



June 10, 2024

Department of Housing and Urban Development
Regulations Division, Office of General Counsel
451 7th Street, SW (Room 10276)
Washington, DC 20410-0500

Re: Docket No. FR-6362-P-01, Reducing Barriers to HUD-Assisted Housing

PolicyLink applauds the Department of Housing and Urban Development (HUD) for taking the necessary steps towards addressing the fair housing issues that tenants across the country are facing when trying to access federally supported housing opportunities. PolicyLink also appreciates the opportunity to comment on the proposed rule to advance opportunities for the more than 100 million individuals, families, and children who experience financial insecurity to have guaranteed access to safe and affordable housing.¹

America's neighborhoods are constantly changing; however, the persistence of deep and entrenched patterns of discrimination in housing continue. To advance equity, PolicyLink advocates for groundbreaking policy changes that enable everyone to be economically secure, live in healthy communities of opportunity, and benefit from a just society. PolicyLink is guided by the belief that the solutions to the nation's challenges lie with those closest to these challenges: when the wisdom, voice, and experience of those traditionally absent from policymaking drive the process, profound policy transformations emerge.

PolicyLink commends HUD's actions to align rental practices in HUD-assisted properties with the whole-of-government call to action set forth by the Biden-Harris administration to advance equity for all, and particularly communities that have experienced persistent discrimination. As addressed in Executive Orders 13985 and 14091, federal agencies have been charged with the responsibility of identifying, addressing, and correcting existing policies and practices that have historically impeded equal opportunity. These orders are further affirmed by the equal rights clause of the 14th Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964, which establish the affirmative duty of the federal government to not only prohibit but actively prevent discrimination on the basis of race, color, or national origin.

Our comment begins by briefly reviewing research on criminal record and the subsequent impacts that engagement with the carceral system has on tenancy and housing opportunities. Following this, we present HUD with recommendations for enhancing the proposed rule and address the specific questions posed by HUD.

¹ PolicyLink. "100 Million and Counting: A Portrait of Economic Insecurity in America." 2019 <https://www.policylink.org/resources-tools/100-million>

Background and Research Review

Previous involvement with the justice system has the potential to bar people from accessing employment, safe and affordable housing, supportive benefits, and other stabilizing measures.² Both public and private housing providers employ policies that attempt to justify housing denials to someone with a criminal record, even though these records often contain significant inaccuracies, are outdated, and full of vague information.³ These practices are not serving their purpose as criminal histories and have been found to be ineffective at predicting successful tenancy.⁴ For example, previous criminal histories (such as drug, prostitution, or other minor offenses) were found to have minimal negative effects on housing outcomes.⁵ Additionally, for individuals with previous minor and felony convictions, over time there are less negative effects on housing outcomes.⁶ Further, and more importantly, for unhoused individuals with criminal histories, studies have found that their ability to access housing – especially supportive housing – does not result in negative housing outcomes and can even help minimize re-offenses.⁷ Ultimately the use of criminal history for housing determinations such as admissions, eviction, and program termination creates deeper hardships for individuals re-entering their communities by compounding existing cost of living pressures and worsening instances of homelessness.

Engagement with the legal system during tenancy is also frequently utilized to justify evictions or lease termination decisions and has reverberating effects for an entire household, even if someone had no direct involvement with law enforcement or the carceral system. For example, some residents may be preemptively displaced from their household for being arrested for fear of the entire household being evicted. This may also happen if a household has a brief visitor with a record or warrant that was unbeknownst to residents. Evictions from HUD-assisted units are also frequently made without regard to the ways in which recipients of HUD-assisted programs – who are disproportionately Black – are regularly over-policed and racially-profiled on site by law enforcement officials.⁸

² Chin, Gabriel Jackson, “Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction” *Journal of Gender, Race & Justice*, Vol. 6. p. 253, 2002, April 14, 2011. Available at SSRN:

<https://ssrn.com/abstract=390109> or <http://dx.doi.org/10.2139/ssrn.390109>; Amanda Geller, Marah A. Curtis, “A Sort of Homecoming: Incarceration and the housing security of urban men” *Social Science Research* 40(4):1196-1213, July 2011 <https://doi.org/10.1016/j.ssresearch.2011.03.008>; see also NAACP, “Criminal Justice Fact Sheet”

³ U.S. Department of Justice, “The Attorney General’s Report on Criminal History Background Checks,” Office of the Attorney General, 2006

https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ag_bgchecks_report.pdf

⁴ Cael Warren, “Success in Housing: How Much Does Criminal Background Matter?” Wilder Research, January 2019

https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf;

Daniel K. Malone, “Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults With Behavioral Health Disorders,” *Journal of Psychiatric Services*, January 2015

<https://doi.org/10.1176/ps.2009.60.2.224>

⁵ Warren, “Success in Housing: How Much Does Criminal Background Matter?”

