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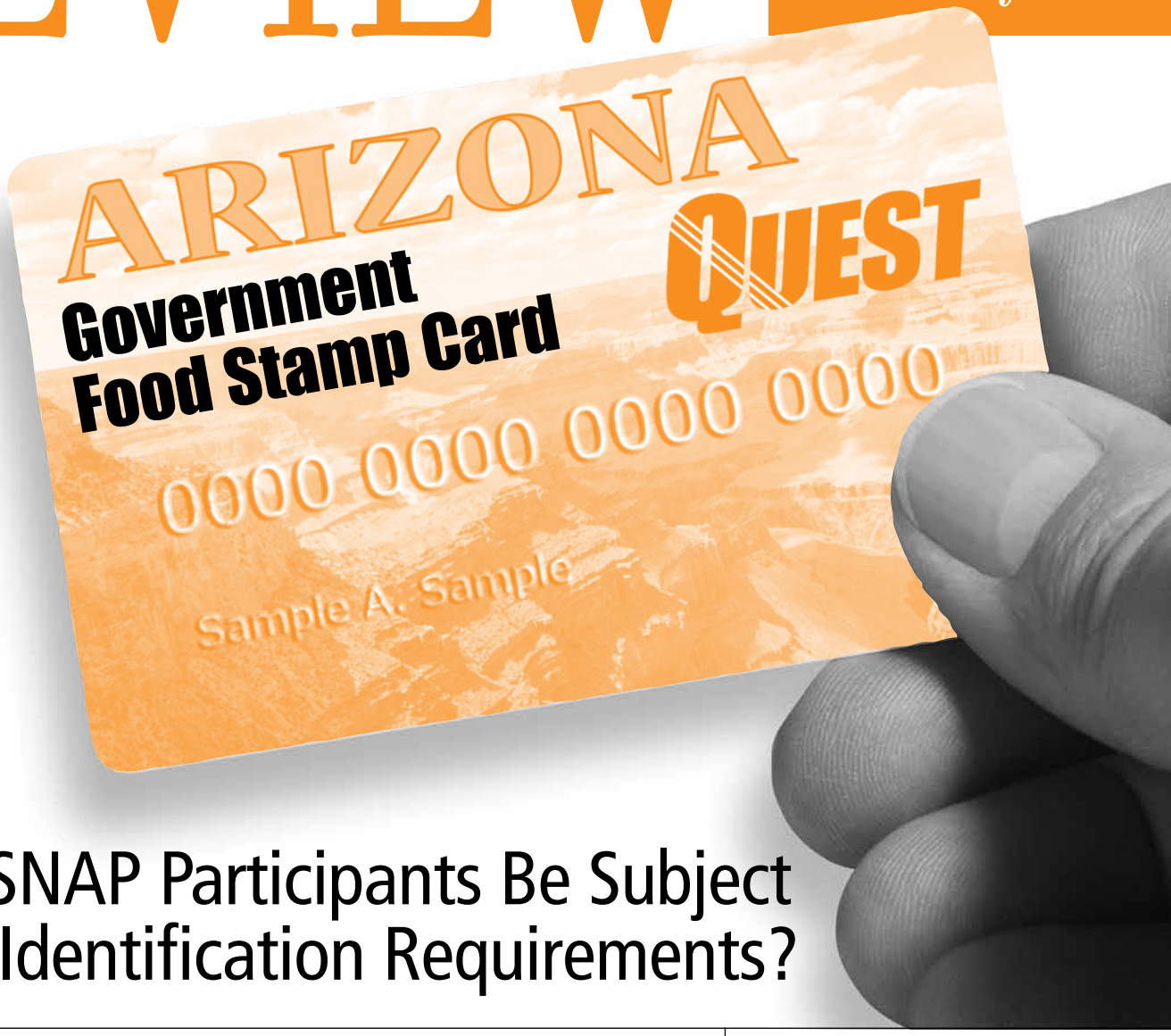

