

July 20, 2022 – 2:00-4:00 PM ET
NATIONAL FAIR HOUSING FORUM
Strategies for Addressing Discrimination: Housing Providers Use of Criminal
Records

Speakers: Demetria McCain, Principal Deputy Assistant Secretary, Office of Fair Housing and Equal Opportunity, HUD, Richard Cho, Senior Advisor, Office of the Secretary, HUD, Anthony Johnson, Fair Housing Advocate

Moderator: Cashauna Hill, Executive Director, Louisiana Fair Housing Action Center

Panelists: Stephon Woods, Trial Attorney, Fair Housing Enforcement Division, Office of General Counsel, HUD, Anna Bruton, Disability and Fair Housing Attorney, Office of Housing Compliance, Office of General Counsel, HUD, Maggie Donahue, Trial Attorney, Fair Housing Enforcement Division, Office of General Counsel, HUD, Natalie Maxwell, Managing Attorney, National Housing Law Project

CASHAUNA HILL: [0:00:00] Welcome to our conversation again and thank you for joining us with the national fair housing training academies forum Strategies for Addressing Discrimination: Housing Providers' Use of Criminal Records.

My name is Cashauna Hill, and I am a NFHTA faculty member and Executive Director of the Louisiana fair housing action center. I am incredibly excited to once again serve as forum moderator. Today's topic brings light to a very important conversation. For those of you who may be new to this topic, approximately one in three people in the United States has an arrest or conviction in their past. For individuals leaving prison, one out of at any will experience homelessness in the future. People who have been arrested or convicted are at risk for homelessness and subsequent recidivism. We are looking forward to hearing from a variety of speakers during today's forum and diving much deeper into this issue. Before we begin, please note: This forum features information and examples that represent the experiences of the speakers the comments made today do not necessarily reflect the policies of HUD. Now before we get started let's review technical tips and instructions. TJ over to you.

TJ WINFIELD: [0:01:37] Thanks, Cashauna. If any of you have difficulties with audio or video first we recommend you sign out of the webinar, sign back in. If you still have trouble with that you can request help in the Q & A box at the bottom of your Zoom screen or send an email to the bottom of the screen.

We do encourage you to ask questions. You can enter your questions at any time by click the same Q & A button the Zoom panel. Please note, though due to time constraints we might not be able to answer questions today. The webinar is scheduled for two hours and is being recorded. The recording and transcript will be made available on the NFHTA website along with resources that supplement today's conversation. Back

to you, Cashauna.

CASHAUNA HILL: [0:02:32] Thank you, TJ. Once again, I am honored to present Demetria McCain as many of you know, Demetria has been a champion in the fair housing community, committed to advancing racial equity inclusiveness and reinvestment in neighborhood. Demetria, a pleasure once again to have you join.

DEMETRIA McCAIN: [0:03:00] Again, a pleasure speaking with you today. I would like to welcome you to our July, can't believe it is July, our July forum, Strategies for Addressing Discrimination: Housing Providers Use of Criminal Records, individuals with criminal histories have barriers to maintaining and getting housing. As Cashauna mentioned across the United States criminal justice system. The Biden-Harris administration recognizes the importance of healthy person whose have criminal involvement helping them re-enter society and truly reunite with their families in fine, stable housing and safe houses. President Biden declared in April 2022 mind you that was actually Fair House Month. He declared in April 20nd, 2022 2nd chance month and HUD secretary issued a memorandum instituting an agencywide effort to review HUD's programs to ensure HUD program and funding and recipients are inclusive as possible with individuals with criminal involvement. Just last month on June 10, our office, FHEO (phonetic) issued a memorandum highlighting our Office of General Counsel's 2016 guidance and on how to apply the Fair Housing Act standards when house providers and others use criminal records. Because too often housing providers, criminal records policies may violate the Fair Housing Act and other civil rights laws. So, today you will hear more from panelists on how to spot these violations. And you hear about best practices around conducting investigations related to the use of criminal records and best practices for housing providers in their actual use of criminal records when they are screening tenants. So, we have a lot that we are going to hear from these panelists today. And I will tell you this is certainly a priority of our secretary, Marcia L. Fudge as well. I will get out of the way and pass it back to you, Cashauna.

CASHAUNA HILL: [0:05:42] Thank you so much, Demetria, I present Richard Cho Office of the Secretary at HUD. In his role, Richard advises the secretary on HUD's efforts to end homelessness, protect HUD you assisted households from COVID 19 advance the integration of people with disabilities, connect housing with healthcare and create housing options for formerly incarcerated people and others who have interacted with the criminal legal system. Richard it's a pleasure to have you join us today.

RICHARD CHO: [0:06:20] Thank you, Cashauna and thank you, Demetria for your time. Thank you to the Academy for putting this training together on a really important and I think far reaching issue. I think it already has been said we know the number of people who have criminal justice involvement in the United States of America is significant. We have been we are coming out of a period of many decades of mass incarceration whereon any given year we have 2 million people in this country who are behind bars.

Many in-state and federal prisons, in jails. People churn in and out of local jails every year. As Cashauna mentioned, one in three Americans reports having an arrest or criminal record, criminal history. We are talking about an issue that reaches many, many Americans.

Now as Demetria mentioned, both President Biden, and Vice President Harris and Secretary Fudge recognized that we have not only way too many people behind bars but also people who experienced criminal justice involvement should not have to experience the collateral consequence of that incarceration where they end up living a second sentence in the community facing barriers to employment, licenses and ultimately, to housing.

And therefore, both the President and the Secretary have charged HUD to really look at all of the ways that we can help to reduce barriers to access to a number of programs, including housing for people who have been involved in the criminal justice system and to support their re-entry. Over the last several months HUD has conducted a discernment process, investigation to understand better what our role should be in helping to meet housing needs, and what we found is really three things: Housing is critical to re-entry, to successful community integration of people leaving prisons and jails; and that housing can serve as a foundation for helping people to obtain jobs, to obtain healthcare, to reconnect with family members and help to successfully re-enter the community and avoid criminal justice involvement. Second we found that broadly screening out people based on criminal histories does not contribute to public safety; but in fact it may do the opposite: It may make public safety worse because you take housing away from people who actually need the housing in order to successfully re-enter communities. But actually, the over-broad use of criminal records as a way to assess people's risk of criminal justice involvement in the future is a very ineffective way to screen people out. In fact it over values people's risk relative to their potential recidivism. Third we also found that despite guidance that I think you will hear about today and issued in 2016 by HUD's office of General Counsel that pointed out over broad use of criminal records may violate the Fair Housing Act. Despite protections under the Americans with Disabilities Act. Despite the fact that the Violence Against Women Act provides additional protections for people with criminal records that relate to their experience of domestic or intimate partner violence or sexual assault. That many HUD assisted housing providers continue to make inconsistent or over broad use of criminal records in housing decisions. So as Principal Deputy McCain mentioned, HUD has been undertaking under the Secretary's charge, a comprehensive review of all of our guidance and policies and ways that we can ensure that HUD's programs are inclusive as possible to people with criminal records.

What we're looking to do is essentially to make sure that while there's laws and statutes that indicate that HUD assisted housing providers often do have discretion to conduct some level of criminal record screening, that that is not unlimited discretion. They need to ensure that they are complying with fair housing, with the Americans with Disabilities

Act and with the Violence Against Women Act.

Also looking for instances where criminal records are what we call a non-discriminatory legitimate interest related to potential harm to persons or property and secondarily that you are taking into account the whole person and all of the other circumstances:

How long ago was that conviction? What was the age at the time of the conviction? And is there other supporting evidence that the person experienced rehabilitation and that their criminal record is not necessarily an indicator that they will be a risk to persons or property.

In other words, we want to make sure that we are implementing our programs in ways we are not taking criminal records at face value. We recognize that people are more than their criminal records that they are whole persons with whole life experiences and what we are looking to do is ensure that our housing providers that we fund and oversee are really conducting an individualized assessment of risk with regard to criminal records. So that's what we are working on with regard to HUD assisted housing. Of course, our reach doesn't reach out to all of the private housing owners who don't necessarily have HUD assistance and that is where fair housing comes into place. So, the trainings that you will receive today I think play an important complementary role in ensuring that we are looking for instances where landlords, whether HUD assisted or not, are using criminal records in ways that is leading to housing discrimination. I want to thank you for being here today, thank NFHTA for putting this together and thank our FHEO colleagues for putting together the content here today. I know it will be a terrific and valuable training. With that, I'll turn it back to you again, Cashauna.