⁶ Warren, “Success in Housing: How Much Does Criminal Background Matter?”

⁷ Malone, “Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults With Behavioral Health Disorders”

⁸ Fredrick J. Eggers, “Characteristics of HUD-Assisted Renters and Their Units in 2019” U.S Department of Housing and Urban Development, Office of Policy Development and Research, June 2021

<https://www.huduser.gov/portal/sites/default/files/pdf/2019-Characteristics-Report.pdf>; Sarah Miller, “The Criminalization of Public Housing Residents,” *Georgetown Journal on Poverty Law and Policy*, March 29, 2020 <https://www.law.georgetown.edu/poverty-journal/blog/the-criminalization-of-public-housing-residents/>

The legal landscape across the United States also affects housing access for people with recorded criminal histories. Different states and municipalities have varying laws and regulations regarding the classification and severity of offenses, making it difficult to assess the true significance of a particular arrest or conviction in relation to housing suitability. This inconsistency raises concerns about fairness and transparency, and increases the risk of subjective judgment and potential biases influencing the decision-making process. Federal agencies like the Department of Justice have released guidance and statements on how databases like the FBI Interstate Identification Index system lack important details, such as the outcome of the case or the disposition for over half of the records, which are needed to provide nuance to someone's past engagement with the system.⁹

Moreover, relying solely on criminal history records disregards the potential for rehabilitation and the ability of individuals to reintegrate into society. It perpetuates a system that further stigmatizes and marginalizes individuals who have already paid their dues to society, hindering their chances of securing stable housing and ultimately contributing to higher rates of recidivism.¹⁰ The disproportionate impact of criminal records on tenancy decisions for marginalized communities, particularly people of color, only exacerbates existing inequalities and perpetuates systemic discrimination in the housing market. It is crucial to recognize the flaws in the continued scrutiny of criminal records in housing decisions, in order to implement alternative methods and policies that prioritize fairness, equity, and a comprehensive understanding of an individual. This is especially important to do with the housing that is financially supported by the federal government to ensure the effectiveness of public dollars to serve individuals and families in need of safe, stable, affordable housing, regardless of their background.

Despite the negative impacts of these screening practices and the proven ineffectiveness of using criminal history, HUD-assisted housing providers continue to rely heavily on criminal history records to influence both housing application and ongoing tenancy decisions.¹¹ By maintaining the status quo, communities across the country will continue to suffer with the negative social and economic effects that befall families trying to live with severed personal, professional, neighborhood networks. However, by moving to more just screening, eviction, and program termination standards, HUD-assisted providers will start to break down long-standing barriers that have excluded too many from their housing futures. As recent guidance from HUD has shown, there are very clear policy pathways available towards a more just housing system.

⁹ U.S. Department of Justice, "The Attorney General's Report on Criminal History Background Checks"

¹⁰ Leah Jacobs & Aeon Gottlieb, "The Effect of Housing Circumstances on Recidivism: Evidence From a Sample of People on Probation in San Francisco" *Criminal Justice and Behavior* 47(9), June 2020

DOI:10.1177/0093854820942285; Jocelyn Fontaine, Douglas Gilchrist-Scott, John Roman, Samuel Taxy, Caterina Roman, "Supportive Housing for Returning Prisoners: Outcomes and Impacts of the Returning Home-Ohio Pilot Project," Urban Institute Justice Policy Center, August 2012

<https://www.urban.org/sites/default/files/publication/25716/412632-Supportive-Housing-for-Returning-Prisoners-Outcomes-and-Impacts-of-the-Returning-Home-Ohio-Pilot-Project.PDF>

¹¹ Jung Hyun Choi, Laurie Goodman, and Daniel Pang, "The Real Rental Housing Crisis is on the Horizon," Urban Institute, March 2022 <https://www.urban.org/urban-wire/real-rental-housing-crisis-horizon>

Recommendations and Areas of Improvement

Definitions and Interpretation of Evidence Requirements

1. **Revise the proposed definitions for criminal history and criminal records, and provide a definition for “criminal activity.”**

The proposed definitions for “criminal history” and “criminal records” are overly broad and risk perpetuating existing housing access challenges that the proposed rule aims to address.

