

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

June 10, 2024

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

RE: Docket No. FR-6362-P-01; Reducing Barriers to HUD-Assisted Housing

Justice in Aging appreciates the opportunity to provide comments on HUD’s notice of proposed rulemaking (NPRM) on criminal records and reducing barriers to HUD-assisted housing. Justice in Aging is a national legal advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable housing, health care, economic security, and the courts for older adults with limited resources. We focus on the needs of low-income populations who have traditionally lacked legal protections, such as women, people of color, LGBTQI+ individuals, and people with limited English proficiency.

We strongly support this proposed rule and HUD’s efforts to reduce housing barriers for people with criminal records. Older adults are increasingly arrested and incarcerated due to the aging of populations that often face criminalization (such as people experiencing homelessness) and the aging of people in prison. Today, older adults comprise five times as much of the prison population as they did in 1991,¹ and the proportion of older adults in prison is projected to increase to more than 30% by 2030.² Many of these older adults are also people with disabilities and people of color, both of whom are overrepresented in the criminal legal system – about 66% of the state and federal prison population are disabled (compared to 27% of adults in the U.S.³), and 42% are people of color with disabilities.⁴ Older people in prison are more likely to report being disabled, with over 50% of those ages 55-64 and around 70% of those 65 and older having a disability.⁵ When these older adults re-enter the community, they face steep barriers to securing accessible, affordable housing, in large part due to their criminal records.⁶

¹ Prison Policy Initiative, “The Aging Prison Population: Causes, Costs, and Consequences” (August 2023), available at <https://www.prisonpolicy.org/blog/2023/08/02/aging/>.

² U.S. Department of Health and Human Services, “Aging, Reentry, and Health Coverage: Barriers to Medicare and Medicaid for Older Reentrants” (March 2018), available at https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/185306/Reentry.pdf.

³ Centers for Disease Control and Prevention, Disability Impacts All of Us (May 2023), available at <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>.

⁴ Lauren Bixby et al., “The Links Between Disability, Incarceration, and Social Exclusion” (Oct. 2022), available at <https://www.healthaffairs.org/doi/10.1377/hlthaff.2022.00495>.

⁵ Bureau of Justice Statistics, “Survey of Prison Inmates, 2016: Disabilities Reported by Prisoners” (March 2021), available at <https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf>.

⁶ See Justice in Aging, “Reducing Barriers to Reentry for Older Adults Leaving Incarceration” (May 2022), available at <https://justiceinaging.org/wp-content/uploads/2022/05/Reducing-Barriers-to-Reentry-for-Older-Adults-Leaving-Incarceration.pdf>.

Washington, DC



Los Angeles, CA



Oakland, CA

We offer the following comments in response to the questions posed in the NPRM, and we provide recommendations for improving this rule for older adults and people with disabilities.

Questions for Comment

Question #3: For Notification Prior to Denial of Admission, HUD Should Require at Least 30 Days' Written Notice with Information on Reasonable Accommodations

HUD should require Public Housing Authorities (PHAs) and owners to provide written notice before denying admission based on a criminal record, and this notice should give applicants at least 30 days to dispute the accuracy of the record and provide mitigating information.⁷ A notice of 15 days is insufficient time for applicants to navigate paperwork and gather documentation they may not have immediate access to. This time period is especially inadequate for older adults and people with disabilities, who often have more difficulties with administrative barriers and may need help from caregivers and other third parties to respond to notices. Providing information about criminal history can also be particularly confusing because many people, including those with intellectual or cognitive disabilities, do not always understand the details and dispositions of their criminal cases. Further, applicants usually spend years, sometimes even more than a decade, on waiting lists for the chance to receive housing assistance. After such lengthy waiting periods, applicants should have more than 15 days to provide evidence challenging a potential denial based on criminal history. And if they actually are denied admission, applicants should still be able to offer evidence during the appeals process as well.

