

**The Bronx  
Defenders**

**Redefining  
public  
defense.**

Written Testimony by Runa Rajagopal<sup>1</sup>, The Bronx Defenders  
NYC City Council

Committee on Public Housing jointly with the Committee on Oversight & Investigations  
**Oversight:** Examining DOI's Report on NYCHA's Permanent Exclusion Policy & Int. No. 1207:  
In relation to reporting on persons who have been permanently excluded from public housing.

Monday, April 24, 2017 at 10:00 am

My name is Runa Rajagopal. I am the Managing Director of the Civil Action Practice at The Bronx Defenders. The Bronx Defenders thanks the Committee for the opportunity to submit comments and testify with our client, Maria Lopez, regarding the New York City Department of Investigation's Report on NYCHA's Permanent Exclusion Policy and on Int. No 1207.

#### **About The Bronx Defenders**

Founded in 1997, our organization is nationally renowned for providing holistic and comprehensive legal services, which include civil, criminal and family defense, social services and community programs to approximately 35,000 low-income families in the Bronx each year. Our innovative, interdisciplinary, team-based model operates on multiple levels to address how an arrest and criminal charge alone can have a devastating impact on a person's life. In New York State, indicative of the rest of the nation, more than 1 in 3 people arrested are never convicted of any crime or offense, yet they suffer drastic so called "collateral" legal consequences and enmeshed penalties as a result of their arrest. This collateral damage, and the instability that results, can be far more devastating than any of the direct penalties that accompany the criminal conviction.

The Civil Action Practice is designed to defend against the many enmeshed civil penalties that arise out of a person's arrest. We fight for our clients, the majority of whom are poor or working poor men, women and youth of color who are overpoliced and disproportionately arrested and incarcerated, *not* to be defined by and punished simply for an arrest or a conviction. Alleged criminal conduct in public housing can lead to a whole host of devastating civil consequences, not only for the person who stands accused but for her entire family. Every year, we represent hundreds of public housing residents facing evictions on the basis that they themselves or a family member was involved in alleged criminal activity. In addition to the legal services we provide, we are a member of the permanent exclusion coalition, and have been working with

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<sup>1</sup> With support from Karen Cornelio & Sharitza Lopez-Rodriguez, Civil Action Practice.

NYCHA, alongside community based reentry organizations, tenant groups, legal services providers and other stakeholders to reform NYCHA's permanent exclusion policies.

**We Urge the Council and NYCHA to Reject the Department of Investigation's Report Recommendations.**

On March 28th, 2017, the New York City Department of Investigation (DOI) issued a misleading and misguided follow-up report on the New York City Housing Authority (NYCHA), concluding that it is "failing" to remove "dangerous criminals" from public housing. The one sided Report pushes for a one size fits all, punitive approach to questions of public safety in NYCHA and makes recommendations that call for the ineffective and draconian policies of years past that **are antithetical to current criminal justice reform and reentry efforts across the country**. These recommendations include: increased NYPD policing of public housing residents, evicting more families for purported connection to family members accused of a crime on or off the premises, whether the family member actually lives in public housing or not, and increasing enforcement of harsh permanent exclusion and other punitive policies, including expanding NYCHA's trespass policy, making it harder for unrepresented tenants to vacate a default judgment and mandatory transfers to downsize to smaller apartments.

The report is problematic on several fronts. Though it is written under the guise of making the public housing community safer for those who live there, no residents, community members, advocates or other experts were interviewed or consulted for this report; in particular, for the cases that were cherry picked as examples of the failure of the current practice, the parties to those cases were not interviewed or consulted. It also assumes, without asking and without any evidence or research that permanently excluding an individual or evicting a family is effective for increasing public safety. It also assumes that aggressive pursuit of permanent exclusion outweighs all of the immense costs to individuals and families.

All contentions of the report and case examples are based on arrest reports and paper files, and the report assumes that everything in the arrest report is true. No consideration is given to the criminal court process that happens after an arrest, the rights of the accused or the dispositions of criminal cases. All in all, the Report fails to fully investigate or recognize the needs and interests of public housing residents or their priorities.