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Advocacy Stories

Advocates and Community Groups Defeat Punitive Housing Authority Proposals

The Chicago Housing Authority (CHA) stirred controversy in the spring of 2011 when it proposed to change its lease and its admission and continued occupancy policy to require drug tests for all public housing applicants and residents and to eliminate the innocent-tenant defense in eviction proceedings (Chicago Housing Authority, FY 2011 Admissions and Continued Occupancy Policy (2011), http://bit.ly/tW8tV7 (scheduled to be presented to the Board of Commissioners July 19, 2011)). With the help of community organizing and persuasive legal and policy arguments, however, advocates and public housing residents convinced CHA to drop both proposals. Here we set forth the arguments in opposition to each and describe the community mobilization that led to their defeat.

Chicago Housing Authority's Drug-Testing Proposal

CHA proposed to introduce drug testing as a condition of admission and recertification for adult members of applicant and resident households. If an applicant or resident refused to undergo a drug test, CHA would remove the applicant from the waiting list or move to terminate the resident's assistance. A positive test result would require the applicant or resident to enroll in substance abuse treatment and complete treatment successfully. Anyone "unwilling or unable" to enter treatment would be denied admission to or terminated from public housing (*id.* at 53 (applicants) and 54 (residents)).

Under the proposal CHA could, however, reconsider eligibility or continued occupancy for an individual who (1) successfully completed substance abuse treatment with a follow-up plan; (2) was fulfilling the plan's CHA-verified requirements; and (3) passed a subsequent drug test. Applicants would have to complete these requirements within one year while residents were allowed only ninety days. Failure to satisfy these requirements within the specified time would lead to removal from the waiting list or termination from the public housing program.

The proposal would have required applicants and residents to give written consent to allow CHA "to obtain information about the results of the drug test and/or any substance abuse treatment facility activities" (*id.*).

Legal Arguments Against Mandatory Drug Testing

Advocates lodged several arguments against CHA's drug-testing proposal. In describing the decision to withdraw the proposal CHA's board chairman explained that it came "close to violating on civil rights" (Natalie Moore, *Chicago Housing Authority Quashes Drug Testing Plans for Residents*, WBEZ91.5 (June 21, 2011), http://bit.ly/mQqurk).

Fourth Amendment. The primary legal argument against the proposal arose from the Fourth Amendment, which guarantees freedom from unreasonable searches. Authorities typically may conduct searches only on the basis of individualized suspicion of wrongdoing, but the U.S. Supreme Court has on occasion upheld searches in the absence of individualized suspicion where "special needs, beyond the normal need for law enforcement," are present (*Chandler v. Miller*, 520 U.S. 305, 313 (1997)). A blanket policy such as CHA's proposed drug-testing program is not based on individualized suspicion of wrongdoing, and so, to pass constitutional muster, the special need for the search must be important enough to outweigh any competing private interests. A strong public safety interest is a classic example of such a special need.

However, a purported public safety interest, merely alleged without evidence of any threat to safety, is not sufficient. The search must actually further public safety. In the public benefits context, a federal district court struck Michigan's policy of mandating drug tests for welfare recipients because of the weak link between drug testing and the state's goal of increasing public safety (*Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000)).

In defending the drug-testing proposal, CHA also alleged that the policy would promote public safety by identifying and removing drug users, thereby reducing demand for drugs and causing drug traffickers to take their business away from public housing (Maudlyne Ihejirika, *CHA Plan for Required Drug Testing of Residents Called "A Slap in the Face,"* Chicago Sun-Times (May 27, 2011), http://bit.ly/vBeEJR).

Research, however, undermines this rationale. In a study of African American youth living in urban public housing, researchers found that drug trafficking persisted even in the absence of significant drug use by public housing residents. Where drug trafficking was eliminated, however, drug use among the residents decreased (Xiaoming Li et al., *Drug Trafficking and Drug Use Among Urban African-American Early Adolescents*, 14 Journal of Early Adolescence 491 (1994). CHA's proposed policy of penalizing drug *users* for the purpose of reducing drug *trafficking* would have been ineffective in protecting public safety in public housing. In light of this marginal link between drug testing and public safety, the constitutionality of CHA's proposed drug-testing program came into question.