Specifically, the proposed definition for “criminal records” includes a wide range of information that extends beyond final judgments of guilt or innocence, thereby conflicting with the justice system’s assurance of due process. This broad definition also fails to recognize the rehabilitative intent of elements such as probation and parole.

For individuals who have had their criminal record expunged or sealed, including proxies such as parole or supervised release terms undermines the purpose of sealing a record, thereby restricting their future outcomes. Additionally, the proposed definition allows for the inclusion of unreliable, frequently inaccurate, or biased evidence in screening practices. As highlighted in HUD’s 2016 Criminal Records Guidance, “Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions,” arrest records are often incomplete and should not be relied upon.¹²

PolicyLink recommends the following revisions to the definition:

- **Eliminate the use of “criminal history” as it creates more confusion and is inconsistent with relevant statutes.** This ensures that the term “criminal history” does not become conflated with “criminal record” or “criminal activity” and ensures that administrators are making decisions aligned with existing federal laws.
- **Provide a clear and precise definition for “criminal activity” to avoid conflating it with “criminal record” or “criminal history.”** This includes establishing a standard for distinguishing between reliable and unreliable evidence of criminal activity.
- **Exclude non-conviction information from the definition of criminal records.** Details of warrants, dismissals, deferrals of prosecution, acquittals, mistrials, probation, parole, and supervised release terms and violations should be excluded, as these do not reflect final judgments and often indicate rehabilitation.
- **Ensure that any records of fines or fees related to infractions of state or local law are not considered criminal records.** Such financial penalties should not be utilized in evaluating housing applicants as they do not pertain to criminal convictions.
- **Definitions should ensure that expunged or sealed records are not considered in housing evaluations, thus supporting the intent of these legal processes to remove barriers to housing and other opportunities.** When individuals' records are sealed, they

¹² U.S. Department of Housing and Urban Development, “Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions” April 4, 2016 https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPEHASTANDCR.PDF

are intended to be given a clean slate.¹³ However, the inclusion of related proxies in definitions can still unfairly restrict their access to housing and other opportunities.

- **Use only reliable, accurate, and unbiased information in housing screening practices, excluding incomplete arrest records.** Incomplete arrest records should be explicitly excluded to prevent reliance on potentially erroneous or misleading information.
- **Align the definition of criminal records with due process principles.** Focus on final judgments of convictions and sentences, and recognize probation and other rehabilitative measures as indicators of rehabilitation rather than criminality.

2. **Eliminate or restrict the evaluation of underlying conduct for an arrest record.**

The proposed rule offers flexibility for assisted housing providers to make housing decisions on admission, exclusion, eviction, and termination based on the underlying conduct of an arrest record. However, arrests can occur without charges being filed or convictions being obtained, thus making it an unreliable indicator of an individual's culpability. This has been echoed by the Supreme Court in *Schwabe v. Board of Bar Examiners*, where they recognize that an arrest alone provides little corroborating evidence to infer “any misconduct” took place.¹⁴ Moreover, arrest records do not provide a complete or accurate picture of an individual's engagement with the criminal justice system. These records often lack context, such as the circumstances of the arrest, whether charges were dropped, or if the individual was acquitted. This incomplete information can lead to unjust housing decisions based on misleading or partial data.

Permitting the evaluation of underlying conduct perpetuates existing systemic inequities. Black, Brown, and Indigenous communities, as well as poor communities, are disproportionately targeted and over-policed. This results in higher arrest rates that do not necessarily correlate with higher rates of criminal behavior. In fact, research has shown that Black Americans are arrested at significantly higher rates than white Americans, even when crime rates decrease.¹⁵ Using arrest records to make housing decisions exacerbates the long-term impacts of these disparities, effectively punishing individuals for systemic biases. Maintaining the flexibility for housing providers to evaluate underlying conduct of an arrest record upholds current barriers to housing for individuals with criminal records. These barriers contribute to cycles of poverty and instability. Housing stability is crucial for successful reintegration into society, and denying housing based on arrests undermines this process, perpetuating homelessness and recidivism.

Allowing housing providers to assess underlying conduct introduces a high degree of discretion and subjectivity into housing decisions. This discretion can lead to inconsistent and discriminatory practices. Further, this addition undermines HUD's goal to eliminate arrest record screening by allowing a pathway for administrators to bring forward their own judgements on

¹³ National Consumer Law Center, “Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing,” December 2019

<https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf>

¹⁴ *Schwabe v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957)

¹⁵ Beth Redbird, Kat Albrecht, “Racial Disparity in Arrests Increased as Crime Rates Declined,” NorthWestern Institute for Policy Research, June 18, 2020

<https://www.ipr.northwestern.edu/documents/working-papers/2020/wp-20-28.pdf>

what led to someone’s arrest record. It will be difficult for administrators to ignore information gathered regarding an arrest record and it will be even harder to not succumb to confirmation bias and accept whatever underlying conduct as grounds for denial, eviction, or termination. Clear, objective standards are necessary to ensure fairness and equity in housing policies.