**Increasing Evictions of Families and Individuals when a Family Member is arrested or convicted of a crime does not make communities safer, but rather, would only worsen NYC's homelessness crisis.**

The DOI assumes that evicting more families like Ms. Lopez's will make public housing safer. However, there is no evidence that indicates displacing families will do anything except exacerbate NYC's housing and homelessness crisis. On the contrary, research has shown that

housing is one of the most fundamental building blocks of a stable life and it has been proven that lack of access to housing and homelessness actually *increases* the risk of incarceration and subsequent re-incarceration.<sup>2</sup> Housing stability, family support and strengthened community ties reduce recidivism and aid in an individual's rehabilitation and reentry. That is what actually makes communities safer.

**Reject the “Once an Offender, Always an Offender” Stereotype Put Forth by the DOI.**

The Bronx Defenders represents countless individuals and families in the Bronx who call NYCHA home. Like Ms. Lopez, because of their contact with the criminal justice system, tenants and their families face termination and eviction from public housing and a whole host of other enmeshed, unfair consequences. Even after the family member has served his debt to society- like Ms. Lopez's son- formerly incarcerated individuals and their families continue to be punished in perpetuity due to lack of access to housing, employment and other resources. Changes in the laws<sup>3</sup> and recognition of the barriers to reentry are slowly changing this reality, however, the DOI's report represents a step back in its call for punitive policies, perpetuating the stigma of criminal justice contact and pathologizing individuals with convictions.

**NYCHA should maintain its discretion to make individualized determinations about safety and the DOI's recommendation for a One Strike Approach should be rejected.**

The U.S. Department of Housing and Urban Development (HUD) gives public housing authorities broad discretion in establishing and adopting written policies for admission of tenants and for screening family behavior and suitability for tenancy. *See* 24 C.F.R. § 960.202(a); § 960.203 (c)(1). HUD permits public housing authorities to consider a person's criminal history involving physical violence to persons or property and other acts that would adversely affect the health safety or welfare of other tenants. In fact, there are only two explicit bans<sup>4</sup> based on criminal convictions for which a public housing authority must deny admission. *See* 24 C.F.R. § 960.205(b)(3). Beyond these restrictions, HUD encourages public housing authorities to consider all relevant information, including factors that indicate a reasonable probability of

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<sup>2</sup> Guidance on Housing Individuals and Families Experiencing Homelessness Through the Public Housing and Housing Choice Voucher Programs, HUD PIH Notice 2013-15(HA), 8 (June 10, 2013), available at <http://1.usa.gov/1afx3vy>.

<sup>3</sup> The NYCHA reentry project, the NYC Fair Chance Act, the Mayor's Announcement re: investment in Reentry and Mental Health Services for those released from Rikers, in addition to alternatives to incarceration and workforce development all represent progressive policies and programs in NYC that recognize the need for services, housing and other supports for successful rehabilitation and reentry.

<sup>4</sup> Individuals found to have manufactured or produced methamphetamine on the premises of federally assisted housing and Sex offenders subject to a lifetime registration requirement under a State sex offender registration program. *See* 24 C.F.R §§ 960.204, 982.553; 982.553.

favorable future conduct and evidence of rehabilitation, to allow individuals who have paid their debt to society to rejoin their families. See HUD Letter to Public Housing Directors, dated June 17, 2011. Moreover, HUD gives public housing authorities specific directions in its November 2, 2015 Guidance to Public Housing Authorities on excluding the use of arrest records in housing decisions and states, among other things, that PHAs are not required to adopt one strike policies, that arrests alone are not evidence of criminal activity to support denial of admission or eviction, that the due process rights of applicants of tenants should be protected.<sup>5</sup>

As the largest landlord in the country whose mission is to increase opportunities for low income New Yorkers and also to provide safe, affordable housing, NYCHA has procedures<sup>6</sup> and programs in accordance with Federal Law and HUD Guidance to make case by case decisions regarding an individual's or family's suitability to continue to live in public housing based on alleged criminal conduct and should continue to maintain its discretion to do so.