Fair Housing and Privacy. Beyond Fourth Amendment concerns, advocates warned CHA that its proposed drug-testing program could lead to violations of federal and state fair housing and privacy laws. Drug testing often results in false positives triggered by legal prescription and over-the-counter drugs (Note, David Lang, *Get Clean or Get Out: Landlords*

Drug-Testing Tenants, 2 Washington University Journal of Law and Policy 459, 484–85 n.182 (2000)). People using these drugs to treat a medical condition may be protected under the Fair Housing Act (42 U.S.C. § 3604) and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)), which prohibit housing discrimination on the basis of disability. Former heroin users, for example, sometimes undergo legal methadone treatment to overcome their addiction. If CHA denied housing to someone because one tested positive for methadone, CHA could be discriminating in violation of the Fair Housing Act and Section 504.

Although individuals could excuse their false positive by explaining their medical condition to CHA, such explanations could infringe upon their privacy rights. A certain type of anti-human-immunodeficiency-virus (anti-HIV) medication, for example, causes one to test positive for drugs (Antje Blank et al., *Efavirenz Treatment and False-Positive Results in Benzodiazepine Screening Tests*, 12 Clinical Infectious Diseases 1787 (2009)). Residents could try to preserve their housing by disclosing their HIV status, but putting them in this position runs counter to Illinois law protecting the privacy of people living with HIV and AIDS (Illinois AIDS Confidentiality Act, 401 Ill. Comp. Stat. 305/1 *et seq*. (2011)).

Consent. Another legal deficiency was the issue of consent since CHA's proposed drug-testing plan would have required all applicants and residents "to sign all consent forms which permit the CHA to obtain information about … any substance abuse treatment facility activities" (Chicago Housing Authority at 53–54). Advocates challenged this part of the plan as overbroad. Under federal law, treatment facilities may not release an individual's substance abuse treatment records without the individual's consent (Public Health Services Act, 42 U.S.C. § 290dd-2(a) (2006)). Public housing authorities, although they may require consent from applicants, may ask a treatment facility "*only* whether [it] has reasonable cause to believe that the household member is currently engaging in illegal drug use" (42 U.S.C. § 1437d(t)(2)(A) (our emphasis); see also 24 C.F.R. § 960.205(c)(i) (2010); *Campbell v. Minneapolis Public Housing Authority*, 168 F.3d 1069 (D. Minn. 1997) (recognizing that 42 U.S.C. § 1437d(t)(2)(A) changed federal law by "narrow[ing] the chemical-dependency treatment information public housing agencies may require applicants to provide")). Because of the limited scope of this question, CHA's proposal to obtain information about "*any* substance abuse treatment facility activities" was much broader than U.S. Department of Housing and Urban Development (HUD) regulations intended and therefore subject to abuse (Chicago Housing Authority at 53–54) (our emphasis).

Policy Arguments Against Mandatory Drug Testing

Advocates advanced policy arguments that centered on the high costs of programwide drug testing and the limited availability of affordable treatment options. Advocates cautioned CHA against incurring the significant costs of implementing a programwide drug-testing requirement. The policy apparently assumed, although it did not explicitly so state, that CHA would incur the cost (Cf. 24 C.F.R §966.4 (2010) (prohibiting public housing authorities from passing along costs of criminal background checks to tenants); 24 C.F.R. § 960.205 (2010) (prohibiting public housing authorities from passing along costs of obtaining drug abuse treatment information to applicants and tenants)). Clearly applicants and tenants would be unable to absorb the cost. Since the proposed plan would have required drug tests for nearly 12,000 public housing residents, CHA's annual expenditure for residents alone would have been more than $500,000 a year, at an average cost of $42 per test (American Civil Liberties Union, Drug Testing Public Assistance Recipients as a Condition of Eligibility (April 8, 2008), http://bit.ly/r6FK5z). With the added costs of testing applicants, CHA clearly would have been pouring significant amounts of money into a program that would not necessarily have produced commensurate results.