CASHAUNA HILL: [0:12:55] Thank you so much Richard and thanks again to Demetria McCain for joining us today. These remarks set a great stage for the conversation that we are going to have today. As we move on, it is my pleasure to introduce to you all Mr. Anthony Johnson for a conversation that we will have. Mr. Johnson is a person with lived experience of incarceration, homelessness, and housing discrimination. Born and raised in Chicago, he has an associate's degree from Kennedy King College of Chicago and a bachelor's degree from Columbia College. Mr. Johnson is a very effective advocate for more inclusive screening procedures in housing. Mr. Johnson, welcome to today conversation.

MR. JOHNSON: [0:13:42] Thank you very much.

CASHAUNA HILL: [0:13:43] In an earlier conversation you and I had, you shared your experience with the legal system began to turn around when you encountered a judge who listened to your experiences and treated you with compassion. And as you said to me, this judge treated you like a human being. Unfortunately, it seems that kind of compassionate treatment hasn't really been a part of your housing search so far. Would you mind sharing a little bit about your housing history since your release earlier in the

pandemic.

MR. JOHNSON: [0:14:24] Yes, I will. First, I want to give honor and glory to my Lord and Savior, Jesus Christ. God has protected me from hurt, harm, damage in the streets, stab wounds, being shot at, jaw broke twice and everything else that goes along with the streets. You know, my house search that began first of all, my mother had died back in 2014 and that kind of I made some bad choices because I was battling alcohol and so forth. But after going to court, after catching a case while under the influence and going to court this judge gave me a chance. But the problem that I had was once I got inside the jail COVID hit. So, I was discharged out of the Cook County jail excuse the background noise, there is an emergency ambulance in the background. I was discharged, homeless, in the middle of a pandemic and I was COVID positive. Because I was on a deck with 40 guys and 25 of the guys, including myself, was all COVID positive. So, with that said, when I came out, I had to pray and ask God to help me. Because I had nowhere to go. The shelters were not taking anybody nor were they letting anybody out. Actually when I walking through the street, I actually thought The Rapture had happened and I was the only one left. Because I was walking down the middle of the street with nobody on the street. This was 9:30 at night. With that said I had nowhere to go. So I went to Norwegian hospital and I told them I was sober and I just got out of yeah. They would not let me into the hospital because I wanted to get into the detox program. I knew that was a program I could get in. They wouldn't let me go into it because I had no drugs or alcohol in my system. With that said, one of the nurses winked at me and said well if you had any alcohol in your system we could let you in the program. Once I did that, left, put some alcohol in my system, came back, they admitted into the program and then I was COVID positive. So, from there I was in isolation. They transferred me to the overflow center at McCormick place. It was not a transfer. I was kicked out. When they were taking me out of the hospital there were lines of patients on gurneys that were COVID positive. They were waiting on a room. With that said they transferred me over there. When I got it there when I was coming out of bed, there was no place for me to go. Not only was I recovering from COVID and homeless, I had a criminal record. Finally, when COVID, a little bit of restrictions I applied for housing made it to the top of the waiting list. They denied me because of my background. That was in May.

CASHAUNA HILL: [0:17:39] Can I interrupt to ask a clarifying question just to make sure that our audience understand where you were looking.

MR. JOHNSON: [0:17:42] Yes.

CASHAUNA HILL: [0:17:43] You mentioned you applied to house, made it to the top of the wait list. Was this HUD, public housing that you applied for?

MR. JOHNSON: [0:17:56] CHA, yes, public housing authority. and I made it to the top of the waiting list. I believe it was in May 2021. I had all of my certificates,

recommendations letters, everything I had done positive. Community service letters, everything. When I got there, they were like okay, I showed them this is what I have been doing in my life. I know I have a criminal background, please review. I have a folder I lost because I am homeless. That is unfortunate. Look at my portfolio, I have done incredible things. They said we are going to look at it later on. So I filled out the application and left. Thinking they were going to call me back for a second interview whatever the case may be. I got a letter denying me because of my criminal background. That hurt. Because I am living in a place that before I got locked up I was living in an abandoned building. I don't know if you can see this or not but I what living in this building. For them to deny me like that especially for the positive things I was doing and trying to help the community and being a positive turning the page on my past, that was like a hit, was a hit in the gut. So with that said I was dealing with depression, anxiety, battling the urge to drink and so forth and it was just a bad timing. And not only that is correct the next month I get another interview to go to another CHA apartment and I went apprehensively because of what happened to me the first time I had my portfolio and I showed them my credentials and everything I was doing positive and so forth and I thought that was I was going to get an apartment there. About a few days after the interview, I get another denial letter that they denied me about my criminal background, which that just . . . I mean I had kind of lost all hope at that time.

CASHAUNA HILL: [0:20:21] When you received these two denials, were you ever given an opportunity to explain your circumstances? I know you mentioned the paperwork that you had, certificate the, things like that. I know you mentioned going through treatment and we heard about your college background: Did you get an opportunity to explain anything about your circumstances before or after you were denied?

MR. JOHNSON: [0:20:46] Absolutely no. I was explaining to the people. I told them I said look I have an affirmative issue. I have been to prison seven times. But all of my rest was under the influence. I had an alcohol panel and with that I am clean and sober now and I want you to take my credentials into consideration and my letters of recommendation and everything I have done positive into consideration. As a person. As I was filling out the forms. They said okay, we will do that, we will do that. Save the time for that. We will get a chance to look at all that.

And they actually lied to me.

CASHAUNA HILL: [0:21:28] So, Mr. Johnson, given that you were denied twice from public housing after your release what is your current housing situation?

MR. JOHNSON: [0:21:37] I am currently living in a shelter. I am living in a shelter now. The shelters are good places to be. However, if a person how can I say it? If a person has no place else to go that is a good place for them to be. However, shelters are not the best places to be. Because people there have serious mental health problems, people having drugs in there. You are having roommates that don't care nothing about you or a

person that's in the bed next to you will steal from you. There are no metal detectors in these shelters so there is a possibility that the person you may have any kind of words with will kill you.

And it's a very, - if it's out of the elements, that is a good thing, but there are people who I have been on the street with, who live in tents, up under bridges, sleep in abandoned garages and abandoned houses would rather be there than the threat a shelter has to a person's well-being.

CASHAUNA HILL: [0:22:54] Thank you, Mr. Johnson that is so helpful. So that we can stay on time today and so I don't keep you too long I am going to ask you one last question: Given everything you shared with us and how important you know housing to be as you work to get back on your feet: If you could request anything from property owners and housing providers about the screening procedures they use, what would that request be?

MR. JOHNSON: [0:23:25] The request that I would have is that they deal with people on an individual basis. Now I made a lot of bad choices. However, people do improve and people do change. One of the things that I have learned is that the system is designed to pretend to help people but in the endgame, it has been designed to separate families and to keep people homeless. For instance, a person that has been born, bred, and raised in public housing, say, for instance, they commit a crime, or they get caught up in the system, they go to jail or go to prison and then, when they come out, they cannot go back to their families. Because they have a criminal background which means that opens the door for homelessness, that opens the door for the person to be on the street, that opens the door for the person to commit more crimes. Because they can't go home, but they have a place where they've been that gives them three hots and a cot, which is jail, so they will go back to jail because at least they have shelter. The answer to your question is I believe that if the individuals that are giving housing would take that into consideration on a case-by-case basis and not blanketly the whole landscape denying people housing because of their criminal background. Even if they are nonviolent and no threat to anyone. You know, it does not make sense to me why that would be designed that way. I have been with a lot of people in these streets that are good people and made bad choices; but the system will not give them a second chance.

CASHAUNA HILL: [0:25:08] Mr. Johnson we are so appreciative of you taking the time to be with us today and doing everything that you needed to do to be here. We know it could not have been easy. We very much appreciate your story and your time. As you know, it is so incredibly important --

MR. JOHNSON: [0:25:25] Thank you.

CASHAUNA HILL: [0:25:25] and-- helpful for people to hear stories like yours as we continue our work. Please accept thanks from today's attendees.

MR. JOHNSON: [0:25:35] Yes, and I want to say thank you to everyone who has helped me: The organizations, the politicians and everyone who has opened the door that didn't look at my background but look at the person you see now. And it's only by the grace of God and I thank my God for touching people's hearts to understand that yes, I may have made bad choices but I am not a bad person. And I want to thank everybody that's on this panel for allowing me to speak because there are a lot of people that I see daily even by just coming over here, that need help and they need everyone on this panel to be able to assist them to get them off the street and in adequate housing so they can be housed and can move forward to live and be productive citizens because living on the street is a bad place to be. I have been there.

CASHAUNA HILL: [0:26:26] We wish you the very best of luck, Mr. Johnson and again we thank you so very much.

MR. JOHNSON: [0:26:32] Thank you, thank you very much.

