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HOUSING FOR ALL:

HELPING CLIENTS WITH CRIMINAL RECORDS AND
SUBSTANCE USE DISORDER ACCESS HOUSING

Presented by:

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A bit of history

- Rise in the use of criminal record & SUD screening by HUD:
 - 1975: Federal regs instruct PHAs to consider criminal history of applicants. PHAs adopt broad screening policies rejecting applicants with records.
 - 1988: Anti Drug Abuse Act called for strictly denying or terminating people based on drug-related criminal activity.
 - 1996: “One Strike, You’re Out,” 3 year ban after eviction for drug-related offenses, encouraged “stringent screening.”
- Fair Housing Act (1968): Protects against disability discrimination, but specifically excludes active SUD.

And a few findings

- U.S. DOJ: 1 in 3 adults has either an arrest or conviction record.
- NIMH: 20% of U.S. population is affected by SUD.
 - Of those with SUD, 60% have a mental health condition.
- People with stable housing are more likely to successfully reintegrate into society and less likely to reoffend.
 - There is no sociological research establishing a relationship between a criminal record and an unsuccessful tenancy.
- Stable housing helps people recover from SUD, and housing instability and homelessness leads to increased misuse of substances.
 - Housing First seen as the best model.
 - Some studies find there is likely no “one-size-fits-all” housing solution for people with SUD.

Things are starting to change

- HUD guidance/notices:
 - 2011, Donovan letter to PHAs: Encouraged PHA use of discretion to allow for offender reentry.
 - Notice PIH 2015-19: Backs away from one-strike, can't deny/terminate based on arrest records.
 - 2016, HUD General Counsel guidance: Overly restrictive bans on people with criminal histories may violate fair housing law.
- Permanent supportive housing: HEARTH Act (2009).
- Support Act (2020): Pilot initiative to target housing to people with SUD.
- PHA re-entry pilot programs: Burlington; Baltimore; Oakland; Philadelphia; LA; NYCHA, etc.
- Local ordinances preventing discrimination against people with criminal records: Seattle, WA; San Francisco, CA; Newark, NJ; D.C. etc.



Eligibility for federally subsidized housing and housing subsidies

- General guidance! Some programs do not have these limits: LIHTC, Shelter Plus Care, PSH, HOPWA.
- Bases for denial we'll be discussing today:
 - Convicted for production of meth in federally assisted housing
 - Lifetime registered sex offenders
 - Evicted from federally assisted housing for drug-related criminal activity within the last 3 years (but see exceptions)
 - Other criminal activity:
 - Drug-related criminal activity,
 - Violent criminal activity,
 - Other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, employees, or agents of the owner.

Lifetime Registered Sex Offender

- Bar for lifetime registered sex offenders. Can be on any state registry, not just Vermont.
- Challenging a denial:
 - Is the person actually a **lifetime** registrant?
 - If not a lifetime registrant:
 - PHA should analyze the time, nature, and circumstances of the offense.
 - E.g.: How many years ago did the crime happen?
 - Applicant can try to show mitigating circumstances and/or rehabilitation.
 - Examples: Crime occurred a long time ago, consensual relationship with partners a few years younger, no subsequent problems, indecent exposure related to substance use disorder now in remission, etc.

Previously Evicted for Drug-Related Activity

- Mandatory ban for 3 years for eviction from federally assisted housing for drug-related criminal activity.
- Challenging a denial:
 - Statutory exceptions:
 - Successful completion of an approved, supervised rehab program.
 - Circumstances have changed: E.g., HH member who committed the crime died, HH member who committed the crime is in prison, person who committed the crime is terminally ill and too sick to use, etc.
 - Was the eviction from federally-assisted housing? If not, it can't be used for the 3 year mandatory ban regulation.
 - VAWA: Drug-related criminal activity linked to DV.

Other Criminal Activity: Only some crimes count!

- PHAs/owners may reject applicants for **some** types of other criminal activity that occurred within a **reasonable** period of time.
- Challenging a denial:
 - Arrest alone is not enough: PIH 2015-19.
 - Conviction was not for a covered crime: Must be drug-related, violent, or would threaten health/safety/peace for residents or staff.
 - Examples of what should NOT count: A simple assault in a bar fight, petit larceny from a store, trespassing while experiencing homelessness, etc.

Other Criminal Activity

Scenario 1

Jack has been experiencing homelessness for about 6 years. Prior to being in the GA emergency housing program, he picked up the following convictions: (1) trespassing for violating a no trespass order for the only pharmacy in his town; (2) burglary for breaking into a restaurant after-hours and sleeping there after helping himself to food; and (3) 4 petit larceny convictions for stealing supplies for camping, food, and personal items. He's denied based on his record.

- This isn't violent criminal activity or crimes that demonstrate a hazard to others. It's an impermissible denial.

Other Criminal Activity (cont.): Time-limited look-back periods

- The look-back period for criminal activity is supposed to be “reasonable”.
- Challenging a denial:
 - The look-back period must be specifically stated in the housing provider’s admissions plan.
 - “Reasonable” is not defined in regs, but HUD guidance suggests shorter periods than what we sometimes see:
 - Shouldn’t be permanent unless statutorily required (like for lifetime registered sex offenders and meth).
 - Suggestions from HUD memos/guidance: 12 months for drug-related, 24 months for violent criminal activity, 5 years for most serious offenses. PIH 2015-10, 2015-19, 66 FR 28776.

