



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”**

Thank you for the opportunity to comment on the Department of Housing and Urban Development (HUD)’s Notice of Proposed Rulemaking (NPRM) on reducing barriers to HUD-assisted housing. The Consortium for Constituents with Disabilities (CCD) is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration, and inclusion of children and adults with disabilities in all aspects of a society free from racism, ableism, sexism, and xenophobia, as well as LGBTQ+ discrimination and religious intolerance. The CCD Housing Task Force (HTF) works to ensure that all people with disabilities have safe, stable, accessible, affordable, and integrated housing that enables people to live in communities of their choosing, with full access to home and community-based services and supports. These comments are submitted on behalf of the undersigned CCD HTF member organizations.

We strongly support HUD’s efforts to decrease barriers to HUD-assisted housing for people with arrest and conviction histories in general, and also specifically because people with disabilities are disproportionately represented in this group. Among two million people incarcerated in jails and prisons, approximately 800,000 have a mental illness, and 1.2 million have a substance use disorder<sup>1</sup>. Approximately 66% of incarcerated people self-report having a disability, and Black, Hispanic, and multiracial disabled men are especially overrepresented in prisons.<sup>2</sup> In addition, like the general population, the prison population is rapidly aging.<sup>3</sup> Older adults in prison are more likely to have disabilities, with over 50% of those ages 55-64 and around 70% of those 65 and older having a disability.<sup>4</sup>

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<sup>1</sup> U.S. Substance Abuse & Mental Health Services Administration, About Criminal and Juvenile Justice (March 2022), available at <https://www.samhsa.gov/criminal-juvenile-justice/about>.

<sup>2</sup> Health Affairs, “The Links Between Disability, Incarceration, and Social Exclusion” (October 2022), available at [https://www.healthaffairs.org/doi/10.1377/hlthaff.2022.00495?url\\_ver=Z39.88-2003&rft\\_id=ori%3Arid%3Acrsref.org&rft\\_dat=cr\\_pub++0pubmed](https://www.healthaffairs.org/doi/10.1377/hlthaff.2022.00495?url_ver=Z39.88-2003&rft_id=ori%3Arid%3Acrsref.org&rft_dat=cr_pub++0pubmed).

<sup>3</sup> Prison Policy Initiative, “The Aging Prison Population: Causes, Costs, and Consequences” (August 2023), available at <https://www.prisonpolicy.org/blog/2023/08/02/aging/>.

<sup>4</sup> 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>.

People with disabilities, particularly those experiencing homelessness, are vulnerable to frequent interactions with law enforcement that lead to cycles of unnecessary institutionalization. Before their current incarceration, 83% of people in state and federal prisons reported previously residing in another institution, such as other correctional settings and psychiatric hospitals.<sup>5</sup> People with disabilities who are incarcerated — often for petty misdemeanor offenses that target people experiencing homelessness — are often repeatedly criminalized due to a lack of affordable housing and supportive services, with law enforcement serving as a de facto crisis intervention system.<sup>6</sup> We are hopeful that HUD’s new rule will help disrupt this cycle by increasing access to housing for people with disabilities with histories of incarceration or criminal records.

**Question #3: Opportunity to dispute criminal records relied upon by PHA or owner (Denials).** *The proposed rule would provide that PHAs and owners provide applicants with relevant criminal records no fewer than 15 days prior to notification of a denial of admission, as well as an opportunity to dispute the accuracy and relevance of the records relied upon. Is 15 days prior to notification of a denial of admission an appropriate timeframe? Do the processes described in §§ 5.855(c), 882.518, 960.204, and 982.553 adequately balance the needs of applicants and housing providers? If not, what additional processes or measures would be helpful?*

HUD should require notice that is in writing and includes information about how to request reasonable accommodations, particularly since this rule specifies that PHAs and owners must consider whether they may need to provide reasonable accommodations for disability-related records and conduct. We also believe HUD should extend the notice period from 15 days to at least 30 days. A 15-day notice period is especially inadequate for older adults and people with disabilities, who often have more difficulty navigating administrative barriers and may need more assistance responding to notices.