CASHAUNA HILL: [0:26:33] Thank you for joining us.

MR. JOHNSON: [0:26:36] Thank you for having me.

CASHAUNA HILL: [0:26:36] Thank you. As we move on, I would like to share the learning objectives for today's forum. They are listed on our screen we also encourage you all to take a look at them in further detail on the NFHTA HUD Exchange page. At this time, I will introduce our panel speakers, you all can find out everything about them from their bios page on the Forum page of the NFHTA website joining us today we have Stefon Woods, Anna Bruton, Maggie Donahue and Natalie Maxwell. Please keep in mind that during today's round table discussion you will all have the opportunities to submit questions at any time via the Q & A box and we will do our best to address the questions in today's conversation. However, please note that we may not have time to get to all questions and personal questions will not be addressed. Also as a reminder, today's event is being recorded. The slide deck is already available on the Forum page on HUD Exchange and we will share the link in the Chat additionally other materials including the record will be available on HUD Exchange soon after the event. Please remember to type any questions that you have into the Q & A box. With that, we will get started with our first panelist. Stefon.

STEFON WOODS: [0:28:23] Thank you so much. Good afternoon or good morning. As Cashauna mentioned, I am Stefon Woods. I am a trial attorney here at HUD. Joined by Anna Bruton and Maggie Donahue. Today we will be discussing how the Fair Housing Act is implicated by housing provider's use of criminal records. First, I would like to contextualize the conversation a bit. We all know and understand there is an over representation of black and brown people in the criminal justice system. With this slide want to highlight the fact that blacks represent 13% of the US population however

account for 27% of all arrests. In 2019 the incarceration rate of Black males was almost six times that of white non-Hispanic males similarly black females two times the rate of white non-Hispanic females. There was also a 2021 study finding Hispanics incarcerated 1.3 times higher than white non-Hispanics. Additionally, a survey from 2016 found that 38% of state and federal prisoners reported having a disability whether cognitive, ambulatory or vision; yet persons with disabilities account for 15% of the general population.

First, I want to make sure we all understand what the Fair Housing Act prohibits: Discrimination in the sale, rental or financing of dwellings and in other housing related activities on the basis of race, color, religion, sex, which includes sexual orientation and gender identity, disability, familial status or national origin. The Fair Housing Act does not protect the person with the record from discrimination. However the housing provider may violate the act using criminal records to deny housing to people that have protected characteristics listed in the Fair Housing Act as mentioned earlier. In terms of who can be held liable for violations of the act that spans from private landlords, management companies, condominium associations, as well as third-party screening companies who provide screening reports to housing providers for applicants, HUD-subsidized housing providers, and public entities that operate, administer, or fund housing or that enact ordinances that restrict access to housing.

There are three theories of liability under the Fair Housing Act.

The first I will discuss is discriminatory intent also known as disparate treatment. The second is discriminatory effects also known as disparate impact.

Then I will pass it to my colleague Anna to discuss the refusal to make reasonable accommodations.

Is a housing provider may violate the Act if they intentionally discriminate in their use of criminal history information. Meaning they treat an applicant or renter differently because of a protected characteristic.

In the way that we understand analyze this, is basically when a house provider is using criminal records or other criminal history information, that use can be seen as pretext for unequal treatment because of a protected characteristic. And in those cases that is no different from discriminatory application of any other rental or purchase criteria.

So some examples we have seen in some of our cases or heard about is where housing provider rejects a Hispanic applicant based on a criminal record but admits a non-Hispanic white applicant with a comparable criminal record.

Or a property manager discourages a black applicant with a criminal record from applying but encourages a white individual with a comparable record to apply for

housing. Or after learning that an applicant was previously homeless and hospitalized for treatment of a mental health condition, the management company departs from its standard procedures and runs a criminal background check and then ultimately denies that person housing.

Some other examples include:

A house provider evicts a black tenant who was convicted of a crime but does not evict a white tenant who was convicted of a similar crime, or we've seen examples where a locality applies a crimefree ordinance requiring the eviction of criminally involved residents in a neighborhood with a significant black or Hispanic population but does not apply the ordinance in neighborhoods that are predominantly populated by White households.

So, for claims that are brought that allege the housing provider used criminal records or policy or history to discriminate intentionally those claims should be investigated in a manner similar to other allegations of intentional discrimination. We want to highlight 2018 office of General Counsel elements of proof memo that describes what evidence is used to prove claims of intentional discrimination. One of the first things that memo describes is that evidence may be direct or circumstantial, which we will discuss in the next few slides.

Direct evidence most typically takes the form of a facial discriminatory statement or policy. For instance if a housing provider makes oral or written statement indicating a preference or applicant or tenant not of complainant's protected class those are direct evidence of discrimination. A policy is facially discriminatory if it explicitly treats members of a protected class less favorably than those who do not belong to the protected class. An example highlighted earlier: Where the landlord moved to evict a black tenant who had a criminal record but not a white tenant with comparable record.

Unless there is direct evidence of discriminatory intent such as written or oral statements or a policy that treats people of a protected class differently or less favorably, evidence is gathered and analyzed using the McDonnell Douglas shifting burden framework. First evidence must establish a prima facie case for disparate treatment. Some examples of prima facie elements are 2018 OGC memo. Please consult that. The courts have determined those tests are not to be so rigid so elements will adjust to fit any case or circumstance that might be at issue that you are investigating.

The burden then shifts to a housing provider to offer evidence (Reading) of a legitimate nondiscriminatory reason which has to be clear, it has to be reasonably specific and it has to be supported by admissible evidence.

But the plaintiff/complainant may still prevail if the criminal record was not the true reason for the adverse housing decision and was instead mere pretext for unequal

treatment a protected characteristic.

The second theory of liability under the Fair Housing Act is discriminatory effects. A housing provider that has a facially neutral policy or practice that has a discriminatory effect on a protected characteristic would violate the act if that policy is - if- it is unjustified. Basically, where policy or practice that restricts access to house, on the basis of criminal history has a disparate impact on members of a protected class, that policy or practice is unlawful if it is not necessary to serve a substantial legitimate, nondiscriminatory interest, or if it could be served by another practice that has a less discriminatory effect.

Discriminatory even effects liability is accessed under a three step burden shifting standard. First the plaintiff or HUD must prove that the criminal history policy has a discriminatory effect. It will go through each of these in a moment. I wanted to highlight or overview the steps first. First the plaintiff or HUD has to prove there is discriminatory effect. Second the housing provider must proof the challenged policy is justified, meaning it is necessary to achieve a substantial legitimate and nondiscriminatory interest and third if the housing provider successfully proves its criminal history policy is justified, plaintiff or HUD must prove interests are served by a policy with another practice that has a less discriminatory effect.

Step one. Does the policy have a discriminatory effect? This particular step is a very fact specific and case specific inquiry. It's really important to consult local statistical evidence where it's available. That evidence can be used to evaluate whether a challenged policy has ism packet on a protected class. My colleague Maggie will go into a little more depth about what types of evidence would be used based on what sort of claim or allegation or policy is at issue. But if local statistics are not available, then there is no reason to believe that they would and there is no reason to believe that they would differ from national statistics and national statistics can also be used. Additional evidence such as applicant data, tenant files, census demographic and localized criminal justice data may also be relevant. It is important to note that house providers may offer to refute the claim that policy or practice has discriminatory effect. So, if you are bringing these cases, investigating these case it is important to consider that rebut that potentially if that is the case. But that is a possibility for housing providers to be able to provide that information.

Step two is the policy justified. The housing provider must prove the challenged policy or practice is necessary to achieve a substantial legitimate non-discriminatory interest of the provider. So it's important to note that the housing provider has to submit evidence that proves that first there is an interest and sec that the policy itself is necessary to further whatever that interest is. What we see a lot of times in our cases is where some landlords and property managers assert protecting other residents and property is a reason. However, the provider has to still show the policy achieves safety among residents if that is the interest they are asserting.

Richard mentioned earlier: Exclusion because of prior arrests and convictions. For exclusions because of prior arrests, these exclusions cannot satisfy a housing provider's burden to show the policy or practice is necessary to achieve a substantial legitimate nondiscriminatory interest and that's because areas records do not show proof of past unlawful conduct. They are just allegations or suspicions that someone possibly engaged in a crime. Or in criminal conduct. So, without any indication of a prosecution or conviction or acquittal, arrests are likely not sufficient for the housing provider to prove that. Exclusions because of prior conviction will serve as evidence to prove that someone engaged in certain criminal conduct, but the housing provider still has to prove the policy to exclude based on those convictions is necessary to achieve a substantial nonlegitimate nondiscriminatory interest. Blanket prohibitions just will not suffice. There can't be a blanket ban on all convictions whatever. Even more tailored policy that excludes certain types of convictions still have to be justified. So, the housing provider still has to provide sufficient evidence that there is a justification.