Other Criminal Activity Scenario 2

Mark was convicted of an aggravated assault in 1999, when he was 40 and struggling with alcohol. He also picked up a petit larceny in 2018 when he stole about \$300 worth of supplies from the drug store. He's denied based on his criminal record.

- The 2018 conviction isn't violent criminal activity or a crime that demonstrates a hazard to others.
- Although federal regulations don't define "reasonable period of time," 22 years seems quite unreasonable.

Other Criminal Activity (cont.): Mitigating circumstances

- Challenging a denial: Mitigating circumstances
 - Seriousness of the offense and degree of the applicant's participation in the criminal activity.
 - Effect denial would have on the rest of the family (e.g., effect on children)
 - Effect denial would have on the rest of the community (e.g., person is experiencing homelessness, person will end up in hospital without stable housing, etc.)
 - Evidence of rehabilitation (programs completed, working, etc.)
 - Applicant took responsibility/took steps to prevent or mitigate harm
 - Mitigating circumstances related to the disability of a family member
 - Participation in social service or counseling programs

Other Criminal Activity (cont.): Reasonable Accommodations

- Challenging a denial: Reasonable Accommodations
 - A reasonable accommodation is a change in a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy a dwelling. 42 USC 3604(f).
 - Reasonable: No undue financial/administrative burden on housing provider, doesn't "fundamentally alter" the program. 24 CFR 8.11.
 - Exception for "direct threats." Direct threat assessments must be based on objective evidence, assessing nature and severity of risk, probability of injury, if RA could mitigate risk.

Other Criminal Activity (cont.): Reasonable Accommodations

- Challenging denials: Reasonable Accommodations (cont.)
 - Housing provider can request verification of disability, if non-obvious
 - From healthcare provider, peer support group, non-medical service agency, other reliable 3rd party. From individual, too, if credible. (HUD/DOJ Joint Statement 2004, p. 13-14)
 - Nexus: Must demonstrate link between the disability and the criminal activity.
 - E.g., *Simmons v. TM Assocs. Management, Inc.*: Woman allowed to add her son to her lease when his criminal activity occurred while he was off his psychiatric medications and was directly related to his mental health symptoms.

Other Criminal Activity Scenario 3

Suzanne has been diagnosed with advanced COPD and is on an oxygen machine. Six months ago, she was convicted of aggravated assault after she beat her son-in-law in the head and trunk with her portable tank because, she reports, “he’s got no respect,” but she was not required to serve time. You gave the housing provider a note from her doctor to document her disability, but she’s denied. Is that proper?

- There’s no documentation of a nexus between the disability and the criminal activity.
- You can still try to show mitigating circumstances.

Other Criminal Activity (cont.): Reasonable Accommodations for SUD/Alcohol

- Challenging a denial: Reasonable accommodations (cont.)
 - SUD in recovery is a covered disability.
 - Current users of illegal controlled substances are not considered “disabled” for reasonable accommodation purposes. 42 USC 12210(b).
 - Current use includes that which has “occurred recently enough to indicate that the individual is actively engaged in such conduct.” 29 CFR 1630.3.
 - Anyone who is currently in or has completed a drug rehab program is covered, as are persons who are otherwise able to show that they have been “rehabilitated successfully.” 29 USC 705(20)(C)(i).
 - Alcohol misuse is a covered disability, even if active.
 - May need to demonstrate that applicant will not threaten the health, safety, welfare or other tenants, or interfere with peaceful enjoyment.

Other Criminal Activity (cont.): Other excuses

- Other bases for challenging denials:
 - VAWA: Convictions related to DV.
 - E.g., abuser forced survivor to act as a drug mule, or the abuser committed the crime and the abuser is no longer part of the household.
 - Criminal record is incorrect or has been expunged.
 - Housing providers should not gather criminal record information from the newspapers. Some previously publicized convictions may have since been expunged.

What about private landlords?

- No VT law bars landlords from rejecting an applicant based on a criminal record.
 - Possible FHA argument if there's a disparate impact.
- Reasonable accommodations under the FHA:
 - Criminal activity must be directly-related to a covered disability.
- Reasonable accommodations based on VT fair housing law, 9 VSA 4503:
 - Criminal activity must be directly related to a covered disability.
In VT, active substance use disorder is a covered disability.
- VT fair housing law covers DV/SA: If criminal activity is directly related to status as a DV survivor, applicant could argue that they are protected under 9 VSA 4503.

Advocacy Opportunities

- Federally subsidized properties:
 - PHA five year and annual plans
 - Con Plan (DHCD)
 - Qualified Allocation Plan (VHFA)
 - Requests to housing providers to amend admissions policies.
- Private landlords:
 - Local or state ordinances preventing discrimination against people with criminal records. (Nothing that I know of yet!)
 - Homeless Bill of Rights

Got questions?

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