



The Housing Conference
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Hearing Best Practices: A Due Process Review and HUD Updates

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TODAY'S ROADMAP

- Due Process Review
- New HUD Guidance on Criminal Screenings/Terminations
- 2016 Rule Streamlining Public Housing Hearing Process
- Procedures Governing the Hearing
- Effect of Decisions

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Due Process Review

Principles

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Due Process Principles

- U.S. Constitution – government cannot deprive a person of life, liberty or property without due process of law – 14th Amendment
- The Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits--
Goldberg v. Kelly

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Due Process Principles-- Elements of Due Process

- Adequate notice
 - Must specifically state reasons for the decision enough to allow the person to understand the who, what, where, and when
- Opportunity to defend
 - Notice must state the authority (citation) on which the PHA relies to reach its decision

Use Proper Citations to Support Termination Notice

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Due Process Principles Notice-- Citations HCV Program

- 24 CFR 982.551 *Obligations of participant*
- (l) *Crime by household members.* The members of the household may not engage in drug-related criminal activity or violent criminal activity or other criminal activity...

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**Due Process Principles
Notice--Citations**

- 24 CFR 982.553(b)(1)(i) *Denial of admission and termination of assistance for criminals and alcohol abusers.*
 - (A) Any *household* member is currently engaged in any illegal use of a drug; or
 - (B) A pattern of illegal use of a drug by any *household* member interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents

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**Due Process Principles
Notice—HCV Citations**

- *What supporting authority (citation) can you use instead if the crime is not by a HH member?*

Serious or repeated violations of the lease

24 CFR 982.551 *Obligations of participant.*
(e) *Violation of lease.* The family may not commit any serious or repeated violation of the lease.

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**Due Process Principles
Notice—Citations
Public Housing Program**

- 24 CFR 966.4 + *lease*
- *May terminate for criminal activity by "covered person"*
- *Covered person* means a tenant, any member of the tenant's household, a guest, or another person under the tenant's control
- *Tenant responsibilities: To assure that no tenant, member of the tenant's household, or guest engages in...*

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Due Process Principles
Notice— HCV citations
Debt Repayment Agreements—failed to enter


24 CFR 982.552(c)
Not:
(vii) If the family breaches an agreement with the PHA to pay amounts owed to a PHA, or amounts paid to an owner by a PHA.
Instead Use:
(v) If the family currently owes rent or other amounts to the PHA or to another PHA in connection with Section 8 or public housing assistance under the 1937 Act.
(vi) If the family has not reimbursed any PHA for amounts paid to an owner under a HAP contract for rent, damages to the unit, or other amounts owed by the family under the lease.

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Due Process Principles
Notice All Programs

- *May only terminate on grounds cited in the regulations.*
- *May only terminate based on grounds stated in the notice.*

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Due Process Principles--

Other Notice Requirements

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VAWA Notices

- All notices of denial and termination must include explanation of rights under VAWA and VAWA self-certification form HUD-5382
- Must be made available in multiple languages per LEP requirement
- Must be in accessible format

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VAWA Notice PIH 2017-08

- Issued May 19, 2017
- Provides detailed guidance for implementing requirements in the Final Rule for VAWA 2013
- Offers useful examples and scenarios, and provides clarifications on certain aspects of the rule, including scenarios that would involve hearings

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Decision to Deny or Terminate Based on Criminal Conviction Records

- Opportunity to Dispute
- Per 24 CFR 5.903, 24 CFR 960.204(c), and 24 CFR 982.553(d)
- If PHA obtains criminal record and determines to deny or terminate based on these records, PHA must:
 - Send notice of *intent* to deny or terminate
 - Provide subject of record and HoH with copy
 - Give opportunity to dispute accuracy or relevance of criminal records
- **Before denial or eviction**

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Notice of Denial or Termination

- **Notice should:**
 - Clearly state reason for denial or termination
 - State process and deadline for requesting next level review
 - Include RA statement
 - Include right to request an interpreter
 - Must include explanation of VAWA and VAWA self-certification form HUD-5382

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Terminations
Due Process Principles—
Elements of Due Process

- **Hearing prior to termination**
 - **The hearing must be fair:**
 - Person must have an opportunity to be heard
 - Right to confront witnesses
 - Right to representation
 - Impartial decision-maker...