Step three is there a less discriminatory alternative? This step is only applicable if the housing provider successfully proves that its policy is justified. So at that point if that has been proven then plaintiff or HUD has the burden to prove that such interests could be served by another practice that has a less discriminatory effect. Less discriminatory alternatives depend on the case. One thing Mr. Johnson mentioned he would like housing providers to do is do more individualized assessment. This is something we broad up in 2016 criminal records guidance. Looking at relevant mitigating information. Because that is likely to have a less discriminatory effect. Relevant information can include the facts or circumstances that surround the criminal conduct, the age of the individual at the time of the conduct; any evidence that the individual maintained a good tenant history before and or after the condition or conduct; or any evidence of rehabilitation efforts. Just a note: This list is not exhaustive of all possibly relevant individualized evidence. Make sure that you understand exactly what evidence the complainant may want to put forward.

The last thing that I will touch on is the statutory exemption for exclusion because of legal manufacture or distribution of a controlled substance. Section 807 (B)(4) of the Fair Housing Act does not prohibit conduct against a person because such person has been convicted of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C 802).

There is a limitation on this exemption. First of all, Section 807(B)(4) only applies to disparate impact claims based on denial of housing due to the person's conviction for drug manufacturing or distribution. It does not provide a defense to disparate impact claims for policies based on arrests.

Additionally, it only applies to disparate impact claims based on convictions for drug illegal manufacturing or distribution of a controlled substance and not any other drug

climbs crimes, specifically something like possession. It does not apply to disparate treatment cases. By virtue of the case, the conduct is because of the protected characteristic and not the drug use itself. For instance if a landlord had an exclusion policy that excluded black tenants because if they have a policy that excludes convictions for illegal manufacture, distribution of a controlled substance that is applied only to black residents and not white residents, they allow a white resident with a conviction of illegal manufacture or distribution of controlled substance, this exemption would not apply.

With that I will turn it back over to Cashauna to turn it over to our next person.

CASHAUNA HILL: [0:44:33] Thank you so much Stefon. After we move to Anna I am going to ask for a quick clarification and reminder, the nonlawyers on the call made it very clear in the Q & A box that they would like some of the terms explained. I don't know that we are going to have time to do that right now. But I do want to remind all of our speakers to please, when at least using Latin terms *prima facie* or something like that, if you could please just remember to quickly explain what a term like that means. Stefon could I ask you now before we move on to quickly give on the spot short primer on disparate impact and what that term itself means if you wouldn't mind doing so.

STEFON WOODS: [0:45:30] Sure. Disparate impact one of the theories of liability under the Fair Housing Act means there is a policy or practice being employed by the landlord that has a discriminatory effect on a protected class. In a situation like that, the landlord may not be overtly saying I don't want black residents or I don't want Hispanic residents. Or they are not using a policy that explicitly excludes only black residents but allows white non-Hispanic residents. Disparate impact really refers to a facially neutral policy. If the landlord says I don't want anyone with a certain conviction and then there is evidence that individuals who have those convictions are disproportionately a minority or specifically a protected class under the Fair Housing Act; if the landlord does not have any justification for having that blanket exclusion; and if there isn't a less discriminatory way of advancing any interest that the landlord might have that's when you have a violation of the Fair Housing Act. Does that explain it a little bit better?

CASHAUNA HILL: [0:46:41] That was a very professional explanation. Thank you so much. I knew you could do it.

STEFON WOODS: [0:46:46] Of course.

CASHAUNA HILL: [0:46:47] We will move to our next panelist. I do want to remind all of today's attendees that all of the slides from today's event are already available on the NFHTA forum page of the HUD exchange site. We will again place that link in the Chat for everyone to access the slides from today's conversation. They are already available. The event is being recorded and that recording will also be available on the NFHTA page

in the coming days our next panelist Anna Bruton will explain reasonable accommodations requirements as they relate to screening policies.

Anna.

ANNA BRUTON: [0:47:36] Thank you. Welcome to have one. My name is Anna Bruton and I will discuss reasonable accommodations as they relate to criminal records history and policies. I am going to begin the conversation with a quick poll question.

Next slide please, Stefon.

I am not sure if the question's coming up so I will read it. A property management company implements the policy denying admission for any individual with two or more convictions, the management company states such a policy is need today protect health safety and welfare of other residents. An individual with two recent public intoxication convictions applies for housing and requests a reasonable accommodation to the housing provider's policy. The individual tells the management company they are addicted to alcohol. Can the housing provider permissible deny the applicant based on this policy? Yes or no answer.

Looks like from the results of the poll, 37% of respondents answered yes the housing provider could permissible deny the applicant based on is policy, 63% of respondents said no. Just to clarify with this particular example, as most of you selected, the majority the correct answer would be No. That is because addiction to alcohol whether current or past is generally considered a disability and so an individual with a current or past addiction to alcohol may be entitled to reasonable accommodation. The housing provider in that circumstance should have performed a reasonable accommodation analysis and responded to that request before making any final determination for that particular applicant. So the reasonable accommodation obligation exists under the Fair Housing Act which applies to private and federally funded housing providers. It also exist under Section 504 of the Rehabilitation Act applies to recipients of federal financial assistance. Next slide, please, Stefon.

And the obligation also exists under the Americans with disabilities act. Which applies to - which- has two parts: Title II of the ADA and III. Title II of the ADA applies to housing built, operated, or sponsored by state or local governments. And Title III applies to public accommodations associated with housing that are open to the general public and commercial facilities.

So, an example of housing under Title II or covered housing would be a housing public authority. An example of covered housing under title II, excuse me, under Title III of the ADA would be homeless shelters. Next slide, please.

The term "reasonable accommodation" is defined as a change, exception or adjustment

to a rule, policy, practice, or service that may be necessary for a person with a disability to have equal opportunity to use and enjoy a dwelling, including public and common use spaces within the housing. And it is unlawful for a house provider to refuse to make reasonable accommodations when they may be necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling as a resource, those joining us today so also reference the joint statement from HUD and the Department of Justice on reasonable accommodations under the Fair Housing Act.

Next slide, please.

When performing reasonable accommodation analysis, several things need to be looked at: Does the individual have a disability. Defined by the statute and regulations. Under the Fair Housing Act, Section 504 and ADA define what constitute a disability. Second: Is there a disability related need for the accommodation? Pretty much here you are looking at the link between the disability and the reasonable accommodation being requested.

Third also assessing whether the accommodation is reasonable. Generally absent a statutory exception which are under the Fair Housing Act Section 504 and ADA they all have statutory exceptions to the reasonable accommodation exception, which are -- the two exceptions are undue financial and administrative burden or fundamental alteration to the actual house program. About September 1 of those exceptions applying, reasonable accommodation is generally going to be reasonable in a housing provided under the law.

Also as a part of the analysis it is important to note an individual requesting an accommodation does not need to use any kind of formal process. A house provider can't require any formal process another for an individual to request an accommodation. An individual with a disability can request an accommodation verbally or any other format. There are no special or magic words needed to be used. They can't specifically say I am requesting a reasonable accommodation. That does not have to be part of their request.

Housing providers must grant a reasonable accommodation request made on behalf of the individual, made by the individual with the disability or also on behalf of an individual with a disability. You can have third parties or other individuals who can make a reasonable accommodation request on behalf of a person that does have a disability. That could be a medical provider, a family member. Anything of that kind of sort. Also to sad: Housing providers cannot ignore known or obvious disabilities and there may be circumstances where a provider may be required to provide an accommodation when the provider has knowledge of the individual's disability and the need for a particular accommodation.

Next slide, please?

With regard to reasonable accommodations in criminal records: Under federal fair housing and disability laws an individual with a disability has the right to request reasonable accommodation to a housing provider's criminal records screening policy. Most commonly you might see an individual with a disability request a reasonable accommodation to such a policy when either applying for housing or when they are applying to participate in a supportive service, or another activity offered by a housing provider.

Next slide, please.

Also to note an individual with a disability can request a reasonable accommodation to a housing provider's criminal record screening policy prior to the screening taking place, during the actual screening process or after the screening has been done by the housing provider; must consider the request in response to the individual's request prior to making any final housing determination. If an individual requests a reasonable accommodation after a determination already has been made by a housing provider, the housing provider must reevaluate individual's application in light of the accommodation request.

And failure to grant a reasonable accommodation constitutes a disability discrimination under federal fair housing and nondiscrimination laws specifically the Fair Housing Act, Section 504 in the Americans with Disabilities Act.