It is also vital for HUD to require notice that is in writing and includes information on how to request reasonable accommodations (RAs), especially since this rule specifies that PHAs and owners must consider whether they may need to provide RAs for disability-related records and conduct.⁸ Many older adults with disabilities are unaware of their legal rights under the Fair Housing Act (FHA) and Section 504 and may not know they can request an RA. Additionally, many housing providers fail to provide RAs, and requiring information about RAs in notices will help keep PHAs and owners accountable for complying with their legal obligations. HUD's Office of Inspector General has already pointed out that HUD lacks adequate policies and procedures for ensuring that PHAs properly address RA requests, observing that "[d]ue to HUD's inconsistent oversight...some PHAs may not be properly implementing existing requirements and may not understand all their responsibilities related to requests for reasonable accommodation."⁹

Question #4: HUD Should Require Consideration of Older Age as a Mitigating Factor

We urge HUD to add older age as a mitigating factor for PHAs and owners to consider before denying or terminating assistance based on a criminal record.¹⁰ As HUD itself notes in the preamble,

⁷A notice period of 30 days also aligns with other proposed notice periods, such as HUD's proposal to implement a 30-day notice period prior to evictions for non-payment of rent.

⁸ We recommend the notice also include information about how households can request that PHAs and owners consider mitigating circumstances related to a household member's medical condition.

⁹ HUD Office of Inspector General, "HUD Did Not Have Adequate Policies and Procedures for Ensuring That Public Housing Agencies Properly Processed Requests for Reasonable Accommodation" (February 2022), available at <https://www.hudoig.gov/reports-publications/report/hud-did-not-have-adequate-policies-and-procedures-ensuring-public>.

¹⁰ We encourage HUD to define "older age" broadly to include individuals in their 50s.

crime commission drops sharply as a person ages, and older people are substantially less likely to recidivate and typically age out of criminal activity altogether. The older an individual is, the less likely they will be re-arrested after release from prison.¹¹ Research shows that arrest rates drop to about 2 percent in people ages 50-65 and almost zero percent for people older than 65.¹² The Equal Employment Opportunity Commission (EEOC) has also recognized older adults' low likelihood of engaging in criminal conduct – the EEOC's guidance on use of criminal records in employment decisions already incorporates older age as a mitigating factor. This guidance states that relevant individualized evidence includes “older age at the time of conviction, or release from prison.”¹³ HUD should similarly add older age as a mitigating circumstance in its revisions to 24 CFR § 5.852 and parallel regulations.

HUD should also highlight the importance of age in subregulatory guidance. HUD's current fair housing guidance on criminal records states that “relevant individualized evidence might include...the age of the individual at the time of the conduct.”¹⁴ Yet this guidance is unclear as to whether HUD means older or younger age, although a common interpretation is that housing providers should grant more leniency for crimes committed during someone's youth. While that may be true, as discussed above, older age at the time of conduct has a substantial impact on recidivism. Therefore, future guidance should clarify the significance of age – particularly older age – as a mitigating factor.

Finally, we note that including older age as a mitigating factor will increase housing opportunities for older adults and advance the goals of the federal government's strategic plans on homelessness and aging. Among other priorities, these plans aim to prevent housing instability and homelessness for the country's rapidly growing population of older adults.¹⁵ Older adults are the fastest growing age group among people experiencing homelessness, and formerly incarcerated older adults face especially high risks of homelessness, even more so than their younger counterparts.¹⁶ The recent California Statewide Study of People Experiencing Homelessness found that a significant number (33%)

¹¹ Prison Policy Initiative, *supra* note 1.

¹² Vera Institute of Justice, “Aging Out: Using Compassionate Release to Address the Growth of Aging and Infirm Prison Populations” (December 2017), available at <https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations%E2%80%94Full-Report.pdf>.

¹³ U.S. Equal Employment Opportunity Commission, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act (April 2012), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.

¹⁴ HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 2016), available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF; HUD, Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (June 2022), available at <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf>.

¹⁵ United States Interagency Council on Homelessness, “All In: The Federal Strategic Plan to Prevent and End Homelessness” (December 2022), available at https://usich.gov/sites/default/files/document/All_In.pdf; The Interagency Coordinating Committee on Healthy Aging and Age-Friendly Communities, “Aging in the United States: A Strategic Framework for a National Plan on Aging” (May 2024), available at <https://acl.gov/sites/default/files/ICC-Aging/StrategicFramework-NationalPlanOnAging-2024.pdf>.

¹⁶ Justice in Aging, *supra* note 6.

of older adults in the study cited their criminal records as a barrier to securing permanent housing.¹⁷ HUD should help reduce these barriers for older adults through this new rule.

