is possible that some individuals with a criminal record may be denied admission based upon their immigration status, even though they are lawfully residing in the United States. Members of the family who do not have the required information status may reside in the unit if the family acknowledges such members.²⁵ If a family has such members, the rent for the unit will be prorated so that federal assistance is provided only for those family members who are citizens or who have eligible immigration status.²⁶

Rural housing has different immigration rules. Currently, Section 515 rural housing does not have any immigration restrictions, as the rules implementing such restrictions have been delayed indefinitely.²⁷

dard depending on the ages, sex, and relationship of the family members, or on medical reasons. Fair Housing Enforcement: Occupancy Standards Notice of Statement of Policy, 63 Fed. Reg. 70256-01 (Dec. 18, 1998) (states that “an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act,” but acknowledges that there is still some flexibility in this general rule). Multifamily housing operated by Rural Housing Services provides an exception for buildings where no one-bedroom units exist. 7 C.F.R. § 3560.155(e) (2007); See also, RD, MFH Asset Management HANDBOOK, 2-3560, § 6 (2007), available at <http://www.rurdev.usda.gov/regs/hblist.html>.

²⁴See generally 42 U.S.C.A. § 1436a (West, WESTLAW through P.L. 110-48 approved 07-18-07) (setting forth seven categories of individuals with eligible status); 24 C.F.R. part 5, subpart E (2007) (acceptable evidence of eligible immigration status is an original document from the Immigration and Naturalization Service (now the United States Citizenship and Immigration Service, which is part of the Department of Homeland Security) document stating the individual is within one of the seven categories), *id* § 5.510.

²⁵24 C.F.R. § 5.508(e) (2007).

²⁶*Id.* § 5.520.

²⁷70 Fed. Reg. 8503 (Feb. 22, 2005) (indefinitely delaying the implementation of regulations at 7 C.F.R §§ 3560.152(a)(1), 3560.154(a)(7), 3560.156 (c) (12), and 3560.254 (c) (3) until they can be aligned with HUD regulations).

However, if the Section 515 development is assisted under the HUD project-based Section 8 program, or the resident is a Section 8 voucher holder the HUD immigration regulations apply by virtue of the restrictions imposed on the Section 8 program. The Section 514 and 516 farm labor housing program is operating under rules that require the leaseholder(s) to be a U.S. citizen or to have Lawful Permanent Resident status. Other household members are not required to prove status unless the household is a Section 8 voucher holder.²⁸

2.3.4 Non-Discrimination and Equal Opportunity

PHAs and owners must comply with relevant civil rights laws and may not discriminate based upon race, color, religion, sex, national origin, disability or other factors.²⁹

2.4 Social Security Number (SSN)

PHAs and owners of HUD-assisted housing will ask for a social security number (SSN). If the applicant has a SSN, he or she must provide that number.³⁰ If the applicant was never given a SSN, the applicant does not have to produce a number, but will be asked to provide a written statement that no SSN has been issued to the applicant.³¹ For the rural housing programs, the RHS regulations require all household members to provide SSN.³² The agency, however, does not have statutory authority to collect or authorize the collection of SSN. Moreover, in its Forms Manual Insert³³ instructions for the Resident

²⁸42 U.S.C.A. §§ 1484(f)(3)(A), 1486(g) (West, Westlaw, through Pub. L. 106-569 approved 12-27-2000); 7 C.F.R. § 3560.11(2007).

²⁹See, e.g., 24 C.F.R. §§ 982.202(b)(3) (voucher program; other factors include unwed parents, recipients of public assistance, or children born out of wedlock), 960.103 (PHA must comply with equal opportunity requirements), 5.105(a) and 5.852(e) (owners of federally assisted housing), 1.4 (applicable to recipients of federal assistance), and 100.60 (fair housing act regulations) (2007); Parrott v. City of Union Point Hous. Auth. 2008 WL 2302685 (PHAs motion to dismiss denied as applicant with 34 year old conviction alleged sufficient facts that rejection was discriminatory because it was based on fact that he had been convicted of killing a Caucasian).

³⁰24 C.F.R. § 5.216 (2007).