Next slide, please.

So to kind of evaluate the interplay between criminal history, reasonable accommodations and substance abuse, I posed kind of a hypothetical for us to discuss and review. I will read it out loud. An applicant applies for a one-bedroom apartment in May 2022. The result of her criminal background screening would reflect two misdemeanor drug convictions in January 2021. When questioned about her background, the applicant explains that she started using illegal drugs to manage her hallucinations after she lost her medical insurance and could no longer obtain her prescribed psychiatric medication, the applicant further explains that she is participating in a supervised rehabilitation program and is not currently using illegal drugs. The applicant requests a reasonable accommodation to the housing provider's criminal records screening policy. Based on the facts above, can the housing provider outright deny this request?

Next slide, please. To assess this situation, you have to look at how drug use and addiction are treated under the law. Individuals currently engaged in the illegal use of drugs, excluded from the definition of disability under federal fair housing and nondiscrimination laws and not entitled to protections under those laws. Contrary, drug addiction is a disability and that is recognized under federal fair housing and nondiscrimination laws and federal disability laws provide protection for an individual

participating in a supervised drug rehabilitation program and is no longer engaging in the use of illegal drugs. It also provides protection to an individual who successfully completed a supervised drug rehabilitation program or has otherwise been successfully rehabilitated and who is not currently engaged in the illegal use of drugs or an individual who is not erroneously regarded as engaging in the illegal drug use but is actually not engaged in such use. Based on the scenario given in the previous slide this individual may be entitled to reasonable accommodation and the housing provider cannot outright deny the reasonable accommodation request.

Now, to address kind of interplay between criminal history, reasonable accommodations and the concept of direct threat. I have another hypothetical here to for-- discussion. Again, I will read it out loud.

A tenant has resided in his apartment building for eight years without incident. A new management company recently took over and required that all tenants reapply. The results of the tenant's criminal background screening showed a 15-year-old felony assault conviction. When asked about his background, the tenant explained that he got into an altercation with another individual during a mental health exacerbation caused by a lapse in treatment. The tenant produced records showing a history of compliance with his medication treatment regimen and accolades for community service. However, the management company relies on this conviction to determine that the tenant presents a "direct threat" and issues the tenant an eviction notice. The management company denies the tenant's reasonable accommodation request to their criminal records policy.

Is the housing provider likely to succeed using a "direct threat" argument?

Next slide please.

In order to kind of assess the situation and make determinations under the direct threat standard you'll kind of have to look at factors. The law says the Fair Housing Act does not require that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. However, A housing provider must have reliable, objective evidence that an individual with a disability poses a direct threat before excluding them from housing on that basis. And a provider cannot base this determination on fear, speculation, or stereotype about a particular disability or persons with disabilities in general.

Next slide, please.

I think go back one. I think you skipped one there you go.

So, a determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable, objective evidence. This assessment must consider the nature, duration, and severity of the risk of injury; the probability that injury would actually occur; and whether there are any reasonable accommodations that will eliminate the direct threat. Also, as part of the individualized assessment, a housing provider must also take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat.

Going back to the scenario presented earlier in the hypothetical it is likely the housing provider would not be successful in a direct threat argument in this case. Pointing out a couple of factors, one the conviction as noted in the hypothetical was dated. It was 15 years old. There was no evidence that there had been any recent or further danger posed by the tenant. No conflicts with other tenants or anything of that sort. The particular tenant had an eight-year history of looking at the property without any incident.

The tenant also produced information showing he was compliant with his medication and treatment and also accommodate dated about his community work. All of these things would go in favor of the tenant and would seek to show that the tenant would not be would-- not pose a direct threat to the health and safety of other residents at the property.

Next slide, please?

So just regarding finally some best practices that housing providers could follow regarding reasonable accommodations.

Have fair written and reasonable accommodation procedures that are available in accessible formats. Document reasonable accommodation requests, interactions with applicants and residents, and actions taken to resolve the request. Housing providers should engage in the interactive process with applicants and residents. They should make individualized determinations on a case-by-case basis. They should be reasonable in their assessments and in their determinations. Also, something just to note for those who do receive HUD funding and those who are recipients of federal financial assistance that recipients of HUD assistance and federal financial assistance have an obligation to monitor the compliance of its subrecipients. What this means is recipients are responsible for making sure their subrecipients anyone-- who they give HUD assistance to complete a program or perform a service. Recipients are responsible for making sure their sub-recipients are complying with the law, including the Fair Housing Act Section 504 and ADA. With regard to individuals with disabilities making sure they are not engaged in any activity discriminatory against individuals with disabilities and making

sure that reasonable accommodations are being provided with that I turn it back over to Cashauna.

CASHAUNA HILL: [1:04:16] Thank so much, Anna. Before we move on, I have a quick follow up for you as well another point of clarification if you can give us a quick explanation so we can stay on time, I appreciate it. We have several attendees asking for clarity around substance and alcohol use and disability. When someone will be considered a person with disabilities, and we have several attendees who have mentioned that. They have the understanding that people who were in recovery from substance or alcohol abuse might be considered as a person with a disability under the Fair Housing Act but people who were actively using or abusing these substances would not be considered a person with a disability.

So can you just give a bit of clarity there, please, if you don't mind.

ANNA BRUTON: [1:05:16] Sure. Starting with the latter: So, yes, that is true. So, an individual who is actively using illegal drugs or substances, under the Fair Housing Act, ADA and Section 504 would not be considered a person with a disability and those protections would not apply to them. Versus a person who is in recovery, in a rehabilitation program and also is not currently using the illegal drugs or substances.

Could be considered a person with disability and those protections and the Fair Housing Act, Section 504 and ADA would apply to them the first part of the question I think I would need a little more on that because I am not too sure.

CASHAUNA HILL: [1:05:58] Again, people's question was whether someone has to be in recovery to be considered a person with a disability or can they be actively using or abusing alcohol and other substances and still be with a person with a disability? Is the requirement in order to be a person with a disability, is the requirement that the person be in recovery, I think is just the question.

ANNA BRUTON: [1:06:23] Okay. Let me clarify that. That can get a little conflated because the standards are different. When it comes to alcohol it does not matter whether the person is currently abusing alcohol or were abusing in the past: Under Section 504, ADA and Fair Housing Act they still can be considered a person with a disability receive protection under the law. They do not have to be in recovery when abusing alcohol. When it comes to illegal drugs the standard is different. If you currently are using an illegal drug, again you are not covered by the protects under the Fair Housing Act, Section 504 and ADA. If you are in recovery, say in a rehabilitation program and not using the illegal drugs, then, yes, you could be considered an individual with disability and receive the protects under those three laws that I stated earlier.

CASHAUNA HILL: [1:07:21] Thank you so much, Anna, that is very helpful. Our next panelist, Maggie Donahue will examine best practices for housing providers to screen

tenants and investigators looking to see if there is statistical evidence showing a criminal records policy has a disparate impact. Maggie.

MARGARET DONAHUE: [1:07:47] Thanks. I am Maggie Donahue a trial attorney in the office of General Counsel at HUD and our fair house enforcement division. So very excited to talk about two topics. I don't have time to say everything HUD said about the two topics. You can't find a lot of detail and best practices I am going to cover in the June 10 memo that Demetria McCain mentioned. Please check out that memo for a more fulsome discussion of these topics. So I wanted to start talking about statistics, looking at statistics to try to figure out whether a policy or practice is causing a disparate impact and the overall point I want everyone to take home with this is while there are a lot of resources out there, a lot of statistics out there you can and should look at this is complex and you should get in touch with an economist or statistician early on. For those investigators at HUD who are listening, if you have one of these cases, get in touch with the Office of Systemic Investigation and they may help you connect with an expert early on.

Before you even get into the statistics, before you even talk with an expert, one thing that's very important to do is Tip 1: Identify the policy or practice and get the details. What is the policy or practice? You need to know that before you can tell whether that policy or practice is causing a disparate impact. This may seem pretty obvious, right?

But actually figuring out what the policy or practice is can be complicated. A lot of times you will have a landlord will have a written policy that will be different from what they tell tenants or applicants the policy and that might be different from what the actual policy in practice is. You want to look at all iterations of the policy, identify those, figure out what they are and analyze all of them.

There are also going to be situations where the landlord will tell you we don't have a policy. We farm this out to a third party; they are the ones who do the screening. We don't have a policy; it is their fault if any discrimination is happening. And sort of point the finger and leave you with no answer.