Question #5: HUD Should Define Criminal Activity That Threatens Health, Safety, or Right to Peaceful Enjoyment

HUD should specify what constitutes criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or staff. HUD should define the term to minimize the risk of housing providers using it as a catch-all category and labeling disability-related conduct as such criminal activity. People with disabilities are overrepresented in the criminal legal system due to the criminalization of behaviors connected to disability. For example, older adults with dementia often have behavioral symptoms that may sometimes be deemed criminal, such as a tendency to wander that may result in trespassing.¹⁸ People with disabilities also experience criminalization due to crime-free or nuisance ordinances that punish tenants for relatively innocuous conduct and frequent calls for emergency services. As HUD's Office of General Counsel has observed, a common problem with such ordinances is that they are overly broad and have vague definitions of criminal activity: "The criminal activity that constitutes a lease violation is frequently broadly and ambiguously defined and may include any violation of federal, state or local laws, however minor. Thus, disorderly conduct, excessive noise and similar activity may constitute a crime resulting in eviction."¹⁹ HUD invites the same problem here in its own proposed rule.

HUD should instead include a definition that only permits exclusions based on criminal activity that poses an actual, substantial risk of harm to other residents or staff and cannot be reduced through RAs or other measures. The definition should exclude conduct that is relatively minor, such as conduct that is merely perceived as inconvenient or annoying. It should also emphasize that PHAs and owners should not accept generalized assumption or speculation as evidence of disqualifying activity. Otherwise, housing providers will have too much latitude to mischaracterize certain disability-related behaviors as "threatening" criminal activity.

The FHA's "direct threat" exemption provides a potential framework for defining threats to health, safety, or peaceful enjoyment. Under the FHA, landlords must provide reasonable accommodations to people with disabilities unless their tenancy would constitute a direct threat to the health and safety of other individuals or result in substantial physical damage to others' property.²⁰ Joint HUD-DOJ guidance stresses that landlords may not exclude individuals "based upon fear, speculation or stereotype about a particular disability or persons with disabilities in general." Rather, their

¹⁷ Benioff Homelessness and Housing Initiative, "Toward Dignity: Understanding Older Adult Homelessness" (May 2024), available at <https://homelessness.ucsf.edu/sites/default/files/2024-05/Older%20Adult%20Homelessness%2005.2024.2.pdf>.

¹⁸ Rashmi Goel, "Grandma Got Arrested: Police, Excessive Force, and People with Dementia" (2023), available at <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=3400&context=lawreview>.

¹⁹ HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (2016), available at <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

²⁰ 42 U.S.C. § 3604(f)(9).

“determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (e.g., current conduct, or a recent history of overt acts).”²¹

HUD should adopt a definition for threats to health, safety, and peaceful enjoyment that aligns with the definition (as defined in case law and guidance) for a direct threat under the FHA. The purpose of the FHA’s direct threat exemption is consistent with the purpose of exclusions for criminal activity that threatens health, safety, or right to peaceful enjoyment. Further, housing providers who must consider RAs under this proposed rule will have to engage in a direct threat analysis regardless; it would be simpler if the direct threat framework were incorporated into the rule itself.

Question #11: HUD Should Clarify that Under the Fair Housing Act, People with Alcohol Use Disorder May Have the Right to Reasonable Accommodations

While we do not object to continued use of the term “alcohol abuse” to maintain consistency with relevant statutes, case law, and subregulatory guidance, we urge HUD to clarify that people with alcohol use disorder may have the right to RAs. People with alcohol use disorder engaged in current alcohol use qualify as persons with disabilities under the FHA. This issue is often confusing because, in contrast to the FHA, these individuals are not considered people with disabilities under HUD’s Section 504 regulations (although, as mentioned in our prior comments, we support HUD revising this discrepancy in its forthcoming NPRM on Section 504.)²² Another reason for confusion is because people with substance use disorder engaging in current illegal drug use are excluded from qualifying as people with disabilities under the FHA and Section 504.²³ Many conflate the law around current illegal drug use with that for current alcohol use. We also note that people with substance use disorder may have addiction to both drugs and alcohol;²⁴ someone with substance use disorder who is in recovery for illegal drug use but continues using alcohol would still qualify as a person with a disability under the FHA.