**Question #4: Mitigating factors.** *The proposed rule would provide that PHAs and owners consider the following set of mitigating factors when a decision to deny or terminate assistance or to evict is predicated on consideration of a criminal record: the facts or circumstances surrounding the criminal conduct, the age of the individual at the time of the conduct, evidence that the individual has maintained a good tenant history before and/or after the criminal conviction or the criminal conduct, and evidence of rehabilitation efforts. Are there other mitigating factors that should be considered? Should HUD define these mitigating factors in greater detail in regulation or guidance? Please provide suggested definitions or standards.*

## **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 further

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<sup>5</sup> Health Affairs, *supra* note 2.

<sup>6</sup> Judge David L. Bazelon Center for Mental Health Law, et al., Brief for Grants Pass v. Gloria Johnson, et al., as Amici Curiae (2024), available at <https://www.bazelon.org/wp-content/uploads/2024/04/Amicus-brief-Grants-Pass-v-Johnson-4-3-2024.pdf>.

clarification and guidance on this issue. The lack of stable housing can worsen health conditions and heighten older adults and people with disabilities' risks of institutionalization. We recommend that HUD explain how considerations about medical conditions may be broader than considerations for reasonable accommodations. For example, 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.

## **Older Age**

We also 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. As HUD itself notes in the preamble, 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. Research shows that arrest rates drop to about 2 percent in people ages 50-65 and almost zero percent for people older than 65.<sup>7</sup> 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. The guidance states that relevant individualized evidence includes "older age at the time of conviction, or release from prison."<sup>8</sup> HUD should similarly add older age as a mitigating factor in its revisions to 24 CFR § 5.852 and parallel regulations.

## **Individualized Assessments and Reasonable Accommodations**

While we support individualized assessments, we concur with the National Housing Law Project (NHLP) comments that HUD should direct housing providers to focus on whether reliable evidence shows that the applicant does not, at the time of admission, adhere to relevant laws having a nexus with housing and the health and safety of other residents and neighbors.

HUD should also ensure that housing providers have the training and capacity to conduct individualized assessments in a nondiscriminatory manner.<sup>9</sup> In particular, we question whether housing providers will be able to determine "whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodation to persons with disabilities." As HUD's Office of Inspector General recently found,

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<sup>7</sup> 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>.

<sup>8</sup> 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>.

<sup>9</sup> Although the proposed rule defines "individualized assessments" in the context of admissions, our references to this term extends to assessments of mitigating circumstances in the context of evictions and terminations.

“[f]ailure to provide a reasonable accommodation may be construed as disability discrimination and housing discrimination complaints based on a failure to provide a reasonable accommodation were generally increasing every year from fiscal years 2009 to 2019, even as the total number of all housing discrimination complaints was decreasing. According to annual reports published by HUD’s Office of Fair Housing and Equal Opportunity (FHEO) during the 11-year period from 2009 to 2019, the total number of housing discrimination complaints had decreased 24.5 percent...while the number of housing discrimination complaints based on a failure to provide a reasonable accommodation had increased by 46.1 percent...”

OIG concluded that HUD did “not have adequate policies and procedures for ensuring that PHAs properly addressed, assessed, and fulfilled requests for reasonable accommodation.”<sup>10</sup>

In response to the OIG report, the CCD HTF urged HUD to mandate training for PHAs and owners on reasonable accommodations.<sup>11</sup> The concept of reasonable accommodations is often confusing for many housing providers because it involves a modification of policies, whereas many housing providers believe that nondiscrimination requires them to always apply the same policies to each applicant or tenant. We are aware of cases in which housing providers refused to provide reasonable accommodations to disabled persons under the claim that doing so would violate the alleged requirement to “treat everyone the same” under civil rights laws. Many people with disabilities are unable to secure reasonable accommodations without legal assistance or other help from an advocate.