It is true that the landlord might be farming this out and the third party may be someone you want to add as a respondent in this matter. At the same time, it is still the landlord's policy. And, to get to the point of Tip one figuring out what the policy is, a third-party screening company is a great source of information for you to explore to home in on what the policy or practice is so you can conduct interviews, request information from the third-party screening company to help you figure out this information. You can Google or find out how is the third-party company marketing the product to its clients, what are they saying are the criteria can be set, what are they saying about who is actually setting that criteria. So, you get a lot of finger pointing a lot of times and your job as investigator is to figure out what the policy is, step one.

Now Step two is very much related to Step one: Identify statistics specifically tailored to the policy or practice.

And I have a quote from Supreme Court from the landmark decision in Inclusive Community project. That “a disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity”.

So, pointing to the policy or policies causing the disparity is step one. Step two is tailoring your statistics so you can actually show that causation. If you look at HUD's regulations on disparate impact, they also emphasize the importance of showing the causation, causal relationship between the 2. So, when we are talking about how you what you mean by tailoring your statistics specifically to the policy or practice let's take an example. If you have, for example, a policy or practice where the landlord says no one on probation or parole can live in this property, well the best thing for you to find are statistics about people on parole for the populations, not for the people who have been arrested. So as close as you can get to the actual policy, the better.

I just mentioned relevant populations. So, who is the relevant population? Now, the most relevant population is going to be the actual when-- you are talking about screening policies, the actual applicants and the actual people who are rejected. So, if you are lucky enough to be able to figure out the demographics of the people who are applying and the demographics of the people rejected because of a policy, that's great and that's who you want to use.

So, let's say you are able to get this data and it's going to be most likely the case if you have a HUD subsidized landlord required to keep this data. You get this data, and you see, for example, that out of everybody who's applying to this property, 20% of the people are Hispanic. But then let's say the policy rejects people with any felony conviction; then you look into who's rejected because of a felony conviction and you see that 70% of the people rejected are Hispanic.

That is evidence showing there is a disparate impact on Hispanics based on this policy. I want to go back to the point I made at the beginning, consulting an economist or statistician.

Even when you have actual data, the most straightforward data you will get, you want to be consulting with someone, for example, to let you know: Do you have neurofibromatosis numbers? Is your sample size big enough in order to make a conclusion about disparate impact and causation here. Now, a lot of the times, you are not going to have that information ability the dem demographics of who's apply being and being rejected because of policy. Most landlords are not going to have information about the race, ethnicity, disability status of applicants and then who's rejected. So, you are going to need to find other data to see if a policy predictably results in disparate impact on a protected class.

So, what is the relevant population there? If you don't have actual data and you are looking at this predictably results question?

Well, you are going to want to figure out the likely applicant pool so what is the relevant market area? Are people coming just from mostly- from the same county, all across- the United States, coming from a few specific zip codes? What is going on there? Terms of what the relevant market area is. Is there income restrictions in things that make the applicant pool here different from what you might find in the general population? You want to be looking at that information and again here is when it's especially important to be consulting with an expert.

When you are looking on your own for statistics, criminal justice statistics and statistics just about general demographics, specific areas there are a lot of resources and these are in the June 10 Memo in a lot more detail, and they are here on this slide. I want to highlight that it's possible that you still won't be able to find the best data and you might have to actually pick up the phone or send an email to contact state or local government or criminal justice agencies to obtain relevant criminal justice data. I want to show you examples of what you can find on some of the web resources that I referenced in the slide earlier. So, here I have a screenshot from Vera Institute, people like me who like to see charts and graphs. They have a lot of helpful charts and graphs. I wanted to check out the racial disparities this website has related to where I group up in Lake County, Illinois. I typed that in. This chart here shows what disparities exist in the population; who's in jail. As you can see here, there is a huge disparity, only 7% of people in that coin are black but black people constitute 50% those people who are in jail. So, you are can also see LatinX people constitute 22% people in the county but only 17% of the population. There, you can see a difference between what you see locally and what you might see nationally. Now, this is only jail, does not include prison. There is a lot more digging you might have to do. Helpful to see what is out there. Stefon in his presentation mentioned statistics that we at HUD have cited in a couple of memoranda recently that we released related to the disproportionate impact that the justice system has on people with disabilities. You can find the report that we cite on the Bureau of Justice statistics website I want to show a screenshot. You can pull up reports also can pull up the raw data you see in the Download section, data table download it will pull up an Excel spreadsheet. There is just a ton of information on the BJS website here, the last highlight here is the statistic. I think that Stefon mentioned earlier.

Census.gov has lots of information. Also has mapping tools if you are like me and like to look at visuals to help you figure out what's going on. I just highlighted it here. You can look at Florida and demographic characteristics for Florida. You can zoom in and get county specific information. There is there is just a lot of information there if you are looking at the general demographics. I want to move on to best practices for landlords who want to reduce their risk of liability under the Fair Housing Act, and this specifically relates to especially to disparate impact claims. So the first tip and I saw somebody in

the Chat say why hasn't HUD been advocating for this kind of rule? Well, we do suggest this as our first best practice in order to avoid liability under the Fair Housing Act.

Consider not using criminal history to screen tenants for housing at all. We recently released or posted on HUD.gov an article by Calvin Johnson for our PDR division outlining that criminal history is actually not a good predictor of housing success. Now, this is not going to be possible to have a complete to completely not look at criminal history for HUD subsidized landlords and house histories. But a common misconception is there needs to be more checking and more redistribution that actually exist under the statutes. So we recommend for HUD landlords to do the minimum required under the statutes and the HUD regulations in order to comply with those obligations and no more and that will help you avoid liability for doing too much criminal background checking that will lead to disproportionate on those impacted by the criminal justice Step 1 misconception is that landlords are required to conduct general criminal background checks for their programs. This is false. There is only one required criminal background check that FAAs and site based Section 8 landlords are required to do and that is for the lifetime sex offender registry bar. Those landlords can conduct that check by going to the DOJ's website that compiles that information.

It is free. They don't have to use third party screening companies which pose their own issues. They don't have to do broader checks than just the sex offender registry bar.

Another thing that I will say about this issue again because it seems to be something people have been interested in, in the chat, is that there are also limited requirements to establish standards convicted of manufacturing methamphetamine on the premises of federally assisted housing. But conducting a criminal background check is not a required means to screen for those standards. You can have an application question to that effect the other common misconception is that discretion is unlimited for those for HUD subsidized landlords and that is also not true.

There's limitations based on program regulations and statutes, state and local laws, including in Chicago where the Chicago housing authority is which has a local law that requires an individual assessment. I was very interested to hear Mr. Johnson's story and fair housing laws limit that discretion. There are a number of other best practices we suggest in the June 10 memo, limiting your evictions based on criminal activity. Conducting an individualized assessment to determine if the eviction is necessary. Never evicting a person because they are a victim of criminal activity. Another practice we have been hearing become more and more common is the landlord is banning a tenant's invited guest from visiting the tenant based on the guest's criminal involvement this we have seen also impacts families from being able to have family members being able to visit them in their homes. What we know is this practice is actually illegal in most jurisdictions across the United States based on the common law covenant of quiet enjoyment that tenants have. I am running out of time, so I am going to have to go quickly here. Now we have a number of if you do choose to use criminal records

screening policies a number of steps you can take to avoid potential violations of Fair Housing Act. There are a lot of them. I refer you to the June 10 memo to take a look at them we do talk and conduct an individualized assessment. I believe Stefon talked about this in his presentation so I won't get into a lot of this but I will say that that should be limited to times in which you have evidence that the criminal activity is going to impact the health and safety of the community and only then should you be taking that next step then conducting an individualized assessment. One of the reasons is because of a report that came out of Cashauna's agency from 2015 they found house providers using discretionary records screening policies doing case by case analysis they favored white applicants over black applicants 50% of the time. We talk about individualized assemblies to avoid fair housing liability in terms of disparate impact you have to be careful you are doing that assessment in a fairway, not letting biases creep in and limiting to when you really need to do it, when you really have a crime that you have determined that's recent enough and there is a pattern where you really have evidence it is going to impact things. I think I am out of time. I am going to turn it back to Stefon and Cashauna thank you for the opportunity to talk about this topic.

CASHAUNA HILL: [1:26:47] Thank you. We can get into more best practices during the Q & A session. There have been questions already about the very point you raised which is how do we control for racial disparate that might happen if landlords are using only individualized assessments, when they are thinking about.

So we can discuss that more once we hear from our final panelist as we move to Natalie Maxwell. One final reminder that the slides from today's event are already available on the NFHTA Forum page of HUD Change Exchange we are going to move to Natalie Maxwell who will discuss the importance of evidence and provide a practical perspective on how to investigate these types of case. Natalie.