Previous policies that allowed for the consideration of arrest records have failed to reduce crime or improve community safety. Instead, they have often led to increased homelessness and instability among marginalized populations. Instances where individuals with arrest records but no convictions were denied housing highlight the harmful impacts of such policies. For example, a report by the Shriver Center on Poverty Law documented numerous cases where families faced eviction or were denied housing due to arrests that did not result in convictions.¹⁶

PolicyLink strongly recommends that HUD completely remove the ability for program administrators to further investigate arrests, or the underlying conduct that led to that arrest, that did not result in a conviction from the proposed rule. This approach aligns with principles of justice and equity, ensuring that housing policies do not reinforce systemic discrimination or perpetuate cycles of poverty and instability. HUD’s commitment to fair housing practices must reflect an understanding of the broader social and racial injustices that impact communities of color and marginalized groups.

3. Provide a definition for “threatens the health, safety, and right to peaceful enjoyment.”

The proposed rule offers housing providers a flexible catch-all rationale to evaluate an applicant’s or tenant’s criminal activity or records. However, this standard is too broad and risks vastly inconsistent policies from various housing providers. PolicyLink recommends that HUD define “threatens” to include the actuality, immediacy, and substantiality of a threat. This would ensure that housing providers do not judge activity or records based on stereotypes, assumptions, or speculation that do not pose an actual, immediate, or substantial threat.

Moreover, the “right to peaceful enjoyment” needs to be further defined to protect people living with disabilities and others who may be subject to more frequent nuisance complaints. Frequently, nuisance complaints by neighbors or administrators about mental health episodes, abusive events, or law enforcement calls can be misconstrued as affecting the ability for residents to enjoy the premises.¹⁷ For example, consider a tenant who has a mental health episode that results in a neighbor calling the police. Under a broad interpretation, this incident could be deemed a threat to peaceful enjoyment, potentially leading to eviction. However, with a more precise definition that considers the actual, immediate, and substantial nature of the threat, this tenant’s right to housing would be better protected. A clearer definition would protect such individuals from unjust eviction and ensure their access to safe housing.

¹⁶Marie Claire Tran-Leung, “When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing,” Sargent Shriver National Center on Poverty Law, February 2015
<https://www.povertylaw.org/wp-content/uploads/2019/09/WDMD-final.pdf>

¹⁷Ignacio Jaureguilorda, Faith Laurel, Ruth Lopez and Merrill Rotter, “Eviction Prevention and Mental Health: A New Paradigm for Civil Justice Reform” Center for Court Innovation, November 2021
https://www.innovatingjustice.org/sites/default/files/media/document/2022/Guide_CCI_EvictionPrevention_MentalHealth_01242022.pdf

- 4. Expand the existing definition of “individualized assessment” to be applicable to an applicants’ eviction and credit history.** PolicyLink supports the proposed rule’s addition for HUD program administrators to conduct individual assessments and evaluate mitigating circumstances when making housing decisions. This definition should be expanded to allow for screening standards to apply to other areas that pose fair housing concerns. Expanding the definition so that program administrators can assess applicants beyond the negative information on their records, including credit and eviction history, will allow for a much more well-rounded individualized assessment practice. Additionally, an individualized assessment that takes into consideration these additional areas would support a more wide-sweeping reduction of barriers to HUD-assisted housing.

Improve Accessibility to New Rules, Rights, and Expectations

Improving clarity of rights, expectations, procedures and complaint processes to tenants and housing applicants.

Several measures within the proposed rule offer improved transparency in the process of housing admissions, lease terminations, and evictions for HUD-assisted housing provider administrators. However, the process additions and changes under the proposed rule may be difficult for current and prospective tenants to access, use, or understand.