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Due Process Principles—
Elements of Due Process

- **Hearing prior to termination**
 - **The hearing must be fair:**
 - Decision based only on evidence presented at hearing
 - Decision that includes the reasons and evidence relied upon

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Due Process Principles—
Elements of Due Process

Ex Parte Communications

- This is a contact between the decision-maker and a party (or other on behalf of party), regarding matter under review, without notice and opportunity for all parties to participate
 - No special influence
 - All parties have opportunity to rebut
 - All facts are on the record

Hearing officer must avoid even the *appearance* of ex parte communications – before, during and even after the hearing

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Due Process Principles—
Elements of Due Process

- Family must be given opportunity to examine, *before* the hearing, any PHA documents, records and regulations relevant to the hearing
 - Family must be allowed to copy at family's expense
 - If PHA doesn't make document available upon request by family, can't use at hearing

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Due Process Principles—
Elements of Due Process

- Limited English Proficiency (LEP) obligations apply to hearings
 - PHAs must offer competent oral interpretation, free of charge, upon request

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Purpose of Reviews and Hearings

- Participants (HCV) and tenants (PH) have deeper hearing rights than do applicants
 - Exception is applicant denial related to restrictions on noncitizens

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Purpose of Reviews and Hearings

- Practical principles:
 - PHA needs to do it right – proof of good faith
 - Don't skip any steps
 - Respect the family and the PHA
 - Written decision is critical

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New HUD Guidance

Criminal Screening/Terminations

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Application of FFHA-- Criminal History

- Unlawful under the Fair Housing Act to:
 - Apply policy or practice that restricts access to housing on the basis of criminal history (which) has a disparate impact on individuals of a particular race, national origin, or other protected class
 - Instead, must ensure policy or practice serves a substantial, legitimate, nondiscriminatory interest of the PHA
- PHAs no longer have the option to *not* consider the circumstances.

OGC Guidance 4/4/16

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Application of FHA to the Use of Criminal Records

- PHAs must scrutinize their policies to ensure they do not create a disparate adverse impact on protected classes
- Policy must distinguish between “criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.”

Model Policy:
Notice PIH 2015-19

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Arrests

- Arrests not resulting in convictions may not be used as the sole basis to exclude people from housing
- Arrest records do not constitute proof of past unlawful conduct and are often incomplete
- Cannot prove that the exclusion actually assists in protecting resident safety and/or property.

PIH Notice 2015-19
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HUD Regulations Regarding Termination

- HUD regulations require terminations in some situations:
 - Must terminate for a family evicted for serious violation of lease
 - However, PHA decision is subject to consideration of reasonable accommodation
- Mostly, terminations are discretionary decisions of PHA

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2016 Rule Streamlining Public Housing Hearing Process

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2016 Rule Streamlining Public Housing Hearing Process

Purpose of the rule was to remove overly prescriptive process requirements for PH grievances, where not mandated by law

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Public Housing—Streamlining Final Rule

- Final rule eliminated regulations on:
 - Specific procedures to request hearing
 - How a PHA may choose a hearing officer, including the requirement to consult with residents about the PHA choice for the hearing officer
 - Consequences for failure to properly request a hearing
 - How a grievance must be submitted in the informal settlement process...

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Public Housing—Streamlining Final Rule

- Final rule also eliminated regulations on:
 - Requirement of escrow deposit for grievance related to rent
 - Hearing to be conducted informally
 - Requirement that a PHA must make available for inspection a previous hearing officer decision for prospective complainants

All these requirements are now important discretionary decisions in the ACOP

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Public Housing—New Procedure

- PHA must maintain a log of all public housing hearing decisions and make that log available upon request of the hearing officer, prospective complainant, or a prospective complainant's representative

24 CFR 966.57

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**Public Housing--
Informal Settlement for Tenants**

- First step in the grievance process
- Grievance request shall be personally presented, either orally or in writing to the PHA office or office of the project in which tenant resides

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**Public Housing--
Informal Settlement for Tenants**

- PHA must provide tenant with a written summary. Summary must:
 - Specify names of participants
 - Date(s) of meeting
 - Nature of the proposed disposition of complaint and specific reasons
 - Specify procedures by which grievance hearing may be obtained

24 CFR 966.54
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**Public Housing--
New Requirements**

- Grievance procedures must be in lease or references in all tenant leases
 - At least 30 days notice to tenants and resident organizations with proposed changes in the PHA grievance procedure, with opportunity for written comments
 - Comments must be considered