NATALIE MAXWELL: [1:27:44] Thank you, Cashauna for folks not familiar with the national housing law project our in addition is to advance housing justice for poor people and communities. We do this by strengthening and enforce the rights of tenants, increasing house opportunities for under verve served communities preserving and expanding the nation's spliff safe and affordable homes. As part of our work we provide technical assistance to housing attorneys, tenant organizers and housing just cities advocates. So some of the examples I am going to share today are taken from those examples from folks that we work with.

Attorneys from HUD have talked about the different types of standards of proof for fair house claims. So what I am going to do is take deeper dive into the evidence that may be used if you are trying to investigate these types of claims as well as provide some real world examples.

So, as Stefon mentioned, the disparate treatment or discriminatory intent cases under the Fair Housing Act involve intent to discriminate. This intent can be proven by direct

evidence, by the use of testing or burden shifting method that Stefon talked about. With regard to direct evidence. In 2022, we have lots of opportunities where people provide video or audio recordings of things that happened to them and those recordings include statements where we are talking about the creation of some of these crime-free housing programs. Oftentimes there have been meetings taking place at city councils or commissions that have been recorded and that are that have been provided online through Zoom and remain available.

You may be able to? Investigating these claims get access to that information. Even if that information is not posted online, it might be available through public record requests.

Another major way that these cases are proven is through documentation. Especially publicly available documents that can be obtained during present investigations or is part of testing. So that could be photographs. It could include documents that reflect the policy.

As Maggie mentioned, however, sometimes the documents that are reflected in the policy are not necessarily what the actual criminal record screening policy is but it's a good place to start. Any documents that reflect the adoption or passage of a criminal screening program or policy and any amendments to it.

There may be internal or external communications by relevant parties, by the housing provider. So, including denial of applications. There could be correspondence we have seen in the creation of crimefree housing programs, recruit landlords to participate, communication from city officials.

Or from the police department as to why they should be participating in those programs and obviously also websites.

This is an example of a property record that was publicly available. It is recorded in the Property records. What it is, it is part of the governance of a homeowners association for a homeowner in the association to rent out their property, there is a list of requirements that they have to include in any leases that they have as well ascertain screening that they are required to do. And so in this example the dash and this is just a screenshot because the policy is much longer than this-- policy requires that any applicant convicted of a felony within the ten years immediately prior to the application date shall be disapproved and similarly any applicant convicted of a criminal charge within the ten years immediately prior to the application date which charge would constitute a felony in the State of Florida shall be disapproved. So this is an example of when both Richard Cho and Stefon Woods were talking about blanket bans or overly inclusive bans. So we are still seeing these documents which is one of the reasons I wanted to highlight it. Even though as was mention, HUD issued guidance several years ago, saying that these types of blanket bans are not permitted.

And so it's also worth noting here I-- am not going to read the whole thing in the interests of time. But there is nothing in this policy that references any protected class. So this is where the direct evidence becomes important; because these policies usually are not passed in a vacuum. Especially in recent years. If for example there were witness statements reported by the complainant or someone who had applied to live in this particular property, there may be intentional discrimination that can be inferred from the statements, including any statements based upon stereotypes against protected classes. This wasn't the case here, but if in addition to having this policy, the minutes of the homeowners association board meeting included statements like we're trying to address the influx of urban communities into our neighborhood . . . we are starting to get closer to having intent to exclude people based on race from a particular community. The use of urban communities. In this example, we have heard that type of coded language.

Even where the folks passing the policy may not explicitly reference race, they may reference what is commonly understood, coded language.

The next example here is an example taken from a management company that provides services to a number of private landlords and though encourage the use of this crime-free lease addendum.

I am going to highlights paragraph two, resident any member of the resident's household or a guest or other person under the resident's control shall not engage in any act intended to facilitate criminal activity including drug related criminal activity on near or within sight of the premises. This is an example of broad-based language where this particular policy for example could have an impact on survivors of necessary particular is violence or intimate partner violence whereby there is some criminal activity that occurs in the home; and we continue to see instances where the entire household is being evicted. Even though there are clearly less discriminatory ways to address that situation. As was mentioned earlier, with the federal housing programs, such activity would be prohibited by the Violence Against Women Act.

This last example I will share with you here is part of a crime-free housing program and some of us mentioned these. I want to make sure folks know what I am talking about when I say that. Crime-free housing programs have really proliferated across the country in many jurisdictions, both urban and rural. And they typically require property owners to execute a crime-free lease addendum with tenants. They require mandatory criminal background checks of applicants which as we just heard from Maggie is really not a best practice. They also involve some mandatory landlord training and the participation in these programs can be either mandatory or voluntary.

In addition, we see the crime-free housing programs often used in conjunction with the adoption of nuisance property ordinances and those ordinances have a broad definition

about what nuisance conduct is.

And basically, require the landlord to take certain steps to abate the nuisance. Otherwise, the landlord may be subjected to potential fines, fees, condemnation or for jurisdictions where there is a property license, the loss of property license.

So, this is a lease that was obtained through a public records request. It also includes a list of all of the properties participating in the program and so, as part of the investigation, there was some mapping of the locations of where these properties were located to overlay that with the demographics of the area. So, as other folks mentioned another way to show discriminatory intent is to show the housing provider is treating protected classes differently.

There are a few examples here. I am going to move on to disparate impact in the interests of time.

So disparate impact can be proven using the same types of evidence under a disparate treatment case but also there is a place where we see the use of statistical evidence. And so I wanted to just provide talk a little about an example of how testing can be used in these cases. So, there is a report that was created by the Equal Rights Center Unlocking Discrimination was the title. What they did with that testing was, -let- me back up. So the Equal Rights Center is a private organization. As part of their Fair Housing Act they engage in testing to uncover whether housing discrimination is occurring. Anyone not familiar with IDF, it is a secret shopper for housing discrimination. What they did was look at whether white and African American female testers, who were posing as having similar backgrounds, were treated differently on the basis of race when they went to apply for housing in the DC area through that they were able to gather information about criminal records screening policies and procedures that local housing providers had in place. And so that testing revealed that in fact there was discriminatory treatment based on race.

With regard to the types of statistics that might be used, highlighted a few cases here. So, I am just going to touch on One then folks can read more if they're interested from the slide deck. The first case Jackson versus Tryon Park Apartments is a New York case where the complaint relied on some EEOC guidance that cited to national statistics about arrest and general population rates of African Americans.

The DOJ estimates the rate of expected the people impacted by the policy based on race and ethnicity and also relied on New York State data on incarceration rates and prison release rates. This data was sufficient as to survive a motion to dismiss. Which, when these cases get filed in court, often is the first step in testing whether or not the case will be allowed to go forward.

Other evidence of disparate impact that it is important to try to obtain to the tenant

selection plan; any applicant data, census data, eviction data, tenant files.

With regard to the mitigating factors, so on this slide I have included information act mitigating factors related to criminal history such as the nature of the crime, the circumstances surrounding the criminal conduct; the ages at the time of the conduct, et cetera.

But in addition, it's worth noting that other mitigating circumstance that is we have talked about so far today are around whether that criminal history is related to the disability or for federally assisted housing, whether that criminal history is related to an incident of domestic violence, intimate partner violence or sexual assault or other gender-based violence that is covered by the Violence Against Women act. Cashauna I don't know if we have time to do this last poll.

CASHAUNA HILL: [1:43:44] You know what Natalie I don't think we do. We have a ton of questions to get to that I am going to try to distill down. But if there are a few closing words you want to say, please go ahead.

NATALIE MAXWELL: [1:43:59] I will leave you with this. I have created a list of questions in the slides with respect to evidence in the parts of the housing process where the criminal screening comes up in the tenant screening/admissions policy. We also see this come up in the eviction context and finally with crime free housing programs and nuisance ordinances. Since folks will have the slide, I will go ahead and leave I had there and happy to answer any questions.

CASHAUNA HILL: [1:44:37] Thank you so much, Natalie and thank you so much to all of our panelists for your time today and presentations. With that we are going to move into the question-and-answer portion of today's forum. We don't have a lot of time so we are going to jump right in.

The first question I would like to pick back up on something we were discussing during Maggie's presentations about assessment. Attendees wrote in they were looking for best practices and or policies, information around how they can craft their policies. So that we can leave having given housing providers practical advice and best practices I would like to specifically ask about individualized assessment. From everything discussed today, it seems like individualized assessments might be helpful in terms of not violating the Fair Housing Act but as we heard from Maggie and know from the experiences of many lawyers and of course people directly impacted all across the country, the individualized assessments still leave a risk of housing providers using discretion in discriminatory way. Using things given to white people, people of color are not getting. How can we see that discretion does not lead to denial for people of color? How can we assure that doesn't happen?