Under NYCHA's procedures, after a housing manager makes the initial assessment of whether a tenant should face termination because she or a family member is accused of criminal conduct, the tenant's file will be forwarded to the Legal Department and 250 Broadway for prosecution. There, NYCHA attorneys make another individualized assessment based on the facts or context of the case, family circumstances and other information/evidence and either will offer a settlement or move the case forward for a hearing. With a settlement, the NYCHA attorney will offer a probationary period, we have seen anywhere from 1 year to 5 years, as in the case of Ms. Lopez, a permanent exclusion and other terms, like a transfer of apartments. At the hearing, a NYCHA Impartial Hearing Officer hears the facts and evidence of the case and first decides whether the charges are sustained. If they are, the Hearing Officer must decide the proportionate disposition: whether the tenant should be placed on probation, whether the "wrongdoer" family member should be permanently excluded or whether the tenant should face the ultimate punishment of termination and thereafter, eviction.

It is important to note the context of terminations and permanent exclusions. Unlike in criminal court, tenants facing eviction or termination have no right to counsel. Like Ms. Lopez, a tenant may be in the predicament of fending for herself in all her housing cases, even if she or her

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<sup>5</sup> HUD PIH Notice 2015-19(HA) (November 2, 2015), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>

<sup>6</sup> NYCHA's Management Manual, General Memoranda and termination procedures, as governed by the Federal Consent decrees under *Escalera, et al v. New York City Housing Authority*, 425 F. 2d 853, certiorari denied, 400 U.S. 853 (1970), consent decree on remand docketed March 25, 1971, 67 Civ. 4307 (S.D.N.Y. 1971, D.J. Mansfield), and the consent judgements of January 26, 1976 in the United States District Court for the Southern District of New York cases of *Joseph Tyson Sr. v. New York City Housing Authority* and *Myrdes Randolph v. New York City Housing Authority*, 73 C 859, 74 C 1856, 74 C 2556, 74 C 2617 (S.D.N.Y 1976, Metzner, J.), all set forth the procedures and policies to make an individualized, case by case assessment when there is an allegation of undesirable or criminal conduct whilst balancing the due process rights of tenants.

family member has an attorney in the criminal case, the facts of which gave rise to the other housing consequences. Tenants are also not afforded any of the greater constitutional protections that exist in criminal court when facing eviction, including the higher burden of proof beyond a reasonable doubt, as the burden in most civil proceedings is the lowest standard of preponderance of the evidence, the presumption of innocence until proven guilty, the right to confront witnesses, the right against self-incrimination or the right to a jury, to name a few.<sup>7</sup> By facing concurrent cases (criminal and housing), as was the case for Ms. Lopez, Tenants or their family members are at risk of jeopardizing their criminal case by making statements against their own interest or risk an adverse presumption lodged against them for remaining silent. Additionally, with the incredible backlog in criminal court, a tenant may be in the position of losing his home or some other punishment, like probation or exclusion of a family member, prior to ever getting his day in criminal court or even if the criminal case is dismissed.

It is not uncommon for tenants to be confused by the termination process and moreover, to misunderstand or be unclear of the terms and conditions of settlement stipulations. Ms. Lopez was on her own when she faced termination- going from office to office but unable to secure legal representation, despite her best efforts. In 1995, she signed a 5 year probationary period and permanent exclusion of her son, before he was convicted of any crime. In 2012, when she faced termination again because of the purported violation of her permanent exclusion agreement, she still was unable to find counsel and was forced to represent herself. The Hearing Officer decided to terminate her tenancy. It was only thereafter that she connected with our office. Despite our best efforts on appeal, we lost. Thereafter, NYCHA did another review of Ms. Lopez's case and used their discretion to reverse her termination and reinstate her tenancy on condition that her son continue to be permanently excluded.

Though we believe NYCHA could assert its discretion more, as they did with Ms. Lopez, we applaud NYCHA's current efforts to tailor and contextualize alleged criminal conduct, to improve its permanent exclusion practices and to target its efforts on those who actually pose risks. The Council and NYCHA should reject the DOI's recommendation to follow the cruel, one strike approach as held in *HUD v. Rucker* or the "known or should have known" standard, and continue to make individualized assessments to secure the safety of public housing.