The proposal also failed to account for the limited availability of substance abuse treatment for low-income people in Illinois. CHA proposed to deny admission and terminate assistance for anyone who tested positive and was "unable to enter a substance abuse treatment program" (Chicago Housing Authority at 53–54). Conditioning one's housing on one's ability to enter treatment, however, ignored the severe shortage of treatment beds. In recent years Illinois has significantly reduced funding for treatment; facilities have had to close, and demand has far exceeded supply. The Illinois Human Services Commission estimates that treatment is available for only one of every fourteen people who need it. This shortage manifests itself in long waiting periods; in 2008, for example, more than 7,000 Illinois residents found themselves on waiting lists for treatment facilities (Illinois Human Services Commission, Human Services in Illinois: A Point-in-Time Review of the Current System 234 (June 2010), http://bit.ly/rkKSvb).

Despite these severe shortages and long wait times, the proposed policy gave residents only ninety days to enroll in a substance abuse treatment program or risk termination, whether or not treatment was available. Because the average waiting period for methadone treatment, for example, was 139 days, residents addicted to heroin would almost certainly have faced eviction and homelessness (*id.*). Advocates argued that if CHA was committed to ensuring that its residents received the substance abuse treatment that they needed, CHA needed to realign the drug-testing policy to match the realities of Illinois's treatment system.

The Innocent-Tenant Defense

While CHA's proposed mandatory drug-testing policy drew the lion's share of attention, the new lease released in May proposed another change that, advocates knew, could pose significant harm to CHA residents: elimination of the innocent-tenant defense. Advocates at Legal Assistance Foundation of Metropolitan Chicago had fought hard fifteen years earlier to convince CHA to offer tenants who were subject to eviction for the criminal activity of a household member or guest the opportunity to assert as an affirmative defense that the tenants knew nothing of that activity and so should retain their housing. Each year when CHA released its new lease and amended admissions and continued occupancy policies, Richard Wheelock, Legal Assistance Foundation Housing Law Project supervisor, looked first for the language he had advocated in the 1990s: "The CHA will not be required to prove that the resident knew, or should have known, that the authorized member of the household, guest, or another person under the resident's control was engaged in the prohibited activity. How-

ever, the resident may raise as a defense that the resident did not know, nor should have known, of said criminal activity." In May 2011, for the first time in fifteen years, those sentences were missing.

Regulatory Background

In 1996 HUD issued a policy directive, PIH (Public and Indian Housing) 96-16, on the requirement that public housing leases allow termination of housing assistance if household members or their guests engage in any drug-related or other criminal activity that "affects the health, safety, and peaceful enjoyment of the premises" by other residents (42 U.S.C. § 1437d(l)(6)). The directive became known as the "one strike and you're out" policy, and it encouraged housing authorities to "root out criminals" aggressively. Drug-related criminal activity is cause for eviction regardless of where the alleged activity occurs; it need not occur on the public housing premises. The primary way that CHA learns about off-premises criminal activity is through an intergovernmental agreement with the Chicago Police Department, which reports to CHA arrests on public housing property and arrests of individuals whom the police identify as public housing residents. CHA conducts annual criminal background checks of all public housing residents over 18. The effects of this lease term are harsh: entire families can be evicted due to the actions of a single family member or acquaintance who may not even be a member of the household. Even possession of drugs by a home health care worker can be grounds for eviction of a public housing resident.

Around the same time that HUD was encouraging aggressive application of lease terminations for criminal activity, Legal Assistance Foundation, representing the Central Advisory Council—the central board of the local advisory councils that represent CHA residents—negotiated with CHA to adopt the innocent-tenant defense. The defense allows heads of household to argue in court that their lease should not be terminated because the alleged criminal activity happened without their knowledge and they had no reason to know the criminal activity would happen. While the burden is on the tenant to raise the defense and prove it by a preponderance of the evidence, the innocent-tenant defense mitigates some of the harshness of the criminal-activity eviction regulations.