Because the law around civil right protections for alcohol/substance use disorder is confusing, HUD should more clearly distinguish alcohol abuse from alcohol use arising from an alcohol/substance use disorder. HUD should ensure that in the latter situation, housing providers know that people with alcohol/substance use disorder may be entitled to an RA that allows them to gain admission or avoid eviction and termination despite what may otherwise be considered disqualifying alcohol abuse.

²¹ HUD and U.S. Department of Justice, Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act (May 2004), available at <https://www.justice.gov/crt/us-department-housing-and-urban-development>.

²² Justice in Aging, Comments on HUD’s Section 504 Advance Notice of Proposed Rulemaking (July 2023), available at <https://justiceinaging.org/wp-content/uploads/2023/07/JIA-HUD-Section-504-ANPRM-Comments-FINAL.pdf>.

²³ 42 U.S.C. § 3602(h); 24 C.F.R. § 8.3.

²⁴ American Psychiatric Association, “Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5),” (2013), available at [https://repository.poltekkes-kaltim.ac.id/657/1/Diagnostic%20and%20statistical%20manual%20of%20mental%20disorders%20_%20DSM-5%20\(%20PDFDrive.com%20\).pdf](https://repository.poltekkes-kaltim.ac.id/657/1/Diagnostic%20and%20statistical%20manual%20of%20mental%20disorders%20_%20DSM-5%20(%20PDFDrive.com%20).pdf).

Additional Issues

HUD Should Ensure Criminal History Screenings for Live-In Aides Are Not More Stringent Than Screenings for Tenants

Although the proposed rule does not explicitly address criminal history screenings for live-in aides, many PHAs and owners conduct criminal background checks for live-in aides as they would for household members.²⁵ Housing providers sometimes refuse to approve live-in aides who have criminal records, resulting in barriers to securing in-home care for older and disabled people who need these services to live in the community. These denials can be especially problematic given the severe national shortage of direct care workers, which already makes it difficult for older adults and people with disabilities to find caregivers.²⁶ And while tenants can request that a housing provider permit the live-in aide as an RA, not all tenants know to make this request. Even when they do, some requests are wrongfully denied.

HUD should ensure that criminal history screenings for live-in aides are not more stringent than those for applicants under this proposed rule. We urge HUD to specify in future guidance that PHAs and owners should conduct individualized assessments not only for applicants, but also for live-in aides before denying an aide based on criminal records. This guidance should also discuss the importance of RAs as a mitigating factor in this context. Additional clarification is necessary because the importance of live-in aides will only grow as the population ages and more people need in-home supports to maintain housing stability.

HUD Should Clarify How Housing Providers Should Consider Mitigating Circumstances Related to Household Members' Medical Conditions

We support the proposed rule's requirement for housing providers to consider mitigating circumstances related to a household member's medical condition, and we recommend more clarification and guidance on this issue. The lack of stable housing can worsen health conditions for older and disabled adults and heighten their risks of institutionalization. HUD should explain how considerations about medical conditions may be broader than considerations for reasonable accommodations. The term "medical condition" should encompass not just disabilities, but also other health conditions. And unlike situations involving reasonable accommodations, HUD should allow housing providers to consider household members' medical issues even when there is no nexus between the health condition and the criminal history or activity at issue. For example, an applicant with a previous conviction may have subsequently developed a disability that makes it highly unlikely they could engage in similar conduct in the future. Or a situation may arise where one member of a household participates in criminal activity but lives with a chronically ill senior whose health would deteriorate if the family were to lose housing. Although these households likely would not be able to request RAs for disability-related criminal conduct, we believe the new rule should allow them to request that landlords consider household members' medical issues as a mitigating factor.

²⁵ PHAs have discretion to deny approval for a live-in aide for reasons, including criminal activity, listed under 24 C.F.R. § 982.316.

²⁶ See generally, Administration for Community Living, Direct Care Workforce Strategies Center, available at <https://acl.gov/DCWcenter>.

Moreover, we recommend that HUD prohibit housing providers from requiring onerous documentation to verify household members' health conditions. Applicants and tenants should be able to exercise their option for PHAs and owners to consider medical issues without providing access to medical records and divulging extensive details.