### **Permanent Exclusion should be more narrowly applied.**

NYCHA's policy of permanently excluding the offending family member when the "bad actor" is not the tenant of record is a disproportionately punitive and highly invasive policy that rips apart families. It is the policy of effectively evicting the person allegedly engaging in the

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<sup>7</sup> See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 *Hastings L.J.* 1325, 1325-28 (1991)

offensive conduct from the household, permanently, so that the rest of the family can continue to keep their home. For the life of the tenancy, in the current apartment or any apartment the tenant moves to thereafter, the excluded individual cannot reside in or even visit the apartment. To make sure the tenant complies with this exclusion, NYCHA will conduct surprise inspections of the entire apartment, any time between 9 am and 7 pm. If the individual is found on premises, NYCHA will move to terminate the tenancy for violation of permanent exclusion. Further, if the tenant fails to open the door to inspectors, NYCHA will also move to evict the tenant and her family. Because this exclusion is permanent, Tenants have to affirmatively move to remove it, even if it is based on conduct by a family member from ten or twenty years ago.

It is not unusual for tenants to regularly make the difficult decision to permanently exclude their sons and grandsons from their homes to safeguard the rest of their family, even if the criminal case is still pending and there has been no conviction of guilt. The punishment of permanent exclusion needs to change for many reasons.

First, focusing on interventions on low-risk people can actually increase their likelihood of recidivism and can decrease public safety. Permanent Exclusion, in particular, can increase risk by removing a person from their family, and thus from family and community supports that are proven to reduce recidivism. Additionally, excluding residents from NYCHA rarely addresses the low risk to public safety-it only relocates the problem. Moreover, any new permanent exclusion policy must narrowly tailor the use of exclusion to support safe NYCHA developments, but curtail its use as a punitive measure. We encourage the practice of capturing good data on termination proceedings and its periodic review to both ensure NYCHA's compliance with its own policies and to reflect on the effectiveness of NYCHA practice. Lastly, research shows that a person's risk of recidivism declines quickly over time. HUD, the federal government, and New York State all recognize the importance of second chances for people who have been involved in the criminal justice system.

NYCHA has been working with our permanent exclusion coalition and we applaud their efforts to reform their permanent exclusion practices to balance the rights of tenants and to keep families together while continuing to preserve resident safety. NYCHA recently released a new form to allow residents to lift permanent exclusion bans based on the passage of time or evidence of rehabilitation and it is much easier for tenants to understand. We credit NYCHA for these changes that are headed in the right direction and ask them and the Council to reject the DOI recommendations for stricter enforcement of permanent exclusion.

## **More Law Enforcement, policing and criminalization of residents is not the answer**

We urge NYCHA and the Council to reject the call for more policing of the public housing community, for NYCHA investigators to be armed and provided bulletproof vests and to broaden the categories of trespass notices. There are no cited instances where an investigator faced harm to necessitate more armed policing. Additionally, given the history of overpolicing and discriminatory policing of residents of color in NYCHA and the already strained relationships between the NYPD and housing residents, such steps to increase militarized interactions and opportunities to prosecute and incarcerate would not enhance but would hurt efforts to ensure the safety and health of the community.

### **CONCLUSION**

The DOI's call for regressive and punitive policies to increase evictions, policing and incarceration of public housing residents should be rejected by the Council and NYCHA in its entirety. Rather, we want to encourage an evidence based, case by case approach to public safety problems to ensure a balance is struck regarding the goal of protecting the community and protecting the fundamental, constitutional rights of tenants and their families. NYCHA needs to use the broad discretion it has to make fair and just assessments regarding who is eligible for a lease and for the ability of families to remain housed, despite having members who have had contact with the criminal court system. Additionally, practice of permanent exclusion must continue to be reformed, as NYCHA plans to, to tailor this practice to those who actually pose a risk to the community. Moreover, NYCHA residents are in need of greater government investment in infrastructure to improve the quality of living conditions in public housing.<sup>8</sup> Such financial and other investments would do more to improve the health and safety of public housing residents.

We hope to work with Council, NYCHA and other community stakeholders to ensure our most vulnerable communities continue to have access to safe, affordable housing and to meet these goals. Thank You.

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<sup>8</sup> See "Public Housing: New York's Third City" By Victor Bach, Community Service Society, March 2017.