In 2002 the Supreme Court affirmed the constitutionality of Section 1437d(l)(6) (*HUD v. Rucker*, 535 U.S. 125 (2002); see also Lawrence R. McDonough & Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 Clearinghouse Review 55 (May–June 2007)). Even so, CHA confirmed its commitment to the innocent-tenant defense (see Kate N. Grossman, *Housing Agency May Fine-Tune Aid Program*, Chicago Sun-Times, April 17, 2002, at 24 ("Peterson affirmed his support for [the innocent-tenant defense] Tuesday, despite the Supreme Court ruling.")).

Arguments Favoring Retention of the Innocent-Tenant Defense

The *Rucker* decision abolished, at least for the time being, any hope that a court might order CHA to retain the defense; we knew the agency could take the innocent-tenant defense out of the lease at any time. Whether to retain the policy was entirely at CHA's discretion; thus litigation was not a promising strategy. In light of the lack of traditional legal handles, the survival of the innocent-tenant defense clearly would depend on mobilizing community members and advocates to pressure CHA.

The policy reasons in favor of the innocent-tenant defense are many. Given the one-strike rule's harshness, fairness requires some countervailing weight on the side of tenants. Public housing residents have no pretermination administrative hearing rights if their housing assistance is terminated for criminal activity, and CHA has pursued a policy of issuing a notice of termination any time a household member or guest is arrested. Without the innocent-tenant defense, residents have no argument as to why they should not be evicted apart from technical defenses or contending that the criminal activity did not happen. Note that the defense is a "modest" option; tenants must raise it and prove their "innocence" by a preponderance of the evidence. The burden on CHA, which need not prove the opposite, is low.

CHA, in allowing the innocent-tenant defense to become part of its leases fifteen years ago, acknowledged that innocent residents should not be punished for a crime they could neither foresee nor prevent. Unless CHA could articulate a reason for a change now, CHA was subject to condemnation. As Lawrence Wood, Legal Assistance Foundation Housing Practice Group director, distilled the issue, "just because you *can* do something, does not mean you *should*."

Strategy

Chicago luckily has a vibrant and active Central Advisory Council and many community groups working on housing issues. Legal Assistance Foundation worked through these networks to educate their members about what abolition of the innocent-tenant defense would mean and to encourage them to reach out to other constituencies. Time was limited because the period in which CHA would accept public comments about the changes was only a month.

Advocates faced both advantages and disadvantages. CHA's drug-testing proposal described above was a major change that would have made CHA probably the only housing authority in the country with this policy. In a sense this was a great advantage: significant press attention was assured. At the same time the story about the innocent-tenant defense was in danger of being lost in the focus on drug testing. The innocent-tenant defense was also inherently less conducive to explanation in sound bites; it necessarily involved reference to federal regulations, Supreme Court precedent, and legal principles such as "affirmative defense" and "burden of proof." Packaging a message in such a way that people's eyes did not immediately glaze over was essential.

The first step was to try to alert Chicago media outlets that CHA was planning major changes in its lease. After initial e-mails to media contacts to explain the background and why the issue was important, the focus turned to mobilizing other advocates to come to the single public comment hearing scheduled for June 2, 2011.

Legal Assistance Foundation reached out to the Central Advisory Committee and local community organizations—Ken-

wood Oakland Community Organization, Logan Square Neighborhood Association, and Metropolitan Tenants Organization—to fill them in on the background of the innocent-tenant defense and its relevance to public housing residents. These organizations spread the word to other community organizations, advocacy groups, and stakeholders and mobilized their members. The result was busloads of residents mobilized to attend the public hearing—over 400 people came to be heard. While most of the comments were against the drug-testing policy, many residents and advocates spoke out as well against removing the innocent-tenant defense. The hearing went on for several hours.