PolicyLink recommends that regulations or guidance explicitly require housing providers to deliver clear, plain language notices and information to current and future tenants on their rights under the proposed rule and existing regulations, exceeding the notice requirements already in place. This should include, but not be limited to:

- **Publicly Displayed Screening Criteria:** Ensuring that screening criteria are prominently displayed and easily accessible to all prospective tenants. This includes clearly outlining criminal records screening factors, so prospective tenants are fully aware of what will be considered in their application process.
- **Written Notice of Right to Present Mitigating Circumstances:** Mandating that HUD program administrators provide a written notice to current residents and housing applicants of their right to present mitigating circumstances, including how to submit that evidence and the obligations that housing providers have to review these circumstances when making housing decisions. This written notice should be provided to applicants when they initially apply into a program and to current residents before they receive a termination or eviction notice so they have enough time to gather information and evidence before a decision is made on their tenancy or application.
- **Evidence Preparation Guidance:** Clear guidance on what types of evidence tenants or applicants might need to prepare or expect to provide throughout the process. This could include documentation of rehabilitation efforts, references, or other supporting materials.
- **Verbal Review with Prospective Tenants:** Mandating that housing providers verbally review the screening criteria, lease termination, and eviction rules regarding criminal records with all prospective tenants during the application process. This step is crucial to ensure understanding and transparency.

- **Evidence Preparation Guidance:** Clear guidance on what types of evidence tenants or applicants might need to prepare or expect to provide throughout the process. This could include documentation of rehabilitation efforts, references, or other supporting materials.
- **Regular Circulation of Information:** Implementing a requirement for housing providers to regularly circulate information about screening criteria, lease termination, eviction rules, and administrator obligations in these processes to all tenants. This could be through periodic newsletters, tenant meetings, or digital communication platforms, ensuring that all tenants are kept informed of their rights and any updates to the rules.
- **Tailored Communication Strategies:** Encouraging housing providers to employ diverse communication strategies tailored to the needs of different tenant populations, including those with limited English proficiency, disabilities, or other barriers to understanding. This could involve providing translated materials, using large print, or offering one-on-one explanations as needed.

Responses to HUD’s Questions for Comment

Question 1: “Currently engaging in or engaged in.”

PolicyLink recommends that HUD establish a rule that clarifies what constitutes “current” criminal activity for the purposes of determining termination or eviction. A timeframe of twelve months is too long to be considered “current” given that ongoing illegal drug use results in a mandatory denial of admission. A shorter timeframe would be more appropriate and reflective of the intent to address present behavior rather than past actions that may no longer be relevant.

PolicyLink suggests that HUD consider establishing a timeframe of less than twelve months, such as three to six months, to determine whether criminal activity is “current.” This adjustment would help ensure that decisions related to termination or eviction are based on more recent and relevant conduct, thereby promoting fairness and accuracy in housing determinations. Additionally, it would help avoid penalizing individuals for past behavior that may no longer reflect their present circumstances, supporting their efforts toward rehabilitation and stability.

Question 2: Lookback period for criminal activity.

PolicyLink supports the proposed rule’s establishment of a three year lookback period as a reasonable time frame, emphasizing that a longer lookback period should be regarded as presumptively unreasonable. PolicyLink also strongly encourages HUD to make clear in the proposed rule or subsequent guidance and regulations that this lookback period is not intended to be a blanket ban for any conduct within 3 years, but that it is an upper limit for a lookback period. Without this clarification, there is a significant concern that this lookback period could be misapplied in ways that deviate from the proposed rule’s intentions. Specifically, if housing providers and administrators interpret the three-year period as a mandatory minimum, rather than a maximum limit, it could lead to adverse outcomes for applicants. Clarifying that this is an upper limit may also incentivize housing providers to consider shorter lookback periods where appropriate to enhance their fair housing compliance.

Blanket denials used by both public and private housing providers because of someone’s criminal history creates compounded economic challenges. Individuals with a record may experience challenges finding the stable and gainful employment needed to cover rent, utilities, groceries, healthcare, and transportation

expenses. Further, research by Lauren Russel highlights how the mere expansion of access to criminal history record information by way of technological advancements in state repositories fostered a discouragement effect for Black men seeking work.¹⁸ The same “chilling” effects can be observed in the housing market for those with criminal records, undercutting someone’s hopes of finding and maintaining decent, affordable housing opportunities.

PolicyLink also recommends that HUD prohibit any extension of the lookback period under any circumstances, including for different types of criminal activity. Allowing extensions could introduce discretionary decision-making and inequities in the application of the rule, ultimately undermining the purpose of having a defined lookback period. PolicyLink also recommends that HUD clarify the event that triggers the lookback period to ensure that HUD program administrators are clear on how to follow this lookback period consistently. A consistent three-year limit helps ensure a fair and equitable approach across all HUD-assisted housing providers, reducing the risk of arbitrary or biased decisions that could disproportionately affect vulnerable populations.