³¹*Id.* §§ 5.216(a)(2), 982.551(b).

³²7 C.F.R. § 3560.153(a)(10) (2006).

³³The Forms Manual Insert (FMI) are form and instructions that RD publishes that set out instructions for completing various RD/RHS forms.

Certification Form the agency states that a SSN need not be entered if the tenant, co-tenant or any household member does not have a SSN. In the alternative, it asks for the household member's alien registration number.³⁴ For many of the other programs, such as LIHTC, HOME and Shelter Plus Care, there is no federal regulation that requires owners to request the SSN. Nevertheless, such owners may ask for this information. Most individuals who are leaving prison or who have served time will have a SSN, and the primary issue will be the validity of the number.

2.5 Preferences and Targeting

Nationwide, there is an inadequate supply of affordable housing for the lowest income renters.³⁵ Some PHAs and a few owners establish preferences to determine who should be first in line to get housing. Thus, an eligible individual may fail to reach the top of the list because others on the waiting list have a preference, even though they applied later.

Federal law requires that in the admission process PHAs or owners must accept a certain percentage of families at or below a specified income range. This obligation is called targeting.

2.5.1 Preferences³⁶

Typical preferences that PHAs or owners have adopted include a preference for residents of the community (residency preference), veterans, victims of domestic violence, homeless applicants and families with members who are working. Among eligible

single individuals, a PHA may give a preference to those who are elderly or disabled. For rural housing, all preferences will be further categorized to give preference to those families that are very low-income, followed by low-income, and last, moderate income.³⁷ If the PHA or owner uses preferences, they should be set forth in the written admission policies.

Not all low-income housing providers have a system of preferences. PHAs will establish preferences more often than other housing providers. Many owners of federally assisted housing no longer use preferences and admit families from the waiting list based upon date and time of application. Some programs are designed for families with one member who has HIV/AIDS and related diseases or for families who are homeless at the time of application for the housing. See Appendix 1 for a list of such housing. These preferences do not overcome or negate a prior criminal record, but such housing may have less restrictive admission policies.

Applicants should seek to qualify for all the applicable preferences at a particular development. It is important to determine how the preferences are applied. Some PHAs add the preferences together so that an applicant with more than one preference is selected over an applicant with only one preference. Other PHAs may rank preferences so that families with certain preferences, such as a homeless or a veteran preference, get priority over other applicants with other preferences.

There is no federal preference system for LIHTC properties.

2.5.2 Targeting

For public housing, the voucher program and project-based Section 8, selection processes must ensure that a certain percentage of all new admissions for the year are families who are extremely low-income (ELI). This obligation is referred to as targeting. For the voucher program, 75 percent of all new admissions must be families who are ELI; for public housing and the project-based Section 8 program, 40

³⁴FMI Form RD 3560-08, at 4, ¶ 7 (Apr. 26, 2006) (Tenant Certification) available at: <http://www.rurdev.usda.gov/regs/formstoc.html>.

³⁵See U.S. Department of Housing and Urban Development, A Report on Worst Case Housing Needs in 1999: New Opportunity Amid Continuing Challenges at 8-9 (Jan. 2001) available on-line at: www.huduser.org/publications/affhsg/wc99.pdf. For every 100 very low income renter households in 1999, there were only 70 units affordable and actually available to them. *Id.* The situation is even worse for extremely low income renter households, with only 40 units affordable and available for every 100 households in this income group. *Id.*; see also Kathryn P. Nelson, Office of Policy Development and Research, U.S. Department of Housing and Urban Development, TESTIMONY BEFORE THE HOUSE COMMITTEE ON FINANCIAL SERVICES, SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY (May 3, 2001), available on-line at: <http://financialservices.house.gov/archive/hearings.asp?formmode=detail&hearing=40.html>.

³⁶Preferences may be called by a different name locally. For example the term may be priorities or emergency status.