HUD Should Require PHAs and Owners to Affirmatively Consider Reasonable Accommodations as a Mitigating Factor

We appreciate that the proposed rule explicitly states that housing providers may need to consider mitigating factors related to RAs. However, we renew our request for HUD to make clear that PHAs and owners covered by Section 504 may need to affirmatively provide an RA in certain situations, including in the context of criminal history or activity. In past comments, we urged HUD to clarify in its Section 504 regulations that recipients who have notice about a person's disability and needs may be required to provide an RA even in the absence of an express request. Courts have determined that Section 504 does not place a burden on individuals with disabilities to actively request RAs in all situations where they need accommodations. When recipients have knowledge about an individual's disability and need for an accommodation, or when the disability and need for accommodation are obvious, recipients may need to proactively provide an RA. See, e.g., *Greer v. Richardson Indep. Sch. Dist.*, 472 F. App'x 287, 296 (5th Cir. 2012)(holding that a disabled person's failure to expressly "request" an accommodation is not fatal to a Section 504 claim where the defendant had knowledge of the individual's disability and needs but took no action); see also *McCoy v. Texas Dep't of Crim. Just.*, No. C.A.C 05 370, 2006 WL 2331055, at *8 (S.D. Tex. Aug. 9, 2006)(finding that a disabled person was not required to request an accommodation to invoke Section 504 because defendants had notice of the disability and the need for an accommodation was obvious).

Further, we urge HUD to mandate – even in cases without prior notice about a disability – that PHAs and owners take reasonable steps to determine whether someone may need an RA for disability-related criminal activity. The proposed rule states that housing providers may need to consider granting RAs for people with disabilities, but without more, it is merely reminding housing providers of their existing obligation to follow civil rights laws. HUD should create a more affirmative responsibility for landlords to inquire into whether households would like to request RAs related to potentially disqualifying criminal conduct.

HUD Should Prohibit Housing Providers from Evicting/Terminating Due to Failure to Disclose a Criminal Record Unless the Record Is Material

We support HUD's proposal to generally bar housing providers from denying admission for failure to disclose a criminal record unless the record would have been material. HUD should extend this limitation to evictions and terminations as well. When tenants fail to disclose criminal records on recertification applications, they may be at risk for eviction/termination. For example, we are aware of a case in which a PHA tried to terminate a family's voucher due to the mother – who had intellectual disabilities – not disclosing her son's arrest when recertifying. Although the arrest was not material and the omission a mistake due to the mother's disability, the PHA pursued termination. The PHA also denied the mother's RA request to withdraw the termination notice and only agreed to allow the family to keep the voucher after the mother, with help from an attorney, filed a fair housing complaint. To prevent similar cases, HUD should prohibit PHAs and owners from evicting and terminating assistance based on failure to disclose immaterial records.

The disclosure of criminal records also raises the issue of what types of questions PHAs and owners ask about criminal history. One major problem with many subsidized housing applications (both initial and recertification applications) is the inclusion of overbroad questions about criminal records. For example, some PHA applications ask about any criminal activity an individual may have been involved in regardless of the circumstances and when it occurred, including arrests that did not result in convictions. These overbroad questions increase the risk that people will accidentally provide erroneous or incomplete information. Applicants may not remember every potentially relevant criminal incident or case that may have occurred years ago for every household member. And as noted earlier, many do not always understand the details and dispositions of criminal cases. People are also sometimes unsure about how to answer questions when their records have been expunged or sealed. When people unknowingly make mistakes in answering questions about criminal history, they can be accused by PHAs and owners of intentional misrepresentation. PHAs and owners will then deny admission or terminate assistance based on the alleged misrepresentation even if it is not material to substantive eligibility. While the proposed rule will help prevent denials (and hopefully terminations) when the records at issue are not material, HUD should also provide future guidance limiting the types of questions housing providers can ask about criminal history.

We urge HUD to create model application questions about criminal history that only ask for the minimum information necessary for PHAs and owners to make eligibility decisions under this rule. Moreover, PHAs and owners should consider removing certain questions about criminal history altogether if they plan to conduct and rely on criminal background checks to verify information.

Conclusion

Thank you for your consideration of Justice in Aging's comments. We strongly support this proposed rule and appreciate HUD's commitment to reducing housing barriers for people with arrest and conviction histories. If you have any questions about this submission, please contact Jennifer Kye, Senior Attorney, at jkye@justiceinaging.org.

Sincerely,



Tracey Gronniger
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