Question 3: Opportunity to dispute criminal records relied upon by PHAs/Owners.

PolicyLink applauds HUD for establishing a standard to appeal HUD-assisted property application decisions in a timely manner. This requirement addresses the tangible impacts that housing search and application delays have on the finances and stability of an individual or family in search of affordable housing. However, PolicyLink encourages HUD to clarify the steps that should be taken within 15 days on behalf of the housing provider and applicant, especially regarding the timeline for a housing provider’s initial determination, and then for a re-evaluation of a determination after receiving mitigating information. Additionally, providing applicants with clear and detailed information about the dispute process, including what constitutes relevant mitigating information and how it can be presented effectively, is essential.

These clarifications would encourage timely correspondence between housing providers and applicants, while giving applicants enough time to gather mitigating information, as well as a clear expectation of what the re-evaluation process would look like. Overall, ensuring that housing applicants understand the appeal process and receive enough time to gather information is key. Delays can cause applicants to use their limited time and financial resources to appeal a decision that may still force them into substandard housing or even become unhoused.

Housing providers should also be required to provide written determinations of their decisions along with copies of the evidence that led them to make the decision. In addition, this written determination should include how information gathered and evaluated led administrators to determine that an applicant did not meet their screening criteria. This same written determination should very clearly outline the next steps that an applicant should take and how to pursue an appeal within the recommended time frame.

To further enhance fairness and due process, PolicyLink recommends considering extending the minimum period from 15 days to 30 days for all housing determinations. This extension would allow applicants

¹⁸ Lauren Russel, “‘The New Jim Crow:’ Employer Access to Criminal Record Information and Racial Differences in Labor Market Outcomes,” *Working Paper*, December 2022
https://scholar.harvard.edu/files/lauren russell/files/jmp_12.21.2022.pdf

more time to secure legal assistance or gather complex evidence, especially in cases involving extensive criminal records. Additionally, regular training for staff on fair housing practices and the nuances of evaluating criminal records should be implemented to prevent discriminatory practices and ensure consistent application of the rules. Establishing a mechanism for periodic review and feedback on the effectiveness and fairness of the dispute process would help housing providers continuously improve their procedures and address emerging issues.

Question 4: Mitigating Factors.

PolicyLink is overall, reassured by the consistency that HUD employs in the rule for administrators to take a more individualized approach to screening housing applicants. Relatedly, the expectations for HUD-assisted housing provider administrators to conduct a review of the evidence before making a housing admission or lease termination decision underscores this commitment to individually assessing applicants.

The rule currently lacks sufficient information on what might be considered mitigating evidence or mitigating factors. The regulation outlined in § 5.852(a)(1) and (2) provides discretion to entities responsible for housing programs in screening and eviction actions. This discretion is important, allowing these entities to consider various factors and circumstances relevant to each case. However, while this regulation grants flexibility, it does not explicitly frame these considerations as mitigating circumstances. PolicyLink recommends that HUD add language to the proposed rule explicitly stating factors to be considered as mitigating circumstances. For example, the proposed rule or subregulatory guidance could include a statement such as, "In exercising discretion, housing authorities should consider these factors as mitigating circumstances that may reduce the severity of actions taken against applicants or tenants." Further, the definition of Individualized assessment could be expanded to include:

"The purpose of the "individualized assessment" is to determine the risk that an applicant will engage in conduct that would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees. *The individualized assessment must include consideration of the specific details of the applicant's criminal record, including the nature, severity, and recency of the conduct, as well as any mitigating factors such as evidence of rehabilitation, personal responsibility, and efforts to rectify past behavior.*"

This expanded definition prompts administrators to make the connection between the rehabilitative or reparative efforts and the record that may signal non-repetition, change in circumstances, change in behavior, or change in activity. Administrators will be able to clearly identify what mitigating information is so they are not issuing denials, terminations, or evictions based on subjective perceptions of rehabilitation or mediation. A more expansive list of examples of mitigating evidence would be helpful to issue in addition to this rule or through subregulatory guidance to prevent confusion or misinterpretation of evidence. The current examples that are provided do not fully encapsulate the breadth of experiences that people may have, especially for people living with disabilities or medical conditions, those who have experienced homelessness, or have engaged with the child welfare system.

Additionally, it is critical that HUD make the distinction that evaluators of evidence for housing decisions are merely evaluating based on their pre-established criteria, not re-litigating or further criminalizing an

applicant or tenant for the conduct that led to their engagement in the carceral system. By instituting this clear delineation, HUD will be ensuring that the entire application and eviction process is fair and just to the tenant and that they have the potential to grow beyond their past and not face continued stigma.