³⁷7 C.F.R. § 3650.154(g)(1) (2007); see also RD, MFH ASSET MANAGEMENT HANDBOOK, 2-3560, § 6 (2007), available at: <http://www.rurdev.usda.gov/regs/hblist.html>.

percent of all new admissions must be ELI families.³⁸ Most large urban PHAs can easily meet the targeting requirements. However, some smaller rural or suburban PHAs report having difficulty achieving the required percentages of extremely low-income families. In those jurisdictions, an applicant with a criminal record who is also ELI may have an advantage as the PHA is obligated to meet the targeting requirements and, therefore, may use more lenient admission standards.³⁹ However, information on whether a PHA or owner is meeting its targeting requirements may be hard to obtain. Information from PHAs may be obtained via a state freedom of information act or public records act request. There is no easy way to get the information from a private owner of federally assisted housing, but a Freedom of Information Act (FOIA) request could be made to get the information from HUD, assuming that they have the raw data from the tenant rent recertification forms that owners submit.

2.6 Waiting List

Most PHAs and federally assisted housing owners maintain a waiting list. At any given time, a waiting list may be open or closed. A PHA must announce when it is going to open the waiting list. A HUD-assisted owner must open the list in a manner that is consistent with its Affirmative Fair Housing Marketing Plan and civil rights laws, which may mean, for example, targeting certain populations and/or placing advertisements in certain newspapers or on specific radio stations.⁴⁰

The PHA or owner does not have to make the waiting list public, but may be required by federal rules to allow applicants to monitor where they are on the

list. Once on the list, an applicant may be asked to respond to requests from the PHA or owner of continuing interest in the housing. Failure to respond may result in being dropped from the waiting list. It is important for applicants to notify the PHA or owner in writing (saving a copy) of any change in address. If removed from the list, a disabled tenant may ask as a reasonable accommodation to be placed back on the list, provided the reason for the request is based upon the applicant's disability.⁴¹

2.7 Screening

When an applicant reaches the top of the waiting list, the PHA or owner may screen the applicant to determine if the applicant will be a suitable tenant.⁴² In other words, the PHA or owner is seeking to determine if the otherwise eligible applicant will abide by the lease and/or program regulations. Screening may also include a determination that the applicant will pay rent on time, keep the unit in good condition, and will not disturb other tenants or damage the unit or development. Other typical screening criteria include judgments about whether the applicant will engage in criminal activity, or has committed fraud or threatened staff in the application process.

The overarching principle for any tenant selection criteria and the information considered by a PHA or owner in determining eligibility or suitability ought to be that the policy is "objective and reasonable."⁴³ For example, the policies or practices should be related to tenant behavior which may affect the tenancy and not be established to exclude certain classes of applicants such as unwed mothers or welfare recipients or individuals protected by the fair housing laws.⁴⁴

³⁸42 U.S.C.A. §§ 1437n(a)(2) (public housing), 1437n(b)(2) (voucher program) and 1437n(c)(3) (project-based Section 8) (West, WESTLAW through P.L. 110-48 approved 07-18-07).

³⁹7 C.F.R. § 3560.152(d) (2007) (provides an "ineligible tenant waiver" if there are no eligible tenants on the waiting list and the borrower has documented marketing and outreach for eligible tenants to the unit); *see also* RD, MFH ASSET MANAGEMENT HANDBOOK, 2-3560, § 6 (2007), available at <http://www.rurdev.usda.gov/regs/hblist.html>.

⁴⁰24 C.F.R. § 5.655(b)(2) (2007) (Section 8 project-based assistance programs); *Id.* §§ 108.1–108.50 and 200.600–200.640 (2007) (applicable to all subsidized and unsubsidized housing programs administered by HUD); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶ 4-4A. (5/03) (2007).

⁴¹*See, e.g.*, 24 C.F.R. § 982.204(c)(2) (2007).

⁴²*See, e.g., id.* § 982.552(e) (PHA may screen voucher applicant for suitability, in accordance with PHA policy contained in the PHA Administrative Plan).

⁴³*Id.* § 960.202(a)(2)(iv).