Further, according to the Institute of Real Estate Management, the annual turnover rate for multifamily property managers stands at 33%, far higher than the average national rate of 22% of employees across industries.<sup>12</sup> This turnover rate adds to the challenge of ensuring that employees conduct individualized assessments in a consistent way that complies with civil rights laws. We recommend that HUD provide resources similar to this [handbook on reasonable accommodations](#) (produced under HUD’s Fair Housing Initiatives Program) with clear examples that will help housing providers conduct individualized assessments for applicants and tenants with disabilities.<sup>13</sup>

We also urge HUD to mandate that PHAs and owners take reasonable steps to determine whether someone may need a reasonable accommodation for disability-related criminal activity before denying or terminating assistance. The proposed rule notes that housing

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<sup>10</sup> 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>.

<sup>11</sup> CCD Housing Task Force, Letter Re: GAO Report, “Enhanced Data and Strategy Could Improve Oversight of Accessibility Requirements” (September 2023), available at <https://www.c-c-d.org/fichiers/CCD-HTF-Letter-GAO-RA-Report-July-2023-FINAL.pdf>.

<sup>12</sup> Institute of Real Estate Management, “How to Overcome High Employee Turnover in Property Management” (April 2021), available at <https://www.irem.org/learning/publications-news/blog/irem-blogs/2021/04/how-to-overcome-high-employee-turnover-in-property-management>.

<sup>13</sup> MassHousing, “A Handbook on the Legal Obligations and Rights of Public and Assisted Housing Providers Under Federal and State Fair Housing Law for Applicants and Tenants with Disabilities” (July 2015), available at [https://masshousing.com/-/media/Files/Housing-Stability/Fair-Housing/RA\\_Handbook.ashx](https://masshousing.com/-/media/Files/Housing-Stability/Fair-Housing/RA_Handbook.ashx).

providers may need to consider granting reasonable accommodations 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 applicants and tenants would like to request reasonable accommodations related to potentially disqualifying criminal conduct.

## **Live-In Aides**

Many PHAs and owners conduct criminal background checks for live-in aides as they would for household members. HUD should ensure that criminal history screenings for live-in aides are not more stringent than those for applicants under this proposed rule. Aides are not interchangeable, and each has specific skill sets and backgrounds that meet the unique needs of a person with a disability. We recommend that HUD 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.

**Question #5: Justifying denial of admissions.** *The proposed rule would provide that criminal activity in the past can be the basis for denying admission only if it would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA/property employees. Should HUD provide additional specificity in the rule or in subsequent guidance on this requirement, and if so, on what aspects?*

HUD should specifically define what constitutes criminal activity that threatens health, safety, or right to peaceful enjoyment to prevent unjustified exclusions from housing. People with disabilities continue to face stigma and bias, such as misperceptions that people with mental illness are more likely to engage in violence, despite evidence to the contrary. HUD's 2017 study, "Rental Housing Discrimination on the Basis of Mental Disabilities" (MD) documented significant levels of adverse treatment toward individuals with mental illness and intellectual/developmental disabilities when compared with individuals who did not have such disabilities.

According to the study:

"Individuals with MD often face multiple challenges when they seek housing in the rental housing market. Challenges may include both economic barriers and stigma or suspicion on the part of housing providers that limits their access to diverse housing choices. Complaints based on disability make up the largest number of housing discrimination complaints filed with federal, state, and local fair housing agencies and with private fair housing groups. In 2014, disability complaints made up 51.84 percent, or 14,271 of the total number of 27,528 fair housing complaints filed with HUD, its partner state and local agencies, and private fair housing enforcement organizations. A significant portion of these complaints involves people with MD. For example, HUD noted that, in fiscal year 2010, fully 40 percent of the disability complaints involved MD, which includes people with psychiatric disability or mental illness (PD/MI) and intellectual or developmental disability (I/DD)." <sup>14</sup>