Further, HUD should alter the definition outlining the evaluation of rehabilitation services to include people currently in rehabilitation programs, adjust the language from “drug rehabilitation” to “substance abuse treatment services,” and remove language that requires PHAs to approve a program. Adjusting this definition not only brings language regarding substance abuse up to date with current medical terminology, but it also provides avenues for people who are facing a medical ailment like addiction the flexibility to have a forgiving recovery process. Additionally, for people in recovery, the process is frequently marred with recurring instances of relapse and sobriety, suggesting that recovery is not linear, and therefore, expectations from program administrators on sobriety should be mindful and inclusive of this process. Further, it is important to note that treatment services for substance abuse vary across the country in their effectiveness, or even accessibility for many low-income communities, as many reports and research shows how rehabilitation is an increasingly exploitative industry.¹⁹ Therefore, for many lower-income applicants, predicating housing access and stability on rehabilitation involvement will inadvertently cause more barriers to rehabilitation or substance use recovery.

Question 5: Justifying Denial of Admissions.

PolicyLink recommends that the proposed rule have clear documentation requirements for housing providers to follow when making admission or termination decisions. This should include the written decision, copies of evidence, confirmation that the evidence directly violated stated admissions criteria, and administrator signatures. The documentation should provide a clear rationale for why they believe an applicant’s conduct would threaten the health, safety, or right to peaceful enjoyment of the premises by staff, and residents. This way, housing providers, applicants, and HUD can all have an understanding of what evidence and information was evaluated, how it informed the decision-making process, and what threats administrators see as important to mitigate on the premises.

HUD should also conduct periodic reviews of assisted housing providers to ensure that their decision-making process, preponderance of the evidence, and screening procedures are in accordance with the proposed rule and the 2024 HUD Guidance on tenant screening. Instituting such reviews will allow HUD to have a track record of what housing providers screen on and how they exercise their discretion and preponderance of the evidence. Further, periodic reviews will support HUD’s understanding of what similar standards PHAs and other housing providers are instituting that have helped them execute this rule to their fullest ability. HUD will also be able to understand what conduct or records administrators feel are especially threatening to the ability for residents, staff, and others to have a healthy, safe, and peaceful enjoyment of the premises. Afterwards, HUD can use these learnings to issue continued guidance on this rule.

¹⁹ Scott Fallon, “NJ finds ‘widespread fraud and corruption’ in addiction treatment industry,” NJ.com, February 6, 2024

<https://www.northjersey.com/story/news/health/2024/02/06/widespread-fraud-in-addiction-treatment-industry-nj-reports/72486248007/>; Brian Mann, “As Addiction Deaths Surge, Profit-Driven Rehab Industry Faces ‘Severe Ethical Crisis’” National Public Radio, February 15, 2024
<https://www.npr.org/2021/02/15/963700736/as-addiction-deaths-surge-profit-driven-rehab-industry-faces-severe-ethical-crisis>

Question 7: Evidence relating to Exclusions.

The proposed rule mandates that housing providers apply a "preponderance of the evidence" standard when deciding whether to exclude a household member based on their participation in, or culpability for, an action or failure to act that warrants denial or termination of housing. This standard aims to ensure a consistent approach in evaluating evidence, which is crucial for decisions affecting tenants' or prospective tenants' housing opportunities. PolicyLink supports the consistent standard, which emphasizes the importance of providing comprehensive information to minimize inconsistencies and discretionary decisions. To achieve these goals, we recommend providing a strengthened definition for preponderance of the evidence that puts it within the context of evaluating criminal history and records for clarity of application, including the following adjustments:

- **Contextual Application:** Clarify that the "preponderance of the evidence" standard should be explicitly applied when assessing criminal history and records for housing decisions related to admissions, evictions, and lease terminations. This ensures that housing providers understand the necessity of evaluating all evidence in this specific context, considering the potential impact on housing stability and fairness.
- **Evidence Types:** Clarify what evidence can be used that meet standards for proving the occurrence of criminal activity. Additionally, excluding all evidence types such as police reports, witness statements, dismissed charges, and others that did not result in a conviction that are notably unreliable, inaccurate, and frequently biased.²⁰
- **Reliability and Relevance:** Emphasize that the evidence considered must not only be weighed for its reliability but also its relevance to the housing decision. This helps prevent the misuse of irrelevant or prejudicial information that could unfairly disadvantage tenants or prospective tenants.
- **Transparency and Documentation:** Require housing providers to document the evidence considered and the rationale for their decisions. This transparency promotes accountability and allows for a clearer understanding of how the "preponderance of the evidence" standard is being applied in practice.