After the hearing, the focus turned to the submission of written comments from all the groups who had already participated. And, with the assistance of John McDermott of Logan Square Neighborhood Association, Legal Assistance Foundation reached out to aldermen (the Chicago equivalent of city council members) who had public housing developments in their wards and asked them to submit letters in support of the innocent-tenant defense.

■ ■ ■

On June 21, 2011, little more than a month after the proposals became public, CHA announced that it was "shelving" the proposals to require drug testing and remove the innocent-tenant defense (Maudlyne Ihejirika, *CHA Kills Controversial Plan to Drug Test Residents*, Chicago Sun-Times, June 21, 2011, http://bit.ly/m5Bggr). CHA credited the "tremendous amount of feedback" for its decision (*id.*).

From the perspective of a legal aid attorney, the lessons learned from this experience are many. The cooperative division of labor between our two organizations—the Sargent Shriver National Center on Poverty Law focused on opposing the drug-testing requirement while Legal Assistance Foundation concentrated on advocacy to retain the innocent-tenant defense—enabled us to concentrate our resources. A network of community organizers who have grassroots skills and media savvy was key to this victory; the community organizers helped us learn to break down "legal issues" in a way that could capture the public's attention and imagination—a skill all advocates should cultivate. Most important, we must not limit our imagination to what can be achieved through litigation.

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A Victory for Collaborative Advocacy: *Odems v. New York City Department of Education*

"Fabulous news!" was the subject line of Molly Kovel's e-mail to me in June 2011. Kovel's organization, Bronx Defenders, was cocounsel with MFY Legal Services, where I am a senior staff attorney, in *Odems v. New York City Department of Education* (2009 NY slip op. 33070U (N.Y. Sup. Ct. N.Y. Cnty. Dec. 16, 2009), http://1.usa.gov/r3L8xf). The New York City Department of Education had just told Bronx Defenders that the department was withdrawing its appeal to the New York State Appellate Division, First Department, in the *Odems* case. Only a month earlier, opposing counsel had filed a motion for an extension of time to file the department's appeal.

The collaboration between MFY and Bronx Defenders on the *Odems* case started in December 2008. Bronx Defenders was interested in appealing the New York City Department of Education's administrative decision against hiring a job applicant based on a single felony conviction. Bronx Defenders heard that MFY had a similar case against the department on the appellate track and reached out to us. MFY was eager to share what it had learned in *Acosta v. New York City Department of Education* as well as the handful of other cases that MFY had filed against the department (*Acosta v. New York City Department of Education*, 16 N.Y.3d 309 (2011)). *Acosta* eventually worked its way to the New York Court of Appeals, and the timeliness of that court's favorable decision on March 24, 2011, likely influenced the department's decision to withdraw its appeal in *Odems*.

Without the significant collaborative support of reentry advocates that began in *Acosta*, the successful outcomes reached in both cases would not have been possible. In both cases, however, the collaborative relationships between the attorneys and the clients were central to the effectiveness of the advocacy. After all, the clients' personal stories of how they struggled and triumphed and the clients' desires for better lives formed the basis of the advocates' work.

Background

Theresa Odems applied for employment as a part-time school aide at Public School 7 in New York City in 2008. Odems submitted substantial evidence in support of her employment application, but the Department of Education denied her application in December 2008 based on a single felony conviction more than eighteen years old. According to the department, employing Odems would pose an unreasonable risk to the safety and welfare of the school community.

During the department's review of applicants with a prior criminal history, Odems explained that she was in her early 20s when she became entangled in an abusive relationship, which caused her problems with the law. She pled guilty to a felony charge of attempted criminal sale of a controlled substance in 1990. Soon after, she voluntarily entered a residential treatment facility and completely rehabilitated herself from drugs and the abusive relationship once and for all. Odems was then granted early termination from probation and continued to live a productive life, doing volunteer work and holding a job.

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