24 CFR 966.3 + 966.52
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Public Housing-- Definitions & Requirements

- **Hearing officer** – an impartial person or persons selected by the PHA, other than the person who made or approved the decision under review, or a subordinate of that person
 - Does not need legal training
 - **Hearing officer**
 - PHAs must include their policies regarding the selection process of hearing officers and hearing panel members in the tenant lease
 - Changes to the lease are subject to a 30-day comment period
- 24 CFR 966.53(e) The Housing Conference

Public Housing-- HUD-Declared Due Process Determination

- Grievance procedures applicable unless excluded because of due process determination
- Due process is a determination by HUD

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Public Housing— HUD Due Process Determination

- If HUD-declared due process, PHA may evict through court and may bypass the grievance procedure for:
 - Any criminal activity that threatens health, safety, or right to peaceful enjoyment of other tenants or PHA employees
 - Any violent or drug-related criminal on or off
 - Any criminal activity that resulted in felony conviction of a household member
 - OGC guidance
- 24 CFR 966.51

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Public Housing-- Due Process Determination

- If a state's due process determination is rescinded by HUD, PHAs may establish expedited grievance procedures to deal with the due-process categories

24 CFR 966.52 + 53

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Public Housing-- Expedited Grievance

- Examples of provisions under an expedited grievance procedure could include:
 - Requiring the tenant to request a hearing within a shortened deadline
 - Bypassing the informal settlement step
 - Scheduling and holding hearing within a shortened timeline
 - Hearing decision issued within a shortened timeline

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Public Housing— Notification to Post Office New Requirement

- Note to PHA: When PHA evicts for criminal activity, PHA must notify the local post office serving the unit, that the family is no longer residing in the unit

24 CFR 966.4(l)(5)(iii)(B)

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Procedures Governing the Hearing

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Procedures Governing the Hearing

- Reasonable accommodation reminder:
 - Could include qualified sign language interpreters, readers, accessible locations, or attendants
 - PHA accommodate person who can't write due to disability
 - If resident is visually impaired, any notice required under regulations must be in an accessible format

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Procedures Governing the Hearing- Reasonable Accommodation

RA issue can arise for an applicant, participant, tenant, resident as part of the tenancy which becomes a hearing issue

RA issues can arise for hearing parties

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Reasonable Accommodation

- **Definition:**
A requested change, exception, or adjustment in rules, policies, practices, or services that may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling

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**The Reasonable Accommodation Process—
Direct Threat**

- **The Act does not protect:**
 - Persons currently engaging in current illegal use of controlled substances.
 - PWD whose tenancy would constitute a "direct threat" to the health or safety of other individuals or result in substantial physical damage
 - Unless the threat can be eliminated or significantly reduced by reasonable accommodation

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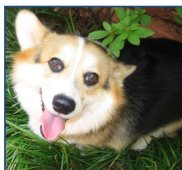
**The Reasonable Accommodation Process—
Direct Threat**

- Determination of direct threat is an individualized assessment based on reliable objective evidence
- **Must take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat**
- May obtain satisfactory assurances that the individual will not pose a direct threat during the tenancy

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Reasonable Accommodation-- Service Animals

- Service animals are not pets
- Same process as for any accommodation
- Can't require special training



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Procedures Governing the Hearing-- LEP

- PHA must comply with LEP Guidance
 - Must offer competent oral interpretation, free of charge, upon request
 - PHA could use language line
 - For written translation, PHA should do the four-factor analysis

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Effect of Decisions

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Effect of Decision

- PHA is not bound by a hearing decision:
 - For which the PHA is not required to provide a hearing, or that otherwise exceeds the authority of the hearing officer
 - Contrary to HUD regulations or requirements, or otherwise contrary to federal, state or local law

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Effect of Decision


- If PHA determines that its not bound to a decision, must promptly notify family with reasons
 - PH regs state the board makes this determination
- Decision by the hearing officer never constitutes a waiver of the family's right to a trial or judicial review

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RAD Hearing Requirements —

- PH Conversions
 - Basically, public housing hearing requirements survive the conversion to RAD
- PBV
 - PBV mostly follows HCV regulations
- PBRA (Multifamily)
 - Procedural rights survive the conversion to RAD

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Questions???

Visit NMAreferences.com for
PIH notices and other HUD
guidance discussed in this
presentation

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