The proposed rule does not provide clarity on how to gather and evaluate evidence under the "preponderance of the evidence" standard, leaving significant room for interpretation. This gap raises questions about the sufficiency, reliability, and accuracy of the information, the reliance on self-disclosure, and the level of scrutiny required for evidence evaluation without re-litigating an applicant's background. To address these issues, we recommend that HUD establish clear guidelines in the proposed rule or subregulatory guidance:

- **Evidence Accuracy:** Set standards for verifying the accuracy of evidence used in housing decisions. This can be done by retrieving information from various sources, including multiple record repositories and conducting a cross-validation of gathered information.
- **Self-Disclosure of Mitigating Evidence:** Provide rules for the consideration of self-disclosed mitigating evidence, ensuring that applicants have the opportunity to present context or additional information to an event or record in question.
- **Depth of Evidence Evaluation:** Define the prescribed depth of evidence evaluation to ensure thorough but fair assessment without excessive re-litigation of applicants' backgrounds.

²⁰ Additional evidence types that should not be used as proof of criminal activity include expunged and sealed records and juvenile records.

One effective approach could be instituting a panel of reviewers, including program administrators, residents, and community members, to evaluate admission, lease termination, or eviction decisions. This panel would provide a balanced perspective and enhance the fairness and consistency of housing decisions.

Question 9: Owner responses to tenant comments on tenant selection plans.

Owners should be required to respond to comments received from tenants on proposed changes to the tenant selection plan prior to finalizing those changes. This requirement would promote accountability and demonstrate a commitment to tenant engagement and feedback. A reasonable timeframe for owners to respond would be within 30 days of the comment period's conclusion. This period provides owners sufficient time to review, consider, and address tenant concerns while ensuring that the amendment process progresses efficiently. To enhance transparency and trust, HUD should also require owners to publish a summary of tenant comments and their responses. This practice would ensure that tenants see their input acknowledged and understand the rationale behind the final decisions.

Question 10: Screening Requirements for HCV and PBV Owners.

PolicyLink strongly encourages HUD to expand the proposed rule requirements to the Housing Choice Voucher (HCV) program. The current exclusion undermines the effective use of federal funds to address the housing crisis and hinders federal housing programs' capacity to support reparative efforts targeting race-based mass incarceration policies. Moreover, inconsistent rule coverage among programs creates challenges for tenants in navigating, understanding, and enforcing their rights across various federally supported housing programs and providers. This is particularly problematic for relocated or temporarily displaced public housing residents with housing vouchers managed by third-party, private property managers who would not adhere to the same rules as the original PHA. Maintaining the currently proposed exclusion also undermines many of the advancements that HUD has accomplished regarding criminal record policies by permitting differential treatment of private HCV landlords. Ultimately, this inconsistency will impede the proposed rule from fully achieving its goals of increasing housing access for individuals with prior involvement in the carceral system. Additionally, concerns about HCV landlords are not applicable to the Project Based Voucher (PBV) setting as subsidies are directly tied to a unit and do not require buy-in from a private landlord to accept the subsidy. Currently, there are contradictory statements in the preamble and the regulatory text regarding PBVs and the proposed rule. PolicyLink strongly recommends HUD to correct the final text to mitigate any future confusion on the applicability of this proposed rule to PBVs.

Conclusion

Addressing equity issues related to tenant screening practices, including those related to screening on criminal records, is vital for creating a more inclusive and equitable housing system. PolicyLink urges HUD to consider the recommendations outlined above and take decisive action to promote fair housing practices and ensure that all individuals have equal access to safe and affordable housing.

PolicyLink would like to commend HUD for taking decisive action on this critical issue, particularly as the demand for reliable access to affordable, adequate housing continues to grow across the nation. HUD-assisted buildings and units play a pivotal role in meeting this need. Public housing authorities, and

other HUD-assisted programs have consistently been at the forefront of innovation in the housing market, setting new standards and expectations for housing providers and their interactions with tenants. This proposed rule has significant potential to create lasting change and establish stronger standards for housing providers.

Thank you for your attention to this critical matter. We reiterate our strong support of HUD to make the necessary regulatory changes and guidance needed to oversee fair and just tenant criminal records policies. Please contact me at rasheedah@policylink.org if you would like to speak with PolicyLink in more detail about our comment.

Sincerely,

A handwritten signature in cursive script that reads "Rasheedah Phillips".

Rasheedah Phillips, Director of Housing
PolicyLink