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<sup>14</sup> HUD Office of Policy Development and Research, "Rental Housing Discrimination on the Basis of Mental

People with disabilities are also often criminalized due to behaviors connected to disability. For example, people with disabilities experience criminalization due to crime-free or nuisance ordinances that punish tenants for relatively innocuous conduct and frequent calls for emergency services.<sup>15</sup> Moreover, people with I/DD and people with communication-related disabilities may interact with others or behave in public spaces in non-normative ways. Unfortunately, such behaviors are disproportionately criminalized even when there is no threat to health and safety. Therefore, the more guidance and training HUD provides, the more likely these biases can be minimized and ideally eliminated.

HUD should therefore define threats to health, safety, and right to peaceful enjoyment to preclude overly broad categories of disqualifying criminal activity. This definition should ensure that such threats are actual and substantial and cannot be reduced through reasonable accommodations or other measures. It should also emphasize that PHAs and owners should not accept “[g]eneralized assumption,” “subjective fears,” or “speculation” as conclusive evidence of disqualifying activity.<sup>16</sup>

The Fair Housing Act (FHA)’s “direct threat” exemption provides a 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.<sup>17</sup> 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 “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).”<sup>18</sup>

Another advantage to adopting a definition aligning with that of the FHA’s direct threat exemption is that many housing providers are already familiar with the latter. Building on existing guidance, policies, and procedures will increase the likelihood of PHAs and owners applying this new rule correctly and consistently.

**Question #11: Continued use of the term “alcohol abuse.”** *As discussed in the preamble, this proposed rule continues the use of the statutory term “alcohol abuse” when describing the relevant potential disqualifying circumstances related to alcohol. HUD seeks public comment on the continued use of the term and whether there are alternative, less pejorative, and/or more current terms that could replace “alcohol abuse.”*

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Disabilities: Results of Pilot Testing” (August 2017), available at [www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf](http://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf).

<sup>15</sup> 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>.

<sup>16</sup> Cf. H.R. REP. NO. 711, 100th Cong., 2d Sess. 18, 29, reprinted in 1988 U.S. CODE CONG. ADMIN. NEWS 2173 (regarding whether a person should be considered a direct threat to others under the FHAA).

<sup>17</sup> 42 U.S.C. § 3604(f)(9).

<sup>18</sup> 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>.

The NPRM explains that HUD is declining to use the term “alcohol use disorder” (AUD) in part to avoid conflict with civil rights laws due to AUD qualifying as a disability under the FHA. In the final rule, HUD should more clearly distinguish alcohol abuse from alcohol use arising from AUD, and we urge HUD to clarify that people with AUD may be entitled to reasonable accommodations.

Stable housing is critical for people trying to recover from AUD, but like others with disabilities, people with AUD may be vulnerable to overcriminalization and being labeled as threats to health and safety. As we previously noted, HUD should narrowly define “threats to health, safety, or right to peaceful enjoyment” to minimize unjustified exclusions. We also note that screening based on alcohol abuse should still narrowly focus on the applicant’s or resident’s tenancy-related behavior. HUD should require PHAs and owners to provide information about how they determine whether alleged alcohol abuse is disqualifying.

## **Conclusion**

We strongly support this proposed rule to reduce barriers for people with arrest and conviction histories. In order for the rule to achieve its goals, we believe housing providers will need significant training and technical assistance during implementation. To that end, we hope HUD will encourage housing providers to partner with aging and disability organizations that can provide support on reasonable accommodations and other aspects of this rule affecting people with disabilities.

Thank you for your consideration of our comments. Please contact the CCD HTF co-chairs if you have any questions.

Sincerely,

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Corporation for Supportive Housing

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National Alliance on Mental Illness (NAMI)  
National Disability Rights Network (NDRN)  
National PLAN Alliance (NPA)  
NEW START  
RespectAbility  
SAGE  
The Arc of the United States