And if nobody would like to jump in I will do something I never have done in my role as

moderator. I actually have thought and worked quite a bit on this exact question. So I will take a few moments to share what we provide to landlords when we get this very same question. So it feels important to make sure that landlords start from a place of crafting screening policies that are going to provide equal access to house opportunity right? So approaching the policy as a way to ensure that everyone has access to house rather than approaching the policy as a way to keep people with the arrest or conviction in their backgrounds out of house. Landlords should also consider creating policies that have reasonable and defined lookback periods if they are going to consider convictions and they should, of course as we have heard today, not consider arrests.

And they should have policies that don't contain broad bans against certain conviction like fell any conviction.

To the point about individual circumstances: If they are going to be considered, we always suggest that they should be paired, the individual circumstances, with defined screening categories and criteria for admission. What that might mean is that if a landlord is going to say they consider an individual circumstances-- they clearly should state in writing what those individual circumstances are.

So, people who are applying should get information from the landlord that says we will look at if you have any conviction s in your background, we are going to look at the length of time since the conviction, maybe. Or we will look at whether or not you have completed any sort of treatment. We will look at your ties to the community. So, rather than just acting on vibes or feelings about an individual which, again we know can allow some discrimination to creep in, housing providers should have set standards for the circumstances that they would consider and of course the biggie is always to make sure to apply the policy consistently across racial groups. So that is what I would say about this topic in terms of using individualized assessments. Does anyone else have anything to add on that?

MARGARET DONAHUE: [1:48:59] I want to put in a plug for the June 10 Memo. There are actually a couple of points that memo makes about how you can try to make sure that you're not doing more discrimination when engaging in the individualized process. What I alluded to before, it says individualized reviews should be utilized only in clearly delineated circumstances when the individual would otherwise be excluded because of current reliable evidence that the specific crime at issue would threaten safety and or property.

And I think that is one of the most important things.

CASHAUNA HILL: [1:49:37] Thank you, Maggie that is very helpful. It is, yes, critically important that people concerned object whether their policies violate the Fair Housing Act should definitely take a look at that memo. It does have some incredibly helpful information in it.

We will move on and Stefon we actually had several questions for you. Around the test that you shared and specifically with regard to step 2 of the disparate impact test. The attendees who asked about this I think are hoping to get a sense of what time E. type or amount of evidence must be provided to show that a challenged policy or practice is necessary. We had a question about whether step two was going to require that a housing provider show that if they didn't have this policy, safety would be worse than it is. So, just how can people meet that burden, really seems to be the question. Do you have any thoughts on that?

STEFON WOODS: [1:50:54] Yes, just a few. I think that it's going to be a very, it's difficult to give an exact example of what it looks like because it depends on each case. I think the main take away is house providers cannot just say it is going to enhance the property or this is going to exclude very generic blanket statement. If there is proof that certain issues are present at the property specific to whatever crime that is at issue that a policy that the landlord is employing in its policy then they have to show how those, like the nexus between how do you achieve safety and it if it's actually being achieved was you are employing this policy. So I think it's just really going to be dependent on each case. The investigator has to look at reliable evidence. Has to really question what the landlord is producing, to see if this is in fact what the issue is.

I hope that is a little helpful.

I don't know if Maggie or Anna you have anything to add to that. That is really the crux of the issue with that.

CASHAUNA HILL: [1:52:02] Anything to add?

MARGARET DONAHUE: [1:52:05] I don't think HUD has made any official statements about what would be enough to the specifics of do you need to produce a peer reviewed article that says there is evidence that people are going to reoffend if they have XYZ crime during this period of time. HUD hasn't given that specific guidance out there.

There are court cases where the judges have said that landlords are not liable for criminal acts for not doing a background check because the criminal justice system made a judgment that the person is not a threat to safety. They have been released into the community. So there has been cases where court versus said they couldn't have the landlord couldn't know that this person would be a threat. But HUD hasn't actually provided specifics on what you could show to say that there would be.

CASHAUNA HILL: [1:53:11] Thank you so much, Maggie. Another question about HUD's standards is from an attendee is asking about whether HUD established a threshold in order to deem a policy discriminatory. If, for instance, a particular policy meant that

30% of African American applicants and 20% or 25% of LatinX applicants were kept out, would those percentages be high enough to create a disparate impact issue? Is there a standard for how high the percentage of excluded people needs to be.

MARGARET DONAHUE: [1:54:03] I can touch on this too. When we wrote the disparate impact rule in 2013 it was something we engaged with commentators were making on whether or not it would be appropriate to give a certain threshold to establish a very specific threshold for what would bring you I cross the line to show discriminatory effect, what we ended up seeing then is that because there are so many different types of cases that fall under disparate impact it's really hard to establish that threshold. When you look at employment context, the courts have recognized that everything's so case specific, so you really have approach it on a case-by-case basis to see what is going to cross that threshold to show the causal disparate impact. So . . .

CASHAUNA HILL: [1:55:04] Thank you so much.

Thank you, Maggie. That is very helpful. I do also want to ask about enforcement options. I think unfortunately this may have to be our last question. So, we had many attendees write into the Q & A box that they're aware of HUD assisted properties or public housing authority sites.

Where the best practices may not be complied with. And so the question is if any of you know whether HUD is monitoring housing authorities' compliance with the memos that we've discussed or the best practices that we have discussed.

And I think this is really this question is rooted in Mr. Johnson's experience that we heard about earlier, where a large housing authority has denied him access to housing based on his background. So, is anyone aware of any monitoring that is taking place to ensure compliance?

STEFON WOODS: [1:56:25] I want to actually call on Kathleen Pennington who is our Associate General Counsel for Fair Housing Enforcement. I have don't want to overstep and state what our process is. Richard Cho mentioned we were in the process every implementing the Secretary's memo at least to identify areas where there is some sort of inconsistency in terms of the guidance we are giving, that the agency is giving to HUD assisted housing providers. There is a possibility that is a natural outflow of that. I also want to give Ms. Pennington to speak on that if she has anything to add.

KATHLEEN PENNINGTON: [1:57:08] Thanks. I think you should file complaints; you should let us know about these situations. I know we were all looking we interest at the comments that people were making in the chat about situations where they have seen this I would say, definitely bring this information to us because we are very interested in handling these types of cases and I don't know if Demetria want to add anything to that, I see she is still on. I feel certain she agrees about us on that. But if you want to say

anything, please do.

DEMETRIA McCAIN: [1:57:44] I would concur with the statements. This has been great to the presenters. Excellent.

CASHAUNA HILL: [1:57:56] Thank you, Kathleen and Demetria and Stefon for the response. Natalie in terms of enforcement options if people in their various communities are aware of property owners that have screening procedures that may have a disparate impact on the basis of race or if they are aware of broad bans against anyone who has an arrest or conviction in their background, what kinds of enforcement options are available for those folks?

NATALIE MAXWELL: [1:58:35] In those cases folks still have the ability to file complaints with HUD. HUD will investigate any allegations either against private housing providers or federally assisted housing providers. I think it's also important for folks to know that there are several fair housing agencies across the country that are funded to investigate fair housing cases. Like Cashauna's program, like the Equal Rights Center that I mentioned. So if they have questions they can reach out to their local fair housing center. In addition, there are Legal Aid programs that are funded across the country some of which have income restrictions so, folks should be aware of that. But they can also help. Especially because as we mentioned in the presentation, some of these cases come in are identified when someone receives a notice for eviction. And so those attorneys may be able to assess those cases and in some cases will then, once they have dealt with that immediate eviction threat, refer them to the local fair housing partner to further work with them to file complaints and last but not least since I know we have attorneys on the call: If people have an attorney who is representing them they can file a lawsuit in state or federal court. And finally, if they are in a jurisdiction that has local fair housing laws or ordinances they can file complaints with their local fair housing administrative agency.

CASHAUNA HILL: [2:00:29] Thank you so much Natalie for that response. And thank you to all of our panelists today for a very insightful conversation. It is an honor to have you with us and we thank you very much for your time. Thank you also to all of you for your participation in today's forum. We hope you will join us for our next event. Please check out NFHTA website for the description and important information on register for upcoming forums. Please also connect with the National Fair Housing Training Academy on LinkedIn for insights and information on upcoming events including future forums and courses. Thanks to everyone who made today's event possible including, as always, our American Sign Language interpreters. Finally, be on the lookout for a survey which will pop up when the training ends. The survey allows you to provide feedback on today's event. Your feedback is critical to improving these forums. It shouldn't take very long to complete the anonymous survey and we highly appreciate your input. Thank you. We look forward to seeing you at the next NFHTA forum. Take care everyone.