⁴⁴*Id.* §§ 960.203(a), 982.202(b)(3); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, ¶ 4.1 (June 2003); HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Handbook 4350.3, REV-1, CHG-2, ¶ 4-8 (June 2007); *see also* Thomas v. Housing Auth., 282 F. Supp. 575 (E.D. Ark. 1967); Hann v. Housing Auth., 709 F. Supp. 605 (E.D. Pa. 1989); Neddo v. Housing Auth., 335 F. Supp. 1397 (E.D. Wis. 1971); Atkinson v. Kern County Hous. Auth., 130 Cal. Rptr. 375 (1976); *see also* Gilligan v. Jamco Development Corp., 108 F.3d 246 (9th Cir. 1997); *but see* McDougal v. Tamsberg, 308 F. Supp. 1212 (D.S.C. 1970).

The definition and implementation of suitability standards may vary depending upon the program, the interest of the PHA or owner and local conditions. For example, a program that serves homeless individuals may have different screening criteria than a development that is designated for the elderly. Developments with high vacancies may have less restrictive application standards.⁴⁵ Applicants with criminal records, or advocates who assist such individuals, should verify the screening criteria used to determine where applicants might be more readily accepted. For a discussion of strategies for improving such policies, *see* Chapter 6.

Some PHAs or owners may perform an initial screening and reject applicants prior to placing them on the waiting list. Generally such early screening, if it occurs, is based upon the information that applicants provide. Depending upon the PHA or owner's practice, applicants must take steps to explain their criminal history prior to applying or while on the waiting list. Chapters 2, 3 and 5 provide some guidance on what to do to improve or explain a poor criminal record.

Screening is conducted to review credit history, tenancy history and criminal background. The discussion in Chapter 2 focuses on the criminal background screening. Screening for credit history and tenancy history are also important for applicants with criminal backgrounds, but are not discussed in this Guide. Nevertheless, steps should be taken to explain any deficiencies in these areas to increase the chances for admission.

Significantly, LIHTC owners as well as owners of HOME developments are not permitted to discriminate against voucher holders because of their status as voucher holders.⁴⁶

2.7.1 Domestic Violence

Recent amendments to the Violence Against Women Act (VAWA) of 2005 added protections for

federal housing applicants for tenants who are victims of domestic violence.⁴⁷ Congress enacted the housing provisions of VAWA in response to the interrelationship between domestic violence and homelessness, the overbroad implementation of the "one-strike" drug-related criminal activity policies and housing discrimination against victims of domestic violence.⁴⁸ The law clarifies that an individual's status as a victim of domestic violence, dating violence, or stalking is not an appropriate basis for denial of admission or denial of housing assistance.⁴⁹ The VAWA amendments are applicable to public housing, project-based Section 8 and tenant-based Section 8 only.⁵⁰ These VAWA amendments may provide a basis for survivors of domestic violence to argue that they cannot be denied federally assisted housing due to drug or violent criminal convictions if such convictions arose because they were victims of domestic abuse. Such a claim may be very difficult to make. But with a sympathetic set of facts and if the applicant has the support of the community and social service providers, it may succeed. Documentation in the form of court, police or medical records may also be helpful. There are no reported cases on the issue.

⁴⁵HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, 4350.3, REV-1, CHG-2, ¶ 4-7D1 (June 2007) (encouraging owners with short waiting lists to use less restrictive policies).

⁴⁶26 U.S.C.A. § 42(h)(6)(B)(vii) (West, WESTLAW through P.L. 110-48 approved 07-18-07); 42 U.S.C.A. 12745(a)(1)(D) (West, WESTLAW through P.L. 110-48 approved 07-18-07). Selected other developments also may not discriminate against voucher holders.

⁴⁷Pub. L. No. 109-162, 119 Stat. 2960 (2006).

⁴⁸42 U.S.C.A. § 14043e (West, WESTLAW through P.L. 110-48 approved 07-18-07) (findings).

⁴⁹42 U.S.C.A. §§ 1437d(c)(3), 1437f(c)(9)(A), 1437f(d)(1)(A), 1437f(o)(B) (West, WESTLAW through P.L. 109-279 (excluding P.L. 109-248, 109-270, 109-271) approved 08-17-06). VAWA also seeks to prevent evictions and termination of housing subsidies of victims based upon domestic violence.

⁵⁰*Id.*



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